Development of Alternative Dispute Resolution (ADR) in Indonesia

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Introduction

Alternative Dispute Resolution (ADR) can be interpreted as alternative to adjudication or alternative to litigation. If we use the first interpretation, arbitration cannot be part of ADR as arbitration is an adjudication in nature. The second interpretation can include arbitration as a part of ADR as it is not a litigation or court process. However, ADR has been developed rapidly in all part of the worlds as it has a flexibility and its ability to respond to merely substantive interest (tangible/ proprietary related interest) but also psychological and procedural interests as three of them are basic human interests.

In Indonesia based on the Law No. 30/1999 concerning Alternative Dispute Resolution and Arbitration, ADR is interpreted as alternative to adjudication as it is reflected in the title of the Law No. 30/1999 which separates ADR and arbitration. Therefore ADR includes negotiation, mediation, conciliation, early neutral evaluation and other hybrid type of ADR. As it happens in other Asian countries, Indonesia has been practicing ADR in traditional community long time ago. In traditional community *Pasemah*, South Sumatera for example, customary dispute resolution uses *Jurai Tue* or *Sungut Jurai* as third party conciliator. In West Sumatera, it is known *Kerapatan Adat Nagari* or *Kerapatan Ninik Mamak* which functions to settle disputes based on their customary rules. Although, traditional type of ADR has been widely practiced throughout the islands archipelago, institutionalization of ADR to resolve contemporary/modern problems has been left behind compare to some Asian countries such as Japan with *Chotei* (conciliation by Commissioners) and *Wakai* (conciliation by presiding judge), Philippines with *Barangay Justice*, and Singapore with Court Annexed ADR in Subordinate Courts.

Typology of ADR In Indonesia

To understand the law and practice of ADR in Indonesia, it is easier to categorize type of ADR which is practiced in Indonesia as follows:

1. Judicial Type ADR (Court Connected ADR)
2. Administrative Type ADR

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3. Private Sector Type ADR
4. Traditional Type ADR

Judicial type ADR or Court Connected ADR (CC-ADR) starts to develop as September 11, 2003, Supreme Court (SC) issued the Supreme Court Regulation No. 2 / 2003 concerning Mediation Procedures Within the Court. The SC Regulation functions as a guidance for settlement judges or non judges mediator to implement article 130 Civil Law Procedure which obliges the judges to try the amicable settlement before the civil proceeding starts. The article 130 Civil Law Procedure has not been effective yet as judges have little motivation to mediate and they have a limited knowledge and skill on how to mediate the case. The SC Regulation No. 2 /2003 introduces important provisions as follows:

- Mediation is mandatory for parties in dispute and handling judges;
- Parties in disputes can select listed mediator(s) or outside mediator [2]
- Code of Conduct developed by the Supreme Court is a basis for mediator to conduct his/her tasks;
- The separation of function between settlement judges and handling/trial judges;
- Duration of mediation
- Agreement can be formulated into decision of court which has an executorial power;
- The introduction of combined approaches of interest based mediation and early neutral evaluation;
- Prohibition of using minutes of mediation (if it fails to reach agreement) as evidence in litigation process;
- Mediators (judges and non judges) must be certified which will be administered by the Supreme Court;
- CC-ADR is a closed session but there is an exception for public interest cases such as environmental and consumer protection cases ;
- In addition to district court, Regulation No. 2/2003 also applies to other court jurisdiction (such as Administrative Court)

As the SC Regulation No. 2/2003 needs further concrete steps, the Supreme Court in cooperation with ADR private institutions is currently undertaking programs to develop code of ethics, accreditation policy, curriculum and syllabus, CC-ADR recruitment policy, mediation guidelines, and pilot areas in four district courts. By developing pilot areas means that we prepare four courts to be models that are subject to evaluation after one year implementation. Recruitment for trainees (potential mediators), training on mediation skill, infrastructure development, and mentoring will be carried out in four district courts. The socialization of CC-ADR is also now conducted by Bar Associations.

Administrative type of ADR is the type of ADR which provides procedures and services which are organized, facilitated and held by the administration (relevant government

[2] Outside mediator can be from Indonesian National Arbitration Body (BANI), National Mediation Center (PMN), Indonesian Institute for Conflict Transformation (IICT), Capital Market Arbitration Body (BAPMI), Universities, Bar Associations, or individuals agreed by parties.

instances). Administrative type of ADR in Indonesia includes: ADR in labor, environment, forestry, human rights and consumer protection.

The old and the first administrative type ADR is under labor dispute settlement scheme under the Law No. 22/1957 Labor Dispute Settlement and Law No. 12/1964 concerning Labor Dismissal Process in Private Companies. The scheme introduces Government Officers Mediator *(Pegawai Perantara*) to mediate the labor dispute, and The Committee for Labor Conflict Settlements (Labor Tribunal) to arbitrate the dispute. Under the proposed new Law (Bill concerning Industrial Relation Conflict Settlement), there are four types of dispute resolution that can be chosen by parties: (1) negotiation by parties; (2) mediation service performed and provided by Ministry for Manpower based on parties request ; (3) neutral conciliator (non government officers) appointed from list of conciliators provided by government; (3) arbitration by registered arbitrator; (4) Specialized Court on Industrial Relation Disputes attached in District Court and in the Supreme Court which introduces ad hoc judges/justices (non carrier) in addition to carrier judges/justices. The Bill also obliges the mediator or conciliator to provide suggested rulings when the mediation and conciliation fail to reach agreement. The parties are given certain period of time to comment (agree or disagree) on suggested rulings made by mediator/conciliator. If the parties do not make comment on the suggested rulings it has to be perceived as the disagreement to the suggested rulings.

In the issue of environment, ADR has also been recognized as an important element of environmental dispute resolution. Article 30-33 of Environmental Management Act (EMA) No. 23/1997 introduces mediation and arbitration as means to settle environmental disputes. Government Regulation No. 54/2000 as implementing regulation of article 30-33 of EMA No. 23/1997 establishes Environmental Dispute Settlement Service Provider in national as well as provincial/district levels facilitated by Ministry of Environment (MOE) in the national level, and Local Environmental Protection Office in the province and district levels. This service provider provides mediation and arbitration services which are carried out by mediators/arbitrators from government and private/community members. To date the MOE has established the National Environmental Dispute Settlement Service Provider in 2002 although to date they have not had cases to be mediated/arbitrated. The dysfunctional of this service provider established by MOE is because of some factors among others: (1) the public do not know about the existence and function of the environmental dispute settlement service provider; (2) the parties which are powerful do not have enough motivation to settle their disputes to mediation as they are not threatened by strong enforcement action (it does not create a sense of urgency); (3) the public complaint procedures and mechanisms as an entry point for mediation or arbitration have not been established yet. In other words no window or gate which the environmental cases can enter into ADR.

Although the Law on Forestry No. 41/1999 recognizes the ADR as a means to settle dispute related to forestry, to date the Ministry of Forestry has not been interested to develop special procedures, mechanisms or institution to implement the ADR provisions.

The Law on Consumer Protection (Law No. 8/1999) introduces Consumer Dispute Settlement Body (*Badan Penyelesaian Sengketa Konsumen*-BPSK) which is established by government in each district level for the purpose to serve out court settlement through mediation. The members of BPSK consists of representatives of government, consumer and business which functions among others: (1) provide mediation, conciliation and arbitration services; (2) supervision of the compliance level; (3) to issue subpoena; (4) to receive complaint; (5) regulatory function. It is not easy to find the members of BPSK who are able to carry out the various jobs as stated above. It is also interesting to see whether the function of ADR service provider can effectively be implemented as they also function as regulator who can impose sanctions. The Ministry of Trade & Industry with respected local government is responsible to establish BPSK. To date, no one district has established BPSK.

Private sector type ADR has two sub types: (1) business association type; (2) independent type. Business association type is ADR service provider which is established, attached or facilitated by business association such as Indonesian National Arbitration Body (BANI) which was established by the Indonesian Chamber of Commerce & Industry (KADIN) .The Indonesian Capital Market Arbitration Body (BAPMI) which was established by Self Regulatory Organizations (SROs) of Stock Exchange (JSX and Surabaya Stock Exchange) and capital market related professional associations. Both institutions provide arbitration and other ADR services. The independent type ADR is a service provider run by independent organization such as the Indonesian Institute Conflict Transformation which was established in 2001 (NGO based organization which is interested in public interest case settlement, dispute system design and capacity building works). In this category, The National Mediation Centre (PMN) which was established in September 2003 provides the mediation service of private and commercial cases as PMN is a continuation of Jakarta Initiative Task Force (JITF) [3] which serves whenever needed as mediator and facilitator of specific debt restructuring cases, particularly those involving foreign lenders following the economic crisis experienced by Indonesia.

On a case by case basis, the JITF applies a set of international "best practice" guidelines for debt restructuring. In applying the guidelines, JITF establishes and enforces a schedule, specifying the timing and expected result of meetings between the parties. If, during the course of the negotiations, specific issues arise that are appropriate for mediation, JITF personnel can intervene and act as mediators [4]. Until November 2003, debt restructuring cases handled by JITF is 117 which involves the total debt of 29.288.338.178 US dollar. 70 % cases are considered settled thru mediation[5] . As the

[3] The establishment of *The Jakarta Initiative Task Force* (JITF) together with *the Indonesia Bank Restructuring Agency (IBRA)* which tasks is to restructure the debts of banks which were collapse during the crisis was one requirement of *the International Monetary Fund* (IMF) to expedite the accomplishment of debt restructuring programs for banks and companies which were collapsed during the crisis.

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[4] See M. Husseyn Umar, *The Application of ADR in Indonesia* in " ADR in Asian and Pacific Countries: Now and in the Future". Proceeding of International Symposium on Civil and Commercial Law, February 15, 2002, ICD-RTI, Japan Ministry of Justice, March 2003

[5] *Kompas* Daily Newspaper, November 28, 2003

JITF will be ended in December 2003, PMN will then be operated as independent and professional ADR service provider using their experiences primarily for trade and investment related disputes.

Traditional Type ADR has been used in various traditional/"*Adat*" community such as in West Sumatera with *Kerapatan Adat Nagari* , North Sumatera with *Runggun Adat* and South Sumatera with *Jurai Tue.* This type is used only for disputes among the members of *adat* community. The existence of the traditional type ADR was under a threat when the old order government issued the (former) Law on Village Government in 1979 which abolished the existence of self governing body of *Adat* community and turned it into a part government institution. In the period of reform, under the Law No. 22/1999 on Local Government, the village is given an autonomy to be a self governing body. One of the tasks of the head of village is to mediate disputes among members of the village (article 101). The role of the Head of Village to mediate village disputes can be used as a start to institutionalize/revitalize traditional type ADR in Indonesia.

Law No. 30/1999 on ADR & Arbitration

This Law which was promulgated in 1999 provides the rules for ADR (consensually based dispute settlement) and arbitration. The article 2 mentions about the scope of application of this Law that applies for disputes settlement that are predetermined by parties in the agreement/contract. However, the use of arbitration in the administrative type ADR such as in the labor, environment and consumer protection dispute settlement refers also to the rules provided in the Law No. 30/1999.

The Law No. 30/1999 only provides one article (article 6) about ADR (consensually based dispute settlement). The major provisions included in the Law relates to arbitration. The spirit reflected in this Law is the encouragement to use negotiation, mediation, conciliation as consensual based settlement prior to arbitration as an adjudication. In other words, the ADR provision included in this Law is not the main part of the Law. Regarding ADR, Law No. 30/1999 introduces ADR into three layers: (1) direct negotiation within 14 days; (2) ad hoc mediation/expert (14 days); and (3) institutional mediation (30 days). If the parties fail to reach agreement then the parties can utilize ad hoc as well as institutionalized arbitration. If they reach agreement, the parties submit and register the agreement to the respected district court.

Regarding arbitration, the article 2 mentions that the Law only applies for dispute that the settlement through ADR and arbitration is predetermined by parties in the agreement/contract. However, If it is not predetermined, the parties can still settle the disputes through arbitration under this Law after the parties make a written agreement to settle thru arbitration after the disputes arises. The article 9 of this Law sets the rules how the written agreement looks like.

The other provisions in this Law include the requirement of arbiter, right of the parties to dismiss the arbiter under certain circumstances; procedural matters, arbiter's binding

opinions and award; the execution of arbitral award, including the recognition and execution of international arbitration award.

Conclusion

- In every type of ADR in Indonesia requires concrete steps to be publicly accepted and effectively implemented. Judicial type, administrative, private sector and traditional type of ADR has its own strengths and problems. The special appointment within the government agencies must be made to functions as a reform's concept designer, coordinator, facilitator of the development of ADR in Indonesia. The Ministry of Justice and National Law Commission are both appropriate institutions to be a focal point of institutionalizing ADR in Indonesia.

- Effective implementation of ADR in Indonesia requires the presence of strong law enforcement (non discriminative, swift & sure law enforcement). The presence of strong law enforcement creates the motivation of the parties (especially the more powerful parties that can uses the absence of strong enforcement to disregard ADR which is voluntary in nature). This factor is more relevant for the development of the administrative type of ADR which is a means to settle most public interest related cases.

- The presence of private (non government) ADR institutions to provide ADR services and to conduct dispute system design and capacity building (training) works is a start to develop more comprehensive programs to prepare professional mediators, arbiters, and to develop other supporting systems such as the establishment of strong and independent professional associations to oversee the quality and integrity of its members in conducting their jobs;.

- The national and local government must provide genuine support for the development of the traditional type of ADR by preventing them to intervene too much to their affairs, providing legal recognition, providing and opening the opportunity for them to broaden their knowledge and skill by bringing relevant other countries experiences , and providing facilities for the operation of traditional type of ADR.

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