

UNEARTHING THE PHILOSOPHICAL ROOTS OF PANCASILA ON DISTINCTIVE LEGAL TREATMENTS FOR CHILDREN IN CONFLICT WITH THE LAW

Bambang Santoso, Soehartono, Muhammad Rustamaji
Faculty of Law, Universitas Sebelas Maret (UNS), Surakarta, Indonesia
E-mail: hatchi_ajie@yahoo.com

ABSTRACT

Thus far, equality before the law is understood as an ideality without limitation and exception. Its enforceability is considered to apply indiscriminately for every law breaker. However, reality of law enforcement says differently when a perpetrator of the crime is called an early age child. Special regulations exist in justice system, law governing it as well as provisions derived from the children rights, although the child is positioned as dealing with the law. In such context of an establishment of law regarding children in conflict with the law, it is interesting to find philosophical roots of distinctive treatment negating equality before the law. The explorative step is more attractive, especially when many mosaics of conception has been discovered about what are the truths when a child is in conflict with the law: 1) violations committed by children are not purely mistakes of the children, 2) children are, nevertheless, having rights that must be fulfilled including when dealing with the law, 3) children has privileges with broad distribution of regulations in various sectors and according to the view based on Pancasila, they are *keten* (a link) of a nation. Such varied conceptions elicit necessity of unearthing philosophical roots, truths and realities that are always plural. So that, the law established is not only be legal because it is formed in legitimate manner and by legitimate power (*pedigree thesis*), also incorporating the existing basic values or moral principles, though not absolute, depending on condition of society (the moral thesis) (Twining, 2009). Thus, study of such legal products is not only be seen as the work of professional, but as Satjipto Rahardjo viewed, it is placed as an scientific object to explain that a law codified in legislation, though, is not something sacred to examine for its philosophical content.

Keywords: Children in conflict with the law, philosophy of Pancasila, different treatment.

A. INTRODUCTION

In a speech ending his tenure as a full-time professor at the Faculty of Law, Diponegoro University, Satjipto Rahardjo left an important message to bearers of the law. The important message is product of legislation should not

only be seen as a result of professional work, but it must also be seen as a scientific object (Satjipto Rahardjo, 2000:1) to explain that a law codified in legislation, though, is not something sacred to examine. Based on this Satjipto's view, such establishment of law should be interpreted as bringing with it various components of ideas, concepts, solutions, structures, institutions, and even legal methods which are, in fact, not value-free and neutral cases. Thus, as there is specialization in regulation concerning children in conflict with the law, although it might be said to deviate from the principle of equality before the law that has been conceived as ideal without limitation and exception, so varied proposals about variances of substantial components with different meaning and functions, their underlying basic legal philosophies, purposes and functions of enactments, the ways of its legal arguments as well as the way of thinking, are, of course, signaling a problem that should be examined more deeply in its philosophical side.

In Indonesian context, spectrum of study on values of philosophical content of Pancasila about establishment of law with state involvement in differentiating legal treatment and accessibility for children in conflict with the law, such legal issue found its momentum when confronted with the principles of justice and equality before the law. Through various legislative provisions concerning the children in question, state is projected to exist in order to protect and fulfill human rights of the children even though their status are in conflict with the law.

Therefore, when many questions come to arise, especially contesting partial position of the state with special treatment and as if it negates equality before the law for minors in conflict with the law, simultaneously a view comes to mind asking: Is specialization in the legal treatment a form of discrimination? Why does different treatment not apply in general to all perpetrators of crimes and offenders regardless of their ages? How to explain its association with fidelity to law, political obligation, and civil disobedience when children in conflict with the law get different treatment before the law that is predicted to be perspective progressively, but in fact, shows a partial

face, with specialized enforceability only for children in conflict with the law to gain access to justice and equality before the law? These various questions are still unsettled when concretization of different legal treatment ideas for children in conflict with the law have been followed up with a variety of technical provisions of human rights fulfillment in various sectors. Finally, consequence that every activity and outcome of different treatment for children in conflict with the law should be accountable to the public is a tangency point between legality of the law (*pedigree thesis*) and public morality (the *moral thesis*) that is important to discuss and to find its philosophical root.

B. CONCEPTION OF NOT-PURELY-MISTAKE OF CHILDREN IN CONFLICT WITH THE LAW

As individual with immaturities both physically and mentally, a child is a vulnerable human. It can be said so because independence in determining attitude, action, or even a choice is still strongly influenced by environment around them. In fact, children tend to imitate/replicate behavior of their closest environment as reflections that will be adopted and possibly become samples taken in reasoning and attitude of their actions. Therefore, every act of a child is not always reflecting a true reality of him/her, but it is more likely replication of patterns resulted from daily catches of his/her senses.

Based on their such pseudo self-reality awareness, diction 'diversion' emerges when children in conflict with the law or when they are dealing with the law. Aspects of sociological, psychological and pedagogical (Ministry of Women Empowerment and Child Protection of Indonesia, 2016:54) are considerations used to measure that a child is actually not able to be responsible for his/her action. Therefore, transferring settlement of children cases from criminal justice process to the one outside of the criminal justice with still pay attention to restorative justice is primary choice as a form of understanding of not purely mistake of a child.

Therefore, when the law understands about the not-purely-mistake of a child in offense case, the law is said to be progressive precisely because

he/she is not treated equally without any different treatment. Law is said to be progressive when it precisely has partiality to the weak (Muhammad Rustamaji, 2009:25), in this case, children in conflict with the law. Then concept of children in conflict with the law as the weak legal subjects must be defined earthly and interpreted more materially. With the aforementioned concept, a just law is one taking into account sources of new laws in achieving justice. Such understanding is required for ongoing displacement from the day to another. That is to put the rights of future generation, including children in conflict with the law, in the conception of justice. Ironically, curriculum in many faculties of law are not seemingly arriving at the rights of future generation (intergenerational justice) yet (Muhammad Rustamaji, 2015:104), especially when potential of this next generation would be on a child with status children in conflict with the law. Next question can be raised: are children in conflict with the law which also the next generation weighed and tolerated as a source of legal justice?

A focus of review that is still discussing the law should be uniform, value-free, neutral and universal for any legal subject. Presumably, a shift should be conducted. Utilitarianism of law and equal application to the existing entire nation resources should be tolerated again. Responses are thrown loquaciously as such utilitarian thinking can be said undemocratic, when the votes say majority wants utilitarianism of such law? Presumably, this kind of thinking prevents progression of the law when no partiality to child as a legal subject which is categorized as 'the weak and vulnerable'.

C. OBLIGATION OF FULFILLING THE RIGHTS OF CHILDREN ALTHOUGH THEIR STATUS ARE CHILDREN IN CONFLICT WITH THE LAW

Observing the existence of various specific regulations of juvenile justice system (Act Number 11 of 2012), Child Protection Act which is governing it (Act Number 23 of 2002 as amended by Act Number 35 of 2014), as well as provisions that is derivation of the rights of the child (Government Regulation

Number 65 of 2015), it can be seen that the state has duty in fulfillment of children's rights guaranteed by the law even though the children are those in conflict with the law. The deepest meaning with such varied regulations is, of course, philosophical roots of the fulfillment of Children rights. However, the question is: how such obligations will be met? Is textual legislation alone sufficient to guarantee the fulfillment of the rights of children in conflict with the law, or are a deep understanding of human rights and transformation of acts and attitude of state apparatus needed?

Based on these questions above, relying on accuracy of legislation texts is, of course, a very risky action. Hence, development of science and ideas around the studies of man and of humanity should also be mandatory menu for each bearer of the law, and even society at large. It should be understood that human rights is an always actual issue today (Rahayu, 2013: 10 & 36-38) and it is no longer seen merely as a manifestation of individualism and liberalism are confronted with communalism collectivity as previous period. At present, human rights is better understood humanly as the inherent rights in dignity of humanity regardless of racial background, ethnicity, religion, color, gender, occupation, age and legal status they bear. This conception of human rights in the present context motivated by more humane reading must be understood as the embedded rights owned solely because he/she is a human, the rights that are possessed naturally and one will not live like a human being without such rights pinned on him/her. With such understanding, the concept of human rights is interpreted as mutual standard of respect to humanitarian for every person in the world (a common standard of Achievement for all peoples and all nations) (Rhona K.M. Smith, et.al, 2008:14), which must be fought for, and next, to be achieved for the common life.

As can be seen in the literature on human rights, at international level, human rights discourse has undergone very significant development. Since the Universal Declaration of Human Rights was proclaimed in 1948, other two milestones of the dynamics of international human rights enforcement were recorded . First, the acceptance of two covenants of UN, namely about the

Civil Rights and Political Rights and Economic Rights, Social and Cultural Rights. The two international covenants were already recognized since 1966, though they applied only ten years later after ratification by thirty-five member states of UN. Second, the admissibility of the Vienna Declaration and its Program of Action by representatives of 171 countries on June 25, 1993 at the UN World Conference on Human Rights in Vienna, Austria. This second declaration is a compromise between visions of Western countries and views of developing countries in promotion of human rights (Rhona K.M.Smith, et.al, 2008:34-37).

Considering the broad coverage and the size of support on importance of human rights, then human resource is the next aspect to consider in carrying out the enforcement of such human rights. Mediocre qualifications of bearers of the law will certainly not be able to answer demands of the world for good fulfillment and protection of human rights. Therefore, persons with high quality and quantity are needed in carrying responsibility of returning children in conflict with the law to the correct path of life.

In order to meet such qualification of human resource, it may not be a mistake to borrow idea of progressive law regarding *prophetic intelligence* in determining qualification of human rights enforcers, especially in scope of children in conflict with the law. Description of a human rights enforcer with good qualification emphasizes on human aspect as a focus of study. Ability to do self-transformation in order to be daring in rule breaking requires so-called *prophetic intelligence* (PI). This prophetic intelligence will guide and provide holistic courage in acting progressively.

As a current development, discipline of psychology develops *prophetic intelligence* as a comprehensive approach of previous intelligence approaches. The PI guides cognitive intelligence, emotional intelligence, adversity intelligence and spiritual intelligence (M. Syamsudin, 2012:262). Embedding the PI in willingness and ability to make self-transformation is what is meant as high qualification in typology of progressive law enforcer.

Legal world is very concerned in 'borrowing' this prophetic intelligence concept in order to overcome legal crisis and worriedness in fulfillment and protection of human rights. Especially, when the crisis optic is directed to morality of law enforcers, including officers of juvenile correctional facility. *Prophetic intelligence* is a person's ability to make self-transformation in interaction, socialization and adaptation to vertical and horizontal environments. Conception of dualistic, namely external and internal, physical and *ukhrowi* life, is taken to understand its benefit and wisdom. On this side, the embodiment of words 'For Justice Based on God' which is implemented further in penitentiary system of children in conflict with the law gains its momentum to be emphasized again.

In principle, everyone can achieve the prophetic intelligence with the proviso that he/she has a will to do self-transformation (Muhammad Rustamaji, 2016: 114), especially for law enforcers and officers of juvenile penitentiary facility. The self-transformation includes self-awareness, self-discovery, and self-development by applying and comprehending principles of honesty (*sidiq*), trustworthy (*amanah*), openness (*tabliq*), and smart (*fatonah*).

When the self-transformation has been done, then the rule breaking becomes visible attitude and action. The progressive law is used as an approach offered for law enforcement, and it should no longer emphasize only logocentrism of legal texts. Logocentrism, a tendency in system of thought to seek legitimacy by referring to arguments of universal truth or security of central and original meaning (Anthon F. Susanto, 2010:xii), is a major barrier that should currently begin to abandon in the series of self-transformations of law enforcers. In this facet, what is behind every act of restoring children in conflict with the law to community as a good child and as a useful future generation for others will be found. Officers of juvenile penitentiary facility with such self-transformation will bring re-awareness to the children in conflict with the law that a choice to be a good person who does not take away the rights of others will be forgiven and a 'second chance' to correct their mistakes in the past. At the culmination, the progressive Law is used to expand and

simultaneously to sharpen *multiple intelligence* guided by *prophetic intelligence*. So that, as the hammer is knocked with the words 'For Justice Based on God the One ', correctional attempt with all of its systems is being the next hope indicating holistic efforts in a series of legal justice enforcement and fulfillment and protection of human rights that will be accountable vertically to God Almighty, and also horizontally to all humans (society). The overall picture is, thus, showing that the established law will finally not only be legal because of it is formed in legitimate manner and by legitimate power (pedigree thesis), but also incorporating existing basic values or moral principles, though not absolute, depending on condition of society (the moral thesis) (William Twining, 2009:126-127).

D. CHILDREN AS A *KETEN* (LINK) IN HUMANITARIAN ROOTS OF PANCASILA PHILOSOPHY

Analyzing the rights of children in conflict with the law that is laden with humanity values, in the Indonesian context, philosophy of man and of humanity can be found, namely in the second principle of Pancasila. Principle of Fair and Civilized Humanity expounds the aspiration of the Founding Fathers about how should people of Indonesia and their humanity.

Although it is recognized that a discussion of Pancasila should not separate one principle from another because it is as a unity, but exposition of humanitarian contained in Pancasila on the analysis above will focus on the second principle of Pancasila. Excavation of 'a submerged trunk ' of the second principle that is symbolized by the series of rings and squares connected to each other endlessly was called *de onverbreekbare keten der mensheid* by Sukarno, the first president of Indonesia. This is a chain of humanity showing incessant relationship of women-men forming *charakter gemeinschaft*. Through the *charakter gemeinschaft*, a nation was formed from a unity of characters growing from unity of human being group which was originally consisted of *verwantschapsfamilie*, then tribes were formed and having a keen sense of living together '*le swish d'entre ensemble*' as one nation (Soekarno, 2014:154-

165). As an evolutionary development of human heart, humanity is a soul feeling relationship between human beings. The soul with desire to raise and differentiate a human being's soul as higher than that of an animal. So that when a human being is doing something low and causing injury to another one, in this case, he/she has violated humanity, unlawful, *menselikkheid* (Soekarno, 2014:158). But for these violations, it turns out a considerable room of forgiveness can be found, a room to fix to each other for the sake of a unity of unbroken mankind and humanity chain. At this point, the humanity is abstracted as a relationship between human beings and aspects of their humanities universally.

More concretely, by tracing the history, the second principle of Pancasila has actually described a historical record of human rights the Indonesian nation desires and aspires to, namely just and civilized humanity. Sukarno declared it substantively in *Suluh Indonesia Muda* (1928) and in the Meeting of *Dokuritsu Zyunbi Tyoosakai* (June 1, 1945). This is the philosophical principle called 'internationalism' or 'humanity'. Immediately, Soekarno emphasized that the meaning of internationalism is not a 'cosmopolitanism' –rejection to nationality. According to Soekarno's view, 'nationalism' and 'internationalism' are interacting to each other. Internationalism cannot flourish if it is not rooted in a nationalism earth. Nationalism cannot flourish if it is not living in a garden of internationalism (Yudi Latif, 2012:180-181, Soekarno, 2014:171). With awareness of such close relationship between nationalism and internationalism, orientation of a just and civilized humanity is twofold in nature. 'External' oriented means to participate in the fight for peace and justice of the world, and 'internal' oriented is to glorify human rights both as individuals and groups (Yudi Latif, 2012:181).

Rather, this 'internal' humanity orientation is used by perspective of the law when it discovers the phenomenon of children in conflict with the law. It can be explained that the law enforcement system to the correctional system see that children in conflict with the law as a man who had made a mistake. On the one hand, the law must be enforced against him/her without prejudice to

his/her rights as a child. While on the other hand, children in conflict with the law must also be nurtured in order to return them to the correct path amid their family and community. Fallacy actions of children in conflict with the law in the past should not be seen as necessarily expelling them from dignity and humanity value as human being, so they must still be treated as human beings. One of symbols can be examined, namely the call 'offenders' is replaced with children in conflict with the law (M. Haryanto, 2016:115). The symbol is not only a refinement of diction, but more than that, it will be full of human values content that is believed to be an improvement way for a child who had made a mistake in dealing with a problem in his/her life.

Furthermore, fourth paragraph of preamble of the 1945 Constitution also contains two important things. First, it makes humanitarian issues as a goal of the state within the framework of fulfillment of happiness and collective rights and implicitly covers the right of individuals in national and international life. Second, humanitarian issue is anchored on foundation of the state, particularly the second principle, the 'Fair and Civilized Humanity' (Yudi Latif, 2012:182). At such culmination, a balance between individualism and collectivism is presumably still within the scope of humanitarian of Pancasila style.

But in the Great Meeting of 15 July 1945, Sukarno asserted that with the adoption of preamble draft of the Constitution, so the members agreed that foundation, philosophy, and systems used in arrangement of the Constitution draft was based on *kekeluargaan* (in spirit of amicable agreement). By "agreeing the words social justice in the preamble" means "our tremendous protest to the individualism basis". Therefore, according to Sukarno's view, in the Constitution of independent state, however, what so-called '*les Droits de l'home et du citoyen*' or 'the rights of the citizens' should be included, Indonesia will make their own choices. Sukarno did not want ideas of individualism and liberalism became a priority when the state is based to principles of *kekeluargaan*, mutual assistance, *gotong royong* (burden sharing), and social justice (Yudi Latif, 2012:187).

A middle course is taken over the debate; most of basic rights contained in the 1945 Constitution are the basic right of citizens. This indicates that the recognition of human rights is placed in a *kekeluargaan* atmosphere. For mutual goodness, the rights granted to citizens (including to children) is also intertwined with obligations in collective interest. This is seen partly in Article 27 paragraph (1) of 1945 Constitution. Based on the fact, the state of Indonesia based on the 1945 Constitution is not integralistic state weakening individual, nor a liberal state weakening collectivity. Indonesia is a country of *kekeluargaan* respecting human rights of citizens and human beings in general, as individuals or groups (Yudi Latif, 2012:194). This review is what seems to give a philosophical foundation why fulfillment and protection of the rights of children in conflict with the law are still necessarily performed in a spirit of *kekeluargaan* of Indonesia. Moreover, considering the latest developments following amendments of the 1945 Constitution which has been experiencing a shift with inclusion of conception of human rights in Article 28 of the 1945 Constitution, actually the true foundation to seek is showing increasingly strong position.

Further as an exposition of Pancasila, Article 28 J of the 1945 Constitution and its amendments have also confirmed that 'in the implementation of these rights, every person shall respect the human rights of others in the life order of society, nation, and state'. Similarly, it has been confirmed in the same article that, 'every person shall be subject to restrictions set forth by the law, which is solely to ensure recognition and respect for the rights and freedoms of others, and to meet the just demands which are appropriate to considerations of morality, religious values, security and public order in a democratic society' (Article 28J of the 1945 Constitution).

Not just stop at the textually provisions of the constitution and laws, under such conditions, a discourse emerging is, in fact, showing that the distinctive legal treatment for children in conflict with the law must be interpreted to be a catalyst to save the nation. The distinctive legal treatment to children in conflict than that of adult offenders is a partiality with full

awareness of significance of the nation's potencies in which one of the potencies is hidden in the children in conflict with the law. Therefore, the deepest meaning in rescuing children in conflict with the law must be found, namely it is not only the matter of providing special treatment on offenders, but more than that, it is actually the rescue of the nation's assets of human resources that are still very likely returned to the correct path for continuation of the nation.

E. CLOSING

Children in conflict with the law in philosophical reading are apparently showing diverse aspects (multifaceted). An error visibly caught by senses is very likely mistaken if only partially understood. Therefore, establishment of law regarding children in conflict with the law should not only be seen to be legal because it is formed in legitimate manner and by legitimate power (pedigree thesis), but also incorporated with the existing basic values or moral principles, although not absolute, but depends on condition of society (the moral thesis). Furthermore, steps of unearthing philosophical roots related to study of children in conflict with the law as an object of science will find many conception mosaics indicating that as children in conflict with the law, the true are: 1) violations committed by children are not purely mistakes of the children, 2) children are, nevertheless, having rights that must be fulfilled including when dealing with the law, 3) children has privileges with broad distribution of regulations in various sectors and according to the view based on Pancasila, they are *keten* (a link) of a nation.

BIBLIOGRAPHY:

Books and Journals:

Haryanto, M, 2016, The Principle of Presumption of Innocence and Presecution Policy. *Yustisia Law Journal*. Faculty of Law. Universitas Sebelas Maret. Edition 96, September-December 2016. Year XXV.

- Latif, Yudi, 2012, *Negara Paripurna (Historisitas, Rasionalitas, dan Aktualitas Pancasila)*, Jakarta: Gramedia Pustaka Utama, 2012.
- Ministry of Women Empowerment and Child Protection of Indonesia, 2016, General Explanation of Indonesian Government Regulation Number 65 Of 2015 on Guideline on Implementation of Diversion and Treatment for Children of Less Than 12 (twelve) Years Old, Jakarta: Deputy for Child Protection Agency.
- Rustamaji, Muhammad, 2016, Simulacra Asas Praduga Tidak Bersalah dalam Ingsutan Kewenangan Praperadilan. *Yustisia Law Journal*. Faculty of Law. Universitas Sebelas Maret. Edition 95, Mei-Agustus 2016. Year XXV.
- Rustamaji, Muhammad. and Gunawati, Dewi, 2009, Model Pembelajaran Mootcourt Bagi Strata-1 Ilmu Hukum Sebagai Pencapaian Pendidikan Hukum Progresif, *Yustisia Jurnal Hukum*, Fakultas Hukum. Universitas Sebelas Maret. Edisi 78, September-Desember 2009. Tahun XX.
- Rustamaji, Muhammad, 2015, 'Mempertimbangkan Filsafat Kritis dan Deep Ecology dalam Pergumulan Masyarakat Ekonomi ASEAN', a paper in the Proceedings of the National Seminar, Editor: Aidul Fitriadi Azhari, Kesiapan Indonesia: Harmonisasi Hukum Negara-negara ASEAN Menuju Komunitas ASEAN 2015. Surakarta: Universitas Muhammadiyah Surakarta.
- Rahardjo, Satjipto, 2000, "Mengajarkan Keteraturan Menemukan Ketidakteraturan (Teaching Order Finding Disorder)" (An article was delivered in the speech at the end of tenure as a full-time professor at the Faculty of Law, Universitas Diponegoro. Semarang: Publishing Agency of Universitas Diponegoro
- Rahayu, 2013, *Hukum Hak Asasi Manusia di Era Global: Tantangan Implementasinya di Indonesia*, An Inauguration Speech at Reception of Position as Professor of international law of the Law Faculty, Universitas Diponegoro. Semarang: Publishing Agency of Universitas Diponegoro.
- Smith, Rhona K.M. et.al, 2008, *Hukum Hak Asasi Manusia*, Yogyakarta: PUSHAM UII.

Soekarno, 2014, *Pancasila Dasar Negara: Kursus Pancasila Oleh Presiden Soekarno*, Yogyakarta: Pusat Studi Pancasila. Universitas Gadjah Mada (UGM).

Susanto, Anthon F, 2010, *Ilmu Hukum Nonsistematik (Fondasi Filsafat Pengembangan Ilmu Hukum Indonesia)*, Yogyakarta: Genta Publishing.

Syamsudin. M, 2012, *Konstruksi Baru Budaya Hukum Hakim Berbasis Hukum Progresif*, Jakarta: Kencana.

Twining, William, 2009, *General Jurisprudence, Understanding Law from Global Perspective*, Cambridge: Cambridge University Press.

Regulation:

The 1945 Constitution of The Republic of Indonesia