

# **Land Settlement disputes and ongoing development of substantive rule of Law in Indonesia**

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## **Abstract**

*Recently, About 60 percent of all legal cases nationwide are related to land. These conflicts are emerging widely that happened both in vertical or horizontal disputes which are involved many parties. As described above, it is important for indonesia to find the best solution, how to solved the problem in honest, fast and binding decision. In practise there are two method to settled the disputes, through court litigation and non-litigation which popular mentioned as alternative disputes resolutions (ADR). One of ADR method is mediation. This is the method that assume effective to solve land disputes in Indonesia, by involving the third parties to help the disputant settled their problems.*

**Key words : land dispute, mediation, Adr**

## **A. Introduction, Land Disputes in Indonesia**

Indonesia is a country that has some land disputes. Recently, About 60 percent of all legal cases nationwide are related to land. These conflicts are emerging widely that happened both in vertical or horizontal disputes which are involved many parties. According to Maria S.W. Sumardjono, basically, land problems can be divided into 5 types:<sup>1</sup>

- 1) land disputes in the forestry, plantation, housing area project from neglect.
- 2) Land problems concerning violating land reform regulations.

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<sup>1</sup> Maria,S.W. Sumardjono et al, Mediasi Sengketa Tanah, Potensi penerapan alternatif Penyelesaian Sengketa, Kompas , 2008, p.2.

- 3) The effect of land acquisition for development interest.
- 4) private problems concerning land disputes.
- 5) disputes regarding customary land rights.

From the juridical practice aspect, Boedi Harsono states that: the land problems are able to be disputed as follows:<sup>4</sup>

- 1) Dispute concerning which is such a plot of land
- 2) Dispute concerning a plot of land boundary
- 3) Dispute concerning a plot of land width
- 4) Dispute concerning the land status (State land or private land)
- 5) Dispute concerning the owner's land rights
- 6) Dispute concerning the encumbering rights
- 7) Dispute concerning the conveyance land rights
- 8) Dispute concerning indicator of location and decision of its width to the government or private project
- 9) Dispute concerning the release/liberation of land rights
- 10) Dispute concerning the land clearing
- 11) Dispute concerning payment of compensation/indemnity, allowance or other reward
- 12) Dispute concerning the annulment of land rights
- 13) Dispute concerning the expropriation of land rights
- 14) Dispute concerning the granted land rights
- 15) Dispute concerning the issued certificate of title
- 16) Dispute concerning proof of any rights or law action and other disputes.

In Indonesia, three kinds of land conflict are particularly prominent. The first conflict involves local communities denied access to or otherwise excluded from land by agribusinesses or extractive industries to which the state has granted concessions. Violence often breaks out at the point the community organises to defend the land against clearing or to resist eviction, but most of these cases are extremely complex and do not fall easily into simple narratives of good farmer vs bad company.<sup>2</sup>

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<sup>2</sup> <http://www.understandingconflict.org/conflict/index/3/Land-and-Resource-Disputes>.

A second type of land conflict involves disputes related to Indonesia's process of administrative fragmentation, known as *pemekaran* (literally, blossoming) through which a group of subdistricts can petition to become a new district (*kabupaten*) or several *kabupaten* can petition to form a new province. The criteria for economic viability laid out in regional autonomy laws and regulations are frequently ignored, and in many parts of Indonesia, the new units are created not so much to bring government closer to the people – the original rationale – but to allow a group previously under-represented in local government to have a chance at access to spoils. In eastern Indonesia, many of these new units are drawn along ethnic lines. The disputes arise when borders are not carefully drawn and resource wealth has to be divided, or competition emerges for which town is to be capital, since land values often skyrocket. The third kind of conflict involves disputes over land between indigenous peoples and migrants from elsewhere in Indonesia. In some cases the disputes go back to land taken during the Soeharto era for the vast official resettlement program known as transmigration, but many cases involve more recent migrants, coming on their own in search of economic opportunity.<sup>3</sup>

All of these conflicts are often complicated by unclear or overlapping lines of authority among different ministries and different levels of government; historical injustices that are often difficult to sort out, let alone redress; the involvement of private security forces; poor dispute resolution mechanisms; and corruption. Another opinion from The State Minister for Agrarian Affairs/Head of the National Land Agency Regulation Number 1 of 1999 regarding Procedure of Land Dispute Resolution, article 1 states that:

“Land dispute is a difference of opinion with regard to:

- a) The authentication of land rights;
- b) Grant of land rights;
- c) Registration of land rights including conveyance and publication of rights to title;

As described above, it is important for Indonesia to find the best solution, how to solve the problem in honest, fast and binding decision. In practice there are two methods to settle the disputes, through court litigation and non-litigation which are popularly mentioned as alternative dispute resolutions (ADR). One of ADR methods is mediation. This is the

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<sup>3</sup> Ibid.

method that assume effective to solve land disputes in Indonesia, by involving the third parties to help the disputant settled their problems. Therefore the aim of this paper is to provide an overview of mediation as one of the alternative of land dispute resolution in Indonesia.

## **B. What is Mediation**

Mediation actually have been embodied in Indonesian culture. In the situation that the parties are unable to solve their dispute, they may want or may need to seek recourse to third parties to have their dispute resolved. One possibility is to have a third party involved who does not have the authority to make a binding determination regarding the parties' dispute. Any such party may offer its good services (if that party is in a relation of trust to the parties) or conciliation services (if a professional with expertise and/or experience regarding conciliation techniques).

Mediation have become popular techniques of alternative dispute resolution for domestic disputes in the United States and later in the United Kingdom. During the 1990's, mediation also became popular on the European continent, first in The Netherlands and later also in France and Belgium.<sup>4</sup> In Indonesia, mediation is also popular by words "berembuk" which lead by the adat leader.

Regarding this method, Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution does not stipulate specifically the definition of mediation. There are many definitions given by some experts:

1. Diane Parrish: "Mediation is a process in which a neutral third person known as a mediator, facilitates communication between disputing parties, enabling them to reach a mutually acceptable agreement that reflects both parties' needs and interests".
2. Kimberlee K. Kovach: "Facilitates negotiation, it is a process by which a neutral third party, the mediator, assists disputing parties in reaching a mutually satisfactory resolution.
3. Mark E. Roszkowski: "Mediation is relatively an informal process in which a neutral third party, the mediator, helps to resolve a dispute. In many respects, therefore,

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<sup>4</sup> Philip de ly, International contract, 2004, p.22.

mediation can be considered as structured negotiation in which the mediator facilitates the process.”

4. A. Grant: “Mediation is the name given to a confidential process whereby parties to a dispute invite a neutral individual to facilitate negotiations between them with a view to achieving a resolution of their dispute.”<sup>13</sup>

On article 6 paragraph 3, Law Number 30 of 1999 stipulated that : ”In the case of dispute or difference of opinion as meant in paragraph (2) (in direct meeting) unresolved, then based on the written agreement between parties, the dispute or difference of opinion can be settled through the assistance of one or more experts or through a mediator.”<sup>5</sup> Mediation, a form of Alternative Dispute Resolution (ADR), also refers to appropriate dispute resolution, and aims to assist two (or more) disputants in reaching an agreement. Whether an agreement results or not, and whatever the contents of that agreement, if any, the parties themselves determine, rather than accept something imposed by a third party. This means that Indonesia acknowledged mediation as one of the methods to solve the disputes. Respected to adat law and variety culture in Indonesia head of adat or in Indonesian words say “ *tetua adat*” can be mediator in mediation process.

As mentioned that, the more modern country, the more ADR used to settle the conflict, also affected that These developments to a large extent are related to the length and costs of court proceedings (primarily attorney’s fees) and the need for governments to reduce the budgets of justice departments and the dockets of courts. Both the demand and supply side were thus in favor of encouraging adjustments to civil procedure, court-annexed proceedings or privatization of justice.<sup>6</sup>

However, these developments related primarily to domestic disputes and international dispute settlement processes until recently and still up to today remained by and large unaffected by these developments. It would be interesting to collect empirical data to support this proposition.

International mediation services still seem to be of a modest importance in practice. From the legal perspective, they raise interesting issues such as 1) the tolling

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<sup>5</sup> Indonesian Law No. 30, 1999. Article 6.

<sup>6</sup> Philip de ly, opcit, p.23.

or not of a statute of limitations by introducing mediation proceedings; 2) the confidentiality of mediation proceedings including immunity for the mediator to testify in court or at the least a right to be excused to disclose contents of the mediation process; 3) the without prejudice character of mediation proceedings; 4) the prohibition or not of a mediator later to act as arbitrator if the mediation would prove to be unsuccessful and would lead to subsequent arbitration proceedings.

In the case of land disputes, it is better for disputing parties to negotiate first, in the deadlock situation then the involvement of the third parties who understand the case is the best way that meeting in the court. Another important issue is whether parties should proceed to mediation before they can institute arbitration or other proceedings. In this respect, the drafting of the mediation clause is extremely important. Courts in Germany, France and England have held that parties first should go to mediation if contractually provided for and a request for arbitration otherwise would be inadmissible. Moreover in Indonesia, after the higher court no.1 / 2001 mention that in civil disputes, before the parties sue their case in green table, it is a must that they are facing mediation first. With the mediator that pointed by the court. Parties should be aware of this line of case law and should provide otherwise in their mediation clause if these consequences are unintended and if they do not want some sort of compulsory mediation, with the risk of being exposed to dilatory tactics of the other party, before being able to resort to binding dispute settlement. It may, thus, be recommended clearly to express in the mediation clause if mediation is optional or compulsory.

### **C. Mediation In land disputes.**

The Presidential Decree No. 34 of 2003 regarding National Policy in Land Affairs, issued on May 31, 2003 clearly stipulated the distribution of authorities of land affairs between the central and local government. There are nine functions given to the Regional Government which includes: issuance of location permit, provision of land for public interest, resolution of land disputes, and resolution of compensation for land allocated for development, land redistribution, determination and resolution of *ulayat* land problem, etc. The emergence of various land cases cannot be released

from the context of the government policy (New Order, at that moment) which having many characters of ad hoc, inconsistent, and ambivalent among one and another regulation, resulting in the land law structure to overlap with each other. Law Number 5 of 1960 regarding the Basic Agrarian Law which initially is an umbrella law for land policy in Indonesia becoming dysfunctional, and even as substantial becomes contradictive with the enactment of various regulations sector.<sup>7</sup>

Whether mediation is mediation appropriate to be utilized for the settlement of land disputes is questionable. Although some of the opinion says that the choice of mediation is determined by the will of the parties to settle their dispute, in practice shows that the practice of mediation is more appropriate to be applied in cases where both parties still expect their relationship to continue, or where both parties are equally strong on legal grounds, or when a short time span is sought, or when it is suspected that no satisfactory judicial outcome will be produced by a court settlement.<sup>8</sup> Mediation as one of Alternative Dispute Resolution is becoming more common in many areas. Disputants may use mediation in a variety of disputes, such as commercial, legal, diplomatic, labour, environmental, land rights, customary land rights, workplace relations, community and business sectors, family matters, etc.,<sup>9</sup> which are all areas where mediation can resolve conflicts and help to develop ongoing solutions without the need for formal litigation and court proceedings.<sup>10</sup> However, more formal forms of mediation are also being developed in Indonesia

the National Land Agency, In this process, is often asked to be a mediator for solving the land dispute with mutual discussion and respect for each other. If the

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<sup>7</sup> Listyowati Sumanto, mediation , athe alternative of land disputes in Indonesia. Papewr on asia pacific mediation forum. 2008p.5.

<sup>8</sup> Ibid

<sup>9</sup> Mark E. Roszkowski, *Business Law, Principle, Cases and Policy*, quoted by Gunawan Wijaya dan Ahmad

<sup>10</sup> Maria The land disputes can be solved through 3 (three) methods, which consist of:

mediation creates an agreement, it must be put in writing, in the form of a notice to the parties to lawsuits, an agenda meeting, and the written agreement as a proof of their consensus, and if necessary, to be made in an act witnessed by Notary, so that it has the strength of perfect verification (a legally binding agreement). The cancellation of the decision of the State Administrative Official can be done if there's a fault in law/administration. The legal basis for such cancellations are:

- 1) Law Number 5 of 1960 regarding Basic Agrarian Law.
- 2) Presidential Decree Number 34 of 2003 regarding National Policy of Land Sector.
- 3) Minister of State for Agrarian Affairs/Head of the National Land Agency Regulation Number 3 of 1999 regarding Authority Delegation and the Annulment of Grant of Land Rights Decree. In practice, an individual or the legal entities, which feel unsatisfied can state an objection to the Head of the National Land Agency. The other way is by giving their objection to the Head of Regency/Municipal Land Office, and then proceed to the Head of Province Land Office<sup>11</sup>

Regarding the settlement through mediation, The Regional Government (Provincial and Municipal/Regency Government) has supported the settlement of land disputes and delegated authority to the Mayor/Regents. The Governor authorised the Regents to form a special team to handle such cases or request the Heads of Sub-District (*Camat*) to investigate land dispute cases. The team's duty, for example, in Muara Enim Regency – the South Sumatra Province covers examine the validity of the demand letters, do a societal approach to the community filing demands to the government; invent some the legal subjects and objects of the dispute; Prevents third-party intervention; Witnesses the agreement to solve problems; and Reports to the Muara Enim Regional Government Head/Regent after completing each task.

Most of the communities' demands in South Sumatra include:

- 1) Compensation for trees and crops (the amount granted as compensation for trees and crops varies depending on the cases and circumstances);

- 2) Provision of employment opportunities; and
- 3) The return of forcefully occupied lands.<sup>12</sup>

## **E. Conclusions**

Mediation As one of the alternative dispute resolution, it helps people to solve their problems and move forward with their lives in the quickest, cheapest and most effective way possible. This method is now widely accepted because has some positive aspects such as that mediation can bring about a lasting resolution to most disputes without cost, delay, expense and acrimony of court battles. There is also a growing acknowledgment that, in addition to resolving disputes, mediation can help parties to manage their future relationships in a positive way which are the importance of using ADR as a way to settle the disputes. Rather than settling disputes through court, mediation is one of the best ways because it is embodied in Indonesian regulations and Indonesian culture. It is effective to solve the disputes because the parties can decide their case by themselves by making such an agreement. Although it has the weakness that mediation only give recommendation not an award. But mediation is still become the best way to solve land disputes in Indonesia.

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<sup>12</sup> Listiyowati, opcit, p. 8.

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