

WOMEN JUDGES ON THE VIEWS OF FIQH SCHOLARS AND THEIR APPLICATION IN MUSLIM COUNTRIES

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Abstract

One of the concerns being debated by fiqh scholars is the issue of women as judges. Most fiqh scholars prefer male judges, but some allow women to serve as judges. Similarly, its application in Muslim countries differs. This article explains the differing views of fiqh scholars on the permissibility of women serving as judges in courts, as well as its application in Muslim countries. The research data were gathered by reviewing various literature related to this topic, including fiqh books, statutory regulations, and various related articles. This research found that differences in opinion among fiqh scholars on the permissibility of women as judges are caused by differences in understanding the Prophet's hadith, which forbids delegating matters to non-experts. Meanwhile, the appointment of women as judges in several Muslim countries can be classified into three categories: countries that allow women to be judges in all cases, countries that allow women to be judges in only certain cases, and countries that do not allow women to be judges in all cases. There has been a policy change in this group of Muslim countries that allows women to serve as judges in countries that previously did not accept women judges in the court.

Keywords: women judges, gender, muslim countries

Abstrak

Permasalahan hakim dari kalangan kaum perempuan, merupakan di antara permasalahan yang menjadi perdebatan ulama fikih. Sebagian besar ulama fikih menyaratkan hakim harus laki-laki, sementara sebagian lainnya ada yang memperbolehkan perempuan menjadi hakim. Demikian pula penerapannya di negeri-negara muslim juga terjadi perbedaan. Artikel ini menjelaskan perbedaan pendapat ulama fikih tentang kebolehan perempuan menjadi hakim di pengadilan, dan juga penerapan negara-negara muslim untuk jabatan hakim bagi perempuan. Data penelitian ini diperoleh dengan menelusuri berbagai literatur yang terkait dengan bahasan ini, baik dalam kitab fikih, aturan perundang-undangan, maupun berbagai artikel terkait. Temuan penelitian ini menunjukkan bahwa perbedaan pendapat ulama fikih dalam menetapkan kebolehan perempuan menjadi hakim diantaranya disebabkan oleh perbedaan pemahaman terhadap hadits Nabi saw yang melarang menyerahkan suatu urusan kepada yang bukan ahlinya. Sementara itu pengangkatan hakim perempuan pada beberapa negara muslim dapat dibagi kepada tiga kelompok, yaitu; negara yang memperbolehkan perempuan menjadi hakim dalam semua perkara, negara yang memperbolehkan dalam perkara tertentu saja, dan negara yang tidak memperbolehkan perempuan menjadi hakim dalam semua perkara. Pada kelompok negara muslim tersebut, terlihat adanya perubahan kebijakan yang mengarah pada kebolehan perempuan menjadi hakim pada negara-negara yang semula tidak memperkenankan perempuan menjadi hakim di pengadilan.

Kata Kunci: hakim perempuan, gender, negara muslim

1. INTRODUCTION

Judges play an important role in law enforcement and the administration of justice. The judge is the person in charge of upholding truth and justice. As a result, Islam imposes stringent requirements on those seeking to be appointed as judges, intending to ensure that the person holding the position of judge is truly authoritative, knowledgeable, and trustworthy (Jamillah, 2017).

The role and position of the Islamic court as part of the implementation of Islamic law and the subsystem of national law is very strategic and significant. The existence and position of the principle of justice can be found not only in theoretical developments through academic studies but also in the practical application of Islamic law in Indonesia. Implementing the principle of justice is not only an individual normative obligation, but also a collective normative obligation that involves academics, legal practitioners, and the government (Rosadi et al., 2021). One of the thorny issues in this judicial matter is the requirements and mechanism for filling the position of a judge, as well as the length of time a person serves as a judge. The selection of judges is a critical issue because it influences, and even produces, the types of people who serve as judges, as well as the decisions they make. The overall provisions concerning the requirements, the mechanism for filling positions, and the term of office of judges are intended to realize independent judicial power and judge freedom (Harijanti, 2014).

Judges must be capable of acting as statesmen. Judges should be impartial or independent in their duties in order to uphold truth based on law and justice. They must have knowledge and expertise in state administration, as well as sufficient field experience and a commitment to carrying out and supervising state life under constitutional corridors. When viewed through the lens of their duties and functions to uphold law and justice, judges are essentially statesmen, not for the benefit of others other than the interests of the state, and not an element of the state that is reflected in the interests of the people. Judges are free to carry out their judicial duties and are only accountable to God (Barhamudin, 2019).

Al-Mawardi argued the duties and obligations of judges are to decide or reconcile disputes or quarrels, to be guardians for people who are unable to act, to manage waqf assets, to carry out mandated wills, to marry women to equal men, to carry out *hudūd*, to consider a public benefit, and to equate everyone before the law fairly. According to fiqh scholars, asking for the position of judge is not permissible if the goal is to boast and advance personal interests, but it is permissible if the goal is to uphold the truth and is accompanied by good intentions (Misbahuddin, 2010).

Along with the noble role and duties of the judge, not just anyone can be appointed to this position. To be assigned as a judge, a person must meet certain requirements as determined by fiqh scholars. There are several conditions that fiqh scholars have agreed on, but there are also several conditions that are disputed. Most fiqh scholars stipulate that the male gender is one of the requirements for becoming a judge. That is, according to this viewpoint, women should not serve as judges. There are several considerations and reasons given by groups that oppose women being appointed as judges. Meanwhile, a small number of other fiqh scholars believe that the male gender is not required for judicial positions. This means that women can become judges and make valid decisions. This article will describe how fiqh scholars' views on women judges, as well as the implementation of women judges in several Muslim countries.

Several previous researchers conducted research and discussion on judges and judicial power, both in the form of library research and field research. Among the researcher that addressed this issue is al Bakr Muhammad Abd Rahman who wrote a book entitled *al Sulthah al Qadhoiyyah wa Syakhshiyyah al-Qadhi*. This book discusses the provisions of judicial power and the personality of a judge in Islam (al Bakr, 1988).

Misbahuddin wrote a more detailed article about judges, specifically the requirements, duties, and obligations of judges according to al-Mawardi (Misbahuddin, 2010). Along with Misbahuddin's writings, Jamilah proposed a discussion about judges under Islamic and Indonesian law. For someone who wishes to be appointed as a judge, Islam imposes stringent requirements. The goal is to ensure that the judge in charge is truly authoritative, knowledgeable, and trustworthy (Jamillah, 2017). Furthermore, Khusnul Khotimah explained the Islamic ethics of judges (Khotimah, 2015), while Muhammad Ali explored the judges from the perspective of hadiths (Ali, 2017).

Aden Rosadi published an article titled *the Concept of Justice in the Qur'an and Hadith*. This paper discusses the concept of justice as found in the Al-Quran and Hadith. According to Rosadi, the role and position of the Islamic judiciary are very strategic and significant as part of the implementation of Islamic law and the subsystem of national law. The existence and position of the principle of justice can be found not only in theoretical developments through academic studies but also in the practical implementation of Islamic law in Indonesia. Implementing the principles of justice is not only an individual normative obligation but also a collective normative obligation involving academics, legal practitioners, and the government. The principles of justice contained in the Al-Quran and Hadith have a significant impact on the course and implementation of justice in Indonesia in an effort to uphold law and justice (Rosadi et al., 2021). Harijanti, who was more concerned with practice in Indonesia, wrote about the mechanism of filling the position of judges in the post-reform Indonesian constitutional system (Harijanti, 2014). In line with Harijanti, Barhamuddin explained the independence of judges in accordance with Law No. 48 of 2009 (Barhamudin, 2019), Meanwhile, Engy Abdelkader discussed the concept of women judges in various Muslim countries (Abdelkader, 2014).

Based on the literature review, it is clear that this current research is different from previous studies. Previous studies have mostly focused on the concept of justice and the concept of judges in Islamic law in general, as found in the Quran, hadith, and thoughts of particular figures. There are also articles about the implementation of special judicial powers in Indonesia. Meanwhile, the focus of this research is on the views of fiqh scholars on the position of women as judges, as well as the application of women judges in several Muslim countries.

RESEARCH METHOD

This is library research that examines various references related to the issue of women judges in the view of fiqh scholars, and their application in Muslim countries. The views of fiqh scholars on women judges were investigated using various fiqh book references, such as *Wa Adillatuhu* by Wahbah az-Zuhaili, *al Sulthah al Qadhoiyyah wa Syakhshiyyah al-Qadhi* by Muhammad Abd. Rahman al-Bakr, as well as *al Ahkam al Sulthoniyah* and *al-Adab al Qadhi* by al Mawardi. The application of women judges in Muslim countries was compiled from various regulations, articles, books, and other related references that support this discussion. The data in this research were analyzed through the analytical descriptive procedure.

RESULTS

a. Concept, Role, and Duties of Judges

Muhammad Ali contended that a judge is someone who has judicial powers that are governed by law, someone who decides a case fairly based on evidence and faith in oneself. When exercising judicial power, judges are confronted with a variety of issues that may influence their decisions in the future (Ali, 2017). Wahbah az Zuhaili (Az Zuhaili, 2011) suggested ten duties of judges, including;

- 1) To resolve a dispute between two people, either peacefully (*ishlah*) or by forcing them to follow the established law;
- 2) To fight those who violate the rights of others and help those who have been wronged and ensure that their rights are respected;
- 3) To uphold *hudud* and fight for Allah's rights;
- 4) To deal with the problem of murder and fights which cause injuries;
- 5) To take care of orphans' or mentally ill people's assets and appoint responsible people to look after them so that their assets are protected;
- 6) To manage waqf assets;
- 7) To carry out the wills;
- 8) To marry a woman who does not have a guardian or a woman whose guardian does not want to marry her off;
- 9) To pay attention to public facilities such as roads and so forth;
- 10) To do *amar makruf nahi munkar*, both with words and actions.

Judges play a critical role in establishing and developing laws in the state. This role is manifested in a wide range of interpretations, despite the fact that various existing laws and regulations are valid according to the law (Harijanti, 2014).

As a result of the importance of a judge's role and duties, the position of the judge should not be held by just anyone. If the position of judge is given to just anyone, he will undoubtedly cause harm to himself, let alone to others. In this regard, the Prophet Muhammad conveyed the classification of judges. In his hadith narrated by Abu Dawud, "there are three kinds of judges, (only) one of whom goes to Paradise, while the other two (kinds of) judges are in Hellfire. The one in Paradise is a judge who knows the truth (*al-haq*) and uses that truth to decide cases. While a judge knows the truth and decides a case unfairly, he will be in Hellfire. Furthermore, if the judge decides the case (convicts) because he is "blind" and "illiterate" (in law), he (also) is in Hellfire" (Al-Asqolani, n.d.)

b. The complexity of Judge Requirements

The requirements for a judge are the things that a person must fulfill in order to be appointed as a judge. There are qualifications for the judge that the scholars have agreed on, as well as requirements that have not been agreed upon. According to Wahbah az Zuhaili, the requirements agreed upon by the scholars are intelligent, mature (or *baligh*), independent, Muslim, and able to hear, see, and speak (Az Zuhaili, 2011). Simply put, Abdurrahman al-Bakr proposed three criteria for a judge that fiqh scholars agreed on: being Muslim, mature, and intelligent (al Bakr, 1988).

Abdurrahman al-Bakr mentioned being Muslim is one of the most basic requirements for a judge. Similarly, the conditions for being mature and having reason have been agreed upon for the validity of a judge's appointment. It is illegal to appoint children as judges, and it is also illegal to appoint insane people as judges. This is due to the fact that judges must be intellectual, have a strong personality, and have a broad understanding of various life issues (al Bakr, 1988).

Meanwhile, fiqh scholars disagree on what constitutes *'adalah*, male, and capable of performing *ijtihad*, as a requirement for a judge. The person is considered to have the *'adalah* criteria if he leaves major sins, does not commit minor sins, his faith is correct, maintains honor, is trustworthy, and is not suspected of prioritizing his personal interests or preventing harm to himself in a way that is not justified by religion. The Maliki, Shafi'i, and Hambali schools all require *'adalah* to be a judge. As a result, according to these schools, appointing people whose testimony has been rejected or wicked people to be judges is not permissible because their words cannot be trusted (Az Zuhaili, 2011). This is based on Allah's word in Surah al-Hujurat verse 6: "*O you who have believed, if there comes to you a disobedient one with information,*

investigate". In relation to this, if the wicked person's testimony is unacceptable, let alone being a judge. In contrast to the preceding viewpoint, the Hanafi school of thought contends that the wicked can be judges. Nonetheless, the wicked should not be appointed as judges (Az Zuhaili, 2011).

The ability to perform *ijtihad* is required by the Maliki, Shafi'i, Hanbali, and some Hanafi scholars, including Imam al-Qaduri. As a result, a person who does not master religious law or a *muqallid* (a person who knows the Imam's school of thought by heart but is unable to decipher its arguments) may not be appointed as a judge, because such a person may not issue fatwas, let alone become a judge (Az Zuhaili, 2011). It is based on a hadith narrated by Buraidah: The Prophet saw said, *the judges are three kinds: two judges are in Hellfire and one judge is in Paradise. A man who judges without the truth while he knows it is in Hellfire. A judge who has no knowledge and violates the rights of people is in Hellfire. A judge who judges with the truth is in Paradise.*

Most Maliki scholars believe that the ability to carry out *ijtihad* is essential. Nonetheless, the *mu'tamad* and valid opinion, according to them, is that a judge from among the *muqallids* is permissible as long as there is a *mujtahid* (Az Zuhaili, 2011). Meanwhile, the majority of Hanafi scholars do not require a judge to be able to perform *ijtihad*.

Al Mawardi (al Mawardi, n.d.), as cited in (al Mawardi, 1971) mentioned several requirements to become a judge, including:

- 1) Mature (baligh) men, this is based on *ijma'* and the word of Allah in surah An-Nisa (4) verse 34

الرجال قوامون على النساء بما فضل الله بعضهم على بعض

"Men are the protectors and maintainers of women, as men have been provisioned by Allah over women"

This verse implies that men are given the advantage of reason and intelligence in their opinions. As a result, women are not permitted to lead men.

- 2) Intelligent, so he understands the orders (*taklif*), important matters (*daruri*), and is able to distinguish things correctly, intelligently, and not being forgetful
- 3) Independent (not a slave), the slave's power over himself is insufficient, so he cannot wield power over others. Furthermore, the testimony of a slave in legal cases is not accepted, so it stands to reason that his status as a slave hampered his application of the law and appointment as a judge. Slaves, however, are not prohibited from giving fatwas or transmitting hadiths because fatwas and hadith transmissions do not contain aspects of authority. If the slave is free, he is allowed to serve as a judge, even though guardianship is in the hands of the owner, because lineage does not meet the criteria of legal authority.
- 4) Islam, because it is a prerequisite for receiving a testimony. Allah says in surah an-Nisa (4) verse 141 *"And Allah will never grant the disbelievers a way over the believers"*. Disbelievers cannot be judges of Muslims. Abu Hanifah said infidels may be appointed as judges for infidels. Even though the appointment of an infidel occurred in the ruler's tradition, it was an appointment as an official rather than an appointment as a judge. The Imam may refuse to accept the decision of the judge.
- 5) Fair, which means telling the truth, being honest, being free of forbidden things, avoiding sins, being free of doubtful nature, and having control over both his religion and the world lives.
- 6) Have good hearing and vision to determine rights, distinguish between the accuser and accused, and distinguish between parties who confess and those who do not confess. He can tell the difference between right and wrong and recognize the right and wrong sides. If he is blind, his power is void. Imam Malik, on the other hand,

permitted it. There are different points of view on deaf judges, just as there are on deafness in the position of the imam (caliph). Health organs are not required for the position of judge, but they are required for the position of imam. A judge is permitted to decide cases while sitting on a chair due to illness, despite the fact that not being disabled is the primary requirement for an imam.

7) Understand Shari'a laws; basic sciences (*usul*) and their branches (*furu*).

c. The Hadith Prohibiting Women from Becoming Judges

Male gender is one of the requirements for becoming a judge that fiqh scholars debate. There are those among the fiqh scholars who believe that the judges must be men. Women are not permitted to hold the position of judge, as required by all fiqh scholars except those of the Hanafi school of thought (Az Zuhaili, 2011). Opinions opposing women becoming judges are based on a hadith of the Prophet Muhammad narrated by Bukhari, a Nasai, Tirmizi, and Abi Bakrah. The hadith emphasizes that people will not be pleased if they leave their affairs (government) to women.

Another reason given by this viewpoint for not allowing women to become judges is that deciding a case requires a highly intelligent mind and reasoning, as well as experience with life's problems. In this case, women's intuition is considered weaker and they have fewer opinions because they lack experience in observing life's realities. A judge must also sit in front of other men, such as jurists, witnesses, and people in dispute. Women are not permitted to sit with foreign men in order to avoid slander. Furthermore, the Prophet Muhammad and his successors never appointed judges or governors from among women (Az Zuhaili, 2011).

According to Hanafi scholars, women can be appointed as judges in cases of property and financial disputes (*al-qadhaa al-madani*). The reason is that women's testimony is acceptable in muamalah cases. Women cannot be judges under *hudud*, *qisas*, or other *jinayah* laws because their testimony in these cases is unacceptable. In contrast to the preceding viewpoint, Ibnu Jarir ath-Thobari argued that women can be judges in all types of cases since they could become muftis, he reasoned, she could also become a judge (Az Zuhaili, 2011).

d. Women Judges in Muslim Countries

Women can fill judges positions in Muslim countries in three categories: (1) a country that allows women to occupy the position of the judge without exception; (2) a country that allows women to occupy the position of the judge but limits them in certain cases; and (3) a country that does not allow women to occupy the position of judge in all cases. Indonesia is an example of a country in the first category that allows women to serve as judges.

Indonesia is home to one of the world's largest Muslim populations. The requirements for judges in Indonesia, particularly in religious courts are regulated in Article 13 of Law Number 3 of 2006 regarding the First Amendment to Law Number 7 of 1989 concerning Religious Courts. In this article, the requirements for religious court judges are as follows: (a) Indonesian citizens; (b). Muslim; (c). believe in God Almighty; (d). loyal to Pancasila and the 1945 Constitution of the Republic of Indonesia; (e). sharia and/or law graduate who masters Islamic law; (f). physically and mentally healthy; (g). dignified, honest, fair, and behaved beyond reproach; and (h). not a former member of the banned Indonesian Communist Party including its mass organizations, or not a person directly involved in the September 30th Movement/Indonesian Communist Party.

Based on the provisions of Article 13 of the law it is clear that the male gender is not a requirement to become a judge in Indonesia. The position of a judge in Indonesia

may be held by either a man or a woman, as long as he or she meets the requirements stipulated by the law. Likewise, other judicial institutions, including general courts, military courts, and state administrative courts, also do not stipulate particular gender requirements for judges. Abdel Kader highlighted that the system for recruiting judges is partly due to the European legal system. The appointment of women as judges in Indonesia has been carried out since 1964. Although this has sparked debate among Muslim scientists, the necessity argument has been used to justify the appointment of women judges (Abdelkader, 2014).

Meanwhile, Muslim countries that fall into the second category, namely Egypt, allow women to serve as judges but limit them in certain cases. The Egyptian constitution has guaranteed gender equality since 1923. The provisions of the 1971 constitution also stated that Islam is the official religion of the country. This constitution establishes Islamic law as the primary source of legislation and calls for gender equality in the political, cultural, and economic spheres (as long as it does not conflict with religious law) (Abdelkader, 2014). The majority of classical Islamic schools of thought, including the Hanafi school of thought, forbid women from serving as judges. However, according to the expert, there is no constitutional legal provision or law that expressly prohibits women from serving as judges. However, most objections are based on cultural and social norms, as well as religious ideology. From time to time, women were barred from pursuing a judicial career.

The exclusion of women from serving as judges was not explicitly stated in the constitution or law, but it was reflected in discriminatory behavior by government officials. An example of this case occurred in 1979 when two women lost a lawsuit against the formal refusal of women judges. The practice of applying this provision is consistent with the fatwa issued by al-Azhar University's Fatwa Council in 1952, which stated that "there is general agreement that women are not suitable for the position in the judicial field, and it is considered sinful for those who demand it" (Abdelkader, 2014)

In 1988, a woman applied to become a judge, but her application was also denied. President Hosni Mubarak, on the other hand, appointed the first female judge, Tahani El-Gebali, to the constitutional court in 2000. The institution, however, did not rule on civil or criminal cases. Subsequently, in 2007, President Mubarak appointed thirty-one women, previously serving as prosecutors, to serve as judges in family law cases (Abdelkader, 2014).

Besides Egypt, Malaysia is also among those that allow women to occupy the position of judge, but within certain positions/limitations. Malaysia, which is a federal state, has different legal provisions among the existing states. However, in general, related to the judge's provisions, the requirements are almost the same. Most states do not require a male gender for the position of judge, but in practice some governments do not appoint women judges as in seven states, namely Negeri Kelantan, Negeri Sarawak, Negeri Johor, Negeri Sembilan, Negeri Pulau Pinang, Negeri Perak, and Perlis State. Meanwhile, several states also do not require men to serve as judges. In practice, the government appoints women to serve as judges as found in the Federal Territory (Kuala Lumpur, Putra Jaya and Labuan), Terengganu State, Malacca State, Selangor State, Sabah State and Kedah State (Aufar, 2019). The strict requirements for men as judges are contained in the regulations of the State of Pahang. In this rule it is emphasized that the Chief Sharia Judge and Sharia High Court Judge is a man, as stipulated in Section 43 of the 1991 Enactment 3 of the 1991 Islamic Law Administrative Enactment where in paragraph (1) it is stated "Chief Judge Syarie and Judge The Sharia High Court should be appointed by His Excellency His Excellency the Sultan on the advice of the Majlis. And continued in paragraph (3) which reads: (3) "A

person is eligible to be appointed under subsection (1) if: a) He is a Muslim man; b) He is a citizen; and c) For a period of not less than ten years prior to his appointment, he has practiced as a Sharia Lawyer at any Sharia Court or as a member of the Sharia Court or has expertise in Islamic law. Although the regulation requires men to serve as Chief Sharia Judges and judges at the Sharia High Court, the regulation does not explicitly prohibit women from becoming judges at the Sharia Lower Court (Aufar, 2019).

Meanwhile, Iran and Saudi Arabia are Muslim countries that fall into the third category, namely countries that do not allow women to serve as judges in all cases. In Iran, legal provisions are divided into two categories: before and after the 1979 Iranian revolution. Classical Shia fiqh provisions forbid women from serving as judges. Sheikh at-Tuusi is one of the Shia scholars who strictly forbids women from serving as judges. Nonetheless, the issue of women judges is currently being debated in Iran. Similarly, Saudi Arabia. Even though Saudi Arabia has traditionally barred women from becoming judges, there has recently been a discourse to allow women to serve as a judge, as stated by Hind al Zahid, as Deputy Minister of Women's Empowerment who emphasized that Saudi women would soon take up the position of judges (Shri Bhimo, 2021).

4. CONCLUSION

A judge is a person who uses judicial powers granted by law to decide a case fairly and confidently based on evidence. Judges play an important role in the administration of the state, helping to build and develop the law. As a result, only people who have met a number of requirements can hold the position of judge. There are some requirements of the judge that are not disputed by fiqh scholars, and some that are. Male gender is one of the requirements that fiqh scholars debate. This means that some fiqh scholars oppose women serving as judges. The rejection of the fiqh scholars is based on a hadith of the Prophet that forbids the handing over of a case to incompetent people. In terms of its application to Muslim countries, some countries allow women to serve as judges without exceptions, such as Indonesia, countries that allow women to become judges but only in family law cases, such as Egypt; and countries that completely prohibit women from becoming judges, such as Iran and Saudi Arabia. In the current development, it is mentioned that Saudi Arabia will change its policy concerning women serving as judges.

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