

## **Formulation Of Criminal Law In The Ownership, Use Of Fire Weapons To Realize Security And Order In The Indonesian Jurisdiction (Case Study Bharada E)**

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### **ABSTRACT**

Firearms can be used as instruments that are very dangerous if misused by irresponsible parties. There are at least 3 philosophical, sociological and juridical foundations that need to be considered in renewing regulations on the ownership, use and control of firearms. The purpose of this research is to find out and analyze the reform formulation of regulations on the ownership, use and control of firearms. The data that has been collected is analyzed descriptively qualitatively, namely to describe the relationship between the results of the research and the applicable laws and regulations, to explain the problem to a conclusion, and studied as a whole. The formulation of renewal of regulations on the ownership and use of firearms, with technological advances as an instrument for firearms has developed a lot, the Emergency Law is outdated, it is time to update it to adapt to current developments in the field of weapons. The Emergency Law only more or less regulates illegal / improper use of firearms. Juridically, because it involves the rights and obligations of the community, the regulation must be at the level of a law whose derivatives can be further regulated in Government Regulations or Police Regulations. Sociologically, the use of firearms must be very limited for civil society who have an interest in firearms. .

**Keywords: Renewal, Regulation, Firearms**

### **ABSTRAK**

Senjata api dapat dijadikan sebagai instrumen yang sangat berbahaya apabila disalahgunakan oleh pihak-pihak yang tidak bertanggung jawab. Setidaknya ada 3 landasan filosofis, sosiologis dan yuridis yang perlu diperhatikan dalam pembaharuan peraturan kepemilikan, penggunaan dan pengawasan senjata api. Tujuan dari penelitian ini adalah untuk mengetahui dan menganalisa formulasi pembaharuan peraturan kepemilikan, penggunaan dan pengawasan senjata api. Data yang sudah terkumpul dianalisis secara deskriptif kualitatif, yaitu menggambarkan hubungan antara hasil penelitian dengan peraturan undang-undang yang berlaku, untuk menjelaskan persoalan sampai pada suatu kesimpulan, dan dipelajari sebagai sesuatu yang utuh. Formulasi pembaharuan peraturan kepemilikan, penggunaan senjata api, maka dengan kemajuan teknologi sebagai instrumen senjata api sudah banyak berkembang, Undang-undang Darurat sudah ketinggalan jaman, sudah saatnya diperbaharui untuk menyesuaikan perkembangan jaman dibidang persenjataan. UU Darurat hanya kurang lebih mengatur pengguna senjata api yang ilegal / tidak sebagaimana mestinya. secara yuridis oleh karena menyangkut hak dan kewajiban masyarakat, maka pengaturannya harus dalam level undang-undang yang turunannya bisa diatur lebih lanjut dalam Peraturan Pemerintah atau Peraturan Kepolisian, secara sosiologis pengguna senjata api harus sangat dibatasi bagi masyarakat sipil yang benar-benar berkepentingan dengan senjata api.

Kata Kunci : Renewal, Regulation, Firearms

## **A. Introduction**

Normatively, Indonesia is actually a country that is quite strict in implementing firearms ownership rules for civilians. There are a number of legal bases governing this matter, starting at the statutory level, namely Emergency Law No. 12 of 1951, Law No. 8 of 1948 and legal regulations No. 20 of 1960

Police Regulation Number 1 of 2022 concerning Licensing, Supervision and Control of Standard Firearms for the Indonesian National Police, Non-Organic Firearms for the Indonesian National Police and the Indonesian National Armed Forces, and Security Equipment Classified as Firearms replaces the previous regulation, namely the Regulation of the Head of the Indonesian National Police Number 8 of 2012 concerning Licensing, Supervision and Control of Non-Organic Firearms for the Indonesian National Police and the Indonesian National Armed Forces for Sports Interests, Regulation of the Head of the Indonesian National Police Number 18 of 2015 concerning Licensing,

Supervision and Control of Non-Organic Firearms for the Indonesian National Police / Indonesian National Armed Forces for Self-Defense Interests, and Regulation of the Head of the National Police of the Republic of Indonesia Number 11 of 2017 concerning Licensing, Supervision and Control of Non-Organic Firearms for the State Police of the Republic of Indonesia / Indonesian National Armed Forces and Security Equipment Classified as Firearms for Other Police Functions. Licensing for Police Organic Firearms is carried out for Police Organic Firearms used by members of the Police in carrying out their duties as police officers for the Republic of Indonesia. Police Regulation Number 1 of 2022 confirms that the Licensing of Police Organic Firearms is carried out by the Head of the Indonesian National Police. The issuance of permits can be delegated to officials appointed based on the Regulation of the Head of the Indonesian National Police. Types of permits include import, purchase, issuance, issuance and re-entry, use, grant, transportation, storage and destruction.

Police Regulation No. 1 of 2022 concerning Firearms regulates Licensing, Supervision and Control of Police Standard Firearms, Police and Army Non-Organic Firearms, and Security Equipment classified as Firearms. Police Regulation No. 1 of 2022 concerning firearms has the basis that the ownership and use of organic firearms by the Indonesian National Police and non-organic firearms by the Indonesian National Police / Indonesian National Armed Forces as well as security equipment classified as firearms are granted permits, supervision and control by the Police The Republic of Indonesia in accordance with the provisions of the legislation.

The firearm used by Bharada E in the police shooting incident that killed Brigadier J at the residence of the Head of the Professional and Security Division of the Police sparked polemics, Bharada

E is said to have used a Glock type pistol with a magazine containing 17 bullets. Some believe that Bharada E firearms should not be used by enlisted members of the police force

### **A. Focus Of Problem**

How to Formulate Criminal Law on the Possession and Use of Firearms Case Study Bharada E and  
How to Formulate Criminal Law on Illegal Firearms Ownership in Criminal Law Reform

### **B. Research Methodology**

The type of research used is normative juridical. Normative juridical research is a process to find a rule of law, legal principles, or legal doctrines to answer legal issues. The reason for using normative juridical is because the problems studied are incomplete regulations related to firearms.

In this legal research, several approaches are used, including: First, the legal approach is carried out by examining existing regulations related to firearms that are still used today based on hierarchy, so that they can become arguments for solving legal issues. Second, the conceptual approach is an approach that refers to legal principles, which can be found in the views of scholars, legal doctrines, laws and court decisions. Third, the case approach is an approach by understanding the *ratio decidendi* used by judges to arrive at their decisions. This approach was taken to examine cases related to firearms to be used as a reference in this study.

The main point of study of this approach is the difference in decisions regarding several cases of the use of firearms by Bharada E, which were handled by judges which caused polemics among the public and law enforcement, given the incomplete regulations on firearms. The legal materials used in this study are primary legal materials, secondary legal materials and tertiary legal materials.

### **C. Finding And Discussion**

#### **1. Formulation of Criminal Law against possession of firearms (Case study Bharada E)**

In the Regulation of the State Police of the Republic of Indonesia Number 1 of 2022 it states 8 types of organic police weapons. Police standard firearms or so-called police organic firearms are firearms caliber 5.5 millimeters and above with a manual, semi-automatic and/or automatic working system, and have been modified, including ammunition, grenades and explosives for security and public order. This is explained in Article 1 paragraph 4 of Police Regulation Number 1 of 2022 concerning Licensing, Supervision and Control of Indonesian Police and Army Standard Firearms, Indonesian Police and Army Non-Organic Firearms, and Security Equipment Classified as Firearms. This regulation was stipulated by the Police on January 29, 2022 and promulgated by the Director General of Laws and Regulations of the Minister of Law and Human Rights on February 3, 2022. Article 2 paragraph 2 of Police Regulation Number 1 of 2022 states 8 police

organic firearms. In Article 2 paragraph 2 of Police Regulation Number 1 of 2022 it is stated that organic police firearms consist of:

1. Hand-held firearms
2. Submachine gun firearms
3. Assault firearms
4. Light, medium and heavy machine firearms
5. Sniper firearms
6. A sniper rifle
7. Throwing firearms
8. Smooth barrel firearms.

According to Article 1 Paragraph 3 of Police Regulation Number 1 of 2022, Firearms are tools that are partly or wholly made of metal that have mechanical components or devices such as barrels, hammers or triggers, triggers, springs, and bullet chambers that can eject bullets or gas. through the barrel with the help of explosives.

Formulation Policy is a step taken by the state to formulate what actions are considered disgraceful, then use criminal law as one of the efforts to deal with actions that are considered disgraceful, so that people stay away from them or do not commit these actions. As for the use of criminal law by issuing statutory regulations which clearly contain criminal sanctions. This is in line with what Barda Nawawi Arief said on another occasion, legislative policy is a policy in establishing and formulating something in legislation. Legislative policies are also often referred to as "formulative policies".<sup>1</sup>

The use of criminal law as a way to deal with crime should at the formulation stage be planned properly and correctly, because the purpose of criminal law itself is ultimately to achieve social welfare. The welfare of the community here is the welfare of the community at large, not just sending perpetrators to prison and creating new problems, namely prisons that are full.

The use of legal remedies, including criminal law, as an effort to overcome social problems, is included in the field of law enforcement policies. In addition, because the goal is to achieve public welfare in general, even this law enforcement policy is included in the field of social policy, namely rational efforts to achieve community welfare. This means that, in terms of policy making at the policy formulation stage, the criminal law sanctions used to deal with crime should be chosen rationally both in determining the type of criminal sanction, the duration of the criminal sanction and the method of execution of the crime. Policy making that is not rational, will actually cause its own problems, namely

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<sup>1</sup> Hartono, *Penyidikan dan penegakan hukum pidana melalui pendekatan hukum progresif* Jakarta: Sinar Grafika, 2012

the emergence of criminogenic factors. The Criminal Code divides criminal acts into two types, namely crimes and violations. Delicts included in crimes are included in Book II and violations are included in Book III. But deep. The Criminal Code does not state what criteria are used to differentiate the two types of offenses. The difference between violation and crime is the difference between statutory offenses and legal offenses.

Crime is a legal delict while violation is a statutory delict, so a crime is an act because it is contrary to legal order, while a violation is an act which is labeled by law as an act that is contrary to public order.

According to Sudarto, the criteria for distinguishing the two types of offenses mentioned above are based on the following opinion: that between the two types of offenses there is a qualitative difference. The two types of delict referred to as crime or "rechtdelicten" are actions that are contrary to justice, regardless of whether the act is punishable by a crime in a law or not. Meanwhile, the

second type of offense, namely violation or "wetsdelicten", is an act that the public is only aware of as a crime because the law calls it a crime, so because the law threatens it with a crime.<sup>22</sup>

According to Sudarto, qualitative differences cannot be accepted, because there are crimes that are only recognized as offenses because they are listed in the Criminal Code, so actually they are not felt as contrary to a sense of justice and instead there are violations that are truly felt to be contrary to a sense of justice. Van Bemmelen stated that the difference between a crime and a violation is not a qualitative difference, but a quantitative one, that is, crimes generally carry more severe penalties than violations. The Criminal Code clearly distinguishes between crimes and violations. Crimes are included in Book II of the Criminal Code, while violations are contained in Book III of the Criminal Code. The articles related to Book II of the Criminal Code regarding crimes in detail are as follows:

The Indonesian Criminal Code adheres to a monistic school, in which there is no difference between a criminal act and criminal responsibility in a monistic school, but in its development as well as in the world of practice there is a clear difference between a criminal act and criminal responsibility, as emphasized by Sudarto regarding the monistic view. "The monistic view is a view that sees all the conditions for the existence of punishment, all of which are the nature of actions". This view provides the principles of understanding, that in terms of acts/criminal acts it includes prohibited acts (criminal act) and criminal responsibility/mistakes (criminal responsibility).

Speaking in terms of criminal acts, especially the Criminal Code, there is a division between crimes and violations, in which these crimes and violations are juridical qualifications. According to Barda Nawawi Arief, there are two policies for formulating criminal offense provisions, namely:

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<sup>22</sup> Moeljanto, *Perbuatan Pidana dan Pertanggungjawaban dalam Hukum Pidana*, (Jakarta: Bina Aksara, 1993).

1. Juridical Qualification. That is, "official/formal qualifications set by the legislators and have certain "juridical consequences/effect". This juridical qualification by J.A.W. Lensing is called by the term "classified by statute". According to the currently valid positive criminal law (which is based on the Criminal Code), juridical qualifications consist of "crimes" and "offences" as in the Dutch Criminal Code (WvS). In the general rules of Book I of the Criminal Code there are differences in legal consequences/consequences between crimes and violations, including in "assistance, concurrence/concursion, timeframe" expiration" means expiration of prosecution and implementation/execution of the crime.

## 2 Non Juridical Qualifications

Namely qualifications (name, designation, type of offense) according to this theory or the opinion of scholars or according to general terms. This non-juridical qualification or scientific qualification by J.A.W. Lesing refers to the term "classified by doctrine." There are quite a lot of non-juridical designations, including: From the point of view of actions: 1) commissionist delict; 2) commissa delict (or also called "impure omission delict"-oneigenlijke omissie-delicten or "delicta commissiva peromissionem") From the point of view of objective elements (mental attitudes): 1) dolus delict; 2) culpa delict; 3) offense pro-parte dolus, pro-parte culpa. From the point of view of formulation: 1) formal offense; 2) material offenses. From the point of view of the prosecution process: 1) ordinary offenses; 2) complaint offense (absolute or relative). From certain aspects or points of view, there are designations/qualifications: political offenses, economic offenses, sexual/pornographic offenses, religious offenses, administrative offenses, ordinary and extraordinary crimes, white collar crimes, top hat crime, cyber crime, hit-tech crime, and so on.

As for the provisions in the Draft Indonesian Criminal Code 2022, it is explained regarding the Ownership of Firearms Article 306 as follows: Everyone who without the right enters into the territory of the Republic of Indonesia, makes, receives, tries to obtain, surrenders or tries to hand over, controls, carries, has supplies, owns, storing, transporting, hiding, using, or removing from the territory of the Republic of Indonesia firearms, ammunition, explosives or other dangerous substances, tear gas or rubber bullets, shall be punished with a minimum imprisonment of 3 (three) years and a maximum of 15 (fifteen) years.<sup>3</sup>

The case of ownership of the firearm used by Bharada E in the police shooting incident that killed Brigadier J at the residence of the Head of the Professional and Security Division of the Indonesian

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<sup>3</sup> [http://bphn.go.id/data/documents/draft\\_ruu\\_kuhp\\_final.pdf](http://bphn.go.id/data/documents/draft_ruu_kuhp_final.pdf)



Police when he was disabled has sparked polemic. Bharada E is said to use a Glock type firearm with a magazine containing 17 bullets. Some believe that Bharada E firearms should not be used by enlisted members of the police force. Regulations for the use of firearms by members of the Police had previously been regulated in Police Regulation No. 1 of 2022 concerning Licensing, Supervision and Control of Indonesian Police Standard Firearms Non-Organic Firearms for the Indonesian Police and Army, and Security Equipment Classified as Firearms.

The definition of standard police firearms is in Article 1 point 4. Whereas Police standard firearms, hereinafter referred to as Police organic firearms, are firearms caliber 5.5 millimeters and above with manual, semi-automatic and manual working systems. / or automatic, and has been modified, including ammunition, grenades and explosives for public security and order. Then, it is stated in Article 2 that the use of firearms by police personnel must have permission from an official appointed by the police. At least, there are 8 types of organic firearms regulated in the Regulation.

Police, ranging from hand-held firearms to throwing firearms. The following details the types of firearms whose use requires a permit as stipulated in Article 2 Hand-held firearms; Submachine gun firearms, Assault firearms, Light, medium and heavy machine firearms, Sniper firearms, Sniper rifles, Throwing firearms; and Smooth barrel firearms. According to Article 8 of the Police Regulations, a permit to use a firearm must meet a number of requirements, namely: have a letter of recommendation from a direct superior, have a certificate of passing a police psychological test; and have a health certificate from a police doctor. Police Regulation Number 1 of 2022 does not stipulate details on the use of firearms based on the class of members of the police. The important thing is Bharada E's role in relation to the security task of his leadership. Is he assigned to guard the official residence, as a driver, or as an adjutant. If a guard is of course allowed to carry a rifle, bayonet or according to the provisions. If a driver is attached to a firearm, let alone a semi-automatic type like a Glock, as an adjutant, is the assistant to a high-ranking officer now changed to a minimum enlisted level and does an adjutant need to carry a semi-automatic firearm like a Glock, and considering the age of Bharada E, he is an enlisted education graduate in 2019 so that in terms of the age of the Service it is not appropriate to use firearms so far the rules for using this type of weapon have not been regulated in detail in Police Regulation Number 1 of 2022 but the Police have regulated the use of firearms for its members with Standard Operational Procedures for Borrowing and Using Firearms in their respective scope of work such as the weapons used by Bharada E are bound by the rules of the Republic of Indonesia Police Mobile Brigade Commander Decree Number 127 of 2019, so that the instructions regarding the use of firearms, their designation, including the rules for controlling them should become a special rule, this is important for to avoid misuse. That's why this should also be used as material for evaluation so that in the future there

will be no more incidents of firearms by personnel that can cause casualties.<sup>44</sup> Formulation of the Criminal Law of Illegal Firearms Ownership in the Reform of the Criminal Law

To determine future formulation policies, the authors use a study of the 2022 Criminal Code Draft

9. Draft Criminal Code 2022 concerning possession of firearms, ammunition, explosives and other weapons

Article 306

Everyone who without rights enters into the territory of the Republic of Indonesia, makes, receives, tries to obtain, surrenders or attempts to surrender, controls, carries, has supplies, possesses, stores, transports, hides, uses, or takes out of the territory of the Republic of Indonesia firearms, ammunition, explosives or other dangerous materials, tear gas or rubber bullets, shall be punished with imprisonment for a minimum of 3 (three) years and a maximum of 15 (fifteen) years<sup>55</sup>

Judging from the provisions of the article, there are 3 (three) things that are the subject of discussion

- a. Juridical qualification between crime and offence The 2022 Draft Criminal Code does not include an offense whether it is a violation or a crime which will cause juridical problems in terms of the application of the law in practice and also in the event of an attempt, assistance, concurrent criminal acts, etc. In the criminal provisions chapter there must be provisions/affirmations regarding the juridical qualifications of a criminal act as a crime or violation
- b. Making firearms regulations is based on ownership administration issues. In this context, the ownership administration approach includes those related to the psychology and health of firearm owners, alcohol addiction track records, criminal track records, ownership goals, non-civilian career track records, and so on. In this fourth perspective, the police institution is assisted by a panel or assessment committee that assesses whether or not a person has a weapon.<sup>66</sup> The committee or panel consists of military elements, intelligence elements, community elements, expertise elements, and a number of elements that can be added or removed. In this fourth perspective, the existence of the police is only as elements that follow up by providing certificates or confiscating and/or destroying firearms that have been assessed by a panel team or committee team, as well as legally processing public persons who misuse firearms for interests that endanger society and the state.

<sup>4</sup> Hartono, *Penyidikan dan penegakan hukum pidana melalui pendekatan hukum progresif* Jakarta: Sinar Grafika, 2012.

<sup>5</sup> [http://bphn.go.id/data/documents/draft\\_riuu\\_kuhp\\_final.pdf](http://bphn.go.id/data/documents/draft_riuu_kuhp_final.pdf)

<sup>6</sup> Cook PJ & Cole TB, Strategic Thinking About Gun Markets & Violence, *Journal of American Medical Association*. 1996, hlm. 275-289



Police who are entitled to hold firearms have actually passed a series of stages and rigorous tests. There are six stages of consideration for a member of the police to have the right to hold a firearm. These considerations are used to assess the eligibility of members of the police force in holding and carrying firearms while on duty:

1. "The first consideration, is an assessment of the duties of the police member whether or not they are oriented towards handling firearms.
  2. The second consideration, the person concerned must obtain a recommendation from his leadership as the party that evaluates the eligibility of his members to hold firearms.
  3. The third consideration, the person concerned must pass a psychological test.
  4. The fourth consideration, the person concerned must pass a health test and pass a shooting proficiency test.
  5. The last consideration is the most decisive, that is, the track record is seen.
2. Concept analysis of the future Criminal Code according to the author:

That in order to draft the forthcoming Criminal Code, the possession of firearms must include a clear juridical qualification between crime and violation so that it does not cause juridical problems in its application and there must be a conspiracy (samenspanning, conspiracy) and repetition (recidive) as well as elements that included in corporate responsibility because if there is no clarity it will cause conflicting problems considering that the Emergency Law currently in force according to the author is no longer feasible in its application because it only explains it universally.

#### **D. Conclusion**

Based on the results of the research and discussion that has been carried out, it can be concluded as follows:

1. There is an urgency to renew regulations on the ownership, use and control of firearms, so with technological advances as firearms instruments have developed a lot, the Emergency Law is outdated, it is time to update it to adapt to current developments in the field of weapons. The Emergency Law only more or less regulates illegal / improper use of firearms.
2. Considerations or philosophical, sociological, juridical basis for the formulation of the Bill on Firearms, among other things, philosophically the use of firearms is for certain interests, including the safety of society, nation and state, juridically because it concerns the rights and obligations of the community, then the regulation must be at the level of a law whose derivatives can be regulated further in Government Regulations or Police Regulations or

Regulations of the Indonesian Armed Forces Commander, sociologically the use of firearms must be strictly limited to civilians who have an interest in firearms.

### **E. Recommendation**

On the basis of these conclusions, the authors can provide suggestions as follows:

1. The government makes clear and firm regulations regarding the crime of misuse of firearms in order to create a sense of public safety and ensure legal certainty for the Indonesian people.
2. The government, in formulating criminal law reforms for the regulation of criminal acts of misuse of firearms in the future, should consider providing a clear classification of users and techniques for using firearms, accompanied by strict sanctions.

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