

By Operation of Law Breakthrough Discretion

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ABSTRACT- Police is one part of one of the law enforcement officers in the field assigned to act in accordance with legal procedures . Police policy is also given the discretion to do that is a concept of granting authority to act according to his own judgment . Use of Discretion intended to rapidly and precisely in order to maintain general liability , maintain order and ensure public safety. However, abuse of discretion or failure in its implementation in the field can destroy the authority of the police. This can happen if the discretion is done beyond the limits provided by law or morality. It is difficult to know who can be categorized as discretionary deviation regular (non- criminal) that is considered contrary to the normative rules of law .

Keywords : Discretion , Law Enforcement , Justice .

1. INTRODUCTION

1.1 Background .

Police is the law enforcement agency that is part of the criminal justice system, law enforcement by the police is a gate to the subsequent enforcement of course it will always be in the spotlight amid the incessant reforms in all fields including law reform in Indonesia .

Demands the creation of a justice society would of course be the main task of the law enforcement of course the process of justice is not only done in front of the courts alone but still a lot of effort as well as other legal measures to achieve or leads to justice .

Police as an entrance to the commencement of the process of determining a person should continue to criminal proceedings or not , a person is found guilty or not here the role of the police as a filter in the enforcement process where the purpose of law enforcement according to Natural Law philosopher is justice, rule of law, and

expediency.¹ Law enforcement through the court process is a last resort, known as *Remedium ultimum* principle which is a popular term in *menhkaji* criminal law , related to criminal purposes and as a means of punishment is a state of repair and restoration that has been damaged by a criminal act. *Remedium ultimum* significantly improved the most recently used (*drug Pamungkas*) .

In carrying out law enforcement duties police are given the authority to act according to his own judgment of authority in general is known to *Police Discretion*.² which is a legal breakthrough in efforts to deal with crime that should not *dislesaikan* through court proceedings or settlement of cases through *Restorative Justice* (mediation) course conducted by the legal restrictions that are clearly not made on the basis of like and

¹. Darji Darmodiharjo and Shidarta, *Principles of Philosophy of Law and how the philosophy what the law of Indonesia*, Jakarta , PT Pledge Mandiriabadi, 1995, Page 137.

² Momo Kelana, *the Police Act Understanding background and commentary chapter by chapter* , Jakarta , PTIK Press, 2002, page 111.

dislike. Discretion is the completeness of the system of regulation by the law itself, although giving the Discretion policy achievement is a reflection of law enforcement but clear boundaries and legal certainty to pelaksanaannya still obscure .

Police Discretion in the application in order to reach the goal of the law itself there are several things that must be implemented so that it contains three (3) identity , namely :

1. Principle of legal certainty or rechtmatigheid this principle from the point of judicial review;
2. Principle of law or justice of this principle Gerechtigkeit review from the point of philosophy;
3. Principle of expediency or reviewing Doelmatigheid this principle from the point of sociology .

The development of community progress quite rapidly, with the widespread phenomenon of the rule of law , human rights , globalization, democratization, decentralization, transparency, and accountability , has spawned a variety of new paradigms in seeing the purpose, duties, functions, powers and responsibilities of the Indonesian National Police which in turn led to the growth of a wide range of demands and expectations of society towards the implementation of the Indonesian National Police duties increasing and more oriented to the community being served.

Wherever this world , both the police will always be drawn in a different direction , namely the direction of formal procedural and substantial sociological direction . Ground state as it encourages us to understand the work of the police as being " rooted regulations" and also " rooted behavior " . If the police learn also means trying to provide an explanation of the

object , as it generally rules in science, then we will not be able to understand the work of the police as well as possible , without going into a job that is essentially as it was rooted behavior.

2 . APPLICATION DISCRETION

2.1 The Role of Discretion of the cases were settled out of court .

Kuatno and Typhoon, two suspected thieves bananas in Cilacap , Central Java finally breathe easily. Cilacap District Attorney formally freed both from custody after two psychologists examination of Cilacap General Hospital stated that the suspect mentally retarded. However, this case leaves a bad precedent in the middle of the chaos of our law enforcement . The year 2012 is expected to be the starting point to uncover high profile cases, it begins with the collection of a thousand spoofs banana as a symbol of resistance .

Banana theft , especially by the mentally ill, the actual economic value of money is nothing compared to the robbery by criminals tie state reaching hundreds of trillions of dollars . True it is forbidden to steal , but the case is trivial , which in essence can be resolved amicably but police still processing the fact the case .

This phenomenon illustrates that the law has undergone legal logic upside down by treating a small case like a big case. But ironically injects power law immunity for the conspiracy involving the power elite. Inevitably, the performance of law enforcement just jogged on the issue of theft watermelon , cocoa , gloves worn , flip flops , and bananas .

While matters such as corruption is expected to be revealed until it rests intellectual actor always foundered and anticlimactic. Arrogance of power and our

laws reinforce themselves so that the law is like a knife , blunt sharp downward but upward . Dare to ensnare ordinary people , but lost the guts to punish the elite group involved in corruption cases . As a result, people become victims of mental oppression that colonialism changed clothes in the reform era .

Lately, our criminal justice system by a rowdy small cases involving the poor and helpless economically and power. After the public shocked by the criminalization of child thieves flip-flops belonging to members of Brimob Palu , Central Sulawesi , followed by bananas theft impunity by Kuantno and Typhoon to both languishing in Cilacap Police custody for almost two months. Suddenly people expressed concern with collecting a thousand bananas addressed to Police Headquarters and Police Cilacap. Society offended because legal reforms that had been touted turns further strengthen a sense of arrogant rulers, while the public sense of justice harmed .

Solidarity actions such as collecting coins thousand, a thousand sandals, nor a thousand bananas it has become a social phenomenon and a symbol of resistance to the law enforcement community that tuna morality. Action was charged protest, criticism, cynicism and disappointment to the public which was considered excessive police interpret criminal justice . Our criminal justice system as has mengalpakan mediation process, so that all criminal offenses require to be submitted to the court . As a result of the criminal justice system in Indonesia seem cruel and counterproductive to the value of human life.

From the description above cases, the role of the police is crucial for the creation of justice in the law enforcement process as a goal rather than the law itself is justice , the police as law

enforcement officers are given a policy to take legal action by law breaches by implementing Discretion , although the act of stealing Crime is yet another remedy can still be done .

Police as investigators in the criminal justice system placing it in the front ranks that police are required to be able to select or sort out which ones are appropriate cases for prosecution or not based on the laws and regulations in force. In the absence of screening by the police at the time of the investigation there will be a buildup of cases that will not be efficient for all parties. In this case the decision by the police become important.

Members of the police in carrying out the duties and responsibilities to maintain security and order policy is to implement the Discretion of the legal issues that have not been regulated or that breach laws require to create justice in society.

Police discretion has not been defined and described in detail about the shape and the types of actions that are included in discretion , that there is only a limit or size are used as guidelines in making decisions applying police discretion, discretion in applying the limitation described in Article 16, paragraph 2 of Law Law No. 2 of 2002 stated that the actions of the investigators for the sake of the investigation with 5 (five) requirements as follows:

- a) is not contrary to the rule of law ;
- b) conform to legal obligations requiring an office action ;
- c) it must be appropriate and reasonable and included in his environment ;
- d) for appropriate consideration by state forces;
- e) respect for human rights .

Police discretion contained in article 18 of the Police Act No. 2 of 2002 , which reads :

(1) For public interest, officials of the Indonesian National Police in carrying out its duties and authorities to act according to his own judgment.

(2) The provisions referred to in paragraph (1) may only be performed in a state that is very necessary to pay attention to laws and regulations, and the Code of Professional Ethics of Indonesian Police .

The formulation of the Indonesian National Police authority in Article 18 paragraph (1) of Act No. 2 of 2002 is an authority derived from the principle of general liability Police (*plichtmatigheids beginsel*) is a principle which authorizes the police to conduct policy officials to act or not act according to his own judgment, in order to establish, maintain order and ensure the safety of the public.

Discretion is not an authority but it is a policy provided by the law for the police action and must be legally defensible and norms prevailing in society, Discretion is very vulnerable to the abuse of power (abuse of power) that needs to be given oversight clear and tight against its application .

Role of Discretion can be used as a solution to a legal case out of court settlement with the hope to achieve the objectives of the law itself is created justice in society other than the criminal law itself is *remedium ultimum* (the last legal remedy) if the efforts of other law not possible to apply so there is no longer legal problems such as the above cases .

2.2 The impact of the adoption of Discretion to legal purposes .

Discretion Implementation is based on the consideration of its needs for duties (*Flichtmassiges Ermessen*) . The substance of Article 18 paragraph (1) Police Act No. 2 of 2002 , the understanding of " Police Discretion " in Article 18 paragraph (1) must be attributed also to the coaching profession consequences set out in section 31 , 32 , and 33 of Law No. 2 of 2002 so it looks a guarantee that the Indonesian National Police officers will be able to take action appropriately and professionally based on his own judgment in the implementation of their duties .

The formulation in Article 18 paragraph (2) constitute the guidelines for the implementation of " discretion " as referred to in paragraph (1) is in addition to the principle of necessity, remain discretionary actions should be appropriate and pay attention to the laws and professional codes of ethics Indonesian National Police. The task of the police in the criminal justice system placing it in the front ranks and is the first door in the process of law enforcement so that police can apply Discretion to sort these cases would be continued or settled out of court through mediation , so the police are required to be able to select or sort out the matter which are appropriate for submission to a court or by legislation , in the absence of screening by the police during the investigation there will be a buildup of cases that would not be efficient for all parties . In this case the decision by the police become important.

Given the discretionary powers that be police policy was very spacious , the necessary requirements that must be owned by the workers , especially in assessing a case . This is necessary in order to avoid abuse of power (abuse of power) is given discretion or judgment based on the ability to self- police itself subjectively , the role of the police in law

enforcement as if it is like that the police is the law of life , because it is in the hands of the police legal purposes to protect and create a safe state in society can be realized .

The law can only be set up and lead a common life in general, because if the law regulates in great detail , to provide a complete step -by-step and detailed, then at that time also the life of jam . Therefore, it is actually the complete discretion of the regulatory system by the law itself .

Matters that enter the field of preventive police duties in terms of granting discretion is greater than law enforcement matters . This is because of the tasks that police generally are preventive tasks, the tasks in the field or general duties police, the scope is very broad and not entirely written in the legislation . Then handed over to the police the next action itself as the way out by the police. And this is where the rooms discretion .

Discretion that is on duty at the time the police because the police crack down, and then faced with two (2) wide choice of whether to process it in accordance with their duties and obligations as criminal law enforcement or rule out the case in the sense of taking action police discretion . This discretionary actions have meaning not execute his duty as criminal law enforcement based on the reasons that can be accounted for by the law . The reasons could be fostering actors , for the sake of good order or for reasons other laws . Overall reasons closely related or even this fit in the framework of preventive police duties .

Police action in the form of cracking (repressive) followed by a discretionary act , called the act of active police discretion . While the decision of the police in the form of police attitudes are generally tolerate (silencing) of a crime or violation of law called passive police discretion .

Implementation Discretion is the basis of the mandate of the Code of Criminal Procedure (Criminal Procedure) Act and the Indonesian National Police , the application of this discretion is aimed at maintaining security and order to uphold the rule of law to protect human rights . Discretion in taking action to avoid actions that exceed the authority (abuse of power) necessary to supervise the implementation of such discretion guided by fixed boundaries outlined by the Act.

In the application of discretion by police members must be carefully controlled so that no abuse of authority which can cause harm to both the police institution itself and each individual Police , any member of the police who made a mistake either intentionally or unintentionally (because lalainya) , must accountable for errors or omissions that according to the applicable law .

According to Hadi Utomo Warsito system of accountability for errors or omissions made by members of the Police is as follows :

- a. Violation of criminal law norms must be justified according to the criminal law ;
- b. If he harms another person in performing a task or command legal office , then it is the state that is responsible , so that any aggrieved person can seek redress from the state based on a " inrechtmatige overheidsdaad" through the State Administrative Court.³

Police say an act of unlawful :

- a. According to the German library , an officer acting illegally, when he violated a duty positions assigned to him . This

³ Warsito Hadi Utomo, the Police Law in Indonesia , Jakarta , Achievement Library, 2005, Page 20.

violation classify it as rechtswidrig action, if the action is against the law it is driven by motives that lived beyond considerations of the issue, or motif want to reach the goal, or if it acts arbitrarily.

- b. Hoge Raad (Netherlands) in a decision dated December 31, 1919 stating that an act onrechtmatig is any legal action, or contrary to the obligations under the law, violate decency, or contrary to the cautious attitude zorgvuldigheid expected in relation to personal or social objects others.

From the above formulas can be concluded that the actions of a police officer can be held to be invalid, not only where:

1. Breaking the law applicable both general (eg, violating the Criminal Justice Act), or that are specific (eg, inspection of vehicles on public roads despite ban and services), or
2. Without a legal basis in the form of the action without the right and authority (eg forcing someone to pay its debts) as well as the action goes beyond the limits of authority (eg beat and abused suspects);
3. Having considerations beyond issues (eg examination stalling suspect not because of lack of evidence, but because of the attitude of the suspect is not polite) or ;
4. Want to achieve other goals (eg, hold a driver's license in order to get traffic offender ransom).

In the execution of the task is still a lot going on the actions that police officers in the grade one of the categories above. These actions always bring harm to people,

communities or countries. Humans are exposed to acts of physical or material, people feel anxious and lose a sense of calm and the country loses at least his achievements.

Policies that are given to members of the Police Discretion in applying, should be given shape, clear criteria for form and these criteria are not contained in the Code of Criminal Procedure Code (Criminal Code), which exist only in the form that is used as a size restriction in the use of discretion is based explanation in Article 5 paragraph (1) letter a number 4 the Code of Criminal Procedure Code (Criminal Code) and Article 16 paragraph 2 of Law No. 2 of 2002 on the Police stated that the reference to " other actions " are actions of the investigators for the benefit investigation as follows:

- a. does not conflict with a rule of law;
- b. in line with legal obligations requiring an office action;
- c. it must be appropriate and reasonable and included in his environment;
- d. The above considerations are worth based on the state force;
- e. respect for human rights.

Justice is one of the purposes of the law's most talked about throughout the course of the history of philosophy of law, the purpose of the law is not only justice, but also the rule of law, and expediency. With the existence of a rule of law, it is intended to avoid any doubt act for law enforcement officers and to prevent arbitrary actions of the authorities, as the implementation of the guarantee of equal standing before the law (equality before the law). Universally, the concept of similarity principle has been accepted before the law and

are believed to be true of almost all of the legal world. In this principle, each person has an equal footing before the law and government, and must uphold the rule of law and without exception.

According to law enforcement Soekanto,⁴ law enforcement process always involves a number of elements / interrelated factors, namely: a) the factors the law itself; b) Factors law enforcement officers; c) factor means or facilities to support the law enforcement; d) community factors; e) cultural factors.

Discretion in applying this restriction is necessary because in article 1, paragraph 1 of the Criminal Code is not warranted in interpreting the Act by analogy, which is primarily the reason why the method of interpretation of the Act by analogy is forbidden to be used in criminal law, is that legal uncertainty for communities it not to happen.⁵

The law is always related to human life that are in a group of people or a community, in a society that has always been the law. Understanding the laws here can be a law that grew out of the habit in the society and the laws made by the competent authority. The existence of law in society is expected to create order, justice, and social welfare. Mochtar Kusumaatmadja stated that the law is one of the social rules (in addition to a moral code, religion, morality, decency, customs etc.), which is a reflection of the prevailing values in society, so that a good law is the appropriate law the law of life (living law).⁶

Law has the objective to be achieved, namely to create an orderly social order, create order, balance and fairness. With the achievement of the expected order in the interests of human society would be protected. The presence of law according to Satjipto Rahardjo of which is to integrate and coordinate the interests of one another. The law enforcement process was created as a means or instrument to regulate the rights and obligations of legal subjects, each subject so that the law can perform their duties properly and get the right to fairly, the law also serves as an instrument for the protection of legal subjects, if linked the existence of a state, the law can function as a protector of citizens from government action and absolute tyrant.⁷

In view of the adherents of Realism (the realist) Law is the result of social forces and means of social control, according to the GCC termuka Llewellyn realist, that the principal thing in science is the realist movement in thinking and working of the law (Friedmann, 1990:191). In another formulation, Llewellyn said the formula of realism as follows: Do not get your law from the rules, the rules get bolts from the law that is (Shuchman, 1979:554). Realism found no case against the judge's decision. What counts as law in the books, a new estimate of how judges will decide.

Indonesian is a normative - constitutional state of law, or that is often referred to as a state of law. Police is one of the important pillars in achieving legal promises into reality. We can look at the reform era has given rise to a new paradigm in the whole order of society, nation and state that basically

⁴ Soerjono Soekanto, Factors affecting law enforcement, Eagles, Jakarta, 1986, Page 5.

⁵ P.A.F. Lamintang 1990 Basics of Criminal Law of Indonesia, Bandung new rays, 1990, Page 71.

⁶ Awaludin subekti and Marwan, Deconstruction and Legal Progressive movement of thought, Semarang, 2013, Page 154.

⁷ Bahder Johan Nasution 2011, the State Law and Human Rights, CV. Mandar Maju, 2011, Page 258.

contains corrections to the old order and refinement towards a new order Indonesia better. The new paradigm include the supremacy of law , human rights , democracy , transparency and accountability are applied in the practice of state government administration including police administration functions .

Identifying the police as a social control bureaucracy does give a description of the police. The police should take a look not only exercise social control, but also providing services and legal interpretation in a concrete , namely through his actions. With social control, interpretation services and agents are becoming more was complete that the police realize the promises of the law. If we approach and analyze it as a legal philosophy that all knowledge is growing speculative means concerted action, which can be justified scientifically .

Discretion can be said to be a freedom in making decisions , but it is not arbitrary can be done by the police. According to Skolnick is wrong to argue, that discretion was equated with arbitrariness to act as they pleased. Police actions taken based on the consideration of moral principles and institutional principles , as follows :

- a. Moral principles , that moral conception will give leeway to a person , even if he had committed a crime .
- b. Institutional principle , that the institutional goals of the police would be more secure if the law does not run with the rigid , causing resentment among ordinary citizens who abide by the law .

To prevent arbitrary action or arrogance of these workers based on ability or subjective judgment , according to the manual task execution Police Officer discretionary action by the police is limited by :

- a. The principle of necessity , that it must be absolutely necessary .
- b. The action taken is really for the benefit of police duties ;
- c. The principle purpose , that the most appropriate action to negate something interruption or non-occurrence of a concern to effect greater .
- d. The principle of balance , that in taking action should be taken into account .

3 . CONCLUSION

Application of discretion committed by members of the Police aims to maintain security and order to uphold the rule of law to protect human rights , to implement a policy Police Discretion as policy enforcement in the prevention of crime, which is owned by members of the Police Discretion based on Law No. 2 of 2002 Article 18 paragraph 1 of the Police, policy implementation discretion owned by members of the police should be seen as a limitation in making decisions according to his own judgment must still consider the terms of the skills and competence and experience in running a police service it is intended to avoid abuse of power (abuse of power) so that the application of such discretion can be protected by law .

In a discretionary action by members of the police should be held responsible , appropriate application of Discretion by the rules and actions do not exceed the limits of the authority possessed by the application of Discretion can be used as an excuse and can be justified according to the law so that such actions are legal and allowed by legislation so that members who carry out such discretion must be protected by law , but if the application proved to be a discretionary action

that exceeds the authority (abuse of power) then it should be sanctioned or dismissed Disciplinary action with respect of the police department (PTDH) if such actions including the criminal offense sanctioned in accordance with applicable laws in the Book of the Law of Criminal law .

REFERENCES

- (1) Awaludin subekti and Marwan , 2013 , Deconstruction and Legal Progressive movement of thought , Semarang .
- (2) Bahder Johan Nasution 2011, the State Law and Human Rights , CV . Mandar Maju.
- (3) Darji Darmodiharjo and Shidarta , 1995 Principles of Philosophy of Law and how the philosophy what the law of Indonesia, Jakarta , PT Pledge Mandiriabadi .
- (4) Momo Kelana , 2002, the Police Act Understanding background and commentary chapter by chapter , Jakarta , PTIK Press .
- (5) Police Law of the Republic of Indonesia, Jakarta , CV . Novindo Independent Library .
- (6) P.A.F. Lamintang 1990 Basics of Criminal Law of Indonesia , Bandung new rays.
- (7) Soerjono Soekanto 1986, Factors affecting law enforcement , Eagles , Jakarta.
- (8) Warsito Hadi Utomo , 2005, the Police Law in Indonesia , Jakarta , Achievement Library.