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Islamic view of mediation in court in civil dispute

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Abstract: *In theory it may still be true of the view, that in Negaa the law that is submissive to the rule of law, the position of the judiciary is regarded as a judicial power acting to act as a pressure valve for all violations of law and order of society. Therefore, the judiciary remains relevant as the last resort or the last sought-after truth and justice, so it is theoretically still relied upon as a functioning body and the role of establishing truth and justice (to enforce the truth and justice). But on field practice it appears that the process in the judiciary is not effective (ineffective) and inefficient. The completion of the case takes a very long and long time. Not only is it a lot of cost and effort to be incurred until it gets a judicial verdict. The journey of case settlement still occurs if one of the defeated back will appeal and can also get to the level of casation and reconsideration (the term will be like adventure unto the unknown). What a very tedious process for justice. A lot of criticism from all over the world to the problems they face when litigated, ranging from the completion of the very slow or waste time/waste of time (it happens because the result of Sisem the test is very formalistic (very formalistic), and also very technical (very techincal). It is necessary to solution to the problems faced by those who are in dispute. Therefore PERMA No. 1 year 2008 as a product of the Supreme Court makes such a rule for any court under the auspices of the Supreme Court to carry out mediation before the further litigants in the proceeding before the Tribunal of judges at a court.*

Key Words: *Islamic View, Mediation, Court, Dispute, Civil.*

1. INTRODUCTION:

Mediation is currently the only powerful way to get things done with cheap costs and processes that don't take up much time and effort. Because in the process of mediation that precedence is a sense of family between parties litigants. Unlike the judicial process, each party proves that it is the most correct and blame the other party. In the process of mediation, each party may and can say or propose what is his desire to the Mediator as an intermediary to resolve the dispute.

Not only that, in the process of mediation, tolerance and sense of justice can be achieved. Because the conditions of the mediation process are deliberately created and planned so that each party is comfortable to convey their wishes while also paying attention and giving the other party to reveal the same, namely the wishes of each party that is litigated. Settlement of disputes through peace is much more effective and efficient. That is why at this time, there has been a variety of dispute resolution (settlement methods) out of the court, known as the Alternative Dispute Resolution (ADR), in various forms such as:

- Mediation (mediation) through a compromise system (compromise Thursday,) between the parties, being a third party acting as a mediator only as a helper, and a facilitator.
- Conciliation (consiliation) through conciliators (consiliator), i.e. a third party acting as a conciliator plays a role in formulating peace (conciliation), but the decision remains in the hands of the parties;
- Expert determation, i.e. appoint an expert to give a decisive solution. Therefore the decisions he took are binding on the parties;
- Mini-trial, the parties agree to appoint a advisor who will act to give opinions to both parties. Opinions were given advisor after hearing disputes from both parties. Opinions contain weaknesses and strengths of each party, as well as to give opinions on how to settle for the parties. [M. Yahya Harahap: 2008].

2. METHOD:

This research is normative juridical research, (Soerjono Soekanto, 2004) with a of approach, conceptual approach, and a comparative approach (comparative approach) The legislation approach is used by researchers to analyse the application of death penalty in corruption as stipulated in statutory regulations. The concept approach was used by researchers to analyse the concepts of death sentences in the eradication of corruption crimes and their application. While the comparison approach was used by researchers to compare the application of death penalty in some countries.

The data used in this study consisted of primary and secondary data. Primary Data is obtained from legislation consisting of:

- Contitutional 1945 Article 28A-Article 28 J on human rights.

- Law No. 31 of 1999 on the eradication of corruption crimes.
- Law number 20 of 2001 on the amendment to law Number 31 year 1999 on corruption eradication.
- Law No. 39 year 1999 on human Rights.
- Law No. 6 of 2006 on human rights courts.
- Penal CODE (Criminal Law Code)

Secondary Data is derived from general criminal law books and special Criminal law, legal journals, jurisprudence (ruling judges), legal dictionaries, legal encyclopedia, and articles related to death penalty in corruption crimes.

Data collection techniques are conducted with document studies. (Burhan Chamin, 2001) Documents are written materials or objects relating to a particular event/activity. (Burhan Chamin, 2001) Document studies are conducted by conducting searches to find data relevant to the legal issues encountered. The data that has been obtained is further recorded, edited, studied, and then taken as the core theory, idea, concept or the relevant legal provisions, all data is recorded using the card system (card system), which is a research card containing notes on the results of the study.

Furthermore, the data is collected and compiled, and grouped according to the issues researched. Data processing is preceded by conducting a selection of the collected data, both primary, second, and tertiary data materials. The Data is then selected and sorted according to the needs that will be used to analyse and explain the legal issues or problems expressed in this research.

3. DISCUSSION:

3.1 Mediation

Mediation is a vocabulary or term derived from the English vocabulary, mediation. Mediation is a process of resolving disputes between two or more parties through negotiations or a manner of consensus with the assistance of a neutral party that has no authority to terminate. [Takdir Rahmadi: 2010]. According to Laurence Boulle as quoted by Prof. Dr. Fate Rahmadi He wrote that mediation is: mediation is a decision-making process in which the parties are assisted by a third party (mediator) who seeks to improve the quality of the decision making process and assist the parties to achieve a result agreed upon by the parties, without having a binding decision-making function. [Fatahillah A. Syukur: 2011].

Mediation is one of the alternative forms of dispute resolution that is content. Mediation is also a pouring procedure in which a person acts as a vehicle to communicate between the parties so that their distinct view of the dispute can be understood and possibly reconciled, but the primary responsibility of achieving a peace remains in the hands of the parties themselves. [Muslih MZ: 2007].

In mediation, dispute resolution is more born than the wishes and initiatives of the parties, while the role of the mediator only helps them to achieve the agreement. In assisting the disputing party, the mediator shall be impartial or not favoring to either party.

The Mediator cannot compel the parties to accept an offer of dispute resolution therefrom. The parties determine the agreements they want. The task of the mediator only helps to seek alternatives and encourages them to jointly resolve the dispute, as stated in article 15 PERMA No. 1 year 2008, namely:

a. The Mediator shall prepare the proposed schedule of mediation meetings to the parties to be addressed and agreed;
b. The Mediator shall encourage the parties to directly participate in the mediation process;
c. If deemed necessary, the mediator may do caucus;
d. The Mediator may encourage the parties to browse and explore their interests and to seek out the best possible solutions for the parties. [PERMA No. 1 Year 2008].

3.2 Mediation in Islamic Law

The Koran contains a number of principles of conflict and dispute resolution that can be used by human beings create a harmonious, peaceful, fair and prosperous life. The principles of conflict resolution that the Koran has manifested by the Prophet Muhammad saw in various forms of facilitation, negotiations, adjudications, reconciliation, mediation, arbitration and settlement of disputes through the judiciary (litigation). [Abbas: 2004].

The Koran explains the conflicts and disputes that occur among mankind is a reality. The man as the caliph of Allah on Earth is required to resolve the dispute, because it is human being equipped with reason and revelation in organizing his life. Man must seek and find the best dispute resolution pattern so that the enforcement of justice can materialize.

The dispute resolution pattern can be formulated by human beings referring to the Koran, hadith, and local practices and wisdom. The collaboration of this resource will make it easier for people to realize peace and justice, because the solutions are offered based on religious teachings, while having roots in culture.

The fundamental value of conflict resolution in Alqruan is found in the name of religious teachings, namely Islam. Conflicts and disputes are interpreted in a thorough sense. Conflict of dispute does not only occur in the political and economic fields, but also in the legal and social dimensions. The term conflict resolution is more addressed to the resolution of political, economic, social, cultural and other cases. While the term dispute resolution is more dominant on the legal dimension. Dispute resolution in the legal dimensions is further divided into two categories, namely: the category of dispute Resolution in court, and the category of dispute resolution outside the court. The resolution of conflict and dispute resolution in the legal dimension got a place of its own in the Koran scattered in a number of verses.

In legal dimensions, conflicts or disputes occur because the parties feel their rights and justice are not met. For this they sought to claim the right and get justice, because the parties believed that they had the right, but apparently he did not get it. Justice is the goal of all people to make it happen, but the fact of justice is very difficult to achieve and becomes something foreign to society. As a result the person who deserves the right, does not acquire it otherwise the person who is not entitled, then he gets that right. The granting of rights to one of the parties that is not based on the facts and the right reasons, will cause injustice and unfairness in the community.

In resolving a dispute, the Koran and hadith offered to his people in a court in two ways, namely the proof of the fact of the Law (adjudication), and settlement through Peace (Iṣlāh). The process of dispute resolution by adjudication cannot guarantee the satisfaction of the disputing parties, because there is a party that has limitations in filing a proof tool. Thus, some Qur'anic verses offer the process of resolving disputes through peace (Iṣlāh-SULH) and Hakam in front of the court, although it is used to resemble the way used in mediation. The Islamic legal system is known as Iṣlāh and Hakam.

Iṣlāh in Islamic teachings contains the meaning of a pattern of resolving disputes or peaceful conflicts with the exclusion of differences in the basis of disputes. The point is that the contentious parties are commanded to summarize each other's mistakes and strive to forgive one another. The notion of Iṣlāh also greatly develops its use among the Islamic community broadly, both for the cases of economic disputes of business and non-economic business. This Iṣlāh context can be identified with a mediation or conciliation understanding. [M. Yahya Harahap: 2008].

Besides Iṣlāh is also known as the term Hakam. Hakam has the same meaning as mediation. In the system of Islamic law of Hakam usually serves to resolve the dispute of marriage called Syiqaq. The jurists give a different understanding of the essence. However, from this different sense it can be concluded that the Hakam is a third party that cleave into the conflict between the husband and wife as the party who will arbitpass or settle the dispute between them.

As a guideline, the sense of essence can be taken from the explanation of article 76 paragraph 2 of the law No. 7 year 1989 Jo. Law No. 3 year 2006 Jo. Law No. 50 year 2009 of religious justice. It is said that: "The Hakam is a person appointed to the Court of the family of the husband or the family of the wife or other party to seek the resolution of the dispute against the Syiqaq". The explanation of the passage can be concluded that the Hakam function is only to help find the dispute resolution efforts, not to impose the verdict. After the utmost effort to seek the peace effort between the wives, the obligation of the Hakam ends. Hakam then reported to the judges about the efforts they made against the parties (the husband), then the judge would decide the dispute taking into consideration the input from the essentials.

Thus, we see that the essence in this Islamic law has similarities to the mediator in the mediation process in court. Both (the mediator and the Hakam) do not have the authority to break. Both are the mechanisms of dispute resolution outside the courts conducted by third parties. Iṣlāh and Hakam can be developed to be a method of completion of various types of disputes, as Islamic teachings are ordered to resolve every dispute that occurs among people in a peaceful way (Iṣlāh) in accordance with the word of Allah SWT:

وَإِن طَآئِفَتَانِ مِنَ ٱلْمُؤْمِنِينَ ٱقْتَتَلُوا۟ فَأَصْلِحُوا۟ بَيْنَهُمَا ۖ فَإِنۢ بَغَتْ إِحْدَىٰهُمَا عَلَى
ٱلْأُخْرَىٰ فَقَٰتِلُوا۟ ٱلَّتِى تَبْغِى حَتَّىٰ تَفِىٓءَ إِلَىٰٓ أَمْرِ ٱللَّهِ ۚ فَإِن فَآءَتْ فَأَصْلِحُوا۟ بَيْنَهُمَا
بِٱلْعَدْلِ وَأَقْسِطُوٓا۟ ۖ إِنَّ ٱللَّهَ يُحِبُّ ٱلْمُقْسِطِينَ

It means: And if there are two classes of those who believe in war, you shall reconcile between the two but if one violates the covenant of the other, let it break the covenant that you are fighting until it recedes again at the commandment of God. If he has receded, be righteous between them according to Justice, and let you be fair; Indeed, Allah loves people who are righteous. QS. Al-Hujarāt/49:9].

The Koran and Hadith suggest to choose Iṣlāh as a means of dispute resolution based on the consideration that, iṣlāh can satisfy the parties, and no parties feel victorious or lost in resolving their disputes. Iṣlāh delivers on the tranquility, contentment and strengthening of the relationship of the parties to the dispute.

Islah is the will of the disputing parties to make a peace agreement. Imam Zakariya mentions section as an Akad in which the parties agreed to end their dispute. The peace contract that has been made by the Parties shall be notified to the judge, so that the judge does not continue the process of resolving their dispute through the fact-adjudication evidence.

Akad Iṣlāh (Peace) in happy to be established by the judges, to be implemented by the parties. The existence of Iṣlāh as a peaceful effort in the resolution of disputes has been explained in the Qur'an QS. An-Nisa/4:114 and 128.

لَّا خَيْرَ فِي كَثِيرٍ مِّن نَّجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ بَيْنَ
ٱلنَّاسِ ۚ وَمَن يَفْعَلْ ذَٰلِكَ ٱبْتِغَآءَ مَرْضَاتِ ٱللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا

It means: There is no good in most of their promptings, except the promptings of the one who Enjoin (man) give charity, or do Ma'ruf, or hold peace among men. And whoever does so for seeking the cause of Allah, we will give him a great reward. QS. An-Nisā '/4:128).

What it means: And if a woman is worried about nusyuz or the indifferent attitude of her husband, then it is not why for both of them to hold a truth peace, and the peace is better (for them) even though the man is according to his habit. And if you associate with your wife well and nourish you (from Nusyuz and indifferent attitudes), then Allah is all knowing what you do. QS. An-Nisā '/4:128). The same thing also explained Prophet Muhammad saw in Hadith that means: Iṣlāh is something that must exist among the Muslims, except a peace that dispilalizes the unclean or prohibition of the halal, and Muslims are bound to the promise, except the forbidden promise that is lawful and justify the unclean. This hadith gives affirmation to Muslims to choose the path of peace (mediation) in resolving their dispute, except the peace that is to justify the unlawful and prohibition of the lawful. Even ' Umar ibn Khattab obliged the judges in his time to invite the Parties to do Peace (Iṣlāh), both at the beginning of the process of the matter submitted to him, or during the trial that was in court. The judge must not let the parties not take a peaceful effort. Judges must be proactive and encourage the parties to manifest a peaceful agreement in their disputes.

The assertion of Caliph ' Umar was known from the letter he wrote to Abu Musa al-Ash'ari, a judge in Kufah. ' Umar ibn Khattab wrote a letter containing the principal principles of the court. One of the principles imposed on the judges is the principle of Iṣlāh (peace). Judges are obliged to run Iṣlāh except Iṣlāh which justify the unclean and prohibition of lawful. [M. Mahmud Amus: 1987]. Umar argued that this obligation should be done by judges, because it is hoped that through peaceful efforts (Iṣlāh) justice can realized for the parties. The decision of the Court binding on the parties is not able to give satisfaction to the parties, as the ruling is made based on facts and evidence that has put the parties in a state of win or loss.

' Umar ibn Khattab strongly uphold the peace (Iṣlāh) was applied in court, because the court ruling could not be able to satisfy the wishes of the parties in dispute. The court ruling tends to leave an unkind impression between the parties and the revenge between the two. ' Umar once said, "return to the parties who are in the fight to make peace, because the ruling on the court (court) will leave a sense of revenge. [Muhammad Na'am: 1994].

3.3 Mediation in Indonesia

This law of Indonesian civil proceedings prevails, regulates the peace in resolving civil disputes conducted through the mediation pathway. Although things have been submitted to the Court, but at the time of the trial was first held with both parties attended by both the defendant (its power) and the plaintiff (its power), the judge obliged to inquire on both sides whether they have traveled the mediation path, whether the parties who dispute will make peace first. It is as stipulated in Article 130 HIR or section 154 RBg.

Therefore, for the sake of certainty, order, and smoothness in the process of reconciling the parties in resolving a civil dispute, Article 130 HIR or article 154 RBg is still a cornerstone of regulation for the implementation of mediation. The contents of Article 130 HIR/RBg as follows:

- If on the appointed day, both sides of the hadith, then the Court of the Council of the Assembly seeks to reconcile them;
- If the peace is reached at the time of trial, a deed of peace which both parties punished will execute the treaty, the Act of peace is strong and executed as the usual verdict;
- To the ruling so that it cannot be appealed;
- In an attempt to reconcile both parties, the assistance of an interpreter is required that then for that diturut the following rules of the article (if mediation is not achieved then the examination of the case continues at the next proceeding in accordance with article 131 HIR/RBg).

In addition to the Formyl Foundation set in HIR/RBg, there is actually an MA effort to integrate mediation into the judicial system in a more pushy direction. Initially, the MA issued SEMA No. 1 of 2002 on the empowerment of

first-tier courts implementing a peaceful institution. However, the perceived existence of SEMA is not much different from article 130 HIR, 154 RBg.

Then, MA do a refinement by issuing PERMA No. 2 year 2003. In his consideration, there are several reasons which are behind the publication of PERMA, among others:

a. To reduce the accumulation of cases in court;
b. The mediation process is faster, not formalistic and technical;
c. Cost of relaif cheap or minimal cost;
d. Empowering first-level courts to implement a peaceful institution (ex. Article 130 HIR/154 RBg) is incomplete, so it needs to be perfected;
e. May provide access to the parties to the dispute to obtain justice or to provide a more satisfactory solution to the resolution of the dispute, as the dispute resolution further prioritizes the humanitarian and fraternity approach based on negotiations and agreements rather than the legal and collective power approaches.

According to PERMA No. 2 year 2003, the meaning of mediation is the process of resolving disputes in court through negotiations between the litigants and assisted by a mediator who has a position and function as a neutral and impartial third party and as a neutral third party (impartial) and as a helper or alternative dispute resolution of the best and mutually beneficial to the parties. In principle, there are two types of mediation, that is outside and in court. The mediation within the courts is governed by this PERMA. However there is also mediation outside of the courts where mediation conducted outside the court governed the law No. 30 of 1999 or the arbitration act which is clearly written in article 6 paragraph 1 to 9.

The selection of the mediation process as a resolution of the dispute is essentially not only caused by a lower cost compared to litigants through a court. The mediation process goes with the purpose of two important principles. First, there is the principle of win-win solution, not a win-lose solution. Here, the parties "win equally" not only in the sense of economy or creed, but also include the triumph of moral and reputation (good name and trust). Secondly, mediation has the principle that the verdict does not prioritize the consideration and reason of the law, but on the basis of alignment and sense of justice.

Through the implementation of PERMA No. 2 year 2003 and after evaluation of the implementation of the mediation procedures in the courts based on the regulation of the Supreme Court of the Republic of Indonesia No. 2 year 2003, apparently found several problems that are sourced from the regulation of the Supreme Court, so the Supreme Court regulation No. 2 year 2003 need to be revised with the intention to further leverage the mediation

PERMA No. 1 year 2008 consists of VIII chapters and 27 articles that have been appointed by the Chief Justice on July 31, 2008, PERMA No. 1 year 2008 brings some important changes, even causing legal implications if not lived. For example, it allows the parties to travel mediation at the appeal and casmation levels. The changes were important to the judges, legal counsel, advocates, justice seekers, and those who were involved as mediators or arbitrators.

According to PERMA No. 1, 2008, mediation needs to be paid to the litigants in court because:

a. Mediation is one of the faster and cheaper process of dispute resolution, and can provide greater access to the parties find a satisfactory solution and fulfill a sense of fairness;
b. can be one effective instrument to address the issue of stacking matters in court and strengthening and maximizing the functioning of the Court institution in the settlement of disputes in addition to the process of severing litigation (adjudicative);
c. Encourage the parties to take a process of peace that can be intensified by how to integrate the mediation process into a litigated procedure in the District Court

4. CONCLUSION:

Mediation is the process of decision making in which the parties are assisted by a third party (mediator) who seeks to improve the quality of the decision making process and assist the parties to achieve a result agreed upon by the parties, without having the function of binding decision making. In resolving a dispute, the Koran and hadith offered to his people in a court in two ways, namely the proof of the fact of the Law (adjudication), and settlement through Peace (Iṣlāh). The process of dispute resolution by adjudication cannot guarantee the satisfaction of the disputing parties, because there is a party that has limitations in filing a proof tool. Thus, some Qur'anic verses offer the process of resolving disputes through peace (Iṣlāh-SULH) and Hakam in front of the court, although it is used to resemble the way used in mediation. The Islamic legal system is known as Iṣlāh and Hakam. Iṣlāh in Islamic teachings contains the meaning of a pattern of resolving disputes or peaceful conflicts with the exclusion of differences in the basis of disputes. The point is that the contentious parties are commanded to summarize each other's mistakes and strive to forgive one another.

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