

MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE SETTLEMENTS OF CIVIL DISPUTE IN THE COURTS BASED ON JUSTICE VALUES

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Abstract

Mediation is one of the alternative forms of dispute resolution. In the mediation, a win-win solution for the parties is sought in overcoming the dispute. In the settlement of civil cases in the court, it is prioritized mediation settlement, as stipulated in Supreme Court Regulations Number 1 Year 2008. However, the implementation of mediation in court based on Supreme Court Regulations Number 1 Year 2008 has not been effective because of obstacles in the implementation of mediation. The constraints must be sought to resolve the efforts by reconstructing the implementation of mediation as an alternative to civil disputes in court that can provide justice for the parties. This paper will give a reconstruction of mediation as the alternative settlement of civil dispute in the court. In this paper used methode legal research, primary data based on library and secondary data based on library research. The results of this journal is the implementation of the mediation process there are still many obstacles, including the lack of availability of certified mediators in each court and the lack of roles of the parties and legal advisers who insist to defend each other's desires, and advocates or legal counselors do not provide a true picture of the disputed case.

Keywords : Mediation, Civil, and Justice

A. INTRODUCTION

Conventionally dispute settlement is usually conducted in litigation or dispute settlement in court. In such circumstances, the positions of the disputing parties are highly antagonistic (opposite to each other). Even if it is finally taken, the settlement will solely as a last way after another alternative is not successful.

In this regard, it is necessary to find out and think about the way and system of dispute settlement which is fast, effective and efficient. It should be fostered and embodied a dispute resolution system that adapts to future economic and trade development rates, which have the ability to resolve disputes quickly and cheaply.

In addition to the conventional dispute resolution model through litigation of the justice system, in practice Indonesia is also introduced a relatively new model. This model is quite popular in America and Europe countries known as Alternative Dispute Resolution (ADR), which includes negotiation, mediation, conciliation, arbitration. Although dispute resolution can be

done using the ADR model, it does not rule out the possibility of settling the case in a litigation manner. The settlement of cases in litigation can still be used when a non-litigation settlement does not work. Thus, the use of ADR is one of the mechanisms for settling non-litigation disputes by considering all forms of efficiency and for future purposes as well as beneficial to the parties to the dispute. Law enforcement does not only happen through the process of justice (*pro justitia*). But it can also be through alternative dispute resolution (ADR), the practice is growing because of the increasingly complex, costly, and time-consuming judicial process without lost or win lost solutions. Things are getting worse due to unhealthy judicial practices such as improper principle violations, corruption, collusion and nepotism. In the alternative dispute resolution is a win-win solution.

The high volume of cases (especially civil cases) at the district court level, the higher courts, especially at the Supreme Court and review level is one of the reasons why the Supreme Court

Regulation Number 1 Year 2008 (SUPREME COURT REGULATIONS Number 1 Year 2008) on Mediation Procedures justice was issued.

Mediation is one of alternative dispute resolutions (abbreviated as ADR). ADR is a foreign term that needs to be synthesized in Indonesian. Various Indonesian terms have been introduced to various forums by various parties, such as the Dispute Resolution Selection, Dispute Resolution Alternative Mechanism (MAPS), non-court dispute options, and cooperative dispute resolution mechanisms.¹

The Supreme Court is called upon to further empower the judges to settle the case with the peace outlined in Article 130 of the HIR, through the mechanism of mediation integration in the justice system. This system is similar to the form of judicial connectivity with mediation or court connected mediation developed in various countries.²

Then the Supreme Court, on September 23, 2003 issued SUPREME COURT REGULATIONS Number 2 of 2003 on Mediation Procedures at the Court. Considering the consideration of SUPREME COURT REGULATIONS Number 2 Year 2003, it is possible to consider the need for institutionalization of the mediation process in the judicial system, namely: to overcome the pile of cases in court, so that an effective instrument is needed that will be able to overcome the possibility of court cases, including the accumulation of cases in the Supreme Court. One way is with the mediation system, by way of mediating the mediation into the proceedings in court. Mediation is effective because the process is faster and cheaper, and gives access to the parties to the dispute to obtain justice.

Regardless of the legal basis used SUPREME COURT REGULATIONS Number 2 Year 2003, which was later renewed by SUPREME COURT REGULATIONS Number 1 of 2008 has brought fresh air to the institutional change of the process of reconciling the parties to settle a civil dispute

from the voluntary into a mandatory. Why is an alternative mediation in resolving civil disputes in court currently ineffective? What are the constraints of mediation as an alternative to civil disputes settlement in the Simalungun District Court? How to reconstruct the effective and efficient mediation in resolving civil disputes in justice-based justice courts?

B. DISCUSSION

1. The effectiveness of mediation as an alternative in resolving the civil dispute in court;

Rachmadi Usman defined the word *mediasi* comes from English word "mediation" which means dispute settlement involving a third party as mediator or mediated dispute resolution, while the mediator is called a mediator or mediator.³

Soesilo Prajogo in the Dictionary of International and Indonesian Law explains that mediation is a peaceful dispute resolution process involving third party assistance to provide acceptable solutions to the parties to the dispute. The success of the mediation process is usually largely determined by the ability to diplomacy, the ability to provide impartial suggestions, the quality and neutrality of the parties required to mediate.⁴

Based on Article 1 paragraph (7) SUPREME COURT REGULATIONS Number 1 Year 2008 mediation is a way of resolving disputes through negotiation procedures to obtain agreement of the parties assisted by mediators. Every civil case in a court of first instance shall have mediation. After the lawsuit is filed with the court of first instance, then the chief judge will determine the judge of the assembly to examine and decide upon the case.

After the panel of judges opens the hearing at the first hearing, the first step

¹ Suyud Margono, 2000, *ADR (Alternative Dispute Resolution) dan Arbitrase*, Ghalia Indonesia, Jakarta, p. 35 and 36.

² Tjok Istri Putra Astiti, *Pemberdayaan Hakim Perdamaian Desa Dalam Penyelesaian Kasus Adat di Luar Pengadilan*, Buletin Musyawarah, 1 Juli 1997, p. 6.

³ Rachmadi Usman, 2003, *Pilihan Penyelesaian Sengketa di Luar Pengadilan*, Citra Aditya Bakti, Bandung, p. 79.

⁴ Soesilo Prajogo, 2007, *Kamus Hukum Internasional dan Indonesia*, Wacana Intelektual, Jakarta, p. 294.

taken by the judge is to order the parties to mediation. So it means that the existence and function of the first hearing is only a single event, namely ordering the parties obliged to first take mediation.

To be able to judge whether the mediation has been effective in resolving civil disputes in court, he requires an indicator in his judgment. In this case the indicators of assessment are: the settlement of disputes in a relatively shorter time, the number of cases in arrears is much less than incoming cases, the availability of certified mediators, and adequate infrastructure facilities.

Factors affecting the mediation process in resolving civil disputes in court, obtained are as follows:

a. Mediator's expertise;

The results of interviews with Ulina Marbun⁵, judge and mediator at the Tanjung Balai District Court stated that: "Not all judges can act as good mediators. To be a good mediator requires skill and expertise. To be able to skill and skill should first take mediator training. In addition it also requires the sincere intention of a mediator to settle the disputed parties " .

The lack of availability of certified mediators in each of the courts is one of the reasons why there are still many cases that have not been successful at the mediation level. The mediator tends to position himself not much different from his function as a judge in front of the trial while conducting mediation.

The resulting judicial products in the settlement of cases filed against him, almost 100% of conventional decisions are winning or losing. It is rarely found solutions based on win-win solution. Based on this fact, the seriousness, ability, and dedication of judges to reconcile can be said

⁵ Interview with the Tanjung Balai District Court, on January 15, 2016.

to be very barren. As a result, the presence of Article 130 HIR, Article 154 RBG, in the procedural law is mere decoration⁶. In accordance with the facts, the success of mediation in resolving civil disputes in the Simalungun District Court almost never happened.

b. Role of the parties and legal advisor.

If both parties have insisted on maintaining their individual desires, then the mediation cannot be continued or in other words fails, so it must be separated. In matters of psychology like this will be difficult to find a solution because it is human beings have limitations in that regard.

However, it often also the failure of mediation caused by advocates or legal advisor. This happens because sometimes lawyers or legal counselors do not give a true picture of the case in dispute. Even impressed legal counsel hinders peace.

2. The mediation constraint as one of the alternative solutions to civil disputes in the Simalungun District Court;

The dispute resolution through mediation is different from court settlement or arbitration because the mediator has no authority to decide disputes between the parties.⁷ Dispute resolution options through mediation greatly outweigh the benefits of dispute resolution through the litigation path. However, from various advantages or benefits obtained, there are many obstacles found in the empowerment of SUPREME COURT REGULATIONS Number 1 Year 2008. The constraints or weaknesses are influenced by several factors. Factors affecting mediation empowerment include the following:

⁶ M. Yahya Harahap, 2006, *Hukum Acara Perdata Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, Sinar Grafika, Jakarta, p. 241.

⁷ Garry Goodpaster, 1993, *Negosiasi dan Mediasi, Sebuah Pedoman Negosiasi dan Penyelesaian Sengketa Melalui Negosiasi*, ELIPS Project, Jakarta, p. 25.

- a. The parties do not obey orders. If the judge instructs the parties to mediation, neither both party nor one party disregards it by, for example, not choosing a mediator within the prescribed time limit or for example refusing to attend a meeting scheduled by the mediator, there is no sanctions may be granted to force ;
- b. One party is not present. At the first hearing the judge is required to submit an order for the dispute to be resolved through mediation. However, if at a determined trial one of the parties is absent, then the Supreme Court Regulations also does not regulate what action to be performed by the judge;
- c. The court authority to call the parties or attorneys who do not want to be present, in the Supreme Court Regulations is not clearly regulated. In the event that the parties have appointed a legal representative who will represent them in the mediation process, where there shall be a special power of attorney, which is also not clearly regulated in the Supreme Court Regulations ;
- d. Charging honorarium to the parties if using mediator services outside the court;
- e. Less available means, where the mediation in court does not yet have a special temple to conduct the mediation. During this time the mediation only borrowed a place in one of the court rooms.

In addition to the matters described above, the socialization of the role and function of mediation as one of the legal instruments in the effort to resolve disputes has not been optimally done, so the people who basically want the system and mechanism of problem solving is simple, fast and cheap does not respond well and correctly to the existence of the mediating institution.

Constraints or barriers to mediation in civil court settlement in court, among others:

- a. Lack of mediator resources, in which the mediator has a very big role in the successful process of mediation. Therefore, a mediator must have special expertise in the field of mediation. It has also been required by Supreme Court Regulations , where a mediator, whether of a judge or not, must have been certified by the mediator and has undergone mediator training;
- b. The reluctance of legal practitioners to support the mediation process. The tendency of legal practitioners or parties concerned with the status quo not to suggest mediation to clients.

3. Effective and efficient mediation reconstruction in resolving civil disputes in High Court based on justice.

The underlying philosophy of mediation is to authorize the parties to resolve their own dispute. The mediator makes no decision on the dispute of the parties. The mediator exercises this philosophy by helping the parties to negotiate cooperatively. The mediator remains neutral and impartial to one party including the results achieved. An outcome will be good if it has been carefully considered by the parties. A mediator can only offer stakeholder solutions, help them to achieve results and convince them to do well.

In the order of values (something considered good and bad, right and wrong), mediation is nothing more than a peace process desired by the parties to achieve a common good. The value to be achieved by mediation is the value of the co-balance that is wrapped with the value of legal certainty and justice.

The philosophical mediation is the philosophy of the Indonesian nation. It is seen in Pancasila in the fourth precept that is "Welfare led by the wisdom of wisdom in the representation of representatives".

The principle of deliberation is the basic value used by disputants in finding a solution, especially outside the court. The value of consensus deliberations is concretized in a number of alternative forms of dispute resolution such as mediation, arbitration, negotiation, facilitation and other forms of dispute resolution. In the history of Indonesia's legislation the principle of peaceful consensus-deliberation is also used in the judiciary, especially in the settlement of civil disputes.

In indigenous and tribal peoples, it is also preferred to resolve disputes through deliberations, aimed at bringing about peace within the community. The discussion route is the main route used by the customary law community to resolve the dispute, because in the deliberation there will be a peace agreement that will benefit both parties.

Mediation in the literature of Islamic law can be likened to the concept of *tahkim* which etymologically means making a person or a third party or called *hakam* as the mediator of a dispute. *Hakam* must be heard his pen. In the event of a dispute, the parties go to the judge. In the verses of the Qur'an, Allah advises people to resolve disputes through deliberation. This is in line with the nature of *tahkim* whose nature of the settlement of the dispute is consensus (agreement) by way of negotiation. To be completed without going through litigation process. *Hakam* has no authority to make decisions. Thus basically mediation is the development of negotiation (negotiation is also an alternative means of dispute resolution) with the help of neutral third parties as mediators. The mediator does not act as a judge because the mediator has no decision-making authority who has the right to make decisions or decide the decisions are the parties to the dispute agreed upon in the course of the mediation process.

Supreme Court Regulations Number 1 Year 2008 has been in effect for

approximately eight years. In that time period based on research result of researcher was Supreme Court Regulations Number 1 Year 2008 has not been successful in solving the case brought to court. As to how successful the application of Supreme Court Regulations has been, justice for the justice seeker has not been established. Likewise in the case of cases, there is still a buildup of cases at the Supreme Court level.

Supreme Court Regulations Number 1 of 2008 has been replaced with the enactment of Supreme Court Regulations Number 1 Year 2016. There are some changes in Supreme Court Regulations Number 1 of 2016, which was not previously stipulated in Supreme Court Regulations Number 1 Year 2008. Supreme Court Regulations Number 1 Year 2016 is getting better. Factors causing failure of mediation that was not previously provided for in Supreme Court Regulations Number 1 Year 2008 has been regulated in Supreme Court Regulations Number 1 Year 2016. So it is expected Supreme Court Regulations Number 1 Year 2016 is better than Supreme Court Regulations Number 1 Year 2008.

Effective and efficient mediation reconstruction of civil justice disputes based on legal system theory, proposed by Lawrence M. Friedman, which states that there are 3 (three) major elements of the legal system, namely:

a. Legal substance;

Supreme Court Regulations 's No Performance Difficulties 1 of 2008, one of the causes is that the provisions contained in the Supreme Court Regulations are not perfect, or the Supreme Court Regulations has not set the provisions of mediation more detailed and complete, for example there is no incentive for the mediator of the judge, while the non-judicial mediator gets incentives in accordance with the agreement- s parties. This causes the tendency of judge media-tor

judge less and maximum in seeking mediation. However, on the other hand, in accordance with the results of the study, there is no single case in the Pematangsiantar and Simalungun District Courts using mediator services outside the court. This is due to the burden of expenses borne by persons other than the costs to court if the parties use the services of mediators outside the court. So it is necessary to consider the state to provide incentives to mediation outside the courts that are successfully reconciled by the mediator. This is reasonable because the state also provides legal assistance to the public in seeking justice, both in civil and criminal cases. With the success of the parties settling their dispute through mediation means the people seeking justice have found it. In Supreme Court Regulations Number 1 Year 2016, it is also not regulated. So mediators outside the court will not take part in resolving disputes.

The court has authority to call the parties or attorneys who do not want to be present, in the Supreme Court Regulations is not clearly regulated. In the event that the parties indicate a lawyer who will represent them in the mediation process, where there should be a special power of attorney, which is also not clearly regulated in the Supreme Court Regulations . However, in Supreme Court Regulations Number 1 Year 2016 has clearly determined that for the claimant who did not carry out mediation in good faith the plaintiff's lawsuit will be declared unacceptable, and on the verdict there is no legal effort of appeal or cassation.

b. Legal structure

Goodwill is essential to the success of the mediation process in order to win a win-win solution. If the parties do not want to see their needs and only pursue profit, then peace through mediation will be difficult to achieve. With Supreme

Court Regulations Number 1 of 2008 Article 8 paragraph (1), the mediator of each court comes from judges and not judges who have accredited certificates by the Supreme Court of the Republic of Indonesia. Judges are assigned as mediators where they also need to get training on mediation. A mediating judge may be a judge in a court case and a judge is not a court case. However, there are obstacles, will it succeed in the implementation of mediation by mediator—the mediator is the judge case examiner? This is impossible because the judge mediator will not really seek peace because it will reduce his job, because there are also judges who are not interested in realizing the peace of the parties.

With the mediation process, the mediator is one of the judges of the case examiner who has known to sit down the real issue through the caucus, would tend to side with one side and if peace fails, then the physician is no longer impartially even if there is a condition of separation of mediation from litigation in Article 19 of this Supreme Court Regulations . With the lack of number of judges who already have mediator certificates, the head of the court needs to issue a policy by appointing an additional judicial mediator, especially if the number of civil cases in the jurisdiction is much in order to realize a fairer and balanced mediation process.

c. Legal culture

Legal culture is an atmosphere of social thinking and social power that determines how laws are used, avoided, or abused. The legal culture is closely related to the legal consciousness of society. The higher the awareness of community law will create a good legal culture and can change the mindset of society about the law so far. Simply put, the level of public compliance with the law is

one indicator of the function of law.

Article 19 paragraph (4) Supreme Court Regulations Number 1 Year 2008 states that the mediator cannot be subject to criminal or civil liability for the content of the peace agreement from the results of the mediation process. This is because basically the content of the substance of the peace agreement is the result of the discussion of the parties, while the mediator has no authority related to the agreement. Thus, a conclusion is drawn that the parties are responsible for the content of the peace agreement.

C. CONCLUSION

Mediation as an alternative in resolving civil disputes in the courts is currently ineffective, because in the implementation of the mediation process there are still many obstacles, including the lack of availability of certified mediators in each court and the lack of roles of the parties and legal advisers who insist to defend each other's desires, and advocates or legal counselors do not provide a true picture of the disputed case. Even impressed counsel to prevent peace;

- a. Mediation constraints as an alternative to civil disputes settlement in the Simalungun District Court, are the reluctance of legal practitioners to support mediation process and lack of mediator resources;

- b. Effective and efficient mediation reconstruction of a justice-based justice court dispute from: (i) the legal substance should be considered in the Supreme Court Regulations article for the state to provide incentives for mediation outside the court successfully reconciled by the mediator and court authorities to call the parties or attorneys who do not want to attend, (ii) the legal structure with the training court leaders need to issue a policy by appointing additional judicial mediators, especially if the number of civil cases in the jurisdiction is classified as much in order to realize more mediation processes fair and balanced; and (iii) legal culture by raising awareness of community law. The higher awareness of community law will create a good legal culture and can change the mindset of the public about the law so far.

To law enforcers, in particular judges and lawyers / advocates to further empower mediation in civil disputes in public courts, by encouraging the parties to play a direct and active role in the mediation process, explaining to the parties the benefits of mediation and achieving a settlement mediation;

- a. Improve existing facilities and infrastructure in the courts for mediation facilities such as adequate mediation chambers;
- b. Disputes in civil disputes use mediation mechanisms to resolve in good faith to reach a win-win agreement, before deciding to pursue a litigation settlement.

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