Marital Rape in Indonesia in Maqashid Shari’ah Perspective

History of Author

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Abstract

This article contains the concept of marital rape in Indonesian law, both positive law and Islamic law which is reviewed through maqashid shari’ah. Marital rape is included in the category of domestic violence that can happen to anyone. The type of research that will be used in this legal research is normative legal research. This research is a perspective legal research, which does not require hypotheses that must be proven, but provides perspective on what should be done. Analysis of the marital rape problem is carried out using the maqashid shari’ah approach where the applicable regulations regarding marital rape guarantee 5 main principles in Islam, namely maintaining religion, soul, reason, offspring and property maintained. The results of this study resulted in an understanding from the Qur’anic point of view regarding mu’asyarah bi al-ma’ruf and the maqashid shari’ah view on marital rape. So marital rape for any reason is strictly prohibited because it can damage the 5 main principles in Islam, namely maintaining religion, soul, reason, offspring and property and the law in force in Indonesia still does not provide special protection to victims. Although there is a hadith that shows that wives should not reject their husbands and can be categorized into nushuz, husbands are also required to come to their wives in a ma’ruf way and understand the wife’s condition so that there is no coercion that will hurt both physically and psychologically.

Keywords: marital rape, domestic violence, Maqashid Shari’ah.

Introduction

Today, violence against women is an important topic that never ends to be discussed, this is because women are often the object of violence itself, where in the social environment women are still placed and considered as weaker parties than men. Violence experienced by women is one form of gender injustice that commonly occurs in society. Violence experienced by women can happen anywhere. Violence is a form of crime. Violence is not only limited to physical violence, but also violence against psychological-psychological and to one’s sexuality. Violence can happen anywhere, anytime and even carried out by anyone regardless of status and blood relationship.

Rape as a form of sexual violence often occurs to women, be it adult women, adolescents or children. Unfortunately, the perpetrators are not only from adult men, but also teenagers and minors, not only from the scope of distant people but also from the scope of the closest people, such as husbands. The case of rape committed by a husband against his wife or can be called marital rape where in foreign terms is called marital rape, is one example that crimes can be committed by anyone.

In Indonesia’s general criminal law, the Criminal Code, rape is known as rape that occurs outside marriage, in the sense that both the perpetrator and the victim are not bound by marriage. Marital rape is included in the act of sexual violence, as stipulated in the Law. No. 23 of 2004 concerning the Elimination of Domestic Violence. If viewed from Law No. 23 of 2004 concerning the Elimination of...
Domestic Violence, marital rape can be categorized as a form of domestic violence. Article 1 point 1 of the Law on Domestic Violence basically states that domestic violence is an act committed against someone, especially women within the scope of the household, where the actions committed can cause suffering both physically, psychologically, can also be in the form of neglect in the household and acts in the form of unlawful deprivation of independence. In simple terms, domestic violence can also be interpreted as acts carried out with violence or threats of violence with the aim of suppressing or controlling people who are in one household sphere.¹

As for what is meant by sexual violence is sexual relations carried out by violence or threats of violence against people who live or live within the scope of the household.² The categories of sexual violence itself are: (a) Isolation of the wife from her inner needs. (b) Unwanted sexual intercourse by the wife. (c) Coercion of a wife to work as a prostitute and so on. Based on this, although in the Indonesian general criminal law (KUHP) the term marital rape (marital rape) has no regulation, but the act has actually been regulated in the Law on Domestic Violence in Article 8 related to sexual violence, although the formulation of the article is still very broad, because the victims referred to in the article are all people who live within the scope of the household. Whether it’s people who are related by blood or not, such as housekeepers and so on.

Aldila and Sularto commented that marital rape arrangements in Indonesia are placed in the classification of torture instead of rape because abuse is very different from the perpetrator’s treatment of victims. The imposition of criminal sanctions for torture and rape is also lighter because it uses the concept of a gender-biased Criminal Code. Professor of criminal law UGM, Prof. Marcus Priyo Gunarto explained that the Marital Rape case was added to the formulation of Article 479 to be consistent with Article 53 of Law 23/2004 on domestic violence, namely the criminal act of sexual violence in the form of forced sexual relations committed against wives or husbands in the nature of complaint offenses.³ According to Nita and Diana, one of the elements of marital rape in Indonesia is the coercion of wives to have sex and the types of sanctions are imprisonment and fines. Indonesia’s positive law also does not clearly state who can be the perpetrator, only the word “everyone” is included so that it is less clear about its meaning. As for victims, in Indonesia they are only called “people who are within the scope of their household”.⁴

Departing from the Positive Law that applies in Indonesia, various Islamic literature is also revealed about how Islamic teachings alleviate the problem of oppression against women. But the reality of Islamic society has changed over time and place to place, allowing for a new and more grounded understanding. So far, many hadith hadith have been documented in a number of standard hadith books, which tend to corner women, even though these hadiths in fact bear the title as one of the sources of Islamic law.

In Islamic law, marital rape itself is included in Islamic criminal law, because acts of persecution that interfere with the individual rights of others and contradict the Maqasid As-Sharia category of hifz an-nafs as well as the principle of muasarah bi al-ma’ruf. Reda Danbouki, a lawyer and executive director bbc.com of the Center for Women’s Legal Guidance and Awareness in Egypt, Cairo, said

¹ Sulistyowati Irianto, “Hukum Perlindungan Perempuan dan Anak”, hal.195.
marital rape is blamed on the general culture in Egypt that believes that a marriage contract binds a wife to be available for sexual intercourse as long as the husband wants it. The common belief here based on some religious interpretations is that if a woman refuses to have sexual relations with her husband, she becomes a “sinner” and “angels curse her all night”.

There is a hadith of the Prophet about “If a husband invites his wife to the aisle (to have intercourse) and refuses to come so that all night he (the husband) is angry, then the angel will curse him (wife) until morning.” Causing mixed reactions from society, especially wives or women.

There are different views of society, especially women, in seeing the meaning of this hadith, from the opinion that agrees with the positive side of this hadith states that the hadith intends to maintain harmony in the household. The angels in question are the right and left angels. A wife should serve her husband because it is his duty and obligation so that if the wife does not serve, then it is natural to be cursed by angels. A woman, if married, then the woman seems to belong to her husband. Thus, women should provide the best service to their husbands. This angelic curse is intended for the wife to pay more attention to the rights of her husband. This hadith is a warning to wives to maximize their services as well as proof of the Prophet SAW’s affection for women.

Then there are also people who see the harsh impression contained in the hadith, this hadith seems very harsh on women. It is as if women are like items that at any time if the husband wants to use, can be used without considering the condition of the wife, whether physically and psychologically ready or not. The harshness of this hadith can be overcome by negotiations between husband and wife so that the best way is found that is accepted by both parties. In the hadith there seems to be an impression as if it appears like a dictator who is very oppressive and coercive to women. This impression is so thick that it can be detrimental to women. Women seem like things that are just as men’s as they want. As if women’s lives and paths have been closed (by men), even though women also have the same rights.

This article uses the maqashid shari’ah approach, where the focus is to examine the concept of marital rape with the perspective of Islamic law. The purpose of this paper is to find out the view of Islamic law related to marital rape, where Islam affirms that there are some obligations of wives and husbands that cannot be denied, but Islam also teaches mu’āṣarah bi al-ma’ruf to each spouse. Based on this, of course, the concept of marital rape is very contrary to the mu’āṣarah bil ma’ruf that has been established by Islam. In this paper, the maqashid shari’ah approach becomes an analytical tool for the concept of marital rape which will use Jasser Auda’s maqashid theory through six system features optimized by him as an analysis knife, namely cognitive nature, wholeness, openness, interrelated hierarchy, multi-dimensionality and purposefulness. This system feature is used to explain how to understand the impact of marital rape in Indonesia through an effective approach. To understand the concept of marital rape in Indonesia, it is necessary to look at several cases and positive laws that apply. Various legal understandings and points of view, both positive law in Indonesia and Islamic law, will be explained. As a result, the relationship between one rule and another rule can be found. This

7 Ibid., p. 17.
analysis is carried out through, first, placing marital rape in Indonesian positive law by analyzing the existing marital rape concept so as not to cause confusion for law enforcement and the community. Second, explain the relationship between the Qur’anic postulates and hadith which became the basis for Islamic law on the concept of marital rape.

Discussion

Marital Rape

Rape is a type of sexual assault that usually involves sexual intercourse or other forms of sexual penetration committed against a person without that person’s consent. Such acts may be committed by physical violence, coercion, abuse of authority, or against persons who are unable to give valid consent, such as persons who are unconscious, incapacitated, intellectually disabled, or legally minors. The term rape is sometimes used interchangeably with the term sexual assault. The term marital rape is also referred to as conjugal rape, referring to the sexual relationship desired by a man towards his wife obtained by force, threats of violence or physical violence or when he is unable to give consent. The words ‘unwanted sexual intercourse’ refer to any kind of penetration carried out against his will or without his consent.9

According to a criminologist Mulyana W. K. as quoted by Nurlaila Isima, there are 6 types of rape, namely:

1. Sadistic Rape: In this type of rape the perpetrator gets satisfaction by carrying out attacks on the victim, both in the vital direction and towards the victim’s genitals.
2. Angea Rape: This type of rape is an abuse that makes the victim’s body an object of venting anger.
3. Dononation Rape: In this case the perpetrator rapes the victim because the perpetrator considers that the perpetrator is superior to the victim, the perpetrator has a motive to molest the victim and also wants to rape the victim.
4. Seductive Rape: This type of rape has a trigger or stimulation. The stimulation can be from the perpetrator or also the victim. For example, verbal seduction results in the perpetrator unwittingly forcing the victim to have intercourse without remorse and guilt.
5. Victim Precipitatied Rape: The type of victim precipitated rape emphasizes the act of rape occurs because of the victim’s own actions.
6. Exploitation Rape: In this type of rape the perpetrator takes advantage of the position that exists in him as a person who is needed in terms of economic and social status that exists in the perpetrator. So that the perpetrator can take advantage of the victim because the condition is needed by the victim.10

Based on the types above, marital rape or marital rape is included in the type of rape Exploitation Rape, where the husband takes advantage of the position as the head of the household and has a higher status than the wife because the wife depends on the husband financially and socially. Judging

10 Nurlaila Isima, “Marital Rape Criminal Law Policy in the Concept of Law Reform in Indonesia”, Al-Mujtahid; Journal Of Islamic Law, Vol. 1, No. 2. h 128.
from several existing cases, marital rape is also included in sadistic rape because husbands torture wives by beating or injuring using tools such as knives, cigarettes and others.

Marital rape comes from English which consists of two words, marital and rape. Marital is defined as a marital relationship, while rape means rape. Marital rape is a wife who has been sexually abused by her husband in a marriage or household. Thus, marital rape is an act of violence or coercion committed by a husband against his wife to engage in sexual activity without considering the wife's condition.

Muh Endro Susila in the journal Islamic Perspective of Marital Rape quoted by Irfan Syaifuddin stated that marital rape in reality is not in one particular form or model, but there are three forms of sexual violence committed by husbands to wives, namely:

1. Battering rape: the husband commits sexual violence and physical violence at the same time when forcing the wife to have sexual intercourse. Some wives are even physically injured by coercion by husbands when they are not ready or willing to have sexual intercourse. Marital rape generally occurs in this form.

2. Force-only rape: the husband forces or threatens his wife before having sex. This coercion or threat is done so that the wife will serve the husband's desires. If the husband has vented sexual desires on his wife, then the husband has not committed physical violence. But if the husband does not fulfill his desires, he may be able to physically abuse his wife.

3. Obsessive rape: the wife or partner gets sexual violence in the form of sadistic behavior in sexual intercourse. Sadistic behavior in sexual relations, where the husband commits physical violence such as hitting, pulling hair, strangling or even using sharp tools that injure the wife to get sexual satisfaction with the wife’s suffering from the violence. 11

Based on the form of marital rape above, which is actually marital rape is very dangerous if allowed to develop in society, but Indonesian society still denies the existence of marital rape, the perspective of the community that still considers that marital rape is not recognized as rape because rape can only occur outside marriage as mentioned in article 285 of the Criminal Code makes this marital rape doubtful. And during the marriage period, the couple is considered willing to have sexual relations whenever and whatever form it takes.

In this marital rape concept, what is included in the act is when there is sexual violence with a wife and if the husband forces to get sexual services without the wife’s willingness. This willingness is often not expressed due to various factors such as fear, shame, compulsion both economic, social and cultural, and so on. This marital rape act includes acts of violence carried out both dissectically and psychologically. The impact caused by marital rape is quite serious and has a major influence on victims both physically and psychologically.

As for the impact caused by marital rape, first, it causes physical injury caused by the husband's rough treatment in having sex forced on the wife whose condition is tired, overslept, when the wife is menstruating, even when the wife is pregnant. Wives who are physically injured due to marital rape usually do not seek treatment because they are embarrassed to be known to others. 12 Second,
psychologically marital rape can cause prolonged disappointment or fear and trauma of sexual intercourse. There are also short-term and long-term impacts. Short-term psychological effects are usually characterized by the appearance of anger, annoyance, guilt, shame and humiliation will be experienced for a moment within a few days. The long-term psychological impact experienced by the victim is the emergence of negative attitudes or perceptions towards her husband and sex because of the trauma she endured. Trauma is a mental injury suffered by a person after experiencing things that feel beyond normal limits and abnormal.

As explained above, the problem of marital rape is a problem of violence against wives that leads to rape, because there is an element of sexual coercion. This has a bad impact on the wife both psychologically and physically.

**Marital rape in positive law**

Indonesia has a law that regulates rape in its Criminal Law, but marital rape in Indonesia’s general criminal law, the Criminal Code does not yet have its own regulatory article. The current Criminal Code only regulates rape that is generally known, namely rape that occurs outside the marriage bond as stipulated in Article 285 of the Criminal Code, so that marital rape cannot be said to be a criminal act of rape, but marital rape (marital rape) can be categorized as a form of sexual violence that occurs within the scope of the household, as stipulated in Article 8 of the Law on Domestic Violence.

In Indonesia’s positive law, marital rape has only received special attention after the issuance of Law Number 23 of 2004 concerning the Elimination of Domestic Violence, which previously discussed rape in articles 285 of the Criminal Code and persecution in articles 351 and 353 of the Criminal Code but has not been classified as marital rape.

Article 285 of the Criminal Code states that whoever by force or threat of violence forces a woman to have intercourse with him outside of marriage, shall be threatened with rape with a maximum imprisonment of twelve years. Then continued by article 286 of the Criminal Code, Whoever has intercourse with a woman outside marriage, even though it is known that the woman is in a state of faintness or helplessness, is threatened with imprisonment for a maximum of nine years. Both articles do deal with the issue of rape, but do not directly refer to marital rape. Therefore, the rules regarding marital rape are declared as complaint offenses from the category of persecution and are included in domestic violence.

Positive law in Indonesia discusses domestic violence in Law number 23 of 2004 which discusses the elimination of domestic violence, in article 1 it is stated that domestic violence is any act against someone, especially women, which results in physical, sexual, psychological, and/or domestic misery or suffering including threats to commit unlawful acts, coercion, or deprivation of liberty within the household.

Related to marital rape which is not a category of rape as regulated in Article 285 of the Criminal Code, the consequences for the wife as the victim cannot complain to the perpetrator in this case

14 Article 285 of the Criminal Code
15 Article 286 of the Criminal Code
16 Article 1 of Law No. 23 of 2004
the husband with rape charges. Even if possible, the case will be processed as a criminal offense of persecution, which can be threatened with Articles 351, 354, and 356 if referring to the Criminal Code. In addition, marital rape perpetrators can also be sentenced to criminal sanctions in accordance with the provisions of Article 46 of the Domestic Violence Law.

Referring to one of the reported cases, this marital rape case has violated the article above because the perpetrator forced the victim to have intercourse to injure the victim who experienced serious psychological trauma. Stated in the next article, the criteria for acts regarding domestic violence are mentioned in article 5, where the article categorizes there are four acts that are prohibited because they are included in domestic violence, namely: (a) physical violence (b) psychological violence (c) sexual violence (d) domestic neglect. Then it is explained by the next article that, Article 6 states that physical violence as referred to in Article 5 letter a is an act that results in pain, falling ill, or serious injury. Article 7 states, psychological violence as referred to in Article 5 point b is an act that results in fear, loss of self-confidence, loss of ability to act, a sense of helplessness, and/or severe psychological suffering in a person. Continued by article 8, sexual violence as referred to in Article 5 letter c includes: a. forced sexual relations committed against people who live within the scope of the household; b. forced sexual relations against one person within the scope of his household with another person for commercial purposes and/or certain purposes.

Law Number 23 of 2004 concerning the Elimination of Domestic Violence (UUPKDRT) discusses the regulation of domestic violence is the coercion of sexual relations carried out against people living in the scope of the household “forced sexual relations committed against people who live within the scope of the household” and there are already criminal arrangements, but the regulation of this article is very broad because the article does not classify The victims were children, wives, or domestic servants. Only the purpose as a differentiator of the classification of an act. For article 8a there is no purpose, only coercion of intercourse while 8b has the purpose of “commercial purpose and/or specific purpose.” Only this as a differentiating classification for his conviction. The classification of victims in sentencing in this legislation does not exist. The handling of the problem of sexual violence in which victims are children, wives, relatives and domestic workers is very different, therefore, this arrangement does not look at victims of forced sexual relations committed against people who live within the scope of the household. The inherent patriarchal culture makes the position of women below men, so women have dependence on men. With the existence of a marriage between husband and wife and Indonesian culture which is still thick with patriarchy, it results in the placement of the wife as a servant of the husband’s needs so that sexual violence committed by husband to wife is considered something natural and the act is vulnerable to being carried out repeatedly during the marriage bond occurs.

Referring to the explanation above, that marital rape arrangements in Indonesia are still placed in the classification of torture not rape, persecution is very different from the treatment of perpetrators towards victims. The imposition of criminal sanctions for torture and rape is also lighter. Indonesia’s positive law also does not explicitly regulate the concept of marital rape and marital rape is categorized as a complaint offense that can only be processed if the person reporting

17 Article 5 of Law No. 23 of 2004
18 Article 6,7,8 of Law No. 23 of 2004
feels aggrieved. The Criminal Code only states that rape is a compulsion to occur outside marriage, while Law Number 23 of 2004 regulates rape in the family, but in imposing sanctions there is no specification of the victim. This causes the wife to have no rights if she gets sexual violence from the husband.

Marital rape in Islamic law

When it comes to the household, Islam has laid down such rules, as well as the rules for getting along between husband and wife. Islam teaches the nature of ma’ruf especially from husband to wife. As for mentioning the rights and obligations of husband and wife, where one of the rights of the husband is to be served by the wife and the wife’s obligation is to serve the husband. But today there is a problem that is quite hot in society, namely marital rape. Rape in Arabic terms is referred to as Ightisab which comes from the word ghasb which means to take or take something without willingness. But Ightisab is not a special meaning for rape. In Islamic law, scholars use the term al-zina bi al-ikrah or zina by force. Rape is rather than a form of adultery. Zina in the definition of jumhur ulama is intercourse between a man and a woman through the genitals without possession or shubhah (confusion) of possession.

Imam Hanafi and Imam Shafi’i use the term al-zina bi al-ikrah or mean adultery by coercion. While Sayyid Sabiq used the term adultery, because sexual relations were carried out with strangers, not wives or slaves. The fuqaha do not give a clear estimate of the term rape, especially marital rape. Although Islam has regulated the rights and obligations of husband and wife, what happens in the reality of the field is the perspective of society which considers that the wife has no right to refuse the husband if the husband invites to have conjugal relations under any circumstances as the hadith below:

Meaning: From Abu Hurairah (r), the Prophet (peace be upon him) said, “If a husband invites his wife to the aisle (to have intercourse) and refuses to come so that all night he (the husband) is angry, then the angel will curse him (wife) until morning.”

The hadith does not contradict the reason or postulates of the Qur’an because in this case the husband and wife should indeed be the prerogative of the husband, and will cause a problem if a wife refuses his invitation. The wife’s refusal to her husband’s invitation can result in wounding her glory and tearing her greatness. If this happens, then the husband’s desire to ask for sexual intercourse will decrease. If the refusal is repeated, sometimes the husband stops asking his wife for sexual intercourse altogether. This is something that is very dangerous, because the husband may go to another place and begin to betray his wife so that starting from this it will trigger conjugal disharmony and can even lead to divorce. Therefore the angel condemned the wife who refused the invitation of the husband to have intercourse.

But there are also those who argue that the hadith cannot be fully applied, especially for wives who also help their husbands earn a living (work). That this hadith applies, if the wife’s reluctance is caused by the factor of laziness, even though her rights have been fulfilled by the husband. As for if the cause is fatigue due to several things, such as all day working, taking care of the household, doing household chores or taking care of children so that the wife no longer optimally serves her husband, or because of the neglect of the rights of the wife by her husband, then the threat of angelic anathema in the hadith cannot be applied. If such conditions are still enforced, it will cause social inequality because it is too partial to men, even though Islam highly values and glorifies women. If the husband constantly demands his right to be served, even though the wife is exhausted from her homework or helping her husband work, then there will be conflict between the two and have bad consequences for the husband-wife relationship.

The existence of hadith is understood as a necessity for the wife to serve her husband’s sexual desires under any circumstances. The wife’s rejection of her husband’s sexual desires is rewarded with nushuz, and iniquity is cursed by angels until morning. Such hadiths cannot be understood for what they are. The wife should have the courage to refuse if there are obstacles that do not allow sex between husband and wife, the husband should also listen and consider the objections raised by his wife. This kind of problem also applies to husbands who refuse their wife’s wishes. Most people mistakenly assume that wives do not have sex drive so that wives are not allowed to ask their husbands first. The wife adequately serves the wishes of the husband.

According to ibn Abi Hamzah, what is meant by firash (bed) is a form of kinayah or parable of jima’ (intercourse), and if she (the wife) refuses to come to him without udzur so as to make the husband angry, then the angel curses him because a wife should obey the husband’s orders except in matters of immorality. It is said that menstruation does not fall into the category of udzur in terms of fun because the husband has the right to take pleasure in what is above the navel according to the jumhur, while all scholars agree that it can have pleasure for the menstruating wife in addition to the wife’s farji.20 Regarding the meaning of angelic anathema to wives who refuse or avoid the husband’s invitation, in this hadith it is said that angels pray for accidents for immoral perpetrators as long as they are in their faith. This shows that they also pray for the good of the doer of obedience as long as they are in obedience. Then the editor of the hadith explicitly states that this anathema is valid only for the night, from the time the rejection occurs until the time of shubuh. In fact, this is actually not the case. This text only indicates that jima’ is usually done at night because usually free time is at night and it is possible that this is done during the day.

But having rights does not mean that you can take them in a vanity way. In general, people are commanded to do things in a ma’ruf way and home life is no exception. Although the term marital rape is not well known in Islam, the Qur’an and Hadith regulate prohibitions on conjugal relations that can be included in the category of marital rape, in accordance with the meaning previously explained. Among the prohibition are the following:

1. Prohibition of forced sexual relations with women who are menstruating or puerperal.
2. Prohibition to have sexual intercourse through the rectum.
3. Prohibition of conjugal relations during fasting. However, if the relationship is done at night, then it is allowed.

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4. Prohibition of doing ‘azl (coitus interruptus).
5. Prohibition against sadistic sex.

Other forms of sexual violence, for example in this case resulting in injury to limbs or the ability to have intercourse, in this case Islam establishes the law of diyat with one hundred camels. Diyat in the sense of jarimah is an act done by a person to the object of the soul and limbs, whether the act results in death, only results in injury or malfunction of the victim’s limbs which is done accidentally or semi-intentionally.21

Islamic law is decreed by Allah Almighty to protect the benefit of mankind, both the benefit of the individual and the benefit of society and or both. The benefit of mankind can generally be classified into three aspects, namely daurorriyah (primary), hajiyyah (secondary) and tahsiniyah (complementary). To guarantee and maintain this benefit, Islam establishes a number of rules in the form of commandments and prohibitions. This rule is accompanied by the threat of worldly punishment and ukhrawi when violated.22 Basically, the purpose of providing legal sanctions according to Islamic Crime is prevention, teaching and education which is intended so that criminal offenders can take lessons from what criminals get when they get punishment.

Mu’asyarah bil ma’ruf

Mu’asyarah bil ma’ruf has the aim that the household is well established and harmonious. In addition, giving birth to offspring who are salih and salihah and is an integrative ethic between husband and wife and is something that must be practiced consistently. Yusuf Al-Qaradawi believes that the characteristics that stand out in Muslim families remain the dominance of loyalty, obedience, affection, and building friendship. Marriage must begin with God’s intention. For those who are about to enter the home, it should begin and remember that building a home is worship. All families will inevitably encounter various problems and experience personal conflicts as well as problems and conflicts between family members. This is natural, especially between two people with different customs and personalities. To create a happy and happy family, each must strive to solve problems and resolve the conflict well, or at least minimize the conflict so that it does not get bigger.23

Husband and wife must understand that the position of wife and husband in the household is the same but has different rights and obligations. On the one hand, society understands that the position of the wife in the family is below the husband who states that the wife should uphold her husband with honor and glory. Then the Islamic concept of marriage teaches that the rights of husband and wife are balanced. Obligations imposed on a husband or wife also have balanced obligations. Creating a harmonious, sakinah, and peaceful family can be done by cultivating an appreciation of Islamic teachings. This will be done by fostering mutual respect, cultivating an attitude of frugal living, and fostering introspection between husband and wife.24

According to Sayyid Sabiq, good treatment or mu’asyarah bil ma’ruf is one of the mutual rights between husband and wife. Both husband and wife are obliged to treat their partners well so that

23 Huzaemah Tahido Yanggo, “Contemporary Women’s Jurisprudence” (Surabaya, Ghalia Indonesia, 2010). thing. 176-181.
they are always harmonious and serene. The domains of mu’asyarah bil ma’ruf according to Hussein Muhammad include dowry, the right to bread, sexual relations, and human relations. In the field of sexual and human relations, mu’asyarah bil ma’ruf carried out by husband and wife is that between the two must give and take each other, love and cherish each other, not hurt each other, do not show hatred for each other, and each does not ignore each other’s rights or obligations.

In this case, husband and wife are required to fulfill each other’s rights and obligations according to their roles. The rights of wives to husbands consist of two kinds, namely material rights and then non-material rights. These material rights include dowry and bread. Among Islam’s forms of care and respect for women is to give them the right to belong. Then the purpose of living in this case is the provision of the wife’s needs, such as clothing, food, shelter and so on which are the needs of the wife. Income is only required of the husband, because of the demands of the marriage contract and because of the continuity of fun as the wife is obliged to obey the husband, always accompany him, manage the household, and educate her children. The immaterial rights for wives include mental livelihoods such as getting along with wives well, taking care of wives, then interfering with wives well. So mental livelihood is the fulfillment of needs, especially biological and psychological, such as love and affection, attention, protection and so on, whose concrete form is sexual intercourse. So that in everyday life when it is called mental bread, then what is meant is precisely sex.

Islam also provides for the rights of husbands to wives, whereby a wife must obey the husband, not disobey the husband, maintain the honor and property of the husband, decorate for the husband, do not allow a person to enter the house except with the consent of the husband. The Prophet advised women to obey their husbands, because it can bring benefit and goodness. The Prophet also explained that the majority of things that put a woman in hell are her iniquity to her husband and her kufra (not gratitude) to the kindness of the husband. Then every wife’s jewelry that looks more beautiful will make the husband happy and feel enough, there is no need to do it with the haram. There is no doubt that the beauty of a woman’s form will increase the love of her husband, while seeing anything that causes hatred will reduce his love. Therefore, it is always recommended that the husband does not see his wife in a form that is hateful if the husband asks his wife’s permission before intercourse.

Maqashid syari’ah

Maqashid Shari’ah is viewed from lughawi (language), so it consists of two words, namely maqashid and shari’ah. Maqashid is the jama’ form of maqashid which means intentionality or purpose. Shari’ah linguistically means which means the road to the water source. The road to this water source can also be said to be the road to the main source of life. In relation to the maqashid shari’ah, al-Shatibi uses different words, namely maqashid shari’ah, al-maqashid al-syar’iyyah fi al-shari’ah, and maqashid min syar’i al-hukm. Although in different words, according to Asafri Jaya Bakri contains the same purpose, namely the purpose of the law sent down by Allah SWT. As al-

28 Samsul Bahri, “Mental Livelihood and Material Compensation”, Pulpit of Law, No. 52. thing. 24
Shatibi said: Indeed, the Shari’ah aims to realize the benefit of mankind in the world and in the Hereafter and the Laws are decreed for the benefit of the slave. Thus, it gives the understanding that the content of maqashid shari’ah is the benefit of mankind. Meanwhile, according to the term, among ulama ushul fiqh is the meaning and purpose desired by sharak in proclaiming a law for the benefit of mankind, also called asrar asysyari’ah which is the secrets contained behind the law set by sharak, in the form of benefit for mankind, both in the world and in the hereafter. Therefore, Asafri Jaya Bakri views that the content of maqashid shari’ah is a benefit. This benefit, through maqashid shari’ah is not only seen in a mere technical sense, but in an effort to dynamic and develop law is seen as something that contains philosophical value from the laws that God shari’ah has on humans.30

The essence or initial purpose of the implementation of shari’a is to create human benefit. As al-Ghazali said, the benefit can be realized if the five elements of sharak’s goals can be realized and maintained, namely religion, soul, reason, offspring, and property. In an effort to realize and maintain these five basic elements, al-Shatibi divides into three levels of maqashid or the purpose of Shari’ah, namely:

1. Maqashid al-Daruriyat, is intended to preserve the five basic elements of human life. Al-Daruriya (primary goals) are defined by Judiciary Wahyudi.14 as goals that must exist, the absence of which will result in the total destruction of life which according to the most popular version is to protect religion, soul, reason, property and offspring. For example, to save souls, Islam obliges mankind to eat but in moderation. To save property, Islam promulgates for example muamalah laws while prohibiting destructive measures such as theft and robbery.

2. Maqashid al-Hajiyat, is intended to eliminate difficulties or make the maintenance of the five basic elements even better. Al-Hajiyat (secondary goals) was defined by Yudian Wahyudi. As something that is needed by humans to facilitate achieving the interests included in the dhariuriyat category, on the contrary get rid of factors that complicate the effort to realize dhariuriyat. Because of its function that supports and complements the primary purpose, this secondary presence is needed but not necessarily. That is, if the things of Hajyat do not exist then human life will not be destroyed, but there will be various imperfections, even difficulties. For example, to save lives as a secondary goal through eating requires cutlery such as stoves. Indeed, without a stove, humans will not die because they can still eat food that is not cooked, but the presence of a stove can complement the type of menu that can be served. There are various conveniences with the presence of the stove. To protect property as a primary purpose, equipment such as firearms is needed, indeed people can protect their property with machetes, knives or chopsticks, but firearms are more helpful.

3. Maqashid al-Tahsiniyat, it is intended that man can do his best for the completion of the maintenance of the five basic elements. Al-Tahsiniyat (tertiary goals) is defined by Judiciary Wahyudi.16 as something whose presence is neither necessary nor necessary, but will beautify the manifestation of the interests of dhariuriyat and hajiyat. On the contrary, its absence will neither destroy nor complicate life, but diminish the sense of beauty and ethics. Here personal choice is highly respected insofar as it does not contradict the provisions of the nash. For example, the stove needed in order to realize the primary goal of saving lives through eating it has eighteen wicks, gas stoves, electric stoves or solar light stoves are left to the aesthetic sense

30 Ibid., p. 66.
and local ability. Firearms needed in order to realize the primary purpose of protecting property through firearms, they are long or short barreled, made in Indonesia or America, black or white, and so on, left to local choice and capability. Of the three levels of shari’ah objectives, according to Asafri Jaya Bakri, it shows how important the maintenance of the five basic elements is in human life. In addition, it also refers to the development and dynamics of understanding the law created by God in order to realize benefit.

**Marital rape perspective maqashid shari’ah**

Maqasid Shari’ah can be understood as the purpose of a set of Islamic laws in the formation of justice and the welfare of society, not a series of rules that lead to the destruction of social order. The legal decisions of a leader should be like that, in one of the principles of usul al-fiqh is expressed Tasharruf Al-Imam Manuthun Bi Al-Maslahah namely the policy of a leader (must) refer to the benefit of the led (the people).31

Marital Rape is an act of gender-based violence which in its resolution must be based on human values, glorify others and provide benefits and eliminate harm to humans. So that efforts to deal with wives who are victims of domestic violence must be in line with the objectives of Islamic law. Protection against the guarantee of the 5 main principles in Islam namely preserving religion, soul, intellect, lineage and property, with the following details: (1) Maintaining Religion (hifdz al-din), in the case of domestic violence will make a husband’s mental attack on his wife as a victim, will result in the impact of disrupting the psychological integrity of a wife’s mental integrity. Thus seen spiritually the wife tends to have difficulty expressing gratitude so that the ability to guarantee a relationship with the creator is reduced.

Furthermore (2) Maintenance of the soul (hifdz al-nafs), violence against human dignity as well as behavior in household violence, is an act of discrimination that leads to intervention in the weakened party. Supposedly in married life, a husband’s duty is to provide guidance by treating his wife and children well, not vice versa to act arbitrarily or restrain his wife. (3) Maintenance of reason (hifdz al-‘qal), a wife who becomes a victim of a wife’s abusive actions in the household environment is often restricted by her freedom as an independent individual, psychological disorders often cause a person to lose his thinking power so that he cannot think logically, even spiritually they become unable to express their emotions.

Furthermore (4) Maintenance of offspring (hifdz al-Nasl), the violence experienced by the wife in her household is reflected in acts of sexual violence even though forced abortions by husbands are of course far from the principle of social life in the household which should be based on the principles of muashara bil ma’ruf and deliberation which must be instilled in household life. (5) Maintenance of Property (hifdz al-mal wa al-‘irdh), a wife within the scope of the household has the right to earn a decent living from a husband, the act of neglecting his wife and children is an irresponsible act, because it is the husband’s obligation to ensure the survival of the family he brings.

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Conclusion

Neither Indonesian positive law nor Islamic law justifies the concept of marital rape. Both of these laws impose sanctions on perpetrators of marital rape although not specifically. Efforts to deal with wives who are victims of domestic violence must be in line with the objectives of Islamic law, namely protection against the guarantee of the 5 main principles in Islam, namely maintaining religion, soul, intellect, lineage and property. So that in Islam a husband is ordered to have intercourse with his wife in a ma’ruf manner with the prohibition to do harm to his wife. For example, good manners, good morals in getting along with family. So that it can be understood from here that each husband and wife have rights and obligations to form a sakinah household life. Likewise, neither Indonesian positive law nor Islamic law justifies the concept of marital rape. Both of these laws impose sanctions on perpetrators of marital rape although not specifically. Although there are hadiths which show that a wife may not reject her husband and can be categorized intonusyuz; However, the husband is also required to approach his wife in an acceptable way and understand the condition of the wife so that there is no coercion that will hurt both physically and psychologically.

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