

The Essence of Marital Dispute Mediation in Legal Philosophy Study

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The Essence of Marital Dispute Mediation in Legal Philosophy Study

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ABSTRACT: Marriage is the union of two lives through a firm and eternal agreement based on love. As a social institution, marriage receives legal protection from society and the state. The legalization of marriage is carried out according to the religious law of each party, and the marriage must be recorded. Marriage as a state's legal institution is related to family ties, society, and the future of the nation. Therefore, the state intervenes in the marital particulars of its citizens. Marriage as a *mitsqon gholidan* is a firm agreement, the suitability of the bond between husband and wife. The principle of complicating divorce is in line with the goal of marriage, which is to establish an eternal family. Divorce is comprehensive and very influential for people's lives. This can be studied juridically, sociologically, and philosophically. Juridically, divorce must have legal certainty. Sociologically, family is a part of the society. Philosophically, divorce is an act taken by a couple when their marriage cannot be maintained. Divorce must be carried out before a court hearing after mediation attempts are unsuccessful. Philosophically, divorce is an act that can actually be avoided. The essence of marriage is to establish an eternal and happy family. Happiness is the motivation of fulfilling the rights and obligations in marriage.

Keywords: Marriage, Mediation, the essence of divorce.

ABSTRAK: Perkawinan sebagai persatuan hidup atas dasar ikatan cinta kasih dengan perjanjian bebas dari keluarga yang bersifat kekal. Sebagai lembaga sosial maka perkawinan mendapat perlindungan hukum baik dari masyarakat maupun negara. Sahnya perkawinan dilakukan menurut hukum agama masing-masing pihak dan wajib dilakukan pencatatan. Perkawinan sebagai lembaga hukum negara, berkaitan dengan ikatan keluarga, masyarakat dan masa depan bangsa. Oleh sebab itu negara ikut campur dengan masalah perkawinan warga negaranya. Ikatan perkawinan sebagai *mitsqon gholidan* merupakan perjanjian yang teguh, kesesuaian ikatan suami istri. Asas mempersulit perceraian sejalan dengan tujuan perkawinan yaitu membentuk keluarga yang kekal. Perceraian bersifat komprehensif sangat berpengaruh dengan kehidupan masyarakat. Hal ini dapat dikaji secara yuridis, sosiologis dan filosofis. Secara yuridis perceraian harus mempunyai kepastian hukum, secara sosiologis karena keluarga sebagai bagian masyarakat. Secara filosofis perceraian merupakan perbuatan yang ditempuh pasangan suami istri jika perkawinannya tidak dapat dipersatukan. Perceraian harus dilakukan di depan sidang pengadilan setelah pengadilan telah berusaha dan tidak berhasil melalui mediasi. Secara filosofis perceraian perbuatan yang sebenarnya dapat dihindari. Esensi dari perkawinan membentuk keluarga yang kekal dan Bahagia. Kebahagiaan sebagai motivasi dalam memenuhi hak dan kewajiban dalam ikatan perkawinan.

Kata Kunci: Perkawinan, Mediasi, Hakikat perceraian.

Introduction

Law is a guidance for human in behaving and doing activities in social and national life. Social interaction must be regulated by law. As a collection of norms, law originates from state's power; it is coercive and must be obeyed by society, so anyone

who breaks it will be punished.¹ Marriage is regulated in Law number 1 of 1974. Here marriage is a material and spiritual bond to form an eternal and happy family based on the belief in One Almighty God. The purpose of marriage is common interest. Hence, it is regulated in a statutory regulation that administer humans' life and behavior in meeting their needs. To meet those needs, the order of life is made in the form of legal rules. Essence is a deep and comprehensive philosophical study which includes the elements and norms applicable in the society. Philosophy is a critical study of all life phenomena and all human thoughts; it is described in basic concepts. Philosophy solves problems critically, seeks solutions, and provides appropriate arguments and reasons for the solutions. Therefore, the logic of thinking and the logic of language is necessary. Humans as living beings always philosophize in thinking to seek the truth because humans are always curious and constantly trying to get answers to questions about who they are, their existence, and their purpose of life.² Through philosophy, humans try to know the nature of life. Essence is associated with matters concerning the purpose of law, justice, legal certainty, and the benefits of the rule of law. Justice is the crown of every rule of law, so the purpose of law is to obtain justice.

The legal rules for marriage are clear. It includes the validity of the marriage, the procedures for marriage, and the breaking of the marriage bond. Article 38 of Law number 1 of 1974 states that marriages can break up due to death, divorce, and court decisions. Article 39 of Law number 1 of 1974 stipulates that divorce must be carried out before a court hearing. One of the judicial institutions is the Religious Courts. This institution has the authority to resolve marital disputes. This institution upholds law and justice for the community based on laws applicable in social and national life. The state and this judicial institution are closely connected because Religious Courts are one of the most important state institutions authorized to settle marriage disputes for Muslims.³ One of the marital disputes is the breakup of a marriage due to divorce.

Based on Law number 3 of 2006 concerning the Amendment of Law number 7 of 1989 concerning Religious Courts, the Religious Courts have the authority to resolve marital disputes for Muslims. Therefore, the government is very serious in paying attention to marriage, and also divorce. According to the Regulation of the Minister of Religious Affairs number 1 of 2016 concerning Mediation Procedures in Court, judges are given the obligation to resolve divorce disputes through peaceful ways. The obligation to promote reconciliation is one of the principles in this regulation. Mediation is a solution to resolve marital disputes, including divorce. It is carried out in accordance with the values and rules that are believed by the people of Indonesia, namely peace. The settlement of disputes outside the court has become people's choice at this time. Mediation is one of the processes to achieve peace through an agreement with the help of a mediator. Mediation is integrated into proceedings in court through the Regulation of the Minister of Religious Affairs number 1 of 2016. In resolving cases, the Religious Courts must prioritize mediation, and this is not an

¹ H.M. Syarifuddin, *Filsafat Keadilan Biological Justice Dan Praktiknya Dalam Putusan Hakim*, ed. Kencana (Jakarta, 2020), p. 2.

² HM Syarifuddin, *Filsafat Agama, Budi Pekerti, Dan Toleransi* (Jakarta: Kencana, 2022), p. 4-5.

³ Abdul Mustopa, "Mediasi Dalam Perspektif QS Al Hujarat Ayat 9 Dan 10 Serat Korelasinya," Pengadilan Agama Cilegon <https://www.pa-cilegon.go.id>, n.d.

reception for divorce cases, cases which dominate in the Religious Courts. Based on the Regulation of the Minister of Religious Affairs number 1 of 2016, dispute resolution through mediation is the settlement of cases that are carried out peacefully, appropriately, and effectively to obtain justice. This is one of the progresses and changes in the judiciary system because mediation is a simple, fast, and inexpensive implementation of justice. This proves that the implementation of a simple, fast, and inexpensive justice system as mandated by Law number 4 of 2004 concerning Judicial Power has not materialized. The causative factor is the number of disputes in society, including the increasing divorce cases in every year.⁴

Disputes can be resolved through litigation and non-litigation methods. The litigation process takes a long time and must go through formal procedures. In addition, appeals, cassation, and reconsideration are still possible. This encourages people to use non-litigation methods because people think that court decisions do not solve their problems. Judicial institutions have actually implemented the principle of simple, fast, and inexpensive justice. They have examined and decided cases in accordance with the applicable regulations, but the law provides an opportunity for the defeated side. In addition, the litigants have their own egos, so trials become lengthy, time-consuming, and expensive. This burdened the parties and led to a backlog of cases at the Supreme Court.⁵

The Religious Courts of Palembang and the Palembang City District Court recorded high divorce rates.⁶ The Class 1A Religious Court of Palembang, South Sumatra, recorded that divorce and divorce claims from wives were the most widely handled cases during the Covid-19 pandemic, particularly in 2021. In Palembang City and its surroundings, divorce cases initiated by the wife (divorce claim) reached 65%, while those at the initiative of the husband (*talak* divorce) reached 35%.⁷ Mediation is a way to resolve disputes through dialogue to obtain a win-win solution for both parties. Mediators always try to resolve disputes in a way that benefits both parties. Mediation in divorce cases is regulated in the Regulation of the Minister of Religious Affairs number 1 of 2016 concerning Mediation Procedures in Courts. This regulation states that all civil disputes submitted to court must go through a mediation process, but mediation in divorce cases often fails. Therefore, policies must be made to increase the success rate of mediation in marital disputes. This normative juridical research uses primary, secondary, and tertiary legal materials. Research with secondary legal materials is carried out through library research. Further, this research was carried out using statutory approach, conceptual approach, and case approach. The analysis was carried out in a qualitative descriptive manner with deductive conclusion drawing.

⁴ Ronald Fadly Sopamena, "Mediasi Sebagai Penyelesaian Sengketa Cerai," *Batulis Civil Law Review* 2, no. 2 (November 27, 2021): 102–8, <https://doi.org/10.47268/ballrev.v2i2.622>, p. 103

⁵ Muntasir Syukri, "HAKIKAT MEDIASI DALAM PERKARA PERCERAIAN DI PENGADIAN AGAMA," *Varia Peradilan*, no. 360 (n.d.): 1.

⁶ Sri Turatmiyah et al., "Does Judge Has Ex Officio Rights In Determining Mut'ah and Iddah?," *Srinjaya Law Review* 3, no. 2 (2019): 191, <https://doi.org/10.28946/slrev.Vol3.Iss2.249.pp187-198>.

⁷ Sri Turatmiyah, Annalisa Y, and Arfianna Novera, "Efektifitas Mediasi Masa Pandemi Covid-19 Sebagai Upaya Mencegah Terjadinya Perceraian Di Wilayah Hukum Pengadilan Kota Palembang," 2022., p.2

Discussion

Mediation in the Philosophical Views of State of Law

Marital disputes, including divorce, are a subject within the field of judicial mediation, and this field has received the attention of legal scholars. Mediation is a form of dispute resolution through negotiations based on the agreement of the conflicting parties, and this is an alternative in solving household problems. Mediation is an integration of procedural processes that promotes simple, fast and inexpensive solution that has been stipulated by the Regulation of the Minister of Religious Affairs number 1 of 2016. This is evidenced by the enactment of several regulations to increase the effectiveness of mediation at trials. This way of achieving resolution is in line with the principle of dialogue for consensus, the highest principle regulated in the 1945 Constitution of the Republic of Indonesia and other laws and regulations. Article 3 section (2) of Law number 14 of 1970 which has been amended by Law number 4 of 2004 and Law number 48 of 2009 concerning Judicial Power states that the state judiciary system is run to enforce law and justice based on Pancasila. This is consistent with the teachings of Islam, which always prioritize peace in marriage, a material and spiritual bond between a man and a woman to build a family that is *sakinah, mawaddah, and warrahmah*.⁸

Mediation in a philosophical view is in harmony with the teachings of Islam, a religion that leads to peace. The holy book of Islam, the Quran, strictly commands humans as people of religion to improve their relationship with others by doing good. However, in reality, there are still many people who do not want to live side by side with other groups. The Quran in surah Al-Hujurat verse number 9 and 10 commands humans to settle disputes peacefully. Mediation should be used during the trial process to resolve marital disputes that can lead to divorce. Litigating parties must take mediation in resolving disputes in all court environments. This is in accordance with the format of Indonesia as a state of law and has been regulated in Article 1 section (3) of the 1945 Constitution of the Republic of Indonesia. The dynamic nature of law is following the development of society according to their needs. Law must always be able to protect the society by maintaining order, peace, and tranquility and by regulating patterns of behavior in social and national life with the orientation towards the future. Law must not be oriented to the past, or backward looking. Based on this foundation, law must be able to encourage and initiate changes in people's lives towards a better direction and provide goodness to all parties. Therefore there must be harmony between the state and the law towards change.⁹

Mediation as regulated in the Regulation of the Minister of Religious Affairs number 1 of 2016 gives judges the authority to make their own strategy in resolving disputes. The high number of divorce cases in the jurisdiction of the Religious Court of Palembang is another task for judges, who are expected to be able to resolve

⁸ Khoiril Annam, "STRATEGI HAKIM MEDIATOR DALAM MENCEGAH TERJADINYA PERCERAIAN," *Jurnal Hukum-Yustisiabalen* 7, no. 1 (2021): 117.

⁹ Abdul Mustopa, "MEDIASI DALAM PERSPEKTIF Q.S AL HUJARAT AYAT 9 DAN 10 SERTA KORELASINYA," <https://www.pa-cilegon.go.id/artikel/561-mediasi-dalam-perspektif-q-s-al-hujarat-ayat-9-dan-10-serta-korelasinya> akses tgl 28 Nov 2022, 2022.

disputes through mediation. The success of mediation is inseparable from the role of judges; they mediate and reconcile the disputing parties. The right method makes the judge as a mediator able to find the best solution for both parties, so that divorce does not occur. Judges are institutions with the authority, duties, and responsibilities to provide legal justice to people who desire it. The principle that applies is that a judge may not reject any case either on the grounds that there is no law governing the case or because the law governing it is unclear. The adage of *curia novit jus/ ius curia novit* is only an assumption because, in fact, it is impossible for a judge to know all the broad and complex laws. However, this adage is still used so that judges actually try cases based on law, not based on anything else. Therefore, in examining a case, the judge must find the law. The discovery of law by judges is a process that must be applied to concrete legal events. Law discovery as a process of concretization or individualization of legal regulations (*das sollen*) is carried out by taking certain concrete events (*das sein*) into account.¹⁰

The foundation of marriage law is regulated in Law number 1 of 1974 concerning Marriage. This law completely and universally regulates marriage and divorce according to Islam. The laws and regulations completely regulate the principles and legal norms for marriage and divorce. This perfection is often abused by individuals, making marriage and divorce too easy, so many people think that marriage is done for divorce. One of the violations of marriage law is carrying out a marriage and/or divorce without involving a marriage registrar. Law number 1 of 1974 prevents violations in cases of marriage and divorce. The norms and principles regulated in Law number 1 of 1974 aim to inhibit and prevent violations of these principles and norms. The principles in marriage law regulate the minimum age for marriage, the obligation to register marriages, and the obligation to divorce only before a court of law. The general principles regulated in Law number 1 of 1974 are the purpose of marriage, the legality of a marriage, the principle of monogamy, minimum age, equal rights and position between husband and wife, and the principle of making divorce difficult.¹¹

Juridically, divorce is the breaking up of a marriage after trial in court; this provides legal certainty and legal protection for both parties. Divorce can occur due to various factors, one of which is an imbalance in the rights and obligations between husband and wife. Marriage is a process of exchange and integration between two individuals, so that negotiation and deliberation are necessary in all respects. The absence of deliberation causes the nonperformance of rights and obligations, triggering divorce. Divorce is a product of industrialization and urbanization. Divorce was once considered taboo, but, as time has progressed, divorce is now seen as something usual and common. Changes in social relations have occurred due to globalization, which has turned people apathetic and led to an increase in divorce rates. Social changes that make everything easy to obtain from external sources have downgraded the dependence among people. So far, the dependence of husbands on their wives, and

¹⁰ Mawardy Amien, "Bertugas Membentuk Dan Hakim Menemukan Hukum," *Varia Peradilan* XXXIII, no. 387 (2018): 61.

¹¹ Rizky Amalia, Tiara Sosialita, and kadek gangga Putri, *Telaah Batas Usia Minimum Kawin Sebagai Syarat Melangsungkan Perkawinan*, (Malang: setara Press, 2022); Rzky Amalia, Tiara Sosialita, and Kadek Anda Gangga Putri, "Telaah Batas Usia Minimum Kawin Sebagai Syarat Melangsungkan Perkawinan," in *Perkembangan Hukum Keperdataan Di Indonesia* (Malang: setara Press, 2022), 684.

vice versa, is something that makes marriages last. However, movements regarding gender equality, equal rights between men and women, and activities that want to boost patriarchal doctrines in society make couples choose to divorce rather than maintain their marriage.¹²

Divorce Mediation in Religious Courts

Philosophically, marriage is an attempt to gain material and spiritual happiness as husband and wife in a family. The purpose of marriage is to establish a happy and eternal family based on the belief in the One and Only God. This is the motivation for the parties to consistently fulfill their rights and obligations. To create a happy family, husband and wife must truly understand and strive for a *sakinah, mawadah, and warrahmah* marriage in a strong *mitsaaqan ghalidan* bond. The Regulation of the Minister of Religious Affairs number 1 of 2016 regulates dispute resolution through mediation. Here the role of mediator is very important. They must be neutral and impartial, maintain the confidentiality of the parties, and provide justice and trust to the disputing parties. Judges must conduct mediation in resolving disputes in general and divorce disputes in particular. Article 3 section (1) of the Regulation of the Minister of Religious Affairs number 1 of 2016 states that every judge, or mediator, and attorney is required to conduct mediation in resolving disputes. If this step is not successful, the judge or mediator in considering his decision must explain that efforts to resolve the dispute have been taken through mediation and write the name of the mediator in the verdict. The parties here are those who are disputing and want to resolve their disputes in court. The results of some studies show that divorce mediation has not been effective. This is proven by the fact that there are still many divorce cases that are not successfully mediated. Mediation at the Religious Court of Palembang has not been successful; only 0.4% of the cases were successfully mediated.¹³ The main cause of the failure of divorce mediation is that the litigants do not have the willingness to settle their cases through mediation. This makes mediation ineffective. The parties must first understand the benefits of settling cases through mediation. The success of mediation, especially in divorce cases, benefits the disputing parties. Judicial institutions also benefit because they are able to help create marriages that are *sakinah, mawadah, warrahmah*, and eternal.¹⁴ One of the reasons for the increasing number of divorces is underage marriage. This marriage endangers the development of children and increases the vulnerability of children as they are prone to discrimination and violence. Therefore, marriage requires maturity of thought and physical, mental, and economic readiness.¹⁵

¹² Ahmad Fauzi, "HAKIKAT PERCERAIAN (SEBUAH TINJAUAN FILOSOFIS TERHADAP MAKNA PERCERAIAN)," *Mabkamah: Jurnal Kajian Hukum Islam* 6, no. 1 (2021): 56.

¹³ Sri Turatmiyah, Annalisa Y, and Arfianna Novera, "Efektifitas Mediasi Masa Pandemi Covid-19 Sebagai Upaya Mencegah Terjadinya Perceraian Di Wilayah Hukum Pengadilan Agama Palembang," 2022., p. 23.

¹⁴ Arum Kusumaningrum, Yunanto, and Benny Riyanto, "Efektifitas Mediasi Dalam Perkara Perceraian Di Pengadilan Negeri Semarang," *Diponegoro Law Journal* 6, No. 1 (2017): 2.

¹⁵ Kholifatun Nur Mustofa, "Provisions of Minimum Age of Marriage in Indonesia: Amendments Efforts and Responses," *Ay-Syir'ah Jurnal Ilmu Syari'ah Dan Hukum* 52, no. 2 (2018): 292, <https://doi.org/DOI: 10.14421/ajish.2018.52.2.289-312>.

The effectiveness of mediation in preventing divorce² influenced by various factors: a qualified and committed mediator, the good faith of the disputing parties, the trust of both parties in the mediation process and the mediator, and the case itself. Mediation is a dispute resolution process with the help of a mediator. Mediators have an important role because they must involve themselves to identify problems causing the dispute. Principles of mediation are determining factors for the success of mediation. They are the philosophical foundation for the program. Mediators must understand them so that they do not go astray from the path of the mediation philosophy.¹⁶ According to Ruth Carlton, the basic principles of mediation are as follows. The first principle is confidentiality. The two disputing parties may not disclose issues causing the dispute to the public. The second principle is voluntariness. Disputing parties must take the path of mediation without any coercion. The third principle is empowerment. Parties wishing to settle cases through mediation are essentially capable of deliberating on their own issues and reaching an agreement. The fourth principle is neutrality. The mediator must be neutral during the mediation process because the people who play an important role in the success of the mediation are the disputing parties. The mediator only ensures that the mediation is carried out with the right process. The mediator neither decides whether one party is right or wrong nor imposes an opinion on one party or both. The fifth principle is mediation as a unique solution. Here the result of mediation is a solution that results from the creativity of the parties with the help of a mediator, which means that the mediation process does not have to comply with legal standards.¹⁷

Based on Article 24 of the Regulation of the Minister of Religious Affairs Number 1 of 2016, the mediation process is carried out in several stages. Within five working days, the parties must have submitted a summary of the case to the mediator. The mediation is carried out no later than thirty working days after the mediator has been appointed. If in that time the results of mediation have not been obtained, the mediation time can be extended until another thirty working days. If the mediation succeeds in achieving the settlement, the mediator is required to submit a summary of the results of the mediation in writing, which contains a peace agreement that is made in writing as stipulated in Article 27 Section (1) and (3). The essential element of effective and efficient mediation in divorce disputes is the goodwill of the parties. The Regulation of the Minister of Religious Affairs Number 1 of 2016 is the implementation of the proceedings in the civil procedural law as stipulated in HIR and RBG. In the regulation of the Minister of Religious Affairs number 1 of 2016, there is a discrepancy with the civil procedural law; namely, if the parties do not have goodwill in the mediation process, then they are required to pay mediation costs. The success rate of mediation in divorce disputes is still very low due to the absence of goodwill from the parties. If the plaintiff does not have goodwill, then the lawsuit is declared *not accepted*, or NO (*niet ontvankelijk verklaard*). Based on Article 7 Section (2) of the Regulation of the Minister of Religious Affairs number 1 of 2016, if the plaintiff has no goodwill and

¹⁶ Syahril Abbas, *Mediasi Dalam Hukum Syariah, Hukum Adat Dan Hukum Nasional* (Jakarta: Kencana, 2017); Kholifatun Nur Mustofa, "Provisions of Minimum Age of Marriage in Indonesia: Amendments Efforts and Responses." 292.

¹⁷ Syahrizal Abbas, *Mediasi Dalam Hukum Syariah, Hukum Adat Dan Hukum Nasional*, (Jakarta: Kencana, 2011). *Ibid*.

the mediator states that the plaintiff does not have the goodwill, the case judge will drop the decision by explaining that the lawsuit cannot be accepted. Mediation is a solution in resolving divorce disputes, and it is integrated with the practice of proceedings in the judiciary. Mediation has its own characteristics because it can be carried out after the case is registered in court. Mediation is one way to resolve disputes in courts that provides various benefits because the case can be resolved quickly and cheaply so that it can reduce the number of case backlogs in the court.

The divorce rate as recorded by the Religious Court of Palembang had increased. In 2020 there are 2560 cases, while in 2021 there are 2865 cases, and until July 2022 there are 2070 cases. Twelve cases were successfully mediated in 2020, while eight cases were mediated in 2021, and 13 cases were mediated in 2022.¹⁸ Mediation is one of the solutions in resolving divorce disputes. It does not only prioritize peace but also instills sincerity from the parties because no party loses. After mediation is reached, the results are outlined in the form of peace deeds. Peace in dispute resolution is in accordance with the values and norms that are believed by Indonesian people. Through peace, both wins, no one loses, because peace always emphasizes the principle of kinship and put ego aside. Divorce in the jurisdiction of the Religious Court of Palembang is caused by economic factors, domestic violence, third person, and unlawful polygamy. Society has their own view of polygamy, as regulated in the law. Because polygamy is a form of legalized violence, the state regulates it in the law. The wife of a husband who do polygamy, instinctively, feels gender injustice. Therefore the state needs to issue regulations by reformulating the concept of polygamy in formal law as a fact and hope. In terms of polygamy, Muslims have several views. Literalists, namely the group that understand and interpret the Quran and Hadith literally, accept views and ideas about women as long as it does not oppose the values of Islam fundamentally. The progressive group, that tries to interpret the Quran and Sunnah contextually, recognizes that the position of men and women is equal in family ties, in society, and in national-life context and believes that men and women are biologically different.¹⁹

Mediation in divorce disputes is a must for judges, who act as a mediator to reconcile the two parties, because the impact of divorce is felt not only by the husband and the wife but also by their family members, for example their children. Children of separating parents will feel the effects of their divorce for the rest of their lives. One of the difficulties that can arise after a divorce is how to adapt to the environment. Divorcing couples must deal with their emotions, cover up their divorce, give excuses to their children, overcome mental depression due to divorce, and so on.²⁰ Therefore mediation in divorce cases with the reconciliation principle is different from mediation

¹⁸ Turatmiyah, Y, and Novera, "Efektifitas Mediasi Masa Pandemi Covid-19 Sebagai Upaya Mencegah Terjadinya Perceraian Di Wilayah Hukum Pengadilan Agama Palembang." *Ibid*.

¹⁹ Rike Humairoh, "Aturan Poligami Dalam Perundang-Undangan Di Indonesia: Studi Atas Pandangan Aktivistis Perempuan Pada Lembaga Swadaya Masyarakat (LSM) Di Yogyakarta," *ASY-SYIR'AH Jurnal Ilmu Syari'ah Dan Hukum* 54, no. 1 (2020): 118.

²⁰ Ismiati, "Perceraian Orangtua Dan Problem Psikologis Anak," *At-Taujih : Bimbingan Dan Konseling Islam* 1, no. 1 (2018): 1–16, <https://doi.org/10.22373/taujih.v1i1.7188>.

for other disputes because the purpose of mediation in divorce disputes is to reunite the husband and wife into their marriage.

Divorce affects not only the divorced couples but also their children, and in fact they are the one who are mostly affected. They have to bear the heaviest psychological burden. They become angry easily, withdrawn, afraid, worried, sad, and ashamed of their parents' divorce. Divorce also greatly affects their psychological condition because, in their view, divorce is shameful.

Mediation of divorce disputes is sought by mediator judges in every trial process in court. In their efforts of reconciling parties in marital disputes, they provide advice to both parties regarding Islamic views. The Quran surah Al-Hujurat verse number (9) states that the believers are brothers, that humans are obliged to reconcile their brothers and sisters, and that they must be mindful of Allah SWT so that they will receive mercy. This means that, if someone finds two groups of believers arguing, then he is obliged to reconcile them in a just and right way because Allah SWT really loves those who can act fairly.²¹ The legal construction for mediating divorce disputes is regulated in the Regulation of the Minister of Religious Affairs number 1 of 2016. In this law, Article 14 states that the mediator has the obligation to prepare a proposed meeting schedule for the parties to agree on. The mediator motivates the disputing parties to play an active role in the mediation process. The mediator can carry out a caucus, a meeting with one of the parties without the presence of the other party, if necessary. Therefore, the mediator must encourage all parties to understand the interests of all parties and find the best solution. The effectiveness of mediation in resolving divorce disputes is greatly influenced by several factors. If mediation is successful and effective, both parties will benefit greatly. The success of a mediation in divorce disputes indirectly helps the judiciary and helps a family to become a *sakinah, mawadah, warrahmah*, and eternal family based on the believe to One and Only God.

Mediation is a philosophical perspective is a process towards peace with the help of a mediator. Based on the theory of legal effectiveness developed by Soerjono Soekanto, legal effectiveness is influenced by abstract conceptions of what is good and what is bad, by which the concepts are then obeyed.²² The quality of a mediator is important for the success of a mediation. A mediator must have good skills so that the mediation runs smoothly according to the procedures set out in the Regulation of the Minister of Religious Affairs number 1 of 2016 concerning Mediation Procedures in Courts. Judges who can be appointed as mediators must have a mediator certificate. Their job is to carry out mediation properly. Mediation judges must carry out their duties and authorities according to their functions. Mediators who already have expertise and certificates will be able to carry out their duties effectively so that they are able to organize the mediation process properly. Education and training will increase judges' knowledge about dispute resolution through mediation and make them creative in developing certain programmed techniques. Such education and training are important because the duties and powers of mediator judges are very different from those of judges in court proceedings. Judges as mediators must have

²¹ Mardalena Hanifah, "Perbandingan Tugas Mediator Pada Pengadilan Agama Indonesia," *JHAPER* 6, no. 2 (2020): 105–6.

²² Mardalena Hanifah., *Ibid.* p. 109.

special techniques that prioritize human values, flexibility, friendliness, and communication because their function is as intermediaries. Sufficient facilities that suit the number of cases entering the court also support the success of mediation. Adequate and comfortable mediation space and friendly mediators will make the disputing parties more positive. In addition, the effectiveness of divorce mediation is so strongly influenced by the legal culture of the society. Goodwill and compliance of the parties during the mediation process is also one of the factors that drive the success of a mediation. Overly lengthy and protracted conflicts are the cause for the two parties not communicating with each other, so there is no goodwill to make peace from both of them. One of the causes of the failure of divorce mediation is that both parties have agreed to end the marriage through divorce; at the time of the mediation, the two parties are difficult to reconcile. The current shift in values and norms makes married couples think that marriage is not something sacred and that divorce is a common incident, not something taboo. The common cause of mediation failure is irresponsible conduct, such as not providing a living, both physically and mentally. In addition, many marriages are carried out by couples who are still underage due to arranged or forced marriage, which causes disharmony between them.

The role of mediators is very important in the mediation process in Religious Courts, but their number is too small compared to the large number of divorce cases that go to the courts. Mediation judges are required to find a new approach in mediation. Approaches that are effective and often applied by judges as mediators in the divorce mediation process are religious approach, accounting approach, and psychological approach. In the religious approach, the mediator judge explains the philosophical purpose of marriage, namely to carry out God's commands and to establish a happy and eternal family because the Quran in surah Al-Hujurat verse number (9) states that the believers are brothers, that humans are obliged to reconcile their brothers and sisters, and that they must be mindful of Allah SWT so that they will receive mercy. The people of Aceh provide a position of respect and high dignity for women. One of the causes of household disputes that result in divorce is polygamy. Polygamy is a form of violence against women. This practice always intersects with forms of gender injustice, discrimination, and oppression of women.²³

Regarding the protection of women in marriage, the Customary Leaders of Aceh explained that the three reasons for forced marriages due to *khalwat* punishment were legal custom or tradition, women's dignity, and religion. This legal tradition has been firmly entrenched in the life of the people of Aceh. The people's agreement to force *khalwat* marriages is something that is non-negotiable. Acehnese believe that this is in accordance with Islamic Law. This is also in accordance with the purpose of marriage, which is to establish an eternal and happy family by providing protection and increasing the dignity of women.²⁴ The purpose of mediation in divorce disputes is to restore the marriage. Therefore, mediation is an obligation that must be taken by the judge as a mediator. If the mediation is successful, the marriage will be able to be

²³ Rike Humairoh, "Aturan Poligami Dalam Perundang-Undangan Di Indonesia: Studi Atas Pandangan Aktivistis Perempuan Pada Lembaga Swadaya Masyarakat (LSM) Di Yogyakarta.", p. 118.

²⁴ Wahyu Fahrul Rizk, "Khalwat Marriage Adat and Practices in Aceh: A Study on Adat Sanctions and Settlement Process of Khalwat Case," *Ary-Syir'ah Jurnal Ilmu Syariah Dan Hukum* 54, no. 2 (2020): 357.

restored, the family becomes whole again, the children do not have to bear the psychological burden, and both parties get justice. Mediation in divorce disputes is achieved through an agreement between the parties in the spirit of harmony and peace. Mediation makes a marriage whole again. Mediation in divorce process is said to be successful if one or both parties withdraw the divorce application. The benchmark for the success of mediation in divorce cases is the number of revoked divorce applications. With the withdrawal of the divorce application, the marriages of the disputing parties are restored, and their families can get along again. The withdrawal of the divorce application was not only due to the successful mediation efforts but also due to the agreement and commitment of both parties to withdraw the application. Therefore, mediation must be carried out in every trial process, both by mediation institutions in court and by institutions outside the court determined by the disputing parties.²⁵

Conclusion

Based on the description and analysis above, the conclusions are as follows. Mediation in divorce disputes must be carried out by the mediator using the principle reconciliation. Divorce mediation is different from mediation in general disputes. The success of mediation in divorce disputes, in addition to providing kindness to both parties, is saving the integrity of the family so that the marriage is intact again in accordance with its main goal, which is to form an eternal and happy family based on Belief in One Almighty God. Effective mediation is greatly influenced by several factors; they are the goodwill of both parties to participate in the mediation process, the causes of the dispute, the skill of the mediator judge in using certain techniques, and the friendliness, flexibility, and the communicativeness of the judge as a neutral party. In addition, the legal culture of the community, in which they understand and comply with the principles and norms in laws and regulations, also supports the success of mediation.

The failure of mediation in divorce cases can be caused by several factors such as both parties have agreed to divorce, judges as mediators are very busy with their routine – namely resolving disputes in the trial process – so they do not have time to lead mediation of divorce cases, there is no goodwill from both parties so that mediation is very difficult to run, and inadequate facilities that do not support the course of the mediation process. Mediation judges as intermediaries in resolving divorce disputes must orient their work towards justice for all parties. In the process of mediating divorce disputes, the justice that is achieved is procedural justice because mediation is related to an understanding of bringing justice through the legal process, including in this case the process of resolving divorce disputes to maintain the integrity of a family. The basic principles of mediation must be adhered to for the success of mediation. The principles are confidentiality, voluntariness, empowerment, neutrality, and unique solutions. Mediation in court to resolve disputes has been integrated into the proceedings at trial. Mediation has become an effective instrument in dealing with cases in court. In addition, mediation is a factor that can strengthen and optimize the return of the function of the judiciary in dispute resolution, in addition to its

²⁵ Rike Humairoh, "Aturan Poligami Dalam Perundang-Undangan Di Indonesia: Studi Atas Pandangan Aktivis Perempuan Pada Lembaga Swadaya Masyarakat (LSM) Di Yogyakarta.", p. 118.

adjudicative function. The Regulation of the Minister of Religious Affair number 1 of 2016 concerning Mediation procedures in Court proves that the judiciary is proactive in supporting the effectiveness of mediation so that the mediation process becomes an integral part of the procedural law, like other stages of the process namely the reading of lawsuits, reply, rebuttal, and verification. Mediation is a stage in the process of examining cases because the purpose of mediation is to settle disputes peacefully and to accelerate dispute resolution processes to reduce the backlog of cases in court. In divorce disputes, mediation helps maintain marriage and restore family unity.

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