

## THE IDEAL FORMULATION OF DIVERSION IN THE JUVENILE CRIMINAL JUSTICE SYSTEM

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### ABSTRACT

*This article discusses two main issues, first, how is the legal politics of determining diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System? Second, how is the formulation of diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System? The research method uses a normative juridical approach. Based on the discussion, it is concluded that first, diversion is the will of the community. Currently, diversion regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System must be applied at every level of examination of juvenile cases. However, the categorization of diversion in Article 7 paragraph (2) of Law Number 11 of 2012 concerning the Criminal Justice System for Children is still discriminatory, therefore the current implementation of diversion is not fully in favor of the best interests of the child. Second, the ideal formulation of diversion in Law Number 11 of 2012 concerning the Criminal Justice System for Children includes diversion that must be attempted for every criminal act committed by a child because a child who commits a criminal act is influenced by external factors or not a pure intention, the punishment of a child must prioritize in the best interests of the child, and criminalization against children that prioritizes rehabilitation, education, and resocialization.*

Keywords: Reformulation; Diversion; Child.

### INTRODUCTION

This article discusses the legal politics of determining diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System and the formulation of diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. The enactment of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System provides confirmation related to child protection in Indonesia (Tarigan, 2015). Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA Law) also brings about fundamental changes in the juvenile justice system in Indonesia. This fundamental change can be seen from the adoption of the concept of diversion in the settlement of children's cases. In essence, diversion requires the settlement of children's cases outside the criminal justice system, the aim is none other than to achieve peace between victims and perpetrators and avoid the bad stigma of criminal justice. The concept of diversion is an alternative form of settlement of criminal acts that are directed to informal settlements by involving all parties involved in the crime that occurred (Marlina, 2009).

Until now diversion is still glorified both among academics and legal practitioners. This principle is considered to be able to resolve children's cases by accommodating the best interests of victims and perpetrators and avoiding deprivation of liberty to protect the future of children. However, the current application of diversion is not as described in legal theories. The desired diversion in the SPPA Law is only for children who commit crimes with certain categories, in other words, diversion has not been in favor of all the nation's children and is still discriminatory. The categorization of diversion can be seen in the provisions of Article 7 of the SPPA Law which essentially states that diversion can only be applied to criminal acts with threats of under seven years and not repetition. The diversion provisions are contrary to the mandate of Article 2 letter c of the SPPA Law and paragraph 1 of the Convention on the Rights of the Child (Fahlevi, 2015), that the juvenile criminal justice system is implemented based on the principle of non-discrimination without discriminating against the legal status of the child. On the other hand, the diversion in the SPPA Law is not yet fully in line with restorative justice which requires recovery, especially for children who have committed crimes. Although in its development the retributive system began to shift towards expediency (Sambas, 2012), However, in handling cases of children in conflict with the law, the retributive system is still very thickly used by law enforcement officers. The act of detaining children is still a "must" paradigm, this is based on data from the Jakarta Legal Aid Institute, namely 57% of children in conflict with the law receive a detention from the police (Tiara & Biliansyah, 2018).

The problem of diversion is like an iceberg and is still a problem that has not been resolved until now. So it is not surprising that many studies have examined this diversion. One of them is in Never Varida Ariani's article which examines the implementation of the SPPA Law to protect the interests of children. The article published in the legal media journal discusses the implementation of the juvenile criminal justice system and the government's efforts to protect children in conflict with the law, namely the application of diversion. Meanwhile, this research does not only examine the implementation of diversion but also examines the ideal formulation of diversion in the future. In discussing the ideal formulation of diversion in the future, after this, the current implementation of diversion in Indonesia will be described. Next, this article will describe the results of the legal political analysis of the determination of diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. Finally, this article will offer a diversion formulation in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

### RESEARCH METHOD

In order to find, and analyze a problem to be studied, certain methods are used in accordance with the research needs. The research method used in writing this article is juridical normative. Based on this method, this research is conducted by examining and analyzing theories, doctrines, and laws and regulations that are relevant to the issues being discussed. The data in this study comes from literature studies in the form of books, journal articles, magazines, regulations, and other reliable literature sources. The data

obtained were processed by description, prescription, and systematization methods. Then the data were analyzed descriptively qualitatively.

## RESULT AND DISCUSSIONS

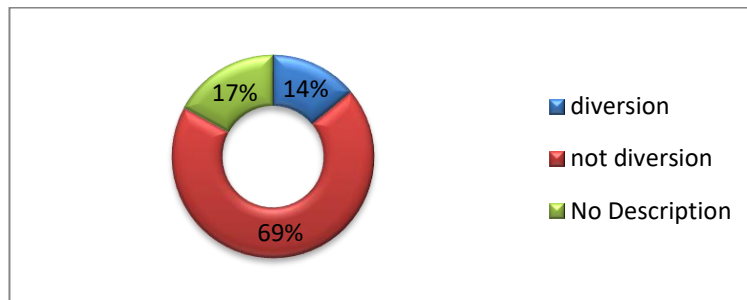
### Current Implementation of Diversion in Indonesia

The Indonesian judiciary has been oriented towards restorative justice (Suhariyanto, 2015) like diversion. As explained earlier that diversion is mandatory at every level of examination. The process of implementing diversion at each level in the juvenile criminal justice system is as follows:

#### 1. Diversion is under investigation at the Police

Investigations of children in conflict with the law are carried out in a family atmosphere (Riadi, 2016). The legal basis for the implementation of diversion at the investigation level is Article 7 paragraph (1) of Law Number 11 of 2012. The authority given to the Police as investigators to conduct diversion in the settlement of criminal cases committed by children is based more on the position of the police as law enforcement agencies the first and directly in contact with the community. The police have such great potential to change the culture of society (Adi, 2009).

The diversion process at the investigation level begins after receiving the police report, the investigator makes a written letter to ask for advice from the community advisor. The results of the research by the community supervisor must be submitted to the investigator no later than 3 X 24 hours. The investigators seek diversion no later than seven days after the investigation begins. If the perpetrator and the victim agree to carry out diversion, the community advisor and social worker start a deliberation by involving the relevant parties. Deliberations are held no later than 30 days after the start of the diversion. If the diversion results in an agreement, the Court will issue a diversion decision no later than 3 days from the receipt of the diversion agreement. After receiving a decision from the Court, the investigator issues a letter to terminate the investigation (Ratomi, 2019). However, the current application of diversion is not as described in legal theories. Based on data from the Jakarta Legal Aid Institute, the application of diversion to child offenders has not been maximized. During the investigation process, many children's rights related to diversion were not fulfilled. Of the 229 cases that were entered, only 32 cases were diverted, while 158 cases were not diverted at the investigation stage and 39 cases were empty and no information was given for diversion or not, as shown in the following graph:

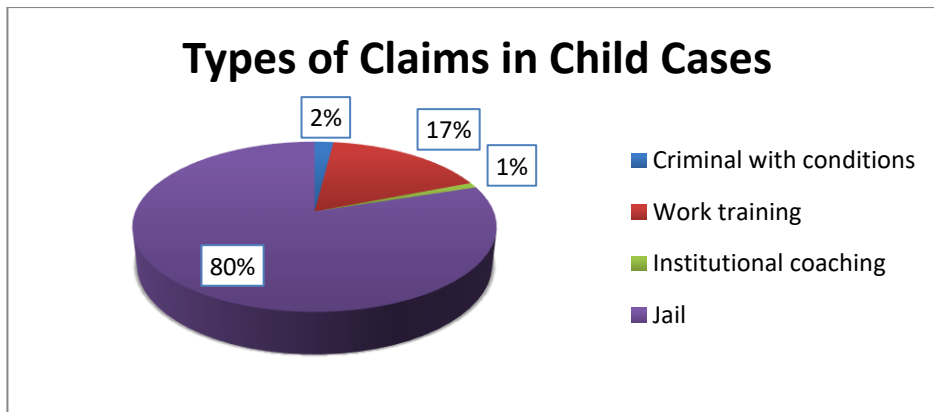


**Chart. 1.** Diversion of children in conflict with the law at the investigation stage  
Source: LBH Jakarta

#### 2. Diversion at the prosecution stage at the Attorney General's Office

Diversion at the prosecution level was carried out after the Prosecutor received the dossier from the Police. The transfer of files to the Prosecutor's Office was caused because the diversion at the investigation level failed. Diversion is declared failed if no agreement is found and diversion is successful if the parties reach an agreement. Furthermore, after an agreement is reached, the Court issues a decision on the diversion agreement no later than three days from the receipt of the diversion agreement. After receiving the decision from the Court, the Public Prosecutor issues a letter to terminate the prosecution. The retributive system is still very thickly used by law enforcement officials. The act of detaining children is still a "must" paradigm, this is based on data from the Jakarta Legal Aid Institute, namely as many as 57% of children in conflict with the law receive a detention from the police. The right to legal aid for children in conflict with the law is still largely ignored, it can be seen from the diagram above, the number of children who do not receive legal assistance is greater than the number of children who receive legal assistance. This is further exacerbated by the fact that after a random check of the data, it turns out that the reported child received legal assistance but did not receive legal assistance (Tiara & Biliansyah, 2018).

Furthermore, in 80% of the cases examined at the trial, the demands submitted by the Prosecutor were still dominated by demands in the form of imprisonment imposed on 268 children (Napitupulu, 2019). This shows that the Prosecutor's tendency to use imprisonment is still high compared to other alternative punishments, even though other alternative penalties are possible to be imposed. The implication of the high number of prosecutions for imprisonment is the high rate of imprisonment for children.

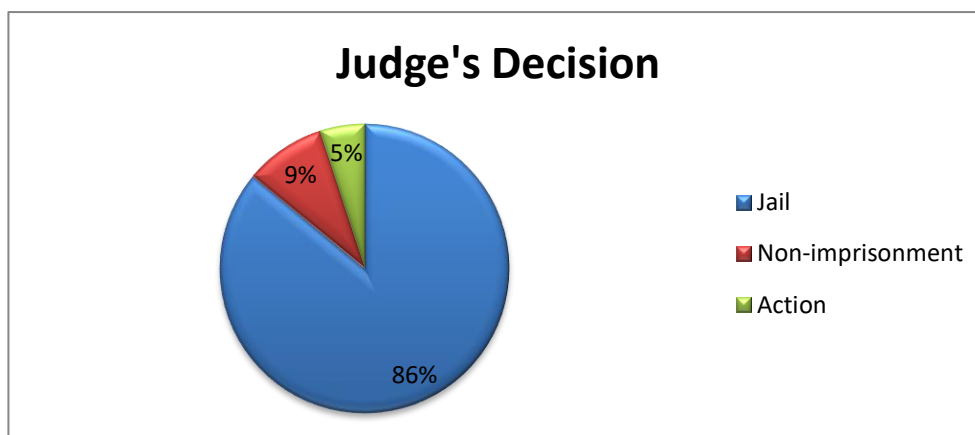


**Chart. 2.** Types of claims in child cases  
**Source:** Institute for Criminal Justice Reform (ICJR) 2019

### 3. Diversion in Court stage

The court is the last institution in determining the fate of a person (Adriansyah, 2018), including the children of criminals. The diversion process at the Court level is carried out if the diversion at the prosecution level by the Prosecutor's Office does not result in an agreement or failure. After receiving the file from the Public Prosecutor, the Head of the District Court is obliged to appoint a judge or panel to handle the child's case no later than three days after receiving the case file. Judges who have been appointed must seek diversion no later than seven days after the determination. The diversion process is carried out in the mediation room of the District Court. After the diversion process is complete, the judge makes a diversion report. The minutes can be in the form of successful diversion and failed diversion. If the diversion reaches an agreement, the Chairperson of the District Court issues a decision no later than three days from the date of its enactment. With the successful diversion, the judge decided to terminate the trial.

Although the diversion process in the juvenile criminal justice system is an obligation, not all crimes committed by children can be diverted. The seriousness of the crime is a consideration in the application of diversion (Ayu & Susetyo, 2015). Child cases that can be diverted are only child crimes that are punishable by imprisonment of fewer than seven years and are not a repetition of a crime, this is as stipulated in Article 7 paragraph (2) of the SPPA Law. The diversion process can realize dignified justice for children as the greatest gift from God Almighty (Yustia, 2013), namely justice that humanizes humans, not only perpetrators but also victims. The existence of diversion makes punishment institutions not a way to solve children's problems because they are prone to violations of children's rights. Although the protection of children's rights has been guaranteed de jure, de facto children's rights have not been fulfilled (Zai et al, 2011). Based on 2019 Institute for Criminal Justice Reform (ICJR) data, it was found that imprisonment was imposed on 259 children or reached 86% as shown in the following graph:



**Chart. 3.** Judge's decision in cases of children in conflict with the law  
**Source:** Institute for Criminal Justice Reform (ICJR) 2019

Based on the graph above, the implementation of diversion in Indonesia currently tends to be punished, especially imprisonment. When compared to other countries, the success of diversion in Indonesia is currently relatively low. The implementation of diversion in Australia, Japan, and China has so far been quite successful when compared to Indonesia, as shown in the following table (Alam & Purwati, 2015):

Table. 1. Comparison of implementation of diversion

Country	Investigation	Prosecution	Court
Australia	Police conduct informal warnings with verbal warnings and formally carried out by media conference is a minor crime and an apology to the victim and compensation	There is not any	There is not any
Japan	The police can stop the case if: a) a crime against property and a minor crime; b) The suspect is truly sorry; c) The suspect has given compensation; d) The victim has forgiven the suspect	The prosecutor has the authority to postpone the prosecution by considering the following factors: a) The characteristics of the age and condition of the perpetrator; b) The severity of the crime; c) Circumstances as a result of the crime	There is not any
China	The police give a warning or impose a fine, then the case is not prosecuted	There is not any	Suspension of the sentence is done to see that the situation and actions will not be harmful in the future
Indonesia	The police conduct diversion by Article 9 by considering the category of crime, the age of the child. Community research, community and family support	The Public Prosecutor conducts a diversion by Article 9 by considering the category of crime, the age of the child. Community research, community and family support	The judge performs diversion by Article 9 by considering the category of crime, the age of the child. Community research, community and family support

#### Ideal Diversion Formulation in Law Number 11 the Year 2012

The Indonesian criminal law system is entering a new era in its development. Restorative justice is a form of reform in Indonesian criminal law that is oriented towards improving and restoring the situation. Restorative justice or restorative justice is a court that emphasizes the repair of losses caused or related to criminal acts. Restorative justice or restorative justice has been adopted in the legislative policy regarding the settlement of children's cases in the national legal policy. Restorative justice is a concept that animates the birth of diversion in the SPPA Law. This has brought about a fundamental change in juvenile justice in Indonesia. Diversion based on restorative justice is needed to protect children in conflict with the law because in self-discovery children are often not aware that their actions are against the law. This kind of child behavior is a violation of social norms and legal norms committed by children at a young age or also called juvenile delinquency. Prevention of child delinquency must start from the right understanding (Harefa, 2015), and a humanistic approach. Even if the child who commits a crime is sanctioned, the sanctions given are not only in the form of punishment but also action sanctions (Nainggolan et al, 2010).

Juvenile delinquency refers to an act or act committed by a child if the act committed by an adult is a crime (Bala & Bromwich, 2002). Child delinquency occurs because of the natural process of every child who must experience psychological shock in the process of reaching maturity. The factors that most influence the causes of criminal acts committed by children are environmental, socio-economic, and psychological factors. Restorative justice that animates the birth of diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System has different principles from the conventional justice model, namely as follows:

- a. Require the violator to be responsible for correcting the situation or loss he or she has caused.
- b. Involving the victim, parents, family, and friends of her age.
- c. Create a forum to work together in problem-solving.
- d. Connect directly and clearly between mistakes and formal social reactions.

The diversion for child perpetrators of crime aims to prevent, reduce recidivism, provide alternative options for perpetrators other than punishment, collect restitution for victims, and reduce the burden of criminal justice (Rosidah, 2012). Although the application of diversion has many advantages, the desired diversion in the SPPA Law is only for children who commit criminal acts with certain categories, in other words, diversion has not been in favor of all children of the nation and is still discriminatory. The categorization of diversion can be seen in the provisions of Article 7 paragraph (2) of the SPPA Law which essentially states that diversion can only be applied to criminal acts with a threat of under seven years and not repetition. On the other hand, the exception to the application of diversion in the SPPA Law is inconsistent with the basic framework for establishing restorative justice. Bagir Manan stated that according to Kitayarah there are six main principles as a framework for restorative justice, namely (Rizky et al, 2008):

- a. Criminal acts are human events in the form of violations of social relations, both personal and against other parties. Criminal acts are not merely a violation of state law, but violations against people.
- b. The aim of justice is to as far as possible repair the damage and restore relations to both individuals and society to their original state.
- c. Victims should have the opportunity to choose to take part in the process. Participation can be in the form of information and dialogue with perpetrators regarding restitution (compensation), reducing fear, increasing security, growing new hopes, and others.
- d. Perpetrators are allowed to accept responsibilities and obligations towards victims and society in general.
- e. Surrounding communities and their sources must express the various needs of victims and perpetrators, including prevention of violations.
- f. The formal criminal justice system must ensure that victims and perpetrators engage in values that bind all participants without coercion, including monitoring.

The existence of exceptions and categorization in the application of diversion is a form of discrimination against children in conflict with the law and is contrary to the provisions of Article 2 letter c of the SPPA Law which states that the juvenile criminal justice system is carried out based on non-discrimination. The logical consequence of this kind of diversion arrangement illustrates the character of the legislators that indirectly has built a polarization of discriminatory thinking, namely by applying different treatment in dealing with children in conflict with the law. The application of diversion should refer to the principle of the best interests of the child to ensure the protection, dignity, and welfare of every child in conflict with the law. To provide equal treatment to children in conflict with the law, it is necessary to reformulate the provisions of Article 7 paragraph (2), the provisions in Article 7 paragraph (2) should be abolished so that diversion can be carried out for every criminal act committed by children.

Reformulation of the provisions of Article 7 paragraph (2) which contains categorization in the application of diversion, needs to be carried out so that it is in line with the non-discriminatory principle in Article 2 letter c of the SPPA Law. In addition, not all criminal acts committed by children fully arise from the will of the child's conscience but are influenced by factors outside themselves such as environmental factors, family education, association, globalization, technological developments, and so on. For example, children steal to eat, children who are perpetrators of terrorism have been contaminated with radical ideologies by irresponsible people, children who are drug dealers because of the demands and recommendations of adult criminals, and so on. In other words, a child who commits a crime should not be seen as a criminal, and his actions should not be viewed as a crime only, but a juvenile delinquency or delinquency behavior that is carried out by the child in the process of determining his identity. This condition of the child must be seen as a person who needs help, understanding, and affection (Rosidah, 2014).

Actions against children in conflict with the law must pay attention to the sustainability of their lives (Jafar, 2015). However, children are identical with weak, unstable, and need assistance. Therefore, every child who conflicts with the law without exception has the right to obtain diversion in the settlement of his case. Therefore, improvements are needed in the formulation of future diversions. These improvements include, first, that diversion must be sought for every criminal act committed by a child because as described above that a child who commits a crime is influenced by external factors or not purely his will. Second, the punishment of a child must prioritize the best interests of the child. Third, the punishment of children prioritizes rehabilitation, education, and resocialization.

Based on the description above, the perspective of children in conflict with the law must be oriented towards protection, protection, and equality. Deviations in behavior or unlawful acts committed by children are caused by factors outside of the child. Following its philosophical foundation, that diversion is based on Pancasila. Therefore, the application of diversion should not be selective but in favor of all children who commit criminal acts. Equity in the application of diversion is also in line with restorative justice which animates the birth of diversion and is consistent with the principle of non-discrimination in the implementation of the Indonesian juvenile criminal justice system as stipulated in Article 2 letter c of the SPPA Law.

## CONCLUSION

Based on the analysis and discussion above, this article concludes that the diversion accommodated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System is the will of the community. Although diversion in the juvenile criminal justice system is an obligation, not all criminal acts committed by children can be sought for diversion. What can be diverted is only a child crime which is punishable by imprisonment of fewer than seven years and is not a repetition of a crime. The categorization of the application of diversion illustrates the character of the legislators who have indirectly built a polarization of discriminatory thinking, namely by applying different treatment in dealing with children in conflict with the law. This article also concludes that the categorization of the application of diversion creates discrimination against children in conflict with the law so that it is contrary to the principle of non-discrimination in Law Number 11 of 2012. Therefore, it is necessary to reformulate the provisions of Article 7 paragraph (2). So that in the future every child who commits a crime must be sought for diversion. This needs to be done to eliminate discriminatory treatment of children in conflict with the law.

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