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Mandatory Mediation Under Indonesia Legal System

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ABSTRACT

Mediation is a form of dispute resolution outside of court. Mediation is regulated in Law No. 30 of 1999 concerning arbitration and Alternative Dispute Resolution. However, this law does not specifically regulate mediation, and PERMA Number 1 of 2016 concerning Supreme Court mediation procedures again regulates mediation. PERMA does not exist in the hierarchy of laws and regulations and PERMA seems to fill a legal gap in the product of the law plus the warrant of the National Police Chief number 6 of 2019 concerning the handling of criminal acts based on the principle of Restorative Justice and the regulation of the Attorney General of the Republic of Indonesia (Perja) number 15 of 2020 concerning the handling of criminal acts based on the principle of Restorative Justice. Therefore, this paper questions whether mandatory mediation can be implemented in Indonesia through the application of laws or legal regulations. The research method in this study is normative law, using primary legal sources of Legal Regulation Theory and legal ideals of Gustav Radbruch. The results show that there is an urgent need to introduce mediation laws in Indonesia. The reason is, firstly, that the practice of mediation is very developed and is applied not only to civil cases, but also to some criminal cases and cases of human rights violations. Second, PERMA only applies within the Supreme Court. Third, the mediator and the mediation work to be carried out require guidelines in their behavior.

Keywords: *Mediation Obligations, Law Reform, Dispute Resolution*

INTRODUCTION

Indonesia as a country that is based on law, then all activities of the Indonesian people are based on legislation. But the life of the nation and state will be faced with conflict and lead to a dispute. Basically, the division of disputes is divided into 2 (two) categories, namely disputes in the civil realm and disputes in the criminal realm. Disputes in the criminal sphere are related to the interests of the general public, while disputes in the civil sphere are related to the interests of each individual in other words, personal interests (Ahmad Syaifudin, 2017). Problems that often occur in civil disputes are generally related to the rights and obligations of individuals. One of the problems of fulfilling these rights and obligations is none other than family law disputes that have various kinds of disputes. The disputes include Hadhanah (maintenance and care of children), divorce, determination and provision of maintenance to divorced couples and the division of inheritance (J. T. B. Boboy, B. Santoso, and I. Irawat, 2020).

In order to overcome and resolve disputes and disputes, Indonesia, which is a state of law, has 2 (two) efforts to resolve disputes. (1) in the case of litigation. Litigation is an effort that focuses on dispute resolution through litigation. Justice is obtained

through a trial process led by a judge based on evidence that is appropriate and relevant to the case. The judge will decide the matter or dispute based on 2 (two) pieces of evidence and the judge's conviction (Emirzon, 2001). The nature of the decision is to use coercion (coercion), which the parties are obliged to submit to and obey the decision. (2) Without Litigation. The meaning of non-litigation efforts is dispute resolution efforts that are carried out outside the court and have a designation as an Alternative Dispute Resolution. The main approach to this effort is that justice is obtained by bringing together both parties to negotiate the goals and interests of each party to get an agreement that suits the parties. This approach is known as consensus (Hukum Online, 2024).

Peaceful dispute resolution is also known as mediation. In Indonesia itself, there has been a regulation that regulates Alternative Dispute Resolution outside the court, namely In Law Number 30 of 1999 concerning arbitration and Alternative Dispute Resolution. This law arises with one of the considerations that the settlement of civil disputes can be resolved by non-litigation route or taken through alternative dispute resolution outside the court. However, In Law No. 30 of 1999, the majority regulates arbitration, while mediation and arbitration" are two very different things.

In Law No. 30 of 1999 on arbitration and Alternative Dispute Resolution is not enough to accommodate the arrangements on mediation, then came the Supreme Court regulation (PERMA) No. 1 of 2016 on mediation procedures in court by the Supreme Court. The "Supreme Court " is one of the institutions of judicial power in Indonesia which has one of the tasks of organizing the highest court in Indonesia and oversees 4 (four) judicial environments (Sabela Gayo, 2023).

If we look at UU No. 2 of 2004 on Industrial Relations dispute resolution has indeed provided a legal basis for resolving disputes between workers and employers (Nur Febya Adhawiyah, & Imam Budi Santoso, 2022). However, some aspects that may not have been sufficiently accommodated in this law include:

a) Unoptimized mediation process: despite the provisions regarding mediation, its implementation is often ineffective or poorly optimized.
b) Access to justice: not all workers have equal access to the dispute resolution process, especially in remote areas.
c) Sanctions and enforcement: lack of strict sanctions for entrepreneurs who violate the decisions of dispute resolution institutions.
d) Worker protection: there are still gaps in the protection of workers ' rights, especially contract or outsourced workers.
e) Complicated procedures: dispute resolution processes that are considered complicated and time-consuming can be a barrier for workers to bring demands.
f) Union involvement: there has been no clear regulation on the role and involvement of unions in the dispute resolution process.
g) Changes in the social and economic context: the changing dynamics of the world of work, such as the emergence of the gig economy, may not be fully covered by this law.

Further in law No. 14 of 2008 on Public Information Disclosure does establish mediation as one of the steps in resolving public information disputes (Harun, T., & Jumarianto, J., 2022). However, there are several aspects that have not been sufficiently accommodated, including:

a) The lack of detailed operational guidelines on the conduct of mediation can make it difficult for the parties involved.
b) The absence of strict provisions on the role of an independent and qualified mediator in the mediation process.
c) Mediation processes often take a long time, reducing effectiveness in dispute resolution.

d) Not all people understand their rights regarding information disclosure, which can hinder active participation in the mediation process.
e) Sanctions for information managers: the lack of firm sanctions for information managers who do not meet the disclosure obligations may reduce the motivation to participate in mediation.
f) There is no adequate mechanism to protect the identity and rights of the reporter who filed the dispute.
g) Limited resources and facilities in the institutions responsible for mediation may affect the quality and speed of the process.

The importance of the authority of the Supreme Court is to maintain the orderly implementation of the law in the four judicial environments below it, one of its functions is to fill legal gaps in the law by making Supreme Court regulations (PERMA). One of the Permas issued by the Supreme Court is the Supreme Court Regulation (PERMA) Number 1 of 2016 concerning mediation procedures in court (Khairunnisa, 2023).

PERMA in the legal position is a legal product issued by the Supreme Court is still a debate because there is nothing in the hierarchy of legislation. "This is certainly a big question because PERMA does not exist in a hierarchy of legislation. Although the position of PERMA has been regulated in Article 8 paragraphs (1) and (2). However, this article does not seem to be firm in regulating the position of PERMA. The affirmation of the type of legislation is turned on in Article 7 Paragraph (1) which is then closed in Paragraph (2) as an affirmation of the hierarchical position in accordance with the type of legislation in question, but in the next article, namely Article (8) the type of legislation is added again, and opens and places other legislation, including PERMA, as part of the type of legislation" in Indonesia (Hulu, H. E. ,2022).

In PERMA No. 1 of 2016 concerning "mediation procedure in court is made because there is a legal vacuum in the regulation on mediation which is very limited to Law No. 30 of 1999 concerning arbitration and Alternative Dispute Resolution. PERMA Number 1 of 2016 on mediation procedures does provide a breath of fresh air for the mediation process, such as the confirmation of the existence of mediation outside the court (Sabela Gayo 2023). The existence of a mechanism for the submission of a peace agreement to be ratified into a peace deed by the First Instance Court, contributes to increasing the role of out-of-court mediation in the Indonesian legal system. However, over time, the practice of mediation is increasing so that it becomes an urgency for the establishment of" law on mediation (Sabela Gayo, 2024). "Some of the reasons this has become an urgency are:

a) The process of dispute resolution outside the court through mediation is an alternative that is often taken by people in dispute. Not only civil disputes are mediated settlement, currently for some criminal disputes have been mediated as the practice that occurs in the juvenile criminal justice system through diversion based on the principle of restorative justice (restorative justice) as stipulated in Article 1 Number 7 of Law Number 11 of 2012 on juvenile criminal justice system ("SPPA law").
b) Then for the current situation which has entered the era of the COVID-19 Pandemic where everything is taken or done online (in the network) including mediation processes that can occur online. However, in PERMA Number 1 of 2016, it is only explained in Article 5 which states that the mediation process can be carried out through remote Audio-Visual Communication Media, but in PERMA it is not explained how the online mediation process should be carried out even though the scope of PERMA should be able to" answer legal gaps that are not explained in the law. But in PERMA itself, "it is not

enough to regulate the mediation process.

c) Mediation is increasingly developed and chosen as an effective and efficient dispute resolution in the midst of problems that follow the litigation system and arbitration system.

Mediators are developing into a profession that is in demand, both in Indonesia and in many other countries. Professional Association of mediators has sprung up one of them is the Indonesian dispute Council (DSI) based in Jakarta which has given birth to many mediators and works with various international mediator institutions. Then this profession needs to be regulated in law as other professions that have been regulated by law. Based on this, then in this paper will discuss how important the obligation of mediation under the Indonesian Legal System to form a law on mediation in Indonesia based on the background of the above, the problems discussed in this study is to question whether Mandatory Mediation can be done in Indonesia through legislation or the enactment of legislation.

MATERIAL AND METHODS

The approach used in this writing is based on normative juridical methods, namely legal research that starts from the prevailing laws and regulations (statute approach) associated with the problems discussed. Legal entities in this study can be distinguished into sources of research in the form of primary legal entities and primary legal materials and secondary legal entities. Primary legal material consists of legislation, official records or minutes in lawmaking. And secondary materials in the form of all publications on law that are not official documents publications on law include textbooks, legal dictionaries, legal journals and commentaries on court decisions (Ariman Sitompu, 2022).

RESULTS AND DISCUSSION

If you look at how the Supreme Court actually reproduces legal products such as PERMA, SEMA, FATWA and SK KMA contained in Law No. 3 of 2009 on the Supreme Court. One of them is as stipulated in Article 79 of Law No. 3 of 2009 which stipulates that the Supreme Court can further regulate the matters necessary for the smooth operation of the judiciary if there are matters that have not been sufficiently regulated in the law with the aim of filling vacancies (Hukum Online, 2024).

If we read in the " law on the formation of legislation does not regulate the position of PERMA in the hierarchy of national legislation. Such a situation is certainly a contradiction of the principle of hierarchy which means that a set of laws and regulations should be arranged systematically and arranged hierarchically. Then, PERMA itself is capable or has the potential to be tested materially or judicial review if in the future, there are people who think PERMA does not provide a sense of justice but actually harms" their rights (Winsherly Tan, 2021).

The practice of mediation in Indonesia is currently growing rapidly. The mediation process does not only occur in civil cases as stipulated in Article 4 of PERMA Number 1 of 2016, law no.2 of 2004 and Law No.14 yr 2008 it turns out that the scope of cases resolved by mediation has expanded as the application of mediation in the criminal justice system both versions as stipulated in Article 1 Number 7 of Law No. 11 of 2012 on the child criminal justice system then Law No. 39 of 1999 on Human Rights in Article 89 paragraph (6) letter B of the human rights law, namely human rights violations that are" civil. And referring to " Article 89 paragraph (4) of the human rights law, mediation carried out by Komnas HAM is mediation outside the court. Most of the cases mediated are economic, social and cultural rights disputes (ekosob). For example, land and labor disputes, Police Chief Regulation No. 6 of 2019 concerning the handling of criminal acts with the principle of restorative justice and the regulation of the Attorney General of the Republic of Indonesia (Perja) No. 15 of

2020 on handling criminal acts with the principle of Restorative Justice.

From the above, it can be seen that the application of mediation is not only for civil cases as stipulated in PERMA, but also applied in criminal cases and certain cases of human rights violations that are also played by third parties as mediators (Sabela Gayo., & Hj. Yeon, A. L. ,2012). "The Mediator plays an important role in encouraging the parties to resolve their problems. The Mediator here is a mediator who has a mediator certification. However, currently, in PERMA Number 1 of 2016 concerning mediation procedures in court has not explained the code of ethics that must be owned by mediators. However, in PERMA Article 15 describes the mediator's code of conduct as follows: (1) The Supreme Court determines the Mediator's Code of Conduct; (2) each mediator in carrying out its functions must comply with the mediator's code of conduct as in Paragraph 1. However, Article 1 of the mediator code of conduct explains that the scope of the mediator code of conduct issued by the Supreme Court is only binding on people who perform the mediator functions listed in the list of mediators in the general and religious courts. That is, mediators who carry out their functions and duties as mediators who are not listed in the list of mediators in the general and religious courts, do not have a code of conduct that must be held when becoming a mediator even though the mediator who has carried out his duties and" his function as a mediator is a certified mediator.

Furthermore, "certified mediators who are not recorded in the list of mediators in the general and religious courts, such mediators adhere to the code of conduct issued by the certification body. For example, mediators resulting from mediator certification bodies such as the Indonesian dispute Council (DSI) have guidelines for a code of conduct issued by DSI that applies to all mediators registered with DSI institutions with an additional mediator oath. However, there is a problem that each mediator does not have a clear grip on the code of ethics because it can be different between" certification bodies from one another.

The application of mediation has been growing in Indonesia. However, laws or regulations governing mediation are still regulated at the PERMA level. Law and society are inseparable from each other. The enactment of the law takes place in a social order called society. Pameo the Romans who declared UBI societas ibi ius has described how close the relationship between law and society. Therefore, the law must be placed as a framework for a process that continues to develop (law in the making). The law is not a dogma that is final. The law of course will move simultaneously in accordance with the demands of his time (continue on progress).

The application of mediation in Indonesia can be stated that PERMA No. 1 of 2016 concerning mediation procedures in court should have been amended and established a regulation on mediation that is regulated at the level of law so that the application of mediation in Indonesia has a definite legal or standard payment when the application of mediation is carried out. This is also supported by The Theory of legal ideals according to Gustav Radbruch, there are three basic values put forward which have the aim of creating harmonization in the implementation of law, namely Justice, expediency and certainty.

Currently, the condition of mediation practice in Indonesia has not been able to achieve the three objectives of the law. First of all, Justice. What is meant by Justice here is equality between rights and obligations. Regarding the practice of mediation in Indonesia, the Indonesian regulation itself has not regulated in detail related to mediation. Mediation is only regulated at the PERMA level which only applies to the Supreme Court, while the practice of mediation has begun to develop not only in civil cases, but several criminal cases and several cases of human rights violations.

So that the regulation and the description above means that there are no

rules governing the practice of mediation, there is no mediator code of conduct that applies to all mediators in all existing cases. When then we refer to the ideals of the second law, namely the usefulness of the law, it means that the law must provide the greatest benefit or happiness for as many members of society as possible. This second legal ideal cannot be achieved even though mediation is only regulated by PERMA.

CONCLUSIONS

Mediation is one of the options for resolving disputes outside the court involving third parties, namely mediators. This is regulated in Law No. 30 of 1999 concerning arbitration and Alternative Dispute Resolution. However, this law does not specifically regulate mediation; most of its content regulates arbitration, and although arbitration and mediation are methods of resolving disputes out of court, they are different. Due to the legal vacuum in Law Number 30 of 1999, the Supreme Court issued a legal product called PERMA, which does not exist in the hierarchy of laws and regulations stipulated in law Number 12 of 1999. This mediation procedure is expressly regulated in PERMA Number 1 of 2016 concerning mediation procedures. This PERMA only applies to courts subordinate to the Supreme Court. But over time, the development of mediation practices has become more widespread. The practice of mediation is now increasingly applied not only to civil disputes, but also to criminal disputes through its diversity, the prosecutor's office on restorative justice and cases of human rights violations. Therefore, there is an urgent need to make Mandatory Mediation in Indonesia through legislation or the enactment of laws and regulations.

Declaration by Author

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