International Journal of Law
www.lawjournals.org
ISSN: 2455-2194
Received: 05-06-2021, Accepted: 20-06-2021, Published: 05-07-2021
Volume 7, Issue 4, 2021, Page No. 27-32

Validity of police discretion regarding termination of corruption investigations post-refund of state financial damages

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Abstract
This research is based on the discretion of the Police in the form of a Secret Telegram Letter from the Criminal Investigation Department No. 206/VII/2016 (STR 206/VII/2016) which includes the termination of investigations into criminal acts of corruption after the return of state financial losses, which in its implementation contains pros and cons. Furthermore, this paper aims to see the validity of STR 206/VII/2016. This research is a normative legal research, with a case approach and a statutory approach. The results showed that the STR Kabareskrim No. 206/VII/2016 substantially has no basis for validity, this is because the STR does not meet the prerequisites for taking police discretionary actions as regulated in Article 18 of the Police Law which requires that every discretionary action by the police have a clear urgency (in the Police Law it is called a state of urgency). and for the sake of the public interest, where throughout the author's search, neither of these two things were found in the arguments for the formation of STR 206/VII/2016. Furthermore, the discretion of the police must pay attention to the provisions of laws and regulations where in the case of establishing STR 206/VII/2016 only consider the directives of the President and the National Police Chief and override the spirit of eradicating corruption in the Anti-Corruption Law.

Keywords: discretion, police, corruption

Introduction

In the provisions of Article 1 paragraph (3) of the 1945 Constitution it is emphasized that Indonesia is a state of law, so everything must be in accordance with the law and have clear rules, as well as issues of defense and security in society. The Third Amendment to the 1945 Constitution has added the norm regarding the rule of law in Article 1 paragraph (3) of the Third Amendment to the 1945 Constitution which reads: "The State of Indonesia is a state of law". This provision is a form of normalization that comes from the content in the Elucidation of the 1945 Constitution which states "The Indonesian state is based on law (Rechtsstaat) not based on mere power (Machtsstaat)". With the inclusion in the norms of the 1945 Constitution, the concept of the rule of law in the explanation of the 1945 Constitution has binding legal force as the highest norm in the national legal system of the Indonesian state.

In terms of defense and security, the 1945 Constitution in Article 30 paragraph (2) explains that:

"State defense and security efforts are carried out through a universal people's defense and security system by the Indonesian National Army and the Indonesian National Police of the Republic of Indonesia, as the main force, and the people, as the supporting force".

To realize order and security in society, police officers are required to have high police knowledge and technical skills and commendable behavior so that they can become role models in the community. It is also worth noting that a police officer who serves in the community is considered capable in all matters related to his duties, the community considers the police to be all-knowing about the tasks they carry out without seeing the officer in the rank of enlisted, non-commissioned officer or officer, in any uniform. as well as the consequences if the actions of the police are detrimental to the community, it is only natural that the first accusation will be directed at the police officers themselves, therefore every member of the police must always be aware of their duties in society.

In terms of carrying out police duties as protectors or maintaining order in society, it is not uncommon for police officers to be faced with certain conditions that require them to take actions outside of procedures or forced actions to achieve security and order in society, these actions are often referred to as " Police Discretion." Within the scope of the police profession in the Indonesian National Police (Polri) institution, the concept of Police Discretion is standardized in Article 18 of Law Number 2 of 2002 concerning the Indonesian National Police, which reads:

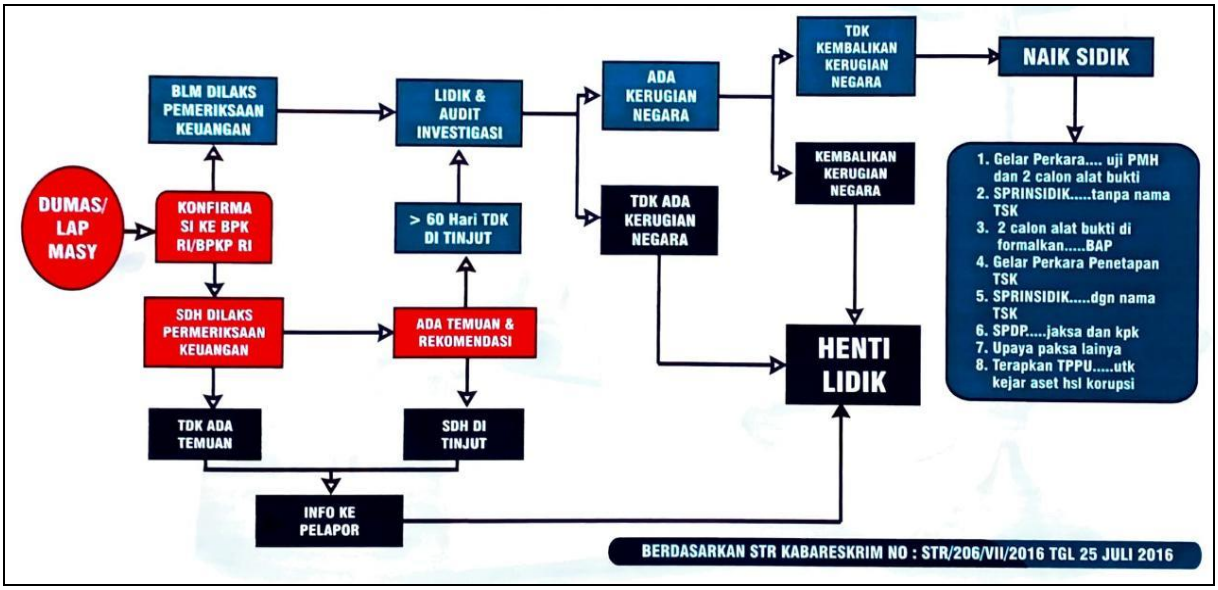
1. For the public interest, officers of the Indonesian National Police in carrying out their duties and authorities may act according to their own judgment.
2. The implementation of the provisions as referred to in paragraph (1) can only be carried out in very necessary circumstances by taking into account the laws and regulations, as well as the Professional Code of Ethics of the Indonesian National Police.

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 is an authority that originates from the principle of general police obligations (plichtmatigheids beginsel), namely a principle that authorizes police officers to act or not act in accordance with his own judgment, in the context of his general obligation to maintain, maintain order and ensure public security.

Article 48 of the Criminal Code (KUHP) states that: "*Anyone who commits an act forcibly cannot be punished*". Then Article 49 states that:

"Whoever commits a forced defense for himself or for another person, honor, morality or property for himself or for another person because of an attack or threat of attack that is very close at that time which is against the law shall not be punished.".

Regarding matters concerning police discretion as the author mentioned above, in writing this law, police discretion will be appointed in the form of a Secret Telegram Letter Number 206/VII/2016 (hereinafter referred to as STR 206) where in Point 2 (two) the implementation of law enforcement it was said that "if in the investigation process there is a return of state financial losses, the investigation is stopped and is not raised to the level of investigation". In order to make it easier, the writer provides an illustration in the form of images related to the STR 206 scheme, as follows:



Note: Summarized through STR Kabareskrim 206/VII/2016

Fig 1: Skemar STR Kabareskrim 206/VII/2016

Based on the picture, it is known that the police can stop the investigation of alleged corruption crimes resulting from public reports if no state financial losses are found or the state financial losses have been returned. As far as the research that the author has carried out in its application, STR 206 has been applied in Karanganyar Regency in cases of abuse of office related to the management of crooked land in Puntukrejo Village, Ngargoyoso District, Karanganyar Regency. Puntukrejo village is known as a village rich in natural resources with agricultural products such as coffee, ginger, turmeric, and tobacco. Geographically, Puntukrejo Village is located right under the foot of Mount Lawu, making it a strategic location and has beautiful views that make the interest of tourists to visit this location quite high. This natural condition also makes investors interested in investing their business in the area.

One of the investors who invested in Puntukrejo Village was Mr. AM by establishing a Bali Ndeso restaurant tour. The Bali Ndeso restaurant began to be built at least in September 2016, and started operating at least in mid-May 2017 and is still operating until now. The Bali Ndeso restaurant is engaged in the culinary field. Truly Mr. AM doesn't have the land to set up a tourist spot in that place.

Resto Bali Ndeso stands on 7 (seven) plots of land which is basically a crooked land part of the village apparatus Br. HRT as the Head of Kenteng Hamlet. With the agreement between the two parties without any written text or documents, Br. AM leases the village's crooked land for a period of 2 (two) years. During the contract extension period between Mr. AM with Mr. HRT was carried out without the knowledge of other village parties and the community. The implementation of the lease on the crooked land has actually violated the Regulation of the Karanganyar Regency Regent Number 85 of 2016 in article 15 paragraph 4 which reads: "The transfer of the function of the Village treasury land is determined by a Village Regulation after obtaining the BPD agreement and written permission from the Regent". The results from the development of Bali Ndeso tourism are not included in the village treasury's opinion because they are enjoyed by village officials who cheat. Moreover, the village apparatus who had cheated entered into a lease agreement with another party as the owner of Bali Ndeso without a written agreement being made.

In fact, an agreement without a written text or document can be said to be valid because there are no requirements in Article 1320 of the Civil Code (Civil Law) which requires an agreement to be made in writing. It can be interpreted that an agreement made without a text agreement can also be binding on the parties who made it. This provision is also reinforced by Article 1338 paragraph (1) of the Civil Code (KUHP) that all agreements are valid as law for those who make them. However, other provisions governing village asset utilization agreements have also been regulated in Article 12 of the Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 1 of 2016 concerning Village Asset Management explaining that the rental period does not change the ownership status of village assets which can be carried out for a maximum of 3 (three) years and can be extended and must be carried out based on a written agreement containing the parties to the agreement, the object of the agreement, the type or area of land, the period of time, responsibilities, force majeure, as well as the requirements deemed necessary.

The provisions regarding the procedure for renting village assets are also written and clarified in Article 14 paragraph

(2) and paragraph (3) of the Karanganyar Regent Regulation Number 85 of 2016 concerning Procedures for Village Asset Management, namely:

Paragraph (2) : The rental period as referred to in paragraph (1) is a maximum of 3 (three) years and can be extended.

Paragraph (3) : The rental of DesaVillage sets is carried out based on an agreement, at least containing:

1. The parties to the agreement;
2. The object of the lease agreement;
3. Type, area or quantity of goods, amount of rental, and period of time;
4. Lessee's responsibility for operational and maintenance costs during the term of the lease;
5. Rights and obligations of the parties;
6. Circumstances beyond the ability of the parties (force majeure); and
7. Other requirements deemed necessary

Based on these regulations, it can be concluded that the lex specialis derogat legi generalie principle applies, which requires the agreement to be made in writing. In addition to that, this case has violated Article 54 of Law Number 6 of 2014 concerning Villages which explains that the use of village treasury land in terms of investment plans that enter the Village is required to conduct a village meeting which is attended by the Village Consultative Body, Village Government, and other elements of the Village Consultative Assembly. villagers.

Village officials Mr. HRT has also changed the function of the crooked land based on verbal agreement, where the land that should be used for farming has been built for the Bali Ndeso tourist attraction. The act violates Article 12 of the Regent's Regulation Number 10 of 2017 concerning Space Utilization Permits which reads:

“Every person, company and/or entity that will carry out the conversion of agricultural land to non-agricultural land is required to apply for IPPT issued by the Head of DPMPSTP on behalf of the Regent.”.

This problem also has the potential to violate Article 3 of Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption (hereinafter the Corruption Act) because the village apparatus who cheated had abused their authority and enjoyed the benefits derived from the proceeds of state land which of course resulted in state financial losses. as accommodated in Article 3 of the Anti-Corruption Law which states that:

“Any person who, with the aim of benefiting himself or another person or a corporation, abuses the authority, opportunities or facilities available to him because of a position or position that can harm the state finances or the state economy, shall be sentenced to life imprisonment or a minimum imprisonment of 1 (one) year and a maximum of 20 (twenty) years and or a fine of at least Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah).

Although in its development, based on the Decision of the Constitutional Court Number 25/PUU-XIV/2016 that the word can in the article above is abolished so that there must be state losses first, so there is a shift in Article 3 of the Anti-Corruption Law from formal offenses to material offenses in order to ensure legal certainty. In the end, state financial losses persisted as a result of abuse of authority by village officials (village heads) related to the transfer of land functions to crooked land on the basis of oral consent, where the land that should be used for farming has been built for the Bali Ndeso tourist attraction. This act violates Article 12 of the Regent's Regulation Number 10 of 2017 concerning Space Utilization Permits and also violates Article 15 paragraph 4 of the Karanganyar Regency Regent's Regulation Number 85 of 2016 concerning Procedures for Management of Village Assets. Violation of these two provisions is not without reason, it is known that village officials enjoy the results of abuse of authority in the form of renting out crooked land to investors. Besides that, the development of Bali Ndeso tourism is not included in the village treasury's opinion because it is enjoyed by village officials who cheat.

However, in its development as the author explained at the beginning of the issuance of STR 206, the case that the author mentioned above was stopped at the investigation stage and resolved in a non-penal manner where the village head returned the state financial losses that arise due to the abuse of authority committed by him. The existence of out-of-court settlements is indeed a new dimension which is currently being studied from the theoretical and practical aspects. At first the settlement of legal problems, one of which was the problem of corruption, was only resolved by the parties concerned. However, with the existence of the state, it is with that state that takes over to solve these problems. In Indonesia, this is also stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia in the 3rd Amendment which states that "the State of Indonesia is a state of law". The rule of law means a state that stands above the law which can guarantee justice for its citizens.

Restorative justice is an approach to justice that focuses on the needs of victims and perpetrators, as well as the communities involved, not to apply the principle of punishing perpetrators. As the results of Zumhana's research which states that the handling of criminal acts using the means of criminal law (penal policy) has failed a lot. So, in this study, the validity of the STR Kabareskrim Polri Number 206/VII/2016 is questioned.

Reseacrh Methods

This research is a normative legal research. This study confirmed that "the appropriate approach used in this legal research is the statute approach, the case approach, and the conceptual approach". In this study, researchers used techniques. The data collection technique used in this study was a document study. This study uses the technique of analyzing legal materials with deductive logic, according to Peter Mahmud Marzuki who quoted Philipus M. Hadjon's opinion explaining the deduction method as the syllogism taught by Aristotle, the use of the deduction method stems from the submission of the major premise (general statement) then put forward the premise minor (special nature) of the two premises and then draw a conclusion or conclusion.

Discussion

The validity of the STR of the Police Criminal Investigation Unit Number 206/VII/2016.

Talking about police discretion in the criminal justice system, a relationship will be found between law, discretion, police, investigation and the criminal justice system. So the main issue that will be studied is essentially the operation of the law and the discretion of the police. The police have a

very big role in enforcing criminal law. The police as part of the law enforcement apparatus is one of the subsystems tasked with investigating and investigating criminal acts. The position of the National Police as law enforcement is stipulated in the Law on the Indonesian National Police in Article 1 point (1) and Article 2 that: Article 1 point 1 "the police are all matters relating to the functions and institutions of the police in accordance with the laws and regulations. " While Article 2 "the function of the police is one of the functions of the state government in the field of maintaining public security and order, law enforcement, protection, shelter and service to the community".

Law Number 2 of 2002 Article 1 point (1) and Article 2 can be clearly seen that the Police in their position as law enforcement officers have the function of enforcing the law in the field of judicial, preventive and repressive tasks. So that with the discretionary authority in the judicial field as stated in Law No. 2 of 2002 on Article 18 paragraph (1) that "in the public interest, police officers in carrying out their duties and authorities can act according to their own judgment". If viewed from the side of the explanation of Article 18 Paragraph (1) of Law No. 2 of 2002, then what is meant by self-assessment is:

"What is meant by "acting according to his own judgment" is an action that can be taken by a member of the Indonesian National Police who in acting must consider the benefits and risks of his action and is truly in the public interest.".

Meanwhile, in carrying out such discretionary actions, the police are limited by Article 18 Paragraph (2) of Law 2/2002 which states that:

"The implementation of the provisions as referred to in paragraph (1) can only be carried out in very necessary circumstances by taking into account the laws and regulations, as well as the Professional Code of Ethics of the Indonesian National Police".

In this context, according to the author, it will be a problem if this discretion actually stimulates or facilitates the abuse of power by the police. With the breadth of power possessed by the police, it has the potential to be misused for the benefit of oneself, other groups or organizations. Even though the use of the discretionary power granted by the legislators is actually, the legal route provided to solve a problem has even become less efficient, less useful or jammed. Even from a legal point of view, every power will be based on and limited by legal provisions. However, the discretionary power that is so broad and its boundaries are unclear will cause problems, especially if it is associated with the principles of criminal law, namely the principle of legal certainty and human rights. States have an obligation to respect the human rights of people everywhere and to protect and uphold the human rights of citizens in their territories. These obligations are not only negative (to not be violated) but also positive (to be enforced or implemented).

Based on the editorial of Article 18 Paragraph (1), Article 18 Paragraph (2) of Law 2/2002, conclusions can be drawn regarding the terms of discretion (self-assessment) by the police, including: 1. Police Discretionary Actions Oriented to the Public Interest, 2. Police discretion is exercised when conditions are urgently needed (discretion urgency), 3. Observing the provisions of the legislation and the police code of ethics. After finding and determining the conditions for police discretion based on Law 2/2002, in order to test the validity of the STR Kabareskrim 206/VI/2016, it will be described with the following arguments and arguments:

Urgency and public interest in establishing STR Kabareskrim 206/VII/2016.

Discretion in the form of STR Kabareskrim 206/VII/2016 in administrative law known as policy regulations, policy regulations (beleid regulations), is a legal product born of the authority to regulate public interests independently on the basis of the freies ermessen principle. This means that when this freies ermessen or discretion is put in written form, it becomes a policy regulation, namely a general regulation issued by a government agency with regard to the implementation of government authority over citizens or against other government agencies and the making of these regulations does not have a firm basis in the Constitution and formal legislation either directly or indirectly.

This means that policy regulations are not based on the authority to make laws and therefore do not include statutory regulations that are binding on the general public but are attached to the government authority of a state administrative organ and are related to the implementation of its authority. In this case, policy regulations (beleidsregel) are a means of state administrative law aimed at dynamizing the enactment of laws and regulations.

In the concept of discretion, in general, the use of discretionary authority by government administrative bodies/officials can only be done in certain cases where the applicable laws and regulations do not regulate it or because the existing regulations governing something are unclear and this is done in an emergency/urgent situation. in the public interest as stipulated in a statutory regulation. In this context, there are similarities regarding the requirements for the use of discretion both in general in the administration of the state by government officials as regulated in Law Number 30 of 2014 concerning Government Administration (UU AP) with discretion in the police body where in exercising discretionary authority there must be a clear urgency that gives benefit in the public interest.

As the author described above, it can be concluded that the use of discretionary authority by the police can only be done in certain cases where the applicable laws and regulations do not regulate it or because the existing regulations governing something are unclear and this is done in an emergency/urgent situation. in the public interest as stipulated in a statutory regulation. Meanwhile, what is meant by important urgent issues, at least contain the following elements:

a. The problems that arise must concern the public interest, namely, the interests of the nation and state, the interests of the wider community, the interests of the common people, and the interests of development.
b. The emergence of these problems suddenly, is outside the predetermined plan.
c. To solve this problem, the laws and regulations have not regulated it or only regulate it in general, so that the State administration has the freedom to resolve it on its own initiative.
d. The procedure cannot be completed according to normal administration, or if it is completed according to normal administrative procedures it is less efficient and effective.
e. If the problem is not resolved quickly, it will cause

harm to the public interest.

Based on the doctrine, it can be concluded that an urgent situation is a situation that appears suddenly concerning the public interest which must be resolved quickly, where to resolve the issue, the laws and regulations have not regulated it or only regulate it in general. While the definition of public interest according to the elucidation of Article 49 of Law Number 5 of 1986 explains that what is meant by "public interest" is the interest of the nation and state and/or the interests of the common community and/or development interests, in accordance with the applicable laws and regulations. This means that it is still possible for sectoral laws and regulations to interpret the meaning of public interest in certain fields as long as it is not only about the interests of certain people or groups/groups but applies broadly.

Then after that the question arises what is the public interest that wants to be protected in the STR Kabareskrim Number 206/VII/2016 regarding the termination of investigations and investigations into criminal acts of corruption after the return of state financial losses? As it is known that the issuance of the STR Kabareskrim Number 206/VII/2016 is a directive of President Joko Widodo to all ranks of the Head of the Regional Police (Kapolda) and the Head of the High Prosecutor's Office (Kajati) on July 19, 2016, on that occasion the direction and purpose of the STR was not clear, where is the urgency for the public interest to be achieved regarding the issuance of the STR Kabareskrim Number 206/VII/2016.

Based on the descriptions and arguments that the author built, the authors say that in terms of urgency and benefiting the public interest the formation of STR 206/VII/2016 is not fulfilled, this alone is true enough to say that STR 206/VII/2016 is invalid and contrary to positive law in force in Indonesia. This is in accordance with the view of Hans Kelsen who said that in order to strengthen the argument the author will also explain in the next aspect related to the formation of police discretion the provisions of the Law and the Police Code of Ethics must be considered.

Police Discretion Must Pay Attention to Legislative Provisions.

The argument about a provision must pay attention to the provisions (law) in order to determine its validity departs from the view of Hans Kelsen which states that the basis for the validity of a norm is always from the norm, and not from facts. The search for the basis for the validity of a norm is not from reality but from other norms that are the source of the birth of the norm. Therefore, a norm whose validity can only be obtained from higher norms, Kelsen calls "basic norms". The basic norm functions as a reference for every norm formation, so that the basic norm is also the main source and is a binder between different norms, in forming a normative order. In this view, if a norm is included in a certain norm system, the validity of that norm can be tested by the basic norm.

The flow of positive law developed by Hans Kelsen, was also developed by John Austin. According to Austin the law is; “a rule laid down for the guidance of an intelligent being by an intelligent being having power over him”. In principle, positive law provides an affirmation that, first, a state legal system applies because it gets its positive form from an institution of power; second, the law is only seen from the formal form, so that the formal legal form is separated from the material law form; and third, the legal content is recognized as existing, but not as legal science material.

So the question is what is the norm in the provisions that underlie the birth of the STR Kabareskrim 206/VII/2016, is it only limited to Article 18 of the Police Law and overrides the Anti-Corruption Law, if that is done then it can be said that the formation of the STR Kabareskrim 206/VII/2016 is one of the form of abuse of power. Especially after it was known that the STR was formed based on the direction of the President and the National Police Chief at that time.

Conclusion

Based on this research, it can be concluded that STR Kabareskrim No. 206/VII/2016 substantially has no basis for validity, this is because the STR does not meet the prerequisites for taking police discretionary actions as regulated in Article 18 of the Police Law which requires that every discretionary action by the police have a clear urgency (in the Police Law it is called a state of urgency). and for the sake of the public interest, where as long as the author's search is not found in the arguments for the formation of STR 206/VII/2016 Furthermore, the discretion of the police must pay attention to the provisions of laws and regulations where in the case of establishing STR 206/VII/2016 only consider the directives of the President and the National Police Chief and override the spirit of eradicating corruption in the Anti-Corruption Law.

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