COMMUNITY MEDIATION TRAINING IN BALI AND PAPUA: ACCESS TO JUSTICE IN INDONESIA

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ABSTRACT

Indonesia consists of thousands of tribes with different customs, languages and laws and each has its own way of resolving disputes. However they have something in common which is the traditional custom of *musyawarah* where parties are asked to compromise their interests to seek an amicable settlement. The nature of mediation is in accordance with the mechanism of *musyawarah mufakat*—reaching a unified agreement through negotiation or mediation—as the indigenous way to settle disputes among the society members, for both private and public matters. It can be assumed, therefore, that mediation would be preferred to other dispute resolution processes as the parties play a dominant role in resolving their own disputes. In 2008 the Supreme Court of Indonesia revised the regulation on court-annexed mediation to be implemented not only in the civil courts, but also in sharia courts. It endorses mediation training conducted at the community level to prevent disputants from going to the courts, which may increase the case backlog. The trainings can provide certified mediators in court from different backgrounds such as NGO worker and tribal leaders.

This paper analyses aspects of the community mediation training in Bali and Papua starting from selection of participants (personality traits, level of education, professional background, cultural issue, gender consideration and number of participants) to the methods and syllabus. Cultural approaches being used according to local culture, including time and venue allocation, are also discussed to describe the unique implementation of community mediation trainings in the two provinces. Bali and Papua have been chosen as case studies because they still strongly hold and practice traditional values in the mediation trainings that have been conducted.

This paper will present some findings from an evaluation of the community mediation trainings and will examine whether community mediation as practiced in Indonesia is really a form of mediation or arbitration, whether community mediation settlements can result in a final and binding legal enforcement such as a court decision, the clash between indigenous values and state laws and gender issues.

Keywords: community, mediation, mediation training, access to justice, culture, Indonesia.

INTRODUCTION

Indonesians have been using litigation in court to resolve their disputes since it was introduced during the era of Dutch occupation. Nevertheless, recent developments indicate that this mechanism has not been able to achieve its objective to provide a fast, simple and low-cost procedure to settle a dispute. Many people are having difficulty in seeking justice in court, especially vulnerable parties such as the poor and women. Many reasons are contributing to this, such as accusations of corruption, lack of good human resources, a complicated bureaucracy, and a lack of funding. The indigenous people are also finding it difficult to get access to justice in court. Judges fail to pay attention to traditional norms whenever they make decisions or settlements because they are obligated to apply the state laws. Previous research has indicated that the failure to consider indigenous values may have contributed to the low rate of success in the implementation of court decisions or settlements, among other constraints (Indonesian Institute for Conflict Transformation (IICT) 2005). Decisions cannot be enforced because wider stakeholders reject the outcome if they are not in accordance with the norms of the local culture (Lembaga Bantuan Hukum (LBH) Bali 2005).

There was a movement to return to the traditional way of resolving disputes in the late 90's as one alternative to overcome the problems in court. Its purpose was to give Indonesian society the right to resolve their private disputes based on their own indigenous mechanisms to create justice. People were encouraged to play a dominant role in settling their disputes without court or state interference. The Dutch government actually acknowledged and endorsed this traditional procedure in its civil procedural laws for local/native people, which is not applied for the Europeans. However, this approach is losing its spirit and is no longer used (Tumpa 2008). The basis of this approach is called *musyawarah*

Musyawarah as the basis of dispute resolution

The nature of the mechanism of *musyawarah mufakat*—reaching a unified agreement through negotiation— is in accordance with mediation. It is the indigenous way to settle disputes among society members, for both private and public matters (Barnes 2007). Therefore, mediation has actually been widely embraced and practiced by the tribes in Indonesia for a long time.

During the last decade mediation has become a significant formal alternative dispute resolution process in Indonesia. A law has been issued to use arbitration and alternative dispute resolution to settle private disputes, although mediation is only regulated in one article (Law No. 30 Year 1999). It has also been practiced in a variety of contexts such as banking, insurance, environment, labour and in the judicial system in the form of court-annexed mediation. A court-annexed mediation model was newly introduced in 2003 by the issuance of Supreme Court Regulation No. 2 Year 2003.

Why mediation training?

Court-annexed mediation obligates judges to become the mediators in settling private disputes being brought into courts. However, due to the lack of judges (especially in the rural areas), non judges (such as lawyers, academics, community leaders, etc.) have been allowed to become mediators in court. In order to become a mediator in court, these professionals have to undergo 40 hours of mediation training and pass the theory and practical exams held by an institution accredited by the Supreme Court of Indonesia. The Supreme Court also endorses mediation training and practice at the community level to prevent disputants from going to the courts, which may increase the case backlogs.

Mediation gives more power to the disputants than to the third party to decide the outcome of their dispute (Bagshaw 2006). It is expected that it will create a fast, simple and low-cost procedure for the parties. It can be assumed, therefore, that mediation would be preferred to other dispute resolution processes as the parties play a dominant role in resolving their own disputes. These are the reasons why Indonesian Institute for Conflict Transformation (IICT) prioritises to train mediation at the community level. The IICT is concerned with the empowerment of Indonesian community to resolve their own disputes and conducts mediation training for community leaders. As one of accredited institutions, the IICT is also able to certify trainees to become court mediators.

With funding support from the European Union (EU), the Supreme Court of Indonesia has created Good Governance in the Indonesian Judiciary program. One component is mediation training for community leaders in 5 (five) provinces, which are East Java, West Sumatra, South Sulawesi, Bali and Papua. IICT was appointed to conduct this training program between May-December 2007. This paper will analyze the trainings conducted in Bali and Papua, and present some findings in the 2 (two) provinces. Bali and Papua are chosen because they still strongly hold and practice traditional values in their daily activities and apply some values in the mediation training.

COMMUNITY MEDIATION TRAININGS IN BALI AND PAPUA

There were 4 (four) activities in the program of mediation training, which included preliminary visits, basic mediation training, assisted mediation and follow-up certification training. Preliminary visits involved an initial survey on the local conditions, meeting and selecting prospective participants for the training and choosing an appropriate venue. IICT and EU conducted this activity to analyze the local culture and the way it resolved conflicts (Lederach 1995). It also provided an opportunity to properly prepare for the training in order not to 'parachute' in (Brubaker and Verdonk 1999). Basic mediation training provided community leaders with basic skills and theory on mediation. Assisted mediation was intended to give assistance to participants who were having a dispute in the form of co-mediation. This also made the participants aware of the traditional way of resolving disputes and other alternatives for resolving disputes as comparison (Lang & Taylor 2000). Follow-up certification training emphasized the advanced mediation skills of community leaders and provided some additional sessions concerning the certification materials and exams on theory and practice.

Selection of Participants

Before doing the first activity of preliminary visits, IICT and EU developed some criteria to choose prospective participants for the training. These criteria addressed personality traits, level of education, professional background, cultural issues, gender considerations and the number of participants.

When selecting the participants based on personality traits, some considerations were taken. The most important personality trait requirements that we set for the prospective participants were that they did not have an authoritarian, or worse, a dictatorial style. This was important because those who have this kind of personality trait would not be fit to become mediators. Another requirement was the ability to nurture good relationships in the community. We cross-checked the participants' background with members in the community and local NGOs. Another personality trait was for the prospective participant to have the talent/style to be a mediator (such as patience, empathy, initiative, communication skills and the ability to be neutral and impartial) and a willingness to learn new knowledge and to share his/her experiences.

With regard to the required level of education, it was initially set that at least the prospective participants should have finished high school in order to understand the theory of mediation comprehensively. But then it was realized that this requirement was not desirable considering some tribal leaders had no education whatsoever, some even being against the formal education saying it was not in accordance with traditional values. So we set as the minimum prerequisite that prospective participants must be able to speak and write Indonesian language fluently, as the training was conducted in Indonesian language.

Based on professional background, we set no requirement as to the achievements of the tribal and religious leaders. Most of them were farmers, teachers and businessmen. But the participants were expected to have the age of a minimum of 25 years in order to be mature enough to be involved in a highly participatory model of mediation training.

Some requirements were made related to the cultural issues. Supported by the top officials of the Supreme Court, the program was specially designed to reflect the traditional ways of resolving conflicts. To meet this objective, the participants were expected to understand the local culture (especially the local ways to resolve conflicts), to have been involved in at least one case that has been mediated, whether or not the case reached a settlement, to have a position in a customary or religious institution that settled disputes and to represent the community in one area, and be willing to participate in the training full time. However, the committee did not accept prospective participants who were having a conflict with another tribal leader. This was to prevent any misunderstandings from the local leaders who were suspicious enough of the mediation training program. Suspicions may have arisen because the trainers were from Jakarta and were sponsored by foreign funding.

The committee also tried to balance the number of participants between men and women. However, due to cultural conditions in Bali and Papua it was impossible to do so. In the two provinces men are the ones who settle the disputes in their community. Women are involved only in religious ceremonies where they can lead the performance. Tribal leaders were reluctant when asked to send a female representative to the training. In the interests of gender-balanced training, the committee negotiated to involve the leaders' wives to be the participants. Female

NGO workers were also invited because they did not need to have to permission from their tribal leaders. In the end, there were only 3 females among 23 participants in Papua and only 6 six females among the 25 participants in Bali. The total number of participants was limited to a maximum of 25 people in each province to make it effective and efficient.

There were a few difficulties in selecting the participants in the field. Although most prospective participants were able to speak and write Indonesian language, a few of them were illiterate. However, because they had a strong influence in their community and fulfilled the other criteria, they were still selected and were assisted by a translator if necessary. This leniency also applied to the age requirement, especially in Papua. Because tribal leaders are elected genealogically, some of them are still very young. Some even are still children but usually are temporarily represented by the elders. These tribal leaders are called *ondoafi* (Aliansi Masyarakat Adat Nusantara (AMAN) 2003) They were therefore selected, although below 25 years old, if they were mature enough (more than 17 years old) to lead their tribes and were able to settle conflicts that arose in the community. This is not found in Bali because they are led by elders, called *bendesa adat* (LBH Bali 2005). In Bali, tribal leaders were usually prominent religious leaders so they were mostly asked by the people to settle disputes. Other criteria were met by the prospective participants. In the end, there were three categories of people chosen to become participants: tribal leaders, prominent religious leaders and local NGO workers.

Training Method

The committee made sure that the mediation training was based on an adult-learning model. It was expected that this would lead to high participation from the trainees because the participants already had experience in resolving conflicts. Most of the sessions were conducted by doing simulations, role-plays and games. The mediation theory based on Western models was adjusted to accommodate the traditional, local values. Whenever there were contradictions, the trainers asked for feedback from the participants and used this to enrich their mutual knowledge and experience. Trainees were encouraged to be active in any session by asking questions and sharing their experiences. Whenever one trainer was conveying the theory or leading a session, four other trainers were assigned to support the participants to anticipate any confusion or misunderstandings. Cases for simulations and role-plays were also formulated according to local culture. Names of the disputants, locations and the kind of disputes used traditional terms. To help participants and trainers with administrative matters, the training was also assisted by two staffs.

Training Syllabus

As mentioned above, this program consisted of two kinds of mediation training: basic and follow-up (including certification). The basic mediation training was conducted over four and a half days. At the opening, an ice breaker was used to make participants and trainers relax with one another. Then some training rules were formulated and agreed upon. These rules comprised the obligation of participants to join all training sessions full-time, to not verbally or physically attack other participants when any disagreement arose, a prohibition on smoking inside the

training room and a requirement to turn-off or silence mobile phones. These rules were based on participants and trainers suggestions and were mutually agreed to. The rule of not verbally or physically attacking other participants when any disagreement arose was specifically important in Papua because most of the participants were tribal leaders. Trainees were also asked to join the program full-time because one of the requirements to get a certificate to practice as a mediator in courts is 90% attendance. At the start of each training day, trainers also conducted reflexive sessions to remind the participants of what they had learned previously, what could be improved and what was going to be taught in the next session.

The syllabus of the basic mediation training included: an overview of approaches to alternative dispute resolution; an introduction and simulation of a negotiation; a strategy of negotiation based on positions and interests; a basic understanding of issues, positions and interests; conflict analysis; an arbitration-mediation simulation, introduction and simulation of a mediation; stages of mediation; skills and techniques of mediator; defining issues and formulating an agenda and its simulation; reframing and a simulation; caucus and a simulation; uncovering hidden interests; traps for mediators; a role play of a multi-party mediation; a mediator's code of conduct; and drafting a settlement.

Before drafting the syllabus for the follow-up training, trainers asked participants for feedback and requests in relation to the assisted mediation activity. Based on a survey at this stage, most of the participants felt the need to improve their knowledge of mediator's skills and techniques, conflict analysis and combining and formulating of alternative dispute resolution approaches according to their local culture. They also asked to be given information about state laws and regulations and traditional norms. These materials were then combined with the certification sessions which included the institutionalization of alternative dispute resolution in formal sectoral regulations, the Supreme Court regulations on court-annexed mediation, the mediators' code of ethics in court and exams in theory and practice. This training was conducted over three days.

Cultural Approach

When conducting the trainings, both basic and follow-up, the committee gave maximum effort to adjust them according to local culture. Case simulations were formulated to be based on local content. The trainings always started by praying to God Almighty on each day led by one participant who took a turn. All participants from Papua are Christians and most of the participants from Bali are Hindus. In Bali, the committee provide incense as part of the Balinese culture. In Papua, we provided sirih and buah pinang (betel nut tree) for the participants because they usually chewed this kind of fruit as part of the culture.

In choosing the venue, we initially searched for a local community centre that could be used for the training, but because the facilities were not adequate, we then selected an appropriate hotel for the training venue. The important criterion for choosing a hotel was that it had sufficient facilities but was not luxurious which would have been uncomfortable for local participants. Time was allocated so as not to clash with local holidays (either customary or religious events).

FINDINGS

After conducting the four activities related to the community mediation trainings in Bali and Papua, some findings are presented which include whether community mediation as practiced in Indonesia is really a form of mediation or arbitration, whether community mediation settlements can result in a final and binding legal enforcements such as a court decision, the clash between indigenous values and state laws and gender issues.

Arbitration, not mediation

As mentioned earlier, IICT with the support from the Supreme Court of Indonesian and EU choose to conduct mediation trainings rather than other alternative dispute resolutions because of its comparative advantages. This is also in conjunction with the establishment of court-annexed mediation. But in the field, we find that mediation cannot be used for all private disputes in the community. According to customary law in Bali, which is called *awig-awig*, all disputes that have been regulated in customary law must be settled by an adjudication process (LBH Bali 2005). The ones that have not been regulated can be settled by mediation. Each traditional village in Bali may have different customary laws. This situation is similar in Papua where the tribal leaders and elders are used to doing arbitration in settling the disputes in their community, not mediation. Because of their position as customary leaders and their wisdom, people expect them to adjudicate.

The trainings were not trying to change or force mediation as the way of resolving conflicts in those two provinces. That would not be a possible or wise because it contradicts the traditional values. The initial objective was to empower participants to incorporate the traditional way of resolving disputes in their mediation. The goal then shifted to giving the participants proper knowledge of doing better conflict resolution by paying more attention to the interests of the disputants. Participants felt that they had an increased ability to resolve a conflict after the training was completed. They were also able to provide options to disputants whether they wanted to use arbitration or mediation in the process of settling a dispute. Participants also found that they can combine mediation and arbitration in resolving their conflicts in the form of Med-Arb. This form highly involved the disputants in the mediation process by inviting suggestions of settlements from them, but then it was the third party to decide the outcome. By doing so, disputants at least felt their voices were accommodated and got their access to justice.

However, the participants can only do mediation if they register themselves as mediators in court-annexed mediation. They have to put aside their position as tribal/religious leaders who are used to adjudicate.

Can community mediation settlement resolve in final and binding legal enforcement such as court decision?

Based on Indonesian civil procedure, the settlements produced outside the court have no legal enforcement such as a judicial decision. When court-annexed mediation was newly established, based on Supreme Court Regulation No. 2 Year 2003, the regulation stayed the same. No out-of-court settlements can be enforced and they are only binding to the parties who have agreed on

those settlements. This limits the possibility of getting more disputes settled by mediation in court. Realizing this condition, the Supreme Court of Indonesia revised the regulation on court-annexed mediation in 2008 and now allows out-of-court private case settlements to be registered in court and to have final and binding legal enforcement such as court decision (article 23). But this regulation has one requirement, that the settlement must be mediated by a certified mediator.

This clause impacts on traditional ways of resolving disputes and also on community leaders. They can now play a bigger role in resolving private disputes in accordance with the local culture. Additionally, the revision of court-annexed mediation also allows for mediation in Sharia courts for civil disputes among Muslims. Community leaders who are certified can settle disputes between the community members who are Muslims and then bring the settlement into court to have a legal enforcement. By doing so, court-annexed mediation gives alternatives to the disputants in choosing their mediator. This is a major breakthrough in court-annexed mediation which provides wider access to justice for Indonesian people, especially the vulnerable parties. It is expected that the poor and women's voices can be heard without having to go to the court which can be an intimidating experience and costing them a lot of money.

The class between indigenous values and state laws

Civil dispute resolution in Indonesia includes three legal sources: customary (*adat*) law, Islamic law and civil law inherited from Dutch colonial era (Mills 2006). It is a complex system and each influences the other. The civil law is considered as the state law and fundamental norms. Despite the freedom of individuals to choose which law is suitable in resolving a dispute, the regulation says that a settlement produced by Islamic law or *adat* law must not against the state law. If it contradicts the state law, then it is considered as void (*batal demi hukum*). This regulation has caused many controversies, especially for traditional communities who still want to apply their laws. Many riots are prevalent in Indonesia in response to decisions or settlements produced from courts which fail to provide just outcomes for indigenous people and neglect customary values (IICT 2005).

By giving the chance to allow indigenous way of resolving conflict and acknowledge its settlements to have final and binding legal enforcement such as court decision, the Supreme Court of Indonesia has made a progressive step in reforming the judicial system in the country. The Supreme Court can also gain a benefit in issuing this policy which is to overcome the case backlog that has been hampering its performance. By empowering tribal and religious leaders to resolve conflicts in their own community, it can lessen the burden of the Supreme Court. The community members will also feel that now they have access to justice within their reach.

The United Nations Declaration on The Rights of Indigenous Peoples (article 5) also states that indigenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they

so choose, in the political, economic, social and cultural life of the state. Simarmata (2006) also indicates that a government will run more smoothly if it acknowledges the existing institutions of indigenous community, including the way of resolving conflicts. Nevertheless, the consideration of a universal human right has to be addressed because it is needed to ensure and protect the interests of vulnerable parties in mediation. The perception that there is no universal human right and argues that it applies in accordance with the situation of certain cultures (Ife 1999) has to be rejected.

Gender issues

It is difficult to discuss gender issues with the traditional community. They have already had the custom that it is men who are resolving conflicts. Tribal leaders reject the idea of sending women from their tribes to be participants in the mediation trainings, not to mention to be mediators in settling disputes in their community. Some customs in Papua forbid women to come by themselves to the mediation process and have to be represented by the men in their family (IICT 2005). In Bali, women are only allowed to settle disputes which involve women or to lead a religious ceremony. Women's interests are still marginalised. Women are also having difficulty in conveying their interests because most of the adjudicators and mediators, both in court and in the community, are men.

In the context of Indonesia with its patriarchal environment, mediation may also conceal the interests of women because most of the mediators are men. The number of female mediators has to be increased and they have to be given greater opportunity to mediate a dispute, especially where there are women disputants involved. Community mediation has to pay attention to balance the position women, who are mostly in more vulnerable condition. Women have to be given the opportunity to speak for themselves to convey their interests. Women need not to be represented by men in the mediation process which still happens in some cultures in the country. 'The questioning and challenging of' statements can bring about changes, including challenges made to statements made by the judiciary and community institutions (Parker 1992, p. 35).

The trainings try to acknowledge this gender awareness to the participants. However, we do not convey it in a frontal manner because it will only cause bigger resistant from tribal leaders. At the very least, we expect them to respect the rights of women to represent themselves in the mediation process. We also expect the female participants to become the agents of change in their community to speak out for women's interests. By empowering them with mediation knowledge, it is expected that women in their community now have the alternative to get access to justice.

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