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Progressive Juvenile Court Judges: Reform of the Juvenile Criminal Justice System in Indonesia through a Socio-Legal Approach

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The legal culture of the current juvenile criminal justice system in Indonesia is based on written text contained in legislation that is positivistic and ignores progressive legal principles. This research takes a socio-legal approach (socio-legal research), from within the non-doctrinal legal research tradition, and uses the constructivism paradigm to explore this issue. The findings of this study reveal that judges in the juvenile justice court do not follow a progressive legal approach, where the law is judged by the social goals to be achieved and consequences of the operation of the law. It can be concluded that progressive law can be used as a basis and reference for juvenile court judges to make decisions on cases that prioritize social and religious morality, alongside substantive justice. Therefore, it is necessary to reform this legal culture by changing the positivist paradigm to a non-positivist one, by not only using a juridical approach, but also by engaging in social sciences and new legal values that support a progressive legal approach. For these reforms to take place, a judge must have the moral courage to take breakthrough steps outside of the law.

Key words: *reformation, legal culture, juvenile court judge, progressive.*



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Introduction

Over the past two decades, violence and criminal activities by children in Indonesia have grown to almost twice the rate of crimes committed by adults; however, the rate of child victimization has declined according to the Indonesian Child Protection Commission, 2018. It is estimated that this trend will continue, and this is a major cause of concern for law enforcement agencies.

This contradicts the spirit of the 1945 Constitution, which states that children are placed in a special position and hailed as the nation's future, and a reflection of human survival. Article 28 B, Paragraph (2), declares that the State guarantees that every child has the right to survival, growth, and development, and the right to receive protection from violence and discrimination. Recognizing that children are an important part of society, all parties must strive to protect them from becoming either victims or perpetrators of crime (Mardiah et al. 2012).

An opposite scenario is certainly not supportive, and tends to hinder the implementation of adequate guidance to children. This study reveals that the policy of imprisonment of delinquents has detrimental effects on juvenile offenders' mental health. This is a result of the effect of criminal imposition in the form of stigma on children as perpetrators of crime (Hadisuprpto 2003). The term 'criminal justice system for children' is a translation of the term 'juvenile justice system'; it is used in conjunction with a number of institutions in the judicial system, which include the police, public prosecutors and legal counsels, supervisory institutions, juvenile detention centers, and juvenile development facilities (McCord et al. 2001). The juvenile justice system handles activities and processes relating to the interests of children; all these actions are carried out by police, prosecutors, judges, and other officials, who ideally must keep in mind the welfare of the children involved, and provide special protection to juveniles dealing with the law (Sudarto 1980).

The purpose of juvenile welfare in the juvenile justice system has been emphasized in international legislation in the form of the *Convention on the Rights of the Child*, which was nationally accommodated in Act No. 3 of 1997, and amended to Act No. 11 of 2012 concerning the Juvenile Criminal Court System.



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As judges tend to favor juvenile imprisonment, law enforcement in the juvenile justice system places more emphasis on formal juridical aspects than on goals that identify the interests and protection of children. The high number of cases of children being sentenced to prison indicates that judges have not been able to bring into force sanctions that favor children. In our opinion, juvenile criminal law enforcement places emphasis on the juridical aspects (regulatory considerations), ignoring crucial facets of child protection. Therefore, imprisonment or confinement of juveniles is on the rise, even though the juvenile justice system is meant to prioritize approaches based on diversion and restorative justice, as stipulated in Article 5 of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System. In fact, at an empirical level, this regulation has not even been implemented. Thus, there is an urgent need to understand the functioning of law enforcement agencies, and the methodologies they use to judge or resolve conflicts associated with juvenile crime. This article intends to discuss progressive ways to reform the legal culture of juvenile court judges, in accordance with reformist legal discovery methods that can be used in the juvenile justice system in Indonesia.

Literature Review

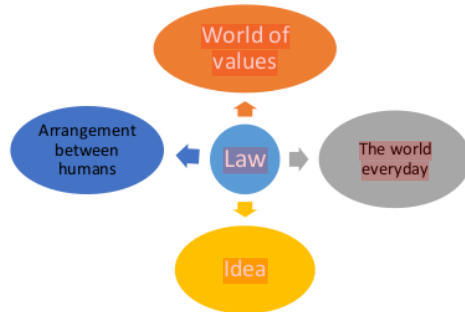
Law enforcement is essentially a unit; a system of substance, structure, and culture (Friedman 1989)—it is not a stand-alone entity and does not exist in a vacuum, but is a part of society. Because law relates to a sense of justice for the community, it is considered to be a channel to solve problems faced by the community (Rahardjo 2004); thus, the law is expected to follow societal developments. However, in reality, there are several legislation examples in effect in Indonesia that are disharmonious, vague, and not in sync with the actual conditions faced by people in the community. This distances the law from its innate purpose—to create a sense of justice and certainty. Legal culture is a component of the legal system. People who use or do not use the law/are obedient or fail to comply with the law are still highly dependent on this legal way of functioning (Warassih 2005). If the substance and structure of the law concerns external matters, then the legal culture of the juvenile court judge focuses on internal issues. Legal culture stems from values, attitudes, and morals (Schwab 1997) and is manifested in legal behavior; it also has the advantage of attracting people's attention to the values associated with the law and legal processes.

According to Friedman, sub-cultures are often found in society, but one that is prominent is the legal culture of “insiders”; namely, judges and legal counsel working together in the legal system. Because law is business, their values and attitudes offer great diversity to the system (Friedman 2005). One aspect of the legal system is the legal structure. *“Legal structures are closely related to the justice system carried out by law enforcement officials. In the criminal*

justice system, the application of law enforcement is carried out by investigators, prosecutors, judges and advocates” Friedman 1977). This structure is intended as a form, pattern, and fixed way (persistent style) of working of the legal system. Within the framework of this structure, the legal system can be known by the form of its institutions, how it works, its administrative patterns, the kinds of authority it has, and so forth.

Friedman equates structures to a series of photographic images of the legal system: “It is what you see if you catch and freeze the system in a series of still photographs” (Friedman 1977). Furthermore, it is known that the legal structure consists of law enforcement officers (police, prosecutors, and judges). The court, however, is an institution that exercises state power (Kusmu 1996), the operational functions of which are carried out by judges. Here, the judge is the central point (core) or “key actor” of the judicial authority, whose role is to examine and judge cases. Figure 1 below shows the law as being a focal connection between values and reality, as envisioned by Robert B. Seidman (Rosidah 2014; Obiunu & Rachael 2018).

Figure 1. Law according to Robert B. Seidman.



Law is seen as a process to convert ideas or legal values into reality. Each component of the figure above represents values that exist in an environment that is loaded with non-legal factors. The Robert B. Seidman model can be used to explain that laws issue change, either through formal steps or the ways in which bureaucracy takes action. This can be due to changes in the surrounding social, cultural, economic, political and other forces. This change is enabled by legislators and bureaucratic enforcement mechanisms. A person’s behavior is not only determined by law, but also by other forces that arise in their environment; thus, the law is not neutral and free of value (Seidman 1987).

Sudarto, 1986 states that there are special requirements that need to be met before someone can become a juvenile court judge. These include having expertise and experience in the field



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of both law and child welfare, and possessing social skills to communicate with children in a manner that is based on trust and open communication. This means that the position of a juvenile court judge is a specialized one. It does not imply a narrowing of the conditions, but rather an extension of the terms. While making decisions on the implementation of laws regarding children, whether criminal or civil, the judge concerned should have extensive and in-depth knowledge in this area (Sudarto 1986).

The general principles of child protection in Indonesia have been included in the provisions of the Convention on the Rights of Children, having been ratified by Indonesia through Presidential Decree No. 36 of 1990 concerning Ratification of the Convention on The Rights of Children. According to Don J. Young, the court is charged by law to act in the interest of the child (Young 1971). However, the law has not been fulfilling this purpose with regards to juvenile justice, because it fails to function in line with the legal needs of the community, and has not been comprehensive in providing protection to children who face the law. This is despite the fact that, in the judicial process, proceedings are carried out by law enforcement professionals who are trained to deal with children. The implementation of law enforcement for juvenile cases is undertaken by law enforcers who are specialists in their fields.

Article 43 of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System outlines the conditions for being appointed as a judge (in this case, a judge in the juvenile justice system). The first requirement is experience as a judge in a general court environment; the second is a keen interest, attention, and dedication to children's problems; and the third is technical training in juvenile justice. Article 43 of Act No. 11 of 2012 concerning the Juvenile Justice System also requires investigators, public prosecutors, and judges to undergo technical training in juvenile justice.

Act No. 11 of 2012 concerning the Juvenile Criminal Justice System has different guidelines for the juvenile justice system—from the investigation stage to examination in court. One such guideline is that judicial and public prosecutors in juvenile trials are to not wear a toga, which is an official judicial robe. However, in practice so far, this has not been followed, and child offenders receive the same treatment as adults undergoing regular court procedures. In addition, children who face the law are kept together with adult prisoners. The judicial process in Indonesia thus functions contrary to the provisions of the law.

Research data has revealed that KPAI handled 1885 cases in the first 2018, a majority of which were children booked for illegal activities (drugs, stealing, and immoral offences). Data from the KPAI revealed that juvenile crimes accounted for 504 of the cases, followed by family cases and alternative care or children whose parents were divorced (325 cases). In



¹ third position were pornography and cyber-related crimes, with 255 cases. Since 2011, juvenile cases have taken the top position, as reported by KPAI Chairman Susanto in a discussion on 23 July 2018 at Wahid Hasim Street, Central Jakarta. He added that accused juveniles were brought to Special Correctional Institutions for Children (LPKA) for stealing (23.9%), drug-related issues (17.8%), immoral cases (13.2%), and other offenses.

There are several factors that cause children to commit crimes—such as opportunity, environment, and intention. However, children have limited reasoning, insight and logic, and tend to act while in emotional states not conducive to good reasoning. They do not have the maturity to distinguish between choices when making value judgements and fail to recognize the consequences of their actions. When a juvenile is booked for a crime, he/she is tried in a criminal court with standard procedures created for adults—research, investigation, prosecution, and examination—following which, if found guilty, they are incarcerated in a correctional institution with adult prisoners. This has a major detrimental effect on their mental health and well-being. In addition, children are affected by being placed in the company of adult convicts, with this having a negative impact on their psychological development. A study has revealed that the prevalence of mental disorders in children in the juvenile justice system is consistently higher than that in the general adolescent population (Grisso and Barnum 2000).

A number of comprehensive studies have indicated that there are several types of mental health disorders common among juvenile offenders, and that some symptoms increase the risk of aggressive behavior (Teplin et al. 2002). In addition, the risk of aggression is high for specific disorders and comorbid disorders due to emotional (anger) and self-regulating (impulsive) symptoms that tend to increase risk (Stoddard-Dare et al. 2011; Atkins et al. 1999). Mental health disorders commonly found in juvenile offenders include affective disorders (major depression, persistent depression, and manic episodes), psychotic disorders, anxiety disorders (panic, separation anxiety, general anxiety, obsessive-compulsive disorder, and post-traumatic stress disorder), disruptive behavior (oppositional behavior and attention-deficit hyperactivity), and substance use disorders (Mallet 2006). These vulnerable children often continue to be plagued with these issues, even after their release.

The justice system is currently faced with the task of providing mental health assessments and care services for young people, as there is dependency on the juvenile justice system to undertake this (Underwood and Washington 2016). The juvenile justice system initially utilized a rehabilitation and prevention approach, emphasizing the needs and rights of children over requests to punish them (Garascia 2005). Garascia's report was in accordance with the provisions of Article 2 of Act No. 11 concerning the Juvenile Criminal Justice



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System, which regulates the principles that apply to the juvenile justice system—protection, best interests of the child, survival and growth, and guidance. Anything related to the principle of deprivation of liberty (punishment) is meant to be carried out as a last resort.

In-depth examination of the juvenile justice system in Indonesia reveals that judges do not pay attention to the principles of child protection, especially that of non-discrimination (prioritizing the best interests of children and their right to live, survive and grow; this includes children who engage in criminal activities). This calls for juvenile court judges to take steps towards a progressive legal approach, where the law is only a means to guarantee and safeguard human needs. This is similar to the provisions of Article 7 of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System, which stipulates that a criminal offence with a penalty of imprisonment of less than seven years can be diversified or resolved outside the criminal justice process. It requires a restorative justice approach, involving the perpetrator (child dealing with the law), the victim's family, parents of the perpetrator, and other parties that are engaged in prioritizing problem-solving over reprisals (Scriven 2017; Obiunu & Rachael 2018). Diversion must also be sought in every legal process—investigation, prosecution, and examination of child cases in the District Court—as outlined in the diversion agreement. Implementation of the same is to be supervised by law enforcement agencies. Article 5 through Article 12 of Act No. 11 of 2012 concerning the Child Criminal Justice System offers other provisions for judges to make decisions using progressive legal approaches.

Materials and Methods

Several studies have thoroughly analyzed the juvenile justice system in Indonesia which refers to Act No. 11 of 2012 at the normative level (Ariani, 2014). Unfortunately, little attention has been paid to the legal culture of juvenile court judges with a progressive legal approach. This research article is devoted to justifying the cultural importance of the progressive legal approach that must be possessed by those judges. In this study, two different research characteristics were used, namely normative legal research and socio-legal research.

The normative legal approach is carried out by argumentation to identify concepts or ideas and principles in examining and studying in depth the problems in research. The identification carried out in the socio-legal study is not limited to text but encompasses an in-depth study of the context in which all processes take place, for example, from law making to the implementation of law. This study uses socio-legal research with the aim of explaining



1 legal symptoms interpreted in a factual manner. The social facts can be explained by legal assistance, and legal norms can be explained by social facts assistance (Bruggink, 1996).

Data collection in this study was carried out with an inventory of documents through literature studies and field studies. Library studies were carried out by searching for legal literature in the form of legal documents, books, journals, and provisions in the form of legislation relating to research. Field research was carried out by visiting relevant institutions and conducting interviews with informants.

Management of research materials in the form of collected legal materials was then processed and analyzed to obtain two forms of truth, namely qualitative truths and quantitative truths. The analytical instrument used is the method of interpretation.

Discussion and Conclusions

Reform of Juvenile Court Judges' Legal Culture with a Progressive Legal Approach Positive Legal Culture of Juvenile Court Judges

Progressive reformation of the legal culture in Indonesia is urgently required, as the judges handling juvenile cases are mostly proponents of positive law. According to legal positivism, the law is conceptualized as a lawyer's right to regulation—it is underpinned by the belief that the law is the most effective tool with which to discipline a society, and therefore legal processes must run according to rules and logic. This view sees law as a linear, mechanical, and institutionalized regulatory institution, which works for the interests of the legal profession itself. It is seen as rational, logical, and an order that is applied to humans—therefore, humans must submit to it (Rahardjo 1998).

This thought process implies that the law is not for humans, but rather humans are forced to adjust to the legal and technical procedures being utilized. Formalistic, bureaucratic, and centralized legal institutions have been built to serve such laws. This situation is accessible to those who have economic and political advantages, and who are able to access all the set procedures (Warassih 2009).

Legal positivism stipulates that rules are reference points, and the only source of guidance for judges handling delinquent child cases. Judges are positioned as mouthpieces of the law and can only apply laws mechanically and procedurally. This rule of law is thought of as sacrosanct and a purpose in and of itself, without regard for other legal dimensions. Honesty and wisdom in implementing the law are ignored. As a result, sensitivity, empathy, and dedication to truth and justice are left behind. Truth and justice become legal-formal problems. This way of thinking places importance on the value of legal certainty over justice



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and usability, and is deductive in finding legal truth by prioritizing formal logic (syllogism) (Rahardjo 2007).

In practice, what a judge decides is highly determined by the mindset or paradigm of the law enforcement officers. This determines how judges read and interpret the law. The same rules can be read differently by people with different paradigms (Rahardjo 2009). To understand the situation better, we provide an example of a case heard at Kotabumi District Court, North Lampung Regency. Two second-grade students at junior high school, Solihin and Yanto, were caught in a physical fight. During a sporting event, Yanto made fun of Solihin's worn-out shoes. After the sport finished, Solihin hit Yanto and injured him with a knife that he had on him. As the wound was small and no major harm had been done, the school called both parents and sought a resolution. Solihin's parents promised to pay Yanto's medical bills, and the matter was closed. However, Yanto's parents were dissatisfied and complained to the police, accusing Solihin of persecution and carrying sharp weapons.

Solihin's parents are native to Kotabumi, where it is customary for people to carry weapons. The following day, Solihin was escorted by his illiterate parents to the police station. A trial was conducted, presided over by a single juvenile court judge. Solihin cried and trembled as he was questioned and shouted at by the judge. He was sentenced to eight months in prison as per Article 351, paragraph 2. The judge who sentenced him said he was merely carrying out his duties according to the law, and that Solihin's actions had proven him guilty. This case shows the mindset of the juvenile court judge to be positivistic, although Article 5 of Act No. 48 of 2009 concerning Judicial Power determines that judges and constitutional judges must explore, follow, and understand legal values and justice in the context of their society.

This provision was intended to ensure that a judge's decision is both in accordance with the law, and gives sense of community justice. The case mentioned above was legally and philosophically adhered to; however, the judge had an obligation to ensure that his/her decision was in accordance with the law and the community's sense of justice. The juvenile court judge should have considered and explored local social conditions and legal feelings, with a focus on child welfare and protection. Solihin's case was the first legal action of this nature undertaken in Kotabumi, North Lampung Regency, as it is commonplace for men (including young men and children) to carry sharp weapons in this region.

Therefore it is posited that the judge should have sought to understand the local beliefs in the area, as well as the concept of diversion (the concept of transferring a case from a formal process to an informal one). The transfer process is intended to provide protection to children in conflict with the law; in this case, diversion was implemented when the parents reconciled



¹ at the school. Diversion is an effort to support and implement the provisions stipulated in Article 16 paragraph (3) of Act No. 23 of 2002 concerning Child Protection; arrest, detention, where child imprisonment should only be used as a last resort.

According to Wignyosoebroto (2010), it is time that the working paradigm of judges in developing countries with multiple cultures, such as Indonesia, changed. A judge's role is no longer limited to carrying out a simplistic reading of the law, nor is he/she a device designed to work mechanically; they are human beings with the ability to be sensitive to humanity and social needs. Even if a judge is asked to read words textually, as stated in the law book, he/she must also be able to make interpretations that are not literal (connotative) in order to reveal social norms that contextually underlie every law prescription. Modern, educated judges that serve the legal needs of a society with multiple cultures are not an extension of the legislature. Judges serving in such regions are expected to be able to play a role as agents who deliver acts of law that have been transformed into an expression of wisdom and justice commonly accepted by citizens in the local community (Wignyosoebroto 2010).

This view is in line with the progressive legal approach, which seeks to dismantle deeply rooted traditional legal methods. Progressive law is liberating; it ensures that human morality and law are part of a process that is not closed or final. Progressive law does not only mean implementing rules that fulfill procedures, but also laws that are seen as a whole human problem. Progressive law is a law that essentially regulates human behavior through legal norms that are created to prioritize justice and happiness, which are essential for life (Rahardjo 2009). The progressive legal agenda offers a new paradigm to legal methods that have been dominated by legal positivism. Progressive law proposes the following maxim: "Law for man or for the people and not vice versa". This can be expanded to principles and doctrines for the people, not the other way around. With this paradigm, if people face a problem, they are not immediately blamed; a way through the existing law is sought, which includes reviewing the principles, doctrines, and procedures that apply to their case (Rahardjo 2009).

The presence of wise and creative law enforcers is absolutely necessary to guide a broad and creative interpretation of such rules. A progressive judge seeks to search and find justice amid the limitations of existing legal rules. This is also the reason that the ingenuity and wisdom of law enforcers in exploring the spirit of a regulation, and the ability to determine precisely the primacy of a social interest or need that must be served by law, are the core premises of progressive law.

Ethics of Juvenile Court Judges who have not been Progressive



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It is very important to reform the professional ethics of juvenile court judges. This claim is based on the results of this study which highlight that the process of handling a case by a judge in court is not merely a juridical technical matter, but also involves ethical elements. The priority ethical element is related to the orientation and motivation of the judge in carrying out the law. When handling a case, there can be a shift in the orientation and motivation of the judge in looking at and interpreting the case being handled. Orientation towards realizing the objective values of law and protection of society shifts the subjective orientation of judges, in order to obtain certain benefits outside the ideal objectives of the law.

We discuss another case here; that of Raju or Muhammad Azwar, an 8-year old boy studying in the third grade at an elementary school. He was ridiculed by 14-year-old Armansyah, which ended in a physical altercation. Although Raju's father agreed to pay for Armansyah's hospital bills, Armansyah's parents reported Raju to the police on charges of persecution. Raju was investigated three times at the Gebang Sector Police Station, Langkat Regency, without a legal advisor or a Correctional Center officer present, and then sent to trial. During the trial, Judge Tiurmaida H. Pardede was harsh on Raju, who felt like he was being treated as a prisoner and deserved to sit in the defendant's seat. The judge's approach frightened him and he felt stigmatized, because at the first hearing, the judge had stated that "from Raju's expression, he knew that Raju was indeed a bad boy". In January 2006, on the second day of the trial, Raju was sentenced to home detention in Pangkalan Brandan, a port town in Langkat Regency. He was locked up for 14 days. The young boy cried daily for his family and asked to be allowed to attend school. However, Tiurmaida insisted that the case continue to be heard because when the file entered the court, Raju's was eight years and one month old.

The actions (violence) and decisions of the judge in this trial process reflect his professional ethics as being without regard for children's rights and welfare. His focus was on the crime committed by the child. The judge should have been neutral and impartial. This is where the need for a progressive legal approach becomes apparent, where law enforcers prioritize children's interests (welfare and protection) and are sincere in carrying out the law. The judge, as a professional, must submit to and obey a professional code of ethics. Judges are also required to have good moral beliefs, so that they can be an example for their peers. Tri Prasetya is another term for the promise made by Indonesian judges, namely, to uphold the image of authority and the dignity of judges, to fulfil roles that adhere to the judge's code of honor, and uphold the spirit of the judge corps. A judge is also required to carry out Tri Prasetya. Judges, thus, should showcase ethics in: (1) personality, (2) performing office



¹ duties, (3) service to justice seekers, (4) fellow judge relationships, and (5) setting good examples inside and outside the courtroom (Code of Honor for Indonesian Judges).

Juvenile court judges who make an effort to understand and follow the professional code of ethics in its true form will be exemplary, both in terms of morality and intellectual ability. They will be able to deliver fair and high-quality verdicts and truly serve the community. Quality decisions are fair decisions that pay attention to the protection of children's rights and welfare (Magnis-Suseno 1993).

Legal Culture of Juvenile Court Judges in Accordance with the Legal Progressive Discovery Method

There are two opinions with regards to judges making legal discovery. As adherents to the doctrine of seinsclair (la doctrine du sensclair), judges maintain that they are only required to make legal discovery if (1) no regulation is found for a concrete case; and (2) the existing regulations are unclear. According to the adherents of this view, in the two aforementioned cases, there should be no legal discovery by the judge (Karison 1955).

As described above, it is customary in Kotabumi for locals to walk around with sharp weapons on them. It is a practice meant to help youngsters develop self-confidence. In the case mentioned above, if the judge had understood the social norms behind the young boy's weapon, he would have made a legal discovery. The judge would have been able to understand the local wisdom behind practices in the community.

The legal culture of juvenile court judges currently uses positivistic legality, which refers to the text of the law. Progressive law, however, makes its presence felt in close relationship with humans. A judge, in deciding juvenile cases, must look from the perspective of a child, not from his own viewpoint or that of the law. Reformation of this legal culture in the juvenile criminal justice system will take place only when the paradigm of judges changes from legal positivism to new attitudes, behaviors and moral laws, with progressive thinking and legal approaches. A judge must have the courage to make a legal breakthrough outside of the law. Thus, a juvenile court judge must work in accordance with the flow of thought and basic principles of progressive law when hearing a case.

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