

Independence of Female Judges in the Perspective of Islamic Law

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Abstract. *The purpose of this article is to provide the public with an overview of the independence of female judges as bearers of judicial power. Under positive law, gender does not matter, so both men and women can become judges. This is in contrast to scholars who have concluded that women's lack of intelligence makes their testimony half as valuable as that of men. Women cannot hold judicial positions because they are mentally weak. This is because the job requires impeccable reasoning. The judiciary is the legal vehicle through which judges carry out their duties to hear and decide cases submitted to them in a manner that is free from the interference or influence of other institutions of power. On the side of the executive or legislative bodies. Situations vary depending on your opinion. This article uses a normative type of research, and the provisions of the findings of this study indicate that although Indonesian society is famous for its very high normative approach to religion, judges who decide cases in Indonesia still have a sense of justice in society. Obedient to religious norms.*

Keywords: *Islam; Judge; Judiciary; Women.*

1. INTRODUCTION

As one of the four pillars of justice in Indonesia, judges must consist of people who have the skills needed to become judges. All organizations want Indonesian judges to be professional judges. The Supreme Court as the institution responsible for this continues to innovate to find and shape professional judges.

However, no matter how good the program designed and implemented by the Supreme Court to identify and train career judges, the judges themselves are willing to make improvements and changes in order to support individual judges to be effective. Sometimes it is necessary to review and look at the biographies of ideal judges. If you look at the history of great judges, at least in one judge, you want to imitate or at least improve the quality of that judge, even if you cannot imitate him perfectly. A dream was born. Judges are not only executors of regulations using only syllogisms, but also executors and inventors (Law on the Establishment of Judges), and are obliged to formulate fair and wise regulations (Law on the Establishment of Judges), I can. Therefore, judges must not only be bound by the law in the sense of legal regulations characterized by the dominance of the interests of the ruling minority group (ruler).

Judges have the duty to carry out their judicial duties to ensure that all cases submitted to them are decided in accordance with the investigation, examination and decision of the case before them, and are decided correctly, fairly and wisely. do that. To realize the independence of judges, legal guarantees must be given. Regarding the position of judges, the Prophet explained it in one of the sayings of Imam Baihaqi: Meaning: "When a judge sits in his place (according to the position of a righteous judge), the two angels will justify him," and will help and show him, unless he deviates. If he takes a wrong turn, the two angels will leave him. (H.R. Baihaqi).

2. RESEARCH METHODS

This research is a type of normative research that examines legal norms and regulations that analyze the independence of female judges who are considered unfit to be judges from an Islamic perspective, and is different from positive law which does not ask for any reasons. This study analyzes the independence of female judges who are considered unfit to be judges from an Islamic perspective. The position of men is that men and women have equal status before the law. Judges themselves are also elected and appointed by the government to resolve disputes and decide cases fairly. In other words, a judge is a person whose job it is to adjudicate a case. He holds an honorable position as long as he acts justly. Regarding the position of the judge, the Prophet said in one of Imam Baihaqi's sayings: Meaning: `` If a judge sits in his place (of a righteous judge) (according to his position), then the two angels will justify and help, "and show him. ", unless he deviates. If he takes a wrong turn, the two angels will leave him. (H.R. Baihaqi).

3. RESULT AND DISCUSSION

The position of judge not only has the task of investigating the rules of God, but also has the function of mujtahid. A reliable judge must be able to examine both the law contained in legal regulations (law on paper) and regulations that permeate and develop among the community (law in action). The judge's function as a mujtahid is recognized in the rule of law, as well as *fiqh* which is also called *rechtwinding*, a regulatory innovation. However, Qadri Azizi's trusted judge has a double duty: legality plus obligation. That is, he not only seeks clear regulations, but also God's law. God is responsible not only for His work on man, but especially for His decisions regarding His law.¹

- a) The requirements for prospective judges are set out in the law. Article 13 of Law No. 3 of 2006 concerning amendments to Law No. 7 of 1989 concerning Religious Courts, clearly states the requirements to become a judge, namely:²
 - a. Indonesian citizen
 - b. Muslim by religion
 - c. Pious to God Almighty
 - d. Loyal to Pancasila and the 1945 Constitution
 - e. Bachelor of Shari'a and/or Bachelor of Law who mastered Islamic law
 - f. Physically and mentally healthy
 - g. Authority, honesty, fairness, and irreproachable behavior

¹ Aziziy A. Qodri. (2002). *Ekletisme Hukum Nasional: Kompetisi Antara Hukum Islam Dan Hukum Umum*. Yogyakarta: Penerbit Gama Media.

² Djazimah Muqoddas, (2011), *Kontroversi Hakim Perempuan Pada Peradilan Islam Di Negara-Negara Muslim*, Yogyakarta: LKiS.

- h. Not a former member of a banned organization of the Indonesian communist party including its mass organizations, or not a person directly involved in the 30 September movement/Indonesian communist party.³
- b) The conditions for becoming a judge according to Islam are as follows:
 - a. The first condition is male. This condition combines two qualities of puberty and non-femininity at once. (Imam Al-Mawardi, "Principles of Islamic State Management Al-Ahkam Sultaniyyah".⁴
 - b. The second requirement has a heart) There must be knowledge (command) until it can distinguish all things correctly, intelligently, and without forgetting. His intelligence allows him to explain ambiguities and decide complex issues.
 - c. The third requirement is freedom (no slavery). He cannot have power over others because his power over himself is incomplete. It is also logical that the status of a slave prevents him from applying the law and being appointed as a judge, since the testimony of slaves is not admissible in court. If the slave is free, then blood is not one of the criteria for legal authority, so he is allowed to act as a judge even though guardianship is in the hands of the owner.
 - b. The fourth condition: Islam. A disbeliever cannot be appointed judge over a Muslim, even if he is a disbeliever, because Islam is a condition for the acceptance of testimony.
 - c. Fifth condition: Justice. This requirement of fairness applies to all sectors. A just person speaks the truth, is honest, is pure from haram, is far from sin and doubt, has self-control in both pleasure and anger, and is a chivalrous person in his religion and in the world.
 - d. Sixth condition: healthy hearing and vision. This means that with healthy eyesight and hearing, one can distinguish between the accuser and the accused, between confession and admission, between truth and falsehood, and between right and wrong. Another requirement is that the candidate must be a civil servant judge and be at least 25 years old.
 - e. The above conditions are requirements that must be met by prospective judges for the Court of First Instance. As explained in the Basic Law on Judicial Power, the Religious Courts consist of the Court of First Instance, the Court of Appeal and the Court of Cassation.

The profession of a judge is a legal expert. Judges essentially represent a service to society and to people working in the field of law. Therefore, judges are required to have a high sense of ethics and responsibility, this is stated in the basic principles of the Code of Ethics for Judges. Judges as enforcers of law and justice have the task of studying, scrutinizing, and understanding the legal values that exist in society. (Judiciary Law No. 35 of 1999, Article 27(1)). The independence of judges as executors of judicial power means the regulatory instruments by which judges carry out their duties to hear and decide cases they face, and the independence of judges from other spheres of power, meaning that they cannot be intervened or influenced. From World politics is actually synonymous with the exercise of global leadership. And leadership given to women always faces more obstacles and challenges than men. In this country, there are many examples of when a woman occupies a position of power, such as a regent, the public eye is always on her actions and appearance. Unlike men who hold

³ Law No. 3 of 2006 on the Amendment to Law No. 7 of 1989 on Religious Courts

⁴ Al-Ahmady Abu An-Nur, (200), Indzaru Al-Mukhaddirdt, Jakarta: Darul Farah, hlm. 143.

public office, small mistakes, errors, and contradictions in public opinion are always taken into account and even questioned.

3.1 Independence of Women Judges

Because the courts are the last bastion of justice, the independence of judges is closely related to the implementation of justice. This word has a very deep meaning. On the one hand, it can mean that the courts are society's last hope for justice, truth and adherence to the rules. On the other hand, it means that in principle all problems and conflicts do not have to be resolved through the courts, but can also be resolved through arbitration or other means of conflict resolution (Article 58 of Law No. 48 of 2009).

For regulatory states, courts are institutions or tribunals whose existence is absolute. Is it hard to imagine what this country would be like without this institution? The loss of the existence of courts means the loss of the status of the governing state itself, so what happens is a forest state. Judicial power in the Indonesian constitutional system is understood as an independent power exercised by the Supreme Court and the judicial bodies under it and the Constitutional Court to administer the law and uphold the rule of law and justice. However, according to Article 13 of Law No. 3/2006 on the Amendment to Law No. 7/1989 on Requirements for the Position of Judge, women are allowed to participate in politics and even become judges. However, the 1945 Constitution and Articles 27 paragraphs 1 and 2, 28, 30 and 31 stipulate that men must be judges. There is a further question as to whether women can be judges under positive law.

The independent judicial power in the sense of independence has been emphasized in Article 24 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia, as follows:

- 1) Judicial power shall be an independent power to administer justice in order to uphold law and justice.
- 2) Judicial power shall be exercised by a Supreme Court and the judicial bodies under it within the general judicial system, the religious judicial system, the military judicial system, the state administrative judicial system, and by a Constitutional Court.
- 3) Other bodies whose functions are related to judicial power shall be regulated by law.

If we further deal with the independent judicial power in the sense of being independent and free from the influence of other powers, then the affirmation of the basic laws of the state will be further developed. In Law No. 48 of 2009 on Judicial Power, as well as in Law No. 14 of 1985 on the Supreme Court which has been amended by Law No. 5 of 2004 concerning Amendments to Law No. 14 of 1985 in conjunction with Law No. 3 of 2009 on the Second Amendment to Law No. 14 of 1985 concerning the Supreme Court.

Article 1 Item 1 of Law No. 48 of 2009 on Judicial Power states:

Judicial power is an independent state power to administer justice in order to uphold law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia, for the implementation of the rule of law of the Republic of Indonesia.

The Official Explanation Number I of Law No. 48 of 2009 contains a more explicit clarification of the independence of judicial bodies in the administration of justice. In the author's opinion, this clarification is:

"The 1945 Constitution emphasizes that Indonesia is a state of law. In line with this provision, one of the important principles of the rule of law is the guarantee of an independent judicial power, free from the influence of other powers, to administer justice in order to uphold law and justice."

In line with the rhythm of understanding above, it is also emphasized in Article 3 paragraphs (1) and (2) of Law. No. 48 of 2009, as follows:

- 1) In carrying out their duties and functions, judges and constitutional judges must maintain judicial independence.
- 2) Any interference in judicial affairs by other parties outside the judicial power is prohibited, except in matters as referred to in the 1945 Constitution of the Republic of Indonesia.

The argument for judicial independence above culminates structurally and vertically in the Supreme Court. This is regulated in Article 2 of Law. Law Number 14 of 1985 (as amended by Law Number 5 of 2004 and Law Number 3 of 2009): The Supreme Court is the highest court among all judicial institutions and is free from government influence in its operations.

Functionality, another effect. The independence of judges must be maintained so that each judge is not easily influenced by temptation or other means in carrying out their judicial duties. Although not absolute, the independence of the judiciary is limited by the code of ethics and guidelines for judicial behavior, basic values of religious behavior, as well as law enforcement and judicial institutions.

3.2 The Position of Female Judges in Islamic Law

The Maliki, Shafi'i and Hanbali schools of thought do not allow the appointment of female judges. Imam Hanafi, on the other hand, allowed the appointment of female judges to decide all matters except Hadith and *Qishas*. Even Ibn Jalil as-Tabari allowed the appointment of female judges in all matters as well as male judges. According to him, if women are allowed to issue fatwas on all kinds of issues, then they will also become judges and have the freedom to decide all issues. For example, Hakim Iyad mentioned the requirement of men to be judges in his book, and Al-Mawardi of the Syafiyya school also mentioned men as a requirement to be judges. Women do not have the authority to be judges in any matter, but they can give testimony in such matters.⁵

Other scholars who discussed the male requirement were Ibn Rushd and Wahabah as-Zuhayri. They conclude that there is a difference of opinion among scholars regarding the requirements to be a judge. Some of these requirements are agreed upon by

⁵ Djazimah Muqoddas, (2011), *Kontroversi Hakim Perempuan Pada Peradilan Islam Di Negara-Negara Muslim*, Yogyakarta: LKiS.

lawyers, while others are still a matter of debate among lawyers. The agreed requirements for judges include being rational, mature, independent, Muslim, and able to hear, see and think (*nasik*). The conditions that are disputed are being male and being able to perform *ijtihad*.⁶

The reason women refuse to become judges is because they have shortcomings and weaknesses. Women are vulnerable in many ways, including lack of intelligence, lack of insight, lack of social interaction, and limited ability to interact with the opposite sex.

Scholars have concluded that women's lack of intelligence makes their testimony half as valuable as that of men. Because women are weak-minded, they cannot hold legal positions that require mental perfection. Allah favors men over women in terms of reason and opinion. (Al-Mawardi, *Adab Al-Qadhi*) According to shara guidelines, women are only given the responsibility of taking care of their husband's property.⁷ The scholars as classified by Noryamin Aini, determine different laws between men and women. The weakness of women is shown in several ways as follows:⁸

- a. In many cases, women are legally judged and treated as half a man. In many *fiqh* provisions, scholars generally agree that women have only half the rights of men, such as rights regarding testimony, inheritance, *aqiqah*, and others.
- b. Women are imperfect creatures with weak intellectual abilities and cannot control their emotional and irrational turmoil.
- c. Women are considered seductive creatures, but can also be seduced with wishful thinking. In this context, hijab seeks to limit women's public space. In society, it is often asserted that men have three enemies: wealth, throne, and women.
- d. Because women are weak and not independent in taking care of themselves, women are still considered necessary in various legal activities and require the representation and guidance of men as their guardians.
- b. Since woman was created from Adam's rib, she is a creature destined to obey man. Therefore, the main duty of a woman (wife) is to serve her husband.
- c. There is a gap in the dominant storyline between men and women. So socially, women's space is the domestic world, and men's space is the public world.
- d. Some are differentiated only by gender. For example, the Dumhur Fuqaha agreement does not require Friday prayers to be held or cases to be adjudicated according to the law of *Qishas*. Some Imams are of the opinion that the *qishas* for a woman who kills a man is not sufficiently obligatory and must be accompanied by other punishments. In other words, the value of a man's life is not comparable to that of a woman.

And most scholars, particularly the Saraf Fuqaha, agree that women are prohibited from playing leadership roles. This agreement is based on the word of Allah in verse 34 of Surah an-Nisa. The same thing is also said in the hadith narrated by Imam Bukhari: This is the basis of the scholars' consensus on women's leadership. These statements and agreements of the scholars are questions and statements that exclude Islam and place women in a lower position than men in Islam. Looking at the various opinions of the scholars of the madhhab above, there is still much debate about whether or not

⁶ Al-zuhaili, Wahbah, (1986), *Ushul Al-Fikih Al-Islami*. Bairut: Dar Al-Fiqr.

⁷ M.Shufudi Ismail, (2017), Tokoh Hadith Prolifik, Ensiklopedik Dan Ijtihad, *Jurnal Ilmiah Islam Futura*.

⁸ Noryamin Aini, (2022) Inter-religious Marriage: Perspective of Maqashid al-Syari'ah and Human Rights, *Journal of Religious and Philosophical Studies*.

women can become judges in Islamic law, but there is still much debate about whether or not women can become judges in Islamic law. This is because, since the time of the Prophet until today, in principle, many women have become leaders. But in reality, there are still many social problems that corner women, one of which is gender issues.

4. CONCLUSION

Since men and women have equal rights to vote and elect, there is no strong argument against women participating in politics. The majority of sectarian scholars also say that women cannot be judges. This stipulation applies in all cases. Whether related to property disputes, *qishas*, *hud*, or other cases. However, women are prohibited from becoming imams or caliphs. Quraisy Shihab also added that the Quran has many stories about the equality between women and men, and the difference is their obedience to Allah. There is no difference based on gender, race, skin color, or ethnicity. Women and men are equal and are encouraged to work together to compensate for each other's shortcomings. Judicial independence is not just about announcing the law, judges must have the courage to conduct "judicial *ijtihad*" in handling the cases they face.

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