

## The Failure of Mediation in Divorce Cases Handling at Gorontalo Religious Court

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**Abstract:** *This research analyses the failure of mediation in divorce cases at the Gorontalo Religious Court. This phenomenon is counterproductive to the efforts of the Supreme Court of the Republic of Indonesia to prevent the accumulation of cases and also to ignore religious recommendations for reconciliation when in conflict. This research is qualitative in nature with data collection using observation, interviews and documentation. The data was then analysed critically descriptively. The results showed that mediation failures continued to increase due to technical and non-technical reasons. Technically, the typology of divorce cases generally puts one of the parties (generally the wife) in a difficult position with an accumulation of long-standing disappointment and discomfort. This condition makes it difficult for mediators (both judge mediators and non-judge mediators) to carry out the mediation function. Non-technically, the support system in terms of time, place, process and totality of task implementation (especially for judge mediators) does not appear to be sufficiently supportive. The fact that all judge mediators have not all attended mediator training is another non-technical factor affecting mediation failure. Thus, the failure of divorce case mediation is not caused by a single factor but an accumulation of technical and non-technical factors that are intertwined at the same time. As long as there is no education, advocacy and correction of these two aspects, mediation failures in religious courts will continue to occur.*

**Keywords:** *Failure; Mediation; Divorce Case; Religious Court; Gorontalo*

## Kegagalan Mediasi dalam Penyelesaian Kasus Perceraian di Pengadilan Agama Gorontalo

**Abstrak:** Penelitian ini menganalisis kegagalan mediasi kasus perceraian di Pengadilan Agama Gorontalo. Fenomena itu menjadi kontraproduktif dengan upaya Mahkamah Agung Republik Indonesia untuk mencegah penumpukan perkara dan juga mengabaikan rekomendasi agama untuk *islah* jika sedang berkonflik. Penelitian ini bersifat kualitatif dengan pengumpulan data menggunakan observasi, wawancara dan dokumentasi. Data kemudian dianalisis secara deskriptif kritis. Hasil penelitian menunjukkan bahwa kegagalan mediasi terus mengalami peningkatan karena alasan teknis dan non teknis. Secara teknis, tipologi kasus gugatan perceraian umumnya menempatkan salah satu pihak (umumnya pihak istri) pada posisi sulit dengan akumulasi kekecewaan dan ketidaknyamanan yang sudah berlangsung lama. Kondisi tersebut menyulitkan mediator (baik mediator hakim maupun mediator non hakim) untuk melaksanakan fungsi mediasi. Secara non teknis, dukungan sistem baik dari segi waktu, tempat, proses dan totalitas pelaksanaan tugas (khususnya mediator

hakim) tampak juga tidak mendukung secara memadai. Kenyataan bahwa semua mediator hakim belum semuanya mengikuti pelatihan mediator, menjadi faktor non teknis lainnya yang mempengaruhi kegagalan mediasi. Dengan demikian, kegagalan mediasi perkara perceraian bukan disebabkan oleh faktor tunggal tetapi akumulasi faktor teknis dan non teknis yang berkelindan pada saat yang sama. Selama tidak dilakukan edukasi, advokasi dan koreksi terhadap kedua aspek tersebut, kegagalan mediasi di pengadilan agama akan terus terjadi.

**Kata Kunci:** Kegagalan; Mediasi; Kasus Perceraian; Pengadilan Agama; Gorontalo

## A. Introduction

The failure of mediation in divorce cases in religious courts is a widespread and disturbing phenomenon. Apart from the very low willingness of the parties to reconcile, mediation failure also occurs due to unprepared facilities and low community literacy as well as the mediation procedure itself which tends to be a formality. Mediation failures occur in all cases handled by the Gorontalo Religious Court, including divorce, inheritance, and others. For divorce cases, data from 2020 shows that out of 124 cases mediated, only 7 cases (5.6%) were successfully mediated. In 2021, the success rate was no better. Of the 131 cases mediated, only 6 cases (4.5%) were successful. The data for 2022 has slightly improved, but it is still not encouraging.<sup>1</sup> The high failure rate of mediation shows that there is something wrong.

So far, studies on the failure of litigation mediation in religious courts have tended to look at the preconditions that make it difficult for the parties to be reconciled and the consequences caused by the sectoral ego of the litigants. Yet failure can also be influenced by the mediator's unprofessionalism or other non-technical aspects. Two trends from existing studies can emphasise the lack of attention to the professionalism dimension of mediators. Firstly, many studies have focused on the complexity of the parties' conflict as a trigger for the failure of mediation in religious courts.<sup>2</sup> S. Hariyani, for example, cites the parties' lack of

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<sup>1</sup>See [http://pa-gorontalo.go.id/transparan/laporan/laporan\\_tahunan](http://pa-gorontalo.go.id/transparan/laporan/laporan_tahunan), access 20 Juli 2022.

<sup>2</sup>Novi Hidayati Afsari and Ineu Andini, "Proses Mediasi dalam Mencegah Terjadinya Perceraian di Pengadilan Agama," *Iktisyaf: Jurnal Ilmu Dakwah dan Tasawuf*, Vol.1, No. 1, 2019, pp.53-63.

desire to reconcile as a trigger for the failure of mediation in divorce cases.<sup>3</sup> Secondly, there are studies that focus on the absence of the parties during the mediation process. Dian Mustika, for example, points out that one of the causes of the low success of mediation in religious courts is the very low interest of the parties in attending the mediation process.<sup>4</sup> In the same perspective, Y. Guntara explains that the absence of the parties has caused the chances of successful mediation to decrease by more than 50%.<sup>5</sup> From the trend of existing studies, it appears that the mediation process involving judges as mediators in the midst of a backlog of cases is not being considered. The large number of cases that must be resolved immediately by judges as well as mediators, makes mediation only carried out as a formality to fulfil the provisions of the material procedural law of the religious courts.

This study addresses the inadequacies of previous studies by investigating how the formalistic mediation process is carried out by judges who are also mediators, which has consequences for mediation's high failure rate. The success rate of mediation is directly tied to the issue of professionalism and fullness of obligations. It is critical to understand how judges' dual roles contribute to the success or failure of the mediation process.

This study is founded on the notion that mediation failure is influenced not only by the wishes of the parties, but also by the professionalism and totality of the mediation process. If mediation is solely used to meet the requirements, the success rate can be computed. Mediation, as part of the litigation process in religious courts, is intended to provide a win-win solution to the accumulation of cases. If this noble goal cannot be realized, an evaluation and a new strategy are required so that the litigation procedure in religious courts results in more peaceful solutions.

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<sup>3</sup>Sri Hariyani, "Efektivitas Mediasi dalam Penyelesaian Perkara Perceraian di Pengadilan Agama Pasuruan," *Negara dan Keadilan*, Vol. 9, No. 1 Pebruari 2020, pp. 62-71.

<sup>4</sup>Dian Mustika, "Efektivitas Mediasi dalam Penyelesaian Perkara Perceraian di Pengadilan Agama Jambi," *al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan*, Vol. 15, No. 02, 2015, pp. 297-308.

<sup>5</sup>Yudi Guntara, "Aktivitas Mediasi dalam Menanggulangi Kasus Perceraian di Pengadilan Agama Bandung," *Mutawasith: Jurnal Hukum Islam*, Vo. 2, No. 1, 2019, pp. 107-129.

This study employs qualitative methodologies such as case studies and explanatory types. The qualitative approach was chosen because it can explain phenomena spontaneously and holistically, allowing researchers to investigate informants' genuine experiences, including their comprehension of the problem's context. Gorontalo Religious Court is the site of the research. From March to November 2022, data were gathered by observation, interviews, a literature search, and documentation. Judges, non-judge mediators, clerks, litigants, and lawyers were among the informants. The Huberman and Miles three steps—data reduction, display, and verification—guide the analysis.<sup>6</sup> Research questions categorize data for reduction. Lastly, data is compared across sources and interpreted to confirm its importance.

## B. Mediation in Islamic Perspective

Mediation for dispute resolution has long been recognized in Islamic tradition and literature.<sup>7</sup> According to Islam, disputants should make peace. If the parties cannot reach an agreement, it is suggested that the family play an active role in bringing about peace.<sup>8</sup> Sociologically, the involvement of the family as hakam is very urgent and strategic, because the family is more intimately acquainted with the issues at stake in their life.<sup>9</sup>

In terms of efficiency and effectiveness, dispute resolution through peace is considered the best.<sup>10</sup> Therefore, in surah An-Nisa' (4): 128 implicitly stipulates that peace is the best way to solve problems (*wa al-sulh khayr*). In addition, in *fiqh* there

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<sup>6</sup>Basrowi & Suwandi, "Teknik Analisis Data Penelitian Kualitatif," *Jurnal Inovasi Penelitian*, 2014.

<sup>7</sup>Azwina Wati Abdull Manaf, Asfarina Kartika binti Shakri, and Siti Marshita binti Mahyut, "Mediation in Islam," *Advanced Science Letter*, 2018.

<sup>8</sup>Nurzuhriyah A. Kasuba, Zulfa Fevriani, and Karimulloh, "Mindful Parenting dan Parental Mediation dalam Perspektif Islam dan Psikologi," *Jurnal Psikologi Islam dan Budaya*, Vol. 3, No. 2, 2020, pp. 87-100. <https://doi.org/10.15575/jpib.v3i2>

<sup>9</sup>Muhamad Harjuna, "Islam dan Resolusi Konflik," *Religi: Jurnal Studi Agama dan Budaya*, Vol. 14, No. 1, 2018, pp. 23-43.

<sup>10</sup>Yasmin Moll, "Subtitling Islam: Translation, Mediation, Critique: Public Culture," Vol. 29, No. 2, 2017, pp. 333-361. <https://doi.org/10.1215/08992363-3749093>

is also a rule which states that sulh is the main legal settlement instrument (*al-sulh sayyid al-ahkam*).<sup>11</sup>

Based on the requirements of QS. al-Nisa'/4: 35, it is affirmed in the Islamic judicial system that the duty and function of *hakam* is as a peacemaker, who is a party sent by both husband and wife, without understanding the conditions of who is right and who is wrong between the two husband and wife.<sup>12</sup> Consequently, the verse supports the *hakam's* role as a neutral delegate from both parties who will be actively participating in the process of conflict resolution between the two.<sup>13</sup>

In a religious perspective, when there is prejudice and slander against someone that results in a dispute or hostility, religion teaches that *islah* is the best solution. *Islah* encourages peace by forgiving each other. Through *islah*, honesty and sincerity are required to forgive each other in order to strengthen *ukhuwah Islamiyah* (Islamic brotherhood).<sup>14</sup> Apart from being based on the Qur'an, *tahkim* also has a basis in the Hadith of the Prophet, which confirms that "Peace is permissible between Muslims, except peace that forbids the lawful and legalises the unlawful".

The companions also demonstrated the practice of *tahkim*, and no one questioned or condemned it. An example is the episode involving 'Umar ibn al-Khattab and a horse trader. 'Umar intended to buy the horse provided at the time, so he tried it out. It fractured its leg while he was riding it, so 'Umar wanted to return it to the owner, but the owner refused. "Appoint someone to be a hakam who will function as a mediator between the two of us," 'Umar stated. "I agree with Shuraih al-Iraqi being the *hakam*," the horse's owner replied. So, they both walked into judgement with Shuraih and Shuraih stated to 'Umar, "Take what you have acquired or return it to its original state (without defects)". That is, 'Umar had to pay the

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<sup>11</sup>Mohammad Nor Anwar Mohd Sabri and Nor "Adha Ab Hamid, "Sulh and Peace: Its Application According To Islamic Perspective," *International Journal of Law, Government and Communication*, (2021).

<sup>12</sup>Saidilyos Kh, "Arbitration (Tahkim) and Reconciliation (Sulh) as Alternative Dispute Resolution Mechanism," *The Light of Islam*, 2020.

<sup>13</sup>Ahmad Faisal, "Problematika Mediasi di Pengadilan Agama Gorontalo dan Pengadilan Agama Limboto Tahun 2015," *al-Mizan*, Vol. 12, No. 1, 2016. pp. 81-98.

<sup>14</sup>Nor "Adha Abdul Hamid et. Al., "Alternative Dispute Resolution (ADR) Via Sulh Processes," *International Journal of Law, Government and Communication*, Vol. 4, Issues 17, Dec 2019, pp. 25-33. Doi: 10.35631/ijlgc.417003

horse's price. This approach of conflict resolution was not challenged. In other words, Islam has long recognized the institution of *tahkim* for its presence and efficacy.<sup>15</sup> The spirit of reconciliation can also be seen in the words of 'Umar ibn al-Khattab, who advocated for the resolution of family disputes to be restored to the family for an acceptable conclusion, because resolution through the courts often causes discomfort.<sup>16</sup>

That is how Islam beautifully describes the peaceful solution of *tahkim* and *islah*. The essence of *islah* implies the importance of peace in Islam, and how important it is to forgive each other when there are mistakes and errors that have already been made. The essence of *islah*, means that a person must be able to prioritise togetherness, peace and humility in himself, and then must keep away from arrogance and ego.<sup>17</sup> Thus, the institution of peace according to Islamic law refers to QS. Al-Nisa (4): 35 and 128 and QS. al-Hujurat (49): 9 which recommends that parties to a dispute make peace efforts.

The success of *islah* is determined by the *muslih* (peacemaker) in this case the judge as mediator. Therefore, prerequisites and criteria are needed to become *muslih* including: piety, *khawf* (fear of God, charismatic, *faqih* and understanding the disputed issue. These criteria are *ta'acquf* in nature, which today can be interpreted as a professional negotiator.<sup>18</sup> With mediation or *islah*, the mediator can approach and provide understanding to each individual in conflict. Differences in wants, needs and concerns are inherent in cases that must be resolved. Therefore, with the mediation process, it is hoped that mutual understanding can be built,

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<sup>15</sup>Maryam Kasim et al., "Manajemen Konflik dalam Perspektif al-Quran dan Hadis," *Jurnal Himayah*, Vol.3, No. 2, Oktober 2019, pp. 255-270.

<sup>16</sup>Norjihah Ab Aziz and Nasimah Hussin, "The Application of Mediation (Sulh) in Islamic Criminal Law," *Jurnal Syariah*, Vol. 24, No. 1, 2017, pp. 115-136.

<sup>17</sup>Delly Yuningsih, "The Settlement for Marriage Dispute Through the Islah in Indonesia," *Journal of Law, Policy and Globalization*, Vol. 89, 2019, pp. 48-52. Doi: 10.7176/JLPG/89-07

<sup>18</sup>Mohammad Hashim Kamali, "Tajdid, Islah and Civilisational Renewal in Islam," *ICR Journal*, Vol. 4, No. 4 Okt 2013, pp. 484-511.

understanding of differences, and obtaining ways to respond properly and be able to consider the impact of continuing disputes.<sup>19</sup>

The concept of *islah* is also crucial to *maqashid al-syariah*, which results in *maslahat*. In general, Muslim jurists classify *maslahat* into three categories: *daruriyah*, the primary benefit, *hajiyyah*, the secondary advantage, and *tahsiniyah*, the tertiary or complementary benefit.<sup>20</sup> Consequently, the incorporation of PERMA No. 1 of 2016 on mediation procedures into the legal system aims to bring *maqasid shari'ah* to fruition. *Maqasid al-syari'ah*, according to al-Syatibi, encompasses the upkeep of five things (*ushul al-khamsah*), namely religion (*al-din*), soul (*al-nafs*), intellect (*al-aql*), offspring (*al-nasl*), and property (*al-mal*).<sup>21</sup> These five essentials must be realized, either at the level of *daruriyyah*, *hajiyyah*, and *tahsiniyyah* advantages or at the level of their hierarchical perfection.

### C. Mediation in the Perspective of Indonesian Legislation

Unless otherwise determined based on this Supreme Court Regulation, mediation must be attempted to resolve all civil disputes submitted to the court, including cases of opposition (*verzet*) to a verdict of *verstek* and opposition of litigants (*partij verzet*) or third parties (*derden verzet*) against the implementation of a verdict that has permanent legal force.<sup>22</sup> However, the obligation to mediate referred to in paragraph (1) does not apply to the following types of disputes: (a) disputes whose examination in court is determined by the deadline for settlement; (b) disputes whose examination is conducted in the absence of the plaintiff or defendant who has been properly summoned; (c) counterclaims and the entry of third

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<sup>19</sup>Massuhartono Massuhartono, "Efektivitas Peran Mediator dalam Mencegah Perceraian (Studi Pada Pengadilan Agama Klas 1A Jambi)," *JIGG (Journal of Guidance and Counselling)*, Vol. 1, No. 1, 2017, pp. 50-70. <https://doi.org/10.30631/jigc.v1i1>

<sup>20</sup>Nispan Rahmi, "Maqasid al-Syari'ah: Melacak Gagasan Awal," *Syariah Jurnal Hukum dan Pemikiran*, Vol. 17, No. 2, 2017, pp. 160-178.

<sup>21</sup>Muhammad Lutfi Hakim, "Pergeseran Paradigma Maqashid al-Syari'ah: Dari Klasik Sampai Kontemporer," *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol. 10, No. 1, 2016, pp. 1-16. <https://doi.org/10.24090/mnh.v10i1>

<sup>22</sup>See Regulation of The Supreme of The Republic of Indonesia (PERMA) Number 1 2016, article 4 paragraph 1

parties in a case (intervention); and (d) disputes concerning the prevention, rejection, cancellation, and validity of marriage.<sup>23</sup>

The goal of the dispute resolution process known as mediation is to bring the parties involved in the conflict closer together through negotiation or consensus building with the assistance of a mediator.<sup>24</sup> The most important aspect of the mediation procedure is the bargaining phase, which is fundamentally equivalent to the discussion or consensus-building phase of the procedure.<sup>25</sup> During the process of mediation, there should be no use of pressure to accept or reject an idea or solution. This is because negotiation and debate are by their very nature voluntary activities. Everything has to be settled by mutual consent between the parties.

Mediation, especially in marital disputes like divorce, benefits the parties since it helps them achieve an agreement and tackle the issues that cause household disintegration. Regulation of The Supreme of The Republic of Indonesia (PERMA) judges must develop a mediation meeting schedule for the parties to discuss and agree on. The mediator must also encourage party participation.<sup>26</sup>

The Supreme Court of Indonesia requires mediation before a judge decides a matter for three reasons: *First*, mediation should reduce caseloads.<sup>27</sup> If the parties can resolve their disagreements peacefully, the number of cases judged will decrease, and the parties won't need to pursue lengthy legal procedures. A judge's ruling is based on the facts and legal standing of the parties. Losers usually appeal and cassate. Ultimately, the Supreme Court backlogs all cases. *Second*, mediation is cheaper and

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<sup>23</sup> *Ibid.*, paragraph 2.

<sup>24</sup>Ria Zaitullah, "Efektivitas Mediasi dalam Penyelesaian Perkara Perceraian di Pengadilan Agama Menurut Peraturan Mahkamah Agung (PERMA) No. 1 Tahun 2016," *Al-Manahij: Journal of Indonesian Islamic Family Law*, Vol. 2, No. 2, 2020, pp. 142-157. <https://doi.org/10.19105/al-manhaj.v2i2.3417>

<sup>25</sup>Fitra Dewi Nasution and Ferry Aries Suranta, "Penyelesaian Semgketa Perdata dengan Mediasi Menurut Peraturan Mahkamah Agung Nomor 1 Tahun 2008," *Jurnal Mercatoria*, Vol. 5, No. 1, 2012, pp. 35-46 [10.31289/mercatoria.v5i1.625](https://doi.org/10.31289/mercatoria.v5i1.625)

<sup>26</sup>Ria Zaitullah, "Efektivitas Mediasi dalam Penyelesaian Perkara Perceraian di Pengadilan Agama Menurut Peraturan Mahkamah Agung (PERMA) No. 1 Tahun 2016," *Al-Manahij: Journal of Indonesian Islamic Family Law*, Vol. 2, No. 2, 2020, pp. 142-157. <https://doi.org/10.19105/al-manhaj.v2i2.3417>

<sup>27</sup>Devanry Tamalawe, "Efektifitas Mediasi Sebagai Bagian dari Bentuk Pencegahan Perceraian Menurut Hukum Acara Perdata," *Lex Crimen*, Vol. v, No. 3, March 2016, pp. 22-29.



faster than litigation.<sup>28</sup> Although further study is needed, if the settlement agreement is a shared choice, then the parties can automatically accept the final outcome because it is the result of their work and reflects their common intent. Mediation or ADR is also faster and cheaper than litigation, according to the literature. *Third*, mediation should give parties greater access to justice.<sup>29</sup> Parties can achieve justice through consensus deliberation or litigation. Mediation in the formal justice system allows the justice-seeking public and disputing parties to first try to resolve their conflicts via consensual deliberation with a mediator. A settlement procedure allows the parties to jointly seek and establish their own final outcome, which is better and more rewarding.<sup>30</sup>

In practice, every mediator makes an effort to resolve the situation for which he or she is seeking help. Several ways will be tried, such as cooling the atmosphere, enhancing information flow, and assisting in the creation and development of choices.<sup>31</sup> The final decision, however, is still chosen by the parties.<sup>32</sup> The mediator is also barred from engaging too deeply, let alone intervening or coercing the parties, according to ethics. It should be highlighted in this context that the essence of the mediator's duty is to foster empathy between the parties, so creating a climate conducive to bargaining with the goal of reaching an agreement.<sup>33</sup>

The failure of mediation not only affects the accumulation of cases, but also has implications for many parties, especially women, both sociological,

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<sup>28</sup>Wiryatno Lukito Totok, "Efektifitas Penerapan Peraturan Mahkamah Agung Republik Indonesia Nomor 2 Tahun 2015 (PERMA No. 2 tahun 2015) tentang Tata Cara Penyelesaian Gugatan Sederhana dalam Penyelesaian Perkara Perdata (Studi di Pengadilan Negeri Kabupaten Kediri)," *Mizan: Jurnal Ilmu Hukum*, Vol. 9, No. 1, 2020, pp. 35-44. <https://doi.org/10.32503/mizan.v9i1.1052>

<sup>29</sup>Adam Prima Mahendra, "Mediasi Penal pada tahap Penyidikan Berlandaskan Keadilan Restoratif," *Jurist-Diction*, Vol. 3, No. 4, July 2020, pp. 1153-1178. DOI: 10.20473/jd.v3i4.20200

<sup>30</sup>Novi Hidayati Afsari and Ineu Andini, "Proses Mediasi dalam Mencegah Terjadinya Perceraian di Pengadilan Agama," *Iktisyaf: Jurnal Ilmu Dakwah dan Tasawuf*, vol.1, no. 1, 2019, pp.53-63.

<sup>31</sup>Desy Sunarsi, Yuherman and Sumiyati, "Efektifitas Peran Mediator Non Hakim dalam Penyelesaian Perkara Perceraian di Pengadilan Agama Kelas 1A Pulau Jawa," *Jurnal Hukum Media Bhakti*, Vol. 2, No. 2, Des 2018, pp. 138-151.

<sup>32</sup>Andi Rahmah, "Mediasi Penal Sebagai Alternatif Penyelesaian Tindak Pidana KDRT," *Jurisprudentic: Jurusan Ilmu Hukum Fakultas Syariah dan Hukum*, 2018, pp. 251-272.

<sup>33</sup>Evalina Alissa and Yerni Erwita, "Studi Komparatif Mediasi Antara Peraturan Mahkamah Agung (PERMA) Nomor 1 Tahun 2008 dan Peraturan Mahkamah Agung (PERMA) Nomor 1 Tahun 2016," *Jurnal Sains Sosio Humaniora*, Vol. 3, No. 2, 2019, pp. 214-220.

psychological, and other implications. Some of the psychological conditions experienced by wives after divorce include psychological instability characterised by sadness, disappointment, frustration, discomfort, unhappiness, stress, depression, fear and worry.<sup>34</sup>

Not only for the divorced husband and wife, but also for the children. Some of the psychological conditions experienced by children after their parents' divorce include: shame, sadness, and anger.<sup>35</sup> Therefore, mediation is urgent to implement in order to maintain the integrity of the conflicted husband and wife's household so that it does not end in divorce.

1. Mediation failure due to low willingness of the parties to reconcile

Table 1  
Implementation of Divorce Case Mediation at the Gorontalo Religious Court  
Year 2020-2022

| Year         | Incoming cases | Cases that cannot be mediated | Cases mediated | Successful mediation | Failed mediation | Failure percentage (%) |
|--------------|----------------|-------------------------------|----------------|----------------------|------------------|------------------------|
| 2020         | 634            | 115                           | 124            | 7                    | 117              | 94,35                  |
| 2021         | 708            | 119                           | 131            | 6                    | 125              | 96,18                  |
| 2022         | 674            | 95                            | 112            | 17                   | 95               | 84,82                  |
| <b>Total</b> | <b>2016</b>    | <b>329</b>                    | <b>367</b>     | <b>30</b>            | <b>337</b>       | <b>91,78</b>           |

Source: compiled by researcher, 2022.

Table 1 shows that the success rate of mediation in divorce cases is very low. The percentage of successful mediation becomes even smaller in cases of contested divorce. Hamka mentioned that the chances of success of mediation in a contested divorce case have been very small. Prolonged conflict is generally the reason why it is difficult for the parties to be reconciled through mediation. At the same time, the desire to maintain the integrity of their household is no longer a priority.<sup>36</sup>

This confirms the difficulty in reconciling the parties in divorce cases, which in general also illustrates the chances of mediation success to a large extent. Fatma (name withheld/applicant for divorce), for example, asserted that even if advised and

<sup>34</sup>Resty Humairah, "Dampak Perceraian Terhadap Kondisi Psikologis Keluarga," *Applied Microbiology and Biotechnology*, 2016.

<sup>35</sup>Ismiati Ismiati, "Perceraian Orang Tua dan Problem Psikologis Anak," *At-Taujih: Bimbingan dan Konseling Islam*, Vol. 1, No. 1, 2018, pp. 1-16.

<sup>36</sup>Hamka (Judge of Gorontalo Religious Court), *Interview*: Gorontalo, August 15, 2022.

mediated in any way, she would still insist on asking for a divorce because she had little hope in the current state of her domestic life. Although she realised that divorce was a difficult path, she thought it was far more promising than keeping a partner who, in her opinion, did not show good faith and responsibility as they should.<sup>37</sup>

Table 1 also shows a condition of mediation failure in the Gorontalo Religious Court that has been going on for a long time. The failure of mediation can even be described as a common symptom in all religious courts.<sup>38</sup> There are three fundamental causes of mediation failure, namely the low willingness of the parties, the unsupportive mediation system and the lack of mediator professionalism.

Non-attendance at mediation, refusal to be reunited with the other party, and psychological distress are common features of the parties' reluctance to be mediated in divorce cases. Some even feel very saturated and depressed with the condition of the household and consider separation as the best option.

The refusal of the parties to be reconciled means that there is less chance of success in divorce mediation. The failure of mediation in many cases reflects the conditions to which the parties respond and the consequences of a response. Psychological responses have been the basis of mediation failures due to long-standing and sustained adverse experiences.

The absence of favourable new conditions and goodwill from the spouses, has been the observation and experience of the parties leading to doubts and even fears of reconciliation. These doubts and fears become the source of the decision to separate from the couple. Thus, the failure of mediation is not caused by the mediation factor itself, but rather by the bad experiences that have permeated and influenced the lives of the parties.

Based on the judicial mediators' interviews, the following descriptions describe the general trend of the parties' viewpoints thus far:

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<sup>37</sup>Fatma (applicant for divorce/name withheld), *Interview*: Gorontalo, September 7, 2022.

<sup>38</sup>Supardi Supardi and Zahrotul Hanifiyah, "Penyebab Kegagalan Mediasi dalam Proses Perceraian (Studi Kasus di Pengadilan Agama Kudus Periode Januari-April 2017)," *Yudisia: Jurnal Pemikiran Hukum dan Hukum Islam*, Vol. 8, No. 1, 2017, pp. 121-138.

1. Party sectoral egos with self-righteous attitudes and views.<sup>39</sup>
2. Because the parties have agreed to separate from the start, being advised and mediated in any way has no effect.<sup>40</sup>
3. In reality, communication between the parties had been severed for some time. Because of the extended conflict, the decision to separate was made as the best way out.<sup>41</sup>
4. There are times when parties appear cooperative but are merely formalities because they expect the trial to be held shortly and result in a judgement pronouncing their divorce.<sup>42</sup>

No matter how much the mediator tries to reconcile, the mediator is still an external party who cannot do much if the parties no longer have the intention to reconcile with their spouse. This point remains a major factor in the failure of mediation in any Religious Court at any level and in any place, including Gorontalo Religious Court.

## 2. Mediation failure due to inadequate support system

Table 2  
Support System for Mediation in Gorontalo Religious Court

| No | Support system         | Explanation  |
|----|------------------------|--|
| 1  | Time                   | short  |
| 2  | Venue                  | limited  |
| 3  | Process                | There is no mechanism that can force the parties to attend                                   |
| 4  | Judge mediator support | Not totality because the appreciation mechanism for the success of mediation is also unclear |

Source: Compiled by researcher, 2022

According to the provisions of PERMA No. 1 2016, the time allotted for the implementation of mediation is clearly insufficient. The judge compels the parties and/or their lawyers to confer on the first day of the hearing, or at most two working

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<sup>39</sup>Hasan Zakaria (Judge of Gorontalo Religious Court), *Interview*: Gorontalo, August 18, 2022

<sup>40</sup>Djufri Bobihu (Judge of Gorontalo Religious Court), *Interview*: Gorontalo, August 18, 2022

<sup>41</sup>Hadrawati (Judge of Gorontalo Religious Court), *Interview*: Gorontalo, August 5, 2022

<sup>42</sup>Syafruddin Mohammad (Judge of Gorontalo Religious Court), *Interview*: Gorontalo, August 9, 2022

days, to pick an agreed mediator.<sup>43</sup> The parties may present case resumes to each other and the mediator within 5 working days of appointing an agreed-upon mediator. The confidential mediation process can last up to 30 working days from the mediator's selection or appointment.<sup>44</sup> Although it can be extended by a maximum of 30 days if an agreement is expected, the entire time allowed is not directly related to the difficulty of the disputed matter.<sup>45</sup>

Mediation might take place in a courtroom or another agreed-upon location.<sup>46</sup> With the addition that the judge mediator cannot organize mediation outside the court.<sup>47</sup> The Gorontalo Religious Court has one mediation room. Although representational, the size and facilities are inadequate for the amount of cases to be mediated, and parties usually prefer a judge mediator. So, parties seeking judge mediation must queue. Psychologically, the protracted wait harmed the parties. Radia (application for divorce/name withheld) said she was bored and annoyed when the mediation schedule was delayed due to the Gorontalo Religious Court's small mediation chamber.<sup>48</sup>

If a party fails to show at the first hearing after being summoned, the judge can rule *verstek*, defeating the absent party. The parties' absence from mediation gives the appearance that they don't want to reconcile and is just buying time until the 60-day mediation period concludes. Because there is no way to coerce or punish parties who don't attend mediation like in litigation, this commonly happens. Mursyidin stressed the necessity to penalize non-mediation parties.<sup>49</sup> According to him, if two days have gone since the agreed mediation conference and the parties do not appear without sufficient reason, the mediator should be entitled to determine that the mediation has failed without waiting forty days. Consequently, mediation

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<sup>43</sup>See Regulation of The Supreme of The Republic of Indonesia (PERMA) No. 1 2016, article 20 paragraph 2.

<sup>44</sup>*Ibid.*, article 24 paragraph 2.

<sup>45</sup>*Ibid.*, paragraph 3.

<sup>46</sup>*Ibid.*, article 11 paragraph 1.

<sup>47</sup>*Ibid.*, paragraph 2.

<sup>48</sup>Radia, (Applicant for divorce/name withheld), *Interview*: Gorontalo, August 10, 2022.

<sup>49</sup>Mursyidin (Chairman of Gorontalo Religious Court), *Interview*: Gorontalo, September 16, 2022.

avoids case buildup and accelerates case settlement, saving time in case handling. Mursyidin said PERMA No. 1 2016 must be revised for this.<sup>50</sup>

In terms of support for judge mediators, judges generally perceived that their main task was to resolve disputes by deciding cases. The salary received is also interpreted as a reward for carrying out this main task. The assignment as a mediator is considered an additional task that is different from the main task and should also be rewarded in the form of intensive or other appreciation. Although the regulation has been formulated in article 25 paragraph 1 of PERMA No. 1 2008, its realisation at the practical level has not been apparent. Hamka said that although it is not the only reason, the absence of adequate appreciation for judges who succeed in reconciling the parties, makes the implementation of mediation tasks by judges seem only a formality.<sup>51</sup> In the same context, Burhanuddin said that appreciation does not have to be in financial form, but can also take the form of career advancement guarantees for judges who successfully reconcile a number of cases.<sup>52</sup>

### 3. Failure due to low professionalism of the mediator

According to the provisions of PERMA No. 1/2016, mediators can be selected from a list of certified mediators prepared by the religious court, or they can be appointed from among the judges who perform mediator duties. Specifically, mediators from among judges can be seen in Table 3 below:

Table 3  
Judge mediators at the Gorontalo Religious Court in 2022

| No | Judge's Name                      | Have a Mediator Certificate |    |
|----|-----------------------------------|-----------------------------|----|
|    |                                   | Yes                         | No |
| 1  | Hadrawati, S.Ag., M.HI.           |                             | √  |
| 2  | Drs. Burhanuddin Mokodompit, M.H. |                             | √  |
| 3  | Drs. Muh Hamka Musa, M.H          |                             | √  |
| 4  | Drs. Syafruddin Mohammad, M.H.    |                             | √  |
| 5  | H. Hasan Zakaria, S.Ag., SH.      |                             | √  |
| 6  | Djufri Bobihu, S.Ag., SH.         |                             | √  |

Source: Compiled by researcher, 2022.

<sup>50</sup> *Ibid.*

<sup>51</sup> Hamka (Judge of Gorontalo Religious Court), Interview: Gorontalo, August 15, 2022.

<sup>52</sup> Burhanuddin (Judge of Gorontalo Religious Court), *Interview*: Gorontalo, July 29, 2022.

In addition to judge mediators, the Gorontalo Religious Court also prepares non-judge mediators. The names of the non-judge mediators can be seen in table 4:

Table 4  
Non-judge mediators in Gorontalo Religious Court in 2022

| No. | Non-Judge Mediator Name               | Certificate Number            | Note       |
|-----|---------------------------------------|-------------------------------|------------|
| 1   | Dr. Fri Sumiyati Bilakonga, ST., SH., | 304/A/MEDIASI-XI/IPPI/IV/2022 | Active     |
| 2   | Nurmin K. Martam, SH., MH.,           | 255/A/MEDIASI-                | Non active |

With this number of mediators, if equated with the number of cases that must be mediated, one can imagine the enormous task that must be completed by a judge who also doubles as a mediator. In his or her capacity as a judge alone, every day a judge sometimes has to hear 5 to 6 cases. If this is added to the task of mediating between the parties, then it is understandable that the implementation of the mediation task is not optimal. The presence of non-judge mediators has also so far been ineffective, especially since of the two registered non-judge mediators, one of them is no longer actively carrying out his role at the Gorontalo Religious Court.<sup>53</sup>

In terms of professionalism, certified mediators are believed to have skills that come from structured training. During training, mediators usually gain specialised knowledge and insights relating to mediation as shown in the following table:

Table 5  
Mediator Training Materials

| No | Materi  |
|----|---|
| 1  | Introduction to mediation   |
| 2  | Benefits of mediation and characteristics of cases that can be resolved through mediation |
| 3  | Regulation governing dispute resolution through mediation                                 |
| 4  | Conflict analysis techniques  |
| 5  | Negotiation   |
| 6  | Reframing and agenda setting for mediation  |
| 7  | Stage of dispute resolution   |
| 8  | Peace agreement drafting  |
| 9  | Caucuses and multi-party meetings   |
| 10 | Code of ethics for mediators  |
| 11 | Role play and mediator certification test   |

<sup>53</sup>Fikri (Junior Legal Registrar Gorontalo Religious Court), *Interview*: Gorontalo, November 11, 2022.

One of the basic skills that a mediator must have is the ability to ask questions and listen. Generally, the parties to a dispute are not willing to listen to each other. Therefore, someone is needed who can be a place to pour out all their complaints. In theory, active listening techniques include: (1) attending skills; (2) following skills; and (3) reflecting skills.<sup>54</sup> Although it is not the only way to improve skills, as recognised by Rizal Darwis, who has participated in mediator training, through training and role plays designed by the instructor, participants really gain new skills in an effort to mediate between disputing parties.<sup>55</sup>

The limited number of non-judge mediators is also an obstacle in the mediation process at the Gorontalo Religious Court. In this context, it is time for the Gorontalo Religious Court to collaborate with other institutions such as universities that have certified lecturers. At IAIN Sultan Amai Gorontalo alone, there are 12 lecturers who are certified mediators, but unfortunately until the end of 2022, they have not been involved in handling mediation cases at the Gorontalo Religious Court. Expecting judges to participate in training is a difficulty in itself when they are busy deciding cases. After all, the positions of judge and mediator demand professionalism that is sometimes not linear. In court, judges are seen to maintain their authority, while when acting as mediators, judges must be communicative and not rigid, because they are carrying out their function as conflict mediators.

## Conclusion

The failure of mediation in the Gorontalo Religious Court is not just the result of the parties, but also the result of the support system and the professionalism of mediators, especially judge mediators. Mediation failure has become a widespread phenomenon that is largely a repetition and shared mistake. The bad experiences of the parties have been the basis of the mediators' difficulties in carrying out the mediation function. At the same time, the support system does not favour the

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<sup>54</sup>Tri Harnowo, "Penerapan Teori Diskursus Habermas sebagai Alternatif Penyelesaian Sengketa," *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada*, Vol. 32, No. 1, 2020, pp. 55-72.

<sup>55</sup> Rizal Darwis (non-judge mediator), *Interview*: Gorontalo, August 30, 2022.



chances of mediation success. The fact that all of the judge mediators have never attended training, makes the chances of mediation success even smaller. Thus, the causes of mediation failure are a combination of technical and non-technical factors.

This study provides a new perspective in seeing the failure of mediation not on static factors but on the dynamic process of how conflict and its handling services do not run ideally. The typology of divorce cases, which generally have been harbouring embers for a long period of time, actually requires a more systematic approach in handling. Handling that is only formalistic, limited mediation skills and other support systems that are not parallel, have become the basis for repeated failures in mediating divorce cases in religious courts. Thus, this paper asserts a perspective that mediation failure is not caused by a single factor, but an accumulation of technical and non-technical factors that do not adequately support it.

This paper has limitations in that the source of data relies only on one religious court institution, so it cannot be generalised and used as a comprehensive basis for policy formulation. Policy formulation as lessons learnt requires a wide scale survey and in-depth informant interviews to be used as a basis for policy formulation. Surveys of a number of judicial institutions, observations of ongoing mediation processes and interviews with informants on their experience of mediation and the ability of mediators to perform their functions, can provide a strong basis for the aim of improving legal services and preserving and strengthening family resilience. A follow-up study that accommodates a wider sample and diverse sources of information could provide a source of knowledge for deeper understanding and better structuring of social life.

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