Policy Review Dispute Settlement Through The Mediation Mechanism Within Court and Outside Court

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Abstract
One of the important principles in court proceedings is that court proceedings are conducted in a simple, fast and low cost manner. In civil law, such terms are defined in article 130 HIR/154 RBg which requires judges to try to reconcile the parties before the hearing case. The Supreme Court of the Republic of Indonesia published Supreme Court rules Number 1 year 2016 regarding Mediation Procedure in court that aims to empower the courts of first instance as peace institutions as well as to overcome the accumulation of cases in the Supreme Court. The results of this study showed that the performance of judges to run the mediator function is very low, Lack of success of the mediation related to no judge mediator certified by the state court, especially in the regions, the lack of mediation infrastructure, the lack of incentives and career paths that can support the motivation of judges to perform the function of mediators, and support from the parties in the mediation process is weak.

Key Word: Dispute, Mediation, deed meat

Introduction
In the Indonesian legal system, in general there are 2 (two) types of dispute resolution that can be passed, namely: through government courts (litigation) and through institutions outside government courts (non-litigation). Litigation settlement is carried out through the General Courts which are subject to civil procedural law, namely HIR (Herzien Indonesia Reglement) for Java and Madura and RBg (Rechtsre voor de Buitengewesten) for outside Java and Madura as formal law, and the Civil Code (Criminal Code) or Burgerlijk Wetboek (BW). Meanwhile, out-of-court settlements are often also referred to as alternative dispute resolution (Alternative Dispute Resolution -ADR), namely by means of negotiation, mediation, conciliation, consultation, expert judgment and arbitration which have also been regulated in Law Number 30 of 1999 concerning Arbitration and Arbitration. Alternative Dispute Resolution, and in Chapter XVIII Article 36 and Article 37 of Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts.

In both forms of dispute resolution both place settlement with a mediation mechanism, namely a process of resolving disputes between two or more parties through negotiation or consensus with the help of other parties, a neutral party that does not have the authority to decide.\(^1\) The implementation of mediation in court was initially regulated in the provisions of Article 130 HIR/Article 154 RBg, where the mediation system is connected to the court case system (mediation connected to the court). While the implementation of mediation with the Alternative Dispute Resolution (ADR) mechanism is regulated by Law (UU) Number 30 of 1999 concerning Arbitration

\(^1\) Destiny Rahmadi, Mediation Completion Dispute through Approach Consensus, PT. Raja grafindo Persada, Jakarta, 2010, p. 12.

and Alternative Dispute Resolution. The provisions of Article 130 HIR/Article 154 RBg are then regulated further through the Supreme Court Circular Letter (SEMA) Number 1 of 2002 concerning Empowerment of First Instance Courts to Implement Peaceful Institutions. Not long after, SEMA Number 1 of 2002 was refined again by the Supreme Court by issuing Supreme Court Regulation (PERMA) Number 2 of 2003 concerning Mediation Procedures in Courts. Five years later the Supreme Court formed a working group to examine the various weaknesses of PERMA Number 2 of 2003, then it was further stated in PERMA Number 1 of 2008 concerning Mediation Procedures in Courts, and finally updated again to PERMA Number 1 of 2016 concerning Mediation Procedures in Courts. In Indonesia as well as in the world, the use of mediation as a dispute resolution model has become the preferred alternative. In America, the practice of mediation is of greater interest to the public through special institutions such as ADR than through judicial institutions which are too long-winded and costly to hire lawyers to attend each trial. In addition, confidentiality is also not guaranteed. In 1980, US President Jimmy Carter inaugurated a Dispute Resolution Act (DRA) dispute settlement agency. Whereas in Japan the practice of mediation is always connected with conciliation and arbitration. If mediation fails, the process is stopped, but directly with conciliation and the mediator acts as conciliator. If conciliation fails, it will immediately proceed with settlement through arbitration and the conciliator acts as a bitrator. In contrast to Australia, the implementation of mediation is more connected with courts, court officials who act as mediators.

The birth of PERMA Number 1 of 2016 was intended to develop and institutionalize mediation in the context of peace in court, whether it was carried out before the examination of the main case was carried out (chotei); in examining cases at the first level (wakai); during the examination of the main case at the level of appeal, cassation, and review; and mediation in the context of peace which is carried out outside the court (one day wakai). Thus, PERMA Number 1 of 2016, there has been a fundamental change in judicial practice in Indonesia. The court is not only tasked and authorized to examine, try and decide on cases it receives, but is also obliged to seek peace between the parties to the dispute. Efforts to reconcile according to PERMA provisions No. 1 of 2016, according to Article 4, are excluded for cases that have been resolved through commercial courts, industrial relations, objections to decisions of the business competition supervisory commission, objections to decisions of consumer dispute settlement agencies, objections to decisions of the Information Commission, requests for cancellation arbitration awards, settlement of political party disputes, disputes resolved through a simple lawsuit procedure, and other disputes whose examination in court is determined by a time limit for settlement in the provisions of laws and regulations.

As previously explained, the backlog of cases at the Supreme Court is dominated by civil disputes. So the existence of PERMA Number 1 of 2016 is expected to be able to resolve cases with a simpler, faster and lower cost mechanism so that it can reduce the accumulation of cases at the Supreme Court. The accumulation of cases at the Supreme Court is due to the increasing number of cases going to the District Court (PN), and almost every decision in the District Court (civil decision) will be followed up by efforts to fight against the law by the losing party through appeals to the High Court (PT), although not necessarily due to a valid reason but simply taking advantage of the opportunities provided by the law. With the same reason, almost all High Court decisions will be submitted to the Supreme Court for cassation, and after the cassation decision there is still an opportunity to submit a judicial review (PK) to the Supreme Court. Even when the decision is about to be executed, it is still possible for third parties to resist through the derden mechanism verzet. The derden verzet decision can still be filed for appeals and cassation. So that the goal of resolving land

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4 Rachmadi Usman, op cit, p. 28.
5 I Made Sukadana, Judicial Mediation, mediation in the Indonesian civil justice system in order to realize a simple, fast and low-cost judicial process, Prestasi Pustaka, Jakarta, 2012, p. 117.
cases simply, quickly and at low cost is sometimes difficult to implement, and the accumulation of cases at the Supreme Court continues to occur every year.

**Institutionalization of Mediation in Courts**

The institutionalization of court mediation as regulated in PERMA Number 1 of 2016 is inseparable from the philosophical foundation of our country, namely Pancasila, especially the fourth precept which reads "Populist led by Wisdom of Wisdom in Deliberation/Representation". In resolving disputes, it should be carried out through a process of deliberation to reach a consensus or for peace between the disputing parties to obtain a mutual agreement.

Initially, mediation in courts tended to be voluntary, but with the issuance of PERMA Number 1 of 2016, mediation was strengthened by requiring every civil dispute to first mediate for peace.

PERMA Number 1 of 2016 is a provision that regulates in detail the principles and procedures of mediation in courts in Indonesia, thus judges handling civil cases in every court in Indonesia are obliged to follow the provisions in PERMA Number 1 of 2016. Obligations This mediation is regulated in article 4 which states that "Except for cases resolved through commercial court procedures, industrial relations courts, objections to decisions by the Consumer Dispute Settlement Agency, and objections to decisions by the Business Competition Supervisory Commission (KPPU), all civil disputes submitted to the Court The First Level must first seek a settlement through peace with the help of a mediator. Even if mediation is not taken, it can result in the decision being null and void by law."

The mandatory nature of this provision is based on careful considerations from the Supreme Court as stated in the PERMA preamble No. 1 of 2016, namely First, that the use of mediation is expected to overcome the problem of accumulation of cases. Second, the mediation process is seen as a way of resolving disputes that is faster and cheaper than the process of deciding by a judge. Third, the implementation of mediation is expected to expand access for the parties to obtain a sense of justice. Fourth, the institutionalization of the mediation process into the justice system can strengthen and maximize the function of the court institution in resolving disputes.

With regard to the Mediator's Code of Conduct as mandated in Article 15 paragraph (1) and paragraph (2) of PERMA Number 1 of 2016, through Decree of the Head of the Supreme Court Number 108 of 2016 has stipulated a Mediator's Code of Conduct which includes the responsibilities and obligations of the mediator. The responsibilities of the mediator include responsibility towards their profession and towards the parties. The responsibility of the mediator towards the parties includes the obligation to maintain impartiality both in the form of words, attitudes and behavior towards the parties, the mediator is also prohibited from influencing the parties for the purpose of giving benefits to the mediator and the mediator must carry out its functions in good faith, not taking sides, not having personal interests, and do not sacrifice the interests of the parties.

The Mediator Code of Conduct places obligations on mediators to:

1. Carrying out the mediation process in accordance with the principle of self-determination by the parties or in accordance with the principle of the parties’ autonomy,
2. Explain to the parties at the first full meeting the meaning of mediation, the mediation process, and the caucus and the role of the mediator,
3. Respect the rights of the parties to consult with their legal counsel, experts and the right to leave the mediation process, Avoid using threats, pressure or intimidation and coercion against one or the parties to make a decision,
4. Maintain the confidentiality of information revealed in the mediation process,
5. Destroy the records in the mediation process,
6. Avoiding conflicts of interest, if you become aware of a conflict of interest or a potential conflict of interest, the mediator must resign.

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6 Regulation Supreme Court Number 1 of 2008 concerning Procedure Mediation in Court, Article 2 paragraph (3).
7. Carrying out the mediation process in a balanced manner and maintaining the quality of the mediation process,
8. Improve abilities and skills,
9. Non-judge mediators are allowed to accept fees from the parties on the basis of a written agreement with the parties.

To ensure the implementation of mediation that meets quality standards good settlement for the parties to the dispute, since the issuance of PERMA 1 of 2016 the requirements for becoming a mediator have been set, namely that they must attend training to obtain a mediator certificate from an institution accredited by the Supreme Court.

**Institutionalization of Mediation Outside the Court**

The term mediation in Indonesian society is actually known later after the popular term arbitration. This is based on the fact that the law higher education curriculum in Indonesia before and after independence had introduced arbitration as one of the settlements of civil disputes or trade disputes regulated in Articles 615 to Article 651 Reglement de Rechtsvordering (Stb 1847; 52). Meanwhile, mediation has only been introduced to new law students in the last two or three decades. The Faculty of Law, University of Indonesia, for example, only introduced mediation in 1996 as one of the materials in the "Dispute Resolution Options" course. In the period before the 1990s, mediation had actually been introduced in international law courses or international dispute resolution, but was not yet the main focus or subject matter.

In Indonesian laws and regulations, mediation arrangements can be found in Law no. 22 of 1957 concerning Labor Disputes (LN of 1957 No. 42) although this law does not use the term mediation, it uses the term "mediation". From the persistence aspect, mediation has become popular or well-known in academics and legal practitioners since the development of environmental law in Indonesia in the mid-1980s, to be precise after the birth of Law No. 4 of 1982 concerning Basic Provisions for Environmental Management (LN of 1982 No. 12) which was still valid at that time, known as the environmental dispute settlement forum three-party model (Tri Partite). The Three-Party Model in Law no. 4 of 1982 seems to follow the Three Parties model in Law no. 22 of 1957 concerning Labor Disputes.

However, in the context of pre-independence Indonesian customary traditions and religious values and laws, the concept of dispute resolution through mediation is also known, namely:

**1. Mediation in the Customary Law System**

The concept of mediation in the customary law system was known through deliberation for consensus between interested parties in order to discuss a problem or a plan so that an agreement or consensus was produced, long before the litigation system was introduced by the Dutch colonial government. Settlement of disputes according to customary law is usually always directed at restoring and balancing the order that has been disrupted due to the existence of the dispute, and is not punitive in nature.

Patterns of amicable and amicable dispute resolution in several customary law communities persist, for example in the Batak community it is known as the rungun adat forum, in Minangkabau society it is known as the Minangkabau Peace Justice Institution, which in general is a settlement through deliberation and kinship which has many similarities by means of Mediation and Conciliation.

However, nowadays, village peace judges are experiencing many obstacles in upholding the law and reconciling the parties so that the impression appears as if they are powerless in the current situation of conflict in the countryside. Settlements that tend to develop in today's society tend to choose the use of litigation or court proceedings that are decided.

**2. Mediation in the Islamic Legal System**

In the Islamic legal system, dispute resolution by mediation is similar to the terms islah and hakam. Islah is an Islamic teaching which means that it emphasizes the method of resolving disputes or conflicts peacefully by setting aside the differences that are the root of the dispute. The point is
that the disputing parties are ordered to let go of each other's mistakes" and practice to forgive each other. This is in accordance with the word of Allah SWT. in Al-Qur'an Surah Al-Hujarat (49): 9 which reads "if there are two groups of believers fighting then reconcile them, peace should be done fairly and correctly because Allah loves those who act justly."

The term islah has developed widely in its use to resolve cases of business economic and non-business economic disputes. For example, when there was a disagreement between two Islamic figures, namely Abdurrahman Wahid and Abu Hasan, almost all Muslim religious leaders advised the two of them to reconcile. The context of islah can be identified with the notion of mediation or conciliation.

After the hakam tries its best to seek peace between husband and wife, the hakam's obligations end. The Hakam then reports to the Judge about the efforts they have taken against the parties (husband and wife), then the decision will be taken by the Judge taking into account the input from the Hakam.

3. Mediation in the Indonesian Legal System

There are at least two laws and regulations that can be used as a basis for implementing mediation, namely, first, HIR (Herziene Indonesische Reglement) for Java and Madura and RBg (Rechtsre voor de Buitengewesten) for areas outside Java and Madura as formal law, and second, Civil Code (KUH Perdata) or BW (Burgerlijk Wetboek) as material law. Both laws and regulations are still valid in Indonesia today. The application of mediation in the two regulations is regulated in articles 130 HIR and 154 RBg.

Provisions regarding peace (dading) are also regulated in the Civil Code, namely in Articles 1851 to 1864. In these articles there is not a single word that mentions the word mediation. However, by seeing that peace must be agreed upon, there is an opportunity for mediation. This is in view of the provisions of Article 1338 paragraph (1) of the Civil Code, which states that "all agreements made legally apply as laws for those who make them". This article basically confirms that everyone can make any agreement, as long as it is made valid and does not conflict with custom, custom and law. Included in this is the freedom to agree to settle disputes through mediation.

Factors Inhibiting the Implementation of Mediation in Court

a. Absence of a mechanism that can force parties not to attend the mediation meeting

The voluntary principle of mediation means that the mediator cannot force the parties to participate in the mediation process. The parties think that when they have brought the case to court it means that all previous conciliatory steps have failed to produce results. Therefore, the court is the last place to seek justice (ultimatum remedium) by cutting off, not through peace. So the mediation process in court is considered a waste of time because it will not result in peace.

b. Limited Number of Judge and Non-Judge Mediators

It turns out that the number of civil cases that have entered the courts of first instance has not been matched by the number of certified mediators. There are still many courts that do not have a certified judge mediator or a mediator who is not a certified judge registered with the court. This condition clearly has an influence on the performance of dispute resolution through settlement in court.

c. Lack of Motivation of Judge Mediators

Judges still feel that their main job is to try and decide cases. The mediation process is often still considered an additional workload and prolongs the settlement of cases. This is also related to the absence of clear policies regarding incentives and career paths for judges who carry out the mediator function. Other factors related to the low motivation of judges to succeed in mediation in court are:
1. The duty as a mediator breaks concentration as a judge because it adds or changes working hours so that the judge has to adjust his schedule;
2. The judge feels that he has no expertise as a mediator because he has never attended mediator training;
3. The reluctance to mediate is also due to the notion that there is no benefit to the judges personally and only helps their superiors (the Supreme Court) to reduce the pile of cases;
4. The judge mediator also feels that the mediation that is carried out only benefits the panel of judges examining the case who no longer need to handle the case when they reach an agreement.

d. Involvement of Mediators Not Judges
The absence of a certified non-judge mediator at the court of first instance has caused the court's performance in resolving disputes through peace and reducing the backlog of cases to not work as expected. Even though PERMA 1 of 2016 in Article 11 paragraph (3) has provided opportunities for the involvement of non-judge mediators to mediate disputes in court, so far there are still many courts in areas where there are no registered non-judge mediators. So that in each case the panel of judges cannot provide information on the list of non-judge mediators that can be chosen by the parties to the dispute, even though it has been mandated in PERMA 1 of 2016. This is due to several factors, namely:
1. Non-judge mediators receive fees as mediators;
2. Do not want to give court room for mediation process for free if it is mediated by a non-judge;
3. There is a perception that the courtroom is not for outsiders;
4. Concerns about competing with non-judges to mediate.

e. Quality Mediation Judge
Mediation judges who have attended mediator certification training in court so far are still limited. Even though PERMA 1 of 2008 has stated that everyone who carries out the function of a mediator has a mediator certificate which is obtained after attending training by an institution that has been accredited by the Supreme Court. This is due to the lack of support from the Supreme Court to finance judges to attend mediator certification training.

f. Mediator's understanding of the Mediation Implementation Guidelines
PERMA 1 of 2016 has provided procedures for carrying out mediation that are quite detailed and clear as a guideline for implementing mediation in court, so that it is hoped that it will not cause confusion among court officials, both judges and clerks. However, some judges still do not understand how to carry out mediation in court according to the stages set out in SK KMA 108 of 2016 concerning the governance of mediation. Some judges also do not understand how to align their main duties as adjudicators with carrying out the mediator function. The birth of technical pandas managing mediation regulated in SK KMA 108 of 2016 aims to answer the lack of guidance in PERMA 1 of 2008.

g. Neutrality of Judge Mediators
The provisions of Article 20 paragraph (4) letter d PERMA 1 of 2016 which allows the parties to choose a mediator from the judge of the panel of examiners of cases makes it difficult for the judge-mediator to truly be neutral. Especially in the process of repetition of mediation in the process of examining cases, mediation in the stages of appeal, cassation, and review. The neutrality of the judge mediator will be better in the mediation process before examining the main case. The non-neutrality of the mediator judge is influenced by the judge’s habit of deciding, where in each decision he sided with one of the parties or won one of the parties and another party was defeated.

h. The Good Faith of the Parties
The success of the mediation process is highly dependent on the parties as autonomous rights holders to determine the process and the final outcome of mediation. Therefore, whether or not the
parties have good intentions to resolve disputes through mediation to produce peace from the start of the mediation process will be a factor that determines the success of mediation. In most predate disputes in Court, the failure of mediation is mostly due to the lack of good faith of the parties, this is evident from the absence of the parties on the appointed day of mediation and the position of the parties which tends to show an attitude of confrontation and emotion rather than compromise.

i. Mediation Room Availability

The availability of special rooms or facilities and infrastructure for mediation is an important factor that must exist in every Court of First Instance to support the implementation of mediation. Supporting facilities and infrastructure for an ideal mediation process such as round tables, whiteboards, and separate rooms for caucuses. The location and conditions of the mediation room must also be made in such a way as to support the implementation of the principle of confidentiality which must be maintained, the parties feel comfortable in expressing their problems more freely, and are not afraid of other people hearing their problems.

In practice, there are still many mediation rooms provided that do not meet the ideal criteria. The mediation process sometimes still uses the court room or the work space of the mediator judge and there are other judges in the work space, thereby limiting the freedom of the mediator judge and the parties to speak in the mediation process. This will affect the smoothness of the mediation process, especially in disclosing the interests of the parties.

j. External Support

Support from external parties in the implementation of dispute resolution through a mediation process that is integrated with the court occurs due to the lack of socialization of PERMA 1 of 2016 to the public, especially among law enforcement officials and society in general. For advocates or lawyers, for example, PERMA 1 of 2016 is still widely perceived as merely fulfilling aspects of formality, and has a tendency to threaten lawyers’ sources of income. Lawyer honorarium patterns are divided into 3 types, namely:

1. Lawyers have regular clients and receive a fixed fee which is usually per year or per month;
2. Lawyer receive an honorary basis handling case until finished;
3. Lawyers who receive honoraria from clients based on working hours or frequency of visits to court.

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