

LEGAL CERTAINTY OF ALTERNATIVE DISPUTE RESOLUTION MEDIATION

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ABSTRACT

If you look deeper into the substance of arbitration, the regulations are more dominant compared to the regulations regarding alternative dispute resolution. This arrangement is very important regarding the legal capacity of a mediator in carrying out his mediation function. Alternative dispute resolution in Indonesia is a tradition that has been implemented for a long time, such as in customary law in rural communities. An alternative model for resolving disputes in customary law communities is carried out by means of deliberation to reach a consensus. Dispute resolution through mediation is much more effective and efficient in terms of time, energy and costs when compared to dispute resolution through court. the process of resolving disputes through mediation is final and binding. The method used in this research is normative juridical. where doctrinal research is related to mediation within the framework of norms that have been abandoned or there is a legal vacuum. the rules regarding mediation are very simple while the legal requirements are increasing. the substance of the mediation arrangements is incomplete, such as arbitration. National legal product was regulated arbitration and alternative dispute resolution. in addition to being able to resolve civil disputes to general courts, there is also the possibility of submitting them through arbitration and alternative dispute resolution. laws arbitration and alternative dispute resolution such as mediation do not have legal certainty, because the substance of the mediation arrangements is incomplete. This is certainly detrimental to the disputing parties. Supreme Court regulated vacuum law to control this legal proceeding. The mediation process is carried out based on the practices that apply in the field. This is certainly detrimental to the disputing parties, and reduces public interest in resolving their disputes through mediation

Keywords: *Dispute Resolution; Mediation; Legal Certainty*

INTRODUCTION

The occurrence of conflicts or disputes on this earth has started since the creation of the first human (Prophet Adam. AS and Siti Hawa) was predicted previously by Allah SWT. Contained in the Qur'an Surah Al-Baqarah Verse 30 concerning the creation of humans and their dominion on earth states, which means, "Remember when your Lord said to the angels; that indeed I (Allah SWT) want to make a leader (Caliph) on the face of this earth, a person who will cause destruction and bloodshed, even though we (the Angels) always glorify ourselves by praising You. Allah again says that indeed I know what you do not know ". The verse tells that the angels protested against Allah SWT. Due to the creation of humans on this earth, it is because of human actions that damage, conflict or disputes occur which lead to bloodshed, and even the loss of human life itself. An example is the murder of Abel by Khabil, son of the Prophet Adam AS.

Dispute resolution is a noble job, because in principle it is about returning to the original position before the dispute occurred.

There are two ways to resolve disputes: (1) disputes are resolved through litigation which is the oldest form, (2)

dispute resolution is based on cooperation (cooperative) outside of court which is called " Alternative Dispute Resolution (ADR)", among which are by mediation (Rachmadi Usman, 2013: 5). Law N0.30 of 1999 concerning Arbitration and Alternative Dispute Resolution in Article 1 point (10) states that Alternative Dispute Resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties such as: consultation, negotiation, mediation, conciliation, or expert assessment. Alternative dispute resolution carried out by arbitration bodies according to Law Number 30 of 1999 is not included in alternative dispute resolution, although experts state that arbitration is part of alternative business dispute resolution methods outside of court. Alternative dispute resolution is a form of dispute resolution outside of court , known as non-litigation.

The aim of resolving disputes outside the court forum is to accommodate the interests of the parties due to differences of opinion as is the aim of the establishment of Law Number 30 year 1999¹. Apart from that, the principle of alternative dispute resolution is win- win,

¹ Wijaya, Gunawan, 2005, Business Law series on alternative dispute resolution, PT Radja Grafindo, Jakarta, p. 1

avoiding complicated formalities such as resolving disputes in court forums (litigation), and preventing cases from piling up in court forums.

Viewed from a historical perspective, according to the author, alternative dispute resolution has existed on this earth since the first humans, such as the Prophet Adam AS who mediated the conflict between his son Khabil and Habil in choosing his life partner. Before the arrival of Islam, in the Christian religion, mediation for resolving disputes was also carried out by the Pope/Priest for his congregation in dispute. During the time of the Prophet, mediation for resolving disputes was also carried out by the Prophet Muhammad SAW, such as when laying the Hajjar Aswad stone, the Hudaibiyah agreement between Muslims and the Quraish infidels during the Hajj season.

Alternative dispute resolution in Indonesia is a tradition that has been implemented for a long time, such as in customary law in rural communities. An alternative model for resolving disputes in customary law communities is carried out by means of deliberation to reach a consensus carried out by the Village Head

or Traditional Chair, such as in cases of debts, land issues, marriage and so on.²

Dispute resolution through mediation is much more effective and efficient in terms of time, energy and costs when compared to dispute resolution through general court (litigation) which has a long time and formal procedures, such as legal action, appeal, cassation and the possibility of legal action. as extraordinary as hindsight is. Meanwhile, resolving disputes through mediation can be done without time and costs, because the terms stages, appeal, cassation and judicial review are known. Because the process of resolving disputes through mediation is final and binding.

The principle or philosophy of resolving disputes through mediation is that it starts from the principle of community life, whether individual or group, always side by side, which does not rule out the possibility of conflict or disputes that give rise to disputes. The solution is carried out wisely by the country's founding fathers through deliberation, as intended in the 4th

² Emirzon, Joni, 2001, Alternative dispute resolution outside of court within the framework of negotiation, mediation, conciliation and arbitration, first cet , PT Gramedia Pustaka Utam, Jakarta, p. 499

principle of Pancasila, namely deliberation to reach consensus.³

According to Folberg and Taylor in Joni Emirzon, if you carry out dispute resolution mediation, it must go through the following stages: (1) introduction between the parties and the mediator to build a relationship structure, (2) exploring the facts of the problem to be resolved and isolating the issue, (3) building and compiling settlement options that will be taken, (4) carrying out negotiations to make decisions, (5) clarifying plans that will be taken, (6) carrying out legal processes (legal review), and (7) carrying out proper implementation accompanied by review and revision.⁴

Dispute resolution through mediation is carried out and initiated by impartial parties. The mediating party is known as the "mediator". In practice, there is a typology of mediators who carry out their functions, namely: (1) mediators of social relations which are often found in rural communities. This mediator function is carried out by traditional leaders, community leaders and religious

³ Ifsyanusi, 2018, www, Bengkulu todaycom, Getting to know the philosophy and objectives of mediation, March 6 2018, accessed March 3 2023, from

<https://www.bengkuluinteractive.com/mengenal-filosofi-dan-besar-mediasi>

⁴ *Op. Cit*, p 80

scholars. The mediator is meant to have authority in society. (2) An authoritative mediator is a mediator whose profession is to work for a government agency. In Indonesia, it is known as the National Land Agency (BPN) as a land dispute resolution mediator, (3) Independent mediator or professional mediator. This independent mediator model is the best mediator, when compared to the social mediator and authoritative mediator types, because it has no relationship with the parties in conflict.

This type of independent or professional mediator is most sought after by the public in resolving disputes. This model has developed in the United States and North America under the auspices of the Community Dispute Resolution (CDR) Institute and the Society in Professional Dispute Resolution (SPIDER). This mediator function is carried out by the professions of lawyers, accountants and doctors⁵.

In the Arbitration and Alternative Dispute Resolution Law in Article 1 Number (10) it is stated that the scope of alternative dispute resolution consists of (a) Consultation, (b) Negotiation, (c) Mediation, and (d) conciliation or expert

⁵ Usman, Rachmadi, 2013, Options for Dispute Resolution Outside the Court, second cet, Citra Adiyta Bakti, Bandung, p. 87

assessment. The focus of the study in this article is on mediation, because among the dispute resolution alternatives most widely used in society is mediation. Mediation involves a third party who is neutral and does not take sides with anyone, then the mediation process is carried out without complicated formal procedures.

If you look at the law, dispute resolution through alternative dispute resolution, including mediation, is only regulated in two articles, namely Article 1 point (10) as mentioned above, and Article 6 paragraphs (1) to paragraph (9). Meanwhile, regulations regarding arbitration are very dominant. So Law Number 30 of 1999, in the author's opinion, is more accurately described as the Arbitration Law. Because regulating dispute resolution issues through arbitration is more than regulating mediation issues.

There is a lack of articles regulating mediation in Law Number 30 of 1999, there is a lack of norms governing the requirements to become a mediator, whether they must be a legal expert, or whether experts in other disciplines are also permitted. Apart from that, there is no guidance on the procedural law used in dispute resolution mediation. Therefore,

Law N0.30 of 1999 should be revised, so that alternative dispute resolution arrangements including mediation are regulated perfectly to obtain legal certainty.

In the author's opinion, Indonesia can compare mediation arrangements in several countries, such as in Malaysia, mediation arrangements are contained in institutional regulations called: "Kuala Lumpur Regional Center for Arbitration, abbreviated as (KRLCA). In Singapore, the mediation institution joins arbitration under the auspices of: " Singapore International Mediation & Arbitration Center, known as " IMAC ", and in Belgium, mediation joins the institution called: " Center for Arbitration and Mediation, known as;" CEPAN"⁶.

Alternative dispute resolution, apart from being carried out outside the court, can also be carried out in court, known as judicial mediation, where the relevant District Court judge will act as a mediator. The aim is to anticipate that every civil case that goes to court does not immediately go to trial. However, there is an opportunity for resolution by mediation to the parties in dispute, as mandated by Article 130 HIR and Article 154 RBG.

⁶ *Op. Cit*, 2020, p. 68

Historically, the regulation of judicial mediation was regulated in Supreme Court Circular Letter Number 1 of 2002, then replaced by Supreme Court Circular Letter Number 2 of 2003. Subsequently, Supreme Court Regulation (PERMA) Number 1 of 2008 was issued, and was further refined by the Supreme Court Regulation (PERMA) Number 1 of 2016.

From the explanation above the author formulates the problems, among others, how is the regulation of alternative dispute resolution mediation in Indonesian legislation and What is legal certainty in mediated dispute resolution from the perspective of Indonesian Legislation

METHOD

The type of research used is normative law. Normative legal research functions to provide legal arguments when there is a void, ambiguity and conflict of norms⁷. The research approaches used in this research are the Legal Approach, Concept Approach, and Historical Approach. The legal materials used in this research consist of: Primary Legal Materials, namely legal materials that are binding, consisting of laws and regulations related to this research, namely Law Number 30 of 1999 concerning Arbitration and

Alternative Dispute Resolution. And Secondary Legal Materials, namely legal materials used to provide explanations related to primary materials in the form of scientific works, written literature by experts related to the problems being studied.

RESULTS AND ANALYSIS

Alternative Dispute Resolution Mediation Arrangements

Article 130HIR/Article 154 RBg is the embryo of the emergence of a peace institution (Dading) which requires court judges when hearing civil cases to seek peace for the parties to the dispute. However, in reality, it is rare to find peace decisions, in fact almost 100% of court decisions are in the form of conventional decisions in the form of winning or losing, and it is rare to find dispute resolution based on the concept of win-win solution. Based on these facts, it turns out that the seriousness, ability and dedication of judges to make peace in resolving cases/disputes can be said to be very minimal. This means that the existence of Article 130 HIR/Article 154 RBg in procedural law is no more than a mere accessory or dead formula.⁸

The complete lack of role of Article 130 HIR/Article 154 RBg as a legal basis

⁷ Irwansyah, 2020, Legal Research Methods, Choice of Methods and Article Writing Practices, Mirra Buana Media, Yogyakarta, p. 100

⁸ Harahap, M.Yahya, Hukum Acara Perdata, Sinar Grafika, Jakarta, 2008, p. 241

for resolving cases peacefully in court, is not solely due to a lack of ability, skills and dedication of judges alone, but is inseparable from the dominance and motivation of the role of advocates as legal representatives in disputes. directs that dispute resolution by litigation continue from the court of first instance to the judicial review level, in order to pursue adequate professional fees. However, the Supreme Court as the highest judicial institution in law enforcement in Indonesia has indicated that there is behavior of judges who do not really empower Article 130HIR/Article 154 RBg in reconciling the parties to the dispute.⁹

In fact, according to the HIR/RBg procedural law, the judge must actively lead the event from the start of the first hearing until the implementation of the judge's decision, even though the initiative in the case comes from the parties to the dispute. The judge's initiative in resolving the dispute is not only up to the parties themselves, but the judge must actively reconcile the disputing parties.¹⁰

⁹ Rachmadi Usman, 2012, *Mediasi di Pengadilan dalam Teori dan Praktik*, Sinar Grafika, Jakarta, p. 27-28

¹⁰ Abdul Kadir Muhammad, *Hukum Acara Perdata Indonesia*, Cetakan ke- VII P.T. Citra Aditya Bakti, Bandung, 2000, p. 22

Furthermore, Article 3 Paragraph (1) of Law Number 14 year 1970 (Basic Law on Judicial Power) states, among other things, that settlement of cases outside of court on the basis of peace or through a referee is still permitted. Peace or through arbitration is still allowed, but arbitration decisions only has executorial power after obtaining permission or an execution order from the court.

Furthermore, Article 4 Paragraph (2) of the Basic Law on Justice also states that the provisions of Article 3 Paragraph (1) above do not preclude the possibility of resolving civil cases peacefully. Furthermore, in Article 4 Paragraph (2) of Law Number 14 of 1970 concerning Basic Provisions of Judicial Power, and amended by Law Number 4 year 2004 which focuses on labor or employment mediation. Then it was updated again with Law Number 48 year 2009 which adheres to the principle that the process of resolving cases or disputes must be simple, fast and low cost.

In Article 58 of Law Number 48 year 2009 it is reiterated that efforts to resolve civil disputes can be carried out outside the State courts through arbitration or alternative dispute resolution. One alternative form of dispute resolution is

mediation as stated in Article 60 (1) of Law Number 48 year 2009.

In 1999, a national legal product was born which regulates arbitration and alternative dispute resolution, namely Law Number 30 of 1999, State Gazette of 1999 Number 138. In the consideration of letter (a), it is stated that based on the applicable laws and regulations, in addition to being able to resolve civil disputes to general courts, there is also the possibility of submitting them through arbitration and alternative dispute resolution. Then in letter (b) it is also stated that the legal regulations currently in force for resolving disputes through arbitration are no longer in accordance with developments in the business world and law in general.

Law Number 30 of 1999 is more suitable to be called an arbitration law, because the articles in it regulate many institutions, mechanisms and processes for resolving disputes through arbitration.¹¹ Regulations regarding mediation in Law Number 30 of 1999 are only touched on in a few articles, namely in Article 1 Number (10) which states that: "alternative dispute resolution is dispute resolution outside of court by means of consultation,

negotiation, conciliation or assessment. experts, and this includes mediation."

Even though the title of the law is about arbitration and alternative dispute resolution. It seems that Law Number 30 of 1999 was born to meet the demands of the international world considering that Indonesia has participated actively, both in the regional scope such as the ASEAN Free Trade Area (AFTA) and Asia Pacific Economic Cooperation (APEC), and in the global scope, because Indonesia ratified international agreements as a member of the World Trade Organization (WTO) with Law Number 7 of 1994.¹²

In Article 6 of Law Number 30 of 1999 which consists of 9 paragraphs, it states about mediation as an alternative dispute resolution. Civil disputes can be resolved by the parties through alternative dispute resolution based on good faith by excluding litigation settlement in the District Court. Settlement of disputes or differences of opinion through alternative dispute resolution as intended in Paragraph (1) above shall be resolved directly by the parties within a maximum period of 14 days, the results are stated in a written agreement

Disputes of differences of opinion as referred to above cannot be resolved, so

¹¹ Joni Emirzon, 2001, Alternatif penyelesaian sengketa di luar pengadilan dalam kurung negosiasi, mediasi, konsialiasi, dan arbitrase, cet pertama, PT Gramedia Pustaka Utam, Jakarta, p. 13

¹² *Op. Cit.* p. 7

based on written agreement between the parties, the dispute can be resolved through the assistance of one or more expert advisors or mediators. Article 6 Paragraph (4) states: If the parties within a maximum period of 14 days with the assistance of one or more expert advisors or through a mediator are unable to reach an agreement, then the parties can contact an arbitration institution or alternative dispute resolution institution to appoint a person. Mediator.¹³

Efforts to resolve disputes through mediators as referred to above must strictly adhere to confidentiality, and within a maximum period of 30 days a written agreement must be reached which is signed by all parties involved. A written dispute resolution agreement is final and binding on the parties, and is implemented in good faith, and must be registered with the District Court within a maximum of 30 days from the signing of the agreement. peace efforts referred to above cannot be achieved, then the parties based on the written agreement can submit a dispute resolution through an ad-hoc arbitration institution.

In Article 6 of Law Number 30 of 1999 which consists of the nine paragraphs mentioned above, there is no explanation

¹³ Look article 6 paragraph 4 Law Number 30 of 1999

regarding mediation such as the requirements to become a mediator, the authority of the mediator, and the involvement of third parties in the mediation process. Therefore, Law Number 30 of 1999 is more accurately said to be an arbitration law, not a mediation law.¹⁴

Dispute Resolution Mediation Philosophy.

The philosophy of resolving disputes through mediation starts from within social life, whether as individuals or groups living side by side, inseparable from the occurrence of conflicts/disputes that can give rise to disputes. The dispute is resolved in a wise manner by the interested parties. The implementation of wise dispute resolution was actually carried out by The Founding Father, by optimizing reason and wisdom to deliberate to reach consensus as intended by the 4th principle of Pancasila which has been extracted from the values of the local wisdom of the Indonesian nation, which in current terminology it is known as "mediation".¹⁵

¹⁴ Syahrizal Abbas, 2009, *Mediasi dalam Perspektif Hukum Syariah, Hukum Adat, dan Hukum Nasional*, Kencana Prenada Media Group, Jakarta, p. 297

¹⁵ *Op. Cit*, Ifsyanusi

There are five basic mediation philosophies, namely:

- a. The principle of confidentiality;
- b. Voluntary principle (volunteer)
- c. The principle of empowerment (empowerment)
- d. The principle of neutrality
- e. The principle of a unique solution (unique solution)

Then in the order of values, mediation is nothing more than a peace process desired by the parties in order to achieve a common good. The value that mediation aims to achieve is the value of togetherness, balance wrapped in the value of legal certainty and legal justice. The value here is a concept that they consider to be the truth by making a choice in the mediation process to achieve a peace which they consider to be the best concept that contains freedom and eliminates superior domination of the interior.

Dispute Resolution Mediation Theory.

Dispute resolution through mediation was initially limited to disputes in the civil sector, due to the view that the dispute did not harm society in general, but only to individuals or groups. In Indonesia, there are several disputes that are resolved through mediation, such as:

banking disputes, consumer disputes, labor disputes and environmental disputes.

The existence of alternative dispute resolution through mediation can reduce the backlog of cases in court.¹⁶

If you look at PerMA Number 1 year 2016 concerning Mediation Procedures in Court, Article 1 Number (1) states that mediation is a method of resolving disputes through a negotiation process to obtain agreement between the parties with the assistance of a mediator.

The involvement of third parties in dispute resolution is assumed to be able to change the power dynamics and social dynamics in the conflict relationship, as well as influence the opinions and behavior of the parties to the dispute, by providing knowledge and information, so that the negotiation process becomes more effective and helps the parties to resolve the dispute. they face.¹⁷

From the definition above, according to Susilawetty there are several things related to mediation, namely: (a) there are things that need to be resolved by the parties, namely disputes. The dispute is based on an agreement they have previously made, or was made after a dispute occurred, (b) the parties to the dispute want to resolve the dispute with a

¹⁶ Susilawetty, Arbitration and Alternative Dispute Resolution Reviewed in the Perspective of Legislation, Gramata Publishing, Jakarta, 2013, p. 24

¹⁷ *Ibid.*

mediator as the mediating party. The mediator's involvement begins with their agreement after going through a negotiation process, (c) the parties will determine who will act as mediator, by selecting a mediator who is an expert in the area of the dispute they will resolve. The mediator can be an individual or a neutral institution, (d) the parties hear the views and opinions of the mediator, the mediator cannot decide because the decision remains with the parties to the dispute, (e) if there is an agreement between the parties, then the result of the agreement is This must be stated in the form of a written agreement, and the parties have an obligation to comply with the agreement.¹⁸

Mediation as a form of dispute resolution has its own strengths, therefore it is the choice of the parties in resolving disputes. These powers are; The mediation process is not regulated, so the process has flexibility and that is the main attraction, because it is not trapped in technical legal debate; Dispute resolution through mediation is always closed, and only attended by the disputing parties and the mediator; the principal can play an active role in the bargaining process to find the best solution; consensus is the key to

¹⁸ *Ibid*, p. 25

resolving disputes; consensus and collaboration can produce win-win dispute resolution.¹⁹

If we look at the process of resolving disputes through mediation with procedures that are not complicated and have a " final and binding " nature, this is one of the advantages of non-litigation dispute resolution, when compared to resolving disputes through litigation which is bound by applicable laws and regulations.

In Supreme Court Regulation (PerMA) Number 2 year 2003 concerning mediation in court, as intended in article 2 of the PerMA, all civil cases submitted to the court of first instance must first be resolved through peace with the help of a mediator. This shows that the scope of disputes that can be resolved by mediation is all civil cases that fall under the authority of general courts and religious courts of first instance.²⁰

¹⁹ Takdir Rahmadi, 2017, *Mediasi Penyelesaian Sengketa Melalui Pendekatan Mufakat (Edisi Kedua)*, PT Raja Grafindo Persada, Depok, p. 22-25

²⁰ Syahrizal Abbas, 2009, *Mediasi dalam Perspektif Hukum Syariah, Hukum Adat, dan Hukum Nasional*, Kencana Prenada Media Group, Jakarta, p. 23-24

Requirements for Becoming A Mediator

The existence of a mediator as a neutral third party who helps resolve the parties' disputes is very important, even though he is not the decision maker. The presence of a mediator as a mediator certainly gains trust from the parties. This trust is built on the background of the skills possessed by a mediator in carrying out his mediation function. Therefore, if you become a mediator, of course you must have certain conditions and qualifications²¹.

The requirements for becoming a mediator from among court judges are regulated in Supreme Court Regulation Number 2 year 2003 which was replaced by Supreme Court Regulation Number 8 year 2008, then replaced by Supreme Court Regulation Number 1 year 2016, which will be explained below. In Law Number 30 year 1999, not a single article mentions the requirements for becoming a mediator, only the requirements for becoming an arbitrator are regulated, as stated in Article 12 of the law as follows:

- a. Capable of conducting legal disputes.
- b. Minimum age 35 years.

- c. Has no genetic/sanguineous relationship with the parties to the dispute.
- d. Has no financial relationship with the arbitration decision.
- e. Minimum 15 years experience in the field.

Then in Supreme Court Regulation Number 2 year 2003 in Article 1 Number (10) it is stated that to become a mediator you must fulfill the requirements of having a mediator certificate issued by an institution that has been accredited by the Supreme Court of the Republic of Indonesia. Accredited institutions are training/educational institutions that specifically manage training to become mediators as follows; 1. National Mediation Center (PMN) training institute based in Jakarta; 2. *Continuing Legal Education (CLE)* Faculty of Law, University of Indonesia; 3. *Fatahilla Mediation Center* UIN Syarif Hidayatullah Jakarta; 4. *International Mediation and Arbitration Center (IMAC)*; 5. *Jimly School of Law and Government* Surabaya; 6. *Indonesian Institute for Conflict Transformation (IICT)*; 7. Indonesian Sharia Lawyers Association; 8. Indonesian Mediation Center, Gadjah Mada University; and Other institutions that have received accreditation from the

²¹ Syahrizal Abbas, 2009, *Mediasi dalam Perspektif Hukum Syariah, Hukum Adat, dan Hukum Nasional*, Kencana Prenada Media Group, Jakarta, p .54

Supreme Court of the Republic of Indonesia to provide mediator training.

Supreme Court Regulation Number 1 of 2008 has encouraged growth of professional mediators, this can be seen from the provisions which state that in principle every person who carries out the function of mediator is required to have a mediator certificate obtained after attending training held by an institution that has obtained certification from the Supreme Court. This is in accordance with the provisions of Article 5 Number (1) of Supreme Court Regulation Number 1 of 2008 which states that in principle every mediator must have a certificate as a mediator issued by an institution accredited by the Supreme Court of the Republic of Indonesia. Then in Supreme Court Regulation Number 1 year 2016 through Article 13 it is stated that every mediator (judge mediator) must have a certificate issued by the Supreme Court or an appointed institution and receive accreditation from the Supreme Court. However, judges who do not have a certificate can also act as mediators if there are limited judges who are certified mediators. The requirements to become a mediator regulated in the Perma above are formal requirements that must be fulfilled by a mediator.

The mediator's requirements can be seen from two sides, namely the internal side of the mediator and the external side of the mediator. The internal side relates to the personal ability of the mediator who will carry out the profession of bridging and managing the mediation process, so that the disputing parties succeed in reaching a mutual agreement and ending their dispute.

Therefore, a mediator must be able to build trust for both parties, the mediator must have a sense of empathy or care in resolving disputes between both parties, the mediator must not judge and decide cases based on legal facts, he is only a mediator. The mediator may not directly dispute a statement by the parties, but must respect the statements of the parties. The external side relates to the formal requirements that the mediator must have in relation to the dispute being handled. The mediator must obtain approval from both parties to the dispute, the mediator must not have a family relationship, the mediator must not have a financial relationship or other interests with one of the parties to the dispute.²²

In Article 13 Numbers (1) and Numbers (2) of Perma Number 1 of 2016, it is stated that: every mediator is required

²² *Op. Cit*, p.60

to have a mediator certificate after attending training and being declared passed by the Supreme Court or an institution that has received certification from the Supreme Court. The chairman of the court has the authority to issue a decision letter to a judge who is not certified to carry out the function of mediator, if there is a limited number of certified mediators.

From the external side, the formal requirements that mediators must have in relation to mediated disputes must fulfill the requirements, namely chosen/appointed mediator must be agreed upon by the parties; Not having a blood or marriage relationship up to the second degree with one of the parties to the dispute; Do not have a working relationship with any of the parties to the dispute; Have no financial interest/other interests in the agreement taken; Has no interest in the negotiation process or the results to be achieved.²³

Legal Certainty of Dispute Resolution Mediation

Law Number 30 year 1999 is a written legal product that applies to all Indonesian people since it was enacted as law. As a legal product, if related to Hans

²³ *Ibid*, p. 64-65

Kelsen's opinion, law is a system of norms which are statements to emphasize aspects of what should be (*das sollen*) by including several regulations about what should be done.

If we trace back the birth of Law Number 30 year 1999, it was because Dutch colonial legal products regulating alternative dispute resolution (mediation) were already outdated. Meanwhile, law must follow developments over time, so that there are no conflicts in resolving disputes, as per Roscoe Pound's idea of the function and purpose of law, where law is not just a collection of systems of rules, doctrines or principles created by authorized institutions. However, there are also processes that make law real through the use of power, therefore Roscoe Pound put forward the idea of the function of law as social engineering.²⁴

Law Number 30 year 1999 certainly cannot be separated from Indonesia which has ratified the ratification of *the Agreement of Establishing World Trade Organization* which is a world trade organization with Law Number 7 year 1994. Apart from that, regionally Indonesia is also active in

²⁴ Umar Hasan, 2020, *Desertation, Alternative Mediation Regulations for resolving commercial disputes from the perspective of legal certainty and justice (comparative study between Indonesia and Malaysia)*, p. 210

supporting *realization of the Asean Free Trade Area (AFTA) and the Asia Pacific Economic Cooperation (APEC)*, was in line with the implementation of reforms in 1998 which of course brought many changes in various fields such as: law, politics, economics and social. It seems that not all of these changes have been appreciated positively, as evidence is that quite a few legal products have received sharp criticism from various elements of society, because they are not in accordance with the demands for reform. Thus, it can be concluded that the birth of Law N0.30 of 1999 which also regulates alternative commercial dispute resolution is urgent (*premature*).²⁵

As a consequence, it can be observed that the regulations or laws governing arbitration and alternative dispute resolution such as mediation in Law Number 30 year 1999 do not have legal certainty, because the substance of the mediation arrangements is incomplete, such as arbitration. The mediation process is carried out based on the practices that apply in the field. This is certainly detrimental to the disputing parties, and reduces public interest in resolving their

²⁵ Joni Emirzon, 2001, *Alternative dispute resolution outside of court within the framework of negotiation, mediation, conciliation and arbitration*, first cet , PT Gramedia Pustaka Utam, Jakarta, p .7

disputes through mediation. In fact, according to Sudikno Mertokusumo, legal certainty is a guarantee that the law can be properly enforced.²⁶

Legal certainty is an inseparable part, especially from written legal norms. Legal certainty is essentially the main goal of law, therefore certainty in society is closely related to legal certainty itself which causes a person to live in order. Legal certainty does not only consist of articles contained in the law, but there must be consistency in one judge's decision with another judge's decision in the same case. Then Roscoe Pound in Peter Mahmud Marzuki said, the existence of legal certainty allows for predictability.²⁷

Legal certainty certainly cannot be separated from the function and purpose of the law itself. In principle, the function and purpose of law are contained in the definition of law itself, namely a set of rules or principles that regulate society's life. This means that the aim of the law is to order human life in society, which enables people to live with legal certainty. If it is connected to the commercial world,

²⁶ Sudikno Mertokusumo , *Legal Discovery , An Introduction , Sixth Cet., Second Edition*, Liberty, Yogyakarta, 2009, p . 22

²⁷ Marzuki, Peter Mahmud. 2013. *Penelitian Hukum (Ed. Revisi, Cet. 8)*. Jakarta: Kencana Prenada Media Group, p. 137

legal certainty is really needed, because without legal certainty it would be very irrational to carry out the calculations required in the commercial world. If we look at its purpose, it is almost the same as the function of law, namely to maintain and guarantee legal certainty.²⁸

The doctrine of legal ideals (*Idee des Recht*) states that there are three elements of legal ideals that must be proportional, namely legal certainty (*rechtssicherheit*), justice (*gerechtigkeit*), and expediency (*zweckmasigkeit*). Regarding law enforcement, as stated by Gustav Radbruch in *Idde des recht*, it must fulfill these three principles. There are two meanings of legal certainty, namely legal certainty because of the law and certainty in the law. Laws that guarantee legal certainty in society are useful laws.

The concept of legal certainty must include a number of interrelated aspects, one of which is legal certainty, the protection given to individuals from the arbitrariness of other individuals, judges and authorities. It is an inevitability of legal certainty that can be linked to individuals and relates to what individuals

expect of the authorities' treatment, including the trustworthiness and consistency of the judge's or authority's decisions. According to Herlien Budiono, legal certainty is a characteristic that cannot be separated from the law, especially written legal norms. Law without the value of certainty will lose meaning, because it cannot be used as a guide to behavior for everyone. In line with this, Apeldoorn said that legal certainty has two aspects, namely: the ability to determine the law in concrete terms and legal security. This means that justice seekers want to know what the law is in a particular matter, before they start a case and protection for the parties from the judge's arbitrariness. Regarding legal certainty, anyone will agree that the guilty will be punished.²⁹

Utrecht further said that legal certainty contains two meanings, firstly, there are general rules, so that individuals know which actions they can and cannot do, and secondly, there is legal security for individuals from the authority of the authorities. With these general rules, individuals can know what the state can impose or do on the individual concerned. Legal certainty is the hope for justice seekers against arbitrary actions from law

²⁸ Mochtar Kusumaatmadja, Arief Sidharta, 2000. Pengantar Ilmu Hukum : Suatu Pengenalan Pertama Ruang Lingkup Berlakunya Ilmu Hukum. Bandung: PT Alumni, p. 49

²⁹ *Op. Cit*, Hasan, Umar p. 214

enforcement officers who sometimes have arrogance in carrying out their duties as law enforcers. With legal certainty, the public will know the correctness of their rights and obligations according to the law. Without legal certainty, people do not know what to do, do not know what actions are right and wrong, whether or not they are prohibited by law. Legal certainty can be realized through the creation of good and clear norms in a law, as well as their implementation.

If seen in Law Number of 30 year 1999 regulates arbitration and alternative dispute resolution. This means that the substance of the regulation regulates arbitration and alternative dispute resolution. However, if you look deeper into the substance of arbitration, the regulations are more dominant (complete) compared to the regulations regarding alternative dispute resolution. In fact, there are only two articles that regulate alternative dispute resolution, namely Article 1 Number (10) which regulates forms of dispute resolution outside of court, such as: consultation, negotiation, mediation, conciliation or expert assessment. That is only a mention of the institutional form.

If you look at Law Number 30 year 1999, either implicitly or explicitly, it

does not regulate the conditions for appointing a mediator, such as education level, age to become a mediator and the mediator's right to refuse, as applies to the conditions for appointing an arbitrator, and the right he denied. This arrangement is very important regarding the legal capacity of a mediator in carrying out his mediation function.

Then it is also necessary to regulate the procedural law used or chosen by the parties as a mediator in resolving disputes, as is the case in arbitration proceedings, the parties to the dispute are free to determine which procedural law to follow in the arbitration proceedings . Apart from that, it is also necessary to regulate when the mediator's duties end, as well as standard costs required for resolving disputes through mediation, to be guided. For example, in Malaysia mediation for commercial dispute resolution is under the auspices of an institution "*Kuala Lumpur Regional Center for Arbitration (KRLCA)*" which is regulated in the 2012 Mediation Law (*ACT 749*).³⁰

With the lack of regulation regarding mediation in Law Number 30 year 1999, this means that there has been a legal vacuum regarding mediation. Therefore, Law Number 30 of 1999 needs

³⁰ *Ibid*, p. 229

to be revised (*law reform*) so that the regulatory substance regarding mediation is regulated completely (comprehensively), so that legal certainty in the implementation of mediation is more guaranteed.

Law Number 30 year 1999 has been in effect for more than two decades, and is no longer relevant to the development of arbitration law and alternative dispute resolution. Even the Indonesian National Arbitration Board (BANI) in 2016 held a National Seminar to discuss the revision of Law Number 30 of 1999. BANI has even prepared an academic text for these changes, and has even proposed these changes to be included in the National Legislation Program (PROLEGNAS) for the period 2019 – 2024.

Capable of carrying out legal actions that are determined normatively, because to be a mediator you must be capable of carrying out legal actions. According to civil law provisions, a person capable of carrying out legal actions must be 21 years old and/or married, and other requirements relate to the skills of a mediator. Provisions in civil law regarding legal age of competence may be adopted and regulated in Law Number 30 of 1999.

The mediator must not have consanguineous or marital relations up to the third degree with the disputing parties, because if there consanguineous or marital relations between the mediator and the disputing parties, then there is a possibility that the mediator will not be neutral in mediating the parties' disputes. If this happens, of course the parties will fail to come to a mutual agreement in resolving the dispute. Likewise, financial interests in collective agreements to be made by the parties to the dispute must be regulated in Law Number 30 year 1999.

It turns out that to become a mediator in a district court (judicial mediator) the requirements for becoming a mediator are regulated in a limited way in Article 13 of PerMA Number 1 year 2016, where to become a mediator you must have a mediator education/training certificate organized by the Supreme Court or another training institution, which obtained certification by the Supreme Court.

The procedural law used also needs to be regulated, as a guideline for mediators to mediate the resolution of the parties' disputes. At least instructions for freedom of choice or use of civil procedural law applicable in Indonesian jurisdiction, so that the dispute resolution

process runs well according to legal format.

In Supreme Court Regulation Number 1 year 2016, the start of mediation is regulated in Articles 14 through to Article 17, which essentially regulates the legal procedures for judicial mediation. Arbitration procedural laws in Law Number 30 year 1999 are regulated in Articles 27 to Article 48. However, arbitration institutions such as the Indonesian National Arbitration Board (BANI) have their own procedural laws which are regulated in the 2020 BANI Rules. However, the parties to the dispute are given the freedom to choose which procedural law they use, and this is one thing that differentiates alternative dispute resolution from dispute resolution through court or litigation, where the procedural law has been determined by the judge or court. This means that there must be norms that regulate the freedom to choose procedural law.

CONCLUSION

Regulations governing arbitration and alternative dispute resolution such as mediation in Law Number 30 year 1999 do not have legal certainty, because the substance of the mediation arrangements is incomplete, such as arbitration. The mediation process is carried out based on

the practices that apply in the field. This is certainly detrimental to the disputing parties, and reduces public interest in resolving their disputes through mediation. Law Number 30 year 1999 concerning Arbitration and Alternative Dispute Resolution should be revised because it is no longer in line with the development of mediation as an alternative dispute resolution.

Concerning arbitration and alternative dispute resolution should be revised because it is no longer in line with the development of mediation as an alternative dispute resolution.

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