



## Juridical Analysis of the Determination of Judges' Diversion Case Studi of Children Number 2 / Diversi / Pid. Sus-Anak / 2018 / Pn Pmn in the Legal Area of the Pariaman District Court

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### **Abstract**

One of the important changes accommodated in the Criminal Justice System for Children Law is a restorative justice approach that is implemented in a diversified manner to minimize children from negative stigma and keep children away from legal processes that can put a psychological strain on children. In the practice of implementing the diversion of children against the law in the jurisdiction of the Pariaman District Court, there have been differences in the determination of judges in providing the diversion of children against the law. Judges in the same case, where the diversion agreement was reached at the stage of the investigation but the judge refused to make the decision, while at the level of prosecution with diversion efforts carried out again, the judge set a diversion attempt against the child. This can be seen in the case with the PDM-16 / Paria-Anak / 8/2018 register number in the name of ArifanMahesa and Harifan Maisa called Ipan. At the time of the case, Ipan was 17 years old. This research is normative juridical research with the problem approach method through the law approach, historical approach, and conceptual approach. The nature of this research is descriptive using secondary data. The results showed that: 1. Investigators and Public Prosecutors in principle fulfill the legal procedures in seeking diversion and handling children who conflict with the law. However, the lack of coordination between investigators and prosecutors has made the results of research on alleged criminal acts committed by children in conflict with the law summary; 2. the judge does not consider in a non-juridical and rigid manner to the provisions of the applicable law, and according to the author is quite ignorant of the overlapping forms that occur to result in the process of law enforcement in the context of legal protection for children in conflict with the law takes a long time and protracted dissolved in the higher examination process, To improve the future is needed The Supreme Court needs to make and provide guidelines for the determination of diversion requests for diversion at the level of investigation and prosecution if the diversion is carried out against a crime that is threatened with a crime over 7 (seven) years besides criminal threats for under 7 (seven) years. As well as conducting a review of Perma on Diversion.

**Keywords:** *Judge Determination; Diversity; Children; Restorative Justice*

## Introduction

At present, the number of cases of children in conflict with the law is still quite high and alarming, referring to data submitted by the Indonesian Child Protection Commission, explaining that the case of Children in conflict with the law is the most frequently reported case to the Indonesian Child Protection Commission. From 2011-2019, the number of cases of children dealing with law reported to the Indonesian Child Protection Commission reached 11,492 (eleven thousand four hundred and ninety two) cases, far higher than the reported cases of children who are entangled in health and drug problems around 2,820 cases, pornography and cybercrime around 3,323 cases, and trafficking and exploitation of 2,156 cases.<sup>1</sup>

One of the important changes accommodated in the Law on the Criminal Justice System for Children is a restorative justice approach that is implemented by diversion so as to minimize Children from negative stigma and keep the child away from legal processes that can impose the psychological of the Child. Restorative justice is a settlement process that is carried out outside the criminal justice system by involving victims, perpetrators, victims' families and perpetrators, the community and parties with an interest in a criminal act that occurs, in order to reach agreement and settlement. These goals are realized through strict regulation of restorative justice and diversion so that children can return to their social environment naturally.

Restorative justice is a model of punishment handed down by courts based on the restoration of victims' rights. The sentence handed down by the court to the offender aims to as much as possible restore the state of the victim of a criminal offense before a criminal event occurs. In the criminal justice system, the principle of restorative justice should be applied, because so far the prison sentence has been used as the main sanction for perpetrators of crimes found guilty in court. In fact what is needed by the community is the maximum condition as before the crime. The principle of restorative justice is an inherent part of the criminal justice system in developed countries. In Indonesia, this principle is still interpreted in criminal conviction, and has not yet reached the level of restoration of the relationship between the perpetrators of crime and victims of crime, both during criminal and post-criminal convictions.

Muladi stated that the criminal justice system is a judicial network that uses material criminal law, formal criminal law and criminal implementation law, however, this institution must be seen in a social context. according to Muladi the nature of being too formal if based only on the interests of legal certainty will bring disasters in the form of injustice. Muladi also stressed that the meaning of integrated criminal justice system or “*integrated criminal justice system*”, is synchronization or synchronization and harmony, which can be distinguished in the following ways:<sup>2</sup>

- a. Structural Synchronization
- b. Substantial Synchronization
- c. Cultural Synchronization

The concept of synchronization is the meaning of the Integrated Criminal Justice System, which is expected to be intertwined within the framework of law enforcement in Indonesia in its implementation often gets intervention and influence from extra judicial powers and there are differences in perceptions between one sub-system with other sub-systems in resolving cases, for example on the one hand the Police and Prosecutors Office has tried hard to find evidence so that the suspect can be detained and transferred to the Court as the defendant. However, after entering the Court, the Judge examines and

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<sup>1</sup><https://www.suara.com/health/2019/07/23/071000/anak-berhadapan-dengan-hukum-potret-buram-perlindungan-anak-di-indonesia?page=all>, accessed last on October 5, 2019, at 07.32 WIB.

<sup>2</sup> Edi Setiadi and Kristian, 2017, *Integrated Criminal Justice System and Law Enforcement System in Indonesia*, Jakarta: Kencana Prenada, page. 35.

finally decides the defendant's release, or seeks a diversion that previously could not or was never attempted at the level of investigation and prosecution.

Diversion is a form of legal reform in the juvenile criminal justice system. Diversion according to Article 1 Number 7 of the Law System on the Juvenile Justice System is a transfer of settlement of the case of the Child from the criminal justice process to a process outside of criminal justice. Through diversion, law enforcement officials are given the authority to take policy actions in dealing with or resolving problems of child abuse by not bringing cases into the criminal justice process.<sup>3</sup> The diversion effort is carried out through deliberations involving children and their parents / guardians, victims and / or parents / guardians, Community Guidance, and Professional Social Workers through a restorative justice approach to jointly seek a fair solution by emphasizing recovery back to its original state, and not retaliation.

Diversi refers to Article 6 of the Juvenile Justice System Law aimed at achieving peace between victims and children; settle the Children case outside the judicial process; avoid the child from deprivation of liberty; encourage the community to participate; and instill a sense of responsibility in children. Whereas in implementing the diversion of law enforcement officials and various related parties must pay attention to the interests of victims, the welfare and responsibility of children, avoidance of negative stigma, avoidance of retaliation, harmony of society, and decency, decency and public order.

The process of implementing diversion must be carried out at the level of investigation, prosecution and examination of cases of Children in district courts. The diversion process according to Article 7 paragraph (2) of the Juvenile Justice System Law can be carried out in the event that a criminal threat threatened with a child is threatened with imprisonment for less than 7 (seven) years and the criminal act committed does not constitute a repeat of the criminal act.

In the practice of implementing diversionary measures against children dealing with law in the jurisdiction of the Pariaman District Court, there has been a difference in the determination of the judge in providing the diversion of children against the law. The judge in the same case, where at the stage of the investigation the diversion agreement was reached but the judge refused to make the decision, while at the prosecution level with an attempt at diversification again, the judge determined the diversion attempt against the child. This can be seen in the case with the PDM-16 / Paria-Anak / 8/2018 register number in the name of Arifan Mahesa or Harifan Maisa called Ipan. At the time of the case Ipan was 17 years old.

The case occurred when Ipan on Friday, April 23, 2018 around 19.30 WIB. or at some time in 2018 housed in the Padang Sari housing complex of Koto Tengah, Padang City, or at least in a place that is still within the jurisdiction of the Padang District Court but based on Article 84 paragraph (2) of the Criminal Procedure Code<sup>4</sup> Pariaman District Court has the authority to examine and try this case, there has been an alleged crime of theft with violence committed by Ipan and his friends against victims Nando Erlangga Putra and Rivaldo Putra located in Korong Ganting Nagari Kurai Taji Timur Nan Sabaris District Padang Pariaman District.

The incident started when the reporter was at his home and at that time Opet came to the reporting house and told the reporting wife of Ms. Elma Murni that the reporting son had been hacked by someone and regarding his right hand and motorcycle, the whistleblower was also taken away by the perpetrator at the time of the incident. Ipan was arrested by the police on Friday, July 20, 2018 around 19:00 WIB at the housing near the Flight School in Korong Petak Ketaping, Batang Anak District.

<sup>3</sup> Angger Sigit Pramukti, 2015, *Child Criminal Justice System*, Yogyakarta: Yustisia Library, page. 68.

<sup>4</sup> Article 84 Paragraph (2) BOOK OF CRIMINAL LAW states that the district court in the jurisdiction of the defendant lives, is the last residence, where he was found or detained, only authorized to try the defendant's case, if the residence of the majority of witnesses summoned is closer to the place of the district court than the place of domicile of the district court in which the crime was committed.

Padang Pariaman. At that time Ipan explained that he was arrested for having committed a crime of providing assistance when the crime was committed against theft which was accompanied by violence (Article 365 of the Criminal Code), stole 1 (one) unit of the Honda Beat brand in orange-blue with police number BA 2045 FT with Order number: MH1JFD22DK089039 and engine number: JFD2E2076504 in Yurni's name. That due to his actions, Ipan is threatened with committing a criminal offense as regulated in Article 365 paragraph (1), (2) 2nd jo Article 480 of the Criminal Law Code with a criminal threat against violation of Article 365 paragraph (1) of the Criminal Code Law no later than 9 (nine) years, while the violation of Article 365 paragraph (2) of the 2nd Book of the Criminal Law no later than 12 (twelve) years.<sup>5</sup>

In the case there has been at least a difference in the determination of the diversion carried out by the Pariaman District Court judge on the same case, namely the Ipan case. At the investigation level based on the recommendations of the Community Research Investigators made a diversion attempt on the Child and had reached an agreement on diversion. However, when the Investigator requested a diversion from the Pariaman District Court, The court rejected the petition for diversion on the grounds that based on Article 7 paragraph (2) letter a of the Criminal Justice System Law the Child states that "Diversion is carried out in the event that the criminal act carried out is threatened with imprisonment for under 7 (seven) years" while in this case the suspect is threatened with Article 365 paragraph (1), (2) Jo 2nd. Article 480 of the Criminal Code, with the threat of punishment of the principal crime for more than 7 (seven) years. So the judge assessed Diversi's request to be rejected.<sup>6</sup>

The pre-prosecution level of the same case and based on the delegation of cases accompanied by the suspect and the evidence of evidence to the Pariaman District Attorney's Office, The Public Prosecutor, taking into account the Social Assistance Report of Children Confronting the Law, carried out a diversionary effort against Ipan and once again diversionary efforts were reached. When asked to the Pariaman District Court, the Judge granted the request through Determination Number 2 / Diversi / Pid. Sus-Anak / 2018 / PN Pmn.<sup>7</sup>

From both stages it can be seen that in the same case where at the level of investigation and prosecution a diversion attempt has been reached but the judge can refuse and provide a different diversion determination. This matter if paying attention to the best interests of the child, will actually be very detrimental because the Child has gone through a series of law enforcement processes from the level of investigation to the level of prosecution which will certainly burden the psychological child.

## ***Result and Discussion***

In language, the verdict means the final result or conclusion of a case examination.<sup>8</sup> The term decision or court decision in Dutch is called *uitspraak van rechter* and in English it is called *Verdict*.<sup>9</sup> Verdict in an international encyclopedia is synonymous with *civil procedure, criminal procedure*. In the common law system, court decisions are called case law.<sup>10</sup>

Decisions are the results or conclusions of something that has been carefully considered and assessed that can be in written or oral form.<sup>11</sup> Understanding the Decision can be seen in Article 1 number 11 of the Criminal Procedure Code, in it explained that the decision is the judge's statement pronounced

<sup>5</sup> Pariaman District Attorney Case File with PDM-16 / Paria-Anak / 8/2018 register number in the name of Arifan Mahesa.

<sup>6</sup> Pariaman District Attorney Case File with PDM-16 / Paria-Anak / 8/2018 register number in the name of Arifan Mahesa.

<sup>7</sup> *Ibid*

<sup>8</sup> Yan Pramadya Puspa, 1977, *Legal Dictionary*, Semarang: Various Sciences, page. 695.

<sup>9</sup> Jonaedi Efendi, 2018, *Reconstruction of Basic Judicial Considerations*, Depok: Prenadamedia Group, page. 79.

<sup>10</sup> *Ibid*

<sup>11</sup> Leden Marpaung, 2011, *Criminal Case Handling Process*, Jakarta: Sinar Grafika, page. 129.

in an open trial, which can be criminal or free or free from all legal claims in respect of and according to the procedure set out in the law.<sup>12</sup> The phrase "Judge's Statement" means that the judge has formulated his law which is the basis of conviction, or is free, or free from all demands. Until the verdict is an embodiment of the law found by the judge.<sup>13</sup>

The judge's decision is the culmination of a case that is being examined and tried by a judge in a court. The verdict given by the judge can be regarding the following matters:<sup>14</sup>

1. Decision regarding the event, whether the defendant has committed the alleged crime to him.
2. Decisions regarding the law, whether the actions carried out by the defendant are a criminal offense and whether the defendant is guilty and can be convicted.
3. Decision regarding the criminal, if the defendant can indeed be convicted

A judge's decision must be handed down or decided based on a judge's judgment that is logical, honest, conscientious, careful, serious, and without being accompanied by personal interests, class, subjectivity, and so forth. If a judge's decision is not based on this, the judge's decision can be overturned by the Supreme Court. Judge's consideration is one of the most important aspects in realizing the value of a judge's decision that contains justice (*exaequoetbono*) and contains legal certainty, and in addition it must contain benefits.

A good judge's judgment will result in a good and perfect judge's decision. The judge's decision should be tested by 4 (four) basic criteria questions (the Fourway Test) known as the judge's basic theory of consideration, these criteria are:<sup>15</sup>

1. Really this decision ?;
2. Am I honest in making decisions ?;
3. Is it fair for the parties to the decision ?;
4. Was this decision useful?

Judges' considerations are the main ingredient for formulating criminal threats which can affect the imposing of a criminal. The pattern of criminal threats as well as the number of criminal threats are two important things that are considered by the Judge in imposing a crime for a criminal. Likewise in providing legal considerations for the settlement of diversion of children, judges must pay attention to matters that are juridical and at the same time non-juridical considerations. So that the penalties imposed on the convicted person can realize the legal goals.

In the practice of implementing diversionary measures against children dealing with law in the jurisdiction of the Pariaman District Court, there has been a difference in the determination of the judge in providing the diversion of children against the law. Judges in the same case, where at the stage of the investigation the diversion agreement was reached but the judge refused to make the decision, while at the prosecution level with an attempt to diversify again, the judge determined the diversion attempt against the child. This can be seen in the case with the PDM-16 / Paria-Anak / 8/2018 register number in the name of Arifan Mahesa alias Harifan Maisa aka Ipan. At the time of the case, Ipan was 17 years old.

The case occurred when Ipan on Friday, April 23, 2018 around 19.30 WIB. or at some time in 2018 housed in the Padang Sari housing complex of Koto Tengah, Padang City, or at least in a place that is still within the jurisdiction of the Padang District Court but based on Article 84 paragraph (2) of the

<sup>12</sup> Kadri Husin and Budi Rizki, 2012, *Criminal Justice System in Indonesia*, Bandar Lampung, Lampung University Research Institute, page. 127.

<sup>13</sup> Ibid, page. 127.

<sup>14</sup> Sudarto, 1986, *Criminal Law and Law*, Bandung, page. 74.

<sup>15</sup> Lilik Mulyadi, 2007, *Judicial Power*, Surabaya, Bina Ilmu Surabaya, page. 136.

Criminal Procedure Code<sup>16</sup> The Pariaman District Court has the authority to examine and try this case, there has been an alleged criminal act of theft with violence committed by Ipan and his friends against victims Nando Erlangga Putra and Rivaldo Putra located at Korong Ganting Nagari Kurai Taji Timur District Nan Sabaris District. Padang Pariaman.

The incident began when the reporter was at his home and at that time Opet came to the reporting house and told the reporting wife Elma Murni that the reporting son had been hacked by someone and about his right hand and the motorcycle of the reporting child was also taken away by the perpetrator at the time of the incident.

Ipan was arrested by the police on Friday, July 20, 2018 at around 7:00 pm in the Housing near the Flight School in Korong Petak Ketaping, Batang Anak District, Padang Pariaman Regency. At that time Ipan explained that he was arrested for having committed a crime of providing assistance when the crime was committed against theft which was accompanied by violence (Article 365 of the Criminal Code), stole 1 (one) unit of the Honda Beat brand in orange-blue with police number BA 2045 FT with Order number: MH1JFD22DK089039 and engine number: JFD2E2076504 in Yurni's name. That as a result of his actions, Ipan has been threatened with committing a criminal act as regulated in Article 365 paragraph (1), (2) jo jo Article 480 of the Criminal Law Code with a threat of Criminal against violation of Article 365 paragraph (1) of the Law Criminal Law no longer than 9 (nine) years, while the violation of Article 365 paragraph (2) of the 2nd Book of the Criminal Law no later than 12 (twelve) years.<sup>17</sup>

In the case, at least the difference in the determination of the diversion was carried out by the judge of the Pariaman District Court on the same case, namely the Ipan case. At the investigation level based on the recommendations of the Community Research Investigators made a diversion attempt on the Child and had reached an agreement on diversion. However, when the Investigator requested a diversion from the Pariaman District Court, The court rejected the petition for diversion on the grounds that based on Article 7 paragraph (2) letter a of the Criminal Justice System Law the Child states that "Diversion is carried out in the event that the criminal act carried out is threatened with imprisonment for under 7 (seven) years" while in this case the suspect is threatened with Article 365 paragraph (1), (2) Jo 2nd. Article 480 of the Criminal Code, with the threat of punishment of the principal crime for more than 7 (seven) years. So the judge assessed Diversi's request to be rejected.<sup>18</sup>

The pre-prosecution level of the same case and based on the case delegation accompanied by the suspect and evidence to the Pariaman District Attorney's Office, The Public Prosecutor, taking into account the Social Assistance Report of Children Confronting the Law, carried out a diversionary effort against Ipan and once again diversionary efforts were reached. When asked to the Pariaman District Court, the Judge granted the request through Stipulation Number 2 / Diversi / Pid. Sus-Anak / 2018 / PN Pmn.<sup>19</sup>

The Public Prosecutor in the Indictment Plan to be indicted against the suspect does not include violations of the criminal act of theft by violence as explained previously in Article 365 verses (1), (2) second. But the Public Prosecutor only plans to prosecute a single person against the offender, namely Article 480 Book Of Criminal Law concerning detention.<sup>20</sup>

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<sup>16</sup> Article 84 Paragraph (2) of the Criminal Procedure Code states that a district court in the jurisdiction of the defendant lives, is the last resident, where he was found or detained, only have the authority to hear the case of the defendant, if the residence of the majority of witnesses who were summoned were closer to the place of the district court than the seat of the district court in which the crime was committed.

<sup>17</sup> Pariaman District Proceusator Case File with registration number PDM-16 / Paria-Anak / 8/2018 above the name Arifan Mahesa.

<sup>18</sup> *Ibid*

<sup>19</sup> *Ibid*

<sup>20</sup> *Ibid*

From both stages it can be seen that in the same case where at the level of investigation and prosecution a diversion attempt has been reached but the judge can refuse and provide a different diversion determination. This matter if paying attention to the best interests of the child, will actually be very detrimental because the Child has gone through a series of law enforcement processes from the level of investigation to the level of prosecution which will certainly burden the psychological child.

In a diversion attempt at the investigation level, as explained above, that diversionary effort was achieved. So through the Padang Pariaman Police Resort letter Number B / 869 // VII / 2018 / Polres, a diversion agreement is requested to be requested from the Pariaman District Court Judge, with the following details of the diversion agreement:

1. Both parties (the Reporting Party and the Reported Party) have reached an agreement by deliberation;
2. Reporting Parties have forgiven the reporter's actions;
3. The Reported Party promised not to repeat any unlawful actions or actions after this agreement was made;
4. Both parties (the Reporting Party and the Reported Party) consider this case to be over and there is no demand to sue each other in the future.

However, based on the Pariaman District Court Letter 1B Number W3. U8 / 1077 / HPDN.01.4 / VII / 2018 concerning the Application for the Establishment of Diversity on behalf of Arifan Mahesa dated 30 July 2018. The Chair of the Pariaman District Court stated that the petition for diversion could not be granted / granted, on the grounds of:

Based on Article 7 paragraph (2) letter a Law Of The Criminal Justice System, states that "Diversion is carried out in the event that the criminal act carried out is threatened with imprisonment for under 7 (seven) years", while in this case (Arifan Mahesa) the suspect is threatened with Article 365 paragraph (1), (2) 2nd jo. Article 480 Book Of Criminal Law, with legal threats from the above mentioned criminal offenses for more than 7 (seven) years;

Judging from the Pariaman District Court letter, it is known that the judge did not consider the non-juridical aspects in the context of granting or not requesting Diversi from the Investigator. It can be seen from the brief description above, the judge is only focused on the criminal threat stipulated in Article 7 paragraph (2) letter a Law Of The Criminal Justice System. So diversionary efforts cannot be made.

Whereas in the diversionary effort carried out by the Public Prosecutor at the Prosecution level, as explained above, Determination of Judge Number 2 / Diversi / Pid.Sus.-Anak / 2018 / PN / Pmn granted the request of the Head of the Pariaman District Attorney. In determining the judge, the Chairperson of the Pariaman District Court gives consideration that:

1. Considering whereas based on the minutes of the Diversity Agreement dated August 3, 2018 between Children and Victims an agreement was reached on August 3, 2018, with the following agreements:
  - a. We from the Child's Party (Defendant) have acknowledged our mistakes. We committed criminal acts against the victim by providing information to Pare who asked the Child (the Defendant) to sell Honda Beat brand motorcycles which are the result of criminal acts of theft with violence perpetrated by Pare, for these actions we the Child (the Defendant) has regretted these actions and we the Child (the Defendant) apologize to the victim for our actions, on the request from the victim has forgiven the act that has been done, and the victim requested that this case need not proceed with the trial;

- b. That the facilitator has given an opportunity to the Social Worker element, to express which opinion in the Diversi The Social Worker pleads with the victim to forgive the acts committed by the Child (the Defendant) to the Victim and resolved in a diversified manner because the child (the Defendant) is still a child and the child's parents (the Defendant) are also still able to supervise and educate the child (the Defendant);
  - c. That after hearing requests and good opinions from the family of the Child (the Defendant), Penitentiary, Social Worker, Facilitator, which is based on the victim to solve this case only to the level of Diversity, and from the victim's side agreed not to proceed to trial.
2. Considering, that the diversion agreement has fulfilled and is not in conflict with statutory regulations, so it is reasonable to be granted;
  3. Noting the provisions of Article 12, Article 52 paragraph (5) Law Of Child Criminal Justice System, and Book Of Law Of Criminal Event then the judge determines:
    - a. Grant the Request of the Head of the Pariaman District Attorney;
    - b. Ordering the Parties to implement the Diversity agreement;
    - c. Order the Public Prosecutor to issue a warrant to stop the prosecution after the agreement is fully implemented;
    - d. Order the Public Prosecutor to take responsibility for evidence until the Diversity Agreement is fully implemented;
    - e. Order the evidence to be returned to the rightful party if the diversion agreement has been fully implemented;
    - f. Ordered the Head of Pariaman District Attorney to deliver a copy of this stipulation to the Community Guidance, Children / Parents of Children, Victims and Witnesses.

Judging from the description above relating to Determination of Diversity Against the Defendant Ipan, then it can be seen that, The first difference is the Article which is threatened by the perpetrators, where at the Investigation level, the Investigator threatens the perpetrators with Article 365 paragraphs (1), (2) the 2nd Jo. Article 480 of the Criminal Code. Whereas at the Public Prosecutor's level, it turns out that the Public Prosecutor only preached Article 480 of the Indonesian Criminal Code. Judging from the imposition of this Article, it is quite unfortunate that in the imposition of criminal acts against perpetrators, between the Investigator and the Public Prosecution did not make clearer and clearer coordination. It can be seen that in the perpetrator's case file there is no P-19 form from the Public Prosecutor to the Investigator.

Second, although it is known that the lack of coordination between the Investigator and the Public Prosecutor, it is known that the Judge's Consideration in rejecting the diversion of the agreed agreement at the level of investigation can be understood that the Chairperson of the Pariaman District Court, does not inspire and support the provisions of the Supreme Court Regulation No. 4 of 2014 concerning Guidelines for the Implementation of Diversity in the Criminal Justice System for Children (hereinafter referred to as Perma Diversi). Article 3 Perma Diversi explains that: "The juvenile judge must try diversification in the case of a child convicted of a criminal offense threatened with imprisonment for under 7 (seven) years and also charged with an offense threatened with imprisonment of 7 (seven) years or more ..."

Third, although in the provisions of Article 3 of the Perma Diversi it is stated that the juvenile judge must seek diversion so that it can indirectly grant / make a determination of this diversion effort as stated in Article 3 of the said Perma Diversi, however, according to the Author of the Spirit of Article 3 Perma Diversi expressly wishes that the child is protected through the fulfillment of the best interests of the child. So that if in the end the opportunity is indeed opened that judges in accordance with Article 3 Perma Diversi are obliged to work on Diversity, the judge should be able to directly grant the Investigator Diversi's request, because in the end the decision issued by the judge if the case of the Ipan reaches the



level of Court Examination will still contradict Article 7 paragraph (2) letter a Law Of Child Criminal Justice System, states that "Diversification is carried out in the event that a criminal act carried out is threatened with a prison sentence of less than 7 (seven) years", while in this case (Arifan Mahesa) the suspect is threatened with Article 365 paragraph (1), (2) 2nd jo. Article 480 Book Of Law Of Criminal Law, with legal threats from the aforementioned principal penalties for more than 7 (seven) years, as explained above. So that in principle the author agrees with the opinion of Nazif Firdaus in his research results relating to "Legal Certainty in the Implementation of Diversity Against Children in Conflict with Laws in Narcotics in the Legal Areas of the Tanjung Pati District Court" which in its conclusion Nazif explained that,<sup>21</sup>

"Implementation of diversion against children in conflict with the law in narcotics crime with reference to Perma Diversi causes legal uncertainty, because in theory the application of Perma Diversi would cause doubts to law enforcement (specifically Investigators and Public Prosecutors) regarding the obligation to seek diversion towards children in conflict with the law so that the principle of the best interests of the child is not achieved. In addition, the issuance of Perma Diversi which is not supported by consolidation with the National Police and Prosecutors' Office shows that the Supreme Court undermines the nature of the juvenile criminal justice system. Whereas in practice in the Legal District of Tanjung Pati District Court, The Child Judge does not seek diversion for every child who is in conflict with the law in a narcotic crime, with the conviction and the determination of the diversion of children charged with the same primary charges. "

So that the practice carried out by the Pariaman District Court Judge also finally caused legal uncertainty, extend the juvenile justice process, and do not accommodate the best interests of the child and are contrary to the spirit of the Child protection law, if the reasons for rejecting the granting of diversion are limited to violating Article 7 paragraph (2) letter a Law Of Children Criminal Justice System.

Fourth, judging from the judge's consideration in the determination of the diversion, it can be seen that the Pariaman District Court Judge, stipulate / grant the request of Diversity Head of the Pariaman District Attorney's Office based on a diversion agreement made by the Public Prosecutor.

Fifth, when related to Perma Diversi, the resource person explained that Perma Diversi in principle regulates the scope of the court when the case of the Child enters and is examined at the court level. So in the Perma Diversi provisions it is clearly requested that when the case of the Child reaches the level of a court hearing, and in the case file it is found that the Public Prosecutor charged the Child with a criminal threat for more than 7 (seven) years and charged the Child also with a criminal threat under 7 (seven) years in the form of charges of subsidiarity, alternative, cumulative, or combination (combined), then the Child Judge must seek Diversity.

But in Perma Diversi if it is read carefully, that there is no norm that gives judges an opportunity to grant / accept diversion requests by the Investigator / Public Prosecutor relating to diversion efforts carried out at the level of Investigation and Prosecution. This according to the Judge was indeed unfortunate. However, the resource person did not answer when the Perma Diversi norm was linked to Article 7 Law Of Children Criminal Justice System.

The concept of restorative justice is also in line with the concept of progressive law, justice in the concept of restorative justice requires efforts to recover losses or consequences arising from criminal acts, and the perpetrators in this case are given the opportunity to be involved in the recovery effort. Progressive law is a concept of how to judge. The way to judge is not only one but diverse, progressive

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<sup>21</sup> Nazif Firdaus, and friends. 2019, "Application of Supreme Court Regulation Number 4 of 2014 concerning Guidelines for the Implementation of Diversity in Narcotics Crimes", Journal of Yuridika Vol Insight 3. No. 2, page. 160.

law has its own place.<sup>22</sup> In the idea of progressive law, the law is for humans, not vice versa. Therefore, even though the law begins with the text, but then the work of law is taken over by humans, it means that it is humans who will seek deeper meaning from the texts of the Act and then make a decision. Progressive punishment can also be interpreted as testing the limits of legal ability, if it is said that running the law is creating justice in society, then the law is an effort to realize that justice. The progressive law never stops, but continues to flow to realize its ideas, namely the law for humans.<sup>23</sup> Based on the Convention on the Rights of the Child which was later adopted in Law Number 35 of 2014 amending the Law Number 23 of 2002 concerning Child Protection, there are four "General Principles for Child Protection" which must form the basis for the state in implementing Child protection.<sup>24</sup>

#### 1. The principle of non-discrimination

This principle very clearly instructs countries to never practice discrimination against children for any reason. Therefore, anyone in this country must not treat the child by seeing it as of any ethnic or ethnic origin, including from socio-economic groups like anything.

According to the author relating to this principle, if it is related to the current state of diversion efforts in Indonesia with enactment Law Of Children Criminal Justice System and Perma Diversi, has the potential to violate the principle of non-discrimination against children. As explained above, this is because the case of the child who will be attempted diversion is very dependent on the perspective of law enforcement to assess the efforts of the diversion. For example in the context of the application of Perma Diversi, where the child is threatened with a crime over 7 years, the fate of the diversion of the child is very dependent on the model of the indictment made by the Public Prosecutor, because according to Perma Diversi if the indictment model includes a criminal under 7 (seven) years, the Child Judge must seek diversion.

In addition, as explained above, that there has been at least a protracted legal process in the case of the Child as the researcher described above, also makes this principle of non-discrimination seem to be marginalized. According to the author the discrimination is also not necessarily only in the context of one case of the child with another case of the child. But in conflicting or overlapping law enforcement processes, or at least inefficient for the child, as stated above, that the Child is forced to continue his legal process to the court level even though in principle the level of investigation has been achieved diversion. So that the diversion effort and agreement must be repeated and deliberated again at the court examination level. It also makes the law appear to discriminate against children through its law enforcement authority. It is different if authority and necessity seek diversion as such Law Of Children Criminal Justice System not given at every level of the judicial process from the level of investigation to the level of court examination. Although in this context, the state through its apparatus is expected to apply the principle of non-discrimination, but the state of legal norms makes this happen.

#### 2. The principle of the best interests of the child

This principle reminds all child protection providers that considerations in making decisions regarding the future of the child, not the size of an adult. What do adults think is good, not necessarily good according to the size of the interests of the child. In connection with this principle if it is related to the Ipan case, it is clear that the best interests of the child are to be marginalized with various implementation efforts and the process of seeking diversion that occurs.

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<sup>22</sup> Satya Arinanto, 2011, *Understanding the Law*, Raja Grafindo Persada Limited Company, Jakarta, page. 3.

<sup>23</sup> *Ibid.* page. 5.

<sup>24</sup> Hadi Supeno, *Op. Cit.*, page. 53.

This makes it seem as if by law that the diversion process must go to the court stage, whereas Law Of Children Criminal Justice System mandated to seek diversification from the level of Investigation, Prosecution and Trial hearing. So as happened in the Ipan case, Child Victims and Children who are in conflict with the law must repeatedly make a diversion agreement, and is presented again at each level of examination. Not only does it prioritize the best interests of the child, but also according to the authors eventually become unproductive for various parties because the protracted process also affects the work and time of each party including his family.

3. The principle of respect for the opinions of children.

The most important point of this principle, children are subjects who have personality autonomy. Therefore, he cannot only be seen in a weak, accepting, and passive position, but actually he is an autonomous person who has experiences, desires, imagination, obsessions, and aspirations that are not necessarily the same as adults. Aspirations Children are usually very distinctive and often not understood by parents, children have their own world and their own expectations. Therefore the resolution of criminal cases should not be fixed in the text of the Law so that the objectives to be achieved in the settlement are the return of balanced social harmonization between the perpetrators, victims and the community.

If related to this principle, it is clear that the State or at least law enforcement officials do not consider and pay attention to the opinions of the children (each party), because it is clear at the level of investigation that diversion efforts have been agreed upon so naturally it can be said that the child in conflict with the law and the child victim has agreed to do the diversion.

So according to the writer based on the description above, related to the consideration of judges in trying diversion is associated with law enforcement theory and restorative justice theory, it can be seen that the judges do not give non-judicial and rigid consideration to the provisions of the applicable law. And according to the writer, he is quite ignorant with the overlapping norms that occur, where in principle Law Children Criminal Justice System gives the same obligation to all law enforcement agencies to seek diversion in accordance with the provisions of Article 7 Law Of Child Criminal Justice System, but that provision was immediately expanded with Perma Diversi. Viewed in the context of legislation as if it might not be seen that eventually these norms overlap, because it can be said that the Supreme Court only broadened or at least clarified the provisions of Article 7 paragraph (2) Law Of Children Criminal Justice System through Article 3 Perma Diversi.

However, if examined further through the spirit / nature of Article 7 paragraph (2) Law Of Children Criminal Justice System which requires that in each the judicial process must be diversified to show that Law Of Children Criminal Judgment System in order to protect and pay attention to the best interests of the child, give equal rights and obligations to Law Enforcement from the level of investigation to the examination process to seek diversion. Meanwhile, Perma Diversi finally showed the ego or superiority of one of the institutions to seek diversion that resulted in the process of law enforcement in the context of legal protection against a child who is in conflict with the law takes a long time and drags on a higher examination process, while it is known that at the investigation level diversion efforts have been reached.

In addition, it is quite unfortunate that a judge cannot grant a petition for diversion on the basis of Article 7 paragraph (2) letter a Law Of The Criminal Justice System, which explains in essence the criminal threat over 7 (seven) years cannot be granted for diversion. While on the one hand, based on Article 3 Perma Diversi, judges are obliged to provide diversion efforts when the indictment regulates threats under 7 (seven) years and above 7 (seven) years. The judge is of the view that Perma Diversi only regulates diversification efforts at the court examination level, whereas the diversion agreement reached at the level of investigation and / or prosecution is not included in

the arrangements stipulated in the request so it must be rejected because it refers to the provisions stipulated in the Law Of Criminal Justice System. In this case the judge did not consider the philosophical goals of Perma but was very legalistic in reading the rules.

### ***Conclusion***

1. Process of Case Inspection of Children in conflict with the law in the determination of judges Number 2 / Diversi / Pid. Sus-Anak / 2018 / PN Pmn can be seen that investigators in the Case in principle carry out compliance with the process of examining cases of Children in conflict with the law. The Public Prosecutor also implements and fulfills the administrative and legal processes required in the case handling process against Ipan. But in the process of examining cases leading to diversionary efforts at the investigation level, The author is of the opinion that the investigator lacks coordination with the Public Prosecutor so that the results of the conclusion of the alleged crime committed by Ipan differ from the results of the conclusion of the alleged criminal act which is examined and examined by the Public Prosecutor. This is partly due to the absence of clear regulations governing coordination between law enforcers in relation to seeking diversion towards children, which ultimately harms the rights and interests of children.
2. Judges' consideration in trying to diversify is related to law enforcement theory and restorative justice theory, it can be seen that the judge does not give consideration in a non-judicial manner and is quite ignorant of the overlapping norms that occur, where in principle Law Children Criminal Judgment System gives the same obligation to all law enforcers to seek diversion in accordance with the provisions of Article 7 Law Of Children Criminal Justice System, but that provision was immediately expanded with Perma Diversi. Viewed in the context of legislation as if it might not be seen that eventually the norm overlaps, because it can be said that the Supreme Court only broadened or at least clarified the provisions of Article 7 paragraph (2) Law Of Children Criminal Justice System through Article 3 Perma Diversi. However, if examined further on the nature of Article 7 paragraph (2) Law Of Children Criminal Judgment System that requires that in every court process must be tried diversion shows that the Law Of Children Criminal Judgment System in order to protect and pay attention to the best interests of the child, give equal rights and obligations to Law Enforcement from the level of investigation to the examination process to seek diversion. Meanwhile, Perma Diversi finally shows the ego or superiority of one of the institutions to seek diversion that results in the process of law enforcement in the context of legal protection for children in conflict with the law which takes a long time and is protracted in the juvenile criminal justice process, while it is known that at the investigation level diversion efforts have been reached. In addition, the Judge also believes that Perma Diversi only regulates diversification efforts at the court examination level, whereas the diversion agreement reached at the level of investigation and / or prosecution is not included in the regulations stipulated in the perma, so it must be rejected because it refers to the provisions stipulated in the Children Criminal Judgment System. In this case the judge did not consider the philosophical goals of Perma but was very legalistic in reading the rules.

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