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The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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THE RECONSTRUCTION OF LEGAL AID LAW FOR CHILDREN WHO GET CONFLICT WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON THE VALUE OF PANCASILA

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1. Introduction.

Indonesia country is a constitutional which is coming from the law number three/MPR / 2000 about the law an the order of rules of law. Chapter 28D verse one stated “everyone has a right in testimonial, guarantee, protection, and the law which must be fair and have the same treatment in law. Constitution has given the guarantee that all of society, will not be treated discriminatively and forbid the human right based on the chapter 28 verse 2 stated “everyone has a right to be free from the discriminated action and get the protection for the discriminative things.

Pancasila as the ideology and the rules of social live in Indonesia has become a priority with the vision to guarantee the process of life and nation character, in order all of Indonesian society has a right to get law protection, therefore the little children.

Some helps from law for children who get conflict with law, the treatment be difference with adults, children have no ability to protect their own right, many side convince their live, the country and society have importance to protect children.

Based on the abstract above , so the problem study is formulated below :

1. How the setting of legal aid the children who have conflict with law in the process of children law is positive right now?
2. How is the application of legal aid the children who have the conflict with law is positive nowadays?
3. How is the reconstruction of legal aid for children who have the conflict with the law in process of legalization for children based on the value of Pancasila?

Based an Soerjono Soekanto, the base of theory is using paradigm. Where the paradigm is divided in two three kind, they are :

1. Paradigm means law, 2.) paradigm differentiate law, 3.) paradigm as the laws order sector.

The kind of research is a sociological juridical law research or empirical juridical. According to Kirk and Miller, the qualitative research is a certain tradition in social science fundamentally depended on the observation of human in the region and term. According to Sugiyono the method of qualitative is suitable to be used in the research which the problem is unclear, and it is being done in the narrow social situation, so the result of this research will be deeper. According to Soerjono Soekanto the qualitative approach is actually the research which result is descriptive.

The research uses the social legal research approach, Tamahana states that socio-legal studies is given to law and society studies. Based on F.X. Adji Samekto, social legal studies form the law as norm and reality, researcher in socio legal studies demand the controller of law which have been built in the knowledge of law itself (as the apriori law and unlimited of values), and the domination of how theories work. As the consequence which look at as a reality.

The location of research is in Medan city (the court of law grade 1A, Medan, the office of public prosecutor, resort police office Medan, PERADI). This research uses the primary data and secondary data and the object of tertiary law.

The technique of data collecting has been done by observation and interview with the key informant whom have been decided by researcher based on the characteristic of research. To get the accurate data, it needs sampling distribution and random decision whether it is simple and more difficult.

The respondents whom will be asked are law practitioner and advocates, policeman, lawyer, public prosecutor. Meanwhile the collecting of secondary data, is being done by library research (documentation) that is a chronological way to find out the data by reading, analyzing, classifying and being done by the understanding of law as reflected in rules, the literature which is relevant with the problems.

The technique of analysis with the primary data, the researcher uses the technique of data analysis and type is Strauss and J. Corbin, by analyzing the data since the researcher was in the field. Then the researcher arranges the category of the data in term on theme. After the data has been given the validation, the researcher did the reconstruction and analysis with the qualitative inductive to answer the problem.

The technique of validation has a purpose to know the validity of data which has been got in the research. The technique which is used is triangulation for the source, they are :

1. By comparing the data which has been taken from observation with the data which has been taken from the result of interview with the informant.
2. By doing the comparison between perception, point of view and general opinion and the opinion research.
3. By comparing the result of interview with library research after the triangulation process done. The researcher will decide the valid data which will be used as a material for research.

The grand theory which is used in this dissertation is the theory of justice.

1. John Rawls theory about justice.

Based on John Rawls in the book of “A Theory of Justice” explains the theory of social condition as the difference principle, is the social difference and economy must be settled to give a benefit for them who are not lucky. The term of social economy different in the different principle to answer. The difference in prospect of someone to get the element of welfare income and authority. Meanwhile the principle of fair equality of opportunity shows them who have low chance to achieve the prospect of wealth, authority and income. Themselves must be given the special protection.

2. John Stuart Mill's Justice Theory

Based on John Stuart Mill's idea of utilitarianism, there are two kinds. They are happiness and truth. Mill stated the happiness and the truth as the assumption which the base of thinking about justice based on utilitarian perspective. Mill stated the purpose of life is the happiness and there is no pain, but Mill stated that the justice is not *sui generis* because depended on functions. Mill's approach through the justice is placed in analysis about logics and morality sense, started from the unfair things in society and it build is the universal concept to analyze it. Mill stated the justice theory which is separated from the function prosecution.

3. The theory of Pancasila justice

Pancasila is the philosophy for Indonesian country and laws of 1945 is source of law for all of rules of Indonesian laws. Laws manage every single life is element in a nation. So the justice can be built continuously and it has purpose for country to achieve welfare of society. One of nation purpose is to create the justice for everyone, that thing consist in the second part and fifth in Pancasila. As well as can be seen in the principle of thought in UUD NRI 1945 and country is willing to create the social justice for all of people in Indonesia.

4. The theory of restorative

The restorative justice is a form of justice which is centered for the need of victim, the criminals and society. The approach of restorative justice is a paradigm to be used as a strategy and frame in handling crime problems which answer the dissatisfaction of justice system of criminal nowadays. The restorative approach is assumed as the changing of model and mechanism which work in the justice system in handling the problems of criminal nowadays.

The middle theory is the system law theory of Lawrence M. Friedman. As a system, friedman divides the system of law into the three element, they are: a. Legal structure, b. Legal substance, c. Legal culture.

Friedman states the law can not be straighten if there is no credible law upholder, competent and also independent. The weak of mentality in laws upholder cause the inability to straight up the law as well.

The dissertation applied theory uses the progressive theory, the concept of progressive law was born and developing from the dissatisfaction feeling from the expert of law through the theory and traditional law practice which develop and criticize the asymmetrical between law and theory (law in books) with the law in action, and the failure from law in giving the respon through the problems which happened in society. The progressive law is started from the basic assumption, law is the institution which has a purpose to transport the human in to the balance life, wealth and make the human get the happiness. Law it self does not reflect the law as the absolute and final, but is decided by it is ability to serve human. Characteristic of progressive law based on satjipto rahardjo is : law is presented to serve the society. a.) progressive law will be still exist because the law will always be on it is position as the law in the making and will not be final as long as human present, so the progressive law will always be exist to arrange to life of society. b.) in progressive law, the ethnic and humanity moral will be very strong, which will give the respon for the developing and human needs and serve the justice and wealth.

The process of green table of children who have conflict with law in the civil court of law based on the requirement of chapter 5 2/ till chapter 62 laws numb 11, 2012 about the system of Crime Judicature. In the court of law, ist class in Medan, the process of green table for children who hare the konflik with law based on the requiremen of law is the laws numb 11, 2012 about system of crime judicature of children and KUHAP.

A. Value Reconstruction

Value reconstruction is known as process to rebuilt or recreate and recognized, reconstruction is an inteperatation of psychoanalytic data as well to explain the development which has the material meaning. Indonesian society need to do recontruction for basic values of lordly Pancasila, humanity, unity, citizen and justice, because Pancasila as the Phylosophy od Nation and National Wisdom. For one life of human which can be seen in numb. 4 the value which has a basic in country and society, are : 1. Justive, 2. Truth, 3. Law, 4. Moral

The second part of Pancasila has the Koherent meaning with the charactiristics of situation and the Nations authentic and human authentic which are “Monopluralis”. The 5 th part of Pancasila, “The Social justice for all of Indonesian citizens” the value of social justice explain the law and justice are not walking by themselves, but must be seen and done as a unity. If the law and justice are separated, so at the time law has lost the orientation for it self. The social justice is a distributive justice which is stated by general justice.

Reconstruction value is meant as the process of rebuilding on recreating or reorganized. If there is rebuilding process, in this case there is value. The laws as product of national legistation will be perfect if Pancasila can be made as way of life with the Pancasila’s value as basic.

B. Legal aid For children who have conflict with laws in some countries

1. Australia

The history of law in Australia before 1973 was done with the from of counseling which was done by accompanying a person who acts suspiciously in the court of law, then it will raise the legalization laws freely to fulfill the needs in of law. In 1997 federal government change the common things in legal aid generally, so the legal aid which is financed is the community of legal aid or group legal aid, one of the children group who is under 18 years old. The federal government provides 55% for the fee of legal aid and city government provides 45%.

Australia never manage the contitutional writttenly about the rights of legal aid for all of people, but the problem of legal aid is based on the decision of court of law which is important, where in that decision is known as legal accompaniment. In the case of dietrich and In re K, become *yuris prudensi* that legal aid for accompaniment or legal aid.

2. South Africa

Legal aid in South Africa wasl already avalaible since the law number 22 1969 was initialed, and it is about legal aid act. South africa finance the legal aid routinely for people

who need 77 US Dollar every year. South Africa is a democratic constitutional which is formed based on the basic values of human dignity, the equality of rights the equality in front of law and the same protection and the function of law can be accepted if:

- a. Every people who declare that the right which is settled in Carter of human's right which is violated or threatened, have a right of process in law in the competence court of law to get the protection.
- b. Every people presumed, and arrested have a right to get the law advisor in front of court of law, so the substantial unfair can be avoided
- c. Every children have a right to get the law advisor in front of law to make sure that there will no unfair in the case where the child is involved.

The South Africa constitution give the responsibility explicitly to the country to prepare the law advisor in law consultation service for a person who get accusation, arrested and children's problem, where the unfair substantial can be happened but let us back to the interpretation of constitutional problem, sometimes the interpretation ask whether the constitutional country is an obligation to provide the law advisor and the law consultation. South Africa has legal aid council, it is a independent part which was formed based on legal aid 1969. The function of legal aid council is applying the general principal and accountable from the finance user.

3. Taiwan

In Taiwan, the finance is used to legal aid provided by country and put in Judicial Financial (Judicial yuan) and there is no the different crime problem which is done by Adults or children who get conflict with law. Legal aid foundation is controlled by law minister and judicial council, in 2004, there were 17.889 legal aid offer which were accepted by legal aid council 10.000 offers can processed and 4.272 offers were crime and children is involved in it as subject. By the foundation, because the crime was not claimed as a hard crime, so 61,5% can be helped by foundation because children who get conflict with law come from poor family.

C. Yuridical Reconstruction

The right of legal aid has been accepted universally, even though the legal aid was not strictly started as country's responsibility, but in chapter I, verse (3) UUD 1945 started that Indonesian country is the state with law, financial help for the poor society is an obligation of country to provide based on the law number 16 2011. About legal aid based on chapter 16

verse (1). “The financing for legal aid which is needed and used to manage the legal aid based on laws given to the budgets of Nation’s income and expenditure.

Finance for legal aid for children who get conflict with law has not been settled clearly in the laws number 11, 2012 about legal aid, the some treatments between children and adults in financing legal aid can be seen not only in the rule of law which manage about fee for legal aid special for children who get conflicts with law.

D. Reconstruction Chapter 23 verse (1) No. 11 2012 about system of criminal justice, chapter 23 is :

- (1) In every level of examination, children must be given the legal aid and accompanied by society counselor or another counselor based on the decision of laws rules.
- (2) In every level of examination, the victim is child or the witness child must be accompanied by parents/on the trusty guardian whom trusted by victim’s child or yhe child of witness, or social worker.
- (3) Parents as suspect or defendant who is Investigated, the requirements as mentioned in 2 and verse is not valid anymore for parents.

E. Theory of legal aid for children who get conflict with the law based on country responsibility

Reconstruction Of chapter 23 verse (1) laws no. 11, 2012 about the system of criminal justive for children who get the guarantee from country automatically become the responsibility of country. Legal aid for children get conflict with law theoretically can be an inportant basic because of it context, country appears when it is needed by the citizens, the legal aids which bron from country is responsibility is only normative, but it is also constitutionally legal aid.

The theory of legal aid for children who get the conflict with law automatically and freely based on country which try to expand the thoughts about the progressive law theory which reject status quo in law. The theology of friedman law theory specially related with substansial law which really motivate this new theory every day can be used to revise the laws substance which is not clear, so the laws can be clearer and strict and the substance will be clearer also from the progressive thoughts toward the better law substance and fair based on the Pancasila.

F. Conclusion

1. The setting of legal aid in Indonesia based on laws no. 11 2012 about the system of children criminal justice has been set based on chapter 23, verse (1) and a must, but it has not been guaranteed by country clearly. Laws numb 11 2012 manages strictly about diversion in restorative justice which is meant to make a distance for the children from the justice proces so can avoid the stigma of law.
2. The implementation of legal aid for children who get conflict with law in Indonesia especially in the region of National court of law in Medan generally deals with laws no. 11, 2012 about the system of children criminal justice based on chapter 52–chapter 62 laws no. 11 2012 about the system of children’s justice.
3. Reconstruction of law for children who get the conflict in process of justification based on the value. Of Pancasila strictly states the legal aid for children who get conflict with law can be received automatically and the responsibility of country to fullfill it. The values reconstruction based on national wisdom of Pancasila must be fair, humanity and full of dignity, so all rules of law in Indonesia can suitable with the and part of Pancasila, “the fair humanity and civilized.”

G. Sugestions.

1. The setting of legal said for children who get conflict with law in law numb 11, 2012 about the system of children’s and more strictly about the financial guarantee and availability of advocates for children who get the conflict with law.
2. In giving the legal aid for children who hare conflict wit law in all level of examination such as investigator, prosecutor, and court of law, there must be the advocates or the legal aid frist which has cooperation with all official based on level examination.
3. Reconstruction of laws numb 11, 2011 about the system of criminal justice of children especialy chapter 23 (1) stated, “every level of innvestigation children must be given the free legal aid which is automatically granted by country, verse (2) is: “in every level of investigation, children must accompanied by social counselor or other compainent which is suitable with laws.

H. Implication Of Dissertation

Dissertation entitled: “RECONSTRUCTION OF LEGAL AIDS FOR CHILDREN WHO GET CONFLICT WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON JUSTICE VALUE PF PANCASILA” can be useful for the reseacher individually and useful for society, and a stimulous for laws maker to revise laws numb. 11, 2012 especially to reconstruct chapter 23 which has 3 verse precionly be come 4 verse. This Dissertation also can be useful for the begining of a new theory in law for the next time, especially for those who want to reasearch about legal aid for children who get the problem with law or legal aid generally. This Dissertation hopefully can be useful for academic and sosiological for society and it can add the elements of scientific research for Doctor Programme of law faculty in UNISSULA.

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