MEDIATION AS ONE OF THE INDUSTRIAL RELATION DISPUTE SETTLEMENT

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ABSTRACT

Mediation is an effort to resolve a conflict by involving a neutral third parties. A conflict of dispute in the field of employment is a problem faced by almost all countries in the world. The purpose of this research is to analyze and finding the characteristic of mediation as an option in resolving dispute on work termination of employment in South Sulawesi, to analyze and identify the role and the purpose of mediator in resolving the dispute of work termination, mapping the success rate of mediation in resolving the dispute in working relations. The type of research that will be used is a normative research and empirical research (sociology of law) with a statutory approach, conceptual approach, historical approach, also comparative approach. The result of this research showed that the problem related to with employment happened because the job opportunity is getting narrower, while the number of populations is increasing, the basic need and normative right are not guaranteed from the labor also the discrimination in the work place, low salary rates, insufficient health insurance, a guarantee of work safety that is not optimal, unsatisfactory retirement guarantees, also work termination. Therefore, the only option to in solving an employment issues in South Sulawesi is by mediation between the worker parties and the entrepreneur that giving a justice, certainty, and expediency for all parties (win-win solution).

Keywords: Characteristics; Dispute; Mediation; Work Relation.

I. INTRODUCTION

The problem on the field of employment now have been a daily sight in various country, both in developed and developing countries. The problem related with employment is often happened because the job opportunity is getting narrower while the number of populations is increased. Various problem on employment also arise because the basic right and normative right of the workers that are not guaranteed in which a discrimination is happening in the work place. It then is arising a conflict which covers the low payment rates, health insurance, work safety guarantee, retirement guarantee, facility given by the company, and it usually end with layoff. Relating with layoff, worker always being on the weakest parties if they facing the employer that is a party who have power. As a party that always considered the weakest, it is uncommon for the worker to always experience injustice when dealing with the company interest. Layoff have its own regulation, which is the Law No. 2 of 2004 concerning on Industrial Relations Dispute Settlement. Therefore, if a legal dispute that involved with employment happened, then the settlement could be filed with a special court other than regular court or other settlement outside the court such as arbitration, conciliation, and mediation. Layoff can be solved, one of which is through mediation. This method is in accordance with the provisions of Law No. 13 of 2003 which stipulates that industrial relation dispute must be carried out by the entrepreneur and worker/labor or labor union by deliberation to reach a consensus.

Regarding to those the industrial relation dispute, several problems can be formulated whether mediation is a choice on industrial relation dispute settlement and how is the success rate of mediation in settling industrial dispute?
II. RESEARCH METHODS

This research is a normative and an empirical research. The type of the research is a statutory approach, conceptual approach, historical approach, and also comparative approach. The legal materials then analyze qualitatively.

III. RESULTS AND DISCUSSION

Etymologically, the term of mediation coming from Latin language, mediare mean “in the middle”. It means that pointing on a role of third party, in this case as mediator, in carrying out their duties which is mediate between the partis in order to settling the dispute. “in the middle” also mean, the mediator needed to be on neutral or did not take any side in settling the dispute. The interest of both parties needed to be maintained fairly by the mediator, hence the trust of the partis is growing up to the mediator. According to Indonesian Dictionary, the term mediation is a process of involving a third party in resolving a dispute where the position is only as an advisor, and he is not authorized to make a decision to resolve the dispute.[1]

Layoff according to the Article 1 number 25 of the Law No. 13 of 2003 is termination of employment relationship because of a certain thing that results in the coming of an end of the rights and obligations of both the worker/laborer and the entrepreneur. Layoff is a situation where the labor is stop working from their employer. Layoff for worker is the beginning from the end of having a job, the end of the ability to financing the necessities of life for him and family. Therefore, a layoff is a situation that is not expected. Especially for worker, because layoff will give them a psychological-financial impact for the worker and their family. Layoff should be the last act if there is an industrial relation dispute. The entrepreneur in facing their worker should maintain a good relationship with their worker.[2]

Relating with the settlement of layoff dispute by deliberation that is recommended to consist two elements namely the entrepreneur/businessman and labor, so the settlement of the dispute can be solved with win-win solution. But, win-win solution that is expected, will be facing a classic problem that is done by the entrepreneur side (the entrepreneur side always refuse in carrying out the agreement). It is because there is no transparency or because the corruption, collusion, and nepotism (KKN) which getting worse, hence the neutrality that is expected doesn’t exist.

In the mechanism on layoff permission, where that phase is the last phase to giving a protection to the labor, it is almost there is no permission has been denied. Therefore, this phase is only to slaughter and then talking about the severance pay without examine more about the reason of the layoff.

The existence of this phenomenon it doesn’t mean there is a conceptional and institutional failure, but only failure in its implementation. Therefore, the implementation of layoff should be fixed. Layoff should only be done by the entrepreneur, if the decision has been obtained from the Industrial Relation Dispute Settlement Institution.[3]

In the negotiation process regarding the fate of the worker after merger, workers represent through labor organization that can used the golden shake hand. This mechanism is very effective for them, because the labor used “unity” as discourse, therefore if they did not unite, then the stability of the company will be disturbed. This is where the act plays its important role, which to protect the labor. Unfortunately, the Law No. 13 of 2003 as a new labor regulation is not accommodating labor protection. Precisely, the previous labor act strictly stated that layoff is prohibited. Other things that need attention is layoff that caused by a crime (serious crime) such as theft, terrorism, and etc.

On the previous labor act, layoff for labor that has done a crime or serious crime still has to gain a permission from the Industrial Relation Dispute Settlement Institution. A crime or serious crime in this case is a crime or serious crime which fall within the scope of the crime. Therefore, before layoff was granted, there must be a final and binding decision by the court (incracht van bewijsteun) according to the presumption of innocent principle.

However, in the current labor act, layoff for labor who have committed crime or serious crime can immediately carried out by the company on the condition that the worker has been proven to be caught red-handed or there is a confession or an evidence in the form of the incident and supported by at least two (2) witness. A layoff could also be happened causing by the work relation that is not based on a work contract. This method is preferred by the entrepreneur because there is no obligation to providing a severance pay. If the working contract relation is stopped halfway, then the permission to giving a layoff is still needed. One of the parties should be done a payment to covering the shortage of the service period.

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In recent years there were many companies that offering early retirement for their worker. This offering should be seen in the context of negotiation. If the negotiation is considered favorable by the parties, then the offer will be not a problem. The problem that arise is when the position of the party in the negotiation is not balanced, so the early retirement policy is actually is a forced thing.

Other than that, layoff could also happen because of modernization, automation, and efficiency. Layoff that happening recently cause by the prolonged economy crisis, and serious mistake still have to obtain a permission from the Industrial Relations Dispute Settlement Institution. A crime or a serious mistake in this case is a crime or serious mistake which in the scope of crime. Therefore, before the layoff was given, there should be a final and binding decision by the court (inrecht van bewijssteen) according to the presumption of innocent.

Therefore, a company need to done an efficiency in a various field with reducing the labor. Seen from the number of the labor that getting layoff, there is two type of layoff namely an individual layoff or individual is a layoff that is done by the employer to the worker which the number is less than 9 (nine) persons. While a layoff in a large scale or mass, if the labor that getting layoff is more than 9 (nine) persons. According to the Law No. 2 of 2004, in the event of massive layoffs, the parties are obliged to seek a settlement of dispute through bipartite negotiation. Before attempting others attempt, the entrepreneur and worker or the labor union in the company must try as much as possible so that layoff do not occur.

In Indonesia, mediation is a method of dispute resolution that include a group of alternative mechanism for amicable dispute outside the court (also known with Alternative Dispute Resolution), which regulated on Article 3, Article 4, Article 8, Article 9 to Article 15 of the Law No. 2 of 2004.

According to the theory, there are several definitions about mediation, but generally as it is stated before, mediation is actually a form of alternative dispute resolution process. The term of alternative dispute resolution, because mediation is one of the methods of dispute resolution outside the court that is not giving a decision, fast, cheaper, and giving access to the dispute parties to obtain justice or a satisfactory completion. In the process of mediation, the implementation is done by a neutral third party (mediator) that is selected by the parties, and the appointment was carried out by Ministry of Law and Human Rights. The mediation process runs more informally and is controlled by the parties, and reflects more on the priority interest of the parties and maintain the continuation of the relationship between the parties.

A litigation dispute resolution in the court usually takes quite a long time and tiring, starting from the district court, high court, and maybe even up to the supreme court level. This exactly required a lot of money and also can disturb the relation between dispute parties.

Other than formal court institution there also other forms of dispute resolution based on the deal (compromise, negotiation) or with involving a third party as mediator or a conciliator or in a form of arbitration. This form then known as alternative dispute resolution. In carry out its function, it turns out a formal court institution has gaining a lot of critics from society, with various of weakness that is attached on its own formal court, has made a justice-seeking society is avoiding the settlement of the dispute from the court (from litigation to non-litigation), this condition is not only affect the court in Indonesia, but also affecting every country in the world, from west to east.

In the developing country, the court sometimes considered to taking side to people who have a high social status and a big entrepreneur (social stratification). Even in several country, a court is considered unclean, hence the decisions are considered to take a side that didn’t bring justice (injustice). The independence of the court institution is questionable.

As it is stated by B. Arief Sidharta, these act of political-power especially during the New Order era (ordebaru), were always packaged in a written positive law that met all the formal requirements. A law formed in a manipulation cleverly and formally, then enforced by forced with the support of the military apparatus. The law is enforced if it beneficial and make it easy for the ruler to carrying out its duties. On other hand, the law is overridden if it hindered or make it difficult for the ruler. The law enforcement is also handled with highlighting the use of unlimited divisional authority by the authorities and direct interference (intervention) of the executive (political rulers) in the implementation of judicial authority, this intervention often present in the form of shamtrial.
In facing various dispute in industrial relation, the recent employment problem is not only relying on a formal court, but it is necessary to find solution on various weaknesses in dispute resolution either through negotiation, mediation, conciliation, arbitration or the Industrial Relation Court.

The effort to find a solution for a various weakness of dispute resolution through the Industrial Relation Court, then in various country in the world, developed a model of dispute resolution then it is known as Alternative Dispute Resolution.

The alternative dispute resolution gaining a public support that feel saturated with a formal court that considered unclean. Even in United States it is already developed a various model of Alternative Dispute Resolution such as; arbitration, negotiation, mediation-conciliation, and etc. and in every state in United States there is already a mediation center to resolving various problem.

In Indonesia the alternative dispute resolution has been confirmed in positive law. Such as through the development of legislation as the basis of the application such as the Law No. 30 of 1999 concerning on Arbitration and Alternative Dispute Resolution. Specifically, in the field of employment it is regulated through the Law No. 2 of 2004 Concerning on Industrial Relation Dispute Settlement which providing a very large portion for the implementation of alternative dispute resolution through arbitration, bipartite, mediation, conciliation, and the Industrial Relation Court for the disputing parties.

According to the culture of Indonesia society, deliberation is a dispute settlement method that is very effective and efficient then a settlement through court. This method has well-known before the independence of Indonesia. In the industrial relationship, a dispute settlement through deliberation could avoiding a conflict in scope of employment or minimum the intensity could be reduced. If there’s a conflict then the dispute settlement can be pursued in a peaceful manner without precluding the possibility of a coercive mechanism. This can be seen in the Law No. 2 of 2004 concerning on Industrial Relation Dispute Settlement, that stated the parties need to dispute the settlement through a bipartite negotiation before making another attempt.

Relating with recent regional autonomy according to the Article 14 Paragraph 1 letter h of the Law No. 32 of 2004, it is stated that the affairs which fall under the authority of the Regional Government for regencies and cities are compulsory affairs that become the authority of the regional administrations for regencies/municipalities are affairs on a regental/municipal scale including employment. The regulation of employment in the regional should be matching with the national law and international law standard that is in accordance with the democracy state principle.

It should be noted, the concept of autonomous government which related with the labor regulation in the region and work relation must be able to accommodate the regional values and adapting with the employment law, both nationally and internationally. The same applies with the industrial relation dispute especially in the issue of layoff.

The Theory and Conceptual Approach

Theoretical framework is a support on building or in form of explanation from the analyzed problem. The theory thus providing an explanation by organizing and systematizing the problem that discussed.[4]

According to M. Solly Lubis, theoretical framework is a thoughts or points of opinion, theory, thesis regarding a case or problem that can be used as a material for comparison and theoretical guidance. This can be an external input for the authors.

According to Radbruch, the duty of legal theory is to make a legal value clear and postulates the very foundation of the philosophy.[5] So the theory about science is a rational explanation that is in accordance with the research object that is explained to get a verification, the should be supported with an empirical data that can help in revealing the truth. The purpose of the theory is to providing direction for the research to be carried out.[6] Theory also providing a clue to the symptoms that arise in research and the design of research as well as research
steps that is related to literature, policy issues and other important source.[7] A research could result an answer on a theory testing using data collection method and alternatives to emergence of new theories through observation or active participation in the process.[8]

A theory generally containing three elements, namely:

An explanation about relationship between the element on theory

The theory adopting deductive system, which is something that is the opposite from general (abstract) to something specific and real.

A theory giving an explanation of symptoms that is explained, therefore for research need then the theory had a purpose/aim to giving a brief to the research that will be done.

From the main topic of this research, then the theory that will be used is Labor Management Cooperation Theory, as it is confirmed by William E. Brock that a state needs to develop a complete working atmosphere based on the concept of great value which is equality and mutual respect between worker and entrepreneur. This theory will explain that a mediation as one of method of dispute settlement that is raised by the Law No. 2 of 2004 is an attempt to harmonize the interest between worker and entrepreneur if there is a difference in opinions and even in disputes.

Moreover, mediation is an implementation of great value of Indonesia society which is deliberation. So, philosophically the mediation on employment cannot be separated from the indigenous Indonesia culture as it is state by William E. Brock.

Deliberations is part of the human culture, while the deal that is done between employer and worker contain a cultural component namely legal culture. The cultural value is closely related with the law because a good law is a law that reflects the value that is exist in the society. the value is not concrete but it is very abstract and, in the practices, it is subjective, in order to be useful then this abstract and subjective value has to be concrete. The form of concrete value is in form of norm. Legal norm is general, which applies to anyone.

The value and norm related with morals and ethics, moral will reflect from the attitude and behavior of people. In situation like this, it has entered the area of norms as a guide for human attitudes and behavior. The social behavior that is obedient to the law will facilitate law enforcement. The existing moral of society will be institutionalized in a legal culture. The attitude of obedience to legal values greatly affects the success or failure of law enforcement itself in community life.

Lawrence M. Friedman stated that a legal culture is human behavior on law and legal system, value, thoughts and hope. This thoughts and opinion are to some extent the determinant of the legal process. He also stated that a legal culture is a social mindset and social force that determine how laws are used, avoided, or abused. Without a legal culture, then the legal system will be powerless if it is applied in people lives.

Other than that, according to SoerjonoSoekanto that the factor of means of facilities is an important factor in the law enforcement. Without any facilities and infrastructure that supporting, then it is impossible for law enforcement to run smoothly. This include the skilled human resource, good organization, adequate equipment and sufficient finance.

The dispute settlement in Indonesia is sometimes have its own pattern, as it is sated by Daniel S. Lev., that the legal culture in Indonesia in the dispute settlement have its own characteristics which are caused by several values. The term of legal culture is used to reflect the legal tradition in regulates people lives.

The important factor in dispute settlement is a consensus between dispute parties. in reality, every society recognize the unequal division of authority. Likewise, in the business world that entrepreneur have a big authority because as an owner of the company compared to workers whose position is very weak.

According to M. Solly Lubis, the conceptual framework is a concept construction internally to in reader who receive stimulation and conceptualization encouragement from reading and literature reviews.

In order to avoiding a different interpretation of term that is used in this research and to giving a guidance in research process, then the definition of operational from a various term that is used, is explained in the following
description. Alternative Dispute Resolution is every form of dispute resolution outside the court that is done by the worker and entrepreneur.

Industrial relation dispute is a difference opinion which resulting in conflict between the entrepreneur with worker/labor or labor union because there is conflict about rights, conflict of interest, conflict on layoff, conflict between labor union on a company.

Labor law is a regulation both written or unwritten that is related with the work relation between worker/labor and entrepreneur/employer. An industrial relation mediation then will be said as mediation is a dispute settlement of rights, an interest dispute, layoff dispute, and dispute between worker/labor union, but only in one company with deliberation that is mediated by one or more neutral mediator.

An industrial relation mediator then will be said as mediator is a government agencies employee, which responsible for employment who meet the requirements as mediator that is stipulated by the Minister to be in charge of mediation and have obligation to provide a written advice to the parties to resolve dispute over rights, interest, layoff, and dispute between labor union only in one company. Labor or worker is everyone who working and receiving wages or other forms of remuneration.

Collective labor agreement is a result of negotiation between the labor union or several other labor unions that is registered in the responsible agencies and the employer or several employers or a group of employers which contains the terms of work, right, and obligation of both parties.

IV. CONCLUSION

The problem that is related with employment is happened because the job opportunities are getting narrower, while the number of populations are increased, the basic and normative rights of workers are not guaranteed as well as discrimination in the work place, the low wages, inadequate health insurance, insufficient work safety guarantee, unsatisfactory retirement guarantee, and termination of employment. Therefore, the only option to resolving the employment problem is through mediation between worker and entrepreneur that able to provide a justice, certainty, and expediency for all parties (win-win solution)

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