

The Potential in Expanding the Authority of Religious Court in Settling the Lowest Level of Domestic Battery Cases between Married Couple

Syamhudian Noor^{1*} Thohir Luth² Masruchin Ruba'i³ Ismail Navianto³

1. Doctoral student of law, The Faculty of Law, Brawijaya University, Lecturer of UPT-MKWU, Palangka Raya University, Yos Sudarso Palangka Raya 73111, Kal-Teng, Indonesia

2. Lecturer of The Faculty of Law, Brawijaya University, MT Haryono No.169, Malang 65145, Indonesia

3. Lecturer of The Faculty of Law, Brawijaya University, MT Haryono No.169, Malang 65145

Abstract

This article discusses about the potential in expanding the authority of Religious Court in settling the lowest level of domestic battery cases between married couple. This issue is remarkable in a sense that as far as it concerned, the settlement of domestic battery cases in Indonesia is the authority of District Court. According to the regulation in Article 49, Constitution Number 3 year 2006 about the ammendment of Constitution Number 7 year 1989 about Religious Court, stating that the authority is merely limited to marriage affairs (including about divorce), inheritance, will, *hibah*, *wakaf*, *zakah*, *infaq*, *shadaqah*, and Sharia economy. Meanwhile, domestic abuse cases are known to be the prominent factor of divorce in Indonesia. Therefore, it is such an unfortunate when Religious Courts are responsible for to judge the final result but not with the process (background of the problem). This study is being discussed based on several theories, those are the theory of National Law of Pancasila, theory of authority, objective theory of law and theory of *Maslahah Mursalah (Hifzun Nasl)*. Finally, it can be concluded that, ideally, Religious Court shall possess the authority to conduct a court on domestic battery case since it is the reason why divorce usually happen. It is basically peculiar when religious court only able to decide the divorce statement of a marriage couple without considering the background of the divorce (domestic battery).

Keywords: Low level of domestic battery

1. Introduction

One of the lawful goal in founding Republic of Indonesia is to protect the whole nation and the society based on the believe in one supreme God and the value of justice and civilized humanity.

The protection abovementioned includes on the freedom in being Moslem, the religion majority believed in Indonesia. The existance and implementation of this protection are quoted in several sections of Article 28 in Chapter XA about Human Rights in 1945 Constitution of the Republic of Indonesia (hereinafter referred as UUD 1945), it isalso explicitly regulated in Article 29 verse (2) in UUD 1945. It is stated that: "The country guarantee the freefom of each individual to worship their own religion and belief".

One of other means of protection in freedom of belief is brought up in Article 18 of Constitution of the Republic of Indonesia Number 48 Year 2009 about Judicial Authority (hereinafter referred as 2009 UUKK) by founding Religious Judicial Court under the jurisdiction of Supreme Court.¹

This being further supported by the enactment of Constitution of the Republic of Indonesia Number 7 Year 1989 (Hereinafter referred as 1989 Religious Judicial Court Constitution), Constitution of the Republic of Indonesia Number 3 Year 2006 about the ammendment of Constitution of the Republic of Indonesia Number 7 Year 1989 (Hereinafter referred as 2006 Religious Judicial Court Constitution), and Constitution Number 50 Year 2009 about the second ammendment of Constitution of the Republic of Indonesia Number 7 Year 1989 about Religious Judicial Court (Hereinafter referred as 2009 Religious Judicial Court Constitution).

However, it turns out not every religious affair and society's problem can be brought into the court room (religious court). Our country limit its authority to several Islamic law that can be dealt by Religious Court (article 2). Furthermore, in article 49 section (1) 2006 UUPA emphasized that Religious Court has the authority to investigate, decree, and settle particular cases in district level among Moslems, such as: marriage, inheritance, *wasiat*/ last will, *hibah*, *waqaf*, *zakah*, *infaq*, *shadaqah*, and *sharia* economy.²

In regard to the abovementioned article 49 2006 UUPA, the "*Mafhum Mukholafah*" of Domestic Battery is out of the nine authority league of the court, that makes Religious Court has no competence to investigate the case. In other words, the authority to investigate, decree, and settle the cases belongs to other courts, eventhough Moslems are involved in the case.

¹ The full sentences of Article 18 UUKK 2009 are: "Judiciary is the authority of Supreme Court and other courts under its supervision, such as general courts, religious court, military court, civil court of justice, and constitutional court". Article 18 UUKK 2009 in Supplement State Gazette of Republic of Indonesia Number 5076.

² Article 49 UUPA 2006 in State Gazette of Republic of Indonesia 2006 Number 22.

This power limitation impedes the basic goal set at the moment of founding Republic of Indonesia in providing protection for the whole nation in terms of the value of 'Beliving in one Supreme God'. This is because it prevents the attempt to protect the freedom of actualizing religious activities for Moslems in Indonesia (as cited in article 29 section (2) UUD 1945).

There so so many other cases that could be better and more efficient to be settled by Religious Court, including in settling familial dispute in the consequence of domestic battery.

The arrangement of domestic battery in Religious Court is merely about whether or not the couple will get divorced or not. Meanwhile the domestic abuse cases is being set aside (not the area of Religious Court).

This "Negligance" is in fact being justified by UU No. 23 Year 2004 about the Elimination of all kinds of form of Domestic Abuse. According to this constitution, the judicial authority of arranging domestic abuse cases belongs to District Court. In other word, religious court can only decree the result of the cases, without judging the process or the reasoning behind the case.

Logically, religious court should also have some place to judge the background (the process) of why divorce shall happen. This is because divorce normally occur as the effect of bas interaction in marriage.

Based on the introduction to the study, the rearcher intended to conduct a further reserach on the case entitled "The Pontential in Expanding the Authority of Religious Court in Settling the Lowest Level of Domestic Battery Cases Between Married Couple".

2. The Ettempt to Settle the Low Level of Domestic Battery in Indonesia

The attempt to eradicate Domestic Battery in marriage in Indonesia is initially marked by the enactment of Constitution No. 23 Year 2004 about The Elimination of Domestic Abuse (hereinafter refererred as Constitution of Domestic Abuse Elimination). This constitution consists of 10 chapters and 56 articles, and it is expected to be able to provide lawful protection, especially for women, from any act of battery.

In the constitutions issued above, the government are responsible to prevent all domestic abuse cases to happen. Based on the Constitution Article 12, the Government has to: *First*, initiate regulation on eliminating domestic battery; *second*, conduct communication and education on eliminating domestic battery; *third*, socialize the regulation and advocate the domestic abuse cases; and *fourth*, providing education and intensive training on gender sensitive issues and domestic abuse issues as well as dtermine the standard and accreditation for gender-sensitive services.

Next, in order to provide maximum services for the victim of domestic abuse, central government along with the local government should: provide special room in police offices, paramedic, social workers, and spiritual guidance; provide and develop a system and working mechanism in order to give accessible service program; and provide protection for the companions, witnesses, families, and the friends of the victim.

Several essential points regulated in the constitution are about the restriction of domestic battery;¹ the scope/member of family;² types of domestic battery;³ the classification of physical,⁴ psychological,⁵ sexual,⁶ and familial negligence abuse;⁷ the rights of the victim;⁸ society's contribution and responsibility;¹ evidence-related

¹ Domestic Abuse/violence is every act towards the other, especially woman, that result to the misery or physical, psychological, sexual injury, and/or domestic negligence. Including threatening, forcing the other to do something, or violating the rights (against the law) (article 1 section 1).

² The scope of "domestic" in Constitution (Article 2 Section 1) includes: a. husband, wife, and children (including step and foster children); b. The relatives of one party in point a because of blood relation, marriage, nurture, custody, and those who stay in the same roof (parents in law, children in law, siblings in law); and/or c. Those who assist the household and stay in the house (house assistants).

³ Several types of domestic battery (Article 5): a. Physical abuse; b. Psychological abuse; c. Sexual abuse; or d. Family negligence.

⁴ Physical abuse is the act that results into pain, disease and massive injury (Article 6).

⁵ Psychological abuse is the act that results into fear, inferiority, no initiative to take action, helpless feeling, and/or psychological disorder for someone (article 7).

⁶ Sexual abuse is every act in forcing someone to have intercourse, forcing someone to unwillingly having deviated sexual act, forcing sexual intercourse with someone for commercial and/or other purpose. Sexual abuse in article 8 is explained as follows: a. Forcing sexual intercourse with those who live in the family; b. Forcing someone one family to have intercourse with other people for commercial and/or other purpose.

⁷ Family negligence means someone who ignoring people in the family, when the statutory regulation or based on agreement or contract shall provide living, maintenance, or protection to the people. Besides, negligence also refers to those who cause economical dependency by limiting/ prohibiting the other to have a proper job either inside or outside the house that makes the victims are under the control of the doer (article 9).

⁸ According to this Constitution, the victim has the right to get protection from the family, police, attorney, court, social organization, advocate, or other stake holders, either for temporary or based on the decree of the court. The victim also has the right to get medical services according to what the victim's need. The victim also deserves to have special treatment (especially related to the privacy of the victim. The victim also has the right to be accompanied by social worker or legal aid

issues;² and the statutory regulations about domestic battery.³

In additional, in setting low level of domestic abuse cases (physical and psychological) between marriage couple, the applied regulation is *delikaduan*. It means the victims themselves who report the domestic battery cases to the police (article 26 section 1), or else the victims ask the help of their family to report the domestic battery act done towards them to the police (article 26 section 2).

3. The Arrangement of Low level of Domestic Battery Cases between the Marriage Couple in Islamic Perspective.

Most of divorce cases happen because of “*zhalim*” attitude towards the other spouse, both in terms of physical and psychological aspect. Some of the examples of psychological abuse are rights violation and defamation. One bad or *zhalim* attitude can lead to another *zhalim* attitude towards their spouses, and each of them shall be served with its equal punishment as it is said in Al-Quran Surah Ibrahim verse 42 which means:

“And never think that Allah is unaware of what the wrongdoers do. He only delays them for a Day when eyes will stare [in horror].”

It is also related to Allah’s commandment within Hadits Qudsi told by Imam Moslem (Muslim, T.th) that says:

“O my servants, I have forbidden oppression for myself and have made it forbidden among you, so do not oppress one another”.⁴

Therefore, it is strictly forbidden for Moslem to oppress or do *zhalim* to other even when they are capable of doing so. Besides, *dzalim* act brings guilt at the end. Those wrongdoers might be able to sleep at night, but not with the victims. The vulnerables could possibly wish for the worst for the bad ones.

Logically, oppressing those who are not related at all to us is strictly realted, let alone to our own spouses. Surely, the level of prohibition is even higher for marriage is a sacred bond between two beings under the name of love and affection.

The settlement for domestic battery between marriage couple is the responsibility of court, based on Islam perspective. The court then, commonly in Islam, will be decreed with *ta’jir* punishment (Ibrahim Unais, T.Th).⁵ The implementation of *ta’jir* aims to educate and fix the habit of the convicted to make the concerned aware of their mistake and never redo it anymore (Muslich, 2005).⁶ According to al-Mawardi,⁷ *ta’jir* is a educative punishment for any sins executed by people that the exact punishment itself has not been clearly determined by *syara’* (Al-Mawardi, 1966).

In 2012, a court in Qatib, Saudi Arabia decided to give 30 times of scourging in front of public for a husband who did a domestic battery (hit the wife till it leaving some bruises). The judge then obliged the convicted to participate in a 10-day-training so that he understood how to treat a wife properly. He also had to pass a written test based on the training, as well as do social work for three hours each day in mental hospital in Dammam.⁸

The abovementioned is one of the example of *ta’jir* punishment that was intended to create deterrence effect to the doers of domestic abuse. This also works as a system of pedagogy to reprogram the mindset of the convicted to prevent any abusive action to be taken towards the spouse in the future.

in every level in investigation process according to the statutory regulation. The concerned also deserves to get religious guidance.

¹ The constitution of Elimination of Violence in Household (article 15) mentions the contribution and the role of society in the case, by saying that one who hear, see, or know that a domestic violence happen shall attempt to help based on their capability to: a). Prevent the criminal act from happening; b) Provide protection for the victim; c) Provide emergency help; and d) Help the process of filing the request to gain protection.

² In proving the case of Domestic violence: In this constitution, it is said that one Witness is already considered enough to prove that the convicted is wrong, but not limited to other means of legitimate proof (article 55). Those legitimate proofs are: a. the explanation from the witness; b. explanation from expertise; c. letter; d. hints; e. explanation from the convicted.

³ The regulation upon jail or fine punishment for domestic battery case is in Chapter VIII start from article 44 to article 53. The length period of jail time and the amount of fine is vary according to the violence act committed. In the process of enacting the constitution, the chapter of punishment was debatable for it does not regulate the minimum punishment, it only states the maximum punishment possible instead. Therefore, it was argued that the convicted might only get trial punishment only.

⁴ Shahih Muslim, (IV/ 2577).

⁵ Based on the etymology, *ta’jir* comes from the word *عزر* that means to prevent and refuse, educate, respect, and help to empower. Ibrahim Unais, et.al., *al-Mu’amul Wasith*, (Kairo: Darul Ihya at-Turatsul Arabi, th), page 598.

⁶ Ahmad Wardi Muslich, *Hukum Pidana Islam*, (Jakarta: Sinar Grafika, 2005), page 249.

⁷ Abul Hasan Ali al-Mawardi, *Kitabul Ahkam as-Sulthaniah*, (Beirut: Darul Fikr, 1966), page 236.

⁸ The director of the hospital was demanded to file a report to the court, about the performance of the convicted of domestic battery during their punishment period. <http://amp.kaskus.co.id/suami-kekerasan-dalam-rumah-tangga-wajib-belajar-cara-memperlakukan-istri>, accessed on February 7th 2017.

4. Potential and Theory of Expanding the Authority of Religious Court in Settling Low Level of Domestic Battery between Married Couple.

There are several consideration that urges the expansion of Religious Court's authority to settle domestic battery cases, those are: First, the case of domestic battery and divorce commonly occur at the same moment. In most cases, domestic battery is the main justification they brought to put their marriage to an end.¹

Settling a domestic dispute in Religious Court is limited only whether a couple will get divorced or not. Meanwhile, the background cases of domestic abuse is left untouched (for it is not the authority of Religious Court). Whereas what the involved couple wants in domestic battery case is not merely the decree of "being divorced" but also a wise settlement that can give deterrence effect to the guilty spouse. Therefore, when the concerned would like to continue having a family, either with the current spouse or another person in the future, the convicted will no longer abuse their spouse within their marriage life.

Wise decision as abovementioned means that the decision does not merely prioritize misery for the guilty, but also advantages for those living around the convicted (including the relatives, especially the children and the spouse).

Other than wise decision, court shall manage to give a decree with deterrence effect. Deterrence effect could implicitly influence the psychological state of other marriage couple in the society that hinders them from doing the same abusive act to their spouse.

The reality happens in Religious Court is domestic battery case becomes the most common reason of divorce which is intentionally being neglected by the Court. Religious Court, in this case, only provide "Recommendation Letter" that can be a supportive document when the victim wants to sue the doer in District Court.

These facts are dangerous, knowing that if the dispute is managed to be settled, the doer could possibly repeat the mistake in the future. On the other hand, if the Court demand the couple to get divorced, the abuser might do the same to the new spouse.

This "negligence" is in fact justified in Constitution of Domestic Abuse Eradication. According to the constitution, the authority of judging the case is fully lying on district court (General Court). This means that religious court only have the power to decide the result, without the background of the case.

Surely it is inappropriate to limit the judgment of Religious Court on the result of the case without considering the reason. This is because in the beginning of their intention to bond themselves through marriage, each couple wishes their marriage to be *sakinah, mawaddah wa rahmah*, all of them want to have happy marriage and long-last. Unfortunately, throughout their marriage life, good expectation may not always be true. Sometimes, there will be miscommunications, disputes, or even fights that result to negative atmosphere that threaten the harmony in a family.

When marriage couple keeps being affectionate, trustworthy, considerate, calm, and loyal in managing every single problem they face, an ideal condition (harmony) will be resulted. Yet, when all those personalities missing in both parties, a chaos will spark that affect the psychology of each spouse negatively (being emotional, rude, and tend to hurt the other). When this happens, domestic abuse is just a moment away.

Ideally, religious court shall have the power to judge the reason why a divorce happens. It is because divorce commonly happens because of wrong interaction in marriage.

Second, based on the perspective of authority. Even though the power entrusted to religious court in managing several cases as mentioned in Article 49 of Constitution of Religious Court 2006 (marriage, inheritance, *wasiat*/ The last will, *hibah, waqaf, zakah, infaq, shadaqah*, and *Sharia* economy) has adequately strengthen the means of 1995 Constitution regarding with the national protection upon the basic human rights of the people (especially the right to have religion),² yet he intention to expand the authority to handle the case of domestic abuse also does not hamper the national goal to protect the abovementioned freedom to exercise people's beliefs.

Historically, in the beginning era of Islam (in the era of Prophet Muhammad s.a.w, his trusted friends, and *tabiin*), there are no specific differences between criminal law and civil law, both were managed by Religious Court. As it is said by Rasyidi (M.Rasyidi, 1971), he stated that Islam does not strictly differentiate the boundaries between private law and public law for some aspects of public law are included in public law and

¹ The percentage of domestic battery as the reason of divorce is 90% (99.9% because of psychological abuse using harsh words, and 30% of them are along with physical abuse), an interview with SR (judge of of Religious Court on Tanjung, The South of Borneo) on February 21st 2017.

² One of the human rights regulated in Chapter XA 1945 UUD is the freedom to exercise their belief. The protection upon this right is justified in several articles, those are: Article 28E Section (1) and (2), Article 28H section (1) and article 28I section (1). The protection, enforcement, and fulfillment of human rights are further described in article 28I section (4) and (5) that says human rights are the responsibility of the country, especially the government that is regulated in the constitution. The protection on religion is explicitly regulated in article 29 section (2) of 1945 UUD, that says: "The State guarantees all persons the freedom of worship, each according to his/her own religion or belief".

vice versa.¹

There is a clear similarities in divorce cases appealed in religious court and the domestic cases, that is both of them are categorized as private law. If since the beginning of Islam (historically), there is no specific differences between private and public law in Islamic Judiciary, then the decision to merge the authority in Religious Court is also justified to be done.

The attempt to extend the authority does not only strengthen the protection upon the freedom of believe, but also to provide more protection to other means of rights (Sutardi, 2006), those are the rights to have children, the rights for children to grow and being protected from any kind of discrimination and abusive action as mentioned article 28 B section (1) and (2):²

“(1) Every person shall have the right to establish a family and to procreate based upon lawful marriage.

(2) Every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination”.

Third, based its efficiency, conducting a separate court for the divorce and the settlement for the domestic abuse is not efficient and not effective. This is also violating the basis of judiciary conduct, when a court shall be conducted under the principle of “simple, fast and low budget”.³

The principle of “simple, fast, and low budget” in judiciary is accommodated by the constitution in order to enforce the ideal law to provide effective and efficient law enforcement service.

Etymologically, principle means the basic of law, the foundation in constructing and idea or opinion, the basic goal (of a group or organization). The word “simple” focuses on whether the settlement of a dispute is complicated or not. Based on those meanings, the principle of “simple” means a clear, easy, understandable, intelligible solution. The point is to allow parties to express their will clearly and consistently. Then, the solution is made clearly, transparently, in sequence, along with flexible law of procedure in order to implement simple process of procedures for the parties.

In other words, this principle means that the implementation of judiciary in Indonesia is not complicated. What actually is simple shall not be made complex by the judges by conducting a complicated and long investigation.

The separation (in two different court) between divorce and domestic battery case settlement in the status quo is considered complicated by the common society for they have to file the report to two different courts. It will be easier, in terms of administrative aspect, when domestic battery is included in the authority of Religious Court.

According to the etymology, fast means a short, brief period of time, with not complication. The proper “fast” focus on whether the “tempo” of a case settlement is fast or not. The fast principle in judiciary means the process of managing the dispute does not take a long period of time.

Nevertheless, the fast solution of the case still has to go in line with the law of justice, and shall be done accurately and fair. The principle of “fast” does not simply demands the judge to solve the case in less than an hour. The goal is that the case may not last for a long period of time, such as years, according to the “simple” principle of the law of procedure. Therefore, the required attitude from the judge is not merely extremely conducting an investigation in a flash as a machine that set aside the dignity and morality of humanity. A judge must investigate a case thoroughly and modestly, rationally and objectively by giving equal opportunity to the parties involved in the case. The second point of this principle is that the accuracy of investigation shall be maintained and according to the law of justice. A fast investigation is worthless when it is full of lies and violation towards truth and justice. However, on the contrary for what a truth and justice gained with all the misery and bitterness in an eternal moment of waiting.

One quick and accurate verdict done contains higher value of justice. Decree and verdict done based on law, truth and justice has its own level of justice in itself, the high level of effectiveness at resolving of a verdict and also accurate has a fair and fulfilling justice in law supremacy.

The enactment of the separated trial of divorce with the domestic battery case happened between a married couple in two different courts (that happened until recent time), is whether or not will hinder the process of the delivery of justice by the victim of the domestic battery case. The separated trial will definitely require a longer time in understanding the matter of the domestic battery case, this is caused by the judge that require more time to study, looking for evidences, understanding and studying the casefiles proposed to the judge. Not to mention the obligation to present a nearly similar evidence for the new trial (which might be already presented

¹ M.Rasyidi, *Keutamaan Hukum Islam*, (Jakarta: Bulan Bintang, 1971), page 25

² Human Rights are the basic rights of human being that cannot be intervened by other human beings, groups, or organizations. The complete explanation of this right is recorded in Article 28A to 28J in Chapter XA of 1945 UUD, 4th amendment. Compare it with A. Bazar Harahap dan Nawangsih Sutardi, *Hak Asasi Manusia dan Hukumnya*, (Jakarta: Perhimpunan Cedekiawan Independent Republik Indonesia [PECIRINDO] , 2006), page 6.

³ Constitution No.48 2009 about Judiciary Authority, in State Gazette of Republic of Indonesia Number 5076.

previously) in front of the court. This is surely an ineffective method, and it prolongs the trial process. Even that it is not impossible that the time spent will be years.

Unlike if, the religious trial is given the authority in dealing the domestic battery case in the household of the married couple. Apart from cutting the time of settling the case, this can also accelerate the achieving of the justice that expected by the victim of the domestic battery case done by the counterpart.

The phrase of “light cost” consists of two words, cost means the money spent for the enactment (establish, enact, and so on) of something, payment (administration, payment that spent for dealing with the paperwork and so on), the cost of the case such as to summon and the seal. While light here lead to the many or at least the cost that must be spent by the justice seeker in settling the matter in front of the court.

Based on that fact, then the light cost meant is the attempt in enacting the trial and not requiring much of cost so that it does not burden the people who go through the trial process. The light cost in this case can also mean that it does not require other cost except when it is truly needed in the case settlement.¹

The religious court can involve optimally in actualizing the phrase of “simple trial, quick and light in cost” here, if given the authority in handling the lowest domestic battery case of the married couple while having the divorce case examination with the reason of domestic battery case.

Fourth, seen by the perspective of sociology, with the majority of population of Moslem (reaching almost 90%),² with all the complexity of the problem exist, is real normal if the right of having the case in the religious court is not limited in some certain cases, as mentioned in the article 49 UUPA of 2006. It is normal if the matter of domestic battery case in the household happened between the married couple became the competence of Religious Court in the near future.

If it is connected with the existence of Pancasila, the expansion of the authority of the Religious Court of course will strengthen more the existence of Pancasila.³ The first verse of Pancasila begins with “*Ketuhanan Yang Maha Esa* (Belief in the one supreme God)”, will become more alive if the upholding of the religious rules is “facilitated” in the living of the nation. Second verse, “*kemanusiaan yang adil dan beradab* (just and civilized humanity)” can meant that the expansion of the authority if the religious court must be done in order to realize the justice for the cases from the perspective of the God Almighty Justice (Armawi, 2009).

The presence of the facilitation upon the religious law supremacy in the form of expanding the authority of the religious court, in case of dealing the domestic battery case in the household done by the married couple merely to realize the justice of God is according to the principle of “law supervision” in a country that mentioned by Padmo Wahyono (Wahyono, 1982).⁴

The duty of adding the authority also supported by the constitutional fact, that theoretically the building of the judicial body under the jurisdiction of the Supreme Court is to realize the justice based on the verse of “Belief in the one supreme God”. This can be seen in the Article 2 point (1) Constitution of Judge Authority of 2009, this article explicitly mention that Judicial Court is done “FOR THE SAKE OF JUSTICE BASED ON THE BELIEF IN THE ONE SUPREME GOD”.⁵

It is interesting to see that in the first point of Article 2, point (1) of the Constitution of Judge Authority of 2009. There, it is very explicitly written that “FOR THE SAKE OF THE JUSTICE BASED ON THE BELIEF IN THE ONE SUPREME GOD”, with the emphasis shown by the capital letters used, and put between quotation mark. This shows that the enactment of the judicial process must be based on the justice from the perspective of God, and is the expansion of authority of the Religious Court in handling the domestic battery cases in the household will be so helpful in realizing the standardization of Justice of God for the Moslem society of Indonesia.

The logic is if the enactment of the judicial power aimed to uphold law and justice based on the God Almighty, then in the context of settling the matter of domestic battery case happened in the relationship of the

¹ There must be an explicit number for the cost and should be as light as possible. All the payment in the trial must be clear upon the allocation of the cost and given the receipt for the money. The court must be responsible upon the money to the concerned by recording it in the financial journal of the case so that the concerned may see it in any given time.

² According to the statistics agency of 2010 the number is 87.18% or approximately 207,176 million of people, <http://www.sp2010.go.id>, accessed on 7 January 2017.

³ Belief in the one supreme God is a principal that is deep in Indonesia and is the final goal because the final goal of the nation is not merely to gain sovereignty that is attempted by the government. Instead, the one supreme God is the final goal supposed to be. Armaidly Armawi, *Pemikiran Filosofis Hubungan Negara dan Agama di Indonesia*. The summary of the dissertation for the Doctorate Program of Philosophy, Post-Graduate program of Faculty of Philosophy (Yogyakarta: GadjahMada University, 2009), page 12.

⁴ PadmoWahyono defined of Function of Indonesian Law as a supervision. Hence, the different from perspective of liberal that symbolize law as Goddess of Justice that is blindfolded and holding a sword and a scale. Indonesian Law is symbolized with the supervising tree.

⁵ This statement can be seen in CHAPTER II that mentioned the Principal of Judicial Power on the UUKK of 2009 in the Addition of Attachment of Republic Indonesia No. 4358.

married couple among the Moslem society. The standardization of justice of Allah SWT that must be applied by them (Moslem people) in Indonesia.¹ If the standardization of justice of God is applied, why does handling the matter of domestic battery of household only become the authority of the General Court? Can it not if the authority of handling the matter of domestic battery case as handled by the religious court? Is it not getting closer to justice of God if the one judging them who involve in the domestic battery case happened between the married couple are the judges from the religious court?

According to the rules of handling the case of divorce, then the judges of the religious court in enacting the duty to give the verdict the case of divorce that caused by the domestic battery of the household happened among the married couple, but firsthand mediate the couple by prioritizing the approach of restorative justice in dealing with this matter.²

The approach of restorative justice is one of the approach that focus more on the condition in the realization of the justice and balance for the suspect of the crime as well as the victim. So that the judicial process for the crime is changed to the direction of the settlement that is balance for the victim and the suspect.³

Since the approach used is the restorative justice, then whatever is the verdict of the court (whether the mediation or the divorce happen), upon the suspect of the lowest domestic battery case still given some sanction according to the lawsuit of the victim and the considerations of the judge that handles the case. With the presence of the application of the sanction here, it is expected that the act of the domestic battery can go *insyaf* (enlightened) so that will never repeat their deeds anymore in the future.

The use of the approach of restorative justice in dealing with the domestic battery case in the household happened between the married couple in the religious court is more humane compared to the formal legalistic approach, moreover if among them has blessed with children. This is also approaching closer to the settlement in Islamic law, especially if compared with the settlement using the formal legalistic way (through the general judicial process). The settlement through the method can bring further problem to the family from the suspect and the victim of the domestic battery that is clearly the father or the mother of the children.

Seen from the perspective of *masalahah*, the use of the restorative justice approach in the religious court tend to bring more good for the conflicting family (especially their children) instead of applying a formally legalistic approach. This is according to the purpose of the Islamic law establishment (*maqshidussyariah*), that is to realize the goodness and avoid the harm.

Abu Ishak Al Syatibi, as quoted by Thohir Luth mentioned that the purpose of the Islamic law (*maqshidussyari'ah*) is to keep the unity of the religion (*hifdzuddiin*), soul (*hifdzunnafs*), mind (*hifdzulakli*), descendent (*hifzunnasl*), and wealth (*hifzulmaal*) (Luth, 2011).

Giving the sanction to the suspect of the lowest domestic battery case for the married couple that done through the religious court with the approach of the restorative justice is the representation of the application of the *maqshidussyariah* in the field of *hifzunnasl* (descendent upbringing). When the approach is done, then the risk of the neglected children due to the impact of the punished of one of the parents because of the domestic battery case upon the other parent can be avoided. Based on this logic, the writer classify the *maqshidussyariah* in the field of *hifzunnasl* here in the level of *hajjat*, where if this thing (the expansion of the authority of the religious court in term handling the case of the domestic battery that happened between a married couple) is not given then it well invite more risks of the children negligence, in economic as well as education.

Fifth, the perspective of the legal purpose to create justice, certainty and usefulness. The presence of the expansion of the authority of the religious court in term of handling a lowest case of domestic battery happened by the married couple will be seen more fulfilling the sense of justice for the victim of the domestic battery, the suspect of the domestic battery and their children. It is fair for the suspect because the suspect must go to the prison for several years due to what the suspect did the light domestic battery upon their partner. The judge, in this case, will handle the case by using the restorative justice, so that the punishment later will have the tendency to have the nature of educating (in the form of social work, obligatory study, fine and so on). Fair for the children because they do not have to feel the separation with the parents in a long time (due to one of the parent is in prison).

The presence of the expansion of authority of religious court in term of handling the lowest domestic

¹ Islam as a samawireligion that came from the supreme God definitely has a complete rule and principals, from the things that related to the social life until the personal matter, from the norms that is public until the rule and regulation of Civil Law. Hence, to fulfill the standardization of the God's Justice as mentioned in Article 2 point (1) of the Constitution of Judicial Power of 2009, then it is true that if the right of practice of Islamic teaching is given to the Muslim people of Indonesia.

² Restorative Justice in itself has the meaning of a justice that is restoring. Restoration covers the recovery of relationship between the victim side and the suspect. The recovery of relationship here can be based on the deal between the victim and the suspect.

³ Jecky Tengens, Pendekatan Restorative Jusctive dalam Sistem Pidana Indonesia, <http://www.hukumonline.com>. Accessed on 14 October 2016.

battery case happen between the married couple will also give some certainty for the victim. The majority case of domestic battery (filed as the reason of divorce) that recently exists in the society is not followed up by the victim/court. The most important thing for the victim is to get away from the torture of the couple, without any “willingness” to sue more. In fact, this thing is very dangerous for the sake of the supremacy of humanity value because it might be possible that when they are successfully mediated by the court, the suspect will repeat the abuse done before. Or it might also possible that when the religious court have the verdict for them to divorce, then the suspect will do a similar act to the new couple later.

This will be different if the religious court is also given the authority in giving the verdict upon the lowest domestic battery case happened between the married couple while the divorce case is put on trial. This will definitely give the certainty in the upholding of justice for the victim and the suspect. The victim will feel that the suspect is not going to get free that easily, without any “legal sanction” that is also educative that will be useful for the future of their family.

The presence of the expansion of the authority of the religious court in term of the handling the lowest domestic battery that happened between the married couple is also seen the benefit of it, especially for the victim and the children. This is because the suspect do not have to be in prison for a several years. With that, the feeling of “losing in function” due to the absence of the suspect in the household is decreased anyhow. This expansion will also be beneficial for their children. Moreover, for the parents who have underage children who need love and affection, support, as well as care from both of their parents.

The expansion of the authority of religious court, considering that there was several expansions happened previously. In the early era of the religious court in Indonesia, the authority of the religious court is only about the matter of marriage, *talak*, *rujuk* (NTR), then there are some additions about the matters of inheritance, *wakaf* and *syariah* economy.

The expansion of the authority of religious court also very possible, considering that there was some changes in the general requirement on the authority of the court. The expansion of the absolute competence of the religious court started to be established after the enactment of the Constitution of the Religious Court of 2006. In article 49 of UUPA of 1989, the requirement on the absolute authority of the religious court explained in two places: (1) the requirement which is “general” mentioned in the second part about the position of religious court; and (2) the requirement which is specific mentioned in the part of “authority of court”. In the requirement on the absolute authority of the religious court that is general, it is mentioned that religious court is one of the actor of the judicial authority for the justice seeker that are Moslem about “certain civil law matter” (article 2 Constitution of Religious Court of 1989). While in the Constitution of the Religious Court of 2006, it is mentioned that religious court is one of the actors of the authority of judicial for the justice seeker who are Moslem looking for “certain matter”.

The change from “certain civil law matter” into “certain matter” indicates that the religious court has the chance to check and make a verdict upon the matters in a larger scale.

Based on the explanation mention above, a conclusion can be made. That the chance upon the expansion of authority of religious court in term of handling the domestic battery case happened between the married couple is very likely to be possible to be done. While the method on how the concept of the expansion of authority of the religious court in term of handling about the lowest domestic battery case happened in the married couple in the Constitution of Religious Court of 2006, the writer propose the need of adding the content of article 49 of Constitution of Religious Court of 2006 about the handling upon the lowest domestic battery case happened in the married couple. So that later the requirement in the article 49 of Constitution of Religious Court of 2006 will be:

Religious court has the duty and authority in checking, making verdict, and settling the matter in the first level between the Moslem people in the matter of:

a. Marriage; b. Inherited wealth; c. *Wasiat* (Last Will and Testamen); d. *Hibah*; e. *Waqaf*; f. *Zakat*; g. *Infaq*; h. *Shadaqah*; i. *Sharia* Economy; j. Lowest domestic battery happened in the married couple.

5. Conclusion

The authority of the Religious Court can be expanded in dealing the case of domestic battery due to several considerations as follow:

- a. Religious court can have the role in actualizing the phrase of “judicial process done in a simple, quick and light costed” in settling the case of domestic battery by doing the examination upon the divorce lawsuit under the reason of domestic batter case, also in processing the case of the domestic batter as well.
- b. Seen from the perspective of the authority. Even though the delegation of the authority to the religious court to handle certain matters as mentioned in the article 49 of UUPA of 2006 (the matter of marriage, inheritance, will, *hibah*, *waqaf*, *zakat*, *infaq*, *shadaqah* and *sharia* economy), has already in accordance with the mandate of Constitution of 1945 about the protection of the country upon the right of the people (especially the right to practice the religion), yet the presence of willingness to expand the authority of the

- religious court in Indonesia in term of dealing with the domestic battery case happened between a married couple is not against the attempt upon the protection of religion either.
- c. The expansion of the authority of religious court in handling the domestic battery case will show the real legal function of Indonesia that is the supervision upon the people based on the Belief in the One Supreme God.
 - d. Seen from the perspective of sociology, with the majority of society is actually Moslem (reaching almost 90%), with all the complexity of the problem exists, is very normal if the right in having the litigation upon the matter of domestic batter case happened between the married couple to be the competence of the Religious Court in the future.
 - e. Seen from the legal purpose, the presence of the expansion of the authority of the religious court in term of handling the lowest battery case happened between a married couple will be fulfilling the justice more, legal certainty and the usefulness for the victim, suspect and the children they have.
 - f. Seen from the perspective of *maslahah*, the expansion of the authority of the religious court will invite more benefit for the conflicting family (especially for their children) instead of applying it formally legalistic only. This is according to the goal of the establishment of the Islamic Law (*maslahah mursalah*), in term of *hifzunnasl* (upbringing the children).
 - g. The expansion of the absolute competence of the religious court to the case of domestic battery is very possible to be done considering that there are changes in the requirement upon the position of the Religious Court.

Article 2 of UUPA of 1989 mentioned that Religious Court is one of the actors of the judicial power for the Moslem justice seeker in search of justice in “certain civil law matter” that is governed in this constitution. While in the UUPA of 2006, it is mentioned that the religious court is one of the actors of the judicial power for the Moslem justice seeker in search of justice in “certain matter”.

The change from “certain civil law matter” into “certain matter” indicates that the religious court has the chance to examine and giving verdict in matters on a larger scale.

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