

Kodifikasia : Jurnal Penelitian Islam, Vol 16, No. 01 (2022), 1-18

DOI : 10.21154/kodifikasia.v16i1.3925

p-ISSN : 1907-6371

e-ISSN : 2527-9254



PRINCIPLES OF MASLAHAH MURSALAH ON WOMEN'S EQUALITY AND JUSTICE: AN ANALYSIS TOWARDS SUPREME COURT REGULATION OF REPUBLIC OF INDONESIA NUMBER 3 2017 CONCERNING WITH GUIDELINES FOR ADJUDICATING WOMEN'S CASES AGAINST THE LAW

Endrik Safudin* and Uswatul Khasanah**

Abstrak:

Peraturan Mahkamah Agung Republik Indonesia Nomor 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum lahir dimaksudkan untuk mewujudkan keadilan bagi perempuan agar mendapatkan akses yang sama atas sumber daya di dalam proses persidangan. Dengan kata lain, peraturan tersebut memuat ketentuan yang berkenaan dengan kontrol yang sejajar terhadap relasi antara laki-laki dan perempuan atas pemberian hak dan kewajiban khususnya pada proses persidangan sehingga keadilan substantif bagi perempuan dapat terwujud. Dengan kata lain, peraturan tersebut memberikan pedoman bagi hakim agar memberikan akses yang sama terhadap perempuan yang berhadapan dengan hukum, misalnya, akses pengambilan keputusan terhadap hak mendapatkan ganti kerugian, akses menjelaskan dampak kasus dan kebutuhan pemulihan. Dengan menggunakan penelitian kepustakaan (*library research*), penelitian ini akan menggali yaitu pertama, kesetaraan gender dan keadilan gender dalam prinsip masalah mursalah. kedua, prinsip masalah mursalah kesetaraan dan keadilan gender dalam Peraturan Mahkamah Agung Republik Indonesia Nomor 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum. Ketiga, prinsip masalah mursalah dalam Peraturan Mahkamah Agung Republik Indonesia Nomor 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum. Hasil penelitian ini menunjukkan pertama, kesetaraan gender dan keadilan gender sejalan dengan prinsip masalah mursalah.

* Institut Agama Islam Negeri Ponorogo, email: endriksafudin@iainponorogo.ac.id

** Institut Agama Islam Negeri Ponorogo, email: uswatulkhasanah28@gmail.com

Kedua, prinsip masalah mursalah kesetaraan dan keadilan gender sangat terakomordir oleh Peraturan Mahkamah Agung Republik Indonesia Nomor 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum. Ketiga, Peraturan Mahkamah Agung Republik Indonesia Nomor 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum dikonstruksikan dengan tujuan untuk merubah relasi kuasa sedemikian rupa antara laki-laki dan perempuan, baik dalam tataran pengetahuan maupun tindakan khususnya dalam ruang persidangan.

Kata kunci: Masalah mursalah; Keadilan substantif; Relasi kuasa

Abstract:

The Supreme Court Regulation of Republic of Indonesia Number 3 of 2017 concerning with the Guidelines for Adjudicating Women's Cases Against the Law is intended to create justice for women in order to have equal access on the resources in the trial process. In other words, the regulation contains provisions relating to equal control towards the relationship between men and women over the granting of rights and obligations, especially in the trial process, so that substantive justice for women can be realized. In other words, the regulation provides guidelines for judges to provide equal access to women conflicting with the law, for example, access to decision-making on the right to compensation, access to explain the impact of cases and the need for remedies. By using library research, it will explore, firstly, gender equality and gender justice in the principle of masalah mursala; secondly, the principle of masalah mursalah on equality and gender justice in the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning with the guidelines for Adjudicating Women's Cases with the Law; thirdly, the principle of masalah mursalah in the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning with guidelines for Adjudicating Women's Cases conflicting with the Law. The results of this study show that first, gender equality and gender justice are in line with the principle of masalah mursalah, second, the principle of masalah mursalah on equality and gender justice is accommodated by the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning with the Guidelines for Adjudicating Women's Cases Against the Law, third, the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning with the Guidelines for adjudicating women's cases against the law are constructed with the aim of changing power relations

in such a way between men and women, at the level at both knowledge and action, especially in the courtroom.

Keywords: *Maslahah mursalah; Substantive justice; Power relation*

INTRODUCTION

Women are prone to experiencing acts of injustice and inequality, including women dealing with the law. According to paragraph 1 chapter (1) of the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning with the Guidelines for Adjudicating Cases of Women facing the Law (PERMA No. 3 of 2017), women in dealing with the law are defined as women conflicting with the law, women as victims, women as witnesses or women as parties.

According to the 2020 Annual Minutes of Violence against Women (CATAHU) released by the National Commission on Violence against Women (KOMNAS for woman), the number of violence against women was 8,234 cases. The major violence that made women victims occurs in the private sphere. The most prominent cases were household violence, namely 6,480 cases or about 79%. If it were classified, the first rank would be violence against the wife as many as 3,221 cases (49%). Furthermore, violence against girlfriends are 1,309 cases (20%). In third position, violence against girls was 954 cases (14%), and the rest is violence perpetrated by ex-husbands, ex-girlfriends, and violence against household workers. Violence in this privacy area has a similar pattern in previous years¹.

Referring to these data, women is more vulnerable to experience violence than men. In some cases, most victims did not get the problem solving. These cases were closed with paying some money by perpetrators to the victims, marrying them, and even forming a peace agreement with the victims². The various resolutions of the cases above cannot be separated from a situation where victims giving report to law enforcement officers through the legal process precisely experience various problems in matters of legal substance, legal structure, and legal culture that lead to inequality and injustice. In order to prevent this problem, the Supreme Court issued PERMA No. 3 of 2017.

¹ Komnas Perempuan, "Kekerasan meningkat: Kebijakan penghapusan kekerasan seksual untuk membangun ruang aman bagi perempuan dan anak perempuan," *Catahu: Catatan tahunan tentang kekerasan terhadap perempuan*, 2020, 1.

² *ibid*

The question appearing might be whether this regulation is able to realize equality and justice for woman dealing with the law or whether this regulation really bring benefit. Starting from this anxiety, the writer is interested in studying PERMA No. 3 of 2017 with a deep analysis from the perspective of *masalah mursalah*.

Research on PERMA No. 3, 2017 is not new thing in the academic field, for instance, the article written by Ichsan, Yusmad, and Arif entitled the implementation on the Regulation of Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning with the guidelines for adjudicating women cases conflicting with the Law in Court (Study at Palopo Court)³, an article written by Rizky Silvia Putri and Amar Ma'ruf entitled the Implementation of Supreme Court Regulation Number 3 of 2017 concerning with the guidelines for Adjudicating Cases of Women Facing the Law against Divorced Cases at Tanjung Karang Court of Religious Affairs⁴, an article written by Lilik Mahsun with the title The Effect of PERMA Number 3 of 2017 Against the Considerations of Judges adjudicating Women as Perpetrators of domestic Violence⁵. The three articles also discuss the Supreme Court Regulation Number 3 of 2017 concerning with the guidelines for Adjudicating Women's Cases Against the Law. However, there are differences in which the first and second article discuss its application, and the third article discusses its effects, while this study has different characteristics because it uses an analytical view with a *masalah mursalah* perspective.

By using library research, this study will further answer some of the problems from the initial questions that the author has described above, namely, first, how is gender equality and gender justice in the principle of *masalah mursalah*? second, how is the principle of *masalah mursalah* gender equality and justice in PERMA No. 3, 2017? Finally, how is the principle of *masalah mursalah* in PERMA No. 3, 2017?.

³ Muammar Arafat Yusmad Dan Firman Muhammad Arif, "Menyoal Penerapan Perma No. 03 Tahun 2017 Tentang Pedoman Mengadili Perkara Perempuan Berhadapan Dengan Hukum Di Pengadilan (Studi Di Pengadilan Negeri Palopo)," *Maddika: Journal Of Islamic Family Law* 1, No. 2 (2020): 112.

⁴ Rizky Silvia Putri dan Amar Ma'ruf, "Implementasi Peraturan mahkamah Agung No. 3 Tahun 2017 tentang pedoman mengadili perkara perempuan berhadapan dengan hukum terhadap perkara cerai gugat di Pengadilan Agama Tanjung Karang," *As-Salam: Jurnal Studi Hukum Islam dan Pendidikan* 7, no. 2 (2018).

⁵ Lilik Mahsun, "Pengaruh Perma Nomor 3 Tahun 2017 Terhadap Pertimbangan Hakim Yang Mengadili Perempuan Sebagai Pelaku Kekerasan Dalam Rumah Tangga," *Jurnal Hukum Caraka Justitia* I, no. 1 (2020).

DISCUSSION

The concept of *Maslahah Mursalah*

The word *maslahah* etymologically means benefit⁶. Terminologically *maslahah* is something assumed beautiful by most people because it brings beauty and avoids damage to humans, and in accordance with the rules of *syara'* when the law is enacted⁷. In respect of the purpose of the law (*maqshid al-syariah*), there are five rules which can be applied when deciding sharia law, namely maintaining religion (*hifdz ad-din*), maintaining the soul (*hifdz al-nafs*), maintaining reason (*hifdz al-'aql*), maintaining offspring (*hifdz al-nasl*), and maintaining wealth (*hifdz al-mal*)⁸. *Hifdz ad-din* is *haq attadayyun*, namely the right to worship and carry out religious teachings with the aim of maintaining the sanctity of religion. *Hifdz al-nafs* is *haq alhayat*, namely the right to live and create a better quality of life with the aim of maintaining the sanctity and purity of the soul. *Hifdz al-'aql* is *haq al-ta'lim*, namely the right to get education as a tribute to reason in fulfilling intellectual or scientific rights. *Hifdz al-nasl* is the right to protect and maintain offspring or family as a form of continuity or existence of human life. *Hifdz al-mal* is *haq al-mal*, namely the right to protect property from interference from others as a form of protection of the rights of all that is owned.

Maslahah can be categorized into several categories⁹. *The first* category is *maslahah* which is based on the level and need for benefit. Ushul fiqh scholars distinguish it into three stages, namely *maslahah daruriyah*¹⁰, *maslahah hajiyah*¹¹, and *maslahah tahsiniyah*.¹² *The second* category is *maslahah* based on its form. *Maslahah* consists of two kinds, namely first, *maslahah* which is able to create benefits, beauty and pleasure for humans which means bringing benefits, and second, *maslahah* which is able to save mankind from destruction and humiliation which means getting rid

⁶ Maithuf Siroj, *Paradigma Ushul Fiqh* (Yogyakarta: Pustaka Ilmu, 2013), 11.

⁷ Amir Syarifuddin, *Ushul Fiqh, Jilid II* (Jakarta: Logos Wacana Ilmu, 1999), 325.

⁸ Asnawi, "Konseptualisasi Teori Maslahah," *Jurnal Filsafat dan Budaya Hukum* 1, no. 2 (2014): 324.

⁹ Ahmad Qorib dan Isnaini Harahap, "Penerapan Maslahah Mursalah Dalam Ekonomi Islam," *Journal Analytica Islamica* 5, no. 1 (2016): 57.

¹⁰ *Maslahah daruriyah* adalah kemaslahatan yang berkaitan dengan keperluan pokok umat manusia di dunia dan di akhirat. Kemaslahatan ini ada lima atau sering disebut dengan *masalih al-khamsah*, yaitu memelihara agama, memelihara jiwa, memelihara akal, memelihara keturunan, dan memelihara harta. Sumber: Suwarjin, *Ushul Fiqh* (Yogyakarta: Teras, 2012), 142.

¹¹ *Maslahah hajiah* adalah kemaslahatan yang diperlukan untuk menyempurnakan kemaslahatan pokok (mendasar) sebelumnya. Sumber: Ahmad Sanusi, *Ushul Fiqh* (Jakarta: RajaGrafindo Persada, 2012), 79.

¹² *Maslahah tahsiniyah* adalah kemaslahatan yang bersifat pelengkap atas kemaslahatan sebelumnya. sumber: Ibid.

of destruction.¹³ The third category is *maslahah* based on the content of *maslahah*, namely *maslahah 'ammah*¹⁴ and *maslahah khassah*¹⁵. The fourth category is *maslahah* which is based on whether or not *maslahah* has changed, namely *maslahah sabitah*¹⁶ and *maslahah mutaqayyirah*¹⁷. The last category is *maslahah* based on the existence of *maslahah* according to *syara'*, namely *maslahah mu'tabarah*¹⁸, *maslahah mulghah*¹⁹, and *maslahah mursalah*.

From the categorization of *maslahah* above, one of the categories of *maslahah* based on the existence of *maslahah* according to *syara'* (Islamic law) is *maslahah mursalah*. *Maslahah mursalah* is one of the *mashodirul ahkam* used to solve problems that present after the death of the Prophet Muhammad. Etymologically, *maslahah mursalah* comes from the word *maslahah* and the word *mursalah*. The word *maslahah* is *masdar* (basic word) of the word *salaha* which means value, need and benefit²⁰. While the word *mursalah* etymologically means detached or in the sense of *mutlaqatan* (free). The word "free" when associated with the word *maslahah* means that it is detached and free from explanations indicating whether it is permissible or not to be carried out.²¹

Etymologically, *maslahah mursalah* is defined by various *ushul fiqh* scholars including, first, Muhammad Sa'id Ramadan al-Buti who defines *maslahah mursalah* as any benefit that is in accordance with *syar'i* law (former of Islamic law) without any arguments that allow or eliminate it²².

¹³ Syarifuddin, *Ushul Fiqh*, Jilid II, 208.

¹⁴ *Maslahah amah* adalah kemaslahatan umum yang berkaitan dengan orang banyak. Kemaslahatan ini untuk kebutuhan mayoritas orang dan tidak ada nilai *mudharat* yang tersimpan di dalamnya. Sumber: Nasrun Haroen, *Ushul Fiqh 1* (Jakarta: Logos Publishing House, 1996), 116.

¹⁵ *Maslahah khassah* yaitu kemaslahatan pribadi dan jarang ditemukan di kehidupan. Sumber: Ibid.

¹⁶ *Maslahah sabitah* yaitu kemaslahatan yang bersifat pasti, tidak berubah sampai akhir zaman. Sumber: Linda Melinda, "Analisis Maslahat Mursalat Tentang Menjaga Jarak Dalam Shaf Shalat Berjamaah Pada Masa Pandemi Covid-19 Di Mesjid Al-Inayah Komplek Bumi Harapan Desa Cibiru Hilir Kecamatan Cileunyi Kabupaten Bandung," t.t., 4.

¹⁷ *Maslahah mutaqayyirah* yaitu kemaslahatan yang berganti-ganti sesuai dengan pergantian tempat, waktu, dan subjek hukum kemaslahatan. Sumber: Ibid.

¹⁸ *Maslahah mu'tabarah* adalah *maslahah* yang diperhitungkan oleh *syar'i*, di mana terkandung beberapa petunjuk *syar'i* baik secara langsung atau menyampaikan petunjuk terhadap *maslahah* yang menjadi dasar dalam memutuskan suatu hukum. Sumber: Eka Rahayuningsih dan M. Lathoif Ghozali, "Sertifikasi Produk Halal dalam Perspektif Mashlahah Mursalah," *Jurnal Ilmiah Ekonomi Islam* 7, no. 1 (2021): 135–45.

¹⁹ *Maslahah mulghah* adalah *maslahah* yang tidak diakui secara *syar'i*, bahkan ditolak walaupun dianggap baik secara akal. Sumber: Ibid.

²⁰ Adib Bisri dan Munawir, *Kamus al-Bisri* (Surabaya: Pustaka Progesif, 1999), 141.

²¹ Totok Jumantoro dan Samsul Munir Amin, *Kamus Usul Fiqh* (Amzah, 2005), 203.

²² Ahmad Munif Suratmaputra, *Filsafat Hukum Islam Al-Ghazali Maslahah Mursalah dan Relevansinya dengan Pembaharuan Hukum Islam* (Jakarta: Pustaka Firdaus, 2018), 69.

Meanwhile, according to Imam Ghazali, *maslahah mursalah* is any matter (*maslahah*) for which there is no evidence against it from the *syara* in the form of specific texts that eliminate it and no one cares about it. From the two scholars' opinions above, *maslahah mursalah* can be defined as a benefit that is not touched by *syara*' and there is no evidence that orders it to be done or to leave it.²³

According to Al-Syatibi, *maslahah mursalah* can be used as a legal basis if several conditions are met, including first, the benefit is in line with the actions/ kinds of *syara*' actions. It means that *maslahah* which is not conformable with the actions/ kinds of *syara*' actions or which is contrary to the *syara*' arguments cannot be used as guidance. Second, benefit can only be specified and applied in the field of *muamalah* (social relation) which cannot be applied to the field of worship²⁴. Third, the product of *maslahah* is protection against the aspects of *dharuriyah*, *hajjiah*, and *tahsiniyah*. *Maslahah* method is a step to eliminate difficulties in various dimensions of life, especially in social matters.²⁵

Thus, the discussion about *maslahah mursalah* cannot be separated from *syara*' law (*maqshid al-syariah*), because *maslahah mursalah* is the goal of Islamic sharia itself. Therefore, in short, it can be said that *maqshid al-sharia* can be used as a measurement of *maslahah mursalah*.

Gender Equality Concept

The term gender was first introduced by Robert Stiller, where this term is used to separate human characteristics between definitions that are socio-cultural in nature with definitions that are biological physical characteristics. This definition is also in line with Stoller Oakley's opinion which defines gender with attributes worn by humans that are built by human culture²⁶.

In terminology, gender is used to identify the differences that exist in society with sexual differences. The scope of the differences defined here are in the form of language, space, time, thoughts, actions, property, mass media, technology, professions, education, taboos, production facilities, and

²³ Wahyu Abdul Jafar, "Eksistensi Wakaf Tunai Dalam Tinjauan Maslahah Mursalah," *Al Hurriyah: Jurnal Hukum Islam* 4, no. 1 (2019): 24.

²⁴ Suratmaputra, *Filsafat Hukum Islam Al-Ghazali Maslahah Mursalah dan Relevansinya dengan Pembaharuan Hukum Islam*, 85.

²⁵ Hendri Hermawan Adinugraha dan Mashudi Mashudi, "Al-Maslahah al-mursalah dalam penentuan hukum Islam," *Jurnal Ilmiah Ekonomi Islam* 4, no. 01 (2018): 71.

²⁶ Riant Nugroho, *Gender dan Strategi Pengarus-Utamanya di Indonesia* (Yogyakarta: Pustaka Pelajar, 2008), 2–3.

household facilities²⁷. According to Hilary M. Lips, the word gender is more attached to culture that attaches to men and women²⁸.

Talking about gender, definitely it cannot be separated from the discussion of gender equality which is raised by feminism. The issue of gender equality is not only ideological and political, but also epistemological and philosophical. It is called ideological and political because this issue was initiated by the interests of the feminist movement that wants women's liberation from the oppressive structure of patriarchy. Meanwhile, it is called epistemological and philosophical because of feminism's efforts to dismantle the structure of women's oppression by using various theoretical approaches²⁹.

Gender equality is defined as the harmony of conditions for men and women in obtaining their rights as human beings, so that they can act and be involved in political, legal, economic, socio-cultural, educational, defense and national security activities, and can feel the development products³⁰. It is explicitly stated in QS. Al-Ahzab: 35, QS. An-Nahl verse 97, QS. Al-Hujurat verse 13, QS. Az-Zariyat verse 56 and so on, so there is no longer any reason for women not to participate in the public sphere. This also occurs to what should be obtained through social state policies and government services in the term of public sphere³¹. The realization of gender equality can be done by taking actions based on a strong responsibility to raise women from structural poverty starting from individuals, communities, countries, and the international community.

Gender equality has a difference with gender equity. Gender equality talks about granting equal rights to all people in every situation or opportunity. Meanwhile, gender justice talks about giving rights proportionally based on the needs of the recipient.

Gender equality can be viewed from four indicators, namely first, the channel element. Women and men have equal access to the centers of development efforts. Second, the element of involvement which women and men are equally active in development agendas. Third, the element of benefit which women and men must get the benefits of development products. Fourth, the element of supervision which women and men have

²⁷ Siti R. Dzuhayatin, *Agama dan Budaya Perempuan: Mempertanyakan Posisi Perempuan dalam Islam, dalam Sangkan Paran Gender* (Yogyakarta: Pustaka Pelajar, 1997), 11.

²⁸ Mansour Fakih, *Analisis Gender dan Transformasi Sosial* (Yogyakarta: Pustaka Pelajar, 1999), 8.

²⁹ Isnatin Ulfah, *Menggugat Perkawinan: Mengoptik Fenomena Tingginya Gugat Cerai dengan Kaca Mata Feminisme* (Ponorogo: STAIN Ponorogo Press, 2012), 17.

³⁰ Nugroho, *Gender dan Strategi Pengarus-Utamanya di Indonesia*, 29.

³¹ Faqihuddin Abdul Kodir, *Qira'ah Mubadalah* (Yogyakarta: IRCiSoD, 2019), 441–42.

full sovereignty in making decisions on the use and products of business centers.³²

Gender Justice Concept

Today, differences sex can lead to differences in gender issues. This gender difference is not a problem as long as it does not cause gender inequality³³. Justice in a gender perspective can be defined as a condition of justice for men and women through cultural processes and policies that can remove various barriers to engagement for men and women³⁴. Justice in the context of men and women must ensure that there is no discrimination, a tendency towards certain gender and neglect of others. Justice here can also be interpreted as giving an equal burden of rights and obligations between men and women, so there is no domination between them³⁵. In addition, based on the *mubadalah* perspective, a public *maslahah* must really provide benefits to all levels of society which does not stand for a particular gender³⁶. Gender justice is explicitly touched on, for example, by QS. An-Nisa' verse 34.

There are several gender inequalities that manifest in various forms. The first³⁷ is marginalization or process of impoverishment, which results in economic poverty.³⁸ The second is underestimation meaning that there is an assumption that one gender is considered to be more important or superior to the other. In this case, women are placed in lower positions and tasks than men. The third is stereotypes, namely standard images related to individuals or groups that are not in accordance with existing facts. Injustice will arise if there is negative labeling. This can trigger discrimination and injustice that harms women³⁹. The Fourth is violence which is an attack either on the physical or on mental integrity of a person's psychological⁴⁰. The last is double burden or what is often known as giving the bigger work obtained by one gender than the other one⁴¹. The existing gender inequality

³²Hidayah Quraisy dan Muhammad Nawir, "Kesetaraan Gender Pegawai Dinas Pertanian," *Equilibrium: Jurnal Pendidikan* 3, no. 1 (2015): 112.

³³Nugroho, *Gender dan Strategi Pengarus-Utamanya di Indonesia*, 9.

³⁴Herien Puspitawati, *Konsep, Teori dan Analisis Gender* (Bogor: IPB Press, 2012), 5.

³⁵Indar Indar, "Iddah Dalam Keadilan Gender," *Yinyang: Jurnal Studi Islam Gender dan Anak* 5, no. 1 (2010): 10.

³⁶Kodir, *Qira'ah Mubadalah*, 513.

³⁷Nugroho, *Gender dan Strategi Pengarus-Utamanya di Indonesia*, 117.

³⁸Fakih, *Analisis Gender dan Transformasi Sosial*, 76–77.

³⁹Nanang Hasan Susanto, "Tantangan mewujudkan kesetaraan gender dalam budaya patriarki," *Muwazah: Jurnal Kajian Gender* 7, no. 2 (2015): 123.

⁴⁰Fakih, *Analisis Gender dan Transformasi Sosial*, 79.

⁴¹Nurul Hidayati, "Beban Ganda Perempuan Bekerja (Antara Domestik dan Publik)," *Muwazah* 7, no. 2 (Desember 2015): 109.

is caused by the gap in the social structure that surrounds it, so it can cause both men and women as victims of this social structure.⁴²

Gender justice is in line with the main pillars (*da'a imut tasyri'*) that build Islamic law. According to Suparman Usman, these pillars are first, Islamic law establishes and confirms comprehensive justice for mankind (*tahqiq al-adalat*), second, Islamic law maintains and shapes the benefit of mankind (*ri'ayat mashalih al-ummat*), third, Islamic law does not increase (reduce) burdens and remove (eliminate) difficulties (*qillat al-taklif, nafyu al-haraj wa raf'u al-masyakkat*), fourth, tiered accountability (*tadaruj fi al-tasyri'*) and fifth, each person only bears his own sin.

Gender Equality and Justice in the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning Guidelines for Adjudicating Women's Cases in Conflict with the Law

Women are very vulnerable in getting different public services compared to men, especially when dealing with the law. When women become victims, their attention to their rights (conditions, losses, consequences of the case and the need for recovery) is very different from what is obtained by men. To respond to these problems, PERMA No. 3 2017 was later created. The PERMA is the right step after Indonesia ratified the international convention on civil and political rights (ICCPR) through Law Number 12 of 2015 concerning Ratification of the International Covenant on Civil and Political Rights which is long before, Indonesia has ratified CEDAW through Law Number 7 of 1984 concerning the Ratification of the Convention on the Elimination of all Forms Discrimination Against Women.

PERMA No. 3 of 2017 in detail regulates the prohibition of being demeaning, blaming, intimidating or using experience and sexual background, especially for women conflicting with the law. This PERMA serves as a guide for law enforcers, either judges, prosecutors or lawyers to manage cases involving women, especially those conflicting with the law, either as a victim, as a witnesses or as the parties⁴³. PERMA is a breakthrough to break gender values in judicial practice which is patriarchal and has the potential to create discrimination against women.

Gender equality and justice are the core of PERMA No. 3 of 2017. Gender equality is defined as an equivalence and comparability of conditions between men and women in order to get each other's opportunities and

⁴²Fadhilatul Maulida dan Busyro Busyro, "Nafkah Iddah Akibat Talak Bain Dalam Perspektif Keadilan Gender (Analisis Terhadap Hukum Perkawinan Indonesia)," *Al Hurriyah: Jurnal Hukum Islam* 3, no. 2 (2018): 121.

⁴³Pasal 1 angka 1 Peraturan Mahkamah Agung Republik Indonesia Nomor 3 Tahun 2017 Tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum

rights as humans, so they are capable of being involved and active in various fields⁴⁴. Gender justice is defined as a process to achieve justice for men and women⁴⁵.

By affirming gender equality and justice, it is intended that there will be no discrimination, especially against women. Discrimination against women means all distinctions, exclusions or restrictions made on the gender basis which have the effect or purpose of reducing or eliminating the respect, enjoyment or use of human rights and fundamental freedoms in the legal, political, economic, social, cultural, civil or other fields by women, regardless of their marital status on the reason of equality between men and women⁴⁶. Therefore, realizing gender justice, equality, power relations⁴⁷ must be changed and regulated in such a way, both at the level of knowledge and action.

Furthermore, PERMANo. 3 of 2017 imperatively provides arrangements for judges in adjudicating women's cases in conflict with the law based on the principles of respect for human dignity, non-discrimination, gender equality, equality before the law, justice, benefit and legal certainty⁴⁸. In addition, in handling cases involving women, judges must take into account gender equality and non-discrimination, by identifying the facts of the trial, namely:

- a. Inequality of social status between the litigants
- b. Inequalities in legal protection that result in access to justice
- c. Discrimination
- d. Psychological consequences experienced by the victim
- e. The victim's physical and psychological powerlessness
- f. Power relations that result in the victim/witness being powerless
- g. History of violence from perpetrator to victim/witness⁴⁹

In the process of examining women who are in conflict with the law, judges are prohibited from:

- a. Implying attitudes or makes statements that demean, blame or intimidate women in conflict with the law;

⁴⁴ Pasal 1 angka 4

⁴⁵ Pasal 1 angka 6

⁴⁶ Pasal 1 angka 6

⁴⁷ Relasi kuasa yaitu relasi yang bersifat hierarkis, ketidaksetaraan dan/atau ketergantungan status sosial, budaya, pengetahuan/pendidikan dan/atau ekonomi yang melahirkan kekuasaan pada satu pihak kepada pihak lainnya dalam konteks relasi antar gender sehingga merugikan pihak yang mempunyai posisi lebih rendah. lihat pasal 1 angka 9

⁴⁸ Pasal 2

⁴⁹ Pasal 4

- b. Legitimizing the occurrence of discrimination against women by utilizing culture, customary rules, and other traditional practices as well as utilizing gender-biased expert interpretations;
- c. Doubting and/or taking into account the experience or gender background of the victim as a reason to release the perpetrator or reduce the punishment of the perpetrator; and
- d. Make statements or views that contain gender stereotypes

Furthermore, in chapter 7, it is explained that during the trial examination process, the judge must prevent and/or warn the parties, legal counsel, public prosecutors and/or legal counsel who behave or make statements that demean, blame, intimidate and/or take advantage of their experience or sexuality background of the women's against with the law.

Thus, it can be seen that PERMA No. 3 of 2017 was made to create gender equality and justice, especially for women. This confirms that the noble purpose of law is to realize justice, benefit and legal certainty⁵⁰. According to Aristotle, the purpose of law is to expect justice solely and the content of the law is determined by an ethical awareness of what is asserted to be fair and what is unjust⁵¹. The same thing was said by Francois Geny with his ethical theory, that the purpose of law is solely for justice. Geny further said that the purpose of law is determined by aspects of a person's beliefs which are considered ethical⁵².

Therefore, gender equality and justice in PERMA No. 3 of 2017 emphasizes the function of law as a tool of social and bureaucratic engineering that prioritizes the concept of role model and encouragement for anyone to treat women properly in social life. Gender equality and justice can only be achieved by applying a regulation with a gender responsive character⁵³.

⁵⁰ Endrik Safudin, *Pengantar Ilmu Hukum* (Malang: Setara Press, 2020), 31.

⁵¹ Endrik Safudin, *Pengantar Ilmu Hukum* (Malang: Setara Press, 2020), 31.

⁵² Ibid.

⁵³ Kesetaraan gender dalam hukum menjadi obyek pokok pembahasan para *feminist jurisprudence* yaitu aliran filsafat hukum yang berlandaskan pada kepercayaan atas kesetaraan politik, ekonomi dan sosial berbasis gender. *Feminist jurisprudence* mulai eksis pada tahun 1960-an. Lihat Neuro Tandon, *Feminism: a paradigm shift* (New Delhi: Atlantic Publishers & Distributors, 2008), 123. *Feminist jurisprudence* mengendalikan keterlibatan utama dalam diskursus ilmu hukum terhadap pemikirannya yang berpengaruh pada mayoritas perdebatan mengenai kekerasan seksual dan domestik, ketidaksetaraan ditempat kerja dan diskriminasi berdasar gender. Melewati bermacam pendekatan, kaum feminis sudah menandai unsur-unsur gender dan terlibatnya gender dari norma hukum dan penerapannya yang kelihatan netral. Akhirnya menjadikan hukum yang mempengaruhi pekerjaan, perceraian, hak reproduksi, pemerkosaan, kekerasan di dalam rumah tangga, dan pelecehan seksual seluruhnya telah merugikan perempuan sejauh sejarah kehidupan manusia, sehingga harus dirancangulang. Lihat Aga Natilis, "Reformasi Hukum dalam Rangka Mewujudkan Keadilan Bagi Perempuan: Telaah Feminist Jurisprudence," *Jurnal Crepido* 02, no. 01 (Juli 2020): 18.

This application ultimately culminates in the intention of realizing equality before the law, which is not only a substantial principle in the judicial process, but also a substantial principle in legislation⁵⁴. So, women can get their right to live with more dignity, free from fear and discrimination.

The Principle of *Maslahah Mursalah* in the Regulation of the Supreme Court of Republic of Indonesia Number 3 of 2017 concerning with the Guidelines for Adjudicating Women's Cases in against with the Law

In the social life, not only men who are against with the law, but also women might conflict with the law. Women who are against with the law can be understood as those conflicting with the law, as victims, as witnesses or women as parties. According to CATAHU 2020 issued by women's national commission KOMNAS), the number of violence against women was 8,234 cases. The violence that makes women victims of this majority occurs in the private sphere. The most prominent cases were domestic violence, namely 6,480 cases or about 79%. If it is classified, the first rank is violence against wives (KTI) with 3,221 cases (49%). Furthermore, violence within a boyfriend is 1,309 cases (20%). In third place, violence against girls was 954 cases (14%), and the rest was violence perpetrated by ex-husbands, ex-girlfriends, and violence against domestic workers. Violence in this private area experienced a similar pattern in previous years⁵⁵.

To avoid injustice or gender inequality in adjudicating cases for women conflicting with the law, the Supreme Court issued PERMA No. 3 of 2017. PERMA which contains 12 chapters broadly provides guidelines for judges in adjudicating women's cases conflicting with the law started from the principles and objectives, case investigation, to material trial investigation.

From the perspective of *maslahah mursalah*, PERMA provides benefits for women who are against with the law. This benefit can be seen in the consideration, namely "that the protection of citizens from all acts of discrimination is the implementation of constitutional rights as stated in the 1945 Constitution of the Republic of Indonesia." Furthermore, the PERMA provides benefits that are in line with *syara'* actions. In addition, the PERMA is also not part of the field of worship. Finally, the goal that PERMA aspires to is realized in the *dharuriyah* aspect.

If examined more deeply, the chapters in the PERMA reflect the benefits of *dharuriyah*. Some aspects of the benefit of this *dharuriyah* are reflected

⁵⁴ Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (London: The Glass House Press, 2003), 86.

⁵⁵ Perempuan, "Kekerasan meningkat," 1.

in several chapters, including, *first* is *hifdz din* or religious maintenance. Religion is a belief that must be possessed by humans so that their dignity sticks out higher than other creatures. This maintenance is illustrated in the form of religious protection in Islam, namely applying the teachings in the Qur'an, where in relating and interacting with one another, it must be based on tranquility, tenderness, protection, peace, kindness, and justice. The maintenance of religion in this case has been reflected in chapter 2 which explains the principles and objectives for judges in adjudicating women's cases⁵⁶.

Second is *hifdz 'aql*, namely the maintenance of reason. The presence of PERMA provides certainty for women who are in conflict with the law. This is because the existence of PERMA is a form of maintaining reason, where the psychological pressure experienced by women dealing with the law in the form of injustice or gender inequality in obtaining justice can be eliminated. This maintenance of reason is reflected in chapter 4 to 10, in which several chapters speak of guidelines for judges in conducting case examinations. The application in these articles is a prohibition to discriminate which can damage the mind and eliminate the function of the human mind.

Third is maintaining the soul (*hifdz al-nafs*). The maintenance of this soul, for example, can be seen in the regulation of chapter 8 paragraph (1), namely that judges must ask for opinions from women as victims regarding losses, as a result of the case and the need for recovery. PERMA intends to prohibit omission, impartiality or indifference to women as victims.

Fourth is maintaining offspring (*hifdz al-nasl*). PERMA imperatively emphasizes to judges to be consistent with the principles and standards of human rights, especially in the legal field and always take into account the circumstances and rights of victims of unequal losses resulting from gender inequality⁵⁷.

Fifth is protecting property and honor (*hifdz al-mal wa al-'irdh*). The embodiment of this safeguard, for example, includes the justification of personal rights and the management of *mua'amalat*. Meanwhile, the application of maintaining women's honor and dignity can be seen in chapter 7 which emphasizes the prohibition of insulting others, demeaning, blaming, intimidating and/or taking advantage of knowledge or history of women's sexuality who conflicts with the law.

⁵⁶ Pasal 2 menyatakan: "*hakim mengadili perkara perempuan berhadapan dengan hukum berdasarkan asas: penghargaan atas harkat dan martabat manusia, non diskriminasi, kesetaraan gender, persamaan di depan hukum, keadilan, kemanfaatan dan kepastian hukum*"

⁵⁷ Pasal 8 ayat (3)

Of all descriptions above, it can be revealed that the principle of *maslahah mursalah* in PERMA No. 3 of 2017 is in line with the objectives of Islamic law (*maqashid al-syari'ah*). It means that the legal norms presented in PERMA are for human needs, namely as a means of human peace (*sabili al-ibtida'*) and safety in the world and the hereafter (*sa'adah fi al-dunya wa sa'adah fi al-akhirat*). PERMA is in line with the intent of a legal norm that must be centered and based on the recognition of human dignity as the ultimate goal of the law⁵⁸. Therefore, PERMA No. 3 of 2017 further confirms that the law exists to integrate interests and human needs in society. This integration aims at maintaining balance and order in society⁵⁹.

CONCLUSSION

Based on the discussion above, it can be concluded that first, equality and gender justice are in line with the principle of *maslahah mursalah*; second, the principle of *maslahah mursalah* of equality and gender justice is highly accommodated by the Regulation of the Supreme Court of Republic of Indonesia Number 3 of 2017 concerning with the Guidelines for Adjudicating Women's Cases Against the Law; third, the Regulation of the Supreme Court of Republic of Indonesia Number 3 of 2017 concerning with the Guidelines for Adjudicating Women's Cases Against the Law was constructed with the aim of changing power relations in such a way between men and women at the level of knowledge and action, especially in the courtroom.

Thus, *maslahah mursalah* equality and justice for women in PERMA No. 3 of 2017 looks very clear and bright. In other words, PERMA No. 3 of 2017 was formed for the purpose to create the benefit of women's lives.

⁵⁸ Endrik Safudin, *Harmonisasi Hukum Dalam Antinomi Hukum: Telaah Kritis Atas Penerapannya Oleh Mahkamah Agung* (Yogyakarta: Qmedia Dan Fakultas Syariah IAIN Ponorogo, 2021), 2.

⁵⁹ Safudin, *Pengantar Ilmu Hukum*, 134.

REFERENCES

- Adinugraha, Hendri Hermawan, dan Mashudi Mashudi. "Al-Maslahah al-mursalah dalam penentuan hukum Islam." *Jurnal Ilmiah Ekonomi Islam* 4, no. 01 (2018): 63–75.
- Asnawi. "Konseptualisasi Teori Maslahah." *Jurnal Filsafat dan Budaya Hukum* 1, no. 2 (2014).
- Bisri, Adib, dan Munawir. *Kamus al-Bisri*. Surabaya: Pustaka Progesif, 1999.
- Dzuhayatin, Siti R. *Agama dan Budaya Perempuan: Mempertanyakan Posisi Perempuan dalam Islam, dalam Sangkan Paran Gender*. Yogyakarta: Pustaka Pelajar, 1997.
- Fakih, Mansour. *Analisis Gender dan Transformasi Sosial*. Yogyakarta: Pustaka Pelajar, 1999.
- Haroen, Nasrun. *Ushul Fiqh 1*. Jakarta: Logos Publishing House, 1996.
- Hidayati, Nurul. "Beban Ganda Perempuan Bekerja (Antara Domestik dan Publik)." *Muwazah* 7, no. 2 (Desember 2015).
- Indar, Indar. "Iddah Dalam Keadilan Gender." *Yinyang: Jurnal Studi Islam Gender dan Anak* 5, no. 1 (2010): 103–27.
- Jafar, Wahyu Abdul. "Eksistensi Wakaf Tunai Dalam Tinjauan Masalah Mursalah." *Al Hurriyah: Jurnal Hukum Islam* 4, no. 1 (2019): 20–31.
- Jauhar, Ahmad Mursi Husain. *Maqasid al-Syariah*. Jakarta: Amzah, 2013.
- Jumantoro, Totok, dan Samsul Munir Amin. *Kamus Usul Fiqh*. Amzah, 2005.
- Kodir, Faqihuddin Abdul. *Qira'ah Mubadalah*. Yogyakarta: IRCiSoD, 2019.
- Mahsun, Lilik. "Pengaruh Perma Nomor 3 Tahun 2017 Terhadap Pertimbangan Hakim Yang Mengadili Perempuan Sebagai Pelaku Kekerasan Dalam Rumah Tangga." *Jurnal Hukum Caraka Justitia* I, no. I (2020).
- Maulida, Fadhilatul, dan Busyro Busyro. "Nafkah Iddah Akibat Talak Bain Dalam Perspektif Keadilan Gender (Analisis Terhadap Hukum Perkawinan Indonesia)." *Al Hurriyah: Jurnal Hukum Islam* 3, no. 2 (2018): 113–30.

- Melinda, Linda. "Analisis Masalah Mursalat Tentang Menjaga Jarak Dalam Shaf Shalat Berjamaah Pada Masa Pandemi Covid-19 Di Mesjid Al-Inayah Komplek Bumi Harapan Desa Cibiru Hilir Kecamatan Cileunyi Kabupaten Bandung," t.t.
- Natilis, Aga. "Reformasi Hukum dalam Rangka Mewujudkan Keadilan Bagi Perempuan: Telaah Feminist Jurisprudence." *Jurnal Crepido* 02, no. 01 (Juli 2020).
- Nugroho, Riant. *Gender dan Strategi Pengarus-Utamanya di Indonesia*. Yogyakarta: Pustaka Pelajar, 2008.
- Perempuan, Komnas. "Kekerasan meningkat: Kebijakan penghapusan kekerasan seksual untuk membangun ruang aman bagi perempuan dan anak perempuan." *Catahu: Catatan tahunan tentang kekerasan terhadap perempuan*, 2020, 1–109.
- Puspitawati, Herien. *Konsep, Teori dan Analisis Gender*. Bogor: IPB Press, 2012.
- Putri, Rizky Silvia, dan Amar Ma'ruf. "Implementasi Peraturan Mahkamah Agung No. 3 Tahun 2017 tentang pedoman mengadili perkara perempuan berhadapan dengan hukum terhadap perkara cerai gugat di Pengadilan Agama Tanjung Karang." *As-Salam: Jurnal Studi Hukum Islam dan Pendidikan* 7, no. 2 (2018).
- Qorib, Ahmad, dan Isnaini Harahap. "Penerapan Maslahah Mursalah Dalam Ekonomi Islam." *Journal Analytica Islamica* 5, no. 1 (2016): 55–80.
- Quraisy, Hidayah, dan Muhammad Nawir. "Kesetaraan Gender Pegawai Dinas Pertanian." *Equilibrium: Jurnal Pendidikan* 3, no. 1 (2015).
- . "Kesetaraan Gender Pegawai Dinas Pertanian." *Equilibrium: Jurnal Pendidikan* 3, no. 1 (2015).
- Raban, Ofer. *Modern Legal Theory and Judicial Impartiality*. London: The Glass House Press, 2003.
- Rahayuningsih, Eka, dan M. Lathoif Ghozali. "Sertifikasi Produk Halal dalam Perspektif Mashlahah Mursalah." *Jurnal Ilmiah Ekonomi Islam* 7, no. 1 (2021): 135–45.
- Safudin, Endrik. *Harmonisasi Hukum Dalam Antinomi Hukum: Telaah Kritis Atas Penerapannya Oleh Mahkamah Agung*. Yogyakarta: Qmedia Dan Fakultas Syariah IAIN Ponorogo, 2021.

- . *Pengantar Ilmu Hukum*. Malang: Setara Press, 2020.
- Sanusi, Ahmad. *Ushul Fiqh*. Jakarta: RajaGrafindo Persada, 2012.
- Siroj, Maithuf. *Paradigma Ushul Fiqh*. Yogyakarta: Pustaka Ilmu, 2013.
- Suratmaputra, ahmad munif. *Filsafat Hukum Islam Al-Ghazali Masalah Mursalah dan Relevansinya dengan Pembaharuan Hukum Islam*. Jakarta: Pustaka Firdaus, 2018.
- Susanto, Nanang Hasan. “Tantangan mewujudkan kesetaraan gender dalam budaya patriarki.” *Muwazah: Jurnal Kajian Gender* 7, no. 2 (2015): 120–30.
- Suwarjin. *Ushul Fiqh*. Yogyakarta: Teras, 2012.
- Syarifuddin, Amir. *Ushul Fiqh, Jilid II*. Jakarta: Logos Wacana Ilmu, 1999.
- Tandon, Neuro. *Feminism: a paradigm shift*. New Delhi: Atlantic Publishers & Distributors, 2008.
- Ulfah, Isnatin. *Menggugat Perkawinan: Mengoptik Fenomena Tingginya Gugat Cerai dengan Kaca Mata Feminisme*. Ponorogo: STAIN Ponorogo Press, 2012.
- Usman, Suparman. *Hukum Islam: Asas-Asas dan Pengantar Studi Hukum Islam Dalam Tata Hukum Indonesia*. Jakarta: Penerbit Gaya Media Pratama, 2001.
- Yusmad, Muammar Arafat, dan Firman Muhammad Arif. “Menyoal Penerapan PERMA NO. 03 Tahun 2017 Tentang Pedoman Mengadili Perkara Perempuan Berhadapan Dengan Hukum Di Pengadilan (Studi di Pengadilan Negeri Palopo).” *MADDIKA: Journal of Islamic Family Law* 1, no. 2 (2020): 11–24.