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Judicial Institution and Judicial Power: How Judicial Authority Existence in Administering Judicial Power in the Islamic View

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Abstract

The judiciary is very important thing to be paid attention, due to its effects on the integrity of the nation as well as state, even in the pre-Islam era up to current days. This study aims to expose the existence of the judicial institution's authority in administering a judicial power. This research applied library method. The data collected form literature, and the analysis technique used the descriptive analysis based on the evidence of judicial institutions. The court is authority institutions which conduct a justice, trough examining and deciding cases of legal disputes or violations of laws. *Wilayatul Hisbah* whose main authority is to settle minor criminal acts which are do not require a judicial process in their settlement. In supporting this authority, there is such fatwa council, *tahkim* or arbitration institution that was held as an institution for implementing judicial power in Islam.

Keywords: judiciary; judicial institutions; judicial power

Abstrak

Peradilan sangat penting untuk diperhatikan karena berpengaruh terhadap keutuhan bangsa dan negara. Dari masa pra-Islam hingga masuknya Islam saat ini. Kajian ini bertujuan untuk memberikan pemahaman tentang keberadaan lembaga peradilan sebagai kekuasaan kehakiman. Metode penelitian yang digunakan adalah metode penelitian kepustakaan. Materi yang menjadi acuan berupa literatur, dengan deskriptif analisis berdasarkan kajian lembaga peradilan. Pengadilan adalah badan yang melakukan peradilan yaitu memeriksa dan memutus perkara sengketa hukum atau pelanggaran hukum atau undang-undang. *Wilayatul Hisbah* yang kewenangan utamanya adalah menyelesaikan atau mengadili tindak pidana ringan yang sifatnya tidak perlu proses peradilan dalam penyelesaiannya. Dalam mendukung kewenangan ini, maka diadakanlah lembaga fatwa, tahkim atau arbitrase sebagai lembaga pelaksana kekuasaan kehakiman dalam Islam.

Kata Kunci: peradilan; lembaga peradilan; kekuasaan kehakiman

Introduction

The study of theories of the establishment of a civilization, there is a popular opinion that states that a world perspective born of the spirit brought by religious ideas or ideas is the most important element of the establishment of a civilization.¹ Pre-Islamic society, no political power and organized judicial system.² However, if there is a dispute regarding property rights, inheritance rights and violations of the law other than murder, the dispute is resolved through the help of a peacemaker or referee appointed by each party to the dispute. For this reason, there are no official officials, but rather ad hoc in nature. This means that in the event of a dispute, a peacemaker will be appointed who is in charge of resolving the case. This peacemaker is often called hakam.

History records, that Muhammad saw before becoming an Apostle once acted as a referee in disputes that occurred among the people of Mecca. The dispute was concerned with attempts to put the aswad chastisement back in its original place. In the person of the Prophet Muhammad saw accumulated several functions including, as Prophet and Apostle as head of state, as a judge who resolves disputes among the Islamic *ummah*. Originally, the Prophet Muhammad pbuh acted as the sole judge, but after the Islamic *ummah* began to spread to various regions, he gave authority to other companions to become judges who resolved disputes among the companions where they were. It was done because their place was far from the prophet's residence. As a consequence of this granting of authority, he also allowed the companions to "*berijtihad*", in cases not provided for in the Qur'an and Sunnah.

The purpose of the judiciary is to uphold justice. The perfection of Islam can be seen from the principles of the teachings it contains. Among the principles that occupy an important position and become a discourse in Islam from time to time is *iqāmah al-`Adālah* (upholding justice). Upholding justice on this earth is the hope of every human being in order to achieve peace and tranquility in life. Justice is not only promoted by Islam, but all existing religions in general try to uphold justice. This shows the importance of justice in human life for the sake of realizing harmony in society.³

This explains how important the meaning of justice is with the emergence of various social institutions in society, including in this case legal institutions. The birth of various legal institutions in society is an endeavor and a means of

¹ Sulaymān al-Khatīb, *Usul Mafhūm Al-Hadlārah Fī Al-Islām* (Kairo: Al-Zahrā' li al-Γ'lām al-`Arabi, 1986).

² Ali Husni Al-Kharbutli, *Al-Hadlārah Al-`Arabiyah Al-Islāmiyah* (Kairo: Maktabah al-Khānji, 1994).

³ Awal Rifai Wahab, Asni Asni, and Muh. Saleh Ridwan, "Peradilan Islam Pada Masa Rasulullah Dan Khulafaurasyidin: Studi Komparatif Peradilan Islam Era Klasik," *BUSTANUL FUQAHA: Jurnal Bidang Hukum Islam* 3, no. 1 (April 5, 2022): 32–46, <https://doi.org/10.36701/bustanul.v3i1.461>.

upholding justice, especially justice before the law. In addition, for the sake of upholding legal justice in social life, it is highly expected that legal awareness will be present in every individual involved, from ordinary people to the top level of law enforcers.

Method

In this research, the author used the library research method.⁴ This method is used with the consideration that almost all of the material that is referenced (historiography) is in the form of literature, with an analytical descriptive form. In this study, researchers used data collection with documentary techniques, namely by looking for secondary data consisting of:⁵ Primary legal material that includes basic norms or rules, namely the 1945 Constitution, several laws related to state institutions. Secondary data is data obtained through library materials containing primary materials. These secondary data are obtained from books, the Internet and some research results related to state institutions. Tertiary legal materials that provide more information on primary legal materials and secondary legal materials include general Indonesian dictionaries, dictionaries, magazines, newspapers and others

The steps carried out in carrying out the analysis are:⁶ first, all the legal materials obtained through the normative are systematized and classified according to the object of its discussion. Second, after being systematized and classified, an application is then carried out, that is, it is described and explained about the object under study based on theory. Third, the material that is evaluated, which is assessed using the size of the applicable legal provisions.

Results and Discussion

Existence of the Court

A court is a body or organization convened by the state to administer and adjudicate legal disputes. It is concluded that the Court is an organizational unit (Institute) that organizes law enforcement and justice.⁷ The court is the body that

⁴ A. Rio Makkulau Wahyu et al., "Imam Syafi'i's E-Commerce Concept's Relevance," *Jurnal Ilmiah Ekonomi Islam* 8, no. 1 (March 9, 2022): 538, <https://doi.org/10.29040/jiei.v8i1.4370>.

⁵ Rinrin Warisni, "Dinamika Eksistensi Peradilan Agama Di Indonesia," *Jurnal At-Tadbir: Media Hukum Dan Pendidikan* 31, no. 2 (July 31, 2021): 153–60, <https://doi.org/10.52030/attadbir.v31i2.104>.

⁶ Johny Ibrahim Jonaedi Efendi, *Metode Penelitian Hukum: Normatif Dan Empiris* (Jakarta: Kencana, 2020).

⁷ Cik Hasan Bisri, *Peradilan Islam Dalam Tatanan Masyarakat Indonesia* (Bandung: Remaja Karya, 1997).

conducts the judiciary, namely examining and deciding cases of legal disputes or violations of the law.⁸

According to the provisions of article 18 of Law Number 48 of 2009 concerning Judicial Power, "Judicial power is exercised by a Supreme Court and judicial bodies subordinate to it within the general judicial environment, religious judicial environment, military judicial environment, state administrative court environment, and by a Constitutional Court." That is, it can be interpreted that the Court is the perpetrator of judicial power.⁹

Based on this explanation, the author concludes that the Court is a judicial body and is concrete. If allowed, between the judicial institutions and the judicial power can be analogous to the glass and the water. The judicial institutions is positioned as the glass which is the container, while the judicial power is domiciled as the water which is the contents of the glass. So, we can feel the function of the glass when it has been filled with water, which is for drinking. Likewise, the judicial institutions and the judicial power, which we can feel their function when we know their respective positions. Thus, hopefully this paper will be able to help readers in distinguishing the Court and the Judiciary and, hopefully, no longer mistakenly use the words Court and Justice.

Al-Hisbah Region

Etymologically hisbah means "to do something good deeds calculatingly". In Islamic terminology. Hisbah means "an Islamic judicial institution that specializes in moral cases and various forms of maksiat that do not fall within the authority of ordinary courts and mazalim courts."¹⁰

The fiqh scholar siyasi defines hisbah as "a judiciary that deals with cases of persons who manifestly violate the command to do good and cases of persons who do manifestly the prohibition against committing munkar". Thus, the main task of this institution is to invite people to do good and prevent people from doing munkar, with the aim of getting the reward and blessings of Allah swt.

The officer who handles the hisbah is called a muhtasib. Muhtasib must meet the following requirements: 1. Independent, balig, akil, and fair; 2. Have a broad view and stick to the teachings of Islam; and 3. Have adequate knowledge of the forms of mundaneness. Some jurists add another condition that the muhtasib must be a mujtahid. However, this condition was rejected by the *jumhur ulama*.¹¹

⁸ Micheal R. Purba, *Kamus Hukum Internasional Dan Indonesia* (Jakarta: Widyatama, 2009).

⁹ Republik Indonesia, *Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman (Lembaran Negara Tahun 2009 Nomor 157, Tambahan Lembaran Negara Nomor 5076)*, 2009.

¹⁰ Al-Māwardi, *Al-Ahkamu Ah-Sultaniyyah* (Kairo: Dar al-Fikr, 1960).

¹¹ Tim Penyusun, *Ensiklopedi Islam* (Jakarta: PT. Ichtiar Van Houve, 2005).

The legal basis of hisbah is the word of Allah swt. In surah Ali imran (3) verse 104:

وَلْتَكُنْ مِنْكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَأُولَئِكَ هُمُ الْمُفْلِحُونَ

“And let there be among you a class of people who call upon virtue, call upon makruf and prevent from the munkar; they are the lucky ones.”

Basically, hisbah is the duty of every individual Muslim, in accordance with the demands of the above verses of the Qur'an. This is supported by the hadith of the Prophet Muhammad saw narrated by Imam Muslim:

من رأى منكم منكرا فليغيره بيده فإن لم يستطع فبلسانه فإن لم يستطع فبقلبه وذلك أضعف الإيمان¹²

“Whoever of you sees a depravity, should be prevented by his hands (power), if he is incapable, then prevent it verbally, if he is not able to do so, then prevent it with the heart, and it is as weak as faith”.

However, the obligation to do the duty of inviting people to do good and prevent doing evil is a collective obligation of muslims (mandatory kifayah). If this task is performed by some person, the obligation to others who do not do so falls away. However, for muhtasib, this task is a personal obligation that must be carried out, according to government regulations. Therefore, the person who voluntarily performs the duties of amar makruf nahi munkar is not called muhtasib, but is better known by the name of mutatawwi’.

The scholars of *siyasi* jurisprudence distinguish between *muhtasib* and *mutatawwi’*. *Muhtasib* is officially appointed by the government to carry out the duties of *amar makruf nahi munkar*. Therefore this task is mandatory ain for him. *Mutatawwi’* is any individual Muslim who voluntarily performs the task, so this task is *kifayah*. *Muhtasib* obtained the right of kusus from his office, while *mutatawwi’* only hoped blessing and reward from Allah. *Muhtasib* has the right to directly determine the punishment as well as carry out his sanction at the scene for violation of the *amar makruf nahi munkar* principle and the decision is binding. As for *mutatawwi’*’s right to determine the penalty for the offence.¹³

In the days of the prophet Muhammad saw, cases of pedana acts ranging from severe to light were handled directly by the Prophet saw himself, but the execution of his punishment was sometimes delegated to the companions. The Prophet Muhammad once delegated the destruction of idols and grave buildings in Medina to Ali ibn Abi Talib and supervised the mecca market to Sa'id bin Ash.¹⁴

The division of judicial duties expressly emerged and was carried out by Umar bin Khattab by appointing special officers for each institution. The *al-*

¹² Imam Muslim, *Shahih Muslim* (Bairut: Dar al-Jail, n.d.).

¹³ Penyusun, *Ensklopedi Islam*.

¹⁴ Ibnu al-Qayyim al-Jauziyyah, “Al-Thuruq Al-Hukmiyyah Fi Al-Siyasah Al-Syar’iyyah” (Kairo, n.d.).

muhtasib in the days of Umar bin al-Khattab included Sa'id bin Yazid, Abdullah bin Utbah, and a woman named Um al-Shifa, who specially acted as the superintendent of the Medina market. However, the naming of this field of duty as one of the new judicial institutions emerged in the time of Caliph al-Mahdi (775-785) of the Abbasid dynasty.

The violations handled by the *hisbah* institution are violations concerning: Worship, such as a person who does not perform prayers, fasting, zakat and hajj while he is able to pay *zakat* and carry it out. *Muamalah* (human relations), such as fraud in weighing goods, fraud in buying and selling, gambling, arbitrary attitude in exercising rights without considering the interests of others, and other moral violations. *Akidah*, such as the attitude of glorifying the creatures of Allah swt exceeds the majesty of Allah swt himself and other deeds that lead to shirking.

In its historical development. The institution of *hisbah* still remained in the Islamic country controlled by the Umayyad kingdom until the destruction of the kingdom in 750. Today the Islamic State that still maintains the institution of *hisbah* includes Saudi Arabia and the kingdom of Morocco. The institution of *hisbah* no longer exists in some Islamic States including in Indonesia, but the task of *amar makruf nahi munkar* continues. The authority of the *hisbah* institution is scattered to various departments.¹⁵

In Saudi Arabia, Islamic law has an essential and crucial place in state legislation, since the Saudi judicial and constitutional system depends on Islamic law. The Qur'an and Sunna constitute the foundational basis of its constitution.¹⁶ Saudi Arabia has an Islamic court system that consistently upholds Islamic law. Unlike the continental and Anglo Saxon legal systems, which are governed by the judicial, parliamentary, and government policies. In addition, in practice Islamic law is also governed by the sect's viewpoint, whether it comes from the official school, the Hanbali school, or from other schools. As a result, it may be said that Islamic law, which is positive law, completely governs the judiciary in Arab nations.¹⁷

The legal system in Morocco is divided into two types of judiciary; Sharia Courts and Madaniyah Courts (General Courts) which play an important role in the realization of Islamic law in the country.¹⁸

¹⁵ Ibnu al-Qayyim al-Jauziyyah.

¹⁶ Emine Enise Yakar, *Islamic Law and Society* (London: Routledge, 2021), <https://doi.org/10.4324/9781003037637>.

¹⁷ Aden Rosadi, "Islamic Jurisdiction System In Saudi Arabic," *Al-Ahwal Al-Syakhsyiyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 2, no. 1 (March 30, 2021): 1–14, <https://doi.org/10.15575/as.v2i1.12170>.

¹⁸ Muannif Ridwan, Ahmad Syukri Saleh, and Abdul Ghaffar, "Islamic Law In Morocco: Study on The Government System and The Development of Islamic Law," *ARRUS Journal of Social Sciences and Humanities* 1, no. 1 (August 31, 2021): 13–22, <https://doi.org/10.35877/soshum539>.

Whereas in Indonesia itself the role of Islamic law in the development of national law in Indonesia takes several forms, including: Exists in the sense of being an integral part of Indonesian national law. Exists in the sense of existence with independence that is acknowledged for its existence and strength and authority by the national community and given national legal status. It exists in national law in the sense of Islamic legal norms which function as a filter for Indonesian national legal materials. There is in the sense of being the main material and the main element of Indonesian national law.¹⁹ It can be understood that Indonesian National law is a national law that is based on the state philosophy of Pancasila. National law serves Indonesia's national interests which contain the values of diversity, especially belief in religion. Therefore it is clear that religious law (Islamic law) must exist in Indonesian national law, because it is the most dominant basis, where Islamic law plays a very important role in shaping Indonesian human behavior. Therefore Islamic law becomes an absolute element for the development of Indonesian national law.

Al-Mazhalim Region

Mazhalim is a judicial institution that deals with the issue of the tyranny of the ruler and his family towards the people. *Mazhalim* comes from the singular form *mazhlimah* which means institution authorities. In the study of jurisprudence, *mazhalim* is a form of judicial institution other than the general judiciary and the *hisbah* judiciary.²⁰

This *mazhalim* judiciary aims to restore the rights of the people, and to resolve disputes between rulers and citizens. What is meant by ruler is the entire range of government from the highest officials to the lowest officials.²¹

In the case of *mazhalim*, the judiciary can act without having to wait for a lawsuit from the aggrieved. That is, if you know of a case of *mazhalim*, the *qadi* (judge) of the *mazhalim* court must immediately resolve the case. Thus, the *mazhalim* judiciary has power for the following:²²

- 1) Carefully examine the behavior of officials and their families, prevent violations that they may commit, and prevent their tendency to act dishonestly.
- 2) Checking the fraud of the employees responsible for the linking of funds to the State.

¹⁹ Khoiruddin Buzama, "Pemberlakuan Teori-Teori Hukum Islam Di Indonesia," *Jurnal Hukum PRIORIS* 3, no. 1 (2016): 27-45, <https://doi.org/https://doi.org/10.24042/adalah.v10i2.300>.

²⁰ Ibnu al-Qayyim al-Jauziyyah, "Al-Thuruq Al-Hukmiyyah Fi Al-Siyasah Al-Syar'iyah."

²¹ Muhamad Al-Zuhayli, *Tārikh Al-Qadlā' Fī Al-Islām* (Beirut, Dār al-Fikr al-Mu`āshir & Damaskus: Dār al-Fikr, n.d.).

²² Penyusun, *Ensklopedi Islam*.

- 3) Examining officials responsible for state finances.
- 4) Carefully examine the handling and distribution of waqf property and other public interests.
- 5) Restore the rights of the people taken by the State.

This court specifically also handles the cases complained of as follows:

- 1) Salaries of hunters or workers who are unilaterally cancelled or suspended.
- 2) Property forcibly taken by the rulers, including property confiscated by the State.
- 3) Payment of salaries of State officials.
- 4) Disputes over *waqf* property.
- 5) Decisions of judges that are difficult to implement in connection with the weak position of the judiciary
- 6) The kesus which cannot be resolved by the hisbah court so that it neglects the general benefit
- 7) The implementation of basic worship, such as
- 8) Handler of the *Mazhalim* case, the sentencing and execution of the decision

The requirements as a caddie in mazhalim's judiciary are as follows:

- 1) Have a high position and authority
- 2) Have the ability to carry out decisions
- 3) Has a wide and strong influence
- 4) Notoriously clean and honest
- 5) Not greedy
- 6) Warak sting

Carrying out its hearings, the *Mazhalim* judiciary must be equipped with judicial tools: security guards (judicial police) with several aides, *qadi* and rulers, legal experts (*fuqaha*) clerks, and witnesses. The completeness of the *Mazhalim* judiciary is intended so that the siding can run safely and smoothly, as this judicial case concerns state officials.

The completion of the *Mazhalim* case has begun since the Prophet Muhammad saw. A well-known case is the misconduct committed by Zubair bin Awwam (one of the families of the Prophet saw) against an Anshar. In this case it was mentioned that Zubair did not want to drain water into the fields of the anshar people who were his neighbors, so that the person's crops were dry. Then the *anshar* complained to the Messenger of Allah, "take the water to your heart's content, Zubair then flow the water to your heart's content". The *anshar* then said, "O Messenger of Allah, challenge him the son of your uncle." The Apostle's face then turned red, then said again, "take the water to your heart's content, Zubair, and then flow the water to your heart".²³

The age of *al-khulafa' al-rasyidun* the issue of *Mazhalim* was taken seriously and very carefully, according to the custom indicated by the Prophet saw. All these cases concerning the *Mazhalim* judiciary were handled directly by the caliph. At

²³ Imam Al-Bukhari, *Sahih Al-Bukhari* (Bairut: Dar Ibnu Kasir, 1987).

the time of Umar bin Khattab, Amr bin 'Ash called a man with the words "O hypocrite". The case was dismissed by Umar as *mazhalim*, then Umar called Amr bin 'Ash, even though at that time the accused hypocrite had forgiven Amr bin 'Ash.²⁴

During the Umayyad dynasty, there were more and more cases involving *mazhalim*, this was in line with the expansion of Islamic rule. On the initiative of Caliph Abdul Malik bin Marwan, all *mazhalim* cases were resolved in special courts, these courts were handled directly by the caliph. For this reason the caliph provided a special time to deal with the case.²⁵ The *mazhalim* court's rule grew stronger and firmer during the reign of Umar bin Abdul Aziz. In history it is known that the first action taken was to restore all the rights of the people that had been taken by the previous rulers sera to build a means for the public interest.²⁶

During the Abbasid dynasty the caliphs who cared deeply about the *mazhalim* judiciary included the caliphs *al-Mahdi*, *Harun al-Rasyid*, and *al-Makmun*.²⁷ The *mazhalim* trial continued until the collapse of the Islamic world caliphate in 1922. In addition, each State has its own policy in handling *mazhalim* cases. Today the *mazhalim* judiciary in Islamic countries can still be found using various other names. In Indonesia, this court is known as the State Administrative Court.

Fatwa Institute

According to Yusuf al-Qardhawi, *fatwas* are a component of the dynamics of Islamic law, specifically as a topic of Islamic legal doctrine and as a byproduct of the *fatwa* process. As a conduit and link between God's law and Muslims' everyday realities, *fatwas* play a significant role in Islamic law. This connection between reality and the law will create a harmonious legal nuance that is very flexible and tends to have higher dynamics than other Islamic legal conceptions.²⁸

Fatwa which means admonition, advice, answer to questions related to law, in *ushul fiqh* science,²⁹ that is, the opinion expressed by a *mujtahid* or *fakih* as the answer proposed by the requester of the *fatwa* can be personal, institutional or community group. In its development as a technical term derived from the Qur'an,

²⁴ Muhammad Iqbal, *Kontekstualisasi Doktrin Politik Islam* (Jakarta: Gaya Media Pratama, 2001).

²⁵ Penyusun, *Ensklopedi Islam*.

²⁶ Muhammad Iqbal, *Fiqhi Siyasa Kontekstualisasi Doktrin Politik Islam* (Jakarta: Graha Media Pratama, 2001).

²⁷ Penyusun, *Ensklopedi Islam*.

²⁸ Amrin Amrin and Amirullah Amirullah, "Contemporary Legal Istimbat: Study on the Theory of Changes in Fatwa According to Yusuf Qardhawi," *Mizan: Journal of Islamic Law* 6, no. 1 (2022): 89, <https://doi.org/10.32507/mizan.v6i1.1244>.

²⁹ Budiman Budiman, Wirani Aisiyah Anwar, and A. Rio Makkulau, "An Analysis Of Fiqh Jinayah And Criminal Law On The Legal Protection For Children As Victims Of Obscenity," *Jurnal Al-Dustur* 5, no. 2 (November 30, 2022): 183–211, <https://doi.org/10.30863/aldustur.v5i2.2632>.

the word is used in two verb forms meaning "to ask for a definite answer" and "to give a definite answer" (QS al-Nisa' (4): 127, 176).

The concept of *fatwa* in the early days of Islam developed within the framework of the question and answer process about Islamic information. The subject is science, without further specification. Later, when science was associated with hadith, *fatwas* were associated with *ra'yu* (opinion) and *fiqh* (jurisprudence or law).³⁰ Technical use of the term increases when the compilation of legal literature by various schools of the term *fatwa* is used specifically for cases that are not covered in the books of jurisprudence.

During the time of Caliph Umar ibn Khattab, a *fatwa* council was formed whose members consisted of a group of companions of the Prophet saw who had expertise in the field of sharia law to give *fatwas* to the Islamic community who needed them. In the beginning, the companions appointed by the Caliph to give fatwas were: Ali bin Abi Talib, Mu'az bin Jabal, Abdurrahman bin 'Auf, Ubai bin Ka'ab, Zaid bin Tsabit, Abu Hurairah, and Abu Darda', in addition to these friends, the Caliph forbade issuing legal *fatwas*. The purpose of establishing this fatwa council is to give *fatwas* to people who need them and to correct fatwas that are contrary to sharia. In judicial practice, the *fatwas* issued by the fatwa council are used by the *qadi* in deciding the cases they face as long as the legal challenges justify them.³¹

The study of jurisprudence, in terms of legal products, there is a difference between *mujtahid* and *mufti*. The *mujtahids* sought to distort from the nash of the Qur'an and the sunnah in various cases, whether requested by others or not. While the *mufti* does not issue his *fatwa* if it is not asked in the matter that is answered is a problem that can be answered with his knowledge, therefore, the *mufti* in dealing with legal issues must know in detail the case in question, consider the benefit of the *fatwa* requester, the environment surrounding it, and the objectives to be achieved from the *fatwa*.

Mufti is also different from judges, judging from the point of view of the legal force of their respective legal products. The *fatwa* of a mufti is not binding on the mustafti, that is to say, if a person requests and the mufti provides a legal solution, then *al-mustafti* may accept and practice the *fatwa* and may also refuse and not practice it. This is in contrast to the law that is decided by a judge to be binding and must be implemented by the convicted party.³²

³⁰ Agus Muchsin and Wirani Aisiyah Anwar, "The Tradition of Surrendering Penne Anreang in a Bugis Suppa Marriage," *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam* 9, no. 1 (July 1, 2022): 92–101, <https://doi.org/10.24252/al-qadau.v9i1.26444>.

³¹ Abdul Manan, *Etika Hakim Dan Penyelenggaraan Pengadilan* (Jakarta: Kencana, 2007).

³² Wahbah Az-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuh, Jilid I* (Damaskud: Dar al-Fikr al-Mu'ashir, 1984).

In line with the development of jurisprudence itself which is grouped into several schools, the mufti also underwent changes. The *mufti* is no longer required to be an absolute *mujtahid*, but is transformed into a *mufti* in a school or mufti who masters the jurisprudence of one school.

In some Islamic States today, the *mufti* occupies an important position and is one of the official institutions that deal with the problems of Muslims, such as Egypt, Saudi Arabia, Syria, and Morocco. The *mufti* as one of the religious positions is not tied to one school, but is comprehensive in nature taking into account several opinions of the school, according to the conditions and situation of the community. In addition, the *mufti* is also bound by the legislation drafted by his country.

Major changes swept the Islamic world during the 19th-20th centuries AD, the ebb and flow of centralized Ottoman power and Europe's increasing dominance over Muslim territories changed the functioning of the *fatwa* institutions.³³ The practical benefits of official *fatwas* were diminished mainly due to the usurpation of rulers and judiciary by European colonial governments and then continued by states that inherited the relics of the colonizers. However, during this period, *fatwas* became a tool for the mobilization of the population in anti-colonial resistance. Both active and passive in the fight for national independence.

Tahkim Institute

Tahkim is the shelter of two parties to a dispute to the person they agree with and agree to and willingly accept his decision to resolve their dispute, or the protection of the two parties to the dispute to the person they appoint to decide or resolve the dispute that occurs between them.

Both definitions indicate that the election and appointment of peacemakers (*hakam*) is carried out voluntarily by the two parties to the dispute. The institution of *tahkim* was known long before the arrival of Islam. the Nazarenes usually when there is a dispute between them submit the dispute to the Pope for amicable resolution.

The institution of *tahkim* was also carried out by the Arabs long before the arrival of Islam. The disputes that occur between them are usually resolved in *tahkim* institutions. In general, if there is a dispute between tribal members, then the chief in question who they choose and appoint as their *hakam*, while if a dispute occurs between tribes then other tribes who are not involved in the dispute they ask to be their *hakam*.

There are several *tahkim* events that have happened in history that were resolved by *tahkim*, these events are as follows:

- 1) In history it is recorded, that Muhammad saw before becoming an Apostle once acted as a referee in disputes that occurred among the people of Mecca. The dispute was concerned with attempts to put the

³³ John I. Episto, *Ensiklopedi Oxford Dunia Islam Modern* (Jakarta: Oxford, 2020).

aswad chastisement back in its original place. Among the Quraysh there was a dispute as to who was entitled to the noble duty. This dispute almost caused physical clashes among fellow Quraysh tribes. Luckily they found a way out. Namely, they agreed to give honor to the first to come to the Kaaba through the door of the Syaibah. It so happened that Muhammad came early through that door, then they exclaimed. "this is al-Amin. We agree he resolved this dispute". Then they told Muhammad the events that had happened. Finally, Muhammad tried to solve the problem with his own opinion. It turned out that they agreed and were willing with the settlement made by Muhammad.³⁴

- 2) Umar bin Khaththab had also litigated in a land dispute with Ubay bin Ka'ab. Both sides appointed Zaid bin Tsabit, who was not an official judge, as the mediator. Similarly with Thalhah in a dispute with someone, has appointed Jubeir bin Muth'im as arbitrator. All these events were known to the companions, and none of them rejected them.³⁵
- 3) The very famous *pristiwa tahkim* and was the forerunner of a large group split in Islam was the *tahkim* carried out between Ali bin Abi Talib and Mua'awiah bin Abi Sofyan in the settlement of the *siffin* war. As *hakam* (spokesperson) from Ali's side was Abu Musa Al-Asy'ari and from Mu'awiyah's side was appointed Amr bin Ash.³⁶

The above *tahkim* event is a basis that can be used as a basis that the *tahkim* is recognized by sharia, this is also found in the Qur'an as found in QS. Al-Nasa' (4) verse 35 and QS. Al-Maidah (5) verse 95, Caliph Umar ibn Khattab once said: "resolve the dispute so that they make peace, indeed the prosecution through the courts will cause hatred among them."

The difference between a judge and a *hakam* is:³⁷ The judge shall examine carefully which is submitted to him and shall be accompanied by evidence, whereas the right shall not be so. The territory and authority of the judge shall be determined by the agreement of his or her consent and shall not depend on the willingness and consent of the parties to which he is adjudicated, while the right has a authority which is limited to the willingness and consent of the parties who appoint himself as *hakam*. The defendant must be presented before the judge, whereas in *tahkim* each party cannot compel the opponent of his case to hadith in the *majlis tahkim* the arrival of each party of his own accord. The judge's decision is binding and can be imposed on both parties to the case, while the judgment will be executed based on the willingness of each party. In the *tahkim* there are some

³⁴ Badri Yatim, *Sejarah Peradaban Islam* (Jakarta: PT. RajaGrafindo Persada, 1994).

³⁵ Penyusun, *Ensiklopedi Islam*.

³⁶ Yatim, *Sejarah Peradaban Islam*.

³⁷ Tim Penyusun, *Ensiklopedi Hukum Islam* (Jakarta: PT. Ichtiar Baru Van Houve, 1997).

problems that cannot be resolved, whereas in the official judiciary all cases can be examined and resolved.

Conclusion

The court is a body that conducts justice, namely examining and deciding cases of legal disputes or violations of laws / laws. The hisbah region's primary authority is to resolve or adjudicate misdemeanors which by their nature do not require judicial process in resolving them. The cases that were resolved were the problem of reducing doses and scales in the market, selling expired food and loading goods that exceeded the capacity of the vehicle. The origin of the birth of this court is based on the practice of the Prophet Muhammad saw. The conclusion is in the prohibition of deeds that are not commendable and command the good. This power/court began to institutionalize during the reign of Umar ibn Khathab which later developed during the daulah period of the Umayyads. This court settled the case of bribery and acts of corruption. The person who handles/resolves this case is called *wali al-madzalim*. As for the absolute requirement to become a judge in a court of this level is courage or brave and willing to do things that ordinary judges cannot afford to do to try officials involved in disputes. In its implementation, this form of court has been practiced by the Prophet Muhammad saw in his lifetime. However, the establishment of a special institution was only established during the reign of Bani Umayyah, especially during the time of Abd. Malik bin Marwan. As was the case during the reign of caliph Umar ibn Abd Aziz, the first thing he did was to take care of and defend the property of the people who had been ruled by previous officials/rulers. A *fatwa* institute, whatever its name, is a scientific institution that conducts research and makes conclusions based on a special scientific methodology that is always developed over time. The definition of *tahkim* or arbitration in jurisprudence studies as a dispute resolution carried out by a *hakam* chosen or voluntarily appointed by two persons in dispute to end the dispute between them, and both parties will abide by the settlement to be taken by the *hakam* or the appointed *hakam*.

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