

## **MEDIATION IN MARITAL DISPUTES (DIVORCE)** **(Case Study on the Couple Mr. AM and Mrs. SF)**

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### **Abstract**

*In a marriage, the purpose is not only as a medium of worship but also to create a generation. So marriage is often a solution to have children with a process and a halal path in religion to have children. However, if not or have not been blessed with children, a husband and wife should be patient. While a different case with the couple AM and SF who have been married for decades but have not been blessed with children, so in the middle of their marriage they decided to divorce. This study uses an empirical approach or field study, where this study tries to analyze the legal facts in the case of AM and SF which are actually contrary to the spirit and teachings of religion both theoretical and principle. So the researcher wants to reveal what indicators and variables cause the contradiction between theory and practice. Where in the end they actually divorced and then reconciled through mediation, it means that mediation has a central role in resolving marital disputes in a non-litigation manner.*

*Dalam sebuah pernikahan tujuannya disamping sebagai media ibadah juga sebagai menciptakan generasi. Sehingga pernikahan seringkali sebagai solusi untuk mendapatkan keturunan dengan proses dan jalur yang halal dalam agama untuk memperoleh keturunan. Namun jika pun tidak atau belum dikaruniai anak seorang suami istri harusnya bersabar. Sedangkan kasus yang berbeda dengan pasangan AM dan SF yang sudah menikah puluhan tahun namun tidak dikaruniai anak, sehingga ditengah pernikahan mereka memutuskan untuk bercerai. Penelitian ini menggunakan pendekatan empirik atau study lapangan, dimana penelitian ini mencoba mengurai fakta-fakta hukum dalam kasus am dan sf yang justru berlawanan dengan spirit dan ajaran agama baik yang bersifat teoritik ataupun prinsipil. Sehingga peneliti ingin mengungkap indikator dan variabel apa yang menyebabkan kontradiktifnya antara teori dan praktiknya. Dimana pada akhirnya mereka justru bercerai dan kemudian rujuk kembali melalui mediasi, itu artinya mediasi memiliki peran sentral dalam menyelesaikan konflik sengketa pernikahan secara non litigasi.*

**Keywords:** *marriage, divorce, mediation, children, husband, wife.*



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## **A. INTRODUCTION**

Mediation is a solution in resolving disputes where both parties in dispute require a third party to act as a mediator between the two parties in dispute. Although different from arbitration in which an arbitrator has the authority to decide, a mediator does not have the same authority as an arbitrator, but mediators still have a fairly good role in dispute resolution, the assumption is that mediators are able to influence the strength and social dynamics of conflict relationships by providing knowledge and information that can have an impact on the disputing parties. Thus, mediators can help the parties to resolve the issues in dispute.<sup>1</sup>

Such was the case in the divorce settlement of Mr. AM and Mrs. SF, where they decided to divorce due to the lack of children. They had been married for decades. Consequently, Am's wife filed a lawsuit in court. During the divorce proceedings, mediation took place, but both parties agreed not to attend, and the judge ultimately declared a divorce with a final divorce decree.

In a divorce, the divorce occurred because the iddah (waiting period) had expired, and the husband could not reconcile without re-contracting the marriage. Therefore, during the second mediation, they decided to reconcile, and then decided to re-confirm their marriage at the Religious Affairs Office (KUA). This was because both parties were teachers—AM was a religious teacher and SF was a madrasah teacher. This awareness grew during the iddah period. SF eventually realized her mistake and accepted her husband's reconciliation.

Meanwhile, if we look at the case above, the role of a mediator is crucial in resolving marital conflict. This is also regulated by the Supreme Court of the Republic of Indonesia, through Supreme Court Regulation (Perma) Number 1 of 2008 concerning Mediation Procedures in Court. This integrated mediation into the court process, as an effort to minimize the backlog of cases in court.

Based on Article 4 of Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Court, all civil disputes brought to court are required to undergo mediation. The disputing parties must first attempt to resolve the matter through mediation, unless otherwise stipulated by Supreme Court Regulations, including divorce cases and applications for permission to have a polygamy.<sup>2</sup>

In divorce cases, the judge, acting as mediator, is obligated to attempt reconciliation through mediation, as required by Supreme Court Regulation No. 1 of 2008 concerning Mediation Procedures in Court. Therefore, reconciliation efforts through mediation in the Religious Courts are encouraged to persuade couples contemplating divorce to abandon their plans and reconcile.<sup>3</sup>

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<sup>1</sup>Gary Goodpaster, *Negotiation and Mediation: A Guide to Negotiation and Dispute Resolution Through Negotiation*, (Jakarta: ELIPS Project, 1993), p. 201.

<sup>2</sup>Indonesian Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Court.

<sup>3</sup>Supreme Court of the Republic of Indonesia, *Mediation and Peace*, MA-RI, Jakarta, 2004 61, as quoted by Nurnaningsih Amriani, *Alternative Mediation for Civil Dispute Resolution in Court*, Raja Grafindo Persada, Jakarta, 2012, p. 28.

## B. METHODOLOGY

The type of research used to analyze the data was qualitative analysis. Qualitative analysis is a research method that produces descriptive data, namely, what respondents state in writing and verbally, as well as actual behavior, is examined as a whole.

## C. THEORY

### 1. Mediation and Islam

Understanding Mediation: Etymologically, the term "mediation" comes from the Latin word "mediare," meaning "to be in the middle." This refers to the role played by a third party as a mediator in carrying out their duties of mediating and resolving disputes. The mediator must be able to protect the interests of the disputing parties fairly and equally, thereby engendering trust from the disputing parties.<sup>4</sup> Mediation comes from the word "media," which means intermediary or connector. Therefore, mediation means the activity of mediating or connecting two separate things, establishing a relationship between two different conditions, establishing contact so that two things that were previously dissimilar become positively interconnected. With the presence of an intermediary or connector, two things that were previously separate are connected and benefit from the intermediary or connector for the benefit of both parties.

With mediation services, counselors try to mediate or build relationships between them, so that they stop and avoid further conflicts that are detrimental to all parties. In PERMA Number 1 of 2016, the definition of mediation is a way of resolving disputes through a negotiation process to obtain an agreement between the parties with the assistance of a mediator. Noland Harley defines mediation as "Mediation is a short-term structured task-oriented, participatory invention process. Disputing parties work with a neutral third party, the mediator, to reach a mutually acceptable agreement."

What Noland Harley means is that Mediation is a structured, short-term discovery process oriented, the parties concerned work with a neutral third party (Mediator) to reach a mutually acceptable agreement. In the Quran, it is stated that mediation services are services that help clients resolve problems and improve relationships between them. As the word of Allah explains in the letter An-Nisa: 35 Which means: And if you fear a dispute between the two, then send a hakam from the man's family and a hakam from the woman's family. If both hakam intend to make amends, Allah will surely give success to the husband and wife. Indeed, Allah is Knowing and Acquainted.

According to John W. Head, mediation is a mediator procedure in which a person acts as a "vehicle" for communication between the parties, so that their differing views on the dispute can be understood and possibly reconciled, but the

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<sup>4</sup>Takdir Rahmadi, *Mediation of Dispute Resolution Through a Consensus Approach*, (Jakarta: Raja Grafindo Persada. 2010), p. 87.

primary responsibility for achieving a peace remains with the parties themselves. In this definition, the mediator is considered a “vehicle” for the parties to communicate.

Based on the theory above, it can be concluded that mediation is a form of guidance and counseling provided by a mediator who acts as an intermediary between conflicting parties or those in disagreement. This disagreement can lead to conflict, hostility, and a lack of peace or harmony, which can lead to harm for the conflicting parties.

The concept of dispute resolution through mediation, which utilizes a win-win solution, has long been recognized in Indonesian customary law. The concept of dispute resolution through deliberation between the parties has long been recognized by customary law communities. Dispute resolution under customary law is always directed toward restoring and balancing the order disturbed by the dispute, and is not punitive in nature.<sup>5</sup> The concept of win-win dispute resolution, as in mediation, is also recognized in Islamic legal systems. Although not mentioned in mediation, the dispute resolution patterns used resemble those used in mediation. In Islamic legal systems, these are known as *islah* and *hakam*.

*Islah* is an Islamic teaching that emphasizes peaceful methods for resolving disputes or conflicts, setting aside the differences that are the root of the dispute. Essentially, disputing parties are commanded to forgive each other's mistakes and practice mutual forgiveness. The concept of *islah* has also become widely used within the Muslim community, both to resolve economic and non-economic disputes. For example, when a disagreement arose between two Islamic figures, Abdurrahman Wahid and Abu Hasan, almost all Islamic leaders proposed that the two men reconcile. The context of *islah* can be identified with the concept of mediation or conciliation.<sup>6</sup>

Besides *Islah*, the term *Hakam* is also known. *Hakam* has the same meaning as mediation. In the Islamic legal system, *hakam* usually functions to resolve marital disputes called *syiqaq*. Regarding the meaning of *hakam*, Islamic legal experts provide different definitions, however, from these different definitions it can be concluded that *hakam* is a third party who binds himself to the conflict that occurs between husband and wife as a party who mediates or resolves the dispute between them. As a guide, the meaning of *hakam* is taken from the explanation of Article 76 paragraph (2) of Law Number 7 of 1989, Law Number 3 of 2006, Law Number 50 of 2009 concerning Religious Courts. It is stated that "Hakam is a person appointed by the court from the husband's family or the wife's family or other parties to seek a resolution to the dispute regarding *syiqaq*". From the wording of the resolution, it can be concluded that the function of *hakam* is only to seek a resolution to the dispute, not to make a decision. Thus, we see that *hakam* in Islam has similarities with a mediator. Neither the mediator nor the judge has the authority to make a

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<sup>5</sup>Adies Putra Arba, Effectiveness of Mediation in Divorce Cases in District Court (study at Yogyakarta District Court), thesis (Yogyakarta: Sunan Kalijaga Islamic University, 2015), p. 45.

<sup>6</sup>Amriani Nurnaningsih, Alternative Mediation for Dispute Resolution in Court, (Jakarta: Rajawali Press. 2012), p. 67.

decision. Both are out-of-court dispute resolution mechanisms carried out by a third party.<sup>7</sup>

## **2. Divorce, Mediation and Religious Courts**

According to Arabic, divorce comes from the word Talaq or Itlaq which means to be free from bonds, to separate, to divorce, to be free. Divorce according to the Indonesian Dictionary is called "cerai" which means to separate, to be separated between husband and wife. Divorce according to Gunarsa is the most painful choice for a husband and wife, however, divorce can be the best choice that can open the best path to a happy life. Divorce results in the status of a man as a husband and a woman as a wife ending, but divorce does not stop their respective statuses as father and mother to the children they have born.<sup>8</sup>

According to Article 39 No. 1 of 1974 of the Republic of Indonesia Law, the legal basis for divorce is as follows:

- a. Divorce can be carried out before the relevant court if the parties have tried and failed to reconcile the two parties.
- b. To get a divorce there must be sufficient grounds, that the husband and wife will not live in harmony as husband and wife.
- c. The procedures for divorce before a court are regulated in these laws and regulations.

The above definition can be concluded that divorce is the termination of a marriage relationship due to the will of both parties, carried out at the request of the husband or wife based on a court decision, resulting in the termination of the husband or wife's status. Divorce results from the failure to achieve the goal of a happy, lasting, and prosperous marriage.

According to Article 38 of Marriage Law No. 1 of 1974, a marriage can be dissolved due to death, divorce, or by court decision. Dissolution of marriage due to divorce can occur due to divorce or based on a divorce lawsuit. In Law No. 7 of 1989 concerning Religious Courts, the term divorce has been distinguished into 2 (two) forms: divorce by divorce and divorce by lawsuit. Divorce by divorce is a divorce in the form of divorce that comes from the husband. Meanwhile, divorce by lawsuit is a divorce filed by the wife. The law distinguishes between divorce at the wife's will because the characteristics of Islamic law in divorce do require it. Therefore, the process of divorce at the husband's will is different from the process of divorce at the wife's will.

## **D. ANALYSIS AND DISCUSSION**

### **1. AM and SF Marital Dispute Mediation**

Conflict is an unavoidable phenomenon when one person comes into contact with another. When conflict occurs in a husband-wife relationship that results in a

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<sup>7</sup>Abbas Syahrizal, *Mediation: In the Perspective of Sharia Law, Customary Law, and National Law*, First Edition, (Kencana Prenada Media: Jakarta. 2009), p. 18.

<sup>8</sup>Amriani Nurnaningsih, *Alternative Mediation for Dispute Resolution in Court*, (Jakarta: Rajawali Press. 2012), p. 69.

breakdown in that relationship, this is called a marital dispute, including what happened to the couple AM and SF. Both parties, AM (husband) and SF (wife), involved in the dispute are encouraged to seek peace through non-litigation mediation, as peace is fundamentally better than conflict.

When peace cannot be achieved through mediation outside the court, the last resort is to file a lawsuit in court, but the initial step taken by a judge in hearing a case, again, is to try to achieve peace through mediation in court, because the role of a judge in reconciling the disputing parties is more important than his function as a judge who issues a decision on the dispute he is trying.

This mediation provision is written in Supreme Court Regulation Number 1 of 2008 concerning Mediation Procedures, namely a method of resolving disputes through a negotiation process to obtain an agreement between the parties with the assistance of a mediator.<sup>9</sup>

Efforts to reconcile the parties in dispute are the main priority and are considered fair in ending a dispute, because reconciliation can end with no loser or winner, and family and harmony are still achieved.<sup>10</sup>

The reason the mediation process is a priority in resolving marital disputes is because it has several benefits, including: disputes are resolved with a win-win solution, it is less time-consuming, less expensive, it maintains the relationship between the two parties in dispute and it can avoid new problems, or even bigger ones.

The concept of mediation has long been recognized and applied in Islam. Mediation, particularly in resolving marital disputes in Islam, involves appointing two peacemakers from each side, the husband and wife, who are in dispute. These two peacemakers are called hakamain. This is in accordance with

with the guidance contained in the word of God:

وَإِنْ خَفْتُمْ شِفَاقَ بَيْنَهُمَا فَأَبْعِثُوا حَكَمًا مِنْ أَهْلِهِمَا وَحَكَمًا مِنْ أَهْلِهِمَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بِيَنَّهُمَا  
إِنَّ اللَّهَ كَانَ عَلَيْهَا حَسِيرًا

Meaning: *And if you fear a dispute between them, then send a peacemaker from the man's family and a peacemaker from the woman's family, and if they both intend to reconcile, Allah will surely grant success to the husband and wife. Indeed, Allah is All-Aware and All-Knowing.* (QS. An-Nisa: 35)

This verse explains that the role and function of hakam in Islamic justice means peacemaker, namely a peacemaker sent by both parties, husband and wife, if there is a dispute between the two, without knowing who is right and who is wrong between AM (husband) and SF (wife).<sup>11</sup>

<sup>9</sup>Supreme Court Regulation Number 1 of 2008 Concerning Mediation Procedures in Court Article 1 Number 7

<sup>10</sup>Abdul Manan, Application of Civil Procedure Law in the Religious Courts, (Jakarta: Kencana, 2006), p. 151.

<sup>11</sup>Slamet Abidin, et al., Fiqh Munakahat, (Bandung: Pustaka Setia, 1999), p.189.

This is where the urgency of mediation in Islam lies: prioritizing the family. This is because the family is more knowledgeable and intimately familiar with the disputed issues in their lives. However, if the family's efforts to reconcile are unsuccessful, the decision will be taken to the Religious Court.

Disputes can be caused by a variety of factors, including differing interests or disagreements between parties. They can also be caused by rigid rules perceived as obstacles and barriers to achieving each party's goals. Because each party will strive to achieve its goals, the potential for disputes increases.<sup>12</sup>

Any disputes that arise must be resolved by the parties. This can be done through the courts or out of court. Dispute resolution through the courts is guided by procedural law, which regulates the requirements that must be met for a dispute to be filed and the efforts that can be taken. Meanwhile, out-of-court dispute resolution is a dispute resolution carried out based on the agreement of the parties, and the dispute resolution procedure is left entirely to the disputing parties. Dispute resolution outside the courts can be done through various methods, including negotiation, mediation, conciliation, and arbitration.<sup>13</sup>

Mediation is also mandatory for parties in civil litigation in court on the first day of the hearing. After the mediation process is completed, they must return to the judge at the scheduled hearing. If the parties reach an agreement, they may request a settlement agreement. However, if an agreement is not reached, the mediator must declare in writing that the mediation process has failed, and the hearing will proceed as usual.

## 2. Mediation in AM and SF's Divorce Dispute

As previously explained in Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Court, it is stated that "all civil disputes, including the AM and SF cases, when submitted to court must first be resolved through mediation."<sup>14</sup> Based on this provision, parties involved in a divorce dispute are required to first undergo mediation. This mediation process is part of the procedure in civil cases in religious and general courts.

The mediation process in court begins with the completion of the necessary documents for the trial, such as the complete lawsuit, power of attorney, and summons for the parties. The judge will then explain that, according to procedure, the parties are required to undergo mediation before the divorce process can begin. Mediation takes place in a special room at the Religious Court, and generally requires a maximum of two sessions. If no settlement/reconciliation is achieved during the mediation, the divorce proceedings can then proceed.

Then, the next stage proceeds. The mediation process is divided into several stages, as outlined in Supreme Court Regulation Number 1 of 2016:

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<sup>12</sup>Jimmy Joses Sembiring, *How to Resolve Disputes Outside the Court of Negotiation, Mediation, Conciliation & Arbitration*, pp. 1-2.

<sup>13</sup>Ibid.

<sup>14</sup>Supreme Court Regulation Number 1 of 2016 Concerning Mediation Procedures in Court Article 4 Paragraph (1)

a. Pre-Mediation Stage of AM and SF's Marital Dispute:

- 1) On the day of the first hearing, which was attended by both parties, the judge required the parties to undergo mediation.
- 2) The judge postponed the trial process to provide an opportunity for the mediation process for 40 working days.
- 3) The judge explains the mediation procedure to the disputing parties to choose a mediator from a list of names provided on the first day of the hearing or at the latest within 2 working days.
- 4) If within that time period the parties have not decided who will be the mediator, the Chief Judge will immediately appoint a judge who is not the principal examiner of the case to carry out the function of mediator.

b. Stages of the AM and SF Marital Dispute Mediation Process:

- 1) Within a maximum of 5 working days after the parties appoint an agreed mediator, each party submits a resume of the case to the mediator judge.
- 2) The mediation process takes a maximum of 40 working days from the time the mediator is selected.
- 3) The mediator is obliged to prepare a mediation meeting schedule for the parties to agree on.
- 4) The mediator is obliged to declare that the mediation has failed if one of the parties or their legal representative has failed to attend the mediation meeting according to the agreed schedule twice in a row without reason after being properly summoned.

c. Stages If Mediation Reaches an Agreement Between AM and SF:

- 1) If mediation results in a peace agreement, it must be formulated in writing and signed by the parties and the mediator.
- 2) If the mediation is represented by legal counsel, the parties are required to state in writing the agreement or deal reached.
- 3) The parties are required to return to the judge on the appointed hearing day to notify them of the peace agreement.
- 4) The parties can submit a peace agreement to the judge to be strengthened in the form of a "Peace Deed".
- 5) If the parties do not want the peace agreement to be in the form of a Deed of Peace, it must contain a clause (special provision in the agreement) for withdrawing the lawsuit or a clause stating that the case has been resolved.

d. Stages If Mediation Does Not Reach an Agreement Between AM and SF:

- 1) If mediation does not result in an agreement, the mediator must state in writing that the mediation process has failed and notify the judge of this failure.
- 2) At each stage of the case examination, the judge remains authorized to reconcile the two parties before pronouncing the verdict.
- 3) If mediation fails, the statements and confessions of the parties in the mediation process cannot be used as evidence in the trial process.

### 3. Case Analysis of AM and SF Couple

A household should always want harmony, but along the way it is not free from problems, including those experienced by the couple Adan SF.

Where both of them decided to divorce due to child problems, where both of them had been married for 30 years but until today they had not been blessed with children.

Therefore, Sister SF decided to file for divorce from her husband, Brother AM, at the Gerung Religious Court. Interestingly, during the divorce proceedings, both parties agreed not to attend. Thus, the mediation ultimately resulted in a divorce.

Then it is also necessary to mention that Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Court in the process of resolving marital disputes is in line with Islamic law, where divorce is a halal solution but is hated by Allah SWT. This was mentioned by Wahbah az-Zuhaili who said in *Fiqhul Islam WA Adillatuhu*, divorce is a matter that is hated by Allah SWT. As the words of the Prophet SAW narrated by Ibn Umar RA,

أَبْعَضُ الْحَلَالِ إِلَى اللَّهِ الطَّلاق

*"The halal act that Allah hates most is divorce."* (HR Abu Dawud and Ibn Majah)

This hadith was also narrated by Al Hakim and he said it was authentic. Wahbah az-Zuhaili also explains in *Tafsir Al Munir*, although divorce is permitted in Islam, it must still be avoided unless it is an emergency or necessity.

"Even though talak is something that is permissible and permissible and is in the husband's hands, he must stay away from it and not do it except when there is something that reaches the level of emergency or necessity, it must be done separately and there cannot be more than one talak at a time and it is done when the mood and mind are normal," explained Wahbah az-Zuhaili.

However, if the condition of the husband-wife relationship that is currently in dispute that a judge is facing is truly irreconcilable, the judge or mediator is no longer effective, because in conditions like this, separation is the best solution and to cover other bad possibilities if the marriage is maintained.

However, after further mediation, the two decided to reconcile and carry out the tajdid marriage at the KUA after the thalaq bain sugra (when the iddah had expired) fell.

According to Adam Maslow, one of the things that makes someone restless is when someone does not get their physiological needs (such as a house, job, title, position, possessions, including children).

Therefore, the author believes that marital discord is not always caused by economic factors. The couple above is a productive couple, with Am being a religious teacher and SF a teacher at a madrasah. They were financially well-off, but

their inability to have children led to their divorce. However, after mediation, they ultimately decided to reconcile.

#### **E. CONCLUSION**

Mediation and arbitration are peace efforts by a third party in resolving marital disputes. Judicial and Islamic teachings have emphasized the urgency of this mediation because the principle of dispute cases is to achieve peace between the two disputing parties (win-win solution).

However, if the condition of the disputing relationship between husband and wife that is being faced by a judge is truly irreconcilable, the judge or mediator is no longer effective, because in conditions like this separation is the best solution and so that other bad possibilities are closed if the marriage is maintained. "Even though talak is something that is permissible and permissible and is in the husband's hands, he must stay away from it and not do it except when there is something that reaches the level of emergency or necessity, it must be done separately and there cannot be more than one talak at a time and it is done when the mood and mind are normal," according to Wahbah az-Zuhail.

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