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THE URGENCY TO FORM A MEDIATION LAW IN INDONESIA (REVIEWED BY THE THEORY OF PROGRESSIVE LAW ON THE LEGAL SOCIOLOGY PERSPECTIVE)

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Abstract: In the social relation, human as individual beings also has a role as social beings. Human's social life in society also had been regulated by the law. Human has a lot relations with another humans mainly on doing profitable daily activities such as business interaction, familyhood, collaboration, contracts, etc. But, from those social relations also found legal issues between humans. Those legal conflict or issues need to be ended. One of the easiest ways to ending conflict is by choosing mediation process. But in Indonesia still have no specific constitution for Mediation Law. There are some legal norms void and blurry about mediation in Indonesia and this bring uncertainty of law and blurry of norms. This research is trying to explaining raising issues due to no Mediation Law in Indonesia and the urgencies to make law regulation about Mediation by using progressive law and sociological jurisprudences perspectives. This research is using normative-juridische methodes. Conclusions, urgencies to make law regulation about mediation is very important to have concerns and considered for better law advancement and enforcement in Indonesia.

Keywords: Mediation; Progressive Law; Sociological Jurisprudences; Urgency.

I. INTRODUCTION

The law and society are like two sides of a coin that cannot be separated. Where there is society there is law. Law is always attached to human association. But humans as social beings also sometimes have disputes in their social relationships which cause conflict or disputes in the midst of these social relations.[1] Although humans are social beings or zoon politicon according to Aristotle[2], humans are also wolves for other humans or homo homini lupus according to Thomas Hobbes.[3] Two

[1] Endrik Safudin, *Alternatif Penyelesaian Sengketa dan Arbitrase*, Malang: Intrans Publising, 2018, p1.

[2] Muhamad Amirulloh, 2020, *"Zoon Politicon Menjadi Zoom Politicon",* Jurnal Rechtsvinding, p4.

[3] Yulius Eko Priyambodo, 2014, *"Homo Ridens: Suatu Tawaran 'Menjadi' Manusia di Zaman*

human natures that unite into one within him like two sides of this coin also create conflict between people.

It is this conflict or dispute that must be resolved so that social relations can be rebuilt after the conflict subsides and is resolved. One way to resolve the conflict is through mediation. Etymologically, the term mediation comes from Latin, *"mediare"* means to be in the middle. The word "mediation" comes from the English word "mediation" which means a dispute resolution involving a third party as an intermediary or intermediate dispute resolution, the mediation of which is called a mediator or a person who mediates.[4]

Gustav Radbruch argues that three legal values, namely justice (philosophical), legal certainty (juridical) and benefits to society (sociological) must be made the main elements in a legal approach so that order is established in society.[5] Society always yearns for order and to achieve that order the law must be able to provide justice, benefit and certainty. So the legal objectives that must be achieved according to Radbruch are justice, expediency and legal certainty.

In the process of achieving these legal objectives, priorities must be determined from these three basic values. This is understandable because sometimes, the law to achieve justice will collide with benefits and legal certainty, and vice versa legal certainty can sometimes ignore justice and benefits. The order of priority taught by Radbruch is: first Legal Justice; second Legal Benefit; and the third is Legal Certainty.

By setting the order of priority as above, it is hoped that the legal system can resolve conflicts from the three legal values above. Justice is treatment that is fair, impartial, on the right side, not one-sided, does not harm anyone and gives equal treatment to each party according to the rights they have.

Benefit means that the law must provide benefits for every community that needs it, both for those who feel disadvantaged and those who feel they are not harmed. Both parties must be able to feel from every legal decision. While legal certainty means that the provisions and decisions of judges must be based on clear, consistent, regular and consistent rules and free from the influence of subjectivity.

This is what according to Radbruch law must be able to combine the three objectives of law, namely justice, benefit and legal certainty. Where the main priority is legal justice, then followed by legal benefits and finally legal certainty. One way to create harmony between the elements of justice, benefit and legal certainty in society can be seen from the way community disputes are resolved through the courts (litigation) as well as the way community settlements are done outside the court (non-litigation).

Ini.", Jurnal Melintas, Universitas Parahyangan, p54.

[4] Ismail Rumadan, 2017, *"Efektivitas Pelaksanaan Mediasi di Pengadilan Negeri",* Puslitbang Hukum dan Peradilan Mahkamah Agung RI, Jakarta, p29.

[5] Hari Agus Santoso, 2021, *"Perspektif Keadilan Hukum Teori Gustav Radbruch Dalam Putusan PKPU "PTB"",* Jurnal Jatiswara, Vol. 36 No. 3, p328.

Mediation is one of the dispute resolution outside the court. Mediation has been regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. However, the law does not explicitly regulate mediation, so this is regulated again in PERMA (Supreme Court Regulation) Number 1 of 2016 concerning Mediation Procedures in Court by the Supreme Court. PERMA does not exist in the hierarchy of laws and regulations, and PERMA appears to fill the legal void in a law product.

When viewed from these three legal ideals, the current condition of mediation practices in Indonesia has not been able to achieve these three legal ideals. First, justice. What is meant by justice here is the equitable distribution of rights and obligations. Regarding mediation practices in Indonesia, Indonesian regulations themselves have not yet regulated in detail regarding mediation. Mediation is only regulated in regulations at the PERMA level which only apply to the Supreme Court, while mediation practices have begun to develop not only in civil cases, but in several criminal cases and in several cases of human rights violations. There are no regulations governing the practices and mechanisms of this mediation, there is no uniform code of ethics of mediators that applies to all mediators in all existing cases and there is no law that regulates more clearly about mediation.

Then, if it is associated with the second legal ideal, namely the benefit of the law, which means that the law must provide the maximum benefit or happiness for as many people as possible. This second legal ideal also cannot be achieved if mediation is only regulated in PERMA because PERMA cannot embrace mediation practices outside of courts under the Supreme Court, so that its benefits cannot be felt equally in all mediation practices that are starting to develop in Indonesia at this time.

Then, if it is related to the third legal ideal, namely legal certainty, PERMA is not yet strong enough to provide legal certainty regarding the mediation practice that is currently developing in Indonesia. In terms of the hierarchy of laws and regulations, PERMA does not even exist in the hierarchical arrangement of laws and regulations. PERMA is a product issued by the Supreme Court with the aim of filling the legal void in the law and only applies to certain judicial environments. To fill this deficiency in law enforcement, responsive changes are needed that can meet the needs and interests of the community. The law must see and hear the needs of society. One of the legal streams that is very close to the sociological needs of community law is the progressive legal school.

As explained, that progressive law emerged based on concern for the legal condition in Indonesia which according to legal observers both at home and abroad as one of the worst legal systems in the world. So that the law in Indonesia makes a low contribution in helping enlighten the nation to get out of adversity. Even though law is an institution that aims to deliver humans to a just, prosperous life and make humans live happily.[6]

[6] Abintoro Prakoso, 2017, *"Sosiologi Hukum",* Laksbang Pressindo, Yogyakarta, p168.

The word progressive comes from the word progress which means progress, here it is hoped that the law should be able to keep up with the times, be able to respond to changing times with all the foundations in it. As well as being able to serve the community by relying on the moral aspect of human resources: Law enforcement itself. In addition, the concept of progressive law cannot be separated from the concept of progressive which has its starting point from the view of humanity that humans are basically good, have compassion and care for others. As an important capital for building legal life in society. Thinking of progressivism means having the courage to get out of the mainstream of thoughts of legal absolutism, then placing law in all human issues.[7]

The term progressive law was used by Satjipto for the first time in his article which was published in the Kompas daily on June 15, 2002 with the title "Indonesia Needs Progressive Law Enforcement". After that progressive law was also used as part of the title of his book, Dissecting Progressive Law (2006), Progressive Law: A Synthesis of Indonesian Law (2009), and Progressive Law Enforcement (2010). In the book Progressive Law: A Synthesis of Indonesian Law, which is edited by Ufran, there is Satjipto's article explaining progressive law that has been published in journals or scientific meetings, especially the Progressive Law Journal, a journal which is currently no longer published.[8]

In "Progressive Law (Exploration of an Idea)" and "Progressive Law: Liberating Law", Satjipto Rahardjo explained, the idea of progressive law arose out of concern for the legal situation in Indonesia. According to him, the legal situation has not approached the ideal situation, namely the welfare and happiness of its people. What happened was just the opposite, a downturn and setback, resulting in a lot of disappointment with the legal situation. This setback occurs because honesty, empathy, and dedication in carrying out the law are becoming increasingly rare and expensive. As a result, judicial mafia, commercialization and commodification of law are increasingly widespread.[9] Therefore this article will discuss the importance of establishing a mediation law to achieve legal progress in Indonesia in terms of the aspect of progressive legal schools using the perspective of legal sociology.

II. DISCUSSION

In carrying out its authority, the judiciary has carried out mediation and arbitration processes as part of alternative dispute resolution institutions. The implementation of the institutional process is also part of the legal development process. Despite the fact that the mediation process has not run optimally like the arbitration process in the business law environment.[10]

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[7] *Ibid.*

[8] M. Zulfa Aulia, 2018, *"Hukum Progresif dari Satjipto Rahardjo: Riwayat, Urgensi, dan Relevansi.",* Undang: Jurnal Hukum, Vol. 1, No. 1, p164.

[9] *Ibid.*

[10] M. Zulfa Aulia*, Op.Cit.*, p164.

Modern legal scientification is strongly influenced by the emergence of the positivism paradigm in modern science. The main character of modern law is its rational nature. Rationality is characterized by the procedural nature of legal regulations. Such procedures become an important legal basis for upholding justice, even procedures become more important than talking about justice itself. In this context, efforts to search for justice or seek justice, can fail simply because it collides with violations of these legal procedures. This means that all cases must be based on applicable laws and procedures that must be applied. The modern legal system gave birth to the concept of equality before the law. But in reality this procedure can be purchased. In every practice of seeking justice, the one who is able will always win (the have always come out ahead)[11]

Roscoe Pound's theory of social interests is a more explicit attempt to develop a progressive model of law. In this perspective, good law should provide something more than just legal procedures. The law must be competent as well as fair, which should be able to recognize the wishes of the public (society) and be committed to achieving substantive justice.[12] Jerome Frank and Oliver Wendell Holmes stated that the main goal of legal realism is to make law more responsive to social needs by encouraging the expansion of fields related to law so that legal mindsets can include knowledge in a social context and influence official actions by law officer.[13]

Progressive law also shares an understanding with legal realism (legal realism) in which according to this school, the holders of state power are not the only source of law, but the executors of law, especially judges. The power to make laws is no longer absolutely in the hands of political holders, but also in the hands of law enforcers. It was also stated that the form of law is no longer limited to a law, but also includes judge's decisions and actions taken and decided by law enforcers.[14]

The development of progressive law cannot be separated from the legal order as stated by Phillip Nonet and Phillip Selznick, namely[15]:

1. Repressive legal order, in which law is subordinated to the political order and economic order.
2. An autonomous/independent legal order, in which the law has an equal (coordinative) position with the political, economic, social and cultural order.
3. Responsive legal order, where the law tries to get closer to the social needs of a society.

[11] *Op. Cit*. p135.
[12] *Op. Cit*. p166.
[13] *Ibid.*
[14] *Loc. Cit.*
[15] Op. Cit., p167.

Daniel S. Lev in his book Judicial Institution-and Legal Culture in Indonesia, describes the legal system and legal culture. The legal system emphasizes procedures but does not explain how these people actually solve their problems in everyday life. The legal culture is broken down into procedural legal values and substantive legal values. Procedural law values question the ways of organizing society and conflict management. Meanwhile, the substantive component of the legal culture consists of fundamental assumptions regarding the distribution and use of resources within society, especially regarding what is fair and what is unfair according to society and so on. Legal culture is an important element for understanding the differences that exist between one legal system and another.[16]

Mediation was first recognized in Article 130 of the Herzien Inlandsch Regulation (hereinafter referred to as HIR). HIR itself is a law formed during the Dutch colonial period and regulates procedural law in civil and criminal trials. Article 130 HIR determines that[17]:

1. If on that appointed day both parties appear, then the district court, through the intermediary of its chairman, will try to reconcile them.
2. If reconciliation occurs, then regarding this matter, at the time of the hearing, a deed must be drawn up, by which both parties are obliged to fulfill the agreement made; then the letter (deed) is enforceable and will be carried out as an ordinary judge's decision.
3. Against such a decision no one is permitted to appeal.
4. If when trying to reconcile the two parties it is necessary to use an interpreter, in that case the following provisions of the article must be complied with.

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (hereinafter referred to as Law No. 30 of 1999) is the second legal product which recognizes mediation as one of the dispute resolutions outside the court. Article 1 point 10 of Law no. 30 of 1999 stipulates that: "Alternative Dispute Resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely settlements outside the court by way of consultation, negotiation, mediation, conciliation, or expert judgment." However, Law no. 30 of 1999 does not clearly define the mediation mechanism. Article 6 of Law no. 30 of 1999 merely stipulates that the disputing parties may request the assistance of expert advisors and mediators as well as the time limit for resolving the dispute itself.

[16] Abintoro Prakoso, p203.

[17] Ruben Denny Djari, 2020, *"Urgensi Rancangan Undang-Undang Tentang Mediasi: Terwujudnya Keadilan Dan Kepastian Hukum Bagi Para Pihak"*, Jurnal Education and Development Institut Pendidikan Tapanuli Selatan, Vol. 8 No. 1, p141.

Another thing that has caused controversy is Article 130 paragraph (1) of the HIR which stipulates that, "If on that appointed day both parties appear, then the district court, through the intermediary of the chairman, will try to reconcile them." What needs to be underlined is the word "try" in the Article, which means that HIR adheres to the principle that mediation is voluntary. There is a significant difference between the principles adopted by the HIR and those that apply according to Perma No. 1 of 2016. Perma No. 1 of 2016 stipulates that in principle mediation is mandatory for all parties who will file a dispute in the private sector.

This means that mediation no longer adheres to the voluntary principle. In fact, various legal consequences have been determined which are quite fatal for parties who do not have good intentions. It is understandable that the purpose of setting this model is so that the disputing parties prioritize mediation before carrying out a litigation settlement.

In fact, one of the goals of law is to provide happiness for the community. Jeremy Bentham said that human attitudes and behavior are driven by their interests and these interests are primarily personal interests. To make humans feel happy, it must start from this many personalities. However, he realized that it was not easy to make everyone feel happy without exception. Therefore, utilism has succeeded if it can make the majority of people feel happy (the greatest happiness for the greatest number of people).[18]

John Stuart Mill (1806-2873) then refined Bentham's ideas with his social utilism. He linked the happiness of the individual with the necessity to create the happiness of all humans. According to Mill, because humans are also social beings, humans must have sympathy for other people. This feeling is natural, so humans need to maintain it to achieve happiness together.[19]

Article 61 of Law Number 48 of 2009 concerning Judicial Powers (hereinafter referred to as the Judicial Powers Law) stipulates that, “Provisions regarding arbitration and dispute resolution out of court as referred to in Article 58, Article 59 and Article 60 are regulated in law. ” It is quite clear that the mandate of the provisions of the article is the establishment of a law that regulates arbitration and dispute resolution out of court.

Mediation is recognized as one of the out-of-court dispute resolutions in Article 60 paragraph (1) of the Judicial Powers Law. This means that it is not enough to

[18] Shidarta, 2009, *“Moralitas Profesi Hukum”,* Bandung: Refika Aditama, p62.
[19] Loc. Cit.

arrange mediation in just one Perma. Therefore, the idea of establishing a Law on Mediation is appropriate.[20]

PERMA Number 1 of 2016 Concerning "Mediation Procedures in Court was made because there is a legal vacuum in the regulation of mediation which is very limited to Law Number 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution. PERMA Number 1 of 2016 Concerning Mediation Procedures indeed provides a breath of fresh air for the mediation process, such as strengthening the existence of mediation outside the court. The existence of a mechanism for submitting a Peace Agreement to be strengthened into a Peace Deed by the Court of first instance, contributes to increasing the role of mediation outside the court in the Indonesian legal system. However, as time goes by, the practice of mediation is increasing so that it becomes an urgency to establish a law on mediation. "Several things are the reasons for this to be urgency, namely[21]:

First, the process of resolving disputes outside the court through mediation is an alternative that is often taken by people who are in dispute. It is not only civil disputes that are being resolved through mediation, currently some criminal disputes have been mediated as is the practice that occurs in the juvenile justice system through diversion based on the principles of restorative justice as stipulated in Article 1 point 7 of the Law. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System ("SPPA Law").

Second, then for the current situation which has entered the era of the COVID-19 pandemic where everything is taken or done online (in the network) including mediation processes that can occur online. However, in PERMA Number 1 of 2016 it is only explained in article 5 which states that the mediation process can be carried out through long-distance audio-visual communication media, but the PERMA does not explain how the online mediation process should be carried out even though the scope of PERMA should be able to answer the legal vacuum which is not specified in the law. However, PERMA itself "has not sufficiently regulated the mediation process.

Third, mediation is growing and being chosen as an effective and efficient dispute resolution amidst the problems that surround the litigation system and the arbitration system. Mediation has developed into a desirable profession, both in Indonesia and in many other countries. Professional associations of mediators have sprung up such as the Association of Indonesian Procurement Mediators and

[20] Op.Cit, Ruben Denny Djari, hlm. 145.

[21] Winsherly Tan, 2021, "Urgensi Pembentukan Undang-Undang Tentang Mediasi Di Indonesia", Nusantara: Jurnal Ilmu Pengetahuan Sosial, Vol. 8 No. 3, p290.

Arbitrators (PERMAPI) which was officially formed on 25 July 2019 in Jakarta (Jambione, 2020). So this profession needs to be regulated in the law as other professions that have been regulated by law.

The final additional issue, when compared to other countries, which already have their own laws on mediation, and even have international mediation institutions, the Indonesian State needs to catch up with the progress of these other countries, such as Singapore, Thailand, or Malaysia, which already thriving in this mediation setting.

Another positive thing is that with the existence of the Mediation Law which in the end can form a national mediation agency or agency or in its development can become an international mediation agency or institution, the State of Indonesia attracts the attention of foreign investors and businessmen to cooperate from an economic standpoint. This has a good impact on the economy of the Indonesian State and raises the quality of Indonesian state law in the eyes of the international community.

Review from the sociology of law, there is a sociological theory of legal development, which explains that social phenomena can be studied through 2 aspects, namely[22]:

1. Aspects of social statics as a theory of social order
2. Aspects of social dynamics as a theory of social progress

To apply the sociological theory approach, of course, mediation institutions need to pay attention to the cultural approach through the static aspects and social dynamics. The Indonesian state needs to establish a mediation law to meet the needs of the community in resolving cases outside the court so that legal development in Indonesia can also be better with the existence of special laws governing mediation. This breakthrough idea of forming a mediation law answers the problem of emptiness and blurring of norms regarding mediation law in Indonesia. So it can be concluded that the urgency of establishing this mediation law is very important to pay attention to and consider for the sake of better law advancement and law enforcement in Indonesia.

III. CONCLUSION

The urgency of establishing a Mediation Law in Indonesia is needed to improve legal regulations regarding mediation because there are still some normative legal issues such as how to further explain the provisions of mediation practices, how online mediation procedures are, professional arrangements for mediators, and so on. Compared to other countries that already have Mediation Laws, Indonesia needs to

[22] *Op. Cit.*, H.P.Panggabean, p7.

establish its own Mediation Laws that are separate from Arbitration Laws and Supreme Court Regulations. This is to ensure fairness, certainty, and benefits are maintained and do not cause conflicts of norms in mediation practices in Indonesia.

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