

FORMULATION OF DIVERSION IN NATIONAL AND INTERNATIONAL LAW INSTRUMENTS

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ABSTRACT

The adoption of Diversion both in national and international law hoped to give a protection and guarantee to children's right. But the reality shows that the settlement of dispute in children criminal case tends to the retribution, so that the child ended in prison. Consequently, the material studied here is, how is the formulation of diversion within national and international law? To answer this question, this paper using the normative juridical approach. The result of the research shows that the national law which concern about diversion – Children Criminal Judicial System Law (UU SPPA), Government National statutory No. 65/2015 about the Diversion Implementation Guidelines and Children Handling under age 12 (twelve) years, Supreme Court National statutory No. 4/2014 about Diversion Implementation Guidelines in Children Criminal Judicial System, and Attorney General's National statutory No. PER-006/A/J.A/04/2015 about Diversion Implementation Guidelines in Prosecution Phase. Moreover, diversion gets its attention from international forum in The Beijing Rules, The Riyadh Guidelines, and The Tokyo Rules. The international law instrument which concern about diversion should be an integral part with national law, and serve as the complementary rules for national law about diversion.

Keywords: Diversion, National Law, International Law.

INTRODUCTION

The presence of a child in a married life is a gift and a solace for the family and their parents. But, the *storming* phase happened by children often did not recognized his/her unlawful acts (Anwar dan M. Ridho Wijaya, 2019). In the present day, children frequently faced with the criminal law issues. The Indonesian Commission of Children Protection (KPAI) data shows that there are 1.434 the case of children dealing with the law throughout 2018 (Irmayani, 2019). Even annually there are 4000 children that the cases are settled by the court and sentenced to the prison (Aprilianda, 2012). The high value of the children facing the law problems should not give the point of view that they are the criminals. The criminal act which done by children should be considered as the social phenomenon called *juvenile delinquency* (Kartono, 1992). So, there should be no negative stigmas and labels toward them. Otherwise, we should have a new paradigm to solve this issue, by giving the special attention and affection toward them. Children dealing with the law are a helpless child and need to be helped, so that they could become the good generation in this country.

The juvenile criminal actors should be given the attention from each of their sovereign state. Several law instruments have already enacted to ensure the protection of the children's rights. Diversion is one of the concept of children case settlement which has already approved and adopted in law instruments, both national and international. Diversion supports the children's position to avoid the punishment which cause the stigmas and seize their future. In Indonesia, diversion acknowledged since the adoption of National Statutory No. 11/2012 about Children Criminal Judicial System Law (UU SPPA). Besides, the variation of international law has already regulated the diversion in children criminal case settlement - *The Riyadh Guidelines, The Beijing Rules, and The Tokyo Rules.*

The adoption of diversion in national and international law hoped to give the protection and guarantee the children's rights. But in reality, the juvenile criminal actors have not yet received treatment in favor of their best interests (Ernis, 2016). According to the Police Record, the amount of the children which accused for their criminal act reached for approximately 11.344 cases (Djamil, 2013). The Correctional Facilities Directorate General's Data, from 2015 to 2019, there are 11.334 juvenile criminal actors existed in 33 Indonesian Law and Human Rights Ministry's Office. Then, there are more than 2.500 children sentenced to the prisons (Hamper, 2014). As the consequence, the damage of children occurs due to the lack of the protection and guarantee, and the unjust judgment done to the juveniles (Bakhtiar).

RESEARCH METHOD

One of the purposes of the implementation of diversion is to decrease the imprisonment punishment of children. But the *status quo* shows that the dispute settlement done to the juvenile cases tends to the retribution which causing the imprisonment of juveniles. Hence, as an instrument that protects the children's rights, the research about the diversion in national and international law could be interesting. The problem researched in this paper is how is the diversion formulation in national and international law instruments? To answer this question, this paper will use the normative juridical approach. Normative juridical research is an approach which placed the law as the judicial system construction (Fajar ND, 2010). Norm system inferred is the basic principles, norms and rules from the national national statutorys, judicial decisions, and doctrines from the highly qualified publicists. Therefore, such approach will be conducted by analyzing the theories, concepts, and laws that correlates with the problem discussed.

RESULT AND DISCUSSIONS**Diversion in National Law Instruments**

a. National Statutory No. 11/2012 about Children Criminal Judicial System Law (UU SPPA)

To be specific, children have a different right with the mature person in general. This caused by the fact that children often become either the victim or the perpetrator of the criminal acts. This actual fact results in the worries for the parents, law enforcer, and societies (Sosiawan, 2016). This day, the protection of children becomes the special challenge for Indonesia. *Arif Gosita* said that the children protection is a measure conducted to ensure the fulfillment of children's right (Ariani, 2014). The government has enacting UU SPPA as the legal instrument which specifically governs the protection of juvenile criminal actors. The base of substance in this national statutory is the adoption of diversion in juvenile case settlement. According to the national statutory, diversion is the transfer of child dispute resolution from the judicial to non-judicial process. The implementation of diversion is based from the will to avoid the negative impact of judicial process which can affect the psychological development of the children (Suhaimi, 2013). Before such national statutory enacted, the juvenile crime settlement regulated in National Statutory No. 3/1997 about Juvenile Court. But this national statutory have not yet stipulate clearly about diversion in juvenile case settlement (Wicaksono and Pujiyono, 2015). The national statutory of diversion in UU SPPA lies in Article 6 until Article 15. The purposes of diversion according to this national statutory are:

- a) achieve peace between victims and children;
- b) settle the dispute outside the judicial court;
- c) Avoiding children from deprivation of independence;
- d) Encourage people to participate;
- e) Instill a sense of responsibility to the child.

Before the establishment of UU SPPA, the children criminal justice system have not yet shows the successful rates to suppress the juvenile criminal actors. Children criminal justice system has failed to make a justice, the increasing value of juvenile recidivist, failure of judicial process for juvenile, and imprisonment-tend judicial decision. These are the bases to enact UU SPPA (Hambali, 2019). The born of diversion concept in UU SPPA bring the fundamental change in juvenile criminal justice system in Indonesia. While decreasing the interaction of children in judicial process (Wahyudi, 2011) this concept put forward the interests of the good for children. The policy formulation in criminal law about diversion in Indonesia in UU SPPA will be explained in the table below:

Table 1. Formulation of Diversion in UU SPPA

No	Article	Substance
	Article 6	Purpose of diversion: a. Achieve peace between victims and children; b. Settling cases of children outside the judicial process; c. Avoiding children from deprivation of independence; d. Encourage people to participate; e. Instill a sense of responsibility to the child.
2.	Article 7	Diversion must be pursued at the level of investigation, prosecution and examination at a court hearing. A criminal offense that can be sought diversion is a crime that is punishable by imprisonment under 7 years and not repetition.
3.	Article 8	Diversion is carried out by involving children, parents / guardians, victims and parents / guardians, social counselors, and professional social workers based on a restorative approach. If necessary, the diversion process can involve social welfare workers or the community. the diversion process must pay attention to the interests of the victim, the welfare and responsibility of children, avoidance of negative stigma, avoidance of retaliation, community harmony, propriety, decency, and public order.
4.	Article 9	In conducting diversion, investigators, public prosecutors, and judges must consider the categories of criminal acts, the age of the child, the results of social research, and family and community support. if the diversion results in an agreement, then the agreement must be approved and there is a willingness from the victim and / or his family. This agreement can be excluded in terms of criminal offenses in the form of violations, minor crimes, crime without victims, and the value of losses not exceeding the provincial minimum wage.
5.	Article 10	Diversi agreement to settle criminal offenses in the form of violations, minor crimes, crime without victims, or the value of the loss of victims no more than the value of the provincial minimum wage can be done by investigators together with the perpetrators and / or their families, Community Guides, and can involve community leaders. The Diversity Agreement made by the Investigator on the recommendation of the Community Guidance may take the form of compensation for losses in the event of casualties, medical and psychosocial rehabilitation, re-submission to parents / guardians, participation in education or training in educational institutions or LPKS no later than 3 (three) months, or community service for a maximum of 3 (three) months.

6.	Article 11	The results of the Diversion agreement can take the form of peace with or without compensation, submission back to parents / guardians, participation in education or training in educational institutions or LPKS no later than 3 (three) months, or community service.
7.	Article 12	The results of the agreement are outlined in the form of a Diversi agreement. The results of the Diversi agreement are submitted by the direct supervisor of the official responsible at each level of examination to the district court in accordance with the jurisdiction within a maximum period of 3 (three) days after the agreement was reached to obtain the determination. The determination is carried out within a maximum period of 3 (three) days from the receipt of the Diversi agreement. Determination is conveyed to the Community Guidance, Investigator, Public Prosecutor, or Judge within 3 (three) days from the date of stipulation. Upon receipt of the decision, the Investigator issues the termination of the investigation or the Public Prosecutor issues the termination of the prosecution.
8.	Article 13	The juvenile criminal justice process continues in the event that the Diversi process does not produce an agreement or the Diversi agreement is not implemented.
9.	Article 14	Oversight of the Diversi process and the implementation of the agreements produced is directly with the direct supervisor of the responsible official at each level of inspection. During the Diversion process until the Diversi agreement is implemented, the Community Guidance is required to provide assistance, guidance, and supervision. In the event that the Diversity agreement is not carried out within the stipulated time, the Community Guidance immediately reports it to the responsible official. The responsible official is obliged to follow up on the report within a maximum period of 7 (seven) days.
10.	Article 15	Provisions regarding guidelines for implementing the Diversi process, procedures, and coordinating the implementation of Diversi are regulated by Government National statutorys.

According to the table 1 above, UU SPPA has already comprehensive enough in regulating diversion. But diversion has not yet suppressed the crime and juvenile imprisonment rates. The implementation of diversion at the day tends to be legalistic and discriminated. Diversion is only for the juvenile crime that sentenced for below 7 (seven) years and not include recidivist. The categorization of such diversion is inconsistent with the provision under Article 2 Paragraph C UU SPPA, which stated that the juvenile criminal justice system should be conducted based from non-discrimination principle. This means that there is no distinctive treatment regardless of its race, religion, gender, ethnic, culture, and all related inherent status. Besides, such categorization did not give justice for the children, considering the act that not derived from their will. The juvenile criminal actors affected by external factor, such as his/her environment, friends of the same age, cyberspace activities, etc (Nashriana, 2011). but according to *Tannebaum*, one of the causes for the juvenile criminal actors is the conflict within the societies (Prasetyo, 2020). Therefore, there should be no categorization in diversion implementation, but all of the juvenile criminal actors should be included in diversion.

b. Government Regulation No.65/2015 about Diversion Implementation Guidelines and Children Handling under age 12 (Twelve) Years.

This government regulation was formed to carry out the mandate of Article 15 and Article 21 paragraph (6) of national statutory No.11/2012 about Criminal Justice System for Children. Basically, cases of children dealing with the law must be sought diversification starting at the stage of investigation, prosecution, and examination in court proceedings. However, because based on sociological, psychological, and pedagogical considerations, children under age 12 years can not be brought to trial. The substance regulated in this Government Regulation includes guidelines for the implementation of the diversion process, the procedures and coordination of the implementation of the diversion, and the terms and procedures for making decisions on children under age 12 years who commit crime or suspected of committing criminal offenses.

The stipulation of Government Regulation No.65/2015 has consequences for the handling of cases of children in conflict with the law or children who commit criminal acts. When this government regulation comes into force, every decision taken against a child who is not yet 12 years old who is undergoing a criminal justice process at every level of examination, must be guided by this government regulation. Furthermore, if the case of a child under age 12 years has been delegated to the public prosecutor, then the public prosecutor returns the case to the investigator to make a joint decision with the social counselor and professional social worker. Whereas cases under 12 years that have been submitted to the court, the judge returns the case to the public prosecutor to be submitted to the investigator in order to make a joint decision with the social counselor and professional social workers.

Government Regulation No.65/2015 is substantially good enough in responding to the mandate of the Children Criminal Judicial System Law (UU SPPA). However, according to the author, there are several issues that should be included in the substance. First, related to the obligation to calculate the negative impact caused by every act of government and law enforcement in the diversion process. Second, rules regarding the fulfillment of the right to access public information related to the implementation of diversion. Third, the rules regarding guarantee of equal opportunities for everyone to provide an assessment of the running of the diversion process.

c. Supreme Court Regulation No. 4/2014 about Diversion Implementation Guidelines in Children Criminal Judicial System

The issuance Supreme Court Regulation No. 4/2014 is carried out in an effort to better implement diversion (Firdaus, 2019). The issuance of this Supreme Court Regulation was carried out in response to the mandate of Article 5, Article 14, Article 29, Article 42, and Article 52 paragraph (2) of the diversion – Children Criminal Judicial System Law (UU SPPA). The UU SPPA has not clearly stipulated the procedures and stages of the diversion process. Based on the UU SPPA, the application of diversion is only intended for the crime of children whose criminal threats are under 7 years and not repetition. However, with Supreme Court Regulation No. 4/2014, the provisions regarding the application of the diversion were expanded. Article 3 Supreme Court Regulation No. 4/2014 stipulates those juvenile judges are obliged to seek diversion in the event that a child is convicted of a criminal offense threatened with imprisonment of less than 7 years or more in the form of indictments on subsidiarity, alternative, cumulative, or a combination.

The substance set out in Supreme Court Regulation No. 4/2014 includes the obligation of diversion, the implementation of diversion in court. The stipulation of this Supreme Court Regulation has consequences for juvenile judges who were determined before the birth of the UU SPPA. Based on this Supreme Court Regulation, judges in a court that have been determined as juvenile judges based on a Supreme Court decision in accordance with regulation No. 3/1997, are determined as juvenile judges based on the UU SPPA.

d. Attorney General's Regulation No. PER-006/A/J.A/04/2015 about Diversion Implementation Guidelines in Prosecution Phase

Handling cases of children who are in conflict with the law must truly guarantee the protection of the best interests of the child. Before the case of a child is submitted to the court, the public prosecutor is obliged to seek diversion. In this regard, in the context of optimizing the performance of the Prosecutor's Office in handling child cases, procedures for implementing standard and binding diversions are needed for the public prosecutor (Priamsari, 2018). On that basis, on April 15, 2015 the Attorney General established a Attorney General's Regulation No. PER-006/A/J.A/04/2015 about Diversion Implementation Guidelines in Prosecution Phase.

The substance regulated in the Attorney General's regulation the encompass obligation of diversion and the process of implementing the diversion at the prosecution phase. Based on Attorney General Regulation No. PER-006 / A / JA / 04/2015, the mechanism for applying diversion to cases of children in conflict with the law includes the appointment of a public prosecutor as a facilitator, sending invitations to implement the diversion, making minutes of the diversion process, making peace statements, making diversion agreement letter, making proof of receipt of compensation, making minutes of the diversion opinion, making a report of the results of the diversion, and making a decree terminating the prosecution (Khalis, 2019).

Diversion in international instruments

The application of diversion to children following the developmental actions in its development has received attention from the international community. The attention of the international community towards children participating in actions is represented through law instruments. The attention of the international community is intended to prevent children who commit crimes from the court (Rover, 2000). Some international law instruments which will be described below:

a. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*

The Beijing Rules is one of the international law instruments that regulates the authority of law enforcement agencies to take policy actions in handling cases of criminal acts committed by children. The act is a diversion process (Nurwianti et al., 2017), namely the process of handling cases of children in conflict with the law from the formal criminal justice process to the process outside of formal justice (Djeke, 2016). According to the provisions of Article 5.1 of the Beijing Rules, the purpose of the criminal justice system is to advance the welfare of children, and promote the principle of proportionality.

The Beijing Rules govern diversion in Article 6, Article 11, and Article 13. Article 6 stipulates that law enforcement officials can exercise discretion at any level of examination of a child's case. This provision combines several important aspects which are effective, fair, and humane for children. Therefore, the qualifications of a professional who handles child cases must be absolutely ensured in order to ensure the wise implementation of juvenile justice. Furthermore Article 11 of the Beijing Rules stipulates that diversion is an attempt to divert the settlement of cases of children outside the formal justice process with the aim of preventing children from stigmatization. As explained in Article 11.2, transfers can be made at any level of decision making by the police, prosecutors and courts. Then Article 13 of the Beijing Rules provides that the detention of a child who has committed a criminal offense is a last resort and in a short time. If detention is carried out, the offender's child must be separated from adult detention. In addition, detained children must receive care and protection from anything that harms them.

The existence of The Beijing Rules makes the settlement of cases of children in conflict with the law not necessarily imprisoned, so that children can avoid the negative effects of the criminal justice system. The principles of diversion according to The Beijing Rules are as follows:

- 1) The idea of diversion is carried out after seeing appropriate considerations, namely law enforcers (police, prosecutors, judges and other institutions) are given the authority to handle young lawbreakers without using formal justice.
- 2) The authority to determine diversion is given to law enforcement officials such as police, prosecutors, judges and other institutions that handle cases of these children, according to their policies according to the criteria determined for that purpose in their respective law systems and also in accordance with the principles contained in The Beijing Rules.

- 3) Implementation of the diversion idea must be with the consent of the child, or parents or guardians, however the decision to implement the diversion idea after a review by the competent authority on the request for the diversion idea.
- 4) Implementation of the diversion idea requires cooperation and the role of the community, in connection with the diversion program such as supervision, temporary guidance, recovery and compensation to the victims (Rosidah, 2014).

The Beijing Rules become an integral part of the development of the national laws of the countries which ratify them. Substantially, The Beijing Rules have encouraged countries to prioritize welfare and the best interests of children in conflict with the law. However, The Beijing Rules have not provided strict limits on the age of children who must undergo criminal responsibility. The Beijing Rules only determine parameters in determining the age of criminal responsibility of children, such as emotional, mental, and intellectual maturity (Darmi, 2016).

b. *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*

Implementation of diversion against children in conflict with the law or children who commit crimes is an obligation and responsibility carried by the international community (Fithri, 2017). The Riyadh Guidelines are one of the international law instruments that underlie the implementation of diversion. The Riyadh Guidelines consist of 66 Articles, but only Article 58 expressly regulates diversion. Based on Article 58, law enforcement and other related parties involved in the process of resolving cases of children in conflict with the law, must be trained and as much as possible seek diversion. The diversion formulation in The Riyadh Guidelines is indeed not comprehensive. However, the provisions in The Riyadh Guidelines require treatment that promotes the best interests of children in conflict with the law (Andrianto, et al., 2016). Settlement of cases of children in conflict with the law through a formal process is the last attempt. Community service programs must be developed as an effort to prevent crime. Furthermore, deprivation of liberty must be sought as a last resort and carried out in a short time, without compromising the best interests of the child. This aims to prevent children who are in conflict with the law from stigmatization, victimization, and over criminalization.

c. *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*

The Tokyo Rules is UN resolution No. 45/113 which consists of 23 articles. The Tokyo Rules contain the provisions of non-custodial actions in the settlement of cases of children in conflict with the law. Basically, The Tokyo Rules are intended to increase the participation of the community in fostering children who commit criminal acts (Fithri, 2017). In rules 5, The Tokyo Rules provide an opportunity for diversion at the pre-trial stage. A case at the pre-trial stage may not be proceeded to a judicial process to protect the interests of the community, prevent crime, and respect the rights of victims of criminal acts. The Tokyo Rules emphasize detention as a last resort in resolving cases of children in conflict with the law. In resolving cases of children who are in conflict with the law, the state must consider the rights of children who commit criminal acts, victims of criminal acts, and the interests of society. This provision is intended to reduce the number of restrictions on independence of children in conflict with the law. So that children who are in conflict with the law have the opportunity to realize and correct their actions, respond directly to the community, and recover the losses caused by their actions.

The diversion formulation in several international law instruments, is a form of concern for the international community in providing protection for children in conflict with the law. International law instruments containing the diversionary provisions encourage the settlement of cases of children in conflict with the law through a non-litigation process. This aims to prevent children from the negative impact of the litigation process on children's growth and development. Therefore, the international law instruments governing this diversion should be an integral part of the national law instruments. Because international law instruments can be input for national law instruments regarding diversion. A country can adopt the diversionary provisions in international law instruments by ratifying them to be further regulated in its national law instruments (Parthiana, 2003). The entry of international law instruments into national law will give its own color in the diversion formulation. In addition, the adoption of diversion in international law instruments into national law instruments can be a parameter to determine the extent of a country's sensitivity to the development of diversion in international law.

CONCLUSION AND SUGGESTION

Diversion has been accommodated in national and international law instruments. Several national law instruments specifically regulate the diversion, such as Children Criminal Judicial System Law (UU SPPA), Government Regulation No. 65/2015 about the Diversion Implementation Guidelines and Children Handling under age 12 (twelve) years, Supreme Court Regulation No. 4/2014 about Diversion Implementation Guidelines in Children Criminal Judicial System, and Attorney General's Regulation No. PER-006/A/J.A/04/2015 about Diversion Implementation Guidelines in Prosecution Phase. The diversion arrangement in the national law instrument shows the government's positive response in providing protection for children in conflict with the law. The diversion formulation in the national law instrument cannot be said to be perfect. However, the successful implementation of diversion is very dependent on law enforcement and the community itself. Furthermore, the diversion received the attention of the international community represented through law instruments namely, The Beijing Rules, The Riyadh Guidelines, and The Tokyo Rules. International law instruments governing this diversion should be an integral part of national law instruments. Because international law instruments can be input for national law instruments regarding diversion.

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