

The Philosophical Basis for the Formulation of the Stipulation of Diversion Implementation Outside Criminal Justice System within the Frame of Child Protection and Welfare

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Abstract

Child is mandate and gift from the God. They have dignity and potential that will shape their future. Also, they have role in shaping the nation's history. The mirror reflecting the nation's character in the future also lies in their hands. During the period of their growth, children often have to face legal process because of what they do. There are many children proven guilty of crime and they are punished. The Law Number 11 Year 2012 on the Criminal Justice System For Children regulates diversion for children having conflict with the law. The diversion process function by taking a child out of formal criminal justice for the child. However, diversion regulated in the Article 7 point (1) of the Law on the Criminal Justice System for Children is also implemented in the Criminal Justice System For Children by the investigator, prosecutor and the judge. Unfortunately, this practice can place stigma upon a child. Referring to result of research and analysis, some experts say that there are philosophical basis of international laws and national laws that can be used as the philosophical foundations for the formulation policy of the regulation for the implementation of the diversion outside criminal justice system. It is aimed at protecting children and maintaining their welfare as well as preventing children who have legal conflicts from stigma and labelling. It is also directed towards protection of children from violence caused by criminal justice process.

Keywords: Philosophical Basis, Formulation Policy, Diversion, Criminal Justice System for Children, Child Protection and Welfare

1. Introduction

Child is an important topic to discuss because the future of the human being depends on the child. It is child who shapes the nation's history and mirror of the nation's behaviour in the future (Wagiati Soetodjo: 2005). Consequently, the needs of the children for the growth and self-development must be prioritized. However, many children are found guilty of crimes and the judges impose criminal sanction on them.

As a nation who has ratified the Convention for the Rights of the Child, the convention is used as one of the legal sources for drafting laws and regulations related to the child (Nonot Suryono: 2012). It means all Indonesian children have the rights to be protected by the state including those who have problems with the law regardless their positions as the perpetrators, victims or witnesses (Nonot Suryono: 2012).

The government and the House of Representatives promulgate the Law Number 3 Year 1997 on the Court for the Child on January 3, 1997. The Consideration section of the Law on the Court of the Child states that the purpose of the Child Court is to educate and protect children in order to guarantee that the growth and the physical, mental as well as the social development of children remain in tact, harmonious and balanced (Consideration "Menimbang" in the Law Number 3 Year 1997 on Child Court).

The reality shows that the Law on the Child Court cannot keep up with the legal needs of the community and the law has not yet comprehensively protect children conflicting with the law. Some researches on the implementation of the Child Court find facts that the court process on the child causes negative impacts. According to Setya Wahyudi :

Child imprisonment shows negative tendency for the psychological development of the child in the future. Presently, most children conflicting with the law, especially those brought to the court, are

punished by deprivation of freedom. If they are imprisoned, their rights which are guaranteed by the Law on Child Protection, are not fulfilled. Besides due to the fact that there are not sufficient number of Child Prisons, minor inmates are often placed in the same location as the adult inmates (Setya Wahyudi: 2011).

Besides Setya Wahyudi, Paulus Hadisuprpto also conducted research in two cities of the Central Java, especially in the city of "Siera" and "Sigma". He found some weaknesses in the implementation of the Child Court :

1. The Implementation of the Law on the Child Court in dealing with children cases tend to create stigma caused by the processes since investigation, prosecution, the trial in the court until the re-education stage. All indicate stigmatization against children and it will surely be disadvantageous for children in the future. Criminological analysis indicates that stigmatization will plant certain mental marks on the children (selfprophecy process). This has potential to create child criminogenic factor that can stimulate children to repeat their bad conducts in the community.
2. Although the Law on the Child Court normatively has shown how to deal with delinquent children, it is difficult to put the guidance into action. Instead, the handling of children involving in criminal cases tend to create stigma upon them. This, in turn, will stimulate them to repeat their bad conducts in the future (Paulus Hadisuprpto: 2003).

The government promulgate the Law of the Republic of Indonesia Number 11 Year 2012 on Criminal Justice System for Children on July 30, 2012. The promulgation of this law is stimulated by the increase of the number of children conflicting with the law every year. According to the data gathered by the Suara Merdeka daily newspaper, there are 4,000,000 children conflicting with the law in 2008-2009. During 2010-2011, there are more than 7000 children conflicting with the law and 6726 of them have been processed. The rest of them are still being processed. In 2011, it is recorded that there are 6271 children imprisoned in 16 detention houses in Indonesia. Sixteen out of thirty two children interviewed by the KPAI confessed to have been tortured during the investigation process carried out by the police (KPAI: 2013).

The process of the child court has not given satisfying results for the welfare of the children and it still tends to be repressive because there are many judges' decision giving imprisonment sanctions (Muhammad Aenur Rosyid: 2013). This stimulates children to start their career as repeat offenders at their early ages.

When children commit crime, there have been debates on the best solution. To protect children from the influence of formal criminal justice process, there are opinions of legal experts based on humanity values expressing that children must be removed from criminal justice process and given some better alternatives for them (Marlina: 2010). Diversion is presently regarded as the best and the most effective method in dealing with children conflicting with the laws and such a method is internationally recognized. The basic reason of it is that the court will put stigma upon children due to the crimes hat they have committed. Therefore, it is better for them to avoid criminal justice system (Marlina: 2010). From the prespective of the protection for the best interest of the child, diversion is indispensable. It is because diversion allows the cancelllation of the criminal prosecution. There will never be record as former defendants and the stigma as a criminal can be avoided (Paulus Hadisuprpto: 2008). Besides, diversion is also conducted in order to give chances to the children to be better member of the community involving resources in the area where they live.

The Law on the Criminal Justice System for Children regulates diversion. According to the Article 1 point (7), diversion is the shift of the process on child case from the criminal justice process to process outside criminal court. Furthermore, Article 7 point (1) of the Law on Criminal Justice for Children stipulates that diversion must be striven at the level of investigation, prosecution and examination in the court.

Referring to the definition of diversion above, it should be conducted since the beginning. The diversion should be conducted before the child conflicting with the law goes into criminal justice system. On the other hand, when diversion is attempted in any stage of criminal justice sytem, stigma will not be easy to avoid because it comes out

since the child has to face an investigator. Therefore the stipulation in the Article 7 point (1) of the Law on Criminal Justice System for Children is amended in order to realize child protection and welfare.

In order to amend the Article 7 point (1) of the Criminal Justice System for Children, it is necessary to conduct analysis on the philosophical basis of the regulation for the implementation of diversion outside criminal justice system for children in order to protect them and secure their welfare.

2. Research Method

This is a qualitative research using normative legal research type. A normative research must employ statute approach because the focus and its central theme are laws (Johnny Ibrahim: 2010). Normative legal research is employed because its point of departure is the analysis on the considerations of some international laws as well as national laws which are used as the basic concepts for the philosophical basis of the formulation policy of laws on diversion outside criminal justice system for children in order to protect them as well as securing their welfare.

To achieve the goal of the research, statute approach and comparison approach are used. The legal materials used in this research cover considerations of some international laws and national laws. The secondary materials are opinions of legal experts. They are accompanied by tertiary material as well. Those three legal materials are processed and analyzed juridically and qualitatively in order to find solutions of the research problem.

3. Result of Research and Analysis

3.1. The philosophical Basis of Some International and National Laws

3.1.1 Philosophical Basis of International Laws

- a. *Preamble of the Universal Declaration of Human Rights (UDHR)* covers the equality of rights, justice and freedom from fear
- b. *Preamble of the Convention on the Rights of the Child (CRC)* covers equality of rights, justice, freedom, protection and welfare.
- c. *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), Adopted by General Assembly Resolution 40/33 of November 29, 1985* covers principles of justice, protection, welfare and principle that the stipulation is implemented according to local cultures.

3.1.2 National Laws

- a. The Constitution 1945 of Indonesia covers principles of rights equality, justice, protection and welfare.
- b. The Consideration of the Law Number 39 Year 1999 on Human Rights covers the principles of protection and welfare.
- c. The Consideration of the Law Number 4 Year 1979 on Child Welfare covers principles of justice and welfare.
- d. Considerations of the Law Number 23 Year 2002 on Child Protection covers principles of protection and welfare.
- e. The Consideration of the Law Number 3 Year 1997 on Child Court covers principle of protection.
- f. The academic manuscript of the Law Number 11 Year 2012 on Criminal Justice System for Children covers principle of protection.
- g. The consideration of the Law Number 11 Year 2012 on Criminal Justice System for Children covers principle of protection.

3.2. The Philosophical Basis of Criminal Justice for Children According To Some Experts

3.2.1 Walker

Diversion is conducted in order to give a chance to the offender to be a better individual through non-formal path by involving resources in the community. Diversion attempts to provide justice for a child who commits crime and his or her case is handled by law enforcement official. This justice is elaborated through a research on the situation in order to give appropriate sanction or treatment (Walker: 1993).

According to Walker, diversion attempts to provide justice for a child who commits crime. Therefore, Walker's opinion covers principle of justice.

3.2.2 Mardjono Reksodipoetro

According to this expert not all cases (including the one involving children) must be processed by the law, but they can be handled outside the court when they are still at the stage of investigation. In this way, we can use

mediator, administrative fine, re-education, and the child can be returned to their parents in order to obtain protection, but this is accompanied by a clear warning (Mardjono Reksodipoetro: 1994).

Mardjono Reksodiputro's opinion covers the principle of protection.

3.2.3 Sudikno Mertokusumo

According to this expert, the goals of the court (child court) are not only to prove a concrete case and impose a decision, but also the case settlement. The decision must settle the case and it must be executable. We must not make a decision which is not executable or the one that can create a new problem. Seeing that a child must be protected and consequently special attention and treatment must be given, child court must not be focused on whether or not the conduct or violation is proven. More attention and consideration must be placed on the background and the motivation behind the child's conduct. The consequence of the decision for the future of the child must be considered as well (Romli Atmasasmita: 1997).

It can be concluded that Sudikno Mertokusumo's opinion reflects the principle of protection.

3.2.4 Setya Wahyudi

The basic idea of the implementation of diversion is to protect a child committing crime from the negative influence of the formal process of criminal justice. It is because such a process will possibly hurt the child. This alternative policy is regarded as the right step and it can give optimum result, especially when a child commits minor crime or non serious violation while the family, school and the community support the child and they can act normally, not blow up the problem (Setya Wahyudi: 2011).

It can be concluded that Setya Wahyudi's opinion above reflect the principle of protection.

3.2.5 Barda Nawawi Arief

The implementation of the child court needs special approach, special attention, special consideration, special service, special treatment and special protection for a child having problem with the law and the court. Therefore, a legal process which is only aimed at punishing, mentally degrading and discouraging must be avoided. We must also avoid stigmatization process that can disturb the process of maturity and growth of the child in a normal sense (Muladi & Barda Nawawi Arif: 1992).

Barda Nawawi Arief's opinion above reflects the principle of protection.

3.2.6 Satjipto Raharjo

Especially for crime committed by children, other action is necessary to be taken to handle it. For this purpose, it is necessary to establish the child court which prioritizes protection and rehabilitation for children as an individual who has some limitations compared to adult (Satjipto Rahardjo: 2009).

In this way, Satjipto Raharjo's theory reflects the principle of protection.

To conclude this part, it is clear that expert's opinion above reflect the principles of protection and justice.

Referring to some considerations of international and national laws as well as the opinions of experts above, it is concluded that there are principles which can be employed as concepts to analysis the problem of this research, how is philosophical basis for regulating the implementation of diversion outside criminal justice system for children for the sake of protection and welfare for the children. Those principles are right equality, justice, freedom from fear, protection, welfare and the implementation of regulation must be in accordance with local culture.

a. The principle of rights equality :

Within international laws :

1. Preamble of the Universal Declaration of Human Rights

Paragraph 1 : Acknowledgement on the absolute dignity and equality of rights.

2. Convention on The Rights of The Child,

- Paragraph 1 : Acknowledgement on inherent dignity and absolute equality of rights.

- Paragraph 3 : Entitled to all rights and freedom without any forms of discrimination.

- Paragraph 7 : The spirit of peace, dignity, tolerance and equality.

3. The Preamble of the Constitution 1945 of Indonesia

Paragraph 1 : Freedom is the right of all nations.

Article 2.2 of the Convention of the Rights of the Child as well as Article 40.1 CRC also affirm the principle of rights equality which is possessed by every child in criminal justice process. This allows them to be treated in accordance with their dignity. Made Sadhi Astuti says that there are some rights of the children which must be put into attention and made as an object of collective struggle. Children have rights, among others : the rights for not being a victim in criminal justice process and the rights for enforcing justice in a criminal justice process according to their ability. They must be educated as early as possible in order to prevent them from being a victim and

victimizing others (Made Sadhi Astuti: 1997).

In relation with Made Sadhi Astuti's theory above, children have the rights for not being the victim of criminal justice process, the rights for enforcing justice according to their ability and the rights for early education in order to prevent them from being victims and victimizing others. However, those rights are not actualized in reality. Instead, children often become victims of criminal justice process in forms of bad treatment and physical violence.

Regarding this fact, Koesno adi says :

The handling of child perpetrator by law enforcement officials through penal way has brought disadvantages for the future of the child. It is because the handling tends to leave stigma instead of the law enforcement's treatment reflecting child protection. Children who involve in crimes often have to face bad treatment or even worse than adults when they face the same situations. Most children involving in crimes experience violence in criminal justice process (Koesno Adi: 2009).

The article 28 (B) of the Constitution 1945 of the Republic of Indonesia also stipulates that children have the rights for growth, protection from violence and discrimination. Furthermore, the Article 13 point (1) letter "a" of the Law on Child Protection stipulates that every child has the rights for protection from any forms of discrimination. The Article 64 point (2) letter a also stipulates that the special protection for children facing problems with laws is implemented through humane treatment according to child's dignity and rights. The child's rights to be free from any forms of discrimination is also elaborated in General Explanation of the Law on Criminal Justice System for Children. It says that the state guarantees the rights of each child for life, growth and entering maturity as well as protection from violation and discrimination. Therefore, the best interest of the child must understood as the best interest for the existence of human being (The General explanation of the Law Number 11 Year 2012 on Criminal Justice System for Children).

This is in accordance with human rights theory proposed by Marzuki Darusman. According to this prominent figure, human rights must be in accordance with the nature of human being as individual and social being. Human rights must be respected and uphold highly as well as fairly according to human dignity (Marzuki Darusman:1999).

Regarding to this principle of rights equality, there should be balance between the child conflicting with the law, child as a victim and the community. When a child becomes a victim, he or she has the rights for the repayment of any losses implied by the perpetrator. It is stipulated in the Article 10 point (2) letter "a" of the Law on Criminal Justice for Children that the agreement on diversion as regulated by the point (1) is conducted by the investigator under the recommendation from the advisor of the community and it can be in the form of payment for the losses suffered by the victim.

The Article 11 of the Law on Criminal Justice System for Children stipulates that the agreement of diversion can be in forms of peace settlement with or without payment for the loss. On the other hand, the community has the rights for service as a form of sanction on the child as diversion agreement. This is regulated in the Article 10 point (2) letter "e" of the Law on Criminal Justice for Children saying that the agreement on diversion as stipulated by the point 91) is conducted by the investigator under the recommendation from community advisor. It can be in the form of community service for maximum three months. Community service is also regulated by the Article 11 letter "d" of the Law on Criminal Justice for Children.

b. Justice Principle:

Justice Principle can be found in :

1. *Preamble of the Universal Declaration of Human Rights*

- Paragraph 1 : Acknowledgement on the natural dignity and absolute equality of rights are foundations of justice.

2. *Preamble of the Convention on the Rights of the Child (CRC)*

- Paragraph 1 : Justice and world peace.

3. *Fundamental Perspectives of The Beijing Rules*

- Article 1.4 : Child justice is an integral part of development process which regards social justice value for children.

- Article 1.6 : Child justice must be developed.
- 4. The Preamble of Constitution 1945 of Indonesia
 - Paragraph 1 : Humanity and justice
 - Paragraph 2 : Sovereign, just and prosperous
 - Paragraph 4 : eternal peace and social justice. Civilized and just humanity as well as social justice.
- 5. The Consideration of the Law Number 4 Year 1979 on Child Welfare
 - Letter b : Child needs wide chances for growing and entering maturity normally. This covers mental and physical aspect.

Article 40.3 letter " b" of the Convention for the rights of the Child stipulates:

Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. A variety of disposition, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 40.3 letter " b" of the CRC above affirms that the steps for dealing with children conflicting with laws must be conducted without criminal justice process, by always safeguarding the rights and legal protection aspect as well as maintaining that children are handled by ways according to their condition and in proportion with their legal violation. This is in line with the justice theory known as "morality of authority" proposed by John Rawls which says that children still have some limitation compared to adults. They do not have suitable knowledge and understanding which can be the basis for them to stand against the order. As a weak individual, when a child conflicts against the law, it is not necessary for him or her to be processed in the court. It is better for them to be under protection from their parents (John Rawls: 2006).

The Article 8 point (3) letter "a" of the Law on Criminal Justice System for Children stipulates that the diversion process must regard the interest of the victim. According to Barb Tews, the attention for the victim is the core value of restorative justice (Barb Tews: 2006). Besides, the Article 8 point (3) letter "e" and letter "f" of the Law on Criminal Justice for Children stipulates that diversion process must regard the harmony of the community (letter "e"), appropriateness, decency and public order.

The realization of justice for a child conflicting with law, the child as a victim and justice for the community can be regarded from restorative justice approach. The Article 1 point (6) of the Law on Criminal Justice for Children stipulates that restorative justice is the settlement of a crime case by involving the perpetrator, victim, family of the perpetrator/ victim and other related parties in order to find common solution which is just by placing the gravity on the repairment aimed at restoring original condition. It is not a revenge.

Furthermore, Article 5 point (1) of the Law on Criminal Justice System for Children stipulates that Criminal Justice System for Children must prioritize restorative justice approach. With regards to restorative justice, Article 8 point (1) and (2) stipulate that :

(1) Diversion process is conducted through dialogue involving the child and the parents/guardian, community advisor and professional social worker by employing restorative justice approach.

(2) If necessary, dialogue as stipulated in the point (1) can involve social welfare official and/or the community.

Referring to the discussion above, the handling of child case through diversion process is implemented in dialogue involving the child with his or her parents/ guardian, community advisor and professional social worker, as well as social welfare official. A community who practices restorative justice indicates justice for child conflicting with the law, child who becomes a victim as well as the community.

According to Eva Achjani Ulfa the meaning found in the rehabilitation concept, resocialization, restitution repairment and compensation seem to be parts of concept in restorative justice (Eva Achjani Zulfa: 2011).

c. The Principle of Freedom from Fear :

1. Universal Declaration of Human Rights (UDHR)

- Paragraph 2: freedom from fear...

2. The Preamble of Convention on the Rights of the Child (CRC)

- Paragraph 1 : the basis of freedom..

- Paragraph 2 : wider freedom

- Paragraph 7 : freedom and solidarity.

Child is born with irrevocable rights for life and freedom as these are basic rights. Therefore, these rights must be protected. According to Zuhdi Ahmad, there are three fundamental rights : rights for life, rights for liberty and rights for property. Those three rights are fundamental in daily life (Zuhdi Achmad: 2010).

The children rights are parts of human rights safeguarded and protected by the national laws such as the Constitution 1945 and The Law Number 30 Year 1999 on Human Rights which regulate children rights, the implementation of the responsibility of parents, family , community, government and the state in protecting children, while Law Number 23 Year 2002 on Child Protection covers protection for children conflicting with laws. Besides, children are also protected and safeguarded by international laws, such as the Universal declaration on Human Rights (Bambang Sukanto: 2010).

The values governing children which are adopted as universal norm regards children a complete human beings. Therefore their rights must be protected, especially children conflicting with laws. They must be really protected from fear by keeping them away from formal provcess of the criminal justice for children (Bambang Sukanto: 2010).

Hadi Supeno also says :

The will to build humane court for everyone, especially for children, has become a universal issue and therefore, the international public put this matter in special written document. The Universal Declaration of Human Rights cover 30 articles and 8 of them concern about the justice process. This, of course, includes children because they are also human as intended in this declaration (Hadi Supeno: 2010).

Principle 2 of the *Universal Declaration of Human Right* rules that :

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be paramount consideration.

According to the above principle, children have the rights for special protection and they must be given chances as well as facility guaranteed by the law. That includes also other facility supporting their physical, mental and behavioral development. In this way, it is hoped that children can grow without loosung their dignity and freedom. This protection is important because children are parts of community but they have physical and mental limitations.

Child as a victim of crime committed by other child also has the right to obtain legal protection. According to Sudikno Mertokusumo, legal violation happens when certain legal subjects do not conduct their obligation or violate the rights of other legal subjects. Legal subjects whose rights are violated must be given legal protection (Sudigno Mertokusumo:1996).

The interest of the community must also be regarded. Paul W. Tappan as quoted by Sudarto states that child court is not supposed to function as a criminal court and social institution only. Besides regarding the interest of the child, the court must also regard the interest the community (Paul W. Tappan dalam Sudarto: 1981).

d. Protection Principle :

1. Preamble of the Convention of the Rights of the Child

- Paragraph 9 : Due to physical and mental limitations, children need legal protection.

- Paragraph 10 : Child protection

- Paragraph 11 : Child in difficult situation needs special attention.

- Paragraph 12 : Harmonious protection and development

- Paragraph 12 : Improve the living condition of children

2. Fundamental Perspectives of The Beijing Rules

- Article 1.2 : When he or she is vulnerable to commit violation

- Article 1.4 : Contribution to child protection

3. Preamble of the Constitution 1945

- Paragraph 4 : Forming the government of Indonesia who protect the nation and the people of Indonesia.

4. Considerations of the Law Number 39 Year 1999 on Human Rights
 - Letter "a" : The rights for securing their dignity, proud and self esteem as well as harmony with their environment.
 - Letter "b" : Therefore, it must be protected, respected and defended.
5. Consideration of the Law Number 23 Year 2002 on Child Protection
 - Letter "a" : The protection of child's rights is part of human rights.
 - Letter "c" : Children have strategic role in securing the existence of nation and state in the future.
 - Letter "d" : It is necessary to be protected
 - Letter "e" : To realize protection, it is necessary to obtain institutional support and laws and regulations support.
 - Letter "f" : Various laws only regulate certain aspect of child, but they have not specially regulated all aspects related to child protection.
6. Consideration of the Law Number 3 Year 1997 on Child Court
 - Letter "a" : Child needs education and protection in order to secure their growth, physical development, mental development as well as social development in intact, harmonious and balanced form.
 - Letter "b" : To conduct education and protection, it is necessary to obtain appropriate institutional and legal support.
7. The academic manuscript of the Law Number 11 Year 2012 on Criminal Justice System for Children
 - Paragraph 1 : The education for a child who is suspected to have committed crime must be conducted continuously for the growth as well as physical, mental and social development. He or she must also be protected from any danger.
8. The consideration for the Law Number 11 Year 2012 on Criminal Justice System for Children
 - Letter "b" : Children have the rights to obtain special protection, especially legal protection in the justice system.
 - Letter "c" : The obligation to give protection for children facing problem with laws.
 - Letter "d" : The existing laws have not comprehensively protected children having problems with law. Therefore, new laws must be made.

Article 3.1 of CRC stipulates that any action committed by the community, private parties, the court, administrative authority and legislative body that brings implication upon children must consider the best interest of children.

Paragraph 59 of the law on Child Protection also states that the government and other state institution have an obligation to provide special protection for children in emergency situation or those facing problems with the law.

Special protection for children is also stipulated in the Principle 2 of the Declaration of the Rights of the Child 1959 :

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be the paramount consideration.

The above principle affirms that children must be given special protection through facility and chances safeguarded by the law. In this way, they can grow and develop their physical, mental, behavioral and social condition healthily and normally without losing their freedom and dignity.

Furthermore, the Article 3 of the Law on Children Welfare stipulates that children must be prioritized to be saved, helped and protected in any dangerous situation. According to the explanation of this article, dangerous situation is a situation threatening the life of individual either caused by nature or action of individuals. Moreover, the Article 2 letter "a" of the Law on Criminal Justice System for Children stipulates that criminal justice system for children is conducted based on the principle of protection.

Principle 8 of the Declaration of the Rights of the Child 1959 states that "*The child shall in all circumstances be among the first to receive protection and relief*".

The Article 8 point (3) letter "c" and letter "d" of the law on Criminal Justice System for Children is a realization of legal protection for children conflicting with laws. It must be noted that diversion process must protect children from negative stigma (letter c) and revenge (letter d).

According to Syaifudin, the behavior of an individual influenced by stigma may result to the growth as a career and professional criminal (Syaifudin: 1995). Regarding to diversion aimed at preventing revenge, Sudarto refuses the principles of employing witness only for punitive sanction. The second target is the principle used for restraining the implementation of merely punitive sanction (Sudarto: 1981). The Children Rights Observer Foundation states that :

There are principally three approaches for handling children conflicting with the law:

1. Children are assumed as individuals without legal capacity to commit crime due to their nature

and character which still depends on adults. Their ages, physical, mental, moral and spiritual developments have not reached the level of maturity;

2. Children are regarded as individuals who do not really understand their guilts. Therefore, they are entitled to the reduction of sanction and different type of punishment compared to adult or even moved to non-judicial way of solution.

3. Children are believed to be easier to educate and enlighten compared to adult.

Thus, special intervention must be conducted in order to protect children, instead of placing them against the authority for criminal responsibility (Yayasan Pemantau Hak Anak: 2011).

On the other hand, M. Nasir Djamil proposes that children are not supposed to be punished. Instead, they must be counseled and educated. In this way, they can grow normally, healthily and smartly (M. Nasir Djamil: 2013).

In line with M. Nasir Djamil, Satjipto Raharjo as quoted by Turiman states that especially for children committing crimes, there should be other way to deal with it. The child court must prioritize protection and rehabilitation for children. It is because children have limitations compared to adults (Turiman: 2010).

Made Sadhi Astuti also says that children need special protection and care. They belong to weak faction in the community and they cannot defend themselves. Last but not least, they are very sensitive towards abuse and neglect against themselves (Made Sadhi Astuti: 2002). This is connection with Peter Newel's theory that :

Some subjective reasons of the existence of children, so the children need protection : a) cost recovery due to failure to provide child's protection is very high. Much higher than the costs incurred if the children receive protection; b) children are very influential over the long term and immediate actions or the lack/do un-actions from the government and other groups; c) the children are always experiencing separation or gap in the provision of public services; d) children do not have voting rights, and do not have the lobbying power to influence the government's policy agenda ; e) children in many circumstances can not access the protection and regulation of children's rights; and f) children are more at risk of exploitation and abuse in (Peter Newel in Hadi Supeno: 2010).

Furthermore, child victim also has the right for legal protection. Article 64 point (1) stipulates that: The special protection for children conflicting with the law as stipulated in the Article 59, covers children conflicting with the law and child victim. They are the responsibilities of the government and the community". The community obtain advantages as a result of criminal justice process of children. *The Tokyo Rules, Rule 5* states that :

Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of the deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

Rule 5 of The Tokyo Rules above protects the community as well as the victim.

Regarding with the principle protection, there should be balance between children conflicting with the law, child victim and the community. This is in line with the goal of the law proposed by Apeldoorn saying that the goal of the law is to peacefully regulate the community. The law requires peace among citizens. The peace is defended by the law through the protection of interests of certain citizens (materially and ideally), honor, freedom, life, property and so on against things that can bring disadvantages (L.J. van Apeldoorn: 1980).

e. Welfare Principle :

1. The Preamble of the Convention on the Rights of the Child (CRC)

- Paragraph 5 : growth and welfare of all members, especially children.
- Paragraph 8 : related to welfare
- Paragraph 10 : children welfare

2. Fundamental Perspectives of The Beijing Rules

- Rule 1.1 : The country members must make attempts to advance child welfare.
- Article 1.3 : Involving full mobilization of all resources in order to promote child welfare.

3. The Preamble of Constitution 1945 of the Republic of Indonesia

- Paragraph 4 : To advance public welfare.

4. The Consideration of the Law Number 39 Year 1999 on Human Rights

- Letter "a" : For the welfare of human being

5. Consideration of the Law Number 4 Year 1979 on Child Welfare

- Letter "c " : There are children with spiritual, physical, social and economical problem.

- Letter “d” : The safeguarding of welfare cannot be implemented by the children themselves.
 - Letter “e” : The attempt to eliminate the barrier can be implemented and obtained when children welfare is guaranteed.
 - Letter “f” : It is necessary to make law regulating children welfare
6. Consideration of law Number 23 Year 2002 on Child Protection
- Letter “a” : Guarantee the welfare of every citizen.
 - Letter “d” : To realize children welfare by safeguarding the fulfilment of their rights.
 - Huruf “e” : The children welfare needs institutional and legal support in order to safeguard its implementation.

Rule 5.1 The Beijing Rules states “*The Juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the other*”. According to the *Rule 5.1 of The Beijing Rules* above, the justice system for children must emphasize on children welfare and ensure that every reaction on children conflicting with laws must be in proportion to the circumstances of both the offender and the victim. Furthermore, the *Commentary of the Rule 5 of The Beijing Rules* explains that the goals or important targets of child justice system are :

a. *The promotion of the well being of the juvenile*

b. *Principle of the proportionality*

On the other hand, Agung Wahyono and Siti Rahayu propose that :

Child criminal justice is conducted by regarding children welfare. Due to the fact that children are the potentials as well as the heirs of nation’s ideals. Consequently, children welfare is important. In order to prepare them for such big responsibilities, they must be given chances to grow and mature normally. There are children who have problems in some aspects : spiritual, physical, social and economical. These problems can only be eliminated if children welfare is safeguarded (Agung Wahyono and Siti Rahayu: 1993).

This is also stipulated in the Article 1 letter “a” of the Law on Child Welfare: “Child welfare is life order and child livelihood that can safeguard the normal growth and development in spiritual, physical or social sense.”

Furthermore, the Article 6 point (1) of the Law on Child Welfare stipulates that a child with behavioral problem is provided with service and care in order to help him or her to go through barriers in his or her growth and development. In addition the point (2) stipulates that service and care as stipulated in the point (1) are also given to a child found guilty under the judge’s decision. Therefore, according to the Article 6 of the Law on Child Welfare, children conflicting with the law still have the right for good service and care in order to help them to go through problems in their growth and development.

Referring to the previous paragraphs, the Article 6 of the Law on Criminal Justice for Children stipulates the goal of diversion : a) To make the peace between the victim and the child; b) Handling child case outside the court; c) Keeping the child away from abduction; d) Stimulate the community to take part; e) Teaching the children on the importance of the sense of responsibility (Article 6 on the Law Number 11 Year 2012 on Criminal Justice System for Children).

On the other hand the Article 8 point (3) letter “b”, of the law on the Criminal Justice on Children, stipulates the diversion process must regard : a) the interest of the victim; b) Welfare and responsibility of the child; c) prevent negative stigma the interest of victim; d) prevent revenge; e) order in the community; f) obedience, decency and public order (Article 8 on the Law Number 11 Year 2012 on Criminal Justice System for Children).

To conclude the previous discussion Article 6 and Artikel 8 of the law on Criminal Justice System for Children regulate that the implementation of diversion is conducted by regarding the interest of the child conflicting with laws, minor victim and the community.

f. The rule is implemented by regarding the local culture

Fundamental Perspectives The Beijing Rules, Rules 1.5: This rules must be implemented by regarding local cultural condition in each country member.

The preamble of the Convention on the Rights of the Child also affirms the importance of traditional and cultural values of each country for the harmonious protection and growth of children.

Culture consists of anything learned from normative behaviour patterns covering all ways, patterns of thought, feelings and actions (Jacobus Ranjabar: 2006). Cultural values refer to the good and bad of situation, event or certain object that function as guidance and stimulant for human behaviour in social interaction process. This in turn will form a system of behaviour (Setya Wahyudi: 2011). According to Koentjaraningrat, cultural values as a combination of abstract concepts living in the majority or certain group in the community differentiate the good and the bad (Soerjono Soekanto: 2002). The basic values of Indonesian culture system has been formulated into a state ideology, called Pancasila. Although it must be remembered that all the values of the basic values of Indonesian culture system has been formulated into a state ideology, called Pancasila, Pancasila is not a basic culture of Indonesia , but other values are regarded as the basic values of Indonesian position is considered lower than Pancasila. If there is a conflict of values , top priority is given to the values of the national ideology (Setya

Wahyudi: 2011). One of the Indonesian culture is to solve the problems with deliberation and consensus. This is in accordance with the fourth principle of Pancasila, namely democracy led by the wisdom of deliberation / representation .

Related to the culture of Indonesia (Java), Setya Wahyudi argued :

Society of Indonesia (Java) that exalts peace and tranquility in his life with the founding pillars of attitude, mutual respect, appreciate and avoid conflict. With this attitude, the Java community does not like to exaggerate the problem, and preferred conflict sealed. Judiciary as an institution of conflict resolution can be considered inappropriate. Judiciary as an institution of conflict resolution , it can be avoided according to the Javanese culture (Setya Wahyudi: 2011).

Referring to the analysis above, diversion outside criminal justice system is acceptable for Indonesians. This is because:

- a. Diversion is aimed at prioritizing child protection by avoiding stigma and negative effect of criminal justice process;
- b. Diversion is aimed at creating peace between the perpetrator and the victim by giving compensation as well as asking forgiveness. In this way, it is hoped that there will be no more conflict. Also, the perpetrator is expected to express his or her regret and promise not to repeat the bad conduct;
- c. Diversion program can be in forms of the issuance of warning, skill training and counselling;
- d. The implementation of diversion must be under the approval of parents of the children by written agreement;
- e. Diversion methods are usually applied in minor cases and cases which do not endanger the community as well as cases in which there is a close relation between the perpetrator and the victim;
- f. If diversion is conducted, the case is closed and there will be no criminal record for the child.

On the other hand, the court process resumes when diversion fails (Setya Wahyudi: 2011).

Hence, the writer concludes that all principles in the national laws, international laws and expert opinions on child justice system can be employed as basic philosophical concepts for the formulation of the regulation on diversion outside criminal justice system for children in order to protect the children and safeguard their welfare.

Moreover, as an analytical tool to search for the new concept of the philosophical basis for the formulation policy of the laws and regulations for diversion outside criminal justice system for children in order to protect the children and safeguard their welfare, theories of G. Pieter Hoefnagels, Barda Nawawi Arief and Mulasi are also employed. According to them, law enforcement policy is a part of social policy which also includes legislative policy. To handle cases of children conflicting with laws, non-penal approach shall be implemented. Judging is a conflicting humanity problems closely related to emotion, conscience and justice. As humanity problems, the development of children rights in criminal justice process is necessary because it is a procedural guarantee for the basic supervision of child protection (Made Sadhi Astuti: 2002). The development of children rights in criminal justice is a result of interaction because of relationship between the existing phenomena who compete to insert influence one against the other. Therefore, a research should be conducted in order to identify the variety of phenomenon and actors participating directly or indirectly in the interaction. A further consequence of it, it is necessary to understand anything or anyone involves or even has responsibility in order to safeguard children rights in criminal justice process. However, each part should take positive, useful and responsible role in order to achieve child justice and welfare (Made Sadhi Astuti: 2002).

4. Conclusion

In the Article 7 point (1) of the Law on the Criminal Justice System for Children arranged about the meaning of diversion , that the removal of children from the settlement to the criminal justice process outside the criminal justice process . Based on Article1, point 7 of the Law on the Criminal Justice System for Children should be versioned in place since early before things children in the criminal justice system . However, pursuant to Article 7 paragraph (1) of the Law on Child versioned on the Criminal Justice System for Children implemented in each stage of the judicial system, namely the investigation, prosecution and examination in court. This will create a stigma for children in conflict with the law and put his status in the community .

From considerations some provisions of international and national legislation as well as the opinion of the members of the judiciary children contain some basis, that the foundations of equality, justice, free from fear, protection, prosperity and the rule is applied in accordance with the country's culture .

Foundations can be used as a concept of how be used as the philosophical basis for the formulation of the stipulation of diversion implementation outside criminal justice system within the frame of child protection and welfare because it can prevent

children in conflict with the law of the place stigma and status of children in the community as well as the follow- violence as a result of the criminal justice process.

Considerations of international laws, national laws as well as experts' opinions on child justice process cover some principles. They are principles of rights equality, justice, freedom from fear, protection and welfare. They include also principle of the implementation which should regard the local culture. Those principles are applicable for the basic concepts for the regulation of diversion outside criminal justice system for children aimed at protecting the children and safeguarding their welfare. In this way, children conflicting with laws can be protected from stigma and labelization in community and violence caused by criminal justice process.

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