

HUSBAND'S SEXUAL VIOLENCE: Protection Rights for Wives in Terms of Islamic and Indonesian State Law

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Abstract: This paper discusses the right to protect wives from husband's sexual violence, a perspective of Islamic law, penal Code, and the Law of Elimination of Domestic Violence. In recent years, violence to women has increased, while from a legal standpoint, it has not accommodated various problems related to sexual violence. Therefore, this paper reveals how these protections from three different law perspectives, and prove that these problems can be resolved through those laws. Through normative juridical research using grammatical and systematic interpretation methods, it was found that sexual violence in Islamic Law is categorized as a violation of honor which is punishable by *ta'zir*. The punishments regarding to violations of a person's freedom are in the form of imprisonment and banishment. In the Penal Code: Offense against decency and persecution. In the Domestic Violence Law: legal protection for victims in the form of physical, psychological, sexual violence. There is a correlation between these three different law perspectives, for instance, the equivalent view which perceives violent behavior as despicable behavior, is prohibited, and threatens with imprisonment or *ta'zir*. This synergy has implications for fulfilling the human protection from violence, implementing a sense of security, and ensuring the survival of community.

Keywords: Sexual Violence, Protection, Wives, Islamic Law, Indonesian State Law

Abstrak: Tulisan ini mendikusikan jaminan hak perlindungan istri dari kekerasan seksual suami ditinjau dari perspektif hukum Islam, hukum pidana, dan Undang-Undang Penghapusan Kekerasan dalam Rumah Tangga. Beberapa tahun terakhir ini, kekerasan terhadap perempuan semakin meningkat, sementara dari sisi hukum, belum mampu mengakomodir problem-problem berhubungan dengan kekerasan seksual. Karena itu, tulisan ini akan mengungkapkan bagaimana perlindungan ini dari perspektif ketiga hukum tersebut sekaligus membuktikan bahwa melalui ketiga hukum ini, masalah tersebut dapat diselesaikan. Melalui penelitian yuridis normatif dengan metode penafsiran gramatikal dan sistematis, tulisan ini menunjukkan bahwa kekerasan seksual suami terhadap istri dalam Hukum Pidana Islam dikategorikan

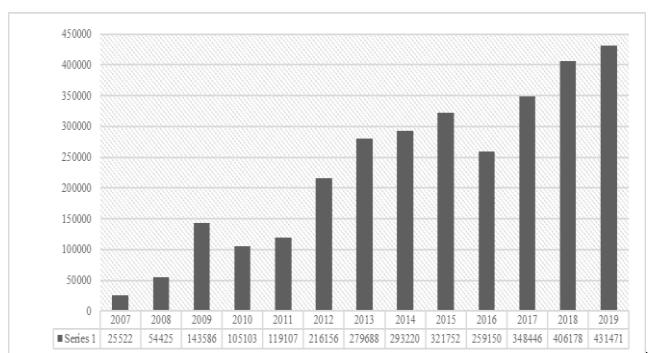
sebagai pelanggaran terhadap kehormatan yang diancam pidana *ta'zir*. sanksi bagi yang berkaitan dengan pelanggaran terhadap kemerdekaan seseorang diancam dengan hukuman penjara dan hukuman buang. Perlindungan dalam Kitab Undang-Undang Hukum Pidana: Delik kesusilaan dan delik penganiayaan. Perlindungan dalam Undang-Undang Penghapusan Kekerasan dalam Rumah Tangga: perlindungan hukum terhadap korban kekerasan dalam rumah tangga baik berupa kekerasan fisik, psikis, seksual. Dari ketiga hukum tersebut terdapat korelasi diantaranya, yakni kesamaan pandangan bahwa Perilaku kekerasan adalah perilaku tercela, dilarang dilakukan, dan diancam dengan pidana penjara atau hukuman *ta'zir*. Melalui sinergitas tersebut, berimplikasi pada pemenuhan hak perlindungan dari kekerasan, mewujudkan rasa aman, dan menjamin kelangsungan hidup masyarakat.

Kata Kunci: Dogma Agama; Kekerasan Seksual; Perlindungan Istri; *Ta'zir*

Introduction

The National Commission on Violence against Women (Komnas Perempuan) noted that during 2019 there were 431,471 cases of violence against women. The number was 6% higher than in the previous year.¹ Furthermore, Komnas Perempuan Commissioner, Mariana Ami-ruddin said that in the last 12 years, violence against women has increased almost 8 times or as much as 792%.² An illustration of the statistics on the increase in violence against women in Indonesia over the past 12 years figured in Figure 1 below:

Figure 1. Number of Sexual Violence in Indonesia



Terhadap Perempuan (CATAHU 2020)," accessed February 1St, 2021, <https://komnasperempuan.go.id/informasi-kdrt>.

² Mariana, "Acara Catatan Kekerasan Terhadap Perempuan Tahun 2019 Di Kawasan Cikini," accessed February 1St, 2021, <https://nasional.kompas.com/read/2020/03/06/15134051/catatan-komnas-perempuan-431471-kasus-kekerasan-terjadi-sepanjang-2019?page=all>.

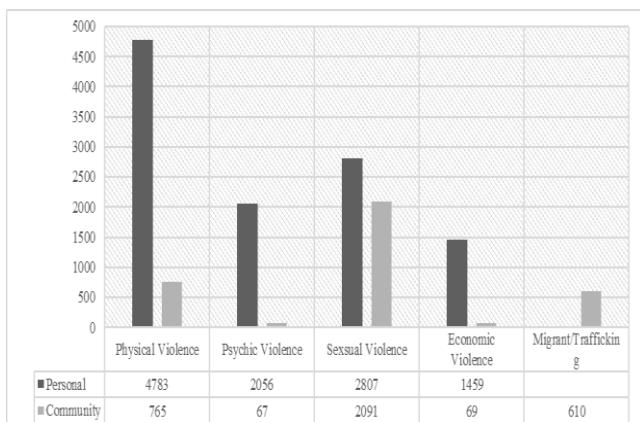
The consistent increase within the statistics indicates that violence has become a strong culture in Indonesian society. There is no protection for women, and even the law enforcement system in Indonesia allows these cases to occur. Even though Indonesia is a constitutional state, however, in reality, the legal protection itself has not been able to accommodate these various social problems. The classic reason is still there, because the realm of women is still considered too domestic. Thus, law enforcement is still quite weak and gender unfair.³

Furthermore, the 2021 annual records show that there is an increase in the number of cases during a pandemic. Data on complaints to Komnas Perempuan also experienced a drastic increase of 60% from 1,413 cases in 2019 to 2,389 cases in 2020. The most obvious cases are in the Personal Realm or called KDRT (Domestic Cases / Personal Cases) as much as 79% (6,480 cases). Violence in this private sphere has experienced the same pattern as the previous years, namely, the most noticeable form of violence is physical abuse, 2,025 cases (31%) are in the first rank, followed by sexual violence with 1,983 cases (30%), psychological

³ Nadya Aprilliani Kartika, "Analisis Semiotika Unsur Kekerasan Dalam Budaya Patriarki Film Marlina Si Pembunuh Dalam Empat Babak" (UIN SUSKA Riau, 2020).

1,792 (28%), and the economy in 680 cases (10%). Forms of violence against wives (KTI) ranked first 3,221 cases (50%), followed by relationship violence in 1,309 cases (20%) who took second place. The third position is violence against girls as many as 954 cases (15%), the rest is violence by ex-boyfriends, ex-husbands, and violence against domestic workers. The statistical description of sexual violence forms as cited in the 2021 annual records from Komnas Perempuan figured in Figure 2 below:

Figure 2. Forms of Violence Against Woman



Based on Figure 2, the most prominent cases are in the Personal Realm or called KDRT (Domestic Cases / Personal Cases) and sexual violence is the most common form of violence throughout 2020. The statistics indicate that sexual violence against wives in Indonesia is still an entrenched social problem and it is hard to be touched by the realm of law. In the context of domestic life, some people think that the husband as the leader and head of the household has full authority over his family.⁴ This authority seems to legitimate the husbands to treat their wives as they want, so that they (husbands) feel unaware⁵, that they have

committed violence against their spouses and their wives (as victims) perceive that the violence is normal in married life. The social reality found in society believes that husband is the controller of the wife so that it is "okay" for the husbands to perform violence when their wives do not grant the husband's wishes. This condition is exacerbated by the shame culture when a household's problems are exposed and heard by others, hence they choose to remain silent in order to maintain their married life continuity.⁶

Sexual violence is a concrete form of a husband's violence against his wife. Sexual violence is an action related to a person's sexuality (both men and women) which is carried out under pressure.⁷ Sexual violence includes, but no exception on rape, sexual slavery, human trafficking for sexual exploitation, sexual harassment, enforced sterilization, enforced abortion, and enforced prostitution.⁸ Sexual violence against wives in the household is better known by the general public as marital rape or means domestic rape.⁹ Sexual violence against wives suffers in physical, sexual, and psychological, including the threat of certain acts, coercion, or arbitrary deprivation of freedom, either in public or in a private environment.¹⁰

Tentang Penghapusan Kekerasan Dalam Rumah Tangga," *Jurista* 6, no. 2 (2017): 1-27.

⁶ Siti Khasanah, "Tinjauan Hukum Islam Terhadap Pemberian Izin Poligami Oleh Pengadilan Agama Pasuruan Dengan Alasan Istri Tidak Dapat Menjalankan Kewajiban Sebagai Isteri Karena Sering Kecapekan Bekerja Dan Suami Hiperseks," *Doctoral Dissertation UIN Sunan Ampel Surabaya*, 2018.

⁷ Simson Ruben, "Kekerasan Seksual Terhadap Istri Ditinjau Dari Sudut Pandang Hukum Pidana," *Lex Crimen* 4, no. 5 (2015): 12.

⁸ International Criminal Tribunal for Rwanda, Chamber 1., dalam Betty Itha Omas, Dkk., *Kekerasan Terhadap Perempuan Sebagai Pelanggaran HAM, Glosari*, (Indonesia, Desember, 2006): 44.

⁹ Ruben, *Kekerasan Seksual Terhadap Istri Ditinjau Dari Sudut Pandang Hukum Pidana*, p. 121.

¹⁰ Atika Rahmi, "Urgensi Perlindungan Bagi Korban Kekerasan Seksual Dalam Sistem Peradilan Pidana

⁴ Fanny M. Cheung and Diane F. Halpern, "Women at the Top: Powerful Leaders Define Success as Work + Family in a Culture of Gender," *American Psychologist* 65, no. 3 (2010): 182-93.

⁵ Sri Agustina, "Tindak Kekerasan Dalam Rumah Tangga: Analisis Komparatif Antara Hukum Islam Dan Undang-Undang Nomor 23 Tahun 2004

Ruben S in his journal classifies sexual violence against wives into serious and trivial sexual violence. Serious sexual violence includes¹¹ a) Sexual harassment by physical contacts, such as groping, touching sexual organs, kissing forcefully, embracing, and other acts that cause disgust, terror, humiliation, and feeling controlled. b) Forcing sexual intercourse without the consent of the victim or when the victim does not want it. c) Forcing sexual intercourse in a way that is unwelcomed, degrading, and / or painful. d) Forcing sexual intercourse with other people for prostitution, and / or other certain purposes. e) The occurrence of sexual intercourse where the perpetrator takes advantage of the victim's dependent position which should be protected. f) Sexual acts with physical violence with or without the aid of tools that cause pain or injury. While, trivial Sexual Violence includes verbal sexual harassment, such as verbal comments, porn jokes, whistles, taunts and nicknames and / or non-verbally, such as facial expressions, body movements, or other acts that call for sexual attention that the victim does not want it, something harassing and or insulting the victim. Repeating minor sexual violence can constitute a serious type of sexual violence.

The problem of sexual violence is a form of crime that disgraces and tarnishes humanity, including husbands' sexual violence against their wives. The crime of sexual violence suffers the victim, and it needs serious attention.¹² The wife experiences prolonged trauma, feelings of shame, fear, and sometimes they have difficulty in expressing the violence they have experienced.¹³ Traditions and culture or the

Terpadu Berkeadilan Gender," *Jurnal Mercatoria* 11, no. 1 (2018): 37–60.

¹¹ Ruben, *Kekerasan Seksual Terhadap Istri Ditinjau Dari Sudut Pandang Hukum Pidana*, p. 96

¹² Abdul Wahid and Muhammad Irfan, *Perlindungan Terhadap Korban Kekerasan Seksual : Advokasi Atas Hak Asasi Perempuan* (Bandung: Refika Aditama, 2001).

¹³ Ann Wolbert Burgess and Lynda Lytle Holmstrom, "Rape Trauma Syndrome," *American Journal of Psychiatry* 131, no. 9 (September 1974): 981–86; M.

religious views of society that consider open talking about sex in front of other people as taboo. This then makes efforts to reveal cases of sexual violence crimes very complicated, because they are related to the dignity and honor of the victim. More than that, the disclosure often adds to the suffering of women and their families themselves.¹⁴ Efforts to provide protection and stop violence are urgent because sexual violence has caused various injuries to victims, physically and psychologically.¹⁵

Although rape is considered as domestic sexual violence, it is still controversial. The study about sexual violence as well as the right to protection of wives in a constitutional state within the majority of the Muslim population has a patriarchal root as an interesting matter to study further, because the influence of culture, dogma religion, and the legal system in Indonesia contributed to the increase in the number of violence itself. This paper discusses and describes how is the protection for wives against their husbands' sexual violence from the perspective of Islamic Law, Indonesian Penal Code, and Law on the Elimination of Domestic Violence (UU PKDRT).

The paper uses a normative juridical study¹⁶, with an approach that takes the val-

Scheffer Lindgren and B. Renck, "'It Is Still so Deep-Seated, the Fear': Psychological Stress Reactions as Consequences of Intimate Partner Violence," *Journal of Psychiatric and Mental Health Nursing* 15, no. 3 (April 2008): 219–28.

¹⁴ Rahmi, *Urgensi Perlindungan Bagi Korban Kekerasan Seksual Dalam Sistem Peradilan Pidana Terpadu Berkeadilan Gender*, p. 40.

¹⁵ Ann L. Coker et al., "Frequency and Correlates of Intimate Partner Violence by Type: Physical, Sexual, and Psychological Battering," *American Journal of Public Health* 90, no. 4 (April 2000): 553–59.

¹⁶ The Normative juridical study is where the law is conceptualized as what is written in statutory regulations (law in books) or law is conceptualized as a rule or norm which becomes a benchmark for human behavior that is considered appropriate. Contained in Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2012). Furthermore, this

ues, norms, and regulations contained in Islamic Law, Criminal Law, and the Law on the Elimination of Domestic Violence (PKDRT Law) in Indonesia into account. Data sources are primary and secondary legal materials. The analysis of legal material that has been collected was then selected, described, interpreted using normative juridical methods, namely grammatical interpretation and systematic interpretation.¹⁷ They were then linked to relevant references and formulated systematically with each subject, namely the perspective of Islamic Law, Criminal Law, and the PKDRT Law.

Protection for Wives from Husband's Sexual Violence

1. Protection in The Perspective of Islamic Law

Islam respects the position of women in life. There is no single believes that allows a husband to hurt his wife, even a husband himself who sexually abuses his wife.¹⁸ A husband is a protector and a leader for his family. Women in Islam are very honored not because they are mothers as stated in the *hadith*, but because they have the same dignity and status as men.¹⁹ The relationship between man and

normative legal study is based on primary and secondary legal materials, namely studies that refer to the norms contained in statutory regulations. See Soeryono Soekarto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1984), p.4.

¹⁷ Grammatical an interpretation is interpretation based on grammar and words that become a tool for legislators to state their intentions and wishes. Systematic interpretation is an interpretation that connects one article with another in the relevant legislation or other legal legislation, or reading the explanation of statutory law so that the meaning can be drawn and understood. Contained in Soeroso, *Pengantar Ilmu Hukum*, (Jakarta: Sinar Grafika, 2008), p. 100.

¹⁸ Musdah Mulia, *Kemuliaan Perempuan Dalam Islam* (Jakarta: Aleks Media Komputindo, 2014).

¹⁹ Zain-ul-Abdin Sodhar, Abdul Ghani Shaikh, and Khair-un-Nisa Sodha, "Woman's Social Rights In Islam: An Evaluation of Equality of Rights Between

woman (husband and wife) in the *Al-Qur'an* is beautifully described as one body that supports and influences each other.²⁰ According to the *Al-Qur'an*, the ideal husband and wife relationship pattern is based on *Mu'āsharah bil-Ma'rūf*²¹ in QS. *An-Nisa*: 19, *sakīnah, mawaddah wa rahmah* (peace, love, and affection)/QS. *Al-Rum*: 21, as well as a balance in rights and obligations/ QS. *Al-Baqarah*: 228.²² These verses give the understanding that God wants a husband and a wife in a marriage life run in a harmonious interaction, a peaceful ambience, and a balance of rights and obligations. In other words, *Mu'āsharah bil-Ma'rūf, sakīnah, mawaddah wa rahmah*, and the balance of rights and obligations are moral foundations that must be used as a reference in all matters related to husband-and-wife relationships. Since the main purpose of running a household is to get peace and tranquility, Islam prohibits domestic violence.²³

Men and Women," *Grassroots* 49, no. 1 (2015): 171-78; Azizah Yahia Al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities," *Journal of Law and Religion* 15, no. 1 (2000): 37-66.

²⁰ Kusmana Kusmana, "MODERN DISCOURSE OF WOMAN'S IDEAL ROLE IN INDONESIA: Tafsir *Al-Qur'an* of Ibu and Female Agency," *Journal Of Indonesian Islam* 9, no. 1 (June 1, 2015): 25-58.

²¹ There are several opinions in understanding *Mu'āsharah bil-Ma'rūf*. One of them means ``fixing / correcting speech, deeds, appearance''. Some interpret it as an order to the husband (only) to treat the wife well, not to hurt her either with words or deeds. Umi Sumbulah, "Ketentuan Perkawinan Dalam *Khi Dan Implikasinya Bagi Fiqh Mta'syarah: Sebuah Analisis Gender*," *Egalitata: Jurnal Kesetaraan Dan Keadilan Gender* 2, no. 1 (2007): 83-113; Anis Hidayatul Imtihanah, "Hukum Keluarga Islam Ramah Gender: Elaborasi Hukum Keluarga Islam Dengan Konsep *Mubadalah*," *Kodifikasi: Jurnal Penelitian Islam* 14, no. 2 (2020): 263-82.

²² Badriyah Fayumi. (2002), *Islam dan Masalah Kekerasan Terhadap Perempuan*, dalam Amiruddin Arani ("et al"), *Tubuh, Seksualitas, dan Kedaulatan Perempuan: Bunga Rampai Pemikiran Ullama Muda*. Copy I. Jakarta: Rahima ("et al"): 106.

²³ Rafia M. Hamid, "Domestic Violence in Muslim Communities," in *Religion and Men's Violence Against Women* (New York, NY: Springer New York, 2015),

Rape in the view of Islamic law is an act of forcing sexual intercourse, either utilizing persuasive or repressive ways. In short, rape is intercourse between men and women, between men and men (homosexual), women and women (lesbian), which is not carried out based on voluntary and full of coercion.²⁴ To make it easier to understand rape, there are at least four types that can be identified, they are:²⁵ First, rape is committed by people known to the victim, including friends, boyfriends, coworkers, family members, or neighbors. However, it does not mean that rape is not committed by strangers who were unknown to the victim. Second, date rape is rape committed by a boyfriend or close friend on a date. Third, rape with subtle threats, is rape committed by a person who has a higher position than the victim. Such as masters (bosses) to servants (workers), bosses to their workers, teachers to students, police to prisoners, and so on. It is usually done utilizing seduction, making promises, and trickery. Fourth, marital rape. This term is meant to express a rape committed by a husband against his wife or vice versa, by forcing him to ask for sexual intercourse, without considering the willingness and readiness of the partner.

Rape in marriage, also known as sexual violence in marriage, is relatively unpopular in the customs and culture of sexual relations in Indonesia. Rape is assumed to be the obscene act of a man against a woman by forcing her to

give off her sexual desire.²⁶ The act was done neither in the context of willingness nor of the household. It can be seen that the definition of rape has been reduced. Domestic rape is not included in this category of offense.²⁷ Therefore, domestic rape is still controversial. Even so, there are some, among Indonesian, women who are persistent enough to fight for the discourse that if a husband forces his wife to serve his lust when the wife is not willing to do it voluntarily, then that includes domestic rape. The expansion of this definition was initiated from the statement that all sexual relations characterized by coercion are included into rape action.²⁸

Review of Islamic law teaches the principle of *Mu'āsharah bil-Ma'rūf* (good and voluntary relationship) in sexual intercourse/relationship. Both husband and wife must give and receive, love and care for each other, do not hurt each other, do not show mutual hatred, and do not neglect each other's rights and obligations.²⁹ *Mu'āsharah bil-Ma'rūf* is one of the bases for the development of women's *fiqh* which tries to humanize humans and treat humans well, especially in husband-and-wife relationships.

Therefore, the husband does not have sexual monopoly rights, or a husband should not only think about his enjoyment as he wishes. Since sexual relations must be based on gender equality, which means no one is superior or inferior. Both husband and wife are equally obliged to serve and provide the best service. They are servants of their respective partners.

319–42; Hayatullah Laluddin et al., "The Contract of Marriage and Its Purposes from Islamic Perspective," *Asian Social Science* 10, no. 2 (December 29, 2013): 139–44.

²⁴ Dede Falahudin, "Sanksi Pidana Pemerkosaan Terhadap Anak Yang Dilakukan Oleh Ayah Kandung Menurut Perspektif Hukum Positif Dan Hukum Pidana Islam (Analisis Penerapan Hukum Dan Pertimbangan Hakim Dalam Putusan Pengadilan Negeri Tangerang Nomor: 2663/Pid. B/2009/PN. Tng)" (UIN Syarif Hidayatullah, 2018), p. 124

²⁵ Intan Retnowulan, "Analisis Hukum Pidana Islam Terhadap Uqubah Pemerkosaan Dalam Qanun Aceh No. 6 Year 2014 About Islamic Criminal Law" (UIN Walisongo, 2017).

²⁶ Michelle J. Anderson, "From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law," *Geo. Wash. L. Rev* 70 (2002): 51–130.

²⁷ Resti Arini, "Kekerasan Psikis Dalam Rumah Tangga Sebagai Suatu Tindak Pidana," *Lex Crimen* 2, no. 5 (2013): 22–42.

²⁸ Abdushomad Muhyiddin, "Perkosaan Dalam Rumah Tangga," 2021, accessed January 16, 2021, <http://www.rahima.or.id>.

²⁹ Muhammad Anhar, "Tindakan Marital Rape Dalam Keluarga Menurut Hukum Islam Dan Hukum Nasional" (Universitas Islam Negeri Alauddin Makassar, 2017).

Husbands and wives should have sexual relations following these principles. Husbands are required to treat their wives well. Wives are also required to treat their husbands well. Intention and effort to provide the best for each partner are not just recommended but required. From the description, it is clear that domestic rape is prohibited. This is because it will contradict the Word of Allah *subhānahu wa ta 'ālā*:³⁰

"They (your wives) are clothes for you and you are clothes for them. " (QS. *Al-Baqarah* /2:187).

"And treat them kindly (QS. *An-Nisa*/4:19)
"And the best of you (men) are those who are best to your women".

Thus, husbands and wives should not force sexual intercourse. This is because forcing sexual intercourse is the same as treating one's partner inhumanely, considering his partner as an object of lust, and like a colonized person. Husband and wife are equal and have the same position and must be treated properly. Regarding the principle of *Mu'āsharah bil-Ma'rūf* and the recommendation to do good to the wife, such as not to hurt her physically or psychologically, as exemplified by Prophet Muhammad, also to understand the content of the word *libās* in QS. *Al baqarah* Verse 187, which means protecting each other in all matters/situations³¹. Hence, there must be ad-

justment and equalize attitudes, including the issue of sexual intercourse between husband and wife. It must be done voluntarily, and there is no compulsion between the husband and wife. Whereas, forcing sexual intercourse with the wife or vice versa tends to *idzā* (hurt) one of the parties. This is certainly an illegal act (*haram*).³²

In *hadīth*, the لعنة for wives who do not serve their husbands, must be interpreted as motivations to always try making adjustments to their husbands; and vice versa. The term لعنة itself does not mean haram. The proof is that the *fiqh* ulama still impose limits whether there is no *udzur syar'i*, such as extreme pain or fatigue. This discourse is certainly open to being interpreted more deeply so that the basic norms of Islamic law can provide legal protection following the mission of justice and the equality, through *ijtihad* carried out by ulama (scholars) and making *ijma*.

The classification of sexual violence in Islamic Criminal Law does not strongly state the punishment.³³ Punishment for sexual violence puts more emphasis on the form of sexual violence behavior. For example, the sexual activity with an inappropriate way, such as anal intercourse. In this case, the legal experts had different opinions in imposing criminal sanctions. According to Imam Abu Hanifah, the

³⁰ Ardiansyah, "Larangan Dan Sanksi Tindak Pidana Kekerasan Seksual Dalam Rumah Tangga (A Comparative Study on Islamic Law and the Law Number 23 of 2004 Concerning Law on the Elimination of Domestic Violence)," *Qiyas: Jurnal Hukum Islam Dan Peradilan* 1, no. 1 (2016): 3-16.

³¹ *al-libās* (clothes/garment). The textual meaning is a literal meaning (*lafdziyah*), that is, clothes / garments are defined as clothes to cover one's genitals, or clothes to protect the body from heat and cold. Specifically, what will be discussed here is clothing / garment in a contextual or spiritual meaning, namely the broad meaning of clothing. Therefore *al-libās* has 4 (four) meanings, among others: Clothing which means سكنا (peace of mind), clothes which mean to mix up (بخلطون), clothes that mean ب يا (clothes), clothes that mean الصالح العمل (good deeds)

or also known as devotion. Out of the four meanings, the most important one is *al-libās* which means *al-amal ash-sholih* or devotion. Nihayah, R. (2019). Term Al-libās in Al-Quran: Textual-contextual Interpretation Studies. *Syariati: Jurnal Studi Al-Qur'an dan Hukum*, 5(02), 217-226.

³² Ardiansyah, *Larangan Dan Sanksi Tindak Pidana Kekerasan Seksual Dalam Rumah Tangga (A Comparative Study on Islamic Law and the Law Number 23 of 2004 Concerning Law on the Elimination of Domestic Violence)*.

³³ Jumadin Brutu, "Formulasi Pelecehan Seksual Dalam Perspektif Hukum Pidana Positif Dan Hukum Pidana Islam" (Universitas Muhammadiyah Magelang, 2018); Topo Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat Dalam Wacana Dan Agenda* (Jakarta: Gema Insani Press, 2003).

perpetrator was sentenced to *ta'zīr*.³⁴ It was not considered adultery, because interfering with women through faraj was called adultery, while passing through the rectum was called *liwāth*.

Meanwhile, according to Imam Malik and Imam Syafi'i, the perpetrator is still subject to punishment based on *qiyyas*, equivalent to adultery. Other forms of sexual violence, for example, sexual violence, which results in injury in body, or the ability to have violence, in this case, Islam stipulates the diat law with one hundred camels. Furthermore, a form of sexual violence in the household is that the husband forces his wife to prostitute themselves for commercial purposes. While, the case of husbands coercing their wives to prostitute themselves for commercial gain is a category of selling women.³⁵ In this context, according to the opinion of the Zahiri school, cases of rape can be classified under the concept of *hirabah* because rape is a violation of human rights.

Therefore, the division or classification of the most important and most widely discussed by Islamic jurists are *hudūd*, *qīṣāṣ*, and *ta'zīr*. *Hudūd* crime is the most serious crime in Islamic Criminal Law. It is a crime against the public interest.³⁶ However, this does not mean that the *hudūd* crime does not affect personal interests at all. It is especially related to what is called the Rights of Allah subhānahu wa ta'ālā.³⁷ Consequently, this crime is punishable

by the hadd, that is, punishments determined as the Right of Allah subhānahu wa ta'ālā. In this definition, predetermined punishment means that both the quality and the quantity have been determined and it does not have a degree. There are seven crimes classified as *hudūd*, are *riddah* (apostate), *al-baghyu* (rebellion), *adultery*, *qadzaf* (false accusation of adultery), *sarīqah* (theft), *hirābah* (robbery), and *shurb al-khamr* (drinking khamar / alcohol).

The next category is *qīṣāṣ*. It falls into the middle position between *hudūd* and *ta'zīr* crimes in terms of severity. The crimes in the *qīṣāṣ* category are less serious than the previous (*hudūd*) but are more serious than the latter (*ta'zīr*). The target of this crime is the intentional or unintentional integrity of the human body. It comprises what is known in modern criminal law as crimes against persons. Therefore, intentional killing, killing resembling intentionality, killing due to negligence, persecution, inflicting pain, and due to negligence, fall into the category of *qīṣāṣ*.

The last category is the crime of *ta'zīr*, the basis and determination of the punishment are based on *ijma'* (consensus) regarding the right of the Muslim state to commit crimes with the penalty for all inappropriate acts, which cause physical, social, political, financial or moral harm/damage to individuals or society as a whole.³⁸ Classifying *ta'zīr* into certain categories is very difficult, it is because the violations are very diverse. Besides, if the reality of life develops, it will also have an impact on the emergence of increasingly complex crimes, such as the emergence of crimes that have never appeared before. As a result, it becomes difficult to classify the types of violations. Of course, *ta'zīr* is different from *hudūd*. This means, in general, *ta'zīr* occurs in cases for which the punishment has not yet been determined by the *syara'*. Hence, the determination of *ta'zīr* punishments is better based on similar

³⁴ Abdel Wadoud Moustafa Moursi El- Seoudi, "Punitive Punishment (Ta'zir) in Islamic Law," *Advances in Natural and Applied Sciences* 8, no. 2 (2021): 90-96.

³⁵ Ko-Lin Chin and James O Finckenauer, *Selling Sex Overseas: Chinese Women and the Realities of Prostitution and Global Sex Trafficking* (New York: NYU Press, 2012).

³⁶ Muhammad Luthfi Abdullatif, "Tinjauan Hukum Pidana Islam Terhadap Tindak Pidana Penganiayaan Pasal 351 Kitab Undang-Undang Hukum Pidana" (UIN Sunan Gunung Djati, 2018).

³⁷ Syarifah Gustiawati, "Elastisitas Hukum Pidana Islam," *Mizan: Journal of Islamic Law* 1, no. 2 (2018): 251-64.

³⁸ Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat dalam Wacana dan Agenda*, p. 22.

cases which have been classified. Afterward, the cases that may be included in it, if not possible, it is better left to the policy of *qadī*. For that reason, cases of *ta'zīr* for certain determined punishments are generally divided into the following 7 types:³⁹ a). Violation of honor (self-respect); b) Violation of glory; c) Actions which destroy sense; d) Violation of property; e) Security disturbances; f) Subversion; and g) Acts related to religion.

Husband's sexual violence against wife in marriage which has been regulated in the PKDRT Law, is relevant to Islamic Criminal Law, specifically a violation of honor or measurement which could confirm with *ta'zīr* punishment, which means giving lessons. According to the term *ta'zīr*, however, it means giving lessons due to immoral acts or crimes committed for which the penalties have not been predetermined by religion, instead of by the imam (highest ruler) or the one who represents him (judge) based on *syara'*. The Islamic Criminal Law also regulates punishments for those who commit crimes related to violations of a person's independence, which is punishable by imprisonment and banishment.⁴⁰

2. Protection in The Perspective of Indonesian Penal Law

In fact, assuring legal protection for victims of sexual violence (Marital Rape), is very difficult. It is hard to find a clear foothold in the Penal Code (W.v.S) because what is regulated on offenses of decency and offenses of abuse do not cover the area of domestic sexual vi-

olence. Article 356 of the Penal Code stated that: "The punishments specified in Article 351⁴¹, 353⁴², 354⁴³ and 355⁴⁴ can be added to the penalty by one third". Paragraph (1e) stated: "in respect of the offender who commits the crime against his mother, his lawful father, his spouse or his child".

Mulida in her book entitled 'Sexual violence and divorce' explains⁴⁵ that juridically, marital rape (rape within the bond of marriage) is not regulated in the Indonesian Penal Code (KUHP) and the newest RUU KUHP. This means that the Penal Code (KUHP) or RUU only accommodates rape (rape that occurs outside of marriage, although in the reality of society it often occurs. Therefore, marital rape is not included as an act of rape, but an act of abuse that can only be accommodated by articles 351, 353, and 356 in the Penal Code (KUHP). Based on these provisions, it can be limited to persecution, however, legal protection can be obtained if the husband's sexual violence against his wife or vice versa is carried out by combining elements of violence or violence that do not stand alone. It means that sexual violence is performed with physical violence from husband to wife or vice versa, as a medium for obtaining satisfaction in commit-

⁴¹ Article 351: (1) Maltreatment is punishable by a maximum imprisonment of two years and eight months or a maximum fine of four thousand three hundred rupiah. (2) If the act results in serious injuries, the guilty one shall be subject to a maximum imprisonment of five years.

⁴² Article 353: (1) Maltreatment with prior plan is punishable by a maximum imprisonment of four years. (2) If the act results in serious injury, the guilty is subject to a maximum imprisonment of seven years.

⁴³ Article 354: Anyone who deliberately seriously injures another person, will be subject to serious maltreatment with a maximum imprisonment of eight years.

⁴⁴ Article 355: (1) Serious maltreatment committed by prior plan, is punishable by a maximum imprisonment of twelve years. (2) If the act results in serious injuries, the guilty person is subject to a maximum imprisonment of seven years.

⁴⁵ Mulida Hayati and Ibnu Elmi, *Kekerasan Seksual dan Perceraian* (Malang: Intimdia, 2009).

³⁹ Rini Apriyani, "Sistem Sanksi Dalam Hukum Islam," *JILS: Shariah Journal* 2, no. 2 (2017): 17–40.

⁴⁰ Umar Faruq Thohir and Anis Hidayatul Imtihanah, "The Domestic Violence; The Nushuz Concept In Comparison Of Indonesian Positive Law And Islamic Law," *International Journal for Studies on Children, Women, Elderly And Disabled* 6, no. 1 (2019): 19–24; Alfitri Alfitri, "Protecting Women from Domestic Violence: Socio-Legal Approach to CEDAW Bill in Indonesia," *Studia Islamika* 27, no. 2 (August 3, 2020): 273–304.

ting sexual violence. It is further explained that after the issuance of Law No. 23/2004 on the elimination of domestic violence (PKDRT Law), marital rape can be used as a juridical basis in solving cases of domestic violence. However, a juridical settlement related to sexual violence experienced by a wife is not easy because cultural constraints that place "a husband having more rights to his wife" are more closely related to marital rape.

In terms of penal/criminal law, the form of protection for victims of domestic sexual violence committed by a husband to his wife is classified as protection of the judicial process and protection outside the court. The form of legal protection for victims of domestic sexual violence committed against their wives, the handling of cases, among others, is by reporting to the authorities; investigation; arrest; detention; and court proceedings. Meanwhile, the form of protection outside the judiciary includes negotiation; mediation; facilitation; and arbitration. Also, the protection in the judiciary is carried out through judicial processes.

3. Protection in The Perspective of Islamic Law

Domestic violence is a violation of human rights (HAM) and a crime against human dignity and a form of discrimination that must be eliminated.⁴⁶ Many of the victims of domestic violence are women who must get protection to avoid the threat of humanist violence. There is much domestic violence that has not been covered by the perspective of the legal system (including legal substance, legal structure, and

legal culture) that had not guaranteed a legal protection for victims of domestic violence.

Following current updates, the categorization of domestic violence is not only physical, but psychological, sexual, and neglect of the household,⁴⁷ so an adequate legal system is needed to prevent and overcome these forms of domestic violence. The presence of Law Number 7 of 1984 concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, has not shown its real benefits, especially for women and all forms of violence that occur them. As a concern for this problem, the performance of the legislative was marked by the promulgation of Law Number 23 of 2004 concerning the Elimination of Domestic Violence on September 22, 2004, which is commonly referred as the PKDRT Law.

As a philosophical basis, it describes the hope about the emergence of the PKDRT Law as everyone's dream, where a harmonious household life without violence in it could be establish. The question that has occurred in various discussion forums is whether the PKDRT Law can protect victims, most of whom are women, by imposing proper punishments.⁴⁸ Taking into account the existence of the PKDRT Law has brought a lot of dreams or hopes for women to fight for their rights when they get adverse treatment within their household, such as suing the perpetrator who has made her as a victim of domestic violence. A rational reason for the emergence of the

⁴⁶ Habib Shulton Asnawi, "HAM Dalam Ruang Domestik: Studi Terhadap UU. No. 23 Tahun 2004 Tentang PKDRTHAM Dalam Ruang Domestik: Studi Terhadap UU. No. 23 Tahun 2004 Tentang PKDRT," *Al-Mawarid Journal of Islamic Law* 11, no. 2 (2011); Atikah Rahmi, "Pemenuhan Restitusi Dan Kompensasi Sebagai Bentuk Perlindungan Bagi Korban Kejahatan Seksual Dalam Sistem Hukum Di Indonesia," *DE LEGA LATA: Jurnal Ilmu Hukum* 4, no. 1 (July 30, 2019): 140-59.

⁴⁷ Ron Acierno et al., "Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study," *American Journal of Public Health* 100, no. 2 (February 2010): 292-97.

⁴⁸ Toetik Rahayuningsih, "Undang-Undang Nomor 23 Tahun 2004 Tentang Penghapusan Kekerasan Dalam Rumah Tangga Sebagai Sarana Perlindungan Hukum Bagi Perempuan," in *Second Scientific Meeting of the Association of Teachers and Law Enthusiasts with a Gender Perspective in Indonesia (AAPHGI)* in Theme "Gender Perspective Legal Development (Surabaya: AAPHGI, 2006).

PKDRT Law is because the existing KUHP had not provided sufficient legal protection to women who become victims of domestic violence.⁴⁹

The specific regulations in the PKDRT Law are different from those in the Penal Code (KUHP) related to persecution. Besides, the progress shown in the PKDRT Law is the provision of obligations for law enforcement officers, health workers, social workers, volunteer companions, or spiritual mentors to protect victims so that they are more sensitive and responsive to household interests, which is initially directed at household's integrity and harmony.

To make it easier to examine the substantial meaning of the PKDRT Law, some highlights on the Article 1, and Article 5 letter c jo with Article 8 of the PKDRT Law. It is described as follow:

Article 1

1. Domestic violence is each act against someone, especially women, which results in suffering physically, sexually, psychologically, and/or neglect of the household, including threats to commit acts, coercion, or illegal deprivation of freedom within the household scope.
2. The Elimination of Domestic Violence is a guarantee provided by the state to prevent domestic violence, take action against perpetrators of domestic violence, and protect victims of domestic violence.
3. Victims are people who experience violence and/or threats of violence in the household scope.
4. Protection is all efforts aimed at providing a sense of security to the victim car-

ried out by the family, advocates, social institutions, police, prosecutors, courts, or other parties either temporarily or based on court decisions.

5. Temporary Protection is the protection provided directly by the police and/or social institutions or other parties, before the issuance of a protection order from the court.
6. Protection Orders are decrees issued by the Court to protect victims.
7. Minister is the person whose scope of duties and responsibilities is in the field of women's empowerment.

Article 5

Everyone is prohibited from committing domestic violence against people within the household scope, utilizing physical violence; psychological violence; Sexual Violence, or; Domestic Abandonment.

Article 8

Sexual violence as referred to Article 5 letter c including:

Forcing sexual intercourse to people who live within the household scope;

Forcing sexual relations to one person in the household scope with another for commercial and/or specific purposes.

A civilizing understanding toward aspects of legal protection for victims of domestic violence, both in the form of physical, psychological, sexual violence committed by husbands against wives or vice versa (Article 51, 52, and 53 of PKDRT law) is petitioned offense. This means that to be able to prosecute, it requires a complaint from the aggrieved participant, and before being tried, the case can be withdrawn by the petitioner.

Regarding investigations, prosecution and examination in court proceedings are accomplished according to the provisions of the applicable criminal procedure law unless it is considered as another condition by this

⁴⁹ Nurjannah Nasution, "Juridical Review of the Role of the Witness and Victim Protection Agency (LPSK) in Protecting Child Victims of Sexual Violence in the Family Environment," Legal Brief 8, no. 1 (2018): 16-29.

PKDRT Law (vide Article 54). Based on Article 55 as the valid evidence, the statement of a victim-witness alone is sufficient to prove the defendant is guilty if it is accompanied by another/ other valid evidence(s). In the elucidation of Article 55, another valid evidence in sexual violence committed to the husband and wife is confession. The rights of domestic violence victims as the implicit guarantees in the Law on the Elimination of Domestic Violence include:⁵⁰

1. The victims are entitled to:
 - a. The right to get protection from the Police, Attorney General's Office, Courts, lawyers, Social Institutions, or other parties either temporarily or based on the stipulation of a protection order from the court.
 - b. Get health services according to medical needs.
 - c. Get special treatment relating to the confidentiality of the victim. The term special handling deserves to be affirmed to facilitate its application in the field, for example, victims have the right to keep their identity and/or existence confidential before, during, or after the trial process takes place.
 - d. Get assistance from social workers and legal help at every level of the investigation process following the provisions of the current laws (perundang-undangan) based on Undang-Undang.
 - e. Legal support for victim assistance has not been specifically regulated in legislation.

2. For the sake of recovery, victims can receive services from health workers, social workers, volunteer assistance, and/or spiritual mentors.

Husband's Sexual Violence against Wives: A Legal Dialectics

In the Indonesian context, Islamic law has its roots in people's legal awareness and has a normative influence on Indonesian culture. The acceptance of Islamic law has become an authoritative source in Indonesian constitutional law and is no longer just a persuasive source. As the largest religious community within the territorial boundaries of the state, Islamic law has both a legitimate and constitutional basis to be enforced in the Indonesian legal system on the conceptual level, philosophical basis, and constitutional basis.⁵¹ In the context of Islam as a religion that is embraced by the majority of the nation, following the public interest theory in constitutional law, one of the duties and obligations of the state is to accommodate and focus on the wishes and interests of citizens. In this case, it includes the desires and interests of Muslims in Indonesia, there is no exception to the protection of wives from husband's sexual violence which is still considered as a private domain.

Culture, interpretation of religious belief, and politics of impartiality for the women condition are closely related to violence actions against women in Indonesia. Ensuring the protection of wives from husband's sexual violence requires a mental revolution, a change in mindset, a change in culture, and the political culture amendment from the culture of women oppression to be a culture of women protection.⁵² Shifts and changes in

⁵⁰ Aartje Tehupelory, "Penghapusan Kekerasan Dalam Rumah Tangga Dan Perlindungan Anak, Ditinjau Dari Perspektif Hukum, Budaya," in Second Scientific Meeting of the Association of Teachers and Law Enthusiasts with a Gender Perspective in Indonesia (AAPHGI) in Theme "Gender Perspective Legal Development (Surabaya: AAPHGI, 2006), 18-20.

⁵¹ Melissa A. Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law* 7 (2011): 1-46.

⁵² Taslima Khatun and Khandaker Farzana Rahman, "Domestic Violence against Women in Bangladesh:

paradigms and mindsets are needed to prevent violence against women and protect the dignity of women.⁵³ Therefore, the handling cases of violence against wives and providing guarantees of the protection need to be adjusted to the culture and religion itself as well as the prevailing laws and regulations in Indonesia.

Efforts to dialogue and synergize between Islamic law as a rule that has been entrenched in Indonesian society, criminal law, and UUPKDRT to protect violence against wives can be done by seeking a correlation. Based on the description of legal comparisons previously described, the correlations could be understood as follow:

First, related to domestic violence behavior in the view of Islamic and positive law is despicable and forbidden behavior. These laws view that husband and wife have the same position in the family so that the husband should not act arbitrarily against his wife, including committing sexual violence.

Second, related to the substance of the criminal act of sexual violence by husbands against wives, the UUPKDRT emphasizes that the formulation of criminal acts in sexual violence is in line with criminal acts against the soul in the concept of *Jarimah*, namely crimes against the human body, and those are not allowed to be committed. For perpetrators of violence, they will get the threat of criminal punishment.

Third, related to punishment for perpetrators of violence, in the UUPKDRT, perpetrators of violence will receive criminal penalties in the form of imprisonment and fines. In Islamic law, the perpetrator of a

criminal offense other than the soul is *qisash*. Besides, the perpetrator also received a sentence of *ta'zir* or imprisonment. Therefore, it could be concluded that prison punishment in the UUPKDRT is also a form of *ta'zir* punishment in Islamic criminal law.

Fourth, related to the regulation of violent crime in the UUPKDRT and Islamic Law, are aimed to protect humans, the interests and benefits of the community, maintain the community system, maintain a sense of security, avoid immorality prevent damage and ensure people survival.

As a country built with lofty ideals, Indonesia places religion in an important position. Indonesia must pay attention to the elements of religious law in the development of national law in a country, because Indonesia is the country with a Muslim majority population. Islam comes with a fundamental message to spread peace. Islam fully protects women and firmly rejects the practice of violence. Hence, the formulation of policies and laws in Indonesia needs to be able to accommodate this peace message to prevent domestic violence, protect victims of domestic violence, take action against perpetrators of domestic violence, and maintain harmonious and prosperous household based on Islamic principles peace.

Conclusion

Protection in the Islamic Law related to Husband's sexual violence against his wife in married life is categorized as a violation of honor or value which is punished by *ta'zir* (giving punishments). The punishments regarding violations of a person's liberty are punishable with imprisonment and banishment. Protection in the Penal Code (Undang-Undang Hukum Pidana): Offense against decency (Delik Kesiusilaan) and offense against persecution (Delik Penganiayaan). Article 356 of the Penal Code (KUHP) stated that: "The punishments laid down in Articles 351, 353, 354 and 355

Analysis from a Socio-Legal Perspective," Bangladesh E-Journal of Sociology 9, no. 2 (2012): 19-29.

⁵³ Tamara F. Lawson, "A Shift towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed against Women in Municipal and International Criminal Law," Southern Illinois University Law Journal 33 (2009): 181-215.

may be enhanced with one third:". Paragraph (1e) stated: "in respect of the offender who commits the crime against his mother, his lawful father, his spouse or his child". Protection in the *PKDRT* Law: legal protection for victims of domestic violence, in the form of physical, psychological or sexual violence committed by husbands against wives or vice versa, namely: Articles 51, 52, and Article 53 of *PKDRT* law. As a country with a Muslim majority, Indonesia must focus on the elements of Islamic religious law in the development of national law, especially those regulating sexual violence against wives in legal marriage institutions. The formulation of policies and legislation (perundang -undangan) is in line with Islamic principles that spread peace and reject violence. The efforts to conduct dialogue and synergy between Islamic law as a rule that has been entrenched in Indonesian society, criminal law, and UUPKDRT to protect violence against wives can be achieved by seeking a correlation within these laws. It is because these three laws are in line with the view that domestic violence behavior is despicable behavior, prohibited, and threatens the perpetrator with imprisonment or *ta'zir* punishment, which aims to protect humans from violence, especially women with the wife's status.

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