# Police Discretion Liability in the Function of Criminal Law Enforcement

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***Abstract*— Police discretion in potentially abused, injustice, corruptive actions are things that cannot be hidden anymore. Pretrial as a means of control and supervision in its practice has limitations. In government discretion, the State Administration Court has received to examine and test it as a form of liability, but on the contrary it is not so in police discretion. That means, police discretion in the function of criminal law enforcement cannot be examined and/or tested that is used without any liability. The research method used was normative legal research with statutory, conceptual, historical, and analytical approaches using primary, secondary, and tertiary legal material. Based on the result, police discretion liability in the function of criminal law enforcement in Law on Police and Criminal Procedural Code was not governed expressly. Therefore, the concept of police discretion must obtain clearer, more measured, and objective interpretation and explanation so that the legitimization and operational are application and in line with the conception of legal state, law enforcement, and law liability. The absence of mechanism and examining and/or testing institution could not be maintained anymore, so had to be open to the obligation to account for it, either by pseudo-administrative trial, pure administrative trial, or both, with internal liability or external liability. Besides that, the aspect of legitimization and operational of police discretion was not applicable, limited by and in the sense within the scope of its legality principle and specification, and could not be used in the function of criminal law enforcement except police investigator discretion as a form of special discretion and constituted a specification of police discretion, realized in free discretion and bound discretion according to the Criminal Procedural Code.**

***Keywords:*Police Discretion; Criminal Law; Liability; Pretrial**

## I. INTRODUCTION

The existence of police discretion is familiar in the practical and academic world; in fact, it is considered a necessity in carrying out the duties and functions of the police which are too broad. There are a lot of definition of police discretion, one of which is a power or authority granted by law, or by the power of law to act based on one's own judgment or belief, which action is more moral than law[1], to the understanding that the police discretion as a policy of the police to make an immediate decision that sometimes the decision violates the law in the public interest immediately which if the decision is not made will result in disruption of public order and interests[2].

In the legal approach, the term discretion in the phrase police discretion is actually not new. The term discretion can be found in the discipline of State administration law which is often referred to as *freisermessen, discreationnaire power, pouvoirdiscreationnaire* or *naareigngoedvinding*, which all contain the same meaning, which is a legal principle concerning freedom of action or decision making for state administrative officials[3].

Lukman called *freisermessen* as one of the facilities that provides space for officials or State administrative bodies to take action without having to be fully bound to the law[4]. Meanwhile, Marbun and Mahfud state that *freisermessen* is the legal authority to interfere in social activities and tasks for public interests[5]. Both *freisermessen* and *pouvoirdiscreationnaire* are terms that mean referring to wisdom and as adjectives mean referring to authority or power[6].

Even though discretion is interpreted as freedom of action or decision, it does not mean that its use can be free as freely as it is, but it still has some limitations. Basah said the restrictions are the upper and lower limits[7]. Muchsan argues there two limitations; first, it must not conflict with the prevailing legal system (positive legal norms), and second, its use is only shown in the public interest[7].

In its development, the use of discretion in the discipline of State Administrative Law has now been regulated in the Law No. 30/2014 on the Government Administration (State Gazette of the Republic of Indonesia 2014 No. 292, Supplement to the State Gazette of the Republic of Indonesia No. 5601, hereinafter referred to as the Law of Governmental Administration), where discretion is defined in Article 1 number 9, i.e.: "Decisions and/or actions determined and/or taken by Government Officials to overcome concrete problems encountered in the governmental administration in terms of laws that provide choices are not regulated, incomplete or unclear, and/or there is government stagnation".

In addition, the Government administrative law provides regulations on and use of discretion, especially in Chapter VI Article 22 to 32, involving the purpose, scope, requirements and procedures for the use of discretion. So far, the implementation of police discretion in law enforcement is still being debated. Some say there is no problem, but the others say there are many problems in this implementation. The implementation of police discretion is not only based on the Police Law as stated, but also based on the Law No. 8/1981 on Criminal Procedure Law (State Gazette of the Republic of Indonesia of 1982 No. 76, Supplement to the State Gazette of

the Republic of Indonesia No. 3209, hereinafter referred to as the Criminal Procedure Code)[8].

Although the authority and procedures for preliminary investigation and investigation have been arranged in such a way in the Criminal Procedure Code, there are still gaps that lead a huge opportunity for the implementation of a discretion. This is related to Article 5 paragraph 1 sub-paragraph 4 of the Criminal Procedure Code and Article 7 paragraph 1 letter j of the Criminal Procedure Code which both reads: carrying out other actions according to responsible law, giving an opportunity to implement a policy of acting on the personal consideration of the investigator[9], and in general, police officers serving in the field, especially in the scope of the investigation, the Investigation sector has applied discretion in varied quantity and quality. The actions commonly taken include:1) actions related to the arrest, detention, and suspension of detainees; 2) actions of handling light cases in an alternative way outside the law; 3) actions of handling cases involving children; 4) actions related to the examination, especially among officers; and 5) shakedown [9].

Furthermore, aside from what has been stated, based on the understanding and characteristics of the discretion itself, the Criminal Procedure Code has discretionary provisions, some of which are: 1) Subjective conditions of detention by investigators, i.e. in the case of circumstances that raise concerns that the suspect or defendant will escape, damage or lose evidence and/or recidivist; 2) The investigator is authorized to take the first action at the scene; 3) The investigator has the authority to transfer one type of detention to another; 4) Investigators who conduct an examination, due to reasonable reasons, come to the residence of the suspect or witness; and 5) Even, some actions in the implementation of the investigation also come from the police regulations, which actually are not regulated in the Criminal Procedure Code or the Police Law[10].

Therefore, especially in the opinion which states that there are many problems related to police discretion in investigating criminal acts, it is very potential to cause the abuse of authority, injustice, and corruption[11]. in the form of extortion practices by irresponsible law enforcement officials[12] and so on, is a fact that can no longer be hidden and/or covered up because it is seen as a disgrace and is not suitable for discussion, even stated to the public.

## II. METHODS

The research method used is normative legal research, i.e. a scientific research procedure to find the truth based on legal scientific knowledge from the normative side, examining the application of rules or norms in positive law[13] to find the rule of law, legal principles, or doctrines, produce new arguments, theories, or concepts to find solutions to arising legal issues and answer them, and provide a prescription about what should be the issue raised in solving the problem faced[14]. In this case, the legal scientific logic from the normative side is used to find solutions to legal issues that arise and then answer them, as well as provides prescriptions about what should be implemented and responsibility of police discretion in the function of criminal law enforcement. This research uses several approaches, namely: statutory approach, conceptual approach, historical approach, and analytical approach[13]. The statute approach is adopted in the 1945 Constitution relating to the functions of the police, the Criminal Procedure Code, the Law on Judicial Power relating to the functions of the police, the Police Law, the Government Administrative Law, the Administrative Court Law and the Government Regulation on the implementation of the Criminal Procedure Code.

## III. RESULTS AND DISCUSSION

The police in their criminal law enforcement functions can carry out forced efforts which are nothing but a limitation of a person's human rights, namely limiting freedom and independence in the form of arrest and/or detention, carrying out checks up to very personal matters through the search of the body or place of residence, taking over and control material rights through confiscation, examination of letters, etc., which cannot be carried out by anyone or authority. However, in the performance of their duties, law enforcement officials must respect and protect human dignity and maintain and uphold basic rights as well as civil and political rights[15], and should and must always be accompanied by high responsibility, so that the decision can be accounted horizontally to humans and vertically to God Almighty[16].

Legal liability means as a condition obliged to bear everything (if anything happens may be sued, blamed, sued, etc). Liability is an act (thing and so on) of responsibility, something that is accounted for. This means that legal liability is similar with legal responsibility, which is to bear everything (if anything happens may be prosecuted, blamed, sued, etc.) legally, actions (things and so on.) legally responsible, or something that is legally accountable[17]. Legal liability is a very basic legal concept; it functions to connect the principle of law (a priori) with a posteriori actions, whether in accordance with the law or not in accordance with the law, and at the same time determine the legal consequences. Therefore, it also becomes an instrument in its function as a means of control. Kelsen defines legal liability as a liability associated with the concept of legal liability, where an individual is said to be legally responsible for an action based on an error (responsibility based on fault or culpability) that might end to be subject to sanctions[18].

This is also in line with the opinion that every power and/or authority will always demand accountability, rights are the presence of obligations on the other side, whereas accountability is the presence of power on the other hand[19]. Even, the power distribution system applies the principle that every power must be accounted for. Therefore, every assignment of authority must have been considered the burden of responsibility for each recipient of power. Willingness to carry out responsibilities must be inclusive when received

power[20]. This is a consequence of the teaching of granting authority to government officials implied in it regarding the accountability of the official concerned[21], and there is no single position that evade responsibility. Authority must meet with responsibility, and every position or official must have responsibility and place of responsibility (*geenmachtzonderveraantwoordelijkheid*)[22]. In the State of law, this term is called *geenbevoegdheidzonderverantwoordelijkheid* or there is no authority without responsibility. On the other words, each delegation of authority to certain government officials implies the responsibility of the official concerned, no one can exercise authority without assuming responsibility[20] since responsibility is balanced with authority[23]. Thus, police discretion as an authority must be legally accountable is a necessity.

This idea is needed to answer the deadlock regarding police discretion as a policy, especially for police investigators in the implementation of law enforcement functions. They do not have effective means of supervision and accountability[9], limitations of the Criminal Procedure Code through Pre-trial as a means of horizontal control and supervision, as well as the implementation of Pre-trial which is engineered by immediately passing the main case to the Court and becoming nullified, until the pretrial judge refuses to test or in no way test and evaluate it. It is seen as a discretion from the competent official, and there are exceptions based on Article 2 of the PTUN Law which states that several decision criteria that are not included in the TUN Decree because it cannot be checked and/or tested and maintained.

In addition, the notion of accountability for police discretion is also a demand of the modern view of the need to limit police discretion, as most formal controls in the police force are very few. Even though it already exists, hierarchical control only regulates the external boundaries for the use of police powers, while the daily decision-making process is implemented without restrictions. Therefore, the police department must develop and declare policies that provide specific guidance to police personnel for general situations that require police discretion. Policies must include the issuance of orders to citizens regarding their movements or activities, handling small disputes, securing the right of free speech and assembly, the selection and use of investigative methods, and the decision whether or not to arrest in situations certain involving certain crimes.

This means to overcome the misuse of discretion by not eliminating it completely, instead by managing its implementation through administrative guidance. This guidelines can serve as benchmarks for testing discretion, while reducing the use of police discretion that depends on the irrelevant, inappropriate, or arbitrary factors. The control of police discretion must depart from the paradigm that in good position the police must not use discretion or, if they do, it must be a standard policy used under strict control to ensure non-racism, discrimination, uncertainty, inequality, corruption, arbitrary authority, abuse of power and other bad behavior that are not in line with the concept of the rule of law and the enforcement of the law itself.

Therefore, if they are truly aware of the nature of discretion, the choice to use it is not easy. The use of discretion is demanded and must be able to explain adequately that the choice to do so is unavoidable, the reasons for its actions, and compliance with general legal principles so that the act of discretion becomes valid. Discretion is subject to legal constraints both regarding aspects of legitimacy and concerning operational aspects. The use of discretion must also be realized from the outset which is a situational authority or cannot be enforced in all situations, must be carried out with full and demanding responsibilities, and is not a routine power. It is because it is merely an authoritarian government that treats discretion as a form of pleasure. In addition, the discretion must also be proven, assessed or tested by moral standards where the action must be consistent with the attachment to morality as the foundation[24]. Therefore, the absence of an institution to examine it can no longer be maintained.

Since police discretion in the function of criminal law enforcement is related to the existence of authority and its implementation, the concept of responsibility in this study is the concept of responsibility which is inherent together with the existence of the authority itself and its implementation. This means that the police discretion must open itself to the obligation to objectively account for its authority and its implementation, both in pseudo administrative justice (*administratiefberoep*) and pure administrative justice (*rechtsspraak*).

## IV. CONCLUSIONS

The legal responsibility of the police discretion in the function of criminal law enforcement functions to connect the principle of law (a priori) with a posteriori action by providing a limit on the a posteriori action: whether it is suitable or not at the same time determining the legal consequences as a system that departs from legal obligations to an act which is contrary on the basis of an error which may result in sanctions. This is also in line with the teaching of the granting of authority which implies accountability, as well as the inevitability of answering deadlocks, especially in the implementation of criminal law enforcement functions: potential to be misused, do not have the means of supervision and accountability effective, the limitations of the Criminal Procedure Code through Pretrial and the exemptions based on Article 2 of the Law on Administrative Court. Therefore, they cannot be examined and/or tested and no longer tenable in line with the demands of the modern view of the law. Limiting and controlling police discretion to ensure that they are not racist, discriminatory, uncertainty, disharmony, corrupt, arbitrary, abuse of power and other bad behavior are not in line with the concept of the rule of law and enforcement of the law itself.

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