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Themes

*Engaging Science, Technology and Culture
to Accelerate the Achievement of A Sustainable Development*



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Mediation as Means to Develop Civilized Society and Social Relationship

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Abstract

Tempus Mutantur, et nos mutamur in ilid, time always change and so do we. This term is exactly describes the condition of social change. The change is not only about social relation, but also changes in way of thinking and the way people reach their goals. One of those is receiving rights or defending their interest. Related to the aims, nowadays society's members tend to choose litigation that is supposed to be able to give legal certainty, but in the other side, litigation not always gives satisfaction. Each party in a dispute will do everything to reach their goals, with legal ways or even illegal ways. Those ways are potentially grow collusion or graft that makes legal apparatus became worse morally. Based on the facts, people chose mediation rather than litigation. Mediation comes from Latin words, "mediare" that means "in the middle of". The word refers to the third party's position as mediator in his duty to mediate and to settle the dispute between parties. Benefits of mediation are: reputation of each party will be secured, and the most important thing, relationship between each party can be maintained. The principles such as secrecy, voluntary, empowerment, neutrality, and unique solutions, are mediation principles that is not recognized by judicature system. Hopefully, with mediation society will develop in civilized way, society gives priority to civilized values. With mediation, illegal practices that have been done in judicature system can be reduced.

Keywords: mediation, litigation, civilized society , social relationship.

1. Introduction (Mediation as a Form of Alternative Dispute Resolution)

Conflict resolution in the society basically can be solved in many ways or procedures, this is depending on the ultimate goal of the parties in conflict. Trends of conflict resolution in today's society still leads to the litigation. The litigation is the path taken through a formal court. People tend to choose this path because this path

considered able to give legal certainty related due to the decision of the judge which is independent and incontestable. But on the other hand, dispute resolution through the litigation can not fully able to provide satisfaction, considering through this pathway the parties in conflict will use various methods so that what is expected can be realized although in an illegal way. This leads to the moral decrease of the law enforcement and even trigger the growth the practices of collusion and bribery. In addition, the litigation process produces decisions which not able to accommodate the common interest, tends to cause new problems, slow in its completion, the cost is expensive and there are indications to trigger hostility between the conflict parties, so that people would prefer to solve their problem out of court or choose alternative way. Based on this the alternative pathway of dispute resolution introduced and developed in the community, one of them is non-litigation dispute resolution path.

In Indonesia there are several alternative methods of dispute resolution, namely: negotiation, conciliation, arbitration and mediation. **Negotiation** is a process of communicate, which is utilized to meet our needs, especially when our opponent possess what we want. **Conciliation** is a process of resolving disputes where the parties in conflict utilize the help of independent third parties which act as consiliator (mediator), consiliator has authority to make recommendations. Therefore the result of its decision is just a suggestion. **Arbitration** is a way of resolving a civil dispute outside the general litigation based on the arbitration agreement made written by the parties in conflict. While, the **Mediation** is a dispute resolution process, which the parties in conflict utilize the help of independent third parties to act as a mediator (mediator), where the Mediator has no authority to make binding decisions, but the disputing parties. they are encouraged to make a decision. In consequence, a form of its settlement is an act of peace between the parties in disputes.

In principle, the goal of mediation is to resolve dispute between the parties by involving a third-party, who neutral and impartial. Mediation can deliver to the implementation of the peace agreement, that permanent and sustainable, considering the resolution of disputes through mediation put both sides on the same position, neither won or defeat. On the implementation of the mediation, the parties in conflict must be proactive and they have a full Authority to make decision, they are just assisted by a mediator, who only helps in order to keep the realization process of the peace agreement in the right track. Dispute resolution through mediation can be really useful,

because the parties can reach an agreement, which put an end to their disputes, fair and mutually. Even in mediation, where the parties have failed to reach an agreement, should be felt its benefits.

Dispute resolution is hard to resolved, but it doesn't mean that it's impossible in reality to achieved. The major key of the dispute resolution is the willingness and a good faith to end conflicts. These often require third party assistance in the realization. Mediation is one form of dispute resolution involving a third party. The other advantages are obtained by taking the path of mediation, namely:

1. Mediation is expected to resolve disputes quickly and relatively inexpensive compared to the dispute to court or arbitration institutes.
2. Mediation will focus its attention at the real interests and even at the emotional or psychological needs each of the parties. That is a manifest, that mediation is not just focused on personal legal rights.
3. Mediation gives the parties an opportunity to participate directly and informally to resolve their disputes.
4. Mediation gives the parties the ability to control the process and result of their dispute resolution.
5. Mediation can change the result, which in litigation and arbitration is difficult to predict, with certainty by consensus.
6. Mediation gives results that stand the test and able to create a better mutual understanding among the parties in conflicts, because they decided on their own.
7. Mediation is able to eliminate the conflict or hostility that nearly always accompanies every decision made by a judge in a court or arbitrator in the arbitration institution.¹

Based on the description above, mediation can be called as a win-win solution for the parties to the dispute. Generally, this win-win solution statement comes not from the settlement itself, but from the fact that this settlement enables both parties to put the dispute behind them.

¹ Syahrizal Abbas, Mediasi. Jakarta. Kencana. 201. hlm 25-26.

According to **Ruth Carlton** there are five principles of mediation. **The first principle** is the secrecy or confidentiality. Confidentiality is intended that everything that happens in a meeting organized by the mediator and the parties to the dispute should not be released to the public or the press. **The second principle**, is a volunteer (voluntary) principle. Each of the parties come to mediation on their own will and is voluntary with no pressure from another parties or outsiders. **The third principle**, empowerment. This principle is based on the assumption that people who want to come to mediation actually have the ability to negotiate their own problems and can reach an agreement by themselves. **The fourth principle**, neutrality. In the mediation, the role of a mediator is just facilitates the process alone, its contents remain the property of the parties to the dispute. **The fifth principle**, a unique solution. That the result of the solution from the mediation process should not be in accordance with legal standards, but can be generated from the process of creativity (derived from the desire of both parties).²

2. Meaning and Models of Mediation in Effort of Dispute Resolution

Etymologically Mediation is derived from the Latin, means at the center. This is more emphasized to the duties of the third-party mediator to mediate and resolve disputes between the conflict parties.

J. Folberg and A. Taylor interpret mediation by:

*“ The process by which the participants, together with the assistance of neutral persons, systematically isolate dispute in order to develop options, consider alternative, and reach consensual settlement that will accomodate their needs. ”*³

The Meaning of Mediation described above describes more the essence of mediation in activities and the role of mediator as a third party. Another opinion expressed by **Garry Goopaster** which gives another definition of mediation:

*"The process of problem-solving through negotiation, which an impartial person involved in cooperation, due to help the dispute parties obtain the satisfactory agreement. "*⁴

² Syahrizal Abbas, Mediasi. Jakarta. Kencana. 201. hlm 28-30

³ J. Folberg dan A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation*. Cambridge University Press, hlm 7.

⁴ Gary Goodpaster. *Negotiating and Mediating*. Jakarta: Elips Project, 1993, hlm. 247.

While **The National Alternative Dispute Resolution Advisory Council** gives limit about the mediation:

“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 endeavour 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.”⁵

Christopher W. Moore asserts that mediation is the intervention of the negotiations:

*“The intervention in a negotiation or conflict of an acceptable third party who has limited or no authoritative decision making power, but assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.”*⁶

This definition describes the relation between mediation and negotiation, mediation as a form of intervention of negotiations performed on a third party.

Practically mediation can be grouped into several models. According to Lawrence Boulle, it can be divided into 4 (four) parts:

- **Settlement Mediation** known as the compromise mediation. Its purpose is to establish a compromise of the claims of both parties in conflict.⁷
- **Facilitative Mediation**, also known as interest-based mediation or problem solving that aims to prevent the disputing parties of their position and negotiate their needs and interests of their legal rights in a stiff way.⁸
- **Transformative Mediation**, also known as therapeutic mediation or reconciliation. This model of mediation emphasizes to find the causes of disputes between the parties, considered to improve the relation between them through

⁵ David Spencer dan Michael Brogan, *Mediation Law and Practice*, Cambridge: Cambridge University Press, 2006, hlm.9.

⁶ Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass Publisher, 1996, hlm 15.

⁷ Syahrizal Abbas, *Mediasi*. Jakarta. Kencana. 2011. hlm 31-35

⁸ Allan J. Stitt, *Op.cit.*, hlm.2.

recognition and empowerment as a basis of conflict resolution of existing disputes.

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- **Evaluative Mediation**, also known as normative mediation is a model of mediation that aims to seek agreement based on the legal rights of the parties to the conflict in the region that anticipated by the court.¹⁰

Based on some definition of mediation above, it can be concluded that essentially mediation emphasize the existence of an agreement or compromise among the parties to the dispute through a neutral intermediary, who help to dig the causes of conflict and accommodate the needs and wishes of the parties. Considered to the create a social relationship, that flexible and not rigid in the future.

3. Regulation of Mediation in the Positive Law of Indonesia

Basically, the legislation in Indonesia has provided meaning of mediation. It is stated in Article 1, point 7 of the Supreme Court Regulation No. 1 2008 explains that mediation is a way of resolving dispute through the negotiation process to obtain the agreement of the parties with assistance of a mediator.

Mediation is a dispute resolution process that is faster and cheaper, and can provide greater access to the parties to find a satisfactory resolution and sense of fairness. Integrating mediation into the court process may be one of the effective instrument to overcome an accumulation of a proceeding in a court of law, to strengthen and maximize the function of courts in resolving disputes in addition to litigation (ajudikatif). On the other hand, the procedural law, both Article 130 HIR and Article 154 RBG, encourage the parties to pursue the peace process, that can be intensified by integrating the process of mediation to the court procedures.

Implementation of mediation in the Court, essentially has been accomodated in Article 4 and Article 7 Regulation of the Supreme Court of the Republic of Indonesia No. 1 of 2008, which states that all cases proposed to the First Instance Court shall first attempted through mediation except commercial matters, judicial industrial relations and objections to the decision of BPSK and

⁹ Robert A.Baruch dan Joseph P.Folger, The Promise of Mediation; Transformative Approach to Conflict, USA: Willey, 2004, hlm.41.

¹⁰ Allan J. Stitt, Op.cit., hlm.2.

KPPU, where mediation obliged on the first day or the first trial attended by the parties. From the perspective agents of mediation, the mediation in Indonesia can be categorized into two forms, namely mediation held at the justice court, known *as court mandated mediation* and mediation outside the courts. Formally, the non-judicial mediation based on Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.

Arbitration Institute in this legislation is discussed completely in 80 chapters, while the alternative dispute resolution is only mentioned in two articles, namely Article 1 point 10, Article 6, which consists of nine verses. Article 1, point 10 states that Alternative Dispute Resolution is an agency to solve disputes or differences of opinion through procedures agreed by the parties, namely the settlement out of court through consultation, negotiation, mediation, conciliation or assessment from experts. Under these provisions, mediation is an alternative dispute resolution. Although mediation clearly mentioned, but its meaning and other alternative dispute resolution institute is not explained, because is considered clear enough according to the explanation of these laws mentioned above.

4. The Role of Mediation in the Frame of Human Development and Social-Civilized Relation

Development can be defined as a coordinated effort to create more legitimated alternatives for every citizen to fulfill and achieve their most humane aspirations.¹¹ The first theme is the coordination, which implies to a need for a planning activity, which previously discussed. The second theme is to create an alternative that more legitimately. This may imply that development should be oriented to diversity to all aspects of life.

Its mechanism requires the creation of institutions and laws that are trusted to play a role, that efficient, transparent and fair. The third theme is to achieve the most humane aspirations, which means that development must be these oriented: solving problems, building moral values and ethic of the people.

¹¹ <http://profsyamsiah.wordpress.com/2009/03/19/pengertian-pembangunan/>

Existing development in Indonesia clearly mentioned in Article 2, paragraph 3 in the Constitution of 1945 which states that the development of our country based on economic democracy, of course it only means explicitly, but in the formulation of the Constitution of 1945 and Pancasila as well contained more deeply about the meaning of mentioned development, namely that development must be based on all the elements / subsystems in the country. Nowadays, one of the real form of development is mediation. Mediation is a fast reaction, on the contrary the institution of litigation (formal court lines) is not able to handle directly and comprehensively with the parties to the dispute, and to handle an illegal culture in the environment of law enforcers as well. Satisfactory settlement of the dispute can only be reached by way of deliberation to reach a consensus. This is a basic concept for the implementation of mediation as an alternative form of dispute resolution.

Deliberation to reach a consensus is the philosophy of the Indonesian people in any decision-making, including in efforts to resolve the dispute. Consensus agreement as the basic philosophy of the nation is reflected in Pancasila. In the four precepts of Pancasila democracy mentioned, “kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan dan perwakilan.” democracy led by wisdom of deliberation and representation.” These highest value is then defined in the basic Constitution of 1945 and some regulations under it.

Deliberation to reach a consensus is the basis to find solutions to the disputing parties to resolve their disputes outside of court. Indigenous peoples who still exist in Indonesia such as Kampung Naga society, still put forward the principle of deliberation to reach agreement, in order to solve conflicts of its citizens. Mediation brings many advantages. It makes Indonesias citizens more civilized by putting forward values of morality to resolve disputes. Compared to knock down each other with justify a variety of negative ways.

5. Conclusion

Mediation is a form of alternative dispute resolution outside the court mechanism as a form of the paradigm transformation, that aims to compromise the needs and interests of the parties. Mediation is expected to create a way more social and civilized community. It leads local people to put forward the values of deliberation

to reach a consensus. In addition, by choosing the path of mediation, bad practices in courts can be minimized. This is in accordance with the ideals of our country based on the philosophy of Pancasila, kemanusiaan yang adil dan beradab, fair and civilized community. Deliberation as a fundamental concept of mediation has a good purpose. It avoids the parties in dispute to do criminal activity or violence and provides the good relation between continuously and sustainability.

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