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RESEARCH ARTICLE

THE ESSENCE OF JUSTICE FOR THE LIVING LAW IN THE ALTERNATIVE DISPUTE RESOLUTION OF INDONESIA LEGAL SYSTEM.

By Dr Deity Yuningsih.

Senior Lecturer at Faculty of Law, Halu Oleo University, Southeast Sulawesi, Indonesia.

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Abstract

The Alternative Dispute Resolution (ADR) In Indonesia Legal System, is a model of dispute resolution which based on living law in Indonesia society. This model is often used other than the settlement of dispute through the court by Indonesia people. Whereas, the settlement of dispute through the court can guarantee legal certainty, because as guided by the statutory law. Based on that statement, this research describes essence of justice for the living law In the ADR In Indonesia Legal System. This research uses the type of normative legal research. It based on conceptual and regulation approach. This research is analysed with qualitative descriptive in using. The result of research shows that essence of justice which based on the living law in ADR, in principle, it focuses on the substantive justice for the sake of harmonization and peacefulness which based on cohesive living value in existence. It still appreciates the procedure of applicable in the Indonesia Society, such as colloquy based on kinship. So that, it yields for society's legitimated justice.

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Introduction:-

Dispute sometimes comes up in our life as a consequence of social relations between individuals or groups to each other. Folberg and Taylor (I Made Widnyana, 2007), argue that there are two types of disputes, among others: (1). intrapersonal conflict or conflict within the individual; and (2) interpersonal conflict or intergroup conflict. According to Folberg and Taylor's opinion, the second type can be considered as a conflict in the scope of legal object. The dispute contains conflict of law in relationship between community members, basically, it could lead disharmony because there are those whose neglected rights. The injured party, usually, will express dissatisfaction to the other. Since, they feel to get in loss. Based on that, in Indonesia society context, there is alternative legal instrument and legal mechanism which can be used as an attempt to resolve the dispute in order to restore such rights, namely the the settlement of disputes through the courts (litigation) and the the settlement of disputes through the outside court (non litigation).

Settlement of dispute by using a model of ADR, is also an integral part of the effort to implement progressive law as conceived by Professor Satjipto Rahardjo. It is more accommodating legal values which lives in Indonesian society context, which accentuates the legal sense for Indonesian people than the statutory law which emphasizes the ruling class' political will. This is often not accordance with the values of justice Indonesian society itself (Muhammad Jufri and Deity Yuningsih, 2016).

Corresponding Author:- By Dr Deity Yuningsih.

Address:- Faculty of Law, Halu Oleo University, Southeast Sulawesi, Indonesia.

In Indonesia, Legal effort through the court (litigation) is usually taken by people. But this effort does always depletes vigor, long time, and high cost. However, it requires the ability of law proceeding in the court. Settling of dispute through the court would produce a legal certainty since the judge's decision in winner and loser. The winner will take all of the loser, while the loser will feel dissapointed. For the people of Indonesia, it can terminate relationship and it will cause the new conflict.

There legal effort which does performance in Indonesia's legal system, namely the Alternative Dispute Resolution (ADR). The parties in dispute can choose it. This is an alternative dispute which not through the court. It is set out in Regulation of Number of 12 of 1999 on Arbitration and the Alternative Dispute Resolution. The ADR is one of the institutions for dispute resolution which is agreed by the parties in conflict. It is done which not involved the court by performance of negotiation, consultation, mediation, conciliation, or the involvement of legal expert (see Indonesia Regulation of Number of 12 of 1999).

The ADR, in principle, especially in consultation, negotiation, and mediation. It is recognized by Indonesia people as a form of dispute resolution in outside court through deliberation. This is known as a living law in Indonesia people since old time. In this context, the author does to research on ADR of Indonesia people as a living law in an effort to obtain justice. Actually, the living law in the context of Indonesia people, has been integrating into customary law as it is known as *adat* law. It is an unwritten law which does accommodate the values of justice in the legal sense of Indonesia people. Court decision, vice versa, it will be guided by statutory law which does glorify legal certainty.

Method of Research and Materials:-

This research uses normative legal research which is to examine basic norms in Indonesia's positive legal (Johny Ibrahim, 2008). This research, also uses regulation and conceptual approach (Peter Mahmud Marzuki, 2007). Regulation conceptual is useful for Indonesia regulation which concerned with legal issues of ADR, while the conceptual approach is used to analyze ADR in living law based Indonesia's legal system. Therefore, the conceptual approach is based on jurists' opinion and legal experts' view. This research uses written legal materials as analysis instrument, containing primer legal materials such as Indonesia Regulations on ADR, and secondary legal materials such as text books, law journal, law article, and scientific paper on law. Author analyses this topic research using interpretation of legal material substance based on legal theory and legal principle, in order to explain the nature of justice for ADR in Indonesia Living Law.

Result and Discussion:-

The result of research shows that living law in the Indonesia society of context, it becomes the main runway as a guidelines for dispute resolution of outside the court. The living law usually does include customary law (*adat* law). In Indonesia, dispute resolution of outside the court or ADR, it can be held if the parties in quarrel to choose it. There is a reason that dispute resolution of outside the court is preferable than through court. Because the settlement of dispute through the court has long procedure and convoluted. For example, Sasak Tribe located in Lombok, Nusa Tenggara Barat, is one of provinces of Indonesia. Sasak Tribe usually uses ADR to resolve disputes occurring among each other. Sasak people argue that settlement of dispute in ADR using, is preferred. ADR accommodates legal value contained in customary law (*adat* law). In Sasa Tribe, there is an institution in charge of maintaining the *adat* law. It is known as "Krama". It seems that this institutotion performing the role for dispute resolution of outside the court such as ADR. "Krama" has authority to hear the case based on *adat* law, and it imposes sanction of *adat* law. This institution is unique. It resolve disputes in Sasak Tribe not to issue a decision in lose or win, but its win-win solution. The leaders of "Kara" who act as judge attempts to give advice for parties in obedience of *adat* law as the living law. They suggest to their people for improving the quality of understanding on *adat* law values based on local wisdom. It is intended to achive a harmonious common life in worthy and well becoming (Syapruddin, 2014).

According to Hadikusuma (2003), dispute resolution of outside the court, in Sasak Tribe, among heirs is resolved based on five of *adat* law's principles. Those include in Indonesia tribes, as follows:

- a. Principle of divine and principle of self-control (*betel leq reden neneq* in Sasak Language);
- b. Principle of equal rihts and togetherness (*doe sopog, bareng ngepe* in Sasak Language);
- c. Principle of harmony and kinship (*awak sopog, saling peririq, saling angkat, saling ajinin, saling sedok* in Sasak Language);
- d. Principle of deliberation and consensus (*Soloh*);

e. Principle of Justice and *Parimirma* (*endeq naraq bine kire, tarik nyacap*)

Another example, Tolaki Tribe, is one of tribes living in Southeast Province of Indonesia. Rahmat Saini (2015) wrote that dispute on family law, such as inheritance problem, divorce, and quarrel. It was solved by using of Tolaki's *Adat* Law. Parties in dispute would complain to the chairman of village, known as *Kepala Desa*. In Rahmat Saini's writing that *Kepala Desa* with along prominent leaders of *Adat* Law, would do summoning for parties, they collected evidences and informations for unpleasantness among the parties. It would be resolved according to Tolakinese of *Adat* Law.

Until now, Tolakinese views that Tolaki's *Adat* Law still in keeping of justice, peacefulness, and welfare. Decision of Tolaki's *Adat* Law ties up Tolaki Tribe without differentiating of social status. Everyone who breaks *Adat* Law, it does consider as a person in saucy deed, so that he or she will be ostracized.

The ADR concept, it does provide creation for a good relationship among disputed parties. In author's view, basically, it is one way for dispute solution or alternative solution in settlement dispute without court procedure. In society's Indonesia legal culture, especially, legal conflict is solved through amicable way based on values in harmony and recognition of living law. However, the ADR concept, it does accomodate the living law as values recognized by society itself. The ADR concept does consider dynamic dispute resolution. This is very simpel because it can be done through co-operative solution. Also, it can be the model of dispute resolution which generates win-win solution.

In Von Benda Beckman's view that dispute resolution or dispute of legal conflict in simple condition of society where kinship or relationship is still very tight, it is usually there institution as a choice which settles conflict based on folk institution. This institution is the traditional institution which acts as guard regularity and magical balance in society itself (Sahnan, 2010).

Indonesia Legal System admits two kinds of legal format, as follows: Written Legal such as statutory law and Unwritten Legal such as customary law and *adat* law. Later, there are legal values which do provide living law as legal obeyed by Indonesia people. *Adat* Law contains them. *Adat* Law, actually, is unwritten legal which does not require a specific procedure. Unlike the written legal which requires a specific procedure. *Adat* law and customary law for Indonesia people is an actual law. Since it usually obeyed duly by Indonesia people.

In Professor Soepomo's view that *adat* law in Indonesia is living law since it is the embodiment of real legal sense of Indonesia people. *Adat* law will continue which follows headway of society itself. This opinion, also, is followed by Frederich Carl Von Savigny (1779-1861). He said that there was a legal embodied into people's soul (*volkgeist*) where law would flourish to expand with society itself. This opinion is known as Historical Jurisprudence. One of schools of law is followed by scholars of *adat* law in Indonesia, including Dr Guswan Hakim and Dr Ruliah, both lectures of Law Faculty, Halu Oleo University, located in Southeast Sulawesi Province of Indonesia (Jufrina Rizal, 2008).

There is same opinion expressed by Eugen Erlich. He is one of the pioneers of sociology of law. He said that Savigny's view on *volkgeist* was fact of law as a living law in the society. It was a living law of the people. Eugen Erlich said that the centre of gravity of legal development was not placed in legislation nor in juristic science, nor in judicial decision, but in society itself. Eugen Erlich, actually, is the first who used the term of "living law" in his popular book titled *Grundlegung der Sociologie des Recht*. This book has been translated into English "*Fundamental Principles of Sociology of Law*".

Professor Satjipto Rahardjo is one of Indonesia experts for sociology of law. He also agrees towards existence of *adat* law as a living law which reflects legal idea and legal sense of Indonesia people. On the other hand, Professor Djojodiguno explains *adat* law as the living law which in human creation on legal values. It can be flourished in evolution with its elasticity, so it provides different dispute resolution for the case in different legal event. Especially, the problem of rights and obligations in dispute (Deity Yuningsih, 2016).

The scholars of *adat* law in Indonesia have argument that *adat* law is simple and dynamic. It is not rigid which will receive the change and be responsive towards values in Indonesia society. Changing values is realistic in society. *Adat* law, in principle, stresses on substantive justice in order to reflect harmony and peacefulness based on compact

values in existence. This reason why *adat* law in frame work of dispute resolution, it based on living law. To reflect realistic substantive justice, then *adat* law has self-mechanism for dispute resolution. This mechanism does use deliberation in kinship which provides realistic justice as values legitimated by society itself.

In view of Robert Seidman, in his theory on “the law of the non transferability of law”, says that law could not be transferred away from society to another. Because law does not always permanently attached in a particular community. Also, not to be considered as traditional law in legal retardation (Deity Yuningsih, 2011). It means that different law can be effective for such society, since it can guarantee legal certainty and justice. However, such legal can provide justice in accordance with the needs of law for society itself.

According to author’s point, law as living values, it should be kept in order to guarantee social justice. In the Indonesia legal system context, *adat* law still does provide legal justice in accordance with legal awareness of Indonesia people. Therefore, effort to be positive legal in statutory law whereas legal values containing in it, not in accordance with needs of law for society itself. It will effect new conflict in society, including rejection of society.

Closing:-

Living law is a main principle used as the guidance in dispute resolution for Indonesia people, it does resolve disputes in outside court. ADR, basically, it can become a solution in dispute without the court. In Indonesia society context, ADR is very important because it accommodates the living law based on kinship in legitimated harmony. ADR for dynamic or simple people is suitable since it prioritizes co-operative solution and win-win solution.

The nature of justice in ADR based on living law, in principle, it more emphasizes on substantive justice in order to reflect harmonization and justice in compact legal values. The meaning of living law in this context, it based on *adat* law which recognizes exist procedure, such as colloquy in kinship. So that, it can achieve the justice as societal expectations in legitimacy. However, enforcement for living law depends on the professionalism of traditional leaders. Based on that, it is very important to give legal understanding and legal training on legal procedure, scope, including legal force in ADR based on living law in Indonesia society context.

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