

Marital Rape As A Crime Of Sexual Violence In Positive Law In Indonesia

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ABSTRAK

Rape in a relationship has similar effects to rape outside of marriage. It is intended to avoid unnatural sexual behavior in a couple. Although men are considered to have full rights over their wives including in terms of sexual relations, it can worsen the relationship. The problem raised in this paper is to find out how the regulation of marital rape in Indonesia. The research method used is normative legal research, in order to analyze the vague norms related to marital rape in Law No. 23 Thn. 2004 with Law No. 12 of 2022. With the results of the analysis explaining that the factor of marital rape which later became a serious case both in the national and international scope needs regulations on marital rape, especially in Indonesia as a form of affirmation in the gender structure

Keywords: Marital Rape, Crime of Sexual Violence (TPKS), Indonesian Positive Law

INTRODUCTION

The balance between rights and obligations and having a peaceful life in the household is something that must be very desirable for married couples. However, this can become a problem if there is coercion to fulfill the desires of one of the two. Especially if there is violence that harms one of the parties.

Domestic violence often occurs because there is no cooperation between husband and wife. This means that a household is no longer the main place to fill the void of life between husband and wife. As referred to, such as the absence of understanding between their respective rights and obligations, equality of status, the absence of attitudes and behaviors of mutual respect, respect and mutual assistance in various fields. (Tahir, 2012). One form of violence that a wife is vulnerable to is sexual violence.

Furthermore, according to Saleh Ridwan (2015), the purpose of marriage is none other than to achieve a happy life both in this world and the hereafter. Article 1 of Law Number 1 of 1974 concerning Marriage states that:

"The basis of marriage is the inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and lasting family (household) based on the divinity of the Almighty. The article shows that the purpose of marriage is to form a family that is always happy and peaceful. Households should be used as a safe place for each family member, because a family is built with a physical and mental bond

between husband and wife. The behavior of expressing love and respect for each other, being faithful and giving each other between the two".

The problem arises when husbands often feel that they own their wives completely, resulting in the neglect of their wives' rights. In fulfilling sexual needs, for example, when the husband feels too dominant over her, there will tend to be an attitude of prioritizing personal needs without considering the circumstances and rights of his wife. This is the initial gap in the occurrence of forced sexual intercourse, which is later popularly known as *marital rape*. (Mufidah, 2008).

It cannot be denied that the need for sex is something that is absolute in a household relationship. In the view of religion, sex is not a taboo subject to discuss, considering that sex is a legitimate activity in a marriage. Sex is considered a procreative necessity and the creation of humans began with sexual activity.

The regulation of sexual violence is currently formulated in various positive legal regulations in Indonesia. These regulations include: Criminal Code (KUHP), Law No. 23/2004 on the Elimination of Domestic Violence. However, the formulation of domestic sexual violence in these various laws is not yet comprehensive. In fact, it is still considered partial because there is no strict legal system to prevent impunity for this behavior.

However, not only in the Indonesian sphere but also in the international sphere there are still many debates related to marital rape decisions. In the 2019-2024 PROLEGNAS (National Legislation Program), the Sexual Violence Law has been passed. Although it has gone through pros and cons since 2016. The TPKS Law passed by the DPR regulates 9 (nine) criminal acts of sexual violence, such as non-physical sexual harassment, physical sexual harassment, forced contraception, forced sterilization, forced marriage, sexual torture, sexual exploitation, sexual slavery, and electronic-based sexual violence. (Kompas.id., 2022).

Marital rape is forcible marital rape that is one of the hidden crimes and is part of domestic violence. Although this crime has been criminalized, it is still a complaint. It is necessary for victims to be active in upholding justice for themselves. Because this behavior is an act of coercion committed by the husband against the wife to engage in sexual activity without considering the wife's condition.

Unlike other forms of domestic violence crimes. If physical violence is received by the victim, the marks of the violence will be visible so that it is easy to use as evidence in the examination, but marital rape or marital rape is not like violence that gives real marks, but only hidden impacts and only the victim feels it.

Therefore, the author wants to describe and analyze the legal review of marital rape behavior from an Islamic point of view. Then a review is carried out on several aspects of the phenomenon of the case. The description in this paper is also intended to see how marital rape is seen from the point of view of Law No. 12 of 2022, so that the idea of criminalizing sexual relations gets a meeting point in it. So that the final point will answer, what should the state respond to these cases and the appropriate law to answer these behaviors.

LITERATURE RIVEW

Basically, every research must contain a substance that is legal novelty and emphasizes legal issues that are oriented towards new legal perspectives. To achieve this, every writing or research certainly requires a lot of literature as a comparison (Muqabalah) with related themes, therefore researchers use several books, books, theses and other scientific works as a form of comparison with the themes raised by researchers.

This research, at least, contains research topics that have similarities with writings by several previous authors, but substantially have fundamental differences with these writings. Of the various kinds of research that exist, the following details:

1. **Policy Formulation of Sexual Violence Against Wives (*Marital rape*) Based on Gender Justice in Indonesia.** This journal was written by Aldila Arumita and R.B. Sularto which was published in the Indonesian Journal of Legal Development, Volume 1 Number 1 of 2019. This journal discusses the policy formulation of sexual violence in general which is then examined using gender justice theory. The formulation in question is to provide certain policies that are conceptualized to achieve a justice that can actually be applied to wives.
2. **Marital Rape in Review of the Law on the Elimination of Domestic Violence.** This journal was written by Ni Made Sintia Ardi Ari & Ida Bagus Surya Dharma Jaya which was published in the journal of Kertha Wicara Legal Science Volume 8 No 7, 2019. This journal discusses marital rape which is explained in the view of positive law only. Then reviewed using the PKDRT Law. This journal is very simple in discussing marital rape, only using the law and seeing the sanctions that are clear in it.
3. **The Concept of Sanctions for Domestic Sexual Violence (Marital Rape) in Indonesia from the Perspective of Islamic Jurists in Malang City.** Thesis (State Islamic University of Malang) written by Moh. Qadarusman in 2021, this research discusses the concept of sexual violence in the household (marital rape) in Law No. 23 of 2004 concerning PKDRT according to Islamic jurists in Malang City and the concept of sanctions for sexual violence in the household (marital rape) in Law No. 23 of 2004 concerning PKDRT from the

perspective of Jasser Auda's Maqasid Shari'ah theory. Meanwhile, the research conducted by the author focuses on examining the evidence of visum et repertum in the crime of coercion of sexual intercourse in marriage (marital rape) and the judge's consideration in imposing a sentence on the perpetrator of the crime of coercion of sexual intercourse in marriage (marital rape) through visum et repertum and other evidence.

4. **"Marital Rape in the Perspective of Maqasid Al-Shari'ah"**. Karina Martyana's thesis shows that *marital rape* in the Criminal Code cannot be referred to as, but is called an act of persecution. In Maqasid Al-Shari'ah, the act of *marital rape* does not reflect the fulfillment of sharia objectives in marriage. The research focused on maqasid studies in general.
5. **"Marital Rape Criminal Law Policy in the Concept of Legal Reform in Indonesia"** by Nurlaila Isima, in the Al Mujahid Journal Vol.1 No.2 of 2021. The study explains how the Criminal Code (KUHP) does not recognize marital rape. The difference is that this research focuses on the position of *Marital rape* in the Criminal Code to the latest legal reform, namely the PKS Bill.
6. **Legal Assistance for Victims of Marital Rape in Review of Law Number 23 of 2004 concerning the Elimination of Domestic Violence (Case Study at the Women Crisis Center Mawar Balqis Cirebon)** by Didi Sukardi, R. Agus Abikusna, Rani Sri Imayati Rahayu in Jurnal Mahkamah; Journal of Islamic Law Studies Vol. 4, No. 1, June 2019. The study explained how the Women Crisis Center Mawar Balqis Cirebon has a very important role in providing legal assistance to victims of marital rape who are unfamiliar with the law and the assistance is carried out based on the wishes of the victim how the legal sanctions against the perpetrator in fiqh munakahat. While this research focuses on Sanctions.

THEORETICAL REVIEW

Rape

Forcible rape is a criminal act that occurs when a person forces another individual to engage in sexual penetration by force or violence. In the Indonesian dictionary, rape means to abuse or violation with violence. Meanwhile, rape is defined as the process, method, act of raping or violating with violence. (Prima, 2015).

If we quote some Islamic sources, the term rape is very relevant to the expression *yatadammanu ibāhah al-wata'*, which means permitting sexual relations, because basically the relationship between men and women is forbidden, unless there are things that allow it by syarak law. (RI, 2008). Which is then also emphasized in the article on this behavior in the literature The crime of rape as regulated in the Criminal Code Article 285 which reads as

follows: "Any person who by force or threat of force forces a woman who is not his wife to have carnal knowledge of him, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years".

Marriage

In Indonesian, "*Perkawinan*" comes from the word "*Kawin*", which according to the language, means forming a family with the opposite sex having sex or having intercourse. Marriage is also called "marriage", derived from the word *nikah*, which according to the language means to gather, enter each other, and is used in the sense of intercourse (*wathi'*). The word "marriage" itself is often used for the meaning of intercourse (*coitus*), as well as for the meaning of marriage contract. The definition of marriage according to the Law of the Republic of Indonesia No. 1 of 1974 concerning Marriage in Article 1 is "the inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family or household based on the Almighty God." (LAW, 1974)

The use of the word '*aqada*' to explain that marriage is an agreement made by the people or parties involved in marriage. (RI, 2008). In this view, it is explained that marriage is not a biological element that is merely sex, but more than that, marriage is a legal event. Then it is emphasized by the Marriage Law in force in Indonesia that, "Marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy eternal family (household) based on God Almighty".

Marital Rape

Marital rape can be defined as a type of violence in the form of forced sexual intercourse by a husband against his wife without considering the wife's condition or circumstances. (Arumita, 2019). In terms of terminology, *marital rape* is an English term, consisting of the words *marital* and *rape*. *Marital* itself is related to marriage, then *rape* itself means *rape*. So *marital rape* can be interpreted as rape committed by a husband with his wife in a marital relationship.

Marital rape is just like any other "type" of rape in that there is forced unwanted sexual contact - except that it occurs between two married people. Marital rape refers to unwanted sexual intercourse by a woman with her husband that is obtained by force, threat of force, or physical violence, or when she is unable to give consent. Marital rape can be committed using violence or rape with beatings can also be in the form of sadistic/obsessive rape. It is a non

consensual act of violent deviance by the husband against the wife where she is physically and sexually abused.

Marital Rape Factors

The concept of marital rape takes us further than just bringing the discussion into the legal space. However, it is important to note that the concept can be caused by several underlying causes. As mentioned that:

"This lack of emic perspective means that there is little challenge to definitions of the very concepts that are critical for understanding gender-based violence as a global problem-for example, the concepts of consent and the bases of legal personhood. The study of rape as a concept involves recognizing and codifying the underlying politics, ideologies, and cultural, legal, and academic practices that underlie the ways intimate violence is represented (de la Cadena 2014)." (Yllo, Kersti & M. Gabriela: 2016)

Marital rape behavior basically occurs due to several factors. If quoting several opinions, it is explained that women's vulnerability to sexual violence in sexual relationships is inevitable from the economic, social and political conditions historically and culturally of society. (Randall, Melanie: 2017)

The factors that can be concluded as factors that cause and at the same time support the occurrence of marital rape include: (Syarifuddin, 2018)

1. Patriarchal Culture

Patriarchy is a social system that places men in a higher position than women so that they have control over women in various aspects. This patriarchal culture has spread to almost all levels of society. Tribes, customs and even religions still agree on patriarchal culture so that support for male dominance is still applied in society.

In the case of marriage, the husband is considered to have dominance over the wife so that if violence occurs, the pretext of the husband as the head of the family who must be respected and upheld must still be maintained. For example, the Javanese expression *mikul duwur mendhem jero* positions women as the guardians of the integrity of the household. Thus, if something happens to a woman, she must ignore her feelings to maintain the integrity and harmony of the household.

2. Misunderstanding of religious teachings

In reality, the partial interpretation of religious texts has led to an understanding that is not in accordance with the concept of Islamic teachings on domestic life. Today, the understanding that develops is to position the husband as the head of the household

and has power over family members. On the other hand, wives have the duty to do domestic affairs and serve their husbands. This position is reinforced by the husband's role as breadwinner while the wife only passively receives income and manages family finances.

3. *Inequality in Domestic Power Relations*

The hegemony of inequality in men's power relations over women is legitimized by social, religious, legal, state and socialized for generations so that it becomes something that is accepted as it is. (Dalem, Dewa: 2012). The pattern of relations between men and women in reality is equally dehumanized. The existence of the domestic-public role dichotomy between men and women, causes women to have a space that is not as free to move as men.

4. *Community Social System*

On the other hand, it is revealed that marital rape cases are also caused by social aspects which then produce immoral behaviors. Social values are the construction of society as a result of interactions between members of society which are spread among citizens of society (not innate individuals from birth). (Anggraini, Nini et al., 2019). So it is considered reasonable if at certain times there are rules in protecting women from unnatural actions, which develop in society in various forms of ways, habits, behavioral procedures in Law No. 3 of 2004.

5. *Historical Aspects*

In a historical context, marital rape is also a form of discrimination against women who are considered weak. Reflecting on the long history in the world, especially during the prophetic era. The number of slavery systems that later became the tradition of each group. In the end, there was a term to free slaves by buying them (men) and marrying them (women).

Some legal dimensions related to marital rape are still vague and some opinions say that marital rape is a phenomenon that arises from the cultural elements of society. That way it is considered strong if the fiqh cannot avoid the influence of the geographical and climatic conditions of an area that not only shapes human absorption of the symptoms around it, but also creates differences in absorption and expression of humanity in accordance with the conditions and situations that exist. (Khisni, 2017).

METHODOLOGY

This type of thesis research is categorized as a type of normative research with the *Library Research* method, which is research used in collecting information and data in depth through several literatures of law books, books, journals, notes, magazines, or other references. (Yaniawati, 2020). Meanwhile, normative research is research that comes from legal sources written in law regulations (*Law in Book*) which can be a benchmark for rules and norms that apply to society. (Efendi & Johnny, 2018)

This research approach uses two approaches, namely: *Statutory Approach (statute approach)*, *Historical Approach (Historical Approach)*. (Efendi & Johnny, 2018). Both approaches are used as a research analysis knife, so that this research is directed more clearly in accordance with the problems taken.

RESEARCH RESULTS

Law No. 12 of 2022: Crime of Sexual Violence (TPKS) & Law No. 23 of 2004: Elimination of Domestic Violence (PKDRT)

Marital Rape in the perspective of Indonesian positive law is prohibited, this is regulated in several articles 5, 8 and 46 of the PKDRT Law and article 4 letter b and article 6 letter b of the TPKS Law are still not well examined as a criminal offense specifically (*Lex Specialis*). From the researcher's point of view, the two laws (PKDRT Law and TPKS Law) that regulate the issue of sexual violence, one of which is *marital rape* in Indonesia, are still inadequate and inefficient in law enforcement.

Regarding marital rape in the TPKS Law is not much different from the wording in the PKDRT Law, which Law No. 12 of 2022 TPKS cites article 4 paragraph (2) which reads: "sexual violence within the scope of the household". And the PKDRT Law is mentioned in article 5c and article 8. Article 5c prohibits violence within the scope of the household in the form of sexual violence. While article 8 is an explanation of what constitutes acts of sexual violence, including (a) and (b). Article 8a sexual coercion committed against a person within the scope of the household. Article 8b sexual coercion of a person within the scope of the household with another person for a specific purpose.

Then the point of marital rape is contained in the PKDRT Law in articles 5, 8, and 46. From this article, point b states the provisions prohibiting acts of sexual violence within the scope of the household. Although editorially there are still multiple interpretations and changing meanings, because this violence can occur to anyone for those who live in the scope of the household (article 2 of the PKDRT Law). Meanwhile, in the TPKS Law, the point of marital rape is contained in Article 4 point (1) regarding physical sexual harassment, forced

marriage, sexual torture. Then in point (2) letter a regarding rape, letter h regarding sexual violence within the scope of the household. This is the same as the PKDRT Law where the wording is considered multi-interpretative and changes even though the point of the act is the same.

Marital Rape: A Review of Family Justice in Islam

The commentators, when interpreting Allah's words in Surah an-Nisā'/4: 28: *wa khuliqal-insānu d}a'ifā* explains that what is meant by weakness in the verse is weakness against female (read: sexual) temptation. Weakness here is interpreted as a problem in controlling sexual instincts which then leads to unauthorized, brutal, and barbaric acts such as rape. (RI, 2008)

The principles developed by Islam regarding human interaction in the public sphere (state and society) are important to be used as a measure of human relations in the domestic sphere (family or household). The enforcement of justice in the form of regulations that reach domestic life is no less important than the enforcement of justice in the public sphere. (RI, 2008)

Meanwhile, the meaning of justice itself has a relatively broad perspective as the times evolve. If in the past only the man who divorced was fair in the context of a patriarchal society, it is now unfair because as a contract involving two equal parties, rights and obligations must also be equal. (Ruhaini, 2013)

Some urgent issues to be discussed from an Islamic point of view, namely related to the obligations of a wife. Primarily in the position of determining the owner of offspring which is the right of both. It should be underlined that although both have the same rights, the wife has more right to determine, because she is the one who can feel her own health condition, both physical health and mental health. (RI, 2008)

Islam makes marriage and the relationship between husband and wife a *mitsaqan ghalidzan* (strong bond) which is interpreted as a solid agreement and witnessed directly by Allah so that it has implications for being accountable for maintaining the relationship for a long time. The family envisioned by Islam is the realization of husband and wife who work together to create a *sakinah* situation capitalizing on the *mawaddah* and grace that both seek. In addition, it makes the position of husband and wife as *equal* mantras as important subjects in the family. Both have the same responsibility to carry out their respective roles and functions in realizing a harmonious family life as the purpose of marriage.

Kartini Kartono in his book *Abnormal Psychology and Sexual Abnormality* identifies types of sexual deviations (abnormalities). Such as Sadism, which is a sexual relationship that is accompanied by physical or psychological torture to the partner. The opposite is Masochism, which is torturing oneself or asking to be tortured when having sexual relations. (RI, 2008) If we analyze further in the Qur'anic source, there are several statements that contain sentences of equality between men and women such as: (Adawiyah, 2019)

1. Men and women are both servants of Allah, among others in QS. Al-Zariyat: 56, al-Hujurat: 49, an-Nahl: 97
2. Men and women are both caliphs on earth, as stated in QS. Al-an'am: 165, al-baqarah: 30.
3. Men and women both accept the primordial covenant. The verses on which this equality is based are QS. Al-a'raf: 173, al-Isra: 70
4. Adam and Eve were both involved in the cosmic drama (the drama of the chronological expulsion of Adam and Eve from Paradise). The verses on which this equality is based are QS. Al-Baqarah: 35, al-a'raf: 20 and 22.
5. Men and women have the same potential for achievement. The verses on which this equality is based are QS. Ali Imran: 195, an-Nisa: 124, an-Nahl: 97, Ghafir: 40.

Marital Rape: A Global Reading

"Jacquelyn Campbell et al.'s chapter focuses on the ways that public health scholarship and interventions intersect with marital rape globally. She presents a medical account of how forced sex in intimacy increases women's vulnerability to acute and chronic diseases. Her chapter summarizes public health research linking marital rape to other, distinct forms of violence against women and shows why rape in marriage is firmly a public health concern. McWilliams and Ní Aoláin argue that a rights-based understanding of marital rape is necessary to address the needs of women cross-culturally. They suggest that resistance to legal frameworks for determining the workings of intimate relationships, and to international laws that challenge how states fail to support women's rights, puts women at risk of harm and constrains women's access to full citizenship."

At least Campbell's opinion above is one of the important readings from a medical point of view that will result in the victim suffering adverse health effects. Although there are many criticisms related to the case in various places, there are also many who are pro it. The

foundation that needs to be considered in giving criminal decisions on marital rape behavior is as some cases about women, namely: (Yllo & M. Gabriela: 2016)

"A woman who is raped by her husband may stay with him because she has nowhere to go, may want to provide stability for her young children, or may feel love for her husband, despite his sexual abuse (Mahoney, Williams, and West 2001, 143, 147). Many victims of wife rape are financially unable to leave (Russell 1990, 220-22). Some rapists tell their wives that they will murder them if they leave."

The importance of the formation of criminal law as a means of providing a deterrent effect on marital rape behavior. As in (Randall, Melanie. Et.al., 2017) "Criminal law has an especially important role to play in shifting social norms towards equality and in condemning behaviors and actions, such as sexual assaults, which undermine equality, bodily integrity and dignity". The law has an important role to play in shifting social norms towards equality and in condemning behaviors and actions, such as sexual assaults, which undermine equality, bodily integrity and dignity." (Randall, et.al., 2017)

Julie Goldscheid, also explained wisely in her main gender issue, namely: (Randall, et.al., 2017), "International human rights laws' due diligence framework requires a range of responses that include the obligation to prevent, protect, and provide redress, along with the obligation to prosecute and punish. Explicitly framing states' obligations in terms of that more comprehensive approach would reach broadly to address the cultural and social barriers that allow marital rape to continue without sanction".

DISCUSSION

The phenomenon of marital rape cannot be underestimated, given that the impact of these acts is very broad, not only for the victimized wife, but also for children and other relatives. Indeed, marriage does cause a man and a woman to have a very close bond, creating new rights and obligations for the new status. Deprivation of rights often occurs in marriage, *marital rape is an example*.

Interestingly, there are several theories that are considered valid to establish sexual relations between husband and wife. They are the property theory, the unity theory, and the ongoing consent theory. (Yllo & M. Gabriela: 2016; Randall, et.al., 2017):

"Under the first theory, women were historically considered to be the property of men. Rape was a transgression against the man who owned the woman as his property, not against the woman herself. The rape of a married woman by her husband, however, was not a transgression because a man was allowed to treat his chattel as he deemed

appropriate. Because the rape of a married woman was a violation of her husband's property, "prosecuting a husband for raping his wife made no more sense than indicting him for stealing his own property". The second justification, the unity theory, was a derivative of the feudal doctrine of coverture, in which a woman's independent legal identity was abolished at marriage, becoming subsumed within-or covered by-her husband's identity. Sir William Blackstone (1765, 442) explained this theory in his noted treatise on English common law: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated" into her husband's legal existence. Once man and woman had been unified by marriage, "a man could no more be charged with raping his wife than be charged with raping himself". Lord Matthew Hale, articulated what would become the most popular justification in modern jurisprudence for the marital rape exemption. Hale wrote: "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract".

However, the above cannot be accepted openly by most people. Not only that, there are many things that will harm women. As explained from several sources:

"However, there are evidently 'significant similarities, particularly in relation to the psychological and emotional traumas that [male FTP] victims have reported' (Weare, 2018a: 125) when compared to those that are well recognized in the experiences of rape victims. With harm being particularly relevant to the exclusion of FTP cases from the legal definition of rape, deconstructing the 'no-harm' myth is relevant to pursuing potential law reform in this area." (Killan, et.al., 2021)

Juridically, initially in Indonesian positive law *marital rape* was not a sanctionable criminal offense. *Marital rape*, which means coercion or rape of sexual intercourse within marriage, is a symptom that exists in society and gradually began to be criminalized by Indonesian law. The lack of regulation of sexual violence in the Criminal Code also results in weak laws that can properly handle sexual violence cases legally.

Before the formation of the PKDRT Law, every act of sexual violence that occurred in the household was reported after the victim experienced it or even died. With complaints of domestic violence (KDRT) or criminal acts only, not special offenses of domestic violence. This also underlines that the act of rape regulated in the law only mentions outside of marriage.

There are no specific articles or rules governing the issue of rape or sexual coercion in the household. (Soeroso & Moerti, 2011)

If we learn more about marital rape, it allows us to find a strong solution to sanction such behavior. However, the interesting thing here is whether the problem of marital rape, which is then raised as an issue by women is just to limit a man as a legal husband. Which is then reinforced by the issue of women's human rights and gender equality. This is as Noelle explains:

"The study of queer identities argues that, in societies transitioning to a neoliberal economic organization, individuals constitute themselves through the resistance, reimagining, and embrace of not only new forms of consumption and making a living but also new types of "love" relationships and formalized attachments." (Yllo & M. Gabriela: 2016)

The big point in this case is that Islam does not teach violence, especially in the household affairs between husband and wife who want to come to each other (jima). Islam recommends contact between husband and wife on the basis of mutual consent (an taradhin) in their respective rights and obligations. Which is none other than aimed at achieving a household that is *sakinah mawaddah warahmah* (QS Ar-Rum: 21). And every couple must understand each other's conditions. All actions in the fulfillment of rights and obligations must be based on good things in trust, respect, love for each other (Mu'asyarah bil ma'ruf) (AnNisa: 19). And all things that have harm must be avoided, this is in accordance with the hadith or ushul fiqh rule "Harm should be eliminated" and "It is not permissible to do something that harms yourself or others" (Sabda Prophet Muhammad SAW History of Malik and Ibn Majah). (Halim & Robiatul, 2022)

Although some Islamic literature explains that a wife should follow what her husband wants. So that a wife is prohibited from refusing what her husband wants without a certain reason. Furthermore, Imām Al-Gazālī stated that sexual intercourse does not only function to continue offspring (creation), but the first function is for pleasure (recreation). If this is the concept in the relationship between husband and wife, it can be concluded that marital rape behavior in a husband and wife relationship is something that is considered abnormal that tries to leave the values in the relationship.

The regulation of *marital rape* is not previously explained in Indonesian criminal law, such as the Criminal Code, even in the PKDRT Law explicitly. However, *marital rape* can be considered as a criminal offense that occurs in domestic violence even though its scope is broad and not specific. Likewise, the newest law, the PKDRT Law, does not clearly mention the

wording of *marital rape* in it, only terming marital coercion within the scope of the household. However, if it continues to be ignored, it will become a serious problem in domestic relations.

The method offered in some cases of marital rape is as in (Randall, Melanie. Et.al., 2017: 252) says:

1. Where the parties are still married and the victim does not want criminal prosecution, the remedy for marital rape may lie in looking for a prompt, cost-effective and less traumatic means of redress, such as using alternative dispute settlement mechanisms, which could, for example, include properly supervised mediation efforts, preferably under the auspices of a court, in order to prevent impunity of offenders.
2. Stiffer measures such as detention and imprisonment could be used only as a last resort for an incorrigible spouse or cases where the parties are separated and the 'home' is already broken.
3. Therefore, alternative means of redress such as mediation could also be employed in order to promote marital rape reporting.

Thus, the case of *marital rape* when viewed from the aspect of loss, it will be very visible that this behavior is not beneficial to the woman. Islam also emphasizes that the behavior of having relations between husband and wife should be done properly. Therefore, these behaviors should get sufficient sanctions as contained in the discussion as well as those contained in the Domestic Violence Law and the PTKS Law stipulated in Indonesia.

From the whole discussion, which regulates the act of *marital rape*, it still cannot meet the expectations of researchers who are able to become the legal basis for the problem of *marital rape*. The unclear editorial mention in the law still gives other assumptions on *marital rape*. And in its application, it is still a complaint offense, which requires the activeness of the victims in handling the case. Researchers think that sexual acts need regulations such as other general criminal offenses with general offenses. So that this does not make it difficult for law enforcement officials to enforce it. Therefore, the regulation of *marital rape* clearly as a form of *lex specialis* in the legal rules of sexual violence must be held.

CONCLUSIONS

Based on the discussion above, several conclusions can be drawn that can be used as answers. marital rape in Indonesian positive law, including prohibited acts, is regulated as in articles 5, 8 and 46 of the PKDRT Law as well as in article 4 letter b, and article 6 letter b of

the TPKS Law. The PKDRT Law can be categorized as a *lex specialis* for law enforcement in Indonesia on the issue of marital rape. Conceptually, the act of marital rape is contrary to Islamic teachings, then the existence of ideas that regulate this must be held as a form of maintaining benefits, especially in households based on human values. Ennobling each other and also prioritizing benefits and eliminating all forms of harm to humans.

REFERENCES

- Adawiyah, Robi'atul. (2019). *Islamic Family Law Reform and its Implications for Women's Rights in Indonesian and Malaysian Marriage Law*. Cirebon: Nusa Litera Inspirasi.
- Anggraini, Nini, Dwiyantri Hanandini & Wahyu Pramono. (2019). *Domestic Violence and Divorce in the Family*. Padang: CV. Rumahkayu Pustaka Utama.
- Arumita, Aldira Sari. (2019). Policy Formulation of Sexual Violence Against Wife (Marital Rape) Based on Gender Justice in Indonesia. *Journal of Indonesian Legal Development*, Vol. 1, No.1, p.120
- Dalem, Dewa Nyoman. (2012). "Factors Affecting Gender Bias in Contraceptive Use among Couples of Childbearing Age in Dawan Kaler Village, Dawan Klungkung Subdistrict." *Pyramid*. <https://Ojs.Unud.Ac.Id/Index.Php/Piramida/Article/View/7001>
- Efendi, Jonaedi and Johnny Ibrahim. (2018). *Normative and Empirical Legal Research Methods*. Depok: Prenadamedia Group.
- Halim, Abdul and Robiatul Adawiyah. (2022). "Ulama's View on the Forcing of Sexual intercourse against a wife in a state of illness". in *Masadir: Journal of Islamic Law INKAFI Gresik*. Vol.2, No.1. <https://www.kompas.id/baca/dikbud/2022/04/12/uu-tpks-disahkan-perjuangan-untuk-victims-still-long>. accessed on January 10, 2024 at: 15.07 WIB
- Khisni, Akhmad. (2017). *Contemporary Fiqh: (Compilation of Islamic Law Products of Social Reality in the Field of Family Law of Contemporary Indonesian Muslim Society)*. Semarang: UNISSULA PRESS.
- Killan, Rachel, Eithne Dowds and Anne-Marie McAlinden. (2021). *Routledge Studies in Crime and Society: Sexual Violence on Trial Local and Comparative Perspectives*. New York: Routledge Taylor & Francis Group.
- Criminal Code
- Mufidah. (2008). *Gender-Informed Islamic Family Psychology*. Malang: UINMalang Press.
- Law of the Republic of Indonesia no.1 of 1974 concerning marriage
- Prima, Tim Pena. (2015). *Big Indonesian Dictionary*. Surabaya: Gitamedia Press.
- Ruhaini, Siti Dzuhayatin, et al. (2013). *Towards Progressive, Gender Responsive, and Child Rights Accommodative Family Law*. Yogyakarta: Suka-Press.
- Randall, Melanie, Jennifer Koshan and Patricia Nyaundi. (2017). *The Right to Say No Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi*. North America: Hart Publishing.
- RI, Department of Religious Affairs. (2008). *Thematic Qur'anic Interpretation: Building a Harmonious Family*. Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an.
- Saleh, Muhammad Ridwan. (2015). Marriage Under Age (Early), *Al-Qadāu Journal*, Volume 2 Number 1.
- Soeroso and Moerti hadiati. (2011). *Domestic Violence from a Juridical-Victimological Perspective*. Jakarta: Sinar Grafika.

- Syaifuddin, Muhammad Irfan. (2018). "Conception of Marital Rape in Munakahat Jurisprudence." *Al-Ahkam Journal of Shari'ah and Legal Sciences* 3 (2): 171–90. <https://doi.org/10.22515/alahkam.v3i2.1399>
- Tahir, M. Maloko. (2012). *Dynamics of Marriage Law*, Makassar: Alauddin University Press.
- Yaniawati, Poppy. (2020). Library Research. https://scholar.google.co.id/scholar?hl=id&as_sdt=0,5&cluster=7876723881719423602
- Yllo, Kersti & M. Gabriela. (2016). *Marital Rape: Consent, Marriage, and Social Change in Global Context*. New York: Oxford University Press.