

The Role of Mediation Agencies in Divorce Cases As an Effort to Provide Protection Against Women and Children

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Abstract

The focus of this study is to assess the role of divorce mediation institutions to protect women and children. In the case of divorce, the role of mediation institutions is urgently needed as an effort to protect women and children whose rights are often ignored which causes prolonged suffering. The issues raised in this study is the urgency of mediation in divorce cases and the role of mediation as an effort to provide protection for women and children. The method in this research is normative research, by examining the sources of data obtained through the literature as well as examining the results of mediation in the Religious Courts contained in the Peace Deed. The results of the study showed that mediation institutions have a significant role in resolving divorce cases. With the role of mediation and the expertise of a mediator, the conflicting members can reconcile in realizing a harmonious family. If it is not possible to reconcile, then the parties agree to fulfil the rights of the children to benefit the child as stated in the Peace Act.

Keywords: Mediation, Protection, Children, Women, Deed of peace

INTRODUCTION

Marriage is a sacred institution that is expected to realize inner and outer well-being for all family members. In Islam, the purpose of marriage is to meet the demands of human life, to build relationships with men and women to create a happy family with love and to obtain legal offspring based on the provisions taught in the *Shari'ah*. (Soemiyati, 2007: 12)

However, in its journey, the institution of marriage often faces problems, boredom often appears in marriage (marital boredom) which triggers conflict between husband and wife. Conflict that occurs continuously can lead to divorce. Divorce means the breaking of marital ties based on the wishes of the husband or wife or because of the wishes of both. The dissolution of marriage is the last solution for husband and wife for the powerlessness of the marriage institution in dealing with household problems. (Zein, 2004).

The consequences of divorce are enormous, especially for couples who have children. A child whose parents are in conflict will feel prolonged suffering and misery, when the child should get the caress of love and affection under the care of his parents instead the child participates in witnessing the conflict of his parents. The growth and development of children is also disturbed, according to (Huraerah, 2006) broken homes due to divorce are part of violence against children. The more children who are broken home due to their parents' conflicts in the household, the more the quality of the nation's children will affect (Damis, 2013).

The period of divorce for children is a very critical period, especially regarding the interaction of parents who no longer live together in one complete family. Children's minds are often raging and affect mental stress. Children must be able to adjust to a new pattern of life without complete parents. According to Risnawati (2018: 34) there are several things that can be felt by children when their parents are separated, including: (1) Feeling that their life is no longer safe. (2) Children feel they are not wanted by their parents (3) Children feel lonely, sad and angry (4) Children will feel lost their parents, feel alone, even children tend to blame themselves as the cause of their parents divorce.

In Indonesian positive law, the institution of peace is referred to as mediation. Provisions for mediation in the Court are regulated in the Regulation of the Supreme Court of the Republic of Indonesia No. 1 of 2016 concerning Mediation Procedures in Courts. The PERMA stipulates that mediation must be carried out by the parties to civil litigation in court which can be carried out starting on the day of the first trial with the aim of creating peace between the parties to the dispute.

Based on the above background, the author conducted a study on the role of mediation institutions in divorce cases as an effort to provide protection for women and children. In this case, the discussion will focus on 2 (two) issues, namely the urgency of

mediation in divorce cases and the role of mediation as an effort to provide protection for women and children.

The research method in this study uses normative research, namely legal research that examines the principles, norms and rules of law that are in accordance with the research theme. The approach that the author uses in this research is the statutory approach, the conceptual approach and the case approach. As for what is meant by the statutory approach in this study, the authors examine the Marriage Law no. 16 of 2016 in conjunction with No.1 of 1974, the Law on Child Protection, the Law on Religious Courts, the Regulation of the Supreme Court No. 1 of 2016 concerning Mediation Procedures in Courts. Conceptual approach is used in this study to examine concepts related to mediation in divorce cases and the concept of protecting children and women. While the case approach comes from the decision on the Deed of Peace in divorce cases through the Mendisi forum in the Court. The legal materials used in this study consisted of primary legal materials consisting of statutory regulations, secondary legal materials consisting of books, journals, documents or other literature related to this research as well as tertiary legal materials including encyclopedias.

DISCUSSION

Mediation in Divorce Cases

Mediation comes from the English "mediation", in Latin the term mediation is called *mediare* which means being in the middle (Usman, 2003). The Big Indonesian Language Dictionary (<https://kbbi.web.id/mediation>) defines mediation as the process of involving a third party in resolving a dispute as an advisor. In terminology the meaning of mediation is as a means for the negotiation process. Marian Roberts stated in her book *Mediation in Family Dispute: Principles and Practice*, as quoted by Mohammad Noor (2008), are:

“The most important point to remember when discussing mediation is that it is nothing more and less than a device for facilitating the negotiation process. The negotiation can and do occur without a mediator but mediation can never occur in the absence of negotiation.” [The most important thing when discussing mediation is that mediation is nothing more and nothing less than a tool to facilitate. negotiation process. Negotiations can and can happen without a mediator, but mediation never will without negotiation] (Mohammad: 2008)

The Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts defines mediation as a method of resolving disputes through a negotiation process to obtain an agreement between the parties with the assistance of a mediator (Article 1) and in its preamble explains mediation as an appropriate peaceful dispute resolution method, effective and can open wider access to the Parties to obtain a satisfactory and fair settlement.

Gary Goodpaster (1993: 201) defines mediation as a negotiation process to solve problems which is attended by an impartial outside party with a neutral position that can assist the parties in obtaining an agreement based on the agreed agreement. Unlike the role of a judge or arbitrator, a mediator does not have the authority to decide disputes between the two parties. Therefore, both parties authorize the mediator to be able to help resolve the dispute between them.

In Indonesia, the process of peaceful dispute resolution is basically often carried out by the community. This can be seen from the pattern of dispute resolution that occurs in indigenous peoples who place the customary head as a mediator and make decisions based on their customary wisdom (Nugraha, 2019: 152). This is also part of the embodiment of the values contained in the points of Pancasila. The principle of deliberation with the aim of consensus, has the meaning that in determining a unanimous decision, it can be carried out jointly through wisdom with the aim of being able to prioritize common interests.

Juridically, the dispute resolution mechanism is through *dading* (peace institution) has been regulated in HIR Article 130 and in the Civil Code Article 1851. The contents of the two articles can be concluded that the formal requirements for *dading* include; 1.) there is an agreement between the two parties to the dispute; 2.) the settlement decision is based on an existing dispute; and 3.) the peace agreement must be stated in written form and the decision making an end to the dispute that arises. (Hadrian & Hakim, 2020: 88)

The Supreme Court as the perpetrator of judicial power in Indonesia, made efforts to further regulate the mediation procedure by issuing the Supreme Court Circular Letter (SEMA) Number 1 of 2002 on January 30, 2002 concerning Empowerment of First Level Courts Implementing Peaceful Institutions (ex article 130 HIR), which was later supplemented by Supreme Court Regulation (PERMA) Number 2 of 2003 entitled

Mediation Procedures in Court. In the preamble to letter e, it is stated that one of the reasons the Supreme Court Regulation was issued is because the Supreme Court Circular Letter (SEMA) Number 01 of 2002 is not yet complete. SEMA has not fully integrated mediation into the judicial system which is coercive but still voluntary and as a result SEMA has not been able to encourage and coerce the disputing parties to settle their cases through the peace route.

After the Supreme Court conducted an evaluation of PERMA No. 2 of 2003, it turned out that problems were found stemming from the PERMA. The Supreme Court revised PERMA number 2 of 2003 to PERMA Number 1 of 2008 which was then revised again to PERMA Number 1 of 2016 concerning Mediation Procedures in Courts, this last change was because PERMA Number 1 of 2008 was deemed not optimal to meet the needs. implementation of mediation more efficient and able to increase the success of mediation in court.

Basically, in divorce cases, the judge's obligation to make peace efforts is regulated in Articles 65 and 82 of Law Number 7 of 1989 as amended by Law Number 3 of 2006 and amended by Law Number 50 Year 2009 jo. Article 39 of Law Number 1 of 1974 jo. Article 31 Government Regulation Number 9 of 1975. In these articles it is regulated that the judge is obliged to reconcile the litigants before the decision is rendered. (Manan, 2017: 161)

For judges in the Religious Courts who handle divorce cases, they must continue to be able to try to reconcile the parties. Because no matter how fair a decision is, it will be better and fairer to resolve it by way of peace. In a decision, there must be a party who is defeated and/or won, it is impossible for both parties to the dispute to win or lose, because the characteristics of dispute resolution through litigation are winning or losing. (winning or losing).

Mediation in divorce cases has its own noble and majestic value. If peace can be achieved in marital disputes between husband and wife, it is not only the integrity of the marital bond that can be realized but can return to normal care and foster children, harmony between extended families for both parties can also continue, ownership of joint property can also be achieved. protected from conflict. Mental and mental development of children can avoid feelings of depression and low self-esteem in social life.

In the implementation process, mediation is accompanied by a mediator, either a judge mediator or a certified professional mediator. A mediator has a very decisive role in the mediation process. The success of mediation in addition to the good faith of the parties can also be determined by the role of the mediators. The actions taken by the mediator must also be very careful, because family issues are very sensitive issues and require full concentration, in order to glue fragile emotional relationships. Therefore, a mediator must have good communication skills and be able to convey messages that can change other people's perceptions of the situation at hand and be able to formulate an agreement for the disputing parties.

According to Pranawati (2017), since 2008, mediation in Muslim divorce has been in a transitional stage, mediation has been professionalized by requiring mediators to have certificates as regulated in PERMA No. 1 of 2016 Article 13 paragraph (1) that every mediator is in principle required to have a mediator certificate held by the Supreme Court or an institution that has obtained accreditation by the Supreme Court.

Mediation As an Effort To Provide Protection For Children and Women

The definition of protection is generally defined as an action or action taken to provide a sense of security, prevent from danger or various things that can cause unwanted losses. In the Big Indonesian Dictionary (KBBI) protection comes from the word "protection", taking refuge means placing oneself under, behind, behind something so as not to be seen; hiding. Protect in the sense that it is not visible or visible. (KBBI, n.d.)

In law, the term protection is identified with legal protection. Satjipto Rahardjo (2014) defines legal protection as protecting human rights that have been harmed by others and this protection is given to the community so that they can enjoy all the rights granted by law. Philipus M. Hadjon (1987: 2) defines legal protection as the protection of dignity, as well as the recognition of human rights owned by legal subjects based on legal provisions from arbitrariness.

The basic principle of legal protection in Indonesia is based on Pancasila as the ideology and basic philosophy of the state with the concept of *Rechtsstaat* and the Rule of Law which focuses on the principle of protection. law based on human dignity. Whereas. The principle of legal protection against government actions stems from the concept of

recognizing and protecting human rights. (Hadjon, 1987:25). In Islamic teachings, the concept of human rights is explained through the concept of maqashid al-syariah (sharia goals). (Abdillah, 2014) The formulation of the objectives of sharia is to realize the benefit (mashlahah) of mankind by protecting and realizing things that are very principled (dharuriyat).) and fulfill things that are needed (hajiyat) and decoration (tahsiniyyat). (Khallaf, 1978: 199)

Mediation has a role in efforts to provide protection for women and children in families in conflict so that they can return to being intact together to run the household ark in accordance with the purpose of marriage. Can re-glue the ropes of love, mercy and trust of Allah. Quraish Shihab in his book Insights of the Qur'an interprets the concept of , mawaddah, rahmah dan amanah of Allah as the glue that binds the relationship in marriage, so that if love is lost and mawaddah is broken, there is still grace and even if this is no longer left, it is still strengthened by trustworthiness and as long as the couple is religious, the trust can be maintained. (Shihab, 1996).

Islam teaches its adherents to avoid conflict if there is a dispute between husband and wife. The targets of mediation in divorce cases are as follows: first, husband and wife have good intentions to be able to return to live in harmony in the household and not continue the divorce; second, husband and wife voluntarily want to continue the household and fulfill their obligations in the household; and third, even if an agreement to get back together is not successful, a peace agreement is made to fulfill the rights and obligations of both parties as a result of the divorce (Imron, 2016)

As an example of the existence of a peace agreement agreement in the Peace Deed Number 622/Pdt.G/2020/PA.Ktbm, Party 1 is a wife as the plaintiff, suing for divorce from her husband as Party II in a civil divorce lawsuit at the first level at the City Religious Court Earth that ends in peace through Mediation. With the peace agreement that the parties are willing to repair each other and foster a good household and Article 2 reads that Party II (husband) promises to no longer commit domestic violence against the First Party as his wife and children of the Parties. In Article 4 it is stated that Party II will work hard to earn a living for the family and together with Party 1 will care for and care for children as well as possible.

The same thing as agreed by the parties in the divorce case in the Peace Deed Number 0248/Pdt.G/2020/PA.Sky to end the divorce suit in the Religious Courts and agree to be open to each other, listen to each other so that it does not cause emotions, agreed to share roles in the continuation of further household life and husbands agreed not to commit domestic violence.

Even if the implementation of peace in divorce cases through mediation is not successful, it can be agreed that the consequences of divorce are the fulfillment of the rights of the wife and children (PA Sei Rampah, 2021). As seen in the cheerful divorce case, Decision Number 957/pdt.G/2020/PA.Sim, that in the decision there was already a peace agreement regarding the consequences of divorce, namely related to child care given to his ex-wife while still giving the ex-husband a chance to meet with her children. And the agreement from the ex-husband to give fulfillment of the right to a living for his ex-wife in the form of iddah and mut'ah as well as the fulfillment of the right to a living for his two children every month according to the agreement until the children are adults.

This is a commitment built so that even if the parents divorce, the children's rights can be fulfilled as stipulated in the Marriage Law Number 1 of 1974 which was amended to Number 16 of 2019 Article 41 which reads "the consequences of breaking up a marriage due to divorce are; Both the mother and the father are still obliged to maintain and educate their children, solely for the sake of the child's interests, if there is a dispute regarding the control of the children, the court will give a decision.

The position of the peace deed as an authentic deed has binding legal force between the parties, in this case husband and wife. (Firdaos: 2020). A peace agreement to return to living in harmony by making an agreement based on willingness without any coercion. In the Peace Deed above, the husband promises and agrees not to commit domestic violence against his wife, this is a good faith from the husband to be able to treat his wife in a good way. Back to running his household life with a rope of love, happiness and eternal based on God Almighty.

With the return of peace can save and provide protection for their children. Children are the group most affected by their parents' divorce. Some of the reasons for example lack of love and attention from both parents because parents will separate, children feel lonely because they can't get together with their parents, there is no freedom

to meet and so on. This will interfere with the child's growth and development. In the rules of fiqh, the scholars formulate rules including "*al-dhororu yuz'alu*", (the danger must be eliminated by peace efforts), "*Dar'ul Mafasidi Awla Min Jalbil-Masholibi.*" (rejecting danger takes precedence over attracting benefits). This rule can be part of the consideration for the parties not to proceed with the divorce and make peace.

Even if you have to divorce, then divorce can be done in a good way, in the Qur'an surah at-Thalaq verse 2 it is emphasized that "When they are nearing the end of their iddah period, then reconcile in a good way (ihsan) or let them go. in a good way (ihsan)". In his commentary, Quraish Shibab explains that the word ihsan in this verse is used in two ways; first, giving favors to other parties; and second, good deeds. Therefore, the word ihsan is broader than just giving a favor or a living. Its meaning is even higher and deeper, than the content of the meaning of fair, because fair is treating others the same as treating oneself, while ihsan treats others better than he treats oneself, and gives more than we should give and take less than we should take. (Shihab, 1996)

With a peace agreement for the benefit of the child which was agreed upon by both divorced parents, it is hoped that the mental development of the children will be maintained. Children can adapt to the changes that occur as a result of divorce. Conflicting parents usually always have a fight. Sometimes the fight can still be hidden so that children don't know it, but not infrequently children can see and hear clearly the fight. In order to overcome this worst impact on children, the agreement in the peace deed must be fulfilled as much as possible by the parties. This is part of the implementation of the realization of children's rights contained in Law No. 35 of 2017 in conjunction with No. 23 of 2002 concerning Child Protection Article (4) states that every child has the right to be able to live, grow, develop, and participate fairly in accordance with human dignity, and to receive protection from violence and discrimination.

The results of the agreement of the parties listed in the peace deed have binding legal force after being stated in the minutes of the judge's decision handling the case. The legal force on the peace deed is regulated in Article 1858 of the Civil Code that peace between the parties is as strong as the final judge's decision. This is also emphasized in Article 130 paragraphs (2) and (3) of the HIR that the peace deed has the same power as a decision that has permanent legal force so that legal remedies are closed against it. In

addition to having permanent legal force, the peace deed also has executive power which includes the decision being equated with a decision that has permanent legal force.

If one of the parties does not obey or carry out the agreement that has been agreed in the peace deed voluntarily, the aggrieved party may request execution at the Court or a request from the head of the court to carry out the execution in accordance with the applicable provisions in Article 195 HIR.

This is in accordance with the order in the peace deed which punishes the parties to obey the peace agreement they have agreed upon. So in the decision there is a condemnatory order, so that if the decision is not obeyed and fulfilled voluntarily, its fulfillment can be carried out through execution by the Court.

Based on the legal force, the peace deed is a reflection of the principles of justice, namely procedural and substantive. Substantial justice is seen from the contents of the agreement that has been agreed upon by the parties in good faith. Procedural justice in the peace deed can be viewed from the process of resolving cases through an effective and efficient process. Therefore, the settlement of cases through a peace deed is very effective, efficient, all legal remedies are closed and can be immediately requested for execution if one of the parties refuses to fulfill the contents of the agreement. (Firdaos, 2020)

However, the success of mediation in divorce cases is still low. based on Sunarsi's research (Sunarsi et al., 2019) concluded that the success rate of mediation in the Religious Courts was only below 15%. In general, the lawsuit or application for divorce that is filed in the Court is already the climax of the failed peace attempt, so it remains to be resolved by litigation. The role of mediation in this case can still help in efforts to provide protection for women and children by making peace agreements due to divorce including the fulfillment of child custody rights, children and wife's livelihood rights and regarding joint assets so that in the future there will be no more quarrels.

CONCLUSION

Mediation is a dispute resolution method carried out through a negotiation process to obtain an agreement between the parties with the assistance of a mediator. The process of implementing mediation is regulated in Supreme Court Regulation No.1 of 2016. In divorce cases in the Religious Courts, the mediation process has been carried out since the

beginning of the trial and continues to be pursued every time the trial until the end of the decision. Because the settlement of divorce disputes has its own noble value with the aim of benefiting. With the achievement of peace between husband and wife in disputes in their household, it is not only the integrity of the marital bond that can be restored in harmony, but the maintenance and development of children can be carried out normally and can be protected from conflict.

Efforts to provide protection for women and children in families in conflict can be formulated in the Peace Deed as an agreement between the parties. If the parties agree to return to live in harmony and peace, it can be agreed in the Deed of Peace, the desired agreement between the parties, such as no more violence in the household and matters related to the fulfillment of rights for women and children as well as agreeing to carry out obligations each party. Meanwhile, if peace to return to living in harmony cannot be agreed upon, it can be agreed to fulfill the rights of the wife and children as a result of divorce, as well as problems with joint property so that it is hoped that there will be no more conflict between the parties. The Peace Deed as an authentic deed has permanent legal force as well as executive power.

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