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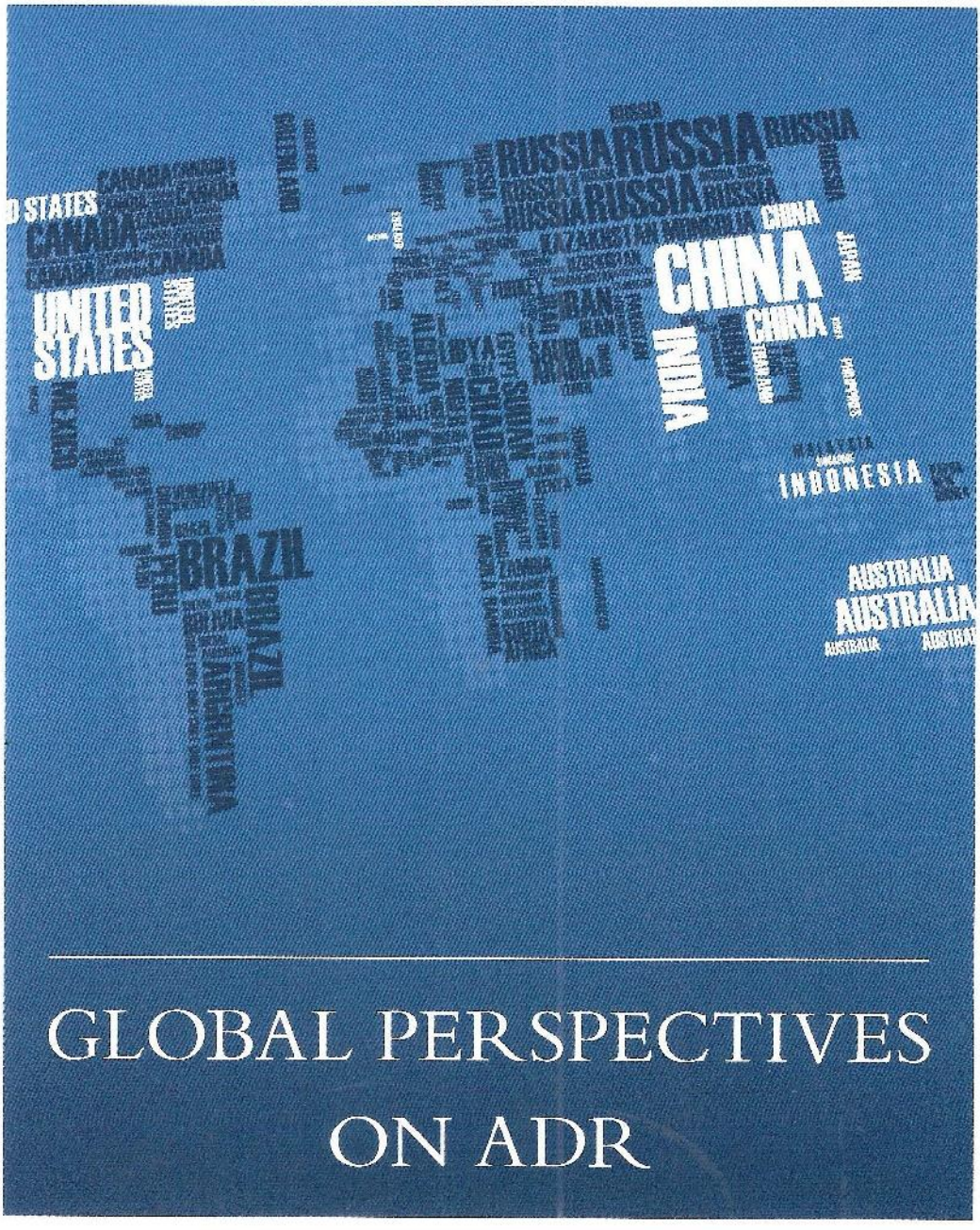

GLOBAL PERSPECTIVES ON ADR

Carlos Esplugues and Silvia Barona (eds.)

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GLOBAL PERSPECTIVES ON ADR

Edited by

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PREFACE

Modern societies are increasingly complex. This complexity tends to be accompanied by a continuous escalation in litigiousness. The more developed a society is, the more disputes tend to exist. Moreover, these tend to be increasingly heterogeneous and complicated. This situation has a direct effect both on the State's system of justice and on the implementation of the principle of access to justice for citizens. Figures show the growing inability of the State, the single holder of the monopoly of justice in recent times, to cope with this situation. The State tries to tackle this soaring reality by way of different tools. Thus many national regulations on civil procedure have undertaken reforms in the last years, in an attempt to make it quicker and more tailored to the needs of the parties. Additionally, huge amounts of money have been invested in the strengthening of the State's system of justice.

Unfortunately all these measures taken so far by many State legislators seem to have not been fully successful. The judiciary seems increasingly incapable of giving a valid response to the continuously growing number of disputes lodged before them, disputes of different nature and difficulty which deserve a quick, sound, affordable and, in many cases, specialised response. Already overworked courts face a huge workload and this fact directly affects access to justice for citizens; delayed justice implies in too many cases absence of justice.

This circumstance creates an increasing feeling of failure as regards the ability of the State to preserve and ensure the fundamental right of access to justice to citizens. The enormous budgetary effort made by many States as regards the judiciary has been insufficient in providing citizens with a valid and certain response to their legal problems. In addition to that, this situation does not only exist in Western countries; it tends to repeat itself in many other parts of the world. And the true problem is that, far from stopping, it will most probably continue to grow in the future thus putting the whole State's system of justice under increasing pressure, precisely at a time when many countries are facing budgetary constraints.

Citizens have long tried to surmount this situation in different ways. In some cases, they have adopted a purely passive attitude. In certain cases it seems more sound and inexpensive to leave the dispute unresolved than to refer it to State courts that in too many cases will render a late, unspecialised and not always certain response. In other situations, citizens have tended to explore the possibility of referring their disputes to non-judicial means of dispute resolution:

the so-called alternative dispute resolution devices. Arbitration, mediation, conciliation or negotiation are all embodied within this movement. Each one of them enjoys a different level of acceptance and implementation.

Certainly, problems undergone by the judiciary in many countries have entailed a correlative increasing resort to ADR devices as a way to ensure access to justice to citizens, at least in certain areas of law. Nevertheless, the use of ADR has been different in the several geographical areas of the world and has also varied regarding the specific ADR device referred to and the kind of disputes involved. Arbitration has so far been the most commonly used tool, although nowadays mediation is also gaining popularity.

ADR devices allow citizens to find responses to their need of justice. Many of these devices are not new insofar as they have long existed in national legislation, although the problems generated by complex modern society have granted them a certain image of novelty. In any case, the response provided by ADR devices is subject to some criticism of a different kind. From a justice standpoint, ADR may be regarded with some caution insofar as it is a private response which entails costs for citizens and that gives rise to a response not controlled by the State. From a systemic standpoint, the response provided has tended to be too limited in terms of the number of cases dealt with and of the sectors affected by it. Moreover its expansion has entailed a reproduction of some of the most criticised vices of the judiciary: growing costs, lack of speediness or absence of certainty in the response provided. In fact, within the ADR movement these problems favour mediation rather than arbitration.

The State has long enjoyed the monopoly on justice, but this time seems to be coming to an end. The State as the single provider of justice services for citizens seems to be under growing scrutiny. Despite all the moves undergone and the huge budgetary effort made by the State, it seems incapable of ensuring access to justice to citizens in this complex modern society in which we live. Mistrust of the judiciary has favoured growing resort to ADR devices for citizens but, at the same time, these devices seem not to form a global and real alternative to State courts insofar as they enjoy a limited use and provide a reduced response to a huge problem.

Complex societies and complex problems require complex solutions. And assuring full access to justice for citizens seems to demand an elaborated and sophisticated response too. It is time to offer citizens flexible and easily tailored solutions for them far away from doctrinal responses. That implies that State courts and ADR devices should no longer be viewed as real and separate alternatives lacking any contact with each other.

ADR can no longer be approached as a global alternative to State courts with *the aim of leaving courts aside. State courts and non-judicial methods of dispute* resolution should not be considered as two juxtaposed and independent realities which run parallel each other with no contact whatsoever. Sophisticated and

collaborative responses are needed for citizens to have their duty to receive speedy, affordable and certain redress ensured. That implies a reshaping of the notion of full access to justice for citizens which should be based on the understanding of State courts and ADR as two different realities that actually interact when necessary to ensure citizens gain redress.

This new approach to access to justice means that it is for the parties to decide freely whether they refer their dispute to State courts or to ADR or to any of the mixed devices that increasingly exist in practice. This option must be chosen by them freely and taking into account their situation and legal expectations. It should not be directed or favoured by the State in any case and should not be based on budgetary concerns. We are not dealing with a budgetary question, namely whether the State should spend more or less on the judiciary and whether resort to ADR devices by citizens may result in some saving by the State. Acceptance by the State of the role played by the ADR movement should not come accompanied by a correlative weakening or impoverishment of the judiciary. The situation is different; we are simply offering citizens a multi-gear solution for having their disputes resolved and it is for them to decide how to approach and tackle them.

The new understanding of access to justice supposes that this basic fundamental right should no longer be understood as access solely to State courts of justice. On the contrary it should signify access to any of the existing available instruments for the parties to have their dispute resolved. The time of fully alternative responses is gone and a new era of proposals' plurality is arriving. The traditional concept of access to justice now implies a reference to a certain number of possibilities for the parties to obtain redress to their disputes. This opens up a new horizon for them that is much more easily adapted to their needs. But in order for this to be operative, citizens must be well aware of the existence of this alternative and, relatedly, of what ADR means, implies and supposes for them.

This book is based on this new understanding of access to justice and it looks to the future. Accordingly it approaches the reality of ADR in some of the most relevant countries of the growing Asian-Pacific economic area, the area in which the game of the future will be played. These countries tend to share the same problems of a growing number of disputes in a framework of overworked State courts and enormous amounts of money spent on the judiciary by national governments as in Western countries. But because they have different legal and historical backgrounds the response provided by them distinguishes one from another.

The book is written by leading academics and practitioners and it makes reference to both the existing legal basis for ADR in each of these jurisdictions and the way these rules are implemented. It offers an exhaustive analysis of the existing situation in these nations and tries to trace some common trends for the

future development of ADR in this area of the world. Insofar as ADR has historically been a reality very much linked to common law countries and because some of the major Asia-Pacific States still belong to the British Commonwealth, a necessary reference to two European common law countries, Britain and Ireland, is also included. Despite the historical link between these two countries, their origin, culture and legal responses vary and allow the reader to compare them with the development that is currently happening far away, in the Asia-Pacific area.

This publication marks the way ahead. We hope that it will become a useful tool for practitioners and academics. The future of ADR and, by way of its potential interaction with State courts, of the understanding of what access to justice really means and implies for citizens, needs to ensure that all those involved in justice – judges, parties or legal practitioners – have a clear understanding of the existence of ADR as a complementary way to solve disputes, of its significance, consequences, advantages and also of those difficulties that its use may entail. With this book we want to contribute to this goal.

This book is direct result of the Research Project DER2010–17126 sponsored by the Ministry of Education of Spain on 'La experiencia del arbitraje y la mediación en los sistemas anglosajones y asiáticos y su incorporación en el nuevo modelo de justicia española del siglo XXI', to which many of the authors belong.

We would like to finish this preface by thanking Ms María Aranzazu Gandía Sellés, PhD student and assistant at the Department of International Law of the University of Valencia for her constant and valuable help and support in editing the present book.

Carlos Esplugues and Silvia Barona
Valencia, 22 January 2013

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INDONESIA

Marcella Elwina SIMANDJUNTAK, Valentinus SUROTO and
B. Resti NURHAYATI

Contents

1. INTRODUCTION

The development of alternative dispute resolution in Indonesia started with the enactment of Act No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (the Arbitration Act). Before the enactment of the Act, dispute resolution was commonly done only in court through the litigation process. The purpose of this chapter is to describe how ADR has developed in Indonesia since the enactment of the Arbitration Act. In addition, this chapter also describes the regulation and various kinds of alternative dispute resolution. First and foremost, however, this chapter will discuss the development of dispute resolution in court. It should be noted that in Indonesia, methods of ADR such as reconciliation and mediation are integrated in the court process. ADR is used to avoid the courts being flooded with cases, and to help break deadlock between the parties. This is in line with the nature of the Indonesian judicial system, i.e. fast, simple, and inexpensive.[1]

In the past few years, there has been significant development and progress in out-of-court dispute resolution. It is true that at present, out-of-court dispute resolution is mainly focused on civil cases, especially those cases related to trade. Although there are many ways to resolve criminal cases using ADR, in Indonesia, these methods have not been adopted. However, the government recently enacted Act No. 11 of 2012 on Juvenile Justice, based on the concept of restorative justice. The Act provides for the possibility for children or juveniles who are charged with crimes to have their trials outside the court without undergoing the process of litigation.

Even though ADR has become increasingly popular in the past few years, if we trace its history, it is clear that indigenous and rural societies have used ADR mechanisms like mediation for a long time, and still today they use this mediation to resolve personal disutes and minor criminal cases. This will be discussed further in the following sections.

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1 Before discussing this further, it is important to categorise various types of disputes. While ADR can be used in both civil and criminal disputes, in criminal disputes it is limited to indigenous societies. We could distinguish between several types of disputes depending on the kind of legal personality involved in the dispute. The first type covers private law disputes between legal personalities, namely natural persons and legal entities. This type of dispute is commonly referred to as a private dispute and is characterised by the absence of public authorities. The second type covers disputes between legal personalities under criminal law and can be referred to as a public-initiated dispute or, more popularly, a criminal case. This kind of dispute concerns an individual brought to trial on the initiative of the State. The third type of dispute is dispute between legal personalities under constitutional law; this kind of dispute involves institutions of the State. The fourth type is a dispute between the State as defendant and an individual as plaintiff, which some scholars refer to as a public defendant dispute. The final type is a dispute between legal personalities under international law, which is referred to as an international dispute to which the resolution, mechanism and institutions are completely different from other types of dispute. See also H. Juwana, *Dispute Resolution Process in Indonesia*, IDE Asian Law Series No. 21, Institute of Developing Economies (IDE-Jetro), Japan 2003, pp. 1–2.

2. DISPUTE RESOLUTION MECHANISMS IN INDONESIA

As already mentioned, in Indonesia, legal disputes, especially in civil cases, can be examined and decided both in court (litigation) and outside court (non-litigation). As a country formerly colonised by the Dutch for more than 300 hundred years, it must be understood that the Indonesian judicial system has many things in common with the judicial systems of the European countries that use the civil law system.

2.1. DISPUTE RESOLUTION IN COURT

The legal basis of dispute resolution through litigation in Indonesia is Article 10 of Act No. 48 of 2009 on Judicial Powers. The Article states that:

> '(1) The court cannot deny the investigation, trial and decision of any case by stating that there is no legal basis for a particular case or that the legal basis is not clear; instead, the court must investigate and and hold the trial for the case.
> (2) The provision as stated in article (1) does not prevent any efforts to resolve the civil case by reconciliation.'

Some legal experts argue that this means that whatever the case, the dispute 'should' be examined in court and the use of reconciliation should be considered as an 'exception'. But since the enactment of the Supreme Court Regulations No. 1 of 2008 on Court-Annexed Mediation Procedure (PERMA), every process of dispute resolution in the court should first be aimed at achieving reconciliation.

Based on Article 18 of Act No. 48 of 2009 on Judicial Powers, there are five types of courts or tribunals in Indonesia. The courts and tribunals have their own jurisdictions called *peradilan*. The five courts are divided on the basis of absolute competence of the court to examine or execute a case. Article 18 clearly states that: 'the judicial power in Indonesia consists of the Supreme Court and the courts under the Supreme Court such as the General Court, Religious Court, Military Court, Administrative Court, and Constitutional Court.'

The General Court has the right to investigate and decide civil and criminal cases. This includes any cases related to family law such as a child custody, divorce, division of wealth between husbands and wives, etc. In terms of familial cases, the General Court applies to non-Muslim families. In addition, the General Court has the right to investigate and decide criminal cases and cases related to trade and business disputes. One of the departments in the General Court, for example, is the Trade Court which has the right to investigate and decide bankcruptcy cases based on Act No. 37 of 2004 on Bankruptcy and Postponement of Debt Payment and Intellectual Property Rights cases. Under

the General Court there is also the Children's Court whose purpose is to investigate children's criminal cases, the Human Rights Court which has the power to investigate and decide cases involving violations of human rights (based on Act No. 26 of 2000 on the Human Rights Court), and the Corruption Court which is in charge of investigating and deciding corruption cases.

The role of the Religious Court is to decide cases related to family disputes such as the custody of children, inheritance, divorce and the division of wealth between husbands and wives or the wealth accumulated during marriage for Muslims. The Military Court has the right to decide offences committed by military personnel or the army and police. This includes both military cases based on the Military Penal Code and cases which are not fully related to military cases but which have a connection with military issues. However, since the enactment of Act No. 48 of 2009, even the General Court has the right to investigate and decide any cases related to military personnel, depending on the types of violation. In this case, the General Court has a broader scope as it possesses the right to investigate civil cases involving non-Muslims and criminal cases other than those involving military personnel which should be examined and decided under the Military Penal Code.

The Administrative Court has the authority to investigate any disputes in State administration between natural or legal persons and agencies or officials of State administration as a result of a decision which is considered to violate the rights of the natural or legal person. The Administrative Court was created to protect those who are disadvantaged by a decision of State administration. Another court is the Constitutional Court which is responsible for the judicial review of acts or regulations which are considered to be unconstitutional.

In addition to the types of courts above, Aceh, based on the special autonomous nature of the Nanggroe Aceh Darussalam Province, has a Shari'ah Court. This court has the right to investigate and decide cases resulting from violation of the Shari'ah law as already regulated in certain Qanun (a compliation of several provisions) which applies only in this province. Cases that can be solved by the Shari'ah Court are gambling cases (*maisir*), liquor cases (*khmer*), and seclusion cases – based on the Qanun, a man and a woman who are not married must not be together in a secluded place without a third person.

In order to regulate the court in detail, Act No. 2 of 1986 was enacted. This Act is on the General Court, and was later amended by Act No. 8 of 2004. In addition, Act No. 14 of 1985 on the Supreme Court was enacted, and was updated and amended by Act No. 5 of 2004 and Act No. 3 of 2009.

Hierarchically, the resolution or investigation of a case in court is executed in two levels. The first level is the State Court; if any parties in dispute want to appeal, they can go to the second level or High Court. This applies to any Court under the General Court and the Religious Court. In general, the State Court and High Court examine the facts or what is usually referred to as *judex factie*.

Further, any disadvantaged parties in the High Court can appeal to the Supreme Court (known as a cassation). The cassation examination is often called as *judex juris*. There are various reasons why cassation examinations may overturn the decision of the lower court: (a) the court is considered not to have the right or to have gone beyond its right to examine and decide the case; (b) the court incorrectly applies the enacted law or is against the enacted law; and (c) the court does not fulfil all the requirements as regulated in an act or regulation. Thus, according to their hierarchies, vertically every court is divided into three categories (levels), i.e. State Court, High Court, and Supreme Court.

Legal practitioners understand that the resolution of a case in court has many weaknesses. Nevertheless, it avoids vigilantism (*eigenrichting*). The weaknesses of dispute resolution in court, especially for civil cases in Indonesia, are that it is time consuming, costly, and moreover difficult to enforce. Another weakness is severe delay in the investigation of cases due to too many cases in court. The following table demonstrates the number of cases in the State Court, High Court, and Supreme Court for the period of 2010–2011 based on the Annual Report of the Supreme Court of the Republic of Indonesia.[2]

Based on this Annual Report, the total number of cases received by all courts all over Indonesia in 2011 was 5,319,522. There were 113,300 unresolved cases from 2010 plus 5,206,222 new cases. There was a 70.60% increase in the number of cases from 2010 in which the total number was 3,051,717. The number of cases received by State Courts and High Courts throughout Indonesia in 2011 was as follows:

Table 1. Details of incoming cases in every type of Court

Types of Courts	Unresolved Cases 2010	Incoming Cases 2011	Number	Resolved	Unresolved
General	37,307	4,816,804	4,854,111	4,808,881	45,230
Religious	62,959	363,249	426,208	353,933	72,257
Military	497	2,932	3,429	3,000	429
Administrative	438	1,432	1,870	1,428	442
Tax (uder the General Court)	9,466	7,065	16,531	7,724	8,807
Total	110,667	5,191,482	5,302,149	5,174,996	127,183

2 Supreme Court of the Republic of Indonesia, Annual Report 2011, Executive Summary, Jakarta 2011, pp. 8–29.

Table 2. Total number of cases that had to be resolved by the State Court and High Court in 2011

Level of Court	Unresolved Cases 2010	Incoming Cases 2011	Number	Resolved	Unresolved
State Court	110,667	5,191,482	5,302,149	5,174,966	127,183
High Court	2,633	14,740	17,373	14,300	3,073
Total	113,300	5,206,222	5,319,522	5,189,266	130,256

Table 2 shows the total number of cases that had to be resolved by the State Court and High Court in 2011. From Table 3, it can be seen that the number of incoming cases in the Supreme Court in 2011 was 12,990 (in all types of courts, i.e. General, Religious, Military and State Administration). Surprisingly there was a 4.04% decrease in the number of cases compared to 2010. This is the first decrease in the number of cases in the last decade. In the past, the number of cases that came to the Supreme Court of the Republic of Indonesia increased every year. However, the phenomenon is in contrast with the number of the incoming cases to the State Court and High Court which increased significantly.

Table 3. Cases based on authority in the Supreme Court of the Republic of Indonesia in 2011

No.	Types of Authority	Unresolved Cases 2010	Incoming Cases 2011	Load of Cases	Resolved	Unresolved
A.	Cases					
1.	Cassation	6,479	10,336	16,815	10,968	5,805
2.	Revision/*Herziening*	1,935	2,540	4,475	2,648	1,827
3.	Pardon/*Gratie*	10	64	74	57	17
4.	Judicial Review	-	50	50	46	4
	Total	8,424	12,990	21,414	13,719	7,695
B.	Non-cases					
	Petition of Fatwa	-	221	221	221	0
	Total		221	221	221	0

To avoid the delay in resolving cases – in line with the idea that 'justice delayed is justice denied' – ADR was introduced as one of the efforts to give justice to those in need. The increase in the number of cases and the delay in the cases' investigation in court as discussed above gives us an idea of the importance of ADR in overcoming the weaknesses of the litigation process.

2.2. TYPES OF ADR

In the 'modern law' era, arbitration was the first method of ADR introduced in Indonesia, and appeared before other alternatives such as mediation. Before and after independence, arbitration was regulated and used as a method of resolution for civil and trade disputes as regulated in Articles 615–651 of the Civil Procedure Regulations (*Reglement op de Rechtsvordering, Staatblad 1847:52*), Article 377 of the Revised Regulations of Indonesia (*Het Herziene Indonesische Reglement, Staatblad 1941:44*), and Article 705 of the Regulations for Territories Outside Java and Madura (*Rechtsreglement Buitengewesten, Staatblad 1927:227*). All of those were created and enforced when Indonesia was still under Dutch colonial rule. Article 377 HIR and/or Article 705 RBg emphasise that the disputing parties can resolve their cases through an arbitrator or an arbitration in which the arbitration has the function of and the right to resolve cases in the form of decision (decree).[3] In addition, there was also a regulation stating that the disputing parties or arbitrators are subject to procedural law applied to Europeans (Dutch colonists). But since 1999, the legal basis of dispute resolution through arbitration and other methods of ADR is Act No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.

Some experts state that the name of Act No. 30 of 1999 on Arbitration and Alternative Dispute Resolution causes confusion because it differentiates arbitration from other methods of ADR. In fact, arbitration is only one of many types of the available methods of ADR. Moreover, Act No. 30 of 1999 contains more regulation concerning arbitration compared to other methods of ADR. The other methods of ADR mentioned in the Act are consultation, mediation, conciliation, and expert judgement.

2.2.1. Arbitration

According to Act No. 30 of 1999, arbitration is a way of resolving civil/private disputes outside of the general court which is based on a written arbitration agreement between the parties involved in the dispute. Arbitration as regulated in Act No. 30 of 1999 covers both national and international disputes relating to trade, banking, finance, investment, industry and intellectual property rights. All of these are based on Article 5 which states that the disputes that can be resolved with arbitration are those related to trade and in which the parties in dispute, according to the law, have absolute ownership. The cases that cannot be resolved by arbitration agencies are cases which, according to the law, cannot be resolved with reconciliation.

According to Article 3 of the Arbitration Act, the High Court or State Court has no right to resolve any dispute between parties that already have an

3 M.Y. Harahap, *Arbitrase*, Pustaka Kartini, Jakarta 1991, p. 22.

arbitration agreement. This demonstrates the power of the arbitration institution; where the parties have chosen arbitration, the State will not intervene. This respects party autonomy and freedom to pursue different methods of dispute resolution. In addition, the speed of decision-making and the privacy and confidentiality associated with arbitration have led to its popularity amongst the business community.

Resolution through arbitration requires an arbitration agreement between the parties involved in the dispute. An arbitration agreement is an agreement in the form of an arbitration clause in a written agreement signed by the parties before the dispute occurs, or it is in itself an arbitration agreement signed by the parties after the dispute happens. Therefore, based on the time when an agreement is made, in practice there are two kinds of arbitration in Indonesia, i.e. *pactum de compromittendo* and deed of compromise. The difference between the two lies in the time when the agreement is made. A *pactum de compromittendo* is created before the dispute occurs, whereas a deed of compromise is created after the dispute arises. The requirement of a written arbitration agreement is stated in Article 7: 'In the event that a dispute arises, or has arisen, the parties agree to resolve the dispute with arbitration by means of a written agreement signed by the parties involved in the dispute.'

In practice, an arbitration agreement is executed by writing an arbitration clause into the agreement. The use of the term 'arbitration clause' means that the primary agreement is followed or supplemented by an agreement about how to carry out the arbitration in resolving disputes between the parties.[4] According to Suyud Margono, arbitration clauses regulate the particular arbitration bodies to be appointed when disputes arise, the location where the arbitration will take place, the law and regulations that will be used, the qualification of the arbitrators, and the language which will be used in the arbitration process.[5]

In practice, there are two types of arbitration in Indonesia. The first is ad hoc arbitration or, as it is often called, voluntary arbitration. This type of arbitration is used to resolve or decide a particular case. The second type is institutional arbitration, which is arbitration by a permanent arbitral body. The arbitral body is an institution which is created for the purpose of hearing disputes following an agreement between the parties for their dispute to be dealt with outside the court.[6] One of the permanent arbitration institutions in Indonesia is BANI, or Badan Arbitrase Nasional Indonesia (Indonesian National Arbitration Body). Even though permanent arbitral bodies like BANI have existed for a long time in Indonesia, the number of cases investigated and resolved by BANI is still relatively small compared to the number of cases investigated and resolved by

4 S. Margono, *Penyelesaian Sengketa Bisnis Alternative Dispute Resolution: Teknik dan Strategi dalam Negoisasi, Mediasi dan Arbitrase*, Ghalia Indonesia, Jakarta 2010, p. 147.

5 As stated by Suyud Margono in F.H. Winarta, *Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional*, Sinar Grafika, Jakarta 2010, p. 42.

6 M.Y. Harahap, *supra* n. 3, p. 151.

the court. The following table shows the number of cases investigated and resolved by BANI from 2008 to 2011 as reported by the Board of BANI Arbitration Centre, Krisnawenda:

Table 4. Number of cases registered, revoked, struck out and resolved by BANI

Year	Cases Registered	Cases Revoked	Cases Erased	Cases Resolved
2008	19	1	5	13
2009	44	5	4	35
2010	41	4	4	33
2011	58	3	5	40
2012–July	36	3	–	2

Arbitration procedure begins with the filing of the dispute with the Arbitration Panel chosen by the parties. Subekti points out that the filing should include at least (a) the complete names and addresses of the parties in dispute; (b) a short description of the dispute; and (c) what the parties in dispute claim.[7] In the filing, they must attach a copy of the agreement or the deed of agreement which particulary includes the arbitration clause. If the filing is done by the representatives of the parties, the person lodging the claim must have a special power of attorney for that purpose. After examining the case, the arbitration panel will decide the case based on the provision of law or based on justice and appropriateness.

The Arbitration Act states that the arbitration decision is final and legally binding on the parties. This means that if one of the parties does not comply with the decision willingly, the other party can ask the State Court to re-examine the decision.

2.2.2. Other types of ADR

Although the Arbitration Act mentions other methods of ADR such as consultation, negotiation, mediation, conciliation and expert judgement, it does not define these terms (except arbitration, as discussed above). Other types of dispute resolution other than arbitration are only regulated in one chapter and one article of the Act, i.e. Chapter II, Article 6. Therefore their meaning or their definition can only be understood from legal doctrine or expert opinion. Further, this chapter only explains mediation but does not explain other types of dispute resolution. Chapter II, Article 6(1) of Act No. 30 of 1999 states that civil disputes or disagreements can be solved by the parties involved with alternative

7 As stated by Subekti in F.H. Winarta, *Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional*, Sinar Grafika, Jakarta 2011, p. 50.

dispute resolution based on the good faith to avoid litigation in the State Court. This particular part of the Act also states that ADR should be conducted by a face-to-face meeting of the parties within 14 days and the result of the meeting should be set forth in a written agreement.

2.2.2.1. Consultation

Because the Arbitration Act does not explain the meaning of consultation, the meaning of this term can only be understood from experts' opinions. According to Gunawan Wijaya, consultation is a personal act between one party, the client, and another party, the consultant, who is able to meet the needs of the client. There is no regulation concerning the obligation to follow or comply with the opinions of the consultants. There is always a possibility that the clients will do what the consultants say; however, the clients are free to decide what is best for their own interests. This means that in a consultation, the role of the consultant in dispute resolution is not significant. The consultant only expresses his or her opinions then formulates the possible forms of dispute resolution the parties want if they ask the consultant to do so.[8]

2.2.2.2. Negotiation

Negotiation is an ADR mechanism executed outside the court. In general, this type of dispute resolution is informal. There is no obligation for the parties to meet directly at the time the negotiation is being conducted. Through negotiation, the parties in dispute perform a re-assessment of their rights and obligations and expect a win-win solution by making a concession on their particular rights based on reciprocity. The agreement achieved in the negotiation is usually set forth in a written agreement and signed and executed by the parties involved in the dispute.[9] This agreement is final and binds the parties. Article 6(7) of the Arbitration Act, requires that this written agreement is registered at the State Court within 30 days of the date of the signing of the agreement. It also requires that the agreement must be executed within 30 days from the date that the agreement is registered at the State Court. Idrus Abdullah gives another opinion about negotiation: according to him, negotiation is a personal approach between the two parties in dispute to negotiate to resolve the dispute without involving a third party.[10]

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8 G. Wijaya, *Alternatif Penyelesaian Sengketa*, Seri Hukum Bisnis, Raja Grafindo Persada, Jakarta 2005, pp. 86–87.

9 G. Wijaya, *supra* n. 8, p. 89.

10 I. Made Sukadana, 2012, *Mediasi Peradilan: Mediasi dalam Sistem Peradilan Perdata Indonesia dalam Rangka Mewujudkan Proses Peradilan yang Sederhana, Cepat, dan Biaya Ringan*, Prestasi Pustaka Publisher, Jakarta 2012, p. 17.

The Arbitration Act does not limit the scope of negotiation. But according to Gunawan Wijaya, based on Article 5, it is appropriate to say that anything which is in accordance with law and which can be resolved with an 'agreement' can be negotiated. *Because it is an agreement between two parties, the result of* negotiation cannot be denied due to the oversight of the law or because of another reason such as that one of the parties has been harmed. It may be possible to renege on the agreement if there is proof that key elements of the dispute have not been properly considered, or there has been fraud or coercion, or the agreement has been achieved based on fraudulent documentation.[11]

2.2.2.3. Mediation

Mediation is regulated in Article 6(3) of the Arbitration Act. This Article explains that if the dispute or the disagreement cannot be resolved with the agreement of the two parties, it may be resolved with the involvement of one or more expert advisors through a mediator. If in this way agreement is still not achieved, or the mediator fails to invite the two parties, the two parties can contact an arbitration body or an ADR body to appoint a mediator.

After the appointment of the mediator by an arbitration body or an ADR body, the mediation must start within seven days. An effort to resolve the dispute through a mediator is executed by upholding confidentiality, and within 30 days there must be a written agreement signed by all the parties involved in the dispute.

A written agreement to resolve disputes or disagreement is final and binds the two parties who execute it. The agreement must be registered at the State Court within 30 days of it being signed and the agreement must be executed within 30 days of its registration at the State Court. If agreement is not achieved, the two parties, based on the written agreement, can file a claim to resolve the dispute through arbitration body or ad hoc arbitration.

Before the enactment of the Arbitration Act, the Supreme Court of the Republic of Indonesia issued the Circular No. 1 of 2002 to empower the State Court to put the reconciliation into effect. This Circular aims at, among other things, limiting cassation and ordering all judges in charge of trying the cases to really try to resolve the dispute by applying the provisions of Article 130 HIR or Article 154 RBg, and not only offer suggestions to achieve an agreement between the two disputing parties.[12]

The Circular No. 1 of 2002 was then revoked and replaced with Peraturan Mahkamah Agung (PERMA) No. 2 of 2003 on the Procedure of Mediation in Court. PERMA No. 2 of 2003 is expected to become an effective instrument in reducing the caseload of the court. According to Made Sukadana, the reason

11 G. Wijaya, *supra* n. 9, pp. 88–90.

12 I. Made Sukadana, *supra* n. 10, p. 8.

behind this Supreme Court Regulation is clear because mediation is one of the fastest and least expensive methods of ADR compared to the litigation process which can take a very long time. To follow up the execution of PERMA, the Supreme Court decided that some of the State Courts should take part in a pilot project to develop dispute resolution by way of agreement or settlement. Batu Sangkar State Court (West Sumatra) and Bengkalis State Court (Bengkalis Regency) developed the execution of mediation with a focus on indigenous issues; meanwhile, in Jakarta Pusat State Court and Surabaya State Court, the focus of mediation was on business cases (with written mediation agreements).[13]

PERMA No. 2 of 2003 was replaced with PERMA No. 1 of 2008 on Court-Annexed Mediation Procedure which became effective on 31 July 2008. Substantially, the material/content of the two regulations is similar. PERMA No. 1 of 2008 emphasises that if the process of dispute resolution in court is not preceded by mediation procedure, the decision is 'null and void'. Even judges in their decision have to mention that they have tried to resolve the dispute through mediation.

This PERMA also prolonges the mediation process from 22 to 40 business days. With the agreement of the parties in dispute, this process can also be prolonged for a second time to the maximum of 14 business days. In the past, the mediation process was only 22 business days if the mediator was a court mediator and 30 business days if the appointed mediator was from outside the court. Another change is that the scope of mediation is broader in the new PERMA. In the old PERMA, mediation could only be executed by the General Court in the State Court. With the enactment of PERMA No. 1 of 2008 the scope of mediation is broadened into the Religious Court. The new PERMA also provides that the process of mediation must be executed in every level of court, which includes the High Court, cassation and case review or *herziening*.

Thus, even though the Arbitration Act, especially in Article 6(1) states clearly that ADR should be executed outside the court; the Supreme Court integrates mediation into the process or procedure of the court. Some legal experts are critical of such integration of the mediation process into the court. This Supreme Court regulation is considered to be confusing both from normative and practical perspectives. From the normative perspective, this regulation is confusing because based on the hierarchy of legislation, by imposing an obligation and reducing the rights of citizens, PERMA goes beyond the limits of its authority. In order for such content to be legitimate, it should be contained in a regulation of at least the same level as an Act. Even Article 2(3) of PERMA mentions that any parties who do not execute the mediation procedure in accordance with PERMA are acting contrary to the provision of Article 130 HIR and/or Article 154 RBg which can result in the withdrawal of the verdict. The Supreme Court Regulation No. 1 of 2008 plays down the regulation of peace

[13] I. Made Sukadana, *supra* n. 10, pp. 19–20.

agency as regulated in HIR/RBg which has the same level as an Act. Therefore, it is evident that the validity of this Supreme Court Regulation is debatable. But on the other hand, the Supreme Court is of the opinion that, based on Article 79 of Act No. 3 of 2009 about the Second Amendment of Act No. 14 of 1985 on the Supreme Court, the Regulation is valid. Article 79 of the Act determines that the Supreme Court has the right to issue a Regulation of the Supreme Court to fill in or supplement the procedural law. From a practical perspective, there is confusion because PERMA No. 1 of 2008 insists that mediation is to be integrated in court procedings. Moreover, the Supreme Court threatens that a court's decision will be 'null and void' if mediation is not conducted prior to the court procedings. Experts state that this integration slows down the process of resolving disputes as it prolongs the process of examination. It is also contrary to the Indonesian judicial principle that access to justice should be simple, fast and low cost.[14]

In line with the above opinion, it is stated in the preamble of the PERMA No. 1 of 2008 that the integration of mediation into the process of dispute resolution in court can be an effective instrument to solve the overwhelming number of cases in the court. It could strengthen and maximize the function of the court in resolving disputes in addition to the judicial court process. From a practical perspective, regarding the confusion about the integration of mediation into the litigation procedure in court, it is explained in the preamble that based on Article 130 HIR and Article 154 RBg, this is aimed at intensifying and pushing the parties in dispute to always undertake the alternative process of resolution first. In this vein, it is clear that, practically speaking, the purpose of the PERMA is to guarantee the certainty, order, and the smoothness of the resolution process before the issuance of other regulations of the same level as Acts.[15]

If in Act No. 30 of 1999 we cannot find the meaning of the definition of mediation, we can find such a definition in the PERMA No. 1 of 2008. Mediation is a way of resolving disputes through the process of negotiation to achieve an agreement between the two parties with the help of a mediator. A mediator is a neutral party who helps the parties in dispute in the process of negotiation to seek many possibilities of resolving the dispute without deciding or forcing an agreement. In this meaning or definition, the significant differences between the mediation and arbitration processes is that in mediation a mediator does not have the right to decide or force an agreement; but in arbitration, an arbitrator has the right to decide and force a resolution.

How about cases which can be resolved through mediation? Article 4 states that except cases which are to be resolved through the procedure of the trade court or industrial relations court, and appeals of decisions of the Consumer Dispute Settlement Body and the Business Competition Supervisory

14 I. Made Sukadana, *supra* n. 10, pp. 27-28.

15 I. Made Sukadana, *supra* n. 10, p. 28.

Commission, all civil disputes submitted to the State Court must first be resolved through an agreement with the help of a mediator. The exceptions exist because there is already a dispute resolution agency particularly for cases related to industrial relationships, consumer disputes, and business competition.

Mediation is basically executed in private unless the two parties agree otherwise. As a consequence of the integration of mediation in court proceedings, on the first day of trial the judge strongly requests the two parties to resolve the dispute through mediation. Even where there are co-defendants in the dispute, this does not prevent the mediation process. Therefore, from the beginning the judge must try to delay the process of the court proceedings so that the parties in dispute have the chance to resolve their dispute through mediation. Furthermore, at the start of proceedings the judge has to explain the mediation procedure to the two parties.

The two parties can choose any or a combination of any of the following as their mediator: a judge who is not responsible for investigating the case; an advocate or law professor; a non-legal professional who the parties feel has sufficient knowledge or experience in the subject matter of the dispute; or a judge panel of examiners. If the two parties fail to choose a mediator on the appointed day, the judge will appoint a certified judge who is not responsible for investigating the case. If no qualified judge can be found to act as a mediator, the trial judge must appoint another judge who is not responsible for the case to act as a mediator.

The parties involved in the dispute must undertake the mediation process with good faith. One of the parties may withdraw from the mediation process if the opposing party does not undertake the mediation in good faith. The mediator has to declare that the mediation has failed if one or both of the parties or the representatives of the parties do not come to the mediation meeting twice in a row according to the mediation schedule which the two parties have agreed, or have not come to the mediation meeting twice in a row without any reason even though they have been invited. If, during the mediation process, it becomes apparent that the dispute concerns the interests of a third party who is not mentioned in the lawsuit or mediation, the mediator must inform the parties and the judge in charge of the case that the case cannot be mediated because the parties are not complete.

If mediation is succesful, the two parties with the help of the mediator must formulate in writing the resolution that they have achieved, which must be signed by the two parties and the mediator. If during the mediation process the two parties are represented by their lawyers, the parties must formulate in writing the resolution that they have achieved. Before the parties sign the resolution, the mediator examines the content of the resolution to avoid any part of the resolution which is against the law or which cannot be executed or which is in bad faith. The parties must appear before the judge again on the appointed

day to submit the resolution to him. The parties can submit the resolution to the judge to be strengthened in the form of deed of resolution. If the parties do not want the dispute resolution to be strengthened in the form of deed of resolution, the resolution they have achieved must include a clause revoking the lawsuit and/or a clause stating that the case has been resolved.

The mediation process is said to fail if after the limit of the maximum length of time, i.e. 40 business days, the disputing parties fail to produce a dispute resolution. If this happens, the mediator must declare in writing that the mediation process has failed and inform the judge of this failure. Upon receiving the information about the failure, the judge continues to investigate the case in accordance with the applicable procedural law. At every stage of investigating the case, the presiding judge still has the right to push for resolution before he pronounces the verdict. This resolution effort lasts for a maximum of 14 business days from the date that the disputing parties express to the presiding judge their wish to achieve resolution.

PERMA states that if the disputing parties fail to achieve a resolution, the statements and confessions of the parties in the mediation process cannot be used as evidence in the process of the trial of the case or another case. In addition, the notes taken by the mediator must be destroyed and the mediator cannot become a witness in the process of the trial of the case. The mediator is also not subject to civil and criminal liability over the content of the resolution as the result of the mediation process.

Except in the State Court, the parties may agree to mediate disputes that are currently in the process of appeal, cassation or case review as long as the verdict of the disputes has not been decided. The agreement of each party to mediate should be put into writing to the Head of the State Court which is in charge of the dispute. The Head of the State Court in charge of the case should notify the Head of the Court of Appeal or the Head of the Supreme Court about the wish of the parties to find a resolution. If the case is being examined in the Court of Appeal or Cassation, the judge can delay the investigation of the dispute for as long as 14 business days from the day he receives the information that the parties want to achieve resolution. If the case file and the review material have not been sent to the higher court, the Head of the State Court must delay the process to give the parties a chance to achieve resolution.

Even though there has been a regulation about mediation and mediation has been integrated into court proceedings for the purpose of overcoming the backlog of cases in court, in reality only few justice seekers prefer to use mediation. The success of mediation in dispute resolution, unfortunately, is also relatively poor. Table 5 below shows the results of a study by Made Sukadana describing the low success rate of the court mediation process:[16]

16 I. Made Sukadana, *supra* n. 10, pp. 174–175.

Table 5. Percentage of success of mediation in some State Courts

Court Location	Year	Number of Cases	Successful Mediation	Percentage of Success
Bandung	2006	370	19	5.14
	2007	360	16	4.44
	2008	425	45	1.58
	2009	305	26	8.25
Jakarta Selatan	2006	2173	12	0.55
	2007	2439	14	0.57
	2008	1663	10	0.60
	2009	1479	13	0.87
Bogor	2006	83	3	3.52
	2007	105	6	5.71
	2008	127	3	2.36
	2009	92	26	28.26
Depok	2006	90	2	2.22
	2007	137	3	2.18
	2008	141	5	3.54
	2009	105	3	2.85

From the Table, we can see that the percentage of success of mediation is not yet significant. This lack of success, according to Made Sukadana, is because the courts have not taken mediation seriously. Besides, this is caused by the abundance of cases submitted to the courts. The number of mediator-judges is also very small. For this reason, litigation is prioritised above mediation.

In his study, Made Sukadana concluded that unsuccessful mediation is primarily caused by the limited amount of time mediator-judges have. In order for mediation to be successful, judges need to have more time to dedicate to it. Furthermore, judges have to pay more attention to the mediation process because it is hard to find a resolution that is acceptable to all of the parties involved in the dispute.[17]

2.2.2.4. Conciliation

In essence, conciliation is a type of dispute resolution based on agreement between the parties. Like consultation, negotiation and mediation, the Arbitration Act does not contain the meaning and definition of conciliation.

17 I. Made Sukadana, *supra* n. 10, pp. 176–177.

The term 'conciliation' can only be found in Article 1(10) and in paragraph 9 of the general explanation of the Act. According to Made Sukadana, conciliation is a process in which a third party (the conciliator) provides assistance by offering and suggesting a way of resolving the dispute between the two parties. The conciliator must be neutral in the sense that he cannot direct the decision in favour of the interests of one of the parties.[18] According to Gunawan Wijaya, any dispute which is going to be resolved through conciliation is subjected to the provisions of Articles 1851–1864 of the Civil Law Act. In accordance with Article 6(7) of the Arbitration Act, the written agreement as the result of conciliation must be registered in a State Court within 30 days of it being signed and must be executed within 30 days of its registration at the State Court. The written agreement of conciliation is final and binds each party. Furthermore, Gunawan Wijaya states that conciliation can be attempted before the litigation process begins. Hence, conciliation can not only help avoid the litigation process altogether, but can also be initiated by either party in every level of court, both inside and outside the court proceedings, with the exception of disputes in which a legally enforceable verdict has already been given.[19]

2.2.2.5. Expert judgment or legal opinion by arbitration body

According to Gunawan Wijaya, in addition to resolving disputes that happen between parties who have agreed to use ADR, an arbitration body can also offer consultation in the form of a legal opinion upon the request of every party in need; not only for parties bound in an agreement but also for other parties. He states:

> 'A legal opinion is an input for each party in composing or drafting an agreement. This will regulate the rights and obligations of each party in the agreement. In giving the legal opinion, the legal expert can interpret or give explanation to the provisions in the agreement which have been written by each party. In this case, the legal opinion by an expert will make the provision clear for each party to execute it.'[20]

Made Sukadana explains that expert judgment can be defined as a resolution reached by the two parties in dispute with the help of an expert. The role of the expert is to assess a loss (usually in tort cases) or to assess a condition.[21] The legal basis of expert judgment or legal judgment is the formulation of Article 52 of the Arbitration Act. This Article states that each party in an agreement has the right to ask for a binding opinion from an arbitration body in the context of certain legal relationships. Therefore an arbitration body can offer a binding

18 I. Made Sukadana, *supra* n. 10, p. 9.
19 G. Wijaya, *supra* n. 8, pp. 93–94.
20 G. Wijaya, *supra* n. 8, p. 95.
21 I Made Sukadana, *supra* n. 10, p. 9.

opinion about a certain legal relationship before the dispute arises.[22] Gunawan Wijaya also explains that an opinion given by an arbitration body is binding because the opinion offered will become an inseparable part of the body of agreement. Any violation of the given legal opinion means a violation of the agreement or default. In addition, this legal opinion is final for each party as regulated in Article 53 of Act No. 30 of 1999 which states that any party should not violate a legal opinion through any legal efforts.[23]

3. DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION IN VARIOUS LEGAL FIELDS AFTER THE REFORMATION ERA

It is unarguable that the trend of the use of ADR has increased after the reformation era with the fall of the New Order regime under Soeharto, in 1998. After the fall of the regime, many civil movements appeared. Alongside the civil movements, various NGOs also appeared that offered help for the society in seeking justice. Before the reformation, Soeharto did not give enough space for civil movement and NGOs in Indonesia. The interference of the executive (the government) in judicial authority was very significant. Thus we can say that the reformation was one of the factors which opened the way for the development of ADR in Indonesia.

3.1. ENVIRONMENTAL DISPUTE RESOLUTION

The first Act in the Republic of Indonesia to introduce non-litigation dispute resolution during the enactment of Act No. 14 of 1970 on the Basic Principles of Judicial Power was Act No. 23 of 1997 on Environmental Management which was then replaced by Act No. 32 of 2009 on the Protection and Management of the Environment.

Act No. 23 of 1997 on Environmental Management states that environmental dispute resolution can be executed through the court or outside the court based on the voluntary choice of the parties to the dispute. If the parties choose out-of-court dispute resolution, court proceedings can only be commenced if one or all of the parties declare that the preferred process has failed. In this case, the court does not have the right to investigate and try the case, except where the dispute resolution outside the court has been considered to fail.

22 G. Wijaya, *supra* n. 8, p. 95.

23 G. Wijaya, *supra* n. 8, pp. 95–96.

Environmental dispute resolution outside the court can be resolved with the help of a third party which may or may not have the authority to make a binding decision.

The provision of environmental dispute resolution which can be found in Act No. 23 of 1997 on Environmental Management did not change in Act No. 32 of 2009. The difference, however, lies in the phrase that clearly mentions the term mediator and/or arbitrator as this third party.

For more details, the definition of environmental dispute as regulated in Act No. 32 of 2009 on the Protection and Management of the Environment is a 'dispute between two or more parties as the result of any activity which potentially and/or which already has an impact on the environment.'

Article 85(3) of Act No. 32 of 2009 states that 'environmental dispute resolution can make use of a mediator and/or an arbitrator to help resolve the environmental dispute'. According to Takdir Rahmadi, there are three ways (not just two) to resolve environmental disputes outside the court, i.e. through negotiation, mediation, and arbitration.[24] Out-of-court dispute resolution may help achieve an agreement in respect of (a) the form and amount of compensation, (b) recovery actions as a result of contamination and/or destruction, (c) particular actions to guarantee that there will be no more contamination and/or destruction, and (d) actions to prevent a negative impact on the environment. Article 85(2) of Act No. 32 of 2009 only prohibits the use of mediation and arbitration in the category of environmental criminal cases.

Due to the possibilities of environmental dispute resolution outside the court, the Government of the Republic of Indonesia issued Government Regulation No. 54 of 2000 on the Institute for Providing Services for Out-of-Court Environmental Dispute Resolution. Based on this government regulation, an institution or a third party can offer services in environmental dispute resolution through mediation and/or arbitration.

3.2. FORESTRY DISPUTE RESOLUTION

The legal basis of forestry dispute resolution is Act No. 41 of 1999 on Forestry as amended by Act No. 1 of 2004. Article 74(1) of Act No. 41 of 1999 states that: 'Conflicts pertaining to forestry can be resolved in a court or outside a court, depending on the options that are voluntarily selected by the parties involved.' It is further stated in paragraph 2 that: 'When conflict resolution is selected to be outside a court, claims can then be made in a court if consensus is not achieved among the parties involved.' Forestry dispute resolution outside the court does not apply to forestry crime as regulated in the Forestry Act.

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24 T. Raihmadi, *Mediasi: Penyelesaian Sengketa melalui Pendekatan Mufakat*, Raja Grafindo Persada, Jakarta 2010, pp. 57–58.

Article 75(2) states that out-of-court dispute resolution in relation to forestry disputes aims to achieve an agreement in relation to (a) return of a right, (b) the amount of compensation, and/or (c) specific actions necessary for recovering the functions of forests. This Act also regulates that the parties can appoint and make use of the services of a third party. It is also stated that an NGO can help in forestry dispute resolution. Hence NGOs can become a mediator or offer their services to the parties involved in a forestry dispute.

As already mentioned, forestry dispute resolution can take place both in and out of court. This regulation is a big step forward. In the past, even though forestry disputes between the State and the people were common, in Act No. 5 of 1967 on Basic Forestry Law, there was no regulation on this matter. In Article 17 of the Basic Forestry Law for example it is stated that:

> 'The implementation of the rights of indigenous communities and the rights of its members and the rights of individuals, to directly or indirectly benefit from the forest, as far as (these rights) are based on provision in the law and still exist in reality, may not disturb the goals stipulated in this law.'[25]

According to Adriaan Bedner and Stijn van Huis, this Article has the potential to prejudice the rights of the indigenous community. In the explanation of the Article, the rights of the indigenous community are reduced to only consist of the use of forest land for livestock, hunting, and the collection of forest products. In the past, the existence of the indigenous society was considered to have the potential to disturb national policy goals of conservation and production. However, the most important 'disturbance' that might be caused by indigenous communities according to the old *rezim* was their obstruction to development projects. This restriction according to Bedner and Huis impacted the lives of *adat* law communities in a more fundamental way. The Basic Forestry Law granted power to the State to define land as forest area. Indigenous communities tilling land in areas designated as forests suddenly had to comply with national forestry policies. In practice, this meant that their rights to farm land within forest areas had suddenly been replaced by the right to collect forest products. As they could no longer sufficiently support themselves, they were often forced to turn to agriculture elsewhere or to work in the forestry sector.[26]

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25 A. Bedner and S. van Huis, 'The Return of the Native in Indonesian Law' (2008) 164(2/3) *Bijdragen tot de Taal-, Land- en Volkenkunde* 182.

26 A. Bedner and S. van Huis, *supra* n. 25, p. 182.

3.3. WATER RESOURCES DISPUTE RESOLUTION

Water resources dispute resolution is regulated in Act No. 7 of 2004 on Water Resources. A water resources dispute is a dispute relating to the management of water resources and/or a dispute about the right to use water or the right to lease water, such as a dispute between consumers, a dispute between businessmen, between consumers and businessmen, between territories or areas, and between upstream and downstream.

Based on Article 88 of Act No. 7 of 2004, the first step in resolving the dispute is the deliberations to reach consensus. If the parties cannot achieve a consensus or agreement, they can obtain dispute resolution through the court or outside the court. Out-of-court dispute resolution methods include arbitration as well as other types of ADR. Water resources dispute resolution can be done through consultation, negotiation, mediation, conciliation, and expert judgment.

3.4. LABOUR OR INDUSTRIAL RELATIONS DISPUTE RESOLUTION

Act No. 2 of 2004 on Industrial Relations Disputes (LN 2004, No. 6) also regulates the use of mediation as a method of industrial relations dispute resolution. Article 1(11) defines industrial relations mediation as the resolution of disputes over rights and interests or termination of employment, and disputes between workers/labour associations in a company, through discussion which is mediated by one or more neutral mediators.[27]

Further, Article 1(12) formulates the definition of mediator as an official in a government institution who is responsible for employment, who meets the requirements of a mediator as regulated by the minister for labour affairs, and who has the responsibility to produce a written suggestion to the parties in dispute as to how to solve their industrial relations dispute. The second part of the Article contains commonly known elements of the definition of a mediator, i.e. they must be neutral and not show bias towards a party. But, according to Takdir Rahmadi, there is no clear statement in this Act that the mediator does not have the right to decide the case. The mediator's role could then be confused with the duty of an arbitrator who has the right to decide a case.[28]

Based on Act No. 2 of 2004, mediation can be commenced after the parties have failed to achieve a resolution through bipartite negotiation and do not then choose to attempt resolution through conciliation or arbitration within seven business days. Article 4(4) of Act No. 2 of 2004 states:

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27 T. RAHMADI, *supra* 24, p. 62.

28 T. RAHMADI, *supra* 24, p. 63.

'In case the disputing parties do not choose to resolve the dispute through conciliation or arbitration within seven business days, the government institution in charge of employment delegates the dispute resolution to the mediator.'

From the wording of Article 4(4) it is not really clear whether the mediation is mandatory or voluntary. However, if we pay close attention to the words 'institution in charge of employment delegates the dispute resolution to the mediator', it seems that mediation is mandatory if the disputing parties do not choose conciliation or arbitration. Furthermore if we relate this to Article 83(1) of Act No. 2 of 2004, we have a better understanding that labour dispute resolution is mandatory. Article 83(1) of Act No. 2 of 2004 states: 'The petition submitted without attachment of the minutes of settlement through mediation or conciliation, should be returned by the judge of the Industrial Relations Court to the plaintiff.' The statement of Article 83(1) implies that the Industrial Relations Court does not have the authority to investigate the dispute if the parties have not tried to resolve the dispute through mediation and conciliation.[29]

3.5. CONSUMER DISPUTE RESOLUTION

In Article 45(2) of Act No. 8 of 1999 about Consumer Protection (LN 1999, No. 22) it is stated that: 'Consumer dispute resolution can be done through the court or outside the court based on the voluntary preference of the disputing parties'. In paragraph 4 it is stated that if the disputing parties choose out-of-court consumer dispute resolution, court proceedings can only be commenced if one or both of the parties declare that their efforts to resolve the case have failed.

Act No. 8 of 1999 on Consumer Protection regulates the use of mediation as an out-of-court method to resolve consumer disputes. The use of consensus in consumer dispute resolution is reflected in Article 47 of Act No. 8 of 1999 which, among other things, states: 'Consumer dispute resolutions outside the court are executed in order to reach an agreement as regards the form and amount of the compensation and certain actions to guarantee that there will be no more losses on the consumers' side.'[30] Mediation, arbitration and conciliation, as regulated in Article 52(a), are carried out by the Consumer Dispute Settlement Body (Badan Penyelesaian Sengketa Konsumen, BPSK). BPSK is a particular body which was created pursuant to the Consumer Protection Act. The primary task of BPSK is to resolve any disputes between consumers and businessmen.[31] Therefore the task and authority of BPSK includes handling and resolving consumers' disputes, by making use of mediation, arbitration or conciliation.

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29 T. RAHMADI, *supra* 24, pp. 63–64.

30 T. RAHMADI, *supra* n. 24, p. 59.

31 G. WIJAYA, *supra* n. 8, p. 73.

But according to Gunawan Wijaya, consumer disputes may be resolved by other methods, such as peaceful settlement (agreement) between the disputing parties. At every stage of the dispute, the parties should consider reaching a peaceful settlement. This means that according to the Act of Consumer Protection, there are three methods of dispute resolution, namely through the court, through BPSK, and through ADR and/or arbitration as regulated in Act No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.[32]

Article 54(3) states that the decision of BPSK is final and binding. BPSK must issue their decision within 21 business days of proceedings being commenced. Within seven business days of receiving the decision of BPSK, the parties must comply with the decision. The disputing parties may submit an objection to the State Court within 14 business days of receiving the notification of the decision. If the parties do not submit an objection during the appointed time they are deemed to agree with the decision of BPSK.

3.6. PUBLIC INFORMATION DISPUTE RESOLUTION

Resolution of public information disputes according to Act No. 14 of 2008 on Public Information Disclosure (LN 2008, No. 61) can be achieved through the litigation and non-litigation processes. As regards the litigation process, the lawsuit must be submitted to the Administrative Court if the defendant is a State public agency and to the State Court if the defendant is a public agency other than a State public agency.

A public information dispute is a dispute between a public agency and users of public information which is related to the rights of obtaining and using information based on legislation. The legal basis of public information dispute resolution which is submitted to the court is Article 4(4) which states that: 'Every applicant of public information has the right to submit a lawsuit to the court if he or she encounters any obstacle in receiving information or he or she cannot receive certain information as regulated in the legislation.' This is based on the consideration that everybody has the right to: (a) see and know about public information; (b) go to a public meeting which is open to everybody to gain public information; (c) gain a copy of public information through a petition as regulated in the provision of the legislation; and/or (d) spread public information as regulated in the legislation.

Not all public information can be disclosed. Therefore a public agency has the right to withhold public information if it is against the provisions of the legislation. Public information which cannot be disclosed by a public agency is the following: (a) information that can harm the State; (b) information which is related to the protection of business interests from unfair competition; (c) information related

[32] G. Wijaya, *supra* n. 8, p. 76.

to personal rights; (d) information related to confidentiality of position; and/or (e) public information that is not known or documented completely.

Public information dispute resolution outside the court can be done via mediation and adjudication. Mediation as explained in Act No. 14 of 2008 is a dispute resolution between the parties with the help of an Information Commission mediator.

The Information Commission is an independent agency which is in charge of executing legislation along with its implementation, establishing standard technical guidance of public information services and resolving public information disputes through mediation and/or non-litigation adjudication. If mediation is used, the members of the Information Commission are the mediators. The Information Commission consists of the National Information Commission which is in the capital of Indonesia, the Provincial Information Commission, and if needed, the Information Commission can be established at the regional level.

One of the roles of the Information Commission is to invite and/or unite the disputing parties and ask for relevant notes or materials owned by the related public agency to make a decision in resolving public information disputes. The dispute has to be resolved within 100 business days at the latest. Article 39 states that the Information Commission decision resulting from the agreement through mediation is final and binding. The agreement of each party in the process of mediation is set forth in the form of the mediation decision of the Information Commission.

Dispute resolution through mediation can be applied to any dispute when there is no timely information, when there is no response to an information request, when there is no sufficient response to an information request, when there is an imposition of unreasonable fees, and/or when information is delivered after the period stipulated in the Act.

3.7. DISPUTE RESOLUTION IN BANKING

The use of mediation to resolve banking disputes is not based on law, but on Bank Indonesia's policy as stipulated in Bank Indonesia Regulation No. 8/5/PBI/2006. The use of mediation in the context of banking disputes as stated in Bank Indonesia Regulation No. 8/5/PBI/2006 is voluntary.

Bank Indonesia through Bank Indonesia Regulation No. 3/5/PBI/2006 on 30 January 2006 and Circular Letter of Bank Indonesia No. 8/14/DPNP on 1 June 2006 issued a policy that strongly encourages bank customers and banks to pursue mediation as a means of dispute resolution. The Regulation specifies the criteria of disputes that can be resolved through mediation, namely: (a) civil disputes arising from financial transactions; (b) disputes arising from the results of the bank's settlement of customer complaints; and (c) disputes that carry

financial claims with a maximum value of Rp 500,000,000 (rupiahs). The deadline for filing dispute resolution according to the Regulation should be no later than 60 days from the date of settlement completion. It should be written and sent to the banking agency mediation.[33]

3.8. LAND DISPUTE RESOLUTION

Under the provisions of Article 23(c) of the Presidential Decree of the Republic of Indonesia No. 10 of 2006 on National Land Agency, it is stated that the Deputy Minister of Research and Treatment Dispute and Conflict is in charge of alternative problem, dispute, and conflict resolutions through mediation, facilitation, etc.

The provisions of Article 23 of Presidential Decree No. 10 of 2006 show the government's policy to use mediation as a way to resolve land disputes. Prior to the enactment of Presidential Decree No. 10 of 2006, the usual approach to settling land disputes was by way of consensus agreement. However, the new use of the term mediation is explicitly stated in Presidential Decree No. 10 of 2006. This results from the increasing popularity of the term mediation within the field of law, in Indonesian laws and regulations, and among Indonesian policy makers. Detailed legal provisions on the use of mediation in the context of land disputes do not exist. The existing provisions are only in the form issued by the Technical Guidelines of National Land Agency No. 05/Juknis/DV/2007 on the Mechanism of Mediation Implementation. The preamble of the Technical Guidelines states that one of the laws that becomes the legal basis of mediation is Act No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. The Act firmly stipulates that the use of arbitration and alternative dispute resolution is voluntary. Thus, the use of mediation to resolve land disputes is also voluntary.[34]

3.9. DISPUTE RESOLUTION IN JOURNALISM

Article 15(2)(d) of Act No. 40 of 1999 on the Press (LN 1999, No. 166) regulates the functions of the Press Council, such as giving consideration to and solving complaints from the public over cases dealing with the news in the press. Alamudi Abdullah states that although the function of the Press Council as defined in Article 15(2)(d) is general and does not specifically mention the function of mediation, in practice, the Press Council has taken on the function of mediation for disputes between the press and those who feel aggrieved by the news.[35]

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33 T. Rahmadi, *supra* 24, p. 65.
34 T. Rahmadi, *supra* 24, p. 66.
35 T. Rahmadi, *supra* 24, p. 73.

Mediation by the Press Council is mediation outside the courts and done voluntarily or by the choice of the parties. Thus, the Press Council is able to run the mediaton if the press broadcasting the news and those who are reported so request or agree. If the parties, with the help of the Press Council, reach agreement, the dispute ends with a peace agreement out of court. If the parties fail to reach an agreement, and those who were reported are not satisfied, they can submit a lawsuit to the court on the basis of tort. In addition to its mediating function, the Press Council also performs the role of the keeper of the journalism code of ethics. As the keeper of the code of conduct, the Press Council has the authority to issue Statements of Assessment and Recommendations. Conceptually, these are similar to a combination of expert judgment and fact-finding.

As a follow up to the implementation of the dispute resolution function, the Press Council issued Regulation Press Council No. 1/Peraturan-DP/J/2008 about the complaints procedure to the Press Council. The provision in the Press Council relating to the mediation function is listed in Article 7(1) which states: 'The Press Council seeks a settlement through deliberation and consensus which is set forth in peace statements'. The formulation of Article 7(1) does not contain the word 'mediation' or 'mediator', but rather has the words 'seek resolution through deliberation and consensus which is set forth in peace statements'. Conceptually, these words reflect the role or function of mediation that is run by the Press Council.[36]

3.10. DISPUTE RESOLUTION IN INDIGENOUS SOCIETY

Even though the term mediation derives from English and is an English word, conceptually the essence of mediation has been practiced by the people of Indonesia long before the term mediation became popular within the scope of law. '*Adat* law' or customary law is a phenomenon in Indonesia. The presence of *adat* law in the community has a special meaning because it is a reflection of the culture and way of life of the people. *Adat* law has a distinctive character. It is believed to be bound to the society where it was born and has grown, and is a form of phenomenological juridical community.[37] According to Iman Sudiyat, *adat* law is concrete, real and empirical. The division of all material governed by *adat* law is made in accordance with the inductive nature of the object or objects being handled. So its existence is not in the abstract as it is for the modern law whose formulations are often far from reality. Other characteristics of *adat* law are that it is religious, communal, democratic, closely connected to the local culture, able emphasise feelings rather than what is rational, able to prioritise moral and

36 T. Rahmadi, *supra* 24, p. 74.

37 M. Syamsudin, E. Kumoro, A. Rachiem F. and M. Tabrani (eds.), *Hukum Adat dan Modernisasi Hukum*, FH UII, Yogyakarta 1998, p. v.

spiritual values, unpretentious and simple. *Adat* law in Indonesia has never distinguished between public law (or criminal law) and private law. At least according to Iman Sudiyat, the boundary between the two is rather vague.[38] Philosophically and culturally *adat* peoples do have a different character, nature and characteristics to urban communities characterised by their understanding of modern law. *Adat* peoples in Indonesia are communalistic. The phrases '*urip bebarengan*' (live peacefully together), '*padha-padha*' (togetherness) and '*rukun agawe santosa*' (harmony brings happiness) in Javanese society, for example, can illustrate that they emphasise the importance of harmony.[39] Therefore, indigenous or *adat* communities place great importance on 'consensus and agreement' in decision-making. By their nature, these people think that bringing a case to court is sometimes considered taboo and will not solve the problem at hand, as the nature of court settlement is winning and losing. Maintaining harmony is considered more important by the *adat* peoples with their kinship attachment.

Mediation in *adat* communities is used to resolve family, inheritance, land boundary and other types of disputes. In addition, mediation is also used to settle some minor crimes such as fighting, petty thefts, etc. Thus, in *adat* communities, peace settlement through 'consensus agreement' is not confined to civil matters only, but also for criminal matters. According to the principle of State law, a criminal offence should not be settled between parties in conflict; however, in reality, community leaders in *adat* communities often resolve criminal offences through mediation. The above example highlights the differences in approach to conflict settlement between the State law and the law of society (folk law, non-State law).[40]

Almost all of the disputes in indigenous societies in the past were settled by a consensus agreement or '*musyawarah-mufakat*' which is very similar to mediation. Besides Indonesia, some indigenous societies in several Asian countries such as Malaysia, Thailand and the Philippines also used mediation to settle disputes. Joel Lee and Teh Hwee Hwee suggest:

> 'Mediation is also practised in Malaysia, Indonesia, Thailand and the Philippines. [...] In the neighbouring country of Indonesia, consensual procedures for decision-making and dispute resolution have traditionally been used. Disputes have been handled by judicial procedures in which an authorative decision-maker met with the disputing parties to negotiate a settlement with his advice, using customary standards and criteria. In addition, group consensual-based deliberative procedures

38 I. Sudiyat, 'Perkembangan Beberapa Bidang Hukum Adat sebagai Hukum Klasik Modern', in M. Syamsudin, E. Kumoro, A. Rachiem F. and M. Tabrani (eds.), *Hukum Adat dan Modernisasi Hukum*, FH UII, Yogyakarta 1998, pp. 20–21 and pp. 29–31.

39 M. Koesno, 'Menuju kepada Penyusunan Teori Hukum Adat', in M. Syamsudin, E. Kumoro, A. Rachiem F. and M. Tabrani (eds.), *Hukum Adat dan Modernisasi Hukum*, FH UII, Yogyakarta 1998, pp. 62–63.

40 T. Raihmadi, *supra* n. 24, pp. 69–70.

known as *musyawarah*, which aim to achieve an acceptable solution for all involved, have traditionally been employed.'[41]

Although Indonesian *adat* law is very important for the people of Indonesia and varies greatly because of the diversity of tribes and customs in Indonesia, Sukanto argues that Indonesian people have to be careful because *adat* law contains outdated or inapplicable rules, and customs that are influenced by Western religion or law.[42] Therefore, we suggest that case settlements in *adat* communities should be thoroughly investigated as to whether they are still applicable.

As previously described, in *adat* law there is no clear difference in the method of resolving criminal and civil matters. In *adat* law, the cases that were categorised as criminal law according to State law can also be resolved by consensus agreement or through the peace efforts. In relation to this issue, Bagir Manan says:

'Peace in *adat* law is not limited only to civil disputes. Peace is also prevalent in criminal offences. Often, criminal cases that require imprisonment are resolved peacefully. In cases of death caused by a fight or quarrel, the resolution is achieved through the compensation to families of the victims. The compensation is not only material, but can also be immaterial such as paying *adat* fines or carrying out certain obligations to restore the spiritual balance. Even statements of regret and sincere apology that are accepted by the victim's family can sometimes be an important foundation for peace. [...] Moreover, this kind of peace efforts should bring about legal consequences, which is closing the case once peace is achieved. The doctrine which states that the criminal nature remains intact and thus the offences will still be pursued should be abolished.'[43]

Within the scope of *adat* communities, *adat* functionaries act as mediators in resolving disputes between members of the *adat* communities. The members of *adat* communities often ask religious leaders to help resolve disputes or family and inheritance conflicts. However, within *adat* communities, those *adat* functionaries often play dual roles as mediators as well as arbitrators. In early stages, functionaries use a persuasive approach and give suggestions for dispute settlement, but if one or both parties reject their proposal, the dispute will be resolved through court. Those who are dissatisfied with the decision of *adat* functionaries can take their case to the local court.[44]

There are even written rules of dispute and conflict resolution by *adat* functionaries in Aceh Province (where Shari'ah law is enforced). The regulation

41 J. Lee and H.H. Teh, 'The Quest for an Asian Perspective on Mediation', in J. Lee and H.H. Teh (eds.), *An Asian Perspective on Mediation*, Academy Publishing, Singapore 2009, pp. 5–6.

42 Soekanto, *Meninjau Hukum Adat Indonesia: Suatu Pengantar untuk Mempelajari Hukum Adat*, Edisi 3, Raja Grafindo Persada, Jakarta 1996, pp. 62–63.

43 T. Rahmadi, *supra* n. 24, p. 71.

44 T. Rahmadi, *supra* n. 24, pp. 71–72.

of dispute resolution by *adat* functionaries in the province of Aceh (which has a special autonomy to apply part of Islamic law) has even been made in writing. This written form of rules is called Qanun No. 7 of 2000 on the Implementation of *Adat* Life. In this Qanun it is stated that *adat* law, customs and practices that still prevail and thrive in Acehnese society must be maintained as long as they are not in conflict with Islamic Shari'ah law. Islamic Shari'ah in this case is the benchmark of the carrying out of *adat* life in Aceh. *Adat* institutions serve as a means of control of security, peace, harmony and public order, to solve social problems and to mediate (justice of the peace) the disputes that arise in the community. In this Qanun it is also stated that in resolving the dispute, law enforcement officials first give the chance to Keuchik (village-level traditional leaders) and Imum Mukim (subdistrict level traditional leaders) to resolve disputes in Gampong and Mukim respectively. Keuchik have the authority to resolve disputes and problems that occur in Gampong. The disputes and problems include problems in families, between families, and social issues that arise in society. Keuchik should try to resolve those problems peacefully through deliberation in a Gampong *adat* meeting. If within a period of two months the dispute can not be resolved in Gampong, and the parties to the dispute do not accept the *adat* decision at Keuchik level, the dispute will be resolved by Imum Mukim in a Mukim *adat* meeting. All disputes and controversies that Keuchik and Imum Mukim have reconciled in a traditional meeting are binding on the parties. Those who do not follow the *adat* decision at the Keuchik or Imum Mukim level will receive a severe penalty according to *adat* customs because they damage the agreement and disrupt the balance of living in the community. Furthermore, the Qanun also expresses that if within the period of one month Imum Mukim cannot resolve the case or the parties to the dispute are not satisfied with the *adat* decision at Mukim level, then the parties can submit the case to law enforcement officials. Law enforcement officials can take into consideration the *adat* decision that has been imposed upon disputing parties when solving the case. The minutes of the meetings for each settlement made by Keuchik and Imum Mukim are recorded and announced to the public.

Based on the rules in this Qanun, the *adat* institution led by Keuchik or Imum Mukim will first attempt to resolve any disputes (either civil or criminal cases), before the parties in such disputes submit their case to the court. In this case Imum Mukim or Keuchik serve as mediators (justices of the peace) of the disputes that community. The total time for the process of dispute resolution allowed in the village level by Keuchik is two months whereas the time allowed at the district level by Imum Mukim is one month. We can conclude that the dispute resolution process as set forth in the Qanun is a process of mediation which is conducted before parties to a dispute bring their cases through a formal channel that is dispute resolution by means of State law. Any legal decision given

at the level of the Gampong and Mukim *adat* meeting will be recorded and announced for the public.

However, in reality, there are disputes in *adat* communities that have been resolved by *adat* functionaries that are then submitted to the State Court. According to Iakdir Rahmadi, this could be evidence of the problems of the dispute resolution process by *adat* functionaries. Thus, we need to examine the problems. One of the causes he mentions is the decline of the kinship system and social attachment which results from the increase of materialism and individualism in society as well as the weakening of the power of *adat* functionaries. The increasing popularity and prestige of advocacy professions might also constitute an important factor in the decrease of dispute resolution through consensus agreement. The general public is no longer interested in consensus agreement because they are more familiar with advocacy professions. Thus, during a conflict, people tend to seek assistance from lawyers even though legal professions in Indonesia are more litigation-oriented. In addition, the curriculum in law departments in universities tends to direct their graduates to view court as the only means of resolving a dispute. However, in recent years, a number of law schools in Indonesia have offered courses such as 'a choice of dispute resolution' or 'alternative dispute resolution' that among other things includes learning about negotiation and mediation that are based on a consensus approach to dispute resolution.[45]

4. FINAL REMARKS

The above discussions show that at least in the past decade, alternative dispute resolution in Indonesia has experienced rapid growth, especially within the area of the making of policy or laws and regulations. The political will of the Supreme Court to use alternative dispute resolution is also evident through the issuance of the Supreme Court Regulation No. 1 of 2008 on Court-Annexed Mediation Procedure. It stipulates that parties to a dispute should seek peace efforts and/or mediation; otherwise, a court decision would be considered 'null and void' or annulled by law. The Supreme Court has even integrated mediation into the process or events in court. However, as previously stated, in reality the success rate of peacemaking or reconciliation, mediation and arbitration is very low. Training for new judges to serve as mediators is critical so that all judges in the State Court or even in higher courts can conduct the mediation process to reduce the backlog of cases in courts. Under the present conditions, this is an extremely challenging endeavour.

45 I. RAHMADI, *supra* n. 24, p. 72.