

STRATEGY FOR REDUCING THE NUMBER OF DIVORCES THROUGH IMPROVING LEGAL MATERIALS

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Abstract: *There have been many laws and regulations that have been used as a reference in the implementation of marriages in Indonesia, including as guidelines in the divorce process, in fact they have not been able to stem the number of divorces in society, in fact the number has continued to increase from year to year. Under these conditions, it means that there are some deficiencies in the law on marriage that need to be perfected, so that husband and wife are not arbitrary and easy to divorce. Because even though divorce is permissible, the implementation process must be carried out selectively and with great care, so that the impact of losses and harm that may arise in the future can be minimized. After conducting in-depth analysis and research on laws and regulations related to marriage, it turns out that there are 2 (two) main issues that need to be urgently refined, so that people do not easily and haphazardly file for divorce. The two main issues that are being refined are meant, namely: 1) improvement of material on marriage legislation relating to the reasons that are permissible and not permissible in carrying out a divorce, 2) improvement of material on marriage legislation relating to the criteria for determining a mediator (hakam) in resolve marital disputes or divorce proceedings.*

Keywords: *Completion, Material of Law No. 1 of 1974, Decreasing Number of Divorces.*

Introduction

Background

It's been 39 years of Law Number 1 of 1974 concerning Marriage, it's been 22 years of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI), then it's been decades since the Civil Code (KUH.Prdt) has been used as a guide in Marriage and divorce in Indonesia, it turns out that divorce events continue to occur, even the number has increased from year to year. The proof, the number of divorce cases that occurred in 2011 reached 1,900 cases. Meanwhile, divorce cases in 2012 reached 2,321.¹

Data released by the Director General of Islamic Guidance at the Ministry of Religion of the Republic of Indonesia shows that the number of married Indonesians in 2012 was two million people, while 285,184 cases ended in divorce.²

The increase in the number of divorces every year indicates that there are problems that occur in the material of laws and regulations related to marriage that need to be improved immediately, especially regarding: 1) reasons justifying divorce and 2) requirements for people who become mediators in settling lawsuits divorce regulated in law.

Indeed, divorce is permissible as stipulated in Article 39 paragraph (1-3) of Law Number 1 of 1974 concerning marriage, jo Article 19 of RI Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974. Then divorce is also permissible according to Article 116 paragraph (1-8) Compilation of Islamic Law (KHI), and also according to the Civil Code (KUH. Pdt) CHAPTER X concerning Dissolution of Marriage Part 3 Article 209.

Even though the permissibility of carrying out a divorce as stipulated in the law above does not mean that a divorce can simply be carried out easily, it must fulfill proper reasons for divorce, after mediation has been carried out first by a competent mediator to resolve each divorce lawsuit, so that neither party who feel aggrieved in every divorce.

Therefore, determining the reasons for divorce and the criteria for becoming a mediator as stipulated in the laws and regulations that have been in effect so far, indeed need to be reviewed from the perspective of whether it is appropriate or not to be maintained in current living conditions, both according to provisions from Allah, as well as according to logic and human nature. Because by using the material of marriage legislation that has been in effect so far, it turns out that divorce cases continue to occur, even the number is increasing from year to year.

It cannot be denied that most of the conditions for divorce and the criteria for determining a person to become a mediator regulated in legislation are products and results of human thought (ijtihad) which may be suitable at one time and not suitable at another or suitable at certain societies and not suitable for others. After all, every result of human thought can be changed anytime and anywhere, if it is deemed necessary for the sake of bringing greater benefits and rejecting various existing difficulties and damage.

¹Antara Sumut, (2012), Divorce Cases in Medan Are Dominated by Wife's Lawsuits, <http://www.antasumut.com/case-di-medan-di-dominance-juangan-istri/>. Retrieved on July 24, 2012.

²EXPOSnews, (2012), <http://eksposnews.com/view/25/32168/Angka-Divorce-di-Indonesia-Very-High.html>. Retrieved on 24 July 2012..

Various reasons for divorce as stated in the marriage law, it is appropriate and appropriate to make improvements, updates and revisions that are adapted to the circumstances and conditions of Indonesian society while still being guided by the Qur'an and Hadith, so that the legal material formed is in accordance with the ideals law (rechtsidee) and legal feelings (rechtsgevoel) of society.

Decision makers or authorized officials must have the courage to make new breakthroughs in an effort to improve the material of laws and regulations relating to marriage, especially regarding the reasons justifying divorce and the criteria for someone to become a mediator in settling a divorce lawsuit.

Problem Formulation

Based on the background stated above, several problem formulations can be taken in this study:

1. What are the reasons that are permissible and not permissible in carrying out divorces as an effort to reduce the number of divorces in Indonesia?
2. What are the criteria for a mediator in carrying out mediation on divorce claims as an effort to reduce the number of divorces in Indonesia?

Research Methods

The research begins with inventory and analysis³against all instruments of statutory provisions related to the implementation and settlement of marital disputes as stipulated in the applicable marriage law in Indonesia. Inventory activities are intended to:⁴

1. Finding the identification criteria to resolve which norms should be referred to as positive legal norms, and which are referred to as other social norms that are non-legal in nature;
2. Make corrections to the norms indicated as legal norms (positive);
3. Organizing the identified and collected norms into a comprehensive system.

After that, only in-depth research was carried out on problems in society, the procedures that apply in society and certain situations, including the relationship of activities, attitudes, views, ongoing processes, the influence of an phenomena related to permissible and prohibited reasons for divorce, and determination of criteria to become a mediator in resolving divorce lawsuits, both at the family level and at the court level. Research implementation is not only limited to collecting and compiling data, but includes analysis and interpretation of the meaning of the data obtained,⁵as well as identifying the linkages between law and social institutions⁶that exist in society.

The research method used is a combination of normative legal research methods and empirical legal research methods.⁷In addition to using normative research methods, empirical research methods are also needed, namely research on laws that live in society, which are implemented

³The flow of research using analysis and description check Bambang Sunggono, *Legal Research Methodology* (Jakarta: PT.Raja Grafindo Persada, 1998). h. 36. See also Bambang Waluyo, *Legal Research in Practice*. (Jakarta: Sinar Graphic, 1996), p. 39.

⁴Faisar Ananda Arfa, *Islamic Law Research Methodology*, cet. 1 (Bandung: Pioneer Media Citapustaka, 2010), p. 53.

⁵Soejono and Abdurrahman, *Legal Research Methods*, cet. 2 (Jakarta: PT. Rineka Cipta, 2003), p. 21.

⁶*Ibid.*, h. 57.

⁷Faisar Ananda Arfa, *Islamic Law Research Methodology*, h. 69.

or carried out by members of the community⁸, because in improving the law material, it must be combined between the law that is regulated normatively (law in the books) with the law that lives and applies in the midst of society (law in society). While the approach used is to use an anthropological approach (a science that studies patterns of disputes and their resolution in simple societies, as well as societies that are undergoing a process of development and development)⁹and sociological juridical (socio legal approach)¹⁰or empirical juridical approach, namely the approach to the legal reality of society by studying social phenomena in society whose legal aspects are visible¹¹considering the main problems examined and studied in this study are: 1) reasons that are permissible and not permissible in carrying out divorces as an effort to reduce the number of divorces in Indonesia, 2) determining the criteria for a person to become a mediator in settling divorce lawsuits in an effort to reduce the number of divorces in Indonesia .¹²

Research Results and Discussion

The large number of divorces that occur in the midst of society is not only caused by violations and crimes committed by one party from the husband or wife alone, but also due to the lack of firm, fair and beneficial statutory material relating to marriage, especially concerning the reasons for carrying out a divorce and also weaknesses in determining the criteria for a mediator in settling a divorce suit. Therefore it is necessary to make improvements urgently, so that there is no convenience for a husband or wife to divorce. Efforts to improve referred to are carried out on 2 (two) important main issues, namely:

1. Completion of the Material of Marriage Laws and Regulations in Determining the Reasons for Divorce

After an in-depth analysis of the reasons for the divorce as outlined in Article 39 paragraph (1-3) of Law Number 1 of 1974 concerning marriage, jo Article 19 Republic of Indonesia Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974, it turns out that there are some reasons for divorce that are no longer worth defending as reasons for divorce. Because some of the reasons for divorce regulated in it are reasons for divorce related to circumstances beyond the ability and desire of the husband and wife. The reason for this type of divorce is no longer worth defending as a reason for divorce, because it will be detrimental and cause suffering for one of the parties. Therefore, in order to perfect the reasons for divorce that have been regulated in the marriage law, it is necessary to refine it by dividing the reasons for divorce into 2 (two) types, namely:

- a) Permissible reasons for divorce. Every violation and crime committed by a husband or wife on purpose is a reason for the permissibility of divorce. The opening of the door to divorce is caused by an element of intent in committing crimes and violations, causing suffering, oppression, anxiety for one of the parties. Some of the reasons for divorce that are included in the category of permissible divorce are:

⁸Asri Wijayanti and Lilik Sofyan Achmad, *Legal Writing Strategy*, cet.1 (Bandung: CV. Lubuk Agung, 2011), p. 97.

⁹Sudarsono, *Introduction to Law*, cet. 3 (Jakarta: PT Rineka Cipta, 2001), p. 267. If Euber argues that the anthropological approach is a comprehensive approach that is carried out towards humans, such as writing about parts of human history, the environment and family life, settlements, economic aspects, politics, religion, artistic styles, language and others .

¹⁰For more details regarding the use of the socio-legal juridical approach in sociological/empirical legal research, check Ronny Hanitijo, *Methodology of Legal Research* (Jakarta: Ghalia Indonesia, 1982), h. 120.

¹¹Zainuddin Ali, *Legal Sociology*, cet. 4 (Jakarta: Sinar Graphic, 2008), p. 13-15.

¹²Soejono and Abdurrahman, *Legal Research Methods*, h. 55 and see Faisar Ananda Arfa, *Islamic Law Research Methodology*, p. 70.

1. One of the parties commits adultery or becomes a drunkard, addict, gambler, and so on which is difficult to cure;
2. One party leaves the other party for 2 (two) consecutive years without the other party's permission and without valid reasons or for other reasons beyond his control;
3. One of the parties commits cruelty or serious persecution that endangers the other party;¹³
4. Conversion of religion or apostasy which causes disharmony in the household;¹⁴
5. Deliberately not providing a living physically and spiritually.

The five types of crimes and violations above are violations and crimes committed intentionally by husbands and wives. If one of the five reasons for divorce above is carried out by the husband or wife on purpose, then one of the parties who feel aggrieved is allowed to file a divorce suit, because the door to divorce is opened by using one of the five types of action above. Conversely, if the party who committed one of the five types of violations and crimes admits his guilt and promises not to repeat his actions again, while the party who feels oppressed, hurt forgives him, then the door to peace remains open.

The reasons for this type of divorce are reasons for divorce that require a dharuriy solution (a settlement that is very immediate and urgent to do) because the reason for the divorce arises due to an intentional element that causes harm, household chaos and oppression, so a dharuriy settlement is needed. in order to avoid protracted household problems that might pose a greater danger to the continuity of the household.

- b) Prohibited reasons for divorce. Every conditions and situations beyond the ability and will of the husband or wife are reasons that are not permissible for divorce. The closing of the door to divorce is caused by conditions and circumstances beyond the will and ability of the husband and wife. Thus, in this kind of condition, love and affection from their partner is highly expected. Because a true partner is a partner who remains in love, loyal and obedient both in joy and sorrow. If loyalty comes at a time of good health and economic conditions, that is very reasonable, but something extraordinary, if loyalty still comes when the economy and health are weak. A husband or wife who is in a weak condition, both in the economic and health fields, must be cared for, loved, comforted and given the spirit of life. so that he can get up and get out of his downturn. It is really very inhumane, if one of the husband or wife leaves and divorces their partner in a weak condition that comes beyond their ability and will. The conditions and circumstances in question are;

1. One of the parties has a disability or illness with the result that he is unable to carry out his obligations as husband/wife. The reason for this kind of divorce should not be used as a reason that justifies one of the parties carrying out a divorce suit, because the occurrence of post-marital disability or illness that befalls one of the husband or wife is not their will, but destiny from Allah SWT which cannot be rejected by anyone. It is very illogical and humane if someone has the heart to sue a husband or wife for divorce while suffering from a disability or illness that he himself does not want the disability or illness to befall him. Precisely in this kind of condition, attention and affection from one party is expected,

¹³ RI Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage.

¹⁴Instruction of the President of the Republic of Indonesia Number 1 of 1991 concerning Compilation of Islamic Law (KHI).

2. One of the parties gets a prison sentence of 5 (five) years or a more severe punishment after the marriage takes place. This kind of reason for divorce also does not deserve to be used as a reason for filing a divorce suit, if the act that caused him to go to jail was not directly related to the desecration and betrayal of the marriage bond, such as a fight that caused another person's death, hit another person which resulted in the death of a road user, jailed for being responsible for the criminal acts of members or subordinates and so on. This kind of action or condition is not solely because of his will and desire to betray the marriage vows previously made. So it doesn't deserve to be used as a reason to file a divorce suit.
3. Between husband and wife there are constant disputes and fights and there is no hope of living in harmony in the household again. The reasons for disputes and fights here are reasons that are immeasurable and seem subjective. If disputes and fights arise due to hatred and suspicion alone, without being accompanied by authentic evidence, it may not and should not be used as a reason for filing a divorce suit. In this case Allah said in QS. An Nisa/4:19 which means: "*and get along with them properly. then if you don't like them, (then be patient) because maybe you don't like something, even though Allah made a lot of good in it*". The same thing with this Allah said in QS. Al Baqarah/2:216 which means: "It may be that you hate something, even though it is very good for you, and it may be (also) that you like something, even though it is very bad for you; Allah knows, while you do not know.

The verse above shows that disputes and quarrels that result in hatred towards one party resulting in a fight, should not be used as a reason to break the marriage bond, because something that is disliked may be able to bring good in the future. Disputes, fights, hatred and various problems do not need to be feared, but must be solved and a way out is sought, so that households are built that are *sakinah* (full of calm), *mawaddah* (compassion) and *warahmah* (full of God's grace).

The existence of point "3" in legislation so far has resulted in the ease with which husband and wife can divorce. As evidence, most married couples who divorce in court use the reasons for point "3" above. For this reason, the reasons contained in point "3" above must be eliminated in order to avoid the large number of married couples getting divorced in Indonesia.

If you want the number of divorces to be reduced, then the three reasons for divorce above must be abolished in the marriage law, so that husband and wife do not easily and haphazardly file a lawsuit for divorce before the family and the court.

If there is still a lawsuit for divorce from the husband or wife before the court due to one of the three reasons for the divorce above, then the judge or mediator must settle the lawsuit in an amicable way, not through divorce. Even the decision of the mediator regarding the reasons for this type of divorce obliges one of the parties to help, love and protect the other party. Because this dispute arises beyond the ability of the husband and wife.

So a marriage may not be broken up due to the reasons stated in point "b" above, because the benefits to be gained are much higher when compared to the losses that will come. This opinion is supported by a hadith narrated by Ahmad and At Turmudzi that the Prophet SAW said: "Any woman who asks her husband for *talaq* without any danger, then the smells of heaven are forbidden for her."

Judges or parties who become mediators (hakam) may not give decisions in the form of divorce with unclear and unmeasurable disputes according to Islamic law, logic and human considerations.

There are 2 (two) types of law contained in the verses of the thalaq, namely: first, the command to make peace/maintain the household (QS. An Nisa/4: 34, QS An Nisa / 4: 35, QS. An Nisa/4: 128), and secondly, the permissibility of carrying out a divorce (QS Al Baqarah/2: 229, QS Al Baqarah/2: 236, QS Al Ahjab/33: 49). If there is a meeting of two laws on the same issue, namely the order to carry out peace and the permissibility of carrying out a divorce, then the practice of the meaning of the order must be prioritized over permissibility. Meanwhile, the meaning of the permissibility of carrying out a divorce as contained in the verse of thalaq is only an act that is forced or in an emergency situation, and is not the main choice.

2. Completion of Legal Materials in Determining Mediator Criteria in Settlement of Divorce Lawsuits

Every marriage dispute, especially a divorce suit that is filed in court, always goes through mediation stages first as stipulated in:

- a. UU no. 1 of 1974 Article 31 paragraph (1) which reads: "The judge examining the divorce suit tries to reconcile the two parties";
- b. Direction from the Supreme Court No. 1 of 2008 which states that before the case is examined it must first go through the mediation stages so that peace is expected;
- c. KHI Article 143 paragraph (1) which reads: "In examining a divorce lawsuit the judge tries to reconcile the two parties", paragraph (2): "As long as the case has not been decided, efforts to reconcile can be carried out at each trial session";
- d. KUH. Prdt CHAPTER X Part 2 Article 202 which reads: If the defendant agrees to the demands, the district court must order that the husband and wife together face one or more member judges who will try to reconcile them.

Implementation of some of the above laws and regulations, the Religious Courts have provided 10 (ten) mediators from outside, both from advocates and universities who helped provide mediation. The problem so far is that the eligibility of a person who will become a mediator in resolving any divorce lawsuit in court is generally based on the following criteria:

- a. There is a direct blood relationship with the husband or wife who is in dispute (especially the mediator appointed from the family);
- b. Based on educational background and expertise (particularly for mediators appointed from universities);
- c. Based on trial experience and fame (especially for mediators who are appointed from among advocates).

It turns out that the three criteria above are not sufficient enough to be used as criteria in determining the eligibility of a person to become a mediator in resolving marital disputes or divorce lawsuits, but must be further refined by adding the following criteria:

- a. Have competence, ability, broad insight in the fields of:
 1. Knowledge of customary law that applies to the community of origin of the husband or wife, especially regarding the process of resolving marital disputes;
 2. The root of the problem being faced by both parties.
- b. Having wisdom, authority and character in the midst of society.

This opinion is based on QS An Nisa/4: 35 as said by Allah: "if it is feared that there is a dispute between the two (husband and wife), then send a mediator (hakam) from the male family (min women's family (min expertha))".

The use of the word "ahlun" in QS An Nisa/4: 35 above is to emphasize that the appointment of a mediator (hakam), in addition to seeing the closeness of the blood lineage, is also based on competence, ability, broad insight in the field of customary law that applies in society especially regarding the process of resolving marital disputes.

The two criteria above must be the main considerations for families, communities and law enforcement officials in appointing someone to become a mediator (hakam). If the two conditions above exist in a person, then he should be prioritized as a mediator, even if he does not have a bloodline relationship with the family in the dispute, as long as his presence as a mediator is based on the appointment of one of the parties to the dispute.

The definition of the word "ahlun" as found in QS. An Nisa/4:35 above can be seen in the Al Munawwir Dictionary which means: entitled, deserving of it. While another understanding of the word "ahlun" is family, family and relatives.¹⁵

The definition of "ahlun" when viewed from terminology has two meanings, namely: a) expertise, b) family or relatives in the community. The term "ahlun" in Arabic can be interpreted as residents who have their own rules and customs according to the conditions, habits and cultural customs that apply in them.¹⁶Therefore, envoys who are sent as mediators in the settlement of divorce lawsuits are people who have expertise in resolving marital disputes according to customary law that applies in the midst of the community where the bride and groom are married or the customs where the bride and groom are. If indeed the expertise in mastering adat is in the family of the husband and wife, then the mediator (hakan) must be from the side of their family, because they will be more respected, respected and obeyed by both parties to the dispute.¹⁷

Conversely, if indeed between their two families there is no person who is able to understand, know and carry out the dispute resolution process in accordance with applicable customary law, then another traditional leader may be appointed as a mediator in resolving marital disputes between them. Provided that the mediator has the expertise to solve the problem. Moreover, there is a principle in Islam that handing over a mandate or work to someone must be done by an expert or a person who is competent in the field of trust or work assigned to him, as Allah has said in QS. An Nisa/4:58: *"Indeed, Allah orders you to convey messages to those who are entitled to receive them, and (orders you) when establishing laws among people so that you determine fairly"*.

The verse above explicitly uses the word "ahlun" which means the group entitled to receive it, namely a group that has the competence and ability to carry out the mandate. Therefore the emphasis of "ahlun" is on the ability and competence.

¹⁵ Ahmad Warson Munawwir. Al Munawwir Arabic – Indonesian Dictionary, print. 14. (Suarabaya: Progressive Library, 1997), p. 46.

¹⁶ Muhammad Ali, Ash-Shabuni. Interpretation of Ahkam Verses, trans. Mu`ammal Hamidy and Imron A. Manan (Surabaya: PT. Bina Ilmu, 1985), h. 274.

¹⁷Anwar Sadat Harahap, (2012), Settlement of Marriage Disputes in Muslim Batak Communities in Southern Tapanuli, Doctoral Dissertation of IAIN North Sumatra, p. 170.

So actually, the main consideration that becomes the appointment of a person as a mediator is a consideration of the ability to master and know the procedure for resolving marital disputes using customary law where the bride and groom come from. If this kind of competence exists within the family, then they should be prioritized as judges in resolving family disputes, because they better understand the nature, character and behavior of the family in dispute.

If the process of implementing a marriage is carried out using certain customary law, then the process of implementing the dispute resolution must also be carried out through the same customary law process. The frequency of using customary law in carrying out marriages must be balanced with the frequency of using customary law when carrying out existing marriage dispute resolution. Because in this way, it will be difficult for someone to commit a crime in the household, let alone do a divorce. This is because there are many things and paths that must be followed if you continue to use the customary route in any marriage dispute resolution.

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