

# Self-Reflexivity: A Must-Have Guide for Judicial Mediators in Indonesia

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**Abstract:** Court-Annexed Mediation is relatively a new institution in the Indonesian legal system. It was initially established in 2003; however, to date, its settlement success rate is still low. One of the major problems is lack of competence of its mediators due to lack of funding to provide sufficient trainings. This paper argues that judicial mediators in Indonesia must also have self-reflexivity when settling disputes because parties come from various cultural backgrounds. The paper examines some aspects that can influence judicial mediators in mediating the process and producing amicable settlements. The author provides his self-reflexibility when assessing his expectations in writing this paper and in the implementation of court-annexed mediation in Indonesia.

**Keywords:** Self-reflexivity, mediation, gender, culture, Indonesia.

## I. INTRODUCTION

Indonesia is a country with rich cultural backgrounds. The Islamic, Buddhist, Hindu, Chinese Confucian and Western values have influenced the Indonesian culture into an intricate blend of different traditional norms consisting of more than 300 tribes[1]. It has three legal sources concerning civil dispute resolution which influence one another: indigenous (*adat*) law, Islamic law (*Sharia*) and state civil law[2]. Despite the complex systems, each legal source offers similar aspects to prioritize settling disputes amicably based on *musyawarahmufakat*. It is a dispute resolution method which prioritizes communal harmony over individual interests to reach mutual consensus[3]. Barnes asserts[4]:

...Perhaps due to the absence of a credible court system the *musyawarah* maybe the most important institution for conflict resolution in Indonesia, including business, and 'civil' disputes as well as criminal disputes. Decisions made through this process have strong legitimacy in the community since all the parties have been consulted and involved in the process. The process is collective, consultative decision-making one in which all parties who consider they have an interest in a matter talk it through until a resolution is found. Everything that is said is considered equally correct and is applied towards solving the problem as presented to the group. One of the assumptions is that the ultimate result will be consensus (*mufakat*) among all present, acceptable as appropriate by all parties.

As a newly established amicable method in settling disputes in the Indonesian judicial system, court-annexed mediators must equip themselves with appropriate skills and knowledge. The mediators consist of judges who are obligated to settle civil disputes amicably prior to litigation process and other professionals who have undergone certification trainings. However, primarily due to their *pro bono* service as mandated by the Indonesian civil procedure law, most disputants select judges to mediate their cases[5]. Judges in Indonesia mostly are stationed in different courts starting from remote areas and climbing up to major islands as career promotion, generally within two to three years[6].

Due to the rich and complex cultural backgrounds combined with the three different legal sources, the judicial mediators need to be mindful with the different cultural backgrounds of parties when mediating their disputes. They must have self-reflexivity to guide them in order to maintain their impartiality which is one of the basic principles of mediation. Fook defines self-reflexivity as[7]:

The ability to locate oneself in a situation through the recognition of how actions and interpretations, social and cultural background and personal history, emotional aspects of experience, and personally held assumptions and values influence the situation.

## II. SELF-RELEXIVITY: A MUST-HAVE GUIDE FOR JUDICIAL MEDIATORS IN INDONESIA

Judicial mediators must address the influence of any personal experience in the mediation process and make visible his or her subjectivity when examining the cases[8]. As mediators who come from different social and cultural backgrounds to disputants, they need to examine their own 'truths' and influence when settling disputes. It is crucial for court-annexed mediators to take a reflexive position when undergoing mediation process and analysing facts, to preserve opinions and minimise bias.

There are many aspects that can influence mediators' impartiality when handling cases. Three aspects that I have previously researched are briefly presented in this paper, which include the position of mediators and their institution, the influence of power imbalance, and women's position in mediation process. Foucault contends that institutional and historical position of an individual and the constraints faced need to be considered in self-reflexivity[9]. Court-annexed

mediation is established by the Supreme Court of Indonesia to provide faster, cheaper and simpler procedures for justice seekers, which have been lacking from court litigation process. This objective may give additional burden to judicial mediators whose primary duty is to give judgement on cases with certain time duration and obligatory complex procedures that they have to undergo[10]. Another principle that court-annexed mediators have to take into consideration is the authority of parties to decide mediation process and settlement. Mediators need to be reflexive on this crucial principle because they are used to having the power to arrange and decide the outcome in litigation process.

When there is a power imbalance, court-annexed mediators also need to ensure that they accurately heard vulnerable parties' voices when conducting mediation by seeking feedback from their peers or other people on their case assessment[11]. Male mediators, in particular, need to be mindful that their position as males and the patriarchal values of their culture may have influenced how women responded to them and their own behaviour and interpretations.

Court-annexed mediators also need to be mindful with the assumption that upheld traditional and religious ideas about the place of women in the family and society, and were not mindful of the nature, influence and effects of domestic violence on women[12]. Mediators need to assess that local cultural values and practices could guide and inform the settlement of disputes. Despite positive intention to empower indigenous dispute resolvers to have jurisdiction in the Indonesian judiciary system; however, after analysing the practice of traditional dispute resolution and its strong patriarchal culture, mediators need to review their perceptions.

The process of indigenous dispute resolution frequently perceives women's presence as participants as disturbing, and as hampering parties to reach settlement. Local dispute resolution practices marginalised the position of women as participants[13]. by not giving women the opportunity to represent themselves and convey their interests as mediators, as most of the indigenous (and court-annexed mediators) were men. If local/traditional dispute resolution processes and practitioners should have a place in court-annexed mediation, *adat* leaders who settle disputes must be carefully selected, and educated and trained sufficiently in order to be aware of their patriarchal values and assumptions[14]. They need to be able to recognise and understand their attitudes to the position of men and women in society. This is particularly important where women are subjected to domestic violence.

### III. AUTHOR'S SELF-REFLEXIVITY

As Deikman argues, it is important for a researcher to be alert to his or her position and influence on the research strategies when conducting the research[15]. Ever since I graduated from the law school, I have seen the failures of the judicial system in relation to access to justice, especially justice for the poor. The court retributive justice system has been unable

to provide a fast, cheap and simple procedure to settle cases including family disputes. I have been reading and collecting newspaper/magazine articles to record cases of injustice in Indonesia. I have also been discussing the cases with my colleagues in order to come up with a possible solution to overcome this problem. This was one of the reasons I resigned as a lawyer, became an NGO worker and assisted the Supreme Court of Indonesia to develop court-annexed mediation[16].

My previous position as a non-government organisational mediator, mediation trainer and activist involved collaboration with the Supreme Court of Indonesia, assisting the court to draft mediation regulations and establishing court-annexed mediation. I consider myself as 'neutral' because I am not attached to the court or the judiciary system. However, my previous position enabled me to gain access to the data needed for this research. I am mindful that I have a 'vested interest' in ensuring that court-annexed mediation is working as I have contributed to the establishment of the institution.

My experience working in a NGO and doing certification trainings or research for the Supreme Court of Indonesia at a particular time, and this was initially confusing for me. I am now aware that sometimes, whether consciously or unconsciously, I may have led participants to respond according to the policies on court-annexed mediation that the Supreme Court had developed, because my organisation had helped draft the regulation. This constraint also brought advantages for me in getting the data I needed for this research, as I knew how to find the data in the courts, had access to data which usually is difficult for the public to obtain.

I am aware that my religion, culture and experiences have reinforced the strong traditional norms of my community and the Asian values of my culture, such as valuing harmonious relationships and communal living[17]. It is therefore important to take a reflexive stance in relation to my values and assumptions about the alternative dispute resolution systems I have researched, and how these may have influenced my interpretation of the data. Many respondents from the research that I have conducted come from diverse cultural backgrounds and they challenged some of my prior assumptions. They also helped me to recognise and understand different cultural aspects that may hamper their ability to convey their perspectives and experiences in interviews and in mediation. Thus, there was a need to be aware of the impact of my own cultural position. In interview I asked questions in a culturally sensitively way. I listened to feedback and tried to keep an open mind in order to fully understand participants' responses.

The conduct of the research interviews may have affected participants' responses to my questions in interview. As previously explained, I believe court-annexed mediation can be the champion of legal reform in Indonesia, and personally I have this desire to see its implementation succeed in the

judiciary[18]. I carried this spirit in my interviews with participants. When the interviewees responded suitably to my motivation and experience, I became aware that my tone and gesture had changed. This led the participants to answer my questions accordingly. I constantly reminded myself to be objective when dealing with this issue and to appear to be neutral by not showing excessive tones and gestures.

When interviewing female respondents, I became aware of how my personal experiences also got caught up in the process. Coming from a patriarchal culture, I am accustomed to proposing solutions, giving advice, or even deciding the outcome to settle the dispute, if necessary[19]. I was mindful that this background could influence my response to female participants. I could not avoid providing suggestions to a female interviewee who was applying for divorce in the *Sharia* Court and who asked me what to do[20]. I advised her to go through the mediation process and make compromises to maintain the future integrity of her family, and I now realise that this advice could have harmed her interests. However, as I am used to listening to my sisters when they shared their concerns, my background also brought positive responses. I had the patience to listen and build empathy, which freed up participants to tell their stories.

My experience as a trainer in numerous mediation trainings in Indonesia—especially in certification trainings for court-annexed mediators—influenced the interview processes undertaken for my research. When reflecting back I became aware that at times I may have subconsciously acted as an instructor, directing the interviews and treating interviewees as if they were training participants. My law background also played a role, where I sometimes reverted to using inappropriate legal terms to explain the mediation process in court-annexed mediation. I kept reminding myself to address these issues every time I conducted interviews. I prepared some generic words that could be understood by lay people to replace these legal terms. If there was no substitute for the jargon, I tried to explain the meaning of the legal term I was using.

#### IV. CONCLUSION

Mediators and researches should both engaged in self-reflexivity when examining information derived from mediation processes and settlements. Being born in a certain culture, dominated by traditional patriarchal values, could lead to misperceptions on the position of men and women in mediation. Mediators should realise that there is no one ‘truth’ when listening to information and facts of cases from disputants. Voices from all parties must be equally heard and carefully examined for mediators to be impartial.

As a mediator in my institution, I have used an approach to mediation based on the mediation trainings I have undertaken with Western trainers. I have used a facilitative approach adopted from the interest based Western models of mediation[21]. I tried to maintain my impartiality towards disputants, even though I sometimes encountered imbalances

of power between the parties. After conducting this research, I would now use a more interventionist role to assist weaker parties to balance their position in mediation processes. I now believe that active and interventionist approaches may be more culturally appropriate for the Indonesian context, but I am also mindful that the unique needs of the parties should determine my mediation style.

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