



**THE IMPLEMENTATION OF DISCRETION ON CRIMINAL  
SETTLEMENT IN THE THEFT CASES**

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**Abstract**

On criminal law enforcement in Indonesia based on the principle of legality, especially in the case of theft criminal acts is necessary understanding of the purpose of punishment. Theft is a crime that has been formulated in the Indonesian Criminal Code, under Article 362. But punishment is not always done although the formulation of the offense is met because it sees in terms of subjective considerations of law enforcement. This research is normative research, so all data obtained in this research using secondary data. The results of this research are on the application of discretionary in settlement of criminal cases in the case of theft guided by the purpose of punishment and theories in the implementation of criminal law enforcement. So it is more to settling disputes out of court by using *restorative justice* approach

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## INTRODUCTIONS

Law enforcement is a form of implementation of the norms that live in society both legal norms, social norms, religious norms as well as customs norms in society. Bernard L Tanya said that the implementation of a law enforcement in society is being a duty of law enforcer that to be carried out<sup>1</sup>. If we look at the opinion of legal experts Indonesia, Satjipto Raharjo that in carrying out the law enforcement there are several things that need to be considered, especially the relationship between law enforcement and the communities, because law enforcement is not an activity that the pattern of implementation is a stand alone, but always correlate between law enforcement and communities so that the goals of law enforcement can be achieved<sup>2</sup>.

Law enforcement performed by some components of the criminal justice system in Indonesia that begin with the process of investigation conducted by the police, the prosecution conducted by the prosecutor, then the inspection process before the court made by a judge towards the decision that the free decision or *Vrijspraak*, the offender free from any claims *Onslag van alle Rechtvervolging* and the offender sentencing or *Veroordeling*. Although there are still others institutions that are a system in criminal justice such as advocates and lawyers, and prisons as a place for the execution of the convicted persons, but who became a pioneer in a judicial process is the police. Citing the opinion of Marcus Priyo

Gunarto said that the police as an investigator institution which is an entrance of a criminal case that is expected and must have sensitivity to a case to be handled, can provide an assessment of a case whether it is feasible or not to continue the next process<sup>3</sup>.

Some examples of theft cases that occurred in our country of Indonesia conducted by a person who can be considered a controversy of society because many posts in social media who deplore a process to the court like the case of "Nenek Mina" a thief 3 pieces of cocoa owned by PT Rumpun Sari Antan (RSA) Who was sentenced as long as 1 Month 15 Days with a trial period of 3 months<sup>4</sup>. Then the case of Kholil (51) and Basar (40) who stole 1 watermelon in the garden belonging to Darwati (34) resident of Ngampel, Mojoroto so Tuesday the 24th of the month 11 of 2009 underwent the inaugural session<sup>5</sup>. Then the case of Asyani (63) is accused of stealing seven rod of teaks owned by forestry which sentenced as long as 1 year and a fine 500 million rupiah subsidiary one day imprisonment with probation 15 months has dropped a decision on Thursday 23 April 2015<sup>6</sup>. From some examples above are a form of punishment against theft offense committed by a process in the criminal justice system in Indonesia. But in the purpose of sentenced to achieve a justice in society is necessary a

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<sup>1</sup> Bernard L Tanya. 2011. *Law Enforcement in the Light of Ethics*, Yogyakarta: Ghenta Publishing. p. 25

<sup>2</sup> Satjipto Raharjo. 2009. *Enforcement A Sociological Review*. Semarang: Genta Publishing. p. 31

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<sup>3</sup> Marcus Priyo Gunarto. 2000. "The Attitude to Convict that Oriented On Purpose Punishment". *Mimbar Hukum Journal*, Volume 21 Nomor 1. P. 94

<sup>4</sup> [http // m.detik.com / news / news / that](http://m.detik.com/news/news/that) uploaded on Thursday Date 19/11/2009, at 15:24 pm

<sup>5</sup> [http // m.detik.com / news / news / .](http://m.detik.com/news/news/) that uploaded on Thursday Date 24/11/2009, at 18:48 pm

<sup>6</sup> [Lipsus.kompas.com / topikpilihanlist / 3492/1 / justice. untuk.nenek.asyani.](http://lipsus.kompas.com/topikpilihanlist/3492/1/justice.untuk.nenek.asyani) downloaded on Saturday, December 10, 2016

subjective action of law enforcers, especially investigators in this case the police, subjective action that intended is the act of discretion against a case, especially to the case examples mentioned above. In the law enforcement refers to the opinion of Muladi cited by Sadjijono that there are some concepts in law enforcement which consists of three things to note: The concept of law enforcement that is total or *total enforcement concept* which requires all values that are behind these legal norms enforced. Full enforcement concept, realize that the concept of total should be limited to procedural law for the protection of individuals. The concept of actual law enforcement or the *actual enforcement concept* that emerged after believed the discretion in law enforcement because of the limitations, both with regard to infrastructure, human resources, the quality of regulations and poor public participation<sup>7</sup>.

The emergence of discretionary on the police is an unavoidable job because discretion is not an option but rather a necessity in the police action in assessing a case<sup>8</sup>. Regarding to the important a discretionary act on a criminal case, especially in offenses that can calculate the amount of damages as well as to repair or restore the original shape. The formulation of the problems of this research are: how are the pattern of discretionary application conducted by the investigator in the theft deliberation at law enforcement and how are the application of punishment theory in the implementation of discretion so as to give a justice in society.

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<sup>7</sup> Sadjijono. 2008. *Police in the Development of Law in Indonesia*. Yogyakarta: p. 70

<sup>8</sup> M. Faal. 1991. *Screening Criminal Acts by Police (Police Discretion)*. Jakarta: Pradnya Paramita. p. 17

## RESEARCH METHODS

In compiling this research using normative research methods that use how to trace the various library materials both journals and books that are related to the issues to be discussed in this research. In the normative study tend to library materials as secondary data, the scope of normative research at the level of legal principles<sup>9</sup>.

This research also uses empirical juridical, namely legal research using secondary data as the first data, followed by primary data or field data, as a means of collecting data consists of the study of documents, observation and interview.

## FINDINGS AND DISCUSSION

### 1. Patterns of Discretion Application Conducted by Investigators on the Criminal Theft in Law Enforcement.

#### 1.1 Discretion in the Duties of Police

Police is a tool of the state as law enforcement, so that the tasks that being an obligation must reflect the sense of guidance and protect the society. Police duties in preventing and combating crimes, maintaining security, maintaining public order. In carrying out such a task the police divide into three components of operational driving:

1. Subject, is the composition of police power consisting of units of the functions of Detective, Traffic, Samapta, Bimmas, Intel and others.
2. Methods compiled in the operation of the Police.
3. Objects in the form of kamtibmas interference, in the form of; crime,

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<sup>9</sup> Soerjono Soekanto and Sri Mamudji. 2001. *Legal Research Normative*. Jakarta: Grafindo Persada. p. 13

violations, traffic accidents, social irregularities, and others<sup>10</sup>.

The police in performing their duties as law enforcement have the authority or function based on two principles:

- a. The principle of legality, meaning that all police actions must be guided by the rules or legislation. If in their actions deviate from the guidelines then the police were dealt with.
- b. The principle of utility or benefit means that the police action which is the obligation and responsibility to take action according to self-assessment for the public interest so that all the actions can be considered valid, this is some view that the police action is given freedom in carrying out the task to be more successful<sup>11</sup>.

Police duty is not only related to the implementation of law but more broadly. The task has actually blended with some aspects of daily life in society, because the consequences of the main tasks of the police include various kinds of maintenance and prevention activities, such as maintaining order and security, the safety of people, goods, society, preventing and eradicating the spread of community diseases. As the main task not only to organize the law in a narrow sense, but also to organize the law in a broad sense in a creative way so that there is freedom in acting so that the application of discretion can be done<sup>12</sup>. In the application of police discretion in this case as the investigating action taken can be considered valid if the

action was based on the authority and power. Actions taken based on the principle *pligmatigheid* must meet the elements of the obligation as a condition of the action was considered legitimate<sup>13</sup>. Abintoro Prakoso cites the opinion of Djoko Prakoso said that the police discretionary authority against repressive measures and preventive actions of police officers must consider the principles of self-assessment as a requirement for applying discretion:

- a. The purposes principle (notwending, noozakelijk)

This principle determines that discretionary action can be done by looking at situations and conditions that prioritize human rights, if not done will have a negative impact on the public interest or communities.

- b. The problem principle as directive (sachlickzakelijk)

This principle of action that needs to be taken should have connection with the problem being addressed. In the application of discretion, police must be completely objective and has no interests or motives that are private and free from collusion, nepotism, corruption and provide benefits to the institution.

- c. The purpose principles as the measurement (zweckmasigdoelmatig)

This principle requires that action to achieve the objective must use the right method or method along with the subjects performing the actions really have good knowledge and science. For example, if a case is committed a refresive action using a

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<sup>10</sup> Kunarto. 1997. *Behavior of Police Organizations*. Jakarta: Cipta Manunggal. p. 233

<sup>11</sup> Kunarto. 1997. *Ethics Police*. Jakarta: Cipta Manunggal. p. 79

<sup>12</sup> Satjipto Rahardjo and Anton Tabah. 1993. *Police Actors and Thinkers*. Jakarta: Gramedia Pustaka Utama. p. 28

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<sup>13</sup> Visi Riski Brigitta Azhar. 2013. *Discretion Crime Police in Drug Use by Children According to Law No. 2 of 2002 about the Indonesian National Police*. Research Report Faculty of Law, University of Mataram. p. 11

criminal law means to cause great losses then the action does not need to be done  
d. Principle of balance (everedig)

Members of the police in doing their obligation both preventive and refresive in preventing crimes and combating crimes must be able to calculate between action and effect, it is often in criminalization and decriminalization, even it is a criminal act if the impact of repressive action is greater than the benefits should be considered<sup>14</sup>.

As a reason for the police to carry out an act of discretion are: there is no such legislation so complete that it can regulate all human behavior, there are delays to adjust legislation towards developments of society, resulting in uncertainty, the lack of money to applied the legislation as required by the legislator, the existence of individual cases requiring special handling<sup>15</sup>. Similarly with the opinion of Hon Edward F Wait that police officers in the line of duty when dealing with a case should not be doing an action proceedings faced but need the expert opinion to be able to decide clearly the efforts made to law enforcement in certain actions<sup>16</sup>.

## 1.2 The Application of Discretion on the Criminal Theft

Definition of discretion that is expressed in English is discretion is power authority conferred by law to action on the basic of judgment or conscience, and its use is more an idea of moral than law, with the meaning as a power or authority to do

under the law for consideration and their beliefs and emphasizing moral judgment rather than legal considerations<sup>17</sup>. If we see an example of the case that had made discretionary action by police of DIY about cases of theft accompanied by violence ever conducted in 2015 with completely 1 case<sup>18</sup>. In the second book of the Criminal Code about crimes chapter of theft under Article 362 of the Criminal Code or Wetboek van Strafrecht which stated: whoever took the stuff something wholly or in part belonged to another person, with the intent to be held unlawful, punishable as theft, with imprisonment five years or a fine sixty rupiah. Then if we see the provision of Article 365 (1) of the Criminal Code about theft with the following violence: threatened with a maximum of nine years imprisonment, theft is preceded, accompanied or followed by violence or threat of violence against persons, in order to prepare or facilitate theft, or in the case of being caught red-handed, to allow for self-escaping or other participants, or to retain possession of the goods they have stolen. Paragraph (2) stated: threatened with a maximum imprisonment of twelve years: in point 4: if the act resulted in severe injuries.

If it describes the provisions of Article 362 of the Criminal Code concerning theft, there are elements that indeed must be met can be said of a criminal act of theft such as:  
a. Whose element, this element means that the offender of theft is a person as a legal subject brought under legal rights

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<sup>14</sup> Abiontoro Prakoso. 2013. *Renewal of Juvenile Justice System*. Yogyakarta: Laksbang Grafika. p. 168-169

<sup>15</sup> Soejono Soekanto. 2004. *Factors Affecting Law Enforcement*. Jakarta: Raja Grafindo Persada. p.7

<sup>16</sup> Hon Edward F Wait. *The American Institute of Criminal Law and Criminologi*. Vol. 1. No. 5 (Jan 1911) PP. 794-795. Published by: Northwestern University School of Law Sable. *Journals* . p. 140

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<sup>17</sup> M. Faal. 1990. *Screening Criminal Police or Police Discretion*. Jakarta: Pradnya Paramita. p. 15

<sup>18</sup> Muhammad Ikbal. 2016. *Application of Discretion By Police in Yogyakarta Viewed from Policy of Criminal Law (Penal Policy)*. Thesis. Master of Law Faculty, University of Gadjah Mada. Yogyakarta.

and obligations. The person must be able to responsible. In the trial court, to prove the element of "whoever" is a formal requirement which, include the full name, address, date of birth, and religion.

- b. The element of "taking stuff" meaning goods, here are not only tangible goods, but also intangible goods.
- c. The element of "wholly or partially belongs to someone else" means the goods are taken belongs to another person, either in part or in whole.
- d. The element "with the intention of having" the words "with intent" indicating that the crime of theft form are intentional. That is, the offender deliberately took the item for the purpose of possession. In criminal law the form of error consists of deliberate and negligent. Deliberate based on *weten en Wilen* or the will and knowledge, while the omission is less of carefulness or probe-alleged of offender towards the events that might occur.
- e. The element of "unlawful" means the act of taking things done in ways that are contrary to law or against the law<sup>19</sup>.

In the offense of theft which has been stated above with some elements, that the offense of theft must be criminalized but punishment also requires considerations so not causes a harm in society and cause injustice in society. If all deeds of the elements of the offense are punished then there is no need for any theories of criminal responsibility, and no longer need to describe the elements of criminal acts set forth by some legal experts. The Indonesian Criminal Code does contain criminal matters such as Article 44, Article 48,

Article 50, Article 51, but the aforementioned Article of theft is out of the context of the existence of criminal negation.

In the opinion of Soerjono Sukanto citing the opinion of Roscoe Pound and Lafavre applying discretionary action is necessary in law enforcement, because the discretion is between law, morals and ethics, so that in law enforcement not only implement the provisions of the law but also must pay attention to the values of social rules and behavioral patterns of society<sup>20</sup>. If cites the opinion of Sukarton Marmosudjono one of which must be considered in law enforcement is the approach that should be used, such as judicial approach, in this approach a lot of things need to be considered because this approach is the most important in law enforcement, therefore, to reach social justice is needed socio-political and socio-cultural approach, so it can support the development and unity of the nation and sense of social justice can be fulfilled in the life of nation and state<sup>21</sup>.

## **2. The Application of Punishment Theory of Discretion Implementation So Can Give Social Justice**

### **2.1 The Theory of Punishment**

In the theory of punishment from some literature or reference that we often encounter there are 3 theories namely: absolute theory, relative theory, combined theory, but with the development of the era then the new theory of punishment appears that is contemporary theory. If it is briefly described one by one of the above

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<sup>19</sup> Eddy OS Hieriej. 2002. *Theory and Law of Evidence*. Jakarta: Erlangga. p. 37-38

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<sup>20</sup> Soerjono Sukanto. *Op. cit.*

<sup>21</sup> Sukarton Marmosudjono. 1989 *Law Enforcement in the State of Pancasila*. Jakarta: Pustaka Kartini. p. 36

mentioned penal theory which begins with the absolute theory that this theory in the opinion of Adam Chazawi says absolute theory is born in the classical concept in criminal law which is more to a retaliation because the reason of this theory, the retaliation is the legitimacy of punishment<sup>22</sup>. Then the theory of relative or *ne peccetur* which has the purpose of sentencing is to public order and prevent crime, if we see the views of Plato, Seneca, Feuerbach, about the purpose of sentencing in view of relative theory that is to prevent more crimes and more to provide a sense of fear from legal provisions although the application of criminal is not a primary objective<sup>23</sup>. It is contrast with the theory of absolute and relative theory, the combined theory that coalition of retaliation and public order, according to Vos cited by Eddy OS Hieriej that retaliation was actually an order to protect public order and protect the public, the opinions of Vos and Zevenbergen are almost same that the essence of criminal rather an *ultimum remedium*<sup>24</sup>. Of the several theories of punishment that has been described above with the progress and development of the era it appears the name contemporary criminalization theory that is the pattern or shape of the settlement in criminal law, the settlement preferably carried out by perpetrators and victims by seeking agreement to seek solutions and peace between the two parties. According to Eva Achjani Zulfa said that the patterns of

settlement made by the offender or victims in a peaceful manner is a form of *restorative justice* that recovery to its original shape<sup>25</sup>. That the implementation of restorative justice did not require sentencing to be borne by the offender, but the actors have an obligation to be borne or compensation to be paid to recover damages and losses suffered by the victim and the community. In determining the amount of a compensation to be borne by the offenders of the crime depends on the agreement of both parties, if the penalty that must be accepted by the offender any long that must be followed when the through judicial and got a ruling that fixed or *incracht* will not heal the wounds suffered by the victim and community. But with the compensation of collective bargaining by involving several stakeholders, the victim, the offender, the communities will restore all and reconcile all parties<sup>26</sup>.

*Restorative justice* is a concept or results of the procedure to give thought to respond to the development of a criminal justice system with emphasis on the needs of communities and the victims were deemed excluded by mechanisms that work in the criminal justice system that existed nowadays. As a new framework for thinking in responding to a criminal offense for law enforcement, it emphasizes the willingness of the offender to correct the harm it has caused as a form of responsibility, the willingness of the victim to forgive, the willingness of the community

<sup>22</sup> Adam Chazawi. 2007. *Lessons of Criminal Law, Section 1*. Jakarta: Raja Grafindo Persada. p. 157

<sup>23</sup> Jan Rummelink. 2003. *Criminal Law and the Comments of Foremost Articles of Netherlands Criminal Code and Its Equivalent in the Code of Penal Indonesia*. translated by Tristan Pascal Moeliono. Jakarta: Gramedia Pustaka Utama. p. 605

<sup>24</sup> Eddy OS Hieriej. 2014. *Principles of Criminal Law*. Yogyakarta: Cahaya Atma Pustaka. p. 35

<sup>25</sup> Eva Achjani Zulfa. 2014. *Basic Concepts of Restorative Justice*. delivered in the event of criminal law and criminology training "Principles of Criminal Law and Criminology and Developments Today" Cooperation Faculty of Law, Gadjah Mada University with Community of Criminal Law and Criminology, Yogyakarta, February 23 to 27, 2014.

<sup>26</sup> Yoachim Agus Tridiatno. 2015. *Restorative Justice*. Yogyakarta: Cahaya Atma Pustaka. p. 27

to engage in the settlement of the case and the willingness of law enforcers to enforce the law fairly<sup>27</sup>.

*Restorative Justice* was first discovered by Albert Eglash in 1977 with a concept that is built in these terms that the principle of restitution involving the parties between victims and perpetrators in the process of reparations for victims and rehabilitation for offenders<sup>28</sup>. Settlement of the case through *restorative justice* is long overdue in society, even this way has been practiced thousands of years ago although done in non-formal. Indonesia in several regions of completion is done by means of *restorative justice* is often referred to as settling disputes amicably and thus has become a tradition in society, the form of this practice is also growing in some countries such as Europe, America, Canada, Australia, and New Zealand, although each of these countries have different terms but in principle are same<sup>29</sup>.

## 2.2 The Implementation of Discretion so It Gives Social Justice

Justice is the most fundamental of all policies, especially in the law enforcement, justice is preferred because the law is always followed by justice, adegium saying "*Nihi lex esse von videtur quae justa non fuerit means something that is unfair then it is not law*". Citing Maryanto's opinion that justice is a law-and-fair attitude and character. Then also say that justice is a social value that has a very wide meaning,

even at a point can be contrary to the law as one of the social values. The measurement of justice is reaching the ideal area or within the realm of ideals, Plato a philosopher says that justice is based on knowledge of something good<sup>30</sup>. When connected with the law of universal purpose is to achieve a peaceful, just, prosperous and happiness. The realization of the aims of the law inherent with the nature of human nature as a creature of God, the form of real life for law in its implementation is influenced by several factors, but must consider factors such as: geography, demography, natural wealth, national, culture, defense and security<sup>31</sup>.

The aims of the law can also be explained by reference to the three opinions of the concept of ethical concept, utility concept, formal juridical concept. Explaining one by one from each of these three flows from the ethical concept, that sees the purpose of the law as justice, whereas the utility flow explains the purpose of the law is to provide the greatest benefit, when quoting Bentham and Beccaria in his writings entitled "*introduction to morals and legislation*" to say that the State and Law solely for the sake of true benefit to the happiness of society as a whole. Then the explanation of formal juridical concept explains that the purpose of law is to solely attain legal certainty, the function of the law which runs so that it is expected to create order<sup>32</sup>. Nevertheless it is with the purpose of the law by using three flaws, but if law and justice are placed in a container that is

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<sup>27</sup> Yunan Hilmy. " Law Enforcement By the Police Through Restorative Justice Approach in National Legal System, The Center for Research and Development of the National Legal System". *Journals*. Jakarta. p. 249

<sup>28</sup> James Dignan. 2005. *Understanding Victim and Restorative Justice*. Open University Press. p. 94

<sup>29</sup> Marlina. 2012. *The Child Criminal Justice in Indonesia, Concept Development Diversion and Restorative Justice*. Bandung: Reflika Aditama. p. 180-181

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<sup>30</sup> Maryanto. "Reflection and Relevance Thought Philosophy of Law For Development Science Law". *Journal of Law Faculty of Law, Sulian Agung Islamic University, Semarang*, Vol. 13 (1) 2003. p. 52-54

<sup>31</sup> Slamet Supriatna. 1987. *Fundamentals of Legal Sciences*. Jakarta: Akademika Presindo. p. 19-20

<sup>32</sup> Ahmad Ali. 1988. *Raising the Curtain Law*. Jakarta. p. 64-65



not separated by cited opinions Gustav Radbruch that in law enforcement justice is the most central in the law, although certainty and expediency is not the aspect that stands alone and apart from justice because it is within the framework of justice itself<sup>33</sup>.

If citing Lawrence M Friedman's opinion about the discretion that his understanding has a wide variety and meaning but rather a very subjective consideration, meaning that when faced with a case in law enforcement may choose alternatives because if applying the law has bad implications for the protection and justice of the communities because the rules of law has several aspects and has a double meaning both to the legal officer and to the society<sup>34</sup>. To give a sense of justice in society in the handling of criminal acts of theft or burglary offense needs to be done as an approach in law enforcement is called *restorative justice approach*. When referring to the opinion of Sharpe cited Susan Allison Morris and Gabrielle Maxwell that the 5 principles of restorative justice in resolving the criminal case so that it can be done discretionary action by the police are:

- a. Requesting the participation of other parties to the agreement of both parties, the victim and the offender so that the community may be involved or an interested person interested in the settlement of the act.
- b. Everything that has been damaged must be corrected, the victim and the offender repair each other and must separate themselves from the mistakes

and fears, they need to require the solution that underlies the conflict or the problem of crime on both sides in order to use the right mind.

- c. Directly look at the situation to be accountable, although it is not easy that the offender must face the fact that they have violated the law, they should also meet with the person who suffered the loss and see how their actions against other damages. Various interested parties expect an explanation of what happened to the victim and the community so as to make sense of it. Parties will always expect to take action to repair the damage.
- d. Unite the things that have split the cause of the crime between people in the society that caused enormous damage. The restorative process works directly towards peace for victims and offender to reintegrate into society. Sticking to the restorative view between the victim and the offender is only temporary and non-permanent. Each of them thinks about the future and forgets the past. Not too long establish the cause of loss and suffering.
- e. Can see ways to strengthen the community in maintaining order so that no damage occurs<sup>35</sup>.

If we see the reason for a discretionary action against the offense of theft toward the offender is not merely a daily quest to meet his needs, but it is an unconscious condition that the deed done is a theft offense. When viewed from the theory of error raised by

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<sup>33</sup> Bernard L. Tanya. 2011. *Political Law Interests of Joint Agenda*. Yogyakarta: Ghenta Publishing. p. 67

<sup>34</sup> Lawrence M Friedman. 2009. *Law System*. Translation Nusamedia Ujung Berung Bandung. p.42.

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<sup>35</sup> Allison Morris and Gabrielle Maxwell. 2001. *Restorative Justice for Juveniles*. Oregon. Oxford. Hart Publishing Portland. p. 5-6

Noyon and Langemeijer cited by Eddy OS Hieriej expressed his opinion: *met te Zeggen dat iemand schuld heeft druken wij uit, dat zijn psychische betrekking tot zijn ook overigens onder de omschrijving der strafwet vallen gedrag zoo is, dat zij straf rechtvaardigt, 1) dad de dader den feitlijken aard van zijn gedraging en van daarmede gepaard gaande omstandigheden, voor zoover deze laatste van belang zijn, heeft gekend of had behooren te kennen; 2) dat hij ook de onrechtmatigheid van zijn gedrag heeft ingezien of had behooren in te zien; 3) dat niet een ongewone psychische toestand, die op zijn gedrag van invloed is geweest, bestraffing misplaatst doet voorkomen en 4) dat de dader niet heeft gehandeld onder den indruk van overweldigende voorstellingen, waarbij men geen ander gedrag van hem had kunnen verlangen* which have meaning when declaring a fault, then the psychic means he has fulfilled the formulation of the offense of criminal laws, as such may be liable: 1) the offender knew or should have known of the nature indeed, of his own deeds and the circumstances that accompany them as long as it is important; 2) that he is also aware of or should be aware of his actions unlawful; 3) that there is no unusual psychic circumstance affecting his conduct so that the criminal is out of place and 4) the offender does not act because of the influence of the assumptions so that it can not be expected to do otherwise<sup>36</sup>.

From the above error theory when associated with the offense of theft committed by someone who has been exemplified above such as Minah, Kholil and Basar, Ashyani. To quote Soejono Soekanto's opinion that the factors that can influence a person to be able to commit theft or offense of theft are due to exogenous

factors that are created from the outside of an offender and are often said to be quite complex and varied factors due to social inequalities, economic disparities and injustices, the above is an example of the cause of the occurrence of theft that comes from outside their self<sup>37</sup>. If see the quote of Eddy OS Hieriej opinion that says people who commit a criminal act is not necessarily punished depending on whether the person can be held accountable for criminal or not because the most important element of criminal liability is a mistake<sup>38</sup>. It should be explained in terms of a criminal accountable by referring to two concepts that indeterminism and determinism, a criminal act can be seen to have a mistake or not depends on the concept which can be said to be guilty, indeterminis concept view that human beings have free will in action. Free will is the basis of a decision of the will. If there is no free will, then there is no mistake. Thus there is no reproach so there is no criminal prosecution. Then the determinist concept view that human have no free will. The decision will be determined solely by the nature and the motif that receive stimuli from within and from outside. That is, a person can not be found guilty because they have no free will<sup>39</sup>.

Similarly, if it is associated with the theory put forward by George P Fletcher in one theory abolition of the criminal which is a theory that is grounded in *the utilitarian theory of excuse* or theory expediency excuses as part of *the utilitarian theory of punishment* or theoretical benefits of a sentence, this theory is called *theory of pointless punishment* means

<sup>36</sup> Eddy OS Hieriej. *Op.cit* . p. 127

<sup>37</sup> Soejono Soekanto. 1983. *Factors Affecting Law Enforcement* . Jakarta: Rajawali Press. p. 126

<sup>38</sup> Eddy OS Hieriej. *Op.cit*. P. 120

<sup>39</sup> *Ibid*. p. 122

punishment theory is not necessary<sup>40</sup>. Refers to Soejono Soekanto opinion that the offense of theft over if it is associated with the provision of Article 48 of the Criminal Code, which states, " *Whoever does a deed for the influence of force, not convicted*". When citing the opinion of Eddy OS Hieriej about power forced above that if characterize the power forcibly included in the justification or an excuse for such things become a big debate, but if it is removed from both of them can be described in postulate *quo alias non fuit licitum necessitas licitum facit* which meaning that force circumstances allowing what was previously prohibited by law<sup>41</sup>.

## CONCLUSIONS

With the changing times, sentencing has begun to shift in the direction of the settlement made by the victim and the offender are mediated by the investigator to obtain the agreement of both parties to achieve peace. The application of discretion committed by the police in the case of the offense of theft under Article 362 of the Criminal Code of course, is easy because the offense of theft by violence also can be applied the discretion by police on Article 365 paragraph (1) and (2), clearly indicates that the completion of the criminal case on offense both regular and theft with violence the main priority is the interests of victims and offender are preferred so as to obtain justice in society.

In the theory of punishment known as four theories are: absolute, relative, combined and contemporary, but the theory that fits in the application of discretion is contemporary theory, this theory more

emphasis on *restorative justise* . Settlement pattern on restorative justise approach is the approach that involves many parties both from the law enforcers, communities, families and victims and offenders.

Law enforcement is required on all kinds of offenses that have been formulated in terms of positive law, especially the Criminal Code, but need to look at and consider the implications for people who are looking for justice, if considered offenses that light in the Criminal Code contained in book II of crime many factors are taken into consideration for the proceedings until the court can be discretionary.

In the application of discretion against theft offenses are necessary with a strong reason based on the theories in sentencing, so that the actions to be carried out on a case or a criminal case does not cause a lot of controversy on the communities.

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<sup>40</sup> Eddy OS Hieriej. *Op.cit.* p. 211

<sup>41</sup> *Ibid.* p. 218

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