MEDIATION OF DISPUTE RESOLUTION OUT OF COURT, A CHOICE BASED ON LAWS

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ABSTRACT

Basically everyone wants to live in peace, but it turns out that in daily life in any part of the world there is always a dispute. A protracted dispute requires the help of a neutral third party to resolve it. In ancient time with very simple life, disputes were resolved by the Village Head or Indigenous Elders. In the modern era with highly heterogeneous society, there are more matters that can trigger a dispute. Every time there is a dispute, people always try to settle by litigation, so there is a buildup of cases in court. The accumulation of cases led the Supreme Court to reform its bureaucracy in the justice sector, namely introducing a mediation process before the trial. In 2003, PERMA Number 2 of 2003 on Mediation Procedures in the Court was first issued, which was later amended with PERMA Number 1 of 2008. Lastly, PERMA Number 1 of 2008 was revoked and declared invalid by PERMA Number 1 of 2016. Now all civil cases that enter the General and Religious Courts must be mediated first.

Keywords: mediation, alternative dispute resolution, laws.

A. INTRODUCTION

From ancient time to present, with heterogeneous societies in everyday life, there are often frictions that may cause disputes when they are not resolved immediately. The friction arises because of differences in views or interests between the parties. In simple life, the disputes that occur will be resolved by the Village Head, Customary Elders, or community leaders.

In modern time, with the wider interactions between people and people, people and institutions, institutions and institutions, disputes may occur and even disputes with the state. In other words, dispute may occur between two parties and even more individually; it can also be communal ranging from simple to the most complex levels.

In order not to drag on, the dispute must be resolved immediately by the parties using the institution that has been provided by the Law, both formally (through litigation institutions) and non-formal (non litigation). Most people only know how to resolve disputes with court institution (litigation). In the reality that happens everyday with many cases that go to the Court, the longer the dispute resolution efforts, the more the buildup of cases in the Court. In specific, when one party is not satisfied and continues the process to a higher level, it maybe even to the level of cassation.

In addition to the length of time and cost to settle a litigation case, the court's decision is not necessarily satisfying to the parties. A lot of dissatisfaction arises with the judiciary, and there are also many demands from the community for a quick dispute resolution process with low costs and legal certainty.

What does the Supreme Court do as the highest judicial institution to resolve disputes peacefully and effectively so that the parties obtain a satisfactory and just solution?

B. DISCUSSION

Since Indonesia's independence, the founders of the country had committed to establish a country using the principles of democratic state and were also committed to realizing the concept of a state of law. The manifestation of the commitment of the state establishment based on the law is stated in the Fourth Paragraph of the Preamble to the 1945 Constitution which reads "... then the Indonesian independence was composed in an Indonesian State Constitution ...". The formulation shows that the state of Indonesia must be carried out according to the constitution as the basic law of the state. Originally, prior to the amendment to the 1945 Constitution, the phrase of state of law was only in the Explanation of the 1945 Constitution, and the complete Chapter on the State Government Systems reads: "The state of Indonesia is based on law (rechtstaat), not based on mere power (machstaat)". However, after the amendment of the 1945 Constitution which was carried out in 1999 - 2000, the form of the conception of the state of law is formulated in Article 1 paragraph (3) which states, "The State of Indonesia is a state of law". [1]

[1] A National Seminar organized by the Association of HTN / HAN Teachers of the DPD of Central Java in collaboration with the Indonesian Judicial Commission and the Faculty of Law, Muhammadiyah University Surakarta, Lorin Hotel, April 25-26 2018

2 Arief Hidayat in the National Seminar "Arranging Health Workers in the Draft Law on Health Workers, dated November 16, 2013 at Soegiyapranoto Catholic University, Semarang

To find out whether the concept of state of law is actually adopted by the state of Indonesia, it can be seen from the amendment of the Articles in the 1945 Constitution as the entire source of Indonesian politics of law. As for what makes the basis of the affirmation of both as the National Law is; ***First,*** The preamble and articles in the 1945 Constitution of the Republic of Indonesia contain the Objectives, Basics, Legal Ideals, and the Basic Norms of the State of Indonesia which must be the objectives and footholds of Indonesian Politics of La. ***Second,*** the amendment to the articles in the 1945 Constitution contains distinctive values derived from the views and culture of the Indonesian Nation that was inherited by the ancestors of the Indonesian Nation. [2]

The commitment of the founding fathers to realize the state of law embodied in the Fourth Paragraph of the 1945 Constitution was then formulated in Articles 24 and 25 of the 1945 Constitution (hereinafter referred to as UUD 1945). Article 24 of UUD 1945 states:

1. Judicial power is an independent power to conduct justice in order to enforce law and justice
2. Judicial power is carried out by a Supreme Court and lower Judiciary Agencies in the environments of General, Religious, Military, State Administrative, and Constitutional Courts.
3. Other bodies with the functions related to the judicial power are regulated in the Law.

Article 24 of UUD 1945 was implemented by Law Nr. 14 of 1970 on the Principles of Judicial Power, and then it was the last amended by Law Nr. 48 of 2009 on Judicial Power. In the Law, there are several articles related to dispute resolution, as follows:

Article 38

1. In addition to the Supreme Court and the lower judiciaries and the Constitutional Court, there are other bodies with the functions related to judicial power.
2. The functions related to judicial power as referred to in paragraph (1) include:
   a. Investigation and examination;
   b. Prosecution;
   c. Implementation of decision;
   d. Providing legal services; and
   e. Dispute resolution out of court.
3. The provisions concerning other bodies with the functions related to judicial power are set forth by law.

Article 58

Civil dispute resolution efforts can be held out of the state court through arbitration or alternative dispute resolution.

Article 59

1. Arbitration is a way of resolving civil dispute out of court based on an arbitration agreement made in writing by the parties to the dispute.
2. The arbitration decision is final and has permanent legal force and is binding on the parties.
3. When the parties do not implement the arbitral decision voluntarily, the decision is carried out based on the order of the Chairperson of District Court at the request of one of the parties to the dispute.

Article 60

1. Alternative dispute resolution is a dispute or opinion difference resolution through a procedure agreed upon by the parties, namely a settlement out of court by means of consultation, negotiation, mediation, conciliation, or expert judgment.
2. The settlement of disputes through alternative dispute resolution as referred to in paragraph (1) are set forth in a written agreement.
3. The written agreement as referred to in paragraph (2) is final and binds the parties to be carried out in a good intention.

Article 61

The provisions concerning arbitration and alternative dispute resolution out of court as referred to in Articles 58, 59 and 60 shall be regulated in the Law.

Dispute is also related to simple or complex questions and involves various types of problems, for example: [3]

1. The facts arising from the credibility of the parties or from the data provided by third parties including the explanations of the data.
2. The legal problems which are generally the result of misleading opinions or interpretations provided by legal experts.
3. As a result of technical differences, including the differences of opinion from technical and professional experts from the parties.
4. The differences in understanding the matters that arise, for example in the use of confusing words or differences in assumptions.
5. The differences in the perceptions of justice and morality, culture, values and attitudes.

[3] Priyatna Abdurasyid, Arbitrase dan Alternatif Penyelesaian Sengketa (suatu pengantar) (Arbitration and Alternative Dispute Resolution (an introduction)), Jakarta, PT Fikahati and BANI, 2002, p.5

Long before Indonesia's independence, the customary law that lives in the community gives an obligation to the Customary Head to mediate and give fair customary decisions to the disputes in the indigenous community he leads. The procedures for resolving disputes that occur in the midst of the community become a habit of living in the community to resolve disputes by means of deliberation for consensus.

The results of the deliberations to reach consensus must be stated in writing to be known by the parties as stipulated in Article 1851 of the Civil Code which reads as follows:

> "Peace is an agreement by which both parties submit, promise or hold an item, end unfinished cases, or prevent the occurrence of a case ".
> This agreement is valid when it is made in writing.

Peace is the will of both parties so that peace is not possible for other legal remedies, such as appeal or cassation. However, recent developments indicate that the Court is not the only appropriate settlement institution, particularly for business people. The court turns out to contain many weaknesses and causes disappointment for the community.[4]

Disputes resolution in the court which takes a long time and high costs causes a huge pile of cases in the court so that it later raises the regulation for the alternative dispute resolution out of court (non-litigation) based on article 24 of the 1945 Constitution, Articles 38, 58, 59, 60 and 61 of Law No. 48 of 2009 on Judicial Power.

Through the non-litigation process, an agreement that is "win-win solution" will be produced which can guarantee the confidentiality of the dispute between the parties because the mediation process and results (decisions) are not published. In addition, the problem can be resolved with the condition that the parties have good will. Therefore, after the mediation process, the good relation between the parties is well-maintained.

Public dissatisfaction with the court as a dispute resolution institution raises an Alternative Dispute Resolution (ADR). The community hopes that the dispute resolution out of court will provide justice and legal certainty in the true sense effectively and efficiently.[5]

In Indonesia, there are several kinds of dispute resolution, i.e:

1. Dispute resolution in court through litigation
2. Dispute resolution out of court that includes:
   a. Administrative Alternative Dispute Resolution/ADR - dispute resolution out of court facilitated or integrated in public services/state administration, for example:
      - BANI (Indonesian National Arbitrage Agency) was established based on Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution to resolve the disputes in commercial sector;
      - PHI (Industrial Relations Court) was established based on Law Number 2 of 2004 on Industrial Relation Dispute Resolution to resolve the cases arising from the termination of employment;
      - BPSK (Consumer Dispute Settlement Agency) was established based on Law Number 8 of 1999 on Consumer Protection to resolve the disputes between consumers and businesses.
   b. The dispute resolutions out of court by institutions or individuals (Private Sector Alternative Dispute Resolution) are:
      - Business Assocation Type, such as the Capital Market Arbitration Board (BAPMI) established by the Capital Market Association with the Self Regulatory Organization.
      - Independent Type, such as the National Mediation Center (PMN), The Institution of Conflict Transformation (IICT), The Indonesian Mediation Agency (BaMI), etc.
   c. Traditional Type Alternative Dispute Resolution, the dispute resolution that has long developed in various regions in Indonesia. [6]

In 2003, a Supreme Court Regulation (PERMA) Nr. 2 of 2003 on Mediation Procedures in Courts was issued to make the dispute resolution out of court more efficient and effective.

The direction of the regulation (legal policy) is to make mediation a choice for resolving disputes by encouraging the effectiveness of the implementation of mediation in the court.

With the presence of PERMA Number 2 of 2003, the parties are endeavored and given the opportunity to be able to resolve their disputes peacefully through neutral third parties before entering the trial.

In its implementation, PERMA Number 2 of 2003 experiences obstacles. For example, the judges did not try to reconcile the two parties to the dispute, and the parties usually did not attend themselves in the mediation process and were only represented by their legal counsel. Besides, the peace institution (dading institution) is not popular in the community.

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[4] Cabdra Irawabm SH., M.Hum, Aspek hukum dan Mekanisme penyelesaian sengketa diluar pengadilan (Alternative Dispute Resolution) di Indonesia (Legal Aspects and Mechanisms of Dispute Resolution Out of Court (Alternative Dispute Resolution) in Indonesia), Bandung, Mandar Forward Publisher, 2010, p.2

[5] Ibid, p.3

[6] Dr.Susanti Adi Nugroho, SH.MH, Mediasi sebagai alternative penyelesaian sengketa (Mediation as Alternative Dispute Resolution), Jakarta, PT. Telaga Ilmu Indonesia, 2011, p.139-140

The Supreme Court is aware that PERMA Number 2 of 2003 contains obstacles to its implementation so that it can be said to be unsuccessful as initially expected.[7] PERMA Number 2 of 2003 was later amended by PERMA Number 1 of 2008 on Mediation Procedures in the Court. The scopes of the enactment of PERMA Nr. 1 of 2008 are as follows:

1. The Supreme Court Regulation applies only to the mediations related to litigation process in the Court.
2. Every judge, mediator and party must follow the procedure for dispute resolution through mediation as stipulated in this Regulation.
3. Not taking the mediation procedure based on this Regulation is a violation of the provisions of Article 130 of *HIR* and/ or Article 154 of *Rbg* which makes the decision null and void.
4. The judge, in consideration of the case decision, must state that the case in question has been pursued by peace through mediation by mentioning the name of the mediator for the case in question. [8]

In PERMA Number 2 of 2003, mediation is still mandatory to do, but in PERMA Number 1 of 2008, on the first trial day attended by both parties, the judge who tries the case obliges the litigant parties to take mediation first.

The absence of the parties participating in the defendant does not preclude the conduct of mediation (Article 7 paragraph 1 and 2 of PERMA Number 1 of 2008).
Next, PERMA Number 1 of 2008 was revoked with the application of PERMA Number 1 of 2016 on February 4, 2016. The new matters in PERMA Number 1 of 2016 are:
Scope of regulation:

- PERMA Number 1 of 2016 applies to the mediation related to litigation in the court, both the Religious and General Courts, and the peace agreement petitioned to be strengthened by a court decision.
- The decision of the First Level Court must state that the case has been mediated by mentioning the name of the mediator.
- Not ordering mediation is considered as a violation.
- The cases which are not mediated at the first level, at the appeal stage or cassation, the parties must take mediation with an interim decision.
- The appellate or cassation court makes decisions based on the results of mediation.

Compared to the previous PERMA, with this latest PERMA, all disputes related to PERMA have to go through the mediation process first.
Through mediation, it is expected that dispute resolution can be completed quickly with little costs and the presence of certainty.

However, with the enactment of PERMA Number 1 of 2016, there are now exceptions for several matters with the settlement that can be carried out without mediation, i.e.:

- The disputes with the determined grace period for the hearing. Recently, the deadline for mediation is only 30 (thirty) days from the time of the appointment of mediator.
- The disputes decided in verstek. For the mediation process, the parties must be present with or without the presence of the attorney unless the health condition allows him/ her to be present. There must be a doctor's certificate for that matter.

When the parties are under supervision, residing abroad, or due to the unavoidable demands of the profession or occupation, they can be exempted from the obligation to attend the mediation process.

In order that the mediation process runs smoothly, the parties must act in a good will. When there are those who do not have good will, it will disrupt the mediation or even spoil it. In other words, the dispute will be resolved by litigation. When the dispute is resolved by litigation, it will certainly take a lot of time and money.
It is considered of not having a good will when the parties or their proxies:

1. are absent after get invited two times in a row without valid reason.
2. are present in the first mediation and then absent despite being called for two times in a row.
3. are not present repeatedly, which disrupts the schedule of mediation meetings without valid reason.
4. attend a mediation meeting but do not submit and / or not respond to the case resume of the other party.
5. do not sign the concept of peace agreement without valid reason.

Conversely, the parties should act in a good will in resolving a dispute between them so that the dispute does not drag on. The plaintiffs with no good will will bring various consequences; the lawsuit will be declared not accepted, and must pay the cost of mediation. In addition, the mediator will state that the Plaintiff is not in a good will in the mediation report accompanied by the recommendations of sanctions and the amount of fees that must be paid by the Plaintiff.

According to Article 1 paragraph 2 of PERMA Number 1 of 2016, Mediator is:

> "Judge or other party who has a Mediator Certificate as a neutral party who assists the Parties in negotiation process in order to find a variety of possible dispute resolution without using a way to decide or impose a resolution."

[7] Ibid, p.183
[8] Ibid, p.6

The one who can become a Mediator is an individual or Judge who gets a training as a Mediator from the institution receiving the accreditation from the Supreme Court.
The similarity between Judge Mediator and Individual Mediator is that the individual mediator in mediating must do it in a neutral place. When carried out by Judge Mediator in court building, it is prohibited to do it in the courtroom.

Although there is PERMA Number 1 of 2016, it turns out that the community only knows the mediation process when they are in a dispute which is submitted to the court. For most people, they are not aware of the presence of mediation institutions to resolve their disputes, so there are still many who use lawyer services that ultimately lead to litigation which takes time and costs.

In order that the wider community knows the presence of mediation institution that can be used to resolve disputes in an easy way, at low costs, and obtain legal certainty, a socialization of alternative dispute resolution out of court is necessary.

C. CONCLUSION

Towards the achievement of the objectives of the bureaucratic reform of the Supreme Court oriented to the realization of the great Indonesian Judiciary as one of the considerations in the issuance of PERMA Number 1 of 2016, mediation is a tool/ means to improve public access to resolve disputes through a simple process, fast, and low cost.

Mediation out of the court is an obligation to be followed by the parties, not following the mediation process based on PERMA no. 1 of 2016 causes the verdict to be null and void. Many people think that mediation is only a formality procedure, because they are reluctant to make peace when mediated and want to continue the dispute in the litigation process. people who consider that mediation is only a formality just because they do not know matters relating to mediation and this requires socialization of mediation outside the court to the outside community.

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