INTEGRATION MODEL OF ENVIRONMENTAL DISPUTE SETTLEMENT OUTSIDE THE COURT BETWEEN LOCAL COMMUNITIES AND CORPORATIONS

https://doi.org/10.47743/jopafl-2022-23-26

Erwin SYAHRUDDIN
Faculty of Law,
Brawijaya University, Malang, East Java, Indonesia
erwinsyahruddin332@gmail.com

Moh.FADLI
Faculty of Law, Brawijaya University, Malang,
East Java, Indonesia

Rachmad SAFA'AT
Faculty of Law, Brawijaya University, Malang,
East Java, Indonesia

ISTISLAM
Faculty of Law, Brawijaya University, Malang,
East Java, Indonesia

Abstract: *Alternative Dispute Resolution (APS) is a concept of dispute resolution in various countries whose implementation is separate between mediation, negotiation, conciliation, consultation, expert opinion, and arbitration. The application of APS type separation makes the settlement mechanism not optimal because each type has its own uniqueness. Whereas the current trend shows the increasing use of various alternative dispute resolution outside the court. For this reason, in the Alternative for Environmental Dispute Resolution (APSL) there must be an effective model that can be applied. The type of research used is normative.*
Keyword: *Environment Disputes Resolution, Hybrid System, Sosiology Perspective*

Introduction

Countries in the world have started paying attention to environmental management since 1972. In that year, the Indonesian government welcomed the First World Environment Conference which was held in Stockholm, Sweden in June 1972, but in June 1972, At that time, the Indonesian government did not know a special institution that handled environmental problems. Whereas the current trend shows the increasing use of various alternative dispute resolutions outside the court such as arbitration, mediation, consultation, conciliation, and expert judgment. Research from Queen Mary University in London shows 93% of respondents have a preference for resolving disputes through arbitration and alternative dispute resolution (ADR). (Mary, 2018). Settlement of disputes through non-litigation has been known as ADR (Wiryawan, 2010). Management of the environment and natural resources tends to be directed towards investment interests and is always understood as economic sense and not understood as ecological and sustainable

sense. Therefore, environmental sustainability was then raised as an issue that environmental sustainability and the availability of natural resources are human rights. Awareness of the relationship between human rights and the environment is triggered by the high rate of global environmental destruction caused by the rapid industrial growth in the forestry, marine, energy, and mining sectors. This destruction in turn makes it impossible to enjoy or fulfill human rights, which are not only limited to economic, social and cultural rights, but also include civil and political rights (Kasim, 2004). Alternative Dispute Resolution (APS) is a concept of dispute resolution in various countries whose implementation is separate between mediation, negotiation, conciliation, consultation, expert opinion, and arbitration. The application of APS type separation makes the settlement mechanism not optimal because each type has its own uniqueness. Currently, it is seen that alternative solutions to environmental disputes outside the court are increasingly being looked at. For this reason, in the Alternative for Environmental Dispute Resolution (APSL) there must be an effective model that can be applied.

Legal materials and method

The type of research in this study is normative with the nature of the research in this study is explorative. The approach used in this study uses the

Results and discussion

ADR (Alternative Dispute Resolution) concept approach as a way to resolve disputes which has long been known in various beliefs and cultures. Various facts have shown that basically mediation, conciliation, and negotiation are not foreign methods in an effort to resolve disputes in the community. It's just that the context of the approach and method is different from the local legal culture. The definition of Legal Culture is: “People's attitudes toward law and the legal system-their beliefs, values, ideas and expectations. In other words, it is that part of the general culture which concerns the legal system”. Like traditional Chinese people consciously, they accept moral bonds more because of the influence of social sanctions than because they are forced by law (Sutiyoso, 2008). Alternative Dispute Resolution is a dispute resolution institution or difference of opinion through a procedure agreed upon by the parties, namely an out-of-court settlement by means of consultation, negotiation, mediation, conciliation, or expert judgment. Settlement of disputes in civil cases can be done through litigation (the term used for those who use judicial institutions), and non-litigation (the term used for those who use institutions outside the court), can be carried out if the litigating parties agree to choose one or the other. one such institution. So the choice is not an act of chance but as human behavior related to the law. As stated by A. De Wild, that the law is a form of human behavior that can be observed (Munir, 1997).

An alternative theory of dispute resolution was proposed and developed by Ralf Dahrendorf in 1958. The theory of dispute resolution is oriented towards social structures and institutions. Ralf Dahrendorf argues that society has two faces in terms of dispute and consensus (H. Salim HS., 2013). Therefore, Ralf argues that sociological theory should be divided into two parts, dispute theory and consensus theory. Dispute theory analyzes conflicts of interest and the use of force that binds society together in the face of such

pressures. Meanwhile, consensus theory examines the value of integration in society (H. Salim HS., 2013). Richard L. Abel, defines a dispute (dispute) as, "Public statements regarding inconsistent claims for something of value (H. Salim HS., 2013)." Furthermore, it can be added regarding the definition of dispute, namely, "Conflicts, disputes and disputes that occur between one party and another and/or between one party and various parties related to something of value, whether in the form of money or objects." In this definition, a dispute is constructed as a dispute/contradictory between the disputing parties consisting of two parties or more than two parties. For example, those who have a dispute between A and B, C, D. A are the plaintiffs, while B, C, D are the opposing parties (defendants). Based on this description, it can be formulated the definition of dispute resolution theory.

Therefore, in responding to the practice of environmental disputes that are oriented towards achieving a common understanding or consensus which is the inherent goal of environmentally sound and sustainable development (communicative action), it is very necessary to reconstruct the concept of practical ratios into the concept of communicative ratios through alternative environmental dispute resolutions. Habermas believes that actions between humans in a society do not occur arbitrarily, but are rational. The rational nature of the action in Habermas's view is instructive. It assumes that the participants in communication are oriented towards achieving understanding with each other. Understanding can also be interpreted as agreement or consensus. The communicative ratio guides communicative actions to reach mutual agreement in the form of consensus about something. This consensus does not just happen. The main prerequisite for consensus is mutual understanding and borrowing of perspectives. One party must try to understand the other person's problem or try to play the role of the other in order to know the problems faced by the other person so that consensus is reached to resolve a dispute.

Habermas' theory of communicative action rests on the idea that social order ultimately depends on the capacity of actors to recognize the intersubjective validity or validity of the various claims on which social cooperation is based. Thus, cooperation through communicative action is obtained by claiming validity that can be justified through communication, including by criticizing. The speaker in Habermas' communicative act performs a speech act that is oriented towards mutual understanding by submitting a validity claim, and assuming that the validity claim will be accepted by the listener. Good communication requires listeners to understand and accept speech acts. The listener approves or affirms the speaker's statement. If the speech act is accepted, what is called an actor relationship arises which creates social relations. According to Habermas, the world can be divided into three. First, the subjective world (part of the internal world) which is based on the feelings, beliefs, desires, experiences, and intentions of the actors. Second, the shared social world formed by norms, actor relationships, institutions, and where the actors place themselves (part of the outside world). Third, the objective world, namely the objective objects and circumstances (part of the external world). Habermas argues that a speaker who performs the act of speaking at the same time must create claims of validity, truthfulness, sincerity, and understanding by the hearer of the speech act to be successful.
According to Habermas' view, philosophy must have relations and cooperation with other disciplines such as social science and empirical science in general. The link between philosophy and empirical science is presented in his book "Theory of Communicative Action". Habermas' critical reconstruction of the problem of rationality takes its roots from

the critical theory of the critique of instrumental ratio (Dennis A. de Vera, 2014). The Samin community based on the critical movement tries to find justice in the midst of political currents that fully support development. They voiced their protest against the cement project in the forest environment, where they depend on farming for their livelihood. They feel that they understand very well the environment that they depend on and that the landscape of the environment cannot be changed because it will definitely disturb not only the forest ecosystem but also the agricultural ecosystem built by local residents. Those who are always silent and never interfere in government politics are immediately opposed if the environmental aspect which is very potential for human survival is disturbed and even wants to be damaged on the grounds of development for the welfare of the people around and hearing about job opportunities. However, they don't need work, they just need to live sustainably and side by side with nature because it's the only nature they depend on. If the nature is no longer there because it is occupied by a company that utilizes the surrounding land, both from the land where they live and where they live. It doesn't stop there, the natural resources that serve as water reserves and a place to support the earth, namely limestone mountains, will also not be separated from human exploitation in industrial activities.

For this reason, in responding to the practice of environmental disputes that are oriented towards achieving a common understanding or consensus which is the inherent goal of environmentally sound and sustainable development (communicative action), it is very necessary to reconstruct the practical ratio model into a communicative ratio model through alternative environmental dispute resolution. Habermas believes that actions between humans in a society do not occur arbitrarily, but are rational. The rational nature of the action in Habermas's view is instructive. It assumes that the participants in communication are oriented towards achieving understanding with each other. Understanding can also be interpreted as agreement or consensus. The communicative ratio guides communicative actions to reach mutual agreement in the form of consensus about something. This consensus does not just happen. The main prerequisite for consensus is mutual understanding and borrowing of perspectives. One party must try to understand the other person's problem or try to play the role of the other in order to know the problems faced by the other person so that consensus is reached to resolve a dispute.

Alternative Dispute Resolution (APS) or Alternative Dispute Resolution arises from a movement over the motive of the high costs of litigation resulting in high economic costs, prolonged psychological fatigue, plus insurance costs, and wasted time spent on litigation. In the 80s, President Bush Senior criticized lawyers for not being sensitive to “access to justice”. Developing the access to justice model is to answer criticism of the judicial process or litigation whose results are increasingly moving away from the community's sense of justice. Mauro Cappelletti and Bryant Garth are the main initiators of access to justice placing mediation which is an alternative form of dispute resolution as the third wave of access to justice. However, in practice there are also weaknesses in the model and practice, for example, in contrast to judges or arbitrators, the mediator does not have the authority to decide disputes between the parties, the mediator supports the parties in reaching an agreement where the parties themselves determine the agreement between them. , a third party who is neutral and tends to be passive in offering a solution to a solution, the mediator only acts as a mediator in a dispute. In addition to mediation, other alternative dispute resolution (arbitration, conciliation, negotiation, etc.) also have several

shortcomings that cannot be denied. From these shortcomings, it is necessary to formulate an ideal alternative dispute resolution model that can adapt to the needs of justice seekers. Habermas' theory of communicative action rests on the idea that social order ultimately depends on the capacity of actors to recognize the intersubjective validity or validity of the various claims on which social cooperation is based. Thus, cooperation through communicative action is obtained by claiming validity that can be justified through communication, including by criticizing. The theory of communicative action relies on justification, namely the theory of argumentation or discourse. Therefore, discourse by Habermas is called a "reflective form" of communicative action. An outcome in discourse, both consensual and non-consensual, is rational only if in the process there is no visible exclusion, suppression of argument, manipulation, self-deception, and the like (Rehg, 2017). A neutral observer can judge whether the interlocutor has complied with institutional procedures, while the participants involved must assess how well they have met the dialectical prerequisites by rigorous critical testing. The truth condition of a proposition is the potential agreement of all. Thus the pragmatic universal meaning of truth is determined by the demand to reach a rational consensus (Rehg, 2017).

Habermas divides three forms of argumentation, namely argumentation as a product, argumentation as a procedure, and argumentation as a process, or all three can be harmonized as: 1) logic; 2) dialectic; and 3) rhetoric. At the logical level, the parties consider the argument as a product, namely a number of reasons that support the conclusion. From this perspective, the disputants aim to build a “convincing argument” from the intrinsic nature of the argument and by which claims of validity can be determined. The logical strength of such an argument depends on how well one has considered all relevant information to avoid possible objections from the opposing party. Logical judgment presupposes the dialectical adequacy of argumentative procedures. The product of argument-making practice is logically strong only if at the dialectical level, arguments and counter-arguments have been given in a rigorous critical discussion (Habermas, 1984).

Habermas calls these conditions a "ritual competition for the better argument." The participants in the dialectic must be able to state the problems they face, respond to relevant objections, fulfill the burden of proof proposed, and so on. Therefore, in the mediation process, the mediator must establish dialogical communication between the parties, provide equal opportunities for the parties to raise their problems and demands, and listen to both parties in a balanced manner. If necessary, the mediator can clarify a party's statement or request supporting evidence from that statement. Critical examination of the parties' statements in turn depends on the rhetorical quality of the persuasive process. The rhetorical perspective is intended to design arguments to place the audience in the appropriate socio-psychological space to make responsible collective judgments. The rhetorical aspect is suitable for open mediation such as public mediation. In public mediation, interested parties can be present, although they do not have to be speakers. The parties directly involved in this kind of mediation must not only be able to convince the opposing party, but also be able to convince the audience present, who are also interested parties.

This prerequisite basically requires all parties to assess all relevant information and arguments as rationally as possible, and consider arguments based only on merit in achieving an impartial truth. One of the challenges to implementing Habermas' theory on

mediation is the requirement to involve all affected parties to participate so that the discourse is inclusive. In reality, it is impossible for all affected parties to participate in a mediation process, especially in public mediation, such as in agrarian or land cases. The solution is to involve only representatives of the disputing parties. Representatives position themselves as all affected parties, and decisions must be made with the consideration of all affected parties even if they do not participate in the discussion.

The speaker in Habermas' communicative act performs a speech act that is oriented towards mutual understanding by submitting a validity claim, and assuming that the validity claim will be accepted by the listener. Good communication requires listeners to understand and accept speech acts. The listener approves or affirms the speaker's statement. If the speech act is accepted, what is called an actor relationship arises which creates social relations. According to Habermas, the world can be divided into three (G. Goldkuhl, 1999). First, the subjective world (part of the internal world) which is based on the feelings, beliefs, desires, experiences, and intentions of the actors. Second, the shared social world formed by norms, actor relationships, institutions, and where the actors place themselves (part of the outside world). Third, the objective world, namely the objective objects and circumstances (part of the external world). Habermas argues that a speaker who performs the act of speaking at the same time must create claims of validity, truthfulness, and understanding by the hearer of the speech act to be successful (G. Goldkuhl, 1999). Harry C. Bredemeier states that law can be used as an integrator, and a means to facilitate social integration. This theory is a development of Talcott Parsons' theory of social systems, which says that social systems break down into sub-systems (Rahardjo, 1977). Talcott Parsons with a structural-functional theory that begins with four important functions of the action system, namely adaptation, goal attainment, integration, and latency (Ritzer, 1996). This theory is known as cybernetics theory. The theory of cybernetics was first coined by Talcott Parsons, where in his theory Parsons assumes that society is a system consisting of parts (sub-sub) that are interrelated and influence each other reciprocally. Parson's view that society is a functionally integrated system in the form of equilibrium. Although social integration can never be achieved perfectly, in principle the social system always tends to move towards dynamic harmony. More specifically, this theory states that in a society there are various kinds of sub-systems, where between one subsystem and other subsystems are interrelated and influence each other. The sub-systems referred to include sub-systems, among others, cultural sub-systems, social sub-systems, political sub-systems and economic sub-systems, or popularly known as AGIL (Tittenbrun, 2014).

This theory will be used in building alternative models of environmental solutions. What is needed in action theory is an active, not passive adaptation. This theory demands an active environmental transformation against stagnation, to realize human values. Human efforts produce a complex balance between the factors that hinder and facilitate evolutionary change (Beilharz, 2005). Talcott Parsons' Cybernetic Theory which puts forward a theory about society that is comprehensive by starting with the actions of individuals with all their broad interrelationships in society. According to Talcott Parsons (Soemitro, 1989) individual behavior is not a biological behavior, but as behavior that has a sociological meaning. Individual behavior can always be given a place in a certain social relationship, which means that behavior is a structured action. Talcott Parson in his systems theory suggests that this broad social system consists of sub-systems of individual actions in the fields of culture, social, personality and behavioral organisms. Human actions in this

society are limited by two basic environments, each of which is physical, namely the physical-organic environment and the ideal which is called the ultimate reality environment. Between the two basic environments there is a subsystem which is a hierarchical unit, namely the cultural subsystem with the function of maintaining patterns; social subsystem with integration function; the political sub-system with the function of pursuing goals and the economic sub-system with the function of adapting without overriding the main priority of the environment as a dependent element.

The chart above is a modification of Talcott Parson's cybernetics theory which describes the cybernetic relationship between sub-systems in society that takes place through the process of information flow from subsystems with high information levels to subsystems with low information. On the other hand, flows from sub-systems with low information levels also occur, which in this case is conditioned by subsystems with higher energy levels. Within the framework of these sub-systems, law can enter into cultural sub-systems and can enter into social sub-systems. As a cultural sub-system, law maintains patterns, cultural values which are guidelines for individual behavior. As a social, economic and cultural sub-system, law functions to integrate, regulate individual activities in meeting their needs and prevent conflicts and other things that interfere with the smooth running of social interactions and community productivity. While the act of communication is an adaptation function that is carried out in response to community conflicts that cannot maintain their lives in the midst of environmental changes.

Law as a result of human reason essentially contains various ethical and moral values needed by a dynamic society. So dynamic law is always able to provide a way out in the event of a legal conflict or continuing uncertainty. Dynamic law can always provide a way out and a solution if there are disputes and disputes, especially to the needs of the community regarding values. The environmental aspect in this chart is placed as the center of the hypocenter in maintaining the existing system. While the alternative for the existing dispute resolution is a dispute control system to make a legal agreement (consensus). So, the law receives input from the economic, political and cultural fields to analyze its impact and then it is formulated in communication actions in the form of the best alternative dispute options (prismatic) and in the end it becomes output to be returned to the community as a form of responsive social justice. . Habermas' communication action is access to representation of alternative prismatic dispute resolution. This communication action can be transformed into a legal institution such as BANI (Indonesian National Arbitration Board), or emphasize alternative practices of adaptive dispute resolution (pseudo dispute resolution) which in principle will be a means of integration that can be accepted, recognized and utilized and provide the best win. -win solution in the community. This APSP model also relies heavily on Habermas' theory of communicative action which rests on the idea that social order ultimately depends on the capacities of actors. This prerequisite basically requires all parties to be involved in inclusive discourse from the government, the private sector, NGOs, experts and the affected community. Based on Habermas' theory, the Prismatic Environmental Solution Alternative Integration Model (Cybernetic Theory Modification) cannot stand alone but requires support from the determining actors in dispute resolution, namely the parties involved in the process of realizing social justice. The following is a picture of the APP implementation model in which there are determining factors in realizing a fair decision:

From Figure 2 it can be explained that the APSP actors consist of, Affected Communities, NGOs, Entrepreneurs/Proponents, Consultants and Government. Conflict conditions can be explained by Donald black's morphological theory to determine the dynamics of the relationship between conflicts. Morphological analysis will be able to assist in seeking conflict resolution. According to Donald Black, "Morphology is the horizontal aspect, or the distribution of people in relation to each other, including their division of labor, integration, and intimacy" (Black, 1976). Morphology is the horizontal aspect of social life, dividing people's relationships from one another, including the division of labor, interaction, intimacy, unity. It varies across settings of every kind, whether society, community, neighborhood, or organization, public place, marriage or close friends (Black, 1976). Variable morphology explains many patterns / forms of social life. For example, forms of social evolution, such as the family, the growth of government, the diversity of cultural life. Differentiation also explains aspects of stratification, religion, violence, and organization. Morphology also describes the quantity and force of laws. The strategy of explaining the application to the evolution of law in the judiciary. And it is possible to explain law and the continuity of law itself in relation to the center of social life (Black, 1976).

Conclusion

The conclusion from this morphological discussion is that it causes differentiation varies across groups. Differentiation within each group horizontally among humans. Differentiation of various kinds, from society to organization, family, friends. This includes differences between people in the business world and differences in places. Organizational actors are the corporate aspects, or capacities of collective action. The more organizations, the more organized the community groups are than without organizations. In this study, Donald Black concluded, organization is a social aspect that can be counted. Then stated that law varies directly with organization, meaning that people in groups always win over individuals before the law (an organization bringing a lawsuit against another is more likely to win than an individual bringing a lawsuit against another individual). At the same time, the legal direction in organizational behavior is "Law is greater in a direction toward less organization than toward more organization". The impact of this statement indicates that the organization/group is more likely to bring a lawsuit against an individual. In a direction toward less organization, law varies directly with organizational distance. But, In a direction toward more organization, law varies inversely with organization. In order for the local community to get a balanced bargaining position and a balanced position of power against companies or the upper class as stated in the Black Legal Behavior Theory, they must group together and synergize. From the actors of the affected community groups, NGOs, entrepreneurs/initiators, consultants and the government, all of them are mutually configured with one another and centered on the mediator as the hypocenter of the dispute resolution process management discourse. Then the mediator corresponds with the actors involved.

References

1. Bambang Sutiyoso. (2008). Hukum Arbitrase Dan Alternatif Penyelesaian Sengketa.Yogyakarta: Gama Media.

2. Dennis A. De Vera.(2014). Habermas, Discourse Ethics, And Normative Validity.Jurnal Kritike: Volume 8, Nomor 2.
3. Donald Black.(1976).The Behavior Of Law.Academic Press:New York.
4. Emmy Yuhassarie, (Ed.).(2005).Mediasi Dan Court Annexed Mediation.Pusat Pengkajian Hukum: Jakarta.
5. G. Goldkuhl, Et. Al., (Ed). (1999).Proceedings Of The Fourth International Workshop On The Language Action Perspective On Communication Modelling.Language Action Perspective. Copenhagen.
6. George Ritzer. (1996). Sociological Theory.The Mcgraw-Hill Companies.Inc.:New York.
7. H. Salim HS.,Dan Erlies Septiana N. (2013).Penerapan Teori Hukum Pada Tesis Dan Disertasi. Rajawali Pers:Jakarta.
8. Ifdhal Kasim. Hak Atas Lingkungan Hidup Dan Tanggung Gugat Korporasi Internasional.Jurnal SUAR.Volume 5, Nomor 10 & 11.2004.
9. Jacek Tittenbrun. (2014).Talcott Parsons' Economic Sociology.International Letters Of Social And Humanistic Sciences.Volume 13.
10. James Bohman Dan William Rehg.(2017).Jürgen Habermas (Online), Https://Plato.Stanford.Edu/Archives/Fall2017/Entries/Habermas/.(9 Januari 2019).
11. Jürgen Habermas.(1984).Theory Of Communicative Action, Volume One: Reason And The Rationalization Of Society, Diterjemahkan Oleh Thomas A. Mccarthy, Boston, Massachuset, Beacon Press
12. Mauro Cappelletti, Et. Al.(1976).“Access To Justice: Comparative General Report”, International Private Law.
13. Mochamad Munir.(1997). Penggunaan Pengadilan Negeri Sebagai Lembaga Untuk Menyelesaikan Sengketa Dalam Masyarakat (Disertasi).Universitas Airlangga Program Pascasarjana:Surabaya.
14. Peter Beilharz.(2005). Teori-Teori Sosial.Pustaka Belajar:Yogyakarta.
15. Queen Mary University Of London.(2018).International Arbitration Survey: The Evolution Of International Arbitration.Http://Www.Arbitration.Qmul.Ac.Uk/Media/Arbitration/Docs/2018-International-Arbitration-Survey---The-Evolution-Of-International-Arbitration-(2).PDF (Diakses Tanggal 2 November 2020).
16. Ronny Hanitijo Soemitro(1984). Masalah-Masalah Sosiologi Hukum.Sinar Baru:Bandung.
17. Ronny Hanitijo Soemitro.(1989).Perpektif Sosial Dalam Pemahaman Masalah-Masalah Hukum.CV. Agung:Semarang.
18. Satjipto Rahardjo(1977).Pemanfaatan Ilmu-Ilmu Sosial Bagi Pengembangan Ilmu Hukum, Alumni:Bandung.
19. Wiryawan, I Ketut, Dan I Ketut Artadi(2010).Penyelesaian Sengketa Di Luar Pengadilan. Udayana University Press:Bali.