

## **The Effectiveness of Mediation Implementation of the Divorce Provision in the Supreme Court of Syar'iyah Sigli**

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**Abstract:** Settlement of cases through a mediation process is an appropriate, effective and effective way of resolving disputes and can open wider access to the Parties to obtain satisfactory and fair resolution. With the issuance of the Republic of Indonesia Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in the Court it is hoped that cases can be effectively resolved through the mediation process. But in reality the implementation of mediation is still less effective in resolving cases in the Court, this is evident from the few cases that were successfully resolved by mediation at the Syar'iyah Sigli Court. Of the 289 divorce cases registered in 2016, only 1 (one) case succeeded in mediation and in 2017, divorce cases registered reached 367 cases, only 2 (two) cases were able to be resolved through mediation. So that what becomes a legal issue is what factors that influence mediation cannot be carried out effectively in divorce cases in the Syar'iyah Sigli Court and what are the obstacles in the mediation process. The research was conducted using the sociological juridical research methods using the statute approach and case approach. The results showed that mediation could not be carried out properly as follows: First, the quality of judges appointed as mediators was not evenly distributed, there was only 1 (one) mediator judge who had mediator certificates who had participated in mediation training organized by the Supreme Court of the Republic of Indonesia. Second, mediation facilities and facilities at the Syar'iyah Sigli Court are still inadequate both in terms of mediation space and supporting facilities therein. Furthermore, the obstacles in mediating divorce cases in the Syar'iyah Sigli Court are the unpreparedness and proportionality of Human Resources (SMD) within the Syari'iyah Sigli Court to resolve the high number of divorce cases in the jurisdiction, and the unavailability of other human resources from the professions Psychosciences or other practitioners to facilitate settlement in the mediation process within the Syar'iyah Sigli Court.

**Keywords:** Effectiveness, Mediation, Divorce, Perma No. 1 of 2016.

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### **I. INTRODUCTION**

Mediation is an amicable way of resolving disputes that is appropriate, effective and can open wider access to the Parties to obtain satisfactory and fair resolution. For this purpose the Republic of Indonesia Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in the Court (PERMA Number 1 of 2016) was established.

In the mediation process the parties to the dispute have proactive rights and have full authority in decision making. In this case, the mediator does not have the authority to give a decision on the dispute, but only serves to help and find solutions to the parties to the dispute.

The mediation process has facilities available at the local court, where the mediation is carried out in a special room that has been provided by the court. In the room both parties carried out a mediation process accompanied by the appointed mediator judge, which was in accordance with the mandate of PERMA Number 1 of 2016.<sup>1</sup>

In addition, the mediation in Article 1 of PERMA Number 1 of 2016 states as follows, "How to resolve disputes through a negotiation process to obtain the agreement of the Parties with the assistance of the Mediator". The scope of mediation in the Court is contained in Article 2 paragraph (1) and (2) PERMA Number 1 of 2016, as follows:

1) Provisions regarding the Mediation Procedure in this Supreme Court Regulation apply in litigation in the Court both in the general court and religious court.

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<sup>1</sup>Munir Fuady, *Arbitrase Nasional Alternatif Penyelesaian Sengketa Bisnis*, Citra Aditya Bakti, Bandung, 2000, p. 47.

2) Courts outside the general court and religious court environment referred to in paragraph (1) may apply Mediation based on this Supreme Court Regulation to the extent possible by statutory provisions.

The purpose of mediation in divorce cases regulated in PERMA Number 1 of 2016 is theoretically profitable for the parties. These objectives are as follows:

- a. The achievement of a dispute resolution that results in a decision that can be accepted by all parties so that the parties do not make an appeal and appeal;
- b. The settlement of cases is faster and the cost is cheap;
- c. Good relations between the parties to the dispute can be maintained, and;
- d. The higher level is the possibility of carrying out an agreement because it was made by both parties. As for the Shariah Court, mediation aims to:
  - a. reduce the accumulation of cases (court congestion) and;
  - b. facilitate the access to justice in society.

Specifically in the Province of Aceh, the state gave the right to change the name mentioning to the Religious Court, the Syar'iyah Court.<sup>2</sup> This was explained in Law Number 44 of 1999 concerning Special Privileges for the Province of Aceh, Law Number 18 of 2001 concerning Special Autonomy for the Province of Aceh as Nanggroe Aceh Darussalam Province, was revoked by Law Number 11 of 2006 about the Government of Aceh (LoGA).

The Syar'iyah Court in Article 128 paragraph (2) of the LoGA states that "the Syar'iyah Court is a court for everyone who is Muslim and resides in Aceh". Implementing regulations of Article 128 of the BAL established the Nanggroe Aceh Darussalam Province Qanun Number 10 of 2002 concerning Islamic Sharia Courts.

Since the inauguration of the Syar'iyah Court on March 4, 2003, the Syar'iyah Court directly replaced the function of the Religious Court (PA) authority under the Syar'iyah Court, the authority of the Religious High Court (PTA) became the authority of the Provincial Syar'iyah Court. This is in accordance with Presidential Decree of the Republic of Indonesia Number 11 Year 2003. The transfer of functions and authority of the court is in line with the mandate of Law Number 18 of 2001 concerning Special Autonomy for the Province of the Special Region of Aceh as the Province of Nanggroe Aceh Darussalam. Based on this law, the Shar'i Court is used as an Islamic Shari'a court with absolute authority covering all aspects of Islamic Shari'a, the arrangements of which are stipulated in the form of a Qanun.<sup>3</sup>

Juridically the position of the Syar'iyah Court in the Province of Nanggroe Aceh Darussalam in the National Judicial System has a strong legal basis as stipulated in Law Number 48 of 2009 concerning Judicial Power (UUKK).<sup>4</sup> The Syar'iyah Court, besides carrying out its functions within the scope of the authority of the Religious Courts in the field of marriages, inheritance, wills, grants, waqaf, zakat, infaq, shadaqah and shari'ah economics, also carries out their functions in a Special Autonomy namely special cases which become their authority, cases Jinayah (Islamic Criminal) is only limited to the cases of Khamar, Maisir, Khalwat, Ikhtilath, Adultery, Sexual Harassment, Rape, Qadhaf, Liwath and Musahaqah.

One type of absolute competence of the Syar'iyah Court is to handle divorce disputes, both divorce and divorce cases, as stipulated in Article 49 of Law Number 50 Year 2009 concerning Religious Courts (UUPA). In the Syar'iyah Court, the effort to reconcile through the mediation process of the parties is considered fair in ending a dispute, because there is no one who reconciles who loses and who wins.<sup>5</sup> Among the cases in the Religious Courts that were handled the most by cases were divorce cases.<sup>6</sup>

In this case, the Syar'iyah Sigli Court is the first court to settle the divorce case, either divorce or divorce. Divorce cases registered at the Syar'iyah Sigli Court from 2016 - 2017 recorded 656 cases. Of the 656 divorce cases recorded from April to December 2016, there were 289 divorce cases, only 1 (one) case that was successfully mediated, so the parties referred. In January - December 2017, divorce cases registered at the Sigli Syar'iyah Court reached 367 cases, but only 2 (two) cases were able to be settled through mediation so that the divorce case was not continued by the trial.<sup>7</sup>

Based on the data above proves that from 2016 to 2017 with the number of divorce cases 656 cases only 3 (three) divorce cases were successfully resolved by the mediation process at the Syar'iyah Sigli Court, so

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<sup>2</sup>The Religious Courts in Aceh Province are called the Shariah Court. inaugurated on March 4, 2003 M / 1 Muharram 1424 H. in accordance with Law Number 18 of 2001, Presidential Decree Number 11 of 2003 and Qanun of Nanggroe Aceh Darussalam Province Number 10 of 2002.

<sup>3</sup>Yusrizal, Sulaiman, and Mukhlis, "The Authority of the Syar'iyah Court in Aceh as a Special Court in Dispute Resolution", Vol. 13, No. 1, *Jurnal Kanun Ilmu Hukum*, Syiah Kuala University Faculty of Law, Banda Aceh, 2011, p. 66.

<sup>4</sup>*Ibid.*, p. 67.

<sup>5</sup>Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama*, Kencana, Jakarta, 2008, p. 151.

<sup>6</sup>Mukti Arto, *Peradilan Agama dalam Sistem Ketatanegaraan Indonesia*, Pustaka Pelajar, Yogyakarta, 2012, p. 373.

<sup>7</sup>Divorce Case Annual Documents 2016 to 2017, from Badriyah as Registrar at the Syar'iyah Court, Sigli.

it should be questioned over the failure of the mediation process carried out so far. Essentially mediation is an initial process that must be taken with sincerity by each court specifically the Syar'iyah Sigli Court itself to obtain success to refer back in a marriage that has been legally valid. So with the description above, this paper is interesting for further review by questioning the main issues of what is an inhibiting factor in conducting the mediation process at the Syar'iyah Sigli Court so that it cannot run effectively.

## II. METHODS

This research is based on legal research conducted using sociological juridical research. Sociological juridical research is research based on legal provisions and phenomena or events that occur in the field.<sup>8</sup> This study uses a statute approach and case approach,<sup>9</sup> which are then analyzed qualitatively in order to be understood or understand the symptoms being studied.

## III. RESULT

Divorce in the terms of jurisprudence is called "divorce" or "furqah". Divorce means breaking ties, canceling the agreement, while furqah means divorce, the opposite of gathering. Then these two words are used as a term by fiqh experts, meaning "divorce between husband and wife". The words "talak" and "furqah" in the term fiqh have a general and special meaning. The general meaning is all kinds of divorce that are handed down by the husband, which are determined by the judge and divorce which falls on its own like a divorce caused by the death of one of the husband or wife. Special meaning has the meaning of divorce imposed by the husband only.<sup>10</sup>

Thus divorce is eliminating the marriage bond so that after the loss of the marriage bond the wife is no longer lawful for her husband, and this happens in the case of divorce ba'in, while the meaning of reducing the release of the marriage bond is the reduction in divorce rights for the husband which results in a reduction in the number of divorces that are entitled husband from three to two, from two to one, and from one to be lost the right of divorce, that is, happens in the divorce of raj'i.<sup>11</sup>

According to Article 38 of the Marriage Law No. 1 of 1974, marriages can be broken because of death, divorce, and the court's decision. Marriage broken up due to death is often referred to as "divorced death". Marriage is broken because of divorce, there are two names, namely "divorce" and "divorce divorce". Marriage is broken because it is based on a court decision called "divorce canceled". There are several reasons for the mention of these terms, namely the reasons for mentioning the terms divorce and divorce cancel showing the impression there is no dispute between husband and wife. While the mention of divorce and divorce divorce shows the impression there is a dispute between husband and wife. The mention of a marriage is terminated because it is based on a court ruling and because of divorce, both must be with a court ruling.<sup>12</sup> Looking at Article 38 of the Marriage Law No. 1 of 1974, which states that marriages can be terminated due to death, divorce, and the court's decision, then the divorce can be classified based on the person authorized to drop or terminate the marriage. The termination of a marriage handed down by a judge, based on a lawsuit filed by parties entitled to a marriage. If the lawsuit is proven, the judge makes the decision in accordance with the lawsuit filed, such as divorce that can be decided by the judge because of the case of syiqaq, ilaa ', dzihar, li'an, and fasakh.<sup>13</sup>

Divorce is a despicable act and is hated by God, therefore divorce is permissible if it meets the conditions as contained in Article 19 of Government Regulation No. 9 of 1975, namely divorce can occur for the following reasons:

- a. One party commits adultery or becomes a drunkard, compactor, gambler, etc. that is difficult to cure.
- b. One party leaves the other party for 2 (two) consecutive years without the permission of the other party and without a valid reason or for anything else beyond its ability.
- c. One of the parties received a sentence of 5 (five) years in prison or a heavier sentence after the marriage took place.
- d. One party commits atrocities or severe persecution that endangers the other party.
- e. One of the parties has a disability or illness with the result of not being able to carry out their obligations as husband / wife.
- f. Between husband and wife there are continual disputes and quarrels and there is no hope of living in harmony again in the household.<sup>14</sup>

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<sup>8</sup>Soerjono Soekanto, *Penelitian Hukum Normatif : Suatu Tinjauan Singkat*, Raja Grafindo, Jakarta, 2001, p. 26.

<sup>9</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2009, p. 22.

<sup>10</sup>Kamal Muchtar, *Asas-asas Hukum Islam Tentang Perkawinan*, Bulan Bintang, Jakarta, 1974, p. 144.

<sup>11</sup>Abdul Rahman Ghazali, *Fiqh Munakahat*, Kencana, Jakarta, 2008, p. 192.

<sup>12</sup>Abdulkadir Muhammad, *Hukum Perdata Indonesia*, Citra Aditya Bakti, Bandung, 2010, p. 117.

<sup>13</sup>Kamal Muchtar, *Op. Cit.*, p. 147.

<sup>14</sup>Abdulkadir Muhammad, *Op.Cit.*, p. 118.

Actually the original law of a divorce itself is makruh, but seeing certain circumstances and in certain situations, the divorce law becomes as follows:<sup>15</sup>

- a. Obligatory, namely a divorce that must be done by a person who has sworn not to associate his wife with a certain period, while he does not want to pay the oath of expiation so that he can get along with his wife. Such actions bring harm to his wife.
- b. Sunnah, i.e. if in a household it cannot be continued and if it is maintained then more harm will arise.
- c. Mubah, that is divorce is permissible if there is indeed a need for divorce and there are no parties harmed by divorce while the benefits are also apparent.
- d. Haram, that is if the divorce is carried out without reason, while the wife is in a menstrual condition or a holy period that has already been worked out.

### 1. Definition of Mediation

Basically mediation is a way to settle disputes outside the court through negotiations involving third parties who are neutral (non-intervention) and impartial (impartial) to the parties to the dispute and their presence is accepted by the parties to the dispute.<sup>16</sup>

In the Big Indonesian Dictionary, the word mediation is given as the process of involving a third party in resolving a dispute as an advisor.<sup>17</sup> The definition of mediation in the Indonesian Law Dictionary is derived from English mediation which means the process of peaceful settlement of a dispute involving the assistance of a third party to provide a solution that is acceptable to the parties to the dispute.<sup>18</sup>

Etymologically, the term mediation comes from the Latin language, *mediare* which means to be in the middle. This meaning refers to the role displayed by third parties as mediators in carrying out their duties to mediate and resolve disputes between the parties. "Being in the middle" also means that the mediator must be in a neutral and impartial position in resolving disputes. He must be able to safeguard the interests of the disputing parties fairly and equally, so as to foster the trust of the disputing parties.<sup>19</sup> Etymologically mediation can be interpreted to emphasize more on the existence of a third party that bridges the parties to the dispute to resolve the dispute.<sup>20</sup> Mediation is a way of resolving disputes through negotiations based on consensus or the consensus of the parties by asking for a neutral party which is then referred to as the mediator.<sup>21</sup>

In Black's Law Dictionary, the notion of mediation is:<sup>22</sup> "A method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution".

The definition of mediation according to Moore as quoted by Fatahillah A. Syukur, namely: "The intervention in a negotiation or a conflict of an acceptable third party who as limited or no authoritative decision-making power, who assist the involved parties to voluntary reach a mutually acceptable settlement of the issues in dispute."<sup>23</sup>

According to Hoynes stated that in various literature found a number of mediation principles. The basic principles are philosophical foundations for holding mediation activities. This principle or philosophy is a framework that must be known by the mediator, so that in carrying out mediation does not go out of the philosophy behind the birth of the mediation institution.<sup>24</sup>

Then according to Ruth Carlton, there are 5 (five) basic principles of mediation, as follows:

- a. Confidentiality, that is, the confidentiality meant here is that everything that happens in a meeting organized by the mediator and the parties to the dispute may not be broadcast to the public or the press by each party.
- b. Volunteer (voluntary), namely each warring party comes to mediation on their own volition and wishes voluntarily and there is no coercion and pressure from other parties or outside parties.
- c. Empowerment is that people who want to come to mediation actually have the ability to negotiate their own problems and can reach the agreement they want.
- d. Neutrality, namely in mediation, the role of the mediator is only to facilitate the process, and the contents remain the property of the parties to the dispute. The mediator is only authorized to control the process

<sup>15</sup> Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, Prenada Media, Jakarta, 2006, p. 201.

<sup>16</sup> Rachmadi Usman, *Mediasi di Pengadilan dalam Teori dan Praktik*, Sinar Grafika, Jakarta, 2012, p. 24

<sup>17</sup> Tim Penyusun Kamus Pusat Bahasa, *Kamus Besar Bahasa Indonesia Edisi Ketiga*, cet. II, Balai Pustaka, Jakarta, 2002, p. 726.

<sup>18</sup> B.N. Marbun, *Kamus Hukum Indonesia*, cet. I, Sinar Harapan, Jakarta, 2006, p. 168.

<sup>19</sup> Syahrizal Abbas, *Mediasi dalam Perspektif Hukum Syari'ah, Hukum Adat dan Hukum Nasional*, Kencana Prenada Media Group, Jakarta, 2009, p. 2.

<sup>20</sup> Wirhanuddin, *Mediasi Perspektif Hukum Islam*, Fatawa Publishing, Semarang, 2014, p. 25.

<sup>21</sup> Takdir Rakhmadi, *Mediasi Penyelesaian Sengketa Melalui Pendekatan Muafakat*, PT. Raja Grafindo Persada, Jakarta, 2010, p. 46.

<sup>22</sup> Bryan A. Garner, Ed, *Black's Law Dictionary*, 8<sup>th</sup> ed, USA, West, 2004, p. 1003.

<sup>23</sup> Fatahilallah A Syukur, *Mediasi Yudisial Di Indonesia Peluang Dan Tantangan Dalam Memajukan Sistem Peradilan*, Mandar Maju, Bandung, 2012, p. 21.

<sup>24</sup> Fatahilallah A Syukur, *Mediasi Yudisial Di Indonesia Peluang Dan Tantangan Dalam Memajukan Sistem Peradilan*, Mandar Maju, Bandung, 2012, p. 28.

of mediation. In mediation, the mediator does not act like a judge or jury who decides the wrong or right of one party or supports the opinion of one of them, or enforces his opinion and resolution to both parties.

e. A Unique Solution (unique solution), namely that the solution that results from the mediation process does not have to be in accordance with legal standards, but can be generated from the creativity process.<sup>25</sup>

In a review of the history of the judiciary in Indonesia, the settlement of disputes through peaceful means or known as *dading* has been regulated in Article 130 HIR, Article 154 RBg and several other regulations. However, the peaceful effort referred to in the above regulation is different from the mediation as developed now.

From some of the definitions above that, the relationship between mediation and negotiation, namely mediation is an intervention on the negotiation process carried out by a third party. Third parties have limited or no authority to make decisions, which helps the parties to the dispute reach a dispute that is accepted by both parties.

## **2. Principle in Mediation**

In carrying out the mediation process there are certainly principles that become the basic principles in carrying out mediation. In PERMA No. 1 of 2016 concerning Mediation Procedures in the Court in Article 35 states that mediation is separate from the litigation process, meaning that the mediation process is not included in the substance of the trial, because basically the judge who is the mediator is different from the judge of the case examiner but his authority has become the court's authority. To know that the special characteristics of mediation, in PERMA No. 1 of 2016 states that:

- 1) Mediation is generally closed, in Article 5 paragraph 1 unless the parties wish otherwise.
- 2) Good faith of the parties. In Article 5 paragraph 2 of this PERMA the good faith of the parties is also a consideration of the parties to be able to continue the mediation process or end the mediation process by rejecting the lawsuit because the parties do not have good will.<sup>26</sup>
- 3) Mediation is informal, meaning that it does not necessarily mean that mediation must be carried out in the mediation room but can be carried out outside the courtroom according to agreement<sup>27</sup> in order to create comfort so as to cause good communication between the two parties. This can be done by a non-judge mediator. For mediators who are court judges or court employees are prohibited from conducting mediation outside the mediation room.<sup>28</sup>
- 4) Mediation is mandatory. Except in disputes resolved through commercial justice, industrial relations, objections to the decisions of the consumer administration body and so forth.<sup>29</sup>
- 5) Low cost. In carrying out mediation using the services of the mediator, the costs used are only the costs of summoning the parties, but if using the services of a non-judge mediator or the delivery of the fee depends on the mediation process takes place.
- 6) The time needed to carry out mediation is very short, namely for 30 days.
- 7) The peace agreement is the end of the mediation process, meaning that if the party agrees to peace then the lawsuit is revoked and set forth in the form of a peace deed.
- 8) Mediation uses communication patterns, so between the two parties an active dialogue is led by the mediator.
- 9) Mediation results are a win-win, no win or lose must be able to accept the agreement that has been made.
- 10) Voluntary peace, in PERMA No. 1 of 2016, case examiners still open the opportunity for parties to make peace before reading the verdict, if for a moment before the second verdict is read out, both parties want to make peace then the case examining judge appoints the case examiner to carry out the mediator function by prioritizing the judge who is certified.

## **3. Mediation Benefits**

Mediation as an alternative to dispute resolution certainly has a positive impact or can be said to benefit the parties who choose mediation as a way to resolve disputes faced by these parties. Problems that can be resolved through the mediation process will have greater opportunities than improving relations between the

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<sup>25</sup>*Ibid.*, p. 32.

<sup>26</sup>Article 22 Paragraph 1 of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in the Court

<sup>27</sup>Article 11 Paragraph 1 of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in the Court.

<sup>28</sup>Article 11 Paragraph 2 of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in the Court.

<sup>29</sup>Article 4 Paragraph 2 of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in the Court.

parties to the dispute, this may occur because mediation is not intended to find who is right and who is wrong. Mediation strives to achieve a win-win solution.<sup>30</sup> Each party wins, because the final agreement taken is the result of the parties' own wishes.<sup>31</sup>

The concept of win-win solution dispute resolution as in mediation, is also known in Islamic law. Although it is not called mediation, the pattern of dispute resolution used resembles the pattern used in mediation. In the Islamic legal system known as *ishlah* and *hakam*. *Ishlah* is a meaningful Islamic teaching that emphasizes the peaceful resolution of disputes or conflicts by setting aside differences that are at the root of disputes.

Besides the term *ishlah* also known as *hakam*. *Hakam* is also interpreted as a peacemaker that is someone who is sent by both husband and wife parties in the event of a dispute between the two, without knowing the condition of who is right or wrong between the husband and wife. The dispute between husband and wife in Islamic terminology is called *syiqaq*, which is a dispute, strife, animosity that starts and occurs on both sides of the husband and wife together.<sup>32</sup>

Advantages of mediation according to Christopher W. Moore, quoted by TakdirRahmadi in his book *Mediation in Court*, namely:

- a. Economical decision. Mediation usually costs less when seen from financial considerations compared to the costs that must be incurred to carry out protracted litigation.
- b. Quick settlement. In an age where problems can take up to one year to be tried in court, and years if the case is appealed, the choice of mediation is often one of the shorter ways to resolve disputes.
- c. Satisfying results for all parties. The disputing parties are generally more satisfied with the mutually agreed-out solutions rather than having to approve the solutions that have been decided by third party decision makers such as judges.
- d. Comprehensive agreement. Agreements through the peace channel are often able to cover procedural and psychological issues that cannot be resolved through legal channels.
- e. Practice and learn creative problem solving procedures. Mediation teaches people about practical problem solving techniques that can be used to resolve disputes during the flight period.
- f. Larger court rates and predictable outcomes. The party that negotiates the choice of dispute resolution has more control over the outcome of the dispute.
- g. Individual Empowerment. Negotiations through mediation can be a forum for learning and using personal power or influence.
- h. Preserve existing relationships or end relationships in a more friendly way.
- i. Decisions that can be implemented.
- j. A better deal than just accepting the results of a compromise or win-lose procedure.
- k. Decisions that apply without knowing the time. Dispute resolution through mediation tends to last for all time and if the consequences of the dispute arise later, the parties to the dispute tend to utilize a cooperation forum to resolve the problem to find a middle ground for their differences of interest rather than trying to resolve the problem with an adverbial approach.<sup>33</sup>

#### **4. Weaknesses of Mediation**

TakdirRahmadi in his book *Mediation in Court in Theory and Practice*, states that there are several weaknesses in the implementation of mediation:<sup>34</sup>

1. Usually takes a long time
2. Difficult execution mechanism
3. It is very dependent on the good faith of the parties to settle the dispute until the end.
4. Mediation will not bring good results, especially if insufficient information and authority is given to him,
5. If the lawyer is not involved in the mediation process, there may be important legal facts that are not presented to the mediator, so the verdict is biased.

#### **5. The Role and Function of the Mediator**

As the author has explained above, the Mediator is a Judge or other party who has a Mediator Certificate as a neutral party that helps the parties in the negotiation process to look for various possible dispute resolutions without using a way to decide or force a settlement.

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<sup>30</sup>AhwanFanani, *PengantarMediasi (Fasilitatif) Prinsip, Metode, danTeknik*, FakultasTarbiyah IAIN Walisongo, Semarang, 2012, p. 12.

<sup>31</sup>NurnaningsihAmriani, *MediasiAlternatifPenyelesaianSengketaPerdata di Pengadilan*, PT Raja GrafindoPersada, Jakarta, 2012, p. 29.

<sup>32</sup>Muhammad Saifullah, *MediasidalamTinjauanHukum Islam danHukumPositif di Indonesia*, Walisongo Press, Semarang, 2009, p. 11.

<sup>33</sup>Takdir Rahmadi, *Op.Cit.*, p. 79.

<sup>34</sup>*Ibid.*, p. 82.

According to the legal dictionary the mediator is the mediator. The word mediator comes from Latin which means mediator or third party as a conciliator for the disputing party. In carrying out its functions, the mediator is obliged to obey the mediator's behavioral guidelines established by the Supreme Court. It is also not permissible for a mediator to concurrently act as a judge to examine and hear the case. This provision can be concluded from the article which states that the judge examines a case, both as chairman of the assembly and members of the assembly, is prohibited from acting as a mediator for the case in question.

Every person who carries out his function as a mediator is basically required to have a mediator certificate obtained after attending training conducted by an institution that has been accredited by the Indonesian Supreme Court. Unless there is no certified mediator in the jurisdiction of the court concerned, all judges in the court concerned may be placed on the list of mediators. If in the court area there are no judges, advocates, legal academics, and non-legal professions who are certified by the mediator, the judge in the court concerned is authorized to carry out the mediator function.

To make it easier for the parties to choose a mediator, the president of the court provides a list of mediators which contains at least five names of the mediator accompanied by the mediator's educational background or experience. The president of the court places the names of the mediating judges who already have certificates in the list of mediators. If there is no certified mediator in the jurisdiction of the court concerned, all judges at the court concerned can be placed on the list of mediators. Non-certified mediator judge can submit a request to the head of the court so that his name is placed on the list of mediators in the court concerned. After checking and verifying the validity of the certificate, the president of the court places the applicant's name on the list of mediators.

From the provisions of Article 13 paragraph 1 of PERMA No. 1 of 2016 the authors conclude that except for mediating judges, all who carry out the mediator function are required to have mediator certificates obtained after attending training conducted by institutions that have obtained accreditation from the Supreme Court.

The task of the mediator is also regulated in this PERMA, among others the mediator is obliged to encourage the parties to explore and explore their interests and find various solutions for the best solution for the parties. And, the mediator is also required to prepare a proposed mediation meeting schedule for the parties to be discussed and agreed upon. If deemed necessary, the mediator can carry out a caucus.<sup>35</sup>

In general, the task of mediators in the mediation process in the description are:

- a. Control the process and confirm the basic rules;
- b. Maintain structure and momentum in negotiations;
- c. Cultivate and maintain trust between the parties;
- d. Explain the process and educate the parties in good communication;
- e. Strengthen the atmosphere of communication;
- f. Helping the parties to face the situation and reality;
- g. Facilitating creative problem solving among the parties;
- h. End the process when it is no longer productive.<sup>36</sup>

## **6. Mediation Stages**

The success or failure of mediation can be seen from the process or stages of mediation. If the mediation process is carried out with the results obtained will certainly be good and vice versa if the mediation is carried out poorly or not seriously then the results obtained will certainly not be maximal or even fail, for that the authors state the stages of mediation as follows:

### **1. Pre-Mediation Stage**

The first stage carried out was that the plaintiff registered his claim with the Registrar of the Religious Courts. The details of the pre-mediation stages are as follows:

- a. The Chairperson of the Religious Courts appoints the divorce hearers in a letter appointing the panel
- b. Then if at the first hearing the plaintiff and defendant come, then the Religious Court judge obliges to fulfill mediation. As stated in Article 17 paragraph (1) PERMA No. 1 of 2016. On the day of the hearing that has been determined and attended by the Parties, the Judge Examining the Case requires the Parties to take Mediation.<sup>37</sup>

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<sup>35</sup>Susanti Adi Nugroho, *Penyelesaian Sengketa Arbitrase Dan Penerapan Hukumnya*, Kencana, Jakarta, 2015, p. 59.

<sup>36</sup>*Ibid.*, p. 63.

<sup>37</sup>Article 17 Paragraph 1 of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in the Court.

- c. Then the presiding judge explained to the plaintiff or defendant about mediation procedures in court based on PERMA No. 1 of 2016.
- d. The parties in this case the plaintiff or defendant are given a maximum period of 2 (two) days in selecting the mediator.<sup>38</sup>
- e. If the parties cannot choose a mediator who has been registered in the court within two days as stated in Article 20 paragraph (1) PERMA No. 1 of 2016, the chief judge of the case examining panel appoints a mediator judge both with a certificate as a mediator and a judge who do not have a certificate as a mediator or court employee.<sup>39</sup>

## **2. Stages of the Mediation Process**

The steps of the mediation process are as follows:

- a. In carrying out mediation, the parties are obliged to attend in good faith. The parties may not be in good faith if the parties have been summoned 2 times appropriately and did not attend mediation or attend mediation in the first meeting and subsequent meetings did not arrive.<sup>40</sup>
- b. The mediator prepares a mediation meeting for the parties to dialogue. This mediation process takes place within 30 working days of the mediator being appointed or chosen by the parties and has been agreed. The mediation period can be extended for 30 days from the end of the 30 day mediation period.
- c. In exploring the problems faced by the mediators, it can involve experts or certain community leaders as stated in Article 26 (1) With the agreement of the parties and / or legal counsel, the mediator can present one or more experts, community leaders, religious leaders, or figures custom.
- d. Mediators in an effort to make peace can also use caucuses, namely meetings with one of the parties.
- e. After determining the date and day for the mediation to be carried out, the mediating judge calls the parties to mediate in the Religious Courts building or elsewhere according to the parties' agreement made at the outset. The summons of the parties was carried out by the substitute bailiff of the religious court.
- f. In the first mediation meeting, the mediator gave a speech in the form of an explanation of his role and function as a mediator, the profit and loss of carrying out the mediation, convincing the parties to the litigation to carry out good mediation. Establish ground rules regarding the rules of the stages, emphasizing that the disputing parties have the right to make decisions, giving mediators the opportunity to build trust and show control of the process.
- g. Provide the opportunity for the parties to explain the problems they experienced each party was given the same time.
- h. Identify the problem by the mediator and provide an opportunity for the parties to articulate their wishes as outlined in the agreement items. The agreement was written down in the form that was made with the help of the mediator and was signed by the parties and the mediator. The accuracy can be done by meeting the requirements as follows:<sup>41</sup>
  - a. Contrary to law, public order and / or decency;
  - b. Harm a third party or
  - c. Cannot be implemented.
- i. If the agreement made is only part of it, then the parties and the mediator will still be signed. Partial agreement is strengthened by the deed of peace. Filing a lawsuit can be submitted again on matters not agreed upon.
- j. If a mediation agreement is not reached, the mediator is obliged to make a report to the case review judge, in the event that:
  - a. The Parties do not produce an agreement until the maximum time limit of 30 (thirty) days and the extension as referred to in Article 24 paragraph (2) and paragraph (3);
  - b. The Parties are declared in good faith as referred to in Article 7 paragraph (2) letter d and letter e.
- k. Mediation ends if an agreement is made and ends with disagreement or goes to the court hearing.

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<sup>38</sup>Article 20 Paragraph 1 of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in the Court.

<sup>39</sup>Article 20 Paragraph 3 of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in the Court.

<sup>40</sup>Article 7 Paragraph 2 of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in the Court.

<sup>41</sup>Article 27 Paragraph 3 of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in the Court.

## **7. Settlement of Divorce Cases With Mediation**

Settlement of cases by way of peace is far more effective and efficient, besides it also contains several benefits both substantial and psychological, including:<sup>42</sup>

- a. An informal settlement is a settlement through a conscience approach, not based on law. Both parties break away from the rigidity of the legal term (legal term) to a conscience and moral approach. Keeping away the doctrinal approach and the principle of proof in the direction of a common perception of mutual benefit.
- b. What resolves the parties' own disputes is the disputes resolved by the parties themselves because those who understand more and know the problems they face themselves, the mediator is only as an intermediary.
- c. The short settlement period is generally a settlement period of only one or two weeks or a maximum of one month, provided there is sincerity and humility from both parties. That is why it is called speedy, between 5-6 weeks.
- d. Low cost, that is to say, no cost. Even though there are, it is very cheap or zero cost. This is the opposite of the judicial or arbitration system which must be very expensive.
- e. Proof rules are not necessary, there is no fierce battle between the parties to argue with each other and bring down the opposing party through the system and principles of proof that are formally and technically very tedious as in the arbitration process and the court.
- f. The settlement process is confidential, that is, settlement through peace, truly confidential or confidential: the settlement is closed to the public, and only the mediator knows, so that the good name of the parties is maintained. Not so with the settlement through the court, the trial is open to the public.
- g. The relationship between the parties is cooperative in that the settlement which speaks is of conscience, therefore a settlement is established based on cooperation. The parties did not beat the drums of war in hostility or antagonism, but in brotherhood and cooperation. Each keeps revenge and animosity.
- h. Communication and focus of the settlement is in the settlement of peace, an active communicative form between the parties. In communication radiates the desire to correct past disputes and mistakes towards a better relationship for the future. Through this communication, what they have accomplished is not the past but for the future.
- i. The intended outcome of winning is the result sought and addressed by the parties in the settlement of peace, it can be said to be very noble, namely to win together which is called the win-win concept, by distancing themselves from the selfish and greedy nature of wanting to win themselves, thus there is no loss and no winning or not winning or losing such as settlement through a court decision or arbitration.
- j. Free of emotion and resentment, namely the resolution of disputes through peace, reducing high emotional and turbulent attitudes, towards an atmosphere free of emotions during the settlement and after the settlement is reached. Not followed by revenge and hatred, but a sense of kinship and brotherhood.

Settlement of divorce cases by way of peace has been regulated in Article 39 of the Marriage Law No. 1 of 1974, Article 65 of the Religious Courts Law No. 7 of 1989, Articles 115, 131, 143 and 144 of the Compilation of Islamic Law and Article 32 of Government Regulation No. 9 of 1975. The provisions contained in these articles are asking the judge to try to reconcile the parties before the case is decided by the court. Judges are demanded to always offer peaceful efforts in every court process, because the settlement of cases through a peaceful way is far better than judges having to sentence.<sup>43</sup>

At the divorce case hearing (the first trial) the judge tried to reconcile the two parties. In this session, a husband and wife must come in person, except if one of the parties resides overseas and cannot come to meet privately, it can be represented by their power of attorney specifically authorized for this purpose. If the two parties reside overseas, the plaintiff in the peace session must face personally.<sup>44</sup>

The importance of peaceful efforts in resolving family disputes requires judges to invite or bring the closest party or family to question them. The judge can ask for help from the next of kin from both parties to help reconcile the two parties, and if this fails, the judge will settle the case through a legal process.<sup>45</sup>

In divorce disputes, the recommendation for peace becomes a legal principle of the Religious Judicial Procedure, which is the duty of the judge to try it in every examination opportunity.<sup>46</sup> If the reconciliation effort is successful, then the case is revoked with the agreement of both parties. For this reason, the judge makes a decision stating that the case has been revoked due to peace and the parties are still in the bond of a legal marriage based on the Marriage Certificate issued by the District Office of Religious Affairs (KUA), where they

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<sup>42</sup>Yahya Harahap, *Hukum Acara Perdata*, Sinar Grafika, Jakarta, 2008, p. 236.

<sup>43</sup>Syahrizal Abbas, *Op.Cit.*, p. 293.

<sup>44</sup>Mukti Arto, *Praktek Perkara Perdata pada Pengadilan Agama*, Pustaka Pelajar, Yogyakarta, 2008, Cet. VIII, p. 96.

<sup>45</sup>Syahrizal Abbas, *Loc.Cit.*

<sup>46</sup>Aris Bintania, *Hukum Acara Peradilan Agama dalam kerangka Fiqh al Qadha*, PT. RajaGrafindo Persada, Jakarta, 2012, p. 156.

used to carry out marriage. The stipulation can be said as a Peace Deed. The deed of peace has the same power as the decision of a judge of permanent legal force.<sup>47</sup>

If peace has been reached then no further petition for divorce will be filed based on the same reason or other reasons that were known at the time of the peace. Divorce can only be filed again based on new reasons that occur after the peace.<sup>48</sup>

The meaning of peace in divorce cases has its own noble value. With the achievement of peace between husband and wife in divorce cases, not only the integrity of the household can be saved but also the continuation of child care can be carried out as it should.<sup>49</sup>

As the implementation of PERMA Number 1 of 2016, of course the role and function of mediators is very influential on the success of mediation, therefore every mediator must be equipped with good communication skills and understanding of the PERMA. The mediator qualifications as outlined in Article 13 PERMA Number 1 of 2016 are as follows:

- 1) Each mediator is required to have a mediator certificate obtained after participating in and declared to have passed the mediator certification training organized by the Supreme Court or an institution that has obtained accreditation from the Supreme Court.
- 2) Based on the decision of the president of the court, an uncertified judge can perform a function in the absence or there is a limited number of certified mediators.
- 3) Further provisions regarding the terms and procedures for certification of mediators and granting of accreditation for mediator certification bodies are determined by a decision of the chairman of the Supreme Court.

The list of mediators is evaluated annually and updated by the Chairman of the Syar'iyah Court, Sigli. In the Mediation Register book you can find out the number of successful and failed mediations. Likewise, the list of mediators may change each year due to the transfer of judges. The following is a list of mediators at the Sigli Syar'iyah Court.

**Table1**  
**List of Mediators at the Sigli Syar'iyah Court<sup>50</sup>**

No.	NAME / Employee ID Number DATE OF BIRTH	EDUCATION
1	Jakfar 19641231 199403 1049 Reubee, December 31 <sup>st</sup> 1964	(Bachelor) IAIN Ar-Raniry (Graduate)UMSU (Postgraduate) UNISBA
2	Siti Salwa 19820118 200604 2005 Banda Aceh, January 18 <sup>th</sup> 1982	(Bachelor) IAIN Ar-Raniry
3	Muhammad Redha Valevi 19850623 200904 1004 Matang Kuli, June 23 <sup>rd</sup> 1985	(Bachelor) IAIN Ar-Raniry (Graduate)Unsyiah

Those 3(three) judges above who were appointed as mediators, there was only 1 (one) person who had a mediator certificate, namely M. Redha Valevi. The mediator judges who do not have a mediator certificate because they have not attended training conducted by the Indonesian Supreme Court. Mediator training is very limited in number, because the Indonesian Supreme Court is held nationally, so the participants are very limited.<sup>51</sup>

<sup>47</sup>Mahkamah Agung, *Pedoman Pelaksanaan Tugas dan Administrasi Pengadilan BukuII*, Mahkamah Agung, Jakarta, 1998, p. 115.

<sup>48</sup>Mukti Arto, *Op.Cit.*, p 97.

<sup>49</sup>Abdul Manan, *Op.Cit.*, p. 103.

<sup>50</sup>The data source was obtained from Badriyah as Registrar at the Syar'iyah Court, Sigli.

<sup>51</sup>Interviews with Munir, Syar'iyah Sigli Court Mediator Judge, on January 9, 2018 and Siti Salwa, M. Redha Valevi, all Syar'iyah Sigli Court Mediator Judges on January 10, 2018.

**Table 2**  
**Divorce Case Mediation Report**  
**Syar'iyah Sigli Court in 2016**

NO	MONTH	CASE TYPE		INFORMATION				AMOUNT OF CASE
		DIVORCE	DIVORCE CLAIM	SUCCESSFUL		FAILED		
				DIVORCE	DIVORCE CLAIM	DIVORCE	DIVORCE CLAIM	
1	April	9	27	0	1	9	26	17
2	May	9	12	0	0	9	12	36
3	June	8	12	0	0	8	12	20
4	July	15	13	0	0	15	13	28
5	August	6	27	0	0	6	27	20
6	September	6	24	0	0	6	24	30
7	October	16	28	0	0	16	28	44
8	November	13	37	0	0	13	37	50
9	December	10	17	0	0	10	17	27
<b>TOTAL</b>		<b>92</b>	<b>197</b>	<b>0</b>	<b>1</b>	<b>92</b>	<b>196</b>	<b>272</b>

In table 3 above, 95 cases of divorce cases are known to be more than 272 cases of divorce cases. In fact, on average each month the number of divorce is higher than divorce throughout 2017.

The success rate of mediation in divorce cases in 2017 is 0 cases. While the success rate of mediation in divorce cases is 2 cases. Then the failure rate of mediation in divorce cases is 95 cases. So the failure rate of mediation in divorce cases is 270 cases.

From the two tables above illustrates so clearly that the failure in mediation has been so high every year, this can be a major factor in the high number of trust in the jurisdiction of the Syar'iyahSigli Court, which was supposed to be with the birth of PERMA Number 1 of 2016 giving a new face to success in reducing divorce rates at each Regional and National level.

So in this issue there are a number of things that need to be improved in terms of mediator qualifications as follows:

- a. Mediator resources must be improved by providing training to them. Mediation is a form of Alternative Dispute Resolution (ADR) that is different from litigation, so judges who are determined to be mediators must receive good training. In this case, the Indonesian Supreme Court must take the initiative so that more mediator training can be given.
- b. The Syar'iyahSigli Court must provide certified mediators from outside the court. This is because there are only 1 (one) certified judges appointed as mediators.
- c. Giving rewards to judges who successfully carry out the mediator function. Until now, the Supreme Court of the Republic of Indonesia has not issued PERMA regarding the criteria for the success of judges and rewards for judges performing mediator functions, even though they have been mandated in Article 25 paragraph (2) of PERMA Number 1 of 2008.
- d. Judges who carry out the function of mediators and have been certified tend to have more success rates when compared to judges who carry out the function of mediators do not have certificates. However, the success rate is not too far away. Even a judge who has been certified has a very low success rate, not reaching 50%.
- e. Mediator training for judges who carry out the mediator function is not the only way to successfully mediate in court. Even judges who have been certified have not been able to reach a high rate of mediation success. However, this does not mean that the Supreme Court does not need to provide training, but training must still be given to all judges who carry out the mediator function and provide regular monitoring and evaluation of their performance.

Ideally, the Supreme Court of the Republic of Indonesia needs to provide mediator training for all judges in the Syar'iyahCourt, so that:

- a) The mediator judges can work optimally when mediating. If they have received training, they already have the ability in accordance with the functions and roles of mediators.

- b) Mediation works effectively. Trained mediators will be able to organize the mediation process well.
- c) Add the judge's skills in mediating. They will have programmed techniques. The task of the mediator is different from that of the judge in court. If in court the judge is very guarding the authority of the court, while when he becomes a mediator he must be more flexible and communicative, because it functions as an intermediary between the parties.
- d) Be better prepared when appointed as a mediator. In fact, all judges were appointed by the Chief Justice to be the mediator, because the number of certified judges was still very small.<sup>52</sup>

YahyaHarahap explained that the provisions of the legislation are not always able to provide legal solutions that arise as a result of rapid social change (rapid social change)<sup>53</sup>. However, in PERMA Number 1 of 2016 concerning Mediation Procedures in the Court has binding power and forced power for parties who litigate in court, because if they do not carry out mediation, the court's decision will be null and void<sup>54</sup>. Every trial in a civil case must be sought for peace and mediation itself is an extension of the peace effort<sup>55</sup>. Mediation will bridge the parties in solving the deadlocked problem in order to achieve / get the best solution for them.<sup>56</sup> As for what can be done in the mediation process, that is, the Syar'iyahSigli Court should focus more on preparing Human Resources (HR) as mediators in accordance with the provisions of the applicable laws and regulations. However, if the HR is not fully available in the Syar'iyahSigli District Court, then the court should take appropriate internal policies such as providing Psychology that has been certified as a mediator in completing cases in the mediation process. The objective is oriented to the success of mediation as a legal effort to obtain peace so that it does not end in divorce.

#### IV. COCLUSION

The factors that cause mediation are not effective in divorce cases that occur in the Syar'iyahSigli Court are first, the quality of judges appointed as mediators has not been evenly distributed, there is only 1 (one) mediator judge who has a mediator certificate who has participated in mediation training organized by Supreme Court of the Republic of Indonesia. Second, mediation facilities and facilities at the Syar'iyahSigli Court are still inadequate both in terms of the mediation space and supporting facilities therein. Third, the level of community compliance that undergoes a mediation process is very low and the culture of the community believes that mediation has been carried out by local village leaders or clerics. Therefore, a factor influencing the unsuccessful mediation at the Syar'iyahSigli Court is Human Resources (HR) intended to resolve divorce cases in the mediation stage is a mediator judge, in which the judge has the habit of being a breaker in the settlement of cases, where it can be one of the factors of imbalance in the settlement of cases in the form of mediation, in addition, the level of cases handled by the number of human resources is very unbalanced so that it also becomes a failure supporter because it is considered too coercive in resolving peace in the mediation process. Then, the obstacle of the divorce case mediation process in the SigliSyar'iyah Court is first, the strong desire of the parties to divorce. Secondly, there has been a prolonged conflict. Third, psychological or psychological factors. Fourth, the time to mediate the parties is limited and the five judges who handle cases become mediators. Furthermore, the obstacle in resolving mediation cases for success is the involvement of human resources who have other special professional expertise such as practical psychology which is more focused in conducting the peace process in mediation, which has no involvement in the court world, so that they are more reliable in make a peace agreement in the case of divorce through the disputed emotional behavior to take the thing to be achieved so as not to separate in a marriage bond. In this case the SigliSyar'iyah Court must be able to issue a special policy to involve other practitioners' experts in achieving mediation success.

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<sup>52</sup>Interview with Munir, as Chairman of the Syar'iyah Court of Sigli on January 10, 2018.

<sup>53</sup>Yahya Harahap, *Loc.Cit*, p.167.

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