

Reconstruction of Legal Protection on Women in Law No. 23 of 2004 Concerning Elimination of Domestic Violence Based on Islamic Justice Values

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Abstract

This study aims to find and analyze what causes domestic violence (KDRT) in Indonesia which mainly directed at women who become victims and whether it is necessary to reconstruct the law based on Islamic justice values. This research is non-doctrinal legal research or socio-legal research law which uses a statute approach, a case approach, and a comparative approach where the research took place in Klaten and Sukoharjo religious court. The results showed that the religious courts in Klaten and Sukoharjo regarding domestic violence cases in the form of divorce and legal divorce were caused by problems of family neglect, thus the protection of the Domestic Violence Law cannot be in effect. Research in other countries shows high attention to victims of domestic violence with the protection of victims which when compared to Indonesia currently, The weakness of the PKDRT Prevention Law which is not yet fully pro-KDRT victims, especially women, needs to be reconstructed with the addition of articles on the provision of compensation in the form of compensation or restitution for victims of domestic violence. The author concludes that compensation and restitution are needed as an implementation of the values and benefit of Islamic justice as a form of legal protection for victims of domestic violence.

Keywords: Reconstruction, Domestic Violence, Islamic Justice Value.

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INTRODUCTION

Based on data obtained by The National Commission on Violence Against Women (Komnas Perempuan) over a period of 3 years, the number of cases of violence against women has increased quite drastically and is concerning as follows: 20,391 cases in 2005, 14,020 cases in 2004, 5,959 cases in 2003, and 5,163 cases in 2002, where 82% or 16,615 cases out of a total of 20,391 cases were cases of violence in the family and personal relationships [1].

Included in the category Domestic Violence (KDRT) is Violence Against Wife (KTI) in this case of violence the perpetrator is someone who is close to the victim, including ex-husband, ex-boyfriend, brother, or sister-in-law, in-laws, uncle, illegitimate husband and etc. Of the 708 cases, the majority of complaints, up to 70%, were victims of husband violence where some of the victim reported that they lost their eyesight due to

the violence, but ironically less than 2% were willing to take their cases to court or report to the police.

Increased violence against women, including domestic violence, has created a demand for the state or government to act. The indifference of society and the state to the problem of domestic violence is due to gender ideology or gender bias and patriarchal culture [2]. Gender is the differentiation of social roles and characteristics of men and women related to their sex (sex). Patriarchy is a culture that places men as the main or superior compared to women. Bias means oblique prejudice and also means one-sided. Gender is a cultural-sided concept that seeks to make a difference in the role of mental, characteristic, emotional behavior between men and women that develops in society.

The result of gender ideology and patriarchy also affects the provisions in the marriage law that differentiate the roles of men as heads of households

and women as housewives (article 31 of the Marriage Law) which creates views in the society where the men are in power. A man as a husband is often positioned in the highest order in the family that he can enforce his will, including violence as well as the influence of articles on the Marriage Law which are still gender-biased. This condition results in violence and abuses of women's rights that occur in the private or domestic sphere. This which should be the responsibility of the state is instead eliminated. Protecting Women from Domestic Violence: Islam, Family Law, and the State in Indonesia aimed to become a family affair, even though matters arising in the household which are individual laws in the marriage bond are the scope of civil law.

Through the civil law instrument, in this case, the Marriage Law, perpetrators of domestic violence cannot be subject to punishment because law enforcement can only be done by filing a lawsuit from the party who feels aggrieved. As long as the party experiencing domestic violence does not feel aggrieved by this action, which sometimes due to the pressure from the family or fear of losing the main source of income, then there will be no claim to court. It is different from public law which aims to protect the public interest. With the increasing number of domestic violence and the consequences it has on victims, some people want the perpetrators of violence to be convicted. The provisions in the Criminal Code that regulate violence are articles 89 and 90, and those that regulate persecution are Articles 91, 356, and Article 357.

Based on the problem contained in the Marriage Law and the Criminal Code, special rules regarding domestic violence are needed. This means that clear legal rules and public policies regarding domestic violence are also needed. These efforts have been manifested in Law no. 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT). This law is a public demand that is in accordance with the objectives of Pancasila and the 1945 Constitution to eliminate all forms of violence on Indonesia, Especially domestic violence is also in accordance with UN conventions that have been ratified by the Indonesian government through Law No. 7 of 1984 concerning the Elimination of Discrimination against Women.

Domestic violence as violence based on gender is part of human rights violations. The right of victims to compensation is basically an integral part of upholding human rights in the field of welfare/ social security. For this reason, it is very important for the reconstruction of the existing weaknesses in the national law with the hope of the emergence of a new theory as a renewal in facing the crisis of effects of domestic violence faced by women in the household as a pillar of the nation.

This problem are what urges the author to study it in a research as an effort to build a better law wherein

this study is concentrated on 2 main problems as follows:

- 1) What are the weaknesses of legal protection efforts for women as victims of domestic violence in Indonesia Currently?
- 2) How is the reconstruction of legal protection for women from the act of domestic violence in Indonesia based on the Islamic justice value?

METHOD OF RESEARCH

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in social science is a critique of the positivist paradigm. According to the constructivism paradigm of social reality that is observed by a person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and seek answers fundamentally about cause and effect by analyzing the factors that cause the occurrence and appearance of a particular phenomenon or event.

The method of approach in research using the method (socio-legal approach). The sociological juridical approach (socio-legal approach) is intended to study and examine the reciprocal relationship that is associated in real terms with other social variables [3].

Sources of data used include primary data and secondary data. Primary data is data obtained from field observations and interviews with sources; While Secondary Data is data consisting of:

- 1) Primary legal materials, namely binding legal materials in the form of prevailing laws and regulations and have something to do with the issues discussed [4].
- 2) Secondary legal material, namely legal material whose nature provides an explanation of the primary legal material.
- 3) Tertiary legal materials are legal materials that provide further information on primary and secondary legal materials.

Research that is associated with the socio-legal approach is research that analyzes problems that are carried out by combining legal materials (which are secondary data) with primary data obtained in the field, supported by prior to secondary legal materials, in the form of writings of experts and existing legal policies [5].

RESEARCH RESULT AND DISCUSSION

Weaknesses of Legal Protection Efforts for Women as Victims of Domestic Violence in Indonesia Currently

Households are supposed to be a place to be for all family members, but in fact, to some households, it is a place of suffering and torture due to acts of

domestic violence. According to Article 1 of Law no. 23/2004 concerning the Elimination of Domestic Violence (PKDRT) "Domestic Violence is an action directed against someone, especially women, which results in physical, sexual, psychological and or domestic neglect including threats to commit acts, coercion/ deprivation of freedom against the law within the sphere of the household. "

Article 1 of the 1974 Marriage Law concerning marriage stipulates that "The basis of marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and everlasting family based on God". Likewise, Article 33 of the 1974 Marriage Law also further strengthened this by stating that, "Between husband and wife have the obligation to love each other, respect, be loyal and provide physical and mental assistance to one another".

However, The results of the research conducted by the author at the Klaten Religious Office regarding cases of domestic violence shows that the case occurred in 2017-2018[6], namely the incidence of divorce and legal divorce which entered into 895 cases and those who broke up due to factors causing domestic violence were 21 cases or 0.01% In 2018 there were 1934 cases and divorces due to domestic violence there were 12 cases or 0.06% in 2018-2019, and there was an increase of 26 cases from 1345 cases, while most of the cause of domestic violence was due to family neglect.

Furthermore, The results of research from the Sukoharjo religious court also shows that the cases of domestic violence in 2017-2018 shows that of the 1464 cases that entered which caused divorce, 395 cases or 31.7% are due to domestic violence, and in 2018, where 1595 cases were entered, the divorce that was caused by Domestic violence is 395 cases or 24.7%. From the data obtained by the author, The factors that cause domestic violence are economic factors or family neglect, therefore the victim often did not want to report it as they will be pressured by the family, in this case, their children that will be with their father no more and the fear of losing the main source of family income.

The Domestic Violence Law as an instrument for upholding gender equality is an effort to eliminate all forms of violence against women, divides the space for violence against three spheres, namely in the family (domestic), in the community (public domain), and carried out by the state (state). This division of scope then reveals crimes that have been hidden and protected from outside intervention to help victims of various forms of violence in the family. This type of violence is recently known as KDRT (domestic violence).

The KDRT Prevention Law as an instrument for upholding gender equality is an effort to eliminate all forms of violence against women, divides the space for

violence against three spheres, namely in the family (domestic), in the community (public domain), and carried out by the state (state). This division of scope then reveals crimes that have been hidden and protected from outside intervention to help victims of various forms of violence in the family. This type of violence is recently known as KDRT (domestic violence).

Prior to the enactment of the KDRT Prevention Law, domestic violence was not considered a specific criminal crime. Therefore, it is not surprising that there are many cases of violence that are not considered for legal protection and assistance from law enforcement officials. In such a position, the issue of legal vacuum that specifically regulates acts of domestic violence violations becomes one of the factors that neglects victims of violence as parties that must be helped. On the other hand, the issue of gender bias that departs from a patriarchal culture as a result of social constructs is also a socio-cultural obstacle to the creation of gender-just social and personal relations patterns.

With the promulgation of Law no.23 of 2004 concerning the Elimination of Domestic Violence, the umbrella of law enforcement for victims of domestic violence becomes clear and its implementation is the collective responsibility of all elements of the nation. After the Law on KDRT was officially enacted, namely Law No.23 of 2004, then all types of violence that occur within the scope of the household, whoever is either the perpetrator or the victim and then complained to law enforcement officials, will be processed in accordance with the provisions in this law. In this case, the position of the law serves as an instrument to eliminate the birth of new victims with a very diverse model of violence and perpetrators.

However, in the various criminal provisions regulated in the PKDRT Prevention Law which can be seen in broad outline in the table, both mentioning the type of violence, the threat of imprisonment, and fines, it turns out that there are still many shortcomings that need to be evaluated and important for later reconstruction. According to the author, there are several irregularities contained in the KDRT Prevention Law, as follows:

- a. Articles 51, 52, and 53 which explain criminal acts of physical violence in article 44 paragraph (4), criminal acts of psychological violence in article 45 paragraph (2), and criminal acts of sexual violence in article 46 that are committed by husband and wife or vice versa are complaint offense while Article 15 has explained that every person who hears, sees, or knows the occurrence of violence in household is obliged to make efforts in accordance with his / her limits to; a. prevent criminal acts from taking place; b. provide protection to victims; c. provide emergency aid; and d. assist in the

process of filing an application for the determination of protection.

- b. About the fine penalty; Where in these articles, by paying attention to the higher crime committed, then the greater the fine that must be paid by the perpetrator to the state, while victims who suffer major losses in the form of loss of the future or loss of life do not receive compensation or compensation/ restitution. This is what needs special attention from the state so that this law can be reconstructed for the better. Because the protection of victims must take precedence over making a deterrent sentence against the perpetrator, although this is also important to do, it contributes more to the state than protection of victims of violence [7].

Reconstruction of Legal Protection for Women from the Act of Domestic Violence in Indonesia Based On the Islamic Justice Value

As postulated in Islamic Law, *Hifdzun Nafsi* (guarding the soul/ life), is a sharia' that means protection of the soul. It is an obligation because after all the protection of one's soul must be protected not only by humans as God's creatures, as family members and also members of society in general. As the commandment of Allah stated in Al-Qur'an Q.S. at-Tahrim/66:6 which reads:

يَا أَيُّهَا الَّذِينَ آمَنُوا قُوا أَنْفُسَكُمْ وَأَهْلِيكُمْ نَارًا وَقُودُهَا النَّاسُ وَالْحِجَارَةُ عَلَيْهَا مَلَائِكَةٌ غِلَاظٌ شِدَادٌ لَا يَعْصُونَ اللَّهَ مَا أَمَرَهُمْ وَيَفْعَلُونَ مَا يُؤْمَرُونَ

"O you, who believe, protect yourselves and your families from the fires of hell, whose fuel is people and stones; the keeper of angels who are harsh, hard, and do not disobey Allah against what He commands them and always do what is commanded."

In this regard, the Marriage Law (UUP) has attempted to contain ideal principles which aim to protect women from acts of violence. However, there are still provisions in the UUP that are detrimental to women by dividing the roles of the head of the household towards men and the housewife to women. The existence of a provision that divides the roles of husband and wife is very contrary to the principles of the UUP, especially the principle of granting equal rights and positions between husband and wife.

The division of roles then cannot be separated from the patriarchal culture that lives in society and the law itself is a product of the society that is influenced by its culture. In addition, there are many cases of domestic violence against wife/ women that are motivated by a patriarchal culture and gender ideology that has had an impact on all aspects of life, so people engaged in the protection and empowerment of women want to make provisions outside the law that regulates domestic violence.

The law on domestic violence is very important because without clear legal regulations or public policies it will further enrich the practice of domestic violence. Even the problem of domestic violence has not been seen as a public problem, some of which are trivial problems that occur at the domestic level. The provisions regulating the problem of violence in the Criminal Code have not provided adequate protection for victims of violence, because the violence referred to in the Criminal Code is only aimed at physical violence as formulated in Articles 89 and 90 of the Criminal Code. This formula has not reached forms other than physical violence, such as emotional/ psychological, economic, and sexual [8].

Another limitation in the Criminal Code is the absence of a minimum sentence. This means that the sentences handed down by judges often do not match the expectations of the victim. In addition to the provisions of Article 351 paragraph (1), (2), and (3) of the Criminal Code and Article 356 of the Criminal Code, which is often used to ensnare perpetrators of domestic violence, set sentences of 2-12 years in prison for perpetrators of torture. However, in reality, perpetrators of violence are often punished very low, that is, within days or months during probation. This is motivated by the perception of law enforcement officials (judges or prosecutors) who see that the abuse perpetrated by a husband against his wife is different from that perpetrated by a person who is not married. This is done because of the tendency that emphasizes the concept of harmony in the family.

As a result, it is not surprising that many women victims of domestic violence prefer to remain silent and do not take their husbands to court. When victims of domestic violence continue their case to criminal proceedings, it is not uncommon for the charges to be withdrawn because of the husband's position as breadwinner rather than in the interests of his life's safety [9]. This is what necessitates a change in thinking that domestic violence does not only mean violence against a partner (husband and wife) but also includes other family members. This is also based on the fact that domestic violence does not only affect husband-wife couples but also affects or has a psychological or physical impact on other family members, especially children.

It needs to be understood that domestic violence is a crime against humanity and not just a private household matter itself, so special regulations such as the KDRT Prevention Law are needed. With the promulgation of the KDRT Prevention Law, it still keeps records such as, marital rape which is regulated as an offense for complaint, light violence as an offense for complaints so that households are not easily intervened by outside parties. This note shows that domestic violence is actually something of a controversial nature. On the one hand, the legislators acknowledge the existence of domestic violence, but on

the other hand, they try to keep domestic violence matters from being touched by outsiders. In other words, domestic violence is a tragedy, but not everyone agrees that it is included in the rule of law system.

Even though the legal substance has changed, as long as the legal culture and legal apparatus have not changed their minds, this KDRT Prevention Law will be in vain. Changing thoughts for law enforcement officers and society from all walks of life is very important because the patriarchal mindset and gender bias are still inherent in society, including women themselves.

Many women who are victims of domestic violence feel that the violence that occurs is due to their mistakes due to what they do, do not satisfy the perpetrator. Hence, they deserve such violent treatment. Most women also feel that it is better if they don't tell other people, as the violence will increase if they do so and it will not provide the best solution so that they are forced to always try to forget and forgive the perpetrator although the violence still happens all the time. By considering these various events, the researchers used the Welfare Theory. The theory of benefit is also called "maslahah mursalah"[10], which is the benefit that is not mentioned by syara' and there is no argument either to do it or to leave it, but if it is done it will bring goodness.

In this maslahah mursalah, several rules of law emerge such as; 1) Eligibility, defined as something that can bring danger to human life, both physically and spiritually, therefore must be left behind, 2) Eligibility must not be eliminated by creating a new state, 3) Rejecting independence must take precedence over attracting benefit, 4) Eligibility In particular, must be endured to reject a greater degree of necessity, 5) Doing lesser benefit when faced with the choice of 2 decency, 6) Something that must be done allows something that is forbidden, 7) In fact, pettiness must be eliminated, 8) In fact that desire is placed in place. obscurity, 9) The difficulty brings convenience, 10) In fact, the traditions that are known to humans and have been good and are in the form of benefit with that tradition are sources of law, 11) Any intermediaries who convey to the purpose must be blocked and prevented if they cause damage and are obligatory opened when it brings goodness.

These principles are described as follows; 1) Violence that brings independence must be abandoned, 2) Legal sanctions in the form of fines should not cause new misery for women, then the law must be reconstructed, 3) Refusing (fine) must take precedence to attract benefit, 4) Eligibility (compensation) must be It is done to refuse a greater degree of independence (fines), 5) Doing better (giving compensation) to the victim is lighter than 2 (between fines or compensation), 6) Women commit violence because they are forced to (defend themselves) , 7) Fines are

petty, because the heavier the victims suffer, the more they benefit the state, therefore they must be eliminated. bring convenience or relief in the form of compensation/ restitution, 10) The human tradition rejects violence d protected by religion can be a source of law, 11) the PKDRT Prevention Law rejects domestic violence, the reconstruction of the PKDRT Prevention Law is an effort to protect women from fines to become compensation/ restitution to cover misuse of the PKDRT Prevention Law in the government's interest.

Reconstruction of legal protection for women in the PKDRT Prevention Law based on the value of Islamic justice and benefit, namely in the form of a change from the form of fines imposed on perpetrators to be paid to the state needs to be reconstructed into sanctions providing compensation in the form of compensation/ restitution that must be given to victims of violence. It needs to be reviewed as well as related to articles that contain offenses on complaints so that acts of violence in the household are also the responsibility of the community and government to deal with them fairly. Likewise, with regard to the sanctions of violence committed by husband and wife with violence committed by other family members, it must be based on the situation and conditions concerned because differences can lead to public assumptions that violence between husband and wife is more tolerated and more tolerated, whereas- The KDRT Prevention Law aims to eliminate all types of violence against anyone.

Fair treatment of victims, in this case, includes the protection of victims by law enforcement officials like judges, as law enforcers who are competent and independent and do not have personal interests or certain tendencies towards victims in the application of fair treatment of victims, this means that they are tasked to not asking questions mean to entangle or corner the victim, especially in cases of sexual violence.

The question of law enforcement officials is prohibited from blaming or cornering the victim in the Draft Criminal Procedure Code as emphasized in article 155 with sentence questions that are entangled in nature, it is prohibited to be asked to expert victim, witnesses or to defendants, besides that in the process of case examination at every stage, law enforcers must present and examine witnesses or experts submitted by women victims where in the Draft Criminal Procedure Code contain progressive rules regarding the protection of witnesses and victims in article 40 of the protection stated in the Bill, namely legal protection of physical protection and non-physical protection without time limit in the context of protecting women witnesses or victims protection is often carried out in the form of placing witnesses or victims in a safe house even though the needs of witnesses and victims can be in the form of being kept by the perpetrator within a certain

radius so that they are not allowed to reach witnesses or victims of placing witnesses or victims in a safe house.

For the victim, it becomes a relocation that deprives the victim of social life as usual which impacts on the victim's ability to recover to do work and take care of children's education. In addition, the added form of protection is in the event that witnesses and/ or victims and their families, as well as victims' companions, receive threats that endanger their lives and/ or assets, the National Police of the Republic of Indonesia is obliged to provide protection both before during and after the case examination process as well as the process of filing and providing temporary protection where it must also be easily accessible and provide legal certainty for victims.

The Dignity of the witnesses or victims of criminal acts related to victim recovery needs to be upheld as there needs to be some form of recovery which is also commonly referred to as reparations for recovery, namely restitution of compensation for satisfaction rehabilitation and a guarantee of restitution/ Compensation aimed at returning the victim to the state before the crime was committed both in terms of restoring legal independence. Those who have been violated the social status of the place of origin of work return of confiscated goods and family life, but in some cases restitution is not possible, such as in the case of victims experiencing permanent disabilities. Therefore, it is important that other forms of recovery in Indonesia are the responsibility of the perpetrator or a third party.

Compensation aims to provide compensation for damages resulting from a criminal act, both physical and mental damage, including suffering from emotional stress, missed opportunities. Compensation is the responsibility of the state because the perpetrator is unable to provide full compensation to the victim, which is actually the responsibility of the perpetrator in Indonesia. The right to compensation only applies to victims of serious human rights violations. The victim's request for compensation is made by the victim through the court through the witness and victim protection agency in the Criminal Procedure Code. Compensation should be extended not only to victims of gross human rights violations but also to women victims of violence. Rehabilitation is the responsibility of the state in the form of medical services, legal services, and social services for victims in their original position and can continue after a court decision fulfills the sense of justice and guarantees of Komnas Perempuan in the concept of recovery.

In a broad sense, it also provides the role of the accompanying community and the state's family to effectively and sustainably provide recovery for victims as part of the rights of victims that must be fulfilled and cannot be separated from one another, the idea of victim recovery needs to be included in the Criminal Procedure

Code with the formulation of article 134 is as follows; 1) every victim or his heir has the right to receive restitution, 2) restitution as referred to in paragraph 1 in the form of compensation for loss of wealth or income suffering from costs for medical or psychological treatment and or other losses suffered by the victim, 3) the restitution is given and shall be included at once in the court decision regarding the criminal case of trafficking in persons, 4) the granting of restitution as referred to in paragraph 1 is carried out since the first level court decision is made, 5) the restitution as referred to in paragraph 4 can be deposited in advance in the court where the case was decided, 6) the granting of restitution is carried out within 14 days, starting from the notification of the verdict which has obtained permanent legal force, 7) in the event that the perpetrator is acquitted by the court at the appeal or cassation level, the judge orders in his decision that the restitution money that was deposited is returned to the person concerned, 8) in an effort to make compensation (restitution), the police and/ or the public prosecutor are obliged to combine the claim for compensation with a criminal case that befell the victim.

CONCLUSION

The Weaknesses of The KDRT Prevention Law Protection against Domestic Violence are contained in Articles 51, 52, and 53 which describe criminal acts of physical violence in Article 44 paragraph (4), criminal acts of psychological violence in Article 45 paragraph (2), and criminal acts of sexual violence in Article 46 which are committed by husband and wife or on the contrary, it constitutes a complaint offense while Article 15 has explained that every person who hears, sees, or knows the occurrence of violence in household is obliged to make efforts in accordance with his/ her limits to; a. prevent criminal acts from taking place; b. provide protection to victims; c. provide emergency aid; and D. to assist in the process of filing an application for the determination of protection.

Reconstruction of legal protection against the KDRT Prevention Law is based on the values of Islamic justice and benefit, namely in the form of a change from the form of fines imposed on perpetrators to be paid to countries that need to be reconstructed into sanctions providing compensation in the form of compensation or restitution that must be given to victims violence. It needs to be reviewed in relation to articles that contain offenses on complaints so that acts of violence in the household are also the social responsibility of the community and government. As for the penalties for violence carried out between husband and wife with sanctions of violence carried out on other family members must be based on justice by looking at the situation and conditions concerned, because the differences in these sanctions can lead to the assumption of society that violence between husband and wife is more tolerated, while the KDRT Prevention

Law aims at eliminating all forms of violence against anyone which is in accordance with the Islamic Justice Values.

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