

## **Implementation of Mediation Integration in the Examination Process at the Sharia Court Of Aceh**

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**Abstract:** Dispute resolution in society can be made peacefully out of court or through an authorized court, depending on the willingness of the parties concerned. Consequently, the parties to the dispute must follow the procedures applicable to each dispute resolution system. With the issuance of Supreme Court Regulation No. 1 of 2016 on mediation procedures in court has required all parties litigating through the judiciary to pursue mediation procedures, which is one of the court methods known for resolving a dispute. Thus, the mediation has been integrated into the dispute resolution process through the courts, including the Sharia Court. The problem is how the implementation of mediation integration in the examination process at the Aceh Sharia Court was.

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### **I. INTRODUCTION**

Any dispute that occur in society must be resolved to avoid self-judgment (*eigenrichting*) from the party who feels aggrieved. Dispute settlement can be done by non-litigation or through the litigation process. One type of judiciary in Indonesia that is authorized to judge certain cases for people who are Muslims is Religious Courts, but specifically, in Aceh Province, is called the Sharia Court. The settlement of disputes outside the courts concerned is conducted through negotiation between the parties involved, mediation with the help of a neutral third party, counsel or expert judgment.

Article 3 of the Supreme Court Regulation No. 1 of 2016 on the Court's mediation procedure determines that all parties proposing dispute resolution through the judiciary shall be required to pursue a mediation process. It means that there has been an integration between the settlement process through mediation and the dispute resolution process applicable to the courts by the provisions outlined in civil procedural law.

Settlement of disputes through the courts is stipulated in Law Number 48 of 2009 on Judicial Power. In its consideration, it is mentioned that the judicial authority according to the 1945 Constitution of the Republic of Indonesia is an independent power by a Supreme Court and the lower courts within the environment of the general court, religious court, military court, state administrative court, and constitutional court, to administer justice to uphold law and justice;

A peace settlement outside the court is regulated by Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (Law No. 30 of 1999), conducted through intermediaries using consensus, through negotiation, conciliation or mediation. Dispute resolution through mediation can result in a win-win solution. In contrast, settlement through courts and arbitration tends to result in a win-lose solution because the process is hostile and disconnects.<sup>1</sup>

Religious Courts in Indonesia, especially outside Java and Madura were first established in Aceh Province, based on Government Regulation No. 29/1957 (PP No. 29 of 1957) on the establishment of Religious Courts sharia (Mahkamah Syar'iyah) in Aceh Province. With the issuance of Law Number 7 of 1989 on Religious Courts, which was amended and supplemented by Law Number 3 of 2006 on Amendment of Law Number 7 of 1989 on Religious Courts, further amended by Law Number 50 of 2009 on the Second Amendment to Law Number 7 of 1989 on Religious Courts, there has been a legal unity that regulates the issue of Religious Courts within the framework of national law and system.

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<sup>1</sup> Takdir Rahmadi, *Mediasi Penyelesaian Sengketa melalui Pendekatan Mufakat*, PT Raja Grafindo Persada, Jakarta, 2011, page 24.

This law regulates the duties and authority of the Religious Courts to examine, decide upon and resolve on the first level Between people who are Muslims in the field of (a) marriage; (b) inheritance; (c) wills; (d) grants; (e) waqf (mortmain property); (f) zakat (tithe); (g) infaq; (h) shadaqah; And (i) sharia economy. (Article 49 of Law No. 3 of 2006). The authority of Religious Courts as regulated in Law No. 3 of 2006 is only related to family law (ahwal al-syakhsyah) and partly in the field of civil law (muamalah).

Law Number 11 of 2006 on Aceh Government (Law No. 11 of 2006) has given greater authority for Aceh for the implementation of Islamic Shari'a for people who are Muslim because it has the authority for the establishment of Islamic Sharia Court. The Law of the Aceh Government is the foundation of the establishment of Islamic Sharia Court conducted by the Mahkamah Syar'iyah and contains an order to enact Qanun (local law) on the authority of the Sharia Court.

Based on these authorities, the Aceh Government has enacted Qanun Number 10 of 2002 on Islamic Sharia Courts passed on October 14, 2002/ 7 Sha'ban 1423 H. Furthermore, by Presidential Decree No. 11 of 2003 on the Sharia Courts and the Province Sharia Court in Nanggroe Aceh Darussalam Province, the Religious Courts in Aceh have changed its name to the Mahkamah Syar'iyah (Sharia Court).

Settlement of disputes through the judiciary must be in accordance with the procedures outlined in legislation or commonly referred to the civil procedure law applicable to each type and level of the judiciary concerned. The court's duty is to resolve dispute fairly, by adjudicating the parties to the dispute in court and then giving its verdict.

The court's duty to adjudicate disputes included in *juris dictio contentiosa*, which is a court's authority to judge in the true sense to give justice in dispute. The courts in carrying out their duties based on *contentiosa jurisdictio* must be free from influence or pressure of any party (independent justice).

Dispute resolution using peace outside the court is known as the Alternative Dispute Resolution (ADR) concept. Alternative Dispute Resolution is a dispute or disagreement resolution through a procedure agreed upon by the parties, namely non-court settlement using consultation, negotiation, mediation, conciliation or expert judgment.<sup>2</sup>

One alternative dispute resolution that can be made in court is through mediation, in addition to the formal examination of cases in accordance with the provisions of applicable civil law. The Consideration of Supreme Court Regulation No. 1 of 2016 point d mentioned that the Mediation Procedure in the Court becomes a part of civil procedure law that can strengthen and optimize the function of the judiciary in dispute settlement; moreover, points e. also mentioned that "*The Supreme Court Regulation No. 1 of 2008 on Mediation Procedures in Courts has not been optimal in meeting the need for a more efficient Mediation implementation and improving the success of Mediation in Courts.*"

Each judge, mediator, and party shall follow the dispute resolution procedure through mediation and on the day of the trial both parties must be present at the trial, the judge obligates the parties to mediation, but in practice, the Mahkamah Syar'iyah indicates that the mediation integration in the examination process in the court has not run maximally, so efforts to overcome the accumulation of the cases in the court has not become an effective instrument that strengthens and maximize the function of the court has not been achieved. Therefore, the problem is how the implementation of mediation integration in the process of dispute settlement was at the Aceh Mahkamah Syar'iyah Court by the procedure of civil procedural law.

## II. REVIEW OF LITERATURE

Article 1 number 1 of Supreme Court Regulation No. 1 of 2016 states that mediation is a way of dispute resolution through negotiation process to obtain the agreement of the parties with assisted by the mediator. From this understanding, there are 4 (four) basic things contained in the mediation, namely: the dispute to be resolved, the settlement through negotiation, the purpose of negotiation to obtain agreement, and the role of mediator in assisting the settlement.<sup>3</sup>

### 1. A dispute to be resolved

In everyday life, people always interact with others, which is colored by two things; Namely cooperation or conflict. Cooperative activities or mutual help is a human nature because, without the help from others, a human cannot live well and orderly, prosperously and happily. On the other hand, a person cannot escape from conflict or dispute, because in fulfilling the daily necessities of life always faced by the different interests or even contradict each other, causing a dispute.

The philosophy conceived in mediation is that the parties (human being) outwardly do not want themselves to be dealing with disputes over extended periods of time, so everyone is always trying to avoid and

<sup>2</sup> It can be seen in Article 1 point 10 of Law no. 30 of 1999 on *Arbitration and Alternative Dispute Resolution*.

<sup>3</sup> Chaliq, Abd., *Filosofi Mediasidalam mewujudkan Rasa Keadilan*, <http://www.pta-semarang.go.id/index.php/panmudhukum/40-artikel/artikel-peradilan/93-filosofi-mediasi-i>, Accessed on March 14, 2016.

get out of the conflict, although conflicts or disputes cannot be eliminated from the reality of human life. The search for dispute resolution patterns continues to be done by people, to fulfill their natural desire to live in peace, security, justice, and prosperity.<sup>4</sup> Therefore, every dispute occurring in the community should be resolved to restore the order and prosperity.

## **2. The settlement through negotiation**

The dispute resolution through mediation is carried out through deliberation that results in a peaceful settlement. Peace will occur if the parties have negotiated first. Negotiations are concerned with the subject matter of the dispute, bargaining on issues to be agreed upon. With the achievement of an agreement means that there has been a consensus on the subject of the dispute among the parties concerned. Thus it can be ensured that the outcome of the accord as a solution to dispute resolution will provide satisfaction and satisfy the sense of justice for the parties, this is because of the joint involvement in the process, both seek alternative solutions to formulate a peace agreement based on the negotiations between the parties themselves, assisted by the mediator they entrusted with.

The result of dispute resolution by way of consensus in negotiation is known as a win-win solution which is a communication technique that places both parties in a winning position. One party does not have to push (step on) the other side to win, and no one is willing to be a place of pressure (footing). The most appropriate word for the opposite is a partner, the starting point to win in a negotiation is the desire and concern for the success of the partner. With win-win solution many things can be achieved, at least three types of success can be seen directly, namely:

- a. Strategy communication becomes easier because the goal is not to defeat a partner but to help him;
- b. The advantage of a win-win solution in strategy communication is unlimited because the solution of a problem becomes more perfect and the next issue will open;
- c. Happiness belongs to the first party and the second party as a partner; there is nothing more valuable than a quiet mood when doing something with other parties or in a team.<sup>5</sup>

## **3. The purpose of negotiations to get the agreement**

The mediation process with the help of mediator will run smoothly because the mediator serves to mediate and balance the interests of both parties. The negotiation (mediation) has the objective of achieving or producing an acceptable agreement to the parties to the dispute to end the dispute.<sup>6</sup>

The mediator does not make a decision on the disputes faced by the parties, but he guides the parties in negotiations and seeks a solution. Normatively there is no standard rule regarding this matter, and there is no legislation governing the procedures, deadlines, fees and so forth. This method is excellent, fast and easy without being noticed by other parties as long as it is based on good faith.

## **4. The role of the Mediator in assisting the settlement**

An alternative dispute resolution is a form of non-court dispute resolution, in the form of consultation, conciliation, mediation and expert assistance to the disputes that occur in the community. The scope of the dispute that can be resolved through mediation is the entire civil case that is under the jurisdiction of the general court and religious court. The authority of the religious court includes marriage, inheritance, will, grant, wakf, zakat, infaq, shadaqah and sharia economy.<sup>7</sup>

The settlement of civil disputes through mediation is a process of settling a rights dispute, a conflict of interest, through a certified mediator or a mediator-certified judge.<sup>8</sup> The judge mediator is a judge appointed by the Chairman of the assembly to lead the mediation process between the disputing parties after the chairman of the assembly opens the preliminary hearing. Article 3 of the Supreme Court Regulation No. 1 of 2016 provides

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<sup>4</sup> Anita Marwing, Eksistensi Mediasidan Hakam dalam Tinjauan Hukum Acara Peradilan Agama, [Http://Id.Portalgaruda.Org/Article.Php?Article=448054&Val=9487](http://Id.Portalgaruda.Org/Article.Php?Article=448054&Val=9487), Accessed on March 14, 2016.

<sup>5</sup> Patar Simatupang, <https://www.komunikasi-stratgesi-v-win-win-solution-solusi-terbaik/> Accessed on March 18, 2016.

<sup>6</sup> Andri Helmi M, Penyelesaian Sengketa Bisnis, Alternative Dispute Resolution, <https://andrihelmi.files.wordpress.com/2014/09/11-penyelesaian-sengketa-bisnis-adr-dan-arbitrase.pdf>, Accessed on March 20, 2016.

<sup>7</sup> It can be seen in Article 49 of Law no. 3 of 2006 concerning Amendment to Law Number 7 of 1989 concerning Religious Courts which regulates the authority of the Religious Courts; Namely: marriage, inheritance, will, grant, wakf, zakat, infaq, shadaqah and sharia economy.

<sup>8</sup> Mediator Certificate is a document stating that a person has attended a mediation training or education issued by an institution accredited by the Supreme Court, Visible in Article 1 point 11 of the Supreme Court Regulation of the Republic of Indonesia Number: 01 Year 2008 on Mediation Procedures in Court

that "Every judge, mediator, and the party shall follow the dispute resolution procedure through mediation provided for in this regulation." This provision indicates that mediation is integrated into the proceedings in court.

With the enactment of the Supreme Court Regulation No. 1 of 2016, then the dispute resolution can be made through out-of-court mediation and in the process of court examination in court. The settlement of disputes through out-of-court mediation by the parties with the assistance of a certified mediator and if successful in resolving the conflict will result in a peace agreement.

If the parties want the peace agreement to be in the form of a peace deed which has the executorial power can file the peace agreement to the court authorized to obtain a peace deed<sup>9</sup> by filing a lawsuit. The filing of the lawsuit must be accompanied or attached to a peace agreement and documents proving the existence of a legal relationship of the parties to the object of the dispute. While dispute settlement through mediation in court is done through the pre-mediation stage, stage of the mediation process that results in a peace agreement.

The parties with the assistance of the mediator shall formulate in writing an agreement reached and signed by the parties and the mediator. The material of this Agreement shall not be contrary to law, public order and or morality, harm to any third party or unenforceable.

The peace agreement is notified to the judge who examined the case to be strengthened in the form of a peace deed. If the parties do not want the peace agreement to be upheld in the shape of a peace deed, the peace agreement shall contain the clause of the lawsuit and clause stating the case has been completed.<sup>10</sup>

Efforts to settle disputes through mediation in court not only at the first level, but still possible in the process of examining cases of appeal, cassation, and re-examination. The parties' agreement to pursue peace is communicated in writing to the Chairman of the Court of First Instance adjudicating the dispute concerned. The Chief Justice immediately notifies the High Court Chief who is examining or Chief Justice of the Supreme Court about the will of the parties to pursue peace. Judge of case examiner at the appeals or cassation level shall be obliged to suspend the examination of the case concerned for 14 (fourteen) working days from receiving notice of the parties' willingness to pursue peace to enable the parties to pursue peace.

Article 17 paragraph (1) Supreme Court Regulation No. 1 of 2016 provides that "on the day of the appointed hearing and in the presence of the parties, the judge of the case investigator requires the parties to mediate." In paragraph (3) it is also determined that the calling of a party not present at the first hearing may be summoned once more by the procedural law practice. Furthermore, in Article 4 paragraph (1) the Supreme Court Regulation No. 1 of 2016 also determined that All civil disputes submitted to the Court include filing opposition against judgment (*verzet*) on the verstek decision and opposition parties litigant (*partij verzet*) or the third party (*derden verzet*) against the execution of a decision which has a permanent legal force, shall first seek settlement through mediation, unless there is a decision under the Supreme Court Regulation.

This provision requires the judges to examine the case in court, to resolve the dispute through the mediation process. The mediation process known as the out-of-court dispute resolution process has been integrated into the formal dispute resolution process in the court. One of the concepts of the Supreme Court is to find a way to incorporate the mediation into the proceedings in the courts so that it can be one of the "effective instruments" to overcome the possibility of accumulation of cases in court.<sup>11</sup>

Based on the provisions of Article 7 paragraph (1) Supreme Court Regulation No. 1 of 2016 which requires the parties to pursue mediation procedures in the process of court examination in court, then the mystical atmosphere of Supreme Court Regulation No. 1 Year 2016 has bound the judge of case investigators and the parties become united or assimilate from the process of settlement through mediation into court proceedings and becomes an integral part of a judicial system.

The integration effort between the two dispute resolution systems is a policy that makes the judiciary more effective in handling the case submitted to it, with consequences resulting in the cancellation of the verdict imposed if it does not undergo mediation procedures. However, Supreme Court Regulation regarding mediation procedures in court does not explain the reasons for integration and how the integration process should take place, so it becomes part of the civil procedural law that goes on trial.

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<sup>9</sup> Article 1 number 2 of the Supreme Court Regulation No. 1 of 2008 which states that the peace deed is a deed containing the content of the peace agreement and the verdict of the judge that reinforces the peace agreement that is not subject to any ordinary or extraordinary legal effort. Whereas in Article 36 (1) the Supreme Court Regulation No. 1 Year 2016 stipulates that Parties with or without the assistance of a certified Mediator who succeeds in settling disputes outside the Court with the Peace Agreement may file a Peace Agreement to the Court authorized to obtain the Deed of Peace by filing a lawsuit.

<sup>10</sup> It can be seen in Article 27 paragraph (1) up to paragraph (6) the Supreme Court Regulation No. 1 of 1 of 2016.

<sup>11</sup> Can be seen in Consideration of Supreme Court Regulation No. 2 of 2003 regarding Mediation Procedure in the Court.

Thus, the concept of mediation integration is the effort and process of unifying the differences that exist in a pattern or system applicable and applied so far to the Mahkamah Syar'iyah, in particular in relation to dispute resolution according to civil procedure law, which has been integrated into the conflict resolution process at the Mahkamah Syar'iyah with dispute settlement through mediation, so that the creation of harmony in a national judicial system.

The process of examining the case in court is the main duty of the judge, namely to receive, examine and hear and resolve every case submitted to him. Furthermore, the judge examines the case and ultimately judges; Which means giving the interested parties the right or the law. Before passing its verdict, the judge should pay attention and make every effort possible so that the decision will not cause a new case, so the judge's decision must be complete and not create a new case.<sup>12</sup>

The process or procedure of mediation also has more flexible rules that are divided into three stages, namely pre-mediation, mediation implementation and mediation result execution. These three steps are the way for mediators and parties to solve their disputes.<sup>13</sup> Thus, the act of integrating the mediation process with court proceedings is a matter that must be done seriously by the court apparatus, whether at the first level, appeal, cassation or on review level, as long as the case has not been terminated.<sup>14</sup>

The Supreme Court sees that mediation is not only one of the quickest and cheapest settlement of cases, it can provide greater access to the parties, find satisfactory solutions and fulfill the sense of justice, but also to strengthen and maximize the functioning of the courts in dispute resolution in addition to the judicial process that is adjudicative.<sup>15</sup>

Supreme Court considerate to integrate mediation into the proceedings in court because:

- a. It can be an effective instrument for overcoming the possibility of the accumulation of cases in court;
- b. The examination process is faster and cheaper;
- c. It may grant access to the parties to the dispute to obtain justice or satisfactory settlement of the dispute at hand.

When looking at the typology of mediators then one of the important typologies is those who try to help the disputants to resolve differences and have a strong position, so they have the potential or capacity to influence the outcome, as evidenced by the birth and development of the profession of mediator, just like the profession of lawyer, doctor, accounting and so on.<sup>16</sup>

Thus the objective to be achieved by the litigation system or dispute resolution in accordance with civil procedural procedure is not the settlement of the dispute, but to justify an event that the parties bring to court by granting or rejecting a litigant's claim based on the results of the evidence, in accordance with the mechanism contained in the procedural law applicable to a court.

The sociological approach can also analyze the implementation of mediation integration into the dispute resolution process according to civil procedural law at the court. The sociological approach is intended as a method or way of approaching to establish relationships with the object under study as knowledge or science of the nature, behavior, and development of society.<sup>17</sup>

If a dispute has reached the stage of the settlement process at the court, the mechanism or procedure of its settlement will be different from the procedures and mechanisms that go outside the court. A legal issue in society can be brought to justice by applying or appealing to a judge to be processed for resolution. In the first trial, if all parties are present, it will be explained about the obligation to complete the settlement through mediation first.

The process or procedure of mediation in court is similar to what is done through mediation outside the court, but the appointed mediator may be a judge mediator or non-judge mediator. If the chair of the court

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<sup>12</sup> Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, Liberty, Yogyakarta, 1981, *Op.Cit.*, page 79.

<sup>13</sup> Syahrizal Abbas, *Mediasi dalam Perspektif Hukum Syariah, Hukum Adat dan Hukum Islam*, Kencana Prenada Media Group, Jakarta, 2009, page 36.

<sup>14</sup> In the event of a peace agreement against a portion of the plaintiff's lawsuit also applies to voluntary peace at the examination stage of the case at the level of appeal, cassation or judicial review (Article 30 para (4) of Supreme Court Regulation No. 1 of 1 of 2016.

<sup>15</sup> Can be seen in Consideration of Supreme Court Regulation No. 1 of 2016 that explains that: a. Mediation is one of the quicker and cheaper processes of dispute settlement, and can provide greater access to the parties in finding satisfactory solutions and fulfilling a sense of justice. (b). The integration of mediation into the proceedings in the courts can be one of the most effective instruments to deal with the problem of custody in court and to strengthen and maximize the function of the judiciary in the settlement of disputes in addition to the adjudicative court proceedings.

<sup>16</sup> H. Nazarkhan Yasin, H, *Mengenaiklaim konsruksidan Penyelesaian Sengketa Konstruksi*, Gramedia Pustaka Utama, Jakarta, 2004, page 139-140.

<sup>17</sup> Kamus Besar Indonesia, *Op. Cit.*, page 958.

assembly will designate a judge mediator or a certified court official, the tendency will be influenced by the nuances or conditions of the court, meaning that the parties must obey the rules or mechanisms set out with the Supreme Court Regulation on mediation in court.

When the law is said to have an integration function, then how does the process take place so that the law can have an integration function. Whether the law is effective or not, it can be analyzed from its capability in regulating interactions in a system in which the law applies.

With the order, the actors are bound to a regulatory system and are the foundation for a law to be effective and the correlation between law and other rules systems. The external correlation is not only the existence of a jurisdiction (law authority) that links the law with political power through political monopoly in the form of sanctions, but also demands a legitimacy that links the law to society through the concept of justice and through the motivation of individuals to mobilize the law in their behavior.

The case examiner judge is authorized to examine the truth of the event, assess the evidence, conduct a local examination, confiscate the object of the dispute, adjourn the trial and even provide interlocutory decisions and so on to expedite the review of the case. Also, it is also authoritative to make (appoint) themselves as mediator judges who will apply known mediation mechanisms and processes of mediation, mediation proceedings, reframing, caucus or also offering alternative solutions to dispute resolution faced by the parties. The key to the successful settlement of disputes depends on the examiner judge, whether the mediation settlement process is successful or not, depending on the sincerity, awareness, sincerity and good faith of all parties involved in the dispute resolution process.

Thus it is clear that the emphasis of the dispute resolution process through mediation or litigation is within the jurisdiction of the judge of the case, so how can the parties willingly settle the conflict through the peace effort. With the willingness of the parties to resolve disputes through a peaceful effort also means that they have accepted mediation mechanisms in dispute settlement, a formal litigation process should be postponed to provide an opportunity for the parties to pursue the peace.

Implementation of mediation integration into the court's examination system is done by a "*consensus and deliberation*" strategy to reach an agreement. The practice of mediation integration into the judicial process has not shown maximum results; it is influenced by several factors that become obstacles, among others because:

- a. The lack of goodwill of the parties to resolve their dispute by way of mediation;
- b. The absence of a mediating mechanism that could impose one party unwilling to take mediation seriously;
- c. There has not been a consistent rule on mediation, particularly regarding the imposition of mediation fees to the parties to the dispute;
- d. The number of certified mediator and mediator judge is limited;
- e. Support of case examiner judges was not maximal;
- f. The mediation room and other supporting facilities are not yet perfect;
- g. Support from an advocate or proxy in the process of mediation is lacking;
- h. The legal culture of the society that does not always support dispute resolution through mediation.

### **III. CONCLUSION**

The implementation of mediation integration in the dispute resolution process at the Sharia court is conducted by deliberation and consensus. If it cannot be done through deliberation, then it will be proceeded with the process according to procedural law. The integration process is done gradually and in certain cases.

The integration of mediation into the dispute resolution process in court has not been maximized yet, due to several barriers to the settlement of disputes through the judiciary. The constraint faced were the lack of good will of the parties to resolve their dispute through mediation, the absence of a mediation mechanism that can force one of the parties who was not willing to pursue mediation seriously, the rules of mediation that were not run consequently, especially regarding the imposition of mediation fees to the parties to the dispute, the limited number of certified mediators and judge mediators, the support of the judges that have not been maximized yet, the mediation room and other supporting facilities that have not been perfect, the support of the advocate or the proxy that were lacking in the mediation process and the legal culture of community that does not always support dispute resolution through mediation.

Efforts should be made to cultivate the legal culture of dispute settlement through mediation by means of advocacy, education through educational institutions and religious sustainability to the community in general and the parties to the dispute and mediator/judge mediators in particular, to always prioritize dispute resolution through mediation rather than through litigation as it is the best way to resolve conflicts between the disputing parties as they can result in a win-win solution.

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