CRIMINAL COURT SYSTEM FOR JUVENILE CRIMINAL OFFENDER IN INDONESIA AND THE STRUGGLE FOR ACCESS TO JUSTICE

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Abstrak

Sistem Peradilan Pidana Indonesia membentuk sebuah peradilan khusus untuk tindak pidana anak. System ini dibuat dengan pertimbangan bahwa anak memiliki perbedaan factor dari orang dewasa yang menuntun mereka melakukan kriminalitas. Hal tersebut dapat dianalisa berdasarkan factor psikologis dan sosiologis. Tujuan utama adalah untuk mengamankan akses keadilan terhadap tindak pidana anak. Namun, ketentuan dalam peradilan anak masih memiliki kelemahan yang dapat mengancam akses terhadap keadilan. Oleh karena itu, dalam aspek penegakan, inklusivitas sering dikesampingkan. Penelitian ini adalah interdisipliner dengan menggunakan metode normative-empiris dan kualitatif. Normatif-empiris menganalisa instrument hukum menggunakan pendekatan undang-undang juga menggunakan data primer yang diambil dari wawancara. Metode kualitatif adalah sebuah metode yang secara keseluruhan menjelaskan sebuah fenomena dengan menganalisa kualitas suatu hubungan, situasi, dan materi lainnya. Penelitian ini menganalisa inklusivitas kenakalan remaja yang telah mempengaruhi proses pembuatan hukum dengan mengundangkan system peradilan khusus untuk anak, lalu mengkritisi bagaimana buruknya hukum diundangkan lalu mempengaruhi penegakan hukum. Penegak hukum telah sadar untuk memprioritaskan restorative justice sebagai suatu kewajiban oleh hukum. Namun ada masalah structural dalam pewujudannya. Penegakan hukum perlu ditingkatkan baik dalam aspek substansi dan atribusi.

Kata kunci: ***factor kriminalitas, Pelaku tindak pidana anak, hukuman, restorative justice***

ABSTRACT

The criminal law system of Indonesia formed a special court system for children criminals. This system is determined by considering that juvenile has distinguishing factors than adult that drive

them to conduct criminality. Those can be analyzed based on psychological and sociological factors. The main purpose is to secure access for justice towards children criminality. However, provisions in Juvenile Court System law still have weaknesses that will endanger the access of justice. Therefore, in the enforcement aspects, that inclusivity is often being abandoned. This research is interdisciplinary by using normative-empirical method and qualitative method. Normative-empirical is analyzing on legal instrument using statute approach and also using primary data taken from interview. Qualitative method is a method that holistically describes a phenomenon by analyzing the quality of relations, situations, and other materials. This research analyzed on the inclusivity of juvenile delinquents that has affected the law making process by constituting special court system for children, then criticizing on how poor the law being constituted and then affecting the enforcement. Law enforcers have awareness on prioritizing restorative justice as mandated by the Law. But there is a structural problem among the realization of it. The law enforcement needs to be improved both in the substantial aspect and attributive aspect.
Keywords: **criminality factor; Juvenile crime offender; punishment; restorative justice**

1. Introduction

Every human being has a chance to break the law. Children by their nature have different characteristics than adults. Some factors are to cause the criminality and some as a barrier from it. Environmental factors, for instance, one of many factors that cause criminality. Other criminals-constituting factors in social studies being classified into several theories, such as, environmental, classic, neo-classic, socialist, sociologist, bio-sociologist, and many others. Sutherland in the differential association theory (1939) stated that Criminal behavior is learnable and learned in interaction with other deviant persons. Through this association, they learn not only techniques of certain crimes, but also specific rationale, motives and so on. These associations vary in frequency, duration, etc. Differential association theory explains why any individual forwards toward deviant behavior. His assertion is most useful when explaining peer influences

among deviant youths or special mechanism of becoming certain criminal.[73]

We shall look at physical factors of the subject, to conclude precisely the best treatment for them. A person becomes a criminal because of several cause-factors. According to Freud' psychodynamic approach, it can be traced from their childhood experiences. The investigation is to get inside the subject's mind, life-history, their personality, and basically their interactions with the world that driven by their self-identity. It is also to search their biological relationship, to find if the subject is a criminal descent and have it in his/her genes. All those factors may affect their individual unconscious mind, so that, to them, doing unlawful actions is not something forbidden. If a children conducting an unlawful act, then the investigation is to seek whether the main cause-factor lies on the children's id, ego, or super ego.

Other than Freud's psychodynamic approach, behavior approach can be used to identify the cause of criminality. By identifying it, we can determine the best approach to treat it. Behaviorism stated that behaviors are learnt from the environment. Basic assumptions of behaviorist are that when we are born, a human mind is *tabula rasa*. In contrary with Lombrosso's study about the creation of criminals, that they are born evil and can be described by their physical traits, children are born clean slate. If a child then turns into a criminal, the environmental factors are to be investigated. It is believed that unlawful behaviors are learnt.

Situations as described above are the objects of law. Children, with all their characteristics, are subject of law. Generally, law breakers hold culpability before criminal law system, not excluding children. In Bandung, Indonesia, there is a record on types of crime and its percentage, as seen in a picture below:

73 http://www.julianhermida.com/contbondstrain.htm accessed August 16th, 2017, 2.30 PM

Picture 1. Type of Delinquents Conducted by Child-Inmates in Children Detention House in Bandung[74]

From the picture above, crime against decency held most percentage of child-criminality, followed by crime against social order and narcotics. These child-criminals then must go through criminal justice system. In many areas in Indonesia, child-criminality happened although the ratio is various. Some has a high number of child-criminality traffic (West Java, for example) and some have a lower number. Although the record is possibly affected by the number of density in each region.

Juvenile justice is the area of criminal law applicable to persons not old enough to be held responsible for criminal acts. In most states, the age for criminal culpability is set at 18 years.[75] Indonesia is one of most states that determining juvenile culpability at maximum 18 years old and/or not in wedlock at the time. That is as stated in Law Number 23 Year 2002 regarding Child Protection (UU Perlindungan Anak/UUPerAnak). Article 1 point 1 mentioned,

Anak adalah seseorang yang belum berusia 18 (delapan belas) tahun, termasuk anak yang masih dalam kandungan.

Child is a person aged below 18 years old, including a fetus in a womb. Furthermore, Law Number 11 Year 2012 regarding Juvenile Court System gave limitation for child in conflict with the law, that is a person aged 12 or above and below 18. So, only juvenile delinquents that is 12 years old and above may be tried in juvenile court.

Before the establishment of Juvenile Criminal Court Law (UU Sistem Peradilan Anak/UUSPPA), there was no specific regulation regarding juvenile delinquent. There was only one provision in Indonesian Criminal Code that distinguish the punishment for children. Article 45 of the code stating *minderjarig*[76] may serve special kinds of punishment, such as, being returned to their parents or guardians, being educated by the government, and the last option for

[74] Sri Maslihah, Psychology Department of Universitas Pendidikan Indonesia, presented in Seminar of "Kids Who Kill" Held by Universitas Pendidikan Indonesia, March 10th, 2017.

[75] https://www.law.cornell.edu/wex/juvenile_justice accessed July 20th, 2017, 5.02 PM

[76] *Minderjarig* is a minor, a person aged below 16. 16 is a maturity age according to Indonesian Criminal Code. This regulation has been abandoned since the establishments of the UUSPPA, through *lex speciali derogate legi generali* principle. Means, the special law is used instead of the general law.

the judge to choose is, to use criminal penalty as regulated in a criminal law, but, reduced 1/3 from maximum years of imprisonment. This regulation wasn't followed with procedural law about it.

In year 1997, Indonesia established special law for children, that was Law Number 3 Year 1997 regarding Juvenile Court. This law, in its consideration section, stated that juvenile owns a specific characterization, which they need to be nurtured and protected. In order to fulfill their needs of protection, there shall be a supportive institution and law enforcement/enforcers towards them.

However, The Juvenile Court Law, in general, was only imitating provisions in *Kitab Undang-Undang Hukum Acara Pidana Indonesia* (Indonesia Criminal Procedural Code) and addressed them to children. This law even created a term *Anak Nakal*.[77] There was still a contradiction in a matter of accommodating children's characterization, while the law didn't provide any further procedure that equals the principle. Although there was no specific support provided towards children, especially those who became criminal offenders, this law already recognized the need of special treatment for juvenile delinquents and that was a start.

That was in accordance with international instruments regarding child protection that started with Geneva Declaration about Rights of Child in year 1924 (later it was acknowledge in Universal Declaration of Human Rights, 1948). Departed from that, on November 20th, 1958, United Nation's General Assembly established The Declaration of The Rights of The Child that provided 10 (ten) principles.[78]

The procedure that equals the principle was provided through UUSPPA. This law provides the mechanism of diversion as an attempt to avoid the use of litigation. By having diversion procedure, the law tries to pursue restorative justice and replaces retributive justice. These mechanisms are believed to protect children's right better.

Then, in the recent system of Indonesian law, it is already mapped systematically the system of juvenile criminal justice. The system that already containing and understanding the background of juvenile delinquent and juvenile crime offender, prioritizing the psychological state of juveniles, considering the social system where the juvenile is raised, and then these

[77] *Anak Nakal* is similar with juvenile delinquent in a negative sense. It is equal with telling a child as a bad kid.

[78] See Muladi and Barda Nawawi Arief. (2007). *Bunga Rampai Hukum Pidana (Capita Selecta of Criminal Law)*. Bandung: Alumni, p. 115-141.

aspects has been formulated to the legal system. This can be seen through several laws, old and new, that concerning juvenile delinquent.

The problem lies on the aspect of implementation. As Friedmann said, to describe a legal system is to analyze components that constitute it. They are the legal system's sub-systems. First, that is a legal structure. Structure is a skeleton that forms a body. It is an institutional body from the system that manages its stability. Second, that is a legal substance. This consists of regulations including code of conduct to determine the behaviour of institutions. Last, that is legal culture. It is about the social power where the legal system emerged.[79]

When the law making process has focused on the subject it regulates, then the law enforcers should bear the exact capacity to implement it. Juvenile court system has been developed in the hope it will cope with children characteristic well and to seek restorative justice through diversion method.

However, years after the establishment of UUSPPA, problems still occurred in many places. Problems here are structural, not only law enforcement-related but also related with bureaucracy, funding, capability of law enforcers in term of child-treatment, misperception of the principle of diversion, imbalance between juvenile crime cases and law enforcers, facilities, administrative aspects, and the list is still going on.

All those boundaries weaken the importance of access for justice for child-criminals. The mindset of securing child-criminals in accessing justice has been swerved away due to these matters. Considering that the treatments for child-criminals are unique, based on psychological and sociological factors that hold a big role in it, then putting them into criminal litigation process is like walking on the egg shells. The legislation should've been constituted very carefully and thoroughly, the law enforcers should've been trained very seriously about aspects of children and child-criminals, and the enforcement should've been done intensively. Technical matters like bureaucracy, funding, administration, facilities, load of work, and such, should not be the cause factors that fail the purpose of

[79] See Lawrence M. Friedmann. (2011). *Sistem Hukum - Perspektif Ilmu Sosial (The Legal System - A Social Science Perspective)*. Bandung: Nusa Media, p. 12-19.

the law. Therefore, this matter is important to be investigated.

2. Methods

This writing used interdisciplinary methods where, as a legal research, it used the normative-empirical method with statute approach. This way was useful to analyze law instruments that related with child criminality. How the development of Juvenile Court System showed the change of paradigm about child criminality. How the existence of that law was not followed with procedural instrument as the standardization of child criminality dispute settlement. Data collections used are secondary data and also primary data in a form of interview.

Then, as a social research, this writing also used qualitative methods. This was to holistically describe a phenomenon of child criminality dispute settlement and how they need to be helped in getting access for justice, by analyzing the quality of relations, situations, and other materials. This research is analyzing on the inclusivity of juvenile delinquents that has affected the law making process by constituting special court system, then criticizing on how poor the law being constituted and affecting the enforcement.

3. The Struggle of Access for Justice

The establishment of UUSPPA as the latest regulation towards children criminality has not fully reached its purposes. This law is implementing restorative justice through a procedure called diversion. Diversion is a criminal dispute settlement through a mechanism similar with mediation. The case will not be tried in a court (litigation). Instead, parties involved will be trying to find a better settlement for them. This is meant to create chance to focus on restoring the child criminal and making way to the victim to cope with the situation, instead of only retaliating on what the child has done. Hopefully, this mechanism will lessen the number of children being put in a prison.

In contrary, data said that the number of child inmate in 2017 increased from a year before. The number is 2.559 child inmates in 2017 and 2.320 child inmates per December 2016 spread in 33 provinces of Indonesia.[80] This is not the only problem occurred since the establishment of UUSPPA. The list is as follows.

a. Regulations of implementation of UUSPPA were not created

[80] See http://icjr.or.id/problem-implementasi-sistem-peradilan-pidana-anak-di-indonesia-masih-ditemukan/ accessed August 18th, 2017 11.28 am

immediately. In fact, after the establishment of UUSPPA, government regulation (Peraturan Pemerintah / PP) was only established 3 years later through PP number 65 year 2015. UUSPPA itself even though it was established on 2012, it was set that it would enter into force 2 years after the establishment. In short, UUSPPA entered into force on 2014, PP number 65/2015 established on 2015. Before this PP was created, to fill the vacant of regulation of UUSPPA implementation, Indonesian Supreme Court established Supreme Court Regulation (PERMA) Number 4 Year 2014 as a guideline of diversion mechanism. At the time, since there were no guidelines of UUSPPA implementation yet, the Supreme Court establish this PERMA as a guideline in their scope of competency. This has affected the task of diversion is more coordinated among Courts. But, this step was not followed by other competencies such as police department and attorney department. There was no uniformity on implementing UUSPPA between related departments. Also, since Indonesia have regional autonomy, there was, and is, a no-uniformity between capitals and districts. Meanwhile, UUSPPA formatted diversion to be implemented in every stage of crime settlement procedure.

Through the interview with Putri Kusuma Amanda from *Pusat Kajian Perlindungan Anak* / Center of Child Protection and Wellbeing (PUSKAPA)[81] it is known that in a period before PP about diversion established, implementation of diversion was very rare. The main reason was because there was no PP about it. The most established social service and institution was in West Java. West Java was the most prepared to sustain diversion method. Regarding data, quality of diversion implementation are equally poor. The worst was in general

[81] http://www.puskapa.org/ PUSKAPA was established in early 2010 at Universitas Indonesia through a collaboration between the university's Faculty of Social and Political Sciences (FISIP UI), Columbia University, and the Indonesian Ministry of National Development Planning (BAPPENAS). The Center was established to contribute to closing the gaps between knowledge and practice in the field of child protection and wellbeing in Indonesia.

attorney's institution. Administrative aspect on data of diversion was mostly manual. And some lack of capability in ensuring the implementation, monitoring, and reporting. Courts are institution that is better in systematically implementing UUSPPA (because they are one-commanded under the Supreme Court and PERMA). *Direktorat Jenderal Pemasyarakatan* (*dirjenpas*) also better in term of monitoring because many child-inmates are being put in custody in *Lembaga Pembinaan Khusus Anak* (LPKA) or in *Lembaga Penempatan Anak Sementara* (LPAS).

While the society waited for the regulations to be fully supported by administrative and technical aspects, child-criminals were mistreated when being prosecuted. It is known that during investigation process, children were mentally suppressed. Criminal investigation is depressing even for adult. Children in one hand received a similar treatment like adult. There was a situation where a child criminal was cigarette-burned during investigation. Detention officers in a child detention house in Jakarta, Indonesia, still in some levels showing their authority towards child inmates under their supervision, instead of acting as their guardian.[82]

b. Provisions in UUSPPA about the competency of law enforcers that deal on child-criminals are not fully committed. Articles 1 UUSPPA mentioned,

8. Penyidik adalah penyidik Anak.
9. Penuntut Umum adalah penuntut umum Anak.
10. Hakim adalah hakim Anak.
11. Hakim Banding adalah hakim banding Anak.
12. Hakim Kasasi adalah hakim kasasi Anak.

Those provisions mentioned that investigators, general attorney, and judges are those who qualified to process child-criminals. Furthermore, article 26 (3) about

[82] This detention house for children is not a fully intended detention house for children, but an adult detention house that then renovated one section to be used for child inmates.

investigation explained qualifications for child investigators. Those are:

1. Experienced
2. Capable, dedicated, and concern on matters regarding children
3. Experienced in technical training of juvenile court.

Same qualifications applied for general attorneys and judges. Highlight is on point 3. It is said that the authority must be experienced in training on aspects of juvenile court. But then this condition is followed with next provision which stated, '*Dalam hal belum terdapat Penyidik yang memenuhi persyaratan sebagaimana dimaksud pada ayat (3), tugas penyidikan dilaksanakan oleh penyidik yang melakukan tugas penyidikan tindak pidana yang dilakukan oleh orang dewasa.*' Translation: In a matter of vacancy of qualified enforcers as obliged in point (3), duties may be carried out by enforcers that settling on crimes perpetrated by adults.

That provision exonerates the urgency of need for enforcers for child-criminals. As the UUSPPA law have already concerned on the rights of child-criminals, the exonerating provision lessen the attempt to reach restorative justice towards child-criminals.

c. Another problem related with point b is about the technical training of juvenile court. Three years after the birth of UUSPPA, instruments of procedural aspects hadn't been created. Even though police department claimed that they struggle to maintain the implementation of UUSPPA, at least in that three years period, the result was not satisfying. The victim of the system here was child-criminal that had to serve their time in detention. Since the implementation instrument for UUSPPA was delayed, aspects about procedural of the training also hadn't been constituted. The Ministry of Justice and Human Rights (*Kementrian Hukum dan HAM*) through its BPSDM (*Badan Pengembangan Sumber Daya Manusia*/Human Resource

Development Body) have duty to conduct integrative training between police, attorneys, and judges. At some point, this was not implemented thoroughly. There is budget cut in this training. Budgeting problem cause a problem in conducting integrated training by BPSDM. Therefore, trainings is held by each institutions. Again, this resulted to a distinguished standard of training. Courts have successfully conducting trainings on child-criminals dispute settlement and providing a certification. Attorney general institutions have never conducting any. Police institutions have PPA unit (unit Perlindungan Perempuan dan Anak). But, officers that are assigned in PPA unit have no certain criteria, sometimes it was just being a woman then they are fit to be in PPA unit. But being a woman does not guarantee them to be a qualified child-investigator in UUSPPA coridor. In police academies, there have no program on child protection perspectives.

d. Social-related problem also occurred, by the occurring of phenomenon where child-criminals that were brought to trial were mostly from less-fortunate group. These middle-low class children were hardly gain access to restorative justice. Since the establishment of UUSPPA in 2012, there were very less evidences that child-suspects and child-criminals treated as a child. There can be seen the vicious circle, where, child from middle-low group involved in crimes because of the environment, the gap between aspiration and opportunity, the family where they were raised that has formed their behavioral state, and many cause factors can be explained with criminology. Then, these child-criminals must go through criminal law procedure that run by adult law enforcers that, even if they struggle to implement the child friendly criminal procedural law, still time shows that the implementation were not thorough. It is mentioned in previous page that a child-suspect got a cigarette-burn during investigation, violations and trauma. Child-inmates psychologically stressed just to be in a detention house together with

adult-inmates (due to less facility). This resulted to poorly educated child-inmates and they serve their punishment without being restored. More than 50% of child-inmates dropped out of school. This percentage was increased ironically that they have to drop out because they were criminally processed. Prison is a school that creates criminals. Diversion method is intended to bridge this situation so that child-criminals can have better settlement than being imprisoned. But the progress was far from optimum. Access to justice, according to Putri, was better for the richer.

e. Sustainable treatment for child-criminals is poor. Generally, mechanisms that are contained in UUSPPA are already on the go. Mechanisms here such as, diversion, restorative justice as basic principle, separating child-inmates and adult-inmates, law enforcers that fit the criteria to deal with children, infrastructures and administrative aspects. But these are still running scattered between regions and institutions.

Through FGD's with Bappenas[83], it is needed a coordination between regional governments, NGO, actively-run LBH, and full support from regional government. For example in, the attempt of implementing UUSPPA, Nusa Tenggara Barat (NTB)[84] is one of the tops in term of criminal settlement. Although it is accepted that maybe NTB is better because the number of population there is not as high density as capitals, hence, lower traffic of child criminality. But still, NTB is a good example of a good coordination between regional government and law enforcers that resulted in better achievements in implementing restorative justice through diversion.

3.1. Achievements of Government of Indonesia in Integrating Juvenile Court System

[83] Bappenas is Badan Perencana Pembangunan Nasional/National Development Planning Agency (visit https://www.bappenas.go.id/id/)

[84] Nusa Tenggara Barat is a province in Indonesia and is a part of Nusa Tenggara Archipelago.

We cannot generally say that Indonesian Government put no attention regarding child-criminality settlement. Initiative in regionals is actually already plenty, but UUSPPA seems to be hardly recognized because there is no documenting system in national scale about UUSPPA implementation. Procedural aspects are scattered among regions and institutions. After the birth of UUSPPA in 2012, until 2014 there should have been a procedural instrument through PP, but it had to wait a year longer until finally there was one PP about diversion implementation for child aged less than 12 years old and in conflict with law (PP Number 65 Year 2015) and another one in May 2017 (PP Number 8 Year 2017 about guidelines of coordination, monitoring, evaluation, and reporting of Juvenile Criminal Court System (SPPA)) Meanwhile, number of cases involving child-suspects and child-criminal are multiplying. Some enforcers initiate themselves to implement diversion with their own terms. Some were pushed by LBH and NGO. Then it resulted to a various standard between competencies. Some have best practices some have misperceptions. Diversion was originated to grow the change of behavior of the subject (children in conflict with law). Not just to reach a deal between perpetrator and victim. The focus must be in restoring the situation. Not reaching material loss being paid.

Some others believe that even if diversion only talks about material payback, that should be ok too. For example, if the victim is willing to receive some amount of compensation offered by the perpetrator, then case is closed. Settlement is reached. But this means, the case may be settled but the child involved in that case is not restored. Also, then what will happen if the perpetrator is not loaded enough to be able to pay a compensation. Diversion is not just in the negotiation and win-win solution. This is a misperception but doesn't mean the enforcers are fully wrong. Their perception is understood because the government was not quick in establishing procedural instruments for UUSPPA.

There were several barriers that have caused the postponed establishment of any procedural instrument of UUSPPA and also the less than optimum enforcement. First, vocal point is on The Ministry of Justice and Human Rights (*Kementrian Hukum dan HAM*). They have struggle on their work load. Second, it is hard to synchronize perception among institutions. Plus UUSPPA is like changing the dogma in a criminal procedural law system. Diversion

itself is a breakthrough innovation. The old system of Indonesian criminal law court that already known still in a blurry line between having a retributive purpose or restorative purpose.

There are several theories regarding purpose of punishment. According to Kant theory, the basis of legitimation of penal is held on *Kategorischen Imperativ*, that is intending every unlawful behavior must be retaliated.[85] This is also known in Absolute Theory, which stated that the purpose of penal is as retribution. In contrary with Absolut Theory, Relative Theory (Teori Relatif/Teori Tujuan)[86] thought that crime is a product of natural behavior of the perpetrator and is from a condition in a society.[87] In Indonesia, the law maker of Penal Code didn't mention which theory is implemented by Indonesia Criminal Legal System. Prof. Simons[88] gave opinion that according to Penal Code makers, penal must be implemented towards public interest and must be aimed towards legal order.

Since the criminal justice system of Indonesia originally never constituted the principle of penal explicitly, it is safe to interpret that the criminal justice system of Indonesia can be concluded based on van Hamel thought, those are:

- The purpose is to enforce legal order (tertib hukum)
- Decisions are made in a corridor of needs
- Ought to prevent crime to happen again
- Penal must be dropped based on a *criminele aetiologie* research and must respect fundamental interest of a criminal.[89]

UUSPPA provides a more spesific purpose that can be seemed a bit different than criminal justice system in general. Penal is no longer only discussing between *Pensylvanich Stelsel*, *Auburn Stelsel*, or *Progressief Stelsel*. UUSPPA provides a system that similar with reformatory for first offender that occured in the United States. This is a system that not only focusing on criminal law and its penal system, but must be hooked with the purpose of the penal itself. Diversion is believed to accomodate it if it is implemented properly. In fact, diversion also caused problems.

[85] Lamintang and Lamintang. (2012). *Hukum Penitensier Indone*sia *(Indonesian Penitentiary Law)*. Jakarta: Sinar Grafika, p. 13.

[86] Also known as *relatieve theorieen*, a thought from *crimineel anthropologische* school, stated that the purpose of penal is to protect the society.

[87] Lamintang and Lamintang. *op cit*, p. 16-18.

[88] Simons. "Leerboek I" on Lamintang and Lamintang. op cit, p. 28.

[89] Lamintang and Lamintang, *op cit*, p. 18

Diversion caused most burden. Judges and Supreme Court is trained and used to a mechanism of mediation. So they actually already familiar with the mechanism when they are exposed with diversion. It just need to input perspectives on child. Attorneys on the other hand, harder to cope with diversion. They are used to prosecute suspects. Their perspective generally is to file for a case, bringing it to the court and generally trying to make sure that the prosecuted is punished. Diversion will only increase their workload, among their already loaded works. Similar situation is happened to police institution. They are tied with procedures in investigation. For example, they must summon parties in 3x24 hours. It will cost them more burden when they must setting a diversion procedure and this procedure is delicate and time-consuming. Resistance is unavoidable. They objected the period of summoning parties that is considered too short. They're also mostly burdened by their role that is being expected to be able to facilitate a diversion. Officers are investigator that works on observing cases, collecting evidences, and make sure they have a criminal case to prosecute. Becoming a facilitator for a mechanism like diversion is a distraction.

3.2. Child-Crime and Punishment

Law was believed as a mechanism that allows people to recompense of conflicts. Through law people would gain security of their rights, a fixed settlement of a crime, and restoring social conflicts and restore it to peace. Law instruments (legislation, enforcers) should be obeyed to make sure the purpose of law is reached.

That come to the question of what the purpose of law is. Especially in this topic, what the purpose of criminal law is. Criminal regulations are providing types of crime and punishment. Generally, punishments provided are showing a set of retaliation of a crime that being conducted. Meanwhile, UUSPPA is giving alternatives where child-criminals don't have to be imprisoned. Or more precisely, the punishment for child-criminals is not harmful.

Child-criminals, if they are proven guilty, have to be punished. But the form of punishment for them has been engineered so that it won't be just a form of retaliation but also to restore the criminal. The modern school of crime and punishment (*aliran modern/aliran positif*) said that human have no absolute free-will, instead, human is

always affected by the environment.[90] So human can't be seen fully culpable of a crime, as the crime is happened by the mixture of individual aspects and environmental aspects. Punishment as a retribution for a subjective fault is not accepted. It is needed to do individualization of crime-actor to re-socialize him. Moreover, on a theory of punishment purpose (*teori tujuan pemidanaan*), the relative theory mentioned that crime punishment is not only about retribution, but also about serving a further purpose, that is to restore the individual, the society, and to prevent crime from happen in the future.[91]

Through UUSPPA and its diversion method, it can be seen that child-criminals are targeted to be re-socialized rather than to be held in a prison. Children are understood as someone who is still getting massive influences from their environment rather than having their own mind state. By their age, they still have not reached their fully-grown maturity, physically and mentally. UUSPPA gave an alternative of dispute settlement that will avoid child-criminals in receiving punishment not suitable with their characteristics.

Characteristics of children need to be highlighted. Children's personality is different with adult, thus it affected the law of crime that involve children as perpetrator. According to behavior theory, human is born clean-slate (*tabula rasa*). The environment will then forming this human into a personality. It is in how his family is, how he's being raised, being educated, how his social life is, that later making him a specific figure of personality and how he behave.[92]

In a process of development to become a grown up, children may be exposed by some factors that possible to increase their opportunity to be a criminal (risk factors). But risk factors are not the same with criminality factors. For instance, poverty is a risk factor, but it doesn't mean that the poor will be a criminal. Poverty is a condition that giving opportunity of a crime.

[90] See http://liseyolanda.staff.uii.ac.id/2009/08/26/tujuan-hukum-pidana/ accessed on August 28th, 2017 3.24 PM

[91] See Djisman Samosir. (2012). *Sekelumit Tentang Penologi dan Pemasyarakatan*. Bandung: Nuansa Aulia, p. 89.

[92] Interview with Dra. Yodi Donatrin, MPsiT., Psikolog.

Risk factors are also accompanied by protective factors that encounter the risk. There are 5 (five) domain of risk factors:[93]

- Individual
- Family
- School
- Peer group
- Community

Child-criminality can be caused by social community, other than individual factors. Children are social creatures. Children are never separated from their environmental influences, such as, home, school, and community. There is a need to interact with others and a social need to live among others. According to Sutherland's differential association theory, criminal behavior is learned in a process of communication in intimate groups. Children are very attached with their environment. What they see is what they do. By excluding physical factors, it is believed that if a child becomes a criminal, it is because of his environmental factor where they grow and learn.

Law, in one hand, is providing generalized provisions. Children, in the other hand, cannot be generalized. There are social-constituted factors that become a factor of crime. The criminal law is seen as not capable in reaching the main purpose of restoring child-criminals. Child-criminals can be understood by social field of study and law belongs to a different field of study. But the law, however, is still needed as penal-code to keep maintaining a balance between restorative and retributive aspects of a crime. Diversion mechanism is the answer to bridge that.

Bandung is an example of city that is already attributed with Children Detention House (LPKA), Children Temporary Detention House (LPAS), and Bapas (Balai Pemasyarakatan). POLDA JABAR (West Java Regional Police Department), for instance, has UPPA (Unit Pelayanan Perempuan dan Anak/Women and Children Service Unit). According to IPDA Dr. Herman K, S.H., S.Sos., M.Si[94] there are some importance in handling child case. Those are:

- Special treatments

[93] Sri Maslihah, *op cit*.

[94] Herman is a PANIT I SUBDIT IV DIT RESKRIMUM POLDA JABAR. Herman gave his speech entitled *PENANGANAN PERKARA ABH DITINJAU DARI PERSPEKTIF HUKUM PIDANA* (Case Settlement involving Children In Conflicts with Law Seen from Criminal Law Perspectives) on "Kids Who Kill" seminar held by Universitas Pendidikan Indonesia, on March 10th, 2017.

- Processed separated-ly from adults
- Accompaniment by parents/guardian during examination
- Child's identity secrecy
- Fulfillment of child's basic needs
- Empathy for children

Herman claimed that diversion is already implemented in many police institutions including POLDA JABAR. But according to his chart, it can be seen that the ratio between child-criminal cases and the implementation of diversion is not balanced.

Picture 2. Child-Case Settlement in West Java

The number of diversion was very low during 2015-2016 periods. In the same period, the number of children as a criminal perpetrator was much higher than children as witness and/or victim.

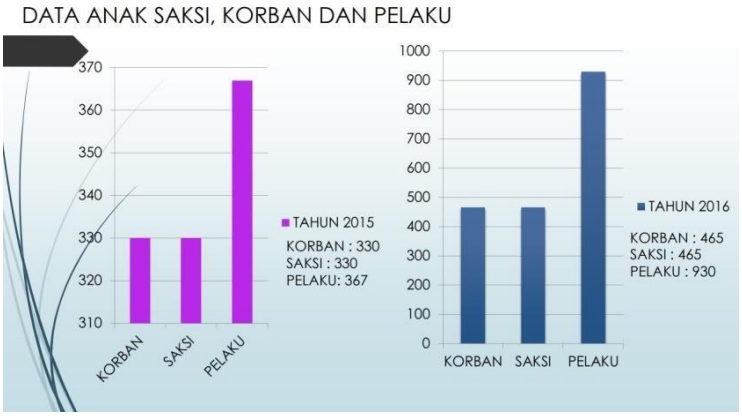

Table 3. Children as Witness, Victim, and Perpetrator in West Java

That number is only in West Java that is recognized as most attributed in term of SPPA facilitations. West Java is also high in term of child-criminality traffic.

The problem is on how diversion being implemented. Diversion is a best alternative way in bridging the needs to restorative justice and law enforcement. The system ought to support this mechanism better. Improvement also needed in capacity of enforcers. Herman mentioned that officers being put in UPPA are women. Diversion is not only about having woman to examine child-criminals.

Criminal law system of Indonesia has developed into prioritizing children more. It has given the system with principle and mechanism to support it, which is restorative justice principle and diversion. But the government still has many home works to maximize the use of those mechanisms.

4. Conclusions and Recommendations

Childrens personality is distinguished from adult's. Children as criminal has psychological factors that are related with environment they grew up in. Their criminality is also constituted by learning onto their surroundings. Children gone bad is not because of their own subjectivity but because of outside factors that drive them to conduct crimes. Those factors led into the development of Juvenile Criminal Court System world wide and also in Indonesia. The modification includes alternative dispute settlement called diversion as written in UUSPPA. This method is believed to accommodate restorative justice of the child-criminals.

The implementation of diversion, however, still far from optimum due to many technical issues, such as capacity of law enforcers in understanding the essence of diversion, load work on enforcers, un-uniformity of implementation between regions and institutions (still scattered), the formulation of provisions in UUSPPA that still giving a a gap to the importance of UUSPPA, principle of UUSPPA in a matter the purpose of penal that is different with Indonesian criminal justice system principle in general, and the fact that chil-criminality is supposed to be observed through socio-legal approach but it is trapped in a legalistic mind of Indonesia Legal System.

As a recommendation, there are several steps that needs to be done in a hope of developing Juvenile Criminal Court System, those are:

- Make amandement of the existing UUSPPA especially on a provision about legal enforcers competency. Officers MUST be those who have been intesively trained about Juvenile Court System and must be sertified.
- Make amendement of the existing UUSPPA on a provision about the obligation of diversion. Diversion is obliged to be conducted, not only to be offered to the parties. Diversion also should be implemented to any crime without limitation.

Limitations here, such as, only for crimes that are punished for less than 7 years.

- Make a reformation of beraucracy that is related with child-criminality dispute settlement.
- Establish the guidelines of UUSPPA through PP that contains a more sharply regulated code of conduct (the 2017 PP is not sharp enough and only normatively regulating the guidelines)
- Strengthen the monitoring system between regionals and institutions.
- Create a national database to record the achievements on UUSPPA implementation nation-wide-ly.
- Adding more detention house for children is not a solution. The goal is to reduce the number of child-inmates, so there is no need to add more detention house. The focus is on increasing the quality of diversion so that child-criminals are restored rather than imprisoned.

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