



# Factors that Encourage the Implementation of Alternative Dispute Resolution Between Indigenous Peoples and Corporations in Indonesia

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## *Abstract*

In essence, customary law prioritizes the existence of deliberation and consensus, both in the family, kinship, neighborliness starting a job or in ending the work between one and the other, preferably the way of settlement in harmony and peace with deliberation and consensus, by forgiving each other without having to rush the relationship directly brought or delivered to the state court. However, it is necessary to evaluate in-depth the implementation of alternative effectiveness of environmental dispute resolution to comply with local wisdom to realize social justice. Therefore, the authors examined the factors that influence the implementation of alternative environmental solutions with the type of socio-legal research and enforcement of legal sociology.

*Keywords:* dispute resolution, environment, indigenous peoples, corporations.

## 1. Introduction

The protection of indigenous peoples for their traditional rights is enshrined in ILO C 169 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) emphasizes the rights of ownership and ownership of the people concerned over the land they traditionally occupied and their control over their economy. It is also stated in the Constitution of the Republic of Indonesia in 1945 (hereinafter abbreviated as the 1945 Constitution) Article 18b (2) stipulates that the State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, which is stipulated in the law. It is also emphasized in Article 32 paragraph 1 of the 1945 Constitution that the State of Indonesia has aspirations to advance national culture in world civilization by guaranteeing the freedom of the people in maintaining and developing their cultural values (Convention ILO 169..., 1989). From the concept of recognition and respect of indigenous peoples, there is a spirit to show social justice by giving freedom to express the identity of local culture as widely as possible which is reflected in the noble values of indigenous peoples who still live in the middle of the political constellation of law in Indonesia.

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forgiving each other without having to rush the relationship directly brought or delivered to the state court. However, the existence of a green constitution along with the recognition and respect of customs contained in the constitution (law in the books) has not yet fully built a strong interdependence (law in action) to create environmental justice. This was also conveyed by Rachmad Safa'at, a paradigm of industrialization based on the ideology of capitalism that relies on the paradigm of modern science that considers that tradition is a problem and a barrier to development (Rachmad Safa'at, I Nyoman Nurjaya et al., 2015).

In 2017, the movement of Samin people began to be seen again in the fight against the government's indifference during the process of issuing environmental permits followed by PT Semen Gresik's business license (semen – cement) in the environmental utilization plan in the forest sector located in Pati and Rembang Districts, Central Java Province. Deep ecology theory "however despite repeated complaints about the use of them it still enjoys wide currency, deep evidently has an attractive resonance for many who seeks to establish a new respect for the natural world", the role of traditional societies that uphold ideas, values, and fairness with local wisdom, as well as maintaining ecological balance involving Samin communities with the consistency of living values evidenced by rejecting the exploitation of Kendeng mountains which are cement raw materials as a PT expansion plan of Semen Gresik (Laksanto Utomo, 2013).

The resistance that led to the foot-grazing action in front of the State Palace (Johnson Simanjuntak, 2016) also gained sympathizers from various other indigenous peoples and local residents who could potentially be affected either directly or indirectly on the project to be carried out. Long before 2017, long before the verdict of PK MA that defeated Semen Indonesia against farmers Rembang and Walhi, this state-owned company suffered defeat against the citizens of Samin in Pati Regency, Central Java. Samin residents sued the plan to build a cement plant in the area and won it in a lawsuit at PTUN and MA in mid-2009. Relatively many companies have legally committed pollution or damage to the environment but have not received any real action. This can be caused by weak legal tools, authority of law enforcement officials, and the occurrence of conflicts between economic interests and social and environmental interests.

Some examples of environmental destruction in Indonesia are quite large, among others, the first, in 1996 there was damage to tropical forests in the lowlands covering an area of 30 km<sup>2</sup> caused by waste disposal from PT Freeport Indonesia. This waste disposal is acidic and toxic that flows into the Ajkwa River and damages the river's ecosystem. Second, in 1999 the disposal of PT Newmont Minahasa Raya (PT NMR) tailings to the seabed was feared to have an impact on marine ecosystems. Walhi in 2001 urged PT NMR to build an environmentally friendly tailings disposal system, but to date, there has been no realization.

In June 1998, the pulp mill of PT Inti Indorayon Utama (PT IIU) was suspended due to alleged environmental damage. It resumed operations in September 1998, then was suspended in March 1999, and resumed operations in May 2000. The community around the plant still demands the closure of PT IIU. Third, the great flood in February 2002 that occurred in Jakarta is suspected to be one of the causes is the conversion of the function of the water catchment area into housing, hotels, and golf courses. The community accused the residential area of Pantai Indah Kapuk which was the cause of the flood (Purwantari, 2002). Examples of cases that were resolved through mediation in Balongan Village, West Java, between Farmers Tambak Balongan village with PT. Pertamina RU VI Balongan has been conducted through alternative dispute resolution by mediation by the procedures determined by the parties facilitated by the Ministry of Environment.

The mediation result, made in the form of an agreement between Farmers Tambak Balongan village with PT. Pertamina RU VI Balongan on the settlement of community compensation and certain actions for the recovery and improvement of the environment. Second, the implementation of mediation results of environmental dispute resolution between the

community of farmers along a village pond with PT. Pertamina RU IV Balongan has been done well by the parties, namely reimbursement of compensation to Farmers Pond of Balongan village and to the Ministry of Environment to take certain actions in the form of environmental countermeasures and recovery. Not only in Balongan village, but environmental disputes through mediation also occurred in Bali regarding wastewater and wastewater pollution by Amed Hotel in 2011 located in Amed Beach, Karangasem District, through mediation and has reached an agreement, namely that the Amed Hotel will repair septic tanks and will manage the waste in collaboration with the local village community (Komang Tri Darmayanti et al., 2012). Therefore, an alternative evaluation of environmental dispute resolution is required to effectively examine the factors that encourage the implementation of alternative dispute resolution between indigenous peoples and corporations in Indonesia.

## 2. Methodology

This study uses a type of socio-legal law research with a legal sociological approach that is conceptualized as actual behavior as an unwritten social symptom, which is experienced by everyone in a social life relationship. The location of the investigation is in the Central Java Rembang regency. The primary data in this study is obtained from direct facts of the field, while secondary data is in the form of legislation relevant to the research. The sociological approach is used because analyzing the impact of alternative failure settlement is very suitable in describing the legal culture in the community concerned.

## 3. Discussion

Lawrence M. Friedman (1975) presented a Theory of Legal System in which there are three main elements of a legal system, including Structure, Substance, and Culture. The Structure of Law according to Friedman is “The structure of a system is its skeletal framework; ... the permanent shape, the institutional body of the system.” This means that the structure of a system is its framework; a permanent form, the institutional body of the system. The substance of law is “The substance is composed of substantive rules and also about how institutions should behave.” This means that the substance of the law consists of substantive rules and also how institutions should behave. Legal culture according to Friedman is “... the element of social attitude and value. Behavior depends on judgment about which options are useful or correct.”

Legal culture refers to those parts of general culture-customs, opinions, ways of doing, and thinking that bend social forces toward or away from the law (Friedman, 1975). This means that legal culture is an element of social attitudes and values. Behavior depends on an assessment of which options are useful or correct. Legal culture refers to parts of the general culture – customs, opinions, ways of doing and thinking – that deflect social power toward or away from the law.

Friedman’s theory shows that legal culture is the deciding factor in a policy’s success. From the results of the study there are several legal behaviors that are accepted in the community into a variable determining the direction of the law in force in the community. The legal behavior is configured against the resolution of environmental disputes and raises factors that influence its success. The factor can be identified into 2 which consists of driving factors and obstacles to dispute resolution outside the court.

*3.1 Factors that encourage the implementation of alternative dispute resolution between indigenous peoples and corporations in Indonesia*

(1) Faster completion (Wahyu Nugroho, personal communication, 2021)

Settlement of environmental disputes if done outside the court will be resolved faster than the judicial process in general. This is in accordance with the settlement through the court (litigation) based on the instruction of the Chairman of the Supreme Court of the Republic of Indonesia on 13 March 2014, has issued a Circular Letter of the Supreme Court of the Republic of Indonesia No. 2 of 2014 concerning the Settlement of Cases in the First Court and the Level of Appeal on 4 (Four) Judicial Environments.

The points of the circular letter are the settlement of cases in the First Level Court no later than 5 (five) months including the settlement of the situation. Against the nature and circumstances of certain cases whose settlement takes more than 5 months, the Panel of Judges handling the case must make a report to the Chairman of the First Tier Court with a copy addressed to the Chief Justice of the Court of Appeal and the Chief Justice of the Supreme Court; settlement of the case at the Court of Appeal no later than 3 (three) months including the settlement of the situation.

Against the nature and circumstances of certain cases whose settlement takes more than 3 months, the Panel of Judges handling the case must make a report to the Chief Justice of the Court of Appeal with a copy addressed to the Chief Justice of the Supreme Court; The grace period does not apply to specific matters that have been determined based on the laws and regulations; For the effectiveness of monitoring compliance with case handling by the above period, to enter case data in electronic-based case management information systems on time. Based on the above explanation that the settlement process through litigation takes a long time and requires relatively little cost. This is due to the slow settlement process, the cost of speaking inexpensive courts, the court is considered less responsive in the settlement of cases, so that the verdict is often unable to solve the problem and the accumulation of cases at the MA level are not resolved.

While non-litigation or out-of-court settlements protect the civil rights of the parties to the dispute in a faster and more efficient manner. Not all members of the public understand environmental dispute resolution processes either litigation (through the courts) or non-litigation (out of court). Therefore, academics and governments must socialize environmental dispute resolution mechanisms to the community. Public knowledge of environmental disputes and their settlement process can be used as a function of control over activities that harm the environment. This is intended for members of the legal literate community. In addition, out-of-court dispute resolution agencies must be established immediately.

(2) Low cost (Wahyu Nugroho, personal communication, 2021)

Environmental settlement through litigation requires substantial costs in terms of litigation costs, operational costs, and the calling of members. In addition, the cost of proof is also relatively more expensive because it must be strengthened by environmental laboratory tests and other supporting evidence. This is different from non-litigation settlements that can force the parties concerned and do something for the resolution of different disputes than if both parties have the same concerns. The ways taken to resolve disputes are strongly influenced by the prevailing system in society. This aspect is a consideration for the parties involved in determining the way that it considers the best and small risk. The process of resolving disputes/conflicts in the community is fractured and developed. Then came an alternative dispute resolution (ADR).

This form emphasizes the development of cooperative methods of conflict resolution outside the court. ADR dispute resolution methods are consensus, acceptable to the parties to the dispute (mutually acceptable solution) with an “informal procedure”. Much of the criticism was

leveled at the court. This is not only in Indonesia but also in developed industrialized countries. The development of a society that demands speed, confidentiality, efficiency, and effectiveness and maintains the continuity of existing relationships, cannot be responded to by existing litigation institutions, which received a lot of criticism in its operations are considered slow, expensive, waste energy, time and money and open and cannot provide a win-win solution so that the concept of alternative dispute resolution offered received a positive response, especially in the business world that requires efficiency and confidentiality as well as sustainable relations/cooperation and in formalistic and wants a settlement that emphasizes more on justice.

(3) Simple (Wahyu Nugroho, personal communication, 2021)

Settlement is simpler because it can be done anywhere with flexible time, in addition to the good intentions of both parties can be conveyed easily and delivered clearly. Thus, it will bring forth prudent solutions in the resolution of environmentally sound and sustainable disputes. This is in contrast to settlement through litigation which in terms of the examination process tends to be rigid or normative, in its interaction using formal words and legal language so that it is less clearly interpreted.

(4) Win – win solution (Zaenal, personal communication, 2019)

There is a balance of position between the parties and provide solutions that are not only good to the company, the affected community but also good to the environment itself. ADR (Alternative Dispute Resolution) which was originally an out-of-court dispute resolution concept that emphasizes win-win solution products in their development in the United States is integrated into the proceedings in court-connected dispute (CDR) or Court Annexed Dispute Resolution (CADR). Alternative Dispute Resolution (ADR) is the concept of cooperative out-of-court conflict resolution directed at an agreement or solution to a conflict or win-win dispute. The intended “win-win” solution here is a solution or agreement that can reflect the interests or needs of all parties involved in the conflict (shared interest). Although at the beginning of its development, especially in the United States ADR is only a mechanism of conflict resolution outside the court, but now ADR is also developed in terms of court proceedings or ADR integrated with the ADR court-connected court system.

(5) Maintaining local wisdom (Ronald, personal communication, 2019)

Customs in Indonesia tend to solve all problems through deliberation by the values that live in the community. The customary values that exist in an ethnic community are a reflection of the mindset of the community that forms local wisdom. the principle of local wisdom that in the protection and management of the environment must pay attention to the noble values that apply in the community’s living system. Local wisdom is part of the community to survive according to environmental conditions, according to needs, and beliefs that have been rooted and difficult to eliminate. Local wisdom is a local knowledge used by the community to survive in an environment that integrates with belief systems, norms, cultures and is expressed in traditions and myths embraced over a long period. The functions of local wisdom are as follows. First, as a marker of the identity of a community.

Second, as an adhesive element (cohesive aspect) across citizens, religions, and beliefs. Third, local wisdom gives a color of togetherness to a community. Fourth, change the mindset and reciprocal relationships of individuals and groups by putting them on the common ground/culture. Fifth, encourage the awakening of togetherness, appreciation as well as a joint mechanism to eliminate the possibilities that permit, even undermine, communal solidarity, which is believed to originate and grow above the common consciousness, of an integrated community. Local wisdom is a manifestation of the behavior of certain communities or communities so that they can coexist with nature/environment without having to damage it. Local wisdom is a superior activity in certain societies, the excellence is not always tangible and material, often contained elements

of belief or religion, customs and culture or other useful values such as for health, agriculture, irrigation, and so on.

Referring to this understanding can also be explained that local wisdom is deeply rooted, fundamental, and has become a form of behavior of a citizen to manage and maintain the environment wisely. The settlement based on local wisdom will show the existence and spirit of the soul of the nation (*folkgeis*) in achieving harmony in the community in maintaining its environment to remain sustainable. The existence and value of local wisdom that hangs its life in the forest and agriculture can continue to be maintained sustainably.

(6) Sustainable development (Fatilda, personal communication, 2020)

It is intended to create a good and trustworthy business climate because it is oriented towards sustainable development and environmentally sound. The resources in the area are part of the buffer system of people's lives, so the community is a development resource for the region. The welfare of the community is a unity and an integral part of the sustainability of resources in the region. Sustainable development is a conscious and planned effort that combines environmental, social, economic aspects into development strategies to ensure environmental integrity and safety, capability, well-being, and quality of current and future generations. Development always brings change and impact, positive and negative.

The positive impact is one of the goals of the implementation of development, namely positive changes for humanity in achieving its welfare. The concept of sustainable development has arisen because so far, not only in Indonesia but also around the world, especially in developing countries, development is less concerned with aspects or negative impacts on the environment, both biological aspects (ecosystem damage and biodiversity extinction) and non-hayati (socio-cultural).

Before the concept of sustainable development was announced, development was dominated by economic considerations, almost without considering its negative impact on the environment. instruments to achieve the objectives of the sustainable development with the AMDAL an activity or business that influences the environment will be more careful first when going to conduct such activities or businesses. If there is no AMDAL, then the three sustainable development objectives, both economic goals, social goals, and ecological goals will not be realized. It will even jeopardize the existence of current and future generations.

(7) The creation of food security (Wahyu Nugroho, personal communication, 2021)

The policy focuses on sustainable food security. Food security concerns the dimensions of availability, access, utilization, and stability of food. In Indonesia, in Law No. 18 of 2012 on Food, food security is defined as the condition of food fulfillment for countries up to individuals, which is reflected in the availability of adequate food, both in quantity and quality, safe, diverse, nutritious, evenly, and affordable and not contrary to religion, beliefs, and culture of society, to be able to live healthy, active, and productive in a sustainable manner. The above definition affects the size in looking at food security. Food security has four dimensions, namely availability, access to food, utilization, and stability of food stocks and prices. With these four dimensions, sizes are made to see food security. The existence of local wisdom system in the management of natural resources owned by indigenous peoples, especially in meeting food needs independently and sovereignly is currently experiencing marginalization, marginalization and denial process. This is because their food stability began to be intervened by the government and private sector so that structural dependence emerged that made them lack trust in natural resources and traditions declined in processing agriculture.

#### 4. Conclusion

Analysis of the settlement of environmental disputes outside the court between indigenous peoples and corporations Samin community disputes with PT Semen Indonesia can be classified into 2 factors, namely the driving factors and obstacle factors of dispute resolution outside the court. The driving factors of environmental dispute resolution conducted outside the court include faster settlement; low cost; win-win solution; maintain local wisdom; sustainable development; and the creation of food security. While the inhibitory factors include the absence of legitimacy of the MHA which makes the weak bargain position of MHA in the eyes of the Corporation in the Negotiation process; Inactivity in the law-making process (Impact of ADR termination); weak government supervision (ADR Impact) is less pro-active than the government in terms of quality and control of environmental policies that are environmentally sound; weak sustainable development paradigm is characterized by the strong anthropocentric paradigm compared to ecocentrics, because it is too oriented to the economic aspect; the absence of alternative arrangements for applicative environmental settlement; economic growth; and moral hazard.

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