

# THE APPLICATION OF DIVERSION TO PERPETRATORS OF CRIMINAL ACTS COMMITTED BY MINORS BASED ON ARTICLE 1 NUMBER 7 OF LAW NUMBER 11 OF 2012 CONCERNING THE JUVENILE CRIMINAL JUSTICE SYSTEM

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## ABSTRACT

The role of law enforcers is at the forefront of the legal world in Indonesia at this time the number of cases and resolutions of legal problems that are applied by prioritizing a sense of justice not only prioritizing legal certainty, legal protection for children can be done as an effort to protect the law against various freedoms and human rights of children. This protection of children also includes interests related to child welfare. The protection of children in conflict with the law is a shared responsibility of law enforcement officials. One form of restorative justice is dialogue between Indonesian people, better known as musyawarah for consensus. So that diversion, especially through restorative justice, becomes a reference for very important considerations in solving legal cases concerning children as perpetrators of crimes.

**Keywords:** *Diversion, Criminal Offences, Juvenile Justice*

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## INTRODUCTION

Criminal acts are a basic understanding in criminal law (normative juridical). Evil crimes or deeds can be interpreted juridically or criminologically (Haines et al., 2013). A crime or evil deed in the normative juridical sense is an act as embodied in a criminal regulation. According to Moeljatno, criminal acts are actions prohibited by a law, the prohibition is accompanied by threats (sanctions) in the form of certain crimes for anyone who violates the prohibition. The formulation of a criminal act will be more complete if a rule of conduct that by a criminal law is prohibited and threatened with a crime for anyone who violates the prohibition. Criminal acts are violations of norms in three areas, namely civil law, constitutional law, and government administrative law which the framer of the law responded to with a criminal penalty (Burhan Bungin, 2001).

A criminal act is a human act punishable by regulations or laws, so a behavior is generally prohibited by criminal threat (Ghani, 2017). Perpetrators of criminal acts are groups or people who commit acts or criminal acts concerned with the meaning of people who commit intentional or unintentional elements as required by law or arising from consequences not intended by law, whether they are objective or subjective elements, regardless of whether the act is done by their own decision or with the encouragement of others (Hamzah, 2009).

People who can be declared as perpetrators of criminal acts can be seen in several kinds, including:

a. People who do

A person who acts alone to perform his purpose in the commission of a criminal offence

b. The one who told to do

To commit a criminal act, at least 2 people are needed, namely the person who commits and the person who orders to commit, so it is not the first party to commit a crime, but with the help of other parties who are tools to commit criminal acts.

c. People who also do

Which means committing criminal acts together. In this case, at least 2 (two) people are needed to commit a criminal act.

d. People who by taking advantage of or abuse of office, give wages, agreements, coerce someone, or intentionally induce other people/parties to commit criminal acts.

Criminal acts can be divided into several types, namely:

a. According to the Criminal Code system: Crimes and Offences

In the Criminal Code, crimes are regulated in book II of the Criminal Code. While violators are regulated in book II. The Criminal Code does not explain the criteria for the division of crimes and offenses, but according to science the distinction between crimes and offenses is qualitative.

b. According to how to formulate it: Formal criminal acts and material crimes.

A formal crime is a crime whose formulation is focused on prohibited acts.

Material crime is a criminal act whose formulation is focused on unintended consequences (prohibited).

c. Based on the form of guilt: Intentional criminal acts and unintentional criminal acts

d. Based on the type of action: It can be distinguished between active/positive crimes can also be called commission crimes and passive/negative crimes, also called emission crimes.

The elements of criminal acts can be divided into 2 (two) aspects, namely:

a. Subjective elements, that is, things that are inherent in the perpetrator or related to the perpetrator, the most important thing is that which is related to his mind. The subjective elements of criminal acts consist of:

a. Willfulness or negligence

b. Intention or intent in all its forms

c. Presence or absence of planning

b. Objective elements, are things related to the external state, namely in which state the crime was committed and is outside the mind of the perpetrator.

a. Fulfill the formulation of the law

b. Unlawful nature

c. The quality of the perpetrator

Causality, which is related between the cause of action and the effect

In the Indonesian Criminal Law System entered a new chapter in its development. One form of reform in Indonesian Criminal Law is the regulation of criminal law in the perspective

and achievement of justice to improve and restore conditions after events and criminal justice processes known as restorative justice which is different from retributive justice (emphasizing justice in retribution) and restitutive justice (emphasizing justice in compensation). When viewed from the development of criminal law science and the nature of modern punishment, it has introduced and developed the so-called "*Doer-Victims*" relationship approach. A new approach that has replaced the approach of deeds or doers or "*daad-dagger straitest*". Legal experts have introduced the formula of justice, especially in the enforcement of human rights, that there are 3 aspects of approaches to building a legal system in the context of modernization and legal reform, namely the structure, substance and culture (*legal culture*) all of which are feasible to run integrally, simultaneously and parallelly (Gunadi & Efendi, 2014). Children are part of citizens who must be protected because they are the next generation of the nation who will continue the leadership of the Indonesian nation (Gaveau et al., 2009). Every child, besides being obliged to get formal education such as school, is also obliged to get moral education so that they can grow into useful figures for the nation and state. In accordance with the provisions of the *Convention on the Rights of the Child* ratified by the Indonesian government through Presidential Decree Number 36 of 1990, then also stated in Law Number 4 of 1979 concerning Child Welfare and Law Number 23 of 2002 concerning Child Protection and Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, all of which set forth general principles of child protection, namely non-discrimination, best interests for children, survival and development and respect for children's participation.

## **METHOD**

This research is a normative and empirical legal research. Normative juridical research with a *conceptual approach* and a legal approach, is legal research conducted by examining library materials or secondary data. The research method used in this study is the normative legal research method. Normative legal research is legal research conducted by examining library materials or secondary data (Soekanto, 2007). The research method used by normative law (*normative law* research) uses normative case studies in the form of legal behavior products, for example reviewing laws, in addition, to obtain information and references, the author also uses a research approach with Legal Principles, Laws and Regulations. The subject of study is the law which is conceptualized as a norm or rule that applies in society and becomes a reference for everyone's behavior. So that normative legal research focuses on the inventory of positive law, legal principles and doctrines, legal findings in cases in *concreto*, legal systematics, levels of synchronization, comparative law and legal history, which aims to describe systematically, factually and the research material in this study used is Law Number 11 of 2012 concerning Juvenile Justice.

## **RESULTS AND DISCUSSION**

### **Legal Regulation on the Application of Diversion to Perpetrators of Minor Theft Crimes Committed by Minors Based on Article 1 of Law Number 11 of 2012 concerning Juvenile Justice**

Basically, the elements of criminal acts cannot be separated from two factors, namely factors that exist within the perpetrator himself and factors arising from outside the perpetrator or environmental factors.

The following are the elements of criminal acts from the point of law:

1. Elements of Behavior

Criminal acts are about the prohibition of doing, therefore the act or behavior must be mentioned in the matter (Simester & Von Hirsch, 2002). Behavior is the absolute mental element of a criminal act. Active behavior is a form of behavior to realize it or do it requires the form of motion or movements of the body or parts of the body, while passive behavior is in the form of behavior that does not carry out certain activities of the body or body parts that a person should in certain circumstances, have to do active actions, by not doing so.

2. Elements of Fighting Properties

Unlawful law is a reprehensible nature or hindrance of an action, which is derived from the law (against formal law) and can originate from society (against material law)

3. Element of Error

Guilt is an element regarding the state or inner image of the person before or at the time of initiating the deed, therefore this element is always inherent in the perpetrator and is subjective.

4. Elements of the Constitutional Consequences

The element of the effect of this constitution is found in material crimes or criminal acts where the effect is a condition as a criminal act: a crime that contains an element of effect as a condition for criminal aggravation, a crime where the effect is a condition for the conviction of the maker.

5. Elements of the accompanying state

The element of accompanying circumstances is the element of a criminal act which is in the form of all circumstances that exist and apply in which the act is committed.

6. Additional Elements of Requirements for Criminal Prosecution

This element is only found in criminal complaints, which are crimes that can only be prosecuted criminally if there is a complaint from those who have the right to complain.

7. Additional conditions for aggravating the crime

This element of this condition is not the main element of the crime concerned, meaning that the crime can occur in the absence of this element.

8. Elements of Additional Conditions for Conviction

This element is in the form of certain circumstances that arise after the act is done, meaning that if after the act is done this condition does not arise, then the act is not unlawful and the maker cannot be criminalized.

Legal protection for children can be done as an effort to protect the law against various freedoms and human rights of children (Hart et al., 2011). This protection of children also includes interests related to child welfare. The protection of children in conflict with the law (ABH), is a shared responsibility of law enforcement officials. Not only children as perpetrators, but also children who are victims and witnesses. Law enforcement officials involved in handling ABH should not only refer to Law No. 11 of 2012 concerning the Juvenile Criminal Justice System or other laws and regulations related to handling ABH, but prioritize peace rather than formal legal processes that began to be enforced 2 years after the SPPA Law was promulgated or August 1, 2014 (Article 108 of Law No. 11 of 2012). The Supreme Court responded very progressively to the Juvenile Criminal Justice System Act (Andrisman, 2009). The Chief Justice of the Republic of Indonesia Muhammad Hatta Ali signed Supreme Court

Regulation (PERMA) Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System even before the Government Regulation which is a derivative of the SPPA Law was issued. The important point of PERMA is that judges are obliged to resolve ABH issues with Diversion which is a legal procedure that is still very new in the criminal law system and reform in Indonesia. In addition, this PERMA contains procedures for implementing diversion which is the guideline of judges in solving juvenile crimes considering that there are no regulations that contain special procedural laws for the diversion of the Juvenile Criminal Justice System (Chazawi, 2022).

In the Juvenile Criminal Justice System, all elements of the criminal justice system are related to handling ABH cases. Police, Prosecutors and Courts as well as Community Advisors or Correctional Centers, Advocates or Assistance Providers, Special Child Development Institutions (LPKA), Temporary Child Placement Institutions (LPAS) and Social Welfare Implementation Institutions (LPKS) as institutions or institutions that handle ABH starting from the child coming into contact with the justice system, determining whether the child will be released or processed to the juvenile court to the stage when the child will be placed in choices, Starting from being released to being included in the institution of punishment in the corridors of restorative justice. This is in line with:

1. 2000 United Nations Declaration on The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters
2. Vienna Declaration on Crime and Justice: "Meeting the challenges of the Twenty-First Century" items 27-28 on Restorative Justice
3. The XIth United Nations Congress on Crime Prevention and Criminal Justice in Bangkok in 2005 on item 32: "Strategic Alliances in Crime Prevention and Criminal Justice"

Furthermore, it is regulated in Law 11 of 2012 and PERMA 4 of 2014

According to the SPPA Law, Diversion is the transfer of the settlement of children's cases from the criminal justice process to processes outside criminal justice, which aims to:

1. Achieving peace between the victim and the child;
2. Resolving children's cases outside the judicial process;
3. Prevent Children from being deprived of liberty;
4. Encourage the public to participate; and
5. Instilling a sense of responsibility to the child.

According to PERMA 4 of 2014 Diversion Deliberation is a deliberation between parties involving children and their parents/guardians, victims and/or parents/guardians, Community Advisors, Professional Social Workers, representatives, and other involved parties to reach a diversion agreement through a restorative justice approach. While the Facilitator is a judge appointed by the Chief Justice to handle the child's case. Diversion is a transfer of the process to a long and very rigid system of solving children's cases. Mediation or dialogue or deliberation as an integral part of diversion to achieve restorative justice (Marzuki, 2008).

Punishment for perpetrators of Child Crime does not then achieve justice for victims, considering that from the other side, it still leaves its own problems that are not resolved even though the perpetrators have been punished. Looking at the principles of child protection, especially the principle of prioritizing the best interests of children, it is necessary to resolve children's cases outside the criminal mechanism or commonly called diversion. The institution

of punishment is not a way to solve children's problems because it is prone to violations of children's rights (Rionika & Dermawan, 2019).

Therefore, an event and procedure is needed in the system that can accommodate the resolution of cases, one of which is to use a restorative justice approach, through a legal reform that not only changes the law but also modifies the existing criminal justice system, so that all the goals desired by the law are achieved. One form of restorative justice mechanism is dialogue which among Indonesian people is better known as "**deliberation for consensus**". So that diversion, especially through the concept of restorative justice, becomes a very important consideration in solving criminal cases committed by children.

If the diversion agreement is not fully implemented by the parties based on the report from the Correctional Center Community Advisor, the Judge continues to examine the case in accordance with the Juvenile Criminal Justice Procedure Law. The judge in handing down his decision must consider the partial implementation of the diversion agreement.

In PERMA 4 of 2014, it is explained that Diversion is applied to children who are 12 (twelve) years old but not yet 18 (eighteen) years old or have reached the age of 12 (twelve) years even though they have been married but not yet 18 (eighteen) years old, who are suspected of committing a criminal act (article 2). This PERMA also regulates the stage of diversion deliberations, where facilitators appointed by the Chief Justice must provide opportunities to:

1. Children to be heard regarding charges
2. Parents/Guardians to convey matters related to the child's actions and the expected form of settlement
3. Victim/Child Victim/Parent/Guardian to provide feedback and expected form of resolution.

If deemed necessary, the diversion facilitator may call community representatives or other parties to provide information to support resolution and/or may conduct separate meetings (Caucus). A caucus is a separate meeting between a Diversion Facilitator and one party known to the other. The Juvenile Criminal Justice System ("SPPA") is the entire process of solving children's cases facing the law, from the investigation stage to the guidance stage after undergoing a crime. In this case, a child in conflict with the law is a child who is 12 years old, but not yet 18 years old who is suspected of committing a crime. If the child commits a crime before the age of 18 and is brought to court after the person exceeds the age limit of 18 years, but has not reached the age of 21 years, the settlement is still submitted to the juvenile court. However, if a child under the age of 12 commits or is suspected of committing a criminal offence, investigators, community counselors, and professional social workers decide to: hand it back to the parent/guardian; or participate in education, guidance, and guidance programs in government agencies or Social Welfare Implementation Institutions (LPKS) in agencies that handle the field of social welfare, both at the central and regional levels, for a maximum of 6 months.

SPPA must prioritize a restorative justice approach, namely the resolution of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration to the original situation, and not retribution, including:

- a) criminal investigation and prosecution of children in accordance with the provisions of laws and regulations, unless otherwise stipulated in the SPPA Law;
- b) juvenile trials by courts in the general judicial environment; and
- c) coaching, guidance, supervision, and/or assistance during the process of committing a crime or act and after undergoing a criminal or act.

Especially points a and b must be sought diversion, namely the transfer of the settlement of child cases from the criminal justice process to processes outside criminal justice. Diversion is carried out for crimes that carry a prison sentence of under 7 years and is not a repetition of a crime, meaning both similar and unsimilar crimes, including crimes resolved through diversion. The diversion process is carried out through deliberation involving children and their parents/guardians, victims and/or parents/guardians, community counselors, and professional social workers based on a restorative justice approach, and can involve social welfare and/or community workers if necessary.

The form of the result of the diversion agreement can be, among others:

1. peace with or without indemnity;
2. handover back to parent/guardian;
3. participation in education or training at educational institutions or LPKS for a maximum of 3 months; or
4. community service.

The result of the agreement is then set forth in a diversion agreement and submitted by the direct supervisor of the responsible official at each level of examination to the district court according to his jurisdiction a maximum of 3 days from the time the agreement is reached to obtain a determination. If the diversion does not result in agreement or the agreement is not implemented, then the juvenile justice process proceeds to juvenile criminal justice proceedings.

In addition, every child in the criminal justice process has the right, among other things: to be free from torture, punishment or cruel, inhuman and degrading treatment; not sentenced to death or life imprisonment; not to be arrested, detained, or imprisoned, except as a last resort and for the shortest time; or to obtain justice before an objective juvenile court, impartial, and in a closed hearing to the public. Basically, the provisions for juvenile criminal justice follow the criminal procedure law as stipulated in the [Code of Criminal Procedure](#) ("KUHAP"), unless otherwise stipulated in the SPPA Law. Investigators must seek diversion a maximum of 7 days after the investigation begins. If the diversion fails, the investigator must continue the investigation and delegate the case to the public prosecutor by attaching the minutes of the

diversion and the community research report. The arrest of children is carried out for the purpose of investigation for a maximum of 24 hours. Children arrested must be placed in a special children's service room. Meanwhile, the conditions for the detention of children are: At the request of the investigator: a maximum of 7 days and can be extended by the public prosecutor for a maximum of 8 days. At the request of the public prosecutor: a maximum of 5 days and a maximum of 5 days can be extended by the district court judge. At the request of the judge: a maximum of 10 days and can be extended by the head of the district court for a maximum of 15 days.

Noteworthy, detention should not be carried out if the child obtains assurances from parents/guardians and/or institutions that the child will not run away, will not remove or damage evidence, and/or will not repeat the crime. The public prosecutor must seek diversion a maximum of 7 days after receiving the investigator's case file. If diversion fails, the public prosecutor must submit the minutes of diversion and submit the case to the court by attaching a report on the results of community research. The chief justice appoints a single judge or panel judge to handle a child's case a maximum of 3 days after receiving the case file from the public prosecutor, provided that:

1. At each level of the judiciary, it is conducted by a single judge
2. if the crime is punishable by imprisonment of 7 years or difficult to prove, an examination can be determined by the panel of judges The judge must seek diversion a maximum of 7 days after being determined by the chairman of the district court as a judge which is carried out for a maximum of 30 days. If diversion is unsuccessful, the case proceeds to the trial stage.
3. The judge examines the child's case in a hearing that is otherwise closed to the public, except for the reading of the verdict.
4. After the judge opens the court and declares the hearing closed to the public, the child is called in along with parents/guardians, advocates or other legal aid providers, and community counselors.
5. After the indictment was read, the judge ordered the community counselor to read the report of the results of the community research on the child in question without the child present, unless the judge thinks otherwise.
6. When examining the child victim and/or child witness, the judge may order that the child be taken outside the courtroom provided that the parent/guardian, advocate or legal aid provider, and community counselor remain present.

The reading of court decisions is carried out in a hearing that is open to the public and can not be attended by children, with the identity records of children, child victims, and/or child witnesses must be kept secret by the mass media using only initials without images.

## CONCLUSION

With the presence of a diversion system in the application of the law, it is expected to make a legal reform for law enforcers in implementing and applying the law in the community, in the case of perpetrators of minor theft committed by minors Based on the provisions in the Child Criminal Justice System applied to children aged 12 to under the age of 18 years who are suspected of committing criminal acts, Settlement of juvenile cases from criminal justice proceedings to extrajudicial proceedings. This is because criminal acts committed by minors are not necessarily the fault of children because minors are considered incompetent to take legal action. In the Juvenile Criminal Justice System, restorative justice is prioritized, where imprisonment is only given as a last resort and if given, the sentence is sought in the shortest time.

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