

HOW DIVORCE MEDIATION SHOULD BE GOVERNED

Sudirman L, IAIN Parepare
Islamul Haq, IAIN Parepare
Muhammad Ali Rusdi Bedong, IAIN Parepare
Nurhamdah, IAIN Parepare
Syafa'at Anugrah Pradana, IAIN Parepare
ABD. Karim Faiz, IAIN Parepare
Rustam Magun Pikahulan, IAIN Parepare

ABSTRACT

Practical reconciliation in a divorce case is part of the commitment and performance of judges, mediators and all related components in the Religious Courts. The purpose of this research is to initiate appropriate governance in divorce mediation. This study employs a qualitative method sourced from field data. The data are statistics on divorce occurring in South Sulawesi, Indonesia. It was found that the governance used in mediation consisted: first, pre-mediation related to the curriculum of mediators and partner development and second, mediation based on the level of relationship estrangement. This governance idea is expected to increase the success rate in reconciling the verge of divorce parties

Keyword: Mediation, Divorce, Reconcile, Marriage, Law, Religious Court, Dispute Resolution

INTRODUCTION

Divorce is a fairly complex problem. Families who have problems tend to keep the problems faced by their families a secret and try to solve themselves. In general, when the problem is chronic enough, it is also recognized that the advice by the Advisory Board for the Guidance and Preservation of Marriage and the reconciliation efforts carried out by the courts tend to be less methodological, less professional (Douglas et al., 2011). Fostering family life, counselling prospective brides and advising families with problems are essentially educational activities that change unfavourable conditions to better ones. For these activities, it is very appropriate to do it through education, persuasion, and psychology (Lukito, 2006).

Islam views that divorce must be tightened and is an emergency door that can only be taken if there is no longer a solution? In the marriage law regulations in Indonesia, divorce can only be carried out in front of a Religious Court trial, and even then, it must also be included with strong enough reasons (Hawkins, Willoughby & Doherty, 2012). Therefore, it is necessary to be careful to see the root of the problem that afflicts household shocks.

These problems are resolved peacefully and sometimes also continue continuously if each party maintains their individual opinions, and no one wants to give in, and each wants to win without seeking and thinking about the best way for the continuity of domestic life and happiness for so long. it has been built together. In addition, conflicts or disputes occur because the parties feel that their rights are not being fulfilled. They tried to claim that they had rights, but he did not get it (Allen & Hawkins, 2017).

For this reason, efforts to reconcile the parties in litigation carried out at each stage of the trial (Allen & Hawkins, 2017). However, because the situation of husband and wife litigation in the

Religious Courts has become very severe, the peace efforts so far have not brought many results, as evidenced by the accumulation of cases in court (Amato, 2010).

The effectiveness of peace in a divorce case is part of the commitment and performance of judges, mediators and all related components in the Religious Courts. Therefore, this study aims to formulate good governance in the mediation process to reconcile two parties who want to divorce.

METHODOLOGY

The type of research in this study is qualitative field research. As for location, the research is carried out at the Office of Religious High Court South Sulawesi Province d ith take the sample is a Religious Court of Makassar. Therefore, the object population (target) of this research is the Religious Courts in the Makassar KPTA area consisting of 24 Religious Court Offices from this amount. It is determined that the sample of data collection sources is part of the number and characteristics possessed by the population (Wahab, 2002). This research was conducted using the Proportionate Stratified Random Sampling technique, a sampling preceded by classification or strata followed by random sampling based on sample balance (Sujarweni, 2014).

The data collection method used in this research is observation or observation and interviews. The sources of data that the researchers will interview are PA (Religious Court) judges within the religious courts of the South Sulawesi province. Secondary data gathered through literature studies, reviewing sources of Islamic law, legislation, documents of the case, research results, scientific journals, scientific articles and conference papers relating to the object of research. The researcher's data analysis is that the collected data is selected and edited, then reduced by sorting it into a specific concept and category. Then the results of the data reduction are mixed and organized to become a perfect data formulation.

The data processing and analysis technique used is qualitative on primary data and secondary data. Furthermore, the data is constructed based on the content and structure of the discussion to obtain an overview of the concept of the judge's efforts to reconcile the divorce case in the South Sulawesi religious court.

RESULTS

Why does Divorce Reconciliation Tend to Fail?

Divorce cases, either through the mediation process or through the panel of judges who convened at the Makassar Religious Court class IA from 2017 to 2020, are illustrated in the following table.

No	Year	case accepted	Divorce Case	Divorce cases decided	Peace	Percentage
1	2017	3	4	5	6	7
1	2018	1,744	1,534	1,259	5	0.39%
2	2019	1,953	1,692	1,464	10	0.68%
3	2020	2015	1,805	1,435	11	0.76%
	amount	5,712	5,031	4,156	26	0.62%

Source of data from the Makassar Religious Court Registrar class IA.

The table shows that divorce cases dominate the number of cases received by the Makassar religious court. Divorce cases that were successfully reconciled during 2017-2020 only 26 cases out

of 5,031 divorce cases, or only around 0.62%. The lack of cases being resolved peacefully through peace efforts by the panel of judges cannot be separated, among other things, due to the lack of professionalism of the judges appointed to function as mediators in the courts where their respective duties are and the legal order that orders peace efforts are understood only as a moral obligation, not an obligation law.

The Ability of Panel Judges and Mediator Judges

The judges who hear cases and mediator judges who are good at managing conflicts and communicating to seek common ground between the parties will easily encourage peace. Therefore, the ability of a mediator will affect the success of mediation.

It also takes the foresight of the judge to reveal the problem. So is it between the parties and the judge's wisdom in providing a solution so that the parties succeed in resolving the problem peacefully and well (McKoski, 2010)?

Sociological and Psychological Factors

The social conditions of the parties will determine the success of the judge's reconciliation efforts. For example, a woman who sues for divorce from her husband will undoubtedly think about her livelihood, and that of her children after the court's decision for divorce is handed down. Likewise, those wives who do not have jobs or have no income will think again to file for divorce from their husbands for fear of living expenses in the future. However, for women who already have steady jobs and even sufficient income, the tendency to separate from their husbands is more substantial.

Marhumah, Justice Seeker at the Makassar Religious Court, Interview, July 15, 2020 at the Makassar Religious Court office who sued her husband for divorce in a religious court in her statement stated that:

“I went to the religious court with the aim of getting a divorce in front of the judge, because I was ashamed of my neighbors and family because I had suffered for a long time because of my husband's neglect of family economic responsibilities. This makes our household often quarrel, husband does not change his attitude even though he is often in the middle of the family.”

The psychological condition of the parties can affect the success of the judge's peace efforts at trial. A person who wants to separate from his partner must have felt uncomfortable, even physical and psychological suffering that lasted a long time. The greater the pressure on a person, the greater the desire to separate from his partner.

H. Muhtar Gani, Judge Mediator of the Watansoppeng Religious Court during an interview on March 25, 2020 stated that Internal factors from the parties, especially psychological factors, must be understood by judges because they can support the success of peace efforts.

Moral and Religious Quality

The good behaviour of the parties can make it easier for the judges of the panel to seek peace. However, bad behaviour can make one party not want to get back together because if he returns to the marriage bond, his life will worsen. Likewise, the level of quality of a person's religion affects the success of peace efforts (Currie, 2011).

The Good Faith of the Parties

When the assembly peace efforts and the mediation process take place, the panel and the

mediator judge act as mediators who try to reconcile the parties. However, no matter how good the efforts to reconcile will not succeed if it is not supported by the parties' good faith to reconcile and the awareness of each party of their shortcomings so that they can forgive each other and start living in harmony again. Especially the good faith of the Petitioner/Plaintiff to make peace and accept the Respondent/Defendant to live together (Durkheim, 2008). Strong Desire of the Parties to Divorce.

It often happens when the conciliation effort is made by the assembly of one party, even though both parties have an extreme desire to divorce. Their arrival to the Religious Courts usually occurs due to the unsuccessful efforts of peace made by the family. So this is what often makes it difficult for the assembly to seek peace (Alam, 2019).

There has been a Protracted Conflict

The conflict between the parties has been going on for a long time. When peace is sought, the parties' emotions cannot be suppressed so that the parties can no longer accept input from the assembly and feel that they are right on their own. It often happens that the Petitioner/Plaintiff cannot forgive the Respondent/Defendant, so that it is difficult to get along again (Taufik, 2021).

According to Hj. Sulastris Kasim Mediator Judge of the Sidrap Religious Court, Interview, 6 December 2019 that:

“Attempts to reconcile judges in divorce cases are seldom successful because: Plaintiffs when their case goes to a religious court are considered to be the last resort they have taken, even though they have never gone through mediation outside the court; Lack of time spent by judges in trying to do so; and the high volume of cases that must be resolved every day by judges”.

Prolonged complications between husband and wife make it difficult for them to be reconciled, so that going to the religious court is considered the last resort to solve the problem, namely legalizing the divorce.

Psychological Factors

A profound disappointment with his life partner often creates a sense of hopelessness in a person's marital relationship. So there is no other choice but to end the marriage (Nolan-Haley, 2012).

Then the judge did not understand the psychology of the parties so that it did not touch or arouse the parties' feelings to get along and peace again in fostering their household. Moreover, "Putting together a broken heart is much more difficult than putting together treasures." That is why efforts to reconcile judges in divorce cases are rarely successful. Unlike other civil cases, such as property cases.

Persuading the parties should be done with a psychological approach. However, the judge's provision of this knowledge is still minimal. However, this does not mean that this can be used as an excuse because religious judges must explore, understand and live up to the law that lives in society by increasing knowledge. It is very dangerous if the judge does not have sufficient knowledge (Tjersland, Gulbrandsen & Haavind, 2015).

DISCUSSION

How Should Reconcile Mediation be Managed

The procedure carried out by judges in making efforts to reconcile divorce cases formally is guided by the procedural provisions stipulated in the law, in particular Law Number 7 of 1989 in

conjunction with Law Number 3 of 2006 in conjunction with Law Number 50 of 2009 concerning Judiciary Religion and PERMA Number 1 of 2008 concerning Mediation Procedures in Courts.

Religious courts based on Islam are also guided by the Qur'an and the Sunnah of the Prophet. in pursuing peace. Efforts to make peace with the judge had been carried out in the first trial before the lawsuit. It seems irrational because how can the judge know and advocate peace when the judge himself does not know the case. Likewise, before the plaintiff reads out his lawsuit, the plaintiff can change his lawsuit (Shaydullin & Baranov, 2014).

The peace proposal can be made anytime, as long as the case has not been decided. However, the recommendation for peace at the beginning of the first trial is absolute or mandatory. It is included in the minutes of the session. There is an obligation to state so, even though it may be doubtful. There has also been peace, but mostly not in the congregation. If there is peace, it is made before the court. Its power is the same as the decision on cases that have occurred. The peace deed may no longer be submitted to a case except for new matters beyond that (Lukito, 2006).

The procedural provisions that apply in religious courts throughout Indonesia are the same legal provisions, so the process of peace efforts carried out by judges also refers to the same provisions. For this reason, the researchers found almost no difference in the statements of the judges at the research location.

The procedure and form of reconciliation sought by the judges are as stated by Deputy Chairperson of the Makassar Religious Court Class IA, Interview, July 15, 2020 at the Head of the Makassar Religious Court:

“The judge's first attempt was to present a husband and wife who are litigating divorce before the court to be advised by the chairman of the panel to make peace, if they cannot be reconciled then they are directed to go through a mediation process by choosing a mediator whose list of names is available at the Makassar PA office. And if mediation outside the trial is not successful, then reconciliation efforts are carried out in each trial by the assembly until the case has not been decided. It takes the form of the assembly advocating peace by explaining how much benefit they will get if they make peace.”

The enormous benefits of peace should encourage the peace effort seriously with various tactics and strategies that judges must carry out, but because the volume of cases handled by judges every day is so large that the time for peace efforts is not optimal. It was confirmed by Abdul Samad, Deputy Chairperson of the Polewali Religious Court, *Interview*, March 11, 2020 at the Polewali Religious Court office, as stated that:

“Actually, the judge explained how much benefit a husband and wife will get in court if they reconcile, but because they are already based on high emotions, disappointment from their partner and shame in their environment, they are difficult to reconcile. Besides that, the number of cases that come in every year is so large and the majority are divorce cases, so the time for the assembly to further explore the root of their problems is not optimal.”

Judges in seeking peace take several ways to arouse the feelings of husband and wife in litigation to want to make peace, as expressed by Muhtar Gani, judge of the Watansoppeng Religious Court, Interview, July 15, 2020 at the Watansoppeng Religious Court office, as follows:

"Procedures in divorce cases are examined in a closed manner, for that the assembly can use methods that are considered to be able to influence their awareness to make peace. Especially those whose reasons for divorce are based on continuous disputes between them, the panel is obliged to make serious efforts to their peace. One of the judges' efforts is to bring their child who is still a baby in court to arouse the husband's affection so that they return to harmony in building their household".

Judges in seeking reconciliation for husband and wife courts go through the procedures and procedures regulated in the law and the forms of effort to achieve peace, but because the volume of cases handled by the judges every day is too many and problems from the parties involved. Divorce cases are already very complicated, so the judge's efforts to achieve peace are mostly unsuccessful (Tjersland, Gulbrandsen & Haavind, 2015).

CONCLUSION

Failure to reconcile couples on the verge of divorce is caused by three main things: incompetent mediators, inadequate divorce management, and partner relationships that are too strained. For this reason, an appropriate mediator curriculum is needed to produce more capable mediators. In addition, cases received by the courts should be managed to be classified and identified for more appropriate treatment.

REFERENCES

- Alam, S. (2019). 'Reconstruction of marriage zonation in islamic law perspective'. *Legality: Jurnal Ilmiah Hukum*, 27(2), 161–176.
- Allen, S., & Hawkins, A.J. (2017). 'Theorizing the decision-making process for divorce or reconciliation'. *Journal of Family Theory & Review. Wiley Online Library*, 9(1), 50–68.
- Amato, P.R. (2010). 'Research on divorce: Continuing trends and new developments'. *Journal of marriage and family. Wiley Online Library*, 72(3), 650–666.
- Currie, A. (2011). 'Religious and cultural belief systems regarding death and the deceased body and their potential to impact upon forensic practice: Eastern religious belief systems and maori culture'. *Pathology*, 43(1), S25.
- Durkheim, E. (2008). *The elementary forms of the religious life*. North Chelmsford, Massachusetts: Courier Corporation.
- Hawkins, A.J., Willoughby, B.J., & Doherty, W.J. (2012). 'Reasons for divorce and openness to marital reconciliation'. *Journal of Divorce & Remarriage. Taylor & Francis*, 53(6), 453–463.
- Lukito, R. (2006). 'Religious ADR: Mediation in islamic family law tradition'. *Al-Jami'ah: Journal of Islamic Studies*, 44(2), 325–346.
- McKoski, R.J. (2010). 'Reestablishing actual impartiality as the fundamental value of judicial ethics: Lessons from Big Judge Davis'. *Ky. LJ. HeinOnline*, 99, 259.
- Nolan-Haley, J. (2012). 'Mediation: The new arbitration'. *Harv. Negot. L. Rev. HeinOnline*, 17, 61.
- Shaydullin, R.R., & Baranov, S.Y. (2014). 'Mediation in Islamic law (Sharia) and its use in some countries of the Islamic World'. *Herald Civ. Proc. HeinOnline*, 75.
- Sujarweni, V.W. (2014). *Metodologi penelitian: Lengkap, praktis, dan mudah dipahami*. Yogyakarta: Pustakabarupress.
- Taufik, A. (2021). 'The settlement principles and effectiveness of divorce by mediation of islamic civil perspective: A critical review of the supreme court regulation'. *Justicia Islamica*, 18(1), 168–188.
- Tjersland, O., Gulbrandsen, W., & Haavind, H. (2015). 'Mandatory mediation outside the court: A process and effect study'. *Conflict Resolution Quarterly. Wiley Online Library*, 33(1), 19–34.
- Wahab, R. (2002). 'Metodologi Penelitian Kualitatif'.
- Hj. Harijah Damis, (2020). Deputy chairperson of the makassar religious court, *Interview* at the Makassar PA office on July 15 2020.
- Marhumah, Justice seeker at the makassar religious court, interview, July 15, 2020, at the Makassar Religious Court office.
- Makka, A.H. (2020). Mediator judge at polewali religious court. *Interview*, April 8, 2020.
- Sulastri, K.H. (2019). Mediator judge of the sidrap religious court. *Interview*, December 6 2019.
- Makka, A.H. (2020). Mediator judge at polewali religious court. *Interview*, April 8, 2020.
- Abdul, S. (2019). Deputy chairperson of the polewali religious court. *Interview*, December 17 2019.
- Muhtar, G. (2020). Judge of the Watansoppeng Religious Court. *Interview*, July 15, 2020, at the Watansoppeng Religious Court office.