

## **CONSTRAINTS HAMPERING THE IMPLEMENTATION OF INDONESIAN COURT-ANNEXED MEDIATION AND SOME PROPOSED SOLUTIONS**

**Fatahillah AS**

Indonesian Institute for Conflict Transformation (IICT)

Kebayoran Baru Jakarta Selatan Indonesia

[fatahilla@postgrads.unisa.edu.au](mailto:fatahilla@postgrads.unisa.edu.au)

### **ABSTRACT**

The Supreme Court of Indonesia issued its regulation concerning Mediation Procedures in Courts in 2003. It is based on the civil procedural law which obligates presiding judges to try to settle the disputes amicably. This regulation uses mediation as an alternate process for disputed parties to reach an amicable and lasting agreement. It does not place the disputing parties as winners or losers but rather considers social and humanitarian aspects. This mediation regulation is intended to overcome the costly and time-consuming nature of dispute settlements in courts which has led to complaints from disputants and a backlog of cases. Another benefit is that disputants themselves have the power to control the process and outcome of dispute resolution.

However, until now, the implementation of the Supreme Court Regulation No. 2 Year 2003 is still far behind expectation. The success rate of dispute settlement based on this regulation is below 5%, in spite of the contradiction between the *musyawarah* (amicable) tradition of Indonesian people and the high rate of litigated cases in courts.

This paper analyzes some constraints which have been hampering the implementation of court-annexed mediation including internal factors (legal constraints, judicial constraints, time limits for mediation, inadequate facilities) and external factors (lawyers, parties, lack of funding, clash with local culture) and proposes some solutions.

**Keywords:** constraints, court-annexed, mediation, Indonesia, proposed solutions

## INTRODUCTION

Alternative Dispute Resolution (herein after abbreviated as ADR) is not a strange practice for Indonesian people. It has been well-known by Indonesian tribes and customs before the nation's independence as a united country. The mechanism of *musyawarah mufakat*—which means reaching a unified agreement through negotiation or mediation—has been used almost in every aspect of community interaction. As an example, for the *Minangs* tribe in *Batusangkar* (West Sumatra), conflicts or disputes are more often settled by religious and traditional leaders in their own community. Those who prefer litigation will be perceived negatively and may get social sanction from their community (LP3ES, 2005). Indonesian people, like any other Eastern countries, put more emphasize on the brotherhood and long-term relationships than short-term profits. Furthermore, as most of the Indonesian population are Muslims, Islamic teaching obligates its followers to strengthen their brotherhood (which is known as *silaturahmi*).

This mechanism of *musyawarah* as the indigenous way of Indonesian people plays a vital role in settling disputes or conflicts among the society members in Indonesia, for both private or public matters. Barnes (2007) states that due the lack of trust on the judiciary, *musyawarah* has gained acknowledgement from the community since all disputants share ideas in the process.

This era of globalization of communication and education has affected the minds and the ways of Indonesian people in resolving disputes. Juwana (2003) suggests that Indonesia is on the crossroad between the traditional and modern system and between the Asian and Western values. To accommodate this shift, some forms of ADR have been implemented in the Indonesian legal system since 1990's. In 1999, the issuance of Law No. 30 on *Arbitration and Alternative Dispute Resolution* was intended to provide legal basis for the institutionalization of ADR. Arbitration is final, has legal enforcement/execution and is binding. Final means that the decision by the arbitrator can neither be appealed nor reviewed. If one party does not uphold the agreement, one can ask the District Court to enforce it. Umar (2005) mentions that, 'prior to that, the relevant regulation was the *Law on Arbitration*, which was part of the *Old Law on Civil Procedures of 1848* enacted during the Dutch colonial administration' (p. 79).

The implementation of Law No. 30 has not been successful because disputants still feel that arbitration is no different from litigation. There is still an adversarial process and the third party decides the verdict which mostly results in one party winning and the other losing. The law also mentions mediation as an alternative in article 6. Other forms of ADR such as negotiation, reconciliation and mediation have been used in the regulations since then to settle disputes in wider fields such as in environment, labour, consumer disputes, insurance and banking.

The Supreme Court of Indonesia tried to overcome the weaknesses of arbitration by issuing Regulation No. 2 Year 2003 concerning *Mediation Procedures in Courts or Court-Annexed Mediation*. Mediation is used as an alternative to litigation to avoid adversarial process to reach lasting agreement by considering social and humanitarian aspects. It also aims to overcome the long and expensive nature of litigation process in courts which has led to complaints from disputants and they themselves have the power to control the process and outcome of dispute resolution (IICT, 2005). Parties

are given the authority by the mediator to decide what they want in the mediation process (Bagshaw, 2006).

Another benefit is that mediation could overcome the problem of case backlogs in the Supreme Court. Based on its annual report per March 2006, the backlog stood at 13,997 cases (The Supreme Court of Indonesia, 2006, p. 7). This problem cannot be resolved just by increasing the number of judges in the Supreme Court because the rate of cases entering the Supreme Court is far greater than the ability of the Government to increase the number of judges in the Supreme Court. Instead, to overcome this constraint, the effort must be directed to the court of first instance (IICT, 2005).

The Indonesian judicial system is divided into four courts, each of which handle different matters i.e. General Court (civil and criminal cases for non Muslims), Religious Court (family law matters between Muslims), Military Court (offences by the member of the armed forces) and Administrative court (public defendant). Its judicial power consists of three tiers. The lowest is the District Court (known as *Pengadilan Negeri*) as the court of first instance, the middle is the High Court as the court of appeal (*Pengadilan Tinggi*) and the highest is the Supreme Court (*Mahkamah Agung*) as court of the last instance.

The legal basis for the Supreme Court to issue its regulation is based on Indonesian civil procedural law which is inherited from the Dutch colonial era. Mills (2006) explains that there are two court procedures governing the local people: the *Herziene Indonesisch Reglement* (herein after abbreviated as HIR) on the islands of Java and nearby Madura; and the *Rechtsreglement Buitengewesten* (herein after abbreviated as Rbg) on the other islands.

Under HIR article 130 and Rbg article 154, judges are obliged to try to settle disputes amicably. Without trying to do it, every decision which results from the proceedings will be considered void. However, the articles do not specify how the judges can settle the disputes amicably, which is why the Supreme Court issued the regulation on mediation procedures in court. Although the Supreme Court does not have the authority to make the law, it has the power to draft further regulations to explain the law which provides no detail on the procedures. The scope of the regulation is confined to procedural matters only (The Supreme Court of Indonesia, 2006). Prior to the issuance of the regulation, the Supreme Court issued its Circular Letter No. 1 Year 2002 to ask the judges to make efforts settling the disputes amicably, but it also failed to address the procedures.

Court-annexed mediation falls under the jurisdiction of the District Court which only handles civil disputes between non Muslims. When parties reach a deed of settlement (known as *akta perdamaian*), it is automatically final, binding and enforceable. 'Final' means the settlement cannot be appealed or brought to the Supreme Court. 'Binding' means the disputants have to obey and enforce it. 'Enforceable' means the court could rule the execution if one party fails to enforce it. This enforceable power of settlement is known as *Berkekuatan Hukum Tetap* [and has equal power of enforcement to a judge's decision] (Sutadi, 2003).

In practice, court-annexed mediation is also being carried out by the Religious Court for civil disputes among Muslims. There is one article in the Supreme Court Regulation which allows the procedures to be used in other kind of courts if deemed necessary (article 16). Many private disputes have been settled by mediation in Religious Courts, especially divorce cases.

The deed of settlement resulted from court-annexed mediation is expected to overcome the problem of long, expensive and complicated procedures in the litigation process. Court-annexed mediation only takes 22 days if it is carried out in court or 30 days out of court, whereas based on the Supreme Court Circular Letter No. 6 Year 1992, the litigation process could take up to 6 months. As Juwana describes:

...The long process is usually due to postponement in each of the court hearing for various reasons, such as the judge is taken ill, the defendant or plaintiff asks more time to prepare the written pleadings. However, the delay has in many occasions been used as outright strategy from lawyers in an attempt to slowdown the proceedings (Juwana, 2003, p. 18).

In addition, if the loser is not satisfied, s/he could appeal the decision in the High Court which could take another 6 to 8 months and then go to the Supreme Court. According to Harahap (2004, p. 154), 'the average time required for the completion of a case from the court of first instance up to the Supreme Court can be between 7 to 12 years'. It is in some parts caused by case backlog. (The Supreme Court of Indonesia, 2003, p. 168).

Notwithstanding the long, expensive and complicated procedures of litigation process, the implementation of the Supreme Court Regulation No. 2 Year 2003 is still far behind expectation. The percentage of successful mediated cases based on this regulation is below 5% (IICT, 2005, p.15) despite the *musyawarah* (amicable) tradition of Indonesian people. This paper analyzes some constraints which have been hampering the implementation of court-annexed mediation including internal factors (legal constraints, judicial constraints, time limits for mediation, inadequate facilities) and external factors (lawyers, parties, lack of funding, clash with local culture) and proposes some solutions.

This paper draws not only on the literature related to the Supreme Court and court-annexed mediation in Indonesia but also on my experience as a trainer, researcher and former executive director of Indonesian Institute for Conflict Transformation (IICT), an NGO accredited by the Supreme Court of Indonesia to provide certification trainings for judges and other professionals to become certified mediators in courts.

## **CONSTRAINTS**

The constraints which have been hampering the implementation of court-annexed mediation in Indonesia are categorized into two sections: internal factors involve the constraints within the judiciary system and the external factors comprise the constraints outside the system.

## **INTERNAL FACTORS**

### **1. Legal Constraints**

As mentioned above, court-annexed mediation is based on a Supreme Court regulation. The implication of this is that only cases that have been registered in the District Court can be mediated and result in a deed of settlement, with final, binding and enforceable power. Sutadi (2004) emphasizes that the judge mediator can only mediate the disputes which have been registered in court. No out-of-court settlements can be enforced and they are only binding to the parties who have agreed on those settlements. This limits the possibility of getting more disputes being settled by mediation in court.

There is one exception to this ruling. Law No. 2 Year 2004 concerning *The Industrial Relations Court* states that the agreement signed by labours and employer to settle a dispute can be registered and executed by the court (The Supreme Court of Indonesia, 2006). This can only happen because hierarchically the law is higher than the Supreme Court regulation.

### **2. Judicial Constraints**

Based on article 130 of HIR, the judge has the obligation to settle the disputes amicably, but it is the judge who has become the primary constraint in the implementation of court-annexed mediation. The first reason is because by nature, a judge is not suitable to be a mediator. As Santosa (2004) indicates a judge is used to adjudicating, not facilitating. That is why in practice, the mediation process is no different to litigation when a judge becomes a mediator in most mediated cases. S/he adjudicates and decides the dispute as he is accustomed to doing in a proceeding. No wonder many disputants feel dissatisfied and reject the settlement decided by a judge mediator. In addition parties also have little trust in judges because of their poor reputation.

The second reason is because judges feel that their obligation to perform the role of mediator has added a burden to their job and they do not receive an additional fee when they act as mediators. Parties pay nothing when they choose a judge to be a mediator in their case which is why almost 95 % of civil cases are mediated by judges. Disputants do not want to spend more money to pay the non-judge mediator. To make the matter worse, a judge receives a low monthly wage. As Crouch (2004) concludes it is pressuring them to find additional sources of income, including bribes and they may deliberately 'collude' with prosecutors to weaken cases.

The third reason why judges are constrained to act as mediators is because the regulation states that mediators have to undergo certification training first by an accredited institution to become a certified mediator in court so some judges are not performing their duties as mediators because they have not been certified. Moreover, some judges also think mediation only benefits judges in the Supreme Courts because it is intended to overcome the case backlog in the Supreme Court. They are hesitant to implement the court-annexed mediation because they see no benefit for them.

### **3. Time Limits for Mediation**

The regulation states that the mediation process which takes place in court consumes 23 working days including one day to appoint one mediation by parties and 31 working days if a case is mediated outside the court. This time limit is too short to mediate a case, especially if the case is complicated and many parties are involved or if there is one party who lives outside the town or abroad (ICT, 2003). For example, the summoning of parties could take a week because they live in a remote area. Communication and transportation still remain big problems in Indonesia, especially with its vast geographic areas.

In practice, if the mediator sees that there is a possibility to settle a dispute between parties, s/he could ask the presiding judges to extend the time at the end of the mediation process. Presiding judges usually approve this request by extending the mediation by one or two weeks.

### **4. Inadequate Facilities**

Because of the nature of a mediation process and the need to maintain confidentiality and provide a comfortable environment that can encourage disputants to settle amicably, facilities play an important part in the success of court-annexed mediation. Therefore a designated mediation room is desirable with some additional supporting facilities. However most courts in Indonesia do not have this luxury. (Sutadi, 2004) also indicates that rooms for judges' office are also difficult to find .

In practice, many mediated cases are held in the judge mediator's office where s/he shares the space with three to four other colleagues and therefore the confidentiality of mediation process can not be maintained (ICT, 2005).

## **EXTERNAL FACTORS**

### **1. Lawyers**

Lawyers play an important part in the success of court-annexed mediation. However, most Indonesian lawyers are against court-annexed mediation because it limits the amount of money they could earn from a consultation fee. Because mediation takes a shorter time (23 or 31 working days) compared to the litigation process (6 months), a lawyer will receive less income if his client chooses mediation. In practice, lawyers persuade their clients not to undergo the mediation by saying that they have big chance to win in the litigation process (ICT, 2005).

### **2. Parties**

Another big problem that has been hampering the implementation of court-annexed mediation is there is no enforceable mechanism to make parties come to the mediation

process (IICT, 2005). Although mediation is voluntary by nature, the main reasons why parties do not get involved are because of their lack of understanding of mediation and the negative persuasion from their lawyers. This is happening in the litigation process where a judge could issue a default decision if one party is absent in the proceeding.

In most cases where parties are absent in the mediation process which is compulsory, they just wait for the mediation time to expire so they could move further to litigation. This is of course causing inefficiency in case management and contributing to case backlog.

### **3. Lack of Funding**

Until now, many stakeholders have not been aware of the existence, purpose and benefits of court-annexed mediation. Because of funding limitations, the Supreme Court of Indonesia cannot easily disseminate and publish the regulation on mediation, especially because of the vast geographic area of the country. As the Supreme Court (2005, p. 19) reports that it has been allocated almost US\$ 100,000,000 in 2005 for all four court systems which is inadequate.

### **4. Clash with Local Culture**

Local cultures hamper not only the court-annexed mediation, but also the Indonesian legal system in general. As Indonesia has been under Dutch occupation, its legal system is still based on the Dutch system which contradicts the local culture of Indonesian indigenous people. As Mills (2006) reports the Dutch aimed to unify the law for all Indonesians and it was being followed by the Indonesian government, but some customary laws still apply in the regions.

This unification of law has brought with it many controversies and contradictions with local cultures. As Indonesia consists of thousands of tribes with different customs, languages and laws, it would be impossible to enforce the law without acknowledging the local culture. Many riots have been prevalent in Indonesia due to decisions from the legal apparatus or specifically, from the judiciary, because the decisions do not fulfil the requirement of a just outcome for indigenous people and neglect the customary values (LBH Bali, 2005). This is causing failures to execute court decisions, especially in land disputes, because local people are demonstrating and fighting. These riots have caused many people to lose their lives, relatives and property. Barnes (2007) comments that the Indonesian people and foreigners do not perceive that the courts and legal system timely fair justice.

The same problem occurs in court-annexed mediation. Because the number of judges are limited and their rotation time is rather high, the placement of judges do not address the cultural situations. Judges from one province/tribe are placed in a different area where they do not know and understand the local culture so they fail to pay attention to the customary values. No wonder then many decisions/settlements do not take into account the indigenous culture and result in many contradictions and a lack of support.

## **SOME PROPOSED SOLUTIONS**

Given the range of constraints caused by both internal and external factors which directly affect the court-annexed mediation system, some proposed solutions are offered in this section. These solutions are:

### **1. Legal Basis**

In order to encourage more disputes to settle amicably, the legal basis of court-annexed mediation is recommended to be changed into a law, not based on a Supreme Court regulation. By doing so, it will be higher in the hierarchy and more enforceable by the legal apparatus (The Supreme Court, 2005). It will also unify different kind of cases such as labour, banking, insurance environment and others under one procedure. It can also require that settlements reached out of court have equal enforcement and execution as a decision from a judge. But this will only work effectively if other constraints are also addressed.

### **2. Lack of Funding and Education**

Because the regulation of court-annexed mediation is relatively new, stakeholders and community at large are suggested to be educated and socialized too so they know and understand the purpose, procedure and benefits of using court-annexed mediation. Although the Supreme Court has limited funding, it might cooperate with NGOs and donors to disseminate information. Dissemination of information in the media that can be easily understood by common people who are mostly illiterate in legal terminologies is also important. For example, IICT has published the procedure of court-annexed mediation in a small handbook with illustrative pictures and colours (IICT, 2005).

For judicial education, it is recommended that the Supreme Court of Indonesia require mediation to be one of the compulsory subjects to be taken by prospective judges. By doing this at an early stage judges will become accustomed to mediation. Training for current judges and lawyers is also important to assist them to become better mediators (Harahap, 2005).

Cooperating with law schools in universities may also be important. As of now, many universities, especially in the big cities, have put Alternative Dispute Resolution as a compulsory or optional course to be taken, especially by law students. To encourage law students to use mediation, the Supreme Court could cooperate with universities to hold a moot-court competition on mediation. By doing so, students will learn mediation through the most effective way, which is learning by doing.

To educate and certify judges and professionals who want to be mediators in court, the Supreme Court should accredit more institutions (The Supreme Court, 2005). Until now, there are only two organizations which have been accredited, namely the Indonesian Institute for Conflict Transformation (IICT) and Pusat Mediasi Nasional (PMN). It is impossible for both organizations to hold certification trainings across the vast area of Indonesia in a short period of time.

### **3. Funding and Facilities**

After the Indonesian reforms in 1998, there has been a growing concern to endorse the improvement of the Indonesian judiciary system and facilities. This is because increased numbers of people realize that legal certainty is a must for the nation's development. Therefore, the government should give more funding to the Supreme Court to improve its facilities and raise the salary of judges. As the Supreme Court concludes many court buildings are no more suitable to be used as courthouses, thus new buildings are required (The Supreme Court, 2005).

To improve court-annexed mediation, additional facilities have to be provided in a court. In its monitoring program, IICT (2005) has suggested that ideal facilities include: a room for joint meetings, a round table, chairs for parties and mediator, air conditioning, a whiteboard, an additional room for separate meetings and adequate waiting areas. Surprisingly, these facilities have been provided for a pilot project in a court situated in a remote area (Bengkalis, Riau) although they received financial assistance from the local government which might affect the mediator's perceived impartiality.

### **4. Revision on regulation**

Realizing the weaknesses in the regulation, the Supreme Court of Indonesia is now revising it by adopting the Japanese mediation system *wakai*, into the Indonesian court-annexed mediation system (The Supreme Court, 2006). Based on this system, mediation will not only take place before the litigation process but also in the litigation stage, allowing the presiding judge to be the mediator of the case.

Some other procedures, such as the recognition of out-of-court settlement in the district court as having equal execution or enforcement power and the extension of mediation time, will also be adopted (The Supreme Court, 2006). Mediation will also be conducted at all levels of the court hierarchy, including in the High Court and the Supreme Court. More professionals or non judges are also endorsed to become certified mediators in the court under this plan.

### **5. Mediators' Fee and Association**

To encourage judges to support court-annexed mediation, it is recommended that they receive an additional fee when they are chosen by parties as mediators, either from the government or from the parties or both (IICT, 2003). This will also increase the possibility of professionals being chosen as mediators because the parties now have to pay the judges too. If judges cannot get an additional fee, the Supreme Court has to give non- financial incentives to them, such as promotion for those who have settled the disputes amicably.

The fee system for lawyers also possible to change in regard to mediation. After conducting a training in Riau, IICT has created a package system fee for lawyers so they wanted to support mediation as they wanted to settle a case as soon as possible to be able to handle other cases to get more money (IICT, 2005).

An association of mediators also needs to be established to be the focal point for this profession and to create a code of conduct. As of now, a plan to establish Asosiasi

Mediator Indonesia (AMI) is taking place pioneered by former participants of IICT certification training.

## **6. Local Culture**

One way to synergize the local culture with the court-annexed mediation system is to recommend more customary and religious leaders to become accredited mediators in courts. By doing so, they will be able to mediate a case which involves indigenous people and requires knowledge of the local culture. It is expected that by involving them, they will be able to produce just outcomes because they understand the customs, know how to settle disputes accordingly and are respected by the disputants (IICT, 2005).

As Bagshaw observes, 'knowledge about conflict and its causes is shaped by our cultural understandings and world views and determines how we act, react and intervene' (Bagshaw, 2006, p. 7-8).

## **CONCLUSIONS**

There are still so many things to be done in the effort to make court-annexed mediation a success in Indonesia. Although there are many constraints hampering its progress, there is a need to improve the system by involving all stakeholders. The big hope comes from the nature of Indonesian people's way of resolving conflicts or disputes through amicable settlement.

The primary factors that need to be addressed are education and incentives to assist the judges to understand and accept mediation as they are the main actors involved. The law obligates them to settle cases amicably. If it is too hard to change the negative behaviour of existing corrupt judges, the Supreme Court of Indonesia should and must pay attention to their prospective new judges by educating and disciplining them.

Last but not least, the local culture must also be considered whenever the presiding judges settle a dispute, either by litigation or mediation. By doing so, the decisions or settlements will get more support from indigenous people.

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