

# *Implementation of Mediation in the Settlement of Administrative Disputes*

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**Abstract-** The research analyses the mediation of dispute settlement in Administrative Courts. Mediation as means of dispute settlement can be conducted both in and out of the courts. The implementation of in court-mediation in settling civil disputes is constructed from the interpretation of article 130 Herziene Indonesisch Reglement (HIR)/154 Rechtsreglement Buitengewesten (R.Bg.). Mediation, in the settlement of administrative disputes, is not regulated in formal juridical. This research aims to identify the implementation of mediation in the settlement of administrative disputes. This is a doctrinal research implementing legal, conceptual, and comparative approaches. The Supreme Courts initiates some dispute settlement methods through mediation in courts by issuing the Supreme Courts Regulation No. 1 of 2016 on Procedures of Mediation in Courts. Those provisions can be applied in the implementation of mediation in Administrative Courts. The implementation of administrative dispute mediation is first conducted through the step of mediation. If the attempt fails, the dispute is then continued to the trial process. The mediation is persuasively carried out by the judge of Administrative Courts to the disputing parties through the step of preparation check.

**Keywords-** *Mediation, Settlement Administrative Disputes*

## I. INTRODUCTION

In a philosophical study, dispute settlements through mediation can be referred to the fourth principle of *Pancasila*: Democracy led by the wisdom of deliberations among representatives. This principle implies that deliberation has been the philosophy of Indonesian nation and state's life, which also includes in settling problems or disputes. Dispute settlements through deliberation and trial, as the last way out, becomes the identity of Indonesian, as reflected in the fourth principle of *Pancasila*. Sociologically, the dispute or problem settlement through mediation has also been the culture among Indonesian.

Mediation can be carried out both in and out of the court. In court-mediation is constructed from the interpretation of Article 130 Herziene Indonesisch Reglement (HIR)/154 Rechtsreglement Buitengewesten (R.Bg.): "If on the appointed day the both parties face, the district court through its chairman as the

intermediary will try to reconcile them". At first, that article is only implemented to give space for the disputing parties to pursue their own reconciliation, in which the judge cannot intervene too far to the problems due to the Ethics code and procedural law. Therefore, it is the both parties who should actively involved in achieving the reconciliation.

Mediation of civil dispute settlements, both in District Courts and Religious Courts, is offered to the disputing parties at the beginning of the trial. This is different from the mediation process in Administrative Courts. According to the Circular Letter of the Supreme Court Number 2 of 1991, the implementation of reconciliation/mediation in Administrative Courts is possible to be conducted outside the trial. The plaintiff formally revoked the lawsuit in an open for public-hearing. Thus, there has been no mediation integration as in the settlement of civil disputes [1].

The courts' duty is to enforce the law and the justice when receiving, examining, adjudicating, and resolving any submitted disputes. At present, the courts are still believed as the institution for settling disputes. Their existence functions to coordinate the occurring disputes among the justice seekers who believe in litigation channel. Moreover, they are the institution, created by the legal system, that function as the means of fair dispute settlement through simple, fast, and low-cost process in a trial This principle is realized in order to create an effective and efficient trial [2].

In realizing simple, fast, and low-cost judicial objectives, the Supreme Court as the highest court in Indonesia begins to initiate several methods to shorten the process of dispute settlement in courts. One of the progressive ideas is by integrating mediation in courts, namely court connected mediation [3]. The idea of mediation in courts is developed by the Supreme Court by issuing the Supreme Court Regulation Number 2 of 2003, which is later completed by the issuance of the Supreme Court Regulation Number 1 of 2016 on The Procedures of Mediation in Courts. However, the implementation of court connected mediation has not been too institutionalized, or in other words it is less applied within the society. This is seen from the success of mediation implementation in courts, which is only below 2.5% as follows: "The percentage of success

mediate cases on this regulation in district court pilot project of the Supreme Court of Republic of Indonesia is below 2,5 %, in spite of the contradiction between the amicable tradition of Indonesian people [5].

There are many factors hindering the success of achieving an agreement, such as: since the dispute among the parties is based on emotional conflict, it raises a lack of enthusiasm among the parties to create a communication forum. Moreover, there are parties openly declaring that they are not willing to take the mediation and force to directly go to the trial process. Mediation in courts has been developed in many countries, in which some of its aims are to give judicial access for the citizens and to save the cost, etc. As explained in the National Standards for Court-Connected Mediation Programs: “courts across the country are seeking ways to provide a better quality of justice for various kinds of litigation, improve citizens access to justice, save court and litigant costs and reduce delays in the disposition of cases...” Therefore, this article explores the following research questions: What form of mediation in administrative dispute settlement which can create an effective and efficient trial.

## II. RESEARCH METHOD

The research is a legal doctrinal research or legal normative research. In normative concept, law is a good norm which is identified as a must be realized-justice or a norm which has been manifested as an explicit order and clearly formulated positively. The data are collected through literature study to obtain data in the form of documents and writing by searching the legislation, documents, scientific literatures, and researches from the experts. The research uses the main sources of the secondary data or literature materials. The secondary data include the primary, secondary, and tertiary legal materials. The data are secondary data which are then analysed through deductive logic.

## III. FINDINGS AND DISCUSSION

### 1. *Mediation in Courts: Definition and Scope*

Public trust to courts as the means of dispute settlement is offset by the improvement efforts given by the Supreme Court. One of them is people’s desire that the courts are able to resolve the dispute fast and not formalistically. In realizing the simple, fast, and low-cost judicial objectives through an effective and efficient judicial institution, the Supreme Court as the highest court in Indonesia begins to initiate several methods to shorten the process of dispute settlement in courts. One of the ideas is by optimizing the mediation institution in civil cases. This institution is intended for the litigants not to have to go through all the long and time-wasting trial processes. They only need to go to the stage of pre-examination, if the parties successfully achieve the reconciliation through a mediation at the beginning of the trial.

The integration of mediation into the trial process is expected to become one of the effective instruments to overcome the problem of case accumulation in courts as well as to strengthen and to maximize the function of non-judicial institutions in settling the disputes, besides the adjudicated judicial process (adjudication). The Supreme Court Regulation No. 1 of 2016 on the Procedures of Mediation in Courts is the translation of Article 130 HIR/154 Rbg. Mediation in courts is constructed from the interpretation of Article 130 HIR/154 Rbg, saying: “If on the appointed day both the parties face, the district court through its chairman as the intermediary will try to reconcile them”. At first, that article is only implemented to give space for the disputing parties to pursue the reconciliation themselves, in which the judge cannot intervene too far to the problems due to the Ethics code and procedural law. Therefore, it is the both parties who should actively involved in achieving the reconciliation.

The reconciliation agreement will be the complete resolution because its final result do not apply the principal of win or lose. The agreement, having been strengthened into a reconciliation decree, is a binding and final dispute settlement. It binds because each agreed item in the decree can be carried out through an execution process (executable) if one of the parties denies it. Meanwhile, it is final meaning that strengthening the agreement between the parties into a reconciliation decree has closed all legal efforts for the both parties.

In several aspects, the settlement through mediation process has benefited many parties [4]. The shorter the time taken, the lower the cost spent. Whereas from the emotional aspect, the settlement through win-win solution will provide comfort for every party because the points of agreement are made by the parties themselves to meet their wishes.

The optimization of mediation process through the court is crucial as the intensity of legal efforts usage in cases (civil) is high, resulted in cases accumulation in courts and the Supreme Court. The parties, in settling the dispute in courts and the Supreme Court, tend to use all of the available legal efforts ranging from the appeal, cassation to the judicial review. Many cases, whose dispute object is even very small, is still submitted to the level of judicial review in the Supreme Court.

According to the provision of Article 1 point 10 of Law Number 30 of 1999 on Arbitration and Dispute Settlement Alternative, says: “Dispute settlement alternative is an institution of dispute settlement or difference in opinion through an agreed procedure, namely out of the court settlement through consultation, negotiation, mediation, conciliation, or expert judgement. In general, mediation is an out of court-dispute settlement process, as stated by the scholars about the definition of mediation. Meanwhile, the title of the Supreme Court Regulation Number 1 of 2016 is the Procedures of Mediation in Court, meaning that it

refers to a process under the courts' power and authority [3].

As a comparison, the writer will describe the mediation process (*chotei*) and the reconciliation process (*wakai*) through the trial in Japan. *Wakai*, a reconciliation effort in trial process, as well as *chothei*, an out of court-mediation for achieving reconciliation among the disputing parties, are widely used in settling disputes within the courts in Japan, either in the first level court environment, appeal, or in the cassation level of civil cases. Both *wakai* and *chotei* have similarity in terms of finding out the appropriate dispute settlement through a peaceful agreement between the disputing parties [6].

Germany also implements and uses the term Court Connected Mediation through *schlichtung*. The difference between the model in Japan and Germany is that: "... The Japanese model is based on the pursuit for social harmony, moral, duties and other extra-legal considerations. Meanwhile in Germany: "The German approach, as embodied in the Bavarian Mediation Law, stands in harsh contrast to the Japanese recognition of extra-legal consideration..."[7].

The system, adopted by Japan and Germany, is also adopted by Sweden and Australia. The difference is that each system is based on the legal system of each country as has been written that: The national systems show great diversity, however. From the passive trial judge and referral out of the court in Australia to the very active trial judge and statutory conciliation in Japan with the Swedish system being positioned somewhere in-between [8].

Some obstacles of mediation failure in a trial, according to a research result of IICT (Indonesian Institute for Conflict Transformation, 2013), are: (1) Not all judges have joined any mediation training so that they have not had the same understanding, (2) The limited number of judges in some local areas, so that they are more focus on settling the cases through litigation, (3) the lawyers' role inhibits the mediation process because that process will affect their financial fee from the clients, (4) the lack of the disputing parties' knowledge on the benefit of dispute settlement through mediation, (5) some judges still see the mediation as an additional burden for their job in giving the verdict, and (6) the judges' reluctance to optimize the mediation since there is no rewards and punishment system in the implementation of mediation.

**2. Mediation in Courts: Realizing an Effective and Efficient Trial**

The court as one of the modern legal institutions has obtained a trust from the global community. This is the time when the court becomes a mechanism provided by the state to resolve disputes. The public trust on courts is still high even though the way to resolve disputes through the courts obtains a quite sharp critique both from legal practitioners and theorists. The courts' role and function are thought to be overloaded, wasting time,

very expensive, unresponsive to the public interest, too formalistic, and too technical. This can be seen from the indication of the large number of cases which go to the court. According to the Supreme Court's annual report in 2013, the number of cases accepted by the courts all over Indonesia is 3,934,648 cases.

The reasons which encourage people to resolve any disputes through the court are: First, a belief that the court is a place to get the desired justice. Second, a belief that the court is an institution expressing the value of honesty, incorrupt mentality, and other main values. Third, the time and cost they spend will not be in vain. Fourth, the court is a place for everyone to truly get legal protection [6].

**3. Mediation in the Settlement of State Administrative Disputes**

There are problems and criticisms on the process of dispute settlement in the Administrative Court. Similar with the process of dispute settlement in other courts (litigation), the dispute settlement needs a long time process. Thus, it is reasonable if cynicism over the litigation process emerges. Another effect which can occur is the difficulty in the process of execution [8].

**TABLE 1. PROBLEMATIC CASES EXECUTION**

No	Case Number	The Parties	The Processing Time	Reasons of Postponed
1	2	3	4	5
1	152/G.Tun/2001/PTUN-JKT jo 70/B/2002/PTUN JKT jo 183 K/TUN/2003	Plaintiff: Didid Tjindarbumi Defendant : Rector of UI	7 years	The plaintiff has retired
2	149/G/2006/PTUN-JKT jo 127/B/2007/PT.TUN-JKT jo 131K/TUN/2008 jo 96 PK/TUN/2010	Palintiff : Ir. Yasman Hadi Defendant : Minister of State-Owned Enterprises	5 years	There has been no agreement between the Plaintiff and the Defendant regarding a rehabilitati on
3	37/G/2009/PTUN-JKT jo 237/B/2009/PT TUN JKT jo 151 K/TUN/2010 jo 149 PK/TUN/2011	Plaintiff : PT Corbec Com Defendant : Minister of Communication and Information	4 years	The verdict has no longer be able to be implemented
4	143/G.TUN/2003/PTUN JKT jo 91/B/2004/PTUN JKT jo 421 K/TUN/2004 jo. 07 PK/TUN/2006	Plaintiff: Ir. Hary Sunaryo Defendant: Ka BPN	9 years	The verdict is in contrast with the other verdict No. 194/G.TUN/2002/PTUN-JKT

The execution of Administrative Court’s decision which has legal force often emerges, for example in the process of the district head election. In this case, the procedures have been arranged in such a way within the District Head Election Rules, made by the General Election Commissions. Thus, even though the General Election Commission’s Decree is sued in the court, the process of the election continues. It often occurs when cases in courts have permanent legal force and the General Election Commissions’ Decree is declared null and void, but the elected district head has been appointed. It is not easy to annul the district head who has already been elected and has obtained a Decree of the President or Minister of Home Affairs as well as has been inaugurated. Verdicts, which have permanent legal force, in some cases are difficult to be implemented because of the long process in the court, for example an Employee Decree. When this decree will be implemented, the employee has entered a retirement age.

In formal juridical terms, a reconciliation is not known in the settlement of administrative disputes. The Administrative Court does not have jurisdiction for holding any reconciliation over the disputing parties. This is due to the substance of the case examined by the administrative Court, which is not civil cases but the decision of the state administration.

Problems will arise if both parties do not want to continue the case. The Supreme Court has given the way, that is by issuing the Circular Letter of the Supreme Court Number 2 of 1991. This letter has opened a chance for reconciliation, that is an out of court- reconciliation, so that the court has no role. The plaintiff officially revokes the lawsuit in an open for public- trial and gives the reason of the revocation. Then, the Chairperson of the Assembly orders the revocation of the lawsuit from the case register.

In the practice, even though the procedural law of the Administrative Court does not recognize a judicial institution, if the judge finds it necessary for a dispute to be resolved through a mediation, he will advise the disputing parties to take a reconciliation. The idea of mediation in the Administrative Court is in line with the policies and steps developed by the Supreme Court in order to accelerate the process of dispute settlement and to reduce the number of case accumulation in the Supreme Court.

The Supreme Court develops policies in order to realize an effective and efficient court through an intensification of mediation, an improvement of class action regime, and a development of small claim court concept. This can be seen from the Supreme Court Regulation Number 2 of 2003 on the Procedures of Mediation in Courts. As has been stated in Article 6 of the Supreme Court Regulation Number 2 of 2003 on the Procedures of Mediation in Courts: If deemed necessary, the provisions in this Supreme Court Regulation, aside from being implemented in general courts, can also be implemented for other judicial

institution. Moreover, this regulation is then revised by the issue of the Supreme Court Regulation Number 1 of 2008.

The act of not regulating mediation institutions in the Procedure Law of Administrative Courts is based on the argument that an administrative dispute settlement belongs to the scope of public law. The public law aims to implement a general regulation. An administrative dispute is a dispute emerged in the field of administration between person or civil legal entities and administrative officer or institution, either in the centre or the region, as the result of the issue of State Administration Decree [10].

The position of defendant or administrative officers is as the executor of the government affairs/ public affairs based on the applicable laws. The Defendant, in an administrative dispute, does not represent the personal but public interest. Therefore, there are concerns that if there is a reconciliation institution in the form of mediation in Administrative Courts between the plaintiff and the defendant, they (who should represent the public interest) will act in a personal capacity which may harm other parties/ wider community.

In contrast, the dispute occurring in the realm of private law only concerns on the interest of the disputing parties. However, due to the practical needs, the legislative trend shows that the dispute, in the realm of public, has frequently been regulated in legislation. Mediation institution are increasingly used in various dispute settlements of the public law realm, for example Law Number 14 of 2008 on the Public Information Openness (which regulates the public information dispute settlement through mediation institution).

**TABLE 2. CHARACTERISTIC DIFFERENCES BETWEEN PUBLIC AND PRIVATE LAWS**

No	Differences	Public Law	Private Law
1	The subject	one of the parties is the ruler	both of the parties are individual/ civil legal entities
2	The parties’ position	unequal	equal
3	The Characteristic	forcing	volunteer/ complementary ( <i>aanfuletrecht</i> )
4	The protection of interest	protecting public interest	protecting individual interest

Some administrative disputes are able to be resolved through reconciliation, which started from the judge’s advice and continued to the revocation of the lawsuit by the plaintiff. Administrative Court then issues a determination\_including:

**TABLE 3: DETERMINATION OF LAWSUIT  
REVOCATION**

No	Determination	Plaintiff	Defendant
1	Determination Number 80/G/2012/PTUN JKT	H. Fathullah et all	Head of the Land Office of South Jakarta Administrative City
2	Determination Number 178/G/2012/PTUN JKT	Lie Ellen Raharja	Head of the Land Office of North Jakarta Administrative City
3	Determination Number 102/G/2014/PTUN. JKT	M. Mahyudin Hamdani et all	Head of the Land Office of West Jakarta Administrative City
4	Determination Number 02/G/2015/PTUN.J KT	Erum Rumsiah et all	Head of the Land Office of Serang
5	Determination Number 02/G/2015/PTUN.J KT	Tita Rosita et all	Head of Regional Personnel Agency of Pandeglang, Banten

Before the examination of the dispute's subject matter begins, the judge of the Administrative Court must conduct a preparatory examination to correct and complete the plaintiff's lawsuit. In the preparatory examination, the judge must give advice to the plaintiff to correct and complete the lawsuit with the needed data within 30 days from the day the preparatory examination held.

In the preparatory examination, the panel of judges ask the plaintiff to attach/ show the sued Administrative Decision and the initial data concerning the dispute's subject matter together with the lawsuit. This stage is the right time for conducting mediation. The informal nature of mediation makes it appropriate to be conducted during the preparatory examination because it is held inside a deliberation room in a closed for public-trial or is held inside the judge's office without wearing a toga. There are several things which can be done during the preparatory examination, namely: (1) reconciling the disputing parties, (2) correcting and examining the facts which are not postulated by the parties, (3) perfecting the petitum, (4) advising the plaintiff to revoke the lawsuit because it has no legally strong foundation.

Mediation of civil cases both in the General Court and the Religious Court is required for the judge in the first day of the trial (except for the cases resolved through the procedures of the State Court, the Industrial Relation Court, on the decisions of the Consumer Dispute Settlement Agency and objections to the decision of the Business Competition Supervisory Commission). If the process goes without any mediation, this will be considered a violation to the provision of Article 30 HR and or Article 154 R.Bg, causing the verdict null and void.

The concept of mediation obligation embraced in a dispute settlement in the court aims to fasten, simplify, and reduce the cost. If this concept is adapted, the implementation of mediation institution within administrative dispute settlement processes will become compulsory (except for the cases with a short or fast procedure whose handling does not need a dismissal procedure and preparatory examination). Disputes which are required through a mediation process should be all types of disputes processed with common procedures, that is disputes obligated to undergo the dismissal process and preparatory examination. Meanwhile, the cases which are not obligated to undergo the dismissal procedure and preparatory examination (fast, short, and special procedures) are not necessary to be obligated to undergo mediation procedures.

Resolving disputes through mediation in the General and Religious Court needs a mediator. There are two types of mediator, namely (1) a neutral party who helps the disputing parties during the negotiation process in order to find any possibilities for resolving the disputes without using any compelling solution (2) a judge examining the case who is also permitted to be a mediator for the case he examined.

#### IV. CONCLUSION

Dispute settlements can be conducted through both out of court-mediation and court connected mediation. The court connected mediation in civil dispute settlements is different from that of administrative dispute settlements. Mediation in the settlement of civil disputes is offered to the parties at the beginning of the trial. This is different from the mediation process in the dispute settlement in Administrative Court. According to the Circular Letter of the Supreme Court Number 2 of 1991, the implementation of reconciliation/ mediation in the Administrative Court is possible to be conducted outside the trial. The plaintiff officially revokes the lawsuit during an open for public-trial. The Supreme Court begins to initiate several methods of dispute settlement in courts through court connected mediation. This is regulated in the Supreme Court Regulation No. 1 of 2016 on the Procedures of Mediation in Court. Disputes are firstly solved through mediation. If the mediation fails, the disputes are then continued to a trial process. The mediation is implemented by the judge persuasively to the disputing parties during the administrative dispute settlement. The preparatory examination stage becomes the right time to implement mediation. The informal nature of mediation makes it appropriate to be implemented in this stage because the examination is conducted in the deliberation room within a closed for public-trial or it is conducted in the judge's office without wearing a toga. The implementation of mediation institution in the process of administrative dispute settlement is also compulsory (except for the cases with short or fast procedure whose handling does not go through dismissal procedures and preparatory examination). The disputes which are

obligated to undergo a mediation should be all types of disputes processed through common procedure, referring to the disputes which is obligated to undergo the dismissal process and preparatory examination. Meanwhile, the disputes, whose obligation to undergo a dismissal procedure and preparatory examination is not regulated, do not need to go through a mediation procedure.

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