

THE LEGAL PROTECTION FOR CHILDREN AS PERPETRATORS OF THE THEFT CRIME

Agustri Heriyanto

agustri.hy@gmail.com

Universitas Bhayangkara Jakarta Raya, Indonesia

Erwin Owen Hermansyah

erwin.owan@dsn.ubharajaya.ac.id

Universitas Bhayangkara Jakarta Raya, Indonesia

Dwi Atmoko

dwi.atmoko@dsn.ubharajaya.ac.id

Universitas Bhayangkara Jakarta Raya, Indonesia

Abstract

The purpose of this research is to find out and analyze the legal protection for children as perpetrators of the theft crime and the obstacles faced in realizing legal protection for these children. The approach method uses a normative juridical approach. The results of the research stated that legal protection for children in conflict with the law can be found in national instruments as follows: the 1945 Constitution of the Republic of Indonesia, Act No. 39 of 1999 concerning Human Rights, Act No. 4 of 1979 concerning Child Welfare, Act No. 35 of 2014 concerning child protection, Act No. 11 of 2012 concerning the Child Criminal Justice System. Then in protecting children as perpetrators of the theft crime, a diversion system is also implemented. Diversion is a form of protection for children as perpetrators of the theft crime which must or must be carried out. In practice, the success of legal protection for children in the implementation process of children as perpetrators of the theft crime is not solely related to the applicable law, but it is also very dependent on the constraints that affect its implementation.

Keyword: Children; Crime; Protection; Theft.

A. INTRODUCTION

Children according to language are the second offspring as a result of the relationship between a man and a woman. In the preamble of Act No. 23 of 2002 concerning the protection of children, it is said that children are a mandate and gift from God Almighty, who has inherent dignity as a complete human being.¹ In a visionary view, children are a form of investment that is an indicator of the success of a nation in carrying out development. Children are the next generation of a nation, so children also

1 M. Nasir Djamil, *Anak Bukan Untuk Dihukum*, Sinar Grafika, Jakarta, 2013, page.8

have rights that must be recognized and protected by the state.² The success of child development will determine the quality of human resources in the future, as well as being the generation that will become the nation's successor so that they must be prepared and directed from an early age so that they can grow and develop into children who are physically and mentally healthy, advanced, independent and prosperous, quality resources and can face future challenges. Therefore, child development efforts must start as early as possible from the womb to the next stages of growth and development.³

Children have the right to get protection, attention, affection, and education for the welfare of the child. Children must receive special protection for their physical and mental interests. It is hoped that children can grow and develop well and children are protected from the threat of crime that endangers themselves. The protection of children's rights is essentially directly related to the regulation in laws and regulations, policies, businesses and activities that guarantee the realization of the protection of children's rights, first of all based on the consideration that children are a vulnerable and independent group, in addition to the existence of groups of children who experience obstacles in their growth and development, both spiritually, physically, and socially.⁴

The State and Government of the Republic of Indonesia have the obligation and responsibility to respect and guarantee the human rights of every child regardless of ethnicity, religion, race, class, gender, ethnicity, culture and language, legal status of children, child's birth order, and physical and/or physical condition or mentally. The state and government are also obliged and responsible for providing support for facilities and infrastructure in the implementation of child protection.⁵

Arrangements regarding the obligations and responsibilities of the state and government are contained in the provisions of Article 21 and Article 22 of the Law on Child Protection. Article 23 and Article 24 of the Law on Child Protection regulates state and government guarantees for the implementation of child protection. The state and government guarantee the protection, maintenance and welfare of children by taking into account the rights and obligations of parents, guardians, or other people who are legally responsible for children. The state and government also guarantee children to exercise their right to express opinions according to the age and level of intelligence of the child. The guarantee provided by the state and government is also followed by supervision in the implementation of child protection. The community's obligations and responsibilities for child

2 Evan Ferdiyan Rachmanto, Legal Protection For Children As Victims Of Violence, *Journal of Law and Legal Reform*, Vol.2 No.4 2021, page.515-526

3 Solehuddin, Pelaksanaan Perlindungan Hukum Terhadap Pekerja Anak yang Bekerja di Bidang Konstruksi (Studi di Proyek Pembangunan CV. Karya Sejati Kabupaten Sampang), *Artikel Universitas Brawijaya*, Malang, 2013, page. 5.

4 Waluyadi. *Hukum Perlindungan Anak*, Mandar Maju, Bandung, 2009, page.108

5 Rini Fitriani, Peranan Penyelenggara Perlindungan Anak Dalam Melindungi Dan Memenuhi Hak-Hak Anak, *Jurnal Hukum Samudra Keadilan*, Vol.11, No.2 July-December 2016, page.250-259

protection are as regulated in Article 25. The community's obligations and responsibilities towards child protection are carried out through community role activities in the implementation of child protection. The provisions of Article 72 paragraph (2) of the Law on Child Protection states that the role of the community is carried out by individuals, child protection institutions, social institutions, non-governmental organizations, educational institutions, religious institutions, business entities, and the mass media. Article 26 of the Law on Child Protection regulates the obligations and responsibilities of families and parents.⁶

Crime is a behavior that is prohibited by the state, because it is an act that is detrimental to the state and to that act the state reacts with punishment as the ultimate measure (*Ultimate Remedium*). Crime has also spread to children. It is not only children who are victims of violence that occurs against children, what is most concerning now is that when the child himself is the perpetrator of a crime.⁷

Lately, the phenomenon that occurs in society shows that criminal acts committed by children have increased from time to time as is often reported in both print and electronic media about various crime events where the perpetrators are children. Deviations in unlawful behavior by children are caused by various factors. Among other things, the negative impacts of rapid development, globalization in the field of communication and information, advances in science and technology, and changes in lifestyle have brought about fundamental social changes in people's lives. So it will greatly affect the values and behavior of children. In addition, children who lack or do not receive affectionate guidance, guidance in developing attitudes and behavior, self-adjustment and supervision from parents, guardians or foster parents will cause children to be easily dragged into unhealthy relationships. So it will be detrimental to his personal development. Even this can open up opportunities for children to commit criminal acts. Although children can determine their own steps and actions based on their thoughts, feelings and desires, the circumstances around them can influence their behavior. Among them is behavior to do evil.⁸

The theft crime is a social phenomenon that is always faced by the community, various efforts made by the authorities and the citizens themselves to eliminate it occur continuously in the community in order to create a safe, comfortable, and peaceful environment, but these efforts are unlikely to be realized as a whole, because every crime will not be abolished easily but can only be reduced in terms of intensity and quality. In addition, the theft crime is also a crime committed by individuals or groups who rob, take other people's property on purpose and harm the victims. The theft crime that occurs in today's society is not only committed by adult perpetrators (legally competent) but is also mostly done by minors. A minor

6 *Ibid*

7 Gultom, *Perlindungan Hukum Terhadap Anak*, Refika Aditama, Bandung, 2006, page.25

8 Pingkan V. Tambalean, *Penegakan Hukum Atas Tindak Pidana Pencurian Yang Dilakukan Oleh Anak Di Bawah Umur, Lex et Societatis*, Vol.1 No.2 April-June 2013, page.15-27

is someone who is not yet 18 (eighteen) years old, including a child who is still in the womb.⁹

One aspect of the protection that children need is the right to obtain legal protection, because of their interactions in social life, which includes being perpetrators of criminal acts, witnesses, and victims of their predisposition to face the law.¹⁰

The position of children in the legal environment as legal subjects is determined from the form and legal system of children as a group of people who are in legal status and are classified as incapable or underage.¹¹ In essence, children cannot protect themselves from various kinds of actions that cause mental, physical, social harm in various fields of life. Basically, protection must also be given to children who commit crimes, especially in the implementation of crimes against children who are foreign to them. Children need to get protection from errors in the application of laws and regulations that are applied to them which cause mental, physical and social harm. Child protection in this case is called legal protection. Therefore, in carrying out examinations for children as perpetrators of theft committed by children, attention must be paid to correction and rehabilitation, so that children can return to normal and independent lives for their future potential.¹²

Regarding legal protection for children in conflict with the law, the Indonesian government has regulated it in Act No. 35 of 2014 concerning Child Protection and Act No. 11 of 2012 concerning the Juvenile Criminal Justice System, hereinafter referred to as the SPPA Law, which is intended to provide protection and ensuring the rights of children who are in conflict with the law. Article 1 paragraph (3) of Act No. 11 of 2012, emphasizes that "Children in Conflict with the Law, hereinafter referred to as Children, are children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of having commit a crime." Children who are in conflict with the law, if proven to have violated the law, will be sentenced or sanctioned in the form of actions or crimes.

The special criminal justice system for children certainly has a special purpose for the future interests of children and society which contains the principles of restorative justice, the definition of restorative justice itself is not uniform, because there are many variations of models and forms that develop in its application. Therefore, many terms are used to describe the

9 Pingkan, *Op.Cit*, page.15-27

10 Niken Subekti Budi Utami, Imam Prabowo, Legal Protection For Children Victims Of Sexual Violence, In The Fulfillment Of Restitution Rights, *Yustisia*, Vol.9 No.2 May-August 2020, page.262-287

11 Maulana Hassan, *Pengantar Advokasi dan Hukum Perlindungan Anak*, PT.Grasindo, Jakarta, 2000, page.3

12 Delvia Kartika Sari,Eko Wahyudi, Implementasi Perlindungan Hukum Bagi Anak Sebagai Pelaku Tindak Pidana Pencurian Dalam Proses Penyidikan, *Supremasi Jurnal Hukum*, Vol.4 No.1 2021, page.61-77

concept of restorative justice, such as communitarian justice, positive justice, relational justice, reparative justice, and community justice.¹³

The purpose of this research is to find out and analyze the legal protection for children as perpetrators of the theft crime and the obstacles faced in realizing legal protection for these children.

B. RESEARCH METHODS

The research method used is a normative juridical approach. The normative research in question is research whose object of study includes basic norms or rules, legal principles, statutory regulations, comparative law, doctrine, and jurisprudence.¹⁴

C. RESULT AND DISCUSSION

1. Legal Protection for Children in the Theft crime

Indonesia is a country that upholds human rights, including children's rights, which are marked by guarantees for the protection and fulfillment of children's rights.¹⁵ Protection and fulfillment of children's rights, including legal protection for children in conflict with the law. Provisions regarding legal protection for children in conflict with the law are regulated in international legal instruments and national legal instruments.

Legal protection for children in conflict with the law can be found in the following national instruments:¹⁶

a. Constitution of the Republic of Indonesia

One of the goals of the Indonesian state as stated in paragraph four of the Preamble to the 1945 Constitution of the Republic of Indonesia is to promote public welfare. To advance public welfare, it can be realized by providing protection for all Indonesian people, including children in conflict with the law. The form of protection for children is regulated in Article 28 B paragraph (2) which reads: *"Every child has the right to survival, growth and development and the right to protection from violence and discrimination."*

b. Act No. 39 of 1999 concerning Human Rights

Act No. 39 of 1999 concerning Human Rights has specifically formulated the definition of a child in Article 1 paragraph 5, which reads: *"A child is every human being under 18 (eighteen) years of age and unmarried, including a child who is still in the womb if this is in his interest"*.

13 United Nations, *Handbook on Restorative Justice Programmes*, United Nations Publication, New York, 2006, page.6.

14 Amiruddin & Asikin, Z. *Pengantar Metode Penelitian Hukum*, Raja Grafindo Persada, Jakarta, 2004, page.5

15 Explanation of Act No. 35 of 2014 on Amendments to Act No. 23 of 2002 on Child Protection

16 Ikrima Asya Wirantami, Eko Soponyono, Purwoto, *Perlindungan Hukum Bagi Anak Pelaku Tindak Pidana Pencurian Dengan Pemberatan (Studi Putusan No. 33/Pid.Sus-Anak/2018/PN Smg)*, *Diponegoro Law Journal*, Vol.10 No.3, 2021, page.632-652

- c. Act No. 4 of 1979 concerning Child Welfare
As an effort to protect children in conflict with the law, this law emphasizes that every child has the right to welfare, including children in conflict with the law. Every child without discrimination has the right to welfare, care, care and guidance based on affection both within his family and in special care to grow and develop properly. Legal protection for children in conflict with the law is regulated in Article 6.
- d. Act No. 35 of 2014 concerning Amendments to Act No. 23 of 2002 concerning Child Protection
The definition of child protection according to this law is all activities to guarantee and protect children and their rights so that they can live, grow, develop and participate optimally in accordance with human dignity and protection from violence and discrimination. Article 59 paragraphs (1) and (2) of Act No. 34 of 2014 have regulated that the government, regional governments and other state institutions are obliged and responsible for providing special protection for children.
- e. Act No. 11 of 2012 concerning the Juvenile Criminal Justice System, Children in conflict with the law are children in conflict with the law, children who are victims of criminal acts and children who are witnesses of criminal acts.¹⁷ Article 1 point 3 of the SPPA Law specifically states that children in conflict with the law are children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing a crime.

In its development, the protection of children in the legal field has been regulated in Act No. 3 of 1997 concerning Juvenile Court which was updated in Act No. 11 of 2012 concerning the Juvenile Criminal Justice System. Legal protection for children in Indonesia has been regulated in various laws and regulations, but specifically regulated in Act No. 35 of 2014 Amendments to Act No. 23 of 2002 concerning Child Protection.

Then in protecting children as perpetrators of the theft crime, a diversion system is also implemented. Diversion is a form of protection for children as perpetrators of the theft crime that must or must be carried out, this has been regulated in Article 7 paragraph (1) that at the level of investigation, prosecution, and examination of children's cases in district courts, diversion must be sought. The diversion model is intended to avoid and keep children away from the formal judicial process so as to avoid stigmatization of children in conflict with the law and it is hoped that children can return to their normal social environment. The implementation of diversion is motivated by the desire to avoid negative effects, especially on the soul and development of children that have the potential to occur if the completion of the criminal process is carried out

¹⁷ Act No. 11 of 2012 concerning the Juvenile Criminal Justice System, Article 1 number 2

through the criminal justice system.¹⁸

The principle of diversion cannot be separated from discretion. According to the legal dictionary, discretion is the freedom to make decisions in every situation faced according to one's own opinion.¹⁹ When associated with the principle of Diversion in Act No. 11 of 2012 concerning the Juvenile Criminal Justice System, then the discretionary authority is given to the apparatus to be able to seek the application of the principle of Diversion.²⁰

In dealing with children's problems in conflict with the law, Restorative justice should be prioritized, which is intended to prevent and keep children away from the judicial process. So as to prevent children from being labeled negatively so that children can be accepted again in society. Restorative Justice in question is the Diversion process, Diversion aims to achieve peace between victims and children, resolve child criminal cases outside the judicial process, prevent children from being deprived of freedom to participate and instill a sense of responsibility in children. Diversion is carried out through deliberation involving children and their parents or guardians, victims or their guardians, community advisors and professional workers. However, in accordance with the provisions of Article 7 paragraph (2) of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System, this diversion process is not carried out if the crime is threatened with imprisonment of more than 7 (seven) years and is not a repetition of the crime..²¹

Referring to Article 1 point 7 of Law 11 of 2012 concerning the Juvenile Criminal Justice System, the definition of diversion is the transfer of the settlement of children's cases from the criminal justice process to a process outside the criminal justice system. Then, Article 5 paragraph (3) emphasizes that in the Juvenile Criminal Justice System, diversion must be sought. Restorative justice is a diversion process, in which all parties involved in a particular crime work together to overcome problems and create an obligation to make things better by involving victims, children, and the community in finding solutions to repair, reconciliation, and pacify the heart that is not based on revenge.²²

18 Rr. Putri A. Priamsari, Mencari Hukum Yang Berkeadilan Bagi Anak Melalui Diversi", *Jurnal Law Reform*, Vol.14 No.2 2018, page.228

19 J.C.T. Simorangkir, Rudy T. Erwin, and J. T. Prasetyo, *Kamus Hukum*, Sinar Grafika, Jakarta, 2008, page.38.

20 Kusdina Dwi Hartari, Rista Paradistya Perlindungan Terhadap Hak Anak Yang Menjadi Pelaku Tindak Pidana Pencurian Di Balikpapan Timur, *Jurnal Lex Suprema*, Vol.3 No.1 March 2021, page.485-501

21 Act No. 11 of 2012 on Juvenile Criminal Justice System

22 Prayogo Kurnia, Resti Dian Luthviati, Restika Prahanela, Penegakan Hukum Melalui Restorative Justice Yang Ideal Sebagai Upaya Perlindungan Saksi Dan Korban, *Gema Thr*, Vol.27 No.49 January 2015, page. 1497-1509

2. Obstacles in the implementation of legal protection for children as perpetrators of the theft crime

Obstacles that occur in the process of completing the investigation Diversion means a series of actions carried out by investigating officials in accordance with the method in the law to seek and collect evidence, and with evidence make or become clear on the crime that occurred and at the same time find the suspect or the perpetrator of the crime.²³

Social Welfare after a crime is reported or reported. In accordance with Article 29 of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA) it is determined that investigators must seek Diversion within a maximum of 7 (seven) days after the investigation begins, the Diversion process as referred to above is carried out no later than 30 (thirty)) days after the start of the Diversion, in the event that the Diversion process is successful in reaching an agreement, the investigator submits the diversion report along with the Diversion agreement to the head of the District Court to make a determination research report.

In practice, the success of legal protection for children in the implementation process of children as perpetrators of the theft crime is not solely related to the applicable law, but it is also very dependent on the constraints that affect its implementation. The obstacles in the process of resolving Diversion by investigators include limited facilities in the implementation of diversion due to the absence of assistance from the government to provide all these facilities, prior to the implementation of cooperation between the local police and related agencies, the difficulty of digging up information for both suspects and victims, awareness parents are still low so it is difficult to collect evidence, there is no willingness from both parties to solve the problem by diversion, the nature of the child is still closed.²⁴

D. CONCLUSION

Diversion is a form of protection for children as perpetrators of the theft crime that must or must be carried out, this has been regulated in Article 7 paragraph (1) that at the level of investigation, prosecution, and examination of children's cases in district courts, diversion must be sought. In practice, the success of legal protection for children in the implementation process of children as perpetrators of the theft crime is not solely related to the applicable law, but it is also very dependent on the constraints that affect its implementation.

23 Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP*, Penyidikan dan Penuntutan, Second Edition, Sinar Grafika, Jakarta, 2006, page.109

24 Satino, Sulastri, Yuliana Yuli, Perlindungan Hukum Terhadap Anak Yang Melakukan Tindak Pidana Melalui Diversi Berdasarkan Sistem Peradilan Pidana Anak, *Jurnal Esensi Hukum*, Vol.2 No.1 June, 2020, page.15-28

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