



Islamic Criminal Law Response on Physical Violence in the Household on Law No. 23 of 2004

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Abstract. In the perspective of Islamic criminal law, it does not recognize domestic violence. There are many arguments for naqli and aqli which teach fellow human beings to love one another and not to hurt each other either physically or psychologically. A husband should not feel superior and selfish in the household as well as a wife who should not be nusyuz. According to the majority of scholars, they define nusyuz as a wife's deportment leaving out of the obligation to obey her husband or a deviant act that arises and is committed by a wife to her husband. Regarding domestic violence incidents that have been regulated in positive law, Islamic criminal law should also regulate these domestic violence incidents, but the Islamic criminal law literature has not explained in detail the sanctions for these domestic violence incidents. In this study, the authors used a type of literature review research, which is a type of research whose data sources are already available in libraries and digital access, which is normative research. The conclusion of Islamic criminal law perspective clarifies that if there is physical violence against a partner or family that causes death or injury and so on, then this is categorized as a jarimah of punishment in ta'zir. In a positive legal perspective, the sanctions for domestic violence against physical violence, this proves that the purpose of maqasid sharia in positive legal sanctions is related to the five aspects of maqasid sharia; preservation of religion, maintenance of soul, maintenance of off spring, maintenance of assets and maintenance of reason.

Keywords: Islamic Criminal Law, Response, Physical Violence in the Household

1. Introduction

In the Compilation of Islamic Law/*Kompilasi Hukum Islam (KHI) Pasal* (Article) 2 has explained that: "*Perkawinan menurut hukum Islam adalah pernikahan, yaitu akad yang sangat kuat (mitsaqan ghaliizhan) untuk menaati perintah Allah dan melakukannya merupakan ibadah*" (Marriage according to Islamic law is a marriage, namely a very strong contract (*mitsaqan ghaliizhan*) to obey Allah's commands and doing so is worship) (*Kompilasi Hukum Islam*, 2010 *Pasal* 2). In terms of the purpose of marriage, it is also regulated in *Pasal* (Article) 3 of the Compilation of Islamic Law which states that: "*untuk mewujudkan kehidupan rumah tangga yang sakinah, mawaddah, dan rahmah*" (to create a household life that are *sakinah, mawaddah, and rahmah*) (*Kompilasi Hukum Islam*, 2010 *Pasal* 3) and also based on the word of Allah SWT in *Ar-Rum* verse 21. In Jalalain Imam As-Suyuthi's Interpretation, *sakinah* is a feeling of comfort in the family (As-Mahalli & As-Suyuthi, n.d., p. 454). Meanwhile, *Mawaddah Wa Rahmah* is a feeling of affection. As for compassion, according to Ibn Kathir in his interpretation, *Mawaddah* is a feeling of love or love. (Ar-Rifa'i, 1999, p. Jilid 5, 285) However, the fact is currently inversely proportional to the purpose of marriage itself, many cases of Domestic Violence have occurred in Indonesia. Reporting from MetroTv news online, according to data from the Ministry of Women's Empowerment and Child Protection (KemenPPPA), until October 2022 there

were 18,261 cases of domestic violence throughout Indonesia, 79.5% or 16,745 of the victims were women. Then, from data from the Ministry of Women's Empowerment and Child Protection (KemenPPPA), it is clear that domestic violence also affected 2,948 men (TV, 2022 accessed 2023-02-24). Observing from the data, domestic violence tends to occur on the wife's side. In the perspective of Islamic criminal law, it does not recognize domestic violence. There are many arguments for *naqli* and *aqli* which teach fellow human beings to love one another and not to hurt each other either physically or psychologically (Chamidi, 2019, p. 192). A husband should not feel superior and selfish in the household as well as a wife who should not be *nusyuz*. According to the majority of scholars, they define *nusyuz* as a wife's deportment leaving out of the obligation to obey her husband or a deviant act that arises and is committed by a wife to her husband (Noor, 2018, p. 21).

Based on Law No. 23 of 2004 in Pasal (Article) 1, it defines that domestic violence as any act against a person, especially a woman that results in physical, sexual, psychological misery or suffering, or neglect of the household including threats to commit acts, coercion, or deprivation comply with the law within the household sphere (Nasional, 2004). According to Eko Prasetyo and Suparman Marzuki, acts of violence are meant by physical actions that cause injury, disability, illness or burden to other people (Saputra, 2021, p. 33). Regarding to the domestic violence incidents that have been regulated in positive law, Islamic criminal law should also regulate these domestic violence incidents, but the Islamic criminal law literature has not explained in detail the sanctions for these domestic violence incidents. The purpose of this literature review research is to describe the response of Islamic criminal law and the interconnection of Islamic criminal law with positive law against domestic violence in criminal acts of physical violence. To assist the writer in exploring the problem further, the writer looks for several previous scientific works whose paths are almost the same as the problems that the writer takes.

Firstly, an article written by Md. Jahirul Islam, et al. In his article, the author explains that actually until now there has been no consensus on the incident of domestic violence, but according to Islamic criminal law jurisprudence, crimes can be divided into three categories, namely: *hudud* crimes, *qisas* crimes, and *ta'zir* crimes and for the Islamic restorative justice solution to domestic violence is *qisas*. Because this is included in individual crimes such as assault, beating, or persecution that causes bodily harm or death, it is referred to as a *qisas* crime (Islam et al., 2018). Secondly, an article written by Bustanul Arifin, hich explains that legal protection for women who are victims of domestic violence from an Islamic legal perspective is regulated in positive law, which is believed to be able to overcome cases of domestic violence as well as efforts to protect victims' rights, which was originally domestic violence as a private area. In the view of Islamic criminal law from positive law it is in accordance to the intended purpose of sharia (Arifin & Santoso, 2016). Thirdly, an article written by Abdul Aziz, which explains that domestic violence is defined as acts of violence perpetrated against women resulting in physical, sexual, psychological suffering, domestic misery and neglect. If violence is carried out in order to educate or provide teaching as justified by Islamic teachings, such as a *nusyuz* wife (Aziz, 2017).

2. Methods

In this study, the authors used a type of literature review research, which is a type of research whose data sources are already available in libraries and digital accesses, which is normative research. According to Bachtiar in his book "Legal Research Methods", it states that normative research is legal research that focuses on rules or norms originating from court decisions, the doctrines of leading legal experts, and legislation (Bachtiar, 2018, p.

57). The author's reason for conducting normative research is because he wants to explore the Islamic criminal law literature regarding physical violence in the PKDRT Law No. 23 of 2004. Data sources are everything that becomes a source of reference for writers in doing scientific writing. The data sources that the authors take are as follows: Firstly, primary data, namely data that is directly related to the object to be examined. In this case the primary data will be taken from the Al-Qur'an, books of Hadith and Tafsir, Fiqh books, and Law No. 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT). Secondly, secondary data namely legal materials that will explain primary legal materials. The technique of collecting data in this research is literature study by reading, understanding, taking notes, and collecting books and other scientific works that are appropriate to the problems to be studied so that they can provide information. The data analysis technique used by researchers in this study is qualitative analysis. Qualitative analysis is used to describe the data obtained in words according to the results of the author's analysis which are not in the form of numbers or statistics.

3. Results and Discussion

3.1 Theory of Response

Response means answer, reply, or reaction (Nirmala & Pratama, 2006, p. 367). In the complete dictionary of psychology defines response as the emergence of stimulation due to giving an answer by a glandular muscle process (Chaplin, 2006, p. 432). In *Kamus Besar Bahasa Indonesia (KBBI)*, response is a form of reaction to an event that occurs (Nasional, 2005, p. 1170). *Kamus Besar Bahasa Indonesia (KBBI)* clarifies that the correct response is not a response. While the response is a form that is not standard (Nasional, 2005, p. 1170). According to Soekanto (2006, p. 21), response is the interaction of an individual or a group in which there is action and reaction. Ahmadi (2010, p. 68) defines response as a process of observation that creates a message and an impression. Ion to Zulqarnain (2022, p. 54), in his book "Educational Psychology", the theory of behaviorism is known as learning theory. This is because all the behavior of organisms as environmental influences. Initially, the theory of behaviorism was initiated by Nathaniel L Gage and David C Berliner, then it was developed into a school of educational psychology (Zulqarnain, 2022, p. 55).

3.2 Islamic Criminal Law

In Arabic, Islamic criminal law is *jarimah* or *jinayah*. *Jarimah* etymologically comes from the sentence *jarama yajrimu jarimatan*, which means "to do" or "cut" (Mardani, 2019, p. 1). It specifically means "sin" or "hatred action". As for the finger of *ajrama-yajrimu*, it means "to do something that is contrary to truth, justice, and deviates from the straight path" (Abu Zahrah, 1976, p. 21). *Jarimah* in terminology, namely *syara'* prohibitions were given by Allah SWT with *hudud* and *ta'zir* punishments (Hanafi, 1993, p. 1).

The source of Islamic criminal law, aims to guide human's life that must be obeyed (Ali, 2012, p. 11). The following is the systematics of sources of Islamic criminal law: First, the Qur'an contains a collection of Allah's revelations delivered to the Prophet Muhammad SAW. The content contained in the Qur'an is the rules of life that govern human life in relation to Allah SWT, in relation to self-development, in relation to fellow human beings, and in relation to nature and other creatures (Ali, 2012, p. 12). Second, *As-Sunnah*, according to the *Shari'at* is everything that originates from the Prophet Shallallahu 'alaihi wa sallam in the form of *qaul* (sayings), *fi'il* (deeds), *taqrir* (determination), the nature of the body and morals which is meant by *tasyri (shari'ah)* for Muslims. Third, *Ar-Ra'yu* or reasoning is a source of Islamic teachings that uses human reasoning (reasoning) in

interpreting general verses of the Qur'an and Sunnah (Ali, 2012, p. 15). Various types of *Ar-Ra'yu* include: First, *Ijma'*, namely the unanimity of the opinion of the mujtahidin fuqaha at one time on a law after the time of the Prophet Muhammad SAW. Second, *Ijtihad*, namely the details of Islamic teachings originating from the Al-Qur'an and Al-Hadith which are general in nature by mujtahid. Third, *Qiyas*, namely equating the law of a case where there is no legal provision with a case that already has legal provisions. However, the scholars differed on the application of *qiyas* to *hudūd* finger. Fourth, *Istihsan*, namely excluding the law of an event from the law of other similar events and giving it another similar law. Fifth, *Mashlahah mursalah* is a legal determination based on benefit (goodness and interest) which has no provisions from *syara'*, either general or specific provisions. Sixth *Sadduz Zariah*, is blocking something that becomes a path of damage. Seventh, *Urf* is a custom that has been passed down from generation to generation which does not conflict with Islamic teachings (Ali, 2012, p. 16).

3.3 Persecution (*Al-Jarh*)

According to Alfian in his journal "In Islamic criminal law, persecution can also be called Jarimah Pelukaan. According to Al-Munjid's dictionary, it is explained that wounding is from the word "jarah" which means "shaqq ba'd bodih" which means hurting a part of the human body. (Ichwanto, 2017) Persecution has several forms, including in terms of intention, and in terms of the object or target. According to Abdul Qadir Audah, the crime of intentional persecution is an unlawful act because the perpetrator wants the victim to be injured, in contrast to an accidental crime. (Audah, 1964, p. 204) In this case, the sanction of persecution is given to the caliph or judge (Ta'zir).

3.4 Physical Violence in Law Number 23 of 2004

In the Law on Domestic Violence Article 1 defines that: "Domestic violence is any act against a person, especially women, which results in physical, sexual, psychological misery or suffering, and/or neglect of the household including threats to commit acts, coercion, or deprivation independence unlawfully within the household sphere." The violence referred to in Article 1 is misery or suffering physically, sexually, psychologically, and/or neglect in the household. As for the forms of domestic violence according to Article 5 of Law no. 23 of 2004 is physical violence, psychological violence, sexual violence, and neglect of the household. Physical violence according to Article 6 of the law is "Actions that result in pain, falling ill, or serious injuries" (Nasional, 2004 Pasal 6). Therefore, if an incident of domestic violence causes pain or serious injury it is included in physical violence (Tamiatri, 2005, p. 12).

3.5 Response to Islamic Criminal Law Regarding Physical Violence in the PKDRT Law Number 23 of 2004

The incident that occurred recently in the Medan Baiak Nagari Padang Bintungan area, Nan Sabaris District, Padang Pariaman Regency at 12.00 WIB, Friday 3 March 2023, a husband and wife died as a result of domestic violence. The information that the author was able to receive from Instagram user @parimanterkini was that the cause of domestic violence was suspected that the wife wanted to go for Umrah but the husband did not allow it (Instagram @parimanterkini, 2023 accessed 2023-03-03). The condition when the wife was found dead in the room, while the husband hanged himself behind the house. The police and military have evacuated the victim.



Figure 1 (photo left-right: husband hanged himself behind the house; evacuation of the crime scene, wife died in the room)

Islam actually has a special view on household affairs, such as: First, Islam stipulates that household life is a friendly relationship. Second, if in the household a wife disobeys (*nusyuz*), then the husband is obliged to advise and educate his wife with great affection in accordance with the word of Allah SWT QS An-Nisa verse 4. Third, Islam establishes a mechanism for solving household problems that threaten peace for be patient and reduce hatred, according to the word of Allah SWT QS An-Nisa verse 19. However, if it continues, it will only be resolved by means of *talaq*. In sum, from the perspective of Islamic criminal law, if there is physical violence against a partner or family that causes death or injury and so on, then this is categorized as a finger of punishment in the form of *uqubah*, *hudud*, *ta'zir*, and *qisas*.

3.6 Description of the Interconnection between Islamic Criminal Law and the Positive Law of Physical Violence UU no. 23 of 2004

According to Amin Abdullah the theory of the integrative-interconnection approach is an approach that seeks mutual respect; general science in religion which creates a cooperation in approach (approach), and method of thinking (process and procedure) (Amin Abdullah, 2006, p. 15). So this theory is useful for integrating Islamic criminal law with positive law. Likewise, the interconnection of the problem of physical violence in Islamic criminal law and positive law is formulated in Law no. 23 of 2004 in substance *maqasid sharia* is compatible with Islamic criminal law because its goal is to protect human welfare. In a positive legal perspective, the sanctions for domestic violence against physical violence in Article 44 paragraph 1 state that: *Setiap orang yang melakukan perbuatan kekerasan fisik dalam lingkup rumah tangga sebagaimana dimaksud dalam Pasal 5 huruf a dengan pidana penjara paling lama 5 tahun atau denda paling banyak Rp 15.000.000,00.* (Undang-Undang No. 23 Tahun 2004 Tentang Penghapusan Kekerasan Dalam Rumah Tangga, 2004 Pasal 44, ayat 1) "Every person who commits acts of physical violence within the scope of the household as referred to in Article 5 letter a shall be subject to a maximum imprisonment of 5 years or a maximum fine of Rp. 15,000,000.00." This proves that the purpose of *maqasid sharia* in positive legal sanctions is related to the 5 aspects of *maqasid sharia* (preservation of religion, maintenance of soul, maintenance of offspring, maintenance of assets and maintenance of reason).

4. Conclusions

Based on the formulation of the problems that have been formulated previously, it can be concluded that the response of Islamic criminal law regarding physical violence in the PKDRT Law Number 23 of 2004 is as follows: First, from the previous discussion

which explains the response of Islamic criminal law regarding physical violence in the PKDRT Law Number 23 of 2004, literature Islamic criminal law has not yet explained in detail the sanctions for the domestic violence incident. Therefore a crime that is not determined by the Qur'an and Hadith is related to a crime that violates the rights of Allah SWT and the rights of a servant is called Ta'zir punishment. The legal decision of the government or the state provides these sanctions. Second, the author describes the interconnection between Islamic criminal law and the positive law regarding physical violence is that the interconnection in the matter of physical violence between Islamic criminal law and positive law is in Law no. 23 of 2004 in substance maqasid sharia is compatible with Islamic criminal law.

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