

## THE POSITION OF SUPREME COURT REGULATION NUMBER 4 YEAR 2014 IN THE IMPLEMENTATION OF DIVERSION BY THE PUBLIC PROSECUTOR BASED ON THE REGULATION OF LAW

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### Abstract

The judge continued to carry out diversions against a child who had committed a criminal offense, one of the articles of which was punishable by a sentence of under seven years. For the prosecutors themselves, there is no such rule, but in practice, in practice, many prosecutors carry out Supreme Court Regulations No. 4 Year 2014, in the sense that prosecutors continue to diversify children who commit crimes with a sentence of more than 7 years as long as the prosecutors overlay the charges. 7 years and under, and the average diversion is successful. This paper aims to analyze the position of Supreme Court Regulations Number 4 Year 2014 in the implementation of diversion by the public prosecutor based on the laws and regulations. The type of research used is social legal research. The data used are primary data (obtained directly from respondents and resource persons, namely the Luwu Office Attorney using interview techniques) and secondary data (various references or scientific papers in the field of law in the form of legal books and research documents related to previous data and statutory regulations. invitation). All data collected were analyzed qualitatively. The results show that the position of the Supreme Court Regulation Number 4 Year 2014 in the implementation of diversion by the public prosecutor is a rule that regulates the procedures for solving a problem in order to smooth the judiciary, in this case the implementation of diversion, given that there is a legal vacuum regarding the procedures for implementing diversion after the formation of the Law Number 11 Year 2012 concerning SPPA, where in the Law it is ordered that the Government Regulation regarding the implementation of diversion be made no later than 1 year from the enactment of the SPPA Law, but in reality the Government Regulation in question was promulgated outside of the stipulated time, so there is a vacancy law in the implementation of the SPPA Law. The Supreme Court which is given the authority by law to make complementary rules to fill the legal gaps or gaps has appropriately exercised its authority through the formation of the said Supreme Court Regulation.

**Keywords:** *implementation of diversion, public prosecutor, supreme court.*

### INTRODUCTION

The issue of law enforcement against children as perpetrators of criminal acts has always been the center of attention in the midst of law enforcement problems in this country. How could I not, children who are the nation's next generation, are now one of the biggest contributors to the rampant

criminal acts that have occurred. Many factors influence this condition, one of which is related to the weak role of parents in supervising children in the midst of the emergence of technological developments.

As part of the regeneration of this nation, a child cannot be held fully accountable for his or her behavior. This is because the behavior shown by the child is the result of thinking about what he sees, feels and experiences in his daily life. Therefore, as a human being who is still weak in mind, every child's action is nothing but a form of delinquency and not a planned crime. So that the punishment of children must consider the best interests of the child.

Moeljatno who argues that the definition of a criminal act according to his term is a criminal act is "An act which is prohibited by a prohibition of law is accompanied by a threat (sanction) in the form of a certain criminal, for whoever violates the prohibition."<sup>1</sup> Rusli Efendy argues that a criminal act, namely "an act which is prohibited by the criminal law and punishable by punishment" explains that the words of a criminal incident must be interpreted as a compound word and must not be separated from one another. Because if only the word event is used, this can have another meaning, for example a natural event.<sup>2</sup>

Doctrinally, in criminal law there is a monistic view known as a monistic view, which is a view that sees the entire conditions for the existence of a crime, all of which are the nature of the act. This view provides principles of understanding, that in the definition of an act/criminal act, a prohibited act, and criminal responsibility are included.<sup>3</sup> Meanwhile, according to D. Simons<sup>4</sup> a criminal act is "an unlawful act that has been carried out intentionally or unintentionally by a person who can be held accountable for his action and which by law has been declared an act that can be punished." Andi Zainal Abidin stated that "the mistakes Simons meant were *dolus* (intentionally) and *culpalata* (negligent).<sup>5</sup> Criminal law is a set of rules governing 3 elements, namely rules regarding criminal acts, criminal liability and verbal process of law enforcement in the event of a crime. This element shows the relationship between material criminal law and formal criminal law, which means that violations of material criminal law will be meaningless without the establishment of formal criminal law (criminal procedural law). Vice versa, formal criminal law cannot function without violations of material criminal law norms (criminal acts).<sup>6</sup>

The issuance of Law Number 11 Year 2012 concerning the Criminal Justice System for Children is a form of government attention to the rampant criminalization of children that is far from the aspect of benefit or is not based on the best interests of the child. This law uses many new terms in the justice process against children, such as restorative justice and diversion. Restorative justice is defined as an effort to restore a situation like all by prioritizing the manifestation of benefit, while diversion is interpreted as an effort to transfer, namely the transfer of a criminal act that was previously carried out in a trial, transferred to deliberation to achieve the best possible benefit, not only for children as perpetrators, but also benefits for victims of crimes committed by children.

Restorative justice can also be adapted to local legal traditions, principles, and philosophies and national legal systems by placing the role of the community in an important place, not only to overcome problems that occur, but also to prevent the recurrence of criminal acts in the future.<sup>7</sup> Law enforcement against children, should not be oriented towards retaliation, but the punishment is solely carried out to ensure the development of the child which is oriented towards punishment based on restorative justice. In fact, for certain crimes, there is also a diversion process, in which a child who commits a criminal act is transferred to the law enforcement process, by using deliberative consensus methods, in order to find the ideal follow-up formulation for a child who commits a crime.

The Due Process Model is one model that supports the criminal justice system because it separates the authority of various bodies in the criminal justice system.<sup>8</sup> Further regulations related to the SPPA Law have not yet been finalized. Based on the SPPA Law, the Government is required to make six materials in the form of Government Regulations and two materials in the form of Presidential Regulations. However, not all of the supporting regulations are available. The government has just

<sup>1</sup> Moeljatno, *Asas-Asas Hukum Pidana*, Jakarta: Bina Aksara, 1987, p. 54

<sup>2</sup> Rusli Effendy, 1986. *Azas-Azas Hukum Pidana*, Makassar: Lembaga Percetakan dan Penerbitan Universitas Muslim Indonesia (LEPPEN-UMI), 1986, p. 1

<sup>3</sup> Sudarto, *Hukum dan Hukum Pidana*, Bandung: Alumni, 1986, p. 31-32

<sup>4</sup> P.A.F. Lamintang, 1984, *Dasar-Dasar Hukum Pidana Indonesia*, Bandung: Sinar Baru, p. 185

<sup>5</sup> Andi Zainal Abidin Farid, *Hukum Pidana I*, Jakarta: Sinar Grafika, 1995, p. 250

<sup>6</sup> Andi Sofyan and Nur Azisa, *Hukum Pidana*, Makassar: Pustaka Pena Press, 2016, p. 3

<sup>7</sup> A. M. Syukri Akub and Sutiawati, *Keadilan Restoratif (Restorative Justice) Perkembangan, Program Serta Prakteknya di Indonesia dan Beberapa Negara*, Yogyakarta: Litera, 2012, p. 29-30.

<sup>8</sup> M. Said Karim, *Ganti Kerugian Terhadap Korban penangkapan yang Tidak Sah dalam Proses Peradilan Pidana*, Makassar: Pustaka Pena Press, 2019, p. 68

completed the substance of the Government Regulation (Government Regulation No. 65 Year 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Not Aged 12 (Twelve) Years Old) and Presidential Regulation on Training of Law Enforcement Officials. (Presidential Regulation of the Republic of Indonesia No. 175 Year 2014 concerning Integrated Education and Training for Law Enforcers and Related Parties Regarding the Child Criminal Justice System). The government has not made various arrangements that still require further arrangements for legal certainty. In fact, the Supreme Court has even made regulations related to the implementation of the SPPA Law in practice.

One of the regulations that the author means is the Supreme Court Regulation Number 4 Year 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System. In the provisions of Article 3 of the Perma, it is stipulated that the Juvenile Judge is obliged to seek diversion in the event that the child is charged with committing a criminal act which is punishable by imprisonment of less than 7 years and is also charged with a criminal offense punishable by imprisonment of 7 (seven) years or more. the form of a subsidiarity indictment, alternative, cumulative, or combination. Meanwhile, in the provisions of Article 7 of the Law on the juvenile criminal justice system, it is determined that:

- 1) At the level of investigation, prosecution and examination of cases of children in district courts, diversion is required.
- 2) Diversion as referred to in paragraph (1) shall be implemented in the event of a criminal act that is committed:
  - a. threatened with imprisonment of less than 7 (seven) years; and
  - b. is not a repetition of a criminal act.

In these provisions, it is clear that diversion will be carried out in the event that the criminal act is threatened with under seven years. However, in practice, the judge still carried out diversion against a child who had committed a criminal offense, one of which was punishable by under seven years. For the prosecutors themselves, there is no such rule, but in practice, in practice, many prosecutors carry out Supreme Court Regulations No. 4 Year 2014, in the sense that prosecutors continue to diversify children who commit crimes with a sentence of more than 7 years as long as the prosecutors overlay the charges. 7 years and under, and the average diversion is successful. Although basically the Supreme Court Regulations are made by the Supreme Court, the position of Perma is recognized as statutory regulations as stipulated in Article 8 of Law Number 12 Year 2011, however in that Perma, the nomenclature used is "child judge", therefore regarding The enforcement of this Perma in the implementation of diversion at the level of investigation and prosecution must be addressed wisely by the relevant law enforcement officials. Based on this description, the issue that will be discussed in this paper is what is the position of Supreme Court Regulations Number 4 Year 2014 in the implementation of diversion by the public prosecutor based on the laws and regulations?

## METHOD

The type of research used is social legal research<sup>9</sup> namely, legal research conducted with an approach to legal practice in society. This research is based on the existence of symptoms in the form of a gap between expectations (*das sollen*) and reality (*das sein*) in the field of law. In this connection the research orientation is law in action.<sup>10</sup> The data used are primary data (obtained directly from respondents and resource persons, namely the Luwu State Attorney using interview techniques) and secondary data (various references or scientific papers in the field of law in the form of legal books and research documents related to previous data and statutory regulations. invitation). All data collected were analyzed qualitatively.

## DISCUSSION

### **The position of Supreme Court Regulations Number 4 Year 2014 in the Implementation of Diversion by the Public Prosecutor Based on the Laws and Regulations**

Before discussing further about the position of Supreme Court Regulations Number 4 Year 2014 in implementing Diversion, the author will first explain the position of the Supreme Court Regulation itself in the theory of legislation in Indonesia. M. Solly Lubis stated that what is meant by state regulations (*staatsregelings*) are written regulations issued by official agencies, both in the sense of an institution, and in the sense of a certain official. These regulations include laws, government regulations in lieu of laws, government regulations, presidential regulations, ministerial regulations,

<sup>9</sup> Kadarudin, *Riset Sederhana di Bidang Ilmu Hukum*, Ponorogo: Uwais Inspirasi Indonesia, 2020, p. 63

<sup>10</sup> Peter Machmud Marzuki, *Penelitian Hukum*, Yuridika, Vol. 16, No. 2, Maret 2001, p. 103

regional regulations, instructions, circular letters, announcements, decree.<sup>11</sup> Furthermore, I Gde Panjta Astawa argued that state regulations (staatsregelings) or decisions in a broad sense (besluiten), can be classified into three groups, namely:

1. *Wettelijk regeling* (laws and regulations);
2. *Beleidsregels* (Policy Regulations); and
3. *Beschikking* (Determination).

In contrast to what has been stated above, Jimly Asshiddiqie argues that law is basically a product of decision making that is determined by the functions of State power that bind legal subjects with legal rights and obligations in the form of prohibitions (*prohibere*) or necessity (*obligatere*), or ability (*permittere*). Starting from this understanding, Jimly then defines that State law is a law established by a decision of the State's power as a result of regulatory, ruling, or court action. Therefore, it can be said that the State as an organization of general power can make three legally binding decisions for legal subjects related to these decisions.

According to Prodjudikoro, which includes a monistic view, translates strafbaarfeit into a criminal act by stating that, "an act for which the perpetrator is subject to punishment and the perpetrator is the subject of a criminal act".<sup>12</sup>

Legal subjects that are affected are only certain subjects, sometimes they are legal subjects in general, because the nature of the formulation is still generally abstract. If the subject affected by the decision of the State organization has an individual concrete character, then it is said that the legal norms or rules contained in the decision are individual and concrete norms of law. However, if the legal subject concerned is general abstract or not concretely certain, then the legal norms contained in the decision are referred to as abstract and general norms. Decisions that are general and abstract in nature are usually *regeling*, while concrete individual ones can constitute decisions that have an administrative nature (*beschikking*) or decisions in the form of a judge's "verdict" which is commonly referred to as a decision. Therefore, the three forms of decision-making activities can be distinguished by terms:<sup>13</sup>

1. Settings produce regulations (*regels*). The results of such regulatory activities should not be referred to by any other terms except "regulations".
2. Determination produces decisions or decisions (*Beschikking*). The results of these administrative decisions or decisions should only be called "decisions", not in other terms.
3. The judgment or court produces a verdict (*vonnis*).

Based on the definition above, it can be concluded that what is meant by State regulations is the whole of the regulations issued by State administrators in carrying out state affairs, both legislative, executive and judicial institutions, of course not all types of State regulations can be said to be statutory regulations. . According to Bagir Manan, statutory regulations are any written decisions made, stipulated and issued by State Institutions and/or Officials who have (carry out) legislative functions in accordance with applicable procedures.<sup>14</sup> The meaning of "authorized" is "who has (carries out) a legislative function" as expressed in the meaning of laws and regulations as stated by Bagir Manan and Kuntana Magnar, that statutory regulations are any written decisions made, stipulated and issued by the institution. and or State Officials who have (carry out) legislative functions in accordance with applicable procedures. From the meaning of laws and regulations put forward by Bagir Manan and Bagir Manan together with Kuntana Magnar, a number of elements emerged, namely:<sup>15</sup>

- a. Written decision;
- b. Issued by state institutions and or officials who have (carry out) legislative functions;
- c. Contains rules of conduct that are generally binding or binding;
- d. In accordance with the applicable procedures.

Based on the opinions as stated above, the author formulates that a regulation can be categorized as a statutory regulation, if it meets the following elements:

<sup>11</sup> Arif Christiono Soebroto, *Kedudukan Hukum Peraturan/Kebijakan di Bawah Peraturan Menteri Perencanaan Pembangunan Nasional/Kepala Bapenas*, Direktur Analisa Peraturan Perundang-Undangan Jakarta: Bapennas, 2012, p. 1

<sup>12</sup> Wirjono Prodjudikoro, *Hukum Acara Pidana di Indonesia*, Bandung: Sumur, 1981, p. 55

<sup>13</sup> Jimly Asshiddiqie, *Perihal Undang-Undang*, Jakarta: Rajawali Pers, 2020, p. 7-8

<sup>14</sup> Bagir Manan and Kuntana Magnar, *Peranan Peraturan Perundang-undangan dalam Pembinaan Hukum Nasional*, Bandung: Armico, 1987, p. 13.

<sup>15</sup> Turiman Fachturahman Nur, *Karya Ilmiah-Makalah, Dasar-Dasar Ilmu Perundang-Undangan, 2009*, <http://rajawaligarudapancasila.blogspot.com>.

### The Form is Written

What is meant by written regulation is not yet a definite definition. Written rules are not the same as written rules. For example jurisprudence, cannot be categorized as non-written regulations, even though the form is written, written regulations contain the following characteristics:

- 1) Based on Law Number 12 Year 2012 concerning the Formation of Legislative Regulations are all the regulations listed in Article 7 paragraph (1) and Article 8 paragraph (1) regarding the types and hierarchy of statutory regulations;
- 2) The regulation is established by the State institution or authorized State official;
- 3) Making the rules through certain procedures (certain);
- 4) If observed, all laws and regulations are placed in state and regional sheets. Thus these regulations are placed on the official sheet.

### Formed by State Institutions or State Officials

Legislation is established by State institutions or State officials. This is different from the Islamic religious norms, for example, which are revelations from Allah SWT. In addition to being established by state institutions or state officials, laws and regulations can also contain sanctions for violators, and the implementation of these sanctions can be enforced by the state apparatus. Thus compliance with statutory regulations comes from outside, namely carried out with sanctions. Meanwhile, adherence to religious norms comes from within, namely self-awareness to obey them.

### General Binding

In terms of address or address, laws and regulations are general legal norms, namely those aimed at the public. Apart from being general in nature, laws and regulations are abstract and apply continuously. For this reason, laws and regulations constitute *Regelings* and must be distinguished from *Beschikking* which are individual, concrete and once completed. Legislation is the object of the Judicial Review while *Beschikking* is the object of the state administrative court. Legislation also follows the principle of norm hierarchy in accordance with the order.

Based on the provisions of Article 1 number 2 of Law Number 12 Year 2011 concerning the Formation of Legislative Regulations, it is determined that statutory regulations are written regulations that contain legally binding legal norms and are formed or stipulated by State institutions or authorized officials. through the procedures stipulated in statutory regulations.

The provisions related to the type and hierarchy of statutory regulations, were last amended based on Law Number 12 Year 2011 concerning the Formation of Legislative Regulations. It is emphasized in Article 7 paragraph (1) of Law Number 12 Year 2011, that:

1. Jenis dan hierarki Peraturan Perundang-Undangan terdiri atas:
  - a. The 1945 Constitution of the Republic of Indonesia;
  - b. Decree of the People's Consultative Assembly;
  - c. Laws/Government Regulations in Lieu of Laws;
  - d. Government regulations;
  - e. Presidential decree;
  - f. Provincial Regulation; and
  - g. Regency/City Regional Regulations.

Furthermore, Article 8 of Law Number 12 Year 2011 also stipulates that:

- (1) Furthermore, Article 8 of Law Number 12 Year 2011 also stipulates that (1) Types of laws and regulations other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, the Court. Agung, Supreme Court of the Constitution, the Supreme Audit Agency, the Judicial Commission, Bank Indonesia, Ministers, Agencies, Institutions, or Commissions at the same level as established by law or the government at the behest of the Law, the Provincial Regional People's Representative Council, the Governor, the House of Representatives Regency/City Region, Regent/Mayor, Village Head or equivalent.
- (2) (2) Legislation as referred to in paragraph (1) is recognized for its existence and has binding legal force as long as it is ordered by a higher level of statutory regulations or is established based on authority.

In connection with the above discussion, the Supreme Court as one of the administrators of judicial power in Indonesia (Judicative), is given the authority by law to issue a regulation that functions as a filler or a complement to lack of rules regarding procedural law, in order to facilitate judicial administration. Since it was first published in 1954, the regulations obtained based on the delegation of

authority have been called Supreme Court Regulations.

The authority of the Supreme Court to issue Supreme Court Regulation stems from the constitution, namely the provisions of Article 24A paragraph (1) of the 1945 Constitution which states that "the Supreme Court has the authority to judge at the cassation level, examine statutory regulations under the law against laws, and have other powers that given the law".

We can see other powers given by law in the Law on the Supreme Court (Supreme Court Law), namely Law No. 14 Year 1985 which was amended by Law No. 5 Year 2004 and amended again by Law No. 3 Year 2009. in relation to the authority of the Supreme Court to issue a Perma contained in Article 79 of the Supreme Court Law which reads "The Supreme Court can further regulate matters necessary for the smooth running of the judiciary if there are things that are not sufficiently regulated in this law".

Furthermore, based on the explanation of the provisions of Article 79 of the Supreme Court Law, it is determined that:

"If in the course of the judiciary there is a legal deficiency or void in a matter, the Supreme Court has the authority to make rules as a complement to fill the gap or vacancy. With this Law, the Supreme Court has the authority to determine the arrangements for the settlement of an issue that has not been or is not regulated in this Law. In this case, the regulations issued by the Supreme Court are differentiated from those drawn up by legislators".

Based on the provisions of Article 79 of the Supreme Court Law and its explanation above, it can be concluded that the formation of PERMA can be done in terms of:

- (1) There is a delegation of authority from legislators to the Supreme Court;
- (2) The rules made by the Supreme Court are limited to regulating the procedure for solving a problem (meaning regulating the procedural law of a matter) for the smooth running of the trial.
- (3) The rules made by the Supreme Court are substantially different from the rules made by legislators.
- (4) The rule made by the Supreme Court is not to interfere with the rights and obligations of citizens.

In connection with the position of Supreme Court Regulation of Diversion, the author observes that the element of the existence of a legal vacuum, which is one of the conditions that can give rise to the authority of the Supreme Court to issue regulations has been fulfilled in the provisions of the SPPA Law. Which in the provisions of Article 15 of the SPPA Law, emphasizes that "Provisions regarding the guidelines for the implementation of the Diversion process, procedures, and coordination of the implementation of Diversion are regulated by a Government Regulation."

Furthermore, in the provisions of Article 107 of the Juvenile Criminal Justice System Law, it is stipulated that the implementing regulations for this Law must be enacted no later than 1 (one) year from the enactment of this Law.

If referring to the aforementioned provisions, where the SPPA Law mandates that the Law Implementation Regulation must be stipulated no later than 1 year from its enactment, the Government Regulation regarding Diversion, should have been made 1 year from the date the SPPA Law was enacted. In the provisions of Article 108 of the SPPA Law it is stipulated that this Law shall come into effect after 2 (two) years from the date of promulgation.

By referring to the aforementioned provisions, where the SPPA Law was enacted on July 30, 2012, then on July 30, 2014, the law must be declared as valid. Furthermore, 1 year after that, namely on July 30, 2015, Government Regulations related to the implementation of Diversion should have been made by the government, while Government Regulation Number 65 Year 2016 concerning Guidelines for Implementation of Diversion and Handling of Children who are not yet twelve years old, was promulgated on August 19, 2015. In fact, this has exceeded the deadline given by law.

Based on the description above, the writer sees that there is a gap in the legal vacuum, where the SPPA Law itself mandates that as of July 30, 2014, the SPPA Law must have been enacted, however, the Government Regulation itself was only drawn up one year after the validity period. The question then is, within the 1 year period of legal vacuum, the relevant law enforcement officers have no basis for implementation. Therefore, the decision of the Supreme Court to issue Perma 4/2014 which took effect as of July 24, 2014 is the right action in order to fill the legal vacuum in order to smooth the implementation of the SPPA Law itself.

## CONCLUSION

The position of the Supreme Court Regulation Number 4 Year 2014 in the implementation of

diversion by the public prosecutor is a rule that regulates the procedures for solving a problem in order to smooth the judiciary, in this case the implementation of diversion, given that there is a legal vacuum regarding the procedures for implementing diversion after the formation of the Law Number 11 Year 2012 concerning SPPA, where in the Law it is ordered that the Government Regulation regarding the implementation of diversion be made no later than 1 year from the enactment of the SPPA Law, but in reality the Government Regulation in question was promulgated outside of the stipulated time, so there is a vacancy law in the implementation of the SPPA Law. The Supreme Court which is given the authority by law to make complementary rules to fill the legal gaps or gaps has appropriately exercised its authority through the formation of the said Supreme Court Regulation.

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