



Analysis of the use of discretionary rights by members of the national police under law No. 2 of 2002 and the use of discretion in error

Edi Saputra Hasibuan

Dosen Fakultas Hukum, Universitas Bhayangkara Jakarta Raya, Jakarta, Indonesia

ARTICLE INFO

Article history:

Received Jun 3, 2023

Revised Jun 13, 2023

Accepted Jun 30, 2023

Keywords:

Authority
Discretion
Police

ABSTRACT

The National Police is an institution that is the spearhead in enforcing the law and maintaining security stability in the country, against this heavy task, it is natural that every member of the police on duty has specialization in order to face and overcome existing threats, besides that as a distinguishing factor that must be inherent in every member of the National Police, there must, the existence of this right can be a way out to solve a complicated condition in the field, on the other hand, discretionary rights can also be used incorrectly because the interpretation of people can vary, this paper will see how the proper use of discretionary rights is in accordance with the legal corridor, because every member of the National Police really must be able to understand authority through their discretionary rights properly, so that there is a proper order and legal system, as a concrete example in the eyes of every community.

This is an open access article under the [CC BY-NC](https://creativecommons.org/licenses/by-nc/4.0/) license.



Corresponding Author:

Edi Hasibuan,
Fakultas Hukum,
Universitas Bhayangkara Jakarta Raya, Indonesia
Jl. Perjuangan No.81, RT.003/RT.002, Marga Mulya, Kota Bekasi, 17121
Email: edi.hasibuan@dsn.ubharajaya.ac.id

1. INTRODUCTION

Polri is a drill bit whose duty is to prevent and solve all threats of crime in the country that can cause unrest, panic, and the destruction of order in the community, over time the task of the police is increasing when this one institution gets the title as a law enforcer, then the provision of in-depth understanding of the law has become an absolute requirement for every existing member (Vanya Karunia, 2022)

When examined carefully, the presence of a police institution becomes an important condition in ensuring security and building good order in society, not only in Indonesia but in all countries in the world requires a special institution that is a representative of the state in direct contact with the community, there is a term called tupoksi, namely the main duties and functions in the police, which can be clearly divided into maintaining security, meeting the need for legal protection, protecting, realizing welfare, and the most important thing is to be able to protect the entire community, one form of business in fulfilling all the above factors is to implement an Integrated Police System (System of Policing) with due regard to human rights (S. Haji, G. Gunarto, 2018)

With the progress of the Times and the increasing need for law, the police are also required to be able to be dynamic, not always members of the police are dealing with crime, but also the presence of general disorderly factors, disputes between communities that ultimately have

the same needs, namely a settlement (dispute resolution), the rise of events that collide between public interests and, therefore, in this case the duties of a member of the police increase along with the needs of the community, in this position a police officer can be assessed as a “pengertib”, “pengusik”, “oppressor”, “protector”, and “servant”, or even seen as a “master”(Ismail, 1998)

Related to these problems, it is very appropriate if the role and views of the police can be related to the discretionary rights that he made in the field, every decision that comes out certainly has a long-term effect on a problem(Agung et al., 2019), not all things are regulated in a law, nor do all problems have to be blocked by existing rules, this problem reminds the author with what was conveyed by Prof. Satjipto that the Indonesian police is about how it acts as a "civil police" which means that the police should be able to put themselves in proportion, understand when to be hard (strong hand society) and when to act with character soft hand society (Satjipto Rahardjo, 2007)

When it comes to the No.30 year 2014 the right of discretion is a right to exercise authority in taking an action or decision on an existing problem, with the aim of filling a legal vacuum or maintaining legal certainty,(Edi Saputra Hasibuan, 2022) giving birth to an order on the implementation of Administrative Order and maintaining the accountability of an official or government body, as well as state institutions in implementing the protection and provisions of the law in a state order. How then Law no.2 in 2002 responded to this? Because it is clear that this rule is the legal basis for the police institution, the author is interested and intends to highlight clearly about the discretionary rights of police members associated with the use of force against police members(Sulaiman, 2023)

2. RESEARCH METHOD

This research is carried out in a normative manner, its application is to examine each regulation, related rules, and implementation, which will then be combined with the study of literature and the study of literature by analyzing books, journals, papers, print media, and online news related to the provisions on the discretionary rights of police members as well as cases, evaluations, and breakthroughs made by the police institution. The intended data Target is related to the authority and discretion of a member of the police, and how that right can actually be used according to existing procedures (Ariman Sitompul, 2022)

3. RESULTS AND DISCUSSIONS

Reviewing discretionary rights in a legal perspective

The establishment of this one institution is strengthened by law no.2 of 2002 which in essence regulates all the behavior of police members and also all their authority, therefore of course in it do not forget to provide a note about the right of discretion as a matter that is official and Real in the corridors of law (Wikisource, 2023)

If we look at the police law, it is explained that “for the public interest, officials of the National Police of the Republic of Indonesia in carrying out their duties and authorities can act according to their own judgment” furthermore, “the implementation of these provisions can only be carried out in very necessary circumstances by observing the laws and regulations and the Professional Code of ethics”.(S. Haji, G. Gunarto, 2018)

With the explanation of the rights described above, the author sees that the provision is made to support the professional duties of Police members which include functional tasks (Agustin Firmansyah , Heru Widodo, 2022), then this can support each member to be able to control a condition that changes unexpectedly without having to be based on the orders he gets, the point is that a condition in an event can change drastically so that it requires a new decision or policy taken in a relatively short or urgent time.(Ansori, 2005)

Considering the need to develop preventive principles in maintaining public security and order, this is also a factor in the existence of this discretionary right (Muhammad Yusuf Siregar, 2017) in addition to the existence of this right is also accompanied by training and coaching on knowledge and deepening of professional ethical codes that can affect the actions of police officials to be more responsible, as well as improving professional techniques to be more professional and with integrity.in the life of each member duty (Yasminingrum, 2007)

In connection with the training and professional development mentioned above, the police act of 2002 does also regulate it, in Article 33 it is explained that "in order to Support Professional Development, Studies, Research, and development of Police Science and technology are carried out" (Ariman Sitompul* Arie Kartika , Windy Sri Wahyuni, 2022) If analyzed further guidance on ethics and the profession can also be linked to the level of confidence to take action that is considered necessary in the field in order to address legal issues in the field directly in a narrow time and require the role of a member of the police, because indirectly as a member of the police is often considered to understand in overcoming all problems and as a mediator or also as a mediator (Ariman Sitompul, Pagar Hasibuan, 2021)

Why is discretionary right necessary in real life in the field? This question may arise considering that the police already have so much authority, and also as law enforcers they should apply the law, the fact is that not always the application of the law is carried out (Agustin Firmansyah , Heru Widodo, 2022), in the sense that there are several points of legal emptiness that must be filled with wise decisions of a member, the void or legal gap (legal gap) is one of the factors for the application of discretionary rights, the act of interpreting a rule so that it can be applied properly is certainly necessary, the legal gap arises when a proportion of the law is in the middle, neither true nor false.(Jennex, 1992)

In addition to the legal vacuum factor discussed above, there is also a condition where a rule collides with other rules, either under or above it which often causes confusion among the general public and even legal scholars, one party can use a clause in the law, while the other party can use other rules that regulate the same thing (Ramadhi Kurniawan, 2018), so it does not know which is correct, or which has stronger legal provisions (Rian Septia Kurniawan, 2020) The occurrence of a contradiction between two rules that collide with each other will certainly cause long-term effects on a conflict, Ross called it a legal effect that is not commensurate given the same factual circumstances (incompatible legal effects are attached to the same factual conditions) (Ross, 1959)

Furthermore, discretionary rights are closely related to activities that require quick decision making, each member of the National Police has the power to think and weigh events on the ground, this decision is the fruit of discretionary analysis or *freies ermesen*, in accordance with the police law (Amiarso, 2021). Again, the purpose of this discretion is expected to help each member in taking quick action in a narrow time, discretionary rights, not only in the police act, but it turns out that this discretion is supported by the Criminal Procedure Code with several conditions that must be met, namely:(Ketut & Adnyani, 2021) a) in accordance with the legal obligations that make the act must be implemented, b) not against the law, c) respect for Human Rights, d) must be reasonable, appropriate, and within the authority of his position, e) mature consideration based on urgent/compelling circumstances

One concrete example of the use of positive discretionary rights (suitably) is the application of restorative justice (restorative justice) where this form of settlement is to focus on a way out without elements of retaliation,(Datu Nur Fathahita, Abd. Asis, 2023) namely resolving a case without having to go through court proceedings, data until July 2022 showed the success of the National Police which was able to resolve around 15,811 cases using this restorative justice method, since Regulation No.8 year 2021 related criminal acts based on restorative justice appear, there were approximately 275,500 cases of criminal offences, of which the police managed to pursue 170,000 cases of which 15,811 could be pursued for restorative justice. It would be very good if this effort can continue to be done, because a case is not always about retaliation and the function of the police here should be able to show their ability to sort out which cases deserve to be submitted to court, and which are not, based on the ability and legislation(Rahardjo, 2006)

Misuse of discretion and impact on members

The existence of discretion can indeed lead to various possibilities and different results, discretion can be seen as a weapon that is specifically held by certain people who are granted by law to him, therefore discretion can also cause harm if misused, the easiest example is when members of the National Police escort groups to large motorcycle clubs that are traveling in tandem (convoy), not infrequently in (Agustin Firmansyah , Heru Widodo, 2022) this makes other road users feel annoyed because it interferes with and dislikes traffic violations by law

enforcement, on the other hand it can indeed be a discretionary right of police members if traffic violations are needed for greater needs, the problem then, is the act of violating traffic lights in the public interest so that it requires discretion? The phenomenon of escorting large motorcycle groups has indeed become a problem for several groups of people, and this has been highlighted by the National Police that escorting large motorcyclists or a particular community can cause envy or inequality in society, so that elements in the public interest are very clearly contradictory, this discretionary right is what the placement is not right (Ketut & Adnyani, 2021), Polda Metro Jaya is one that makes decisions on the traffic division, that there is no longer any special escort in any form, because all pedestrians have the same rights, except in an emergency. (Ketut & Adnyani, 2021)

Furthermore, in 2009, a procedure was issued that explains the use of police force, as a law enforcement officer, the National Police really need to pay attention to how they behave, that is, while maintaining their authority, while conditions on the ground often require hard and firm actions and decisions (Santoso, 2020), from which this regulation arises which leads to how each member uses their power in combating crime, firm and hard action is very necessary in cases like this. (Kurnawan, 2023) a member can take strong action that he thinks is necessary by taking into account the risks and existing rules, this rule provides limits so that the use of force by members is not excessive, for example a member can point his gun at the perpetrators of crimes so that they do not run (prevent), so that the perpetrators surrender and surrender, but should, and in a very forceful condition (overmacth) then a member can use his strength to save himself, this is supported also in the Criminal Code. (Dwiasi Wiyatputera, S.H., S.I.K., 2023)

The issuance of this rule regarding the use of force can be a guideline, because basically the use of force is not always wrong, in the precarious situation of facing anarchist attitudes it is not possible to avoid friction against violence (Manalu, 2020), as long as it is still done selectively and under control, often when there are protests there are brutal people and of course in, but in the midst of a complex problem when there is a protest, a police officer must be able to do something even outside the rules to achieve a stage of perfect control of the situation (Ariman Sitompul, 2023)

This act of police discretion can indeed be said to be full of benefits and also full of risks, because there is no formulation of the limitations in the application of this discretion it self, so that it can cause a sense of arbitrariness as a member of the National Police, but what needs to be remembered is that police discretion exists as a response (Luntungan, 2023) at least there are some things that are important notes in measuring decision making using discretionary rights: a) Action must be appropriate and in line with legislation, b) A decision must be reasonable, appropriate, and still within the scope of his position, c) Actions aligned with legal obligations, d) What to do should be strictly in a state of force, e) Exercise of discretionary rights not to disregard the human rights of others

All of the above explanations if it is a description of the provisions of discretionary rights in the process of activities and law enforcement for each member of the National Police (Supriyanto, 2018), then if there are members who clearly commit criminal acts and violations by using discretionary rights that cannot be accounted for, they will still be processed as stipulated in the Criminal Code, Criminal, nowadays, the police are increasingly assertive towards their internal affairs since reflecting on the case of Ferdy Sambo and Teddy Minahasa, which until this writing was made the case of Inspector General Teddy is still in trial, so there is no special treatment of Police members for violations, the law enforcement process for the police has now been transformed by focusing on release or disengagement, so if there are unscrupulous members who commit serious violations and indications of criminal violations, the police will always follow the verdict of the trial, and will not hesitate-reluctant to make a dismissal with disrespect or (PTDH).

4. CONCLUSION

Based on what has been discussed above, it can be seen that the authority in the form of discretion is a special space for a member of the national police to be able to increasingly have an impact on the community, the figure of a member of the police is always considered versatile and understanding in dealing with legal issues, so it is, training and professional development which is

also regulated in law no.2 of 2002 can be a reference point for members of the National Police so that they have provisions in weighing and exercising their discretionary rights.

Although with all the authority and advantages possessed by each member of the police is relatively considerable, but do not let this become a double-edged knife, discretion does have benefits as a wiggle room in filling the existing legal vacuum but is also very vulnerable to irregularities in the field, because obviously there is no institution that can assess the use of discretion by, there is no room for violations even to members of the police, for that every member must understand some indicators and criteria of discretion well, so that there are no errors in the application of discretionary rights.

REFERENCES

- Agung, A., Mahardi, G., Minggu, I. M., & Putu, L. (2019). Diskresi Kepolisian dalam Pemberantasan Tindak Pidana Narkotika (Study Kasus Di Wilayah Hukum Polsek Padangbai Karangasem). *Jurnal Analogi Hukum*, 1(1), 16–21.
- Agustin Firmansyah , Heru Widodo, D. M. (2022). Tinjauan Hukum Implementasi Diskresi Kepolisian Dalam Penyidikan Tindak Pidana Narkotika. *Veritas*, 8(2), 131–135. <https://uia.e-journal.id/veritas/article/view/2066>
- Amiarso, E. A. (2021). Pertimbangan Diskresi Kepolisian Dalam Penanganan Kasus Tindak Pidana Minuman Keras Di Yogyakarta. *IJCLC*, 2(1), 54–65. <https://doi.org/10.18196/ijclc.v2i1.11562>
- Ansori. (2005). *Konsep diskresi kepolisian dalam proses pidana*. X(3), 197–199.
- Ariman Sitompul, Pagar Hasibuan, M. S. (2021). The Morality Of Law Enforcement Agencies (Police, Prosecutor's Office, KPK) In Money Laundering With The Origin Of The Corruption. *EUROPEAN SCIENCE REVIEW*, 9(19), 58.
- Ariman Sitompul* Arie Kartika , Windy Sri Wahyuni, M. (2022). Money Laundering Crime In The Perspective Of Islamic Law In The System Of Proof. *Justicia Islamica: Jurnal Kajian Hukum Dan Sosial*, 19(2), 282. <https://doi.org/10.21154/justicia.v19i2.3920>
- Ariman Sitompul. (2022). *Metode Penelitian Hukum Normatif (Strategi Praktis Penulisan Skripsi, Tesis, Disertasi)* (1st ed.). Malang : Mazda Media.
- Ariman Sitompul. (2023). *Kebijakan Kriminal Dalam Sistem Peradilan Serta Penanggulangan Kejahatan di Indonesia* (1st ed.). Malang : Mazda Media.
- Datu Nur Fathahita, Abd. Asis, M. B. (2023). Analisis Hukum Pelaksanaan Diskresi Kepolisian Dalam Tindak Pidana Narkotika. *Alauddin Law Development Journal (ALDEV)*, 5(1), 70–73. <https://journal3.uin-alauddin.ac.id/index.php/aldev/article/view/35336>
- Dwiasi Wiyatputera, S.H., S.I.K., M. . (2023). *Prinsip Penggunaan Kekuatan dan Senjata Api oleh anggota Polri dalam Tindakan Kepolisian Penggunaan Kekuatan adalah segala penggunaan/pengerahan daya, potensi atau kemampuan anggota Polri dalam rangka melaksanakan tindakan kepolisian*. <https://polribelajar.id/prinsip-penggunaan-kekuatan-dan-senjata-api-oleh-anggota-polri-dalam-tindakan-kepolisian/>
- Edi Saputra Hasibuan, L. S. (2022). Upaya Evaluasi Polri Sebagai Respon Perubahan Terhadap Deretan Kasus Di Tubuh Polri. *Syntax Literate: Jurnal Ilmiah Indonesia*, 7(12), 18163. <https://www.jurnal.syntaxliterate.co.id/index.php/syntax-literate/article/view/10841>
- Ismail, C. (1998). *“Polisi: Pengayom v.s. Penindas”*. Jakarta: Jakarta Citra.
- Jennex, D. (1992). *Ronald Dworkin and the Doctrine of Judicial Discretion*.
- Ketut, N., & Adnyani, S. (2021). *Kewenangan Diskresi Kepolisian Republik Indonesia dalam Penegakan Hukum Pidana*. 7(2), 141.
- Kurnawan, R. (2023). *Timbulkan Kecemburuan, Polisi Dilarang Kawal Moge dan Mobil Mewah*. <https://otomotif.kompas.com/read/2021/03/15/184039115/timbulkan-kecemburuan-polisi-dilarang-kawal-moge-dan-mobil-mewah>
- Luntungan, B. E. (2023). Tindakan Diskresi Kepolisian Negara RepublikIndonesia Dalam Perspektif Hukum Pidana. *Journal Scientia De Lex*, 10(4), 5–8. <https://unpi.ac.id/ejournal/index.php/scientia/article/view/299>
- Manalu, S. (2020). Analisis Yuridis Tindakan Diskreasi Kepolisian Pada Tahap Penyeliikan. *Fiat Iustiti*, 1(1), 109–125.
- Muhammad Yusuf Siregar, Z. A. P. (2017). *Diskresi Kepolisian Dalam Memberhentikan Perkara Pidana Karena Adanya Perdamaian Oleh Lembaga Kepolisian Resort LabuhanbatuDilihat Dari Segi Hukum*. 5(2), 70–72. <https://jurnal.ulb.ac.id/index.php/advokasi/article/view/307>
- Rahardjo, S. (2006). Membedah Hukum Progresif. *Kompas*, 8.
- Ramadhi Kurniawan. (2018). Diskresi Kepolisian Dalam Penyelesaian Perkara Kecelakaan Lalu Lintas Melalui Mediasi Penal. *UJSJ*, 2(3), 310.

- Rian Septia Kurniawan. (2020). Diskresi Kepolisian Dalam Menjaga Keamanan Dan Ketertiban Masyarakat Di Wilayah Hukum PolsekSimokerto Surabaya. *Airlangga Development Journal*, 4(2), 124–128. <https://e-journal.unair.ac.id/ADJ/article/view/23104>
- Ross. (1959). *On Law and Justice*. Stevens & Sons Limited, London.
- S. Haji, G. Gunarto. (2018). “Implementasi Kewenangan Diskresi Kepolisian Dalam Penanganan Tindak Pidana di Polres Demak Jawa Tengah.” *Jurnal Hukum Khaira Ummah*, 13(1), 56. <https://jurnal.unissula.ac.id/index.php/jhku/article/view/2583>
- Santoso, P. (2020). *Diskresi Kepolisian Melalui Mediasi Penal (Studi Kasus di Polsek Galur , Kulonprogo)*. 1(2), 95–118. <https://doi.org/10.18196/jphk.1206>
- Satijpto Rahardjo. (2007). *Membangun Polisi Sipil: Perspektif Hukum, Sosial, dan Kemasyarakatan*. Jakarta: Kompas.
- Sulaiman. (2023). *Diskresi dan Penerapannya*. Jaringan Dokumentasi Dan Informasi Hukum. <https://jdih.babelprov.go.id/diskresi-dan-penerapannya>
- Supriyanto. (2018). Analisa hukum diskresi polisi pada upaya pemberantasan tindak pidana narkoba di polres blitar kota. *Supremasi*, 8(September), 20–25.
- Vanya Karunia. (2022). *Tugas dan Wewenang Kepolisian*. Kompas. <https://www.kompas.com/skola/read/2022/12/26/080000169/tugas-dan-wewenang-kepolisian>
- Wikisource. (2023). *Undang-Undang Republik Indonesia Nomor 2 Tahun 2002*. https://id.wikisource.org/wiki/Undang-Undang_Republik_Indonesia_Nomor_2_Tahun_2002
- Yasminingrum. (2007). Sikap Tindak Diskresi Polisi dan Implementasinya. *Jurnal Hukum & Dinamika Masyarakat*, 5(1), 88.