

Role of Mediator in Medan Religious Court in Reducing the Number of Divorce from 2016 to 2018

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Abstract

Every year The Religious Court of Medan has a high number of divorce case. It has been proven from the data revealed by the court. From January 2016 to June 2018, there are 7.443 divorce cases. From that number, only 19 cases can be solved through the mediation process. Mediation process is a process which will be conducted before the trial start. In this process all parties, husband and wife will be invited by the court to come and meet each other in a room. This mediation process will be facilitated by a Mediator. In this process both parties will do a discussion about their family, their problem, and their will. This process is a way which is initiated by the government to complicate the divorce process and reduce the number of divorce case. Furthermore the government hope that through this process, both parties who have had a discussion will think twice about the impact and the result of divorce, and try to solve the problem through discussion not divorce. Mediation Process is set in the Indonesian Supreme Court Law (PERMA) Number 1 of the year 2016 about Mediation. From the fact above, there is a fact that the mediation process does not work functionally. This research will show the obstacles which are faced in the mediation process. In the other side this research will also analyze the role of Mediator in the Mediation process at The Religious Court of Medan.

Keywords: Marriage, Divorce, Mediator, Mediation, Obstacle

1. INTRODUCTION

Human is a social being (*zoon politicon*) which means human always live together with other human in their social life and construct a social community together. One of the smallest forms of living together by human is family. Family is formed because of marriage. Marriage is one of the dimensions in human life. Because the importance of marriage, many stakeholders impose certain rules for it including religions, tradition and state (Marini, 2018). Those stakeholders create rules of religion which is used in society's life.

Tradition or religion explains that marriage is one of sacred things and happens eternally. Every religion in Indonesia believes that marriage has important and holy meaning; purposed to achieve happiness and welfare as a family. Indonesian has its national law for marriage. This law imposes the principle and the legal standing which used as the orientation which obtain for all layer of society (Saleh, 1976). The Indonesian National law of marriage named *Undang-undang Nomor 1 Tahun 1974* (Act Number 1 of the year 1974 which also known as UUP (Sudarsono, 2005).

Based on the content in UUP, marriage means there is physical and spiritual bond between a husband and a wife. In Islam, marriage is not only about matrimonial bond like as mentioned on article 26 of Indonesian Civil Code (*KUHPerdata*). Marriage has also sacred value. Marriage falls the divorce phenomenon. It means that marriage is not able being separated with divorce. Every husband and wife surely don't want or even make a plan to have a divorce. Divorce is part of marriage termination which is stated in article 30 of UUP or in *KUHPerdata* (Indonesian Civil Law Wetboek) called as the dissolution of marriage as mentioned article 199 of *KUHPerdata*. One of the principles in National Marriage law which is in line with the religion value is to complicate the process of divorce in order to prevent the failure to achieve the marriage goal. It is to create a happy, prosperous and eternal family. Therefore divorce will only being approved by the law if only there are reasons to do it like what UUP regulates. The reason to have a divorce already being enacted in UU. It becomes conditions that have to be fulfilled when a husband or a wife want to purpose a divorce.

Based on Mark Cammack Research in 1950, the number of divorce case in South East Asia including Indonesia can be classified as one of the highest in the World. In that decade, 50 out of 100 marriages end up with divorce. But in 1970 until 1990, the number of divorce the rate of the cases in Indonesia decreases significantly and back to increase since 2001 until 2009 (Hermansyah, 2017). Medan Religious Court noted that from 2016 to 2018, at least there are 7.443 divorce cases based on their own internal data. From 7.443

divorce cases, there are only 19 cases which are solved through mediation process. It means only 0,2 % from the total number of divorce cases can be solved by mediation process.

2. LITERATURE REVIEW

2.1. Mediation Process

The law obliges that every divorce case which is processed in the court to follow the mediation process before it enter the main court hearing session (Cheevers, 2020). Mediation process is facilitated by a Mediator. The role of Mediator is really important for a divorce process (Elsaman, 2020). It is because the mediator have to create a good communication with the one who want to have a divorce in order to be able to take a good decision for the problem (Hakimi, 2020). The success of a Mediator depends on the mediator themselves; whether the mediator act actively in the mediation process or not. If mediator fail act actively in the mediation process we can conclude there is something wrong on it. This research goal is to find the problem and solution which is hopefully can help to reduce the number of divorce case which also become the focus of this research.

Marriage is a sacred institution but the number of divorce case in Indonesia keeps increasing, which shows the contradiction between the value and goal of marriage with the divorce fact (Umar, 2020). Every divorce case should come through mediation process. Mediation is a way to solve the problem through discussion to have an agreement which is helped by a mediator (Murni, 2020). The role of mediator is really crucial and can impact to the number of divorce case. It is because when a mediator can actively act in the mediation process and reach a ~~same~~-common understanding with husband and wife, the divorce problem will not go further and the family problem will be solved through the mediation process. When the mediator is unable to actively act in the mediation process there is a big possibility that the mediation will be failed and there is a problem on it. Although the mediation process is hoped as the way to reduce and to refrain the divorce case number but in the fact, the mediation process fail to fulfill the hope. The following questions will be answered through this research by analyzing how the role of Mediator in Medan Religious Court in order to reduce the number of divorce case, and what are the obstacles which are faced in the mediation process of a divorce case in Medan Religious Court.

3. RESEARCH METHOD

A normative legal research and an empirical approach were used in this research by focusing on the primary data which was supported by secondary and tertiary data to analyze how the implementation or the actualization of positive law in certain law phenomenon. This focus is to make sure whether the result of implementation of the positive in society life is suitable with the law purpose or not based on its specifications, its is categorized as an normative empirical research the data that used in this research was collected through direct observation and interview to the society members who are facing the divorce case in The Religious Court of Medan (Medan Religion Court).

4. DISCUSSION

4.1. The Role of Mediator in The Divorce process in The Religious Court of Medan

The word “mediasi” is derived from an English word “mediation”, meaning the settlement of disputes involving a third party who acts as intermediary, or dispute settlement by means of mediatory (Usman, 2003). The mediation term etymologically originated from the Latin word “mediare”, which means “being in the middle”. The significance refers to the role of the third party who acts as a mediator in carrying out duties of mediating and resolving the dispute of the parties. “being in the middle” connotatively means the mediator must be in a neutral, impartial position in effort of the dispute settlement (Abbas, 2009). The mediator must be capable of fairly and conscionably maintaining each party’s personal interests, resulting in reliance from the disputing parties.

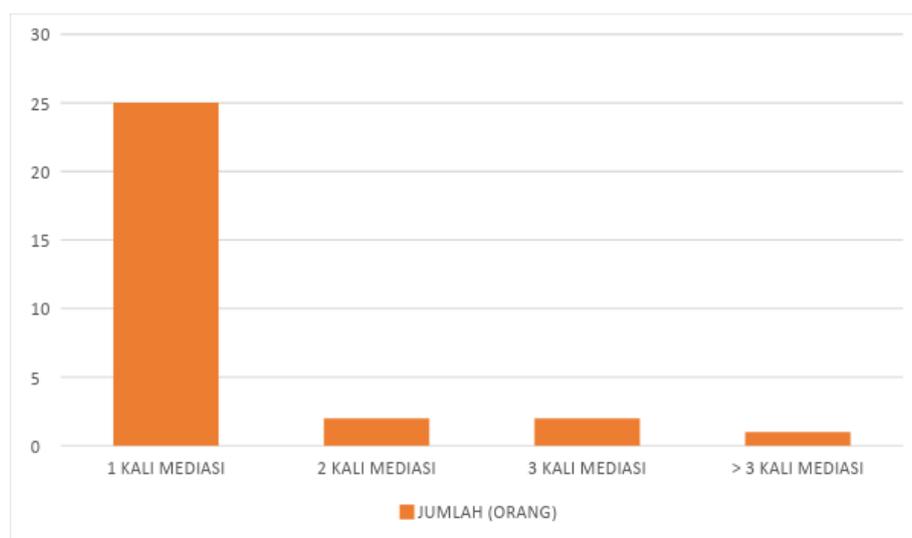
Judicially, the definition of mediation is regulated in section 1 of article 1 of Supreme Court Regulation No. 1 of 2016 on the Mediation Procedure in Court (PERMA No. 1 Tahun 2016), the definition is firmly stated as “a method of resolving disputes through the means of a negotiation process intended to obtain both clients’ agreement with the assistance of the mediator (Republic of Indonesia, 2016). Mediation in The Religious Court is conducted based on the command from the panel of judges on the 1st day of the case-hearing process. In that same process the judges explain the existence of a legal obligation of the disputing parties to mediate before the court proceedings, whilst providing the option to choose which mediator will lead and facilitate the mediation.

In the process of mediation, a mediator acts as a party who mediates the parties in a mediation process, having the “independent” nature which means the mediator will not take sides and will behave impartially during the mediation period. In carrying out the duty, the mediator has a freedom in deciding which method will be used in the mediation process. In common practices, the mediator will use a general method of mediation or instead caucus meeting in carrying out the mediation process. The general method seeks to arrange a meeting and bring together the disputing husband and wife concurrently, whereas the caucus method (individual sessions) arranges separate meetings with each of the clients at a different time (Rofikoh, 2020). In general, the mediator will ask questions or let the disputing parties to have a dialogue regarding their divorce plan. At this point, the mediator has a role in sharing advices, other conflict resolution alternatives, and reminding the parties of the afterward consequences of a divorce (Sulistiyono, 2019). The mediator cannot interfere in their plan of divorcement agreed by both of the parties, due to its independent nature and role of solely mediating the process.

4.2. The Obstacles Encountered by Mediators in Divorcement Process in The Religious Court of Medan

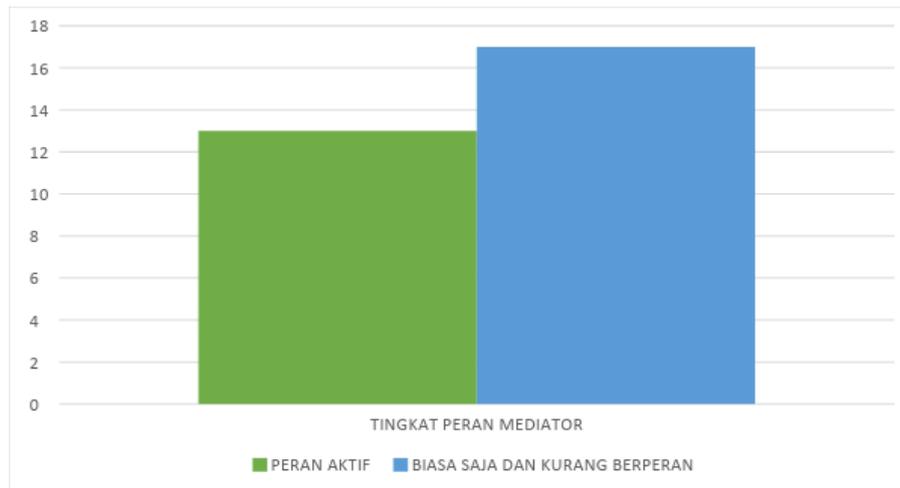
A mediation process as regulated by Supreme Court Regulation No. 1 of 2016 on Mediation Procedure in Court in section 2 of article 24 states that the mediation process last at no longer than 30 (thirty) days since the establishment of the court order to perform mediation. In section 3 of article 24, it is mentioned that based on the agreement of the disputing parties, the length of time for mediation is extendable for a further of 30 (thirty) days since the expiration of the period as mentioned in section 2. Therefore, the maximum time period for a mediation process is 60 (sixty) days long. In carrying out the mediation process, obstacles are frequently present which in the end greatly hinder the process itself.

Based on the questionnaire that was given to disputing parties present at The Religious Court of Medan, it was found that the summoning of the clients carried out by the court for mediation was done by 1 (one) time only then it was proceeded by litigation process. It was mainly caused by the absence of a party by the time of mediation. It can be concluded from the explanation that mediation becomes less effective together with the ineffectiveness of the mediators’ roles, for a one-time summoning is highly unlikely to result in reaching an agreement. Based on an interview with a mediator from The Religious Court of Medan, H. M. Dharma Bakti Nst., S.H., S.E., M.H stated that at the first meeting of mediation, many couples going through the process of divorcement were in the state of being too emotional, causing them to be unwilling to come to an agreement. In comparison with the Supreme Court Regulation No. 1 of 2016 on Mediation Process in Court, which mentioned the time given for mediation is 30 days long and is extendable by the agreement of the parties, it clearly proves that the provided time cannot be utilized to the fullest to conduct mediation. Hence a conclusion could be drawn that there is a tendency to expedite litigation process, neglecting the importance of mediation. The following chart represents the frequency of mediations done by disputing parties.



Source : Interviews with Respondents in The Religious Court of Medan from July-August 2018

Figure 1. Frequency of Attending Mediation



Source : Interviews with Respondents in The Religious Court of Medan from July-August 2018

Figure 2. Respondents` Assessment of The Role of The Mediator in Mediation Process

Obstacles in Mediation Process

1. The Parties` lack of Good Faith

Many clients that have submitted a petition for divorce in The Religious Court of Medan no longer want to reconcile with their partner. Based on the statement from Mediator Affan Mukti, S.H., M.H. that clients going through divorce proceedings already had their firm will to divorce, presuming the mediation process merely as an act of formality. He further mentioned that this fact shows the lack of good faith in following the process.

2. The Parties` lack of knowledge

The parties are unaware of the purpose of mediation, and hence unwilling to be cooperative in following the process and assuming the process as insignificant. Therefore the disputing parties in The Religious Court of Medan tend to have no knowledge of the roles or the functions of a mediator. From the conducted research, it was found that the disputing parties in The Religious Court of Medan consider the process of mediation as important. This fact was built upon the results of interviews which had been done towards 30 respondents. 25 out of 30 respondents contend that mediation is a significant process in divorcement. However, this information is not directly proportional to the data obtained by interviews with the mediators, because there were 3 out of 5 mediators stated that there were many uncooperative clients who failed to understand the role of a mediator.

3. Ineffectiveness of The Less Applied Summoning The Parties for Mediation

From the data obtained through interviews with society members going through divorce in The Religious Court of Medan, 20 out of 30 respondents only received a one time summoning following with-the mediation process and no more than that. This indicates that the summoning supposedly done by the court has not been applied in an effective manner. As a matter of fact, a call forgery done by a bailiff was discovered

4. Intervening Lawyers

From the result of interviews with mediators from The Religious Court of Medan, it was found that the parties which are represented by their lawyers often ignore the process of mediation by reason of not receiving a big amount of honorarium if the dispute is settled at the mediation stage or at least not bigger than the amount they are paid for if the case ends with a divorce as a legitimate solution.

5. Egoistic Nature of the Parties to Divorce

Similar to the aforementioned reasons, the parties often become reluctant to follow the mediation process well or lacking in good faith. This is believed to be the outcome of a highly egoistic nature of each of the parties while in the middle of mediation and insisting to proceed with the divorce.

6. Insufficient Facilities for The Mediation Process

Based on the interview done with one of the mediators in The Religious Court of Medan, H.M. Dharma Bakti Nst., S.H., S.E., M.H., a factor that is also influential in conducting the mediation process is the availability

of the facilities in The Religious Court of Medan itself. The facilities referred to in this case being such as adequate rooms, children's playground, and other supporting facilities. Those are required in helping the mediation process run smoothly and well, resulting in the parties being able to comfortably and effectively follow the process.

5. CONCLUSIONS AND SUGGESTIONS

5.1. Conclusions

1. The Ineffective role of the mediators in a mediation process is a result of not taking the advantage of the length of time as regulated in Supreme Court Regulation No.1 of 2016 on Mediation Procedure in Court which provided as long as 30 days for mediation and in fact extendable for another 30 days with the consent of the parties. During the process, only few of the clients were summoned for more than once by the mediator. Meaning, the mediator did not fully utilize the given time which can possibly lead to the parties rethink thoroughly about their desire in continuing with the divorce. The very few numbers of caucus method implementation in spite of being the most effective method in finding the point of agreement between the parties.
2. Obstacles encountered in effort of conducting the mediation process are as follows :
 - a. The Parties' Lack of Good Faith.
 - b. The Parties' Lack of Knowledge regarding mediation, resulting in uncooperative attitudes in following the process and assuming the process as insignificant.
 - c. Summoning The Parties for Mediation is less applied.
 - d. Ineffectiveness in Summoning The Parties for Mediation.
 - e. Egoistic nature or the Parties insisting to divorce.
 - f. Insufficient facilities for Mediation.

5.2. Suggestions

Based on the discussion and conclusions above, the suggestions which can be given are :

1. Based on the discussions above, it is advisable for the mediators righteously carrying out their duties to the fullest extent. The mediators equivocate the reasoning behind these occurrences being the reluctance of the parties in following the process, however, this research proves these actions wrong. This is due to the fact of the Supreme Court Regulation No.1 of 2016 on Mediation Procedure in Court regulations in the time given for the mediation process is 30 (thirty) days long and extendable for another 30 days with the consent of the parties. It can be concluded from this fact that a onetime summoning for the mediation process is not in accordance with the regulations, because the entirety of the time given is a maximum of 60 (sixty) days. Taking that into consideration, we would like to suggest the establishment of a Supervisory council to oversee the performance of bailiffs and mediators in which its structural arrangements could be guided by the structure of the Notary Supervisory Council. The referred council is amounted to 9 members, consisting of elements : a. government of 3 (three), b. Notary Organization for 3 (three) persons; and c. experts or academics as much as 3 (three) persons. This is done in order to optimize the role of the mediator acting as intermediary in a mediation process in an effort to reach an agreement and reconciliation.
2. The necessity for supervision of The Religious Court bailiffs and mediators in carrying out their duties. Because based on the facts found, in some cases in which the bailiffs who should have summoned the parties for mediation process did not directly summon them and immediately signed a statement letter that the parties were called but did not want to attend the mediation session. The mediator must play an active role in the mediation process; this suggestion was based on interviews with mediators which themselves acknowledge most mediators only play a passive role. This should be changed because the mediator should play an active role in the process of divorce proceedings in The Religious Court alongside with high expectations that active mediators would increase the number of divorce cases withdrawal and reduce divorce rates in the city of Medan. This active role can be attempted with various ways : first, if the disputing parties do not want to be called together in a joint session, the mediator can implement another mediation method which such as the caucus method. The purpose of this method is

so that mediators must not be rigid in effort of approaching the parties. This is intended to make the process work effectively. Second, socialization events dedicated to talk about mediation must be held by both the mediators the Religious Court. This is due to many parties who are following the process do not know what mediation is and its purpose. Therefore the socialization event is necessary, the initial steps that could be done including the installation of announcements talking about mediation and its purposes and aims in all across the environment of The Religious Court of Medan.

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