Witness Position in Court and How to Judge According to Ibnu Rusyd (Reinterpretation in the Book of Bidayatul Mujtahid Wa Nihayatul Muqtasid)

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ABSTRACT

The position of witnesses in court has a fairly important role as evidence if other evidence is not available to provide information about an incident/dispute. In the texts of fiqh books, the matter of witnessing in court is required to be male except for witnesses related to property rights (*huquq al-amwal*) or body rights. As if women's rights are not recognized when compared to men, this means that there is a gap between fiqh texts and the reality of society. According to Ibn Rushd, the fuqaha agree that when a judge wants to try a case (case trial), the principle of equality must apply between the accuser (prosecutor) and the defendant, or between the applicant and the respondent in a trial court. According to Ibn Rushd, a judge should not only listen to the words of one party without paying attention and listening to the statements of the other party. In this case, Ibn Rushd emphasized that the judge in the trial court must give time and opportunity to the plaintiff to first provide a statement of his indictment after being asked by the judge. If any part of the indictment case or object of the lawsuit which is denied, is rejected by the defendant, then according to Ibn Rushd, the judge must ask and investigate the evidence to the plaintiff. On the other hand, if the plaintiff does not have evidence and the case is related to assets, then based on the agreement of the fuqaha, the defendant must take an oath.

Keywords: Witness Position; Method of Judgment; Reinterpretation;

A. INTRODUCTION

The context of Fiqh runs dynamically following the context of the era after Fiqh was created. The understanding of Fiqh is clearly different when it is understood by the audience or the *mukhatab* after it. The interpretation of the original works of the book both in the classical era and in the medieval era also has different variants of interpretation. These differences can occur between interpreters or translators, and can also occur due to different socio-economic contexts and times. Likewise, the context of understanding contained in the book of interpretation or translation results, has different variants of understanding and interpretation when it is reunderstanding or reinterpreted by interpreters, translators or *faqih* in the next period.

An example is the opinion of Ibn Rushd in his famous book *Bidayatul Mujtahid wa Nihayatul Muqtasid*. This journal was compiled with the intention of understanding and reinterpreting the text written by Ibn Rushd which was then translated and understood in the present context which is related to the realm of contemporary Islamic law. This journal also only focuses on the position of witnesses in court and how to judge according to Ibn Rushd.

B. WITNESSES AND THEIR POSITION IN ISLAMIC COURTS

The position of witnesses in court has a fairly important role as evidence if other evidence is not available to provide information about an incident or dispute. In the texts of fiqh books, the matter of witnessing in court is required to be male except for witnesses related to property rights (*huquq al-amwal*) or body rights. As if women's rights are not recognized when compared to men, this means that there is a gap between fiqh texts and the reality of society.

This issue is certainly not an easy thing to answer by stating that today's society is already degenerate and has abandoned religious teachings. But we have to look at the substance of the problem from the question of the testimony. There is a question that then arises is whether the gender requirement in the testimony is something that is *qath'i* or something that is *zanni*? (Ihsanudin dkk, 2002: 93).

Whereas if you look at the moral message of the Qur'an that the position of men and women is equal (Ahmad Baidawi, 2005: 117). However, lately there have been many problems when women's awareness has begun to appear stretched to demand their rights in the space for their activities that have been oppressed, discriminated against by the treatment of the text message of the Qur'an which incidentally is the source of all Muslim laws (Faisar Ananda Arfa, 2004: 100-101). The issue of witnesses has so far been seen as a fairly significant issue and there must be a reinterpretation of text messages which have been considered as one male and two female witnesses. But before discussing in length, we first know the definition of a witness.

According to etymology, the word witness in Arabic is known as*Asy-syahadah* (الشهادة),is the*isim masdar* form of the wordيشهد- شهد(*syahida-yasyhadu)* which means attending, witnessing (with eyes) and knowing. The word *syahadah* also means *al-bayyinah* (proof), *yamin* (oath) and *iqrar*

(confession) (A. Warsan Muenawwir, 2002: 746-747). In terminology, Al-Jauhari stated that "Testimony means definite news. *Musyahadah* means something real, because a witness is someone who witnesses something that other people don't know about. It is also said that testimony means someone who tells truthfully what he has seen and heard." (Faisar Ananda Arfa, 2004: 100-101). In the dictionary of fiqh terms, "Witnesses are people or persons who present information to establish rights over other people. In court, evidence with witnesses is very important, especially when there is a custom in society that legal acts committed are not recorded." (M. Abdul Mujieb, 1994: 3036).

In popular scientific dictionaries, the word "witness" means a person who sees an event; people who are entered into an agreement" (Burhani MS, Hasbi Lawrens: 601). From the various definitions stated above, it can be concluded that a witness (*syahadah*) is a person who gives true information about what is seen, experienced, witnessed and what is heard about a particular disputed event in front of a court session with a special word, namely starting by oath first.

Rasulullah SAW explained the burden of this proof which means as follows; (A. Warsan Muenawwir, 2002: 93).

"It was narrated from Baihaqi with a valid isnad, proof (required) for the accuser, and an oath is required for the disbeliever."

The concept is intended that in order to get a sentence in accordance with the petitum of his lawsuit, a plaintiff must present evidence that justifies the arguments of his lawsuit. Evidence other than two witnesses sometimes has more proving power than witnesses. This is because there are indications of circumstances that seem to speak for themselves which proves the truth of the plaintiff.

The plaintiff was asked to submit evidence to strengthen his claim in two respects. First, if the defendant rejects his claim in whole or in part, and cannot bring evidence of his resistance or can bring evidence of his resistance but it cannot be accepted. Second, if you have acknowledged the entire contents of the lawsuit, but the plaintiff wants a decision that results in parties other than the person claiming it (Basiq Djalil, 2012: 39).

Basically a criminal case that arrives before a court trial begins with an act or violation of rights committed by a person, because between the violating

party and the party whose rights have been harmed cannot resolve the case as well as possible through private peace, then in accordance with With the principle of the rule of law, the settlement method can only be done through legal channels, namely through an institution called the court (Ansharuddin, 2004: 32).

Regarding the legal basis regarding obligations and the existence of an order of proof, it is found in the letter al-Baqarah verse 282 which means; (Depag RI, 1998: 70).

"Call upon two of your men to witness. If two men cannot be found, then one man and two women of your choice will witness—so if one of the women forgets the other may remind her. The witnesses must not refuse when they are summoned (QS: Al-Baqarah: 282).

So from the verse it can be understood that whoever files a case to claim his rights, that person must be able to prove it by including evidence that is able to support it. In the procedural law of Islamic courts, it is the duty of the plaintiff to prove the truth of his claim, because according to the origin all matters are taken from his birth, it is obligatory on the person who presents his claim against something born to prove the truth of his claim. This is as the *kaidah kulliyyah*which states where the meaning is as follows; *"Evidence is to determine what is different from the external state and the oath to establish the original state"* (Ansharuddin, 2004: 42).

This rule is based on the Hadith of the Prophet which means; *"Evidence (required) for the accuser, and an oath is required for the disbeliever"* (Bukhari: 116). The above hadith is used as the legal basis for the burden of proof, meaning that the plaintiff must be able to prove that the contents of his lawsuit are true, and vice versa for the defendant who previously submitted an answer to his lawsuit will be subject to oath. This provision is used to guarantee the upholding of justice, truth, and legal certainty for a person.

Differences of opinion among the *fuqaha* are caused by their doubts about the meaning of the word "*adil*" which is compared to the word "*fasik*". That is because the *fuqaha* agree that the testimony of the wicked is unacceptable (Ibn Rusy, 2007:684). Based on the word of Allah in Surah al-Hujurat verse 6 which means:

"O believers, if an evildoer brings you any news, verify ˹it˺ so you do not harm people unknowingly, becoming regretful for what you have done"(Depag RI: 516).

The *fuqaha* do not differ in the opinion that the testimony of a wicked

person can be accepted if his repentance is known. Unless the testimony occurred before doing *qazaf*. Because, according to Abu Hanifah, his testimony cannot be accepted even though he has repented. While the majority of*fuqaha* are of the opinion that his repentance is accepted (Ibn Rusyd, 2007: 685). The difference of opinion above is caused by differences in understanding of the word of Allah in Surah an-Nur verse 4 which means: (Depag RI: 680).

"Those who accuse chaste women ˹of adultery˺ and fail to produce four witnesses, give them eighty lashes ˹each˺. And do not ever accept any testimony from them—for they are indeed the rebellious."

The exception in the verse above is whether to return to the closest part of the sentence or to the whole sentence except in matters that are confirmed by Ijma ', that a repentance cannot remove a *hadd* (Ibn Rusyd, 2007: 685). Proof with a male witness accompanied by the plaintiff's oath is a school of all fiqh experts, except the Abu Hanifah school (Ibn Qayyim: 235). The group that does not accept the testimony of a man is accompanied by the plaintiff's oath to adhere to the *nash* of the Qur'an which requires witnesses from two men or a man and two women. The hadith that explains that the Prophet once decided a case with the testimony of a man who was strengthened by the plaintiff's oath is a hadith that cannot be used to confirm the Qur'an (Muhammad Hasbi ash-Si ddiqi: 121).

Imam Shafi'i is of the opinion that the proof with a male witness accompanied by the plaintiff's oath does not contradict the Qur'an, because it is not forbidden to decide based on witnesses whose quantity is less than that specified in the Qur'an. who have the right that they protect and maintain it by witnessing (Ibn Qayyim: 235). All schools accept the testimony of one man and two women in matters of property, such as buying and selling, debts and so on. The Hanafis accept this kind of testimony in all civil matters, but in criminal matters it is unacceptable. According to the Ahluzh-Zhahir school, such a witness can be accepted in all rights of slaves in criminal matters except adultery (Muhammad Hasbi ash-Si ddiqi: 121).

Allah SWT. said in the previously mentioned surah Al-Baqarah verse 282 which means:*"Call upon two of your men to witness. If two men cannot be found, then one man and two women of your choice will witness—so if one of the women forgets the other may remind her.1 The witnesses must not refuse when they are summoned"* (Depag: 48). The verse above is an order for people who have

rights, to protect and maintain their rights. Allah shows the most powerful way to protect and preserve rights. They can use alternative means if they can't use the strongest method. The testimony of one man is stronger than the testimony of two women Ibn Qayyim: 258-259).

According to Imam Ahmad, the procedural law of proof with two female witnesses is allowed only in areas that cannot be seen by men. Examples of virginity and other female problems. The testimony does not require the plaintiff's oath except in cases of confinement which are only based on the testimony of a woman as a crown witness. The *fuqaha* have different opinions about the acceptance of the testimonies of two women in the *hudud* issue. According to jumhur *fuqaha*, the testimony of two women in *hudud* matters cannot be accepted even though they are together with a man.

According to the Zahiri *fuqaha*, a woman's testimony can be accepted in all matters if the number is more than one and is accompanied by a man. Abu Hanifah and Maliki have the same opinion regarding the permissibility of female witnesses in civil matters, but Abu Hanifa adds to personal matters such as divorce, reconciliation, marriage and the release of slaves (Ibn Rusyd, 2007: 691-692). Imam Malik added that the condition is that it is permissible for women to be witnesses in civil matters if it is confirmed by the plaintiff's oath (Muhammad Hasbi ash-Si ddiqi: 123).

Meanwhile, according to Imam Shafi'i, testimony is not enough for just under four people. For Allah has made the testimony of a man equal to two women. Allah also requires that the witnesses be two men (Ibn Rusyd, 2007: 692). All scholars agree that the defendant can present a witness from his side if the defendant has reasons to reject the lawsuit and escape from the lawsuit. However, if the defendant does not have a reason that can be stated, then the defendant may reject the witness submitted by the plaintiff, for example by providing information or evidence that shows the unfairness of the witnesses presented by the plaintiff (Muhammad Hasbi ash-Si ddiqi: 128).

C. HOW TO JUDGE ACCORDING TO IBN RUSHD (THE ANALYSIS WITH POSITIVE LAW IN INDONESIA)

According to Ibn Rushd, the *fuqaha* agree that when a judge wants to try a case (case trial), the principle of equality must apply between the accuser (prosecutor) and the defendant, or between the

applicant and the respondent in a trial court Said dkk, 2007: 712). This is also regulated in Law no. 8 of 1981, which regulates several principles as follows:

1. Equal treatment before the law, without any discrimination.
2. The Presumption of Innocentness.
3. The right to obtain compensationand rehabilitation.
4. The right to obtain legal assistance.
5. The right of the defendant's presence before the court.
6. Judiciary that is free and carried out quickly and simply.
7. Courts that are open to the public.
8. Violation of the rights of citizens (arrest, detention, search, and confiscation) must be based on the law and carried out with a warrant (written).
9. The right of a suspect to be given assistance regarding prejudice and accusations against him.
10. Court obligations and control its decisions UU, No 8: 1981).

The principle of equality before the law, this means that there is no difference in treatment of anyone. Article 5 of Law Number 14 of 1970 explicitly states: *"The court will judge according to the law without discriminating against people"* (UU, No 14: 1970).

In civil cases, the courts assist justice seekers and try their best to overcome all obstacles and obstacles in order to create a trial that is simple, fast and low cost. Further, General Explanation No. 3 letter a of the Criminal Procedure Code (KUHAP) states: *"Equal treatment of everyone before the law by not holding differences in treatment."*

According to Ibn Rushd, a judge should not only listen to the words of one party without paying attention and listening to the statements of the other party. In this case, Ibn Rushd emphasized that the judge in the trial court must give time and opportunity to the plaintiff to first provide a statement of his indictment after being asked by the judge. If there is part of the indictment case or object of the lawsuit that is denied, rejected by the defendant, then according to Ibnu Rushd, the judge must ask, investigate the evidence in court (*bayyinat*) to the plaintiff. On the other hand, if the plaintiff does not have evidence and the case is related to assets, then based on the agreement of the *fuqaha*, the defendant must take an oath. If the case is related to marriage, divorce or murder, then according to Syafi'i, an oath is required in cases that only occur when there is a lawsuit. On the other hand, according to Malik, an oath in one of the

three cases is not obligatory unless there is or is with witnesses.

In another section relating to the judiciary regarding property, Ibn Rushd questioned whether the defendant had to take an oath in the case being sued in the same case relating to the object of property, or the defendant did not need to swear at the trial unless the plaintiff stated that there was cooperation between the plaintiff and the defendant. Thus it also means that property ownership can be distinguished between the plaintiff's ownership and the defendant's ownership.

In this case, according to Ibn Rushd, the *fuqaha* are still in disagreement. According to him, the majority of *Amsharfukaha* are of the opinion that the oath is only imposed on the defendant.

This is based on the generality of the Hadith of the Prophet Muhammad s.a.w. narrated by Ibn 'Abbas r.a. which reads**:**

البينة على المدعي واليمين على المدعى عليه

It means: *"The evidence (witnesses) is charged to the plaintiff while the oath is charged to the defendant".*

According to Malik, the oath does not apply to the defendant in the case of an object of property. However, according to him, the oath is valid only in relation to property disputes, for example land disputes or building disputes, movable or immovable property disputes, where between the plaintiff and the defendant there is evidence of a mix-up in property ownership (Said, 2007: 713). This case can also apply in courts of inheritance or will disputes that occur between the heirs. In this case, the heirs who are the defendants must swear an oath before the judge. This oath is only valid if requested by a judge for cases that cannot be proven either in the judicial process or at the proof stage.

A little is described about the proof that proof is a provision that contains outlines and guidelines on ways that are justified by law to prove the guilt that has been charged to the defendant. According to M. Yahya Harahap, proof is a provision that regulates the evidence that is justified by law and may be used by judges to prove the guilt charged.

In Criminal Law, the scope of evidence consists of:

1. Evidence system
2. Types of evidence
3. The strength of evidence of each piece of evidence

The evidentiary system in criminal law must be based on the judge's conviction (conviction in time). The evidentiary system must also be based on

the applicable positive law (*wettelijk stesel*). The evidentiary system must also be based on the judge's conviction for logical reasons (*laconviction raisonel*).

The system of evidence based on the judge's belief alone (conviction in time) means that whether or not the defendant's guilt is proven or not is determined solely on the judgment of the judge's belief or feeling. The basis for the judge to form his belief does not need to be based on the existing evidence.

The proof system is based on positive law (*positive wettelijk bewijs theorie*) which states that if an act of the defendant has been proven in accordance with legal evidence according to the law, the judge must declare the defendant guilty without considering his own belief.

The system of evidence based on the judge's belief on logical reasons (*conviction rationalnee*) means that the judge is based on his belief that must be accompanied by clear and logical considerations and reasons. Here the judge's consideration is limited by the reasoning which must be reasonable.

The proof system is based on the law negatively (*negative wettelijk bewijs theorie*), which states that this proof system is between the *positive wettelijk* system and the *conviction resionnee* system (logical belief). Whether or not a defendant is wrong is determined by the judge's conviction which is based on the method and with valid evidence according to the law.

So the judicial system adopted by the Indonesian criminal justice system is the *wettelijk stelsel negative* proof system or the negative evidence system according to the law, in which errors are proven by at least two valid pieces of evidence. With the minimum valid evidence, the judge obtains the belief that a crime has occurred and the perpetrator becomes a defendant.

The oath in court related to the existence of some property ownership that was sued between the plaintiff and the defendant was also confirmed by the seven *fuqaha* in Medina at that time. The *fuqaha* who stipulate the oath based on considerations of benefit, namely so that between one party and another party do not sue each other in court (Said, 2007): 713).

The purpose of this opinion is that deliberation in internal settlement becomes a priority scale because assets are owned by several legal subjects. In addition, the dispute over the object of property focuses more on the relationship between individuals, which also means that the law in this case focuses more on civil law, unless the object of property threatens the

public benefit. Also included in this case is the abuse of official positions for personal gain, namely corruption, so it is included in the realm of criminal law.

On the other hand, it does not mean that the assumption rejects the claims or demands of one of the parties in the event of a dispute over assets or materials. Claims from one party can occur if the property dispute can no longer be resolved internally or because there is no solution and consensus between the two. In other words, the judiciary is the last resort to settle their case.

In this section, Ibn Rushd emphasizes good cooperation between the two parties to settle property cases in their internal sphere. Ibnu Rushd anticipates that there will be a wideopen space to be sued through the court in this case. This statement is implicitly to avoid one of the parties to pressure the other party, or hurt the other party. In this case, Imam Malik with inductive reasoning does not see the need for a wife to ask her husband to swear an oath before the court when a wife sues her husband for talaq.

In other words, in the event of divorce, the wife does not have to ask her husband to swear an oath in court in recognition of the dissolution of their marriage. As stated in article 114 of the KHI that: *"The dissolution of a marriage due to divorce can occur due to talak or based on a divorce suit."* Furthermore, Article 115 states: *"Divorce can only be carried out in front of the Religious Court after the Religious Court has tried and failed to reconcile the two parties."*

The oath above is as stated by Imam Malik against a husband if he becomes a defendant in a divorce case. In this case according to Imam Malik an exception is when the wife has a witness for their divorce. It can be assumed here that as article 14 of the Compilation of Islamic Law requires witnesses in the implementation of marriage, divorce as meant by Imam Malik must also have witnesses. This is also confirmed in Article 129 of the KHI. In article 129 of the KHI, divorce is implicitly carried out in front of witnesses, which is marked by filing a divorce to the Court. Article 129 states: *"A husband who is going to impose divorce on his wife submits an application both verbally and in writing to the Religious Court which is in charge of the wife's place of residence accompanied by reasons and requests that a hearing be held for that purpose"* (KHI, 1992: 129).

During the four popular schools of thought, the concrete evidence of divorce in court was the oath between the two

parties that they had terminated their marriage. However, in the modern era, especially in Indonesia, divorce is proven by a divorce certificate, after it was decided in a Religious Court decision which has permanent legal force. According to Abu Hanifah, witness testimony from the defendant does not need to be heard in court, except in cases of marriage and other cases that do not occur repeatedly. Meanwhile, according to other *fuqaha*, witness testimony does not need to be heard at all. Malik and Syafi'i are of the opinion that witnesses from the defendants need to give their testimonies which are heard before a judge in court. Their argument is that the defendant's witness testifies to the plaintiff that the object being sued is owned by the defendant and is his property. The *fuqaha* who argue that the witness from the defendant is not heard, adheres to the provisions of the *syara'* which makes the witness on the side of the plaintiff and oath on the side of the defendant. Therefore, this rule cannot be reversed. The provisions of the rights and obligations of each party, both from the plaintiff and the defendant, are *ta'abbudi* (the use of ratios or reason for *hiyal* or legal deception because it is solely a form of worship and is a vertical relationship with Allah s.w.t. as *Shari'*).

In other words, the *fuqaha* who argue that the testimony of the defendant is not heard in the Court, because they hold fast to the hadith about testimony only to the plaintiff and the oath only to the defendant. Thus, according to them, this opinion belongs to the *qat'i* area which does not open up more space for ijtihad and is no longer interpreted.

D. CLOSING

From the descriptions above, it can be summarized the importance of reinterpretation of previous manuscripts or books, whether written in the Classical Era or the Middle Ages. The significance of this reinterpretation is because the understanding is clearly different from the understanding of the previous interpreter with the understanding of the interpreter who came later. Ibn Rushd proves that his book should be reinterpreted for the sake of the dynamics of the discipline of Fiqh or Usul al-Fiqh. Ibn Rushd, who is dubbed in the field of Western philosophy as “Averose”, has contributed greatly to the science of philosophy, especially in the realm of Jurisprudence. The categorization of witnesses and the strength of their role in the judiciary need to be redeveloped. Likewise, the judicial methods and methods that come from the four schools of thought and then commented on by Ibn

Rushd deserve to be reinterpreted and also developed again for the development of the fiqh treasures and the development of the Islamic judicial system. *Wallahu ma'a at taufiq wal hidayah wa huwa a'lam.*

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