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Plea Bargaining System as a Non-Litigation Settlement in the Framework of Repositioning Criminal Justice in Indonesia

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ABSTRACT

In its development, Plea Bargaining was accommodated into a written rule in 1970, when the court decided the case of Brady v United States. The Plea Bargaining System uses methods in civil law to resolve criminal cases. Indonesia's legal system can adopt the Plea Bargaining concept into the criminal justice system. The drafting team introduced the term Plea Bargaining in the Academic Paper of the Draft Criminal Procedure Code (NA RUU KUHAP). This design is considered different from the initial concept applied in other countries. Therefore, an analysis of legal protection and certainty for justice seekers (justiciabelen) is needed. The research method used is normative juridical, namely by studying secondary data and understanding law as a set of rules related to Plea Bargaining. The result shows that Indonesia can make the Plea Bargaining system as Ius Constituendum in the criminal justice system in order to achieve the rights of a suspect and defendant in the investigation process and court

1. Introduction

Ethical Theory views that law is placed on the highest possible manifestation of justice in the order of society. In the sense of the word, law solely aims at justice. According to Hans Kelsen, a general rule is "fair" if it is applied to all cases in which it should be applied. A general rule of thumb is "unfair" if it applies to one case and does not apply to another similar case. Justice means maintaining a positive legal system through its application that genuinely follows the soul of the positive legal system. This justice is justice based on the law.

Law is seen as a means of dispute settlement. Disputes or conflicts are common in society, between families that can fracture family relationships, between them in a joint affair (company), which can dissolve cooperation. Disputes can be about marriage or inheritance, contracts, land boundaries, etc. That dispute or conflict needs to be resolved. As for resolving disputes in a society, some are resolved through formal institutions called Courts and some are resolved by themselves by the people concerned by getting the help of people around them (outside the court).

In some developed countries in common law countries, especially the United States, pre-trial justice is increasingly considered more important than the criminal trial process. The trial's final outcome often reflects what was gleaned from the examination. It is not a public secret, violations of suspect rights and victims' rights occur in the pre-trial stage. In other words, suspects and victims at that stage are in a vulnerable position[1], If in civil procedural law is known as mediation as a way of resolving disputes outside the court, then in criminal law also applied systems such as Restorative Justice, Plea Bargaining and Rechtelijk Pardon to resolve cases outside the court.

In this case, restorative justice means justice that is restored or re-established. Each party involved in a criminal act is given the opportunity to deliberate, restorative justice emphasizes welfare and justice. The realization of restorative justice in criminal law enforcement with Plea Bargaining is a pattern of solving criminal cases carried out peacefully between criminal offenders and law enforcement officials that can be carried out in each stage process in the integrated criminal justice system for the realization of restorative justice. Based on the formulation in the fourth paragraph of the Preamble to the 1945 Constitution[2], it can be known that there are objectives of "social defence" and "social welfare", which must be reflected in the goals of national development.

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[1] Romli Atmasasmita, *Sistem Peradilan Pidana Kontemporer* (Jakarta: Kencana Pernanda Media, 2010). 14.

[2] Barda Nawawi Arief, *Tujuan Dan Pedoman Pemidanaan* (Semarang: Universitas Diponegoro, 2009). 43. These two term are frequently condensed into one term, namely “social defense”, because in the term “community protection”, it also “community welfare”.

In addition to the necessity to harmonize the development of universal law for the sake of legal order between nations in the era of multidimensional globalization.[3] The purpose of positive law is to protect the entire Indonesian country and all Indonesian bloodshed and carry on general welfare, educate the nation's life and participate in implementing world order based on independence, lasting peace and social justice. Based on the purpose of the law, Soedjono Dirdjosisworo said that the law's real purpose is to will harmony, and peace in the association of living together. Law fills a real and peaceful life in all walks of society.

In other words, criminal law reform must be a tool to protect the entire Indonesian nation and all Indonesian bloodshed, promote the general welfare, educate the nation's life, and participate in implementing world order based on independence, lasting peace and social justice. Mochtar Kusumaadmadja stated that reform could be realized through legislation, judicial decisions, or a combination of both, and "the law must be a tool of development," which will later be introduced into national legal development policies.[4] Criminal law reform is one of the efforts to realize social welfare and as an effort to realize the goals of the law itself.

Regarding criminal law reform, there is at least two objectives goal to be achieved by criminal law, namely the inward goal and the outward goal. The inward goal is the reform of criminal law carried out as a means for the protection of society and the welfare of Indonesian society, where the goal is as an a cornerstone of criminal law and criminal law reform. While the purpose of the inward goal is to create a world order in connection with the development of international crimes. Social defense with law enforcement in criminal law and criminal reform carried out with the aim of:[5]

1) Protection of society from anti-social acts that harm and endanger society, then the purpose of punishment is to prevent and overcome crime.
2) Protection of society from the dangerous nature of a person, then criminal/punishment in criminal law aims to correct the perpetrator of the crime or try to change and influence his behavior to return to obey the law and become a good and valuable citizen of society.
3) Protection of society from abuse of sanctions or reactions from law enforcement or citizens in general, then criminal objectives are formulated to prevent the occurrence of arbitrary treatment or actions outside the law.
4) Protection of society from disruption of the balance or harmony of various interests and values resulting from crime, then criminal law enforcement must be able to resolve conflicts caused by criminal acts, can restore balance and bring a sense of peace in society. Community protection in this case also

[3] Muladi, "Hukum, Globalisasi dan HAM", (Lectures delivered at PDIH Undip, Semarang, November 7th, 2014).
[4] Shidarta, *Mochtar Kusumaatmadja dan Teori Hukum Pembangunan* (Jakarta: Epistema Institute, 2012). 89.
[5] Barda Nawawi Arief, *Op. Cit.*, 45-46.

includes specifically the protection of crime victims, which occurred after the Second World War. Victims, in this case include victims of "abuse of power", must receive legal protection.

According to R. La Porta in the Journal of Financial Economics, the form of legal protection a country provides has two properties: prohibitive and sanction.[6] The most apparent form of legal protection is the existence of law enforcement institutions such as courts, police and other out-of-court (non-litigation) dispute resolution institutions. This is linear with the understanding of law according to Soedjono Dirdjosisworoe who states that law has various interpretations in society and one of the clearest understandings of law is the existence of law enforcement institutions.

After ratifying the Criminal Code (KUHP) on December 6th, 2022, the Government of Indonesia plans to revise the Criminal Procedure Code (KUHAP) issued since 1981. Based on an informal agreement between Commission III and the Government, the Draft Law (RUU) Amending the Criminal Procedure Code becomes an initiative for the Legislative Assembly (DPR). There are three points in revising the Criminal Procedure Code, including Coercive Efforts, Evidence, and giving a greater role to Advocates. Therefore, with various considerations, the author raises titles related to the Plea Bargaining System within the framework of Criminal Justice in Indonesia.

2. Method

This research included the type of legal research. Based on Soerjono Soekanto's opinion, legal research is a scientific activity based on certain methods, systematics and thinking, which aims to study one or several general symptoms of certain laws by analyzing them. In addition, an in-depth examination of the legal facts was also carried out and then sought a solution to the problem was found. The type of research used in this study is normative legal research/normative juridical approach because the problem under study is closely related to law in books, meaning that the disclosure of the problem under study adheres to normative provisions using secondary data. Secondary legal materials consist of books, journals, papers, research reports and other forms of writings related to the subject matter that discussed. Furthermore, tertiary legal material is in the form of dictionaries. The research specification used in this study is descriptive research. Descriptive research is research to describe something in a certain space and time. In legal research, descriptive research must present legal materials appropriately, review regulations, and find legal facts thoroughly.

[6] Rafael La Porta and others, 'Investor Protection and Corporate Governance', *Corporate Governance and Corporate Finance: A European Perspective*, 58 (2007), 91–110 <https://doi.org/10.4324/9780203940136>.

3. Plea Bargaining as the Component of Criminal Law System

According to Larry J. Siegel and Joseph J. Senna, view the criminal justice system as follows:[7] "Criminal justice may be viewed or defined as the system of law enforcement, adjudication, and correction that is directly involved in the apprehension, prosecution, and control of those charged with criminal offenses."

The criminal justice system was established as an effort to tackle crime, punish the guilty according to the purpose of punishment and restore the cosmic balance lost due to the occurrence of criminal acts.[8] The Criminal Justice System is not a deterministic system whose work can be determined with certainty but a probabilistic system with definitively unpredictable results. The criminal justice system is a physical system because it contains bodies or associations of bodies that are components of the criminal justice system (police-prosecutors-courts and prisons) that are integrated to achieve goals. As an abstract system, the components of the criminal justice system are a unit that is arranged in an integrated manner with one another there is interdependence (Muladi, 1995, p.15).

According to Mardjono Reksodiputro, in the criminal justice system, there is a movement of supporting subsystems that, as a whole, try to transform inputs into outputs to achieve the goals of the criminal justice system, namely: First, preventing the community from becoming victims of crime, Second, solving cases of crimes that occur so that the community is satisfied that justice has been served and the guilty are convicted, Third, strive so that those who have committed crimes do not repeat the crime[9], so that the crime can be tackled or control the occurrence of crime so that it is within the limits of tolerance acceptable to society.

For the law to be enforced, case resolution can be done through alternative channels because case resolution can be done through litigation/judicial institutions and non-litigation/outside the court (Titia Tauhiddah et al., 2020, p. 95). The concept of effective and efficient criminal justice in the Criminal Procedure Bill called the Special Path is often equated with the Plea Bargaining system because the confession of the accused can shorten the judicial process carried out, the parties involved in the Special Path process (Plea Bargaining) are the Prosecutor, Legal Counsel and/or Defendants and it can be said that there is rarely the involvement of the Judge.

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[7] Larry J. Siegel and Joseph J. Senna, *Essentials of Criminal Justice* (USA: Thomson Learning, Inc., 2007). See more in Rocky Marbun, Justice System...*Op. Cit.*

[8] Julianus Edwin Latupeirissa and others, 'Specialty Investigation Against Corruption Crime by the Corruption Eradication Commission', *Journal of Law, Policy and Globalization*, 87 (2019), 149–58 <https://doi.org/10.7176/JLPG/87-17>.

[9] Mardjono Reksodiputro in R. Abdussalam book entitled Evaluasi Pelaksanaan Sistem peradilan Pidana di Indonesia, Dinas Hukum Polri, 1997.

The definition of Plea Bargaining in Black's Law Dictionary is:[10] "A bargaining agreement between the prosecutor and the defendant whereby the defendant pleads guilty to a particular crime or more than one charge in exchange for the prosecutor to demand a light sentence or acquittal from the charge for another crime", Timothy Lynch states his view of Plea Bargaining, that:[11] "Plea Bargaining consists of an agreement (formal or informal) between the defendant and the prosecutor. The prosecutors usually agree with reducing prison sentences, which overrides the constitutional right of non-self in crimination and the right to trial of the accused.

There is no precise understanding regarding plea bargaining, several experts interpret plea bargaining as follows:[12]

1) The process carried out by the defendant and the prosecutor in criminal cases where there is an admission of guilt and it gives an advantage to both parties who eventually seek court permission.
2) Negotiations between the defendant and the prosecutor regarding the offer of leniency by the prosecutor if the defendant pleads guilty.
3) An agreement made by the defendant and the prosecutor if the defendant pleads guilty and the prosecutor will give the defendant a charge that is not high or light.

The practice of Plea Bargaining in the United States can be seen in Supreme Court rulings. The Supreme Court has ruled that it can reward with a reduced sentence for the defendants who plead guilty, for example in Brady v. United States. After the Supreme Court ruled on Brady v. United States, plea bargaining was carried out continuously. With plea bargaining, criminal justice runs effectively and efficiently also the resolution of criminal cases becomes fast. There are 95% of criminal cases in the United States can be resolved through the Plea bargaining mechanism so that criminal justice in the United States can realize effective and efficient criminal justice.[13]

Plea bargaining is done with a plea guilty from the defendant in exchange for reducing indictment and/or criminal charges commuted. With this process, the judge no longer conducts hearings at the court and can immediately impose a crime. Therefore, plea bargaining is considered cost effective and reduces the burden on prosecutors and courts.[14] Regulations regarding the plea bargaining system in the United States are regulated in the Federal Rules of Criminal Procedure, specifically in rule 11. Federal

[10] Black's Law Dictionary With Pronounciations, Sixth Edition (Boston: St. Paul Minn West Group. 1990). 1152.
[11] Timothy Lynch, 'The Case Against Plea Bargaining', *Regulation*, 26.3 (2003), 24–27.
[12] Zikry Ichsan, 'Gagasan Plea Bargaining System Dalam RKUHAP Dan Penerapan Di Berbagai Negara', *Jurnal Hukum*, 2014. 2.
[13] Romli Atmasasmita, *Op. Cit.*, 119.
[14] M Lutfi Chakim, 'Plea Bargaining', *'Rubik Kamus Hukum' Majalah Konstitusi Mahkamah Konstitusi No. 100 Juni 2015*, 2015 <http://www.lutfichakim.com/2015/06/plea-bargaining.html> [accessed 5 January 2020].

Rules of Criminal Procedure rule 11 sub (d) prohibits the court from accepting a guilty plea without first hearing the defendant's testimony as to whether the confession he made was voluntary and not due to pressure or coercion or other promises made by the prosecutor outside of those contained in the Plea Agreement.

According to Carolyn E. Demarest,[15] some things benefit both the prosecutor and the defendant in the Plea Bargaining mechanism: "The Plea Bargain mechanism is believed to bring benefits, both for the defendant and for the community. The advantage for the defendant is that he and the prosecutor can negotiate the appropriate sentence he deserves. The community benefited because this mechanism will save the cost of examination in court, where the defendant confesses his actions and will still get a sentence. Although the sentences given are on average less than what judges would decide if through conventional court processes, on the other hand this mechanism can have an effect on the criminal justice process because the prosecutors have more time and can handle more cases.

4. Paradigm of Plea Bargaining Legal Certainty

Certainty is an inseparable feature of the law, especially for written legal norms. Laws without certainty value will lose meaning because they can no longer be used as a code of conduct for everyone. Certainty itself is referred to as one of the goals of the law. Legal certainty is something that can only be answered normatively based on applicable laws and regulations rather than sociological ones. Normative legal certainty is when a regulation is made and promulgated with certainty because it regulates clearly and logically in the sense that it does not cause doubts (multi-interpretation) and logical in the sense of being a norm system with other norms so that it does not clash or cause norm conflicts arising from uncertainty.

According to Gustav Radbruch, legal certainty can be seen from two angles: certainty in the law itself and certainty due to the law. Certainty in law means that each legal norm must be formulated with sentences that do not contain different interpretations. As a result, it will bring obedience or non-obedience to the law. In practice, there are many legal events where when faced with the substance of the legal norms that regulate them, sometimes unclear or imperfect so that different interpretations arise which consequently will lead to legal uncertainty.

Nusrhasan Ismail (2006: 39-41) stated that creating legal certainty in laws and regulations requires conditions relating to the internal structure of the legal norm itself. The internal conditions are: First, the clarity of the concept used. Legal norms contain descriptions of specific behaviors that are then incorporated into certain concepts. Second, clarity of the hierarchy of authority from the institution forming

[15] Carolyn E. Damarest qouted in Dimas Prasidi, *Plea-Bargaining: Sebuah Jalan Permisif bagi Keadilan*, [accessed 20 December 2018].

laws and regulations. Clarity of this hierarchy is important because it concerns whether or not it is valid and binding or not the laws and regulations it makes. Third, there is consistency in statutory legal norms. This means that the provisions of some laws and regulations related to one particular subject are consistent.

Criminal law norms, in the renewal of criminal procedural law, what needs to be considered is that formal criminal law must support material criminal law. As Sudarto's opinion stated that: "ius puniendi" should be based on "ius poenale", the current Criminal Procedure Code is oriented towards the old Criminal Code (WvS) of the Dutch East Indies Heritage, so the new Criminal Procedure Code should also be oriented to the new Criminal Code. Therefore, it is necessary to study the principles and norms of the new Criminal Procedure Law in line with the new Criminal Code.[16] According to Lilik Mulyadi, ideally the renewal of the Criminal Procedure Code is carried out with dimensions, benchmarks and scope and is oriented towards aspects, namely that the renewal of formal criminal law/criminal procedure law, especially the Criminal Procedure Code, is oriented towards human rights as basic rights that are inherently inherent in human beings, are universal and lasting so that they must be protected, respected and defended and must not be ignored, reduced or deprived by anyone.[17]

Then, an explanation from Paul Sieghart quoted by Lilik Mulyadi, basic human rights consist of 3 (three) generations, namely the first generation (civil and political), the second generation (economic, social, and cultural), the third generation (group rights) which are all individual rights. The three generations of human rights must be the estuary of reforming the Criminal Procedure Code because it is expected that the law is not following Black's second proposition, "Downward law is greater then upward law", namely the law is like a spider's web, which in its application is discriminatory, the law always oppresses the lower class because of this, the law is declared like water that always flows down. With a dimension that prioritizes human rights, theoretically and in practice, the future Criminal Procedure Code should consequently apply the following:[18]

a. Equal treatment of everyone before the law with no distinction of treatment;
b. Arrests, incarcerations, searches and seizures are based solely on a written order by a statutory authority and only in the case and in the manner provided for by law;
c. Every person suspected, detained, prosecuted, and/or brought before a court shall be presumed innocent until a court decision declares his guilt and obtains permanent legal force;

[16] Lilik Mulyadi, *Bunga Rampai Hukum Pidana Perspektif, Teoritis Dan Praktik* (Bandung: PT Alumni, 2008). 357-358.
[17] Lilik Mulyadi, *Bunga Rampai Hukum Pidana Umum Dan Khusus* (Bandung: Alumni, 2012). 516.
[18] *Ibid.*, 517.

d. If a person is arrested, detained, prosecuted or trial without reason under the law and/or because of an error in persona or the law applied, he must get compensation and rehabilitation since the level of investigation and law enforcement officials who intentionally or by negligence cause the principle of law to be violated, prosecuted, convicted and/or subject to administrative punishment;
e. Judiciary conducted promptly, modestly and lightly and freely, honestly and impartially shall be applied consequently at all levels of examination;
f. Every person involved in a criminal offense shall be allowed to obtain legal assistance for the purposes of his defense;
g. To a suspect, from the moment of arrest and/or incarceration, shall be informed of the indictment and what legal basis they are charged with, shall also be informed of all his rights;

Philosophically, Article 28D paragraph (1) of 1945 of The Unitary State of Republic Indonesia Constitution states that "everyone has the right to recognition, guarantee, protection, and just legal certainty and equal treatment before the law." Juridically based on Article 4 paragraph (2) of Law No. 48 of 2009 concerning Judicial Power which mandates that the judicial process must be carried out simply, quickly, and at low cost, but the implementation of the criminal justice process to this day has not been able to realize the mandated judicial process.

In 2018, for example, there are remaining cases in 2017 that still need to be resolved. Overall, there are 132,070 cases left in 2017 that must be resolved in 2018, plus new cases entered in the current year, 2018, which is 6,123,197 so the total caseload needs to be resolved by the Supreme Court and the judiciary below in 2018 is 6,255,267. Until the end of 2018, there were still cases that had not been able to be resolved, namely 133,813 cases, which must be resolved in the following year, in 2019. This shows the burden on the judiciary to settle cases in the following year. The data shows that the process of solving cases in the criminal justice system in Indonesia runs less effectively and efficiently.

The length of the criminal justice process in Indonesia is the background for regulating special pathways in the Criminal Procedure Code draft, which is a new step in reforming Indonesia's criminal justice system. Based on the Text in article 199 of the Draft Code of Criminal Procedure reads:

1) When the prosecutor reads the indictment, the defendant confesses to all the acts charged and pleads guilty to committing a criminal offense punishable by a crime charged not exceeding 7 (seven) years, the prosecutor may hand over the case to a brief examination hearing.
2) The defendant's confession shall be outlined in the minutes signed by the defendant and the prosecutor.

3) The judge shall:
   a. notify the defendant of the rights he waived by giving confession as referred to in paragraph (2);
   b. inform the defendant of the length of the imprisonment that may be imposed; and
   c. ask whether the confession referred to in paragraph (2) is given voluntarily.
4) The judge may reject the confession referred to in article (2) if the judge doubts the genuineness of the defendant's confession.
5) Exempted from article 198 paragraph of imprisonment imposition against the defendant as referred to in paragraph (1) shall not exceed 2/3 of the maximum criminal offense indictment.

Based on article 199 of the Draft Code of Criminal Procedure, it is known that a special path is given to the defendants who confess to the criminal offense indictment. The effect of the confession to the crime charged is that the defendant will be on trial for a brief examination hearing. The consequence of the change in the ordinary examination hearing to the brief examination hearing is faster the trial process that accommodates the principle of a free trial and is carried out quickly and simply.

Lilik Mulyadi reaffirmed that if the above is applied consequently, there will certainly be respect for human rights as a basis for law enforcement. Further explanation by Lilik Mulyadi that in addition to being oriented toward human rights factors, the reform of the Criminal Procedure Code should also be oriented to the principles adopted in the case examination process. Is it oriented to the principle/system of accusatorial common law courts, the inquisitorial ecesiastical courts, or a mixture of both (the mixed type). In addition to these principles, it will certainly correlate with the model of the Criminal Justice System (criminal justice system), whether it will adopt the Crime Control Model (CCM), Due Process Model (DPM), Medical Model, Bureaucratic Model, Status Passage Model, Power Model, or Just Desert Model.[19]

Furthermore, according to J.E. Sahetapy quoted by Lilik Mulyadi, if related to two popular approach models in the criminal justice system (DPM and CCM), it can be argued that the criminal justice system in Indonesia version of the Criminal Procedure Code has used the Due Process Model approach, however, in practice it has reflected the Crime Control Model. On the other hand, Lilik Mulyadi used the opinion of Muladi that the weaknesses of CCM and DPM mentioned CCM is not suitable because this model views that repressive actions are the most important in carrying out the criminal justice process. At the same time, DPM is not entirely beneficial because it is anti-authoritarian values, therefore according to the model of the criminal justice system that is suitable for Indonesia is the one that refers to the daad-dader

[19] *Ibid.*

strafrecht which models a balance of interests that pays attention to various interests that must be protected by criminal law, namely the interests of the state, the interests of individuals, the interests of criminal offenders and the interests of victims of crime.[20]

5. Conclusion

Indonesia can make the Plea Bargaining system as Ius Constituendum in the criminal justice system in order to achieve the rights of a suspect and defendant in the investigation process and court, with the existence of Special pathways that more or less adopts from the common law state legal system, namely Plea Bargaining can improve the criminal justice system in Indonesia for the better and restore the full functionality of the Witness and Victim Protection Law which where, in actual practice, the testimony of a Perpetrator Witness has not been sufficiently strong evidence in the trial. Plea Bargaining is seen as a legal problem solving as outlined in the reform of the criminal justice system in Indonesia.

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[20] *Ibid.*, 519.

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