



## IMPLEMENTATION OF DIVERSION IN CRIMINAL CASES OF THEFT BY CHILDREN BASED ON LAW NUMBER 11 OF 2012 CONCERNING CHILDREN'S CRIMINAL JUSTICE SYSTEM

By

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### Abstract

Children are the next generation of the nation and have a long future journey and high aspirations. The psychological condition of children is still unstable, not independent, and easily influenced so criminal acts committed by children cannot be fully held accountable by the children themselves because children as perpetrators are not pure perpetrators but are also victims. When a child conflicts with the law, the child has the right to receive special protection. The research aims to determine the application of diversion in cases of criminal acts of theft by children and to determine the factors that become obstacles in the process of applying diversion to criminal acts of theft by children. The type of research used is normative juridical legal research, namely research that examines document studies using various secondary data such as statutory regulations, court decisions, legal theory, and research journals, and can be in the form of opinions by experts. The results of the research show that the implementation of diversion in cases of criminal acts of theft by children in Berau Regency has been successfully implemented in a coordinated manner among related institutions, where implementation is determined at all levels of case examination (investigation, prosecution, and trial). The obstacles faced in implementing diversion in Berau Regency are the lack of understanding of the community's thinking regarding the concept of diversion, the conditions and peace agreements not being achieved, and children not meeting the requirements for diversion. Police agencies and the Regional Technical Implementation Unit for the Protection of Women and Children (UPTD PPA) are expected to increase outreach to the community, victims, and victims' families regarding the concept of diversion and it is hoped that all levels of inspection will be more active in involving various parties who should be involved in the diversion process.

### Keywords:

**Children, Crime, Theft, Diversion**



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## 1. INTRODUCTION

Children are the next generation of the nation's ideals and have a longer future journey. Based on the Preamble to the 1945 Constitution of the Republic of Indonesia in the 4th paragraph, it is stated that the Indonesian state aims to protect the entire Indonesian nation and all of Indonesia's blood, promote general welfare, and educate the life of the nation. The phrase promoting general welfare and making the nation's life intelligent is directed at children because making the nation's life intelligent is carried out through the educational process in a learning context that generally contains children of all ages.

Childhood is a time when children cannot yet be independent, do not yet have full awareness, and their personalities have not yet been fully formed. In other words, children's psychological conditions are still unstable, not independent, and easily influenced. Under these conditions, the actions committed by children cannot be fully held accountable by the children themselves because children as perpetrators are not pure perpetrators but are also victims. Therefore, children should not be exposed to the formal criminal justice system if there is anything that is in the best interests of children in conflict with the law.

In today's reality, children often face deviant criminal behavior that violates public order and is contrary to statutory regulations [1]. In several cases, it was found that children's behavior was influenced by their immediate environment which hurt them. It is not uncommon for children in a state of neglect to be unable to fulfill their needs, giving rise to a desire to commit deviations. Children who commit criminal acts are known as "juvenile delinquency", namely behavior that is contrary to the rules and values inherent in society [2].

Criminal cases committed by children will have a huge impact on the child himself. The consequences of the formal justice process will directly or indirectly have a psychological impact on children. Most court decisions deprive children of their right to learn and receive protection in their growth and development. The important role of diversion is needed in protecting children's human rights. When a child commits a crime, there must be a solution. One of the crimes often committed by children is the crime of theft as regulated in article 362 of the Criminal Code which states "whoever takes something, which wholly or partly belongs to another person, to unlawfully possess it, is threatened with for theft with a maximum penalty of five years or a maximum fine of nine hundred IDR."

If you examine the sound of the article, there is the phrase "a maximum prison sentence of five years" which means that the crime of theft by children still allows for diversion because the penalty is less than seven years. The current juvenile criminal justice system refers to Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, the process mechanism must still go through a formal process like adults through investigations and inquiries by the police, prosecution processes by the prosecutor's office, and trials in court.

When children are placed in the formal criminal justice process, it is not uncommon to encounter treatment such as beatings, torture, or other inhumane acts. Indeed, not all law enforcement officers act badly like that, but as a part of the criminal justice system process, it has the potential to violate the basic rights of children as contained in Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection [3].

In this case, children who conflict with the law have the right to receive special protection, namely with a restorative justice approach through the diversion system. The criminal justice system contained in Law Number 3 of 1997 concerning Juvenile Courts has been reformed through Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, as an effort to overcome weaknesses in Law Number 3 of 1997.

In Article 1 paragraph (7) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, diversion is the transfer of the resolution of children's cases from the criminal justice process to a process outside of criminal justice. Diversion is regulated in Article 5 paragraph (3) that the

juvenile criminal justice system must strive for diversion. Apart from that, there is also Article 8 paragraph (1) which regulates the diversion process as follows: "The diversion process is carried out through deliberation involving children and their parents/guardians, victims and/or their parents/guardians, community counselors, professional social workers based on restorative justice approach."

The research aims to determine the application of diversion in cases of criminal acts of theft by children and to determine the factors that become obstacles in the process of applying diversion to criminal acts of theft by children.

## **2. THEORETICAL FRAMEWORK**

### **2.1 Definition of Children and Children's Rights**

According to the General Indonesian Dictionary regarding the meaning of child, it is stated that etymologically, child is defined as a human being who is still small or a person who is not yet an adult.

In Law Number 23 of 2002 concerning Child Protection, article 1 number 1, a child is someone who is not yet 18 years old, including children who are still in the womb. In Article 1 paragraph (3) of Law Number 11 of 2012, children are children who are 12 years old, but not yet 18 years old and have never been married. According to [4] Sugiri, during the process of growth and development, the child is still a child and only becomes an adult when the process of development and growth is complete. So the age limit for children is the same as when they become adults, namely 18 years for women and 21 years for men.

Every child will one day bear responsibility as the young generation who will continue the ideals of the nation's struggle. Efforts need to be made to protect and fulfill children's rights without any discrimination. Children's rights or human rights are ethical principles and international standards for actions towards children. This right refers to the United Nation Convention on the Rights of the Child in the United Nations Convention on the Rights of the Child (UNCRC) which regulates what things must be fulfilled by the state so that every child can grow as healthy as possible, be protected, have their opinion heard, receive education, and treated fairly [5].

Children's rights are fundamental rights that must be recognized and given to children. These children's rights apply to children who have parents and those who no longer have parents and also apply to neglected children. Children's rights are some of the human rights that must be guaranteed, protected, and realized by parents, families, communities, governments, and nations. Children's rights have been stated in several laws and regulations in force in Indonesia, including the 1945 Constitution of the Republic of Indonesia; Law Number 39 of 1999 concerning Human Rights; and Law Number 23 of 2002 concerning Child Protection.

## **2.2. Crime in General**

### **2.2.1. Definition of Criminal Acts**

The term criminal act comes from a term known in Dutch criminal law, namely *Strafbaar Feit*. *Strafbaar Feit* consists of three words, namely *straf*, *baar*, and *feit*. *Straf* is translated as criminal and law, *Baar* is translated as can or may *Feit* is translated as acts, events, violations, and deeds [6]. The legislators did not explain what is meant by the words "*strafbaar feit*". Simons defines *Strafbaar Feit* as an unlawful act that has been deliberately carried out by someone who can be held responsible for his actions, which is stated as punishable [7].

Apart from the term "*strafbaar feit*" in Dutch, another term is also used, namely "*delict*" which comes from the Latin "*delictum*" and in Indonesian the term "*delik*" is used. In principle, in general, there are two definitions of criminal law, namely *ius poenale* and *ius puniend*. *Ius poenale* is the definition of objective criminal law. According to Mezger, criminal law is a legal rule that binds a certain action that fulfills certain conditions to a consequence in the form of a crime [8]. A person

can be declared to have committed a criminal act, if the act has been regulated by law, by the Principle of Legality in Article 1 paragraph (1) of the Criminal Code which states, that no act can be punished except by the strength of the criminal regulations in the law. invitation that already exists, before the action is carried out.

Criminal acts are actions that are prohibited by a prohibitive legal regulation which is accompanied by threats (sanctions) in the form of certain penalties, for anyone who violates the prohibition [9]. In legislation, criminal incidents and criminal acts are also often called offenses. An offense is an act that can be subject to law because it is a violation of criminal law. According to Hans Kelsen, a crime is a condition where sanctions are given based on existing legal norms [10].

### 2.2.2. Elements of a Criminal Act

Every criminal act contained in the Criminal Code can generally be described into elements that occur from subjective elements and objective elements. The subjective elements of a criminal act, namely: (a) Intentional or unintentional (*dolus* or *culpa*); (b) The intent or purpose of an attempt or poking as intended in Article 53 paragraph (1) of the Criminal Code; (c) Various purposes or brands as found for example in crimes of theft, fraud, extortion, forgery, etc.; (d) Pre-planning or *voorbodachte raad* for example in the crime of murder according to article 340 of the Criminal Code; and (e) Feelings of fear or fear as included in the formulation of criminal acts according to Article 308 of the Criminal Code.

Meanwhile, objective elements are elements that are related to circumstances, namely under which circumstances the actor's actions must be carried out. The objective elements of a criminal act, namely: (a) the nature of breaking the law or *wederrechtelijkheid*; (b) the quality of the perpetrator, for example "the condition of being a civil servant" in a crime of office according to article 415 of the Criminal Code or "the condition of being a manager or commissioner of a limited liability company" in a crime according to article 398 of the Code Criminal Law Law; and (c) causality, namely the relationship between an action as a cause and a reality as follows [11].

The elements of a criminal act from the perspective of the law are as follows:

- (a) Behavioral elements  
A criminal act is about prohibition of action, therefore the act or behavior must be mentioned in the formulation. Behavior is an absolute element of a criminal act.
- (b) Elements of Resistance  
Law against the law is a reprehensible or prohibited nature of an action, the nature of which originates from the law (against formal law) and can originate from society (against material law).
- (c) Elements of Error  
Mistake or *schuld* is an element regarding a person's inner state or image before or at the time of starting the action, therefore this element is always inherent in the perpetrator and is subjective.
- (d) Elements of Constitutive Effects  
This element of constitutive consequences is found in material criminal acts (*material delicten*) or criminal acts where the consequences become a condition for the completion of the criminal act.
- (e) Elements of Concomitant Circumstances  
The elements of accompanying circumstances are elements of a criminal act in the form of all the circumstances that exist and apply in which the act is committed.
- (f) Elements of Additional Requirements to Be Criminally Prosecuted  
This element is only found in criminal complaints, namely criminal acts that can only be prosecuted if there is a complaint from the person who has the right to complain.
- (g) Additional Conditions to Aggravate the Penalty  
This conditional element is not a basic element of the criminal act in question, meaning that the criminal act could have occurred without this element.
- (h) Elements of Additional Requirements for Being Sentenced

This element is in the form of certain conditions that arise after the act is carried out, meaning that if after the act is carried out these conditions do not arise, then the act is not unlawful and the person who did it cannot be punished.

It is stated [12] that the elements of criminal acts also recognize formal elements and material elements, namely:

- (a) Human actions, namely actions in the broadest sense. Which means not doing anything that is an action and is done by humans.
- (b) Violating criminal regulations, in the sense that something will be punished if there is a previous criminal regulation that regulates the act, so the judge cannot accuse a crime that has been committed according to a criminal regulation, so there is no criminal act.
- (c) Threatened with punishment, this means that the Criminal Code regulates different punishments based on the criminal act that has been committed.
- (d) Committed by a guilty person, where the elements of error are that there must be a will, wish, or willingness of the person who committed the crime and that person did something intentionally, knowing and being aware of the consequences of his actions in advance. Error in the narrow sense can be interpreted as an error caused by the maker not paying attention to the consequences that are not intended by the law.
- (e) The responsibility that determines that a person whose memory is not healthy cannot be held accountable lies in the state of his soul.

## 2.3. Understanding Diversion in General

### 2.3.1. Understanding Diversion

The term diversion was first introduced in the formulation of the results of a national seminar on juvenile justice held by the Faculty of Law, Padjadjaran University, Bandung on October 5, 1996. Diversion is the possibility of a judge stopping or diverting/not continuing the examination of a case and examination of a child during the examination process before the court [13]. Diversion comes from the English word "Diversion", which is an idea, or thought, if with proper consideration to avoid stigma (evil brand) in children. At any time during the stages of the juvenile justice system, law enforcement officials of the juvenile criminal justice system (the Police, District Prosecutor's Office, District Court, and Correctional Institution administrators) are given the authority to divert the judicial process to forms of activities such as (a) delivery of guidance by parents or guardians; (b) warning, imposition of fines or restitution; and (c) guidance by the social department or community social institutions or counseling.

The concept of diversion and restorative justice is an alternative form of resolving criminal acts which are directed towards informal resolution by involving all parties involved in the criminal act which has developed in several countries in dealing with crime [14]. The essence of diversion is community deliberation or mediation. Mediation is a form of alternative dispute resolution (ADR) outside of court. According to article 1 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, diversion is the transfer of children's cases from the criminal justice process to a process outside criminal justice. Diversion is carried out to provide protection and rehabilitation to perpetrators as an effort to prevent children from becoming adult criminals [14].

Diversion efforts are a form of protection for children who conflict with the law by resolving cases as a diversion step from the judicial process to alternative processes outside criminal justice. The operation of diversion cannot be separated from the authority of investigators, public prosecutors, or judges as stated in Article 7 paragraph (2) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which states that diversion is carried out in the case of criminal acts committed:

- (1) Threatened with imprisonment for less than 7 years and;
- (2) Not a repetition of a criminal act that is adjusted to the provisions of the examination process.

### 2.3.2. Diversion Objectives

Diversion aims to find the best solution or path between the perpetrator and the victim. It is hoped that this diversion can achieve justice for both the perpetrator and the victim, the justice in question is dignified justice, namely justice that humanizes humans, not only towards the perpetrator but also towards the victim. In Article 2 of the Republic of Indonesia Government Regulation Number 65 of 2015 concerning Guidelines for Implementing Diversion and Handling Children Who Are Not Yet 12 (Twelve) Years Old, the objectives of diversion are:

- (1) Achieve peace between victims and children;
- (2) Resolving children's cases outside the judicial process;
- (3) Preventing children from deprivation of liberty;
- (4) Encourage the public to participate; And
- (5) Instill a sense of responsibility in children.

The most basic thing about implementing diversion is to avoid and keep children away from the justice process, so it is hoped that this will be a preventive step for children who conflict with the law so that they can return to the social community [15].

### 2.4. General Provisions Regarding Theft According to the Criminal Code

One of the chapters in book II of the Criminal Code is Article 362 of Law Number 1 of 1946 concerning the Criminal Code which states that anyone who takes an item, which wholly or partly belongs to another person, intending to possess it illegally. against the law, is punishable for theft by a maximum imprisonment of five years or a maximum fine of nine hundred IDR.

Article 364 of Law Number 1 of 1946 concerning the Criminal Code stipulates that the acts described in Article 362 and Article 363 number 4 are committed in a house or closed yard where the house is located if the price of the goods stolen is not more than two hundred and fifty IDR, punishable for petty theft by a maximum imprisonment of three months or a maximum fine of nine hundred IDR.

The theft regulated in this article contains mitigating elements from Article 362 of Law Number 1 of 1946 concerning the Criminal Code. The mitigating element is that the item stolen was not more than two hundred and fifty IDR, usually, this crime is called petty theft, and if a child commits a crime of petty theft, then the child can go through the diversion process.

Article 365 paragraph (1) of Law Number 1 of 1946 concerning the Criminal Code states that a maximum prison sentence of nine years is punishable for theft which is preceded, accompanied, or followed by violence or threats of violence against a person to prepare or facilitate theft. That is, to facilitate the theft, or if caught red-handed, to enable oneself or other participants to escape or to retain control of the stolen goods.

If a child commits theft with violence as stated in Article 365 paragraph (1) of Law Number 1 of 1946 concerning the Criminal Code, then the child has committed a criminal act with a penalty that is more severe than ordinary theft, therefore the child is not can go through the diversion process, but the child must go through the juvenile criminal justice process in a closed trial.

## 3. RESEARCH METHODS

The research location to obtain information related to diversion in criminal acts of theft by children, both those directly involved and those not directly involved, is the Berau Resort Police, Berau Regency Prosecutor's Office, Berau Regency District Court, and the Regional Technical Implementation Unit for the Protection of Women and Children, both of whom directly involved or not directly involved.

The research uses normative juridical methods, namely research that examines document studies using various secondary data such as statutory regulations, court decisions, legal theory, and research journals, and can be in the form of opinions by experts.

The data collected consisted of (1) primary data obtained through interviews; and (2) secondary data obtained from literature studies related to legal materials which include laws, all official research

documentation containing legal provisions, books, journals, articles, research results, and other relevant matters.

Data analysis uses qualitative analysis which is connected to theory and can be obtained from written materials such as laws, books, journals, and articles. After that, it is described by elaborating

### **3. RESULTS AND DISCUSSION**

#### **3.1. Application of Diversion in Criminal Cases of Theft by Children**

In the author's opinion from the results of the research conducted, theft by children that can be attempted through the diversion process is light theft, as in the case of a child who committed the crime of theft at a shop by taking a piece of bread for the child to consume. This incident is an example of a crime of light theft committed by a child and can be diverted at the same time at the scene by the police, in other words, the victim does not need to make a case report related to the crime of theft by a child to the police station.

In light of theft, we must be familiar with the term forgiving reasons, namely reasons that erase the guilt of the perpetrator of a criminal act, while the action remains against the law. So, the reasons for forgiveness are seen from the perspective of the person/perpetrator (subjective). For example, in the case of a child who is hungry and comes from a poor family, the child is forced to steal bread from a food stall to meet his own needs. So, in the author's opinion, children in this case do not need to go through the diversion process.

In Article 2 of the Republic of Indonesia Supreme Court Regulation Number 4 of 2014, it is stated that diversion is applied to children who are 12 years old but not yet 18 years old, even if they have been married but are not yet 18 years old, who are suspected of committing a criminal act. When a child who is not yet 12 years old commits a crime of theft, investigators and community counselors decide to hand the child over to their parents/guardians or include them in educational programs, guidance at government agencies, or social welfare institutions that handle the field of social welfare.

From the results of interviews with the Berau Resort Police, the Berau District Prosecutor's Office, and the Berau District Court, information was obtained that the diversion process at each level is by the provisions of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, and by the Regulation of the Supreme Court of the Republic of Indonesia Number 4 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System.

The diversion process is carried out after receiving the Notice of Commencement of Investigation (SPDP), law enforcement officials such as the Police, District Prosecutor's Office, and District Court are waiting for the research report conducted by the Correctional Institution (BAPAS) regarding the child's background in the family, residence, and environment. education. The report is in the form of a recommendation as to whether the child can use case resolution through the diversion process or not. If the report from the Correctional Institution (BAPAS) is in the form of a recommendation for resolving the case through the diversion process, then all levels of examination are obliged to undertake the diversion process in juvenile cases.

The legal officers involved held mediation by presenting the child and his parents/guardians, the victim and/or his parents/guardians, community counselors, and the Regional Technical Implementation Unit for the Protection of Women and Children. When mediation is carried out, law enforcement officers involved in the diversion process must wear civilian clothes and not wear togas. Apart from that, law enforcement officers must act humanely so that children do not feel intimidated and do not cause trauma to children who conflict with the law.

At each stage at the examination level, law enforcement officials such as juvenile police, juvenile prosecutors, and juvenile judges as facilitators in the diversion process are obliged to provide understanding to victims related to diversion that diversion is important to strive for so that we do not deprive children of their right to learn and receive protection in their growth and development. as well as finding the best solution or path between children in conflict with the law and victims. If diversion efforts in cases of criminal acts of theft by children fail at the investigation or police level, the case will be transferred to the prosecution or prosecutor level. If at the prosecution or prosecutor's level the diversion process fails, the case is transferred to the trial or court level, and the District Court is obliged to attempt the diversion process in cases of criminal acts of theft by children.

The diversion process that has been attempted at 3 (three) levels of examination, namely at the investigation level, prosecution level, and the court has failed, so the child's case will continue in the child trial process which will be carried out behind closed doors with law enforcement officers not wearing togas but wearing civilian clothes.

Thus, it can be stated that the implementation of the diversion process in cases of criminal acts of theft by children in Berau Regency implemented by the Police, District Prosecutor's Office, and the District Court is by applicable legal provisions based on Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

Criminal cases that were not successful in going through the diversion process in Berau Regency were cases of violent theft, motor vehicle theft which resulted in major losses to the victim, and criminal acts of theft where the perpetrator had already committed a crime or was often called a recidivist.

### **3.2. Factors that Become Obstacles in Implementing Diversion in the Crime of Theft By Children**

Based on the results of research that has been carried out, cases of criminal acts of theft by children increase every year, while the diversion process that has been attempted often fails. So the increase in criminal cases of theft by children is not commensurate with the successful diversion process every year.

Based on the results of interviews that have been conducted, the main cause of obstacles to implementing the diversion process in resolving criminal cases of theft by children is the public's lack of understanding of the concept of diversion. Sometimes most of the victims and/or the victims' families feel that the resolution of cases carried out through the diversion process does not provide justice for the victims. The diversion process is considered an advantage and a form of legal support for children who conflict with the law.

Based on the public's lack of understanding of the process of resolving criminal cases outside criminal justice, has resulted in diversion efforts that have failed in implementation due to several factors, namely: (1) the community tends to prioritize the interests and rights of victims of criminal acts without considering the rights of children involved. conflict with the law; (2) there are different ideas between the two parties in determining a peace agreement, especially regarding compensation for losses resulting from criminal acts of theft by children. Often the offer made by the child is not by the losses suffered by the victim, and in several cases, it has even been found that the victim deliberately does not agree to the nominal amount of compensation proposed by the child so that later the child will increase the cost of compensation even more; and (3) children who conflict with the law do not meet the diversion requirements, namely the threat of imprisonment for less than seven years and are not a repeat crime. Most cases of criminal acts of theft by children are repeat crimes that have been successfully diverted previously or what is usually called recidivism, so these children's cases must be resolved through the juvenile criminal justice process. In line with the research results reported by [16], the next inhibiting factor for diversion is caused by community factors, namely the negative response from the community, especially the victim or the victim's family or the perpetrator's family, towards efforts to resolve children's cases through diversion because the paradigm is still embedded in society. which requires that every criminal act that arises must be subject to criminal punishment. Law enforcers' efforts to overcome barriers to diversion at the Blitar District Court mean that law enforcers in this research are judges there has been no effort to overcome barriers to implementing diversion because these efforts are not a necessity so if diversion fails to be implemented then the child's case will be continued to in the trial process.

#### 4. CONCLUSIONS

Based on the results of the research that has been carried out, at the end of writing this thesis the author makes a conclusion as a brief overview of the Implementation of Diversion in Criminal Cases of Theft by Children Based on Law Number 11 of 2012 concerning the Juvenile Criminal Justice System in Berau Regency. as follows:

1. The implementation of diversion in cases of criminal acts of theft by children in Berau Regency has been successfully implemented at all levels of examination (investigation, prosecution, and trial). The application of diversion in cases of criminal acts of theft by children in Berau Regency has been successfully pursued by applicable legal provisions and carried out in a coordinated manner between the Berau Police, Berau District Prosecutor's Office, Berau District Court, Correctional Institutions (BAPAS), and the Regional Technical Implementation Unit Women and Children (UPTD PPA), and Social Services. Where at every level of case examination a diversion process can be attempted. Collaboration between these various institutions has an important role in providing the necessary support, protection, and guidance for children in conflict with the law ensuring that the diversion process runs well by applicable legal provisions, and providing the necessary protection and guidance for children who commit crimes.
2. Factors that become obstacles in implementing diversion include understanding people's thinking regarding the concept of diversion. The second factor is the difference in thinking between the two parties in determining a peace agreement, which causes the peace agreement requested by the victim to not be reached the final factor which becomes an obstacle in implementing diversion in criminal cases by children is that children who conflict with the law do not meet the requirements for diversion.

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