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Role of the Judge in Settling Civil Dispute through Mediation Method in Indonesia

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Abstract- Mediation is an Indonesian philosophy that has been stated in the fourth pillar of *Pancasila*. This fourth pillar specifically states that democracy should be led by the great wisdom and representation. Any dispute resolution should be reconciled based on consensus deliberation. This principle is the highest value stated in the 1945 National Constitution as well as in many other laws. The principle of consensus deliberation is the base value used by the disputing parties in seeking dispute resolution outside the court. This study aims at discussing mediation method as one way to settle dispute. The data and information used in this study is by reviewing relevant materials advanced in the literature, laws and regulation issued in Indonesia as well as other sources. The study argued that mediation is not only a peaceful way in settling disputes, but it is also effective and able to give open access widely to the parties to obtain fair treatment and satisfactory settlements. This method is also easy, quick, and low cost to be implemented. This method can be considered as an integral mechanism in settling the disputes associated with the process of civil judicial cases as mandated by the in the Article 130 HIR / 154 RBg, which encourages the parties to pursue the peace process. Mediation becomes as the court procedure of civil law to strengthen and optimize the function of the judiciary in resolving disputes. Therefore, mediation can be an important method to settle any legal disputes in Indonesia.

***Index Terms*-** Mediation, reconciliation, civil dispute settlements, highest value, consensus deliberation.

I. INTRODUCTION

The 1945 Indonesian Constitution firmly stated that Indonesia is a law state or there is a supremacy law in the country. This means that the Republic of Indonesia is a state based on law (*Rechsstaat*), not based on power alone (*Machstaat*). According to the Article 1 paragraph 3 of the 1945 Constitution, there are three basic principles that should be upheld by all citizens, namely, the rule of law, equality before the law, and the law enforcement in ways that do not conflict with the law.

Based on the above, the Republic of Indonesia has the characteristics as the law state as written in the 1945 constitution. These characteristics are as follows:

1) Recognition and protection of human rights that contain equality in the political, legal, social, economic and cultural.
2) The court is independent, impartial and is not influenced by any power and any pressures.
3) The legality is in all forms (Muchsin, 2005).

As the law state, the rule of law consequently must be upheld and implemented in good faith, in the sense that all actors, whether they are members of the public or the government officials must submit and should not deviate from the law in Indonesia (Muchsin, 2005). Thus, the rule of law and order conditions are prerequisite for any efforts to create Indonesia peacefully and prosperously. If the law is upheld and the order is realized, there will be certainty of safe and peaceful lives and a living harmony will also be realized. Where there are people, there is law (*Ibis Lus Ibi Societas*).

Law is a set of rules written and unwritten, if it is breached, you will get penalized. Therefore, the law will protect the rights and obligations of any legal subjects in peace, while peace itself is a harmony between order and safe. However, in human life there is always a misunderstanding that can lead to disputes. These disputes can be resolved through the courts (Litigation) and outside the Court (Non Litigation).

This paper aims at discussing three issues. The first is the background of judges (judges court assembly) during the first trial that ordered the parties to resolve their dispute through mediation. The second is to address the mechanism for settling civil disputes through mediation. The third is to examine the role of the judge as a mediator in settling disputes in the mediation process in court. However, before the above issues are discussed in detail the following section deals with the discussion of the elements that can raise disputes and the relevant laws and regulation to settle the disputes in section B as the background analysis. Section C then highlights the theoretical framework of dispute settlement advanced in the literature. Finally, concluding notes are drawn in section D. Note that, the data and information used throughout this paper are taken from materials advanced in the literature, the laws and regulation and other relevant sources.

II. ELEMENTS OF DISPUTES AND THE RELEVANT LAWS

There are at least five elements that can raise disputes. These are detailed as follows. First, disputes can raise because of data conflicts. The data conflicts may occur because of the lack of information, information errors or misinformation, view differences, differences in interpreting the data, and differences in interpreting procedures. Data is very important in an agreement. Therefore, the accuracy of data is critical to the achievement of a good deal. For that, in any negotiations the parties will always try to find data or information that becomes the object of negotiations as completely as possible. Once the data is collected or obtained, it is necessary to have the same understanding and interpretation between the parties. If there are

differences in the views or opinions, the negotiations will not produce an agreement (deadlock).

Second, disputes can raise because of the conflict of interests. This may happen because in doing any activities each of the parties has an interest. Without any interests the parties will not be able to cooperate. The conflict of interest may be due to several factors, namely, (a) competitive feeling or competitive actions; (b). substantial interest of the parties; (c) a procedural interest; and (d). psychological interests.

Third, disputes that are due to relationship conflict. Relationship conflict can occur because of the presence of strong emotions, misperceptions, poor communication, or miscommunication, and repetitive negative behaviour. To avoid this dispute, the parties that have a working relationship must control the emotions through the rules agreed, clarifying the differences in perception, and build a positive perception, then improve the quality and quantity of communication and eliminate the negative behaviour carried out repeatedly.

Fourth, disputes can raise because of structural conflict. This structural conflict may occur because of the destructive patterns of behaviour or interaction, the unequal controls, unequal possession or distribution of resources, unequal power and rules, differences in geography and psychology or other environmental factors that inhibit cooperation, and a limited time. Therefore, the parties in this case are necessary to clarify or reinforce the rules of the game, change of destructive behaviour patterns, reallocates the ownership or control of resources, build a healthy competition, mutual understanding, change the negotiation process of the positional be bidding based on interest, change the psychology and environment associated with the parties, and modify outside pressures of the parties and change the limited available time to reliable time availability.

Finally, disputes can raise because value conflict. The value conflicts may occur because of differences in opinion or behaviour of the evaluation criteria, the differences in worldview, ideology, and religion, judgment without regard to the judgment of others. Conflicts of this value should be eliminated. This may be done by avoiding the problems of the term or value and allow the parties to agree or disagree, or create a conducive environment that has one dominant value, and conduct research to seek any results in which all parties gain.

From the above five types of conflicts, the dispute essentially arises due to the conflicting arguments between one party and other parties. Thus, a dispute arose because of a problem that clashed with others which immediately want to solve the problem. This problem is usually not understood by judges in handling cases that are being disputed. Actually, the judge should decide it rather than postpone the case of dispute settlement. If each party has a good intention to solve the problem, then the problem will be resolved easily. But if one of the parties had no intention to settle the dispute, then the solution will also be difficult or even not resolved. The sincerity of the parties will determine success or failure in settling the disputes. However, in the case that the dispute was not possible or not successfully resolved by the parties concerned, it is then necessary to have a third party to help resolve it. These third parties may be of individuals, private organizations or government agencies.

In principle, the parties that have disputes are eager to settle the disputes quickly, accurately, fair and inexpensive. These have become a general principle in the settlement of disputes. However, there has been problem associated with the institutions that are best able to carry out on the issue. In general, the parties who have disputes are prefer to settle the disputes by using the social institutions that exist in the community, whether individual institution or social institutions. In the business world, there is an institution that is able to settle the disputes, This institution is called as the Alternative Dispute Resolution (ADR) in many developed countries (Harahap, 1997).

However, if the ways of the dispute settlement lead to deadlocked, then the dispute was taken to court as the last resort of dispute resolution. Note that, not all disputes were solved through existing social institutions. The court is usually as the last solution towards disputes.

The court has been the last method to settle the dispute. Disputes that are brought to court is usually considered as the settlement of litigation. Basically, every case has three components. These components are 1) law element; 2) Elements dispute, and 3) human elements. If one of these elements was missing, the case is then closed. Which elements come first than others? Perhaps, the element of human is the main element appeared before the other elements. This is simply because human being has different interests so human element is the source of the problem leading to disputes. This dispute then comes into contact with the law. Three elements are ultimately integrated together to form one case.

Conventionally, dispute resolution is usually done through litigation or through dispute resolution in the court. The completion was solely as a last resort (*ultimatum remedium*) after another alternative is not able to solve it. For that reason, reconciliation or mediation is an effective way to resolve a dispute or disputes in various fields (e.g. business disputes, labour disputes, disputes in marriage, and other civil disputes). Mediation can produce a win-win solution and without going into court trial.

In explaining the dispute in court, the case will be settled by applying civil law, after the documents to held the court completed and the date of the trial was scheduled. The judge must request in advance to the disputing parties to held mediation as determined in the Article 130 HIR / 154 RBg. This article together with the Rules of the Supreme Court No. 1/2016 was an attempt to organise the disputing parties, so that they can be together again as they should, as winning and losing of this case still will bring consequences to them.

In accordance to the above conditions, the following notes need to be given attention.

1. The Article 130 HIR, which mentioned that :

(1) if the two disputing parties come to the court on the setting day, the Court, through its chairman, will try to reconcile them. (IR. 239)

(2) if the reconciliation was met by the two parties at that setting date, the court needs to make a legal certificate, by which both parties are obliged to fulfil the agreement to have reconciliation. This legal certificate is as the formal statement of the judge that both of the disputing parties agreed to have reconciliation (RV.31; IR.195 etc.).

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(3) for that kind of the above decision, there will be no further appeal;

(4) If at the time of reconciliation process, both of the disputing parties need an interpreter, this request has to be fulfilled as mentioned in the articles 131.

2) The Article 158, which reads:

(1) When at the appointed day the two parties come, the court using the hand of chairman mediated the reconciliation of the disputing parties;

(2) If the reconciliation was reached, then at that time the court has to make the legal certificate for that reconciliation. This certificate indeed has a power and should be followed as the joint agreement of the two parties.

(3) for a permanent decision like that, there will be no an appeal.

(4) during the reconciliation, the used of an interpreter is welcome.

3). Chapters in the Civil Law

The Article 1851 in the Civil Law book which reads: "Reconciliation is an agreement of the two disputing parties that have been submitted promise or hold the goods to end a case that is being dependent or prevent the raising of a case. This agreement was not valid if it was not made in writing.

This agreement has many elements as follows:

a. The approval among the parties. This agreement is considered valid if it meets the elements of consent set forth in the Article 1320 of the Civil Code, as follows:

1) There is an agreement of the parties;
2) The competent parties acting legally
3) The agreement on a certain matter
4) as a cause that by religion is accepted (halal).

b. The approval to do

The article 1851 of Civil Code limits the legal action towards only permitted cases. The limitations contained in three actions:

1) To give up things
2) Delivering things
3) Arresting things

c. Reconciliation on the existence dispute

In the article 1851 of the Civil Code, it was clearly stated that reconciliation can be made on the present case, in the form the on-going case, or a case that is proposed as long as the case has been recorded in the court.

d. In the written form.

In the Article 1851 of the Civil Code, the reconciliation must be embodied in written form. If not, it should be rejected .

4). *Akta Van Dading and Akta Van Vergelijk*

The used of *akta Van Dading* and *akta van Vergelijk* till now is still in doubt. This is because this term according to the experts referred to reconciliation law. As Retnowulan Sutantio (2003) used the term Akta Van Dading to declare reconciliation in Article 130 HIR / Article 158 RBG. Also, it is argued by the Chief Justice Marianna Sutadi that the terms Akta Van Dading to declare reconciliation as in the Article 130 HIR / Article 158 Rbg. Whilst MR Tresna in his book used the terms Akta Van Vergelijk to declare reconciliation in Article 130 HIR (Tresna, 1975).

However, many judges are more likely to use the term *Akta Van Dading* for reconciliation letter made by the parties which was not yet confirmed by the Judge, while *Akta Van Vergelijk* is the legal letter after obtaining confirmation from the judge. Reconciliation can only be made in the presence of the parties or by the judge who examined the case. Also, it can be made by the parties outside the court and it was brought to the court concerned to be approved.

From the above discussion, it can be concluded that reconciliation can be divided as follows:

a. Reconciliation letter as approved by the judge (*Akta van vergelijk*)

b. Reconciliation letter without the consent of the judge (*akta van Dading)*

However, if the reconciliation is seen from the place where it was made, reconciliation letter or legal certificate can be made as follows:

a. made in the court (in front of the judge)
b. made out of the court (not in front of the judge)

But, what are the legal consequences of reconciliation if it is in front of the judge vis a vis if it is not in front the judge?

The answer to this question can be read in the Article 1858 of the Civil Code. In this article it was mentioned: "All reconciliation between the parties is legitimate like a final judge's decision. This reconciliation cannot be declined for reasons either for law ignorance or for any losing of one party. This suggests such reconciliation has a strong legitimate as the formal decision made by the court (in *kracht van gewisjde).*

5. Resistance of third parties on reconciliation.

The term *Res Pro Veritabe* means that there should not two decisions for the same case of the same parties. However, if there is other third party outside the case concern, this condition certainly has different legal consequences. In this case, there will be the same examination process in the court to the present of the third party towards the final judge decision.

6) To empower the first trial court through reconciliation

This is stated in the article 130 HIR / Article 154 RBg and the Supreme Court letter No. 1 of 2002 towards the empowerment of first trial court using Reconciliation organization (ex Article 130 HIR / 154 RBg). The detail of the statements are as follows:

a. all the judges (Judges' Assembly) should try hard to make the reconciliation done completely, not only to make it done formally as in the Article 130 HIR / 154 Rbg;

b. Judges appointed can act as a facilitator who helps the parties in terms of time, place and the data collection, prepared arguments for the parties towards reconciliation;
c. At a later stage if it is required by the parties in conflict, the judge or other party appointed can act as a mediator to held meetings among the disputing parties to seek inputs on the disputed subject and based on the information obtained and desire of each party to reconcile, and write proposal, and consult all these to the parties to obtain mutually beneficial results (win - win solution);
d. The judge appointed as a facilitator / mediator by the parties cannot become the judge in the court assembly in handling the same cases to maintain objectivity;
e. The length of time given to the judge who appointed as facilitator and mediator must be a maximum of three (3) months, and may be extended if there is a reason. But this extension should have an approval made by the Chairman of the District Court and the extension time excludes time for settling disputes as in SEMA No. 6 Year 1992 that stated:

"To organise a simple, fast and inexpensive any case court trial, all cases in the District Court or in the High Court needs to be settled within six (6) months. However, in certain cases it can be more than 6 (six) months, and in such circumstances the Chairman of the Court or the High Court is required to report the matter by stating the reasons to the chairman of the Court and the Chief of higher Court.

f. The agreement of the parties needs to be set forth in a written agreement and signed, then was made in the form of legal reconciliation certificate (Dading), so with that legal certificate the disputing parties will be penalised in case they do not follow what has been agreed / approved.
g. The success of settling disputes through reconciliation can be used as reward for the judge who became facilitator / mediator;
h. If the efforts made by the judge is not successful, the judge concerned needs to report to the chairman of the Court / chairman of the assembly and the case examination can be continued by the court without closing the opportunity for the disputing parties to reconcile during the examination process takes place;
i. The judge who became facilitator or mediator shall make a report to the Chairman of the Court on a regular basis;
j. If the reconciliation is reached, this reconciliation process can be used as a reason for settling disputes exceeding 6 months.

7) Indonesian Supreme Court Regulation No. 1 Year 2016.

Each Judge, Mediator, the Parties and / or legal representative must follow the procedures for settling disputes through mediation. All civil disputes submitted to the Court, including cases of resistance (verzet) against the decision (verstek) and parties opposing parties (Partij verzet) or third parties (derden verzet) against the implementation of decisions that have already in permanent legal forms, must be first solved through mediation, unless there is other ways determined by the rules of the Supreme Court.

On the trial day that was attended by the parties, the Examining Judge Case obliges the parties to pursue mediation. The examining judge must explain the mediation procedure to the parties including: definition and the benefits of mediation, obligations of the parties to attend a mediation meeting directly, mediation fees, any options to follow up the reconciliation agreement through a legal certificate or case retractions, obligations of the parties to sign a mediation form. The disputing parties are entitled to choose one or more mediators listed in the mediator list in the court. Mediation process lasts not longer than 30 (thirty) days from the determination of the order mediation. On the basis of the agreement of the parties, the mediation can be extended period of time longer than 30 (thirty) days since ending a period of 30 (thirty) days. Material negotiations in mediation are not limited to *posita* and *petitum* accusation.

Due to the parties and / or attorney agreement, mediator could bring one or more experts, community leaders, religious leaders, or traditional leaders, whichever comes first in which the parties reach agreement towards binding or not binding on the explanation and / or expert assessment and / or community leaders.

If mediation reached an agreement, the parties with the assistance of the mediator must formulate a written agreement in the reconciliation agreement signed by the parties and the mediator. The reconciliation agreement should be against the law, public order and / or morality, harm the third party or unenforceable. The parties through the mediator can apply for a reconciliation agreement to the case examiner judge and it was confirmed in the form of legal certificate. If there is no the legal certificate of reconciliation, the reconciliation agreement may be cancelled.

Mediation process is essentially closed unless the other party wants it open. The meetings of the disputing parties can be conducted via remote audio-visual communication that enables all parties to see and hear each other in person and participate in meetings. Meeting via audio communication remotely was considered as a direct presence. The parties shall attend the mediation meeting directly with or without accompanied by lawyer, obliged to follow the mediation in good faith.

The mediator should report in writing the success of the mediation to the case examiner judge by attaching a reconciliation agreement. Mediator should also declare if the the mediation failed to reach an agreement and notify in writing to the Case Examiner jugde. In the article 1 PERMA No. 1 2016, it was explained that:

Paragraph (1): Mediation is a way of settling disputes through negotiation process to obtain the agreement of the Parties with the assistance of Mediator;

Paragraph (2): The mediator is a judge or other parties who have certified mediator as a neutral third party who assists the parties in the negotiation process for a wide range of possibilities for the settlement of disputes without using a way of breaking or impose a settlement;

Paragraph (3): mediator certificate is a document issued by the Supreme Court or institutions that have obtained

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accreditation from the Supreme Court which states that a person has attended and passed the certification training Mediation;

Paragraph (8): Reconciliation agreement is the result of mediation agreements in the form of documents, which contain provisions for dispute resolution signed by the Parties and the Mediator;

Paragraph (10): The reconciliation certificate is a certificate which contains reconciliation document and the judge's decision that support the reconciliation Agreement.

Paragraph (11): the judge is a judge at the Court of First Instance in general courts and religious courts;

8. The Act No. 30 of 1999 on Arbitration and Alternative of conflict Settlement.

In the article 6 paragraph (1), it is expressed as follows: "a dispute or civil difference of opinion can be resolved by the parties through alternative dispute settlement based on good faith by excluding the settlement of litigation in the District Court".

According Priyatna Abdurrasyid (2002): "Mediation is a dispute resolution process where the disputing parties utilizing the help of an independent third party to act as a mediator-arbitrator, but they were not given authority to take binding decisions".

Using variety of procedures, techniques and skills help the parties to resolve their disputes through negotiations. Mediator is also a facilitator in some form of mediation provides non-binding evaluation of the value of the dispute if necessary, but not authorized opening to make binding decision.

From the above 8 regulation, it is compromised as follows:

a. The judge serves as mediator

b. This function is initially set in HIR and Rbg, but then released again in SEMA No. 1 of 2002 and enhanced with PERMA No. 3 of 2003, then refined again with PERMA No. 1 of 2008. Finally, it was amended by PERMA No. 1 of 2016 on Mediation procedure in the court.

c. In line with the above, in 1999 the Government issued Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (APS) .

III. THEORITICAL FRAMEWORK

The legal system theories propounded by Lawrence M. Friedman (2001) says that there are three elements of the legal system, namely: structure, substance and legal culture. Structure is concerned with the institutions authorized to make and implement laws (Judiciary and Legislature), substance deals with materials or forms of the legislation, while legal culture is a people's attitude to the law and the legal system which involves the beliefs in the value, thoughts or ideas and their hopes.

Lawrence M. Friedman highlights 4 (four) functioning legal systems. The first is as part of a system of social control that regulate human behaviour. The second is as a means to resolve disputes or dispute settlement. The third is the legal system which has function as social engineering function. The fourth is the legal system as a social maintenance that is a function that emphasizes the role of law as the maintenance of the status quo that does not want changes.

Sunaryati Hartono (1976), however, argues that the law is not only passively accept and experience the influence of socio-cultural values in society, but it should also actively influence the emergence of new social cultural values. One factor that can influence the functioning the good law is the society cultural law. This is closely related to the legal consciousness of society. Sunaryati (1976) further suggests that awareness of the law is a notion which became a creation of legal scholars that cannot be seen directly in the life of society, but it can only be inferred from the social life experiences through a way of thinking and certain interpretation. The success of the process of implementation of the rule of law in society is determined by the values espoused and prevailing in a society concern.

Mochtar Kusumaatmadja (1976) argued that the law as social norms cannot be separated from values prevailing in a society. It can even be said that the law is a reflection of the values prevailing in society. A good law is the law in accordance to the living law in the community that would be in compliance or is a reflection of the values prevailing in the society. These values cannot be separated from the attitudes and qualities that should be owned by the people who become members of the community. Without a change in attitudes and characteristics in the direction required by a modern life, then all the development in the sense of physical objects will have a little meaning. This has been proven by loses that occurs in many developing countries that ignore this aspect. So, the essence of the development problem lies in the problem of reform thinking and attitudes.

In modern society or pre modern society, there is a tendency to formulate legal rules in written form formally and generally called law containing a set of rules with a particular hierarchy. The main objective is to ensure legal certainty in the community. For the law enforcers this becomes a solid foundation to implement or carry out their duties as servants of the law. Thus it can be said that the law is a law in the sense of the rule of law that is structure and process of a set of laws that apply at a particular time and place in written forms.

A Law or regulation is considered good or bad, if it fulfils the following conditions:

1. Applicable juridical. This means that the law should be made and issued by official or government agency authorized using legitimate procedure, in which the law should be formalised and socialised according to rules or procedures that has been determined;

2. Applicable sociologically. This means that the law can be applied effectively, recognized, adhered to, or adhered to in the community as part of everyday life. The rule of law in society can be implemented from the top (by authorities) or accepted graciously by the society.

3. Applicable philosophically. It means that the applicable law in the society has been complied in accordance with the intention to issue the law. The application of the law philosophically is determined by the rule of sociological law. Thus, the sociological applicable law is an absolute requirement in order to be able to apply philosophically.

The law in anywhere cannot follow any developments that occur in the community. This means that the changes occurring in society are faster than changes of the law.

There are several reasons why the alternative dispute settlement started to get more attention in Indonesia, despite of factors mentioned above. There are also other factors such as:

1. Economic factors, which the alternative settlement has potential to become as a means for dispute resolution that is more economical, both from a cost standpoint and time.
2. Scope discussed factors. The alternative dispute resolution has the ability to discuss issues agenda more broadly, comprehensively and flexibly.
3. Building good relationship factor. The alternative dispute settlement that rely on the completion of case cooperatively. This way is perfect for those who emphasize the importance of good relations between people that have taken place or will take place.

Besides that, there are other things affected the development of the alternative of dispute resolution in Indonesia due to the demands of international business imposed by a free trade system and the increasing the number and weight of disputes in society. For these reasons, it is necessary to find ways and dispute resolution system that is fast, effective and efficient.

The globalization era requires the existence of a dispute settlement system and trade that are able to adjust with the speed of economic development and trade that led free market and free competition. For that reasons, there must be an institution that is able deal with those development changes.

The alternative dispute settlement began to receive attention in Indonesia because there is Indonesian culture that emphasised the important of consultation and consensus locally called *musyawarah* (discussion) and *mufakat* (compromising). Also, it is because of there some advantages or benefits. These advantages are as follows.

1. The process is Voluntarily. The parties believe that using the alternative dispute settlement, the results will be better as this settlement has no coercion element.

2. The procedure is fast, since the alternative dispute resolution is informal so the parties involved were able to negotiate the use of the terms conditions.

3. Non judicial decision. It is because no authority to make decisions on the dispute parties. This means that the parties involved were able to predict and control outcomes of dispute.

4. Control on the needs of the organization in which alternative dispute resolution procedures, putting the decision in the hands of people who have a certain position, in interpreting both short-term and long term goals of the organizations involved, as well as interpreting the positive and negative impacts of each option under disputes

5. The procedures is confidential. The alternative dispute resolution procedure provides a guarantee of confidentiality for the parties in equal portions. The parties can explore the options of disputes that are potential and are able to maintain their rights to present the data to counter.

6. Flexibility in determining the terms of problems settlement and comprehensive in which this procedure can avoid the constraints of judicial procedures which has very limited in space and scope.

7. Save time, where the choice of settling disputes through alternative dispute resolution, offers the faster opportunity to resolve disputes. This is because of the principle in business that says "time is money and if there is a delay of dispute resolution there will be more expensive.

8. Cost-effective, it is because the longer the solution, there will be more expensive costs spending.

9. The high possibility to implement the agreement, because the decision taken is a decision which is based on the involvement of the disputes parties.

10. Maintain relationships. The alternative dispute resolution is capable to keep the on going working relationship or ongoing business as well as in the future.

11. Control and easier to predict results. Settlement through alternative dispute resolution is more easily estimate the advantages and disadvantages compared to ways in which the dispute is resolved through the litigation process.

12. The decision made is persisted over time. This is because there will a dispute again in the future, the parties will be able to use again the cooperative form of solving disputes than applying adversely.

Mediation institution is not a part of the litigation institute. This means that the mediation institute is outside the Court. But now the Mediation Institution had crossed into the territory of the Court. Developed countries including the US, Japan, Australia, Singapore has Mediation Institution in the court and outside the court.

Actually the mediation institute in Indonesia is more advanced than other countries. This can be found in the Civil Procedure Code, especially the Article 130 and Article 154 Rbg. These articles organised the reconciliation institute to judges shall first reconcile the dispute parties before the case is adjudicatelly examined. To empower the Article 130 HIR / 154 RBg, one of the results of the National Working Meeting (Rakernas) of the Supreme Court in Yogyakarta on 24 to 27 September 2001 is the important of the empowerment of the Court at First Instance in implementing the reconciliation (Dading Institute) as defined in Article 130 HIR / 154 RBg, and other articles in the Criminal Procedure applicable in Indonesia, in particular the article 132 HIR / article 156 RBg. These articles are the recommendation of the annual session of People Representative Assembly (MPR) in 2000 in that the Supreme Court should resolve pending law case. Therefore, the issuance of letter made by the Supreme Court (SEMA) No. 1/2002 is emphasis the importance of the reconciliation/mediation institute (Eks.Pasal 130 HIR / 154 RBg.).

However, the above SEMA No. 1 of 2002 is still considered incomplete, so it needs to be refined. The integration of mediation into the court proceedings can be one instrument to effectively address the possibility of accumulation of cases in courts. In addition, the institutional mediation in the justice system can strengthen and maximize the functions of the judiciary in resolving disputes apart from adjudicative litigation. Thus, on September 11, 2003 the Supreme Court issued the Regulation of the Republic of Indonesia (PERMA) No. 2 of 2003 on Mediation Procedure in the court, which then revised by the

Indonesian Supreme Court Regulation No. 1 Year 2008 on Mediation Procedure in court. Based on the vision of the establishment of judicial body in Indonesia, it was mentioned that one of the supporting elements is Mediation as an instrument to improve public access to justice and at the same time able to implement the principle of the administration of justice that is simple, fast, and efficient. However, this regulation is revised again by the Supreme Court Regulation Republic of Indonesia Number 1 Year 2016 About the Mediation Procedure in court.

Whilst Mediation or Alternative Dispute Resolution (APS) outside the court is already regulated in Article 6 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, the institutions of Alternative Dispute Resolution ca also found scattered in the legislation. This, for example, can be found in the field of environment, labour and others. This study will reveal how judges attempts to reconcile disputes as stipulated in the article 130 HIR / 154 Rbg and how the Alternative Dispute Resolution outside the court.

On the other side, Sudikno Mertokusumo (1993) states: "that the judge is expected to be impartiality in deciding who is right and who is not in a case and end to the dispute or its case ". For judges in adjudicating a case, the emphasis is particularly in fact or event in question and not the law. The legal regulation is just a tool, whereas the event or facts is the critical factor. This is because there is the possibility of an event that cannot be solved by the regulation, and hence it needs other solution (Sudikno Mertokusumo,1993). The judges' verdict in the criminal case is limited by what the public prosecutor indicted, equal with the civil that is limited by what is sued. Judges should not make decision outside cases that the prosecutor charged. Ideally, the cases that should be indicted and it should also be proved (Andi Hamzah, 2003). Similarly, in the use of mediation institutions in an effort to settle cases between the parties, especially cases that do not use court.

The tasks of a judge appointed as a mediator in civil cases is to reconcile the conflicting parties in civil procedure law. Reconciliation can be interpreted formally and materially. Reconciliation in forma sense are:

1. Not continuing dispute (case) in court, or
2. Make an agreement to resolve the dispute before litigation in court.

This can be seen in the Law No. 4 of 2004 on Judicial Power, especially in Article 5 (2) that states as follows:

"The court assists to seek justice and strive to overcome all obstacles and barriers to achieve the justice that is simple, fast and inexpensive ".

If the parties do not continue the dispute (case) in court, then the case will be declined. If the parties make a reconciliation agreement for resolving the dispute before the process of further litigation, it is a must to make reconciliation certificate .

Reconciliation materially is defined as the achievement of an agreement on the settlement of disputes after through litigation in the courts. Litigation process is a process in the civil procedure that includes reading the lawsuit, answers, replicate, closing argument, evidence, conclusions and decisions. The process can be passed in whole or in part, which ended with the verdict. If in the process of litigation, there has been reached agreement on the settlement of the dispute, the judge will make a decision in accordance with the agreement until it reached conclusion about the solution of dispute. The judge will further make a verdict which theoretically can be justified even though not in accordance with the opinion of one or both parties. In this case, the judge's decision serves to terminate or abolish the dispute that is formal, material and emotional. In a dispute that has formal character that is a dispute about the rule of law or the legal status of an object of the dispute, in this case the ultimate goal is the certainty of law.

In the dispute with material characteristically, in order to achieve a common perception of the agreement towards the allocation of rights on objects, valuation or pricing, the fulfilment of obligations between the parties. This can happen in a dispute over the sale and purchase, leasing, accounts payable, inheritance, wills, *sodakoh (charity)*, property in marriage, the wife living, a living child, in this case the target is a sense of justice. In a emotional dispute in the sense that will reach agreement (common perception) for each other to forgive, give mutual respect / appreciate and help each other, the ultimate goal is to create good relationship, peaceful, harmony.

Based on the article 130 paragraph (1), it was stated that the judge before examining a civil case should strive to reconcile the two sides. In conducting the reconciliation process, this can be done throughout the process as well as in the high court (Retno Wulan and Iskandar Oerip, 1995). To have clear example, it can be seen from the decision made by the High Court of Bandung, dated October 4, 1973 No. 143 / Pdt / PT Bandung, and March 27, Number 60 / pdt / PT Bandung, as well as the provision contained in Article 31 Rv. These dual decisions could be serve as jurisprudence in the legal establishment, especially regarding the reconciliation efforts that can be done by the judges. If the attempts made by the judge has reached an agreement and the parties accepted the case, the reconciliation certificate must be made and both parties should comply with the contents of the reconciliation certificate that that was signed.

With this reconciliation certificate, there will be a legitimate power as the judge's decision that has been *in kracht van gewisjde* for the party that was supposed to give something or omitted to pay a certain amount of money. If, for instance, there is no explanation of the obligation, it can immediately be executed against the goods in question to obtain a sum of money to be paid to the entitled party to receive a sum of money including other expenses. Therefore, it is appropriate that the reconciliation agreement solely become the responsibility of the dispute parties to make it.

IV. CONCLUDING NOTES

The settlement of dispute is one of the important legal aspects of the society in resolving a conflict or dispute. This is the duty of the Courts to resolve a case based on the Act and judges which were guided by the Law No. 48/2009 on judicial Power, which is the main and a general framework that lay the basis and principles of justice.

Along with the demands of globalization which led to free trade, the settlement of disputes can be resolved by the court or outside the court, or commonly known as the Alternative Dispute

Resolution (ADR) or also known as the Alternative Dispute Resolution (APS) with the issuance of the Law No. 30/1999 About the Arbitration and Alternative dispute Resolution. One method to this is through mediation.

The judge as mediator in resolving disputes has a very important role in handling disputes through alternative dispute settlements and /or through reconciliation / mediation. This method is considered much better and more wisely since nobody loses and nobody wins (win-win) than using the judge verdict with the decision one loses and one wins. Using mediation method, the cost is relatively low and it is efficient in term of time. This method is also in accordance with the principle of civil procedural law which states that "the court shall reconcile the litigants".

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