

## ISLAMIC LEGAL ETHICS TO MARITAL RAPE Juxtaposing *Mu'āsyarah bi al-ma'rūf* and *Ḍarār ma'nawī* Principles

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### Abstract

This paper points out the position of marital rape from the angle of Islamic legal reasoning. In the modern context, marital rape is a debated issue, particularly from a gender standpoint. By examining the legal sources in *fiqh* (such as the Qur'an, hadith, and the opinions of Islamic scholars), this study argues that marital rape is a violation of the principles of Islamic legal ethics. The act of marital rape is not in accordance with the principle of good relations (*mu'āsyarah bi al-ma'rūf*) because it causes *ḍarār ma'nawī*—psychological danger for the victim. In addition, marital rape denies the equality of biological rights between husband and wife.

[Tulisan ini menjelaskan posisi perkosaan dalam perkawinan dari sudut pandang penalaran hukum Islam. Dalam konteks kontemporer perkosaan dalam perkawinan merupakan isu yang diperdebatkan, terutama dalam perspektif gender. Dengan menganalisis sumber-sumber hukumnya dalam fikih, seperti Qur'an, hadis serta ijtihad ulama, penelitian ini menunjukkan bahwa perkosaan dalam perkawinan merupakan tindakan yang bertentangan dengan prinsip hukum Islam. Perbuatan marital rape tidak sesuai dengan prinsip hubungan yang baik (*mu'āsyarah bi al-ma'rūf*) karena menimbulkan *ḍarār ma'nawī* yakni bahaya secara psikis bagi korban. Selain itu, perkosaan dalam perkawinan menafikan kesetaraan hak penyaluran biologis antara suami-istri.]

### Keywords

*Ḍarār ma'nawī*, marital rape, *mu'āsyarah bil ma'rūf*

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## Introduction

The National Commission on Violence against Women (*Komisi Nasional Anti Kekerasan terhadap Perempuan*) noted that there are 1,983 reports of sexual violence that occurred in the family domain and were classified as domestic violence during 2020.<sup>1</sup> And in 2021, there were at least 335,399 cases of gender-based violence against women that were reported to The National Commission on Violence Against Women. 3,400 cases among those are sexual violence.<sup>2</sup> Efforts to eliminate sexual violence in Indonesia have been through a long way before being realized in the Act of Crime of Sexual Violence (*Undang-Undang Tindakan Kekerasan Seksual*).<sup>3</sup> Before being issued, this Act suffers from controversies and

<sup>1</sup> Komnas Perempuan, Catatan Tahunan, "Perempuan dalam Himpitan Pandemi: Lonjakan Kekerasan Seksual, Kekerasan Siber, Perkawinan Anak, dan Keterbatasan Penanganan di Tengah Covid-19" (Jakarta: tp, 2021), 8.

<sup>2</sup> Komnas Perempuan, Catatan Tahunan, 16.

<sup>3</sup> Yanuar Farida Wismayanti et al., "Child Sexual Abuse in Indonesia: A Systematic Review of Literature, Law and Policy," *Child Abuse & Neglect* 95 (2019): 104034, <https://doi.org/10.1016/j.chiabu.2019.104034>; Yanuar Farida Wismayanti et al., "The Problematization of Child Sexual Abuse in Policy and Law: The Indonesian Example," *Child Abuse & Neglect* 118 (2021): 105157, <https://doi.org/10.1016/j.chiabu.2021.105157>.

refusals, particularly the marital rape clause. Generally, the refusal comes from conservative groups.<sup>4</sup> They assume that the clause on marital rape in the draft is not in accordance with the Islamic Law principle.<sup>5</sup> They reject the concept of marital rape by arguing that if a woman is married to a man, then she must submit and fully obey that man (her husband). The wife is obliged to serve her husband and must comply with all his wishes, including when the husband asks for any sexual service.

A number of studies on marital rape have been conducted by several scholars. For instance, the concept of marital rape has been seen from the point of view of *fiqh munākahat* (Islamic Family Law) by Syaifuddin.<sup>6</sup> He concludes that forcing sexual relations with the wife violates the principle of Sharia, because ideally sexual relationship between husband and wife is based on mutual consent (*tarāḍīn*) and in an appropriate manner (*ma'rif*). Not different from those, Rachman justified that marital rape is contradicted by the principles of *sakīnah* (serenity), *mawaddah* (affection) and *rahmah* (compassion) as the basis for the household relationship.<sup>7</sup>

From a broader perspective, Syarifuddin concludes that sexual coercion is part of sexual violence which is constituted in Law no. 23 of 2004. It is categorized as a sexual crime. Besides those works, abundant scholars have addressed marital rape from many perspectives, such as Millah,<sup>8</sup> Durassamin,<sup>9</sup> Sibuan,<sup>10</sup> and Samsudin.<sup>11</sup> This researches

<sup>4</sup> From this point of view, it is clear that they are still trapped in a patriarchal culture and use religious arguments to legitimize their views. Women in their eyes have an inferior position than men, especially in the family sphere when the doctrine that all household members must submit to the man who has the position as the head of the family. Thus, the husband has absolute authority over his wife. So coercion to have sexual intercourse by the husband on his wife is not included as an act of rape. Ade Irma Sakina, "Menyoroti Budaya Patriarki Di Indonesia," *Share: Social Work Journal* 7, no. 1 (2017): 71–80, <https://doi.org/10.24198/share.v7i1.13820>.

<sup>5</sup> Sakina.

<sup>6</sup> Muhammad Irfan Syaifuddin, "Konsepsi Marital Rape Dalam Fikih Munakahat," *Al-Ahkam Jurnal Ilmu Syari'ah Dan Hukum* 3, no. 2 (2018): 171–90, <https://doi.org/10.22515/alakhkam.v3i2.1399>.

<sup>7</sup> Evi Septiana Rachman, "Marital Rape Dalam Perspektif Hukum Islam (Kajian Epistemologi)," *Justicia Sains* 4, no. 01 (2009).

<sup>8</sup> Zīnatul Millah, "Seks Dan Kuasa Dalam Hukum Islam: Studi Fiqh Seksualitas," *De Jure: Jurnal Hukum Dan Syari'ah* 9, no. 1 (2017): 13–29, <https://doi.org/10.18860/j-fsh.v9i1.4144>.

<sup>9</sup> Zikri Darussamin and Armansyah Armansyah, "MARITAL RAPE SEBAGAI ALASAN PERCERAIAN DALAM KAJIAN MAQĀSHID SYAR'AH," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 12, no. 1 (2019): 84–98, <https://doi.org/10.14421/ahwal.2019.12107>.

<sup>10</sup> Riskyanti Juniver Siburian, "Marital Rape Sebagai Tindak Pidana Dalam RUU-Penghapusan Kekerasan Seksual," *Jurnal Yuridis* 7, no. 1 (2020): 149–69, <https://doi.org/10.35586/jjur.v7i1.1107>.

explain marital rape from the perspective of Islamic Criminal Law and Human Rights. Different from the previous studies, this article uses the glasses of Islamic legal ethics by focusing on how the sources of Islamic law (Qur'an, hadith, *ijma'*, and *qiyas*, as well as on the opinions of scholars) spoke sexual manner and justified the rape in marriage. The discussion in this study includes the definition of marital rape, and the discussion of marital rape according to Qur'an, hadith, and authoritative *ijtihād* scholars. The primary sources in this study are the main sources of Islamic law, in the form of verses from the Qur'an, texts of hadith, and *ijtihād* of scholars related to the theme of marital rape. The sources of hadith in this study emphasize the hadiths of the prophet which are widely used as references in the justification of acts of sexual violence. The data collected was then analyzed qualitatively.

### Defining Rape in Marriage

Rape in marriage has a special term that is used in general by the world community, namely marital rape. In the Oxford Dictionary, marital rape is defined as rape committed by the person to whom the victim is married.<sup>12</sup> In general, marital rape means rape committed between the husband and wife who are in the marriage bond. Hasbianto defines marital rape as violent behavior towards the wife in the form of coercion to have sexual relations and sexual coercion without paying attention to the satisfaction of the wife.<sup>13</sup>

'Ādil Mir, vice chairman of The Union of Arab Academics, defines marital rape as sexual coercion that implies the husband using violence and threats in intercourse with his wife without *riḍā* (consent) from her<sup>14</sup> 'Abdali expresses the definition of marital rape as any sexual penetration in any way carried out by an individual to his partner without the *riḍā* of the partner.<sup>15</sup> From these definitions, marital rape is a type of rape against the wife which

<sup>11</sup> Titin Samsudin, "Marital Rape Sebagai Pelanggaran Hak Asasi Manusia," *Al-Ulum* 10, no. 2 (2010): 339–54.

<sup>12</sup> Oxford Dictionaries, *marital rape*, [www.oxforddictionaries.com/definition/english/marital-rape](http://www.oxforddictionaries.com/definition/english/marital-rape), accessed on 21 December 2020.

<sup>13</sup> Hasbianto, Elli N. *Kekerasan dalam Rumah Tangga: Potret Muram Kehidupan Perempuan dalam Perkawinan* in the National Seminar on the Protection of Women and Sexual Harassment and Violence, organized by the Center for Population Research, Gadjah Mada University Yogyakarta, 6 November 1996.

<sup>14</sup> Ādil Mir, "Mā Huwa Maḥbūm al-Iḡṡāb al-Zaujī?", *democraticac.de*, accessed from <https://democraticac.de/?p=35542> on 20 September 2021.

<sup>15</sup> Sufyan 'Abdali, "al-Iḡṡāb al-Zaujī 'ala aui al-Qawānīn al-Waṭāniyyah (al-Jazā'irī wa al-Farānsī)", *Majallab al-Janān li Huḡūq al-Insān*, no. 8, June 2015, 143.

includes coercion, threats, and violence, which is followed by a negative impact on the partner, both physically and psychologically. However, in the household, the negative effect of marital rape does not only appear in the short term but also as a sustainable effect (*long-term effect*). The issue of rape in the household is widely debated because it is considered the privacy of a household.<sup>16</sup>

## Sexual Manner in the Sources of Islamic Law

### 1. Al-Qur'an

The relationship of a couple who is navigating the ark of the household is based on the principles of goodness and propriety. This relationship must be based on good and proper interaction between the two parties. Because this action is the most basic ethic in fostering the household, besides it also has the function to preserve and revive all virtues that are felt equally by both parties.<sup>17</sup> In the Qur'an, An-Nisā verse 19 states the principle of sexual manner, *mu'āsyarah bil ma'rūf*.

*Mu'āsyarah bil ma'rūf* can be interpreted as "treating fairly in terms of housing and living, as well as softening speech".<sup>18</sup> Az-Zuhaili interprets the word *mu'āsyarah bil ma'rūf* in the form of good speech, improving behavior and appearance, as well as behaving fairly in terms of livelihood and housing.<sup>19</sup> The sentence *asyiru* itself is a derivation of the word *al-asyaratu* which means mutuality, which is why the choice of the word *mu'āsyarah* in this verse in Zuhaili's view emphasizes the spirit for equality, and therefore the command to interact properly does not only apply to the husband, the wife also has an obligation to uphold this principle.<sup>20</sup>

<sup>16</sup> Liv Tønnessen, "When Rape Becomes Politics: Negotiating Islamic Law Reform in Sudan," in *Women's Studies International Forum*, vol. 44 (Elsevier, 2014), 145–53, <https://doi.org/10.1016/j.wsif.2013.12.003>.

<sup>17</sup> Muhammad Endriyo Susila, "Islamic Perspective on Marital Rape," *Jurnal Media Hukum* 20, no. 2 (2013), <https://doi.org/10.18196/jmh.v20i2.271>.

<sup>18</sup> Abul Qāsim Mahm d Al- Zamakhsar , *al-Kasyyā f 'an Ghawāmiḍ al-Tanzīl* , Vol. 1 (Beirut: Dar al-Kutub al-Arabi, 1987), 491. Similar interpretations can be seen in classical commentaries such as: Abu Ishāq az-Zajāj, *Maān Al -Qur'an wa I'rābuhu*, Vol. 2 (Beirut: 'Alam al-Kutub, 1988), 30. See also: Nasiruddin Abi Sa'id Abdillah bin 'Umar bin Muḥammad ash-Syirāzi al-Baidawi, *Annārah-Tanzīh wa Asrār al-Ta'wīl* , Vol. 2 (Beirut: Dar Ihya' at-Turats al-'Arabi, 1997 ), 66.

<sup>19</sup> Wahbah Zuhaili, *al- Tafsir al-Munr fī al-Aq dab wa asb- Syar ' ab wa al-Manhaj*, Vol. 4 (Damascus: Dar al-Fikr al-Muashir, 1997), 302.

<sup>20</sup> Wahbah Zuhaili, *al-Tafsīr al-Was* , Vol. 1 (Damascus: Dar al-Fikr, 2001), 300.

The word *ma'rūf* in this verse indicates any behavior that is recommended by Islam, accepted in a normal sense, and also does not conflict with the values of morality and general decency. Therefore, the act of making it difficult to provide a living, all acts of physical or verbal violence, and showing a sullen face in front of their partner are no other things that negate the principle of *mu'āsyarah bil ma'rūf* in marriage.<sup>21</sup> Some Islamic scholars issued a fatwa regarding the obligation of a husband to treat his wife properly based on *istinbāt in this* verse of An-Nisā verse 19. Shihab explained that interacting with the wife properly, in the form of not disturbing, not forcing her will, and interacting as well as possible is an obligation for the husband.<sup>22</sup> Ibn Al-Arabi explains:

This (*mu'āsyarah bil ma'rūf*) is obligatory for a husband. However, this obligation does not have to be committed before the court, unless it has become a habit of a community due to the emergence of bad habits (in interacting with the wife). So if this happens, the husband must make conditions (agreement) and be bound by the rules by oath (in front of the judge).<sup>23</sup>

It can also be understood that this verse contains a prohibition against inappropriate attitudes and interactions with partners. This is in accordance with the *fiqh* rules *An order against something is a prohibition to do things that are contrary to something earlier*<sup>24</sup> In essence, this verse was revealed in order to eradicate the traditions that prevailed during the pre-Islamic era, when husbands interacted with their wives in such a bad and inappropriate way, such as saying harsh words to their wives and doing actions that had a negative impact on the wife's psyche and physicality.<sup>25</sup> Therefore, Ibn 'Assyria when interpreting this verse asserts: *and get along with them in a proper way*. It means a prohibition to treat them badly<sup>26</sup>

Therefore, the attitude of a party, whether husband or wife forcing their partner to have sex without their consent (*riḍā*) is painful and negates the principle of *mu'āsyarah bil ma'rūf*. Because marital rape in the sense of forcing intimate relationships is prone to

<sup>21</sup> Muḥammad Rashid bin Ali Ridla, *Tafsir al-Qur'an al-Karm (Tafsir al-Manār)*, Vol. 4 (Cairo: al-Hai'ah al-Mishriyah al-'Ammah lil Kitab, 1990), 374.

<sup>22</sup> Muḥammad Quraish Shihab, *Tafsir al-Misbah: Pesan, Kesan dan Keserasian al-Qur'an*, (Jakarta: Lentera Hati, 2002), 382.

<sup>23</sup> Muhyiddin bin Arabi, *Abkām al-Qur'an*, Vol. 1 (Beirut: Dar al-Kutub al-Arabiyyah), 468.

<sup>24</sup> Abul Ma'ali al-Juwaini, *al-Waraqat* (Riyadh, Dar al-Somaie, 1996), 14.

<sup>25</sup> Wahbah Zuhayli, *at-Tafsir al-Munir*, vol. 4, 303.

<sup>26</sup> Muḥammad at-Tahir Ibn 'Assyria, *at-Tabrīr wa at-Tamwīr*, Vol. 4 (Tunis: Dar at-Tunisiyyah li An-Nasyr, 1984), 287.

causing *harm* (bad effects) both physically and psychologically for the victim, especially when accompanied by threats, torture, and physical violence. And all forms of partner actions that cause *ḍarar*, then the law is haram because it is not following the obligations of *mu'āsyarah bil ma'rūf*. Because after all, treating your partner well negates all things that have a bad impact and cause dislike. On the other hand, several verses are used as justifications for acts of sexual violence in the household, including Surah Al-Baqārah verse 223. Frase *anna syi'tum* in verse 223 literally (translated as "anytime and in the way you like") does not necessarily give absolute freedom to a husband to channel his desires. The pronunciation of *anna syi'tum* shows the functions of (how), and this only means that the husband may channel the relationship in any style (*kaijfiyah*), such as standing, sitting, and others to produce offspring, and no style is forbidden. It is not permissible to channel it into the anus because this part is not a place to produce children, as it is also not allowed to have sex while the wife is menstruating because apart from the prohibition in the previous verse, it is also not the right time to plant the 'seed' because potentially harmful to health.<sup>27</sup> So clearly this verse gives a message that there are certain limits in having sex between husband and wife that should not be violated and breached, such as having sex when the wife is menstruating, fasting, or having intercourse through the anus (*anal sex*). If a husband invites to have sex in the above circumstances and/or methods, then the wife may refuse it because it is not permissible to obey creatures in the context of disobedience to Allah.

Therefore, the context of this verse talks about the freedom of sexual intercourse within the limits that have been determined by the sharia. This is contrary to the understanding of some people that the understanding of this verse implies that women's fields can be planted with anything, at any time, and in any way according to the will of men as seed cultivators. That is, women become mere objects for men's desires, especially in terms of sexuality. Such an understanding eventually brings subordination, and discrimination thought patterns on the pretext of religious teachings, and in the end, bares sexual violence behavior in marriage, one of them being coercion to have sexual relations with a partner.<sup>28</sup>

<sup>27</sup> Muḥammad Mutawall ash-Sya'rāwī, *Tafsir ash-Sya'rāwī*, Vol. 2 (Cairo: Mathabi' Ahkbar al-Yaum, 1997), 969.

<sup>28</sup> Husein Muhammad et al., *Fiqh Seksualitas: Risalah Islam Untuk Pemenuhan Hak-Hak Seksualitas* (Jakarta: Perkumpulan Keluarga Berencana Indonesia (PKBI), 2011).

## 2. Hadith

The hadith that is often used as a justification for the actions of a husband who forces his wife to have sex is:

Told from Musaddad, narrated from Abū 'Awānah, from al-A'masy, from Ab Hāzim, from Ab Hurairah *radliyallahu 'anhu* he said, the Messenger of Allah said: "If a husband invites his wife to his bed, but the wife does not want to make her husband angry, then the angels will curse her until the morning<sup>29</sup>

The above hadith is very popular among the people, and not a few also quote it in lectures or writings about the relationship between husband and wife. The majority explains this hadith in accordance with the textual understanding, namely the curse of the angels for the wife who refuses her husband's desire to have sex, without further investigating the reasons for the wife's refusal. In this level of understanding, the hadith implies that the wife inevitably has to accept her husband's invitation regardless of her condition when serving her husband's sexual desires.

The intervention of 'angels' in this hadith is actually not absolute. Because the text of the hadith hints at the existence of *muqayyad* (limited by one condition), namely anger on the part of the husband because of the refusal. That is when the wife refuses the invitation to have intercourse but the husband is not angry, it could be because he understands the wife's condition or indeed leaves her rights, then the intervention of the curse of the angel will not occur.<sup>30</sup> Muḥammad bin Salih al-Utsaimin also added another condition, namely if the man has carried out his duties and obligations as a husband, such as providing a living. Therefore, if the husband does not carry out his obligations, then the wife has the right to refuse the husband's invitation as a "sanction" for the husband and this does not fall into the category of *musyūz* (disobedience).<sup>31</sup> The scope of the law in this hadith does not apply absolutely completely. Moreover, the scholars emphasized that in the condition of the wife

<sup>29</sup> Muḥammad bin Ismā'il al-Bukhārī, *abīh al-Bukhārī*, vol. 4 (Beirut: Dar al-Ṭūq an-Najāt, 2001), 116.

<sup>30</sup> Aḥmad bin Alī bin ajar Al-'Asqalānī, *Fathul Bārī Sharh abīh al-Bukhārī*, Vol. 9 (Beirut: Dar al-Ma'rifah, 1960), 294. See also: Muḥammad bin Ismail bin Shalah Ash-Shan'ani, *Subulus Salām*, Vol.2 (Cairo: Darul Hadith, tt), 210. See also: Aḥmad bin Muḥammad bin Abi Bakr al- Qasṭalānī, *Irsyadus Sāri li Sharh abīh al-Bukhārī*, Vol. 8 (Egypt: Al-Mathba'ah Al-Kubra Al-Amiriyah, 1905), 96

<sup>31</sup> Muḥammad bin Salih al-Utsaimin, *Sharh Riyādbus alibin*, Vol. 3 (Riyadh: Darul Wathan, 2005), 142.



due to *syar'i age*, such as carrying out obligatory fasting, or in a state of menstruation and childbirth, the woman is allowed to refuse the husband's invitation.<sup>32</sup>

It is also permissible for the wife to ignore the husband's invitation if the relationship causes a bad impact (*darar*) on the wife.<sup>33</sup> This impact can occur if the wife's condition is not ready psychologically and physically, such as being tired and not in the mood after a lot of activity, being emotional before menstruation, sick from pregnancy and childbirth, or burdened with the impact of sexual activity on her reproductive organs.<sup>34</sup> Instead of being used as an argument to perpetuate misogynistic understanding and the practice of sexual violence, this hadith has come to erase it, certainly, if it is understood comprehensively. This hadith cannot be used as an excuse to justify the act of forcing intercourse, because this kind of intimate relationship—based on the studies that have been described in the previous chapter—only causes a bad impact (*darar*) on one of the parties, something which is criticized by the content of the meaning of the hadith. Therefore, *the Al-Azhar Fatwa Global Center* emphasizes that this hadith cannot be used as a justification for hurting the wife, both physically and psychologically, as well as our neglect of the bad impact felt by women when they accept their husband's bad ethics and their bad interactions.<sup>35</sup>

### 3. Ijtihad

In the *fiqh* books, the discussion of sexual violence that occurs in the family sphere has not become the focus of jurists' attention. Jurisprudence experts tend to focus on aspects of sexuality related to compensation for dowry and maintenance so that a wife who is reluctant to fulfill her husband's sexual libido has committed *nusyūz* (spouse disobedience) which results in the loss of the husband's obligation to provide a living and dowry. Some *fiqh* texts also clearly allow husbands to force their wives to have sex without the wife's *consent*. This coercion is allowed in the context of the wife, not in '*uzūr syar'i*' (something that causes someone according to *syar'i* law to be allowed not to do something that should be

<sup>32</sup> Muḥammad Shams al-Ḥaq Azimabadi, *'Aunul Ma'būd Syarh Sunan Ab Dāwūd*, Vol. 6 (Darul Kutub Al-Arabiyyah, 1995), 126.

<sup>33</sup> Wahbah Al-Zuhayli, *Al-Fiqh Al-Islami Wa-Adillatub* (Damaskus: Dar al-Fikr, 2008).

<sup>34</sup> Khaled bin Usman al-Sabt, "Hadīṣ 'Iṣṣā Da'a ar-Rajulu Imraatuhu,'" [khaledalsabt.com](https://khaledalsabt.com/explanations/1447), accessed from <https://khaledalsabt.com/explanations/1447>, on June 12, 2021.

<sup>35</sup> Al-Azhar Fatwa Global Center, "Tashbīḥ Ba'd al-Mafāḥim al-Khāṭiḥ Haul Qaul Sayyidinā Rasūlillāh 'Iṣṣā Bātat al-Mar'atu'," [azhar.org](https://www.azhar.org/fatwacenter/fatwa/a7waal/ArtMID/7989/ArticleID/), accessed from <https://www.azhar.org/fatwacenter/fatwa/a7waal/ArtMID/7989/ArticleID/>, on October 30, 2021.

done) One of these opinions was expressed by Ibn 'Abidin, who explained that the husband is allowed to have sexual relations with his wife if the wife refuses her invitation without any deterrent (*'uṣṣūr*) according to the Sharia. However, the wife has no right to force her husband to have sexual intercourse after doing so once.<sup>36</sup>

The same source also mentions the opinion of the Hanafi *fiqh* scholars that a wife who is reluctant to fulfill her husband's invitation to have sex is still entitled to earn a living, as long as she remains in her house. The reason is simple, that is, her husband can still force her while she is still in the house.<sup>37</sup> In the Hanbali school, the husband's obligation to provide for his wife is closely related to his wife's ability to fulfill her sexual libido. Ibn Qudāmah explains that the condition for a wife to earn a living is that she allows her to 'serve' her husband. Therefore, the wife who is still small is not obliged to provide for her because it is impossible for her to have sexual relations. Meanwhile, an adult wife must be provided with a living because there is still the possibility to 'serve' her husband because he can use coercion.<sup>38</sup> Classical Islamic scholars do not question coercion at all, and even make it a benchmark for whether or not a *nusyūz* woman can earn a living. It seems that the classical ulama's understanding of the permissibility of forcing a wife to have intercourse has been institutionalized and accepted as the norm. The proof is that there is always opposition from religious leaders whenever there is a discourse on regulations governing marital rape, not only in Indonesia but also in other Islamic countries.<sup>39</sup>

Some contemporary scholars themselves support the concept of rape in marriage. Ahmed Karima, a professor of comparative jurisprudence at al-Azhar University, also explained that forcing a wife to have sexual intercourse according to the legal perspective of religion is not permissible. Because sexual relations must be based on perfect agreement and continuity of taste. Islam highly values human values. And coercion to have sex is contrary to Islamic ethics, therefore the law is haram according to Islamic law.<sup>40</sup> Fathī al-

<sup>36</sup> Ibn 'Ābidn, *Radd al-Mukhtār 'alā al-Durr al-Mukhtār*, vol. 3 (Beirut: Darul Kutub al-Arabiyyah, 2005), 4.

<sup>37</sup> Ibn 'Ābidn, *Radd al-Mukhtār 'alā al-Durr al-Mukhtār*.

<sup>38</sup> Ibn Qudāmah, *al-Mughnī li Ibn Qudāmah* vol.8 (Cairo: Maktabah al-Qāhirah, tt), 228.

<sup>39</sup> Muslih Muslih and Abu Hapsin, "Rereading the Concept of Nusyūz in Islamic Marriage Law with Qira'ah Mubādalah," *Analisa: Journal of Social Science and Religion* 5, no. 02 (2020): 139–52, <https://doi.org/10.18784/analisa.v5i02.1176>.

<sup>40</sup> Almasryalyoum Contributor. "Ahmed Karīma 'an al-Ighṭiṣāb al-Zaujī: Ijbār al-Zaujāh 'ala al-Mu'āsyarah Harām", Almasryalyoum.com, accessed from <https://www.almasyalyoum.com/news/detailsamp/2358336>, on 26 October 2021

Fiqī, a member of *Lajnah al-Fatwā* al-Azhar argues that a husband should not have sex with his wife without paying attention to her consent so that the wife is not ready to fulfill her biological condition. Because one of the goals of marriage is to fulfill the biological needs of both parties, and the act of coercion denies this.<sup>41</sup> Al-Azhar institutionally in its official release commemorating the Day of Anti-Violence Against Women in November 25, 2018.

After these facts, is it logical that we remain silent in the face of various forms of violence against women? Either the violence is physical or psychological, with various colors such as *intimate partner violence* including beatings, psychological violence, marital rape, and murder of women.<sup>42</sup>

### Marital Rape according to Islamic Legal Ethics

From the results of examining the opinions of scholars in addressing rape in marriage above, it can be seen that they agree on the inability of a husband to force intercourse with his wife when in a condition of *'uḡur syar'i*. In this case, the factor in the prohibition of this action is the intimate relationship itself, not because of the coercion factor. The proof is that having sex in an *'uḡur syar'i* condition is still *haram* even though it is done with the consent of the wife. However, classical scholars do not question the husband's act of forcing his wife to have sex when the wife is not in a state of *'uḡur syar'i*. Considering that they also have the perception that *istimta'* rights (to channel sexual libido) are the dominant right of a husband, it is up to him to distribute it whenever and in any way. This opinion is implied – one of them – in the text of the book *al-Majmū'*:

*istimta'* for the husband the law is not obligatory, because it is a right for the husband so that he may leave it, as is his right to the house he rents. And the impetus for *istimta'* is lust and love so it is impossible to be obligated.<sup>43</sup>

Due to the dominance of men over this right, the jurists also argue that it is obligatory for the wife to be given a living if it is possible for her husband to have sex with her so that a young wife is not obliged to be supported because it is not possible for the husband to be *istimta'* with her, and the obligation to provide maintenance will be null and

<sup>41</sup> Islām Jamāl, “*Lā Yajūzu al-Jimā' bi al-Ikrāb... wa al-Malāikah Taghḏab 'ala al-Mumtani'ah bilā ...*” *albawabhnews.com*, accessed from <https://www.albawabhnews.com/147118#>, on October 29, 2021.

<sup>42</sup> Al-Azhar Observer, *al-Yaum al-'Ālamī Li Nabḡi al-'Anfi idd al-Mar'ab*, accessed from <https://www.azhar.eg/detail-multi-portal/ArtMID/3500/ArticleID/40278> on December 24, 2021.

<sup>43</sup> Abu Zakariyyā Muhyiddīn al-Nawawī, *al-Majmū' syarḥ al-Muḥaḡḡab*, vol. 16 (Beirut: Dār al-Fikr, tt), 412.

void whenever the husband does not allow him to channel sexual libido to his wife.<sup>44</sup> Grand Sheikh Al-Azhar, Ath-Thayyeb emphasized that erroneous traditions and culture have contributed to the perception that the right to *istimtā'* rests with the husband completely, while the wife does not have this right at all.<sup>45</sup> This perception makes the husband's position more dominant over his wife. The husband has a superior position while the wife becomes inferior. And there is subordination that places women under the domination of men. This weakness affects the low bargaining position of a woman in terms of *istimtā'*. This then forms a strong, established, and dominating discourse on sexuality and finally forms normalization and discipline that continues to run in such a way that we ourselves are not aware of it. The way of thinking of each individual continues to be dictated to think and look at the boundaries that have been outlined by a discursive structure that has been deeply rooted and established, and there is no other choice.<sup>46</sup>

In fact, there are other opinions from other scholars who favor mutuality and equality in husband-wife relations. This discourse views the sexuality of women and men are equal and balanced. Therefore, the wife also has the same and equal rights in terms of *istimtā'*. Because this right is a shared right that is equally owned by both parties, both the husband and the wife. Al-Kasani argues that the wife has the right to demand her husband to have intercourse. Therefore, when the wife demands her rights, then the husband is obliged to fulfill them.<sup>47</sup>

With the inclusion of *istimtā'* as a common right (*ḥuqūq musytarakah*) which is equally owned by both parties, husband and wife, so that both parties become equal, then no party should have a monopoly on this right and in the end, this discourse denies the relationship that is mutually exclusive, subordination.<sup>48</sup> So that no one party can claim to be the most entitled in terms of sex, thus assuming that the other party must always be in a position to

<sup>44</sup> Ibn Najīm, *al-Baḥr al-Rā'iq Syar Kanẓ al-Daqāiq*, vo.2 (Cairo: Dār al-Kitāb al-Islāmi, tt), 196. Ibn Qudāmah, *al-Mughnī li Ibn Qudāmah* vol. 8, 228. Aḥmad al-Dardīr, *al-Syarḥ al-Kabīr*, vol. 2 (Beirut: Dār al-Fikr, n.y), 514.

<sup>45</sup> Akhbarelyom contributor, "Ba'd Isyti'āl Ma'rakah al-Ightiṣāb al-Zaujī, Shaykh al-Azhar: Haḥḍhi Huqūq al-Zauj 'alā Zaujatih", Akhbarelyom, accessed from <https://m.akhbarelyom.com/news/newsdetails/3365814/1> on October 29, 2021.

<sup>46</sup> Eriyanto, *Analisis Wacana* (Yogyakarta : LKiS, 2009), 75-76.

<sup>47</sup> Abu Bakr bin Mas'ud bin Aḥmad Al-Kasani, *Badai'u As-anai' fi Tartīb Ash-Syarāi'*, Vol. 2 (Beirut: Dar al-Kutub al-Ilmiyah, 1986), 331.

<sup>48</sup> Al-Zuhayli, *Al-Fiqh Al-Islami Wa-Adillatub*.

serve anytime and anywhere. On the other hand, there is a common perception among scholars who support and reject the concept of marital rape. This perception is the prohibition of all forms of sexual relations that can cause *harm* (bad effects) to one of the parties. Sexual intercourse that causes *ḍarar* is a form of action that is contrary to the principle of *mu'āsyarah bi al-ma'rūf*.<sup>49</sup> Therefore, scholars include sexual relations that have *ḍarar* (bad effect) on the wife's side as one of the *reasons* that allow the wife to refuse her husband's invitation to have sex. That is, the wife is not obliged to meet her husband's biological needs if he is in a vulnerable condition to get *ḍarar* (bad effects). This condition can be due to illness, suffering from infectious diseases, or experiencing psychological disorders.

Scholars who normalize acts of sexual coercion imply the attitude that such acts are commonplace and commonplace. Thus, in the act of coercion used by the husband to have sex with his wife, according to them, there is no element of *ḍarar* in it. It may be that the *ḍarar* caused by the offense of rape in marriage is mostly *ma'nawī*, that is, the *ḍarar* that does not affect the physical or the material but attacks the psyche, mental, and feelings more. At that time there was very little information about *ḍarar ma'nawī* that could arise as a result of sexual coercion. Only Maliki scholars admit that *ḍarar ma'nawī* (psychological impact) in the household—such as the husband being cold and seeming distant, or calling him an inappropriate name—can be a reason for the wife to file for divorce.<sup>50</sup> So it is not surprising that they normalize forced sexual relations. This is because *ḍarar ma'nawī* has not received much attention from them in viewing the sexual relationship between husband and wife. As explained earlier, research shows that marital rape has a psychological and even physical impact on the victim. Therefore, it is necessary to take steps to equalize the perception among scholars that the offense of rape in marriage which is embodied in the act of forcing sexual intercourse has a negative psychological impact (*ḍarar ma'nawī*). This *ḍarar ma'nawī* is one of the *syar' uẓūr* which allows the wife to refuse her husband's wishes, as well as being a *māni'* (prevention) for the husband to vent his sexual libido.

The normalization of acts of sexual coercion contained in classical *fiqh* texts must be understood in the context of the conditions at a time when the dominant discourse

<sup>49</sup> Muḥammad at-Tahir Ibn Assyria, *at-Tabrīr wa at-Tamwīr*, vol. 4, 286.

<sup>50</sup> Al-Haṭṭāb, *Mawāhib al-Jalīl fī Sharḥ Mukhtaṣar Khalīl*, vol.4 (Beirut: Dar al-Fikr, 1992), 17.

positioned men as superior to women, as well as the lack of medical and psychological information about the negative effects of coercion in marriage psychologically. This kind of understanding needs to be re-examined. Because if this condition is allowed to continue and develop without realizing it, then what happens is a process of neglecting the interests of women which in turn causes many cases of violence against women. This is in accordance with what al-Qarāfi suggested so that we read the text by paying attention to the context of time, place, and customs when the text was written so that we are not easily trapped in stagnation and stagnation in understanding religious goals.<sup>51</sup> In addition, acts of sexual coercion are also not in accordance with the Islamic call to respect women. Respect for women in every line of life is an obligation. Sexual coercion is by no means a form of respect for women because this action is more inclined to acts of injustice because women position only as sexual objects, who do not have full authority and sovereignty over their bodies. The husband deliberately takes advantage of his position of superiority unilaterally without caring about the negative effects that take various forms on his wife.<sup>52</sup>

### Conclusion

Marital rape is commensurate with the term *al-ighṭiṣāb al-ḥanji* which means any coercion to have sexual intercourse committed by a husband to his wife in the household without *riḍā* (consent) from the wife. It is not debated that any type of rape followed by a *ḍarar* (negative impact) is forbidden. However, the interpretation of the *ḍarar* is more to the physical factor, not of the victim's psyche. Only Maliki scholars recognize the existence of *ḍarar ma'nawi*, which constitutes psychological elements such as trauma. *Ḍarar ma'nawi* can be a reason for divorce initiated by the wife. Although it is not recognized directly by the majority of Islamic scholars, marital rape in Islam is not justified as valid. Marital rape is categorized as *sū' al-mu'āsyarah* (bad relationship) and negates the principle of a good relationship (*mu'āsyarah bi al-ma'rūf*) which is commanded in An-Nisā verse 19. All forms of behavior that lead to *ḍarar* are illegitimate (haram) because they violate the principle of *mu'āsyarah bi al-ma'rūf*. The wife has the right to refuse sexual relations based on coercion. In addition, marital rape is contrary to the equality of biological rights between husband

<sup>51</sup> Shihāb al-Dīn al-Qarāfi, *Anwār al-Burūq fī Anwāi al-Furūq*, vol.1, 177.

<sup>52</sup> KUPI, *Official Document of the Process and Results of the Indonesian Women's Ulema Congress*, 78.

and wife. Theoretically, it means that, from the Islamic law perspective, marital rape is inappropriate to Islamic legal principles.

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