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# A COMPARATIVE STUDY OF MEDIATION OF DIVORCE CASES THROUGH LITIGATION AND NON-LITIGATION IN INDONESIA

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***Abstract***

*This qualitative study aims to conduct a comparative study of the mediation process of divorce cases through litigation with non-litigation. This study is a qualitative research with a comparative approach. Primary data sources include Peraturan Mahkamah Agung Republik Indonesia Nomor 2 Tahun 2003 tentang Prosedur Mediasi di Pengadilan, PERMA Nomor 1 Tahun 2008 tentang Prosedur Mediasi di Pengadilan dan PERMA Nomor 1 Tahun 2016 tentang Prosedur Mediasi di Pengadilan. Data collection through documentation. The results of the study concluded that there are various competitive aspects related to the mediation of divorce cases between non-litigation and litigation, including flexibility, speed, confidentiality, whether or not a lawyer needs to help, costs, whether or not the relationship can be maintained, the right holder to carry out the procedure and the content of the settlement. Thus, praxis, mediators, both non-litigation and litigation, should first provide socialization to the parties to the husband and wife in dispute.*

***Keywords:*** *Comparative studies, divorce mediation, non-litigation, litigation*

***Abstrak***

*Studi kualitatif ini bertujuan untuk melakukan kajian komparatif terhadap proses mediasi kasus perceraian melalui jalur litigasi dengan non litigasi Studi ini merupakan penelitian kualitatif dengan pendekatan komparatif. Sumber data primer, antara lain Peraturan Mahkamah Agung Republik Indonesia Nomor 2 Tahun 2003 tentang Prosedur Mediasi di Pengadilan, PERMA Nomor 1 Tahun 2008 tentang Prosedur Mediasi di Pengadilan dan PERMA Nomor 1 Tahun 2016 tentang Prosedur Mediasi di Pengadilan. Data sekuder dari berbagai literatur ilmiah yang relevan. Pengumpulan data melalui dokumentasi. Hasil studi menyimpulkan terdapat ragam aspek kompetitif terkait mediasi kasus perceraian antara jalur non litigasi dengan litigasi, antara lain, fleksibilitas, kecepatan, kerahasiaan, perlu atau tidaknya bantuan pengacara, biaya, dapat atau tidaknya memelihara hubungan, pemegang hak melakukan prosedur maupun isi penyelesaian. Dengan demikian, secara praksis, para mediator, baik non litigasi maupun litigasi sebaiknya memberikan sosialisasi terlebih dahulu kepada para pihak suami-isteri yang bersengketa*

***Kata Kunci*** *: Studi komparasi, mediasi perceraian, non litigasi, litigasi*

## A. Introduction

To solve the divorce problem, conflict resolution is needed. Conflict resolution is a process of problem identification, problem formulation, problem analysis and problem solving that considers individual and group needs such as identity and also recognizes the institutional changes. In conflict resolution there are two resolution paths that can be offered, namely

the court path (*ligitation*) and the path outside the court (*non-ligitation).* settlement using the court path (*litigation*) in this case the Religious Court.

The use of this litigation route has the characteristic that it tends to have a win-lose character. While the use of out-of-court channels (*non-litigation*) which is often referred to as*alternative dispute resolution* by way of settlement through consultation, negotiation, conciliation, and mediation. the use of non-litigation channels tends to have a *win-win solution* character (Safudin 2018, 6). In this context, the existence of legal institutions is expected to present a solutive legal construction (Islamy, Abduh, dkk. 2024, 75).

The realization of justice that is fast, simple and low cost is the hope of every justice seeker, but the current reality is that the settlement through the judiciary is still considered less effective and efficient. There is a lot of public criticism about the performance of the Court which is very slow in handling cases and processes which according to the public are considered long-winded and rigid and require expensive costs. An effort to reconcile the two parties without anyone feeling disadvantaged and without coercion but based on mutual decision is called mediation (Lailany dan Sudirman 2019, 99).

Mediation is an attempt to reconcile the two parties to a dispute assisted by a mediator who does not have the authority to make decisions during the negotiations. Mediation provides positive values in dispute resolution (Roberts. 2028, 8).These value emphases reinforce the assertion that educational and legal values can be integrated (Islamy, Zulihi, dkk. 2024, 333).

This qualitative study aims to conduct a comparative study of the mediation process of divorce cases through litigation and non-litigation channels. There are several findings of previous studies related to this study, including Azzuhri Albajuri stating the need for renewal in the family mediation process by establishing legislation on Family Mediation and Alternative Family Dispute Resolution in Indonesia (Al Bajuri 2020). Then Muhammad Andri mentioned that there are five weaknesses in the implementation of *Alternative Dispute Resolutions* in resolving divorce disputes in the Religious Courts. *First,* the disputing parties are not willing to follow the mediation procedure. *Second*, the ability of the mediator in resolving divorce disputes in the Religious Courts, so knowledge and professionalism are important elements owned by the mediator. *Third*, the factor of legal counsel, the facts in the field are that legal counsel does not direct his clients to take the peaceful route (mediation) and tends to leave it alone. *Fourth*, the limited time and the large number of divorce disputes in the Religious Courts affect the success of mediation. *Fifth*, the importance of mediators from the family and closest people so that it affects the success of mediation of divorce disputes (Andri 2020). Furthermore, Dedy Mulyana's study states that there are two legal powers of mediation results if the mediation is carried out in court then the decision has permanent legal force, on the other hand, if the agreement resulting from mediation

outside the court its position does not have permanent legal force but only as an ordinary contract for the parties (Mulyana 2019, 177–98).

Unlike the previous studies above, the focus of this study is to conduct a comparative study of the mediation process of divorce cases conducted in court and outside the court.

## B. Research Method

This study aims to conduct a comparative study of the mediation process of divorce cases through litigation and non-litigation channels. This study is a qualitative research with a comparative approach. Primary data sources include Supreme Court Regulation of the Republic of Indonesia (PERMA) Number 2 of 2003 concerning Mediation Procedures in Courts, PERMA Number 1 of 2008 concerning Mediation Procedures in Courts and PERMA Number 1 of 2016 concerning Mediation Procedures in Courts. Meanwhile, secondary data sources from various relevant scientific literature. The data collection technique in this research was achieved by documentation. This technique is an activity of recording and collecting documents and other files related to this research. The data obtained by the documentation is analyzed through a qualitative descriptive approach which begins with classification, categorization and interpretation which ultimately reaches the level of conclusion.

## C. Result and Discussion

### 1. Divorce Mediation in Regulations in Indonesia

The increasing number of divorce cases in Indonesia is a social phenomenon that is increasingly concerning (Islamy dan Abduh 2023, 52). However, peacemaking is important to be assumed as a step to consider the possibilities of peace between husband and wife who are about to divorce, so that it is hoped that a change in attitude between them and divorce as an alternative to solving household problems can be undone (Sudirman 2020, 21).

In the Big Indonesian Dictionary (KBBI), the word mediation means the process of including a third party in the settlement of a dispute, whose position is only as an advisor, he is not authorized to make a decision to resolve the dispute (Bahasa 2008, 1020). In the Academic Paper on Mediation published by the Supreme Court, mediation means the effort of the disputing parties to resolve the dispute through negotiation with the help of another neutral party called a mediator (Mahkamah Agung 2007, 35). In the Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in article 1, it is stated that mediation is a way of resolving disputes through a negotiation process to obtain an agreement between the Parties with the assistance of a Mediator (Indonesia 2016 Tentang {prosedur Mediasi Bab I, Pasal I ayat 1).

Based on Supreme Court Regulation (PERMA) Number 1 of 2016 concerning Mediation Procedures in Court. The process of the mediation stages consists of six parts. The explanation is as follows. Part One is the *Submission of Case Resumes and the Timeframe for the Mediation Process* in

article 24 paragraph (1) " Within a maximum period of 5 (five) days as of the determination as referred to in article 20 paragraph (5) (Indonesia 2016, 6), the parties may submit the case resume to the other party and the mediator. How long the disputing parties conduct the mediation process. Based on article 20 paragraph (2) "The mediation process lasts for a maximum of 30 (thirty) days as of the determination of the order to conduct mediation.

The second part of the mediation stage based on Supreme Court Regulation (PERMA) Number 1 of 2016 concerning Mediation Procedures is the *scope of mediation meeting materials.* In the event that the mediation reaches an agreement on issues other than as described in paragraph (1), the plaintiff amends the lawsuit by including the agreement in the lawsuit in accordance with article 25 paragraph 2.

The third part of the mediation process in accordance with Supreme Court Regulation (PERMA) Number 1 of 2016 concerning Mediation Procedures is the *involvement of experts and community leaders*. Article 26 paragraph (1) states that "With the consent of the parties and/or their attorneys, the mediator may present one or more experts, community leaders, religious leaders, or traditional leaders.

The fourth part of this stage of the mediation process is "*mediation to reach an agreement*" in article 27 paragraph (1) stipulates that "If the mediation succeeds in reaching an agreement, the Parties with the assistance of the Mediator shall formulate the agreement in writing in a peace agreement signed by the parties and the mediator". Paragraph (2) states that "In helping to formulate a peace agreement, the mediator shall ensure that the peace agreement does not contain provisions that":

a. Contrary to law, public order, and/or decency;
b. Harming a third party; or
c. Not enforceable

Paragraph (4) also states that "The parties through the mediator may submit a peace agreement to the judge examining the case to be confirmed in a Deed of Peace" and must include the withdrawal of the lawsuit. Paragraph (6) states that "The mediator shall report in writing the success of the mediation to the judge examining the case by attaching the peace agreement".

The fifth part of this stage of the mediation process is the *Peace Agreement.* Article 29 paragraph (1) states "In the event that the Mediation process reaches an agreement between the plaintiff and some of the defendants, the plaintiff amends the lawsuit by no longer submitting the defendants who did not reach an agreement as opposing parties". In paragraph (6), the last paragraph of article 29 states "The partial peace agreement between the parties as referred to in paragraph (1) cannot be made at the voluntary peace stage of the case examination and the level of appeal, cassation, or judicial review".

The sixth part of the mediation stage process is *Unsuccessful or Unworkable Mediation*. Article 32 paragraph (1) states "The mediator shall declare the mediation unsuccessful in reaching an agreement and notify it in writing to the judge examining the case.

**2. Mediation Outside the Court Institution**

Law No. 30 of 1999 and Government Regulation No. 54 of 2000 are the juridical basis for the implementation of out-of-court mediation. Law No. 30 of 1999 emphasizes out-of-court dispute resolution through arbitration or alternative dispute resolution which includes consultation, negotiation, facilitation, mediation or expert assessment. Meanwhile, Government Regulation No. 54/2000 emphasizes the settlement of environmental disputes through mediation or arbitration. This PP also broadly regulates institutions that provide environmental dispute resolution services outside the court.

Dispute resolution through out-of-court mediation does not mean that mediation has nothing to do with the court. Mediation still has links with the court, especially regarding the results of the parties' agreement in mediation. Article 24 of Government Regulation No. 54/2000 states that no later than 30 days from the date of signing the agreement, the original drawing or authentic copy of the agreement shall be submitted or utilized by the mediator or other third party, or one of the parties, or the parties to the dispute to the Registrar of the District Court. The same thing is also regulated in Article 6 point 8 of Law No. 30 Year 1999.

Meanwhile, the process of implementing mediation in the provisions of Article 20 of PP 54 Year 2000 begins with the selection or appointment of a mediator by the parties at 8 copies of the service provider. On the basis of the appointment, the mediator as soon as possible conducts the mediation process through negotiation, facilitation, and encourages the parties to reach an amicable agreement that can end the dispute.

When an agreement has been reached through the mediation process, the agreement shall be set out in the form of a written agreement on stamped paper, signed by the parties and the mediator. Within a maximum period of 30 days from the date of signing of the agreement, the original or authentic copy of the agreement shall be submitted and registered with the clerk of the District Court where the submission and registration of the authentic copy of the agreement shall be made by the mediator or one of the parties or the parties to the dispute.

**3. Mediation in Court Institution**

Supreme Court Regulation No. 02 of 2003 makes mediation part of the summons process. It becomes an integral part of dispute resolution in court. Mediation in court strengthens peaceful efforts as stated in the procedural law Article 130 HIR or Article 154 R.Bg. This is emphasized in Article 2 of Perma No. 02/2003, which states that all civil cases submitted to the court of first instance must first be resolved through peace with the assistance of a mediator. The provisions of Article 2 require the Judge to first offer mediation to the disputing parties before proceeding with the case examination process. This offer is not a form of choice but an obligation, which must be followed by the parties. Article 3 paragraph 1 No. 02/2003 states that on the day of the first hearing attended by both parties, the Judge obliges the parties to

mediate first. The provision in this paragraph indicates that the parties cannot refuse the obligation given by the Judge to take the mediation route first before the case proceeds. However, Article 3 paragraph 1 also does not set out the legal consequences for parties who refuse mediation or for Judges who do not offer mediation. A closer look at Article 3 of the Permai shows that a party refusing to mediate does not carry any legal consequences for the case, as the case will also proceed if mediation fails. This means that when the parties are adamant in their stance that they are not willing to accept mediation offered by the Judge, it does not mean that the case will not be continued by the Judge.

Whether or not a case proceeds is highly dependent on whether the formal requirements of the case are met as specified in the procedural law. Similarly, if the judge does not offer or propose mediation to the parties, it does not mean that he/she cannot continue the case examination process. The judge postpones the trial process to provide an opportunity for the parties to take the mediation process Article 3 paragraph 2 No. 02 of 2003. So the postponement of the trial on the first day, only provides an opportunity for the parties to conduct mediation, and if they fail in mediation then the case will still continue based on the procedural law process.

At the first hearing or before the mediation process is conducted, the Judge is obliged to provide an explanation to the parties regarding the procedures and costs of mediation. This is important so that the parties are aware of the mechanism, procedure and costs of mediation that must be incurred in the mediation process. The parties can choose a mediator who is available in the list of mediators in the court, either a mediator who comes from a judge or a mediator who comes from outside the court. If the parties appoint a power of attorney, it is sufficient for him to act in the interest of his client. Article 4 of Perma No. 02/2003 states that within 1 working day at the latest, the parties or their attorneys shall confer to select a mediator from the court's list of mediators or a mediator outside the court's list. The selection of the mediator shall be based on the mutual agreement of the parties, and the judge shall not have any authority in selecting the mediator. The freedom to choose a mediator will affect the success rate of mediation. The parties choose someone as a mediator, because the person concerned is considered capable of helping resolve their dispute. The point of trust given by the parties is an asset for the mediator in carrying out the mediation task.

The 1 working day period stipulated by Perma is only for the parties to choose a mediator who is registered with the court, or a mediator who is outside the court. The parties are given the freedom to decide which mediator to choose, and within 1 day they must make a decision. If within one working day the parties do not reach an agreement to choose a mediator inside or outside the court, then the parties are obliged to choose a mediator from the list provided by the court of first instance Article 4 paragraph 2 of the Perma. If within one working day the parties are unable to agree on selecting a mediator from the list provided by the court, the President of the Tribunal is authorized to appoint a mediator

from the list of mediators by stipulation Article 4 paragraph 3 Perma (Abbas 2017, 302–6).

The provision of Article 4 Tema regarding the time limit of 1 day in selecting and determining prospective mediators is based on the consideration that dispute resolution through mediation must be carried out as quickly as possible. The application of the principle of speed in determining the mediator can also be seen from the authority of the panel of judges to appoint a mediator by stipulation, if the parties cannot agree in choosing a mediator provided by the court of first instance. The choice of mediation as a dispute resolution route will facilitate and accelerate the settlement of cases in court. Thus, the application of mediation in court is an integral part of a number of procedural law processes, as mediation is offered to the parties at the first hearing in court.

**4. Comparison of Divorce Dispute Resolution Through Non-Litigation Mediation and Litigation**

The comparison of dispute resolution through mediation with non-litigation (out of court) and litigation (in court) can be seen from various aspects, as follows (Wijayanta 2022).

| | **Non Litigasi** | **Litigasi** |
|---|---|---|
| Flexible | - Rules can be made by the person concerned provided that<br>- grounded in the ground rules | - Civil lawsuit (establishment) lawsuit letter, answer letter, rebuttal letter, and evidentiary |
| | of the conversation, after which it is free to<br>- Free time and place<br>- The attendance of relevant persons and interested persons is free according to the schedule agreed upon by the parties.<br>- What is resolved in the procedural process may also be responded to. | statement<br>- Meetings are set by the court, subject to the time availability of the guardian of the person concerned. The opening of the hearing can only take place at the court<br>- Only the person concerned or his/her guardian shall be present.<br>- Only matters specified in the lawsuit are the subject of the hearing.<br>- Amendment of the lawsuit requires formalities |
| Speed | - Upon the agreement of the person concerned with the mediator, anytime | - Establishment exchanges were conducted once a month, many times up to several tens |

| | | |
|---|---|---|
| | anywhere.<br>- When an agreement is reached, there is a settlement. | of times.<br>- Interrogation of witnesses. Because it takes a long time.<br>- Court decisions take time to make proposals and sentences by the court.<br>- Appeal / cassationi (Tarigan 2016, 6) |
| Confidentiality | - Closed procedure<br>- In principle, the agreement is also closed<br>- The extent to which the agreement will be opened can be determined by the person concerned | - In principle, court procedures and decisions are both open |
| Cost | - Commission fee for application (Commission fee for meeting in exchange for agreement) | - Case registration<br>- Stamp duty to be affixed in front of the lawyer's fee payment<br>- Lawyer's fee |
| Can maintaining a relationship | -Can be maintained<br>-Moving towards resolution through discussion The relationship after the agreement can be maintained | -Cannot maintain<br>-Existence or non-existence of legal rights<br>-Competing for win or lose<br>-Hostile relationship<br>-Relationship after the lawsuit will be difficult to maintain<br>- |
| Who is the holder of the right to perform the procedure ? | -The person concerned<br>-Carrying out the procedure based on the voluntary participation of the person concerned<br>-Free to stop in the middle<br>-Willing to agree or not | -Court<br>-Procedures are carried out based on legal regulations<br>-Participation is mandatory<br>-Dropping the lawsuit is not free<br>In principle, until the court's decision is rendered<br>- |
| Content of the Solution | - Agreement from the parties involved | - Win or lose, as per the plainiff's requesrt |

Based on the explanation of the various comparisons above, it can be said that there are at least seven comparative aspects related to the mediation of divorce cases between non-litigation and litigation channels. Therefore, mediators should first provide socialization to the parties to the dispute about the importance and benefits of the mediation process. Trying to convince the parties that through mediation, the cases they face will be resolved quickly, so that with this, it is expected that many cases related to conflict will be successfully mediated. among others as follows, flexibility, speed, confidentiality, the need for / at least the assistance of lawyers, costs, can / at least maintain relationships, holders of the right to carry out procedures, the content of the settlement.

## D. Conclusion

Based on the subject matter of this study, it is concluded that there are at least seven competitive aspects related to the mediation of divorce cases between non-litigation and litigation channels in Indonesia, including flexibility, speed, confidentiality, whether or not the assistance of a lawyer is required, cost, whether or not the relationship can be maintained, the right holder to conduct the procedure and the content of the settlement.

The study findings as described above emphasize the importance of comparative considerations in deciding whether to use non-litigation or litigation mediation. Thus, in practice, mediators, both non-litigation and litigation, should provide prior socialization to the disputing spouses. Therefore, it is important to conduct further studies related to the socialization of mediators regarding the competitive aspects between the use of non-litigation mediation and litigation.

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