



State, Islam, and Gender: Dynamics of Marital Rape Law in Indonesia

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Abstract

Marital rape, which is an act of sexual violence in marriage, is often debated among the public because it is considered an act that is impossible to happen. There is debate about responding to acts of marital rape among the community, which is the background for writing this article in a review of positive law, Islamic law, and gender justice. The purpose of this research is to understand and analyze the dynamics of rape marital law in Indonesia according to positive law, Islamic law, and gender. Using a qualitative method with a normative legal approach, this paper describes and analyzes the laws, books, and articles related to this research. The results found from this study are that marital rape is included in the crime of sexual violence, although it is not explained in detail regarding the criminal sanctions for the perpetrators. This shows that Indonesia's positive law has not touched on marital rape in detail. Marital rape is not justified in Islamic law; this can be seen from the verses of the Quran, which emphasize a good relationship between husband and wife. Based on gender justice, it is the wife who becomes the victim of marital rape because the husband thinks that he is at a higher level, so the wife must obey her husband's orders because it is an obligation, while the husband ignores the wife's rights.

Keywords: Marital Rape, Positive Law, Islamic Law, Gender Justice

Abstrak

Marital rape yang merupakan tindakan kekerasan seksual dalam perkawinan seringkali menjadi perdebatan dikalangan masyarakat karena dianggap sebagai tindakan yang tidak mungkin terjadi. Adanya perdebatan dalam menyikapi tindakan *marital rape* dikalangan masyarakat menjadi latarbelakang ditulisnya artikel ini dalam tinjauan hukum positif, hukum islam dan kedilan gender. Tujuan dari penelitian ini adalah untuk memahami dan menganalisis dinamika hukum marital rape di Indonesia menurut hukum positif, hukum islam dan gender. Menggunakan metode kualitatif dengan pendekatan hukum normative, tulisan ini



mendeskripsikan dan menganalisis perundang-undangan, buku dan artikel yang terkait dengan penelitian ini. Hasil yang ditemukan dari penelitian ini adalah *marital rape* masuk kedalam tindak pidana kekerasan seksual, meskipun tidak dijelaskan secara rinci terkait sanksi pidana bagi pelaku. Hal ini menunjukkan bahwa hukum positif Indonesia belum menyentuh secara detail mengenai *marital rape*. *Marital rape* tidak dibenarkan dalam hukum Islam, hal ini terlihat dari ayat-ayat Alquran yang menegaskan hubungan yang baik antara suami istri. Berdasarkan keadilan gender, yang menjadi korban *marital rape* adalah istri karena anggapan suami berada di tingkatan yang lebih tinggi sehingga istri harus patuh terhadap perintah suaminya karena itu merupakan kewajiban, sementara suami mengabaikan hak-hak istri.

Kata kunci: *Marital Rape*, Hukum Positif, Hukum Islam, Keadilan Gender

Introduction

Marital rape among Indonesian people is still very foreign, when interpreted in terms of rape in the household it becomes a taboo to hear, because people generally understand that rape in marriage does not exist and only occurs outside of marriage or is forced to have sexual relations with people who are not husband or wife. The discussion of Marital rape is not found in the Criminal Code and the Law on the Elimination of Domestic Violence. Article 285 of the Criminal Code seems to emphasize the word "outside of marriage", if rape occurs within a marital bond, it cannot be called rape. In Law no. 23 of 2004 concerning PKDRT, it is explained that:

"Domestic violence is any act against a person, especially a woman, which results in physical, sexual, psychological misery or suffering, and/or neglect of the household including threats to commit acts, coercion, or unlawful deprivation of liberty within the household."

The word "outside of marriage" as stated in Article 285 of the Criminal Code can be agreed upon and accepted in Indonesia because it believes that acts of rape within a marriage bond cannot occur because fulfilling sexual needs in marriage is the wife's obligation. In a patriarchal cultural system, a wife is obliged to obey her husband. According to Anil Anantthaswamy and Kate Douglass, followed by Riskyanti Juniver Saribuan, it is estimated that this patriarchal culture was thought to have occurred during a time when humans were still dependent on nature (humans defended their lives by hunting and gathering food) until the agricultural era when people no longer lived independently. nomadic, thus giving rise to the need for protection from a man because he is considered physically stronger than a woman.¹

Patriarchal culture places limitations on women's roles so that women feel discriminated against. From these restrictions, various social problems emerged that discriminated against women's freedom. Indonesia is a constitutional state, but seeing the reality, it seems that it has not been able to accommodate these various problems. This happens because there is an

¹ Riskyanti Juniver Siburian et al., "Ruu-Penghapusan Kekerasan Seksual" 7, no. 1 (2020): 149-69.

assumption that the realm of women is a local (domestic) domain, so that law enforcement is still quite weak and there is no gender justice.²

In the context of Islamic family law, the term marital rape is still being debated. Marriage is understood as a very strong contract between a man and a woman, the tamlik contract, namely the ownership contract and the ibahah contract, namely the contract that is given the authority/ permissibility to have sexual relations between a married man and a woman. From the marriage, in essence it would be difficult to imagine if there was rape within the marriage bond.³

The Quran and Hadith do not provide detailed explanations related to the relationship between husband and wife, but only explain a good treatment between them (mu'asyarah bil ma'ruf). In general, the public understands this from an argument which explains that prioritizing the interests of the husband rather than the wife, so that male-biased religious interpretations are prone to occur. In understanding this interpretation, it is as if only the wife is considered to have an absolute obligation at the request of her husband, but not vice versa. If it is understood more deeply, such an interpretation is not true, because the goal is for husband and wife to get the same happiness and it is not justified that the husband can act arbitrarily and even commit acts of violence that hurt his wife to achieve that happiness.⁴

Many studies related to the issue of marital rape have been carried out. Research conducted by Amrita Singh on Marital rape: An Unaddressed Stigma, with the results of the research is that there must be a legal system in dealing with marital rape laws, when there is a change in the condition of society, the law must also follow these changes by amending the applicable regulations. Marital rape is a sensitive topic that must be handled in the interests of the parties and upholding justice.⁵

Research conducted by Padma-Bhate Deosthali, Sangeeta Rege and Sanjida Arora with the title Women's Experiences of Marital Rape and Sexual Violence Within Marriage in India: Evidence from Service Record, The results of this study are that marital rape that often occurs in a marriage begins with an understanding regarding patriarchal values which imply that the wife has a duty and obligation to obey everything her husband orders, including in terms of sexual relations. Government agencies must support wives who are victims of marital rape, because this action is part of a crime that must be resolved and involves the government.⁶

² Aldila Arumita Sari and R B Sularto, "Kebijakan Formulasi Kekerasan Seksual Terhadap Istri (Marital Rape) Berbasis Keadilan Gender Di Indonesia," *Jurnal Pembangunan Hukum Indonesia* 1, no. 1 (2019): 117, <https://doi.org/10.14710/jphi.v1i1.117-127>.

³ Sheila Fakhria and Rifqi Awati, "Membaca Marital Rape Dalam Hukum Keluarga Islam Dan Rancangan Undang-Undang," no. Susila 2013 (2020).

⁴ Muha Anwar and Mmad Khoirul, "Perspektif Islam Terhadap Pemerkosaan Dalam Pernikahan," *Al-Burhan, Kajian Ilmu Dan Pengembangan Budaya Al-Quran*. 21 (2021): 255-66.

⁵ Amrita Singh, "Marital Rape: An Unaddressed Stigma," *SSRN Electronic Journal*, 2022, <https://doi.org/10.2139/ssrn.4099279>.

⁶ Padma Bhate Deosthali, Sangeeta Rege, and Sanjida Arora, "Women's Experiences of Marital Rape and Sexual Violence within Marriage in India: Evidence from Service Records," *Sexual and Reproductive Health Matters* 29, no. 2 (2022): 127-38, <https://doi.org/10.1080/26410397.2022.2048455>.

Research conducted by Ni Made Sintia Ardi Ari and Ida Bagus Surya Dharma Jaya on Marital Rape in terms of the PKDRT Law. The results of this study state that marital rape is not regulated in the Criminal Code, but this action is regulated in Law no. 23/2004 on PKDRT article 8. Research conducted by Muhammad Khoiril Anwar on Islamic Perspectives on Rape in Marriage. This research is focused on the interpretation of interpretation using Hasan Hanafi's thematic interpretation study method, and the results of this study are that the term marital rape is not recognized in the Koran. Marriage in Islam signifies the legality and legitimacy of the relationship or association between a man and a woman in a good/good way.⁷

Compared to previous research, this research try to analyses the topic in the larger perspective such positive law, Islamic law and also gender.

Based on the background, the identification of the problem that will be discussed in this study is, marital rape in a review of positive law, Islamic law and gender justice. The problem formulation of this research is: How is marital rape in positive law, Islamic Law, and Gender Justice review? The purpose of this study is to understand and analyze the dynamics of rape marital law in Indonesia both from the perspective of positive law, Islamic law and gender.

The method used in this research is a descriptive analytical method of library research, through a qualitative approach, namely by describing and analyzing phenomena that occur in society. In addition, analyzing several documents of laws and regulations and literature both from books and journals related to this research.

Terminology of Marital Rape

The word "rape" is taken from English which means to rape, according to the Latin "rapere" means to steal, force, seize or take away. The term marital rape or rape in marriage is considered a controversial act which causes confusion, because when translated broadly, it is considered a sexual offence. With marriage, sexual relations between men and women become legal and socially agreed upon. As for marital rape, women/wives generally do not admit that sexual violence committed by their husbands is rape, so there is little possibility of reporting it to the authorities.⁸

Based on the terms, rape is defined as sexual intercourse between a husband and wife, in which the wife is used as the victim and the husband as the perpetrator, which is carried out when the condition is unconscious or the relationship is carried out vaginally, orally or anally with coercion and threats. Rape committed within a marriage bond is the same as other types of rape in general. Rape in marriage is a sexual relationship that is not expected by a husband to his wife which is carried out by force, threats of violence or physical violence or without obtaining consent.⁹

⁷ Anwar and Khoiril, "Perspektif Islam Terhadap Pamerkosaan Dalam Pernikahan."

⁸ Moh.Qadarusman, "Konsep Sanksi Kekerasan Seksual Dalam Rumah Tangga (Marital Rape) Di Indonesia Perspektif Ahli Hukum Islam Di Kota Malang" (Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2021); Fakhria and Awati, "Membaca Marital Rape Dalam Hukum Keluarga Islam Dan Rancangan Undang-Undang."

⁹ Fakhria and Awati, "Membaca Marital Rape Dalam Hukum Keluarga Islam Dan Rancangan Undang-Undang."

According to Mulyana W. K. quoted by Abdul Wahid and Ni Made Sintia Ardi Ari, and Dharma Jaya. mentions that there are 6 (six) types of rape, namely: 1) Sadistic rape, happiness that the perpetrator gets by giving an attack or wound to the victim's genitals or body, 2) Anger Rape, an outlet for the perpetrator's anger by abusing the victim, 3) Domination Rape, relying on strength to persecute the victim with his strength as if the perpetrator is in a superior position. 4) Seductive Rape, Actions that occur due to stimulation created by both (the victim and the perpetrator), until finally the victim thinks that intimacy does not need to cross the line, while the perpetrator forces the victim to have sexual intercourse. 5) Victim Precipitated Rape, the act of rape occurs because the victim is the originator. 6) Exploitation Rape, the perpetrator commits an act of rape on the victim by taking advantage of the victim's dependence on him both economically and socially.¹⁰

Rape in marriage (marital rape) when associated with this type of rape, is included in the category of exploitation rape. This is because a wife in the family is a person who depends on her husband both economically and socially, and the husband is positioned as the head of the family has a major role in earning a living for the family.¹¹

According to Finkelhor quoted by Muh. Endriyo Susila said that there are 3 categories of marital rape;¹²

- 1) Battering rape, the husband forces his wife to have sexual intercourse when she is not ready or does not wish to have sexual intercourse, so that the husband commits sexual violence together with physical violence.
- 2) Force only rape, sexual intercourse carried out by the husband's compulsion towards his wife, usually begins with a threat. Physical violence is carried out if the husband's sexual desires are not fulfilled, on the other hand if the husband's sexual desires are fulfilled then the physical violence is not carried out.
- 3) Obsessive rape, sexual relations carried out in the form of sadistic behavior by partners. This action includes physical violence and can even involve using sharp tools to injure.

Based on the results of complaints from Komnas Perempuan's (national women's commission) annual records, there were 192 cases of marital rape in Indonesia in 2019, 100 cases in 2020, 2021 cases of sexual violence against women reached 2,363 cases, and marital rape cases took second place with the total reached 591 cases.¹³

Marital Rape in a Positive Legal Review in Indonesia: KUHP and PKDRT

The discussion related to marital rape in positive law in Indonesia can be mapped as follows:

¹⁰ Abdul Wahid, *Perlindungan Terhadap Korban Kekerasan Seksual Advokasi Atas Hak Asasi Perempuan* (Bandung: PT Refika Aditama, 2001); Ardi Ari and Dharma Jaya, "Perkosaan Dalam Perkawinan (Marital Rape) Ditinjau Dari Undang-Undang Penghapusan Kekerasan Dalam Rumah Tangga."

¹¹ Ardi Ari and Dharma Jaya, "Perkosaan Dalam Perkawinan (Marital Rape) Ditinjau Dari Undang-Undang Penghapusan Kekerasan Dalam Rumah Tangga."

¹² ME Susila, "Islamic Perspective on Marital Rape," *Jurnal Media Hukum* 20, no. 2 (2013): 317-32.

¹³ "Konsep Marital Rape Masih Dianggap Antara Ada Dan Tiada."

Table1. Provisions of Marital Rape Law in Indonesia

KUHP	UU No. 23 Tahun 2004
<p>Article 285 "Anyone who uses violence or threats of violence forces a woman to have intercourse with him outside of marriage, is threatened with committing rape with a maximum imprisonment of 12 years"</p>	<p>Article 1 "Domestic violence is any act against a person, especially a woman, which results in physical, sexual, psychological misery or suffering, and/or neglect of the household including threats to commit acts, coercion, or unlawful deprivation of liberty within the household."</p>
<p>Article 287 verse (1) "Anyone who has intercourse with a woman who is not his wife, he knows or should reasonably suspect, that the woman is not yet 15 years old, if it is not clear how old she is, that the woman is not yet married, shall be punished with a maximum imprisonment of nine years"</p>	<p>Article5 "Everyone is prohibited from committing domestic violence against people within the scope of his household, by: a. Physical abuse; b. psychic violence; c. sexual violence; or d. Domestic Abandonment"</p>
	<p>Article 8 "Sexual violence as referred to in Article 5 letter c includes: Coercion of sexual relations committed against people who live within the scope of the household; Forcing sexual relations with someone within the scope of the household with another person for commercial purposes and/or certain purposes"</p>

From the mapping related to marital rape, it can be concluded that in the Criminal Code there is an affirmation of "outside marriage" while "inside marriage" there is no article that regulates it. The provisions stipulated in this Criminal Code, what is called rape is the coercion of sexual relations on women not on wives, coercion or rape is only meant for those outside of marriage not in marriage ties. Therefore, the wife cannot complain about this act to court as an act of rape, even if the complaint is included in the case of persecution.¹⁴

¹⁴ Sari and Sularto, "Kebijakan Formulasi Kekerasan Seksual Terhadap Istri (Marital Rape) Berbasis Keadilan Gender Di Indonesia."

Rape as described in KUHP/285 does not seem to accommodate the protection of women's rights not to take the desired action, including in the context of forced sexual relations within the family (husband and wife). The need for a criminal law policy (criminal policy) is an integral part of social policy (social policy) as one of the efforts to combat crime through the establishment of a criminal law as part of efforts to protect society. Law No. 23/2004 was born and regulates sexual violence although it does not specifically regulate domestic rape (marital rape).

In Law No. 23/2004 it is emphasized that sexual violence is included in domestic violence, although it is not explained in detail regarding marital rape. The scope of coercion of sexual intercourse perpetrated against people living in the household environment is very wide and there is no detailed explanation regarding the classification of victims of this sexual violence. Article 8 seems to generalize who is a victim, be it children, wife, siblings or even household assistants. When viewed from the point of view of treatment for victims of sexual violence, child victims, spouses, relatives and household assistants are different. Therefore, regulations related to this matter are not very probing from the point of view of victims of sexual violence against people living in the household environment. Even in articles 8a and 8b there is no special classification, this only regulates differences in terms of sentencing which are regulated later in articles 8a and 8b.

Aldila Arumita Sari and R.B Sularto emphasized that women's dependence on men is based on patriarchal culture and nurture theory which places women below men. This is the reason for the need for special specialization in the regulation of sexual violence on the part of the victim, the wife and the perpetrator, the husband. Because the culture in Indonesia which is analyzed using nurture theory is still thick with patriarchal culture positioning the wife as a servant of the husband's needs, so that sexual violence perpetrated by husbands against wives seems to be something normal and these actions are prone to being repeated as long as the marriage bond lasts.¹⁵

The categorization of sexual violence is: a) isolating the wife from her inner needs; b) sexual relations that the wife does not want; c) forcing a wife to work as a prostitute. In terms of criminal law sanctions, the Criminal Code does not regulate marital rape, so this act cannot be categorized as a crime of rape as regulated in article 285 of the Criminal Code. Article 46 of the PKDRT Law which regulates criminal penalties for those who commit acts of sexual violence is not felt to be sufficient, because the scope related to sexual violence is still broad and there are no specific specifications regarding legal sanctions for perpetrators of marital rape.

Marital Rape in the Review of Islamic Law

The relationship between husband and wife in Islam is categorized as a strong bond (*mitsaqan ghalidzan*), an agreement that Allah SWT witnessed directly which has implications for taking care of each other for a long time with the aim of creating a *sakinah, mawaddah warrahmah* family. The hope of marriage is that there is mutual pleasure between husband and wife, there is no domination but mutual dependence between them.

¹⁵ *Ibid.*

On the other hand, religious narratives seem to cause inequality in the relationship between husband and wife, especially in terms of sexuality. The legality of the relationship between men and women in the marriage bond is used as the legality of the husband's ownership rights to the complete ownership of the wife's body. The classic narrative states that the compensation for living that has been given by the husband to his wife makes sexual rights belong to the husband, and the wife must fulfill the obligation to serve the husband.¹⁶

The position of husband and wife in a family is equal, there is no domination because both are partners in the family. Hopes of ideal family goals will not be realized if good cooperation is not built, both of them have their respective roles and functions in creating a happy and harmonious family.¹⁷

Allah said in the Quran;

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ

"Men (husbands) are protectors of women (wives), because Allah has made some of them (men) superior to some others (women), and because they (men) have provided maintenance from their wealth. (QS. An-Nisa' [4]: 34)

The word qawwam has been given different translations. Some translate it as a leader, ruler, and protector. Muhammad Irfan Syaifuddin in his research argues that the interpretation of verses in the Koran which are interpreted partially will lead to an understanding of the concept of domestic life in an Islamic view to be incorrect. There is a difference in position between husband and wife, the husband is the head of the household who is considered to have full power over family members. Meanwhile, the wife plays a role in the domestic area, by taking care of the children and serving her husband, and she is passive and only accepts and the husband manages everything.¹⁸

In the book of al-Munir's interpretation it is explained that the word qawwam means leader, in this case that men have the duty to protect women, manage their affairs, educate according to the rules taught in religion. Therefore, understanding the meaning of alqawwamah means leadership in the marriage bond which includes all the affairs in it, and not with false leadership.¹⁹

Another wrong view of domestic life based on Islamic concepts is that it is permissible to beat one's wife for reasons of nusyuz. This erroneous understanding then led to domestic violence and also marital rape which is understood to be permissible in Islam, if the wife disobeys or rejects her husband.²⁰ In Islamic literature it seems that it is permissible to beat

¹⁶ Fakhria and Awati, "Membaca Marital Rape Dalam Hukum Keluarga Islam Dan Rancangan Undang-Undang."

¹⁷ Muhammad Irfan Syaifuddin, "Konsepsi Marital Rape Dalam Fikih Munakahat," *Al-Ahkam Jurnal Ilmu Syari'ah Dan Hukum* 3, no. 2 (2018): 171, <https://doi.org/10.22515/al-ahkam.v3i2.1399>.

¹⁸ Syaifuddin, "Konsepsi Marital Rape Dalam Fikih Munakahat."

¹⁹ Abd Aziz, "Etika Interaksi Sosial Dalam Pola Meminta Izin: Studi Analisis Surat Al-Nūr," *Al-Burhan: Jurnal Kajian Ilmu Dan Pengembangan Budaya Al-Qur'an* 20, no. 2 (2020): 180-97, <https://doi.org/https://doi.org/10.53828/alburhan.v20i2.208>; Anwar and Khoirul, "Perspektif Islam Terhadap Pemerkosaan Dalam Pernikahan."

²⁰ Syaifuddin, "Konsepsi Marital Rape Dalam Fikih Munakahat."

wives. It is even stated that hitting is one of the methods recommended in the Koran as a lesson for wives who behave nusyuz. The verse that is used as the basis for this thought is a continuation of the previous verse.

فَالصَّالِحَاتُ قَنِيَّتٌ حَفِيظَاتٌ لِلْغَيْبِ بِمَا حَفِظَ اللَّهُ وَاللَّاتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ ۗ
فَإِنْ أَطَعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا إِنَّ اللَّهَ كَانَ عَلِيمًا كَبِيرًا

“So pious women are those who obey (to Allah) and take care of themselves when (her husband) is not around, because Allah has taken care of (them). The women you are worried about nusyuz, you should advise them, leave them on the bed (separate beds), and (if necessary) beat them. But if they obey you, then don't look for reasons to trouble them. Verily, Allah is Most High, Most Great”. (QS. An-Nisa' [4]: 34)

At a glance, this verse seems to allow wife beating. This view may appear if we only look at what is written in the verse at the beginning. The question that needs to be asked then is whether the beating was indeed a recommendation from the Koran, or was it a small emergency that should not have been carried out? This question is important to raise considering that the Koran was revealed to a society that does not "humanize" women.²¹

There are several attitudes that are carried out by the wife which are included in the nusyuz category, namely in the form of disobedience and neglect of the rights that should be obtained by the husband. In addition, another attitude that is included in the wife's nusyuz attitude is the inability of the wife to maintain her honor so that she has a relationship with a third person (having an affair) and does not carry out her husband's orders (which are not against religion).

This kind of nusyuz attitude will trigger various kinds of violence perpetrated by husbands in the form of physical, psychological, sexual and also verbal abuse with various levels. As already mentioned in QS. An-Nisa: 34 it is stipulated that Allah allows a husband to beat his wife if the two previous steps - being advised and separated from the bed - do not succeed in changing his nusyuz. The provisions for hitting a disobedient wife are not to repeat the beating in the same place, not to hit the wife's face and are prohibited from using the media when carrying out the beating, although this is permissible, the scholars agree that leaving this method is the most important action.²²

Nusyuz and marital rape seem to be two contradictory things. Nusyuz is a disobedient attitude made by a husband/wife towards their partner. When associated with the wife's position, the act of leaving obligations and not giving the husband's rights (sexual rights) can be categorized as nusyuz. One of the fatwas put forward by ibn Taimiyah if the wife does not want

²¹ Amirudin Arani dan Faqihudin Abdul Qadir, *Tubuh, Seksualitas, Dan Kedaulatan Perempuan* (Jakarta: Rahima, 2002).

²² Zuhaili, *Tafsir Munir: Akidah-Syariah-Manhaj* Jilid 3.

to serve her husband in sexual intercourse then the wife is considered nusyuz, even the husband is allowed to beat his wife and stop giving her alimony.²³

Allah said;

نِسَاؤُكُمْ حَرْثٌ لَّكُمْ ۖ فَأْتُوا حَرْثَكُمْ أَنَّى شِئْتُمْ ۖ وَقَدِّمُوا لِأَنفُسِكُمْ ۗ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّكُمْ مُلْقَوَةٌ ۗ وَبَشِّرِ الْمُؤْمِنِينَ

“Your wives are fields for you, so come to your fields whenever and in the way you like. And prioritize (the good) for yourself. Fear Allah and know that you will (later) meet Him. And give good tidings to those who believe”. (QS. AL-Baqarah [2]:223).

The word *hartsakum* is interpreted literally as a garden or field. The meaning of this translation is that the parable of the wife is like a field or garden where you plant and give many generations or offspring.²⁴ In this verse, Allah SWT orders the husband to come to the field or garden (wife) that he likes and wants in any way. In al-Munir's interpretation, the word *fa'tu hartsakum anna syi'tum* is translated that a husband may come to his wife from any direction and from any position. In this verse it also indicates that it is permissible to have sexual intercourse with a wife on the basis of marital ties, not adultery and at specified times, not prohibited times (fasting, I'tikaf and menstruation).²⁵ According to fiqh, several conditions that become *udzur syar'i* for a wife who refuses to have sexual intercourse are: a) during the menstrual period; b) during the puerperium; c) during fasting; d) while on pilgrimage; e) late stages of pregnancy; f) husband suffers from a contagious disease; g) the condition is dropped by *talaq*.²⁶

Allah said;

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرْهًا ۚ وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا آتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُّبِينَةٍ ۚ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ ۚ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَىٰ أَنْ تَكْرَهُوا شَيْئًا وَيَجْعَلَ اللَّهُ فِيهِ خَيْرًا كَثِيرًا

“O you who believe! It is not lawful for you to inherit women by coercion and do not give them trouble because they want to take back some of what you have given them, unless they have committed a real heinous act. And associate with them in the proper way. If you don't like them, (then be patient) because maybe you don't like something, even though Allah made a lot of good in it”. (QS. An-Nisa' [4]: 19)

Regarding this verse, it is explained in al-Munir's interpretation that there is an order to have sexual intercourse with his wife in a proper and good way as well as in speaking must be in a good way too. The word *'asyiruhunna bilma'ruf*, something that is liked in this case is good

²³ Z Darussamin, “Marital Rape Sebagai Alasan Perceraian Dalam Kajian Maqāṣid Syarī’Ah,” *Al-Ahwal* 1, no. 1 (2019): 84-98; Fakhria and Awati, “Membaca Marital Rape Dalam Hukum Keluarga Islam Dan Rancangan Undang-Undang.”

²⁴ Wahbah Az Zuhaili, *Tafsir Al-Munir : Akidah, Syari’ah, Manhaj (Al-Fatihah - Al-Baqarah) Jilid 1* (Jakarta, 2013).

²⁵ Anwar and Khoirul, “*Perspektif Islam Terhadap Pemerkosaan Dalam Pernikahan.*”

²⁶ Fakhria and Awati, “*Membaca Marital Rape Dalam Hukum Keluarga Islam Dan Rancangan Undang-Undang.*”

character and is not considered something that is not good by religion or custom. ²⁷ Be worthy of your wife by doing good to her, because if you look at history, before Islam came, women at that time were oppressed and their rights were taken away. then Allah SWT determines his rights in the marriage bond and stipulates a ban on being unkind to him. ²⁸

According to Islamic law, sexual intercourse is one of the obligations of the husband/wife to fulfill the rights of their partners which are legalized in the marriage bond. Sexual intercourse should be enjoyable for both parties. If conditions arise that have a negative impact on one of the parties, then the sexual relationship should not be carried out. As the objective function of carrying out marriage is as a biological means, but one must not forget the purpose of marriage, namely forming a Sakinah, Mawaddah and Rahmah family which is manifested and felt jointly between husband and wife, not just one party.²⁹

In the view of Islamic law, marital rape is included in the category of persecution which definitely deviates from the principle of maqashid shari'ah, to be precise, hifdzun nafs and at the same time contradicts mu'asyarah bil ma'ruf. ³⁰ Marital rape is a way that can hinder the creation of maqasid syari'ah to be achieved in sexual relations between husband and wife. Marital rape can cause mafsadah (damage) for humans, especially for the wife who is the object/victim in this action. Judging from the mafsadatan that arises from marital rape, namely physical and psychological suffering for the wife who is the victim, therefore, based on maqasid shari'ah, marital rape is an act that is prohibited in Islam and even punishable by acts that are forbidden if it is carried out accompanied by verbal violence. physical, threats, damaging intimate organs, and so on.³¹

Marital Rape in the view of gender justice

There are several verses in the Qoran that explain the principles of gender. Those verses are explaining; a) similarities between men and women as servants. As in Q.S Az-Zariyat: 56; b) men and women as caliphs/leaders on earth, this is explained in Q.S Al-An'am: 165; c) men and women accept the primordial agreement with Allah, explained in Q.S Al-A'raf: 172. These verses emphasize that in Islam there is no discrimination against gender, both men and women have equal rights. ³²

Nowdays, the term gender bias is always being discussed among gender activists. From several literature studies, men and women have differences about themselves and their respective identities. This refers to the term gender bias towards views of masculinism and feminism. According to the individualist theory, violent behavior is learned from the masculine

²⁷ Wahbah Az Zuhaili, *Tafsir Al-Munir: Akidah, Syari'ah, Manhaj (Al-Baqarah-Ali Immran-An-Nisaa')* Jilid 2, vol. 2, 2013.

²⁸ Anwar and Khoirul, "*Perspektif Islam Terhadap Pemerkosaan Dalam Pernikahan.*"

²⁹ Fakhria and Awati, "*Membaca Marital Rape Dalam Hukum Keluarga Islam Dan Rancangan Undang-Undang.*"

³⁰ Muhammad Yunus, "*Marital Rape (Perkosaan Dalam Perkawinan) Ditinjau Dari Perspektif Hukum Islam Dan Hukum Positif Di Indonesia (Studi Putusan Pengadilan Negeri Bangil No. 912/Pid/B/2011/PN.Bgl)*" (Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2018).

³¹ Darussamin, "*Marital Rape Sebagai Alasan Perceraian Dalam Kajian Maqāsid Syari'ah.*"

³² Susanti, "*Kesetaraan Gender Dalam Perspektif Al-Quran,*" *Al-Munawwarah: Jurnal Pendidikan Islam* 11, no. 1 (2019): 41-52.

characteristics of a man. A man shows his identity as a real man when he commits domestic violence.³³ The term gender bias is also interpreted in the condition that each individual is biologically born as male and female, and each has social characteristics as male and female seen from signs of masculinity or femininity that are supported based on values or symbols in society.³⁴

There are several elements that influence women in viewing the current marital rape phenomenon. These elements determine the extent to which women interpret marital rape as an act of "fairness" or injustice because there are rights that are not accepted over male selfishness. In this context, women are aware that there are systems and values that regulate their sexual life.³⁵

a) Male power, domination and control over female sexuality

Women perceive that there are differences between men and women which result in moral and social conditions. Physiologically, men are illustrated as symbols of strength, power and domination. This is because of the consequences of the socio cultural biological criteria (masculinity). Women seem to be trapped in this condition, they seem to think that they have the right to accept sexual violence because it is a consequence of their nature as women and their role as wives.

b) Stereotypes and values of sexuality

Women's perception of their views on marital rape is a construct of sexuality values and a consequence of their gender status as women. There are many attitudes that must be maintained by women who are normative, such as they cannot be expressive in terms of sexuality because this shows as if it is unethical. Besides that, women also have to be able to take care of their bodies so that their husbands are always interested, and they also have to be ready to serve their husbands at any time if they refuse then they have violated norms and values.

Gender equality and justice expects a relationship in a democratic and open family with mutual respect, appreciation and love so that harmony is created by carrying out their respective roles in a family so that each family member gets his rights as a human being and maintains his dignity as a creature glorious God. If the rights of family members are not obtained in accordance with a balanced portion, then a Sakinah family cannot be built properly. The existence of power holders by occupying subordinate positions and marginalization of those in control generally arise because of hierarchical relationships within a family. This unequal position triggers disharmony, when one party feels he is superior. This is a fact that

³³ Anugriarty Indah Asmarany, "Bias Gender Sebagai Prediktor Kekerasan Dalam Rumah Tangga," *Jurnal Psikologi* 35, no. 1 (2013): 1-20; Sari and Sularto, "Kebijakan Formulasi Kekerasan Seksual Terhadap Istri (Marital Rape) Berbasis Keadilan Gender Di Indonesia."

³⁴ Gabriel J. Ybarra, Susan L. Wilkens, and Alicia F. Lieberman, "The Influence of Domestic Violence on Preschooler Behavior and Functioning," *Journal of Family Violence* 22, no. 1 (2007): 33-42, <https://doi.org/10.1007/s10896-006-9054-y>; Asmarany, "Bias Gender Sebagai Prediktor Kekerasan Dalam Rumah Tangga."

³⁵ Trijayanti Putri Andayani and Nurul Hidayat, "The Sexual Negotiation Space of Women in the Marital Rape in Jember," *Jurnal Entitas Sosiologi* 8, no. 2 (2019): 53, <https://doi.org/10.19184/jes.v8i2.16651>.

occurs in society that the majority of wives are victims who are marginalized so that domestic violence arises.³⁶

Conclusion

Marital rape is an act that is not justified even if it is committed by a couple who are bound in a legal marriage. In the view of researchers, positive law in Indonesia does not specifically regulate marital rape. The rules dealing with marital rape are generalized to domestic violence. The Criminal Code does not regulate the crime of marital rape, there is only an affirmation that rape occurs outside of marriage, so also the PKDRT Law does not explain in detail and detail regarding marital rape, but explains sexual violence committed within the family sphere. Sanctions for the perpetrators were also imposed in general, without any explanation of who was the victim, even though if you look at the effects that occurred on the victim and the consequences of these actions, they were different as well as the way to handle them. Seen from the point of view of Islamic law, the Koran clearly does not justify the occurrence of marital rape, the verses of the Koran emphasize that the goals of marriage are *sakinah, mawaddah and Rahmah*, and to realize these ideals there must be cooperation between family members. As for the verses in the Koran which give rise to different interpretations of the word *qawwam* (leader) it is explained as a protector not as a ruler in the family. In terms of gender justice, marital rape is very clearly detrimental to women/wives, because the majority of victims in this marital rape are wives, because men are considered to have a higher status than women, this stems from a cultural understanding patriarchy, society understands that the obligation of women/wives is to serve their husbands, and the husband's obligation to provide for his wife. Therefore, for the sake of upholding justice and gender justice, it is necessary to support the government for the existence of special regulations regarding rape marital law.

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³⁶ Yunus, "Marital Rape (Perkosaan Dalam Perkawinan) Ditinjau Dari Perspektif Hukum Islam Dan Hukum Positif Di Indonesia (Studi Putusan Pengadilan Negeri Bangil No. 912/Pid/B/2011/PN.Bgl."

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