

Children and the Criminal Law: Legal Perspective as A Tool of Social Engineering

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ABSTRACT

Restorative justice in the juvenile justice system from a legal perspective as a tool of social engineering emerge several similarities and differences of opinion from each law enforcer regarding the implementation of diversion itself. Child investigators, prosecutors, judges and correctional officers are a unit included in a system called juvenile justice system, aimed at tackling juvenile delinquency while at the same time also being expected to provide protection to children who have problems with the law. The results show that the implementation of the principle of restorative justice in the juvenile criminal justice system is preferred to resolve the problem not only through legal settlement. But more than that, it provides an opportunity for the parties involved to determine solutions, build reconciliation as well as build good relations between victims and perpetrators. Legal form in reality (law in action) and legal form as a rule as in legislation (law in book), the ideal goal to be achieved initially departs from the *ius constituendum* (law aspired) in which the legal goal definitely to achieving justice.

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1. Introduction

Two significant events occurred in Indonesia in 2014 in relation to children in conflict with the law. First, Indonesia's Law No. 11/2012 on the Juvenile Criminal Justice System came into effect on 30 July, with the first minors being tried on 12 August 2014. Second, the United Nations Committee on the Rights of the Child (UNCRC) presented its concluding observations to Indonesia's periodic report. It is timely to reflect on the progress Indonesia is making in respect to children in conflict with the law.¹

¹ Davies, S. G., & Robson, J. (2016). Juvenile (In) justice: Children in Conflict with the Law in Indonesia. *asia-pacific journal on human rights and the law*, 17(1), 119-147.

Responsive law is a law that orient to result and objectives to be achieved outside of the law.² Such law where the legal order is negotiated and do not subordinated to win. The characteristic of responsive law is to look for values implied in regulations and policies, because basically the theory of responsive legal is a legal theory that contains a critical view. This theory views that law is a tool to achieve a goal.

In its developmental model, responsive law seeks to solve fundamental problems in building a political-legal system, where without such political-legal system it is impossible for legal and political developments to move in a better direction. The implementation of responsive law is inseparable from the close integration between legal and politics. The manifestation of this integration is the direct subordination of legal institutions to the ruling elites, both in the public and private sectors.

During this, it is realized or not, besides not fulfilling the sense of justice for communities, the existence of the law also poses a threat to the community. Such condition, a responsive law implies that law enforcement cannot be done separately. Enforcing the law does not only implement the law, but must have social sensitivity. It is time for law enforcers to be responsive as the foundation for the implementation of true justice from the social realities that occur in society.

Progressivism requires the support of enlightenment of legal thought and it can be done by a progressive academic community. The strength of progressive law does not completely dismiss the presence of positive law, but always anxious to ask "what can I do with this law to give justice to the communities". In short, it did not want to be a prisoner of the system and the law alone. Justice and happiness of the people is above the law.³

Thus, it can be said that law and social dynamics are two things that complement each other. The community gives life to law while the law directs the community towards its goal. As a view of sociological jurisprudence, good law is a law that is in accordance with the law that lives in society. Furthermore, this thought views that the relationship with positive law,⁴ it can only be effective if it is in harmony with the law that lives in communities and the center of development of the law is not located in the legislative bodies, judicial decisions or the science of law, but in fact is precisely located within the community itself.

The process of balanced and restorative justice orientation to protect the community, gives the opportunity for the perpetrator to be directly responsible to the victim and the community and to make a joint agreement between the victim, perpetrator and

² Mahmud Kusuma, *Menyelami Semangat Hukum Progresif, Terapi Paradigma Bagi Lemahnya Hukum Indonesia*, Antony Lib, Yogyakarta, 2009, p. 60.

³ Satjipto Rahardjo, *Membedah Hukum Progresif*, Buku Kompas, Jakarta, 2008, p.116

⁴ Aleksander Peczenik, *Scintia Juris, Legal Doctrine as Knowledge Of Law and as a Source of Law* (2005), Van Hoecke, chapter one, sections II.D and II.G of this volume. See also Carel Smith, 'Het normatieve karakter van de rechtswetenschap: recht als oordeel' ('The Normative Character of Legal Doctrine; Law as Judgement') (2009) 3 *Rechtsfilosofie & Rechtsteorie* 202 Arend Soeteman, 'Wetenschappelijke rechtsgeleerdheid. Commentaar op het preadvies van Carel Smith' (Scientific Legal Doctrine. Comments on the Preliminary Report of Carel Smith) (2009) 3 *Rechtsfilosofie & Rechtsteorie* 226, especially section 5.

community. All parties involved are brought together to reach an agreement on the actions of the perpetrators.

In this concept, the authors propose a theory about the concept of restorative justice which refers to the purpose of law as a tool of social engineering, where law as a tool of social engineering is involved in its function as an independent variable in which society functions as a dependent variable. Society is influenced by law so that it is formed in a form of community awakening. If so, then need a plan for the desired form of society. Achievement of the desired form of society is realized through the direction of the policy established through legal path.

2. Diversion Principle in the Criminal Justice System for Children: Legal Perspective as a Tool of Social Engineering

The main principle of implementing the diversion concept is persuasive action or non-penal approach and giving an opportunity for someone to correct mistakes by giving justice to the case of a child who has already committed a crime to the law enforcement apparatus as a law enforcer. Two justices are explained through a study of circumstances and situations to obtain appropriate sanctions or actions. The general description of the purpose of implementing the diversion, namely:

- a) Social control orientation, which the law enforcers hand over the perpetrators in the responsibility of communities' supervision, by observance of the approval or warning given. Perpetrators accept responsibility for their actions and do not expect a second chance for perpetrators by the community.
- b) Social services by the community to the perpetrators, to do functions to supervise, interfere, improve and provide services to the perpetrators and their family. The community can interfere with the perpetrator's family to provide repairs or services.
- c) Towards a process of restorative justice or balanced, which protects the community, gives the opportunity of perpetrator to be directly responsible to the victim and the community and to make a joint agreement between the victim, perpetrator and the communities. All parties involved are brought together to reach an agreement on the actions of the perpetrators.

According to Article 7 of Act No. 11 of 2012 concern the Criminal Justice System for Children must be sought at the level of investigation, prosecution, and examination of children cases at the hearing in court.

Based on findings of the research, the implementation of the principle of restorative justice in the juvenile justice system from a legal perspective as a tool of social engineering, emerge several similarities and differences of opinion from each law enforcer regarding the implementation of diversion itself. Child investigators, prosecutors, judges and correctional officers are a unit included in a system called juvenile justice system, aimed at tackling juvenile delinquency while at the same time

also being expected to provide protection to children who have problems with the law.⁵

Restorative justice is one of ADRs model which is aimed at crimes against individuals or members of communities rather than crimes against the State. In restorative justice, the parties involved are more prioritized to resolve the problem not only through legal settlement, but provide the opportunity for the parties involved to determine solutions, build reconciliation as well as build good relations between victims and perpetrators. This good relationship is useful to (one of them) suppress recidivism. In this case, the victim plays a major role in the problem-solving process and can file a claim as compensation to the perpetrator. In short, restorative justice emphasizes a balanced approach between the interests of perpetrators, victims and the community where there is a shared responsibility between the parties in rebuilding the social system in the community.

In *Alternative Dispute Resolution* (ADR), there are also government plans to amend Act No. 8 of 1981 concerning Criminal Procedure. This plan has been delayed for a long time, the reasons for this is the debate between legal experts with a legal-conventional view and those with a legal-sociological perspective. Especially those with a sociological legal perspective have long been influenced by the liberal thinking model in the framework of the criminal justice process, which has come to be known as the due process liberal model.

In this connection, it is inevitable if the use of ADR in this perspective is more felt to be developed by the police rather than the prosecutor or the court, given the role of the police as the initial gate of the criminal justice system. It can be expected that a case that has started by ADR, say so, will be more likely to be continued and ended by ADR as well rather than ADR being raised in the middle (when the case is handled by the attorney) or at the end of the criminal justice process (it is decided by the court).

Ratio decidendi is a Latin's expression meaning "reason for decision". In the field of law, *ratio decidendi* is a reason that is the subject of a decision.⁶ In the British general legal system, the doctrine of *stare decisis* applies, i.e. the court's ruling will set a legal precedent for further matters. Therefore, the court's decision consists of two elements, namely *obiter dictum* and *ratio decidendi*. *Decidendi ratio* is legally binding and the court in subsequent cases is bound by the precedent set by the *ratio decidendi*, while *obiter dictum* is only persuasive in nature.

The concept of the essence of the juvenile justice system includes a diversion process that must be completed at the investigation stage, with the maximum objective of prosecution, by presenting the public prosecutor. If the diversion is not successful, the case file is immediately submitted to the court. In the concept of this juvenile criminal justice, by measuring the concepts of investigation and prosecution that are combined in one process, the gap and its essence are in the principle of opportunity. From the

⁵ Gultom, Maidin, 2008, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak Di Indonesia*, Refika Aditama, Bandung, p.2

⁶ *Black's Law Dictionary*, p. 1135 (5th ed. 1979)

perspective of the Indonesian criminal justice system, the principle of opportunity is defined as the principle of law which authorizes the attorney general to prosecute, to a person or corporation for the public interest.

The principle of opportunity is called *deponering*, which means the exclusion of criminal cases for the public interest. However, can all criminal cases involving children dealing with the law be regarded as in the public interest? First, we must return to the definition, deepening, and position of the child itself in the laws and ideals of the nation.

Ideally, children as part of the younger generation are successors to the ideals of the nation's struggle and as human resources for national development going forward.⁷ Continuous developing is needed for the survival, physical and mental growth and development as well as protection from all possibilities that endanger or damage the future of children. Children are asset of the nation, as part of the young generation they play a very strategic role as the successor of a nation. In the Indonesian context, children are the successors to the ideals of the nation's struggle. In addition, children are the hope of parents, the hopes of the nation and the State that will continue to regenerate development and have a strategic role, having special characteristics or traits that will ensure the continued existence of the nation and State in the future. Therefore, every child must receive guidance from an early age, children need to get the widest possible opportunity to be able to grow and develop optimally both physically, mentally and socially.

In measuring the legal ratio in Act No. 11 of 2012 in producing restorative justice towards the conviction of children as a tool of social engineering, we will aim towards the ultimate goal of the distance ratio between law and justice which are essentially abstract in nature and fulfilled by the values of legal philosophy. The relationship between law and justice is built by the foundation of maxim, principal, postulate, and principle, so that law can be born in concrete. Law in action and legal form as a rule as in legislation (*law in book*), the ideal goal to be achieved initially departs from the *ius constituendum* (the law aspired) it is certain the legal goal in achieving justice.

Based on the interview with Kompol Ema Rahmawati as Kasubdit PPA (Women and Children's Services), a judicial review of UUSPA will be submitted in the future, mainly related to criminal provisions against police investigators who do not carry out diversion against children in conflict with the law (ABH). As for the development of supporting facilities and infrastructure of UUSPA, it has become the national priority program of the National Police since 2018.⁸

Although the legislators have made arrangements for the implementation of customary criminal law (although not explicit), based on observations so far, it has been revealed that normative formulations tend to get less attention for law enforcement. Therefore,

⁷ Ediwarman, 2006, *Peradilan Anak di Persimpangan Jalan dalam Prespektif Victimology (belajar dari kasus Raju)*, Vol.18 No. 1, April 2006, Jurnal Mahkamah, Pekanbaru, p.8.

⁸ Interview with Kompol Ema Rahmawati as Kasubdit PPA (Women and Children's Services) the Headquarter of Police of the Republic of Indonesia.

for the future criminal law (*ius constituendum*) can emphasize the recognition of the existence of customary criminal law.⁹

The legal paradigm has accommodated the criminal justice system as it should, only that improvements are still needed in terms of the quality of law enforcers, from the investigation, prosecution, examination at judicial events, to the stage of assisting children who are dealing with the law in the realm of rehabilitation. The need for monitoring to do in each province on the composition of officers who supervise and assist children, as well as centralization of data tabulation related to the implementation of diversion at each level.¹⁰

3. The Relation of Legal Logic Premise as a Tool of Social Engineering to the Principle of *Ius Constituendum*

Etymologically, logic comes from the Greek word *logikos* which means “relating to knowledge”, “relating to language”.¹¹ The Latin word “logos” (*logia*) means words. David Stewart and H. Gene Blocker in the book of “*Fundamentals of Philosophy*” formulate logic as “thinking about thinking”.¹² Patterson defines logic as “the rules of straight thinking”.¹³ Irving M. Copi in the book of “*Introduction to Logic*” formulates logic as “a science studying methods and laws used to distinguish true reasoning from false reasoning”.¹⁴

While reasoning is reason activity in understanding the meaning of each term in a proposition, connecting a proposition with other propositions and drawing conclusions on the basis of those propositions. Thus it is clear that reasoning is a form of thought.¹⁵ Another form of thought is the understanding or concept and proposition or statement. Understanding, proposition, and reasoning have inseparable relationships. Because reasoning requires propositions and propositions presuppose understanding. There are no propositions without understanding and no reasoning without propositions.¹⁶

Legal reasoning is the application of the principles of thinking straight (*logical*) in understanding the principles, rules, data, facts, and legal propositions. In legal reasoning, logic is understood more narrowly as the science of drawing conclusions in a valid manner from various data, facts, problems, and existing legal propositions. So

⁹ See the Draft Concept of Legislation of Criminal Code, Directorate General of Legislation, Department of Law and Human Right RI, 2019.

¹⁰ Interview with Mr. Naswardi and Robert, as special mediator of child at Komisi Perlindungan Anak Indonesia (KPAI),

¹¹ Harry Hamersma, *Pintu Masuk ke Dunia Filsafat*, Yogyakarta: Kanisius, 2008, p. 21

¹² David Stewart dan H. Gene Blocker, *Fundamentals of Philosophy*, 4th e., New Jersey: Prentice Hall, 1996, p. 45.

¹³ Edwin W. Patterson, *Logic in the Law*, University of Pennsylvania Law Review, Vol. 90, No. 8, 1942, p. 876

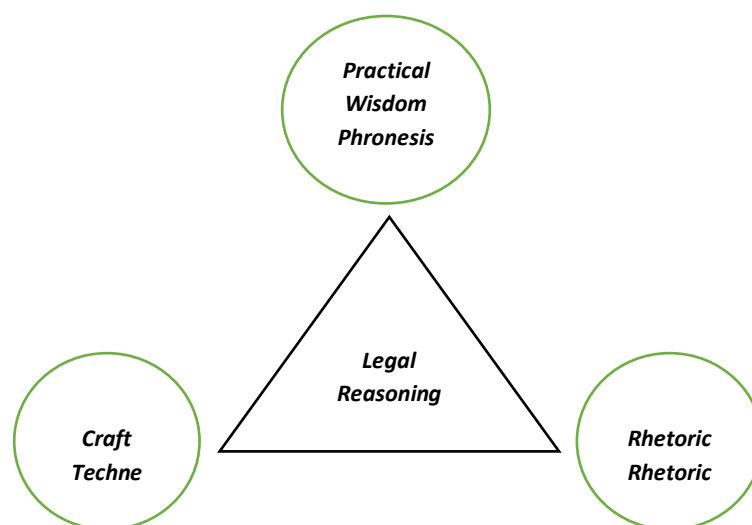
¹⁴ M. Copi & Cohen Carl, *Introduction to Logic*, Richmond-Tx., Prentice Hall, 1997, p. 3.

¹⁵ R. G. Soekadijo, *Logika Dasar: tradisional, simbolik, dan induktif*, cet. Ke-3, Jakarta: Gramedia Pustaka Utama, 2003, p. 3.

¹⁶ *Ibid*, p. 3.

the term “legal reasoning” actually does not indicate other forms of reasoning outside logic, but the application of the principles of thinking from logic in the field of law itself. In this sense there is no legal reasoning without logic (as a science of the right and valid rules of thought), there is no legal reasoning outside of logic. Therefore, legal reasoning must be understood in terms of “logical reasoning in law”.

Scharffs states that a good legal reasoning must combine practical wisdom, skills, and “rhetoric”. *Good legal reasoning is a combination of practical wisdom, craft, and rhetoric. The good lawyer is someone who combines the skills or character traits of practical wisdom, craft, and rhetoric. Each of these three concepts is an essential component of legal reasoning.*¹⁷ The relationship between practical wisdom, craft (rhetoric) and rhetoric (rhetoric) is illustrated by Scharffs through the following Figure 1.



The authors would like to give a brief comment on the three premises that are reversed by Roscoe Pound, which are both departing from needs, then made legal, and directed to manipulate society (a tool of social engineering). The problem is that the law in the context of Anglo Saxon and Anglo America is more interpreted as “judge made law”. That is, the main law-forming agent is the judge. Actually the capacity of judges to manipulate social is not as massive as what lawmakers can do in the tradition of the civil law system. The material that can be accommodated in the law also does not always depart from the habit, but instead can be contrary to the habit that is considered to need to be changed. On the other hand, in the tradition of the common law system, customary law (living law) actually appears more early and given a special place.

Sometimes the law is packaged from habits that are already taking place in society, this is important to ensure the sociological validity of the law and sometimes from the interests of social engineering; this is to ensure there are new values that are ideal and want to be realized, changing the original *ius constituendum* into *ius constitutum*.

¹⁷ Brett G. Scharffs, *The Character of Legal Reasoning*, 2004, p. 740

4. Conclusion

There are influence of monistic and dualistic' theories on how criminal law works to uphold justice. Also, there is an influence of the interpretation of legal hermeneutics on the essence of justice aspects in the juvenile justice system law, where discussion of hermeneutics in legal science cannot be separated from the epistemological crisis of legal science itself. The presence of these alternatives can be assured to answer the anxiety of legal science "*legal positivism*", presenting hermeneutics as an alternative to science is not a simple problem. The diversion system is sufficient from the perspective of this philosophy of justice in its efforts to ensure the fulfillment of juvenile restorative justice. However, from the point of view of fulfilling order in the community it may still need further study in the future.

The implementation of the principle of restorative justice in the juvenile criminal justice system is preferred to resolve the problem not only through legal settlement. But more than that, it provides an opportunity for the parties involved to determine solutions, build reconciliation as well as build good relations between victims and perpetrators. Legal form in reality (*law in action*) and legal form as a rule as in legislation (*law in book*), the ideal goal to be achieved initially departs from the *ius constituendum* (*law aspired*) in which the legal goal definitely to achieving justice.

Conflict of Interest Statement:

The author(s) declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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