

The Contribution of the Indonesian Woman Constitutional Justice in Achieving the Sustainable Development Goals

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Abstract

This study explores the role of women as constitutional judges for the realization of sustainable development goals (SDGs). One of the goals of the SDGs is gender equality, one such as ensuring effective participation for women as public officers, including as constitutional judges. However, the number of female constitutional judges is much less than male constitutional judges in Indonesia due to patriarchy and Islamic paradigms. A woman's perspective is a substantial thing in decision-making, though. To comprehend the issue, this research will examine the election and the role of women constitutional judges in the realization of the SDGs. The statutory approach was adopted to study laws and regulations, and the comparative approach was implemented to deeply understand the comparison between Indonesia's laws and Islamic perspectives relating to the status of women as judges. Secondary data from the literature review and library research support an analysis for a deeper understanding of the concept of requirements to be a Constitutional Justice. The finding of this research implies that there are different opinions from an Islamic perspective; even contemporary scholars argue that women can be judged, including in constitutional justice. This study emphasizes that anybody can be a judge if they can fulfill the requirements: having integrity and impeccable personality, being just, being a statesman/stateswoman mastering the constitution and constitutionalism, and not concurrently holding a public office. Consequently, it will encourage decisions that consider women's rights to realize sustainable development goals.

Keywords: *constitutional justice, woman status, sustainable development goals,*

Abstrak

Penelitian ini menelisik lebih dalam peran perempuan sebagai hakim konstitusi guna perwujudan tujuan pembangunan berkelanjutan (SDGs). Salah satu tujuan SDGs ialah kesetaraan gender, yang mana salah satu sasarnya ialah jaminan partisipasi secara efektif bagi perempuan dalam pengisian jabatan



publik, termasuk di dalamnya sebagai hakim konstitusi. Akan tetapi, masih terdapat kesenjangan kuantitas hakim konstitusi perempuan dan hakim konstitusi laki-laki. Padahal paradigma hakim konstitusi perempuan dalam memandang kasus khususnya yang berkaitan dengan hak-hak perempuan cukup penting dalam rangka mencapai salah satu tujuan SDGs. Untuk memahami isu tersebut, penelitian ini mencoba memahami kedudukan perempuan sebagai hakim terlebih dahulu dengan menggunakan perbandingan antara pandangan Islam dan hukum positif Indonesia. Selanjutnya akan memotret peranan hakim konstitusi perempuan dalam perwujudan SDGs. Guna menelaah pandangan Islam lebih mendalam, penelitian ini membandingkan pendapat ulama klasik maupun kontemporer dalam memahami Nash. Selain itu, penelitian ini merupakan penelitian normatif kualitatif, sehingga akan membahas lebih detail terkait kajian dalam kitab-kitab fiqh maupun studi kepustakaan. Lebih lanjut, penelitian ini juga memaparkan praktik pemilihan hakim konstitusi yang juga memiliki hakim konstitusi perempuan dalam sejarahnya. Pada akhirnya, penelitian ini menegaskan bahwa siapapun bisa menjadi hakim konstitusi terlepas dari gender, selama memenuhi persyaratan hakim konstitusi yakni berintegritas dan berkepribadian tidak tercela, adil, negarawan yang menguasai konstitusi dan ketatanegaraan, serta tidak merangkap sebagai pejabat negara. Hal ini akan mendorong putusan hakim yang memperhatikan hak-hak perempuan guna mewujudkan tujuan pembangunan berkelanjutan.

Kata kunci: hakim konstitusi, kedudukan perempuan, tujuan pembangunan berkelanjutan

INTRODUCTION

In Indonesia, there is still a considerable disparity in the percentage of women who become leaders of an agency or decision-makers, such as a judge. Among the reasons is the patriarchal culture that has mushroomed due to the understanding of misogynistic verses. Namely, the legal postulates used by jurists to affirm the status of men compared to women (Fauzi, n.d.). This interpretation is considered to carry the mindset that women have lower quality than men, this condition is worse in more remote places than in urban areas (Karim et al., 1080). Based on history, Islam is a religion that elevates women's status, for example, the prohibition of burying babies alive (Abidin, 2023).

On the other hand, the role of women constitutional judges is very important, especially regarding women's human rights. Maria Farida, who incidentally is the first female constitutional judge, has shown her various sides towards the rights of women and children. This can be seen in the dissenting opinion regarding the Women's quota, during the testing period of Law Number 10 of 2008 related to the old MD3. Maria put forward several arguments for the importance of women's roles: (1) Women represent half of the population and have the right to half of the seats (justice argument); (2) Women have different experiences from men (biological or social) who are represented (experience argument). In line with this argument, women can enter positions of power because they will be bound in different politics; (3) Women and men have conflicts of interest so that men cannot represent women (interest group argument); and (4) Female politicians represent an important role model of encouraging other women to follow (Thalib, 2014, p. 241) Unfortunately, the awareness of the importance of women in the composition of constitutional judges is not balanced with their practice. On the other hand, the Constitutional Court is an institution that has a function as a protector of human rights guarantees, including women's rights.

Based on history, the Constitutional Court was designated by the amendment of the 1945 Constitution, providing institutional structure in the Indonesian constitutional system in an equal position with mutual control. One of the state institutions that emerged with the amendment of the 1945 Constitution is the Constitutional Court. Checks and balances are the principles of a democratic country and a state of law. On the other hand, the existence of the Constitutional Court as an independent organ of judicial power strengthens the conception of the state of law embraced by Indonesia. As is known, one of the principles of the state of law is the existence of a free and impartial judicial body.

The concept of the state of the law as proposed by Frederick J. Stahl which he called the *rechstaat*, where the main elements are as follows: (a) the recognition and protection of human rights; (b) the limitation of power to protect human rights; (c) government based on law; and (d) the existence of administrative justice. Meanwhile, the conception of the state of law in the Anglo-Saxon tradition was developed and pioneered by Albert Venn Dicey, known as the rule of law that having criteria, for instance: (a) supremacy of law; (b) equality before the law; dan (c) constitution based on human right (Asshiddiqie, 2005). Today, there is no longer a problem with the difference between resistance and the rule of law because they lead to one main goal, namely the recognition and protection of human rights.

The protection of these human rights is one part of the judicial administration system. To uphold law and justice, the role of Constitutional Judges is very strategic in the institution of the Constitutional Court. Judges as the executors of judicial power, Tocqueville is seen as playing an important role in the emergence of modern democracy and its enforcement (Caresse, 1998). Constitutional judges must be carried out according to a mechanism that refers to the conception of the state of law. That is, it requires a separation of powers and produces a free and impartial judiciary. The requirements for being a Constitutional Judge can be found in Article 24C paragraph (5) of the 1945 Constitution of the Republic of Indonesia, "Constitutional Judges must have integrity and personality that is not reprehensible, fair, statesman who controls the constitution and state administration, and does not concurrently serve as a state official". However, there is no meaning of these requirements in either the Constitution or the Constitutional Court Law.

In Islam, there are several opinions regarding the requirements of judges (*qadhi*). According to Al-Mawardi in *Ahkam Sulthoniyah*, the requirements for a person who will occupy the position of *qadhi* must meet seven conditions: male, an intellectual ability, independence, Islam, individual credibility (*al-'is*), perfect hearing and vision, and knowledge of sharia laws (Al-Mawardi, 2000). The comprehension and analysis provided by scholars demonstrate the significant social, cultural, and political impact on contemporary society. The issue of whether a woman can attain the position of a judge within the Muslim community

arises from the varying interpretations of the Qur'an and the hadith of the Prophet Muhammad SAW.

Based on the situation in Indonesia, it is worth noting that there are currently no gender-specific provisions in place regarding the qualifications for judges, be it in the Supreme Court or the Constitutional Court. While there have been female judges serving in various courts across Indonesia, including two who have held positions as Constitutional Judges, the proportion of male to female constitutional judges shows a significant gap. It is imperative to consider implementing policies that promote the election of female constitutional judges. Affirmative action is necessary to provide moral support and to strengthen the rights of women in this regard.

To explore more about the woman's position in the judiciary, research was conducted to compare the requirements to be a judge from an Islamic perspective (using a comparative approach), including provisions in the Qur'an, Hadith, and some scholars. This research employed the normative legal method, also known as doctrinal legal research. As this research focused on written materials, it is often called library research or document research. It also employed the statute approach to thoroughly analyze and look at all laws and regulations on the legal issue at hand. (Solikin, 2021). In this regard, those laws and regulations also Islamic regulations, pertain to the requirements of Constitutional Justice.

The studies on the position of women in the judiciary have been conducted by some scholars, such as Achmad Lubabul Chadziq. However, Chadziq's research focused on comparing Indonesian law in general and Islamic Law (Chadziq, 2021). Moreover, his study explained the duty of judges in general. On the other hand, this research emphasizes the requirements of the Constitutional Court of Justice and the role of judges in the enforcement of human rights, especially the enforcement of sustainable development goals (SDGs).

This study emphasizes the role of women constitutional judges as a step to encourage the certainty of full and effective participation and equal opportunities for women to lead at all levels of decision-making in political, economic, and societal life which is part of the goals in the sustainable development goals. It is different from other studies, such as Iwan Ridhwani, which also discusses the need for government public policy reconstruction in the framework of the SDGs, which still discusses policies in general. Meanwhile, this research has focused on the role of constitutional judges in efforts to realize the SDGs.

DISCUSSION

Sustainable Development Goals

The Sustainable Development Goals (SDGs) are a form of agreement on a global development agenda that contains 17 goals and is divided into 169 targets that are interrelated with each other in various areas of life (Ridhwani & Lestari, 2023). This commitment is being implemented by member states of the United Nations as part of an endeavor to establish a human life that is oriented towards sustainability. Gender

equality is one of the seventeen goals, which is derived from a range of development objectives.

Indonesia has adopted rules related to the SDGs into the national medium-term development plan (RPJMN) and then further regulated in Presidential Regulation Number 11 of 2022 concerning the SDGs. Including the goals of ensuring full and effective participation, and equal opportunities for women to lead at all levels of decision-making in political, economic, and societal life. Therefore, the position of female constitutional judges as a step of women's role participates as law decision-makers in the legal and social fields to contribute to attaining SDGs.

Judge and the Judiciary

In Arabic studies, the term 'judge' is derived from the word 'hakama,' which means to qadhi, originating from 'qadha,' meaning 'to decide,' 'lead,' 'rule,' or 'establish (Aziz, 2017). The word Al-hakim, which means al-Qadhi, means the person who decides the case of the person who asks the law against him. In terminology, a judge is a person appointed by the Sultan or the Government to decide and determine the law of something that is charged and disputed. According to Law Number 48 of 2009 concerning Judicial Power, judges, and constitutional judges are state officials who exercise judicial power regulated in the law. Based on this understanding, a judge is a person who has the authority to examine, adjudicate, and decide cases according to their respective authority. In the context of constitutional judges, they have the authority as stated in Article 24C paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia)

Al-Mawardi said that the duties of judges (*qadhi*) in general are ten (Al-Mawardi, 2000), namely:

- a. Resolving disputes and hostilities through peaceful and voluntary means between the litigants by applicable rules, as well as through coercion with legal force that compels the parties to carry it out.
- b. Sanction or punishment to the guilty and provide the right to be free from all sanctions or punishment based on evidence.
- c. Acting as a guardian judge over a person who does not have legal skills in terms of property management and the execution of every transaction on such management.
- d. Collecting and developing *waqf* assets to then deliver the assets to the entitled.
- e. Carry out the will in accordance with the provisions of the party giving the will in a case based on the provisions of Islamic law.
- f. Marrying women with whom having the same level as her, including becoming marriage guardians if they do not have guardians.

- g. Implementing the law of limitation on the parties who are found guilty by the applicable law. If the case is part of Allah's rights, then Qadhi has the right to handle all legal proceedings on his own without waiting for the party who filed the lawsuit with strong evidence or recognition. However, if the case is part of human rights, then the legal process awaits the demands of the aggrieved party.
- h. Inspecting and handling public benefits in their jurisdiction, such as prohibiting any disturbances on the road and demolition of unsuitable buildings.
- i. Examine and supervise the capabilities of witnesses and their employees and select a person to represent them. If they are considered right and upright, then qadhi raises them. While if they are disabled and betrayed, they must replace and appoint another stronger and more credible person as a witness.
- j. Upholding the equality of rights of the parties before the law and giving a fair verdict, not following their lust to harm one of the parties or lean towards falsehood.

Women Judge in Islam Perspective

View of Classical Scholar

According to the view of classical Islamic fiqh, it has been formulated and determined that men are higher in rank than women in leading society. Several arguments are used as the basis by the jurists in looking at the legal position of women as judges, namely (Muqoddas, 2015): First, there is a textual understanding of the postulates of the Qur'an whose substance places men as leaders for women. The thinking of the fuqaha' is based on the postulates of the Qur'an as Q.S. An-Nisa verse: 34, that:

"The men are the leaders of the women because Allah has exceeded some of them over the others and because they (men) have provided for a portion of their possessions. Therefore, a righteous woman is obedient to Allah and takes care of herself when her husband is not there, because Allah has taken care of (them). The women whom you are worried about, then advise them separate them in their beds, and beat them. Then if they obey you, do not look for ways to trouble them. Indeed, Allah is the Highest and the Greatest."

Furthermore, fiqh scholars view almost all verses in the Qur'an that discuss leadership, to prioritize men and always believe in Allah and Muhammad. Second, there is a sahih hadith based on the substance of the hadith that prohibits women as heads of state, which is narrated by Imam Bukhari, Imam Ahmad, Imam Tirmidhi, and Imam Nasa'i from Abu Bakrah r.a. as follows that people who hand over the leadership of themselves to women will be not lucky, this statement said by the Prophet Muhammad after knowing that Kisra as the queen.

Third, the socio-historical and cultural conditions of the Jahiliyah Arabs and the beginning of the arrival of Islam show that the patriarchal culture is quite strong in society (Muqoddas, 2015). Even before the advent of Islam, women were tragically regarded as a source of shame, to the extent that the uninformed society practiced the abhorrent custom of burying infant girls alive. The introduction of Islam sought to uphold the honor, esteem, and

dignity of women, effecting a transformative shift in perspective: from viewing women as objects of shame or mere complements to men to recognizing them as equal human beings with shared rights and responsibilities in the eyes of God.

There are at least three groups of scholars who give their views regarding the position of women as judges, namely:

1. Groups that view women as illegitimate judges

Most scholars prohibit women from becoming judges in any case. This opinion was expressed by several scholars from the Malikiyah, Shafi'iyah, Hanabilah, and some scholars from the Hanafiyah School. The jurists require 'there must be a man and be able to perform *ijtihad*, this is related to the permissibility of appointing a person whose testimony is rejected or a wicked person to be a judge (Az-Zuhayli, 2011). The scholars require the judge to be a man based on the hadith that "there will be no happiness in those who leave their affairs (government) to women." Another reason is that deciding the case requires an intelligent mind and intellect, as well as experience related to how to solve life's problems. Women's intellect is considered to be less strong and has weak arguments because experience in observing the reality of life is lacking (Az-Zuhayli, 2011).

In addition, in carrying out his duties and functions, a judge must listen *fiqh* experts, witnesses, and parties to the case. Women are forbidden to sit with foreign men to avoid slander. Therefore, women are not allowed to become the highest leaders of the state and other leadership positions in the state (Az-Zuhayli, 2011). There is an even more extreme and firm opinion that states that those who appoint women as judges will be guilty, as found in the book *Al-Bakr* and quoted again by Aziz (Aziz, 2017). As stated earlier, Imam al-Mawardi also stated that one of the conditions for being a judge is a man, so a woman can't become a judge based on al-Mawardi's opinion (Al-Mawardi, 2000). Another scholar who explained the requirements for men as a condition for judges is Ibn Rushd in his book *Bidayatul Mujtahid*, the person who is allowed to judge should be independent, Muslim, puberty, male, intellectual, and fair (Ihyak, 2016). Moreover, scholars who reject a woman's judicial decision are because they equate it with the *Imamah Kubra* (supreme leadership) and equalize her with a slave because of her lack of honor (Rusyd, 2007).

2. Groups that view women as judges in civil cases and not in criminal cases (*Qishash*, *Hudud*, and *Ta'zir*)

This opinion was expressed by some scholars from the Hanafi mazhab. The Hanafi mazhab argues that women can be witnesses in *muamalah* matters, therefore they can also be judges in *muamalat* (civil) affairs and are not accepted in other cases, such as *hudud*, *qishash*, or other *jinayah* laws (Az-Zuhayli, 2011). It is known that competence in the field of determining cases is closely related to the competence to be a witness.

3. Groups that view women as judges in all cases (Civil and Criminal)

Ibn Jarir at-Thabari stated that women are allowed to be judges in all cases. This is based on the ability of women to become mufti, so they are also allowed to become a judge (Az-Zuhayli, 2011). Scholars argue that decisions made by female judges are permissible for all matters, based on the fact that everyone can judge among people, so the law is permissible except for cases that are specialized by *ijma'* such as the supreme leadership (Rusyd, 2007). In addition to Ath-Thabari, Imam Ibn Hazm, as quoted by Aufar, also allowed women to be judges. Ibn Hazm reasoned that Imam Abu Hanifah narrated a story that Umar bin Khattab appointed a woman named al-Syifa to be a *wilayat hisbah* or auditor in the market (Aufar, 2019). Furthermore, according to Ibn Hazm, the hadith stated: "It will not be happy for those who leave their affairs to women" is a hadith related to the general problem of caliphate or leadership.

Furthermore, Ibn Hazm also allowed women to be leaders by *istidlal* with the hadith: "And women are the leaders of her husband's house and her children, and she will be held accountable for her leadership". (HR. Ahmad, Al-Bukhari, Muslim, Abu Dawud, and at-Tirmidhi).

According to Imam al-Baji as quoted by Muqoddas, there are at least 4 postulates used by groups that state that women are legitimate to be judges in all cases, both criminal and civil, namely:

- a) The verses of the Qur'an and the Hadiths of the Prophet Muhammad state that Muslims, men, and women, some of them are leaders for others. Based on the origin of the case of "equality" between men and women, unless there is special evidence that mentions the exception of a certain case, namely the power of the *'uzhma imamah*. Meanwhile, power other than the *'uzhma imamah* is very likely to be filled by women. One of the postulates regarding the equality of leadership between men and women is in Q.S. at-Taubah:71.
- b) A hadith narrated by Ibn Umar that the Prophet said that all people are leaders and will be held accountable for what they lead. The hadith shows that everyone is a leader, regardless of gender. This means that women also have the right to be leaders and judges just like men.
- c) Qiyas

Female Judges According to Contemporary Scholars

The views of contemporary scholars are not much different from classical jurisprudence, but because of the difference in the times, it will affect the results of *ijtihad* scholars. There are two views on the law of women judges among contemporary scholars, namely:

1. Preacher who prohibits women from becoming judges

The contemporary scholars who prohibit women from becoming judges are Malikiyah Ulama, Shafi'iyah Ulama, and Imam Sayyid Sabiq. One of the Maliki scholars from Damascus, Muhammad Sukhal al-Majjaji, as quoted by Aufar, requires three qualities that

must be possessed by judges, namely: perfection, fairness, and knowledge. Perfection includes the intellect and the body, so the judge must be puberty, independent, male, able to hear, see and speak. Meanwhile, the fair judge is required must be a Muslim, not an infidel or a wicked person. Meanwhile, the characteristics of knowledge are interpreted as judges must master the science of jurisprudence or have the criteria to become a mujtahid (Aufar, 2019).

Furthermore, al-Habib bin Tahir, a Maliki scholar from Tunisia, explained that women and *sissy (khuntsa)* are not valid as judges. This law is based on several evidence, namely:

- 1) Hadith explaining women's lack of reason and religion that narrated by Al-Bukhari (Asriaty, 2016).
 - 2) Hadith that explains that you will not be happy if it is led by a woman
 - 3) Qiyas from the law does not allow women to become the leader of the country (*al imamah al kibra*) because judges are the same as state leaders in implementing the law.
 - 4) Qiyas from hudud law and *qishas* where in both cases, women are not allowed to be judges and the law is qiyas from slave law (cannot be a witness in both cases). If this state of qiyas is allowed, then it is the same as allowing a slave to become a judge.
2. Scholars who allow women to be judges absolutely

One of the scholars who allowed women to become judges was Yusuf al-Qaradhawi. Al-Qaradhawi stated that there is no Nash that prohibits the appointment of female judges. The hadith narrated by Abu Bakrah which is the basis for the prohibition of appointing women as judges can be understood with three understandings, namely:

- 1) understand with *asbab al-wurud* the hadith arises from the Prophet Muhammad's comment to the Persians who appointed a woman to be king, not the Prophet's prohibition against giving affairs to women.
- 2) If the hadith is understood to prohibit women from holding the highest power, then if women participate in the role of public office that is not the highest power, it is allowed.
- 3) Modern society under a democratic system does not give women a leadership position by placing full responsibility on women, but these responsibilities are carried out jointly by a few people.

Furthermore, Jawad Mufhniyah argues that An-Nisa:34 does not consider women as worse than men, but they are equal. This verse explains the husband's role as a leader in the family, not to lead people or society (Yanggo, 2018). The other scholar, Kamal Jaudah, commented on hadith about Queen Kisrah, that the head state does not work alone, but she is helped by some experts. Consequently, there is no barrier for a woman to be a leader or to be a public official (Yanggo, 2018).

The Development of the Role of Women in Society

One of the main themes as well as the main principles of Islamic teachings is the equality between human beings, both between men and women as well as between nations, tribes and descendants. Islam is here to restore the position of women who have been deprived of the culture of ignorance. Islam recognizes equality as well as acknowledging the natural differences between men and women. However, the difference in status is not focused on gender, but on its functions and roles (Hanapi, 2015).

Mahmud Syaltut as quoted by Shihab, stated that the human character between men and women can be almost the same. Allah has bestowed on women as he has bestowed on men. God has given both sufficient potential and ability to have responsibilities and enable both men and women to carry out activities that are general or special. So sharia laws put the two in one framework. Men can buy and sell, get married, if they violate the rules, get sanctions or punishments, sue and witness, and women can also sell, do business, get married, if they violate the rules, get sanctions or punishments, sue and witness (Khoer et al., 2021).

In the early days of the development of Islam, women were considered to have participated in the development of Islam. Khadijah was the wife of the Prophet as well as one of the people in *the group of assabiqunal awwalun* (the first people as Muslim/Muslimah). Khadijah has a big role in supporting the struggle of the Prophet Muhammad. Apart from Khadijah, the other wife of the Prophet, namely Aisha is the most narrator of hadith among women. Hafsa bint Umar was a woman who was very meritorious in preserving the pages of the Qur'an, which were later written during the caliphate of Uthman bin Affan. Um Sulaim, the wife of Abu Talhah, was a friend who participated in the Battle of Uhud, the Battle of Hunain, and the Battle of Khaibar (Utsman & Ulama'i, 2000).

The role of women in the public sphere also continued until the time of Khulafaur Rasyidi and the dynasties that followed. Um Haram (the Prophet's aunt), participated in the invasion of the island of Cyprus in 649. In the post-reign of Khulafaur Rashidin, there was Zubaidah, the wife of Harun ar-Rashid, who was a philanthropist in the struggle for Islam. There is also Rabi'ah al-Adawiyah a female Sufi figure. The hadith expert is Fatimah bint Mundzir, as well as several narrators of hadith such as: 'Aisyah bint Sa'ad bin Abi Waqash, 'Aisyah bint Quddas, Hafshah bint Abdul Rahman, Shafiyah bint Shaibah bin Usman, Zainab bint Muhajir (Utsman & Ulama'i, 2000).

Furthermore, the Islamic view concerns women in terms of their origin and rights in various fields: (a) The origin of the female incident and (b) Women's rights. The origin of the occurrence of women can be found in Q.S. An-Nisa verse 1, "O people, fear your Lord who created you of the same kind and from whom Allah created his mate and out of them Allah multiplied many men and women". Meanwhile, about women's political rights, it can be found in Surah At-Taubah verse 71: "And the believers, men, and women, some of them are helpers to others. They instruct (do) the ma'ruf, prevent the ungodly, perform prayers, pay zakat, and obey Allah and His Messenger. They will be given Grace by Allah. Indeed, Allah is the Mighty and the Wise".

According to Shihab, verse An-Nisa 34 speaks calmly of the leadership of a man (in this case the husband) towards his entire family in the field of domestic life. This leadership also does not revoke the rights of the wife in various aspects, including in terms of ownership of personal property and management rights even without the consent of the husband. Historical Reality shows that women are involved in practical political matters. For example, Um Hani's attitude was justified by the Prophet when giving temporary security guarantees to music people (security guarantees are one of the aspects of the political field). Aisha directly led the war against Ali bin Abi Talib who at that time occupied the position of head of state (Afif, 2019).

The Constitutional Court of Justice

The Constitutional Court is a new institution provided by the amendment of the 1945 Constitution. The proposal regarding the Constitutional Court has been debated during the discussion of the amendment to the 1945 Constitution. Regarding the appointment of constitutional judges, there was an interesting debate between the members of the meeting. Soetjipno from F-PDI Perjuangan proposed that Constitutional judges be appointed by the MPR on the proposal of three Presidents, three Supreme Court proposals, and three DPR proposals (Tim Penyusun Buku Mahkamah Konstitusi, 2010).

However, due to the strong idea of the MPR's position as the highest institution, there was a significant change in the proposal for the appointment of constitutional judges (Isra, 2015). Zainal Arifin from F-PDIP proposed that the recruitment pattern for Constitutional Court judges is three that represent high state institutions, namely representing presidential institutions, then the House of Representatives and the Supreme Court which are then approved by the MPR (Tim Penyusun Buku Mahkamah Konstitusi, 2010).

Ultimately, the Constitutional Court Law requires the criteria to become a constitutional judge form of (a) having integrity and an irreproachable personality, (b) being fair, and (c) being a statesman who controls the constitution and state administration. In addition, a candidate for constitutional judge must qualify as (a) an Indonesian citizen; (b) have a doctoral degree (S3) with a bachelor's degree (S1) with an educational background in the field of law; (c) fear God Almighty and have noble character; (d) be at least 55 (fifty-five) years old; (e) physically and spiritually capable in carrying out duties and obligations; (f) has never been sentenced to imprisonment based on a court decision that has obtained permanent legal force; (g) is not being declared bankrupt based on a court decision; and (h) have at least 15 (fifteen) years of working experience in the legal field and/or for prospective judges who come from within the Supreme Court, are serving as high judges or as Supreme Court Judges.

The legal system in Indonesia has never required gender as one of the requirements for candidates for constitutional judges. This is none other than because the desired criteria are fair, has integrity, and is a statesman who has control of the constitution and constitution. These criteria are needed to achieve the goal of establishing the institution of the

Constitutional Court itself. In the context of constitutionalism, the Constitutional Court is constructed as a guardian of the Constitution whose function is to uphold constitutional justice in people's lives.

In the 20-year history of the Constitutional Court, there are two female constitutional judges, namely Maria Farida Indrati and Enny Nurbaningsih. Both are constitutional judges proposed by the President. Maria Farida Indrati was elected as a constitutional judge proposed by the President for 2 periods, namely August 16, 2008-August 13, 2013, and August 13, 2013-August 13, 2018. Meanwhile, Enny Nurbaningsih. become a constitutional judge on August 13, 2018-June 27, proposed by the President.

Maria Farida is the only female constitutional judge who has completed her duties during her 2 terms of office. For the first time, Maria Farida assumed the position of Constitutional Judge on August 16, 2008, and ended on August 13, 2013. Towards the end of Maria Farida's term as a Constitutional Judge in August 2013, President Susilo Bambang Yudhoyono elected and resubmitted Maria Farida to serve as a Constitutional Judge, namely from August 13, 2013, to August 13, 2018. During her 10 years of service, many of Judge Maria Farida's thoughts and scientific discourses have also colored the style of the Constitutional Court's decision. Maria Farida is the constitutional judge who most often conducts concurring opinions or dissenting opinions in Constitutional Court decisions. (Mahkamah Konstitusi RI, 2022).

Enny Nurbaningsih is a Constitutional Judge who was selected and proposed by President Joko Widodo after the Constitutional Judge Selection Committee formed by the President provided recommendations on the names of candidates for Constitutional Judges who were considered eligible because of the series of selection processes carried out previously. In addition to Enny's name, there are the names of Ni'matul Huda (Professor of HTN Islamic University of Indonesia) and Prof. Susi Dwi Harijanti (Professor of Law, Padjadjaran University).

This condition shows that women's capacity to become candidates for constitutional judges has been recognized. If the candidate for constitutional judge meets the requirements as intended in the law, then the candidate for judge can be submitted to become a constitutional judge. Based on Al-Jauziyah, the fiqh rules stated the legal fatwa will change with changes in the times, places, customs, and circumstances, these are all part of the religion of Allah (Zaelani, 2020). Time changes emphasize the reform of judicial power, especially related to the constitutionality of all laws and regulations and the protection of the constitutional rights of citizens, demands the establishment of a Constitutional Court as *the guardian of the constitution*. The Constitutional Court functions to oversee and maintain that the constitution is obeyed and implemented consistently, as well as making the constitution the basis for the implementation of the democratization process (Tim Penyusun, 2004).

Apart from being the guardian of the Constitution, the Constitutional Court also acts as *the sole interpreter of the constitution*. The Constitutional Court has binding decision-making power in the event of a dispute over the interpretation of constitutionality. Therefore, all

considerations and decisions issued by the Constitutional Court have a great influence on the life of the state. The Constitutional Court's final *and binding decision* not only has an impact on the parties to the case, but also on state institutions, law enforcement officials, and citizens. Legal considerations and decisions of the Constitutional Court have strong implications for the constitutional legal system.

The role of constitutional judges as the main actors in the Constitutional Court institution has a strategic, crucial role, even in terms of issuing fair decisions. Thus, the need for judges today, in this case, constitutional judges, emphasizes more substantial aspects, namely moral integrity, and justice, that govern the Constitution and constitution. So, it is not close to the possibility for women who meet these qualifications as constitutional judges.

The ability of female judges cannot be separated from the current condition, which is different from before, where women today can easily access education and develop their capabilities to refute the reason for the lack of reason for women. If the requirement for men to become judges is still enforced, it can hinder the formation of a judicial institution fronted by judges with the required character. The opinions of Carlo Guarnieri and Pederzoli as quoted by Saldi Isra state that those that can affect the power of the judiciary are: (a) the character of the judge himself; (b) the legal system applied; (c) the character of the political system in which the legal system is applied (Isra, 2015).

A famous example of legal differences due to differences in time and place is the opinion of Imam Shafi'i who changed when he migrated to Egypt. The legal fatwa of Imam Sha'I, when he was in Iraq was known as *qaul qadim*, while the legal fatwa when he was already settled in Egypt was known as *qaul jaded* (Yaqin, 2016). There are also different legal opinions when circumstances change. For example, argument on the water of Musta'mal (Ahyar, 2015). The requirements of constitutional judges in Indonesia's positive law affirm the existence of two major components in it, namely capacity and integrity. The fulfillment of these two components will determine public trust which will have implications for the authority of the Constitutional Court (Palguna, 2018). In line with SDGs, because achieving gender equality and guarding the human rights, dignity, and capability of women is substantial thing in the world of fairness and sustainable (Bayeh, 2016). The dignity of the Constitutional Court cannot be separated from constitutional judges who are institutional personifications, so that judges are part of the legal structure as a component of the embodiment of the legal system.

CONCLUSION

There are differences of opinion regarding the position of women judges among scholars. These differences of view are motivated by differences in interpretation and understanding of the postulates. However, to achieve broader legal goals, the implementation of legal rules also needs to look at the social conditions, places, and times in which they are enacted as in the opinion of Ibn Qayyim Al-Jauziyah. Female constitutional judges do not

violate Islamic law because, based on the understanding of legal changes, it is flexible to obtain constitutional judges with integrity and fairness who understand the constitution and constitutionalism. The woman constitutional judge has a key role in ensuring the protection of women's rights and enhancing participation in the enforcement of law and justice. As a result, it will be achieving the results of the sustainable development goals in the meantime. It is better to revise the provision in the election of constitutional judges by encouraging the president, parliament, and Supreme Court to propose a greater number of women as constitutional court candidates.

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