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## Review of Child Punishment In The Juvenile Criminal Justice System (A Coparative Study Between Indonesia And The United States)

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**Abstract:** Comparative law is one of the methods for learning the law. For legal researchers, aside from looking from the historic perspective, it is also useful to compare the laws between respective countries, be it a whole legal system as in between legal traditions of civil law and common law or comparing between a micro system such as juvenile justice systems in each country for some purposes. Researchers could benefit from using comparative law to look for similarities or differences between legal systems or in the future they could use it for solution in the domestic law to be even better. In this paper, we will compare youth justice system between Indonesia and United States, specifically California State. Youth justice system in Indonesia has this unique sub-system called diversion and restorative justice. The main purpose of it is so children who conflicted with the law have chances to redeem themselves and build reconciliation with the victims and their families. There are also different rights set for the children written in the Code such as the hearing process must be enclosed, and their identity must not be exposed by the media to public eyes. In the United States, there aren't so many differences by the book except the bargaining, but they have a special procedure before the initial hearing that is the court will consider if the child's crime is still fit within the juvenile court jurisdiction or sending them to the criminal court which called by *judicial waiver*. This means that the child is stripped of their special rights and will go to adult prison if the juvenile court decided they could not handle the case for its nature of crime. When the child is proven to be guilty, they also will be sent to adult prison. Finding similarities and differences between legal systems could be useful for research but doesn't mean that the legal system is flawed or too good. It needs to be reminded that not all the system or sub-system could be applied to other countries since there are also differences in cultures and practices especially between Western and Asian society.

**Keyword:** Comparative Law, Juvenile Justice System, Indonesia, United States.

### INTRODUCTION

One method of studying law other than using legal history is by doing comparative law. In the book Introduction to Legal Science, the comparative method is a method for studying

law, the main of which is to make comparisons, namely comparing a legal order that runs in one particular country with a legal order that also runs in other countries, in ancient times and in modern times. Thus, by comparing the two laws, researchers can find out the similarities and differences between a legal order that applies in a country with other countries (Daliyo, 2014). The use of comparative law is not only done for example between the same legal system but can also be different.

The types of comparative law fall into five categories namely: (a) comparisons between foreign legal systems and domestic legal systems to determine the similarities and differences between them; (b) studies that objectively and systematically analyze legal systems that offer solutions to legal problems; (c) studies that examine causal ties between different legal systems; (d) studies that compare the steps involved in various legal systems; and (e) studies that try to find and examine the evolution of various periods in a legal system (Peter de Cruz, 1993). The type of legal comparison that will be used in this article is the type of comparison between foreign legal systems and local legal systems that are useful for finding similarities or differences between the two existing legal systems.

For the researcher, finding similarities and differences can support comparable home country laws to be more effective in the future. Therefore, the purpose of this article is to compare the two juvenile justice systems in the United States and Indonesia to find the differences and similarities between the two legal systems for children in conflict with the law in the juvenile criminal justice system. Due to the high number of juveniles in conflict with the law in Indonesia and other countries such as the United States, by finding the similarities and differences between the two systems, it is hoped that Indonesia's juvenile criminal justice system will be better in the future.

The number of cases where children are in conflict with the law can be seen from one of the cases in Indonesia such as a case where a 17 (seventeen) year old child killed his father because he was scolded because the child was caught stealing, then another example is a case where two children aged 17 (seventeen) and 14 (fourteen) years respectively kidnapped and killed an 11 (eleven) year old child on the pretext of wanting to sell the child's organs to get money to help the family's economy. Looking at the examples of cases of children in conflict with the law, it is important for law makers to continue to review whether the laws currently applicable to children are still relevant or not, which is one of the functions of comparative law as well.

## **METHOD**

The method that will be carried out as the basis of this research is normative or doctrinal juridical legal research, which will examine written law from various aspects such as theory, history, philosophy, comparison, laws, applicable legal principles and so on, but this method does not examine its implementation in the field (Purwati, 2020). The method also carried out in this research is a qualitative method, which is to approach and/or analyze rather than understand the problems surrounding social life based on holistic, complex, and detailed reality conditions. This method can also be interpreted as research that reaches aspects of social phenomena and life (Murdiyanto, 2020).

## **RESULTS AND DISCUSSION**

### **Legal Traditions and Systems Civil Law (Continental Europe) and Common Law (Anglo Saxon)**

Broadly speaking, Indonesia's criminal justice system is derived from the civil law legal tradition of Continental Europe. Indonesia adopted this legal system because it was colonized by the Dutch and therefore automatically adopted the laws and traditions adopted by the Dutch as well. The civil law system also has its own characteristics, such as legal codification, judges are not adhered to previous judges' decisions in determining cases, and

an inquisitorial judicial system. The existence of legal codification can be interpreted as written rules arranged systematically which are codified in the form of laws. This legal codification can be said that the law must be made in writing (*lex scripta*) which is common in the laws of countries that adhere to civil law.

The next criterion is that judges are not bound by previous decisions because they see the law as a legal basis so that judges are given freedom in deciding a case. And, the inquisitorial legal system where it has the biggest role in running the trial, the judge must play an active role in finding facts and evidence (Nurhadinto, 2015). This role makes the judge the main driver in running the trial and the main determinant who makes the decision without any intervention from any party. Countries that adhere to civil law themselves besides Indonesia, mainly countries in the European Union other than the UK such as the Netherlands, Germany, France, Spain and several countries in Asia such as Malaysia.

It can be said that the beginning of history records the formation of the civil law system itself through Roman law which was combined and codified under the reign of King Justinian in the 6th century. The law contained at least the law of individuals, family law, inheritance law, the law of property ownership, default, self-enrichment, even the law of contracts and damages where all of these laws were protected and subject to the judiciary at that time. Although as early as 533, the first three books of Justinian's Institutes (governing persons, property, and obligations) and most of the civil laws of the 19th century dealt with the same issues and were even interconnected, so they began to be called civil law. This use of legal codification also over time became entrenched in the legal systems of European states (Ann Glendon, 1994).

If Indonesia applies a civil law legal system, the United States also applies a common law system originating from Anglo-Saxon countries. The people of the United States who first freed themselves from England long ago also brought this legal tradition. Unlike civil law, the common law legal system also has its own characteristics, namely the source of law in the form of jurisprudence, judges adhere to the doctrine of *stare decisis*, and there is an adversary system in the criminal justice system. Adhering to jurisprudence can be said that the source of law of countries that use the common law system is jurisprudence or judge decisions used as a legal basis. The doctrine of *stare decisis* adopted by judges is that judges apply the law or previous decisions on similar cases. Then there is also an adversary system which is similar to the plea bargaining method or negotiation system to speed up the process of handling a case (Nurul Qamar, 2010).

Although in theory the United States adheres to the common law system, as mentioned earlier, the North American colonies brought with them the English legal system in the 17th century. Unfortunately, as a society that had parted ways with royal traditions, the colonists at that time only adhered to religious law from the Bible, John Bunyan's literature (*Pilgrim's Progress*) and the law in William Blackstone's *Commentaries of Law in England*. Thus, in the years after the colonists settled in Massachusetts Bay, Cornwall's Revolution, the establishment of the protectorate, and the Commonwealth brought a series of disruptions and changes to English law. So, in practice, the law in the United States has actually been disconnected from the heritage of its home country, namely England because of the independence revolution and also developed its own legal system that suits them best (Nurul Qamar, 2010).

The legal system in the United States is formed tends to be more complex than English law which adheres to the entire common law system and the form of state in the form of a kingdom so that the rules are different. The United States is a country that upholds freedom so that the need to overhaul all existing laws, even embracing presidential in the end. The most striking difference is where the United States is a country that becomes federal which makes the emergence of the existence of states that regulate their own laws. The source of law besides still adhering to the common law system is that it consists of constitutions and

statutes as well as administrative regulations which of course vary from state to state. A notable difference is also the separation of powers which does not exist in common law other than federalism.

The existence of striking differences between civil law and common law legal systems is also influenced by the history, place, and nature of society for the formation of thoughts on these legal systems. Of course, law makers will automatically make various considerations in forming laws, whether the law is in accordance with the customs of the community and as far as possible does not harm certain groups or circles. As for the criminal system itself, especially the juvenile criminal justice system, it was raised from the issue that many children commit crimes.

### **Indonesian Juvenile Criminal Justice System**

The criminal justice system between adults and children in Indonesia has been officially separated since the enactment of Law No. 3 of 1997 concerning the Juvenile Criminal Justice System which was later amended through Law No. 11 of 2012 concerning the Juvenile Criminal Justice System (later referred to as the SPPA Law) with a new approach. The principles introduced by Indonesia are diversion and restorative justice. Indeed, according to Article 5 paragraph (2) of the SPPA Law, the juvenile criminal justice system includes: (a) investigation and prosecution of juvenile crimes; (b) trial of juveniles conducted by the court; (c) guidance, counseling, supervision, and/or mentoring during the process of executing punishment or actions after serving the criminal period.

According to Article 7, diversion is carried out at the stage of investigation, prosecution, and examination of juvenile cases, where the conditions are only for criminal offenses that are punishable by a maximum imprisonment of 7 (seven) years and do not constitute a repeat offense. Thus, the implementation of diversion is also carried out as an alternative solution outside the court between child perpetrators and victims so that children do not need to attend trial and be deprived of their independence. The results of the diversion can vary, such as compensation, peace between the child offender and the victim, and handover back to the parents, participation in the LPKS program for a maximum of 3 (three) months, and can also be in the form of community service, depending on the agreement between the child offender and the victim.

Basically, in juvenile criminal proceedings, the whole process is almost similar to ordinary criminal justice, even children are allowed to file an appeal hearing until review. However, what is different is that the rights of the child must be considered from the time of arrest until he/she is admitted to a special correctional institution for children. A striking difference from ordinary justice is that the examination and prosecution of children must be closed (Article 54) and the identity of the child must be kept confidential, and media coverage can only use the initials of the child (Article 19 jo. Article 61). The main punishment for children according to Article 71 consists of warning punishment, punishment with conditions (coaching outside the institution, community service or supervision), vocational training, coaching inside the institution, and finally imprisonment. There are also additional punishments such as forfeiture of benefits obtained from the proceeds of crime and fulfillment of customary obligations. Imprisonment for juvenile can only be imposed half of the maximum adult imprisonment, and if less than 3 (three) months the juvenile proves to be well behaved then he/she is entitled to parole.

### **United States Juvenile Justice System**

The United States has officially separated juvenile justice from adult justice since the establishment of juvenile courts in 1899. It should be noted that although the same in principle, the juvenile justice system in the United States tends to have different rules depending on which state is being reviewed, as it is a federal country. Juvenile law does not

fall under federal law and therefore state laws may differ from one another. Thus, the author will take the juvenile justice laws of the state of California for comparison.

In the state of California, children under the age of 18 who are suspected of breaking the law can be brought to juvenile court. The process is as follows:

1. *Filing Petition*

The Probation Department and the District Attorney can file a petition, which is a request for the court to get involved in the case. The judge's job is to check whether the petition is valid or not. Keep in mind that juvenile suspects and parents must get a copy of the petition, but it is not required for victims. Depending on the petition number, the 602 Petition, if the petition is valid, the juvenile suspect becomes a ward of the court and is referred to as "delinquents". There is also one type of petition, the 601 Petition, but it is for minor offenses only so it is rarely used and the status of the child becomes "status offender".

2. *Detention dan Initial Hearing*

A child who is officially a suspect will also be detained by the court and will attend a hearing. At the hearing, the alleged crime will be read out and a bargaining system may apply, whereby the child can accept or reject the charges. If the child is under supervision, the judge can decide whether the child should remain under supervision or stay at home.

3. *Pretrial Conference dan Motion Hearing*

At this stage is the proposal to settle. The aim is to determine whether the case will be resolved through settlement or proceed to trial. The prosecution can also discuss the evidence. If there are legal issues, the prosecutor can apply to the judge to resolve the issues.

4. *Transfer Hearing*

For children over 15 (fifteen) years of age suspected of committing serious crimes Where a juvenile suspect is suspected of committing a serious crime, the judge may consider whether or not to send the juvenile to the criminal court.

5. *Jurisdictional Hearing*

During this process, the trial can be formally opened. The child may admit to all or part of the charges to avoid a hearing. However, if the hearing is held, the judge can decide whether the child committed the act as charged. Keep in mind that juvenile proceedings do not include a jury. The prosecution must present evidence which is then countered by the defense lawyer. If the judge is of the opinion that the evidence submitted to the court is insufficient, the trial will be terminated and the child can return home. On the other hand, if there is evidence that the juvenile defendant committed the crime, a sentence will be determined.

6. *Disposition Hearing*

In the decision hearing, the judge read out the report from the probation officer. The report contains a statement from the probation officer as to what remedies should be imposed on the juvenile, the juvenile defendant, the parents of the juvenile defendant, the minutes of arrest, a report from the school, and a statement from the victim. The victim is also allowed to attend the hearing at this stage, before which the victim and/or the victim's parents will be given formal notice and can testify as victim witnesses. The verdict can be in the form of probation in a residential or foster home or institution, sent to a camp for probation or ranch, sent to a rehabilitation center (Secure Youth Treatment Facility) or for rare cases instead of being sent to the regular court, the child can be sent to a juvenile correctional institution or Division of Juvenile Justice.

Around the 1980s and into the 1990s, states began major reforms to the juvenile justice system aimed at "hardening" the system. One of the most widely approved reforms was the transfer mechanism whereby the juvenile court had the power to send juvenile defendants for

trial in the regular or criminal courts. This development indicates a change that emphasizes punishment, and is less centered on the juvenile court's ability to protect the child. The increased use of the transfer mechanism has also become something that has a strong tendency to criminalize children. The decision to send a child to the regular court lies within the power of the judge, which is now referred to as "judicial waiver". It is currently the most frequently used mechanism in the courts. (Steven N. Zane, 2016).

In the juvenile transfer mechanism, in addition to judicial waiver, there are also several other transfer mechanisms such as:

1. Legislative waiver can also be referred to as automatic transfer where the decision lies with the legislative body of the jurisdiction of the accused child. This mechanism has the dual purpose of defining and narrowing the minimum age at which a child can be sent to the ordinary courts of the jurisdiction and defining the range of cases between the juvenile and ordinary courts;
2. Prosecutorial waiver or concurrent jurisdiction is one of the mechanisms that authorizes the prosecutor to determine where the juvenile defendant will be tried, thus giving the prosecutor the most power (John Burrow, 2008).

Under Section 707 of the Welfare and Institutions Code - WIC, Division 2. Children, Part 1. Delinquents and Wards of Juvenile Court, Chapter 2. Juvenile Court Law (California State Law), a juvenile defendant may be sent to the general court as if convicted of a serious crime such as murder, arson, robbery, rape (including sodomy), kidnapping for ransom, kidnapping for the purpose of robbery, kidnapping causing serious injury, attempted murder, assault with a firearm, and so forth. The dispatch is subject to an evaluation supported by a report on: (i) the seriousness of the crime committed by the child; (ii) whether the child can still be rehabilitated even after leaving the juvenile justice jurisdiction; (iii) the history of recidivism; (iv) the success rate of the child's recovery; and (v) the situation and conditions when the child committed the crime (whether the child was the main perpetrator and so on).

## CONCLUSION

Speaking in modern times like today, although it is still divided between the two largest legal systems in the world, the reality is that no country purely adheres to civil law and common law. Countries also adopt provisions from other countries even though they have different legal traditions, such as Indonesia which brought customary law or living law into the Criminal Code even though customary law is actually unwritten law because it lives in indigenous communities, but is finally recognized in written law.

In comparing the juvenile justice systems in Indonesia and the United States, it turns out that there are many similarities and differences in them, such as how Indonesia promotes and prioritizes the welfare and best interests of children no matter what crimes they commit, but for the United States, although it still prioritizes the best interests of children, but for certain crimes that are included in serious crimes, the state will not hesitate to punish children as severely as using the juvenile transfer mechanism. Of course, this difference makes these countries have their own systems that may or may not be acceptable.

In essence, comparative law is not intended as a competition as to which legal system is better and which is worse, because a legal system itself must have its own uniqueness and shortcomings and is considered to be in accordance with the habits of the people in their country of origin. It cannot be denied that this legal system cannot always be fully implemented in the legal system of the country concerned. Considering the culture and legal habits of that country, it must always be taken into account, especially for legal researchers and law makers in the future. Consideration of the advantages and disadvantages of having regulations can also be used as a benchmark in making regulations.

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