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THE URGENCY OF APPLYING DOMESTIC VIOLENCE SCREENING MECHANISM FOR DIVORCE MEDIATION IN RELIGIOUS COURT*

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Abstract

The mediation process in divorce cases is vulnerable to power relation imbalances and domestic violence. Domestic Violence Screening is a set of questions delivered by the mediator to the parties in Religious Court to examine whether domestic violence happens in the marriage. Domestic Violence Screening in mediation is not well known in Indonesia however it has been vastly used in many countries such as USA and Australia. This research tried to explained the benefit of Domestic Violence Screening in divorce mediation in Religious Court and identify whether it can be applied in Indonesia. Screening allows for: a) identification of power relation imbalance and domestic violence; b) domestic violence recording; and c) provide referral services for domestic violence victims.

Keywords: *divorce, mediation, screening, religious court.*

Intisari

Mediasi perkara perceraian rentan mengalami ketimpangan relasi kuasa dan kekerasan dalam rumah tangga/KDRT. Skrining KDRT (*screening domestic violence*) merupakan sejumlah daftar pertanyaan yang diajukan oleh mediator kepada para pihak yang berperkara di pengadilan agama untuk memeriksa apakah telah terjadi kekerasan selama ikatan pernikahan. Meskipun skrining KDRT belum dikenal di Indonesia namun telah digunakan secara luas dalam mediasi di berbagai negara. Penelitian ini bertujuan untuk memberikan gambaran sejauh mana manfaat skrining KDRT pada saat mediasi perkara perceraian dan apakah skrining tersebut dapat diterapkan di Indonesia. Keberadaan skrining memudahkan untuk: (a) mengidentifikasi terjadinya ketimpangan relasi kuasa dan kekerasan domestik sebagai faktor penyebab perceraian, (b) melakukan pendataan kasus KDRT, dan (c) memberikan layanan rujukan kepada korban KDRT.

Kata Kunci: perceraian, mediasi, skrining, pengadilan agama.

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A. Research Background

Court annexed mediation for civil cases has been implemented in Indonesia since the enactment of Supreme Court Regulation (Perma) Number 2 of 2003 which was then amended by Perma Number 1 of 2008 and finally amended by Perma Number 1 of 2016 regarding the Court Mediation Procedure. Mediation is a way of dispute resolution through negotiation process to obtain agreement of Parties assisted by Mediator.¹ Based on Perma No. 1 of 2016, mediation is a mandatory stage that must be passed in the process of lawsuit or petition in court. The absence of mediation causes the case filed to be null and void.

In the religious court, every case that is filed, shall go through the stage of mediation first before further settled by the trial process. The mediation process is carried out by the mediator² who is appointed, be it a judge mediator or a non-judge mediator.³ The purpose of holding a mediation process in religious courts is to give opportunity for the parties to reconcile. But in practice, not many parties agree to reconciliation.⁴

In many literatures on mediation it is mentioned that power relation imbalance between the parties in mediation of divorce cases often occur, especially when there is violence in the household (domestic violence).⁵ Cases of domestic violence are often “hidden” within a divorce case, hence religious courts as institutions authorized in divorce settlement issues, often find domestic

violence as a subject of mediation.⁶ Religious court data illustrates the number of domestic violence in Indonesia. National Commission on Anti Violence Againsts Women (“*Komnas Perempuan*”) Report in 2009-2016 states that religious courts account for 70-95% of the total data of cases of violence against women that they collected.⁷

In Indonesia, divorce cases involving domestic violence is a unique case, as on one hand divorce is a civil case while on the other hand domestic violence is a criminal case. If referring to Article 54 of Law No. 7 of 1989 regarding Religious Courts the procedural law used in the religious court is the same with that is used in General Courts. Thus Law No. 23 of 2004 regarding Elimination of Domestic Violence (hereinafter referred to as Law on Elimination of Domestic Violence) is applicable to Religious Courts in addition to the commonly used laws and regulations such as Law No. 1 of 1974 regarding Marriage, Article 19 of Government Regulation No. 9 of 1975 regarding the Implementation of Law No. 1 of 1974 regarding Marriage, and Article 116 of Compilation of Islamic Law. Gender sensitivity of judges in handling cases can be seen from the application of Law on Elimination of Domestic Violence. Implementation of the Law on Elimination of Domestic Violence is absolutely necessary and can be integrated by the judges in consideration of their decision-making.⁸

Divorce is a way out of the violence experienced in the household. Gelles in his research

¹ Definition of mediation from the Regulations of the Supreme Court No. 1 of 2016 regarding Procedures of Mediation in Courts.

² Within this study the term judge is used in different manners, judge in the context of decider of cases in courts and judge as a mediator.

³ Non-judge mediators (hereinafter referred to as mediator) are mediators coming from professionals with diverse professional backgrounds such as lawyers, psychologists, social workers, retired judges, retired Ministry employees, retired clerks, etc. To become a professional mediator, an individual must undergo certification training to meet the standards of the mediator profession. (See Abdul Syukur, 2012, *Mediasi Yudisial di Indonesia: Peluang dan Tantangan dalam Memajukan Sistem Peradilan.*, Mandar Maju, Jakarta, p. 22).

⁴ The degree of difficulty of mediation of divorce cases is caused by domestic violence in the form of physical violence, infidelity, and an economic situations that cause pain. Almost all the divorce petition / request to court are the climax of a failed conciliation effort. If mediation is done in the sense of reconciliation (the marriage becomes intact) the goal is certainly difficult to achieve, because in general the parties are determined to divorce. The success of mediation then should be measured on the basis of the agreement reached, even though the agreement is to be divorce. (see study by M.Saifullah, “Efektivitas Mediasi dalam Penyelesaian Perkara Perceraian di Pengadilan Agama Jawa Tengah,” *Jurnal Walisongo*, Vol. 25, No. 2, October 2015, p. 193).

⁵ The majority of academic views and mediation practitioners with relational issues and domestic violence issues in mediations such as Rachel field (1996), Renata (1997), Thoenne (1995), Penelope (1992), Bagshaw (1999), Linton (2012), L.Tishler, Carl (2004), etc.

⁶ Faqihuddin Abdul Kodir and Ummu Azizah , 2013, *Referensi Bagi Hakim Peradilan Agama tentang Kekerasan Dalam Rumah Tangga*, Second Edition, Komnas Perempuan, Jakarta, p. 4.

⁷ Komnas Perempuan, 2016, *Lembar Fakta Catatan Akhir Tahun Komnas Perempuan Tahun 2016*, Komnas Perempuan, Jakarta, p. 1.

⁸ See Court Decision Case No. 214/Pdt.G/2007/PA.Bgr by Religious Court of Bogor which is considered a legal breakthrough. See M.Andi Raihan, 2014, *Perceraian Akibat Kekerasan dalam Rumah Tangga “Studi Kasus Putusan Hakim dalam Perkara Perceraian Nomor 214/Pdt.G/PA.Bgr.”*, Undergraduate Thesis, Faculty of Syariah and Law of Universitas Islam Syarif Hidayatullah, Jakarta.

mentions the decision of a wife to seek help (divorce) or not is based on severity and frequency of violence.⁹ The more severe the level of violence experienced by the wife then the desire to seek help (one of it through divorce) will be even greater. Other studies have shown that the frequency and severity of the occurrence of violence increases when one partner makes the decision to leave or separate.¹⁰

According to Frederick and Lizdas and Menard and Salius, fear and intimidation are real aspects of domestic violence especially when domestic violence victims are actively trying to escape from an abusive partner.¹¹ Meanwhile Clemant and Gross thought that mediation can only work if all parties can negotiate without worrying for their safety.¹² This is similar to the opinion of Bagshaw who stated that mediation should not begin if there are still parties who do not have enough competence, are less prepared in collecting the necessary information, cannot recognize their own interests and needs and their children, or are unable to negotiate for their own interests.¹³

Academic feminists argue that the mediation process has the potential to generate injustice for women both in the process and the resulting output.¹⁴ Feminists underline the element of relationship imbalances, domestic violence, and replication of patriarchal values, which in turn gives injustice to women, and causes women's position to become weak.¹⁵ Dimitrios mentioned the need to

be aware of the imbalance of power in relationship in the form of financial inequality, inequality due to cultural differences, gender inequality, and violence against women in the mediation process.¹⁶

Responding to the opinions above, Bryan explained that negotiations in the mediation process need to take account the the strength of the resources of the husband and wife in the dispute in relation to the power relation issues. The type of resources can be tangible resources and/or intangible resources.¹⁷ To maximize the resources of the husband and wife, Bryan for example suggested two ways in doing so: a) screening or examining unfit cases in mediation and directed to use court mechanisms; and b) develop innovative mediation practices in the face of imbalances in connection with power and domestic violence.¹⁸

The practice of screening for domestic violence in divorce mediation process is well known and implemented in the United States of America and Australia. In 1993, the United States of America surveyed 200 mediation programs. As a result, as many as 80% of the programs reported to have screened domestic violence.¹⁹ In Australia, screening is a common practice in most jurisdictions of family law, however detection rates vary.²⁰

Screening in Indonesia is still not commonly used in the mediation of divorce cases and there is little literature on this subject. The research conducted by Abdul Syukur in the Religious Court of Padang and the Religious Court

⁹ Lockton and Ward in Shera Ditriya Bastian, 2012, *Hubungan antara Resiliensi dan Coping pada Istri yang Melakukan Kekerasan dalam Rumah Tangga*, Undergraduate Thesis, Faculty of Psychology Universitas Indonesia, Jakarta, p. 10.

¹⁰ See Geffner & Pagelow (1990); Dutton, (1994); and Pearson (1997).

¹¹ Elizabeth Clemants and Alon Gross, "Why Aren't We Screening? A Survey Examining Domestic Violence Screening Procedures and Training Protocol in Community Mediation Centers," *Journal Conflict Resolution Quarterly*, Vol. 24, No.4, Summer 2007, p. 416.

¹² *Ibid.*

¹³ Dale Bagshaw, "Developing Family Mediation Standards- An Australian Experience", *Journal Mediation Quarterly*, 1999, Vol. 16, No.4, p. 389.

¹⁴ Field and Rachel, "Using the Feminist Critique of Mediation to Explore "The Good, The Bad and The Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia", *Australian Journal of Family Law*, Vol. 20, No. 5, 2006, pp. 45-78.

¹⁵ From various sources, see previous footnote number 2.

¹⁶ See Eliades, "Dimitrios, Power in Mediation-Some Reflection," *The ADR Bulletin*, Vol. 2, No. 1, 1999.

¹⁷ What is categorized as tangible resources are income, education, and employment. While intangible resources are dominance, status differences, levels of depression experienced, self-esteem.

¹⁸ E.Bryan Penelope, "Killing Us Softly: Divorce Mediation and the Politics of Power," *Buffalo Law Review*, Vol. 40, 1992, p. 447.

¹⁹ See Nancy Thoennes, *et al.*, "Mediation and Domestic Violence: Current Policies and Practices", *Family and Conciliation Courts Review*, Vol. 26, 1995.

²⁰ Helen Clerck, "One Way or Many Ways", <https://aifs.gov.au/publications/family-matters/issue-98/one-way-or-many-ways>, accessed on 11 September 2017.

of Bandung concluded that screening is important to be undertaken to detect the presence of domestic violence when handling family dispute which will later be used to determine the approach and technique used in the mediation process. However, the majority of judges in the research were still passive in detecting the occurrence of domestic violence by only waiting for reports from the parties.²¹

This study is the result of preliminary research to get an idea of the use of domestic violence screening mechanisms that can be applied in the mediation process in religious courts. In the macro level this research is part of the effort to enrich the discourse related to the mediation of divorce cases. This study intends to answer the question as follows: (1) Why is screening important to be used in the mediation of divorce cases?; (2) What screening mechanism are known and implemented in other countries? ; (3) What types of screening instrument can be utilized in mediation?; (4) To what extent is applying screening for domestic violence in the mediation of divorce cases possible in Indonesia?

B. Research Method

This research is a legal research with a feminist perspective as while the matter studied is legal problem, the analysis uses a feminist perspective. Methodology is important in pushing the feminist agenda because it is impossible to use conventional methods when it comes to a more pro-women structure of power and law.²² With the right methodology, feminists can declare a legal argument appropriately and correctly.²³ Theory is needed by feminists “to understand the essence of many problems women experience when faced with the law.”²⁴

This research uses two methods, first is literature studies where Supreme Court Regulation regarding Mediation and literatures on mediation from Indonesian and foreign writers were studied and analyzed. Literature studies allow for giving legal grounds and references on the types of screening mechanism and screening implementations. The second method is an empirical work conducted in Religious Court of Jakarta Selatan and Depok. In these two Religious Court, observation and interviews were conducted. Judge-mediator, non-judge mediator, court legal aid staff, and disputing parties were interviewed. Observation was conducted by sitting in the mediation process to see the dynamics of the mediations and by sitting in the legal aid room (Pos Bantuan Hukum – Posbakum) to see how consultation and divorce request is made.

C. Research Results and Analysis

1. The Reasons Why Screening Mediations of Divorce Cases is Important

Why is Screening in Divorce Mediation Process Important? Various literatures and researches on mediation have been written. Based on those literatures and researches it is concluded that there are three main reasons why screening is important to be implemented in divorce mediation.

a. To Identify Domestic Violence in Mediation

Identifying domestic violence in mediation is not always clear or easy.²⁵ Identification of physical and sexual abuse is easier than recognizing psychological violence.²⁶ In addition to violence, Dutton mentions there is a form of power imbalances or power control over the victims committed by their partner (table 1). Power relation 1

²¹ Abdul Syukur, 2011, *Mediasi Perkara Kekerasan Dalam Rumah Tangga : Teori dan Praktik di Pengadilan Indonesia*, 2011, p. 157.

²² Katherine T. Bartlett, “Feminist Legal Methods”, *Harvard Law Review*, Vol. 103, February 1990, p. 831.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Anita Vestal, “Domestic Violence and Mediation: Concern and Recommendations”, <http://www.mediate.com/articles/vestala3.cfm>, accessed on 12 September 2017.

²⁶ In Law No. 23 of 2004 regarding Elimination of Domestic Violence (LAW ON ELIMINATION OF DOMESTIC VIOLENCE), psychological violence is more focused on as actions that result in fear, loss of self-esteem, loss of ability to act, feelings of helplessness, and/or severe psychological suffering on a person.

in relationship is the most important parts to be recognized and understood during the mediation process. Power relation is often

implied, not explicitly shown. Therefore it is necessary to have a skill to recognize it.

Table 1.

Types of Power and Control Relations			
Using Coercion and Threats	Intimidation	Emotional Abuse	Social Isolation
Threatens to harm, leave, commit suicide, report to welfare, making drop charges, making do illegal things.	Make victim afraid by using looks, actions, gestures, (smashing things, destroying property, abusing pets, showing weapon).	Calling names, making feel bad, playing mind games, made to think victim is crazy.	Controlling actions, people to see and talk, limits travel and outside involvement.
Economic Abuse	Male Privilege	Using Children	Minimizing, Denying and Blaming
Limits getting or keeping a job, making ask for money, taking the money, limits access to information of family income.	Make all the big decisions, acting like master of the castle, being the one to define men’s and women’s roles.	Making children to rely messages, use visitation to harass, threaten to take children away.	Making light of the abuse and not taking her concerns seriously, saying the abuse did not happen, shifting responsibility for abusive behavior.

Source: Adapted from Duluth Domestic Abuse Intervention Project, Power and Control Wheel, Dutton and Goodman, 2005.²⁷

One of the main critiques regarding screening is the lack of trained mediators who can identify domestic violence in mediation. In Indonesia, the obstacle in implementing screening is the lack of knowledge and understanding regarding definition and parameter of domestic violence as regulated in Law on Elimination of Domestic Violence.²⁸ This research found that mediators and/or judges understand domestic violence as limited only to physical and psychological abuse. Several other mediators and/or judges even said that domestic violence is only limited to physical violence. The lack of knowledge and understanding of the

definition and parameter of domestic violence among judges and mediators will make it difficult for them to screen in mediation. On the other hand, the disputing parties are also unaware that domestic violence is a form of criminal act punishable by the law.

Authors suggest that mediators for divorce mediation needs to be trained on the aspects of DV inter alia: a) how to recognize and identify DV; b) how to understand the decision of the victim to still stay in an abusive relationship or leave; c) types of DV; d) recognizing characteristic of intimate partner violence/abuse; e) specific technique such as caucus to be implemented; and f)

²⁷ The Duluth Model, “Domestic Abuse Intervention Project Power and Control Wheel, <https://www.theduluthmodel.org/wp-content/uploads/2017/03/Equality.pdf>., accessed on 12 September 2017.

²⁸ Abdul Syukur, *Op.cit.*, p. 157.

how to level the power relation imbalance, including taking accounts issues of security/safeguard.

b. Documentation of Domestic Violence Cases

Since the beginning of 2017, the Religious Courts have replaced the divorce documentation format with details of the

causes of divorce as follows: 1) Opium usage; 2) Gambling; 3) Leaving the other party; 4) Sentenced to imprisonment; 5) Polygamy; 6) Domestic violence; 7) Physical disability; 8) Continual disputes and arguments; 9) forced marriage; 10) Apostasy; and 11) Economics. Previous classification of reasons for divorce is based on the reasons as in table 4 below.

Table 4.

Factors of Causes of Divorce			
Moral	Irresponsibility	Physical Abuse	Constant fights
1. Unhealthy polygamy	1. Forced marriage	1. Underage marriage.	1. Political.
2. Moral crisis	2. Economy	2. Physical cruelty.	2. Disturbance from third parties.
3. Jealousy	3. Absence of responsibility	3. Mental cruelty.	3. Absence of harmony.
		4. Imprisonment	
		5. Physical disability.	

Source: Data from Religious Courts of South Jakarta and Depok, 2016.

Komnas Perempuan observes that the pattern of data collection of violence against women conducted by the state (in this case the religious court) shows the state’s perspective and attitude towards the existing cases. Categorization in data collection in religious courts such as the use of terms like moral crisis, disharmony, unhealthy polygamy, etc., indicates that the state is concealing violence against women as reasons for divorce. Such categorization is making the real cause of the case be untouched and contribute to impunity of the perpetrator.²⁹

The Authors agree to *Komnas Perempuan* statement above and thought that the new format of categorization is clearer and more measurable and also facilitates data collection of incoming violence cases

compared to the format prior to 2017, regardless of the possibility of duplication of data as the categorization of domestic violence also includes economic violence. In addition to that, the Authors note that data recording in Religious Court can be more accurate if also taking into account the mediation screening data. This will allow types of violence to be explored and recorded. *Komnas Perempuan*, as user of the Religious Court data can recommend the Religious Court of the way data is recorded in order to really depict violence in real terms.

c. Referral Services for Victims of Domestic Violence

As already stated above, Indonesia still distinguishes the settlement of divorce with domestic violence through criminal and

²⁹ *Komnas Perempuan, Loc.cit., p.8.*

civil justice system. However, **most parties usually only choose to settle the case in civil justice system by divorce process.** Divorce judges and/or mediators may still recommend filling the case of domestic violence to the criminal justice system, especially if it has a life-threatening impact on the victim. According to the authors, every judge and/or mediator in fact should recommend filling the domestic violence case to the criminal justice system, even though the decision to file the case to the criminal court or not is in the hands of the victim.

If the victim chooses not to file a criminal case, in the future if the screening is applied in the religious court (as well as the district court), the mediator may recommend a referral service to the victims of domestic violence if necessary. This referral service is important when, for example the mediator is of the opinion that the wife suffers severe psychological and physical violence affecting her ability to conduct her activities and undergo mediation process. In this case, the mediator may refer her to the psychology counseling institution so that the psychological condition of the wife can be mended and refer her to the health service to treat her physical wounds. The mediator may also convey to the judge that there is domestic violence in

his or her case and recommend that the judge examine the fact of the domestic violence, to include such fact in the decision and recommend the victim to resolve domestic violence through the criminal court.

2. Domestic Violence Screening Practices in USA and Australia

Domestic Violence screening in the mediation process is well known and implemented in almost all states in the United States of America with varying degrees.³⁰ Some United States of America's law and regulation impose obligations for court judges to screen cases of domestic violence.³¹ Once a case enters the judicial process, the following guidelines impose an affirmative duty upon the judges to ensure cases referred to mediation are appropriate.³² In principle cases of violence of any kind that are not suitable for mediation, shall be screened without exception.³³ Domestic Violence screening is treated as the basis for information on whether the case in court is eligible for mediation or not. However in some jurisdictions, cases involving domestic violence is excluded from mediation with the following conditions: (1) when an order of protection is in effect, or (2) when there are special rules regulating that the victim herself must request the mediation or the judge referring the case to mediation must included the order that the parties not be required to a face-to-face mediation or there should be a multi-tiered evaluation to determine whether the history of domestic violence could affect the fairness of the mediation process or the physical safety of the domestic violence victim.

³⁰ The United States of America needed 20 years to introduce and develop mediation into their court system (See Nirajan J. Bat, "Legislative Initiative For Court Annexed Mediation in India", <http://www.mediate.com/articles/bhattn.cfm>, accessed 12 September 2017). Fifty states in the United States of America (in addition with Washington D.C and Puerto Rico) offer various options of dispute resolution where mediation is the most common. (See Jane C. Murphy and Robert Rubinson, "Domestic Violence and Mediation: Responding to the Challenge of Crafting Effective Screens", *39 Fam. L.Q.*, Spring 2005).

³¹ See Alexandria Zylstra, "Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators", *Journal of Dispute Resolution*, Issue 2, 2001, p. 262.

³² *Ibid.*

³³ In Elizabeth Clemants dan Alon Gross, "Why Arent We Screening? A Survey Examining Domestic Violence Screening Procedures and Training Protocol in Community Mediation Centers", *Journal of Conflict Resolution Quarterly*, Vol. 24, No. 4, Summer 2007, p. 416.

Table 2.

Procedures of Mediation with Domestic Violence in Courts in The United States of America

1. Exclusion from Mediation of Cases Involving Domestic Violence

- a. Exclusion when an order of protection is in effect Alaska, New Jersey, Alabama, Hawaii, and Michigan all provide exemption from mediation when a protection order is in effect.
- b. Exclusion based on findings of a history of domestic violence in the household Pennsylvania, Florida, Michigan, Nevada, Alabama, Louisiana, and Virginia. Additionally, the regulations of the local courts in Illinois, Missouri, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, and Washington allows an exclusion to mediation in the case of domestic violence.

2. Mediation with Special Rules

- a. Victim agrees to mediation. Delaware stipulating a case of domestic violence is excluded from mediation except the victim, who is represented by a counsel, requests for mediation. Other States, including Alabama, Hawaii, and Tennessee, requires that, in addition to the victim’s consent, the mediator must be specially trained. Alabama and Hawaii also allow the victim to be accompanied by a supporting person. Kentucky and Tennessee requires the judge to make findings of the consent of the victim without coercion, before the consent of the victim of domestic violence for mediation applies.
- b. Prevention of face-to-face mediation. In Texas, if one of the parties requests an exemption from mediation based on allegations of domestic violence, but the judge determines the allegation is not supported by sufficient evidence, the judge may refer the case to mediation but must include a clause that the parties are not required to meet. West Virginia permit the prohibition of face-to-face mediation in cases of domestic violence, but the prohibition permit is left to the experts.
- c. Multi-tiered evaluation. Alaska has one very detailed rule for mediating cases with domestic violence. A party may request a court order for mediation. Courts are prohibited from requesting mediation when a protection order applies. If domestic violence occurs between both sides, but there is no on-site protection order, custody mediation is only permitted if the victim agrees and both parties are told that they are entitled to disapprove of mediation and that such a decision will not result in a fair settlement. In this determination, the court should consider whether there is a history of domestic violence that could affect the achievement of justice in the mediation process or the physical security of victims of domestic violence.

Source: Alexandria Zylstra,³⁴ 2001.

In addition to that, the interesting thing about mediation procedures in the courts of USA is that it is also regulated in state court regulations regarding domestic violence screening training. For example, California state law requires a court training program on domestic violence for judges

and commissioners dealing with cases of domestic violence. The law also provides a domestic violence orientation program for new judges and annual training sessions.³⁵

Unlike in the United States of America, mediation in Australia allow the parties to directly

³⁴ Alexandria Zylstra, *Loc.cit.*

³⁵ *Ibid.*

file a case to court if they can prove the existence of domestic violence or child abuse in the case.³⁶ Domestic violence is considered a criminal offense that must be handled by the court and be given sanctions by equitable laws. However, if the victim by his or her own will (having obtained sufficient information about mediation process) still insists to proceed with mediation, Family Dispute Resolution (FDR) will take the necessary steps to protect their interests.³⁷

Australia already has its own screening instrument which is the AVERT Family Violence initiated by the Office of the Attorney³⁸ and The Detection of Overall Risk Screen/DOORS, which has been developed specifically for professionals working in family law and has been validated against Australian samples. Both instruments are developed and widely recognized in the field of family law in Australia. However, the Family Violence Study found that, despite some positive comments, 51% of lawyers and 69% of non-legal professionals who participated in the study reported that they rarely or have never used the instrument.

Although screening in family mediation is a common practice, researches show that screening for family violence among mediation clients has not been very effective, one of which is because there is no clarity as to how patterns of family violence can influence decisions about mediation. Further, in practice there is still a strong debate about what screening tools are the best or most appropriate for use in mediation. Disputes over screening tools also occur in the context of the wider family law system, and evidence that victims of family violence often choose not to disclose them, both within the context of family law and in the broader context, for example in health systems.³⁹

Based on comparisons in the two countries above, the authors see that the presence of screening

is absolutely necessary in recognizing the domestic violence that occurs in mediation and looking further into the patterns and types of violence that occur. This may be a tool for mediators to determine whether or not the case filed is suitable to be mediated (e.g. in the United States of America). On the other hand, the presence of screening may not be effective in its use by interested parties because screening is not understood as important, the parties do not understand the effects and impacts of violence in mediation, and the lack of screening training (e.g. in the United States of America and Australia). The existence of protocols or guidelines in the conduct of screening and their application in the context of domestic violence in Indonesia needs to be followed up by the Supreme Court to make a proper screening instrument guide in the Indonesian context.

3. International Screening Instruments

This paper intends to introduce some examples of the widely international evolving and often used screening instrument model in examining domestic violence as well as the characteristics of each screening instrument (see table 3). Some examples of such instrument models are: (a) Tolman; (b) Conflict Assessment Protocol/ CAP; (c) Relationship Behavior Rating Scale/ RBRS; (d) Domestic Violence Evaluation/ DOVE; and (e) Mediator's Assessment of Safety Issues and Concerns/ MASIC.

The Tolman model is based on the research of Richard M. Tolman, Ph.D. which begins with open-ended questions about negotiations in the presence of a partner, then turns to fear issues and concludes with specific questions related to abuse. Such an approach allows the mediator to better assess the participants' fears even if the respondent

³⁶ Abdul Syukur, *Op.cit.*, p.194.

³⁷ *Ibid.*

³⁸ See Attorney-General's Department, 2010, *AVERT Family Violence: Collaborative Responses in the Family Law System*, Attorney-General's Department, Canberra.

³⁹ See Helen Clerck, "One Way or Many Ways", <https://ajfs.gov.au/publications/family-matters/issue-98/one-way-or-many-ways>, accessed on 11 September 2017.

does not interpret or acknowledge violence in their relationships.⁴⁰

CAP is a screening tool used in divorce to determine whether the parties benefit from: a) the implementation of the usual mediation process, or b) the implementation of mediation where specific rules, resources and skills are applied; or rather have a negative impact on mediation assessed by the mediator based on patterns of decision-making, arguments, expressions of anger, and behaviors demonstrated by the parties during mediation.⁴¹ RBRS is a screening instrument consisting of 41 questions with six validated subscales consisting of: psychological abuse, coercive control, physical abuse, threats of physical violence and sexual violence, intimidation and coercion. This subscale is used to assess the profile of violence in an

epidemiological study of the divorced couple being mediated. RBRS has been revised to RBRS-R and has been validated so as to better confirm the discrimination regarding types of harassment.⁴²

DOVE is an interview-based instrument with 19 questions, which assesses the risks in mediation settings, but has been criticized for being too long winded and is not specific enough to question particular violent behaviors. MASIC was developed by Holtzworth-Munroe et al, containing seven subscales and is straightforward and can quickly be handled. MASIC asks the parties to identify their partner’s behavior, but does not measure the violent behavior of the parties to their spouses.⁴³ MASIC is the model deemed to be the most suitable and fulfills the critics of feminists.

Table 3.

Comparison of Characteristics of Screening Instruments

Tolman	Cap	Rbrs-r	Dove	Masic
<ul style="list-style-type: none"> • Create screenings for men and women. • Initiates with general open questions of harassment/ violence experienced. • Additional questions about alleged mental health problems, drug or alcohol abuse may also assist the mediator in assessing the suitability of mediation • Questionnaire at the beginning of mediation, interview method. 	<ul style="list-style-type: none"> • The first screening tool used in divorce cases. • Coverage of violent acts is limited to physical violence and does not include coercive measures. 	<ul style="list-style-type: none"> • Copyrighted so that it can be accessed by purchasing this screening tool • Valid instruments used in court mediation. • Method of use with interviews. • More specific questions on violence. • Assessment for screening results is very complicated. 	<ul style="list-style-type: none"> • Requires training for users / mediators for usage. • This instrument is not specific to photographing violent behavior / questions on violence are broad. • In the form of a questionnaire of questions. • Assessment for screening results is very complicated. 	<ul style="list-style-type: none"> • No copyright/ free to be utilized. • More detailed and wide range of violent actions. • Is already standardized. • Has good psychometric data. • Considered to be representative

Source: Compiled by Authors, 2017.

⁴⁰ Alexander Zylstra, *Loc.cit.*

⁴¹ L.K Girdner, “Mediation triage: Screening for spouse abuse in divorce mediation.”, *Mediation Quarterly*, Volume 7 No. 4, 1990, p. 365-376.

⁴² See Beck et al., 2009, Beck, Menke dan Figueredo, 2013.

⁴³ Helen, *Loc.cit.*

4. Domestic Violence Screening in Current Indonesian Religious Court Mediation Process

In the research conducted in Religious Court of Jakarta Selatan and Depok, screening for DV is not yet implemented in divorce mediation process. The mediators in both Religious Court consider screening for DV will ease them in unraveling the true cause of divorce and follow up on the mediation. This is different to the research of Syukur

in the Religious Court of Padang and Religious Court of Bandung. In his research, his informants stated that cases of domestic violence can be detected through the behaviors of the parties or explicitly through the lawsuit. Syukur's informants stated that some have been conducting screening in the mediation process even though most of them are still passive in detecting the occurrence of domestic violence. While in the Authors' research, judges and mediators have expressed similar answers when asked about their knowledge of the presence of screening saying that they had never heard of and heard about screening in mediation.⁴⁴

In discussions with judges and mediators in religious courts there was a discourse about the possibility of applying screening in all divorce cases in religious courts. Judges and mediators were open to the idea of domestic violence screening in divorce mediation process as long as it is based on regulation or policy of the Supreme Court. One of the judges said screening would save time for the mediator in getting information about the violence experienced during the mediation. However the mediators expected that the screening tool offered is standardized so that the mediators can directly apply and utilize them. Findings of domestic violence in mediation according to several mediators and judges can act as fact of case and be inserted in the consideration part in Judge Decision. However one

mediator is concerned about his colleagues who are not "courageous" enough to include domestic violence in the Decision's considerations but still use the category of "disharmony".

One of the judges is of the opinion that in the case of divorce, it is also necessary to consider the bigger picture which is that the child's interest needs to be considered if one of his parents is reported to the police. The reason is considered by the judge as a humanitarian reason that should be taken into account. Concerning this, the Authors consider that children who are used to seeing, hearing and experiencing domestic violence will endure negative impacts such as impact on security, stability and welfare.⁴⁵ Victims of domestic violence can be direct victims (who directly experience violence) and indirect victims (who witnessed violence occurring). Several previous studies have found that direct child victims of domestic violence (harassment and abandonment) and indirect victims of domestic violence are equally susceptible to trauma; where in the end they also have the possibility to engage in intimate relationships shrouded by violence in adulthood.⁴⁶

As a domestic violence detection tool, there are several opinions about when is the proper time to start initiating screening. Some emphasize that screening is best to start at the time the case is processed, some say it is best to start before the case is processed and others say it can be done before and during mediation. Astor recalls the important of screening to start at the time the case is reported by fulfilling the ideal requirements inter alia: 1) interview best be conducted by official who posses excellent communication ability and has undergo domestic violence settlement training; 2) Screening should be conducted in a peaceful and confidential manner; 3) Screening must be conducted separately if the situation of the parties favors to it; 4) In the

⁴⁴ Interviews with informants in this study were: a non-judge mediator dated August 10, 2017 and two non-judge mediators on September 6, 2017 in Religious Court of Depok, as well as interviews with a non-judge mediator and a judge mediator on 28 August 2017, and one non-judge mediator on 4 September 2017 at Religious Court of Soute Jakarta.

⁴⁵ Carlson in Margaretha, Rahmaniar Nuringtyas, *et al.*, "Trauma Kekerasan Masa Kanak dan Kekerasan dalam Relasi Intim," *Makara Seri Sosial Humaniora*, Vol. 17, No. 1, 2013, p. 33-42.

⁴⁶ See Appel and Holden (1998); Capaldi, *et al.*, (2001); and Dauvergne and Johnson (2001).

screening process, question regarding violence or abuse must be asked specifically; 5) if from the screening domestic violence is encountered, a right and effective referral service must be recommended; 6) Screening must be approved by the victim of domestic violence. The approval must be delivered in a well-informed and free-of-pressure condition.⁴⁷

In the practices of mediation in the United States of America, screening is conducted in the initial stages of mediation and during the mediation.⁴⁸ The Authors agree with initiating screening at the early stage of mediation. However based on this research, it is also possible that screening continues to happen during the mediation based on the dynamic of the mediation. The mediators can still be aware of any possibility of domestic violence or power relation imbalance, especially psychological abuse during the mediation.

In implementing screening, there are several guidelines to follow: a) the mediators conduct separate screening interviews at the early stage to give the parties the same opportunity to tell their stories and determine whether any domestic violence occurs; b) Despite any situation, information retrieve from both parties is confidential and must not be disclosed to the other party unless permission to do so has been granted by the parties or as ordered by the law or court.

In addition to interviews, screening is also possible through other media such as telephone, questionnaire, checklist model, interview before mediation, even interview/observation throughout the mediation process.⁴⁹ The key point in conducting screening is the availability of standardized questions and the expert person to deliver it.

D. Conclusion

Based on the above explanation on the types of screening instrument, the importance of screening and the practices of mediation in Religious Court of

Jakarta Selatan and Depok, below are four points that the Authors have concluded:

1. Screening is important in divorce mediation to identify domestic violence and power relation imbalance between the parties (husband and wife). Identification is important to level the position of the parties and prevent the victim to be more victimized.
2. The practices of screening in USA and Australia prove that screening is an important instrument in mediation process despite the debate on what is the best method, its effectiveness and the importance of training judges and mediators for screening in mediation.
3. In Indonesia, in consideration to The Supreme Court Regulation Number 1 Year 2016 on Court Mediation Procedure where court-annexed mediation is mandatory, there is an urgency for screening to be introduced and be understood by judges and mediators through mediation screening trainings. With the judges and mediators familiar to screening mechanism, it is hoped that Religious Court can play an active role on detecting domestic violence, recording a more accurate types and form of violence, and recommend medical, psychological and legal aid referral services.
4. As a preliminary research, this research introduced the importance of screening to be implemented in Religious Court but still need further studies of what screening method/instrument is best used in Indonesia and the technical operation of screening. Furthermore

⁴⁷ *Ibid.*

⁴⁸ See Hillary Astor, 1992, *Guidelines for Use If Mediating in Cases Involving Violence against Women*, National Committee on Violence Against Women, Canberra.

⁴⁹ See British Columbia Mediation Roster Society, 2008, *Safety Screening in Family Mediation*, British Columbia Mediation Roster Society, Victoria.

it is also important to make screening part of the mediation training.

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