International Journal of Civil Engineering and Technology (IJCIET)
Volume 8, Issue 8, August 2017, pp. 1060–1067, Article ID: IJCIET_08_08_113
Available online at http://http://www.iaeme.com/ijciet/issues.asp?JType=IJCIET&VType=8&IType=8
ISSN Print: 0976-6308 and ISSN Online: 0976-6316

© **IAEME** Publication

Scopus Indexed

ISLAMIC LEGAL PARADIGM ON DISPUTE SETTLEMENT

Abu Rokhmad
Walisongo Islamic State University, Semarang, Indonesia

ABSTRACT

Dispute is a human phenomenon that is almost always present in every society. The best step in the event of a dispute is resolved and not silenced. In the event of a dispute, there are two mechanisms that can be used to resolve it, namely through court (litigation) and outside court (non-litigation). The litigation paradigm believes that the law must be enforced to end the conflict. The procedures for filing the case, the law and the rules are so clear that the truth, whoever loses and wins immediately can be seen. Hence, justice will be realized if the formal evidence submitted meets the standards of applicable legal norms. In addition, a non-litigation paradigm is used, a paradigm that is rooted in consensus, deliberation or peace settlement between the parties. The philosophy of resolution is not to seek absolute victory on the one hand, so there must be another party to lose. This paradigm further encourages the conflict to end by making all parties as winners, win-win solution. Even if there is an unfulfilled desire, both parties must bear the same weight loss. Islamic law also recognizes two paradigms of dispute settlement. Islamic law supports any dispute settled by law in the court (al-qadha). There is nothing wrong if society brings the issue before the judge. But, Islamic law calls for moral advice, it is better for the parties to make peace and settle the matter in a kinship (islah, tahkim). Thus, brotherhood is maintained and feelings of unease can be avoided.

Key words: paradigm, islamic law, dispute resolution.

Cite this Article: Abu Rokhmad, Islamic Legal Paradigm on Dispute Settlement. *International Journal of Civil Engineering and Technology,* 8(8), 2017, pp. 1060–1067
http://www.iaeme.com/IJCIET/issues.asp?JType=IJCIET&VType=8&IType=8

1. INTRODUCTION

In the event of a dispute, the public may choose the settlement through two channels, namely in court and out of court. These two terms are understood and named differently by experts. Some experts use the term settlement of disputes through state institutions (state institutions) and the institution of the people (folk / traditional institutions) (Benda-Beckman, 1986). Vago uses the term public and formal methods of conflict resolutions and non-legal methods of conflicts resolutions. Kubasek and Silverman uses the term litigation for the settlement of disputes in court, and the extrajudicial settlement of disputes, or popular with the term alternative dispute resolution (ADR) to settle disputes out of court (Kubasek and Silverman, 1997).

In the Indonesian literature, ADR is also called the Co-Operative Dispute Settlement Mechanism (Mekanisme Penyelesaian Sengketa Secara Kooperatif/MPSSK), or Alternative Dispute Mechanism (Mekanisme Alternatif Penyelesaian Sengketa /MAPS). The use of the word 'out of court', 'alternative' and 'cooperative' indicates that the parties to the dispute are free to choose any means outside the court (state institutions, formal and public settlements, litigation) to resolve the dispute faced. According to Law no. 30 of 1999 on Arbitration and Alternative Dispute Resolution (ADR), Article 1 (10) states that *"Alternative dispute resolution is an institution for settling disputes or differences of opinion in a procedure agreed by the parties that is, outside the court by way of consultation, mediation, conciliation or expert judgment."*

Non-litigation dispute resolution can actually be done both inside the court and out of court. In some literature, non-litigation dispute resolution in court or named after the *Court Connected ADR* or *Inside Court ADR* or *Court Dispute Resolution* (CDR) (Sulistiyono, 2006), may be, for example, the peace agreement in court. In the legal system in Indonesia, peace institutions in court called *dading*. Formally, the judge's guidance for directing dispute resolution through *dading* is regulated in Article 130 of the HIR (Het Indonesich Reglement, Staatsblad 1941), while the parties to the dispute in making the peace agreement are regulated in article 1851 of the Civil Code. On the other hand, institutions of non-litigation dispute resolution outside the court among others include negotiation, mediation, conciliation and others. Thus, what about Islamic law regarding the dispute settlement? Is it more likely to use litigation or non-litigation institutions? In this context, this paper attempts to Islamic law paradigm regarding these two paradigms of dispute settlement.

2. ON PARADIGM

Science is fundamentally built on certain assumptions and points of view in the world and / or in humans. A view that the Earth, and other cerestrial objects in the solar system surround the sun clearly has different consequences and theoretical implications in the development of astronomy, when compared to the old paradigm that the earth is the center of the universe. Similarly, the paradigm that man is a machine, has given birth to medical science that sees the sick as a broken machine that must be treated or repaired mechanically as well (Thoha, 2004).

Similarly, a paradigm that the source of all existence or manifest is God (theocentricism) will obviously have different implications in the development of science, compared to other paradigms that humans have a central position in the universe (anthropocentric) (Thoha, 2004). It is also a paradigm when conflicts are to be resolved through state law, because the community also has its own way to solve the problem. These two paradigms will have implications for different conflict resolution procedures.

It is known there are two paradigms of research, namely the paradigm of quantitative and qualitative research. Epistemologically, the quantitative paradigm holds that the source of science consists of two, namely rational thinking and empirical data. Therefore, the measure of truth lies in coherence and correspondence, in accordance with previous theories and in accordance with empirical reality. The development of science and follow the cycle spins logico [hypothetico]- deductive empirical studies approach (Glaser & Strauss, 1967, in Jennings & Junek, 2007; Suriasumantri,, 1985). The paradigm of quantitative approach tends particularistic and based on the philosophy of positivism of August Comte (1798-1857). In contrast, qualitative research is humanistic which places humans as the main subject in social or cultural events (Susilo, & Syato, 2016). This type of research is based on the phenomenological philosophy of Edmund Husserl (1859-1928) and later developed by Max

Weber (1864-1920) into sociology studies. The two paradigms are clearly very different and immediately visible in the design of research.

As a concept, the term paradigm was first introduced by Thomas Kuhn in his *The Structure of Scientific Revolution* (1962). Furthermore, this concept was popularized by Robert Friedrichs in his book *Sociology of Sociology* (1970), followed by Lodahl and Cordon (1972), Phillips (1973), Effrat (1972) and Friedrichs (1972 a and 1972 b) (Ritzer, 1985). Kuhn believes that the paradigm is an overall arrangement of beliefs, values and techniques being equally used by certain members of the scientific community (Ritzer, 1985).

In general, the paradigm is defined as a set of beliefs or basic beliefs that determine a person in daily action. There is also a view that the paradigm is a fundamental image of the subject matter of a science. The paradigm outlines what to learn, what statements should be put forward and what rules should be followed in interpreting the answers obtained. Thus, the paradigm is like a mental window used one to observe the outside world or where people explore the world view (Muslih, 2004).

According to Patton, the paradigm is a view, a general perspective or a way of segregating the complex realm, then giving meaning and interpretations. This understanding shows that the paradigm is not just a methodological orientation or a set of rules for research but also discuss perspectives, underlying assumptions, generalizations values, convictions or a complex disciplinary matrix (Handayani & Sugiarti, 2002).

Egon G. Guba states that paradigm is a set of fundamental beliefs that guide human actions both in everyday actions and role in scientific research (disciplinary inquiry paradigm). Discipline inquiry paradigm is a basic conviction that used various circles to find the truth of the reality of being a science or discipline specific knowledge (Salim, 2001). In the context of this article, the paradigm is not in terms of scientific research, but more as a perspective of Islamic law in selecting or determining appropriate mechanisms for resolving disputes.

3. ISLAMIC LAW AND DISPUTE RESOLUTION

Reviewing on the dispute will be immediately comes to mind is how the law is enforced. The dispute will not be a problem if its enforcement mechanism is operating as regulated as well as in the law. However, law enforcement is not just automated and linear work (Rahardjo, 2002). The human factor is very involved in the effort to enforce the law. Thus, law enforcement is no longer the product of logical deduction, but rather the result of choices. The output of law enforcement can not be based solely on logical prophecy, but also 'not according to logic' (Rahardjo, 2002).

It is true that one of the functions of the law is to resolve the conflicts that occur in society (Milovanovic, 1994; Vago, 1997). Law as the most obvious model of the justice system) became operational after the conflict, when a person claims to have been compromised interests of others. The court's task is to make decisions that can end the conflict (Aubert, 1975). This is the explicit or implicit traits that characterize most of the study of law and society. When the rights of owned by a person is in conflict with the rights of others, then there is a conflict between the rights of the people involved (Rahardjo, 2002). In such situations, the existence of law is required in order to resolve the conflict that arises. The use of such a law has some advantages, to provide a rational, integrative, legitimate beings, and supported the implementation mechanism and clear sanctions (Vago, 1997).

Since conflict is a complex and unique issue, its settlement of disputes often can not be based solely on the logic of the law, but also justice and the common good. To borrow Rahardjo's legal language, a progressive law enforcement is needed (Rahardjo, 2002). Thus, there is no standard type of absolute enforcement. There is only a kind of standard, modern law enforcement structure (Ghofur & Susilo, 2017; *Ghofur* & *Sulistiyono*, *2015*). Therefore, it is possible to modify the types of law enforcement according to the characteristics of a particular society. Shortly, progressive dispute resolution characteristic is beyond the limits of legal procedure that are not anarchic and fixed within legal boundaries, intelligent and meaningful, socially just and relying on an autonomous society (Rahardjo, 2002

From the perspective of Islamic law, when a dispute occurs there are two paths of settlement that can be taken, namely *hakam* (Q.S Sura 4: 105), and reconciliation (Q.S Sura 4: 128). *Hakam* in its most concrete is transformed into a *qadi* (judge) or judicial *(qadha / hukumah*) deciding the case legally (Madkur, 1993). In other hand, reconciliation is to reconcile the legal institutions, either through a third party or not (al-Munawar, 2004).

Furthermore, there is also stated that the dispute settlement in principle can be done through three channels, namely by peaceful means *(shulh),* arbitration *(tahkim)* and (the judicial process *(al-qadha*') (Dewi et al., 2005; Hamid, 1983). The difference in the two opinions lies in the concept of *hakam, tahkim* and *al-qadha* '. The terms *hakam and tahkim* are sometimes understood in the context of peaceful dispute resolution with third parties as arbitrators / mediators. This notion is similar to *shulh,* just depending on the presence of a third party. *Hakam* and *tahkim* also be understood as the settlement of disputes under the law with *al-qadha* as the place. Others argue that in Middle East countries, non-litigation dispute resolution covers several ways, among others *sulh* (conciliation) and *tahkim* or *hakam* (arbitration), also known as *al-wasathah* (mediation).

Al-qadha (justice) can be interpreted as decided, finish, sets. According to Salam Madkur, the courts are the place to decide disputes between people based on the God's provision. According to Sayyid Sabiq (1971), the court is an institution to resolve the dispute *(al-khusumat)* that occurs between human beings in accordance with the rule of law that has been prescribed by Allah. These two views over the court makes a referral of settlement when there is a dispute, any kind of disputes either civil or criminal.

Throughout the history of Islamic law, encountered three models of law enforcement agencies, the power of *al-qadha* (*wilayat al-qadha*), the power of *al-hisbah* (*wilayat al-hisbah*) and the rule of *al-madhalim* (*wilayat al-madhalim*). Each of which has different powers (Zein, 1994). *Al-qadha* authority is to resolve certain problems, including *madaniyyat* judge actions, civil *(al-ahwal al-syakhsiyyah),* criminal *(jinayat)* and other additional duties. *Al-hisbah* is the official state agency with authority to resolve minor problems which by nature do not require the judicial process. *Al-madzalim* is a government agency set up specifically to defend those persecuted due to arbitrary attitude of the state authorities, commonly sticking by *al-qadha* or *al-hisbah*. The agency is also authorized to resolve bribery or corruption issues.

In the context of modern Indonesia, *wilayat al-hisbah* and *wilayat al-madzalim* -- can be aligned with state auxiliaries institution, the state agency that is independent and semi judiciary. In concrete form, the agency has the first name begins with a "commission" as the Business Competition Supervisory Commission (KPPU) or the Commission Eradication Commission (KPK) to *al-hisbah,* and the National Human Rights Commission (Komnas HAM) to *al-madzalim*. Of course this alignment needs further analysis.

The existence of the judiciary is a collective obligation *(fard kifayah)* to prevent injustice and resolve disputes as well as mandatory for a judge to administer justice for mankind (Zein, 1994). One of the functions of the judiciary, according to TM. Hasbi Ash-Shiddieqy is showing religious law. The judge simply applies to the realm of reality, not establishes something that does not yet exist. However, the judge can not refuse the settlement of a lawsuit on the grounds there is no provision of law. Therefore, *ijtihad* is allowed and the religion guarantees its validity.

Ishlah is to decide disputes *(qath'u al-niza', qath'u al-munaza'ah, qath'u al-khusumah*). *Ishlah* is an agreement with a view to put an end to a dispute between two or more mutually dispute. *Islah* is the entrance to prevent a dispute, deciding a controversy and contention. The opposition, if allowed to take place, will bring destruction, for it *ishlah* prevents the things that will cause destruction and eliminate the things that evoke slander and contradiction (ath-Tharabilisi, 1973). *Ishlah* can be done on the initiative of private parties dispute, but it can be proposed by the other party or a third party involved (*hakam*). *Hakam* serves as a mediator (conciliator) of two or more parties. In technical terms of non-litigation dispute settlement, the *hakam* is aligned with the mediator or arbitator.

The means of dispute resolution is a tradition that has long been rooted in Arab societies even before Islam was born. When the message of Islam is present, the tradition is reinforced by Islamic doctrines that teach Muslims to create peace and harmony in society, and egalitarian in nature (Ghofur & Susilo, 2016; Ghofur & Sulistiyono, 2015). Almost all the legal community has its own traditions in resolving disputes, both traditional and modern.

In practice, Islamic law does not only advocate peace for civil cases only, even peacefully possible for criminal matters. Thus, Islam recognizes two paradigms in dispute resolution namely the litigation and non-litigation paradigm. The litigation paradigm is a fundamental view and belief that the only appropriate institution to resolve disputes is through the courts. In contrast, the non-litigation paradigm departs from the basic assumption that dispute resolution does not have to go through law and the courts. Out-court methods are much more effective at resolving disputes without leaving a wound on the opponent's heart.

Support from al-Qur'an and al-Hadith texts to resolve disputes peacefully. Such reconciliation is mentioned in QS, 4: 128, 35, 129, 2: 182, 224, 228, 731: 9, 10. Even in the context of a dispute or conflict that has hardened into open war even, Islamic teachings still support peaceful efforts. Thus, peace is a basic principle in the life (*umma*) of Islam. This principle is a way of life that enables a person or society to solve and overcome various problems in an easy, smooth, balanced and fair way. Even the word Islam itself - as a religious nomenclature - means the religion of peace.

Peace in the form *shulh* to end a dispute divided in three forms. First, the peace in an existing case of recognition of the defendant, namely someone who sued the other party about an object lawsuit and the defendant confirmed the contents of the demands of the defendant. Such peace, according to the jumhur ulama allowed. Secondly, the peace of something denied by the defendant, as the plaintiffs have a right to something that is controlled by the defendant but the defendant denies the allegations. According to the Maliky, Hanafi and Hanbali school, such peace is permissible. The reason for the generality of subsection *al-shulh khair* and sayings of the Prophet Muhammad who advocated making peace origin does not justify the unlawful and prohibiting the lawful; Third, peace in the silence of the defendant's case, namely the existence of a lawsuit in which the defendant did not provide answers to the lawsuit alleged. According to Ibn Abi Laila, peace in this form is permissible. However the

Shafi'i school of thought holds that peace in this form is not permissible because the silence of the defendant is a form of denial.

4. CONCLUSIONS

From the above analysis, it can be concluded that the dispute is a human phenomenon that almost always exist in society. The best step in the event of a dispute is resolved and not silenced. In the event of a dispute, there are two mechanisms that can be used to resolve it, namely through court (litigation) and outside court (non-litigation). The litigation paradigm believes that the law must be enforced to end the conflict. The procedures and procedures for filing the case, the law and the rules are so clear that the truth, whoever loses and wins immediately can be seen. Justice will be realized if the formal evidence submitted meets the standards of applicable legal norms.

In addition, the community also uses a non-litigation paradigm, a paradigm that is rooted in consensus, deliberation or peace settlement between the parties. The philosophy of resolution is not to seek absolute victory on the one hand, so there must be another party to lose.This paradigm is pushing for conflict can be ended by making all parties as the winner. Even if there is a desire unfulfilled, the both parties should bear the burden of losing the same weight.

Islamic law also recognizes two paradigms of dispute resolution. Islamic law to support any legal disputes are resolved in court *(al-qadha)* . There is nothing wrong if people bring the matter before a judge. But Islamic law calls for moral advice, should the parties to reconcile and resolve the issue amicably *(reconciliation, tahkim)* . Thus, the brotherhood (silaturrahmi) stay awake and uncomfortable feeling can be avoided. According to Islamic law, all disputes can be settled amicably out of court, including criminal cases though .

REFERENCES

[1] Al-Hejailan, Salah, ‘Mediation as a Means for Amicable Settlement of Disputes in Arab Countries,’ dalam *Conference on Mediation*, Geneva, 29 Maret 1996. Fathi Kemicha, The Approach to Mediation in the Arab World,’ dalam *Conference on Mediation,* Geneva, 29 Maret 1996.

[2] Al-Munawar, Said Agil Husin, “Islah: Kajian Hukum Islam dan Hukum Positif” dalam *Hukum Islam dan Pluralitas Sosial*, (Jakarta: Penamadani, 2004).

[3] Arief, Barda Nawawi, “Pemberdayaan Court Management Dalam Rangka Meningkatkan Fungsi Mahkamah Agung: Kajian dari Aspek Sistem Peradilan Pidana,’” Makalah dalam *Seminar Court Management di MA-RI dan Diskusi Buku: Fungsi MA dalam Praktek Sehari-hari*, (Salatiga: FH UKSW, 2001).

[4] Ash-Shiddieqy, M. Hasbi, *Koleksi Hadis-hadis Hukum*, (Semarang: Pustaka Rizki Putra, 2001).

[5] Ash-Shiddieqy, T.M. Hasbi, *Peradilan dan Hukum Acara Islam*, (Bandung: al-Ma’arif, tt).

[6] Ath-Tharabilisi, Imam ‘Alauddin Abil Hasan Ali bin Khalil, *Mu’inul Hukkam*, cet. II, (Mesir: Musthofa al-Bab al-Halabi, 1973).

[7] Aubert, Vilhelm, *Sociology of Law: Selected Readings*, (tt: Penguin Books, 1975).

[8] Benda-Beckman, F. von., “Some Comparative Generalizations about The Differential Use of State and Folk Institutions of Dispute Settlement,” dalam A.N. Allot, dan G. Woodman (ed.), *People’s Law and State Law*, (Foris, Dordrecht, 1986).

[9] Dewi, Gemala (et.al), *Hukum Perikatan dalam Islam di Indonesia*, (Jakarta: Kencana dan FHUI, 2005).

[10] Direktorat Pembinaan Badan Peradilan Agama Islam, *Kompilasi Hukum Acara Islam*, (Jakarta: Depag, 1994).

[11] Ghofur, Abdul, and Sulistiyono Sulistiyono. "Eklektisisme dalam Taqnîn Hukum Keluarga di Dunia Islam." *ISLAMICA: Jurnal Studi Keislaman* 8, no. 2 (2015): 261-291.

[12] Ghofur, Abdul, and Sulistiyono Sulistiyono. (*2015*). *Peran Ulama dalam Legislasi Modern Hukum Islam. Asy-Syirah: Jurnal Ilmu Syariah dan Hukum 49*(*2*), *265-297.*

[13] Ghofur, Abdul, and Sulistiyono Susilo. "Perempuan dan Narasi Kekerasan: Studi Kritis Peran Gender dalam Deradikalisasi." *Teosofi: Jurnal Tasawuf dan Pemikiran Islam* 5, no. 2 (2016): 431-454.

[14] Ghofur A., & Susilo S. (2017). Maslaha as the Philosophical, Political, and Legal Basis on the Islamic Banking Legislation in Indonesia. *Global Journal Al Thaqafah 7*(1), 7-17

[15] Hamid, A.T., *Ketentuan Fiqih dan Ketentuan Hukum yang kini Berlaku di Lapangan Perikatan*, (Surabaya: Bina Ilmu, 1983).

[16] Handayani, Trisakti dan Sugiarti, *Konsep dan Teknik Penelitian Gender*, (Malang: UMM Press, 2002).

[17] Karim, Helmi, *Fiqh Muamalah*, (Jakarta: Rajawalipress, 1993).

[18] Kubasek, N.K. dan G.S. Silverman, *Environmental Law*, (New Jersey: Prentice Hall Upper Saddle River, 1997).

[19] M. Zein, Satria Effendi, "Arbitrase dalam Islam", dalam *Mimbar Hukum*, No. 16, Tahun V, (Jakarta: Yayasan al-Hikmah, 1994).

[20] Madkur, Muhammad Salam, *Peradilan dalam Islam*, (Surabaya: Bina Ilmu, 1993).

[21] Milovanovic, Dragon, *A Primer in the Sociology of Law*, Second Edition, (New York: Harrow and Heston, 1994).

[22] Muslih, Mohammad, *Filsafat Ilmu*, (Yogyakarta: Belukar, 2004).

[23] Rahardjo, Satjipto, "Indonesia Inginkan Penegakan Hukum Progresif", dalam *Kompas*, 15 Juli 2002.

[24] Rahardjo, Satjipto, "Menjalankan Hukum dengan Kecerdasan Spiritual" dalam *Kompas*, 30 Desember 2002,

[25] Rahardjo, Satjipto, "Negara Hukum, Proyek Yang Belum Selesai" dalam *Kompas,* 11 Agustus 2003,

[26] Rahardjo, Satjipto, "*Sosiologi Hukum Untuk Aceh Pasca-Tsunami*," Makalah Semiloka Nasional, PDIH Undip-Bappenas, 31 Mei-2 Juni 2005.

[27] Rahardjo, Satjipto, "Tidak Menjadi Tawanan Undang-undang" dalam *Kompas*, 24 dan 25 Mei 2000

[28] Rahardjo, Satjipto, *Sosiologi Hukum: Perkembangan Metode dan Pilihan Masalah*, (Surakarta: MUP, 2002).

[29] Rahman, Afzalur, *Nabi Muhammad sebagai Seorang Pemimpin Militer*, (ttp: Amzah, 2002).

[30] Ritzer, George, *Sosiologi Ilmu Pengetahuan Berparadigma Ganda*, terj. Alimandan, (Jakarta: Rajawali).

[31] Sabiq, Sayyid, *Fiqhus Sunnah*, jilid III, (Kuwait: Darul Bayan, 1971).

[32] Salim, Agus, *Teori dan Paradigma Penelitian Sosial*, (Yogyakarta: Tiara Wacana, 2001).

[33] Satjipto Rahardjo, *Hukum Progresif Sebagai Dasar Pengembangan Ilmu Hukum Indonesia*, *Penafsiran Hukum Yang Progresif*, Bacaan Mahasiswa PDIH Undip Semarang, 2005).

[34] Sulistiyono, Adi, *Mengembangkan Paradigma Non-Litigasi di Indonesia*, (Surakarta : Sebelas Maret University Press, 2006)

[35] Suriasumantri, Jujun S., *Filsafat Ilmu: Sebuah Pengantar Populer*, (Jakarta: Sinar Harapan, 1985).

[36] Susilo, Sulistiyono, and Ibnu Syato. "Common identity framework of cultural knowledge and practices of Javanese Islam." *Indonesian Journal of Islam and Muslim Societies* 6, no. 2 (2016): 161-184.

[37] Thoha, Mahmud, *Paradigma Baru Ilmu Pengetahuan Sosial & Humaniora*, (Bandung: Teraju, 2004).

[38] Vago, Steven, *Law and Society*, (New Jersey: Prentice Hall, 1997).

[39] Muslich Shabir, Muhammad Abduh and Islamic Reform. *International Journal of Civil Engineering and Technology*, 8(7), 2017, pp. 902–910.

[40] Abdul Ghofur. The Implications of Democratization Towards Deformalization of Islamic Law in Indonesia: Study on Abdurrahman Wahid’s Thoughts. *International Journal of Mechanical Engineering and Technology* , 8(6), 2017, pp. 70 –84

[41] Shahul Hameed Bin Mohamed Ibrahim and Ebaad Momin. Towards Achieving A Maqasid Shari’ah Oriented Islamic Banking. *International Journal of Management*, 7 (2), 2016, pp. 200 - 214 .