

The Judge's Judicial Policy In Settling Juvenile Delinquency

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Abstract

The aim of research is to analytic the cause of juvenile delinquency which against the criminal law, describing the judge's policy that enables to mirror the substantial justice, defining model of the judge's policy which enables to mirror the substantial justice. This research is held by normative and nomologic (non-doctrinal) approach. Normative research is used to analytic the premier and secondary legal material, describing the verbalization legal system of tribunal criminal justice for juveniles. Nomological research analytics the judge's policy in settlement juvenile delinquency and defining model of the judge's policy which enables to mirror the substantial justice for juveniles. The final result of this research has shown up the findings as follows: (1).the legal system of tribunal criminal justice for juveniles does not work effectively, there is no a strictly formulation of material legal action (strictly material delict) in the constitution of tribunal criminal justice system for juveniles, no a balance or harmonization between the legal system of juvenile criminal law and the social system in society. Juveniles delinquency may occur because of the weakness of internal factors of juveniles and it's strength of external factors of juveniles and other criminological factors, such as: the effect of modernization of science and technology, the instability of economical system of a country, the disorder of socio-political behavior of a country, the declination of the justice values in criminal justice system of juveniles, there is no a penal sanction among the apparatus of legal enforcement, such as: investigators, prosecutors, judges, legal officers in prisons, attorneys (lawyers) who have committed mal-judicial praxis including the judges who do not consider the result of legal research in society which has been reported by the social workers from the Hall of Society, neither hold the diversion justice, the failure of parents, Social Institutions and the government in holding the guidance and counseling for juveniles; (2).a view of judges do not consider optimally the result of social research from the Hall Society in their decisions. The Special Court for Juveniles Delinquency has not been built that the legal praxis for juveniles must be combined in one, in general courts. The paradigms of legal officers for juvenile delinquency has still looked heterogeneously. They more facedly considered the normative aspects than the sociological ones. The legal doctrine from Hans Kelsen "Reine Rechtslehre (the pure legal doctrine) has been firstly considered in legal settlement for juvenile delinquency, legal formal criminal truth has been considered as absolutely document by the legal officers in law enforcement for juvenile delinquency; (3).the model policy which enables to grab the substantial justice for juvenile delinquency is Double Tracts Criminal Justice System for Juvenile Delinquency Model.

Keywords: the cause of juvenile delinquency, the judge's judicial policy, and the model of judicial policy

1. Introduction

The law enforcement of criminal law for Juvenile Delinquency should be based on the values of the Five Principles of Philosophical Pancasila and the Foundational Constitution 1945. Wetboek van Strafrecht or Indonesian Penal Code as the basic of the law enforcement of criminal law juvenile delinquency has not been able to mirror the values of substantial justice yet. The Indonesian Constitution number 11 the year 2012 on Criminal Justice System for Juvenile Delinquency does not strictly formulate the material legal action (materiel delict). The Indonesian Constitution Number 35 The year 2014 as The Change of the Constitution Number 32 The Year 2002 on The Protection of Juvenile has mainly oriented on the victim protection instead of the offenders' protection. The implication of the unformulated strictly of the above material legal action, the judges have reasonable policy using their discretion to punish the penal dispute based on the legally state constitution. The independence of the judges using the legal policy is frequently compensates the juveniles' interest, the souls and the future of juveniles.

In legal praxis, the judges of criminal law for juvenile tend to prior the normative consideration, making the judge as the mouth of constitution (*la bouche de la-loi*) instead of considering sociological consideration in punishing the penal dispute of juveniles. The judges of criminal law for juveniles are still lack to consider nor considering optimally the result of society research from the Hall Society in examining, justifying and giving punishment to juvenile penal dispute. Based on the result of the writer's research in the state courts of

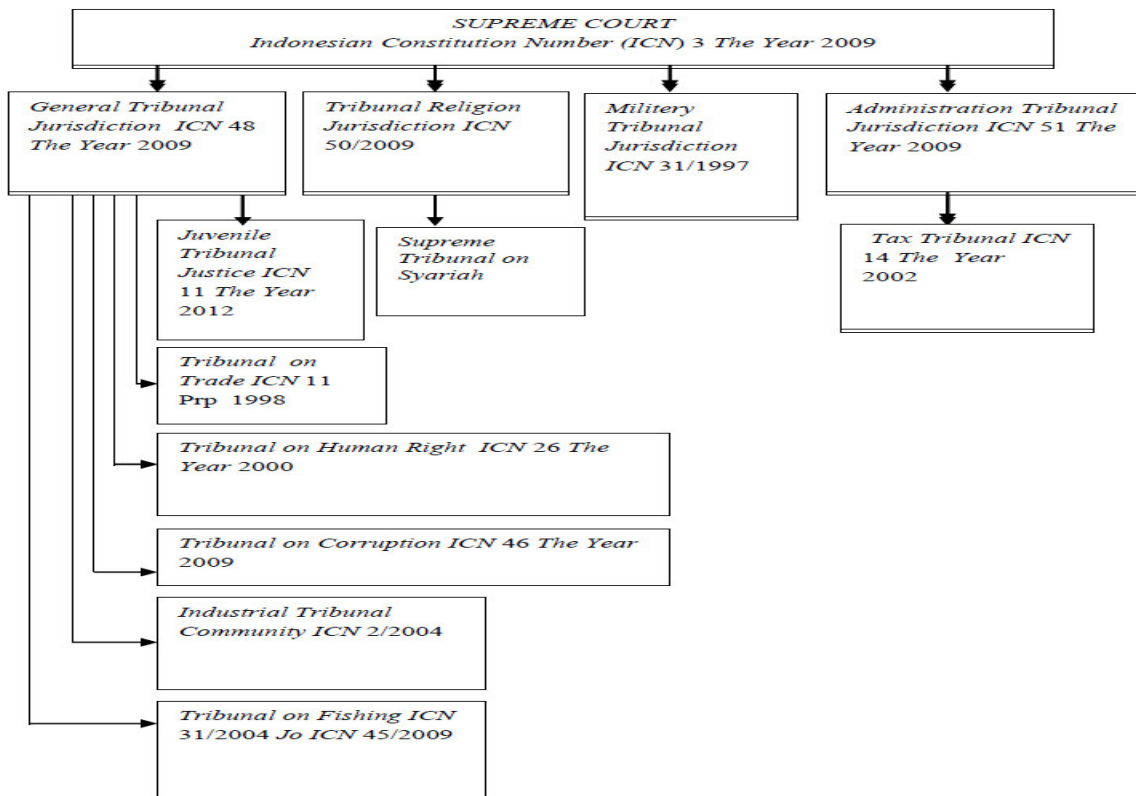
Surabaya, Sidoarjo, Malang, Lumajang, Gresik and Bojonegoro in 1996 has been founded 95,65 percent the judges do not consider the result of society research from the Hall Society.

The Special Tribunal Justice for Juveniles has not been built, the empowering of human of resources of the apparatus of the law enforcement in criminal law for juveniles has not been optimal. The Model of Integrated Criminal Justice at the presence has neglected the principal of the best interest for juveniles may enable to have an implication to damage the future interest for juveniles and the country. The integrated criminal justice system for juvenile needs the professional apparatus of legal officers starting from the investigators, prosecutors, judges, the attorneys and the legal officers at the prison. The apparatus of legal official for juveniles should have the professional academic competence and the high integration of moral. The academic competence is not only in jurisprudence but also the large knowledge in other sciences, such as: sociological of law, psychology, pedagogy, criminology, science on victimization, anthropology of law, economy, politics, socio-culture, philosophy, technology, and theology in globalization point of view. Substantial justice in criminal law should be grabbed through the change of paradigm of the apparatus of legal officials of criminal law for juveniles. A global people is a global knowledge. The substantial justice is not enough to be grabbed through the Intelligence of Quotient, but it also must be studied through the Emotional and Spiritual Quotient approach.

The penal punishment to juveniles have still commonly taken place at any tribunal justice of State. The principal of ultimum remedium has not functionalized effectively. The judges of criminal law for juveniles have not considered judicial, sociological and philosophical consideration proportionally aspects. The judges are more tendentiously consider judicial normative consideration aspects instead of considering sociological and philosophical consideration aspects. The un-equivalence of these legal considerations may have the negative effects and compensate the rights of juveniles, soul, the future of juveniles and State as well as avoiding the general principal of the best interest for juveniles. Epistemologically, juveniles delinquency can be searched from the internal and external competence of juveniles, sociological aspects, and any other aspects of unity of knowledge (consillience) and the other criminological aspects.

The judges in Tribunal State in Surabaya held the tribunal justice for juvenile delinquency had based on the legal rules which had been stated in Indonesian Constitution on Tribunal Justice for Juvenile Delinquency. The process of Tribunal Justice for Juvenile Delinquency in Indonesia belongs to the process of Special Tribunal Justice as stated in Sketch 1 as follows:

SKETCH 1
 SPECIAL TRIBUNAL JUSTICE



The process of criminal justice for juveniles delinquency in Tribunal State Surabaya is held in a special room of court as it is visualized in Picture 1

PICTURE 1
Special Room of Court in Tribunal State Surabaya



The invention of delinquency research was approved that the highest position of delinquency was dominated by the violently stealing. Stealing which is committed violently is the field of criminal law. If violently behavior is committed by the adult dependant, it can be categorized criminality however if the violently behavior is committed by juveniles it belongs to delinquency. Violently behavior on adult delinquency is more potentially to be a professional action while violently behavior on juvenile delinquency belongs to in-dangerous juvenile delinquency. Delinquents commit delinquency because of the weakness of their internal and external factors. Principally, delinquents do not have the mens rea to be criminals. Delinquents forcedly do delinquency or commit the crime, they can be, their position as the victims of culture, the negligence of economy, the victim of un-justification treatment, the play of political practice, the victim of exploitation business, the victim of environment, the victim of abusing sexual exploitation and other behavioral exploitations.

Based on the invention of the writer, the delinquency or criminal legal action which has been accumulated in the data of research is dominated by the in-dangerous delinquency. This delinquency is in-dangerous juvenile delinquency, it means that the delinquency which has been committed by juvenile by the age of over twenty-one years, it will be very difficult to cure, it is alike a tree which has been crooked will be very difficult to make it straightly. Therefore the guidance, the prevention and the protection for the middle juveniles must behaved well among the parents, school, society and the government.

Stepping from the above Juvenile compensation, the article 4 the Convention of United Nations on Human Right of the Child 1924, stated:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present convention with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

That is why, the judge is obligate to consider the result of society research in giving the penal punishment to Juveniles. The judge's obligation to consider the result of society research from the Hall Society in giving penal punishment to the Juveniles is functioned as the *das Sain* in this research, has been disobeyed by the judges of criminal juveniles. The penal punishment for the judges of criminal juveniles who do not consider the result of society research from the Hall Society in giving the penal punishment to juveniles neither consider the rules of article 60 point (3) juncto the article 7 point (1) of Indonesian Constitution Number 11 the year of 2012, the judges of criminal law who have made guilty in implementing the criminal law or have made mal-legal praxis for juveniles including do not carry out the judicial diversion in this research has been made as the *das Sollen* neither has been regulated in Indonesian Constitutions.

The main legal issues in this research are: (1). Why do juveniles potentially commit the delinquency which against the Indonesian criminal law; (2). Why the judge's judicial policy in giving the penal punishment for Juveniles has not been able to mirror the substantial justice; and (3). How the ought to model of the judge's policy which enables to mirror the substantial justice.

2. Methods

Answering the above legal issues, doctrinal and nomological methods are used in this research. The aim of this research is to search closely why juveniles potentially commit delinquency which against the Indonesian Criminal Law, why the judges' policy in giving the penal punishment to juveniles is not able to mirror the substantial justice yet, and how the ought to model of the judge's policy of criminal justice for juveniles is able to mirror the substantial justice.

The micro theory is used to analytic the above legal issues are The Code of Rules and Regulations Lawrence M Friedman, Sebernetika Theory Talcott Parson, The Shell Theory (The Unity of Knowledge) Edward O Wilson, Sobural Theory (The study of social, culture and structural culture) of Sahetapy, The Theory of Making Policy Wavyne Parson, Restorative Justice Paulus Hadi Soeprpto, Double Tracks Criminal Justice System for Juvenile Delinquency and The Legal Concept of Progressive Law Satjipto Rahardjo.

3. Discussion

3.1. The Cause of Juvenile Delinquency

Psychologically, delinquency of the child or a juvenile can be classified into four categories, namely: (1).the logical delinquency is committed by the child the age of one to five years, or a delinquency is committed by the children in the mass of ego centrist period ; (2).normal delinquency is committed by the child which the age of six to ten years; (3). in-dangerous delinquency is committed by juveniles (one which the age of eleven to twenty); and (4) criminal delinquency is committed the age of twenty-one to thirty years.

The logical and normal delinquency can not be given a penal punishment because of incapability of soul and way of thinking of the offenders are still labile. The incapability of the offenders in psychology and the pattern of logical thinking that enable the juveniles can not be penalized in judicial criminal law.

Rationality, the way of thinking of juveniles are commonly have not been perfect yet. In the period of the age of juveniles, the sense of to be known as grown-up people, egoistic, sense of belonging something, the sense of trial to do something, sense of heroic, the sense of aggressor is relatively to be higher. Hence, they are easy to be fishable or to be deceivable in situations which destructive effects. The crime or delinquency which committed by juveniles can be caused in two factors, that is the internal and external factors.

Delinquency that enables to penalize are in-dangerous and criminal delinquency. The criminal delinquency is not the object of the research because the capability of the above juveniles have been grown-up persons.

Juveniles have special characteristics such as: their soul and way of thinking are not stabile, their internal and external factors of are still powerful. Juveniles are part of the weak society, the instability between internal and external factors, their soul is not only labile but their mens rea of committing the crime is neither clear, the social mobility which surrounding the juveniles, the instability of economical condition of the country, the expensive of educational cost, the sophisticated science and technology, the development of culture which erosions the local culture, the controversial of law enforcement against the public interest, The Indonesian Constitution Number 11 The Year of 2012 on The Tribunal Criminal Justice System for Juvenile does not formulate the penal legal material, The Indonesia Constitution Number 35 The Year of 2014 on The Change of The Indonesian Constitution Number 32 The Year of 2002 on The Protection of The Child has only oriented on the victim of Juveniles. It does not protect on the juveniles as the offenders of delinquency or the offenders of crime , the survival of unhealthy democratization, the disorder of political survival, the development of pathological society which is more and more complicated to overcome are the criminogenic or criminological factors of juvenile delinquency.

Legal substantially, the law enforcement in Indonesia including the laws enforcement of criminal law for juveniles as the *lex specialis* derogate *lex generalis* from *Wetboek van Strafrechts* still faces the law of Euro centries of which soul, and the contain has not been suitable with the developing of age and the value of substantially justice anymore in Indonesia. When it is deepened from the study of law through the principles of legal formal and material which pertaining in Legal Codification of Books, such as: *Heriene Indonesische Reglement (H.I.R)* or *Reglement Indonesia* which has been renewed (*R.I.B*), *Wetboek van Strafrecht* on Indonesian Penal Code, *Rechtreglement voor De Buitengewesten (R.Bg)*, *Burgerlijk Wetboek (B.W)* and *Wetboek van Koophandel*, it seems follow the legal principle of Euro sentries. This legal doctrine has commonly appeared the controversial decision which injures the substantial justice value in Indonesia particularly on the process of criminal justice system for juveniles. The principle of *ultra petita* which is the derivation from article 178 *H.I.R* just refers to the rules of legal doctrinal even-though sociologically in the assembly of court the judge looks the fact of law which containing the truth and the substantial justice, the judge has to leaf it out the truth and the substantially judge a quo because in the *pettitum* of legal action or the legal issue from the prosecutor is not requested. The reality of leafing out of the principle *ultra petita* is not the breach of law because in the assembly of court the judges have constitutionally fair or the independence of constitution which is guaranteed in legalized constitution.

The government has not completely adopted the Convention on the Rights of the Child. Indonesian Constitution on Criminal Justice System for Juveniles. The Indonesian Constitution on Criminal Justice System for Juveniles does not formulate the material criminal legal action, and The Indonesian Constitution on Protection on The child does not give the protection for juveniles as the offenders of the crime or delinquency. The judges just think or evaluate the truth of criminal law of material on judicial normative consideration which is regulated rigidly in constitutions which is actually ought to be considered in the formulation of criminal legal action. The truth of material criminal law not based on the right sociological consideration which can be found hermeneutically from legal fact in the assembly of court of justice for juveniles.

Principally, the sophisticated of technology and science of a state may exchange the stale of human life in the state. The change of stale life or social life is tendentious to be followed by the stale of behavior. The change of behavior of human beings can not be separated from functionality of law of the state. If the sophisticated of science and technology is related to the enforcement of the criminal law for juveniles in Indonesia it seems the effect of the application of electrical media, such as: internet, face books, television, and hand-phones. The effect of electrical media may the cause of the factors of external delinquency of juveniles.

The overpopulation and the industrial technology have provided the strong contribution in the various of ways to degradation of the quality of environments which must be fully depended for the strengthen of life for human beings. As the effects of degradation of the quality of environments, the health and the healthy life have been in-dangerous for human life. In major cities are covered by blankets of choking, mustard-colored smog which endanger for the skin of human beings. The deterioration of unhealthy natural environments, the increasing of social problems, the unhealthy life in society, such as: nutritional and infection diseases are the greatest killers in the world. In industrialized countries are plagued by the chronic and degenerative diseases of civilization, heart diseases, cancer, and strokes, psychological diseases such as: severe depression, schizophrenia and the other psychiatric disorders, deterioration of social environments, such as: at first a someone occupied the honorable status of social position suddenly had to degrade as the civil society.

The people society facing the social diseases in society (pathological diseases), the disorder of economical condition which have no certainty of recovery, the confusing leaders among the business players, the confusing leaders of legislature, the confusing leaders of bureaucracy, the frighten inflation, the massive unemployment, mal-distribution of income, and the un-wealthy society as the national issues.

Juveniles as a part of social community are in-dangerous to face the change of culture because of their aggressive soul are still powerful but in carrying out the conclusion are labile. The crisis of culture which mostly dominated by juveniles are mal-consuming of narcotic, mal-consuming of the illegal drugs, mal-operating in electrical media, the mass fighting on the road, the boyish racing motor cycles on the road, committing crime by violation on the road, becoming groups of Bonec Mania, celebrating the school graduation on the road, celebrating the change of New Year by racing motor cycles which no standardization of exiling gas (Indonesian term "Kenalpot Brong") on the road.

The child or juvenile is one of the element of social structure of which the totally of social structure, whether it is in micro or in macro scale. Any activity of juveniles is clearly related to social structure. If the juveniles commit deviance of social behavior, such as: delinquency, brutality, Bonecmania, Aremania, Jackmania, arrogated attitude, moral decadency, un-sociality behavior, having credibility crisis to society including the government, egoistic attitude, having factuality attitude, apathetic attitude, and other criminalities, alike: murder, the ill or injured treatment, mass-fighting, violently pick out, any destructions, stealing and any other deviance of social behaviors, it means that there has been something wrong with above structural community.

The other factors from the above statement which enable to make the law to be empowering because of the adagium of criminal law including the criminal law for juveniles. Disability of law, is also enable to be the cause of the other disabilities, such as:

1. The occurrence of miscommunications among the parents, children, and society with the government;
2. The lack of well-formed approach or coordination (destructuralization) among the institutions, such as: Department of Education and Department of Social, Department of Education and Department of Judiciary of Institution, One of The Cabinet Minister with another Cabinet Minister, A Law Institution Enforcement with the other Law Institution Enforcement, such as: The Supreme Court and Judicial Committee, The Committee of Combating Corruption and The Board of Criminal Detective, The Committee of Combating Corruption and The People and The State Body of Prosecution and so on;
3. The weakness of managerial of Structural Community (disorganization) because of the men-resources does not support the managerial of Structural Community so that the managerial system has been empowering;
4. The disorganization of a structural community may damage the functionality (disfunctionalization) of the structural community;
5. If the functionalization has been damage, the structural of community has been damage as well, it means that society and juveniles as the seekers of substantial justice in the criminal justice of law is very difficult to grab,

as the result, juveniles are easy to commit the destructive delinquency.

That is why, it is un-proportionally and not wisely that the responsibility of behavioral of juvenile delinquency must be burdened on (given to) juveniles. It is more over, if these legal issues are violently settled out which refers to normative aspect only. It is only on judicially approach. It is really ironist without involving the other functions. A Juvenile is only a tiny society which is empowering to face the above disfunctionalization of structural community.

Sociological theory has been oriented on macro aspect while the personality and the soul of someone has been oriented on micro aspect. It means that the orientation of sociological theory is more general comparing with personality and the soul of someone.

The eco-system of behavior of human beings in totally social structure is very dominated or colorized behavioral stimulation of the juveniles to have a better behavior or on the other hand. Criminal behavior may occur because of the abnormality in society. The abnormality may derive from the individual factors nor the external factors. This abnormality must be reformed for the offenders must be cured that they do not disturb the society.

The way of thinking of the child or juveniles in the totally social structure is on the contrary to be more crucial if in the social structure has destructions whether it is on its system, functionality or on its substance of social problem itself. Conditional destructions of social function, the violently behavior in society and the legal structure which having disordered may effect to encourage juvenile behavior to commit an offence or deviant behavior in the living of legal structure, such as: stealing, having the mass fighting to someone, consuming the illegal drug or narcotic, Committing violently treatment which suffer the society and the other treatments. Juvenile delinquency which the writer invented in any researches may describe as follows::

Juveniles can be potential to commit a crime or delinquency because of the weak of internal and external factors, the mobility of science and technology and the other criminological factors. The cause of juvenile delinquency is not only defined by the internal and external factors, it also defined by the other factors that enables to stimulate, to arose or to motivate juveniles to commit the crime or delinquency, such as: the child or juveniles can be neglected by the parents, the state, the treatment of exploitation on juveniles, the economical condition in the family or the country which has been disordered, no well formed democracy principal in a country, the un-effectiveness of the justice system, the overlapping jurisdiction competence in integrated criminal justice system, no transparency of justice in the public community, no correspondent perception on legal paradigm among the apparatus of legal enforcement, the principle of forum legal privilegeatum (legal immunity) for the decision makers of Onslag van Rechtsvervolging is still functionalized in the criminal justice system, the enforcement of democratization has not been optimally carried out yet, the learning process of political survival has been disordered, the failure of the parents and the government in giving the guidance for juveniles are also enable to stimulate juvenile delinquency.

3.2. The Judge's Judicial Policy in Tribunal Justice for Juveniles

The policy in this writing is the judge's judicial policy that is used to decide the criminal dispute of juvenile delinquency which enables to mirror the substantial justice for juveniles. The value of judicial justice depends on the judge's consideration which is used to decide the criminal dispute of juveniles. The judge's consideration that can be used in the judge's decision is discretion by using the intelligence of Intelligence Quotient (IQ), Emotional Quotient (EQ) and Spiritual Quotient (SQ). The instinctive consideration of the judges must be used judicial, sociological and philosophical consideration.

The judge's policy is the policy which is given by the judges to decide the legal criminal dispute which enable to mirror substantial justice for juveniles. The judge's policy which evaluate the justice for juveniles may apply the two legal approaches, that is the judicial approach and sociological approach. Judicial approach to evaluate the truth of the formal criminal legal action, and sociological approach for evaluating the truth of material criminal legal action that is why the criminal law emphasizes on the truth of the material criminal legal action. The substantial justice for juveniles can be searched from actus reus aspects and mens rea. Actus reus is criminal legal action or criminal behavior dealing with the external factors while mens rea is criminal legal action with the capability of moral, intention, and desire of the offenders to commit the crime. The mens rea more emphasizes on the competence of internal of the offenders.

The judge's decision is the head or the principal of the justice. The principal justice depends on the quality of the judge's consideration in giving the punishment of criminal law for juveniles. The quality of the judge's consideration depends on the legal competence of the judges who examined out and decided the case of the criminal law for juveniles which has been settled out. The central problem in giving the legal reasoning in criminal law for juveniles can be looked out on the principal of fair or independence of the judges in giving legal reasoning as stated in article 24 point (1) The Basic Indonesian Constitution 1945 the Post of Amendment, Jo the article 1 point (1), Jo article 5 point (1) Indonesian Constitution on Authorization of Judicature, a quo is still in-conditionally constitutional is very difficult to have account, no strictly penal sanction if the judges have

committed judicial mal-practice in applying the article rules of the constitutions. The characteristics of the above conditionally constitution may implicate the value of substantial justice for the offender of criminal law for juveniles is difficult to grab.

The sociological consideration is the lung of the substantial justice value because the consideration is the proof of the truth of formal and material in criminal law. The soul of substantial justice is on its sociological consideration. The judge must think critically and comprehensively in comprehending and meaning the *actus reus* and the *mens rea* of legal action which the judges settled out from the process of investigation, prosecuting up to the punishment.

The study of jurisprudence looks too broaden as of which characteristic that the law is dynamics. Global people comes to global knowledge, a global knowledge means a global conflicts, and law has an important role to settle the conflicts.

Juvenile delinquency is not only considered ontologically by using quotient intelligence. The legal reasoning of the judges is not sufficiently centralized on the truth of the legal subject which has been formulated in *actus reus* of criminal law of juvenile as describing of prosecutor but it has also considered the epistemological aspect and the proportionally axiological consideration as well. Juvenile delinquency must also be researched epistemologically by using intelligence of Emotional Quotient (EQ). The judge should examine and consider the wholly and comprehensively consideration that in developing countries such as Indonesia that juvenile delinquency may occur in three categories factors, namely: the crime or Juvenile delinquency, family back ground of juvenile, and the trust of society and the country. Actually, it has a complex communications between the role of society and juvenile delinquency. The society may issue the written or unwritten rules, guarding juvenile delinquency, or having the repressive treatment against the behavioral deviance from the criminal law that has been committed by juveniles. The guarding for juvenile delinquency is not the exaggerated repressive treatment executed by the indicators but the society treatment to socialize the law, having guidance for juvenile delinquency in their resort in order to obey the law, to replace the position of juveniles to their earlier position that is to cure or rehabilitates the juveniles from the unlawful act is more significantly treatment instead of having repressive treatment, and the best treatment is to replace the juveniles to society through the informal education, having the guidance for juveniles in society.

Considering the objective condition of juveniles in Indonesia is seemly more complex instead of seeming the real objective of adult delinquency. Examples: The increasing rate of the couples, such as the claim of the wife, means the delinquency is on the husband while the increasing rate of divorce as the requirement of the husband (talaq statement) the delinquency is on the wife. The legal consequence of adult delinquency looks clearer than juvenile delinquency. The *mens rea* of adult delinquency is more criminological and professionally while the *mens rea* of juvenile delinquency is more sociological and physical. As an example, The child who is the age of four years which has been neglected by his parents then he steals a piece of bread because of hunger, has different legal consequence than the authors who have corrupted the state money in hundred rupiahs. The plundering or robbery of money state by the corruptors is not juvenile delinquency but it has been categorized as extra ordinary crime.

Criminal Justice System is the principle of law enforcement of criminal justice system. The Indonesian Penal Code is still traditional, individualistic, course of legal, *lex superiori derogate lege inferiori* (the higher constitution deletes the lower constitution) and the law enforcement of criminal justice system for juveniles is *lex specialis derogate lex generalis* of Indonesian Penal Code. The judges' policy of juvenile delinquency can be studied from their legal reasoning in their decision. In legal praxis, still exists instability of interest between the punishment of penal sanction and treatment sanction. The judge has more tendentious to consider the normative judicial aspects in constitutions considering sociological judicial aspects or the judges are more consider the truth of formal criminal law instead of considering the truth of material criminal law as reported in the result of society research which has been made by the Hall Society (vide article 59 point (2) the Constitution of Tribunal Court jo article 60 point (3) CJSJ. The above tribunal system may compensate the interest and the future of juveniles.

3.3. The Model of The Judge's Policy in Criminal Justice System for Juveniles

The model of the judge's policy can not be separated from the enforcement of criminal justice system for juveniles. The formulation of legal norm must be balanced with the social structure in society. The reality of social life of Indonesian is heterogeneous. The form of social life of Indonesians is pluralism. The norm of socio-life of Indonesian is complex. The effect of Pathological life is getting more and more complex. That is why the system of law and the social structure must be balance. The element of sobural (the element of social-culture and social structure) must be involved in formulating constitutions.

In general, the aim of Alternative Dispute Resolution (ADR) is providing the alternation of settlement dispute. The resolution dispute can be settled out in litigation or in non-litigation (mediation). Dispute resolution which is held litigation must be based on the agreement. Although the litigation process is held formally, the

dispute resolution must be carried out voluntarily, not enforcedly. The prototype of dispute resolution may also be settled out in mediation. The mediator who facilitating the dispute resolution must be neutral. That is why, the mediator may not interfere the legal substance. The mediator may punish a special sanction, behaving as the settler of dispute resolution. The court as the Judicative Institution does not give the criminal sanction to the dependant who has committed the crime any more. The compromise of settlement or dading is carried out by the disputers. Later the Institutional Courts develop slowly to settle out the criminal dispute democratically using a set of special rules. The criminal justice is too complex. The settlement dispute of criminal law which is full of debates in the court is very important to leaf out. At last, the Police takes over the previous law enforcement of criminal justice is held in a special prototype. The Institution of Representative State enforces the rule of constitutions in a welfare state.

The non-litigation justice for juveniles must consider the principles of United Nations Convention for Juveniles, such as: The Beijing Rules. Bases on the rules of article 24 verse (1) The Beijing Rules stated that the trial of legal aid which must be given to juveniles is for the whole aids as the provision for working which is useful for juveniles, such as: logging house, education, vocational training, unemployment or any other assistances. The process of the assistance is expected enable to facilitate the process of rehabilitation of behavior for juveniles. The best principle of behaving juveniles as the promotion of well being for the juveniles is paramount consideration as the highest mission in dispute resolution of non-litigation justice.

Mediation justice for juveniles can be differentiated into three models of justice, namely: Restorative Justice, Diversion Justice, and Progressive Justice.

a. Restorative Justice for Juveniles Delinquency

Restorative justice is the justice for juveniles to settle out the criminal dispute resolution for juveniles by involving the roles of investigator, prosecutor (if it is necessary), lawyer, the offender of legal criminal for juveniles, the victim, the parents of the offender, and the parents of the victim. The criminal justice is held by the trial of compromising agreement, return back the position of the offender and the victim to the former position, not carrying out the criminal dispute in the courts as it is stated in the rules of constitutions.

Based on the explanation of Lexicon Webster Dictionary, restorative justice is the justice system which repositions the offender and the victim to the former situation. While the explanation of article 1 point (6) IC CJS stated that restorative justice is the criminal justice system for juveniles which involving the investigator, offender, the parents of the offender, the victim, the parents of the victim cooperatively to find out the dispute resolution justice, repositions the offender and the victim to the former situation by compromising peacefully among the disputers.

In restorative justice, it is needed a professional mediator, the justice of responsibility settlement, sense of humanity, familiarity, honesty, sense of seriousness in settling the legal dispute of criminal justice for juveniles by win-win-solution, no disputers compensated to each other. That is why, the restorative justice must be held democratically, peacefully, no statement of guilty and right from the offender or the victim. The restorative justice for juveniles delinquency can be held in a special room discussion for restorative justice for juveniles

b. The Criminal Diversion Justice for Juveniles

The criminal diversion justice for juveniles is the change of tribunal process from the criminal justice system to criminal justice but it is in out side the institution of the court. The criminal diversion justice for juveniles is held if it is fulfill the requirements as follows: (1), The rule of diversion justice is regulated in IC CJS, (2). The trial of criminal justice for juveniles in the area of General Tribunal Court is obligate to try the diversion justice, except it is specially regulated in another constitution, (3). Juveniles who have a conflict in criminal law, must be threatened the penal sanction not more than seven years, (4). The diversion justice must posses the agreement from the victim, the parents of the victim, the offender and the parents of the offender, except the criminal dispute for the light negligence with the penal without victim, the cost of compensation value is not more than minimal salary of working from the local province, (5). Diversion justice is held democratically among the offender, the parents/ custodian of the offender, the victim, the parents/ custodian of the victim, the counseling of society, the professional and social worker bases on the justice of restorative justice.

The aim of having criminal diversion for juveniles is peacefully achievement between the offender and the victim, settle out the criminal dispute in outside the process of tribunal institution, avoiding the juveniles from the seizing of freedom, supporting the society to take roles in diversion justice, cultivating the sense of responsibility to juveniles, omitting the sense of juveniles stigma in society, omitting the sense of threatening between the offender and the victim, rehabilitating the behavior of the offender, protecting the society from delinquency of juveniles

Based on the above description, the criminal diversion justice for juveniles is held in a special Room of Discussing for Diversion Justice. The process of diversion justice must pay attention to the category of criminal legal action, the age of juveniles, the result of social research from the Hall Society, the victim interest, juvenile prosperity, the responsibility of juveniles, avoiding the negative stigma, avoiding the sense of revenging, the

harmonization in society, the proportionally principal, morality, general decency. The agreement of diversion on Recommendation of the Society Counseling can be retribution as the compensation to the victims, medical rehabilitation, psychological rehabilitation, to surrender the offenders to their parents, involving education or training in the Institution of Education or in the Provider of Institution on social prosperity at least for three months. The result of diversion agreement can be compromising without retribution as the compensation which is written in Document Agreement of Diversion. The Document Agreement of Diversion is given by the Responsible Occupant to the court.

c. The Progressive Justice in the Criminal Law for Juveniles

The progressive justice in criminal law for juveniles is the settlement of criminal dispute for juveniles which the basic of the intuitive justice in society. The progressive justice is the justice which is not allowed to agonize the living intuitive justice in society. The intuitive justice must be based on “the best interest for juveniles” principle. Internally, the physique of the children are still weak, their soul is still labile, their interest and their future are still in a long time. Juveniles are the holders of the fate nation and state. Having disadvantage of the future of juveniles is principally having disadvantage the future of the nation and state. The juveniles commit the criminal action or behavioral delinquency, having disadvantage of someone interest because of their internal capability is still in-power and their external factors are having more strictly. No equivalence of strength between internal and external factors of juveniles. Ontologically, the external factors have been dominated instead of the internal factors.

Based on the study of victimization, juveniles have been the offenders of criminal actions or have been the victims from criminal action are not only the severe guilty of juveniles but also the negligence of the parents, society and the state have no been able to them well, have not fulfilled their need, have not well protected their interests. A lot of juveniles have been the victims of negligence, un-careless, the victims of the government policy, the violation of law, the victims of behavioral politics, the scenario of social behavior, cruelty of tyrannical power, and the victims of exploitation. Juveniles community can not be forced with the violation of law which abusing the principles of law, abusing the pulse of social life which victimizes the interest, soul and the future of juveniles. The violation of law in the enforcement of criminal law for juveniles may enable to be an implication of abusing social life, particularly in the form of social life for juveniles.

The human rights may characterize universal and having social structure. Dealing with social structure, no institutions that enables to insist the absolutely standardization of the world. In legal praxis, each state has own social structure or has own the originality of state. Each state has the root of social and the root of culture which is different to each other. The legal states of the world have historical background and the background the way of thinking which are also different to each other. Hans Kelsen Theory which is popular with the theory of “Reine Rechtlehre” (the pure of legal doctrine) giving the basic theory that the state is the building of law which containing of legal positivisms. The positive of law does not talk about the special legal structure (Speziellen Rechtsordnung) but it talks about the general legal doctrine (all gemeine Rechtlehre). The positive of law is just eager to answer the question “What and How the law is” it does not want to talk about “How the law is found” (nicht aber die Frage, wie es sein order gemacht werden soll). Hans Kelsen justified that the pure legal doctrine is jurisprudence not legal politics (Sie ist Recht Wissenschaft, nicht aber Recht politik). Something which have no relationship with the law must be left out or omitted (alles ausscheiden mochte, was nicht zuden exakt als recht bestimmten Gegenstand gehort). The doctrine of the pure of law wants to pure the jurisprudence by throwing the foreign element at once. (law, allen ihr fremden Elementen befreien). Law can be differentiated in simple sense by spelling “law” written in a small capital, and the in broad sense by spelling “Law” written in capital letter. (Fletcher 1996). Based on the above contextual, in Indonesia, the term “law” is used in constitutions (Geetz), while “Law” is used in law (recht). Satjipto Rahardjo, stated: Pancasila is reflected as a rule of law, a rule of moral and a rule of justice.

Rule of law is not a machine, but it is the finite justice. The characteristic of progressive of law is dynamic, always works continuously, non-stop to fulfill the need of human beings. The progressive of law having soul and interacts with the other sciences, including philosophy, as the nervous working system in the body of human beings. In motor cycles, the progressive of law works as the eyes of the chain which works out giving the energy and power to each other for running the motor cycles. That is why, the progressive of law is very difficult to work in autonomic and the progressive of law is not autonomic.

The system of law and the system of social should work equivalently to achieve the feeling of law from the both sides (the system of law and the system of social), without the equivalence of working between the system of law and the system of social, the substantial justice is quite impossible to be grabbed.

The law will be running well if the system of law and the system of social can be unified or compromised. On the other hand, if the system of law is not suitable with the system of social, the law will not be able to work well. In Indonesia the system of law does not match with the system of social that the law in Indonesia has been broken out

The output of the progressive of law may not hurt he intuitive of justice in society. The criminal law is

a law which emphasizes on the truth of the material of criminal law. That is why, the judges of Criminal Justice for Juveniles which is expected as the holder of justice must be brave to have “the rule making” to find out the truth of the criminal law for juveniles and having “the rule of breaking” to achieve the substantial justice in the law enforcement of criminal law for juveniles. The rule making is quite needed to have the truth of actus reus and the rule breaking is quite important to examine the truth of the mens rea which has been committed by juveniles.

Intuitively, the progressive of law is quite relevant to consider in giving the punishment in the decision of the criminal of law for juveniles. The soul and the doctrine of the progressive of law is not only relevant to apply in non-litigation justice model, but it is also relevant to apply in special litigation justice model for juveniles.

4. Conclusions

4.1. Juveniles are potential to commit delinquency which have to face the criminal of law because the weakness of the internal factors of juveniles of which strength of the external factors of juveniles and the other criminological factors which must be faced by the juveniles.

Stepping the above criminological factors, juvenile delinquency can also be lightened from the legal structure which have been legalized in Indonesia are not relevant or do not match with the working system between the system of law and the system of social. As the result the system of law does not work as rhythm as the system of social, the function of law does not work well, whether the function of legal substance, legal structure or legal culture, the degradation of justice values in the enforcement of criminal justice system for juveniles, the failure of guidance function from the parents, the Institute of Juveniles in Society, the roles of society or the roles of the government in the guidance for juveniles and still have a lot of other criminological factors which can be the cause of juveniles delinquency.

4.2. The substantial justice can be resourced from the judges’ consideration which is used in their decisions. In the condition which is very urgent and the judicial authority which is possessed, the judges’ consideration can be behaved by using the judicial policy or discretion in giving the punishment in the criminal dispute for juveniles. The judicial policy of the judges have not been able to mirror the substantial justice in criminal justice system for juveniles because:

1. The system of law and the system of social does not work equivalently.
2. The paradigm of legal praxis among the legal officers in criminal justice system for juveniles are still heterogeneous. The legal praxis in criminal justice system for juveniles, the judges are more prior the normative of law consideration instead of considering the sociological and philosophical consideration. The pure legal doctrine of Hans Kelsen (Reine Rechtlehre) still has been “the prime cause of law” by the legal officers of criminal justice system for juveniles in the settlement of juvenile delinquency.
3. The truth of formal criminal of law is the absolutely document in the enforcement of criminal justice system for juveniles.
4. The mal-legal praxis of the legal officers in enforcing the function of Integrated Criminal Justice System up to the dissertation is written has never been touched by the penal sanction. If the such model enforcement is applied in criminal legal dispute for juveniles it will be a bad or an abused of precedent. Ironically, it occurs in a state of which Pancasila as the ideology of the state.

4.3. Based on the above description, the policy model of the judge which enables to mirror the substantial justice is Double Tracks Criminal Justice System for Juveniles Delinquency bases on the values of Pancasila and the basic of progressive justice.

5. Suggestions

1.1. Internally, the source of juveniles must be increased whether it is started from moral education, religion, handicraft education, vocational education, physical education, society education, environmental education, planting the sense of nationality, the sense of nationalism, heroics, or to make grown-up the education of juveniles until the minimal of strata one of scientist (S1).

1.2. Externally, juveniles should have the protection from their parents, society, and the state. Juveniles should life in prosperity, they do not have any difficulties in economic problems, free the influence of foreign culture which ruins the Indonesian nationality.

1.3. The juveniles must be life harmonically with their family they are not allowed to be separated with their pure parents.

1.4. The government should build up the infra-structure for juveniles’ interests, such as: the place of praying, place for playing, Juvenile Social Institution for holding the orphans, The Social Educational Institution for having the guidance and giving the job training for juveniles who have dropped out from schools, giving the

guidance for the village teenagers who have special talent, having the guidance and holding the juveniles who have the criminal legal conflict.

1.5. The government should give the protection to the juveniles who have criminal legal conflict.

1.6. The government should give the political learning professionally, the polite democratization, giving transparently and accountably justice to juveniles.

1.7. Juveniles are able to access the educated printed and electrical media from the government or private sectors.

1.8. The law Indonesian systems which are still in Euro sentries, including the Indonesian Penal Code and the Criminal Justice System as the basic guidance of the law enforcement of Indonesia must be changed and suited with the intuition of justice of Indonesians. It is necessary to have Rules breaking and Rules making to Indonesian Constitution Number 11 The Year 2012 on Criminal Justice System for Juveniles juncto the Indonesian Constitution Number 35 The Year 2014 on The First Change on Indonesian Constitution Number 32 The Year 2002 on The Protection of The Child.

1.9. The Institution of the Law of Indonesian must be built up according to the civilization of the world that enables to compete in global and have a result that the dignity and civilization of Indonesian are equal to the civilization of advanced countries in the world.

2.1. There should be the change of paradigms among the legal officers, started from the investigators, the prosecutors, the judges, the prison institution officers and the attorneys that they do not think that the truth of the formal criminal law are the absolute document in the material of criminal law, and the principal of ultra petita and comprehending law of la bouche de la loi are the source of the right in searching the truth of the material of criminal law.

2.2. The education of legal culture should be built from the academic area and the legal officers.

2.3. The freedom and the independence of the judge in examining and giving punishment must not be interpreted in the simple sense.

2.4. The mal-legal praxis in the decision of Onslag Van Rechtsvervolging must be formulated as the criminal legal action and it must be regulated in constitutions of the criminal of law. The legal officers such as: the investigators, prosecutors, judges and the legal officers from the Prison Institution who have involved the guilty in the decision of Onslag Van Rechtsvervolging must be responsible for their guilty as they are stated in the criminal law.

2.5. The judges who do not consider the result of the social research from the Hall Society in their decisions and the legal officers who do not behave the diversion justice must also be given the penal sanction as they are stated in the criminal constitutions.

3. The government has to facilitate the Double Tracks Criminal System for Juveniles by building and completing the Special Tribunal Justice for juveniles which must be separated from the Tribunal Justice for the grown-up people.

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