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## Police discretion is a judgmental skill

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**Abstract.** This study aims to investigate the factors that influence the giving of discretion by police officers in the field in providing services to the public or when carrying out their functions and duties and responsibilities. Discretion is a phenomenon like Noumena. As a phenomenon, the empirical context of Discretion can be detected by the human senses. As a noumena, Discretion is in the context of the inner intentions and emotional conflicts of the discretion maker. Discretion is found in almost all aspects of human life, even doing an action or not doing an action can be categorized as Discretion. This Literature Study uses descriptive qualitative methods with results ; (1). Discretion tends to damage the normal structure of solving a problem, (2). Discretion is a method (mission) to make a balance between existing situations and conditions (reality) with expected situations and conditions (vision). (3). Discretionary actions relate to the interests of many parties, (4). Discretion must be carried out by the right person, in the right place, and at the right time.

**Keywords.** Police; judge; interests; situation; condition

### 1. Introduction

Discretionary actions can be carried out at anytime, in anywhere and by anyone who has the authority to discretion, so discretion is basically an act that is familiar with human life, ordinary, general, universal, but unique, and the discussion about discretion never stops and complements various studies on authority.

At first, the discretion did not have written guidelines and was only guided by morality and ethics according to the prevailing legal-culture. This discretion which is only guided by morality and ethics is present in every activity of social life. So basically discretion is not extraordinary; however, the discussion on discretion has never been finalized, because there are different dimensions, perspectives and paradigms.

In its first development, the discretion is given legal standing through general rules and stated in the Act while taking into account morality and ethics. Discretion with general legal standing is generally found in police duties and can be applied to the general public.

Because there has been a repetition of events that have been predicted to occur, then discretion develops again with systematic guidance to deal with problem options, called Standard Operating Procedure (SOP). Discretion, with this SOP foundation, is generally guided and valid within the internal scope of the corporation.

The context of discretion which is only guided by morality as well as ethics, and regulated by the SOP is not discussed further in this article. The focus of the discussion in this article is the discretion with general legal standing and can be applied to the general public, namely the discretion carried out by the police.

Expressed by Joel B. Plant and Michael S. Scott (2009): “*Borne of practical limitations, a sense of justice, and the absence of close supervision and immediate review, the police exercise a tremendous amount of discretion at all levels of the police hierarchy, including at the line level, where police officers decide how to handle incidents. Police make discretionary decisions about all sorts of matters, such as where and on what public safety problems to concentrate resources, whether to formally enforce the law when they have legal grounds to do so, and what methods to use in performing their duties.*”<sup>1</sup>

To be able to do police discretion, a member of the National Police must understand his identity, the limits of his authority, as well as various matters concerning the discretion of the police itself.

Substantially the duties of the police are the same in various parts of the world, which is to create a sense of security for the community. In an effort to create a sense of security, the police are given authority by law and legislation, including for acts other than those expressly regulated by law and regulation but the objective that can be justified is to create a sense of security and not out of the limits determined by laws and regulations, which is called police discretion.

Many actions seem normal but are basically discretionary, like traffic police members who divert the flow of vehicles, run the vehicle when the traffic lights are red, and so on. In another police function such as detective, there is also discretion like arresting a suspect, while in the same case with different perpetrators apparently no arrests are made, when confirmed it turns out that there are subjective and objective reasons called investigators' considerations. Other discretions in other police functions are, for example, by uniformed police, non-uniformed police, and community guidance officers.

Police discretion (doing or not doing) has logical consequences which has positive or negative impacts against parties who are affected by the discretion or members of the police who are doing the discretion.

Ideally police discretion is the most rational choice, which should be fast, precise, effective and efficient with the least risk from the various risks that might arise from other discretionary alternatives, so there shouldn't be any negative result, or at least is the least negative result.

## **2. Literature review**

The Republic of Indonesia National Police Law (2002) states that: “in the public interest, the State Police of the Republic of Indonesia in the exercise of its duties and authority can act according to his own judgment”.<sup>2</sup> Then in the explanation in the general section mentioned: “In this case every official of the Republic of Indonesia National Police has

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<sup>1</sup>Joel B. Plant and Michael S. Scott., *Effective Policing and Crime Prevention - A Problem-Oriented Guide for Mayors, City Managers, and County Executives.*, (U.S. Department of Justice Office of Community Oriented Policing Services, July 2009) www.cops.usdoj.gov.

<sup>2</sup>Republic of Indonesia, Law No. 2 of 2002 on the State Police of the Republic of Indonesia, Republic of Indonesia State Gazette of the Year 2002 No.2, Additional State Gazette of the Republic of Indonesia No. 4168. Article 18 paragraph (1)

discretionary authority, namely the authority to act in the public interest based on self-assessment”<sup>3</sup>

According to the literature that mention above, it is visible that there are two main components of discretion namely: (1) public interest, and (2) based on their own judgment.

The public interest provides a limitation that discretion must not be carried out for personal or group interests. Based on their judgment granting authority or freedom to the holder of discretionary rights to make a decision is about whether discretion is appropriate and how the discretion will be implemented.

Besides giving freedom, context-based self-assessment contains a hidden threat that is if the implementation of discretion has a negative effect then it becomes the personal responsibility of the executor of the discretion.

It is explained in the Law of the Republic of Indonesia National Police (2002) that: What is meant by " act according to his own judgment " is an action that can be carried out by members of the Indonesian National Police, which in their actions, they must consider the benefits and risks from their actions and in the best interests of the public”<sup>4</sup>

Carrying out other actions is one of the authority of members of the Indonesian National Police which is legally formally stated in the following statement in the Police Act: “*take other actions according to responsible law*”<sup>5</sup>, which with such formulations, it can be said that discretion is taking other actions in the public interest based on one's own judgment.

“Taking another action” has limits, and it is regulated by the Law of the Republic of Indonesia National Police (2002) that: “Other acts as referred to in paragraph (1) point 1 is an act of pre-investigation and investigation which is implemented if you meet the following requirements: a. not against the rule of law; b. in line with the legal obligations that require the action to be carried out; c. be suitable, reasonable, and included in the environment of his position; d. reasonable in consideration based on compelling circumstances; and e. respect for human rights”<sup>6</sup>

One of the limitations defined in the context of other actions is “reasonable consideration under compulsory circumstances”. The use of the word ‘consideration’ shows the existence of the stages before the discretion is carried out. This is in line with the Latin proverb that says *Agere volentem semper meditari decet*,<sup>7</sup> which means “before acting, consider it first”.

Still related to the formal juridical basis of the Law of the Republic of Indonesia National Police (2002), discretion gets additional requirements, namely: “Implementation of the provisions as referred to in paragraph (1) can only be done in the most necessary circumstances by observing the laws and regulations, and the Republic of Indonesia National Police Professional Ethics Code”<sup>8</sup>

Sadjijono (2006) stated: “...can be concluded specifically, that discretion is an authority to act or not to act on the basis of his own judgment in carrying out legal obligations. Because

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<sup>3</sup>Republic of Indonesia, Law No. 2 of 2002 on the State Police of the Republic of Indonesia ... *Ibid*, Explanation of part I General

<sup>4</sup>Republic of Indonesia, Law No. 2 of 2002 on the State Police of the Republic of Indonesia ... *Ibid*, Explanation of Article 18 paragraph (1)

<sup>5</sup>Republic of Indonesia, Law No. 2 of 2002 on the State Police of the Republic of Indonesia ... *Op-Cit*. Article 16 paragraph (1) letter 1.

<sup>6</sup>Republic of Indonesia, Law No. 2 of 2002 on the State Police of the Republic of Indonesia ... *Ibid*, Article 16 paragraph (2)

<sup>7</sup>Based on various literatures it is known that this thinking is a Latin proverb

<sup>8</sup>Republic of Indonesia, Law No. 2 of 2002 on the State Police of the Republic of Indonesia ... *Ibid*, Article 18 paragraph (2)

the actions are carried out on the basis of self-assessment and consideration, the appropriateness or absence of judgment is greatly influenced by the morality of the action taker.”<sup>9&10</sup>

Based on Sadjijono's (2006) thought above, there are new elements to better understand about discretion namely: (1) perform legal obligations, and (2) morality.

The element ‘carrying out legal obligations’ sets limits that all actions in discretion must not be contrary to laws and regulations, or in other words may not exceed or violate everything that has been regulated by law. Must not exceed and violate the law is actually commensurate or also paired with morality.

The U.S. Department of Justice states that (2003): “Policy is a guide to the thinking and actions of those responsible for making decisions. Its essence is discretion. And policy serves as a guide to exercising that discretion. The development of policies to guide the use of discretion by police officers is the key to the effective management of police organizations. It is also critical to the control of violence between the police and community.”<sup>11</sup>

Statement from the U.S. Department of Justice above, gave rise to a thought about the background of the discretion carried out by the police, so that other elements are found and can be used to better understand discretion, namely policy as a guide to discretion.

Beyond the discussion and understanding of policy, the policy as a discretion guide also raises a discourse about the existence of an ongoing process. So discretion must also be understood as the movement of action in the process of time, which means that there is a time context before discretion is performed, the time context at which the discretion is implemented, the context of the time after the discretion is implemented.

Based on the literature above, it can be said substantially that: discretion should be carried out in a crucial and compelling state, in line with legal and human rights as well as the public interest, within the scope of authority, and based on its own judgment, which is moral, proper and sensible.

Based on the literature above, it can also be said structurally that: discretion has a series of actions that are inseparable, i.e.; initial stages (pre-discretion); discretionary stages (at the time of discretion); and the final stage (post-discretion).

In the context of those stages, there are variations in the use of time. There is pre-discretion that takes a long time, then the implementation of brief discretion and brief post discretion. Examples of such discretion can be seen from the process of securing international conventions and other international events.

Pre-discretion has a long time showing that the problem must be faced with discretionary actions that are in a predictable and conditional-need condition.

There is pre-discretion that takes less than an hour, and the implementation of discretion and post-discretion that need quite longer time; an example of such discretion can be seen in the process of regulating traffic flow when a toll road collision occurs.

Pre-discretion that takes less than an hour indicates that the problems that must be faced with discretionary actions are in the condition of unpredictable and conditional-need.

There is a time when pre-discretion, discretion even post-discretion occurs very quickly, and an example of such discretion can be seen in the process of disabling criminals who are caught while committing crimes.

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<sup>9</sup>Sadjijono., *Police Law – Position Perspectives, and their Relationships in Administrative Law*. (Yogyakarta: Laksbang Pressindo, 2006), pages 155.

<sup>10</sup>Know the *Police Law – Position Perspectives, and their Relationships in Administrative Law*. (Surabaya: Laksbang Mediatama, print:2, 2008), pages 153.

<sup>11</sup>U.S. Department of Justice, *Principles of Good Policing: Avoiding Violence Between Police and Citizens*, (Washington, DC: Community Relations Service Office, Revised September 2003), [www.usdoj.gov/crs](http://www.usdoj.gov/crs).

Very fast discretion circuit shows that the problems that must be faced with discretionary actions are in the condition of unpredictable and situational-need; in other words, it can be illustrated that before pre-discretion no discretion implementation has a thought: “later, we and/or I will do the discretion”.

The series of very fast discretion generally have slight limits with criminal acts, because there are overlapping conditions: “can take other actions” with condition “cannot take any other action”

Shooting the perpetrators who are troubling the citizens, is another example of a series of very fast discretion, and the condition of being a hero can immediately turn into a criminal if it misses and hits an innocent civilian.

### 3. Discussion

The executor of the discretion is certainly not a robot; likewise, the police personnel who carry out discretion are certainly not robots. Therefore, in the discretion process, there is a thoughtful process, as well as very complicated emotional clashes, to eventually produce a decision to act (other action) or not to act, that runs through the loopholes of regulation. This condition can be called a judgment skill. Statistical paradigms, sees that judgmental skills are to determine something based on personal considerations or based on consideration of decision makers or based on the consideration of researchers.

Discretion by police personnel has a broad scope and consistent variations in actions, but generally it more often shows inconsistencies; therefore, police discretion must be understood in both a substantial and structural context.

By paying attention to the discretion process, then the discretion is necessary or can't be based on predictable conditions such as the predicted incidental activity or un-predictable conditions because the problem arises immediately while previously there were no members of the police who thought "later we will do discretion".

Discretion is also related to time limitation, therefore there is discretion in the conditional-need framework and there is discretion in the situational-need framework.

From the substantial context and structural context, it can be discussed further about the condition of the causes of the discretion; some time before the implementation of discretion (pre-discretion); the implementation phase of the discretion itself; or shortly after discretion (post-discretion).

Many things cause discretion. Some of them are for legal purposes meaning creating a new law which is in line with Soerjono Soekamto's thoughts (in Wawan Tanggul Alam 2004:10-12) that: “The law as a ruling decision, namely the result of the process of discretion”<sup>12</sup> in this context, discretion is making a law that is temporary, deviates but does not violate any applicable law, nor does it rule out general law in total, because: “*the function of the police must pay attention to the spirit of upholding human rights, law and justice*”.<sup>13</sup>

Another reason for discretion is that it is in the public interest, because one of the important conditions in police discretion is stated explicitly “*not against the public interest*” and related to the basics “*general obligations (plichtmatigheid)*”.

Discretion is also carried out because of the aim to provide protection and service to the community. Posted by Joseph D. McNamara (2011): “*The people wanted more good policing, not less. For the first time, localities saw officers as individuals eager to protect them rather*

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<sup>12</sup>Damang Averroes Al-Khawarizmi., Definition of Law., <http://www.negarahukum.com/hukum/pengertian-hukum.html>, uploaded November 18, 2011, accessed 2 August 2016 1:35:00 PM

<sup>13</sup>Republic of Indonesia, Law No. 2 of 2002 on the State Police of the Republic of Indonesia ... *Op-Cit*, Explanation of Article 2

than aloof strangers-outsiders occupying their neighborhoods—who existed simply to give them traffic citations, or arrest them for minor violations”.<sup>14</sup> Then it was stated by Eugene O'Donnell (2011) that: “Assisting people in need is a huge part of what police do, and many police departments have rebranded themselves as “services” rather than “forces.” Worldwide, police officers bring an impulse to help others to their work and a willingness to make personal sacrifices, even risking their own well-being. This admirable quality can serve as a bridge to encouraging ethical conduct by individual officers and to formulating ethical standards and practices for police departments, especially when the discussion of ethics centers on building a better nation and improving living conditions for officers, their families, and their posterity.”<sup>15</sup>

Discretion can also be caused by the context of the presumption of guilty which is the paradox of the presumption of innocence. *Presumption of guilty is the background of police steps in forced efforts such as arrest and other forced efforts.* It is impossible for the police to use force based on the presumption of innocence, because it can be ascertained based on the presumption of guilty.

Related to this presumption of guilty, delivered by Hartwig et al. (2010) that: *We found that innocent and guilty suspects were similar in terms of level of motivation, nervousness and impression management during an investigative interview. In contrast, there were large differences in planning and strategizing related to verbal content and information management of guilty and innocent suspects.*<sup>16</sup>

Discretion can also be caused by a desire to prioritize prevention efforts. It was stated by Police Scotland (2015) that Sir Robert Peel (1829) asserted: “*The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it.*” – Sir Robert Peel.<sup>17</sup>

Sir Robert Peel's thought above, is in conformity with the idea that: “Legal action is the optimum remedium for the crime” Therefore, prevention is the first drug in the problem of crime. Today, the thoughts of Sir Robert Peel above, become a reference for various modern police agencies in the world to develop crime prevention programs so that the overall implementation of the duties and functions of the police with its main center is the crime prevention.

Crime prevention is closely related to budget and logistical efficiency, as submitted by the National Crime Prevention Council (2013): *This strategic plan focuses on the years 2013 through 2018. It also looks to the future. It does so because anticipating crime risk and impact is vital to prevention and saves both lives and money.*<sup>18</sup>

From the above context, it is clear that crime prevention is one form of police discretion and the implementation of discretion affects the efficiency of the budget and logistics.

The deadline for prevention is actually to the stage where a crime has occurred, so that there are overlapping dimensions between crime prevention and coercion against crime. This

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<sup>14</sup>Joseph D. McNamara., *Policing Diverse Communities.* (E-jurnal USA, U.S. Department of State/Volume 15/number 10, published April 2011) <http://www.america.gov/publications/ejournalusa.html>, E-mail: eJournalUSA@state.gov.

<sup>15</sup>Eugene O'Donnell., *Fostering Ethical and Humane Policing* (E-jurnal USA, U.S. Department of State / Volume 15 / number 10, published April 2011) <http://www.america.gov/publications/ejournalusa.html> , E-mail: eJournalUSA@state.gov

<sup>16</sup>Hartwig et al. *Impression and Information Management: On the Strategic Self-Regulation of Innocent and Guilty Suspects* (John Jay College, City University of New York, USA *The Open Criminology Journal*, 2010, Volume 3) pages 16. E-mail: hartwigmaria@gmail.com

<sup>17</sup>Police Scotland, *Crime Prevention Strategy.* March 2015

<sup>18</sup>The National Crime Prevention Council (NCPC), *National Crime Prevention Council Strategic Plan.* (Arlington: NCPC, 2013) .[www.ncpc.org](http://www.ncpc.org).

can be drawn from the clause: “(1) Police must use non-lethal force to control the situation. (2) The use of non-lethal force as referred to in paragraph (1) may use equipment in accordance with police equipment standards. (3) The use of equipment as referred to in paragraph (2) is intended to: a. protect police officers or others, from the attacks that can cause death or serious injury; b. protect the property; c. restrain individuals from trying to resist”<sup>19</sup> so it is clear that even though the crime has occurred, the context of prevention still exists, which uses non-lethal force.

Discretion is also caused by the attraction of various interests (among various interests), where the middle ground, or the best decision, is the action that has the least negative consequences, that is the condition that the decision maker must choose.

In the context of pre-discretion. Predictable discretion does not seem too complicated because discretionary decisions have been prepared administratively and involve many parties. Such discretion can be seen from the preparation of diversion of traffic flow, sustainable security systems, management of activities in the implementation of world sports security, or music concerts and so on.

Unpredictable discretion becomes a very complicated thing because generally the decision of discretion does not involve many parties and has very limited time constraints such as steps to overcome congestion due to a traffic accident, or it could even be less than a second, such as the decision to or not shoot perpetrators of crimes that threaten the lives of officers and the lives of the public.

Some complicated things also happen during discretion. Complicated matters include, among others, the discretion that must be on the right time. Discretion that is not on the right time cannot be said to be discretion but it is very likely to be categorized as police abuse of power.

Discretion must also be on the right target, because discretion that is not on the right target is not discretion but an unlawful act.

Discretion ignores the applicable laws and regulations within a certain time limit, certain place, but shall not conflict with applicable laws and provisions. This context might be confusing, but it can be explained briefly that when the discretion is complete then the problem can be put back into law and the applicable provisions, without reducing the substance of the law. This means that discretion remains in a certain legal context and there are benefits of the law.

Discretion is the last option. Basically, if the situation and conditions that develop can be controlled by standard or normative procedures, there is no need for discretion. The emergence of an event or activity that is not normal causes the need for discretion. Thus, it is clear that discretion is the last option.

Abnormal activities certainly cause various settlement options. The various problem solving options must be analyzed in order to find the best settlement option with the lightest negative risk; that's why discretion is the top choice for solving problems.

Shortly afterwards, the discretion is carried out a very vulnerable condition, because the momentary conditions determine the executor of the discretion to commit acts of abuse of power or to settle the discretion. This is very clearly illustrated from the thoughts conveyed by Jeffrey L. Johnson (2007): “*The line between reasonable force and a criminal excessive force beating is thin indeed. There is no middle ground, no buffer zone. It's either reasonable or*

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<sup>19</sup>Republic of Indonesia National Police., Regulation of the Head of the Republic of Indonesia National Police No: 6 Year 2005 concerning Guidelines for Action, For Members of the Indonesian National Police, in Using Police Force article 5.

*criminal. One extra baton strike, shove or control hold can make the difference between an officer doing his job and being sent to prison.*<sup>20</sup>

Jeffrey L. Johnson (2007) argued that there was a very rapid or temporary transition of conditions between reasonable force as the final limit of discretion to abuse of power as a criminal act, that is, an action that led to the implementation of discretion into prison. Of course the evaluation of such an instant time requires careful and thorough examination, using various perspectives from various disciplines of knowledge.

The discussion of discretion becomes even more complicated when there is an overlap of one discretionary action with another. An example of the overlapping state of discretion with other discretion occurs when a back-up police officer sees a situation where: (1) the perpetrators of crimes that have been arrested by their colleagues, or (2) there are groups of people who want to play judges, or (3) the public has ignored the warning of the arresting officer. The condition of the back-up police is in a discretionary choice to protect the perpetrators, and/or to protect his partner, and/or to protect the public, and/or to protect and secure all of them. Of course, this condition requires skill and judgment ability.

#### **4. Conclusion**

Based on the various discussions that have been presented, it can be concluded that: (1) Discretion is a method (mission) to make a balance between existing situations and conditions (reality) with expected situations and conditions (vision). The balance that results from discretion is very likely not in accordance with formal expectations, however, negative effects do not occur or negative effects are minimal; (2) Discretionary actions relate to the interests of many parties, namely the decision makers and executors of discretion, parties directly involved or those who are not directly involved but also receive the impact of decisions and actions of discretion. As a result of these conditions, discretion will be seen as something good by those who feel that they get a benefit from it, and is perceived as something negative by those who feel disadvantaged. With this limitation, discretion must be a discretion that meets the criteria of good and right, thus minimizing negative views; (3) Because of the two points above, discretion must be carried out by the right person, in the right place, and at the right time.

The entire discussion and conclusion about discretion shows that the center of discretion lies in the decision maker and discretion implementer; therefore, discretion is an ability or skill to judge.

Of course, the discussion about discretion does not stop at the stage of understanding that discretion is ability or skill to judge, so further research on discretion is expected to focus on discussion of morality in discretion or focus on discretion that is part of the standard operating procedure (SOP).

#### **5. Future research**

For future research agendas, it must also be carried out in other public sectors that provide public services, such as courts, taxation, health and research approaches using a mix method that combines quantitative and qualitative approaches so that more varied and deeper results can be obtained.

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<sup>20</sup>Jeffrey L. Johnson, *Use of Force and The Hollywood Factor* (Park Ridge-USA: AELE Monthly Law Journal, AELE Mo. L. J. 501, Special Articles Section - April, 2007) pages 503

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