



Islamic Law on Mediation in Indonesia; Position and Strategy

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Abstract

This paper is about Islamic Law on Mediation in Indonesia; Position and Strategy. Islamic law in the context of its position and strategy towards national law becoming positive law has sparked ongoing controversy since independence until now. The various strategies and explanations about them give a special style to the peculiarities of Islamic legal thought in Indonesia. This paper focuses on how the position and strategy of Islamic law in the positivization of law in Indonesia. The plurality of Indonesian law, which is a necessity, becomes a positive partner for Islamic law towards the positivization of legal law nationally. The strategy taken is to unite perceptions which are the substance of Islamic teachings in the meaning of sharia and fiqh in the form of universality values that exist in Islam such as the substance of justice, honesty, equality, balance and the like. The concept of mediation in Islamic law must be in accordance with PERMA No. 1 of 2016, its position and strategy. Mediation is nothing more than facilitating the negotiation process, where a mediator tries to help the parties negotiate effectively and efficiently so that they can reach the decisions they want. There are two simple rules for mediators proposed by Stitt, namely the first is do no harm.

Keywords: Islamic Law, Mediation, Position, Strategy

Background

Thomas E Crowley who said that Mediation is a process in which a neutral person to help the opposing parties reach their own settlement. It is a process in which a neutral party tries to help the disputing parties reach a resolution on their own. Crowley revealed that experts liken mediation to a “turbocharged negotiation” in which the mediator is the turbocharger. This means that mediation is more about finding a common ground for agreement on whatever the parties want with a win-win solution. The same thing was also expressed by John Haynes, who said that mediation is a process where there is a third party who helps the disputing parties find a way out so as to reach an agreement as a solution that is accepted by the parties. and this can maintain good relations between the disputing parties. According to him, the mediation process is the management in negotiating between the two parties, and the mediator is a manager who leads the discussion about the problems to be resolved.

With such a position and strategy of Islamic law, it can provide a solution as well as a great opportunity for Indonesian Islamic law to penetrate into coloring the development of national law into positive law through the process of positivizing Islamic law in Indonesia. (Muhammad Shohibul Itmam, Luluk Sekar Liyana, 2019)



Islamic law is equated with Shari'a. Shariat itself lughawy means the road to the watering place or the original path followed, or the place where water flows in the river (Syarifuddin, 1999). Meanwhile, according to the term, namely the teachings and rules that are sourced from the Qur'an and as-Sunnah. In a similar sense, Jaih Mubarak quotes Muhammad Ismail (1999) asserting that "what has been determined by Allah for his servants both in the field of belief, action and morals. Meanwhile Hasbi Ash Shidiqy quotes Saltut's opinion giving the meaning of shariat to laws and regulations that ordained by Allah for his servants to be followed in his relationship with Allah and his fellow human beings" (Ash-Shiddieqy, 1975).

Islamic Shari'ah is Islamic law that applies eternally throughout the ages. Meanwhile, fiqh is a concrete formulation of Islamic Shari'ah to be applied to a particular case in a place and at a time. Both can be distinguished but cannot be separated (Makrifah, 2016). If then this understanding is used to read the story of the king of Andalusia above, then the stipulation that the sanctions for people who have sexual relations during the day of Ramadan according to shariat can choose one of the options, fast for two consecutive months, free slaves, or feed them. 60 poor. However, that there are certain social facts in consideration for which the last two options are not applied to the Andalusian emir, it is solely the result of fiqh ijtiḥad. Fiqh is also identified as one of the dimensions of Islamic law, namely the product of fuqaha' reasoning on shariah, which is empirically used as applied law by Muslims in various regions. Islamic law.

It has a dual function, namely the shariah function and the fiqh function. Shariah is an institutional function that Allah commands to be fully complied with, or the essence of Allah's instructions for individuals in managing their relationship with Allah, fellow Muslims, fellow human beings, and with all creatures in this world. While fiqh is a product of human thought. Fiqh is a human endeavor which with its intellectual power tries to interpret the application of sharia principles systematically (Bisri, 2004).

Discussion

There is a term syarī'ah in Islamic law which must be understood as an essence of the teachings of Islam itself. Syar'at or also written as syarī'ah etymologically (language) as stated by Hasbi as-Shiddieqy is "The way where the springs come out or the way through the waterfall" which is then associated by the Arabs as at-tariqah al- mustaqīmah, a straight path that every Muslim must follow. The shift in meaning from denomination, the source of springs, to a straight path has a reasonable reason. Every living thing definitely needs water as a means of maintaining the safety and health of the body, in order to survive in the world. Likewise, the notion of "straight path" in it implies that the Shari'a is a guide for humans to achieve goodness and salvation both in body and soul. That is the straight path that every human being must always go through to achieve happiness and safety in his life



Terminologically (term) syar'ah is defined as the rules or laws prescribed by Allah to His servants to be followed. The opinion of Manna' al-Qaththan clarified, that syar'at means "all the provisions of Allah that are prescribed for His servants, both concerning faith, worship, morals, and muamalah".

Mahmud Shaltut in *al-Islâm: 'Aqdah wa Syar'ah* said, "Shariah is the rules set by Allah or set on the basis by Allah so that humans hold fast to them in their relationship with their Lord, in relation to their fellow Muslims, in relation to his fellow human beings, relate to the universe, and relate to life. The basic legal norms contained in the Koran are still very general, so that later their development was detailed by the hadith of the Prophet and enriched by the thoughts of scholars. The basic legal norms that are general in the Qur'an are then classified and divided into several parts or more concrete rules so that they can be practiced in everyday life.

To be able to practice these concrete rules in everyday life, it is necessary to have a scientific discipline to understand them first. These disciplines include *ilm al-fiqh*, which into Indonesian is translated into Islamic jurisprudence (*fiqh*). As reported by Muhammad Daud Ali in *Islamic Law*, the science of *fiqh* is a science that studies or understands the Shari'a by focusing on the actions (laws) of human mukallaf, namely humans who according to Islamic provisions have reached puberty. by a mujtahid in his quest to find God's law. *Fiqh* is related to the practical *syara'* laws which are rooted in detailed arguments. It is these *syara'* laws which are called *fiqh*; whether it is produced by *ijtihad* or without *ijtihad*. So it is clear that the laws related to the field of *aqidah* and morals are not included in the discussion of the science of *fiqh* and are not said to be the science of *fiqh*.

The position and strategy of Islamic law towards national law and becoming a positive law is full of challenges and hard struggles and certainly sparks controversy on an ongoing basis from time to time. The portrait of the position of Islamic law, its various strategies and explanations of Indonesian Islamic law give a special style to the thought of Islamic law in Indonesia. The position of Islamic law being part of the raw material for national law can be managed in a pluralistic manner in conjunction with other laws that are growing in Indonesia. The plurality of Indonesian law, which is a necessity, becomes a positive complementary partner for Islamic law towards the positivization of legal law nationally. justice, honesty, equality and the like. With such a position and strategy of Islamic law, it can provide as well as a great opportunity for Indonesian Islamic law to penetrate into coloring the development of national law through the process of positivizing Islamic law in Indonesia.

The application of Islamic law in the context of its position and strategy is almost certain to always start from the discourse around shariah and *fiqh*, because these two terms are the core of Islamic law itself, so discussing them is a necessity if you want to understand Islamic law. Islam teaches a complete law in managing a complex life so that Islamic law develops its understanding between shariah and *fiqh* (Itmam, 2015). Explanations of Islamic law, shariah



and fiqh have actually been given by many experts and have been discussed for a long time, but the level of flexibility of these terms to be used in different time spaces has made it an interesting term to discuss. Therefore, studying and discussing Islamic law, shariah and fiqh mainly in the context of their role and strategic position in contributing to increase the space for discourse on the positivization of Islamic law in Indonesia (Wahid, 2014).

Mediation is a process in which there is a third party as a mediator and impartial, whose job is to resolve the conflict. Which one makes the decision is in the hands of the disputing parties. According to Muntasir Syukri, mediation is an alternative dispute resolution (ADR) out of court which is another option for the disputing parties based on voluntary action and an agreement to take the mediation route. In the Big Indonesian Dictionary, mediation is the process of involving a third party in resolving a dispute as an advisor. In the Regulation of the Supreme Court (Perma) No.1 of 2016 concerning the implementation of Article 1 paragraph 1 it is also explained that mediation is a method of resolving disputes through negotiations to obtain an agreement between the parties with the assistance of a mediator.

The mediator is a neutral party who assists the parties in the negotiation process to seek various possible dispute resolutions without resorting to breaking or imposing a settlement. From the explanation above, it can be concluded that the mediation process involves the parties having the dispute and a mediator as a third person who mediates. Mediation is a negotiation process or process in reaching an agreement between the disputing parties. The purpose of mediation is to reconcile in a win-win solution, reach an agreement that is mutually agreed upon by the parties and maintain good relations between them. The mediator only acts as a facilitator who leads the parties to the goal of a peace agreement.

Each of the disputing parties came voluntarily, based on their own wishes and desires. Without coercion and pressure from others, they voluntarily come to resolve the problems they experience at the negotiating table in the mediation process. of their own choice, however it should be noted that PERMA No. 1 of 2016 is implicitly written that every judge, mediator, parties, and legal counsel are required to follow the procedure for resolving disputes through Mediation. In addition, the presence of the parties may not be represented by a legal representative or any other party in the mediation process. In another article it is also explained that.

One of the important advantages of mediation is confidentiality. The parties will feel that their privacy is protected if they resolve the dispute through mediation when compared to the dispute resolution process through the courts. This principle states that everything that happens in a meeting organized by mediators and disputants (the conflicting parties) is confidential and cannot be broadcast to the public or the press by each party.



Likewise, the mediator must maintain the confidentiality of the contents of the mediation and should destroy all his records at the end of the mediation session he does. The mediator also cannot be called as a witness in a case that is resolved in the mediation that he initiated if the case is brought to another forum, such as a court. Each disputing party (disputants) are advised to respect the confidentiality of each issue and the interests of each party. This guarantee of confidentiality must be provided so that each party can express their problems and needs directly and openly.

This principle emphasizes the position of the mediator in the mediation process. where the mediator is independent, without any intervention from any party. The mediator does not appear like a judge who digs up information ending in a win-lose solution. He does not also act as an arbitrator, but he is tasked with organizing a dialogue between the disputing parties with a certain strategy so that they can view the problem as a common problem and must be solved together.

The mediator is required to be neutral and impartial, because of the position of the mediator as a mediator or someone who facilitates negotiations. The mediator ensures fairness in service, is more objective, constructive and comprehensive. In avoiding taking sides with one of the parties, a mediator must be careful with prejudices or stereotypes on each personal character of the disputing parties, both on a social and financial level.

The mediator will dig a lot of information about the validity of the data, various views of the parties, try to find out what the parties want and help the parties to find other alternative resolutions. The facilitative mediator does not provide any recommendations to the parties, does not provide advice or opinions, nor does he predict what the court will do in the future regarding the case he is handling. This is because what is developed in this type of mediation is that the mediator is a volunteer and does not need expertise in discussion. Facilitative mediation would be a good method to use, because this method provides an opportunity for each party to speak their grievances in order to resolve their problems. The mediator facilitates discussions and negotiations in an effort to find a solution that is acceptable to both parties to the dispute.

The task of the mediator is to try to assist the parties in exploring the desired options and can facilitate discussion even though the mediator is sure whether what is being discussed is right or wrong, whether what is being discussed is fair or unfair. The parties and lawyers are active in their respective roles in the process where they try to persuade each other, but not with the mediator. The mediator's perception of right or wrong is not a priority in this process. In this method, the parties are responsible for managing the discussion while the mediator is responsible for managing the discussion process.



This facilitative mediation process is more structured. Emphasis is placed on the needs and interests of the disputing parties. The mediator directs the parties from positional negotiations to interest based negotiations that lead to mutually beneficial settlements. The mediator only needs to understand the mediation process and technique, without having to be an expert in the area in dispute. In this process the mediator mobilizes the parties to be more creative in finding alternative solutions. The advantage of this method is that when the dispute is over, the parties will feel satisfied, because it is their interests that are raised and not just what is being disputed, while the drawback is that the time required is longer.

Conclusion

Islamic Law on Mediation in Indonesia; The position and strategy must of course be in accordance with the regulations that have been set by the government, one of the sources of which is the teachings of Islam which of course cannot be separated. The success of mediation carried out by traditional leaders is highly dependent on the social status of a mediator. Because the theory put forward by Ahmad Gunaryo is that the higher the social status of a mediator, the higher the probability of success. Recognizing the importance of mediation, Indonesia also wants to show the same steps as the countries that previously and have succeeded in developing mediation, namely by reviving the spirit of nationalism and customs in each region throughout Indonesia through mediation. Mediation commonly used in mediating family disputes, namely the therapeutic model.

Mediation with a therapeutic approach is usually more focused on a comprehensive settlement, not limited to dispute resolution, but on reconciliation between the parties. The negotiation process that leads to decision making will not begin until the emotional relationship between the disputing parties is resolved. The function of the mediator is to diagnose the cause of the conflict and deal with it based on psychological and emotional aspects so that the disputing parties can repair and re-establish their relationship. In this process a mediator is expected to have skills in the field of counseling as well as mediation processes and techniques. The emphasis is more on therapy, either the premediation stage or its continuation in the mediation process.



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