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The Concept of Marital Rape: An Analysis of Article 473 of the Criminal Code

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Abstract

The notion of marital rape in Indonesia has experienced considerable evolution, particularly following its explicit regulation in Article 473 of the revised Criminal Code (KUHP). This article recognises that coercion of sexual intercourse within marriage may be classified as a criminal act of rape, contingent upon the victim's report. The phrase "marital rape" remains contentious in society, primarily due to its conflict with social, cultural, and religious frameworks that perceive sexual encounters within marriage as an unequivocal right and duty of spouses. The methodology employed in the formulation of this study is the normative juridical research approach. This research aims to analyse and elucidate the idea of marital rape as defined in Article 473 of the Criminal Code. The research findings suggest that, according to the analysis of criminal aetiologies and legal policy theories, internal factors such as the denial of sexual relations during urges and deficient moral values, alongside external factors like culture and environment, precipitate sexual violence within marriage. In legal practice, the complaint-based provision in Article 473, paragraph 6 of the Criminal Code, frequently obstructs victims' access to justice due to psychological coercion and societal stigma. The proposed ideal is the necessity for stringent regulations in the Criminal Code concerning sexual violence within marriage as a separate criminal offence. It stipulates that any individual in a marital relationship who coerces sexual relations through violence or threats of violence, while their partner has not met their obligations or is in a condition of fatigue or illness that presents a medical risk, should face punishment. Additionally, comprehensive clarifications regarding the parameters of fulfilling obligations and the conditions of medical risk are essential to ensure the legal protection of human rights and individual dignity within the household.

Keywords: The Concept of Rape, Criminal Acts of Sexual Violence, The Penal Code, Marriage

Introduction

Marriage is a sacred agreement between a man and a woman to form a happy family. That definition clarifies the understanding that marriage is an agreement. As an agreement, it implies the existence of free will between two parties who mutually promise each other, based on the principle of mutual consent. Thus, it is far from anything that can be interpreted as containing any coercion [1].

Marriage, according to Article 1 of Law Number 1 of 1974 concerning Marriage (Marriage Law), is defined as a spiritual and physical bond between a man and a woman as husband and wife with the aim of forming a happy and everlasting family (household) based on the belief in the Almighty God. Marriage is a contract that encompasses all aspects contained in the word 'nikah' and is a sacred ceremonial utterance [2].

The purpose of marriage is regulated in Article 1 and Article 3 of the Marriage Law, which emphasizes that marriage aims to form a happy family, create the welfare of husband and wife and children, ensure legitimate descendants, and uphold moral and social values. Therefore, ideally, there should be no elements in the marital relationship that undermine these purposes.

The purpose of this marriage is under the principles applicable in marriage law, namely, the principle of voluntariness, the principle of consent, the principle of free choice, the principle of partnership, the principle of permanence, and the principle of open monogamy [3]. By prioritizing the principles of marriage, the goals of marriage that can uphold the rights and obligations of husband and wife, as well as other family members, will be realized. One of the things that can potentially ruin the purpose of marriage is the occurrence of domestic violence. More specifically, regarding sexual violence, nowadays there are many divorce filings citing sexual violence, such as hypersexuality and coercion to engage in marital relations, which can escalate to

physical violence. One thing that draws the author's attention is the form of sexual violence in the form of marital rape. Rape is a crime that often occurs against women by threatening and forcing them with violence to engage in sexual intercourse with their victims, as stipulated in Article 285 of the Criminal Code.

The Law of the Republic of Indonesia Number 1 of 2023 on the Criminal Code Article 473 Paragraph (1) explains that anyone who uses violence or threats of violence to force someone to have sexual intercourse with them shall be punished with the crime of rape. Furthermore, in the same article, paragraph 6 explains that anyone who commits the crime as stated in paragraph 1 and it is done within the bonds of marriage may be punished with the crime of rape upon the complaint of the victim who is his wife [4]. There is a lot of opposition to this new provision, which arises because the general public holds the view that marital rape is an absurd concept.

However, this opposition largely stems from the public's misunderstanding of the substance of the law itself. On the other hand, the term "marital rape" refers to the act of sexual violence where partners bound by the marriage bond engage in sexual intercourse without the consent of one party. However, when the term "rape" is associated with marriage, societal views vary. Most of society considers that sexual relations between husband and wife are normal, even viewed as the wife's obligation to fulfill her husband's needs. Thus, society perceives that there is no sexual violence in the form of marital rape [5]. The impact of marital rape is not only physical but also psychological. Victims often experience deep trauma, anxiety, and insecurity towards their partners. This can significantly affect their mental and emotional health.

The issue of marital rape has previously been implicitly regulated in Law Number 23 of 2004 concerning the Elimination of Domestic Violence (UU-PKDRT). Article 5 letter C explains that it is prohibited to commit domestic violence against individuals within the household scope through sexual violence. This is further elaborated in Article 8 letters a and b of UU PKDRT No. 23 of 2004, which states that the meaning of Article 5 letter C includes coercing sexual relations with individuals residing within the household and coercing sexual relations with one of the household members and others for commercial or specific purposes [6]. which, however, in this Law remains ambiguous and there are no criminal provisions related to marital rape, leading to the enactment of criminal provisions in the Sexual Violence Crime Law (UU-TPKS) which was ratified on May 9, 2022. Specifically, in Article 4, Paragraph (2) of the Sexual Violence Crime Law (UU TPKS) letter (h), which states that sexual violence within the household falls under the category of sexual violence crimes [7].

Although the law on sexual violence in the form of marital rape has been enacted, there is still ongoing debate about the regulation. The rejection of this regulation is based on religious arguments from official religions in Indonesia, such as Christianity, which in the Bible states that the wife's body belongs to her husband and the husband's body belongs to his wife, and it is further mentioned that husbands and wives should not deprive each other of their marital rights. It is allowed for a temporary period as long as both parties have mutually agreed [8].

Especially in Islam, where marital relations are commonly practiced, there is even a paradigm that forbids wives from refusing marital relations when their husbands request them, justified by religious arguments such as the curse of angels on wives who refuse marital relations [9]. However, in Hinduism, Buddhism, and Confucianism, there are no explicit regulations regarding whether women can refuse their husband's invitation because these religions adhere to harmony and morality in life, so the husband-wife relationship is a form of respect from the husband to the wife and the wife to the husband. The harmony of the household and the fulfillment of the wife's rights are also the main foundations in running a marriage, just as a man must be a leader and his obligation to protect himself and his family from the fires of hell.

In the official religions of Indonesia, marital rape is not recognized because rape is an act of crime that involves coercion and violence to engage in sexual intercourse with someone outside the marriage bond, whereas in Islam, rape is classified as adultery committed by someone through violence, threats, or similar means. Rape in Islam must also meet several criteria, such as the absence of pleasure during the forced sexual intercourse [10]. Thus, rape in Indonesian criminal law and Islamic law differs and results in the adopted paradigm of legal dualism. Therefore, it is important to emphasize that the positive law in force in Indonesia is under religious norms so that the community understands and follows the country's regulations without the paradigm of legal dualism.

Based on the explanation above, the difference in understanding the concept of rape that occurs outside the bounds of marriage and rape that occurs within the bounds of marriage can be seen. Rape within the bounds of marriage is often based on or adopted as sexual violence that occurs within the household, with the victim and perpetrator being household members, namely husband and wife. Marital rape can also create a legal dualism that must be adhered to in society because religious communities in Indonesia do not recognize the term "rape within marriage." In some religions, only women or men can refuse sexual advances under certain circumstances. However, if it is still forced and leads to violence, this action can be classified as sexual violence within the household. The nature of rape in general is the coercion with violence against another person to have sexual intercourse with them without any binding agreement, whereas in marriage there is a contract that legitimizes or sanctifies the sexual relationship, even though it is not permitted to engage in sexual intercourse through violence. Therefore, the matters explained above will be studied and analyzed more deeply regarding the concept of marital rape as stated in Article 473 of the Criminal Code.

Research Method

The type of research used in this study is a juridical-normative legal research approach, where law is conceptualized as norms, rules, principles, or dogmas. The stage of juridical-normative research is conducted through a literature review. However, as needed, interviews can be conducted to complement the literature study. Included in the study/normative-juridical approach are, among others, legal history and comparative law, as well as legal philosophy [11]. This research approach uses a combination of regulatory and conceptual approaches to provide a comprehensive framework, in-depth analysis, and better understanding of the researched topic. The regulatory approach emphasizes the analysis of Law Number 1 of 2023

concerning the Criminal Code Article 473, which includes the applicability of marital rape. The conceptual approach aims to develop theoretical concepts relevant to the research topic, particularly related to marital rape. In this research, only secondary data is used, because generally in normative legal research, the data used is secondary data. The research data is organized systematically and sequentially, and then analyzed qualitatively.

Results and Discussions

Marital rape is a complex issue and often sparks debate, especially due to the traditional perception that sexual relations within the marriage bond are always based on automatic consent from both parties. However, in the ideal concept, marital rape must be understood as the act of forcing sexual relations without consent, where elements of coercion, threat, or violence remain the core issue, even if it occurs within the household. Recognition of the right of every individual, including wives, to refuse unwanted sexual relations becomes the main foundation in building this ideal concept, so that legal protection and respect for human dignity are maintained within the institution of marriage.

The Marriage Law is a legal provision that regulates marriage within the territory of the Unitary State of the Republic of Indonesia. Article 1 of the Marriage Law stipulates that marriage is a bond of body and soul between a man and a woman as husband and wife, to form a happy and eternal family or household based on the belief in the One and Only God. This definition emphasizes that marriage is not merely a formal legal relationship, but also encompasses inherent spiritual and emotional aspects. The purpose of marriage as regulated in this law is to create a harmonious, stable family based on religious values [12].

The rights and obligations of husband and wife are explicitly regulated in the Marriage Law, which stipulates that husband and wife have equal standing in the household and society. Both are obliged to love, respect, be faithful to, and help each other, both physically and emotionally. The husband is obligated to protect the wife and fulfill household needs according to his ability, while the wife is obligated to manage household affairs as best as she can. If one party fails to fulfill its obligations, the other party has the right to file a lawsuit in court. In addition, property acquired during the marriage becomes joint property, while inherited property, gifts, and legacies remain the rights of each party, unless otherwise stipulated in the marriage agreement.

The Marriage Law explicitly regulates the rights and obligations of husband and wife in managing the household. Article 30 of the Marriage Law stipulates that husband and wife bear the noble duty of establishing the household as the fundamental pillar of societal structure. Furthermore, Article 31 emphasizes that the position of husband and wife is equal in household life and social interactions, with the provision that the husband acts as the head of the family and the wife as the household manager. Both parties have the same rights to perform legal actions and are obliged to jointly establish a shared residence.

Article 33 of the Marriage Law requires husbands and wives to love, respect, be faithful to, and provide both material and emotional support to each other. The husband's obligations are specifically regulated in Article 34 paragraph (1), which states that the husband is obliged to provide protection to the wife and meet household needs according to his economic capacity. Conversely, the wife is obliged to manage household affairs as best as she can. If either party neglects their duties, both the husband and wife have the right to file a lawsuit in the competent court. The husband's duty is not limited to providing material and emotional support alone, but also includes protecting the wife and children from all forms of threats and violence, as well as guiding them in household life. Meanwhile, the wife's duties primarily include managing and organizing household affairs and maintaining the family's honor. Wives are also obliged to respect their husbands as the head of the family to achieve harmony in the household [13].

Rape is a criminal act that involves elements of coercion through violence or threats of violence or deceit to engage in sexual intercourse with another person or to commit other immoral acts such as inserting the genitals into the mouth or anus of another person or inserting body parts that are not genitalia into the genitals or anus of another person to obtain sexual satisfaction. Forcing means taking an action that makes someone do something against their free will, usually by using pressure, threats, or violence, so that the person has no choice but to comply. In the legal context, coercion refers to actions that violate a person's freedom to determine their own will. Coercion in the legal context is generally defined as an act that uses violence or the threat of violence, whether physical or psychological, causing someone to do something against their free will [14].

Meanwhile, violence is a term commonly translated from the foreign word "violence." Violence is a combination of the Latin word "*vis*," which means force or strength, and the word "*latus*," which comes from the word "*ferre*," meaning to carry force or strength. According to the Indonesian dictionary, violence is defined as a characteristic or thing that is harsh, forceful, coercive, or pressuring, a strong demand, hence violence means bringing force, coercion, or pressure. "Violence" that can be carried out in such a way that it results in physical or psychological turmoil is violence that is against the law; therefore, it is a crime [15].

Law Number 1 of 2023 on the Criminal Code Article 473 Paragraph 6 explains that if elements of coercion or violence are present in the act of intercourse between husband and wife, or more precisely in marriage, then this act is also categorized as rape. However, the use of the word "rape" in the context of sexual coercion within marriage has faced much opposition. Because essentially, according to the religions present in Indonesia, rape only occurs outside of marriage, as the narrow concept of marriage is a path that legitimizes sexual intercourse between a man and a woman. Therefore, it is important to understand what is permitted by the religions in Indonesia regarding sexual relations between husband and wife before we can criminalize the act of forcing sexual relations into a criminal act or offense with the terms rape or sexual violence within marriage [16].

Based on the marital bond, the cause of rape is when there is a refusal from the wife or husband to have sexual relations, provided that the husband or wife does not consider each other's condition. Next is the factor of one partner's fetish, which turns the sexual relationship into an act of violence disguised as legitimate intercourse. Consummation in marriage is a legitimate or permissible act of intercourse with religious boundaries that protect the rights of the husband and wife. This rape occurs when one partner crosses the line or violates the boundaries of when it is permissible and not permissible to engage in sexual intercourse.

Therefore, from the above explanation, we can see that rape outside of marriage and within marriage are different matters. The fulfillment of the elements of rape outside of marriage is very clear, namely coercion, violence, threats, and deceit. In marriage, this can only be realized if, during sexual intercourse, one of the spouses does not or has not fulfilled their obligations or is unable to engage in sexual intercourse, and if they are forced to do so, it can then contain that element. However, this is closer to sexual violence than to rape because rape is intercourse conducted without the right over another person's body, whereas sexual violence within marriage is a legitimate intercourse conducted by a husband or wife but violates the boundaries of each other's religious norms or human rights norms.

Conclusion

To conclude, marital rape is a complex issue that demands deep understanding because there is still a traditional perception that sexual relations within marriage are always based on automatic consent, whereas forcing sexual relations without consent remains a violation of human rights and dignity, even if it occurs within the household. Based on the analysis of criminal etiologies and criminal law policy theories, internal factors such as the rejection of sexual relations during sexual urges and weak moral values, as well as external factors like culture and environment, trigger the occurrence of sexual violence within marriage. Meanwhile, in legal practice, the complaint-based provision in Article 473, paragraph 6 of the Criminal Code often hinders victims' access to justice due to psychological pressure and social stigma. The ideal concept proposed is the need for strict regulation in the Criminal Code regarding sexual violence within marriage as a separate criminal offense, with the formulation that anyone in a marital bond who forces sexual relations through violence or threats of violence, while their partner has not fulfilled their obligations or is in a state of fatigue, or illness that poses a medical danger, must be punished, along with detailed explanations regarding the limits of fulfilling obligations and conditions of medical danger, so that the protection of human rights and individual dignity within the household can be legally guaranteed.

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