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REVIEW ARTICLE

RELEVANCE OF CRIMINAL LAW FORMULATION IN THE LAW OF DOMESTIC VIOLENCE ELIMINATION IN INDONESIA

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ABSTRACT

Violence Against Women is becoming more and more with specific domestic violence, as well as the cause hidden behind divorce. The issue of domestic violence is arranged by The Law Number 23 of 2004 on The Elimination of Domestic Violence which contains a summary of criminal act in Article 44 to Article 53. This study attempts to analyze the philosophy of regulation of domestic violence in Indonesia and the political law of the law number 23 Year 2004 on the elimination of domestic violence is related to the principles in the formulation of criminal law. This research is a normative legal research, and was obtained by studying documentation, discussion, and literature study and with collection data is literature study and analyzed prescriptively. The authors believe that the household paradigm that is in accordance with the objectives of this law is to realize the integrity of households, and it implies the formulation of criminal law is not appropriate, so it is a manifestation of overcriminalization/ penalization.

Keywords: Domestic Violence; Politics of Law; Criminal Law Formulation; Elimination of Domestic Violence

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INTRODUCTION

The position of husband and wife in a household, provides a limitation that husband and wife have an equal position in accordance with the roles, rights and obligations of each without having to look at the biological status between the two.[1] The husband cannot negate the role and position of the wife and the wife cannot negate the role and position of the husband.

[1] ALIMUDDIN, PENYELESAIAN KASUS KEKERASAN DALAM RUMAH TANGGA DI PENGADILAN AGAMA 47-50 (2014).

Husband and wife are the main actors in building a happy and eternal home.

Violence in any form and carried out by anyone in the household sphere, is not only contrary to the main purpose of marriage, but violence in any form and committed by anyone in the household sphere is an act that violates the constitutional rights (Article 28B of the 1945 Constitution of the Republic of Indonesia in 1945) and demeaning the dignity of humanity (Article 28 G of the 1945 Constitution of the Republic of Indonesia).[2]

Constitutionally marriage as stated in the preamble of Act Number 23 Year 2004 on the Elimination of Domestic Violence (hereinafter as Domestic Violence Elimination Act), a letter asserts: that every citizen has the right to a sense of security and freedom of all forms of violence in accordance with the philosophy of Pancasila and the Constitution of the Republic of Indonesia Year 1945. intended to form families and continue offspring (children). Every descendant (child) has the right to survival, growth and development and is entitled to protection from violence and discrimination. The state is obliged to guarantee that every person in the scope of the household receives personal protection, honour, dignity, and property under his control, and is entitled to a sense of security and protection from the threat of fear to do or not do something, in managing and managing his household.

Marriage ideologically, the intention is the whole values of the Principles of Pancasila, must become a basic ideology in building the direction of the life of the nation and state through the family. The family institution is a reflection of the state and nation's institutions.

This is a form of worship for husband and wife to their Lord. Marriage is a method for husband and wife to build and maintain human values to form a civilized household. Marriage is a medium to unite differences in the nature, character between husband and wife in a harmonious household frame. Marriage is a means to manifest wisdom and wisdom as a basis in building emotional maturity between husband and wife. Marriage is an embodiment of a just and prosperous life order through the household.

Domestic Violence is basically often implemented by the husband against his wife, the husband and wife to helpers and others. In terms of the place of occurrence, physical and psychological violence occurs in the

[2] The 1945 Basic Constitution of Republic of Indonesia [hereinafter The 1945 Constitution].

household or outside it. In terms of the offender, physical and psychological violence in the household can be distinguished between adult offender (husbands, wives, domestic helpers) and adults with children (parents to children and conversely).

Based on the 2018 Report that the National Commission on Violence Against Women showed that the most prominent types of violence against women are domestic violence (personal domain) which reached 71% (9, 609, and the most prominent violence was physical violence 3, 982 cases (41%), ranked first followed by sexual violence 2, 979 cases (1%), psychic 1, 404 (15%) and economics 1, 244 cases (13%) For domestic violence / personal relations, violence against wives was ranked first 5, 167 cases (54%) and then the third largest courtship violence after violence against children was 1, 873 cases, and then the third largest courtship violence after violence against children was 1, 873 cases.[3] Meanwhile, domestic violence cases often became hidden behind the divorce case, this is at least indicated by the data of the Religious Court Board at Indonesian Supreme Court's which records 203, 507 divorce cases that have received the deed divorced throughout 2012. Of the total cases, the cause of divorce is a domestic violence case which is generally not criminally processed. Like unhealthy polygamy (23%), there is no harmony (18%), economic factors (16%), no responsibilities and others (15%). Muslim women victims who submit divorce through the Religious Courts often choose not to process the domestic violence in the General Courts for various reasons. Among others, because they chose to immediately be free from the violence of their husbands; or reluctant to deal with two judicial processes that will take a lot of time, cost and energy.[4]

I. THE DOMESTIC VIOLENCE IN INDONESIA

The root cause of violence against women is a culture of male domination.[5] In this structure of domination violence is often used by men to win

[3] HIBNU NUGROHO, TERGERUSNYA RUANG AMAN PEREMPUAN DALAM PUSARAN POLITIK POPULISME 35-44 (2018)

[4] KOMNAS PEREMPUAN, KORBAN BERJUANG, PUBLIK BERTINDAK: MENDOBRAK STAGNANSI SISTEM HUKUM. CATATAN KTP TAHUN 2012, 58-67 (2013)

[5] MULADI, KAPITA SELEKTA PERADILAN 64-70 (1995); MULADI & BARDA NAWAWI ARIEF, TEORI-TEORI DAN KEBIJAKAN PIDANA (PIDANA DAN PEMIDANAAN) 12-15 (1992) [hereinafter MULADI & ARIEF, TEORI-TEORI DAN KEBIJAKAN PIDANA].

dissent, to express dissatisfaction, to prevent future deeds and sometimes to simply promote it. and all forms of violence are often a reflection of the patriarchal system (*shaped by patriarchy*). In addition, the cultural root approach in practice is also detrimental to women. Here men (husbands) feel superior and have power over women (wives).

Violent crimes are universal, which can occur anywhere, anytime and can befall anyone, even the effects are the same, namely physical and non-physical suffering, can affect both men and women. Violence against women has grown in line with the growth of human culture. However, this has only been a concern of the international community since 1975. According to Article 1 of the Declaration of the United Nations in 1993 states: the definition of violence against women is all forms of gender-based violence that cause or will result in pain or suffering against women both physically, sexual, psychological, including threats, restrictions on freedom, coercion, whether occurring in public or domestic areas (Violence Against Gender-Based Women).

Violence against women is an act or attitude carried out with a specific purpose so that it can harm women both physically and psychologically.[6] Another important thing is that an incidental event (*accidental*) is not categorized as violence even though it causes harm to women.

The above understanding does not indicate that the offenders of violence against women are only men, so even women can be categorized as offenders of violence.[7] Domestic Violence, especially abuse of wives, is one of the causes of chaos in society. Various research findings of the community that wife abuse does not stop with the suffering of a wife or child alone, a series of sufferings that will spread outside the scope of the household and then colour the lives of our community.[8]

According to Mansour Fakih, violence is an attack or invasion of the physical and integrity of mental integrity of a person's psychology.[9] Violence that occurs in the household, especially against wives is often

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[6] HERKUTANTO, KEKERASAN TERHADAP PEREMPUAN DALAM SISTEM HUKUM PIDANA, DALAM BUKU PENGHAPUSAN DISKRIMINASI TERHADAP WANITA 267-268 (2000)

[7] *Id.*

[8] CICIEK FARHA, IKHTIAR MENGATASI KEKERASAN DALAM RUMAH TANGGA BELAJAR DARI KEHIDUPAN RASULULLAH SAW 22-25 (1999).

[9] MANSOUR FAKIH, ANALISIS GENDERDAN TRANSFORMASI SOSIAL 67-73 (1995).

found, even not a small amount. Of the many violations that occur only a little can be resolved fairly, this happens because in society there is still a growing view that domestic violence remains a secret or a household disgrace that is very inappropriate if raised on the surface or is not fit for consumption by the public.

Law Number 23 of 2004 concerning Elimination of Domestic Violence, provides an understanding of domestic violence, namely: Every act committed against a person, especially a woman, which results in physical, sexual, psychological, and/or neglect or physical misery of the household, including threats to commit domestic violence, including threats to commit acts, coercion or deprivation of liberty unlawfully within the scope of the household (Article l paragraph (1) of the Domestic Violence Elimination Act.

Physical violence is an act that results in pain, illness or serious injury (Article 6). Psychic violence is an act that results in fear, loss of self-confidence, loss of ability to act, helplessness, and/or severe psychological suffering on a person (Article 7) Sexual violence is any act in the form of forced sexual relations, forced sexual relations in an unnatural and / or improper manner. Preferably, the coercion of sexual relations with others for commercial purposes and/or a specific purpose (Article 8). Household neglect is someone who neglects people within the scope of his household, whereas according to the law in force for him or because of agreement or agreement, he is obliged to give life, care, or care to these people, and everyone who causes economic dependence by limiting and/or prohibit decent work inside or outside the home so that the victim is under the control of the person (Article 9). The parties included in the scope of the household are husband, wife, children (including adopted children and stepchildren), in-laws, in-laws, in-laws and in-laws, as well as people who work to help the household and live in the household (domestic workers).

The 85th General Assembly on December 20, 1993, the United Nations endorsed the Declaration of Anti-Violence Against Women, which stressed that violence against women was a violation of human rights. Article 1 of the Declaration provides an understanding of violence against women, namely: Every action based on gender differences results in or may result in women's physical, sexual or psychological misery or suffering, including the threat of certain actions, coercion or deprivation of liberty arbitrarily, whether it happens in public or in private life .

The Declaration on the Elimination of Violence against Women which was adopted at the general assembly of the United Nations in 1993, gave a moral obligation to the Republic of Indonesia as a member of the United Nations to accept the declaration.[10]

The objective of criminalization is to carry out the supporting function of the general criminal law function to be achieved as the ultimate goal is the realization of social welfare and protection *(Social defence* and *social welfare)*. The purpose of punishment specifically can be seen from the opinion of Prof. Roeslan Saleh regarding the three reasons that criminal law and criminal law are still needed, especially the third reason, namely: criminal influence or punishment is not merely aimed at the criminal, but also to influence people who are not evil, namely citizens who obey the norms of society.[11]

The opinion above it is clearly seen that the purpose of punishment / giving a criminal is in addition to the criminal himself but also for the general public to be obedient to legal norms. Determined the purpose of punishment contained in the intention that the crime imposed in accordance with the circumstances of the convicted so as to achieve the goal, in addition to this criminal system is a system that aims (*purposive system*). Another reason for the stipulation of the purpose of criminal punishment/granting criminal is the limitations of the criminal sanction itself as stated by HL Packer that the criminal sanction is at once main guarantor and main threat of human freedom. Used providently and humanely it is guarantor; used indiscriminately and coercively, it is a threat.[12]

The above statement implicitly recommends that the purpose of punishment be determined so that the criminal sentence imposed can serve as a guarantor for the purpose of criminal law as a means to achieve the protection and welfare of the community and also as a guarantor there is no decrease in the degree of humanity / dehumanization in criminal conduct.

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[10] ACHIE SUDIARTI LUHULIMA & KUNTHI TRI DEWIYANTI, POLA TINGKAH LAKU SOSIAL BUDAYA DAN KEKERASAN TERHADAP PEREMPUAN 108-110 (2000)

[11] BARDA NAWAWI ARIEF, TEORI-TEORI DAN KEBIJAKAN PIDANA: KEBIJAKAN PENANGGULANGAN KEJAHATAN DENGAN HUKUM PIDANA 153-155 (1992) [hereinafter ARIEF, TEORI DAN KEBIJAKAN PIDANA]; MULADI & ARIEF, TEORI-TEORI DAN KEBIJAKAN PIDANA, *supra* note 5, at 50-51.

[12] *Id.*

Determining the objectives and guidelines for the provision of crime must be taken into consideration by judges in bringing down the criminal so that the judge's decision can be read by other people (the public) and in particular by people with an interest in the case. by Leo Polak in his book *De Zin der Vergelding,* that criminal law is the saddest part of the law. Because he does not know both the basis and limits—both the purpose and size.[13] In general, the objectives of punishment can be distinguished as follows:

a. retaliation, ruling or retribution/absolute
b. influence people's behaviour for the protection of society.[14]

To determine the goals and guidelines for criminalization, it cannot be separated from the purpose of punishment which has been the reason for justification, while the objective is often called the traditional goal of punishment which is retaliation, rewarding or retributive.

The purpose of retributive punishment is based on the justification that every violation of law must be punished because it is a claim of justice and a criminal constitutes a *Negation der Negation* denial above denial.[15] Crime is an absolute result that must exist as a revenge against people who have committed crimes and this is merely to fulfil a sense of justice, so this theory is also called the absolute theory whose goal is to improve the offenders, in improving the offenders this includes various purposes among others carry out rehabilitation, and re-socialize the offender and protect him from unlawful arbitrary treatment. As a means of community protection (*social defences*) penalties contain four aspects that will determine the purpose of punishment, namely:

a. Seen from the point of view of the need for community protection against anti-social acts that harm and endanger the community, an opinion or theory arises that the purpose of criminal and criminal law is crime prevention.
b. Seen from the point of view of the need for community protection against the dangerous nature of the person (the offender, an opinion arises which states that the purpose of the criminal is to correct the offender.
c. Viewed from the need for public protection against the abuse of power in using criminal sanctions or reactions to criminal offenders, it is said that

[13] SUDARTO, KAPITA SELEKTA HUKUM PIDANA 79-82 (1986).
[14] *Id.*
[15] MULADI & ARIEF, TEORI-TEORI DAN KEBIJAKAN PIDANA, *supra* note 5, at 66-68.

the purpose of criminal and criminal law is to regulate or limit the authority of the authorities as well as members of the community in general

d. Another aspect of community protection is the need to maintain a balance or harmony of various interests and values that are disturbed due to crime. Criminal law is to maintain or restore the balance of the community.[16]

Problem of goals and guidelines for crimes becomes a concern in the renewal of the Criminal Law as a result of efforts to pay more attention to factors related to Human Rights and making criminal operational and functional. In this regard, in formulating goals and guidelines for criminalization in the renewal of the aspired criminal system is inseparable from the values contained in the principles of the Indonesian Nation's Philosophy so that it can describe a criminal system, namely the Pancasila Criminal System. with the Pancasila Criminal system is in imposing a crime against the offenders of crime related to the criminal justice subsystem, namely:

a. Number or duration of criminal threats
b. Alleviation and criminal charge
c. The criminal formulation and application should always be oriented towards the Pancasila principles, thus it is hoped the realization of the Criminal system which prioritizes things that are Humanistic and avoids the occurrence of Dehumanization (a decrease in the degree of humanity).[17]

II. The Political Law of The Law Number 23 of 2004 on the Elimination of Domestic Violence

Domestic violence cases are enforced by The Law Number 23 of 2004 concerning the Elimination of Domestic Violence. in which the Law contains the formulation of criminal provisions in Article 44 through Article 53. The formulation of the criminal provisions does not provide a description of the meaning Domestic Violence Elimination Act prioritizes

[16] ARIEF, TEORI DAN KEBIJAKAN PIDANA, *supra* note 10, at 88-90
[17] *Id.*

the prevention and maintenance of harmonious and prosperous household integrity (restorative) but instead affirms the meaning that Domestic Violence Elimination Act prioritizes the prosecution of offenders of domestic violence. Both are the formulation of Domestic Violence Elimination Act objectives in Article 4, so that there is a conflict of norms.

The principles regarding the formulation of criminal law. This discussion requires the fulfillment of the principles regarding the formulation of criminal law as a strategy for the formulation of criminal law, namely:

a. The principle that the reasonable loss, while this loss has a moral aspect (morality), individual-group-collectivity), and it must be public issue.
b. The principle of tolerance of these actions is an assessment of the occurrence of losses; it is based on respect freedom for individual and responsibility.
c. The principle of subsidiarity (before the act is declared a criminal act, it is necessary to note whether the legal interests violated by the act and it can still be protected in other ways because the criminal law is *ultimum remedium.*
d. The principle of proportionality (a balance between the losses by the principle of tolerance and with the reaction to the crimes given).
e. The principle of legality, the legal interests to be protected are clearly related to the principle of error).
f. The principle of practical use, and effectiveness with regard to the possibility of its enforcement and its impact on the general of the prevention (practical use and effectiveness).[18]

The term criminalization is used in this Article to describe a web of state policies and practices related to welfare[19], in other hand, an understanding of the aims of the criminal law. This is turn requires an understanding of where criminal law fits into the overall legal order. And this further requires an understanding of the liberal democratic state

[18] MUHAMMAD NAJIH, POLITIK HUKUM PIDANA: KONSEPSI PEMBAHRUAN HUKUM PIDANA DALAM CITA NEGARA HUKUM 37-40 (2014).

[19] Kaaryn Gustafson, *The Criminalization of Poverty*. 99 J. CRIM. L. & CRIMINOLOGY. 643, 650-658 (2009).

within which the legal order exists.[20] There are several different kinds of criminalizing policies and practices. The general principles of criminalization, such as punishment theory and the role of moral wrongdoing. Main lines of criminalization theories which tend to focus on the issues of harm, offence, paternalism and side constraints.[21]

There are two over aching categories of criminalization, formal criminalization and substantive criminalization. Formal criminalization refers to making something a crime 'on the books' whereas substantive criminalization accounts for non-formal changes that occur through the exercise of discretion by, for example, police, prosecutors, and judges. Chalmers & Leverick reach three conclusions, first, that is a continuing issue of subordinate legislation creating new crimes without any democratic safeguards, and third, that the disparate sprouting of so many criminal offences in such varied places makes fair making nearly impossible to achieve.[22]

Therefore, this study attempts to find out the philosophy of regulating of domestic violence in Indonesia. This study also asses the political law of the law number 23 of 2004 on the elimination of domestic violence is related to the principles in the formulation of criminal law. This research is intended to analyzed concerning how is the philosophical factor of regulating of domestic violence in Indonesia and how is the political law of the law number 23 of 2004 on the elimination of domestic violence is related to the principles in the formulation of criminal law?

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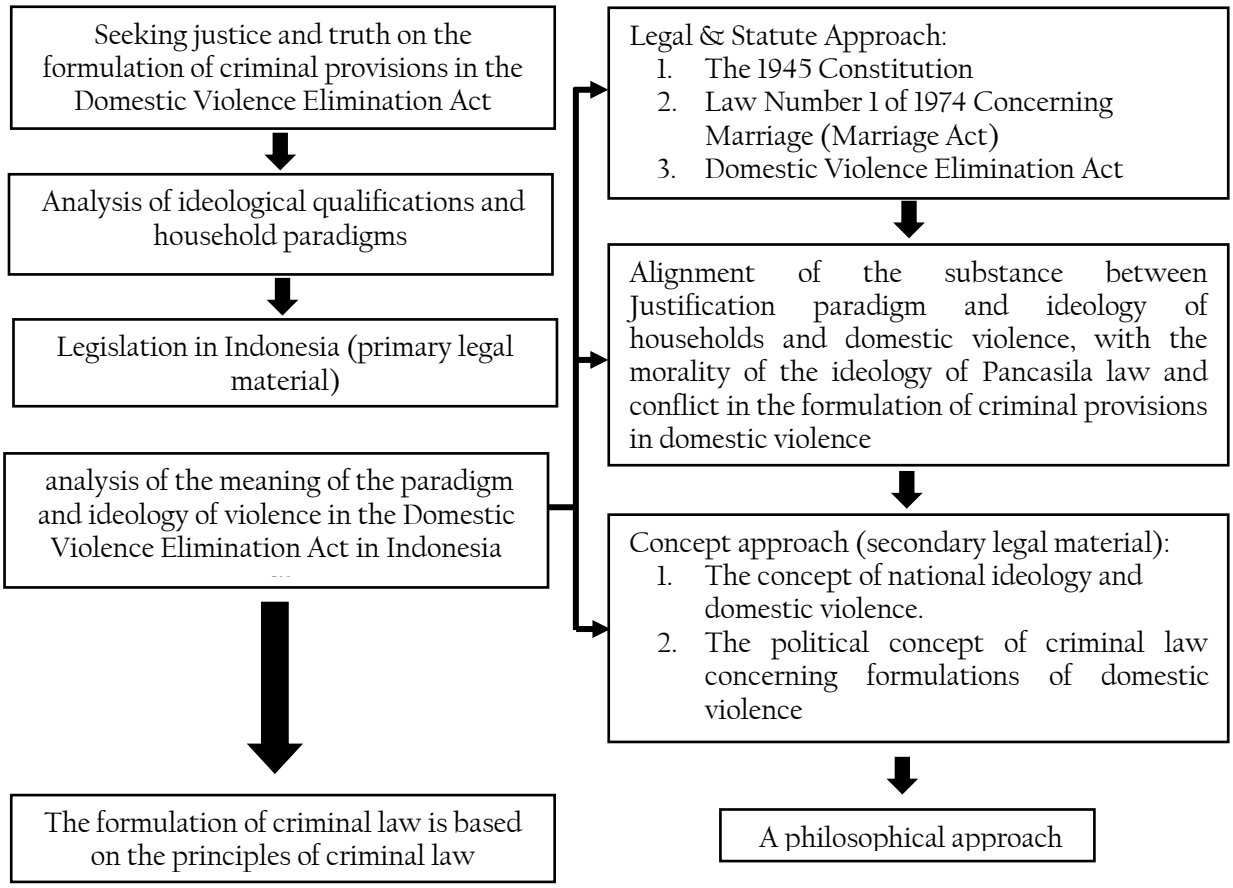
[20] Paul McGorrery & Marilyn McMahon, *Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence*. 94 CRIMINOLOGY & CRIMINAL JUSTICE. 1, 12-14 (2009); Neil Boister, '*Transnational Criminal Law*'? 14 EJIL. 953, 960-965 (2003).

[21] SIMESTER A.P. & VON HIRSCH A., CRIMES, HARMS AND WRONGS 275-283 (2011).

[22] James Chalmers & Fiona Leverick. "Quantifying Criminalization", In CRIMINALIZATION: THE POLITICAL MORALITY OF CRIMINAL LAW, R.A. DUFF, LINDSAY FARMER, S.E. MARSHALL, MASSIMO RENZO, & VICTOR TADROS (eds), 54-79 (2004).

III. METHOD

A. Design of the Study



B. Method of Data Analysis

Legal research is intended to explore and seek the truth.[23] The formulation of sanctions in the Domestic Violence Elimination Act becomes library material or legal material becomes library material or primary legal material.[24] This research is a normative legal research, which

[23] SUGENG ISTANTO, PENELITIAN HUKUM 43-45 (2007).
[24] SOERJONO SOEKANTO, PENGANTAR PENELITIAN HUKUM 112-115 (1986) [hereinafter SOEKANTO, PENGANTAR PENELITIAN HUKUM]; SOERJONO SEOKANTO & SRI MAMUJI, METODE PENELITIAN HUKUM 75-80 (2003) [hereinafter SOEKANTO & MAMUJI, METODE PENELITIAN HUKUM].

provides a prescription analysis. The research uses legal approach, the concept and philosophy. The philosophy is to seek and think of the essence of truth profusely. The special character of the philosophical study of legal science is to find the essence law and justice. In this legal research, primary legal material becomes very important in the context of basic orientation, with secondary legal material and tertiary as a means to enrich the analysis of studies in this.[25]

This research was obtained by studying documentation, discussion, and literature study. The Documentation Technique to trace the provisions of the laws and regulations in Indonesia which regulates domestic violence sanctions, is then thoroughly reviewed to obtain a formulation of domestic violence sanctions, so that prescriptions and formulations of criminal sanctions can be obtained. The documentation technique is used to identify and qualify Pancasila values and relevant provisions. Literature techniques to find concepts, teachings, doctrines, philosophies, and principles of law, which are the work of jurists. These three techniques or methods will result in justification of the household, family, paradigm and ideology which form the basis of values, then used as a basic direction in finding formulations of criminal sanctions.

This research will provide a prescription[26] about the justification of sanctions in domestic violence which now have criminal sanctions for domestic violence. This study is the flow of thought from the view of legal research using qualitative juridical analysis methods,[27] and data analysis in legal research is carried out in a systematic, explosively, and prescriptive manner.[28] Therefore, analysis of prescriptive and formulative legal materials

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[25] SIDHARTA, PENELITIAN DALAM PERSPEKTIF NORMATIF 25-30 (2010); BAMBANG SUNGGONO, METODOLOGI PENELITIAN HUKUM 55-58 (2007); SOEKANTO, PENGANTAR PENELITIAN HUKUM, *supra* note 23, at 116; SOEKANTO & MAMUJI, METODE PENELITIAN HUKUM, *supra* note 23, at 81-82.

[26] PETER MAHMUD MARZUKI, PENELITAN HUKUM 33-37 (2008)

[27] MARIA SW SUMARDJONO, PEDOMAN PEMBUATAN USULAN PENELITIAN SEBUAH PANDUAN DASAR 48-53 (2001).

[28] JAN GIJSSELS & MARK VAN HOECKE, WAT IS RECHTSTEORIE? 245-255 (1982). *Rechwetenschap* by Jan Gijssels and Mark van Hoecke is translated in English as Jurisprudence. When translated literally, *Rechwetenschap* means Science of Law. The term was avoided because the term science can be identified with empirical studies. In fact, law is a more normative study. The term *rechtswetenschap* [Dutch] in the narrow sense is legal dogmatics or the teaching of law [*de rechtsleer*] whose job is the description of positive law, systematization of positive law and in certain cases also explanation. Thus, the dogmatics of the law are not value-free but loaded with values. *Rechtswetenschap* in a broad sense includes legal dogmatics, legal theory [in the strict sense] and philosophy of law. *Rechtstheorie* also contains narrow and broad meaning. In the

primary, secondary and tertiary in their entirety, depth and overall.[29] The analysis was carried out on the whole substance of the laws and regulations that were reviewed.

The analysis can give significant meaning to the analysis of legal material, which can explain the pattern of description, and look for relationships between the dimensions.[30] Prescriptions about the formulation of criminal sanctions in statutory regulations, an analysis of legal materials with a hermeneutic perspective, interpretations, including interpretations: authentic, grammatical, systematic, sociological, teleological, functional or futuristic

DOMESTIC VIOLENCE ELIMINATION: PROBLEMS AND CHALLENGES

Violence in the household is a violation of human rights, crimes against human dignity and forms of discrimination that must be removed (consider the letter b of Domestic Violence Elimination Act). Households as a form of marriage institution must be able to be a catalyst in preventing all forms of violence. Violence in the perspective of the household must be seen as a problem that can threaten the formation of a happy and eternal family.[31]

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narrow sense *rechtstheorie* is a layer of legal science which lies between the dogmatics of law and the philosophy of law. Legal theory in this sense is the science of legal explanation [*een verklarende wetenschap van het recht*]. For more comprehensive comparison, please also *see* Markus P. Beham, *Rechtstheorie*. 20 AUSTRIAN REVIEW OF INTERNATIONAL AND EUROPEAN LAW ONLINE. 452, 452-253 (2018); BERND RÜTHERS, CHRISTIAN FISCHER, & AXEL BIRK, RECHTSTHEORIE 115-119 (2018); JEFFRIE G MURPHY, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE, 245-255 (2018).

29 Yohanes Sogar Simamora, *Prinsip Hukum Kontrak dalam Pengadaan Barang dan Jasa oleh Pemerintah*, *DISS* (2005).

30 JHONY IBRAHIM, TEORI DAN METODOLOGI PENELITIAN HUKUM NORMATIF 27-30 (2006).

31 FRANK E. HAGAN & LEAH ELIZABETH DAIGLE, INTRODUCTION TO CRIMINOLOGY: THEORIES, METHODS, AND CRIMINAL BEHAVIOR 233-246 (2019); Barbara Krahé, *Violence against women*. 19 CURRENT OPINION IN PSYCHOLOGY. 6, 7-8 (2018); Mona Lena Krook, *Violence against women in politics: A rising global trend*. 14 POLITICS & GENDER. 673, 674-675 (2018). Furthermore, the term violence is used to describe behavior, whether overt, or covert, whether offensive or defensive, accompanied by the use of force to others. Law No 23 of 2004, defines domestic violence is any act against a person especially women, which results in physical, sexual, psychological, and/or neglect of the household suffering or suffering, including threats to commit acts, coercion or deprivation of liberty unlawfully in the scope of the household. Indeed, there is no single and clear definition related to domestic violence.

The meaning of a happy and eternal family, containing the spirit that violence in the household, is contrary to domestic values inherent inherently in the meaning of inner and outer bonds between a man and a woman, as a pledge of sacred promise, in forming a family.

Inner and outer bonds between a man and a woman cannot be reduced to the meaning of transactional ties. Inner and outer bonds become *theological spirit (these are listed* phrases based on the Almighty God in the sense of marriage according to the provisions of the Marriage Law, giving justification that the value of God (theology) becomes the basic spirit in building a happy and eternal family) forming happy and eternal families, while contractual ties, are the spirit of building contractual relationships. Domestic violence must be viewed in the perspective of theological spirit as a basis in building emotional relationships filled with love and affection, between a man and a woman in forming a happy and eternal family.

Inner and outer bonds which become the theological spirit (Theological spirit accepts the concept of forgiveness in a husband and wife relationship to build a happy and eternal family. The concept of

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Nonetheless, domestic violence is usually fundamental, including (a) physical violence, which is every act that causes death, (b) psychological violence, which is every act and speech that results in fear, loss of self-confidence, loss of ability to act and feeling of helplessness towards women, (c) sexual violence, which is every act that includes sexual harassment to force someone to have sexual relations without the consent of the victim or when the victim does not want to; and / or engaging in sexual relations in ways that are not natural or preferred by the victim; and or distance him (isolate) from his sexual needs, (d) economic violence, which is any act that restricts people (women) to work inside or outside the home that produces money and or goods; or let the victim work to be exploited; or abandon family members. *See* also Rido Matua Simamora, Analisis Diskresi Kepolisian Dalam Penyidikan Tindak Pidana Kekerasan dalam Rumah Tangga (Studi Pada Unit PPA Sat Reskrim Polresta Padang). 2 UNES JOURNAL OF SWARA JUSTISIA. 332, 338-340 (2019); Bambang Sutrisno & Siti Asmaul Husna, *Perlindungan Hukum Terhadap Isteri yang Menjadi Korban Kekerasan dalam Rumah Tangga oleh Suami*. 7 MIZAN, JURNAL ILMU HUKUM. 51, 52-53 (2019); Agung Budi Santoso, *Kekerasan dalam Rumah Tangga (KDRT) Terhadap Perempuan: Perspektif Pekerjaan Sosial*. 10 KOMUNITAS. 39, 45-47 (2019); Ayu Setyaningrum & Ridwan Arifin, *Analisis Upaya Perlindungan dan Pemulihan Terhadap Korban Kekerasan dalam Rumah Tangga (KDRT) Khususnya Anak-Anak dan Perempuan*. 3 MUQODDIMAH: JURNAL ILMU SOSIAL, POLITIK DAN HUMMANIORA. 9, 11-14 (2019); Syaiful Asmi Hasibuan, *Kebijakan Kriminal (Criminal Policy) Terhadap Anak yang Melakukan Kekerasan dalam Rumah Tangga*. 7 JURNAL HUKUM RESPONSIF. 17, 20-24 (2019): Amalia R. Miller & Carmit Segal, *Do female officers improve law enforcement quality? Effects on crime reporting and domestic violence*. 86 THE REVIEW OF ECONOMIC STUDIES. 2220, 2229-2236 (2019); Dina Afrianty, *Agents for change: Local women's organizations and domestic violence in Indonesia*. 174 BIJDRAGEN TOT DE TAAL-, LAND-EN VOLKENKUNDE/JOURNAL OF THE HUMANITIES AND SOCIAL SCIENCES OF SOUTHEAST ASIA. 24, 30-36 (2018); Ratih Lestarini, et al. *The co-existence of laws regarding domestic violence case settlement: Rote Island, East Nusa Tenggara, Indonesia.* 20 JOURNAL OF INTERNATIONAL WOMEN'S STUDIES. 165, 168-170 (2019).

forgiveness is the basis for looking at domestic violence carried out in marital relations) In building a happy and eternal home, it cannot be seen as the meaning of outward ties, which can be measured using the standard of rationality in the form of division of roles on the basis of the biological characteristics of husband and wife only (gender). Inner and outer bonds place the rights, obligations, and position of husband and wife in the household by using ideological standard measures, namely emotional, mental, spiritual maturity, in looking at the meaning of a happy and eternal household. Domestic violence must be seen in an ideological perspective and not merely in a biological perspective.

The reduction of ideological meaning is limited to biological meaning in the context of domestic violence, justified in positive law (Domestic Violence Elimination Act). that victims of domestic violence, of most whom are women, must receive protection from the state and/or society to avoid and be free from violence or threats of violence, torture, or treatment that demeans human dignity and dignity.

Domestic violence becomes a public problem only because it uses a biological paradigm rather than an ideological paradigm. The household is seen as a rational transactional institution. Domestic violence is simplified on the surface in the form of acts and the consequences of acts that contain phenomenological violence (provisions of Article 1 number 1 of the Domestic Violence Elimination Act), stated that Domestic Violence is any act against a person especially a woman, which results in misery or suffering from physical, sexual, sexual misery, psychological, and/or neglect of households including threats to act, forcing, or deprivation of liberty unlawfully within the scope of the household.

The domestic violence, can be done by anyone, including by men, women within the family circle. Simplification provisions of positive law which simplify the problem of domestic violence can only be carried out mainly by men with female victims, or in other words domestic violence is dominantly only possible by a husband to his wife, is evidence that the Domestic Violence Elimination Act only sees the problem of domestic violence gap is a biological problem and negates the main problem which is an ideological problem.

Violence in the household must be viewed as an ideological problem, therefore the root of the problem is not only seen in the perspective of the form of acts of violence, but the fundamental is the main cause of domestic

violence stemming from the inability of a man with a woman, in building and forming a happy family and eternal. The emotional, psychological, physical, and spiritual maturity of a man and a woman in building inner and outer bonds, which is the theological spirit in a household, is more important to be the basis for seeing domestic violence. Domestic violence is a result of the inability of a man and a woman to interpret the bond physically and spiritually in forming a happy and eternal family ideologically.

An ideological perspective in viewing domestic violence, prioritizing aspects of preventing domestic violence (provision of Article 1 number 2 of the Domestic Violence Elimination Act, states: Elimination of Domestic Violence is a guarantee given by the state to prevent the occurrence of domestic violence, cracking down on offenders of violence in the household, and protecting the violence in the household. *This* provision contains a blurring of norms, on the one hand the state prevents violence in the household, but the spirit and provisions of the next Article contain the meaning of cracking down on the offenders. The state protects the victim but in the provisions of the following Article provides severe conditions for victims can be protected by the state.

Biological perspective in seeing domestic violence prioritizes the aspect of enforcement in the event of domestic violence. The ideological paradigm in viewing domestic violence, will prioritize wholeness and happiness of the household, while the biological paradigm in viewing domestic violence, will prioritize repression as a repressive way.

The ideological paradigm views that the main cause of domestic violence is the foundation and direction in maintaining the integrity and happiness of the household, suffering sanctions are the last choice used in order to maintain the integrity and happiness of the household. The ideological paradigm prioritizes recovery (restoration) in preventing and crack down on domestic violence. The biological paradigm, seeing severe sanctions as the most important way in combating domestic violence, deploying and reprising offenders of domestic violence is the most important choice.

The provisions in the Domestic Violence Elimination Act contain norm conflicts, which in principle are declared non-discrimination, but in the Preamble, it still emphasizes discrimination, which says that the dominant victims are mainly women while the offenders are mainly men.

The preamble as a philosophical foundation of the Domestic Violence Elimination Act should be the direction and foundation in formulating the principle. The principle was born from a philosophical foundation, so that the philosophical foundation became a guide in formulating the principles in the Domestic Violence Elimination Act.

Conflict (Provisions of Article 3 of the Domestic Violence Elimination Act) between the provisions of the preamble, Article 1 and Article 3 concerning the principle, makes the Domestic Violence Elimination Act unable to guarantee legal certainty in preventing, acting and protecting, which is the promise of the state in ensuring the elimination of violence in the household. Conflict of norms is the main cause of the unclear meaning paradigm which is used in viewing domestic violence. The ideological paradigm in seeing domestic violence is more in line with the principle of non-discrimination, justice and gender equality, while the biological paradigm sees violence in the household as a gender problem, thus prioritizing a discriminatory spirit that women are the main victims and men as the main offenders.

Not only does this conflict of norm not guarantee legal certainty, but the conflict of norms is a determinant factor in the paradigm formulation of sanctions in domestic violence. The ideological paradigm sees sanctions against domestic violence, prioritizing prevention that puts forward restorative efforts. The biological paradigm sees severe sanctions in cases of domestic violence as the main effort by prioritizing retributive efforts.

Conflicts *of* norms and vacuum of norms in the provisions of the Domestic Violence Elimination Act, appear in the provisions of Article 4 regarding the purpose of eliminating violence in households, with the provisions of Articles 44, 45, 46, -53.

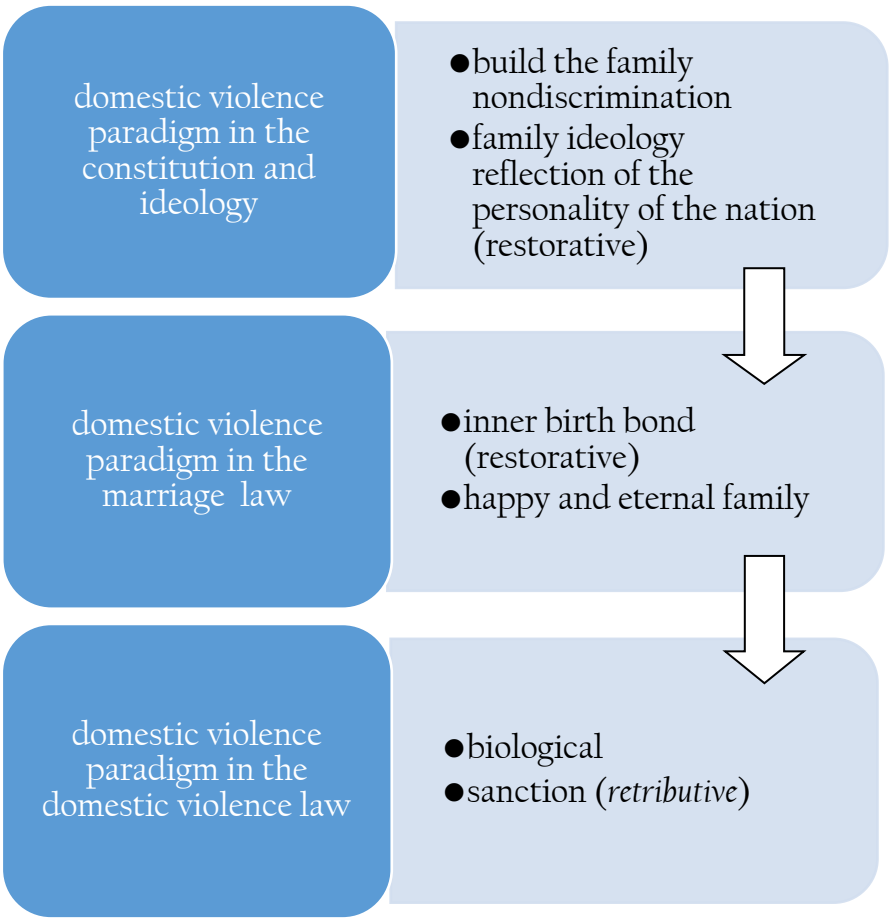
The formulation of criminal provisions in Articles 44-53, does not provide a description of the meaning that the Domestic Violence Elimination Act prioritizes the prevention and maintaining the integrity of a harmonious and prosperous household (and harmonious households restorative) restorative as the purpose for the establishment of the Domestic Violence Elimination Act as stipulated in the provisions of the formulation of Article 4, but instead provides an affirmation of the meaning that the Domestic Violence Elimination Act prioritizes the enforcement of

as the purpose for the formation of the Domestic Violence Elimination Act offenders of domestic violence.

Conflict of norms between the provisions of Article 4 with the provisions of Articles 44 - 53 of the Domestic Violence Elimination Act, not only does not guarantee legal certainty, but the conflict of norms provides a confirmation that the Domestic Violence Elimination Act uses a biological paradigm in cases of domestic violence. Paradigm Domestic Violence Elimination Act, giving priority to approaches retaliation*(retributive)* in view of domestic violence. The Domestic Violence Elimination Act should use the ideological paradigm for cases of domestic violence, so as to prioritize aspects of prevention by prioritizing recovery (*restorative)*, whereby wholeness, happiness, and family welfare come first.

The philosophy of regulating of domestic violence in Indonesia show Article 28 B paragraph (2) of the Constitution of the Republic of Indonesia Year 1945 states every child has the right to survival, growth, and development and it has the right to protection from violence and discrimination and Article 28 G mandates everyone has the right forming families without being discriminated against, violence in all its forms constitutes a human rights violation, ideologically the approach to restoring and preventing is the main in cases of domestic violence. The Marriage Act affirms that marriage in forming a family is implement on the basis of bonding physically and spiritually, by prioritizing the restoration of harmony and integrity of the family into its theological spirit. Domestic Violence Elimination Act is implement based on the principle of respect for human rights, gender justice and equality, non-discrimination, and victim protection and the paradigm of domestic violence as explained by Setyowati[32] as follows.

[32] Dewi Setyowati, Reformulasi Sanksi Tindak Pidana Kekerasan dalam Rumah Tangga Dari Perspektif Keadilan Restorative di Indonesia. *DISS* (2018).



The philosophical problems in the Domestic Violence Elimination Act, justifying gender as the main in seeing violence in the home (*ontology*), so that the paradigm used in viewing violence in the home is limited to biological problems by prioritizing the imposition of sanctions (*epistemology*) as retribution (*retributive*) which is intended as an attempt to enlighten (efforts *axiology*). The Domestic Violence Elimination Act should use an ideological paradigm, which views domestic violence as a matter of emotional, mental and spiritual maturity (*ontology*), by prioritizing recovery (*epistemology*) wholeness, happiness and family welfare being primary (*restorative*), criminal sanctions being the most preferred choice the end to prevent domestic violence (*axiology*).

THE POLITICAL LAW OF THE FORMULATION OF CRIMINAL LAW

The principles regarding the formulation of criminal law. This discussion requires the fulfillment of the principles regarding the formulation of criminal law as a strategy for the formulation of criminal law.[33]

The principle that the reasonable loss, while this loss has a moral aspect (morality), individual-group-collectivity), and it must be public issue. An important feature of a criminal law is that it attracts a punishment or sanction. With the civil law, damages are imposed with the aim to compensate the injured party for loss suffered by criminal law. The aim is to punish the offender and deter others from carrying out the same act.

The principle of tolerance of these actions is an assessment of the occurrence of losses; it is based on respect freedom for individual and responsibility. This Guide refers to the meaning of tolerance defined in Article 1 of the UNESCO Declaration of Principles on Tolerance. Thus, Tolerance consists of respect, acceptance, and appreciation of the rich diversity of the cultures of our world, our forms of expression and the ways of being human. It is fostered by knowledge, openness, communication, and freedom of thought, conscience, and religion. Tolerance consists of harmony

[33] *Supra* note 17, at 57-60. In fact, it was further stated that efforts to reform Indonesian criminal law that internalize the values of Pancasila must remain directed at the national goals to be achieved by the Indonesian people as an independent and sovereign state. The Criminal Code, which is currently still in effect, is a legal product of the Dutch East Indies colonial government, which needs to be adapted to the ideology of the Indonesian people, Pancasila. *See* also Mokhammad Najih, *Indonesian Penal Policy: Toward Indonesian Criminal Law Reform Based on Pancasila.* 3 JILS (JOURNAL OF INDONESIAN LEGAL STUDIES). 149, 155-156 (2018); Tommy Leonard, *Pembaharuan Sanksi Pidana Berdasarkan Falsafah Pancasila dalam Sistem Pidana di Indonesia.* 5 YUSTISIA JURNAL HUKUM. 468, 475-476 (2016); Erfandi, *Implementasi Nilai-Nilai Pancasila dalam Pembangunan Sistem Hukum Pidana di Indonesia.* 5 JURNAL ILMIAH PENDIDIKAN PANCASILA DAN KEWARGANEGARAAN. 23, 27-30 (2016); Dian Alan Setiawan, *The Implication of Pancasila Values on the Renewal of Criminal Law in Indonesia*. 5 UNIFIKASI: JURNAL ILMU HUKUM. 58, 60-63 (2018); Pranoto Iskandar, *The Pancasila Delusion*. 46 JOURNAL OF CONTEMPORARY ASIA. 723, 727-730 (2016); Ira Alia Maerani, *Implementasi Ide Keseimbangan dalam Pembangunan Hukum Pidana Indonesia Berbasis Nilai-Nilai Pancasila*. 3 JURNAL PEMBAHARUAN HUKUM. 329, 330-332 (2016); Herlambang, *Reformulation of Criminal Liability Concept in Criminal Act of Corruption in Indonesia Based on Pancasila*. 1 UNIVERSITY OF BENGKULU LAW JOURNAL. 19, 20-24 (2016).

in difference.[34] It is not only a moral duty but also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of peace. Tolerance is not concession, condescension or indulgence. Tolerance is, above all, an active attitude prompted by the recognition of universal human rights and fundamental freedoms of others. In no circumstances can it be used to justify these fundamental values. Tolerance is to be exercised by individuals, groups, and States. Tolerance is the responsibility that upholds human rights, pluralism (including cultural pluralism), democracy and the rule of law. It involves the rejection of dogmatism and absolutism and affirms the standards set out in international human rights instruments. Consistent with respect for human rights, the practice of tolerance does not mean that the toleration of social justice or the abandonment is weakening of one's convictions. It means that one is free to adhere to one's own convictions and accepts that others are to theirs. It means accepting the fact that human beings, their naturally diverse appearance, situation, speech, behavior, and values, have the right to live in peace and to be as they are. It also means that one's views are not to be imposed on others.[35]

The principle of subsidiarity (before the act is declared a criminal act, it is necessary to note whether the legal interests violated by the act and it can still be protected in other ways because the criminal law is *ultimum remedium.* The intention here is not to embark on any grand tour of subsidiarity, as this principle has already been extremely well dissected in the legal doctrine.[36] Criminal law must be placed as *ultimum remedium* (weapon ultimate) in tackling crimes that use a reasoning instrument, not as a *primum remedium* (main weapon) to overcome criminal problems. The other meaning of the principle of *ultimum remidium* is when the implementation of the formal criminal law must wait until the ineffectiveness of administrative law is enforced. The background to the increasing need to use the principle of subsidiarity in determining illicit actions is driven by two factors. First, the use of the subsidiarity principle

[34] United National Educational, Scientific and Cultural Organization (UNESCO). "*Declaration of Principles on Tolerance*." (1995).

[35] John S Russell, *Trial by slogan: Natural law and lex iniusta non est lex.* 19 LAW AND PHILOSOPHY. 433, 438-440 (2000)

[36] G. T. Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*. 43 COMMON MARK. LAW REV. 63, 65-70 (2006).

will encourage the birth of criminal law a just. Secondly, the practice of legislation has an impact negative on the criminal law system due to the existence of overcriminalization and overproduction so that criminal law becomes a loss of influence in society.

The principle of proportionality (a balance between the losses by the principle of tolerance and with the reaction to the crimes given). The principle of proportionality imposes certain restrictions on law-making and enforcing authorities. The principle of proportionality which, due to its complexity and significance for the process of establishing and applying the law, requires detailed and separate discussion. The essence of the assumption of the penalty must be commensurate with the seriousness of the liver, thus indicating that it is derived from a guaranteed function of criminal law.[37]

The principle of legality, the legal interests to be protected are clearly related to the principle of error). The basic principle in the determination of criminalization, according to classical flow, the principle of legality has a function to limit the scope of criminal law. Whereas in the modern flow the principle of legality is an instrument to achieve the goal of community protection. *Mens rea* means the offense must be committed knowingly and with an intent to evade the prohibition or restriction. where is the *mens rea* is made an element of an offense is generally an indication of criminality. The requirements of a criminal act are in line with the principle of *lex scripta* (formulated as a written criminal law), the principle of *lex certa* (the formulation of clear and not multiple interpretations), and the principle of *lex stricta* (the rule must be interpreted narrowly and not used analogy). According to Remmelink that the error indicator is the denunciation directed by the public against humans who actually can be avoided.[38] While in the opinion of Mezger it is a whole condition that provides a basis for personal prosecution of offenders of criminal acts.

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[37] Joanna Długosz, *The Principle of Proportionality in European Union Law as a Prerequisite for Penalization*. 7 PRZEGLĄD PRAWNICZY UNIWERSYTETU IM. ADAMA MICKIEWICZA. 283, 290-294 (2017)

[38] JAN REMMERLINK, HUKUM PIDANA 57-65 (2003). *See* also JAN REMMELINK & DERKJE HAZEWINKEL-SURINGA. MR. D. HAZEWINKEL-SURINGA'S INLEIDING TOT DE STUDIE VAN HET NEDERLANDSE STRAFRECHT 178-189 (1996); JAN REMMELINK, ACTUELE STROMINGEN IN HET NEDERLANDSE STRAFRECHT 114-116 (1980); JAN REMMELINK & MARINUS OTTE. HOOFDWEGEN DOOR HET VERKEERSRECHT 116-121 (2000).

The principle of practical use, and effectiveness with regard to the possibility of its enforcement and its impact on the general of the prevention (practical use and effectiveness). The principle of effectiveness in criminal law is a matter with deep philosophical underpinnings. It encompasses a restrictive policy stating that the criminal law should not be used if it is not effective in controlling conduct, and expansive policy stating that the criminal law should be used if it is the most efficient and cost-effective means of controlling conduct. Generally, effectiveness is discussed in terms of positive or negative legitimacy. In this way, the effectiveness is viewed as a presumed filter where the limiter claims that no criminalization can be justified if it cannot be expected to be effective. Nevertheless, the very notion of effectiveness as a template for criminalization is generally considered as a difficult parameter when justifying legislation. *First*, and in extremely general terms, it is often stated that ineffective provision would undermine the respect for criminal law systems as prevention in the question would lose much of its function. *Secondly*, if a criminal law is too severe, as noted, it would render itself ineffective as the citizens would find it unfair (fair labeling).[39]

The formulation of criminal acts in The Domestic Violence law begins when a complaint occurs by holding a disclosure of domestic violence. This is considered by some Indonesians to be taboo to be revealed to the public. The moral aspect that emerges is a person must be in a free condition both free to express his opinion or be free from violence. While the issue of the public is indicated by the existence of issues of gender that view domestic violence requires settlement.

The special nature inherent in The Domestic Violence law has placed households as the basis of all domestic order systems that are forced to be in public problems. While the paradigm used is limited to biological problems by prioritizing sanctions as retributive which is intended as an effort to ensnare. Ideally, the context of family law (domestic) is that the ideological paradigm that views recovery efforts that refer to the realization

[39] Ester Herlin-Karnell, *The Development of EU Precautionary*. 3 EUROPEAN CRIMINAL LAW REVIEW. 1, 11-13(2011). *See* also ESTER HERLIN-KARNELL, THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW 217-220 (2012); Ester Herlin-Karnell, *What Principles Drive (or Should Drive) European Criminal Law*? 11 GERMAN LAW JOURNAL. 1115, 1120-1125 (2010); Ester Herlin-Karnell, *Recent developments in the area of European criminal law*. 14 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW. 15, 20-24 (2007).

of a whole, harmonious, prosperous and happy family is seen as more appropriate.

The method that can be proposed is by holding a bipartite, then proceed with mediation and even conciliation or arbitration. Bipartite by finding both parties to the dispute. This is intended to support the Law on in realizing recovery by maintaining the integrity, harmony and family welfare of the Domestic Violence which views that Domestic Violence Elimination Act is the same as persecution as stipulated in Article 351 of the Criminal Code. Losses if domestic violence is in the form of a criminal act, then the offender is one part of the household, so that if it involves a criminal sanction in the form of imprisonment or a fine, it will result in two losses, namely criminal sanctions and at the same time increasing the burden of the household.

The legal interest in Domestic Violence Elimination Act law is the protection of one's body and one's honor. Violence is indeed a disgraceful act in accordance with people's opinions and violence can be avoided by everyone. Acts in The Domestic Violence law are not in accordance with the purpose of drafting The Domestic Violence law so that it does not fulfill the principle of *lex scripta*, the principle of *lex certa*, and the principle of *lex stricta*. The purpose of this law is to take action against offender of domestic violence and at the same time maintain the integrity of a harmonious and prosperous household. This goal should be a guideline to formulate the norms by formulating not to act as criminal acts.

Enforcement of The Domestic Violence law is not optimal because some judges' decisions in domestic violence cases show that the real form of inaccuracy in understanding the meaning of CSDR is ideologically and the judge's decision is limited to describing domestic violence problems as biological problems.

Furthermore, a number of findings have been made by this research and study. Prominent among these findings are summarized as follows:

1. Regulations on the nature of the basic value of the household from inner and outer ties, and the view that the household as an institution maintains wholeness, harmony without discrimination and violence and that households are formed to create a happy, eternal family based on God. from the Almighty. The paradigm for regulating domestic violence is restorative, so a happy eternal family and the formulation of violations involving criminal sanctions is inappropriate. The

formulation of criminal provisions increasingly emphasizes the problem of domestic violence not appearing in the ideological spirit of theological paradigm but seen in a biological paradigm. Victims are seen as objects that can recover from the consequences of domestic violence perpetrated by offenders by providing criminal sanctions, while the meaning of preventing, protecting, maintaining is not considered as the purpose of punishment.

2. The Criminal law politics of the Law Number 23 of 2004 based on the fulfilment of the principles of the formulation of criminal law as a strategy for the formulation of criminal law shows that this regulation is a manifestation of excessive criminalization because it does not fulfil all formulations in the principles of formulating criminal law.

CONCLUSION

The formulation of criminal law in The Law Number 23 of 2004 concerning the eradication of domestic violence has put the problem of the goals that are needed and not in accordance with the objectives of force. The problem lies not in the outcome to be agreed upon, but in consideration of the value of the outcome and the value of the individual's personal freedoms. Doubt about criminal law as a powerful tool to prevent crime that causes freedom to channel revenge in the community or is supported to frighten potential offenders or offenders, but also supports to improve the offender.

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