

Research Article

Exploring Efficacy: A Study of Simple and Complex Approaches to Divorce Mediation

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ABSTRACT: The rising global divorce rate is reshaping the landscape of family dispute resolution, moving away from the adversarial or litigation system toward an alternative dispute resolution known as mediation. This global trend is also observed in Indonesia where the Supreme Court has mandated the use of mediation in civil cases. "Everybody wins, nobody loses" as the primary slogan of mediation emphasizes a win-win outcome for all parties involved, avoiding any losers. However, assessing its efficacy in handling divorce cases in Indonesia becomes crucial. This is mainly because the settlement rate has been discovered to be low in Indonesia since the mandatory implementation of court-annexed mediation for almost two decades compared to other countries such as Australia and the United States. In both countries, settlement is not only based on agreements but also on the process that satisfies the parties. Therefore, this study aims to examine the conceptual issues underlying the low effectiveness of divorce mediation by questioning agreements as a measure of divorce mediation effectiveness. This study uses the sociolegal framework to critique the Supreme Court Regulation 1/2016 regarding Mediation in court and its dynamics in divorce cases. Moreover, courtroom study is applied to observe the mediation process. The results showed that the success of mediation revolves around the number of agreements reached by the parties and the process did not focus on the characteristics of divorce cases, thereby considered not suitable for all cases. Furthermore, the court-annexed mediation regulation creates ambiguity between the use of marital mediation to reconcile the parties and divorce mediation to proceed post-divorce agreement or both.

KEYWORDS: Effectiveness of Mediation, Divorce Mediation, Religious Courts.

I. INTRODUCTION

Divorce trend is increasing globally with Maldives, Kazakhstan, Russia, Belarus, and Moldova identified as the five countries with the highest rates, while India, Mozambique, Kenya, Zimbabwe, and Vietnam rank among the

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lowest in the world.¹ In a smaller scope, there is one divorce every 30 seconds in the United States.² In Asia, Indonesia ranks fourth in the highest divorce rates after India, Vietnam, and Japan, and this indicates an increase in the need for mediation to assist spouses in improving their marital relationships and reaching post-divorce agreements through a neutral third party.

Over the past 50 years,³ mediation has become an integrated feature of the justice system worldwide.⁴ Studying divorce mediation is urgent due to its unique legal and cultural context, impact on families and communities, role in legal harmonization, the exploration of gender dynamics, relevance in regions with legal pluralism, contribution to access to justice, and its potential policy implications. Indonesia⁵ also joined the trend by gradually integrating mediation into its court procedure for civil disputes through the concept of court-annexed mediation.⁶

Divorce contributes 95% to the total cases in family law which comprises inheritance, endowments, gifts, alms, and Sharia economics, and placed under the authorities of Religious Courts.⁷ The number led to the perception that religious courts are primarily formulated to deal with divorce cases.⁸ The

¹ Divorcecom, *Divorce Rate in the World*.

² Brenna Harper, *Divorce Statistics in 2023 (Latest U.S. Data)*.

³ Bernie Mayer, "Mediation: 50 Years of Creative Conflict" (2013) 51:1 Family Court Review 34–41.

⁴ Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 4th ed (San Francisco: Jossey-Bass Publishers, 2014).

⁵ Mark E Cammack, *Islamic Law in Contemporary Indonesia Ideal and Institution*, R.Michael Feener, ed (Cambridge: Harvard University Press, 2007). Meanwhile, since the monetary crisis of 1997-1998 which affected divorce rates in various regions, see Supreme Court Oversight Board, Annual Report of the Religious Judiciary Oversight Body for 2018 and 2019.

⁶ Initially, mediation was initiated through Supreme Court Regulation No. 1 of 2002 on the empowerment of dispute resolution institutions in Article 130 HIR/154 Rbg⁶ which made mediation mandatory in court and could lead to a null and void judgment when not followed. The regulation was formulated and implemented during the Dutch colonial era with Article 130 HIR and Article 154 Rbg which were further strengthened by the enactment of the Law on Arbitration and Alternative Dispute Resolution to regulate mediation outside of the court.

⁷ National Commission on Violence Against Women, *Year-end Notes of the National Commission on Violence Against Women for the Years 2017 and 2018*.

⁸ Stijn van Huis, "Rethinking the Implementation of Child Support Decisions - Post-divorce Rights and Access to the Islamic Court in Cianjur, Indonesia" 2010:1 Law, Social

jurisdiction is established by law and its existence is considered important⁹ and desired by the public.¹⁰ Evident from the survey mentioned the high societal satisfaction levels indicated by the willingness of 80% of applicants to return to Religious Courts when faced with similar legal issues. The research found that parties file for divorce in Religious Courts based on a minimum of three reasons and these include the inability to resolve family issues themselves, motivation to comply with Indonesian law, and belief that they can provide a resolution to family disputes.¹¹

Second, the existence of Religious Courts is also significant for women because they make up at least 60% of the groups filing cases¹² and as many as 7 out of 10 women file for divorce.¹³ This was also reflected in the higher number of contested filings compared to divorce by mutual consent.¹⁴ Moreover, the issues mediated can lead to potential injustices for the parties due to the vulnerability of power imbalances, the occurrence of domestic violence, and the failure to fulfil post-divorce rights.

Third, several studies generally rate mediation over litigation due to the record of 80% success in family disputes and 100% in labour disputes.¹⁵ In Australia and the United States, mediation was reported to have a 95% settlement rate while Indonesia has below 30%.^{16,17,18} Divorce mediation has been in practice for two decades since the enactment of the Supreme Court Regulation on Mediation but was observed to be mostly a formality without

Justice & Global Development Journal (LGD, online: <http://www.go.warwick.ac.uk/elj/lgd/20010_1/vanhuis>.

⁹ C Sumner & T Lindsey, "Courting Reform: Indonesia's Islamic Courts and Justice for the Poor" (2011) 4:1 *International Journal for Court Administration* 3–16.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ AIPJ2, *Analisis Putusan Perkara Perceraian di Indonesia*.

¹⁴ Supreme Court, *Annual Report of the Religious Courts Agency*.

¹⁵ Alysoun Boyle, "Effectiveness in Mediation: A New Approach" (2017) 12 *The Newcastle Law Review* 148–161.

¹⁶ Wahyu Widiana, *Upaya Penyelesaian Perkara Melalui Perdamaian di Pengadilan Agama, Kaitannya dengan BP4*.

¹⁷ Supreme Court, *Annual Report of the Religious Courts Agency in 2018* (2019).

¹⁸ *Evaluation Study on The Pilot Scheme on Family Mediation*, Final Report, by The Hongkong Polytechnic University, Final Report, (2004); M Nur, *Mediasi Keluarga dan Tantangannya Bagi Pengadilan Agama* (2019); mediatecom, *Family Mediation in USA*.

any effect.¹⁹ It was designed to allow the parties to reconcile²⁰ but found to be unsuccessful in most cases in reality.²¹

Several studies were observed to have mentioned effectiveness as a selling point for mediation²² but different views were reported on the measurement parameters. The success of mediation is not only based on the number of agreements reached but also on other factors.²³ Successful mediation was defined as the outcomes of the process which include agreements, the satisfaction of the parties, or both, as well as other benefits such as improved communication and mutual support among the parties.²⁴

The background information shows there is a gap between reality and the ideal perspective underlying divorce mediation in Religious Courts and how this can be transformed into future challenges. Therefore, this study aims to evaluate the effective implementation of divorce mediation in Religious Courts and the measures to determine its success. The discussion begins with an introduction outlining the background information and an overview of divorce mediation in Religious Courts followed by the parameters to measure the success, and the implementation process in Indonesia, Australia, and the United States. Finally, this study concludes with a discussion of how to address the root issues of divorce mediation.

¹⁹ Nur, *supra* note 18; Faisal Rahmat Fauzi, *Efektifitas Mediasi dalam Penyelesaian Sengketa Perceraian (Studi di Pengadilan Agama Bukit Tinggi dan Pengadilan Agama Payakumbuh Tahun 2015-2017)*.

²⁰ The principle of the obligation to reconcile is regulated in Articles 65 and 82 of Law No. 7 of 1989 concerning Religious Courts. According to Islamic teachings, it is advisable to use the "ishlah" approach in cases of disputes or conflicts. Therefore, the judge has to reconcile the disputing parties under Islamic moral values. See Wirdyaningsih, *Mediasi Sebagai Upaya Memujudkan Ishlah dalam Penyelesaian Sengketa Perbankan Syariah* (Yayasan Pengkajian Hadits el-Bukhori, 2018).

²¹ The purpose of reconciliation efforts in divorce cases is to influence the parties initially wanting to divorce to reconsider and decide to withdraw their lawsuit filed with the Court, thereby preventing the separation. Moreover, reconciliation efforts are also made to realize the ideal purpose of marriage as stated in Law No. 1 of 1974 which is to establish a happy and lasting family based on the belief in the Almighty.

²² Patricia Hughes, "Mandatory Mediation: Opportunity or Subversion (19 Windsor Y.B. Access Just.161 Year 2001)" (2001).

²³ Reva Seth, *Mediation: The Great Equalizer? A Critical Theory Analysis* (2000).

²⁴ Boyle, *supra* note 15., W. Ross,

II. METHODOLOGY

This study was conducted using the sociolegal framework which integrates both legal and sociological perspectives to comprehensively examine the complex interplay between legal structures on supreme court regulation and socio dynamics. A qualitative research design utilizing a combination of literature review and courtroom study. The literature review focused on mediation in Indonesia, Australia, and the United States to obtain a conceptual analysis of the Supreme Court Regulation on Mediation. As a reference, Australia and the United States have longstanding experience in divorce mediation and over the past few decades, they have witnessed rapid and innovative developments in their mediation services. Both countries have various academic debates and practical applications. Moreover, the Supreme Court Regulation on Mediation was critiqued and compared to other countries to provide conclusions regarding the level of implementation and effectiveness. However, it is crucial to acknowledge potential biases rooted in cultural differences as they contribute to enhancing the depth of analysis in this research.

Mediation is part of the judicial mechanism but has only been discussed in limited studies concerning courtrooms in Indonesia. Moreover, the courtroom study method²⁵ is usually needed in mainstream legal studies, specifically those focused on cases experienced by women in court.²⁶ The purpose of this method is generally to observe the hearings conducted by judges. However, it was applied in this study to observe 10 mediation sessions conducted by mediators in South Jakarta Religious Court in 2020 where detailed notes were taken on communication dynamics among the parties and their engagement with the mediator.

²⁵ The analysis of the judiciary through the concept of courtroom study becomes essential in critically examining the doctrine of Legal Positivism, which positions judges merely as conduits of the law without any form of creativity in performing their duties. In this critical legal era, judges are required to have the courage to make progressive leaps beyond the confines of principles, conventional logic, and doctrines. See Widodo Dwi Putro, *Kritik Terhadap Paradigma Positivisme Hukum* (Yogyakarta: Genta Publishing, 2011).

²⁶ Antonius Cahyadi & Sulistyowati Irianto, *Runtuhnya Sekat Perdata dan Pidana: Studi Peralihan Kasus Kekerasan terhadap Perempuan* (Jakarta: Yayasan Obor Indonesia, 2008).

III. PARAMETERS OF DIVORCE MEDIATION SUCCESS

The determination of the measure for successful mediation is essential at least to serve as (a) proof of mediator performance, (b) evaluation of parties using mediation, (c) establishing the effectiveness of mediation compared to other dispute resolution mechanisms, and finally, (d) as feedback and evaluation of the mediator performance.²⁷ The definition of effectiveness varies depending on the focus of the study. This study used Alysoun Boyle's perspective which divided the concept into two criteria including simple and complex effectiveness. The simple aspect measures success based on the agreements reached while the complex aspect includes factors other than agreements and serves as a standard in the statistical management of cases in several mediation programs.

The focus of simple effectiveness is to determine the level of contribution and influence possessed by the mediator in the process leading to the agreements between the parties. The success measured through the achievement of agreements is also referred to as short-term success.²⁸ This is because the focus of the mediator is usually on either the agreement itself or the process. The mediators who see the importance of agreements believe that short-term success leads to long-term success. They believe that a good agreement can be judged by its clarity and feasibility. Meanwhile, those who emphasise the process usually believe that joint problem-solving needs to be encouraged to improve long-term success. The effort is necessary to facilitate problem-solving and improve the relationships between the parties in the future when they are open to communication.

Several studies showed that the parties engaged in problem-solving mechanisms during the mediation process were more likely to reach an agreement. Meanwhile, it was discovered that the reasons for the reduction in agreements include hostilities and arguments,²⁹ presence of fundamental

²⁷ W Ross, "Measuring Success in Mediation" (2000) 1:1 *The Mediation Journal* 1–16.

²⁸ Dean G Pruitt & RS Pierce, "Long Term Success in Mediation, Law and Human Behaviour" (1993) 3 Vol17.

²⁹ JM Hiltrop, "Factors Associated with Successful Labour Mediation" in KKressel DG Pruitt & Associates, eds, *Mediation Research* (San Fransisco: Jossey-Bass, 1989) 241; JM

issues,³⁰ and low motivation between the parties.³¹ The achievement of agreements was also reported to be influenced by the attitude of the mediator in identifying the main issues, creating an agenda structure, providing new suggestions, seeking input on new ideas, and showing empathy toward the parties.³²

Previous studies also showed the pros and cons regarding the effectiveness of measuring mediation based on the number or percentage of agreements reached.³³ According to Creo, the failure to reach an agreement is not always an indication of a lack of success but rather serves as an encouragement for mediators to focus on improving the mediation process.³⁴ Success is also not expected to be solely measured by the number of agreements for several reasons. (1) The agreement is just one possible outcome and not necessarily the primary goal of the parties. (2) The absence of an agreement does not mean the mediator did not make a significant contribution to the case the mediator might have helped the parties resolve several issues during the process. An agreement does not guarantee that all underlying problems have been addressed and permanently resolved. (3) The nature of the resolution process implemented such as the opportunity for self-determination by the parties is also considered important in determining the mediator quality. (4) The high reliance on agreements as an assessment tool can lead mediators to force settlements. (5) Making comparisons of settlement rates among mediators in a program can be misleading when some are routinely assigned to more challenging cases.³⁵

Complex effectiveness combines the achievement of agreements with other aspects such as the satisfaction of the parties, compliance rate, the nature of the agreement, improved post-dispute relationships and several others. It is

Zubek, Pruitt DG & Peirce RS, "Disputant and Mediator Behaviours Affecting Short Term Success in Mediation" (1992) 36 *Journal of Conflict Resolution* 546–572.

³⁰ J Bercovitch, *International Dispute Mediation: A Comparative Empirical Analysis*, p.241-262 in K Kressel D.G (San Fransisco: Pruitt, & Associates, Mediation Research, 1989).

³¹ *Ibid*; Hiltrop, *supra* note 29; Zubek, D.G. & R.S, *supra* note 29.

³² PJD Carnevale, RG Lim & M McLaughlin, *Contingent Mediator Behaviour and Its Effectiveness*, in K Kressel D.G (San Fransisco: Pruitt, & Associates, Mediation Research).

³³ AE Gross, *Is Agreement the Gold Standard for Mediation Success?* (2017).

³⁴ RA Creo, "Failure & Me" (2012) 30:10 *Alternatives* 187–188.

³⁵ *Ibid*.

also believed to have the capacity to provide long-term success. Sandu considered both the process and the outcome as two indicators and provided four other measures including fairness, efficiency, satisfaction, and effectiveness.³⁶ Mediation is used and considered more efficient and cost-effective compared to adjudication because of its effectiveness but this is not always the same with the reality in the field. For example, Shahla F. Ali, in the longitudinal study conducted over five years in different countries such as the United States, the United Kingdom, India, China, Hong Kong, Italy, the Netherlands, Malaysia, France, and Australia, used parameters to assess mediation success based on three aspects including efficiency perception, trust, and justice. The efficiency was based on mediation legal framework, user accountability, affordability, and lack of delays. Trust was measured by rankings of fairness, effectiveness of law enforcement, as well as impartial and effective dispute resolution. Meanwhile, the practitioners perceived that fairness was not a crucial factor. This was based on the interpretation that mandatory (81%) or voluntary (82%) mechanisms had no significant impact on fairness for users.³⁷

Mediation is not a panacea for resolving all disputes, at least according to Arthur Marriot. It is considered not suitable for cases related to freedom or citizens' rights or significant commercial matters where decisions of the judicial institution were necessary for fundamental issues.³⁸ Mediation can also be risky when parties disregard public interest values in the context of the Rule of Law. Meanwhile, it offers a better dispute resolution than litigation because of lacks coercion, informality, and opportunities provided for parties to establish rules, procedures, as well as formalities. This method has at least eight advantages and these include reducing court congestion and backlog, increasing community participation, empowering disputing parties,

³⁶ C Sandu, "Mediation. Measuring the Success of Mediation. Conflict Studies" (2013) ue 2 Quarterly 30–39.

³⁷ In this study, justice was focused on the outcomes associated with standards of equality, legality, benefits for all parties, improved relationships, and the enforcement of humanity. The perception of justice regarding the process itself was not questioned such as the existence of fair participation, non-coercion, mediator bias, impartiality, and others in the process.

³⁸ Arthur Marriot, "The Role of ADR in the Settlement of Commercial Disputes" (1994) 1 Asia Pacific Law Review 1–19.

facilitating access to justice in society, producing mutually acceptable decisions, maintaining confidentiality, and a higher probability of achieving agreements between the parties.³⁹

IV. EFFECTIVENESS OF DIVORCE MEDIATION IN RELIGIOUS COURTS

Mediation was reported in several studies to have outperformed litigation and the highest settlement rates were recorded in the family (80%) and labour (100%) disputes.⁴⁰ This was observed to be different from the trend in Indonesia where mediation has been practically applied to divorce cases for two decades when Supreme Court Regulation on Mediation was enacted. However, the settlement rate or effectiveness was found to be below 30%⁴¹ as shown in diagram 3^{42,43} and divorce mediation was observed to be merely a formality.⁴⁴ The purpose of the process in Religious Courts is to provide parties with an opportunity to reconcile⁴⁵ but this is not often achieved in practice.⁴⁶

³⁹ F Golberg, Sander & NH Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Process* (Boston, Toronto: Little Brown and Company, 1992).

⁴⁰ Boyle, *supra* note 15.

⁴¹ Widiana, *supra* note 16.

⁴² Supreme Court, *supra* note 17.

⁴³ Compared to the success of family mediation in various countries, which reaches 60% - 70%, in Australia reaching 95%, and in the United States reaching 95%. See Nur, *supra* note 18; mediate.com, *supra* note 18; University, *supra* note 18.

⁴⁴ Nur, *supra* note 18; Fauzi, *supra* note 19.

⁴⁵ The principle of the obligation to reconcile is regulated in Articles 65 and 82 of Law No. 7 of 1989 concerning Religious Courts. According to Islamic teachings, in case of disputes or conflicts, it is recommended to use the "ishlah" approach. Therefore, the judge has to reconcile the disputing parties by the guidance of Islamic ethics. See Wirdyaningsih, *supra* note 20.

⁴⁶ The purpose of reconciliation efforts in divorce cases is to influence parties that initially intended to divorce to reconsider and decide to withdraw the lawsuit filed with the Court, thereby preventing the separation. Furthermore, reconciliation efforts are also conducted to realize the ideal goal of marriage based on Law No. 1 of 1974, which is to establish a happy and lasting family based on the belief in the One and Only God.

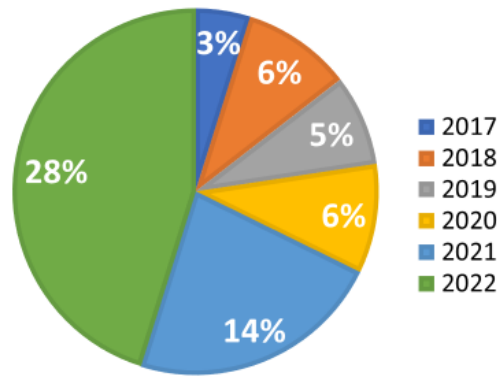


Diagram 1. *Percentage of Divorce Mediation*⁴⁷

As an illustration, divorce mediation in South Jakarta Religious Court from 2017 to 2022 was observed to have a very low settlement rate with an average of less than 5% as presented in the following table. The data also shows that mediation and its implementation are not fulfilling expectations.

| | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|-------------------------------|----------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| Total | 1039 | 1.031 | 948 | 626 | 551 | 715 |
| Successful Mediation | 18 (1,73%) | 36 (3,49%) | 31 (3,27%) | 8 (1,28%) | 54 (9,62%) | 86 (12,02%) |
| Unsuccessful Mediation | 1.021 (98%) | 995 (96,51%) | 917 (98,73%) | 618 (98,72%) | 498 (90,38%) | 629 (87,98%) |

Table 1. *Mediation Data in Religious Courts in Jakarta from 2017 to 2022*⁴⁸

The results from several studies concluded that juridical factors like the legal system and non-juridical factors such as judges and lawyers were the causes of the low mediation settlement rate.⁴⁹ Further examination indicated more fundamental issues at a conceptual level including the structure, culture, and

⁴⁷ Mahkamah Agung, *Summary Laporan Tahunan Mahkamah Agung Republik Indonesia* (2022), online <<https://www.mahkamahagung.go.id/id/summary-laporan-tahunan-mahkamah-agung-ri>>.

⁴⁸ *Ibid.*

⁴⁹ Supreme Court & Development Agency (Balitbang Mahkamah Agung), *Naskah Akademik Mediasi* (2007); IICT, *Info Penting! MA Terbitkan Prosedur Mediasi Terbaru* (2016).

substance. Procedurally, the provisions have been regulated in legislation such as Article 130 HIR and 154 RBg, Law 30/2008 on Alternative Dispute Resolution, and Supreme Court Regulation 1/2016. Further, divorce is also governed by Law 1/1974 concerning Marriage. The concept of the word "reconciliation" used in mediation was observed to substantially differ in several regulations.

Another significant aspect related to the divorce mediation process is answering the question "What becomes of the subject when the parties are not reconciled?". In Australia and the United States, the mediation process is centred around negotiating post-divorce matters rather than attempting to reconcile the marital relationship. The negotiation post-divorce involves addressing various issues such as parenting plans, child custody, child support, and the division of property.

V. ADDRESSING THE CAUSES OF DIVORCE MEDIATION INEFFECTIVENESS

A. Dualism Model of Family Mediation: Marriage and Divorce

Several studies identified two types of mediation normally applied to resolve family issues, and these include marriage and divorce mediation. The concept of family mediation is also known as divorce mediation in several countries and both terms are used interchangeably in relevant literature. The use of family mediation is considered broader in scope as it deals not only with divorce but also with more family matters including cohabiting spouses and non-married partners.⁵⁰ An increasing number of countries around the world have adopted family mediation as an alternative mechanism for resolving divorce but most discourse and studies on marital mediation are not as extensive as those related to divorce.⁵¹ The explanation of these two models including their similarities and differences is presented in the following subsections.

⁵⁰ J Folberg & A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts...p.4.*

⁵¹ SK Boardman, "Practice note: Marital Mediation: A psychological Perspective" (2013) 31:1 Conflict Resolution Quarterly 99–108.

1. Marital Mediation

Marital mediation is a subset created from family mediation in the United States and is considered similar to divorce mediation. It can be used to assist conflicted spouses in reconciling or strengthening their marriage⁵² and described in various literature as marital mediation and mediation to stay in a marriage or relationship. The aim is to assist spouses at all stages of their marriage including newlyweds, young spouses, and long-married spouses having conflicts with their partners. Moreover, the goal is to help address the fights and challenges hindering spouses from staying married.

Husband and wife often experience several crises and intense emotions during the process of divorce. For example, the feelings of pain and hurt including anger, resentment, fear, and/or lingering hopes of reconciliation are all caused by disputes related to divorce or post-divorce child custody. It is also not surprising that strong emotions are often expressed during mediation, and the mediator is required to be skilled in understanding the unique feelings of each spouse while simultaneously maintaining control and moving the process toward a post-divorce future. This means the essence of family mediation is to renegotiate family relationships⁵³ and these include those about parents and children.

Mandatory mediation does not mean that the parties are compelled to reach an agreement in every process, but at the very least, they should attempt to act in good faith. The process is expected to introduce and educate parties about alternative dispute resolution efforts. According to Amundson and Fong, the reason spouses come to mediation is to obtain something considered unachievable on their own. The absence of consideration for dynamic interaction processes means both spouses and individuals lose authority or responsiveness.⁵⁴ They are often trapped in an emotional circle, have many unresolved wounds, and harbour hatred that hinders free and open relationships. In such families or conditions, mediators need to explore

⁵² SK Boardman, *Marital Mediation: An Emerging Area of Practice*.

⁵³ Robert E Emery, *Renegotiating Family Relationship: Divorce, Child Custody, and Mediation*, second ed (New York: Routledge, 2012).

⁵⁴ JK Amundson & LS Fong, "She Prefers Her Aesthetics; He Prefers His Pragmatics: A Response to Roberts and Haynes" (1993) 11:2 *Mediation Quarterly* 199–205.

comprehensive tools to free spouses from such situations. Therefore, professional therapy or counselling skills are often highly desirable to address the emotions and dynamics of past relationships.

Saposnek provided a contrary opinion by stating that the role of mediation goes beyond merely reaching an agreement but also focuses on exploring and discussing a range of emotions such as pain, anger, sadness, anxiety, guilt, and regret. This perspective requires the mediator to connect with the parties on a deep and empathetic level.⁵⁵ According to Favaloro, the adoption of Saposnek's view can lead to a somewhat blurry distinction between mediation and family therapy, leading to confusion in understanding the boundaries.⁵⁶

Some similarities and differences are identified between counselling, family therapy, and marital mediation. The most common trend found was the desire to assist individuals in resolving their family issues. This means a mediator can undergo training and have experience as a counsellor, family consultant, psychologist, social worker, or family therapist. The experience gained from these diverse professional backgrounds can be valuable in performing their duties. Counselling focuses on feelings, perceptions, troubled relationships, adult perspectives, and needs. It also aims to gain personal insight and achieve reconciliation, considered unrelated to legal aspects and is long-term oriented. Counselling also explores personal and family history as the bridge to the present, makes the clients feel momentary dependency, and ends without a written agreement. It usually allows the discussion of the recurring issues disrupting the satisfaction in a relationship. Family therapy focuses on addressing fundamental issues or root conflicts occurring within intact families. This is accomplished through the observation of the communication between the family members. The process usually includes the children from the outside and the development of the hypotheses to explain family functions. Family therapy is also not considered a legal process and usually ends without a written agreement. It serves as a

⁵⁵ DT Saposnek, "The Art of Family Mediation" (1993) 11:1 *Mediation Quarterly* 5–12.

⁵⁶ J Geoffrey, "Favaloro, Mediation: A Family Therapy Technique?" (1998) 16:1 *Mediation Quarterly* 101–108.

comprehensive method of addressing relationship problems by not focusing on the things that need to be specifically resolved. The concept is expected to provide reasons for the conflict and the different steps to avoid its continuous occurrence. The reasons are often understood by exploring the past events of each person and their possible influence on the current relationship. Furthermore, several behavioural changes are also normally expected.

The focus of marital mediation tends to be narrower because it is usually directed at resolving specific disputes in the present and future, not the past. The aim is to reach an agreement and this requires communication skills. The disputes usually faced in this method are unlikely to have a history of prolonged conflict. Therefore, mediation is time-limited and can be scheduled per session for 1 to 2 hours compared to most family therapies that require weekly sessions. This shows there are substantial differences in the goals and methods of these two concepts. Therapy is more about understanding the root conflict while mediation emphasizes making decisions to move the parties past their "stuck" places in the relationships.

In practice, it is sometimes confusing to distinguish the role of a mediator from that of a counsellor and family therapist. These three generally have different focuses and substance depths. During mediation, a lot of time is spent delving into deep-seated past grievances, emotional pain, and the desire to be seen differently by others as well as recalling long-standing family dynamics. However, despite similarities to family therapy, mediators need to hold the pain of the parties and see the reality from the perspective of each person to assist the process of making decisions to be free from their "stuck" relationship.

Divorce has become a standard cultural choice when problems arise but conflict resolution skills can be taught and learned. The difference between marriages enduring conflict and those that do not is mostly the willingness and effort put into learning conflict resolution and communication skills usually taught through marital mediation. Further, parties can simultaneously seek the assistance of marriage consultants or therapists through counselling sessions. The difference is that marriage counselling

investigates the root causes of psychological issues, history, and childhood experiences⁵⁷ with a longer duration and therapists are trained and equipped in the field of family or mental health.

2. Mediation of Divorce Cases

Divorce mediation is the process of providing solutions to spouses planning to divorce through the assistance of a voluntary third party or an individual appointed by the court. It is a collaborative process that allows parties to control the outcome with the mediator acting as a neutral third-party professional to keep them focused on achieving fairness. The mediator also guides the spouses in addressing all divorce-related issues including asset division, custody arrangements, as well as spousal and child support. Moreover, divorce usually leads to difficulty in communication due to emotions, a lack of understanding of the issues, or mistrust. The mediator is expected to assist both parties to communicate effectively and reach necessary agreements regarding child custody and spousal support.

Numerous scholarly works highlight that parties resolve their conflicts with the assistance of an independent mediator for several reasons. First, mediation allows the couple to maintain control over the divorce process by deciding on matters such as child custody, spousal support, and the division of joint assets, as well as the negotiation process. Second, it preserves privacy because all processes and settlement agreements remain confidential. Third, it saves costs and time in resolving all issues. Fourth, in most cases, mediation results in quick solutions because the couple can discuss the issues, resolve their differences, and make independent decisions.

Divorce mediation is undeniably different from marital mediation. In divorce, the focus of the discussion process is how to direct the interests of the parties toward conflict resolution and a better family environment by removing barriers to collaboration.⁵⁸ Meanwhile, the marital aspect focuses

⁵⁷ JB Kelly, “Mediation and Psychotherapy: Distinguishing the Differences” (1983) 1 *Mediation Quarterly* 33–44.

⁵⁸ RE Emery, D Sbarra & T Grover, “Divorce Mediation: Research and Reflections” (2005) 43:1 *Family Court Review* 22–37.

on a deeper exploration of the dynamics of the spousal relationship with an emphasis on the wounds and their commitment to each other. The discussions in marital mediation are broader and distinct from the more transactional and future-oriented divorce mediation process.⁵⁹ Moreover, the marital mediation process serves as a window to have a better understanding of the interaction between spouses to create a context that leads to the possibility of personal healing but the enhancement of marital relationships and behavioral changes are not essential components of divorce mediation. The focus is more on building the commitment of the spouse to interact better as good parents for their children after divorce. These differences do not mean that these two methods have no similarities because they are both Alternative Dispute Resolution (ADR) designed to ensure a third party without decision-making authority assists in resolving conflicts between parties to achieve mutually beneficial solutions.

| | Marital Mediation | Divorce Mediation |
|------------------|---|---|
| Focus | Matters related to marital relationships and conflicts. Conflict resolution is an empowering process for the parties, resulting in an agreement not to divorce. | Emphasis is on the future as parents with a focus on the best interests and post-divorce rights of the child. |
| Mediator | From various disciplinary backgrounds, including mental health professionals. | Idem. |
| Mechanism | Developing skills that empower the parties to find solutions. | Directing the conversation toward the roles and responsibilities of parents and the ongoing relationship between them and their children. |
| Goal | An empowering process and an agreement not to divorce. | An empowering process and an agreement on the post-divorce rights of the child. |
| Strategy | The participation of the parties in decision-making and having a voice | Idem. |

⁵⁹ *Ibid.*

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|---------------|---|--|
| | in the mediation process to reach an agreement. | |
| Result | Reconciliation. | The rights of the child are fulfilled. |

Table 2. *Differences between Marital and Divorce Mediation*

The regulation and implementation of divorce mediation in Indonesia accommodate two concepts. The first is that the provisions of the Supreme Court Regulation on Mediation require the mediator to reconcile the parties, restore their marriage, and make every effort to avoid divorce. This simply means divorce mediation in the country has an element of marital mediation.⁶⁰ The second is the provision of space for divorce mediation within the environment of Religious Courts when the demands are combined with other claims. This means the inability of the parties to agree on living together harmoniously again leads to the need to resolve other demands.⁶¹ The concept shows that the settlement provided by divorce mediation is not limited to only reconciliation but also other rights after divorce. Meanwhile, the main reason for this kind of mediation is when the couple has already agreed and decided to divorce, and the process is only required to discuss the post-divorce rights such as custody and access to children, child support, and the division of joint property or allowance.

The trend shows that Supreme Court Regulation also focuses on the achievement of partial reconciliation agreements between the plaintiff and some or all of the defendants as well as between the parties on some or all of the objects of the case and/or legal issues disputed in mediation process. This indicates that divorce mediation in Indonesia is similar to the concept in Australia and the United States but not as explicit and the implementation

⁶⁰ See Article 3 Supreme Court Regulation Number 1 of 2016 on Mediation Procedure in Courts states that every Judge, Mediator, Parties, and/or legal representatives are obligated to adhere to the dispute resolution procedure through Mediation. Article 4: Mandatory Mediation for Certain Types of Cases.

⁶¹ Article 31 Supreme Court Regulation Number 1 of 2016 on Mediation Procedure in Courts stated that in mediating divorce cases within the jurisdiction of religious courts, divorce claims are cumulated with other claims.

is not yet uniform, specifically in Religious Courts. This can be understood in line with the authority of Religious Courts to examine, decide, and settle cases, including those related to marriage.

B. Inconsistencies in the Implementation of Reconciliation in Divorce Mediation

Reconciliation is the pinnacle of law.⁶² This is the reason mediation is usually used in Religious Courts to allow parties to reconcile.⁶³ The goal of reconciliation efforts in divorce cases is to influence the parties that initially wanted a divorce to reconsider and decide to withdraw from the lawsuit. However, this study discovers that it is not quite right to make reconciliation the goal of mediation based on a minimum of three reasons. First, divorce is not always negative and this is observed in the debate between feminist and family mediation groups since the inception of mediation. Feminist groups view mediation as part of a legal system considered unfriendly to women and identify the bias in the process from the outset. They believe it is vulnerable to an imbalance of power relations, domestic violence, and the re-privatization of family law. Meanwhile, mediation has the potential to empower the parties, specifically women, to provide the space to narrate their experiences and voice their concerns. It can also serve as a screening tool for violence experienced by women in their marriage. In Australia and the United States, mediation cannot be conducted when there is domestic violence because it is believed to stay out rather than continuing a bad marriage. Second, there is a conflict of norms regarding reconciliation in Supreme Court Regulation and the Marriage Law. The principle of the obligation is regulated in Articles 65 and 82 of Law No. 7 of 1989 concerning Religious Courts while reconciliation is also regulated in other legislation. For example, Article 130 of the HIR provides for reconciliation (*dading*) and Article 154 of the RBg contains similar provisions that the district court,

⁶² M Nur, "Mengkualifikasi Keabsahan Kesepakatan Perdamaian Sebagian Pihak" in *Majalah Peradilan Agama*, Edisi 6 (Mei, 2015) 27.

⁶³ The principle of the obligation to reconcile is regulated in Articles 65 and 82 of Law No. 7 of 1989 concerning Religious Courts. According to Islamic teachings, it is best to use the "*ishlah*" approach to resolve disputes because it requires the judge to reconcile the disputing parties according to Islamic moral teachings.

through its chairman as an intermediary, is required to attempt reconciling the parties on the appointed day for appearance.

The Supreme Court issued Circular Letter 1/2002 followed by Supreme Court Regulation on Mediation. The Circular Letter stated that, among other things, reconciliation should be pursued sincerely, not just as a formality. The success could be considered a reward for judges acting as the mediator. Supreme Court Regulation on Mediation 1/2003 and other regulations were subsequently established. Until the enactment of Law 30/1999 on Arbitration and Alternative Dispute Resolution, the form of reconciliation through mediation did not have clarity. The law defines Alternative Dispute Resolution as a resolution or disagreement resolution institution through procedures agreed upon by the parties to resolve disputes outside the court through consultation, negotiation, mediation, conciliation, or expert assessment. Civil disputes or disagreements can be resolved by the affected parties through this system based on good faith to avoid litigation in the District Court.

This provision of reconciliation was perceived not to be clear enough because it was not explicitly defined by the Supreme Court Regulation. The word "reconciliation" was used 78 times in the Regulation starting from the considerations to articles using terms such as reconciliation process, reconciliation proposal, partial reconciliation agreement, reconciliation deed, reconciliation efforts, voluntary reconciliation, seeking reconciliation, conducting reconciliation, and reconciliation outside the court. However, the meaning of the term "reconciliation" was not specified. The Regulation defined mediation as a dispute resolution method through negotiation processes to reach an agreement among the parties based on the assistance of a mediator. The agreement from the mediation process is usually in the form of a document containing the dispute resolution provisions signed by the parties and the mediator. This definition shows that the purpose of the process is to reach an agreement and not to achieve reconciliation.

The examination of the regulations previously mentioned shows that the goal of reconciliation in disputes is to have an agreement. In several civil cases, an agreement means reaching a compromise or settlement on the subject matter

of the dispute that is mediated and agreed upon by the parties. This is considered a successful mediation despite the nature of the agreement. Meanwhile, divorce case focuses on interpersonal conflicts with different characteristics compared to general civil cases. It primarily concerns the relationship between husband and wife, considered substantive and/or emotional and often combines both aspects. When children are present in the marriage, the dispute is required to be managed efficiently considering the potential for power imbalances and domestic violence. Almost all divorce petitions filed in court are the culmination of failed attempts at reconciliation. Therefore, it is usually difficult to apply mediation to reconcile or make the marriage whole again because the parties typically have a strong desire to divorce. The success of mediation in divorce cases should be seen as an agreement between the parties, even when they eventually decide to split up.⁶⁴

The provisions on reconciliation in the Marriage Law are three-fold. First, divorce can only be carried out in court. This rule implies that parties seeking divorce cannot reach an agreement to split up before the court processes. In mediation, agreeing to divorce violates the provision of the Marriage Law which requires not proceeding to divorce. This means the parties do not have the freedom to split up because an agreement to divorce is not recognized. In addition, parties are required to have reasons for divorce, as stipulated in the Explanation of Article 39 paragraph (2) of the Marriage Law, which provides divorce grounds. This paradigm implies that the purpose of mediation and court hearings in divorce cases is to prevent divorce. Therefore, in the process, the role of the mediator is to reconcile the parties to ensure they do not proceed with divorce (see the discussion in the subsection on making divorce more difficult as previously explained). Also, a divorce agreement is not allowed and is contrary to the Marriage Law even though civil mediation applies to divorce cases.

⁶⁴ M Saifullah, "Efektivitas Mediasi dalam Penyelesaian Perkara Perceraian di Pengadilan Agama Jawa Tengah" (2015) 25:2 Al Hakam 193.

C. Implications of the Principle of Making Divorce Difficult in the Marriage Law on Divorce Mediation

Marriage aims to create a happy and enduring family based on the belief in the Almighty God. In pursuit of this goal, the Marriage Law adheres to the principle of making divorce difficult and this is in line with the hadith of the Prophet that "divorce is permissible but detested by Allah". Meanwhile, divorce is allowed under positive law when certain conditions are fulfilled and the process is conducted in a court after relevant authorities have attempted and failed to reconcile both parties.⁶⁵

The Marriage Law requires that marriage is based on six principles including voluntary consent, family participation and registration, monogamy, making divorce difficult, maturity of prospective spouses, as well as improving the status of women. It is important to discuss the principle of making divorce difficult because it forms the basis for the Marriage Law normally used by judges and mediators in both mediation and court hearings at Religious Courts. This principle serves as a preventive measure to ensure the happiness, longevity, and prosperity of families. It also shapes the perspective ingrained in the minds of mediators and judges. The Marriage Law incorporates this principle for three reasons. First, marriage is considered sacred and noble and divorce is an act disliked by God. Second, it restricts the arbitrariness of the husband towards the wife. Third, it upholds the dignity and status of the wife, ensuring equality with the husband.⁶⁶ However, divorce is permissible in some cases even though it is disliked by God.

Historically, the view of making divorce difficult existed long before the enactment of the Marriage Law by the New Order regime to place a strong emphasis on the family as the smallest unit of society with a strategic function to support the state. The New Order also viewed divorce as a spectre, a disgrace, and a damaged family. This led to the use of the Department of Religion, later transformed into the Ministry of Religion, to implement Law 22/1946 on the Supervision and Recording of Marriage, Divorce, and Reconciliation (P2NTR Law) related to the supervision and registration of

⁶⁵ Indonesia, *Article 65 of Law No.1 of 1974 concerning Marriage*.

⁶⁶ Abdul Kadir Muhammad, *Hukum Perdata Indonesia* (Bandung: Citra Aditya Bakti, 2000).

marriages, divorces, and reconciliations among the Muslim community. This law was created and implemented to replace the regulations from the Dutch colonial era⁶⁷ considered outdated because they were provincial (each region had its provisions) and set different rates for registering marriages, divorces, and reconciliations. The Ministry also established the Marriage Advisory and Reconciliation Adjustment Board (BP4) in 1954 due to the high rates of divorce, early-age marriages, and polygamy at the time. After the enactment of the Marriage Law, individuals were no longer required to consult with BP4 beforehand, specifically after the introduction of the Supreme Court Regulation on Mediation in 2003. Today, BP4 continues to fulfil one of its roles and functions as a mediator outside of the court.

The principle of making divorce difficult is not explicitly stated in the Marriage Law but has become the perspective of both judicial and non-judicial mediators in the mediation process. The mediator usually makes efforts to prevent the parties from divorcing by providing advice from the Quran and inquiring about the willingness to reconcile. The individual is also required to remind the parties of their obligations as husbands or wives and suggest that they consider the best interests of the children.⁶⁸ This explicitly shows the regulatory paradigm regarding marriage in Indonesia: divorce is constructed as a difficult legal act and should ideally be avoided to prioritize the integrity of the household. The question remains, why does the divorce rate practically increase every year when making the process difficult is a foundational principle of the Marriage Law?

The principle is conceptually in line with the no-fault divorce clause that has been in place since the 1970s in the United States and applied in almost all parts of the world. However, there is limited literature discussing this concept in Indonesia. The principle is linguistically observed not to be facilitating divorce but rather encouraging the process as in the case of the no-fault divorce clause. One consequence of the clause is the removal of the underlying reasons for divorce and this means the process can be initiated through a neutral request without specific actions or discussions of the

⁶⁷ *Huwelijksordonnantie*. S. 1929 No. 348 jo. S. 1931 No. 467, *Vorstenlandsche Huwelijksordonnantie* S. 1933 No. 98 dan *Huwelijksordonnantie Buitengewesten* S. 1932 No. 482.

⁶⁸ Results of interviews with non-judge mediators at the Religious Courts in 2020.

background as the basis for a judgment. The concept allows the occurrence of divorce when the household has already broken down (*syiqaq*) without the need to identify the guilty party. It is also interpreted to mean that the party at fault also has the right to file for divorce. However, the court is required to consider the reasons for the breakdown of the household to uphold the principle of justice in deciding on divorce.

The principle of making divorce difficult is explained further in the Marriage Law based on two aspects. The first is that divorce can only be accomplished in a court after the relevant authority has attempted and failed to reconcile both parties. The second is that divorce is conducted when there are sufficient grounds indicating the husband and wife can no longer live harmoniously as spouses.⁶⁹ These articles indicate the need to present the following four points: (a) reconciliation (in the current context, mediation) is required to be attempted before divorce; (b) reconciliation is not always successful; (c) divorce requires grounds indicating irreconcilable differences; (e) divorce does not need to establish guilt in the marriage. In cases where divorce is based on the irreparable breakdown of the marriage, once this condition is proven, there is no need to consider the guilty party.

The description suggests that the principle, in its elaboration, actually simplifies divorce and does not seek material truth as required in civil cases where judges search for formal truth by Civil Procedure Law. This means there are discrepancies between the principle and reality. The enforcement of the Marriage Law with this principle by the court is expected to ideally ensure a low divorce rate because people are discouraged from divorcing. However, the rate is observed to be practically increasing every year. For judges, the principle serves as a foundation to interpret unclear articles or clauses, provide legal considerations to justify their decisions and construct law to discover legal principles.⁷⁰

Another effort made by the court in applying this principle is by maximizing reconciliation through mediation or during trial proceedings before a

⁶⁹ Article 39 Law Number 1 of 1974 concerning Marriage.

⁷⁰ O Notohamidjoyo, "Demi Keadilan dan Kemanusiaan: Beberapa Bab dari Filsafat Hukum" (1975) 12:2 Kertha Wicaksana 145–155.

judgment is rendered. During the trial, the principle is emphasized through formal procedures where the petitioner or plaintiff includes the grounds for divorce in the written statement of claim or application and the presentation of evidence. The statement is intended to provide legal certainty for the parties in the court cases. Petitioners or applicants are individuals with direct legal relationships and legitimate basis for their interests. Moreover, the judge needs to determine the validity and genuineness of the reasons presented. As previously explained, the principle of making divorce difficult shapes the perspectives of judges and mediators in handling divorce cases, but its implications are evident during the mediation process. Mediators make efforts to prevent divorce and persuasively encourage spouses, specifically those with children, not to go through the process. As an illustration, some of the statements often used by mediators are as follows:⁷¹

"Divorce is allowed, but it is greatly disliked by Allah. Can you reconsider?"

"You have been married to your husband for a long time, 22 years. Do you not feel attached to this marriage? Can you not be patient anymore?"

"Is it true that you have another partner? Why can't you stay with your wife? Think about the children."

"Yes, you do have the option to divorce; it is your right. But, don't you want to try to preserve the marriage? Perhaps your husband made a mistake, and he might change."

"Have you performed the Istikhara prayer? Try to think it over, do not make hasty decisions."

"What do you think? I will give you one week to reconsider. Maybe after thinking about it, you will change your mind. Let us meet again next week."

"Everyone makes mistakes, your husband is also a human being. Maybe, if given a chance, he can improve. What do you think?"

"Oh dear, this marriage is still new, just one year. Are you both not willing to work on it and promise to improve together?"

⁷¹ Observation of 10 mediation sessions at the South Jakarta Religious Court in 2020.

These conversations are often heard between the mediator and the parties but some others use different methods or tricks. It was also observed that some mediators were more sensitive, non-judgmental, and appeared as though they were family or parents. When it comes to issues like infidelity, domestic violence, or unemployment, they still "persuade" the parties to reconcile but this is often not the case when the parties do not have children. Some mediators insist on reconciliation for the sake of the children.⁷²

D. The Concept of Agreement in Civil and Divorce Cases

Supreme Court Regulation states that the goal of mediation is to achieve a reconciliation agreement. However, the regulation allows for partial reconciliation agreements in divorce cases when the parties have not agreed on the main divorce issues but wish to address the assessor or additional claims through common ground or mutual agreement. Some of these issues typically include child support and custody, or the division of joint property. Mediation Judge records this Partial Reconciliation Agreement in several articles of the report to be signed by both parties and becomes part of the basis for the decision. This agreement is normally attached to the substantive case claim and is expected to become effective after the decision.

The reconciliation agreement practice is not uniform in Religious Courts with some observed to have innovated to make the mediators focus on matters outside the core claim. This is accomplished to achieve a high settlement rate which is the performance benchmark for Religious Courts and to provide greater benefits to the parties by agreeing on post-divorce rights. The role of both judge and non-judge mediators is also maximized to provide the best for the parties.⁷³ Meanwhile, some Religious Courts do not acknowledge partial reconciliation agreements for certain reasons. The first is the difference in perception between judge and non-judge mediators. The non-judge mediators are confused because some judges suggest that

⁷² *Ibid.*

⁷³ Results of an interview with Mr. Ahmad Zaenal Fanani, Deputy Chair of the Madiun Regency Religious Courts, Judge and non-judge mediators at the Bantul Religious Courts on July 13, 2020. In 2020, Bantul received an award as the Best Performing Court in 2020.

mediation should not touch on matters related to child custody or marital property distribution. This becomes an issue during the trial of the case and limits the discussion to only divorce. The second is that several mediations often lead to partial agreements not recorded in the data summary collected by the daily data officers of Religious Courts. This is because the summary format does not have a column for "partial mediation success".

The standard for success in mediation is measured by the non-execution of divorce between husband and wife, and this is normally achieved through the withdrawal of the lawsuit by the plaintiff. This provision is very difficult to fulfil in case of settlement through mediation. Moreover, the amicable settlement of divorce (because it is considered more important) is contrary to several notions of harmony and peace in these cases. This is indicated by the fact most regulations made in Indonesia including Marriage Law, Islamic Law Compilation, and Guidelines for the Duties and Administration Implementation of Religious Courts do not recognize an amicable agreement between husband and wife to divorce. Article 39 of Marriage Law 1/1974 outlines that (1) divorce can only be conducted in front of a court session after the relevant authority has tried and failed to reconcile the two parties and (2) To achieve divorce, there should be sufficient reason that the husband and wife are unable to live together as a couple again. This means divorce is not considered harmony or party of the reconciliation process. It is usually expected that the husband and wife should come back together and not be separated. This measure of success does not conform to the principles developed in mediation science. The agreement of a couple to separate can be the best form of reconciliation for both to maintain relationships between their families and children and to ensure a quick, easy, and cheap divorce process. It is difficult to measure the success of mediation through the withdrawal of suits because the marriage is deep and prolonged. Divorce is not perceived as destructive (*mafsadah*) but rather as a benefit (for the parties). However, divorce is allowed to be pursued when it is considered a better (*maslahah*) option to avoid harmful relationships due to continuous quarrels and the emergence of violence with subsequent damaging effects on the psychology of the children.

The analysis shows that the standard for measuring the success of divorce cases needs to be changed to allow Religious Courts to implement the Supreme Court Regulation 1/2016 designed to reduce the accumulation of these cases through mediation. This is necessary due to the continuous increase in the number of cases being recorded each year. The change is also important to ensure Religious Courts are "accused" of being judicial institutions without proper implementation of mediation.

VI. DIVORCE MEDIATION: NO ONE SIZE FITS ALL

A "one-size-fits-all" method is not always appropriate for divorce mediation because the resolution to each dispute usually has different dynamics and characteristics. This means mediation is not suitable for all cases and this is most evident in the cases with a history of violence but mediators very much ignore this phenomenon in practice. Conflicts are inevitable in the relationship between husband and wife but those that are unresolved can lead to several obstacles. Marital problems are divided into two including perpetual and solvable. Perpetual problems are those repeatedly encountered by couples without any agreement or solution. According to Gottman, almost 70% of problems experienced in marriage are perpetual. They reflect the irreconcilable differences between couples such as the core beliefs, values, and needs. These problems are very basic, and not easy to change, but perhaps not necessarily need to be changed. Meanwhile, solvable problems have relatively simple solutions because they have deeper meanings and do not usually require frequent arguments.

Gottman showed that 16% of perennial conflicts were gridlock and most people were observed to have a good reason not to compromise on these issues. This is mainly because each person had something deep and meaningful believed to be the core to their belief system or personality such as a deeply held value, an unrealized dream, or a personal story.⁷⁴

⁷⁴ JM Gottman, "Gottman method couple therapy" (2008) 4:8 *Clinical Handbook of Couple Therapy* 138–164.

According to practitioners, divorce between husband and wife does not end the family relationship.⁷⁵ This is important because data shows that almost one million children experience the impact of divorce every year, and 95% of the 450,000 cases decided annually in Indonesia concern children under 18 years.⁷⁶ Based on this phenomenon, more children are becoming victims of divorce and this has impacts on their future when the process is not handled properly because of the possibility of losing their family afterwards. Moreover, divorce has become a social problem that should be managed through a systemic and integrated method with due consideration for the best interests of the children. According to Stella Vettori, mediation cannot be an alternative or substitute for litigation due to its inability to perform all the functions of the court but can be used as part or component of the mechanism of the justice system. This means the effectiveness of divorce mediation cannot be measured by the number of agreements achieved alone but also by the quality of the process.

VII. CONCLUSION

Mediation recognized worldwide as an effective means of dispute resolution compared to adversarial or litigious approaches, has been seamlessly incorporated into Indonesia's legal landscape for civil cases including divorces over two decades. The extended timeline from Supreme Court Regulation 1/2003 to Supreme Court Regulation 1/2016 reflects a positive and earnest response from the Supreme Court, illustrating a commitment to improving the overall quality of the civil justice system. However, the available data on mediation outcomes, consistently indicate a low effectiveness rate across almost all Religious Courts. The mediation of divorce cases requires further improvement to achieve optimal outcomes. Previous studies have questioned the effectiveness of mediation in divorce cases but did not touch the root of the problem in-depth, specifically the inappropriate reconciliation process which often leads to ineffectiveness.

⁷⁵ Emery, *supra* note 53.

⁷⁶ AIPJ2, *supra* note 13.

The Supreme Court Regulation is still employing a simple method (agreement) without assessing the practical experiences of women during the mediation process. This proves that the Regulation does not consider the different characteristics of each mediation process and the strategy to maintain peace is also ambiguous and not in line with the Marriage Law. Moreover, the Regulation also needs to open up space on how the dynamic process is a parameter to determine the success of mediation. This is necessary because an agreement not obtained from an empowering process can jeopardize the continuity of mediation and harm its noble goals.

In Indonesia, the regulation and implementation of divorce mediation accommodate two mediation concepts. The provisions in the Supreme Court Regulation on Mediation mandate the mediator to facilitate reconciliation between the parties to restore their marriage as it was originally. The mediator exerts maximum effort to prevent the parties from proceeding with the divorce. In other words, divorce mediation in Indonesia encompasses the concept of marital mediation. On the other hand, the Supreme Court Regulation on Mediation also provides space for mediating divorce cases within the religious court setting, where divorce claims are consolidated with other claims. If the parties fail to reach an agreement to live harmoniously again, mediation proceeds with the other claims. This implies that divorce mediation offers a resolution option that extends beyond merely addressing the divorce but also includes post-divorce rights such as child custody and access, child support, and the division of joint assets or spousal support. Therefore, divorce mediation in Indonesia also aligns with the concept of divorce mediation as seen in Australia and the United States, albeit not explicitly and with some variations in practice.

The closed nature of divorce mediation and lack of record is to be applauded but also serves as a challenge. This is mainly because there is no structure to check for mediator bias and compliance with procedures in the process. The Supreme Court Regulation has not been able to answer this, specifically because the court is separated from mediation in reality. Therefore, further research on mediation dynamics that empower parties needs to be explored in the future as evident that women's interests and needs are significant to be addressed.

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COMPETING INTEREST

The authors declare no competing interests.

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