

## The Essence of Amicability in Civil Dispute Settlement

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**ABSTRACT:** The purposes of this study are to find out the nature of amicability in civil disputes in South Sulawesi High Court. The research method was applied by collecting data from interviews, questionnaires and documentation. This research was carried out in a socio-juridical manner and the nature of the research was descriptive, i.e. to identify and describe what were obtained in the study. In addition, the District Court in the High Court of South Sulawesi was considered representative enough to obtain the required data. The results of the study showed that: 1) the nature of amicable settlement in civil disputes in the High Court of South Sulawesi is the free will of the litigating parties based on a good faith to set aside their selfishness and emotions and the envy and hatred to unite and gather two or more interests then have it embodied to a deed of amicable settlement which is integrated with a court judge's decision. Taking this alternative dispute settlement means the parties making the amicable agreement, the mediator, the judge and the lawyers as well as all stakeholder involved in it have taken a step towards the institutionalization of an alternative civil dispute settlement model as an action of realizing the fast, low-cost, and simple proceeding principle.

**KEYWORDS:** Amicability, Dispute Settlement, Court

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### I. INTRODUCTION

One problem that a trial entity in Indonesia encounters is the slow process of case settlement at Supreme Court or *Mahkamah Agung* (MA). While this court can settle 8,500 cases each year, the incoming cases keeps on increasing in terms of their number. It can therefore be expected that the accumulated cases at the Supreme Court cannot be solved.<sup>1</sup>

The Supreme Court (MA) of the Republic of Indonesia (RI)<sup>2</sup> received 9,799 applications for case appeal in 2013. This decreased by 8.87% from the previous year which amounted to 10,753 cases. The remaining cases from 2012 were 7,784, thus the appeal case examination load for 2013 was 17,583 cases (78.32% of the total cases). From these 17,583 cases, the Supreme Court of RI successfully adjudicated on 12,655 appeal cases. This was an increase by 43.55% from 2012 where only 8,816 appeal cases could be adjudicated. The remaining appeal cases per 31 December 2013 were 4,928. This was a decrease by 36.69% compared to the previous year's remaining cases at 7,784. The ratio of appeal case examination completion in 2013, by making a comparison between the number of unsettled appeal cases and the settled appeal cases in this year was 71.97%. This ratio value indicates an 18.86% increase from last year which reached only 53.11%.

The huge number of civil cases submitted by parties to be examined and adjudicated by Judges can cause case accumulation which eventually results in the slow case settlement processes. The trial institution as the holder of justice power is demanded to work optimally and keep on finding stimulant to respond to this challenge. People in general have high expectation of a simple, yet efficient dispute settlement, both in terms of its time and cost without sacrificing the justice. The attempts to reach it have been made by the Supreme Court through the legal regulations/rules it makes such as Regulation of Supreme Court (hereinafter referred to as Perma) No. 01 Year 2016 which is a revision to Perma RI Number 01 Year 2008 wherein some issues were found, hence it is expected that the revision can empower even further the mediation institution related to how to settle a case at a Court. However, the existence of this Perma does not seem to reduce the cases accumulated at

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<sup>1</sup>Mahkamah Agung Republik Indonesia, 2010. *Cetak Biru Pembaruan Peradilan 2010-2035*, Mahkamah Agung :Jakarta. p. 3.

<sup>2</sup>Quoted from Sunarta's Dissertation (S3), Postgraduate Program of Pasundan University entitled "Peningtegrasian Mediasi Kedalam Proses Peradilan Perdata" Pasundan University Year 2016, also published in Institutional Repositories & Scientific Journals Universitas Pasundan, UPT Perpustakaan and at website <http://repository.unpas.ac.id/eprint/11880> on 01 October 2016 by the Writer DR. Sunarta. SH. MH.

the courts up to appeal level at Supreme Court (MA). The numerous appeal cases and Judicial Reviews or *Peninjauan Kembali* (PK) submitted to Supreme Court (MA) are due to the fact that the currently applicable legal system does not limit what cases can be submitted to Supreme Court. Therefore, there is a need for a more basic settlement which will help reduce the number of cases submitted to Supreme Court (MA).

Perma No. 01 Year 2016 has its enforceability both internally and externally and judging from its drafting technique this Perma is close to a form of law. Perma No. 01 Year 2016 is a development which matches the social dynamic regarding civil case settlement processes, where civil cases are settled not only through a formal process (Court), rather it can also be solved through an informal process (beyond Court). This is legally justifiable based on the provisions of Article 58 Law No. 48 Year 2009 on Judicial Power, which also has previously been governed in the provisions of Article 3 Paragraph (1) in conjunction to Explanation of Law No. 04 Year 2004 on Judicial Power, which provides an alternative opportunity to settle disputes amicably beyond the Court commonly known as ADR (Alternative Dispute Resolution). This alternative opportunity to settle disputes amicably outside the Court has also previously been set forth in Article 3 Paragraph (1) Law No. 14 Year 1970 on Main Provisions of Judicial Power, which has been used as the legal basis to establish Law No. 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement.

The amicability by integrating mediation into a civil trial process has actually been explained in Article 130 HIR/154 RBg Article 130 Paragraph (1) HIR (Herziene Indonesisch Reglement), which states the necessity of Presiding Judge of District Court to procure amicable settlement to the civil cases they are examining. Judges should be able to enlighten the disputing parties and make them aware and convinced that amicable case settlement is a better and wiser way to solve it than the court decision, in terms of time, cost and energy it consumes. The amicable decision does not justify any legal appeal attempt and according to Retnowulan Sutanto and Iskandar Oerip Kartawinata to any amicable decision an appeal cannot be submitted.<sup>3</sup>

While in the Civil Procedural Law an amicable institution has been arranged as set forth in Article 130 HIR/154 RBg which has the aforementioned function, in reality the accumulated cases in Supreme Court from one year to another keeps on increasing and they become liability at Supreme Court. This issue of accumulated cases at Supreme Court has been a topic everyone was and is talking about and it is a dilemma in the justice and law enforcement realm in Indonesia.<sup>4</sup>

Based on the foreword of Supreme Court report in 2002 Annual Session of People's Consultative Assembly, Bagir Manan as the Head of Supreme Court reported that there were ±16,000 unsettled cases by August 2002.<sup>5</sup> Furthermore, as suggested in the foreword of Supreme Court report in 2002 Annual Session of People's Consultative Assembly there were ±16,581 unsettled cases by June 2003 and 75% of the cases in Supreme Court were civil cases.<sup>6</sup>

In response to what have developed in the community, the Supreme Court empowers the application of amicability institution referred to in Article 130 HIR/154RBg by issuing PERMA Number 1 Year 2016 on Procedure of Mediation at Court where it is through this PERMA that the Supreme Court integrated mediation institution to the proceeding at a court or, in other words, the Supreme Court made a new breakthrough by combining the mediation institution process as one of dispute settlement mechanisms (non-litigation) into proceedings at a court (litigation). The combination of mediation institution into proceedings at a court needs to be significantly developed further.

The urgency for a mediation to be within the trial system in Indonesia can be seen from the amendment and update processes of mediation laws. For the first time in history, mediation is formally governed in HIR Article 130 jo. RBG Article 154, which generally requires judges to first lead the disputing parties come to terms before their case is examined. Furthermore, the mediation is governed further in Circular Letter of Supreme Court (SEMA) No. 1 Year 2002 on Empowerment of Amicability Institution in Article 130 HIR/154 RBG. Afterwards, also issued was Regulation of Supreme Court (PERMA) No. 2 Year 2003 on Empowerment of First Level Court to Implement Amicability Institution in the Form of Mediation. Moreover, based on the evaluation and revision of mediation mechanism under PERMA No. 2 Year 2003, this PERMA was then revised once again in 2008 to give greater access to the parties to find satisfactory amicable case settlement which meets the sense of justice.<sup>7</sup>

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<sup>3</sup> Retnowulan Sutanto dan Iskandar Oerip Kartawinata, 1997. *Hukum AcaraPerdata Dalam Teori dan Praktek*, Mandar Maju: Bandung, h. 36

<sup>4</sup> Mahkamah Agung Republik Indonesia, 2010. *Cetak Biru Pembaruan Peradilan 2010-2035*, Mahkamah Agung :Jakarta

<sup>5</sup> Majalah *Varia Peradilan*, edisi Nomor 216 Tahun 2004, h. 7

<sup>6</sup> *Ibid*, h. 216

<sup>7</sup> Wahyu widiana, *Upaya Penyelesaian Perkara Melalui Perdamaian pada Pengadilan Agama, Kaitannya dengan Peran BP4*. Paper was presented in Rakernas BP4 on 15 August 2008 in Jakarta. Accessed from [www.badilag.neton](http://www.badilag.neton) Mondy, 3 July 2017

Furthermore, this Regulation of Supreme Court No. 1 Year 2008 receives another update through the issuance of Regulation of Supreme Court Number 1 Year 2016 on Mediation Procedure at Court. The issuance of this PERMA witnesses a fundamental change to Indonesia's trial practice. The court is no longer tasked and authorized merely to examine, adjudicate, and solve cases it receives, rather it is also responsible for procuring amicable settlement between the disputing parties. The court, which insofar seems like the institution to enforce the law and justice, upon the issuance of this PERMA, also presents itself as an institution which seeks amicable solution between disputing parties. In current context, mediation has been a relevant case settlement mechanism. This is because the huge amount of civil cases submitted to the First Class Court. In particular, the High Court of South Sulawesi for the last 3 (three) years, i.e. from 2011 to 2013, had received 56,213 cases, and only 1,686 cases were revoked. This means only around 3% of them reach an agreement or are settled amicably.<sup>8</sup>

Hence, the amicable effort through a mediation process is not as easy as turning the hand. Rather, more than that, a mediation process is tightly related to many factors, both to the ones inhibiting and supporting it. As explained earlier, mediation is not something totally new in Indonesia, rather it had existed since the Indo Dutch reign as governed in HIR/RBG. Later, it was continued to apply during the post-independence era, and even to the recent reform era.

## II. RESEARCH METHOD

The approach used in this research is socio-judicial one and it is descriptive in nature, i.e. the one which describes and depicts what are obtained in the research. This research is conducted at District Court in the area of High Court of South Sulawesi, targeting the competent parties. This location is selected based on the fact that the number of cases submitted to and registered with the District Court in the area of High Court of South Sulawesi each year increases hence a quick, cost-effective and simple alternative case settlement is needed.

## III. DISCUSSION

Amicability in essence is one of Alternative Dispute Resolution (ADR) systems. The basic principle of amicable dispute settlement has been in Indonesia's national principle, i.e. Pancasila wherein the philosophy implied is that the principle for dispute settlement is deliberation for consensus (*musyawarah mufakat*). Furthermore, Articles 58 to 60 of Law No. 48 Year 2009 concerning Judicial Power, govern "a dispute settlement beyond the court through arbitration or other alternative dispute settlements as agreed upon by the parties including consultation, negotiation, mediation, conciliation, and expert assessment.

According to Makkasau,<sup>9</sup> one of judges at High Court of South Sulawesi the dispute arising between parties is not necessarily negative, thus its settlement should be managed well towards the best resolution for both parties' interests. Hence, dispute settlement is one of important legal aspects in a state of law to allow the creation of order and peace. To maintain the order and peace well, the law ought to conform the legal ideal of people in the state.

People or justice seekers are in desperate need for a simple and efficient dispute settlement, both in terms of its time and cost. Their understanding and knowledge of the importance of legal process encourage justice seekers to be able to act to find the real truth without having to experience both material and non-material losses.

According to Nirwana, a judge in Makassar, the increasing number of civil cases submitted by the parties to be examined and adjudicated fairly by the court has led to case accumulation at the court since they take a very long time to be examined and adjudicated by judges. This leads to a demand for the civil procedural law (*formeel recht*) to be implemented according to the simple, quick and low-cost principle.<sup>10</sup> The attempts to realize this simple, quick and low-cost principle can, among other things, be performed through mediation. In this case, the Judge is demanded to be more active in trying to settle things amicably prior to going to the case main point, as usually practiced in the general trend applicable in proceedings. In addition, the actualization of this amicability institution will stimulate better the development of methods to settle disputes beyond the court (non-litigation). Amicable civil dispute settlement is intended to find the best way for the disputing parties to

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<sup>8</sup>The Data in High Court of South Sulawesi in 2014 show that mediation is a relevant dispute settlement mechanism. This can be seen from the fact that 56,213 civil cases have been submitted to the First-Class Courts, particularly those in the judicial area of High Court of South Sulawesi for the last 3 (three) years, namely from 2011 to 2013, and only 1,686 cases are revoked. This means that only around 3% of them successfully reach an agreement or are settled amicably.

<sup>9</sup>From interview with Makkasau, a judge at High Court of South Sulawesi on 02 August 2018 who explains that dispute settlement is one of important legal aspects in a state of law, to allow the creation of order and peace. To maintain this order and peace well, the law should conform the legal ideal of people in the state.

<sup>10</sup>From an interview with Nirwana, a judge in Makassar, on 6 August 2018, it is found that the accumulation of cases at a court is due to the great amount of civil cases submitted by many parties.

settle their dispute amicably and furthermore a deed of amicable settlement which is signed by both parties will be made.

To strengthen its position as a place where one can find justice and as a vehicle for effective and efficient civil dispute settlement, the court can try to use alternative dispute settlements through mediation and consolidation mechanisms for civil cases registered in the case register. The offer for alternative dispute settlement at the beginning of case examination is required by the applicable regulations. The parties can even cease the proceeding if they are willing to take the alternative dispute settlement.

Mediation is a concept considered as the most suitable by the Supreme Court to perform the amicable settlement process in civil cases as set forth in Article 130 HIR/154 Rbg. This view is based on the assumption that the amicable settlement process using mediation concept is deemed to give the more optimal results as compared to an amicable settlement process in which the parties are given the chance to settle the dispute amicably themselves. The presence of a mediator in an amicable settlement process is eventually intended to provide a form of faster, simpler and less costly dispute settlement as expressly set out in Article 2 Paragraph (4) of Law No. 48 Year 2009 on Judicial Power.

In Indonesia, looking at it a little deeper, settling dispute amicably has actually long and traditionally been practiced by its people. This can be seen from the customary law which places a customary leader as a figure who can settle the dispute between their members. For example, in Minangkabau Mother's Elder Brother (*Mamak Kepala Waris*) act as the mediator and is authorized to give a verdict on the case brought before him at *Rumah Gadang* level.<sup>11</sup>

Amicable dispute settlement is also known in Islamic law, in which Islam recommends the disputing parties to settle things amicably.<sup>12</sup> Islam always commands that every dispute be settled through a method known as *ishlah*. Likewise, among Chinese descendants in Indonesia, one can find a method of settling dispute amicably using the Confucius's teaching which emphasizes the harmonious relationship among humans and between humans and the nature. The ideal view of Confucians deems the dispute settlement beyond the court is better than before it, since the court is only for evil or mischievous persons. Thus, mediation and conciliation are the ways to obtain the ideal justice in settling disputes.<sup>13</sup>

At the beginning of amicable settlement using mediation process at the court, prior to the examination of case by the judge panel, an amicable settlement will first be attempted between the parties. Each judge, mediator and the parties must follow the dispute settlement procedure through mediation as set forth in PerMA Number 01 Year 2016. In a mediation process at the court, some stages must be attended to. In general, according to Ruslan Hendra Irawan, the mediation stages can be divided into 3 (three) namely:<sup>14</sup>

### **1. Preparation Stage**

In a mediation process, a mediator needs to first intensively learn what the dispute between the parties are all about to be discussed in the mediation. And also in this stage, the mediator usually consult with the parties regarding the venue and place of mediation, identities of the parties to be present, the time duration and so on.

### **2. Implementation Stage**

In this implementation stage, what should be done first is to establish a forum where before the mediation begins between the mediator and the parties, a forum is established to prepare the mediation. After the forum is established, a joint meeting is held and the mediator issues an introduction statement. What the mediator should do in this stage are: (1). Introduce himself/herself and let the parties introduce themselves; (2). Explain his/her role and authorities as a mediator; (3). Explain the matter. Afterwards, it is followed by collecting and sharing information, in which the mediator give the parties the chance to explain the fact and position in their own versions. The mediator serves the role of an active listener and he/she can ask questions and should also apply the decision rules and also control the interaction between the parties.

In this stage, the mediator should closely listen to all information presented by each party, since every single information of course contains the interests that each party try to maintain in order for the other

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<sup>11</sup>Budaya Masyarakat Sumatera Barat," [http://pakguruonline.pendidikan.net/sjh\\_pdd\\_sumbar\\_frameset.html](http://pakguruonline.pendidikan.net/sjh_pdd_sumbar_frameset.html), accessed on 18 September 2018.

<sup>12</sup> Q.S. Al-Nisa (4) : 128.

<sup>13</sup> Percy R. Luney, Jr, 1989. "Traditions and Foreign Influences: Systems of Law in China and Japan," *Law and Contemporary Problems*, Vol. 52, No. 2 (Spring 1989), p. 130.

<sup>14</sup>From an interview with Ruslan Hendra Irawan, Head of District Court of Bantaeng on 09 August 2018 who explain the mediation procedure stages in general: preparation, implementation and decision-making stages.

party to agree with it. In presenting the facts, the parties will also have different style. These are all what the mediator needs to pay attention to.

Upon the data collection and sharing, the next step is negotiation the problem solution. This is where the information presented by each party is discussed and responded to. The parties negotiate between them. According to Cristoper W. Moore,<sup>15</sup> there are 12 (twelve) factors which can make a mediation process effective, namely:

- a) The parties have a history of cooperating and succeeding in finishing several matters;
- b) The disputing parties (involved in the mediation process) have no history of suing each other at any court prior to the mediation process;
- c) The number of parties involved in the dispute does not extend to those beyond the problem;
- d) The parties involved in the dispute have agreed to limit the problem to be discussed;
- e) The parties are eager to solve their problem;
- f) The parties have had or to have a deeper relationship in the future;
- g) The anger level of the parties is still within the normal limit;
- h) The parties are willing to accept a third party's assistance;
- i) They have robust reasons to settle the dispute;
- j) The parties have no psychological problems that will seriously disrupt their relationship;
- k) The resources needed to achieve a compromise are available;
- l) The parties are willing to respect each other.

The greatest resources in this mediation process are usually allotted to negotiation stage, since it is in this negotiation stage that the disputed crucial matters are discussed. During this stage, it is also possible that a debate or even commotion occurs between the disputing parties. A mediator should be able to build a cooperation with the parties both collectively and severally to identify any possible issue, give a direction to the parties regarding bargain to solve the problem and change the parties' stands from aiming only for their sole interest to working for collective interest. Therefore, during this stage a reliable and qualified negotiator with great competence not only in law field but also great communication skills in negotiation is needed.

### **3. Decision-Making Stage**

In this stage, the parties cooperate one another with the mediator to evaluate the choices, obtain a trade off and offer a package, minimize debates and to find the fair basis for collective allocation. And eventually, the parties shall agree to make collective decisions. In this decision-making stage, the mediator can also put some pressure on the parties, find the formulation to save the parties' face, help the parties meet the principal (if it is authorized to others).

In the mediation process, the parties can be represented by their lawyer, even though in principle it is recommended that in the mediation process the relevant parties can personally be present. Nevertheless, it is never prohibited if the parties are accompanied by their lawyer. PerMANumber01Year2016 governs the lawyer, namely: 1). The parties' lawyer is required to encourage the parties they accompany to personally involved in the mediation process. 2). If at the mediation process the parties are represented by their lawyers, then the parties must state in writing that they would agree on the achieved agreement.

If the mediation produces an amicable agreement, the parties, assisted by the mediator, must formulate in writing the achieved agreement and it should be signed by the parties and the mediator. Before the parties sign the agreement, the mediator shall examine the content of this amicable agreement to avoid any agreement which might be unlawful or cannot be exercised or contain bad faith.

The parties can propose an amicable agreement to the judge to be strengthened in the form of a deed of amicable settlement. On the other hand, if the parties do not wish the amicable agreement to be strengthened with a deed of amicable settlement, then the amicable agreement should contain a clause which revokes the lawsuit and or a clause which states that the case is closed. If after the maximal time limit of 40 (forty) business days, the parties fail to reach an agreement, the mediator must state in writing that the mediation process has failed and notify the judge on it. The judge, upon his/her receipt of such notice, shall continue the case examination according to the applicable provisions of procedural law.

This procedure of dispute settlement that the parties should follow is intended for the mediation process to work without any obstacle or hindrance caused by either the parties, third parties or the parties' lawyer. Mediation aims at making the parties directly involved in the case come to terms, thus the judge should never be passive and the judge must make active attempts to make the parties willing to have the

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<sup>15</sup> Rahmadi Usman, 2003. *Pilihan Penyelesaian Sengketa di Luar Pengadilan*, Citra Aditya Bhakti: Bandung, pp. 102-103.

mediation. Meanwhile, the lawyer plays a different role in a mediation process from what he/she should in a litigation process. In a mediation process the one actively playing their roles are the relevant parties themselves, the lawyer shall only help their clients in case these clients fail to understand the mediation process, or perform those matters which can be of a help.

During the examination process, if the parties shown signs or possibilities that they want to take the mediation process instead, the judge must postpone the adjudication process to give them the chance to take the mediation. Therefore, the mediation procedure must be explained since not everyone understand and know what the term mediation means, its objectives and how the dispute settlement process through mediation is.

Based on the explanation above, it can then concluded that the amicable settlement stage procedure through mediation process which is integrated to the court has a simple and modest mechanism, i.e. in 3 (three) stage, namely preparation, implementation and decision-making stages.

#### IV. CONCLUSION

The essence of amicable settlement in civil dispute is the free will of the disputing parties in good faith to set aside their selfishness and emotion as well as envy and hatred in order to unite and gather two or more interests and then are embodied in a deed of amicable settlement which is integrated to a court judge's decision. Taking this alternative dispute settlement means the parties making the amicable agreement, the mediator, the judge and the lawyers as well as all stakeholder involved in it have taken a step towards the institutionalization of an alternative civil dispute settlement model as an action of realizing the fast, low-cost, and simple proceeding principle.

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