

The Formulation Policy for the Regulation on the Implementation of Diversion which Reflects the Principles of Protection and Welfare for Children Conflicting against the Law in the Future

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Abstract

Child is an integral part of the life of human being as well as an important element for the existence of the nation and the state. This important role leads to the adoption of the explicit statement in the constitution says that every child has the right for life, grow and mature as well as the rights for protection from violence and discrimination (Article 28 B point (2) of the Constitution 1945 of Indonesia). During their growing process, sometimes children involve in legal problem, such as committing crime. Diversion is internationally recognized as a way to handle children case which can give legal protection for them because it can prevent children from being stigmatized by the process of criminal justice for children. Diversion is regulated in the Law on Criminal Justice Process for Children, but the process stipulated in the Article 7 point (1) is also conducted by the investigator, prosecutor and the judge. This causes negative impact in the form of stigmatization against children.

Referring to the result of research and discussion, the formulation policy for the regulation on the implementation of diversion which reflects the principles of protection and welfare for children conflicting against the law in the future can be recommended based on some provisions concerning children, which in essence provides an opportunity for member states to deal with children in conflict with the law outside the juvenile criminal justice process; some of the legislation governing the Australian state of diversion outside the criminal justice system implementation of the child; conditions of handling children in conflict with the law are dealt with implementation of diversion outside criminal justice system of children; some of the legislation governing the Australian state stages of implementation of non-fee diversion children.

Keywords : Formulation policy, Diversion, Protection and Welfare, Child Conflicting Against the Law.

1. Introduction

Article 1 point (1) of the Law Number 23 Year 2002 on Child Protection stipulates: "Child protection is an activity aimed at safeguarding and protecting child and his or her rights. Therefore, child can live, grow, mature and participate in an optimum way according to dignity and humane values. This includes protection from violence and discrimination". For this purpose, it is necessary to provide continuous education for the survival, growth, physical, mental and social development as well as protection from any damaging possibilities that can destroy the future of the child.

Not all children have same chances to realize their aspiration and hopes during their growth process. A lot of children face high risk because they cannot grow and develop to maturity healthily. There are still a large number of them who cannot get the best education because of poverty or problems faced by their parents. There are also children who are wrongly treated and left by their parents. Consequently they cannot live properly. It is consequently common to find children facing the law because of their conducts. Some are suspected, prosecuted, proven guilty of committing crime and sanctioned by imprisonment.

Children are actually not appropriate to experience hard punishment including imprisonment because it results to the destruction of their future (Hadi Supeno: 2010). Prison will give stigma and eternal labelization to the child. In this way, the restoration of the mental is difficult to implement because the labelization gives a child special status in the community (Hadi Supeno: 2010).

Since there are many children committing crimes, the debates on the best way for the solution has been going on. To protect children from the influence of formal process of criminal justice system, there are ideas or theories expressed by legal experts in order to provide the best alternative for children (Marlina: 2010). Presently, diversion is internationally recognized as the best and the most effective method to deal with children conflicting against the law. At the beginning, the discourse on diversion comes out because there are many children conflicting against the law who are influenced by external factors, such as, interaction in the community, peer group interaction, education and so on. The implementation of diversion is also stimulated by the intention to avoid negative effect damaging mental and growth of the child caused by the involvement in

criminal justice system. The basic reason of it is that the court will impose stigmatization upon children and therefore children must be taken away from the criminal justice system (Marlina: 2010).

From the perspective of the best interest of the child, diversion is necessary because it can cancel prosecution. There will not be any records of the crime committed by the child. Last, but not least, the child will not be stigmatized (Paulus Hadisuprpto: 2008). According to Koesno Adi, diversion is aimed at preventing children from the application of the criminal law which often leaves ongoing stigma, dehumanization and avoiding child from imprisonment which can facilitate the transfer of criminal experience to the child (Koesno Adi: 2009).

The implementation of diversion in Australia can give illustration of the success of law enforcement officials in handling children conflicting against the law. It is through caution mechanism and family group conferencing ([http:// www.alrc.gov.au/publication/18-childrens-involvement-with-legal-aid, criminal-justice-processes/diversion, pdf: 2013](http://www.alrc.gov.au/publication/18-childrens-involvement-with-legal-aid_criminal-justice-processes/diversion.pdf)).

As we can read in this quote that *“Diversion is an important aspect of many criminal justice systems throughout the world. Australia is no exception. Young people suspected of offences are increasingly being diverted from formal court adjudication through mechanisms such as cautioning and family group conferences”* ([http:// www.alrc.gov.au/publication/18-childrens-involvement-with-legal-aid, criminal-justice-processes/diversion, pdf: 2013](http://www.alrc.gov.au/publication/18-childrens-involvement-with-legal-aid_criminal-justice-processes/diversion.pdf)).

The implementation of diversion in South Australia is conducted since the beginning by applying police caution and family conferencing. The police caution stage consists of informal caution and formal caution. Informal caution is regulated in the Section 6 of Young Offenders Act 1993. Informal caution is applied when a child admits that he or she has committed minor crime. In this way, there will not be any administration records by the police. If that child commits crime again, formal caution will be issued. This stage is regulated in the Section 8 (1) of Young Offenders Act 1993. If the informal and formal caution do not succeed in handling child case, it will be processed through family conferencing as regulated in Division 3 (Part 9, 10, 11, and 12) South Australia Young Offenders Act 1993.

According to the Article 1 number 7 of the Law on Criminal Justice System for Children, diversion is the shifting of the case-handling from criminal justice process to outside criminal justice process. Furthermore, Article 7 point (1) of the Law on Criminal Justice System for Children stipulates : At the level of investigation, prosecution and the case examination in the state court, diversion must be attempted”. According to the Article 7 point (1) of the Law on Criminal Justice for Children, diversion can be implemented :

1. At the investigation level through non formal method or outside criminal justice system for children.
2. After the child follows formal justice process at investigation level.
3. After the child follows formal justice process at the level of case examination in the court

Referring to the definition of diversion above, it shall be conducted before the case of the child conflicting against the law enters criminal justice system for children. It is because diversion conducted at any level of justice system will not be able to avoid the stigma against the child, The reason of it is that the stigma upon the child conflicting against the law starts since he or she has to face police investigator. If diversion is conducted at the prosecution level or court examination, it will be difficult to avoid stigma of the child conflicting against the law. Therefore, the Article 7 (point 1) of the Law on Criminal Justice System for Children should be amended in order to realize child protection and welfare.

In relation with the renewal of the Law on Criminal Justice System for Children, it is necessary to conduct research on how the formulation policy on regulation for the implementation of diversion can reflect the principles of protection and welfare for the children conflicting against the law in the future.

2. Research Method

This is a qualitative research employing normative legal research. A normative research should employ statute approach because the focus and its central theme are laws (Johnny Ibrahim: 2010). Normative legal research is employed because the point of departure is analysis on some international laws, national laws and other countries' laws on the implementation of diversion outside criminal justice system for children as comparison.

In order to achieve the designed goal of the research, this research employs statute approach, documentary studies and comparative approach. The types of legal material used in this research covers primary legal material in forms of international as well as national laws and regulations. The secondary legal materials cover documentary studies at the headquarters of East Java Regional Police, Surabaya Metropolitan Police, and tertiary materials. The gathered materials are processed and analyzed by juridical-qualitative way in order to answer the problem of this research.

3. Result of Research and Analysis

3.1 Result of Research

3.1.1 The Regulations for the Implementation of Diversion Outside Criminal Justice System According to International and National Laws

The regulations on the implementation of diversion outside criminal justice system for children in order to handle child case can be found in some international and national laws related to legal protection for children conflicting against the laws. They are as follows :

3.1.1.1 The Regulation on the Implementation of Diversion Outside Criminal Justice System for Children According to International Laws

3.1.1.1.1 *Convention on The Rights of The Child, Adopted by the General Assembly of the United Nations on November 20, 1989, ratified by Indonesian Government through Presidential Edict Number 36 Year 1990*

Convention on The Rights of The Child is a treaty juridically and politically binding countries who agree to sign it. It regulates matters related to children. The Convention adopted by the General assembly of the United Nations on November 20, 1989 is ratified by the Indonesian Government through Presidential decree Number 36 Year 1990 on August 25, 1990. One principle in the Convention on the Rights of the Child related to diversion is the principle known as *the best interest of the child*.

To elaborate this convention, Article 40 of the CRC :

Article 40.1 CRC :

“States parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s respect for the human rights and fundamental freedoms of others and which takes freedoms of others and which takes into account the child’s assuming a constructive role in society”.

This stipulation regulates that every child accused, prosecuted or declared as a child who has committed crime shall be treated :

- a. In accordance with the child’s understanding on his or her dignity and rights;
- b. In the manner that can strengthen respects children’s rights and freedom of other individuals;
- c. In the manner that regards the age of the child and the will to advance or develop the re-integration of the child as well as the will to develop the child’s hope to develop his or her constructive role in the community (Barda Nawawi Arief: 2005).

Another stipulation related to diversion is found in the Article 40.3 of the Convention on the Rights of the Child :

States parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

b) 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 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.

The above stipulation rules that the states parties shall promote the establishment of the laws, procedures, authority and institutions specialized in dealing with children accused, prosecuted or declared as a child whose conducts are against the laws, especially criminal law without using court process by respecting human rights and giving full legal protection.

Referring to the discussion above, it can be concluded that the Article 40 point (3) letter “b” of the Convention on the Rights of the Child :

1. It stipulates the implementation of diversion outside criminal justice system for children;
2. It does not clearly stipulate the types of the crimes that can be handled by diversion. However, it stipulates that any case involving a child shall be treated in proportion with their condition and the violation;
3. It does not clearly stipulate institutions/ authorities who are responsible for the implementation of diversion. Is it only the responsibility of the police or the judge as well as other institutions.

3.1.1.1.2 United Nations Standard Minimum Rules for Administration of Juvenile Justice - The Beijing Rules

The Beijing Rules are United Nations’ rules regulating the implementation of criminal justice process for children conflicting with law. These rules are promulgated by the resolution of the UN General assembly No. 40/33, November 29, 1985. The Commentary Rule 11 regulates Diversion that *“Diversion involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems”.*

This action is taken in order to avoid the negative effect of the next process in the administration of the child court (for example the stigma stipulated by the judge and the punishment.

Therefore, early diversion by referring to alternatives way is perhaps a service with optimum response. This is commonly applied when the violation is not serious and the family, school or other informal social control institutions have reacted or tend to react in the right and constructive way.

On the other hand, diversion according to Rule 17.4 of the Beijing Rules is : “The competent authority shall have the power to discontinue the proceedings at any time”. Besides, the *Commentary Rule 17.4* stipulates that “*The power to discontinue the proceedings at any time (Rule 17.4) is a characteristic inherent in the handling of juvenile offenders as opposed to adults. At any time, circumstances may become known to the competent authority which would make a complete cessation of the intervention appear to be the best disposition of the case*”

According to the Commentary of the Rule 17.4, authorities have the rights to implement diversion based on the characters and nature of the child which is different from the adult suspect. Certain condition can be recognized by the authority who has the rights to fully stop intervention in order to make the best solution for a case.

According to the analysis above, The Beijing Rules cover :

1. The implementation of diversion outside criminal justice system for children;
2. The violation against the law that can be handled by diversion is not explicitly stated, but each state has the rights to decide their criteria in accordance with their own legal system and principles of the Beijing Rules;
3. Diversion shall be handled by authorized official , but it is not clear which official has the right to conduct diversion. Is it only the authority of the police, prosecutor or the judge.

3.1.1.1.3 United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).

The Riyadh Guidelines is an international regulation covering the guidance for handling the child conflicting against the law promulgated by the UN Resolution Number 45/ 112, December 14, 1990.

To illustrate this, *Rule 56 The Riyadh Guidelines* rules that “*In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person*”.

Rule 56 The Riyadh Guidelines above stipulate that to avoid stigmatization, victimization and criminalization against children, the laws shall be treated to ensure that any behaviour shall be regarded not as a crime and freed from any sanction if agreed by the child.

To add the explanation, *Rule 58 of the Riyadh Guidelines* stipulates that “*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, programmes and referral possibilities for the diversion of young persons from the justice system*”.

Referring to the analysis above, law enforcement and other competent officials shall be trained in order to be more responsive towards the special needs of the child by knowing the child better and making an optimum attempt to divert the settlement of the child case outside the criminal justice system.

Therefore, the researcher extrapolates that The Riyadh Guidelines regulate

1. The implementation of diversion outside the child court;
2. The type of violations/ crimes that can be settled through diversion are not explicitly stated, but whether or not any conducts will be sanctioned is based on the consent of the child;
3. Law enforcement officials and other related officials are in charge for diversion, but it is not clearly stated whether or not the matter is within the authority of the police only or the judge and the prosecutor are also responsible for it.

3.1.1.4 United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)

The Tokyo Rules are the United Nations’ regulations covering the basic principles aimed at stimulating the application of non-custodial policy as well as minimum protection for individuals sanctioned by non-imprisonment. These rules are also aimed at stimulating the bigger community involvement in administering criminal justice, especially in the re-education of the perpetrators and teaching the responsibility of the perpetrators towards the community. This is in line with the goal of diversion as regulated in the Article 6 of The Law on Criminal Justice System for Children. A stipulation of the Tokyo Rules which regulate the implementation of diversion is the Rule 5 stating :

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.

Referring to the Rule 5 above, it is possible for the case of the child conflicting against the law is settled outside the criminal justice system if it is regarded that it is not necessary to continue the process to the court in order to protect the interest of the community, prevent the crimes, respect the law as well as the rights of the victim.

Some international regulations above clearly give the authority for countries which have ratified the international conventions related to children to realize legal protection for children conflicting with the laws by regarding the best interest of the children, especially for their growth, physical, social and mental development. To be precise, the stipulation above regulates that children conflicting with the law can be processed outside criminal justice system for children.

Referring to the analysis above, it can be concluded that the Rule 5 of The Tokyo Rules regulates :

1. The implementation of diversion outside criminal justice system;
2. The types of violations/ crimes that can be settled through diversion are in accordance the laws of each country. The judge can also apply non-custodial policy for minor cases;
3. Stating clearly the institutions/ officials responsible for diversion. They are police, office of the public prosecutor and other institution.

3.1.2. National regulations

National Regulation on diversion is covered by The Law Number 11 Year 2012 on Criminal Justice System for Children. It is regulated by the Article 6 until Article 15.

The definition of diversion is covered by the Article 7 of the Law on Criminal Justice System for Children : "The diversion of the settlement of child case from the criminal justice process to the outside criminal justice process". Therefore, not all cases of children conflicting against the law must be settled through formal justice way. There is an alternative to use non-formal way or outside the court in order to protect and safeguard the welfare of the children. In this way, stigma caused by the criminal justice process can be avoided.

Besides, the Article 7 point (1) of the Law on Criminal Justice System for Children states that: " At the level of investigation, prosecution and court examination of the child case, diversion shall be attempted".

Therefore, it can be concluded that according to the Article 7 point (1) above, diversion in the criminal justice system for children consists of three levels : diversion at investigation level, diversion at the prosecution level and diversion in the level of court examination in the court. The crimes which shall be attempted to be settled by way of diversion are the ones punishable by imprisonment for less than 7 (seven) years and it must not be a repeat violation. The limitation on the crime punishable by imprisonment for less than 7 (seven) years is declared clearly and this is an important element. It is because the imprisonment for more than 7 (seven) years is categorized as punishment for harsh crime. It is recorded in the minutes of the discussion among members of the Working Committee that members of the Indonesian Democratic Party in Struggle Faction propose maximum 5 (five) years imprisonment for harsh crime committed by children because 7-year imprisonment is too long for a child. Long punishment can disturb the physical development of a child. After the government explains that the maximum 7-year imprisonment is in accordance with the Criminal Code and it is moreover related to the regulated punishment for a child, the 7-year imprisonment is regarded more advantageous for a child. Therefore, the government's proposal is agreed (Setya Wahyudi: 2013).

According to the explanation of the Article 9 point (1) letter "a" : "This stipulation is an indicator that the lower the punishment is, the more possible it will be to prioritize diversion. Diversion is not intended for the perpetrators of serious crimes, such as murder, rape, drug trafficking and terrorism which are punishable by imprisonment for more than 7 (seven) years". Furthermore, the explanation of the Article 9 point (1) letter "b" states the age in this regulation is aimed deciding the priority for the diversion and the priority is given to younger children.

The stipulation above is a guidance that can be used by law enforcement officials to implement diversion in handling children conflicting against the law. It can be extrapolated :

1. The lower the criminal sanction, the more possible it will be for the child to be prioritized for diversion;
2. Diversion is not intended for perpetrators of serious crimes, such as murder, rape, drug trafficking and terrorism which are punishable by more than 7 (seven) years of imprisonment;
3. The age of the child is put into the regulation in order to decide the priority of diversion implementation. The younger is the age of the child, the higher possibility of the priority for diversion will be given;
4. The stipulation on the consent of the family of the minor victim is only valid when the victim is underage.

The Article 10 of the Law on Criminal Justice for Children stipulates that :

(1) The agreement on diversion is applied for settling violation, minor crimes, crimes without victims, or the value of the loss suffered by the victim is not more than minimum salary in the local province as stated in the Article 9 point (2). Diversion can be conducted by the investigator and the perpetrator with/ or the family, community advisor as well as community leaders;

(2)The agreement on diversion as stipulated in the point (1) is arranged by the investigator under the recommendation of the community advisor. The agreement can be in forms of :

- a. The compensation for the loss if there is a victim;

- b. Medical rehabilitation and psychosocial;
- c. Returning the perpetrator to the parents or guardian;
- d. Participation in education or training in educational institution or LPKS for maximum 3 (three) months; or
- e. Community service for maximum 3 (three) months.

The stipulation in the Article 10 of the Law on Criminal Justice System for Children regulates agreement on diversion to settle certain crimes :

1. Violation, minor crimes, crimes without victim or when the amount of the loss is not more than minimum salary of the local province give chances for the investigator, community advisor and local leader to settle the case ;
2. That agreement is conducted by the investigator under the recommendation of the community advisor;
3. Besides, sanctions that can be put into agreement are also arranged.

Based on the analysis above, the Law Number 11 Year 2012 on Criminal Justice System for Children regulates :

1. The implementation on diversion as stipulated in the Article 7 point (1) and (2) ;
2. The crime types that can be settled through diversion are crimes which are punishable by imprisonment for more than 7 (seven) years and they are not repeat crimes;
3. Stating clearly institution/ officials in charge of diversion : the police, judge (prosecutor) and the judge.

3.1.2. The Arrangements of Diversion Outside Criminal Justice System According To Laws and Regulations of Some Countries

3.1.2.1 The Arrangement of Diversion in South Australia

Diversion in South Australia is regulated in Young Offenders Act 1993 Section 3, 6, 8, 12, 15 A, and Section 16.2b. According to this Act, diversion is only applicable for a child committing crime for the first time. Diversion is not applicable for murder and persecution leading to bad injury or death. Diversion is conducted since the early stage of the case by the issuance of police caution and family conferencing. If the child admits minor violation that he or she has committed, the police can issue informal caution and the police does not have to record informal caution. The child is not further processed.

If caution cannot help to finish the case outside the child court, the case will be settled through family conferencing. If this stage does not work, the case is transferred to the youth court.

3.1.2.2 The arrangement of Diversion in West Australia

Diversion is regulated in the Young Offenders Act 1994, Section 3, 7, 22, 23, and 28 in West Australia. The implementation of diversion in West Australia gives the authority to the police to arrange the method to divert a child who has committed crime from criminal justice system to outside criminal justice system by giving verbal or written warning to the child. Diversion is applied for a child who commits crime for the first time. Before conducting diversion, police has to think over whether the situation will be better if diversion is conducted.

Police are forbidden to conduct diversion for crime types arranged in the schedules 1 and 2 Young Offenders Act 1994 which include murder, sexual violence, accident causing death. By the consent of the superior, police gives warning letter to the child conflicting against the law.

3.1.2.3. The Arrangement of Diversion in the Northern Territory of Australia

Northern Territory conducts diversion as regulated in the Police Administration Act. There are 4 (four) levels of diversion :

- a. The police issue informal caution

Informal caution is issued verbally when the violation is minor or not serious and it is committed by a child for the first time. As Brian Bates explains : “The issue of a verbal warning is appropriate where the offence is of a trivial or very minor nature and it is a first time offence by the juvenile. For example, it may be appropriate to deal with a first time street offence (such as disorderly behavior) by use of a verbal warning (Brian Bates: 2001).

- b. The police issue written warning (formal caution) through family conferences.

The formal caution or family conference can be issued for more serious violation because verbal warning is not effective anymore. Again, Brian Bates say : “The formal caution, otherwise known as a family conference, can be given in circumstances of greater seriousness. This could include situations where verbal or written warnings have been ineffective” (Brian Bates: 2001).

- c. The police return the responsibility to the parents to restore the child’s mental by supervision at home.

- d. The involvement of an institution known as Juvenile Diversion Unit in the police responsible for the diversion process from the formal criminal process to the non-formal one.

3.1.2.4 The Arrangement in the State of Queensland

The arrangement of diversion in Queensland is regulated in the Section 14, 16, 18, 30, Section 72.1 and Section 18 of Juvenile Justice Act 1992. These articles regulate the way of how to divert children violating the law from criminal justice system and advise the police to issue warning to children instead of continuing the case

to the court. Diversion is applied for a child who commits crime for the first time and the violation is not serious. In the implementation of diversion, police explains the purpose of caution, type of the caution and the impact of caution through these steps :

- a. Explaining the problem to the child;
- b. Provide training;
- c. Provide translator.

3.1.2.5 The Arrangement of Diversion in Tasmania

The diversion in Tasmania is regulated by Youth Justice Act 1997, Section 8 and 10. Diversion is conducted for violations which do not cause formal reaction under this law. The police conduct discretion to the children directly by giving :

- a. informal warning (advice);
- b. formal warning (written);
- c. warning through the member of community conference through diversion process.
- d. to be continued to the process in child court. .

Warning is given by inviting the parents to the police station or it is the police who come to the child's house.

3.1.2.6 The Arrangement of Diversion in the New South Wales

Diversion in the New South Wales is regulated in the Young Offenders Act 1997, Section 13, 14, 18, 19, 23, 31 and Section 34. The Article 19 regulates the basis of the formal caution which is a part of police authority. There are some ways to implement diversion : warning, caution and family conferencing.

The violation that can be given warning is minor violation as well as other violation regulated by this Act (*Young Offenders Act 1997, Section 13*). Warning is applicable for minor violence such as trespassing and traffic violation in which there is no violence involved or other matters stipulated by this part. Caution is given for more serious violation, such as possessing forbidden drug, damaging property and stealing. To receive a caution, the child shall admit the violation that he or she has committed and agree to be advised (*Young Offenders Act 1997, Section 19*). Family Conferencing is conducted to handle serious violation committed by children, such as torture, car theft, and damaging property.

3.1.3 The Institution Which Has the Authority to Implement Diversion According to the Law Number 11 Year 2012 on Criminal Justice System for Children

The Article 7 point 1 of the Law on Criminal Justice System for Children stipulates that police, public prosecutor and the judge shall attempt diversion. And then, the point (2) regulates that crimes that can be put into diversion are the ones punishable by imprisonment for less than 7 (seven) years and must not be repeat crimes. According to the Article 27 of the Criminal Justice System for Children, when an investigator conducts investigation on child case, he or she shall ask for consideration or advice from the Community Advisor after the crime is reported. If necessary, the investigator can ask for consideration or advice from experts of education, psychologist, psychiatrist, religious leader, professional social worker or social welfare advisor and other experts.

The investigator must make an attempt for diversion no later than 7 (seven) days after the investigation starts (Article 29 point (1) of the Law on Criminal Justice System for Children). The diversion process is conducted for maximum 30 (thirty) days after it starts (Article 29 point (2)). If diversion succeeds to reach an agreement, the investigator submits the minutes of diversion along with the agreement on diversion to the head of the state court in order to be legalized (Article 29 point (3) of the Law on Criminal Justice System for Children). If the diversion fails, the investigator must continue the investigation and submit the case to the public prosecutor by attaching the minutes of diversion and the report of the community research (Article 29 point (3) of the Law on Criminal Justice System for Children). The public prosecutor shall also make an attempt for diversion and if it fails, the case shall be submitted to the court. The judge has an obligation to make an attempt for diversion as well.

3.1.4 The Implementation of the Handling of Children Conflicting Against The Law At The Level of Investigation In The Headquarter of Surabaya Metropolitan Police and East Java Regional Police

Police has discretionary power in the implementation of their duties. This power allows the police to divert a child case and therefore, the child does not have to face the formal process of the case settlement (Purnianti, Mamik Sri Supatmi, dan Ni Made Martini Tinduk: 2003). However, if we look over into the crime statistic of the police, there are 11, 344,- children whose ages range 0 – 17 (6.45% of the total number of the crime perpetrators based on the age) suspected as the perpetrator of crime in 2000. This indicates that the discretionary power has never been used up to its maximum coverage to handle child case (Purnianti, Mamik Sri Supatmi, dan Ni Made Martini Tinduk: 2003).

The Law on the National Police of Indonesia does not stipulate specifically the discretionary power related to cases of children conflicting against the law. Besides, the law does not specifically regulate action and method to handle children conflicting against the law. The Article 16 point (1) of the Law on Indonesian

National Police states that : “In realizing the duty in the criminal process, the Indonesian National Police has the authority to: a. Arrest, detain, search; h. Cancel the investigation”. Furthermore, the Article 18 point (1) of the Law on Indonesian National Police states that “For the sake of the public, the official of Indonesian National Police can act based on his or her own judgment to realize their duty and authority”. This stipulation shall be the reference for the police to implement their discretionary power. However, the coverage of the discretionary power is not clearly stipulated and it is not specifically intended for children conflicting against the law.

The data of the Surabaya Metropolitan police indicate that there are 174 cases involving children during 2010-2013. The majority is the intercourse reaching 100 child cases (57.47%), obscenity reaching 46 child cases (26.44%), running away together reaching 18 child cases (10.34%), 9 child cases of persecution (5.17%) and trafficking which only reach 1 child case (0.58%) (Surabaya Metropolitan Police, 2014). Not all those cases are handled through criminal justice system for children because some are settled by family dialogues/ peace resolution or non-litigation. The types and the number of child cases conflicting against the law which are settled through family dialogue/ peace settlement or non-litigation according to the data of the Surabaya Metropolitan Police during 2010-2013 reach 53 cases. These cases consist of 20 cases of obscenity (37.73%), 10 cases of running away with a female (18.87%), 21 cases of intercourse (39.62%), 1 child case of persecution (1.89%) and one case of trafficking (1.89%). In the investigation process, other cases have never been settled through family dialogues (Surabaya Metropolitan Police, 2014).

In addition to the statistic above, there are 1.005 child cases in East Java Police Region during 2009-2013 (East Java Regional Police, 2014). This consists of 411 child cases (40.89%) of intercourse, 106 child cases of obscenity (10.54%), 35 child cases of running away together (3.48%), 125 child cases of persecution (12.43%), 6 child cases of rape (0.59%), 55 child cases of beatings, 134 child cases of serious theft (13.33%), 4 child cases of murder (0.39%), 6 child cases of damaging property (0.59%), 6 child cases of extortion combined with threat (0.59%) and 21 child cases of violence against other children (2.08%). Hence, it can be concluded that ilegal intercourse is the majority as it reaches 411 child cases. The criminal justice system for children does not handle all those cases because there are cases settled through family dialogues/ peace process or non-litigation, such as two cases of ilegal intercourse and one obscenity case (Article 290 point (2), (3) of Indonesian Criminal Code) ((East Java Regional Police, 2014).

According to Yasintha Ma’u, to settle cases by family dialogue or peace settlement, the investigator gives chances to all attending parties (victim, parents of the victim, the perpetrator, parents of the perpetrator, community counselor, community leader and religious leader) to express their opinions on the disputed case. If the crime happens in school, there should be teachers who can give some information related to the case. The dialogue is held privately in the Special Room for Teenagers , Children and Women at the Office of Detective Directorate of East Java Regional Police (Yasintha Ma’u: 2014).

3.2 Analysis

The formulation policy on the regulation of the implementation of diversion reflecting the principles of protection and welfare for the children in the future recommended by:

- a. Some provisions concerning children, which in essence provides an opportunity for member states to deal with children in conflict with the law outside the juvenile criminal justice process;
- b. Some of the legislation governing the Australian state of diversion outside the SPP implementation of the Child;
- c. Conditions of handling children in conflict with the law are dealt with implementation of diversion outside SPP Children;
- d. Some of the legislation governing the Australian state stages of implementation of non-fee diversion Children.

Such a fact is in line with labelling theory proposed by Lundman. According to this expert, delinquency can be caused by the stigma “delinquency” imposed by parents, neighbours, peer group, brothers/ sisters, teachers or the community or even the court decision. There are three propositions of labelling theory in relation with the implementation of the child court. A child becomes a criminal because the authority declares him or her as criminal. It is not because he or she violate laws and regulations. The arrest is the first step of labelling process. Labelling is a process of image creation as a deviant and a member of a subculture. This, in turn, will result to the relation known as the *rejection of the rejector*. It will finally cause the continuity of delinquency in the future (Lundman: 1993).

Diversion also aims to encourage children to become responsible members of society. Therefore reintegratif shaming theory of Braithwait also used to analyze. In this case, children in conflict with the law, as the guilty party, then the penalty is a form of apology to the victim in the presence of adults, hope the child will feel ashamed and will not repeat the crime of another (John Braithwait: 1989).

Philosophical point of view, that of Indonesia based on Pancasila, has socio-cultural values are very high and the attention to harmony, balance between an individual's life with the community also protect people

who lost by giving guidance and coaching Made Sadhi Astuti: 1997). In this case, children in conflict with the law is a man who lost because of a criminal act, the better protected under the guidance and supervision of their parents. Sociological considerations, that is based on the opinion of legal ahli can support the findings and thoughts for dealing with cases of children with implementing diversion outside the criminal justice system of children, among others:

- Sudikno Mertokusumo, said that the law serves as a protector of human interests should be carried out as normal and peaceful (Sudikno Mertokusumo: 1996).
- Sudarto said that the main goal is to realize the legal protection of children in addition to the interest of the public welfare, however kepentingan child should not be sacrificed for the benefit of society (Sudarto: 140).

Factors to be considered in the formulation of criminal justice of children Act relating to the implementation of the provisions of diversion outside the criminal justice system of children is as follows:

- a. Investigators as the frontline in case a child has an obligation to implement diversion.
- b. To avoid the negative effects of stigmatization of children, then the prosecutors and judges need to be released from the obligation to implement diversion.

Implementation of diversion is done by stages:

1. Warning, applies to minor offenses, such as traffic violations.
2. Caution, applies to serious offenses, such as drug possession, property damage and stealing.
3. Family conferences, applies to more serious offenses, such as assault, car theft, and destruction of property. Deliberation involves family: children and / or their families, victims and / or their families, community leaders, religious leaders, teachers (when the criminal offense occurs in school), advocates / lawyers, social counselors or NGOs concerned with the problem child, and the child as a mediator police .

4. Conclusion

The formulation policy on the regulation of the implementation of diversion reflecting the principles of protection and welfare for the children in the future recommended by:

- a. Some provisions concerning children, which in essence provides an opportunity for member states to deal with children in conflict with the law outside the juvenile criminal justice process;
- b. Some of the legislation governing the Australian state of diversion outside the criminal justice system implementation of the Child;
- c. Conditions of handling children in conflict with the law are dealt with implementation of diversion outside criminal justice system of children;
- d. Some of the legislation governing the Australian state stages of implementation of non-fee diversion Children.

References

- Barda Nawawi Arief (2005), *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Bandung: Citra Aditya Bakti, 180-181.
- Bates, Brian (2001), *A Diverse Approach to Juvenile Offending in the Northern Territory, Paper Presented at the 4th National Outlook Symposium on Crime in Australia*, New Crimes or New Responses Convened by the Australian institute of Criminology and held in Canberra, 21-22 June, 6.
- Braithwaite, John, Shame, Crime and Reintegration, Chambridge: Chambridge University Press, 1989, 18.
- Children's Involvement In Criminal Justice Processes", (2013), [http:// www.alrc.gov.au/publication/18-childrens-involvement-with-legal-aid.criminal-justice-processes/diversion.pdf](http://www.alrc.gov.au/publication/18-childrens-involvement-with-legal-aid.criminal-justice-processes/diversion.pdf).
- Hadi Supeno, (2010), *Kriminalisasi Anak Tawaran Gagasan Radikal Peradilan Anak Tanpa Pemidanaan*, Jakarta: PT. Gramedia Pustaka Utama, 183.
- Johnny Ibrahim, (2005), *Teori dan Metodologi Penelitian Hukum Normatif*, Malang: Bayumedia Publishing, 302.
- Koesno Adi, (2009), *Kebijakan Kriminal dalam Sistem Peradilan Pidana yang Berorientasi pada kepentingan Terbaik Bagi Anak*, Pidato Pengukuhan Jabatan Guru Besar dalam Bidang Ilmu Hukum Universitas Brawijaya, Malang, 57.
- Lundman, Richard J, (1993), *Prevention and Control of Juvenile Delinquency*, New York: Oxford University Press, 90.
- Marlina, (2010), *Pengantar Konsep Diversi dan Restorative Justice dalam Hukum Pidana*, Medan: USU Press, 1.
- Paulus Hadisuprpto, (2008), *Delinkuensi Anak: Pemahaman dan Penanggulangannya*, Malang: Bayumedia Publishing, 131.
- Purnianti, Mamik Sri Supatmi, dan Ni Made Martini Tinduk, (2003), *Analisa Situasi Sistem Peradilan Pidana Anak (Juvenile Justice System) di Indonesia*. UNICEF: Indonesia, 74.
- Sudarto, (1981), *Kapita Selekta Hukum Pidana*, Bandung: Alumni, 140.
- Sudigno Mertokusumo (1996), *Mengenal Hukum Suatu Pengantar*, Yogyakarta: Liberty, 140.

Republik Indonesia. Undang-Undang Dasar Negara Kesatuan Tahun 1945.
Republik Indonesia. Undang-Undang Nomor 4 Tahun 1979 tentang Kesejahteraan Anak (Lembaran Negara Republik Indonesia Tahun 1979 Nomor 32, Tambahan Lembaran Negara Republik Indonesia Nomor 3143).
Republik Indonesia. Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak (Lembaran Negara Republik Indonesia Tahun 2002 Nomor 109, Tambahan Lembaran Negara Republik Indonesia Nomor 4235).
Republik Indonesia. Undang-Undang Nomor 3 tahun 1997 tentang Pengadilan Anak (Lembaran Negara Republik Indonesia Tahun 1997 Nomor 3, Tambahan Lembaran Negara Republik Indonesia Nomor 3668).
Republik Indonesia. Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak (Lembaran Negara Republik Indonesia Tahun 2012 Nomor 153, Tambahan Lembaran Negara Republik Indonesia Nomor 5332).

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