

# The Settlement Principles of Divorce through Mediation

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**Abstract-** This paper concerns the principles of mediation in the resolution of disputes in the Religious Courts. Settlement of divorce in a religious court is a part of the procedural procedure in a religious court because divorce case is part of civil law. The settlement follows civil procedural law in general in addition to other provisions stipulated in the procedural law of religious justice. Mediation in a divorce case will assist the parties in resolving and finding a middle ground for the interests of both sides so as not to harm one party and ended up with a win-win solution (mutually beneficial). For this reason, it is necessary to pay attention to the principles in achieving peace efforts, namely; the principle of deliberation, the principle of mutual forgiveness, the principle of respecting others, and the principle of justice.

**Keywords—** Divorce, Mediation, Principles

## I. INTRODUCTION

Completion of civil cases in the courts before the case examined by the council judges must first go through mediation as mandated by Article 130 HIR (Het Herziene Inlandsch Reglement), Reglemen Indonesia which were refurbished, and Article 154 Rbg. (Tot Regeling Van Het Rechtsuezen Regulations in DE Gewesten Buiten Java En Madura). The procedure of law regulations for outside Java and Madura states that the judge must first reconcile the parties before the case is examined. It is related to the provisions of the obligation to take a peaceful effort reinforced by Article 4 of the Supreme Court Regulations of the Republic of Indonesia, concerning mediation procedures in the court. Paragraph (1) states "All civil disputes submitted to the court include a case of resistance (verzet) on the decision of verstek and the resistance of the litigants (partij verzet) as well as a third party (daden verze) for the implementation of decisions that have permanent legal force, must first be sought through mediation unless otherwise stipulated based on this Supreme Court regulation.

The result that will be achieved in mediation is the achievement of an agreement between the parties related to the provisions of dispute resolution which are realized in the form of a text and arranged in a peace deed. It is as mentioned in the general provisions of Article 1 of the Republic of Indonesia Court of Justice Regulations, Number 1 of 2016, number (8) which states that a peace agreement is an agreement resulting from mediation in the form of a document that contains provisions on dispute resolution signed by the parties and the mediator.

Based on this description, in mediating divorce, the success of mediation does not lie in the success or failure of stopping divorce. This is because actions that lead to advice on household cases are part of the task of the Marriage Counseling and Preservation Advisory Agency (BP4) as an Islamic community organization in partnership with the ministry of religious affairs. Therefore, mediation in divorce cases must contain important substance that will be undertaken by both parties as a legal consequence of divorce. Thus, mediation is not seen as formal legality to fulfill court proceedings in court but has a contribution in the settlement of divorce.

Every dispute resolution in court requires peace efforts first through mediation. It must start a case that will be examined in court. The mediation is expected to be a media of peace from the parties to the litigation, which in the end the parties can clarify the problem that triggers the dispute. It is guided by a mediator and ends in an agreement that can produce a win-win solution because mediation is based on a consensus approach and the consensus of the parties [1].

## II. FINDINGS AND DISCUSSION

### A. Understanding Mediation

Mediation is a way to clarify an issue that ultimately the parties have trust in each party [2] while according to Basuki Rekso, Supreme Court Judge, "Mediation is a controlled negotiation [3]. Juridical notion of mediation can be found on the Supreme Court Regulation No. 1 Year 2016 about the mediation procedure in the Court on the general provisions of Article (1), Mediation is a way to end the dispute through the negotiation process to obtain the agreement of the parties, assisted by the mediator.

The scope of the mediation meeting material covers first, the negotiation material in mediation is not limited to posita and petitum claim . Second, the event of a mediation agreement outside the regulation in posita and petition the plaintiffs amend the lawsuit to include the agreement in a lawsuit.

Manifestation of mediation efforts is the occurrence of peace between the disputing parties. Islam is very appreciative of peace efforts because after all peace is one of the basic human needs which is only realized through harmonious interaction between humans so that when humans are disputed naturally

the signal of human harmony interaction begins to crack. That is why harmonious interactions are important.

The Prophet's call for not applying *dzolim* to *kafir dzimmi* as in a hadith " Who kills non-Muslims/*Kafir Dzimmi* who is bound by treaties with Muslims, then he will not smell the fragrance of heaven. Indeed the fragrance of heaven can be smelled from a distance of forty trips (in the world) (HR. Ahmad, al Buchori, al Tirmizi, and Ibn Majah).

Allah gives directions or instructions related to peace, as His words in the Qur'an Surah Al Hujarat verse 9:

"And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly." (QS.AL Hujarat; 9)

The position of the reconciler gets a commendable place according to the words of Allah's Messenger that the degree of the reconciler of two quarrels exceeds the degree of the person who fasts circumcision and *qiyamul lail*:

"Would you like to let me tell you the main practice and the fasting of the sun, prayers and be humble? The companions answered "yes" He answered, who reconciled the two parties in dispute, and the damage to the relationship could cut religion. " (Ahmad Ahmad, Abu Dawud, and Tirmidz and disputed by Shaykh Al Bani)

Peace is a legacy of the Prophet, in the history of Islamic propaganda the development of Rosullullah has sought several forms of peace namely; Peace Hudaibiyah, Medina Charter, Laying Back the Black Stone.

#### *B. Principles for settlement of divorce disputes through mediation*

Forum dispute resolution of a divorce juridical normative is the authority of the judicial institution of religion so that a settlement out of court only serves as a medium to promote peace between the parties in the form of institutional institutions. This peace can be a family council, or customary deliberation. The mechanism is as follows; mediation, negotiation, facilitation, and arbitration[4]. In resolving disputes through mediation, the most important thing is the agreement of the parties to the dispute to end the dispute [5].

While the principles that should be stated in mediating their relevance to divorce disputes are:

The deliberation principle. The substance of this principle is the achievement of an agreement between the two parties to end the dispute. It requires the openness of each party so that the mediator can help unravel the problems that are the trigger and try to refer back

The principle of mutual forgiveness. In mediating the willingness to give forgiveness is fundamental. Therefore, if each party is difficult to be reconciled, the role of the mediator is required to guide those who conflict to realize and accept each other's mistakes which lead to forgiveness.

The principle of respecting the rights of others. In the process of mediation, respecting the interests of others is

needed. Each party in mediation should avoid the nature of selfishness, self-righteousness, antipathy to the statements of others, intolerant (not giving a chance) to opponents. The mediator's role is to guide the parties to give each other opportunities to speak, express opinions and listen so that such conditions will make the situation conducive and each party feels respected for their rights.

The principle of justice, the resolution of divorce disputes through mediation that ends successfully so that each party is committed to reconciliation which is not easy as turning the palm. Although the percentage of success is very small, there are still achieving success even though not much. If mediation meets failure, the role of the mediator is demanded to enlighten each party. Regarding the existence of rights and obligations as a legal consequence of the divorce case, it helps the mediator to formulate rights and obligations fairly and can be accepted by both parties, for example: mediate on child custody, mediate on item demands other than divorce claims, and mediate on other items outside the *posita* and *petitum* lawsuit.

Article 31 of the Supreme Court Regulation number 1 of 2016 mentions that mediation of divorce cases is needed in a religious court environment where divorce claims are accumulated with other demands. If the parties cannot reach an agreement to live back together, then mediation continues on other demands. The others can only be executed after the court decision has permanent legal force, as well as mediating on items outside the *posita* and *petitum* of the lawsuit.

As stated in article 25 PERMA NO 1 of 2016, the material for negotiations in mediation is not limited to *posita* and *petitum* claims. Therefore, there is still the possibility of other materials other than those demanded in the lawsuit letter. In the case of divorce, the material leads to the legal consequences after a prison such as entry to child custody, maintenance and education costs of children. It also includes the cost of living for the ex-wife, to determine *iddah* livelihood, *mut'ah*, determine the type of property both shared and inherited assets.

#### IV. CONCLUSION

The settlement of divorce through mediation should ideally be to restore the harmony of family ties that have been broken and will lead to divorce. Therefore, several principles are needed that must be used as a basis for the mediation process to run optimally; principle of deliberation, principle of mutual respect, principle to forgive each other, and principle of justice. Although peaceful efforts to restore harmony in marriage do not produce many results, the mediation process still contributes mainly to reducing matters related after divorce decisions have permanent legal force. For example, related to the responsibility of caring for and educating children, provision for the ability to provide for a living, division of assets, etc.

#### SUGGESTION

Mediation is a process that must be taken in examining cases in religious courts, howbeit the mediation stage must be optimized in such a way that it can make a valuable contribution to settling divorce disputes in religious courts. Law enforcement officials should be committed to assisting the settlement of such disputes. It does not stop with the failure to restore the integrity of a broken household, but it is wiser \ to respond to the divorce case so that the purpose of meditation, which is a win-win solution, can be felt by the parties to the dispute.

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