

## IMPLEMENTATION OF IMAM AL-MAWARDI'S THOUGHTS ON POLITICS AND LAW IN THE INDONESIAN JUDICIAL POWER

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### ***Abstract***

*The constitutional significance in the rule of law within the framework of the political system is the judicial power. This is considered as the benchmark in the implementation of the rule of law. In this case, Imam Al-Mawardi's doctrine contain relevance to the judicial power in Indonesia, especially in its political and law context related to judges as the figure of the court. This research is a literature research based on literal-descriptive method and using a normative, political, and philosophical approach with the objective of analyzing politics and law as a constitutional discourse in the judicial field based on Imam al-Mawardi's doctrine of the judicial power in Indonesia. The results show that Imam al-Mawardi's conceptual ideas of politics and law in the judicial power led to the strengthening of judge as a central figure in the judicial field showing the integrity of the judicial power in the constitution of Indonesia within the judicial field as a form of accountability.*

**Keywords:** *Imam al-Mawardi, Rule of Law, Judicial Power, Politics, Law*

### ***Intisari***

Signifikansi konstitusional pada negara hukum dalam kerangka sistem politik adalah kekuasaan kehakiman. Hal tersebut dinilai sebagai bentuk tolakan dalam pelaksanaan suatu negara hukum. Dalam hal ini, pemikiran Imam Al-Mawardi memuat relevansi dengan kekuasaan kehakiman di Indonesia, terutama dalam konteks politik dan hukumnya terkait figur hakim pengadilan. Oleh karenanya penelitian yang dilakukan adalah penelitian pustaka dengan menggunakan metode deskriptif-literal disertai pendekatan yuridis, politis, dan filosofis dalam rangka mengetahui urgensi politik dan hukum sebagai wacana ketatanegaraan di bidang peradilan dari perspektif Imam al-Mawardi terhadap kekuasaan kehakiman di Indonesia. Hasil penelitian menunjukkan bahwa pemikiran konseptual Imam al-Mawardi tentang politik dan hukum dalam kekuasaan kehakiman lebih mengarah pada penguatan aspek hakim sebagai figur sentral di bidang peradilan untuk mewujudkan integritas kekuasaan kehakiman sebagaimana dalam ketatanegaraan Indonesia pada bidang peradilan sebagai bentuk pertanggungjawaban.

**Kata Kunci:** Imam al-Mawardi, Negara Hukum, Kekuasaan Kehakiman, Politik, Hukum

## A. Introduction

Indonesia is a state law.<sup>1</sup> However, the state law in question is not equal with *rechtsstaat* (civil law) or rule of law (common law). Indonesia as a state law has a prismatic law tendency based on the values of their ideology namely Pancasila. Consequently, Indonesia's state law is intensely referred to as a religious nation-state since it is based from religious ethics.<sup>2</sup> In the context of state political power, Indonesia explicitly applies the *Trias Politica* doctrine (separation of power). Meaning, state power which are divided to the judicial branch, legislative branch, and executive branch limits one another. Additionally, this state power in practice adheres to the principle of checks and balances to prevent abuse of power or arbitrariness of the state against the people.<sup>3</sup>

In regard to the application of the law, the core is under the authority of the court through the judge as the 'last gate' of legal justice in the state administration.<sup>4</sup> Consequently, the judge decision is the law in which can renew the law.<sup>5</sup> This is reflected in the constitutional practice in Indonesia between the constitutional court (*Mahkamah Konstitusi*) and the house of representatives (*Dewan Perwakilan Rakyat*). In this case, statutory provisions can be revitalized through the constitutional court's decision and by the house of representative through legislative amendments.<sup>6</sup> Additionally, other judicial administrators such as the supreme court (*Mahkamah Agung*) must also issue deliberation regarding clemency and rehabilitation which will then be issued by the president. This is a form of reducing the executive power by the judicial branch. Thus, the supreme court as an actor in the judicial branch has contributed to balancing or at least reducing the president's executive heavy actions.<sup>7</sup>

However, apart from the involvement of the judicial power with the other power branches it should be emphasized that the involvement of judges in the judicial branch is extremely essential since judges are the central judicial figure in which they create judicial decisions possessing integrity, credibility, impartiality, capability, and accountability. of the above qualifications is the ideal form of the judge construction in which is more often ignored by

legislative policies between state institutions and even among the judges themselves. This is like the normative legal regulations for the administration of justice, instead of implementing the principles of judicial law such as clause “Freedom of Judge” (Kebebasan Hakim) and/or “For the Justice Based on God Almighty” (Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa).<sup>8</sup> On the contrary, it shows that the regulation and enforcement of the legal system still has distortions and can lead to judicial collusion.”<sup>9</sup> This is contrary to the value of justice as the spirit in the purpose of forming the law,<sup>10</sup> as well as the spirit of the judicial power as a branch of state political power.<sup>11</sup> In other cases, as in the case of Grandma Minah,<sup>12</sup> the case of judge Patrialis Akbar,<sup>13</sup> as well as the case of the dissolution of the TGPTPK (Joint Team for the Eradication of Corruption Crime) in the MA judicial review,<sup>14</sup> giving rise to speculative and anomalous in the public.

Hence, this article examines Imam Al-Mawardi’s doctrines in the *Al-Ahkām Al-Sulṭānīyah* relating to the concept of constitutional law<sup>15</sup> concerning the judicial power in Indonesia. The study of this article cites direct experience of a *mujtahid* figure and a supreme judge (*qāḍī al-quḍat*). It contains an accurate level of experience validity even though in this article adjustments has been made and currently an ongoing discussion concerning constitutional law, especially the court both for academic and practical purposes. Additionally, this article is a multi-disciplinary study that distinguish itself from other studies based on the doctrines of Imam al-Mawardi. The existing studies have only elaborated Imam al-Mawardi’s doctrines in the executive fields and

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8 Article 2, Paragraph (1) Law Number 48 of 2009 concerning Judicial Power.

9 Wasingatu Zakiyah, *et al.*, *Menyingkap Mafia Peradilan* (Malang: Setara Press, 2016), 138-142.

10 Fokky Fuad Wasitaatmadja, *Filsafat Hukum: Akar Religiositas Hukum* (Jakarta: Prenada Media Group, 2015), 47.

11 Samsul Wahidin, *Politik Penegakan Hukum di Indonesia* (Yogyakarta: Pustaka Pelajar, 2017), 79.

12 Madina Nusrat, “Elegi Minah dan Tiga Buah Kakao di Meja Hijau,” *Kompas*, <https://nasional.kompas.com/read/2009/11/20/08094942/elegi.minah.dan.tiga.buah.kakao.di.meja.hijau> (accessed 9 November 2020).

13 Maya Ayu Puspitasari, “Kasus Suap Hakim MK, Patrialis Akbar Minta Jadi Tahanan Rumah,” *Tempo*, <https://nasional.tempo.co/read/885943/kasus-suap-hakim-mk-patrialis-akbar-minta-jadi-tahanan-rumah> (accessed 8 November 2020).

14 Wasingatu Zakiyah, *et al.*, *Menyingkap Mafia Peradilan*, 127.

15 Bagir Manan, *Memahami Konstitusi: Makna dan Aktualisasi*, 56.

not based on a judicial approach.<sup>16</sup> In this case, the researcher initiated the conceptual ideas in this study.

Regarding this matter, Imam al-Mawardi's doctrines have significance to be applied contextually in the concept of judicial power in Indonesia. This is due to Imam al-Mawardi's doctrine imply a form of integration between politics, law, and moral ethics in the implementation of state administration, especially in the judicial power exercised by judges as judicial figures, the legal epicenter in judicial power through judges' decisions, and political actors in state administration through judicial institutions in judicial power. Therefore, Imam al-Mawardi's doctrines emphasize on the judge as the main actor (*figure central*), and element of judicial prestige (*subjectum litis; mukhtar an-nās*), as well as a legal expert who is wise, honest, trustworthy with a mindset according to justice (*omo iudex*)<sup>17</sup> in the form of an intellectual organic official (*officium nobile*) in a legitimate judicial power to provide legal justice in a state system.<sup>18</sup>

Based on the description above, this research shall explore 3 issues. First, the judicial power in Indonesia's constitutional system. Second, judicial power based on Imam al-Mawardi's doctrines. Third, the relevance of Indonesia's judicial power with Imam al-Mawardi's doctrines.

The typology of this research is a literature research<sup>19</sup> based on a literal-descriptive method<sup>20</sup> and a normative, political, and philosophical approach. The data sources include the *al-Aḥkām al-Sulṭaniyah* regarding judicial power

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16 Hanif Fudin Azhar, "Pemikiran Imam al-Mawardi tentang Politik dan Hukum terhadap Kekuasaan Kehakiman di Indonesia," (Undergraduated Thesis, Institut Agama Islam Purwokerto), 17-19.

17 Rusli Muhammad "Eksistensi Hakim dalam Pemikiran Yuridis dan Keadilan" *Jurnal Ius Quia Iustum* XXI, No. 3 (2014): 438.

18 Therefore, inclusively, the term judicial power includes judicial institutions and the main element in the judiciary, namely judges. In this case, judicial power is also associated with the meaning of judicial institutions related to law because it is actually carried out by judges in judge decisions (as law: jurisprudence) in addition to normative arrangements. In this case, the meaning of judicial power is also identical with the matter of judges. State legitimacy is the power granted by law in a legal-formal manner, namely the relevant normative state rules. As in Indonesia, there is Legal Number 48 of 2009 concerning Judicial Power, which regulates all matters concerning the judges themselves. Refer to Monika Suhayati, "Implementasi Hak dan Kewajiban Hakim Sebagai Pejabat Negara" in Disiplin F. Manao & Dani Elpah (ed.), *Hakim: antara Pengaturan dan Implementasinya* (Jakarta: Buku Obor, 2018), 38.

19 Moh. Nazir, *Metode Penelitian* (Bogor: Ghalia Indonesia, 2014), 79.

20 *Ibid.*, 43.

(*wilāyah al-qaḍā*), normative regulations regarding Indonesia's judicial power,<sup>21</sup> as well as other literature sources such as books, dictionaries, scientific journals, and other relevant sources.<sup>22</sup> Additionally, data is collected by literature survey in which the object (including the doctrine) is to be examined through literature review to provide a conceptual description.<sup>23</sup> In terms of data analysis, content analysis shall be used,<sup>24</sup> namely the presentation of the essence of the text to analyze the relationship between the main concepts of Imam al-Mawardi's doctrines on politics and law in judicial power, as well as historical relations in examining several factors that underline the construction of Imam al-Mawardi's thought. In this case, the data is obtained, reduced, and verified from references related to the problem under study, while other relevant data is used as additional study material, and analysis is carried out using deductive reasoning from Imam al-Mawardi's thoughts on judicial power. Thus, research systematics tends to be an *interactive model* which consists of the process of data reduction, data presentation, data verification, and the conclusion of research results.

## **B. Concept of Law State**

In the literature on constitutional law, state law is equivalent to the rule of law (English), *rechtsstaat* (Dutch-German), *Etat de Droit* (France), *Stato di Dirrito* (Italy).<sup>25</sup> In its development, both the 'state' and 'the state law' are a conceptual unit of constitutional law studies that have experienced developments and shifts in the historical trajectory of world development and human civilization.<sup>26</sup> State law is defined as a product of history. However,

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21 Law Number 48 of 2009 concerning Judicial Power, Law Number 3 of 2009 concerning the Supreme Court, Law Number 49 of 2009 concerning General Courts, Law Number 50 of 2009 concerning Religious Courts, Law Number 31 of 1997 concerning Military Courts, Law Number 51 2009 concerning State Administrative Courts, Law Number 8 of 2011 concerning the Constitutional Court, Joint Regulation of the Supreme Court and Judicial Commission Number 02/ PB/MA/P.KY/IX/2012 concerning Code of Ethics and Guidelines for Judge Behavior, Constitutional Court Regulation Number 2/PMK/2003 concerning Code of Ethics and Code of Conduct for Constitutional Justices

22 Ishaq, *Metode Penelitian Hukum* (Bandung: Alfabeta, 2017), 22.

23 Moh. Nazir, *Metode Penelitian*, 43.

24 Ishaq, *Metode Penelitian Hukum*, 69.

25 Hufron & Syofyan Hadi, *Ilmu Negara Kontemporer: Telaah Teoritis Asal Mula, Tujuan dan Fungsi Negara, Negara Hukum dan Negara Demokrasi* (Yogyakarta: LaksBang Grafika, 2016), 181.

26 Abdul Aziz Hakim, *Negara Hukum dan Demokrasi di Indonesia* (Yogyakarta: Pustaka Pelajar,

in general the figures or experts define state law concerning the objectives and tasks (functions) of the state, in terms of internal organization and state structure.<sup>27</sup>

According to Franz Magnis Suseno, state law is defined as a doctrine of state administration which includes (i) citizen-government relations based on objective-universal norms, not based on power and (ii) the objective norm in question is the law, which not only meets the requirements formally but can also be defended against legal ideas.<sup>28</sup> Meanwhile, according to Bambang Arumanadi, state law is defined as:<sup>29</sup>

*“The law state is defined as a state that consists of laws that guarantee justice for all citizens in achieving happiness in society. To base this justice, it is necessary to teach ethical norms to behave well. Likewise in legal regulations that only exist if they reflect justice in the social life between citizens.”*

Based on the understanding above, it shall be concluded that state law is organized with an orientation towards the welfare of mankind within the state through the enactment of law (constitution) accompanied by the principle of checks and balances and separation or distribution of power as a tool to prevent arbitrary acts.<sup>30</sup> Therefore, the history of state law is an attempt to leave absolute state power or a tendency to abuse power.

The concept of a state law develops into two concepts which are based on the socio-political situation in the country<sup>31</sup>:

a. Rechtsstaat Concept. This concept created civil law culture system

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2015), 8.

27 Dody Nur Andriyan, *Hukum Tata Negara dan Sistem Politik: Kombinasi Presidensial dengan Multipartai di Indonesia* (Yogyakarta: Deepublish, 2018), 33.

28 Franz Magnis Suseno, *Etika Politik: Prinsip Moral Dasar Kenegaraan Modern* (Jakarta: PT. Gramedia Pustaka Utama, 2016), 376.

29 Bambang Arumanadi, *Konsepsi Negara Hukum Menurut UUD 1945* (Semarang: IKIP Semarang Press, 1990), 46.

30 Warastra Karebet Amrullah, “Konstitusi sebagai Instrumen untuk Membatasi Kekuasaan Negara,” *Jurnal Konstitusi* II, No. 2 (2009): 48.

31 Eko Riyadi, “Akomodasi Prinsip Negara Hukum Dalam Konstitusi Republik Indonesia Pasca Amandemen,” *Makalah* disampaikan pada Training Tingkat Lanjut Rule of Law dan HAM, diselenggarakan oleh PUSHAM-UII, Jakarta, 3-6 Juni 2015: 7-8.

(Continental Europe) which arose from the resistance of absolute monarchy domination and revolutionized. The content of this concept as stated by Friedrich Julius Stahl, among others (i) human rights, (ii) separation or division of powers, (iii) law state governance, and (iv) administrative justice.<sup>32</sup>

- b. Rule of Law Concept. This concept created the common law culture system (Anglo Saxon). Rule of law rises from the form of legal culture developed in the United Kingdom.<sup>33</sup> The content of this concept as stated by Albert Venn Dicey, among others (i) rule of law, (ii) equality before the law, and (iii) human rights.<sup>34</sup>

The concept of law state according to the International Commission of Jurists is a formulation of concept recommendations that can be use as guidelines for law state practice so that the formulation<sup>35</sup>:

- a. The International Commission of Jurist Congress 1955 (Athens, Greece) has produced the following formulas namely (i) personal security must be guaranteed, (ii) no interpretation of fundamental rights, (iii) guarantee of freedom of opinion, (iv) people's private life must not be being violated, (v) religious freedom must be guaranteed, (vi) the right to receive instruction, (vii) the right to assembly and association, (viii) free and impartial justice, (ix) freedom of choice and choice in politics.
- b. International Commission of Jurist Congress 1965 (Bangkok, Thailand: the results of the emphasis on the Dynamic Aspect of the Law State in Modern Age tea) resulted in the following formulas (i) constitutional protection of human rights, (ii) free trial, (iii) free elections, (iv) freedom of opinion, (v) freedom of association and opinion, and (vi) civic education.

It shall be concluded that state law is defined as a systematic socio-political order of people's lives to achieve common goals through the enactment of constitutional law both materially (relating to personal awareness) and formally (relating to institutional law enforcement) to determine the direction of legal principles, political-ethical, and humanity in the constitutional

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32 Titik Triwulan Tutik, *Restorasi Hukum Tata Negara Berdasarkan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Jakarta: Prenadamedia Group, 2017), 64.

33 Satjipto Rahardjo, *Ilmu Hukum* (Bandung: PT. Citra Aditya Bakti, 2014), 257.

34 Titik Triwulan Tutik, *Restorasi Hukum Tata Negara Berdasarkan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, 66.

35 Hufron & Syofyan Hadi, *Ilmu Negara Kontemporer: Telaah Teoritis Asal Mula, Tujuan dan Fungsi Negara, Negara Hukum dan Negara Demokrasi*, 208.

system.<sup>36</sup> This is a practical effort to run the state with the following contents including (i) strong guarantee of human rights without discrimination, (ii) placing the law state in the state administration, (iii) legitimacy of people's sovereignty, and (iv) free and impartial judicial power. Judicial power has a linear relationship with the concept of state law, including the political and law aspects. The power of the judiciary in a law state is one of the central positions. Hence, apart from being "the last gate of justice" in matters of legal justice, it also has implications for the rights and obligations of the state and nation.<sup>37</sup>

### C. Imam al-Mawardi's Thought about Politic and Law in Judicial Power

#### 1. Study of Political and Law in Judicial Power

The study of state law is inseparable from politics and law. This is because the two have the same central actor, the human person who is visible embodied in the affairs of state administration. Hence, politics correlate to power and authority as an aspect that supports law enforcement. On the other side, the law created by those who possess constitutional power must include rights and obligations for citizens, and for those who are given the powers themselves. In its enforcement, the law must be substance-oriented, namely morality (justice) and humanity. Law enforcement through various instruments of state power as an aspect of state politics such as the judiciary in judicial decisions which are full of 'interpretations' of other laws (legislation).<sup>38</sup>

State power is attributed to judicial power as a constitutional instrument based on the constitution, therefore the matter of administering judicial institutions under judicial power which is carried out by judges through law decisions is considered a form of state politics in guaranteeing rights and obligations in the life of the nation-state. Regarding this matter, judges in judicial power are personal figures who carry out the constitutional mandate in administering the state to maintain religious values and carry out world affairs. This is reflected within Imam al-Mawardi's doctrine as follows:

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36 Hanif Fudin Azhar, "Refleksi Normatif Şahifah al-Madīnah terhadap Negara Indonesia," *Jurnal Volksgeist* I, No. 1 (2018): 4-5.

37 Adies Kadir, *Menyelamatkan Wakil Tuhan: Memperkuat Peran dan Kedudukan Hakim*, 6-7.

38 Satjipto Rahardjo, "Hukum Progresif: Aksi, Bukan Teks," in Satya Arinanto and Ninuk Triyanto, *Memahami Hukum: Dari Konstruksi Sampai Implementasi* (Jakarta: Rajawali Pers, 2009), 4-5.

إي-ين-دلأ ةس-اي-س و ن-ي-دلأ ةس-ار-ح يف ةوبن-لأ ةفال-خ-ل ة-عوضوم ةمام-إلأ

*Al-Imāmah (state; government) is an instrument to replace prophethood in guarding religion and regulating world affairs.*

Regarding this matter, it is considered that politics and law tend to interface with each other because they are oriented towards human rights and morality simultaneously. Consequently, the term judicial power as *political-judicial activism*. It means that judicial power is a form of concretization of constitutional organizing as a national political consensus (*resultant*).<sup>39</sup> Also, in judicial technique, judges in upholding justice must consider positive law (product of political consensus) and concrete facts to produce accurate judicial decisions.<sup>40</sup> That implies an inter-determination of politics and law *sollens-sein*. The law is a crystallization of political will. But on the other side, the law is a guideline for the political activities of the state.<sup>41</sup> The introducers of both indicate the ideal and balanced form of the constitutional system to form an order of state life.

According to Moh. Mahfud MD, the relationship between politics and law is mutually integrated and reinforcing in which he states that “Politics without the law will be wrong, and law without politics will be paralyzed.” This is called the theory of politic and law inter-determination.<sup>42</sup> Meanwhile, Satjipto Rahardjo stated that law requires power (political aspect), but the law also provides normative-juridical guidelines to exercise power so that power does not infringe the law.<sup>43</sup> Additionally, Soerjono Soekanto is of the view that the reciprocal relationship between politics and law indicates that

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39 Quote a statement from K.C.Wheare: “...*A constitution is indeed the resultant of parallelogram of force political, economi, and social...*” Refer to Bagir Manan, *Memahami Konstitusi: Makna dan Aktualisasi*, x.

40 Harjono, “Kedudukan dan Kewenangan Mahkamah Konstitusi dalam Sistem Ketatanegaraan Indonesia,” in Firmansyah Arifin, *et al.*, *Hukum dan Kuasa Konstitusi: Catatan-Catatan untuk Pembahasan Rancangan Undang-Undang Mahkamah Konstitusi* (Jakarta: Konsorsium Reformasi Hukum Nasional, 2004), 25.

41 Abdus Salam, “Pengaruh Politik dalam Pembentukan Hukum di Indonesia,” *Jurnal Mazahib: Jurnal Pemikiran Hukum Islam* XIV, No. 2 (2015): 125.

42 Moh. Mahfud MD, *Politik Hukum di Indonesia* (Jakarta: Rajawali Pers, 2017), 5.

43 Satjipto Rahardjo, *Ilmu Hukum*, 145.

law is a political decisions and as an effort to prevent power abuse arising from power (political aspect). Simultaneously, politics must be able to accept the juridical-constitutional consequences of the law.<sup>44</sup> It is considered that power in the state administration includes not only law-making but also law enforcement<sup>45</sup> as in the judiciary, accompanied by the principle of checks and balance in the practice of the constitutional system. Therefore, the correlation between politics related to the context of state administration and laws related to the juridical legitimacy of state politics is considered as a constitutional aspect capable of strengthening the exercise of judicial power.

In regards to this, it should be noted that in judicial practice, judges do not only accommodate the context of constitutional politics (aspects of judicial institutional authority) and positive law (legal-juridical aspects of *state law*) but also accommodate values outside that context such as the living law (socio-legal) and natural law (morals and ethics) which is the concept of legal pluralism initiated by Werner Menski.<sup>46</sup>

## 2. Judicial Power from Imam al-Mawardi's Thoughts

First and foremost, the judicial system which is aimed at meeting the legal needs of a country. Imam al-Mawardi views and thoughts are based on the *Shafi'iyyah* and *Sunni* doctrines. The *Sunni* view is represented in the matter of strengthening the *status quo* of the political reality of the state administration.<sup>47</sup> Meaning the starting point on the emphasis and affirmation of the requirements for filling positions in the state administration system. As with judicial power, namely the position of judge, and in the distribution of power and accountability for the position of judges in judicial power.

Imam al-Mawardi's thoughts which are based on the *Syafi'iyyah* school are reflected in the book *al-Aḥkām al-Sulṭaniyah* which is used as a milestone in the enforcement of constitutional law. The form of legal thoughts of the *Syafi'iyyah* doctrine is an integrated legal thought which is principally

44 Soerjono Soekanto, "Ilmu Politik dan Hukum," *Jurnal Hukum dan Pembangunan* XVIII, No. 3 (1988): 233.

45 Andi Safriani, "Telaah Terhadap Hubungan Hukum dan Kekuasaan," *Jurnal Jurisprudentie* IV, No. 2 (2017): 38.

46 Werner Menski, *Comparative Law in A Global Context: The Legal System of Asia and Africa* (Britania: Cambridge University Press, 2006), xii.

47 M. Layen Jumaidi, "Pandangan Politik al-Mawardi," *Jurnal Mimbar* XIX, No. 12 (2003): 139.

based on text and rationality based on context. Imam al-Mawardi's thoughts regarding constitutional law assess that judicial power must be followed because in addition to having a legal basis and also it is religiously mandated in upholding justice,<sup>48</sup> as well as formal statehood on legal doctrines and the demands of social life. Consequently, a legal decision through a judge's 'interpretation' integrates between the principle of the text and the rational context as a judicial product that can have implications for the life of the community, nation, and state.

Therefore, reflections on Imam al-Mawardi's thoughts are based on the position of judge, which is the starting point for the internal arrangement of the judiciary itself. This was confirmed by Imam al-Mawardi's statement as follows<sup>49</sup>:

اه عم حصي يتلا هطورش هيف تلمكك نم ال اءاضقلا دلقي أ زوجي الو  
همك ح اهب ذفن ي و هديلق

*"Not allowed to be appointed in the judiciary (a judge) unless can fulfill several (legal) requirements to hold the position of judge and exercise judicial authority."*

For this reason, the requirements for judges include being male, intelligent, independent, Muslim, having a fair attitude, in good physical condition, and understanding Sharia laws.<sup>50</sup> Besides, Imam al-Mawardi wants a mechanism for appointing judges by *muwallī* (the person who appoints the judge), the scope of his power, as well as regarding judges' merit.<sup>51</sup>

Judges are certainly considered a enforcers of justice and law through their judicial decisions. According to Imam al-Mawardi, the qualification of judges is a *mujtahid* with the scope of spiritual, moral, and intellectual

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48 Al-Quran Surah al-Maidah (5): 8.

49 Abu al-Hasan 'Ali ibn Muhammad ibn Habib al-Bashri al-Baghdadi al-Mawardi, *al-Ahkām al-Sultāniyah* (Beirut: Dār al-Fikr, t.t.), 54-56.

50 According to Imam al-Mawardi, the requirements for becoming a judge are instructions for judges to be able to exercise judicial power and be able to create *ijtihad-based* legal decisions independently of Sharia as a source of law. *Ibid.*, 56-62.

51 *Ibid.*, 98-100.

aspects<sup>52</sup> to enforce the law and fulfill justice in the public sphere.<sup>53</sup> Thus, the legal product can contain the values of justice, certainty, and legal benefits simultaneously, as well as responsibility orientation to God, the law, and himself as a judge.

The term judge is etymologically the root word ‘*aḥkam*’ which is defined as ‘law,’ which is related to the duty of a judge.<sup>54</sup> In Islamic literature, judges are termed *qāḍi*. The term *qāḍā* ‘is interpreted as term “judiciary” means the power to receive, examine, adjudicate, and settle cases between parties in a case to uphold law and justice, and term “court” is the institution of the parties in a case carrying out the process of settling the case. The term judge in the Quran is interpreted as an adjective possessed by Allah *ta’ala*, namely *al-Ḥakīm* or Most Wise. According to Tengku Muhammad Hasbi Ash-Shiddieqy, a judge is identical to a philosopher, because in the sense *ḥikmah* (the equivalent of ‘*ḥākim*’) is the highest *ma’rifah*. Thus, the subject that he characterizes as a judge, is defined as a subject or person of the highest quality.<sup>55</sup>

Therefore, the substance of Imam al-Mawardi’s thoughts on judicial power is the personal optimization of judges in spiritual, intellectual, emotional qualifications simultaneously to create legal decisions that contain justice not only based on intellectuality but based on divine values as a basis for morality. In this case, judges are considered as *omo iudex* or moral persons who are experts in law, wise, honest, and uphold justice. Thus, judges are prestigious legal subjects (*subjectum litis*) or *intellectual organic*, namely officials of

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52 Firman Floranta Adonara, “Prinsip Kebebasan Hakim dalam Memutus Perkara Sebagai Amanat Konstitusi,” *Jurnal Konstitusi* Vol. XII, No. 2 (2015): 225. Refer to Danang Hardianto, “Hakim Kontitusi adalah Hati dalam Tubuh Mahkamah Konstitusi,” *Jurnal Konstitusi* XI, No. 2 (2014): 330.

53 In philosophical discourse, the judge is defined as *the speaker of the fundamental values of the community*. In fact, it is said to be “God’s Representative on Earth” because through the judge the fate of a person in front of him can be determined. Regarding the title of mujtahid, judges as law enforcers in the state are determined by their intellectual, moral and spiritual competence. Refer to Suparman Marzuki, *Etika dan Kode Etik Profesi Hukum* (Yogyakarta: UII Press, 2017), 44.

54 Rusli Muhammad, “Eksistensi Hakim dalam Pemikiran Yuridis dan Keadilan,” *Jurnal Ius Quia Iustum* XXI, No. 3 (2014): 431.

55 Teungku Muhammad ash-Shiddieqy, *Filsafat Hukum Islam* (Semarang: PT. Pustaka Rizki Utama, 2013), 6.

the judiciary as a constitutional mandate to uphold law and justice through judicial decisions<sup>56</sup> as a constitutional mandate to uphold law and justice through the judiciary as judicial power based on prophetic characters, namely *ṣiddiq*, *amānah*, *tabligh*, and *faṭānah* which lead to integrity, credibility, and capability to create stability in life.

### 3. Judicial Power in the Indonesian State Administration

The term “judicial power” indicates the institution, namely the judiciary.<sup>57</sup> It means that judicial power is a form of constitutional legitimacy for judges to uphold law and justice through legal decisions through judicial institutions (courts). It is considered important because an independent, impartial, and accountable judiciary is a central part of the practice of a democratic law state such as Indonesia.<sup>58</sup> According to Mukti Arto, the urgency of judicial power in the state, among others<sup>59</sup>: (i) guardian of the constitution, (ii) elements of a democratic state, and (iii) the basis of the law state. As to Abdul Manan, the judiciary is the result of the contextualization of the state judicial power to prevent anarchist acts. The judiciary is institutionally considered as a state institution that can radiate the rays of justice.<sup>60</sup> Meanwhile, according to Sri Soemantri Martosoewignjo, judicial power is a constitutional form of state power to prevent arbitrary actions by other governments that do not respect the rights of the governed.<sup>61</sup>

In the Indonesian state, judicial power is exercised by a MA and the judiciary under it, as well as by the MK.<sup>62</sup> Also, as part of judicial power, the KY was formed and enforced as an external supervisory institution for

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56 Monika Suhayati, “Implementasi Hak dan Kewajiban Hakim Sebagai Pejabat Negara,” in Disiplin F. Manao & Dani Elpah (ed.), *Hakim: antara Pengaturan dan Implementasinya* (Jakarta: Buku Obor, 2018), 38.

57 Budiono Kusumohamidjojo, *Teori Hukum: Dilema antara Hukum dan Kekuasaan* (Bandung: Yrama Widya, 2016), 256.

58 Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara* (Jakarta: PT. Raja Grafindo Persada, 2015), 312-313.

59 Josef M. Monteiro, “Putusan Hakim dalam Penegakan Hukum di Indonesia,” *Jurnal Hukum Pro Justisia* XXV, No. 2 (2007): 130.

60 Abdul Manan, *Etika Hakim dalam Penyelenggaraan Peradilan: Suatu Kajian dalam Sistem Peradilan Islam* (Jakarta: Prenada Media Group, 2010), 1.

61 Sri Soemantri Martosoewignjo, *Hukum Tata Negara Indonesia: Pemikiran dan Pandangan* (Bandung: PT. Remaja Rosdakarya, 2015), 249.

62 Article 24, Paragraph (1) and (2) The Constitution of the Republic of Indonesia.

Supreme Judge and judges under the MA, that it is considered as an institution of *checks and balances* for judicial power as well as the supervision and recruitment of judges,<sup>63</sup> as the demand for reform the Indonesia state wants.<sup>64</sup> The mechanism for appointing judges tends to vary, namely in terms of appointing Supreme Judges, the appointment is carried out by the DPR - KY relations and by the President.<sup>65</sup> Meanwhile, the appointment of Constitutional Judges is carried out by the President with a proportional candidacy system through the President, the MA, and DPR, by nominating three candidates each.<sup>66</sup> The appointment and supervision of career and non-career judges are carried out by the MA and the KY.<sup>67</sup>

#### 4. Indonesian Judicial Power from Imam al-Mawardi's Thoughts

In the constitutional state administration system in Indonesia, judicial power is constitutionally exercised through the *birufikasi* (branch) system by the MA and the judiciary under it, as well as by the MK.<sup>68</sup> The KY is an external supervisory institution for Supreme Judges and judges under the MA. So undoubtedly that the judicial institution presented by the judge under the authority of the judiciary is part of the political aspect of the state administration and is strengthened by the legal aspect in the form of The Constitution of the Republic of Indonesia (UUD 1945) and its organic regulations. Therefore, the inter-determination between politics and law is a constitutional aspect that can underlie the exercise of judicial power as *political-judicial activism* in a law state.

In this context, the requirements for judges in Indonesia are contained

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63 Imam Anshori Saleh, *Konsep Pengawasan Kehakiman: Upaya Memperkuat Kewenangan Konstitusional Komisi Yudisial dalam Pengawasan Peradilan* (Malang: Setara Press, 2014), 1.

64 The reforms referred to are legal reforms, including constitutional reform, namely the 3rd and 4th formal amendments resulted in the establishment of the Constitutional Court, Judicial Commission, and Regional Representative Council institutions. Refer to Sri Soemantri Martosoewignjo, "Kedudukan, Fungsi, dan Peran Mahkamah Konstitusi dalam Sistem Ketatanegaraan," dalam Firmansyah Arifin, *et al.*, *Hukum dan Kuasa Konstitusi: Catatan-catatan untuk Pembahasan Rancangan Undang-undang Mahkamah Konstitusi* (Jakarta: Konsorsium Reformasi Hukum Nasional, 2004), 15-16.

65 Article 24A, Paragraph (3) The Constitution of the Republic of Indonesia. *Vide* Constitutional Court Decision Number 27/PUU/XI/2013

66 Article 24C, Paragraph (3) The Constitution of the Republic of Indonesia.

67 Constitutional Court Decision Number 43/PUU/XIII/2015.

68 Article 24 Paragraph (1) and (2) The Constitution of the Republic of Indonesia.

in the Constitutional Court Law and the Supreme Court Law as organic rules. In the context of the Supreme Court Justices, the conditions specified include: (i). Indonesian citizen, (ii). Fear God Almighty, (iii). Education in the field of law (level two), (iv). Minimum age 45 years, (v). Able to spiritually and physically in carrying out duties and obligations, (vi). Experience as a judge for 20 years, (vii). Never been sentenced to ethical sanctions.<sup>69</sup> In terms of appointment and election, Supreme Court Justices are proposed by KY to be elected by the DPR and then appointed by the President.<sup>70</sup> Meanwhile, in the context of the Constitutional Court Justices, the (special) conditions specified include: (i). Integrity and impeccable personality, (ii). Fair, and (iii). The statesman controls the constitution and state administration.<sup>71</sup> The (technical) requirements for nomination include: (i). Indonesian citizen, (ii). Bachelor of law education, (iii). Minimum age 40 years, (iv). Never been sentenced to imprisonment, (v). Not currently experiencing bankruptcy based on a court decision, (vi). Minimum 10 years experience in the legal field.<sup>72</sup> In terms of appointment and election, Constitutional Justices are proposed by the MA, DPR, and the President, with each of the 3 institutions submitting 3 candidates, to be further determined through a Presidential Decree.<sup>73</sup>

In this case, the qualifications that must be considered according to Imam al-Mawardi are<sup>74</sup>: (i). A man (*baligh*), (ii). Intellectuality, (iii). Independent status, (iv). Muslim, (v). Credibility, (vi). Physical perfection, (vii). Understand the subject of law and its branches. Meanwhile, the qualifications of the judge in Indonesia are as follows<sup>75</sup>: (i). Integrity, (ii). Personality beyond reproach and honesty (iii). Fair, (iv). Professional, (v). Experience in the legal field.

Based on the qualifications of judges, both from the concept of Imam al-

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69 Article 7 Law Number 3 Year 2009 concerning Supreme Court.

70 Article 8 Law Number 3 Year 2009 concerning Supreme Court.

71 Article 15 Law Number 8 Year 2011 concerning Constitution Court

72 Article 16 Law Number 8 Year 2011 concerning Constitution Court

73 Article 18 Law Number 8 Year 2011 concerning Constitution Court

74 Imam al-Mawardi, *Hukum Tata Negara dan Kepemimpinan dalam Takaran Islam*, trans. by Abdul Hayyie al-Kattani (Jakarta: Gema Insani Press, 2000), 132-135.

75 The qualification referred to is the normative implication of article 5 paragraph (2) Law Number 48 Year 2009 concerning Judicial Power to the regulation of separate judicial institutions such as the Constitutional Court, Supreme Court, General Courts, Religious Courts, Military Courts, and State Administrative Courts.

Mawardi and the judicial power system in Indonesia, it is substantially relevant and even synergistic in the content of the qualifications in question. In this case, regarding the appointment of judges in Indonesia, the relevance between Imam al-Mawardi's thoughts and Indonesia's 'judicial arrangements' is that the *muwallī* context can be compared with the KY, DPR, and the President in terms of the appointment of Supreme Court Justices, while the *muwallī* context can also be equated with the MA, DPR, and the President regarding the appointment of Constitutional Justices. However, also a qualification problem that is considered controversial both conceptually and practically in the Indonesian judiciary, namely regarding biological identity (required by men) and religious status (being Muslim).

*First*, the problem is related to the requirements for a man. In this case, according to Imam al-Mawardi, the priority of a man over a woman is because women are deemed not worthy of holding the position of a judge even though it may have legal implications.<sup>76</sup> The judicial power system of the Indonesian state does not require these conditions consistently. That can refer to the normative aspect of the Quran that the human person who has judicial authority is ordered to judge fairly.<sup>77</sup> Historically, adherence to the principle of allowing women to become judges was the result of deliberations by senior Muslim scholars led by Hasbi Ash-Shiddieqy.<sup>78</sup> Therefore, the existence of female judges in the judiciary is a necessity that adapts to the demands of the times and circumstances.<sup>79</sup>

*Second*, the requirements for being Muslim. If you examine the conditions, you must examine the socio-political conditions in the country where Imam al-Mawardi is located, namely the City of Baghdad which is an Islamic state so that these conditions are stipulated in the judge's requirements,<sup>80</sup> as is normatively stated in the Quran.<sup>81</sup> In this case, these conditions only intensely

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76 Abu al-Hasan 'Ali ibn Muhammad ibn Habib al-Bashri al-Baghdadi al-Mawardi, *The Laws of Islamic Governance*, trans. by Asadullah Yate (London: Ta-Ha Publisher, t.t.), 98.

77 Al-Quran Surah An-Nisā' (4): 58.

78 Abdul Manan, *Etika Hakim dalam Penyelenggaraan Peradilan: Suatu Kajian dalam Sistem Peradilan Islam*, 25.

79 H. A. Basiq Djalil, *Peradilan Islam* (Jakarta: AMZAH, 2012), 74.

80 *Ibid.*, 24.

81 Al-Quran Surah An-Nisā' (4): 141.

apply in the jurisdiction of the Religious Courts<sup>82</sup> and the Sharia Court.<sup>83</sup>

*Third, Mujtahid* qualifications. In this contemporary context, it can be said that it is difficult to find a personal judge with the qualifications of the *mujtahid*. As al-Sharbini stated that the position of a judge must be filled, then the filling of the judge's position can be filled by the best person among the existing people even though only with a *muqallid* capacity.<sup>84</sup> This is to prevent a power vacuum that can have fatal consequences to the practice of judicial power within the law state itself.

According to the researcher, the issue regarding judges is related to social and legal changes, as well as the times that occur in the climate of Indonesian society. The Indonesian judicial power system does not consistently require a man, Muslim, and qualified *mujtahid* in the recruitment of judges. Because this context is supported by emancipation, perceptions of human rights, and personal responsibility<sup>85</sup> as well as the scientific agreement of Indonesian Muslim scholars. The qualifications of judges that are applied in Indonesia have implications for personal credibility which can result in legal and social changes in society, besides being supported by the legal policy of judicial power which approaches the substance of Imam al-Mawardi's thoughts. Even though the appointment of judges from the personal circles who are *jahil* and *muqallid* is prohibited because it can have an impact on the resulting legal decisions.<sup>86</sup> The argument is built that *taqlid* is something that is prohibited, while in the case of *ijtihad* it is a matter that is allowed.<sup>87</sup> The activities of judges in judicial power in Indonesia can have the *ijtihad* value because they seek to open the 'satire' of law for justice through their legal decisions that use spirituality, intellectuality, and emotional thinking instruments, and consistently consider legal and social.

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82 Article 2, Paragraph (1) Letter b Law Number 50 Year 2009 about the Religious Court.

83 H. A. Basiq Djalil, *Peradilan Islam*, 224.

84 Abdul Manan, *Etika Hakim dalam Penyelenggaraan Peradilan: Suatu Kajian dalam Sistem Peradilan Islam*, 29.

85 Masdar Farid Masudi, *Syarah Konstitusi UUD 1945 Perspektif Islam* (Jakarta: Pustaka Alvabet, 2010), 202-206.

86 H. A. Basiq Djalil, *Peradilan Islam*, 88.

87 Abdul Manan, *Etika Hakim dalam Penyelenggaraan Peradilan: Suatu Kajian dalam Sistem Peradilan Islam*, 29.

On this basis, the construction of Imam al-Mawardi's political thought indicates the practice of judicial power represented by the judiciary through judges as the main judicial figure in his legal decisions, considered a *status quo* form of the constitutional system in the judiciary field accompanied by strengthening the qualifications of the judge's position and judicial authority. This is to create accountability, impartiality, and independence of the judicial power to support the law state practice in a democratic-nomocratic manner. The construction of legal thought that judicial power is the legality value of Islamic law, namely compulsory based on reason and sharia (*wajib 'aql wa syar'i*), as well as constitutionally accommodating in the constitution of each country, namely a form of state obligation in the constitutional system with intensive attention to matters of judges.

The content of urgency in overseeing legislation by judges in the practice of judicial power through judges' decisions. That it has an impact on rights and obligations, both eliminating and following up on any rights and/or obligations to the litigant. Therefore, Imam al-Mawardi's thoughts on constitutionality are identical to the inter-determination of politics and law in the law state system, including judicial power as *political-judicial activism* through the central role of a qualified judge of the court in his decision as *to the last gate of justice*. The implication is similar to the researcher's idea, namely the Concept of Judicial Integration, which is a conceptual reflection on the relationship between judges, court institutions, and the law state. It means that the judge's person must have high integrity as a starting point for the practice of a court institution under the authority of the judiciary so that it is under judicial principles, and has implications for the law implementation.

#### **D. Closing**

##### **1. Conclusion**

Based on a scientific study, the researcher concludes that the judicial power in the Indonesian constitutional system, the judicial institution presented by the judge under the authority of the judiciary is part of the political aspect of the state administration and is strengthened by the legal aspect in the form of The Constitution of the Republic of Indonesia (UUD

1945) and its organic regulations. Therefore, the inter-determination between politics and law is a constitutional aspect that can underlie the exercise of judicial power as *political-judicial activism* in a law state. Related to this, the pattern of recruitment of judges in Indonesia; both the Supreme Court and the Constitutional Court have provided requirements to become judges based on the legislation of each of these judicial institutions.

Regarding the matter of justice, Imam al-Mawardi's thoughts are based on *Shafi'iyyah* and *Sunni* schools. The *Sunni* view is represented in the matter of strengthening the *status quo* of the political reality of the state administration. It means, the starting point on the emphasis and affirmation of the requirements for filling positions in the state administration system. As with judicial power, namely the position of judge, and judge accountability in judicial power. Meanwhile based on the *Syafi'iyyah* school, as reflected in the book *al-Aḥkām al-Sulṭaniyah*. The form of legal thought of the *Syafi'iyyah* school is an integrated legal thought which is principally based on text and rationality based on context. Imam al-Mawardi's thoughts regarding constitutional law assess that judicial power is something that must be followed because besides having a legal basis both religiously which mandates the existence of upholding justice, as well as formal statehood on legal doctrines and the demands of social life.

This is the reason that Imam al-Mawardi emphasizes the 'figure' of judges, so the requirements for judges include being male, intelligent, independent, Muslim, having a fair attitude, in good physical condition, and understanding Sharia laws. Besides, Imam al-Mawardi wants a mechanism for appointing judges by *muwallī*, the scope of his power, as well as regarding judges' merit. According to Imam al-Mawardi, the qualification of judges is a *mujtahid* with the scope of spiritual, moral, and intellectual aspects to enforce the law and fulfill justice in the public sphere. The legal product can contain the values of justice, certainty, and legal benefits simultaneously, as well as responsibility orientation to God, the law, and himself as a judge.

Both from the concept of Imam al-Mawardi and the judicial power system in Indonesia, it is substantially relevant and even synergistic in the content

of the qualifications in question. In this case, regarding the appointment of judges in Indonesia, the relevance between Imam al-Mawardi's thoughts and Indonesia's 'judicial arrangements' is that the *muwallī* context can be compared with the KY, DPR, and the President in terms of the appointment of Supreme Court Justices, while the *muwallī* context can also be equated with the MA, DPR, and the President regarding the appointment of Constitutional Justices. However, also a qualification problem that is considered controversial both conceptually and practically in the Indonesian judiciary, namely regarding biological identity (required by men) and religious status (being Muslim).

The issue regarding judges is related to social and legal changes, as well as the times that occur in the climate of Indonesian society. The Indonesian judicial power system does not consistently require a man, Muslim, and qualified mujtahid in the recruitment of judges. Because this context is supported by emancipation, perceptions of human rights, and personal responsibility as well as the scientific agreement of Indonesian Muslim scholars. The qualifications of judges that are applied in Indonesia have implications for personal credibility which can result in legal and social changes in society, besides being supported by the legal policy of judicial power which approaches the substance of Imam al-Mawardi's thoughts.

Moreover, the qualifications of judges that are applied in Indonesia have implications for personal credibility which can result in legal and social changes in society, besides being supported by the legal policy of judicial power which approaches the substance of Imam al-Mawardi's thoughts, therefore the activities of judges in judicial power in Indonesia can have the *ijtihad* value because they seek to open the 'satire' of law for justice through their legal decisions that use spirituality, intellectuality emotional thinking instruments, and consistently consider legal and social

## **2. Recommendation**

That is, this scientific article apart from opening up opportunities to be followed up in the framework of developing science, especially constitutional law in the judiciary field. As for other supporting recommendations, such as the practice of judicial power by judges with high quality and integrity as the

main judicial figure through their law decisions in the judiciary institution is an integral form of political power state leaving the judiciary field in the context of upholding legal justice. Therefore, judges base their judicial activities on constitutional political construction, namely judicial power, as well as legal construction, namely the foundation of legislation (results of political consensus) both institutionally and judicial activities combined with other aspects in an integrative manner to produce *in concreto* law (results of activities judicial judge) based on justice. The practice of judicial power can be termed as *judicial-political activism*, and judges are considered as a benchmark for law state practice in the judiciary as well as the pattern of “Judicial Integration Concept.”

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