

Divorce Mediation in Islamic Religious Court in the Era of Covid-19 Pandemic

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ABSTRACT: *Divorce is considered a very difficult process in a family. Societies and religious courts work hand in hand to prevent divorce. However, in some cases, divorce can not be avoided due to various social, psychological, and economic problems. As such, to prevent divorce, religious courts provide mediation programs to persuade couples to divorce. During the Covid-19 pandemic, the divorce rate increased, and mediation has been intensively practiced by the religious courts to reduce the divorce rate. However, limited studies have been conducted to understand how mediation is practiced at religious courts during the Covid-19 pandemic. This study uses a qualitative approach to examine the implementation of divorce mediation in a religious court within a regency in Indonesia. Data was gathered through in-depth interviews and direct field observation. Written materials were also analyzed to understand the case. The results of this study show that the implementation of mediation in divorce during the Covid-19 pandemic in the Regency Religious Court was implemented in two stages, namely the stage before mediation and the implementation of mediation. In carrying out mediation, the caucus and virtual methods have been chosen as two methods of divorce mediating in the era of the Covid-19 pandemic. The two methods have transformed in response to the pandemic and new technological advancements. The transformation is considered relevant to Islamic law and principles. This means religious courts and Muslim societies are responsive to new technological development.*

KEYWORDS: mediation, divorce, religious court, Covid-19 pandemic, Islamic law

INTRODUCTION

The number of divorce cases is increasing every year in Indonesia (Rinaldo, Nisa, & Nurmila). Divorce cases have substantially increased during the Covid-19 pandemic due to social and economic problems caused by the pandemic. Divorce usually happens due to human nature, such as the feeling of fatigue to maintain relationships between a husband and a wife in the household. When such a situation becomes worse and efforts to resolve the problem have stalled, divorce is considered the last solution. Divorce will not occur if the couple does not

agree to do so because divorce occurs when it has been agreed between the two parties to end their relationship.

In Islam, a husband is given much power to declare divorce, which is called *talak*¹ (Mashhour, 2005). When a husband declares the word "talaq" one or two times, then the meaning is he has divorced his wife. When a husband declares the word "talaq" one or two times, he still has a chance to return to his wife. However, when the word "talaq" is declared more than twice, the husband does not have a chance to return to his divorced wife (Ahmad, 2009). In certain case, a wife can also submit divorce documents to the State Islamic court to divorce her husband, such as when a husband leaves her for more than six months without news or living cost or her husband practice domestic violence, a wife can declare her separation from her husband (Muthiah, 2017).

The pandemic of Covid-19 since early 2020 has caused many social and economic problems within a household (Sharma & Borah, 2022). The problems resulted in domestic violence and psychological tension between couples. Some of them seek psychological advice from psyching, while those who are no longer confident with their relationship tend to go to a state religious court to end their marriage. However, the state religious courts usually do not accept their proposal to divorce at the first submission. Instead, the courts usually mediate with the couple to find a resolution to maintain their marriage.

Mediation is a compulsory program provided by the religious court, which means every divorce proposal submitted to the court by a couple must be brought to a mediation program before the proposal can be brought to the court for trial (Pranawati, 2017). If the mediation is not successful in preventing a couple from divorcing, the trial for divorce is implemented. The trial for divorce in the state religious courts usually takes several times in an effort to change the couple's mind to divorce. When the couple's intention to divorce cannot be prevented, then the judges will grant a divorce.

In Indonesia, divorce can be legally resolved by implementing the roles and responsibilities of the religious courts to handle divorce cases, whether the husband files the divorce or vice versa (Nurlaelawati, 2013). The roles of the religious court are stated in Article 49 of Law Number 50 of 2009, the second amendment of Law Number 07 of 1989 concerning religious justice. The law admits that religious courts have a formal authority to settle divorce cases (Ropaun Rambe, A. Mukri Agafi, 2001). During the covid-19 pandemic, the role of the religious court increased significantly due to the increase in divorce proposal submissions. At the same time, the religious court also played more role in the mediation program to prevent the divorce increase.

The mediation process is a part of the divorce trial, which is intended to assist the parties to the litigation by seeking a peaceful settlement of cases based on the good faith of both (Silbey &

¹ Talak is a Muslim divorce that is affected by the simple act of the husband's rejecting the wife

Merry, 1986). By implementing the mediation program, the religious court has an obligation to reduce the rate of divorce cases. The mediation process brings both husband and wife to negotiate and find a solution regarding how to prevent their divorce. In some cases, the mediation program can prevent the divorce of couples. However, limited studies have been conducted to understand how the mediation program is practiced in state Islamic religious courts to prevent the divorce of married couples.

This study, therefore, is carried out to provide insight to academia and practitioners to understand the practice of the mediation process in state Islamic religious courts in Indonesia. In addition, the aim is to examine and provide an explanation regarding how the mediation process can contribute to divorce prevention. As such, the practice might be implemented in other contexts for the benefit of households and humanity.

LITERATURE REVIEW

The Concept of Mediation in Islamic Court

This literal definition of mediation intends to place the position of a third party in the middle (Silbey & Merry, 1986). In this case, the third party is the mediator who mediate issues that the litigants dispute. The mediator is an impartial party to the litigants. The goal is that the litigants can trust the mediator to safeguard the interests of the litigants to obtain a fair and equitable peace path. Laltheide & Robert (1988) explained the meaning of mediation in three elements: the settlement of disputed cases through a process involving two or more individuals. The second element is that disputed cases can be resolved with parties outside the court. The third element is the party appointed to neutralize matters in dispute, as advisors cannot have the authority to make decisions. The term mediation is defined as a form of negotiation involving litigants (both litigants consisting of two parties or collectively) with a third party as a mediator to help mediate disputed issues peacefully, expecting good faith from the litigants to resolve the problem by going this way (Menkel-Meadow, Porter-Love, & Kupfer-Schneider, 2020).

Another definition of mediation is described by The National Alternative Dispute Resolution Advisory Council (Spencer & Brogan, 2006). The definition of mediation gives more broad authority to the mediator as a third party who has previously been appointed and carries out his duties to find alternative paths to an agreement accompanied by the good faith of both parties to the litigation. Mediation is also considered a resolution for disputing parties by involving third parties as intermediaries to mediate and find alternative solutions to the disputed issues. As a peaceful effort, mediation is offered in the court environment to seek a peaceful settlement of cases which aims to bring the parties to the realization of a sustainable peace agreement. It should be borne in mind that resolving disputes through mediation places both parties in the same position; neither party wins or the defeated party (win-win solution) (Syafliwar & Handayani, 2017).

Divorce in Islamic Law

In Islamic law, the word “divorce” is equated with the term "talaq," which means releasing or separating (Rehman, 2007). The equivalent between terms talaq and divorce have been equated, and make the two words have similar linguistic meanings. It is also understood that the abolition of marital status is due to demands from one of the spouses or the decision of the judge's trial in the trial process to separate the status of the relationship between a man and a woman as husband and wife. It is understood that to end a marital status of a couple depends on a judge's decision in the trial of one of the couples who demand to separate each other (Hafen, 1983). However, in Islamic law, when a husband declares the word "talaq" in front of his wife, the process of divorce begins. That means the husband is no longer to have intercourse with his wife. A formal divorce happens when the case is brought to a religious court, and a judge makes a decision on the case (Muslih, Nurdin, & Marzuki, 2020).

Islam views the breakdown of marital relations between a husband and a wife because it is associated with the will to divorce. For example, divorce might occur because of the intention of Allah SWT, or the divorce occurs because a husband explicitly declares the word “divorce” or “talaq”. The breakup of marital relations is also caused by a judge's decision during the trial process to permanently separate a couple (Anshori, 2011). Indonesia Marriage Law Number 09 of 1975 states that divorce is one of the consequences of breaking up a marriage.

Islamic law regulates divorce cases with a rigorous process, which means divorce is not an easy process to prevent a couple from splitting up easily. Divorce can only occur if there is a robust valid reason. For example, divorce can occur because of long disputes and domestic violence. Al-Qur'an verse al-Baqarah (2): articles 226-227 carefully examine the direction of several supporting arguments regarding the issue of divorce in society. Allah SWT. Said as follows:

لِّلَّذِينَ يُؤَلِّونَ مِنْ نِسَائِهِمْ تَرَبُّصُ أَرْبَعَةِ أَشْهُرٍ فَإِنْ فَاءُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ۚ ۲۲۶ وَإِنْ عَزَمُوا الطَّلَاقَ فَإِنَّ اللَّهَ سَمِيعٌ عَلِيمٌ ۚ ۲۲۷

Translation:

(226) Those who take an oath to keep apart from their wives are given four months (for a final decision); if they resume their relations, Allah is Forgiving and Merciful.

(227) And if they resolve on a divorce, (let them remember that Allah hears everything and knows everything.) The verse above explains the legal basis of divorce. First, legal divorce is mandatory because peace is not established, and marriage can only lead to disputes which bring more harm than happiness in a marriage. Second, divorce is unlawful if it does not accompany justified reasons in both Islamic and positive law.

METHOD

This research used qualitative case study approach (Nurdin, Scheepers, & Stockdale, 2022; Rusli, Hasyim, & Nurdin, 2021; Rusli & Nurdin, 2022). The qualitative method was practiced through in-depth interviews with five religious court officials and three judges. In addition,

supporting data was secondary data from documents, articles, or news related to divorce mediation during covid-19 pandemic.

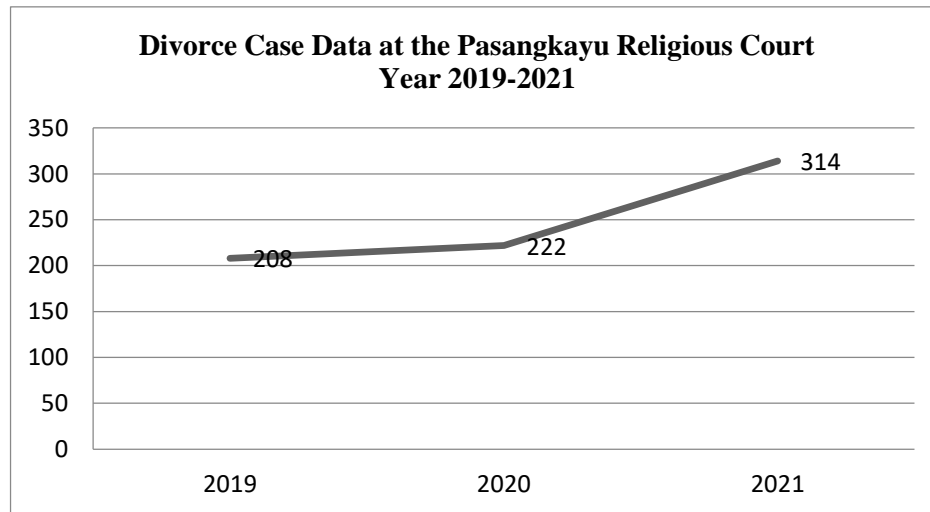
In this study, data collection techniques were carried out by interviewing the religious court officials and judges in the religious court of Pasangkayu regency. Interviews were conducted by asking indepth questions with informants from the religious court. Documents analysis was also carried out in order to obtain complete data, such as documents regarding divorce mediation and trials carried out during the Covid-19 pandemic. The validity of the data obtained using the triangulation technique by means of data analysis carried out by comparing various sources of data so that the results of interviews, observations, and document analysis can be fully analyzed (Nurdin & Pettalongi, 2022). Meanwhile, qualitative data were analyzed using grounded theory as outlined by Strauss and Corbin (1998). The results of qualitative data analyses were presented based on thematic emerged from the interviews (Nurdin et al., 2022; Rusli et al., 2021). Finally, some themes were presented to make sense of the data and to contribute to the body of knowledge.

RESULTS AND DISCUSSION

Implementation of Divorce Mediation in Religious Court During Covid-19 Pandemic

Judges in religious courts do not easily grant a divorce because the filing of a divorce case needs to be supported by evidence that results in the emergence of legal force from divorce cases. Article 116 of Indonesia, Compilation of Islamic Law, mentions several factors that can be used as evidence to grant a divorce. For example, prolonged quarrels and disputes accompany the husband and wife in their household life, and there is no chance of uniting the couple. Meanwhile, Indonesian Marriage Law also mentions several factors that can be used to grant divorce proposed by a husband or wife. For example, when the conflict in a household is continued, and the mediation process conducted by the religious court is not successful, then the court can hand down divorce. The implementation of mediation as a means of settlement for disputing parties involves a third party from the religious court. The third party is usually a judge appointed by the government to mediate and seek alternatives to the issues being discussed by positioning the mediator more actively to find a solution to keep a family intact.

The divorce case in Pasangkayu Regency, Indonesia, during the Covid-19 pandemic, increased because couples face difficult problems related to social, psychological, and economical. The number of divorce cases granted during the 2019 to 2021 period s depicted in Figure 1 below:



Source: Supreme Court of the Republic of Indonesia, 2022

As reported by the Directorate of Decisions of the Supreme Court of the Republic of Indonesia, there were 208 divorce cases recorded in the 2019 period (the pre-pandemic of the Covid-19 period), most of them caused by affairs and domestic violence. Meanwhile, the rate of divorce increased to 222 cases during the early COVID-19 pandemic in 2020. Economic and psychological problems cause most divorces due to strong social interaction limitations. Finally, the number of divorce cases surged to 314 cases in 2021. Economic difficulties caused most divorce cases in 2020 due to prolonged social distancing. In addition, the financial challenges resulted in household psychological well-being, which caused family conflicts and domestic violence. Another reason to divorce during the Covid-19 pandemic was the betrayal of partners or involvement in an affair with an illegitimate partner.

The trigger factors for divorce during the Covid-19 pandemic attracted the attention of government officials at state Islamic religious courts. They worked hard to find a solution to reduce the divorce rate during the pandemic. One strategy to prevent the surge of divorce during the pandemic was to implement divorce mediation intensively. The religious court officials work hand in hand to bring couples who want to divorce to mediation programs. Such divorce mediation was initiated earlier before the divorce proposal was sent to the religious court with the intention of preventing the divorce proposal from reaching the trial stage. The divorce mediation process is discussed in the following sub-sections.

Pre-mediation Process

Pre-mediation was carried out before the mediation stage is carried out. The implementation of pre-mediation has several processes. First, after the judge or panel of judges has been given the mandate to oversee the trial, the panel examines the case filed before proceeding to the next stage. The purpose of this step is for the panel of judges to study, analyze, and even understand the cause of the divorce. After the panel of judges observes the case, the parties must first attend

and carry out mediation which is the obligation of the parties who have registered their cases in the court. Before the arrival of the parties, it is necessary to pay attention to the instructions issued by the judicial institution. For example, during the pandemic, the parties must pay attention to health protocols. Sometimes, the judiciary may divert the arrival of the parties virtually with the panel of judges.

Second, the mediation explanation form must be signed by both parties to the litigation. Previously, the judge who examined the case had to carry out the mediation explanation. After the parties had signed the mediation explanation form, the mediation explanation had to be included in the trial. The mediation explanation contained in the minutes of the hearing is determined in Article 17 of Supreme Court Rules No. 1 of 2016. Then, before mediation is carried out, the parties are given the authority to choose one or more than one appointed mediator who has been registered in the court. This makes the task of the judge who examines the case become easier because the judge is also subject to and obeys what has been stipulated in the Supreme Court Regulation Number 1 of 2016. However, the appointment of a mediator is at the will of the litigant party. They are limited by the time stipulated in Article 20.

Third, suppose the parties failed to appoint a mediator after two days period. In that case, the parties are required to convey their failure to choose a mediator from the litigant party to the chairman of the panel of judges. After hearing the failure to appoint a mediator to the panel of judges, the judge examines the case in the case and immediately appoints a mediator from the side of the judge other than the judge who is in charge of examining cases or officials at court. After the chairman of the panel of judges investigating the case has appointed a mediator from the judge, the panel of judges forwards the mediator's determination to the court's chief judge to make a decision letter regarding the appointment of a mediator from the judge in court.

Fifth, after the panel chairman has determined the appointment of a mediator in court per the Decree of the Chairperson of the Pasangkayu Religious Court, the mediator judge will give the authority to determine the meeting schedule for the mediation. The process is regulated in Article 21, Supreme Court Regulation Number 1 of 2016. After setting the schedule for carrying out mediation, the bailiff or substitute bailiff is obliged to summon all parties to be present to carry out the mediation that the mediator has scheduled. In this case, the judge mediator should understand several stages in the mediation implementation before the mediation is carried out virtually or offline.

The Implementation of Mediation

The implementation of mediation at the Pasangkayu Regency Religious Court has followed regulations as stated by Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures. Accordingly, the mediation stages are carried out for a maximum period of thirty days from the date of being determined to carry out mediation and can be extended for thirty days at the will of the litigants.

The implementation of mediation during the Covid-19 pandemic was adjusting to conditions that changed the transformation of the justice system during the pandemic. For example, the divorce mediation and trial were held electronically. Such transformation was not only caused by the pandemic but also due to advancements in information technology. As such, the religious court should also respond to digital advancement and communities' new expectations in religious court practice. On the other hand, the caucus, as a part of the form of mediation, is used optimally in conciliation at the Pasangkayu Regency Religious Court. A mediator state as follows:

"By optimizing the caucus in carrying out mediation during this time of the pandemic, the litigants can be more open to conveying their problems to the mediator, such as regarding hurt feelings. We also expect from the caucus how each party can provide suggestions to find common ground in good faith."

The caucus is carried out if one of the circumstances can occur at the mediation stage when something confidential is considered essential and cannot be informed to the mediator directly when the opponent is present at the mediation stage. However, caucuses in the pandemic era are not new when a mediation process is carried out. In the pre-pandemic era, caucuses had been run according to the provisions stipulated in the Supreme Court Regulations. This has been explained in a study by Shah (2009), which refers to the Religious Courts Agency stating that eight mediation conditions require the implementation of a caucus. In contrast to the performance of caucuses at the Pasangkayu Regency Religious Court, which are currently more chosen to be carried out in mediation due to circumstances that form the basis for carrying out caucuses at the Pasangkayu Reency Religious Court during the pandemic. A participant said as follows:

"The chief justice only orders the mediator to apply the health protocol in conducting mediation by prioritizing the implementation of the caucus method in the mediation process."

Regarding the implementation of mediation, which is carried out virtually, the action was intended to prevent the widespread of Covid-19 in religious court institutions. All procedures of divorce mediation and trial can be carried out remotely. Such remote divorce mediation and trial were hard to be implemented before the pandemic because Muslims did not recognize divorce trials virtually.

Islamic law perspective on the iimplementation of Divorce Mediation

The implementation of mediation mandated by Supreme Court Regulation Number 1 of 2016, which requires the implementation of caucus mediation and its performance, also adjusting to conditions in the era of the Covid-19 pandemic. The adjustment requires further review from the perspective of Islamic law. The occurrence of marriage is not only seen from the sacred aspect of the family, but marriage also takes the essence of Islamic law and norms. Marriage couples who experience conflict in the household have difficult relationships between them, ending in filing lawsuits, and both divorce in court. The implementation of mediation that the Indonesia Supreme Court Regulation has regulated is intended to reduce the rate of the vast

number of divorce cases in Pasangkayu Regency Religious Court. The divorce rate for contested and *talaq* divorces is increasing yearly. The goal is a manifestation of one of the Islamic laws which strongly opposes divorce even though divorce is permitted.

Islamic law and teachings are the guidelines for *ijtihad* (interpretation) which is the basis for producing *shariah* that can adapt to the conditions of this modern society. Thus, the main goal of Islamic law is to maintain every rule that applies to humans and to realize benefits for societies. Islamic law does not explicitly admit the pandemic as a trigger for divorce, but it emphasizes that divorce occurs due to feelings no longer mutually reinforcing in a household relationship. Therefore, mediation is one of the stages in solving a problem. Mediation is of great concern to the Supreme Court because it plays an important role in reducing the number of divorce cases.

Judicial institutions that handle Islamic civil cases are the domain of the Religious Courts, which consider that the number of divorce cases is very high every year. The Supreme Court, as the highest judicial institution, has issued a regulation regarding mediation within the religious court, which must be carried out under the same standard as the Supreme Court principles. This Supreme Court regulation intends to maintain the marriage relationship so that it can pass on offspring. In that case, Islamic law already accommodates it. For example, *if al-nasl* (caring for offspring), one of the Islamic principles states that marriage's purpose is to give birth to offspring. With the obligation to carry out mediation, anyone who files a divorce case or *talaq* divorce can change his mind to abandon his intention to divorce.

CONCLUSION

The mediation carried out by the Pasangkayu Regency Religious Court to resolve divorce during the Covid-19 pandemic was carried out in two stages. The first is the implementation before mediation, which explains the procedures for examining cases, determines the mediation schedule, and determines the mediator. Second, the implementation of mediation conducted by the Pasangkayu Regency Religious Court applies two methods in mediation: the caucus and virtual procedures. The methods have undergone a transformation in response to the pandemic and the advancement of information technology. The transformation of divorce mediation and trial reflects the pervasiveness of Islamic religious courts in current technological development. As such, Muslim societies are ready to transform themselves in the new era. From an Islamic perspective, such transformation and new practices in divorce mediation and trial are considered relevant to Islamic law and teachings.

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