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Implications of Legal Positivism of the Promotion of Children's Rights on National Law

Lita A.L.W. TYESTA
Diponegoro University, Semarang, Jl. Prof.H.Soedarto S.H, Kec. Tembalang, Kota Semarang, Jawa Tengah 50275, Indonesia
litatyesta.undip@yahoo.com

Retno SARASWATI
Diponegoro University, Semarang, Indonesia
retnosaraswati.undip@gmail.com

Faisal ARIF
Diponegoro University, Semarang, Indonesia
faisalarif.undip@gmail.com

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Abstract:

This article discusses the influence of positivism in the development of legal science, especially in the development of Indonesian law. Through the positivism which was introduced by August Comte, the study aims to analyze the legal positivism as a strategic-political form that is needed in terms of promoting children's rights. As a result, positivism can not only be used as a medium used to help the modern process: the law there can also be used as a means to provide legal protection for the people's, especially for the protection of children's rights.

Keywords: legal positivism; children's rights; Indonesia.

JEL Classification: K40.

Introduction

National law or what is called positive Indonesian law is the law that is valid in Indonesia today; a law that has been made and passed by an authorized body to be enforced in Indonesia. This positive legal term, is concrete evidence of the concept of positivism in Indonesian law (Said 2009). Positive law in Indonesia also adopts the concept of positive law from positive law thinkers so that positive law in Indonesia is also a written regulation that is endorsed by sovereign power (Raharjo 1996).

At the theoretical and practical level, positive law in Indonesia cannot be separated from the influence of positivism thinking which emphasizes legal certainty through laws that are unified in a national legal system. The teachings of positive law at present are useful, at least in terms of providing legal certainty including in the promotion of human rights and children's rights by ratifying various international conventions (Nurhadi 2019).

In various discussions about vulnerable groups, children are one of the most important parts of the conversation. Children are not only the interests of parents, but are of national importance and even of universal humanitarian interests. The peak concern of the nations of the world on various issues around children was accumulated in the Declaration of the Rights of the Child in 1979 and subsequently the declaration was upgraded

to a Convention on the Rights of the Child, hereinafter referred to as the CRC (Convention on the Rights of the Children).

The CRC was unanimously adopted by the United Nations General Assembly on November 20, 1989 and entered into force on September 2, 1990. The Convention consisting of 54 Articles is a positive instrument that establishes rights and sets out universal principles and norms for children.

This convention provides for human rights and fundamental freedoms and takes into account their needs for special assistance and protection because of their vulnerability, because children are the population group most often ignored and sacrificed in the development process (Irwanto 2008). The CRC is the international human right agreement that contains civil, political, economic, social and cultural rights in a comprehensive manner. This convention is the most ratified convention, including Indonesia which has ratified the CRC by Presidential Decree Number 36 of 1990.

The Declaration of the Rights of the Child in 1979 opened a new awareness to the world that in order to guarantee a good start in life for children, it is necessary to guarantee the fulfillment and protection of children's basic rights from the womb until the age of 18 so that children can grow and develop optimally.

To provide guarantees for children's rights, it is necessary to formulate regulations relating to the protection of children's rights. The need for a regulation that regulates children's rights comprehensively can be seen as part of the positivism way of thinking. However, it is not positivism in the narrow sense, but positivism in the sense of political strategy in the promotion of human rights, especially the rights of children. Hence, this paper aims to examine the problem formulations of the theoretical implications of the flow of positivism in national law institutions and the reconstruction as the consequence of legal positivism of children's rights in Law Number 25 of 2014 as a strategic step for the promotion of children's rights.

1. The Theoretical Implications of Legal Positivism to Legal Certainty

Etymologically, the word ‘positive’ contained in fragments of ‘the flow of legal positivism’ was allegedly originated from the influence of the wave of positivism philosophy (Rahardjo 2014). Positivism can thus be interpreted as a flow in the philosophy (theory) of law, which assumes that legal theory is only related to positive law. The science of law does not discuss whether positive law is good or bad, nor does it discuss the effectiveness of law in society (Roestandi 1992).

Judging from the history of his thought, Positivism which developed at this time as a result of philosophical thinking was pioneered by Auguste Comte (1798-1857) (Prasetyo and Barkatullah 2012). The Comte's thought can then explain the chaotic life of the post-revolutionary France of the 19th century, among others because the King was acting arbitrarily, the people were bored and wanted a law that restricted the King. Comte Positivism, as such, was contextually very closely related to the spirit to provide stability to French society at the time by providing clear boundaries between myth, metaphysics and positivistic society.

In the world of law, Hart, a follower of positivism, proposes various meanings of positivism, among them (Paul & Dias, 1981) are: (a) law is an order; (b) analysis of legal concepts is a worthwhile endeavor. This analysis differs from sociological and historical studies and also differs from a critical assessment; (c) decisions can be deducted logically from pre-existing regulations, without the need to refer to social goals, policies and morality; (d) moral judgment cannot be upheld and maintained by rational reasoning, proof or testing; and (e) laws as promulgated, established, positum, must always be separated from the laws that should have been created, desired.

Applied to thinking about law, understanding positivism requires the release of meta-juridical thoughts about law as adhered to by supporters of the natural law school (naturalist). Therefore, according to positivism, every legal norm must exist in its objective nature as positive norms, and be affirmed in the form of concrete contractual agreements between citizens or their representatives. Here the law is no longer conceptualized as abstract meta-juridical moral principles of the nature of justice, but ius who has been positivity as a lex, in order to ensure certainty about what is counted law and whatever even though normative must be stated as things that are not counted law (Wignjosoebroto 2002).

This understanding eventually sharpened to the necessity of legal positivation or what is known as the flow of legism. The basis / rationale of this school is the codification of law which aims at three things: First, the simplicity of the law; Second, legal certainty; and Third, legal unity / unification. With codification, the simplicity of the law is easily achieved which means that the law is easily obtained so that it is not difficult for judges and other law enforcers to use it.

In accordance with the idea of positivism, this flow then gave birth to several important doctrines for the flourishing of the modern state today, including the Rule of Law doctrine. Tamanaha (2004), as quoted by Marjanne

Termoshuizen-Artz (2004) in the Journal of the Law of the Lantern, divides the concept of the 'rule of law' into two categories, 'formal and substantive'. Each category, namely 'rule of law' in the formal sense and 'rule of law' in the substantive meaning, each has three forms, so that the concept of the rule of law or 'Rule of Law' itself according to him has 6 forms.

First, rule by law (not the rule of law), where law only functions as an 'instrument of government action'. The law is only understood and functioned as a mere instrument of power, but the degree of certainty and predictability is very high, and very favored by the rulers themselves, both those who control capital and those who control political decision-making processes. *Second*, formal legality, which includes characteristics that are: (1) prospectivity principles (rule written in advance) and may not be retroactive; (2) are general in the sense that they apply to everyone; (3) clear (clear); (4) public; and (5) relatively stable. That is, in the form of the 'formal legality', it is idealized that the predictability of law takes precedence. *Third*, democracy and legality. Dynamic democracy is balanced by laws that guarantee certainty. But, according to Brian Tamanaha, as 'a procedural mode of legitimation' democracy also contains limitations similar to 'formal legality'. As in 'formal legality', democratic regimes can also produce bad and unfair laws. Therefore, in a democratic system that is based on law in the formal sense or even a rule of law in the formal sense, legal uncertainty can still arise. If the value of certainty and predictability is prioritized, then the practice of democracy can be considered to be more rushed than the authoritarian regime which guarantees stability and certainty.

Next forms are substantive views 'which guarantees' individual rights', rights of dignity and / or justice and social welfare, substantive equality, welfare, preservation of community.

In more detail the positive law in the Austin and Hart concept, according to M. Galanter is a modern law, which has some characteristics, in the forms of: (1) the legal system consists of uniform regulations, both in terms of content and fundamentals; (2) the legal system is transactional in the sense that rights and obligations arise from agreements that are not influenced by factors of age, class, religion or gender differences; (3) the modern legal system is universal, in the sense that it can be implemented in general; (4) the existence of a strict hierarchy of justice; (5) bureaucratic, in the sense of carrying out procedures in accordance with applicable regulations; (6) rational; (7) the implementation of the legal system consists of experienced people; (8) with the development of specialization in complex societies, there must be a link between the parts that exist as a result of the system of boxing; (9) the system is easily changed to adapt to the development and needs of the community; (10) implementing and law enforcement agencies are state institutions because the state has a monopoly on power; and (11) a clear distinction between executive, legislative and judicial duties.

2. Strategic Steps for the Promotion of Children's Rights

Talking about children's rights cannot be separated from the overall reading of the concept of human rights, because children's rights are derivations of human rights, and between the two concepts there are interrelations in terms of general principles.

The mention of rights in the context of human rights need not be accompanied by an understanding of obligations so that they become human rights and obligations. In terms of human rights, these rights are inherent in humans and can only be owned by individuals while obligations are part of the symmetry above the state, because only the state has the power to maintain and protect the rights of these individuals.

Thus, the term 'human rights and obligations' must be interpreted as follows: rights exist in individuals while obligations exist in government-states, so that human rights in individuals give rise to obligations to the government/state to protect the individual against any possible violations including violations of the state or government officials themselves.

In the context of Indonesia, constitutionally the responsibility to protect and uphold human rights rests with the state, especially the government. In Article 28I paragraph (4) of the 1945 Constitution which reads: 'Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government'.

Furthermore, Article 28I paragraph (5) of the 1945 Constitution states that to uphold and promote and uphold human rights is primarily the responsibility of the government'.

The government in question certainly includes the understanding of the central and regional governments. Even the notion of government must also be extended to the executive, legislative and judiciary and other state administrators. In addition to the government, Article 100 of this Law also stipulates that 'every person, political organization, community organization, non-governmental organization or other social organization has the right to participate in the protection, enforcement and promotion of human rights'.

In the framework of human rights, the State as the subject of the main obligations mandated to carry out its obligations in order to respect, protect, and to fulfill the rights of its citizens. This state's obligation is related to the state's aspirations as a tool to advance public welfare this arises as a consequence of the choice of the management state (welfare state).

In a publication of the United Nations Fund for Population Activities (UNFPA), it explains the intent of respecting, protecting, and fulfilling every right, containing some values such as respect, meaning that the state refrains from interfering in the enjoyment of one's rights; protect, meaning that the state forms a law that contains a mechanism to prevent violations of human rights by the state's own organs or non-state actors. This protection is a guarantee for everyone; encounter, meaning that the state takes active steps integrated in institutions and procedures, including allocating community resources to enable them to enjoy their rights. A rights-based approach develops task stakeholders to achieve their obligations and enhances rights holders to assert their rights; and meet, meaning that the state takes active steps integrated in institutions and procedures, including allocating community resources to enable them to enjoy their rights. A rights-based approach develops task stakeholders to achieve their obligations and enhances rights holders to assert their rights.

As stated in the previous description that children's rights are human rights, children's rights are also subject to the following principles:

- the principle of inalienability (irrevocable) This principle states that human rights are inherent in human beings solely because of their existence as humans. Therefore, human rights are integrated into human dignity. Human rights are not gifts, and therefore cannot be revoked even by the government;
- the principle of universality or the principle of non-discrimination This principle states that all human beings regardless of race, ethnicity, religion, gender, religion, political beliefs, wealth and other statuses have the same rights. Thus, in the context of children's rights means that all children's rights must apply equally to all children;
- the principle of indivisibility (the principle of unity of human rights) and inter-dependency (interdependence). This principle wants to emphasize that all human rights are a unity that must not be divided and all human rights are related to one another. All human rights have the same importance, so there should not be an assumption that the same rights are more important than other rights. Concretely, civil and political rights (political) and economic, social and cultural (economic and social) rights are equally important and in the context of children's rights are embodied in the right to life, survival and growth and development.

In addition to the three basic principles, for the rights of children there are still two other principles which are applied in conjunction, namely:

- decision making regarding children must always hold the best interests of the child;
- respect the opinions of children by considering their age and level of maturity (respect for the view of the child)

In the context of positive law, human rights norms are formulated in both national and international levels. There are two human rights instruments at the international level, namely a device that is legally binding (hard laws) and a device that is not legally binding but is politically binding (soft laws). Concretely, hard laws are manifested in the form of: (1) Convention or Pact; and (2) Protocols, including. (a) Additional protocols (additional/ supplementing); and (b) Optional or optional protocol.

Meanwhile, soft laws are realized in the form of: (1) declaration; (2) guide lines; (3) rules or minimum rules or minimum standard rules; and (4) principles.

In terms of regulations relating to children's rights, even though Indonesia had ratified the Convention on the Rights of the Child in 1990, it turned out that it took approximately 12 years to present national law as a consequence of the ratification of the Convention.

The law referred to is Law Number 35 of 2014 concerning Child Protection (hereinafter referred to as the Child Act). With the promulgation of the Children's Law there is at least a clarity on the age limit of children considering that in various laws and regulations, the limits regarding children are very diverse. If the Child Law stipulates that a child is any person who is not yet 18 years old, then there should be a harmonization of these provisions, for example the provisions regarding the minimum age requirement for a marriage as regulated in Law Number 1 of 1974 concerning Marriage. In the Law on Marriage the age limit is determined which is lower than the limit in the Child Law so that there will be a contradiction between the objectives of the Child Law and the Marriage Law (Farid 2010).

In addition to the Marriage Law, Law No. 3/1997 on Child Justice needs to be updated immediately so that it complies with the principles of the Convention and the International Covenant on Civil and Political Rights,

particularly Article 6 paragraphs (5), (7), (9), (10), (11), (14) and (15). In addition, the Convention Against Torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). 'Riyadh Guidelines' (United Nations Guidelines for the Prevention of Juvenile Delinquency), 'Beijing Rules' (United Nations Standard Minimum Rules for the Administration of Juvenile Justice). United Nations Rules for the Protection of Children whose Freedom is Revoked (United Nations Rules for the Protection of Juveniles Deprived of Their Liberty) 'Tokyo Rules' (United Nations Standard Minimum Rules for Noncustodial Measures). Unlike the Marriage Law which has not yet shown the results of renewal, at the beginning of July 2012, the Parliament approved the Bill on the Juvenile Justice System into Law. In a few moments the Bill on the Juvenile Justice System which has been approved by Indonesian Parliament will certainly be enacted soon.

Some international laws are categorized as a legal group that regulates crime prevention. International law that falls into this category such as the 1926 Slavery Convention and the Convention to Act on Trafficking in Persons and Exploitation of Prostitutes (Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others) in 1949. The crime prevention regime requires the state to criminalize certain actions such as the act of enslaving people or exploiting, plunging into prostitution.

Although the locus delicti of the crime is cross-border, criminal acts are carried out in national jurisdiction. The Palermo Protocol, which is the Protocol to Prevent, Act and Punish Trafficking of Persons, especially Women and Children, complements the Convention against Organized Transnational Crime.

If the type of crime designated as Crime Prevention is a crime against people (not property), then a human rights perspective needs to be applied to ensure that victims are not re-victimized (secondary victimization). For example, victims of human trafficking who are stranded in a country without legal documents will be treated as lawbreakers in the country where they are stranded. If the victim of human trafficking is viewed from a human rights perspective, then the victim has the right to reparation and must be protected, not the other way forward, instead of processing the 'violation of the law' and the victim does not realize it because of the limited knowledge/information available to him.

Some of the examples above confirm that even though the LoGA as an embodiment of the CRC in national law has in fact not been able to move all sectors to give birth to policies that have the perspective of children's rights, it is mainly due to the incomprehension of the fulfillment of children's rights to provide a better start in life. for children by decision makers as well as by the community itself so that the quality of Indonesian people will be better in the future. There are even some people who are still resistant to the concept of children's rights as human rights because the concept is contrary to the basic values in religion and eastern values.

Limited budgets are also often the reason why public policies still do not favor the fulfillment of children's rights. The question that often arises is can children's rights be upheld through national legal mechanisms?

According to Mohamad Farid, there is a concept that can be used as a concept of justifiability of right (whether human rights can be upheld through the legal process) is based on the assumption that as legal norms, human rights norms should be upheld through legal mechanisms – both legal and administrative state, civil, or criminal.

However, even though national law is not all harmonized with the CRC and various soft instruments. A positivism figure, Lon Fuller, suggested eight moral requirements that must be met in establishing positive law. FIRST, there must be rules to guide decision making. Second, the rules that guide the authorities must not be kept secret but must be announced. Third, rules must be made to guide future activities. Fourth, the rules must not conflict with each other. Fifth, rules may not require behavior that is beyond the ability of the affected parties. Sixth, in law there must be firmness; seventh, there must be consistency between the rules as announced and the actual implementation. However, it must also be recognized that after the enactment of Law Number 35 of 2014 concerning Child Protection, significant progress can be seen in relation to various public policies that have begun to adopt the CRC as a framework for making policies that were originally zero right based policy to right based policy.

The formation of laws and regulations ranging from laws to regulations at the local level has tried to accommodate the importance of paying attention to the fulfillment of children's rights. In other words, the mainstreaming of children's rights in public policy, both at the central and local levels, has been tried even though efforts to advance and fulfill children's rights have not reached the highest point of attainment.

The formation of these laws and regulations can be seen as a strategic step in the promotion of children's rights. One of the main positivist-utilitatrianist thinkers, Jeremy Bentham (Rahardjo 2014), advocating that the ultimate goal of legislation is to serve the greatest happiness of the largest number of people.

For example, several laws have adopted the concept of child rights as regulated in Act Number 21 of 2007 concerning Eradication of the Criminal Act of Trafficking in Persons. At the regional level, for example in the Special

Province of Yogyakarta has been successfully enacted by Governor Regulation Number 31 of 2010 concerning Domestic Workers and Regional Regulation of Special Region of Yogyakarta Number 6 of 2011 concerning Protection of Children Living on the Road and currently the Governor's Regulation is also ready to be enacted and the most recent is the presence of Yogyakarta Special Region Province Regulation No. 3 of 2012 concerning Protection of Women and Children Victims of Violence.

When considering that the fulfillment of children's rights is primarily the responsibility of the state, the state has an obligation to make regulations so that children's rights can be fulfilled. The step of positivating values into this form of regulation can be seen as a strategic-political process in the promotion of children's rights.

However, it must be recognized that government regulations both at the central and regional levels must still be encouraged so that there is integration so that public policies related to the fulfillment of children's rights can be formulated comprehensively. This is in line with what Fuller advocated, that the moral preconditions for establishing a positive law are that the rules must not conflict with each other.

Conclusions

The results show that positivism in addition to developing in the social sciences influences the development of legal science. The concept of positive law is concrete evidence of the influence of the understanding of positivism. Positive law grows and develops as a written law, created by groups who have the power/ sovereignty to regulate concrete life in society. Legal positivism of children's rights through Law Number 35 of 2014 is evidence that positive law takes an important role in the Indonesian legal system, the emphasis is not only on providing certainty and harmonization between regulations, but also as a mechanism for the promotion of human rights, especially children's rights.

Hence, it is recommended that theoretically, the flow of positivism can be seen not only from the point of view of legal certainty or only interpreted as imperative law from the authorities alone, but can be accepted as a strategic domain for the advancement of various fields of law. Practically, the positivation of children's rights through Law number 35 of 2014 should be followed by harmonization of interrelated regulations.

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