The Repositioning Mediation Court Model in Civil Dispute Resolution with Justice

Benny Riyanto¹, Hapsari Tunjung Sekartaji² & Dewi Nurul Musjtari³

¹Fakultas Hukum, Universitas Diponegoro¹
E-mail : dr.bennyriyanto@yahoo.com
²Fakultas Hukum, Universitas Diponegoro¹
E-mail : hapsari.tunjung@gmail.com
³Fakultas Hukum, Universitas Muhammadiyah Yogyakarta²
E-mail : dewinm@yahoo.com & dewinurulmusjtari@umy.ac.id

Abstract. One of the reasons of the failure of court mediation is caused by mediators who have not succeeded in resolving civil disputes through mediation. Even the existence of Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts has not been able to increase the success rate of dispute settlement through court mediation. Data from previous research results in Batusangkar District Court show a success rate of mediation of 8, 05%. Based on the analysis, one of the causes of failure is based on the character of the mediator. The purpose of this study is to find the repositioning of court mediation models in the justice civil disputes resolution. Theories used include Robert B. Seidmen Theory, Theory of Christopher W. Moore and the Concept of Effectiveness of Law Enforcement according to Soerjono Soekanto. This research is socio-legal research, using qualitative analysis and philosophical and sociological approach. Data used both secondary data and primary data. Secondary data from research result at Batusangkar District Court. Primary data obtained from Denpasar District Court, Semarang District Court and Supreme Court. The result of this research is that the repositioning of court mediation model in solving civil disputes that is justice is the process of settling disputes outside the trial process becoming part of compulsory administrative requirements. Mediation carried out at the time of fulfillment of these administrative requirements may be made by the Judge Mediator and the Non-Judge Mediator. The repositioning of the mediation model is important to do because the character of the decision maker, in this case the judge with the character of the mediator, is not the same. In addition to the character of its law enforcers, the character of the parties and cultural factors also influence the degree of success of mediation in court.

Keywords: Reposition, Court Mediation, Dispute Resolution, Justice.

1. Introduction

Attempts to return a model of dispute resolution that fits the culture of the Indonesian nation have begun by incorporating the provision of mediation into several laws and regulations by classifying the settlement of disputes outside the court. This is confirmed by the issuance of Law number 30 of 1999 on Arbitration and Alternative Dispute Resolution (ADR). Peace between the disputants in the District Court is a mandatory procedure that must be implemented. As stipulated in Article 130 paragraph (1) HIR / Article 154 paragraph (1) RBg that when the judge open the first day of trial session, the judge shall offer peace to both parties litigation, even this peace effort shall be published in the minutes of the hearing. It is because if the sanctions are not contained in the minutes of the hearing then the next sessions are null and void. The existence of the aforementioned provision indicates that the judge has an active role to pursue a peaceful settlement of civil cases examined. The jurists agree that the efforts of the judges to reconcile the parties in the civil case are not limited to the first trial only, but still pursued during the hearing process of the hearing finished. Therefore, with the end of the dispute through peace, no party is defeated and no one feels victorious.
Based on previous research result by Yayat Yoratul Salamah in Batusangkar District Court, as The Supreme Court District Court's Pilot Project during 2003-2007, that the success rate of mediation was 8.05%. This indicates that the dispute resolution through mediation in court has not been successful due to one of them by the character of the law enforcement, in this case the judge as a mediator. The character of the judge who generally solves the problem by making a decision is different from the character of the mediator who seeks to solve the problem in a "win-win situation". Therefore, the researcher is interested to find a solution in order to resolve the dispute through mediation so that the success rate can be increased. The problem in this research is to find the repositioning of court mediation model in civil justice dispute settlement.

2. Methodology

This research used socio-legal approach with qualitative tradition. Its operationalization was carried out according to the constructivism paradigm. The research was conducted with two strategies namely library research and case study. The secondary data were obtained through library research and legal documents which include: a. Primary legal material, including: Article 130 HIR, Law number 30 of 1999, the Supreme Court Regulation Number 01 of 2016, Data from Batusangkar District Court; b. Material secondary law, consists of books on the Legal System, Principles of Law, Legal Theory, Civil Procedure Law, Mediation, Legal Research Methodology, Journal. Primary data obtained through field research (Field Research) conducted by observation, interviews in Denpasar District Court, Semarang District Court and the Supreme Court.

3. The Review: Repositioning Mediation Court

The problems of ineffective court connected mediation caused by some factors. The factors are the failure in creating integrated model, including the failure of mediator in mediation process. A confidential mediation should be integrated with a civil judicial model which is open to public. It causes the emergence legal cultural problems for mediator, advocate, and parties who have legal dispute in mediation practice. As stated by Tony Whatling, cultural assumption influences the success of mediator in a mediation. Steven E. Barkan, based on socio-legal point of view, reveals the influence of social and individual factors. The society has a different point of view towards some certain aspects of their structure and culture, which is helpful in explaining the different preference of dispute settlement method.

4. Findings

Civil disputes are disputes between individuals, individuals and legal entities, also legal entities and legal entities. Civil dispute resolution will be more effective if it can provide a peaceful solution and win-win solution. Effectiveness of Law Enforcement according Soerjono Soekanto there are 5 (five) factors, among others: a. Legal factors (Law); b. Law enforcement factors; c. Supporting facilities or facilities; d. Community factors; e. Cultural factors.

Robert B. Seidman puts forward the theories of the law of the non-transferable law, that the laws of a country derived based on certain cultural social conditions would not be applied simply to apply to a population group living with a social consciousness culturally different. Christopher W. Moore describes the continuum of conflict management and settlement approaches that conflicts within societies have various ways of completion and some of the above are optional. Each option has a different way of formality of the process, the privacy of the approach, the person involved, the authority of the third party, the type of decision being generated, and the amount of coercion imposed by or on the parties to the dispute. On the left side of the circuit (continuum) is informal, a private procedure involving only the parties to the dispute. While on the right side, one party wore coercion and often a public action that forced the opponent obedient (submissive).
The use of the model is determined by the purpose of dispute resolution, complexity, and social status. Each model has advantages and disadvantages. The use of the litigation model or through the judicial system, is based on the paradigm of dispute settlement as the enforcement of the rule of law. The existence of a court is intended as a facilitative means to uphold the authority of the law by providing access to justice for the parties to the dispute.

In Indonesia, in general provision regarding to mediation is regulated under Act Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (Undang Undang Arbitrase dan Alternatif Penyelesaian Sengketa), but it is not regulated further, even it is not mentioned as court connected mediation. Special provision on mediation in court is regulated by Supreme Court Rules Number 1 of 2016 on Mediation Procedure in Court. At the level of ideas, the Act on Arbitration and ADR contains controversy. On the one hand, it showed the mediator’s freedom to use model variation. On the other hand, the Act limits the model variation to offer. Technically, mediation is becoming very strict. The impression created about the mediator’s freedom to use model variation is actually an incorrect impression since what is freed by the Arbitration and ADR Act and the Supreme Court Rules is the technique of model which is specified limited. It means both Arbitration and ADR and Supreme Court Rule follow the paradigm of “limited model” and do not provide “model and technical freedom space”. It is clearly stated on article 6 section (2) of Arbitration and ADR Act:

“Dispute or different opinion settlement through Alternatives Dispute Resolution referred to in section (1) is resolved in a meeting directly attended by parties in a maximum period of time of 14 (fourteen) days and the result is set forth in a written”. The characteristic of mediation is a voluntary system in which a neutral controls a process but does not intervene in the content of a dispute and which leads to consensual outcomes for the parties. Theoretically, mediation is part of the way of ADR so that its territorial is clearly out of court, but since Supreme Court Regulation in 2003 emerged, it has been mediated by the mediation institution.

To overcome this, it is necessary to reconsider the obligation of "pollination" sessions of the court connected mediation process so as not to injure the main character, in a more confidential sense. Mediation must be carried out before the case is registered by the Court, so at that time there has not been any public announcement by the court. This hypothetically can reduce the burden on the disputed nature of the dispute because the parties have not felt defamed by a lawsuit that does not necessarily state its act against the law or default. In this case, the "refining" of mediation that is integrated with the court becomes a necessity. Although the Indonesian people have traditionally known "musyawarah", which in the context of dispute settlement can mean peace efforts or paths between the parties, but it is not entirely the same as mediation. In certain matters deliberations have a fundamental difference with mediation. It can be the same in terms of principle, but there is a gap in its technical aspect. Therefore, making mediation is not easy to accept, and it requires modification at the strategic and model level.

This is related to legal certainty and the quality and consistency of the decisions that are perceived to be deteriorating due to the high number of cases entering the court. These conditions make the Supreme Court difficult to map legal issues and monitor the consistency of decisions. Based on Supreme Court reports since 2013, almost every case at the high court level is appealed to the Supreme Court. Approximately 80% of cases that go to the Court High court level almost certainly requested a legal effort to the Supreme Court. The best way out of the Supreme Court is to limit the case.

The limitation of the case is done with the initial stage of strengthening the lower court function. Strengthening is done by extending the criteria of case restrictions to the optimization of peaceful efforts in civil cases. Supreme Court Regulation Number 1 of 2016 provides an obligation for judges to seek peace through mediation at the first hearing with the presence of both parties to the dispute. The purpose of this process is to ensure that justice seekers can obtain justice in a fast, simple and low-cost process. In the process, mediation involves the neutral and impartial third party in the case,
but has a role in the settlement of the case. The third parties may be admitted if the parties agree to the presence of a third party in this process referred as a mediator, to assist the parties find a way to resolve the dispute amicably.

This is in line with the view in the community that the party summoned by the Court as the party of powers, in the presence of the summons of the trial, the defendant feels he has been placed as the guilty party. This is in the eyes of the Indonesian people is already a negative stigma, which is risking his good name and self-esteem. Thus, the appropriate concept of mediation applied in civil litigation in Indonesia needs to be repositioned initially integrated in the litigation process changed to one of the requirements for filing a lawsuit.

Based on the results of author field research in District Court Semarang and District Court Denpasar obtained data as follows:

**Table I. Success rate of mediation in District court Semarang**

| Year | Number of Civil Cases | Mediation Process | Percentage |
|------|-----------------------|-------------------|------------|
| 2013 | 479                   | 15                | 3,1%       |
| 2014 | 482                   | 8                 | 1,6%       |
| 2015 | 520                   | 7                 | 1,3%       |
| Average |          |                   | **2,05%**  |

a. Author Research Results (2015)

**Table II. Success Rate of Mediation in District Court Denpasar**

| Year | Number of Civil Cases | Mediation Process | Percentage |
|------|-----------------------|-------------------|------------|
| 2013 | 857                   | 21                | 2,45%      |
| 2014 | 934                   | 19                | 2,03%      |
| 2015 | 986                   | 24                | 2,43%      |
| 2016_(Jul) *(y)* | 528                   | 3                 | 0,56%      |
| Average |          |                   | **1,86%**  |

b. Author Research Results (2016)

Based on the above description in two of district court in Indonesia indicate that the success rate of Indonesia court mediation have a low rate. That data reflecting the failure of mediation and the hope of lawmakers and law enforcers to develop a culture of peace amongst peoples in the settlement of civil disputes with justice. The failure of the use of mediation in Indonesia, particularly mediation which is integrated with the court as a court connected mediation. It is characterized by a low agreement reached in mediation in court, so the case continued until a court decision is legally binding.
The other factors that influence the lack of success of the mediation process in the District Court are the inconsistency of the concept of mediation court based on the Supreme Court Regulation Number 01 of 2016, the unprofessional mediator in this case the competence and skill of the mediator (which the majority are the judges who mediate) are still lacking, the facilities and infrastructure supporting the implementation of mediation, community and culture.

In the mediation stages in the District Court the mediator provides an opportunity for the parties to make presentations to clarify personal point of view of the case in turn, which aims to get maximum information for the mediator and both parties. This stage is important because although the mediator is not entitled to decide the outcome of mediation, the mediator is have a role as a facilitator of the parties to identify the problem and make the problem scheme in the case. However, in practice it is still difficult for a mediator, both non judge and judge mediator, to identify and make problem scheme due to several things:

1) The complexity of the problem is not the same in every case. There is a possibility of developments in matters that do not directly or indirectly affect matters;

2) The failure of the mediation process is considered a common one. That mindset should be avoided from the parties, the mediator, even from the judge. Failure of mediation from year to year has not been much decreasing even it has been surprisingly increasing. Therefore, the mediation that fails is considered to be common and common. Thus, the peace effort becomes a formality and is run in a perfunctory manner.

Several factors contributed to the high failure rate of peace efforts through mediation in the District Court according to the author's analysis, as follows:

a) Mediator's Inadequacy

Mediator plays a role as a third party who seeking peace between the parties in the dispute therefor the mediator should have competence in the subject matter of the dispute. The mediator is deemed to have skills with acting skills in accordance with the area under his control and has passed certified as a mediator as one of the requirement;

b) Mediation is considered to extend the process of settlement of cases in the Court;

c) No reward or appreciation for judge mediator from the Supreme Court,

The majority community chose mediator judges as mediators in the mediation process of civil cases in the District Court to help the parties undergo mediation;

d) There is no trust between the parties,

The spirit to achieve win-win solution in mediation is difficult to get with the doubts raised by the opponent himself, either because the peace efforts have been made long before the admission to the court or because the parties are often in default of a family-based agreement previously committed.

e) Cultural complexity on the parties,

Each of region develops with the influence of culture, habits and other factors such as education that differ one region to another one. It affects to build a complex character from the parties. Economic factor becomes the main factor in the consideration of the settlement of the case.

The mediator did take a part as determinant successor of court mediation and it should be realized that success of the court mediation depends on the parties with the authority. Although mediators are not the determinants of success and decision-makers of the mediation process, mediators play an important role in the efforts of the mediation process. Based on the field research, the authors found the fact that all mediation proceedings that took place in the District Court all pointed to judges as mediators.
The above description leads to the understanding that the mediation model integrated into the court requires reconstruction for the purpose to achieve a justice for justiciable as an optimal result, success as a very significant dispute resolution effort. Based on the model that has been developed, the variations possible in practice in are Indonesia need to be loosened. This means that the model and process of strict mediation arrangement should be transformed into an open mediation model and process, so that the mediator has the choice of model and mediation process in accordance with the unique condition of the case at hand.

The mediation placement integrated into the courts as a means to replace and optimize the provisions of Article 130 HIR / Article 154 Rbg regulating the peace was not suitable to be applied in Indonesia. Mediation that is integrated into the court, in fact also combined with the concept of "peace" itself. The "peace" is already based on court registers and announcements by the court. Although the Supreme Court Regulation allows co-mediation, in practice, it is never implemented. Even court connected mediation has become part of the dispute because it has been registered and published to public. So that it becomes a non-legal factor that influence the parties to reach agreement.

This condition hypothetically causes the defendant to feel embarrassed, even challenged, so that the Defendant in particular, very difficult to give concessions in the process of bargaining or negotiation during mediation.

This reality is commensurate with one of the reasons for the birth of the ADR, among which, the judicial process is incapable of maintaining the confidentiality of the parties in the legal relationships that cause disputes. Thus, when mediation is also placed in a process that has been open because it has been announced by the court, the mediation process creates cynicism on the parties. Mediation should have been done before the case is registered to the court, so that the dispute has not been announced to the public yet. It can decrease the burden of the open characteristic of the dispute. In this case, the re-purification of the court connected mediation is a necessity.

5. Conclusion

The conclusion of this research is that the factors influencing the less-successful of court connected mediation in Indonesia are the legislation, law enforcement officers, facilities and infrastructures, society and culture. The repositioning of court mediation model in solving civil disputes rightfully is the process of settling disputes outside the trial process which become part of compulsory administrative requirements. Mediation carried out at the time of fulfillment of these administrative requirements may be made by the Judge Mediator and the Non-Judge Mediator. The repositioning of the mediation model is important to do because the character of the decision maker, in this case the judge, with the character of the mediator is not the same. In addition to the character of its law enforcers, the character of the parties and cultural factors also influence the degree of success of mediation in court.

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