

DIVERSION CONDUCTED BY THE PROSECUTOR IN THE CRIME OF THEFT WITH AGGRAVATION IN JUVENILE OFFENDERS



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*Acep Yopan Apriana*¹; *Sefa Martinesya*²; *Bustomi*³

Abstract

Diversion is an effort that must be carried out by law enforcement, both by Investigators, Public Prosecutors, and Judges, in order to protect children in conflict with the law. However, efforts to implement diversion must also be accompanied by considerations from Bapas who conduct research and assistance to children in conflict with the law. The purpose of this study is to determine the criminal law review of the diversion carried out by the Public Prosecutor in the crime of aggravated theft of child offenders, as well as to determine the juridical implications of the diversion carried out by the Public Prosecutor in the crime of aggravated theft of child offenders. The method used in this research is normative juridical method, with the nature of descriptive research, then data collection sourced from secondary data, and then the data is processed qualitatively. The results showed that: (1) The criminal law review of the diversion carried out by the Public Prosecutor in the crime of theft with aggravation on child perpetrators is basically not in accordance with the provisions in Article 7 paragraph (2) of the SPPA Law, because diversion can only be implemented with the provisions threatened with imprisonment under 7 (seven) years, while the three child perpetrators committed a criminal offense with aggravation stipulated in Article 363 paragraph (1) points 4 and 5 of the Criminal Code which carries a penalty of more than 7 (seven) years in prison. However, if seen from the provisions in Article 2 and Article 3 of the Child Protection Law, then of course diversion should be carried out by the Public Prosecutor, considering that the three child perpetrators have never committed a criminal offense before; (2) The juridical implications of the diversion carried out by the Public Prosecutor in the crime of theft with aggravation on child perpetrators, which resulted in the refusal of the Bapas to sign the diversion agreement on the grounds that the diversion effort has violated the provisions of Article 7 paragraph (2) of the SPPA Law.

Keywords: *Diversion, Public Prosecutor, Child Offender, Aggravated Theft.*

¹ STIH Painan, Banten

² STIH Painan, Banten, sefa.martinesya@gmail.com

³ STIH Painan, Banten, achmadbustomi568@gmail.com

INTRODUCTION

In essence, children cannot protect themselves from various kinds of actions that cause mental, physical and social harm in various fields of life and livelihood. Crimes involving children as perpetrators of criminal acts today are common, so they require extra supervision from parents, government, and society in protecting themselves, given the situation and conditions, especially in the implementation of Juvenile Criminal Justice which is unfamiliar to them.¹

The definition of the juvenile criminal justice system is contained in Article 1 point 1 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as the SPPA Law), that: "The Juvenile Criminal Justice System is the entire process of resolving cases of children in conflict with the law, from the investigation stage to the guidance stage after serving the sentence". Thus, during the process of juvenile criminal justice, starting from the investigation, prosecution, court, and in carrying out court decisions in the Juvenile Correctional Institution, it must pay attention to the principles of child protection and continue to uphold the dignity of children without neglecting justice and not making the human value of children lower.²

Children who commit criminal offenses in the SPPA Law are referred to as children in conflict with the law, and their definition is regulated in Article 1 number 3 of the SPPA Law, as follows: "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 committing a criminal offense". Children who are in conflict with the law and are brought before a court judge basically do not really understand the mistakes that have been made and should be given a reduction in punishment and differentiation of punishment for children with adults.³ In order to achieve protection for children in conflict with the law, it is necessary to apply a form of settlement in the form of Restorative Justice, which in this case has been regulated in Article 5 of the SPPA Law, which states: "The Juvenile Criminal Justice System shall prioritize the Restorative Justice approach". The definition of restorative justice is explained in Article 1 point 6 of the SPPA Law, as follows:

"Restorative Justice is the settlement 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 state, and not retaliation."

Through this rhetorative justice approach, both at the investigation, prosecution and court levels, the diversion process must be pursued. Diversion according to Article 1 point 7 of the SPPA Law, states that: "Diversion is the transfer of the settlement of children's cases from the criminal justice process to a process outside the criminal justice system". Thus, it can be said that diversion is the transfer of handling cases of children suspected of having committed criminal offenses, from the formal process (judicial process) to a non-formal process. Furthermore, according to Article 7 paragraph (2) of the SPPA Law, it is stated that the diversion process can be carried out with the following provisions:

"Diversion as referred to in paragraph (1) shall be implemented in the event that the criminal offense is committed:

- a. punishable by imprisonment under 7 (seven) years; and
- b. is not a repetition of the criminal offense."

Thus, it can be said that the diversion process does not apply to children who are subject to a criminal sentence of more than 7 (seven) years, because according to the Elucidation of

¹ Maidin Gultom, *Perlindungan Hukum terhadap Anak dalam Sistem Peradilan Pidana Anak di Indonesia*, Bandung: Refika Aditama, 2008, hlm.3

² *Ibid.*, hlm. 5 - 6

³ Abintoro Prakoso, *Pembaruan Sistem Peradilan Pidana Anak*, Yogyakarta: Laksbang Grafika, 2013, hlm. 12

Article 7 paragraph (2) letter a of the SPPA Law, the term “imprisonment under 7 (seven) years” refers to criminal law. Therefore, it can be said that the SPPA Law has not fully provided protection for children because Article 7 paragraph (2) letter a of the SPPA Law limits children's rights to resolve cases outside the court, even though the diversion process aims to remove children from the general justice process to prevent negative impacts on children's psychology.

For example, it can be seen in the case in case file Number: B-1229/O.6.14/Epp.1/06/2016, in the case of theft with aggravation, the perpetrators on behalf of:

1. Child of Perpetrator I a.n. M.K.N, aged 14 years 10 months;
2. Child Offender II a.n. A.F, aged 15 years and 3 months; and
3. Child Offender III a.n. L.A, aged 15 years 9 months.

The three juvenile offenders committed the crime of theft and are punishable under Article 363 paragraph (1) 4th and 5th of the Criminal Code (KUHP). The provisions of Article 363 of the Criminal Code state that:

- (1) Shall be punished with a maximum imprisonment of 7 (seven) years.:
 - a. Livestock theft;
 - b. Theft during fire, eruption, flood, earthquake, or seaquake, volcanic eruption, shipwreck, shipwreck, railroad accident, riot, insurrection or danger of war;
 - c. Burglary by night in a dwelling or enclosed yard where there is a dwelling, committed by a person present therein, unknown or unwilling to the person entitled thereto.;
 - d. Theft committed by two or more people;
 - e. Theft by means of breaking, cutting or climbing into the place where the crime has been committed, or by means of false keys, a false order or a false costume..
- (2) If the theft described in point 3 is accompanied by one of the circumstances described in points 4 and 5, it shall be punished by a maximum imprisonment of 9 (nine) years.

The provisions of Article 363 are provisions that regulate the crime of theft with aggravation, because the three child perpetrators of the crime of theft have fulfilled the elements in Article 363 paragraph (1) items 4 and 5, so they are charged with the crime of theft with aggravation which carries a sentence of more than 7 (seven) years. However, with the approval of the Juvenile Judge, the Public Prosecutor (JPU) made efforts to resolve the case through the diversion process for Child Perpetrators I, Child Perpetrators II, and Child Perpetrators III, because he considered it a form of protection for children, the three child perpetrators had never been convicted before, and the victim was willing to forgive the actions of the three child perpetrators.

The form of protection of children that is one of the basis for the Prosecutor's consideration is basically carried out based on the principle of protection of children as stated in Article 2 of the SPPA Law, which states:

- “The Juvenile Justice System is implemented based on the principle of:
- a. Protection;
 - b. Justice;
 - c. Nondiscrimination;
 - d. The best interests of the child;
 - e. Respect for the opinion of the child;
 - f. The survival and development of the child;
 - g. Guidance and mentoring of children;
 - h. Proportionality;
 - i. Deprivation of liberty and punishment as a last resort; and
 - j. Avoidance of retaliation.”

Then, the form of protection of children carried out by the prosecutor is also based on the principles and objectives of child protection as stated in Article 2 and Article 3 of Law

Number 23 of 2002 concerning Child Protection. Article 2 of the Child Protection Law states that:

“The implementation of child protection is based on Pancasila and is based on the 1945 Constitution of the Republic of Indonesia and the basic principles of the Convention on the Rights of the Child, including:

- a. non-discrimination;
- b. the best interests of the child
- c. the right to life, survival, and development; and
- d. respect for the child's opinion”.

Thus, the implementation of child protection carried out by the prosecutor by making diversion efforts in order to avoid discrimination and in the best interests of the three child perpetrators, considering that the three children have never been convicted before. Meanwhile, Article 3 of the Child Protection Law states that:

“Child protection aims to ensure the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with human dignity, and receive protection from violence and discrimination, for the realization of quality, noble, and prosperous Indonesian children.”.

Based on these considerations, the prosecutor received approval from the judge to implement diversion efforts at the prosecution stage. In other words, the Judge had the same opinion as the Public Prosecutor, that considering that there was an amicable agreement between the Victim and the three child perpetrators, the three child perpetrators had never been convicted before, the protection of children, and in the best interests of the child, based on these considerations the Judge approved the diversion effort by the Public Prosecutor..

Basically, judges have the authority to implement diversion, this is as stated in Article 3 of Supreme Court Regulation (PERMA) Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System, which states:

“Juvenile Judges are obliged to seek Diversion in the event that the Child is charged with a criminal offense punishable by imprisonment under 7 (seven) years and is also charged with a criminal offense punishable by imprisonment of 7 (seven) years or more in the form of a subsidiarity, alternative, cumulative or combination (combined) indictment”. In other words, Judges are obliged to seek diversion not only on charges that carry a prison sentence of under 7 (seven) years, but are also obliged to seek diversion on charges that carry a prison sentence of over 7 (seven) years. However, diversion efforts in charges that carry a prison sentence of more than 7 (seven) years can only be carried out if the indictment is in the form of a subsidiary, alternative, cumulative, or combination indictment, while the charges against the three child perpetrators are single charges..

However, the considerations of the Public Prosecutor who has received approval from the Judge to make diversion efforts are not in line with the Correctional Center (Bapas) who refused to sign the diversion agreement on the grounds that Article 7 paragraph (2) letter a of the SPPA Law has expressly regulated that diversion efforts can only be made if threatened with imprisonment under 7 (seven) years.

Bapas, according to Article 1 point 24 of the SPPA Law, is defined as follows: “Correctional Center, hereinafter referred to as Bapas, is a correctional technical implementation unit that carries out the duties and functions of community research, guidance, supervision, and assistance”. In other words, Bapas has the duty and function to conduct community research, guidance, supervision and mentoring of children in conflict with the law. Furthermore, according to Article 9 paragraph (1) letter c of the SPPA Law, it states that Investigators, Public Prosecutors, and Judges in conducting Diversion must consider the results of community partnerships from Bapas.

According to Nashriana, as cited by Okky Chahyo Nugroho, in general, the role of Bapas in the criminal justice process of children in conflict with the law is divided into 3 (three) stages, namely the stage before the court session (pre-adjudication), namely investigation, the stage during the court session (adjudication), namely assistance at trial and the stage after the court (post-adjudication), namely supervision and guidance for children in conflict with the law.⁴ Based on this explanation, it can be stated that the role and function of BAPAS in handling cases of children in conflict with the law is very important in order to achieve the objectives of the juvenile criminal justice system. Therefore, with the community research report conducted by BAPAS, it is hoped that the decision made by the judge will not hurt the sense of justice and a criminal justice system that guarantees the protection of the best interests of children can be realized, so that the negative stigma against children in conflict with the law can be avoided..

Based on the role of Bapas, Bapas should have agreed with the prosecutor's decision to make diversion efforts for the three juvenile offenders, because the community research report conducted by Bapas one of which functions to realize a sense of justice and can guarantee the protection of the best interests of the three juvenile offenders in the juvenile criminal justice system.

Thus, the prosecutor's decision to make diversion efforts is in accordance with the principles contained in Article 2 of the SPPA Law as well as Article 2 and Article 3 of the Child Protection Law previously mentioned. Child protection, according to Maidin Gultom, is all efforts made to create conditions so that every child can carry out their rights and obligations for the sake of the child's reasonable development and growth both physically, mentally and socially.⁵ Children need protection from the state and society for a long time to come. The important reasons why children must be protected, first, children are the next generation and the future of the nation, second, children are a group of people who are naturally weak.⁶

Diversion efforts were made by the prosecutor, apart from the considerations mentioned above, also because the victim wanted to forgive considering that the three child perpetrators were still minors, so the prosecutor made diversion efforts. The victim in this case wanted to make an amicable effort considering that the perpetrators were minors and had never committed a crime or had never been convicted before, so the victim chose to forgive the actions of the three child perpetrators, so on this basis the prosecutor, with the approval of the judge, made diversion efforts for the three child perpetrators. However, as previously explained, Bapas was not willing to sign the diversion agreement, because the SPPA Law provides limitations in the implementation of diversion, namely diversion efforts can be implemented in the event that the criminal offense committed is punishable by imprisonment under 7 (seven) years.

The prosecutor also argues that there is an obligation to make diversion efforts contained in Article 96 of the SPPA Law, which states: "Investigators, Public Prosecutors, and Judges who deliberately do not carry out the obligations referred to in Article 7 paragraph (1) shall be punished with imprisonment for a maximum of 2 (two) years or a maximum fine of Rp200,000,000.00 (two hundred million rupiah)". With the provisions of Article 96 of the SPPA Law, the Public Prosecutor and the Judge may not reject the diversion effort which is a mutual agreement between the victim and the parties of the three child perpetrators.

The implementation of the concept of diversion is carried out with the aim of avoiding children from the negative implications of the existing criminal justice system, and can avoid children from being labeled criminals, therefore the juvenile criminal justice system prioritizes

⁴ Okky Chahyo Nugroho, "Peran Balai Pemasarakatan pada Sistem Peradilan Pidana Anak Ditinjau dalam Perspektif Hak Asasi Manusia", *Jurnal HAM*, Volume 8 Nomor 2 Desember 2017, Jakarta: Kemenkumham, 2017, hlm. 166

⁵ Maidin Gultom, *Op.Cit.*, hlm. 40

⁶ Muchsin, "Perlindungan Anak Dalam Perspektif Hukum Positif", *Jurnal Varia Peradilan* Nomor 308 Tahun XXVI, Juli, Jakarta, 2011, hlm. 5

the protection and rehabilitation of child offenders as people who still have a number of limitations compared to adults, so that in efforts to implement diversion should not be given restrictions, especially restrictions on criminal acts threatened to him. So that restrictions in implementing diversion efforts can result in discrimination against children, the occurrence of such discrimination is certainly not in accordance with the principles and objectives contained in Article 2 of the SPPA Law and Articles 2 and 3 of the Child Protection Law.

Based on the above background, the problems to be discussed in this study are as follows: How is the criminal law review of diversion by the public prosecutor in the crime of theft with aggravation on child perpetrators?

METHOD

The method used in this research is normative juridical method. Then the data source is taken from secondary data, then the data obtained will be processed and analyzed qualitatively.

RESULT

The existing reform in Indonesian Criminal Law is the regulation of criminal law in the perspective and achievement of justice towards the repair and restoration of the situation after the event and the criminal justice process known as restorative justice, this is different from retributive justice which emphasizes justice in retaliation and restitutive justice which emphasizes justice in compensation. So that in the context of punishment of children, in its development it has become an *ultimum remedium* (the last legal effort) in cases of juvenile crime with the aim of improving and reducing the number of crimes against children in conflict with the law and the best protection for children.

The punishment of children in the context of restorative justice in Indonesia is inseparable from the provisions of the legislation governing it, namely Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as the SPPA Law), in which the law has regulated matters relating to restorative justice by using the diversion method as a practical concept of restorative justice itself.

As described in Chapter I, Article 1 point 6 of the SPPA Law clearly defines Restorative Justice as the resolution of criminal cases by involving perpetrators, victims, families of perpetrators/victims and other related parties to jointly seek a fair settlement by emphasizing restoration to the original state and not retaliation. Diversion is regulated in Article 1 point 7 of the SPPA Law, which is defined as the transfer of the settlement of children's cases from the criminal justice process to a process outside of criminal justice.

According to Kusno Adi, conceptually diversion is a mechanism that allows children to be diverted from the judicial process to the social service process. Efforts to divert the juvenile criminal justice process towards a non-judicial process are based on the consideration that the involvement of children in the judicial process has basically created stigmatization.⁷ Thus, the purpose of applying diversion in a child's case is to avoid the detention of the child and the labeling of the child as a criminal. Children are encouraged to take responsibility for their mistakes. Thus, the definition of diversion is basically a transfer from the criminal justice process to outside the formal process to be resolved through deliberation.

Furthermore, according to Article 7 paragraph (2) of the SPPA Law, it is stated that the diversion process can be carried out under the following conditions:

“Diversion as referred to in paragraph (1) shall be implemented in the event that the criminal offense is committed:

- a. punishable by imprisonment under 7 (seven) years; and
- b. is not a repetition of the criminal offense.”

⁷ Kusno Adi, *Diversi Sebagai Upaya Alternatif Penanggulangan Tindak Pidana Narkotika Oleh Anak*, Malang: UMM Press, 2009, hlm. 108

Thus, it can be said that the diversion process does not apply to children who are subject to a criminal sentence of more than 7 (seven) years, because according to the Elucidation of Article 7 paragraph (2) letter a of the SPPA Law, the term “imprisonment under 7 (seven) years” refers to criminal law. Therefore, it can be said that the SPPA Law has not fully provided protection for children because Article 7 paragraph (2) letter a of the SPPA Law limits children's rights to resolve cases outside the court, even though the diversion process aims to remove children from the general judicial process to prevent negative impacts on children's psychology. As an example, the plan of the Indictment Letter No.Reg: PDM/Epp.2/CLG/05/2016, with the perpetrators under the name of:

1. Child of Perpetrator I a.n. M.K.N, aged 14 years 10 months;
2. Child Offender II a.n. A.F, aged 15 years and 3 months; and
3. Child Offender III a.n. L.A, aged 15 years 9 months.

The charges against the three child perpetrators will be described as follows:

That the children of the perpetrators, child perpetrator I MKN aged 14 years and 10 months based on the citation of birth certificate Number: XXXX/XXX-X/UM/2001 dated July 20, 2001, child perpetrator II A.F aged 15 years and 3 months based on the citation of birth certificate Number: XXXX/XXX-X/UM/2001 dated March 6, 2001 and child perpetrator III L.A aged 15 years and 9 months based on the citation of birth certificate Number: XXXX/XXX-X/IST/2001 dated February 8, 2001, on Tuesday April 19, 2016 at around 8:15 pm or at least in April 2016 at the side of the road precisely on Jl. Yasin Beji Propelat Kotabumi Purwakarta Subdistrict Cilegon City or at least still included in the jurisdiction of the Serang District Court which is authorized to examine and try this case, *taking property, which wholly or partially belongs to another person, with intent to unlawfully possess, by night in a house or enclosed yard where there is a house, committed by a person who is there, unknown or unwanted by the rightful person, committed by two or more persons, jointly, who in order to enter the place where the crime is committed, or to reach the property taken, is done by damaging, or by wearing a false costume*, the acts of the perpetrator's children are carried out in the following manner:

That at the time and place as mentioned above, initially the perpetrator's son I, the perpetrator's son II and the perpetrator's son III planned to take other people's property on the Propelat road in the city of Cilegon and its surroundings, using a Honda Supra X 125 motorcycle in blue and black color number A XXXX VF with a three-ringed position, at that time the position of the perpetrator's son III who was riding the Supra X motorcycle, the perpetrator's son I was riding in the middle, while the perpetrator's son II was riding at the very back, when they arrived at Jl. Yasin beji Propelat Kelurahan Kotabumi Kec. Purwakarta, Cilegon City, at that time the perpetrator's children saw the victim riding a red Honda Beat motorcycle carrying a blue bag which was slung on the right side, then the perpetrator's child III was riding a Supra X motorcycle with the perpetrator's child I in the middle and the perpetrator's child II at the back, by approaching the victim, the perpetrator's child II immediately without the permission of the victim pulled the victim's bag so that it was separated from the victim's arms and could be controlled by the defendant I. Seeing the bag being taken by the perpetrator, the victim spontaneously saw the bag being taken by the perpetrator, Seeing the bag taken by the perpetrator the victim spontaneously shouted thief, and a chase was carried out by the community who heard, including members of the Cilegon Police and shortly after that the perpetrator's son who was riding the Supra X motorcycle fell down hearing the sound of warning shots from the police officers, and then the perpetrators' children were secured at the Cilegon Police

Station, for the actions of the perpetrators' children I, II and III, the victim T suffered a loss of Rp3. 000.000,-

The actions of the perpetrator I, perpetrator II, and perpetrator III are regulated and punishable under Article 363 paragraph (1) 4th and 5th of the Criminal Code.

The three perpetrators committed the crime of theft with aggravation and are punishable under Article 363 paragraph (1) 4th and 5th of the Criminal Code (KUHP). The provisions of Article 363 of the Criminal Code state that:

- (1) Shall be punished with a maximum imprisonment of 7 (seven) years.:
 1. Livestock theft;
 2. Theft during fire, eruption, flood, earthquake, or seaquake, volcanic eruption, shipwreck, shipwreck, railroad accident, riot, insurrection or danger of war;
 3. Burglary by night in a dwelling or enclosed yard where there is a dwelling, committed by a person present therein, unknown or unwilling to the person entitled thereto;
 4. Theft committed by two or more people;
 5. Theft by means of breaking, cutting or climbing into the place where the crime has been committed, or by means of false keys, a false order or a false costume..
- (2) If the theft described under point 3 is accompanied by one of the circumstances described under points 4 and 5, it shall be punished by a maximum imprisonment of 9 (nine) years..

The provisions of Article 363 are provisions that regulate the crime of theft with aggravation, because the three child perpetrators of the crime of theft have fulfilled the elements in Article 363 paragraph (1) items 4 and 5, so they are charged with the crime of theft with aggravation which carries a sentence of more than 7 (seven) years. However, with the approval of the Juvenile Judge, the Public Prosecutor (JPU) made efforts to resolve the case through the diversion process for Child Perpetrators I, Child Perpetrators II, and Child Perpetrators III, because he considered it a form of protection for children, the three child perpetrators had never been convicted before, and the victim was willing to forgive the actions of the three child perpetrators.

The form of protection of children, as previously described in Chapter I, is one of the bases for Jakasa's consideration, which is basically carried out based on the principle of protection of children as stated in Article 2 of the SPPA Law, which states:

“The Juvenile Justice System is implemented based on the principle of:

- a. Protection;
- b. Justice;
- c. Nondiscrimination;
- d. The best interests of the child;
- e. Respect for the opinion of the child;
- f. The survival and development of the child;
- g. Guidance and mentoring of children;
- h. Proportionality;
- i. Deprivation of liberty and punishment as a last resort; and
- j. Avoidance of retaliation.”

Then, as previously described, the form of protection of children carried out by the prosecutor is also based on the principles and objectives of child protection as stated in Article 2 and Article 3 of Law Number 23 of 2002 concerning Child Protection. Article 2 of the Child Protection Law, as follows:

“The implementation of child protection is based on Pancasila and is based on the 1945 Constitution of the Republic of Indonesia and the basic principles of the Convention on the Rights of the Child, including:

- a. non-discrimination;

- b. the best interests of the child
- c. the right to life, survival, and development; and
- d. respect for the child's opinion”.

Thus, the implementation of child protection carried out by the prosecutor by making diversion efforts in order to avoid discrimination and in the best interests of the three child perpetrators, considering that the three children have never been convicted before. Meanwhile, Article 3 of the Child Protection Law states that:

“Child protection aims to ensure the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with human dignity, and receive protection from violence and discrimination, for the realization of quality, noble, and prosperous Indonesian children.”.

Based on these considerations, as previously discussed in Chapter I, the Public Prosecutor received approval from the Judge to implement diversion efforts at the prosecution stage. In other words, the Judge had the same opinion as the Public Prosecutor, that considering that there had been an amicable agreement between the Victim and the three child perpetrators, the three child perpetrators had never been convicted before, the protection of children, and the best interests of the child, based on these considerations, the Judge approved the diversion effort by the Public Prosecutor.

Although basically Judges have the authority to implement diversion, this is as stated in Article 3 of the Supreme Court Regulation (PERMA) Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System, which states:

“Juvenile Judges are obliged to seek Diversion in the event that the Child is charged with a criminal offense punishable by imprisonment under 7 (seven) years and is also charged with a criminal offense punishable by imprisonment of 7 (seven) years or more in the form of subsidiarity, alternative, cumulative or combined indictments.”.

In other words, Judges are obliged to seek diversion not only on charges that carry a prison sentence of under 7 (seven) years, but are also obliged to seek diversion on charges that carry a prison sentence of over 7 (seven) years. However, diversion efforts in charges that carry a sentence of imprisonment of more than 7 (seven) years can only be carried out if the indictment is in the form of a subsidiary, alternative, cumulative, or combination indictment, while the charges against the three child perpetrators are single charges.

However, as described in the previous Chapter I, the considerations of the prosecutor who has received approval from the judge to make diversion efforts are not in line with the Correctional Center (Bapas) who refused to sign the diversion agreement on the grounds that Article 7 paragraph (2) letter a of the SPPA Law explicitly regulates that diversion efforts can only be carried out if it is threatened with imprisonment under 7 (seven) years.

Bapas, according to Article 1 point 24 of the SPPA Law, is defined as follows: “Correctional Center, hereinafter referred to as Bapas, is a correctional technical implementation unit that carries out the duties and functions of community research, guidance, supervision, and assistance”. In other words, Bapas has the duty and function to conduct community research, guidance, supervision and mentoring of children in conflict with the law. Furthermore, according to Article 9 paragraph (1) letter c of the SPPA Law, it states that Investigators, Public Prosecutors, and Judges in conducting Diversion must consider the results of community partnerships from Bapas.

According to Nashriana, as cited by Okky Chahyo Nugroho, in general, the role of Bapas in the criminal justice process of children in conflict with the law is divided into 3 (three) stages, namely the stage before the court session (pre-adjudication), namely investigation, the stage during the court session (adjudication), namely assistance at trial and the stage after the court (post-adjudication), namely supervision and guidance for children in

conflict with the law.⁸ Based on this explanation, it can be stated that the role and function of BAPAS in handling cases of children in conflict with the law is very important in order to achieve the objectives of the juvenile criminal justice system. Therefore, with the community research report conducted by BAPAS, it is hoped that the decision made by the judge will not hurt the sense of justice and a criminal justice system that guarantees the protection of the best interests of children can be realized, so that the negative stigma against children in conflict with the law can be avoided..

Based on the role of Bapas, Bapas should have agreed with the prosecutor's decision to make diversion efforts for the three juvenile offenders, because the community research report conducted by Bapas serves to realize a sense of justice and can ensure the protection of the best interests of the three juvenile offenders in the juvenile criminal justice system.

Thus, the prosecutor's decision to make diversion efforts is in accordance with the principles contained in Article 2 of the SPPA Law as well as Article 2 and Article 3 of the Child Protection Law previously mentioned. Child protection, according to Maidin Gultom, is all efforts made to create conditions so that every child can carry out their rights and obligations for the sake of the reasonable development and growth of children physically, mentally and socially.⁹ Children need protection from the state and society for a long time to come. The important reasons why children must be protected, first, children are the next generation and the future of the nation, second, children are a group of people who are naturally weak.¹⁰

Diversion efforts were made by the prosecutor, apart from the considerations mentioned above, also because the victim wanted to forgive considering that the three child perpetrators were still minors, so the prosecutor made diversion efforts. The victim in this case wanted to make an amicable effort considering that the perpetrators were minors and had never committed a crime or had never been convicted before, so the victim chose to forgive the actions of the three child perpetrators, so on this basis the prosecutor, with the approval of the judge, made diversion efforts for the three child perpetrators. However, as previously explained, Bapas was not willing to sign the diversion agreement, because the SPPA Law provides limitations in the implementation of diversion, namely diversion efforts can be implemented in the event that the criminal offense committed is punishable by imprisonment under 7 (seven) years.

The prosecutor also argues that there is an obligation to make diversion efforts contained in Article 96 of the SPPA Law, which states: "Investigators, Public Prosecutors, and Judges who deliberately do not carry out the obligations referred to in Article 7 paragraph (1) shall be punished with imprisonment for a maximum of 2 (two) years or a maximum fine of Rp200,000,000.00 (two hundred million rupiah)". With the provisions of Article 96 of the SPPA Law, the Public Prosecutor and Judges may not reject diversion efforts that become a mutual agreement between the victim and the parties of the three child perpetrators.

Therefore, in the review of criminal law, the implementation of the concept of diversion is carried out with the aim of avoiding children from the negative implications of the existing criminal justice system, and can avoid children from being labeled criminals, therefore the juvenile criminal justice system prioritizes the protection and rehabilitation of child offenders as people who still have a number of limitations compared to adults, so that in efforts to implement diversion should not be given restrictions, especially restrictions on criminal offenses threatened to him. So that restrictions in implementing diversion efforts can result in discrimination against children, the occurrence of such discrimination is certainly not in accordance with the principles and objectives contained in Article 2 of the SPPA Law and Articles 2 and 3 of the Child Protection Law.

⁸ Okky Chahyo Nugroho, *Op.Cit.*

⁹ Maidin Gultom, *Op.Cit.*, hlm. 40

¹⁰ Muchsin, *Op.Cit.*

When associated with the theory used in this study, namely the theory of legal protection, researchers cite the theory of Satjipto Rahardjo, that legal protection is to provide protection for human rights (HAM) that are harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law. Law can be functioned to realize protection that is not only adaptive and flexible, but also predictive and anticipatory. Law is needed for those who are weak and not yet socially, economically and politically strong to obtain social justice..¹¹

So it can be analyzed that this legal protection theory is used to see that protection is a right that a person has to protect his interests, in this case protecting the interests of children who are perpetrators of aggravated theft. In the diversion process carried out by the prosecutor is an effort to protect the interests of the three child offenders, because children have rights that are specifically protected in the Child Protection Law, but the BAPAS refused to sign the diversion agreement because according to BAPAS it violated the provisions of Article 7 paragraph (2) letter a of the SPPA Law.

The Diversion Report Number: B-1229/O.6.14/Epp.1/06/2016, explained as follows: Cilegon District Attorney's Office, which conducted a diversion meeting on Friday, June 3, two thousand sixteen, a child case with child perpetrators, namely:

Child of Perpetrator I

Full Name: M.K.N.

Place of Birth : Cilegon

Age/Date of Birth : 14 years 10 months July 10, 2001

Gender : Male

Nationality : Indonesia

Religion : Islam

Occupation : -

Education : Junior High School Grade 9/3

Child of the perpetrator II

Full Name: A.F.

Place of Birth: Cilegon

Age/Date of Birth : 15 years 3 months/27 January 2001

Gender : Male

Nationality : Indonesia

Religion : Islam

Occupation : -

Education : Junior High School Grade 9/3

Child of perpetrator III

Full Name : L.A.

Place of Birth: Cilegon

Age/Date of Birth : 15 years 9 months / August 3, 2000

Gender : Male

Nationality : Indonesia

Religion : Islam

Occupation : -

Education : Junior High School Grade 9/3

Diversion process is attended by:

1. Public Prosecutor: Endo Prabowo, S.H.
2. Community Counselor: Bayu Karjaredja
3. Victim
4. Offender's children I, II, and III.

¹¹ *Ibid.*

5. Parents of children of perpetrators I, II, and III.

Based on the discussions in the meeting, the following matters were agreed upon:

Article 1

That Parties I, II, and III apologize profusely to the Victim.

Article 2

That the Victim forgives the actions of the perpetrator's children and will not prosecute because the perpetrator's children are still in school, still have a better future, and still need parental guidance and the victim asks the facilitator not to proceed to trial.

Article 3

That all confiscated evidence be returned to the prosecutor and the victim, namely the motorcycle, one ignition key be returned to the prosecutor, while 2 units of cellphone, 1 wallet, Rp100,000, 1 ATM, 1 Sun card, 1 cellphone box be returned to the victim.

Article 4

This agreement is made by the parties without any element of coercion, error and fraud from any party.

Thus, this Official Report is made and signed by the Public Prosecutor of the Cilegon District Attorney's Office (as the Diversion Facilitator).

Thus, based on the diversion minutes, it can be analyzed that there has been a diversion agreement between the three juvenile offenders and the victim, without any coercion from any party. This was taken by the victim, considering that the three children of the perpetrators were still in school and still had a better future.

The diversion agreement is in accordance with the principles contained in Article 2 of the SPPA Law as well as Article 2 and Article 3 of the Child Protection Law previously mentioned. Furthermore, based on Article 3 of the SPPA Law, every child in the criminal justice process is entitled to:

- a. Be treated humanely with due regard to age-appropriate needs;
- b. Separated from adults;
- c. Receive effective legal and other assistance;
- d. To engage in recreational activities;
- e. Free from torture, punishment or other cruel, inhuman, and degrading treatment;
- f. Not sentenced to death penalty or life sentence;
- g. Not arrested, detained, or imprisoned, except as a last resort and for the shortest time;
- h. Obtain justice before a Children's court that is objective, impartial, and in a hearing that is closed to the public;
- i. Not to have his/her identity published;
- j. Obtaining assistance from parents/guardians and people trusted by the child;
- k. Obtaining social advocacy;
- l. Obtaining a private life;
- m. Obtaining accessibility, especially for disabled children;
- n. Obtaining education;
- o. Obtaining health services;
- p. Obtaining other rights in accordance with the provisions of laws and regulations.

Therefore, based on the provisions described above, the prosecutor's decision to implement diversion for the three child perpetrators was appropriate, because the diversion agreement had also been approved by the victim and corroborated by the Judge's approval. Thus, BAPAS should not refuse to sign the diversion agreement made by the prosecutor, because it is in the interest of the three child perpetrators who can still be guided so as not to repeat similar actions.

It was analyzed that the criminal law review of the diversion made by the public prosecutor in the crime of theft with aggravation on child perpetrators was basically not in accordance with the provisions in Article 7 paragraph (2) of the SPPA Law, because diversion

can only be implemented with the provision of a sentence of imprisonment under 7 (seven) years, while the three child perpetrators committed a crime with aggravation regulated in Article 363 paragraph (1) points 4 and 5 of the Criminal Code which carries a sentence of more than 7 (seven) years imprisonment. However, when viewed from the provisions in Article 2 and Article 3 of the Child Protection Law, then of course diversion should be carried out by the prosecutor, considering that the three child perpetrators have never committed a criminal offense before..

CONCLUSION

Based on the discussion described above, it can be concluded as follows:

The criminal law review of the diversion carried out by the Public Prosecutor in the crime of theft with aggravation on child perpetrators is basically not in accordance with the provisions in Article 7 paragraph (2) of the SPPA Law, because diversion can only be implemented with the provision of imprisonment under 7 (seven) years, while the three child perpetrators committed a criminal offense with aggravation stipulated in Article 363 paragraph (1) points 4 and 5 of the Criminal Code which carries a penalty of more than 7 (seven) years in prison. However, when viewed from the provisions in Article 2 and Article 3 of the Child Protection Law, then of course diversion should be carried out by the prosecutor, considering that the three child perpetrators have never committed a criminal offense before.

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