

CONTRIBUTING FACTORS OF MEDIATION FAILURE IN THE TRIBUNAL IN DIVORCE CASES

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ABSTRACT

*The purpose of marriage is to fulfill the everlasting family based on the Belief in the One Supreme God. But it turns out that things do not always go well, that the couple intends to break the marriage through litigation/tribunal. The absolute authority to adjudicate divorce cases rests upon the Religious Courts and the District Court. Both are the same tribunals of the same roof, which is the Supreme Court. The Supreme Court seeks to reduce the accumulation of cases by optimizing litigation mediation. Efforts that have been made is by enacting SEMA No. 1 of 2002 on the Empowerment of the Court of First Instance by Applying the Peace Institution, PERMA No. 2 of 2003 on Mediation, PERMA No. 1 of 2008 on Mediation and the last and still applied to the date is PERMA No. 1 of 2016. However, **the successful mediation process in peace in Semarang City is still very slight**. Thus, the author intends to examine on **Why mediation in Divorce cases tend to be unsuccessful?** This paper uses a qualitative approach to law. The type of this research is critical-sociological-juridical Paradigm and qualitative approach, which is a research using framework that criticize the existing policy (normative) while providing solution (sociology) with the research producing descriptive data in written or oral and behavior from observable population. This research was conducted in Religious Courts and Semarang City District Court. The results of the research found that: **Contributing Factors of Mediation Failure in Tribunal are caused by: 1) domination of Selfishness of both parties, 2) the parties agreed to decide on divorce, 3) Lack of good faith for reconciliation, 4) follow through Mediation as formality, 5) increasing sense of self-importance of the parties.***

Keywords: Divorce, Mediation

INTRODUCTION

The settlement of cases through mediation is initiated by jurists. The Supreme Court as a high institution is responsible for realizing the law on mediation. It holds several national work meetings discussing specifically the application of mediation in the judiciary. The results of the national work meeting resulted in some rules on mediation, such as SEMA No. 1 of 2002 on the Empowerment of Courts of First Instance in Applying the Peace Institution, PERMA No. 2 of 2003 on Mediation, and the last and still used to this date is PERMA No. 1 of 2008 on Mediation. Although the rules governing mediation have undergone several changes, the practice has not yet been fully implemented, as the dispute resolution is always settled through the court's verdict always terminating by winning and losing, that legal certainty is considered as disadvantageous to one of the litigants. Moreover, it is very rarely that the settlement of dispute is settled through mediation. In addition, the settlement of cases through judges' decisions is highly detrimental to the litigants, such as: (1) slow settlement of dispute; (2) expensive court costs; (3) unresponsive court; (4) Court rulings do not solve the problem; (5) Perplexing court rulings; (6) Court rulings do not provide legal certainty; (7) Generalist ability of the judge.¹

The success of mediation in the General and Religious Courts is still unsatisfactory. Data on the success of mediation in the General Court of 2014 reached only 5.3% (372 successfully mediated cases), and 6,674 unsuccessfully mediated cases out of 7,046 mediated cases. In Religious Courts have better success, reaching 24.73% (32,695 successfully mediated cases), 99,528 unsuccessfully mediated cases, out of 132.223 cases².

Based on the above description then the issue discussed was what is the Contributing Factor of Failed Mediation in the divorce cases?

Research methods

The type of sociological-juridical research in a critical paradigm is a study using a framework that criticizes the existing (normative) policy as well as providing solutions (sociological) with research that produces descriptive data in the form of written or oral words and behavior of people who can be observed including what contributing factors of failed mediation in

¹ Harahap, M Yahya. 2005. *Hukum Acara Perdata*. Jakarta: Sinar Grafika p.233

² Mahkamah Agung RI, 2014, *Laporan Tahunan Mahkamah Agung Republik Indonesia 2014*, Jakarta, Mahkamah Agung RI, p. 112

the divorce cases.³ Research was conducted in the Religious Courts and District Court in the Semarang city in accordance with the studied problems. The key person is judge at General Courts and Religious Courts.

Results and Discussion

The Mediation Process shall be conducted no later than 30 (thirty) days after the commencement of the order to mediate⁴.

Broadly speaking, mandatory mediation procedures include:

1. Pre-Mediation Stages
2. Stages of Mediation Process
3. Final Stages of Mediation Process

Pre-Mediation Stages

The plaintiffs to resolve their dispute register the lawsuit to the Court in accordance with the relative competence and absolute competence of the court. After the lawsuit is registered, the court will determine the date of the first hearing, and the plaintiff and the defendant will receive a court summons from the Court.

Based on Article 17 PERMA No. 1 of 2016, on a predetermined hearing day and in the presence of the Parties, the Judge who examines the Case obliges the Parties to pursue Mediation. The judge will also provide an explanation of Mediation. Thereafter, the Parties shall sign the Mediation Explanatory Form as evidence to have obtained a complete explanation of the mediation process.

Then, pursuant to Article 20 paragraph (1), the parties are given two working days to appoint a mediator. The selected mediator must have a certified mediator and be registered in a local court.

Based on Article 20 paragraph (3) PERMA No. 1 of 2016, if the 2-day time limits run out and they have not succeeded in appointing the mediator, the assembly shall appoint a mediator from the court that is the Judge who does not adjudicate the case.

The designated mediator then establishes the day and date of the mediation meeting. This is regulated in Article 21 paragraph (1) PERMA No. 1 of 2016.

Stages of Mediation Process

Based on Article 24 (1) of PERMA No.1 of 2016, the Parties subsequently submit a case resume within 5 days to be submitted to the mediator that the mediator can identify with the problem from the point of view of each disputant parties so as to assist the mediator in the mediation process.

Following the mediator establishes the date of mediation and accepts the respective case resumes, the mediation process is in progress. The duration of the mediation is 30 days from the commencement of the order to mediate. By virtue of the parties' agreement, the term of mediation may be extended to a maximum of 30 days. This was regulated in Article 24 paragraph (2) and (3) PERMA No. 1 of 2016.

Pursuant to Article 25 PERMA No. 1 of 2016, mediation negotiation material is not merely limited to what is stated in the lawsuit. If an agreement is reached for material not listed in the lawsuit, then the plaintiff may change the lawsuit by submitting the agreement. The purpose is to facilitate the parties to reach agreement.

In the event that the mediation process requires information from expert witnesses, such as for assessment or interpretation of the value of an asset, pursuant to Article 26 PERMA No. 1 of 2016, then the cost charged for the expert shall be borne by the parties and must be agreed in advance whether the expert witness is binding or not.

³Moleong, Lexy J. 2001. *Metode Penelitian Kualitatif*. Bandung: Remaja Rosdakarya hal 3

⁴ Article 24 paragraph 2 Perma No. 1 of 2016

Final Stages of Mediation Process

Pursuant to Article 27 PERMA No. 1 of 2016, in case that the mediation process succeeds, then the parties may decide to:

1. make a settlement agreement and be enforced by the settlement agreement through the decision of the panel of judges
2. the parties may request revocation of the lawsuit
3. partial change of lawsuit by the plaintiff and the remainder of the lawsuit continues in the proceedings or so-called partial mediation success.

Conversely, if the mediation process is unsuccessful, then the mediator will submit to the court along with the following reasons, among others⁵:

1. Mediation was timed out but had not yet reached the settlement agreement
2. Lack of good faith, i.e. failed to submit or respond to the case resume as well as sign the accepted settlement agreement for no legitimate reason

And if the mediation is not enforceable, then the mediator shall deliver in written to the panel of judges on the grounds, among others⁶:

1. The Parties have not resulted in an agreement for a maximum period of 30 (thirty) days following the extension
2. The Parties shall not be stated in good faith.

Utmost good faith is a key in the Mediation process. There are legal consequences if the parties are not well-off in the mediation process. Plaintiffs who have no good faith, their lawsuits are declared to be unacceptable (N.O)⁷ and are obliged to pay mediation costs. If the Defendants have no good faith then they shall pay the mediation costs⁸. If the parties, both the plaintiff and the defendant are declared to be lack of good faith then the lawsuit is stated to be unacceptable without the penalty of paying the mediation costs⁹.

The divorce cases in the mediation process tend to have low success rates.

Table 1
Number of Divorce Cases of Semarang District Court

Year	Number of Case	Successful Mediation	Percentage
2015	260	1	0,38%
2016	173	1	0,57%
2017	155	1	0,6%

Source: Semarang District Court, October 2017

Table 2
Number of Divorce Cases of Semarang Religious Court

Year	Number of Case	Unsuccessful Mediation	Percentage (%)
2015	224	0	0
2016	3114	12	0,39
2017	408	3	0,7

Source: Semarang Religious Court, September 2017

The percentage of successful mediation increases in 2017. However, the number is still relatively small.

⁵ Article 32 Perma No. 1 of 2016

⁷ Article 22 Perma No. 1 of 2016

⁸ Article 23 paragraph 4 Perma No. 1 of 2016

⁹ Article 23 paragraph 8 Perma No. 1 of 2016

The community is two or more legal subjects who are not the attorneys of the disputants and bring up their dispute to the court within the General Courts and Religious Courts in order to obtain a settlement. The parties are not the attorneys of legal subject in dispute, but the principal parties¹⁰.

The achievement of a settlement shall be based on the good faith of the litigants. This is because the mediation principles are win-win solution, rather than win or lose. High ego and interests of the parties can inhibit the realization of win-win solution. This factor often restrains settlement through mediation process in the court, even more when it comes to put the reputation of the litigants on stake. Some obstacles from the parties (read community) are as follows¹¹:

- a. It is often that one or both parties consider being self-righteous. Mediators find it difficult to get into trouble because of their uncooperative manner during mediation process. Moreover, self-centered attitude often arises in both parties¹².
- b. Before the parties enter the court hearing, they often agree to break the marriage bond¹³. Thus during the mediation process, it is dreadfully difficult even fail to reconcile.
- c. Communication of the parties has long been broken up. The dragging conflict has left both parties to be short of good faith for settlement¹⁴.
- d. Some parties are cooperative, but they do so that the mediation process quickly completed until it can be proceed to the next trial process. They follow mediation only as formality¹⁵.
- e. The sense of pride/prestige of the parties is increasing, that they quit giving in.¹⁶

Attitudes and manner of the parties indicate that, the divorce case is mostly dissimilar from other cases. The case of painful heart even resentment, the trampled self-esteem and dignity, even the 'disgrace' of which is overspread to the public, making the divorce case is more complicated than other cases to be mediated.

Conclusion

Contributing factors of failed mediation in the divorce case are mostly because the parties put forward egoism and prestige in the divorce case. Therefore it is hard to find settlement solution.

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¹⁰ Rachmadi Usman. 2012. *Pilihan Penyelesaian Sengketa Di Luar Pengadilan*. Bandung: Citra Aditya Bakti, p. 130

¹¹ Processed data, October 2017

¹² Interview with Judge Masyhudi, MH, 29 September 2017 in Semarang Religious Court

¹³ Interview with Judge Bakrie, SH, MHum, 9 September 2017 in Semarang District Court

¹⁴ Interview with Judge Masyhudi, MH, 29 September 2017 in Semarang Religious Court

¹⁵ Interview with Judge Bakrie, SH, MHum, 9 September 2017 in Semarang District Court

¹⁶ Interview with Judge Hakim Masyhudi, MH, 29 September 2017 in Semarang Religious Court