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Government Neutrality as Mediator of Industrial Relations Dispute Settlement in State-Owned Enterprises of Indonesia

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Abstract

The Act number 2 of 2004 on Industrial Relations Dispute Settlement was established as a legal means for resolving the increasing and complex industrial relations dispute. It is hoped that the issuance of the Industrial Relations Dispute Settlement law will be able to realize a fast, fair and inexpensive institution and mechanism of dispute settlement of industrial relations. However, due to the consideration and objective of protecting labor rights, research has been conducted on the law through multiple approaches, namely legislation approach, concept approach and case approach. The results showed that in the The Act number 2 of 2004 on Industrial Relations Dispute Settlement there found legal inconsistency concerning industrial relations mediation, in the case of confusion between mediation and conciliation, the single authority of mediator conducted by employees of the Office of Manpower of Government as a representation of government, mediation is no longer as an alternative media, mediators exceed the standard portion, the inadequacy of the requirements to mediate, the conflict of norms to excessive government intervention and contrary to the nature of mediation of industrial relations itself.

Keywords: Mediator, conflict of norm, single authority, intervention

1. Introduction

Under the PPHI Law, industrial relations dispute settlement can be conducted in litigation in the form of court and non-litigation by accommodating the Alternative Dispute Settlement (Article 1 of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement). The implementation of such industrial relations disputes is an attempt to respond to the demands of the people, especially the labor community, in the process of settling industrial relations disputes, quickly, appropriately, cheaply and fairly (The Act number 2 of 2004 on Industrial Relations Dispute Settlement - Considering Section Letter b) in the corridor of Pancasila Industrial Relations in the spirit of reformation in the field of law that put forward the values of democratization in the decision-making process.

The labor law system applied in Indonesia should reflect the values of Pancasila, in a paradigm known as Pancasila Industrial Relations. PPHI Law as regulation governing industrial dispute settlement mechanism also should accommodate basic concept of Pancasila Industrial Relations. On the basis of such requirement, in the PPHI Law, an alternative dispute resolution mechanism, known as Alternative Dispute Resolution, in the form of Mediation, Arbitration and Conciliation as a non litigation mechanism. Especially with regard to mediation, which in the Decree of Ministry of Manpower and Transmigration No.92 / MEN / VI / 2004 on Mediation Appointment and Dismissal and Working Procedures of Mediation is called Industrial Relations Mediation, though such mechanism is not new in the perspective of growing and developing values in Indonesian society, in fact it receives lots of criticisms because it is counterproductive with the purpose of PPHI Law implementation so that it needs to be evaluated in the context of reform. The application of Mediation of Industrial Relations as regulated in PPHI Law is actually a form of response to the sharp criticism directed to the judiciary in carrying out its functions. According to Yahya Harahap, the judicial institution in carrying out its function is considered overloaded, slow and waste of time, very expensive and unresponsive to the public interest and too formalistic and technical.

According to the theory, there are several definitions of mediation. In the mediation process there is a neutral third party (mediator) chosen by the parties. The mediation process proceeds more informal and controlled by the parties and reflects the priority interests of the parties and maintains the continuing relationship of the parties. Comparing with the examination in court (litigation), in mediation, the highest power is at the parties of each of the disputants. The mediator as a neutral third party only helps or facilitates the mediation process. If the outcome of the court process is the judge's decision then the mediation process results in an agreement between the parties (mutually acceptable solution). The parties' agreement is stronger than the court decision. It means the deal is a compromise or a path they have chosen to agree on for their interests. Whereas if there is another party who decide in court decision, that is judge, in other words, the court decision is not the result of the parties' agreement. If court-connected mediation under the Supreme Court Regulation No. 2 of 2003 is mandatory, then the Mediation of Industrial Relations regulated in the PPHI Law shall be so.

As stated in article 83 section 1 of the PPHI Law that the filing of a lawsuit which is not completed with a report of settlement through mediation and conciliation, the Industrial Relations Court judge shall return the claim to the plaintiff. In fact, it is especially happen and should be done outside the PHI. With the limitations of the mediator resources that are in fact from the government agencies in the field of employment, the Mediation of Industrial Relations is merely conducted to complete the formal requirements in order that the disputes will be immediately examined by the Industrial Relations Court. Industrial Relations Mediation is mandatory prerequisite that potentially distorts the justice goals of the parties. It is rare that industrial relations disputes satisfy the parties in the Industrial Relations Mediation stages. It is alleged that Industrial Relations Mediation does not accommodate the legal principles of mediation in general. The mediator is not the choice of the parties, even the Mediation of Industrial Relations itself is an inevitable process. While the existence of mediator that is normally from the agency of the Department of Manpower, it creates the assumption of partiality if one of the parties is the entrepreneurs of State-Owned Enterprises as a representation of government.

Therefore, it becomes strategic legal issue that is not less important in the perspective of a fast, precise and inexpensive judicial process and to prevent the accumulation of cases, if the settlement of disputes is in the form of Industrial Relations Mediation as proclaimed by PPHI Law, it must represent legal principles of mediation, high neutrality without negating the substance of justice as the basic orientation of the Industrial Relations Mediation itself. Based on the above description, it turns out that a new chapter in the labor law system through The Act number 2 of 2004 on the settlement of Industrial Relations Disputes in Indonesia is also immediately brought new legal issues. These legal issues include: Based on the above description of the following legal issues that writers can present in the formulation of problems that has been formulated in the following questions: (1) Does Industrial Relations Mediation meets the principles of mediation? (2) Is not Industrial Relations Mediation in State-Owned Enterprises contradictory with the principle of neutrality?

2. Research Methods

The research aims at expressing the truth systematically, methodologically and consistently, including legal research. Legal research is different from social research because law does not belong to social science category. Law Science is *sui generis* (Philipus M.Hadjon, Tatik Sri Djatmiati, 2005: 1) which means law is a science of its own kind. The characteristic law science is characterized by (a) analytical empirical that is exposing and analyzing the content and structure of the law; (b) systematization of legal symptoms; (c) making interpretation of the substance of applicable law, and (e) the practical meaning of jurisprudence is closely related to its normative dimension (Herowati Poesoko, 2007: 27). Therefore, the research method is different from social research in general.

This type of research is normative legal research (Peter Mahmud Marzuki, 2005: 29-36), which is a legal research process conducted to generate arguments, theories, new concepts as prescriptions to answer legal issues undertaken by reviewing and analyzing the provisions of legislation, courts and other legal materials. The expected answer in legal research as a result of analytics is right, appropriate, or wrong. Thus it can be said that the results obtained in legal research already contain values. Normative legal research is a research-based analysis of legal norms. In the context of normative legal research, Abdul Kadir Muhammad argues that normative legal research is a legal research that examines written law from various aspects, namely: aspects of theory, historical aspects, philosophy, comparison, structure and composition, scope and material, consistency, general explanation and article by article, the formalities and powers bound law as well as the legal language used, but does not review the applied aspect or its implementation.

In accordance with the objectives to be achieved, the methodology in this research uses three approaches, namely Statute Approach, Conceptual Approach, and Case Approach. The Statute Approach is an approach taken by reviewing all laws with other laws, laws and the Constitution or between regulations with laws on mediation, especially mediation of industrial relations. The result of review of such approach is an argument for solving the legal issues faced. In the context of this study the Statute Approach is used because there may be confusion in various laws, inconsistencies and even conflicting (norms of conflict) between the laws and regulations concerning the Mediation of Industrial Relations.

The Legislation Approach used in this study provides consequences for the assessment and analysis of the consistency or conformity between The Act number 2 of 2004 on Industrial Relations Dispute Settlement including the Decree of the Ministry of Manpower and Transmigration No. 92 / MEN / IV / 2004 concerning Mediation Dismissal and Mediation Work Procedures together with specific recommendations issued by the ILO on Mediation, The Act number 13 of 2003 on Manpower, The Act number 21 of 2000 on Trade Unions, Law No .30 of 1999 on Arbitration and Settlement of Disputes, Government Regulation No.54 of 2000 on Service Providers of Environmental Dispute Settlement Services Outside Courts, Supreme Court Regulation No. 2 of 2003 on Mediation in Courts.

A case approach is an approach done by examining cases that are contained in court decisions relating to related legal issues. The main study in this approach is the *ratio of decidendi* or reasoning that is the judgment of

the court to make decision. In this legal research the representation of the case is in the form of the documentation Industrial Relation Mediation to the Decision of the Industrial Relations Court which has permanent legal force. One of the existing Mediation Treaties is the recommendation of the Department of Manpower and Transmigration of the Government of Lumajang Regency dated January 11, 2007 Number 5671/072 / 427.47 / 2007, following the Decision of the Industrial Relations Court at the Surabaya District Court. 93 / G / 2007 / PHI. Sby in the case between the worker i.e., Mr. Bambang Budi Utomo as the Plaintiff against the Enterprise in this case is PTP Nusantara XI (Persero) - PG Djatiroto, a state-owned enterprise as Defendant. Through this case approach, analyzing recommended material in the mediation which is accommodated as a consideration in the decision of the court is done. By knowing the legal considerations (*ratio decidendi*) of the court decision which has obtained permanent legal force the dynamics of the development of legal values that exist in society concerning Industrial Relations Mediation can be understood.

Conceptual Approach is an approach done by tracing the views and doctrines that are developed in the science of law derived from the opinions of experts or legislation. Thus, ideas that produce legal notions, legal concepts and principles that are relevant to the legal issues faced will be found. The Conceptual Approach is done because conceptual development of the principles of mediation could be possible. It is expected that by applying these three approaches in the research, answers will be found as the responses to legal issues concerning legal consistency, legal conflicts and principles of neutrality in the context of Industrial Relations Mediation, which will lead to a useful prescriptions in revising or creating new legal products.

3. Results and Discussion

3.1 Consistency of Industrial Relations Mediation and Mediation Principles

Consistency comes from the word consistent, which means constant, harmonious, appropriate (Kimberlee K. Kovach, 1994: 610) Consistency is a reflective or coherent state. Consistency of Industrial Relations Mediation with Mediation Principles is a reality reflecting the conformity of industrial relations mediation with the principles of mediation. This consistency is important in order that normatively provisions on industrial relations mediation provides legal certainty and prevent the occurrence of conflict of norms so that there is conformity of legal law. Legal obsolescence is the foundation which provides an orderly guarantee of society and means of its realizations as the purpose law enactment.

To examine and analyze the consistency of industrial relations mediation with the mediation principles, to seek and find the principles of mediation itself from various sources both in legislation, international provisions and the views of experts need to be done. The principles of mediation as a result of verification and formulation are used as a media for measuring the consistency of industrial relations mediation.

The Liang Gie (Sudikno Mertokusumo, 1988: 32) argues that the principle is a general proposition which is expressed in general terms without suggesting specific ways of its implementation, applied to a series of deeds to be a good guide to the action. Principle (W.J.S Poerwodarminto, 1997: 179) is the truth that is the basis of thinking or acting. The principle of mediation means the truth which becomes the central to thinking or acting on mediation. As a principle, its existence becomes a reference that gives legitimacy of law as a prerequisite to the substance of mediation. The principles of mediation are the heart of the rule of law on mediation or the broadest foundation for the emergence of mediation law.

The principle of mediation in this case is not a concrete legal regulation of mediation, but is a basic thought which is the background of concrete rules contained in and beyond every legal system stated in laws and judgments which is a positive law and can be found by searching for common traits in the concrete rules. The function of law science is to seek this principle in positive law. By understanding the notion of principle as a general proposition which must be reflected in a concrete law rule, the provisions on mediation of industrial relations as stipulated in the PPHI law by itself must have conformity or consistency with the principles of mediation in general. Verification of the grid of mediation can be accessed from various sources in a concrete manner, including legislation that includes The Act number 30 of 1999 concerning Arbitration and Alternative Dispute Settlement, Supreme Court Regulation no. 02 of 2003 on Mediation in Courts, ILO provisions and expert opinions which in the process also accommodate customs in practice. Experts in this case are the parties who have competence in their field.

Based on these verifications, comparative formulation is then done which results in the construction of principles on mediation that are functionally used to conduct studies and analysis in order to get answers to legal issues that become the subject matter. Below is a grid on mediation from various sources:

a. The Act number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

No	Terms	Parts	Substances
(1)	(2)	(3)	(4)
1	Definition of mediation	Article 1 point 10	Alternative non-court dispute settlement institutions in addition to consultation, negotiation, conciliation or experts' judgment.
2	Definition of Mediator	-	-
3	Mediator requirements	-	-
4	Origins on Mediator	-	-
5	Proof of Competence	-	-
6	The certification Institution	-	-
7	The field of law	Article 6 (1)	Civil Field
8	Scope	-	Independent non-litigation
9	Mechanism	Article 6 (2)	Stakeholder meetings
10	Duration	Article 6 (2)	14 days
11	Commitment	Article 6 (6)	Secrecy guarantee
12	Results	Article 6 (2)	Written, final and binding agreements are registered in the District Court for a maximum of 30 days
13	Clause concerning the cases	-	-
14	Principles of Mediation	-	-
15	Cost	-	-

b. Supreme Court Regulation No. 2 of 2003 concerning Mediation in Courts

No	Terms	Parts	Substances
(1)	(2)	(3)	(4)
1	Definition of mediation	Article 1 (6)	Settlement of disputes through the negotiation process of the parties assisted by the mediator
2	Definition of Mediator	Article 1 (5)	A neutral and impartial party assisting the parties in searching for various possible dispute settlements
3	Mediator requirements	Article 2 (2)	- Obey the ethics code
4		Article 13 (3)	- Cannot be a witness
5	Origins on Mediator	Article 4 (1)	Mediators from inside and outside the court
6	functional personnel	Article 10 (1)	Can be accompanied by experts
7	Authority of the Parties	Article 3 (4)	The parties may authorize the other parties

(1)	(2)	(3)	(4)
8	Authority of the parties	Article 4 (2)	choosing a mediator
9	Proof of Competence	Article 1 (10)	Certification
10	The certification Institution	Article 1 (10)	Institution accredited by the Supreme Court
11	The field of law	Article 1 (9)	Public (Environment, Human Rights, Consumer Protection, Land, Labor)
12	Scope	Article 3 (1)	Integrated litigationally
13	Mechanism	-	direct meetings
14	Duration	Article 9 (5)	22 days
15	Results	Article 1 (1)	Certificate of Peace as a document of agreement
16	Clause concerning the cases	Article 10 (2)	The agreement in the peace certificate shall contain the clause of the revocation of the case
17	Principles of Mediation	Article 14	- Principle, not open to the public - Public dispute, open to the public
18	Cost	Article 10 (2)	Guaranteed by parties based on agreement

c. The International Labor Organization (ILO) Convention

The ILO provides a basic benchmark on mediation through several principles that lead to the attitude and behavior of mediators such as the following (<http://www.ilo.org/public/english/mediate>, last accessed on May 1st 2008):

- **Volunteerism**

The mediator realizes that mediation dispute settlement is the will of self-determination as a party having authority as subject. Self-determination is realized by building awareness, trust, and

ability among the disputing parties through mediators.

- **Neutrality**

The mediator will uphold the attitude of neutrality and not taking sides to the .

- **Deal**

Mediation is carried out as long as there is agreement of each party. Once the agreement is reached, the initial and basic step of the mediator is to explain the disagreement map including possible possibilities.

- **Competence**

The mediator has the authority to perform his / her duties if the person has obtained proof of expertise through the training and experience process.

- **Secrets**

The mediator is obliged to maintain the confidentiality of each of the disputing parties.

d. Expert opinion

There are some limitations of mediation by experts. Here the authors revisit some of the notions of mediation that has been launched in the literature review in the previous chapter. Gary Goodpaster (1993, 201) pointed out:

Mediation is the process of problem-solving negotiations where impartial and impartial parties work with disputants to help obtain agreement satisfactorily. The mediator has no authority to decide disputes between the parties. However, in this case the parties authorize the mediator to help solve the problems. The assumption that the third party will be able to change the strength and dynamics of the conflict by affecting the personal behavior of the parties, by providing knowledge or information, or by using more effective negotiation process.

Similarly, Christopher W. Moore also mentioned as below:

Mediation is an intervention in a dispute or negotiation by a third party which is acceptable to the parties, not a part of both parties and should be neutral. This third party has no decision-making authority, it is the duty to assist the parties to volunteer to reach an agreement accepted by each party in a dispute.

Jacqueline M. Nolan Haley (1992, 56) also set the limits on mediation as follows:

Mediation is generally understood to be a short-term structured, task-oriented, participatory intervention process. Disputing parties work with a neutral third party, the mediator, to reach a mutually acceptable agreement. Unlike the adjudication process, where a third party intervener imposes a decision, no such compulsion axis in mediation. The mediator aids the parties in reaching a consensus. It is the parties themselves who shape their agreement.

Then, Kimberlee K. Kovach (1994, 59) formulated the limits of mediation as "Facilitated negotiation, it is a process by which a neutral third party, the mediator, assists disputing parties in reaching a mutually satisfactory resolution"

Mark E. Roszkowski (2000, 33), in the Book Business Law, Principle, cases and Policy suggests that:

Mediation is a relatively informal process in which a neutral third party, the mediator, helps to resolve a dispute. In many respect, therefore, mediator can be considered as structured negotiation in which the mediator facilitates the process.

Next in the Black's Law Dictionary (Gunawan Widjaja and Ahmad Yani, 2000: 85), it is said that: "Mediation is private, informal dispute resolution process in which a neutral third person, the mediator, helps, disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.

Furthermore, ELIPS's economic law dictionary mentioned that: "Mediation, mediation:" one of the alternative solutions to disputes outside the court using the services of a mediator or mediator as well as conciliation "(Editors Team of Economic Dictionary ELIPS, 111) Kamus Besar Bahasa Indonesia gives limitation that: "Mediation of the process of including third parties in the settlement of a dispute as an advisor, mediator, intermediary (liaison, mediator) to the parties to the dispute "(W.J.S Poerwodarminto, 1997: 569).

Based on the normative approach through the legislation, as well as the basic principles determined by the ILO and the opinions of experts, these mediation principles can generally be constructed as follows: First, voluntary, which means that mediation is the preferred dispute settlement because the voluntary will of the parties, not pressure or compulsion from other parties. Second, a third party (mediator) who functionally performs the will of the disputing parties. Third, the implementation of mediation in the form of negotiation is conducted directly face to face by the parties and accompanied by the presence of mediator. Fourth, it is informal, because mediation is an alternative to out-of-court settlement. Fifth, togetherness in accessing the win-win solutions. Sixth, the result of mediation is a consensus. Seventh, effective and efficient. Eighth, skill. Ninth, the neutrality of the mediator. Tenth, active participation of the parties to reach the meeting point.

If the construction of the principles of mediation is used as a basis for the purpose of reviewing and analyzing the mediation of industrial relations as stipulated in the PPHI Law, further is elaborated in the Decree of the Ministry of Manpower and Transmigration. KEP. 92 / MEN / VI / 2004 on Mediation Appointment and

Dismissal and Working Procedures of Mediation, there are several points of legal inconsistency found in mediation of industrial relations. The facts of legal inconsistency are:

1. Understanding of Industrial Relations Mediation

PPHI Law contains a common definition between 'mediation' (article 1 verse 11) and 'conciliation' (article 1 verse 13) even though the scope is set differently. Mediation based on PPHI Law Article 1 section 11:

"Industrial Relations Mediation termed as mediation is the settlement of rights disputes, interest disputes, employment disputes, and disputes between unions / labour unions in only one company through discussion mediated by one or more neutral mediators."

Conciliation based on article 1, section 13:

"Industrial Relations Conciliation termed as conciliation is the settlement of interest disputes, dismissal disputes or disputes between unions / labour unions in only one company through discussion mediated by one or more neutral conciliators."

The common definition between mediation and conciliation becomes clearer when it is examined in Article 13 section 2 point b and Article 23 section 2 point a. Article 13 section 2 point b mentioned that in the case that settlement of industrial relations disputes through mediation does not reach an agreement, the mediator issued a written recommendation. While Article 23 section 2 point a also states that in the case of no agreement on the settlement of industrial relations through the conciliation, the conciliator issued a written recommendation.

Based on the definition in the two articles above, the mechanism and output resulting from the two settlement institutions are the same, namely the written recommendation as regulated in Article 13 section 2 point b for mediation and Article 23 section 1 point a for conciliation. Mediation is actually different from conciliation. If the mediator's advice on mediation is essentially the will of the disputing parties, but the solution draft of the dispute in conciliation is the result of a conciliator formulation on the basis of facts which can be extracted from the parties then is set in the form of a decision. This concept of conciliation refers to Oppenheim's opinion (Huala Adolf and Chandrawulan, 1994: 45):

"Conciliation is the process of dispute resolution by handing it to a commission to describe/ explain facts and (usually after hearing the parties and seeking them to reach an agreement), make proposals for a settlement, but the decision does not binding".

Similar definition between the mediation and conciliation institution in the PPHI Law normatively creates legal uncertainty and overlapping conditions in the form of clauses and certainly does not reflect normative norms of a legislative regulation concerning the principle of clarity of the formula. Therefore, the notion of conciliation should be regarding to the outcome as output of the settlement process as set in Article 23 section 2 point a which is previously:

- (1) *In case the settlement is not reached through conciliation, then:*
 - a. *The conciliator shall issue a written recommendation;*
then, is changed as the following sequence of sentences:
- (2) *In case the settlement is not reached through conciliation, then:*
 - a. *The conciliator shall issue a non-binding written decision.*

Written recommendation with written decisions are two phrases with different meaning. Recommendation (W.J.S Poerwodarminto, 1997: 49) is more of a suggestion, advice, or solicitation, whereas the decision (W.J.S Poerwodarminto, 1997: 930) is more directed to something that has been established and is a legal imposition. In the context of industrial relations mediation is the will of the disputing parties and formulated by the mediator, while the decision is more likely to provide an initiative space for conciliators who put the aspirations of the parties to the extent of the data as a basis for sentencing.

The amendment to the provisions of Article 23 section 2 point a above is a form of consistency of laws and regulations that should meet the normative norms as mandated in The Act number 10 of 2004 on the Establishment of Laws and Regulations Article 5 that the establishment of laws and regulations should based on the principle of the establishment of good legislation, one of which is the principle of clarity of the formula. This principle is intended, legislation must meet the technical requirements of the preparation of legislation, systematic and choice of words or terminology, and the legal language is clear and understandable, so it will not cause multi interpretations in the implementation.

2. Authoritative Mediator

The PPHI Law states that Mediation of Industrial Relations termed as mediation is the settlement of disputes of rights, interest disputes, dismissal disputes, and disputes between unions / labour unions in only one company through discussion mediated by one or more neutral mediators (Art. number 11). Whereas the Mediator of Industrial Relations called mediator is a government agency employee who is responsible in the field of manpower qualified as a mediator determined by the Minister to mediate and has obligation to give written recommendation to the disputing parties to settle disputes of rights, interests disputes, dismissal disputes, and disputes between unions / labour unions within one company (Article 1 point 12). As mentioned in the previous chapter of Chapter II, such Mediator belongs to the category of Authoritative Mediator. The authority that the

mediator possesses is based on authority and uses that authority as the basis for carrying out his duties.

Mediator according to the above understanding is done by a neutral third party, i.e., the employee at the agency who is responsible in the field of manpower. This definition is contradictory. Properly, the role of mediator is anyone who is desired by the parties who have the expertise and the ability to do so, including the possibility of choosing an employee in the agency responsible for manpower. Mediation of industrial relations shall give a space for the disputing parties in the form of agreements to determine and establish mediators. Actually, neither the mediator nor the conciliator is a government or private monopoly. Both can perform the same function because the basic approach that should be used is competence. *Mediator (Henry Cambell Black, 1979: 981) is a neutral third person who helps disputing parties to reach agreement through mediation process.* (Mediators are neutral third parties who help resolving disputes to make agreement through the mediation process). The notion is not limited to the personal mediator who must help resolving the dispute. Principle, anyone expected by the parties.

Based on the consideration of the nature of mediation and competence, Article 1 point 12 needs to be changed, so that the article which previously state:

Mediator of Industrial Relations, termed as mediator, is an employee of government institution who is responsible in the field of manpower who is qualified as mediator set by the Minister to perform mediation and has obligation to give written recommendation to disputing parties to settle the rights disputes, interest disputes, dismissal disputes, and disputes between unions / labour unions within a single company.

then, is changed as the following sequence of sentences:

The Industrial Relations Mediator, termed as mediator, is a neutral third party who has been expected by the disputing parties who is qualified as mediator and has the obligation to provide written recommendation to the disputing parties to settle the rights disputes, interest disputes, termination of employment disputes, and disputes between unions / labour unions within a single company.

This change also concerns on Article 8 which previously states:

The settlement of disputes through mediation shall be conducted by a mediator worked at the agency which is responsible for the manpower affairs of the Regency / City.

then, is changed as the following sequence of sentences:

The settlement of disputes through mediation shall be conducted by a mediator who is qualified to be a mediator for the duty of mediating and is expected by the disputing parties.

The consequences of this change allow the parties to choose and determine the mediator in accordance with the principles of mediation that promote the principles of deliberation and volunteerism. Even the mediator typologies who can properly carry out their duties in the context of the settlement of industrial relations disputes are the Independent Mediator who possess professional abilities in his field and are not institutionally bound.

3. Mediation of Industrial Relations as Alternative Settlement Institutions

In Article 4, section 5, if the parties do not specify the option of settlement through conciliation or arbitration within 7 (seven) working days, the agency who is responsible for the manpower field shall delegate dispute settlement to the mediator. The question arises because the delegation is immediately, which means without offering a mediation solution to the disputing parties as an option. It is difficult to find the rationale of such question. The explanatory section of this article only mentions quite clearly. However, in this case it seems that the government still wants to play a role or involved in the settlement of industrial relations disputes as a mandatory intermediary as stated in The Act number 22 of 1957. Due to the fact that, the arising cases will only be accumulated in the mediator and only few are settled with conciliation or arbitration. As stated in Article 4 section 4, puts mediation of industrial relations is no longer as an option which represents the agreement of each disputing party to select the institution which is expected to settle the dispute. The appearance of an Industrial Relations mediator as the third party authorized to settle industrial relations disputes is not based on the choice or selection of the disputing parties. In this case the disputing parties have no right or authority to select or choose the mediator they want because of its reliability, objectivity, impartiality, ability, level of scholarship, honesty, loyalty, etc. that can be the basis for choosing the mediator.

Industrial Relations Mediation should be voluntary, not coercive and is not required in the process of settlement of cases or disputes. The mediation of industrial relations is no longer positioned as an alternative dispute resolution (ADR), but rather placed as a "intermediate mechanism" that must be taken by disputing parties before they take the Industrial Relations Court through filing a lawsuit by one of the parties (article 4 section 4), and the Industrial Relations Court shall return the claim to the plaintiff if the lawsuit is not accompanied by a mediation settlement (article 83 section 1). The inconsistency of industrial relations mediation on the principles of mediation as found in the PPHI Law does not really reflect the background of the aspiration of the issuance of the PPHI Law itself.

Therefore, to re-position the mediation as an alternative to dispute settlement, then Article 4 section 3 and 4 need to be changed, previously state:

- (3) After receiving records from one or all the parties, the local responsible agency in the field of manpower shall offer the parties to choose settlement through conciliation or arbitration.
- (4) In case the parties do not specify the option of settlement through conciliation or arbitration within 7 (seven) working days, the agency responsible in the field of manpower delegates dispute settlement to the mediator.

then, is changed as the following sequence of sentences:

Article 4, section 3

- (3) After receiving records from one or all the parties, the local responsible agency in the field of manpower shall offer the parties to choose settlement through mediation, conciliation or arbitration.
- (4) Regarding the offer of the local responsible agency in the field of manpower as mentioned in article 3, the parties shall agree upon the settlement through mediation, conciliation or arbitration.

Thus, the change will place the mediation of industrial relations as one of alternative settlement offered to the disputing parties. The mediation of industrial relations in the PPHI Law is not a necessity to be implemented but placed in its realm as an alternative to be elected other than mediation, conciliation and arbitration.

4. Authority of Industrial Relations Mediator

Regarding the authority of industrial relations mediator, the PPHI Law Article 12 section 1 states that any person who is required to give information by the mediator for the settlement of industrial relations disputes based on this law shall be obliged to give statements including to open the book and to show the required letters. The normative provisions of that article actually exceed the portion of the mediator's authority because the essence of mediation is the absence of coercion between the parties, including between the mediator and the parties. The parties request voluntarily to the mediator to help resolving the dispute. Therefore, the mediator is only authorized in helping the parties to reach an agreement which can only be decided by the disputing parties. As a party outside the disputing parties, the mediator has no authority to force, the mediator is obliged to meet or bring together the parties to the dispute. Thus the provisions of article 12 section 1, which put forward the word *obligation* to anyone for the interests of the mediator to provide various information in resolving industrial relations disputes is actually an authority that exceeds the essential portion of the mediation settlement institution.

To give the authority as a mediator back, based on the basic concept of mediation, Article 12 section 1 needs to be changed. Previously it states:

Any person, who is requested informations by the mediator for the settlement of industrial relations disputes under this law, is obliged to provide information including to open the books and to show the required letters.

then, is changed as the following sequence of sentences:

Any person, who is requested informations by the mediator for the settlement of industrial relations disputes under this law, may provide information including to open the books and to show the required letters.

or

With the consent of the disputing parties, the mediator of industrial relations may request information including obtaining the data by opening the books and letters including documents owned by the disputing parties.

The word can underlined in the article means that by some consideration the parties may not carry out what the mediator requires regarding the order to provide information if the information is very private to be accessed by others. On the other hand, considering the existence of mediators is the choice and will of the parties, then the mediator functionally act according to the wishes of the disputing parties. Serving is an action performed by a party who is hierarchically in a subordinate position.

Mediator of industrial relations in this matter is agreed and elected by the parties. This election does not necessarily deny the subjective authority of the parties that choose or desire. In other words, the disputing parties retain the privacy that the mediator of industrial relations must respect, including information that is not to be communicated to others, including the mediator.

If the position of the industrial relations mediator only to help, then the logical consequences of such position certainly do not have the authority to govern. If not, then the mediator of industrial relations in carrying out its duties will violate the principles of mediation of industrial relations. More firmly and clearly the principles of mediation of industrial relations concerning the authority of this mediator can be seen from the notion of mediation both proposed by Gary Goodpaster, Christopher W. More, Kimberlee K. Kovac, Mark E. Rososkowski is included in Balck's Law Dictionary to the laws and regulations namely The Act number 39 of 1999, Supreme Court Regulation No.02 of 2003. Based on the formulation of various sources it is asserted that the role of mediator is merely to help the parties, not oblige or govern. The mediator is only obliged to make

written recommendation. In contrast to the process of adjudication (litigation), a third party, the court, has the authority of governing as a form of functional intervention to impose a decision, including actively digging information from the parties by giving the obligation to convey various things and information that is visible as evidence either in the form of important letters or bookkeeping no matter the information or the evidence is not to be shown to others.

5. Sanctions for Industrial Relations Mediators

Other legal facts on PPHI Law found in Ministry of Manpower and Transmigration Decree No. KEP. 92 / MEN / VI / 2004 on Mediation Appointment, Dismissal and Mediation Procedures as further elaboration is related to the lack of sanction for the mediator. If the mediator is unable to complete his duties as in the normative provisions of Article 14 (b) and 15 of the decree, then the sanctions for the mediator shall be given in the form of oral warning which may be followed by written warning for 3 consecutive times until the temporary suspension after 3 written warnings (Article 19) that ends in a permanent discharge (Article 21).

Although the mediator is given the opportunity for self-defense, the dismissal is only to the deprivation of legitimacy as a mediator, and does not effect on the employment status. Mediator is a legitimacy that indicates the actual competence of achievement which also including to a component that affects the level of one's employment formality. If the sanctions do not affect the employment status of the mediator then such facts are of course cannot give pressure and sense of responsibility for the mediator. Moreover, the legitimacy concerns on public services.

The mediator's professionalism as an employee of the agency for manpower, in order to improve the achievement, the added value of competence and the moral and functional dedication cannot be separated from his corps as a civil servant. So it is logical that all things concerning the realm of work and devotion are placed correlatively with job performance as the parameters of career stages and vice versa, namely the sanctions that must be accepted as a consequence of his inability to work. Justification of such understanding can be seen in The Act number 43 of 1999 concerning the Amendment to The Act number 8 of 1974 concerning the Principles of Employment Article 17 section 2 which states that the appointment of civil servants in a position is also using the principle of professionalism according to competence. Therefore, if the person is injuring his professionalism values, it is logical that the civil servant obtains a sanction that also affects the internal personnel corps, not only losing his legitimacy as mediator of industrial relations. Thus it is the demands and challenges for the government in the context of mediation of industrial relations so that the sanction for the mediator is related to career prospects and the rank of someone as a civil servant, including the potential loss of civil servant status if he is proven to take counterproductive action with the status and profession that must be upheld for public service.

Based on above description, as a logical consequence in the perspective of civil servant coaching while maintaining the professional aspect as a mediator of industrial relations it is necessary to review the Ministry of Manpower and Transmigration Decree No. 92 / MEN / IV / 2004 concerning Mediation Dispute and Mediation Working Procedure of Article 17 section 1 and Article 22 section 8. The review is conducted in the form of amending the articles, Article 17 section 1 previously state:

The dismissal of the mediator is carried out by the revocation of its legitimacy by the minister.

In accordance with Article 22 section 8:

If the mediator does not use the opportunity to defend himself within the time referred to in section (1), then the official referred to in section (2) proposes to the minister to revoke the legitimacy of the mediator concerned.

then, is changed as the following sequence of sentences:

Article 17 section 1:

The dismissal of the mediator shall be conducted by revoking its legitimacy as a mediator and / or giving sanction to the person in accordance with the rules of employment legislation.

Article 22 section 8:

In case that self-defense is unacceptable, the Minister shall issue a decision on the revocation of legitimacy as a mediator and or sanction to the person in accordance with the rules of employment legislation.

The imposition of sanctions which also places the mediator of industrial relations under the umbrella of the legislation on employment mentioned that the function of mediators in this case cannot be separated from the unit of civil service organization that is civil servants. His inability to perform his duties as mediator for various causes is also a form of his inability as a Civil Servant.

6. The Legitimacy of Industrial Relations Mediators

Since the mediator determines the success of the dispute resolution process, the mediator must be eligible to meet certain qualifications and experience in communication and negotiation in order to be able to direct the disputing parties. Substantial knowledge of the subject matter of the dispute is not absolutely necessary. More important knowledge needed is the ability to analyze and expertise of creating a personal approach in the

corridor of mediation techniques and techniques to formulate the will of the parties into legal formulation as a recommendation.

The PPHI Law does not specify the qualifications of requirements that an industrial relations mediator must possess. But, further elaboration on Ministry of Manpower and Transmigration Decree RI No. KEP. 92 / MEN / VI / 2004, Article 3 section 1 point h mentioned that the mediator must meet several requirements, one of which has the legitimacy from the Ministry of Manpower and Transmigration. It is further explained in Article 3 section 2 point a that in order to obtain such legitimacy, the mediator candidate has taken the test and passed the education and technical training of industrial relations technical and the working requirements proved with the certificate from the Ministry of Manpower and Transmigration.

In the article does not mention the special material that must be understood by a mediator, especially those directly related to technical ability. If the training material to obtain legitimacy is limited to industrial relations techniques and working conditions, then instintually, industrial relations techniques and working conditions are subject matter which must be matered by the Department of Manpower and Transmigration as it concerns the main tasks and functions of agencies. No training is required. The material relations of industrial relations and the conditions of employment if given as requirement of obtaining legitimacy as mediator of industrial relations are not proper to be a subject matter.

In comparison, it can be seen in Perma No.02 of 2003 Article 1 point 10 stating that the certificate of mediator (evidence of the legitimacy of the mediator according to Ministry of Manpower and Transmigration decree No. KEP 92 / MEN / VI / 2004) is a document stating that a person has attended training or education mediation issued by an institution accredited by the Supreme Court. Likewise in PP No.54 of 2000 is determined the criteria to be a mediator agency provider of environmental dispute resolution services outside the court, one of which is having the skills to conduct negotiations or mediation. Based on the comparative of the legal product, it can be concluded that in order to gain legitimacy as mediator, the basic ability of mediation technique is far more important and fundamental than the subject of industrial relations and working conditions.

Based on these descriptions and considerations, it is important to conduct a review in the form of changing the provisions of Ministry of Manpower and Transmigration No. KEP. 92 / MEN / VI / 2004 in Article 3 section 2 point a whih previously state:

To obtain the legitimacy referred to in section (1) letter a, it must meet the following requirements:

Having attended and graduated from the Industrial Relations education and technical training evidenced by certificate of Department of Manpower and Transmigration

then, is changed as the following sequence of sentences:

To obtain such legitimacy, the mediator candidate has taken the test and graduated from the education and training of industrial relations technic and the working conditions including the test of professional technical expertise concerning the basic capability of the mediator as evidenced by the certificate from the Ministry of Manpower and Transmigration

Another issue that arises relates to the legitimacy of mediators, in *Ministry of Manpower and Transmigration* Decree No. KEP. 92 / MEN / VI / 2004 Article 6 section 1 concerning the legitimacy of special mediators, it is mentioned that on the basis of certain considerations, the Minister may provide legitimacy to the agency of manpower affairs in the Regency. Then section 2 further explains that the legitimacy does not follow the requirements as referred to in Article 3. No explanation in the article concerns the meaning of certain considerations. The authority of the Minister in this case is realized based on the proposal of the local head. Such normative provisions seem to place the competence factor as a nonessential requirement. Likewise no single Article or explanation justifies the reason of the local head of state in proposing the agency to obtain the legitimacy of such special mediator. Therefore, RI No. KEP. 92 / MEN / VI / 2004 Article 6 section 2 is necessary to make the following changes. Previously it state:

The granting of legitimacy as referred to in section (1) does not follow the requirements as referred to in Article 3 then, is changed as the following sequence of sentences:

The granting of legitimacy as referred to in section (1) shall not exclude the requirement of the basic capability of the mediator evidenced by certification.

The background of the importance of the basic capability of mediation techniques requirements in this case is that one of the factors in determining the success of the settlement process is the ability of the mediator's personality in various aspects since the person concerned must perform some functions those are as catalyst, educator, translator, informant, realistic agent, etc according to the context of the situation.

3.2. The Neutrality of Industrial Relations Mediation in State-Owned Enterprises

The PPHI Law Article 8 states that the mediator of industrial relations is handled by the agency of the manpower in the Regency / City, namely the local Department of Manpower and Transmigration. Without additional explanation, the provisions of Article 8 shall explicitly and implicitly provide an understanding that the Department of Manpower and Transmigration intentionally represents the government. Therefore, conceptually

and functionally in carrying out its duties, of course, is in line with the vision of the government.

Meanwhile, State-Owned Enterprises (SOEs) based on The Act number 19 of 2003 concerning State-Owned Enterprises is one of the actors of economic activity in the national economy based on economic democracy. State Owned Enterprises have an important role in the implementation of the national economy in order to realize the welfare of society. Furthermore, SOEs based on The Act number 19 of 2003 Article 1 is a business entity that all or some of its capital is owned by the state through direct participation derived from separated state assets. Institutionally, SOE consists of Limited Liabilities Company and General Company. Pointing from various aspects starting from the establishment, capital, composition of organ (ministers, directors, supervisory board) and general shareholders (RUPS, Board of Directors and Commissioners) for the company, to the plan and implementation of privatization policy, based on The Act number 19 of 2003 cannot be separated from the government intervention through the minister concerned. Therefore normatively SOE is a representation of the will of the government in the form of a company's business, while Department of Manpower and Transmigration is a bureaucratic institution that functionally runs public service activities. However both are in a clear vision line, i.e., government tools to carry out the vision of government.

State-Owned Enterprises as above normative provisions is a form of government business entity. Economically oriented, that creates working relations to produce more value in the sense of profit. Thus, in the perspective of The Act number 13 of 2003 Article 1 point 6 point a, SOE belongs to the category of company. Furthermore, the provision is that any form of business which is a legal entity or not, owned by an individual, belonging to a partnership, or owned by a legal entity, whether private or state-owned, that employs workers by paying wages or other forms of remuneration. The legal consequences of industrial relations dispute, normatively must obey the PPHI Law. Problems arise concerning the level of industrial relations dispute settlement that accommodates industrial relations mediation. Regarding that Department of Manpower and Transmigration and State-Owned Enterprises are in vision as a government tool, therefore the neutrality of mediators becomes an important and fundamental strategic issue.

Based on the provisions of the PPHI Law Article 8, the existence of an industrial relations mediator institutionally does not meet the element of independence as a party that must be separated from the attachment of vision with another party that is SOEs both are in will, the government. Based on the PPHI Law, The Act number 13 of 2003 along with The Act number 19 of 2003 that industrial relations mediators do not reflect the principles of neutrality as a principle in industrial relations dispute settlement law.

Another issue concerning the neutrality of mediation of industrial relations is also found in Article 16 of PPHI Law stating that the provisions on the procedure of appointment and dismissal of mediators and the procedure of mediation are regulated by Ministerial Decree. The Ministerial Decree is the Decree of the Ministry of Manpower no. Kep.92 / Men / VI / 2004 which concern on mediation appointment and dismissal, and mediation Working Procedures. Article 12 Ministry of Manpower and Transmigration states that, in the case of disputes having an impact on the national interest, the Ministry of Manpower and Transmigration may take steps to settle, in coordination with the regional head. There is no explanation of the intended settlement mechanism. Thus, some question arises even it is possible that the step actually cause normative inconsistencies to the mechanism that has been institutionalized. It is not even possible to injure the substance of justice that harms the workers if in its factual normative, the material and legal considerations for industrial relations dispute cases must be won by the workers. By only under the pretext of the national interest, it will castrate the competence and legality of the outcome of industrial relations mediation which will negate the values of justice, while the meaning of national interest is not explained in the relevant legislation. Therefore it can be said that the provision does not reflect the existence of the principle of legal certainty.

The provision of Article 12 of Ministry of Manpower and Transmigration decree as further rule of industrial relations mediation in the PPHI Law is not substantially different from The Act number 22 of 1957 on Industrial Relations Disputes Article 17 section 1 stating that the Minister of Manpower may cancel or delay the implementation of a Central Committee decision, it necessary to maintain public order and protect the interests of the State, while the meaning of state interest is not found in the Explanatory section of The Act number 22 of 1957. From the comparison of these two provisions, if the contextualization of mediation of industrial relations is faced with the interests of the state, the mediator of industrial relations in the perspective of the PPHI Law is not separated from the signs of state interests which are administratively instituted by government and in the realm of business are realized in State-Owned Enterprises (SOEs). It is clear that in this case, normatively the alignment of industrial relations mediators is more likely to lead to entrepreneurs that are SOEs and do not reflect the principles of neutrality that should be upheld. Based on the study and analysis concerning the principles of neutrality of industrial relations mediator, it can be understood that within the provisions of the PPHI Law occurs self contradictory as a form of clash of norms which is definitely not conducive in the functional level that puts PPHI Law as an instrument to create justice because does not reflect the accommodative legal functions of the disputing parties, does not provide equality of assurance to the parties, and is far from the guarantee of the transparency process which may result a non objective mediation.

4. Conclusion

Based on the elaboration as results of the analysis in this study, the conclusions and findings that the author can convey are as follows:

1. There has been an inconsistency in the regulation of industrial relations mediation as regulated in The Act number 2 of 2004 concerning Industrial Relations Mediation with the principle of mediation generally. The Legal facts include:
 - a. Confusion between mediation and conciliation. This confusion of understanding will cause legal uncertainty.
 - b. Single Authority of Mediator. The mediator of industrial relations is determined in a limitative manner; in fact, it excludes the essence of mediation itself as a form of deliberation, including the deliberation of choice to determine the desired mediator.
 - c. Industrial Relations Mediation is not an Alternative Dispute Resolution. The position of mediation of industrial relations as 'intermediate court' in the PPHI Law is mandatory. The provision of the PPHI Law Article 4, sections 3 and 4, instead puts mediation of industrial relations no longer as an option which represents the agreement of each disputing party to choose the institution which is expected to settle the dispute.
 - d. The Authority of the Mediator exceeds the Limitations of the Task
 - e. Weak sanctions for mediators. In the Decree of Ministry of Manpower and Transmigration No. KEP. 92 / MEN / VI / 2004 on Mediation Appointment and Dismissal and Mediation Work Procedures, sanction given for mediators if they are unable to complete their duties as the normative provisions in Article 14 point b and Article 15 of the Ministry of Manpower and Transmigration shall be given in the form of oral reprimands which can be followed up by written warning for 3 consecutive times until the temporary suspension after 3 written warnings (Article 19) that ends in a permanent dismissal (Article 21). Although the mediator is given the opportunity for self-defense, the dismissal is only a deprivation of legitimacy as a mediator, it has no effect on his employment status.
 - f. Mediator Legitimacy without Basic Mediation Skills. The PPHI Law does not specify in detail the qualifications of requirements that an industrial relations mediator must possess. The basic capabilities of mediation techniques are far more important and fundamental than the subject matter of disputes. The minister's authority to appoint a special mediator without following the requirements that a mediator should master cause possible distortion of competence as a mediator and potential failure of mediation success.
2. Normatively based on existing legal provisions, in this case the PPHI Law and the Decree of the Ministry of Manpower of the Republic of Indonesia no. Kep.92 / MEN / VI / 2004 on Mediator Appointment and Dismissal and Work Procedure of Mediation as a further regulation of PPHI Law, supported by case study and analysis in this thesis research, finds that the mediation of industrial relations in Sate does not show neutrality as mediator contrary to the principle of mediation generally.

Recommendations

Based on above conclusions, some suggestions as recommendations given as follows:

- a. To avoid self contradictory in industrial relations mediation in the PPHI Law as an indication of legal inconsistency, the government must reduce its intervention, especially in using its authority if a dispute case found, that based on the government version, threatens public order and national interest. While in the existing legal products there is no explanation of the meaning and limitations of public order and national interests. This case should be considered in order that the process and outcome of industrial relations mediation can be legally responsible, so government intervention under any pretext should not annul the process and outcome of mediation of industrial relations
- b. The follow-up of reducing such inconsistencies should be accommodated in legislation that specifically regulates the mediation of industrial relations.

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