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Judicial Implications of the Appointment of a Judge for Children Who Determines a Diversion Conference That Does Not Meet the Requirements for Diversion Implementation

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Abstract. This paper discusses the juridical implications of the appointment of a Juvenile Judge whose diversion conference implementation does not meet the requirements for diversion. It is structured based on doctrinal research findings, employing a legislative approach and conceptual analysis utilizing teleological interpretation. The research findings indicate that the juridical implications of appointing a Juvenile Judge whose diversion conference implementation does not meet the requirements for diversion lie in the action of the Juvenile Judge in prescribing diversion despite not meeting the mandatory diversion provisions, which, when solely considered from a grammatical interpretation of the Juvenile Justice Law, constitutes an ultra petite action. However, when viewed from a teleological interpretation, the Juvenile Judge's action aligns with the purpose of the Juvenile Justice Law, namely to keep children away from judicial processes to avoid stigmatization. Moreover, even if the judge takes an ultra-petite action, it is based on the principle of the best interests of the child, as long as the contents of the diversion agreement do not contradict the Law, religion, local community norms, morality, or contain elements that the child cannot implement, or exhibit lousy faith, then the Chief Judge should still issue a Decree on the Diversion Agreement.

Keywords: Juridical Implications; Judge's Decision; Children; Diversion.

INTRODUCTION

Article 3 of the 1945 Constitution of Indonesia affirms the country as a state governed by Law. This declaration hinges on how it nurtures its youth, representing the country's future. Therefore, Indonesia must protect children's human rights, encompassing their entitlement to education, survival, growth, development, and safeguarding from violence and discrimination by the author [1].

The International Convention on the Rights of the Child addresses the global issue of children 36 of 1990, specifically focusing on the Ratification of the Convention on the Rights of the Child.

A child, just like an adult, has the potential to engage in deviant actions that may result in criminal behaviour, ultimately subjecting the child to legal consequences. Currently, the Juvenile Crimi-

nal Justice System (SPPA) is governed by Law No 11/2012, which serves as a guiding principle for law enforcement when dealing with children involved in criminal activities. This legislation emphasizes implementing a Restorative Justice approach in the juvenile criminal justice system.

Restorative justice focuses on more than just punishing the offender authors [3]; it aims to repair the harm caused by involving both the victim and the community in the justice process author [4]. Simply punishing juvenile offenders does not necessarily bring justice to the victims, as it may leave underlying issues unresolved author [5]. The community or mediator can restore the victim's well-being using restorative justice.

In the Juvenile Justice System Law, diversion is a way to handle juvenile cases without involving the criminal justice system. It promotes restora-

tive justice by bringing together the young offender and victim with the community's help. However, it's important to note that this doesn't mean the child is let off the hook for their actions. By resolving with the victim, the child can avoid facing potential imprisonment.

Diversion aims to keep children out of the formal criminal justice system, preventing them from facing societal stigma and allowing them to reintegrate into society. It also focuses on restorative justice for children and victims, promoting repair and reconciliation instead of retaliation. By taking a non-penal approach, diversion allows children to make amends and grow as individuals outside the confines of traditional justice. Additionally, it strives to address cases involving children that have come to the attention of law enforcement author [6].

The author [7] believes that subjecting children to harsh punishments, including imprisonment, can harm their prospects. This belief stems from the understanding that various external factors, such as family, friends, education, and socialization, greatly influence a child's behaviour [8]. Imposing prison sentences on children not only carries a social stigma but also hinders their chances of rehabilitation and moral development due to the labels society places on them [8].

The concept behind implementing juvenile diversion is rooted in the belief that treating children as criminals for their actions is detrimental, as it labels them as inherently evil. This approach aims to prevent children from being subjected to the formal criminal justice system, allowing them to avoid its negative consequences author [9]. Instead, the focus is on protecting and rehabilitating these young individuals who have committed offences authors [10]. Including diversion in the SPPA Law ensures that minor deviations from the Law do not automatically result in criminal proceedings; this is particularly important considering that under the Juvenile Courts Law of 1997, even minor delinquencies by children could lead to criminalization authors [11].

The SPPA Law ensures that diversion is carried out at various stages, including the police, prosecutor's office, and court, for children suspected of committing offences that carry a prison sentence of less than seven years and have no prior criminal record. Moreover, the Supreme Court is crucial in promoting diversion to prioritize the child's well-being author [12].

Supreme Court Regulation No 4 of 2014, also known as Perma Diversi, sets out specific conditions for implementing diversion. These include cases where the child is between twelve and eighteen years old and faces a prison sentence of less than seven years, regardless of whether there is an indictment with a sentence of seven years or more.

With the issuance of the Perma Diversi, Juvenile Judges can implement diversion for children who have not been convicted of a criminal offence, as long as the indictment contains criminal charges that carry a sentence of imprisonment of less than seven years.

Referring to the SPPA Law and Perma Diversion, the implementation of diversion in court occurs before the case examination process. The Juvenile Judge is responsible for carrying out the Diversion in Court based on the charges presented by the Public Prosecutor against the child. The criminal charges outlined by the Public Prosecutor serve as the criteria to determine the feasibility of implementing Diversion in Court. Upon receiving an order to review a juvenile case, the Juvenile Judge must first review the indictment prepared by the Public Prosecutor. Suppose the indictment includes a single, subsidiarity, alternative, cumulation, or combination charge that meets the Diversion requirements. In that case, the Juvenile Judge will proceed with the Diversion process per Article 3 of the Diversion Regulation. However, if the indictment does not contain charges suitable for diversion, the child will undergo a trial process by the Child Criminal Procedure Law.

The Criminal Code encompasses criminal offences that possess aggravating characteristics due to the presence of aggravating circumstances and criminal offences that possess mitigating characteristics. For instance, Article 363 of the Criminal Code governs theft offences when aggravating circumstances exist. In contrast, under Article 364 of the Criminal Code, petty theft is regulated when mitigating circumstances are involved. Regarding the types of criminal offenses with aggravating and mitigating characteristics, it is within the authority of the Public Prosecutor to formulate the indictment. The Public Prosecutor may charge the articles sequentially, starting from the most severe penalty to the lightest, or solely charge the theft article (Article 362 of the Criminal Code).

The Public Prosecutor mentioned that the possibility of implementing diversion hinges on the charges filed. Suppose the Public Prosecutor charges the child with the primary charge under Article 363 of the Criminal Code and the subsidiary charge under Article 362. In that case, they may consider diversion due to the presence of Article 362. However, diversion is not an option if the child is only charged with Article 363.

Judges, as a fundamental aspect of the legal system, are ensured independence from any external influence when making decisions or determinations. Regarding the freedom of judges, the author presents evidence of a specific case involving a juvenile judge who orders the implementation of diversion despite the absence of charges in the indictment prepared by the juvenile prosecutor that would warrant diversion. Objectively speaking, based on the prosecutor's indictment, the requirements for diversion still need to be met. Regarding the decision made by the juvenile judge, the author expresses an interest in researching the legal implications of a judge's ruling that mandates diversion without fulfilling the necessary criteria.

This research uses doctrinal research, with a statutory approach and a conceptual approach.

METHOD

This paper has been created using the results of doctrinal research, including a thorough study of existing legal principles, statutes, and case law.

The document utilizes both a statutory and conceptual approach to examine the findings. The statutory approach involves closely examining relevant legislation and legal provisions. The document also adopts a conceptual approach involving a broader analysis of legal concepts and theories.

In this research, the author utilizes primary and secondary legal materials, such as laws and regulations, Diversion agreements, law books, and expert opinions. The author then analyzes these legal materials through grammatical interpretation and teleological interpretation.

RESULTS AND DISCUSSION

Law No 11/2012 on SPPA, which is currently in effect, is considered complete in protecting children who commit criminal offences. One of the

most distinguishing things between the SPPA Law and Law No 3 of 1997 concerning Juvenile Courts is that the SPPA Law introduces diversion.

Etymologically, the word diversion has the same meaning as the word "divert" in English, which means "the act of changing the direction that somebody or something is following, or what something is being used for" authors [13].

According to the history of criminal law development, in 1960, the President of the Australian Criminal Commission first used the term "diversion" in the United States authors [14]. However, implementing such diversion was known before 1960 in police cautioning. According to the author [15], diversion is "an attempt to divert, or channel out, youthful offenders from the juvenile justice system."

The Faculty of Law of UNPAD introduced diversion in Indonesia during a national seminar on October 5, 1996. That is, diversion allows judges to stop examining children's cases in court author [16].

The 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as The Beijing Rules, defines diversion as not involving the criminal justice system by directing juvenile offenders to community services to avoid the adverse effects of the administration of juvenile justice. Diversion is part of an effort to ensure that a child criminal will continue to be a criminal offender as an adult. Law enforcement officials deinstitutionalize the formal criminal justice system to prevent a child offender from developing into an adult criminal offender.

Jerome Stumphauzer, in 1986, concluded the importance of deinstitutionalization of juvenile offenders to prevent children from becoming criminals. Jerome Stumphauzer said, "A worse social learning program could not be designed: remove the youth from the very society to which he must learn to adapt, expose him to hundreds of criminal peer models and criminal behaviours he hasn't earned."

The Riyadh Guidelines, which are international provisions containing guidelines for preventing children in conflict with the Law, were passed by UN resolution No 45/112 on December 14, 1990. Rule 56 of the Riyadh Guidelines regulates the purpose of diversion, which states, "Legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is also not considered an offence

or punished if committed by a young person, thereby preventing further stigmatization, victimization, and criminalization of young persons."

Furthermore, the provisions governing the implementation of diversion outside the juvenile criminal justice system are as stated in Rule 58 of The Riyadh Guidelines: "Law enforcement and other relevant personnel, of both sexes, should be trained to respond to the special needs of young persons and should be familiar with and use, to the maximum extent possible, programs and referral possibilities for the diversion of young persons from the justice system."

The Beijing Rule has set out the principles of diversion, namely:

- a) Law enforcers, i.e., police, prosecutors, judges, and other agencies, consider dealing with child offenders without using the formal court process
- b) Law enforcement officials have the authority to determine diversion by the provisions set out in the Law itself and by the rationale in The Beijing Rules
- c) Diversion may only be implemented after the consent of the child and their parents or guardians and after the authorized official has reviewed the request.

Diversion requires the community to provide temporary guidance, recovery, supervision, and compensation to victims [17].

According to the author's description in the introduction, Juvenile Judges utilize diversion for children who are twelve years old, even if they are married but not yet eighteen years old, have no prior criminal convictions, and as long as the charges in the indictment carry a maximum sentence of less than seven years imprisonment. Based on this provision, the Juvenile Judge infers that the indictment is a guiding factor in deciding whether to implement diversion.

Regarding the judge's determination regarding the implementation of diversion, the author found a practice where the judge set a schedule for diversion deliberations, namely for Child M, as a Stipulation. In his indictment, the Public Prosecutor of the South Konawe District The Prosecutor of the South Konawe District Prosecutor's Office charged the child with a single charge under Article 363 § 1, 3rd and 4th of the Criminal Code. The Juvenile Judge then established a diversion meeting and reached an

agreement. As part of the agreement, Child M and the victim of the theft, specifically Child M's parents, provided compensation for the machine that Child M had taken. This diversion agreement follows Article 11 of the SPPA Law, which states that peace with compensation is one form of a diversion agreement. Objectively, the provisions of Article 363 § 1, 3rd and 4th of the Criminal Code, because it carries a sentence of seven years imprisonment, are not eligible for diversion deliberations.

About the practice of judges determining diversion deliberations, if we solely consider the provisions outlined in Article 7 of the SPPA Law, any actions taken by juvenile judges that deviate from the conditions for implementing diversion can be deemed as *ultra vires* actions, indicating a breach of their authority. However, the author is intrigued by objectively examining the judges' actions. When judges execute their decisions and stipulations, they rely on legal reasoning. Judges employ legal reasoning from various perspectives, including philosophical, juridical, and sociological aspects, as well as through their method of interpretation. This interpretation method may involve grammatical interpretation, historical interpretation, or teleological interpretation, all of which aim to uphold the principles of legal certainty, justice, and benefit for all parties involved.

The author considers the Academic Paper of the SPPA Law. In the background chapter, it is stated that "the most fundamental of this Draft Law is the explicit regulation of restorative justice and diversion. Diversion arrangements are intended to keep children away from the judicial process to avoid stigmatization of children suspected of committing criminal acts so that children can return to their environment naturally". In addition, the author notes that the Chapter on the limitations of diversion states that diversion cannot be implemented in severe cases such as murder, robbery with violence, serious maltreatment, rape, and similar offences. In this academic paper, the legislator finally embodies the implementation of diversion in criminal offences under seven years of imprisonment.

The judges' rulings to apply diversion for cases where the child's actions do not meet the diversion criteria, based on the belief that the offences are not severe, are supported by the principles outlined in Article 6 of the SPPA Law. These decisions align with the overarching objective of the

SPPA Law to shield children from the complexities of the legal system and prevent the labelling of minors accused of criminal activities while still taking into account the interests of the victims.

The final process of the agreement reached in the diversion deliberation is for the Juvenile Judge, as the diversion facilitator, to report the results of the diversion agreement to the President of the Court. Then, the President of the District Court issued a determination of the Diversion Agreement (Article 52 § 5 of the SPPA Law). Article 6 § 4 of the Diversion Regulation states that the Chief Justice can return the diversion opportunity to be improved by the Diversion Facilitator if it does not meet the provisions of Article 5 § 9 of the Diversion Regulation, namely agreements that are contrary to Law, religion, local community decency, decency; or contain things that the child cannot implement; or contain lousy faith. Article 6 § 4 of Perma Diversi gives the role to the President of the District Court to supervise the contents of the diversion agreement authors [19].

Based on the provisions of Article 6 § 4 of Perma Diversi, namely when the Chief Justice finds that there is a diversion agreement that is contrary to the Law, religion, local community decency, decency or contains things that the child cannot implement, or contains lousy faith, then the Chief Justice returns the diversion agreement to the judge to improve the contents of the diversion agreement. The focus of attention is how the contents of the diversion agreement are not related to the process before the diversion agreement is reached.

REFERENCES

1. Purwanto, P. (2020). *Perlindungan Hukum Terhadap Anak Sebagai Korban Tindak Pidana Dalam Perspektif Hukum Positif Indonesia* [Protection Legal Protection of Children as Victims of Criminal Offences in the Perspective of Positive Law Indonesia]. *Jurnal Idea Hukum*, 6(1). doi: 10.20884/1.jih.2020.6.1.133 (in Indonesian).
2. Fernando, Y. (2020). *Sejarah Sistem Peradilan Pidana Anak Di Indonesia* [History of the Indonesian Juvenile Justice System]. *Jurnal Ilmu Sosial Dan Pendidikan*, 4(4) (in Indonesian).
3. Zulfa, E. A. (2009). *Keadilan Restoratif Di Indonesia (Studi Tentang Kemungkinan Penerapan Pendekatan Keadilan Restoratif Dalam Praktek Penegakan Hukum Pidana)* [Restorative Justice in Indonesia (A Study of the Possibility of Implementing Restorative Justice in Criminal Law Enforcement Practice)] (Master's thesis; Hukum Universitas Indonesia) (in Indonesian).
4. Liebman, M. (2007). *Restorative Justice: How it Works*. London: Jessica Kingsley Publisher.
5. Tarigan, F. A. R. (2015). *Upaya Diversi Bagi Anak Dalam Proses Peradilan* [Efforts Diversion for Children in the Justice Process]. *Lex Crimen*, 4(5) (in Indonesian).

The SPPA Law underscores the importance of law enforcement towards children being carried out with the child's best interests at heart. In the context of diversion, the aim is to bring together the victim and the child perpetrator in a way that holds the latter accountable. In the case of "Child M," discussed by the author, despite not meeting all the necessary criteria for diversion, the judge's decision led to an agreement that reconciled the victim and Child M, holding the perpetrator's child responsible by replacing the goods taken. Therefore, as long as the diversion agreement aligns with legal, religious, and community standards and does not include anything unfeasible or malicious, the Chief Justice should proceed with issuing the Diversion Agreement Stipulation.

CONCLUSIONS

The Juvenile Judge's decision to implement diversion may be considered ultra petite, based on a strict grammatical interpretation of the SPPA Law, as it does not meet the legal requirements. However, when viewed through a teleological lens, this action aligns with the overarching goal of the Law, which is to protect children from the adverse effects of the judicial system and prevent stigmatization. Furthermore, as long as the diversion agreement aligns with the child's best interests and does not violate any legal, religious, or community standards, the Head of Court should still approve the Diversion Agreement.

6. Hambali, A. R. (2019). *Penerapan Diversi Terhadap Anak Yang Berhadapan Dengan Hukum Dalam Sistem Peradilan Pidana* [Implementation of Diversion for Children Against the Law in the Criminal Justice System]. *Jurnal Ilmiah Kebijakan Hukum*, 13(1), 15. doi: [10.30641/kebijakan.2019.v13.15-30](https://doi.org/10.30641/kebijakan.2019.v13.15-30) (in Indonesian).
7. Supeno, H. (2010). *Kriminalisasi Anak* [Criminalisation of Children]. Jakarta: Gramedia Pustaka Utama (in Indonesian).
8. Hadisuprpto, P. (2008). *Delinkuensi Anak: Pemahaman Dan Penanggulangannya* [Child Delinquency: Understanding and Countermeasures]. Malang: Bayumedia Publishing (in Indonesian).
9. Shelden, R. G. (1999). *Detention Diversion Advocacy: An Evaluation* [Advokasi Pengalihan Penahanan: Evaluasi]. *Juvenile Justice Bulletin* 171155 (in Indonesian).
10. Thompson, W. E., & Bynum, J. E. (2016). *Juvenile Delinquency: A Sociological Approach*. N. d.: Rowman & Littlefield.
11. Dewata, A. W., Sularto, R. B., & Indraswati, T. L. (2016). *Diversi Sebagai Aktualisasi Konsep Restorative Justice Dalam Penegakan Hukum (Studi Penanganan Tindak Pidana Oleh Anak Di Wilayah Pengadilan Negeri Semarang)* [Diversion As An Actualisation Of The Concept Of Restorative Justice In Law Enforcement (A Study Of The Handling Of Criminal Acts By Children In The Semarang District Court Area)]. *Diponegoro Law Journal*, 5(2), 1–11 (in Indonesian).
12. Hakim, A. (2016). *Analisis Hukum Penerapan Diversi terhadap Anak Pelaku Tindak Pidana Pencurian Sepeda Motor (Studi Penetapan No 03/pid.sus-anak/2015/pn.rap)* [Analysis Legal Analysis of the Application of Diversion to Child Perpetrators of the Crime of Theft of Motorcycle (Study of Determination No 03/pid.sus-anak/2015/pn.rap)]. *Jurnal Ilmiah Advokasi*, 4(2), 1–25. doi: [10.36987/jiad.v4i2.329](https://doi.org/10.36987/jiad.v4i2.329) (in Indonesian).
13. Hornby, A. S., Wehmeier, S., & Ashby, M. (2000). *Oxford Advanced Learner's Dictionary of Current English*. Oxford University Press.
14. Cunneen, C., & White, R. D. (1995). *Juvenile Justice: An Australian Perspective*. N. d.: Oxford University Press.
15. Bynum, J. E., & Thompson, W. E. (2002). *Juvenile Delinquency: A Sociological Approach*. Boston: Allyn & Bacon.
16. Atmasasmita, R. (1983). *Problema Kenakalan Anak Anak/Remaja (Yuridis Sosio Kriminologis)* [Problems of Juvenile Delinquency (Juridical Socio Criminological)]. Bandung: Armico (in Indonesian).
17. Gosita, A. (1996), *Makalah Pengembangan Aspek Hukum Undang-undang Peradilan Anak dan Tanggung Jawab Bersama* [Development Paper on Legal Aspects of Juvenile Justice Law and Shared Responsibility]. Bandung: Seminar Nasional Perlindungan Anak, diselenggarakan Oleh UNPAD (in Indonesian).
18. Mursanto, D. (2018). *Pelaksanaan Keadilan Restoratif Terhadap Anak Sebagai Kurir Narkotika* [Implementation of Restorative Justice for Children as Drug Couriers]. *Jurnal Hukum Volkgeist*, 3(1) (in Indonesian).
19. Iskandar, N., Umami, A., & Fadilla, D. (2022b). Analysis Related To Judges' Considerations In The Immediate Decision Of Criminal Actions Against Children. *Policy Law Notary And Regulatory Issues (POLRI)*, 1(1), 57–64. doi: [10.55047/polri.v1i1.32](https://doi.org/10.55047/polri.v1i1.32)