

2003- RESOLVING ENVIRONMENTAL DISPUTES BY MEANS OF MEDIATION IN MALAYSIA

ADZIDAH BINTI YAAKOB

Senior Lecturer
Faculty of Syariah and Law
Universiti Sains Islam Malaysia (USIM)
adzidah@usim.edu.my

HENDUN ABD RAHMAN SHAH

Senior Lecturer
Faculty of Syariah and Law
Universiti Sains Islam Malaysia (USIM)
hendun@usim.edu.my

NORFADHILAH MOHAMAD ALI

Associate Professor
Faculty of Syariah and Law
Universiti Sains Islam Malaysia (USIM)
fadhilah.a@usim.edu.my

MUSTAFA 'AFIFI AB. HALIM

Senior Lecturer
Faculty of Syariah and Law
Universiti Sains Islam Malaysia (USIM)
afifi@usim.edu.my

NORSUHaida CHE MUSA

Senior Lecturer
Faculty of Syariah and Law
Universiti Sains Islam Malaysia (USIM)
norsuhaida@usim.edu.my

ABSTRACT

Mediation has emerged as a vital tool for resolving environmental disputes in Malaysia, offering an efficient and collaborative approach to addressing complex ecological conflicts. In a country marked by rapid industrialization and diverse ecosystems, disputes related to deforestation, pollution, and land use have escalated. This article examines the practice of mediation in environmental disputes in Malaysia as an alternative access to justice through speedy and cost-effective dispute resolution. Environmental mediation in Malaysia even though is still not widely used involves a structured process wherein a neutral third party facilitates discussions between conflicting parties. Typically initiated voluntarily, mediation promotes open dialogue and understanding. This process can be court-mandated in some cases, encouraging parties to engage in good faith negotiations. This article employs doctrinal research methodology where related environmental court cases and statutes are studied to understand the practice of mediation in resolving disputes. Based on the discussion, the success of mediation in Malaysian environmental disputes lies in its ability to foster innovative solutions. Government support and legal frameworks have bolstered the use of mediation in environmental conflicts. Malaysia's Environmental Quality Act and its recognition of alternative dispute resolution methods underscore the legitimacy of mediation. In conclusion, mediation offers a harmonious avenue for resolving environmental disputes in Malaysia. Its

flexibility, cultural sensitivity, and emphasis on collaboration make it a powerful tool to address the nation's intricate environmental challenges while fostering sustainable outcomes for both nature and society.

Keyword: *Environmental disputes, Mediation, Alternative Dispute Resolution, Sustainability, Cost-effective.*

INTRODUCTION

Mediation has emerged as a vital tool for resolving environmental disputes in Malaysia, offering an efficient and collaborative approach to addressing complex ecological conflicts. In a country marked by rapid industrialization and diverse ecosystems, disputes related to deforestation, pollution, and land use have escalated. Environmental mediation in Malaysia even though is still not widely used involves a structured process wherein a neutral third party facilitates discussions between conflicting parties. Typically initiated voluntarily, mediation promotes open dialogue and understanding. This process can be court-mandated in some cases, encouraging parties to engage in good faith negotiations. The culturally diverse context of Malaysia underscores the importance of mediation, as it accommodates various stakeholder values and beliefs. This approach encourages consensus-building, acknowledges indigenous knowledge, and considers the long-term impacts of decisions on healthy ecosystems and communities. Government support and legal frameworks have reinforced the use of mediation in environmental conflicts. This paper seeks to explore the merit of mediation that offers a harmonious avenue for resolving environmental disputes in Malaysia. Its flexibility, cultural sensitivity, and emphasis on collaboration make it a powerful tool to address the nation's intricate environmental challenges while fostering sustainable (Muhammad Rizal et al, 2016) outcomes for both nature and society.

METHODOLOGY

This article employs doctrinal research methodology. According to Rita et al. (2023) doctrinal research methodology involves the examination and analysis of legal principles, rules, statutes, regulations, and case law to gain an understanding of the legal framework governing a particular area of law. When applying doctrinal research methodology to analyse mediation in environmental disputes in Malaysia, several literatures are analysed to understand the practice of mediation in resolving disputes in Malaysia.

Doctrinal research methodology is a valuable approach for gaining a comprehensive understanding of the legal aspects of mediation in environmental disputes in Malaysia. It provides a foundation for policymakers, legal practitioners, and scholars to assess the legal framework, identify areas of improvement, and make informed decisions regarding the use of mediation in the resolution of environmental conflicts.

LITERATURE REVIEW

Environmental Disputes in Malaysia

Environmental Dispute in Malaysia revolves around a contentious environmental dispute, triggered by the construction and operation of a large-scale industrial facility in close proximity to a protected forest reserve (Haliza & Rohasliney, 2010). The conflict began when environmental advocacy groups and local communities raised concerns about the potential adverse impacts on the fragile ecosystem within the forest reserve. They argued that the

industrial facility's emissions, waste disposal, and deforestation activities were endangering the diverse flora and fauna in the area, including several endangered species. The crux of the dispute lay in the alleged violations of numerous Malaysian environmental regulations, which set strict limits on emissions, land use, and protected areas' preservation (*Azmi bin Ismail dan satu lagi lwn Pendakwa Raya*, 2019).

These concerns led to legal action initiated by environmental organisations in collaboration with affected community members. The legal action aimed to halt the industrial facility's operations and seek compensation for the ecological damage already inflicted. The plaintiffs argued that the facility's operation not only violated environmental laws but also posed a severe threat to the overall biodiversity and ecological balance of the forest reserve, which had long been recognized as a vital green lung for the region. Conversely, the industrial facility contended that it had adhered to all necessary regulatory permits and had implemented measures to mitigate its environmental impact, asserting that it was an essential contributor to the local economy (*Awang @ Harun bin Ismail & Ors v Kerajaan Negeri Kedah & Ors*, 2010). This dispute brought to light the critical tension between economic development and environmental preservation in Malaysia, setting the stage for a complex mediation process to find a middle ground.

Environmental laws and regulations in Malaysia are established to protect and manage the country's natural resources, promote sustainable development, and mitigate environmental challenges. These laws and regulations encompass a wide range of areas, including air and water quality, biodiversity conservation, land use, and waste management. Malaysia has a mix of federal and state-level regulations that govern various aspects of environmental protection (Shamsuddin, 2015). Here is an overview of some key environmental laws and regulations in Malaysia:

1. **Environmental Quality Act 1974 (EQA):** The EQA is a comprehensive federal law that forms the basis for environmental protection in Malaysia. It covers various aspects of environmental quality, including air and water pollution control, waste management, and hazardous substances. It establishes the Department of Environment (DOE) as the regulatory authority responsible for enforcing these regulations.
2. **Environmental Impact Assessment (EIA):** Under the EQA, development projects with the potential to have a significant impact on the environment must undergo an EIA process. Developers are required to submit an EIA report to evaluate and mitigate the environmental impacts of their projects.
3. **Water Quality Standards:** Malaysia has established water quality standards to protect its rivers and other water bodies. The Water Services Industry Act 2006 governs the provision of clean and safe drinking water and sanitation services.
4. **Air Quality Standards:** The EQA sets standards for air quality to control emissions from industrial sources and protect public health.
5. **Wildlife Conservation Act 2010:** This federal law protects native wildlife and their habitats by regulating activities such as hunting, capturing, and trade in wildlife species. It also establishes protected areas and wildlife reserves.

6. National Forestry Act 1984: This law regulates forest management, logging, and conservation activities. It empowers state governments to manage forest resources and promote sustainable forest practices.
7. National Land Code: Land use and development are regulated through the National Land Code, which empowers state authorities to control land use and development within their jurisdictions.
8. Solid Waste and Public Cleansing Management Act 2007: This law governs the management and disposal of solid waste, promoting proper waste management practices and recycling.
9. Chemical Management Regulations: Malaysia has regulations concerning the import, manufacture, use, storage, and disposal of chemicals to ensure their safe handling and prevent pollution.
10. Renewable Energy Act 2011: This act promotes the use of renewable energy sources and sets targets for renewable energy adoption in the country.
11. Environmental Sustainability Policies: Malaysia has established various policies and frameworks to promote environmental sustainability, including the National Policy on Biological Diversity, the National Policy on Climate Change, and the National Policy on the Environment.
12. Marine Parks and Fisheries Regulations: These regulations govern activities in marine protected areas and the management of fisheries to protect marine ecosystems and resources.

It's important to note that Malaysia's environmental regulations may differ between states, as some areas have additional laws and regulations that are more specific to local needs and conditions (Maizatun, 2019). The Department of Environment (DOE) and state-level environmental agencies are responsible for enforcing these regulations and ensuring compliance (Mohd Hairiy et al., 2009).

Malaysia is increasingly focusing on sustainable development and environmental conservation as it faces environmental challenges, including deforestation, biodiversity loss, and air and water pollution. The government is working to strengthen existing regulations and enhance enforcement mechanisms to address these issues and meet international commitments, such as the Sustainable Development Goals and climate agreements.

Resolving Environmental Disputes Via Mediation

In Malaysia, both litigation and mediation are used to address environmental disputes. The choice between the two approaches depends on the nature of the dispute, the willingness of the parties to collaborate, time constraints, and the complexity of the environmental issues involved. In some cases, a combination of both processes, such as using mediation to reach a settlement before resorting to litigation, may be the most effective approach.

In light of the recent natural disaster that has hit a number of states, the Malaysian judiciary has been considering to setting up specialized environmental court for civil cases with the hope to expedite the disposal of environment related cases both at the High Court and at the Subordinate Courts. The Chief Judge of Malaya's and Chief Judge of Sabah and Sarawak's office will also be assessing the need for such courts in the respective High Court (n.a., 2015).

Litigation and mediation are apparently two distinct approaches to resolving environmental cases in Malaysia, each with its own advantages and disadvantages. Litigation involves taking a dispute to court, where parties present their case before a judge or tribunal. It is an adversarial process where one party sues the other, and the judge makes a final decision. Whilst is a collaborative and voluntary process in which a neutral third party, the mediator, helps parties to negotiate and reach a mutually agreeable solution. Regarding cost and time, litigation can be time-consuming and expensive, with cases potentially taking years to conclude. Legal fees, court fees, and other related costs can be significant. Mediation is often quicker and more cost-effective. It can resolve disputes in a matter of weeks or months, avoiding the lengthy court process and associated costs. In litigation, the outcome is determined by the judge or tribunal. Parties have limited control over the final decision. In mediation, the parties themselves have greater control over the outcome (Joseph, 2017). They actively participate in shaping the resolution and can find creative solutions that may not be possible in court.

Mediation maintains confidentiality and it is a private process, and discussions during mediation are confidential. This can encourage open and honest communication. While court proceedings are generally public and the details of the case become part of the public record. In terms of preservation of relationships, litigation can somewhat strain relationships, as it is an adversarial process where each party tries to prove their case. Mediation can help preserve relationships, as it fosters cooperation and encourages parties to find common ground (Joseph, 2017).

Regarding enforceability, court decisions are legally binding and enforceable. Nevertheless, mediated agreements are also legally binding once they are formalized, and they can be enforced through the courts if necessary. In deciding environmental disputes require environmental expertise. In litigation proceedings, judges and legal professionals may not always have specific environmental expertise, leading to potential limitations in understanding complex environmental issues. Mediators with environmental expertise can facilitate discussions and help parties better understand the environmental aspects of their case (Joseph, 2017).

In dealing with disputes between parties, mediator plays significant role in facilitating both parties to communicate effectively by encouraging them to express their views, interests, and concerns. They promote open and respectful dialogue. The mediator serves as a neutral third party who facilitates communication and negotiation between the disputing parties. They do not take sides or impose their own solutions. Mediators assist the parties in identifying and exploring potential solutions to their dispute. They may suggest creative options and strategies to help the parties reach an agreement. Mediators ensure the confidentiality of the mediation process, so that information shared during mediation is not disclosed to external parties without the parties' consent. Mediators give the parties control over the outcome and the process. They do not make decisions for the parties but guide them in reaching their own mutually acceptable solutions. Below are the rules and procedures during mediation (Boullé & Rycroft, 1998).

1. **Introduction and Agreement:** The mediation process begins with an introduction to the mediator's role and the ground rules for the mediation session. The parties typically sign an agreement to participate voluntarily.
2. **Opening Statements:** Each party is given the opportunity to make an opening statement to express their perspective and goals for the mediation.
3. **Information Gathering:** The mediator may ask questions to gain a better understanding of the issues and underlying interests. They may also request documents or other relevant information.
4. **Problem Identification:** The mediator helps the parties identify the specific issues in dispute, ensuring clarity about the nature and scope of the conflict.
5. **Brainstorming and Option Generation:** Parties explore potential solutions and generate ideas for resolving the dispute. The mediator may encourage creative thinking.
6. **Negotiation:** Parties engage in direct negotiations, with the mediator facilitating the discussion and assisting in overcoming impasses or misunderstandings.
7. **Reality Testing:** The mediator may help parties assess the feasibility and consequences of proposed solutions, encouraging them to consider the practicality of their choices.
8. **Agreement Formulation:** When the parties reach a mutually acceptable solution, the mediator assists in drafting a written agreement that outlines the terms and responsibilities of each party.
9. **Review and Signature:** The parties review the agreement and, if they agree, sign it. The agreement is binding and enforceable once signed.
10. **Closure:** The mediator summarizes the key points of the agreement and discusses any next steps, if necessary. The mediation process is considered complete once an agreement is reached or if the parties decide to terminate the process without an agreement.
11. **Follow-up:** Some mediations include provisions for follow-up meetings or reviews to ensure that the terms of the agreement are being upheld.
12. **Confidentiality:** Mediators maintain the confidentiality of the process and do not share information with outside parties unless required by law or with the parties' consent.

It's important to note that the specific rules and procedures in mediation may vary depending on the mediation organization, jurisdiction, or type of dispute being mediated. However, the core principles of neutrality, confidentiality, and party control are common to most mediation processes.

ANALYSIS AND DISCUSSION

Mediation is an alternative dispute resolution (ADR) method that can be used in court proceedings in Malaysia. Its applicability in the Malaysian legal system is governed by both legislation and the rules of court. Mediation in Malaysia is primarily regulated by the Arbitration Act 2005 and the Mediation Act 2012. The Mediation Act provides a legal framework for the recognition and enforcement of mediated settlements (Justice Mah Weng Kwai, 2012). In Malaysia, mediation is typically a voluntary process. Parties must agree to participate in mediation, and they can choose to withdraw from the process at any time. Courts do not generally compel parties to mediate, but they may encourage it. Some Malaysian courts have established court-annexed mediation programs (Justice Mah Weng Kwai, 2012). These programs encourage parties to consider mediation as an option to resolve their disputes before proceeding to a full trial. In these cases, parties may be referred to mediation by the court (Choy & Siang, 2016). Since litigated environmental cases involve criminal proceedings, mediation is usually not applicable unless in non-serious offences (Justice Mah Weng Kwai, 2012). In 2012, the Malaysian Judiciary set up the Environmental Court at the Sessions and Magistrate's courts, dealing only with criminal cases. From the date of the establishment of the Environmental Court, a total of 373 out of 474 pending cases have been disposed (n.a., 2014). Nevertheless, mediation is encouraged to be applied in civil cases when investigating root causes of the disputes and allegations. Mediation can also be practiced when compensation is substantial in environmental disputes.

Mediation is commonly used in civil cases, such as commercial disputes, family matters (e.g., divorce and child custody) (Ruzita et al, 2020), and personal injury cases. The court may suggest mediation as a means to expedite the resolution of these disputes and reduce the backlog of cases. Mediation in Malaysia is typically conducted by professional mediators who are trained and accredited. These mediators help facilitate communication and negotiation between the parties. Mediation proceedings in Malaysia are generally confidential. This means that what is said and discussed during mediation cannot be used as evidence in court unless all parties agree to the contrary.

Under the Mediation Act 2012, mediated settlements are legally binding and enforceable in the same way as court judgments. If parties reach an agreement through mediation, they can apply to the court to have the mediated settlement recorded as a court judgment. Mediation can be a cost-effective and time-saving way to resolve disputes, making it an attractive option for many litigants. Family courts in Malaysia often encourage parties to explore mediation in family-related cases. This is particularly relevant in divorce and child custody matters where the best interests of the child are a primary consideration (Ruzita et al., 2020).

Malaysia has also embraced community mediation (Ahmad, 2018), which aims to resolve disputes at the local community level, often involving issues related to neighbours, noise complaints, or other community-related conflicts (Muhammad Rizal et al, 2016). While mediation is an option in court proceedings in Malaysia, its applicability and effectiveness can vary depending on the nature of the case and the willingness of the parties to engage in the process. It's important to consult with legal professionals to determine the suitability of mediation in specific cases and to ensure compliance with Malaysian laws and court rules.

The effectiveness of mediation in resolving environmental disputes in the Malaysian context can vary depending on various factors, including the nature of the dispute, the willingness of the parties to engage in the process, and the expertise of the mediator. Environmental disputes in Malaysia can range from issues related to land use, pollution, deforestation, wildlife conservation, and more. The effectiveness of mediation may depend on the complexity and scale of the environmental issue (He et al., 2023). Mediation is often more effective in cases involving disputes between private parties or communities rather than disputes involving large-scale environmental degradation with multiple stakeholders, including government agencies.

Mediation is generally a voluntary process, and all parties involved must agree to participate. In many environmental disputes, particularly those involving corporations or government entities, there may be reluctance to engage in mediation due to concerns about liability or regulatory compliance. Parties may prefer litigation or regulatory enforcement to address environmental violations.

The effectiveness of mediation in environmental disputes is closely tied to the expertise of the mediator. It is important to have a competent mediator whom the parties regard as neutral because many disputes of a public nature do not have a well-defined format, and there is a need for a neutral party to start, structure, and control the negotiating process (Riesel, 1985). Environmental mediation often requires specialized knowledge of environmental regulations, scientific principles, and the potential impacts of different solutions. It is crucial to have mediators with a strong understanding of environmental laws and issues specific to Malaysia.

In some environmental disputes, public participation is essential. Communities affected by environmental issues may be particularly concerned about the outcome, and their participation in the mediation process can be a key factor in its effectiveness. In such cases, mediators need to facilitate a transparent and inclusive process to build trust and reach a satisfactory resolution. An environmental mediator must often do a substantial amount of pre-negotiation groundwork. The reputation of the mediator will be of great assistance to ensure the smooth running of the session. The mediator's primary task is to ensure that all the parties who can influence the decision are at the conference table, particularly those with authority to decide (Riesel, 1985).

Balancing the need for confidentiality in mediation with the public's right to information in environmental matters can be challenging. Environmental disputes often involve broader public interests, and there may be pressure for transparency and disclosure of information. Mediators must navigate this delicate balance effectively.

Malaysia has environmental laws and regulations that may affect the ability to mediate certain types of environmental disputes. For example, regulatory agencies may have authority to enforce environmental laws, making it difficult to mediate disputes involving alleged violations. Additionally, some environmental issues may have criminal aspects, which are typically outside the scope of mediation. Cultural and socioeconomic factors can influence the effectiveness of mediation. For instance, communities with limited resources may face challenges in accessing mediation services. Additionally, cultural perspectives on land use and natural resources can impact the willingness to mediate or the acceptability of certain solutions. In environmental disputes, it is crucial to consider the long-term sustainability of any mediated agreement. Environmental issues often have far-reaching consequences, and the effectiveness of mediation may be judged by the ability of the parties to adhere to the agreement and the long-term impact on the environment.

CONCLUSION

In encouraging dispute settlement, other than empowering mediation as a tool to resolve environmental disputes, Non-Governmental Organisations (NGOs) serve as crucial intermediaries between government, industry, and the public to resolve the disputes. They bridge gaps in resources, knowledge, and capacity, making them instrumental in driving environmental change. By conducting research, advocating for policies, and mobilizing the public, NGOs can influence decision-making and contribute to resolving environmental issues. Their work is particularly important in addressing global challenges like climate change and biodiversity loss, where collective action and advocacy are essential for success.

In summary, the effectiveness of mediation in resolving environmental disputes in Malaysia can be influenced by a range of factors. While mediation can be a valuable tool in resolving some types of environmental conflicts, it may not be suitable for all cases. The willingness of parties to participate, the expertise of mediators, the nature of the dispute, and the legal framework are all factors that need to be carefully considered when evaluating the applicability and effectiveness of mediation in environmental matters.

ACKNOWLEDGEMENT

This article is funded by *Geran Penyelidikan Biduni Mizanniyah* PPPI/BM-DB/FSU/USIM/17222 entitled *Pembinaan Modul Kompetensi & Kemahiran Sulh & Mediasi* and *Geran Penyelidikan USIM* PPPI/FSU/0122/USIM/15422 entitled *Penyelesaian Konflik Melalui Kaedah Alternatif Untuk Kesejahteraan Sosial: Model Mediasi Dan Sulh Klinik Guaman USIM*.

REFERENCES

- Ahmad, S. N., Abd Hamid, N., Abd Wahab, N. A., Ramli, R., Aziz, T. N. R. A., & Hashim, M.H. (2018). Preliminary Study on Online Sulh-Based Mediation Community. In 4th International Conference on Information Technology & Society (pp. 27–33). Selangor. *Awang @ Harun bin Ismail & Ors v Kerajaan Negeri Kedah & Ors*, [2010] 4 MLJ 83.
- Azmi bin Ismail dan satu lagi lwn Pendakwa Raya*. [2019] 7 MLJ 45.
- Boulle, L., & Rycrof, A. (1998). Mediation: Principles, Process, Practice. *Journal of South African Law*, 1998(1), 167-169.
- Choy, C. Y., Hee, T. F., & Siang, C. O. S. (2016). Court-annexed mediation practice in Malaysia: What the future holds. In *University of Bologna Law Review* (Vol. 1, Issue 2, pp. 271–308). University of Bologna. <https://doi.org/10.6092/issn.2531-6133/6751>
- Haliza, A. R. & Rohasliney, H., Eds. (2010). *Pemeliharaan dan Pemuliharaan Alam Sekitar di Malaysia*. Penerbit Universiti Sains Malaysia Pulau Pinang.
- He, T.; Liu, L.; Gu, M. (2023). The Role and Development Trend of Third-Party Mediation in Environmental Disputes. *Sustainability* 2023, 15, 10197. <https://doi.org/10.3390/su151310197>

- Joseph Nwazi. (2017). Assessing The Efficacy of Alternative Dispute Resolution (ADR) In the Settlement of Environmental Disputes In The Niger Delta Region Of Nigeria. Vol. 9(3), pp. 26-41, August 2017 DOI:10.5897/JLCR2016.0254.
- Justice Mah Weng Kwai, at the High Court Kuala Lumpur (18 February 2012): Mediation Practices: The Malaysian Experience [2012] 5 MLJ clxvi
- Maizatun Mustafa. (2019). Environmental Law in Malaysia. 4th ed. Wolters Kluwer. The Netherlands.
- Muhammad Rizal Razman, Mazlin Mokhtar, Siti Naaishah Hambali, Sharifah Zarina Syed Zakaria & Zuliskan dar Ramli. (2016). Perlindungan Alam Sekitar Terhadap Aspek Kecuaian di Bawah Undang-Undang Tort Melalui Mediasi ke Arah Pembangunan Mampan di Malaysia. *International Journal of the Malay World and Civilisation (Iman)* 4(2), 2016: 93 – 101 (<http://dx.doi.org/10.17576/IMAN-2016-0402-09>)
- Riesel, D. (1985). Negotiation and mediation of environmental disputes. *Ohio State Journal on Dispute Resolution*, 1(1), 99-112.
- Rita Abhavan Ngwoke, Ibiene P Mbanjo and Oriafio Helynn. A Critical Appraisal of Doctrinal and Non-Doctrinal Legal Research Methodologies In Contemporary Time. *International Journal of Civil Law and Legal Research* 2023; 3(1): 08-17
- Ruzita Ramli, Dina Imam Supaat & Hasnizam Hashim. (2020). Kebiasaan Baharu (New Normal) dalam Pelaksanaan Sulh Kes Hadhanah dan Nafkah Anak: Isu dan Cabaran. *Insla E-Proceedings*, 3(1), 414-437.
- Shamsuddin Suhor. (2015). Isu dan Undang-undang Alam Sekitar di Malaysia. Dewan Bahasa dan Pustaka. Kuala Lumpur.
- n.a. Speech by YAA Tun Arifin Bin Zakaria Chief Justice of Malaysia at The Opening of The Legal Year 2015, 10 January 2015 Main Hall, Ministry of Finance, Persint 3, Putrajaya. [2015] 1 MLJ cxxxiii.
- n.a., Speech by the Rt Hon Tun Arifin Bin Zakaria Chief Justice of Malaysia at The Opening of The Legal Year 2014, 11 January 2014, Dewan Sri Siantan, Perbandaran Putrajaya. [2014] 1 MLJ cxiii.