

**EFFECTIVENESS OF MEDIATION AS A TYPOLOGY OF CIVIL DISPUTE SETTLEMENT (ADR) AT DISTRICT COURT OF BALI<sup>1</sup>****I Ketut Tjukup, I Putu Rasmadi Arsha Putra dan Dewa Gede Pradnya Yustiawan**

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**Abstract**

Mediation has been a typology of civil dispute settlement through negotiation process to obtain agreement from the parties assisted by mediator. The Court implements mediation which is a process of civil disputes settlement that must be taken as an instrument to fulfill the four purposes of the Supreme Court, such as addressing the problem of the accumulation of cases; faster and cheaper dispute resolution; expanding access for the parties to a sense of justice; and strengthening and maximizing the function of the courts in dispute settlement. The focus of this study lies in the investigation of the extent to which effective mediation is applied as an alternative of civil disputes settlement at the District Court of Bali. The method used is empirical law research method. The nature of this research is descriptive. There are two types of data, namely primary data and secondary data with the location of research is the District Court in Bali Province. Data collection was done by using interview techniques; Data processing and analysis were carried out by applying qualitative data analysis method. The result of the research shows that the implementation of mediation in the District Court in Bali has been in accordance with the legislation and has been capable of decomposing cases. However, obstacles in the implementation are still other significant problems that need concern of resolution. The obstacles are those relating to legal substance, legal structure and legal culture.

**Keywords: Effectiveness; Mediation; Civil Dispute Settlement****I. INTRODUCTION**

As a social creature (zoon politicon) human being cannot escape from the relationship with other human beings. Relationship between a man with other human beings is set in material civil law. However, in running the relationship everyone certainly bring about similarities and differences in interests and views, which often lead to disputes, disagreements or conflicts<sup>2</sup>. The emergence of these characteristics results in the emergence of the formal civil law necessary to protect human interests in the future. Nowadays civil dispute settlement is known to be conducted through litigation and non-litigation lanes. At the litigation path, process of settlement is started

from the lawsuit until the judgment of the incracht judge is reached, while at the non-litigation path the action of the settlement is executed through arbitration, mediation, conciliation and negotiation.

Currently dispute resolution through the judicial system is still seen as the only way to resolve disputes or conflicts. The public's view of the judiciary as the sole means of solving the case has had an unfavorable effect, causing the accumulation of cases; all civil cases that occurred in the community led to a settlement in court. The community's trust in the judiciary is not supported by adequate facilities and infrastructure sufficient human resources. As it is

1. This paper is the result of Udayana Superior Research conducted in accordance with the Letter of Appointment Agreement of Research Implementation of Fiscal Year 2017 Number: 2164 /UN14.2.4/PP/2017.

2. Then Husni, 2004, *Industrial Relations Dispute Settlement Through Court and Outside Court*, PT RajaGrafindo Persada, Jakarta, p.1

noticed that the judiciary as the judicial power exerciser in the rule of law acts as a pressure valve against any violation of law and order in society, it is still relied upon as a functioning body and has a role to uphold truth and justice<sup>3</sup>. In fact, the settlement of disputes through the judiciary has several disadvantages, such as, dispute resolution that lasted for a long time and with an expensive cost and win-lose solution system in the settlement of the case. This such unfair decision can lead to discontent for the involved parties and will lead to the emergence of new conflicts.

Formalised dispute resolution techniques like arbitration and litigation have been well developed for the resolution of construction disputes. However, the lengthy process and the high cost involved have called for alternatives. These alternatives are characterised by the flexibility allowed. Collectively, these processes are called Alternative Dispute Resolution (ADR) (Cheung, 1999) ADR is a non-adversarial process for resolving disputes with the assistance of a neutral third party. The most common forms of ADR are mediation and arbitration (Matsumoto, 2011). The combination of resource management and ADR is also known as environmental dispute resolution (EDR) and includes processes such as environmental mediation and negotiation (Rose & Suf, 2001).

A common theme in the environmental conflict resolution literature is the identification of factors believed to influence the probability of successfully using alternative dispute resolution (ADR) (Andrew, 2001). Conflict and dispute regularly feature in construction projects. Mediation has been identified as an effective means to resolve dispute due to its flexibility, cost-effectiveness and non-threatening process (Qu & Cheung, 2012). Mediation, arbitration, and alternative dispute resolution (ADR) are processes used to resolve disputes, either within or outside the formal legal system, without adjudication or decision by a judge (Menkelmeadow, 2015). One of the challenges in resolving the disputes in the early stage through

negotiation and mediation is how to find the most similar litigation cases in the history (Fan & Li, 2013). The key goal of conflict transformation is therefore sustainable resource management, including equitable distribution of benefits arising from these natural resources (Dhiaulhaq, Bruyn, & Gritten, 2014).

One part of the current Alternative Dispute Resolution (ADR) is mediation. In the Collins English Dictionary and Thesaurus it is stated that mediation is a bridging activity between two disputing parties to reach an agreement<sup>4</sup>. Mediation is carried out by parties who are assisted by a mediator who shall act in a neutral and impartial manner. The mediator is unauthorized to force a settlement for the parties on their disputes. The integration of mediation into the proceeding in the court is expected to be one of the most effective instruments for dealing with the accumulation of cases, strengthening and maximizing the function of the judiciary in resolving disputes. In addition to the adjudicative nature of settlement, the mediation is also one of access to justice for the public justice seekers, especially in civil disputes.

Building on the described facts, the judiciary continuously seeks to harmonize the interest of the disputing parties as well as to apply the principles of justice and legal certainty to overcome the problems that always arise in the dispute resolution in the court; to provide the community with a mechanism for resolving conflicts or disputes referring to the principle of freedom that benefits both of the parties; the parties to the dispute may offer dispute resolution options of the intermediary. The parties to the dispute are not fixated on proving whether it is right or wrong in the dispute they face, but they tend to think of a settlement for the future by accommodating their interests equally<sup>5</sup>. For Indonesia society, the settlement on a dispute by consensus agreement will gain support in the form of cultural roots that live and will be respected in social traffic<sup>6</sup>. As has been known in the social life that the principle of kinship is a traditional institution formerly used in resolving

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3. Harahap M. Yahya, 2005, *Hukum Acara Perdata Tentang Gugatan, Persidangan, Penyitaan, pembuktian, dan Putusan Pengadilan*”, Sinar Grafika, Jakarta, p. 229
  4. Lorna Gilmour, Penny Hand, Cormac McKeown, 2007, *Collins English Dictionary and Thesaurus, Third Edition*, Harper Collins Publishers, Great Britain, p. 510.
  5. Timothy Lindsey dalam Syahrizal Abbas, 2009, *Mediasi Dalam Perspektif Hukum Syariah, Hukum Adat, dan Hukum Nasional*, Kencana Prenada Media Group, Jakarta, p. 284.
  6. Maria S. W. Sumarjono, Nurhasan Ismail dan Isharyant, 2008, *Mediasi Sengketa Tanah, Potensi penerapan Alternatif Penyelesaian Sengketa (ADR) di Bidang Pertanahan*, Kompas, Jakarta, p. 5 dan 15.

claws, the principle of deliberation for consensus is undeniable to have been a part of the richness of Indonesian culture but has not developed scientifically to resolve the dispute because the flow of modernization brought changes in social life, that is triggering the emergence of chaos so that the judiciary gets difficulties in resolving disputes<sup>7</sup>. The Indonesian people experience that peaceful dispute resolution has led them to a harmonious, fair, balanced, and shared life in a well-respected society. Society seeks to resolve their dispute appropriately by upholding the value of togetherness and not depriving or suppressing individual freedom and not allowing it to continue but finding solutions for it<sup>8</sup>.

By looking at the background of the institution, mediation can be said is ideal in realizing the principle of fast, simple and low cost. Therefore, the Supreme Court has issued several legal products in the form of Supreme Court Circular (SEMA) and Supreme Court Regulation (PERMA) as a code of law implementation in the Court which is used to decompile civil cases in court, one of which is PERMA about the implementation of mediation in court.

PERMA No. 2 Year 2003 has been amended by replacing it with PERMA No. 1 of 2008, and the latest amendment, PERMA No. 1 of 2016 on Mediation Procedures in Courts which is the implementation of the Civil Procedure Law Article 130 Heirziene Inlandsch Regulation (HIR) applicable to the areas of Java and Madura, and Article 154 of Rechtsreglemen voor de Buitengewesten (R.Bg) applied to the territory outside Java and Madura, which regulate the peace efforts in resolving civil disputes in court. Therefore, efforts to resolve disputes through the mediation path are eligible to be the primary choice. This is because in the mediation path, in addition to the parties can negotiate their main wishes with the peace lane, this dispute settlement path can also benefit the court in an effort to reduce the accumulation of cases in court. Mediation is seen as a faster and cheaper way of dispute resolution than litigation. The enactment

of mediation is expected to broaden access for the parties to gain a sense of justice. The institutionalization of the mediation process into the justice system can strengthen and maximize the function of the courts in dispute settlement<sup>9</sup>.

Nevertheless, the settlement of cases through the mediation did not increase significantly. Even the settlement with this way, based on the results of existing studies, did not progress. In fact, the rules on settlement procedures through mediation are always revised and amended until PERMA No.1 Year 2016 on Court Mediation Procedure is issued. The issuance of PERMA No. 1 year 2016 is expected to be better effective to leverage mediation related to litigation process in the court by giving full strength to mediate in settling the disputes to become an effective instrument in overcoming such cases as well as strengthen and maximize the function of the court in solving the disputes in addition to the process court of a decision-making (adjudicative) nature.

In the present study, the effectiveness of mediation in reducing the accumulation of cases and obstacles found in applying mediation to the courts are examined in detail.

## **II. METHOD**

Research is a scientific activity related to analysis and construction that is done methodologically, systematically and consistently<sup>10</sup>. This research is an empirical law study. The nature of this research is descriptive. Data consist of primary and secondary data. Primary legal materials (primary resource or authoritative records) comprise the Constitution of the Republic of Indonesia Year 1945 and PERMA no. 1 Year 20016 on Mediation Procedures. The location of this research is the District Court in Bali Province. The population in this research are Denpasar District Court, Singaraja District Court, Tabanan District Court, Klungkung District Court, and Bangli District Court. Sampling technique used in this study was *Non Probability* that does not give the same possibilities for each element of the selected population<sup>11</sup>. Data were collected using literature

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7. Ade Saptomo, 2010, *Hukum Dan Kearifan Lokal (Revitalisasi Hukum Adat Nusantara)*, PT Gramedia Widiasarana Indonesia, Jakarta, p. 29
  8. Timothy Lindsey dalam Syahrizal Abbas, loc.cit, p. 283.
  9. Takdir Rahmadi, et all, 2008, "Buku Komentar Peraturan Mahkamah Agung RI NO. 1 Tahun 2008 Tentang Pelaksanaan Mediasi di Pengadilan", Mahkamah Agung RI, Japan International Cooperation Agency/JICA dan Indonesian Institute for Conflict Transformation/IICT, Jakarta, p. 7-9
  10. Soerjono Soekanto, 1984, *Pengantar Penelitian Hukum*, UI Press, Jakarta, p.42
  11. Nasution, 2007, *Metode Riserch*, Bumi Aksara, Jakarta, p. 86.

research, questionnaires and interview techniques. Data were processed and analyzed using qualitative analysis method, and the results were presented informally that is by arranging it in the form of clause or sentence.

### **III.RESULTS AND DISCUSSION**

#### ***Effectiveness of Mediation in Reducing Accumulation of Disputes in the Court***

The essence of PERMA No.1 Year 2016 as an attempt to resolve civil disputes through mediation is Article 130 HIR or Article 154 RBg as the article regulating the peace efforts in court. Hence, if the parties or the examining judges do not comply with the regulation, it is interpreted as a form of violation of the two articles which resulted in the decision null and void. Mandatory use of mediation does not imply that the parties are required to achieve or generate peace.

The application of mediation in the courts is aimed at reducing the accumulation of cases, so that such mediation shall be applied in conducting dispute settlement in court as it is an access to encourage the consciousness of the parties to sit together in resolving the dispute. It is also based on the fact that mediation is a solution to reduce the accumulation of cases in the District Courts, the High Court of the State and the Supreme Court, which can generate peace, establish good relations between the parties; satisfying, saving time and resources, so it does not cost and energy<sup>12</sup>.

When viewed from its concept, law enforcement is to find a harmony between the relationship of values in the rule of law that is able to be applied in the life of society to find goals of peace, order and peace. In accordance with its purpose, the law is made is to provide protection to the community, in this case, the law that has been violated must be enforced. It is through this enforcement that the law will become a real thing<sup>13</sup>.

In the opinion of Wayne La Favre cited by Soerjono Soekanto, law enforcement, as a process, is essentially a discretion containing decisions not strictly governed by rules, but having an element of personal judgment<sup>14</sup>.

When referring to the legal effectiveness theory proposed by Soerjono Soekanto, the effectiveness of a law is determined by five factors. These factors have a neutral meaning, so the positive or negative impact lies on the side of those factors. The factors are as follows<sup>15</sup>:

The law itself; what referred to in this first point according to soerjono soekanto that the law in the material sense is a written rule generally accepted and made by the central authorities and the legitimate areas.

Law enforcement; what referred to in this second point are the concerned parties who directly or indirectly engage in the field of law enforcement. The law enforcers here are the existing District Court employees in Bali, ranging from judges, bailiffs and other non-justicial employees.

Supporting facilities or infrastructures to the law enforcement; in a good law enforcement there must be adequate and complete supporting by facilities and infrastructure. By means or adequate and complete facilities on law enforcement, law enforcement will be going smoothly. The facilities and infrastructures comprise educated and skilled manpower, good organization, adequate equipment, adequate finance, and others.

Society; public adherence to the law is strongly influenced by the three previous factors, namely law, law enforcement, and facilities. The community will not see the rules applied if they do not find justice and legal certainty of the regulation.

Cultural; culture contained in the community comes from the work, creativity, taste and desire that develops through the association of life. In addition, culture can also come from the influence of external culture or acculturation caused by the development of the era and human mind process. In this case, the foreign culture which is transmitted by Dutch colonizers is ingrained and has changed the paradigm of society in resolving disputes, which prioritize deliberation and consensus, into the dispute resolution transmitted by the colonists who put forward the formal decisions.

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12. Takdir Rahmadi, 2010, *Mediasi Penyelesaian Sengketa Melalui Pendekatan Mufakat*, PT RajaGrafindo Persada, Jakarta, p.38.

13. Sudikno Mertokusumo, 1993, *Bab-bab Tentang Penemuan Hukum*, Citra Aditya Bakti, Bandung, p.1

14. Soerjono Soekanto, 2007, *Faktor-faktor yang Mempengaruhi Penegakan Hukum*, Raja Grafindo Persada, Jakarta, p.7.

15. Soerjono Soekanto, 1989, *Kegunaan Sosiologi Hukum Bagi Kalangan Hukum*, cet. V. Citra Aditya Bakti, p. 56-57.

Satjipto Raharjo states emphatically that the process of working a law in society does not necessarily just happen. The law is not the work of the factory, which is so outgoing as it can work, but an entity that requires several steps that allow the provision. At least the steps that must be fulfilled to seek the law or rules to work and function effectively are<sup>16</sup>:

Judging from the statistical data on the effectiveness of the mediation application in court, successfulness can be seen, but when viewed from the target the results achieved are still very far from the ones already planned, because in its implementation some basic constraints are still found. These constraints come from various aspects both in terms of facilities and infrastructure, such as, inadequate places, the legal culture of the community, and even the factor of lawyers who often provide aberrant understanding of mediation. This is due to a lack of socialization regarding mediation in the court<sup>17</sup>.

### ***Constraints Mediation Implementation in the District Court of Bali***

Referring to Roscoe Pond's "law as a tool of social engineering" concept, modified by Mochtar Kusumaatmadja as a legal theory of development, this thought is based on the idea of Eugen Erlich, a Sociological Jurisprudence in his theory of "living law" that the law in accordance with living law as the inner order of society reflects the values that live in it<sup>18</sup>. This is aimed at achieving the ideals of a nation that has national resilience in all fields to improve the standard of living of every citizen; educating the nation and promote the common welfare by maintaining and upholding justice for every Indonesian citizen. Therefore, the development of the law by organizing the rules in the society is necessary, that is, of regulating all human behavior to detail for the sake of the smooth life of the community and to prevent the occurrence of obstacles or injustice<sup>19</sup>.

By understanding the role and function of law in depth on the level of development law theory, it is seen that the law is merely as a means to

change the attitude of society and not as change for the behavior of state organizers towards the better. The enactment on mediation in court have undergone several changes, but at the implementation level there are still many obstacles. facts occur because of the gap between *das sollen*, the law as a means of changing attitudes of society, and *das sein* the law as a tool to impose the will of the government to the public. Romli Attasmita provides an alternative to the theory of legal development, the law as a means of renewal of society and bureaucracy (law as a tool of social and bureaucratic engineering).

Constraints on the application of mediation in court will be split based on the rule of law of development which is a dimension that includes the substance of the laws that govern, the legal structure that runs and the culture as a supporter or supporter who became the thought of Lawrance W. Friedman<sup>20</sup>. The underlying problem of law enforcement lies in the factors that influence it<sup>21</sup>. These factors have a neutral meaning, so the positive or negative impact lies in the content of the factors that influence it. There are several factors that become obstacles in the implementation of mediation in court, namely:

### **Substance of Law**

The legal substance affecting the implementation of mediation in the Court is the Legislation Regulation related to the weak mediation in court. Weak regulation related to the implementation of mediation in court can be seen from the enforcement of certified mediators. Based on the existing rules that the mediator who runs the tuigasnya is as a mediator in the district court should have a Mediator certification. Infact, not all judges are certified as mediators to carry out mediation in court. In addition, other constraints arising from legal substance is the regulation of incentives of judges who perform the function of being a mediator is not yet clear, in relation to a special room for the implementation of mediation process in court there has been no implementing regulations. So it can be understood that the enactment of PERMA

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16. Satjipto Raharjo, 2000, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, p. 70.

17. Results of interview with Pulung Yustisia Dewi, SH., MH (Mediation Court Judge Tabanan) interview on Tuesday 19 September 2017

18. Mochtar Kusumaatmadja, *Fungsi dan Perkembangan Hukum dalam Pembangunan Nasional*, Bina Cipta, Bandung, p.2-5.

19. C.F.G. Sunaryati Hartono, 1988, *Hukum Ekonomi Pembangunan Indonesia*, Binacipta, Bandung, p. 20

20. Lawrance M. Friedman, 1984, *Amerin Law: An invaluable guide to the many faces of the law, and how it affects our daily our daily lives*, W.W. Norton & Company, New York, p. 1-8.

21. Soerjono Soekanto, *loc.cit*, p. 5.

No.1 Year 2016 on Mediation Procedures in the Court has not been applied maximally. When viewed from the perspective of law, legislation is one factor that can affect law enforcement. Regarding the enactment of the law in order to be effective there are several principles for a law to be effective. These principles include<sup>22</sup>: legislation is not retroactive (non-retroactive); legislation made by the higher authorities, has a higher position (hierarchy system); special laws and regulations exclude general laws and regulations (*lex specialis derogat lex generalis*); current legislation in force overrides previous legislation (*lex posteriori derogate lex periori*); legislation can not be challenged; and legislation as a means to the maximum extent possible to achieve spiritual and material welfare for society and individuals, through renewal or preservation (*welvaarstaat* principle).

### **Structure of the Law**

Legal structure is the structure that runs the rules. Related to the constraints faced in the application of mediation in court there are some obstacles faced in terms of structural factors such as:

#### **Law enforcer**

Law enforcers are among those directly involved in law enforcement fields that not only include law enforcement but also peace maintenance. The factors that can influence the mediation in the District Court in the perspective of the role of mediator judge as a legal structure based on the results of interview research conducted are as follows<sup>23</sup>:

The mediator of judges in handling mediation often carries it out in front of the court as a judge in dispute settlement through an adjudicative litigation path. Consequently, when a task of resolving disputes through non-litigation (mediation) channels assigned, it is unfamiliar and troubling, that the function of judges and mediators is different;

The judicial mediator has a pessimistic view of the existence and purpose of mediation in court to reduce the accumulation of cases in court;

Not all judges in the District Court have

pocketed the certificate as a mediator, so some judges may be said to have no skills as a mediator.

Not all District Court judges have the education and skills as a reliable mediator.

Advocate is the person who accompanies the litigant. The main task of the advocate is to ensure the accompanying client to get the appropriate rights in taking legal action<sup>24</sup>.

Advocate is the person who accompanies the litigant. The main task of the advocate is to ensure the accompanying client to get the appropriate rights in taking legal action.

The low understanding of advocate on understanding mediation in court according to PERMA No.1 Year 2016, low advocate knowledge about the essence of mediation process so advocates have the view that mediation will not bring profit for themselves and their clients. Thus it results in the less support for the implementation of mediation.

The absence of advocate support for parties to mediation. The lack of advocate support is based on the advocate's interest to obtain material only. Thus, advocates tend to continue the case in litigation to get a higher honor from their clients.

The honorarium of an advocate is based on the hours of work or the frequency of visits to the court; the case of a quick finish will have a very significant impact on the honor earned by. In fact, in some cases, many parties want to conduct peace during mediation but advocates often influence their clients to continue the case in litigation. Indeed, not all counter advocates of mediation, professional advocates will continue to support peace through mediation.

#### **Involved parties to the dispute**

The parties to the dispute are often reluctant to make peace for various reasons that the parties' goals of court proceedings is to get a judge's verdict not for peace.

In mediation process, mediators often find difficulties in bringing together the parties due to difficulty in adjusting the time<sup>25</sup>.

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22. Ibid, p. 56-57

23. Interview with Ni Luh Suantini, SH., MH (Mediator of Justice of Singaraja District Court) interview on Tuesday 8 September 2017

24. Interview with Kadek Apdila Wirawan, SH (Mediator and Advocate, registered as mediator instead of judge at the Klungkung District Court) interview on Tuesday 31 August 2017

25. Ibid, p. 33

## **Legal Culture**

As for the meaning of culture factor as the supporting factor is:

Legal culture is the attitudes and values associated with common law, together with attitudes and values related to the behavior associated with law and its institutions, both positively and negatively. Cultural factors, namely as a result of work, creations and feelings based on human initiative in the life of the legal structure that is institutionalized into legal entities, such as the structure of the first tribunal, the appellate court and the cassation court, the amount of judges and integrated justice system. Friedman asserts that the law has the first element of the legal system that is the legal structure, institutional order, and agency performance<sup>26</sup>. The existence of a legal culture of retaliation, not to resolve disputes but retaliation that could lead to new disputes. This culture cannot be denied to have been a habit of society in Indonesia. In addition to the culture of retaliation, the culture of prestige is also still rooted in the people of Indonesia. If it can resolve the dispute in the court through the litigation, public prestige will increase because disputes in court in view of having a qualified fund can be resolved, so to defend their rights, must be in spending a large amount of money.

Facilities or infrastructure that support law enforcement are factors that play a very important role in law enforcement process. Without such facilities and infrastructure, law enforcers may not be able to harmonize their proper role with actual roles. This includes highly educated and skilled manpower, good organization, adequate equipment, and sufficient finances. For the meeting place for the mediation, the Registrar states that the mediation chamber is not taken care of even impressed never used at all. The table runding is in the form of ordinary office desk. It is likely that this factor is closely related to the budget funds provided for mediation in the court. Likewise, data relating to some mediated and failed cases are very difficult to find in a certain period of time, whereas the Supreme Court has provided a very clear Format/Blanko to be followed up<sup>27</sup>.

## **IV. CONCLUSION**

The implementation of mediation in the

District Court in Bali is in accordance with the Rules of Invitation. The constraints faced in the mediation at the District Court in Bali are related to the Substance of Law, Legal Structure, and Legal Culture.

The Supreme Court of the Republic of Indonesia should reaffirm the obligation of every Judge in the District Court to attend mediation certification training so that they can become mediators in order to optimize the mediation process. The Supreme Court of the Republic of Indonesia shall establish a regulation on sanctions granted to parties that impede the mediation process in order to optimize the success of mediation. There needs to be seriousness in the mediation of the court regarding the fundamental changes in the Substance of Law, Legal Structure and Legal Culture, and at the same time with a structured socialization involves the academic environment to promote the program of the Supreme Court of the Republic of Indonesia.

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26. Ade Maman Suherman, 2008, *Pengantar Perbandingan Sistem Hukum*, Raja Grafindo Persada, Jakarta, p. 12

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