



Criminal Sanctions' in Law Number 23 of 2004 concerning the Elimination of Domestic Violence Dilemma of Complaint Delict from a Utilitarianist Perspective

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Abstract— Good governance should have more relation with problem solver regulation. Under *Utilitarianism's* perspective, the government have to consider someone's goals during policy's formulation process. This article provides an overview about Eliminating Domestic Violence Law's implementation in Indonesia that cause a dilemma when the government fail to protect the citizen's rights. This article looks for issues arising from the complaint delict's effectiveness that become the basis for the criminalization process according to that regulation. When violence occurs in the marriage, the victim will experience a dilemma because when they report it to the police, it can damage the marriage that they are supposed to protect. In the good governance perspective, it can be said that the government need to explore the true problem that cause a low willingness of domestic violence victims to take legal action to seek justice. Socio-legal research methods with a conceptual and statutory approach will be used in this research. This progressive legal research uses the perspective of utilitarianism theory to understand the unwritten norms of decency in Indonesian society. This study showed that divorce is taboo and must be avoided. So, it can be concluded that the complaint delict in the Elimination of Domestic Violence Act can support maintaining the marriage but is less effective in prosecuting the perpetrator. For this reason, it is necessary to revise the complaint delict that underlie the legal process against perpetrators of domestic violence. This study is essential to carry out because decency norms in society, which consider the judicial process to be taboo, can hinder the enforcement of criminal law for perpetrators of domestic violence.

Keywords— *Complaint Delict; Good Governance; Morals; Penal Sanction*

I. INTRODUCTION

This article looks at the effectiveness of Eliminating Domestic Violence Act. Domestic violence can harm person's dignity and are part of human rights violations. For this reason, it is necessary to monitor the effectiveness of implementing the articles in the Eliminating Domestic Violence Act so that the state can genuinely protect victims of domestic violence. Legal issues then arise because, in the Domestic Violence Act, there is an article that states that the criminal process against perpetrators of domestic violence can only be carried

out based on a complaint from the party who is the victim. By using a progressive legal theory perspective, which views that legal science should be able to see the human side as a whole, the effectiveness of implementing these policies cannot only be seen from the decline in statistics on legal processes against perpetrators of domestic violence. This dilemma emerged due to the consideration in Article 4 of Eliminating Domestic Violence Act force the victim to choose either they report it to the police, or protect their marriage. For this reason, this research will examine the effectiveness of implementing the Eliminating Domestic Violence Act, which embraces the complaint delict in conditions of society that still upholds moral values of decency. The theory of Utilitarianism put forward by J. S. Mill will be the analytical knife used to dissect this dilemma and provide alternative solutions that need to be accommodated by the government to strengthen the role of the Eliminating Domestic Violence Act in protecting the dignity of victims. Socio-legal research method with a conceptual and statutory approach are used in this research.

Domestic violence is an act that causes all kind of misery in the marriage life. Actions that violate human rights can not only occur between husband and wife but can also happen to children. These people are related by blood, marriage, breastfeeding, parenting, or guardianship living in the household[1]. For the record, domestic violence cases in Indonesia are still quite widespread. According to data released by the Central Statistics Agency, the number of criminal cases against someone suspected of having committed domestic violence has decreased. In 2017, the number of domestic violence cases reached 42,683 cases, while in 2021, the number decreased drastically to 28,091.

This explanation can then illustrate that the state has provided a frame of reference for protecting victims of domestic violence. However, there is rationality that can hinder victims' motivation to report the violence they have experienced. This condition then raises questions regarding the Eliminating Domestic Violence Act's ability to fulfill its creation's objectives. Referring to Article 4 of the Eliminating Domestic Violence Act, Implementing these provisions must be kept from the goals the government wants to achieve. For this reason, several conditions want to be realized through the promulgation of this regulation:

1. The government wants to prevent all forms of violence that can occur in married life.
2. This law was specifically created to provide a protection mechanism for victims of violence that occurs within the household.
3. With a clear legal umbrella, it is hoped that law enforcement officers can take action against perpetrators of domestic violence.
4. What is no less important is that the fourth purpose of this rule is to create and maintain prosperity and harmony in marriage.

Under the mandate of the Eliminating Domestic Violence Act, the decision to carry out legal proceedings against perpetrators of domestic violence rests on the victim's willingness to report the incident to law enforcement officials. However, this decision must be faced with the need to maintain the integrity of the marriage. However, the decision to criminalize perpetrators of domestic violence will undoubtedly threaten the integrity of the marriage. This condition, then, of course, requires rational choices that must be made by victims to consider all the choice that they have to bring the biggest happiness that might exist.

Based on these considerations, this research examined the rationality of domestic violence victims. Even though the government has facilitated the process of punishing domestic violence perpetrators and protecting domestic violence victims, these regulations have not been able to increase victims' motivation to report these acts as part of a criminal act. This study will be carried out based on the perspective of progressive legal theory, which places legal science as a holistic field of study[2]. In this case, J. S. Mill's theory of utilitarianism is specifically used to examine the ontology of the rational choices of domestic violence victims who do not want to imprison domestic violence perpetrators even though it has caused them suffering. Utilitarian theory argues that every human being will use their rationality in acting. Utilitarian principles will consider actions that can bring the most significant and highest impact on happiness. This higher happiness is tied to physical happiness and is influenced by a person's consideration of moral values and reason. For this reason, this study will examine the rationality that domestic violence victims consider in determining alternative processes for solving the problems they experience.

The results of the study will be presented in two sub-topics. First, the basic theory of progressive law and utilitarianism will be used to examine the decency norms in Indonesia. This section, 'Norms of Decency in J. S. Mill's Utilitarianism Perspective,' will briefly provide an overview of moral norms, which are the basis of rationality in determining someone's happiness, including victims of domestic violence. Then, the next section will analyze 'Legal Efforts to Eliminate Domestic Violence: The Complaint Delict and the Happiness of Domestic Violence Victims.' Here, the elaboration between the results and the conceptual analysis will be described. Lastly, the Conclusion section will give an explanation about the effectiveness of the complaint delict to criminalize the perpetrators and the rationality of the alternative problem-solving options chosen by the victim.

II. LITERATURE REVIEW

Law as a science has experienced significant developments in the last few decades. In general, this development provides an opportunity for the entry of socio-humanities scientific branches to expand the perspective of legal studies and development to describe better the social conditions that occur in society. This view is new because, so far, many legal experts have tried to maintain the purity of legal science by only discussing positive law, which is positivist. This perspective is now better known as progressive legal theory. Following the main characteristics of the study of law, the object of the study is still guided by the articles in a valid legal system. However, law is no longer seen as a form of system that is static and dogmatic.[3]

The view of progressive legal theory allows space for legal science to be sensitive to social change and society's need for different justice.[4] Progressive legal interpretation must pay attention to human values so that the law can adapt to fulfill these values. Thus, law as an instrument can responsively overcome moral problems that exist in society. Through the lens of progressive law, it is hoped that society can understand the consequences of implementing it and implement it as a solution to social problems following the objectives of making the law.[4]

An understanding of progressive legal theory, which prioritizes sensitivity to social problems and moral values that apply in society, needs to be supported by rationality. In determining which legal action to take, a person needs to base his considerations on the logical consequences he wishes to achieve. Referring to the view of the Utilitarianism theory put forward by J. S. Mill[5], each person will choose the action that can provide the greatest happiness or reduce misery for themselves. Efforts to pursue happiness as a goal must consider one's moral values. *Summum bonum*, or the highest virtue, is goodness in humans given by God. According to these virtues, the truth is accepted as a fundamental moral foundation in law. So then, actions based on moral considerations and bring happiness will have a higher value than happiness based on mere physical pleasure[6].

Mill's theory then emphasized that critical rationality underlies human choices when facing several alternative actions. Actions that will bring a higher value of happiness must be the primary choice to be taken, even though, in the end, these actions cause a feeling of dissatisfaction in several other aspects. To illustrate this rationality, Mill gives examples that 'only a few humans are willing to be humbled just to get pleasure like wild animals' or 'there is no human conscience that invites him to do selfish and despicable things.' To achieve the highest level of happiness, Mill also emphasized the importance of education, which can open one's horizons. This condition is closely related to the standard of happiness that one will have. The higher his insight, the more logical considerations will become the basis for his standard of happiness. For Mill, knowledgeable people will have more opportunities to consider and apply existing moral values.

From these two views, the study of progressive legal science provides space to see the rationality of legal subjects in choosing the legal action they will take. The thought process for making this choice can be linked to the influence of moral values in that society. Specifically, concerning this study, moral values are a moral foundation still firmly rooted in the way of life of Indonesian society. These values are also heavily influenced by norms originating from religious teachings. In carrying out social life, Indonesian people are still bound by the norms of their religious teachings.[7] These values then provide a basis for views regarding actions that are permitted or prohibited, good and evil.

As stated by Mill, the highest rule of virtue comes from God. For this reason, it is unsurprising that religious teachings are still one of the standards for assessing a person's morality. Apart from values originating from religious teachings, morality in decency also appears in the cultural values that live in society. The interaction process between the two also often gives rise to new standards of moral values that generally apply in society. These moral values are not contained in positive law in Indonesia, but these values exist and apply in society. Violations of the standards of truth in society can result in a negative stigma attached to a person or their family. By considering social values that are still very strong, the public assessment process of a person can influence a person's happiness. Based on these considerations, it is unsurprising if someone then brings the moral values of decency contained in religious and cultural teachings as one of the considerations in determining the legal action they will take.

III. METHOD

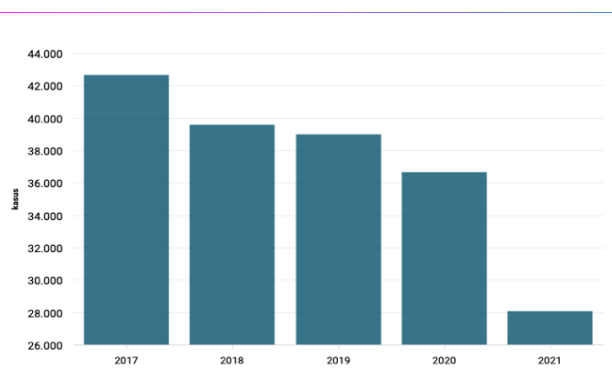
This research uses doctrinal and socio-legal research methods. This type of research is used to see the relationship between articles in legal regulations and their impact on society[8]. This type of research was chosen to show that although the government has provided protection to victims of domestic violence and opened up opportunities to criminalize perpetrators of domestic violence, these regulations have not been able to make this method the public's primary choice. Progressive legal theory will be used as a primary reference that legal studies must be able to look at various factors as a whole in order to interpret the facts correctly. This perspective will be supported by the views of J.S. Mill about Utilitarianism, which can be a reference in seeing the rationality of domestic violence victims in seeking actions that can bring happiness to them. This research will be carried out

using a primary and secondary legal materials literature study. This study's primary legal material is the articles in Law Number 23 of 2004 concerning the Elimination of Domestic Violence.

IV. DISCUSSIONS AND RESULTS

Various parties have begun to voice that the effectiveness of the implementation of the Eliminating Domestic Violence Act can be reviewed[9]. This discourse emerged because, statistically, the decline in the number of complaints regarding domestic violence cases has shown a positive development, but anxiety continues. This is closely related to the possibility of threats, pressure, and stigma towards women who are victims, witnesses, and parties in conflict. Per Women's empowerment and child protection ministry, various factors such as individual views, the presence of other partners, economics, and socio-culture can be a cause of the violence in the marriage life. The possibility that the perpetrator could carry out repeated violence also triggers the reluctance of the victim (that mostly is women) to provide testimony or report.[10] Apart from that, other obstacles that can become obstacles for women to access justice through legal channels cannot be separated from the conditions of (a) limited knowledge about legal rights, (b) financial limitations, (c) limited access to legal assistance/advisors; (d) distance and transportation; (e) accountability and transparency; (f) language barrier; (g) physical and mental limitations; (h) discrimination against particular identities[11].

Graph 1. Number of Domestic Violence Reports 2017-2021



These factors can influence a person's decision to take legal action against the violence they experience. However, women are the group most vulnerable to experiencing domestic violence. Referring to the provisions of Domestic Violence Act, all types of domestic violence can be threatened with criminal sanctions or fines. This provision aims to prevent all forms of misery in marriage life and give a sanction to the perpetrators. With the existence of criminal sanctions, it is hoped that acts of violation of the law can be prevented, conflicts that arise can be resolved, society will gain a sense of security and peace, foster a sense of regret, relieve feelings of guilt and uphold legal norms. However, the Domestic Violence Act also require that the criminal process need the victim's willingness to make a report. Meanwhile, if other people know about domestic violence, they are only allowed to: (a) prevent it; (b) provide protection; (c) provide emergency assistance; and (d) assist in the process of submitting applications for protection determination. In other words, only victims have the right to file a report regarding an act of domestic violence.

Apart from the victim's right to take the punishment mechanism, the victim also has the right to receive spiritual guidance services, as explained in Article 10. This facility is undoubtedly expected to strengthen the victim's mentality in facing the problems that are befalling him. As explained in the previous sub-topic, the moral values of decency taught by religion can be a consideration for victims in determining their next legal steps. A report submitted to the police can undoubtedly be the first step that can be taken to obtain security procedures for victims. However, not all victims of domestic violence want to take this route. It is not uncommon for cases of domestic violence reports to be withdrawn by the victim.

Suppose the analysis is based on the complete structure of the Domestic Violence Act in providing protection to victims and the mechanism for providing legal sanctions to perpetrators. In that case, the Act has provided an excellent legal protection mechanism. However, the analysis is based on the scope of progressive law. In that case, based on utilitarianism, the victim's rationality can provide alternative solutions other than the criminal process for perpetrators of domestic violence. As previously explained, this principle provides an opportunity to include moral values of decency taught by religion and culture so that victims of domestic violence decide not to criminalize the perpetrator. This alternative is also accommodated in the Eliminating Domestic Violence Act, which allows for spiritual assistance and the aim of maintaining the marriage.

Various moral standards and consequences arising from actions that violate these values will certainly bring misery to the victim because of social sanctions from society and future religious sanctions. Thus, it is natural that these considerations become part of the rationality of domestic violence victims. In Indonesia, people still

consider revealing disgrace within the family taboo. Violence in the marriage is a manifestation of quarrels, and this is not an ideal condition. Although several religions in Indonesia provide opportunities for married couples to divorce, this is not a justifiable action.[12] Generally, even the title of widow or widower will receive a negative stigma from society.[13] Apart from that, marital status and the cause of divorce will also be a means of blaming one of the parties, and the victim will even be seen as unable to maintain their marriage. The culture of Indonesian society, which is still very strong in the social standards of life and general standards of truth that apply in society, will undoubtedly have a psychological impact on the victims.

Apart from the predicate and consequences of divorce, which can cause dissatisfaction and even misery for victims of domestic violence, another consideration is society's negative view of the criminalization process. A person's mere connection with the legal process can cause shame for themselves and their families. Thus, it is clear that violence can be a source of misery and need deep consideration to take action. When faced with these two choices, the victim usually choose to get divorce and accept their views on divorce rather than dealing with the law. If this step is taken, it can be said that the criminal process experienced by family members will bring greater misery than the social and religious sanctions arising from divorce.

As a final alternative, it is not uncommon for domestic violence victims to withdraw their report of domestic violence or not report it at all. However, one of the purposes of the Eliminating Domestic Violence Act is also to maintain the integrity of the household. Spiritualists and elders in the community and family will play a significant role in instilling moral values that do not allow divorce and make every effort to maintain the family. It is not uncommon for a decision to maintain family integrity to be made by withdrawing the complaint and forgiving the perpetrator. Although this choice is based on moral values and decency considerations, on several occasions, assistance and education is needed to minimize the side-affect that might happen in the future and cause a cycle of violence. This must be done as a preventive measure not to endanger the victim's life. The choice to maintain a household and ignore the opportunity to avoid the possibility of further violence through divorce or punishment is certainly not an easy decision. This choice is at least based on considerations of insurance and happiness, which are influenced by[14]: (a) moral values; (b) psychological impact on children; (c) social sanctions; (d) whether there is economic dependence; (e) level of knowledge possessed.

V. CONCLUSION

From this explanation, it can be concluded that the Eliminating Domestic Violence Act has provided protection and opportunities for victims to file criminal proceedings against the perpetrators. However, the existence of a complaint delict that must underlie the criminalization process has opened up space for the victim's rationality to choose other actions to resolve the problem. Analysis of the level of happiness generated through alternative actions other than the criminal process has minimize domestic violence cases. The Eliminating Domestic Violence Act cannot effectively force victims to criminalize the perpetrators, but victims can achieve happiness with their rational choices. The norms of decency in society have an essential role in building the rationality of domestic violence victims to continue to maintain the household they have experienced. Based on the principles of good governance, the government needs to revise the Eliminating Domestic Violence Act and review the requirements, which contain provisions that make reports made by victims a basis for legal action that can be taken against perpetrators.

VI. REFERENCES

- [1] G. A. Atikah and A. Riwanto, "Analisis Undang-Undang Nomor 23 Tahun 2004 tentang Penghapusan Kekerasan Dalam Rumah Tangga ditinjau dari Perspektif Hak Asasi Perempuan dalam Upaya Mewujudkan Access to Justice bagi Perempuan Korban Kekerasan," *Res Publica*, vol. 4, no. 1, 2020.
- [2] N. Duxbury, *The Nature and Authority of Precedent*. Inggris: Cambridge University Press, 2008.
- [3] S. Rahardjo, "Hukum Progresif: Hukum yang Membebaskan," *Jurnal Hukum Progresif*, vol. 1, no. 1, 2005.
- [4] A. Khalimy, Yusriyadi, R. Setyowati, Syahrudin, and A. M. A. Wadud, "The Intersection of the Progressive Law Theory and the Self-Declaration Concept of MSEs Halal Certification," *Journal of Indonesian Legal Studies*, vol. VIII, no. 1, 2023.
- [5] J. S. Mill, *Utilitarianism*. Waiheke Island: Floating Press, 2009.
- [6] M. Escamilla, "Rights and Utilitarianism. John Stuart Mill's Role in its history," *Revue d'études benthamiennes*, no. 4, 2008, doi: 10.4000/etudes-benthamiennes.192.
- [7] Lindawati and I. Martoyo, "Perbandingan Teori 4 Dimensi Keagamaan (4BDRS) dan Teori Tahapan Iman Fowler untuk Riset Psikologi Agama di Indonesia".

- [8] Irianto, Sulistyowati, and Shidarta, *Metode Penelitian Hukum: Konstelasi dan Refleksi*. Jakarta: Yayasan Obor, 2011.
- [9] L. Jamaa, "Perlindungan Korban Kekerasan dalam Rumah Tangga dalam Hukum Pidana Indonesia," *Jurnal Cita Hukum*, vol. 1, no. 2, 2014.
- [10] R. S. Kolibonso, "Penegakan Hukum Kejahatan Kekerasan dalam Rumah Tangga," *Jurnal Legislasi Indonesia*, vol. 5, no. 3, 2008.
- [11] M. A. R. Indonesia, M. P. P. I. F. H. U. Indonesia, and A. I. P. for J. 2, "Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum." Mahkamah Agung Republik Indonesia bekerjasama dengan Australia Indonesia Partnership for Justice 2, 2018. [Online]. Available: <https://kepaniteraan.mahkamahagung.go.id/images/artikel/pmppbdh.pdf>
- [12] M. K. Anam and J. Nelli, "Perceraian di Depan Pengadilan Agama Menurut Hukum Islam dan Hukum Positif di Indonesia Studi Analisis Multi Disipliner," *Journal of Indonesian Law*, vol. 2, no. 1, 2021.
- [13] A. Suryana, S. Arieta, and S. Wahyuni, "Stigma Masyarakat terhadap Perempuan Berstatus Cerai Hidup di Kota Tanjungpinang," *Jurnal Ilmu Sosial dan Humaniora*, vol. 1, no. 3, 2023.
- [14] Susiswo, *Hukum Pidana: Perlindungan hukum terhadap Anak dalam Pendekatan Viktimologi*. Yogyakarta: K-Media, 2018.

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