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# The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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## TABLE OF CONTENTS

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Front Page .....	i
Information of the International Seminar .....	ii
Committee Composition .....	iii
Preface.....	iv
Greeting From The Dean Faculty of Law .....	vi
<b>INDONESIA’S KPK AND NSW’S ICAC: COMPARISONS AND CONTRASTS</b>	
Prof. Simon Butt .....	1
<b>CAN INDONESIA FREE ITSELF FROM CORRUPTION IN 2020?</b>	
Prof. Dr. Hikmahanto.,S.H.,LLM .....	4
<b>AN ACT TO ESTABLISH THE ANTI-CORRUPTION AGENCY, TO VEST POWERS ON OFFICERS OF THE AGENCY AND TO MAKE PROVISIONS CONNECTED THEREWITH.</b>	
Rohimi Shapiee.....	7
<b>STRATEGY TO CREATE INDONESIA FREE CORRUPTION IN 2020</b>	
Dr. Jawade Hafidz, S.H., M.H .....	11
<b>THE NETHERLANDS INGLOBAL CORRUPTION</b>	
Siti Malifah Marlou Feer, M.A. ....	28
<b>ROBUST YET FRAGILE: EFFORTS IN COMBATING CORRUPTION IN INDONESIA</b>	
Laras Susanti.,S.H., LLM.....	33
<b>LEGAL STATUS OF AKTOR’S FOR CORRUPTION (In the Perspective of Islamic Law)</b>	
Sumarwoto Umar .....	37
<b>THE ROLE OF LAW IN THE POVERTY REDUCTION STRATEGY</b>	
Lantik Kusuma Aji .....	46
<b>THE INDEPENDENCY OF THE INSTITUTION FOR THE PROTECTION AND THE ESTABLISHMENT OF HUMAN RIGHTS TOWARDS THE GLOBALIZATION ERA 2020</b>	
Khalid .....	55
<b>THE URGENCY OF ANTI CORRUPTION EDUCATION FOR COLLEGES IN INDONESIA</b>	
Siska Diana Sari.....	62
<b>THE PROBLEMS OF DIVORCE IN CUMULATION AT THE RELIGIOUS COURTS BASED ON THE PRINCIPLES OF SIMPLE, FAST AND LOW COST</b>	
Elis Rahmahwati.....	78
<b>DISPARITIES DECISION RELATED TO INTERPRETATION OF ARTICLE 2 AND 3 CORRUPTION ERADICATION ACT</b>	
Agung Widodo.....	87
<b>DIVERSITY ADULT AGE LIMITS POSITIVE LAW IN INDONESIA (Studies in Multidisciplinary Perspective)</b>	
Muhammad Andri .....	102

<b>THE APPLICATION OF BALANCE IDEA IN SETTLEMENT OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION</b> Yati Nurhayati.....	111
<b>MODERNIZATION LAW AS A CRIME CORRUPTION VERY EXCEPTIONAL THROUGH ENFORCEMENT OF ETHICS</b> Dr. Sukresno, SH, M.Hum .....	118
<b>CORRUPTION POTENCIES IN LAND USE POLICY (A Case Study in Kuningan Regency)</b> Haris Budiman .....	126
<b>CORRUPTION PREVENTION AND CONTROLS</b> INP Budiarta .....	133
<b>ISLAMIC LAW VALUES TRANSFORMATION IN THE RECONSTRUCTION OF THE LEGALITY PRINCIPLE OF INDONESIAN CRIMINAL CODE</b> Sri EndahWahyuningsih .....	145
<b>JUSTICE AND CHARITY IN JAKARTA’S NORTH COAST RECLAMATION PROCESS THAT WILL LEAD TO INDONESIA CLEAN OF CORRUPTION</b> Untoro .....	155
<b>CORRUPTION CRIMINAL SANCTIONS WITH VALUES OF JUSTICE-BASED</b> Zulfiani.....	162
<b>THE REFLECTION OF ISLAMIC BANKING IN THEORY AND PRACTICE</b> Anis Mashdurohatun .....	171
<b>THE IMPLEMENTATION OF LOCAL WISDOM SIRI’NA PACCE AS AN EFFORT OF CORRUPTION ERADICATION IN INDONESIA</b> Muh. Afif Mahfud .....	181
<b>DISCOURSE POLITICAL LAW IN INDONESIA ON A COMPLETION OF PLATO PHILOSOPHY</b> Adrianus M. Nggoro,SH.,M.Pd.....	189
<b>STUDY OF INDONESIA’S PARTICIPATION IN ICSID</b> Agus Saiful Abib.....	202
<b>NOTARY ROLE IN THE IMPLEMENTATION OF EXECUTION PROCUREMENT OF GOODS AND SERVICES ARE FREE OF CORRUPTION BASED ON THE PRINCIPLE OF GOOD GOVERNANCE</b> Aris Yulia .....	211
<b>ANALYSIS WIRETAPPING AUTHORITY UPPER KPK LAW ENFORCEMENT IN THE PERSPECTIVE OF HUMAN RIGHTS</b> Ariyanto,SH.,MH.....	221
<b>SOCIAL WORKING PENALTY AS SOLUTION IN ERADICATING CORRUPTION IN INDONESIA</b> Desy Maryani.....	232
<b>LEGAL POLITICSOF EMPLOYMENT IN TERM OF PART OF TASK HANDOVER TO OTHER COMPANIES IN INDONESIA</b> Endah Pujiastuti.....	244

<b>RESOLUTION OF DISPUTES OF OUTSOURCING WORK FORCE IN THE COMPANY EMPLOYING OUTSOURCING SERVICE</b> Pupu Sriwulan Sumaya .....	256
<b>THE APPLICATION OF CORRUPTION LAW TO WARD CRIMINAL ACT IN THE FIELD OF FORESTRY</b> Ifrani .....	267
<b>THE EFFORTS OF ERADICATION OF CORRUPTION THROUGH INSTRUMENTS OF MONEY LAUNDERING LAW AND RETURN ACTORS' ASSETS</b> Yasmirah Mandasari Saragih.....	276
<b>AFFIRM ROLE OF EXISTENCE <i>RECHTSVERWERKING</i> TO ACHIEVING LEGAL CERTAINTY IN LAND REGISTRATION</b> Rofiq laksamana, Setiono, I Gusti Ayu Ketut Rachmi Handayani, Oloan Sitorus.....	287
<b>ANTI-CORRUPTION EDUCATION AT AN EARLY AGE AS A STRATEGIC MOVE TO PREVENT CORRUPTION IN INDONESIA</b> Ida Musofiana.....	304
<b>FREED INDONESIA'S CORRUPTION BETWEEN HOPE AND REALITY</b> Dr. Tongat, SH., MHum., Said Noor Prasetyo, SH., MH.....	313
<b>UTILIZATION OF INDONESIA MARINE RESOURCES IN AN EFFORT TO REALIZE INDONESIA TOWARDS THE SHAFT OF THE MARITIME WORLD</b> Dr.Lathifah Hanim, SH.M.Hum., M.Kn. and Letkol (mar) MS.Noorman, S. Sos., M.Opsla.....	319
<b>POTENTIAL CORRUPTION IN THE VALIDATION POLICIES ON ACQUISITION TAX OF LAND AND OR BUILDING</b> Lilik Warsito.....	325
<b>THE EFFORT OF LAW ENFORCEMENT IN COMBATING CORRUPTION IN SOUTH SUMATERA</b> Sri Suatmiati.....	334
<b>ETHICAL PERSPECTIVE AND THE MAPPING OF NORM IN CORRUPTION ACT</b> Siti Zulaekhah.....	344
<b>AN EXPANSION OF CONCEPT THE STATE ECONOMIC LOSS IN CORRUPTION IN INDONESIA</b> Supriyanto, Hartiwiningsih, Supanto.....	354
<b>JURIDICAL STUDIES ON SUBSTANCE AND PROCEDURE OF THE DISMISSAL OF THE PRESIDENT AND/OR VICE-PRESIDENT AFTER THE REFORMATION</b> Siti Rodhiyah Dwi Istinah.....	364
<b>THE ROLE OF THE SHARIA SUPERVISORY BOARD IN THE FRAMEWORK ENFORCING SHARIA PRINCIPLES AT THE INSTITUTE OF ISLAMIC BANKING IN SEMARANG</b> Aryani Witasari.....	376
<b>SEMARANG CITY GOVERNMENT ROLE IN CONSERVATION AND ENVIRONMENTAL PROTECTION TO THE CAPITAL OF THE NATIONAL HERITAGE IN INDONESIA</b> Achmad J Pamungkas ( <i>Indonesia</i> ), Carlito Da Costa ( <i>Timor Leste</i> ) .....	390

<b>STUDYING THE WISDOM OF ZAKAT</b> Moch. Gatot Koco (Indonesia), Basuki R Suratno (Australia) .....	398
<b>HOMOLOGATION RECONSTRUCTION IN BANKRUPTCY THAT IS BASED ON DIGNIFIED JUSTICE</b> Agus Winoto .....	410
<b>RECONSTRUCTION OF EXECUTIVE AND LEGISLATIVE AUTHORITY IN MAKING GOOD GOVERNANCE (GOOD GOVERNANCE) VALUES BASED ON WELFARE</b> Mohamad Khamim .....	420
<b>THE TASK RECONSTRUCTION AND BPKP'S AUTHORITY IN THE CASE OF JUSTICE VAUE BASED CORRUPTION</b> Sarbudin Panjaitan .....	429
<b>THE RECONSTRUCTION OF MADLIYAH AND IDDAH MAINTENANCE AND MUT'AH IN DIVORCE CASE FOR JUSTICE AND WELFARE</b> Mustar .....	438
<b>JURIDICAL ANALYSIS OF THE ALLEGED CRIMINAL OFFENSE TO MANUFACTURE A NOTARY DEED</b> Subiyanto .....	446
<b>REVITALIZATION DEAL IN AKAD HYBRIDS IN SHARIA BANKING VALUE BASED ISLAMIC JUSTICE</b> Masduqi .....	452
<b>RECONSTRUCTION OF LEGAL PROTECTION DISTRICT HEAD IN THE ELECTION IMPLEMENTATION OF VALUE-BASED JUSTICE</b> Kukuh Sudarmanto Alugoro .....	462
<b>ABUSE OF AUTHORITY OFFENSE THEOLOGICAL RECONSTRUCTION LAW ERADICATION OF CORRUPTION (LAW NUMBER 31 OF 1999 JO. LAW NUMBER 20 OF 2001) BASED ON VALUE OF JUSTICE</b> As'adi M. Al-ma'ruf .....	472
<b>RECONSTRUCTION OF THE DAILY PAID WORK AGREEMENT IN THE EMPLOYMENT LAW BASED ON JUSTICE</b> Christina N M Tobing .....	479
<b>THE LAW AND THE IMPACT OF MARRIAGE SIRRI</b> Sahal Afhami .....	489
<b>CRIMES AGAINST CHILDREN AS ACTORS</b> Muhammad Cholil .....	503
<b>RECONSTRUCTION OF CRIMINAL PROCEDURAL LAW (KUHP) ABOUT THE DETENTION</b> Muhammad Khambali .....	512

<b>BASED ON JUSTICE PROBLEMS OF DISPUTE RESOLUTION REGIONAL CHIEF ELECTION (GOVERNOR, REGENTS AND MAYOR)</b>	
Esti Ningrum .....	520
<b>RECONSTRUCTION REGIONAL MINIMUM WAGE (UMR) IN RENEWAL OF EMPLOYMENT LEGAL REMEDIES BASED INDONESIA THE VALUE JUSTICE PANCASILA</b>	
Urip Giyono .....	531
<b>IMPLEMENTATION OF LAW AS TO MAINTAIN SECURITY IN THE CONTEXT OF PROFESSIONAL POLICE POLMAS (CASE STUDY IN LAMPUNG POLICE)</b>	
Muhammad Yaman .....	539
<b>RECONSTRUCTION OF CRIMINAL SANCTIONS PENAL CODE ACTORS ON ABORTION CRIME BASED ON THE VALUE OF JUSTICE</b>	
Hanuring Ayu Ardhani Putri .....	549
<b>REGISTRATION FIDUCIARY GUARANTEE REALIZE LEGAL PROTECTION OF CREDITORS AND DEBTOR</b>	
Ansharullah Ida .....	556
<b>RECONSTRUCTION OF LEGAL DISPUTES MEDIATION IN HEALTH CARE FOR PATIENTS HOSPITAL BASED ON THE VALUE OF JUSTICE</b>	
Teguh Anindito .....	569
<b>RECONSTRUCTION OF CRIMINAL SANCTIONS AGAINST CRIME OF ACTORS AND MURDER MURDER IN PLAN BASED ON VALUE OF JUSTICE CRIMINAL CODE</b>	
Maria Marghareta Titiek Pudji Angesti Rahayu Teguh Anindito .....	579
<b>IMPLEMENTATION OF PENAL MEDIATION IN CRIMINAL LAW</b>	
Aji Sudarmaji .....	587
<b>FAIR SETTLEMENT RECONSTRUCTION OF PROBLEMATIC CREDIT DISPUTE AT BANK RAKYAT INDONESIA (STUDY CASE AT MEDAN-SINGAMANGARAJA BRI BRANCH OFFICE)</b>	
Bachtiar Simatupang .....	594
<b>RECONSTRUCTION OF THE WASTE MANAGEMENT LAW BASED ON WELFARE VALUE</b>	
M. Hasyim Muallim .....	616
<b>RECONSTRUCTION LAW OF PUNISHMENT AGAINST CHILDREN NARCOTICS ABUSE-BASED PROGRESSIVE LAW</b>	
Salomo Ginting .....	625
<b>LEGAL PROTECTION PROBLEM OF WIFE AND CHILDREN OF POLYGAMY SIRRI IN INDONESIA</b>	
Muhlas .....	639

<b>IDEAL RECONSTRUCTION OF REHABILITATION PUNISHMENT FOR NARCOTICS ADDICTS AND ABUSER'S VICTIMS JUSTIFIED BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NO. 35 YEAR 2009 (CASE STUDY IN SUMATERA UTARA PROVINCE)</b> Ahmad Zaini .....	648
<b>IMPLEMENTATION OF ACCELERATION SYSTEMATIC LAND REGISTRATION FULL IN HUMBANG HASUNDUTAN DISTRICT</b> Ruslan .....	658
<b>RECONSTRUCTION OF STATUS AND AUTHORITY OF THE SHARIA COURT IN THE NATIONAL JUDICIAL SYSTEM BASED ON JUSTICE</b> Jufri Ghalib .....	667
<b>RECONSTRUCTION OF LIABILITY NOTARY PUBLIC OFFICERS TO ACT AS A VALUE-BASED JUSTICE</b> Elpina .....	679
<b>RECONSTRUCTION OF CONSUMER PROTECTION LAW IN MAKING THE BALANCE BUSINESS BASED BUSINESS AND CONSUMER VALUE OF JUSTICE</b> Ramon Nofrial .....	693
<b>RECONSTRUCTION OF LAND USED RIGHT EIGENDOM VALUES BASED ON JUSTICE AND LEGAL CERTAINTY</b> Hakim Tua Harahap .....	706
<b>RECONSTRUCTION OF DIVERSION CONCEPT IN CHILD PROTECTION OF CONFLICT WITH THE LAWS BASED ON THE VALUE OF JUSTICE</b> Ulina Marbun .....	726
<b>RECONSTRUCTION OF PARATE EXECUTION MORTGAGE RIGHTS TO LAND BASED ON THE VALUE OF JUSTICE</b> Zaenal Arifin .....	740
<b>THE RECONSTRUCTION OF DIVORCE DUE TO MARITAL STATUS UNDER THE UNAUTHORIZED GUARDIAN AS VALUE OF JUSTICE</b> Abdul Kholiq .....	751
<b>THE RECONSTRUCTION OF LEGAL AID LAW FOR CHILDREN WHO GET CONFLICT WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON THE VALUE OF PANCASILA</b> Adi Mansar .....	767
<b>MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE SETTLEMENT OF DECLINE IN THE COURTS BASED ON THE VALUE OF JUSTICE (Study at the Simalungun District Court)</b> Mariah S.M. Purba .....	778
<b>POLYGAMIC POLICY IN INDONESIA (Analysis of Polygamic Arrangements and Practices 1959-2015)</b> Warman .....	790

<b>LAW ENFORCEMENT AGAINST CORRUPTION IN PERSPECTIVE OF HUMAN RIGHTS IN INDONESIA</b> Sekhroni .....	798
<b>THE PRINCIPLE OF NATURAL JUSTICE AND HUMAN'S RIGHT PROTECTION FOR CITIZENS IN ERADICATION OF CORRUPTION IN INDONESIA</b> Indriyana Dwi Mustikarini .....	809
<b>PREVENTING LAND MAFIA USING POSITIVE LAND REGISTRY SYSTEM</b> Bambang Sulistyowati .....	816
<b>UNRULY PASSENGER IN AVIATION: THE REGULATIONS AND CASES IN INDONESIA</b> Adya Paramita Prabandari .....	826
<b>EDUCATION ANTI-CORRUPTION IN INDONESIA: PROBLEMS, CHALLENGES AND SOLUTIONS</b> Alwan Hadiyanto .....	839
<b>SPIRITUAL URGENCY OF RELIGIOUS AND EXPENSES OF EVIDENCE IN COMBATING CORRUPTION IN INDONESIA</b> Sulistyowati .....	852
<b>SUE FOR THE STATE ADMINISTRATION OF JUSTICE IN INDONESIA</b> Sarjiyati .....	863
<b>CONSISTENCY MODEL OF COURT DESIGNATION TO FOSTER PARENT RIGHTS AUTHORITY DUE TO DIVORCE ON CHILDREN</b> Erna Trimartini .....	873
<b>AN INVESTIGATION AUTHORITY OF CRIMINAL ACT ON CORRUPTION IN CRIMINAL JUSTICE SYSTEM IN INDONESIA</b> Sukmareni .....	885
<b>PRO CONS THE EXISTENCE OF DEATH PENALTY IN CORRUPTION ACT OF 1999 IN INDONESIA</b> Anis Rifai .....	903
<b>PENAL MEDIATION IN SOLVING MEDICAL MALPRACTICE CASES AS AN ALTERNATIVE OF PENAL SANCTIONS BASED ON LOCAL WISDOM</b> Sri Setiawati .....	913
<b>SPECIAL PROTECTION OF CHILDREN IN CRIMINAL JUSTICE SYSTEM</b> Achmad Sulchan .....	922
<b>MORAL REFORM BUREAUCRACY AS PREVENTION OF ILLEGAL PAYMENTS TO INDONESIA CLEAN OF CORRUPTION</b> Herwin Sulistyowati .....	932
<b>STANCE AND AUTHORITY OF PEOPLE'S CONSULTATIVE ASSEMBLY DURING REFORMATION ERA 1945</b> Ahmad Mujib Rohmat .....	944



<b>TAXES AND ALMS SEEN FROM ISLAMIC LAW</b>	
Mohammad Solekhan .....	954
<b>DIVERSION IN COURT (Case Studies in Karanganyar District Court)</b>	
Anita Zulfiani .....	964
International Seminar	
Photos.....	971

**MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE  
SETTLEMENT OF DECLINE IN THE COURTS BASED ON THE VALUE OF  
JUSTICE (Study at the Simalungun District Court)**

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**ABSTRACT**

PERMA No. 1 of 2008 on court mediation procedure is a refinement of the PERMA No. 1 of 2003, concerning the mediation procedure in court. Alternative dispute resolution through mediation aimed at creating a connection or a direct connection between the parties to have the dispute. Based on the above, mediation plays an important role, but in fact the success rate of mediation in court is still very low. I researched this research establishes, that the main problem of the effectiveness of mediation in the District Court in Simalungun and Pematangsiantar, obstacles encountered in the implementation of mediation in state court in the implementation of the mediation solution.

The method used in this study is an empirical sociological research study to determine the Effectiveness of law from the perspective of the nature of this research is descriptive. The results of this study show that the effectiveness of mediation is still low to solve dispute.

Obstacles encountered in the implementation of mediation in court because the parties did not understand the goodness and benefits of mediation, the role of Advocates less supportive and limitations of a mediator professionals besides facilities mediation process and efforts to overcome it by pursuing the room and mediators were appointed based on considered able to explain the process mediation, and the factors that most substances is the factor structure of the law, legal factors and cultural factors of law, the solution in the implementation of mediation in court additional is expected establishment of the implementation of training and education to become mediators area so as to facilitate legal practitioners, legal academics and legal scholars gain training and education to be a mediator, that mediation can work as expected.

**Keywords: Mediation, One Alternative, Dispute**

## A. Background

A big problem facing our nation is the dilemma that occurs in the field of law enforcement. On one side the quality and quantity disputes that occur in society tends to increase from time to time. While on the other hand, the court states that retain the authority according to the legislation have relatively limited capabilities, so that from these conditions there was a buildup of cases, the cause of delinquency cases at the Supreme Court level.

Law enforcement does not only occur through the judicial process (*pro justitia*). But it can also be through alternative dispute resolution (*alternativedispute resolution/ADR*), this practice is growing because of the judicial process increasingly complex, costly, and time consuming with the output (*output*) lose or win (win lost solution). Circumstances worsened due to various judicial practice unhealthy breach the principle of impartiality, the act of corruption, collusion and nepotism. In the alternative dispute resolution that is intended is a win-win solution.

Concept solve dispute by mediation process its uses a win-win solution of win together, has long been known in Indonesia customary law. Community tradition (law) has long been customary resolve disputes through traditional institutions, the justice of the peace of the village. Usually acting as a justice of the peace of this village is the village chief or the head of the people, which is also the leader / head of customs and religion. A person in charge of the village head not only deal with matters of government, but also has a duty to resolve disputes that arise in society (legal) customary. In other words, the position and duties of the village head was also running affairs as a justice of the peace village (*dorpjustitie*).

The integration of mediation as an alternative dispute resolution in civil court in the beginning there has been arranged on civil procedure set out in Subsection 130 HIR / Subsection 154 RBg. Then the Supreme Court, on 23 September 2003 the Supreme Court issued a regulation (PERMA) No. 2 of 2003 on Mediation Procedure in court. Then Perma No. 2 Year 2003 changes with PERMA No. 1 of 2008 has brought a fresh wind to the institutional change process to reconcile the parties to settle a civil dispute from voluntary becomes something that is mandatory.

With the enactment of PERMA No. 1 of 2008 on Mediation Procedure Court, then any particular civil cases to be tried by court judges in general courts and religious courts are required prior to the procedures of mediation in court.

As mentioned above integration of mediation as an alternative dispute resolution in the civil trial was originally intended to reduce the buildup of cases, both at the District

Court, High Court and Supreme Court Level. Where the accumulated cases will be terminated very influential with the quality of decisions.

But in fact many of the disputes submitted to court is not successfully reconciled through the mediation process. The types of disputes submitted to court is not successfully conciliated can be categorized as:

- a. Lawsuit Against Law
- b. Dissenters Promise (wan prestasi)
- c. Divorce lawsuit

According to the writer's observation, since the enactment of PERMA No. 1 In 2008, the District Court level Simalungun, mediation has not been successful in reducing the number of cases filed appeal and cassation.

Regarding the level of effectiveness of mediation in the study, there are two perpestif of effective words. The first terms of the rules. Whether the regulation has been effectively used or implemented. And both effective meaning here is whether the expected results or what the target or goal successful entry into force of these regulations? When is the first part PERMA No. 1 of 2008 has been successfully implemented. This proved any civil lawsuits filed in the District Court Simalungun superbly through the mediation efforts. Perma means it has been effective. However, if that is referred to in the second part, on the results of the application of PERMA targets have not been effective

Effectiveness is the ability to choose the right destination or the right equipment to achieve its intended purpose. In other words, an effective manager if he could choose the work to be performed or the method (way) is appropriate to achieve the objectives.

This matter with the number of cases that go at the Registrar of the Supreme Court, from 2004 to 2013 have increased. The number of these cases we can see from the data status in the Supreme Court since 2004 to 2013 in view the author via the internet:

Table 1. List of Cases that go on MA Since Year 2004-2013

Tahun	Perkara Masuk	Perkara Putus	Sisa Perkara
2004	n/a	n/a	20314
2005	7468	11807	15975
2006	7825	11775	12025
2007	9516	10714	10827
2008	11338	13885	8280
2009	12540	11985	8835

2010	13480	13891	8424
2011	12990	13719	7665
2012	13472	10995	10112
2013	12337	16034	6415

So that the mandate of PERMA No. 1 of 2008 to reduce the number of incoming cases and case buildup not eventuated well. So it is necessary to reconstruct PERMA No. 1 In 2008 the terms of the substance, public awareness and infrastructure. Based on this background can be drawn several problems. The issues that will be examined in this study are: What are the constraints of mediation as an alternative dispute resolution in civil Simalungun District Court?; How is the reconstruction of an effective and efficient mediation in resolving civil disputes in court based on values of justice?

## **B. Results**

### **1. Constraints Implementation of Mediation in the Settlement of Civil Cases in Court.**

Obstacles or barriers implementation of mediation in the resolution of civil cases in courts, among others:

#### **a. Resources Mediator**

Mediator a very big role in the success or failure of the mediation process. Therefore, a mediator must have specific expertise in the field of mediation. It has also been required by PERMA, where a mediator, both derived from a judge or not should already have the certification of mediators and had never trained mediator.

The main task of mediator in this case is to understand and interpret voice and body language. For example one of the parties being sat cross-hand, it can be interpreted by a mediator that such party was anxious and defensively. On the basis of this interpretation, the mediator can follow up an appropriate form of intervention.

Most of the time spent by the mediator was heard from the parties. Effective listener not only hear the words revealed but understand the meaning of

#### **a. Message delivered by the parties.**

The concept of active listeners confirms that being a good listener is not a passive activity. However relates with work hard. Listeners must physically show his concern, can concentrate fully, could encourage the parties to communicate, be able to demonstrate an

attitude of concern with impartiality, non judge others, not preoccupied to perform a variety of responses and are not distracted by things that are irrelevant.

**b. Reluctance Practitioners Law to Support Mediation Process**

Clients and the legal should prepare for mediation as in the preparation of other negotiations, as well as the need to be familiar destination and the mediation process. They need to be ready to take decisions on matters of tactical as it will be played in the negotiations, setting up who need to be present, the right moment to deliver, how they will face the internal conflict during the process and what strategies will be used.

However the essence of mediation requires that the parties be able to participate directly in the process and all the results of the survey stated that this is an important benefit obtained from the mediation process. From the survey also found that it is important for lawyers to understand both the process and the philosophy of mediation so that they do not take on the role of positional and opposite that would undermine its basic assumptions.

What to do when the mediator seems to have exceeded the mediation process, for example by being supportive a partisan role or try to force the parties to the agreement? One option is to ask for the holding separate meetings to the mediator to submit an objection feels. Another option is to terminate the process and make a report on the matter to their providers. The tendency of legal practitioners or interested parties with the status quo not to suggest mediation to their clients.

**2. RECONSTRUCTION OF MEDIATION AS ONE COMPLETION ALTERNATIVE DISPUTE CIVIL COURT.**

From the research conducted, the PERMA No. 1 of 2008 which needs to be reconstructed are: Subsection 19, point 4 PERMA No. 1 of 2008 states that the mediator cannot be subject to criminal or civil liability for the contents of the peace agreement of the results of the mediation process and Subsection 25 point (2) of the Supreme Court issued the Regulation of the Supreme Court judge the success criteria and incentives for judges who managed to run errands mediator.

Table Reconstruction of Subsection 13 point (6) and Subsection 25 point (2) PERMA No. 1 of 2008

No	Subsection contents Before Reconstruction	Subsection contents Before Reconstruction (Perma No. 1 in 2016)	Weakness	Subsection contents After Reconstruction
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	(Perma No. 1 of 2008)			
1	Subsection 19, point 4 PERMA No. 1 of 2008 states that the mediator cannot be subject to criminal or civil liability for the contents of the peace agreement of the results of the mediation process	Subsection 27 point (1) if the mediation succeeded in achieving agreement, the parties with the assistance of the mediator must formulate a written agreement in the peace agreement signed by the parties and the mediator. Point (2) to help formulate a peace agreement, the mediator must ensure the peace agreement does not contain provisions which: a. contrary to law, public order and morality. b. detrimental to a third party, or c. can not be implemented.  Subsection 16 states: "President of the Court shall submit report on the performance of judges or court staff who successfully resolving cases through the mediation of the President of the Court of Appeal and the Supreme Court	It is feared that if there is no liability for the content deal mediator, then the result of the agreement will be memorable trivial. Besides, it is very risky as an opportunity for the mediator to allow the parties to make a peace agreement	mediator cannot be subject to liability in civil and criminal for the contents of the peace agreement the results of the mediation process, unless proven deliberate or negligent in not carrying out its obligation to examine the material peace agreement that in order to avoid any agreement contrary to the law or which can not be carried out or that contains bad faith
2	Subsection 25 point (2) of the Supreme Court issued the Regulation of the Supreme Court judge the success criteria and incentives for judges who managed to run errands mediator.	Subsection 27 point (1) if the mediation succeeded in achieving kesepakatan, the parties with the assistance of the mediator must formulate a written agreement in the peace agreement signed by the parties and the mediator. Point (2) to help formulate a peace	In this subsection are not described in detail the success criteria mediator. Usually the mediator success criteria can be measured in terms of the implementation process and the	Subsection 25 point (2) President of the Court shall submit report on the performance of judges or court staff who successfully resolving cases through the mediation of the

		<p>agreement, the mediator must ensure the peace agreement does not contain provisions which:</p> <p>a. contrary to law, public order and morality.  b. detrimental to a third party, or  c. can not be implemented.</p> <p>Subsection 16 states: "President of the Court shall submit report on the performance of judges or court staff who successfully resolving cases through the mediation of the President of the Court of Appeal and the Supreme Court</p>	<p>results of the satisfaction of the parties to the mediation result. Whereas Subsection 16 PERMA No. 1 2016 did not explain the purpose of delivering performance reports Judge or Court officials who successfully complete the case through mediation of the President of the Court of Appeal and the Supreme Court. This subsection is also no set incentives for Meditor Judge or Court officials who successfully complete the case through mediation. Do mediator obtain insentiv form of fees or memdapat his appreciation of the Chairman or President of the High Court or the Supreme Court.</p>	<p>President of the Court of Appeal and the Supreme Court. Point (4) incentive is meant to be a mediator of judges and court clerks who successfully complete the case and get a fee or reward (choose one or both) of the Chairman of the Court or the President of the High Court or the Supreme Court.</p>
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### C. Conclusion

1. The process of mediation in resolving civil case in court consists of two phases, namely: pramediasi and mediation process. Mediation in resolving the dispute in court has not been managed well to reduce the buildup of the case or to obtain justice. In the implementation of the mediation process are still many obstacles and barriers. Barriers to implementation of mediation in the settlement of a civil case in court is not ready for the judges who acted as mediator when there were still court judges do not have a certified mediator, that



mediation conducted by a judge who has not or do not have a certificate of mediator. The active role of judges and mediators of knowledge was instrumental in determining the success of a civil case mediation level, because it is very necessary knowledge and understanding of the judges certified mediator. Where to be able to be a mediator, a judge must be certified mediator and has been trained mediator. But until today in the District Court Simalungun still one judge has certified mediator while others have not been trained mediator. Ideally, the mediation process takes place several times, but often at the request of legal counsel mediation meeting only one meeting, and attorney implies that peace dpat not be achieved, and by the mediator suggests that the mediation has failed.

2. To further obtain better results in the institutionalization of mediation in court is necessary to reconstruct PERMA No. 1 Year 2008. Although at this time has been the enactment of PERMA No. 1 2016 there are bebarapa not yet regulated. One of them is the absence of the parties in implementing the mediation can not be represented by a lawyer. If the parties are unable to attend shall be evidenced by a certificate of illness or are abroad. Actually, with the technology that can already be anticipated that by using teleconference upon the parties who are abroad and against the parties who are sick who can not come to court.

#### **D. Suggestions**

1. To the law enforcement officials, especially judges and Advocates / attorney to be more empowering mediation in the settlement of civil disputes in court, by encouraging people contributed directly and actively in the mediation process, explain to the parties the benefits of successful mediation and trying to reach a settlement in mediation.

Mediator to judge, as one of the dominant determinant factor tiidaknya successful mediation, the mediator should be the judge has certified mediator, and the mediator judge must first make every effort to achieve peace in the mediation process. Mediator judges are also expected to act as a mediator pfesional. Mediation is expected succeed because of the nature of mediation is faster and cheaper is also the result of mediation that is a win-win solution.

2. In addition to the role of mediator, legal counsel and the parties to mediation success is also supported by the existing infrastructure in the Court. Facilities such mediation mediation decent space, ,, was instrumental in determining the success of mediation.

Disputing parties in civil disputes using mediation mechanism to resolve in good faith to achieve a win-win agreement, before deciding to pursue efforts to resolve the litigation. The necessity of the parties to the dispute in the District Court to pursue the mediation

process in advance once a person to take the case to court, the mediator appointed by the court or by the parties themselves, have pointed out that the Supreme Court is very responsive to the mediation process, and the responsiveness of this indicates that dispute resolution through mediation is a dispute resolution process that is much better than the judicial process as well as the implications for the judicial process is simple, fast, and low cost; and need concrete support from formal institutions of justice that is the Supreme Court to oversee the process.

## **E. Implications Study**

### **1. Theoretical Implications**

Theoretically, a substantial differentiation in the legislation spawned a wide understanding. The differences in understanding, in practical terms, will impact on the different applications. Similarly, the Supreme Court Regulation No. 1 of 2008 on Mediation in the Court Procedure contains several subsections that interpretable. Among them, in understanding the obligations of mediation, as set out in the Perma, raises at least two different line of thinking: First, the mediation process shall be passed in the stage pernyelesaian any civil disputes submitted to the court; Second, mediation is mandatory for finalizing the civil disputes brought to trial when both parties litigating in the court. Regardless of which of the two votes against this understanding is correct, that surely both will give a different practical implications.

### **2. Practical implications**

Furthermore, the level of technical implementation, the application of Perma also raises some important issues that need dialogical objective, of whom about ability mediator of a judge, the financing to call mediation, standardization (tokok measuring) the success of the mediation, the classification of types of cases mediated (principal and Accessoire) , reporting and evaluation. Several other issues must still be found, either in the form theory or discourse and the reality on the ground (app), but in this paper focuses only few things with brief descriptive exposure. The main hope of course that the subject of discussion deeper. Resources mediator is one thing that most affect the success of mediation in the settlement of disputes. So it is expected that every court of first instance has provided a mediator who has a certificate. Mediators are certified considered very necessary for membership mediator in facilitating, communicating and techniques are needed in mediation.

The parties to the dispute do not understand the benefits of mediation. So it is expected that mediation as an alternative dispute resolution be explained to the public. but besides that the attorney is also expected to prioritize the settlement of disputes by mediation by not promoting material or honorarium.

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