

## The Concept of Police Discretion Against Children in Conflict with the Law

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**Abstract:** *The purpose of this research is to study and analyze the form of police discretion in dealing with children in conflict with the law. In this writing, the author uses a normative legal method with research specifications in the form of descriptive analysis. Investigation of a child by the police is a measure of the child's personality, he can be good or otherwise, therefore a special police unit is needed that is trained in serving and handling children. Discretion as one way to handle child cases is one of the authorities of the police in using their discretionary authority. Discretion is expected to minimize the number of children who must experience detention and all forms of rules in positive criminal law or create children as victims of criminal behavior of children. In the Child Criminal Justice System Law, discretion is given to investigators to be able to seek diversion. This can be seen in Article 29 of the Child Criminal Justice System Law, namely: Investigators are required to seek diversion no later than 7 days after the investigation begins; The diversion process as referred to in paragraph 1 is carried out no later than 30 days after the start of the diversion.*

**Keywords:** *Children; Discretion; Police.*

### 1. Introduction

Every year children who become perpetrators of crimes always increase, in certain cases, children who become perpetrators become a special concern for law enforcement officers. Therefore, various prevention and handling efforts for children in conflict with the law need to be done immediately. One of the prevention and handling efforts for children in conflict with the law today is through the implementation of the juvenile criminal justice system.<sup>1</sup>

In the criminal justice system in Indonesia, if a child commits a crime, the trial process that will be undergone is the same as the general trial process. The first trial process carried out is the investigation stage carried out by the police. The

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<sup>1</sup>Didi Wahyudi Sunansyah, and Aryani Wirasari, (2020), Effectiveness Of Allotment Penalty Imposed By Judge In The Case Of Children For A Child Protection As Victims (Case Study at State Court of Sumber), Journal of Sovereign Law: 3 (1), March , p 88

juvenile trial process is operationally played by law enforcement officers, in this context, law enforcement officers as regulated in Law No. 2 of 2002 concerning the Indonesian National Police are given the widest possible freedom and in all examination improvements to carry out Discretion; the authority of law enforcement officers handling criminal cases to take action to continue the case or stop the case, take certain actions in accordance with their policies.

Discretionary authority is implicitly regulated in Article 18 of the Republic of Indonesia Law Number 2 of 2002 concerning the Indonesian National Police (hereinafter referred to as the POLRI Law). In carrying out the main duties of the Polri in the field of criminal proceedings, investigators are also given discretionary authority in the form of other actions according to responsible law as regulated in the Criminal Procedure Code (hereinafter referred to as the KUHP).

The implementation of diversion is motivated by the desire to avoid negative effects on the child's soul and development by their involvement with the criminal justice system. The implementation of diversion by law enforcement officers is based on the authority of law enforcement officers called discretion; is the authority of law enforcement officers who handle criminal cases.<sup>2</sup>

The police in the field exercise discretion, because if the general provisions are forced to be used just like that for events that are always unique, then the law is at risk of causing social unrest. So in fact, it is in the hands of the police's behavior that the law finds its meaning. Of course, the law makers do not plan to create such unrest, which is why discretion is needed. Here again we clearly see the flashing factors and roles of human behavior.<sup>3</sup>

The implementation of this mechanism from all levels of examination will greatly reduce the negative impact of children's involvement in the judicial process. Investigation of children by the police is a measure of the child's personality, he can be good or otherwise, therefore a special police unit is needed that is trained in serving and handling children. Discretion as one way to handle children's cases is one of the authorities of the police in using their discretionary authority. Discretion is expected to minimize the number of children who must experience detention and all forms of rules in positive criminal law or create children as victims of children's criminal behavior.

The description above has attracted the author's attention to study, understand, and research more deeply about the Police's efforts in handling children in conflict with the law by using discretionary authority where the Police guidelines are in the regulations and the essence of a child who deserves to be positioned specifically in a criminal justice system. In connection with this theme, to research

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<sup>2</sup>Poppy Novita Ayu, Heru Susetyo. (2015), The Role of Investigators in the Implementation of Diversion and Discretion for Children in Conflict with the Law. *Lex Jurnalica*, 12 (1), April, p 46

<sup>3</sup>Mochamad Fajar Gemilang, (2019), Restorative Justice as Progressive Law by Police Investigators. *Journal of Police Science*, 13 (3), December, p 228

further and pour it into legal research with research purposes. For review and analyze form of police discretion in dealing with children in conflict with the law.

## 2. Research Methods

The approach used in this study is normative juridical or written legal approach (statute approach). The normative juridical approach is an approach carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this study. This approach is also known as the literature approach, namely by studying books, laws and other documents related to this study.

## 3. Results and Discussion

### 3.1. Children in conflict with the law

Based on Article 1 paragraph (2) of Law Number 11 of 2012 concerning the Child Criminal Justice System, what is meant by children in conflict with the law are children who are in conflict with the law, children who are victims of criminal acts, and witnesses to criminal acts. Children's problems are a backflow that is not taken into account from the process and development of the development of nations that have high ideals and a bright future to welcome and replace the leaders of the Indonesian nation. In relation to this, the development paradigm must be pro-child.<sup>4</sup>

Harry E. Allen and Clifford E. Simonsen explain that there are 2 (two) categories of child behavior that cause children to have to deal with the law, namely:

- 1) *Offense Statusis* juvenile delinquent behavior that if carried out by adults would not be considered a crime, such as disobedience, playing truant from school, or running away from home;
- 2) *Juvenile Delinquencyis* juvenile delinquent behavior which, if carried out by adults, would be considered a crime or violation of the law.<sup>5</sup>

Based on the explanation above, children in conflict with the law or children in conflict with the law are those who are directly related to criminal acts, either as victims or witnesses in a criminal act. There are also differences in the behavior or unlawful acts of children and adults that cannot be equated, where an act committed by a child could be an unlawful act, but for adults it is not an unlawful act, or vice versa.

### 3.2. Police Discretion

Discretion concerns decision-making that is not strictly bound by law, where personal judgment also plays a role. Police Discretion is an authority concerning decision-making in certain conditions based on the personal considerations and

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<sup>4</sup>Muhammad Joni and Zulchaina Z Tanamas, (1999), Aspects of Child Protection in the Perspective of the Convention on the Rights of the Child, Bandung, PT Citra Aditya Bakti, p 83

<sup>5</sup>Harry E. Allen and Clifford E. Simonsen in Purniati, Mamik, Sri Supatmi, and Ni Made Martini Tinduk, (2003), Correction in America An Introduction, Analysis of the Situation of the Juvenile Justice System in Indonesia, Jakarta, UNICEF, p 2

beliefs of a member of the Police.<sup>6</sup>The discretionary power possessed by the police shows that the police have great power because the police can make decisions where the decisions can be outside the provisions of the law, but are justified or permitted by law. This is as stated by Samuel Walker that one thing that can explain the power of the police or other institutions in carrying out their duties, namely the existence of discretion or authority granted by law to act in special situations according to the assessment and conscience of the agency or officer himself. The implementation of discretion by the police seems to be against the law, but it is a way out that is indeed given by law to the police in order to provide efficiency and effectiveness for the greater public interest, furthermore discretion should not be eliminated. Discretion cannot be eliminated and should not be eliminated. Discretion is an integral part of the role of the institution or organization. However, discretion can be limited and controlled, for example by tightening written orders and the existence of programmed decisions that are at least able to compile and demand discretionary actions. The problem is, unprogrammed decisions often arise and open the door wide for discretionary action.<sup>7</sup>

### **3.3. Forms of Police Discretion in Handling Children in Conflict with the Law**

Children are part of society where their rights must be protected. Children in their growing period are often faced with special situations, one of which is that children must face the law, because their actions have violated the provisions in force in society. Children who violate the rules or propriety in society are often referred to as naughty children. However, what has happened lately is that juvenile delinquency is increasingly leading to criminal acts. In fact, there is a tendency for criminal acts committed by minors to increase.<sup>8</sup>

Child protection activities have at least two aspects. The first aspect relates to policies and laws and regulations governing the protection of children's rights. The second aspect concerns the implementation of these policies and regulations. These two aspects are also called material and formal aspects.<sup>9</sup>

In terms of material aspects, in Criminal Law the definition of a child essentially refers to the age limit of criminal liability (*toerekeningvatsbaarheid*), as based on Article 1 number Law No. 3 of 1997, which explains that:

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<sup>6</sup>F. Anton Susanto. (2004). *Police in Law Enforcement Efforts in Indonesia*. Rineka Cipta Jakarta. p 12

<sup>7</sup>*Ibid*, p 17

<sup>8</sup>Haris Retno Susmiyati and Hariyanti, (2007), *The Juvenile Justice System in Indonesia from a Human Rights Perspective*, Legal Treatise, Faculty of Law, Mulawarman University, 3 (1)

<sup>9</sup>Candra Hayatul Iman. (2013), *Criminal Law Policy for Child Protection in the Reform of the Juvenile Criminal Justice System in Indonesia*. Supreme Court of the Republic of Indonesia, *Journal of Law and Justice*, 2 (3), p 359.

"A child is a person who in the case of a delinquent child has reached the age of 8 (eight) years but has not reached the age of 18 (eighteen) years and has never been married."

The above provisions can be recognized as progress when compared with Law No. 1 of 1960 concerning Amendments to the Criminal Code which does not regulate a minimum age limit at all.

If we look closely at the formulation of criminal witnesses in Law No. 3 of 1997, although two types of criminal witnesses are regulated, namely criminal and action, the form of sanctions determined does not indicate the purpose of punishment which is to protect the interests of children. The formulation of criminal sanctions in Law No. 3 of 1997 refers to Law No. 1 of 1960 as the parent of criminal law legislation.

That one of the problems that arose with the existence of Law No. 3 of 1997 is the lack of synchronization in the regulation of the criminal system between the general provisions in Law No. 1 of 1960 and the provisions regulated specifically in Law No. 3 of 1997. On that basis, in the context of renewing juvenile criminal law, it is necessary to think about a more appropriate and precise place for regulation.<sup>10</sup>

In handling children in conflict with the law in the judicial process, the discretionary authority inherent in police investigators is also known as the first line of defense for children entering the legal process. Given the very broad discretionary power of the police, there need to be requirements that must be possessed by officers, especially in assessing a case. The requirements that must be possessed by police officers are to pay attention to laws and regulations. And the code of professional ethics. Police officers must be preceded by an investigation before conducting an investigation. The function of the investigation is as a filter or filter for events that occur whether an investigation can be carried out or not. The filtering function based on the authority of the police can assess and determine an event as a criminal act or not. If a particular event is a criminal act, the police conduct an investigation.

Discretion is needed as a complement to the principle of legality, namely the legal principle that states that every action or deed of the State administration must be based on the provisions of the law. However, it is impossible for the law to regulate all kinds of cases of positions in everyday life practices. Therefore, there needs to be freedom or discretion from the State administration.<sup>11</sup>

Discretion in the juvenile criminal justice system is the policy of juvenile investigators in determining a juvenile delinquency case, not to continue the investigation with legal considerations in accordance with the legislation and in the best interests of the child. In relation to this, in the Juvenile Criminal Justice

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<sup>10</sup>H. Hamdan, et al. (2021), Limits of Legal Protection for Children Who Can Be Accounted for as Criminals. *AL-ISHLAH: Scientific Journal of Law*, 24 (1,) May, p 59

<sup>11</sup>Zulfikar Judge. (2016), The Position of Children in Conflict with the Law as Perpetrators of Criminal Acts (Case Study: 123/Pid.Sus/2014/PN.Jkt.Tim). *Lex Jurnalica*, 13 (1), April, p 59

System Law, discretion is given to investigators to be able to seek diversion. This can be seen in Article 29 of the Juvenile Criminal Justice System Law, namely:<sup>12</sup>

- a. Investigators are required to attempt diversion no later than 7 (seven) days after the investigation begins.
- b. The diversion process as referred to in paragraph (1) shall be carried out no later than 30 (thirty) days after the start of the diversion.
- c. If the diversion process succeeds 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 decision.
- d. In the event that diversion fails, the investigator is obliged to continue the investigation and refer the case to the public prosecutor by attaching the diversion report and the community research report.

It can be concluded from the article that investigators to attempt diversion is a form of bound discretion, because the diversion effort may or may not be successful. Granting bound discretion to investigators is a form of legal mandate so that investigators as state employees can use existing facilities and see the situation that occurs in order to resolve juvenile delinquents.<sup>13</sup>

In general, children who commit minor crimes are diverted as much as possible. For moderate crimes/delinquencies, there are considerations for diversion. For serious crimes, diversion is not an option.<sup>14</sup> Some crimes are classified as minor or petty crimes, such as minor theft, minor assault without causing injury, or minor damage to property. Moderate delinquency/crime is a type of crime, in which there is a combination of all conditions. All conditions are taken into consideration to determine the appropriateness of diversion or not. For serious crimes such as sexual assault and physical assault cases that cause serious injury, diversion is not an option.

Police investigators are faced with cases where the suspects in the case are children, so investigators conduct investigations of children in conflict with the law. Investigators take other actions at the level of child investigation, namely by providing discretion. In providing discretion to child suspects, investigators through the Unit that handles children in conflict with the law, namely the Police Women and Children's Service Unit (UPPA), have considerations in taking discretionary action against children in conflict with the law. These considerations include legal considerations and non-legal considerations.

In conducting investigations of child suspects, investigators make legal considerations with the aim of the principle of benefit to the community, namely that the actions taken are beneficial to both parties in a criminal case that can be reconciled. The granting of discretion to child suspects is carried out in order to

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<sup>12</sup>Nasir Djamil, (2013), *Children Are Not To Be Punished*. Jakarta: Sinar Grafika.

<sup>13</sup>Zulfikar Judge. (2016), *Op.Cit*, 13 (1), April, p 60

<sup>14</sup>Poppy Novita Ayu & Heru Susetyo, (2015), *Op.Cit*, 12 (1), April, p 47

support the realization of peace and the resolution of criminal cases outside of formal justice. The implementation of the granting of discretion by child investigators is regulated in the Regulation of the Chief of the Republic of Indonesia National Police Number 7 of 2008 concerning Basic Guidelines for Strategy and Implementation of Community Policing in the Implementation of Polri Duties. The above regulation is further strengthened by the existence of technical directions regarding the investigation of children which are explained in the Letter of the Chief of Police No. Pol: B/2160/IX/2009/Bareskrim Dated September 3, 2009 Concerning Guidelines for Handling Children in Conflict with the Law. The granting of discretion is carried out in order to achieve the implementation of the concept of restorative justice as regulated in the Letter of the Head of the Criminal Investigation Unit of the Indonesian National Police No. Pol: ST/110/V/2011/ Dated May 18, 2011 Concerning Settlement of Cases Outside the Court.

The degree of involvement of the child in the case and the child's attitude towards the act are also taken into consideration. While other parties involved in an act of violation have planned it and taken an active part, a child usually only becomes involved at the last moment and only acts as a lookout/guard. The degree of involvement of a child will play a major role in considering diversion and discretion for him/her.

Consideration of the child's parents and/or family's reactions to the act. Support from parents and family is essential for successful diversion. If the family covers up the child's actions, an effective diversion plan will be difficult to implement.

Consideration of the proposal given to make improvements or apologize to the victim. An apology to the victim is a clear indication to the victim that the child is willing to take responsibility for his/her actions. If the child is not ready to apologize for his/her actions, then diversion is difficult to do; Impact of the act on the victim. If the crime has a very serious impact on the victim, even if the child did not intend it, then diversion may not be an option.

Consideration of the victim's views on the treatment methods offered. In order for diversion to be planned properly, there must be input and/or agreement with the victim. As well as consideration of the impact of sanctions or punishments previously received on the child. If the child has had dealings with the law before, and the previous sanctions were not responded to positively by the child, then diversion cannot be an option, unless the previous violation was relatively minor or occurred a long time ago; If it is in the public interest, then the legal process must be carried out.

In legal terminology, police discretion is not explicitly stated using the term "discretion" but is referred to as "acting according to one's own judgment" as stated in Article 18 of the Indonesian National Police Law which reads: For the public interest, officials of the Indonesian National Police in carrying out their duties and authorities may act according to their own judgment. Implementation

of the provisions as referred to in paragraph (1) may only be carried out in circumstances that are absolutely necessary by paying attention to laws and regulations, as well as the Indonesian National Police's Code of Ethics.

So, according to the article, discretion can be exercised by investigators only with considerations that are aimed at the public interest. Discretion may not be exercised if it is only aimed at the investigator's own interests. In the juvenile criminal justice system, for example, if the Juvenile Criminal Justice System Law (SPPA) regulates certain requirements for diversion efforts, investigators should still comply with these rules in order to achieve legal certainty in the Juvenile Criminal Justice System Law.<sup>15</sup>

But once again, because the investigator is dealing directly with the victim and the perpetrator, the investigator is considered to understand better what the victim wants and what the perpetrator feels, and also in the law

SPPA also mentioned the principles underlying the SPPA Law, one of which is prioritizing the best interests of the Child according to Article 2 of the SPPA Law, which is why based on its assessment, investigators can take discretion to conduct diversion of certain cases with various considerations that are logical and reasonable and must not conflict with the public interest and still prioritize the best interests of the child. Also considering the concept of Restorative Justice, which concept tries as much as possible to prevent children from the formal criminal case resolution process which can cause stigmatization that can interfere with the child's psyche and mentality which affects their future.

Discretion in terms of implementing diversion outside the conditions stipulated in Article 7 paragraph (2) of the SPPA Law also cannot be carried out for all criminal acts which carry a prison sentence of more than 7 (seven) years, such as murder, indecent assault or other serious criminal acts related to the body and life, because the public interest also does not want these cases to be resolved amicably and the child returned to his parents and returned to roaming freely in society, which would cause discomfort in society.

Children who have committed serious crimes against the body and life must be educated and guided by the State and given a deterrent effect with criminal penalties so that they are not repeated in the future. This concerns the study of the psychological development of the modern generation where the development of the era increasingly creates massive criminal urges from all ages of humans including children where the parameters of minors have changed with the development of the era affecting the parameters of minors who enter adolescence already have a mature soul and way of thinking and sufficient reasoning to be able to make decisions weighing the pros and cons of an action. This is a consideration for the Police agency in improving the quality of human resources, especially child

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<sup>15</sup>Megah Novita Endriyanti, et al. (2018), Limitations of the Authority of Child Investigators Regarding the Implementation of Diversion in the Process of Resolving Child Criminal Cases, Jurnal Cakrawala Hukum, 9 (2) December, p 211



investigators, by being equipped with scientific knowledge in terms of intuition and analysis related to child psychology which has implications for making decisions on discretionary diversion actions against children in conflict with the law.

#### **4. Conclusion**

The granting of bound discretion to investigators is a form of mandate of the law so that investigators as state employees can use existing facilities and see the situation that occurs in order to resolve children in conflict with the law. Police investigators are faced with cases where the suspects in the case are children, so investigators conduct investigations of children in conflict with the law. Investigators take other actions at the level of child investigation, namely by granting discretion. In granting discretion to child suspects, investigators through the Unit that handles children in conflict with the law, namely the Police Women and Children's Service Unit (UPPA), have considerations in taking discretionary action against children in conflict with the law, namely legal considerations and non-legal considerations.

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