

The Principle of Legal Certainty in the Shadow of Discretion: A Critical Review of the Criminal Investigation Stage

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ABSTRACT: Investigation is a very decisive initial phase in the process of handling a criminal case because it serves to assess whether a legal event can be classified as a criminal offense. This stage requires the application of the principle of legal certainty to ensure that every action taken by law enforcement officials remains within a clear and accountable legal path. In practice, law enforcement officials are given discretionary authority to respond to certain situations that have not been explicitly regulated in written legal norms. This research uses a normative juridical method with an approach to legislation and case study analysis to examine the extent to which the exercise of discretion by law enforcement officials can affect legal certainty at the investigation stage. The results show that Perkapolri Number 6 of 2019 can obscure legal certainty and open opportunities for abuse of authority. In addition to regulatory analysis, this research also analyzes several cases, such as the case of police shooting a drug dealer for trying to injure police officers, corruption in social assistance and the case of KPI employees. The results show that discretion is often used without a clear accountability mechanism and has the potential to violate individual rights. This condition is exacerbated by the absence of time limits and the mixing of process stages. The research concludes that although discretion is needed in certain circumstances, its use must be strictly limited and accountable. Therefore, strengthening internal regulations, consistent implementation of case title, and increasing the function of external supervision such as Kompolnas are needed to maintain the principle of legal certainty in the criminal justice system.

KEYWORDS: Investigation; Legal Certainty; Discretion; Criminal Case; Critical Review.

I. INTRODUCTION

Investigation in the criminal case handling process is a crucial stage that aims to determine whether a legal event can be qualified as a criminal offense or not. The urgency of this stage lies in the complexity of legal norms, where an act can intersect or overlap with the realm of criminal, civil and administrative law. Errors by law enforcement officials in determining legal events at the investigation stage can potentially lead to errors in the application of the law, which in turn can cause the judiciary to impose a verdict of acquittal or release from all legal charges. One illustration that reflects this complexity is the Syafruddin Arsyad Temenggung case. In Supreme Court Decision Number 1555 K/Pid.Sus/2019, the Panel of Judges stated that although the elements of the charged act were factually proven, the act did not qualify as a criminal offense. On that basis, Syafruddin Arsyad Temenggung was released from all legal charges (ontslag van alle rechtsvervolging). In their legal considerations, the Panel of Judges stated that Syafruddin Arsyad Temenggung's position as Head of IBRA must be understood as a public official, so that abuse of authority is not only viewed from the discrepancy between the exercise of authority and the purpose of its granting, but also needs to consider personal motives and social factors behind the issuance of the SKL. Therefore, although administrative errors in the issuance of SKLs are proven, these errors cannot be categorized as criminal acts because they were performed based on mandates from designated authority figures, not on personal initiative (Isman, 2019).

The principle of legal certainty is an essential normative foundation in ensuring guarantee the rights of individuals and realizing justice and equal treatment before the law. The realization of legal certainty requires the implementation of a law enforcement process that is consistent, predictable, and free from ambiguity in its application. In this context, the principle of legal certainty should be used as the main guideline for law enforcement officials, especially at the investigation stage, to ensure that every action taken is within a clear and accountable legal corridor. The development of criminal procedural law aims to guide the public to understand and appreciate their rights and obligations, as well as to encourage an increase in the integrity of law enforcement

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officials in carrying out their functions and authorities. The ultimate goal of this process is to uphold law and justice, protect human honor and dignity, and create order and legal certainty for the realization of the rule of law (Suasti et.al., 2024).

In the practice of law enforcement, law enforcement officers are often faced with situations or conditions that require the use of discretion in handling a case. The discretion is given juridically through legislation. The Indonesian National Police, as stipulated in Article 18 paragraph (1) Police Law, is authorized to act according to its own judgment in the public interest in the implementation of its duties and authorities (Firmansyah et.al., 2022). Similarly, the Attorney General's Office of the Republic of Indonesia derives its authority from Article 34A of the Attorney General's Office Act, which allows Prosecutors and/or Public Prosecutors to exercise their discretion in law enforcement, provided that such actions remain in accordance with applicable laws, regulations, and professional ethical standards.

The practice of using discretion by law enforcement officials in certain situations or conditions is potentially not in line with the principle of legal certainty. This is due to the authority to act based on their own judgment, which allows the apparatus to take action or shortcuts on the basis of emergencies, even though these actions are not always in accordance with procedures or provisions of laws and regulations. In addition, the implementation of investigations that are conducted in a closed, non-transparent manner, without clarity of time, and without an adequate supervision mechanism, directly or indirectly can lead to legal uncertainty for victims/reporters, reported parties, and the wider community.

Legal uncertainty also potentially arises from the absence of specific provisions regarding the timeframe in the investigation process. Criminal Procedure Code and Perkapolri No. 6/2019 have not explicitly regulated the investigative timeframe. This lack of clarity opens up opportunities for criminalization, uncertainty of case follow-up, a growing number of cases, termination of cases without clear legal basis, and violations of human rights. Based on these problems, this research will examine the application of the principles of legal certainty and discretion in the process of investigating criminal cases in Indonesia, and evaluate the extent to which the discretionary space owned by law enforcement officials has the potential to obscure the principle of legal certainty in the investigation stage.

II. METHODS

This research is conducted using a normative juridical approach that centers on interpreting prevailing positive legal norms. This method is used to understand and examine legal concepts based on relevant laws and legal theories (Ramlan et.al., 2023). This research adopts both a statutory and a case-based approach. The statutory approach entails the examination of relevant laws and regulations, while the case approach focuses on analyzing the enforcement of legal certainty and discretionary principles in Indonesian criminal investigations.

This research is based on primary, secondary, and tertiary sources of legal information. The primary materials comprise statutory regulations such as Law No. 8 of 1981 (Criminal Procedure Code) and Police Regulation No. 6 of 2019 (Perkapolri No. 6/2019), while the secondary and tertiary sources include scholarly books, journal publications, and other academic references that aid in analyzing the issues addressed.

III. RESULTS AND DISCUSSION

A. The Application of the Principles of Legal Certainty and Discretion in the Investigation Process

The principle of legal certainty requires law enforcement to be consistent, clear and predictable. In this principle, all legal rules must be obeyed, and every action taken must be in accordance with applicable legal norms. According to Gustav Radbruch, legal certainty is a condition in which the law can function as a guideline that must be obeyed. Meanwhile, Fence M. Wantu argues that a law that does not contain the value of certainty will lose its meaning, because it can no longer be used as a guide to behavior for everyone (Siti & Arif, 2021).

According to Gayus, discretion refers to a policy action that may be undertaken by public officials at both central and regional levels, even if it deviates from existing legal provisions, provided that it serves the public interest, remains within the scope of their authority, and adheres to the fundamental principles of good governance (Prima et.al., 2024). Based on the understanding of the principle of legal certainty and discretion, it can be concluded that the two concepts represent a contradictory approach. The principle of legal certainty emphasizes the necessity of compliance with the norms and regulations that apply in writing, while discretion provides space for public officials to make flexible policy adjustments in situations that are not accommodated by standard rules, as long as they remain within the corridors of authority and do not conflict with the general principles of good governance.

Based on Criminal Procedure Code (KUHP) and Perkapolri No. 6 of 2019, an investigation refers to a sequence of actions undertaken by investigators to identify and uncover events suspected of constituting a criminal offense, with the aim of

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determining whether further inquiry is warranted, in accordance with procedures set forth by law. The stages of investigation are generally regulated in Articles 102-105 of KUHAP and specifically regulated in Articles 5-9 of Perkapolri No. 6/2019.

The provisions regarding investigations in general in KUHAP stipulate that investigators have a legal responsibility to immediately carry out investigative actions if they know, receive reports, or witness a situation potentially involving a crime, as stipulated in Article 102. The action must be documented through an official report and reported to the investigator who has the authority in the relevant jurisdiction. Furthermore, the provisions of Article 103 emphasize that reports or complaints can be submitted either in writing or orally, provided that they must be signed by the reporter and the investigator; if the reporter is unable to write, then this must be explicitly stated in the report. In carrying out investigation duties, investigators are required to show official identification as stated in Article 104. In addition, investigators are also under the coordination, supervision and direction of the investigator as per Article 105. These provisions demonstrate the importance of accountability, transparency and procedural compliance in the implementation of the investigation function.

The provisions regarding investigations specifically in Perkapolri Number 6 of 2019 state that investigators carry out investigations based on reports or complaints and investigation warrants, as stated in Article 5. In carrying out the investigation, investigators can take various actions, such as processing the scene of the crime (TKP), observation, interviews, tailing, disguise, tracking, and research and document analysis, in accordance with Article 6 paragraph (1). The targets of investigation include persons, objects or goods, places, events or occurrences, and/or activities, as explained in Article 6 paragraph (2). To ensure the continuity and measurability of the investigation process, investigators are required to prepare an investigation plan that contains: the investigation warrant, the identity and number of investigators/investigators involved, the object or target of the investigation, the methods used, the equipment required, the time of implementation, and the budget requirements, as specified in Article 7.

After the investigation is completed, the investigator is obliged to compile a written report on the results of the investigation and submit it to the investigator, in accordance with Article 8. Furthermore, the investigator conducts a case title to determine whether the event is a criminal offense or not, as stipulated in Article 9 paragraph (1). The results of the case title can decide three things, namely:

1. If the incident is determined to be a criminal offense, the procedure proceeds to the investigation phase;
2. If the incident does not constitute a criminal offense, the investigation is discontinued;
3. If the incident is a criminal offense but not the authority of the Police Investigator, then the case is transferred to the authorized agency.

The application of discretion by law enforcement officials is an action that cannot be separated from considerations of emergency situations, the need for effectiveness and efficiency in handling cases, and efforts to maintain public order and social stability. Discretion becomes relevant when in practice in the field there are certain conditions which, if handled rigidly according to applicable legal norms, have the potential to pose a risk to the safety of life, property, or honor, and trigger instability in the form of order disturbances or riots. The implementation of discretion by law enforcement officials is influenced by various determinant factors, including: juridical aspects (applicable legal rules), the quality and integrity of law enforcement officials, the adequacy of supporting facilities and infrastructure, public participation and legal awareness, and local cultural values that develop in social life (Naufal et.al., 2024).

Law enforcement personnel in the performance of their duties often face situations that require quick decision-making outside of established procedures, known as discretionary actions. However, the use of discretion should not be done carelessly. Officials must base discretion on rational, logical, selective and proportional considerations so that every decision taken reflects an attitude of prudence and professional responsibility. In addition, the apparatus also needs to balance the actions chosen with the impact that may occur, in order to prevent violations of the principles of law and human rights. One example of a discretionary case occurred in the jurisdiction of Pinrang Police Station, when a police officer shot a drug dealer who resisted and tried to injure the officer (Herman et.al., 2024). In that case, the discretionary action taken was aimed at protecting life safety and responding to direct threats, so that the action could be considered proportional and lawful.

B. The Potential for Discretion to Obscure Legal Certainty in the Investigation Stage

Perkapolri No. 6/2019 indirectly obscures legal certainty in the investigation stage as stipulated in KUHAP. In addition, the regulation changes the legal certainty previously regulated in Perkapolri No. 12 of 2009 which has been revoked. The changes in the Perkapolri are as follows:

1. No time limit for case settlement

Perkapolri No. 12/2009 has regulated the duration limit for handling the case completion as stipulated in Article 31 and Article 32. These provisions normatively provide a legal basis for limiting the duration of investigations that are adjusted to the level of difficulty of the case. Based on Article 31 paragraph (1), investigations are classified into four

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categories of difficulty, namely very difficult, difficult, medium, and easy. This categorization serves as the foundation for setting the maximum duration of investigations, as outlined in Article 31 paragraph (2), which specifies 120 days for very complex cases, 90 days for complex cases, 60 days for moderately difficult cases, and 30 days for simple cases.

The official authorized to issue an Investigation Warrant has the authority to determine the level of difficulty of the case as contained in Article 31 paragraph (3), and the determination must be made no later than three days after the warrant is issued, in accordance with Article 31 paragraph (4). This arrangement is intended to provide clarity from the beginning of the investigation process and prevent unmeasured and prolonged investigations.

If under certain conditions the investigator is unable to complete the case within the specified time limit, Article 32 provides a mechanism for extending the investigation time. As regulated in Article 32 paragraph (1), investigators may request an extension from the issuing authority through the Investigator Supervisor. The authorized official may grant the extension after considering the advice of the Investigator Supervisor (Article 32 paragraph (2)). If the extension is approved, then a new warrant stating the additional period must be issued (Article 32 paragraph (3)). Although the time limit is only for the investigation process and not for the investigation process, this provision shows an institutional commitment to improving the accountability and efficiency of the investigation process, as well as emphasizing the importance of the principle of legal certainty in the implementation of the duties of law enforcement officials.

However, Perkapolri No. 6/2019 does not regulate the time limit for case completion, both at the investigation and investigation stages. This can certainly obscure the principle of legal certainty in the law enforcement process, especially at the investigation process. The Lebak Resort Police is still conducting an investigation into alleged corruption in the distribution of social assistance funds for the 2021 fiscal year, which is estimated to cause state financial losses of IDR 308 million. Until February 2023, the case file had not been declared complete (P21) by the investigators, as the process of deepening and verifying relevant evidence was still ongoing (Dittipidkor, 2023).

2. Merger of the investigation stage and the inquiry stage

According to Article 1 point 2 of the Criminal Procedure Code (KUHP), an investigation is described as a sequence of actions conducted by investigators in accordance with legal provisions to gather evidence, which serves to clarify the occurrence of a criminal offense and identify the suspect. Meanwhile, Article 1 point 5 of the Criminal Procedure Code (KUHP) defines an inquiry as a sequence of actions taken by investigators to identify and uncover an event suspected of being a criminal offense, with the aim of assessing whether it can be advanced to the investigation stage in accordance with legal provisions. Conceptually, the two terms have fundamental differences; investigations focus on discovering criminal events, while investigations aim to gather evidence and identify suspects. However, Article 10 of National Police Chief Regulation No. 6/2019 states that investigation is one part of a series of activities in criminal investigations. This condition has the potential to cause legal uncertainty or even blur the conduct of the investigation and inquiry stage. In practice/implementation in the field, it is not uncommon to find that activities at the Investigation stage are carried out to exceed the limits of their authority and enter the realm of Investigation, or vice versa, at the Investigation stage there are still actions that procedurally should be carried out at the investigation process. This phenomenon reflects the duplication of procedures at both stages (BPHN, 2022).

On the other hand, combining the investigation stage and the investigation stage for a criminal offense that has clear criminal events and sufficient preliminary evidence can provide effectiveness in the case handling process. The concept of including an investigation into a series of investigation stages is an investigative concept as known in criminal investigations that apply in other countries. Orthmann and Hess (2013) in their book *Criminal Investigation* explain that criminal investigation is a procedure that aims to identify the perpetrators of a crime as well as trace and analyze evidence found at the scene of the crime. This process includes a series of stages, ranging from detection, collection, processing, identification, to systematic testing of evidence as part of law enforcement efforts (De Silva, et.al., 2021).

In addition to these factors, the use of discretion in law enforcement sometimes leads to legal uncertainty, such as the case of an employee of the Indonesian Broadcasting Commission (KPI) with the initials MS who stated that she had been a victim of bullying, slavery, and sexual harassment by her coworkers since she started working in 2012. In 2019, MS tried to report the incident to the Gambir Police Station, but the officer rejected the report and advised her to submit it first to her superiors at KPI. In 2020, MS again reported the same case to the police, but her report was still not followed up. The police began to follow up on this case after the case attracted public attention and went viral on social media. Previously, law enforcement officials did not show serious efforts in responding to reports filed by victims (Muammar, 2023).

Based on the above cases, it shows that in the implementation of law enforcement officials often abuse discretionary authority which should function as a policy instrument to adjust the application of law to the real situation in the field. In various cases, discretion is not used to accelerate the achievement of justice or solve legal problems efficiently, but instead is used as an excuse

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to delay the legal process under the pretext of administrative or other interests. This practice has changed the meaning of discretion from a flexible policy tool to a means of repression that threatens substantive justice. When discretion is used to justify delays or omissions in law enforcement, the meaning of legal certainty as the main fundamental principle of legal systems is lost. The law no longer functions as a definite, fair, and evenly applied norm, but rather becomes a tool that is easily adapted to the interests of power. This condition reflects an integrity crisis in the use of discretionary authority and highlights the significance of supervision and reform in the law enforcement system to ensure the upholding of justice and legal certainty.

The application of Police Discretion has an impact on the law because legal provisions are only applied if it is the best solution, but will be ruled out if it creates worse conditions (Ramadhan, 2021). Therefore, in the application of discretion, supervision and case titles are needed for the handling of criminal cases so that the discretion exercised by law enforcement officers is appropriate and remains in accordance with legal provisions. However, there is still ambiguity in the rules of law within the National Police, especially regarding the obligation to hold a case title in the criminal process, because Perkapolri No. 6/2019 Article 9 paragraph (1) requires the holding of a case title on the results of an investigation, while Article 15 paragraph (2) of the Perkabareskrim No. 4 of 2014 states that a case title is carried out by order or approval of the superior investigator, so it is not mandatory (Sudariyanto et.al., 2021). Participants in the case title consist of the head of the Police at the Polres, Polda, or Bareskrim level; a designated official of the Investigation Supervisory Bureau of Bareskrim Polri; the Director or Deputy Director of Criminal Investigation, Criminal Investigation, or Criminal Investigation; the Head of the Investigation Supervision Section; the investigator handling the case; the General Supervision Inspectorate or Regional Supervision Inspectorate; the Division or Division of Profession and Security; the Division or Division of Law; experts; the complainant or complainant; the reported or complained; and legal counsel (Jessica, et.al., 2022). In addition, the participation of the National Police Commission (Kompolnas) in the supervision of the Indonesian National Police (Polri) is needed. Kompolnas as an external supervisory institution of the National Police as stipulated in Law Number 2 of 2002 and Presidential Regulation Number 17 of 2011 still has limitations in terms of position, legal substance, legal culture, personnel, facilities, and financial resources so that the implementation of the duties and functions of Kompolnas has not been maximized (Amin & Aziz, 2023).

IV. CONCLUSION

Investigation is the initial stage in the criminal case handling process which plays an important role in determining whether an event can be categorized as a crime. At this stage, the application of the principle of legal certainty is very important, because this principle emphasizes the importance of compliance with applicable legal norms. The aim is to prevent mistakes in the handling process that can lead to the issuance of an acquittal or release from legal charges against the perpetrator. In addition, law enforcement officials are also given discretionary authority to handle conditions that are not expressly regulated by legal norms, provided that their implementation must remain proportional and not deviate from the principles of justice and applicable legal provisions.

Although discretion is needed in certain circumstances, its application in the field often leads to legal uncertainty. This occurs because there is no clear time limit in the investigation process and the possibility of overlap between the investigation and investigation stages as stated in Perkapolri No. 6/2019. This lack of clarity can open loopholes for criminalization, delays in case completion, or even omission of cases that should be followed up. Furthermore, discretion exercised without supervision can be misused as a tool to suppress or serve certain interests, which ultimately undermines public confidence in the integrity of the law enforcement system.

Therefore, the careful monitoring of discretionary practices by law enforcement personnel is highly necessary. The implementation of case titles needs to be carried out consistently as a form of accountability in every handling of criminal cases. In addition, There is an urgent need to reform internal police regulations and enhance the function of external oversight bodies, such as Kompolnas. Clarity on time limits and procedures in the investigation process also needs to be emphasized to ensure that the exercise of discretion remains within the correct legal corridor and maintain the principle of legal certainty as the main foundation of the criminal justice system.

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