# The Existence of Alternative Dispute Outside of Court through Indigenous Leaders

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Abstract: Pursuant to Article 18B paragraph (2) of the 1945 Constitution, the State recognizes and respects the unity of indigenous and tribal peoples as well as its traditional rights as long as it is alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by law. Research on “The Existence of Alternative Dispute Outside Of Court Through Indigenous Leaders” is a normative study supported by data obtained in the field. Normative legal research is a study using secondary data. The effects of globalization cause the occurrence of various types of customary law conflicts. The customary law approach in non-court settlement disputes results in a win-win solution, resulting in harmonization for the parties. Resolving conflicts with customary law approaches based on propriety, harmony, and harmony can prevent prolonged conflict and realize community harmonization. Harmonization of the life of society and nation, meaningful to realize the ideals of the struggle of the Indonesian nation that is imbued by the noble values of Pancasila, the 1945 Constitution, NKRI and Bhineka Tunggal Ika.

## 1 INTRODUCTION

The Unitary State of the Republic of Indonesia is the State of Law and not the State of Power. One indicator of achievement is the formation of conditions and the ability of citizens or communities to obey the law or even a law-abiding society. The process of law enforcement is not entirely done by using the formal justice method, one of which is repressive police action and followed by legal litigation process. The formal act of litigation relies heavily on the enforced effort and the authority of the law officers who do so. Furthermore, even if there is a result, it will generally end up with a "lose-lose" or "win-lose" situation.

Dispute resolution in Indonesia generally can be reached by 2 (two) ways that are through the court and outside the court. Civil procedure law governs the settlement of disputes within the courts and its arrangements are contained in the Herziene Indonesische Reglement (HIR) and Rechtsreglement voor de Buitengewesten (RBg) or are also governed by the Criminal Procedure Code No. 8 of 1981. Dispute settlement outside the court is Law Number 30,1999 on Arbitration and Alternative Dispute Settlement (APS Law), Supreme Court Regulation Number 1, 2008 on Mediation or other regulation related to non-court dispute settlement. If two or more persons are in dispute and wish to settle the matter, a third party is required as a way to agree or seek a verdict, the way taken other than the courts or litigation is through an out-of-court or non-litigation settlement deemed to be effective and efficient.

The litigation process places the parties against each other. Otherwise, the litigation dispute settlement is the final means after another alternative dispute resolution has not yielded results [1]. The alternative to such waivers is expected to be more appropriate if, under certain conditions, reasons and or actions, alternative dispute resolution mechanisms may be employed. The settlement of disputes outside the court in Article 1 point 10 of the APS Law, Alternative Dispute Settlement is a dispute resolution or disagreement institution through a procedure agreed upon by the parties, namely non-court settlement by consultation, negotiation, mediation, conciliation, expert judgment or dispute settlement by custom.

The settlement of the conflict in a litigation case is defeated to leave suffering for the losers, even the verdict of the courts that already have the legal force remains there are not executable, because it is not by the feelings of community justice. The spirit of the



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struggle of indigenous peoples in settlement of the conflict with the approach of customary law based on the principle of propriety, harmony. It aims to achieve the harmonization of community life and nation to a life of justice, peace, happiness and prosperous for all Indonesian people, by the noble values of Pancasila, 1945 Constitution, Unitary State of the Republic of Indonesia and Bhineka Tunggal Ika. According to Article 18B Paragraph (2) of the 1945 Constitution, the State recognizes and respects customary law community units as well as their traditional rights as long as it is alive and by the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by law.

Shidarta says that in the civil law system family tradition, positive norms in the legislative system is seen as the most important formal legal source. It is especially emphasized in the realm of criminal law. The meaning of the written law in the context of criminal law is often restricted to denotation that is only in the form of law. Therefore, the law needs to be made as complete as possible to accommodate and anticipate any violation of the law.

In some areas of Indonesia, there are still community communities that use customary/community dispute resolution mechanisms. This mechanism is seen as more efficient, faster and more giving a sense of justice regarding cosmic balance in the community. Examples of people who still use customary law are strictly Tenganan indigenous Balinese people who have the structure of government, law and customary institutions that are still running well and coexist with the national legal system. If there are Tenganan residents who steal, for example, it will be sanctioned if done in the territory of indigenous peoples Tenganan. Customary sanctions usually have more deterrent effect compared to sanctions given by the state [2].

The existence of alternative dispute outside of court through indigenous leaders is expected to create a win-win solution for the parties to the dispute. The role of the indigenous leader is urgently needed to avoid dispute resolution through the courts.

# 2 METHODOLOGY

Legal research is a scientific activity, based on methods, systematics and individual thoughts, which aims to study one or several specific legal phenomena, by way of analysis. There is also a thorough examination of the legal facts and then attempts to solve the problems that arise in the relevant phenomena [3]. The research on "The Existence Of Alternative Dispute Outside Of Court Through Indigenous Leaders" is data obtained in the field supports research normative. Normative legal research is a study using secondary data.

Research the existence of alternative dispute outside of court through indigenous leaders as research Normative legal is collecting data that is sourced from literature study using various scientific literature, books, magazines, documents, legislation, and the work of law, as well as other sources of literature. Data in normative legal research, i.e., data obtained directly from the subject of research [4].

# 3 RESULT AND DISCUSSION

## 3.1 Alternative Dispute Outside the Court Through Indigenous Leaders

It can be known from the application of the law in conflict resolution to understand the enactment of the law in public life. With the rise of customary conflicts in society, it is imperative that efforts be made to resolve them justly and wisely, to prevent the occurrence of prolonged conflict, leading to national divisions.

With the approach of customary law that contains the value of propriety, harmony, and harmony then the settlement of adat conflicts conducted outside the court leads to a win-win solution. Historically, the culture of Indonesian society upholds the familial approach. In the case of disputes arising within indigenous peoples, the members of the community choose to resolve them customarily either through traditional elders or deliberation.

The role of Through Indigenous Leaders has a huge role in solving adat conflicts democratically based on the principles of deliberation and consensus to realize the harmonization of community life and nationhood, to achieve justice, peace, prosperity and happiness in the midst of rapid development and social change.

Customs and customary institutions strived to be empowered and conserved and developed to be useful for national development. The empowerment of customs, customs, and customary institutions are intended to make the condition and existence sustainable and stronger. It plays a decisive role in national development and is useful for the people concerned by the level of progress and development of the times and especially to maintain ethical values, moral and culture which are the core of customs,

customs in society and customary institutions so that their existence is maintained and continues.

The customary law approaches non-litigation conflict resolution by creating a win-win solution, resulting in harmonization for the parties. Resolving conflicts with customary law approaches based on propriety, harmony, and harmony can prevent prolonged conflict and realize community harmonization. Harmonization of the life of society and nation, meaningful to realize the ideals of the struggle of the Indonesian nation that is imbued by the noble values of Pancasila, the 1945 Constitution, the Unitary State of the Republic of Indonesia and Bhineka Tunggal Ika.

According to Lawrence M. Friedman (1994) differentiated the legal system into three components namely structure, substance and legal culture. Structural components include institutions such as courts as institutions authorized to apply the law. Substance component is the real form produced by the legal system either in the form of norm, doctrine, prohibition, obligation, sanction, and legal validity. The legal culture includes the attitudes or values of the community that determine the workings of the legal system concerned. Legal culture plays a vital role in guiding the development of the legal system, which affects the behavior of society, because it relates to the perception, values, ideas, and expectations of society against the law. The legal culture determines the workings of the legal system in society.

In real life, people act by the legal culture prevailing in the society. People must not only obey the national law but also pay attention to the living rules of society. In resolving adat conflicts, communities use laws that live in communities such as customary law and religious law.

## 3.2 Comparison of the Legal System to Dispute Resolution Outside the Court

Only emphasizing state law as the only law that should be applied in dispute resolution is inadequate. In the life of the Indonesian people, especially in the dispute resolution of valid legal diversity that is in addition to legislation also apply the existing law in society such as customary law and religious law which is maintained as a guide to behavior that can play effectively.

In legal positivism, that positive law is the law. The positive law is the legal norms that have been built by the state authorities. The law of the state is obeyed or obeyed in absolute terms concluded in a statement "gezetz ist gezet" or "law is the law." This view differs from legal positivism which teaches that the way of view is abstract and formal legalist, the sociological or empirical juridical paradigm, such as the von Savigny pioneered school of thought, which has begun to draw the attention of many from an abstract and ideological analysis of law to a legal analysis focused on the social environment that shaped it.

With Von Savigny's view, it is stated that the law arises not by command of authority or power, but because of the sense of justice that lies within the soul of the nation. The soul of the nation is the source of the law. The dialectic process between the legal positivism thesis and the antithesis of the historical flow pioneered by Von Savigny spawned another school called the Sociological Jurisprudence which teaches that good law must be law by the laws that live in society. This theory separates strictly between positive law and living law. The following figures include Eugen Ehrlich, who argues that the question of law today is no longer a matter of formal legality but moves toward the use of the law as a means of contributing to the formation of a new order of life or according to the conditions of the day. The new positive law will apply effectively when it contains or conforms to the living laws of the community.

Empirically it can be said that the law that prevails in society other than formed by state law is also formed from customary law. However, anthropologically the formation of mechanical mechanisms in community communities is also a law that locally serves as a means of maintaining social order.

Legal pluralism is generally defined as a situation in which two or more legal systems work side by side in a similar field of social life or to explain the existence of two or more systems of social control in one area of social life. Strong legal pluralism refers to the fact that there is a plurality of legal orders in all societies that are regarded as equal, so there is no hierarchy that shows the one legal system which is more dominant than other legal systems. For this, Eugene Ehrlich's Living Law theory states that in every society there are living rules of normative order which are usually contrasted or contrasted with the legal system of the state in the category of strong legal pluralism.

Shidarta [9] says that in the civil law system family tradition, positive norms in the legislative system is seen as the most important formal legal source. It is especially emphasized in the realm of criminal law. The meaning of the written law in the context of criminal law is often restricted to

denotation that is only in the form of law. Therefore, the law needs to be made as complete as possible to accommodate and anticipate any violation of the law.

Shidarta further said, that: "However, such beliefs above are only limited to assumptions." [10]. According to Koesno [11], there are at least four main points that can be as a theoretical problem of customary law. First, the application of the law of custom. In fact, it is an ontological problem which shows Koesno's view of the difference between adat and adat law. Second, the categorization of adat in Indonesia. Also still in the ontological domain, is the issue of indigenous diversity according to some regions in Indonesia. The third thing is about the search for customary law through research. Its search activities through field research on indigenous and tribal peoples in Bali and Lombok. This subject is in the epistemological domain. Fourth is the principles of work in settlement of customary cases. Three principles are included such as the principle of harmonious, proper and barrel. These principles reflect the axiological dimension of customary law in Indonesia.

# 4 CONCLUSION

1. The existence of alternative dispute outside of court through indigenous leaders is expected to create a win-win solution for the parties to the dispute. The role of the indigenous leader is urgently needed to avoid dispute resolution through the courts. With the approach of customary law that contains the value of propriety, harmony, and harmony then the settlement of adat conflicts conducted outside the court leads to a win-win solution.

2. The effects of globalization cause the occurrence of various types of customary law conflicts. The customary law approach in non-litigation conflict settlement which resulted in a win-win solution, resulting in harmonization for the parties. Resolving conflicts with customary law approaches based on propriety, harmony, and harmony can prevent prolonged conflict and realize community harmonization. Harmonization of the life of society and nation, meaningful to realize the ideals of the struggle of the Indonesian nation that is imbued by the noble values of Pancasila, the 1945 Constitution, the Unitary State of the Republic of Indonesia and Bhineka Tunggal Ika.

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