

Marital Rape in Indonesian Criminal Law Perspective

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Abstract

At the initial phase of the regulation setting, the potential ineffectiveness of Law Number 23 Year 2004 (The Elimination Of Domestic Act) has been indicated prior to the enactment of the related law as there was an emergence of pros and cons toward the criminalization of rape in marriage. The debate on rape in marriage involves at least two different views that are opposed each other. First, the view that rejects the criminalization of marital rape. The view derives from the basic assumption that the marriage rape enactment in criminal law will against the religious and cultural values. This view assumes that sexual intercourse is understood as an obligation of a wife in serving her husband. Second, the view that supports the marital rape enactment in criminal law as criminal offense. The view argues that no one including the husband is allowed to impose his will on others, especially toward his wife. Every individual is equal before the law.

Keywords: Reconstruction, Marital Rape, Certainty of Law

1. Introduction

It has been more than a decade that the Law Number 23 Year 2004 on the Elimination of Domestic Violence is being enacted, here in after in this journal refers to The Elimination Of Domestic Act. Article 1 section 1 constructs the domestic violence as any act against certain party, especially women, which results in suffering or misery in the form of physical, sexual, psychological and/or household negligence including any threat to commit act, coercion, or illegal deprivation of liberty in the scope of household. The statutory requirement of Article 1 section 1 of The Elimination Of Domestic Act has given an opportunity for the criminalization of what is now referred to marital rape. However, the law does not explicitly set the regulation on marital rape.

Later criminalization sphere toward marital rape has been reinforced by the emergence of provision of Article 5, Article 8, Article 46 and Article 53 of The Elimination Of Domestic Act. The provision in aforementioned articles strictly states:

Article 5

Every individual is prohibited from engaging in domestic violence toward any other party in their household, by means of:

- a. physical violence;
- b. psychological violence;
- c. sexual violence; or
- d. household neglect.

Article 8

Sexual abuse as mentioned in Article 5 point c includes:

- a. any sexual assault against any individual living in the house;
- b. any sexual assault against any member of the household sphere for commercial purpose and/or other purposes.

Article 46

Any individual that commit sexual assault as mentioned in article 8 point a shall be punished with imprisonment of twelve (12) years or fine of not more than Rp. 36.0000.000, - (thirty-six millions rupiah).

Article 53

The above sexual assault as mentioned in Article 46 conducted by the husband to his wife or vice versa is considered as complaint offense.

However, it has been more than a decade since the enactment of The Elimination Of Domestic Act that its effectiveness on marital rape is not clearly visible. Originally, the ineffectiveness of potential of The Elimination Of Domestic Act as the marital rape preventive instrument has been indicated prior to the law enactment by the emergence of pros and cons toward the criminalization of marital rape. The argument on marital rape includes at least two opposite views. (Muladi 1993). **First**, the view that rejects the criminalization of marital rape. The view derives from the basic assumption that the marital rape enactment in criminal law will against the religious and cultural values. This view assumes that sexual intercourse is understood as an obligation of a wife in serving her husband. **Second**, the view that supports the marital rape enactment in criminal law as criminal offense. The view argues that no one including the husband is allowed to impose his will on others, especially towards his wife. Every individual is equal before the law.

2. Method

2.1 Research Approach

This research was conducted by means of qualitative approach. It was conducted basically to find out the proper knowledge in answering and/or to solve a certain issue (Soetandyo Wignjosoebroto 2007, Suteki 2010), therefore it requires a certain paradigm, point of view, values, methods, basic principles or problem solving that are employed by certain scholar society at a certain period of time. The research took its base on basic assumption derived from post-positivism paradigm where values, ethic and moral choice are within the discussion. The secondary data of this research was presented systematically to be further analyzed in descriptive analysis by employing deductive logic. (Suteki 2010)

2.2 Theoretical Framework

The term *marital rape* – which refers to rape that occurs within marriage according to Indonesian definition— is, in English term, is a combination of the word *marital* which means “any items related to marriage” and the word *rape* which means “the conduct of sexual assault” (John M. Echols and Hassan Shadily, 1993). Therefore in a simple explanation, *marital rape* is defined as any sexual assault occurs within the marriage. The term of marital rape itself is a new discourse in the Indonesian criminal law. The Indonesian criminal law— especially those left from the Dutch colonization – only convicted statutory rape and rape outside of marriage as explicitly addressed in Article 285 of Indonesian Criminal Law. The term of marital rape has emerged in line with the need of human right post reformation era, especially on the area of gender equality between men and women.

There are several terms in English referring to sexual assault occurs within the marriage, they are **marital rape, spousal rape, or rape in marriage**. Marital rape is a non-*consensual* sex in which the perpetrator is the victim's spouse. It is a form of partner rape, of *domestic violence* and of *sexual abuse*. Referring to this concept, the marital rape is described as any sexual intercourse occurs without any consensus or approval in which its victim is their legal partner in the marriage (wife/husband). Marital rape is a rape conducted by the spouse him/herself as a form of domestic violence in particular and a form of sexual assault in general.

In conceptual base, there are various limitation and definition of rape in marriage. According to Bergen for example, he provides limitation on marital rape as any sexual activity through vaginal, oral as well as anal by force, threat or when the spouse is under unconscious condition (Milda Marlia 2007). While Farkha Ciciek provides limitation on marital rape as a force of sexual intercourse sexual preference and desire disregarding the wife's satisfaction (Ibid). Based on the aforementioned limitation it can be inferred that marital rape can occur in different types of sexual activity. Based on the given limitation, it can be drawn an understanding that marital rape is not merely a sexual activity through vaginal penetration but also oral and anal which hold on the similar base that it occurs by force, threat or without the spouse's consent.

Referring to the above limitation, the marital rape is sexual activity occurs within the legal marriage between the husband and wife. Rape within marriage is considered as a result of misconception of husband and wife relation within the marriage. In Indonesian society context— which embraces the matriarchal system— it is generally inferred that the husband and wife sexual relation within marriage means the fulfillment of the husband's rights and the submission of wife's duty toward her husband. Such understanding indicates that the wife must subject to her husband sexual needs even without her consent. This fact often puts the wife in a very weak position in the sexual relationship context within the marriage despite the circumstance of which the wife forces her husband to fulfil her sexual desire. This means that the marital rape can occur when there is a sexual intercourse between the husband and wife within a marriage without the spouse's consent. According to Andi Darmawan, in general it can be understood that in marital rape (Ibid, page 11) it is the wife that mostly experience the sexual violence and assaulted by her husband.

3. Result and Discussion

3.1 Marital Rape Construction According To The Elimination Of Domestic Act In Implementing The Principle Of Legal Certainty

To recognize the pursuant of marital rape construction in The Elimination Of Domestic Act in implementing the principle of legal certainty, there is a need to put forward the principles of legal certainty. However, prior to any further discussion it should be noted that this study sees that the legal value of a certain law cannot be merely based on its legal certainty. Setting of legal certainty as the value of a particular law is another way of preceding the law certainty in applying the law. Nevertheless, this study does not reject the legal certainty as an important value in law. This study proves that legal certainty is merely one of the important values in law despite the other two which are justice and merit. With these three most important values, there is one mutual understanding that under any pressure, the first priority goes to justice instead of legal certainty.

This view truly indicates that legal certainty is indeed an important part of law yet is not the main value, therefore its role in law enforcement is considered mandatory. Given the diversity of views related to the certainty of legal principle, the marital rape in The Elimination Of Domestic Act will employ legal principle as

one of the measurement tools as mentioned before. Jan Michiel Otto – as quoted by Sidharta— stated that the legal certainty is strongly associated with the possibility in which:

- a. There are clear, consistent and accessible rules, issued and acknowledged by the state authority;
- b. There are authorized agencies that implement and subject to the related laws consistently;
- c. Principally, the citizens are adjusting their awareness towards the regulations;
- d. The independent judges (of the court) apply the regulation consistently during the resolution of any legal dispute; and
- e. The judicial verdicts are implemented in concrete.

The study would analyze the marital rape construction in fulfilling the legal certainty aspects according to The Elimination Of Domestic Act. The following is a citation on the construction of marital rape according to The Elimination Of Domestic Act. It is clearly stated according to Article 8 The Elimination Of Domestic Act that sexual assault is constructed as a form of sexual harassment. The harassment stated above refers to any sexual assault among the household members— husband/wife or child/children— or sexual assault by one of the household members towards the other party. The sexual imposition among household members— that is between the husband toward his wife or the contrary, the wife toward her husband— is what has been classified as the *marital rape*. Thus, according to Law The Elimination Of Domestic Act, marital rape is constructed as any sexual imposition between husband/wife towards wife/husband that is not explicitly formulated.

There is actually no demand on legal certainty for the construction of marital rape according to The Elimination Of Domestic Act. Marital rape construction according to The Elimination Of Domestic Act does not clearly imply the rape within marriage but as a general sexual assault among people that reside in the household and the occurrence of sexual imposition by one of the members against other people. The imposition of sexual relation among people within the household itself has a broad coverage definition for it may occur between husband and wife, children and relatives – by blood, by marriage, and/or guardianship— with the husband/wife and children.

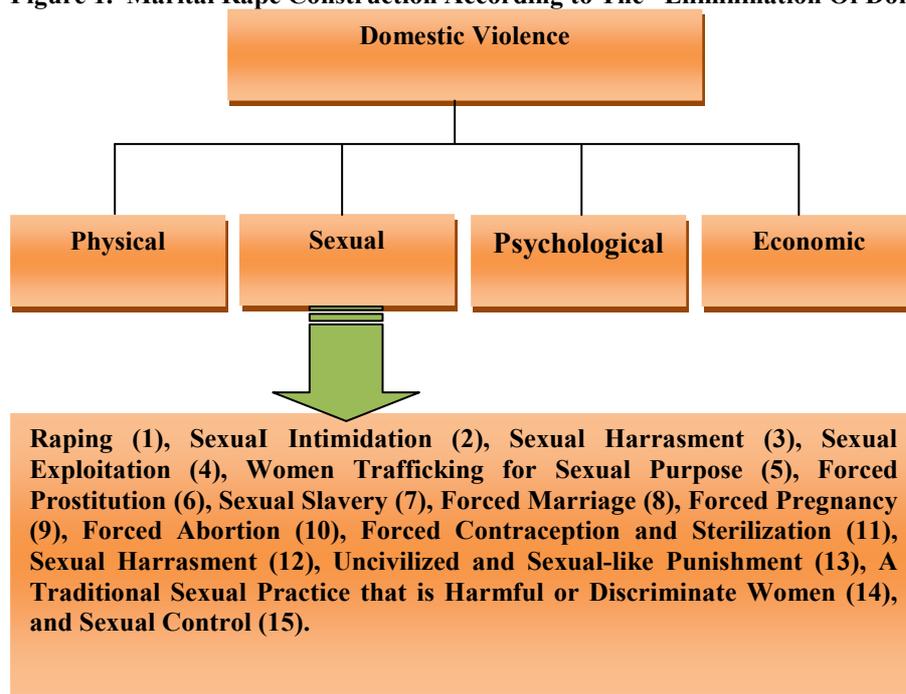
The absence of clear construction on rape within marriage has a huge range of implication. Such construction provides an inconsistency of law application by the law enforcement agencies. Nevertheless, the absence of legal certainty creates some difficulties to the society in implementing it. Therefore, it provides wider opportunity in having law violation. Despite the fact that law clarity does not guarantee the presence of legal certainty, yet it will be the guideline for the society in determining its behavior. Legal norms have become the society reference in determining its actions.

3.2 The Weakness of Juridical Construction of Marital Rape According to the Law Number 23 Year 2004 in Establishing the Legal Certainty

Based on provision of Article 8 The Elimination Of Domestic Act it is clearly set that there is no explicit formula on *marital rape* except that it is implicitly cited as a part of sexual assault which basically is included in the domestic violence. Thus, the fundamental weakness of the marital rape construction based on The Elimination Of Domestic Act is the absence of its formulation as a criminal conduct.

This type of construction has great potential in emerging various issues in its implementation which is due to the regulation in The Elimination Of Domestic Act on sexual assault that has a very wide definition including the occurrence of rape within marriage. The sexual assault itself can be described as various sexual harassment as described on the chart 1 below.

Figure 1. Marital Rape Construction According to The Elimination Of Domestic Act



3.3 The Ideal Construction of Marital Rape That Embodies The Legal Certainty

By noting various tendencies—nationally, regionally and globally— on one hand and the increasing demand between man and woman’s equality rights on the other hand as a reflection of the Pancasila ideology, it is considered important to have the marital rape reconstructed under the Indonesian Criminal Code. As stated previously, it is clearly identified that one of the weaknesses in the provision 8 of The Elimination Of Domestic Act on marital rape is the absence of marital rape construction. Marital rape is not explicitly formulated on the The Elimination Of Domestic Act, instead it is merely implicitly stated as a part of sexual assault within the area of domestic violence.

Therefore, it is considered significantly important to reconstruct the provision on the Article 8 of The Elimination Of Domestic Act on the marital rape as an attempt to clarify its application. The provision of Article 8 of the The Elimination Of Domestic Act on marital rape is proposed to be reconstructed as follow:
Article X

- (1) A legally married (husband and wife) couple is prohibited to conduct:
 - a. Any sexual intercourse through vaginal, oral and/or rectal under force, threat, or without any consent of the related spouse (wife/husband).
 - b. Any forced intercourse or sexual preference without considering the spouse’s intention.
 - c. Insertion of any object apart from its body parts into the woman’s vagina and/or anus.

4. Conclusion

Based on the aforementioned explanation and description, there are some drawn conclusion:

- a. There is an unclear juridical construction on marital rape according to The Elimination Of Domestic Act. The only formulation on marital rape is done implicitly so it might result in potential issues for its implementation.
- b. The fundamental weakness of marital rape construction based on The Elimination Of Domestic Act is the absence of a sole formulation on marital rape as criminal act.
- c. The ideal construction of marital rape proposed in this study is by formulating the marital rape as a sole criminal act apart from the construction of sexual abuse.

5. Suggestion

- a. There is a need of rules construction on marital rape based on The Elimination Of Domestic Act.
- b. Given the increasing trend of marital rape in the society, it needs to be formulated apart from the sexual abuse.

References

- [1] M. Ecohols, John and Hassan Shadily. (1993), *Kamus Inggris-Indonesia*, Gramedia Pustaka Utama, Jakarta, 373.
- [2] Marlia, Milda. (2007), *Marital Rape Kekerasan Seksual terhadap Istri*, Pustaka Pesantren, Sewon Bantul, Yogyakarta, 11, 12.
- [3] Muladi, *Perumusan Tindak Pidana Kesusilaan (Perzinaan dan Pemerksaan) dalam Rancangan KUHP Baru Ditinjau dari Aspek Kebijakan Kriminal dan Aspek Sosial Budaya*, the paper was presented in one-day seminar about the Review toward the new KUHP design particularly on Moralty, Faculty of Law of Soegijapranata Catholic University, Semarang, February 20, 1993, 3-4.
- [4] Satori, Djam'an and Aan Komariah. (2009), *Metodologi Penelitian Kualitatif*, Alfabeta, Bandung, 103.
- [5] Suriasumantri, Jujun S. (2009), *Filsafat Ilmu sebuah Pengantar Populer*, Pustaka Sinar Harapan, Jakarta, 103.
- [6] Suteki, *Urgensi Tradisi Penelitian dalam Proses Penelitian Ilmiah*, the paper was presented in the National Seminar themed "Metodologi Penelitian dalam Ilmu Hukum (Perspektif Filosofis, Normatif dan Sosiologis-Empiris" at Law Faculty of UNDIP Semarang on December 16, 2010, 1, 3.
- [7] Wignjosoebroto, Soetandyo. (2007), *Disertasi sebuah Pedoman Ringkas tentang Tatacara Penulisan*, Sociology Laboratory of the Faculty of Social and Political Sciences of Airlangga University, Surabaya, 65.
- [8] ----- (2002), *Hukum: Paradigma, Metode, dan Masalahnya*, the Institute for Policy Research and Advocacy (ELSAM), Jakarta, 1.
- [9] The Law Number 23 Year 2004 of The Elimination of Domestic Act.
- [10] http://en.wikipedia.org/wiki/Marital_rape, accessed on Tuesday, June 9, 2014 at 11.25 am

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