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A Comprehensive Comparative Analysis of Mediation Practices in Indonesia and Malaysia

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ABSTRACT

Mediation is one of the Alternative Dispute Resolution (ADR) that emphasises a mutually agreeable resolution and incorporates a win-win situation between parties. Mediation is not a rare concept in Indonesia and Malaysia. People in Indonesia and Malaysia have long used mediation in their daily lives as mediation has been proven to be effective since long ago. Due to its extensive use in Indonesia and Malaysia, a comprehensive study was carried out by the researcher to identify the comparison of mediation in Indonesia and Malaysia. In this paper, the researcher will review the practice of mediation in Indonesia and Malaysia via a comparison analysis where the researcher employs a qualitative approach via library-based research. Many reference sources and reading materials have been used by researchers to see similarities and differences between these two countries. The result of this study affirms that mediation practices in Indonesia and Malaysia are quite similar, despite being governed under a different law and regulations. In addition to having many similarities, one of the things that attracted the researcher's attention is that both countries have their challenges in carrying out mediation. Therefore, this aspect of the challenge also needs to be touched upon so that mediation can be conducted in both countries smoothly. It is also hoped that with this study, in the future, this study can also be used as a guide or manual in discussing mediation for both countries.

Keywords: Mediation, comparative analysis, Alternative Dispute Resolution (ADR), Indonesia and Malaysia.

ABSTRAK

Mediasi ialah salah satu daripada Penyelesaian Pertikaian Alternatif (ADR) yang menekankan penyelesaian yang dipersetujui bersama dan menggabungkan situasi menang antara pihak. Mediasi bukanlah satu konsep yang asing di Indonesia dan Malaysia. Masyarakat di Indonesia dan Malaysia telah lama menggunakan mediasi dalam kehidupan seharian mereka kerana mediasi telah terbukti berkesan sejak dahulu lagi. Disebabkan penggunaannya yang meluas di Indonesia dan Malaysia, satu kajian menyeluruh telah dijalankan oleh pengkaji untuk mengenal pasti perbandingan mediasi di Indonesia dan Malaysia. Dalam kertas kerja ini, pengkaji akan mengkaji amalan mediasi di Indonesia dan Malaysia melalui analisis perbandingan di mana pengkaji menggunakan pendekatan kualitatif melalui penyelidikan berasaskan perpustakaan. Banyak sumber rujukan dan bahan bacaan telah digunakan oleh pengkaji untuk melihat persamaan dan perbezaan antara kedua-dua negara ini. Hasil kajian ini mengesahkan bahawa amalan mediasi di Indonesia dan Malaysia adalah agak serupa, walaupun ditadbir di bawah undang-undang dan peraturan yang berbeza. Selain mempunyai banyak persamaan, antara perkara yang menarik perhatian pengkaji ialah kedua-dua negara mempunyai cabaran tersendiri dalam melaksanakan mediasi. Oleh itu, aspek cabaran ini juga perlu disentuh agar mediasi dapat dijalankan di kedua-dua negara dengan lancar. Dengan adanya kajian ini juga diharapkan pada masa hadapan kajian ini juga dapat dijadikan panduan atau manual dalam membincangkan mediasi bagi kedua-dua negara.

Kata Kunci: Mediasi, analisiskomparatif, PenyelesaianPertikaianAlternatif (ADR), Indonesia dan Malaysia.

INTRODUCTION

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Mediation is a process that involves a third party in addressing the dispute to reach a settlement between the parties (Murdoch, J., & Hughes, W., 2008). Mediation is different from the litigation process because it is a consensual and non-adversarial process that delivers the conclusion (Cullinan, P., 2006). No party will win or lose in mediation. At the end of the mediation, both parties will get what they want. Compared to other types of 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). This is supported 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 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 disputes outside of the litigation system through the assistance of a neutral third party called a mediator. Generally, mediation is a process in which the parties with the assistance of a mediator, where the mediator will help control the situation during the mediation, classify the 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 Indonesia and Malaysia employ mediation, there may be differences in certain areas especially on how mediation is implemented and used in each country. Hence, this comparative analysis study is carried out to explore the similarities and differences between the mediation systems in Indonesia and Malaysia. The objectives of this study are as follows:

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

RESEARCH METHOD

As for the research methodology, the researcher undertakes a socio-legal approach, which focuses on how mediation operates for both countries. As a non-doctrinal study, this research employs a qualitative approach. Secondary data, namely library-based research, journal articles, books, and legislation and case law, are used to achieve the research objectives. Non-legal literature such as law textbooks, online articles, newspapers, case analyses, conference proceedings, and seminar papers, are examined in the doctrinal analysis section. The majority of the literature review focused on the general idea of mediation for each country, with no comparison in the practice of mediation in Indonesia and Malaysia. Although some literature did discuss how the mediation is implemented, it does not offer a concrete discussion on comparison for both countries. Not only that, but most of the reference sources related to mediation in these two countries are quite out of date and limited. It does not follow the latest developments for both countries. Therefore, it is hoped that the existence of this research paper, it not only achieve all the objectives of the study but can be used as a useful guide and manual so that all people regardless of race, religion and country can get advantage of it as much as possible.

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RESULTS AND DISCUSSION

Comparison of Mediation Practice Between Indonesia and Malaysia

Under this section, the researcher has divided the similarities and differences into several categories including a historical overview of mediation, duties of mediator in mediation, types of mediation, court-annexed mediation, formulation of agreement in mediation, the aspect of confidentiality in mediation and lastly existence of hybrid arbitration and mediation. Each of these similarities and differences has been explained in more detail by the researcher below.

Historical Overview of Mediation

With reference to the Malaysian historical overview, the usage of mediation has been around since the Malacca Sultanate, which encouraged amicable dispute resolution (Ahmad, 1999). Before being replaced by English law, 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 (Abdul Hak & Ambaras Khan, 2013). The pre-cultural and pre-structural assimilation of non-Malays preferred to handle their disagreements quietly within the community only since they were perceived as foreigners. It can be said that society at that time preferred to resolve problems through mediation rather than bringing their dispute to court (Minnatur J.,1968).

The usage of the legal system to resolve disputes in *Tanah Melayu* has changed since it was colonized 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 (Hiebert M.,1997). Due to that, the 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 (Darmis, 2007). This proves that mediation has been used widely, particularly in the body of the Judiciary system in Malaysia.

As for 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 practiced 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 recognizes 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 (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 the 1990s, the Indonesian 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 (Hardian, 2019). Since the Alternative Dispute Resolution (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 Indonesia and Malaysia, the mediator's role is essentially the same for both countries. The duties of a mediator in mediation are primarily to facilitate, direct, and assist the parties in reaching a mutually agreeable resolution (Murniati, R. (2016). The mediator will serve 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. Lastly, if the parties are able to come to a solution, the mediator may be required to draft 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 a private mediation centre and after receiving the order from the court, the plaintiff's lawyer shall, within seven (7) calendar days, notify the Asian International Arbitration Centre (AIAC) in writing. The best part about mediation is that the parties may designate or appoint more than one mediator to mediate their conflict if they want. The parties may also get help from the Malaysian Mediation Centre (MMC) of the Bar Council to choose the best mediator for them. It should be noted that any mediator selected by the parties may choose to abide by the Malaysian Mediation Centre (MMC) Code of Conduct and the Malaysian Mediation Centre (MMC) Mediation Guidelines or not at all. As for Indonesia, it is the same as Malaysia where it also has court-annexed mediation and private mediation centre. As for private mediation centres, similar to in Malaysia, the private mediation session takes place outside of the court. It is carried out without the court's supervision. The mediators in private mediation centres are handled by the National Mediation Centre (PMN) whereas court-annexed mediation is governed by Supreme Court Regulation (PERMA) No. 1 of 2008.

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Court-annexed Mediation

The court-annexed mediation was originally implemented as part of the measure taken by the judiciary to address the high number of backlog cases in court (Damis, A, 2007). Then, it was in 2004 when the Malaysian Industrial Court became 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 in other states including those in Johor Bharu, Shah Alam, Penang, Ipoh, Melaka, Perlis, and Terengganu (Abd Rahman Shah, Aziz & Abdul Ghafar, 2022). The Malaysian judiciary began a free court-annexed mediation program 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 to Malaysian practice, in Indonesia, there is also court-annexed mediation (Mills, Ayunina & Doputra Ilham Oepangat, 2021). 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 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 would appoint a mediator if the parties consented 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 "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 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, the mediation process emphasizes on the aspect of confidentiality (Shah, et al., 2023). Generally, the 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 party requests 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

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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 a concept 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 after 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 recognized guideline, Article 45 of Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, and actual practices 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 several drawbacks, including the possibility that the parties would not agree to settle their differences amicably, that they will be exposed to legal challenges and 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 Indonesia and Malaysia

In addition to points that were previously discussed, the researcher also covers the analysis of the legal comparison of mediation in Indonesia and Malaysia. It revolves around the aspects of legislation on mediation, the qualification and status of a mediator, matters outside the scope of mediation, conducts mediation in both countries, the cost of the mediation session, the existence of Restorative Justice in Indonesia, and lastly application of mediation in customary practice. This section emphasises more on the discussion of mediation from a legal point of view.

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 formalized 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 (Dahlan, Md. Said & Rajamanickam, 2021).

The Chief Justice of Malaya instructed all Sessions Court and Magistrates judges and their assistant registrars to subject 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 also stated 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 courts who mediate cases, including those in Peninsular Malaysia (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 (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 or conciliators, third parties, or other independent parties, or with the assistance of the Arbitration Council if agreed upon by the Parties.

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Next, in accordance with Article 2 of the Mediation Rules of the International Mediation & Arbitration Centre (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

Looking at the current practice, not all mediators in administrative bodies such as Estate Distribution Division (EDD) and Amanah Raya Berhad (ARB) have qualifications or undergo sufficient training to become a mediator. However, some places require qualifications for mediators. For instance, the mediator in the Civil High Court. The judges, the Judicial Commissioner, the Sessions Court Judge, the Deputy Registrar, and the Senior Assistant Registrar all serve as mediators at the court-annexed mediation. Moreover, as for an individual who wishes to become a mediator in a private mediation centre like the 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 by the Malaysian Mediation Centre (MMC), Panel of Mediators. As for Asian International Arbitration Centre (AIAC), the appointed mediator must meet the requirements of an institution with 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 be fluent in both Malay and English other than adhering to the 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 practice, 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 to by mediators.

Matters Outside the Scope of Mediation

It should be noted that in Malaysia, not all cases can simply 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 in 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 are exempted from the obligation to settle through mediation including 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

From the Malaysiam perspective, there are two ways to mediate a dispute namely through online mediation or in-person mediation which is held physically. Nonetheless, the outcome of the method is the same. In a normal practice of 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, organizing 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 the 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 154 RBg).

Once a settlement has been reached, the mediator will work with the parties to develop a written document called the Peace Agreement outlining the terms of the settlement. The mediator will conclude by summarizing the agreement and outlining the subsequent actions. Based on the dedication they

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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

As far as the practice in Malaysia is concern, 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, they are subjected to pay according to the institution fees. In the Asian International Arbitration Centre (AIAC), there are different charges for domestic cases and international cases. In the case of domestic, the Registration Fee is RM150.00 non-refundable registration fee as cited under Rule 3(e) of 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 and RM500 per day for mediation services. As for international cases, the party requesting mediation must pay a USD150.00 non-refundable registration fee. 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 Malaysian Mediation Centre (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. Even though the fees in private mediation centres are a bit high compared to court-annexed mediation centre, it is still used by large companies that want to resolve their disputes quickly and privately.

In Indonesia on the other hand, the costs of summoning the parties, travel expenses, meeting costs, expert fees, and other costs necessary for the mediation process are some of the factors to be considered when preparing the mediation. 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 vary from one rate to another. However, mediation in Indonesia is less expensive than going to court or arbitration. As for court-annexed mediation, the expenses of court-annexed mediation are 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 unique aspect of mediation in Indonesia which is known as 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 (Maghfirah, Risandy & 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 of repeating or 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

Although it has been a long time since Malaysia achieved independence, traditional mediation is still being used in certain matters, 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 the 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 "*Mediasi Adat*". This type of mediation is based on customary norms and practices 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 practices.

Advantages of Mediation

Taking into consideration the practice of mediation in both countries, there is a significant amount of benefits of which is available to the disputing parties as opposed to litigation. 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 (Shah, Nasrul, & Said, 2023). 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 (Scherer, A.T., n.d). 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 (Salleh, 2007). Even after entering

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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 (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 voluntary, informal, and adaptable (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 the Peace 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 long 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 in both countries is still at a low level. Society still has the mindset that going to mediation makes it 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 is insufficient and too general. As discussed before, mediation has actually been established for a long time in Indonesia and Malaysia. The existing legislation may be a bit backward and not modern according to the current modernization trend. There is also a lack of legal

framework and procedures on how to resolve family disputes by using mediation (Heama Latha Nair, 2021). Besides that, there is a lack of expert mediators who specialises in family disputes. 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 but it lacks comprehensiveness. The main focus of the majority of law schools is on litigation. Due to this, some lawyers lack the knowledge or experience in mediation.

To solve these challenges, some effective steps are needed to solve this matter. For instance, the government must make 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 but it can also be used as a guidebook by all groups of people if they want to know more about mediation

Contributions and Implications

This research contributes fairly to the body of knowledge as well as the inter-nation practical aspects of mediation as it deals with comparative analysis between Indonesia and Malaysia,. As for the first part of the research which is the comparison section, the researcher has made a historical comparison between mediation in Indonesia and Malaysia where observations from this angle show that mediation has been implemented for a long time in both countries, under different terms and without encompassing all features of mediation. It is only the involvement of a third party that helps both parties in resolving the dispute. Next, the researcher has made a comparison between the duties of a 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 a mediator, the type of mediation for both countries are also the same where both countries have court-annexed mediation and private mediation conducted by non-governmental organizations. Not only that, the two countries also involve an agreement to be made after a consensus had been reached but the terms representing this agreement are 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 Indonesia and Malaysia, the researcher has made a comparison regarding the legislation on mediation for both countries. The researcher has listed all the acts or laws involved in mediation for both countries. In addition, the researcher 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 Centre (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, the conduct of mediation and the cost for each mediation session are also different. Uniquely in Indonesia, Indonesia has

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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 beingexempted from using mediation. Even today, the application of Sulh can be seen in the current practice of Sulh by the Syariah Court (Ismail, I.S. 2023). The practice of Sulh which have key similarities with mediation is widely practiced in Malaysia where its application covers matrimonial matters (Sa'odah, A., 2010). 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 researcher has listed all the advantages of mediation. In general, the mediation 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 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. Therefore, the researcher hopes that the government or the parties involved take a proactive step to deal with these two challenges.

Implications

This research is regarded to be significant not only from an academic point of view but also from the practical perspective of both countries, Indonesia and Malaysia. For instance, it can be used as a source for both countries, especially by the judiciary body when carrying out mediation involving two countries. When there is a case that requires mediation between two countries, they can use this article as their reference so that the mediation process of the two countries is smooth and systematic. Not only that, new policies can be enacted by both countries to improve the existing mediation system. Many reformations and improvements can be done by both countries so that mediation in both countries has a more efficient and advanced mediation system. 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 Indonesia and Malaysia, to analyze the similarities and differences in the practices of mediation in Indonesia and Malaysia and lastly to explore the challenges advantages of mediation in both countries, Malaysia and Indonesia. With comprehensive research like this, the researcher 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 Indonesia and Malaysia is shares some of the key features. Based on the discussion previously, the researcher can conclude that there are many things in common between these two countries in relation to mediation. What differentiates the mediation practice for these two countries is only a small number. Since mediation is effective in many disputes, both countries need to take proactive steps so that mediation in these two countries is more developed. Future research in mediation is 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 programs. Such programs 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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