

Culture of Mediation in the Perspective of Islamic Law

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ABSTRACT

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Conflicts among humans are as old as humans, whether they occur in a person such as the gap between desires and reality within. If we pay attention to the history of life, we can find various forms of conflict, both in the form of individuals, groups, ethnicities, religions and races. as well as conflicts between nations. In a country there are also many conflicts, both related to politics, the economy and conflicts within the family that never end.

Dispute resolution through mediation can be equated with dispute resolution through "hakam" and its operational form is "tahkim", this is stated in the Qur'an. Conflicts that continue to become disputes in court often occur in the legal state of the Republic of Indonesia, both criminal and civil.

In the Indonesian Legal Dictionary, the notion of mediation is a peaceful dispute resolution process that involves the assistance of a third party to provide a solution that is acceptable to the disputing parties.

According to Priatna Abdurrasyid, mediation is a peaceful process in which the disputing parties submit their settlement to the mediator to achieve fair results, without large costs but still effective and still acceptable.

Meanwhile, according to PERMA Number 1 of 2016, mediation is a way of resolving disputes through a negotiation process to obtain an agreement between the parties assisted by a mediator.

The results of this study indicate that this government effort, through PerMA no. 1 of 2008, is a solution in solving every case. A mediator is required to have sufficient qualifications, both judge mediators and non-judge mediators. The level of success through mediation efforts by mediators has not been the expectation of PerMA no. 1 of 2008. This is caused by several factors, namely, the professionalism of the mediator, the empowerment of non-judge mediators and integrated coordination.

1. Introduction

History records that in human life conflicts cannot be avoided. The Qur'an describes man as His Khalifah on earth, challenged by angels. Angels are worried about the existence of humans as caliph fil 'ardh, because humans tend to do damage and shed blood on earth.

Conflicts among humans are as old as humans, whether they occur in a person such as the gap between desires and reality within. If we pay attention to the history of life, we can find various forms of conflict, both in the form of individuals,

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groups, ethnicities, religions and races. as well as conflicts between nations. In a country there are also many conflicts, both related to politics, the economy and conflicts within the family that never end.

In a rule-of-law state, community conflicts can continue to become disputes or cases in court. In fact, it can be witnessed that conflicts have escalated into disputes in courts and have caused many problems, including the accumulation of cassation cases at the Supreme Court, reduced public trust in the judiciary in Indonesia, many the riot occurred in court and claimed lives, both from the disputing parties as well as the court and the security forces.

Conflicts that enter court must be handled professionally, especially those related to family law, such as divorce cases combined with cases of joint property, child rearing , living expenses and inheritance disputes. This has claimed many victims, both in the form of material and lives. Why is family conflict so important to deal with, because all problems can be said to start from the family. This can be an indication of why the Qur'an presents many matters relating to the family, not the laws governing the state.

Dispute resolution through mediation can be equated with dispute resolution through "hakam" and its operational form is "tahkim", this is stated in the Qur'an. Conflicts that continue to become disputes in court often occur in the legal state of the Republic of Indonesia, both criminal and civil.

Conflict resolution always requires a mediator who has the power (ruler) to intervene and reduce it. In resolving the conflict, the authorities need rules (laws) to guarantee justice for all. Usually the authorities are not sufficiently proficient in the legal theory and practice needed to mediate conflicts. It is at this point that the authorities need the help of legal experts to formulate legislation. Conflict and dispute is a social necessity. Fulfillment of economic needs is the most dominant and therefore the most

dominant and therefore the most potential to cause conflict compared to other needs. This is caused by selfishness on the one hand and a limited supply of needs on the other.

The philosophical foundation of conflict resolution through mediation was implemented by Muhammad Rasulullah SAW, both before becoming an apostle and after becoming an apostle. The process of resolving conflicts (disputes) can be found in the events of the laying back of the "Hajar Aswad (black stone on the side of the Kaaba) and the Hudaibiyah agreement. These two events are well known to Muslims around the world, and therefore are generally accepted. Relaying of the Hajar Aswad and the Hudaibiyah agreement have conflict (dispute) resolution values and strategies, especially mediation and negotiation, so that these two events have the same perspective, namely creating peace. (Hamadi, R., 2007)

From the actions of the Prophet Muhammad saw. in the Hudaibiyah agreement several principles of mediation can be learned, among others; negotiating attitude, compromising attitude, positioning the parties equally, and respecting the agreement In the mediation process, the ability to convince the disputing parties to be willing to sit together is a step that determines the success of the subsequent mediation process. The mediator or the parties must understand that it is impossible to resolve disputes through mediation to fulfill all demands, and then try to understand each other and refuse to withdraw the interests of both parties. In this case, there is an element of giving and an element of receiving from both parties, so that no one feels aggrieved by one another .

From the events above it is clear that the mediation process has long been known by Islam in resolving cases or conflicts that occur between litigants. Therefore, in this paper, the author examines the problem of mediation in the perspective of Islamic law as a solution to mediate problems.

2. Literature Review

2.1 The Concept of Mediation in the Perspective of Islamic Law

Culture of Mediation in the Perspective of Islamic Law

In language, mediation culture consists of two words, namely culture and mediation. Culture in the Big Indonesian Dictionary (KBBI) is defined as reason or customs, or something that has become a habit that is difficult to change. Grammatically, culture is a way of life that continues to develop and is shared by a group of people and passed down from generation to generation. Mediation comes from the Latin , *mediere*, which means to be in the middle. The mediation used today is absorbed from English, mediation. In the Big Indonesian Dictionary (KBBI), the word mediation is defined as the process of involving a third party in resolving a dispute as an advisor. The person who mediates is called a mediator.

According to Christper W. Moore—as quoted by Desriza Ratman,—mediation is a problem that can be assisted [solving the problem] by a third party that is acceptable to both parties, fair and impartial and does not have the authority to make decisions, but expedites the parties. disputing parties in order to reach a joint decision on the disputed matter.

In the Indonesian Legal Dictionary, the notion of mediation is a peaceful dispute resolution process that involves the assistance of a third party to provide a solution that is acceptable to the disputing parties.

According to Priatna Abdurrasyid, mediation is a peaceful process in which the disputing parties submit their settlement to the mediator to achieve fair results, without large costs but still effective and still acceptable.

Meanwhile, according to PERMA Number 1 of 2016, mediation is a way of resolving disputes through a negotiation process to obtain an agreement between the parties assisted by a mediator.

In general, mediation is a form of negotiation between two individuals (or groups) by involving a third party with the aim of helping to achieve a compromise resolution. Meanwhile, Vinsesio Dugis defines mediation as a number of activities carried out by third parties that aim to defuse and direct conflict to a non-violent stage as part of a voluntary management process. Furthermore, mediation can also be seen as a conflict management process through which conflicting parties seek assistance from or accept assistance offered by individuals, groups, or other organizations, so that conflicting parties can change their behavior, reach an agreement without having to use physical force. .

In the history of Islamic civilization, peace is known as the word " *sulhu* " which means breaking/resolving disputes or peace. The term *sulhu* is found in *fiqh* literature related to issues of transactions, marriage, war, and rebellion. As a term, *sulhu* is defined as a contract that is determined to resolve a dispute.

Apart from the word *sulhu*, mediation in Islamic literature is also equated with *Tahkim*. *Tahkim* in *fiqh* terminology is the existence of two or more people who ask other people to resolve disputes that occur between them with *syar'i* law.

Tahkim is the protection of the two disputing parties to the person they agree with and agrees with and is willing to accept their decision to resolve their dispute, the protection of the two disputing parties to the person they appoint (as an arbiter) to decide/resolve the dispute that occurs between them.

Mediation in Islamic legal literature can be equated with the concept of *Tahkim* which etymologically means to make a person or a third party or what is called a *hakam* mediate a dispute.

Munjid's dictionary states that "arbitration" can be equated with the term "*tahkim*". *Tahkim* itself comes from the word "*hakkama*". Etymologically, *tahkim* means to make someone as a deterrent to a dispute. In general, *tahkim* has the same meaning as arbitration which is known today, namely the appointment of a person or more as a referee by two or more disputing people, in order to resolve their dispute peacefully, the person who resolves it is called a "*hakam*".

According to Abu al Ainain Fatah Muhammad, the notion of *tahkim* according to *fiqh* terms is as relying on two (2) people who are in a dispute with someone whose decision they approve of to resolve the dispute between the disputing parties.

According to Said Agil Husein al Munawar, the meaning of "*tahkim*" according to the group of Islamic jurists of the Hanafi school of law is to separate disputes or establish laws between people with words that bind both parties originating from parties who have power in general

The definition of "*tahkim*" according to legal experts from the *Syafi'iyah* group is to separate disputes between conflicting parties or more with Allah's law or declare and determine *syara'* law for an event that must be carried out.

The Qur'an and the Hadith of the Prophet Muhammad SAW., offer a process of resolving disputes in court in two ways , namely proving legal facts (adjudication) and settlement through peace (*islah*).

Settlement of disputes through the process of proving legal facts (adjudication) is carried out by submitting a number of pieces of evidence by the parties in demanding or defending their rights before the court.

The Prophet Muhammad SAW., stated: "evidence is charged to the plaintiff, while the oath is to the party who denies it." Submission of evidence is intended to prove who has the right and authority over something and who is not authorized or

not entitled to something. Through this, it will be clearly revealed what the situation is and which party gets the rights according to God's law. Evidence is a standard measure (norm) for judges in deciding cases.

In Islam it places great emphasis on peace to anyone in conflict, says Allah in the Al-Qur'an Surah Al-Hujurat Verse 9:
 أَعْلَىٰ أَبَ بَيْنَهُمَا فَاَصْلِحُوا أَتَوْا اللَّهَ فَأَمْرٌ إِلَىٰ تَقِيَةٍ حَتَّىٰ تَبْغِي لِي أَلْحَزَىٰ أَعْلَىٰ إِنْحَدَلْتُمَا بَعَثَ فَإِنْ بَيْنَهُمَا فَاصْلِحُوا قَاتِلُوا أَلْمُؤْمِنِينَ أَمِنْ طَائِفَتَانِ وَإِنْ
 ٩ لَمُقْسَطِينَ أَلُجِبُّ اللَّهُ أَلِنْ طَوًّا وَاقْس

Translation :

“ And if there are two factions of the believers fighting, then make peace between the two. If one of the two groups commits persecution against another group, then fight the group that commits persecution so that the group returns to Allah's commands; if that group has returned (to Allah's command), then reconcile between the two fairly and act fairly. Verily, Allah loves those who act justly” (QS. Al-hujurat: 9) “

The verse above mentions the word fa'ashlihu bainahuma twice. Fa'ashlihu is a form of command (amar) from the root word ishlâh. In the rules of ushul fiqh it is stated that al-ashlu fil-amri lil-wujûb (the main legal content in the editorial order is mandatory). That is, carrying out peace efforts between warring parties is obligatory. Although this verse specifically talks about solving the problem of rebellion by a group which in terms of Islamic law is called Bughat, this provision is generally accepted as the rule of fiqh "al-'ibrah bi 'umûm al-lafdzi la bi khushûsh as-sabab" (taking the generality of lafadzh not taking specificity because of the appearance of the lafazh).

In line with the verse above, Allah says in QS. An-Nisa verse 35:

٣ خَيْرًا عَلِيمًا كَانَ اللَّهُ أَلِنْ بَيْنَهُمَا اللَّهُ أَلُفَقِي حَا إَصْلَ يُرِيدَا إِنْ أَهْلِيهَا مِنْ وَحَكْمًا - أَهْلِهِ مِنْ حَكْمًا بَعَثُوا أَلَفَ بَيْنَهُمَا شَفَاقَ خِفْتُمْ وَإِنْ

Translation:

“And if you are worried that there will be a dispute between the two, then send a judge from a male family and a judge from a female family. If the two hakim people intend to make improvements, surely Allah will give taufik to the husband and wife. Indeed, Allah is all-knowing, all-knowing” (QS. An-Nisa verse: 35)

Justice is one of the needs in human life which is generally recognized in all places in this world. If justice is then consolidated into an institution called law, then that law must be able to become a channel so that justice can be carried out carefully in society. In this context, the judge's most difficult task is to answer the human need for justice, in addition to approaching both parties to formulate for themselves what they want, and this effort can be carried out at the peace stage.

Mediation with the above understanding is commensurate with the concept of at-tahkîm (hereinafter referred to as tahkîm) in Islamic law. In general, tahkim is an agreement between the disputing parties to submit the decision of the dispute to a third party (hakam). This definition is the same as the definition of mediation above, as one of the procedures for resolving disputes outside the court by involving a third party as an intermediary. However, it has quite fundamental differences when compared to mediation which has been integrated into processes in courts like in Indonesia.

Tahkîm is a derivation of the root word law which means legal basis. After being derived, tahkîm means "to make someone a judge (hakam)". According to Syekh Muhammed Irfat ad-Dasuqi, tahkim is a legal process carried out by a neutral party (hakam) who is legally capable, Muslim , and an adult, not as a Qâdhi's power, to make decisions for the disputing parties in terms of the dispute.

Meanwhile, according to Al-Mawardi, tahkîm is defined as the appointment of a magistrate from among the common people by two disputing parties to resolve the dispute, in an area where there is a qâdhi or an area where there is no qâdhi. When Friend Umar Bin Khattab ra. had a dispute with Friend Ubay Bin Ka'ab ra., they both asked for a legal decision from Friend Zaid Bin Tsabit ra.

Based on the definition put forward by Islamic law experts (Fuqaha') it can be underlined, that tahkim is a form of legal settlement outside of formal justice channels by appointing a judge/

muhakkam, outside of criminal law. The position of tahkim is lower than court, because the decisions produced by this forum are only binding on the parties who filed them and only on the issues in dispute.

According to Al-Mawardi, decisions born from the tahkīm forum will have legal force to be executed if four conditions are met:

1. The right is a person who has the ability of ijthad or masters the source of the dispute with all its aspects.
2. The existence of hakam must be voluntarily agreed upon by the parties, this willingness must continue until the decision-making process.
3. The disputed matter is a specific case. In relation to this, Al-Mawardi mentioned that there are cases that can be judged, namely material rights, exchange agreements, and cases that can be carried out by 'afw and ibrâ'. There are cases that cannot be judged, namely cases that specifically can only be decided by a qâdhi (formal court judge) by force.
4. Requirements related to whether or not the decision of the judge is binding for the parties. This means that when a decision has been made it is binding on the parties, and when the status has not been taken it still depends on the choices of the parties. So, if after the issuance of the decision the parties still have the right to vote, it means that tahkim is useless.

2.2 The Effectiveness of Mediation in Resolving Cases

Mediation is an attempt to settle cases through channels outside the court, by seeking a third party that is neutral, and does not have the authority to decide, helping the disputing parties reach a settlement (way out) that is accepted by both parties in conflict. Mediation is one of several ways to resolve disputes more quickly and cheaply, apart from that it can provide an easier way for parties to find a way to resolve a problem that satisfies and fulfills a sense of justice. Another term explains, mediation is a solution to the settlement of cases or conflicts through negotiation of both parties and assisted by a mediator.

The term mediation is very popular and many scientists explain its meaning. The term mediation comes from the Latin, *mediare* which means position in the middle. This shows the meaning of the role of mediator carried out by third parties in carrying out their duties as intermediaries in resolving conflicts between parties. The meaning of the word "mediator" also means that the mediator must be neutral and not take sides in resolving the conflicts they handle. The mediator must be able to keep the disputing parties' secrets fairly and equally, so that there will be a sense of trust from the disputing parties to resolve it.

In carrying out its role, the mediator must be able to perform their duties properly. In the current context, the most conventional method of settling cases is litigation (court process). The Supreme Court has changed the paradigm of adjudicating into the paradigm of resolving legal disputes/cases. Settlement of civil case disputes through litigation is starting to be abandoned and turning to Alternative Dispute Resolution / ADR (mediation). This change was made by issuing Supreme Court Regulation (PerMA) No. 2 of 2003, then revised through PerMA No. 1 of 2008, concerning Mediation Procedures at the Supreme Court of the Republic of Indonesia. This move by the Indonesian government is oriented towards developed countries which have succeeded in resolving disputes through mediation.

Through PerMA No. 1 of 2008, mediation has been integrated into the justice system and is called judicial mediation. Every civil case filed in court must first be resolved through mediation. Mediation in court is carried out by judge mediators and non-judge mediators who have attended Special Education for the Mediator Profession (PKPM) organized by institutions that have been accredited by the Supreme Court.

This government effort, through PerMA no. 1 of 2008, is a solution in solving every case. A mediator is required to have sufficient qualifications, both judge mediators and non-judge mediators.

3. Conclusion

From the discussion above, the writer can draw conclusions, namely:

1. In general, mediation is a form of negotiation between two individuals (or groups) by involving a third party with the aim of helping to achieve a compromise settlement.

2. Mediation is an attempt to settle cases through channels outside the court, by seeking a third party that is neutral, and does not have the authority to decide, helping the disputing parties reach a settlement (way out) that is accepted by both parties in conflict. Mediation is one of several ways to resolve disputes more quickly and cheaply, apart from that it can provide an easier way for parties to find a way to resolve a problem that satisfies and fulfills a sense of justice. Another term explains, mediation is a solution to the settlement of cases or conflicts through negotiation of both parties and assisted by a mediator.

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