THE PRACTICE OF MEDIATION AS A MECHANISM OF FAMILY DISPUTE RESOLUTION: A COMPARATIVE ANALYSIS BETWEEN MALAYSIA AND INDONESIA

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ABSTRACT

Mediation is one of the Alternative Dispute Resolution (ADR) that emphasises a mutually agreeable resolution technique and incorporates elements of soft dispute resolution namely win-win situation. Mediation allows the parties involved in a dispute to participate by outlining their solutions. History suggests that mediation has been practiced in Malaysia a long time ago, despite not incorporating all features of mediation. The same practice takes

place in Indonesia where mediation is one of the preferred methods of dispute resolution in Indonesia. Hence, mediation is not a rare concept in Malaysia and Indonesia due to their long existence and constant practice in Alternative Dispute Resolution (ADR). To this date, mediation has grown in popularity as a form of Alternative Dispute Resolution (ADR) in both countries an even being used as an alternative compared to litigation. In this paper, it will review the practice of mediation in Malaysia and Indonesia via a comparison analysis. This research employs a qualitative approach. In understanding the phenomenon more thoroughly, an exploratory research design is adopted by using the secondary research method which is the analysis of the data. The result of this study affirms that mediation practices in Malaysia and Indonesia are quite similar, despite being governed under a different perspectives. The differences can be found in a number of areas namely legislation of mediation, qualification and status of a mediator, matters outside the scope of mediation, conduct of mediation, cost of mediation, existence of restorative justice and lastly application of mediation customary practice. Although mediation has been established in both countries and bring many benefits and goodness to both countries, there are still challenges that need to be overcome related to mediation especially regarding lack awareness among the society and lack of legislation regarding mediation especially pertaining family disputes. Therefore, with this research, the author hopes that the recommendations given can solve both of these challenges and at the same time the author hoped that this research can be used as a complete guidebook to make a comparative analysis between Malaysia and Indonesia in related to the practice of mediation, especially related to family disputes.

Keywords: Mediation, comparative analysis, Alternative Dispute Resolution (ADR), solution & family disputes..

INTRODUCTION

Mediation can be defined as the involvement of a third party to settle a dispute to reach a settlement (Murdoch, J., & Hughes, W., 2008). Mediation is different with litigation process because it is a consensual and non-adversarial process that delivers the final conclusion (Cullinan, P. , 2006). Compared to other types of Alternative Dispute Resolution (ADR), mediation is classified as one of the oldest methods and has been proven to be the most effective method in resolving disputes (Nora Abdul Hak, 2007). Reference can be made in the case of *Dunnett v Railtrack 2002] All ER 850* where the court stated that *"Skilled mediators are*

now able to achieve results satisfactory to both parties...which are quite beyond the power of lawyers and courts to achieve", and in the case of *Hurst v Leeming 2002] EWHC 1051 (Ch)* where the court described that mediation is "*at the heart of today's civil justice system."* Mediation also can be defined as a process of resolving dispute outside of the litigation system through the assistance of a neutral third-party called a mediator. Generally, mediation is a process when the parties with the assistance of a neutral person or called as mediator, classify disputed issues to develop options, consider alternatives, and reach a consensual settlement to accommodate their needs (Jay Folberg and Alison Taylor,1984).

Despite the fact that both Malaysia and Indonesia employ mediation, there may be differences in certain areas especially on how mediation is implemented and used in each country precisely on family disputes. Hence, this comparative analysis study is carried out to explore the similarities and differences between the mediation systems of Malaysia and Indonesia practices. The objectives of this study are as follows:

1. To examine the practice of mediation in Malaysia and Indonesia;
2. To analyse the similarities and differences in the practices of mediation in Malaysia and Indonesia;
3. To explore the advantages of mediation in both countries, Malaysia and Indonesia; and
4. To explore the challenges of mediation in both countries, Malaysia and Indonesia.

As for the challenges of mediation, despite the fact that mediation is well-established in both countries , there are still challenges that need to be overcome. For instance, both countries' societies still have a low level of awareness. Most of society thinks that this mediation is not something that benefits or favours them. Because of this, they might prefer litigation rather than mediation. Other than that, until today there is a lack of reading materials or legislation related to mediation, especially related to family disputes. Typically, reading sources in both countries only describe mediation in general terms. Even if there are reading materials about mediation, the reading materials do not touch on comparisons between countries or explain in more detail about mediation

RESEARCH METHODOLOGY

As for the research methodology, the researcher undertakes a socio-legal approach, which focuses on how the mediation operates for both countries, especially in resolving family disputes. As a non-doctrinal study, this research employs a qualitative approach. Primary data such as semi-structured interviews, survey via questionnaire through SPSS Version 23 and Focus Group Discussion as well as secondary data, such as library-based research, journal articles, books, and legislation and case law, are used to achieve the research objectives. Public Trust Corporation Act 1995 (PTCA 1995), as well as non-legal literature such as law textbooks, online articles, newspapers, case analyses, conference proceedings, and seminar papers, are examined in the doctrinal analysis section. As for the literature review, as discussed earlier, majority of the literature review focused on the general idea of mediation for each country, with no comparison in the practice of mediation in Malaysia and Indonesia. Although some literature did discuss how the mediation is implemented, it does not offer a concrete discussion on comparison for both countries. More worse, there is a lack of reference or sources to resolve family disputes by using mediation that can be referred. Therefore, at the end of this paper, the researcher hope this paper can be used as reference and guideline to compare mediation between these two countries especially in relation to family disputes.

COMPARISON OF MEDIATION PRACTICE BETWEEN MALAYSIA AND INDONESIA

Historical overview of mediation

According to Malaysia history, the usage of mediation has been around since the Malacca Sultanate, which encouraged amicable dispute resolution (Sharifah Suhana Ahmad,1999) Before English law replace it, the Muslim and or Malay communities used the Islamic way of resolving disputes known as mediation (Judith Nagata, 2008). The local chief acted as the mediator. Back then, the people appointed a third party to implement the manner of dispute resolution prescribed by Islam. *Imam* (religious), *Penghulu* (headman), *Panglima* (commander), and *Ketua Kampung* (village headman) are some of the local chiefs. These chiefs were chosen by the community and approved by the *Sultan* (the "King"). The pre-cultural and pre-structural assimilation of non-Malays had a similar practice (Nora Abdul Hak &Hanna

Ambaras Khan, 2013). The pre-cultural and pre-structural assimilation of non-Malays prefer to handle their disagreements quietly within the community only since they were perceived as foreigners. It can be said that the society at that time prefers to resolve problems through mediation rather than bringing their dispute to court(Joseph Minnatur,1968).

Malay land's attitudes regarding using the legal system to resolve disputes have changed since it was colonised because of the adoption of English law and the subsequent expansion of its judiciary. It was claimed in 1997 that Malaysians were getting increasingly litigious based on the frequency of civil lawsuits filed there (Murray Hiebert,1997).Due to that, daily increases in the number of cases make it difficult for Malaysian courts to keep up with the mounting caseload. The Malaysian judiciary stated in their 2005/2006 annual report that "*the absence of a critical provision such as the power of the court to direct parties to go for Alternative Dispute Resolution (ADR) is another reason for the delay in disposing of cases*" in order to address this issue and reduce the backlog of cases (Aniza Darmis, 2007). This proves that mediation has been used widely, particularly in the body of the Judiciary system in Malaysia

With regard to Indonesia, this can be seen historically where a peaceful resolution has been the norm for the Indonesian community for a very long time In Indonesia, mediation has been practised since before the arrival of the British. Respected community leaders or elders who served as neutral mediators were frequently used to settle disagreements. This is evident from the customary law, which recognises the custom as a person capable of settling disputes in society. Particularly during the Dutch Colonial Era, a formal legal system based on European law was introduced. The indigenous population nonetheless continued to use mediation in addition to the established legal system. The Dutch incorporated mediation that leads to peace in the settlement of disputes (Agus Suprianto, 2021).. The Dutch colonial rulers frequently let customary law resolve issues on its own without their involvement. Before making a decision, the judge or a panel of judges will attempt to resolve the dispute through mediation. After independence in the year 1945, mediation was still employed to settle conflicts. To encourage mediation and provide mediator training, the Indonesian government formed the National Commission on Mediation (*Komisi Nasional Mediasi*) in 1966. In 1990s, the Indonesia government started promoting Alternative Dispute Resolution (ADR), especially as a way to settle conflicts without going for litigation and at the same time to promote mediation as an alternative to reduce backlog cases in court (Endang Hardian,2019).. Since the ADR law was passed, mediation has grown in acceptance as a method of settling disputes in Indonesia. The use of mediation has been actively encouraged by the government, and

mediation centres have been set up all around the nation. Nowadays, mediation is widely accepted in Indonesia as an efficient method of settling conflicts. It is employed in a number of situations, such as business, civil, and labour disputes.

Duties of mediator in mediation

In Malaysia and Indonesia, the mediator's role is essentially the same for both countries. The duties of mediator in mediation is primarily to facilitate, direct, and assist the parties in reaching a mutually agreeable resolution. The mediator will serves as a third party who is impartial and aids in the parties' effective communication and comprehension of one another's viewpoints. The mediator needs to pinpoint the points of contention and aid the parties in comprehending the underlying issues and interests that are motivating the conflict. The mediator also must consider all potential solutions to the conflict, including compromise, negotiation, and settlement. Throughout the mediation, the mediator must uphold his or her objectivity and impartiality. The mediator should not support any one position or side. The mediator is responsible for maintaining the secrecy of all communications and agreements. Unless specifically permitted by the parties or mandated by law, the mediator should not leak any information acquired during the mediation process. The mediator is responsible for overseeing the mediation procedure, making sure that it is carried out effectively, that the relevant information is gathered, and that the parties are treated equitably. And lastly, if the parties are able to come to a solution, the mediator may be required to draught a Memorandum of Understanding (MOU) or settlement agreement outlining the parameters of the settlement. The Indonesian Law on Arbitration and Alternative Dispute Resolution (ADR) No. 30 of 1999 specifies these obligations and duties of mediators in mediation. The law lays out standards for mediators in Indonesia as well as instructions for how mediation should be conducted.

Types of mediation

In Malaysia, mediation may also occur in a variety of settings, depending on the parties' consent or preferences. Court-annexed mediation and private mediation centre such as the Asian International Arbitration Centre (AIAC) and Malaysian Mediation Centre (MMC) are the types of mediation in Malaysia. If the parties prefer to go for private mediation centre and after receiving the order from the court, the plaintiff's lawyer shall, within seven (7) calendar

days, notify the AIAC in writing. The parties may designate more than one mediator to mediate their conflict if they so want. Parties may also ask the Malaysian Mediation Centre (MMC) of the Bar Council to choose a mediator from its roster of accredited mediators. It should be noted that any mediator selected by the parties may choose to abide by the MMC Code of Conduct and the MMC Mediation Guidelines or not at all.

As for Indonesia, it is the same with Malaysia where it also have court-annexed mediation and private mediation centre. As for private mediation centre, mediation takes place outside of the court. It is carried out without the court's supervision. The mediators in private mediation centre is handled by National Mediation Center (PMN) whereas court-annexed mediation is governed by Supreme Court Regulation (PERMA) No. 1 of 2008.

Court-annexed mediation

Since 2004, the Malaysian Industrial Court has become the first court in Malaysia to use mediation to resolve disputes. The first Court Mediation Centre for Malaysia was formally established by the civil court on April 1, 2011, inside the Kuala Lumpur Court Complex. Then, court-annexed mediation developed to other states including those in Johor Bharu, Shah Alam, Penang, Ipoh, Melaka, Perlis, and Terengganu (Hendun Abd Rahman Shah, Siti Maszuriyati Aziz & Norfadhilah Mohamad Ali Abidah Abdul Ghafar, 2022).. The Malaysian judiciary began a free court-annexed mediation programme in August 2011, with judges acting as the mediators. Together with the aforementioned introduction, it also invited all parties involved in a judicial dispute and designated the Kuala Lumpur Court Mediation Centre (hereinafter K.L.C.M.C.) as its official venue. In essence, this court-annexed mediation encourages disputing parties to choose mediation as a means of settling their disputes and acts as an alternative to courtroom processes. This demonstrates that the Malaysian courts encourage parties to conflicts to settle them through mediation as opposed to litigation. Practice Direction No. 4 of 2016, issued by the Chief Registrar of the Federal Court of Malaysia, also supports this by encouraging mediation even throughout the appeals stage. It is mandatory for the lawyers for the parties to be present during the mediation session, unless the parties are not represented by any legal counsel. However, if mediation fails, the case is returned to the judge hearing it, who will continue hearing it until it is resolved.

Similar with Malaysia practice, in Indonesia, there is also court-annexed mediation (Karen Mills, Rininta Ayunina and Dioputra Ilham Oepangat, 2021). The Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (ADR Law), which was revised in 2011, explains court-annexed mediation in Indonesia and the process is thoroughly explained in Supreme Court Regulation No. 1 of 2016 on Mediation in Court Procedure (SC Regulation on Mediation). In some situations, like civil and business disputes, court-annexed mediation is required. The process of court-annexed mediation is explained as below. Before starting the trial, the judge may order the parties to mediate. The parties have the option of accepting mediation or rejecting it. The court will appoint a mediator if the parties consent to it. The mediator may be a judge, another court-appointed mediator, or a mediator from a private mediation organisation. If the parties are unable to agree on a mediator, the court will choose one from a list of approved mediators maintained by each court. If the mediation takes place on the court's grounds with a mediator the court provides, it is free. If the issue cannot be settled within 30 days, the court must only hear the case (extendable). Court-annexed mediation has been a component of Indonesia's legislative framework since 2003. In an effort to resuscitate the *musyawarah* spirit that had been lacking in court dispute resolution, the Supreme Court enacted the decree(Tumpa, H. A, 2008). In an effort to revive the Indonesian civil procedure law, which requires judges to emphasise resolving conflicts amicably, court-annexed mediation was introduced. It also sought to address the issues of widespread judicial corruption and litigation backlogs.

Formulation of agreement in mediation

In Malaysia, any results from a successful mediation must be made in writing called as "Consent Judgement" and must be signed by all parties (Clement & Co., 2022). The judge will make the agreement based on the settlement agreement's agreed-upon conditions. If the mediation is unsuccessful, the parties may pursue their own legal options in Court or through arbitration. This is very different from a trial when a judge makes the decision and the parties are obligated by the verdict. The settlement agreement's conditions are legally binding and enforceable between the parties, and in the event of a breach, the defaulting party may be held liable.

As for Indonesia, when the parties settle their dispute through mediation, the mediator will prepare a written agreement known as a "Peace Agreement" that details the terms of the settlement. The mediator, the parties, and, if applicable, any lawyers acting on their behalf,

will all sign the agreement. The agreement is a binding contract that serves the same purpose as a court ruling. The settlement agreement may be used as proof in any ensuing legal actions involving the dispute by the parties. Either party may request that the court enforce the settlement agreement if the other fails to abide by its provisions. The settlement agreement will be upheld by the court in the same way that a court judgement would. This agreement shares the same features as Malaysia's Consent Judgement. It should be implemented in full knowledge and good faith as it is final and binding on the parties. By doing so, conflicts can be settled more quickly and efficiently, whether they arise inside or outside of court.

The aspect of confidentiality in mediation

In Malaysia, throughout the mediation process, there is aspect of confidentiality. Generally, mediation procedure is entirely private at the initial stage. The mediator must inform the parties up front that no formal notes will be taken as part of the court proceedings. As a result, if the case proceeds to trial, the disputants cannot rely on any admissions or concessions made during the mediation. In order to make the mediation process easier to follow, the mediator may jot down some quick notes. But after the mediation, these notes ought to be deleted. If a settlement is not reached during mediation, any records, declarations, or other comments made by a party will be protected by the "without prejudice privilege" and cannot be cited or used against them in the future. The without prejudice privilege may be waived, though, if both parties agree to do so. No matter how unusual or exciting the information gleaned through it, the mediator must always resist the urge to share it with anyone. By having this confidentiality in mediation, it actually enables the parties to participate successfully and efficiently by ensuring their voluntary entry into the process (Lawrence R. Freedman and Michael L. Prigoffs, 1986).

In Indonesia, Article 6(6) of the Regulation of the Supreme Court No. 1 of 2016 concerning Procedure of Mediation in the Court of Justice ("Regulation 1/2016") states, "*Efforts to resolve disputes or differences of opinion by mediation... shall be undertaken in secrecy.*" Mediations resulting from court procedures are confidential unless the parties "demand otherwise." According to Article 5(1) of the Regulation, the mediation procedure will typically be closed unless the parties request otherwise. Although the definition of "require otherwise" is not defined by statute (for example, whether disclosure of the mediation must be made in accordance with the unanimous agreement and/or is subject to a quorum requirement),

negotiations during mediation are intended to be "without prejudice" and should not be used to influence any subsequent legal proceedings. According to the Law on Arbitration and Alternative Dispute Resolution (ADR Law), the mediator, the parties, and their representatives are all obligated to keep all mediation procedures private. The closed nature of the mediation is not violated by the mediator's report to the examining judge on the party not acting in good faith and the futility of the mediation process. Meetings for mediation can be held using long-distance audio-visual communication tools that enable all participants to participate in the meeting and see and hear each other clearly.

Additionally, parties may be required to uphold the confidentiality of mediation procedures by Indonesian courts. In accordance with guidelines published by the Indonesian Supreme Court for court-sponsored mediation in civil cases, the mediator must ensure that all information pertaining to the mediation process is kept confidential, and the parties must sign a confidentiality agreement prior to the mediation, According to Indonesian law, confidentiality can be dropped if both parties agree to reveal details about the mediation. The waiver, however, needs to be agreed upon in writing and signed by all parties.

Existence of Hybrid Arbitration and Mediation

In Malaysia, there is existence of hybrid arbitration and mediation (Yongkyun Chung, 2016). Combining arbitration and mediation into one process gives the disputing parties the chance to plan and manage their own settlement and the assurance that, in the event mediation is unsuccessful, their disagreement will be settled by a final binding judgement. Mediation-Arbitration, often known as "Med-Arb," enables parties to start the mediation process before turning to arbitration. The parties may try to settle their disagreement through arbitration if mediation is unsuccessful in helping them do so. Essentially, Med-Arb is divided into two parts. Standard mediation methods are used initially, and only if mediation is unsuccessful in reaching a resolution will it move on to arbitration. During the mediation phase, the disputing parties retain decision control and exercise process control; they only cede decision control at the conclusion of the procedure. The AIAC provides Med-Arb proceedings that are conducted in accordance with international standards and best practices for mediation and employ an experienced and unbiased mediator panel. Due to the likelihood that the disagreement will

be resolved through mediation, Med-Arb is likely to be less expensive and time-consuming than alternative dispute resolution procedures like arb-med(Kwon, Hyung Kyun,2017).

Similar to Malaysia, there is also hybrid arbitration in Indonesia. The focus of hybrid arbitration, which combines several alternative dispute resolution methods, is the arbitration procedure. This comprises a two-step process where the parties agree to try mediation first and then arbitration if mediation is unsuccessful in resolving the conflict. The parties will sign an arbitration agreement and consent to make an effort at mediation under the supervision of a designated mediator. The settlement is recorded and enforced as an arbitration award if mediation is successful and the parties are able to come to an agreement. In the event that mediation is unsuccessful, the parties move forward with arbitration, and any agreement made there is enforceable as an arbitration award. The Arb-Med-Arb procedure gives parties the chance to settle their conflict amicably while preserving the legal validity of the final settlement or judgement. This procedure might be especially helpful in complex conflicts or disagreements when the parties want to maintain their ongoing connection.

The provisions of Article 33 of the United Nations Charter (Article 33 of the United Nations Charter) as a generally recognised guideline, Article 45 of Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, and actual practises of the Indonesia National Board of Arbitration provide the legal foundation for the hybrid arbitration process (BANI). The advantages of employing the hybrid arbitration technique include the provision of a definitive judgement, the fact that it is less expensive and more efficient than going to court or arbitration, and the flexibility of the procedure's ability to help resolve issues (Purwanto, Fitriani, R. A.,Serah, Y. A.,Astono, A., & Marsalena, W. S. ,2022).. Hybrid arbitration has a number of drawbacks, including the possibility that the parties would not agree to settle their differences amicably, that they will be exposed to legal challenges and concerned that the arbitrator may show up prejudiced. Due to the fact that the hybrid arbitration method combines arbitration and mediation, it is actually not all that different from the traditional arbitration method for resolving civil disputes. The sole distinction is whether mediation or arbitration is employed as the first conflict settlement process. In Indonesia, the hybrid approach is still being used as a dispute-resolution technique.

ANALYSIS OF THE LEGAL COMPARISON OF MEDIATION IN MALAYSIA AND INDONESIA

Legislation on mediation

On February 14, 2010, the Malaysian Bar and the judiciary created a Practice Direction to encourage litigants to settle their issues through mediation rather than litigation (Shaila Koshy ,2010). Practice Direction No. 5 of 2010 (Practice Direction on Mediation) became effective on August 16, 2010. One could argue that the 2010 Practice Direction formalised the informal practice of some courts of asking litigants if they would prefer to use mediation in specific situations (Shaila Koshy,2010). The Mediation Act 2012 is the piece of legislation that governs mediation in Malaysia (Act 749). There are a total of 20 sections and one schedule in this Act. There are seven sections: introduction, mediation procedure, mediator, the conclusion of the mediation procedure, confidentiality and privilege. Typically, the parties are free to select anybody they want to act as their mediator. If the parties are unable to come to an agreement, they may apply to the Malaysian Mediation Centre (MMC) and choose a trained mediator from its list if they like (Nur Khalidah Dahlan, Muhamad Helmi Md. Said & Ramalinggam Rajamanickam,2021)

The Chief Justice of Malaya instructed all Sessions Court and Magistrates judges and their assistant registrars to have the authority to order the parties to mediate their legal disputes during the pre-trial case management stage, as described in Order 34 Rule 2 of the Rules of Court 2012. This instruction was given in Practice Direction No. 4 of 2016. (Section 1 of Practice Direction No. 4 of 2016). At any step of the legal process, mediation may be advised, including after the trial has commenced and even during the appeals phase (Section 3 of Practice Direction No. 4 of 2016). Order 34 Rule 2(2) provides that during the pre-trial case management, the Court may order or direct the parties to seek mediation as a means of settling their dispute (a). Order 59 Rule 8(c) gives the court discretion to decide costs, taking into account the parties' efforts to settle the dispute amicably or through mediation. The Rules for Court Assisted Mediation, which were written by a judge in Sabah, are freely accessible to all court authorities who mediate cases, even those in Peninsular Malaysia(Ravinthran N. Paramaguru,2011).

The legal framework in Indonesia differs from that in Malaysia, where mediation is supported by article 154 of the Rules of Procedure for areas outside Java, *Madura (Reglement Tot Regeling Van Het Rechtwezen In De Gewesten Buiten Java En Madura, Staatsblaad 1927:227)* and Article 130 of the revised Indonesian Rules *(Het Herziene Inlandsch Reglement, Staatsblaad 1941: 44)* where it stated that resolving disputes through mediation is a part of the dispute resolution process in court (Siti Kunarti, Kartono, Sri Hartini, 2018). This was also true of the Proposed Arbitration Rules and Procedures Act 2021. In accordance with Article 14 of this Act, which describes the jurisdiction of the Assembly, the Assembly may attempt to mediate a settlement between the Parties prior to and during the hearing. Article 19 paragraph 1 of the same Act states that the Arbitration Council must first work to help the parties reach a peaceful resolution, either through their own efforts or with the assistance of mediators/conciliators, third parties, or other independent parties, or with the assistance of the Arbitration Council if agreed upon by the Parties.

Next, in accordance with Article 2 of the Mediation Rules of the International Mediation & Arbitration Center (IMAC), except when a mediation process is taking place within the framework of Hybrid Arbitration which is based on the Memorandum of Understanding between the National Arbitration Body Indonesia (BANI) and IMAC. Next, the mediation process can only be attended by the parties, the powers of the parties, and the Mediator, as stated in Article 11 paragraph 3's explanation of secrecy.

Qualification and status of mediator

Not all mediators in administrative bodies namely Estate Distribution Division (EDD) and Amanah Raya Berhad (ARB) have certain qualification or undergo any relevant examination to become a mediator.. But, there are also places that require qualifications for the mediator. For instance, mediator in Civil High Court. The judges, the Judicial Commissioner, the Sessions Court Judge, the Deputy Registrar, and the Senior Assistant Registrar are all serve as mediators at the court-annexed mediation. Moreover, as for individual who wishes to become a mediator in private mediation centre like Malaysian Mediation Centre (MMC),the individual must have finished the Malaysian Mediation Centre (MMC)'s 40-hour, 5-day Course, as well as a practical assessment, in order to be accredited to the Panel of Mediators. The Mediator will be subject to the Malaysian Mediation Centre (MMC), Rules if recognised

to the Malaysian Mediation Centre (MMC), 's Panel of Mediators. As for Asian International Arbitration Centre (AIAC), the appointed mediator must meet the requirements of an institution in respect to a mediator; possess the necessary training, specialised knowledge, or experience in mediation through formal tertiary education. Generally in Malaysia, it is not an obligation to have any qualification or pass any exam to become a mediator. However, it also depends on where the individual applies to be a mediator. The only eligibility requirement is that the mediators must fluent in both Malay and English other than adhere to Code of Ethics and Professional Conduct.

In terms of qualifications to become a mediator in Indonesia, Indonesia has its own approach to appoint mediators. The Indonesian Mediation Centre (*Pusat Mediasi Nasional*) and the Indonesian Supreme Court have specified requirements for mediators, including having a specific degree of education and experience in mediation as well as completing an exam. A minimum of 60 hours of mediation training, including both academic and practical components, must be completed by mediators in Indonesia. To practise, mediators must be registered with either the Indonesian Supreme Court or the Indonesian Mediation Centre. Depending on where the mediation will take place, the mediators will also likely need to be fluent in the local language. The Indonesian Mediation Centre's Code of Ethics for Mediators is the only regulation that must be adhered by mediators.

Matters outside the scope of mediation

In Malaysia, not all cases can typically be brought to mediation (Sophia Ismail,2021). Mediation is frequently used in cases involving defamation suits, tort disputes, family problems, contract disputes, business issues, and intellectual property disputes. Mediation might not be appropriate in situations where a court must render a decision on a legal issue, when one party needs injunctive relief to be protected. For instance, when a person's safety is under jeopardy, when domestic violence or child abuse has occurred. The parties are unwilling to settle because their relationship has already soured. Next, extreme conflict and a power imbalance between the parties could exist, which the mediator is unable to address. Therefore, to decide if mediation is likely to be helpful, each case must be independently assessed.

In Indonesia, disputes that are exempt from the obligation to settle through mediation namely criminal cases, certain family cases, public interest cases, labour disputes cases and lastly intellectual property disputes. Mediation cannot be used to resolve criminal cases including murder, theft, and assault. This is due to the fact that many situations involve breaking the law, which is something the criminal justice system should deal with. As for certain family law matters. domestic violence and child abuse cases cannot be resolved through mediation. Next, cases involving public policy or matters of public interest, such as environmental disputes, cannot be resolved through mediation. In many of these situations, a court judgement or a government agency's decision is necessary. In Indonesia, mediation cannot be used to resolve labour problems including salary disagreements or unlawful terminations. Instead, the labour court normally handles these issues. Mediation also cannot be used to resolve intellectual property disputes such as trademark or copyright infringement. A judicial decision is necessary in these situations to safeguard the intellectual property owner's rights. It is crucial to remember that the aforementioned list is not all-inclusive and that there may be more situations that Indonesian mediation cannot resolve.

Conduct mediation in both countries

In Malaysia, there are two ways to mediate a dispute namely through online mediation or in-person mediation (physical mediation). Nonetheless, the outcome of the method is the same. In a normal mediation, the parties and the mediator would meet one or more sessions that were set aside by the parties. Then, the mediator and the parties will agree on a set of rules that they will follow during the mediation. Next, , the parties will express their initial points of contention and lay out the issues they wish to settle through mediation. Each party talks about their concerns and potential ways to come to an agreement. If necessary, the mediator may have private, confidential meetings with each party to help assess their continued interest in the matter and or to discuss potential solutions. Then, the mediator helps the parties come to an agreement on a resolution. After the parties have reached an understanding, the details of the resolution are codified in a written agreement called Consent Judgement .

In Indonesia, the mediation process has 3 stages, namely the pre-mediation stage, the implementation stage and the final stage. The mediator will set up a variety of procedures and preparations during the pre-mediation stage before the mediation starts. At this point, the mediator takes a number of strategic actions, including boosting his or her self-confidence, getting in touch with the parties, conducting research and providing background information

for the mediation, focusing on the future, organising the disputing parties, taking cultural differences into consideration, deciding the purpose, the parties, as well as the time and location of the meeting, and creating an environment that is beneficial to both parties.

During the implementation stage, it is the setting where the arguing parties gather and engage in forum negotiations. There are a number of crucial steps: the mediator's welcome and introduction, the presentation and exposition of the parties' actual experiences, the accurate sorting and identification of their problems, the discussion of their agreed-upon problems, the arrival at potential solutions, the discovery of details of agreement, the formulation of a decision, recording and repetition of the decision, and the mediation's conclusion. When both parties are present at a hearing for a civil matter, the judge is required to mediate between them. Despite the amount of further scrutiny, efforts to settle the dispute between the two disputing parties may be made at a subsequent hearing (Article 130 HIR/Article 154RBg).

Once a settlement has been reached, the mediator will work with the parties to develop a written document called Peace Agreement outlining the terms of the settlement. The mediator will conclude by summarising the agreement and outlining the subsequent actions. Based on the dedication they demonstrated during the mediation process, the parties implement the terms of the agreement. The parties typically carry out the mediation's implementation on their own, but additional parties may occasionally assist.

Cost of the mediation session

In Malaysia, there are no fees for mediation that are led by the court-annexed mediation. The parties just have to pay the filing of the consent judgement. But, if the parties choose to go to a private mediation centre, it is subjected to the institution fees. As for Asian International Arbitration Centre (AIAC), in the case of domestic, the Registration Fee is RM150.00 non-refundable registration fee (see Rule 3(e) AIAC Mediation Rules 2018). The fixed administrative fee for mediation is RM500.00 per case. The mediator's fee is RM600 per hour for reviewing papers and related duties; RM500 per day for mediation services. As for international cases, the party requesting mediation must pay a USD150.00 non-refundable registration fee (see Rule 3(e) AIAC Mediation Rules 2018). The fixed administrative costs for mediation are $500.00 USD per case. The mediator will be paid US$6000.00 per day and

US$750.00 per hour to review documents and relevant materials. In the event that both parties decide to submit their disagreement to the Malaysian Mediation Centre (MMC), they are respectfully asked to pay RM100.00 (non-refundable) remittance to the MMC as part of the administrative cost levied by MMC. If the parties decide to move forward with the mediation, the indicated money will be taken into consideration. The administrative fees for each mediation session are RM300.00, and the first payment of RM100.00 will be deducted from the final amount of RM200.00 if the parties agree to proceed with mediation. Both parties are required to pay an equal share of these administrative costs.

As for Indonesia, the costs of summoning the parties, one party's travel expenses, meeting costs, expert fees, and or other costs necessary in the mediation process are mediational considered when preparing the mediation costs in Indonesia. The costs of the mediation process, such as the renting of a meeting space, as well as the mediator's fees and expenses are often borne by the parties in private mediation. Depending on the mediator and the nature of the dispute, mediation fees in Indonesia are vary. However, mediation in Indonesia is less expensive than going to court or arbitration. As for court-annexed mediation, the expenses of court-annexed mediation is free as it is covered by the Court or the government. However the parties might have to make a minor contribution.

In the event that mediation is unsuccessful, the costs of summoning as referred to above shall be borne jointly or in accordance with the parties' agreement. Additional expenses besides the fees for the mediator's services and the summons mentioned above are billed to the parties in accordance with their agreement.

Existence of Restorative Justice in Indonesia

Compared to Malaysia, there is another uniqueness in mediation in Indonesia where there is Restorative Justice (R.J.). In contrast to traditional methods of dispute resolution, R.J. focuses on mending the relationships between the people involved. Through a number of initiatives, including mediation, R.J. principles have been introduced into Indonesia's legal system. Instead of placing blame or deciding guilt, the emphasis in mediation is on mending damage and mending relationships. . Overall, Indonesia's creative approach to conflict

resolution, which emphasises healing, reconciliation, and the restoration of relationships between the parties involved, incorporates R.J. principles into the mediation process.

Indonesia's criminal legal system has not yet fully acknowledged the existence of the R.J. model, despite the fact that indigenous peoples in many regions of the country have contributed to its development (Aliflanya Arisandy Maghfirah, Diny Arista Risandy, Nurindah Hilimi,2016).

The concept is thought to be a different approach to helping the offender fulfil their rehabilitation function so they can reintegrate into society without being punished. R.J. also expressed his expectation for an improvement in Indonesia's settlement burden through the courts, which is suffering a trend accumulation of issues year after year. If something happens, the Police can use the idea of R.J. (also known as "Penal Mediation"). Between the Reporter and the Reported, criminal activity. (Perkapolri No. 6 of 2019 pertaining to Criminal Investigation & Regulations Polri No. 8 of 2021 pertaining to the treatment of criminal offences based on restorative justice.

The offences committed by the offender must not be repeat offences, non-serious offences, radical or terrorist in nature, or life-threatening. Prosecution Regulation No. 15 of 2020 on Termination of Prosecution Based on Justice Restorative & S.E No: 01/E/EJP/02/2022 regarding the Implementation of the Termination of Prosecution based on R.J. were both issued by the prosecutor's office at the level of the criminal process.

Application of mediation in customary practice

In Malaysia, even though it has been a long time since independence, there are still locations where mediation is still used, particularly in relation to custom.. For instance, Native Court still use mediation in resolving their conflicts (Utusan Borneo,2015). *Adat Temenggong* in Native Court continues to use mediation in several circumstances and most of them are only related to custom. If it is not related to custom, it will not be resolved through mediation in the native court.

As for Indonesia, conflicts between members of indigenous or customary practice are also settled through mediation. This method is frequently referred to as "customary

mediation" or "*adat* mediation.". This type of mediation is based on customary norms and practises that are specific to each group. Elders or other community leaders frequently take part in the procedure, acting as mediators to help the problem be discussed and resolved. Conflicts involving land and natural resources, inheritance, marriage and family concerns, and other subjects controlled by customary law are frequently settled through this type of mediation. The procedure is often less formal than mediation conducted in court and may include the application of customary rites, ceremonies, and other practises.

ADVANTAGES OF MEDIATION

Similarly in both countries, there are considerably more benefits of mediation than there are drawbacks for disputing parties. First and foremost, during mediation, both parties have the ability to influence the result by agreeing or disagreeing. This has been shown to be successful, particularly in settling family issues. Due to the parties' freedom of expression during mediation, they can fight for the outcome that best meets their needs (Radford, M. F. ,2012). There are no official rules of procedure or courtroom proceedings; rather, the proceedings are informal. That makes family disputes more suitable to be resolved through mediation than litigation. The disputing parties have a fantastic opportunity to directly communicate and share significant concerns during mediation. The concerns brought up may be helpful in treating the intense emotional issues brought on as well as in negotiating and creating parenting arrangements. Moreover, mediation does not stop the parties from proceeding to court(Asri Salleh, 2007).Even after entering mediation in court-annexed mediation, they are still free to move on with the trial. If, after mediation, the parties are still not pleased with the result, they may ask to resume the trial. In the event that mediation is unsuccessful, parties are encouraged to express their wants and interests directly to the mediator while maintaining their autonomy. This way, there is no risk of the information being used against them in court. This demonstrates that mediation's outcomes are flexible and that, even if parties choose mediation, they can still get justice. They would have had assistance from the mediator to find a resolution or an understanding to reduce the number of concerns before the trial (Zainul Rijal Abu Bakar,2019). The decision reached through mediation may be implemented in the future at any party's discretion. The wants and interests of the parties are the main topics of mediation. In mediation, parties are encouraged to negotiate and come to a solution to the issue that they can both accept. Mediation takes less time and costs less money than a court

trial. No charges, particularly in court, will be brought. Filling out the Consent Judgement is the only expense involved. In contrast to litigation, which is based on a judicial and adversarial procedure, mediation is furthermore voluntary, informal, and adaptable (Diana Cheak,2019).

One significant advantage of mediation over litigation or court proceedings is the guarantee of the outcome. Parties that desire to maintain their business or personal relationships will benefit more from mediation. All disclosures, concessions, admissions, and communication are made completely "without prejudice," in private, and are only known by the parties and the mediator during the whole mediation process. This means that any documents, information, admissions, or concessions disclosed or made by either side during mediation will be protected by the without prejudice privilege and cannot be mentioned or used later against them if a settlement between the parties is not reached. But if both parties agree, the without prejudice privilege may be waived. The role of a mediator is to help disputing parties come to an agreement. In addition, a successful mediation will result in a settlement agreement that all parties sign and accept as written proof of the resolution. The terms of thePeace Agreement are binding and enforceable and may be enforced against the defaulting party in the case of a breach. Parties are generally more ready to accept and abide by the settlement agreement via mediation because it focuses on and addresses their needs and interests. In light of this, it may be said that mediation benefits both nations.

CHALLENGES IN PRACTICING MEDIATION

Although mediation has been established in both countries, there are still challenges that need to be overcome related to mediation. For instance, the level of awareness among society for both countries is still at a low level. Society still has the mindset that going to mediation is difficult to find a solution because they have to sit in the same room with the other party. Not only that, they think that mediation is more time-consuming than going to court. This is because they think that if they proceed with litigation, the judge himself will determine the decision and the parties must agree. But when in mediation, they think that mediation cannot

help them because this mediation is only assisted by a mediator who is neutral. Negative mindsets like this need to be changed by creating more awareness campaigns on social media or in public places. With the existence of this kind of awareness campaign, it can educate the community about the existence of mediation which actually brings many benefits to the community. In addition, people can ask questions with the officers doing the campaign about what they do not understand. With an alternative like this, people will begin to realize that mediation actually brings many benefits to them and is not what they think.

Additionally, the existing legislation are insufficient and too general. As discussed before, mediation has actually been established for a long time in Malaysia and Indonesia. The existing legislation may be a bit backward and not modern according to the current modernization trend. There is also lack of legal framework and procedures on how to resolve family disputes by using mediation (Heama Latha Nair, 2021). Besides that, there is lack of expert mediator who specialise in family dispute. As a result, the appointed mediators are unable to handle family disputes effectively and efficiently. Moreover, most of the lawyers in both countries have lack of experience and training in mediation. In normal circumstances, most of the law schools teach mediation as part of their syllabus t it is not very comprehensive. The main focus of majority of law schools is on litigation. Due to this, lawyers who lack knowledge or experience about mediation are born.

To solve these challenges, some effective steps are needed to solve this matter. For instance, the government must make us social media or public spaces to combat negative mindsets regarding mediation. With the use of this type of awareness campaign, the community can be made aware of mediation's presence and its numerous positive effects. Additionally, the government and the parties involved need to increase the number of readings or legislation related to mediation. This can be done by encouraging more studies and research to be done related to mediation. With the increase in reading material or legislation like this, it can not only be used as a reference if a problem occurs, it can also be used as a guidebook by all groups of people if they want to know more about mediation

CONTRIBUTION

This research is very important because it makes a comparative analysis between Malaysia and Indonesia, especially in the practice of mediation as a mechanism of family dispute resolution. As for the first part of the research which is the comparison section, the author has made a historical comparison between mediation in Malaysia and Indonesia. Based on observations from this angle, it can be concluded that mediation has actually been established for a long time in both countries, but the term used is not officially mediation. It is only the involvement of a third party that helps both parties in resolving the dispute. Next, the author has made a comparison between the duties of mediator for both countries. In general, the mediator's duties are the same, which is to facilitate, direct, and assist the parties in reaching a mutually agreeable resolution. In addition to the duties of mediator, the type of mediation for both countries is also the same where both countries have court-annexed mediation and also private mediation conducted by non-governmental organizations. Not only that, the two countries also made an agreement after a consensus had been reached but the terms were different. In Malaysia, it is called "Consent Judgment' while in Indonesia it is called "Peace Agreement". Next, like in other countries, Malaysia and Indonesia also place great emphasis on the aspect of confidentiality during mediation and both countries are not exempt from having Hybrid Arbitration and Mediation.

For the second part of the research which is from the point of view of analysis on the legal comparison of mediation in Malaysia and Indonesia, the author has made a comparison regarding the legislation on mediation for both countries. The author has listed all the acts or laws involved in mediation for both countries. In addition, the author has made a comparison in terms of the qualification or the status of the mediator in both countries. For example, in Malaysia, to become a mediator in administrative bodies such as Amanah Raya Berhad (ARB) and Estate Distribution Division (EDD) it is not necessary to have qualifications or attend any exams to be a mediator. This is different in Indonesia because the Indonesian Mediation Center (Pusat Mediasi Nasional) and the Indonesian Supreme Court have set a number of exams and training that a person needs to complete before being accepted as a mediator. Not only that, not all matters can be resolved through mediation for both countries. Each country has its own types of cases to be resolved through mediation. Additionally, conduct of mediation and cost for each mediation session is also different. Uniquely in Indonesia, Indonesia has Restorative Justice which is not available in Malaysia. Finally, both countries still practice mediation for customary practice. For example in Malaysia, Adat Temenggung and Sulh in the Syariah Court are also not exempt from using mediation. In Indonesia, land

and natural resources, inheritance, marriage and family concerns, and other subjects controlled by customary law are frequently settled through this type of mediation.

Last but not least, for the third part of this research, the author has listed all the advantages of mediation. In general, this mediation actually has a good impact and brings many benefits to both countries. The only thing that makes it difficult for this mediation to be implemented in both countries is because of the challenges that both countries need to overcome. Among the biggest challenges in mediation for both countries is the level of awareness among society for both countries is still at a low level. Not only that, as discussed before, the existing legislation is insufficient and too general. There is a lack of reading materials or studies related to mediation, especially related to mediation in dealing with family disputes. Therefore, the author hopes that the government or the parties involved take a proactive step to deal with these two challenges.

IMPLICATIONS

This research was conducted to be helpful not only from an academic point of view but also from the practical perspective for both countries, Malaysia and Indonesia. Besides that, it is hoped that this research can achieve all the objectives set at the beginning of the research namely to examine the practice of mediation in Malaysia and Indonesia, to analyse the similarities and differences in the practices of mediation in Malaysia and Indonesia and lastly to explore the challenges advantages of mediation in both countries, Malaysia and Indonesia. With a comprehensive research like this, the author hopes that mediation in both countries will be more efficient and be chosen as the best way to resolve disputes compared to litigation.

CONCLUSION

In conclusion, the practice of mediation in Malaysia and Indonesia are almost the same. Based on the previous discussion, the author can conclude that there are many things in common between these two countries related to mediation. What differentiates the mediation practice for these two countries is only a small number. To resolve family disputes,

mediation can be considered as the most effective technique compared to other Alternative Dispute Resolution (ADR) considering that it has unique characteristics especially involving emotions and feelings. The mediation process is also confidential and informal. This allows disputed parties to express their feelings related to family disputes without restriction. Therefore, since mediation is effective in resolving family disputes, both countries need to take proactive steps so that mediation in these two countries is more developed.

Future research in mediation are required for both countries so that it can proceed concomitantly with the passage of time. Making mediation more widely available to the public is one of the necessary reforms. A campaign to promote mediation is one of the possible programmes. Such programmes can reach out to the community by educating them as much as possible about mediation. Moreover, revised legislation is required for both countries. This is because there are constantly fresh issues with mediation. Thus, the current legal framework must be regularly updated to avoid becoming outdated in order to address this type of mediation difficulty. Consequently, both nations must consider all of these procedures in order for mediation to keep gaining popularity with the public.

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