

PROSPECT FOR THE FUTURE INDONESIA JUVENILE JUSTICE

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ABSTRACT

Artikel ini disusun pada tahun 1995, ketika Indonesia belum mengundang UU No. 3 tahun 1997 tentang Pengadilan Anak dan bermaksud untuk mendiskusikan model pengadilan anak khususnya berkaitan dengan penerapan doktrin "parens patriae" suatu doktrin yang pada dasarnya memandang negara memiliki kepentingan dan kekuasaan terhadap anak-anak. Doktrin ini memberikan landasan pada negara untuk melakukan intervensi yang cukup besar terhadap kehidupan anak.

Mengingat artikel tidak disajikan semata untuk pembaca yang memahami latar belakang hukum Indonesia, maka juga dibicarakan secara garis besar mengenai hal yang mempengaruhi perkembangan hukum Indonesia dan sistem peradilan pidana pada umumnya.

Analisa dalam menerapkan doktrin "parens patriae" didasarkan pada pengalaman dari Amerika Serikat dan menerapkan doktrin dimaksud. Sekalipun doktrin ini telah menimbulkan beberapa persoalan, penerapan doktrin tersebut tetap merupakan suatu pilihan yang sesuai dengan namun sistem sosial serta sistem peradilan pidana di AS.

Secara umum dapat dikatakan bahwa doktrin "parens patriae" tidak tepat untuk diterapkan di Indonesia dengan mengingat pada perbedaan sistem sosial serta sistem peradilan pidana Indonesia pada umumnya yang lebih bersifat rehabilitatif dibandingkan dengan sistem peradilan pidana di Amerika Serikat yang lebih bersifat retributif.

INTRODUCTION

Indonesia does not have a separate system of juvenile justice. Indonesia's juvenile justice system is incorporated with the criminal justice system. All juvenile cases become the jurisdiction of the State Court, which has jurisdiction over civil and criminal cases for both adult and juvenile. However, there are some special laws dealing with procedures and sanctions applicable for juveniles who are involved in the criminal justice system.

Since 1950's, there have been some efforts by Indonesian scholars and law enforcement agencies to give more attention to juvenile justice. Focusing more attention to juvenile justice is a response to the increase of juvenile delinquencies found in several big cities in Indonesia. These efforts resulted in particular policies concerning procedures of juvenile cases in the criminal justice system. The goal of juvenile justice reform activists is to set up a new juvenile justice system which concerns on the welfare of juvenile. One attempt at reform occurred in 1967, when Institution of National Law Development proposed a draft of the Juvenile Justice Act. One of its major goals was to set up a juvenile court. However, the draft have failed to have response from Indonesia's legislative body.

The purpose of this paper is to discuss the Juvenile Justice Act draft, especially in dealing with the philosophy of Indonesia's juvenile justice and the attempt to set up a separate juvenile court for juvenile. The discussion will use the US juvenile justice system as a comparison in order to help the analysis. In order to gain a better understanding about Indonesia's juvenile justice system, this paper also provides a short discussion about Indonesia's legal and judiciary system.

AN OVERVIEW OF INDONESIA'S LEGAL AND JUDICIARY SYSTEM

For about 350 years (from 1600's to 1945), Indonesia had been colonized by the Dutch. Due to Dutch colonization reason, Indonesia has implemented a civil law system; that is a system of law used in the Netherlands. Indonesia's law has been based on Dutch laws. These laws, with particular changes to make the laws consistent with the conditions and values of Indonesian society, have been affirmed as the core of Indonesian legal system. Particular constraints in implementing Dutch law especially in regard with language barrier and the need for new laws, which suitable for present situation,

encourage lawyers and politicians to call for law reform. One of the noticeable law reforms is a Code of Criminal Procedure and in the near future there will be another new national law, that is a Criminal Code. However, the main idea of the new laws are similar with the former laws. This is mainly because the long term of the colonization make the concepts of the Dutch laws have been accepted especially among Indonesian decision makers who have been familiarized (through training) with western (Dutch) concepts of law. The main difference between the new laws and the old laws is that the new laws provide better human rights protection.

In addition to the Dutch laws and other national laws, there are also Adat laws. These laws are considered unwritten laws and part of customs (adat) which have consequences in law. Every ethnic group has its own Adat law which different from one ethnic group to the other. During the Dutch colonization, Indonesians remained subject to their own Adat law, except for particular legal matter they became the subject of the Dutch laws. Following the Indonesian independence and encouraged by the necessity to build nationalism, the unity among ethnic groups in Indonesia became an important issue. For this purpose the Indonesian Constitution laid down the unitary principle among ethnic groups in Indonesia. This principle has influenced Indonesian law development by which the People's Consultative Assembly (the highest legislative body) stresses the development of a unitary system of law. The idea of the unitary system of law has been realized through the enactment of national laws. One example is the Marital Act in 1974, which accommodates a number of marital norms such as Moslem, Christian, Hindu, and Adat into one national law.

Whatsoever, the unitary system of law has weakened the existence of Adat laws as positive laws. In some instances, national laws do not fit with the idea of justice of particular local societies. In trying to reduce the tension between national laws and other local norms which have not been absorbed into national laws, Indonesian law (Judicial Power act) obligates Judges to find, to consider and to accommodate the local norms into their decisions.

The main principle of Indonesian judiciary system is legislated in the Indonesian Constitution, called the 1945 Constitution. The Indonesian Constitution laid down that judicial power shall be exercised by a Supreme Court (Mahkamah Agung) and other Courts. The Supreme Court is the highest judicial power in Indonesia. In addition, there are a number of lower Courts which are divided into four different Court systems: General Courts, Military Courts, Religious Courts, and Administrative Courts. Each court system has three layer system where the Supreme Court is the highest layer of the four

Court system. In this manner the Supreme Court functions as a cassation Court, that is the Court has power to annul or to quash decisions of inferior Courts based on legal incompetency. The Supreme Court also has exclusive jurisdiction in all jurisdictional disputes between courts of different court systems. Also, between one and another High Court, and between one and another District Court located in different High Court's jurisdiction.

General Courts consist of a number of Courts, called State Courts (Pengadilan Negeri). The State Courts, which set up at each second level of local administration (District), function as Court of the first instance and has jurisdiction in both civil and criminal cases. The High Court (Pengadilan Tinggi) functions as appellate Courts in this system of court, which is set up at most of first level of local administration (Province).

The other system of Courts such as Military Courts, Religious Courts, and Administrative Courts have a similar layer systems as the General Courts. The difference among the different Court systems is in regard with legal competency of each system. Military Courts is competent for criminal cases committed by members of Indonesian Armed Forces or by civilian who committed crime together with member of the Armed Forces where the crime harms military interest. The jurisdiction of Religious Court is to handle cases concerning particular family disputes of the Islamic faith. Religious Courts deal with such disputes as inheritance, dowry, gifts, and divorce. In these family matters, the judges of Religious Court implement Islamic law as the main source of law. Another Court system is the Administrative Court which functions to handle cases in regard with administrative laws. Included are the jurisdictional dispute between State's organization and the court is competent to review policies of the local or central administration.

THE PRESENT INDONESIA'S JUVENILE JUSTICE

Different from the juvenile justice system in the United States where there is separate juvenile court dealing with dependent, neglected, and delinquent children. Even though the Indonesia Constitution mandated that neglected children shall be cared by the State, Indonesia has no legal procedure to care for these cases. In regard with delinquent children, there is no separate court for children, therefore they are subject to the jurisdiction of General Court, as well as, adults. There are two procedures for cases dealing with deviant children: criminal and civil procedure (Yustham, 1979:127-137).

Criminal Procedure

The criminal procedure is applied to children who committed in criminal conducts either for felony or misdemeanor. Indonesian Criminal law allows several exceptions for juvenile offenders who commit crimes before the age of sixteenth. For those under sixteen, Criminal Court Judge has three options for court disposition if a child is found guilty of a crime. The first possibility is to surrender the juvenile to his/her parent/legal guardian without any sentencing. The second option is to put the juvenile to become "civil child", that is to surrender the juvenile to the State. The State is then responsible for the welfare of the juvenile until the juvenile reaches the age of eighteen. In this case, the judge may not determine the length of the service (Lamintang, 1985:38). The State also has a power either to surrender the child to foster parents, to surrender the child to private agencies (funded by the State), or to send the juvenile to a State Training House (Wahyono, 1993:77). The third option for criminal Judges is to sentence juveniles. The sentence options for juveniles are more lenient than adults. For an adult criminal the options are: fine, incarceration, imprisonment, life sentence or death penalty. In addition, there are also additional sentences such as revocation of particular rights (such as parental rights), confiscation of particular goods, and public announcement of the conviction. Included in the sentencing option is probation. Probation only can be applied for juveniles convicted for felony or misdemeanor in which the maximum sanction of the crime is no more than one year of imprisonment or the only possible sanction is incarceration.¹

Convicted juveniles are exempted from some of the sentence options available for adult criminals. The first difference is that the maximum imprisonment or incarceration for juvenile offenders must be reduced for one third of the maximum imprisonment stated in the relevant article of the criminal code. If imprisonment or incarceration was provided to a guilty child then the child must serve the sentence in a special facility for juveniles. The second exception, is that the death sentence or life sentence shall not be applied to children. In criminal cases which carry a death penalty or a life sentence then the maximum penalty for those crimes will be fifteen years of imprisonment. Third exception is that additional sentencing such as revocation of

¹ Indonesian Criminal Code differentiates between imprisonment and incarceration. Incarceration is primarily for misdemeanor and for sentences of maximum of one year. For convicts who serve for incarceration, they deserve particular advantages better than their counterpart who serve for imprisonment.

particular rights and public announcement of the conviction can't be applied for juvenile offenders.

These exceptions for juvenile offenders has been implemented in Indonesia since 1915. However, during the Dutch colonization, there were no policies or legislation to provide special procedure for children in criminal cases. The procedure for juveniles similar to adult offenders.

In 1954, the first special criminal judge for juvenile cases was appointed in Jakarta. But policies concerning exclusive procedure for juveniles in criminal cases was not implemented in Jakarta until 1957. However, these policies were not laid down in a formal form of law but rather were a verbal agreement among criminal justice agencies: the Police, the Prosecutor, and the General Court. The agreement covers: 1) Policemen, prosecutors, and judges are not to wear uniforms or robes when in contact with juveniles; 2) In detention facilities juveniles must be separated from adults; 3) Head of District Court should appoint special judges for juvenile criminal cases; 4) The nature of court proceeding is closed for the public; 5) The parent is present in court proceedings 6) Court proceedings are held in specified days (separate from adult criminal court proceedings); 7) Correctional Institution appoints officials to help the proceeding in making a social report or case study (Yustham, 1979:129). In 1959, the Supreme Court issued a circular letter² to recommend exclusive proceeding for juvenile. This recommendation was by and large similar with the agreement.

The formal legislation concerning juvenile proceeding can be found in Criminal Procedural Code (1981) and Regulation of the Minister of Justice (1983). However, these formal legislation are very limited. There is only one article in the Criminal Procedural Code which states that juvenile criminal court proceedings are to be closed from the public. In addition to the Criminal Procedural Code, Regulation of the Minister of Justice also legislates juvenile criminal court proceedings. The Regulation consist of only four articles which deal with: the prohibition to wear robes in juvenile proceedings, juvenile court proceeding is lead by one judge³ except in particular matter it can be lead by a

²Circular letter is commonly used in Indonesian administration and mostly used by superior organization to provide instruction, guidance, or legal interpretation concerning particular matter. It is not acknowledged as formal legal source, but to a large extent it has some practical effect.

³Indonesian criminal court proceedings is lead by a panel of judges that consist of three judges. A single judge is allowed to lead a proceeding in minor criminal cases or traffic violation.

panel of judges, proceedings are held closed to the public except in disposition (verdict) proceeding, the presence of parent or legal guardian in the proceeding, and the article which allows a judge to order to officers of the Justice Department to provide social reports on the welfare and behavioral report of the accused child. The availability of social report is not an absolute requirement. It fully depends on the judge's opinion.

Civil procedure

This procedure is addressed for cases where a parent or a guardian of a child has exhausted or incapable to take care the child because of incorrigibility or other deviant behavior. In this matter, the parent may file a case in civil court in order to surrender the child to the state or to a private agency. The maximum of this rehabilitation program is one year, but for children under the age of fourteen the maximum length of the program is six months. The judge may provide an extension for a period no longer than six months. This program does not terminate parental rights. The parents reserve the right to terminate the service.

Nevertheless, this procedure is rarely used. A study has not been conducted to answer, why families with incorrigible children do not use civil procedure? However, it may not be used because of the acceptance of the concept of extended family among Indonesian society. According to this concept, children are not only members of a family but are also members of a group of families based on blood relation. Therefore children are not merely a responsibility of their parents, but to a large extent the extended families is responsible for the welfare of the children. In this manner, the failure of particular parents in handling their children will tend to be solved by surrendering the deviant children to extended family member family who are considered capable to provide relief. Another possible reason concerning the lack of family in exercising civil procedure is the lack of knowledge by society regarding the procedure. Also Indonesian society may simply not trust the state in its ability to provide services because of the lack of professionals dealing with child/adolescence guidance.

THE NEED FOR JUVENILE JUSTICE REFORM

Why is juvenile justice reform needed in Indonesia? Many criticisms have been addressed by Indonesian lawyers and scholars concerning Indonesia's present juvenile justice system. The criticisms are mainly addressed to the limited protection for children. Actually, the need for reform depends on goals that want to be achieved. Since child

protection has been viewed as a new goal for the juvenile justice system, the need for a reform is clear because the present juvenile justice system was not designed for that purpose. Basically, present Indonesian criminal law do not differentiate between adult and juvenile criminal (Staa, 1979:43). The law uses the legal term criminal to address adult criminal or juvenile criminal. The only distinction is in terms of sentences in which convicted juveniles receive a more lenient punishment as compared to adult criminals. However, this distinction was not created to provide special treatment or protection for juveniles. Rather, the distinction was more likely as a consequences of the concept of justice embraced in Indonesian criminal law. Even though article 45 of Indonesian Criminal Code provides three alternatives disposition (to surrender the child to his/her parents or legal guardian, to surrender the child to the state ("civil child"), or to give sentences), the selection of those alternatives is not based on the best interest of the child. For example, in order to surrender the child to the state, the law doesn't require the inability or the exhaustion of the parents. Instead the law requires that this alternative is applicable for a child who committed a felony or recidivism of particular misdemeanors. In short, the law states that surrendering the child to the state requires higher level of deviant behavior than to surrender the child to the parents.

Indonesian criminal law, as well as other criminal law in countries employing civil law system, views a criminal act from two perspectives. The first is the perspective of the conduct, that is an objective element in regard with criminal action and the result of the action. The second is the perspective of responsibility, that is an subjective element attached in the individual. The subjective element are individual's conditions (element of mind) which influence the directions of individual's behavior. Included in the subjective element are feeling of fear, intent, negligence, insanity, maturity, etc. Since civil law system also views criminal conduct as a sin, the subjective element (element of mind) become very important in determining a punishment. Accordingly, juvenile criminals deserve a more lenient punishment, not because the law is concerned for the protection of the juvenile but rather the belief of a relatively low level of guilt available in juvenile's mind. Juveniles are assumed to be less mature than adults in making a decision to commit a crime. The law views the lack of maturity as a factor to mitigate punishment or to excuse the crime. That's why under Indonesian criminal code, articles concerning juvenile criminals have been placed under the section of "mitigating circumstances." Based on this perspective, juvenile justice reform is needed to secure convicted juveniles to have appropriate sentences or treatments. Actually, juvenile justice reform movement began in the mid 1950s. It was a time when Indonesian law enforcement

agencies realized the need to provide special treatment for delinquent juveniles. This belief was reinforced by the increase of juvenile delinquencies in Jakarta (Notowidagdo, 1979: 32). Accordingly, early juvenile justice reform movement occurred only in Jakarta and later spread to several large cities in Java such as Bandung, Surabaya, and Semarang. The movement brought about some improvements concerning juvenile justice, but only in terms of juvenile criminal court proceedings. This effort is far from sufficient in providing juvenile protection. The nature of the new laws regarding juvenile criminal court proceeding is temporary, in waiting for the enactment of a more comprehensive law concerning juvenile justice. A first draft of the Juvenile Justice Act was drafted by Institution of National Law Development (INLD) in 1967, but it did not receive a positive response from the legislative body. In 1977, the INLD organized a workshop, dealing with the draft of Juvenile Justice Act. The workshop hope to promote the draft in the Indonesian society and to encourage the Government in increasing its concern on child protection issues (Soekito, 1979:13). The workshop resulted in some changes of the draft, mostly dealing with details of the draft, but making no changes on the main ideas. Again, the draft of Juvenile Justice Act has never been passed to become a positive law. The failure of the draft to become a positive law was not because the legislative body rejected the draft, but it more likely the juvenile justice reform was not viewed as a priority. Continuing until present day, the legislative body is more concerned with economic issues.

Since the draft has not been rejected, it is relevant to discuss important points of the draft. Some important points of the draft are dealing with the philosophy of Indonesia's juvenile justice system and the idea to establish a separate juvenile court.

PHILOSOPHY OF INDONESIA'S JUVENILE JUSTICE

A discussion concerning the philosophy of Indonesian juvenile justice is very important, because it lays down a foundation of the juvenile justice. The philosophy not only determines the form of juvenile justice but also the success of the juvenile justice to remedy the problem of juvenile delinquency in Indonesia. Furthermore, the philosophy must also fit the social conditions found in Indonesia.

What is the philosophy of Indonesian juvenile justice? The draft of juvenile justice act do not clearly state the philosophical background of the future juvenile justice system. However, the consideration of the draft states that "in regard with the special position of children and in order to achieve the child's welfare, a special court is needed".

In addition, article 4 of the draft states that "juvenile court decision should place the welfare of the child as a priority in addition to public interest." This statement means that the child's welfare should not be sacrificed in order to protect public interest. Furthermore, the draft intends to place delinquent children, neglected children, and adoption cases under one jurisdiction. All those cases would become the jurisdiction of the juvenile court. Based on these indications, it seems that the drafters attempted to duplicate the U.S. juvenile justice system. Included in the adoption is the "parens patriae" principle. That is a common law doctrine in which the state is considered the ultimate parent and guardian of all children and therefore responsible for the care of all children (Ryerson, 1978:63).

The question is whether the parens patriae principle is appropriate for juvenile justice in Indonesia? To answer to this question is very difficult since Indonesia has no experience in employing the doctrine. However, Indonesia can learn from the United States, which has a long history dealing with the doctrine. Even though, what is good/bad in the U.S. may not be good/bad in Indonesia, at least we can learn from the problems which have resulted from the adoption of "parens patriae" doctrine in the U.S.

PARENS PATRIAE DOCTRINE IN THE US JUVENILE JUSTICE

In the US, the "parens patriae" doctrine influences how the juvenile court functions. The function of juvenile court is not to punish, or to determine whether a child is guilty or innocent. Judge Julian W. Mack, a pioneer of the U.S. juvenile court, states that:

The problem for determination by the Judge is not, has the boy or girl committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career (McCarthy, 1989:57)

Accordingly, the task of juvenile court is not to find justice in terms of retributive action, but, rather to provide social justice. This idea of social justice flourished at the time when juvenile court first emerged in the US. For this reason, the procedure of juvenile court was not only designed for the purpose of finding the truth, but also to probe the problems of children and to find appropriate solutions for them. In this respect, juvenile court proceeding was designed to become informal and its nature was a civil proceeding even in cases dealing with juveniles who committed serious crimes. One remarkable difference

between juvenile court hearings and adult criminal court hearings, is that in juvenile court hearings, the judge encourages all participants (child, parents, defense lawyer, probation officer, and prosecutor) to work together in order to find a solution. The solution should be in the best interest of the child. While in the U.S. criminal court, which used adversarial system, the parties are in a confrontation. Some called the American Adversary system as "Set the Parties Fighting" system. Judge Learned Hand observed in 1935 that: "it is impossible to expect that a criminal trial shall be conducted without some showing of feeling; the stakes are high and participants are inevitably charged with emotion." (quoted in Gardner, 1988:6).

In the US, some criticism have been leveled at juvenile court. The critiques are in terms of its informality in the proceeding and its leniency in sanctions. Constitutionalist criticism argues that juvenile court denies the principle of due process of law (Faust, et.al. 1977:206-209). On the other hand, juvenile court have employed indefinite sentences which has been viewed as punitive and injustice. In response to this issue, the U.S. Supreme Court, through its decisions, made a big shift to juvenile court proceeding. In re Gault (1967) laid down several rights for children in juvenile court. Included in these rights are the right to be noticed of the charge, right to council, right to have privilege against self incrimination, right to transcript of the proceeding, and right to appellate review. Another Supreme Court decision is in the case of In re Winship (1970) required juvenile courts to establish the highest level of proof (beyond reasonable doubt) in an adjudication of delinquency. This requirement is similar to the requirements in adult criminal court.

The lenient sanctions have been blamed for the increase of the crime rate and the level of violence being committed by juvenile offenders (Frost et.al, 1991:331). The criticizer believe that the juvenile court gave too much attention to the problems of juvenile offenders and neglected the victims and the community which also needs protection. In response to the need for harsher sanctions for young criminals, transfer of juvenile offenders to criminal court has become a favored policy (Fagan et.al, 1990:324). The transfer policy has been chosen in order to maintain the philosophy of juvenile court and at the same time may serve the need for harsher sanction. Under the transfer policy, juvenile court waives its jurisdiction on juvenile offenders who committed serious crimes. And, these type of juvenile offenders have become the jurisdiction of criminal court as well as adult criminal. The transfer policy assumes that for some juvenile offenders, the juvenile justice system is not sufficient to fulfill the public need of justice and to rehabilitate the offenders (Frost et. al, 1991:338).

Changes in the U.S. juvenile justice system illustrate that the U.S. juvenile justice employs two different approaches: a modern social justice approach which focuses on treatment/rehabilitation and retributive justice approach that focuses on punishment. The adoption of the two approaches is caused by a failure of the "parens patriae" doctrine to cope with current problems of the U.S. children. The failure is also caused by the denial of society in dealing with methods in treating some delinquent children. To a large extent, society still believes in retributive justice. Even though there is no strong evidence that retributive justice can solve juvenile delinquency as a social problem, but retributive justice is needed in fulfilling the sense of justice of the society.

PROBLEMS IN EMPLOYING PARENS PATRIAE DOCTRINE IN INDONESIA

Informality of the Proceeding

Learning from the US experience, the adoption of "parens patriae" doctrine for Indonesian juvenile justice system may also have some problems. However, the problems facing the US society are different from the problems facing Indonesian society. As discussed above, the "parens patriae" doctrine has created an issue concerning the lack of due process in the U.S. juvenile court. In Indonesia, this issue will not as serious as in the U.S. Indonesia's criminal court does not employ an adversarial system but rather accusatorial system. Accusatorial system acknowledges a limited rights of the defendant, and it doesn't place the rights as important as in the adversarial system. Unlike the adversarial system, which is based on the assumption that truth and justice rise from a proper process, accusatorial system views the truth and justice do not have to be resulted from a proper process. Accordingly, a denial of defendant's rights does not always result in a defect process which can bring legal consequences. The denial of defendant's right is more likely to be viewed as a personal misbehavior (officer misbehave) that may cause an administrative or criminal sanction for the officer. Furthermore, Indonesian Constitution does not contain rights for individuals in the criminal justice system. Therefore, informality in juvenile court would not be a legal problem in Indonesia. However, it doesn't mean that juvenile's rights can be ignored. Juvenile's rights in juvenile justice system is very important in producing justice. Gosita (1986:50-51) suggests that justice is a condition where individuals, including children, are able to realize his/her rights as well as his/her duties. Children should not only be burdened with duties such as going to school or obeying his/her parents, but they also deserve certain rights. The equilibrium between the duties and the rights is a condition for justice.

Further, he argues that perception of individual rights should be developed in the early development of human. Accordingly, juvenile justice reform should enhance children's rights. Soedarto (1986:140-141) argues that the most important rights of children in the juvenile justice system is the rights to participate in the proceedings. Especially in determining the best interest of the child. Without any participation from the child, a court disposition may cause a child to suffer instead providing a cure. This can occur when "the best interest of the child" is defined based on the perspective of the judge and not from the perspective of the child. To a large extent, participation of the child can eliminate mistreatment or other inappropriate punishment.

Leniency of Sanction

Leniency of sanctions for juvenile will not be well accepted by Indonesian society especially in cases where juvenile committed in serious crimes. However, it can be predicted that rejection in Indonesia is weaker than in the U.S. society. Indonesian society is more familiar with soft punishment over adult or juvenile criminals. According to Indonesian criminal code a maximum imprisonment is 20 years. This rule applies not only for a criminal conduct but for all criminal conducts committed by a criminal before he/she is adjudicated. For example, an individual who committed more than one second degree murders, the maximum sanction will be no more than 20 years of imprisonment. In practice the average sentence for second degree murder is less than 10 years imprisonment. Life sentence and death sentence are given for limited crimes and are rarely used. In 1964, the function of imprisonment was changed from retributive to re-socialize and to re-educate criminals. To enhance this function, imprisonment is administered based on principles to encourage rehabilitation (Soemadipradja, 1979:13-16).

Informality in juvenile court proceeding, indefinite sentence, and leniency of sanction are main issues in the application of "parens patriae" doctrine in the U.S. It seems that these issues will not be as serious in Indonesia. The main problem in adopting "parens patriae" doctrine deals with the enlargement of the power of the state to intervene in the life of children, especially in the case of status offenses.

Status Offense

Article 1 (2) of the Indonesia juvenile justice act draft defines delinquent child as those who: a) committed crimes, b) incorrigible, c) runaway from home, d) hang around with criminals or other immoral individuals, e) frequently visits places which are prohibited for children, f) frequently uses suggestive remarks, g) committed other

conduct which may harm his/her personal, social, spiritual, and physical development. The definition includes not only criminal offenses but also status offenses as described in points b through g. Indonesian juvenile justice system has never acknowledged status offenses. The enactment of status offense will become a big shift in the relation between the state and society.

In the U.S., the enactment of status offense for juvenile has also been criticized especially from the perspective of dissimilarity of what is considered illegal conduct of individual behavior. Behaviors such as truancy, running away from home, incorrigibility, etc., are not considered criminal acts for adults, but are illegal if committed by minors. According to "parens patriae" doctrine, the state is allowed to intervene into family government in order to care for children who need assistance. The intervention produces a conflict with the right of parents over the custody of their child. In the U.S., the conflict is solved by limiting the behaviors which deserve court intervention and providing a judicial mechanism that should be set up to deal with the intervention in a limited manner. One solution, given by the Juvenile Justice and Delinquency Prevention Task Force, is the court should determine that all possible alternative efforts to assist the child and the family have been exhausted (McCarthy, 1989:170-175). In this respect, the right of the state to intervene is placed lower than the right of the parents. The solution seems simple and acceptable in a society like the U.S., which has a concept of family as nuclear family. In this kind of family concept, if parents failed to educate the child then the state has the social responsibility to assist the child.

In Indonesia, the solution will be more complex and difficult. The problem is that the concept of family in Indonesian society is the extended family, instead of the nuclear family. The function of the extended family is strong especially in a traditional society like Indonesia. The traditional society can be found in the countryside or villages in Indonesia, where about 80% of the Indonesian population live (Soekanto, 1990:31). In this type of society, the state can't easily replace the role of parents. According to the concept of extended family, family memberships is not defined as parents and their children, but it is defined by blood relation. Children are members of a big family. Uncles, aunts, and grandparents are also parents of the children. Together they share their social responsibilities for the welfare of their nephews or their grandchild. This responsibility is not easily replaced by the state, especially if the families capable to provide assistance. Other family members will take over the role of parent when the mother or father feel overwhelmed by the role. Even if all members of the family were not able to take the responsibility, they still have more favorable alternatives instead of

state intervention. Informal alternatives are favored rather than a formal approach like state intervention.

Furthermore, formal state intervention in family government is not common in the Indonesian society. Even in juvenile criminal cases, especially in misdemeanor or other trivial crimes, formal approaches are rarely used by the state. The state is more likely to encourage the family or the community to resolve the problem. In a traditional society ("Adat" society), civil or trivial criminal cases will be solved through "Adat" procedure. Juvenile delinquency, either criminal or non criminal, tends to be solved through religious approaches. In cases where parents or other family members were not able to care for a deviant child, they tend to ask assistance from religious leaders. Traditional and non traditional Indonesian families (Muslim families) favor voluntarily surrender of their deviant children (included drug addicted children) to "Pesantren"⁴ (traditional Islamic school) which utilizes Islamic moralistic approaches to rehabilitate the child. This method is chosen because the Indonesian Muslim society believe that delinquent children are those who loosen their spiritual tightness. Sudarsono (1989:93) argues that from Islam perspective, spiritual tightness may keep children away from deviant behavior.

Accordingly, the enactment of status offense can alter the form of social relation. To a large extent, formal state intervention on family government will destroy the values system of the Indonesian society. Family relationships will become more loose and stimulate the function of nuclear family replacing the function of extended family. At a certain level, the breakdown of extended family will burden the state. In addition, formal state intervention will weaken the role of particular institutions in traditional society such as the role of "Kepala Adat" (chief of Adat) or other informal social figures such as local religious leaders.

DOES INDONESIA NEED A SEPARATE JUVENILE COURT?

The draft of Juvenile Justice Act proposes the establishment of a special court for juvenile as a part of the General Court System. This means that under the General Court

⁴"Pesantren" is traditional Islamic School. Actually, it is not specifically designed to deal with delinquent child. In most of the "Pesantren", they provide dormitory in which the students stay for a certain period of time. Tuition is not an absolute requirement, its' nature is more like a voluntarily contribution. Some "Pesantren" receive financial assistance from the state, but most of them are funded by the community.

System there will be a State Court (civil and criminal court) and a Juvenile Court. According to the draft, jurisdiction of the Juvenile Court includes delinquent children, dependent children, neglected children, trusteeship, and adoption. The purpose of establishing a separate Juvenile Court is to place all cases related to children under one jurisdiction. This is based on the idea to treat children differently from adult criminals and to employ different procedure rather than those used in criminal court. The question is, whether those goals must be achieved through a separate juvenile court? I argue that a separate juvenile court is not a necessary in order to treat children different from adult. These goals can simply be achieved by requiring criminal court to employ special procedure which are informal and by requiring the judge to consider the social and psychological background of the juvenile in the disposition. The procedure should also guarantee the participation of the juvenile in every hearing. In helping to have appropriate court decision, special judges who have knowledge about child development must be appointed. These special judges should act as judges of the State Court and their main objective is to handle juvenile cases for both criminal or civil.

A separate juvenile court will be very costly and inefficient. Since Indonesia consist of more than 13,000 islands, hundreds of juvenile courts will have to be established. It may cost trillions of rupiah (billions of dollar) for buildings, administrative equipments, and personnel selection. Additionally, a large amount of money will be needed to operate the juvenile courts. On the other hand, the number of juvenile cases in Indonesia may be relatively small, because the tendency of society is to solve the case through an informal approach. This situation is different in the U.S. where legal institutions such as the juvenile court are viewed as the primary institution to solve conflict. Indonesian society is more likely to view legal institution as the ultimate alternative after other informal/non legal procedure have been exhausted. Based on this perspective, a separate juvenile court will be inefficient. Other problem may also result because of the separation between adult court and juvenile court. Soedarto (1986:138-139) indicates that separate juvenile court may cause administrative problem such as conflict of competency between State Court and Juvenile Court.

Another problem that results from a separate juvenile court is found in the U.S. As already discussed before, the idea to place cases dealing with children under one jurisdiction has failed. The reason it has failed is that the U.S. juvenile court was not designed to deal with juveniles who committed serious and violent crimes. Bortner (1988:364-370) indicates the emergence of what she called a "Janus system of juvenile justice" , that is a system which consist of two subsystems. First is a subsystem which

emphasizes in keeping juveniles, involved in juvenile justice system, in the community and out of prison. And, the second is a subsystem which emphasizes on punitive approach. In the U.S., these two subsystem are processed by two different courts (Juvenile Court and Adult Criminal Court). Particular juvenile offenders are transferred to adult criminal court in response to the need of society for retributive justice. In the U.S., transfer policies (jurisdictional waiver) result in harmful implications. Some studies have shown that waivers are inconsistent, inappropriate, and discriminatory. A study in two counties in Florida, based on data gathered from 1981 to 1984, found that many prosecutorial waivers were inappropriate, and failed to target the most serious and chronic juvenile offenders (Bishop, 1991). Lee (1994) conducted a study in Maricopa County, Arizona, and found that seriousness of the crimes is an insignificant factor in determining waiver. The waiver is more likely determined by a record of prior waiver. Bortner (1988:367) argues that juveniles who are processed through punitive approach are predominantly and disproportionately poor, minority, and male.

The "Janus justice" is inevitably emerge not only in the U.S. but also in Indonesia. It is a result from the tension between the need to protect child and the need to protect society. Therefore, an implementation of a totally different system of justice for juveniles will violate the concept of justice of society. Adjie, Oemar Seno (1977:13), a former speaker of Indonesian Supreme Court, argues the juvenile justice system should give attention to the welfare of the accused child and public interest. This statement means that Indonesian juvenile justice should achieve the equilibrium between protecting child's welfare and protecting public interest. In the U.S. these two needs are processed through two different court. In Indonesia it is more appropriate to process the two needs in one court, that is State Court. Since the State Court has a duty to serve public interest, then the incorporation of juvenile justice into criminal justice can be achieved by modifying the duty of the State Court to include child welfare protection.

CONCLUSION

Indonesia does not have a separate juvenile justice system, the juvenile justice system is incorporated into the criminal justice system which include both adult and juvenile. The criminal justice system does not provide sufficient protection and is not really concerned with the welfare of juvenile involved in the system. For example, the leniency of sentence for juvenile is not based on the concern for juvenile welfare instead is based on mitigating circumstances. Accordingly, juvenile justice reform is necessary in

order to guarantee juvenile protection. However, the reform of the Indonesia juvenile justice system does not require a separate system from the criminal justice system. The reform will be more appropriate by applying exceptional or special rules for juveniles. Included are procedures on every layer of criminal justice proceeding and alternative treatments/sentences. In this respect, a separate juvenile court is not a necessary condition. Furthermore, a separate court is very costly and inefficient.

"Parens patriae" doctrine is not a suitable philosophy for Indonesia's juvenile justice system. The main problem in adopting "parens patriae" doctrine is the extent of state intervention. State intervention which uses formal or legal approaches on non criminal juvenile behavior is not appropriate for Indonesian society. To a large extent, the extension of formal state intervention will disrupt the concept of extended family and other social systems. Informal or non legal approaches such as assistance to families who have delinquent children, or assistance to informal social institutions that work for delinquent children are more acceptable and effective. The second problem is that "parens patriae" doctrine gives too much attention on delinquent children and fails to consider public interest and victims. Even though, Indonesian society is a forgiving society, punitive approaches have to be reserved for extreme/serious juvenile criminal cases. Retributive justice is a universal idea and it is a part of human nature. The practices of retributive justice can only be limited, but it never can be lifted out at all.

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