

# THE URGENCY OF MEDIATOR'S GOOD FAITH IN MEDIATING LEGAL DISPUTES: THE CRITICAL ANALYSIS STUDY

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## THE URGENCY OF MEDIATOR'S GOOD FAITH IN MEDIATING LEGAL DISPUTES: THE CRITICAL ANALYSIS STUDY

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### Abstract

*This study aims to explore the concept and urgency of a mediator's good faith in mediating civil law. The reason behind this research is that the mediator must have a good faith, not only for the parties involved in the dispute. This research is a normative juridical study (doctrinal) with secondary data from primary and secondary legal materials, using the bibliography technique. Those materials are analyzed with a qualitative descriptive method. Further, good faith is put as the highest principle in agreement, including mediation, and expecting to be implemented by all dispute parties and mediators as well. A mediator's good faith should be carried out with earnest effort and intention formerly, instead of being pushed by the constitution to mandatory mediating dispute parties. This study has shown that good faith visibly implements if the mediator actively conducts the functions and responsibilities with confidentiality, volunteer, empowerment, neutrality, and exclusive solutions as the principles.*

**Keywords:** Civil Matter; Good Faith; Legal Disputes; Mediator;

### 1. INTRODUCTION

The dispute is one thing that can arise at any time in human life. Disputes can occur from the family sphere to the legal sphere. Since ancient times, dispute resolution has existed in the cultural setting of Indonesian society as a pattern of dispute resolution based on deliberations, for example, village meetings and customary density. There are several options in resolving legal disputes.<sup>1</sup>

Mediation is one of the alternative methods to resolve legal disputes, where disputing parties concur to have an independent third party as a mediator. Nowadays, instead of implementing mediation for legal disputes outside the court only, it is currently integrated. Besides, the salience of incorporating mediation in court, established after a dispute is registered.<sup>2</sup>

Additionally, mediation is a method that tends to be fast, low-cost, and more accessible in justice for parties to resolve disputes satisfied. Incorporating mediation in court could

<sup>1</sup> Mulyani Zulaeha, "Mediasi Interest Based Dalam Penyelesaian Sengketa Tanah," *Kertha Patrika* 38, no. 2 (2016): 156-66, doi:10.24843/kp.2016.v38.i02.p05.

<sup>2</sup> Dian Maris Rahmah, "Optimalisasi Penyelesaian Sengketa Melalui Mediasi Di Pengadilan," *Jurnal Bina Mulia Hukum* 4, no. 1 (2019): 1-16, doi:10.23920/jbmh.v4i1.174.

be an effective instrument for resolving the court's dispute heap while strengthening and optimizing the function of non-judicial institutions.<sup>3</sup>

Regulation of mediation normatively discloses on Burgerlijk Wetboek (BW), Rechtsreglement Voor de Buitengewesten (RGB), and Herzienne Inlandsch Reglement (HIR), also written on various Indonesia's legislations, such as The Law Number 48 of The Year 2009 Regarding the Judicial Power, and Supreme Court Regulation No. 1 of 2016 on Mediation in Court Procedure.<sup>4</sup>

Mediation institution provides chances for all parties to actively initiate dispute resolution that is helped by a mediator and oriented to a win-win solution as a principle.<sup>5</sup> However, those positive sides of mediation are misaligned with the success rate of the court in mediating disputes. It happens due to the stereotype that resolving disputes in court is just to maintain self-respect and negative emotions indeed. Consequently, each party is difficulty effectively communicating and even rejects mediation, then tend to choose assembly for dispute resolution.

Good faith is essentially needed for all disputing parties when implementing mediation.<sup>6</sup> Certain parties are allowed to refuse mediation if another party is proven to conduct mediation with bad faith.<sup>7</sup> For this reason, mediators play a decisive role because they are responsible to reconcile disputing parties. Accordingly, mediators should keep their mind that mediation is oriented to reconcile voluntarily, instead of compulsion. Moreover, as long as the agreed clause does not contradict legal, respects human right, and is feasible to conduct, the mediator could be categorized on the right track.<sup>8</sup>

There are various studies of good faith, such as from Sulistiyawati and Erie Haryanto with the title is "Peran Itikad Baik Mediasi dalam proses Penyelesaian Konflik Keluarga" (The Role of Mediation Good Faith in Family Conflict Resolution), published by Mahkamah: Jurnal Kajian Hukum Islam, Vol. 6, No. 1, June 2021.<sup>9</sup> Its similarity with current research is exploring good faith in mediation as the main issue. In contrast, this study focuses on the good faith principle for mediators. In addition, another study on good faith is given by Niru Anita Sinaga on Jurnal M-Progress, Vol. 8 No. 1, 2018.<sup>10</sup> The title is "The Role of Good Faith Principle in Achieving Justice for Agreed Parties". The difference between the recent and current studies is focused on the position of good faith. The recent research highlights the urge for good faith for achieving the expected result, while the current one emphasizes the role of good faith for mediators.

<sup>3</sup> Mardalena Hanifah, "Kajian Yuridis : Mediasi Sebagai Alternatif Penyelesaian Sengketa Perdata Di Pengadilan," *Jurnal Hukum Acara Perdata ADHAPER* 2, no. 1 (2016): 1-13, doi:<https://doi.org/10.36913/jhaper.v2i1.21>.

<sup>4</sup> Yudha Chandra Arwana and Ridwan Arifin, "Jalur Mediasi Dalam Penyelesaian Sengketa Pertanahan Sebagai Dorongan Pemenuhan Hak Asasi Manusia," *Jambura Law Review* 1, no. 2 (2019): 212-36, doi:[10.33756/jalrev.v1i2.2399](https://doi.org/10.33756/jalrev.v1i2.2399).

<sup>5</sup> Lin Nur Anisa, "Implementasi Prinsip Neutrality Dalam Proses Mediasi," *Al-Mabsut: Jurnal Studi Islam Dan Sosial* 9, no. 1 (2015): 1-17, doi:<https://doi.org/10.56997/almabsut.v9i1.20>.

<sup>6</sup> Zulaeha, "Mediasi Interest Based Dalam Penyelesaian Sengketa Tanah."

<sup>7</sup> Arwana and Arifin, "Jalur Mediasi Dalam Penyelesaian Sengketa Pertanahan Sebagai Dorongan Pemenuhan Hak Asasi Manusia."

<sup>8</sup> Ajrina Yuka ArdHIRa and Ghansham Anand, "Itikad Baik Dalam Proses Mediasi Perkara Perdata Di Pengadilan," *Media Iuris* 1, no. 2 (2018): 200-214, doi:[10.20473/mi.v1i2.8821](https://doi.org/10.20473/mi.v1i2.8821).

<sup>9</sup> Sulistiyawati Sulistiyawati and Erie Hariyanto, "Peran Itikad Baik Mediasi Dalam Proses Penyelesaian Konflik Keluarga," *Mahkamah : Jurnal Kajian Hukum Islam* 6, no. 1 (2021): 79-87, doi:[10.24235/mahkamah.v6i1.7577](https://doi.org/10.24235/mahkamah.v6i1.7577).

<sup>10</sup> Niru Anita Sinaga, "Peranan Asas Itikad Baik Dalam Mewujudkan Keadilan Para Pihak Dalam Perjanjian," *Jurnal M-Progress* 8, no. 1 (2018): 47-66.

This study is normative or doctrinal research, namely research on secondary data in the legal field, whose objects are statutory regulations and library materials. By examining the concept of a mediator's good faith. This research data comes from secondary data sourced from primary legal materials consisting: Burgerlijk Wetboek voor Indonesie, Law Number 48 of The Year 2009 Regarding the Judicial Power, and Supreme Court Regulation No. 1 of 2016 on Mediation in Court Procedure (SC Regulation on Mediation). Secondary legal materials include legal materials that provide explanations of primary legal materials, such as research results, books discussing, mediators and good faith. The data obtained from the results of the literature study was processed using qualitative methods. A qualitative method is a research procedure that produces analytical, descriptive data.

## 2. ANALYSIS AND DISCUSSION

### 2.1. Concept of Good Faith in Mediation

This section is the most important section of your article. Contains the results of the object of study and should be clear and concise. Discussion is presented descriptively, analytically, and critically. The description shall be in accordance with legal issues or arrangement of analyzed legal issues.

Term of "Good faith" literally comes from Latin, it is bonafide which means honest and sincere effort.<sup>11</sup> The principle of good faith originated from Roman law, which is embraced in civil law, and its development is also adopted by several Common Law countries. The development of good faith in Roman law was irrelevant to the evolution of contract law itself.<sup>12</sup>

Good faith has been defined in Ancient Roman times by Cicero. Cicero provides the most complete approach to the present day regarding good faith, namely as a virtue/moral value that expresses the awareness to act honestly based on one's conscience which can be the basis for self-protection from deception, and devious moves that are dangerous, dishonest and misguided, from a cunning and evil attempt at deception perpetrated by those who are able, and know to take advantage of his trustworthiness, simplicity, and ignorance.<sup>13</sup> Therefore, Good faith is described as 'the foundation of all law, or the basic principle of law'<sup>14</sup>

In international law, the term good faith has three distinct meanings. In other words, a perusal of international documents shows that the term is used with three different shades: as a mere legal fact related to an erroneous subjective belief; as a vague standard for evaluating the reasonableness or the normality of behavior; and to designate a

<sup>11</sup> Cedric E. Dawkins, "The Principle of Good Faith: Toward Substantive Stakeholder Engagement," *Journal of Business Ethics* 121, no. 2 (2014): 283–95, doi:10.1007/s10551-013-1697-z.

<sup>12</sup> Ery Agus Priyono, R. Benny Riyanto, and F. X. Joko Priyono, "The Function of Good Faith Principle in the Application of Freedom Principle in Franchise Contract," in *IOP Conference Series: Earth and Environmental Science*, vol. 175, 2018, 1–6, doi:10.1088/1755-1315/175/1/012193.

<sup>13</sup> Muhammad Faisal, "Makna Itikad Baik Sebagai Landasan Hak Kepemilikan Pembeli: Wujud Standar Tindakan Dalam Menentukan Kejujuran Pembeli," *Jurnal Mercatoria* 14, no. 1 (2021): 9–19, doi:https://doi.org/10.31289/mercatoria.v13i1.5079.

<sup>14</sup> Om Prakash Gautam, "Concept Of Good Faith In Domestic Laws-To Debrief The Common Understanding," *International Journal of Legal Research* 6, no. 3 (2019): 1–11.



powerful general principle of the law whose main normative content is the protection of legitimate expectations freely created in another subject by some deliberate course of conduct.<sup>15</sup>

In Hukum Perdata Symposium by Badan Pembinaan Hukum Nasional (BPHN) on 1981, good faith is interpreted as a) honesty when making a contract; b) along the process of enacting a contract, it is mandatory to do in front of the officer; c) being the indicator of declining bad behaviors during contract enactment.<sup>16</sup>

The good faith principle could be explained into two parts, namely<sup>17</sup>:

1. Objectively, each agreement should incorporate norms of propriety and decency to hinder immiserating a certain dispute party.
2. Subjectively, good faith lies inward. Therefore, it constitutes honesty in the law of matters.

The term of good faith has a wide concept and is not limited to contract law only, but still relates to property law, family law, inheritance law, corporate law, and even governing law.<sup>18</sup> Good faith is the supereminent principle in each contract. The application of good faith in a contract is an important factor. The parties who have good faith intentions will receive legal protection fairly, while those who do not have good faith intentions should feel the consequences of their dishonesty. Good faith can also be seen at the time the legal action comes into force or at the time of the implementation of the rights and obligations contained in the legal relationship.<sup>19</sup>

Additionally, good faith is the abstract concept that generates multi interpretations of the meaning and directs it to be more subjective. Otherwise, based on the law's perspective, good faith tends to be associated with fairness and appropriateness that is naturally objective. It emphasizes the environment where the law is enacted.<sup>20</sup>

The principle of good faith has a relationship with civil law compared to common law, therefore Indonesia applies this principle of good faith in every contract agreement. The principle of good faith has the intention of carrying out an agreement honestly and cleanly so that legal certainty is guaranteed and no one is harmed. However, countries that adhere to common law, such as America and England, have prevented the perpetrators of default on an agreement with the promissory estoppel doctrine to prohibit both parties from mutually withdrawing the agreement. The study of good

<sup>15</sup> Robert Kolb, *Good Faith in International Law* (United Kingdom: Hart Publishing, 2017). 35.

<sup>16</sup> Ery Agus Priyono, "Peranan Asas Itikad Baik Dalam Kontrak Baku (Upaya Menjaga Keseimbangan Bagi Para Pihak)," *Diponegoro Private Law Review* 1, no. 1 (2017): 13–22.

<sup>17</sup> Warmiyana Zairi Absi and Rusniati Rusniati, "Prinsip Itikad Baik Dalam Suatu Kontrak," *Justici* 14, no. 1 (2022): 1–10, <http://117.74.115.107/index.php/justici/article/view/471/133>.

<sup>18</sup> M. Khan et al., "Good Faith Principle of Contract Law For the Islamic Banking System," *Utopia y Praxis Latinoamericana* 24, no. Esp.5 (2019): 239–51, <https://produccioncientificaluz.org/index.php/utopia/article/view/29952/31013>.

<sup>19</sup> Antari Innaka, Sa'ida Usdiana, and Sularto, "Penerapan Asas Itikad Baik Tahap Prakontraktual Pada Perjanjian Jual Beli Perumahan," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 24, no. 3 (2012): 504–14, [doi:http://dx.doi.org/10.22146/jmh.16122](http://dx.doi.org/10.22146/jmh.16122).

<sup>20</sup> Margaretha Donda Daniella, William Tandya Putra, and Erich Kurniawan Widjaja, "Asas Itikad Baik Dalam Memorandum of Understanding Sebagai Dasar Pembuatan Kontrak," *Notaire* 2, no. 2 (2019): 231–53, [doi:10.20473/ntr.v2i2.13122](https://doi.org/10.20473/ntr.v2i2.13122).

faith provides space for judges in court to consider propriety and fairness which must be carried out at the pre-contractual stage.<sup>21</sup>

The latest concept of good faith in the Common Law System by Anthony Mason that the concept of good faith includes three doctrines related to (1) an obligation for the parties to cooperate in achieving the objectives of the contract (honesty to promises); (2) fulfillment of standards of respectable behavior; (3) fulfillment of reasonable standards of contract relating to the interests of the parties.<sup>22</sup>

In Indonesia, the principle of good faith is stated in Article 1338 Paragraph (3) of the Indonesian Civil Code which regulates that “Agreements must be carried out in good faith.” This means that the agreement is carried out according to propriety and justice. The law only states that contracts must be executed in good faith; but does not specify pre-contractual, contractual or post-contractual stages. The conclusion is that good faith must exist from the pre-contractual to post-contractual stages.<sup>23</sup>

In a contract, the phrase “in good faith” serves as a complement or an enhancer, increasing the functionality of a treaty. This means that, if a contract is unclear, it can be clarified by the phrase “in good faith.” The Indonesian Civil Code’s Article 1338 Paragraph (3) states that any explanations of contracts must ensure that their intended purposes are not compromised. Additionally, if the circumstances have changed such that carrying out the contract in accordance with its terms would be unfair, acting in good faith can assist to limit or negate, that an agreement can be disregarded.<sup>24</sup>

Good faith is a doctrine that is readily accepted in legal systems. There are two sources of good faith: legislation and common law. In legislation, good faith is mentioned in different ways; in some, good faith is expressly spelled out in the legislation, while in others, the reference is more oblique. In common law, good faith is a growing concept acknowledged by many judges. There are two types of terms in the contract: express and implied. Furthermore, there are two types of implied terms recognized by the court: terms ‘implied in fact’ and ‘implied in law’. Judges and scholars differ in their perspectives on good faith.<sup>25</sup>

Good faith is often said to be related to moral standards, which is the principle of legal-ethical. It represents honesty, directness, and loyalty that each disputing party should be able to pay attention to the other party’s interest. Consequently, good faith could be the gateway to incorporating moral values into law.<sup>26</sup>

<sup>21</sup> May Shinta Retnowati et al., “Analisis Asas Itikad Baik Dalam Jual Beli Online Berbasis COD (Cash on Delivery),” *Alhamra: Jurnal Studi Islam* 3, no. 1 (2022): 10–18, doi:<http://dx.doi.org/10.30595/ajsi.v3i1.11867>.

<sup>22</sup> Zumrotul Ainiah and Lukman Santoso, “Implikasi Asas Itikad Baik Dalam Akad Murabahah Di Perbankan Syariah,” *An-Nisbah: Jurnal Ekonomi Syariah* 4, no. 2 (2018), pg. 89, <https://doi.org/10.21274/an.2018.4.2.73-98>.

<sup>23</sup> Innaka, Rusdiana, and Sularto, “Penerapan Asas Itikad Baik Tahap Prakontraktual Pada Perjanjian Jual Beli Perumahan.”

<sup>24</sup> Elisabeth Nurhaini Butarbutar, “Implementation the Principle of in Good Faith in the Standart Contract,” *International Journal of Business, Economics and Law* 7, no. 4 (2015): 42–47, [https://www.ijbel.com/wp-content/uploads/2015/09/KLIBEL7\\_Law-13.pdf](https://www.ijbel.com/wp-content/uploads/2015/09/KLIBEL7_Law-13.pdf).

<sup>25</sup> Nurhidayah Abdullah, *Good Faith in Contractual Performance in Australia* (Singapore: Palgrave Macmillan, 2020), 15, doi:<https://doi.org/10.1007/978-981-15-6078-1>.

<sup>26</sup> Martijn Hesselink, “The Concept of Good Faith,” *Towards a European Civil Code*, 2004, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1762630](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762630). accessed on 8 September 2022.

Furthermore, good faith is one of the principles that becomes a reference for dispute resolution.<sup>27</sup> It supports win-win solutions, specifically to prevent harm to certain parties and incorporate bad intentions during mediation.<sup>28</sup> The principle of good faith requires that in making any agreement, the parties have the freedom to determine the contents of the agreement, and with whom they agree, however, every agreement should always be based on the principle of good faith, not violating laws and regulations, and not violating community interests. Such a requirement is intended to bring justice to the parties in the agreement, so that the strong do not exploit the weak<sup>29</sup>

The elements of good faith consist of 1). honesty, in terms of conducting responsibilities;<sup>30</sup> 2). propriety, which means the awareness and intention to correctly behave based on morality; 3) rationality, which ensures that nothing stronger bargaining position to take unreasonable advantage from the lower one.<sup>31</sup> Legal experts state that the element of good faith in negotiating, far from making agreements to negotiate more certain, is seen as fostering imprecision. The difficulty is in deeming when negotiating conduct falls short of a legal standard of good faith<sup>32</sup>

The indicator of achieving good faith divides into two concepts, which are relative and absolute. 1) relative refers to the attitude and behavior of each party; 2) absolute specifies rationality, justice, and the use of objective measurement to identify situations whether the imbalance support happens or not based on the objective norms.<sup>33</sup> In addition, good faith is not limited to dispute parties only but refers to the norms developed in society as well. There are two objectives of good faith, 1) to identify whether the agreement is mandatory or not; 2) to understand the obligations of each party and its implementation.

A valid agreement is carried out in good faith because the good faith of the parties will appear in the fulfillment of the achievements set out in the agreement and must comply with the law so that default occurs. Parties that do not have good intentions will cause harm to others.<sup>34</sup>

## 2.2. The Urgency of Mediator's Good Faith in Mediation

Mediation is one of the dispute resolution efforts of the disputing parties to agree to present an independent third party to act as a mediator (mediator). This activity is carried out by the mediator as a party that helps find various alternative dispute

<sup>27</sup> Sulistiyawati and Hariyanto, "Peran Itikad Baik Mediasi Dalam Proses Penyelesaian Konflik Keluarga."

<sup>28</sup> Kadek Oldy Rosy, Dewa Gede Sudika Mangku, and Ni Putu Rai Yuliantini, "Peran Mediasi Dalam Penyelesaian Sengketa Tanah Adat Setra Karang Rupit Di Pengadilan Negeri Singaraja Kelas IB," *Ganesha Law Review* 2, no. 2 (2020): 167–79, <https://ejournal2.undiksha.ac.id/index.php/GLR/article/view/207/158>.

<sup>29</sup> Luh Nila Winarni, "Asas Itikad Baik Sebagai Upaya Perlindungan Konsumen Dalam Perjanjian Pembiayaan," *DIH: Jurnal Ilmu Hukum* 11, no. 21 (2015): 1–12, doi:10.30996/dih.v11i21.442.

<sup>30</sup> Ainiah and Santoso, "Implikasi Asas Itikad Baik Dalam Akad Murabahah Di Perbankan Syariah."

<sup>31</sup> Iwan Permedi, "Perlindungan Hukum Terhadap Pembeli Tanah Bersertifikat Ganda Dengan Cara Itikad Baik Demi Kepastian Hukum," *Yustisia Jurnal Hukum* 5, no. 2 (2016): 448–67, doi:10.20961/yustisia.v95i0.2824.

<sup>32</sup> Leon E. Trakman and Kunal Sharma, "The Binding Force of Agreements to Negotiate in Good Faith," *Cambridge Law Journal* 73, no. 3 (2014): 598–628, doi:10.1017/S000819731400083X.

<sup>33</sup> Farly Lumopa, Suherman, and Imam Haryanto, "Itikad Baik Dalam Pendaftaran Merek Terkenal Di Indonesia," *Jurnal Yuridis* 5, no. 2 (2018): 277–93, doi:<http://dx.doi.org/10.35586/v5i2.772>.

<sup>34</sup> Tuti Haryanti, "Itikad Baik Dalam Perjanjian Jual Beli Dengan Metode Pembayaran Cash on Delivery," *Jurnal Ilmiah Penegakan Hukum* 8, no. 2 (2021): 160–73, doi:<http://dx.doi.org/10.31289/jiph.v8i2.5126>.



resolutions. The position of the mediator, in this case is to encourage the parties to seek agreements that can end the dispute.<sup>35</sup>

In mediation, the mediator's role is to assist the disputing parties by identifying the issues in dispute, developing options, and considering alternatives that can be offered to the parties to reach an agreement. Even though the mediator is involved in offering solutions and formulating agreements, it does not mean that the mediator determines the outcome of the agreement because the final decision remains in the hands of the disputing parties.<sup>36</sup>

The mediator must be able to find alternatives dispute resolution. He is not only bound and focused on what the parties have in their dispute resolution. The mediator must be able to offer other solutions, when the parties no longer have alternative dispute resolution, or the parties have experienced difficulties or even stalled (deadlocked) in resolving their disputes. The important role of the mediator as a neutral third party in assisting the settlement dispute. Therefore, the mediator must have several skills that can facilitate and assist the parties in resolving their disputes.<sup>37</sup>

There are seven functions of a mediator namely<sup>38</sup>:

- 1) As a "catalyst", implies that the presence of a mediator in the negotiation process is able to encourage the birth of a constructive atmosphere for discussion;
- 2) As an "educator", it means that one must try to understand the aspirations, work procedures, political limitations, and business constraints of the parties;
- 3) As a "translator", it means the mediator must make an effort to convey and formulate one party's proposal to another party through good language or expression without reducing the goals achieved by the parties;
- 4) As a "resource person" it means a mediator must utilize available information sources;
- 5) As a "bad news bearer", it means a mediator must realize parties in the negotiating process can be emotional. For this reason, the mediator must hold a separate meeting with related parties to accommodate various proposals.
- 6) As a "reality agent", it means that the mediator must make an effort to provide a clear understanding to one of the parties that the target is impossible/unreasonable to achieve through negotiations;
- 7) As a "scapegoat", means that a mediator must be ready to be blamed, for example in making an agreement resulting from negotiations

The mediator has a very important role to achieve a peace agreement between the disputing parties, namely<sup>39</sup>:

- 1) Conduct a conflict diagnosis;
- 1) Identify problems and critical interests;

<sup>35</sup> Rahmah, "Optimalisasi Penyelesaian Sengketa Melalui Mediasi Di Pengadilan."

<sup>36</sup> Afdolul Anam, Mohammad Amir Hamzah, and Uswatun Hasanah, "Kekuatan Mengikat Mediasi Penyelesaian Sengketa Waris Masyarakat Madura," *Arena Hukum* 13, no. 02 (2020): 300-313, doi:10.21776/ub.arenahukum.2020.01302.6.

<sup>37</sup> Tomi Saladin, "Penerapan Mediasi Dalam Penyelesaian Perkara Di Pengadilan Agama," *Mahkamah : Jurnal Kajian Hukum Islam* 2, no. 2 (2017), doi:10.24235/mahkamah.v2i2.2034.

<sup>38</sup> Mardalena Hanifah, "Perbandingan Tugas Mediator Pada Pengadilan Agama Indonesia Dengan Mahkamah Syariah Malaysia," *ADHAPER: Jurnal Hukum Acara Perdata* 6, no. 2 (2020): 101-16, doi:10.36913/jhaper.v6i2.134.

<sup>39</sup> *Ibid.*



- 2) Develop an agenda;
- 3) Streamlining and controlling communication;
- 4) Teach the parties in the bargaining process and skills;
- 5) Helping the parties collect important information;
- 6) Solving problems to reach choices;
- 7) Diagnose disputes to facilitate problem-solving

The mediator is bound to help all parties to resolve the dispute but unexpectedly decides for them. Mediator support expresses in identifying disputes, leveraging options, and considering alternatives provided for parties to achieve resolution.<sup>40</sup> It is based on the principle of mediation that tends to be result oriented, specifically on achieving agreement among disputing parties voluntarily, free from any constraints<sup>41</sup>

Furthermore, mediators should encourage and empower disputing parties to decide their expected solutions. Mediators initiate dialogues among parties, help clarify each need and expectation, provide guidance, and align differences. If those are achieved, mediators would make a memorandum of agreement.<sup>42</sup>

On the other hand, both the mediator and dispute parties should implement good faith during mediation. It is based on Supreme Court Regulation No. 1 of 2016 that each mediator has to obey behavioral guidelines written on Mahkamah Agung decree No.108/KMA/SK/VI/2016. It states each mediator must execute good faith, neutrality, and sacrifice freely. However, a mediator's good faith is also interpreted as earnest effort and intention formerly, instead of being pushed by the constitution to mandatory mediating dispute parties.

Principles of mediator's good faith refer to the concept of Ruth Carlton, which are:

1) Confidentiality

Mediation ensures confidentiality by applying Privilege and Legal Proceedings during discussions and negotiations among dispute parties. They have to agree that the dispute unnecessarily proceeds into the next legal process.<sup>43</sup>

Confidentiality means restricting the unnecessary party to attend the court mediation.

This principle could be beneficial for everyone who avoids publishing their disputes in the media.<sup>44</sup>

2) Volunteer

<sup>40</sup> Alri Hamka Mbeki, Haerani Husainy, and Maisa, "Pertimbangan Hukum Mediator Dalam Penyelesaian Sengketa Di Pengadilan Negeri Klas Ia Palu," *Jurnal Kolaboratif Sains* 2, no. 1 (2019): 1940-49, doi:<https://doi.org/10.56338/jks.v2i1.720>.

<sup>41</sup> I Komang Wiantara, "Penyelesaian Perkara Perdata Di Pengadilan Berdasarkan Peraturan Mahkamah Agung Republik Indonesia Nomor 1 Tahun 2016," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 7, no. 4 (2018): 456-66, doi:10.24843/jmhu.2018.v07.i04.p04.

<sup>42</sup> Fajar Sugianto, Felicia Christina Simeon, and Dea Prasetyawati Wibowo, "Idealisasi Sifat Alternatif Dalam Penyelesaian Sengketa Melalui Mediasi," *Jurnal Hukum Bisnis Bonum Commune* 3, no. 2 (2020): 253-65, doi:<https://doi.org/10.30996/jhbbc.v3i2>.

<sup>43</sup> Raden Besse Kartoningrat and Isetyowati Andayani, "Mediasi Sebagai Alternatif Dalam Pengurusan Dan Pemberehan Harta Pailit Oleh Kurator Kepailitan," *Halu Oleo Law Review* 2, no. 1 (2018): 291-305, doi:<http://dx.doi.org/10.33561/holrev.v2i1.4191>.

<sup>44</sup> R. Lestari, "Perbandingan Hukum Penyelesaian Sengketa Secara Mediasi Di Pengadilan Dan Di Luar Pengadilan Di Indonesia," *Jurnal Ilmu Hukum* 3, no. 2 (2013): 217-37, doi:<http://dx.doi.org/10.30652/jih.v3i2.1819>.

Mediation encourages each disputing party to voluntarily discuss for achieving a resolution. It must be free from any compulsion, threat, and pressure.<sup>45</sup> Moreover, a person who is indicated as a mediator needs to possess “*keikhlasan*” (volunteer) in supporting dispute parties during mediation. This is based on the understanding that everyone would cooperatively find a resolution as long as they are aware.<sup>46</sup>

### 3) Empowerment

It believes that everyone who decides to conduct mediation must possess the ability to negotiate.<sup>47</sup> Dispute resolution emerges from empowering each party in their capacity, which needs to be acknowledged and respected. In addition, a resolution is supposed to come internally and tends to be easier to accept.<sup>48</sup>

### 4) Neutrality

The mediator is only authorized to control and facilitate the process of mediation, but decision-making would be the responsibility of the dispute parties themselves. Therefore, a mediator is quite distinct from a judge due to their neutrality, in terms of deciding the winning party, imbalance of support, and force of opinion.<sup>49</sup>

A lack of mediator's neutrality happens if imbalance support is shown. For instance, a mediator advises a certain party in front of others, using gestures that reflect disapproval of the other's argument, and objecting directly to certain parties.<sup>50</sup> Thus, mediators must be able to protect the interest of each party fairly and equally, so then that trust could be achieved.<sup>51</sup>

During the stage of resolution, each disputing party conveys expectations on the details of the agreement. Along with this, the mediator would keep each argument written on a document of agreement. Moreover, a mediator is prohibited to intervene in the agreement, but on the other hand, they have to still pay attention to the details of the agreement due to the possibility of bad faith of a certain party.

### 5) Exclusive solutions

The resolution achieved from mediation is unnecessarily limited to the legal standard. It could be defined as creativity. Therefore, the results of mediation mostly fulfill disputing parties' expectations and are closely related to the other good faith principle, empowerment.<sup>52</sup>

<sup>45</sup> Arif Dian Santoso, Isharyanto, and Adi Sulistiyono, “Penyelesaian Sengketa Medik Melalui Mediasi Oleh Majelis Kehormatan Disiplin Kedokteran Indonesia (Mkdki) Untuk Dapat Menjamin Keadilan Dalam Hubungan Dokter Dan Pasien,” *Jurnal Hukum Dan Pembangunan Ekonomi* 7, no. 1 (2019): 29–38, doi:10.20961/hpe.v7i1.29176.

<sup>46</sup> Juni Irianti Sitinjak, “Penyelesaian Sengketa Melalui Mediasi,” *Jurnal Ilmiah Research Sains* 5, no. 1 (2019): 1–10.

<sup>47</sup> Wencislaus Sirjon Nansi, “Mediasi Sebagai Alternatif Penyelesaian Sengketa Pertanahan Di Indonesia,” *Jurnal Pemberdayaan Hukum* 2, no. 1 (2012): 48–55, <https://www.lppmfatimaparepare.org/index.php/JPH/article/view/86/71>.

<sup>48</sup> Emirza Henderlan Harahap Runtung, T. Keizerina Devi Azwar, and Utary Maharany Baru, “Mediasi Dalam Penyelesaian Sengketa Syariah,” *USU Law Journal* 2, no. 3 (2014): 59–73, <https://jurnal.usu.ac.id/index.php/law/article/download/9086/3863>.

<sup>49</sup> Anisa, “Implementasi Prinsip Neutrality Dalam Proses Mediasi.”

<sup>50</sup> Hariyanto Rompis, Dientje Rumimpunu, and Sarah. D.L Roeroe, “Peran Dan Fungsi Mediator Dalam Penyelesaian Sengketa Bisnis Di Indonesia,” *Lex Privatum* IX, no. 5 (2021): 25–34, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/33493/31696>.

<sup>51</sup> Kartoningrat and Andayani, “Mediasi Sebagai Alternatif Dalam Pengurusan Dan Pemberesan Harta Pailit Oleh Kurator Kepailitan.”

<sup>52</sup> I Wayan Suwanda, “Mediasi Sebagai Upaya Penyelesaian Perkara Yang Bersifat Kooperatif,” *Ganec Swara* 15, no. 1 (2021): 897–904, doi:10.35327/gara.v15i1.189.

In Islam the good faith of the mediator is shown in the character of the prophet as a superior mediator, these characters are:

1) *Ash-Shidiq (true and honest)*

This character must be possessed by a mediator who leads to truth and honesty in saying, behavior, or mental states. There is no such behavior made up or commonly called a lie. Right and honest behavior and truth can be accounted. The character of Shidiq also can be steady, stable, mature, wise, honest, and authoritative, being an example for others and having noble character.

2) *Al-Amanah (trust)*

The mediator can be said to be trustworthy when he is honest, must not lie, and have the courage to do the right thing, build a good reputation, and not take sides with either party. Amanah is a trust that must be carried by the mediator in realizing something that is done with full commitment, competence, hard work, and consistency

3) *At-Tabligh (to deliver)*

Tabligh's character is communicative. A mediator is said to have tabligh nature and has provided content that includes aspects of communication skills, leadership, development, and improvement of the quality of human resources and the ability to overcome problems.

4) *Al-Fathanah (smart).*

Fathanah means having broad knowledge. The intelligence possessed by the mediator is not only intellectual intelligence but also emotional intelligence and spiritual intelligence. The characteristics of Fathanah's soul in the mediator, namely: the man of wisdom; high in integrity; willing to learn; proactive stance; Credible and reputable; being the best; empathy and compassion; emotional maturity; balance; a sense of mission, and a sense of competition.

### 3. CONCLUSION

Good faith is the abstract concept that is implemented in contract legal, inheritance law, and family law. It is put as the highest principle in agreement and expects all parties, including mediators to manifest it along the process of mediation to achieve dispute resolution. Mediator's good faith could be visibly practiced if the mediator actively conducts their functions and responsibilities with confidentiality, volunteer, empowerment, neutrality, and exclusive solutions as the principles.

The essence of the principle of good faith is permanent and does not change, while the meaning of good faith is dynamic and changes based on complex and dynamic of legal awareness of the community. The mediator in carrying out his duties must also pay attention that mediation aims to help the parties reach a peace agreement. The orientation of mediation on the outcome is that the parties are willing to resolve the dispute through a peace agreement. The good faith of the mediator can be interpreted as a genuine effort accompanied by intention, not because of the law's order to reconcile the parties which is shown through an active role in carrying out its functions and duties.



In Islam, the characteristics of mediators who have good intentions are ash-shidiq (true and honest), al-amanah (trust), at-tabligh (to deliver), and al-fathanah (smart).

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