

Comparative Perspective on Marital Rape: Western Law and Islamic Law

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ABSTRACT

Marital rape is something that is currently being widely discussed in Indonesia. The existing dialectical debate is due to the Draft Criminal Code (RKUHP) and the Sexual Violence Eradication (RUU PKS) which lists the matter. Rape in marriage can be seen in terms of western law and Islamic law. This is triggered by the existence of feminists who reject western law, that the husband can have sexual relations with his wife with the threat of violence or without the will and consent from the wife. This rejection is based on the law, which initially stated that in a husband and wife relationship there is no such thing as rape. In Islamic law, marriage ties will give rights and obligations to husband and wife to be able to have sexual relations with certain manners. Therefore, this paper will discuss the comparison of the views of western law and Islamic law of rape in marriage. This paper will also provide advice on the regulation of rape in marriage in Indonesia.

Keywords: *marital rape, sexual violence, feminism*

1. INTRODUCTION

Marital rape issue in Indonesia constantly triggers endless dialectic discourse among people. Indonesian people commonly split into two mainstream preferences, people who supports marital rape issues to be regulated in national law and people who against it. As a sociological basic knowledge, Indonesia is the only outside Arab country with the greatest number of Muslim populations, therefore conservative Islamist wing who entirely denies marital rape issue regulation in national law still hold a compelling position in the society. However, Islamist in Indonesia not only consisted by conservative wing, but also reformist wing and liberal wing. Liberal Islamists typically align to common liberal movement who purely adopted western perspective on consensual or non-consensual sexual interaction which eventually determine if rape does exist. On another side, Islamists that are more aligned to reformist movement offer a more moderate perspective: they agree that marital rape should be put in national law but remain opposing the present legal framework of the regulation.

Discourse about marital rape in Indonesia find a more concrete shape when legal draft of penal code revision (RKUHP) and sexual violence eradication (RUU P-KS) are published. As mentioned above, perspective preference in Indonesian society about marital rape issue is branched into three preferences: Liberal, Conservative Islamist, and Reformative Islamist. On the contrary to Liberal side, Conservative Islamist proposes the idea of spouse obligation to engage in a consensual sexual interaction

whenever his or her spouse request for it. Therefore, Conservative Islamist consider the regulation of marital rape in national law would allow the state to extremely intrude the privacy and the sanctity of the marriage institution. This argument is arguably supported by some theorists. Some said that marital rape should not be regulated in RKUHP or RUU P-KS because it has been stated in Law Number 23/2004 about Marital Violence Eradication. Even though it is not strictly stated as marital rape, they said marital violence in the law should interpret marital rape as an inclusive definition of the marital violence. On the other hand, reformative Islamist tend to not be caught on snare in the debate between the liberal wing and conservative wing. They provide critical notes to both of the sides. To response the conservative wing, the reformists firmly stated that national regulation of the marital rape issue is not a threat to the privacy and the sanctity of the marriage institution, the law should be seen as protective coverage from abusive marriage to spouse, both to the wife and the husband. To response the liberal wing, they said that the legal framework to sustain the philosophical goals of the law should not overlap the established one in terms of procedure law. The new law may include a more responsive evidence verification procedure as the general case of sexual violence has its own complexity, but it should never open a crack so that everyone can proclaim himself or herself as a victim of sexual violence. If the law is not deliberately crafted and is discussed in a blind haste, it will provoke legal issues in the practice, such as the complexity of evidence verification and the potential of over criminalization.

In conclusion, the plan to regulate marital rape issues in national law generate perpetual dialectical debate among various kind of society in Indonesia. The debate is led by three big motions which is ruled by Liberal wing, Conservative Islamist wing, and Reformative Islamist wing. The Liberal takes extreme lead to propose marital rape issues to be regulated in national law, while The Conservative take extreme lead to oppose it. To moderate the debate, The Reformist takes stand on criticizing the two wings.

1.2. Research Method and Benefit

Conduct of this research is based on literature and press-based sources research. This research aims to provide an alternative perspective by providing comparative analysis of the two legal traditions: West Law and Islamic Law. This research will breakdown each of the legal traditions' perspective on marital rape in a dialectic manner so that the synthesis of the debate would produce theoretical basis to bridge the gap between each of the perspectives.

1.3. Paper Structure

This research focus on discussing how marital rape issue is constructed in West Law and Islamic Law. Initial problem that is popped up and will be assessed through the research is the perspective gap between West Law and Islamic Law on marital rape issue that triggered endless dialectical discourse among diverse layers of community in Indonesia. In order to set a clear border of research limitation, this research only tries to answer a question: how could the perspective gap on marital rape issue between West Law and Islamic Law be bridged?

2. BACKGROUND

2.1. 1. Marital Rape on Western Law Perspective

Rape can be defined conceptually as any sexual intimacy forced on one person by another [1]. On the other hand, in Webster's New Collegiate Dictionary, rape is sexual intercourse with a woman by a man without her consent and chiefly by force or deception [2]. From cultural perspective, rape can be described as "culturally disvalued use of coercion by a male to achieve the submission of a female to sexual intercourse. From every definition can be concluded that women can be raped by any man by doing sexual intercourse forcibly. However, court has their own concept marriage cannot be judged as a reason for husband to rape his wife [3].

United States (US) has a combination of law from parliament and interpretation of verdict. The law will not

judge someone as a criminal until proven guilty. The myth of rape should be explained to understand US rape law. Society believe the real rape have several criteria, it can be a stranger immediately approach someone with a weapon, or a woman who rated to rape because her revealing clothes, taking drugs or drink, and walking alone at night, also for the raped victims with observable injuries and report to the police. The rape law comes from the abusive act from a male to a female but not his wife to do sexual intercourse. It can be any form of sexual intercourse. Court tended to think the female is unchaste. So, the male acted were not the court's consent [4].

Sir Matthew Hale, a British Chief Justice, wrote rape is easy to be made, difficult to prove, harder to be defended by the party accused, nonetheless he still innocence [4]. After that, the US asserted to use the statement as "Lord Hale Jury Instruction." As a result, for the sexual violence cases US judges gave juries an instruction. The juries required by the law to examine the women in this case with caution. Juries must not be sceptic of the suspected victim. His statement was strengthen by John Frederick Archbold, he stated that husband cannot be guilty by raping his wife [5].

Before the law reform, marital rape still an exception, because the wife treated as husband property. It often involves by several violence, such as physical violence and threats of violence. Since the rape law originally came from British Common Law which stated wife as husband property, the law protected the husband from prosecuted by the raped wife [6]. So, the marriage institution is a consensual thing between the wife and the husband to do sexual interaction even though the wife not willing to do it. From early 1960, not every state protected wife by marital rape. These rape law reforms adopted by Model Penal Code in 1962.

Women increased their power to change the law. In 1970s, with the influence by feminist activist the women have two points for the national law reform about rape state laws. The points has one purpose, to exempt women from the sexual victimization. In this era, they were two points of women victimization, sexual assault and physical assault from the husbands [3].

The doctrine about wives as husband's property is no longer acceptable, because the women declared they have authority to their own body. They want to enjoy and refuse sexual relations as equal to their husbands. As a result, if the husbands want to have sexual relations with spouse, they can refuse it. If their husband forces them to do that, it will categorize as rape [7].

Some of the states put marital rape as a criminal while others still not exemption it from the rape. On July 5 1993, 50 states rule that marital rape became a criminal law although 30 states, per 2005, still exempt husbands from rape the wives [8]. Most of the states not using force as a reason to give the husbands exemption, but the states use conditions for the wives who have vulnerable conditions and it is legal to have sexual relations without their consent [9]. Some states in US, like Michigan, Oklahoma, Maryland, and Washington legally give exemption to husbands have intercourse with their spouses when they

are drugged [10]. Maryland even decide to remove exemptions for all sex as criminal.

Minnesota is the latest state which the Legislative voted to eliminate this exemption to prevent those case from prosecute [10]. One of the cases in this state is Jenny Teeson case. She brought her husband to police because she found videos which her husband recorded. On those videos, her husband did sexually assaulted by penetrated her with an object when she slept while her daughter slept next to her [11]. Her husband ended up only with misdemeanor because of the exemption.

However, the marital rape law in the west law still have loopholes. The marital rape law in US does not regulate about the victims' consent, age, relationship, using force or natural penetration, also the timeframes to report. Feminist activist tend to change the rape law to protect women from domination of male in marriage institution. Some of the states in US still count it as an exemption because of the marital bond and to minimize the chance to prosecute the husbands by the marital rape. In the United Kingdom, marital rape is an illegal thing.

2.1. 2. Marital Rape on Islamic Law Perspective

It has become a historical fact that the position of women for a long time is not equal with men in terms of relationship. Even in some old traditions such as in pre-Islam Arab, woman was considered more as a property rather than a human being. The similar condition could also be found in other parts of the earth's surface [7]. The struggle for gender equality has run for decades and lots of progress has been achieved. From one point of view, Islam is praised for its historically liberating role for women in Arabia and elsewhere. Yet another perspective hold either the religion or some of its practices and practitioners accountable for the lower status and inferior legal rights of women in Islamic countries than other parts of the world. Still other views fall somewhere in the middle of these two positions [12]. As a historical text, the Qur'an was revealed in the context of seventh-century Arabian patriarchy and anarchy. In its effort to reform society, the Qur'an addressed social, political, economic, and moral imbalances, offering a model of greater reciprocity and explicit statements regarding reforms to the realities of women's lives. The foundational idea of gender equality, then, is derived from the Qur'anic worldview [13].

Marriage in Arabic means *az-zawaj* or *an-nikah*, and every Muslim school has a different definition in term of *az-zawaj*, yet the definitions are not much different as well as the meaning refer to the same fact and *jami' wa mani'* (universe and deterrent). Marriage is a legal and social contract between two individuals [14]. In surah Ar-Rum verse 22, Allah says that one of His signs is that He has created wives for male that may can be find peace of mind in them. In another verse, said that He created a person from a single soul, and made therefrom its mate. In surah An-Nuur verse 32, it is stated to marry those among

society who are single. From the verses told before, it signifies that marriage is meant for attainment of peace of mind and mutual love and affection. Islam recommend humankind to married. The main advantage of it is to contribute through legitimate means to the continuity and preservation of humanity [15]. Prophet Muhammad SAW has called upon his nation: "Marry, so your number increases." and the practice of marriage is an answer to his call. With marriage, it avoids deviation or to maladjustment due the failure to fulfil sexual urge. Deviation is dishonourable and is strictly forbidden in Islam. The Holy Quran in surah An-Nur verse 30 and 31 stated man and women need to reduce [some] of vision and guard private parts from forbidden things (haram). In other respects, everyone should have a partner for satisfying their sexual needs in a secure and serene environment, which can be obtained through marriage. The Prophet stated whoever gets married has safeguarded half of their religion.

In Islam, the husband has the right to ask his wife to have sexual intercourse with him and so does the wife. According to Islamic jurisprudence, the sexual intercourse is one of the spouse's duties in the marriage institution [7]. Malik jurists said that the sex intercourse is compulsory between a man and a lawful women if there would be no excuse [16]. Shafie jurist viewed that the sexual intercourse is not obligatory, and it should be at least once because the sexual intercourse is spouse's right [17]. Hambali jurist as mentioned in *Kashful Qana'* opined that the husband should do lovemaking with his wife once in every four month if there would be no excuse, if the intercourse is not compulsory, it is not to be *al-illa'* for who leaves the sex as a right due to the compulsory reason. The early Muslim legal scholars try to show that sexual intercourse is one of the spouse's rights, further Islam allows it in the marriage institution.

Sexual intercourse is also one of the joint rights between the husband and the wife, even there are some Islamic scholars opine that this right is the ultimate right to the husband only. God has created sexual desire inside the husband body and on inside the wives. Thus, both parties have the right to have sexual intercourse because it does not belong exclusively to one party than the other. Prophet Muhammad said in several hadiths which is narrated by Al-Bukhari that if a man invites his wife to sleep with him and she refuses to come to him, then the Angels send their curses on her till morning. Also, if a woman spends the night deserting her husband's bed (doesn't sleep with him) then the Angels send their curses on her till she comes back to her husband [18]. Thus, it is noted that sexual intercourse is a legal, moral and it is a religious duty of wife to submit herself to her husband if he requests for sexual intercourse. The wife can't withhold her consent in having sex with her husband if she's in perfect condition and healthy. Furthermore, if she refuses his request without any valid reason, the husband can lodge a complaint about the wife to the Qadi and Shariah court that his wife is doing *nusyuz* (disobedience).

However, there are some situations in Islamic jurisprudence when a wife has the right legally to refuse

the sexual intercourse. If the husband requests the sex intercourse, the wife must refuse although both parties consent to do it. In other words, they are considered sinful if the wife does not refuse the request in having intercourse. Some of the exceptional situations are during wife's menstruation period, during her parturition period, during the day time of Ramadhan, while she's performing Umrah or pilgrimage and she's in ihram condition, if a husband put away his wife by likening her backs to the backs of his mother and doesn't do expiation yet, or if she has the knowledge that the husband had contracted sexually transmitted diseases.

Considering its fundamental functions, sexual intercourse is sacred in Islam and it will be counted as part of worship to Allah as long as being carried out in line with the rule of Allah (sharia). Based on the rule of sharia, only sexual intercourse conducted by husband with his wife is lawful (halal) hence, any sexual activity carried out outside the marriage is unlawful or haram [7]. The Prophet Muhammad (saw) said, 'Indeed, your Lord has certain rights over you, and your family has certain rights over you and your own soul has certain rights over you, so give to each according to the rights that are due.' (Sahih Bukhari 3.189). This Hadith is a reminder for the necessity of balancing on how to fulfil the rights of others in the family or community, the rights due to our own souls, and due to our Lord. Husband and wife rights are to have sexual intercourse.

In Islamic law considers rape as a serious sexual crime. To define rape in Islamic Law, it is necessary to investigate the juristic definition of illegal sexual intercourse or zina, because most jurists take it into account as part of the definition. Knowing the legal meaning of zina is crucial since a conviction is based on what constitutes the crime [19]. The definition of rape in Islamic jurisprudence is slightly different in meaning and not the same as the western definition. Since it consists of forced sexual intercourse, most of the classical jurists called it *zinā bī l-ikrah*, that is, forced unlawful sexual intercourse [19]. Rape in Arabic is referred to *al-ightisob*, the origin word of *ali-ghtisob* refers to who's taking property of others by force or violence. In the general custom of Islamic society, these words are used to refer rape offence. Rape in Islamic jurisprudence define as forcing someone to commit adultery or sodomy and therefore hudud punishment will be imposed on the rapist. The meaning of zina has been defined by the Malikites, Shafi'ites, and Hanbalites, as the unlawful and mutually consensual vaginal or anal intercourse between a man who is sane and who has reached the age of puberty (*bulgh*) and a woman who is not in his ownership [19]. Rape, on the other hand, is vaginal or anal intercourse by force or against her will or no consent from one of the parties and no deliberate action from the victim.

The combination of words "marital rape" is a new term and Muslim society has never heard of that following term according to Islamic jurisprudence or books. Most of the Muslim society cannot imagine the existence of rape could also happen in marriage institution, since the partner have legal right to have sexual intercourse. Marital rape is

known within the western law as spousal rape, which is referring to an unwanted sexual intercourse by force, threats of force, or physical violence, or the partner is unable to give consent [7]. Proving rape by a spouse can often be more difficult, because it can be more difficult to prove that the victim did not give her consent. Married couples usually have consensual sex, which can take evidence of marital discord or separation to show that the sexual activity was not non-consensual [20]. Since sexual intercourse is considered as a private matter, the victim of marital rape (typically the wife) for a long time prefers to keep silent. One reason for the silence about marital rape is because throughout much of history, in many countries and cultures around the world marital rape was an impossibility

Husband is banded with the obligation to treat her wife well or known as *mu'asyarah bil ma'ruf*. In sexual matters, the doctrine of *mu'asyarah bil ma'ruf* can be applied by respecting the need and the willingness of the wife in sexual matters. Meaning to say, the husband is obliged to fulfil his wife's sexual desire on one side, and on the other side he is not suggested to force her wife to serve him sexually if she is unwilling. It is better for the husband to sacrifice him (to be patient) self rather than sacrificing his wife [7]. In the Islamic context, rape has two sides. The first side states that in marriage there is a division of rights and obligations between husband and wife. And it is true that the wife must always be obedient and obedient in serving the interests and desires of her husband, whatever happens. If this does not work, it can be called *nusyuz* (disobedience). The second point is that the rights and obligations of couples in the marriage bond are balanced, understood, valued, and respected. In this opinion rape occurs when there is penetration, and it can happen to those who are not bound by marriage bond. The other side stated that rape in marriage is a crime where the offender can be arrested using articles about violence, the third view is that rape in marriage is an act that is contrary to human rights, so special laws are needed.

2.1.3. Attempt to Regulate Marital Rape Issues in Indonesia

Law in Indonesia that provide regulation on marital rape issues remains unclear. Some law theorists said that Law 23/2004 about Marital Violence Eradication has a regulation on marital rape even though not strictly stated marital rape in wording structure [21]. They believe that the term interpretation of marital violence itself has included marital rape, therefore marital rape issue does not suppose to be regulated again both in RKUHP and RUU P-KS. However, that kind of regulation often seen as protection uncertainty to the victim. It happened because not every law enforcement officer has equal capabilities to perceive the case as it should be perceived [22]. To tackle the issue, people think that the law should be enhanced so that the officers have a more vivid and rigorous guidance on how they should handle the complexity of the sexual

violence case [23]. The efforts to enhance the law become clearer when RKUHP and RUU P-KS are crafted and published. Specifically, marital rape issue is regulated in RKUHP and not RUU P-KS. Article 480 RKUHP ruled that a husband or wife that is convicted guilty of doing marital rape to his or her spouse will be jailed for at most 12 years. Though major opinions of the society do not appear to oppose the regulation placement of marital rape issue in RKUHP, some theorists stated that it should be more suitable if placed in RUU P-KS [24]. The publication of those legal drafts sparks debate on the society.

The debate was initiated by the different angles promoted by Liberal wing and Conservative Islamist wing [25]. The people who are more aligned to liberal ideas tend to adopt West Law tradition. Philosophically speaking, development of West Law tradition is mostly inspired by the idea that focus on individual freedom, gender equality, and feminism. On the other hand, the people who are more aligned to conservative Islam ideas tend to adopt rigid and conservative interpretation of Islamic Law that focus on transcendent relation to God, social responsibility, as well as the privacy and the sanctity of the marriage institution. This contradiction of perspectives caused infinite debate between the two wings. The liberal believe that marriage is solely embarked from the consensual relationship between two persons, no transcendent matter is included. Both husband and wife are in equal position. Husband or wife may take lead in family-related issues as long as agreed by another party. Therefore, the marriage in liberal perspective has nothing to do with sanctity and should be treated as general agreement as well. Marital rape issue is considered as violation to the marriage agreement. Party who conduct violation to the agreement might face both civil claims and criminal charges. In that kind of relation, state function as the judge of the dispute arose. State intervention indeed seen as an obligation to resolve conflict among the citizens and totally not seen as privacy breach to marriage institution. On the contrary to the liberal side, the conservative believe that marriage is a part of religious practice. It has transcendent relations to God, so God itself has ruled on how marriage should operate. Marriage is not only about two persons that is tied by pledge to each other, but marriage also establish relations between the newlyweds and the God. This God-related matter is the part of sanctity in the marriage that the conservative believes. Islam taught that husband possess position as a leader in a family-related matter as the Holy Quran textually ruled. Thus, rejection to sexual intercourse request might be seen as a rejection to husband authority as a leader. Marital rape that is described by liberal wing is simply defined by the conservative as a husband exercising his authority in the matter of sexual intercourse. It is just the same matter as a husband who reprimand his wife because of misdemeanour behaviour she did. Consequently, the placement of marital rape issues regulation in the national law is seen as state violation to the sanctity of marriage institution. This kind of debate is endless.

Fortunately, there is an alternative to break through the debate. The reformative Islamist wing compromised the

both wing by criticizing them. The reformist stated that it is not right to base the definition of marital rape issues solely on consensual relationship perspective as the matter of fact that sociological reality in Indonesia believe in transcendent relation with God, both in Islam religious belief and non-Islam religious belief. On the fact of historical matters, Indonesian society is built on the grow and the interaction of diverse belief system, even long before Islam get in the Indonesian soil. We know that belief system that based on ancestor spirit (Animism) and belief system that based on holy relics and magical object (Dynamism) do exist since long time ago. It signifies that Indonesian society cannot be separated from transcendent relation with so-called God. Thus, including religious perspective in the national law is a way to fit the values that live and grow in the society. Putting pure liberal view on marriage, as well as marital rape issues, might contradict the existing living law that society sustained. The reformists also request the liberal to not recklessly force the enactment of the law for the law still have some controversies, such as overlapping with the existing regulation, evidence complexity, as well as evidence verification procedure complexity. Disregarding the problem might arise the potential of over criminalization and protection uncertainty to the marital rape issues. On the contrary to the conservative view, the reformist said that husband authority should not be seen as absolute representative of God nor the Holy Quran. Husband is still a human, God's creation and not God itself, that has the potential to exercise bad deeds. Therefore, as the axiom applies, absolute power corrupts absolutely, everyone should be able to be supervised. Then, state power does exist to supervise citizens so people will live peacefully. As stated in the Holy Quran that people should encourage each other to be patient and to do good deeds, state power exists to protect people from the harmful deeds. In short, if the debate between the liberal and the conservative is sustained to only withstand their opinion, legal framework to create protection certainty to marital rape issues might never be enacted. Both parties have to compromise and showcase good faith to lower the tension of the debate. The reformist has started leading to leapfrog the obstacles, now the turn for both parties to decide.

3. CONCLUSION

As a conclusion, it is important to note that this research is to compare between west law and Islamic law in terms or marital rape. In west law, it is known that there's repairing the position of women in many fields of life. One of which, is wife treated as husband property. Some of the states put marital rape as a criminal while others still not exemption it from the rape. Most of the states not using force as a reason to give the husbands exemption, but the states use conditions for the wives who have vulnerable conditions and it is legal to have sexual relations without their consent. On the other hand, marital rape is prohibited in Islam. A wife who refuses her husband's request in having sex without any reasonable justifications is

considered as committing a sin. However, a husband who uses violence upon his wife to have sex with him is not committed as rape offence. However, he can be charged for abusing her rights if his wife sues him to Sharia Court and considered sinful. Even though the husband has privilege in sexual intercourse, sexual activities should be able to be enjoyed by both parties. Therefore, serving partner sexually is not only the obligation of wife but also the obligation of the husband, since the wife has also sexual desire to be fulfilled.

In Indonesia, the regulation on marital rape issues remains unclear. With RKUHP and RUU P-KS, it creates a debate by Liberal wing and Conservative Islamist wing in terms of marital rape.

4. ADVICE

Marital rape issues in Indonesia's regulation are still a controversial discourse. Those who have more conservative ideological see that marital rape does not need to be regulated because the relationship between husband and wife is entirely private matter and the regulation of marital rape has the potential to lead to over criminalization or the difficulty of proof if marital rape is specifically regulated. However, the issue of marital rape currently on the draft phase in Indonesia, such as the Draft Law on the Elimination of Sexual Violence (RUU PKS) and the Draft Criminal Code Book (RKUHP) 2019 which includes sexual violence in marriage ties. The 2019 penal code revision (RKUHP) contains several new articles that contained in the current one. One of the articles that is classified as new as in Article 480 paragraph (2) which regulates rape in which the meaning of rape can be imposed on a legitimate spouse to his husband or wife to have intercourse with coercion or threat of force. For the two parties, Liberal wing and Conservative Islamist wing, should compromise each other. Both of the parties should depress the expectation about the rule. So, the regulation about the rape can be done soon.

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