

# MEDIATION AND THE SEARCH FOR JUSTICE THROUGH LOCAL WISDOM

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# MEDIATION AND THE SEARCH FOR JUSTICE THROUGH LOCAL WISDOM

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## ABSTRACT

*The special characteristic of Indonesian society is multicultural and vulnerable to horizontal violent conflict, so a separate solution is required. The problem of realizing substantive justice in civil cases is due to the principle of proof, the truth that the judge seeks and embodies is sufficient the formal truth. The type of research is normative legal research by using historical, comparative, and conceptual approaches. The results show that the local wisdom is different for each region which is manifested in the form of messages, actions, behavior and man-made objects, the existence of local wisdom cannot be separated from the condition of the Indonesian people, as a nation consisting of several tribes and customs. This affects the applicable law in Indonesia so that not only written law applies but also unwritten law.*

**Keywords:** Local Wisdom, Mediation, Substantive Justice

## INTRODUCTION

A verdict of judge that reflects substantive justice can be assessed from several aspects, including a basis for jurisprudence that is referred by the judge in making legal considerations, the existence of a doctrine or theory is used as the basis for legal considerations by the panel of judges and the judge explores the legal values that live in the community.<sup>1</sup> In terms of exploring the legal values that live in the community because of the existence of living law, this is a very fundamental thing in the field of law is legal independence in the sense that law is the legitimacy of desires or values (Abdul, 2013). Those who live and grow in a legal community that accommodate the wishes of the community will become laws that fulfill the principles of justice, benefit and legal certainty.<sup>2</sup> The problem of realizing substantive justice in civil cases is due to the principle of proof, the truth that the judge seeks and embodies is sufficient the formal truth (formeel waarheid) of himself and the judge' innermost body, and conviction is not required. The parties in a case can submit evidence based on lies and falsehoods, however, such facts should theoretically be accepted by the judge to protect or defend the individual rights or civil rights of the parties concerned.<sup>3</sup>

In Sukarno Aburaera's research, it was concluded that the value of justice in civil dispute resolution mechanisms through courts has not been optimally actualized due to a lack of understanding of the substance of judicial principles in case examination by judges.<sup>4</sup> The principles of justice are in the form of justice carried out for justice based on God Almighty, simple, fast and low cost, openness, equality of position and treatment of the parties, the passive and active attitude of judges, panel judges (Abrar, 2004). If it is implemented properly according to its substance, the value of justice already exists in the civil dispute resolution mechanism at the court.<sup>5</sup>

Mediation as a method of dispute resolution which is expected to provide access to justice for the disputing parties can be done in court and outside the court either with or without a certified mediator, so that the registration of a lawsuit will no longer increase in court. Marc Galanter stated "justice in many rooms", that justice for society does not only exist and is

produced in court courtrooms or in positive legal settings, or more often we know procedural justice but justice for society also exists and can be produced in outside the court. This justice is obtained through the process and social interaction of the community. Justice based on the values, norms and morality of the local community. The community has its own procedures and mechanisms for resolving any conflicts that arise.<sup>6</sup>

The provision of out-of-court mediation keeping in mind that mediation is not something new in Indonesian society known as deliberation<sup>7</sup> but along with the times, dispute resolution in Indonesian society is slowly starting to be influenced by western culture which emphasizes that dispute resolution must be pursued through court, as a result the cases received by the Supreme Court have increased every year. In 2018 it increased by 10.65% compared to 2017, the case burden of the Supreme Court in 2018 increased by 3.82% compared to 2017 which amounted to 17,862.<sup>8</sup> The number of civil cases received by the District Courts throughout 2018 was 106,181 cases, an increase of 22.66% compared to 2017 which received 87,274 cases. Civil cases (lawsuits and applications) received by the Religious Courts increased by 7.50% compared to 2017 which received 516,572 cases.<sup>9</sup> This shows that the disputing parties prefer to settle their disputes in court (Djamanat, 2013).<sup>10</sup>

Based on the explanation above, it can be seen that mediation has not been the choice of the disputing parties even though mediation is a long-lived process in society and is supported by local wisdom (Elim, 2019), with mediation the parties can obtain justice but mediation for some parties still considers mediation only because mediation is imperative then they go through the process so that often the mediation fails to take place.<sup>11</sup> Therefore, a further research and study on mediation is needed to realize substantive justice through local wisdom (Firman, 2017).

## METHOD OF RESEARCH

The type of <sup>12</sup> research is normative legal research by using historical, comparative, and conceptual approaches to analyze regulations related to mediation in relation to local wisdom values (Imam, 2016). It was conducted in West Nusa Tenggara and South Sulawesi Provinces, Indonesia. Determination of the population and sample was done using purposive sampling technique, while the parties who resolved disputes in court that carried out the mediation process were conducted by using incidental sampling (Muhammad, 2018).

## INTERNALIZATION OF LOCAL WISDOM VALUES IMPLEMENTED IN MEDIATION PROCESS TO ACHIEVE JUSTICE

<sup>2</sup> Good law is a law that lives in society. According to Erlich, it is said that a living law is therefore not something that was added from outside historically. It is precisely something that is existential in the life history of a society. Laws are manifested and expressed in their own behavior.<sup>12</sup> In relation to Eugen Erlich's theory, such law is a customary law which is a living law.<sup>13</sup> The life of customary law communities is different from one another, they live and form a legal system that only applies to their community (Hussain, 2020). Werner Menski uses three types of law that are plural in nature, namely laws created by society, laws created by the State and laws that arise through values and ethics. The theory of Werner Menski is law created by the community, so this is where customary law exists with local wisdom in different regions but has the same values contained in the local wisdom. Local wisdom values are implemented in the dispute resolution process. The power of conflict resolution based on local wisdom (customary law), one of which is pursued through mediation, can be found in 3 (three) aspects.<sup>14</sup> The first, to resolve conflicts is an initiative of the parties arising from personal will because of the desire to live in peace, serenity desired by the traditional community (Hussain, 2021). The second, the conflict that occurs can disturb communal interests so that the social feeling that hurts is not only felt by conflicting individuals so that the roles of traditional leaders, religious leaders and community leaders are needed to relieve the pain caused by the conflict. The third, mediation

conducted by traditional communities<sup>15</sup> cannot be separated from the religious and cultural values that animate the community (Hussain, 2020).

### Value of Honesty

The process of mediation requires the parties to prioritize honesty before the negotiation and peace agreement stages. Honesty is born from within humans which is inner attitude of the disputing parties.<sup>16</sup> The value of honesty is a fundamental thing in the process of mediation, honesty is reflected and manifested through recognition of the object of the dispute. In line with the theory of **Triangular Concept of Legal Pluralism**, one type of law is law that arises through values and ethics.<sup>17</sup> The value of honesty in local wisdom is reflected in Kajang customary law community (Patittingi, 2020). The government system of Kajang customary community is led by Ammatoa.<sup>18</sup> Ammatoa's leadership period is lifelong so that the appointment of a replacement Ammatoa will be done after Ammatoa's previous death, the appointment also takes 3 (three) years.<sup>19</sup> Before dying, Ammatoa will appoint a Puto' is seen as the most qualified to replace him, and receive the title Amma-Lolo (temporary officer of Ammatoa). Since then, the person concerned will undergo several stages of the evaluation process, before being officially confirmed as Ammatoa (Quraish, 2003). This stage took 3 years, during which Amma-Lolo was not allowed to leave the customary area and continued to master his mastery of Pasang, under the guidance of Amma' Galla or Galla Puto.<sup>20</sup>

The life of Kajang customary law community is bound by value system of pasang ri kajang,<sup>21</sup> which is a principle of life that is a must and an obligation to be implemented. Pasang ri kajang Patuntung manuntungi, Manuntungi kalambusanna na kamase - maseanna, Lambusu', Gattang, Sa'bara nappisona which means humans who have<sup>22</sup> lived and implemented what they demand in the customary area (Ammatoa) which demands honesty, patience, firmness, modesty and submission in his life.<sup>22</sup> In living life in the traditional area of Kajang, there are 3 (three) things that must be upheld, namely honesty, common sense, and should not make a single rule.<sup>23</sup> Based on Pasang ri Kajang that honesty is a value that must exist in the customary law community of Kajang in living their lives so that when a dispute occurs and resolved it must honestly acknowledge the object of the dispute (Sakharina, 2020), because it is believed that the guilty party and do not admit the mistake will get punishment until his descendants also get the punishment.<sup>24</sup>

The value of honesty is also reflected in the culture of Malongko in Toraja community in relation to dispute resolution can be interpreted as ashamed to admit that it is not his/her right.<sup>25</sup> Longko' does not only include shame and self-esteem but also tolerance, which is about the need for a person to be polite and respectful not to embarrass others, one should not embarrass others because it will embarrass oneself (Sukarno, 2004). Tae'na dibatang dallei tu tau (the words should not be naked like a corn stalk), which means that it is not polite to say something openly to someone if it can hurt or embarrass the person.<sup>26</sup>

The value of honesty is also reflected in the local wisdom of Lombok's people which is symbolized by the words danta (elephant ivory), danti (saliva), kusuma (flower), warsa (rain) which means every words spoken or promises made must be kept and defended strongly like the ivory of an elephant which when it has come out will not enter again, if it spits it will not be licked again (Syamsuddin, 2014), as if it will not bloom twice and the rain if it has come down will not come back up, so sesenggak that states sampi betali isiq pepit, manuse betali isik raos which means cows are tied with a rope while humans are tied with words. This shows the importance of honesty in Sasak indigenous society which is reflected from the words that cannot be denied.<sup>27</sup> This is the reason why the peace agreement made in Bale Mediation as a dispute resolution agency through mediation in Lombok is not strengthened in the form of the Peace Act because the parties trust each other to do their obligations on the peace agreement that has been made (Supriadi, 2008).

### Value of Togetherness

Values created in consensus deliberation on the mediation process. Mediation will be successful when the parties lower their egos and sit together to think (Umar, 2017), formulate an agreement on the object of the dispute. In the community of Ammatoa Kajang, dispute resolution is done by first conducting A'borong which is attended by all Galla,<sup>28</sup> this aims to discuss the sanctions that will be imposed on the disputing parties.<sup>29</sup> The sanction that has been decided by Ammatoa and all Galla present will be conveyed to the parties and question their ability to the sanction in the form of a fine if there is an inability then the family must participate in the payment of the fine (Umar, 2011). After that, there will be a procession of anyekko.<sup>30</sup>

The philosophy of life of Tallu Lolona for indigenous people Toraja, which means that there are 3 (three) important things in this life:

- a) Lolo Tau (Human)
- b) Lolo Patuoan (Animal)
- c) Lolo Tananan (Plants)

Philosophy of Tallu Lolona, three life must respect and cherish each other, the philosophy of lolo tau is a philosophy which views a harmonious relationship between humans that reflects the highest human values, namely kindness, sincerity, and generosity that comes from him/his, towards others, ancestors, spirits and natural surroundings, Toraja peoples are always careful in their daily behavior and ritual behavior.<sup>31</sup> The philosophical meaning of Tallu Lolona means that fellow living beings must always live side by side in harmony.<sup>32</sup> This philosophy of life, if applied in everyday life (Yahya, 2008), will reduce the occurrence of conflict, especially considering that the Toraja community is a society with a very well-maintained kinship so that sometimes disputes that occur in the Toraja community are disputes between families, especially land disputes.<sup>33</sup> In Toraja community, disputes are resolved in Tongkonan,<sup>34</sup> which is a building for gathering and deliberation to discuss a problem led by the customary council.<sup>35</sup>

In Toraja community, Tongkonan is not just a building but it is a family tree for Toraja people to find out who their ancestors were by tracing who was the founder of Tongkonan and then starting to trace their children and grandchildren to the present. The kinship of Toraja people was very well preserved from the very beginning (Yunus, 2020). The lineage of Toraja family can be seen based on Tongkonan, which is unique in its own right, compared to other tribes in Indonesia.<sup>36</sup>

The people of Lombok island resolve disputes outside the court through krame gubug and krame desa which are conducted in berugak,<sup>37</sup> just like Tongkonan in Toraja which is not only a symbol of the building, Berugak is also a place for a more relaxed and open mediation disputing and litigant can resolve their problems peacefully with a broad and open view in terms of their thoughts.<sup>38</sup>

### **Value of Spiritual**

Kajang customary community is Muslim although in its implementation there are many things that are different from Islamic law.<sup>39</sup> Belief in Turi'e A'ra'na is a conception of God in the teachings of pasang. Based on the belief of Kajang customary community towards Turi'e A'ra'na that the orders or mandates and prohibitions from Turi'e A'ra'na will be conveyed to a human who has the privileges and advantages that are mentioned by Kajang community Ammatoa so that not all people can be appointed as Ammatoa.<sup>40</sup> Based on pasang, there are several basic requirements that must be met by Ammatoa candidate in character and behavior including<sup>41</sup> Sabbarapi na guru (patience of a teacher), Pesonapi na sanro (the charm of a teacher), lambusupi nakaraeng (honesty of a king), Gatangpi na ada' (firmness in maintaining customs). The values of patience in pasang ri kajang in sabbarapi na guru (patience of a teacher)

are linked to the mediation process referring to the mediator as a third party who helps the parties to solve problems.<sup>42</sup>

If patience is not possessed by a mediator, it will be difficult for to lead the process of mediation, because he/she faces the disputing parties by listening to the issue from the point of view of both parties, trying to reduce the ego of the two disputing parties and of course not getting involved emotionally in the dispute to be resolved. *Gatangpi na ada'* (firmness to maintain adat) contains the value of a mediator' firmness in the mediation process, the mediator must be firm to order the parties to be present at the mediation process even though they are represented by their attorney, as well as the parties present if the presence of a lawyer is not required, then the attorney There is no need to enter the mediation room, the condition is that a lawyer is required to be present if the assisted party cannot properly explain the dispute and it is difficult to understand the mediator' explanation.<sup>43</sup>

Sasak people cannot be separated from one of the basic trinitarian patterns, namely "epa aik" as the owner who has power over all the origins of natural and human occurrences.<sup>44</sup> The majority of the people of Lombok, especially Sasak are Muslim, place customary sitting above religious orders, adat should not conflict with religion. Religion cannot speak while customary speech is inappropriate,<sup>45</sup> so that in the settlement of disputes in the Lombok community, especially the Sasak people, mediation is placed as a dispute resolution in Bale mediation by taking several approaches, one of which is the Religion approach (Zuhri, 2017). So before discussing the subject of the dispute, the parties must first be given advice regarding the dispute and its resolution from the point of view of Islamic teachings.<sup>46</sup>

## CONCLUSION

Local wisdom is different for each region which is manifested in the form of messages, actions, behavior and man-made objects, the existence of local wisdom cannot be separated from the condition of the Indonesian people, as a nation consisting of several tribes and customs. This affects the applicable law in Indonesia so that not only written law applies but also unwritten law. The process of modernization changed the perspective of most people to resolve their disputes in court to seek justice, before mediation was regulated in a regulation of Supreme Court, the practice of mediation was done by the community known as *deliberation* which was based on the customs or customary law of an area through local wisdom. This local wisdom can be used as a socio-cultural mechanism that is contained in the traditions of Indonesian society. This tradition is believed and has proven to be a powerful means of building brotherhood and solidarity among citizens who have institutionalized and crystallized in the social and cultural order.

## ENDNOTES

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6. Umar, S. (2011). *Law & community justice sociological perspective of law*. Setara Press: Malang, p. 23
7. The word "deliberation" is taken from the word sy-w-r which originally meant to extract honey from the hive. This meaning then develops, so that it includes everything that can be taken or removed from others (including opinions). It can also mean saying or proposing something. Basically, the word deliberation is only used for good things, in line with its basic meaning. See M. Quraish Shihab, 2003, *Wawasan Alquran Tafsir Maudhu'i atas Opelbagai Persoalan Umat*, Mizan : Bandung.
8. Annual Report of Supreme Court, 2018. p.64

9. 141, p. 114
10. Abidin Nurdin, Revitalisasi Kearifan Lokal Di Aceh : Peran Budaya Dalam Menyelesaikan Konflik Masyarakat, Analisis Volume XIII, No 1, 2013, p. 136.
11. Hussain, S., Ahmad, N., Quddus, A., Rafiq, M., Pham, T. P., & Popesko, B. (2021). Online Education 4.0 adopted by the Students of Business Science. *Academy of Strategic Management Journal*, 20, 1-14.
12. Bernard L. Tanya, et.al, 2013, Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi, Genta Publishing: Yogyakarta, p. 128.
13. Customary law as the living law is a pattern of social life in which the law is a process and is also the result of a social process which is the source and basis of that law, customary law as a living and growing law is a social process based on the legal awareness of the community. Customary law as living law, but as a complement to national law, is called unwritten law, which does not reduce its role in delivering the distribution of habits, interests that are not stated in written law. Djamanat Samosir, 2013, Hukum Adat Indonesia (Eksistensi Dalam Dinamika Perkembangan Hukum Di Indonesia), Nuansa Aulia : Bandung, p. 3.
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17. Ethics is used in the sense of moral values and norms that are used by a person or group in regula 19 their behavior, meaning it can also be called a value system in individual human life or social life. (Supriadi, Etika & Tanggungjawab 5) ofesi Hukum Di Indonesia, 2008, Sinar Grafika : Jakarta, p. 8)
18. The provisions of Local Regulation No.9 of 2015 concerning the Affirmation, Recognition of the Rights 11 and Protection of the Rights of Ammatoa Kajang Customary Law Community that Ammatoa is a person who is a symbol of the order of Kajang customary community. 6
19. Interview with the Chief of Ammatoa Kajang, on 11 November 2020
20. Umar Congge, Supardi, 2017, Peran Lembaga Adat Ammatoa Dalam Mempertahankan Adat Istiadat Kajang Kabupaten Bulukumba, *Jurnal Ilmiah Administrasita'*, Vol. 8, No.2
21. The provisions of Local Regulation No. 9 of 2015 concerning the Affirmation, Recognition of Rights and Protection of the Rights of the Ammatoa Kajang Customary Law Community, which states Pasang ri kajang, hereinafter referred to as pairs, is a source of values that governs all aspects of the life of MHA Ammatoa Kajang, including those related to social, cultural, government, and belief issues, environment and forest conservation. 6
22. Umar Congge, Supardi, 2017, Peran Lembaga Adat Ammatoa Dalam Mempertahankan Adat Istiadat Kajang Di Kecamatan Kajang Kabupaten Bulukumba, *Jurnal Ilmiah Administrasita'* Vol. 8. No. 2: pp.141 - 160
23. Interview with the Chief of Ammatoa Kajang, on 11 November 2020.
24. Interview with the Chief of Ammatoa Kajang, on 11 November 2020
25. Interview with Tarra Sampetoding as a Toraja Traditional Leader, on 11 December 2020
26. Markus Sasmento Pasande, 2013, Budaya Longko' Toraja Dalam Perspektif Etika Lawrence Kohlberg, *Jurnal Filsafat*, Vol. 23, No.2, pp.117 - 133 13
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30. Anyekko is bound by the agreement to implement the sanctions made orally (interview conducted with Ammatoa Kajang, on 11 November 2021 16
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32. Interview with Tarra Sampetoding as a Toraja Traditional Leader, on December 2020
33. Interview with the Chief of Lembang
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35. Interviews with Tarra Sampetoding as Toraja Traditional Leader, on December 2020
36. Interviews with Tarra Sampetoding as Toraja Traditional Leader, on December 2020
37. Berugak commonly known as gazebo, berugak mediation is a kind of building with four pillars made of wood with special ornaments and is usually used for a place to relax by sitting evenly. (Report on the Implementation of Mataram District Court Activities Class I A, 2019, p. 43)
38. Zuhri, L., & Iskandar, S. (2017). Local Values as a Conflict Mediation Model. *US-China L. Rev.*, 14, 772.

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