Problems and Prospects of Mediation in the Justice System in Indonesia

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Keywords: Supreme court, court, mediator, mediator judge.

Abstract: Conceptually, mediation is believed to be one model of court settlement in a fast, cheap and beneficial way for both parties. However, based on the annual report released by the Religious Courts and the District Court in several major cities in Indonesia, the success rate of mediation is still low, while cases that fail to be mediated are still high, resulting in conflict in the Court. This study aims to describe and evaluate the root of the problem of mediation success and failure in the Court, and efforts that have been made by the Courts in order to improve the success of mediation and examine the future of mediation within the judicial system in Indonesia. The research method used was formative evaluation method. The results of this study concluded that the success and failure of mediation in court was caused by the disputing parties, advocates, mediators and means. Efforts that are being made to improve the success of mediation are the provision of rewards for mediators, improving the mediation regulation in the form of Supreme Court rulings along with their technical guidance, appointing the court as a mediation pilot project, conducting mediator training for judges and for prospective judges, building cooperation with BP4 (an advisory board that guides and preserves marriage); and the prospect of mediation as an alternative to dispute resolution in court which still gives hope in light of the changing success rate of each year's mediation from each court. Thus, this study reinforces the theory of law enforcement that the mediating and supporting elements of mediation in court are caused by four elements, namely, elements of regulation, disputants, mediators, and infrastructure and facilities.

1 INTRODUCTION

Mediation is one of the dispute resolution efforts of the disputing parties by presenting an independent third party to act as mediator. Mediation can be the best solution to resolve disputes, including in business disputes (Elena Ilie, 2015). According to the Supreme Court Regulation (PERMA) No. 1 of 2016, mediation is a means of dispute resolution through the negotiation process to obtain agreement of the Parties with the assistance of the Mediator

As one of the out-of-court dispute settlement processes, dispute resolution through mediation is now practiced in an integrated manner with the judicial process. It means that the process of mediation in the judicial system in Indonesia becomes a must before the examination of the lawsuit case.

The mediation process in the courts in Indonesia is conducted after the registration of the case and the trial has been attended by the parties. The mediator is determined by the judges when the parties are present at the first hearing.

This mediation law is initiated through Article 154 of the Regulations on the Procedural Laws for the Outside of Java and Madura and Article 130 of the updated Indonesian Regulation. The article encourages parties to pursue a process of peace that can be utilized through Mediation by integrating it into court procedure in court. The law continues to improve both in the process and its implementation by issuing Supreme Court Regulation Number 2 Year 2003 and Supreme Court Regulation Number 1 Year 2008 on Mediation Procedure in Court. Although regulations have been regulated about mediation, the implementation stage is still not effective. According to Bahrul Ulum, the provision of mediation in the Supreme Court Regulation No. 1 of 2008 on Mediation Procedures in Courts is still considered weak (Ulum, Harun, & Faizah, 2016). Thus, the Supreme Court revised Supreme Court Regulation Number 1 of 2008 on Mediation Procedure in Court

Sururie, R., Mukhlas, O., Praja, J., Gojali, D. and Burhanudin, M.
Problems and Prospects of Mediation in the Justice System in Indonesia.
In *Proceedings of the 2nd International Conference on Sociology Education (ICSE 2017) - Volume 1*, pages 591-596
ISBN: 978-989-758-316-2

by issuing Supreme Court Regulation Number 1 Year 2016 on Mediation Procedure in Court.

Although the regulation is sufficient to support mediation in court, its implementation has not been maximally done either by the District Court or by the Religious Courts. For example, based on data obtained in 2011, mediation in Religious Courts was less than 20% (Labuanbajo, 2011). Table 1 shows the successful mediation rate in 2011.

Table 1: Successful mediation in 2011.

Religious Court (PTA) location	Mediated cases	Successful mediation	Percentage (%)
PTA Surabaya	22,011	1,404	6.38%
PTA Semarang	12,084	316	2.62%
PTA Bandung	8,117	126	1.56%
PTA Makassar	2,427	113	4.63%
PTA Jakarta	3,147	112	3.56%

Another example showing the lack of mediation success in the courts in Indonesia is based on data obtained from the Religious Court (PA) Sungguminmin, South Sulawesi Province (Sungguminasa, 2015).

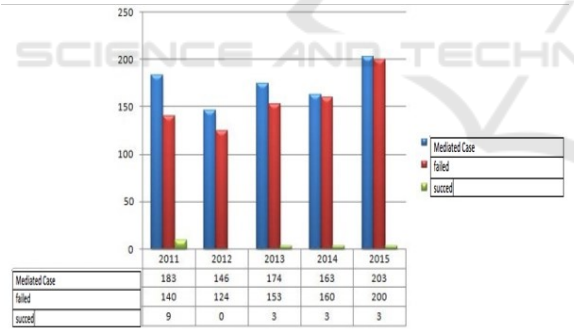

Figure 1: Annual Statistics of Mediation process.

Based on table 1 and figure 1 above, the success rate of mediation is still low, while cases that fail to be mediated are still high so that cases end with conflicts resolved through a trial process that takes a long time to be completed.

This study discussed the root causes of the problems and success of mediation in the courts, the efforts that have been made by religious and state courts in order to improve the success of mediation, as well as the future of mediation within the judicial system in Indonesia.

The root of the success and failure of mediation in the Religious Courts and the District Court depends on the four elements, namely mediators, legal materials (legal instruments), the parties to the dispute, and facilities and infrastructure. The relationship of the four elements is as follows:

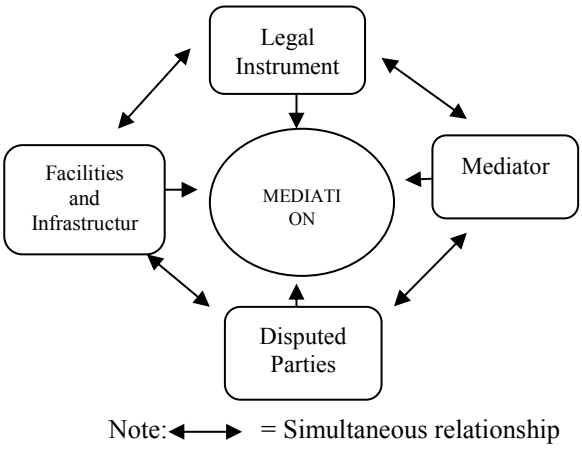

Figure 2: The relationship among mediation elements.

Based on figure 2 above, the framework of thinking used is as follows: First, the system is a whole and an integrated entity, consisting of several elements, namely legal material, mediators, the parties to the dispute, and facilities.

Second, the elements are mutually related to one another. If one element is less supportive, it will affect other elements; and thirdly, the four elements have equal opportunities to support and obstruct law enforcement and justice.

A research conducted in Religious Court in Jakarta concludes that the factors that constrain the settlement of civil disputes through mediation institutions are a) lack of goodwill from the parties to the dispute, b) more formality peace suggestions by judges, c) limited mediator expertise, d) lack of administrative coordination, and e) limited facilities and infrastructure supporting the implementation of the mediation process (Anshori, 2013).

2 METHOD

This study is an empirical study related to problems in the field that rely on data from mediators and the parties studied (Arikunto, 2006). The study used a qualitative approach that is by matching empirical reality with valid theory by using descriptive method and formative evaluation. The method of formative evaluation research means that this method is used to assess the elements of support and inhibition of success and failure of mediation in the courts in

Indonesia. The main function of evaluation in this case is to provide useful information for the decision maker to determine the policy to be taken based on the evaluation that has been done.

The data in the study were obtained from the primary and secondary data sources. Primary data is the result of interviews with the parties involved in mediation in the Courts and legislation closely related to the mediation process and the files of mediation recapitulation cases in every District Court and Religious Court. Meanwhile, the secondary data is the result of research to find the reference knowledge about the key concepts in research that will be done which can also be books/research results, seminar papers, articles from websites, legal dictionaries, and others.

The data analyzed in this study covers subjects closely related to the causes of the success and failure of mediation in the courts, the efforts that have been made by the Religious Courts and the District Courts in order to improve the success of mediation, as well as the future of mediation in the judicial system in Indonesia.

The data collection of this research was done through in-depth interview to informants or respondents involved in mediation process in District Court and Religious Court such as to mediator, judge, and disputed party or advocate; Observations were made to observe directly the implementation of mediation, from the process, the implementation and the settlement of cases through mediation; Literature Studies were conducted by studying and reviewing books, theories or other types of reading that have to do with the mediation problem under investigation.

The data are analyzed through the following stages: 1) The collected data is selected according to data collection techniques; 2) the basic theories or concepts that support the implementation of mediation in court are described; and 3) data were analyzed by taking into account the theories or concepts, so that the answers to the research problem are obtained.

3 RESULTS AND DISCUSSION

3.1 Mediation Model in the Judicial System in Indonesia

Lawrence Boulle mentioned there are four mediation models, namely settlement mediation, facilitative mediation, transformative mediation and evaluative mediation (Bandung, 2015). First, the Settlement mediation is known as mediation of compromise with its ultimate aim of encouraging the realization of a compromise of the demands of both parties in dispute.

Secondly, facilitative mediation is often called interest-based and problem-solving mediation aimed at avoiding disputing parties from their positions and negotiating the needs and interests of stakeholders from their legal rights in a rigid way (Stitt, 2004).

Third is transformative mediation, also known as therapeutic mediation and reconciliation. The media model emphasizes the search for the underlying causes of problems among the disputing parties, with consideration to improve relations among them through recognition and empowerment as the basis for conflict resolution of existing disputes (Bush & Folger, 2004)

Fourth, the evaluative mediation, also known as normative mediation, is a mediation model aimed at achieving agreement on the legal rights of the disputing parties in the area anticipated by the courts (Stitt, 2004).

Of the four types of mediation mentioned above, mediation in the courts applied in the judicial system in Indonesia is more to settlement mediation because in mediation conducted by the court aims to encourage the compromise of the demands of both parties in dispute.

3.2 Supporting and Inhibiting Factors to the Success and Failure of Mediation in Courts

3.2.1 Legal Material

The legal matters of mediation in the legal system in Indonesia are as follows: First, article 130 HIR (Article 154 RBg./article 31 Rv); second, Article 39 of Law Number 1 Year 1974, Article 65 of Law Number 3 Year 2006, Article 115, 131 Paragraph (2), 143 Paragraphs (1) and (2), and Article 144 Compilation of Islamic Laws and Article 32 Government Regulation (PP) Number 9 Year 1975; third, the Supreme Court Circular (SEMA) Number 1 of 2002 on the Empowerment of Courts of First Instance Applying the Peace Institution; the four Supreme Court Regulations Number 2 Year 2003 and Supreme Court Regulation (PERMA) Number 1 Year 2016 on Mediation Procedures in Courts..

Based on the legal material, the rules of mediation are sufficient to support the mediation in court, so that the existence of legal materials about this mediation can be said as a supporting element of the success of mediation in court.

3.2.2 Mediator

The main requirement of a mediator is the ability to invite and convince the dispute party to find the best way to resolve their dispute (expertise in mediation techniques) (Sugiatminingsih, 2009). The ability to reconcile the parties to the dispute is indispensable. The ability of the mediator lies in the mediator's communication ability with the parties to be perfect (Răzvan Lucian Andronic, 2013).

Mediators in court mediation can be categorized into two, i.e., mediators from judges or often referred to mediator judges, and mediators from non-judge who are certified by the Supreme Court obtained through mediator training. In the judicial system in Indonesia, certified mediators are still very few in number and mediators from non-judges (certified mediators) are rarely the choice of the disputing parties because there is a charge to pay by the parties (Saifullah, 2015).

In addition, the ability or skill mediator in mediation is still considered less. Mediators have insufficient knowledge as in the case of sharia economic disputes. This is the obstacle to successful mediation in court (Ramdani, 2017). Based on previous research, this mediator is often an obstacle to successful mediation in court because mediation is more of a formality only.

3.2.3 Disputing Parties

As one form of dispute resolution, mediation can be viewed as a social institution, not viewed as a legal institution (Sugiatminingsih, 2009). Thus, the development or success of mediation depends on the social attitudes of the people in this case are the parties to the dispute.

This element can also be a factor inhibiting or supporting the success of mediation in the Court. Most disputants consider that the mediation process in court is a formal requirement of dispute resolution in court, so that in the mediation process is not undertaken seriously (Bintoro, 2016).

In order for mediation to succeed, the disputants must have a strong desire that the case be resolved through mediation in court (Ahmad, 2014). The attorneys of the parties should be more concerned with the interests of his clients to help to reconcile rather than inhibit the result of mediation (Abdurrohman, 2017).

This is also in line with previous research which states that one of the causes of the failure of mediation is from the advocates who counter the mediation process. They consider that running the mediation process is merely a formality. This is because the longer the advocate becomes attorney of his clients, the more income they get (Arief, 2016).

3.2.4 Facilities and Infrastructure

The element of mediation facilities and infrastructure is necessary to ensure the success of mediation in court. As mediation facilities and infrastructure are sufficient, many cases can be successfully mediated.

Mediation facilities and infrastructure of the judicial system in Indonesia still do not meet the criteria. It is necessary that the mediation room should be comfortable. However, in fact, the place of mediation in the courts of Indonesia is located near the courts so it is uncomfortable. The limited facilities and infrastructure of mediation are also found in the Central Jakarta District Court, where it should be an example for other courts throughout Indonesia (Anshori, 2013).

Therefore, the elements of these facilities and infrastructures actually become the barrier of mediation. Facilities and infrastructure should receive attention, especially the Supreme Court which must standardize the availability of mediation facilities and infrastructure in the courts.

The findings of the four aspects are shown in Table 2.

Table 2: Supporting and inhibiting elements of mediation in the Indonesian judicial system.

No	Elements	Supporting	Inhibiting
1	Legal Materials	V	
2	Mediator		V
3	Disputing Parties		V
4	Facilities and Infrastructure		V

Table 2 shows that three aspects are not supporting the success of mediation in the court. Thus, it is clear that the success of mediation is not yet effective,

3.3 The Efforts of Courts in Enhancing the Success of Mediation

Some of the efforts being made by the Supreme Court to support the success of the mediation are 1) the awarding of awards to mediators who have succeeded in reconciling the parties during the mediation process. This reward is not in the form of incentives, but in the form of job placement for mediators from the judges (Agung, 2013). This reward is expected to

encourage mediators to be more serious in reconciling the parties, especially the non-judicial mediators (certified mediators). The provision of mediation reward can also be optimal if the mediation fee charged to the parties is set in general (Doornik, 2014); 2) Creating a mediation pilot project in Religious Courts and District Courts. This means that the Supreme Court will select judicial courts for mediation; 3) Conducting training of certified mediators; 4) Doing a comparative study to developed countries; 5) Having cooperation with BP4 to provide a peacemaker; 6) Certification training for judge mediator.

3.4 The Future of Mediation in the Judicial System in Indonesia

As part of an alternative dispute settlement, mediation in the courts still gives some hopes. Through mediation, problems can be solved by a win-win solution, meaning that it can provide justice for the disputing parties. Therefore, the most important thing now is how the efforts of the Supreme Court as an institution that oversees the courts in Indonesia are able to encourage the success of mediation in the courts.

The prospect of mediation in the courts will be stronger if the current mediating jurisdiction of mediation is upgraded to a kind of legislation. In addition, policies established by the Supreme Court can further strengthen the position and benefits of mediation in the courts through strengthening the training of certified judicial mediators.

In addition, the role of the community through multi-door mediation needs to be strengthened. The Supreme Court can open the door of mediation outside the court, for example through optimizing the role of BP4 and establishing mediation institutions accredited by the Supreme Court. Islamic Higher Education, especially the Faculty of *Shari'ah* and Law can be appointed as a competent institution to handle mediation, both as mediator and training organizer. The mediation institution can also be in the *pesantren*. The scholars and Islamic leaders *(kyai)* may act as mediators for parties with civil disputes. The involvement of scholars and *kiyai* became mediators based on the opinions of the scholars of interpretation which requires that a peacemaker *(mushlih, hakam* and mediator*)* has the requirements of *khauf, taqwa, faqih* and understand the problem being disputed. The *kiyai* and *ulama* are seen as those who possess the qualifications and the charisma that is able to influence the disputing parties.

The idea of multi-doors mediation as mentioned above can only occur by changing the Supreme Court's rules on mediation or through other policies. Thus, the success of mediated cases will increase in the future.

4 CONCLUSIONS

The study concludes that some of the points that support and inhibit the success and failure of mediation in court are determined by the factors of law, mediators, parties and advocates, and mediation support facilities. Second, the Supreme Court provides rewards to mediators who have succeeded in reconciling the parties; improve regulation of mediation in the form of regulations, appoint court as mediation pilot project, conduct mediator training for judges and for candidate judges, in cooperation with BP4; and thirdly, the mediation in the court still gives hope because the superiority of the settlement of the case through this mediation is done in a win-win solution (equally win), so that it can produce legal justice, legal certainty, and legal benefit.

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