The Marital Rape Based on Contemporary Islamic Criminal Law

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Abstract

This research focuses on the relevance of the marital rape criminal sanction contained in Regulation Number 23 of 2004 concerning the Elimination of Domestic Violence with Criminal Sanctions in Fiqh Jinayah. This research is library research using the method of comparative legal interpretation (comparative). The type of research used is qualitative research. The legal materials used are primary legal materials in the form of classic and contemporary books as well as secondary legal materials in the form of books related to marital rape, as well as legal science journals. The data collection technique in this study is documentation. The data analysis used in this study uses Abdul Qadir 'Audah's analysis of thought. In this study, two conclusions were obtained, namely, that, according to Islamic law, marital rape is not in accordance with the teachings of Islamic law because Islam has taught procedures and behaviors in husband-wife relations that must be muasyarah bil ma'ruf by not hurting each other. Second, when viewed from the perspective of Abdul Qadir Audah's fiqh jinayah, the sanctions contained in the PKDRT Law have relevance to criminal sanctions in Islamic law.

Abstrak

A. PENDAHULUAN
1. Introduction

Along with the development of the era of domestic violence, such as physical, psychological, sexual violence to neglect of family members, it is something that really deserves to be discussed and analyzed up to the law and what sanctions must be imposed. Sexual violence in the household is often taken for granted because victims or perpetrators always think that this is normal, especially women who do not understand the law and their rights or obligations as a wife. Domestic violence is considered a domestic (private) matter which is closed and kept secret from public view. Wives prefer to remain silent about acts of domestic violence, so cases of this violence are rarely revealed. One form of domestic violence is marital rape, a form of forced marital relations which can hurt one of the parties both psychologically and physically. These actions can be prosecuted by law, in accordance with Law no. 23 of 2004 namely regarding the Elimination of Domestic Violence. With the Law no. 23 of 2004 concerning the Elimination of Domestic Violence is one of the legal reforms to follow up on perpetrators and protect victims from criminal acts of domestic violence.

The law mentions the provisions for sanctions for perpetrators of violence, Article 46 of Law No. 23 of 2004 concerning the Elimination of Domestic Violence states: "Anyone who commits acts of sexual violence as referred to in Article 8 letter a shall be subject to imprisonment for a maximum of 12 (twelve) years or a fine of up to Rp. 36,000,000.00 (thirty-six million rupiah)". The criminal sanctions given to perpetrators of domestic violence above must be viewed from the perspective of Islamic law. In order to gain a comprehensive understanding apart from understanding positive Indonesian laws. Where Islamic law besides regulating the relationship with the creator also regulates household life. In Islam, the material aspect of criminal law certainly relates to acts based on Shari'ah that have been determined (outlined) as a crime. Inequality in the relationship between husband and wife has the potential to cause violence against the wife. In fact, it is difficult to deny, if there is a dispute between husband and wife whose origins are due to physical or psychological violence. Therefore the author is interested in examining the relevance of sanctions against marital rape crimes in Islamic law.

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1 Rika Saraswati, Perempuan Dan Penyelesaian Kekerasan Dalam Rumah Tangga (Bandung: PT. Citra Aditya Bakti, 2006), 3.
As for avoiding repetition of research that has been done before, the authors conducted a search of several previous studies, namely first, research entitled The Act of Rape of a Husband Against Wife (Marital Rape) in a Review of Islamic Law and Law No. 23 of 2004 (Study of Annual Records of Komnas Perempuan 2016-2018). This research only focuses on Komnas Perempuan’s CATAHU and forms of marital rape, and only explains the overview of marital rape in Islamic law in general. Second, the research entitled Protection of Women Victims of Domestic Violence in the Perspective of Islamic Law, this research only focuses on the concept of protecting women victims of domestic violence in Islamic law. Third, the research entitled "Marital Rape in a Review of Islamic Law and Law no. 23 of 2004 concerning the Elimination of Domestic Violence". In this study only discusses in general the Islamic view of Marital Rape. The difference between the three previous studies and the author’s research is that they focus on the relevance of the punishment of marital rape in Islamic law and the Law on the Elimination of Domestic Violence.

This research is a response to the lack of existing studies on the relevance of positive legal criminal sanctions to Islamic criminal law in cases of domestic violence. Domestic violence in Indonesia has been regulated by the Law on the Elimination of Domestic Violence (PKDRT), which clearly states sanctions for perpetrators of domestic violence. This needs to be examined for its relevance to Islamic law and viewed from Fiqh Jinayah. The purpose of this research is to find out the views of Islamic law on Marital Rape and the relevance of the sanctions contained in the Law on the Elimination of Domestic Violence with Fiqh Jinayah.

2. Methods

This research includes library research (library research) using the comparative legal interpretation method (Compperative). The type of research used is qualitative research, namely research that refers to legal norms contained in laws and regulations

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The marital rape based on contemporary... and the concept of jurisprudence that does not require a sample and population\textsuperscript{6}. The legal materials used are First, primary legal materials in the form of classical and contemporary books that discuss criminal sanctions in Islamic law. Second, secondary legal materials in the form of books related to marital rape, as well as legal science journals. The data collection technique used is documentation, namely looking for materials that are related to the discussion of titles in the form of books, books or journals\textsuperscript{7}. The data analysis used in this study used the analysis of the Fiqh Jinayah Abdul Qadir 'Audah by reducing the data, presenting the data and then drawing a conclusion.

B. RESULTS AND DISCUSSION

1. Discourse on the Development of Marital Rape in Indonesia

Talking about marital rape in Indonesia means also talking about the laws that apply in Indonesia, the principles that must be included in a legal regulation that has a human rights perspective and justice and gender equality (Sari and Sularto, 2019). In order for violence against women to be reduced or prevented, the law must be properly enforced. In the following, the author describes the laws in force in Indonesia.

a. The Criminal Code, Articles 285 to 287 are arrangements for coerced intercourse outside of marriage and article 287 also discusses victims of underage sexual intercourse. In the Criminal Code there is no regulation regarding rape or forced intercourse in marriage in general, it is only discussed if the victim is underage and causes injuries. Because coercion of intercourse is only regulated outside of marriage, coercion of relations within marriage is not criminalized.

b. Law Number 23 of 2004 Concerning the Elimination of Domestic Violence (PKDRT)

The forms of domestic violence as mentioned above can be perpetrated by husbands against their family members in the form of: Physical violence, which results in pain, falling ill or serious injuries, Psychological violence which causes fear, loss of

\textsuperscript{6}Zainuddin Ali, \textit{Metode Penelitian Hukum} (Jakarta: Sinar Grafika, 2018), 105.

self-confidence, loss of ability to act, a feeling of helplessness, etc. Sexual violence, in the form of sexual coercion in an unnatural way, both for husbands and for other people for commercial purposes, or certain purposes; and household neglect that occurs within the scope of the household, which according to the law is obligatory. In addition, neglect also applies to everyone who causes economic dependence by limiting and/or prohibiting proper work inside or outside the home, so that the victim is under the control of that person (Bull District Court).

Violence against women, including domestic violence is an iceberg phenomenon, not all cases of domestic violence are reported. Based on CATAHU 2022, it shows that the highest number of violence in the realm of domestic violence/personal relations is the same as the previous year, namely KTI which reached 2633 cases (50.2%), an increase of 0.2% from the previous year, followed by KDP 1222 cases (23.3%), KTAP 910 cases (17.4%), KDRT – other RP 279 cases (5.3%), KMP 112 cases (17.4%), KMS 75 cases (2.1%) and domestic workers 12 cases (0.2%). This high KTI shows the highest consistency of reports compared to other types of domestic violence even though the pandemic is over. The following is data on complaints to Komnas Perempuan in the personal and age domains. The details are as follows (Catahu, 2022):

Table 1. Forms of Violence Based on Komnas Perempuan Data and 2021 Service Institution Data.

<table>
<thead>
<tr>
<th>Forms of domestic violence</th>
<th>Amount (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physical violence 4814 cases</td>
<td>(30%)</td>
</tr>
<tr>
<td>Sexual violence 4660 cases</td>
<td>(29%)</td>
</tr>
<tr>
<td>Psychological violence 4754 cases</td>
<td>(29%)</td>
</tr>
<tr>
<td>Economic violence 1887 cases</td>
<td>(112%)</td>
</tr>
</tbody>
</table>


In this case of marital rape, there should be weighted punishment because in Indonesian patriarchal culture, the husband is the head of the household who should protect, not hurt. The existence of a weighting sentence is intended so that the public knows that marital rape is a crime and wrongdoing.
2. Sexual Relation in Islam

Islam views sexual behavior as not a taboo subject. We can see this from the fiqh literature which talks about sexuality in a clear and detailed way, for example when fiqh explains how to prove extramarital sex, menstruation, even sexual activity (sexual acts) are discussed there. In the hadith there are so many chapters and books that talk about sexuality. Likewise in the Koran, there are so many verses that respond to this humanitarian problem, for example QS. al-Baqarah: 222 and 223 about menstruation and about husband and wife sexuality, QS. an-Nisa’ about the relationship between husband and wife, and many more. Thus, it turns out that sexuality (concept and social construction) on values, orientations, and behavior related to sex is not a taboo subject for discussion because it is always discussed both in the Koran, hadith, fiqh, and other literature. This fact dispels the impression that sexuality is a taboo subject to discuss. According to Yusuf Qardhawi, not a single scholar forbids discussing this as long as it is within the framework of knowledge and study. As there is a discussion contained in sura al-Baqarah: 223. The text and translation of Surah al-Baqarah verse 223 is as follows:

نساءكم حرث لكم فأتوا حرثكم أنى شئتم وقدموا ألنفسكم واتقو الله واعلموا أنكم ملقوه وبشر المؤمنين

Meaning: Your wives are (like) the land where you grow crops, so come to the land where you cultivate it however you want. And do good deeds for yourself and fear Allah that you will meet him one day. And give glad tidings to those who believe.

Based on the sexual textuality of husband and wife in QS. al-Baqarah: 223 above, there are at least two things that can be understood at a glance; first, the wife is like a garden; and secondly, orders to come to the wife however the husband wants. Based on research prior to knowing asbabun nuzulnya, some people understood this verse as a sexual intercourse technique, women are sex objects who must be willing to accept whatever sexual behavior their husband has towards him. The stigma attached to the wife makes the wife vulnerable to domestic violence, especially sexual violence. After putting forward the asbab an-nuzul, they found out that the verse above explains that sexual orientation is permissible, regarding the permissible place, namely the vagina, not the anus. The parable of the wife as a field shows that the Qur’an guarantees reproductive health for the wife in sexual matters because in order for the field to be

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fertile it must be fertilized and things that can damage or interfere with fertility must be avoided. This parable also dispels the notion that only a wife must be good at keeping her husband happy so that he does not turn away from his wife. This verse gives guidance on the right time to visit the wife as a farmer chooses the right season to plant crops. This means that the husband may not exploit his wife or force her will at will.

3. **Theory of Fiqh Jinayah 'Abd Qadir 'Audah**

In Islamic law a criminal act is called jinayah, but some jurists use Jarimah. According to 'Abd Qadir 'Audah, the notion of jinayah according to the term fiqh is an act that is prohibited by syara', whether the act involves life or property or anything else. But he said that most fiqh scholars use the word jinayah in a special meaning, namely for actions that affect a person’s soul or limbs, such as killing, injuring and beating.

As for the criteria for an act to be said to be a crime, 'Abd al-Qadir 'Audah formulated it into three forms of pillars (cases), as follows: 1) Pillars of syar'i (laws), namely the existence texts that prohibit an act by punishing it; 2). The pillars of maddi, namely the existence of actions that form a finger, whether in the form of real actions or not; 3). The pillars of adab, namely the existence of actions (mukallaf people), namely people who can be held accountable for the jarimah they have done.

The principles in Islamic criminal law can be classified into three types, namely: first; legality principle, second; material principle and third; the principle of morality. The principle of legality is a principle relating to the formal elements of Islamic criminal law. And what is meant by the principle of legality is the principle which states that there is no crime and no punishment before there is a regulation that regulates it, this is in accordance with the ka'idah which reads:

لا جريمة ولا عقوبة الا بالنص

Meaning: "There is no crime and no punishment without prior criminal law".

According to Abd al-Qadir Audah and Wahbah al-Zuhaili, the material principle of Islamic criminal law only covers actions that are forbidden by syara' to be carried out, be it acts concerning life, property and others. Based on this material principle, sanctions in Islamic criminal law are classified into three types, namely hudud, qisas and ta’zir. Hudud and qisas are legal sanctions whose levels have been clearly determined based

on texts (nass), both the Qur’an and al-Hadith. In the implementation of this material principle, the principle of legal certainty must be upheld, that is, for a crime where there is still suspicion of doubt (doubt or ambiguity), it may not be subject to punishment. This is in accordance with the principles of Islamic criminal law:

الحدود تسقط بالشبهات

Meaning: "Rejected punishment because of doubt".

While the principle of morality is a principle relating to the morals of Islamic criminal law, this moral principle includes, the principles of 'adam al-'uzri, raf'u al-kalam, and suquth al-'uqubat (abortion of punishment). The principle of 'adam al-'uzri is not accepting someone's statement because he does not know the law, this principle is closely related to the principle of legality.

Based on the theory of fiqh jinayah described above, it says that domestic rape is included in a criminal act which has fulfilled several of the pillars mentioned. Nevertheless, Islamic law clearly does not find a form of punishment or finger for the behavior of forcing sexual relations between husband and wife. However, Islamic law regulates the prohibition of inappropriate sexual intercourse, such as through the anus. In this case, the Fuqaha differ in giving criminal sanctions. According to Abu Hanifa, the culprit was sentenced to ta’zir because it was not considered adultery. Meanwhile, according to Imam Malik and Syafi’i, the culprit is still sentenced to hadd on the basis of qiyas, namely being charged with adultery.

Ta’zir is a form of jarimah whose punishment is determined by the authorities so that full authority lies with the authorities for the benefit of the people. Other forms of sexual violence, for example in this case resulting in bodily injury or the ability to have intercourse, in this case Islam establishes a diyat law with one hundred camels. Diyat in the sense of jarimah is an act committed by a person against the object of the soul and limbs, whether the act results in death, only results in injury or the malfunction of the victim’s limbs, which is done accidentally or semi-intentionally.

Islamic law is prescribed by Allah SWT. to protect the benefit of mankind, both individual benefit and the benefit of society or both. The benefit of mankind which in general can be classified into three aspects, namely daruriyat (primary), hajiyyah

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13 Hakim, 133.
(secondary) and tahsiniyah (complementary). To guarantee and maintain this benefit, Islam establishes a number of rules in the form of commands and prohibitions. This rule is accompanied by threats of worldly and ukhrawi punishment when violated. Basically the purpose of imposing legal sanctions according to Islamic Criminal law is prevention, teaching and education which is intended so that the perpetrators of criminal acts can take lessons from what the perpetrators of crimes get when they are punished.

This has relevance to the sanctions imposed on perpetrators of domestic violence as contained in Law Number 23 of 2004 concerning the Elimination of Domestic Violence. In article 46 of Law Number 23 of 2004 concerning the Elimination of Domestic Violence and reaffirmed in article 48. The imposition of criminal sanctions in prison and fines shows that the sanctions in Law Number 23 of 2004 concerning the Elimination of Domestic Violence have relevance to sanctions criminal law in Islamic law especially the crime of violence in the household. The imposition of sanctions both Islamic law and Indonesian state law against crimes of domestic violence in the household has the same goal, namely for the benefit of the ummah.

Etymologically, marital rape consists of two words, namely, Marital, which is related to marriage, and rape, which means rape. So marital rape is rape committed by a husband to his wife in a marital relationship. Rape in marriage (marital rape) can be interpreted as a type of violence in the form of coercion of sexual relations by a husband against his wife without considering the condition or condition of the wife. Judging from Law no. 23 of 2004 concerning the Elimination of Domestic Violence (UU PKDRT), marital rape can be categorized as a form of domestic violence (KDRT). In Article 1 point 1 of the PKDRT Law, it states that domestic violence is an act that perpetrated against a person, especially women within the scope of the household, where the actions committed can cause suffering both physically and psychologically, can also be in the form of neglect in the household and actions in the form of illegal deprivation of liberty. Domestic violence can be interpreted as an act in the form of violence or threats of violence with the aim of suppressing or controlling people who are in the same household.

Sexual violence is an example of domestic violence contained in Article 8 of the PKDRT Law. What is meant by sexual violence is sexual relations that are carried out

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with violence or threats of violence against people who live or live within the scope of
the household. (Soeroso, 2012). Sexual violence has several categories of sexual violence
itself, namely: a. isolation of the wife from her inner needs; b. sexual relations that the
wife does not want; c. forcing a wife to work as a prostitute and so on. Based on this,
even though in the Indonesian general criminal law (KUHP) the term marital rape has
not been regulated, this act has actually been regulated in the PKDRT Law in Article 8
which is related to sexual violence, even though the formulation of the article in the law
The law is still very broad, because the victims in question are all people who live within
the scope of the household, whether people who are related by blood or not, such as
housemaids and so on.

The phenomenon of marital rape cannot be underestimated, considering that the
impact of this act is very broad, not only for the wife who becomes the victim, but also
for children and other relatives in the family. Based on the Annual Records on Violence
Against Women compiled by Komnas Perempuan in 2022, it describes a variety of
spectrums of violence against women that occurred throughout 2021 and there were
the highest cases in a new pattern that was quite extreme (CATAHU 2022).

Rape in marriage (marital rape) as an act that is prohibited, which is actually
regulated in law, the consequences for those who commit these prohibited acts will be
subject to sanctions, especially criminal sanctions. The imposition of sanctions itself
must first pay attention to whether the person is able to take responsibility for the
actions he has committed or not. The reason for imposing a criminal offense against
someone is not enough on the grounds that the person's actions have fulfilled the
elements of a delict in the law. In addition to these reasons, there are still other
conditions that must be met in order for a person to be subject to a criminal charge, this
condition is the existence of an element of guilt (subject guilt) in a person who commits
the act. Error itself is a determining factor of criminal liability. Every action that is
categorized as a crime, if it is violated by someone, that person is obliged to be
responsible for the crime, unless the person is unable to be held accountable. It has been
explained in the previous discussion, which states that marital rape is a form of sexual
violence that occurs within the household as stated in Article 8 of the Law on the
Elimination of Domestic Violence. This law also includes criminal provisions for people
who commit these acts which are regulated in Article 46.
Forcing intercourse by means of violence is an act that is not commendable. The act will only cause the wife’s mental and physical suffering. The wife’s unpreparedness to serve forced sexual relations will only bring various symptoms of health problems, especially in the reproductive organs. The wife’s refusal stems from two factors, namely physical and psychological. Meanwhile, husband coercion is influenced by two elements, namely sexual libido and sexual behavior. One of God’s purposes in providing a place for marriage for his people is to justify sexual relations between each partner. In principle, in sexual relations, husband and wife have the same rights (a balance between the rights and obligations of husband and wife). Forcing sexual relations against wives is not permitted by religion on the grounds that in forced husband and wife relations, there is a real denial of the principle of *mu'asyara bil ma'ruf* (treating properly), once again in a way that is ma'ruf which is highly emphasized in al-Koran. According to the author, based on the principles of justice and equality of men and women, this problem can also apply to husbands when they refuse to serve their wife’s sexual desires. This is in line with Islamic provisions which do not belittle a woman’s sexual rights which are equally important.

According to Abdul Qadir Audah, something that is said to be a crime must have three elements, including something that is prohibited by texts or laws; there is an action in the form of finger; there is an act (mukallaf person), that is, a person who can be held accountable for the finger he has committed\(^\text{15}\). If based on the pillars above, this act of domestic violence, especially rape in the household in Islam, is considered a criminal act. Even though it clearly did not find a criminal or finger form against domestic rape. The Fuqaha differ in giving criminal sanctions in this case. According to Abu Hanifa, the culprit was sentenced to ta'zir because it was not considered adultery. Meanwhile, according to Imam Malik and Syafi'i, the culprit is still sentenced to hadd on the basis of qiyas, namely being charged with adultery. Jarimah ta'zir is a crime that is punishable by ta'zir punishment, namely a punishment that is not specified in a *şarih* (clear) text in both the Qur'an and al-Hadith relating to crimes that violate the rights of Allah and the rights of servants, serves as a lesson for the perpetrator and prevents him from repeating the same crime again. Muhammad Abu Zahrah defines ta'zir with the punishments set by the authorities in order to prevent loss and prevent crime\(^\text{16}\).


\(^{16}\) Zuhaily, 216.
From the two definitions above, it can be understood that ta’zir punishment is a punishment determined by the authorities (judges) against various forms of immorality, whether it violates the rights of Allah or the rights of servants that are harmful or disrupt the benefit of the general public. Regarding the form of ta’zir punishment, Islamic law does not stipulate in detail and strictly the form of punishment that can be imposed on the perpetrator. However, 'Abd al-Qadir Audah divided the forms of ta’zir punishment into several forms, namely: first, death penalty; second, vol punishment; third, imprisonment; fourth, exile & crucifixion; fifth, the punishment of excommunication; sixth, the punishment of reproach; seventh, punishment of threats; eighth, tashhir punishment; ninth, fines.17

According to 'Abd al-Qadir Audah, the principle of ta’zir punishment in Islamic law is not to destroy, but only as ta’dib or teaching. However, most fiqh scholars make an exception from this general rule, namely the permissibility of imposing the death penalty, if desired by the public interest, or if the problem cannot be resolved except by killing him.18 The essence of jarimah ta’zir is immoral acts that harm or disturb public order and it is the authority of the judge to impose certain penalties in accordance with the violations committed because there are no concrete syara’ provisions in this matter.

It can be explained that from the violated rights, the ta’zir jarimah can be divided into two parts, namely; a. Jarimah ta’zir who offends the rights of Allah. b. Jarimah ta’zir which violates individual or human rights. When viewed in terms of its nature, the ta’zir jarimah can be divided into three parts, namely; a. Ta’zir for committing immorals acts; b. Ta’zir for committing acts that endanger the public interest; c. Ta’zir for breaking the law. In addition, when viewed in terms of the legal basis (stipulation), the ta’zir can also be divided into three parts, namely; a. Jarimah ta’zir originating from jarimah hudud or qishah, but the conditions are not met, or doubtful, such as theft that does not reach the nishab, or by the family themselves. b. Jarimah ta’zir whose types are mentioned in the syara’ texts but the law has not yet been established, such as usury, bribes and reduced measures and weights. c. Jarimah ta’zir, both types and sanctions have not been determined by syara’.19

The ta’zir punishments are very numerous, because they cover all immoral acts whose law has not been determined by syara’ and are left to ulil amri to arrange them.

17 Audah, At-Tasyri’Al-Jinaiy Al-Islamy, 218.
from the lightest to the heaviest punishments. In the settlement of cases that include the ta'zir finger, the judge is given the authority to choose between the two punishments, which one is in accordance with the finger that was carried out by the perpetrator. In ta'zir, the punishment is not stipulated by provisions (from Allah and His Messenger), and the qadhi or judge is allowed to consider both the form of punishment to be imposed and the extent.

From the description of the types of jarimah ta'zir, the ta'zir punishment can be divided into four parts, namely 1). ta'zir punishment related to the body which consists of two punishments namely death penalty and flogging punishment. 2). ta'zir punishment related to independence in the form of imprisonment and exile. 3). ta'zir punishment related to property, namely the status of the property owned by the perpetrator, that is, the property is detained. 4). other ta'zir punishments, what is meant by other ta'zir punishments are other than the ta'zir punishments mentioned above, namely: a) Strong warning; b) Present before the court; c) Given advice; d) Reproaches; e) Exclusion; f) Dismissal; g) Announcement of errors openly (Sabrani, 2019).

Based on the explanation of the theory of jinayah in Islam, the punishment for perpetrators of criminal acts of rape in the household can be sentenced to ta'zir in the form of ta'dib or teaching. In this case the crime of rape in the household has violated human rights, namely depriving a wife of her right to freedom in sexual relations. Therefore, the perpetrator of the crime has the right to be sentenced to prison, and if the act takes life or is related to the body, then he deserves the death penalty and flogging.

If referring to Law no. 23 of 2004 concerning the Elimination of Domestic Violence, in which Article 46 states that anyone who commits an act of sexual violence as referred to in Article 8 letter a (coerced sexual intercourse against a person who resides within the scope of the household) shall be punished with imprisonment a maximum of 12 (twelve) years or a maximum fine of Rp. 36,000,000.00 (thirty-six million rupiah). The sanctions contained in the law are relevant to Islamic criminal sanctions in cases of domestic rape. Even so, the judge has a prerogative right where the judge has the right to impose a sentence beyond the sanctions listed in the written regulations based on existing legal facts.

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C. CONCLUSIONS

Domestic violence in Indonesia is still very high. This is influenced by several factors, both external and internal factors, including individual factors, partner factors, socio-cultural factors, and economic factors. Domestic rape includes domestic violence caused by a partner. Domestic violence in Indonesia is regulated in Law no. 23 of 2004 concerning the Elimination of Domestic Violence. The regulation contains sanctions for perpetrators of domestic violence, including domestic rape.

Article 46 clearly states that anyone who commits sexual intercourse to a person who resides within the scope of the household shall be punished with imprisonment for a maximum of 12 (twelve) years or a fine of up to Rp. 36,000,000.00 (thirty six) million rupiahs). These sanctions have relevance to Islamic criminal law. Although Islamic criminal law explicitly contains no provisions regarding punishment or sanctions against domestic violence, based on the theory and opinions of the fuqaha and as explained above that domestic violence is subject to ta’zir or punishment, either in the form of imprisonment or fines even if to the loss of life or related to the body will receive the death penalty or flogging. Islam does not heed the existence of rape in the household, because it violates the Shari’a, because Islam has taught how to relate in the household with mu’asyarah bil ma’ruf both in behavior between husband and wife and procedures for sexual intercourse.

Based on the conclusions above, there are several suggestions that the author proposes, including: The government must be burdensome against marital rape criminal sanctions in order to have a deterrent effect on perpetrators. In addition, the government is obliged to socialize the law related to Marital Rape. Because the theory of socialization of legislation uses the theory of legal fiction, if it has been published in the state gazette and given a certain period of time, the whole community is considered to know, even though one of the factors causing the large number of domestic violence is due to people who are not competent at law and tend to be ashamed (don’t dare to report it). because they consider that the problem of domestic violence is a domestic problem and is supported by Indonesia’s patriarchal culture which considers that placing the husband as the head of the household should protect and nurture not hurt.
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