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ISLAMIC PERSPECTIVE ON MARITAL RAPE

ABSTRACT

Marital rape has become a controversial issue in many countries including Indonesia. For the majority of the Indonesian people, it is impossible for rape to take place inside the marriage institution, however some other peoples believe that it possibly occurs. Since it is considered as a kind of rape anyway, those who agree with that concept, insist on the government of Indonesia to qualify marital rape as an offence. This is sounded usually by the human rights activists, especially the feminists. This research is aimed to elaborate the legal position of what so-call marital rape in Islam. As a country whose population is majority Muslim, it can be understood that the development of the Indonesian law is influenced by the Islamic values. This research provide an important reference to deal with the issue of the criminalization of marital rape in Indonesia. Since the research focuses more on the study of legal materials from various sources, it is qualified as a normative legal research. To support the collection of data, interview upon the competent legal experts has also been exercised. The standard of qualification of the legal experts involving in the interview are those who are interested in Islamic Law,

especially Islamic Family law as well as Islamic Criminal Law. Based on the research finding, it is found that the type of the relationship between husband and wife as suggested in Islamic teaching naturally prevents the what so-call marital rape to occur. It is difficult to imagine the existence of marital rape inside the Muslim families, since the husband is bound with the obligation to treat her wife well (*mu'asyarah bil ma'ruf*). In sexual matter, the doctrine of *mu'asyarah bil ma'ruf* can be applied by respecting the need and the willingness of the wife in sexual matter. Meaning to say, the husband is obliged to fulfill his wife sexual desire in one side, and in the other side he is not allowed to force her wife for sex when she is unwilling. It is better for the husband to sacrifice himself (to be patient) rather than sacrificing his wife. A good husband must be wise in choosing the better choice relating to the above issue. A good husband must be patient (*shabr*) for not saying that who is not patient is not a good husband.

Keywords: Marriage, Rape, and Marital Rape.

ABSTRAK

Perkosaan dalam perkawinan (marital rape) telah menjadi isu kontroversial di berbagai negara termasuk di Indonesia. Mayoritas penduduk masih menganggap perkosaan oleh suami terhadap isterinya (marital rape) sebagai sebuah kemustahilan, namun sebagian orang meyakini hal itu sebagai sebuah keniscayaan. Mereka yang setuju dengan konsep perkosaan dalam perkawinan menuntut kepada pemerintah agar menjadikan perbuatan tersebut sebagai sebuah tindak pidana. Tuntutan kriminalisasi atas perkosaan dalam perkawinan (marital rape) biasanya disuarakan oleh para penggiat hak asasi manusia, terutama mereka yang menyebut dirinya kaum feminis. Penelitian ini bertujuan untuk mengelaborasi kedudukan hukum Marital Rape perkosaan dalam Islam. Sebagai negara yang penduduknya mayoritas Muslim, dapat dipahami bahwa perkembangan hukum Indonesia dipengaruhi oleh nilai-nilai Islam. Penelitian ini memberikan referensi penting untuk menangani masalah kriminalisasi Marital Rape di Indonesia. Penelitian ini lebih memfokuskan pada studi bahan hukum dari berbagai sumber, hal itu merupakan syarat sebagai penelitian hukum normatif. Untuk mendukung pengumpulan data, wawancara pada ahli hukum yang kompeten juga dilakukan. Standar kualifikasi ahli hukum yang terlibat dalam wawancara adalah mereka yang tertarik Hukum Islam, khususnya hukum keluarga Islam serta Hukum Pidana Islam. Berdasarkan hasil penelitian, ditemukan bahwa jenis hubungan antara suami dan istri seperti yang disarankan dalam ajaran Islam, yang secara alami mencegah terjadinya apa yang disebut Marital Rape. Sulit membayangkan adanya perkosaan dalam keluarga muslim, karena suami terikat dengan kewajiban untuk memperlakukan istri dengan baik (*mu'asyarahbilma'ruf*). Dalam hal seksual, doktrin *mu'asyarahbilma'ruf* dapat diterapkan dengan menghormati kebutuhan dan kemauan istri dalam hal seksual. Artinya bahwa suami berkewajiban untuk memenuhi hasrat seksual istri di satu sisi, dan di sisi lain ia tidak diperbolehkan untuk memaksa istrinya untuk berhubungan seks ketika dia tidak bersedia. Hal ini lebih baik untuk suami berkorban (menahan) dirinya (untuk bersabar) daripada mengorbankan istrinya. Seorang suami yang baik harus bijaksana dalam memilih pilihan terbaik yang berkaitan dengan masalah di atas. Seorang suami yang baik harus bersabar (*shabr*) untuk tidak mengatakan untuk tidak mengatakan bahwa orang yang tidak sabar bukanlah suami yang baik.

Kata kunci: Pernikahan, Pemerkosaan, dan Pemerkosaan dalam Perkawinan

I. INTRODUCTION

Relationship between man and woman is always interesting to be observed along the history of human being. It has become a historical fact that the position of woman for long time is not equal with man. Even in some old traditions such as in Arab pre Islam, 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 surface.

In line with the development of human civilization and the advance of the human thought,

attempt and movement to put woman equal with man is always made. Feminists stand in the forefront of this movement. Nowadays, gender equality has become a trending topic in many forms of academic discourses especially which sponsored by the feminists.

It is undeniable that feminism has contributed much in repairing the position of woman in many fields of life such as social, economy, politic, as well as law, however the feminists to some extent have not been satisfied yet with the result. Even though the struggle for gender equality has run for decades and lots of progress has been achieved, but the feminists nowadays are still of the opinion that the woman is not truly equal to the man yet. Gender inequality can still be found in some areas including what happening inside the marriage institution.

Equality between man and woman inside the marriage institution constitutes one of the most actual gender issues recently. The structure of husband and wife relationship in the institution of marriage is criticized to have put the husband more dominant than the wife. The old doctrine stating that husband deserves upon his wife's body is no longer accepted and it is proposed that the wife should have full sovereignty upon her own body. The above notion has obviously brought a very crucial impact upon the relationship between husband and wife in sexual matter. The wife should have the same right with her husband in enjoying sexual intercourse. It is claimed that both parties should be able to enjoy any sexual activity and one party may refuse sexual intercourse proposed by the other party for the reason of unwillingness. Simply, the wife may refuse sexual intercourse demanded by her husband whenever she is unwilling to do so. If the husband forces his wife to have sexual intercourse without her consent, it should be treated as a rape for which the wife deserves a legal protection. This kind of rape is commonly known as marital rape; a rape taking place inside the marriage institution.

Marital rape has become a controversial issue in many countries including Indonesia. For the majority of the Indonesian people, it is impossible for rape to take place inside the marriage institution, however some others believe that it possibly occurs. Since it is considered as a kind of rape anyway, those who agree with that concept, insist on the government of Indonesia to qualify marital rape as an offence. This is sounded usually by the human rights activists, especially the feminists.

If the idea to criminalize this kind of sexual intercourse is accepted, the scope of rape should be extended including which occurs inside the marriage institution. With regard to the running law reform in the field of criminal matter, it is expected that marital rape should be included in the list of sexual offences the future Indonesian Penal Code.

As a country whose population is majority Muslim, it can be understood that the development of law in Indonesia is influenced by the Islamic values. Relating to the issue of the criminalization of marital rape, it is interesting to know the Islamic approach on the mentioned issue since it is more controversial in Muslim countries rather than in Western countries. Based on the above explanation, the problem has been formulated as follows: what is the Islamic perspective on marital rape?

II. METHODOLOGY

The type of this research is what so-called normative legal research which tries to find out principles from any sources of law. The research relies on the study against legal materials both primary and secondary one. Among the primary legal materials are the Indonesian Civil Code, the Marriage Act 1974, the Domestic Violence Eradication Act 2004, and the Convention on the Eradication of all Forms of Discrimination Against Women (CEDAW). While the secondary legal materials are in the form of literatures, articles and papers which are relevant with the issue in question.

To support legal materials which was collected from library based study, interview upon the competent legal experts were also employed. All legal materials either from library based study or interview has been analysed by exercising the descriptive-analytical method. The researcher described the Islamic approach on the issue of marital rape and elaborate analytically the importance to adopt it in the process of legal reform in Indonesia, especially relating to the issue of marital rape.

III. THE RESEARCH FINDING

A. Definition of Marital Rape

Marital rape is just like any other "kind" of rape - that is, forcible unwanted sexual contact - except that it occurs between two people who are married. Marital rape, also known within law as spousal rape, is the rape of a wife or husband by their own partner (Anonym, "Marital Rape", retrieved from <http://rationalwiki.org/wiki/Marital-rape> on March 2nd, 2012 at 15.51). *Marital rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent.* Marital rape could be done by the use of force only, a battering rape or a sadistic/obsessive rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused (Kriti Madan, "Marital Rape in India", retrieved from <http://jurisonline.in/2010/09/maritalrape-in-india/> on March 2nd, 2012 at 14.30).

The term 'marital rape' is contentious and creates confusion for rape is widely regarded as a sexual transgression, and marriage is perceived as socially sanctioned sex. Generally women themselves do not recognize sexual assaults by a husband as rape (compared with sexual assaults by strangers or acquaintances) and so are less likely to report it. Finkelhor & Yllo, as quoted by Kriti Madan, have tried to categorize the sexual assault into three major following forms (Kriti Madan, "Marital Rape in India", retrieved from <http://jurisonline.in/2010/09/maritalrape-in-india/> on March 2nd, 2012 at 14.30):

a. Battering rape:

In "battering rapes", women experience both physical and sexual violence in the relationship and they experience this violence in various ways. Some are battered during the sexual violence, or the rape may follow a physically violent episode where the husband wants to *make up*

and coerces his wife to have sex against her will. The majority of marital rape victims fall under this category.

- b. *Force-only rape*: In what is called “force-only” rape, husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. The assaults are typically after the woman has refused sexual intercourse.
- c. *Obsessive rape*: Other women experience what has been labelled “sadistic” or “obsessive” rape; these assaults involve torture and/or “perverse” sexual acts and are often physically violent.

In the United States, some states require marital rape to be prosecuted in the same way as any other rape, while others make it a separate crime. In states where it is treated as a separate crime, procedures may differ substantially from those of a general rape case. For example, in California, non-spousal rapists are not eligible for probation, but spousal rapists are. In West Virginia, spousal rapists can be sentenced to terms of only 2-10 years, while non-spousal rapists are sentenced to 10-35 (Kerryg, “Marital Rape”, retrieved from <http://kerryg.hubpages.com/hub/Marital-Rape> on March 2nd, 2012 at 14.45).

B. The History of Marital Rape

Rape is often regarded as the most serious sexual offences (HH Judge Peter Rook QC and Robert Ward CBE, 2010:1). Western jurisprudence has a long tradition of absolving husbands from the possibility of rape. The first significant discussion in America of forced sex within marriage being categorized as rape, and of the need for a legal remedy, may well have been “The Markland Letter,” which was published in 1887 in a Kansas newspaper. The letter read, “About a year ago F gave birth to a baby, and was severely torn by the instruments in incompetent hands. She has gone through three operations and all failed...last night when her husband came down, forced himself into her bed, and the stitches were torn from her healing flesh, leaving her in worse condition than ever...”. The Markland letter became nationally notorious largely because its graphic description of violence left little doubt that the husband was a rapist despite the law. American law did not catch up with the Markland letter until 1976. Until then, rape laws throughout the states included a Marital Rape Exemption. In 1976, however, Nebraska became the first state to abolish that exemption (Wendy McElroy, “Spousal Rape Case Sparks Old Debate”, retrieved from <http://www.foxnews.com/story/0,2933,147725,00html> on March 2nd, 2012 at 14.50).

Marital rape is a relatively new term. 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 seen as an impossibility (Kerryg, “Marital Rape”, retrieved from <http://kerryg.hubpages.com/hub/Marital-Rape> on March 2nd, 2012 at 14.45).

Within history can be seen the concept that marriage includes within it conjugal rights. In Western culture this was often ascribed to the teaching of St. Paul (Anonym, “Marital Rape”,

retrieved from <http://conservapedia.com/Marital-rape> on March 2nd, 2012 at 14.00):

“Let the husband render to his wife the affection due her, and likewise also the wife to her husband. The wife does not have authority over her own body, but the husband does. And likewise the husband does not have authority over his own body, but the wife does. Do not deprive one another except with consent for a time, that you may give yourselves to fasting and prayer; and come together again so that Satan does not tempt you because of your lack of self-control”.

The marital rape exemption can be traced to statements by Sir Mathew Hale, Chief Justice in England, during the 1600s. He wrote, “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract.” This established the notion that once married, a woman does not have the right to refuse sex with her husband. This allows husbands rights of sexual access over their wives in direct contravention of the principles of human rights and provides husbands with a “*licence to rape*” their wives. Not surprisingly, thus, married women were never the subject of rape laws. Laws bestowed an absolute immunity on the husband in respect of his wife, solely on the basis of the marital relation. As the concept of human rights has developed, the belief of a marital right to sexual intercourse has become less widely held (Kriti Madan, “Marital Rape in India”, retrieved from <http://jurisonline.in/2010/09/maritalrape-in-india/> on March 2nd, 2012 at 14.30).

From the beginnings of the 19th century, women’s movement activists challenged the presumed right of men to engage in forced sex with their wives. In the United States, “the nineteenth-century woman’s rights movement fought against a husband’s right to control marital intercourse in a campaign that was remarkably developed, prolific, and insistent, given nineteenth-century taboos against the public mention of sex or sexuality.” Suffragists including Elizabeth Cady Stanton and Lucy Stone “singled out a woman’s right to control marital intercourse as the core component of equality.” Nineteenth century feminist demands centered on the right of women to control their bodies and fertility, positioned consent in marital sexual relations as an alternative to contraception and abortion (which many opposed), and also embraced eugenic concerns about excessive procreation. British liberal feminists John Stuart Mill and Harriet Taylor attacked marital rape as a gross double-standard in law and as central to the subordination of women. Feminists worked systematically since the 1960s to overturn the marital rape exemption and criminalize marital rape. Increasing criminalization of spousal rape is part of a worldwide reclassification of sexual crimes “from offenses against morality, the family, good customs, honor, or chastity... to offenses against liberty, self-determination, or physical integrity” (Anonym, “Marital rape”, retrieved from http://en.wikipedia.org/wiki/Marital_rape on March 2nd, 2012 at 14.30).

Marital rape is non-consensual sex in which the perpetrator is the victim’s spouse. As such, it as a form of partner rape, of domestic violence, and of sexual abuse. Once widely condoned or

ignored by law, spousal rape is now repudiated by international conventions and increasingly criminalized. In December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence Against Women. This establishes marital rape as a human rights violation. The first attempted prosecution of a husband for the rape of his wife was *R v Clarke* [1949] 2 All ER 448. The marital rape exemption was abolished in England and Wales in 1991 by the Appellate Committee of the House of Lords, in the case of *R v R*. been promulgated in 1736 in Matthew Hale's *History of the Pleas of the Crown* (Anonym, "Marital rape", retrieved from http://en.wikipedia.org/wiki/Marital_rape on March 2nd, 2012 at 14.30).

In many North American and Western European countries, marital rape was not recognized as a crime until the 1980's or 90's. In fact, as of 1997, only 17 countries named marital rape a crime. Fortunately, publication of the United Nation's Declaration on the Elimination of Violence against Women has raised awareness of the problem and increased the number of countries that outlaw marital rape to more than 100 (Kerryg, "Marital Rape", retrieved from <http://kerryg.hubpages.com/hub/Marital-Rape> on March 2nd, 2012 at 15.30)

In 2006, it was estimated that marital rape could be prosecuted in at least 104 countries (in four of these countries, marital rape could be prosecuted only when the spouses were judicially separated), and since 2006 several other countries have outlawed spousal rape. In many countries it is not clear if marital rape may or may not be prosecuted under ordinary rape laws. Several countries in Eastern Europe and Scandinavia made spousal rape illegal before 1970, but other countries in Western Europe and the English-speaking Western world outlawed it much later, mostly in the 1980s and 1990s. Most developing countries outlawed it in the 1990s and 2000s (Anonym, "Marital rape", retrieved from http://en.wikipedia.org/wiki/Marital_rape on March 2nd, 2012 at 14.30).

C. Marital Rape in Several Jurisdiction

Countries which were early to criminalize marital rape include the Soviet Union (1922/1960), Poland (1932), Czechoslovakia (1950), Denmark (1960), Sweden (1965), Norway (1971), and some other members of the Communist Bloc. The Israeli Supreme Court affirmed that marital rape is a crime in a 1980 decision, citing law based on the Talmud. Criminalization in Australia began with the state of New South Wales in 1981, followed by all other states from 1985 to 1992. Several formerly British-ruled countries followed suit: Canada (1983), New Zealand (1985), and Ireland (1990) (Anonym, "Marital rape", retrieved from http://en.wikipedia.org/wiki/Marital_rape on March 2nd, 2012 at 14.30).

Many United States rape statutes formerly precluded the prosecution of spouses, including estranged or even legally separated couples. In 1975, South Dakota removed this exception. In 1993, North Carolina became the last state to remove the spousal exemption. However, as of 1999, 33 of 50 U.S. states regard spousal rape as a lesser crime [Bergen, 1999]. The perpetrator may be charged with related crimes such as assault, battery, or spousal abuse. There are other

criminal charges that may be inapplicable to married couples. For example, in the U.S., there is a marriage exemption to the charge of statutory rape even if one of the spouses is under the age of consent in the jurisdiction where the sexual act takes place. France's *Cour de Cassation* authorized prosecution of spouses for rape or sexual assault in 1990, but ruled in 1992 that a presumption of consent exists from the time of marriage until it is revoked by either party. In 1994, Law 94-89 criminalized marital rape; a second law, passed 4 April 2006, makes rape by a partner (including in unmarried couples, married couples, and in civil unions) an aggravating circumstance in prosecuting rape. Germany outlawed spousal rape only in 1997, which is later than other developed countries. Female ministers and women's rights activists lobbied for this law for over 25 years (Anonym, "Marital rape", retrieved from http://en.wikipedia.org/wiki/Marital_rape on March 2nd, 2012 at 14.30).

Recent countries to criminalize marital rape include Turkey (2005), Cambodia (2005), Mauritius (2007), Ghana (1998/2007), Malaysia (2007), Thailand (2007), Tunisia (2008), Rwanda (2009), South Korea (2009), and Jamaica (2009). Human rights observers have criticized a variety of countries—including Japan, Poland, and Kazakhstan—for failing to effectively prosecute marital rape once it has been criminalized. Whether marital rape is considered a crime depends on where you live in the world. Almost all developed countries, and many developing countries, recognize marital rape as being a crime. However, the degree that these countries consider the seriousness of the crime of marital rape compared to 'stranger' rape varies from country to country, and indeed state to state. While some countries and states consider that marital rape is not as serious a crime as other forms of rape, other countries and states hold it to be as serious a crime, or a worse crime, as incidence of marital rape is a strong indicator that other forms of domestic abuse are also taking place (Anonym, "Marital rape", retrieved from http://en.wikipedia.org/wiki/Marital_rape on March 2nd, 2012 at 14.30). Further, the list of countries categorized based on their involvement in the issue of marital rape can be seen below:

COUNTRIES THAT HAVE NOT MADE SPOUSAL RAPE A CRIMINAL OFFENSE:²⁶

- | | | |
|---------------------|------------|-----------------|
| • Afghanistan | • Honduras | 1. Oman |
| • Algeria | • India | 2. Pakistan |
| • Bahamas | • Jordan | 3. Saudi Arabia |
| • Bahrain | • Kenya | 4. Sudan |
| • Bolivia | • Laos | 5. Syria |
| • Botswana | • Lebanon | 6. Tonga |
| • Brunei Darussalam | • Malawi | 7. Uganda |
| • China | • Mongolia | 8. Yemen |
| • Egypt | • Morocco | 9. Zambia |
| • Ethiopia | • Myanma | |
| • Georgia | • Nigeria | |
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Only criminalized when couple is legally separated ((Anonym, "Marital rape", retrieved from http://en.wikipedia.org/wiki/Marital_rape on March 2nd, 2012 at 14.30):

- Singapore (legal separation, divorce, restraining order, or attempt by the assaulted party to receive such legal status)
- Sri Lanka
- Tanzania

COUNTRIES THAT HAVE MADE SPOUSAL RAPE A CRIMINAL OFFENCE²⁸

- | | | | |
|--------------------------|----------------------|---------------|-------------------------|
| • Albania | • Costa Rica | • Hong Kong | • Norway |
| • Andorra | • Croatia | • Hungary | • Philippines |
| • Angola | • Cuba | • Iceland | • Poland |
| • Antigua and Barbuda | • Cyprus | • Ireland | • Peru |
| • Argentina | • Czech Republic | • Israel | • Republic of the Congo |
| • Australia | • Denmark | • Macedonia | • Romania |
| • Austria | • Dominica | • Mauritania | • Russia |
| • Barbados | • Dominican Republic | • Japan | • Serbia |
| • Belgium | • Ecuador | • Latvia | • South Africa |
| • Belize | • El Salvador | • Lithuania | • Spain |
| • Bhutan | • Estonia | • Malaysia | • Sweden |
| • Bosnia and Herzegovina | • Fiji | • Malta | • Taiwan |
| • Brazil | • Finland | • Mexico | • Trinidad and Tobago |
| • Bulgaria | • France | • Monaco | • Turkey |
| • Canada | • Germany | • Montenegro | • United Kingdom |
| • Cape Verde | • Greece | • Namibia | • United States |
| • Chile | • Grenada | • Nepal | • Uzbekistan |
| • China | • Guatemala | • Netherlands | • Zimbabwe |
| • Colombia | • Guinea-Bissau | • New Zealand | |
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D. Islamic Concept on Sexual Intercourse

According to Islamic perspective, sexual intercourse has two functions namely recreation and reproduction. Sexual intercourse constitutes part of satisfaction (al-nikmat) that human beings can enjoy during their life in this world. Beside to satisfy human desire, sexual intercourse is the very natural way to maintain human race through generational process. Considering its fundamental functions, sexual intercourse is sacred in Islam and it will be counted as part of worship (ibadah) to Allah as long as being carried out in line with the rule of Allah (sharia). Syakir Jamaludin highlights this point by stating that even the fulfillment of sexual desire will be counted as worship if the realization in accordance with the rule of 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 (*haram*).

The unlawfulness of sexual intercourse is not merely relied on the marital status of the parties, but also referred to particular situations or conditions. Even though sexual intercourse is done between husband and wife it remains unlawful if the following situations or conditions are present:

1. It is conducted during *fasting Ramadhan*,

2. It is conducted when the wife is at the moment of *haid* (menstruation),
3. It is conducted when the wife is at the moment of *nifas* (parturition)
4. Penile penetration upon wife's anus (anal sex).

Unlawful sexual intercourse outside the marriage is called *zina* and it is one of serious sins in Islam. *Zina* can be classified into two categories namely *zina muhsan* and *zina ghair muhsan*. A *zina* is considered *muhsan* if the offender has got married, and it will fall under category of *ghair muhsan* if the offender has not got married yet. *Zina* is not only a sin in the sense that there will be punishment for the offender in the hereafter, but also considered as a crime (*jarimah*) where criminal liability can be held for the offender by the authority. *Zina* is part of hudud offences (*jarimah hudud*), that is any offence which subjects to hadd punishment. Beside *zina* (adultery), other hudud offences are *al-sariqah* (theft), *al-hirabah* (robbery), *qazf* (defamation), *al-riddah* (apostasy), *al-baghyu* (rebellion) and *surb al-Khamr* (drinking liquor).

Hadd is a technical term for calling punishment which is determined by the Lawgiver (*Allah*) and categorized as fixed punishment as opposed to discretionary punishment. As it is fixed, it cannot be mitigated. In the case of adultery, the punishment for the offender differs depending on the marital status of the offender. Married offender (*zina muhsan* case) will subject to stoning to death, while unmarried offender (*zina ghair muhsan* case) will subject to flogging of one hundreds lashes and exile for one year.

If it is connected to the theory of maqhasid sharia, the criminalization of adultery is to support the idea of the protection of offspring (*hifdzu al-nasl*). *Maqhasid sharia* is a theory which explains the objectives of the sharia. All legal rules in Islam can be traced back to the theory of maqhasid sharia. This well known theory is always associated with al-Shatibi, an Islamic scholar.

E. ISLAMIC CONCEPT ON MARRIAGE

Marriage (*nikah*) is a sacred and fundamental institution in Islam. A Muslim can complete his religion only if he got married. The purpose of marriage in Islam is to build a happy family. Happy family is the basis of the individual character building. Happy family will contribute in developing a good and happy society. With marriage, husband and wife are allowed to have sexual intercourse for the purpose of fulfilling sexual desire as well as reproduction. In the *Quran*, marriage is characterised as *mitsaqan ghalidhan* (strong covenant). It is not mere a contract between husband and wife, but it is also a contract between both husband and wife with *Allah*.

Both parties in marriage are bound by rights and duties. The duties of husband are:

1. To consort with his wife in an equitable and kind manner.
2. Have responsibility for the full maintenance of the wife, a duty which he must discharge cheerfully, without reproach, injury, or condescendence.
3. To treat his wife with equity.
4. To respect her feelings, and to show her kindness and consideration.

5. Not to show his wife any aversion or to subject her to suspense or uncertainty.
6. Not to keep his wife with the intention of inflicting harm on her or hindering her freedom.
7. To let her demand freedom from the marital bond, if he has no love or sympathy for her.

On the other side, the main obligation of the wife as a partner in a marital relationship is to contribute to the success and blessedness of the marriage as much as possible. She must be attentive to the comfort and well-being of her mate. She may neither offend him nor hurt his feelings. Perhaps nothing can illustrate the point better than the *Qur'anic* statement which describes the righteous people as those who pray saying: "Our Lord! Grant unto us wives and offspring who will be the joy and the comfort of our eyes, and guide us to be models of righteousness." (*Al-Furqan: 74*)

This is the basis on which all the wife's obligations rest and from which they flow. To fulfill this basic obligation:

1. The wife must be faithful, trustworthy, and honest.
2. She must not deceive her mate by deliberately avoiding conception lest it deprive him of legitimate progeny.
3. She must not allow any other person to have access to that which is exclusively the husband's right, i.e. sexual intimacy.
4. She must not receive anyone in his home whom the husband does not like.
5. She may not accept their gifts without his approval. This is probably meant to avoid jealousy, suspicion, gossip, etc., and also to maintain the integrity of all parties concerned.
6. The husband's possessions are her trust. If she has access to any portion thereof, or if she is entrusted with any fund, she must discharge her duty wisely and thriftily. She may not lend or dispose of any of his belongings without his permission.

7. With respect to intimacy, the wife is to make herself desirable; to be attractive, responsive, and cooperative.
8. A wife may not deny herself to her husband, for the *Qur'an* speaks of them as a comfort to each other. Due consideration is, of course, given to health and decency.
9. Moreover, the wife is not permitted to do anything that may render her companionship less desirable or less gratifying. If she neglects herself, the husband has the right to interfere with her freedom to rectify the situation and insure maximum self-fulfillment for both partners. She is not permitted to do anything on his part that may impede her gratification."

Relating to the issue of sexual intercourse, in Islam a wife is called to serve her husband whenever she is demanded. Serving her husband in sexual matter is considered as a very fundamental obligation for the wife. Even it is said in a hadith that a wife will be cursed by the angel in all night if she refused to serve her husband who demand sexual intercourse with her. It by no means, that there is no exception at all for the wife relating to sexual services. A wife is allowed to refuse the will of her husband for sexual intercourse in the case of sickness, for example.

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. Wise husband and wife must respect the sexual need and the willingness of his or her spouse. In case at a moment a sexual intercourse is intended by the husband but unfortunately unintended by the wife, there will be two solutions as follows:

- a. The husband sacrifices himself not to have sexual intercourse since it is not intended by his wife, or
- b. The wife sacrifices her self to serve her husband even though she does not really want to do so.

In Islam, sacrificing ourselves for serving others is regarded as worship to Allah and it will bear honor. All noble persons with great honor existing along the history of human being are always consists of persons who sacrificed themselves for serving others, aren't they? See Mahatma Gandhi and Mother Theresia from India, KH Ahmad Dahlan from Indonesia, Lady Diana from England, Muhammad Yunus from Bangladesh, and many more.

Marriage has been commonly understood as an *aqd tamlik* (contract of belonging), it means that with marriage a husband has rights upon his wife including right to have the body of his wife and use it for sexual service.

Further question is whether it is acceptable for the husband to force his wife having sexual intercourse. Dealing with this question, Masdar introduces concept of *aqd al-ibadah* (contract of worship). Sexual intercourse can be regarded as worship and in worship there must be no force as well as harrashment since it should be based on the principle of voluntariness.

F. Islamic Perspective on Marital Rape

Considering the nature of the relationship between husband and wife in Islamic teaching, it is difficult to imagine the existence of marital rape, since the husband is bound with the obligation to treat her wife well (*mu'asyarah bil ma'ruf*). In sexual matter, the doctrine of *mu'asyarah bil ma'ruf* can be applied by respecting the need and the willingness of the wife in sexual matter. Meaning to say, the husband is obliged to fulfill his wife sexual desire in one side, and in 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. A good husband must be wise in choosing the better choice relating to the above issue. A good husband must be patient (*shabr*) for not saying that who is not patient is not good husband.

If a marriage consists of a good husband and a good wife (both are patient persons) how can a marital rape take place. Marital rape will definitely have no place in such kind of marriage. The question is, how if a woman involves in a contract of marriage with a bad husband who demands his wife to serve him sexually without considering her wife's willingness? Is the forcible sexual intercourse made by him upon his wife qualified as a rape or commonly known as marital rape?

Dealing with the above question, the majority of Muslim jurists are of the opinion that the

mentioned fact is not a rape. Since rape has commonly been understood as a forcible penile penetration in a vagina belonging to a woman other than the man's wife, hence it is difficult to accept the idea of marital rape in Muslim countries, including in Indonesia.

In Indonesia, marital rape has been ruled in the Domestic Violence Eradication Act 2004 (Undang-undang Nomor 23 Tahun 2004 Tentang Penghapusan Kekerasan Dalam Rumah Tangga). It is qualified as one of the forms of sexual harassment. According to this Act, marital rape is an offence punishable with imprisonment for a period of time not exceeding 12 years or fine not exceeding 36 million rupiahs. However, the prosecution of such a case requires the report from the victim (typically the wife). In fact, the victims of marital rape are reluctant to report the offenders (the husbands) to the police investigator hence the number of marital rape case decided in the court is limited.

The issue of marital rape has become the subject of an academic discussion among Moslem jurists in Indonesia. Zakiah Drajat as quoted by Milda Marlia says:

"In Islam, a wife cannot refuse the sexual intercourse demanded by her husband. A woman is supposed realize her task as a wife including serving her husband in sexual matter. If she is reluctant with that task it is better for her not to marry."

Furthermore in commenting the idea of the criminalization of marital rape, she says that the issue of marital is more appropriate to be delivered to psychologist or religious figure rather than to be regulated in the penal code. Zakiah's opinion seems to be in line with the statement of the President of Oregon State Bart, Charles Burt (1979) as quoted by Sheri and Bob Stritof as follows:

"It's a waste of the court's time to get into that area...a woman who is in marriage is presumably consenting to sex. Maybe this is the risk of being married, you know."

On the other hand, Quraish Shihab as quoted by Milda Marlia states that rape is unlawful even though it is carried out upon someone's wife. In Islam, the wife is obliged to obey her husband instruction. However, if the demand or instruction of the husband contravenes with the Islamic rules such as asking for sexual service when his wife is in the moment of nifas (post-maternity bleeding), it is prohibited for the wife to fulfill her husband demand, and she may report the husband to the judge. In answering the question about the possibility of marital rape to be ruled in the penal code, Quraish prefer to qualify marital rape under category of torture rather than rape itself. Abdul Wahib and Muhammad Irfan explain that term marital rape is unknown in Islam. The issue of sexual intercourse has been ruled in under Islamic teaching of ethic (akhlaq) among other things are the obligation of husband to treat his wife with good manner and the obligation of wife to provide sexual service when her husband demand it.

III. CONCLUSION

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Considering the nature of the relationship between husband and wife in Islamic teaching, it is difficult to imagine the existence of marital rape, since the husband is bound with the obligation to treat her wife well (*mu'asyarah bil ma'ruf*). In sexual matter, the doctrine of *mu'asyarah bil ma'ruf* can be applied by respecting the need and the willingness of the wife in sexual matter. Meaning to say, the husband is obliged to fulfill his wife sexual desire in one side, and he is not suggested to force her wife to serve him sexually if she is unwilling. It is better for the husband to sacrifice himself (to be patient) rather than sacrificing his wife. A good husband must be wise in choosing the better choice relating to the above issue. A good husband must be patient (*shabr*) for not saying that who is not patient is not good husband.

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