



Mediation as an alternative dispute resolution of customary in Indonesia

Muhammad Rudi Syahputra¹, Mohd Din², Iman Jauhari²

¹ Student, Faculty of Law, Syiah Kuala University, Indonesia, Banda Aceh, Indonesia

² Lecturer, Faculty of Law, Syiah Kuala University, Indonesia, Banda Aceh, Indonesia

Abstract

One form of Alternative Dispute Resolution is Mediation. Based on research conducted by various academics on conflict resolution in the society of Indonesia, basically the culture of amicable resolution or conciliation through mediation is a value that is widely embraced by people in Indonesia. This research aims to examine in depth the position of mediation as an alternative dispute resolution between the disputing parties in Indonesian society. This is normative legal research; library research is used together with the approaches of concept and values. The findings are Mediation is one of the alternative dispute resolution. The settlement of disputes can be done in several ways, one of which is by involving a third party in the dispute resolution process to obtain an agreement between the disputing person, where this third party acts as an advisor or mediator. This type of dispute resolution model is called as mediation. Dispute resolution through mediation mechanisms in Indonesian society can be resolved through customary courts that applied in the society. Settlement of disputes in the Banjar community is known as Badamai Customary, in the Dayak community known as the *Kedamangan*, in the Achenese known as *Majelis Adat* (Customary Court). The granting of this authority to customary courts provides a great opportunity to contribute in resolving disputes that occur in the social community and reduces the number of cases that should be handled by formal courts. It is hoped that this will prevent a buildup of dispute cases.

Keywords: mediation; ADR; disputes; customary

Introduction

One form of Alternative Dispute Resolution is Mediation. Mediation is a form of dispute resolution outside the judiciary (non-litigation) with the help of other people or third parties who are neutral and impartial and not as a decision maker called a mediator. The goal here is to reach an agreement to resolve the dispute that they are facing without anyone feeling defeated ^[1]. Settlement of legal issues through mediation is a win-win solution where neither party wins nor loses, so that disputes do not last long or protracted and can improve relations between the disputing parties, also cheap, fast, satisfying the disputing parties because it is cooperative, prevents the accumulation of cases in court, eliminates grudges, strengthens friendship relations and can strengthen and maximize the function of the judiciary in resolving disputes in addition to the judicial process that is decisive (ajudicative) ^[2].

Based on research conducted by various academics on conflict resolution in the society of Indonesia, basically the culture of amicable resolution or conciliation through mediation is a value that is widely embraced by people in Indonesia. Various ethnic groups in Indonesia have a culture of amicable conflict resolution, for example the people of Java, Lampung, Bali, South Sumatra, Lombok, Papua, West Sulawesi, Aceh and the people of South Sulawesi ^[3].

Conflict resolution through mediation aims to resolve as quickly as possible, without prolonging the problems that occur. Subsequent developments from customary law that developed in Indonesia, especially towards conflict resolution through mediation, have led to harmony in society and did not exacerbate the situation, by as much as possible maintaining an atmosphere of peace.^[4] Settlement of customary disputes that are resolved in Indonesia is through a mediation mechanism for both civil and criminal cases. This is different from western criminal law, the purpose of customary criminal law is to restore legal balance which is the goal of all customary reactions or corrections, while the goal is to correct wrongdoers, people who violate the law, as one of the basics contained in the western criminal law system, not exist in the customary law system ^[5].

In Indonesia, the practice of resolving disputes through mediation is carried out by customary courts. Customary disputes usually include domestic disputes; disputes between families related to faraid (division of inheritance); disputes between communities; disputes regarding property rights; petty theft; disputes over marital property; theft of livestock; violation of customs regarding livestock, agriculture, and forests; disputes at sea, disputes in the market; forest burning; slander, incitement, and defamation; environmental pollution; threat; and other disputes that break the customs ^[6].

Settlement of criminal acts according to custom aims to find an agreement and understanding between the two parties (both victims and perpetrators of criminal acts) in the form of the best solution for both parties without

harming the other party). The application of customary criminal settlements is based on customary law or existing customs in the community which is carried out through the customary judicial process^[7].

Based on the introduction, this research will examine and discuss how is the position of mediation as an alternative dispute resolution between the disputing parties in Indonesian society.

Research Method

This research uses normative legal research, which emphasizes the study of documents in library research to study secondary data in the field of law related to the problems and objectives of this research. The approach used is a conceptual approach and a historical approach^[8]. The conceptual approach in this study is intended to find the basis for mediation derived from relevant legal principles and customary law doctrines. The historical approach is carried out within the framework of tracking the application of mediation in customary law in Indonesia.

This study emphasizes secondary data consisting of primary legal materials in the form of documented customary law provisions, secondary legal materials obtained from textbooks, journals, legal cases.^[9] The procedure for collecting legal materials is carried out through literature studies and document studies in accordance with the problems that have been formulated for further comprehensive review.

Results and Discussions

Mediation as an Alternative Dispute Resolution

Etymologically, the term of mediation comes from the Latin, *mediare* which means being in the middle. This meaning refers to the role played by third parties as mediators in carrying out their duties to mediate disputes between litigants. 'Being in the middle' also means that the mediator must be neutral and impartial in resolving cases. He must be able to safeguard the interests of the litigants in a fair and equal manner, so as to foster trust from the disputing parties^[10].

In Collins English Dictionary and Thesaurus, it is stated that mediation is an activity to bridge two disputing parties to produce an agreement^[11]. This activity is carried out by the mediator as the third party who helps find various alternative dispute resolutions. The position of the mediator in this case is to encourage the parties to reach agreements that can end the dispute. The mediator cannot force the parties to accept an offer to settle the dispute from one of the parties. It is all the parties who essentially determine what agreements they want. The mediator only helps find alternatives and encourages them to jointly participate in resolving disputes.

In the Big Indonesian Dictionary, the word of mediation is defined as the process of involving a third party in resolving a dispute as an advisor of mediator^[12]. The definition of mediation according to the Big Indonesian Dictionary contains three important elements. *First*, mediation is the process of resolving disputes or cases that occur between two or more parties. *Second*, the parties involved in the settlement of the dispute are parties from outside the litigants. *Third*, the parties involved in the settlement of the dispute act as advisors and do not have any authority in making decisions. This etymological explanation of mediation emphasizes the existence of a third party who bridges the litigation parties to resolve their disputes. This explanation is very important in order to distinguish it from other alternative forms of dispute resolution such as arbitration, negotiation, adjudication and others. The mediator's position is in the middle and is neutral to the litigants, and seeks to find a number of agreements so as to achieve results that satisfy the litigants.

This linguistic explanation is still very general and does not describe concretely the essence of mediation activities as a whole. Therefore, it is necessary to put forward some definitions of mediation in terminology from conflict resolution experts.

Laurence Bolle stated that, mediation is a decision of making process in which the parties are assisted by a mediator; the mediator attempt to improve the process of decision making and to assist the parties the reach an out come to which of them can assent^[13]. While J. Folberg and A. Taylor define mediation with "... the process by which the participants, together with the assistance of a neutral persons, systematically isolate dispute in order to develop options, consider alternative, and reach consensual settlement that will accommodate their needs"^[14]. The definition of mediation stated by the two experts above illustrates the essence of mediation activities and the role of the mediator as a third party. Bolle emphasized that mediation is a decision-making process carried out by the parties with the assistance of a third party as a mediator. Bolle's statement shows that the decision-making authority rests entirely with the parties, and the mediator only assists the parties in the decision-making process. The presence of a mediator is very important because he can help and make the decision-making process better, so as to produce an outcome that is acceptable to those who are litigating.

J. Folberg and A. Taylor put more emphasis on the concept of mediation on the efforts made by the mediator in carrying out mediation activities. These two experts state that dispute resolution through mediation is carried out jointly by the disputing parties and assisted by neutral parties. The mediator can develop and offer dispute resolution options, and the parties may also consider the mediator's offer as an alternative to an agreement in dispute resolution. The alternative settlement offered by the mediator is expected to be able to accommodate the interests of the disputing parties. Mediation can bring the parties to an agreement without feeling that any party is harmed (win-win solution).

Garry Goopaster defines mediation as a problem-solving negotiation process in which an impartial outside party cooperates with the disputing parties to help them reach a satisfactory agreement^[15]. Goopaster tries to further explore the meaning of mediation not only in terms of language, but he also describes the process of mediation

activities, the position and role of third parties, and the purpose of doing a mediation. Goopaster clearly emphasized that mediation is a negotiation process, in which a third party engages in dialogue with the disputing parties and tries to find a possible settlement of the dispute. The existence of a third party is intended to help the disputing parties find a solution, so that it leads to an agreement or agreement that satisfies both parties.

In mediation, dispute resolution arises more from the wishes and initiatives of the parties, so that the mediator plays a role in helping them reach agreements^[16]. In assisting the disputing parties, the mediator is impartial or impartial. The position of the mediator like this is very important, because it will foster trust which makes it easier for the mediator to carry out mediation activities. The non-neutral position of the mediator will not only complicate mediation activities but can lead to failure.

A rather broad definition of mediation is stated by The National Alternative Dispute Resolution Advisory Council. Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (a mediator), identify the dispute issues, develop options, consider alternatives and endeavor to reach an agreement. The mediator has no advisory or determinative role in regard to the content of dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted^[17].

This understanding of mediation can be classified into three important elements that are interrelated with each other. The three elements are; characteristics of mediation, the role of the mediator, and the authority of the mediator. The characteristics of mediation illustrate that mediation is different from various other forms of dispute resolution, especially with alternative dispute resolution outside the court such as arbitration.^[18] In mediation, a mediator plays a role in helping the disputing parties by identifying the issues in dispute, developing options, and considering alternatives that can be offered to the parties to reach an agreement. The mediator in carrying out his role only has the authority to provide advice or determine the mediation process in seeking dispute resolution. The mediator does not have the authority and decisive role in relation to the content of the dispute, he only maintains how the mediation process can run, so as to produce an agreement from the parties.

An agreement can be reached if the mediator is able to carry out negotiations between the disputing parties. Negotiations may take place between the disputing parties, or assisted by a third party as a mediator. In this regard, Christopher W. Moore asserts that mediation is an intervention to negotiation. He stated "... The intervention in a negotiation or conflict of an acceptable third party who has limited or no authoritative decision of making power, but assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute".^[19] This definition explains the relationship between mediation and negotiation, in the form of mediation as a form of intervention in negotiations carried out by a third party. The mediator has limited decision-making authority, and he only assists the parties in reaching an agreement for dispute resolution. Therefore, the existence of a mediator must be accepted by both parties who are neutral and impartial.

In Indonesia, a more concrete definition of mediation can be found in the Regulation of the Supreme Court of the Republic of Indonesia Number 02 of 2003 concerning Mediation Procedures in Courts. Mediation is dispute resolution through a negotiation process between the parties assisted by a mediator (Article 1 point 6). The mediator is a neutral and impartial party, whose function is to assist the parties in finding various possible dispute resolutions (Article 1 point 5).

The definition of mediation in the Regulation of the Supreme Court of the Republic of Indonesia No. 02 of 2003 is not much different from the essence of mediation put forward by conflict resolution experts. However, this understanding emphasizes one important aspect in which the mediator must proactively seek various possible dispute resolutions. The mediator must be able to find alternatives to dispute resolution. It is not only bound and focused on what the parties have in their dispute resolution. The mediator must be able to offer other solutions, when the parties no longer have an alternative dispute resolution, or the parties have experienced difficulties or even have a deadlock in their dispute resolution. This is where the important role of the mediator as a neutral third party in assisting dispute resolution. Therefore, the mediator must have a number of skills that can facilitate and assist the parties in resolving their disputes.

Mediation Practices in Customary Dispute Resolution in Indonesia

Dispute resolution is an effort to resolve and restore the relationship of the litigants to their original state. The settlement of disputes can be done in several ways, one of which is by involving a third party in the dispute resolution process to obtain an agreement between the litigants, where this third party acts as an advisor or mediator. This type of dispute resolution model is called mediation as described above.

The settlement of a criminal act that has been committed by a person can be resolved through the rules that have been established in the applicable laws and regulations, namely through the litigation process, which has been stipulated in the laws and regulations. The process that must be carried out in the settlement of criminal acts is through the investigation process at the police level, prosecution at the prosecutor's level and evidence at the court level^[20].

Although courts are formed by the state to resolve disputes that occur in Indonesian society, the courts are not the only institution in resolving disputes, because the conflicting parties do not always use the settlement mechanism in the judiciary (court level).

Dispute resolution needs to pay attention to the customary law that applies in the community. Because if customary law is still very strongly maintained in the community, then the customary law mechanism will be a determining factor for the success of dispute resolution. Van Vollenhoven, as quoted by Sudiman

Kartohadiprojjo, stated: "If the authorities decide to maintain customary law, even though that law has receded. Then the determination will be useless. On the other hand, if it has been determined from above that customary law must be replaced, while the people still obey it, even the judge is powerless must face it ^[21].

Dispute resolution through mediation mechanisms in Indonesian society through customary law can be described as follows:

First, dispute resolution through mediation in the Banjar community, known as the *Badamai* Customary. *Badamai* customary means as the deliberation process in joint discussion with the aim of reaching a decision as a solution to a problem. *Badamai* decision that was made through the mechanism of deliberation is an alternative effort in finding a way out to solve problems that occur in society. The Banjarese tend to settle disputes through *Badamai* customary. *Badamai* is recognized as effective in resolving disputes or disputes. At the same time to eliminate feelings of revenge ^[22].

Badamai is a term of dispute resolution, both civil and criminal in Banjar society. The Bapeace tradition in the settlement of criminal disputes is also known as the *Baparbaik* and the *Bapatut*. According to Ahmad Bahrni's research results from traffic accident data that occurred in Banjarmasin during 1995-2000 there were 43 cases of traffic accidents. A total of 25 traffic cases were resolved through *Badamai* customary. The resolution initiative was taken from the perpetrator or his family in 17 cases, the initiative was taken by the victim or his family in 5 cases, and the initiative was carried out by the police and the victim's family in 3 cases ^[23].

Second, dispute resolution through mediation in the Dayak community, known as the *Kedamangan*. East Kotawaringin Regional Regulation No. 15/2001 concerning *Kedamangan* and Pulang Pisau Regional Regulation No. 11/2003 concerning Institutional Establishment and Empowerment of Dayak Customs, requires that every *kedamangan* must have a *damang* as a leader. *Damang* and the holders form a Customary Council.

The main tasks of *demang* include overseeing the application of customary law and maintaining customary institutions, resolving disputes and violations of customary law, providing advice to local governments related to customary law, preserving and developing indigenous culture, promoting Dayak cultural values ^[24].

Third, dispute resolution through mediation in the Achenese, known as *Majelis Adat* (Customary Court). The customary court is an institution to resolve customary disputes based on applicable customary law, the parties who violate the provisions of customary law (material customary law) can be brought before a panel of customary judges for trial ^[25].

The practice of customary courts, apart from having been carried out for generations, is also strengthened by the recognition in the legislation, namely Law Number 11 of 2006 concerning the Government of Aceh. This law is further elaborated in its implementing regulations, through Aceh regional regulation No. 9 of 2008 concerning Fostering Traditional Life and Customs, Aceh's regional regulation No. 10 of 2008 concerning Customary Institutions, and Aceh Governor Regulation No. 60 of 2013 concerning Customary Dispute Resolution.

The authority of customary court in Aceh is regulated in Chapter XIII Article 98 paragraph (1) and paragraph (2) of the Law on the Government of Aceh (UUPA). Paragraph (1) states: "Indigenous institutions function and play a role as a vehicle for community participation in the administration of Aceh Government and district/city governments in the fields of security, peace, harmony and order". Meanwhile, paragraph (2) states: "Social problems are settled in a customary manner through customary court".

Disputes that can be resolved through customary courts include domestic disputes; disputes between families related to faraid (division of inheritance); disputes between communities; disputes regarding property rights; petty theft; disputes over marital property; theft of livestock; violation of customs regarding livestock, agriculture, and forests; disputes at sea, disputes in the market; forest burning; slander, incitement, and defamation; environmental pollution; threats; and other disputes that break the customs ^[25].

The granting of this authority to customary courts provides a great opportunity to contribute in resolving disputes that occur in the social community and reduces the number of cases that should be handled by formal courts. It is hoped that this will prevent a buildup of dispute cases. So that every dispute that occurs can be resolved according to the applicable customary law through mediation based on justice; truth; humanity; harmony; order and security; kinship; benefit; mutual cooperation; peace; and the public good.

Conclusion

Mediation is one of the alternative dispute resolution. The settlement of disputes can be done in several ways, one of which is by involving a third party in the dispute resolution process to obtain an agreement between the disputing person, where this third party acts as an advisor or mediator. This type of dispute resolution model is called as mediation. Dispute resolution through mediation mechanisms in Indonesian society can be resolved through customary courts that applied in the society. Settlement of disputes in the Banjar community is known as *Badamai* Customary, in the Dayak community known as the *Kedamangan*, in the Achenese known as *Majelis Adat* (Customary Court). The granting of this authority to customary courts provides a great opportunity to contribute in resolving disputes that occur in the social community and reduces the number of cases that should be handled by formal courts. It is hoped that this will prevent a buildup of dispute cases.

References

1. I Ketut Artadi dan Dewa Nyoman Rai Asmara Putra, *Pengantar Umum Tentang Alternatif Penyelesaian Sengketa dan Perancangan Kontrak*, Denpasar: Fakultas Hukum Universitas Udayana, 2009.

2. I Made Agus Mahendra Iswara, “Peranan Mediasi Penal dalam Menyelesaikan Tindak Pidana Kekerasan dalam Rumah Tangga (KDRT) di Polresta Denpasar”, Thesis, Fakultas Hukum Universitas Udayana, Denpasar, 2011.
3. Ahmadi Hasan. “Penyelesaian Sengketa Melalui Upaya (Non-Litigasi) Menurut Peraturan Perundang-Undangan” dalam Jurnal Al-Banjari, 2007, 5(9).
4. Sudargo Gautama. “Penyelesaian Sengketa Secara Alternatif (ADR)”, dalam Hendarmin Djarab, *et al.*, (Editor), Prospek dan Pelaksanaan Arbitrase di Indonesia Mengenang Alm. Prof. Dr. Komar Kantaatmadja, S.H., LL.M., Citra Aditya Bakti, Bandung, 2001.
5. *Ibid.*
6. Teuku Muttaqin Mansur M, Adli Abdullah, dan Sulaiman. *Kajian Yuridis Peradilan Adat di Aceh*, Journal of Indonesian Adat Law (JIAL), 2018, 2(3).
7. Putra Aguswandi. *Penyelesaian Tindak Pidana Melalui Peradilan Adat di Aceh*, AL-AHKAM: Jurnal Syari’ah dan Peradilan Islam, 2021, 1(2).
8. Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana, 2005.
9. Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif*, Jakarta: Rajawali, 2010.
10. Syahrizal Abbas. *Mediasi Dalam Perspektif Hukum Syariah, Hukum Adat, dan Hukum Nasional*, Jakarta: Kencana, 2009.
11. Lorna Gilmour, Penny Hand, dan Cormac McKeown. (eds.), *Collins English Dictionary and Thesaurus*, Third Edition, Great Britain: Harper Collins Publishers, 2007. Lihat juga Martin H. Manser, *Oxford Learner's Pocket Dictionary*, New Edition, Oxford: Oxford University Press, 1995.
12. Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia*, Jakarta: Balai Pustaka, 2016.
13. Laurence Bolle. *Mediation: Principles, Process, and Practice*, New York, 1996.
14. J. Folberg dan A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation*, Cambridge: Cambridge University Press, 1984.
15. Gary Goopaster. *Negosiasi dan Mediasi: Sebuah Pedoman Negosiasi dan Penyelesaian Sengketa Melalui Negosiasi*, Jakarta: ELIPS Project, 1993.
16. Allan J Stitt. *Mediation: A Practical Guide*, London: Routledge Cavendish, 2004.
17. David Spencer dan Michael Brogan, *Mediation Law and Practice*, Cambridge: Cambridge University Press, 2006.
18. Arbitration is a way of resolving disputes out of court, based on an arbitration agreement made by the parties, and carried out by an arbitrator who is selected and authorized to make decisions.
19. Christopher W Moore. *The Mediation Process: Practical Strategies for Resolving Conflict*, San Francisco: Jossey-Bass Publisher, 1996.
20. Putra Aguswandi. *Penyelesaian Tindak Pidana Melalui Peradilan Adat di Aceh*, AL-AHKAM: Jurnal Syari’ah dan Peradilan Islam, 2021, 1(2).
21. Sudiman Kartohadiprojo, *Hukum Nasional, Beberapa Catatan*, Bandung: Binacipta, 1971.
22. Ahmadi Hasan. “Penyelesaian Sengketa Hukum Berdasarkan Adat Badamai pada Masyarakat Banjar dalam Kerangka Sistem Hukum Nasional”, Disertasi, Pascasarjana FH UII, 2007.
23. Ahmad Bahruni. “Penyelesaian Tindak Pelanggaran Lalu-Lintas Secara Kekeluargaan, sebuah Tinjauan Menurut Hukum Islam dan Hukum Positif”, dalam Ahmadi Hasan, “Penyelesaian Sengketa Hukum Berdasarkan Adat Badamai pada Masyarakat Banjar dalam Kerangka Hukum Nasional”, Disertasi, Pascasarjana S3 Program Doktor Ilmu Hukum, Universitas Islam Indonesia, 2007.
24. Peri Umar Farouk, *et al.* *Kembali ke Masa Depan: Otonomi Daerah dan Kebangkitan Adat yang Tidak Pasti*.
25. Teuku Muttaqin Mansur, Adli Abdullah M, dan Sulaiman. *Kajian Yuridis Peradilan Adat di Aceh*, Journal of Indonesian Adat Law (JIAL), 2018, 2(3).