

Reconstruction of the Paradigm of Other Actions and Police Discretion to Minimize Potential Disparities in Fair Law Enforcement

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Abstract

This study aims to analyze the reconstruction of other paradigms of action and police discretion in order to minimize potential disparities in law enforcement with justice. This study uses a normative juridical method, to link the relationship between norms and the situation in question. Researchers use a philosophical approach, a conceptual approach, and a sociological approach in the sense that several cases are studied for reference to a legal issue, and a statutory approach. The results of this study require an effort to reconstruct the paradigm through refining the norms regarding Other Actions and Discretion, so that the philosophical, social, and juridical objectives of existence and being given the authority to carry out Other Actions and Discretion are right on target.

Keywords: *Paradigm, Other Actions, Discretion, Disparity in Law Enforcement.*

A. INTRODUCTION

In people's lives in a country filled with various characters and interests, the possibility of conflict is very large; so that the existence of the law is very necessary, and the community must comply with the existing law (Brimbal et al., 2020; Aziz et al., 2021). Basically, submitting to the law is done with all his consciousness, but in practice, it is hard to come by, so in the end law enforcement must often be carried out also with coercive firmness (Wells & Gibson, 2017; Lyons et al., 2017).

Indonesia, is a country that bases law as the basis for all its implementation. One of the classic and fundamental elements in the rule of law principle, as explained by FJ. Stahl is state administration based on law, where this gives rise to two different legal principles, namely the *wetmatige van bestuur* principle (State Administration Law) and the Legality Principle (Criminal Law) (Maryudi et al., 2020). The principle of *wetmatige van bestuur* (State Administration Law) means that every government action must have a legal basis in the form of legislation, or as stated in Article 1 point 8 of Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 2009 1986 concerning the State Administrative Court it is stated that: "*State Administration Agency or Official is an agency or official who carries out government affairs based on the applicable laws and regulations*".

Meanwhile, the Legality Principle (Criminal Law), as contained in Article 1 paragraph 1 of the Criminal Code, implies that: *"There is no act that can be punished except based on the criminal provisions according to the existing law before the act itself"*. The two principles have the same or identical essence, namely that all government actions must have a legal basis, as well as the Police of the Republic of Indonesia as one of the state organs, as regulated in Article 2 of Law Number 2 of 2002 concerning the State Police of the Republic of Indonesia, that: *"The function of the police is one of the functions of the state government in the field of maintaining security and public order, law enforcement, protection, shelter, and service to the community"*.

So, as within this function, the police have both obligations and authority within their scope of work (material law) and how to carry out their duties within their scope of work (formal law) (Thomas et al., 2021; Courchane & Ross, 2019). In order to maintain field conditions and obtain the best results, members of the police are also entitled to carry out policies in the field by first making the best judgments and considerations, which must still be within the limits of the law and the police code of ethics (Bonner & Brimhall, 2021; Renggong & Hamid, 2022). The authority to take the policy is formally stated in Article 16 paragraph 1 letter l of Law Number 2 of 2002 concerning the Indonesian National Police, which states: *"(1) In order to carry out the tasks as referred to in Articles 13 and 14 in the field of criminal proceedings, the State Police of the Republic of Indonesia has the authority to (letter l:) carry out Other Actions according to the responsible law"*.

In addition, the police are also given the authority to act according to their own judgment as stated in Article 18 (1) of Law Number 2 of 2002 concerning the Indonesian National Police which states: *"(1) In the public interest, Indonesian National Police officers in carrying out their duties and authorities may act according to their own judgment. (2) The implementation of the provisions as referred to in paragraph (1) can only be carried out in very necessary circumstances with due observance of the laws and regulations as well as the Professional Code of Ethics of the Indonesian National Police"*.

Thus, in carrying out its functions, it can be concluded that according to Law Number 2 of 2002 concerning the Police, there are 2 (two) powers that are policy in the field that are given and can be carried out by the Police, namely: 1) The authority to carry out "Other Actions". as referred to in Article 16 paragraph 1 letter l of Law Number 2 of 2002 concerning the Police which is intended for Police actions in criminal proceedings; and 2) The authority to carry out "actions according to their own judgment" as referred to in Article 18 (1) of Law Number 2 of 2002 concerning the Police which leads to Police operational actions in the day-to-day law enforcement process, with a note that this can only be done under conditions that very necessary with due observance of the laws and regulations as well as the Professional Code of Ethics of the Indonesian National Police, which is further understood as "police discretion".

All the completeness of rights and authorities that have been assigned by law to the Police, crimes (misdrijven) or violations (overtredingen) still occur. There are many reasons for this action. Apart from that, there were those who did it on

purpose with malicious intent, there were also those who admitted that they did not intentionally or did not know that the act was prohibited (Lontoh et al., 2021). In various cases, the police are often considered insensitive and unwise in processing a case, or do not have the same standard of handling between one case and another (Kasiyati, 2020).

If this is allowed, then the public's trust in the police will decrease. The loss of trust itself has the potential to give birth to disobedience, and disobedience gives birth to disorder or even chaos. To overcome this, the Police can do a lot through its various programs. One of them is by minimizing the disparity in policies and police actions which are considered discriminatory by the community (Firmansyah et al., 2020; Heriyanto et al., 2022). The selection of this element is because basically all police actions have been clearly and firmly regulated through legislation, so that when there is a deviant act from a member of the police, it will easily be assessed where the deviation is compared with the legal basis (Widowati & Wahid, 2021; Nuradi & Rohaedi, 2020).

Police actions based on field assessments and policies, such as Other Actions or Discretion, because their size is relatively unclear, abstract, and relatively subjective (Handayani et al., 2018; Wijaya & Arumningtyas, 2021). Internally, the Police themselves do not have strict and detailed regulations as well as technically uniform to regulate the extent to which actions based on the Other Actions and Discretionary formulations can be carried out).

B. METHOD

This research is normative juridical research or dogmatic legal research. Meanwhile, to link the relationship between norms and the situation in question, the researcher uses a philosophical approach, a conceptual approach, and a sociological approach in the sense that several cases are studied for reference to a legal issue, and a statutory approach.

C. RESULT AND DISCUSSION

1. Disparity in Field Assessment and Decision-Making in Implementing Other Actions and Police Discretion

The disparity in assessments and policies that lead to field decisions in applying the authority of Other Actions or Police Discretion can occur due to various factors, including different interpretations of police officers in the field in understanding the meaning and scope of authority of Other Actions or Discretion (Mustafa, 2021). The description of norms in the law on Other Actions and Discretion is too broad, giving rise to multiple interpretations, while the additional explanations provided have not been able to answer the existing problems.

The functions and authorities of the Indonesian Police are described in Article 2 of Law Number 2 of 2002 concerning the Indonesian National Police. The functions of the Police are strengthened by its principles, namely the principle of legality, which gives the authority to act legally if carried out in accordance with the

sound of legal regulations; and the principle of obligation, which is a principle that gives the authority to act legally even though it is not literally based on a statutory regulation, but is carried out based on obligations in carrying out the original task within the scope of his office, which reaffirms the principle of obligation for the Police in law enforcement.

The Police also often face certain situations that require field policies that must be addressed or decided. The law has provided a legal basis for the Police to respond to this situation as previously stated, namely Article 16 paragraph 1 letter (l) of Law Number 2 2002 concerning "Other Actions" and articles 18 (1) and (2) of Law Number 2 of 2002 concerning the Police concerning "Actions according to their own judgment" which later became known as "Police Discretion".

The Police's own discretion, as derived from Article 1 point 9 of Law Number 30 of 2014 concerning Government Administration, states that: "Discretion is a decision and/or action that is determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide options that are not regulating, incomplete or unclear, and/or government stagnation".

This shows that the Police's Discretion basically has 3 (three) absolute technical requirements for the discretion to be exercised, namely: a) It can only be done to answer that the issue has no legal rules or the legal rules are not yet clear; b) It can only be done if it is absolutely necessary or urgent; and c) Must consider the benefits and risks of his actions and really in the public interest as a priority (Evanty, 2020).

So that the regulation is clear, that in principle on matters that have been regulated by law, discretion cannot be exercised. In addition, it is necessary to remember that there are 4 (four) sub-principles of the Police obligation principle which serve as guidelines for its implementation (the principle of *notwendig* necessity, *noodzakelijk*; the principle of problem as a benchmark for *sachlich*, *zakelijk*; the principle of purpose as a measure of *zweckmassig*, *doelmatig*; the principle of *evenredig* balance), which shows that the use of discretionary rights is very limited.

The formulation of the norm that separates the scope of Other Actions and Discretion also seems unclear to some members of the police themselves, who often use discretionary terminology in the criminal cases handled. Even though there is no discretionary authority for events or acts of a criminal nature. This shows that the understanding of the terminology and the respective boundaries between "Other Actions" and "Discretion" is still not the same among the Police themselves. So, it cannot be blamed if the implementation of the field is not as expected.

If the definition of Other Actions and Discretion is examined more deeply, then the passive attitude that suggests omission of a criminal act or violation, whether intentional or not, can actually also be qualified as another act or discretion. This conclusion is simple, because, if an act has determined the obligation of a member of the police to respond to it, but a member of the police does something

different, then an action that is "different", with the obligation to enforce the law by the police as stated in the statutory norms, can actually be only qualify as Other Actions or Discretion, even if they are passive or unconscious actions.

However, if it is related to the definition of Other Actions which must contain the element of "responsibility", then if the omission will be qualified as Other Actions, then the element of "responsible" attitude is clearly not fulfilled. This is similar to the act of discretion which is seen from the conditions of its application, which are, among other things, urgent, and must provide benefits to the public interest. If these conditions are not met, it can be concluded that the Police exercise discretion, but the discretion is wrong.

On another perspective, the matter of making Other Actions or Discretionary policies itself is actually not a necessity, but it depends on the considerations of the police themselves in the field. The problem is, if there are two similar incidents, it can be in the same place or different places but there are disparities or differences in the treatment of law enforcement, then this similar situation can lead to prejudice from the community, that the Police are favoritism, or discriminate, which means they do not be fair. This difference in treatment can occur due to intentional elements, but humanly it can also be due to unintentional. Thus, if it is considered that law enforcement efforts have been carried out by the Police very seriously, but problems still occur, then it can be assumed that this situation occurs because the understanding of Other Actions and Discretion is not correct, or there has been a distortion in understanding them.

The cause of the distortion of the question of understanding this Other Actions and Discretion will be more pronounced if the discussion is related to the "responsible" element in Other Actions and the "self-assessment" and "public interest" elements which are an integral part of the aims and objectives and the formulation of the Discretion. All of these elements have broad meanings and provide the opportunity for multiple interpretations. For example, a member of the Police who drives a truck on a busway lane and even goes against the road, by saying that this is an act of discretion because the police are carrying out duties in the public interest, then, it will be able to make the understanding of discretion itself more biased, as if the terminology of discretion it can mean "anything". In fact, the elements of "responsible" in Other Actions and elements of "self-assessment" and "public interest" in Discretion do not stop there, because there are many other conditions that must be adhered to in applying the authority of the Other Actions and Discretion.

If it only refers to the element of "responsible", then of course those who use the authority of Other Actions feel that their decisions have been made with responsibility; whereas if it only refers to the elements of "public interest" and "self-assessment", it is easy to claim that everything that is done is in the public interest, because the nature of his work is to serve the general public. Coupled with the right to "conduct self-assessment" which seems subjective, field policy decisions that have been chosen by members of the Police or employees of any institution who work for

the government in serving the community will be deemed to have been legitimized to be claimed as other actions or discretion.

The existence of Discretion itself, in principle, in addition to answering problems that are in a legal vacuum, can also be used to overcome the overlapping between laws and regulations. As Bagir Manan said, the fact is that every statutory regulation has congenital and artificial defects, where this is a consequence of the written legal form which results in the regulation having a limited reach, related to the political, economic, social, cultural and defense situations that affect the at the time of its formation. That makes it very easy to be "out of date" or outdated when compared to the rapidly changing society. Based on this, in order to achieve the goals of the state in the context of the Welfare State, every government official, including the police, is given the right to take "adjustment" actions based on discretionary authority, of which Other Actions or Discretion are examples. Discretion is a form of adjustment to the principle of legality in the sense of *wetmatigheid van bestuur*.

So, it is an "exception" from the principle of legality, but still it must be underlined, it must not violate the principle of legality itself. Kunarto, former Chief of the National Police, once said that because essentially the task of the police is to enforce the law and maintain security and public order, in carrying out preventive or protective duties, members of the police may do anything as long as security is maintained and does not violate the law itself; or in other words more emphasis on the principles of opportunity, utility and obligation. However, because of their subjective nature, in practice, according to Tito Karnavian, a former National Police Chief in another period, there are still many Polri members who do not have the ability to assess and analyze the situation. As a result, the discretionary authority is exercised in an excessive manner.

The demand for "adjustment" of law enforcement actions by the police to the social development of the community is basically a dilemma for the police. On the one hand, the police are indoctrinated and required to carry out their duties, functions, rights, and obligations to enforce the law as stated in the law, so that they often do not dare to deviate from these provisions even if they are based on good intentions. On the other hand, the police themselves are expected to carry out policies in the law enforcement process as desired by the community, especially if the threat of sanctions is not commensurate with the actions that occurred. Moreover, when referring to the police code of ethics which prohibits every member of the police from taking an action that is not based on the law, then this will lead to a tendency for members of the police to enforce the law rigidly, only referring to norms. In fact, this is not in line with the actual existence and ideals of the police as part of the state administration, where the state actually needs and even has to intervene in various socio-economic problems to ensure the creation of shared prosperity in society. In the state, the power and authority of the state have expanded in particular, especially on matters of public interest. The task of the government which Lemaire referred to as "*bestuurszorg*" is the duty and function of

organizing the general welfare. Bestuurszorg covers all fields of society where active government participation in human relations is deemed necessary. Bestuurszorg is the government's task of "welfare state" which is a modern legal state that pays attention to the interests of all the people and which has abandoned the principle of *asasstaatsonthouding* (the government is passive). The existence of *bestuurszorg* is a sign that states the existence of a welfare state.

Even though the purpose of the existence of Other Actions and Discretion is very good, and even though the norms and philosophy of Other Actions and Discretion have been attempted to be clarified through various explanations, however, it turns out that it is not deemed sufficient to properly position the functions of Other Actions and Discretion itself. It can be said that it occurs at any time in society, then the potential for conflict, resistance, and even public distrust of the police will still be open, if the differences in decisions on law enforcement actions in the field are not essentially uniform.

Policies to take discretionary actions are generally born from violations, which so far have made members of the police then make judgments for further actions, can act on violations based on existing legal norms, or by taking discretionary actions, or other considerations. In fact, if the violation occurs on a clear legal basis, then the discretionary authority should not be needed. If, for example, there are humanitarian reasons, does this fall within the discretionary area or does it fall within the corridor of the eraser and forgiving element which should be decided by the judge? This is clearly a very dilemmatic, however, if everything is left to continue criminal processing, namely to the Prosecutor's Office and then transferred to the court, then the discretionary authority will be in vain. In fact, according to Bambang Widodo Umar, if the police are professional, they should be able to make their own decisions. And this again creates a dilemma.

The lack of understanding of the nature of discretion is shackled by the limitations of the formulation of the meaning of the word from the principle of discretion itself, thus obscuring the main purpose of being given the authority to use the discretion. Even though the police officer believes that he is capable of conducting a "self-assessment", and he is also sure that its implementation is intended to be carried out with due observance of the laws and regulations and the police code of ethics, it turns out that this police member's belief will not necessarily be considered correct either by the community, or by their own superiors, because it is not certain that the judgments and considerations of the members of the police force, or in the minds of their superiors, or in the community were the same.

Apart from that, one of the other reasons that can make the understanding of Discretion more biased is when there are expert opinions that seem to legitimize that Discretion may be carried out intentionally against the law. For example, the notion of discretion conveyed by William G. Bayley in *The Encyclopedia of Police Science* which states: "*Police discretion maybe defined as the capacity of police officers to select from among a number of legal and illegal courses of action or inaction while performing their duties*". (*Police discretion can be interpreted as the capacity of the police to choose various*

legal or illegal actions to select the cases it handles, set aside cases, release suspects or perpetrators of violations from lawsuits). or also the views of Gaius T. Lumbuun who said: *"Discretion as a policy from state officials from the center to the regions which essentially allows public officials to carry out a policy that violates the law, the reason has three conditions, namely in the public interest, is still within the limits of its authority, and does not violate the general principles of government. the good one"*.

This understanding is certainly very contradictory to the understanding given by previous experts who emphasized that discretionary actions must not conflict with the principles of the rule of law, must not conflict with the rules or the law itself, and must not conflict with the police code of ethics.

2. Arrangement of Other Actions or Police Discretion so that in its Implementation there is Uniformity and can be Accepted by the Community

The formulation of norms and requirements in Law Number 2 of 2002 concerning the Police, Other Actions and Discretion is very simple. However, this simplicity does not make it easy to understand, but it has a broad and abstract meaning. There are explanations and conditions for its application in various scattered rules, such as the existence of 4 (four) sub-principles of the principle of Police obligation which serve as guidelines for its implementation or 3 (three) absolute technical requirements for discretion to be exercised, as well as what is regulated in Article 7 KUHAP paragraph (1) letter c; but even then the explanations still seem broad.

Reconstructing the frame of mind or paradigm about Other Actions and Discretion is an urgent need. This reconstruction leads to police personnel, because the validity of the authority of Police discretion, depends on their subjective abilities as officers. Misunderstood it, then the decision was wrong. Meanwhile, the decision itself must first be made by carrying out philosophical considerations, sociological considerations, and juridical considerations. Not to mention the changes in the characteristics of society, where the law must be responsive to these changes. Like it or not, as previously stated, changes in social society are facts, and laws that are unable to adapt to changing circumstances or times, whether just norms, or the process of enforcing them, will be abandoned and no longer trusted by the community.

Technically, considering that it is impossible to do it all at once, especially when it comes to improving human resources, the improvement can be done gradually, in the following way: *First, the reform of the law, at least issued the Chief of Police's Instructions or Circular Letter of the Chief of Police that sharpens and narrows the interpretation but is a confirmation of technical guidelines, which can simply be said to be a reconstruction and affirmation of policy decision-making on Other Actions and Discretion in more detail, so that for the same case it gets same handler. Second, with the development of technology, it is very possible to use algorithmic methods to decide police policy, which in itself makes it measurable.*

D. CONCLUSION

Other Actions and Discretion is a matter of decision-making in implementing law enforcement policies, not a matter of making laws, so there is no need to create a new theory with expanded interpretation. Even though the discretion is an attempt to find a way out of a problem for which there is no legal regulation, it is different from the police strategy in carrying out its functions. Differences in this regard include, among others, the legal vacuum, the urgency, and the instant need for discretionary action; while the general Police strategy is on matters that have already been regulated, such as dispersal of masses by firing weapons into the air, and for long-term interests such as borrowing terrorist prisoners from prison cells for an approach in order to extract more information about the terrorist network. myself, for example.

The provision of clear and firm limits on the authority of Other Actions and Discretion, apart from the fact that the narrative of the legal norms, which must be admittedly too abstract, is also due to differences in the ability and maturity of the members of the police force in understanding the concept of the two actions of a policy nature. Basically, people who are given the authority to give policies should be people who are already able to judge because they have mastered and matured in the basic material. The level of "maturity" itself, in essence, is a higher level than just "knowing", so that this fundamental ability must be mastered by police officers.

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