REFORMULATION OF DIVERSION POLICY OF JUVENILE CRIMINAL JUSTICE SYSTEM AS AN EFFORT TO ACTUALIZE THE JUSTICE VALUE IN INDONESIA

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ABSTRACT

State has a duty to provide children welfare, to give protection, and to fulfill children right including the ones who conflict with law. Diversion policy in juvenile criminal justice system is a renewal of law and one of the forms of legal protection especially for the child in conflict with law, based on consideration of the child's best interest. The special protection against the children in conflict with law is a part of strengthening the human right and put the child not as an object, but as a party must be fostered and protected. Diversion policy aims to reach a peaceful settlement between the victim and the accused, to settle the children case outside a court, and to avoid the children liberty deprivation. Diversion policy is a mean to realize fairness or justice value toward children in conflict with law which the settlement is done by diverting the case from criminal justice system. Reformulation of diversion policy of juvenile criminal justice system is based on the consideration of philosophically, sociologically and juridical. Diversion is implemented in criminal case done by the children and it is not a repetition of criminal case.

Keywords: reformulation, diversion, juvenile criminal justice system.


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1. INTRODUCTION

State obliges to protect the entire Indonesian people and the entire homeland of Indonesia; it is including a protection for children in conflict with law or children as criminal offender. The protection itself is a part of the purpose of Indonesia as it is stated in the Preamble 1945 Constitution of Republic of Indonesia. Explicitly, the children right is guaranteed in the 1945 Constitution of Republic of Indonesia Article 28B Section (2) defines that every children has the right of sustainable life, growth and development, as well as protection from violence and discrimination.
Children in conflict with law have equal right as it is guaranteed by the constitution, so in settling down their case they must attain the protection and right from the state. The protection toward children in conflict with law is described in legislation such as Law of Children Protection and Law concerning Juvenile Criminal Justice System. Law Number 11 Year 2012 concerning the Juvenile Criminal Justice System (JCJS) is a renewal law in order to guarantee the children interest, to grant a special protection to children as a part of Human Rights fulfillment, and to put children not as an object but as the ones must be fostered and protected. The Law of Juvenile Criminal Justice System regulates about restorative and diversionary justice, and one implemented in a regular basis by the society is deliberation to reach consensus (musyawarah untuk mufakat) where the involved parties meet to resolve the problem. The familial deliberation is aimed to obtain fair settlement among the parties, to restore to better condition after the criminal acts, and to avoid retaliation.

The definition of restorative justice in Article 1 Number 6 The Law of Juvenile Criminal Justice System is a settlement of criminal acts case involving the victim, the accuse, the family of the victim and the accuse, and other related parties to find fair solution by emphasizing to restore the previous condition, and not to retaliate. The settlement is done by doing discussion to reach a consensus and to achieve fair agreement among parties. Moreover, Article 1 Number 7 the Law of Juvenile Criminal Justice System defines that diversion means the settlement of children case is diverted from the criminal justice process to the process outside the criminal court. The children case settlement which is processes outside the criminal court is considered as one of the state's attempt to protect the children in conflict with law and to ponder their best interest. Regarding of diversion, Article 7 The Law of Juvenile Criminal Justice System specifies:

1. In the stage of investigation, prosecution, and examination of children case in the district court, diversion is obliged to endeavor
2. Diversion as it is meant in Section (1) can be implemented in case of criminal offense which is:
   a. threatened with imprisonment of under (7) seven years
   b. not a repetition of a criminal offense

Diversion is implemented in criminal cases which is threatened with imprisonment of less than seven years and is not a repetition of a criminal offense. The explanation of that article is that the provisions of imprisonment under seven years refer to criminal law and the repetition of a criminal offense is a crime committed by a child, either similar or unrelated crimes, including criminal offense resolved through diversion. The diversion policy has been implemented since 2014 (The Law of Juvenile Criminal Justice System has been applied two years from enactment), having a positive influence in resolving the criminal offense committed by children such as avoiding the children from the criminal justice process and the stigmatization, nevertheless the children case which is settled down through the criminal justice process is still a lot. This can be seen from the increase of the number the child custody and the child convict.

According to Ditjenpas Kemenkumham (Correctional Directorate General of the Ministry Law and Human Rights) in December 2016, the number of child custody for male is 879, and female is 26, whereas the number of child convict for male is 3280 and female is 39 [1]. Furthermore, in December 2017, the number of residents in the correctional center is 992 for male custody and 18 for female custody, then the male convict is 2412 and the female convict is 57 [1]. The comparison of the number of the custody (both male and female) is increasing; the number of children in conflict with law is 905 in 2016 and 1010 in 2017. So, there was an increasing number of custody which is 105. Similarly, the number of children convict (male
and female) in the same year was 2319 in 2016, and 2469 in 2017 so the increasing number is 150.

In July 2018, the data of the number of correctional center residents is 743 for male custody and 22 for female custody, and then the number of children convict is 2553 for male convict and 54 for female convict [1]. The increasing both of the custody and the convict in 2017, and the increasing of the children convict in July 2018 showed that there were a lot of children in conflict with law whose cases entered into trial process. Although the diversion has been specified in Article 7 Section (2) concerning the Juvenile Criminal Justice System, many children cases are still being process for trial. One of the reasons why diversion still cannot be implemented is because of the requirement of diversion implementation in Article 7 Section (2) concerning The Law of Juvenile Criminal Justice System. The law enforcement officers do their duty based on the laws and regulations so that they often think too legalistically. The procedural validity is the key so they are not to be blamed, and are not considered to do against the law [2].

The fact shows that the conflict settlement in Indonesia is not always end up in the court even though it is a violation toward criminal law [2]. The settlement outside the criminal justice process is carried out on the ground that the crime committed occurred unknowingly by the children, they have not been able to think maturely, and the influence which comes from surrounding environment or friend relationship. The non adversary dispute settlement or a settlement without a trial has been applied in society and it reflects the consensus agreement institution as a part of Indonesia philosophy [2].

The Law of Juvenile Criminal Justice System explicitly regulates restorative and diversionary justice where in the Law Number 3 Year 1997 concerning the Juvenile Trial does not manage the restorative and diversionary justice. Those are a renewal of juvenile criminal justice system, and it is not new thing in society because the dispute settlement through the familial discussion by meeting the related parties has been applied before. The diversion policy is a tool to realize the justice value for children in conflict with law by diverting from the trial process. The stipulation of diversion Article 7 Section (2) concerning Juvenile Criminal Justice System gives rules in implementing diversion. It cannot be done to all kinds of criminal cases as a result it does not give the justice value.

The problem of this research focuses on the diversion policy in Juvenile Criminal Justice System concerning the provision of diversion implementation for the criminal offense less than 7 years of imprisonment and it is not a repetition of criminal offense. This diversion policy gives opportunity to settle down the children case without a trial. The existence of children who committed crimes in a trial process can give a negative impact for them such as children stigma, the influence of the judicial process for children, environmental factors in development institution and the lack of proper facilities by the state for fostered children. As a form of social structure and as social sub-process as well as a system, the children criminal justice system is criminogenic in nature, if there are inconsistency practices [3]. To prevent the children in conflict with law from criminogenic practices in criminal trial system and to consider the children best interest, so the renewal of juvenile criminal justice system especially the diversion policy needs to be done. The diversion policy in the Law of Juvenile Criminal Justice System needs to be renewed so that the children in conflict with law have opportunity to be strived for diversion without being limited to the terms of the threat of imprisonment under seven years so that the settlement of the children case can be diverted from the criminal justice process.
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2. UNDERLYING THEORY

The settlement of children case through a customary deliberation, regardless of entering the criminal justice process can give more protection toward the children. It will avoid stigmatization or labeling which will be attached to them and prevent the liberty deprivation. The settlement is based on the local values in society using a peaceful way so that the imbalance situation can be recovered, the perpetrators can improve themselves, and the victim obtains compensation. Relating to children as perpetrators of criminal acts, the regulation of the Juvenile Criminal Justice System should be in accordance with the good values in society that underlie the life of Indonesians which the values contained in Pancasila. Pancasila as the view of life for Indonesians is a series of noble values of Indonesian society which grows in everyday life. The noble values contained in Pancasila are the value of justice. Justice according to Pancasila puts the court as the last effort for every dispute, and that is a peaceful settlement which is really hard to achieve or has gone too far [4]. A positive legal system means everything must be based on justice without exception. The injustice situation will disturb the order which actually becomes the legal order. Disturbed order means that the order and the certainty are no longer guaranteed [5].

Criminal politics can be interpreted briefly as a rational attempt by the community to overcome the crime. It covers the establishment of criminal law, activities of the police, prosecutor, and court and execution apparatus, besides the efforts which is not including in criminal law [6]. Based on Sudarto opinion, criminal politics starts from the stage of law formation to execution, including the settlement of criminal cases outside the realm of criminal justice. Criminal case settlement is no longer retributive but rather restorative. The criminal code is not imposed for the sake of the crime itself, but rather for a more useful purpose is to protect the community and to patronage [6].

The diversion policy in Juvenile Criminal Justice System is the state’s effort to protect the children right especially those who conflict with law. The provision of diversion in Article 7 Section (2) concerning the Juvenile Criminal Justice System has requirement when it is applied. Diversion cannot be done for all criminal acts because this does not provide justice for children, so the reformulation is necessary. The diversion policy reformulation is described in the following framework as follow:

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Criminal law reform including the renewal of the juvenile justice system is part of criminal law policy or politics. Criminal law policy is part of criminal policy or politics [7], where criminal policy or politics itself is part of social policy or politics which aims at providing social welfare. Social policy can be interpreted as all rational efforts to achieve the society welfare and at the same time to provide community protection [7]. Efforts or manifestations of the renewal to create better quality are carried out through reformulation [8] of the provisions in the legislation. Criminal policy can be carried out through penal and non-penal way. Crime prevention especially committed by children is resolved by penal way which is through criminal law. The crime prevention according this way involves the function of law enforcement in criminal justice system consisting of police, prosecutors, courts, and correctional institutions [9]. The non-penal pathway is the path of prevention which is increasing the religious values, counseling through community leaders, and other activities. The criminal problem is not only directed at the completion of the judicial process but also directed at non-judicial process [9].

Law is placed as a means to achieve the state’s purpose, so that the making of new law or revoking the old one by the state must be used as a step to reach the purpose of the state [10]. Creating new law or repealing law as legal renewal, especially criminal law reforms is intended to fill or improve the law so that it can adjust to the development of society or increase the protection and sense of justice of the community. Laws by the authorities are used to achieve and realize the goals that are aspired. Thus, it can be said that the law has two functions; they are the function to express values and instrumental function [11].

Criminal law renewal must be taken with a policy-oriented approach because in essence it is only a part of the policy step (that is part of legal politics/law enforcement, criminal law politics, criminal politics, and social politics). In every policy there is also value. Therefore, the renewal of criminal law must also be oriented to the value approach [7], including renewal of criminal justice system especially the juvenile criminal justice system, and in this case diversion policy must be oriented to the values of socio-political, socio-philosophical, and socio-cultural. A value oriented approach is carried out by exploring and raising ideas and values which exist in society especially custom, customary law, religious law and values recognized by the people of nations in international instrument which are also contained in Pancasila as values which is inherent in life and nationality [12].

3. RESEARCH METHOD
The type of research used is sociological juridical and normative juridical with socio-legal approach method. The socio-legal study is the study of law using the approach of law and social sciences [13]. The type of data used in this research is primary and secondary data. The primary data is the data obtained from the society and law enforcement apparatus directly. The secondary data is attained from the primary and secondary legal material.

4. FINDING AND DISCUSSION

4.1. Philosophical Foundation of Reformulation of Diversion Policy the Law of Juvenile Criminal Justice System
As a view of life Pancasila becomes life guidance among people in society to interact with their surrounding environment. Pancasila is the crystallization of values living in Indonesia society, so this view of life is put in high esteem by its citizens because it is rooted in the culture and on the life of the people [14]. Pancasila is a philosophical foundation in forming and renewing laws, so the legal product resulted must be in accordance with Pancasila’s values. The philosophical foundation is consideration or reason depicting that regulations established should be based on the view of life, awareness, and legal ideals which include...
spiritual atmosphere and the philosophy of Indonesia originating from the Pancasila and the Preamble of 1945 Constitution of Republic of Indonesia (Attachment to Law Number 17 Year 2011 concerning the Formation of Legislation).

Pancasila is state’s philosophy born as collective ideology of the people of Indonesia. It is stated as the philosophy because it is the result of deep contemplation carried out by our predecessors, and later it is set forth in the appropriate system [15]. If the National Law System is aspired to be the Pancasila Law System, so the Criminal Law System should be reviewed and developed to be embodied the values of Pancasila such as the criminal law which is oriented to “belief in the one and only God”, the criminal law which promotes “a just and civilized humanity”, the criminal law which comprises “the unity of Indonesia” (does not distinguish tribes, groups, religions but prioritized common interest), the criminal law which conceives “the democracy guided by the wisdom in the unanimity arising of deliberation” (prioritizing people interest and the welfare, resolving the conflict through familial deliberation peacefully), and the criminal law which covers “the social justice” [16].

Pancasila is the basic norm of Indonesia (grundnorm) and also the legal ideal of the country (rechtsidee) which is normative and constitutive. It is normative because it functions as the foundation and the ideal requirement which underlies every positive law; on the other hand it is constitutive because it leads the law to achieve its purpose [17]. As the national principle, Pancasila is the source of Law which becomes the foundation to create and reform the law in Indonesia. The policy made should be based on the values of Pancasila, the values which have been flourished and developed before the country was born. As the source of norm, the values of Pancasila is interrelated and interconnected one and another which is the Godly value, the humanity value, the unity value, the democracy value, and the last is the justice value.

Pancasila as staatsfundamentalnorm is the legal ideal which has constitutive and regulative function. The constitutive function determines the basic law and order which is giving meaning to the law itself. Pancasila becomes the foundation in creating all of the legislation. The regulative function determines whether or not the positive law becomes a fair or unfair product [18], because naturally regulations are made to fulfill the justice value among people.

4.2. Philosophical Foundation of Reformulation of Diversion Policy the Law of Juvenile Criminal Justice System

Juridical foundation is consideration or reason which illustrates the regulations created to resolve the legal issues or to complete the legal gap by considering the existence regulations, the altered regulation, or the revoked regulation to ensure the legal assurance and justice value in society (Attachment to Law Number 12 Year 2011 concerning the Formation of Legislation). Besides the national law instrument, the law living in society, the juridical consideration covers the international law instrument.

Diversion originates from The Beijing Rules which have been implemented in the Juvenile Criminal Justice system in Indonesia. As international provisions or guidelines, it should also become a guideline in the Juvenile Criminal Justice System in Indonesia [19]. The Juvenile Criminal Justice System is national law instrument governing diversion policy. Diversion is carried out toward children who commit a crime with the threat of imprisonment under seven years and is not a repeat of the crime; this is stated in Article 7 Section (2). The purpose of diversion, mentioned in Article 6 of the Juvenile Criminal Justice System, is to achieve peaceful settlement between the victim and the accused, to resolve cases without judicial
process, to prevent child from liberty deprivation, and to encourage communities to participate and instill a sense of responsibility toward children.

The case settlement through familial deliberation in children case, based on living law in society is accommodate in Article 18B Section (2) the 1945 Constitution of Republic of Indonesia determines: “The state recognizes and respects the customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of the community and the principles of the Unitary State of Republic of Indonesia, which are regulated in law. In addition Article 5 Section (5) of the Law of the Republic of Indonesia Number 48 Year 2009 concerning Judicial Authority determines “Judges and constitutional judges must explore, follow, and understand the legal values and sense of justice which lives in society”, so that the Law living in the community is part of the sources of the law. The case settlement toward children in conflict with law can be done in accordance with the law that lives in society, as long as it does not conflict with Pancasila as the basis and the view of life of the state. The law growing and developing aims to regulate people’s life, and it is still showing its existence as living law in society. The rules of customary criminal law in some areas are still followed and obeyed by its society [20].

The international law instrument related to diversion is The United Nations for the Administration of Juvenile Justice (The Beijing Rules) especially rule 11.2 which stated: “The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contain in these Rules”. Formally, the diversion policy in the Juvenile Criminal Justice System objects to protect the children rights and their best interest. Moreover in the comment is explained: “As stated in rule 11.2, diversion may be used at any point of decision-making-by the police, the prosecution or other agencies such as courts, tribunals, boards or councils. It may be exercised by one authority or several or all authorities, according to the rules and policies of the respective system and in line with the present rules. It need not necessarily be limited to petty cases, thus rendering diversion an important instrument (commentary)”. Diversion can be implemented in every stage of examination and it is not only restricted to less serious crime only, but also the more serious crime can be attempted diversion in order to consider the children best interest.

As the country which ratifies the Convention of Children Right, Indonesia has duty to implement the provisions from the convention. An international law can be a direct legal binding, act as Law, if it has been ratified to be a positive law in its state [21]. The provision of Article 40 number 3 letter b of the Convention of Children Right states if it is necessary, legal action can be avoided in resolving the children case, and the requirement of Human Right and legal advisor must be completed. In addition as long as Human Right and the legal protection are respected, the steps in settling the legal case for children who committed a crime through a trial can be put down. So, it is clear that resolving the children case without legal action is prioritized. This convention tries to anticipate the negative effect of the justice process toward children. It puts the children best interest in the first place and tries to disappearance the stigmatization stick on the children who went through the trial.

**4.3. Sociological Foundation of Reformulation of Diversion Policy the Law of Juvenile Criminal Justice System**

The sociological foundation is consideration or reason that illustrating the established regulations are made to meet the society’s need in various aspects (Attachment to Law Number 12 Year 2011 concerning the Formation of Legislation). This foundation actually relates to empirical facts about the developed problem and the need of society and state.
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Reformulation of diversion policy in the Juvenile Criminal Justice System is done in relation with the empirical fact and the societies’ need especially the children in conflict with law by thinking of their best interest. The customary law with the participation from the societies in settling the children case is still applied for example in Bali. To maintain the balance life between society and it environment, awig-awig is established as a guidelines which regulates the life of the societies. Pakraman village in Bali is customary law communities having a unity in tradition and manner among Hindu societies which have been passed through generation in the bound of kahyangan tiga, having their own region and their own possessions, and having the right to rule their own marriage life [22]. Awig-awig is the rules that govern its societies life and as the customary law at the Pakraman village. In accordance with children who commit a crime or the ones in conflict with law the case settlement can be solved using the customary law. The implementation of awig-awig from one village to other village may be different in solving the children case because it is made based on the village agreement and actually it has distinctive characteristic in each village, but regardless of the distinctive features it should be based on the Tri Hita Karana philosophy. Kinds of sanctions contained in awig-awig are: mangaksama (apologize), dedosan (fine), kerampag (confiscated of property), kesepekang (not spoken to) for certain time, kanorayang (being expelled from the village), keselong (being driven out from the village), and upacara (the village clean ceremony) [22]. One of the villages in Bali called Desa Panglipuran settles the children case through a deliberation between parties and honor figure, or it also can be settled through a lawsuit. Children who make mistake or commit a criminal act are given educative and fostering sanction taking in account of immature age they have, so the sanctions are more like a warning. Children who commit a theft are not going to a trial after making coordination with investigator. The violation is settled down through customary law. Every dispute can be solved through customary law because it is the objective of the customary trial, it is attempted to create a peaceful condition [23]. The participation involving the society can help the children who commit a crime to improve themselves.

Some regions have their own style in handling the children case, but it should be remembered that the future of the children and their best interest are prioritized. State allows solving a criminal act through customary law as long as it is in line with Pancasila and the 1945 Constitution of Republic of Indonesia. According to Satjipto Rahardo “we use what is called Pancasila justice system to accommodate various characteristics which our justice system wants to accommodate such as kinship, fatherhood, harmony, balance, and deliberation. Those values are our culture root” [24].

The diversion of criminal trial aims to prevent the negative effect such as negative stigma or labeling given by society and state, and the settlement without going through the trial process can accommodate that. The labeling theory states that a person becomes distorted because of the label attach to him given by social control agencies and other parties. The deviance does not inherent in the act itself but rather comes from reaction and the label attached to the actor. Mischief is label not action [25]. Because of the label, or being considered as a criminal, law perpetrator will consider himself as evil and dangerous and then it will trigger further violation [26]. The children who commit a crime is considered to do a distorted act, based on the labeling theory it is not because of the crime but rather because of the reaction comes from the society who give the label to them. Diversion is used to provide protection and rehabilitation to the violators as the attempt to prevent them to be adolescence criminal perpetrator [9].

Besides labeling, entering to a criminal trial also brings a negative effect. The arrest moving forward to detention opens an opportunity for children in conflict with law having interaction or making contact with the other convict if the correctional facilities do not
appropriate, so they have to join with the adult convict. The interaction influences the children to learn or to know the various model of crimes, it may be more serious or even the worst one because of the unhealthy interaction among the other convicts. The Differential Association Theory reviews the spreading of criminal behavior obtained from the imitating process or through learning from other convicts. This theory is not addressed on the origin of the crime but it is focused on how the criminal behavior or manner spreads [25]. Edwin Sutherland in his theory concerning the differential association indicates that individual tends to commit a crime because of having supported sources or contacts to do a crime. These contacts causes individual tends to learning or accepting the manner and values supporting the criminal action [25]. In those contacts, children learn the criminal behavior, then once it is being learned they bring it into practice.

Reformulation of diversion policy in the Juvenile Criminal Justice System as a criminal law policy aims to actualize the justice values toward children in conflict with law. This justice is implemented by attempting the diversion involving children who commit criminal activity. Avoiding children from the trial process gives them opportunity to grow and develop; it is what we mean with prioritizing the children best interest. The trial process brings negative impacts for children who commit crime such as having negative stigma or labeling, having contacts with other convicts in the correctional center (Juvenile Correctional Facility). Establishing the children right for their future is the main factor in reformulation of diversion policy as an effort to actualize the justice value.

5. CONCLUSION
Reformulation of Diversions Policy in Juvenile Criminal Justice System is based on philosophical, sociological, and juridical consideration. The philosophical foundation is consideration or reason illustrating the regulations founded according to the principles of Pancasila. Juridical foundation is consideration or reason that the law is formed to resolve the legal matter or to fill the law gap by considering the rules that have already exist or the one which will be altered, which is the diversion provisions in the Juvenile Criminal Justice System in order to ensure the legal assurance and to strengthen justice toward children in conflict with law. Sociological foundation deals with empirical fact, in fact diversion can be applied for a crime with the imprisonment threat more than seven years and can be accepted by the public.

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