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Mediation as an Alternative Institution of Disclaimer in Religion Court in Indonesia According to Justice Perspective

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***Abstract*-Settlement of divorce cases through mediation in the religious court by the judge as the mediator who reconciles the two parties in the sulh dispute which is a dispute resolution process in which the parties agree to end their case peacefully. In this case the judge must always strive for the parties to the dispute to take the path of peace (ishlah) because the path of peace will accelerate the settlement of the case and end it by the willingness of both parties to be carried out voluntarily there is no coercion and the judge only facilitates the parties so that they reach an agreement in order to bring peace. With peace, the parties can try a resolution that is mutually beneficial to each other (win-win solution), this is because in peace, what is emphasized is not only the legal aspect, but how both parties can still benefit. The issuance of circular number 1 of the Supreme Court of the Republic of Indonesia in 2002, the Supreme Court of Republic of Indonesia number 1 of 2008, as amended by the Republic of Indonesia Supreme Court Regulation number 1 of 2016 concerning mediation aimed at the accumulation of cases in the Supreme Court of the Republic of Indonesia that have not been handled by the panel of judges.**

Keywords-Mediation, Mediator, Islah, Justice.

I. INTRODUCTION

Laws are made to provide protection to the public. For the interests of the community to be protected, law must be implemented. The implementation of the law can take place normally, peacefully, but can also occur due to violations of the law. In this case, the law that has been violated must be upheld. It is through the enforcement of this law that law becomes reality. Fiat Justicia Ruat Caelum (law must be upheld even though the sky is falling). This flattering phrase refers to justice which must continue to be upheld whatever happens. The enforcement and application of law, especially in Indonesia, often faces obstacles related to community development. Along with the rapid progress of globalization which causes high potential for disputes, legal resolution is needed by not annulling the norms and principles that live and grow in the fabric of people's lives. [1]

Mediation on the basis of deliberation towards an agreement / peace, apparently has long been developed in Indonesia. Mediation received separate arrangements in a number of Dutch East Indies legal products and in legal products after Indonesia gained independence to this day. An alternative dispute arrangement in the rule of law is very important, considering that Indonesia is a legal state (rechtsstaat). Mediation as an institution for dispute resolution can be done by a judge (state apparatus) in court or other parties outside the court, so that its existence requires legal rules.

The institutionalization and empowerment of mediation in the court (court connected mediation) is also inseparable from the philosophical foundation that originates from the basis of our country, namely Pancasila, especially the fourth principle which reads "Democracy Led by Wisdom in Consultation/ Representation". The fourth principle of Pancasila requires that efforts to resolve disputes / conflicts / cases be carried out through deliberation to reach consensus which is encompassed by a family spirit. This implies that every dispute / conflict / case should be resolved through a process of negotiation or peace between the parties to the dispute to obtain mutual agreement. [2]

Article 130 HIR / 154 RBg which orders peace efforts by judges, is used as the main capital in establishing court mediation law instruments, which have been initiated since 2002 through SEMA Number 1 of 2002 concerning First Level Court Empowerment to Implement Peace Institutions Article 130 HIR / 154 RBg which was later refined in 2003 through PERMA Number 2 of 2003 concerning Mediation Procedures in the Court. The presence of PERMA Number 1 of 2008 is intended to provide certainty, orderliness, smoothness in the process of reconciling the parties to resolve a civil dispute. [3]

This can be done by intensifying and integrating the mediation process into litigation procedures in the Court. Mediation holds an important position in PERMA No. 1 of 2008, because the mediation process is an inseparable part of the litigation process in court. Judges are required to follow the dispute resolution procedure through mediation, if the judge violates or is reluctant to apply the mediation procedure, the judge's decision is null and void (Article 2 paragraph (3) PERMA) ,The religious court has practiced mediation based on PERMA Number 1 of 2008. Mediation on divorce cases or can be called a "heart dispute" because her husband and wife are emotionally emotional.

In consideration of letter A PERMA Number 1 of 2008 stated that mediation is one of the process of dispute resolution that is faster and cheaper, and can provide greater access to the parties to find a solution that is satisfying and fulfills a sense of justice. Furthermore, in letter B it is mentioned that the integration of mediation into the court proceedings can be one of the effective instruments to overcome the problem of the accumulation of cases in the court and strengthen and maximize the function of court institutions in dispute resolution in addition to judicial processes (adjudicative).

PERMA Number 1 of 2016 concerning Mediation Procedures in the Court. This PERMA then replaces the previous PERMA, namely PERMA Number 1 of 2008. In the PERMA Number 1 of 2016 there are differences from the previous PERMA, among others, first, related to the Mediation deadline which is shorter from 40 days to 30 days from the stipulation of orders do mediation. Second, there is an obligation for the parties to attend the Mediation meeting in person with or without legal representation, unless there are valid reasons. Third, the most recent is the existence of good intentions in the Mediation process and the legal consequences of the parties who have no good intentions in the Mediation process. [4]

In an effort to peace, the first step that must be done by the judge in bringing peace to the parties to the dispute is to hold peace to the disputing parties. The duty of the judge to reconcile the parties concerned is in line with the Islamic teaching. The teachings of Islam order to resolve any disputes that occur between humans and the way of peace (ishlah). This provision is in line with the word of Allah Almighty. In the Qur'anic Quranic Verse (5), which means: "Believers are brothers and sisters, so make peace between your two brothers and fear Allah so that you may have mercy, that is, if two believers fight, then make peace." them. Peace must be done justly and justly because Allah loves the just. " To analyze why a matter can be resolved through mediation or not, submitted by Lucy V Kazt, The success of the alternative dispute resolution process through mediation is due to equitable and legal remidies that provide the same relief and compensatory damages that the parties must respect. The parties have the confidence that mediating disputes through mediation will provide remedy for damages to them with a win-win solution and not a win lose solution.

II. RESEARCH METHOD

In order to obtain and collect legal materials and analyze legal materials and scientific information or information, surely a scientific paper and systematically directed and consistent composition are needed. The method in this research is empirical normative legal research. Normative legal research is a legal research that examines the existing norms in the laws and regulations governing mediation as an alternative to settling divorce cases in religious courts in Indonesia. Empirical legal research is research that examines the law not only as a passive norm, but examines the law and regulations in its implementation. [5]

In this paper the problem approach used is (6) the statutory approach and the socio legal approach. To obtain legal materials needed in this study, techniques and legal material collection such as Primary Legal Materials are used, namely by conducting interviews directly with resource persons / respondents people who can be trusted and are considered capable of providing appropriate information with things things that are the focus of research. Secondary Legal Materials, obtained by conducting a library / documentation study with methods such as collecting and studying legal materials both primary legal materials, secondary legal materials, as well as tertiary legal materials and / or non-legal materials or documents important documents relating to the problem to be examined. [6]

III. FINDINGS AND DISCUSSION

1. *Application of Mediation in Settling Divorce Cases in the Religious Courts in Indonesia*

The process of finding justice through a court of law is not easy, because it might take a long time and cost is not small. Even though it cannot be denied that not all justice seekers or litigants have sufficient time and finances. In addition to these obstacles, it is not uncommon to build a case in the Court which causes the litigation process to be prolonged and requires significant costs. Therefore, it is necessary to find a solution in order to facilitate justice seekers or litigants through a mechanism that is more flexible than the court proceedings. To meet these demands also to avoid case buildup, according to SEMA Number 1 of 2002 concerning Empowerment of the First Level Court to apply the Peace Institution (Ex Article 130 HIR / 154 RBg) and Conclusions.

The Results of the Commission II Discussion of the Republic of Indonesia Limited National Working Meeting on the Implementation of Peace Efforts according to Article 130 HIR / 154 RBg dated 26 and 27 September 2002 in Surabaya, which implies a new mechanism in the world of justice, namely the existence of a peaceful institution, which in essence is as follows: (1) That the peace effort must be carried out seriously and optimally, not merely a formality; (2) Involving judges who are appointed and can act as facilitators and / or mediators, but not panel judges (but the results of the Rakernas allow from panel judges on the grounds of lack of judges in the area and because they are more aware of the problems), or the parties concerned request other parties (third) deemed capable of the Chairperson of the Assembly; (3) If this peaceful effort takes a long time, the case examination can exceed a maximum period of 6 (six) months as stipulated in SEMA Number 6 of 1992; (4) A peace agreement is made in the form of a Peace Deed (dading), and the parties are punished for obeying what has been agreed; (5) If unsuccessful, the judge concerned must

report to the Chairperson of the Court / Chairperson of the Assembly and proceeding with the case examination; (6) The facilitator / mediator must be neutral and impartial, must not be influenced internally or externally, not act as a judge who determines wrong or right, not as an advisor; (7) Successful settlement of cases through peace can be used as a reward for judges who become facilitators / mediators. [7]

Based on the aforementioned matters, the Supreme Court then issued PERMA Number 2 of 2003 revoked by PERMA Number 1 of 2008 concerning Mediation Procedures in the Court, with the following reasons: (1) Reducing the problem of case buildup; (2) The dispute resolution process is faster and cheaper; (3) Completion of SEMA Number 1 of 2002 concerning Empowerment of the First Level Court to apply the Peace Institution (Ex Article 130 HIR / 154 RBg); (4) Institutionalization of the mediation process into the justice system; (5) Encouraging the parties to pursue a peace process that can be intensified by integrating the mediation process into litigation procedures in the District Court; (6) Fill in the legal vacuum.

The mediation process implemented in the Religious Courts, in addition to containing many advantages and benefits, the mediation process is also one of the processes so that cases can be resolved more quickly with low costs. In addition to mediation, it can provide access to the parties to the dispute to obtain justice or a satisfactory dispute resolution. This is in line with what was stated by the Chief Justice of the Supreme Court, Bagir Manan, that the Religious Court has also introduced mediation to better reconcile families who are cracked (want to get divorced). [8]

The mediation procedure in the settlement of divorce cases in the Religious Courts is based on PERMA RI No. 2 of 2003. On the first day of the trial process, the judge is obliged to make the parties peaceful and reconcile. If during the first trial, both parties showed an attitude of not being able to live in harmony again, the divorce case did not need to be processed through mediation. However, efforts to reconcile the two parties that litigate must still be carried out by the Panel of Judges who examined the case before the case was decided. This peace effort by the Panel of Judges can be carried out in every trial.

2. *Mediation in the Settlement of Divorce Cases in the Religious Courts According to the Justice Perspective*

Mediation as an Alternative Dispute Resolution (ADR) is seen as a way to resolve disputes that are humane and fair. Mediation is essentially an activity of providing services to the two disputing parties, to minimize their differences and reach an acceptable or agreed-upon settlement. The steps taken by the mediator to produce a settlement are directed at efforts to help the disputing parties reach a compromise or settlement that is acceptable or can be agreed upon. [9]

The steps taken by the mediator to produce a settlement are directed at efforts to help the disputing parties reach a compromise or settlement that can be accepted by both parties by using a persuasive approach. Each mediator must have certain professional qualifications. Mediators must be seen as a storehouse of knowledge and experience. (8) Both parties to the dispute must be able to look at the mediator with respect for their high professional competence. A mediator has a central role in resolving a divorce suit.

Therefore the mediator must possess and master the mediation techniques. Mediation techniques show that mediation has artistic characteristics, such as the art of listening, the art of asking questions, the art of time management, and most the main is the art of persuasion. Each case is a new challenge to use and design techniques that are in accordance with existing conditions, and because no two mediators use the same approach in resolving every dispute case.

Mediators essentially carry out several roles, namely meeting organizers, neutral discussion leaders, custodians or custodians of the terms of the agreement so that debates in the agreement process take place in a civilized manner, controlling emotions of both parties and encouraging parties or agreement participants who are less able or reluctant to express their views . Mediation is essentially an effort to settle a dispute in a peaceful manner where there is the involvement of a neutral third party (mediator), which actively assists the parties to the dispute to reach an agreement that can be accepted by all parties. [10]

Mediation is carried out as a dispute resolution process based on an agreement in the presence of a neutral third party called the mediator, involved and accepted by both parties to the dispute in the agreement. The mediator is tasked with helping the two disputing parties to find a solution to the disputes, but does not have the authority to make decisions during the agreement and the mediation has the goal of reaching an agreement that is acceptable to the disputing parties to end the dispute. In this case the husband and wife are willing to resume their domestic relations and cancel their intention to divorce. [11]

The urgency and motivation of mediation is so that the parties to the litigation are at peace and do not continue their case in the litigation. If there are things that block the problem so far, then it must be resolved in a familial manner with consensus agreement. The main purpose of mediation is to achieve peace between the warring parties. Parties in conflict or litigation are usually very difficult to reach an agreement when meeting on their own. The meeting point that has been frozen about matters that are disputed usually can become liquid if there is a meeting. Then mediation is a means to bring together parties involved in a litigation facilitated by one or more mediators to filter out issues to be clear and the warring

parties gain awareness of the importance of peace between themselves, so that the parties can obtain an acceptable agreement and mutual benefit of the parties to the dispute (win-win solution). [12]

IV. CONCLUSION

The conclusions in this study were: (i) the mediation process can also be applied in the Religious Courts. Besides containing many advantages and benefits, the mediation process is also one of the processes so that cases can be resolved more quickly with low costs. In addition to mediation, it can provide access to the parties to the dispute to obtain justice or a satisfactory dispute resolution. During this time mediation is better known as a form of dispute resolution outside the judicial process, but with PERMA Number 1 of 2008, mediation must be taken as one of the stages in the litigation process within the General Courts and Religious Courts. (ii) the peace agreement is the result of the work and the wishes of the parties themselves, while the mediator functions to help the parties and does not have a word break. The mediator is merely checking the formulation of the agreement so that it does not conflict with the law and can be implemented. The responsibility for the contents of the peace agreement is the joint responsibility of the parties to the dispute.

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