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The Importance of Realizing Fair, Beneficial and Definitive Criminal Case Resolution Based on the Principles of Deliberation and Consensus

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***Abstract*:** *The principle of Musyawarah Mufakat is the basis or basic law for deliberation, urun rembug or joint discussion to resolve problems to finally make decisions that are agreed upon or agreed upon or find solutions to resolve problems that are mutually agreed upon. The culture of deliberation, as a value system lived by the Indonesian people, is a spirit for each party in the deliberation to resolve conflicts, for example, will try to reduce their stance so that a meeting point that is beneficial to all parties can be reached, which leads to consensus. What is decided in the deliberation to resolve the conflict slowly develops into customary law. This research will discuss how the deliberation principle of consensus is regulated in the settlement of criminal cases to realize justice, certainty and legal benefits, and what is the urgency of the deliberation principle of consensus in the settlement of criminal cases to realize justice, certainty and legal benefits. This research uses normative juridical research methods using a statutory approach (state approach), case approach (case approach), comparative approach (comparative approach), conceptual approach (conceptual approach). Based on the results of the research, the principle of deliberation has been applied for a long time, both in the old order, the new order and at this time, although not every stage of the law enforcement process has been carried out, especially at the most crucial stage, namely investigation and prosecution. Law Number 1 of 2023 concerning the new Criminal Code has regulated the enactment of laws that live and develop in society so that it is deemed necessary and very important for the Criminal Procedure Law in the future (Ius Constituendum) to regulate the settlement of criminal cases based on the principle of consensus to follow up on the material law that has been passed and is very irrelevant to criminal law enforcement in Indonesia if Law Number 8 of 1981 concerning the Criminal Procedure Code remains in effect after the enactment and enactment of the new Criminal Code.*

Keywords: *Principles of deliberation and consensus, customary law, justice, legal certainty and legal expediency*

INTRODUCTION

The existing formal criminal law (KUHAP) and material criminal law (KUHP) in Indonesia, which tends to adhere to the Continental European Legal System, are actually far behind and cannot adjust to the changing dynamics of social changes in society that continue to occur. As Satjipto Rahardjo said, "The rule of law is not the same as the state of law but also

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the state with the determination of its people to organize themselves.[1]

The reform of the Criminal Procedure Law is intended to create a criminal justice system based on the motivation to achieve the following:

1. Improve the protection of the human rights of suspects/defendants;
2. Balance between the protection of the dignity of the suspect/defendant and the protection of witnesses/victims and the public interest;
3. Strict delineation between arrest and detention;
4. Ordering and upholding the authority of law enforcement officers.[2]

In line with this description, Andi Hamzah wrote:

Criminal procedure law is also called formal criminal law to distinguish it from material criminal law. Material criminal law or criminal law contains instructions and descriptions of offenses, regulations on the conditions for conviction and rules on punishment, regulating to whom and how the punishment can be imposed. Whereas formal criminal law regulates how the state through its tools exercises its right to convict and impose punishment, so it contains criminal procedures.[3]

The current criminal justice system still adheres to the retributive justice system (retaliation) against the perpetrators of criminal acts. So that the perception of the law is only used as a tool to give the impression of fear as a form of retaliation to the perpetrator. This results in regulations that are used to pay more attention to the perpetrators of criminal acts without paying attention to the victims of criminal acts that occur.[4]

The current formal criminal law (KUHAP) is no longer relevant when compared to the new material law (KUHP) because it accommodates the laws that grow and develop in the community, namely:

1. Article 2 paragraph (1) : the provisions referred to in Article 1 paragraph (l) shall not prejudice the applicability of the law living in the community which determines that a person should be punished even though the act is not regulated in this Act.
2. Article 2 paragraph (2): The law that lives in the community as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the community of nations. [5]

The need for alternatives in the law enforcement process in the future is also the answer to overcapacity in correctional institutions throughout Indonesia, if there is no change in the way the judicial process is carried out, the number of residents in prisons will increase and will certainly add to the burden of old problems related to overcapacity in prisons. The

[1]Andi Hamzah. Pengantar Hukum Acara Pidana Indonesia. Edisi Revisi. Jakarta: Ghalia Indonesia. 1985. h. 12.

[2]Bagir Manan. Restoratif Justice (Suatu Perkenalan) dalam Refleksi Dinamika Hukum Rangkaian Pemikiran Dalam Dekade Terakhir. Jakarta: Perum Percetakan Negara RI. 2008. h. 4.

[3]Andi Hamzah. Pengantar Hukum Acara Pidana Indonesia. Edisi Revisi. Jakarta: Ghalia Indonesia. 1985. h. 12.

[4]Bagir Manan. Restoratif Justice (Suatu Perkenalan) dalam Refleksi Dinamika Hukum Rangkaian Pemikiran Dalam Dekade Terakhir. Jakarta: Perum Percetakan Negara RI. 2008. h. 4.

[5]Kitab Undang-Undang Hukum Pidana (Undang-undang Nomor 1 tahun 2023 tentang Kitab Undang-undang Hukum Pidana)

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capacity of prisons in Indonesia is very disproportionate to the number of prisoners, from the total number of prisoners in prisons and detention centers there are 270,907 people. This is a very large number compared to the maximum capacity that Indonesia has from 165 detention centers, 294 prisons, 33 LPKA and 33 LPP which only amount to 132,107 people to accommodate prisoners and detainees.[6] This condition is very concerning and invites a negative impact on prisons that experience overcapacity problems.

The approach of customary law based on the principle of deliberation and consensus in the perspective of criminal law in Indonesia through the approach of the principles of existing criminal procedure law and the law that lives in the community should be fought for and become a thought for future criminal procedure law reform. The relevant principles are related to the restorative justice approach that accommodates the laws that live in the community. This study aims to determine and analyze the arrangement of the principle of consensus in the settlement of criminal cases to realize justice, certainty and legal benefits in the Indonesian Criminal Procedure Law and to analyze the urgency of the principle of consensus in the settlement of criminal cases to realize justice, certainty and legal benefits in the Indonesian Criminal Procedure Law. The formulation of the problem that will be discussed in this research is How is the regulation of the principle of deliberation of consensus in the settlement of criminal cases to realize justice, certainty and legal benefits and What is the urgency of the principle of deliberation of consensus in the settlement of criminal cases to realize justice, certainty and legal benefits.

Research Method

This writing uses normative juridical research methods through an approach based on primary legal materials by examining theories, concepts, legal principles and laws and regulations.[7] Research using normative juridical methods is a legal research conducted by examining library materials or secondary data as a basis for research by conducting a search for regulations and literature related to the problem under study.[i] The method of approach used in this research is normative juridical in which secondary sources of material are examined in the form of theories, regulations and legal rules using a statutory approach (state approach), case approach (case approach), comparative approach (comparative approach), and conceptual approach (conceptual approach).[8]

Results

1. *Indonesian regulations based on the principle of consensus in the Criminal Justice System.*

The regulation of the principle of deliberation to reach consensus is not a new thing in criminal justice in Indonesia, as can be seen in various regulations that have been regulated since the old order until now, namely:

1. Emergency Law of the Republic of Indonesia Number 1 of 1951 Concerning Temporary Measures to Organize the Unity of the Structure of the Powers and

[6]Rey Japa Bramada, Padmono Wibowo. Upaya Penanggulangan Dampak Over Kapasitas Di Lembaga Pemasyarakatan Kelas Iib Arga Makmur. Jurnal Pendidikan Kewarganegaraan Undiksha. Volume 10 No 1. Februari 2022. h. 3.

[7]Ronny Hanitijo Soemitro. Metodologi Penelitian Hukum dan Jurimetri. Cetakan Kelima. Jakarta: Ghalia Indonesia. 1994. h. 53.

[8] Peter Mahmud Marzuki. Penelitian Hukum. Jakarta: Kencana. 2009. h. 93

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Procedures of the Civil Courts.[9]

2. Arrangements for case settlement based on the principle of deliberation and consensus in Diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.[10]
   That based on the general provisions of Article 1 paragraphs 6 and 7, the principle of deliberation and consensus has been implemented by providing an understanding of the term Restorative Justice, namely the settlement of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair settlement by emphasizing recovery back to its original state, and not retaliation.[ii] Then continued the term Diversion is the transfer of the settlement of children's cases from the criminal justice process to the process outside the criminal justice.[11]
   The Diversion procedure itself is carried out through deliberations involving the Child and his/her parents/guardians, victims and/or parents/guardians, Community Counselors, and Professional Social Workers based on the Restorative Justice approach and can involve Social Welfare Workers, and/or the community.[12]
   Diversion in the juvenile criminal justice system aims at:[13]
   a. Achieve peace between the victim and the child;
   b. Resolving children's cases outside the judicial process;
   c. Avoiding children from deprivation of liberty;
   d. Encourage the community to participate; and
   e. Instilling a sense of responsibility in the child.
3. Regulation of the Indonesian National Police Number 8 of 2021 concerning Handling Crimes Based on Restorative Justice which explains the implementation of handling criminal offenses based on Restorative Justice in the following articles:[14]
4. Regulation of the Attorney General Number 15 of 2020 concerning Termination of Prosecution based on Restorative Justice which explains the procedures for implementing case settlement based on restorative justice, namely:[15]

That in addition to the above regulations there are also several other regulations that regulate the agreement and understanding in case settlement based on Restorative justice which prioritizes deliberation to reach consensus in case settlement, namely:

1. Joint Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia, the Attorney General

[9] Pasal 5 ayat (3) huruf c Undang-Undang Darurat Republik Indonesia Nomor 1 Tahun 1951 Tentang Tindakan-Tindakan Sementara Untuk Menyelenggarakan Kesatuan Susunan Kekuasaan

[10] Pasal 1 angka 7 Undang-undang nomor 11 tahun 2012 tentang Sistem Peradilan Pidana Anak

[11] Pasal 1 angka 7 Undang-undang nomor 11 tahun 2012 tentang Sistem Peradilan Pidana Anak

[12] Pasal 8 Undang-undang nomor 11 tahun 2012 tentang Sistem Peradilan Pidana Anak

[13] Pasal 6 Undang-undang nomor 11 tahun 2012 tentang Sistem Peradilan Pidana Anak

[14] Pasal 2, Pasal 3, Pasal 4 dan 5 Peraturan Kepolisian Negara Republik Indonesia Nomor 8 Tahun 2021 Tentang Penanganan Tindak Pidana Berdasarkan Keadllan Restoratif

[15] Pasal 2 Peratutran Jaksa Agung Nomor 15 tahun 2020 tentang Penghentian Penuntutan berdasarkan Keadilan Restoratif

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of the Republic of Indonesia, the Chief of Police of the Republic of Indonesia, the Minister of Law and Human Rights of the Republic of Indonesia, the Minister of Social Affairs of the Republic of Indonesia, and the State Minister for Women's Empowerment and Child Protection of the Republic of Indonesia Number 166A/KMA/SKB/XII/2009, 148A/A/JA/ 12/2009, B/45/XII/2009, M.HH-08 HM.03.02/2009, 10/PRS-s/KPTS/2009, 02/Men.PP and PA/XII/2009 on Handling Children in Conflict with the Law.

2. Memorandum of Understanding between the Chief Justice of the Supreme Court of the Republic of Indonesia, the Minister of Law and Human Rights of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Chief of the National Police of the Republic of Indonesia No. 131/KMA/SKB/X/2012, No. M.HH-07.HM.03.02/2012, No. KEP-06/E/KJP/ 10/2012, No. B/39/X/2012 dated October 17, 2012 on the Implementation of the Adjustment of the Limitation of Minor Crimes and the Amount of Fines, Rapid Examination Procedures and the Application of Restorative Justice.
3. Joint Regulation of the Chief Justice of the Supreme Court of the Republic of Indonesia, Minister of Law and Human Rights of the Republic of Indonesia, Minister of Health of the Republic of Indonesia, Minister of Social Affairs of the Republic of Indonesia, Attorney General of the Republic of Indonesia, Chief of the National Narcotics Agency of the Republic of Indonesia Number 01/PB/MA/III/2014, Number 03 of 2014, Number 11 of 2014, Number 03 of 2014 Number Per-005/A/JA/03/2014 Number 1 of 2014, Number Perber/ 01/III/2014/BNN on Handling Narcotics Addicts and Victims of Narcotics Abuse into Rehabilitation Institutions.

Based on jurisprudence, several decisions that accommodate applicable customary law have also been implemented, namely:

a. Decision No. 1644K/Pid/1988 dated May 15, 1991, inter alia, states: "A person who has committed an act which according to the living law (adat law) in the area is an act that violates adat law, namely "delict adat". The customary chief and leaders gave a customary reaction (adat sanction) to the perpetrator. The customary sanction has been carried out by the convicted person. If the offender has been given a "customary reaction" by the customary chief, then he cannot be brought again (for the second time) as a defendant in the trial of the State Judicial Body (District Court) on the same charge of violating customary law and sentenced to imprisonment according to the Criminal Code (Article 5 paragraph (3) b of Law No. 1 Drt 1951). In such circumstances, the submission of the case file and the prosecution in the District Court must be declared "inadmissible"

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(Niet Ontvakelijk Verklaard)." [16]

b. Decision No. 984 K/Pid/1996 dated January 30, 1996, among others, held: "The act of infidelity between husband and wife with another party, which has been known as the qualification of the offense of adultery ex Article 284 of the Criminal Code, and this case shows that when the perpetrator (dader) has been given customary sanctions or received customary reactions by the customary village leaders, where customary law is still respected and flourishes in the indigenous community concerned, then the prosecution of the prosecutor against the perpetrators (dader) ex Article 284 of the Criminal Code must be juridically declared unacceptable". [17]

2. *The urgency of the need to apply the principle of consensus in criminal procedure law to realize justice, benefit and legal certainty.*

The practice of resolving crime cases through consensus deliberation to manifest justice, benefit and legal certainty and determining the limits of criminal cases that can be resolved through consensus deliberation. The results showed that the practice of resolving crimes through deliberation to realize legal certainty, justice and expediency needs to be done by combining the renewal of legal theories of development and progressive law, also called integrative law, which is carried out based on the values and moral ethics of Pancasila. Determining the limits of criminal cases that can be resolved through consensus, both general crimes and special crimes, is by determining the category or characteristics or classification of the criminal case itself.

Criminal law policy or criminal law politics itself can be implemented through several operational/functionalization stages of criminal law as argued by Barda Nawawi in his book, namely:

a. Formulation / legislative policy, namely the formulation / preparation of criminal law.
b. Applicative/judicial policy, namely the application of criminal law.
c. Administrative/executive policy, namely the implementation stage of criminal law.[18]

Based on the description above, the formulation policy on the formulation of criminal procedure law in the future needs to be updated as an effort to realize the settlement of criminal cases that are fair, useful and certain based on the principle of consensus. Indonesia has Pancasila which is the source of every source of Indonesian law. Pancasila, which is seen as the ideal of law (rechtsidee), provides direction. This requires that legal policies including criminal law policies with the aim of achieving the values contained in Pancasila must become a" staatsfundament alnorm".[19]

That the values contained in the 4th precept in the points of Pancasila are relevant to be applied in the settlement of criminal cases, namely: That the values contained in the 4th precept in the points

[16] Mahkamah Agung, Varia Peradilan, Tahun ke VI, No. 72, September 1991.

[17] Mahkamah Agung, Varia Peradilan, Tahun ke XII, No. 151, April 1998.

[18] Barda Nawawi Arief. Masalah Penegakan Hukum dan Kebijakan Penanggulangan Kejahatan., Bandung: Citra Adiitya Bakti. 2001. h.75. Dapat juga dilihat pada Muladi. Kapita Selekta Sistem Peradilan Pidana. Semarang: Badan Penerbit Universitas Dipenogoro. 2022.

[19] Fais Yonas Bo'a. Pancasila sebagai Sumber Hukum dalam Sistem Hukum Nasional. Jurnal Konstitusi. Volume 15. Nomor 1. Edisi Maret 2018. h.32.

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of Pancasila are relevant to be applied in the settlement of criminal cases, namely:

1. As citizens and community members, every Indonesian human being has the same position, rights and obligations.
2. It is not permissible to impose one's will on others.
3. Prioritize deliberation in making decisions for the common interest.
4. Deliberation to reach consensus is covered by a family spirit.
5. Respect and uphold every decision reached as a result of deliberation.
6. With good faith and a sense of responsibility, accept and implement the results of deliberation decisions.
7. In deliberation, common interests are prioritized over personal and group interests.
8. Deliberation is conducted with common sense and in accordance with a noble conscience.
9. Decisions taken must be morally accountable to God Almighty, uphold human dignity, the values of truth and justice, and prioritize unity for the common interest.
10. Giving trust to trusted representatives to carry out deliberations. [20]

Based on these values, it is associated with the purpose and function of criminal procedural law which regulates the order of criminal cases directed at the position to achieve peace, the implementation of criminal proceedings by the executor with the task of finding facts according to the truth and then submitting appropriate legal claims to obtain the application of law with decisions and implementation based on justice. Thus the tasks or functions in criminal procedure law through its equipment are:

(1) To seek and find facts according to the truth,

(2) To conduct proper legal prosecution,

(3) To apply the law with decisions based on justice, and

(4) To execute decisions fairly.[21]

The urgency of the new Criminal Procedure Code in the future as a Criminal Procedure Law should prioritize the principle of deliberation in resolving cases both in the investigation and prosecution stages is well accepted by the community, as has been implemented by the Police and prosecutors through "Restorative Justice". The concept of restorative justice that has been implemented coupled with the concept of penal mediation can be considered to be included in the formulation during the drafting of the upcoming New Criminal Procedure Code, in order to realize a fair, useful and certain criminal case settlement based on the principle of consensus.

The current formal criminal law (KUHAP), namely Law Number 8 of 1981 concerning the Criminal Procedure Code, is no longer relevant when compared to the new material law (KUHP) which has accommodated the laws that have grown and developed in the community, namely:

1. Article 2 paragraph (1) : the provisions referred to in Article 1 paragraph (l) shall not prejudice the applicability of the law living in the community which determines that a person should be punished even though the act is not regulated in this Act.
2. Article 2 paragraph (2): The law that lives in the community as referred to in paragraph (1) shall apply in the place where the law lives and as long as it is

[20] Butir-butir Pancasila sila ke-4 “Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan perwakilan”.

[21] Bambang Poernomo, Pola Dasar Teori dan Azas Umum Hukum Acara Pidana, Sumur Bandung, Yogyakarta, 1988, h. 29”.

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not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and the general legal principles recognized by the community of nations.[22]

Conclusion

Existing regulations that apply the principle of deliberation to reach consensus in its implementation are: Emergency Law of the Republic of Indonesia Number 1 of 1951 concerning Temporary Measures to Organize the Unity of the Structure of the Powers and Procedures of Civil Courts, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, Regulation of the Indonesian National Police Number 8 of 2021 concerning Handling Crimes Based on Restorative Justice and Regulation of the Attorney General Number 15 of 2020 concerning Termination of Prosecution based on Restorative Justice.

The upcoming New Criminal Procedure Code (New Criminal Procedure Code) as an important part of the criminal justice system, should absorb the principle of deliberation in the process of resolving criminal cases either through the means of resolving cases through customary law or the Mediation model at the investigation and prosecution stages by Investigators and Public Prosecutors, this is important because it is in accordance with the values of Pancasila, the sociological conditions of Indonesian society and to harmonize between formal law (Criminal Procedure Code) and material (Criminal Code) which has been passed under Law number 1 of 2023.

[22] Kitab Undang-Undang Hukum Pidana (Undang-undang Nomor 1 tahun 2023 tentang Kitab Undang-undang Hukum Pidana)

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Pasal 5 ayat (3) huruf c Undang-Undang Darurat Republik Indonesia Nomor 1 Tahun 1951 Tentang Tindakan-Tindakan Sementara Untuk Menyelenggarakan Kesatuan Susunan Kekuasaan Dan Acara Pengadilan-Pengadilan Sipil

Pasal 1 angka 6 Undang-undang nomor 11 tahun 2012 tentang Sistem Peradilan Pidana Anak

Pasal 1 angka 7 Undang-undang nomor 11 tahun 2012 tentang Sistem Peradilan Pidana Anak

Pasal 8 Undang-undang nomor 11 tahun 2012 tentang Sistem Peradilan Pidana Anak

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