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## The use of mediation in divorce dispute settlement for civil servants in the city of Sabang

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### Abstract

In PERMA No.1 of 2016, mediation is a method for resolving disputes through negotiation to reach an agreement between the parties, with the assistance of a mediator. In addition to the general public and Civil Servants, mediation is also utilized in divorce conflicts involving both parties. According to Article 1 point 1 of Government Regulation (hereinafter referred to as PP) Number 45 of 1990 concerning Amendments to Government Regulation Number 10 of 1983 Concerning Marriage and Divorce Permits for Civil Servants, a civil servant must obtain permission from his superiors to divorce. In addition, divorce permits are governed by Part III of Circular Letter 08/SE/1983 BKAN about Marriage and Divorce Permits for Civil Servants. In practice, however, the implementation of mediation as an alternative means of resolving divorce disputes for civil officials in the City of Sabang has not been optimal, despite the number of divorce cases involving civil servants increasing annually. Problematically, the implementation procedure is linked to the mediation procedure in settlement of divorce cases involving civil servants before the *Syar'iyah* Court in Sabang City. This study intends to examine the implementation of mediation in the settlement of divorce cases involving civil servants at the *Syar'iyah* Court in Sabang City. The research approach is empirical juridical, which refers to studying real-world situations undertaken to discover facts. This study is descriptive. The study results indicate that divorces among government officials continue to occur annually and that the mediation that has been attempted thus far has been unsuccessful. Article 1, number 1 of PP No. 45 of 1990, stipulates that civil servants who wish to divorce need to acquire authorization from their superiors, making the divorce process for civil servants rather difficult. His superiors are required to attempt reconciliation between divorcing parties. Still, if this is unsuccessful, a divorce permit granted by the Mayor or Regional Secretary will be issued and delivered to the *Syar'iyah* Court for approval. However, before the file is sent to the BKPSDM, the parties must first be mediated at the *Geuchik* (village head) level. If that fails, the parties will be mediated again at BP4, and if that fails, the civil servant's superior will mediate the dispute. Mediation has not run optimally due to the following factors: (a) mediation is not prioritized in its implementation; (b) not all mediators in charge have a mediator certification; (c) understanding of mediation is not optimal; (d) parties lack good faith; and (e) limited facilities and infrastructure. However, the *Syar'iyah* Court aims for mediation to function optimally by maximizing its use in divorce and other conflicts, reviewing the effectiveness of each mediator, and strengthening operational standards, despite the lengthy process.

**Keywords:** mediation, divorce, civil servant, *syar'iyah* court, dispute settlement

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### Introduction

Article 1 of Law Number 1 of 1974 on Marriage states, "Marriage is a physical and spiritual relationship between a man and a woman as husband and wife to build a joyful and eternal family (home) based on the One Godhead."

In addition, Article 2 of the Compilation of Islamic Law (KHI) states: "According to Islamic law, marriage is a firm binding contract or *mitsaqan ghalidzan* to fulfill Allah's orders, and carrying it out is an act of devotion."

Article 3 of the KHI states that "marriage seeks to realize a household life that is *sakinah* (peaceful), *mawaddah* (loving), and *rahmah* (blessed)."

The family is the smallest unit of community group composition. The family is also the fundamental unit in developing and realizing the existence of a big group, such as a nation. In addition, family is everyone's objective in life, which begins with a marriage. As stated in Law Number 1 of 1974 about Marriage, marriage aims to build a happy and eternal family <sup>[1]</sup>.

The development of a family must be built on physical and spiritual ties between the spouses to provide family members with happiness and comfort. Article 33 of Law Number 1 of 1974 concerning Marriage states that husband and wife must love each other, respect, be loyal and provide physical and spiritual assistance. Then it is also noted that husband and wife have the same or balanced position in married life and social life in society and have the right to take legal actions <sup>[2]</sup>. The purpose of marriage is to live harmoniously within a household and develop the bonds of brotherhood between the husband's relatives and the wife's relatives. Nonetheless, as the

years pass, numerous environmental and internal variables contribute to the emergence of marital issues. One of them concerns the rights and responsibilities of husband and wife. Divorce is frequently an option if difficulties in the household cannot be handled.

If the marital relationship cannot be maintained in its integrity and continuity, divorce is viewed as a viable choice. Viable choice means that different efforts have been made to find peace between the two groups, both through the *Hakam* (arbitrators) of both sides and the processes and techniques outlined in the *Al-Quran* and *Al-Hadith* (Islamic Jurisprudence) <sup>[3]</sup>.

Article 116 KHI explains that "divorce can occur for the following reasons:

- a. One party commits adultery or becomes an alcoholic, compulsive gambler, etc., which is difficult to treat;
- b. One of the parties abandons the other for two consecutive years without the other party's permission and a valid explanation or for other unavoidable circumstances.
- c. After the marriage, one of the parties receives a prison sentence of five years or a longer penalty.
- d. One party commits atrocities or extreme persecution that puts the opposing party at risk.
- e. One of the partners develops a condition or disease that prevents them from fulfilling their duties as husband or wife.
- f. There is little chance of returning to domestic tranquility between the husband and wife; they engage in regular fights and quarrels.
- g. The husband violates *taklik talak* (an agreement that is hung in a legitimate Indonesian marriage);
- h. Conversion or apostasy of religion that causes discord in the family."

Divorce is possible for all Indonesian nationals, even civil servants (PNS). According to Article 1 point 1 of Government Regulation Number 45 of 1990 concerning Amendments to Government Regulation Number 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants (PP No. 45), a civil servant who wishes to divorce must:

1. Obtain a permit or certificate from the official in advance.
2. Civil Servants domiciled as plaintiffs or defendants to receive permissions or certificates referred to in paragraph (1) must submit a written request.
3. The entire rationale must be included in the letter requesting permission, notifying of a divorce suit, or requesting a certificate.

Article 6 paragraph 3 of Government Regulation No. 10 of 1983 mandates that the official must first attempt to reconcile the husband and wife in question by contacting them personally for advice or mediation before issuing a decision. Article 1 point 1 of Supreme Court Regulation No.1 of 2016 on Mediation Procedures in Court (PERMA No.1 of 2016) defines mediation as a means for resolving conflicts through a negotiation process to reach an agreement between the parties with the assistance of a Mediator. Article 1 point 2 of PERMA No. 1 of 2016 defines a mediator as a judge or other impartial person with a Mediator Certificate who aids the parties in the negotiating process to seek various viable dispute resolutions without the right to decide or impose a settlement.

The Advisory Board for the Development and Preservation of Marriage continued the mediation procedure in the open public after village officials had unsuccessfully attempted to resolve the dispute (BP4). In practice, the mediation performed for government officials and the general public differs in that civil servants must obtain permission from the department head where they work. However, if it does not work, the case file will be transferred immediately to the *Syar'iyah* Court. In cases involving civil servants, the parties must first receive approval from their superiors if the reconciliation process is successful; if it fails, it will be remediated by the Head of the Agency for Personnel and Human Resources Development (BKPSDM). If the mediation is failed, the head of the BKPSDM will issue a letter saying that the mediation was unsuccessful. The divorce case will then be sent to the *Syar'iyah* Court for mediation, where it will be determined whether the divorce is successful. This procedure is more complex and time-consuming.

According to information acquired from the *Syar'iyah* Court of the City of Sabang, there were 15 divorce cases in 2019, including 14 divorces by *talak* case (submitted by the husband) and one divorce by litigation case (submitted by the wife). Only four out of fifteen cases proceeded through the mediation procedure. However, none of the attempted mediations were effective. There were 13 divorce cases in 2020, comprised of 5 divorces by *talak* cases and 8 divorces by litigation cases. Then, six of them underwent the mediation procedure, while seven did not. None of the attempted mediations were effective. Cases that cannot be mediated occur when one of the parties is absent. According to the information shown above, there is no successful divorce prevention mediation for Civil Servants in Sabang City.

The authors are interested in studying adopting mediation in the settlement of civil servant divorce cases at the *Syar'iyah* Court of Sabang City, what circumstances prevent mediation from functioning effectively, and what efforts the *Syar'iyah* Court has made to overcome these hurdles.

### Theory

This study employs two theories: the theory of legal certainty, which seeks to ensure that the law has been effectively implemented, and the theory of justice, which aims to ensure that the process of settling divorce problems through mediation delivers justice for both parties.

## Method

This is an empirical legal study, which refers to research conducted on society's actual situation or natural conditions to discover the required facts and data. This research employs a descriptive technique, which refers to research that defines particular objects and explains things linked to them or systematically describes the attributes or features of specific populations in specific domains <sup>[4]</sup>.

This study employs a qualitative method of data analysis, consisting of research processes that generate descriptive data in written or spoken words from people and observed behavior. The primary data sources utilized in this study are interviews and direct observations of respondents. This research will collect primary data through interviews with respondents and informants in order to obtain facts that can be accounted for by the truth of the topic being examined. The interview-obtained research data are then edited to determine whether they are full, can answer research questions, and can be justified <sup>[5]</sup>.

To generate descriptive data in written or spoken words from individuals, data gathered from field research is examined by connecting it to the applicable legislation. Thus, data from diverse sources on the difficulties mentioned in this study can generate consistent results with the predetermined objectives.

## Findings

Humans are independent and social entities with rights and responsibilities that must be met. Humans must be able to form positive relationships with others since they are social beings that cannot survive alone. One manifestation of this relationship is the marriage between a man and a woman, which attempts to enhance brotherly relationships and construct a *Sakinah* (full of peace), *mawaddah* (full of love), and *warahmah* (full of blessing) home.

However, we must recognize that married life is not always harmonious. Certainties include the existence of marriage and divorce. Certain circumstances lead a husband and wife to quarrel to the point of divorce <sup>[6]</sup>. Divorce occurs when one or both partners are unable or unwilling to resolve home issues effectively. Along with the progression of time, the difficulties that arise in the home expand and deteriorate, such that divorces resulting from these issues can no longer be settled peacefully or amicably.

Divorce is a common occurrence in Indonesia and possibly in other nations. This occurrence of divorce may be a form of decision desired by one or both parties. Both men and women must first agree on a specific cause for the decision. Multiple types of complex challenges in the home typically enhance the likelihood of a divorce between a legal husband and wife <sup>[7]</sup>.

Indicators of the causes of divorce may also include discord, incompatibility, economics, emotional management, and communication difficulties. All of these elements are prevalent in the household, regardless of age. Even economic position cannot be used as a definitive divorce indicator. Obviously, everyone desires to spend their entire life basking in the glow of bliss. However, maintaining a peaceful environment in the home is not as simple as turning the palm of your hand because it involves commitment and knowing how to handle a disagreement between two individuals <sup>[8]</sup>.

The only way to develop a tranquil and happy relationship, according to a study, is for each partner to maintain mental serenity and clarity. A family's harmony can also be affected by the mutual awareness of each member's rights and responsibilities, which is innate to social beings from birth. This indicates that marriage is not merely an average written contract but is full of purpose and significance <sup>[9]</sup>.

Zainuddin Ali underlined that divorce in marriage is permissible according to Islamic doctrine. In general, divorce is a rupture in the connection within the family as a result of one or both parties deciding to live apart and abandon their responsibilities as husband and wife. If several attempts have been made to build harmony, peace, and happiness within a family, but the hoped-for purpose of marriage has not been realized, divorce is unavoidable <sup>[10]</sup>.

Indeed, the initial law of divorce is *makruh* (*dispsied*); however, under specific conditions and in particular situations, the Islamic law on divorce changes as follows: <sup>[11]</sup>

- a. *Wajib* (obligatory); If someone who has promised not to have sexual relations with his wife for a specific period but broke the promise and does not wish to pay the *kafarat* (an Islamic fine for breaching an oath) must undergo a mandatory divorce. This conduct is detrimental to his marriage.
- b. *Sunnah* (advisable); if a household cannot continue and it is maintained, further harm will result.
- c. *Mubah* (permitted); is permissible if it is essential to divorce and neither party is injured by the divorce, even though the blessings of marriage can still be observed.
- d. *Haram* (forbidden); if the divorce is performed without cause while the wife is menstruating or in a holy period.

Divorce, a failure to promote family peace, is now a common occurrence and no longer impedes some parties' daily activities. In the past, people would feel guilty because divorce was regarded as a dishonor and a poor example in their social context; this is not the case now. The fact that not everyone recognizes the importance of family well-being is demonstrated by the inability to establish a typical family. Therefore, divorce is currently viewed as the greatest option for families who are already vulnerable <sup>[12]</sup>.

Although divorce is a legal deed, Allah SWT despises it. Husband and wife must take numerous measures to preserve their union. Nonetheless, a divorce may be pursued if it is the wisest course of action for both parties to continue their respective lives after multiple attempts at reconciliation have failed <sup>[13]</sup>.

Mediation is one way to address divorce conflicts. Mediation is derived from the English term for dispute resolution involving a third party as a mediator or dispute resolution mediated by a third party. The Big Indonesian Dictionary defines mediation as the procedure of employing a third person like a counselor to resolve a dispute <sup>[14]</sup>. According to Rina Antasari, mediation is a procedure for resolving disputes by dialogue or consensus between the opposing parties, with the assistance of a neutral third party, a mediator who does not have the power to decide or impose a settlement <sup>[15]</sup>. Wirhanuddin, in his book <sup>[16]</sup>, stated that resolving conflicts is tough but not impossible.

Mediation can offer numerous benefits, including:

1. Mediation is anticipated to be able to resolve problems swiftly and very inexpensively compared to litigation or arbitration.
2. Mediation allows the parties to exert influence over the process and the outcome.
3. Mediation concentrates the parties' emphasis on their actual interests and emotional or psychological needs instead of focusing just on legal rights.
4. Mediation allows the parties to participate directly and informally in resolving their conflict.
5. Unpredictable results in arbitration and litigation can be altered through consensus-based mediation.
6. Because the disputing parties decide for themselves, mediation produces long-lasting benefits and fosters a greater mutual understanding.
7. Mediation can eliminate the disagreements or formulations that nearly invariably accompany every forceful decision handed down by a judge or arbitrator in an arbitration institution.

According to SE BAKN Number 08/SE/1983 Part III number 6, any superior who gets a letter requesting a divorce from a subordinate must first attempt reconciliation. If his efforts are unsuccessful, he transmits the request for a divorce permit to the office via the hierarchical route with documented explanations. In the letter of consideration, among other things, the objective conditions of the husband and wife are presented, and it also includes proposals as decision-making material for officials.

In Sabang City, husband and wife who are civil servants, or only one of them is a civil servant, and who wishes to divorce must first be mediated by the Geuchik (Village Head) or village officials to settle their differences and prevent the divorce. And if the Geuchik or village officials are unable to resolve the issues between the two parties, the Geuchik or village officials will send a letter to The Advisory Board for the Development and Preservation of Marriage (BP4) at the sub-district level, stating that mediation efforts by both parties have been undertaken but have not yielded positive results. BP4 also requires the parties to remediate. If the mediation procedure conducted by BP4 officials fails to produce the solution desired by both parties, BP4 issues another letter declaring that mediation was unsuccessful. The obtained letters were utilized as evidence and presented to the *Syar'iyah* Court. And suppose the parties filing for divorce are civil officials. In that case, the *Syar'iyah* Court will submit them as ransom to the Personnel and Human Resources Development Agency (BKPSDM), addressed to the Mayor of Sabang City. The ransom comprised a statement from Geuchik, BP4, and their respective agency heads and the Minutes of Investigation (BAP) <sup>[17]</sup>.

With a statement letter from Geuchik, BP4, and their superiors, the mayor will issue an order for the divorce case to be processed and handled following applicable legislation. After the Mayor issues the order, the BKPSDM will generate an inspection warrant for the parties whose positions are not identical. In the BKPSDM mediation process, the mediator in charge must have a rank equivalent to or greater than the parties. Mediation is conducted by one (one) team of three (three) individuals. If mediation is unsuccessful, the special team prepares a report. It produces a judgment known as the Divorce Permit, approved by the Mayor or Secretary of the City of Sabang and then presented to the party as one of the conditions for filing for divorce at the *Syar'iyah* Court <sup>[18]</sup>.

The procedure for mediation can be described as follows: <sup>[19]</sup>

- a. During the first trial, the panel of judges will complete the documents needed in the trial, such as completeness of the lawsuit, power of attorney, summons for the parties, etc. Furthermore, the judge will explain that, according to the procedure, the parties are required to hold mediation before the execution of the divorce process. Then the judge asked whether the parties had a mediator? If not, the Judge will determine a mediator to lead the parties' mediation.
- b. The Panel of Judges then determines another Judge to be a mediator in implementing the mediation.
- c. Mediation was carried out in a particular room at the Religious Court.
- d. Generally, mediation is carried out a maximum of 2 times.
- e. If mediation is not reached/reconciliation, the divorce case process can be carried out.

Since the *Syar'iyah* Court of Sabang City does not have a designated mediator, the mediation procedure is conducted by judges who already possess a mediator certification. The mediation takes place in a room where the parties can mediate simultaneously or separately after obtaining authorization from the other side.

The mediator's function in mediation is limited to that of a facilitator. The parties can only address their own difficulties if they have good intentions, even if the end outcome is divorce. In the mediation process, the mediator must maintain neutrality and explicitly express his responsibilities so that the parties do not form the false impression that he will favor one of them in resolving the dispute. The mediator terminates the mediation immediately if one of the parties makes a statement that triggers the other side's emotions. Generally speaking, wealth mediation is easier to determine than divorce mediation because it involves the parties' hearts, and it is difficult to find a solution when it comes to matters of the heart <sup>[20]</sup>.

Being a mediator is also not a simple job because the mediator should not be aroused by his emotions, must not take sides, and must understand the parties' personalities to aid them in describing the problems that arise and resolving them. However, the mediator does not have the authority to decide anything; only the parties may pick their future status, whether they still want a divorce or wish to make peace with their partner <sup>[21]</sup>.

Being a mediator is also not a simple job because the mediator is a mediator whose emotions should not arouse, must not take sides, and must understand the parties' personalities to aid them in describing the problems that arise and resolving them. However, the mediator does not have the authority to decide anything; only the parties may pick their future status, whether they still want a divorce or wish to make peace with their partner <sup>[22]</sup>. According to Muhammad Syaifuddin Amin, Mediator Judge of the *Syar'iyah* Court of Sabang City, the most common problems are recurring arguments, and the majority of litigants are spouses. Additionally, this issue involves the parties' feelings; thus, it is difficult to be outraged if they refuse or lack the good faith to reconcile. There may be a strong desire to rebuild the family, but occasionally the participants' egos prevent them from achieving unity. On occasion, husband and wife are unable of reflecting on one another, leaving only inner anguish and deep hurts. When neither party wants reconciliation, mediation often fails, and divorce is the only alternative <sup>[23]</sup>.

Some of the problems that usually trigger divorce are as follows:

1. Infidelity.
2. Domestic Violence (KDRT).
3. Drug Use.
4. Fights that occur continuously.
5. Financial Problems.

In addition, several issues prevent mediation from operating optimally, including:

1. Mediation is not prioritized in its implementation. Conducting mediation outside of the *Syar'iyah* Court is not carried out optimally but rather as a prerequisite for advancing the matter to a higher level, namely the *Syar'iyah* Court.
2. Except for the mediator judge of the *Syar'iyah* Court in Sabang City, not all mediators on duty possess a mediator certificate. All mediators entrusted with mediating between the parties lack credentials.
3. As a result of a lack of extensive outreach to the community in the past, a less-than-ideal understanding of mediation may exist. For instance, regarding distinct divorce procedures, if the spouse is a public official, the parties must meet the predetermined requirements.
4. There is no good faith on the parties' side, who, if they have filed for divorce with their partners, have usually been harboring domestic issues for a long time and can no longer tolerate them until they file for divorce. This culminated in mediation, but neither party showed kindness and participated with their egos at the forefront; hence the mediation was unsuccessful.
5. There are limited mediation facilities and infrastructure, as there is just one room. So that simultaneous mediation can be conducted by bringing the parties together. Unless the parties agree otherwise, meetings can be held alone to hear each party's story without the partner's participation.

In this instance, the *Syar'iyah* Court of Sabang is gradually examining the atmosphere of the *Syar'iyah* Court to create a divorce-prevention mediation mechanism. In addition to reviewing the program's implementation and seeking solutions to the existing challenges, participants exchanged ideas and determined what to do.

In addition, mediation is utilized as frequently as feasible despite its lengthy duration. Even if mediation takes a very long time, there is still the possibility of a favorable resolution if the parties are in good faith and want to address the matter well, assuming they have good intentions <sup>[24]</sup>.

Currently, mediation is maximized by evaluating each case and optimizing the application of mediation to reach a point of peace between the parties. However, this goes back to the parties' desires, as there is no use in optimizing everything if the parties do not desire to do good <sup>[25]</sup>.

The *Syar'iyah* Court has also increased operational requirements, such as conducting mental checks using detectors and increasing the number of guards on duty to safeguard against undesirable occurrences. The parties are first evaluated for their physical and spiritual health to ensure that the trial runs smoothly, and the verdict follows their desires <sup>[26]</sup>.

Based on the theory of legal certainty and fairness, the execution of mediation is governed by explicit rules that must be followed. However, the adoption of mediation has not been perfect because there are still parties who believe that mediation does not promote problem-solving but rather complicates addressing divorce-related difficulties. Consequently, the requirements regarding mediation are frequently ignored, and mediation is conducted to simplify the divorce procedure. This lowers the level of justice that any society should accept.

## Summary

1. The mediation process for civil servants who want to divorce must obtain written permission from their superiors. Their Superiors must first try to reconcile the parties, or this is called mediation. If the mediation is not successful, a divorce permit will be issued, which will later be forwarded to the *Syar'iyah* Court along with the mediation files carried out at the Gampong level and BP4. Furthermore, at the *Syar'iyah* Court, a final mediation will also be conducted to decide whether the parties will divorce or not. This process is different from society because it has to go through a long and complicated process.

2. The factor causing mediation not to run optimally is the implementation of mediation that has not been prioritized. In addition to mediation conducted at the *Syar'iyah* Court, the parties must mediate at Geuchik, BKPSDM, and BP4. However, in reality, mediation is facilitated or carried out modestly because officers think that mediation complicates the divorce process of the parties. Another factor is that only the mediator judges in the *Syar'iyah* Court have a mediator certificate, but other mediators do not have a mediator certificate. In addition, not all spouses of civil servants are also civil servants, so some couples do not understand the divorce process that a civil servant must take. Usually, if the parties have filed for divorce, it cannot be helped anymore. Then, the parties who do not have the good faith to reconcile with their partners become additional factors for implementation failure. Facilities and infrastructure are also included in the factors that cause mediation not to run optimally. In the *Syar'iyah* Court, there is only one room for mediation. The BKPSDM also uses a workroom for mediation, and also in BP4 does not have a particular room for mediation.
3. To maximize mediation, the *Syar'iyah* Court tries to continue to mediate even though it takes a long time to get satisfactory results. It is also evaluating fellow judges as mediators to maximize the implementation of mediation and not to get carried away by emotions and side with one party as a mediator. The *Syar'iyah* Court also improves operational standards and guards to avoid unwanted things.

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