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# Effectiveness of Non-Judge Mediators in Providing Legal Services at the Bengkulu City Religious Court

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**Abstrak**

Mediation is important in resolving disputes, mediation is not just an effort made by the court to minimize cases entering the court, more than that mediation is intended to resolve disputes that occur thoroughly by seriously ending an ongoing dispute between two or more people. The purpose of mediation is not only to end the dispute, but also to build sincerity and willingness of the parties without anyone feeling defeated, so that the final outcome of mediation outlined in the form of a peace deed is the best choice of the parties based on sincerity. The research method used is empirical legal research, the focus of the research and the formulation of the problem to be studied is, how the Effectiveness of Non-Judge Mediators in Providing Legal Services at the Bengkulu City Religious Court. The expected goal meets the target so it can be said to be effective, and vice versa. For one mediator, the percentage is 30% of the cases that go to the mediator as many as 30 cases.

**Keywords: Mediation, mediator, effectiveness**

## INTRODUCTION

Initially, mediation was an alternative to non-litigation dispute resolution, namely out-of-court settlement. However, after the issuance of Supreme Court Regulation (PERMA) Number 1 of 2016 concerning mediation procedures in court which states that every civil case must first be resolved through mediation. That means mediation is a process that must be passed in the settlement of civil cases in court. So that the mediation process which was originally a non-litigation media (out-of-court case settlement) turned into a litigation media (in-court case settlement).[1]

Mediation as an alternative dispute resolution (ADR) is a humanist and equitable way of resolving disputes. Humanist because the matter of decision (peace agreement) is the authority of the parties to the dispute and maintain good relations. Fair because each party negotiates options for a solution and the output is win-win. By accurate, precise disputes directly and

[1] Anugrah Reskiani, Mukhtar Lutfi, and Hamzah Hasan, "Kompetensi Mediator Dalam Menunjang Keberhasilan Mediasi Pada Kasus Perceraian Di Pengadilan Agama Makassar (Tinjauan Teoritis Dan Faktual)," *Jurnal Diskursus Islam* 4, no. 2 (2016): 259–70.

people turn to mediation.[2] Mediation is important in resolving disputes, mediation is not just an effort made by the court to minimize cases entering the court, more than that mediation is intended to be able to resolve disputes that occur thoroughly by seriously ending an ongoing dispute between two or more people. Because of the importance of mediation. Every judge, mediator, parties and or legal counsel is obliged to follow the procedure of dispute resolution through mediation.

Peace efforts in the religious courts are called mediation. Mediation is a process of resolving disputes between two or more parties by negotiation or consensus with the help of a neutral party who does not have the authority to decide.[3] According to kbbi, mediation means the process of involving a third party in the resolution of a dispute as an advisor.

Article 1 Point 1 of supreme court regulation No. 1 of 2016 concerning mediation procedures in court, mediation is a way of resolving disputes through a negotiation process to obtain an agreement between the parties with the assistance of a mediator.[4] Referring to this definition, in short, the mediator's task in resolving conflicts is to obtain an agreement between the parties in the course of mediation.

Article 1 Point 2 of supreme court regulation No. 1 Year 2016, a mediator is a judge or other party who has a mediator certificate as a neutral party who assists the parties in the negotiation process in order to find various possible dispute resolutions without resorting to deciding or imposing a settlement.

Each mediator must have a mediator certificate obtained after attending and passing the mediator certification training organized by the supreme court or an institution that has obtained accreditation from the supreme court. The purpose of mediation is not only to end the dispute, but also to build the sincerity and willingness of the parties without anyone feeling defeated, so that the final outcome of mediation outlined in the form of a peace deed is the best choice of the parties based on sincerity. Therefore, the skill and expertise of the mediator is very important to resolve disputes between the two parties.[5]

The religious court class ia bengkulu city currently has 6 (six) non-judge mediators. As for the duties of the mediator in accordance with Article 4 of supreme court regulation No. 1 of 2016, mediators all civil disputes submitted to the court including cases of resistance *(verzet)* to a verdict of verstek and resistance of litigants *(partij verzet)* or third parties *(derden verzet)* to the implementation of a decision that has permanent legal force, must first be resolved through mediation, unless otherwise determined based on this supreme court regulation. Based on this introduction, the focus of research and the formulation of the problem to be studied is, how is the effectiveness of non-judge mediators in providing legal services at the bengkulu city religious court?

## METHOD

This research uses Empirical Legal research with a sociological approach. The sociology of law approach is an approach that analyzes how reactions and interactions occur when the norm system works in society. In addition, a sociological approach to law is also known.[6] This approach is constructed as something that is consistent, institutionalized and socially

[2] Dessy Sunarsi, Yuherman Yuherman, and Sumiyati Sumiyati, "Efektifitas Peran Mediator Non Hakim Dalam Penyelesaian Perkara Perceraian Di Pengadilan Agama Kelas 1A Pulau Jawa," *Jurnal Hukum Media Bhakti* 2, no. 2 (2018).

[3] Takdir Rahmadi, *Mediasi Penyelesaian Sengketa Melalui Pendekatan Mufakat*, *Rajawali Pers*, 2011.

[4] Mahkamah Agung Republik Indonesia, "Perma No 1 Tahun 2016 Tentang Mediasi" (2016).

[5] Agung Supra Wijaya, "Efektivitas Mediasi Dalam Pencegahan Perceraian Di Pengadilan Agama Bengkulu Kelas 1A" (Institute Agama Islam Negeri Bengkulu, 2016), h. 1-11.

[6] Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), h. 87.

legitimized. Empirical research is also used to observe the results of human behavior in the form of physical relics and archives. [7]

The data that has been collected in the data search is arranged in one system (systematized), then the data that has been arranged in one system is explained in one evaluation, then based on the explanation and evaluation, conclusions are made.[8] Data processing in legal research is essentially to seek legal truth, legal truth is truth in the sense of conformity with positive law and positive legal truth.

## RESEARCH RESULTS

### Mediasi

Mediation is part of alternative dispute resolution. According to Article 1 Point 10 of Law No.30/1999 on Arbitration and Alternative Dispute Resolution, alternative dispute resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely out-of-court settlement by means of consultation, negotiation, mediation, conciliation, or expert judgment. However, this Law does not regulate and provide a more detailed definition of these alternative institutions, as it regulates Arbitration.[9]

The mediation process is also known to have a simple procedure, fast process, confidential, fair, relatively low cost, good success, although for certain cases such as divorce it cannot produce peace, but many parties can produce partial peace and the parties can accept the results without causing resentment.[10] The mediation option can be chosen by the parties in dispute because the mediator will be a third party in dispute resolution with economical settlement and simple procedures.

Mediation is a form of alternative dispute resolution. Mediation is a way of resolving disputes based on consensual approaches of the parties with the help of a neutral party who does not have the authority to decide, called a mediator. In the Indonesian legal system, mediation can be used to resolve out-of-court disputes and disputes or cases that have been filed with the court (court-annexed mediation).

Mediation is a dispute resolution process through negotiation or consensus of the parties with the assistance of a mediator who does not have the authority to decide or impose a settlement. The main feature of the mediation process is negotiation, which is essentially the same as the process of deliberation or consensus. In accordance with the nature of negotiation or deliberation or consensus, there should be no coercion to accept or reject an idea or settlement during the mediation process. Everything must be agreed by the parties.

### Mediator

According to PERMA No. 1 of 2008, the definition of a mediator is a neutral party who assists the parties in the negotiation process in order to find various possibilities for resolving disputes without using a method. Article 1 Point 2 Perma 1/2016, a mediator is a judge or other party who has a mediator certificate as a neutral party who assists the parties in the negotiation process in order to find various possibilities for dispute resolution without using a way to decide or impose a settlement.[11] In Article 13 paragraph 1 of Perma No. 1 of 2016, every mediator is required to have a mediator certificate obtained after attending and passing mediator

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[7] Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum : Normatif & Empiris* (Yogyakarta: Pustaka Pelajar, 2010).

[8] F. Sugeng Istanto, *Penelitian Hukum* (Yogyakarta: Cv Ganda, 2007).

[9] Susanti Adi Nugroho, *Mediasi Sebagai Alternatif Penyelesaian Sengketa* (Jakarta: PT. Telaga Ilmu Indonesia, 2009), h. 165.

[10] Ahmad Ali, *Sosiologi Hukum; Kajian Empiris Terhadap Pengadilan* (Jakarta: Penerbit Iblam, 2004), h. 24-25.

[11] Mahkamah Agung Republik Indonesia, Perma No 1 Tahun 2016 tentang Mediasi.

certification training organized by the Supreme Court or an institution that has obtained accreditation from the Supreme Court.[12]

Thus, the mediator's role is only to assist the parties by not deciding or imposing his/her views or judgment on the issues during the mediation process on the parties. Further to the duties of a mediator, Article 14 of Perma 1/2016 has detailed the stages of the mediator's duties in carrying out his/her functions as follows.

1. Introduce themselves and give the parties the opportunity to introduce themselves to each other.
2. Explain the purpose, objectives, and nature of the mediation to the parties.
3. Explain the position and role of a neutral, non-decision-making mediator.
4. Make rules for the implementation of mediation with the parties.
5. Explain that the mediator may hold a meeting with one party without the other party being present (caucus).
6. Arrange the mediation schedule with the parties.
7. Fill out the mediation schedule form.
8. Provide an opportunity for the parties to convey problems and peace proposals.
9. Inventorying problems and scheduling discussions based on priority scale.
10. Facilitate and encourage the parties to:
    a. explore and explore the interests of the parties;
    b. seek various settlement options that are best for the parties; and
    c. work together to achieve completion.
11. Assist the parties in making and formulating a peace agreement.
12. Submitting a report on the success, failure and/or inability to conduct mediation to the examining judge.;
13. Declare that one or both parties have not acted in good faith and inform the examining judge of the case.
14. Other duties in carrying out its functions.

## DISCUSSION

### Effectiveness of Non-Judge Mediators in Providing Legal Services at the Bengkulu City Religious Court

The legal basis for religious courts in the 1945 Constitution is regulated by Article 24 which in paragraph (1) explains that judicial power is an independent power to administer justice in order to uphold law and justice. Law No. 7 of 1989 concerning Religious Courts as amended for the last time by Law No. 50 of 2009, which in Article 2 confirms that religious courts are one of the implementers of judicial power for people seeking justice who are Muslims regarding certain civil cases regulated in law. Furthermore, Article 2 paragraph (1) explains that judicial power within the religious courts is exercised by religious courts and religious high courts.

Religious Courts are also one of the 3 Special Courts in Indonesia. It is said to be a Special Court because the Religious Courts adjudicate certain civil cases and regarding certain groups of people. In the organizational structure of the Religious Courts, there are Religious Courts and Religious High Courts that are directly in contact with the settlement of cases at the first and appellate levels as a manifestation of the function of judicial power. Judicial power within the religious courts is exercised by the Religious Courts and the Religious High Courts.

The Religious Courts are tasked and authorized to examine, decide and resolve cases between people of the Islamic faith in the fields of: marriage, inheritance, wills, grants, waqf, zakat, infaq, shadaqah and sharia economy as stipulated in Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts.

[12] Mahkamah Agung Republik Indonesia.

In the Regulation of the Minister of Law and Human Rights Number 32 of 2017 concerning Procedures for Dispute Resolution of Legislation through Nonlitigation and its successor, the Regulation of the Minister of Law and Human Rights Number 2 of 2019 concerning Resolution of Disharmony of Legislation through Mediation, it is clearly stated that the regulation is intended for dispute resolution or disharmony of legislation (regeling). This means that the legal product that is the object of dispute resolution or disharmony is the type of legislation or regeling.[13]

The background of why the Supreme Court of Indonesia (MA-RI) requires the parties to undergo mediation before the case is decided by a judge is described below. MA-RI's policy of introducing mediation into the Court process is based on the following reasons:

1. The mediation process is expected to overcome the problem of case backlog. If the parties can resolve their own disputes without having to be heard by a judge, the number of cases that must be examined by judges will also decrease. If the dispute can be resolved through peace, the parties will not pursue cassation legal remedies because the peace is the result of the mutual will of the parties, so they will not file legal remedies. Conversely, if the case is decided by a judge, the decision is the result of the judge's view and assessment of the facts and legal position of the parties. The judge's views and assessments are not necessarily in line with the views of the parties, especially the losing party, so that the losing party always takes legal remedies of appeal and cassation. In the end, all cases lead to the Supreme Court which results in the accumulation of cases.
2. The mediation process is seen as a faster and cheaper way of resolving disputes than litigation. In Indonesia, there is no research to prove the assumption that mediation is a quicker and cheaper process than litigation. However, if based on the logic as described in the first reason that if a case is decided, the losing party often files a legal remedy, appeal or cassation, thus making the settlement of the case concerned can take years, from the examination at the Court of first instance to the examination of the Supreme Court cassation level. On the other hand, if the case is resolved by settlement, the parties will automatically accept the final result because it is the result of their work and reflects the parties' mutual will. In addition to the logic outlined above, the literature often states that the use of mediation or alternative dispute resolution is a faster and cheaper dispute resolution process than litigation.
3. The implementation of mediation is expected to expand access for the parties to obtain a sense of justice. A sense of justice can not only be obtained through the litigation process, but also through a consensus deliberation process by the parties. With the introduction of mediation into the formal justice system, the justice-seeking public in general and the disputing parties in particular can first seek to resolve their disputes through a consensus approach assisted by an intermediary called a mediator. Even if in reality they have already gone through the process of deliberation to reach consensus before one of the parties brings the dispute to the Court, the Supreme Court still considers it necessary to require the parties to take peace efforts assisted by a mediator, not only because the applicable procedural law provisions, namely *HIR* and *Rbg*, require judges to first reconcile the parties before the decision process begins, but also because of the view that a better and more satisfying settlement is a settlement process that provides an opportunity for the parties to jointly seek and find the final result.
4. The institutionalization of the mediation process into the judicial system can strengthen and maximize the function of the courts in dispute resolution. If in the past the more prominent function of the court institution was the function of deciding, with the enactment of the PERMA on Mediation it is hoped that the function of reconciling or mediating can go hand

[13] Ade Kosasih and A Majid Ali, "Analisis Kritis Kewenangan Kementerian Hukum Dan Hak Asasi Manusia Dalam Penyelesaian Sengketa Perundang-Undangan Melalui Mediasi," *Al-Imarah: Jurnal Pemerintahan Dan Politik Islam* 6, no. 1 (2021).

in hand and be balanced with the function of deciding. The PERMA on Mediation is expected to encourage a change in the perspective of the actors in the civil justice process, namely judges and advocates, that the court institution not only decides, but also reconciles. The PERMA on Mediation provides guidelines for achieving peace.

In general, in the legal provisions in Indonesia, mediation can be divided into 2 (two) forms, namely: in-court mediation and out-of-court mediation. In the in-court process, where the parties to the dispute (plaintiff and defendant) face each other, each seeks to defend their rights before the court. According to Article 3 paragraph (1) of PERMA Mediation, the mediation process is integrated with the court proceedings. Its implementation is carried out in the trial process at the court of first instance and is imperative for judges, mediators, parties, and/or their attorneys.

In the mediation process, there are 3 (three) stages, namely:

1. Premediation Stage
   The premediation stage is the initial stage where the mediator arranges a number of steps and preparations before the mediation begins. At this stage, the mediator takes several strategic steps, namely building confidence, contacting the parties, exploring and providing preliminary mediation information, focusing on the future, coordinating the disputing parties, being aware of cultural differences, determining the objectives, the parties, and the time and place of the meeting, and creating a conducive situation for both parties.
2. The mediation implementation stage
   The implementation stage of mediation is the stage where the disputing parties meet and confer in a forum. In this stage, there are several important steps, namely welcome and introduction by the mediator, presentation and exposure of factual conditions experienced by the parties, sorting and identifying precisely the parties' problems, discussion (negotiation) of agreed issues, reaching alternative solutions, finding points of agreement and formulating decisions, recording and restating decisions, and closing the mediation.
3. Final stage of mediation implementation
   This stage is where the parties execute the agreements that they have put together in a written agreement. The parties implement the agreement based on the commitment they have shown during the mediation process. The implementation of mediation is generally carried out by the parties themselves, but in some cases, the implementation is assisted by other parties.

According to one of the mediators at the Bengkulu Religious Court Elfahmi Lubis, SH, M.Pd. C.NSP, C.Med. in his office said that the appointment of the mediator was determined by the judge examining the case and in accordance with the schedule of the mediator on duty that day. In some cases, the parties choose the mediator they want, but this is still submitted to the examining judge at that time, and usually the examining judge will grant it.

In a period of 1 year the cases that entered were around 20 to 30 cases per mediator, for cases that entered the Bengkulu religious court for one mediator not only one type of case, namely divorce cases, divorce applications, joint property, child custody, sharia economic disputes, and inheritance.

Still according to Elfahmi Lubis, of the incoming cases that were successfully reconciled by the mediator, the percentage was around 30 percent. The mediator's persistence in leading intense communication with the parties is also a factor that cannot be ignored. Good communication techniques and persuasive style make the parties want to talk about their interests.

Obstacles from the parties themselves who do not want to make peace, intervention from outside parties such as family and lawyers, because there is no commitment after peace, etc. If Mediation does not result in an agreement, the Mediator shall state in writing that the mediation

process has failed and notify the Judge of the failure. At each stage of the case examination, the Judge examining the case is still authorized to seek peace until before the pronouncement of the verdict.

## CONCLUSION

In the mediation process, there are 3 stages, Premediation Stage, the mediation implementation stage, Final stage of mediation implementation. Based on the results of the discussion, effectiveness focuses on the results, if the expected goals meet the target, it can be said to be effective, and vice versa. For o Obstacles from the parties themselves who do not want to make peace, intervention from outside parties such as family and lawyers, because there is no commitment after peace, etc. If Mediation does not result in an agreement, the Mediator shall state in writing that the mediation process has failed and notify the Judge of the failure. At each stage of the case examination, the Judge examining the case is still authorized to seek peace until before the pronouncement of the verdict.ne mediator, the percentage is 30% of the cases that go to the mediator as many as 30 cases.

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