

Marital Rape from the Perspective of the Law on Sexual Violence Crimes and the Maqashid al-Shari'ah

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ABSTRACT

Marital rape, the forcing of sexual relations by a husband upon his wife remains an issue not explicitly regulated in the Criminal Code (KUHP), although certain elements are covered by the Law on the Elimination of Domestic Violence (UU PKDRT) and the Law on Sexual Violence Crimes (UU TPKS). This study examines marital rape from the perspective of the TPKS Law and maqashid sharia (the objectives of Islamic law). The findings indicate that the TPKS UU offers broader coverage regarding victims and criminal penalties, while also placing greater emphasis on preventive measures compared to the PKDRT UU. From an Islamic legal perspective, the principle of mu'asyarah bil ma'ruf (treating one's spouse with kindness and fairness) mandates that a husband treat his wife well; Consequently, forcing sexual relations without regard for the wife's condition contravenes this principle. The study concludes that marital rape constitutes a form of violence with physical and psychological impacts on the victim, thereby necessitating a strengthened legal framework that aligns with the values of justice and humanity inherent in Islam.

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1. INTRODUCTION

Marriage is a vital aspect of human life. Through marriage, a household can be established and nurtured in accordance with religious norms and societal norms. A household unites two individuals of different sexes (husband and wife), who bond with each other to produce offspring to continue the generation.¹ [1]

Marriage or marriage comes from the word According to the Great Dictionary of the Indonesian Language, "nikah" has two

meanings: first, an agreement between a man and a woman to become husband and wife (officially), and second, marriage. However, the Quran uses this word for this purpose, in addition to figuratively meaning sexual intercourse. The word "nika" occurs in the Quran approximately 23 times, generally meaning "to unite."² [2]

Based on a normative legal perspective, marriage is a legal event, with the existence of marriage there must be a state apparatus and laws that clearly guarantee it

¹Abdul Manan, Various Problems of Islamic Civil Law in Indonesia, (Jakarta: Kencana 2006), p.1.

² Wawan Susetya, Knitting the Threads of Marital Love, (Republika: 2008), p.7.

against a violation that occurs at some point in the future as a result of the legal event. Marriage can be associated with the word "contract." Soebekti argues that the word "contract" is an abstract word for something that cannot be seen but can be imagined in the mind.³ [2]

In essence, in sexual relations, husband and wife have equal rights (a balance between the rights and obligations of husband and wife). Ideally, intercourse is enjoyed by both parties as fair and equal human beings. It is not intercourse forced by only one partner. [3] In fact, forced sexual relations, especially by husbands against wives, often occur within marriages. Today, forced sexual relations in the household are termed "marital rape" by feminists, gender activists, and human rights activists. Over time, the issue of marital rape has become controversial. This is suspected to be due to a doctrine derived from the interpretation of religious texts in general, which assumes that a wife must obey and serve her husband wholeheartedly. The slightest disregard for her husband's wishes will be considered *nusyuz*. Rape is considered a violation of the rules. Meanwhile, marriage is considered to legalize all aspects of the marital relationship, including sexual relations. Therefore, marital rape is often considered unreasonable [3], [4].

In the context of Islamic Family Law (IHL), marital rape is also a hot topic of debate, as marriage is believed to be a contract of ownership, a contract granting absolute authority to engage in sexual intercourse to a man who marries a woman. With this understanding, marital rape is difficult to imagine. On the one hand, the spirit of Islamist-Reformists, with a more progressive interpretation of religion, is pushing for legal protection for marital rape, given the high number of victims [5]. According to the National Commission on Violence Against Women's Annual Report 2021, the number of

reports of rape against wives was 100 in 2020. This data is a decrease compared to 2019, when there were 192 reported cases. This data shows a downward trend. However, this graph does not definitively confirm a decrease in marital rape cases in society. One factor contributing to the decline in reported cases is the pandemic, which has restricted many activities [6], [7].

Existing Indonesian legislation has not yet criminalized marital rape [8]. In the Criminal Code, only rape occurring outside of marriage, as stipulated in Article 285, has a legal basis for rape, which carries a maximum penalty of 12 years in prison. Subsequent legal developments, the enactment of Law Number 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT), provided a window of legal certainty for marital rape. Articles 8 and 46 describe types of sexual violence within the household, such as forced sexual intercourse by a member of the household. This is then further defined in Article 46, which stipulates that perpetrators are subject to a maximum prison sentence of 12 years and a fine of up to Rp 36,000,000.

The issue of marital rape in Indonesia has grown significantly through the enactment of the Sexual Violence Eradication Bill (RUU PKS), which has now been ratified as the Sexual Violence Crimes Act (TPKS Law). The TPKS Law provides for various penalties, including imprisonment, additional penalties in the form of compensation, community service, special counseling, revocation of parental rights, and, in certain circumstances, even death, the victim will be subject to appropriate punishment.⁴ [9]

2. METHODS

This study employs a normative juridical research method with a qualitative descriptive approach to examine marital rape from the perspectives of Indonesian positive law and *maqashid al-shari'ah*. The research

³Achmad Kuzari, *Marriage as a Contract*, (Jakarta: PT. Raja Grafindo Persada, 1995), p. 2.

⁴ Muhammad Anis Zayadi and Lumatul Aisyah, 'Criminalization of Marital Rape from the Perspective of Criminalization of Marital Rape

from the Perspective of *Maqāṣid Al-Syarī'ah* (Study of the Domestic Violence Law, the TPKS Law and the Draft Criminal Code)', *Wasathiyah*, 4.2 (2022), 64–77.

applies statutory and conceptual approaches to analyze the legal provisions governing sexual violence within marriage and their relationship with Islamic legal principles. The primary legal materials consist of Law Number 23 of 2004 concerning the Elimination of Domestic Violence, Law Number 12 of 2022 concerning Sexual Violence Crimes, relevant provisions of the Indonesian Criminal Code, and Islamic legal sources, particularly the Qur'an and Hadith. Secondary legal materials include scholarly articles, legal literature, and previous studies addressing marital rape, victims' rights, and the objectives of Islamic law.

Data were collected through library research by examining relevant legislation, Islamic legal texts, and academic publications. The collected materials were analyzed qualitatively using descriptive, comparative, and interpretative methods. The analysis focuses on comparing the legal protection provided under Indonesian legislation with the principles of *maqashid al-shari'ah*, particularly the protection of life, dignity, and individual rights within marriage. Through this approach, the study identifies the legal implications of marital rape and evaluates its compatibility with Islamic principles of justice, mutual respect, and the prevention of harm.

3. RESULTS AND DISCUSSION

3.1 Marital Rape from the Perspective of the Law on Sexual Violence Crimes

There are many types of sexual violence within the household, one of which is marital rape, or rape that occurs between married couples. This type of rape remains widely debated because it is considered an internal household issue, and society tends to blame the victim. However, on the other hand, marital rape, related to sexual violence against women (wives), has negative impacts. It requires courage to express this dissatisfaction with marriage. If a husband

forces his wife to accept sexual favors without her consent, this unwillingness often goes unexpressed due to various factors, such as fear, shame, economic, social, or cultural coercion, lack of choice, and so on [10].

Until now, people have only understood violence as physical acts that are rough, violent, and cruel. Conversely, psychologically oppressive and oppressive behavior is not considered violence. Marital rape, on the other hand, is an act of violence that is committed both physically and psychologically. The impact of marital rape, as described above, has a significant impact on the victim, both physically and psychologically.⁵

Cases of coercion in sexual relations that occur to a woman do not only occur outside of marriage. In marital ties, coercion in intimate relations still often occurs, especially rape or coercion to have sexual relations which is often carried out against a wife. One of the forms of violence that occurs in the household is sexual violence which is known as Marital Rape in legal studies or coercion to have intimate relations. In Article 1 paragraph (1) of Law No. 23 of 2004 concerning Domestic Violence, it is stated that domestic violence is any act against a person, especially a woman, which results in physical, sexual, psychological misery or suffering, and/or unlawful deprivation of liberty within the household [11].

In Law No. 23 of 2004, Article 1, paragraph (1) concerning the Elimination of Domestic Violence, it is explained that rape is the most severe form of violence experienced by women, which not only results in physical damage but also psychological impacts. Forced sexual relations in the household clearly violates the wife's rights, because sex is also her right. Sexual activity based on coercion results in only the husband getting sexual pleasure, while the wife does not feel the same. If there is no will or good communication between husband and wife, there will definitely not be equality in access

⁵Titin Samsudin, 'Marital Rape as a Violation of Human Rights', *Jurnal Al-Ulum*, 2010, 339–54.

to satisfaction. Sexual relations carried out based on pressure or coercion are the same as oppressing someone.

Thus, it can be concluded that marital rape is an act of forcing a husband's will on his wife to engage in sexual intercourse without the wife's consent due to her condition of being unable to have sexual relations with her husband. Religion and humanity are two concepts that cannot be separated by any means.⁶ [5]

Marital rape can be defined as a form of violence involving forced sexual intercourse by a husband against his wife without considering her condition or circumstances. Terminologically, marital rape is an English term, composed of the words "marital" and "rape." Marital itself is related to marriage, and rape itself means "raping." Therefore, marital rape can be defined as rape committed by a husband and wife within a marital relationship [3].

If reviewed from Law No. 23 of 2004 concerning the Elimination of Domestic Violence (hereinafter referred to as the PKDRT Law), then marital rape can be categorized as one form of domestic violence (KDRT). In Article 1 number 1 of the PKDRT Law, in essence states that KDRT is an act committed against a person, especially women, within the scope of the household, where the act committed can cause suffering, whether physical or psychological, can also be in the form of neglect in the household and acts in the form of unlawful deprivation of liberty. In simple terms, KDRT can also be interpreted as an act committed with violence or the threat of violence with the aim of suppressing or controlling people within the scope of the household [10].

Based on this, although in the Indonesian general criminal law (KUHP) the term marital rape has not been regulated, this act is actually regulated in the Domestic Violence Law in Article 8 which is related to sexual violence, although the formulation of

this article is still very broad, because the victims referred to in this article are all people who live in the household, whether they are people who are blood relatives or not, such as domestic helpers and so on.⁷

When comparing the Domestic Violence Law with the Sexual Violence Bill, there are several differences related to the issue of marital rape and sexual violence in general. First, regarding the broader definition of types of sexual violence in the Sexual Violence Bill that are not yet recognized by current positive law, one of which is the existence of marital rape. Second, regarding the subjects who can be victims in the meaning of sexual violence [3]. The Sexual Violence Bill has a broader scope where personal relationships are not only limited to the household sphere. Second, regarding criminal threats, where the Domestic Violence Law in the context of marital rape has a criminal threat in the form of imprisonment with a maximum of 15 years and a fine. Meanwhile, the Sexual Violence Law in the context of rape as sexual violence in general has minimum and maximum criminal threats regulated in Articles 108 to 115 of the Sexual Violence Law, where the main punishment threatened is imprisonment with minimum and maximum limits, as well as additional punishments in the form of compensation, community service, special guidance and revocation of custody rights [13], [14]. Third, in the criminal regulation of rape there is a qualified offense, where certain circumstances can increase the prison sentence imposed, for example, if the perpetrator's actions result in the loss of the victim's life, then the maximum sentence that can be imposed by the judge is 20 years. This is different from the Domestic Violence Law which does not have a qualification that specifically regulates sexual violence, where the qualification of the offense is outside the article that regulates sexual violence. Fourth, the emphasis in the Sexual Violence Law, where what is

⁶ Muh Irham, Hartini Thahir, and Istiqamah Istiqamah, 'Review of Islamic Law on Marital Rape in Households Related to the Draft Criminal Law', Qadauna: Scientific Journal of

Islamic Family Law Students, Vol.3 No.1 (2021), 131-45.

⁷ Domestic Violence, 'Marital Rape as Perspective of the Abolition Law', 2004, 1-14.

prioritized is not only repressive efforts through the listed criminal possibilities, but also preventive efforts. The Sexual Violence Law includes efforts to prevent sexual violence that need to be carried out by the state, government, and local governments in several articles, including the role of the community, for example through strengthening the capacity to eliminate sexual violence for community institutions/groups, religions, beliefs, and customs. Meanwhile, the Domestic Violence Law does not include such preventive content [10], [15].

Therefore, it must be ensured that the legislation, the power to create which lies with the legislative body, truly aligns with the will and logic of the people. Mistakes at the legislative level will certainly have direct implications for public unrest in Indonesia. Mistakes at the legislative level will create subordinate legislation, or delegated legislation. Delegated regulations function as implementing regulations, just as the presence of regional regulations is the implementing regulation for the issuance of a law.⁸ [7]

3.2 The Maqashid Syariah Perspective on the Crime of Marital Rape

In Islamic teachings, sexual relations are not only for recreation (fun), but they contain the value of worship and have the aim of obtaining offspring as successors to good deeds and a place where love and affection abound, as well as successors in conveying God's mandate, safe in the afterlife [5].

Regarding the issue of sexuality between husband and wife, there are several statements in the Qur'an that can be put forward, including in QS. Al Baqarah/2: 187 which means:

Meaning: "It is lawful for you to be intimate with your wives on the night of the fasting month. They (your wives) are your garment and you are their garment."

Islam itself teaches to treat one's wife well, in daily life and in intimate

relationships. In QS al-Baqarah (2): 222 it is stated, "They ask you about menstruation. Say, it is something dirty." Therefore, avoid "gatherings" when they are menstruating, and do not have sexual intercourse with them, so that they become pure. When they are pure, have sexual intercourse with them as Allah has commanded you. Indeed, Allah loves those who repent and loves those who are pure [5].

Furthermore, Islam teaches that a husband must treat his wife with kindness. This prohibits violence, such as beatings, abuse, and so on. While a wife is fundamentally obligated to comply with her husband's demands, if she is not aroused to do so, she may offer to do so. A wife who is sick or unwell is not obligated to comply until her illness subsides. If a husband persists in insisting, he has essentially violated the principle of mutual consent by abusing the very person he is supposed to protect [16].

The Quran also explains the husband's sexual rights over his wife, which are likened to a field for cultivation. This demonstrates that sexual relations are a husband's right over his wife, which must be fulfilled. This is found in Surah Al-Baqarah, verse 223, which reads:

"Your wives are (like) the land where you cultivate, so come to the land where you cultivate however you wish. And do (good deeds) for yourself, and fear Allah and know that you will meet Him one day. And give the believers good news." (Al-Baqarah: 223).

The reason for the revelation of the verse above, Imam Bukhari narrated, from Ibnul Munkadir, that "I once heard Jabir say, the Jews used to say, if a husband has intercourse with his wife from behind, then a child will be born with crossed eyes." So this verse was revealed. It is also mentioned in several other narrations for almost the same reason. Looking at the reason for the revelation, this verse was revealed as a form of leniency and permissibility to have intercourse with a wife from behind. Ibn

⁸ Riskyanti Juniver Siburian, 'Marital Rape as a Criminal Act in the Draft Law on the

Elimination of Sexual Violence', Vol 7. No. 1 (2020), 149-69.

Abbas said, however, even though it is through the back, it remains on one path (genitals). Al harts by Ibn Abbas is interpreted as a place to bear children. Not as a land that can be used as a place to do whatever we want, not to be trampled [13].

If the above Qur'anic and Hadith arguments are ignored, they can be interpreted arbitrarily, undermining and eliminating the principle of justice that Islam has always upheld. If humans interpret this cognitively as a piece of open land whose owners can arbitrarily use it for whatever they wish without regard for the land itself, it will be damaged and have fatal consequences. A potentially fatal consequence of this unfounded cognition is that they will assume that the woman, as their wife, is to be treated as she pleases, based on their power. Even a single argument can be interpreted in a single, non-exhaustive way, failing to reveal deeper meanings. Consequently, this understanding can close the door to *ijtihad*, which should continue to evolve alongside legal developments and emerging issues, and the law becomes authoritarian. However, upon closer examination, there are numerous implicit meanings within each verse of the Qur'an and Hadith. Therefore, the role of a cognitive systems approach is needed.⁹ [2], [16]

In Islamic law, the rights and obligations between husband and wife are equal. The husband is obliged to provide support to his wife, while the wife is obliged to obey and obey her husband. The most basic obedience of a wife to her husband is regarding sexual relations (body relations). As long as there are no Islamic reasons such as menstruation or fasting during Ramadan, a

wife may not refuse her husband's invitation to have sex.¹⁰ [5]

4. CONCLUSION

Marital Rape It is an act of forcing a husband's will on his wife to engage in sexual intercourse without the wife's consent due to her inability to have sexual relations with her husband. Religion and humanity are two concepts that cannot be separated by any means.

The PKS Law in the context of rape as sexual violence generally has minimum and maximum criminal threats regulated in Articles 108 to 115 of the PKS Law, where the main punishment threatened is imprisonment with minimum and maximum limits, as well as additional punishments in the form of compensation, community service, special training and revocation of custody rights. Third, in the regulation of rape crimes there are qualified offenses, where certain circumstances can aggravate the prison sentence imposed, for example if the perpetrator's actions result in the loss of the victim's life, then the maximum sentence that can be imposed by the judge is 20 years.

Islam also teaches that a husband must treat his wife with kindness. This prohibits violence, such as beatings, abuse, and so on. While a wife is fundamentally obligated to comply with her husband's demands, if she is not aroused to do so, she may offer to do so. A wife who is sick or unwell is not obligated to comply with her husband's advances until her illness subsides. If a husband persists in insisting, he has essentially violated the principle of mutual consent by abusing the very person he is supposed to protect.

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¹⁰ Muhammad Yunus, 'Marital Rape (Rape in Marriage) Reviewed from the Perspective of Islamic Law, vol.9 no.1, 2011.

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