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Legal reconstruction of mediation procedure in religious courts based on justice value

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Abstract
This research discusses the weaknesses in the construction of the law of mediation in the religious court and how to reconstruct the law based on justice values in a qualitative type of research. The approach method in this research is socio-legal-research research. The legal theory used as an analytical knife includes the grand theory of justice theory, the middle theory of legal system theory, and the Applied Theory, which is the legal protection theory.
Research shows that There are several weaknesses in the provisions of article 8 of PerMA No. 1 of 2016 dated 2 February 2016 concerning regulations regarding mediation procedures in settling cases, especially in the Religious Courts where the honorarium (Fee) given to the Mediator is unfair. Therefore, based on the results of a juridical analysis of the element of honorarium when viewed from various aspects, both aspects of legislation, legal theory, opinions of legal experts, and so on, it can be concluded that the awarding of an honorarium should be given fairly to all mediators, both judges/court employees, and non-judges.

Keywords: legal reconstruction, mediation, religious courts, justice value

Introduction

Mediation is a peaceful way of resolving disputes that is appropriate, effective, and can open wider access to the parties to obtain a satisfactory and just settlement (Gžibovskis 2023) [2]. Mediation is a way of resolving disputes through a negotiation process to obtain an agreement between the parties assisted by a Mediator, that is, judges or other parties who have a Mediator Certificate as a neutral party who assists the parties in the negotiation process in order to find various possibilities for dispute resolution without using a way of deciding or forcing a settlement.

Article 8 of PerMA Number 1 of 2016 states that the services of Mediators for Judges and Court Staff are free of charge, while the fees for the services of Non-Judge Mediators and not Court Employees are borne jointly or based on the agreement of the Parties. Furthermore, in Article 11 paragraph (1) of the PerMA Number 1 of 2016 concerning the Place for Mediation, it is stated that:

1. Mediation is held in the Mediation Room of the Court or in another place outside the Court as agreed by the Parties.
2. Judge Mediators and Court Employees are prohibited from holding Mediation outside the Court.
3. A non-judge mediator and not a court official who is elected or appointed together with a judge mediator or court employee in one case is obliged to hold a mediation in court.
4. Use of the Court Mediation room for Mediation is free of charge.

From the description of the provisions of Article 8 and Article 11 of PerMA Number 1 of 2016, it is known that mediation is carried out through Judge Mediators and Non-Judge Mediators, related to the costs of the mediator's services and the place where the mediation is carried out, shows an injustice. Whereas the costs of non-judge mediator services are jointly borne by the parties based on the agreement of the parties. Meanwhile, the judge's mediator services are not paid at all for the costs of the mediator's services. Even though the judge as a mediator is an authority that is separate from the role of the judge as a law enforcer or the party who leads the course of a case examination. This resulted in the implementation of mediation in each case not being carried out optimally by the Judge who was assigned to be the Mediator in every civil case. Because of this, mediation in the Religious Courts is often said to have failed to reach an agreement between the two parties and the case proceeded to the case examination stage.

Therefore, it is necessary to have a basic legal reconstruction regarding mediation in the settlement of cases in the Religious Courts based on the value of justice so that the Judge can carry out his role as the leader of the examination of trial cases and his role as a Mediator to realize a peace agreement between the two parties. This requires support from the government to make a legal construction related to this matter.

This certainly expects progress or a positive impact from PerMA Number 1 of 2016 on the success of mediation. Not only is the legal basis of concern, law enforcers, in this case, the role of the Mediator, greatly impacts the success of mediation. The implementation of mediation in an integrated manner into the litigation process in the judicial environment is not based solely on the interests of the Supreme Court, but also on broader interests, namely an effort to realize justice which is achieved by means of a consensus of the parties (Widodo, 2018) [9]. Therefore, Based on this description, the author is interested in conducting research and examining the problem in a scientific paper titled "*Legal Reconstruction Of Mediation*

Procedure In Religious Courts Based On Justice Value" where the main problem discussed in this article is as follows:

1. What are the weaknesses of the regulations on mediation procedures in the settlement of cases in the Religious Courts currently?
2. How to reconstruct the regulations on mediation procedures in the settlement of cases in the Religious Courts based on the value of justice?

Method of research

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach).* The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020) [7].

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of (Faisal, 2010) [1].

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

Research result and discussion

1.weaknesses of the regulations on mediation procedures in the settlement of cases in the religious courts currently

Cases that fall under the authority of the Religious Courts as referred to in Article 49 of Law Number 3 of 2006 and their explanations can be classified into two types, namely voluntary cases, and contentious cases.

Voluntary cases are cases that are petitions in nature and in which there is no dispute, so there are no opponents. In general, cases of this kind do not require a mediator to mediate. This means that voluntary cases do not require peaceful institutions, but specifically for cases of requests for adhol guardians (representative to reject the offer), the presence of a mediator is still very much needed, because even though the marriage guardian is not a party to the application for adhol guardians, he is formally and emotionally related to the request. Moreover, this concerns *silaturrahmi* (Friendly) relations in which in Islamic teachings maintaining *silaturrahmi* ties is an obligation (Hayati, 2021) [3].

Departing from this thought, after the case has been registered, the Assembly first submits the case to the mediator, namely the Judge appointed by the Chairman as a mediator to make efforts to approach the guardian by means of the Petitioner and the guardian being summoned on the day, date and time determined by the mediator, then mediation was carried out between the guardian and the Petitioner so that the marriage took place without the determination of the adhol guardian, meaning that the legal guardian had the right to marry him directly (not with the judge's guardian) with a grace period of not more than one month.

If this effort is successful, then the case for the application for guardian adhol is repealed, so that the marriage takes place with the rightful nasab guardian and the *silaturrahmi* relationship between them is not damaged. However, if the mediation efforts are unsuccessful, the mediator will return the case files to the Chairperson of the Panel that is trying the case for examination and it is possible for the Petitioner to withdraw his case if during the trial it turns out that an approach to the guardian has been successful.

Actually, before the case of the adhol guardian entered the Religious Court, of course, the Petitioner's registration to enter into a marriage through the KUA, but usually, if the guardian is adhol, the legal guardian, even though he is summoned by the KUA, is not present, so it is unlikely that mediation efforts against this adhol guardian will be carried out by the head of the KUA, then KUA's attitude is to refuse marriage because the guardian is an adult and this is the basis for the applicant to apply for legal guardianship to the Religious Courts.

Voluntary cases as discussed above, are principally unacceptable because there is no dispute meaning there is no "*deterrent point*" (Toebagus, 2022) [8], but because there is a public interest in certainty about a problem being faced, then laws and regulations provide answers so that on certain issues that have been regulated by laws and regulations even though there is no dispute, the case can be submitted to the Court, for example: marriage itsbat, marriage dispensation, legal guardian and others.

Meanwhile, what is meant by this contentious case, in making peace efforts in the Religious Courts can be divided into three parts, namely:

a. Mediation of divorce cases;
b. Mediation of cases other than divorce;
c. Mediation of the accumulation (merging) of cases.

Specifically in divorce cases at the Religious Courts, these peaceful efforts are regulated in articles 65, 70, 82, 83 of Law no. 7 of 1989 which was amended by Law no. 3 of 2006, Article 39 of Law no. 1 of 1974, Articles 32 and 32 PP No. 9 of 1975, Article 115 Compilation of Islamic Law and an-Nisa' verse 128.

In divorce cases, peace/mediation efforts in the religious court can be carried out by optimizing the institution that has existed so far, namely BP 4. The method adopted is for example when the case has been accepted by the assembly, the parties are ordered to attend the trial at the religious court. In the first trial, peace efforts were still carried out as

usual, but because the time was very limited if the peace at the first session was not successful, the assembly ordered both parties to come to BP 4 which is in the area where the parties live and appoint BP 4 as a mediator. to the case with a grace period adjusted to the weight of the existing problems. If the peaceful effort is successful, then the case is withdrawn and if it is not successful, then as evidence that the mediation effort has been carried out by the mediator (BP 4), a letter of introduction from BP 4 regarding the failure of the peace effort is needed and the trial is continued by the assembly which remains open to the possibility of reconciling at subsequent sessions.

Because this issue is relatively new, it is necessary to socialize it to the community and coordinate between the religious courts and BP 4 which are in their relative jurisdiction.

For cases other than divorce, the head of the religious court appoints one or more of the existing judges to act as mediators. Judges who serve as mediators can change every semester (six months) with the stipulation that when it is time to change, mediators who have not finished reconciliation/mediation efforts must continue their duties. In order to create justice and the judge in charge as a mediator does not feel burdened by his new assignment, the judge in charge as a mediator gets a smaller share of cases compared to other judges and of course in accordance with SE MA No. 1 of 2002 The judge handling the case cannot be appointed as a mediator for the case he or she is handling. The method taken, for example, after a case other than divorce has been received by the Panel of Judges, the Chairperson of the Panel submits a copy of the lawsuit/application to the judge whose duty is as a mediator. Then the mediator through the bailiff summons the parties to appear on the day, date, and time that has been determined in the context of carrying out peace efforts/mediation with a grace period adjusted to the weight of the problem with a maximum limit of three months (Riyanto, 2016) [5].

If the peace efforts are successful, then the peace efforts must be formulated in writing and the results of the peace efforts are submitted to the Assembly in charge of the case, and then a session is held to re-examine the peace formula, which the Assembly then decides on peace by ordering the parties to obey and implement the content of peace as required by Article 130 HIR/154 RBg.

Specifically for cases of annulment of a marriage, an amicable institution is not needed because the essence of the causes of annulment of a marriage is a violation of a regulation, whereas, for an agreement to be valid, there must be a lawful cause, namely causa (covering the causes, objectives, contents of the agreement) which are not contradictory. law, decency, and public order. (Subekti, 1999) [6]. Thus it is impossible for a judicial institution to order both parties to comply with the contents of an illegal peace agreement.

Reconstruction of the regulations on mediation procedures in the settlement of cases in the religious courts based on the value of justice

The preamble to the 1945 Constitution of the Republic of Indonesia in the fourth paragraph states that the Indonesian State Government protects the entire Indonesian nation and all of Indonesia's bloodshed and promotes public welfare, educating the nation's life, and participating in carrying out world order based on freedom, eternal peace, and social justice (Widodo, 2019) [10], then the Independence of the Indonesian Nationality was drafted in an Indonesian Constitution, which was formed in a structure of the Republic of Indonesia which is people's sovereignty based on Belief in One Almighty God, just and civilized Humanity, Indonesian Unity and a People who led by wisdom in Deliberation/Representation, as well as by realizing social justice for all Indonesian people.

The philosophical basis for the birth of Supreme Court Regulation Number 1 of 2016 concerning the Mediation Process in Courts states that the edition is one of the faster and cheaper dispute resolution processes, and can provide greater access for parties to find a satisfactory resolution and fulfill a sense of justice. Meanwhile, on a sociological basis, it is stated that the integration of mediation into the proceedings in court can be an effective instrument for overcoming the problem of accumulation of cases in court as well as strengthening and maximizing the function of court institutions in resolving disputes in addition to adjudicative court processes.

Article 24 of the 1945 Constitution of the Republic of Indonesia which became the juridical basis for the issuance of Supreme Court Regulation Number 1 of 2016 concerning the Mediation Process in Courts states that judicial power is an independent power to administer justice in order to uphold law and justice. Judicial power is exercised by the Supreme Court and judicial bodies under it.

However, mediation can be said to be a right regulated in Article 28D (1) of the 1945 Constitution of the Republic of Indonesia which states that everyone has the right to recognition, guarantees, protection, fair legal certainty, and equal treatment before the law. Mediation in the dispute resolution process can be said to be the rights of the disputing parties which are regulated and protected by the 1945 Constitution of the Republic of Indonesia.

Based on Article 5 Perma Number 1 of 2016 states that: the Mediation process is basically closed unless the Parties want otherwise; Submission of the Mediator's report regarding parties who do not have good faith and the failure of the Mediation process to the Case Examining Judge is not a violation of the closed nature of the Mediation; and Mediation meetings can be conducted through remote audio-visual communication media which allows all parties to see and hear each other directly and participate in meetings.

The consensus approach itself in mediation as an alternative dispute resolution institution can be seen in Article 26 section on the involvement of experts and community leaders Perma Number 1 of 2016 which states: with the approval of the Parties and/or legal counsel, the Mediator may present one or more experts, community leaders, religious leaders, or traditional leaders; and the Parties must first reach an agreement regarding the binding or non-binding strength of the explanation and/or assessment of experts and/or community leaders. The process of mediation will produce two possibilities, namely, the parties reach a peace agreement or fail to reach a peace agreement, in this case, the parties are obliged to (Karmawan, 2020) [4].

a. Formulate a peace agreement in writing and sign it;
b. Express wrote approval of the peace agreement if in the mediation process, the parties are represented by attorneys; and
c. Return to the judge on the appointed day of the hearing to notify the peace agreement, especially giving priority to a consensus approach.

Based on the description above, it can be concluded that the legal reconstruction as intended by the author is in several articles that are considered inappropriate in the regulation regarding losses to state finances regarding Article 8 PERMA Number 1 of 2016 which states: Judge and Court Staff Mediator Services are free of charge, while service fees Non-Judge Mediators and not Court Employees are borne jointly or based on the agreement of the Parties.

This article does not contain the value of justice, because the fee/honorarium for the services of a mediator is only given to non-judge mediators, while mediators who come from judges or court employees do not receive any honorarium at all. Moreover, this article is felt to be inconsistent with containing legal certainty, bearing in mind that there is no provision regarding the amount of honorarium set for the mediation process so that the litigants do not have an idea of how much money must be incurred so that it is clearly contrary to the 1945 Constitution which states that every citizen has equal rights and status in the eyes of the law. In the opinion of the author, these rules need to be reconstructed so that they turn into: "*Every Mediator, whether a Judge, Court Officer or non-Judge Mediator, has the right to receive services/honor the amount of which is shared or based on the agreement of the Parties to the case*".

Conclusion

Based on the results of the research, the following conclusions can be drawn:

1. There are several weaknesses in the provisions of article 8 of PerMA No. 1 of 2016 dated 2 February 2016 concerning regulations regarding mediation procedures in settling cases, especially in the Religious Courts where the honorarium (Fee) given to the Mediator is unfair.
2. Based on the results of a juridical analysis of the element of honorarium when viewed from various aspects, both aspects of legislation, legal theory, opinions of legal experts, and so on, it can be concluded that the awarding of an honorarium should be given fairly to all mediators, both judges/court employees, and non-judges. Therefore, Article 8 of Perma number 12 of 2016 needs to be changed to: "Every Mediator, whether Judge, Court Officer or non-Judge Mediator, has the right to receive services/honors, the amount of which is shared or based on the agreement of the Parties to the case".

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