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Legal Reconstruction in Indonesia Based on Human Rights

Imam As Syafei Building

Faculty of Law, Sultan Agung Islamic University

Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

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The 5th PROCEEDING

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnau, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

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Reconstruction Validity Legal Deeds Are Dealing With Children In The Process Of Law Criminal Justice System Based Child Justice

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ABSTRACT

ABH is a person who is immature, not yet legally legally carrying out legal actions during the juvenile criminal justice system. The reconstruction of the Act SPPA can establish ABH PK Bapas as supporters during the juvenile justice system process.

Keywords: Reconstruction, Legitimacy, Legal Deeds of Children, Children Who Are confronted with Law, Criminal Justice System for Children, Justice

A. preliminary

State upholds human rights (HAM), including children's rights are characterized by the guarantee of the protection and fulfillment of children's rights in the 1945 Constitution and some regulations, both nationally and internationally. In the Indonesian context, the child is the successor to the ideals of the struggle of a nation. "This strategic role has been recognized by the international community to give birth to a convention that essentially emphasizes the position of the child as a human being who should get the protection of the rights of its³⁰⁷, Moreover, that childhood is the period of sowing, establishment piling, foundation construction, which can be referred to as the period of the formation of character, personality and character of a human being, so that later have the strength and the ability and standing steadfast in pursuing

a life³⁰⁸,

Children put a child the sense of pluralism in conflict with the law (ABH) dilemma. ABH is Children in conflict with the Law of the Child; Who Became Victims of Crime; Children who become witnesses and Crime, which all have to take legal actions in the juvenile criminal justice system (SPPA), while he was still aged children. Expose him back ataslak is the reason for this research, the formulation of the problem:

1. Is it true that the validity of legal actions against the law child in a child undergoing criminal proceedings not reflect justice?
2. How weaknesses of children in conflict with the law to take legal actions in the juvenile criminal justice system?
3. How is the reconstruction of the validity of legal acts of children in conflict

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³⁰⁷ Ruben Achmad, 2005, *Upaya Penyelesaian Masalah Anak yang Berkonflik dengan Hukum di Kota Palembang*, Jurnal Simbur Cahaya Nomor 27 Tahun X, Januari, hlm. 24.

³⁰⁸ Maidin Gultom, 2008, *Perlindungan Hukum Terhadap Anak dalam Sistem Peradilan Pidana Anak di Indonesia*, Refika Aditama, Bandung, hlm. 1.

with the law in carrying out criminal proceedings based child justice?

This study is a qualitative research approach that departs sociolegal of constructivism³⁰⁹, Also through Empirical juridical approach is a method or procedure used to solve the problem by first examining the existing secondary data and then proceed with research on primary data in the field³¹⁰, This approach aims to understand that the law is not solely as a statutory set of rules that are normative, but legal as *menejela* community behavior in public life, interact and relate to aspects of society, socio-cultural aspects.

B. Results and Discussion

The conception of a modern constitutional state requires that any government action should be based on the law and the government is also entrusted with the role, duties and responsibilities are broad and heavy³¹¹, Any talk about the law, will be associated with justice. Laws without justice will lead to arbitrariness or favoritism, while justice without law will lead to uncertainty. Satjip-to Rahardjo law states that talking is talking about the relationship between humans. Thus, discussions about the law, it is clear or vague, is the talk of justice, can not talk about the law only up to form as a formal relationship. We also need to see it as an expression of the ideals of community justice³¹², Law purposes emphasis on “fairness”. Gustav Radbruch

conceptualized one legal purpose or goal of the law is “justice” in addition to expediency and certainty³¹³, Aristotle argued that the purpose of the law is solely to bring about justice. Justice here is *ius suum Quique tribuere*, which means giving to each person what is to be a part or right³¹⁴, Including providing legal protection for ABH. Legal protection according to Setiono, is the act or an attempt to protect the public from arbitrary actions by the authorities are not in accordance with the rule of law, to bring order and peace so as to enable people to enjoy dignity as human beings³¹⁵,

Each discipline law uses different terminology for competent legal terms. Virtually every person (person) means the bearer of rights, which is something that has the right and obligation and called legal subjects. Although according to the law, every person no exception may have rights in law but not everyone is allowed to act independently in exercising the rights that. There are several classes of people who by law has been declared “incompetent” or “less capable” to act alone in performing legal acts³¹⁶ (Called *handelingsonbekwaam*), but they have to be represented or assisted others³¹⁷, So should ABH that are undergoing the process SPPA,

Term SPPA translation of the term The Juvenile Justice System, which is a term used by a number of institutions that are members of the court, which includes police, prosecutors and lawyers, supervisory institutions,

309 Lihat Sudarwan Danim, 2002. *Menjadi Peneliti Kualitatif*, Pustaka Setia, Bandung. Lihat juga dalam Lexy J. Maleong, 2005, *Metodologi Penelitian Kualitatif*, Rosda Karya, Edisi Revisi, Bandung, hlm. 165. Juga dalam Anas Saidi, 2005 “*Metode Penelitian Kualitatif*”, *Makalah Workshop Penyusunan Proposal Penelitian*, LIPI, Jakarta. hlm. 6. Dan Juga dalam S. Nasution, *Metode Penelitian Naturalistik Kualitatif*, Transito, Bandung, hlm.12. lihat juga Esmi Warassih, 2006, “*Penelitian Socio-Legal: Dinamika Sejarah Dan Perkembangannya*”, *Makalah Workshop, Forum Kajian Dinamika Hukum dan Majalah Ombudsman*, Bandung, hlm. 5. Juga dalam Bambang Sunggono, 2003, *Metode Penelitian Hukum*, Raja Grafindo Persada, Jakarta, hlm. 103.

310 Soerjono Soekanto, 1986, *Pengantar Penelitian Hukum*, UI Press, Jakarta, hlm, 52.

311 S.F. Marbun, 1997. *Peradilan Administrasi Negara, dan Upaya Administrasi di Indonesia*, Cet. I, Liberty, Yogyakarta, hlm. 166-167.

312 Soerjono Soekanto, 2001, *Sosiologi Suatu Pengantar*, PT. Raja Grafindo Persada, Jakarta,., h. 159.

313 Ahmad Ali, 2002. *Menguak Tabir Hukum Suatu Kajian Filosofis Sosiologis*, Gunung Agung, Jakarta, hlm. 72.

314 Dudu Duswara Machmudin, 2000. *Pengantar Ilmu Hukum Sebuah Sketsa*, Refika Aditama, Bandung, hlm. 23

315 Setiono. 2004. *Rule of Law (Supremasi Hukum)*. Surakarta. *Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret*. Salatiga. hlm. 3.

316 Kata “*perbuatan hukum*” adalah untuk membedakan dengan kata “*perbuatan*” saja, karena perbuatan hukum adalah suatu perbuatan yang apabila dilakukan oleh seseorang maka dapat menimbulkan akibat-akibat hukum. Akibat-akibat hukum dalam disiplin hukum memiliki ketentuan yang berbeda-beda.

317 Kansil, 1999, *Pengantar Ilmu Hukum*, Balai Pustaka, Jakarta, hlm. 85.

child detention centers, and facilities for child development³¹⁸, In the SPPA, There are inspection activities and termination of cases that concern the interests of the children, and of all activities undertaken by the police, prosecutors, judges and other officials³¹⁹, Must be based on a principle is for the welfare of the child and the child's interests³²⁰,

ABH problems and SPPA developed following the social development of the more advanced, because it needs to be addressed. Thought it was also with the development of social work criminal science and philosophy of humanity, develops a system of treatment of offenders, especially child treatment systems is growing rapidly, especially in developed countries³²¹, Similarly with the role of social Supervisor (PK), which must be requested menyampaikan results of Community Research (Litmas) in SPPA³²², But the role was limited to conveying Litmas PK, then just be a visitor or observer and let ABH facing its own process SPPA, SPPA-law is ambiguous, to say the one hand ABH ABH children on the other side should be held accountable in criminal and legal actions for undergoing the SPPA.

Thus the legal act ABH in undergoing the process of SPPA not reflect justice, besides that it still has many drawbacks, one of which law-SPPA allowing ABH to take legal actions while age ABH not suffice, should PK-Bapas not merely to do Litmas, but made

pengampu ABH during the SPPA. This situation reflects the intended ABH-SPPA not meet UU UU-SPPA contrary to the interests of ABH referred by progressive legal theory.

Progressive Law close to the theories of Natural Law, which is the concern for the things by Hans Kelsen called 'meta-Juridical'. Thus, the Progressive Law put the interests of a greater man than interpreting the law in terms of the 'logic and rules'. Although almost similar to the Critical Legal Studies Movement that emerged in the United States in 1977³²³, But the Progressive Law does not just stop at criticism of the liberal legal system. Progressive Law explores understand that the law is not absolutely driven by positive law or statutory law, but he also moved to the non-formal level. Therefore Progressive Law assumes that the legal basis exists and comes to human then it is accurate to say that the 'law as a great Anthropological document'³²⁴, With the pengertian, the Progressive Law as the law is a "human institution", which complement each other with the human aspect, both in human relations as well as the wider society.

The basic assumption Progressive Law starts from the nature of the legal basis is for humans. The law does not attend to him - alone, as initiated by the science of positive law-but to human beings in order to achieve prosperity and happiness of humankind. Such a position to deliver a predispo-

318 Setya Wahyudi menggunakan istilah sistem peradilan pidana anak, merupakan terjemahan dari istilah *The Juvenile Justice System sebagaimana digunakan SMRJJ – The Beijing Rules yang tertera dalam Rule 5.1. Lihat pula Joan Mc. Cord dan kawan-kawan. Joan Mc. Cord, Cathy Spatz Widom, and Nancy A. Crowell, eds., 2001 Juvenile Crime, Juvenile Justice. Panel on Juvenile Crime: Prevention, Treatment, and Control, National Academy Press, Washington DC. Hlm. 154. Dalam buku tersebut disebutkan: "term juvenile justice is often used synonymously in addition to the court, but it also may refer to other affiliated institutions in addition to the court, including the police, prosecuting and defence attorney, probation, juvenile detention centers, and juvenile correctional facilities", dalam Setya Wahyudi, *Penegakan Peradilan Pidana Anak Dengan Pendekatan Hukum Progresif Dalam Rangka Perlindungan Anak*, *Jurnal Dinamika Hukum*, Vol. 9 No. 1 Januari 2009, hlm. 30.*

319 Yang dimaksud dengan pejabat lain, antara lain adalah Pembimbing Kemasyarakatan (PK) dari Balai Pemasyarakatan (Bapas).

320 Sudarto, 1980, *Kapita Selekta Hukum Pidana*, Alumni, Bandung, hlm. 129, 140.

321 Marianti Soewandi, 2003. *Buku Materi Kuliah Akademi Ilmu Pemasyarakatan Bimbingan Dan Penyuluhan Klien*. Jakarta hlm. 87-88.

322 *Ibid.* hlm. 95

323 Satjipto Rahardjo, 2005, "Hukum Progresif: Hukum yang Membebaskan. *Jurnal Hukum Progresif*". *Program Doktor Ilmu Hukum Univ. Diponegoro*, Vol. 1/No. 1/April 2005, hlm. 9. sebagaimana dikutip dari Andrew Altman, 1990, *Critical Legal Studies – a Liberal Critique*. Princeton Univ. Press, Princeton, N.J

324 Satjipto Rahardjo, 2000, *Mengajarkan Keteraturan Menemukan Ketidak-Teraturan (Teaching Order Finding Disorder) Tigapuluh Tahun Perjalanan Intelektual dari Bojong ke Pleburan. Pidato Mengakhiri Masa Jabatan Sebagai Guru Besar Tetap pada Fakultas Hukum Universitas Diponegoro, Semarang 15 Desember 2000*, hlm. 4.

sition that the law is always on the status of 'law in the making' (which is always in the process of law to be) ³²⁵, In line progressive legal theory in question, then SPPA-laws need to be reconstructed, which ABH during the SPPA in PK-Bapas forgiveness.

C. Conclusions and suggestions

1. knot

- a. ABH validity of legal acts in the children undergo criminal justice process has not reflect justice, because the law requires that the ABH-SPPA to take legal actions-SPPA while Law itself states ABH not be legally competent and have to get legal protection.
- b. ABH weaknesses of legal actions in the juvenile criminal justice system should have all the legal acts SPPA ABH

during the process can be canceled.

- c. Reconstruction of the validity of a legal act ABH in children undergoing criminal proceedings based on fairness, it should be during the SPPA ABH in PK Bapas guardianship.

2. Suggestion

- a. ABH should get justice and legal protection as mandated by the 1945 maximum.
- b. Law-SPPA must have legal certainty, usefulness, fairness and prioritize the protection of ABH not give priority to provide criminal.
- c. Law-SPPA should be reconstructed with PK-Bapas set is divided into two, namely PK for Litmas, and PK for pengampu ABH during the SPPA.

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³²⁵ *Ibid*, hlm. 16.

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