

## **DOMESTIC VIOLENCE AS A CAUSE FOR DIVORCE: ARE THERE EFFORTS FOR MEDIATION?**

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### **Abstract**

Mediation as an alternative to dispute resolution has been integrated in court. Further provisions for mediation as a process that must be carried out are further regulated in the Supreme Court Regulation No. 1 of 2016 concerning mediation procedures in court. This means that cases filed in court including cases of divorce on the grounds of domestic violence are obliged to undergo mediation. This research is a normative legal research that focuses on solving legal problems by providing a basis for theoretical argumentation and adequate concepts. Sources of data in this study came from primary, secondary and tertiary legal materials. The findings of the study indicate that in cases of divorce on the grounds of domestic violence, they still take the path of mediation. This is stated in the Supreme Court Regulation No. 1 of 2016 which requires mediation in civil cases, even in the Supreme Court Regulation states that in the resolution of a civil case a judge does not take mediation, it is considered to have violated the law. Divorce cases on the grounds of domestic violence cannot be categorized as a criminal act, if the filing process is a civil process (divorce), it is different when the wife makes a complaint (complaint offense) and/or an ordinary offense which results in a violation of the Abolition of Domestic Violence. However, divorce cases are considered civil and processed according to other civil cases and on the grounds of domestic violence they still go through mediation.

Mediasi sebagai salah satu alternatif penyelesaian sengketa telah diintegrasikan di pengadilan. Ketentuan lebih lanjut mediasi sebagai suatu proses yang wajib dilakukan selanjutnya diatur dalam Peraturan Mahkamah Agung No 1 Tahun 2016 tentang prosedur mediasi di Pengadilan. Hal ini berarti bahwa perkara-perkara yang diajukan di pengadilan termasuk perkara perceraian dengan alasan kekerasan dalam rumah tangga wajib untuk dilakukan mediasi. Penelitian ini merupakan penelitian hukum normatif yang memfokuskan penyelesaian persoalan hukum dengan memberikan dasar argumentasi teori, konsep yang memadai. Sumber data dalam kajian ini bersumber dari bahan hukum primer, sekunder dan tersier. Temuan penelitian menunjukkan bahwa dalam kasus perceraian dengan

alasan KDRT tetap menempuh jalan mediasi. Hal itu tertuang dalam PERMA No. 1 Tahun 2016 yang mewajibkan adanya mediasi dalam kasus perdata, bahkan dalam PERMA tersebut menyebutkan bahwa dalam penyelesaian kasus perdata seorang hakim tidak menempuh mediasi maka dianggap melanggar perundang-undangan. Perkara perceraian dengan alasan KDRT tidak dapat dikategorikan sebagai tindak pidana, bilamana proses pengajuannya adalah proses perdata (perceraian), berbeda ketika istri melakukan pengaduan (delik aduan) dan atau delik biasa yang efeknya pelanggaran PKDRT. Namun kasus perceraian dianggap sebagai perdata dan diproses sesuai kasus perdata lainnya dan dengan alasan KDRT tetap menempuh jalan mediasi.

**Keywords:** *Mediation; Divorce; Violence; Household.*

## **INTRODUCTION**

Divorce is something that is hated by Allah, but it still can be done. The reasons for divorce must be based on applicable provisions, both religious law and statutory regulations. Theoretically, a household building is dissolved because the husband and wife fail to fulfill their obligations.<sup>1</sup> One of the factors that causes divorce is domestic violence. Violence in the family is considered contrary to the principles and goals of marriage. Because marriage brings each other close and maintains the safety of life.<sup>2</sup> Meanwhile, when there is violence, it has criticized the salvation of life. Violence is no longer in line with the principle of marriage, namely pleasure and affection between the two parties (husband and wife).<sup>3</sup>

Violence is not in line with the purpose of marriage, which is to form a happy and eternal family (household) based on the principle of Belief in the one and only God, it is difficult to realize. The occurrence of domestic violence causes a loss of security and lives in fear. In fact, the 1945 Constitution of the Republic of Indonesia explicitly states that everyone has the right to feel safe. Thus, everyone has the right to security, including in a household. All forms of violence must be put aside because they are contrary to the basic values of the State.

Domestic violence generally occurs against women. Based on data from the Indonesian National Commission for Women, it is revealed that since 2016-2019 there has been an increase in violence against women. In 2016 there were 259,150 cases, in 2017 there was an increase of 348,446 cases and in 2018 as

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<sup>1</sup>Muhammad Farid, *Implikasi Perceraian (Kajian Tentang Akibat Lain yang Ditimbulkan Oleh Sebuah Peristiwa Hukum)*, "Al-Bayyinah Vol. 1. No. 1. (2018): p. 4.

<sup>2</sup>Santoso, *Hakekat Perkawinan Menurut Undang-Undang Perkawinan, Hukum Islam dan Hukum Adat* (UNISSULA Semarang: Jurnal YUDISIA, Vol. 7, No. 2, December 2016), p. 417.

<sup>3</sup>Abdul Djamali, *Hukum Islam (Berdasarkan Ketentuan Kurikulum Konsorsium Ilmu Hukum)* (Bandung: Masdar Maju, 2002), p. 80.

many as 406,178 cases, this number continues to increase until in 2019 as many as 431,471 cases.<sup>4</sup>

Violence against women is included in Domestic Violence. National Human Rights Commission data on violence against wives that occurred in 2019 were 462 cases. Cases of violence against wives were identified in various forms. The most dominant is psychological violence in the form of infidelity, threats, verbal abuse in the form of insults, the criminalization of husbands reporting cases of child neglect because the wife is working and entrusting the child to the caregiver while the husband is not working. Another form of violence is sexual violence using media technology or cybercrime.<sup>5</sup>

The increase in violence in domestic violence has led to filing for divorce. In the judicial process, in the divorce case, the panel of judges seeks peace between the parties (husband and wife). Formally known as mediation or efforts to reconcile by way of deliberation. Mediation is also Allah's call to reconcile two parties based on justice.<sup>6</sup> The mediation process is regulated in Supreme Court Regulation No.1 of 2016 concerning Mediation Procedures in Courts. Mediation is a mandatory matter that must be carried out before the main examination of the case.

Divorce on the grounds of domestic violence, sometimes creates ambiguity. The mediation process is a pros and cons, considering that acts of violence fall into the field of criminal acts. Juridically, acts of violence in household are regulated in Law no. 23 of 2004 which states that all forms of violence are forms of crime, then they are categorized as criminal acts.

The polemic then requires factual answers, in cases of domestic violence it can lead to criminal acts. The mediation process is a questionable matter, whether it is not in conflict with the Domestic Violence Law (UU KDRT) which substantially considers all forms of violence to be crimes and categorized as criminal, so that mediation treatment is no longer a priority. On the other hand, cases of violence occur in domestic contexts, so they cannot be separated from formal trials and mediation efforts. This study will provide answers to problems that arise with mediation efforts in cases of domestic violence.

## **METHODOLOGY**

This research is a normative legal research that focuses on the study of legal norms, to produce new arguments, theories or concepts as prescriptions in solving

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<sup>4</sup>Catatan Tahunan Kekerasan Terhadap Perempuan Tahun 2019, *Komnas perempuan.go.id*, p. 7

<sup>5</sup>Catatan Tahunan Kekerasan Terhadap Perempuan Tahun 2019, *Komnas perempuan.go.id*, p. 29.

<sup>6</sup>See, Al-Hujuraat/49:9.

legal problems faced.<sup>7</sup> and provide an assessment of something that should be done. The legal materials used in this study include primary legal materials consisting of *Herziene Indonesisch Reglement* (HIR) and *Rechtsreglement voor de Buitengewesten* (Rbg), laws, regulations of the Supreme Court. Secondary legal materials are materials that provide an explanation of primary legal materials<sup>8</sup>, consists of text books on law, especially civil procedural law and civil law, scientific journals in the field of law, research results in the field of law that are related to the mediation of divorce cases. Tertiary legal materials are materials that provide instructions and explanations for primary and secondary legal materials,<sup>9</sup> namely the legal dictionary and the Indonesian dictionary. In addition, this research is classified as normative juridical research, which tries to analyze the mediation issue in divorce cases. Compromise legislation in seeking factual answers regarding the position of domestic violence in divorce cases.

## **DISCUSSION**

### **A. Indicators of Domestic Violence**

The word "kekerasan" (violence) in Indonesian is defined as the nature (certain things) hard, violent activities, coercion, convulsions.<sup>10</sup> The term "kekerasan" (violence) in the Indonesian dictionary also means "the act of a person or group of people causing injury or death of another person or causing physical damage or other people's property".

The word "kekerasan" is the equivalent of the word "violence" in English, although they both have different concepts. Violence in English is defined as an attack or invasion of a person's physical or psychological mental integrity. Meanwhile, the word 'kekerasan' in Indonesian is generally understood to mean only physical attacks.<sup>11</sup>

Apart from these different etymological meanings, "kekerasan" and "violence", currently violence is not only defined physically, but also psychologically. As is currently known about violence against wives, children, servants or between family members in the household (hereinafter called as domestic violence), namely, can be in the form of physical violence, psychological

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<sup>7</sup>Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Pers, 2015), p. 14.

<sup>8</sup>Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: PT. Rajagrafindo Persada, 2002), p. 32.

<sup>9</sup>Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum*, p. 32.

<sup>10</sup>WJS. Purwodarminto, *Kamus Besar Bahasa Indonesia* (Jakarta: Balai Pustaka, 1984), p. 489.

<sup>11</sup>Mansour Faqih, *Perkosaan dan Kekerasan Analisis Gender*, in Eko Prasetyo and Suparman Marzuki (eds.), *Perempuan dalam Wacana Perkosaan* (Yogyakarta: PKBI, 1997), p. 7.

violence, sexual violence and household neglect as stipulated in Article 1 of Law No. 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT).

Domestic violence is expressly regulated in Article 5 of the Elimination of Domestic Violence Law, which has stated the forms of violence in the household. Among them are physical, psychological, sexual violence and include neglect of the household or not providing proper living.<sup>12</sup> For this reason, domestic violence is very gradually contained in the Elimination of Domestic Violence Law.

Forms of domestic violence are divided into physical violence (namely acts that cause pain, fall ill or serious injury). Psychic violence (i.e. actions that cause fear, loss of self-confidence, and/or severe psychological suffering to a person). Sexual violence (that is, forced sexual relations between people who live in the household environment, and forced sexual relations between a person in the household and another person for commercial and/or specific purposes). Domestic neglect (such as a person who causes economic dependence by limiting and/or prohibiting decent work in or outside the home so that the victim is under the person's control).<sup>13</sup>

In fact, the principle behind the promulgation of Law no. 23 of 2004 concerning Elimination of Domestic Violence is an awareness of discrimination and unfair treatment of women both in the public sphere and in the household. As well as the abuse of minors by becoming victims of sexual abuse and exploitation of minors and so on. Legal provisions governing domestic violence, case handling procedures, protection of victims and sanctions for the perpetrators.

This law against domestic violence is legalized with several considerations. This awareness becomes a part of the form of justice that will be provided by every citizen. Among the several considerations, among others, is that every citizen has a sense of security and freedom from various forms of violence. Domestic violence is a form of violation of human rights and crimes against human dignity as well as a form of discrimination that must be eliminated. In addition, victims of violence are mostly women and children, so they must get protection to avoid and be free from all forms of violence. And most importantly, the threat of violence, torture, has undermined the degree and dignity of humanity.

## **B. Physical Violence According to Positive Law**

Basically, the term physical violence is not found in the detailed Criminal Code (KUHP). In the existing Criminal Code is a term of persecution which can

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<sup>12</sup>Republic of Indonesia, *Law Number 23 Year 2004 concerning Elimination of Domestic Violence*, Article 5.

<sup>13</sup>Republic of Indonesia, *Law Number 23 of 2004 concerning Elimination of Domestic Violence*, Articles 6-9.

substantially provide an understanding of physical violence caused by a criminal act of maltreatment. Physical violence in the act of persecution as described in the Criminal Code is aimed at harming the victim physically and physically. The definition of persecution according to jurisprudence is the existence of a proper goal to be achieved by an act that is consciously (forced) to cause pain or injury. In the science of law, persecution is defined as an act done on purpose to cause pain or injury to another person's body.

Based on the above understanding, it can be seen about the elements of persecution, namely the presence of intent, the existence of an action and the consequences of the intended action. The intentional element, also called the subjective element. The deliberate action in this case is aimed at his actions. The existence of an act is called an objective element. This element is still abstract, because with terms/words only actions, then in its concrete form there is no limit to its form. In fact, what generally happens is that the act is physically violent and must cause pain or injury to the body. The assumption is that those who can be convicted are those who create *onregt* (actions that are against the law). There is a result of the action (which is intended), namely pain and injury to the body.

Based on Article 5 of Law No. 23 of 2004, emphasizes the prohibition of committing violence within the scope of household, which reads: Everyone is prohibited from committing domestic violence against people within the scope of his household, by means of physical violence, psychological violence and sexual violence and economic violence (household neglect) Thus, the meaning of violence in the above explanation of violence can be in the form of physical, psychological and economic neglect.

Article 6 of Law no. 23 of 2004, describes acts of physical violence in the household, namely "physical violence as referred to in Article 5 letter (a) is an act that causes pain, falls ill, or is seriously injured. In the explanation of Article 5 above, it can be concluded that there are two elements of physical violence in the provisions of the Elimination of Domestic Violence Law, namely: the existence of an act and the result of the action caused. The result of the violence referred to in the Elimination of Domestic Violence Law is that there is an act or action in committing physical violence or torture in the form of hitting, kicking, pinching, pushing, either with his hands/feet or with tools or weapons. Besides that, there is a result of the action, namely pain and injury to the body.

With the criminalization of acts of domestic violence as a crime in Law no. 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT). The Elimination of Domestic Violence Law has become part of Indonesia's positive criminal law system. Because juridically all forms of violence against women,

especially those that occur in the household realm, must be viewed as crimes against humanity and a form of violation of human rights.

The Elimination of Domestic Violence Law broadens the definition of violence not only as an act that results in physical suffering, but also psychological suffering. Violence in this case is defined as an offense of abuse and an offense of psychological, sexual immorality and household neglect. With regard to physical violence against wives or within the family, it has been explained in the Elimination of Domestic Violence Law, as Article 6 states that physical violence as referred to in Article 5 letter a is an act that causes pain, ill, or In the Elimination of Domestic Violence Law, an act can be said to be physical violence if the act results in pain, falls ill, or serious injury to the victim. This indicates that the physical violence has the impact of injuring or injuring the victim in his limbs, so that the victim causes pain, ill or is seriously injured. It can be understood that the definition of persecution in the Criminal Code and violence and physical violence in the Elimination of Domestic Violence Law which has been described above, in principle, contains the same substance and understanding. The acts carried out are the same forms of persecution that can cause pain, injure or may harm the safety of the victim's life and body. So, in the meaning of violence in positive law it is more to the physical object. Including sexual violence that causes pain to the victim, it is categorized as physical violence. In general, sexual violence is an act that is inhumane and separated from the mission of humanity and the benefit of the law.<sup>14</sup> So that in substance, physical violence touches the body and/or physicality of the victim.

### C. The Implementation of Mediation in Divorce Cases

Mediation is a process of dispute resolution based on the principle of volunteerism through negotiation.<sup>15</sup> Mediation is a problem-solving negotiation process in which an impartial and neutral external party works with the disputing parties to help them obtain a satisfactory agreement.<sup>16</sup> In the Supreme Court Regulation (PERMA) Number 1 of 2016 Article 1 point (1) explains that mediation is a way of resolving disputes through the negotiation process to obtain agreement from the parties assisted by a mediator.<sup>17</sup>

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<sup>14</sup>M. Mohsi, *Analisis Perkawinan Paksa Sebagai Tindak Pidana Kekerasan Seksual dalam RUU PKS*, (Al-Adalah: *Jurnal Hukum dan Politik Islam* 5.1 (2020), p. 11.

<sup>15</sup>Suyud Margono, *Alternatif Dispute Resolution (ADR) dan Arbitrase: Proses Pelembagaan dan Aspek Hukum* (Bogor: Ghalia Indonesia, 2002), p. 59.

<sup>16</sup>Muhammad Saifullah, *Mediasi dalam Tinjauan Hukum Islam dan Hukum Positif di Indonesia* (Semarang: Walisongo Press, 2009), p. 76.

<sup>17</sup>The Supreme Court of the Republic of Indonesia, Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures at the Supreme Court of the Republic of Indonesia.

Mediation is an alternative form of dispute resolution that can be carried out both in court and outside the court. Prior to the enactment of the provisions of the Supreme Court Regulation which obliged mediation in court, Article 130 HIR/154 Rbg had regulated judges to seek peace for the parties in litigation. Mediation is a dispute resolution assisted by a mediator through a negotiation process which is expected to obtain agreement (peace) of the parties. Priyatna Abdurrasyid explained that mediation is a peaceful process in which the parties submit the resolution to the mediator with a fair final result. This process is a settlement process that does not waste too much money, but the results are acceptable to both parties.<sup>18</sup>

Mediation is a dispute resolution process in which an impartial and neutral outside party works with the disputing parties to help them obtain a satisfactory agreement. Every civil case that goes to court, the parties present at the trial must first attend mediation, so the judge is obliged to reconcile the two parties.<sup>19</sup> The court must try to reconcile by referring to the rules of the case submitted to the first level, it is obligatory for reconciliation to be carried out with the assistance of a mediator.<sup>20</sup>

Mediation is a dispute resolution process assisted by a mediator. The mediator is a neutral third party chosen by both parties. This is based on the Supreme Court Regulation No. 1 of 2016 number (2) regarding the mediation procedure in court, which explains that the mediator is a neutral party appointed by both parties, be it a judge or other party who has a mediator certificate.<sup>21</sup> However, in cases that have been submitted to court, the mediator is the judge.

Mediation procedures in court as part of civil procedural law can strengthen and optimize the functions of the judiciary in dispute resolution.<sup>22</sup> In a divorce case submitted to the court it is imperative to take the mediation route. The implication that may arise, if the case is not filed for mediation, is that the judge may be deemed to have violated the law. This is stated in Article 3 paragraph (3) of the Supreme Court Regulation No. 1 of 2016 that the Case Examining Judge who did not order the Parties to take Mediation so that the Parties did not conduct

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<sup>18</sup>Dwi Rezki Sri Astarini, *Mediasi Pengadilan Salah Satu Bentuk Penyelesaian Sengketa Berdasarkan Asas Peradilan Cepat, Sederhana, Biaya Ringan* (Bandung: PT Alumni, 2013), p. 34.

<sup>19</sup>See, Article 130 HIR/Article 154 RBg.

<sup>20</sup>Abdul Kadir Muhammad, *Hukum Acara Perdata Indonesia* (3<sup>rd</sup> Ed.; Bandung: Alumni, 1996), p. 165.

<sup>21</sup>Judges or other parties who have a mediator certificate as a neutral party who assist the parties in the negotiation process in seeking various possible dispute resolutions without using a way to decide or force a settlement.

<sup>22</sup>Preamble point (d) Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Courts.



Mediation had violated the provisions of the laws and regulations governing Mediation in Court.

According to Syahrizal Abbas, a mediator must be neutral and must not have an interest in the negotiation process and its results.<sup>23</sup> According to Christopher Moore, dividing mediators into three types of mediators. First, a mediator who is trusted by both parties who is expected to have a mediator who can maintain harmony or good relations in the community where they are a part of. This type of mediator is known as a social network mediator. Second, authoritative mediators, namely mediators who have a strong influence so that they have the potential to influence the final outcome of the mediation process. Third, independent mediator, this mediator is different from the Authoritative mediator type because this type of mediator keeps a distance from the problem and the disputing parties, the specialist professional mediator in solving the problems they face, for example mediators with a background in the profession of lawyers, construction, accounting, or health experts. However, in the scope of the judiciary, the mediator comes from the judges themselves, unless there are other things that require a special mediator to obtain detailed information on cases submitted in court.

The mediator must also function as a realistic agent and as a scapegoat. If the mediator functions as a realistic agent, the mediator must provide understanding to the parties or one of the parties that what is desired cannot be achieved through negotiations. The mediator is the scapegoat, so a mediator must be prepared to be blamed for the sake of achieving an agreement or peace for both parties.<sup>24</sup> According to Yahya Harahap, independent mediation is better than being at the judge's table. The parties' own dispute resolution, short settlement period, low cost, unnecessary evidentiary rules, confidential settlement process, cooperative relationship between the parties, communication and focus of resolution, win-win outcome, free of emotion and revenge.<sup>25</sup> The advantage of litigation dispute resolution is that court decisions have definite, final and legal force. Creating legal certainty in the position of the parties to win or lose (win and lose position), and the implementation of decisions can be forced (execution).<sup>26</sup>

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<sup>23</sup>Syahrizal Abbas, *Mediasi dalam Perspektif Syariah, Hukum Adat, dan Hukum Nasional* (Jakarta: Kencana Prenada Media Group, 2009), p. 64.

<sup>24</sup>Dwi Rezki Sri Astarini, *Mediasi Pengadilan Salah Satu Bentuk*, p. 94-95.

<sup>25</sup>Yahya Harahap, *Hukum Acara Peradara Tentang Gugatan, Persidangan, Penyitaan dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2007), p. 236.

<sup>26</sup>Rosita, *Alternatif dalam Penyelesaian Sengketa (Litigasi dan Non Litigasi)* (Al-Bayyinah Vol. 1. No. 2 (2017), p. 104.

Divorce is one of the reasons for the breakup of a marriage before the court based on Article 39 of Law no. 1 of 1974 concerning Marriage. The issue of divorce becomes absolute or compelling authority in the religious court.<sup>27</sup> Divorce can only be carried out in front of a court hearing after a settlement has been made and the divorce occurs after there is sufficient reason that the husband and wife will no longer be able to live in harmony. Article 19 Government Regulation (PP) No. 9 of 1975 concerning the implementation of Law no. 1 of 1974 and Article 116 of Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI), there are additional reasons for divorce, including husbands violating the statement of divorce and religious conversion or apostasy which causes dissonance in the household.

Supreme Court policy that issued Supreme Court Regulation (PERMA) No. 1 of 2008 concerning mediation procedures in court is an effective instrument to overcome the accumulation of cases in court, and at the same time to maximize the function of court institutions in resolving disputes.<sup>28</sup> Every civil dispute that is submitted to the court of first instance, must seek mediation by the mediating judge or non-judge mediator and the parties in the case in accordance with the mediation procedure in court conducted on the first trial day. If a judge violates or is reluctant to apply the mediation procedure, then the judge's decision is null and void.<sup>29</sup>

The mediation process is an obligation in proceeding at the Religious Court in divorce cases, mediation as an attempt by judges or court parties so that the divorce process can be reconciled and not continue at the next trial. The judge is obliged to explain to the parties to take mediation and advise the parties to select a mediator from the list of mediators. The parties appear again to the judge on the appointed trial day to notify the report of the successful mediation and the mediator is obliged to notify the judge in writing that mediation failed.<sup>30</sup> Hence in a divorce case, you must take the path of mediation, as a solution to get an agreement or peace for both parties. This becomes mandatory, and even judges will be deemed to have violated the law if they do not offer mediation in the case being handled.

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<sup>27</sup>Hamzah, *Peranan Peradilan Agama dalam Pertumbuhan dan Dinamika Hukum Kewarisan di Indonesia* (AL-SYAKHSHIYYAH: *Jurnal Hukum Keluarga Islam dan Kemanusiaan*, Vol. 2 No. 2 2020), p. 124.

<sup>28</sup>The Supreme Court of the Republic of Indonesia, Supreme Court Regulation No. 1 of 2008 concerning Mediation Procedures at the Supreme Court of the Republic of Indonesia.

<sup>29</sup>The Supreme Court of the Republic of Indonesia, Supreme Court Regulation No. 1 of 2008 Article 2 Paragraph 3.

<sup>30</sup>Rachmadi Usman, *Pilihan Penyelesaian Sengketa di Luar Pengadilan* (Bandung: Citra Aditya Bakti, 2003), p. 82.

#### D. Mediation in Domestic Violence Cases

Based on the reasons for divorce as stipulated in Government Regulation No. 9 of 1975 concerning the implementation of Law no. 1 of 1974 in Article 19 letter (f), the cause of divorce on the grounds of domestic violence in the form of acts that cause physical suffering. In letter (d) one of the parties commits cruelty or serious maltreatment which endangers the other party. Meanwhile, other causes of continuing disputes and arguments can be the beginning of domestic violence which results in sexual, psychological and domestic neglect.

Forms of domestic violence according to Law no. 23 of 20014 concerning Elimination of Domestic Violence, the first is an act that causes pain, falls ill or is seriously injured. If this happens then it is categorized as physical violence. Whereas if the act results in fear, loss of self-confidence in a person, and no longer the ability to act and/or severe psychological suffering is felt by a person, this action includes psychological violence. Other forms of acts that may occur within the scope of the household are coercion of sexual relations and coercion of sexual relations with commercial or specific purposes. The last act which includes domestic violence is when one party neglects the household.

The occurrence of domestic violence can be caused by violence that starts with non-physical violence as a manifestation of a gradual emotional outburst that begins with non-physical violence starting with unwanted attitudes and behavior or hurtful words. Another cause is the embodiment of spontaneous emotional outbursts without planning and not supported by a complete background to the event.<sup>31</sup> This condition became the beginning of violence due to a dispute that led to violence.

As a result of the violence, it had an unfavorable effect, leading to filing for divorce in court. Divorce on the grounds of domestic violence is not easy because this case is different from other cases such as default or inheritance because there are only disputes but not accompanied by acts that cause suffering from physical, psychological, sexual violence and household neglect.

When connected with the dispute resolution theory developed and put forward by Ralf Dahrendorf, Dean G. Pruitt and Jeffrey Z. Rubin, Simon Fisher, Laura Nader, and Harry F. Todd Jr. There are five strategies in dispute resolution including: (1) Contending, namely trying to implement a solution that is preferred by one party over the other; (2) Yielding, namely lowering one's own aspirations and being willing to accept less than what is really desired; (3) Problem solving, namely finding alternatives that satisfy the aspirations of both parties; (4)

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<sup>31</sup>Moerti Hadiati Soeroso, *Kekerasan dalam Rumah Tangga Perspektif Yuridis Viktimologis* (Jakarta: Sinar Grafika, 2011), p. 82-83.

Withdrawing, namely choosing to leave the dispute situation, both physically and psychologically; (5) Inaction (silent), which is not doing anything.<sup>32</sup>

In divorce cases on the grounds of domestic violence, the mediator must apply problem solving in this case the reasons why one party commits violence in household and the solution so that it does not happen again. The success of mediation is influenced by the condition of the community in viewing a dispute. According to Ralf Dahrendorf, dispute resolution theory is oriented towards social structures and institutions. Ralf Dahrendorf argues that society has two faces, namely dispute and consensus.<sup>33</sup> While compiling a dispute resolution theory based on the community structure of the disputing parties, the normative order that exists in society is divided into two categories. *First*, the primary rules of obligation, this society has the character of a small community, is based on kinship ties, has general trust and sentiment, and is in the midst of a stable environment. At this stage, the community resolves disputes in a relatively simple way, this is because the community does not know detailed regulations, only knows standards of behavior, and there is no differentiation and specialization of law enforcement agencies. *Second*, secondary rules of obligation, this order society has an open, broad and complex life. In this stage, the community bases the authority on the rule of recognition, rule of change, and rules of adjudication.<sup>34</sup>

The success of mediation in divorce cases on the grounds of domestic violence is also influenced by several factors, this is related to the theory of the legal system of Lawrence Friedman. *First*, the legal structure relating to judges, mediators and advocates. *Second*, the legal substance governing the mediation procedure. *Third*, legal culture, in relation to mediation, is how people perceive and resolve domestic conflicts they face. Lawrence Friedman's theory, then, that most determines the success of mediation against domestic violence is the legal structure in this case the mediator and the legal culture of the community. Because the substance of the law, in this case the legal rule, states that mediation is an obligation that must be carried out.

The relationship with the position of mediation in divorce cases for reasons of domestic violence creates problems. In terms of domestic violence, this is classified as a criminal act that can lead to acts against the law. Philosophically, the Elimination of Domestic Violence Law is a mandate of the 1945 Constitution of the Republic of Indonesia in Article 28 G. In substance, it states that everyone has the right to protection, security and various forms of threats. In addition, citizens

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<sup>32</sup>Salim HS, et al., *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi* (Jakarta: PT. Raja Grafindo Persada, 2016), p. 146.

<sup>33</sup>Salim HS, et al., *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, p. 144.

<sup>34</sup>Khoirul Anwar, *Peran Pengadilan Dalam Arbitrase Syariah* (Jakarta: Kencana, 2018), p. 24.

are also entitled to freedom from various forms of torture. This is in line with Article 1 paragraph (1) of Law no. 23 of 2004 concerning Elimination of Domestic Violence which mentions forms of violence that result in physical suffering or suffering and confiscation by violating the law in households.

In relation to the criminal procedural law system for handling domestic violence cases, judges examine and adjudicate a case after going through an investigation, investigation, and transfer of files to the court. This means that the judge examines the case after there is a defendant and evidence that will be tested in court. There are times, while the case is still in the investigation stage, the victim and the perpetrator have made peace. In the case of husband's physical violence against his wife. Husband and wife have reconciled and mediated by the extended family of both parties. One of the points of peace is that the husband and his extended family have apologized to his wife and promised not to repeat his actions again. That apology has also been accepted by the wife as a victim. However, if the violence committed is not a complaint offense, the case process must continue to court. Complaints against domestic violence are contained in Article 44, Article 45 and Article 46 of Law no. 23 of 2004 concerning Elimination of Domestic Violence.

Returning to the problem, the focus of handling domestic violence cases is the interests of the victims. Basically, there is no attempt at mediation in the criminal proceedings. Judges are also not allowed to mediate in examining and adjudicating criminal cases of domestic violence. However, mediation by the victim and the perpetrator outside the court can be one of the reasons for the judge's consideration regarding the severity of the sentence given to the defendant. The judge considered that between the defendant and the victim witness there had been peace as outlined in the Peace Agreement (*Surat Kesepakatan Damai*). In this case, the judge must really study the results of the mediation, is it really done seriously or is it just a formality? If it is only a formality, the victim still has the potential to receive threats to become victims of violence again in the future.<sup>35</sup> So, in cases of divorce for reasons of domestic violence can take the path of mediation.

In the case of pure domestic violence, the whole provision is basically an ordinary offense. Except for Article 44 Paragraph (4) and Article 45 Paragraph (2) of the Elimination of Domestic Violence Law which are categorized as offenses for complaint. If the provisions above are read comprehensively, then the withdrawal of the report with the aim of terminating the legal process can only be carried out if

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<sup>35</sup>Togar S.M. Sijabat, *Dapatkah Hakim Melakukan Mediasi Kasus KDRT?* (Hukum online .com), <https://www.hukumonline.com/klinik/detail/ulasan/lt5e9561d6c8d80/dapatkah-hakim-melakukan-mediasi-kasus-kdrt/>, accessed on 12 June 2020.

the physical or psychological violence experienced by the victim does not cause illness or obstruction from carrying out occupational work or livelihood or daily activities. It is possible that the withdrawal of the report is acceptable, even if three months have passed since the complaint was made.

Domestic violence is in the form of physical violence and psychological violence, then the criminal provisions for these acts are then further regulated in Article 44 and Article 45 of the Elimination of Domestic Violence Law. Therefore, it can be concluded that the withdrawal of the complaint which results in terminating the criminal process can only occur for criminal offenses that are categorized as offenses for complaint. In divorce cases on the grounds of domestic violence, they will be processed in accordance with the divorce process, and of course they will take the path of mediation, as is the obligation to mediate in divorce cases, this is stated in the Supreme Court Regulation No. 1 of 2016.

## **CONCLUSION**

Divorce cases caused by reasons of domestic violence are submitted to the court to be tried, then the case will be processed in accordance with the judicial process. In the case of court mediation procedures are substantially regulated in Supreme Court Regulation No. 1 of 2016. The correlation with the implementation of mediation in divorce cases caused by reasons of domestic violence will still have a way of mediation. So that the parties in the case as a divorce suit filed by the wife for reasons of domestic violence, the judge will act as a mediator to conduct mediation. So, in a divorce case caused by reasons of domestic violence it is classified as a divorce suit and takes mediation. Unless the case is suspected as a criminal offense, without being based on divorce and entering as an ordinary offense, then there is no way of mediation. However, in a divorce case caused for reasons of domestic violence it is classified as a civil case, so that it cannot be classified as a criminal, except in this case the wife has objections and complains against the husband's domestic violence as a complaint offense, a criminal act is processed and does not go through the mediation process.

Settlement of divorce cases on the grounds of domestic violence through mediation is the best form of settlement. However, it is not an easy thing to do when compared to other cases, because one of the parties has committed an act that has caused physical, sexual, psychological and even household suffering, so the role of a mediator is needed to implement a dispute resolution strategy. Several factors that influence the mediation process include the legal structure, especially the mediator, the substance of the law, and the legal culture of the community, in this case how the community views a conflict that occurs and how to resolve it.

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