

Research Article

Conceptualization of Gender Equality as the Protection of Women in Family Law Cases

Rizky Silvia Putri*, Amar Ma'ruf

Raden Intan State Islamic University Lampung

ORCIDRizky Silvia Putri: <https://orcid.org/0009-0008-1001-3725>**Abstract.**

Gender equality is a fundamental concept in achieving social justice and the protection of human rights. Women often face gender discrimination, gender-based violence, sexist stereotypes, and a patriarchal culture that contributes to gender injustice against women. Therefore, the protection of women in conflict with the law must be strengthened through an approach that focuses on gender equality. Especially in family law cases in the Religious Courts where it involves women. The issues raised are regarding the concept of gender equality as protection of women and what is the concept of gender equality as protection of women in family law cases? This type of research is library research or literature study. The results of this study can conclude that the concept of gender equality has been enshrined as one of the principles in adjudicating cases of women dealing with the law as stated in Article 2 of Supreme Court Regulation No. 03 of 2017 as a form of protection in family law cases. In the actualization of the principle of gender equality, when adjudicating women's cases in the field of family law, judges are required to be gender sensitive. The role of judges in carrying out judicial functions and authority should indeed focus more on legal objectives. It is also necessary to pay attention to the principle of *ex aequo et bono*, which is stated in the subsidiary demands. This principle provides flexibility for judges to explore the law as widely as possible in order to uphold justice.

Keywords: equality, family, gender, lawCorresponding Author: Rizky
Silvia Putri; email:
rizkysilviaputri@radenintan.ac.id**Published** 11 January 2024Publishing services provided by
Knowledge E

© Putri, Ma'ruf. This article is distributed under the terms of the [Creative Commons Attribution License](#), which permits unrestricted use and redistribution provided that the original author and source are credited.

Selection and Peer-review under the responsibility of the RIICSHAW Conference Committee.

1. Introduction

Gender equality means a situation where women and men enjoy equal status and have the same conditions to fully realize their human rights and potential in all areas of life. Gender justice means a fair condition for women and men through cultural and structural processes that remove barriers to actualization for those who, because of their gender, experience structural and cultural barriers.[1] The principle of gender equality supports fair and equal protection for women in the legal system. Within an equal legal framework, women have the same rights as men to be presumed innocent, protected from violence, and have fair access to the courts.

OPEN ACCESS

There is a Supreme Court Regulation No. 3 of 2017 which discusses the guidelines for trying cases of women in conflict with the law, which contains one of the principles that is certainly very important to be considered by judges in deciding cases, namely the principle of gender equality. Based on this regulation, judges are required to be able to behave in a gender-sensitive manner. This Supreme Court Regulation reaches cases under the authority of the Religious Courts, most of which are women. Religious Courts are an effective means of realizing access to material and non-material rights with gender justice as the absolute authority of the Religious Courts consists of cases of marriage, inheritance, wills, grants, waqf, zakat, infaq, shadaqah, and sharia economy. Women's knowledge as litigants is still minimal, resulting in the lawsuit material being made also very minimal, which can ultimately harm women. The protection of women in family law cases is not only an individual matter but also an important foothold in building an inclusive legal foundation that respects human rights. The role of judges in carrying out judicial functions and authority should indeed focus more on philosophical goals and interpretations. The existence of the *ex aequo et bono* principle, which is usually contained in the subsidiarity charge, should provide flexibility for judges to explore the law as widely as possible in order to uphold justice. Departing from this, the author wants to see the extent of the concept of gender equality as a protection for women and how the concept of gender equality is a protection for women in family law cases in outlaw cases.

2. Methods

This type of research is library research.[2] Which is research to obtain information by reading documents and theories that are related to the title or problem.[3] There are also sources of information used, namely secondary information. Secondary information is information obtained from materials such as documents, posts, dailies, web, and information obtained indirectly by researchers either oral or written. The nature of this research is normative juridical, juridical, and normative research is literature-based legal research, research that is intended on written rules or documents as well as secondary information as the basis of its research. this research uses the method of analyzing the information used by carrying out the structuring of information on the information obtained to get the goal is the conclusion. On the other hand, the analysis that the author uses is qualitative analysis, which is a grouping of information for the aspects studied and taken finally without using statistical figures.[4]

3. Results and Discussion

3.1. Gender Equality

Gender discourse emerged in 1977 when a group of London feminists no longer used old issues such as patriarchal or sexist but used a new jargon, gender discourse.[5] This is a smart development because in fact the problem of inequality in the relationship between women and men is largely formed by the differentiation of the construction of “women” and “men” socially and culturally and not biologically (sex, gender). Gender is a social construction that is relative, not generalized or universal.[6] Gender is not the same as sex. Sex is the physical, physiological, and biological status characterized as male and female. So the term sex refers to the differences in biological characteristics of women and men, which are carried from birth. Meanwhile, gender is a social construction. Gender is a concept that refers to the roles, functions, and responsibilities between women and men that result from and can be changed by the social and cultural circumstances of society. [7]

The differentiation of position and role characteristics between women and men results in unequal relations between women and men in society. Women are often considered weaker than men and men are considered to have greater rights or resources than women, for example in terms of education, work, and inheritance. Gender equality is intrinsically linked to sustainable development and is critical to the realization of human rights for all people, the overall goal of gender equality is the creation of a society in which women and men enjoy equal opportunities rights, and obligations in all areas of life. Equality between men and women is when both sexes can share equally in the distribution of power and influence have equal opportunities and access to their rights and are completely free from coercion and intimidation.[8]

The gender equality in question is substantive equality that pays special attention to women’s reproductive roles and functions and to existing gender gaps or inequalities by ensuring that existing policies and practices do not discriminate against women based on their reproductive functions. Talking about gender equality is inseparable from the patriarchal cultural practices that occur in Indonesia. Patriarchal culture places the position of men higher than women so that there are often practices of injustice and discrimination against women ensuring gender equality is not intended to put men against women but rather an effort to build equal relationships or relations between women and men and reduce injustice against women.[9]

Gender justice is needed because in society there are still various gender inequalities between women and men, reflected in the low quality of life and the role of women, including the high number of cases of violence against women, the gap in access and participation in development and control of resources between women and men, while the role and participation of women are also still low in various fields. Patriarchy is a form of family system that places great importance on the father's lineage. In the socio-cultural and religious system patriarchy is an ideology that men have a higher position than women and women are considered the property of men. Patriarchal culture makes men in a position of dominance and has the authority to make decisions. This is cultured in all systems of community life both in socio-cultural education language politics economics and law so that the position of women is often weak and discriminated against.[10]

Islam recognizes the difference (distinction) between men and women, but not discrimination. The difference is based on the physical-biological conditions of women who are destined to be different from men, but the difference is not intended to ennoble one and demean the other. Islamic teachings do not systematically differentiate between women and men. but rather views the two people as a whole. Biologically and socio-culturally, one needs the other and thus each has a role.[11] The concept of gender equality between men and women in the Qur'an, Allah says in surah An-Nisa' verse 124

وَمَنْ يَعْمَلْ مِنَ الصَّالِحَاتِ مِنْ ذَكَرٍ أَوْ أُنْثَىٰ وَهُوَ مُؤْمِنٌ فَأُولَٰئِكَ يَدْخُلُونَ الْجَنَّةَ وَلَا يُظْلَمُونَ نَقِيرًا

Whoever does righteous deeds, whether male or female, and is a believer, shall enter Paradise, and they shall not be wronged in the least

3.2. Gender Equality in Law and Justice

Law is a set of rules that regulates and affects many aspects of human life, ensuring gender equality in law and justice will certainly affect the formation of values and social construction of society. In various international treaties, conventions, and declarations on human rights, the obligation to eliminate discrimination on the basis of sex has become one of the inherent missions in order to achieve gender equality. Among these international agreements, the CEDAW Convention (Convention on Elimination of All Forms of Discrimination Against Women) is one of the international conventions, which specifically addresses women's human rights with an approach of Substantive Equality, Non-Discrimination, and State Obligation.[12]

The 1945 Constitution of the Republic of Indonesia Article 27 paragraph (1) recognizes the guarantee to all citizens of equal standing under the law.[13] The use of the words

“all citizens” means anyone, whether male or female. To achieve equality is not by giving the same burden between men and women, but by opening up opportunities without any intervention from either gender to actualize themselves. Equality is not equalizing men and women, but it is aligning the positions of men and women.

Supreme Court Regulation No. 3 of 2017 concerning Guidelines for Adjudicating Cases of Women Against the Law Article 2 regulates the principles used by judges in adjudicating cases of women in law, including respect for human dignity, non-discrimination, gender equality, equality before the law, justice, expediency, and legal certainty. This regulation was issued to avoid discrimination during court hearings. Supreme Court Regulation No. 3 of 2017 which discusses the guidelines for trying cases of women in conflict with the law contains one of the principles that is certainly very important to be considered by judges in deciding cases, namely the principle of gender equality. Based on this regulation, judges are required to be able to behave in a gender-sensitive manner. Thus this Supreme Court Regulation reaches cases under the authority of the Religious Courts, most of which are women.

The existence of Religious Courts is devoted to Indonesian citizens who are Muslims.[14] According to Prof. Busthanul Arifin, religious courts can be said to be family courts for people who are Muslims, as found in several other countries. As a family court, i.e. a court that handles cases in the field of Family Law, certainly the scope of its duties is different from the general court.

Therefore, all the requirements that must be met by judges, clerks, and secretaries must be in accordance with the tasks carried out by the religious courts.[15] The absolute authority of the Religious Courts is regulated in Article 49 of Law No. 3 of 2006 Concerning Amendments to Law No. 7 of 1989 Concerning Religious Courts which basically consists of cases of marriage, inheritance, wills, grants, waqf, zakat, infaq, shadaqah and sharia economy.[16] In the field of marriage, it covers several matters, among others, permission to have more than one wife, marriage dispensation, prevention of marriage, annulment of marriage, divorce due to divorce, divorce lawsuit, settlement of joint property, control of children, and others. Gender equality is required in every government program design, especially in judicial reform for the following reasons: To ensure equal access to justice, improve the credibility and transparency of judicial bodies, strengthen supervision and monitoring of the justice sector, provide the right of justice seekers to obtain recognition of guarantees of protection and legal certainty as well as equal treatment before the law and realize excellent public services.

3.3. Protection of Women in Family Law Cases

Women in conflict with the law are women in conflict with the law, women as victims, women as witnesses, or women as parties. Problems faced by women in conflict with the law include: Limited knowledge of legal rights, due to lack of access to information, many women facing the law do not know what their legal rights are or how they can defend their rights, especially in terms of getting compensation for the crimes that have befallen them. Financial limitations, many women in conflict with the law are victimized and litigants do not have the financial resources to bring their cases to court, therefore it is important for women in conflict with the law who cannot afford to obtain free legal aid and waivers of case fees. Limited access to legal counsel, in cases of gender discrimination and domestic violence it is common for the perpetrator to have legal counsel but not the victim. The existence of threats, pressure and stigma against women victims, witnesses and parties, as well as the fear of repeated violence committed by the perpetrator so that women facing the law are afraid to give testimony. Accountability and transparency, court procedures that are not accountable and transparent can make it difficult for women against the law to access justice. Language or communication barriers, women against the law who cannot speak Indonesian will find it difficult to understand and convey testimony in the trial process. Physical or mental barriers, women facing the law who have physical or mental limitations require a companion or facilitator that is in accordance with their special needs. Distance and transportation constraints, considering that the court is located in a city or regency that is far from the domicile. Other practices of law enforcement officials and members of the public that hinder access to justice for women in conflict with the law who come from certain minority and ethnic groups.

Religious Courts are an effective means of realizing access to material and non-material rights with gender justice. Women's knowledge as litigants is still minimal, resulting in the lawsuit material being made also very minimal, which can ultimately harm women. So it has become a necessity for the Religious Courts to be able to guarantee the rights of women facing the law in family law cases. In the book *Legal Discussion of Judges of Religious Courts in Lampung Province, Regarding Supreme Court Regulation No. 3 of 2017*, it is explained that the thought of decisions that have gender sensitivity in handling divorce and domestic violence cases, including judges must take steps to provide protection for the victim in examining cases and considering decisions, judges must apply the principle of equality and pay attention to gender equality in their decisions.

In addition to judges being required to behave in a gender sensitive manner, there are also things that judges need to consider in deciding family law cases, including: The presence or absence of domestic violence, so that women are forced to leave or leave their husbands or homes to seek protection and cannot be directly blamed for leaving their husbands. The wife's income contribution to household expenses, in addition to taking care of the daily household, so that the wife needs to be considered getting more than half of the joint property. The existence of a power relationship between husband and wife that makes the wife more vulnerable and powerless in the face of the husband's desire for polygamy or in relation to the husband's control over joint property. Both husband and wife have the same responsibility to care for, nurture and raise children. Potential dangers that threaten both the physical and psychological well-being of women.[17]

Examples of decisions with a gender perspective that are related to family law cases are Decision No. 137 K/AG/2007 Jo. Decision No.112/Pdt.G/2006/PTA.Bdg Jo. Decision No. 688/Pdt.G/2005/PA.Bks. In the Compilation of Islamic Law, iddah maintenance can only be given in cases of divorce, as stipulated in Article 149 of the Compilation of Islamic Law, namely when a marriage breaks up due to divorce, the former husband is obliged to provide mut'ah and iddah maintenance to the former wife. In this Supreme Court decision, the wife received iddah maintenance in the case of a contested divorce, because the wife who sued the husband for divorce was not always convicted of nusyuz, even though the lawsuit was filed by the wife, but ex officio the judge could order the former husband to provide iddah maintenance to the former wife. The situation of the case is as follows: The Plaintiff (wife) and the Defendant (husband) are husband and wife and were married on November 20, 1984 and have been blessed with 3 (three) children, Since 2001 between Plaintiff and Defendant there have been frequent disputes and arguments due to the Defendant often hurling obscenities at Plaintiff and often threatening to use sharp weapons that could endanger the safety of Plaintiff and her children, Defendant has never provided maintenance to Plaintiff for (2) years. In its consideration, the Panel of Judges considered that in accordance with Article 41 letter (c) of Law No. 1 of 1974 Concerning Marriage, Article 149 letter (b) of the Compilation of Islamic Law, even though the lawsuit was filed by the wife but it was not proven that the wife had committed nusyuz, then ex officio the Judge could punish the former husband to provide iddah maintenance to the former wife, on the grounds that the former wife had to undergo an iddah period, the purpose of which was, among others, to istibra' which also concerned the interests of the husband.

The second decision is decision number 266 K/AG/2010 regarding the division of joint property against husbands who do not provide maintenance for children and wives. According to Article 97 of the Compilation of Islamic Law, each wife and husband is entitled to $\frac{1}{2}$ share of the joint property in marriage without questioning who obtained the joint property, but in this Supreme Court decision, the wife received $\frac{3}{4}$ share of the joint property, because the joint property was generated by the wife, and the husband did not provide maintenance for the children and wife for 11 years. The situation of the case is as follows: The plaintiff is the legal wife of the defendant, the marriage took place on April 8, 1995, with a marriage certificate number 35/35/IV/1995, From this marriage the plaintiff and the defendant have two children, Since 1997 (132 months) the defendant has not provided for the plaintiff and children, Since 1998 the household of the plaintiff and the defendant has not been harmonious, there have always been quarrels that have been difficult to reconcile, On November 9, 2008, the Plaintiff left the house with her child because she was evicted by the Defendant and since then the Plaintiff and Defendant have been separated. During their marriage, Plaintiff and Defendant acquired joint property in the form of land, house, car, motorcycle, and household furniture. The panel of judges in their consideration stated that based on the evidence and facts in the trial it turned out that the husband did not provide maintenance and the results of his work and all joint property were obtained by the wife from the wife's work, so for the sake of justice the Plaintiff (wife) received $\frac{3}{4}$ of the joint property, while the Defendant (husband) received $\frac{1}{2}$ of the joint property. Decision No. 266 K/AG/2010 dated July 12, 2010, annulled the decision of PTA Yogyakarta No. 34/Pdt.G/2009/PTA.Yk. dated November 19, 2009, which annulled the Decision of Bantul Religious Court No. 229/Pdt.G/2009/PA.Btl. dated August 20, 2009.

With the existence of several decisions with a gender perspective, it should be jurisprudence for judges in examining and adjudicating family law cases, but in fact, in deciding cases there is a principle held by judges, namely the principle of *ultra petitem partium*.^[18] The principle of *ultra petitem partium* is regulated in Article 178 paragraph (2) and (3) HIR and in Article 189 paragraph (2) and (3) RBG jo. Article 67 letter c of Law No. 14 of 1985 concerning the Supreme Court means that if the judge is carrying out the decision on a case that is not prosecuted or approves more than what is requested, then the decision is an *ultra vires* decision and must be declared defective even though it is in accordance with the public interest. So that judges do not have the courage to determine or legally guarantee the rights of women after divorce, such as *iddah* maintenance if it is not included in the *petitem*. The breakup of marriage makes women have to undergo an *iddah* period, so it is a must if *iddah* maintenance is

attached to the rights of women who are undergoing the iddah period. If the principle of *ultra petitem partium* is applied absolutely in adjudicating a case, then the judge's decision will be far from the principles of justice and expediency. This means that the judge only enforces the principle of legal certainty. According to Gustav Radbruch, as quoted by Satjipto Rahardjo, the law must fulfill various works as the basic value of the law. The basic values of law are justice, utility, and legal certainty. Although the three are the basic values of law, there is a tension between them. Because the three contain different demands, they have the potential to contradict each other. However, the principles of justice and expediency must be prioritized because judges in making decisions must adhere to the fundamental principle in a decision, namely "For the Sake of Justice Based on God Almighty".

In addition, there is flexibility in this rule if it is associated with the principle of *ex aequo et bono*, which is usually contained in a subsidiary claim.[19] If the Religious Court is of another opinion, please decide this case according to the law with justice. This means that this principle gives judges the freedom to explore the law as widely as possible in order to uphold justice. After all, judges are not merely mouthpieces of the law, but also interpreters and discoverers of the law. It is in this context that the ability of judges to explore and uncover legal facts becomes relevant to continue to be explored and developed in order to empower judges who are sensitive to the values of justice not merely legal values. The community will eventually argue that the Religious Courts are considered institutions that only legalize divorce without any justice being obtained. This feeling of disappointment causes people to be antipathetic to the institution of the Religious Courts. They are of the opinion that if they go to court the result is clear that the settlement will only end in divorce and will only get a divorce certificate without any stipulation of punishment for the ex-husband as a form of protection and fulfillment of other rights that women should get. This is where the position of judges as law enforcers and justice providers becomes very important for the realization of justice for justice seekers. The Supreme Court has dared to open the frame of the prohibition of *ultra petitem partium* through several decisions including Supreme Court Decision No. 140K / Sip / 1971 which basically states that it allows judges to make decisions that are *ultra petitem partium* on the condition that they must still be in a framework that is harmonious with the core of the lawsuit.

4. Conclusion

Gender equality has been enshrined as one of the principles in the guidelines for adjudicating cases of women in conflict with the law as stated in Article 2 of Supreme Court Regulation No. 03 of 2017 as a form of protection for women in family law cases. In the actualization of the principle of gender equality when adjudicating women's cases in the field of family law, judges are required to be gender sensitive by considering matters including the presence or absence of domestic violence, so that women are forced to leave or leave their husbands or homes to seek protection, the wife's income contribution to household costs, in addition to taking care of the daily household, so that the wife needs to be considered getting more than half of the joint property, the existence of a power relationship between husband and wife that places the wife more vulnerable and helpless, both husband and wife both have the responsibility to care for, care for and raise children, the potential danger that threatens both physical and psychological women. The role of judges in carrying out judicial functions and authority should indeed focus more on philosophical goals and interpretations. Ideally, a decision must contain the principles of justice, benefit, and legal certainty, if the panel of judges only refers to the principle of *ultra petitem partium* then what can be achieved by litigants is only legal certainty, not justice and benefit. It should be noted that the principle of *ex aequo et bono*, which is usually stated in the subsidiary demands, this principle provides flexibility for judges to explore the law as widely as possible in order to uphold justice.

References

- [1] Asas dan Tujuan. Koalisi Perempuan Indonesia n.d. <https://www.koalisiperempuan.or.id/tentang/asas-dan-tujuan/#:~:text=Koalisi Perempuan Indonesia bertujuan untuk,dan Budaya serta Lingkungan Hidup.>
- [2] Mahmud Marzuki P. *Penelitian Hukum*. Jakarta: 2013.
- [3] Ali Z. *Metode Penelitian Hukum*. Jakarta: Sinar Grafika; 2010.
- [4] J. Moleong L. *Metode Penelitian Hukum*. Bandung: Remaja Rosdakarya; n.d.
- [5] Umar N. *Mendekati Tuhan dengan Kualitas Feminim*. Jakarta: Quanta; 2014.
- [6] Subhan Z. *Tafsir Kebencian: Studi Bias Gender dalam Tafsir Qur'an*. Yogyakarta: LKiS; 2016.
- [7] Indonesia R, Mengadili P, Perempuan P, Hukum D, Rahmattuhan D, Maha Y, et al. *Peraturan Mahkamah Agung Nomor 3 Tahun 2017 Tentang Pedoman mengadili*

Perkara Perempuan Berhadapan Dengan Hukum, Berita Negara Republik Indonesia Tahun 2017 Nomor 1084 2017.

- [8] UNFPA. Frequently asked questions about gender equality 2005.
- [9] Ridwan. Kekerasan Berbasis Gender. Yogyakarta: Fajar Pustaka; 2006.
- [10] Retnowulandari W. Budaya Hukum Patriarki Versus Feminis: dalam Penegakan Hukum di Persidangan Kasus Kekerasan Terhadap Perempuan. *J Huk* 2010;8:17.
- [11] Umar N. Kodrat Perempuan dalam Islam. Jakarta: Lembaga Kajian Agama dan Gender; 1999.
- [12] KONVENSI CEDAW DAN CONCLUDING OBSERVATIONS TERHADAP LAPORAN GABUNGAN KE 6 & 7 (2004-2009, 2009-2012). Kementerian Pemberdayaan Perempuan Dan Perlindungan Perempuan Republik Indonesia n.d. <https://www.kemenpppa.go.id/index.php/page/read/30/283/konvensi-cedaw-dan-concluding-observations-terhadap-laporan-gabungan-ke-6-7-2004-2009-2009-2012>.
- [13] UUD Republik Indonesia. Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 1945;105:Pasal 27 (1).
- [14] Yahya Harahap M. Kedudukan Kewenangan dan Acara Peradilan Agama. Jakarta: Sinar Grafika; 2003.
- [15] Sutantio R. Hukum Acara Perdata. Jakarta: Gema Insani; 1996.
- [16] Fataruba S. Kompetensi Absolut Pengadilan Agama dan Kekhususan Beracaranya Pasca Amendemen Undang-undang Nomor 7 Tahun 1989 Tentang Peradilan Agama. *Sasi* 2016;22:65.
- [17] Mahkamah Agung Republik. Pedoman Mengadili Perkara Perempuan yang Berhadapan dengan Hukum 2018;2:46.
- [18] Nasrulloh AS. Asas Ultra Petition Partium Dalam Penemuan Hukum Oleh Hakim Perspektif Hukum Progresif. 2015.
- [19] Subagyo BSA, Wahyudi J, Akbar R. Kajian Penerapan Asas Ultra Petita Pada. *Yuridika* 2014;29:102. <https://doi.org/10.20473/ydk.v29i1.360>.