PROCEEDINGS

3rd INTERNASIONAL CONFERENCE ON ISLAMIC LAW IN INDONESIA

"Reviving and Strengthening Islamic Law as a Living Law Within World's Legal System"

September 4th-6th 2018
Faculty of Law, Mulawarman University
Samarinda

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FOREWORD DEAN
FACULTY OF LAW, MULAWARMAN UNIVERSITY

Assalamu'laykum Warahmatullahi Wa barakaatuh

First, let us thank to Allah SWT for blessing and guiding us into the right path.

On behalf of the Faculty of Law Mulawarman University, we are greatly honored and pleased that the 3rd International Conference on Islamic Law in Indonesia (ICILI) on "Reviving and Strengthening Islamic Law as a Living Law Within World`s Legal System" has been done and the proceeding will be published online soon.

This international conference is organized by Faculty of Law Mulawarman University in collaboration with the Asociation of Islamic Law's Lecturers in Indonesia (ADHII), Lembaga Kajian Islam dan Hukum Islam (LKIHI) Law Faculty of Universitas Indonesia and has become the 3rd ICILI after the first one in Law Faculty of Universitas Mulawarman and the second one in Law Faculty of Universitas Andalas.

The theme of this 3rd ICILI is to reviving and strengthening the Islamic Law as a Living Law Within the World's Legal System, we hope that the Islamic law will not be limited anymore just in private law but in all the legal system as well as the Islamic Law has every rules for everything to do for humankind.

We would also like to extend our gratitude to our invited speakers Prof. Dr. Noor Aziah Mhd. Awal (University Kebangsaan Malaysia), Prof. Mehmet Asutay, BA, M.Sc. PgDip, MA, Ph.D. (Durham University, UK), Dr. Tawat Noipom (Halal Institute Prince of Songkla University), and Prof.Dr.H. Jaih Mubarok,SE,MH.M.Ag (Sunan Gunung Djati Islamic State University) and also all participants, sponsorship partners, and committees.

Finally, allow me to wish you a beneficiary and pleasant international conference of Islamic law in Indonesia and wish that this conference will always continuous every year.

Wassalamu'alaykum wa rahmatullahi wa barakaatuh

Samarinda, September 2018
Dean

Dr.Mahendra Putra Kurnia, S.H., M.H.

FOREWORD
DR. WIRDYANINGSIH, S.H., M.H.
CHAIRMAN OF ISLAMIC LEGAL ASSOCIATION OF INDONESIA

Assalamu'laykum Warahmatullahi Wa barakaatuh,

Thank God, we pray to God Almighty and prayers and greetings to our lord, the Prophet Muhammad, may we always be in line to uphold Islamic law on this earth.

Alhamdulillah, since the establishment of the Association of Islamic Law Lecturers in Indonesia (ADHII) in 2015, then the following year, the 2016 ICILI (International Conference on Islamic Law in Indonesia) was first held at the Faculty of Law, University of Indonesia, Depok. Then the second ICILI was held at the Faculty of Law, Andalas University, Padang and the third at the Faculty of Law, Mulawarman University, Samarinda. In every conference i ICILI always chooses topics that develop at that time. This time the topic of the 3rd conference was about "Islamic Law Reviving and Strengthening as a living law within the world's legal system".

This conference is a forum for meeting Islamic law lecturers throughout Indonesia to discuss and present their findings, studies and research results related to Islamic law and its development in Indonesia, which is now recorded in the form of proceedings. My hope is that this conference will continue to run in a better direction in order to strengthen Islamic law in Indonesia.

This proceeding is a collection of writings from papers presented at ICILI 3rd at Mulawarman University, Samarinda on 4-6 September 2018. The writing in this proceeding is more and better than the previous proceedings. Many results of research and studies can be a reference for teachers, researchers and Islamic law enthusiasts to further develop the next study.

Finally, hopefully this conference and proceedings will continue with better results. Jadzakallahu khairon katsiro for the help of the parties, especially the Institute of Islamic Studies and Islamic Law FHUI which has supported the implementation of this conference and the realization of this proceeding.

Wassalamu'alaykum wa rahmatullahi wa barakaatuh

October 2018

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THE ROLE OF JUDGE MEDIATOR AND NON-JUDGE MEDIATOR IN HEIRS DISPUTE RESOLUTION AT RELIGIOUS COURT PEKANBARU

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ABSTRACT

Dispute settlement through mediation constitutes way of resolution towards negotiation and peaceful in order to achieve consensus of the parties aided by mediator. It is as explained in PERMA No 1/2016 on Mediation Procedure at Court. Mediation is process of non-litigation. There two kinds of mediation which consist of litigation and non-litigation committed out of the Court regulated by Act No.30/99 on Arbitration and Alternative of Dispute Resolution and mediation performed inside the Court is ruled in PERMA No.1/2016 on Procedure of Mediation in the Court. Phenomena growth in Religious Court at Pekanbaru, occurs many heirs case but unable to be solved by mediation. It means that mediation in the Court years to years doesn't give significant mashlahah impact despite of there are are greatly sides of Mahslahah in such ways, but the real condition that level of success of mediation is still low. The goals of this research consist of the intention to seek the important rule of Judge Mediator and Judge Non-Mediator in resolution of Heirs Settlement in Pekanbaru Religious Court. This research is a kind of Legal Sociology which this legal method utilized to see law in concrete definition and search on how the function effectively law in community's surroundings.Data collection technic applies purposive sampling method, interview before mediator judge and mediator non-Judge. The result of the research summarized that the role of the judge mediator and Non-Judge in the effort to reconcile the parties rated remain low which can be proved by the data seen in Religious Court of Pekanbaru in 2015/2016 from 11 cases mediated there are only 2 disputes successfully reconciled. On other hands that the result of such way is less maximal because of many factors effect it.

Keywords: Mediation, *Mashlahah.* (Common Interest)

A. Background

In the country, Indonesia has various kinds of customary inheritance laws which are adhered to by different kinds of religions and beliefs and have different forms of kinship with offspring systems. Among kinship forms and systems and inherited systems in Indonesia, namely patrilineal, matrilineal and parental or bilateral descent systems, and there are also some inheritance systems, namely: individual systems, collective, major, Islamic inheritance and western inheritance. The parental or bilateral inheritance system is in accordance with the Islamic inheritance system, this is because the verses

of the Koran in the inheritance and marriage area reflect a form of bilateral family system.(Hazairin,1981:14)

In principle, the Indonesian Muslim community in religious practice is subject to Islamic religious norms such as prayer, fasting, zakat, etc., but when dealing with inheritance law generally do not submit to Islamic inheritance law. In the case of a comparison of the division of inheritance, for example, what happens is not two to one between men and women.

In general, the Indonesian Muslim community has its own way of completing the legal relations that arise relating to the property of someone who dies with family members he left behind, even they usually share the property before the heir dies, that is, when one family member is married, they will immediately get the part. So that the full authority of the division is in the hands of parents, because it is feared later that the distribution after he dies will be troublesome for their children. But there is also the implementation of the division of inheritance carried out when parents have died, usually this kind of implementation, if there is any inheritance left when the parents are still alive. And it is not uncommon to find disputes in the division of inheritance, which is ultimately resolved through *litigation* and *non-litigation*.

In resolving disputes through mediation, the parties are usually able to reach agreement between them, so that the benefits of mediation are felt. Even in failed mediation, although no settlement has been reached, the mediation process that has taken place previously has been able to clarify the problem and narrow the dispute. Thus, the parties can decide what kind of solution they can accept rather than pursue other things that are not clear. (Gatot Soemartono,2006:139)

The Judiciary is one of the dispute resolution institutions that have played a role so far.However, the decision given by the court has not been able to create satisfaction and justice for both parties to the dispute. Court decisions tend to satisfy one party and do not satisfy the other. Those who are able to prove that they have rights to something will be won by the court. On the other hand, the party who is unable to submit evidence that he has the right to something, the party must be defeated by the court, even though the party has the right to intrinsically. The consequences of winning lose will foster an attitude of dissatisfaction with one party against a court decision. The loser will use legal remedies because he is unjust to a decision. As a result, the settlement of disputes through the courts requires a long time. On the other hand it is often found in practice that the costs incurred by disputing parties sometimes exceed the value of the disputed assets. This signifies the settlement of disputes through the court route resulting in the breakdown of relations between the parties to the dispute. Before the examination of the case starts which will be conducted in a closed manner, the judge will first try to reconcile the two parties. Peaceful recommendations can actually be made at any time as long as the case has not been decided, but peaceful advice at the beginning of the first session is absolute / must be done and included in the Minutes of the Session, because there is a requirement that states so.(Syahrizal Abbas,2011:2-3)

The problem that arises is that even though there are regulations governing mediation, the actual success rate of mediation in a case in the Court is still very low, as well as the level of success of mediation in the Pekanbaru Religious Court especially regarding the *Mal Waris* case in 2015/2016. This is the interest of researchers to explore

more about the role of mediators in the Pekanbaru Religious Court in resolving inheritance disputes. Therefore, the researcher took the title of the research "The Role of the Mediator Judge and the Non-Judge Mediator in the Waris Dispute Settlement in the Pekanbaru Religious Court".

To facilitate the conduct of this research, the researcher formulated several relevant issues with the title of the research as follows:

1. What is the Role of the Judge Mediator and Non Judge Mediator in resolving inheritance disputes in the Pekanbaru Religious Court?
2. What are the inhibiting factors of the Judge Mediator and Non Judge Mediator in resolving inheritance disputes in the Pekanbaru Religious Court?

B. Research Objectives and Benefits

The purpose of this study was to determine the role of the Mediator Judge and Non Judge Mediator in the Waris Dispute Settlement in the Pekanbaru Religious Court and find out the Inhibiting Factors for the Mediator of Judges and Non Judge Mediators in the Waris Dispute Settlement in the Pekanbaru Religious Court.

This research is expected that the results can provide a contribution of thought to the development of legal science in general and especially in Islamic law, so that it will be more helpful in resolving the problems of inheritance disputes in this Indonesian homeland.

C. Research Methods

The type of research used is socio-legal research research or also known as socio-legislation and this research is categorized as non-doctrinal research. This research is not only based on analyzing and interpreting legislation but also examining how the law applies in the middle middle of people's lives. This means that sociolegal research combines legal research with investigations of social problems. In sociolegal research that is most often a topic is the issue of legal effectiveness, compliance with the law, the role of institutions or legal institutions in law enforcement, the implementation of the rule of law, the influence of the rule of law on certain social problems or vice versa, the influence of certain social problems on the rule of law.(Peter Mahmud Marzuki,2013:128, Bambang Sunggono,2012:103)

While the nature of the research used analytical descriptive, which describes the laws and regulations that apply in a comprehensive and systematic manner, then an analysis of the problems that arise. The data collection techniques used in this study are interview methods. The data obtained from both field studies and document studies is basically data obtained through interviews and documentation edited and analyzed using legal theory, legal principles, and applicable laws and regulations which are used as a juridical basis in this research. The next writer draws conclusions with the deductive method which means drawing conclusions from general matters regulated in the laws and regulations that apply to specific provisions concerning the role of the mediator of

the judge and the non-judge mediator in inheritance dispute settlement in the Pekanbaru Religious Court .

D. Research Results and Discussion

1. Role of Mediator Judge and Non Judge Mediator in Resolving Inheritance Disputes in Pekanbaru Religious Court.

The role of the judge referred to in this research is the behavior of the judge in accordance with the status of his position in the community. The role of the judge related to the work of the judge is not only as the person who decides but also reconciles the expected obligation to carry out its obligations which are related to the role it holds. According to Soerjono Soekanto regarding the role:

a. Roles include norms that are expressed by one's position or place in society,
b. The role is a concept of what individuals do in society as organizations,
c. Role can also be said as individual behavior that is important as a social structure of society. (Soerjono Soekanto, 1996:221).

Mediation is a compulsory means of resolving disputes to date only for civil disputes submitted to the District / Religion Court. The use of this mediation procedure is possible because the civil procedural law that applies in Indonesia in the HIR and RBG provides a strong legal basis. Article 130 HIR and Article 154 of the RBG state that: "judges are required to first seek the peace process", but the method has not been regulated, the Supreme Court issues PERMA Number 1 of 2008 as amended by PERMA Number 1 of 2016 for the smooth running of the judiciary.

Based on the Law of the Republic of Indonesia number 3 of 2006 concerning amendments to Law number 7 of 1989 concerning Religious Courts that is mentioned in Article 49, religious courts have the duty and authority to examine, decide, and settle cases at the first level between religious people Islam in the field: marriage, inheritance, will, grant, endowment, zakat, infaq, sadaqah and sharia economy.

Mediation comes from Latin, which is mediare which means being in the middle. This means showing the role that acts as a mediator. The mediator in carrying out his duties is in the midst of the parties to the dispute, is in a neutral position and does not take sides in resolving disputes and must be able to maintain the interests of the parties to the dispute fairly and equally. (Syahrizal Abbas,2011:2). The settlement of the dispute through the mediation, the results are set forth in the peace deed and it is a written agreement, which is also final by binding the parties to be carried out in good faith. (Rachmadi Usman, 2012: 24)

In the literature of Islamic law, the term ish is known which means deciding a dispute case. In shar'i, peace is a contract with the aim of ending a dispute between two parties that are mutually exclusive. This means that peace is a dispute resolution process in which the parties agree to end their case peacefully. (Syahrizal Abbas,2011:162)

The settlement of disputes in the tradition of the Prophet Muhammad SAW strongly recommends the first step taken is through peaceful means. In a Hadith narrated by at-Tirmidhi which means:

> *"Perdamaian adalah boleh antara kaum muslimin kecuali perdamaian yang mengharamkan yang halal dan menghalalkan yang haram, dan kaum muslimin itu wajib konsisten pada syarat-syarat mereka kecuali syarat yang mengharamkan yang halal dan menghalakan yang haram."*

The mediation process at the Pekanbaru Religious Court in resolving inheritance disputes is likely to succeed and fail. According to Syaifuddin as Mediator Judge at the Pekanbaru Religious Court (January 30, 2017) Mediation was carried out as the initial stage of the trial process, in which the judge as the mediator will process a case after previously being notified by the Chair of the Assembly. While the results of the mediation process are only two possibilities, namely success and failure. The following is the mediation data in the inheritance case.

Tabel 1
Perkara Mal Waris yang di Mediasi tahun 2016

Nomor	Nomor Perkara	Hasil
1	1588/pdt.G/2015/PA.Pbr	Tidak Berhasil
2	1769/pdt.G/2015/PA.Pbr	Tidak Berhasil
3	419/pdt.G.2016/PA.Pbr	Tidak Berhasil
4	370/pdt.G.2016/PA.Pbr	Berhasil /Damai
5	713/pdt.G.2016/PA.Pbr	Tidak Berhasil
6	843/pdt.G.2016/PA.Pbr	Tidak Berhasil
7	1164/pdt.G.2016/PA.Pbr	Tidak Berhasil
8	1298/pdt.G.2016/PA.Pbr	Tidak Berhasil
9	1379/pdt.G.2016/PA.Pbr	Tidak Berhasil
10	1262/pdt.G.2016/PA.Pbr	Tidak Berhasil
11	45/pdt.G.2016/PA.Pbr	Berhasil /Damai

Sumber: *Pengadilan Agama Pekanbaru 2017*

In table 1 (one) shows the data in 2015 there were 2 (two) *mal –waris* inheritance cases that were not successfully mediated while in 2016 the mal inheritance case was successfully mediated in 2 (two) cases and who did not succeed in mediating 7 (seven) cases . From this data shows that the accumulated number of cases that were successfully mediated was only 18.2% while cases that were not mediated were 81.8%.

Mediation in the Pekanbaru Religious Court has not shown satisfactory success. One of the purposes of the publication of Perma No. 1 of 2008 as amended by Perma No.1 of 2016, namely to reduce the accumulation of cases in the Court. While the success rate obtained in the Pekanbaru Religious Court is still low.

2. Inhibiting Factors Mediators of Judges and Non-Judge Mediators in Resolving inheritance disputes in the Pekanbaru Religious Court.

Role of Mediator Judges in conducting mediation in the Pekanbaru Religious Court have carried out the procedures set out in the Perma in order to reach agreement between the two parties namely peace based on the principle of mashlahah, but in practice there are several obstacles faced by judges mediators, especially from the disputing parties. The inhibiting factors greatly affect the success of the mediation played by the Judge Mediator in the Pekanbaru Religious Court as follows:

1. Knowledge of the parties
   The parties consider mediation to be only a procedure or procedure in carrying out the trial process, the parties take part in the mediation process not because of the will of the heart, because basically they have done peaceful efforts before the case is brought to court, there is a concern for the parties if they do not participating in mediation their decisions will be null and void. The lack of knowledge of the parties regarding the mediation process, makes the role of the judge mediator in this matter very influential in mediation.
2. The good faith factor of the parties
   In mediation, many parties feel compelled to undergo the mediation process only because of the procedures established by the court. The parties to mediation are people who have varying characteristics, there are those who feel compelled to undergo this mediation procedure showing an attitude as if the matter being mediated is a trivial matter. Thus giving rise to the impression of the absence of good will from the parties.
3. The absence of parties
   Sometimes parties delay or are absent during the mediation process even though they have been properly and appropriately called and consecutively. Then the presence of litigation parties is very important in the implementation of mediation so that the success of mediation depends heavily on the presence of the parties.
4. Factor complexity of cases
   One of the most serious constraints on the personal mediator of the judge in the Pekanbaru religious court is not only a complicated divorce case but also a mal-inheritance problem and also a sharia economic case, so the mediator should continue to improve the quality of his knowledge about this is in accordance with the development of Muslims today.
5. Third party factors
   Involvement of third parties who come from anywhere, it could be the parties' attorneys (advocates) in the form of not providing support and in carrying out the mediation process, in addition there are also outsiders who confuse the atmosphere of mediation, because the party has an interest in seeking benefits from the case.

Menurut Bharmawi (2 Februari 2017)selaku Mediator Hakim di lingkungan Pengadilan Agama Pekanbaru, faktor-faktor penghambat tersebut dapat diatasi dengan cara atau seni sang mediator dalam menyikapi dan menyelesaikanAccording to Bharmawi (2 February 2017) as the Mediator Judge in the Pekanbaru Religious Court,

these inhibiting factors can be overcome by means of the mediator's art in addressing and resolving inheritance disputes such as:

1. Mediators must be communicative, meaning that in negotiations must prioritize interactive dialogue.
2. Judge mediators must be responsive in dealing with tense circumstances and can create a conducive and full atmosphere of kinship.
3. Judge mediators must be neutral in dealing with the parties by showing an impartial attitude to one of the parties.
4. The judge mediator must always provide an understanding of the importance of *ishlah* as the best way and solution to resolve the dispute.
5. The judge mediator must be wise in deciding the dispute that occurs by looking at the aspects of benefit for both parties to the dispute.

E. Conclusion

Based on the results of the research that has been presented, the percentage of mal-inheritance cases mediated by the Pekanbaru Religious Court for 2 years (2015/2016) has not shown satisfactory results. This can be seen from the percentage of successful cases of 18.2% and the failure of 81.8%. Thus it can be concluded that the role of judge mediator has not been maximal in resolving inheritance disputes in the Pekanbaru Religious Court.

F. Recommendation

It is expected that the settlement of inheritance disputes through mediation in the Pekanbaru Religious Court can be carried out according to procedures and provide appropriate solutions for the parties, so that the role of the judge mediator can be felt in full and real. The Judge Mediator in this case must again provide an understanding to the parties that the mediation of the settlement of the dispute can be resolved without any party being harmed. And to the parties who litigate in the Pekanbaru Religious Court should give full confidence to the court to resolve the inheritance dispute for the benefit of both parties.

Thank-you note

The author wishes to thank the infinite to the Chancellor of UIR, the Chairperson of LPPM UIR, the Dean of the Faculty of Law UIR and the Chairperson of the Pekanbaru Religious Court. Hopefully this article provides insight into the law, especially Islamic law in the country of Indonesia that we love.

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Wawancara dengan Ketua Pengadilan Agama Pekanbaru Bapak Drs. H. Syaifuddin, SH.,M.Hum pada tanggal 30 Januari 2017 dan Mediator Hakim Bapak Bharmawi,SH.,M.H pada 02 Februari 2017

CERTIFICATE OF ATTENDANCE

This Certificate is Awarded to

Anton Afrizal Candra

as Presenter

3rd INTERNATIONAL CONFERENCE ON ISLAMIC LAW IN INDONESIA

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