

# Principle of Law and Justice Certainty on the Position of Woman Witness in Proof System in the Procedural Law of Religion Court

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, Faculty of Law, Brawijaya University, Malang

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

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

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

## Abstract

Based on Article 54 of Law Number 7 Year 1989 on Religion Court that the procedural law in the religion court it applies the civil procedural law based on HIR/RBg and procedural law based on Law of Islam, so that in The Law of Proof that involve the evidence of witness there is a philosophical problem that is the civil procedural law based on HIR/RBg that does not differentiate between woman witness and man witness, on the other hand according to Law of Islam, man witness has two values of woman witness. This matter philosophically causes problem of justice and law certainty. Therefore, in the future policy of national procedural law there is only one procedural law of religion court and it is based on Law of Islam as the Formal and Material Law in religion court. That matter is considered as the implementation of islamic personality principle.

Based on the analysis and law certainty theory, related to the position of woman witness in the law of proof in the procedural law of religion court, it shows the uncertainty of procedural law. By using the justice theory in Islam version under study based on justice conception in Islam, so the position of woman witness in the proof has fulfilled the justice value.

## 1. Introduction

Witness is a tool of evidence in area of law of proof. Law of proof is defined as a set of rule of law that regulates about the proof.<sup>1</sup> On the other hand, what is meant by proof in law is a process, either in criminal or civil law, where by using legal evidence tools, an act is done with a special procedure, to know fact or statement, especially fact or statement that is disputed in court, that is proposed and stated by one party in a court process is right or not as stated.<sup>2</sup>

Law of proof is a part of procedural law. However, the procedural law as the formal law has material and formal element. Material elements in the procedural law are the provision that regulates about authority, for example the provision about right of the party that is defeated. In contrast, formal element regulates about the way to use that authority, for example how to appeal to High Court and others. Law of proof, that is also procedural law, consists of material elements and elements. The law of proof of material regulates about the proof that can be accepted or not with certain tools of proof in court and the strengthness of the proof, while the law of proof of formal regulates about the way to do proof.

That proof is a process to find the truth of a fact or event. In procedural law of civil law, the truth that is found out is the formal truth, while it is different from the procedural law of criminal, the truth that is found out is material truth. It does not mean that in the procedural law the judge finds the truth by halves. The definition of formal truth means that the judge may not exceed the limits that are proposed by the parties that dispute. So it does not see the weight or the content, but the wider review of judge. The Article 178 point 3 HIR (Article 19 point 3 Rbg) prohibit the judge to mae a decision on the case that is not prosecuted. In finding the formal truth the judge of civil law only prove with *preponderance of evidence*, while for the judge of criminal in finding the material truth the event must be proven true *beyond reasonable doubt*.

The proof with the tool of proof of witness in the religion court as stated above in reality between based on the civil procedural law and HIR/Rbg, it is different from the civil procedural law of Islam. This difference involves the man witness and the woman witness, it can be said that the civil procedural law that exist in religion court seems contrary to the civil procedural law of Islam and also to the qur'an that states a must to present two men witnesses or same with one man witness with two women witnesses with the maximum requirement is two. The difference between witness system that is applied by the religion court and Qur'an and the experts' opinion, cause law problem that needs to be solved. The problem that arise is not only juridical problem but also philosophical problem that are law certainty and justice related to the position and testimony value of woman in the process of proof according to procedural law of religion court.

<sup>1</sup> Munir Fuady, *Teori Hukum Pembuktian*,; PT Citra Aditya Bakti, Bandung, 2006, hal. 1

<sup>2</sup> *Ibid*

## 2. Research Method

This research is normative research, that is research of law principles, law norm of law rules and law system<sup>1</sup>. This research uses some approaches, such as: law approach, historical approach and philosophical approach.

## 3. Result and Discussion

### The principle of law certainty in proof system

The dualism of proof system as started in the provision of Article 54 Law Number 7 Year 1989 about religion court which states that the procedural law that exist in the court in the area of religion court is civil procedural law that exist in general court, except what is regulated specially in this law.

At a glance the dualism is not seen, because the procedural law that is stipulated in Law number 7 Year 1989 is not contrary to civil procedural law. The word “except” in Article 54 Law number 7 Year 1989 means that the civil procedural law that is applied as the procedure of religion court that is as long as it is not regulated in this Law. Article 54 Law number 7 Year 1989 states clearly that religion court is civil court and Islam court in Indonesia, so the source of law of religion court is law and regulation and law of Islam. It means that there are two systems of procedural law that are applied in religion court, so in order the dualism does not happen it needs legal reform in guaranteeing law certainty especially in relation to the law of proof.

Basically, in law of Islam the principles of proof are not far different from law of proof that exists in HIR/RBg or Civil code, therefore it can be concluded that proof is a process of using or proposing or defending the tools of evidence in the court based on the law that is applied, so it can ensure the judge towards the truth of propositions that becomes the basic of suit or the propositions stated by the opponent.

The difference in the procedural law of Islam is on the basic of law that is Nash Al-Qur’an, As-Sunnah and the method of ijtihad. In contrast, in national law the basic is on the thought that is stipulated in The Articles from HIR/RBg to Civil code. Either procedural law of Islam or civil procedural law, consider absolutely that it needs the tools of evidence, not only based on the belief of the judge because the belief of the judge is very subjective, therefore it is fairly if the propositions stated by the the parties that are in dispute becomes the basic of the consideration for the judge in order to reach the objective decision.

According to Law of Islam written evidence is the most important and principal evidence, is same with the civil procedural law the written evidence is the main evidence in the procedural law of Islam, each written evidence may not victimize material law of Islam. In the procedural law of Islam, each tool of evidence especially evidence of letter, witness, presumption, confession and vow based on nash, while besides, for example the knowledge of judge, local examination, expert opinion, Qasanah, qifayah, qur’ah, nukul, and others based on the result of ijtihad.

By the explanation above although there is difference between the civil procedural law and procedural law of Islam so in the certainty of law for the procedural law of religion court there may not be two systems of law found in the procedural law of religion court, the law that appears later should be the procedural law of religion court only whether later it comes from the Law of Islam and the civil procedural law that is not contrary to the Law of Islam that is finally becomes absolute procedural law of religion court.

### Principle of Justice and System of Proof

The discussion of principle of justice in gender issues the position of woman and man according to Law of Islam should be on the source of law that is Al Qur’an and Hadist. Indeed, to understand the concept of justice and gender issues it needs right understanding, reminding that in reality of daily life there are many facts which show that concept has not or even is not applied based on Al Qur’an and Hadist. This law of Islam should be understood carefully especially for Moslems themselves either in terms of religious service or social relation among people including the relation of gender equality between men and women in the midst of people's lives. But problems that arise, many of us who are Moslems have not understood, have not even understood Islamic laws at all related to gender equality, so that the treatment to women related to justice in gender equality, have not been appropriate yet or even are contrary to Islamic law.

The natural essence of justice in gender equality is related to the public perception about women. Gender is a matter of culture, especially related to the public life of women. There is a gap of social roles and responsibilities of women against men. It is called discrimination that is harmful for women than men.

The main factor of the gender gap is social cultural value that generally prefers men than women (patriarchal culture). Besides that, interpretation of religious teaching that is less thorough or likely to be understood by text / handwriting is lack of understanding of reality, is likely to be understood partly or less comprehensive (kaffah). Meanwhile, the ability, willingness and readiness of women themselves to change the condition are not actually implemented.<sup>2</sup>

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

<sup>2</sup> Tepas Ahmad Heryawan, “Hakekat Kesenjangan dan Keadilan Gender”, yang dimuat dalam file:///C:/Users/HPPavilion/Documents/ 2722

Gender equality has similar meaning that is condition for men and women to get the same opportunities and rights as humans, to be able to contribute and participate in various activities, especially in the public sector such as: political, legal, economic, social, cultural, educational and other etc .. Gender equality also includes the elimination of discrimination and structural injustice, both for men and women. With gender equality it means that there is no standardization of roles, double burden, and violence against women or men. The absence of discrimination between women and men will make women and men to have access, opportunities for participation and control over the development and get the equal and fair benefits of development.<sup>1</sup>

Nasaruddin Umar said that there are several criteria that can be used as a guide to see the principles of gender equality in the Qur'an. Those measures are explained in the following points:<sup>2</sup>

1. Males and Females Equally as Servant. One of purposes of man's creation is to worship God (QS. Az-Dzariyat / 51: 56). In the capacity of human beings as servants, there is no difference between males and females. Both females and males have the same potential and opportunities to be the ideal servant, that in the Qur'an it is usually referred to as god-fearing, and to achieve this degree there is no differences in gender, race or ethnic group. In the capacity as servants, females and males will each receive an award of God in accordance with the level of devotion (Surat al-Nahl / 16: 97).
2. Male and Female as Caliph on earth. Aim and purpose of human creation on earth, besides to be submissive and obedient servant and serve Allah swt, it is also to be caliph on earth (QS. Al-An'am / 6: 165). The word Caliph does not refer to one gender or such ethnic group. Males and Females have the same functions as the caliph, who would be responsible for their duties of caliphate on earth, as they have to be responsible as a servant of God.
3. Males and Females receive Primordial Agreement. Males and females are equally have their duty and receive a primordial agreement with God. As it is known, on the eve of a child comes out of his mother's womb, he firstly had to accept an agreement with his Lord (QS. Al-A'raf / 7: 172). No one of child born on earth who is not pledged to the existence of God, and their vows are witnessed by the angels. No one says "no". In Islam, individual responsibility and independence happen since early childhood, since in the womb. Since the beginning of human history, in Islam there is no gender discrimination. Men and women equally stated the same divinity pledge. The confidence of a woman in Islam should be formed since birth, because from the beginning it was never given a special burden in the form of "inheritance sin" as impressed in the Judeo-Christian tradition, which gives a negative image if a person born as a woman. In this tradition, women are always connected with the cosmic drama, in which Eve was considered to be involved in the case of the release of Adam from Heaven. Al-Qur'an that has a positive view of the human being, the Qur'an insists that Allah exalt all children of Adam (Surah Al-Isra/17:70). In the Qur'an, there is no a single verse that shows the virtue of someone because of gender or because of certain ethnic group.
4. Adam and Eve, Involve Actively in Drama Cosmic. All verses that tell about the cosmic drama, the story about the condition of Adam and his partner in heaven to come out into the earth, it always stressed the two sides actively by using the pronoun for two people which is pronoun for Adam and Eve, as can be seen in the following cases: Both were created in heaven and utilize the facilities of heaven (Surah Al-Baqarah / 2: 35); Both got the same temptations quality of the devil (Surat al-A'raf / 7: 20); Equally ate an apple and both received the impact that is falling to the earth (al-A'raf / 7: 22); Equally begged for mercy and equally forgiven by God (Surah Al-A'raf / 7: 23); Once on earth, both developed offspring and completed each other and needed each other (Surah Al-Baqarah / 2: 187). Adam and Eve are mentioned together as actors and responsible for that cosmic drama. So, it cannot be justified if there is a presumption that females as a teaser creature that cause human child fall to earth suffering.
5. Males and Females Equally Have Potential to Get Achievement. In terms of opportunities to achieve maximum performance, there is no difference between males and females, as affirmed particularly in the three verses of the Qur'an (Surah Ali Imran / 3: 195, Surat An-Nisa / 4: 124 and QS Mu'min / 40: 40). These verses imply the ideal concept of gender equality and give firmness that the individual achievements, both in the field of spiritual and professional career, it is not always monopolized by one sex only. Males and females have equal opportunities to achieve optimal performance. However, in reality in society, this ideal concept still needs stages and socialization, because there are still some obstacles, particularly cultural constraints that are difficult to solve. One of the obsessions of the Qur'an is the realization of justice in society. Justice in the Quran include all aspects of human life, both as individuals and as members of society. Therefore, the Qur'an does not tolerate any form of oppression,

<sup>1</sup> *Ibid*

<sup>2</sup> Nazarudin Umar "Prinsip-Prinsip Keadilan Gender dalam Al-Qur'an", yang dimuat dalam file:///C:/Users/H HPPavilion/Downloads/download keadilan dan kesetaraan gender/prinsip-prinsip kesetaraan gender.htm, diunduh dari internet tanggal 18 November 2010

whether based on ethnicity, skin color, ethnicity and beliefs, as well as those based on gender. If there is a result of understanding or interpretation that is oppressive or infringe the noble values of humanity, that result of understanding and interpretation are openly to be debated.

With the description mentioned by Nasaruddin Umar above, seen in the Qur'an, in fact it already mentioned the presence of justice and equality between males and females in Islam. But in the daily reality the fairness and gender equality as mandated in the Qur'an it can be said that it is still far from expectations, including the implementation that happen in the world that the majority of the citizens are Moslems.

As mentioned by Nasaruddin Umar above, that in the Qur'an, in fact it has already mentioned the presence of justice and equality between males and females in Islam. However, related to the hadiths of the Prophet, there are hadiths that the degrees of truth are still doubtful, whether the hadith is weak (*dha'if*) or good (*gharib*), whether the hadith is ahad hadith (hadith whose narrator is singular), or hadith *mu tawatir* (hadith narrated by few narrators / the narrations pass various chain of transmission), that content is degrading females that do not reflect the presence of gender equality.<sup>1</sup>

Based on the discussion above with approach to Islam with justice theory in version of Islam, the justice of the provisions of a witness in a formal law of Islam has shown fairness because the conception of justice in Islam is equality in the balance according to each part in accordance with applicable law. So that justice is not demanding the same equation but the equation in balance by positioning everything in accordance with its portion. A teaching of Islam clearly shows that in Islam itself it does not teach the difference in public life between males and females, but the provisions of Islamic law has set the position of the witness in accordance with its portion of each according to the type of case. So in the study the position of women witnesses based on Islamic law can not be reviewed by fairness indictment in equality perspective that should be equal.

#### Legal Reform of Procedural Law of Religious Court

R. Soebekti states that "*Procedural Law serve to the Material Law, then by itself every developments in material law should always be followed by adjustment of procedural law.*"<sup>2</sup> Soebekti has reminded us the significance of the Legal Reform of Procedural law. In this regard what is done here is a *legal reform*, because when it firstly uses the western civil procedural law, especially the law of proof with this legal reform in order to impose Islamic law for Islamic Religious Court.

In practice of nationalities the imposition of Islamic law was not entirely smooth. It can be studied from political situation that color the forming of Law Number 1 Year 1974 on Marriage and the Law Number 7 Year 1989 on Religious Court as amended by Law Number 3 Year 2006 that also color the tendency and the aim of legal policy of country that can be seen from the political aspect of the legal establishment, the political aspect of the content of law (principles and the rule of law), and political aspect of law enforcement. Those three aspects have made Islamic law practiced Indonesian Moslems is in conflict with the rules of other formal legal. In fact, the conflict also happen between article in one formal legal rule, especially at the level of implementation.<sup>3</sup> In fact, the conflict of rule can cause various effects in the form of socio-cultural problem in society.<sup>4</sup> Likewise, if it is associated with customary law and Islamic law. Some provisions of Law Number 1 Year 1974 and Law Number 7 Year 1989 conflict with customary law or Islamic law practiced in the Indonesian Moslem society, because customary law and Islamic law as the law of life in the society are also included in the legal definition of material or substantive law. This can be seen from the presence KHI as a reference (material law) for the completion of a case in Religious Court.<sup>5</sup>

Based on those aspects, it can be said that an effort to implement Islamic law in Indonesia, particularly in the areas of family law, still tied with law politic of rulers who do not really fully support the imposition of Islamic law in accordance with the customary of Indonesian Moslem society. The existence of that law politic causes the creation of inconsistency of regulation and application of legal principles.<sup>6</sup>

Positive law is the law that is applied nationally to all citizen. That national law can be in the form of material and procedural law. Material law is the law that becomes the basis for settling of legal case in a court beside the procedural law. Material positive law, which is also referred to as the substantive law, which is the

<sup>1</sup> *Ibid*

<sup>2</sup> R. Soebekti, *Hukum Acara Perdata*, Bina Cipta, Bandung 1982, hal.14

<sup>3</sup> Misalnya aturan tentang pencatatan dan sahnya perkawinan dalam UU No. 1/1974. Lihat kasus pencatatan perkawinan dalam Stijn Cornelis van Huis and Theresia Dyah Wirastri, "Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws", *Australian Journal of Asian Law*, Vol. 13, No. 1, 2012, h.1-17.

<sup>4</sup> Stijn Cornelis van Huis and Theresia Dyah Wirastri, "Muslim Marriage Registration in Indonesia", hal. 3-4.

<sup>5</sup> Mengenai perdebatan seputar status hukum KHI dalam peraturan perundang-undangan Indonesia bisa dilihat, misalnya, dalam Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010), hal. 95-129.

<sup>6</sup> Bani Syarif Maula, "Politik Hukum dan Positivisasi Hukum di Indonesia", *Istinbath*, Vol. 13, No. 1, Desember 2014, hal. 51

provision of the law which refers to the law and regulation. On the other hand, this law and regulation comes from the law in the society, which can be in the form of customary law or Islamic law. In contrast, the procedural law is law that regulates the procedure or procedure for settling disputes in court in accordance with the competence of related court.<sup>1</sup>

By looking at the principles of civil procedural law with the principles of procedural law of Islamic court that are different it needs for legal reform against the procedural law of religious court. In order to meet the juridical and constitutional order above that Religious Court should has the procedural law itself stipulated in law, that command should be reviewed in depth by paying attention to the philosophical, juridical and sociological aspects.

#### a. Philosophical Aspect

Philosophically, the formation of Western civil procedural law in the XIX century is based on the values prevailing in the tradition of country of Continental European law. The values and principles of Western law upholds the values of individual rights (liberal) and human rights that are secular. This means that when the legislators are planning, preparing and enforcing the rule of law they only concerned the scope of the interests of the people of Europe, particularly the Netherland itself, do not care and pay attention to other things that happen and will happen outside the European society. When the unification of law and the codification of the law is applied in the Dutch East Indies as a colony, then through law politic of concordance, the rule of procedural law and western material civil law is only applied to the Netherlands that were in the Dutch East Indies as well as those who Liken.<sup>2</sup>

Religion court established by Act Number 7 Year 1989, is an attempt to make the religion court more independent same with other justice agencies in accordance with the mandate of Article 10 of Law Number 14 Year 1970 on Basic Provisions on Judicial Power. However, in practice of the implementation and investigation of the case it has no procedural law of its own, so that through the provision of Article 54 it is stated that the procedural law that is used in religious court is the law that is applied in religious court area as long as it is not specifically regulated in Law Number 7 Year 1989 on Religious Court.

Procedural Law enforcement in mutatis mutandis Western Civil Procedural Law that its orientation is mechanistic as procedural law of religion court, in fact it raises various problems, both in terms of legal rules and practice.

#### b. Juridical Aspect

Sources of procedural law of religious court are:

1. Law Number 48 Year 2009 on Judicial Power.
2. Law Number 3 Year 2006 on the amendment of Law Number 7 Year 1989 on Religious Courts.
3. Law Number 20 Year 1947 concerning Judicial Deuteronomy in Java and Madura.
4. Law Number 5 Year 2004 on the Amendment of Act Number 14 Year 1985 on the Supreme Court.
5. Act Number 1 Year 1974 on Marriage and Government Regulation Number 9 Year 1975 on the implementation of Law Number 1 Year 1974.
6. Law Number 41 Year 2004 on Waqf.
7. *Het Herziene Indonesisch Reglement* (HIR) for Java and Madura.
8. *Rechtsreglement Buitengewesten* (RBg.) for outside Java and Madura.
9. *Reglement op de Burgerlijke Rechtsvordering* (Rv).
10. Presidential Instruction (*Inpres*) Number 1 Year 1991 on the use of Islamic Law Compilation for guidance in resolving problems in the field of marriage, waqf and inheritance.
11. Jurisprudence, namely the systematic collection of Supreme Court decisions followed by another judge in the same decision.
12. Circular of the Supreme Court as far as covers the Civil Procedural Law.

State Courts Religious Court is legitimate, instead of being the Special Court, which is the justice of Islam in Indonesia, which is authorized by state law and regulation, to realize the material Islamic law within the limits of its power.

If so then the Religious Court in its procedural law should pay attention to the Law Number 7 Year 1989 and has been revised by Law Number 3 Year 2006, added with 8 kinds of law and regulation that had been mentioned. Moreover, at one time the Religious Court should still pay attention to the law according to Islam. All of this is called the source of Procedural Law of Religious Court.

<sup>1</sup> Roihan A. Rasyid, *Hukum Acara Peradilan Agama*, Raja Grafindo, Jakarta, 2001, hal. 40.

<sup>2</sup> E. Utrech., *Pengantar Dalam Hukum Indonesia*, Pradnya Paramita, Jakarta, 1960, hal. 58-67.

### c. Sociological Aspect

The procedural law of religious court that exist today is no longer relevant to the social condition of the society and beyond simple, fast and inexpensive the principles.

According to Abdul Manan, products of colonial law is one of the obstacles for justice and truth, the more complete states: "To reach those conditions above, many obstacles that should be faced, which are first: the product of colonial law that are still used and national legal products that are no longer appropriate to the current situation, thus causing legal support in various fields has not been optimal. If the legal products are still used so then the development of law in Indonesia is difficult to meet the dynamics of the community."<sup>1</sup>

Abdul Manan's thought is certainly reinforce the analysis that the authors stated that the procedural law prevailing in a religious court was come out of way of the simple principle, fast and inexpensive, even more the Procedural Law on Religious Court has hampered the rights of justice seekers to get justice with simple way, quick and inexpensive. "The civil procedural law is a series of rules that includes how people should act towards and in front of court and how the court should act with each other to carry out the passage of the rules of civil law."<sup>2</sup>

Definition procedural law as defined by Wirjono above illustrates that the procedural law is a tool to get to the main goal that is justice. So the author can briefly say that because of the procedural law is a "tool" then it is very unproper if "tool" inhibits the "destination". Civil Procedural Law of Religious Court should ease -Simple, fast and inexpensive-court process in order to decide the case with the fairest way.

Reminded again what was said by R. Soebekti as the author quoted above that the "Procedural law devotes to the Material Law, then by itself any developments in the material law should always be followed by the adjustment of procedural law." A few decades ago R. Soebekti has reminded us of the importance of the Civil Procedural Law reform. Although on the other hand the material law change very slowly but social (economic, political) change, the society demand the service of the judiciary that is simple, fast and low cost without reducing the sense of justice.

## 4. Closing

### Conclusion

Based on the explanation above it can be concluded that the procedural law of the religion court based on Article 54 Law number 7 Year 1989 cause dualism of law between civil procedural law based on HIR/RBg and procedural of law based on Law of Islam. This dualism of law in the procedural law of religion court shows the uncertainty of law. This uncertainty of procedural of law in the religion court will affect the effort of fulfilling the justice in enforcement of law in religion court.

### Suggestion

- a. The government should make review of academic draft towards the forming of procedural law of religion court that is comprehensive and have unification.
- b. House of Representatives should put draft of Law of procedural law of religion court in national legislation program that becomes priority.

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