

WOMEN AND FAMILY: LAW PERSPECTIVE

Oleh:

Hanafi Arief
hanafi_arief@yahoo.com

Fakultas Hukum Universitas Islam Kalimantan
Muhammad Arsyad Al Banjari Banjarmasin



Presented in “ADRI 17th International Conference, Theme “Marine and Environmental Conversation” Sub Theme “Education Development / Humanities, Environmental / Language and Literature Learning /Law, Technology and Arts Development / Science and ICT Contribution Through Language Development” held on 23 – 24 April 2018, The Joint: Muhammadiyah University of North Maluku and The Council ADRI of North Maluku, Ternate North Maluku, Indonesia.

**BANJARMASIN
2018**

WOMEN AND FAMILY: LAW PERSPECTIVE

Hanafi Arief

Hanafi_arief@yahoo.com

Fakultas Hukum, Universitas Islam Kalimantan
Muhammad Arsyad Al-Banjari Banjarmasin

Abstract

The United Nations (UN) has issued a Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Many countries including Indonesia have ratified the convention, and therefore Indonesia is responsible for ensuring that the country's basic law and the establishment of legislation in the country are in line with guidelines established by CEDAW. Article 5 CEDAW affirms the importance of law reform and the need for a country's government to take serious steps to deal with prejudices and stereotypes affecting the role of women and men, based on the positive or negative aspects of each sex. Equality needs to be clear and exist in the laws and realities of life in a country.

The woman as the mother in the family has a very important role because she is the housekeeper and in hand she lies the success of a family. In addition to taking care of the household, she sometimes has to work outside to support the family's life. Due to this dual role, it often becomes the trigger why she is not maximally taking care of family affairs. As a result she often receives unfair treatment; treated roughly, considered low, small, weak, and so forth. Attitudes that view women as inferior to this male cause many women, especially the educated want to clarify the real position of women in a family. The issue of this woman can no longer be regarded as an insignificant marginal issue. Therefore this issue should be concrete and become the focus of the attention of the nation and state. Women's rights are the women's struggles around the world in general and in Indonesia in particular. Women's rights such as freedom, dignity and equality are often violated both by applicable law and by traditional provisions that apply to women.

This study aims to describe the status of women in the family and their rights in the perspective of Indonesian law and regulations and how the protection provided by law. This study is juridical normative, and prescriptive, with the approach of legislations, and the analysis is descriptive qualitative. The sources of law study are the basic rules, regulations, and international conventions which have binding force legally. The used legal materials are primary, secondary, and tertiary.

Keywords: *Women, Family, Legal Perspective*

INTRODUCTION

Marriage is a covenant. Marital agreements made by two prospective husband wife before their marriage.¹ And therefore the marriage gives rise to rights and obligations of each party; the husband and wife. Article 1, paragraph 1 of the Indonesian Marriage Law 1/1974 states, marriage is a bond between a man's inner physically with a woman as husband and wife with the aim of forming a family are happy and remain upon the One True God. Thus, the husband and the wife need to help each other and complete, so that each can develop nature in helping and achieving well-being spiritually and materially.

In accordance to the Indonesia Marriage Law 1/ 1974, rights and the position of the wife are consistent with the rights and position of the husband in household and social life together in society.² As stated, that the husband is the head of the family and the wife is a mother in the home.³ Set out anyway that husband and wife have compulsory to love each other, respect, loyalty and provide assistance to each other physically and psychologically.⁴

DISCUSSION

Preventing and protecting women from discrimination in the family has long been the attention of International Rights Bodies. In 1994 the International Conference on population and development in Kaherh specifically noted the need to eliminate discrimination, sexual harassment and violence against women through legislative drafting specific. In 1967 the United Nations (UN) has issued

¹R. Soetojo Prawirohamidjojo & Marthalena Pohan, 2008, *Hukum Orang dan Keluarga*, Surabaya: Airlangga University Press, p. 74.

² Section 31 (1) Marriage Law 1/1974

³ Section 31 (3).

⁴ Section 33

a Declaration on the Elimination of Discrimination against Women. The Declaration took rights and thus the women based on equality of rights with men and made efforts to guarantee requiring the potential of such declaration. Based on the declaration of the Commission, The UN on women position organized plan of convention on the Elimination of All Forms of Discrimination against Women. On December 18, 1979, The Council of the UN complied the convention. Each country has a different form of protection to victims of crime. So did the procedures in implementing protection are also different.

The Indonesia Constitution of Indonesia 1945 stated that, each person is eligible for recognition, security, protection, legal certainty and fair and equal treatment before the law.⁵ This section includes an assertion and assurance given to citizens of Indonesia to protection, equal and fair treatment before the law. This section also points out that the protection, equal and fair treatment are fundamental rights of the citizens of Indonesia. Therefore, no one can prevent citizens to protection and the behavior. Meanwhile it is described in turn to uphold and protect human rights in accordance with the law of that country, then the implementation of human rights is guaranteed, arranged, and poured in regulations.⁶ This section is pointed out that the basic rights of the citizens of Indonesia should be protected and given warranty and made in the form of regulations. It is intended to get a certainty and easily enforced.

In 1967, the UN issued a Declaration on the Elimination of Discrimination against Women. The declaration loaded the rights and obligations

⁵Section 28 D, (1) Indonesia Constitution 1945.

⁶Section 28 (5)

of women based on equality of rights with men and took measures to guarantee the implementation of the Declaration. Because the Declaration is not binding, the UN Commission on the position of Women organized plan on CEDAW. On 18 December 1979, the General Council agreed to convene the UN resolution that essentially not contrary to the State Ideology of Indonesia "Pancasila" and the Indonesia Constitution 1945. Therefore, the Indonesian Government in the UN World Conference on women in Copenhagen on 29 July 1980 signed the Convention. On July 24, 1984 the Indonesian Government confirmed the 7/1984 law on CEDAW. This also prompted the Indonesian Government issue a Presidential Decision Number 181 Year 1998 about National Commission of Anti-Violence against women set on 9 October 1998. Section 1 of the decision of the President sets out in the framework of prevention and solves the problem of violence against women as well as the elimination of all forms of violence committed against women, formed the National Commission of Anti-violence against Women.⁷ The commission has the purposes of which are: (a) disseminate a better understanding on all forms of violence against women happening in Indonesia; (b) develop a conducive situation for the Elimination of all forms of violence against women in Indonesia; and (c) enhance prevention and effort to overcome all forms of violence against women and protection of the basic rights of women.⁸ The Commission only a arranges preventive measures against

⁷ The Decision of the President of R.I. 181/1998 on National Commission of Antiviolence against Women, Bandung: Fokus Media, p.79.

⁸Section 1

violence to women victims, but does not strictly prevent the culprit. Thus the commission cannot give maximum protection to the victims.⁹

Laws are rules that are recognized and used by a country to establish justice and peace as well as to organize behavior and habit of humans in a society. One of the purposes of the law is to provide protection for anyone, given by a country through the act. The law is not just a list of rules to be complied with. The law is a tool of social control and can be manipulated for the benefit of specific groups.¹⁰ The law is the network conditions of the behavior of people as members of society, aimed for safety, happiness, and social order.¹¹

Actually Indonesia has some laws and regulations related to the protection of women commonly and in the family specially such as:

Criminal Code

Indonesia has criminal code named *Kitab Undang-Undang Hukum Pidana* (called KUHP). KUHP is the main reference for an evil in Indonesia, although KUHP is deemed unable to provide protection and justice to women in perfect or even a meal plan for which there is less able to provide justice to women victim¹² (violence) as violence summary in KUHP is limited to the scope of physical violence only. That is why other forms of violence occur to women could not be included in the category of acts of violence. While the KUHP actually does not

⁹Laa Jamaa, Hadidjah, 2008, *Hukum Islam dan Undang-undang Anti Kekerasan dalam Rumah Tangga*, Surabaya: Bina Ilmu, p. 28.

¹⁰Noor Aziah Mohd Awal, 2005, *Pengenalan kepada Sistem Perundangan di Malaysia*, Selangor D.E.: Syarikat Percetakan Ihsan, p. 2.

¹¹Maidin Gultum, 2008, *Perlindungan Hukum terhadap Anak*, Bandung: PT Refika Aditama, p. 3.

¹²Neni Utami Adiningsih, 2004, *Penghapusan Keganasan Dalam Rumahtangga*, <http://www.suarapembaruan.com/news> (April 20, 2018).

know the form of violence in the household. Therefore, not all cases of violence in the household could have used about clauses in KUHP. Forms of violence within the household that does not exist in KHUP are such as rape in the household, and the household psychological and economic violence. The KUHP also has not provided sufficient balance for the suffering such as physical or psychological trauma of the violence victims. Further more, the problem of ignorance in the household, it is stated in Chapter XV of leaving persons who need help,¹³ causing severe wounds,¹⁴ death,¹⁵ while the humiliation is attacking the honor or reputation of a person by accusing problems for the public.¹⁶

KUHP is the main criminal law of Indonesia providing for criminal offences involving the husband towards the wife as persecution,¹⁷ although limited to physical abuse only. Offences involve persecution by husband against wife (not his wife against husband) with the heaviest sentence, namely the death penalty in cases of murder intentionally planned in advance.¹⁸ An additional one-third sentence applies to offenders for the persecution to the mother, father, wife, or son.¹⁹

KUHP also provides section involving the husband relinquishing responsibility towards their wives. The same condition applies to those that according to law, are obliged to provide maintenance, treatment and care with the

¹³Section 304

¹⁴Section 306(1)

¹⁵Section 306(2)

¹⁶Section 310, 315

¹⁷Section 351 - 356 KUHP

¹⁸Section 340.

¹⁹Section 356.

sentence up to nine years when resulting in death.²⁰ Likewise about abuse, it is also provided in KUHP with sentence up to nine years,²¹ hold a person improperly resulting in death, with sentence up to twelve years.²² In addition, the humiliation is also part of emotional crimes provided in KUHP with sentence up to nine months or fine at most four thousand five hundred rupiah.²³

Marriage Law 1/1974

Marriage in Indonesia uses two laws namely *Kitab Undang-Undang Hukum Perdata (KUHPerdata* called B.W.) specifically for non muslim citizens and Marriage Law 1/1974 specifically for moslem citizens. B.W regulates for the legal consequences of marriage in book one, although not all of it, because the consequences of another law are also regulated in other parts of B.W., and the others are also regulated in other Laws. The provisions between rights and obligations of husband and wife is contained in article 103 to 118. Among these provisions are followed by sanctions and not followed by sanctions. Rights and obligations of husband and wife can be differed into two parts as a result arising from procreation itself, and the consequences that arise from the powers of the husband.

Meanwhile, beside regulating rights and obligations, Marriage Law 1/1974 also takes rules relating to violence in the household. It is said, to be a husband and wife is obliged to have mutual love, respect, loyalty and physically

²⁰Section 304, 306 (2).

²¹Section 332 (2).

²²Section 333.

²³Section 310 - 321.

and spiritually provide assistance to each other,²⁴ the husband is obliged to protect his wife and provide everything need live homeless ladder fits its ability,²⁵ if a husband or wife neglects his or her duties, each can bring legal action in court,²⁶ for divorce in the cause of one party leaving the others for two years in a row without the consent of the other party and without a legitimate reason or because other things beyond her will,²⁷ either party commits cruelty or mistreatment of weight harm against other parties,²⁸ between husband and wife continually happen dispute and contention and there is no expectation of life pillars again in the household.²⁹

A husband cannot divorce his wife with no plan. Because of that, this law provides for divorce in the because of *taklik* or conditional divorce. The *taklik* divorce happens when the husband recites divorce that depends on the occurrence of such a thing and as soon as the conditions, then the divorce passed.³⁰ In addition, this law also provides for the divorce due to *fasakh* or divorce in the cause of persecution. Both types of divorce can be claimed by the wife.

As stated that there should be enough reasons for divorce, the husband and wife will not be living pillars as husband and wife.³¹ The husband is obliged to protect his wife and give all the needs for survival in accordance with his

²⁴Section 33 Marriage Law 1/1974.

²⁵Section 34 (1)

²⁶Section 34 (3)

²⁷Section 39 (b)

²⁸Section 39 (d)

²⁹Section 39 (f)

³⁰ <http://www.utusan.com.my/utusan/Keluarga/20120808/ke02/Cerai-taklik> (April 20, 2018)

³¹Section 39. *Marriage Law 1/1974*

ability,³² then when a husband or wife defaults in the performance of his or her duties, the parties can file a claim to the Court.³³

Human Right Law 39/1999

The basic rights of women is a fundamental right of one to support the Articles 1 and 2 of the Universal Declaration of Human Rights (UNHR). This declaration was taken by the UN more than 60 years ago after World War II and to show a commitment to uphold high, promote and protect the rights of the individual. This commitment starts from UNO Charter which stressed the confidence of nations internationally on fundamental human rights; that is to highen status and the value of human beings. This declaration at the bottom line is about respect for humanitarian values for each person, because in the verdict it was born as humans. Commitment to uphold and protect the right of every people (women and men) explicitly are stated that all people are born independent and have the same dignity and rights. They were bestowed the common sense and conscience and pleasure mingling with one another in a spirit of brotherhood.³⁴ Statement that this declaration does not allow or reject a discrimination is reflected in article 2: It was stated that every person is entitled to all the rights and freedoms as stated in this statement with no exceptions whatsoever, such as freedom of race, skin color, gender, language, religion, political or other view, national originality or community, birth or other position. Further more, no differential will be held on the basis of political positions, the law or the international position of the country or district from which a person comes from,

³²Section 34 (1).

³³Section 34 (3).

³⁴Section 1, Human Right Law 39/1999

whether he or she was derived from free countries, district guardianship, colony, or which are under the sovereignty of the others,³⁵ political or other national view, or community.³⁶

Indonesia is one of the countries that adopted the Declaration of Human Rights through Law 39/1999. This law provides for the existence of declaration of human rights as a fundamental right that is non-stick and naturally not separated from humans to be protected, respected, and erected to elevate the value of humanities, wellness, happiness, and intelligence and justice.³⁷

This law states that torture is a breach of basic human rights.³⁸ Therefore, each person is recognized as human beings entitled to personal conduct as well as demand and obtain the same protection,³⁹ have the right to live quiet, peaceful, happy, prosperous physically and spiritually,⁴⁰ and have the right to be free from torture, judgment or course of conduct that cruel, inhumane, degrading human dignity and class.⁴¹

Domestic Violence Law 23/2004

As a result of KUHP cannot resolve the cases violent household, the Indonesian Government on the other hand enacted the special law 5/1998 on the Conventions Against Torture and Cruel Judgment, and removing Decision of the President 181/ 1998 on the National Commission of Antiviolence against Women. Then, in 2004 the Government enacted special law on Domestic Violence,

³⁵Section 2.

³⁶Section 2.

³⁷Section 2

³⁸Section 4.

³⁹Section 5

⁴⁰Section 9

⁴¹Section 33.

23/2004 which is the renewal of other laws that favour women. So, this law was created as a supplement to the existing KUHP.

The existence of law 23/ 2004 gives hope for wives towards the attempts to protect themselves. When the law 23/ 2004 is enforced consistently, then the law will help the efforts of protection of women, especially wives of various forms of violence, with some reasons, namely because of: (a) the husbands could not yet do as they are pleased against the victims. This is because the act of violence carried out a husband will no longer be private case, unless being a national and public; (b) the penalties set high; now with only one evidence of the victim's witness plus one valid tool of the crime (evidence of witnesses, evidence of experts, indicator, and evidence of offender) is enough to evidence the offenders of domestic violence.⁴²

CONCLUSION

Indonesia is a very concerned country with human rights in general and women's rights in particular, because Indonesia viewed the women play an important role in the family, community, or country. Since Indonesia independence in 1945 until now, there have been a lot of legal regulations are made with regard to the protection of women, both the protection of themselves as well as their rights. Indonesia also got involved and played active roles in the international meetings as well as events relating to the women empowerment and protection. Indonesia also gave wide space to the community to hold the NGOs (NonGovernment Organizations) to engage in the empowerment and protection of

⁴²Neni Utami Adiningsih, 2004, *Penghapusan Keganasan Dalam Rumah Tangga*, <http://www.suarapembaruan.com/news> (April 20, 2018).

women. Now there have been lot of women commissions run by the community locally and nationally.

LIST OF BIOGRAPHY

Book

Hapriza Ashari, et el, 2005, *Prinsip Undang-undang Malaysia*, Pahang Darul Makmur: PTS Publications & Distributors Sdn. Bhd.

Laa Jamaa, Hadidjah, 2008, *Hukum Islam dan Undang-undang Anti Kekerasan dalam Rumah Tangga*, Surabaya: Bina Ilmu.

Maidin Gultum, 2008, *Perlindungan Hukum terhadap Anak*, Bandung: PT Refika Aditama.

Neni Utami Adiningsih, 2004, *Penghapusan Keganasan Dalam Rumah tangga*, <http://www.suarapembaruan.com/news> (20 April 2018).

Noor Aziah Mohd Awal, 2005, *Pengenalan kepada Sistem Perundangan di Malaysia*, Selangor D.E: Syarikat Percetakan Ihsan.

R. Soetojo Prawirohamidjojo & Marthalena Pohan, 2008, *Hukum Orang dan Keluarga*, Surabaya: Airlangga University Press

Legislation

Undang Undang Dasar Republik Indonesia 1945.

Kitab Undang-undang Hukum Pidana (KUHP)

Undang-Undang Perkawinan Republik Indonesia 1/1974

Undang-Undang Hak Asasi Manusia 39/1999

Keputusan Presiden Republik Indonesia Nomor 181 Tahun 1998 tentang Komisi Nasional Anti Kekerasan Terhadap Perempuan, Bandung: Fokus Media.

Internet

http://www.utusan.com.my/utusan/Keluarga/20120808/ke_02/Cerai-taklik (April 20, 2018)

AUTHOR'S BIOGRAPHY



Drs. H. Hanafi Arief, SH., MH., Ph.D., Law Faculty of Universitas Islam Kalimantan (UNISKA), Banjarmasin, Indonesia. Jl. Adhiyaksa 2, Kayu Tangi, Sungai Miai, Kota Banjarmasin, South Kalimantan, Indonesia.

- Dean of Law Faculty of Universitas Islam Kalimantan (UNISKA).
- Member of Senate, Universitas Islam Kalimantan (UNISKA).
- Supervisor of Legal Aid Institute, Universitas Islam Kalimantan (UNISKA).
- Supervisor of Notary Public, Banjarmasin, Indonesia.
- Head of School Committee of MAN 2 MODEL school, Banjarmasin, Indonesia.