

## Judicial Mediation: Is Reconciliation Impossible in Divorce Cases?

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### Abstract:

Judicial mediation attempts to realize the principle of peace in civil cases, however, in its implementation in religious courts there is still minimal success in producing peace agreements, especially in divorce cases. This research aims to analyze whether it is impossible to reconcile the parties in a divorce case through judicial mediation. This research is empirical legal research with a case approach. The data collection methods involve observation, interviews, and documentation. These data are then validated using the triangulation method. After data validation, the next step is to analyze using an analytical method using the theory of legal objectives. Research findings show that successful mediation in divorce cases is not impossible, it's just that divorce cases are very difficult to reconcile, because the parties who submit divorce cases to court usually have reached the climax of domestic problems, and some have not lived together for a long time.

### Keywords:

Mediasi, Peradilan, Perceraian, Rekonsiliasi.

### Introduction

Conflict is an unavoidable aspect of human life. It can be observed everywhere, not only between individuals but also among groups and even nations. This phenomenon has been forewarned by Allah in the Quran long before humans were created. As seen in the dialogue between Allah and the angels when Allah was about to create

humans as stewards on Earth, Allah stated in Surah Al-Baqarah, verse 30. This verse indicates that humans tend to conflict with each other. Not only in the public domain, but also in civil matters, conflicts often arise, leading to disputes that may escalate into hostility.

In general, conflict resolution can be approached through two main paths: litigation and non-litigation. Mediation is a modern term within alternative dispute resolution.<sup>1</sup> The positive law in Indonesia strongly emphasizes efforts toward reconciliation for cases brought to the courts, including within the realm of religious courts.<sup>2</sup> Every case attended by both parties must first attempt reconciliation through the mediation process, as stipulated in Supreme Court (Mahkamah Agung) Regulation Number 1 of 2016 concerning Mediation Procedures in Courts, Article 4 paragraph (1). This research is important to address the challenges of mediation in the courts. Often, mediation fails to reach an agreement and needs to be continued in the courtroom. The high number of cases entering religious court institutions adds to the challenges faced by mediators in their efforts to reconcile the parties involved.

This study is focused on the religious court in Palangka Raya. According to case data from this court, there has been an increasing trend in the number of cases over the past three years, but the success rate of mediation tends to be low. The challenges in successful mediation primarily arise in divorce cases, where parties often bring deeply rooted marital issues that are difficult to reconcile. Additionally, the majority of cases in the religious court are divorce cases, directly impacting the mediation success rate. In 2020, out of 115 mediated cases, only 7 were successfully reconciled, accounting for a mere 6.09% success rate,<sup>3</sup> In the following year, 2021, there were 109 mediated cases with a success rate of 14 cases (12.84%),<sup>4</sup> It's interesting to note a slight

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<sup>1</sup> Israr Hirdayadi and Khairun Nisak, "Persepsi Masyarakat Gampong Mee Pangwa Kecamatan Trienggadeng Tentang Mediasi Perkara Pidana Dalam Peradilan Adat," *Legitimasi: Jurnal Hukum Pidana Dan Politik Hukum* 7, no. 2 (2018): 243-64, <https://doi.org/10.22373/legitimasi.v7i2.3974>.

<sup>2</sup> Khairuddin Hasballah and Rahmadani, "Studi Pemikiran Ibnu Qayyim Al-Jauziyyah Tentang Hakam Dan Relevansinya Dengan Mediasi Di Pengadilan Agama," *Samarah* 3, no. 1 (2019): 53-68, <https://doi.org/10.22373/sjhk.v3i1.4430>.

<sup>3</sup> "Laporan Pelaksanaan Kegiatan Pengadilan Agama Palangka Raya Kelas IA Tahun 2020," Pengadilan Agama Palangka Raya, 2020.

<sup>4</sup> "Laporan Pelaksanaan Kegiatan Pengadilan Agama Palangka Raya Kelas IA Tahun 2021," Pengadilan Agama Palangka Raya, 2021.

increase in the success rate compared to the previous year, in 2022, there were 116 mediated cases with a success rate of 15 cases (12.93%).<sup>5</sup> The success rate remains relatively consistent, showing a similar trend to the previous years. Even though there has been an improvement over the past three years, the success rate is still relatively low.

Many studies addressing mediation in the courts have already been conducted, such as the work by Taufiqurohman,<sup>6</sup> Indeed, there are also those who examine it from the perspective of health law, like Lego Karjoko,<sup>7</sup> legal aspects of inheritance have been explored by Rini Fahriyani Ilham. As for divorce mediation, one of the researchers in this field is Fikri,<sup>8</sup> Yusna Zaidah,<sup>9</sup> Muh. Syafwan Sikri,<sup>10</sup> and Abdul Aziz.<sup>11</sup> However, none of these studies have addressed religious court mediation in divorce cases from the perspective of the difficulties faced by mediators in achieving peaceful agreements. The aim of this research is to analyze the potential success of court mediation in divorce cases.

## Research Method

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<sup>5</sup> "Laporan Pelaksanaan Kegiatan Pengadilan Agama Palangka Raya Kelas IA Tahun 2022," Pengadilan Agama Palangka Raya, 2022, <https://pa-palangkaraya.go.id/laporan-tahunan/>.

<sup>6</sup> Taufiqurohman, "Implementasi Mediasi Pada Proses Perceraian TKI Di Pengadilan Agama Ponorogo," *Juris: Jurnal Ilmiah Syariah* 20, no. 1 (2021): 115–30, <https://doi.org/10.31958/juris.v20i1.2826>.

<sup>7</sup> Lego Karjoko et al., "The Urgency of Restorative Justice on Medical Dispute Resolution in Indonesia," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial* 16, no. 2 (2021): 362–92, <https://doi.org/10.19105/al-lhkam.v16i2.5314>.

<sup>8</sup> Fikri et al., "Transformation of Maqāsid Shari'ah in Divorce Mediation in Religious Courts: Revitalization of the Bugis-Mandar Customs, Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 1 (2023): 431–54, <https://doi.org/10.22373/sjhk.v7i1.9141>.

<sup>9</sup> Yusna Zaidah and Mutia Ramadhania Normas, "Mediasi Online Dalam Penyelesaian Perkara Perceraian Di Era Pandemi," *Journal of Islamic and Law Studies* 5, no. 2 (2021): 334–48, <https://doi.org/10.18592/jils.v5i3.5847>.

<sup>10</sup> Muh. Syafwan Sikri, Kairuddin Karim, and Muhammad Akbar Fhad Syahril, "Eksplikasi Mediasi Terhadap Perkara Perceraian," *Julia: Jurnal Litigasi Amsir* 9, no. 2 (2022): 134–41.

<sup>11</sup> Abdul Aziz and Lukman Hakim, "Pelaksanaan Mediasi Perceraian Di Peradilan Agama Dalam Perspektif Hukum Islam," *Al-Ashlah* 1, no. 2 (2022): 103–15.

This study is empirical legal research.<sup>12</sup> The research adopts a case study approach.<sup>13</sup> This approach is directed towards how mediators handle the involved parties, along with reporting the outcomes of the mediation. From this, insights into the mediation process and various challenges faced by mediators will be obtained. The data sources in this study are divided into three categories: primary legal data in the form of Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures and data resulting from field exploration. Secondary legal data consists of references related to the research topic. Meanwhile, tertiary legal data includes reference pointers such as dictionaries and encyclopedias. The data collection methods involve observation, interviews, and documentation. These data are then validated using the triangulation method.<sup>14</sup> After data validation, the next step is to analyze using an analytical method using the theory of legal objectives.

### **Results of Research and Discussion**

#### **Mediation in the Courts Post-Supreme Court Regulation Number 1 of 2016 at the Religious Court of Palangka Raya**

The presence of Supreme Court Regulation (Perma) Number 1 of 2016 is an effort to improve the mediation process in the courts. In every civil case attended by both parties, reconciliation efforts through mediation must be made. Compared to the previous regulation, this Perma at least has the following differences:

1. The systematics and substance of Supreme Court Regulation No. 1 of 2016

This regulation, in its history, was first issued in 2003 as Supreme Court Regulation Number 2 of 2003 concerning Mediation Procedures in the courts. Subsequently, in 2008, it underwent a change with the issuance of Supreme Court Regulation Number 1 of

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<sup>12</sup> Sabian Utsman, *Metodologi Penelitian Hukum Progressif*, 1st ed. (Yogyakarta: Pustaka Pelajar, 2014), <http://digilib.iain-palangkaraya.ac.id/2293/>; Evi Eka Elvia et al., "BASYARNAS as a Place for Dispute Resolution of Musyarakah Financing in Sharia Banking in the Disruption Era," *El-Mashlahah* 13, no. 1 (2023): 39-56, <https://doi.org/10.23971/el-mashlahah.v13i1.5345>.

<sup>13</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenadamedia, 2015); Sonny Engelbert Palendeng, Merry E Kalalo, and Deasy Soeikromo, "Penyelesaian Sengketa Merek Dagang Dikaitkan Trademark Dispute Resolution Is Associated With Legal" 16, no. 2 (2021): 274-86.

<sup>14</sup> Zainuddin Ali, *Metode Penelitian Hukum* (Jakarta: Sinar Grafika, 2018).

2008 concerning Mediation Procedures in the Courts. The latest regulation, namely Supreme Court Regulation Number 1 of 2016, marks the third amendment in the history of mediation regulations in the courts.

Supreme Court Regulation Number 1 of 2016 consists of 9 (nine) chapters.<sup>15</sup> Chapter I contains general provisions, including the definitions of terms used in the regulation. Chapter II provides guidelines for mediation in the courts. This chapter covers its scope, types of cases required to undergo mediation, the nature of the mediation process, the obligation to attend mediation, good faith in undergoing mediation, mediation costs, the venue for mediation, and the management of mediation in the courts.

Chapter III contains provisions regarding the mediator. The sections in this chapter include mediator certification and institution accreditation, mediator duties, and mediator code of conduct guidelines. Chapter IV covers the stages of mediation. This chapter includes the obligations of the examining judge, the obligations of legal representatives, the rights of the parties to choose a mediator, the time limit for selecting a mediator, summoning the parties, and the legal consequences if a party does not act in good faith.

Chapter V covers the stages of the mediation process. In this chapter, there are several sections, including the submission of case summaries and the timeframe for the mediation process, the scope of the material in mediation meetings, the involvement of experts and community figures, reaching agreements in mediation, partial peace agreements, and unsuccessful or impracticable mediation. Chapter VI addresses Voluntary Settlements. The sections in this chapter include voluntary settlements at the stage of case examination and voluntary settlements at the level of appellate legal efforts, such as appeals, cassation, or reconsideration. Chapter VII discusses the separation of mediation from litigation. Chapter VIII covers settlements outside the court, and Chapter IX contains closing provisions.

2. Differences and new changes between Supreme Court Regulation No. 1 of 2016 and Supreme Court Regulation No. 1 of 2008

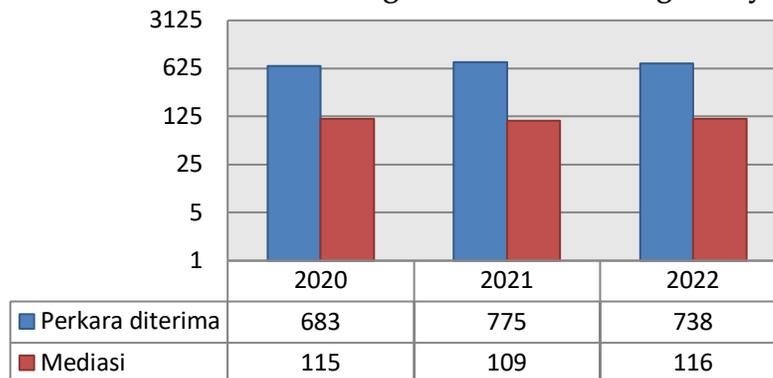
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<sup>15</sup> Lihat Peraturan Mahkamah Agung Nomor 1 tahun 2016 tentang Prosedur Mediasi di Pengadilan.

In general, Supreme Court Regulation Number 1 of 2016 serves as an improvement over the previous regulation. Maskur Hidayat stated that the new aspect introduced in the new regulation concerns the concept of good faith (*itikad baik*). This concept serves as a criterion for mediators to assess whether the mediation process can continue. If the plaintiff is deemed to lack good faith, the lawsuit will be declared inadmissible by the examining judge. The consequence is that the plaintiff will be obliged to pay the mediation costs. Therefore, the mediator reports to the judge that the plaintiff lacks good faith, and subsequently, the judge, in the final decision, declares the plaintiff's lawsuit as inadmissible, accompanied by the penalty of paying both mediation and litigation costs.<sup>16</sup>

Before discussing the implementation of Supreme Court Regulation Number 1 of 2016, let us first delve into the case conditions, both in the religious court of Kuala Kapuas and in the religious court of Palangka Raya. The case conditions in the religious court of Palangka Raya show a consistent upward trend each year over the past three years. The case data for the last three years can be seen in the following diagram.

**Diagram 1**  
**The Number of Cases in the Religious Court of Palangka Raya**

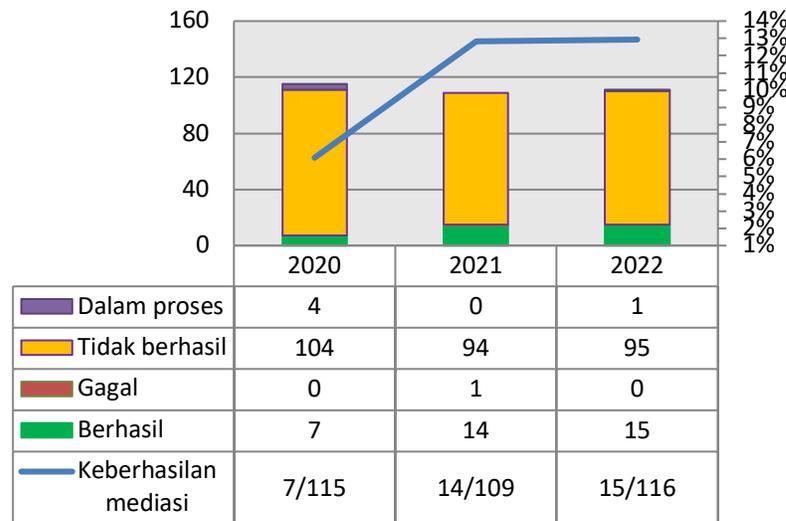


However, this is not in line with the results of mediation in the court. On average, each year, mediation has a low success rate. This is influenced by various factors. The discussion of these issues will be

<sup>16</sup> Maskur Hidayat, *Strategi & Taktik Mediasi Berdasarkan Perma No. 1 Tahun 2016 Tentang Prosedur Mediasi Di Pengadilan* (Jakarta: Kencana, 2016).

explained in the following section. The data can be seen in the following diagram.

**Diagram 2**  
**The Number of Mediation Cases in the Religious Court of Palangka Raya**



In practice, the Religious Court of Palangka Raya has empirically implemented Supreme Court Regulation (Perma) Number 1 of 2016. This is because, normatively, the regulation is applicable to all courts under the jurisdiction of the Supreme Court. This applicability aligns with the enactment of other legislation. In legal theory, it is explained that when a legal norm is enacted, everyone is aware of the law at that moment. Ignorance of the law cannot exempt someone from legal demands.<sup>17</sup> This theory is often known by its Latin term "*ignorantia iuris neminem excusat*" or, in English terms, "*ignorance is no defense under the law.*"

The obligation to undergo the mediation process in religious courts is regulated in Article 4 of Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts. Therefore, according to Tomy Saladin, mediation as an alternative dispute resolution outside court becomes a necessity in the resolution of civil

<sup>17</sup> Ali Marwan HSB, "Mengkritisi Pemberlakuan Teori Fiksi Hukum (Criticising Enactmen of Law Fiction Theory)," *Jurnal Penelitian Hukum De Jure* 16, no. 3 (2016): 251-64, <https://doi.org/10.30641/dejure.2016.V16.251-264>.

disputes.<sup>18</sup> When the court disregards that regulation, especially in cases that are required to undergo mediation first, the decisions it issues can be annulled.

The mediators in the Religious Court of Palangka Raya welcome the presence of Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts. This regulation brings about several changes that are expected to enhance the effectiveness of mediation in the court. Good faith on the part of the parties is one of the significant changes compared to the previous regulation.<sup>19</sup> When a mediator deems that the parties or one of the parties lack good faith, the case can be rejected for further processing.

### **Judicial Mediation: Is Reconciliation Impossible in Divorce Cases?**

The mediation data in the Religious Court of Palangka Raya, as presented in the previous section, indicates there are issues in the mediation process. The success rate of mediation is relatively low compared to the cases mediated. This section will outline and analyze the problems that may affect the success of mediation. The mediators in the Religious Court of Palangka Raya are also judges who serve as mediators. The court has a total of 7 mediators. To understand the issues contributing to the low success rate of mediation in both courts, the author conducted data collection, including interviews with the mediators, observations, and documentation.

Several samples of mediators in the Religious Court of Palangka Raya were interviewed. First, with NH (initials), who stated that the presence of Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures, replacing the previous regulation, is of significant importance. "This new regulation imposes more tangible sanctions for parties who lack good faith, especially in Article 7, paragraph 2," NH expressed.<sup>20</sup>

Article 7 of Perma number 1 of 2016 concerning Mediation Procedures determines that:

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<sup>18</sup> Tomi Saladin, "Penerapan Mediasi Dalam Penyelesaian Perkara Di Pengadilan Agama," *Mahkamah: Jurnal Kajian Hukum Islam* 2, no. 2 (2017), <https://doi.org/10.24235/mahkamah.v2i2.2034>.

<sup>19</sup> Septi Wulan Sari, "Mediasi Dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2016," *Ahkam: Jurnal Hukum Islam* 5, no. 1 (2017): 1-16, <https://ejournal.uinsatu.ac.id/index.php/ahkam/article/view/669>.

<sup>20</sup> NH, *Interview* (Palangka Raya, 17 July 2020)

- 1) The parties and/or their legal representatives are obliged to undertake Mediation in good faith (itikad baik).
- 2) One of the parties or Parties and/or their legal representatives may be declared not to have good faith by the Mediator in the matter concerned:
  - a. Not present after being properly summoned 2 (two) times in a row at the Mediation meeting without a valid reason;
  - b. Attended the first Mediation meeting, but never attended the next meeting even though he had been properly summoned 2 (two) times in a row without valid reasons;
  - c. Repeated absences that disrupt Mediation meeting schedules without valid reasons;
  - d. Attending the Mediation meeting, but not submitting and/or not responding to the other party's Case Resume; and/or
  - e. Not signing the agreed Peace Agreement concept without valid reasons.<sup>21</sup>

The existence of the article above is one of the most important articles in Perma Number 1 of 2016. This is in line with the opinions of other mediators at the Palangka Raya Religious Court. MH said that "the presence of Perma number 1 of 2016 is very significant because there are sanctions for parties who do not have good intentions. "Meanwhile, the previous Perma did not have sanctions like this."<sup>22</sup> Likewise, AZ said that "This regulation is very significant because it contains sanctions for parties who do not have good intentions in participating in mediation."<sup>23</sup> This opinion is also in line with ZH and MN.

The mediators at the Palangka Raya religious court emphasized that good faith is the main thing in changing the new Perma. Sanctions for not acting in good faith can make the litigants more serious in undergoing the mediation process. Furthermore, the mediators revealed the problems that make mediation have a low success rate in religious courts. NH, a mediator at the Palangka Raya religious court, said the following:

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<sup>21</sup> Peraturan Mahkamah Agung Nomor 1 tahun 2016 tentang Prosedur Mediasi

<sup>22</sup> MH, *Interview* (Palangka Raya, 17 July 2020)

<sup>23</sup> AZ, *Interview* (Palangka Raya, 17 July 2020)

The level of success of mediation is largely determined by the case of the litigants, not solely by the mediator's abilities. In divorce cases, it is very difficult to achieve peace, because firstly, the household of the parties is in such a state that it cannot be saved. Second, the case between the plaintiff and the defendant, both of whom do not want to reconcile and build a household.<sup>24</sup>

Furthermore, he also added the issue of where to carry out mediation. The court provides as much as possible a comfortable mediation room, so that the parties can participate in the mediation process comfortably as well. We have tried to propose a comfortable place, but it is hampered by the court's budget. However, the court here is quite comfortable because air conditioning is provided.<sup>25</sup> In line with NH, another mediator, AZ, said that in divorce cases most parties already have reasons for not reconciling. He also added that a mediator's commitment also influences the success of mediation.<sup>26</sup> Meanwhile, other mediators, apart from agreeing with the above, also regret that the Palangka Raya religious court has a limited number of certified mediators. There are only 3 (three) who are certified, while the others do not have it yet.<sup>27</sup>

Based on the data presented above, the low success rate of mediation is influenced by several factors. These factors can be detailed as follows:

1. Type of case

Types of cases can be grouped into two types, namely divorce cases and cases other than divorce. Divorce cases are very difficult to reconcile. This is because if the parties have submitted their case to court, it means that their domestic problems are already serious. They have no commitment to reunite. A divorce case does not mean that reconciliation cannot be attempted, but the possibility of reconciliation is relatively small. This is different from cases other than divorce, such as inheritance cases, child custody, or joint property. These cases have a greater chance of successful peace than divorce cases.

Based on searching observation and documentation data, the cases that were successfully mediated were mostly cases other than

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<sup>24</sup> NH, *Interview* (Palangka Raya, 17 July 2020)

<sup>25</sup> NH, *Interview* (Palangka Raya, 17 July 2020)

<sup>26</sup> AZ, *Interview* (Palangka Raya, 17 July 2020)

<sup>27</sup> NH, *Interview* (Palangka Raya, 18 July 2020)

divorce. Among other things, documentation data was obtained from mediation results reports. However, the author has difficulty tracing the mediation process. This is because what is stated in the mediation report only explains whether the mediation was successful or failed. The contents of the peace agreement above show the peace points formulated by the mediator together with the parties. The problem is that the mediation process is not known to produce a peace agreement. Likewise, if mediation is unsuccessful, the reasons for the failure cannot be known through observation or documentation methods. Therefore, these data can be explored through interview methods with mediators.

Based on the interviews that have been conducted as described previously, it shows that there are two conclusions that can be drawn, namely, firstly, divorce cases are very difficult to achieve peace. This is because in general, if the parties have filed a lawsuit in court, their domestic problems are already critical and difficult to reconcile. They have insisted on divorce. So that the efforts made by the mediator as a facilitator were unable to realize a regional agreement. Second, cases other than divorce, such as joint property, inheritance, and others, have a greater chance of seeking a peace agreement. Because property issues can still be negotiated between the parties. However, if there are heart problems in the household, it is very difficult to achieve peace.

## 2. The parties

Basically, in every dispute the parties are the people in the dispute themselves. So, no matter how good a lawyer or mediator, if the parties do not have a strong desire to resolve the dispute through peace, then peace will not be achieved. So, for mediation to run smoothly, the parties must suppress their egos and realize that not all wishes can be fulfilled in the legal process. Moreover, in the litigation process it will certainly show one party as the loser and the other party as the winner. The way to avoid defeat is to make peace, which means that not all desires can be fulfilled but not everything desired will be lost.<sup>28</sup>

The presence of the parties is important in the mediation process. According to Article 6 of Perma number 1 of 2016:

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<sup>28</sup> Hidayat, *Strategi & Taktik Mediasi Berdasarkan Perma No. 1 Tahun 2016 Tentang Prosedur Mediasi Di Pengadilan*.

- 1) The parties are required to attend the Mediation meeting in person with or without being accompanied by a legal representative.
- 2) The presence of the Parties via long distance audiovisual communication as intended in Article 5 paragraph (3) is considered as direct presence.
- 3) The direct absence of the Parties from the Mediation process can only be done based on valid reasons.
- 4) The valid reasons as intended in paragraph (3) include, among others:
  - a. Health conditions that make it impossible to attend the Mediation meeting based on a doctor's order.
  - b. Under pardon.
  - c. Having residence, residence, or position abroad. Or
  - d. Carrying out state duties, professional demands or work that cannot be abandoned.<sup>29</sup>

Parties who do not attend the mediation process without a valid reason can be categorized as not having good intentions. This good faith is as explained in Article 7 of Perma number 1 of 2016. The presence or presence of a lawyer or legal advisor, mediator is solely to help the disputing parties to formulate a good and correct agreement scientifically and professionally. So that after an agreement is reached there is no longer any debate or subjective interpretation of the agreement that has been made. So, it can be said that the parties with the most dominant role in efforts to achieve peace through mediation are the parties to the dispute.<sup>30</sup>

Mediation at the Palangka Raya religious court is difficult to reach a peace agreement, partly because the parties do not have the desire for peace. Especially in divorce cases, on average those who litigate are firmly determined to divorce, however the efforts made are difficult to achieve a peace agreement. This problem also occurs in various courts in Indonesia. As happened in the Bengkulu religious court. The research results show that the parties themselves have a large contribution to the success or failure of

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<sup>29</sup> Lihat Peraturan Mahkamah Agung Nomor 1 tahun 2016 tentang Prosedur Mediasi di Pengadilan.

<sup>30</sup> Hidayat, *Strategi & Taktik Mediasi Berdasarkan Perma No. 1 Tahun 2016 Tentang Prosedur Mediasi Di Pengadilan*.

mediation. There are two factors related to the parties that caused the failure of mediation at the Bengkulu religious court:

1. The level of community compliance in undergoing the mediation process is still very low. This factor is the main cause of the ineffectiveness of mediation in the Bengkulu Class 1A religious courts.
2. A societal culture that believes that divorce is not a disgrace for the person or family. Likewise, progress in society's educational and economic levels also influences the perception that divorce is not a problem in living life.<sup>31</sup>

The Pamekasan Religious Court has relatively the same obstacles. First, the parties don't know about the urgency of mediation, they consider mediation as a litigation/trial delivery procedure. As a result, they are not serious about following the process.<sup>32</sup> This is what happened at the Sinjai religious court.<sup>33</sup> In fact, it is not only experienced by judicial institutions within the scope of religious courts, but also experienced in district courts. As is the case in the Semarang district court. As research results show, the effectiveness of divorce mediation in the Semarang district court is also low. There are two important points related to the ineffectiveness of mediation in this place, namely:

1. The mediation carried out at the Semarang District Court can be categorized as not being effective. This can be seen from the factors that influence the effectiveness of mediation, one of the factor's causing ineffectiveness is the factor of community compliance in undergoing the mediation process. These causal factors mean that the success rate of mediation in divorce cases at the Semarang District Court is still relatively low, only around 4-10%. The success rate of mediation between 2015 and 2016 is not much different, this means that Supreme Court Regulation

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<sup>31</sup> Agung Supra Wijaya, "Efektifitas Mediasi Dalam Pencegahan Perceraian Di Pengadilan Agama Kelas 1A Kota Bengkulu," *Qiyas: Jurnal Hukum Islam Dan Peradilan* 2, no. 1 (2017): 1-10.

<sup>32</sup> Siti Musawwamah, "Mediasi Integratif Di Pengadilan Agama Pamekasan," *Nuansa: Jurnal Penelitian Ilmu Sosial Dan Keagamaan Islam* 11, no. 2 (2014): 341-64, <http://ejournal.iainmadura.ac.id/index.php/nuansa/article/view/537>.

<sup>33</sup> Muh. Nurhidayat and Firman Muin, "Efektifitas Mediasi Pada Kasus Perceraian Di Pengadilan Agama Sinjai," *Tomalebbi* 4, no. 2 (2017): 112-23.

no. 1 of 2016 has not been able to influence the parties not to continue the divorce.

2. Inhibiting factors in the mediation process that the Semarang District Court Judge has attempted to overcome obstacles in the mediation process have not been able to create effective mediation, this is due to the parties themselves not wanting peace.<sup>34</sup>

Through Perma number 1 of 2016, the significant point is that the good faith of the parties can be optimized to make the mediation process more effective. The mediator has the authority to assess the intentions of the parties during the mediation process. Parties who do not have good faith can be subject to sanctions.<sup>35</sup> The sanction is that the case may be refused to proceed to trial. So, this could be a loss for the parties, because the case cannot be processed further.

3. Mediator

Basically, the only mediators who are allowed to guide the course of mediation are those who already have a mediation certificate or are certified judges. Both from certified judges, certified court employees and external mediators. But sometimes in a court there is not a good enough mediator among the mediators. In these conditions, the Chairman of the Court has the authority to issue a decision letter in the form of changing judges who are not certified mediators to become judges who can carry out the function as mediators.<sup>36</sup> As specified in Article 13 of Perma Number 1 of 2016:

- 1) Every mediator is required to have a Mediator Certificate which is obtained after participating in and being declared to have passed the Mediator certification training held by the Supreme Court or an institution that has obtained accreditation from the Supreme Court.

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<sup>34</sup> Arum Kusumaningrum, Yunanto, and Benny Riyanto, "Efektifitas Mediasi Dalam Perkara Perceraian Di Pengadilan Negeri Semarang," *Diponegoro Law Journal* 6, no. 1 (2017): 1-10, <https://ejournal3.undip.ac.id/index.php/dlr/article/view/15666>.

<sup>35</sup> Amiril Lizuardi, Sudirman, and Ahmad Izzuddin, "Itikad Baik Para Pihak Dalam Pelaksanaan Mediasi Di Pengadilan Agama," *De Jure: Jurnal Hukum Dan Syar'iah* 9, no. 2 (2017): 63-72, <https://doi.org/10.18860/j-fsh.v9i2.6807>.

<sup>36</sup> Nurhidayat and Muin, "Efektifitas Mediasi Pada Kasus Perceraian Di Pengadilan Agama Sinjai."

- 2) Based on the decision of the head of the Court, a non-certified Judge can carry out the function of Mediator if there is no or limited number of certified Mediator.
- 3) Further provisions regarding the requirements and procedures for Mediator certification and granting accreditation to Mediator certification institutions are determined by the Decree of the Chairman of the Supreme Court.<sup>37</sup>

The Decree of the Chief of Court can be used by judges who have not been certified to carry out their duties as mediators with the same roles and duties as mediator judges who have been certified. This authority is given to the chairman of the court with the aim of ensuring that due to limited personnel in certified mediators there are cases where mediation is not carried out.<sup>38</sup> The success of a mediator has two aspects, namely success in terms of quantity and success in terms of quality. Success in terms of quantity is shown by the number of disputes that have been successfully reconciled. Meanwhile, in terms of quality, the measurement is in terms of the complexity of the type of case and the character of the dispute that was successfully reconciled.<sup>39</sup>

The Supreme Court through Perma Number 1 of 2016 requires performance reports on mediators who successfully resolve disputes. As stipulated in Article 16: "The Chief Justice is obliged to submit a performance report of the Judge or Court Staff who successfully resolved the case through Mediation to the Chief Justice of the High Court and the Supreme Court."<sup>40</sup> The Palangka Raya religious court has 7 (seven) mediators, three of whom are certified.<sup>41</sup> This limitation is one of the factors that mediation has not been optimal in the two courts. Although it is not entirely true that mediators who have not been certified are unprofessional. It is just

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<sup>37</sup> Peraturan Mahkamah Agung Nomor 1 tahun 2016 tentang Prosedur Mediasi di Pengadilan

<sup>38</sup> Nurhidayat and Muin, "Efektifitas Mediasi Pada Kasus Perceraian Di Pengadilan Agama Sinjai."

<sup>39</sup> Nurhidayat and Muin.

<sup>40</sup> Peraturan Mahkamah Agung Nomor 1 tahun 2016 tentang Prosedur Mediasi di Pengadilan

<sup>41</sup> Pengadilan Agama Palangka Raya, *Documentation*.

that this certification is one of the qualification standards for professional mediators.

Not only in these two courts, in other courts the number of certified mediators is generally limited. The Bengkulu religious courts also have limited certified mediators. Even though the court is in the highest class, namely class 1A. There are only six mediators who are certified as mediators.<sup>42</sup> Even in the Bukittinggi religious court, none of them has a certified mediator, while in the Payukumbuh religious court, of the ten mediators, two of them are certified.<sup>43</sup>

#### 4. Time and place

Time is one thing that can at least influence the success of mediation. The time provided is related to the normative basis governing mediation procedures and conditions in the field depending on the mediator and the parties. According to Article 24, mediation time is regulated as follows:

1. Within a maximum period of 5 (five) days from the stipulation as intended in Article 20 paragraph (5), the Parties may submit a Case Resume to the other party and the Mediator.
2. The mediation process lasts a maximum of 30 (thirty) days from the date of the order to conduct mediation.
3. Based on the agreement of the Parties, the Mediation period can be extended for a maximum of 30 (thirty) days from the end of the period as intended in paragraph (2).
4. The Mediator, at the request of the Parties, submits the Mediation period as intended in paragraph (3) to the Case Examining Judge along with the reasons.<sup>44</sup>

Based on the article above, mediation time is limited to thirty days. If there are reasons that require an extension of time, it can be extended for a maximum of thirty days. The implementation of

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<sup>42</sup> Wijaya, "Efektifitas Mediasi Dalam Pencegahan Perceraian Di Pengadilan Agama Kelas 1A Kota Bengkulu."

<sup>43</sup> Rahmat Fauzi and Faisal, "Efektifitas Mediasi Dalam Menyelesaikan Sengketa Perceraian (Studi Di Pengadilan Agama Bukittinggi Dan Pengadilan Agama Payukumbuh Tahun 2015-2017)," *Soematra Law Review* 1, no. 2 (2018): 314-34, <https://ejournal.lldikti10.id/index.php/soumlaw/article/view/3722>.

<sup>44</sup> Peraturan Mahkamah Agung Nomor 1 tahun 2016 tentang Prosedur Mediasi di Pengadilan

these normative provisions depends on conditions in the field. The important thing that must be emphasized is for the mediator not to rush in carrying out his duties as a mediator. Haste in the mediation process can ignore things that should be taken into consideration to achieve peace between the parties. Meanwhile, the place for mediation is closely related to the court facilities and infrastructure. Although mediation can be carried out elsewhere according to agreement. As specified in Article 11 below:

1. Mediation is held in the Court Mediation room or at another place outside the Court agreed by the Parties.
2. Judge mediators and court employees are prohibited from holding mediation outside the court.
3. Non-judge mediators and non-court employees who are selected or appointed together with the judge-mediator or court employee in one case are obliged to hold mediation at the court.
4. Use of the Court's Mediation room for Mediation is free of charge.<sup>45</sup>

Mediation based on the author's research is always carried out in the mediation room provided by the court. The court has attempted to provide a representative and comfortable mediation venue. Based on the author's observations, the mediation room provided by the Palangka Raya religious court is quite representative and comfortable. It is just that the Kuala Kapuas religious court provides a more comfortable and beautiful room.

The Bengkulu religious courts also have inadequate facilities. Even though it is class 1A, the mediation and supporting facilities are still inadequate. The place where mediation is carried out is one of the factors that influences mediation because mediation carried out in a comfortable place can make the mediation process smoother. If the place is uncomfortable, it will be very disturbing for the parties and the mediator himself. So, it is difficult to reach peace agreements.

### **Mediator Efforts to Make Mediation Effective in the Palangka Raya Religious Courts**

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<sup>45</sup> Peraturan Mahkamah Agung Nomor 1 tahun 2016 tentang Prosedur Mediasi di Pengadilan

The success of mediation in the Palangka Raya religious courts, as previously mentioned, shows a low success rate. Various factors have also been described in the previous section. The author in this section explores data about the efforts of mediators in the two courts in making mediation more effective. Based on the author's data mining, it can be described below.

NH mediator from the Palangka Raya religious court explained that the efforts that could be taken were as follows:

- 1) Provide a comfortable mediation room
- 2) Provide flexibility in mediation time to the parties so that the mediator can maximize meetings with the parties continuously.
- 3) Improve the skills of mediators to reveal the problems faced by litigants.

Based on the NH explanation above, it can be explained as follows. First, provide a comfortable mediation room. To create a mediation process that runs efficiently, it needs to be supported by facilities and infrastructure, especially the place where the mediation takes place. A comfortable and cool place will influence the mediation process. The observations made by the author show that the mediation venue at the Palangka Raya religious court is quite representative. In this place, quite complete facilities are provided, starting from air conditioning, air freshener, tables, and chairs, as well as decorations that are arranged quite neatly.<sup>46</sup>

Second, provide flexibility in mediation time to the parties so that the mediator can maximize meetings on an ongoing basis. The NH concentration in this second point concerns the mediation time. Mediation carried out with sufficient time and not in a hurry will maximize the ongoing mediation process. Third, improve the skills of mediators to reveal the problems faced by litigants. The mediator's skills are influenced by the mediator's certification and experience as a mediator. Based on the author's research, the Palangka Raya Religious Court has three certified mediators. So far, the court mediators have come from internal mediator judges. Of the 11 (eleven) total judges, 3 (three) of them are certified mediators, indicating the limited number of certified mediators. NH itself is a certified mediator. Next, the author

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<sup>46</sup> Pengadilan Agama Palangka Raya, *Observation*.

carried out data mining on MH. He explained that the efforts that can be made are:

1. Provide sufficient explanation about mediation.
2. Provide sufficient explanation about the advantages or benefits of the case being resolved peacefully.
3. Give the parties sufficient time and freedom to formulate a peace agreement.<sup>47</sup>

MH's overall explanation is in line with NH above, especially in the point of providing sufficient time in the mediation process. The rest is in addition to the procedures for conducting mediation and the benefits of taking this route. AZ gave a slightly different explanation from the two mediators above. He said that:

1. Give the parties a long time to think about weighing the benefits and harms of divorce
2. Optimizing the provision of enlightenment using a religious teaching approach and raising awareness of sanctions for not acting in good faith.<sup>48</sup>

The difference from the previous mediator's opinion is that he detailed the use of a religious approach in the mediation process. Religion is a fundamental sacred thing in every person. This approach will help in formulating peace regarding the problems faced by the parties. Explanation of sanctions for parties who do not have good intentions is also one of the new provisions in Perma Number 1 of 2016. This provision can put pressure on the parties to carry out each mediation process well. While extracting data on the last two mediators, namely NJ<sup>49</sup> and ZH<sup>50</sup> has generally been covered in the opinion opinion above. Based on the explanation above, mediators at the Palangka Raya Religious Court have tried to maximize their abilities for successful mediation. However, at the same time there are things that must be improved and improved, especially certified mediators and improving mediation facilities to make them more

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<sup>47</sup> MH, *Interview* (Palangka Raya, 17 July 2020)

<sup>48</sup> AZ, *Interview* (Palangka Raya, 17 July 2020)

<sup>49</sup> Memberikan penjelasan yang cukup tentang pentingnya mediasi. Memberikan waktu yang cukup tentang untuk pelaksanaan mediasi. Waktu yang cukup untuk merumuskan kesepakatan perdamaian. NJ, *Interview* (Palangka Raya, 21 June 2020)

<sup>50</sup> Memberikan waktu yang cukup untuk merumuskan persoalan mereka untuk kesepakatan perdamaian. Memberikan penjelasan yang cukup atas persoalan yang mereka hadapi. ZH, *Interview* (Palangka Raya, 21 June 2020)

comfortable. So, it is hoped that it can increase the effectiveness of mediation in the Palangka Raya religious courts.

Based on the data presented above, the efforts that can be made by mediators at the Palangka Raya and Kuala Kapuas religious courts can be detailed as follows.

1. Type of Case

The cases in which a peace agreement was successfully implemented were non-divorce cases. Meanwhile, the religious courts, both Palangka Raya and Kuala Kapuas, and even religious courts in other areas, most cases they receive are divorce cases. So, it can be said that it is normal that the success rate of mediation is generally low.

However, this does not mean that there are no efforts to make mediation more effective in realizing a peace agreement. At least, even though the subject of the divorce lawsuit cannot be prevented, peace agreements can be formulated regarding solutions to the consequences of divorce, such as the rights to *hadanah*, *mut'ah* and child support.

2. The Parties

The parties, as explained in the previous section, greatly influence the success or failure of mediation. Here, it is important to strive to raise awareness of the litigants regarding the importance of their role in realizing peace. A mediator is only a facilitator to reach a peace agreement between the parties.

The role of the case examining judge must also be maximized in explaining the advantages of using the mediation route and the threats for those who do not have good intentions in participating in the mediation process. Through synergistic understanding between judges and mediators in providing explanations in taking the mediation route, the mediation process will be more effective.

3. Mediator

The limited number of certified mediators owned by the Palangka Raya is one of the factors that mediation has not been optimal. Even though mediators without certification are not completely competent, the existence of mediator certification is one of the standards of the Supreme Court that a mediator is considered professional in carrying out their duties.

The court must strive for mediators to undergo certification as mediators. This effort can be carried out at the highest level through

the Supreme Court to periodically program a greater quantity of participation of mediators to take part in the certification. So, reasons such as time, opportunity and costs can be minimized if the Supreme Court further improves the certification program in question.

Apart from that, to anticipate the limitations of mediators who come from judges, this can also be overcome with the contribution of certified non-judge mediators. As Dessy Sunarsi's research shows that:

The role of Non-Judge Mediators in supporting the success of this mediation is that although on the one hand the main lawsuit for divorce cannot be prevented, in mediation a peace agreement can be made for a solution to the consequences of the divorce, namely for child custody, mut'ah and child living expenses. Usually, the main lawsuit only contains a request for dissolution of the marriage, but women are not aware of the rights of their children or themselves. Through a Mediator who is focused and professional with time, coupled with a successful caucus (one-sided meeting), the potential root of the problem can be explored. Including in divorce cases, the two parties involved or who find it difficult to communicate. This is where the mediator brings together and builds communication between the two parties.<sup>51</sup>

It was further said that one of the success factors that must be had is the serious efforts of the mediators to facilitate the parties. Foresight and the use of various approaches, including religious approaches, can be optimized, such as knowledge about the rights and obligations of husbands who have left their wives, as well as children not to have their souls divided because of the divorce of their parents.<sup>52</sup> Karmuji in his research explained that one thing a mediator must improve is skill. Skills can be obtained from a few educations, training including mediator certification, and several experiences in resolving conflicts. The mediator as a neutral party

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<sup>51</sup> Dessy Sunarsi, Yuherman, and Sumiyati, "Efektifitas Peran Mediator Non Hakim Dalam Penyelesaian Perkara Perceraian Di Pengadilan Agama Kelas 1A Pulau Jawa," *Jurnal Hukum Media Bhakti* 2, no. 2 (2018): 138-51, <https://doi.org/10.32501/jhmb.v2i2.26>.

<sup>52</sup> Sunarsi, Yuherman, and Sumiyati.

can play his role according to his capacity.<sup>53</sup> He divides the mediator into two capacities, first the mediator who displays the weakest role if in the mediation process, he only does the following things:

1. Host a meeting
2. Lead the discussion
3. Maintain or guard the rules so that the negotiation process runs well.
4. Control the emotions of the parties
5. Encourage parties who are less capable or reluctant to express their views.<sup>54</sup>

Second, a mediator displays his capacity as a strong mediator if in the mediation process, he can do the following things:

1. Prepare and take meeting minutes
2. Formulate a common ground or agreement between the parties
3. Help the parties realize that a dispute is not a battle to be won, but a dispute that must be resolved
4. Develop and propose alternative problem solutions
5. Help the parties analyze alternative problem solutions
6. Persuade the parties to accept certain proposals in the context of resolving the dispute.<sup>55</sup>

It is interesting in a study conducted by Ilyas et al., that at the Jantho Sharia Court there is an opinion that the role of mediator for judges is a double burden. As stated below:

There is an opinion from the mediator judge that the task of being a mediator is an additional task which feels burdensome for him, because his main task is trial. He also believes that the mediation process will slow down the decision of the case and will affect his value as a judge.<sup>56</sup>

This assumption is certainly reasonable, because in general the mediators in religious courts are the judges themselves. So, the

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<sup>53</sup> Muhammad Karmuji, "Peran Dan Fungsi Mediator Dalam Penyelesaian Perkara Perdata," *Ummul Qura* 7, no. 1 (2016): 36-52, <http://ejournal.kopertais4.or.id/pantura/index.php/qura/article/view/3040>.

<sup>54</sup> Karmuji.

<sup>55</sup> Karmuji.

<sup>56</sup> Ilyas, Syahrizal Abbas, and Iman Jauhari, "Efektifitas Peran Hakim Sebagai Mediator Dalam Penyelesaian Perkara Perdata Di Mahkamah Syar'iyah Jantho," *Syiah Kuala Law Journal* 1, no. 1 (2017): 83-100.

perception arises that the task of being a mediator is a burden. However, not all mediator judges are like that. Because, the author's data mining shows that NH explains that for him being a mediator is not a double burden. In fact, he felt happy and proud as a mediator, because his role was as a party who mediates to create a peace agreement. When he succeeds in reconciling, especially in divorce cases, succeeds in reuniting the households of the parties, there is an indescribable feeling of joy.<sup>57</sup>

Based on this, the problem of the double burden of serving as a judge on the one hand and on the other hand as a mediator returns to everyone. How they play their roles, both as judges and as mediators. In the author's opinion, in the future the ideal mediator will be a non-judge. Apart from being beneficial for the role of judges who are the focus, it also increases job opportunities for graduates who want to work as mediators.

#### 4. Facilities and Infrastructure

Facilities and infrastructure as explained in the previous section are one of the factors that can influence the smoothness of the mediation process. A representative and comfortable place will bring about a peaceful atmosphere, so that efforts to realize peace agreements will be more open. The Palangka Raya Religious Court has provided a representative mediation venue. In the future, it is hoped that the Palangka Raya religious court can improve the quality of mediation venues that are even more representative.

Based on the explanation above, mediation in court has many corrections so that it can be even better in the future. So that mediation can be an effort to bring about peace between the litigants with various advantages. Although research shows that forcing mediation in civil case trials in court is considered inappropriate. This is because ontologically, mediation in court is in turn the judge in that court who becomes the mediator, and they do not apply the principles of simple, fast, and low-cost justice. It is further said that mediation should start from the willingness of the parties to resolve disputes peacefully without using court institutions. Meanwhile, the efforts taken by the

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<sup>57</sup> NH, *Interview* (Palangka Raya, 18 July 2020)

parties through the courts are one place where peace can no longer be achieved.<sup>58</sup>

However, the implementation of mediation in religious courts provides positive values in resolving disputes, such as the importance of respect for other people, honor, honesty, fairness, reciprocity, individual participation, agreement, and control of the parties. These values then counter the value system that applies in resolving cases through litigation, such as adversarial processes, impersonality, control by legal advisors, and authoritative regulatory orders. Religious courts handle family cases which are dominated by divorce cases. mediation can provide benefits by increasing the variety of forms of peace efforts that can be offered to avoid divorce. with mediation as well as legal efforts as an important building block before divorce occurs.<sup>59</sup>

Indriati Amarani also added that settlement through the mediation process provides many benefits for the parties. Shorter time taken will automatically reduce costs to as little as possible, while from an emotional perspective, settlement using a win-win solution approach will provide comfort for the parties, because the points of agreement are made by the parties themselves according to their wishes.<sup>60</sup>

When people do not want mediation through the court, they can also go through mediation institutions outside the court, such as the Jogja Mediation Center.<sup>61</sup> However, mediation, both in court and outside court, essentially has the same goal, namely realizing peaceful agreements. Problems related to mediation results, especially in court, must be resolved as previously explained. Mediation in court must continue to be supported, because it is an effort initiated by the Supreme Court to create a win-win solution, while reducing the burden on court cases when they are successfully resolved through mediation.

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<sup>58</sup> Rahadi Wasi Bintoro, "Kajian Ontologis Lembaga Mediasi Di Pengadilan," *Yuridika* 31, no. 1 (2016): 121–42, <https://doi.org/10.20473/ydk.v31i1.1959>.

<sup>59</sup> Karmawan, "Diskursus Mediasi Dan Upaya Penyelesaiannya," *Kordinat* 16, no. 1 (2017): 107–26, <https://doi.org/10.15408/kordinat.v16i1.6457>.

<sup>60</sup> Indriati Amarani, "Penyelesaian Sengketa Yang Efektif Dan Efisien Melalui Optimalisasi Mediasi Di Pengadilan," *Kosmik Hukum* 16, no. 2 (2016): 87–106, <https://jurnalnasional.ump.ac.id/index.php/KOSMIK/article/view/1954>.

<sup>61</sup> Setiati Widiastuti, Sri Hartini, and Eny Kusdarini, "Mediasi Dalam Penyelesaian Sengketa Kesehatan Di Jogja Mediation Center," *Socia* 14, no. 1 (2017): 15–25, <https://doi.org/10.21831/socia.v14i1.15889>.

## Conclusion

The low success rate of mediation at the Palangka Raya Religious Court is influenced by four factors. First, the type of case, divorce cases are more difficult to reach a peace agreement than non-divorce cases. Second, the parties determine the success or failure of mediation, the role of the mediator is as a facilitator to bridge the parties in reaching a peace agreement. Third, the mediator has a significant role in facilitating the parties to realize a peace agreement. The court also has limited certified mediators. Fourth, the time and place of mediation, a mediation process that is carried out less seriously and, in a hurry, can affect the smoothness of the mediation process. Likewise, mediation places, places that are less representative and less comfortable will make it difficult to reach a peace agreement. Thus, successful mediation in divorce cases is not an impossibility, it is just that divorce cases are very difficult to reconcile, because the parties who submit divorce cases to court usually have reached the climax of domestic problems, and some have not lived together for a long time.

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