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Mediation as an Alternative Dispute Resolution in Religious Court Systems in Indonesia

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Abstract

Mediation is one of the most flexible alternatives of dispute resolution since mediating a dispute can be conducted through non-litigation means. In other words, it can be carried out by involving a complete absence of lawsuit in a court of law, or through litigation after the dispute is submitted to the court of law. The legal basis for mediation in the Supreme Court is regulated in the Supreme Court Regulations (Perma) Number 1 Year 2016 on The Procedure of Mediation in the Supreme Court as part of the revision process from the Supreme Court Regulations Number 1 Year 2008. In this case, the Supreme Court Regulations Number 1 Year 2016 has regulated various aspects of mediation, in which mediation is regarded as an obligation that must be carried out by litigators (civil dispute) in a court. If it is not implemented, the court's decision will be null and void.

Keywords: Mediation; Alternative Dispute Resolution; Religious Courts

Introduction

As social beings, humans cannot avoid contacting and interacting with other humans. Such interaction often creates conflicts between people. Conflicts that occur in everyday life are considered typical. However, these conflicts can become an extraordinary issue if they are not resolved through proper and correct mechanisms.[1]

Indonesia acknowledges the existence of agencies that govern discussion activities to examine and solve problems appeared in the community. Nevertheless, the existence of discussion activities does not guarantee that the dispute will be resolved. Consequently, in the context of state, there are justice institutions that are responsible for receiving, examining, judging and giving verdicts. The disputes that are brought into the justice institution mechanism is called litigation method. This method is used as a foundation and expectation by society to solve the disputes in a fair way according to the applicable law.

[1] Maskur Hidayat, *Strategi dan Taktik Mediasi berdasarkan Perma Nomor 1 Tahun 2016 tentang Prosedur Mediasi di Pengadilan*, Jakarta, Kencana, 2016, p. 2

The dispute resolution is expected to be straightforward, fast, and low cost as stated in the Article 4 paragraph (2) Law Number 4 Year 2004 on Judicial Power. In reality, however, the dispute resolution through judicial institution is criticised by the people since they are not satisfied with the judicial process, including time, protracted trial process, expensive cost, rigid procedures, and many others. Therefore, people who enter the judicial process feel as if they were wandering in the wilderness. Meanwhile, the public and justice seekers need a quick and straightforward dispute resolution process.[2]

In the process of dispute resolution in court, Article 130 *Het Herziene Indonesisch Reglement* (HIR) and Article 154 *Rectsreglement Buitengewesten* (RBg) have regulated the judge's responsibility to offer peace to the parties during the first day of trial as an attempt by the court to settle cases quickly through peace. Such peace can be done inside or outside the court. If peace is reached between the parties, a peace letter (deed) will be issued; if it is not reached, the judicial process is then continued to the next phase.

Based on the Article, the system which is regulated in the law of procedure in the dispute resolution submitted to the court is relatively similar to the *court-connected arbitration system*. At the first time, judges facilitate the disputing parties to resolve the disputes through peace. If an agreement is reached between the parties, then the agreement is outlined in the form of a peace agreement signed by the parties. Moreover, a court decision will be issued based on the peace agreement which states the verdict for the parties to follow the peace agreement. In this case, the case is relatively similar to the *court-connected arbitration system*, since the peace agreement becomes the judge's decision as an arbitrary. Also, it has been understood that Article 130 HIR and Article 154 RBg would instead settle a dispute with peace than an ordinary decision process.[3]

The peace efforts made by the judges as regulated in Article 130 HIR and 154 RBg are not effective. Based on the situation, the Supreme Court takes action to empower the judges to resolve the disputes with peace as regulated in Article 130 HIR by integrating mediation mechanism into the judicial system. This system is relatively similar to the *court-connected mediation* developed in many countries.

Mediation is one of the *Alternative Dispute Resolutions* conducted outside the court. As regulated in the Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution, this law states that mediation becomes a procedure to resolve disputes or dissents outside the court. During the judicial process, mediation is regulated in the Supreme Court Regulations (Perma) Number 1 Year 2016 on The Procedure of Mediation in the Supreme Court (that was regulated in the Supreme Court Regulations Number 1 Year 2002, revised in Supreme Court Regulations Number 2 Year 2003, revised in Supreme Court Regulations Number 1 Year 2008). The latest regulation states a new mechanism regarding the pre-trial process that should be conducted to the disputing parties with the assistance of mediators (either the judge or other parties). The regulation issued by the Supreme Court is still based on Article 130 HIR and Article 154 RBg to make the articles more empowered and efficient by modifying them to be more compulsory.

Mediation plays an essential role in resolving disputes both inside or outside the courts, both in divorce and property cases, that has been regulated in the Supreme Court Regulations. Therefore, this topic is considered essential to be explored but this paper will only examine the role of mediation as an alternative dispute resolution in divorce and property cases in Religious Courts.

[2]Yahya Harahap, *Beberapa Tinjauan Mengenai Sistem Peradilan dan Penyelesaian Sengketa*, Jakarta Timur, Sinar Grafi ka, 1997, p. 248;
[3]Yahya Harahap,*Hukum Acara Perdata Tentang Gugatan Persidangan,Penyitaan,Pembuktian dan Putusan Pengadilan,* Jakarta, Sinar Grafika, 2017, p. 239

Concept, Definition, and Foundation of Mediation Procedure

Conceptually, *mediasi* in Bahasa Indonesia is derived from an English word 'mediation' that means an action in mediating between parties.[4] Etymologically, mediation is derived from the Latin word, *mediare*, which means in the middle. This definition signifies the role of a third-party as a mediator to mediate and resolve the disputes between the parties.[5]

According to the Indonesia Dictionary, the word 'mediasi' or mediation refers to a process of involving a third party as an adviser in dispute resolutions. The definition given by the Indonesia Dictionary consists of three major elements. *First*, mediation is a process of resolving disputes or conflicts between two or more parties. *Second*, the parties involved in the dispute resolution do not come from the disputing parties. *Third*, the parties involved in the dispute resolution enact as an adviser.[6]

According to Gary Goodpaster, terminologically, mediation refers to a negotiation process in dispute resolution, in which the impartial and neutral parties work with the disputing parties to facilitate them to reach an agreement satisfactorily.[7] Meanwhile, Takdir Rahmadi suggests that mediation is a process of resolving disputes between two or more parties through negotiation or consensus with the help of neutral parties who do not have capacities to decide on a case.[8] The neutral party is further called 'mediator' who is responsible for facilitating procedural and substantial assistance. The definitions of mediation as provided by scholars are relatively similar to what has been defined in the Supreme Court Regulations Article 1 Number 1 Year 2016 on The Procedure of Mediation in the Supreme Court, that is a dispute resolution through negotiation process to reach an agreement between the parties facilitated by a Mediator.[9]

In the mediation process, the mediator enacts as a facilitator who assists the disputing parties in clarifying their needs and desires, preparing guidance to help the parties in clarifying dissents, and working on a binding agreement as agreed by the parties in the dispute resolution process. Based on this explanation, the purpose of mediation is to reach a win-win solution between the parties, as well as fulfil the needs of disputing parties, as it aims to solve the problem, rather than looking for a win or loss approach.

In practice, mediators have different authority from judges or arbitrators to settle the disputes. As explained by Gary Goodpaster, mediators are not authorized to decide on a case, rather they facilitate the parties in resolving the disputes, as long as they are asked to facilitate the parties to solve the disputes. In relation to the marriage case, the term mediation has been widely known for a long time as *hakamain* appointed by relatives from both parties. (Q.S. Annisa: 35).

The court-annexed mediation/court-connected mediation was started from the Supreme Court Circular Letter (SEMA) Number 1 Year 2002 on The First Level Court Empowerment in Implementing Peace Institution as regulated in Article 130 HIR and Article 154 RBg that govern the peace institution and the responsibility of judges to prioritize peace for both parties before the case is examined. After that, the Supreme Court complemented this regulation by issuing the Supreme Court Regulations Number 2 Year 2003 on The Procedure of Mediation in the Supreme Court. The Supreme Court Regulations Number 2 Year 2003 was replaced by the Supreme Court Regulations Number 1 Year 2008 since there

[4] Edi As'Adi, *Hukum Acara Perdata dalam Perspektif Mediasi (ADR) di Indonesia,* Yogyakarta, Graha Ilmu,2012,p. 3.
[5] Syahrizal Abbas, *Mediasi dalam Hukum Syariah, Hukum Adat dan Hukum Nasional,* Jakarta: Kencana, 2011, hlm. 2.
[6] Syahrizal Abbas, *Loc.Cit.*
[7] Rachmadi Usman, *Pilihan Penyelesaian Sengketa di Luar Pengadilan*, Bandung, Citra Aditya Bakti, 2003, p. 79.
[8]Takdir Rahmadi,*Mediasi Penyelesaian Sengketa Melalui Pendekatan Mufakat*,Jakarta,Raja Grafindo Persada,2011,p. 12
[9] lihat Pasal 1 angka 2 Perma Nomor 1 Tahun 2016 tentang Prosedur mediasi di Pengadilan.

were some issues in the regulation that needed to be revised. In the Supreme Court Regulations Number 1 Year 2008, the necessity of conducting mediation was more emphasised. Furthermore, the Supreme Court issued the Supreme Court Regulations Number 1 Year 2016 which replaced the Supreme Court Regulations Number 1 Year 2008 that further governs the procedure of mediation.

There are several points emphasized by the Supreme Court Regulations Number 1 Year 2016 on mediation. *First*, the mediation process takes place no longer than 30 days from the stipulation of the mediation order. This time regulation is shorter than that of the Supreme Court Regulations Number 1 Year 2008 which regulates the mediation time for approximately 40 days. *Second*, the good faith in carrying out mediation and the legal consequence in the mediation process, as stated in the Supreme Court Regulations Article 7 Number 1 Year 2016 on the responsibility to conduct mediation with good faith. The mediation process that involves parties with a good faith has a legal impact on the process of case examination. *Third*, the mediation cost, the latest Supreme Court Regulation mentions the related costs in detail. *Fourth*, it covers the responsibility of parties or principals to attend the mediation meeting with the statement that the parties are required to attend the mediation directly with/without the attorneys/lawyers. This is considered different from the previous regulation, in which the parties were just required to follow the discussion, not to attend the meeting directly since there was no certain statement that stated the parties to attend the mediation meeting directly. *Fifth*, there is an acknowledgment on a partial settlement for the disputing parties or the agreement on some of the object of dispute.

According to the Supreme Court Regulations Number 1 Year 2016, the mediation process is started by the attendance of two disputing parties (Plaintiff and Defendants), then the Judge who examines the case must explain the mediation procedures to the parties, including the definition and the advantages of mediation, the responsibility of parties to attend the mediation meeting directly, the costs that may incur if the mediators are non-judicial and outside the court employees, the option to continue the peach agreement through a peace deed, or the retraction of a lawsuit, and the form submission that explains the mediation process to the parties to be signed by themselves.

Moreover, the disputing parties are given two days to select the registered mediators in the Religious Court. Then, they report to the case judge. If the parties are not able to choose a mediator, then the assembly chairman appoints to the Judge Mediator or one of the Court Employees, then the chairman issues an order to conduct mediation and appoint the mediator. Meanwhile, the Surrogate Clerk directly informs the order to the mediator. After the mediator's appointment is informed to the appointed mediators, then the mediation process moves to the mediators.

One important change regulated in the Supreme Court Number 1 Year 2016 on the parties who are eligible to be a mediator in the Religious Court. In this case, the employees of Religious Courts are able to be mediators as long as they have mediator's certificate. Furthermore, the appointed mediators decide the day and date of mediation meeting. If the mediation is conducted in the Religious Court building, the mediators contact the parties through the help of bailiffs or substitute bailiffs.

The parties are required to attend the mediation meeting directly with or without being accompanied by the attorneys/lawyers, except when there is a legitimate reason, such as health condition that inhibits the parties to attend the mediation meeting based on the medical certificate; under custodial care; have a residence, house or position in overseas, or carry out state's duties, professional or occupational demands that cannot be abandoned.

If there is one party that cannot attend the mediation meeting two times without any legitimate reason after being asked to attend the mediation meeting, then the absent party is considered as having bad faith. Consequently, it will have a legal impact; if the party who has a bad faith is the Plaintiff, then

the lawsuit cannot be accepted by the examining judge. The party is also imposed a mediation cost. Meanwhile, if the party who has a bad faith is the Defendant, then they are required to pay the mediation cost.

The disputing parties submit the case resume to the mediators and the opposing party approximately five days after the appointment of mediators. After that, the mediation process is conducted within 30 working days, which can be extended for 30 working days by letting the mediators propose a time extension request to the examining judge, including the underlying reasons.

The material for mediation is not limited to the basis of claim and plea for damages of the lawsuit. If there is an agreement reached outside the plea for damages of the lawsuit, then the plaintiffs amend the lawsuit by incorporating the related agreement into the lawsuit. Mediation can also involve experts and public figures with the prior agreement, whether the explanation and the judgment of the experts and public figures are binding or not.

In conducting their functions, mediators should conduct activities/steps based on the Supreme Court Regulations Article 14 Number 1 Year 2016 on The Mediation Procedure. The mediator's task ends with the submission of report to the case examining judge. The form of mediation report includes successful mediation, partly successful mediation, unsuccessful mediation, and mediation cannot be carried out.

Generally, two kinds of cost can be incurred based on the mediation process, including mediator service fees and the costs of calling the parties. The service of mediators from the judge and the court employees are free of charge, while the service of mediators from outside the judge and non-court employees are shared or based on the agreement of the parties;

As a mediator who is expected to prioritize compromised negotiation, he or she is expected to possess certain skills. These skills include: (1) The ability to listen to the disputing parties; (2) Possessing questioning skills towards the disputes; (3) Possessing skills to make a choice in resolving disputes that leads to a win-win solution; (4) Possessing balanced negotiation skills; (5) Facilitating the parties to discover their own solutions for the disputes.[10]

The Implementation of Mediation as an Alternative Dispute Resolution in the Religious Court

Basically, every civil dispute submitted to the Religious Court is considered as a case of resistance (*verzet*) on the default judgment (*verstek* judgment) and the litigation resistance (*partij verzet*), or the third-party resistance (*derden verzet*) towards the verdicts that have permanent legal force. The resolution of these disputes should be prioritized through mediation mechanism. However, based on the Article 4 paragraph (2) Number 1 Year 2016, there are several civil disputes excepted from the obligation to be resolved through mediation, including:[11] (1) Disputes that are examined at a trial are determined to be settled within the provisions of the legislation (such as a request to cancel an arbitration verdict; (2) Dispute where the examination is carried out without the presence of Plaintiff and Defendant who have been called accordingly; (3) Counter-claims and the intervention of a third-party in a dispute; (4) Disputes regarding marriage prevention, denial, cancellation and ratification; (5) Disputes submitted to the Religious Court after making an attempt to solve the dispute through mediation outside the court with

[10]Harijah Damis, *Hakim Mediasi Versi Sema Nomor 1 Tahun 2002 tentang Pemberdayaan Pengadilan Tingkat Pertama Menerapkan Lembaga Damai*, Mimbar Hukum, Nomor 63 Thn. XV, Edisi Maret-April 2004, p. 28

[11]Mashuri, *Mediasi Di Pengadilan Agama Berdasarkan Peraturan Mahkamah Agung Nomor 1 Tahun 2016*, http://www.pa-manna.go.id/artikel-2/hukum.go.id/artikel-2/hukum-dan-peradilan, accessed on 2 September 2018.

the help of certified mediators registered in the Local Court, but it is considered unsuccessful based on the statement signed by The Disputing Parties and the certified mediator.

Although the disputes as stated above are exempted from the obligation to conduct mediation, based on the agreement made by The Disputing Parties, the disputes number (1), (3), and (5) can still be resolved through Mediation voluntarily during the case examination phase at the Religious Court, and during the legal effort phase at the Religious High Court and the Supreme Court. Therefore, every authority possessed by the Religious Court as stated in Article 49 Law Number 3 Year 2006 on Religious Court, that covers material case, should prioritize mediation as a dispute resolution before resolving the case through the Court.

As an alternative dispute resolution, mediation has several advantages: less expensive than the trial; there is no win-lose approach in the mediation process, rather it is a win-win solution. Furthermore, the peace verdict (peace deed) does not prioritize legal considerations and reasons, instead prioritizes equality, propriety and a sense of justice for both parties. Additionally, the settlement time through mediation is faster than litigation in court. Moreover, mediation process can lower the social effects that may occur, such as broken companionship or social relations). Through mediation, these effects can be avoided, and broken relations can be put back together.[12] Besides the advantages on the perspective of disputing parties, the Court can also feel the advantages, such as reducing case burdens which continues to grow every year, as has been stated previously.

Mediation is also a dispute resolution that also has great advantages in resolving disputes in court. In addition, mediation will also make the case process run shorter and the costs incurred will also be less expensive. Mediation is also regarded as an effective instrument to solve the problem of case build-up in court and to empower and maximize the function of judicial institutions in resolving disputes. The regulation of institutionalizing mediations into the case process is seen as an effort to institutionalize and empower mediation in the justice system, which leads the disputing parties to go through the peace process to solve the problem or the disputes will be more equitable if they are solved through peace.

In addition, the most important aspect is better relationships or companionships between the parties in the future, rather than resolving the dispute through the court. The paradigm shift from judging to the resolution of dispute or legal cases is an effort to encourage the development of dispute resolution outside the judicial process, whether it is attached or outside the court.

In a court hearing, a judge must reconcile the two parties through mediation. As regulated in Article 130 HIR, the regulation states that the parties should be encouraged to resolve the dispute through mediation, and the judge should try to reconcile both parties first. If the effort is successful, a peace deed will be issued during the court. Both parties should comply with the agreement, in which this deed has the same legal force as the judge's decision/verdict.

In principle, the efforts of judges to reconcile the disputing parties are imperative as stated in Article 131 paragraph (1) HIR. If the judge is unable to reconcile the parties, this should be noted in the minutes of the trial. This statement shows that if the judge is unable to reconcile the parties, then the failure of the judge must be confirmed in the minutes of the trial. The judge's negligence in stating this failure may result in formal defect of the case examination and may be null and void.[13] Although the peace stage in the trial process is imperative, there is no regulation which states the threats of violations

[12] Bagir Manan, Varia Peradilan Majalah Hukum Tahun ke XXI Nomor 248 Juli 2006, p. 9

[13]Yahya Harahap, *Hukum Acara Perdata Tentang Gugatan Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan,* Jakarta, Sinar Grafika, 2017, p. 292.

that will be given if the judge does not make a peace effort. Therefore, it can be said that Article 130 HIR is only a formality.

The Supreme Court Regulations Number 1 Year 2016 on the mediation procedure requires each party to conduct mediation before judge gives the verdict towards the dispute. If the mediation process is not attempted or if a dispute is directly examined and given a verdict by the judge, the verdict is null and void. Based on the definition, mediation means 'to mediate', in which a mediator does not enact as a judge who can impose his thoughts of justice, nor draw conclusions as binding as arbitrators. Instead, mediators empower parties to discover the solution that they desire. Mediators encourage and facilitate dialogues, assist the parties to clarify their needs and desires, prepare guidance, assist the parties to clarify dissents and work on a binding agreement as agreed by the parties in the dispute resolution process.

Mediation is regarded as an effort to minimize the growing divorce rate, with the expectation that the disputing parties will abandon their desire to get divorced after getting inputs from the mediators. In Article 130 HIR, mediation is also known by peace, in which it means peace between both disputing parties as an initial effort made by the judge.

The success of peace in mediation is not only marked by the issuance of the peace deed and the withdrawal of the case in court by the disputing parties, but also the dispute resolution is resolved in a friendly way between the disputing parties. However, it should still uphold the legal certainty and the desire to fulfil the sense of justice which eventually does not lead to the attempt to bring the case to the higher judicial system.

Based on the lawsuit data that entered the Religious Court in Karawang regency, there are 3,360 lawsuits in 2018 that consist of divorce by talaq, sued divorce, inheritance, joint property, grants, endowments, and sharia economy. Among these cases, only 304 cases or around 9.04% that were mediated.[14]

The high number of unmediated cases is influenced by the factor that the defendants do not attend the trial (particularly in divorce cases), which do not allow for mediation to be conducted. From the 304 cases that had been mediated, there were only 36 cases or around 18.435% that reached an agreement, while the rest of the cases, 248 cases or around 81.57%, did not reach any agreement.[15]

In the divorce cases for reasons of constant strife and quarrel, the role of a judge is considered essential to discover the causes of such strife and quarrel. Once the causes have been identified, it will be easier for the judge to encourage the parties to seek a solution related to their household issues being faced. Additionally, the judge should also make an optimal effort to encourage peace rather than look for the facts for the dispute without understanding the underlying factors of the dispute. Moreover, if the judge just tries to encourage peace within a short period which only spends a couple of minutes, then the outcomes may not provide any advantage for both parties.

Encouraging both parties to emphasise peace is considered imperative particularly for divorce cases, in which it should be carried out optimally if the divorce is caused by the continuous strife and quarrel. For the divorce cases that are caused by adultery, physical disabilities, or mental disabilities that lead to the inability to fulfil obligations, then the peace effort should also be carried out since it is still considered as an imperative. However, this will not be expected to be as optimal as the cases caused by strife and quarrel.

[14] Laporan Tahunan Pengadilan Agama Karawang Tahun 2018, Desember 2018, p. 47
[15] Ibid

As stated earlier, if a divorce case is successfully mediated, and the parties get back together peacefully, then the case will be revoked. Further, the judge will issue the determination of case revocation, which will mark the end of the case. However, if the case is partly successful, in which the wife's rights and children's livelihood can be fulfilled, and the parties continue the divorce case, then based on Article 10 Government Regulations Number 9 year 1975, the divorce case should be examined in court through an ordinary examination process. It must not be agreed based on the peace process as stated in Article 130 HIR.

Conclusion

Mediation is an alternative dispute resolution, for either divorce or material disputes, that has a special scope of private or civil cases. The dispute resolution through mediation institutions in court is an element of the legal process in court and the procedural law. If the mediation is not carried out while the parties attend the trial, then the verdict is considered void and null. Meanwhile, the mediation that is conducted outside the court will become a separated element from the procedural law of the court. However, mediation and formal justice process are collaborated into an entity to fulfil a straightforward, quick and low-cost justice process. This procedure has been realized by the issuance of the Supreme Court Regulation Number 1 Year 2016 on The Procedure of Mediation in the Supreme Court. Based on this regulation, the parties must carry out mediation before continuing the trial. If the mediation is not carried out, then the verdict for the dispute will be null and void.

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