



Optimizing Mediation as An Effort to Settle Marital Disputes in Court

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Abstract: *This study discusses the Optimization of Mediation in the Resolution of Marriage Disputes in Court. Marriage is an essential event in human life as a legal and religious act. Along the household's journey as husband and wife, it is not uncommon for differences of opinion or principles between husband and wife to occur, which end up threatening the integrity of a marriage. Mediation as one of the Alternative Dispute Resolution (ADR) is seen as a humanist and equitable way of resolving disputes. Humanist because the decision-making mechanism (peace agreement) is the authority of the parties to the dispute and maintains good relations. Fair because each party negotiates options for resolving the problem. Divorce cases in religious courts are first required to be mediated; Mediation is carried out to resolve problems to reconcile the husband and wife. This study uses a normative juridical research method using a statutory approach that focuses on optimizing Mediation in the Resolution of Marriage Disputes in Court. The result of this study is that the optimization of Mediation in court cannot be separated in several ways, namely the Supreme Court, as part of law enforcement, which issued PERMA No. 1 of 2016 concerning mediation procedures in court, is the right step in resolving disputes, especially marital disputes. In addition, the role of competent mediators, cooperative parties, and reasonable legal culture.*

Keywords : *Optimization, Mediation, Marriage Dispute*

Introduction

Humans are creatures created by Allah SWT, who are equipped with the desire to marry because marriage is one factor in maintaining the continuity of human life on

earth. Marriage is a physical and mental bond between a man and a woman as husband and wife to form a happy and eternal family.¹

Marriage is the nature of love that arises between men and women who are not mahrams, being the most beneficial and most afdhal way to realize and maintain honor because it is with this marriage that a person can protect himself from what Allah forbids as explained that marriage, according to Islamic law, is marriage, which is a solid contract or mitsaqan ghalidzan to obey the commandments of Allah. That is why the Prophet (peace and blessings of Allaah be upon him) encouraged hastening marriage, facilitating the way for it, and eradicating its obstacles.²

Marriage grants humanity a sense of love, affection, and compassion between husband and wife. The Qur'an and Hadith an essential guides for Muslims to the influence of marriage; this can be seen from the many texts that explain marriage, among them the words of Allah in Surah Ar-Rum verse 21. The verse, in addition to pointing to marriage, also shows that marriage upholds the highest goals in Islamic law, namely maintaining regeneration, maintaining human genes, and each husband and wife bring peace of mind because of their love and affection that is channeled, as well as the husband and wife as a resting place for tired and tense.³

Marriage is an essential event in human life as husband and wife in the smallest social community, but also more than that, marriage is a legal and religious act. However, along the household's journey as husband and wife, it is certainly not uncommon for differences of opinion or principles between husband and wife. Where these differences can gradually become disputes that cause conflict between husband and wife, it is not uncommon for this household destruction to end peacefully again. However, if the husband and wife are not looking for a way out to reconcile so that the quarrel continues, it is not uncommon for the husband and wife's relationship to lead to divorce.⁴ In the history of human civilization, the first conflicts to arise were family conflicts related to romance. The son of the Prophet Adam AS, Qabil, had killed his

¹ Asrorun Ni'am Sholeh, *Fatwa-Fatwa Masalah Pernikahan Dan Keluarga* (Jakarta: Elsas, 2008). h. 3.

² Abdurrahman, *Kompilasi Hukum Islam*, 4th ed. (Jakarta: Akademika Pressindo, 2010). h. 32.

³ Abdurrahman. h. 36.

⁴ Hartawati, *Penyelesaian Perkara Perceraian Melalui Mediasi Sebuah Resolusi Konflik Keluarga* (Bandung: Manggu Makmur Tanjung Lestari, 2021). h. 3.

sibling over an arranged marriage for him that was not to his wishes. Until now, family conflict (divorce) is the conflict that dominates the cases registered in the Religious Courts.

In order to overcome and resolve disputes and disputes, Indonesia, which is a state of law, has 2 (two) efforts to resolve disputes. The efforts are (1) Litigation. *Litigation efforts* are efforts that focus on resolving disputes through court proceedings. Justice is obtained through a trial process led by a judge based on evidence that is appropriate and related to the case. The judge will decide the case or dispute based on 2 (two) pieces of evidence and the judge's belief. The nature of the decision is to use coercion, in which the parties must submit and obey the decision. (2) Non-litigation. The meaning of non-litigation efforts is dispute resolution efforts carried out outside the court and has the designation Alternative Dispute Resolution. The primary approach in this effort is that justice is obtained by bringing together the two parties to negotiate the goals and interests of each party to obtain an agreement that suits the parties. This approach is known as consensus.⁵

Dispute resolution outside the court is familiarly referred to as alternative dispute resolution; this has been practiced in Indonesian judicial bodies. The origin of the implementation of alternative dispute resolution in the Indonesian judiciary is based on the objectives of the Indonesian judicial institution. This goal is to create effective and efficient dispute resolution that can create simple, fast trials and minimal operational costs. The Supreme Court, as the highest judicial implementing institution in Indonesia, came up with the idea to integrate alternative dispute resolution efforts into the Indonesian judiciary using the mediation method. Integrating mediation into the judicial realm is considered to assist judicial institutions in resolving disputes before trial.⁶

The Collins English Dictionary and Thesaurus state that mediation is bridging between two disputing parties to produce an agreement. A mediator carries out this activity as a party who helps find alternative dispute resolutions. In this case, the mediator's position is to encourage the parties to seek agreements that can end disputes and disputes. The explanation of mediation from the linguistic side

⁵ Sujud Margono, *ADR (Alternative Dispute Resolution) Dan Arbitrase Proses Pelembagaan Dan Aspek Hukum* (Bogor: Ghlmia Indonesia, 2004). h. 36.

⁶ Indriati Amarini, "Penyelesaian Sengketa Yang Efektif Dan Efisien Melalui Optimalisasi Mediasi Di Pengadilan," *Jurnal Kosmik Hukum* 16, no. 2 (2016): 86–106, <http://www.jurnalnasional.ump.ac.id/index.php/KOSMIK/article/view/1954>. h. 2.

(etymology) emphasizes the existence of a third party who bridges the disputing parties to resolve their disputes.⁷

Alternative dispute resolution through mediation is an effort made by presenting a neutral third party. The third party is tasked with helping both parties to the dispute conduct discussions, compromises, and negotiations related to dispute resolution efforts that bind them. Juridically, mediation in Indonesian judicial institutions relies on Article 130 HIR / Article 154 RBg related to peace efforts. The practice of mediation is not only listed in the HIR or RBg. However, it is also listed in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (in the future referred to as Law No. 30 of 1999), which is then implemented by the Supreme Court in Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures (after this referred to as PERMA No. 1 of 2016).⁸

The Concept of Mediation According to Islam

Mediation in Islamic teachings is known as al-ishlah and hakam.⁹ Al-ishlah means reconciling, repairing, and eliminating or resolving damage or disputes, creating peace, creating harmony, encouraging and inviting people in dispute to make peace between one another, carrying out good deeds, and behaving as a saint.¹⁰ Ishlah or sulhu is an Arabic word meaning repair.¹¹ Ishlah is also defined as a contract or agreement between two or more people whose purpose is to settle a dispute between them.¹² Shaykh Qahthan 'Abdu al Rahman al Duri prefers the meaning of stopping the conflict.¹³

⁷ Mardalena Hanifah, "Kajian Yuridis: Mediasi Sebagai Alternatif Penyelesaian Sengketa Perdata Di Pengadilan," *Jurnal Hukum Acara Perdata ADHAPER* 2, no. 1 (2016): 3, <https://doi.org/10.36913/jhaper.v2i1.21>. h. 3.

⁸ Syahrizal Abbas, *Mediasi Dalam Hukum Syariah, Hukum Adat, Dan Hukum Nasional* (Jakarta: Kencana, 2009). h. 2.

⁹ Nuraningsih, *Mediasi Alternatif Penyelesaian Sengketa Perdata Di Pengadilan* (Jakarta: Raja Grafindo Persada, 2011). h. 119.

¹⁰ Ahmed Shoim El Amin, "Konsep Mediasi Dalam Hukum Islam," *Al Munqidz: Jurnal Kajian Dan Keislaman* 2, no. 2 (2013): 21–30, <https://doi.org/https://doi.org/10.52802/amk.v2i2.32>. h. 24.

¹¹ Ahmad Warson Munawwir, *Kamus Al-Munawwir Kamus Arab-Indonesia* (Surabaya: Pustaka Progressif, 1997). h. 789.

¹² Zainuddin Zainuddin, "Islah Dalam Pemahaman Qur'an Hadis," *Jurnal Ilmiah Al-Mu'ashirah* 19, no. 2 (2022): 161, <https://doi.org/10.22373/jim.v19i2.14058>. h. 164.

¹³ Qahthan Abdu al Rahman al Duri, *Aqdu Al Tahkim Fi Al Fiqhi Al Islami Wa Al Qanun Al Wadli* (Yordan: Dar al Furqan, 2002). h. 24.

The scholars of fiqh argue that the word al-ishlah can be interpreted as peace, which is an agreement stipulated to eliminate and repair disputes between humans who are in conflict, whether the humans are individuals or groups.¹⁴ Peace is highly recommended in Islam because by implementing peace by the parties to the dispute, the parties will avoid damage and break the relationship, and the dispute between the parties can be ended. Ishlah between husband and wife who are on the verge of divorce by sending al-hakam (negotiator), as in Surah An-Nisa verse 35, which means, And if you are worried that there is a dispute between the two, then send a hakam from the man's family and a hakam from the woman's family. If the two people intend to make amends, surely Allah will help the husband and wife. Indeed, Allah knows best.

In addition to al-ishlah, tahkim, also known as tahkim, tahkim is the refuge of two disputing parties to the person appointed, agreed upon and agreed upon by them and willing to accept the decision of the appointed person in resolving their case or dispute, the refuge of two disputing parties to the person they appointed (as a peacemaker or mediator) in deciding or resolving the dispute faced by those who are in dispute,¹⁵ this means that the understanding of mediation in an Islamic perspective can be equated with the concept of tahkim. In Qur'anic studies, household conflicts consist of nusyuz and syiqaq. For these two types of conflicts, the Qur'an provides techniques for resolving them using ishlah (peace). In household conflicts, disputes between husband and wife, in the case of nusyuz, must be resolved gradually and educatively. Likewise, the conflict of shiqaq should be resolved by sending a hakam (peacemaker).¹⁶ So Islam strongly recommends mediation in resolving disputes that occur in a family.

The concept of mediation according to Indonesian legislation

Mediation is derived from the Latin "mediare," which means "to be in the middle." This meaning refers to the role played by a third party as an intermediary to fulfill its

¹⁴ Abu Muhammad Mahmud Ibn Ahmad al-Aynayni, *Al-Bidayah Fi Syarh AlHidayah*, Jilid 9 (Beirut: Dar al-Fikr, n.d.). h. 3.

¹⁵ Abdul Aziz Dahlan, *Ensiklopedi Hukum Islam*, (1996), h. 1750. (Jakarta: PT Ichtiar Baru van Hoeve, 1996). h. 1750.

¹⁶ Hakam is a peacemaker from the side of man and woman. This messenger can be from family or professional (Alkhabir). According to Wahbah al-Zuhaily, a judge must be an expert in his field and keep his client's questions confidential. Therefore, the culottes should preferably come from the family of the disputing party. Wahbah al-Zuhaily, *Tafsir Al-Munir Fi Al-'Aqidah Wal-Syari'Ah Wal-Manhaj* (Beirut: Dar al-Fikr, 1991). h. 58-59.

obligations, mediate and resolve disputes between parties. Being in the middle also means the mediator must remain neutral and impartial in resolving disputes. He or she must be able to represent the interests of all parties to the dispute fairly and equally, thereby promoting the trust of all parties.¹⁷

In Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Court, *mediation* is defined as resolving disputes through a negotiation process to obtain an agreement between the parties with the assistance of a mediator. Meanwhile, according to John W. Head, mediation is a procedure in which a person acts as a "vehicle" to communicate between the parties so that their views on the dispute can be understood and possibly reconciled. However, the primary responsibility for achieving peace remains with the parties themselves.¹⁸ In practice, the mediator speaks confidentially with each party as part of the mediation process.¹⁹

Mediation has a philosophical basis. This philosophy is the framework that mediators must understand in order to conduct mediation without deviating from the philosophy from which the mediation originated. David Spencer and Michael Brogan refer to Ruth Carlton's perspective on the five basic principles of mediation. These five principles are known as the five fundamental concepts of mediation. These five principles are²⁰; (1) The principle of confidentiality, which means that only the parties and the mediator attend the mediation process, while other parties are not allowed to attend the mediation session.²¹ (2) The principle of volunteerism, Each conflicting party comes to the mediation of their own free will voluntarily and without coercion and pressure from other parties or outsiders. This principle of volunteerism is built on the basis that people will want to work together to find a solution.²² (3) The principle of empowerment is based on the assumption that people who want to come to mediation

¹⁷ Abbas, *Mediasi Dalam Hukum Syariah, Hukum Adat, Dan Hukum Nasional*. h. 2.

¹⁸ Jonh W. Head, *Pengantar Umum Hukum Ekonomi* (Jakarta: ELIPS, 1997). h. 42.

¹⁹ Gatot Soemartono, *Arbitrase Dan Mediasi Di Indonesia* (Jakarta: Gramedia Pustaka Utama, 2006). h. 120.

²⁰ John Michael Hoynes, Cretchen L. Haynes, and Larry Sun Fang, *Mediattion: Positive Conflict Management* (New York: SUNY Press, 2004). h. 16.

²¹ Takdir Rahmadi, *Mediasi Penyelesaian Sengketa Melalui Pendekatan Mufakat* (Jakarta: PT RajaGrafindo Persada, 2011). h. 22.

²² Saladin Tomy, "Penerapan Mediasi Dalam Penyelesaian Perkara Di Pengadilan Agama," *Mahkamah: Jurnal Kajian Hukum Islam* 2, no. 2 (2017): 146–61, <https://doi.org/235/mahkamah.v2i2.2034>. h. 155.

can negotiate their problems and reach the agreement they want.²³ (4) Principle of neutrality: In mediation, the role of the mediator is only to facilitate the process, and the mediation content remains the property of the parties to the dispute. The mediator is only authorized to control the mediation process. In mediation, the mediator, unlike a judge or jury, decides whether either party is right or wrong, supports the opinion of either party, or imposes its opinion and agreement on both parties.²⁴ (5) The principle of unique solutions. Solutions resulting from the mediation process do not have to meet legal standards, but can result from a creative process. Therefore, the outcome of mediation can be in accordance with the wishes of both parties, which is closely related to the concept of empowering all parties.²⁵

Optimizing Mediation in the Settlement of Marriage Disputes in Court

Marriage is a substantial contract (*mitsaqan ghalidzan*) between a man and a woman to live together based on the provisions of sharing as a form of worship to Allah.²⁶ *Marriage* is an agreement born from the desire of a man and a woman to live together in the bond of a contract.²⁷ As a strong and holy contract, it is hoped that husband and wife can live happily and eternally, but in the reality of the lives of husband and wife, many household lives are shaky or disharmonious and because they experience prolonged disputes and quarrels for various reasons such as non-fulfillment of rights and obligations in the household and violence. The result leads to the termination of marital relations or divorce. Divorce cases include contentious²⁸ cases and are characterized by emotional disputes.²⁹ In a divorce case dispute, the obligation

²³ Abbas, *Mediasi Dalam Hukum Syariah, Hukum Adat, Dan Hukum Nasional*. h. 29.

²⁴ Lina Nur Anisa, "Implementasi Prinsip Neutrality Dalam Proses Mediasi," *Al-Mabsut: Jurnal Studi Islam Dan Sosial* 9, no. 1 (2015): h. 9.

²⁵ Ahwan Fanani, *Pengantar Mediasi (Fasilitatif), Prinsip, Metode, Dan Teknik* (Semarang: Fakultas Tarbiyah IAIN Walisongo, 2012). h. 29.

²⁶ Akhmad Kamil Rizani and Baitul Dawiyah, "Concept Hifz An-Nasl in Ticak Kacang Marriage , Dayak Siang Traditional," *Al Qalam: Jurnal Kajian Keislaman* 40, no. 1 (2023). h. 26

²⁷ Vijay Malik, *Muslim Law of Marriage, Divorce and Maintenance* (Delhi: Eastern Book Company, 1988). h. 111.

²⁸ A contentious case is a case in which both parties to the dispute face each other, also known as a lawsuit. Mukri Arto, *Praktek Perkara Perdata Pada Pengadilan Agama* (Yogyakarta: Pustaka Pelajar, 2008). h. 41.

²⁹ As is well known, there are 3 characteristics of disputes, namely: 1) Formal, is a dispute about a legal norm or the legal status of a particular object in dispute, in this case the ultimate goal is legal certainty. 2) Material / material, peace means reaching an equal perception (agreement) about the division of rights to objects, estimation of value or price, fulfillment of obligations between parties, or further resolution. This can occur in disputes over inheritance, grants, wills, shadaqah, joint property in marriage. In this case, the goal is a sense of justice. 3) Emotional, then peace means reaching an

to reconcile the parties is imperative, as a burden required by law/law to the judges who examine, hear, and decide the case.³⁰ Therefore, this reconciliation effort must be carried out thoughtfully and optimally.

The teachings of peace that characterize the Indonesian nation become an embryo in the judicial system. Before conducting an adjudicative settlement, the court must always invite the parties to reconcile. This is based on: 1) HIR Article 130 (Article 154 RBg, Article 31 Rv). 2) Law No. 1/1974, Government Regulation No. 9/1975, Law No. 7/1989, and KHI. 3) SEMA No. 1 Year 2002 (Ex Article 130 HIR/154 RBg) and Discussion Results of Commission II of MARI's limited Rakernas. 4) PERMA No. 2 Year 2003, then revised through PERMA No. 1 Year 2008; the last revision came out through PERMA No. 1 Year 2016 concerning Mediation Procedures in Court. The Supreme Court has changed the paradigm of adjudicating to resolving legal disputes. The settlement of civil disputes through litigation has been abandoned in favor of Alternative Dispute Resolution (ADR) (mediation). The form of this change was carried out by issuing Supreme Court Regulation (PERMA) No. 2 of 2003, then revised through PERMA No. 1 of 2008, and finally revised through PERMA No. 1 of 2016 concerning Mediation Procedures in Court.

PERMA No. 1 of 2016 is an improvement or revision of PERMA No. 1 of 2008. The changes were made for several fundamental reasons, especially concerning the issue of time and measuring the goodwill of the parties to mediate in court. Several essential things distinguish PERMA No.1 of 2016 from PERMA No.1 of 2008 on mediation:

1. The time limit for mediation is shorter, from 40 to 30 days from the date of the order to conduct mediation.
2. There is an obligation for the parties (in person) to attend the Mediation meeting directly with or without being accompanied by a legal representative unless there are valid reasons, such as health conditions that do not allow attendance at the Mediation meeting based on a doctor's certificate; under guardianship;

agreement to forgive each other, respect each other, or appreciate and help each other so as to recreate a peaceful, harmonious, orderly and peaceful living relationship, because they will live in harmony again in the household. In this case, the divorce case. M. Yahya Harahap, *Hukum Acara Perdata (Gugatan, Persidangan, Penyitaan, Pembuktian, Dan Putusan Pengadilan)* (Jakarta: Sinar Grafika, 2006). h. 192.

³⁰ Jaih Mubarak, *Peradilan Agama Di Indonesia* (Bandung: Pustaka Bani Quraisy, 2004). h. 123.

having a residence, residence or position abroad; or carrying out state duties, professional demands or work that cannot be abandoned.

3. The most recent thing is the existence of rules on Good Faith in the mediation process and the legal consequences of parties who do not act in good faith in the mediation process.³¹

It can be seen from several provisions by applying a law in optimizing the mediation process to become effective in its implementation. First, Law Enforcement. The Supreme Court is authorized to regulate judicial proceedings that have not been sufficiently regulated by judicial legislation, so for the sake of certainty, order, and smoothness in reconciling the parties to resolve a civil dispute, it is deemed necessary to establish a Supreme Court Regulation, namely PERMA No. 1 Year 2016 as one of the faster and cheaper dispute resolution processes. Mediation in the court process can be an effective instrument to overcome the accumulation of cases in court. Second, is the role of the mediator. Mediators referred to in this PERMA are mediators who carry out their duties in the court; mediators who serve in the court can come from Judges in the Court or mediators from outside the court but must have mediation skills and are certified as mediators. Mediators from judges are judges with mediation skills obtained through many trainings, while mediators from non-judges have attended the Special Education for Professional Mediators (PKPM) organized by an institution accredited by the Supreme Court of the Republic of Indonesia.³²

Third, the Parties. In legal awareness, the binding force is the two parties' awareness. Public compliance in implementing a law has a crucial role because the law without a society that is aware of the law will make the law not run well. As much as possible, the two parties must cooperate, meaning they do not prioritize their egos. The provisions in Marriage Law Number 1 of 1974, Article 39 states: (1) Divorce can only be carried out in front of a court session after the court concerned has tried and failed to reconcile the two parties, (2) To carry out a divorce there must be a sufficient reason, that the husband and wife will not be able to live together as husband and wife. Based on this article, reconciliation occurs if the husband and wife are back together

³¹ Mahkamah Agung, "Peraturan Mahkamah Agung No. 1 Tahun 2016 Tentang Prosedur Mediasi Di Pengadilan," Pub. L. No. 1 (2016).

³² Beni Ashari, "Peran Mediator Dalam Perkara Perceraian (Studi Solusi Konflik Rumah Tangga Di Pengadilan Agama Jember)," *Mabahits : Jurnal Hukum Keluarga* 1, no. 2 (2020). h. 83.

(not separated). Another alternative to peace is if the peace to get along again is unsuccessful, but the parties agree to peace in the matter of assessors, such as the issue of iddah maintenance, mut'ah, maintenance rights and child maintenance, and division of joint property.³³ Fourth, legal culture, these are abstract conception values regarding what is good and what is wrong. These values are norms or rules that contain patterns of human behavior. Islam also teaches ethics that must be followed by each adherent and establishes prohibitions that must be avoided by each husband and wife so that harmony can be maintained forever. It even regulates the way out if there is a dispute between husband and wife so that they avoid divorce. Although divorce is permissible as a last resort if the two cannot be united anymore, it is a despicable act, as mentioned in the Hadith: The most hated lawful thing by Allah is divorce. This tightening of divorce contains a pearl of profound wisdom because if this divorce is easily implemented and even repeatedly, the sacred value of marriage will be reduced. Similarly, divorce contributes significantly to the problems of children left behind by one of their parents.³⁴

Conclusion

Islam makes marriage a grand agreement between husband and wife to form a prosperous family (sakinah, mawaddah, and rahmah). This implies that the integrity of the family must be intact and maintained. When various problems lead to divorce, mediation as a peace effort in marital disputes must be done optimally. Several things are considered in optimizing the implementation of mediation, namely the aspect of law enforcement, in this case, the issuance of PERMA No. 1 of 2016 as one of the effective instruments in the dispute resolution process that is faster and cheaper. In their duties to mediate, mediators can be carried out by judges or non-judges with mediation skills, as evidenced by certification as a competent mediator. The parties, as interested persons, are expected to be able to cooperate reasonably in the dispute resolution process. Legal culture creates peace and order and upholds the law based on honesty, truth, and justice.

³³ Muhammad Saifullah, "Efektivitas Mediasi Dalam Penyelesaian Perkara Perceraian Di Pengadilan Agama Jawa Tengah," *Al-Ahkam* 25, no. 2 (2015): 181, <https://doi.org/10.21580/ahkam.2015.25.2.601>. h. 192.

³⁴ Masykuri Abdillah, *Islam Dan Dinamika Sosial Politik Di Indonesia*, (Jakarta: PT Gramedia Pustaka Utama, 2011). h. 215.

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