

Conference Paper

Legal Settlement of Domestic Criminal Violence From a Substantive Justice Perspective

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The most obvious shift in the order of interactions and values in social interactions after the reform era is the issue of appropriateness and appropriateness of values and interactions in family-household (private-domestic) affairs. However, after the reform era, the values and interactions in a family or household have been distorted by the state authorities into public affair and are no longer a private (domestic) affair. The fundamental problem of law enforcement lies in the conception of harmonizing the relationship of values. In the context of law enforcement related to domestic violence, the harmonization of the values that form the basis of the interaction system and the values that underlie a household with the values established in the formal state law, namely Law No. 23 of 2004 concerning the Elimination of Domestic Violence. The basic problem that occurs is the misalignment of the implementation of legal politics, the values that are the basis of household building as stated in the PKDRT Law, do not originate from religious moral values. Meanwhile, all Indonesian citizens must be religious and believe in God Almighty.

Keywords: politics law, criminal violence, judicial perspective

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1. INTRODUCTION

The most obvious shift in the order of interaction and values in social interactions after the reform era is the issue of appropriateness and appropriateness of values and interactions in family-household (private-domestic) affairs. Prior to the reform era, values and interactions between and internally family members found their justification based on the values of propriety and decency that live and develop inherently in the social order in which a family lives. How the pattern of relationships and interactions between and internal family members is built does not use the perspective of the State through its formal law. But it is built on the basis of awareness of domestic values that come from values that are inherited from generation to generation from their *ancestors*. What is the

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pattern of the relationship between husband and wife, mother and father with children, daughter-in-law with in-laws, with relatives and so on. There is hardly any difference in perception and meaning between them related to the values and interactions between them. When there is a dispute, they already have a standard mechanism and standard values to resolve it. And the settlement process does not take long and the results are sure to be obeyed by all those involved in the dispute.

However, after the reform era, the values and interactions in a family or household have been distorted by the state authorities into a public affair and no longer a private (domestic) affair. Disputes between husband and wife, children and other family members by the State are seen as public problems and not merely private problems. For example, violence that is the result of disputes between family members is seen by the state as a public problem which must therefore be punished by public law. These rules then become guidelines or benchmarks for behavior or attitudes that are considered appropriate, or should be. The behavior or attitude of the act aims to create, maintain and maintain peace. This is a concrete form of conceptual law enforcement. The integrity of a family with all the values and interactions that are held firmly by all family members is not a major consideration and basis for the State in solving private problems.

The fundamental problem of law enforcement lies in the conception of harmonizing the relationship of values. In the context of law enforcement related to domestic violence, the harmonization of the values that form the basis of the interaction system and the values that underlie a household with the values established in the formal state law, namely Law No. 23 of 2004 concerning the Elimination of Domestic Violence. (hereinafter referred to as the PKDRT Law). Law enforcement as a process is essentially an application of discretion that involves making decisions that are not strictly regulated by the rule of law, but have an element of personal judgment. By quoting Roscoe Pound's opinion, La Vafvre states that in essence discretion lies between law and morals. [1] Pound's opinion emphasizes that it is very difficult to enforce the state's formal law if it is not based on morals. The values that are the basis for building a family or household are actually built from values (rules) that are sourced from moral values. Moral values can always be equated with religious values. Thus the value system that is used as the basis for building a household is a value system that is sourced from religious values for its adherents. The truth and justice of values built on the basis of religion are absolute. Therefore, it must be true, fair, proper, proper, orderly, eternal. Meanwhile, values that do not come from religion are usually temporary and always cause resistance.

The basic problem that occurs is the misalignment of the implementation of legal politics, the values that are the basis of household building as stated in the PKDRT

Law, do not originate from religious moral values. Meanwhile, all Indonesian citizens must be religious and believe in God Almighty. It is very ironic, that a formal state law does not derive its substance from the religious values adopted by its citizens. Thus, in the context of law enforcement on the issue of domestic violence, it does not find its relevance for the context of families and households in Indonesia. The empirical facts of the difficulty of the process of proving and enforcing the law in cases of domestic violence that have occurred so far have further emphasized how the PKDRT Law is not in accordance with existing values and has been passed down from generation to generation by all Indonesians in a household.

Based on this description, it can be said that interference with law enforcement may occur if there is a mismatch between values, rules, and behavior patterns. Conditions like this must be solved by legal politics. Legal Politics must be able to provide benefits from a legal product. In Legal Politics, it can be said that law enforcement does not merely mean the implementation of legislation, although in reality in Indonesia the trend is so, so the notion of *law enforcement* is very popular. In addition, there is a strong tendency to interpret law enforcement as the implementation of judges' decisions. If the judge's decisions are no longer in accordance with the values in a household, then of course it will not be effective. The judge's decision, which only accommodates formal state law, in this case the PKDRT Law, is certain to be ineffective and difficult to implement. Therefore, law enforcement in the context of implementing the judge's decision is also difficult to realize if the judge only bases his decision on the PKDRT Law. From the explanation above, the problems that arise in the writing of this law are: What is the role of legal politics in an effort to realize substantive justice in aligning sanctions according to the PKDRT Law with the objectives of the PKDRT Law?

2. METHODOLOGY/ MATERIALS

Methodology in legal research can be divided into three, namely: 1. Normative Legal Research; 2. Empirical Legal Research; and 3. Socio-Legal Research. The preparation of this paper uses both socio-legal legal research methods by analyzing statutory rules and norms related to the topic of writing. In addition, several approaches used in writing this article are: the statute approach and the conceptual approach.[2]

3. RESULTS AND DISCUSSIONS

In the book *Building Legal Politics Upholding the Constitution*, Mahfud explains that legal politics that directs efforts to improve legal materials with good and strict formats and instruments is not in line with the reality of law enforcement in the judiciary.[3] So, the problem in national legal politics does not lie in the direction of the material but lies in its enforcement by the apparatus. Mahfud's opinion further emphasizes that to apply every law (law), no formal form is needed but it is enough with the values of justice and benefits that exist in society. The values that live in society must be the substance of the formal law of the state. The problem of how to incorporate these values into the formal law of the state is through what is known as legal politics. So in this context, massive awareness is needed for the community to be actively involved in fighting for the values of justice in society so that they become the spirit and soul of the values of justice in the formal law of the state.

Understanding the law is a tangible manifestation of understanding the law. There are 3 aspects of legal politics in a law, namely philosophy, theory, and normative. [4]

2. Meaning and Positioning of Legal Politics in Legislation from the Philosophy aspect:

Ontology: the essence of laws and regulations is a political product of the authorities, which is intended to regulate certain things so as to realize justice, certainty, and benefit for the community.

Epistemology: Legislation is a concrete law and directly binding.

Axiology: the product of legislation has the aim of creating an orderly society and to ensure fair legal certainty.

3. Meaning and Positioning of Legal Politics in Legislation from the Theory aspect:

Legislation must be able to explore the values of justice as a source of law in ensuring fair legal certainty.

If it is associated with laws and regulations, legislation is a political product of the state authorities. So that in the legislation, legal politics has a very basic *meaning* that will determine the direction of the enactment of a law product. In *positioning*, the product of legislation is a guideline, procedure for acting, behaving, regarding a certain matter that it regulates. This particular thing is a limiting meaning so that the laws and regulations do not regulate things beyond what is desired by the regulation. *Meaning* in laws and regulations that limit the authority of a statutory product provides a concrete definition of everything it regulates (eg sanctions, implementation procedures, authority

of related bodies or institutions, validity period, etc.). Normative in laws and regulations can be seen from obedience and adherence to principles. Principles are the basis and guidelines that will provide value for a legal product.

Scope:

1. State policy (official) regarding the law that will be enforced or not enforced in achieving state goals.
2. Political, economic, social, cultural background for the birth of legal products (law as a political product).
3. Empirical law enforcement.

As a political product, laws and regulations are interrelated laws and provide a causal relationship. The following is the interdependence of legal politics in theory: Law is the determinant of politics, namely political activities are regulated by and must be subject to law (rule of law). Political determinants of law, namely the crystallization of political will to interact and compete with each other. Politics and law as a sub-system of society, which is balanced on the one hand, law is a political product, once there is law, all political activities are subject to law. [5]

4. Meaning and Positioning of Legal Politics in Legislation from the Normative Aspect:

Legislation is a guarantee of justice and legal certainty to provide benefits to the community. According to Satjipto Raharjo: legal politics as an activity of choosing and the method to be used to achieve a social goal with certain laws in society whose scope includes:

1. What are the goals to be achieved through the existing system.
2. What methods and which ones are considered the best to be used in achieving these goals.
3. When and in what manner the law needs to be changed.
4. Can a standard and established pattern be formulated to assist in deciding the process of selecting goals and ways to achieve these goals properly?

Fair legal certainty in laws and regulations is not only seen from the perspective of positive law which regulates the procedures for its implementation, but also must and must contain the right and correct legal basis and reasons (*phenomenon*). Fair legal certainty in laws and regulations must also be seen from the perspective of the

values of justice and truth that exist and live in society (*nomena*). Laws and regulations in a theoretical perspective are laws that describe their behavior. [6] Which behavior is not only understood by the substance itself, but also must be understood by the community. Legislation as behavior, the substance of which must contain the overall ascriptive values of law enforcement which manifests into its integrity. Legislation as a reflection of behavior must and must be an open guideline for the way of life of its people.

Related to the problems in this paper, the value that lives in society related to the household is a sacred bond that is personal, so that each household has a " *veto right* " to make rules, solve problems, and run the household. However, when there is an act in the household that results in a victim and a violation of the rules made by the state, the state law must enter into the scope of the household's privacy. In the PKDRT Law, it has been rigidly explained that every action in the household that is considered a criminal act, and causes the perpetrator to be obedient and subject to state law.

3.1. Legal Politics in Criminal Acts of Domestic Violence According to the Model of the Criminal Justice System.

Sociologically, the household is defined as a small entity that is not independent, but in the modern context the household is a small independent entity. At the traditional level, a household is a small entity that is highly dependent on the local social and cultural system. So that the values and interactions are also very much determined by the values and interactions in the community. The pattern of husband and wife relationships with children must also be seen from a broader perspective, namely relatives, relatives and society. Appropriateness and propriety become the domain of the social system, no longer the domain of the household consisting of husband and wife and children. But it becomes the domain of relatives, relatives, the community where the family lives. In the sense of harmony or not a household must be measured from the social system in which the household lives. But modernly, the household has become an independent entity that is inappropriate and inappropriate to be determined only by the members of the household itself. So that if there is a dispute in the modern family, it is completely left to the members of the household with the formal legal framework of the State. But in the traditional household, all disputes must be resolved by all relatives and relatives, and state law is not allowed to interfere in matters that are considered their private and domestic affairs.

1. FAMILY MODELS

In extensive areas of private law, namely in the law of obligations, endeavours to comprehensively harmonize and unify different legal systems were already commenced in the second half of the twentieth century. However, family law has only followed suit in very recent times. This Model Family Code aims at contributing to future discussion on the harmonization, and hopefully even unification of family law. The Model Family Code has attempted to address all aspects of Partnerships and of Parents and Children, which constitute the core areas of any family law. It is elaborated from a global, rather than a European perspective. In many cases, it was explicitly inspired by solutions offered under Canadian, Australian, and New Zealand legal systems. Furthermore, it goes beyond the common core of the solutions found in domestic laws in search of the best solution, and removes all discrepancies existing in these laws due to somewhat patchwork development, thereby creating a wholly autonomous and consistent system of family law based on modern solutions. The Model Family Code offers a mere framework for discussion, a "skeleton" that enables different family policies and realities, as well as cultural systems and values, to be incorporated. It expressly seeks to utilise new terminology, thereby consciously departing from the myriad of national legal terms, which are burdened with historical connotations in the respective countries.[7]

The model of dispute resolution that is settled by family and relatives themselves which has been applied for generations by the people in Indonesia, was seen by John Griffith as a judicial model with the name *Family Model*. In this family model, the basic principle is that the social system of society in a country is equated with the family system. Every problem that arises in the society of the State must be resolved by using the basic values that live and develop in that society. In the context of domestic violence crimes, according to this model the solution does not always use the formal state law with a judicial system made by the state, which always ends up right and wrong, and the sanctions are in the form of corporal punishment. According to this family model, a dispute resolution system that always aims to find wrong and right will be far from the principle of *restorative justice*. [8]. In such a settlement process, the focus is not on finding out who is wrong and who is right, but rather on the goal of reuniting the different views that are the cause of domestic violence. Violence is seen as a result that should not be repeated, with an emphasis on resolving the causes of disputes between perpetrators and victims. The family justice system model proposed by John Griffith is very suitable to be applied in criminal acts of domestic violence. Because the basic values are very in line with the basic values of maintaining the integrity of a household, while preventing the causes and effects of psychological violence in the household.

4. CRIME CONTROL MODEL.

This justice system model focuses on a judicial model that aims to prevent crime. Intended as a model that can prevent crime, of course in this model it prioritizes results over process. In the sense that the process is carried out in an informal way while still based on the applicable laws and regulations. The main objective of this judicial model is to achieve substantial justice. [4]

According to Bibas [9], crime-control model is based on the need to convict the guilty and do so accurately without delay, and at the same breath ensure efficiency. Law enforcers have a duty to avoid to be seen going against the law, since they too cannot escape scrutiny from the legal representatives of the victims. It is aimed at reducing incidence of crime within the society without considering or curtailing accused individual's rights. It increases the prosecutorial powers of law enforcement agencies and believes that crime can be reduced by arresting and punishing the offender. Jaishankar explains the crime control model as the suppression of criminal activities without any delays, it allows for extrajudicial processes so long as the offender is convicted. In this model, societal comfort overrides individual rights and, therefore, the government is obliged to do anything to protect the society. The failure of the law enforcement agencies to eliminate the occurrence of criminal conducts is viewed as a lapse in public order and deterioration in human freedom. [10] In order for the crime –control model to achieve its intentions, efficiency must be paramount within the criminal justice system. The system should have the capacity to apprehend, try, convict and dispose of criminal of offenders. Unlike the due process model, the crime control model is swift, since it works prior to an actual crime;[11] the government's burden of proof is minimal compared to other models. [12]

This judicial model uses the following assumptions:

1. Legality (not ex post facto law).

The principle used in the *crime control model of the justice system* is based on the principle of legality. The principle which always emphasizes the principle that an act can only be punished if it has been explicitly stated in the legislation as an act that can be punished. This model of the judicial system strongly opposes the principle of retroactive law (*not ex post facto law*), because it is contrary to legal certainty.

2. The powers of law enforcement officers are limited.

The next basic assumption in the *crime control model* is that the authority of law enforcement officials is limited. In the sense of law enforcement in enforcing law and

justice against material acts of criminal acts of psychological violence in the household, it is very limited by the prescribed law.

3. Perpetrators are subjects who must be protected and are entitled to an honest and fair trial.

The last basic assumption in the *crime control model* is that the perpetrator is a subject who is protected and is subject to an honest and fair trial. This *crime control* justice model places the perpetrator as a subject and not as an object, therefore any action that is deemed to be able to influence the perpetrator in providing information in the trial process cannot be justified. Perpetrators are given their rights, for example, have the right to get a defender, communicate with their families, practice worship according to their religion, exercise their civil rights and so on. By continuing to protect and guarantee the rights of the perpetrators during the judicial process, the judicial process carried out is truly honest and fair or impartial. In fact, the granting and guarantee of the rights of the perpetrators is a form of justice carried out in an honest and fair manner.

5. DUE PROCESS MODELS.

The *Due Process Model* is very different and inversely proportional to the *crime control model* as stated above. If the *crime control model* aims to prevent crime, the *Due Process Model* focuses more on eradicating crime. The *crime control model* requires law enforcers to be proactive in carrying out their functions as stipulated in the laws and regulations. Meanwhile, the *Due Process Model* which aims to eradicate crime puts law enforcers in a passive position and waits for a new crime to occur to carry out their functions in accordance with what is specified in the legislation. Thus, the underlying values and characteristics built between the *Crime control model* and the *Due Process Model* are fundamentally different.

Underlying Values:

1. Refuse the *informal fact finding process* to determine *factual guilt*, because of the *human error factor*. The perpetrator will only be brought to a fair court if he has received full rights to a defense.
2. Emphasis on prevention (*preventive measure*).

Due Process Model in principle emphasizes crime prevention through a formal process carried out in every judicial process. Because all judicial processes are carried out formally and can be seen transparently, making the perpetrators known and known

to the public. With the perpetrators known to the public, it is hoped that all parties will participate in monitoring and limiting the actors in the social system where the perpetrators live. Thus the perpetrator becomes ashamed and deterred from committing another crime. In addition, this formal and open process can prevent other potential perpetrators from committing crimes.

3. The judicial process is *coercive* (suppressing), *restricting* (limiting), *demeaning* (*demeaning*).

In this *Due Process Model*, the judicial process is carried out by suppressing, limiting and degrading the dignity of the perpetrator if it is not carried out in accordance with the procedural provisions stipulated in the applicable laws and regulations (*due process*). In principle, the judicial process, whatever the reason and form, always contains emphasis, restrictions and degrading the dignity of the perpetrators of crimes. This *Due Process Model* tries to reduce the impact of suppressing, limiting and degrading the perpetrators of crimes committed on the basis of procedures that have been established by the applicable laws and regulations. This is to remember that there should be no human error in law enforcement and the mistakes of the perpetrators who must be held accountable for their actions (*human error*). *The Due Process Model* in the context of the judicial process for the criminal act of psychological violence in the household is also intended to avoid suppression of the perpetrator, victim and other family members, limiting the rights of the perpetrator, victim and other family members, as well as degrading the dignity of the perpetrator, victims and other family members.

However, the judicial process which emphasizes the formality in this *Due Process Model* actually emphasizes the emphasis, limitation and degrading of the dignity of the perpetrators, victims and other family members. So this *Due Process Model* should not be appropriate to be applied in preventing criminal acts of psychological violence in the household.

2. Anti-power with the doctrine of *legal guilt*.

Due Process Model is built on the basis of being anti-power that uses the doctrine that all mistakes must be measured from the point of view of the formal law of the State. *Due Process This model* prioritizes procedural law rather than substantive law. The formal legal process will determine the outcome of a fair or unfair judicial process. So that if this model is applied in the criminal justice process for domestic violence, it is relatively inaccurate. Because the formal legal procedure is the main thing, not in the outcome meeting justice or benefits. Meanwhile, in the case of domestic violence, it

does not completely require formal legal procedures as safe the basic concept of the *Due Process Model*. Without resolving the causes of criminal acts of domestic violence, it is definitely difficult to overcome the consequences of psychological violence in the household. Formal legal procedures do not guarantee the achievement of fair results and benefits.

3. *Equality before the law.*

The law is applied equally and fairly. No one is above the law. **Equality before the law** means that all human beings have the right to be treated equally before the law. They are also entitled to the equal protection of the law, which means all people have the right to be treated **fairly** and not be discriminated against because of their race, colour, gender, language, religion, political beliefs, status or any other unlawful reason. This concept was outlined by Professor A.V. Dicey who described the rule of law.

- i. It means . . . the **absolute supremacy or predominance of regular law** as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may be punished for a breach of law, but he can be punished for nothing else.
- ii. It means **equality before the law**, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this case excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts.
- iii. With us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; . . . the principles of private law have . . . by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land.[13]

The **due process model** focuses on having a just and fair criminal justice system for all and a system that does not infringe upon constitutional rights. Further, this model would argue that the system should be more like an 'obstacle course,' rather than an 'assembly line.' The protection of individual rights and freedoms is of utmost importance and has often be aligned more with a liberal perspective.[14]

In *Due Process Model*, This model applies the principle of equality before the law, in the sense that the judicial process carried out always emphasizes the treatment of each stage of the judicial process equally and equally for perpetrators, victims, regardless of socio-economic background, traditional culture, ethnicity, religion, and race. Equal treatment before the law in this *Due Process Model* also emphasizes the process of finding and determining the evidence that is the basis for deciding the perpetrator's guilt, must be carried out based on the applicable formal legal provisions.

6. CONCLUSION AND RECOMMENDATION

True law is often limited in formal laws made by the State. Order and order can only be seen and measured from the existing formal legal substance of the State. State law is often unable to accommodate the values of justice and alternative truths that live and thrive in society. Alternative understandings of law and justice are still being contested between those in the state's formal law and existing and developing laws and justice in society. In this condition, legal politics is needed to be able to harmonize the essence of justice according to the law (written law) with the value of justice desired by the community. The mindset of the State still places order and order from the perspective of its interests and therefore the formal law of the State must be the only law that legitimizes all behavior of order and order in society. The rational logic of the state places itself on the absolutes of order and justice. Such formalistic legalistic understanding then gives birth to the complexity and irregularity of the life of the nation and state correctly. Legal Politics provides a solution within the household scope through Alternative Evidence for Criminal Acts of Domestic Violence according to the Criminal Justice System Model. Through this model, it is hoped that the judge can explore and find evidence of the violence experienced by the victim. So that although psychological violence often does not leave a mark, it is possible for judges to reveal the truth through a model of evidence according to the existing judicial system.

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