E-ISSN: 2962-2816 | P-ISSN: 2747-1985
JOURNAL OF LAW, POLITIC AND HUMANITIES (JLPH)
https://dinastires.org/JLPH dinasti.info@gmail.com +62 811 7404 455

DOI: https://doi.org/10.38035/jlph.v4i1
Received: 15 January 2024, **Revised:** 23 February 2024, **Publish:** 27 February 2024

Principle of Good Faith in Peace Agreements via Mediation

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Abstract: Many people have selected mediation as a dispute resolution procedure to get the best agreement and solution. However, it is not uncommon for parties to fail to consistently implement an agreement reached through mediation. The purpose of this article is to examine the essence of peace agreements reached through mediation, as well as the importance of the principle of good faith as a form of protection for the parties involved in such agreements. This is normative research that takes both a statutory and conceptual approach. The exploration of data in the form of primary and secondary legal materials was carried out through a literature review and descriptive-qualitative analysis. The analytical results reveal that the mediation process, which concludes with a peace agreement, represents the end of a dispute based on the ideals of benefit and justice. On that premise, its execution must be based on the principle of good faith to provide legal protection to the parties, whether mediation takes place in or out of court. Good faith in implementing a peace agreement is interpreted as an attitude that develops within the parties in dispute to carry out their commitments as a moral obligation to obey and accomplish things that have been agreed upon voluntarily.

Keywords: Mediation, Peace Agreement, Good faith.

INTRODUCTION

Interactions between legal subjects frequently result in differences of opinion or attitudes that violate the rights of other legal subjects, eventually leading to a dispute. The conflict must be resolved without taking the law into your own hands (*Eigenrichting*), as Article 1 Paragraph 3 of the 1945 NRI Constitution states that Indonesia is a rule-of-law country. This means that if a conflict occurs, the parties have the right to get legal protection, either through litigation or non-litigation settlement techniques.

Non-litigation dispute resolution is achieved by Alternative Dispute Resolution, which includes consultation, negotiation, mediation, conciliation, and expert assessment, as outlined in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. Alternative Dispute Resolution is not a new concept in Indonesian culture, as the spirit and essence of Indonesian society is known for its familial and cooperative approach to problem solving. Various ethnic groups in Indonesia typically use deliberation and consensus to reach choices. For example, in Batak, the runggun forum, disagreements are resolved through discourse and amicable means, yet in Minangkabau and Toraja, there is an institution of peace judges who

generally work as mediators and conciliators in resolving difficulties confronting the local community. As a result, the Indonesian people will undoubtedly accept the notion of Alternative Dispute Resolution (Fajar Sugianto F. C., 2020).

Mediation is a popular alternative dispute resolution option among disputing parties since it is included in court proceedings under Article 130 HIR/154 Rbg. The terms of Article 10 Paragraph (2) of Law No. 48 of 2009 about Judicial Power also require that the court, when reviewing, trying, and determining cases, not end peace efforts. In its evolution, mediation in court is further controlled by the rules of Supreme Court Regulation No. 1 of 2016 on Mediation Procedures in Court. This regulation has also seen various modifications. Another breakthrough regarding mediation in court is based on Supreme Court Regulation No. 3 of 2022 concerning electronic mediation in court. Based on the provisions of Perma Number 1 of 2016, mediation is expected to increase access to justice for the community. To meet the need for more effective mediation implementation and be able to increase the success of mediation, on June 17, 2016, the Chief Justice of the Supreme Court issued Decree Number 108/KMA/SK/VI/2016 concerning the governance of mediation in court. The decree contains various instruments and detailed technical instructions regarding the implementation of mediation.

Integrating mediation in court is not only access to justice but also an ideal way to realize the principles of fast, simple, and low cost (Rahmah, 2019). The realization of this principle, due to a successful mediation process, will be expressed in a peace agreement or withdrawal of the lawsuit. Based on the provisions of Article 1858 of the Civil Code that all peace agreements have between the parties the force of a judge's decision at the final level, the peace cannot be disputed on the grounds of an error regarding the law or because one of the parties has been harmed. This provision illustrates that the legal force of a peace agreement is equated with a judge's decision, which has permanent legal force and executorial power. These provisions apply to peace agreements that are successfully carried out in court and confirmed in a peace deed. This is different from the success of mediation in court, where the lawsuit is withdrawn because it still leaves room for the lawsuit to be filed again. In out-of-court mediation, if it is successful, based on the provisions of Article 36 of Perma No. 1 of 2016, the peace agreement can have executorial force if it is registered in court, but the registration process must be carried out by registering the lawsuit first.

This is why not all parties who succeed in resolving their disputes outside of court through mediation agree to confirm the peace deed in court. A peace agreement that is not confirmed in a peace deed has no executorial force; therefore, this research intends to examine the essence of a peace agreement and what the concept of legal protection is like for the parties in a peace agreement.

METHOD

This research is normative research with a statutory approach and a conceptual approach. Types and sources of legal materials are primary legal materials, secondary legal materials, and tertiary legal materials. Searching for legal materials uses the literature study method to search for legal materials, including regulations governing mediation and peace agreements, journals, and other literature books. The collected material is then inventoried and identified, and all existing legal materials are systematized and then analyzed descriptively and qualitatively (Mamonto, M. A. W., & Gani, A. W., 2022).

RESULT AND DISCUSSION

The Meaning of a Peace Agreement in Mediation

Mediation is an ideal way to resolve disputes, therefore mediation is not only carried out outside the court but also in court. Folberg & Taylor (Elizabeth Wilson-Evered, 2021)

define mediation as: “the process by which the participants, together with the assistance of neutral persons, isolate disputed issues to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.” Another definition of mediation in the terms of Perma No.1 of 2016 is that it is a way of settling conflicts through a negotiation process to reach an agreement between the Parties with the assistance of a Mediator. Based on these two definitions, it is possible to conclude that mediation is a way of resolving disputes with the assistance of a mediator, where the resolution process is carried out through negotiations with the goal of reaching a peace agreement.

Ideally, a mediation process aims to obtain a win-win solution which is interpreted as a moral and reputational victory via peace agreement (Afriana, 2017). Other advantages of the mediation process compared to the litigation process include lower costs and less time, a more persuasive approach, especially supported by figures who are respected by both parties to the dispute, discussion of problems that are broader, more comprehensive, and flexible, and maintaining good relations between both parties to the dispute (Busroh, 2017).

Mediation can also help to attain the purposes of justice. Ulpianus (Hernoko, 2010) defines justice as “*Justitia est constans et perpetuavoluntas ius suum tribuendi”*, which says that justice is a continuous will that continues to offer each individual what is their rights, or *tribuere cuique suum*- to give everyone his own rights. Along with Ulpianus, Justinianus (Hernoko, 2010) stated that the basic rules of law are related to living properly, not harming others and giving others what is their share. (in corpus Iuris Civili*s: juris praecepta sunt haec: honesta vivere, alterum non laedere, suum cuique tribuere*).

Tyler (Rumadan, 2017) believes that four factors dominate the assessment of the parties to a dispute to determine whether the resolution process is fair or unfair. First, the ability to participate in the process. Second, third-party neutrality. Third, the level of interpersonal respect given to the disputing party by a third party. Fourth, the quality of the dispute results. Mediation as an instrument for dispute resolution has fulfilled these four things: because the parties play an active role in the mediation process to formulate a peace agreement that positions the parties in a balanced state, the mediator involved is a neutral third party, does not take sides with either party, and the result of the peace agreement is that no one feels defeated or humiliated because their agreement fulfills the parties' sense of justice.

Justice is a basic element in fulfilling agreements, so there is no agreement if there is no justice realized in a balanced and free agreement. Agreement is the relevance of justice itself, which gives rise to fair legal consequences in the form of rights and obligations in accordance with proportion (Mertokusumo, 1999). So, justice in a peace agreement is interpreted as balance, this meaning is synonymous with conformity, balance does not require equal levels and conditions for all parts of the unit to be balanced.

An agreement must also be made on a voluntary basis (B.Salinding, 2017). The agreement referred to in this case is an agreement from both parties that is free from elements of fraud and coercion from the other party, as stipulated in Article 1321 of the Civil Code, which states that no agreement is valid if the agreement was given by mistake or obtained through coercion or fraud. Hereinafter, the provisions of Article 1323 of the Civil Code regulate that coercion in an agreement can be a reason for the agreement to be cancelled. So that the agreement comes purely from the conscience of the parties after a bargaining process in the form of bargaining based on good faith (Wiguna, 2018). The bargaining position must be balanced; there must be no abuse of circumstances that causes an unbalanced position between the parties, so that the strong party can abuse its circumstances by pressuring the weak party to follow its wishes, and the weak party does not have the freedom to determine the contents of the agreement (Parmitasari, 2019). In the bargaining process, the Harvard Negotiation Project developed a negotiation technique known as principal negotiation, or

interest-based negotiation. This technique relies on interests (interest-based), which consist of four (four) basic elements, namely (Nugroho, 2019):

1. People, when negotiating with your opponent, don't concentrate on attacking the person, but on the problem;
2. Interest, what is emphasized is interest, not position. Behind a position, there must be an interest or need. The interests of the parties can be the same, they can be different, if they are different, a solution is sought to cover these common interests.
3. Options, in entering the mediation process the first thing to look for is to build relationships, and create a positive atmosphere, after identifying the interests of the parties, don't rush to a decision, explore as many options as possible that can cover the interests and needs of the parties. party.
4. Objective criteria or what is commonly called objective criteria, the existing options are selected using objective criteria, so the decision will be accepted.

If all of the above elements are fulfilled in the process of making a peace agreement, then the peace agreement can be interpreted as a sign of the end of the dispute between the parties. Through this agreement, the rights of the parties are fulfilled, so peace is created because the relationship between the parties is still well maintained after the dispute occurs. The peace agreement has represented the realization of benefits and justice.

The importance of good faith in peace agreements

Wahyu Sasongko (Asnawi, 2017) states that legal protection is an act of protection or action to protect certain parties aimed at certain parties using certain methods. From this definition, there are three elements in legal protection, namely: a. elements of protective action; b. elements of the protecting party; and c. elements of protective methods or mechanisms. In the context of actions, methods, or mechanisms to protect a successful mediation process, a peace agreement is made accompanied by the good faith of the parties to implement the agreement.

The good faith provisions are regulated in Article 1338 (3) of the Civil Code that an agreement must be implemented in good faith. According to Fuady (Arifin, 2020), The formulation of Article 1338 Paragraph (3) of the Civil Code identifies that good faith is not actually a condition for the validity of an agreement, as is the requirement contained in Article 1320 of the Civil Code. The element of good faith is only implied in the "implementation" of an agreement, not in the "making" of an agreement. Because the element of "good faith" in making an agreement can already be covered by the element of "legal cause" in Article 1320, The provisions of Article 1338 Paragraph (3) of the Civil Code are different from the good faith regulations in Article 7 of Supreme Court Regulation Number 1 of 2016 (Perma 1/2016). In this provision, good faith is actually regulated during the mediation process, where the parties and/or their legal representatives are obliged to undertake mediation in good faith.

Furthermore, it is also stated that one of the parties or parties and/or their legal representatives may be declared not to be acting in good faith by the mediator in the case concerned: 1) Not attending after being properly summoned two (two) times in a row at the mediation meeting without a valid reason; 2) Attending the first mediation meeting but never attending the next meeting even though he had been properly summoned two (two) times in a row without any valid reason; 3) Repeated absences that disrupt the mediation meeting schedule without valid reasons; 4) Attend the mediation meeting, but do not submit and/or respond to the other party's case resume; and/or 5) not sign the agreed peace agreement concept without valid reasons.

Regarding the above regulations, the author believes that these provisions should add an indicator of "not in good faith" if one of the parties does not implement the peace

agreement voluntarily. The element of good faith contains several elements, namely (MP.Hutabarat, 2010):

1. Honesty, in the creation and implementation of legal rights and obligations both in an active and passive sense;
2. reasonableness, is based on the idea of good intentions in an ethical sense so that it becomes the awareness and intention of the parties to do something or not do it because something is achieved as a good deed under moral obligations and for the sake of moral obligations themselves;
3. Fairness, there are no facts that reflect the intention and awareness of parties who have a stronger bargaining position to take advantage of their position with the aim of obtaining unfair advantages over other parties who have a weaker bargaining position.

Based on these elements, the author believes that good faith in implementing a peace agreement is an attitude that arises from within the parties to the dispute to carry out their obligations as a moral obligation to carry out what has been agreed upon voluntarily. Therefore, based on Article 27 Paragraph (2) Perma 1/2016, a peace agreement cannot contain provisions: 1) Contrary to law, public order, and/or morality; 2) Harm third parties; or 3) Not applicable.

The agreement between the parties is made in writing in accordance with the provisions of Article 1851 of the Civil Code, which states that peace is an agreement whereby both parties, by handing over, promising, or retaining an item, end a pending case or prevent a case from arising. This agreement is not valid unless it is made in writing. Observing the provisions of this article, the terms of a peace agreement in written form are imperative (forcing) (C.Pongoh, 2015).

Based on the provisions of Article 27 Paragraph 5 Perma 1/2016, if mediation in court is successful, the results of the agreement are confirmed in a deed of peace that is stated in the judge's decision or contains the withdrawal of the lawsuit. Based on the provisions of Article 130 Paragraph (3) HIR/154 (3) RBG, the peace deed cannot be appealed. The provisions of Article 1858 of the Civil Code also emphasize that there is no legal remedy for peace decisions. The provisions in this article align the peace deed with a decision that has obtained permanent legal force, so that the peace decision is not only attached to binding and evidentiary power but also executorial power. If one party refuses to comply with the contents formulated in the peace deed, the other party can submit a request for execution to the court (Harahap, 2005).

Execution of a peace agreement is only carried out for a peace decision, which contains a sentence to punish the parties for complying with and implementing the peace agreement. The presence of the word punish shows that the peace deed is condemnatory in nature and therefore becomes the basis for execution. Characteristics that can be used as indicators to determine a decision are: condemnation; in the ruling or dictum of the decision, there is an order to punish the losing party, which is formulated in a sentence as follows (Harahap, 2005):

a. Punishing or ordering to hand over an item
b. Punish or order the vacation of a plot of land or house
c. Punish or order to carry out a certain act
d. Punish or order the cessation of an action or situation
e. Punish or order to pay a certain amount of money

A peace agreement in court based on the provisions of Article 27 Paragraph (5) Perma 1/2016 can also be carried out by withdrawing the lawsuit, meaning that the success of mediation is not expressed in the form of a peace deed and peace decision. Withdrawal of a lawsuit, because mediation has been successful, is only permitted for non-material objects. If one of the parties violates the peace agreement, a lawsuit will be filed again. In this case, the

actual guarantee of legal protection has not been realized, because it is still possible to file a lawsuit again.

If a peace agreement in court that is confirmed in a peace agreement has executorial force, this is not the case for a peace agreement outside the court. The agreement is an agreement that only binds the parties; therefore, the principle of *pacta sunt servanda* applies to them, based on the provisions of Article 1338, Paragraph 1 of the Civil Code, that all agreements made legally apply as law for those who make them. The meaning of "applying as law" means giving an agreement that has been legally made the same position as the law (Yunanto, 2019). Therefore, the parties are asked to carry out the contents of the agreement, so that if one of the parties defaults which results in a lawsuit being filed, the judge through his decision can force the parties who violate it to carry out their rights and obligations according to the agreement (Haq, 2010).

If a peace agreement is made outside the court, its execution cannot be carried out immediately. You must first file a lawsuit with the court to obtain a peace deed made by the judge at the trial. By making considerations in accordance with the agreement between both parties, a new peace can be implemented by both parties, and the decision is final and binding, and there are no further appeals or cassation efforts (Triana Dewi Seroja, 2020). This is based on the provisions of Article 36 of Perma 1/2016, which states that the parties, with or without the assistance of a certified mediator who has successfully resolved the dispute outside of court with a peace agreement, can submit a peace agreement to the competent court to obtain a peace deed by filing a lawsuit. Filing a lawsuit requires attaching a peace agreement and documents as evidence showing the legal relationship of the parties with the object of the dispute.

The explanation above shows that even though there has been peace outside of court, to make the peace agreement gain legal force like a peace deed, it must be done by "disputing" again (as if) (Asikin, 2018). The author believes that this process implicitly does not recognize mediation outside the court because it must still be subject to and legalized by the mediation process in court.

The differences between peace agreements in court and outside court have implications for the obligations of the parties to implement peace agreements in good faith. This is done so that parties, both directly involved and not directly involved, can obtain their respective rights through fulfilling obligations based on the agreement. This is because the implementation of good faith includes both internal and external implementation. Internal validity means binding and protecting the parties involved in making a particular agreement, while external validity is a limitation so that their rights are not violated by third parties or other unrelated parties (Hidayat, 2016).

CONCLUSION

Mediation as a way of resolving disputes can be carried out in court and outside court. If this process is successful, the results will be stated in the peace agreement deed. On that basis, the essence of a peace agreement is the realization of an end to the dispute between the parties. The agreement contains the values of benefit and justice, the implementation of which is based on harmony and volunteerism. Legally, a peace agreement reached through an out-of-court mediation process is not yet executory because it still requires confirmation from the court. However, both peace agreements through mediation inside and outside the court can still be rejected by the parties due to low awareness and commitment. Therefore, both the process of making and implementing a peace agreement must be based on the principle of good faith so that legal protection can be achieved for the parties who are bound directly or indirectly by the agreement.

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