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The Essence of Consent in the Personal Data Protection Law: Perspective of Dignified Justice Theory

Teguh Prasetyo [1], **Jesica Yenny Susanty Mamangkey**[2],

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Abstract

The research explores the concept of consent within the framework of the Personal Data Protection Law (UU PDP). It demonstrates that consent in this context not only grants rights but also imposes an obligation to safeguard the Personal Data Subject. The essence of consent in the UU PDP is characterized as a legal principle designed to protect the involved parties within the framework of personal data protection. Within the legal relationships governed by consent in the UU PDP, an additional characteristic emerges – the reinforcement of obligations through the imposition of sanctions. These sanctions, unlike conventional ones under the Civil Code, take the form of administrative and criminal penalties. However, consent in the UU PDP can also retain a conventional nature, evident in the provision allowing parties to the consent related to personal data to have previously agreed upon peaceful dispute resolution. This study enhances our understanding of consent under the UU PDP, emphasizing its crucial role in shaping legal relationships and ensuring personal data protection.

1. Introduction

This study is motivated by a profound intention to delve into the intricacies surrounding the usage of the 'consent' concept within and around the framework of Law Number 27 of 2022 concerning Personal Data Protection (hereinafter abbreviated as the PDP Law). It derives from observation that the PDP Law extensively employs the concept of 'consent.' The recurrent presence of this concept not only sparks curiosity but also prompts a deeper exploration into its multifaceted role. Despite the commonplace understanding of 'consent' within the domain of legal scholars, particularly in the realm of civil law, its consistent and predominant appearance in numerous articles positions it as a

[1] *Universitas Pelita Harapan, Tangerang, Indonesia, email: teguh.prasetyo@uph.edu*
[2] *Universitas Kadiri, Kediri, Indonesia, email: jesicha.susanty@gmail.com*

central element defining the PDP Law as a comprehensive legal framework dedicated to the protection of personal data. Moreover, the 'consent,' a concept widely acknowledged as a norm in legal discourse, is wielded repetitively throughout various articles, almost emblematic of the PDP Law itself. This prompts a critical examination of why 'consent' is not merely an incidental term but emerges as a fundamental concept, marking the very essence of this legislation dedicated to the safeguarding of personal data. Remarkably, up until this point, there has been a noticeable absence of comprehensive scholarly works in the field of law, not only within Indonesia but potentially on a global scale, addressing these queries. Consequently, this paper aims to address the gap in scholarly works, intend to uncover answers to the myriad questions surrounding the utilization of the 'consent' concept within the PDP Law.

The author's juridical curiosity regarding the incorporation of the 'consent' concept in the PDP Law originated from their understanding of this concept rooted in civil law principles. This understanding is particularly informed by the fundamental parallels between the 'consent' concept and the well-established principles within civil law. The author perceives the 'consent' concept as integral to civil law doctrines, drawing from its synonymous significance with terms such as 'agreement' and 'unanimity.' This recognition establishes the groundwork for a comprehensive examination of the 'consent' concept within the PDP Law, as it navigates the nuanced landscape of legal acts involving one or more parties.

The consent concept has a similar meaning to the agreement concept. For example, legal experts, like Subekti, are always cited as authoritative in explaining the consent concept in their many works. According to Subekti, the concept or term consent has the same meaning as the term agreement." Subekti states that in an "agreement," two parties agree to do something. The word "agrees" in the definition of "agreement," according to Subekti and similar concepts used to give meaning to the agreement concept, such as the phrase "unanimously" or "agreed upon," which seems, in the author's opinion, likely to be the reason why authors like Subekti come to the conclusion that, essentially, the consent concept is the same as the agreement concept.

According to the author, the agreement concept, or what Subekti said is synonymous with agreement as mentioned above, always involves a legal act with two or more sides. Such legal acts require the agreement of the parties (Prasetyo & Barakatullah, 2006, p. 77). Thus, it can be said here that "consent," or its equivalent, is the agreement concept, not only meaning a legal act of a single subject but also a legal act involving two or more subjects. At the very least, there is an agreement from one party or a statement of willingness, a commitment from one party to do a certain thing. "Consent," as well as "agreement," is, therefore, synonymous with a mutually agreed legal act. Thus, it can be said here that "consent," or its equivalent, is the agreement concept, not only meaning a legal act of a single subject but also a legal act involving two or more subjects. At the very least, there is an agreement from one party or a statement of willingness, a commitment from one party to do a certain thing. "Consent," as well as "agreement," is, therefore, synonymous with a mutually agreed legal act.

Subekti asserts: "It can be said that the two terms (consent and agreement) are synonymous (1984)". The authors also understand that the concept originates from the idea of a promise. A promise signifies a mutual agreement between two parties. Each party demonstrates willingness and readiness to fulfill certain obligations, including action, provision, and abstention. Additionally, Subekti argues that it is an event where one person commits to executing something to another. Alternatively, Subekti suggests that in this event, two individuals mutually commit to carrying out a certain matter. In Subekti's definition, it seems he perceives the concept as two potential occurrences. The first involves one person committing to a certain matter to another. However, according to Subekti's earlier comparison, there appears to be only one occurrence, denoting two individuals mutually committing to something. In the second interpretation of Subekti's definition, it seems he highlights a single act of commitment or mutual commitment to perform a certain matter.

Due to the occurrence of the agreement event, which Subekti has equated in meaning to an "event," also synonymous with the concept of (consent), according to Subekti, a relationship arises between the two individuals engaging in such agreement and consent. Subekti refers to the relationship between these two individuals as an obligation or can also be equated with a legal relationship between the parties involved. In its form, according to Subekti, the agrement equated in meaning with the concept of consent takes the form of a series of words containing promises or commitments expressed orally or in writing.

The obligation arising from consent or agreement is synonymous with the concept of a legal obligation. In this legal obligation there are two individuals or parties. Based on this, one party in the legal relationship has the right to demand something from the other party. Conversely, the other party is obliged to fulfill that demand. The party entitled to demand something is called the creditor or the one owed (creditor), while the party obligated to meet the demand is called the debtor or the one owing (debater). This obligation between two individuals or parties constitutes a legal obligation. Termed as a legal obligation it signifies that the right of the creditor is legally guaranteed. If the demand is not voluntarily fulfilled, the creditor can pursue it in front of a judge.

Subekti asserts that an agreement and, consequently, an approval or, if in written form, a contract, is an event. The existence of this event is crucial because, without the event referred to as an approval," equated by Subekti with agreement," there would be no obligation or legal relationship (legal relationship) There are also laws that give rise to obligation or legal relationship (legal relationships.

In the "event" or concept known as agreement or "consent and if in written form as a contract, one person promises another to undertake something. The act of undertaking something refers to: (1) providing something, (2) doing something, or (3) refraining from doing something. This points to what is known in legal science as a promise. The nature of a promise is seemingly unidirectional, as if only one person is making a promise to another. It appears that, on one side, in the promise the individual or party making the promise is the active party, while the one being promised is the passive party.

The legal obligation is also an 'event' where two individuals or parties mutually 'promise' to undertake something. Here, it seems as though there are two parties exchanging promises (*quit pro quo*). Both parties in the agreement are active. One person or one party 'promises' to the other party to undertake something. Meanwhile, the other party also 'promises' to the one party to undertake something. In the literature on legal obligation with two active parties, one party 'promises' to the other to undertake something. The other party 'promises' to the one party to undertake something, known as an agreement.

In a legal obligation when both parties 'mutually promise' to each other, it has been understood by many authors of civil law books in Indonesia as a legal act involving two parties (bilateral), or three parties (trilateral), or more (multilateral). In bilateral, trilateral, or multilateral legal obligation both parties or the parties making promises to each other must reach a consent, they must be in agreement, or the parties must agree to undertake something, or, as mentioned above, perform. It is as if, without an agreement or without unanimous consent or if the parties do not agree on what needs to be done, there is no agreement.

The concept of agreement mentioned above was initially understood to have the same meaning as the concept of agreement in civil law literature (there should be an explanation about civil law and its characteristics). However, the concept of agreement or consent also interpreted as an 'event' where individuals promise or individuals mutually promise to undertake something, is also functionally meaningful. This is because, through agreement or consent a legal obligation is established. agreement or consent gives rise to a legal obligation.' However, there are also other sources that give rise to legal obligation. Another source meant here is the law. In other words, or agreement or legal

obligation arises or emerges because of agreement or consent and there is legal obligation that arises or emerges from constitutions.

Considering the description or portrayal of the concept of consent and the concept of legal obligation as well as the concept of consent above, the question that arises is whether all concepts of consent in the UU PDP can also be referred to as agreement or consent as understood in the Indonesian Civil Code above. Also, whether the concept of consent in the UU PDP can be called a source of legal obligation in the field of data protection that arises not because of consent or not because of obligation but arises because of the law. These questions indirectly indicate the lack of clarity in the meaning of the concept of consent used in the UU PDP.

As mentioned above, the ambiguity of the meaning of the concept of consent in the UU PDP has sparked curiosity, and because of the desire to know, the author is driven to conduct research to find the meaning or essence of the concept of consent used in the UU PDP. It is hoped that through the research conducted by the author, the meaning or essence of the concept of consent in the UU PDP can be found, including answering several questions that arise due to the ambiguity of the meaning of the concept of consent in the UU PDP.

Questions that are indirectly expected to be answered by describing the meaning of the concept of consent in the UU PDP in this paper include, for example: can the concept of consent used in the UU PDP be equated with the concept of agreement generally known in civil law as an event that gives birth to or establishes a legal obligation? Why does the UU PDP need to use the concept of consent in regulating the protection of personal data? Can the concept of consent in the UU PDP be equated with the concept of agreement in the *Civil Code* ? If the concept of consent in the UU PDP cannot be equated with the concept of consent known in the *Civil Code* , what reasons can be used to justify this argument? What is the binding strength of the legal obligation born from the concept of consent in the UU PDP compared to the binding strength of the legal obligation born from the concept of consent or agreement understood in the *Civil Code* .

The research questions presented above are not the formulation of the research problem. These questions represent specific inquiries derived from the formulation of the problem that need to be addressed through this research. The answers provided to these questions are expected to simultaneously address legal issues in this study, namely the ambiguity of the meaning of the concept of consent used in the UU PDP (Prasetyo et al., 2022, pp. 178–199)

The theory used to navigate the search for clarity in the meaning or essence (ontology) of the concept of consent in the UU PDP is the theory of Dignified Justice. Questions that begin with "what questions" fall into the category of legal philosophy seeking the essence of law. Meanwhile, questions that start with "how questions" are inquiries in the philosophy of law that mark the search for epistemology (Prasetyo, 2021). On the other hand, questions that start with "why or for what questions" are inquiries in the category of legal philosophy as axiological issues As mentioned above, the concept of consent in the UU PDP has similarities in meaning to the concept of agreement in the *Civil Code* . However, does the same essence apply to the concept of consent used in the UU PDP? This indicates a problem of the lack of clarity in the meaning of the concept of consent in the UU PDP. Based on this, the research problem is formulated as follows: The Essence of the Concept of Consent as an Agreement and Contract in the Personal Data Protection Law.

2. Materials and Methods

The research method used in this article is the normative legal research method. In the context of legal research, normative research is an approach that focuses on analyzing laws and regulations, legal documents, and legal literature (Prasetyo, 2019). The goal of this method is to understand, explain, and interpret the legal norms in force. In the normative legal research method, the researcher

collects primary legal materials such as the Personal Data Protection Law (UU PDP) and the Indonesian Civil Code (*Civil Code*). Secondary legal materials, such as legal literature related to the concept of consent are also used to support the analysis. A qualitative approach is employed to analyze these legal materials (Iskaq, 2020). The research is more focused on interpreting and understanding the meaning of the consent concept in the UU PDP. The results of the analysis are then used to answer the research questions.

3. Results and Discussions

The concept of consent as understood conventionally, or the concept of consent in the Indonesian Civil Code as Subekti has equated its meaning or essence with the concept of agreement as a law or a legal principle whose existence is to provide protection for personal data and is specifically regulated by law. However, in this study, using the perspective of the Dignified Justice theory, it has been viewed as a finding that the characteristic or essence of the consent concept in the Personal Data Protection Law (UU PDP) is a law that provides protection for personal data. The object of regulation of the consent principle in the UU PDP is personal data. Formulated in Article 1 of the UU PDP, personal data is defined as information about an identified or identifiable individual, either directly or indirectly through electronic or non-electronic systems (Simbolon & Juwono, 2022).

Personal data, as the object of consent according to the UU PDP, has been categorized by type. The types of personal data referred to by the UU PDP consist of specific personal data, and general personal data. Specific personal data includes health data, biometric data, genetic data, criminal records, child data, personal information, and/or other data in accordance with the provisions of laws and regulations. General personal data, also regulated in the UU PDP, should be carefully protected and includes: full name, gender, nationality, religion, marital status, and/or combined personal data identifying an individual.

As mentioned earlier, Subekti's understanding of the consent concept is that the parties agree or consent to carry out what they have agreed upon. However, in the UU PDP, the consent concept within the formulations of its articles carries the meaning or essence that the parties do not need to "agree" to perform everything specified in the UU PDP. The agreement born within the UU PDP is beyond their will. In this case, with consent in the UU PDP, the parties do not agree on what they agree upon, but they agree to carry out everything specified in the UU PDP. The parties carry out what they have to perform in the context of data protection not because they agree, but they simply comply with the legal will, in this case, the will be expressed in the PDP Law.

According to the author, the uniqueness of the meaning of the consent concept in the UU PDP is actually not too different from the meaning or essence of the consent or agreement concept as stated by Subekti above. As the most authoritative source explaining contract law, Subekti states that both concepts, namely the term agreement and the concept of consent, including the consent concept in the UU PDP, essentially have the same meaning (1984). It has also been mentioned above that in line with Subekti's understanding, etymologically and juridically, the concept of "consent," both commonly known in the Civil Code (*Civil Code*) and found in the UU PDP, should have similarities with the concept of "consent," known in textbooks or secondary legal materials. Such an understanding implies that the nature of consent in the UU PDP is similar to the nature of consent known in the Civil Code (*Civil Code*).

Wirjono Projdodikoro, another authoritative classical source referred to in this study as secondary legal material in understanding the meaning or essence of the consent concept, including the consent concept in the UU PDP. His definiion explains the similarity between the consent concept and the concept of consensus. Although Wirjono does not explicitly use the term consent in English, it can be inferred from Wirjono's views that, in general, consent is the same as the concept of consensus or the essence of an agreement, consensual (1977, p. 33). Thus, according to the author, there is a similarity

in meaning or essence between the consent concept, including the consent concept in the UU PDP, and the concept of consent known in world legal literature.

However, the nature of consent in civil law according to Wirjono is purely civil. The consent that is purely civil in nature is only supported by civil sanctions and procedural legal procedures. Meanwhile, the nature or essence of the consent concept, which can be equated with consent in the UU PDPP, is not only based on the will of the parties but is based on legal will and can be public, as described in this writing and supported by sanctions that are public in nature, such as administrative sanctions and criminal sanctions.

Rights and obligations arising from an agreement or consent or what is referred to in the UU PDP as consent can also be supported by public sanctions and procedural law. The sanctions and procedural law referred to, as seen in the description of the research results below, are sanctions in state administrative law, as well as other public sanctions, namely criminal sanctions. According to the author, this is the essence or characteristic nature and meaning of the consent concept or what can be equated with consent in the UU PDP.

The character or essence of the consent concept, as mentioned above, is based on rationalization according to the philosophy of Dignified Justice, which in this case must be understood as a derivative nature or derivative of all norms applicable in the Pancasila Legal System. As is known, in the theory of Dignified Justice, there is a postulate that all applicable legal norms must be based on Pancasila as the highest law, the source of all legal sources, also being the highest law that is the origin of the consent concept, both in conventional understanding and in the UU PDP (Prasetyo, 2016, 2020; Prasetyo, Handayani, & Karo Karo, 2021; Prasetyo et al., 2022). Therefore, according to the author, all concepts of consent or what in this case can be equated with consent in the UU PDP, even though different in essence or nature from the consent concept in the Indonesian Civil Code, are derivative or derived from Pancasila, according to the theory of Dignified Justice.

However, even though the nature of consent is derivative, the essence of the consent concept in the Indonesian Civil Code, as stated by experts above (both from Subekti's and Wirjono Prodjodikoro's understanding), is purely civil law. Meanwhile, the nature or essence of the consent concept in the UU PDP is consent according to the law, which can be civil in nature but can also be public (hybrid). These two different natures above convey a clear message that there is a difference between the concept of agreement or consent that is identical to consent in conventional civil law (Indonesian Civil Code) with the meaning of the consent concept or consent in the UU PDP. However, it remains important, in order to answer the set of questions outlined above as questions encompassed in the problem of the lack of clarity of the meaning of the consent concept in the UU PDP navigated by the theory of Dignified Justice.

The research found, for example, one article that can be presented here due to space limitations, namely Article 20 paragraph (1) of the Personal Data Protection Law (UU PDP), which is within or part of Chapter VI. It regulates the obligations of two legal subjects determined by the UU PDP. The two legal subjects referred to in the UU PDP are certain legal subjects, referred to as Personal Data Controllers, and legal subjects referred to as Personal Data Processors. These legal subjects are not known in the Civil Code (*Civil Code*), unless left to the principle of freedom to contract. In the processing of personal data, both Personal Data Controllers and Personal Data Processors can be Individuals, Public Bodies, and International Organizations.

Article 20 paragraph (1) formulates provisions that Personal Data Controllers must have a legal basis for processing Personal Data. The legal basis for processing Personal Data includes "consent." Above, it has been described that the concept of "consent," including the concept of consent used in the UU PDP, can be equated with valid consent. It is explicitly stated that valid and explicit consent from the Personal Data Subject is intended to be given for one or more specific purposes before obtaining consent from the Personal Data Subject. The purpose of personal data becomes an

obligation that must be conveyed by the Personal Data Controller to the Personal Data Subject or the individual to whom personal data is attached.

The public law character, in this case, the nature of state administrative law, can be found in the consent concept in the UU PDP. As a result of the research, in Article 57 paragraph (1) of the UU PDP, there is a threat of sanctions for violations of provisions containing the consent concept in Article 20 paragraph (1) above. The threat of sanctions is an administrative sanction. The mentioned administrative sanctions can be in the form of a written warning, temporary cessation of personal data processing activities, deletion or destruction of personal data, and/or administrative fines.

Administrative fines in the UU PDP are determined at a maximum of two percent of the annual income or annual revenue for the violation variable. The imposition of administrative sanctions is determined only by a specific institution as regulated in the UU PDP. The specific institution enforcing consent according to the UU PDP is appointed by the President. Further provisions regarding the procedures for imposing administrative sanctions are regulated in Government Regulations. Violation resolution can be facilitated by the institution mentioned above.

It is clear from the characteristics of consent in the UU PDP, compared to the essence of the conventional consent known in private law. Although in conventional consent known in the Civil Code, there is also consent with the threat of punishment. In the meaning or essence of consent according to the UU PDP, the party implementing the threat of sanctions has been limited to a specific institution, which is administrative in nature. This is different from the essence of consent known in the Civil Code. As is known, in the consent known in conventional private law, consent accompanied by the threat of punishment is only a threat of civil fines. The debtor or the party bearing the obligation to fulfill the obligation is bound by the threat of punishment if the consent or consent given is not implemented.

Except for the difference in the nature of punishment, both in conventional consent known in private law and consent in the UU PDP, there is an important axiological aspect to be presented here. The purpose or goal of the threat of punishment is for the party who has "agreed" because the law dictates it, to fulfill the obligation. In addition, the threat of punishment, both in conventional private law consent and UU PDP "consent," is intended to exempt the party that must receive an obligation from proving the amount or quantity of the losses suffered.

Regarding the severity of the threat of public sanctions as mentioned above, in the UU PDP, there is a provision for the possible mitigation of the implementation of public dimension punishment threats. In the UU PDP, it is stipulated that the institution specified in the UU PDP can provide dispute resolution facilitation outside the court. This is an indicator that the public nature of the implementation of public dimension punishment threats in the UU PDP can be waived if the parties wish for the implementation of a threat of sanctions to be carried out through conventional consent mechanisms. In the UU PDP, the institution serves only as a mediator. In conventional "consent," such a thing is a provision of dispute resolution through procedures agreed upon by the parties. According to the formulation in the UU PDP, the dispute resolution procedure based on conventional consent is an out-of-court settlement procedure through consultation, arbitration, negotiation, mediation, conciliation, or expert assessment as stipulated by the laws and regulations. The specific law that regulates this procedure is Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Article 1, number 1 of the law defines arbitration as a method of settling a civil dispute outside the general court based on a written arbitration agreement made by the disputing parties. Meanwhile, alternative dispute resolution is formulated in Article 1, number 10 of Law No. 30/1999, which states: "Dispute resolution or difference of opinion through procedures agreed upon by the parties, namely settlement outside the court through consultation, negotiation, mediation, conciliation, or expert determination.

Another interesting dimension of the essence of the concept of consent in the UU PDP, which is also important to note, is related to the legal goal of humanizing individuals. known in the theory of

Dignified Justice. In the obligations contained in consent according to the UU PDP, legal subjects are allowed to make choices and are also given the opportunity to choose options available before giving their "consent." The Personal Data Subject is granted by law the right to know. Another genuine dimension in the concept of consent according to the UU PDP is seen here. The dimension of humanizing individuals in the concept of consent according to the UU PDP is that parties in legal relationships governing the protection of personal data have the right to accurate information before giving their consent regarding their personal data.

Another characteristic or nature of the concept of consent in the UU PDP is seen in many formulations of articles, including Article 65 of the UU PDP. It is regulated there that Article 65 (1) Every Person is prohibited from unlawfully obtaining or collecting Personal Data that does not belong to them with the intention of benefiting themselves or others that could cause harm to the Personal Data Subject. Even though the concept of consent cannot be found in Article 65 paragraph (1), the concept of unlawfulness in Article 65 paragraph (1) of the UU PDP cannot be separated from the concept of "consent." One of the functions of the concept of consent is to create rights. In this case, the right of every person to give consent so that their personal data can be controlled by others or collected by others without causing harm. Therefore, the concept of consent is still necessary in the UU PDP.

Criminal law supports the existence of consent as the basis of rights, as mentioned above, with criminal sanctions. Therefore, in Article 67 (1), it is formulated that Every Person who intentionally and unlawfully obtains or collects Personal Data that does not belong to them with the intention of benefiting themselves or others that could cause harm to the Personal Data Subject as referred to in Article 65 paragraph (1) is punishable by imprisonment for up to five years and/or a fine of up to five billion rupiahs.

4. Conclusion

The research findings and discussions on the nature of the concept of consent in the UU PDP reveal a form of precision in meaning. In regulating legal relationships between parties managing personal data, known in the UU PDP as the Controller of Personal Data and Processor of Personal Data, it is evident that they not only have rights but also, based on "consent," have an obligation to provide protection to the Personal Data Subject. The essence of consent in the UU PDP can be understood as a legal principle that functions to provide protection to the parties in the legal relationship of personal data protection. In legal relationships governed by consent in the UU PDP, there is another characteristic, nature, or essence of the concept of "consent," namely, reinforcement through sanctions, not only conventional ones as known in the essence of consent according to the Civil Code. Support for consent in the UU PDP is provided in the form of administrative and criminal sanctions. However, consent can also have a conventional nature in the UU PDP. This nature can be seen in the possibility given to parties in the consent related to personal data, where they have made a prior agreement to peacefully resolve disputes among them.

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