

MECHANISMS OF ALTERNATIVE DISPUTE RESOLUTION IN CONFLICT AND DISPUTE RESOLUTION IN INDONESIA

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ABSTRACT

According to Aristotle, man is a “*zoon politicon*” meaning that humans essentially always want to interact in society. However, this view is different from Thomas Hobbes who mentioned that human nature, namely “*homo momini lupus*”, meaning that humans are wolves to other humans. Man's desire to meet his needs often causes problems. The process of solving legal problems in Indonesia can be classified into two categories: litigation or non-litigation (alternative dispute resolution Undang-Undang No. 30 Tahun 1999 on Arbitrase dan Alternatif Penyelesaian Sengketa provides a new perspective on problem resolution, but the law only addresses a problem in the form of a dispute, whereas problem can also become conflict. In addition, people often hold the view that dispute resolution through alternative dispute resolution is only a matter of civil matters. This research uses the Doctrinal Legal Research Method. This research will discuss and draw conclusions about what is the difference between dispute and conflict and its relation to alternative dispute resolution? As well as how to resolve disputes and legal conflicts in Indonesia in the perspective of alternative dispute resolution?.

Keywords: *Alternative Dispute Resolution, Dispute, Conflict.*



I. INTRODUCTION

Man can be classified as individual or collection of individuals. In terms of legal subject in Indonesia today, there are 2 (two) categories of legal subject which are individual (*rechtperson*) and legal entity or corporation or other attribution of group. Naturally, human is a social being that is impossible to live alone or, in other words, every aspect of human's life needs other human being. Sociologically, the word "social" comes from the Latin "socius" meaning companion and bond (Sujarwa, 2011). Man befriends with other human beings and man forms a group when individuals are connected one another where each of the individuals would observe and interact with one another (Rahmawati & Muhammad Kusmantoro, 2019).

Aristotle argued that man is *zoon politicon* meaning that naturally man always wants to interact in a society (Herimanto & Winarmo, 2012). While Elly M. Setiadi defined man as social being which is interdependent and would not escape from the influence of other human being to interact with one another (M. Setiadi, 2017).

As a social creature, the relation may not be always harmonious as viewed by Thomas Hobbes that the nature of man is "*bellum omnium contra omnes*" or, in a more familiar adagium, is "*homo momini lupus*" meaning that man is a poaching wolf for the others (Purwanto, 2017). This means that in making his needs man sometimes, individually or collectively, may attack other individual or groups.

Man's desire to satisfy their needs often creates some problems: dispute or, when intensified, a conflict of between individuals, individual against groups, or between groups. To resolve those problems, it is necessary to have an actual resolution mechanism.

In Indonesia, the process in resolve problems legally is classified into 2 (two) mechanisms. First, in-court resolution commonly knowns as litigation process. Second, out of court settlement or non-litigation. The later mechanism often done through alternative dispute resolution method,

Alternative Dispute Resolution (ADR) has been acknowledged in dispute resolution mechanism. In 1976, Chief Justice of US Supreme Court, Warren Burger initiated the out of court settlement. This was well appreciated by academicians, practitioner, and communities (Adi Nugroho, 2019). In Indonesia, dispute settlement without involving court has been practiced with what was known as deliberation.

This out of court dispute settlement has been massive since the enactment of Undang-Undang No. 30 Tahun 1999 on Arbitrase dan Alternatif Penyelesaian Sengketa. The promulgation of this law was due to the pressure given by IMF supplementary regulation at that time (Adi Nugroho, 2019). This law regulates several settlement mechanisms such as arbitration, consultation, negotiation, mediation, conciliation, or opinion from experts.

Undang-Undang No. 30 Tahun 1999 on Arbitrase dan Alternatif Penyelesaian Sengketa indeed gives a new perspective towards problem settlement, however this law only regulate dispute whereas conflict may be one of the forms. In addition, people often think that settlement through alternative mechanism or alternative dispute resolution only designated for civil dispute. Therefore, it is interesting to study the difference between dispute and conflict and its relation to alternative dispute resolution and how alternative dispute resolution is implemented in several legal aspect in Indonesia.

II. DISCUSSION

The concept of Alternative Dispute Resolution (ADR) has actually been developed in some countries such as USA, Japan, and China. In some developing countries, court often viewed as the extension power of the ruler, therefore its decision deemed so biased and unfair that people seek another way to solve their problems.

Indonesia, through its ideology, Pancasila, actually has already adopted this alternative method in resolving dispute or differences through deliberation. This is reflected in the 4th pillar of Pancasila encouraging to resolve problems through deliberation to reach an agreement that leads to wisdom and proper justice. In the era of colonialization, Article 377 of HIR or Article 705 of RBG regulated that ‘should Indonesian and *Vreemde Oosterlingen* opt for their dispute to be decided by an arbitrator, they are obliged to comply with the rules apply for the European” (Subekti, 1980).

A. The Difference of Dispute and Conflict and Its Connection with Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) has been acknowledged in dispute resolution mechanism. In 1976, Chief Justice of US Supreme Court, Warren Burger initiated the out of court settlement. This was well appreciated by academicians, practitioner, and communities (Adi Nugroho, 2019). In Indonesia, dispute settlement without involving court has been practiced with what was known as deliberation.

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Takdir Rahmani argued that conflict and dispute are situations and conditions where individual and other individual, or individual and a group, or a group and another group involve in a factual dispute on perceptions (Rahmadi, 2011). In a glimpse, dispute and conflict holds some similarities, however they actually differ in meaning.

Nurnaningsih Amriani defined dispute as disagreement between parties in an obligation resulted from a violation done by a party or, in other words, as a problem occurs due to parties to defend their own perspectives (Amriani, 2012).

Conflict, etymologically, derives from Latin word *configere* meaning to hit each other. Antonius defined conflict as an act by one party that hinders or bothers other party (Antonius, 2002).

Under the Peraturan Menteri Agraria dan Tata Ruang/Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 3 Tahun 2011 on Pengelolaan Pengkajian Dan Penanganan Kasus Pertanahan, dispute is a disagreement between individuals, legal entities, or other organizations that socio-politically does not extensively affect. While conflict means a disagreement between individuals, groups, classes, organizations, legal entities, or other institutions that socio-politically tend to have an extensive affect.

Based on those two meaning, dispute and conflict can be differ from the effect created. When the effect is not massive, it is a dispute, while conflict create a massive effect. Therefore, dispute can be increased into conflict when unresolved.

Undang-Undang No. 30 Tahun 1999 on Arbitrase dan Alternatif Penyelesaian Sengketa regulates several settlement mechanisms such as arbitration, consultation, negotiation, mediation, conciliation, or appraisal from experts.

a) Arbitration

Arbitration comes from the word *arbitrare* meaning the power to resolve something with wisdom or in peace by an arbitrator (Subekti,

1980). Under Article 1 paragraph (1), arbitration is out of court settlement of a dispute under the arbitration agreement made in written by disputants.

The use of arbitration is often known by business actors as the dispute settlement of business or of commerce. The settlement process done through arbitration conducted by arbitrator registered at an arbitration court.

b) Consultation

Consultation is an act that is “personal” between a certain party (client) and a consultant in which the consultant gives their advice to the client as needed by the client (Hendra Winarta, 2011).

c) Negotiation

Negotiation is a medium for disputing party to discuss the solution to their dispute without any involvement of third party as mediator, therefore there is no standard procedure but the procedure and mechanism of resolution are up to the arrangement by the disputing parties (Muryati et al., 2011). Negotiation taken under 2 (two) grounds. First, to seek something new. Second, to resolve a dispute (Muryati et al., 2011).

d) Mediation

Mediation is a mechanism of dispute resolution assisted by a mediator; the role of mediator is passive giving only alternatives of solution to the matters disputed (Diah M., 2016).

e) Conciliation

Conciliation is a dispute resolution with third party intervention (conciliator) in which its conciliator is active by taking initiatives to make and formulate the measures of resolution which then offered to the

disputing parties. Even though conciliator is active, they cannot make any decision (Angesti Anas Kapindha et al., 2014).

f) Expert's Opinion

Opinion from experts is a dispute settlement mechanism by seeking opinion from experts on the field. This is similar mechanism with consultation.

There are several forms of conflict. Firstly, destructive conflict meaning that a conflict arises from dissatisfaction, hatred, and resentment of a person or group against others as a result of certain factors. Secondly, constructive conflict which defines conflict as fungsional where conflict arises from the disagreement between individuals or groups in responding a problem (Anderson, 2006).

In its relation with Alternative Dispute Resolution (ADR), conflict resolution is quite familiar. Nicholson defines conflict resolution as a way-out to create solution to various impacts of conflict (Nicholson, 1991). While Weitzman defined conflict as an act to resolve a problem done collectively (Morton & Coleman, 2006).

Conflict resolution mechanism, principally, is similar to mechanism of mediation and negotiation because naturally conflict resolution suggests more democratic and constructive methods to settle conflict by giving a chance to conflicting parties to solve their conflict on their own or by using assistance of third parties deemed wise, neutral, and fair to mediate and help the conflicting parties in settling their problems in a peaceful method.

B. Dispute and Conflict Resolution in Indonesia in Perspective of Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is an out of court mechanism. Often people think that dispute settlement through an alternative dispute

resolution is only for civil dispute. Law, impliedly, adopts alternative dispute resolution mechanism in resolving problems such as:

a) Criminal Law

Criminal law is the last resort in a law enforcement process known as *ultimum remedium*. Therefore, to realize the basic principle of criminal law, Indonesia today begins to put forward the settlement through mechanism of Restorative Justice.

Restorative Justice is a process where the offender and victim meets to solve the criminal law (Marlina, 2009). Restorative Justice can be *defined* as mediation between conflicting parties of criminal offense and the period after. While Restorative Justice in a broad sense means that it emphasizes the enforcement of criminal law to restore the relation of victim and offender to avoid dispute or revenge in the future and to manifest the principle of criminal law as the last resort (Putra Denis, 2021).

In juvenile criminal justice, there is diversion mechanism. *Diversion* is a settlement mechanism of juvenile delinquency through peaceful method by putting the offender and victim in a mediation (Johari & Arif Bagus, 2021). Under the Undang-Undang No. 11 Tahun 2012 on Sistem Peradilan Pidana Anak, diversion is defined as diverting the settlement of juvenile case, from due process to out of court settlement. However, not all crimes committed by minor can be diverted.

Restorative Justice and diversion are one of out of court settlement or non-litigation methods in criminal matters. Basically, Restorative Justice and diversion are similar to mediation.

b) State Administrative Law

Van Apeldoorn defined state administrative law as a body of rules to be concerned by the ruler holding duties of governance in their line of

duties (Munaf, 2016). In the context of governmental administration, post enactment of Undang-Undang No. 30 Tahun 2014 on Administrasi Pemerintahan affecting the State Administrative Court, before individual or civil entities filing charges to the court, they have to take administrative measures first.

Administrative measures under the Surat Edaran Mahkamah Agung No. 2 Tahun 1991 Tentang Petunjuk Pelaksanaan Beberapa Ketentuan Dalam Undang-undang No. 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara are 2 (two) types. First, the filing of Complaint (*Bezwaarscriff Beroep*) to the Office/Officilas of State Administrative issuing the policy (*Administratif Beroep*) to the office/officials of other institution enacting the decree of the power to re-examine the disputed decision of the State Administration. If all of the measures have been done, a charge may be filed to the State Administrative Law.

c) Labour Law

Problems of labour often occurred in Indonesia. In Indonesia, the process of settlement is done through a special court namely Court of Industrial Relation Dispute. The enactment of Undang-Undang Nomor 2 Tahun 2004 on Penyelesaian Perselisihan Hubungan Industrial adopts alternative dispute resolution. Under Article 3 paragraph (1) of Undang-Undang Nomor 2 Tahun 2004 on Penyelesaian Perselisihan Hubungan Industrial on the The Settlement of Industrial Relation Dispute which principally states that dispute on industrial relation have to be resolved through bipartite agreement. When the agreement fails, the Office of Man power have to offer the parties to choose the settlement through conciliation or arbitration as stipulated in Article 4 paragraph (4) of Undang-Undang Nomor 2 Tahun 2004 on Penyelesaian Perselisihan Hubungan Industrial.

d) Banking Law

Banking sector is one of the most potential factors of arising disputes or conflicts. This potency has been anticipated by the Financial Service Authority (Otoritas Jasa Keuangan/OJK) by enacting the Regulation of Financial Service Authority (Otoritas Jasa Keuangan/OJK) Number 1/POJK.07/2013 regarding Consumer Protection of Financial Service. Post the enactment of the policy, OJK again promulgated Regulation of Financial Service Authority (Otoritas Jasa Keuangan/OJK) Number 1/POJK.07/2014 on Alternative Institution of Dispute Settlement in Financial Service Sector (Pradipta & Kharisma, 2019).

With the promulgation of Regulation of Financial Service Authority (OJK) Number 1/POJK.07/2014 on Alternative Institution of Dispute Settlement in Financial Service Sector, OJK facilitates banking consumers who are in dispute with banks to settle the problems through mediation, adjudication, or arbitration as the protection for the consumer.

e) Intellectual Property Rights

Intellectual property rights is an exclusive rights given by the state under the law to the rightful holders based on the procedures and conditions to meet (Syafrialdi et al., 2008). Trademark is one of the rights.

Under the Law No. 20, 2016 concerning Trademark and Geographical Indication, when a dispute on trademark occurs, in addition to filing charge to the Commercial Court, it can be settled through alternative mechanism of dispute resolution. The mechanism mentioned are negotiation, mediation, conciliation, and other methods selected by parties. It is in accordance with provisions in Article 93 of Law No. 20, 2016 concerning Trademark and Geographical Indication.

III. CONCLUSIONS AND SUGGESTIONS

A. CONCLUSIONS

1. Dispute and conflict differ from the result. Dispute is when the effect created is not massive, while conflict is. Therefore, dispute may escalate into conflict when unresolved. In Undang-Undang No. 30 Tahun 1999 on Arbitrase dan Alternatif Penyelesaian Sengketa, there are several mechanisms of dispute settlement such as arbitration, consultation, negotiation, mediation, conciliation, or expert's opinion. Conflict in the context of alternative dispute resolution (ADR) is known as conflict resolution. Nicholson defined conflict resolution as a way-out to create solution to the impacts of conflict. Conflict resolution mechanism, principally, is similar to mediation and negotiation for, naturally, conflict resolution suggests the more democratic and constructive methods to resolve conflict by giving chance to conflicting parties to settle the problems with their own way or to use the assistance of third party who is wise, neutral and fair to mediate and help the conflicting parties in resolving problems in a peaceful method.
2. Alternative Dispute Resolution (ADR) is an out of court mechanism of settlement. People often think that dispute settlement through alternative mechanism is only for civil problems. In criminal law, restorative justice and diversion exist. Diversion is specifically assigned for juvenile delinquent. In state administrative law, there is administrative method namely administrative complaint and appeal. In labour law, there is bipartite agreement in resolving labour dispute. In banking law, the enactment of Regulation of Financial Service Authority (OJK) Number 1/POJK.07/2014 on Alternative Institution of Dispute Settlement in Financial Service Sector gives protection to the consumer to settle their problems through mediation, adjudication, or arbitration at the Alternative Institution of Dispute Settlement in Financial Service Sector.

In dispute of trademark, in addition to litigation settlement, it can also be resolved through alternative dispute resolution.

B. SUGGESTIONS

1. Disputing parties should put forward peaceful resolution to find useful and beneficial settlement for all parties so that law would not be the means to retaliate but rather be means of benefit, just, and assurance for legal subject. As for the conflict, before settling the dispute through litigation, the resolution has to be through conflict resolution first.
2. In several field of law, such as labour law and state administrative law, steps and time in out of court settlement need to be considered for the duration of settlement to be short that can put parties in uncertainty.

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