

## Legal Standing of Woman as Witness in Evidentiary System of Legal Procedure in The Court of Religion

Rahmida Erliyani<sup>1\*</sup>, Thohir Luth<sup>2</sup>, Abdul Rachmad Budiono<sup>3</sup>, Sihabudin<sup>4</sup>

1. Doctoral Candidate majoring Law, Law Faculty of Brawijaya University, Malang

2. Professor of Islamic Law, Law Faculty of Brawijaya University, Malang

3. Associate Professor of Labor Law, Law Faculty of Brawijaya University, Malang

4. Associate Professor of Corporate Law, Law Faculty of Brawijaya University, Malang

### Abstract

The legal standing of women in the procedural law on evidentiary in the Court of Religion according to general civil law court by *Herziene Inlandsch Reglement (HIR)* and *Rechtreglement Voor De Suitengewesten (RBg)* is equal to that of male witnesses. Unlike the authentication system based on Islamic law, woman's legal standing as witness in specific cases is different from man as witness because it is required a number of two female witnesses to be equal to one male witness. This difference gets a reaction from the movement that considers gender discrimination against women. The legal standing of woman as witness on evidentiary procedure by the Islamic law in the view of Justice in theory from the version of Islamic justice is a rule that contain justice. Because of Justice in the version of Islam is justice in equality, not justice in equation according to the version and the demands of gender theory thinkers.

The differences in perspective about the position of woman as witness on the legal procedure in the Court of Religion was due to the provisions of Article 54 in the Act No. 7 of 1989. The provision of Article 54 in the Act No. 7 of 1989 does not embody the principles of Islamic personality who became the philosophical basis of the Act.

**Keywords :** Legal Standing of Woman as Witness, Evidentiary System, Court of Religion.

### 1. Introduction

As defined in the norm of Article 54 in the Act No. 7 of 1989, as amended by Act No. 3 of 2006, and renewed for the second time by the Act Number 50 Year 2009 (State Gazette of the Republic of Indonesia Year 2009 No. 129), that the prevailing law in the jurisdiction of the Court of Religion is the legal procedure applicable in the general civil court to the extent that it is not specifically set in the law on the Court of Religion.

The provision of norms in the Article 54 of Act No. 7 of 1987, since the Act was passed to the second revision to Act No. 50 of 2009, has no change in the wording of Article 54 of the editorial staff. It seems an omission to advance towards formal legal provisions of force in the Court of Religion, but there are some formal legal provisions that are applicable in general courts which are not in line with the principle of judicial procedure for law of Religion. Although the Court of Religion in Indonesia was not called Islamic Courts, but in essence it was a religious court of justice for Muslim community who use Islam as a material legal norms for the upheld law. According to the civil justice system, formal civil law aims to enforce civil law material. How in the environment of religious court whose law to the material is the material law of Islam that embodied in various national legal regulations, but the reality in the judicial system in the Court of Religion, the formal law used to enforce was still a lot that comes out of the legal system from western or the Dutch colonial, which of course the spirit of the law is Western legal system.

Evidentiary procedure in civil case in the Court of Religion, with regard to the evidence of witnesses, there is a provision according to formal law of Dutch colonial's law<sup>1</sup> that is inconsistent with the provisions of the witnesses in the perspective of laws of evidence based on Islamic law.

These differences lead to a different perspectives within the community. Some people think that the position and the value of female witness is different from male witnesses, the value of her testimony is considered half of the value of testimony given by men and the position of women to be a witness in a civil case in the Court of Religion seems to have no consideration of the amount of two new people that can be considered as evidence in civil case witness in the Court of Religion. Such perspective is based on the premise that the Court of Religion should apply the rules of evidence which is based on Islamic law on the basis of the principles of Islamic personality who became the philosophical foundation of the Court of Religion's Law.

Evidentiary procedure in settling disputes in the Court of Religion, with regard to the value of women's testimony had been impressed in contrast to the provisions concerning the position of women witnesses by HIR, RBg and BW prevailing in courts of general jurisdiction, so that the level of practice sometime is confusing and may even harm either party litigants.

If we are guided by what is defined by the norms of Article 54 in the Act No. 7 of 1989 which is still valid, then of course in this case refers to HIR (Herziene Inlandsch Reglement) and RBg (Rechtreglement Voor De Suitengewesten) on the evidence of witnesses, it is not distinguished between the value of the testimony by gender between men and women, while some people by basing thoughts and views sourced to Al.Quran and Hadith from Rasulullah, there to provide direction on the value of the testimony of women and men to note that witnesses in civil matters is two men who is qualified for it or can one male witness, along with two female witnesses. This term is based on the provisions in the Qur'an surah Al Baqarah verse 282.

<sup>1</sup> Contained in HIR and RBg as the source of the Civil Procedure Code in Indonesia until today, as inherited from the time of Dutch Colonial and is still valid.

The problem that arises is regarding the strength of evidence of evidence given by female witnesses. Is male witness as a stronger value of proof than female witnesses, why unequal, because according to the concept in the procedural law of witnessing, these are giving testimony would be something events or certain legal actions, that one knew directly, saw by himself, heard by his own, or personally experienced what he explained. So the concept of witnessing is qualified as witness under the procedural law.

## 2. Research Method

This research is a normative study, which is the study of the principles of law, the legal norms from the rules of law and the legal system.<sup>1</sup> This research uses several approaches, such as: approach of legislation (statute approach), Historical Approach, and Approach of legal comparison (Comparative Approach).

## 3. Result and Discussion

### The Legal Standing of Woman as Witness on The Procedural Law in the Court of Religion

Applicable procedural law in the Court of Religion under Article 54 of Act No. 7 1989 was the Law of Civil Procedures in the courts of general jurisdiction and procedural law that is stipulated in the Act No. 7 Year 1989. The applicable procedural law in general courts is as had been set in HIR, RBg, and Book IV of Civil Lawbook (also known as Burgerlijk Wetboek or BW), under the rules of evidence that are either material or formal review. What is listed in the Civil Lawbook's material, in Book IV, is the law of evidence. While the formal rules of evidence other than those are contained in the HIR and Rbg is Rv.

According to article 54 of Act on the Court of Religion, means that the Legal Procedure in the Act of Court of Religion consist of procedural law that specifically regulated in the judicial of Religion Law, that also procedural derives law from the rule of the rules applicable in the general court.

Probation is the process of seeking truth of an event or fact. In civil procedural law, the sought truth is the formal truth, as opposed to the common procedural law, where the sought truth is the material truth. If the evidence, by the judge is considered as sufficient to give certainty about the disputed events to favor what is demanded by the plaintiff, unless there is evidence of an opponent, the evidence was rated as complete or perfect evidence. So the evidence is considered complete or perfect, if the judge believes that based on the evidence that has been filed, an event that must be proven it should be considered definite or true.

As for the Civil Procedure Code that has been in force in the Court of Religion in Indonesia, under the provisions applicable to public court does not seem to question the witness of female sex, including the number of witness of female sex. The status of woman's testimony as witness in Indonesian Court of Religion seems to be equated with the status of the testimony of a man who means the position of the two are not different.

Provision of evidence of witnesses according to the Civil Procedure Code can be explained that according to the HIR system, civil law judge is bound on the valid evidentiary instruments, which means that judges can only consider by the evidence that was prescribed by law. The evidence mentioned by the legislation are: evidence in writing, Evidence by witnesses, suspicions, recognitions, and oath (Article 164 HIR, Article 1866 Civil Code).

Witnessing by using evidentiary instruments as regulated in the Civil Procedure Code in general courts, where it is clear there is a difference with the formal laws based on Islamic law. Based on these differences, it can be said that the Civil Procedure Code that were enacted in the Court of Religion in Indonesia seems contrary to the opinion of the experts of Islamic law and contrary also to the Holy Qur'an that states the necessity to bring the witness of two men and if there is only one man, then allowed to be witnessed by women with the condition of two people. The different systems that are applied for testimony in Indonesian Court of Religion with the Qur'an and the opinion of experts, raises legal issues that need to be solved.

Based on the procedural law in the Court of Religion which use civil law notch female witnesses equal to the witness of men almost evenly across the religious courts in Indonesia. Below are two decisions from the Supreme Court of Justice, from the Chamber of Court of Religion as associated with witness' evidence, namely:

- The Decision of The Supreme Court of The Republic of Indonesia No. 90 K / AG / 2003 Date 11 November 2003

Rule of law:

- Description of two witnesses in divorce cases explains only as a legal consequence (rechts gevolg), have the force of law as giving evidence for it to be considered carefully. " Evidence in the form of witness statements must satisfy the principle of classification 'unus testis nullus testis' as a principle that applies in the procedural law in accordance with the legislation in force ".

- The Decision of The Supreme Court of The Republic of Indonesia number 1282 K / Sip / 1979 Date December 20, 1979

Rule of law:

- In a divorce on the basis/fields of disputes and quarrels, the biological mother and the housemaid can be heard as a witness "

From the forementioned judicial practice, it can be argued that the testimony of the status of men and women in Civil Procedure Code on the Court of Religion only as one type of evidence that the value of the testimony of men and women are equal because they do not discriminate based on gender testimony. Witnessed cases is pervading all areas and types of civil disputes, unless the law states otherwise.

Testimony is the certainty provided by a witness to judges in court about the disputed events by notification, both verbally and personally, by the person who is not a party to the case, which was called to the trial. So the testimony given by

<sup>1</sup> Sudikno Mertokusumo. *Penemuan Hukum*. Liberty, Yogyakarta, 2009, Page 29.

a witness must have experienced by their own events in the sense of seeing by themselves, heard directly, and is not an opinion.

Application of evidence by witnesses affirmed in Article 1895 of the Civil Code, which states "evidence by witness is allowed in all matters that are not excluded by law". So by the principle, the evidence of witnesses reaches all areas and types of civil disputes, unless the law itself determines the dispute can only be proven by deed, then the evidence of witnesses can not be applied.

Witness' evidence is submitted by the parties in accordance with Article 121 paragraph (1) HIR, which is the duty of litigants. However, if the interested parties are not able to present a voluntary basis, although it has been attempted with all power, being witness in question is very relevant, pursuant to Article 139, paragraph (1) HIR, that judge can bring it in accordance with the duties and authorities, which, if it's not carried out an act of unprofessional conduct.

Based on the above evidence of witnesses by HIR / RBg that does not differentiate sex, because all witnesses for both men and women are equal, important witnesses are offered upfront proceedings which meet the requirements.

### **Female Witnesses in The Law of Probation Based on Islamic Law in the Perspective of Gender**

Issue that arises due to the position of woman as witness in the Court of Religion's Law of Probation is in connection with the provision of Islamic law, because Islamic law in its issue is the position of women as a witness does not have that equality between female witness with male witness. Gender issues have surfaced because according to Islamic Law, female witness is placed half of the male witness, namely 1 (one) male witness equal to two (2) female witnesses. This understanding causes a wave of criticism, because the position of women is placed in a lower position than men. It more broadly mean that Islam is regarded as a religion that discriminate against women.

The thoughts that place women under man is based on the books of fiqh and classical tafsir, As mentioned in the QS. Al-Baqoroh: 282, which says "And get two witnesses; if there are no two witnesses, then a man and two women." In the classical commentaries on QS. Al-Baqoroh: 282, that place women became unequal to men, are considered as discriminatory against women.

With the feminist movement, emerge a lawsuit against the religious laws, especially the law of Islam. Islamic law, by feminists, is regarded as one of the bases at the root of discriminatory views against women. On the pretext of emancipation or equality of positions and responsibilities between men and women, then rampant conversation in public's space on the issue of women's position, in both civil and public administration,<sup>1</sup> even further that Muslim women who maintain the honor and sanctity to stay at home are considered as an unemployed and disadvantaged woman. Then women who cover their nakedness with enforcing the headscarf or hijab (limitation) to non mahram, even accused of being old-fashioned action (stiff) and inhibiting the progress of culture. Therefore, in order to advance women thrive, it must be repositioned to public the widest possibility to freely create, communicate, and interact in any way as done by men in this modern era.<sup>2</sup>

It is also stated by Masdar F. Mas'udi in one of his books linking women's rights with fiqh professed by the majority of Muslims. According to him, the existence of discrimination against women is caused by the understanding that is not contextual to a verse or hadith. For that, there must be a vibrant egalitarian interpretation and could not be separated from the context of the legislation that are made.<sup>3</sup>

Another critical thinking on the value of women's testimony that is half the testimony of a man is who believes that such provisions are conditional and temporary or not normally applied. Thus, it is known as the possibility of renewing the understanding of women's testimony in Islamic law.<sup>4</sup>

The provision, which requires two female witnesses in lieu of one witness of men, or in other words that the evidentiary value of female witness is half male witness over the provisions are conditional and temporal, not every provisions are universal. That is because women at that time had less experience in public affairs because the prevailing culture of placing women only play a role in the domestic area. Therefore, in line with social changes in society that allows women to jump in and play a role in various public affairs, including to obtain higher education, working in various sectors of employment, and even for serving as head of state, then the value of a woman's testimony was duly recognized together with the testimony of a man.

The importance of the presence of witnesses, with the aim of which is to anticipate the possibilities that will happen in the future, if one of them was in dispute and brought to justice. So these witnesses can be questioned in connection with the examination of his case.

Thus the provision that two female witnesses in lieu of one witness of men, or in other words that the evidentiary value of female witness is half of male witness over the provisions are conditional and temporal, not every provisions are universal.<sup>5</sup> That is because women at that time had less experience in public affairs because the prevailing culture of placing women only play a role in the domestic area. Therefore, in line with social changes in society that allows women to jump in and play a role in various public affairs, including to obtain higher education, working in various sectors of employment, and even for serving as head of state, then the value of a woman's testimony was duly recognized together with the testimony of a man.<sup>6</sup>

<sup>1</sup> Siti Musdah Mulia, *Menuju Kemandirian Politik Perempuan (Upaya mengakhiri Depolitisasi Perempuan di Indonesia)*, Kibar Press, Yogyakarta, 2008.

<sup>2</sup> Aang Kunaepi, MA, *Mempertegas Kedudukan Perempuan Dalam Islam*, from alislamiyah.uui.ac.id accessed on 2013/08/23

<sup>3</sup> Masdar F. Mas'udi, *Islam dan Hak-hak Reproduksi Perempuan*, Mizan, Bandung, 1997, page 5

<sup>4</sup> Id.

<sup>5</sup> Muhamad Isna Wahyudi "Nilai Pembuktian Saksi Perempuan dalam Hukum Islam". *Musawa: Jurnal Studi Gender dan Islam*, Vol. 8, No. 1, Januari 2009.

<sup>6</sup> See Achmad Gunaryo, "Kesetaraan Gender : Antara Cita dan Fakta" in Sri Suhandjanti Sukri, *Bias Gender dalam*

In connection with the difference between men with women in the spotlight of gender's bias, there are two major theories, namely, nature and nurture.<sup>1</sup> The first theory, nature, saying that differences in the roles of men and women are determined by biological factors. Anatomy of male's biology with a series of differences with female's becoming a major factor in determining the social roles of the sexes. The second theory, nurture, said that the differences in social roles of men and women are determined by cultural factors. According to this theory, the division of the roles of men and women in society is not determined by biological factors, but actually constructed by culture.

### **Legal Standing of Female Witness in Evidentiary System for Civil Case in The Court of Religion**

To determine the value of evidence, there are two fundamental principles that need to be considered in the admission of opposing evidence:

1. All items of evidence can be refuted by opposing evidence

The first principle, all the presented evidence by a party (plaintiff) may be rebutted or countered by opposing evidences. Evidence of witness testimony can be denied by the opponent with the same evidence as well as with other types of evidence. Even authentic act can be rebutted by opposing evidence. The opinion was expressed on the Supreme Court decision no. 3360 K / Sip / 1983. Among other says, it is based on Article 1870 of Civil Code or Article 314 of RBG, that the value or the strength of evidence that attached to the authentic documents is perfect (volledig). However, it is attached as long as there is no opposing evidence (tegenbewijs) that admitted by the counterparty. Therefore, perfection is not prescriptive (beslissend) or forceful (dwingend). Perfection can be disabled with an opposing evidence (tegenbewijs)

2. Evidence that is a certain evidence can not be paralyzed by opponents

Not all evidence can be disabled with opposing evidence. It was contingent upon the provisions of the law. If the law determines the value of the strength of evidence which is attached to the evidence that is decisive (bellissende bewijs kracht) or forceful (dwingende bewijs kracht), then the evidence is irrefutable nor countered by an opposing evidence.

From these explanations, the benchmark for determining the submitted evidence may or may not opposing to the evidence presented by counterparty, are through:

- 1) Depends on the probative value of the evidence (bewijskracht) attached to the evidence in question.
- 2) If the strength that attached to the evidence is decisive or forceful, no opposing evidences are admissible.

#### Levels of opposing evidence that has value

One thing to note, the admission of evidence must be based on the principle of proportional opponent. That is, the opponent that filed the evidence must not be lower in value than the evidence to be paralyzed. Accordingly, it is considered reasonable to specify the terms, in valuing the evidence that can be submitted by opponent to counter the presented evidence by the opposing party, they are:

1. Quality and level of probative value at least equal to the unopposed evidence.
2. Evidence on the same kind countered with evidence that unopposed
3. The attached perfection and strength value of evidence is just as strong to the countered.

The law of evidence consists of material and formal elements. Material evidence laws governs whether the admission of evidence is acceptable or not, by means of certain evidence, in court, and how the strength of probation is. While the formal element rules the procedure in admitting the evidence.

Evidence is everything according to the law that can be used to prove, in order to help judges to decide the case. Therefore, the evidence is necessary for litigants and the court, so that a dispute can not be solved without the evidence, meaning that if the plaintiff is not based on evidence then the case will be terminated, also by the judge, but by rejecting the lawsuit because it is not proven.

In the books of Islamic jurisprudence (fiqh), most Muslim jurists refer to evidence as al-bayyinah, al-hujjah, ad-dalil, and al-burhan, but the last three are uncommon in practice. As mentioned above al-bayyinah is all evidences that explains the purpose of evidence in order to convince judges. While certain is something that is based on in-depth investigation and something that was believed not to vanish except for the arrival of another belief which is stronger than the beliefs that existed before.

The evidence of witnesses in the practice of civil procedural law in the court proceedings is important because it serves to reinforce about the events to their legal actions carried out by the parties who are litigants, in particular incidents or events of legal acts of the parties whose creation was done under the law, then the presence of witnesses is important.

If there is one party that denies, then it can be used as legal evidence. Given these witnesses, later if a problem arises, and the witness saw, heard, and experienced the legal events directly, then it can be used as legal evidence to strengthen their legal incident or event.<sup>2</sup>

Basically the function of the new witness is required if the evidence by writing letters are insufficient or inadequate to support or corroborate the truth of the arguments on which the founding of the party. Witnesses there are those who happen to see or experience the incidents or events that have to be verified in advance the trial, there are also witnesses who were deliberately asked to come to watch an event or legal act that is being held.

---

*Pemahaman Islam*, Center of Studies on Gender, IAIN Walisongo, and Gama Media, Yogyakarta, 2015.

<sup>1</sup> Nasaruddin Umar, *Argumen Kesetaraan Gender: Perspektif Al-Qur'an*, First Edition. Paramadina, Jakarta. 1999, Page 302.

<sup>2</sup> Sarwono, *Hukum Acara Perdata: Teori dan Praktik*, (Jakarta: Sinar Grafika, 2011). p.255.

The strength of witnesses, according to the rules of evidence has the strength of liberative evidence, meanings that judges are free to assess the probative value of this evidence. And basically witness evidence can be submitted for all cases, unless the laws decides otherwise.

The main purpose in proving the witness is explaining the unfolding of the truth of the events and circumstances that presented by the parties to the dispute, so that the decision produced by judges really reflects justice, both for the parties that won and the losing side, so that justice and truth can be empowered.

The legal standing of female witness who has met the formal and the material requirements has a free probative value, the truth value given by witness naturally is not perfect and does not bind, both to the parties and to the judge, that the judges freely assess the truth of the statements of witnesses in accordance with his conscience, even a judge can rule out the testimony of origin that is fairly considered and based on strong arguments. If the testimony of witnesses for each of the following events which fit together and relate, then submitted to the judge in appreciating the value of testimony to enhance it under the circumstances.

On the examination of witnesses, judges should not accept something as fact when stated by the witness as long as he is not sure right the about truth proclaimed by the witness, the one thing though witnessed by many witnesses, but the cases examined were not considered if the judge is not convinced by witness to the truth of all that it conveys.<sup>1</sup>

In order to be implemented properly, the judge must consider carefully the way of life of its proposed witnesses, customs and dignity of life in society which is reprehensible or has a bad habit that can not be trusted or reputable so that it can be trusted.

Judges should pay close attention to everything that affects the attitude of the witness and what prompted the witness to explain everything in a positive prevailing trial. Laws in Indonesia, including in the Court of Religion, does not recognize the distinction and separation of witness' testimony to be accepted or rejected in terms of religious beliefs, ethnic groups, political interest in organizations and public, as well in terms of gender and level of education.

Problems related to testimony in positive law in Indonesia is not so completely set. In Civil Lawbook, regulate only to the extent of the technical and rights, for who might be a witness and give obligations of a witness, it is not set specifically about how the law for a woman's testimony is. It identifies the system of positive law in Indonesia, that the positions of male witness and female witness are equal and there is no differences between the two.

Such problems also occur in the procedural law in the Court of Religion, because the different perspectives on the status of women as witness who can be seen by the laws of evidence based on HIR and RBg, that can also be seen in the provisions based on the evidence based on Islamic law.

Woman's position as witness in a civil case in the Court of Religion shows a different state, as can be seen according to the rules of Islamic law and under general civil law judicial. Both of those rules view different position against female witness in a civil case's evidentiary procedure.

#### 4. Closing

##### Conclusion

1. The legal standing of a witness in litigation based on the evidentiary procedure according to Islamic law varies based on the type of the case. The status and value of testimony of female witnesses in the Court of Religion sometimes also experience a different study of various circles because there are differences in the perception of women's testimony itself in the wording of the civil procedure law in the Court of Religion.
2. The difference perspective in the legal standing of woman as witness on evidentiary procedure in the Court of Religion is due to the provisions of article 54 in the Act No. 7 of 1989 which indicates their legal dualism events in the Court of Religion.
3. The provision of norms in article 54 of Act No. 7 of 1989 does not reflect the principle of Islamic personality who became the philosophical basis of the law, this is what causes the difference in perspective about the position of women as witnesses in evidentiary procedure during trial in the Court of Religion.

##### Suggestion

- a. In need of an overhaul to the law on the legal provisions concerning the events of Law in Court of Religion to better accommodate the provisions of the law of evidence in Islamic law to avoid the dualism in the procedural law in the Court of Religion.
- b. judges that magistrate in the environment of the Court of Religion should consider the evidence and the judicial settlement of civil disputes in religions that based according to the Law of Formal Islamic law, as the implementation of the principle of Islamic personality.

##### References

- Bintana, Aris, *Hukum Acara Peradilan Agama dalam Kerangka Fiqh Al-Qadha*, PT Raja Grafindo Persada, Jakarta, 2012.
- Gunaryo, Achmad, "*Kesetaraan Gender : Antara Cita dan Fakta*" in Sri Suhandjanti Sukri, *Bias Gender dalam Pemahaman Islam*, Center of Studies on Gender, IAIN Walisongo, and Gama Media, Yogyakarta, 2015.
- Kunaepi, Aang, MA, *Mempertegas Kedudukan Perempuan Dalam Islam*, from [alislamiyah.uii.ac.id](http://alislamiyah.uii.ac.id) accessed on 2013/08/23
- Mas'udi, Masdar F., *Islam dan Hak-hak Reproduksi Perempuan*, Mizan, Bandung, 1997, page 5
- Mertokusumo, Sudikno, *Penemuan Hukum*. Liberty, Yogyakarta, 2009, Page 29.

<sup>1</sup> Aris Bintana, *Hukum Acara Peradilan Agama dalam Kerangka Fiqh Al-Qadha*, PT Raja Grafindo Persada, Jakarta, 2012.

- 
- Mulia, Siti Musdah, *Menuju Kemandirian Politik Perempuan (Upaya mengakhiri Depolitisasi Perempuan di Indonesia)*, Kibar Press, Yogyakarta, 2008.
- Sarwono, *Hukum Acara Perdata: Teori dan Praktik*, (Jakarta: Sinar Grafika, 2011). p.255.
- Umar, Nasaruddin, *Argumen Kesetaraan Gender: Perspektif Al-Qur'an*, First Edition. Paramadina, Jakarta. 1999, Page 302.
- Wahyudi, Muhamad Isna, "Nilai Pembuktian Saksi Perempuan dalam Hukum Islam". *Musawa: Jurnal Studi Gender dan Islam*, Vol. 8, No. 1, Januari 2009.