THE LAW LIABILITY OF NON-JUDICIAL MEDIATORS IN LAND RIGHT DISPUTES

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Abstract: Land disputes are one of the most common cases in Indonesia. It is due to the demand for land ownership rights. In this case, mediation is used to resolve the case. The non-judicial mediator is a neutral party who helps the parties fairly. This study examines the civil law liabilities of non-judicial mediators in land ownership disputes and the legal position of a non-judicial mediator on authentic peace deeds. This research applied a juridical-normative approach with a law and a conceptual approach. The results indicated that non-judicial mediators, in carrying out their primary duties, both in terms of rights and obligations, must be based on law and protected by law to optimally provide services to the community while having a clear legal position in the notary. To sum up, unifying the mediation arrangement in one statutory regulation and mediation in the realm is necessary, both in litigation and non-litigation. In addition, future research can investigate the effectiveness and implementation of mediation certification, secrecy, financing, and repetition of mediation in land dispute cases. Further exploration is needed to understand the impact of mediation on the autonomy of the parties involved in land ownership disputes.

Keywords: mediation; non-judicial mediator; law; land right dispute

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1. INTRODUCTION

Indonesia is a country that has natural wealth, such as land. The land is a primary need for residents. Besides, it can also be utilized as a place for farming, business, and other activities. Consequently, many people are competing to have land. Sometimes, they are against the applicable law in fulfilling their need.[1] Therefore, it will lead to several conflicts, such as land disputes. The disputes over land ownership rights begin with a claim for land rights, including land status, priority, and ownership, to secure administrative settlements in compliance with existing legislation.[2]

[1] SUTARSA, A. Model Penyelesaian Sengketa Tanah Di Indonesia Dalam Pembaharuan Hukum Tanah Untuk Mewujudkan Kepastian Hukum [Model of Land Dispute Resolution in Indonesia in Land Law Reform to Realize Legal Certainty]. *Institutional repositories and scientific journal*. 2017.

[2] Peraturan Presiden. Badan Pertanahan Nasional [Presidential Regulation. National Land Agency]. Indonesia, 2006.

Furthermore, many people use various solutions, such as mediation, to solve the case. Mediation is a way of resolving disputes peacefully, exactly, and effectively.[3] In addition, conflicts are settled through mediation when parties agree to a third party's assistance in resolving their issues without using the legal system.[4] It can also give the disputing parties access to justice or a suitable resolution to their disagreement.[5] Parties can access it more widely to achieve satisfying and fair solutions.[6] Thus, in reforming the bureaucracy of the Supreme Court of the Indonesian Republic, which is oriented towards the realization of a tremendous Indonesian judiciary called mediation. It is used to improve public access to justice and implement the principles of simple, fast, and low-cost judicial administration.[7]

Article 50 Jo and Article 51 Number 2 of 1986 determined that the District Court and High Court (General Court) have the duty and authority to examine, decide, and settle civil cases. Therefore, The General Court can adjudicate land disputes that contain aspects of civil law. For example, ownership or control of land is against the law when it violates property rights to land acts of breaking promises of sale and purchase, leases, guarantees, and other land rights.[8] Based on the statements above, it can be defined that land disputes are one example in civil law cases. In addition, there are several applicable regulations of civil law such as Article 154 of the Procedural Law for Regions outside Java and Madura (*Reglement Tot Regeling Van Het Rechtswezen In De Gewesten Buiten Java En Madura, Staatsblad 1927:227*)[9] and Article 130 of recent Indonesian Procedural Law (*Het Herziene Inlandsch Reglement*, *Staatsblad 1941:44*).[10] It encourages the parties to pursue a fair process utilized through mediation; thus, it integrates into the litigation procedure in court.

A third person outside of the courtroom, not a judge, is referred to by the non-judicial mediator as having the authority to assist the conflicting parties in their negotiations

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[3] UCHEAKONAM, C. Arbitration, International Mediation, and the Widening of the Alternative Dispute Resolution Space: Bloated Expectations or a Matter of Time? In: *SSRN* [online]. 2023 [cit. 2023-05-29]. Available at: https://www.ssrn.com/abstract=4491851; TVARONAVIČIENĖ, A. – KAMINSKIENĖ, N. – ŽEMAITAITYTĖ, I. – CUDOWSKA, M. Towards More Sustainable Dispute Resolution in Courts: Empirical Study on Challenges of the Court-Connected Mediation in Lithuania. *Entrepreneurship and Sustainability Issues* [online]. 2021, Vol. 8, No. 3, pp. 633–653 [cit. 2024-05-20]. Available at: https://jssidoi.org/jesi/article/804.

[4] CLAYTON, G. – DORUSSEN, H. The Effectiveness of Mediation and Peacekeeping for Ending Conflict. *Journal of Peace Research*. 2021, Vol. 59, No. 2, pp. 150–165.

[5] SULISTIYONO, A. – MARET, S. Mediation as an Alternative Institution of Disclaimer in Religion Court in Indonesia According to Justice Perspective. *Atkantis Press*. 2019, Vol. 358, pp. 115–118.

[6] TVARONAVIČIENĖ – KAMINSKIENĖ – ŽEMAITAITYTĖ – CUDOWSKA, *c. d.*

[7] SIMANULLANG, C. – IFTITAH, A. Mediasi Dalam Penyelesaian Sengketa Perdata di Pengadilan Negeri Kelas I B Blitar [Mediation in Civil Dispute Resolution at the Blitar Class I B District Court]. *Jurnal Supremasi* [Supremacy Journal] [online]. 2018, Vol. 7, No. 2, p. 3 [cit. 2024-05-20]. Available at: https://ejournal.unisbablitar.ac.id/index.php/supremasi/article/view/379.

[8] BUNGA, M. Tinjauan Hukum Terhadap Kompetensi Peradilan Tata Usaha Negara Dalam Menyelesaikan Sengketa Tanah [Legal Review of the Competence of the State Administrative Court in Resolving Land Disputes]. *Gorontalo Law Review*. 2018, Vol. 1, No. 1, pp. 39–49.

[9] Article 154 RBG.

[10] Ibid.

without the need for an impartial case.[11] In addition, some mediators are non-justices who represent the disputing parties in their capacity as a mediator. However, they are neutral and do not speak for any of them because the disputing parties regularly choose court judges to serve as mediators.

In this case, non-judicial mediators consider peacefully resolving disputes over land ownership rights between the two parties by the Regulations of the Supreme Court of the Republic of Indonesia.[12] A non-judicial mediator is a neutral party who helps the parties without coercion in solving the problem. Thus, two issues need to be studied in this research: (a) civil legal liability for non-judicial mediators in the non-litigation mediation process in land ownership disputes and (b) the legal position of a non-judicial mediator on an authentic peace deed. It supports Indonesia's disputed land ownership rights cases positively. In addition, it expects how a non-judicial mediator responds to a condition where the mediation process fails, and a non-judicial mediator experiences civil and criminal prosecution.

The research conducted by Sulistiono et al. found that post-divorce women's rights in cases of talak and judicial divorces with identical rights have been protected by the involvement of non-judicial mediators at the Samarinda Religious Court.[13] Meanwhile, according to Azzahro, mediation is not entirely successful in resolving divorce cases; the function of non-judicial mediators in the Religious Court Bantul's application of the practice has complied with PERMA Number 1 of 2016.[14] In addition, another study found that the two registered non-judicial mediators are no longer actively performing their roles in the Gorontalo Religious Court, which means that the non-judicial mediators' presence has proven useless.[15]

Meanwhile, there are several previous studies that concern land right disputes. Firstly, the research which is analysed by Arwana and Arifin discussed the land dispute conflict by using mediation.[16] Secondly, the study conducted by Hajati analyses mediation as the model of land dispute resolution.[17] Based on both previous studies used a similar method called normative research. Meanwhile, the statute approach is used to analyse the research. Further, the result of this research does not discuss the non-judicial

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[11] AZZAHRO, M. Z. The Effectiveness of Non-judicial Mediators in Settlement of Divorce Cases in Elderly Cases at the Bantul Religious Court. *INNOVATIVE: Journal Of Social Science Research*. 2023, Vol. 3, No. 2, pp. 6575–6586.

[12] Mediator Non Hakim. Mahkamah Agung RI Pengadilan Ambon [Non-Judge Mediator. Supreme Court of Indonesia Ambon Court]. In: *PENGADILAN AGAMA AMBON* [online]. 6. 9. 2021 [cit. 2024-05-20]. Available at: https://www.pa-ambon.go.id/layanan-hukum/hakim-mediator-2.

[13] SULISTIONO, J. – HARIES, A. – RAHMI, M. The Role of Non Judge Mediators Providing Guarantee of Women's Rights Protection in Divorce Cases. *Al Qalam: Jurnal Ilmiah Keagamaan dan Kemasyarakatan* [Al Qalam: Scientific Journal of Religion and Society]. 2022, Vol. 16, No. 4.

[14] AZZAHRO, *c. d.*

[15] FAISAL, A. The Failure of Mediation in Divorce Cases Handling at Gorontalo Religious Court. *Al-Mizan (e-Journal)*. 2022, Vol. 18, No. 2, pp. 337–356.

[16] ARWANA, Y. C. – ARIFIN, R. Jalur Mediasi Dalam Penyelesaian Sengketa Pertanahan Sebagai Dorongan Pemenuhan Hak Asasi Manusia [Mediation in Land Dispute Resolution as an Encouragement to Fulfill Human Rights]. *Jambura Law Review*. 2019, Vol. 1, No. 2, pp. 212–236.

[17] HAJATI, S. et al. Model Penyelesaian Sengketa Pertanahan Melalui Mediasi dalam Mewujudkan Penyelesaian yang Efisiensi dan Berkepastian Hukum [Model of Land Dispute Settlement through Mediation in Realizing an Efficient and Legally Certain Settlement]. *Jurnal Dinamika Hukum* [Journal of Legal Dynamics]. 2014, Vol. 14, No. 1, pp. 36–48.

mediator. They explained that mediation is used to solve land dispute cases using the judicial mediator. Consequently, this study contradicts previous research by explaining non-judicial mediators' effectiveness in land rights disputes. The non-judicial mediator has several strengths in solving the land dispute case, which this research analyses.

2. LITERATURE REVIEW

2.1 STUFENBAU'S THEORY

Stufenbau's theory is the legal system by Hans Kelsen, which states that the legal system is a rung of the ladder system with tiered rules in which the lowest legal norms must attend to higher legal norms. The highest legal norms (the constitution) must adhere to the most basic legal norms (*grundnorm*).[18] According to Kelsen, the most fundamental legal norms (*grundnorm*) are not concrete or abstract.[19] Meanwhile, a fundamental norm is a formal argumentation of legal norm validity. Besides, it is a norm system that sets human behaviour or attitude; meanwhile, the legal regulations are not associated with individuals. In addition, there are various kinds of legal norms. Therefore, justification is needed to unify the system of legal norms; it is the fundamental standard. Thus, the basic norms are a basis for establishing the validity of all existing legal norms.[20]

Furthermore, *Pancasila* is the most basic example of a legal norm. In this theory, the hierarchy of norms has a layered and tiered arrangement. *Pancasila* is an ideal value and national ideology that serves as a basis for unifying or functioning as an estuary for various existing statutory regulations. According to the Indonesian legal system, all statutory regulations must be based on and sourced from these basic norms (*staatsfundamentalnorm*) and may not conflict with them. Meanwhile, a new rule is legally recognized at a higher level if it is consistent with the applicable regulations.[21] According to Hans Kelsen, norms are multi-layered. In other words, the following legal norms apply, arise, and find in higher norms. Besides, if it reaches the highest norm, thus, it will be known as the fundamental norm. Nonetheless, the dynamic standard system is incorporated.[22] As a result; the law is produced based on a higher standard, eliminated

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18 KELSEN, H. *Teori Hukum Murni: Dasar-dasar ilmu hukum normatif* [Pure Legal Theory: Fundamentals of Normative Legal Science]. Bandung: Nusa Media, 2010.

19 Ibid.

20 MANULLANG, E. F. M. Mempertanyakan Pancasila Sebagai Grundnorm: Suatu Refleksi Kritis dalam Perspektif Fondasionalisme [Questioning Pancasila as a Grundnorm: A Critical Reflection in the Perspective of Foundationalism]. *Jurnal Hukum & Pembangunan* [Journal of Law & Development]. 2020, Vol. 50, No. 2, pp. 284–301.

21 HARYANTI, D. Konstruksi Hukum Lembaga Penyelenggara Pemilihan Umum Di Indonesia Ditinjau Dari Teori Stufenbau [Legal Construction of the General Election Organizing Body in Indonesia Viewed from the Stufenbau Theory]. *Jurnal Pembaharuan Hukum* [Journal of Law Reform]. 2015, Vol. 2, No. 2, pp. 270–278.

22 KELSEN, *Teori Hukum Murni…* [Pure Legal Theory…].

by an authorized institution to form authority constantly. Eventually, it produces a lower norm based on a higher or upper norm.[23]

2.2 LAW VALIDITY THEORY

The law theory by Sudikno Mertokusumo, Bagir Manan, and JJH Bruggink and enforceability should be understood differently with the attachment to its strength. Sudikno Mertokusumo delivered the discussion about *"the strength of enacting the law has three kinds of implementation capabilities, namely, juridical, sociological, and philosophical law"*.[24] Meanwhile, the positive law will apply if it achieves the goals; thus, the law's goals are justice, certainty, and utilization.[25] In addition, the law is constantly in motion; it means that the process of the positive rule of law into the regulations occurs repeatedly. Then, the changes also often occur and take place continuously. Thus, it raises the question of whether it cannot be determined further which legal rules we must attend to at a particular time. Moreover, if it is examined from the semantic perspective or the knowledge that deals with the words and sentence interpretation, it will cause the possibility of various opinions about the law in empirical, normative, and evaluative understandings; all of them are placed in a central position.[26] Based on the validity, it can be divided into several types as follows:

1) Factual or Empirical Validity of Legal Rule
   The factual or practical application of a rule of law can be claimed if the community to whom the rule of law applies is generally complying with the rule of law. A comprehensive understanding of the actual applicability of rules must be understood from all aspects. It means that everyone authorized to apply the relevant rule of law causes society to conduct it.
2) Normative or Formal Validity of Legal Rule
   Positivity does not refer to effectivity mentioned as an absolute requirement (*noodzakelijke voorwaarde*) for the normative validity of a legal order.[27] It explained that natural law would happen if a person abstracts himself from the standpoint (*standpunt, belief*) of formal structure; it is based on higher law rules. Meanwhile, there is a specific correlation in legal rules indicating each other. In addition, a particular rule of law is also focused on the general law rule.

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[23] SYAMSUDDI, A. *Proses Dan Teknik Penyusunan Undang-Undang* [Law Drafting Process and Techniques]. Jakarta: Sinar Grafika, 2011.

[24] MERTOKUSUMO, S. *Mengenal Hukum: Suatu Pengantar* [Getting to Know the Law: An Introduction]. Yogyakarta: Liberty Yogyakarta, 2007.

[25] MUSLIH, M. Negara Hukum Indonesia dalam Perspektif Teori Hukum Gustav Radbruch (Tiga Nilai Dasar Hukum) [The Indonesian State of Law in the Perspective of Gustav Radbruch's Legal Theory (Three Basic Values of Law)]. *Legalitas* [Legality]. 2013, Vol. IV, No. 1, pp. 130–152.

[26] BRUGGINK, J. J. H. *Refleksi Tentang Hukum: Pengertian-Pengertian Dasar Tentang Teori Hukum Terjemahan Bernard Arief Sidharta* [Reflections on Law: Basic Notions of Legal Theory Translated by Bernard Arief Sidharta]. 3rd ed. Bandung: Citra Aditia Bakti, 2011.

[27] KELSEN, H. *General Theory of Law and State* [online]. New York: Routledge, 2017 [cit. 2023-05-29]. Available at: https://www.taylorfrancis.com/books/9781351517997.

3) Evaluative Validity of Legal Rule
   The rule of law is considered valuable if it is based on its substance, which has conclusive power (*verbindende kracht*) or obligatory characteristic (*verplichtend karakter*). Meanwhile, everyone is obliged to obey the rule of law, which they view as valuable or very important for their social behaviour. The evaluative validity of the rule of law is the nature of obliging it or its binding or obligatory power (technical term for *obligatory characteristics*).

Based on Bruggink's perspective above, if it is adjoined with the prevalence of mentioning *applicability*, which in this article is about law, it takes from the term and understanding of the enforceability of law. According to Gustav Radbruch, normative or formal validity, in other words, is juridical validity (*juristische geltung*), factual or empirical validity can be mentioned as sociological validity (*soziologische geltung*), and evaluative validity is philosophical validity (*filosofische geltung*). *Filosofische Geltung* defined that law has power if it is by the legal ambition (*rechtsidee*) as a higher positive value (*uberpositiven Werte*: *Pancasila*, unprejudiced and prosperous society). *Soziologische Geltung* means that the acceptance and enactment of the law in society cannot be separated from reality, whether formal or informal requirements from the law. It is more focused on the reality of society. *Juristische Geltung* is a constitutional statute or regulation that fulfils the formal requirement.[28]

Furthermore, the law notion as stated by Gustav Radbruch in a study entitled "The Concept of Law" in discussion Legal Philosophy is divided into three principles,[29] as follows:

1) Justice
   Justice is a primary principle in law establishment. It is a reference in determining the truth and equality. However, Radbruch emphasizes that there is a debate concerning justice itself. Besides, justice allocation should be equally applied between the right and obligation.[30]
2) Expediency
   Expediency is emphasized as a goal, not an appropriate facility. It has an absolute value for balancing the justice value. It is also used for three goals: individual personality, collective personality, and human artifact.[31]
3) Legal Certainty
   Legal certainty has functioned in adjusting the weakness of justice and expediency elements. Moreover, legal certainty is more emphasized in law enforcement than the scope of determination. It also leads to the justice content in a factual entity. The legal certainty principle will have a limited role in solving several cases since there is an inadequate scientific explanation.[32]

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[28] BRUGGINK, *c. d.*
[29] RAHARDJO, S. *Ilmu Hukum* [Legal Science]. Bandung: PT Citra Adityia Bhakti, 2000.
[30] SADNYINI, I. A. Legal Protection Interior Design in Industrial Design Intellectual Property Rights. *Jurnal Notariil* [Notarial Journal]. 2021, Vol. 6, No. 1, pp. 27–37.
[31] Ibid.
[32] Ibid.

3. RESEARCH METHOD

This study discusses normative legal research, which uses existing laws, court decisions, books, and legal theories to analyse qualitative data.[33] This study used two approaches: a statutory approach and a conceptual approach. It analysed various legal materials, such as primary and secondary laws, using legal principles, theories, and concepts. The primary laws used include Article 130 of the Human Rights Law, Article 154 of the Basic Law on General Provisions, and Article 6 of Statute Number 30 of 1999. Additionally, it examined laws like the 1945 Constitution, Statute Number 3 of 2009, and Supreme Court Statute Number 48 of 2009. It also looked at non-litigation issues, mediation, Constitutional Court rules, and guidelines for mediator behaviour.

In this study, legal material collection followed analytical techniques. First, it analysed Constitutional Court Regulation Number 1 of 2016, Article 130 of the Human Rights Law, Article 154 of the Human Rights Law, and Statute Number 30 of 1999. Second, it examined the correlation with other statutes, mainly focusing on *Pancasila's* fourth precept and Article 18(G) of the 1945 Constitution of the Republic of Indonesia. Lastly, it utilized Stuffenbau's theory and the theory of law validity.

4. RESULTS AND DISCUSSION

4.1 THE MEDIATION OF LAND RIGHT DISPUTES CASES THROUGH A NON-JUDICIAL MEDIATOR BASED ON CIVIL LAW

Mediation is a way of resolving disputes and conflicts by allowing both parties to reach an agreement through a negotiation process employing a mediator.[34] Mediation is a form of alternative dispute resolution, in which disputes and conflicts are resolved through negotiation and facilitation. It aims to reach a mutually agreeable solution for all the parties involved. It may involve legal advice, psychotherapy, and data analysis. Mediation aids in the cancellation and termination of land-related legal relationships.[35]

The mediation process must be completed within thirty (30) days of the High Court or Supreme Court's interim decision. The Supreme Court or High Court receives the case file and the mediation result report from the Chief Justice of the Court. Based on the report, the judge observing the case at the High Court or Supreme Court and provided a decision. Then, all civil disputes caused before the court, including cases of litigants' and third parties' resistance (*partij verzet*) and resistance (*verzet*) against the *verstek* decision, which has permanent legal force, must first be settled through mediation, unless

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[33] HARDIANTO, Y. – KHOIDIN, W. P. – UTAMI, R. S. The Implementation of Restorative Justice System to Resolve Domestic Violence Acts. *YURIS: Journal of Court and Justice*. 2023, Vol. 2, No. 3, pp. 1–13.

[34] Minister of Agrarian and Spatial Planning or Head of the National Land Agency.

[35] ISWANTORO, I. Strategy and Management of Dispute Resolution, Land Conflicts at the Land Office of Sleman Regency. *Journal of Human Rights, Culture and Legal System*. 2021, Vol. 1, No. 1, pp. 1–18 [cit. 2023-05-29]. Available at: https://www.jhcls.org/index.php/JHCLS/article/view/3.

otherwise stipulated based on the Regulation of the Supreme Court The case of land is one of the problems still happening in Indonesia. Based on the Minister of Agrarian and Spatial Planning or Head of the National Land Agency was named Sofyan Jalil, 2019, it received 8,959 land dispute cases. Moreover, land rights are invalidated due to land abandonment, which is the primary cause of around 9,000 land conflicts in Indonesia, according to data from the Ministry of Agrarian Affairs and Spatial Planning / State Land Agency (ATR/BPN). Land disputes are only one part of all issues considered in land cases. Based on the Regulation of the Minister of Agrarian and Spatial Planning Number 11 of 2016, land cases consist of land disputes, land conflicts, and land cases. Land disputes usually arise in every nation due to the intricacy of current land issues, which are not limited to Indonesia. The parties involved in land cases need to understand how to solve the problem correctly so that similar issues do not happen again. The constant ministerial regulation has been explained as a way of settlement by the parties concerned, called mediation.

Moreover, a problem solved through mediation will be simplified and deliberation between related parties. Thus, the result will be a win-win solution for both parties.[36] As a third party, the mediator must assist the related parties in finding the right solution without compulsion.[37] Meanwhile, the type of mediator used by the Ministry of Agrarian and Spatial Planning is an authoritative mediator who can collaborate with one or more non-judicial mediators. A person included in this type of mediator is an official with the competence and knowledge of the dispute. It is classified as a non-judicial co-mediator who has attended and passed through mediator education and examination, which the Supreme Court supervises. The judge and the non-judicial mediators may conduct the mediation when certain administrative conditions are fulfilled.

Furthermore, in carrying out social interactions, conflict often occurs between individual interests.[38] Although it has no solution, thus it develops into disputes. If the dispute occurs, it will take time and money. Meanwhile, developing society's culture and civilization affects the human mindset.[39] Consequently, Alternative Dispute Resolution was raised as an economical solution, both in time and cost; it is used to resolve the dispute, which the parties often do. It is applied to solve a dispute in the increasing demands of work and business. Alternative Dispute settlement (ADR) has been recognized

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36 ABBAS, S. *Mediasi Dalam Hukum Syariah Hukum Adat & Hukum Nasional* [Mediation in Sharia Law Customary Law & National Law]. Jakarta: Kencana Prenada Media Group, 2009.

37 TAN, D. The Singapore Convention on Mediation to Reinforce the Status of International Mediated Settlement Agreement: Breakthrough or Redundancy? *Conflict Resolution Quarterly* [online]. 2023, Vol. 40, No. 4, pp. 467–482 [cit. 2024-05-20]. Available at: https://onlinelibrary.wiley.com/doi/10.1002/crq.21377; ADRIAN, L. The Role of Court-Connected Mediation and Judicial Settlement Efforts in the Preparatory Stage. In: ERVO, L. – NYLUND, A. (eds.). *Current Trends in Preparatory Proceedings* [online]. Cham: Springer International Publishing, 2016, pp. 209–231 [cit. 2024-05-20]. Available at: http://link.springer.com/10.1007/978-3-319-29325-7_9.

38 PIETRASZEWSKI, D. Toward a Computational Theory of Social Groups: A Finite Set of Cognitive Primitives for Representing Any and All Social Groups in the Context of Conflict. *Behavioral and Brain Sciences* [online]. 2022, Vol. 45, No. e97 [cit. 2024-05-20]. Available at: https://www.cambridge.org/core/product/identifier/S0140525X21000583/type/journal_article.

39 TAVARES, M. C. – AZEVEDO, G. – MARQUES, R. P. The Challenges and Opportunities of Era 5.0 for a More Humanistic and Sustainable Society: A Literature Review. *Societies* [online]. 2022, Vol. 12, No. 6 [cit. 2024-05-20]. Available at: https://www.mdpi.com/2075-4698/12/6/149.

in dispute settlement mechanisms. Warren Burger, the Chief Justice of the United States Supreme Court, started the extrajudicial settlement in 1976 that academicians, practitioners, and communities agreed.[40] Based on Article 1(3) The 1945 Constitution of the Republic Indonesia, Indonesia is a state law.[41] It has ideological source called *Pancasila*. It will define that the law has a dialectical character between fact and principle, model, and content; therefore, it will not break into one-sided parts such as form, content, and rule but emphasizes a systematic relationship.[42] In the state law's concept, it is idealized that the commander of dynamical state life refers to the law. It is not politics or economics. Therefore, it is used in English to mention the principle of state law, which means *the rule of law, not man*.[43] It means that the government defines that law as a system; thus, it is not referred to individuals who were doing the act. In addition, the law states that the law has the higher authority; thus, no one has power above the law.

Then, the government's administrative power should be based on the law. It is not an order from the Head of State. Therefore, states and other institutions must be grounded in the law and accountable for legal action. Therefore, the authority directs the government according to the law. It also aims to maintain legal discipline. It is consistent with what Akchurin declared that the country is ruled by law, and its government must be based on the constitution.[44] It is defined as the basis of governance – the national constitution to unify the country.

Meanwhile, the system rules, which have been agreed upon and highly appreciated, involve several relationships. There is the relationship between citizens and the state, the relationship between state institutions, and the performance of authority. It follows the theoretical study by Sudikno Mertokusumo, who stated that the discussion on the *power of enactment of laws* has three kinds of powers of enactment of laws: jurist, sociology, and philosophy.[45]

Further, a mediator is a judge or the other parties with a mediator certificate as the neutral party. It is associated with helping the parties in the negotiation process. It searches various dispute resolution possibilities without breaking or imposing techniques. The mediator's objective in conducting the mediation process is to provide the disputing parties with a final report to the panel of judges observing the case, indicating whether the parties reached an agreement. To achieve this objective, the mediator needs to make every effort to fully resolve the issues of the disputing parties.[46] A mediator

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40 SUBRATA, R. Mechanisms of Alternative Dispute Resolution in Conflict and Dispute Resolution in Indonesia. *Jurnal Litigasi (e-Journal)*. 2023, Vol. 24, No. 1, pp. 151–164.

41 Article 1 of the 1945 Constitution of the Republic of Indonesia.

42 RIJADI, P. – PRIYATI, S. *Membangun Ilmu Hukum Mazhab Pancasila Dalam Buku: Memahami Hukum Dari Konstruksi Sampai Implementasi* [Building Pancasila Mazhab Law Science in Books: Understanding Law from Construction to Implementation]. Jakarta: Raja Grafindo Persada, 2011.

43 ASSHIDDIQIE, J. *Gagasan Negara Hukum Indonesia* [The Idea of the Indonesian Rule of Law]. Jakarta: Majalah Hukum Indonesia, 2005.

44 AKCHURIN, M. Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador. *Law & Social Inquiry* [online]. 2015, Vol. 40, No. 4, pp. 937–968 [cit. 2023-05-29]. Available at: https://www.cambridge.org/core/product/identifier/S0897654600004226/type/journal_article.

45 MERTOKUSUMO, *c. d.*

46 LATUKAU, F. – RUMKEL, N. – SUWARTI. Mediators Optimization of Civil Disputes Mediation Process at Post-Perma Court No. 1 of 2016. *Journal of Social Science*. 2022, Vol. 3, No. 4, pp. 714–729.

certificate is a document proposed by a Constitutional court or institution that has its accreditation. It declares that a person has participated in and graduated from an examination of mediation certification.[47]

Currently, a non-judicial mediator needs legal protection to carry out their primary task of serving society. Thus, after the non-litigation mediation process ends, the settlement approval is obliged and must be strengthened into a settlement agreement if it succeeds. Meanwhile, there are two types of strengthening: the public through an application to determine the settlement agreement from the district court and the private through the notarial settlement agreement. In these two reinforcement types, a non-judicial mediator's professional identity is mentioned completely. Regarding the determination of the court application, it has received legal protection as stipulated in the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2016, Article 35(5) and (6). However, it is different if a mediator strengthens it through a notarial certificate. In this case, a non-judicial mediator must receive adequate legal protection if their mediation process fails.

Meanwhile, in carrying out the primary duties regarding rights and obligations, a non-judicial mediator is based on the law and protected by law. It provides services to the community while also having a clear legal position in the notarial certificate optimally. It is supported by Gustav Radbruch's theory, which states that the purpose of the law is justice, certainty, and expediency.[48]

It should be protected by law in its primary duty of serving the community. In this case, when a non-judicial mediator carries out the litigation mediation process, this legal protection has been regulated in the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2016, Article 35(5) and (6).[49] It is different if a non-judicial mediator carries out a non-litigation mediation process, as regulated in Article 154 of the Procedural Law Regulations for Regions Outside Java and Madura (*Reglement Tot Regeling Van Het Rechtswezen In De Gewesten Buiten Java En Madura, Staatsblad* 1927:227)[50] and Article 130 Indonesian Regulation which has upgraded (*Het Herziene Inlandsch Reglement, Staatsblad 1941:44*).[51]

Generally, the personality of Indonesian society, when dealing with disputes uses litigation (courts) to achieve justice. Therefore, many cases end up in court. It also provokes the decline of the court institution in resolving disputes; its process is adjudicative. The fundamental character of Indonesian society, reflected in the 4th *Pancasila*, as mentioned, is *democracy, led by the wisdom of the representatives of the people*. It carries out a culture of resolving a dispute through deliberation, including negotiation, arbitration, and mediation (non-litigation). Mediation is a dispute resolution process

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47 HANIFA, M. Perbandingan Tugas Mediator Pada Pengadilan Agama Indonesia Dengan Mahkamah Syariah Malaysia [Comparison of the Duties of Mediators in Indonesian Religious Courts with Malaysian Syariah Courts]. *Jurnal Hukum Acara Perdata* [Journal of Civil Procedure Law]. 2020, Vol. 6, No. 2, pp. 101–116.

48 MUSLIH, *c. d.*

49 Supreme Court Rules Number 1 of 2016, Article 35(5), and (6)6.

50 Article 154 RBG.

51 Article 130 HIR.

that is faster, cheaper, and provides greater access to the parties. It is also for finding a satisfactory settlement and fulfilling an impression of justice.[52]

Otherwise, Indonesian society needs to understand this method of resolving disputes widely through mediation. Currently, the arrangements related to mediation are listed in 10 (ten) laws and regulations. Further, the correlation between the ten (10) laws and regulations, especially in the Supreme Court Regulation Number 1 of 2016, is quite clear that it regulates legal protection for a mediator, both judges and non-judicial, when carrying out their primary professional duties in the realm of litigation, which on the contrary is not written regarding the regulation of legal protection for a non-judicial mediator when carrying out their primary professional duties in the non-litigation realm, it also related to the legal position of a non-judicial mediator in a notarial certificate.

4.2 THE IMPLICATION OF NON-JUDICIAL MEDIATOR IN LAND RIGHT DISPUTE CASES

According to some studies, the most complicated and corrupt area of the problem is the land and justice issue. The land sector accounts for thirty percent (30%) of all cases filed with the court. It is necessary to investigate the various land disputes in Indonesia, the reasons behind their unresolved status and their protracted and throughout the country. The result shows that a non-judicial mediator is not included in the law's validity after the non-litigation mediation process. Meanwhile, five basic principles of non-litigation are a philosophical basis for implementing mediation activity: the secret principle (confidentiality), volunteer principle, empowerment principle, neutrality principle, and a unique solution principle.

Furthermore, the existence of these five basic principles of mediation in Indonesia, the arrangements are divided into ten (10) laws and regulations, which are implemented in the preamble and articles. However, the basic principles of mediation are the philosophical foundation behind the non-litigation of mediation institutions. It follows Supreme Court Regulation Number 1 of 2016, Article 35(3), (4), (5), and (6), as follows:

(3) If the parties fail to achieve an agreement, the statements and confessions of the parties in the mediation process cannot be used as evidence in the case trial process.
(4) The mediator's records must be destroyed at the end of the mediation process.
(5) The mediator cannot be a witness in the trial process of the case in question.
(6) The mediator cannot be subject to criminal or civil liability for the contents of the settlement agreement resulting from the mediation.

Meanwhile, if non-judicial mediator has fulfilled these basic principles, they have the right to get immunity, which the mediator obtains during and after the litigation mediation process. The legal position of a non-judicial mediator in the notarial settlement agreement is only as a witness; as regulated in Supreme Court Regulation 1 of 2016, mediation can be distinguished into litigation mediation and non-litigation mediation.

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[52] ABBAS, *c. d.*

The principle of non-litigation mediation is regulated in Supreme Court Regulation Number 1 of 2016 as stated in Articles 36 and 37, Article 36, as follows:

Article 36

(1) After the parties have successfully settled their disputes through a settlement agreement out of court, regardless of whether they have the help of a registered mediator, they can apply to the court with jurisdiction to obtain a settlement certificate by filing a lawsuit.
(2) The filing of an action within the meaning of subsection (1) shall be accompanied by a settlement agreement and documents serving as evidence of the legal relationship between the parties and the subject matter of the dispute.
(3) The examining judge before the parties shall convert the settlement agreement into a settlement certificate only if it complies with Section 27(2).
(4) A settlement certificate for a complaint-enhanced settlement agreement under subsection (1) shall be issued by the investigating judge at a public hearing within fourteen (14) days from the date of filing the complaint.
(5) A copy of the Settlement Certification as referred to in paragraph (4) must be submitted to the parties on the same day as the recitation of the Settlement Certification.

Article 37

(1) If the Settlement Agreement is proposed to be strengthened in the form of a Settlement Certification which is not relevant to the provisions as referred to in Article 27(2), the Case Examiner Judge is obliged to provide instructions to the Parties regarding matters that must be corrected.
(2) Due to observance of the grace period for the completion of the submission of the Settlement Certification as referred to in Article 36(4), the parties are obliged to immediately correct and resubmit the amended Settlement Agreement to the Case Examining Judge.

Based on the statements above show that the position of the non-judicial mediator is only limited to a witness in the notarial settlement certification related to non-litigation mediation. There is a need for attributive regulation through laws and amnesty for non-judicial mediators during and after conducting non-litigation mediation processes. Meanwhile, litigation mediation, as regulated in Supreme Court Regulation Number 1 of 2016, contains ten (10) principles governing the use of integrated mediation in court (court-connected mediation), as follows:

(1) Mediation
(2) Autonomy of the parties
(3) Mediation in good faith
(4) Time efficiency
(5) Mediation certification
(6) Mediator Liability
(7) Secrecy
(8) Financing

(9) Repetition of Mediation
(10) The Settlement Agreements which is out of Court

Meanwhile, in Article 23, such as:
(1) An out-of-court peace agreement backed by a certified mediator can be strengthened by filing a claim in court and forming a settlement certificate.
(2) An out-of-court settlement agreement and other documents proving the existence of a legal relationship between the parties and the object of dispute should be attached.
(3) If the out-of-court settlement agreement meets the following conditions, its effectiveness will be strengthened: a) following the wishes of the parties, b) does not violate legal requirements, c) no abuse of third parties, d) it can be executed, e) it is done in good faith.

In addition, the existence of non-litigation mediation arrangements as regulated in Article 6(7) of Law Number 30 of 1999 with Articles 36 and 37 of the Supreme Court Number 1 of 2016, which relates to strengthening the settlement agreement outside the court into a settlement certification to the local district court, or a notary in the form of a notarial settlement certification. The difference is that Supreme Court Regulation Number 1 of 2016 requires that the settlement agreement, which is confirmed, must be cooperated by the certified mediator. Then, it is submitted through a lawsuit and must meet cumulative requirements. It is according to the parties, not against the law, and not abusing third parties. It also can be executed in good faith; besides that, there is no unlimited time for submission.

Meanwhile, the Law Number 30 of 1999, which has a higher position than Supreme Court Regulation Number 1 of 2016, the strengthening must be registered within 30 days after the signing of the settlement agreement by using Stuffenbau's Theory analysis by Hans Kelsen and the Law Validity Theory by Sudikno Mertokusumo, Bagir Manan, and JJH. Bruggink and based on the *Lex Superior Derogat Legi Inferiori Legal Principle*. Therefore, the higher legal rule should be won; in this case, the author understands the Supreme Court Regulation as a statutory regulation whose position is lower than the law because it follows attributive and delegated authority. In addition, it is based on Stufenbau's theory which states that the legal system is a rung system where high legal norms refer to higher laws, while the highest legal norms rely on basic legal norms.[53]

5. CONCLUSION

Based on the statements above, unifying the arrangements in one statutory regulation and mediation is needed, both litigation and non-litigation. It is a form of filling legal voids and complementing the provisions of Article 130 HIR/154 RBG related to impunity for non-judicial mediators in the non-litigation mediation process

[53] KELSEN, *General Theory of Law and State*.

in the land of right disputes. In particular, for Article 36 and Article 37 of the Supreme Court Regulation Number 1 of 2016, it is necessary to review especially regarding the legal position of non-judicial mediators in civil legal liability cases for non-judicial mediators in non-litigation mediation processes in cases of land ownership rights disputes, on reconciliation deeds notarial. There is impunity for non-judicial mediators in non-litigation cases as a form of respect for human freedoms, as stated in the 1945 Constitution Article 28 Letter G.

The substantial implications for non-judicial mediators in Indonesia include the need for legal protection, the requirement to adhere to the law in carrying out duties, and the importance of unifying mediation arrangements under statutory regulations to optimize services to the community. Additionally, the five basic principles of mediation in Indonesia serve as the philosophical foundation behind non-litigation mediation institutions.

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