

[ARTICLE]

CRIMINALIZATION OF SEXUAL ACTS IN MARRIAGE (MARITAL RAPE) IN
INDONESIAN LAW:

A Perspective of the Theory of Sadd Al-Žariāh

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Abstract: This study examines the issue of marital rape and its punishment within the framework of Islamic law and the theory of Sadd Al-Žariāh. While laws addressing marital rape have been established, there are conflicting views. The dualism in legal systems, which includes both Islam and state laws, often presents challenges in addressing marital rape. Through a normative legal research approach and literature review, this study aims to reconcile Islamic law with positive law and eliminate the legal dualism. The study concludes that sexual acts within marriage, if conducted without valid consent from both parties, can be categorized as rape with criminal penalties. Several laws and regulations in Indonesia support the protection of victims. Unfortunately, only the victims themselves can report such cases. The legislation concerning the criminalization of sexual acts within marriage, also known as Marital Rape, can be justified from the perspective of the Sadd Al-Žariāh theory due to the harmful consequences it imposes. These consequences can manifest as certain, rare, and potential impacts on both parties involved as well as the families they create together.

Keywords: punishment, marital rape, sadd al-žariāh

Abstrak: Artikel ini mengkaji perkosaan dalam perkawinan dan hukumannya dalam kerangka hukum Islam dan teori Sadd Al-Žariāh. Meskipun telah ada undang-undang yang membahas perkosaan dalam perkawinan, terdapat dualisme sistem hukum: hukum Islam dan hukum negara. Melalui pendekatan penelitian hukum normatif dan literatur, penelitian ini mendamaikan hukum Islam dengan hukum positif dan menghilangkan paradigma dualisme hukum. Penelitian ini menyimpulkan bahwa tindakan seksual dalam perkawinan, jika dilakukan tanpa persetujuan yang sah dari kedua belah pihak, dapat dikategorikan sebagai perkosaan dengan hukuman pidana. Beberapa undang-undang dan peraturan di Indonesia mendukung perlindungan bagi korban. Sayangnya, hanya korban sendiri yang dapat melaporkan kasus tersebut. Undang-undang yang mengkriminalisasi tindakan seksual dalam perkawinan, yang juga dikenal sebagai Perkosaan dalam Perkawinan, dapat dibenarkan dari sudut pandang teori Sadd Al-Žariāh karena berbahaya. Konsekuensi ini dapat muncul sebagai dampak tertentu, jarang, dan potensial pada kedua belah pihak yang terlibat serta keluarga yang mereka bentuk bersama.

Kata Kunci: hukum pidana, perkosaan perkawinan, sadd al-zariah



A. Pendahuluan

Although laws addressing sexual violence in the form of marital rape have been established, there is still controversy surrounding these regulations. The opposition to these laws is often rooted in religious arguments, particularly in Islam, where marital relations are commonly practiced and there exists a paradigm that prohibits wives from refusing sexual intercourse with their husbands, citing religious justifications such as the curse of angels upon wives who refuse their husbands' advances. However, on the other hand, the harmony of the household and the fulfillment of rights for wives are also fundamental foundations in carrying out a marriage, with the responsibility of a husband as a leader and the obligation to protect oneself and the family from the fires of hell.

Indonesia, being a predominantly Muslim country, often faces the paradigm of dualism in its legal thinking, encompassing both religious and state laws. This paradigm often leads to various issues, such as secret marriages, divorce outside the court system, unregistered endowments (wakaf), and others, which create problems for the parties involved due to the lack of normative legal strength in relation to their actions under Indonesian positive law. Therefore, it is important to emphasize that the positive law in Indonesia is in accordance with religious norms, allowing the society to understand and comply with the state's regulations without a paradigm of legal dualism.

This research, titled "Criminalization of Sexual Acts in Marriage (Marital Rape) in Indonesian Law: A Perspective of the Theory of Sadd Al-Žarīah," fills the previous knowledge gap regarding the criminalization of sexual acts in marriage through the lens of the Sadd Al-Žarīah theory. Several previous studies have touched on this issue, but there are points of similarity and difference with this research. For instance, Rebecca M. Ryan's study discusses the rejection of a husband's privilege to rape his wife from the perspective of radical feminism and the law¹. Moh. Qadarusman's research explores the concept of sanctions for sexual violence within the household from the viewpoint of Islamic law². Furthermore, studies by Karina Martiyana and Riskyanti Juniver Siburian address the implementation of laws related to marital rape^{3,4}. While this research focuses on the urgency of criminalizing sexual acts in marriage. Lastly, the research by Aldila Arumita Sari and R.B. Sularto speaks about gender justice policies related to the crime of rape within the family. Therefore, this

¹ Rebecca M. Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption," *Law & Social Inquiry* 20, no. 4 (1995), <https://doi.org/10.1111/j.1747-4469.1995.tb00697.x>.

² Moh. Qadarusman, *Konsep Sanksi Kekerasan Seksual Dalam Rumah Tangga (Marital Rape) Di Indonesia Perspektif Ahli Hukum Islam Di Kota Malang* (Malang: tesis UIN Malang, 2021).

³ Karina Martiyana and Muhammad Syahrul Munir, "Perkosaan Dalam Rumah Tangga (Marital Rape) Dalam Perspektif Maqāṣid al-Sharī'ah.Pdf," *Al-Faruq: Jurnal Hukum Ekonomi Islam* 1, no. 1 (2022).

⁴ Riskyanti Juniver Siburian, "Marital Rape Sebagai Tindak Pidana Dalam RUU-Penghapusan Kekerasan Seksual," *Jurnal Yuridis* 7, no. 1 (2020), <https://doi.org/10.35586/jjur.v7i1.1107>.

study plays a crucial role in examining the criminalization of sexual acts in marriage from a new and profound perspective, namely the theory of Sadd Al-Žarīah.

Based on these issues, the author is interested in examining the problem of marital violence in the form of marital rape from the perspective of Islamic legal exploration, specifically through the lens of UshulFiqh (Islamic jurisprudence principles) using the theory of Sadd Al-Žarīah. This theory involves taking preventive measures against greater potential harm (*madhorot*) that may occur. This theory is widely recognized by the majority of scholars as one of the methods for deriving Islamic law known as *istimbatulhukmi*. Thus, the author attempts to study marital rape, including the reasons, urgency, social realities, and legal consequences, with the aim of finding common ground between Islamic law and positive law, thereby eliminating the paradigm of legal dualism.

The focus of this study is to analyze marital rape within the framework of the Law on the Elimination of Domestic Violence and the Criminal Code, using the perspective of the theory of Sadd Al-Žarīah in the study of Ushul Fiqh (principles of Islamic jurisprudence). The research employs a critical analysis approach to these laws and synchronizes them with Islamic legal theory.

In terms of the research focus, this study belongs to the category of normative legal research, which examines written laws from various aspects. The aspects being examined include history, philosophy, theory, comparison, structure and composition, scope and substance, consistency, general explanations, article-by-article analysis, formalities, the binding force of a law, and the language of law ⁵.

Regarding the data collection process, this research falls under the category of library research, also known as literature review or literary research. It utilizes library materials as the primary source of information ⁶. The research material is usually obtained from various literary sources such as books, encyclopedias, scientific journals, newspapers, magazines, and document ⁷. While in the past, literary research could only rely on printed sources, nowadays online sources from the internet can also be included. Considering that this research is a library study, the research paradigm is literary, employing an inductive-deductive thinking process.

All the data sources used in this research fall under the category of secondary data, as they are obtained and sourced from literature ⁸. These sources include written documents such as legislation, books, and other written materials related to the research focus. Since this research does not directly obtain data from legal subjects, the data sources are purely secondary, and there are no primary data sources.

⁵ Susanti, "Soerjono Soekanto, Pengantar Penelitian Hukum, Jakarta: UI Press, 1986, Hal. 3," *UIB Repository*, 2018.

⁶ Hasjim Abbas, *Metodologi Penelitian Hukum Islam* (Jombang: Universitas Darul 'Ulum, 2010).

⁷ Mestika Zed, "Metode Penelitian Kepustakaan - Mestika Zed - Google Buku," *Yayasan Pustaka Obor Indonesia*, 2014.

⁸ Soerjono Soekanto, *Pengantar Penelitian Hukum / Soerjono Soekanto / OPAC Perpustakaan Nasional RI.*, UI Press, 2012.

Secondary data sources are data that have been processed and organized by others, usually in the form of publications, including books, legal dictionaries, legal journals, and others. The function of secondary data is to provide the researcher with some "guidance" on which direction to take. Secondary data sources can be divided into three types: Primary Material, which is the most referenced or the main focus of the study, including: 1) Law No. 23 of 2004 on the Elimination of Domestic Violence. 2) Law No. 12 of 2022 on the Elimination of Sexual Violence. 3) The Criminal Code. 4) *Usulfiqh al Islami* by Wahbah Zuhaili. 5) *Al wajiz fi ushuli al-fiqh* by Wahbah Zuhaili. Then there are secondary data sources that serve as the second reference after the main sources, with lower authoritative value than primary legal sources, and Tertiary Material, which includes legal journals, dictionaries, and encyclopedias.

The primary and secondary legal materials will be analyzed using content analysis to organize and give meaning to the available data. The literature findings will then be connected to existing theoretical foundations. To analyze the collected data, a descriptive analytical method will be used, which means describing the entire theory of *Sadd Al-Žarīah* and the applicable laws in Indonesia.

B. Analysis of Law Article

The criminalization of sexual acts in Article 6 letter b of Law No. 12 of 2022 states that anyone who physically engages in sexual acts directed towards another person's body, sexual desires, and/or reproductive organs with the intention of exercising unlawful control over that person, whether within or outside of marriage, can be punishable by imprisonment for up to 12 years and/or a fine of up to IDR 300,000,000.

From this definition, it can be concluded that sexual acts carried out within or outside of marriage with the intention of coercing one's partner into becoming an object of their sexual desire are considered punishable actions. Furthermore, these actions must be carried out physically against the partner's body, sexual desires, and/or reproductive organs, and with the intention of exerting unlawful control over the partner.

The characteristic of marital rape itself is the presence of coercion and violence perpetrated by a spouse against their partner. This situation can occur due to a false assumption that, within marriage, a husband has the right to engage in sexual acts with his wife without her consent, or because the wife lacks the power to refuse her husband's requests. This leads to dangerous psychological effects on the victim, such as anxiety disorders, depression, and psychological trauma.

Therefore, marital rape is considered a punishable offense under positive law in Indonesia and has specific characteristics that can endanger the psychological well-being of the victim. Hence, there is a need for efforts to raise awareness among the

public about the importance of consent in sexual acts, as well as the enforcement of strict laws against sexual violence within marriage.

In the context of marriage, marital rape refers to sexual violence committed by a spouse against their partner (or vice versa) without their consent, either through physical force or by threatening violence. This can involve sexual coercion that harms the physical and psychological health of the victim.

In Article 473 paragraph (6), there is a specific provision stating that cases of rape committed within the institution of marriage will only be pursued legally if there is a complaint from the victim. This indicates that the law in Indonesia still considers sexual acts within marriage as a private family matter, which can have serious consequences for the long-term well-being of the victim.

In order to provide protection for victims of sexual violence, a holistic approach is needed, including the implementation of strict legal sanctions, broader education, as well as protection and support for victims to report the crime and access medical and psychological services.

C. Criminal Offense of Sexual Acts (Marital Rape)

In the above-mentioned articles, there are several elements that must be fulfilled to constitute the criminal offense of rape or unlawful sexual acts. Here is an analysis of these elements:

1. Law Number 12 of 2022 Article 6 letter b:

a. Sexual Act

The first element that must be fulfilled to constitute this criminal offense is the presence of a sexual act, which includes acts directed towards someone's body, sexual desires, and/or reproductive organs.

b. Specific Intention

The second element is the specific intention of the perpetrator, which is to exercise unlawful control over someone.

c. Physical Conduct

The third element is the presence of a physically performed act, indicating violence or the threat of violence against the victim.

d. Conduct within or outside of marriage

The fourth element is the commission of this criminal act either within or outside of marriage.

2. Law Number 1 of 2023 Article 473:

a. Violence or Threat of Violence

The first element in Article 473 paragraph (1) is the presence of violence or the threat of violence used by the perpetrator to force the victim to engage in sexual acts.

b. Consensual Intercourse Due to Misunderstanding

The second element in Article 473 paragraph (2) letter a is consensual intercourse with someone who has actually given consent, but the consent is not purely voluntary due to the marital relationship where the perpetrator is the lawful spouse.

c. Use of Genitalia or Other Body Parts

The third element in Article 473 paragraph (3) is the use of the perpetrator's genitalia or other body parts to force the victim to engage in sexual acts. This includes situations where the perpetrator inserts their genitalia into the victim's anus or mouth, inserts the victim's genitalia into their anus or mouth, or inserts other body parts or objects into the victim's genitalia or anus.

In both articles, the common element is the presence of violence or the threat of violence used by the perpetrator to force the victim to engage in sexual acts.

D. Criminal Threats in the Law on Punishment for Sexual Acts (Marital Rape)

Both laws regulate the punishment for sexual acts (marital rape), but with different approaches. In Law Number 12 of 2022 Article 6 letter b, criminal threats are imposed on perpetrators who engage in physical sexual acts directed at the body, sexual desires, and/or reproductive organs with the intention of unlawfully exerting control over someone. Meanwhile, in Law Number 1 of 2023 Article 473, criminal threats are imposed on perpetrators who force someone to have sexual intercourse through violence or the threat of violence.

In both laws, the prescribed criminal threat is relatively the same, which is a maximum prison sentence of 12 (twelve) years. However, Law Number 12 of 2022 Article 6 letter b also imposes an additional fine of up to Rp300,000,000.00 (three hundred million Indonesian rupiahs).

The provisions regarding the punishment for sexual acts (marital rape) in both laws are a progressive step in the effort to combat sexual violence in Indonesia. However, since these are new laws in a complex social condition in Indonesian society, continuous evaluation, improvement, and development of criminal law are necessary to establish a more effective legal framework.

E. Weaknesses and Strengths of Positive Law Regarding the Criminalization of Sexual Acts within the Family (Marital Rape)

1. Weaknesses of Applying Positive Law in Dealing with Marital Rape:

- a. Unclear Definition of Sexual Acts: Article 6 letter b of Law No. 12 of 2022 states that anyone who physically engages in sexual acts directed at the body, sexual desire, and/or reproductive organs with the intention of placing someone

- under their control unlawfully can be punished. However, the definition of sexual acts referred to is unclear and can lead to different interpretations.
- b. No Distinction between Marriage and Non-Marriage: Article 6 letter b of Law No. 12 of 2022 does not differentiate between rape within marriage and outside of marriage. However, marital rape has distinct characteristics and requires specific handling.
 - c. Limited Penalties: Article 6 letter b of Law No. 12 of 2022 stipulates a maximum prison sentence of 12 years and/or a maximum fine of Rp300,000,000. These penalties cannot be more severe unless there are additional offenses, raising the question of whether they are proportionate to the impact caused by marital rape.
 - d. Limited Definition of Rape: Article 473 of Law No. 1 of 2023 concerning the Criminal Code still uses a limited definition of rape (only covering sexual acts committed through violence or the threat of violence). This definition potentially overlooks many cases where the victim may not be physically forced but still feels coerced or commanded by their partner to engage in sexual acts.
 - e. Dependence on Victim Complaints: Article 473 paragraph (6) of Law No. 1 of 2023 states that prosecution is not carried out unless the victim files a complaint when the criminal offense is committed within the bond of marriage. This can make it difficult for victims to report rape cases involving their spouse due to discomfort or fear of taking legal action against them. As a result, such crimes may remain undisclosed and unpunished, especially in cases where the victim is reluctant or afraid to report the perpetrator for various reasons.
 - f. Social Stigma: There is a social stigma attached to victims who report marital rape cases because it is considered a taboo matter, especially when the perpetrator is a spouse. This can discourage victims from reporting rape cases out of fear of being judged by society or facing humiliation.
2. Advantages of Applying Positive Law in Dealing with Marital Rape:
- a. Providing Legal Protection: The application of positive law provides legal guarantees for victims of marital rape. It imposes criminal sanctions on the perpetrators, thereby strengthening protection for victims and promoting crime prevention.
 - b. Recognition of Marital Rape as a Crime: Article 6 letter b of Law No. 12 of 2022 acknowledges that rape within marriage is a criminal offense that must be punished. This recognition strengthens protection for victims and sends a clear signal that such actions are unacceptable.
 - c. Legal Actions That Can Be Taken: With Article 6 letter b of Law No. 12 of 2022, victims can take legal action against perpetrators of marital rape. This article provides legal certainty for victims and provides an opportunity to seek justice.

- d. **Prevention Efforts:** The application of positive law to address rape within marriage can serve as a prevention measure for perpetrators. With clear legal provisions, it is hoped that the incidence of marital rape can be reduced, and public awareness of criminal law can be increased. Article 473 of the Criminal Code imposes a maximum prison sentence of 12 years. If the criminal offense results in severe injury or death, the punishment can be increased by a certain percentage of the maximum penalty. This can act as a deterrent for potential offenders to refrain from committing such acts.
- e. **Possibility of Changes and Additional Articles:** Depending on legal dynamics, there is a possibility for improvements and legal developments to provide better protection for victims of sexual offenses within marriage.
- f. **Equal Legal Protection:** With the recognition of marital rape, wives who are victims can receive the same legal protection as other rape victims. This is important to demonstrate that sexual violence within marriage is a serious crime that is not acceptable in society and is punishable under the law.

F. Correlation of the Marital Rape Law with Other Laws

The substance of the law on the criminalization of sexual acts within marriage is to protect the rights of each spouse, making it a violation to force a partner unilaterally. Here are several laws related to the prohibition of coercion against partners in Indonesia, including some regulations related to Human Rights (HR) in the context of the prohibition of coercion:

1. **Law of the Republic of Indonesia Number 23 of 2004 concerning the Elimination of Domestic Violence:** This law regulates the protection of victims of domestic violence, including coercion against partners. It provides provisions regarding the cessation of violence, protection, assistance and recovery for victims, as well as legal actions that can be taken against perpetrators of violence.
2. **The 1945 Constitution of the Republic of Indonesia:** Indonesia's constitution guarantees human rights for all citizens. Articles related to coercion against partners and human rights include Article 28B, which guarantees the rights of every individual to life, freedom, dignity, and self-protection.
3. **Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights:** This law provides a legal basis for the protection and promotion of human rights in Indonesia. It regulates the general principles of human rights, the protection of human rights, and the establishment and duties of the National Commission on Human Rights (Komnas HAM).
4. **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):**
 - a. **Article 2:** Requires participating countries to take effective measures to stop discrimination against women.

- b. Article 16: Requires participating countries to take appropriate action to combat the practice of forced marriage and sexual coercion within marriage.
- 5. Universal Declaration of Human Rights (UDHR):
 - a. Article 3: States that everyone has the right to life, liberty, and security of person.
 - b. Article 5: States that no one shall be subjected to torture, cruel, inhuman, or degrading treatment.
- 6. Declaration on the Elimination of Violence Against Women (DEVAW): Recognizes the right of every woman to live free from all forms of violence, including coercion within the family.
- 7. Law of the Republic of Indonesia Number 13 of 2006 concerning Witness and Victim Protection: Regulates the protection of witnesses and victims of criminal acts, including victims of coercion and domestic violence.

G. Analysis of Sadd Al-Žariāh Regarding Marital Rape in the Study of Positive Law in Indonesia

The relationship within a family should not be viewed as a relationship between a master and a subordinate, but should be based on fairness in roles and functions, as well as a balance in rights and obligations. To achieve the essence of marriage, good cooperation, mutual understanding, and empathy between husband and wife are crucial. Roles should be carried out fairly and wisely, and each function should be well balanced. This is the concept of the husband-wife relationship within the family that is expected to create a physically and emotionally happy household.

Furthermore, it is important to note that if there are things that do not align with the purpose of a happy and blessed marriage, including the presence of coercion in sexual relations, such actions must be prevented and dealt with firmly. In Islam, the husband-wife relationship should be based on love, affection, and mercy, as well as mutual agreement and consent between the husband and wife. Coercion in sexual relations not only contradicts the principles of humanity but also violates religious teachings that emphasize justice, mutual respect, and the preservation of the honor and safety of the husband and wife. Therefore, in the context of the husband-wife relationship, it is important to create an environment that respects, supports, and avoids all forms of coercion or abuse that can damage the bond of marriage and disrupt the physical and psychological well-being of both parties.

According to scholars of *usul al-fiqh*, *Sadd Al-Žariāh* is to prevent any permissible (*mubah*) action that could lead to something prohibited. The term 'prohibited' here encompasses two things: harm (*mafsadah*) and negative consequences, dangers, or detrimental effects (*mudharrat*). Thus, *Sadd Al-Žariāh* is a method to prevent something from becoming a means or a cause of harm or to close the door to potential harm.

Wahbahaz-Zuhaili quotes the opinion of Imam asy-Syatibi in the book al-Wajîz, stating that the laws derived through the method of Sadd Al-Ẓarīah can be divided into four categories based on the anticipated consequences.

قَسَمَ الشَّاطِئِي الذَّرَائِعَ بِاعْتِبَارِ مَا لَهَا وَمَا يَتَرْتَّبُ عَلَيْهَا مِنْ ضَرَرٍ أَوْ مَفْسَدَةٍ إِلَى أَرْبَعَةِ أَنْوَاعٍ

*It means, "Imam Asy-Syatibi divides every means, considering the consequences that occur afterwards and what is caused by it, in terms of danger and harm, into four categories."*⁹

Firstly, every permissible (legal) action in Islamic jurisprudence (fiqh), but leads to definite harm or danger, is considered forbidden (haram). For example, digging a well behind a door in dark places. Generally, digging a well anywhere and anytime is permissible. Sharia does not prohibit it, neither explicitly through textual evidence nor implicitly through other indications. However, since such an action can cause harm (mafsadah) and danger (mudharat), and even potentially take lives of those passing by, scholars unanimously agree that such an act is forbidden (the prohibition arises from the potential consequences that may occur, not from the essence of digging the well itself).

Secondly, every permissible action that leads to harm or potential danger, but the potential danger arising from it rarely occurs, is considered permissible. For example, digging a well in an uncommon location that is not usually encountered by most people. In this case, Sharia permits it because if the location is already uncommonly encountered, it means the well digging is also rarely found. Consequently, there will be no one trapped by the existence of the well digging. This permission is based on the principle in Islamic jurisprudence that is established on prevailing customs, rather than considering its rare consequences. As stated by Sheikh Wahbah:

*Because Sharia positions the law according to prevailing customs and benefits that occur, not based on its rarity of occurrence."*¹⁰

The third is that any action that is predominantly inclined towards harm and danger, and is dominant based on the assumption that its impact is dangerous, is considered prohibited. For example, selling weapons to robbers, thieves, and others; or selling alcoholic beverages to drunkards and the like. In this realm, the prevailing assumption can be positioned as certainty due to the dominant prevailing practice. As conveyed by Sheikh Wahbah:

لَأَنَّ الظَّنَّ الْعَالِبَ يُلْحَقُ بِالْقَطْعِيِّ لِرُجْحَانِهِ وَلِمَا فِيهِ مِنَ التَّعَاوُنِ عَلَى الْإِثْمِ وَالْعُدْوَانِ

⁹ Wahbah A-Zuhaili, "Al-Wajîz Fi Ushûlil Fiqhi" (Bairut: Dârul Fikr, 2018).

¹⁰ A-Zuhaili.

*It means, "(This prohibition) is because the prevailing assumption has occupied a final position in the law, due to the dominance of harmful and damaging practices. It is also considered to assist in sinful deeds and enmity."*¹¹.

The third point is in line with the explanation of scholars in classical and contemporary fiqh books, stating that any behavior that is believed to lead to prohibition, or even if not fully believed but strongly suspected to lead to prohibition, is unanimously considered prohibited, as in the example above (This prohibition is due to the element of assisting in sinful acts).¹²

The fourth is that any action that has become dominant and leads to harm, or will result in flawed transactions, such as deferred (term) buying and selling, which often becomes a means for the practice of usury, even though in practical terms it may be a valid transaction, but on the other hand, it becomes a means for usury to occur. In this case, there are two opinions that can be followed (Maliki and Hanbali schools reject it, while the Shafi'i school permits it).

In conclusion, any action that can lead to harm, whether to life, intellect, or wealth, is not permissible. Likewise, any means that promotes goodness is permissible and may even be obligatory.

To make it easier, I will organize it in the form of the following materials:

Table 01 Classification of *Dzariah*

No	انواع الذرائع	الحكم		Example
	Types of Dzariah	Law		
1	ما يكون اداؤه الى المفسدة قطعاً	ممنوع وتعدّ يوجب الضمان	Prohibited and must bear the consequences.	Digging holes on frequently traversed roads in dark conditions.
	Something that is certain to lead to harm.			
2	ما يكون اداؤه الى المفسدة نادراً	مأذون فيه	Allowed/per mitted.	Digging a hole in a place rarely passed by people.
	Something with a small potential for causing damage.			

¹¹ A-Zuhaili.

¹² Abu Bakar Syatha Ad-Dimyathi, "Hâsiyyah I'ânatut Thâlibîn," in *Juz III* (Bairut: Dârul Fikr, 2005).

3	ما يكون اداؤه الى المفسدة كاثيرا لا ناذرا	ممنوع (لأن الظن الغالب يلحق بلقطع)	Prohibited (high possibility treated as certainty)	Selling weapons to robbers / selling wine to liquor makers
	Something that does not have the potential for harm (but widely practiced and contains harm)			
4	ان يكون اداؤه الى المفسدة كاثيرا, لا غالبا ولاناذرا	ممنوع في رأي المالكية والحنابلة, وصححها الشافع لانها ليست غالبة وان كانت كثيرة	Controversial (some prohibit and some permit)	Bai' ajal (a transaction designed to circumvent usury), another example is being alone with a non-mahram.
	Something with a high potential for harm			

Next, to analyze the essence of marital rape practices in society as things that have the potential for harm or not, thus categorized as actions (dzariah) that need to be closed/prohibited, in which in this context the Law plays a role as the closure, the author compiles a compilation related to the impact of marital rape from research and scientific publications.

Determining the certainty of an impact can be done by considering factors that influence the impact. Some parameters that can be used to determine the certainty of an impact are as follows:

1. Frequency of the impact: The more frequent the impact occurs, the more certain it is.
2. Level of impact intensity: The greater the impact, the more certain it is.
3. Consistency of the impact: An impact that is consistent with other factors in the same situation is more certain.
4. Probability of the impact: The higher the likelihood of the impact occurring, the more certain it is.
5. Duration of the impact: The longer the impact persists, the more certain it is.
6. Empirical evidence: Data and information that can serve as concrete evidence of the occurrence of the impact.
7. Consensus among experts: The more experts agree that the impact is certain to occur, the more certain it is.

By considering these parameters, the certainty of an impact can be analyzed and determined. This can also be related to the theory of *Sadd Al-Zārah*, where a certain harmful impact has a higher level of certainty compared to potential or rare harmful impacts.

There is strong evidence in the literature indicating that marital rape causes severe physical, sexual, reproductive, and psychological health consequences. As women are repeatedly violated by someone they trust, the consequences of marital rape on women's health are very serious. Furthermore, sexual violence is also found to be associated with stillbirth, pelvic inflammatory disease (PID), poor access for women to prenatal care, and suicide attempts by women ¹³.

Table 02. The impacts of marital rape

No	Research	Findings	Implications
1.	The National Commission on Violence against Women recorded 348,446 cases of violence against women in 2017. ¹⁴	24.3% have experienced physical and sexual violence	Increase in divorce cases.
2	1) Infrequent sexual frequency, 2) Violence or commonly known as "marital rape," 3) Sexual disorders, 4) Sexual dissatisfaction. ¹⁵	Poor husband-wife relationship is directly proportional to family disharmony	Lack of a harmonious family.
3	Survey of 105 women in adult psychiatric clinics at the National Institute of Mental Health and	Fifty-nine women (56%) reported a history of Intimate Partner Violence (IPV)	Seven individuals (14%) exceeded the threshold for PTSD, and twelve individuals (20%) exceeded

¹³ Nandini Agarwal, Salma M. Abdalla, and Gregory H. Cohen, "Marital Rape and Its Impact on the Mental Health of Women in India: A Systematic Review," *PLOS Global Public Health* 2, no. 6 (2022), <https://doi.org/10.1371/journal.pgph.0000601>.

¹⁴ Theresia Mutiara Galistya, "Kekerasan Terhadap Perempuan Dan Perceraian Dalam Perspektif Pemberdayaan Perempuan," *Jurnal Dinamika Sosial Budaya* 21, no. 1 (2020), <https://doi.org/10.26623/jdsb.v21i1.1500>.

¹⁵ Arisyia Arfianah, "Analisis Masalah Hubungan Seks Serta Dampaknya Terhadap Keharmonisan Dalam Rumah Tangga (Studi Kasus Di Media Massa Online)" (Malang: UIN Maulana Malik Ibrahim, 2022).

	Neurosciences in South India ¹⁶		the threshold for sub-threshold PTSD. PTSD (post-traumatic stress disorder) is a mental disorder that occurs after experiencing or witnessing a traumatic or highly unpleasant event.
4	Prospective observational study in a tertiary care hospital in Delhi, India, screening 400 women aged 20-28 weeks of pregnancy for IPV between December 2013 and April 2015 ¹⁷	49 (12.3%) women experienced IPV during pregnancy	Depression was diagnosed in 19 (46.3%) women affected by IPV.
5	Prevalence and predictors of suicidal ideation among 462 pregnant women in South India ¹⁸	The prevalence of suicidal ideation during pregnancy was 7.6% (35/462). Eleven women (2.4%) reported having a suicide plan, and 8 (1.7%) had attempted suicide during pregnancy	Younger age, middle socioeconomic status, perceived low support, domestic violence, depressive symptoms, and history of past suicidal ideation.
6	Survey of 828 women who reported experiencing sexual violence ¹⁹	from their spouses 41% of them had to be referred to crisis intervention departments (specialized mental	The psychological impact led to self-harm practices (46%), suicide attempts (28%), reproductive health

¹⁶ Prabha S. Chandra, Veena A. Satyanarayana, and Michael P. Carey, "Women Reporting Intimate Partner Violence in India: Associations with PTSD and Depressive Symptoms," *Archives of Women's Mental Health* 12, no. 4 (2009), <https://doi.org/10.1007/s00737-009-0065-6>.

¹⁷ Sandhya Jain et al., "A Hospital-Based Study of Intimate Partner Violence during Pregnancy," *International Journal of Gynecology and Obstetrics* 137, no. 1 (2017), <https://doi.org/10.1002/ijgo.12086>.

¹⁸ T. A. Supraja et al., "Suicidality in Early Pregnancy among Antepartum Mothers in Urban India," *Archives of Women's Mental Health* 19, no. 6 (2016), <https://doi.org/10.1007/s00737-016-0660-2>.

¹⁹ Padma Bhate Deosthali, Sangeeta Rege, and Sanjida Arora, "Women's Experiences of Marital Rape and Sexual Violence within Marriage in India: Evidence from Service Records," *Sexual and Reproductive Health Matters* 29, no. 2 (2022), <https://doi.org/10.1080/26410397.2022.2048455>.

		health departments) due to health complaints	complaints (25%), and 1% attempted murder.
7	Survey of 828 women who reported experiencing sexual violence from their spouses ²⁰	82% experienced physical injuries	Significant impacts include miscarriage, reproductive tract infections, and uterine prolapse at a rate of 22%.

From the provided analysis, it can be concluded that marital rape falls into the category of dzariah (potential harm) that should be avoided. According to the author's analysis, marital rape can be classified as a form of the third category of dzariah, where the potential harm, particularly in terms of psychological impact, is significant. Therefore, the legislation on criminalizing sexual acts within marriage, known as marital rape, can be justified from the perspective of the theory of sad dzariah, as it considers the well-being and harmony of the family.

However, it is worth noting that there are still differences of opinion regarding the categorization of marital rape. While some may permit it, others prohibit it. Despite these differences, the negative impacts of marital rape on the physical and mental health of the victims, as well as the damage it causes to the family, should not be disregarded. It is essential for spouses to respect and value each other's rights within the institution of marriage. In Islam, marriage is considered an agreement based on love and mutual respect. Therefore, acts of violence and coercion in marriage should be avoided and prohibited.

H. Conclusion

The study concludes that sexual acts within marriage, if conducted without valid consent from both parties, can be categorized as rape with criminal penalties. Several laws and regulations in Indonesia support the protection of victims; however, unfortunately, only the victims themselves can report such cases. The legislation concerning the criminalization of sexual acts within marriage, also known as Marital Rape, can be justified from the perspective of the Sadd Al-Žariah theory due to the harmful consequences it imposes. These consequences can manifest as certain, rare, and potential impacts on both parties involved as well as the families they create together.

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