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### SHOOT DIED IN THE UNEXPECTED TERRORIS IN REVIEW OF CATCHING PROCESSES FROM THE PRINCIPLE OF DUE PROCESS OF LAW

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#### **ABSTRACT**

The act of shooting dead is one of the actions that are often taken by the authorities in carrying out the process of arresting those suspected of being terrorists. Shooting dead means taking the life rights of a person even though it is uncertain whether they are indeed considered guilty or not. This means that they are sentenced not to go through the judicial process. In this case, it should also apply the name Due Process of Law. The issue raised is How are Arrangements about the Action of Dead Shoot According to Applicable Law? How is the shooting action on suspected terrorists in the Arrest process in terms of the Due Process of Law Principle? The results obtained by the author are actions that can be taken by the authorities in the use of weapons. Its use is also because there will be a harmful impact on the authorities and the community, there is no other way that can be done to stop the perpetrators, and to prevent the perpetrators from running. Acts of shooting dead on terrorist suspects do not conflict with the principle of due process of law as long as they are carried out according to the applicable provisions, as the author explained in the first discussion. But it still has to be the last step. As long as it prioritizes the principle of equality before the law, the principle of presumption of innocence, carrying out due process accordingly, and the fulfillment of rights, the act of shooting does not violate these matters.

#### **INTRODUCTION**

Every human being has his own interests, and not infrequently those interests conflict with other humans, so as to cause strife in human life itself. Therefore in the community groups rules must be made so that no more disputes occur, which in the presence of these regulations can protect or protect the interests of each individual.

As stated by C.S.T Kansil in his book that the rules of social life that are regulating and forcing to guarantee order in the community, are called the rule of law or the rule of law.<sup>1</sup> The rule of law is manifested in legislation, in his book Yuliandrisaid: "Legislation is a written decision of the state or government which contains instructions or patterns of behavior that are general and binding."<sup>2</sup>

When the public violates the laws and regulations, the state has the right to punish. As with the teachings of the sovereignty of God embraced by Friedrich Julius who said that the state is a body that represents God in the world who has full power to maintain law in the world. The violators of order need to get a penalty so that law order is guaranteed. In line with that, the theory of community agreements states that the monopolistic state authority is on the will of man himself, who wants peace and order in society. They promised to obey all provisions made by the state and on the other hand were also willing to get punished if it was seen that his behavior would result in the disruption of order in society. They have given power to the state to punish someone who violates order. Likewise with the theory of state sovereignty, adherents of the theory put forward a more assertive stance because the state is sovereign, then only the state itself moves to punish someone who tries to disturb order in society. It is the state that creates the law so everything must submit to the state. In relation to punishment, the law created by that country is criminal law.<sup>3</sup>

That is why the state has the authority to punish citizens who violate these rules. In criminal law, prohibited acts are regulated in the law and violators will be subject to criminal sanctions, prohibited acts are called criminal acts, one of the criminal acts is like committing terror, or better known as terrorism. In Indonesia in particular, terrorism is regulated in a separate law which was originally regulated in the form of a Government Regulation in Lieu of Law namely Number 1 of 2002 concerning Eradication of Terrorism Criminal Acts, then stipulated into law namely Law Number 15 of 2003 concerning Establishment of Government Regulation in Lieu of Law Number 1 Year 2002 Regarding Eradication of Terrorism Criminal Acts, Becomes a Law. Therefore, the state has the authority to punish those who commit acts of terror as stipulated in the law.

The process to punish those who commit terrorism crimes must go through stages until finally given a sentence, in criminal procedure law in general it is knowseveral stages such as: investigation, investigation, prosecution, trial, and criminal conduct. In carrying out law enforcement against this crime of terrorism there are still problems.

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<sup>1</sup> C.S.T. Kansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia*, (Jakarta: Balai Pustaka, 1986), hlm. 34

<sup>2</sup> Bagir manan, *Dasar-Dasar Konstitusional Peraturan Perundang-undangan Nasional*, Fakultas Hukum Universitas Andalas, Padang, 1994, sebagaimana dikutip oleh Yuliandri, *Asas-Asas Pembentukan Peraturan Perundang-undangan yang Baik Gagasan Pembentukan Undang-Undang Berkelanjutan*, (Jakarta: Rajawali Pers, 2010), hlm. 37.

<sup>3</sup> Lili Rasjidi & Ira Thania Rasjidi, *Pengantar Filsafat Hukum*, (Bandung: CV. Mandar Maju, 2010), hlm. 86.

In practice, the handling of criminal acts of terrorism by the state often occurs violations. According to the Secretary (The Islamic State and Acin Center), hereinafter referred to as ISAC noted ten people were shot dead because they were suspected of being involved in terrorism. According to them the arrest by shooting dead a terrorism suspect was carried out not according to procedure. The arrest is not accompanied by an arrest warrant and is usually accompanied by damage.<sup>4</sup> The fact that is seen is that in the process of arresting many law enforcement officers who carry out shootings on perpetrators or suspected terrorists.

Regarding this matter, many gave negative responses and regretted the actions of the law enforcement officers. Moreover, remembering that every human being has the right to life, and no one has the right to seize it except by the will of God, and even if he is required to be shot dead as a punishment then this must also be through a court decision that has permanent legal force (Inkracht Van geweisde), even though on the other hand, the existence of the death penalty is still being debated. So that raises the question whether what is done by law enforcement officials is justified, and how the action is seen from the principle of due process of law.

### **PROBLEM**

Based on the background of the problem above, obtained several things that become a problem, namely as follows:

1. What are the Rules for the Action of Dead Shoot According to Applicable Law?
2. How is the shooting action on suspected terrorists in the arrest process in terms of the principle of due process of law?

### **DISCUSSION**

#### *Regulations regarding dead shoot act under applicable laws*

As is well known that the state of Indonesia is a state of law, this is in accordance with the provisions contained in the 1945 Constitution which read: "The Republic of Indonesia is a state of law."<sup>5</sup> Therefore, Indonesia in carrying out its state of affairs must be based on law. All actions of the state which are not based on law, let alone contrary to law, cannot be justified and are not legal.

Likewise with the shooting action taken by law enforcers in this case the police and densus 88 anti-terror, these actions must be regulated in advance so that these actions are justified to be carried out. The act of shooting can not be equated with the death penalty contained in Article 10 of the KUHP,<sup>6</sup> because shooting is an act of shooting dead people involved in a crime in the form of

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<sup>4</sup> Redaksi An-najah, "Korban Salah Tangkap Terorisme Tak Pernah Dapatkan Hal Rehabilitasi & Permintaan Maaf", dalam <http://www.an-najah.net/2013/01/korban-salah-tangkap-terorisme-tak-pernahdapatkan-hak-rehabilitasi-permintaan-maaf/>, access on 11 January 2016

<sup>5</sup> Lihat Undang-Undang Dasar 1945 Pasal 1 ayat (3).

<sup>6</sup> Article 10 of the KUHP reads: Crimes consist of: a. Criminal principal: 1. Death penalty; 2. Criminal imprisonment; 3. Confinement; 4. Fines.

an initiative of the authorities in the framework of law enforcement processes. While the death penalty is a sentence given to perpetrators of crimes after passing a court decision that has permanent legal force (*Inkracht Van geweisde*), which is carried out by the authorities as stipulated in the Criminal Code (KUHP) that is carried out by the executioner<sup>7</sup> whereas in the Law on Combating Terrorism Criminal Acts there is no further regulation regarding the death penalty. The execution of capital punishment by being shot to death is regulated in Law Number 2 / PNPS / 1964.

Eliminating the lives of someone involved in a crime must be committed by the competent authority as stipulated in the law and based on a court decision that has permanent legal force (*Inkracht Van geweisde*). Regarding this act of shooting, it must be carried out based on existing legal provisions. Chief of Police Regulation No. 1 of 2009 concerning the Use of Force in Police Action stipulates that the use of force is any use of power, potential, or ability of police officers in carrying out police actions.<sup>8</sup>

The stages of using this power are also divided into stages, namely:<sup>9</sup>

- a. Phase 1 forces that have a preventive impact;
- b. Stage 2 verbal commands;
- c. Stage 3 soft bare hand control;
- d. Stage 4 hard bare hand control;
- e. Stage 5: control of blunt weapons, chemical weapons (tear gas, chilli spray) or other equipment according to police standards;
- f. Stage 6 uses firearms or other tools that can stop perpetrators who can cause serious injury or death to members of the national police or the community.

It appears that the use of firearms is the last stage or the last step used by the police. For the use of firearms by the police, this can be done when things happen where the perpetrators 'actions can immediately cause serious injuries or kill police or community members, the police have no other reasonable and reasonable alternative to stop the perpetrators' actions, and finally the police are preventing their run the perpetrators who constitute an immediate threat to the lives of members of the national police or the community.<sup>10</sup>

Based on the National Police Chief Regulation Number 8 of 2009 concerning the Implementation of Human Rights Principles and Standards in the Implementation of the Republic of Indonesia's National Police Duties, it is stipulated that in implementing service and protection duties for members of the public, every member of the Indonesian National Police must pay attention to one of them, namely the principle of proportionality of officers' actions that is balanced between actions taken with threats faced in law enforcement.<sup>11</sup>

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<sup>7</sup> It is regulated in Article 11 of the Criminal Code which reads: capital punishment is carried out by the executioner in the place of a hanger by strapping a rope tied to the gallows on the neck of the convict then dropping the board where the convict is standing.

<sup>8</sup> See article 1 Point 3 Peraturan Kapolri Nomor 1 Tahun 2009 tentang Penggunaan Kekuatan Dalam Tindakan Kepolisian

<sup>9</sup> See article 5 Ayat (1) Peraturan Kapolri Nomor 1 Tahun 2009 tentang Penggunaan Kekuatan Dalam Tindakan Kepolisian

<sup>10</sup> See article 8 Ayat (1) Peraturan Kapolri Nomor 1 Tahun 2009 tentang Penggunaan Kekuatan Dalam Tindakan Kepolisian

<sup>11</sup> See article 9 Ayat (1) dan (4) Peraturan Kapolri Nomor 8 Tahun 2009 tentang Implementasi Prinsip dan Standar HAM dalam Penyelenggaraan Tugas Kepolisian Negara RI.

So if the perpetrators of the crime do not use firearms at all, police members should also be able to enforce the law without using firearms, except if the perpetrators cannot be handled anymore. So again emphasized that the use of firearms is only as a final step.

One of the human rights protection instruments that the police must pay attention to is the right of every person to live, defend his life and life, the part of human rights that cannot be reduced by anyone and under any circumstances one of them is the right to life.<sup>12</sup> In the 1945 Constitution also guarantees the right of a person to live.<sup>13</sup> To take steps to use firearms, members of the national police must pay attention that everyone even if a person is a criminal has the right to life.

In the Criminal Procedure Code (KUHAP) even investigators are given the freedom to take other actions, but they must comply with responsible law.<sup>14</sup> So from here the investigator is given the opportunity to take other actions but must still pay attention to applicable legal provisions.

There are indeed various regulations above, none of which explicitly mentions shooting, but only stipulates that police officers are allowed to use firearms in certain cases as stated above. However, from the explanation above, it can be seen that if the actions of the perpetrators of the crime can cause serious injury or death to both members of the national police or the community, the police can use firearms whose aim is to stop the actions of the potentially dangerous perpetrators including shooting die, and once again it is emphasized that this is the final act.

### *Dead shoot acts on suspected terrorists in the arrest process judging from the due process of law principle*

Terrorism is a method or technique of intimidation with systematic targets, for the sake of a particular political interest.<sup>15</sup> In tackling these crimes, there are still several problems, one of which is the arrest. For the process of arresting many officers took steps to shoot dead suspected terrorists, this step is unfortunate by many parties.

What should be emphasized more in arrests are the methods of arrest which pay attention to the norms of propriety and protection of the rights of the suspect. Because so far, the arrests made by the National Police appear to lack respect for the rights of suspects and there is a tendency to show off power.<sup>16</sup> In the Terrorism Criminal Act itself regarding arrests, it is regulated that investigators can arrest those suspected of committing acts of terrorism based on sufficient preliminary evidence, as referred to in Article 26 paragraph (2)

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<sup>12</sup> See article 5 Ayat (1) dan (2) Peraturan Kapolri Nomor 8 Tahun 2009 tentang Implementasi Prinsip dan Standar HAM dalam Penyelenggaraan Tugas Kepolisian Negara RI

<sup>13</sup> See article 28A Undang-Undang Dasar 1945, yang berbunyi: "setiap orang berhak untuk hidup serta berhak mempertahankan hidup dan kehidupannya."

<sup>14</sup> See article 7 Ayat (1) Huruf J KUHAP

<sup>15</sup> A. M. Hendropriyono, *Terorisme Fundamentalisme Kristen, Yahudi, Islam*, (Jakarta: Kompas, 2009), hlm. 25

<sup>16</sup> Abdul Wahid et.al., *Kejahatan Terorisme*, (Bandung: PT Refika Aditama, 2004), hlm. 109.

for a maximum of 7x24 hours.<sup>17</sup> There are no further arrangements regarding the arrest process.

Dead shot is an act of shooting dead a criminal in the form of an initiative of the authorities in the context of the law enforcement process. As stated by Ari Wibowo in his book:<sup>18</sup>

"Terrorism with religious or ideological motives cannot be resolved using only a criminal law approach that tends to be repressive. The use of methods that are too repressive can actually trigger revenge from both the perpetrators themselves and their groups. Even the death penalty can not be deterred because they believe that his death as a martyr who drove to heaven."

Based on that, then shooting dead terrorists is not the best way to tackle terrorism. The act of shooting dead by law enforcers here can be categorized as extra judicial killing, which is defined as actions, in whatever form, which causes a person to die without going through a legal process and a court decision made by the state apparatus.<sup>19</sup>

Its important characteristics are:<sup>20</sup>

- 1) take actions that cause death;
- 2) carried out without going through a legal process;
- 3) the perpetrators are state apparatus;
- 4) actions that cause death are not carried out in a state of self-defense or carry out a law order.

Violations of individual citizens' rights (in the case of arrest, detention, search and seizure) must be based on the law and carried out with a warrant. This includes what is required by the due process of law.<sup>21</sup>

"The process of establishing the Criminal Procedure Code (1969-1981) shows that what we want to strive for is understanding to see the judicial process based on a due process of law, in which the rights of the suspect / defendant / convict are protected and considered as part of the rights of citizens (civil rights) because it is part of Human Rights.<sup>22</sup>

Due process of law theory is an important theory to explain the relationship between the principle of equality in the law and the principle of presumption of innocence in the protection of suspects and victims of terrorism, the two principles must be mutually complementary and harmonious and then implemented in legislation. Without the application of the two principles, it is impossible for the due process of law to be realized.<sup>23</sup>

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<sup>17</sup> See article 28 Undang-undang Nomor 15 Tahun 2003 tentang Pemberantasan Tindak Pidana Terorisme

<sup>18</sup> Ari Wibowo, *Hukum Pidana Terorisme Kebijakan Formulatif Hukum Pidana Dalam Penanggulangan Tindak Pidana Terorisme di Indonesia*, (Yogyakarta: Graha Ilmu, 2012), hlm. 114.

<sup>19</sup> Mahrus Ali, *Hukum Pidana Terorisme Teori dan Praktik*, (Jakarta: Gramata Publishing, 2012), hlm. 71-72.

<sup>20</sup> *Ibid.*

<sup>21</sup> M. Syukri Akub dan Baharuddin Baharu, *Wawasan Due Proses of Law dalam Sistem Peradilan Pidana*, (Yogyakarta: Rangkang Education, 2012), hlm 81-82.

<sup>22</sup> Soeharto, *Perlindungan Hak Tersangka, Terdakwa, dan Korban Tindak Pidana Terorisme dalam Sistem Peradilan Pidana Indonesia*, (Bandung: PT Refika Aditama, 2007), hlm 26-27.

<sup>23</sup> *Ibid.*, hlm. 27.

As the principle contained in the due process of law, namely the principle of equality before the law and the presumption of innocence, terrorist suspects must be treated equally through appropriate law enforcement processes and a person cannot be said guilty and convicted without a court decision that has the power permanent law. In addition, it also wants a fair legal process that is realized by the fulfillment of the rights of the suspect / defendant / convict, then it can be seen at a glance that by taking action to shoot dead at suspected terrorists have violated the principle of due process of law itself, which also become a principle adopted in the Criminal Procedure Code (KUHAP).

Due process of law comes from the ideals of a "rule of law" (rechtstaat) which upholds "the rule of law" (the law is supreme), which confirms that in law enforcement: "we are governed by law" and "not by people" or "boss". The Due Process of law does not "allow violations" of one part of the legal provisions under the pretext of enforcing another part of the law.<sup>24</sup> So that the concept and essence of due process can be guaranteed by law enforcement and its implementation, it must be "guided" and "recognized", "respected", and protected (to protect) and "guaranteed" properly "incorporation doctrine" (incorporation doctrin), which contains various rights, among others (some of which have been formulated in Chapter VI of KUHAP).<sup>25</sup>

- a. The right of self incrimination. No one can be forced to provide information that incriminates him in a crime.
- b. "It is prohibited to revoke" or "deprive" (life) "life" (liberty), or "property" (property) without compliance with the provisions of the procedural law (without due process of law).
- c. Everyone must be "guaranteed the right to self" (person), "residence, letters" for examination and confiscation "unreasonable".
- d. "The right to confront" in the form of "cross-checking" with people who accuse (report).
- e. "The right to a (judicial) hearing" is fast (the right to a speedy trial).
- f. "Equal protection rights" and "Equal checks in law" (equal protection and equal treatment of the law).
- g. "The right to legal assistance" (the right to have assistance of counsel) in self defense.

Based on that, it is suspected that in the legal process terrorists must be carried out properly, and the fulfillment of their rights as stipulated in the Criminal Procedure Code. However, by carrying out the action of shooting death has caused the loss of suspected terrorist rights. The right that is removed here is the right to live from the suspected terrorist, the most difficult condition to accept is to shoot the suspected terrorist dead, a person who is only still suspected of committing a criminal act of terrorism and therefore is still attached to the presumption of innocence in himself.

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<sup>24</sup>*Ibid.*

<sup>25</sup>*Ibid.*

Many rules require that the authorities uphold human rights, as regulated in Article 4 and Article 9 of Law Number 2 of 2002 concerning the Indonesian National Police,<sup>26</sup> concerning the right to life in Article 5 paragraph (1) letter a and (2) letter a Police Chief Regulation Number 8 of 2009 concerning Implementation of Human Rights Principles and Standards in the Implementation of the Indonesian National Police's Tasks,<sup>27</sup> in terms of arrests regulated in Article 6 letter d Police Chief Regulation Number 8 of 2009 concerning Implementation of Human Rights Principles and Standards in Implementing the Tasks of the Indonesian National Police.<sup>28</sup> In the Universal Declaration of Human Rights article 3 also states that everyone has the right to life, freedom and safety as individuals.

As explained above, the shooting can be justified if it is carried out in certain circumstances, that is, if during the process of arresting a suspected terrorist, the act will endanger the members of the national police and the community or there is no other way than to shoot and prevent the alleged escape of terrorists. According to the author there are still many other ways that can be done without having to shoot dead suspected terrorists, such as shooting on a non-lethal part or if not can also be done with anesthesia whose aim is to temporarily weaken. Maintaining the lives of suspected terrorists in addition to safeguarding their rights also for the purposes of future checks for them, but it is also useful to dismantle a wider terrorist network. There is even a hypothesis which develops that the actions of the apparatus who shot dead suspected terrorists are merely to seek public attention, so that the public can see that the apparatus has worked hard to eradicate criminal acts of terrorism. Indeed, how the arrest process carried out by the authorities in practice no one can find out, except officials and suspected terrorists. So whether the authorities carried out the shooting action according to the procedure or not only those who knew. Fortunately, if there were people who saw something like the bombing that occurred in Thamrin, Jakarta, it was clear how the terrorists attacked the apparatus, threatening the safety of the police and the community, in this case shooting was justified and this did not violate principle of due process of law.

The description of events or field facts that the writer found through the internet shows that there was an arbitrariness of the authorities in using firearms, including:

1. When Santoso (Mujahidin Eastern Indonesia) conveyed his bluff by writing to the Special Detachment 88 which contained: "We as Mujahideen of the Eastern Indonesia task force challenge the Anti-Terror Detachment 88 to fight openly and males! Let's go to war male! Don't you just dare to shoot, arrest our unarmed members! If you really are a group of men, then face us! Don't you guys just win looks on television! " The contents of the letter

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<sup>26</sup> Article 4 reads: The National Police of the Republic of Indonesia aims to uphold human rights. Article 9 reads: in carrying out duties and authorities based on legal norms, religious norms, politeness and decency and upholding human rights and prioritizing prevention.

<sup>27</sup> Article 5 (1) letter a reads: human rights protection instruments that need to be considered by the police: a. the right of every person to live to maintain his life and lives. Article 5 (2) letter a reads: the part of human rights which cannot be reduced by anyone and under any circumstances: a. right to live.

<sup>28</sup> Article 6 letter d reads: the right to be free from arbitrary arrest, the right to be free from enforced disappearance.



showed that the authorities seemed to be free to use firearms even though the suspected terrorists were not equipped with firearms, but indeed no one could be sure that what was contained in the letter was true or not.<sup>29</sup>

2. As stated by Observer Counter Terrorism Director of the Community of Ideological Islamic Analyst (CIIA) Ustadz Harits Abu Ulya on [voa-islam.com](http://voa-islam.com) regarding the process of arresting suspected terrorists: "From the testimony of residents in the field, the victims did not fight, were not armed and the results of the post mortem contained injuries from 2 right legs, 4 left legs, 1 waist. The victim's mistake at that time was only because of running. Even then, maybe because of fear of warning do not run away immediately shot. The browning gun that was reported was not there. Because the victim's waist bag and contents were found by the population."<sup>30</sup>

It appears that suspected terrorists do not use firearms, is it not as the rule that the writer explained above that the apparatus must pay attention to the principle of proportionality that is the balance between actions and threats. Even if the suspect is about to run away the authorities can by shooting the suspect's foot with a single shot, not by insistent attacks.

Acts of shooting dead on terrorist suspects seen in the principle of due process of law do not constitute a conflict between the principle of equality before the law, the presumption of innocence, violating applicable provisions and the elimination of their rights in this case the right to life. As long as it is carried out based on established procedures, which are carried out because of the dangers that arise to the authorities and the community such as severe and deadly injuries, there is no other way that can be done other than by shooting dead and to prevent the escape of suspected terrorists. It must also be remembered that the act of shooting to death is used as the final act.

## CLOSING

Acts of shooting carried out by the authorities according to the applicable rules are not explicitly explained, in the rules only explain some of the stages that must be carried out by the authorities in acting, the final stage is the use of firearms. Its use cannot be arbitrary, because it is further regulated that it can be used if: there will be a harmful impact on the authorities and the community, there is no other way that can be done to stop the perpetrators, and to prevent the perpetrators from running.

Acts of shooting dead on terrorist suspects do not conflict with the principle of due process of law. Considering the meaning contained therein is the principle of equality before the law, the principle of presumption of innocence, carrying out due process accordingly, and the fulfillment of rights, then the act of shooting does not violate these matters as long as they are carried out

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<sup>29</sup> Uni Lubis, "Dendam Jaringan Teroris Santoso Kepada Polisi", dalam <http://www.rappler.com/indonesia/119355-dendam-jaringan-teroris-santoso-kepada-polisi>, access 13 Februari 2016.

<sup>30</sup> "Kembali Tembak Mati Terduga 'Teroris', Kata Direktur CIIA: Densus 88 Gagal Selesaikan Poso," dalam <http://m.voa-islam.com/news/indonesiana/2015/01/12/34993/kembali-tembak-mati-terdugateroris-kata-direktur-ciia-densus-88-gagal-selesaikan-poso/>, access 13 Februari 2016.

according to applicable regulations, as the authors explained in the first discussion. But it still has to be the last step.

Apparatus in carrying out its duties and authorities must pay attention to applicable regulations, so that the actions taken will not be contrary to law. This is also the case in the provision of using firearms, even more so in the case of shooting death. Apparatus in carrying out the shooting action must pay attention to the principle of due process of law, which wants the principle of equality before the law, the principle of presumption of innocence, carrying out due process accordingly, and the fulfillment of the rights of the suspect / defendant / convict. Because besides of course this has become a principle adhered to in the Criminal Procedure Code, as well as a form of state protection.

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