

Legal Problems Of Police Discretion Parameters In Patrol Activities To Prevent Street Crime

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Abstract. *The Police face a complex situation in the field when street patrols encounter a crime threat in which the Police must act quickly for the safety of the public and the safety of the Police officers themselves in the field. In positive law or legislation, other police actions are not mentioned in detail, but in their actions the police are limited by the law, becoming a dilemma for the police, on the one hand aiming to maintain public security and safety but on the other hand must still follow the direction of the law, so that the police's function changes into a merely positive function. The aim of this research is to determine and analyze (1) the legal validity of various police discretionary actions in the corridor of law enforcement, (2) the form of manifestation of police discretion in patrol activities to prevent street crime, (3) the legal problems of the parameters of police discretion in patrol activities to prevent street crime. The approach used in this research is normative juridical. The research specifications are descriptive and analytical. The data sources used are secondary data. Secondary data is data obtained from library research, consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Based on the results of the research and discussion, it can be concluded: (1) Article 18 of Law Number 2 of 2002 concerning the Republic of Indonesia Police is the most appropriate article to represent the discretion of the Police. The wording in Article 18 which reads "act according to one's own judgment" refers to the concept of discretion or "Freies Ermessen". (2) The use of force that can be accounted for includes those in accordance with the Regulation of the Chief of Police Number 1 of 2009 concerning the Use of Force in Police Actions, namely from the deterrent effect, verbal orders, soft hand-to-hand control, hard hand-to-hand control, blunt weapon control, firearm control, which actions are part of the manifestation of Police discretion which in this case is functionalized in the implementation of Police Patrols as a representation of the goal of preventing street crime. (3) The quick calculation of Police members who are on patrol by disabling street crime*

perpetrators is overshadowed by accusations of human rights violations, extrajudicial killings, violating the principle of due process of law. This polarization of social paradigms has not infrequently created the growth of a dilemmatic attitude within Police members in facing threatening situations.

Keywords: *Patrol; Police Discretion; Street Crime.*

1. Introduction

Indonesia as a state of law (*rechtstaat*)¹ It is the duty of every citizen to exercise governmental authority based on applicable law, preventing authoritarianism and policies. The state must be able to regulate its citizens to prevent harm to others. Thomas Hobbes, in his book *Leviathan*, stated that humans are wolves to other humans.²

This is because humans have a desire to negatively impact others, making it dangerous if human behavior is not regulated by law. The existence and sovereignty of law are crucial to ensuring the well-being of society. The Rule of Law explains that Indonesia positions the law as the supreme commander in running the nation's government.

According to Abdoel Djamali³, the law has a special characteristic, namely to protect, regulate and provide balance in maintaining the public interest. If someone violates the provisions of the law in the sense of harming, neglecting or disturbing the balance of the public interest, then the violation will receive a reaction from society, the reaction given in the form of restoring the imbalance carried out by taking action against the violator. The restoration of the imbalance is carried out by authorized officials for the purpose of imposing punishment.

The characteristics of law are closely related to the nature of the law itself, and when discussing the role of legal rules, this is related to the purpose of the law itself. Looking further, the definition of law actually encompasses or contains the nature of law and the role of legal rules. This suggests that some legal rules are coercive and some are regulatory, thus the purpose of legal rules is to provide balance within the law.⁴

2. Research Methods

To conduct a study in this research, the author used the method normative juridical. Considering that the problems being researched and examined adhere to the legal aspect, namely based on norms, regulations, legislation, legal theories, and the opinions of legal experts. In normative legal research, law is conceptualized as a rule or norm that is the basis for human behavior that is considered appropriate. This research is categorized as normative research

¹Sri Praptini, Sri Kusriyah, and Aryani Witasari, *Constitution and Constitutionalism of Indonesia*, Jurnal Daulat Hukum, Volume 2 Issue 1, March 2019, p. 7

²Joseph Losco and Leonard Williams, *Political Theory: Classical and Contemporary Studies Volume I (The Thoughts of Thucydides - Machiavelli)*, Jakarta: PT Raja Grafindo Persada, 2005, p. 87

³Abdoel Djamali, *Introduction to Indonesian Law*, Rajawali, Jakarta, 2001, p. 3

⁴Waluyadi, *Introduction to Legal Science in the Perspective of Positive Law*, Djambatan, Jakarta, 2001, p. 53

because it examines library materials against secondary data sourced from library materials.

3. Results and Discussion

3.1. Legal Validity of Various Police Discretionary Actions in the Corridor of Law Enforcement

The Republic of Indonesia is a democratic state based on the rule of law, based on Pancasila and the 1945 Constitution of the Republic of Indonesia.⁵, upholding human rights and guaranteeing equal status before the law and government for every citizen, and the obligation to uphold the law and government without exception. As a nation based on the rule of law, Indonesia has the consequence that the rule of law must be upheld and implemented properly. Everything related to behavior, both the behavior of community members and government officials related to social, national, and state life, must be based on applicable legal norms.

As a nation governed by the rule of law, every government action must be based on law. Law is a system of norms that includes criminal law. Law enforcement through the criminal justice system aims to combat all crime.⁶ Similarly, Mardjono Reksodipoetro believes that the criminal justice system is a systematic approach within a social environment to address crime. In this context, "addressing" is defined as "controlling" crime within tolerable limits. This tolerance is considered an awareness that crime will always arise as long as humans exist in a social environment. Therefore, the success of a criminal justice system will be measured by the reduction in crime rates in society. All sub-structural elements within the criminal justice system are expected to consistently coordinate and not operate independently or neglect their relationship with other functions. Although each sub-structural element has a diverse role and operates independently, the ultimate goal and mindset are one and constitute a unified whole.

Law enforcement in the criminal justice system is closely linked to the principle of legality, or *wetmatigheid van bestuur*. This principle is a determining factor, even though it is not based on the responsibility delegated by the applicable laws and policies. Therefore, all law enforcement officers, in carrying out their duties as law enforcers, will not have responsibilities that could influence or reverse the conditions or legal status of their communities.⁷

⁵Sri Praptini, Sri Kusriyah, and Aryani Witasari, *Op.Cit*, March 2019, p. 7

⁶Ella Angelia, *Implementation of Discretion in Criminal Investigations at the Criminal Investigation Unit of the Indonesian National Police Headquarters (Discretion in Handling Demonstrations)*, Jakarta: Veteran National Development University Jakarta, Thesis, 2018, p. 25

⁷Ari Nurhaqi, *Police Discretion in Law Enforcement against Criminal Acts*, Bandung: Parahyangan Catholic University, Thesis, 2017, p. 1.

However, in reality, not every action by law enforcement officers provides regulatory policy. In specific circumstances, law enforcement must act quickly or urgently to resolve a specific public problem, but no legal policy exists. In such circumstances, law enforcement is granted discretionary power, an example of a means that grants law enforcement the freedom to implement a policy without being fully constrained by legislation.

Discretion in the Black Law Dictionary comes from the Dutch word "Discretionair" which means wisdom in deciding on an action not based on the provisions of regulations, statutes or applicable laws but on the basis of wisdom, consideration or justice.⁸ Discretion is always associated with decision-making, power, or authority exercised by an individual regarding the issues at hand. Discretion is often defined as "Freis Ermessen." According to the legal dictionary compiled by JCT Simorangkir, discretion is defined as "the freedom to make decisions in every situation encountered according to one's own opinion."⁹

Discretion is the freedom to choose one of several actions to take. Discretion is a policy that must be adopted by law enforcement due to the actual situation on the ground. It is an authority in the form of freedom of action from state officials or making decisions based on their own opinions in order to serve the public responsibly.¹⁰

Discretion is a legally mandated responsibility for law enforcement officers to implement policies in certain circumstances, in line with the conscience and perspective of the law enforcement officers themselves. Discretion is essentially a complement to the legal control mechanism. One structural sub-element of the criminal justice system that is granted the authority or power to act on its own initiative (discretion) is the Indonesian National Police. Judging from the sequence of law enforcement processes in the criminal justice system, which begins with the stages of inquiry, indictment, prosecution, and judge's decision in court, up to community institutions, it is clear that the police are the first institution to carry out the initial stages of enforcing criminal law.¹¹

All police authorities in carrying out their duties are guided by Law No. 8 of 1981 concerning Criminal Procedure Law as its legal umbrella and Law No. 2 of 2002 concerning the Republic of Indonesia National Police. The general provisions of Law No. 2 of 2002 concerning the Indonesian National Police (Polri) contain definitions of various matters related to the police, including the concept of police.

⁸Yan Pramadya Puspa, Op.Cit. 1977, p. 91

⁹JCT Simorangkir et al., Op.Cit, 2008, p. 38

¹⁰David L. Carter, Op.Cit, 1999, p 138

¹¹Ni Ketut Sari Adnyani, Discretionary Authority of the Republic of Indonesia Police in Criminal Law Enforcement, Scientific Journal of Social Sciences, Vol 7 No. 2, December 2021, p. 136.

However, the definition of the police is not comprehensive, as it only addresses the functions and institutions of the police as stipulated in statutory regulations. Article 1 of Law No. 2 of 2002 reads in full:

- 1) Police are all matters relating to the functions and institutions of the police in accordance with statutory regulations;
- 2) Members of the Republic of Indonesia National Police are civil servants of the Republic of Indonesia National Police;
- 3) The officers of the Republic of Indonesia National Police are members of the Republic of Indonesia National Police who, based on the law, have general police powers;

The function of the police is contained in Article 2 of Law No.2 of 2002 which reads:

"The police function is one of the functions of the state government in the field of maintaining public security and order, law enforcement, protection, patronage and service to the community."

The definition of the police as a function above is one of the functions of state government in the areas of maintaining public security and order, law enforcement, protection, and service to the community. Meanwhile, the definition of the police as an institution is a government organ designated as an institution authorized to carry out its functions based on statutory regulations.

According to Sadjijono, the terms "police" and "police" have different meanings. The term "police" refers to an organ or government institution within a state, while the term "police" refers to both an organ and a function. An organ refers to a government institution organized and structured within a state organization. A function refers to the institution's duties, authority, and responsibility under the law to carry out its functions, including maintaining public order and security, enforcing the law, and protecting, protecting, and serving the public.

The police are one component of the criminal justice system that is at the forefront of crime prevention. Their role appears to be greater than that of other components. This institution is crucial to the overall success of criminal justice. Therefore, the police are referred to as "The Gatekeepers of..."¹² Function in everyday language is used in relation to the position or work being done.¹³

¹²Amanda Julva, Op.Cit, March 2017. p. 2.

¹³Warsito Hadi Utomo, Op.Cit, 2002, p. 90

The police's discretionary powers are generally explained in Law No. 2 of 2002 concerning the Police. Meanwhile, the enforcement of criminal law is regulated separately in Law No. 8 of 1981 concerning Criminal Procedure, commonly known as the Criminal Procedure Code (KUHP). Discretionary powers are responsibilities or powers exercised according to law based on trust and consideration, prioritizing discretion over legal considerations.¹⁴

The 1945 Constitution of the Republic of Indonesia, as the source of all legal sources in Indonesia, does not include any provisions prohibiting the exercise of discretion. The conceptual basis for discretion, both in the governmental and judicial spheres, is the same: an action must be taken even in situations where the rules are silent, do not provide a prescription, or are at least unclear or vague. Essentially, discretion serves to resolve complex problems that require immediate attention, and to resolve urgent matters that arise suddenly and for which no regulations yet exist.¹⁵

Discretionary powers arise, in addition to those already explained, from changes in circumstances and conditions that cannot be predicted by the applicable laws and regulations. Law enforcement must continue to take action to ensure continuity. The distinction between normal and abnormal situations regarding the application of the principle of legality is natural and normal.

Therefore, the justification for discretionary power is the difference between normal and abnormal conditions regarding the applicability of the law. Social conditions are not constant, and changes in social conditions cannot always be anticipated by the principle of legality or the applicability of statutory regulations. In normal situations and conditions, where the law, *ceteris paribus*,¹⁶ (all variables in the same state) applies, then the principle of legality applies. In an abnormal situation where the *ceteris paribus* law does not apply, then by law the principle of legality does not apply and discretionary power applies.¹⁷ Law enforcers are not free to choose between taking action or inaction. This aligns with Sellin's explanation that "no actor is free to make a choice among possible courses of

¹⁴Komang Danan Prayudhi Dharma Yasa & I Dewa Gede Dana Sugama, Police Discretionary Authority as a Sub-Element of the Structure of the Criminal Justice System in Indonesia, *Journal of Contemporary Law Studies*, Volume: 2, Number 1, 2024, p. 26

¹⁵Budi Pramono, Discretion Exercised by Law Enforcement Officials in the Indonesian Military Legal System. *Magnum Opus Law Journal*. Volume 3, Number 1, February 2020, p. 76

¹⁶The *Ceteris Paribus* Law is an assumption in economics that means "with other things remaining the same" or "all other things constant." This assumption is used to simplify economic analysis by assuming other variables not being analyzed are constant or unchanged. This allows economists to focus on the relationship between two main variables, such as price and quantity demanded, without being affected by changes in other factors. See: Cahyo Saputro & Qurroh Ayuniyyah, Demand and Supply in Microeconomics, *Diversity: Jurnal Ilmiah Pascasarjana*, Vol. 4 No. 2, August 2024, p. 184

¹⁷Krishna D. Darumurti, *Government Discretionary Power*, Bandung: Citra Aditya Bakti, 2012.

action or inaction, for adherence to norms is the only possibility."¹⁸(no actor is free to make a choice between possible actions or inactions, because compliance with the norm is the only possibility).

At the implementation level, forms of discretion can be grouped into two things, namely discretion in the form of policies that are attached to and under the umbrella of statutory regulations, and those in the form of policies, while still paying attention to statutory regulations and not conflicting with statutory regulations.¹⁹

In the police corridor, situations or conditions that require the police to implement policies (discretion) are caused by several things, including:

- 1) Officials are faced with a choice based on rational and fundamental decisions. However, each choice implies that there are indeed several alternatives, and the antithesis of discretion is a situation where the law provides the correct and proper solution to a case.
- 2) The reason for the use of discretion is a matter of non-concrete legal grammar.
- 3) A gap or lacuna (legal gap) in a legal rule is seen as a source of discretion because the interpreter must make a choice among several alternatives. The problem of legal gaps is often related to semantic indeterminacy.
- 4) Contradiction or inconsistency between two legal rules occurs when "incompatible legal effects are attached to the same factual conditions" (incommensurate legal effects are given to the same factual conditions).

Discretion as one of the authorities given to the police is an effort to achieve law enforcement, and discretion is according to Warsito Hadi Utomo a completeness of the legal regulatory system.

3.2. Forms of Manifestation of Police Discretion in Patrol Activities to Prevent Street Crime

Discretion is the authority to act based on one's own judgment in carrying out legal obligations. Because actions are taken based on one's own judgment and considerations, the appropriateness of that judgment is greatly influenced by the morality of the person taking the action. When discretion is associated with the

¹⁸Harold E. Pepinsky, *Better Living Through Police Discretion*, Law and Contemporary Problems Journal, Vol 47 Issue 4, Fall 1984, p 250

¹⁹Budi Pramono, *Op.Cit*, February 2020, p. 77

police, it implies the inherent authority of the police to act based on their own discretion and judgment in carrying out their police functions.

The judgments that each police officer believes to act are strongly influenced by the specific circumstances that require action. However, the judgments held by each individual police officer vary greatly depending on their experience, knowledge, intelligence, and morality. Therefore, each police officer's discretionary authority must not be exercised carelessly without rational and logical justification, but rather selectively, proportionally, and legally accountable.

Because the authority held is for the purpose of carrying out legal obligations and duties, when carrying out legal actions, it is mandatory to adhere to legal and moral norms. Moral norms relate to these actions based on conscience and legal norms because authority is exercised on the basis of law, so that in assessing concrete situations,²⁰ the applicable benchmarks are in the form of requirements that have been discussed in the previous discussion, namely based on Article 16 paragraph (2) of Law No. 2 of 2002 concerning the Indonesian National Police, which are explained as follows:

1) Police Actions Must Be in Accordance with Statutory Regulations

The Indonesian National Police (Polri) in carrying out its duties and authorities, particularly in exercising discretion, must not conflict with laws and regulations. However, if the discretionary action taken is more beneficial and benefits the public interest, then the laws and regulations can be set aside. What is meant by laws and regulations here are all regulations made by a government body that is given the power to make laws, for example government regulations, regional government regulations such as provincial, district and city regulations.

praja, the Indonesian National Police's professional code of ethics, and also includes field guidelines and technical guidelines for the Indonesian National Police. More specific regulations as guidelines for the Police in exercising discretion are Law No. 2 of 2002 concerning the Indonesian National Police, the Criminal Code, the Criminal Procedure Code, Regulation of the Chief of Police No. 1 of 2009 concerning the Use of Force in Police Actions, and Standard Operating Procedure No. 1 of 2010 concerning the Management of Anarchy.²¹

²⁰Iqbal Felisiano and Amira Paripurna, Police Professionalism in the Implementation of Discretionary Authority in Theft Cases (Case Studies of Cocoa Theft, Kapok Seed Theft, and Watermelon Theft), YURIDIKA, Vol. 25 No. 3, September–December 2010, p. 254

²¹Joko Rudiantoro, Op.Cit, December 2014, p. 497

- 2) Actions that are in line with legal obligations that require official actions to be taken

That the actions that will be taken by members or officials of the Indonesian National Police in the field in upholding their duties and authority, particularly in exercising discretion, are truly carried out for the purpose of eliminating a disturbance or to prevent a disturbance from occurring, this means that if the necessary action is not taken, then something that needs to be prevented will occur.²²

- 3) The action must be appropriate and reasonable and fall within the scope of his/her position.

The job of any police is to maintain law and order, more specifically to fight crime in society, and so it is for the police in the Republic of Indonesia, even though their duties and authorities and what they will do have been formulated by legal procedures in detail, at the same time the police have been faced with the need to make decisions and take spontaneous actions that are contrary to legal procedures, so that order will be disturbed, with this position the police will have various demands, namely on the one hand being bound by legal procedures, while on the other hand to move freely so that they can carry out their duties of maintaining order well.²³

- 4) Action based on reasonable considerations based on compelling circumstances

Provisions governing force majeure (overmacht) or something that cannot be avoided are regulated in Article 48 and Article 49 of the Criminal Code.²⁴ In law enforcement in the field, the police cannot be prosecuted or punished if the police act because of a forced situation by a power that cannot be avoided or is forced to defend themselves or because of carrying out statutory regulations or to carry out official orders given by the authorized power, this forced situation is interpreted as mental, physical, spiritual or physical coercion.²⁵

- 5) Discretionary measures must respect Human Rights

Human Rights (HAM) which must be upheld and respected by

²²Ibid

²³Ibid

²⁴Roy Roland Tabaluyan, Excessive Defense of Force According to Article 49 of the Criminal Code, *Lex Crimen* Vol. IV No. 6, August 2015, p. 30

²⁵Joko Rudiantoro, *Op.Cit*, December 2014, p. 498

The police are rooted in human rights that flow from a moral vision, not from a legal vision that must first be filtered through philosophy, sociology and national law. Human rights that flow from a moral vision are universal, very fundamental and will not be revoked by any means, therefore whether or not they have been ratified, this type of human rights must be upheld and respected by police throughout the world, especially those related to actions according to their own judgment or discretion carried out by police officers in the field.²⁶

Viewed from the perspective of law enforcement, according to Article 13 of Law No. 2 of 2002 concerning the Republic of Indonesia Police, it regulates the duties of the Indonesian National Police, namely having the duty to maintain public security and order, enforce the law and provide protection, guidance and services to the community.²⁷ Therefore, the main duties and functions of the Indonesian National Police (Polri) are not only to protect the community but also to enforce the law. As law enforcers, they should carry out their duties as an agency that upholds the law, and all their actions must be based on applicable norms.

Police action based on their judgment is called police discretion. Discretion cannot be exercised arbitrarily; it must be exercised rationally and logically, yet selectively and proportionally, meaning the action taken is balanced against the potential consequences.²⁸

In the interpretation of the general function of a police officer, according to Satjipto Rahardjo, the police are a state apparatus tasked with maintaining public security and order, providing protection and providing care to the public.²⁹ Furthermore, Satjipto Rahardjo, citing Bitner's opinion, stated that if the law aims to create order in society, including combating crime, it is ultimately the police who will determine concretely what constitutes enforcing order.³⁰

In carrying out their duties, the police implement several approaches to creating order in society. These approaches consist of more or less 3 approaches, each of which is explained as follows:

1) Pre-emptive Approach

A preemptive or preventative approach aims to eliminate factors that trigger crime by increasing the community's resilience to threats to public order and

²⁶Ibid

²⁷Article 13 of Law No. 2 of 2002 concerning the Republic of Indonesia Police

²⁸Patahillah Asba & Moh. Eka Wahyu, Discretionary Authority of the Indonesian National Police in the Implementation of Demonstrations. *Amsir Law Journal*, Vol 4 No 2, April 2023, pp 156-161.

²⁹Satjipto Rahardjo, *Law Enforcement: A Sociological Review*, Yogyakarta: Genta Publishing, 2009, p. 111

³⁰Ibid

security. The Indonesian National Police (Polri) takes steps to minimize negative public intentions and prevent threats or disruptions to public order and security. For example, the Polri can provide outreach, education, and monitoring of factors that have the potential to lead to crime.

2) Preventive Approach

The preventive approach aims to maintain public order by reducing the opportunities for individuals with negative intentions to commit crimes. The Indonesian National Police (Polri) implements preventive measures by increasing police presence in crime-prone areas, increasing patrols, and providing a sense of security and protection to the public. Furthermore, the Polri collaborates with relevant agencies to enhance cooperation in crime prevention efforts.

3) Repressive Approach (Action)

The repressive approach aims to maintain public order and security by prosecuting and eradicating crimes. The Indonesian National Police (Polri) prosecutes perpetrators in accordance with applicable law, while upholding human rights principles. In carrying out these actions, the Polri collaborates with the judicial system to ensure that perpetrators receive appropriate punishment.³¹

In the three methods above, the Indonesian National Police (Polri) determines targets based on an analysis of the target's form, time, and location, which are the focus of the crime. This allows the Polri to allocate resources and efforts effectively to maintain public order and protect the community.

4. Conclusion

Article 18 of Law Number 2 of 2002 concerning the Indonesian National Police is the most appropriate article to represent the Police's discretion. The wording in Article 18, which reads "act according to one's own judgment," refers to the concept of discretion or "Freies Ermessen." In English, discretion means, "the quality of being discreet, or careful about what one does and says." According to its linguistic meaning, this discretion must be carried out with great care. In the language of Law Number 2 of 2002, discretion is formulated as "in circumstances of extreme necessity." The rule of Police discretion stipulated in Article 18 of Law Number 2 of 2002 is an authority that originates from the principle of general obligations of the Police, namely the principle that gives the authority to Police officials to act or not act according to their own judgment within the framework

³¹Muhamamad Daffa Setiadi and Mutho'am, Effectiveness of Patrols as a Preventive Measure for Overcoming Crime and Violations: A Study of the Wonosobo Police, *Legal Transformation: Journal of Legal Studies*, Vol. 2 No. 01, March 2023, p. 32

of their general obligations to maintain order, protect and guarantee public security. The essence of Article 18 paragraph (1) of Law Number 2 of 2002 concerning the Republic of Indonesia National Police is the authority of the Police apparatus that has been introduced for a long time, but its implementation in everyday life has been widely used. Article 18 of Law Number 2 of 2002, which determines that for the public interest, police officers in carrying out their duties and authorities can act according to their own judgment. The formulation of the Police's discretionary authority is an authority that originates from the principle of the Police's general obligations (*plichtmatigheids beginsel*), namely the principle that gives the Police apparatus the authority to act or not to take any action based on their own personal judgment in the context of their obligation to maintain, preserve order and maintain public security. The validity of the Police's discretionary authority is based on considerations of the need to carry out their duties and this depends on their subjective abilities as officers.

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