

Potential Criminalization of Beating a Nusyuz Wife in Islamic Law: an Examination of Law No. 23 of 2004 Concerning The Elimination of Domestic Violence

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Abstract

In the case of so much the role of the husband towards his wife, the Shari'a gives legitimacy to husbands to beat nusyuz wives. However, the permissibility of hitting a wife to educate is not explained clearly in the Qur'an, how to beat her or when it is permissible, so that this beating has the potential to be punished according to Law No. 23 Years of Articles 5 and 6 concerning the elimination of Domestic Violence (KDRT). The gap that occurs between the prohibition of domestic violence as regulated in the law and the permissibility of hitting one's wife in Islamic law becomes an ongoing polemic if there is no bright spot for an in-depth discussion that has the potential to criminalize Islamic law. This research uses a normative doctrinal approach. The main data source is secondary data in the form of documents. This research is descriptive in nature which explains in detail the data collection and the current situation. The data collection technique is done by means of literature. The data analysis method of this paper is normatively qualitative, initially identifying through various forms of documents. Next, examine the data obtained from the field and literature by studying the rule of law to generate data and conclusions from the materials obtained by the researcher. From this research, it was found that the hitting procedure that has been put forward by the opinion of the Syafi'i, Hanafi, and Hanbali schools is categorized as a misdemeanor in Article 44 paragraph (4) of the 2004 PKDRT Law, because this procedure of hitting basically causes pain, inflicted by the husband on his wife, and this physical violence does not cause illness or hinder the victim's ability to work, carry out his position, or carry out daily activities. Meanwhile, Imam Malik's opinion requires that the procedure for hitting him should not be painful or cause pain, so that he does not qualify as a crime of physical violence in the PKDRT Law.

I. Introduction

Marriage is one of the sunnah acts of worship prescribed for Muslims. This marriage bond aims to form a Sakinah, mawaddah, waRahmah family¹. Article 1 of Law Number 1 of 1974 states that marriage is a physical and spiritual relationship between a man and a woman as husband and wife with the aim of building a happy family. Meanwhile, in the Compilation of Islamic Law, marriage is a truly strong agreement to obey Allah's provisions and doing so is an act of worship, with the aim of achieving a peaceful domestic life². These two meanings have similarities in their goals, namely that marriage is expected to build happiness and peace in marriage.

In general, every married couple wants to live a happy and harmonious life. However, sometimes expectations do not match reality. Disputes and debates color household life, sometimes even ending in big fights and even violence³. All of this should be resolved maturely and wisely through mutual and open discussion. There are many problems in domestic life, sometimes they seem small and trivial but can result in disharmonious relations between husband and wife, a cause commonly known as nusyuz in Islamic law.

Nusyuz comes from the words nasyaza, yansyuzu, nusyuzan, which give several meanings, including nusyuz which means getting up from one's place or getting up⁴. Etymologically, the word nusyuz means a high place, masdar which is taken from the word Nasyaza, yansyuzu which means something lifted from the Earth. However, if the context is related to the husband and wife relationship, it is interpreted as the wife's attitude of being disobedient, opposing or acting rudely towards her husband⁵. In the fiqh dictionary nusyuz means refusing or being disobedient. If you draw the conclusion from the word nusyuz, it means irtifa' (exalting/exalting) in other words disobedience⁶. In terms of terminology, nusyuz means a wife's disobedience to her husband in carrying out the things that Allah has obliged wives to do to their husbands⁷. According to Handayani, in terms of

¹ Rifqatul Husna, 'Melacak Makna Nusyuz Dalam Al-Qur'an: Analisis Semantik Toshihiko Izutsu', *Jurnal Islam Nusantara*, 5.1 (2021), 131-45.

² Rahmat Ramadhan, 'Analisis Kompilasi Hukum Islam Pasal 84 Tentang Nusyuz Istri Perspektif Mazhab Hanafi Dan Mazhab Syafi'i', *Comparativa*, 2.1, 202.

³ Ahmad Hafid Safrudin, 'Sanksi Pidana Terhadap Suami Dalam Memperlakukan Isteri Saat Nusyuz', *Salmiya*, 1.4 (2020).

⁴ Denny Febriansyah, 'Solusi Islam Bagi Istri Dan Suami Yang Nusyuz Dan Kaitannya Dengan Undang - Undang Kekerasan Dalam Rumah Tangga', *AZ-ZAWAJIR*, 3.1.

⁵ H. Haswir, 'Penyelesaian Kasus Nusyuz Menurut Perspektif Ulama Tafsir', *Al-Fikra : Jurnal Ilmiah Keislaman*, 11.2 (2017), 247.

⁶ Ramadhan.

⁷ Ra'd Kamil Al-Hayali, *Memecahkan Perselisihan Keluarga Menurut Qur'an Dan Sunnah* (Yogyakarta: Mitra Pustaka, 2004).

terminology, nusyuz is an attitude of submission to Allah to obey one's husband⁸. M. Qurais Syihab in his tafsir al-Misbah, explains that nusyuz is disobedience to

the rights and obligations that Allah has given to women/wives.⁹

Forming a sakinah family is a task for both husband and wife. Trying to be a role model, a leader, and being responsible are some of the roles of a husband.

Men have a leadership role over women, with men fulfilling the role of husband and women as wives. The husband's responsibility as a leader is to guide towards piety and avoid actions that will lead to hellfire. This is in line with Allah SWT's command in QS. At-Tahrim verse 6:¹⁰

يَا أَيُّهَا الَّذِينَ آمَنُوا قُوا أَنْفُسَكُمْ وَأَهْلِيكُمْ نَارًا وَقُودُهَا النَّاسُ

"O you who believe! Protect yourself and your family from hellfire..."

One of the obligations of a husband is to protect his wife and family from the punishment of hellfire. As head of the household, the husband is fully responsible for the welfare of his family, including his wife and children.

This great responsibility means that a husband is required to provide an example, examples of speech and advice to his family if a family member makes a mistake¹¹. In fact, because the husband's role in his wife is so great, the Shari'a gives legitimacy to husbands to beat wives who are nusyuz, this is explained in the word of Allah SWT in the QS. An-Nisa verse 38:

أَلْ رِجَالٌ فِيْ وُجُوْهِ النَّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ قُلْ لِلَّهِ الْغَلْبُ وَالْحَقُّ تُخَافُونَ لَشَوْهُمْ فَعَطَّوْهُنَّ وَأَهْجَرُوهُنَّ فِي الْمَضَاجِعِ وَأَضْرِبُوهُنَّ فَإِنْ أَطَعْنَكُمْ فَلَا تَبْغُوا عَلَى يَهُنَّ سَبِيًّا أَلْ إِنَّ اللَّهَ كَانَ عَلِيًّا كَبِيرًا

"Men are the leaders of women, because Allah has preferred some of them (men) over others (women), and because they (men) have spent some of their wealth. Therefore, a pious woman is one who obeys Allah and takes care of herself when her husband is not around, because Allah has taken care of (them). Women whose nusyuz you are worried about, then advise them and separate them in their beds, and beat them. Then if they obey you, then don't look for ways to trouble them. Indeed, Allah is Most High, Most Great."

The order to beat is in the context of learning for a disobedient wife, as in The Prophet also ordered our children to pray and allowed us to hit them if the child

⁸ T Handayani, 'Eksistensi Undang-Undang Penghapusan Kekerasan Dalam Rumah Tangga Dalam Aktualisasi Konsep Nusyuz Fiqh Madani', *Jurisdiction*, 3.1 (2012), 69–77.

⁹ Quraisy Shihab, *Tafsir Al-Misbah, "Pesan, Kesan Dan Keserasian Al-Quran"* (Jakarta: Lentera Hati, 2002).

¹⁰ Kemenag.go.id, 'Quran.Kemenag.Go.Id', *Quran.Kemenag.Go.Id*

<<https://quran.kemenag.go.id/surah/66/6> > [accessed 11 October 2022].

¹¹ Abdul Aziz, 'Islam Dan Kekerasan Dalam Rumah Tangga', *KORDINAT*, XVI.1.

was disobedient, of course this beating was for the purpose of learning¹². However, the ability to hit one's wife for education is not explained clearly in the Qur'an, how to hit or when. just allowed. So if the skill of hitting is practiced without in-depth knowledge, it can be misinterpreted as hitting according to each individual's understanding, so that this beating can potentially be punished according to Law no. 23 of the Year Articles 5 and 6 concerning the elimination of Domestic Violence (KDRT)¹³.

In article 5 of Law no. 23 of 2004 stipulates that *"Everyone is prohibited from committing domestic violence against people within their household, by means of; a. physical violence, b. psychological violence, c. sexual violence or, d. domestic neglect."* Then article 6 of Law no. 23 of 2004¹⁴ determines that *"Violence referred to in Article 5 letter a is an act that results in pain, illness or serious injury"*.

What is problematic is that in Islamic law it is permissible to beat a wife who is nusyuz as a form of learning. It is explained in Q.S An-Nisa verse 34. However, this verse does not explain in detail what kind of beating is, how to hit it, and under what circumstances it is permissible to hit one's wife.

The discrepancy between the prohibition of domestic violence as regulated in the law and the permissibility of beating one's wife in Islamic law has become an ongoing polemic if there is no clear point for in-depth discussion.

This has become a weapon for several groups, who accuse Islam of being a radical religion and having the potential to criminalize Islamic law¹⁵. Criminalization refers to actions or decisions made by authorities to classify certain actions as illegal and punishable by the community or society as criminal acts. Likewise, ordinary people use religious reasons as a shield to defend themselves when domestic violence occurs in their homes.

2. Research Method

The research method chosen by the author in this study is doctrinal which is normative in nature. This approach involves legal research by studying library materials, including secondary legal sources. Sources are systematically compiled, reviewed, and analyzed, and conclusions are reached regarding the issue being investigated¹⁶.

¹² Aziz.

¹³ Sarip Hidayat, 'Korelasi Tindak Pidana Kekerasan Dalam Rumah Tangga Menurut Undang-Undang Nomor 23 Tahun 2004 Dengan Konsep Nusyuz Dan Penyelesaian Sengketanya', *Logika : Jurnal Penelitian Universitas Kuningan*, 13.2 (2022), 181-91.

¹⁴ Pemerintah Republik Indonesia, *Undang-Undang Republik Indonesia Nomor 23 Tahun 2004*, 2010.

¹⁵ Soerjono Soekanto, *Kriminolog : Suatu Pengantar* (Jakarta: UI Press, 1981).

¹⁶ Khudzaifah Dimiyati and Dkk, *Paradigma Baru Dalam Penelitian Hukum: Pengalaman Pendekatan Objek Normatif Dalam Penyidikan Perkara Pidana* (Yogyakarta: Muhammadiyah Press, 2021).

Research on legal systematics which focuses on written law which is linked to research problems, is included in normative legal research. The main goal is to identify fundamental ideas in legal etymology and epistemology, such as subject-object relationships, rights and obligations, and legal events.

This research is descriptive, meaning it explains in detail the data collection and current conditions. In this case,¹⁷ from the analysis of the elements of criminal acts of domestic violence in Law No. 23 of 2004 and the explanation from QS. An-Nisa verse 34 is in the form of law from books by imams of the Islamic jurisprudence school.

This research uses library research as a method to synthesize data, which includes understanding, studying, and examining written materials through content analysis¹⁸ to improve and support research.

This research uses normative qualitative data analysis methods. Initially, the researcher identified various forms of documents such as laws, views of madzhab scholars, etc., literature in the form of books and scientific journals, which were related to or had the same subject matter as the research being carried out.

Next, examine data obtained from the field and literature by studying legal regulations to assist, document and review data to produce data and conclusions from the material obtained by researchers.

3. Results and Discussion

The View of Islamic Law on Beating a Nusyuz Wife

In principle, the jurists agree on one word about the ability to beat a wife when she commits nusyuz, or disobeys orders or commits an abomination. According to the instructions of Allah Ta'ala, if women are worried about nusyuz, they should be advised, separated from each other in bed, and given blows¹⁹. That is, you can beat your wife if it is proven to be nusyuz and what needs to be underlined is that this beating is the last step of the education level after advising and separating the bed.²⁰

Fiqh scholars also have their own opinions about the procedure for this provision of hitting. The word "hitting" here does not include hitting without rules. Fiqh experts have an opinion from the explanation of the command to hit in QS. An-Nisa: 34, including the following:

¹⁷ Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2006).

¹⁸ Soerjono Sukanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 2015).

¹⁹ Abdurrahman Al-Juzzairi, *Fiqh Empat Madzhab* (Jakarta: Pustaka Alkautsar, 2016).

²⁰ Husna.

The opinion of the Shafi'i School

According to Syafi'i, a husband can beat his wife after proving that she is Nusyuz. Although it is allowed, he thinks that he chooses not to hit. There are several recommendations in hitting him, namely²¹:

- 1) Not hitting with blows that hurt or draw blood.
- 2) Do not repeat and avoid hitting the face.
- 3) Beating should be done by hand, with a handkerchief, not with a whip or stick.

The Opinion of the Maliki School

Beating a wife who is nusyuz as learning is allowed according to the opinion of the Maliki Madhhab, with the criteria of beating:²²

- 1) Does not hurt like what the apostle said in the hadith.
- 2) Does not cause bone fractures.
- 3) Do not scratch the scar.
- 4) Does not cause trauma.

If the husband knows before hitting that the beating will not cause a deterrent to the wife who is nusyuz then it is not allowed to hit because the purpose of the beating is education which creates a deterrent.

The Opinion of the Hanafi School

According to the Hanafi Madhhab, hitting a wife is permissible but with a light blow and no injury. In this context, Sharia provides criteria for the extent to which beating is permissible, namely²³:

- 1) Do not hit the face, because the face is a very valued part of the body.
- 2) Avoid hitting the stomach or other parts of the body that can cause death or harm, because the purpose of this beating is not to cause injury, but to improve the disobedient wife's attitude.
- 3) Avoid using tools that can cause injury. The Hanafi school recommends using tools such as ten skewers or less.

The Opinion of the Hanbali School

According to the Hanbali school of thought, it is permissible to beat a wife who is worried about nusyuz against her husband, but it is necessary to observe the

²¹ An-Nawawi, *Al-Majmu'u Syarhul Muhdzzab*, 16th edn (Damaskus: Dar al-Fikr, 2006).

²² Al-Hattab Ar-Ru'yani, *Mawahibul Jalil Li Syarhi Mukhtashoril Kholil* (Riyadh: Dar Alamil Kutub, 2003).

²³ Wahbah Az-Zuhaili, *Fiqh Dan Perundangan Islam* (Kuala Lumpur: DBP, 2002).

procedure for beating her, namely²⁴:

- 1) A light blow that does not leave a scar, such as hitting that will not cause bruises or red marks on the skin.
- 2) The level of violence of beating is below that of beating children and animals.
- 3) Can't exceed 10 shots or preferably less than that.
- 4) Can't hit deadly, meaning can't use tools that have the potential to take lives such as sharp weapons, hammers, etc. Do not hit vulnerable body parts, such as heartburn and head.
- 5) Do not hit that can cause a bleeding wound, such as hitting with a sharp tool that will potentially tear the skin and cause a bleeding wound.
- 6) Do not hit that will cause permanent wounds. Like hitting the hand until the hand is paralyzed.

Analysis of Nusyuz Wife Beating Against the Potential Crime of Domestic Violence

The researcher found out that in Islamic Law it is permissible to beat a wife who is nusyuz with the conditions and provisions that have been arranged by the opinion of the madhhab imams. There is also a category of physical violence from the formulation of the PKDRT Law article 44.

Conditions for acts of Physical Violence according to the PKDRT Law

The formulation in article 44 paragraph (1) to paragraph (4) of the PKDRT Law results in 4 categories of physical violence, namely ordinary physical violence, mild physical violence, physical violence resulting in the victim becoming ill or seriously injured, and physical violence resulting in the death of the victim. From the 4 categories, the author concluded that there are conditions for an act to be said to be physical violence according to the PKDRT ²⁵Act from each category, the conditions are as follows:

- 1) Committing acts of physical violence that cause pain to the victim.

Whoever intentionally causes pain to the victim in the household, the victim feels pain and that is caused by the perpetrator's actions without physical changes, then can be punished in the category of ordinary physical violence and can be charged as per Article 44 paragraph (4) of the PKDRT Law²⁶. This physical violence must

²⁴ Sankiti, *Syarhu Dzadil Mustaqni'* (Riyadh: Darul Ibnu Jauzi, 2002).

²⁵ Pemerintah Republik Indonesia, *Peraturan Menteri Negara Pemberdayaan Perempuan Dan Perlindungan Anak Tahun 2010 Tentang Penghapusan Kekerasan Dalam Rumah Tangga (PKDRT)*. (Indonesia: Lembaran Negara Republik Indonesia, 2010).

²⁶ Anwar Muhammad, *Hukum Pidana Bagian Khusus (KUHP Buku II)* (Bandung: Citra Aditya Bakti, 1989).

cause illness or hinder the victim's ability to work, carry out his duties, or perform daily activities. If this physical violence does not cause illness or hinder the victim's ability to work, perform his duties, or perform activities every day, it will still be punished as minor physical violence and can be subject to sanctions under Article 44 paragraph (1) of the PKDRT Law.

2) Committing acts of physical violence that result in falling ill.

If someone (within the household) commits an act of physical violence which causes the victim to fall ill. Falling ill means the emergence of problems with the role of the organs in the human body²⁷. The perpetrator may be subject to sanctions in Article 44 paragraph (2) of the PKDRT Law.

3) Committing acts of physical violence that result in serious injury

If someone in the household commits an act of physical violence which results in the victim receiving serious injuries. Serious injuries in this condition are injuries that fall within the criteria in Article 90 of the Criminal Code. The perpetrator may be subject to sanctions in Article 44 paragraph (2) of the PKDRT Law.

4) Committing acts of physical violence that cause the death of the victim

This prohibited action is practicing physical violence that causes the death of an individual in the household. A key aspect of this prohibition is that the victim's death is an unintentional or accidental result of the perpetrator's actions. The perpetrator can be subject to sanctions in Article 44 paragraph (3) of the PKDRT Law.

4) Element of Intention

In terms of physical violence that contains an element of intent, it only applies to acts of violence that result in pain. In acts of physical violence that result in illness, serious injury and death of the victim, there is no element of intent involved, because the act is the result of an accident or the result of an act.

The Criminal Code itself does not provide a definition of what "intentional" means, but in MvT (*Memorie van Toelichting*) it is explained that intentional is defined as wanting and realizing. Meanwhile, in criminal science "deliberation is studied in several theories, including²⁸:

- a Will Theory. The essence of this intention is the desire to achieve elements of actions that can be sanctioned because they are stated in the law.
- b Theory of knowledge or imagining. Intentional means that the perpetrator is aware of the potential consequences of his actions. The perpetrator may not

²⁷ Muhammad.

²⁸ Guse Prayudi, *Berbagai Aspek Tindak Pidana Kekerasan Dalam Rumah Tangga* (Merkid Press, 2015).

want the consequences, but is aware that they may occur. This theory focuses on what perpetrators understand or realize, especially the potential outcomes of their actions.

Potential Criminal Act of Hitting a Wife Who is Nusyuz in Islamic Law

Observing the discussion in the previous chapter, the researcher will create a table of qualifications for hitting by madzhab imams based on the analysis in Article 44 of Law no. 23 of 2004 to make it easier for writers to compare laws.

Table 1. Categories of criminal acts based on the permissibility of beating one's wife in Islam

The Opinion Of The Madhhabs	Qualifying Batting by Madzhab Imam	Crime Category In Article 44
Imam Syafi'i	a. Do not hit with blows that injure or bleed. b. Don't do it repeatedly and avoid hitting the face. c. Beatings must be carried out by hand, with a handkerchief, not with a whip or stick	Potentially included in acts of mild violence in article 44 paragraph (4)
Imam Maliki	a. It's not painful. b. Does not cause bone fractures. c. Doesn't scratch scars. d. Does not cause trauma.	Potentially included in acts of mild violence in article 44 paragraph (4)
Imam Hanafi	a. Don't hit the face, b. Avoid hitting the stomach or other parts of the body that could result in death or harm c. Avoid using tools that could cause injury. The Hanafi School recommends using tools such as ten sticks or less.	Potentially included in acts of mild violence in article 44 paragraph (4)
Imam Hanbali	a. A light blow that does not leave scars, such as hitting that will not cause bruises or red marks on the skin. b. The level of beating violence is below hitting children and animals. c. Can't be more than 10 strokes or preferably less than that	Potentially included in acts of mild violence in article 44 paragraph (4)

	d. Can't hit the dead one, meaning can't use tools yang berpotensi menghilangkan nyawa seperi senjata tajam, palu,dll. e. Do not hit vulnerable parts of the body, such as the solar plexus and head. f. Don't hit things that can cause bleeding wounds, such as hitting with a sharp instrument that has the potential to tear the skin and cause bleeding wounds. g. Do not hit that will cause permanent injury. Like hitting the hand so that the hand is paralyzed.	
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There is an explanation of the previous data, the researcher knows that hitting a wife who is nusyuz is indeed permitted in Islamic law along with the correct procedure for hitting according to the opinion of the Imams of the Fiqh Madzhab. It is also known that the conditions for an act to constitute physical violence according to the PKDRT Law. So the researcher can find two points from the previous explanation.

The first point, looking at the procedures put forward by the schools of Islamic jurisprudence, Islamic law regulates in detail the procedures for a law, in this case the qualifications for the procedures for beating a nusyuz wife that are put forward by the schools of thought, then in the procedures it is necessary to maintain the honor of the wife as a woman. . For example, in the Hanafi Madzhab it is forbidden to hit the face, because the face is a valuable part of the body. Even though the act of hitting a nusyuz wife causes pain, basically the aim is to provide a deterrent effect on the wife.

The second point, in the conditions for an act to be said to be an act of physical violence in the household, that is, one of the conditions is an act that causes pain. Furthermore, in the procedures for hitting that have been put forward by the opinion of the Islamic School of Imams, hitting basically causes pain, except for the opinion of the Maliki school of thought which requires that the act of hitting must not be painful or cause pain.

4. Conclusion

It should be noted that in Islam husbands have a very important role, both in achieving happiness in this world and the hereafter. However, achieving this is a joint responsibility between husband and wife. However, the husband as the leader of the household must be able to lead his family. Therefore, Islam provides rules on how to educate a wife who behaves nusyuz, namely that first she must be given a warning by giving good advice. Second, if there is no change

in the first method, then separate the beds. And if there is no change then do the third and final step, namely hitting it.

Regarding the qualifications for hitting a nusyuz wife put forward by the madzhab imams, some opinions have the potential to be included in the category of light crimes in article 44 paragraph (4) of the 2004 PKDRT Law, namely in the opinion of Imam Syafi'i, Imam Hanafi and Imam Hanbali. In Imam Maliki's opinion there is no indication that it falls into the category of physical violence in the PKDRT Law.

The method of hitting that has been put forward by the opinion of the Syafi'i School, Hanafi School, and Hanbali School is categorized as a light crime in Article 44 paragraph (4) of the 2004 Domestic Violence Law, because this method of hitting basically causes pain, carried out by the husband. to his wife. However, this physical violence does not cause illness or hinder the victim's ability to work, carry out his position, or carry out daily activities.

Suggestion

From the conclusions that have been outlined, the author suggests that married couples should maintain family harmony. If a problem occurs in the family, it should be resolved amicably. Moreover, regarding the issue of a wife's nusyuz, a husband should advise her first, even though the option of hitting is permitted in the Shari'a, this is the last option, and does not need to be done if giving advice is enough to discipline a wife who is nusyuz.

Then the Office of Religious Affairs (KUA) should hold pre-marriage classes for prospective husbands and wives who want to enter into a marriage relationship. In the pre-marriage class, material is included on how to resolve problems in the family, especially in resolving problems between a husband or wife who is passionate about both of them. This aims to provide prospective married couples with knowledge before entering the world of marriage and as a preventive measure to avoid domestic violence.

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