

Legal Reconstruction of Police Discretion in Handling Minor Crimes Based on the Value of Justice

Joko Prasetyo^{1*}, Eko Soponyono², Sri Endah Wahyuningsih³

¹Doctorate Student of Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

²Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

³Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

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*Corresponding author: Joko Prasetyo

Abstract

The purpose of this study is to analyze and find The Weaknesses of the Police's Discretion in Handling Minor Crimes in Indonesia Currently and How Is the legal Reconstruction Of Police Discretion In Handling Minor Crimes Based On The Values Of Justice. The method used in this study is a normative-juridical approach that uses a constructivist paradigm. The results of the study shows that the Weaknesses in Implementing the synergist Regulations of police discretion in handling minor crimes in terms of legal substance is that the discretion can be used as an engineering tool of the police apparatus to obtain personal benefits from the cases it handles. Weaknesses from the aspect of the legal structure can lead to the practice of abuse of authority. The weakness of the legal culture aspect is that the creation of formal justice creates public distrust of law enforcement officers so that in this case the police must be careful in applying discretion. Based on this, it is necessary to reconstruct the law on the value of police discretion in handling minor crimes based on justice in Article 18 paragraphs 1 and 2 of Law Number 2 of 2002 so that in resolving conflicts that occur between perpetrators and victims can achieve justice.

Keywords: Legal Reconstruction, Police Discretion, Minor Crimes, Justice Value.

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INTRODUCTION

Minor crimes (*Tipiring*), especially minor theft crimes, have recently attracted public attention because their handling is considered to be no longer proportional to the seriousness of the regulated criminal acts. The regulation of minor crimes is currently assumed to be a kind of protection from the existence of disproportionate law enforcement against crimes that (the losses) are considered not serious. For example, it can be seen in Indonesia's famous case of Grandma Minah-The Cocoa Theft, the theft of a handful of Cocoa by an old woman, the theft of 10 thousand rupiahs committed by a junior high school student, the theft of flip-flops, and so on [1]. In fact, with *Tipiring*, the public expects that the sentence to be handed down by the judge will also be light. If found guilty, then the punishment that will be imposed is only a conditional punishment, known as a sentencing. However, in reality, this is not the case. Minor Crimes not only cover violations, but also include minor crimes that are contained in Book II of the Criminal Code which consist of minor animal abuse, minor insults, minor abuse, minor theft, light embezzlement, minor fraud,

minor damage, and light offenses. An understanding of the Supreme Court Regulation Number 2 of 2012 needs to be carried out in an effort to educate the public regarding minor crimes. This is because not all people understand what are the things that are included in minor crimes (*Tipiring*). Technically, the law called *Tipiring* is a crime punishable by imprisonment or Jail for a maximum of three months and or a fine of a maximum of seven thousand five hundred rupiahs.

Talking about law enforcement practices in Indonesia, it can be seen that there are symptoms or tendencies to think of law enforcement officers who are influenced by the western philosophy of thinking that prioritizes legal certainty. This of course occurred due to the adoption of Dutch law as a national criminal law that emphasizes the principle of legality and is positivistic. The result is a situation where every criminal offense must lead to a settlement in the Court, although personally in many cases the parties have reconciled. This is of course less relevant to the life of the Indonesian people, which has been passed down

from generation to generation by the spirit of peace-loving by the nation's ancestors.

The dominance of the Criminal Code as a representation of Western Law brought by the Dutch to Indonesia has led to a transformation of the legal system and social values of society, which have directly marginalized the existence of customary law to the point of literally "*killing*" it. The dominance of Western law controls the regulation of people's lives, both in the public and private fields. The implementation of Western law has resulted in the imposition of the Western value system on the value system of Indonesian society, which between the two are different value systems.

The settlement of criminal cases that puts forward positivism has completely contradicted the sense of justice in the life of the Indonesian people, which long before the founding of this country (later adopting the Dutch criminal law system) already had a settlement system that prioritized deliberation and peace. What would happen if every criminal offense had to be formally resolved and put forward positivists, is, as seen by the current fact that Prisons become full, there are piles of cases in the judiciary, even one case gives birth to subsequent cases because of feelings and acts of revenge, and in many cases where ex-convicts actually become more professional ("upgraded") in committing crimes as the "prison". "In fact, became a school of crime [2].

Related to the above, basically in the criminal law enforcement system in Indonesia, especially at the level of the Police, it is known and the possibility of discretionary action as a form of effort to accommodate the legal values that live in the community. Discretion is defined as action outside the rule of law carried out by police officers for the public interest, humanity, justice and education. A popular general term related to the application of discretion by the police is to make peace in cases of criminal offenses. The settlement of criminal cases with peace, of course, can be facilitated by the police themselves, by the parties (internal), or submitted to settlements according to the law that lives in the community/customary (non-judicial).

In relation to police discretion in criminal cases based on local wisdom, in order to realize law enforcement that is appropriate or relevant to the values that live in society, so that social justice is realized for all people in accordance with Pancasila. The author sees that for criminal cases that are classified as minor crimes.

The government in its goal of realizing good governance has an obligation to provide services to the community (public service). With this "*public service*" function, means that the government does not only implement the legislation itself. Therefore, the

government has the right to create concrete legal rules that are intended to realize the objectives of the legislation. Furthermore, the increasingly active involvement of the law in issues related to social change, in fact, raises problems that direct the conscious and active use of law as a means to participate in compiling the new order of life. This can be seen in terms of regulation by law, both from the aspect of legitimacy, as well as aspects of the effectiveness of its application.

In essence, there is freedom of action for state police officers to carry out their functions dynamically in order to resolve important and urgent issues, while there are no rules for that, but it must be remembered that freedom of action for state police officers is not freedom in the broadest sense and without boundaries, but are bound by certain limits permitted by state law. In the exercise of discretion, it is necessary to set a tolerance limit so that uncontrolled authority does not occur. The tolerance limit of this discretion is to provide freedom or flexibility for state police officers to act on their own initiative, to solve urgent problems for which there are no rules for that, but must not cause harm to the community, must be legally and morally accountable.

Legal development is not only limited to the formation of regulations, norms, or rules, but systematic and holistic legal development, always covering various aspects, namely proper legal planning, the formation of new laws, which adhere to the principles of Pancasila and the Constitution of the Republic of Indonesia in 1999. 1945, implementation and service of good law, effective and efficient law enforcement but still humane. Based on this, it is necessary to develop a planned and systematic law to accelerate the renewal and formation of the national legal system in all its aspects.

Crime, seen from a Juridical point of view is an act of behavior that is contrary to the law. Violation is an act whose nature violates the law and is only known after there is a wet that determines it.

The difference between a crime and a violation is that a violation is a minor act of violating the law and is usually punishable by a fine. While crime is a serious and big thing, such as murder, or persecution, or humiliation, or theft, and so on.

The difference between a crime and a violation referring to Article 53 of the Criminal Code concerning trials is that in crime there is an experiment, while in violation there is no trial.

The description of the background above is interesting for researchers to raise it into a study with the main problem as follows:

1. What Are The Weaknesses Of The Police's Discretion In Handling Minor Crimes In Indonesia Currently?
2. How is the legal Reconstruction Of Police Discretion In Handling Minor Crimes Based On The Values Of Justice?

METHOD OF RESEARCH

In this study, the research method that the author uses is a normative, juridical method. With the method, researchers examine issues based on the juridical aspect, i.e. norms, regulations, legislation, legal theories, opinions of legal experts [3]. The specification of research used in this study is descriptive-analytical: it provides a relevant description of the nature or characteristics of a problematic situation in research to be analyzed based on legal theories and general practices of implementing positive law on solving problems.

The type of data used in this research is secondary data, obtained from laws and regulations, official documents, textbooks, academic papers concerning with the research problems. The secondary data in the field of law consists of [4]:

1. Primary legal materials, or main legal materials. They are authoritative, i.e. legal materials that have authority. They include statutory regulations and official documents that contain legal provision.
2. Secondary legal materials. They are documents or legal materials that provide explanations for primary legal materials such as textbooks, articles, scientific journals, research results, scientific papers which are relevant to the research topics, i.e. electronic medical records, data interoperability of medical records, legal aspects of electronic medical records and data interoperability of medical records.
3. Tertiary legal materials. They provide instructions or explanations for primary and secondary legal materials, such as dictionaries, encyclopedias, and cumulative indexes.

RESEARCH RESULT AND DISCUSSION

1. Weaknesses Of The Police's Discretion In Handling Minor Crimes In Indonesia Currently

The function of the police based on Law Number 2 of 2002 has been clearly formulated, namely: to act as one of the functions of the state government in the fields of maintaining security and public order, law enforcement, protection, and services to the community. Based on the formulation of the article, it is clear that the scope of the function of the police is part of the executive's duties in the field of law enforcement, as well as in the field of fostering security and public order. In order for these public services to be implemented and achieve maximum results, the state administration is given certain independence to act on its own initiative in the context of administering state administration. In the administration law, the right to freedom on one's own initiative is known as *pouvoir*

discretionnaire (France) or *freies ermessen* (Germany). According to Zaelani [5], it can be interpreted that the function of public services in the administration of the welfare state government results in a partial shift of power between state institutions and legislative institutions to executive institutions (government; state administration).

Thus the extent of government power (state administration) as a result of the *pouvoir discretionnaire*, there is a tendency for arbitrariness that can harm the interests of the community. The attitude of the actions of state administration officials that can harm the interests of the community, in the form of: unlawful acts (*onrechtmatige overheidsdaad*), abuse of authority (detournement de pouvoir), as well as including arbitrariness (*abus de droit*).

Freedom of action (discretion) according to experts in state administrative law, such as Gultom [6], which defines discretion as follows: "..., is a power or authority conferred by the law. to act on the basis of judgment or conscience and it uses more an idea of moral than law."

Police officers in carrying out their duties and authority throughout the territory of the Republic of Indonesia, especially in the legal area of the official concerned on duty. In the public interest, Indonesian state police officers, in carrying out their duties and authorities, may act according to their own judgment, and can only be carried out in very necessary circumstances by taking into account the laws and regulations, as well as the police professional code of ethics. In carrying out their duties and authorities, police officers always act based on legal norms and heed religious norms, decency, morality, and uphold human rights, and prioritize preventive action.

Regarding the application of discretion in the context of handling minor crimes, it has been regulated in positive law in Indonesia. The existence of legal substance becomes the basis and conditions for legitimacy for the implementation of legal legality, especially for the Police in the implementation of the Police's discretionary authority.

The weakness of the Police's discretion is the police's discretion as an engineering tool of the Police to obtain personal gain from the cases they handle. The National Police take discretion as regulated in Article 18 of the Indonesian National Police. Article 18 paragraph (1) does not definitively mention the term "*discretion*", but "*acts according to one's own judgment*". Furthermore, paragraph (2) emphasizes the conditions for the exercise of discretion, namely "*in very necessary circumstances by taking into account the laws and regulations, as well as the Professional Code of Ethics of the State Police of the Republic of Indonesia*".

The problem of discretion, which is often associated with acts of abuse of authority or arbitrary actions, is not necessarily caused by the police using discretion beyond their limits. However, discretion is often justified as a criminal act in the form of abuse of authority that leads to criminal acts because the understanding of legal practitioners is very positivistic so that they view discretion as an act without a legal basis because it does not rely on statutory regulations. This situation resulted in the emergence of legal uncertainty which in turn disrupted the performance of the police for fear that their discretionary actions would be considered as criminal acts.

Article 18 The Indonesian National Police provides a concrete interpretation, based on the notion of discretion itself, in regard to when discretion can be used. As a form of authority granted by law, the government's discretionary action is a legitimate action. Although, sometimes these actions deviate or are not in accordance with the law or legislation. In such conditions, discretion does not necessarily qualify as an act against the law. Discretion can only be seen as an act against the law when it can be proven that the discretionary act is a practice of abuse of authority.

Discretion is a form of good principle and can accommodate the interests of the community or the public interest in terms of seeking a form of social justice from a law enforcement officer. Besides the weakening of public confidence in a legal institution, it is also not based on any basis that only justifies a legal institution that is not good or fails in carrying out its duties, therefore this discretion is a form of concrete step in enlightening law enforcement in Indonesia because in relation to their duties and obligations, as investigators they have the freedom to screen a criminal case based on their own judgment according to the public interest, but that freedom is also based on the principles of good governance and free of corruption, that is not in contradiction with the code of ethics of the Police profession as stated in the Regulation of the National Police Chief No. 14 of 2011, as well as prioritizing aspects of social justice for the community.

2. Legal Reconstruction Of Police Discretion In Handling Minor Crimes Based On The Values Of Justice

The provision regarding discretion arises because in its implementation, it must pay attention to the Code of Ethics of the Indonesian National Police because the rules that allow members of the National Police to exercise discretion are regulated in Article 18 of Law Number 2 of 2002 concerning the Police. Article 18 paragraph (1) For the public interest, officers of the State Police of the Republic of Indonesia in carrying out their duties and authorities may act according to their own judgment. It does not definitively mention the term "*discretion*", but "*acts according to their own judgment*". Furthermore,

paragraph (2) emphasizes the conditions for exercising discretion, namely "*in very necessary circumstances by taking into account the laws and regulations, as well as the Professional Code of Ethics of the State Police of the Republic of Indonesia*".

With the condition that in the exercise of discretion, the following points must be considered, namely, it must [7]:

- a. Not against a rule of law.
- b. In line with the legal obligations that require the action of the position must be appropriate and reasonable and included in the environment of his office.
- c. On proper consideration based on compelling circumstances must respect human rights.

From the article, it can be concluded that discretion is not an authority, but more of a police act that must be accounted for based on applicable laws and norms. Police discretion is very vulnerable to irregularities and abuse so it needs to be given limits and supervision.

The elements of obligation as a condition for the action to be considered valid are then known as the 4 (four) *plichtmatigheid* principles which consist of [8]:

- a. *Notwendigkeit*, namely wanting an action that is really needed, but also not more than what should be according to the duty of the officer.
- b. *Sachlichkeit zakelijk*, according to Police measures, it should not be driven by individual motives.
- c. *Zweckmussingkeit*, actions that actually achieve goals. Which action of the many alternatives does not matter, the principle of the goal can be achieved.
- d. *Verhathism assigheid*, which requires a balance between the methods or tools used with the object rather than the action, this is done so that the person being acted upon does not suffer more than what is necessary.

Actions that are taken by the police according to Novita [9] are based on considerations based on moral principles and institutional principles, as follows:

- a. The moral principle, that the moral conception will give leeway to a person, even though he has committed a crime.
- b. The institutional principle, that the institutional goals of the police will be more secure if the law is not enforced rigidly, causing resentment among ordinary citizens who obey the law.

How it is formulated in Law Number 2 of 2002 concerning the National Police to anticipate excesses of abuse of discretionary authority is to anticipate excesses of abuse of discretionary authority, then discretionary actions by the police are limited by:

- a. The principle of necessity, that the action must be really needed.

- b. Actions taken are strictly in the interests of police duties.
- c. The principle of purpose, that the most appropriate action to eliminate a disturbance or not the occurrence of a concern for a greater consequence.
- d. The principle of balance, that, when taking action, a balance must be taken into account between the nature of the action or target used and the size of the disturbance or the severity of an object that must be acted upon.

Efforts that should be taken by the Head of the National Police Unit in an effort to prevent the abuse of this authority in carrying out the duties of the National Police are to carry out inherent supervision. In the implementation of this inherent supervision, a unit head does not have to be together with members at all times, but by reporting at any time using electronic media, either in carrying out the tasks ordered or reporting every incident that occurs to the unit head.

With current technological advances, it is very helpful for leaders to oversee the work of members to avoid abuse of authority in the field because at any time the police chief can see the whereabouts of members at that time and can directly receive reports from the public if there are members who make deviations in the implementation of their duties in the field. By giving the telephone number of the head of the unit to the community at every activity, it will prevent the abuse of authority by members in the field because members will feel supervised by the whole community.

The enforcement of criminal law in Indonesia in today's state realm refers to Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP). It is also undeniable that the Criminal Procedure Code generally adheres to the principle of formality adopted from the colonial legacy law which views that every criminal act is resolved in a formal juridical manner in an institution called the court (judicial law enforcement).

The settlement of criminal cases itself starts from the initial investigation process and continues with an investigation at the police level, followed by prosecution and trial in the Court. This is related to the criminal justice system which is a series of manifestations of the power to enforce criminal law, namely the power of investigation (by the investigating agency), the power of prosecution (by the public prosecutor), the power to adjudicate (by the judiciary), and the power to implement decisions (by the executor of the execution).

At the first level of the Integrated Criminal Justice system above, it is the duty of the Police. The police as one of the law enforcement agencies according to Law Number 2 of 2002 concerning the Police aims to realize domestic security which includes the maintenance of public security, order, and law

enforcement, the implementation of protection and service to the community, as well as the establishment of public peace by upholding human rights.

Talking about law enforcement practices in Indonesia, it can be seen that there are symptoms or tendencies to think of law enforcement officers who are influenced by the western philosophy of thinking that prioritizes legal certainty. This of course occurred due to the adoption of Dutch law as a national criminal law that emphasizes the principle of legality and is positivistic. The result is a situation where every criminal offense must lead to a settlement in the Court, even when the parties in concern have reconciled outside the court. This is of course less relevant to the life of the Indonesian people, which has been passed down from generation to generation by the spirit of peace-loving by the nation's ancestors.

Based on that, the criminal law enforcement system in Indonesia, especially at the level of the Police knows of the possibility of discretionary action as a form of effort to accommodate the legal values that live in the community. Discretion is defined as action outside the rule of law carried out by police officers for the public interest, humanity, justice, and education. A popular general term related to the application of discretion by the police is to make peace in cases of criminal offenses. The settlement of criminal cases with peace, of course, can be facilitated by the police themselves, by the parties (internal), or submitted to settlements according to the law that lives in the community/customary (non-judicial) [10].

From a legal point of view, every power will be based on and limited by legal provisions. However, the discretionary power that is so broad and its boundaries unclear will cause problems, especially if it is associated with the principles of criminal law, namely the principle of legal certainty and human rights [11].

Police discretion has become the authority and responsibility of the police. In the Police Law Number 2 of 2002 Article 18 has been mentioned in one article regarding one form of legal authority in the form of police discretion, where the police are authorized to take other responsible actions. The Police as an institution has exercised discretion, this means that the police institution can work professionally as a protector of the community. The same thing was conveyed in the Regulation of the Head of the Indonesian National Police Number 1 of 2009 concerning the Use of Force in Police Actions that the implementation of police discretion is needed if the police consider it important to do so, for example, if in traffic on the highway the traffic police observe an extraordinary traffic jam, then the police can take action by making way for motorized vehicles even though the position of the light is still in the red position and stops again at the next red position, thus the congestion condition can be resolved. This is

an example that the discretion of the police provides the principle of benefit to the community.

Penal mediation is an alternative for resolving criminal cases outside the penal route. In the settlement of criminal cases, if the defendant takes the penal route, usually there is always a criminal imposition by the judge against the perpetrator, this philosophically sometimes does not satisfy all parties, therefore there is a thought of settling a criminal case through the ADR (Alternative Dispute Resolution) route with the aim of resolving conflicts that occur between perpetrators and victims to achieve justice.

CONCLUSION

1. The Weaknesses in Implementing Synergic Regulation of police discretion in handling minor crimes in terms of legal substance, is that discretion can be used as an engineering tool of the police apparatus to obtain personal benefits from the cases it handles. Weaknesses from the aspect of the legal structure can also lead to the practice of abuse of authority. The weakness of the legal culture aspect is that the creation of formal justice creates public distrust of law enforcement officers so that in this case, the police must be careful in applying discretion.
2. The reconstruction of the value of police discretion in handling minor crimes based on justice and benefit in implementation is to realize justice, benefit and legal certainty where the article to be reconstructed is Article 18 paragraphs 1 and 2 of Law Number 2 of 2002, which reads: "*In the public interest, officers of the State Police of the Republic of Indonesia in carrying out their duties and authorities can act according to a responsive attitude in realizing justice and benefit*". Meanwhile, paragraph 2 reads: "*The implementation of the provisions as referred to in paragraph (1) can only be carried out in very necessary circumstances with due regard to justice, expediency, and legal certainty in accordance with the laws and regulations as well as the Professional Code of Ethics of the State Police of the Republic of Indonesia*".

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