

Actions of Violence in Arresting Suspected Terrorists based on Human Rights Perspective

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Abstract--- Terrorism is categorized as extra ordinary crime so that the Police needs extra ordinary actions to overcome it. The actions carried out by the police are still limited by the applicable legal regulations and human rights although it is possible to carry out the discretionary actions. In some cases of arresting terrorists, it has led to actions of violence carried out by the Police so that it leaves the issue of the use of authority, especially involving discretion. This important issue is related to the discretionary boundaries, namely arbitrariness, abuse of power, and necessity of the needed action. To analyze this issue, a legal research with black-letter law paradigm was conducted. The technique of collecting legal materials in this study used library research. The legal materials were analyzed deductively and used interpretation method (hermeneutics). The research results showed that actions of violence carried out by the police in arresting suspected terrorists were allowed if they fulfilled the elements that have existed in the provisions of the laws and regulations. In the context of human rights, practices of violence in arrests are still problematic.

Keywords---- Terrorism, Police, Discretion, Violence, Human Rights

I. INTRODUCTION

The state has law enforcement tool, in combating terrorism crimes, namely the National Police of the Republic of Indonesia (*POLRI*) as stipulated in Law Number 2 of 2002 concerning the National Police of the Republic of Indonesia.¹ The police are the frontline in enforcing criminal law so that it is not excessive if the police are said to be a living criminal law.² A member of the National Police of the Republic of Indonesia in carrying out their duties and functions of the Police that uses her/his professional ability is limited by the professional code of ethics as the third moral foundation facing various crimes which are her/his responsibility³, in addition to the provisions of procedural law (material criminal law).

Special Detachment 88 Anti-Terror Police as a special unit that handles terrorism cases in Indonesia under the control of the Head of the Indonesian Criminal Investigation Agency that pursues, discloses, and arrests terrorists in Indonesia is in the collaboration with the National Agency for Combating Terrorism (*BNPT*) to make efforts to de-radicalize against the arrested terrorists and the community groups that have radical tendencies.⁴ In handling criminal acts, one important thing is the discretion of the Police⁵, as stipulated in Article 18 paragraph (1) of Law Number 2 of 2002 concerning the National Police of the Republic of Indonesia (National Police Law). The provision asserts that in the public interest, the officials of the National Police of the Republic of Indonesia can act according to their own judgment in carrying out their duties and authorities.

“Actions according to someone’s own judgment” is commonly called as discretion. Discretion carried out according to individual police’s judgment is potential to cause abuse of power. In connection with the case of Siyono, a suspected terrorist in Klaten, Central Java, in the past 2016, the Commission for Disappeared and Victims of Violence (*Kontras*) considered that there was an irregularity in Siyono’s death. This was based on the physical condition of Siyono’s corpse that was full of bruises allegedly as a result of actions of violence and torture. In a press conference at the National Police Headquarters, it was stated that the cause of Siyono’s death was a collision when Siyono resisted the members of Detachment 88.⁶ In this case, it was found that actions of violence were carried out by an investigator in the arrest of the suspected terrorist that caused the suspect to die. This has led to opposition in the community towards the actions taken by the police officers, which have been assumed to be actions

⁴ Dedi Prasetya, *Op.Cit.*, p. 5.

⁵ Welker S. Mendefinisikan diskresi sebagai wewenang yang diberikan hukum untuk bertindak dalam situasi khusus sesuai dengan penilaian dan kata hati instansi atau petugas itu sendiri. Dalam Buku A. Josias Simon Runturambi dan Arin Sri Pujiastuti, 2015, *Senjata Api dan Penanganan Tindak Kriminal*, Jakarta: Yayasan Pustaka Obor Indonesia, p. 123.

⁶ KOMPAS.com, Sabtu, 26 Maret 2016, Pukul 15:18 WIB: Kontras duga Densus 88 lakukan pelanggaran HAM terhadap Siyono dalam <http://nasional.kompas.com/read/2016/03/26/1518371/kontras.duga.densus.88.lakukan.pelanggaran.HAM.terhadap.Siyono>, diakses pada tanggal 18 April 2018 Pukul 23:04.

¹ Dedi Prasetyo, 2014, *Diskresi Kepolisian pada Tahap Penangkapan Tersangka Terorisme*, Malang: Universitas Brawijaya Press, p. 23.

² Satjipto Rahardjo, 2002, *Polisi Sipil dalam Perubahan Sosial di Indonesia*, Jakarta: penerbit Buku Kompas, p. xxv.

³ Muhammad Nuh, 2011, *Etika Profesi Hukum*, Pustaka Setia Offset, p. 134.

of seizing Human Rights(HAM). Conceptually, the state has an obligation to respect human rights. These obligations are not only negative (not to be violated), but also positive (to be enforced or implemented).⁷ Based on the explanation above, this article discusses about the issue of the use of discretion in efforts to arrest suspected terrorists accompanied by actions of violence, especially within the framework of human rights.

A. Research Method

This article was compiled from the results of legal research (doctrinal research). This study was a descriptive research. It used qualitative research approach with the data sources of the library materials in the field of Law, namely the Primary law material, Secondary law material, and Tertiary law material. The technique of collecting data in this study used inventory of legal materials through library research. The legal materials were analyzed deductively and used interpretation method (hermeneutics).

B. Discussions

1) The Use of Discretion in Efforts to Arrest Suspected Terrorists Accompanied by Actions of Violence

Saut P. Panjaitan stated that discretion is a form of deviation towards the principle of legality in the sense of *wet matigheid van bestuur* so that it is an exception from the principle of legality. Benjamin conveyed that discretion is defined as the freedom of the officials to make decisions according to their own considerations. Gayus Lumbun also revealed that discretion is a policy that violates the law as long as it has three conditions, namely the public interest, still within the boundary of its authority, and does not violate good governance principles.⁸

Discretion is the opposite of a routine obedience and becomes a habit. It involves knowledge, skills, and insight to carry it out in an unpredictable manner. The police are not soldiers who must obey orders blindly. The police must have the competence to implement regulations to different situations while remaining within the existing regulatory corridors. Discretion is the authority imposed by the law to act in special situations in accordance with the judgment and conscience of the agency or official itself. Thus, discretion can be defined legal or illegal.⁹

The police are given the authority or discretion by our criminal law to carry out a whole series of processes against anyone involved in crimes.¹⁰ The authority of the police is not

to influence the course of the criminal process, but to strengthen the law enforcement process.¹¹

Article 18 of Law Number 2 of 2002 concerning the National Police of the Republic of Indonesia regulates discretion. The provision affirms that:

- a. For the public interest, the officials of the National Police of the Republic of Indonesia can act according to their own judgment in carrying out their duties and authorities.
- b. The implementation of the provisions referred to in paragraph (1) can only be carried out in very necessary circumstances by paying attention to the laws and regulations, as well as the Professional Code of Ethics of the National Police of the Republic of Indonesia.

The formulation of the police authority in Article 18 paragraph (1) constitutes an authority that derives from the principle of the general obligation of the police officials to act according to their own judgment in the context of the obligations to generally protect, maintain order, and guarantee public security. Harold E. Pepinsky conveyed 5 (five) things that generally ignore discretion, namely:

- i. it is required by accountability;
- ii. it consists of unexplained variation in police decisions;
- iii. it does not contribute to the over-whelming class bias in policing;
- iv. it is increased by the imposition of laws, regulations, and rules; and
- v. its creation is necessary for reducing the injustice of policing.¹²

Article 18 paragraph (2) explains that in carrying out the authority duties in connection with the community, the Police needs to pay attention to the laws and regulations, and the Professional Code of Ethics of the National Police of the Republic of Indonesia regulated in Article 10 paragraph (1) of the Regulation of the Chief of the National Police of the Republic of Indonesia Number 7 of 2006 concerning the Professional Code of Ethics of the National Police of the Republic of Indonesia which reads:

- a. respecting human dignity through respect and protection of Human Rights;
- b. upholding the principle of freedom for all citizens;
- c. avoiding disgraceful deeds and upholding the values of honesty, justice, and truth for the service to the community;

⁷ James W Nickel, 1996, *Hak Asasi Manusia*, Jakarta: PT. Gramedia Pustaka Utama, p. 61.

⁸ Darmono Yuti Witanto dan Arya Putra Negara Kutawaringin, 2013, *Diskresi Hakim sebuah Instrumen Menegakkan Keadilan Substantif Dalam Perkara-Perkara Pidana*, Bandung: Alfabeta, p. 71.

⁹ Komisi Kepolisian Indonesia, 2012, *Diskresi Kepolisian dalam Tinjauan Hukum dan Implementasinya di Lapangan*, Jakarta, p. 25.

¹⁰ Joseph, H. Tieger, 1971, *Police Discretion and Discriminatory Enforcement*, *Duke Law Journal* Vol. 1972:717, *United States: Duke University School of law*, p. 718.

¹¹ Joseph, Goldstein, 1960, *Police Discretion No To Invoke The Criminal Process: Law Visibility Decisions In The Administration Of Justice*, *Yale Law Journal* Vol. 69 No. 4, March 1960, *New Haven: Yale Law School*, p. 543.

¹² Harold E Pepinsky, 1984, "Better Living through Police Discretion", *Law & Contemporary Problems*, Vol.47, No.4, h.249. diakses dari <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3785&context=lcp>, 12 Februari 2019, pk.05:16 wib.

- d. upholding the law in order to create social order and a sense of security in the public;
- e. improving the quality of the service to the community;
- f. carrying out the first action of the police as required in police duties, both on duty and outside the service.

The police represent the interests of the community with great strength and responsibility. The natural demand on the police is by giving rewards, by maintaining the highest ethical standards. The implementation of the police activities is sometimes said to be a "moral mine" because a lot of police work must involve themselves in other people's conflicts and handle various kinds of deviant behavior. In some of its duties, the police must use discretionary actions.¹³ Such discretionary actions are not far from the use of force by the police on criminals even the way taken uses violence.

The concept of violence as introduced by Kiefer refers to two things, *first*, referring to an action to harm another person, causing injury or experiencing pain. *Second*, it refers to the use of physical forces that are not common in a culture.¹⁴ The definition of violence can be found in the Black's Law Dictionary. Violence, is defined as, "Unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury. Physical force unlawfully exercised; abuse of force; that force which is employed against common right, against the laws, and against public liberty."¹⁵

Violence as another dimension of law enforcement becomes one of the worst in the world.¹⁶ The police is the law enforcer that often uses violence so that it is a group of unique workers. They run the important functional and symbolic roles in the community as one of the protections, but paradoxically, they are also a threat to the same freedom.¹⁷

Actions of violence of the police is *preventievebevoegdheid* (preventive authority) justified by Hoge Raad (Dutch Supreme Court) that actions of violence of the police must be based on two principles, namely the principle of proportionality and the principle of subsidiarity. The principle of proportionality means that the objectives and means used to achieve the objectives must be proportional, while the principle of subsidiarity means that achieving an objective needs soft actions to overcome the conditions. If soft actions cannot overcome them, then more decisive, but proportional actions should be used. The violation of these

two principles is the basis of punishment for the perpetrators, including the police.¹⁸

The use of force in actions of the police is regulated in the Regulation of the Chief of the National Police of the Republic of Indonesia Number 1 of 2009 concerning the Use of Force in Actions of the Police. In Article 2 paragraph (1), the Objective of this Regulation is to give guidance for the members of the National Police of the Republic of Indonesia in the implementation of actions of the police that needs the use of force so that they can avoid excessive or irresponsible use of force, paragraph (2) the objectives of the use of force in actions of the police are to:

- a. prevent, inhibit, or stop actions of "criminals or suspects who are trying or carrying out actions that are contrary to law;
- b. prevent criminals or suspects from escaping or committing actions that are harmful to the members of the National Police of the Republic of Indonesia or the community;
- c. protect themselves or the community from threats of actions or actions of criminals or suspects that can cause serious or deadly injuries; or
- d. protect the honor of decency or property of themselves or the community from the attacks that are against the rights/or threatening human life.

Efforts of violence carried out by police at the stage of arresting suspected terrorists using various kinds of weapons are very reasonable. Terrorism actors often resist when getting arrested, even the perpetrators tend to attack the police officers that can threaten the life safety of the officers and the community of course. Terrorism actors are the people who have special skills that can harm humans.

Actions of violence carried out by the Police in arresting suspected terrorists are allowed if they fulfill the elements that have existed in the provisions of the laws and regulations. This is because the Police Officers have the authority to act according to their own judgment in carrying out other actions which are based on their authority to commit actions of violence against a suspected terrorist for the public interest, in which in this case, the police are also allowed to fight back in the event of an urgent and threatening interest in the safety by committing a crackdown. That action of the police cannot be blamed if it has been in accordance with the provisions of the laws and regulations as it sounds in Article 1 paragraph (1) of the Criminal Code which states that: "an action cannot be punished, except based on the strength of the provisions of the existing criminal laws and regulations".

2) Arrest of Suspected Terrorists Accompanied by Actions of Violence in the Perspective of Human Rights

¹⁸ Indriyanto Seno Adji, 2009, *Humanisme dan Pembaruan Penegakan Hukum*, Jakarta: Kompas Gramedia, p. 61.

¹³ Kunarto dan Hariadi Kuswaryono (ed), "*Polisi dan Masyarakat*", Makalah, Hasil Seminar Kepala Polisi Asia Pasifik ke VI Taipei, 14 Januari 1998, p.64-65.

¹⁴ A. Latief Wijaya, 2002, *Carok, Konflik Kekerasan dan Harga Diri Orang Madura*, Yogyakarta: LKIS, p. 7.

¹⁵ Henry Campbell Black, 1990, *Black's Law Dictionary*, Sixth Edition, West Publishing Co, St. Paul, Minn, p. 1570.

¹⁶ Agus Raharjo, "*Hukum dan Dilema Pencitraanya (Transisi Paradigmatik Ilmu Hukum dalam Teori dan Praktik)*", Jurnal Hukum Pro Justitia, Vol. 24, No. 1, Januari 2006.

¹⁷ Thomas Barker & David L. Calter, 1999, *Police Deviance*, Anderson Publishing Co. Cincinnati OH, p. 3.

Human rights are an inherent set of rights in the nature and existence of humans as the creatures of God Almighty and a gift that must be respected, upheld, and protected by the state, law and government, and every person for the honor and protection of human dignity.¹⁹ Human rights mean that the inherent rights in humans are based on their nature so that the rights that humans have as human beings are inherent in the notion of human rights themselves, that human rights must be understood universally.²⁰ Human rights provide the greatest and widest freedom for every human being without any view of the origin of nationality, gender, skin color, race, class of religion, age, and political beliefs, even those rights need to be respected and upheld by the state, law, even everyone.

Human rights include a broad understanding which covers civil rights, political rights, economic rights, and socio-cultural rights. In addition, human rights also transcend national borders, religion, and gender. Therefore, human rights are a universal concept that is not limited to the citizens who are bound in a particular country. Human rights reflects a concept of fundamental rights that can be claimed by all humans, wherever they are.²¹

Article 1 paragraph (3) of the 1945 Constitution affirms that "The State of Indonesia is a State of Law". In a state based on law, all actions of the state and government are always based on certain principles and rules of law, both written and unwritten. Therefore, the core meaning of this principle is that all actions must be legally accountable, including all actions carried out by the public officials.²²

Detachment 88 has Standard Operating Procedure (*SOP*) that is quite credible and accountable. In this case, a new member of the detachment 88 will carry out decisive actions if she/he has fulfilled Standard Operating Procedure (*SOP*). All targets handled by the members of the detachment 88, especially in cases of terrorists that must be arrested alive, if there must be the use of violence, it is ensured because of the danger that has the potential to cause casualties. Arresting live targets is the greatest priority for the detachment 88 because this will give the opportunity to get a lot of important information in network disclosure.

In carrying out the duties, the detachment 88 should prioritize the legal principle of presumption of innocence for all suspected terrorists because this is directly related to a person's human rights, in which every Indonesian citizen is guaranteed his rights in the 1945 Constitution, especially his right to life. In Article 28 A of the 1945 Constitution, it reads "every human being has the right to defend his life". In

Article 6 of the Law on Civil and Political Rights Number 12 of 2005, it states "every human being has the right to the inherent life in him". This right must be protected by the law. No one can be deprived of his life rights arbitrarily. Even though the suspected terrorist is not an Indonesian citizen, a person's right to life should be guaranteed by the State of Indonesia as in Article 3 of the Universal Declaration of Human Rights which reads: "Every person has the right to life, freedom, and safety as an individual."

Violence committed by detachment 88 which causes the loss of life of the suspected terrorists must be calculated in detail so that it can avoid arbitrary actions and the actions that are outside the specified procedures, both in the Law and other regulations. The use of violence by the police is a piece of equipment to be able to carry out its work, namely to foster and maintain order in the society.²³ The boundaries of vague violence have the potential to encourage abuse of authority and Human Rights violations. The existence of such conditions is recognized by the international community through MU-UN resolution 34/169 on December 17th, 1979 concerning "Code of Conduct for Law Enforcement Officials", which allows law enforcement officials to use force as the excess action in carrying out their duties and the 8th/1990 UN Congress on "The Prevention of Crime and the Treatment of Offenders" which has received "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials".²⁴

Handling for Terrorists in relation to Human Rights carried out by Detachment 88 has clearly violated Human Rights (*HAM*) if the work system used is not changed. In this case, Detachment 88 tends to use repressive method in handling suspected cases of criminal act of Terrorism by means of violence which is not necessarily the victim of violence of the suspected terrorist that is indeed one of the actors in the terrorism network. In this phase, the potential for Human Rights violations can occur because the use of force or violence will take precedence. When conducting interrogation to get information on terrorism, the actions that are considered a form of violence are committed. The approach of violence that "plays the role of judges" must be replaced with a persuasive and sympathetic approach, dialogue, welfare approach, and alignment of the understanding of religion which is put forward so that it can win the sympathy of the majority of the people.

The Criminal Code Procedure (*KUHAP*) has formulated a number of rights for suspects/defendants to protect themselves from various possible Human Rights violations, as stipulated in Article 50-68 of the Criminal Code Procedure. However, normatively, concern for suspects that have been regulated by the Criminal Code Procedure related to terrorism cases and the existing normative rules is often

¹⁹ Pasal 1 Ayat (1) Undang-undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.

²⁰ A. Gunawan Setiardi, 1993, *Hak-Hak Asasi Manusia Berdasarkan Ideologi Pancasila*, Yogyakarta: Kanisius, p. 73.

²¹ Sukron Kamil, 2007, *Syariah Islam dan HAM Dampak Perda Syariah Terhadap Kebebasan Sipil, Hak-Hak Perempuan, dan Non-Muslim*, Jakarta: CSRC, p. 2.

²² Mardenis, 2011, *Pemberantasan Terorisme Politik Internasional dan Politik Hukum Nasional Indonesia*, Jakarta: Rajawali Press, p. 204.

²³ Satjipto Rahardjo, 2009, *Penegakan Hukum (Suatu Tinjauan Sosiologis)*, Yogyakarta: Genta, p. 119.

²⁴ Barda Nawawi Arief, 1998, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Bandung: Citra Aditya Bakti, p. 22.

ignored by law enforcement officials. Protection of the rights of suspects/defendants based on Law Number 5 of 2018 concerning the Eradication of Terrorism Crimes Article 25 paragraph (1) states that investigations, prosecutions, and examinations in courts in criminal acts of terrorism are carried out based on criminal procedure law, namely the Criminal Code Procedure.

In a seminar, James Welsh, a member of Amnesty International from Australia, had ever stated that that everywhere, torture and ill-treatment are experienced by criminals when being examined by the police, including in countries that uphold Human Rights. Torture is used as a tool to get recognition.²⁵ The work pattern of the National Police had ever been criticized by P. Kooijmans, as a Special Rapporteur of the United Nations Human Rights Commission who specifically studied about the alleged existence of Human Rights violations in Indonesia relating to the Indonesian Criminal Code Procedure. Kooijmans provided an evaluation and concluded that the police had full authority for 20 days of detention, denying the occurrence of Human Rights violations. There is no special institution that can accommodate complaints about abuse and violence that often occur in the initial phase investigation, both at the stage of handling in the field and investigation.²⁶

Actually, attitudes and anticipatory actions have been poured through international instruments. LuhutPangaribuan said that the inherent principle in the convention is non-derogable human rights. It means that violence or torture in any form (physical or psychological) does not have an exceptional attitude so that any attempt to torture or torture without exception and under any circumstances (in a state of war, domestic political instability) is not justified and as a serious violation of criminal law.²⁷

II. CONCLUSIONS

Actions of violence committed by the Police in the arrests of suspected terrorists are allowable if they fulfill the elements that have existed in the provisions of the laws and regulations. Based on the provisions of Article 18 of Law Number 2 of 2002 concerning the National Police of the Republic of Indonesia, the Police Officers have the authority to act according to their own judgment in carrying out other actions which are based on their authority to commit actions of violence against a suspected terrorist for the public interest.

The eradication of terrorism crimes committed by detachment 88 is still far from the values contained in Human Rights because in its enforcement, law enforcement officials, especially in special detachment or called detachment 88 anti-terror, often take repressive actions that can endanger a person's Human Rights. In many operations, the actions of

violence were committed to the people who were suspected or even just suspected of committing criminal acts of terrorism.

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²⁵ Indriyanti Seno Adji, *Op.cit*, p. 60

²⁶ *Ibid*, p. 61.

²⁷ Indriyanti Seno Adji, "Cacatan Tentang Pengadilan HAM dan Masalahnya", Majalah Hukum Pro Justitia, XIX, No. 1, Januari 2001, p. 31.

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