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The Role of Mediation Institution in Resolving the Civil Disputes in the General Courts

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Abstract
The process of dispute settlement or the process of civil cases in the general court is started by taking mediation which is facilitated by mediator's judge before the the disputes and the civil cases continued to be investigated in front of the court by the appointed judge. The purpose of mediation is to solve the disputes by doing consensus between the parties itself. However, the success or the failure of the process of mediation will depend on the mediator's ability and authority. Observing the mediator's authority as stipulated in the Supreme Court Regulation No. 1 of 2008, it can be said that the authority of the mediator is still limited and seems uneffective in resolving the disputes amicably.
Keywords: Mediation Institution, Civil Disputes, District Court

1. Introduction

The institution of the general court (the judiciary) is one of legal institutions, which plays the most important role in resolving the disputes between the parties if the parties can not solve the disputes to reach the consensus between them. The scope of it to solve the disputes is wide. One of its authorities is to resolve the disputes in the civil field. Therefore, it will not be surprising that in the judicial institution there is pile of those civil cases which is proposed by the parties to get the solution for their problems. However in fact, the disputes in terms of being "settled" are rather slow.

The slowness of settlement process of the civil cases in the general courts is not only because of the number of the cases, but also it is because of the settlement process that takes longer time, as well as the costs of the settlement are expensive. The process of the civil cases settlement in the courts in simple ways will be begun with a claim filling, the determination of the judges, calling out the parties to come and joining the trial process, the investigation of the cases including peace effort, claim reading/hearing, answering and replying steps, the evidence's process, and the verdict. Furthermore, the unsatisfied parties of the verdict of the judges can take a legal action, such as an appeal, resistance, cassation, and also an extraordinary legal remedy - called judicial review (PK in Bahasa).

Observing the civil cases settlement process in the general courts, indeed, it can be said that the process is complicated. Therefore, the Supreme Court as the highest judicial instituton in Indonesia has issued the regulation to enforce the mediation agency as one of its efforts to minimize the number of civil cases in the general courts. It is also as the effort to accelerate the civil cases settlement process, which is filled by the parties.[1]

The Supreme Court Regulation No. 2 of 2003 on the Mediation Procedure in the Court has ammanded by the Indonesian Supreme Court Regulation No. 1 of 2008 on the Mediation Procedure in Court. The rationale for the implementation of the mediation institutuion in civil cases settlement process is that it is a cheap and fast process, as well as it provides a better access to the parties to find the sense of fairness and the satisfactory solution. The integration of mediation in the court's proceeding becomes one of the effective instruments to overcome the number of the cases. Besides, the court proceedings as an adjudicative, the integration of mediation can also strengthen and maximize the functions of the judiciary. PERMA No. 1 of 2008 stipulates further that the Procedural Law either article 130 HIR or article 154 RBG encourage the parties to take the peacefull process that can be intensified by integrating the mediation process to the litigation procedure in the District Court.[2]

According to PERMA No. 1 of 2008, the mediation is the way to resolve the disputes through the consultation process to obtain the parties' agreement in which the parties is assisted by the mediator. The mediator is a neutral party who will help the parties in the negotiation process without using the way to take decision or impose a solution.[3] According to Jimmy Yoses Sembiring, mediation is a dispute settlement process

[1]Mediation institution is not only applicable in the civil cases settlement process in the general court, but also applicable in the religious court. The mediation institution is used to be regulated and enforced by the Circular Letter of the Supreme Court (hereinafter referred to SEMA in Bahasa) No. 1 of 2002 on the Authority of Court in Implementing the Peaceful Agency (Ex-article 130 HIR/154 RBg). Due to SEMA has no completed yet, the institution of the mediation then re-governs into the regulation of the Supreme Court (hereinafter referred to PERMA in Bahasa) No. 02 of 2003. PERMA No. 02 of 2003 further was replaced by PERMA No. 01 of 2008.

[2] See the considering of PERMA No. 01 of 2008 in word "c".

[3] See article 1 point (6) and (7) of PERMA No. 01 of 2008 on the General Rule. The article then is compared to article 1 point

with the mediator as the third party. As the party, the mediator will give some suggestions to the parties in order to resolve the disputesbetween them.[1] M. Yahya Harahap furthermore states that mediaton is a process for settling the disputes in court by doing the negotiation between the litigants. The negotiation of the parties is assisted by the mediator who works as:

1. The third party, neutral and impartial; and
2. The helper who will look for any kind of alternative which will be the best for the parties and give the mutual benefit to the parties.[2]

The difference between the mediation's integration systems and the reconciliation process under the Article 130 HIR / Article 154 RBg is located to the direct involvement of the mediator in every negotiation until the completion stage. Meanwhile, the reconciliation process as stated in Article 130 HIR / 154 RBg, the judges can not directly involve in the process. The judges merely advise and wait for the result, which is made by the parties.

Gatot Soemartono stipulates that many parties recognize that mediation is a process to resolve the disputes assisted by the third party. The role of the third party is to help the parties identifying the disputes and proposing the proposal on the dispute to be resolved. The proposal aims to be used as the reference (guideline) for dispute settlement.[3]

From some of the opinions as mentioned above, it is indicated that the integration of mediation institutions in the settlement process of the civil cases in the court is necessary and bring some benefit. It is because the dispute is resolved basing on the agreement and the willingness of the parties. However, the arises problem is whether the integration of the mediation institutions will be beneficial and effective to resolve the dispute or should the process of the case (dispute) carry on to the trial process which is quite complicated an unsatisfy ti the parties's interests. Indeed, the role of the mediator must be seen and examined during the mediation process as governed by PERMA No. 1 of 2008.

2. The Rationale of Mediation Institution in the Court

It can be seen in the civil cases settlement process in the general court that the court has applied the civil law principles such as simple, fast and in-expensive. However, the principles certainly are not easy to be applied.The difficulty for applying those principles are because the trial is done in several times and the legal remedies is also possible to be taken by the parties if they are dissatisfied with the decision that has been imposed by the judge in which the remedies are not specifically and expressly regulated regarding the period of time of the level legal effort in the court.

Simplicity, the civil cases settlement process in the judicial system can be expressed as the following stages:

a. Filing the claim with paying the down-fee for those who can afford;
b. Setting the judge by the head of the court;
c. Setting the time and the dialing command to the parties by the Judge / the Chief Judge;
d. Trial Process:
    1. Claim reading which is preceded by the peaceful attempts by the Judge / the Chief Judge;
    2. Defendant's answer;
    3. Plaintiff's answer to the defendant's answer;
    4. Defendant's re-answer to response the plaintiff's answer;
    5. Proving which is preceded by the submission of evidence by the plaintiff and the evidence by the defendant;
    6. Conclusion of the parties; and
    7. Ruling by the Judge.

These stages as mentioned previously are the stages of the trial process that only apply in the first court (District Court) in which each of the stages is not specified by the period, not including with the inspection of the places (if it is appropriate) and the trial's delaying because of certain reasons. Then, when the judge has decided the verdict and the parties are not satisfied or do not accept the verdict, it is still possible to do an appeal, cassation and judicial review, not including with the legal remedies such as *verzet* and *derden verzet*. There are not a periods of time for this legal effort. Therefore, the civil cases settlement process through the general court is not easy, either in terms of a complicated procedure of it or in terms of high cost for the parties. In addition,

(5) and (6) of PERMA No. 02 of 2003. Article 1 Point (5) of PERMA No. 02 of 2003 states that "mediator is a neutral party and has function to assist the dispute's parties to look for any alternatives of dispute settlement". Meanwhile Article 1 Point (6) of PERMA No. 02 of 2003 states further that "mediation is a dispute settlement through negotiation process between the parties with assisting of the mediator".

[1] Jimmy Yoses Sembiring, 2011, *The Way to Settle Disputes Out of the* Court *Process*, Visimedia, Jakart, p. 27.

[2] M. Yahya Harahap, 2006, *The Civil Procedural Law on Suing, Courting, Seizuring, Proofing, and Taking Desicion of the Court*, Sinar Grafika, Jakarta, p. 244.

[3] Gatot Soemartono, 2006, *Arbitration and Mediation in Indonesia*, Gramedia Pustaka Utama, Jakarta, p. 119.

the process implies to the cases in the judiciary in which the cases will overload particular in the Supreme Court and the judicial review levels.

In response to those cases as stipulated above, the Supreme Court releases a policy that intergrates the mediation institution in civil cases settlement process in the District Court in which every claiming of the civil cases must be taken by the parties through a mediation.The mediation as "a must" has been stated in Article 2 PERMA No. 1 of 2008.the article stipulates that all the judges, the mediators, and the parties should follow the mediation process. Not following the mediation procesudure is a violation of the Article 130 HIR/ 154 RBg which results the decision, null, and void. The judge in making the consideration of the decision is obliged to mention that the parties have pursued the mediation procedure and also mention the name of the mediatior which has involved in the related cases.[1]

The procedure of mediation is a permanent procedure and has to be passed not only by the litigants (the parties) but also by the judges and the mediators. If the judges, the mediators, and the parties do not forge the mediation procedure, it is considered as a violated based on the Article 130 HIR/ 154 RBg which has the legal consequence, such as the decision will become null and void. The Article 130 HIR/ 154 RBg regulate the responsibility of the judges who examine the civil cases for settling the process.[2] If this effort does not reach the basic purpose, then proceed to the inspection process. There still will be the chance to do reconciliation during the inspection process. In the civil cases, a peaceful process is justified even the court has decided the decision and has a permanent legal force (*inkrach van gewijde*).

3. Mediator and The Authority

Mediator is a neutral party who assist the parties in negotiation process to look for every possible way to resolve the disputes without using the decision process. The successful or unsuccessful of the mediation process will depend on the ability and the authority of the mediator in implementing the process of mediation. Based on PERMA No. 1 of 2008, it can be concluded that there are two kinds of authority which the mediator posses.[3] *First,* the mediator has the authority to declare the failure of mediation process if one of the party or the parties or their attorneys have been two times in succession to do not attend the mediation meeting based on the schedule which has been agreed, or have been two times in succession to do not attend the meeting with out any clear reason.*Second*, in the mediation process, if the mediator is knowing and understanding that the dispute is involving the assets or property or interest of the other parties which is not mentioned in the letter of claim, the mediator may tell the parties and the examining judge that the case is not eligible to be mediated by the reason of the parties are not complete.

Article 14 verse (1) PERMA No. 1 of 2008 affirmes that the mediator has the authority to declare the settlement process by the mediation will be failed if one of the party or it proxies does not attend the meeting two times in succession after they are called with the invalid reason. In contrast, when their absences are based on the valid reasons, the mediator has no authority to declare the failure of the mediation process. Nevertheless, in PERMA No. 1 of 2008, it does not set out more about what does it mean of "*by without the valid reason*" as the basis reason in which the mediator can declare the mediation process is failure. Similarly, the reasons as what the parties mentioned can use and can be accepted by the mediator in order to the mediation process do not declare fail/invalid.

Article 14 verse(2) PERMA No. 1 of 2008 furthermore authorizes the mediator to convey the parties or their proxies and to the judge that the dispute between the parties is not eligible to be mediated because the party is not complete. In the other words, the parties should be sued but they are not sued while the main claim related to the assets or properties or the interests of the parties which are not sued. The legal consequence may occur when the claim found that there are incompleted parties and the process is forced to be continued. So that the claim will be unacceptable by the judge because lack of parties.

The problems arise whether the mediator has the authority only to convey the parties or the attorney and the judges that the disputes between the parties can not be mediated because lack of parties. If the mediator does not have the authority to recommend the parties especially the claimant to amend the claim by inserting the in-claimant parties in this case to be filed. In this context, it is entirely unregulated in PERMA No. 1 of 2008. So that the mediator must be very careful in order to avoid the judgement that the mediator is un-neutral or the mediator do intervene the interest of the disputed parties.

The state administration dispute is known a preliminary investigation and the investigation in the trial. The preliminary investigation carries out in two phases called the consultative meeting and the investigation's preparation. According to Rochmat Soemitro, before the trial schedule is set in the consultative meeting, the

[1] See article 2 PERMA No. 01 of 2008.
[2] See article 130 verse (1) HIR and article 154 verse (1) RBg.
[3] See article 14 verse (1) and (2) PERMA No. 01 of 2008.

Head of the Administrative Court decides that the claims are not acceptable based on:[1]

a. The disputes is not within the scope of the court;
b. Formal conditions specified in Article 56 are not fulfilled;
c. The basic reason for the claim is not eligible;
d. The claim is filed prematurely; and
e. What is claimed that is fulfilled.[2]

Before the investigation of the content of the disputes started, the judge shall do the preliminary investigation to complete the obscure claim. In the preliminary investigation, the judge shall give the advices to improve and complete the data of the claimant. In addition, in the preliminary investigation, the judge can call the entity or the state administrative official who is being sued for asking the data needed by the claimant.[3]

There is an interesting thing in the administrative disputes process in the preliminary investigation which is given by the constitution either to the Head of the Administrative Court or the judge who will examine the cases. At this stage, the Head of the Administrative Court is authorized to issue the determination which substantially established that the main dispute does not become the scope of the State Administrative Court, the claim of the claimant does not meet the formal requirements such as the identity and address of the parties are unclear, the basic reason of the claim is not feasible, a prematurely claim (has not met the submission time) and what is prosecuted or sued have been fulfilled by the State Administration. Similarly, in the preliminiary investigation by the judge is aimed to complete the claim which is proposed by the claimant and call the defendant to confirm the claim.

By doing the investigation in the consultative meeting and the preliminiary investigation for settling the dispute in the state administration, the parties especially the plaintiff will be greatly helped. For instance, when a submitted dispute is defined or otherwise said not as the State Administrative Court authority, the plaintiff may apply to a competent court. In addition, the plaintiff has the opportunity to improve its claim and forth.

Compared to the mediation process in the general court, the mediator has the authority to declare the failure of the mediation process or the mediation process can not be continued due to lack of the parties or because one of the party is not involved. While the claims become the authority of the general court, the mediator does not have the authority to convey the parties to the plaintiff.

4. The Effectiveness of Mediation Institution in the Court

The recognition of the mediation institution as one of the alternative to resolve the civil disputes presented by the parties to the court is not only can be found in the general courts and the religious courts, but also in other fields of civil dispute, such as labor disputes and business disputes. This indicates that the mediation institution also have an important role or deem to be effective in resolving the disputes, the labor disputes, the business disputes, and others.

Effective or ineffective of the institution in executing the duties and functions as well as the mediation institutions actually depend on the issues concerned than the ability of the mediator. Without having a broad authority, it will be difficult for the mediator to facilitate and meditate the cases. By examining the Article 14 in PERMA No. 1 of 2008, it can be said that the mediation institutions in the public courts have a very limited authority while the parties in the first trial are required to take the mediation process through the provided mediator or can be chosen by the parties.

In order to create the effectiveness for the mediation institution in the public courts, the institution needs to be given the sufficient authorization. By reffering to the premiliniary investigation in the state administration, it substantially can be adopted as the part of institution's authority; even the institution is not the one issued the authority. The most important thing is the mediator is authorized to convey the parties especially for the claim of the plaintiff which does not become the authority of the court, the identity of the parties is incomplete, and there is a contradiction or discrepancy between the reasons or the basis of the claim (posita, *fundamentum petendi*) with the demand (petition) of the claim. Thus, the mediation is failed and the cases continue to the trial by the judge, but the plaintiff is no longer deal with the dispute which is formal and related to the claim.

The other issue is related to effort of the judge in the trial process if the mediation process that the parties have taken is failed to reach the agreement of the parties. In PERMA No. 1 of 2008 is not governed the failure of mediator to reconcile the parties and the judge does not have the authority to strive for the parties to resolve their problem peacefully as stated in Article 130 HIR/ 154 RBg. Therefore, there is no provision that explicitly can limit the authority of judges, so that the judges who examine the cases have the authority as well as the moral obligation to strive for the parties disputes peacefully (consensus of agreement). The peaceful

[1] See article 62 The Law No. 5 of 1986 regarding The Administrative Court that has been amanded by the Law No. 51 of 2009 regarding the Second Amandement of The Law No. 5 of 1986 regarding The Administrative Court.
[2] Rochmat Soemitro, 1998, *The Administrative Court*, Refika Aditama, Bandung, p. 16.
[3] See article 63 The Law No. 5 of 1986 regarding The Administrative Court.

resolution of disputes is one of the most positif way to solve the dispute because the principles are built equally and beneficially (win-win solution), which the won party will be satisfied and the defeated party will not feel aggrieved.

5. Conclusion

The integration of mediation institution in the civil cases settlement process in the general court (including the religious court) through the Supreme Court Regulation No. 2 of 2003, which is replaced by the Supreme Court Regulation No. 1 of 2008 is a regulation which is expected to minimize the number of civil cases in the court and to expedite the civil cases settlement process which is proposed by the parties, so that it will avoid the public indication for the slowliness of the settlement process by the judiciary. However, the effectiveness or uneffectiveness of the mediation institution to resolve the civil cases through the mediation depends on two things, the regulation regarding to the authority of the institution and the ability and the professionalism of the mediatorfor meditating the parties.

Observing the authority of mediation institution as regulated in Article 14 verse (1) and (2) PERMA No. 1 of 2008 turns out to be very limited. Therefore, it will be difficult for the mediator to meditate the parties. The authority of the mediation institution is limited because there are only two of the authority that they have, the authority to declare the process if the mediation is failed and the failure of the mediation because of lack of parties.

In order to create the effectiveness of the mediation institution, the authority needs to be extended by adopting the investigation process in the deliberation meeting and the premiliniary investigation by the judiciary of the state administration in the state administrative court.

References

Gatot Soemartono, 2006, *Arbitration and Mediation in Indonesia*, Gramedia Pustaka Utama, Jakarta.

Jimmy Yoses Sembiring, 2011, *The Way to Settle Disputes Out of the* Court *Process*, Visimedia, Jakart.

M. Yahya Harahap, 2006, *The Civil Procedural Law on Suing, Courting, Seizuring, Proofing, and Taking Desicion of the Court*, Sinar Grafika, Jakarta.

Rochmat Soemitro, 1998, *The Administrative Court*, Refika Aditama, Bandung.