

## **Criminal Policy in Resolving Cases of Theft by Children**

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### **ABSTRACT**

Children are an essential component of human life and the stability of a nation and state. Law enforcement officials must prioritize the type of legal protection for children who are in conflict with the statute. The provisions of law number 11 of 2012 concerning the juvenile criminal justice system include a diversionary settlement, which provides one form of protection under positive law. There are several problems in this study, among which is the resolution of the crime of theft committed by children according to positive law. As well as obstacles in the process of resolving the diversion of the crime of theft committed by children according to positive legislation. This research is a form of normative juridical analysis. In the meantime, the legislative approach and the conceptual approach are the two main approaches used in this analysis.

**Keywords:**  
SPPA, Diversion,  
Children

### **INTRODUCTION**

Children are an integral part of human existence and the stability of a nation and state. Children who are part of the younger generation's success tend to grow and develop under different socioeconomic circumstances in school. In the preamble to the 1945 constitution, the republic of indonesia aims to safeguard the entire indonesian nation and the entire indonesian blood spill, promote public health, educate the nation's life, and contribute to the development of a global order based on eternal peace and social justice. These provisions are in the interest of achieving high quality human resources and being able to lead and maintain national unity and unity, as well as safeguarding human rights based on pancasila and the 1945 constitution. The indonesian government adopted the provisions of the convention on the rights of the child (convention on the rights of the child), which was ratified by presidential decree no. 88. 36 of 1990, which was later enacted in law no. 36 of 1990, was also included in the bill.

The stipulation of government regulations, rather than law no. 17 of 2016, is incorporated into the constitution of the united states on december 17, 2016. The second amendment to law no. 1 of 2016 was introduced by the legislature on january 1, 2016. The following is a sample of the legislation enacted on october 23, 2002, which includes the following provisions: the following are the main principles of child protection. The provisions of the 1945 constitution protect the fundamental rights inherent in every human soul of a society that has a state, including the right to life, growth, and development, as well as the right to be protected from violence and discrimination (article 28 paragraph (2) of the 1945 constitution). children who do not comprehend the justice system or are unable to be held accountable for their conduct must be protected in every juvenile criminal justice procedure. There are 4,000 children in indonesia who are subjected to the juvenile criminal justice system of robbery, violence, immorality, and others, and who generally do not receive legal protection from law enforcement.

The protection of children's rights essentially involves direct arrangements in laws, policies, initiatives, and activities that ensure the realization of the protection of children's rights, first and foremost, on the basis of the fact that children are fragile and independent individuals, as well as the existence of groups of children that face challenges in their spiritual, physical, and social growth (waluyadi, 2009). Because today's crimes do not only involve gods, but they have spread to children, not just children as victims of violence against children, the most worrying thing now is that when the child himself becomes the perpetrator of a criminal offence (maidin gulton, 2006). On the other hand, a child's conduct in conflict with the law must be tried in a special juvenile court located in the general judicial zone, using a special procedural procedure scheme. It is believed that punishment in punishing children who are in conflict with the law is detrimental to a child's future, but it is also believed that it is detrimental to his or her health. This detrimental behavior is exacerbated by stigma, which is used to punish individuals. On the other hand, social security requires the denial of criminal responsibility (guilt) and is replaced by a theory of social action (barda nawawi arief, 1994).

The development of a juvenile criminal justice system is one of the ways to prevent and cure crime. The purpose of establishing a juvenile criminal justice system is not limited to imposing criminal penalties on children who have committed criminal offenses, but rather, it is based on the assumption that the enactment of sanctions is a way of ensuring the safety of children as perpetrators of criminal offenses. Because criminal acts committed by children are largely influenced by negative actions by adults or those around them, children who break the rules are highly influenced by many external factors, such as socialization, training, playmates, and so on. Law enforcement agents are often confronted with two competing goals in every investigation of criminal cases: the interests of victims who must be protected in order to heal their suffering because they have become victims of crime (mentally and physically), and the interests of the accused / suspect, even though he is guilty, who is still a human being with human rights to be upheld. Therefore, the perpetrator must be regarded as an innocent individual (innocence theory). The law makes mistakes in resolving civil cases by overemphasizing the rights of the accused/defendant, while the rights of the victim are ignored.

Law enforcement officials must prioritize the type of legal protection for children who are in conflict with the statute. In the provisions of law number 11 of 2012 concerning the child criminal justice system, one form of protection is offered by diversionary settlement. Diversion refers to the transfer of children's cases from the criminal justice system to a process outside the criminal justice system (article 1 paragraph 7 of law number 11 of 2012 concerning the juvenile criminal justice system). In a diversionary settlement, priority must be given to reparative justice for both sides, whether victims or perpetrators of criminal offenses. Restorative justice refers to the resolution of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other interested parties in order to find a mutually beneficial solution by focusing on restoration to the original state, not retaliation (article 1 paragraph 6 of law no. 196/2003). (on the juvenile justice system, 11/2012.) The crime of theft itself is regulated by the provisions of articles 362 to 367 of the criminal code, and in article 362 of the criminal code, "anyone who takes property that is whole or part of another with the intention of unlawfully possessing it will be punished with a

maximum of five years or a sixty-rupiah fine." The following are the elements derived from this article:

1. Objective elements, including:
  - a. Taking
  - b. An item, and
  - c. That wholly or partly belongs to another person.
2. Subjective elements, including:
  - a. With intent,
  - b. To possess the goods/objects for himself, and
  - c. In violation of the law.

Law enforcers become so subjective in resolving a criminal case, one of which is a case of theft committed by a child, to protect children who conflict with the rules. If a child's theft is committed by a child, the jury must consider his or her condition in the judicial procedure. This goes against the purpose of diversion, one of which is to restore stability between victims and children and resolve children's cases outside of the legal system. The author can explain some of the issues raised by the description of the background, such as how the method of settling theft cases committed by children can be explained.

## METHOD

This research is a form of normative juridical analysis. Normative juridical research refers to laws that are established in society and become a reference for everyone's behavior; this type of research is also known as library research, theoretical/dogmatic research, or h. ishaq, 2017. Although the method is used in the context of research activities to establish a relationship with the subject matter investigated or methods to gain an understanding of the research problem, it also employs several approaches, including the statute approach and the conceptual approach. The statutory approach is a method that employs various legislative laws as the subject matter and applies the neutral theme of a study (h. salim hs, dan erlies septiana nurbani, 2013,). Therefore, the study must consider the statute as a closed structure with broad, all-inclusive, and systematic characteristics (joenedi efendi dan jhonny ibrahim, 2018). The conceptual approach is a method used to analyze the meaning contained in the statutes, as well as examine similar cases encountered by researchers.

## RESULTS AND DISCUSSION

If applied to children, discussing the issue of children in conflict with the law is a very difficult thing or way, considering that such actions have certain motivations and characteristics that are different from adult offenders. The convention on the rights of the child explicitly states that all activities concerning children are carried out by public or private social welfare agencies, judiciary departments, government departments, or legislative bodies (sri rahayu, 2015). It is clear that the application of a rule of law must prioritize the best protection for children who contravene the rules, particularly in the juvenile criminal justice system, as shown by this rule. The criminal justice system consists of four parts: police, prosecutors, courts, and correctional facilities. These four elements work together to ensure that justice is preserved. The pre-trial stage (before the judicial hearing), which includes discovery and investigation, the judicial stage (during the judicial hearing), which includes the examination and defense of the

prosecution's allegations, and the post-trial stage (after the judicial hearing), which includes the implementation of decisions that have been made in the trial (marlina, op.cit., h. 10).

The criminal justice system is intended to serve as a response to crime prevention and law enforcement efforts. However, its effectiveness in addressing crime-related issues has been somewhat limited. Despite passing through all stages of the criminal justice system, many offenders have a tendency to reoffend, becoming recidivists.

Within the juvenile criminal justice system, minors aged 12 to 18 who are suspected of committing a criminal offense are considered children in conflict with the law. Conversely, there are also minors who are victims of criminal acts, experiencing physical, mental, or economic harm due to such acts. If a criminal offense is committed by a minor before turning 18 and the case is brought to court after the minor has turned 18 but not yet 21, they are still subject to the jurisdiction of the juvenile court., Accessed on October 27, 2021, From the Supreme Court of the Republic of Indonesia, Palopo District Court Class 1 B: <https://www.pn-palopo.go.id/index.php/berita/artikel/363-sekilas-tentang-sistem-peradilan-pidana-anak>).

Additionally, if a child under the age of 12 commits or is suspected of committing a criminal offense, the investigator or community supervisor may opt to either hand over the child to their parent/guardian or involve them in an educational program or counseling provided by government agencies or social welfare institutions specializing in child welfare. In contrast to adult cases (individuals aged 18 and above), where parental or guardian presence is not mandatory at every stage of the investigation, it is a requisite for cases involving children in conflict with the law.

Ensuring the protection of children involved in criminal activities is crucial, and one method to achieve this is through the application of diversion. This involves diverting cases away from the formal judicial process towards alternative resolution methods such as mediation or deliberation. The aim is to prevent further legal action against children and shield them from negative influences. The decision to divert a case lies within the discretion of the investigator, public prosecutor, or judge, based on the stage of the investigation and subject to a determination process. Should mediation fail to resolve the case, the criminal justice system must adhere to due process, thus safeguarding the human rights of children suspected of committing crimes.

The protection of children engaged in criminal acts is also outlined in Article 66 of Law No. 39 of 1999 concerning Human Rights. Firstly, every child has the right to be free from persecution, torture, or inhumane treatment. Secondly, the imposition of the death penalty or life imprisonment is prohibited for child offenders. Thirdly, children have the right not to be unlawfully deprived of their liberty. Fourthly, any arrest, detention, or imprisonment of children must strictly adhere to applicable laws and should only be used as a last resort. Fifthly, every child deprived of liberty is entitled to humane treatment, taking into account their developmental needs based on age, and must be separated from adults unless their interests dictate otherwise. Sixthly, children deprived of liberty have the right to receive effective legal or other assistance throughout all stages of legal proceedings. Lastly, every child deprived of liberty retains the right to defend themselves and access justice before an impartial Juvenile Court in closed hearings.

Additionally, Article 64 of Law No. 23 of 2002 concerning Child Protection, amended by Law No. 17 of 2016, outlines several provisions. Firstly, it underscores the humane treatment of children, respecting their dignity and rights. Secondly, it mandates the early appointment of specialized child support officers. Thirdly, it calls for the establishment of dedicated facilities and infrastructure tailored to children's needs. Fourthly, it advocates for the imposition of suitable sanctions prioritizing the best interests of the child. Fifthly, it requires the continuous monitoring and documentation of the development of children in conflict with the law. Sixthly, it guarantees the maintenance of relationships with parents or family members. Seventhly, it ensures protection from identity disclosure through mass media and discourages labeling.

Meanwhile, in the legal framework of the juvenile criminal justice system, specifically governed by Law No. 11/2012, Article 3 delineates the rights of children in conflict with the law as follows:

1. Treated humanely by taking into account the needs according to their age.
2. Separated from adults.
3. Receive effective legal and other assistance.
4. To engage in recreational activities.
5. Free from torture, punishment, or other cruel, inhuman, and degrading treatment.
6. Not sentenced to the death penalty or life imprisonment.
7. Not arrested, detained, or imprisoned, except as a last resort and for a short period.
8. Obtain justice before a juvenile court that is objective, impartial, and in a hearing that is closed to the public.
9. Not to have their identity published.
10. Obtaining assistance from parents/guardians and people trusted by the child.
11. Obtaining social advocacy.
12. Obtaining a private life.
13. Accessibility, especially for disabled children.
14. Obtaining education.
15. Obtaining health services; and
16. Obtaining other rights following the provisions of laws and regulations,

In statutory law, instances involving children caught in legal conflicts form the basis for regulations outlined in Law Number 11 of 2012 concerning the Child Criminal Justice System. This law includes provisions for the resolution process known as diversion, which involves transferring the handling of children's cases from the formal criminal justice system to an external process (Article 1 Paragraph 7 of Law Number 11 of 2012 Concerning the Juvenile Criminal Justice System). The efforts made through diversionary methods prioritize restorative justice for both victims and perpetrators of criminal acts. Restorative justice seeks to resolve criminal cases by involving offenders, victims, families of offenders/victims, and other relevant parties to collaboratively seek fair solutions, emphasizing restoration rather than retribution (Article 1 Paragraph 6 of Law No. 11/2012 on the Juvenile Justice System).

The concept of diversion was introduced in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (SMRJJ) or The Beijing Rules (UN Assembly Resolution 40/33 dated November 29, 1985). According to these rules, diversion grants law enforcement officials the authority to take policy actions in handling or resolving juvenile offenses without following formal procedures, which may

involve halting or continuing the criminal justice process or reintegrating offenders into the community (Sri Rahayu, Op.Cit., pp. 133).

Although the concept of diversion is relatively new in Indonesia, it initially emerged in seminar discussions (Marlina, Op.Cit., p. 168). The diversion concept involves redirecting cases away from formal procedures with the intention of protecting children in conflict with the law. Moreover, each institution internally deliberates on juvenile offenders. Through these internal discussions, each institution demonstrates a willingness to extensively discuss the diversion concept among law enforcement officials involved in juvenile criminal justice (Ibid).

Diversion is a strategy aimed at steering juvenile offenders away from the formal criminal justice system. This approach is carefully considered to prevent the stigma associated with labeling children. Consequently, authorities at every stage of the juvenile criminal justice system, including the police, prosecutors, courts, and community institutions, are empowered to divert legal proceedings towards alternative activities. These activities might entail parental or guardian guidance, warnings, the imposition of fines or restitution, supervision by social services or community-based social institutions, and counseling (Nasir Djamil, 2013).

The core objective of diversion is to offer juvenile offenders an opportunity to reform and reintegrate into society through informal channels, utilizing community resources. Its aim is to ensure justice for children who have committed criminal acts by involving law enforcement officials as crucial actors. In the implementation of diversion programs, various methodologies are employed, as outlined by Bambang Hartono (2015), pp. 82-83)

1. Implementation of social control (social control orientation), i.e. law enforcement officials leave the offender in the responsibility of community supervision or observation, with obedience to agreements or warnings given. The offender accepts responsibility for his/her actions and no second chance is expected for the offender by the community.
2. Social service orientation, i.e. carrying out the function of supervising, interfering, correcting, and providing services to the offender and his/her family. The community can interfere with the offender's family to provide repairs or services.
3. Towards a restorative justice or negotiation process (balanced or restorative justice orientation), namely protecting the community, providing opportunities for the perpetrator to be directly responsible to the victim and the community, and making a joint agreement between the victim, the perpetrator, and the community.

The aims of diversionary settlement efforts include fostering reconciliation between victims and children, resolving cases involving children outside of the judicial system, preventing the loss of children's autonomy, encouraging community participation, and fostering a sense of accountability in children (Article 6 of Law No. 11/2012 on the Juvenile Justice System).

In the diversion process, law enforcement officials or stakeholders, as outlined in Article 8, paragraph (3) of Law Number 11 of 2012 concerning the Child Criminal Justice System, must consider several factors. These factors encompass the interests of victims, the well-being and accountability of children, avoidance of negative labeling, prevention of retaliation, community cohesion, and the preservation of decency and public order.

Moreover, a clear regulatory framework concerning diversion is articulated in Article 5, paragraph (3) of Law Number 11/2012 concerning the Child Criminal Justice

System. This provision stipulates that in the Child Criminal Justice System, diversion must adhere to the provisions outlined in Article 5, paragraph (2), which include conducting investigations and prosecutions of juvenile crimes in accordance with laws and regulations, unless otherwise specified in this law. Additionally, juvenile trials are conducted within regular judicial settings, and guidance, mentoring, supervision, and/or assistance are provided throughout the implementation of punishments or actions following the completion of sentences.

Therefore, the legal regulations concerning the resolution of juvenile cases through diversion do not suggest that every juvenile offender has unrestricted access to diversion. Instead, during the implementation phase, certain prerequisites must be fulfilled or observed to pursue a diversionary settlement. These prerequisites are delineated in Article 7, paragraph (2) of Law Number 11 of 2012 regarding the Child Criminal Justice System:

- a. Threatened with imprisonment under 7 (seven) years; and
- b. Not a repetition of a criminal offense

The diversion criteria mandated in the juvenile justice system for minors involved in legal conflicts should be streamlined to ensure adherence to these regulations. Theft, as defined in Article 362 of the Criminal Code, involves the unlawful appropriation of property, either entirely or partially belonging to another individual, and is punishable by a maximum imprisonment of five years or a maximum fine of sixty rupiahs.

In accordance with Article 362 of the Criminal Code, theft constitutes a crime against individual interests, specifically property or wealth. The delineation of Article 362 outlines the elements of ordinary theft as follows::

1. Objective elements, including:
  - a. Taking
  - b. An item, and
  - c. Which wholly or partially belongs to another person.
2. Subjective elements, including:
  - a. With intent
  - b. To possess the goods/items for oneself, and
  - c. In violation of the law.

Apart from that, the crime of theft itself can be categorized as theft.

Furthermore, in the criminal offense of theft, which is contained in the provisions of Chapter XXII of the Criminal Code, there are types of theft, among others;

#### 1. Ordinary Theft

Ordinary theft involves the action of taking an object, whether entirely or partially owned by another individual, with the intention of possessing it illegally. The regulations pertaining to ordinary theft are stipulated in Article 362 of the Criminal Code (R. Soesilo, 1995).

#### 2. Theft with aggravation

Theft with aggravation, also termed special theft or theft with qualification (gequalificeerde diefstal), is addressed in Article 363 of the Criminal Code. This designation refers to instances of ordinary theft that occur alongside certain exacerbating circumstances (Ibid. 251).

#### 3. Petty Theft

Petty theft involves the basic components of theft but is characterized by the inclusion of mitigating factors that lead to reduced penalties. Described as mild theft, this category is defined in Article 364 of the Criminal Code.

#### 4. Theft with Violence

Theft involving violence, as specified in Article 365 of the Criminal Code, carries a maximum imprisonment sentence of 9 years. This type of theft includes instances where violence or threats of violence against individuals occur prior to, during, or following the theft, either to aid in the preparation or execution of the theft, or to evade capture, providing oneself or others involved in the act with an opportunity to escape apprehension.

#### 5. Theft in the Family

Stealing from or assisting in stealing from one's spouse is not considered a punishable offense, as both partners hold equal ownership of marital assets. This exemption is also justified on moral grounds. This type of theft is addressed in Article 367 of the Criminal Code (*Ibid.*, p. 251).

In an act of theft, there are types of criminal offenses on certain grounds, namely as follows (Adami Zhazawi, 2007);

1. Based on the form of guilt, there is a distinction between deliberate criminal acts (*delous delictem*) and unintentional criminal acts (*culpose delicten*).
2. Based on the type of action, it can be distinguished between active/positive criminal offenses, also known as commission offenses (*delicta commissionis*), and passive/negative criminal offenses, also known as commission offenses (*delicta omissionis*).
3. Based on the time and period of occurrence, it can be distinguished between instantaneous criminal offenses and criminal offenses occurring over a long period.
4. Based on the source, general criminal offenses and special criminal offenses can be distinguished.
5. Judging from the legal subject, it can be distinguished between communal crimes (*delicate communia*, which can be committed by anyone), and *proporia* crimes (which can be committed only by people who have certain personal qualities).
6. Based on the severity of the punishment, we can distinguish between ordinary crimes (*gewonne delicte*) and criminal complaints (*klacht delicten*).
7. Based on the severity of the punishment, we can distinguish between basic criminal offenses (*eenvoudige delicten*), aggravated criminal offenses (*gequelificeerde delicten*) and mitigated criminal offenses (*geprivilegieerde delicten*).
8. Based on the legal interests protected, criminal offenses are limited in variety depending on the legal interests protected, such as criminal offenses against life and body against property, criminal offenses of forgery, criminal offenses against the good name, criminal offenses against decency, and so on.

The classification of the crime of theft and the basis for criminal acts committed by children as perpetrators of criminal acts, as mentioned above, can be resolved by diversion in the form of the following settlement efforts;

1. Mediation
2. Restitution
3. Offender's apology
4. Accountability by the perpetrator towards the victim



5. Assurance from the perpetrator's parents that their child will not reoffend.
6. Restoration of the original situation
7. Service to the victim
8. Restoration of the perpetrator through elements of society, which can take the form of community education, social work, or being entrusted in an institution.

Efforts to resolve cases through diversion represent a proactive approach by law enforcement officials to steer children away from the judicial process as perpetrators of criminal acts. These endeavors require the collaboration of various stakeholders to ensure that diversionary settlements align with legal requirements, including;

1. Victim's side.

The participation of the victim in the diversionary settlement process holds significant importance. Traditionally, within the criminal justice system, the victim's involvement has been limited, despite being the directly affected party. Therefore, in the deliberative process, it is crucial to prioritize the inclusion of the victim's interests and ensure they are heard, as their input forms an integral part of the decision-making process.

2. The perpetrator and the perpetrator's family

The involvement of the perpetrator's family is essential due to the perpetrator's status as a minor and their significant role in the resolution process. The family's participation is crucial as they will be involved in reaching agreements, such as compensatory payments or other forms of restitution, as outlined in the settlement agreement.

3. Community representative

It's crucial to advocate for the interests of the community where the criminal incident occurred, ensuring that public concerns are adequately represented in decision-making processes. Local community leaders, such as the village head and other respected figures with legitimacy as community representatives and no vested interest in the case, should be considered for this role.

In adhering to the principle that juvenile imprisonment should be a last resort (*ultimum remedium*), the most favorable course of action is to return the juvenile defendant to their parents for proper education and upbringing. However, the implementation of diversionary measures does not imply that all juvenile cases must result in the decision to return the juvenile defendant to their parents. Instead, judges must consider specific criteria, as outlined by Marlina (Op.Cit., p. 205.);

1. The child is a first-time offender.
2. The child is still in school.
3. The criminal act committed is not a serious crime of decency, a crime that results in loss of life, western injury, or lifelong disability, or a crime that disturbs/damages the public interest.
4. The parents/guardians of the child are still able to educate and supervise the child.

Hence, law enforcement officials, including judges, should consider the implementation of diversion with a restorative justice approach as an alternative for resolving cases involving children in conflict with the law within the judicial process. This consideration is essential to uphold the rights of children, as outlined in the law concerning the Juvenile Criminal Justice System. Moreover, in addition to safeguarding the rights of the accused, law enforcement officials must also ensure due attention is given to the rights of victims impacted by the theft committed by the accused.

## CONCLUSION

The resolution of theft crimes committed by children involves various approaches, including mediation, restitution, perpetrator apology, perpetrator accountability to the victim, parental guarantee to prevent recurrence, restoration of the original situation, service to the victim, and societal reintegration of the perpetrator. This reintegration may include community education, social work, or placement in an institution. In ensuring legal protection for children involved in criminal offenses, law enforcement officials serve as intermediaries in the justice system. It is imperative for them to prioritize the rights of children throughout the judicial process and adhere to the guidelines outlined in the framework of Law Number 11/2012 concerning the Juvenile Criminal Justice System.

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