

The Legal Politics of Marital Rape under Law No. 12 of 2022: A Maqāsid al-Sharī'ah Perspective

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Abstract

This study examines the legal politics of marital rape regulation in Law Number 12 of 2022 on Sexual Violence Crimes (UU TPKS) through the lenses of Responsive Legal Theory and Maqāsid al-Sharī'ah. It explores the paradigm shift in Indonesian law that redefines marital rape from a private matter into a public legal concern aimed at protecting victims of sexual violence within marriage. Using a normative juridical method with legislative and conceptual approaches, the study analyzes the legal-political background, state orientation, and legislative process behind the formulation and ratification of the

law. The findings indicate that the inclusion of marital rape in the TPKS Law reflects a responsive legal character, emphasizing justice, victim protection, human rights recognition, and gender equality. However, significant challenges remain in its implementation, particularly regarding evidentiary issues and persistent cultural resistance. From the perspective of Maqāṣid al-Sharī'ah, the criminalization of marital rape aligns with the protection of dignity (ḥifẓ al-'ird), life (ḥifẓ al-nafs), and lineage (ḥifẓ al-nasl). The study concludes that integrating Responsive Legal Theory with Maqāṣid al-Sharī'ah provides a strong conceptual foundation for strengthening the legitimacy and effectiveness of marital rape regulation in Indonesia and advancing substantive justice within the national legal system.

Keywords: *Legal Politics ; Marital Rape; Maqāṣid al-Sharī'ah; UU TPKS (Law No. 12/2022); Marital Rape*

Introduction

Sexual violence in the household, especially rape within the bonds of marriage or also known as *marital Rape* is a complex and multi-dimensional legal problem. Although Law Number 12 of 2022, which was passed on May 9, 2022, concerning Criminal Acts of Sexual Violence, has attempted to provide a comprehensive legal framework, it still leaves gaps, especially regarding the regulation of rape within marriage or *marriage. Rape*. This issue, hidden behind domestic walls, is crucial given its implications for human rights, the dignity of victims, and the integrity of the institution of marriage itself. This phenomenon is further exacerbated by the existence of conservative interpretations of marriage law, which sometimes still consider a wife's refusal of sexual relations as a form of disobedience, not as a right to bodily autonomy.

The debate over the recognition and legal enforcement of *marital rape* in Indonesia reflects the dynamics between morality, patriarchal culture, and national legal reform. In the context of Indonesian positive law, this issue has become increasingly important following the enactment of Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence, which for the first time provides normative recognition of sexual violence within marriage. This change marks a paradigm shift in the national criminal and family law systems, which previously placed husband-wife relations in the private sphere, closed off from public legal intervention. However, this recognition has not yet fully transformed the social and legal constructs that place wives in a subordinate position.

Marital rape is a form of sexual violence, yet its existence is often overlooked by the Indonesian legal system and society. This term refers to the act of forced sexual intercourse by one party, usually a husband, against a wife, without their consent, even though both are legally and religiously married. Socially, in a patriarchal society like Indonesia, this phenomenon is often not

considered a crime but rather a “wife’s obligation,” reinforcing the unequal power relations within the household. ¹This issue reinforces the argument that power relations within the household remain unequal. This concept also demonstrates how social constructions restrict legal space for victims. As a result, victims often experience moral and social pressure. This is despite Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence already recognizing *marital rape* as a criminal act. ²The phenomenon of sexual violence that occurs in Indonesia, including sexual harassment against women, especially rape, is no longer seen as a mere problem between individuals, but is a social problem related to human rights issues, especially those related to protection from all forms of torture, violence, cruelty, and neglect of human dignity.³

Historically, *marital rape* began to be known in 17th century England through Sir Matthew Hale’s statement in *Historia Placitorum Coronae* (1736) “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 up herself in this kind unto her husband, which she cannot retract.” A husband cannot be found guilty of rape committed by himself against his lawful wife, because by their mutual matrimonial consent and contract, the wife has given herself to her husband in this respect, which cannot be withdrawn.” This doctrine rests on the concept of *marital unity*, where the wife’s identity is “merged” with her husband, as well as the view that the wife is the husband’s “property” so that rape is not a violation of the individual woman but rather against the property interests of men. According to Foucault, men have been formed into owners of ‘power’ who determine the direction of society’s ‘knowledge discourse’.⁵

Legally, Indonesian national law inherits a colonial legal system that positions the husband as the head of the family and the wife as the party

1 Hendrasari Brafely Mitchell Elieser Tumengkol, Yoan Barbara Runtunuwu and Rivan Rawung, “Tinjauan Yuridis Perkosaan Dalam Perkawinan (Marital Rape) Menurut Hukum Positif Indonesia Program Studi Ilmu Hukum , Universitas Negeri Manado , Indonesia Terhadap Perempuan (Komnas Perempuan), Yang Menunjukkan Bahwa Masih Banyak,” *Jurnal Pendidikan Dan Sosial Humaniora* Volume. 5, no. e-ISSN: 2962-4037; p-ISSN: 2962-4452 (2025): Hal. 160-177.

2 Dewi Bunga et al., “Praktik Pemaksaan Perkawinan Pasca Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual,” *Jurnal Aktual Justice* 8, no. 1 (2023): 47–62.

3 Cucu Solihah et al., “Marital Rape (Kekerasan Seksual Dalam Perkawinan) Perspektif Budaya Hukum Dan Undang-Undang Nomor 23 Tahun 2004 Tentang PKDRT,” *PALASTREN: Jurnal Studi Gender* 15, no. 1 (2022): 149, <https://doi.org/10.21043/palastren.v15i1.7167>.

4 Laleyna Weintraub Siegel, “The Marital Rape Exemption: Evolution to Extinction,” *Cleveland State Law Review* 43, no. 2 (1995): 351–78.

5 Foucault, Michel. (1997). *Sex and Power: A History of Sexuality*. Rahayu S. Hidayat (Translator). Jakarta: Gramedia Pustaka Utama, 83

obliged to submit to the husband's authority. ⁶This norm is legitimized by Article 105 of the Civil Code (BW) and Law Number 1 of 1974 concerning Marriage, specifically Article 31 paragraph 3, which regulates marital relations within a heteronormative and patriarchal framework. As a result, sexual violence within marriage has never been recognized as a violation of a woman's bodily rights, but rather is considered part of a wife's obligations. ⁷Before Law Number 12 of 2022 was passed, the national criminal law system did not recognize the term *marital rape* ⁸because sexual relations within marriage were considered the rights and obligations of husband and wife. This creates a gap between the principle of constitutional equality and discriminatory social practices against women. Meanwhile, the old Law on the Elimination of Domestic Violence No. 23 of 2004 concerning Domestic Violence defines sexual violence as forced sexual relations, committed against someone who is a husband or wife's partner, or someone who lives within the household. ⁹or against one person within the scope of his household with another person for commercial purposes and/or certain purposes.

Law, like water, tends to find its level surface. This level surface not only varies from society to society, but also varies within each society. ¹⁰From this, it can be understood that the development of national law demonstrates two main models for understanding the concept of *marital rape*: *First*, "Generally" includes *marital rape* in the general definition of rape by removing all exceptions for the husband, so that any sexual intercourse without consent, whether inside or outside of marriage, is punished as rape; *second*, "specifically" which does not call *marital rape* as rape but includes it as a form of sexual violence or domestic violence with a narrower special article. ¹¹

6 Sabri Samin, *Dinamika Hukum Perdata Islam Di Indonesia*, TrustMedia Publishing (Yogyakarta: TrustMedia Publishing, 2016).⁹¹

7 Solihah et al., "Marital Rape (Kekerasan Seksual Dalam Perkawinan) Perspektif Budaya Hukum Dan Undang-Undang Nomor 23 Tahun 2004 Tentang PK-DRT."

8 Marital rape is an act of violence or coercion carried out by a husband against his wife to engage in sexual activity without considering the wife's condition. See Marlia, 2007. Marital rape according to Elli N. Hasbianto as quoted by Milda Marlia is an act of forcing sexual relations or sexual desire without considering the wife's satisfaction. See Marlia, 2007.

9 Trachel Fragma Sari, Nani Mulyati, and Siska Elvandari, "Pengaturan Tindak Pidana Perkosaan Dalam Perkawinan Menurut Hukum Pidana Indonesia Dan Hukum Pidana Singapura" 2, no. Desember (2024): 37-46.

10 AE; Nirwono; Daniel S. Lev; Priyono, *Hukum Dan Politik Di Indonesia : Kesenambungan Dan Perubahan* (Jakarta: LP3ES, 2014).¹⁹⁷

11 Melanie and Vasanthi Venkatesh, "The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law," *Brooklyn Journal of International Law* 41, no. 1 (2015): 2015, <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1414&context=bjil>.

Psychologically, victims of *marital rape* experience the same or even more traumatic impacts than victims of rape by strangers, because the perpetrator is a loved and trusted person, and the violence occurs repeatedly in a space that should be safe. Commonly reported consequences include post-traumatic stress disorder (PTSD), depression, anxiety, chronic fear, guilt, loss of self-esteem, and impaired sexual functioning and intimate relationships, often accompanied by suicidal ideation and difficulty building trust¹². Systematic reviews of *marital rape* also found that women who experience a combination of physical and sexual violence by an intimate partner tend to have higher scores on depression and anger than victims of physical violence alone. Therefore, psychosocial interventions for victims of *marital rape* need to be specifically designed to take into account the complexities of betrayal, shame, and socio-cultural barriers they face.¹³

This situation highlights the urgency of thoroughly examining the legal politics behind the ratification of Law Number 12 of 2022 concerning the TPKS, particularly regarding *marital rape*, which often escapes the reach of criminal law intervention.¹⁴ The debate within legal politics regarding the regulation of *marital rape* in Law Number 12 of 2022 concerning the TPKS reflects the tension between efforts to protect human rights and traditional values that remain strong in society. Conservative groups oppose recognizing *marital rape* as a crime, arguing that it contradicts religious and moral norms, while progressive groups demand strong legal protections for victims.¹⁵ The lack of a specific mechanism governing how *marital rape cases are handled* in the criminal justice process is one contributing factor. Difficulty providing evidence is a significant barrier, as sexual violence within marriage typically occurs without witnesses, and victims often experience social pressure not to report it. Furthermore, law enforcement officials remain biased and consider domestic sexual violence an internal family matter that does not require

12 Anggy Rahman, "Analisis Perbandingan Hukum Positif Dan Hukum Islam Terhadap Marital Rape (Perkosaan Dalam Perkawinan)" (2023).

13 Raquel Bergen, "Marital Rape; New Research and Directions," *Applied Research Forum*, no. February (2006): 1-14, <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.216.3998>.

14 Teguh Dwi Cahyadi Azhar Fikri Izzuddin, "KRISIS PERNIKAHAN DI ERA DIGITAL: STUDI NETNOGRAFI TIKTOK TENTANG GENERASI Z DAN RELEVANSINYA TERHADAP HUKUM KELUARGA ISLAM" 5, no. 3 (2025): 858-68.

15 Rimayun Matippanna Aman Pratama, Gabryella, "DYNAMICS OF ARTICLE FORMULATION IN LAW Journal of Legal Restoration Aman Pratama, et al. Dynamics of Article Formulation ... Introduction The Law on Sexual Violence Crimes (UU TPKS) Has Traveled a Very Long Journey Since It Was First Created," 2022, 112 - 29.

legal intervention. ¹⁶Society still views marriage as ¹⁷granting the husband absolute rights over his wife's body ¹⁸, making consent for sexual intercourse unimportant. As a result, victims of domestic rape often struggle to obtain adequate recognition, support, and justice.¹⁹ On the other hand, the Indonesian legal system views marriage as a private sphere that cannot be disturbed by state intervention. ²⁰ This perspective creates a legal gap in protecting victims of domestic sexual violence. Prior to the enactment of Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence (TPKS), the handling of *domestic rape cases* relied heavily on judicial interpretation.

In the private sphere, stigma and public awareness significantly influence reporting tendencies. Most victims are reluctant to report due to fears of social stigma and economic risks, such as the loss of their husband's livelihood. ²¹Researchers' concerns continue to mount, suggesting that this family issue could become a government responsibility. The state, as the protector of its citizens, has provided detailed protections in several draft laws and regulations. As a manifestation of this concern, the state and several institutions are active in the field of women's protection.²²

The study of *marital rape*, or forced sexual intercourse within marriage, has attracted the attention of several legal researchers in Indonesia, although the direction of the discussion remains diverse. One study that highlights this issue is Nurmala's work, "*Marital Rape from the Perspective of Indonesian Criminal Law*," published in *the Yustisia Journal*. This research focuses on the

16 Bunga et al., "The Practice of Forced Marriage After Law Number 12 of 2022 Concerning Criminal Acts of Sexual Violence."

17 Noer Yasin, Musataklima Musataklima, and Ahmad Wahidi, "The Illegality of Interfaith Marriages in Relation to Supreme Court Circular Letter Number 2 of 2023 Concerning Rejection of Applications for Registration of Interfaith Marriages in Indonesia," *De Jure Legal Research Journal* 23, no. 4 (2023): 389–402.

18 Fina Al Mafaz, Abbas Arfan, and Fakhruddin Fakhruddin, "Marriage is a Fearful Trend in the Perspective of Islamic Law and Positive Law," *Multi-disciplinary Studies: Journal of Islamic Studies* 11, no. 2 (2024): 329–44.

19 RR Dewi, Marital Rape: A Study of Legal Protection for Domestic Rape Victims in Indonesia, *Jurnal Mimbar Hukum*, Vol. 31 Number 1, 2019, 46

20 Muhammad Anshary, *Marriage Law in Indonesia (Problems)*, 2022.

21 Mita Aulia Eva Manfaatin, *Revealing Sexual Violence in Higher Education: Initial Thoughts*, *Journal of Early Childhood Islamic Education*, vol. 01, 2024, <https://books.google.com/books?hl=en&lr=&id=EDqdEAAAQBAJ&oi=fnd&pg=PA3&dq=students'+understanding+of+sexual+violence&ots=dKUu9fOV0j&sig=HP4sd2x-OEmLqonKTB1k5e30CwLI>.

22 Musleh Harry, "Examining the Provision of Legal and Religious Education to Islamic Families to Protect the Rights and Welfare of Women and Children: Case Study in Malang Regency, East Java," *Samarah: Journal of Family Law and Islamic Law* 8, no. 3 (2024): 1526–46, <https://doi.org/10.22373/sjhgk.v8i3.19566>.

regulation of marital rape in the Criminal Code Number 1 of 2023. *Using* normative legal research methods, Nurmala found that Criminal Code Number 1 of 2023 does not recognize marital rape as a crime. This results in wives not receiving adequate legal protection when they become victims of sexual violence by their husbands. This research recommends a revision of Criminal Code Number 1 of 2023 and the development of special legislation. However, Nurmala's research does not analyze legal politics or the direction of national family law reform, so it remains normative-descriptive in nature.

Muhammad Zainuddin Sunarto (2024), Postgraduate Dissertation, UIN Maulana Malik Ibrahim Malang. Sunarto's research focuses on examining the philosophical basis of the TPKE Law in regulating (or not regulating) forced marriage as a criminal act. As well as using the analysis of maqāsid shari'ah (Dzari'ah) and grundnorm (normative basis of national law) as a critical perspective.²³ This research does have some similarities with Sunarto's dissertation, especially in the use of the Maqasid al-Shari'ah framework to analyze family-related issues. However, there are fundamental differences both in the conceptual approach and the orientation of the analysis. Sunarto's dissertation emphasizes the Sadd al-Dzari'ah approach, which refers to the principle of blocking ways that can cause harm or mafsadah. In this framework, the analysis is primarily oriented towards preventing potential negative impacts on the family institution. In other words, the main focus lies on the preventive approach. In contrast, this study adopts Jamaluddin Al-Athiyah's perspective within the Maqasid al-Shari'ah framework, which emphasizes the development and preservation of family welfare. This approach does not stop at preventing harm; but rather proactively seeks to identify and build conditions that enable the realization of "family prosperity." In Al-Athiyah's view, within the maqasid framework, the family is seen as an institution that must be maintained through protecting values such as harmonious relationships, justice in family roles, continuity between generations, as well as the psychological and social well-being of family members.

Methodologically, this study places the concept of Maslahah as the main analytical framework. While Sadd al-Dzari'ah's approach focuses on the logic of "avoiding harm," the maqasid-based approach used in this study operates on the logic of "realizing benefits." Thus, the analysis not only assesses whether a particular practice has the potential to cause mafsadah, but also examines the extent to which the practice contributes to the achievement of the family's maqasid goals as formulated by Al-Athiyah. Therefore, this study offers a distinct contribution by shifting the focus of analysis from merely preventing harm (a preventive approach) to actively building family welfare through a proactive approach oriented towards maslahah, as articu-

23 Nurmala, R. (2018). Marital rape from the perspective of Indonesian criminal law. *Jurnal Yustisia*, 7 (2), 145-160

lated in the thoughts of Jamaluddin Al-Athiyah.²⁴

Furthermore, Hidayat and Puspita's research in the article "*Sexual Violence in Marriage: Analysis of the Draft Law on the Elimination of Sexual Violence*" published in the *Journal of Law and Development* provides a significant contribution in analyzing the initial idea of regulating marital rape in the Sexual Violence Bill (RUU PKS) (prior to the enactment of Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence/UU TPKS). This research uses a normative-empirical approach, namely reviewing regulations while conducting interviews with legal practitioners. The results of the study indicate that the RUU PKS has begun to accommodate marital rape as a criminal offense, despite strong resistance from several community groups citing cultural and religious norms. However, the focus of this research is still limited to a normative-empirical description of the acceptance or rejection of the concept of marital rape, without further examining the direction of legal politics and its implications for national family law reform.²⁵ Meanwhile, Safitri stated in her research that marital rape is a form of discrimination against women and a violation of human rights. According to Safitri, Indonesia is obliged to align its national laws with international standards. This study has made a significant contribution in broadening the argumentative basis for recognizing marital rape, but remains limited to the normative human rights realm. It has not yet examined in detail how the legal politics of the TPKS Law play a role in driving the direction of family law reform.²⁶

The discussion of *marital rape* in this study will be linked by researchers to the context of legal politics, according to Moh Mahfud MD. Legal politics examines the official line (policy) regarding laws to be enforced, either by creating new laws or replacing old ones, to achieve state goals.²⁷ According to another opinion, legal policy is a policy taken (implemented) by the state (through its institutions or officials) to determine which laws need to be replaced or amended or which laws need to be maintained or laws regarding what needs to be regulated or issued so that with this policy the state and government can run well and orderly so that the state's goals (such as the welfare of the people) can be realized in a gradual and planned manner.²⁸

24 Nasaruddin Mera et al., "Child Custody Rights for Mothers of Different Religions: Maqāṣid Al-Sharī'ah Perspective on Islamic Family Law in Indonesia," *Samarah* 8, no. 3 (2024): 1644–68, <https://doi.org/10.22373/sjhk.v8i3.23809>.

25 Hidayat, A., & Puspita, R. (2020). Sexual violence in marriage: Analysis of the draft law on the elimination of sexual violence. *Journal of Law and Development*, 50 (3), 467–488.

26 Safitri, Y. (2021). Marital rape as a form of domestic violence: A human rights perspective. *Jurnal HAM*, 12 (2), 201–219.

27 Mahfud Md, *Legal Politics in Indonesia*, (Jakarta: PT Rajagrafind Persada, 2019), 15

28 Hotma Pardomuean, *LEGAL POLITICS* (Jakarta) (Krakatau Books,

The regulation of marital rape reflects the tension between religious values, social morality, and a commitment to modern constitutionalism. Article 28G paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution²⁹ affirm the right of every citizen to feel safe and free from torture or degrading treatment. Therefore, all forms of sexual violence, including those occurring within marriage, must be constitutionally protected by law.

In Moh. Mahfud MD's political theory of law, law is considered a political product, and is seen as never born in a vacuum, but rather as the result of the prevailing political configuration. Furthermore, law cannot be viewed merely as interpretative articles or *das sollen* requirements, but as a subsystem that in reality (*das sein*) is greatly influenced by politics, both in the formulation of its material and articles as well as in its implementation and enforcement.³⁰ MD Mahfud explained that legal policy is the state's fundamental policy in determining the direction, form, and content of laws to achieve specific goals. In the context of Law Number 12 of 2022 concerning the TPKS (Community Service for the Prosecutor's Office), the underlying legal policy is the state's efforts to respond to social, moral, and international pressure to uphold justice based on human rights.

At the operational level, these regulations still overlap with family law norms that place the husband as the head of the family.³¹ Article 31 paragraph 3 of Law Number 1 of 1974 concerning Marriage states, "The husband is the head of the family and the wife is the housewife." This tension raises a significant normative issue: how to balance the principle of gender equality and the religious values embraced by Indonesian society. *Marital rape* becomes a testing point for the legal side of victims and the extent to which national law can internalize international human rights principles, particularly the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which has been ratified through Law Number 7 of 1984.³²

2010). 91

29 Article 28G Paragraph 1 "Everyone has the right to protection of themselves, their families, their honor, their dignity, and their property under their control, and has the right to feel safe and protected from the threat of fear to do or not do something that is a human right." Article 28G Paragraph 2 "Everyone has the right to be free from torture and treatment that degrades human dignity and has the right to obtain political asylum from another country."

30 Mahfud Md, Legal Politics in Indonesia, (Jakarta: PT Rajagrafind) Persada, 2019), 10

31 Faidyah Nur Ainina, "The Concept of Rape in Marriage According to Indonesian Law, Thesis," Uin Malang Thesis (2024).

32 *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* is an international treaty adopted in 1979 by [the United Nations General Assembly](#). It is considered an international charter of women's rights. ^[1] The Convention entered into force on September 3, 1981, and has been [ratified](#) by 189 countries. See Christine C. Chen, Allen W. Heinemann, and Dennis L. Hart, "CE-

This issue also shows the tension between national law and religious law. Some classical fiqh views, for example, still reject the concept of *rape in marriage* because sexual relations are the husband's right.³³ However, contemporary fiqh approaches, such as the thinking of Jamaluddin Al Athiyah, have begun to revise this view by emphasizing the principle of *mu'asyarah* (good relations and mutual respect) as the basis of justice in marriage. Therefore, this research will also be examined from the perspective of *Maqoisid Syariah*, which leads to the principle of benefit. Jamaluddin Al Athiyyah developed *Maqoisid Syariah* with a strong emphasis on the humanitarian dimension, reducing the objectives of sharia to four main dimensions: individual, family, public space, and universal humanity, and expanding the objectives of sharia to be more detailed so that they can be operationalized in various areas of life, including³⁴ family law. This is in line with the Syatiba thought that Allah revealed sharia (legal rules) for no other reason than to take advantage of benefits and avoid harm (*jalbul mashalih wa dar'ul mafasid*).³⁵ The essence of the maqashid al-syari'ah lies in the public interest. This public interest, through the analysis of maqashid al-syari'ah, is not merely viewed in a technical sense, but rather in the dynamics and development of law, as something that embodies the philosophical values of the laws enacted by God for humanity.³⁶ Therefore, it is necessary to demonstrate the importance of national family law reform in regulating *marital rape* that can adapt to the spirit of gender justice without ignoring the socio-religious values of the Indonesian nation. This reformed legal policy must be directed at harmonizing family law³⁷ and criminal law within a comprehensive framework of victim protection.

This research will also be examined using Philippe Nonet and Philip Selznick's responsive legal theory, which explains the evolution of law into three types: repressive law, autonomous law, and responsive law.³⁸ Repres-

DAW," Archives of Physical Medicine and Rehabilitation, 2003.

33 Dewi Silva Sari, "A LEGAL STUDY OF RAPE IN MARRIAGE FROM THE PERSPECTIVE OF THE INDONESIAN NATIONAL LEGAL SYSTEM AND ISLAMIC LAW," *Indonesian Journal of Social Sciences* 3, no. 2 (2022): 238-53.

34 Jamaluddin Athiyyah, *Nahwa Tafil Maqashid Asy-Syariah* (Damas-cus: Dar al-Fikr, 2003).

35 Ash- Syathibi , *Al-Muawafaqat fi Ushul al-Ahkam*, Beirut: Dar al-Kutub al-Ilmiyyah, t.th. 7-8

36 M. S. A. Nasution, "Filsafat Hukum Islam Dan Maqashid Syari' Ah," 2021, 167-86.

37 Erfaniah Zuhriah, "Childfree, the Digital Era, and Islamic Law: The Views of Nahdlatul Ulama, Muhammadiyah, and Gender Activists in Malang, Indonesia Erfaniah," *Samarah: Journal of Family Law and Islamic Law* 7, no. 3 (2023): 1606-26, <https://doi.org/10.22373/sjhk.v7i3.17753>.

38 "Responsive Law": Choices in the Transition Period / Nonet, Philippe | Constitutional Court Library," accessed November 20, 2025, <https://simpus.mkri.id/opac/detail-opac?id=8873>.

sive law tends to be an instrument of power, autonomous law focuses on procedural certainty and separation from politics, while responsive law is oriented towards fulfilling social needs, participation, and substantive justice by positioning law as part of the cultural and moral dynamics of society.³⁹ From this perspective, the regulation of *marital rape* in Law Number 12 of 2022 concerning the TPKS can be seen as an indicator of a shift towards responsive law, where the state no longer only ensures household order but also seeks to respond to victims' demands, improve the structure of patriarchal power relations, and recognize wives' right to bodily autonomy in sexual relations.

Therefore, this study will not only examine the legal substance of the TPKS Law but also map the direction of national family law reform in regulating *marital rape* towards a more just and responsive legal system.⁴⁰ Within the framework of this study, the legal politics of *marital rape* are understood as a reflection of the dialectical process between constitutional values, social norms, and the state's legal ideology. Moh. Mahfud MD emphasized that legal politics should not be neutral, but must side with substantive justice and protection for vulnerable groups. In another note, Moh. Mahfud MD stated that every legal product is a reflection of the political configuration that gave birth to it, meaning that every legal product's content will be largely determined by the political vision of the dominant group (the rulers). Therefore, any effort to produce laws with a responsive/populist character must begin with democratization efforts in political life.⁴¹ Therefore, this study will examine the extent to which Law Number 12 of 2022 reflects a justice-oriented legal politics and how the direction of responsive and beneficial national family law reform can be formulated to eliminate this inequality.

Research methods

The researcher used normative legal research,⁴² which relies on written regulations and other legal materials. This research is also known as library research, as data collection focuses on library data and documents. Researchers use conceptual and statistical approaches, as well as comparative approaches. A conceptual approach is research that uses concepts related to

39 Philipe & Philipe Selznick Nonet, *Responsive Law*, ed. Raisun Mut-taqien, IV (Yogyakarta: Hikam Media Utama, 2019), <https://books.google.co.id/books?id=ZgNUEAAQBAJ&printsec=copyright&hl=id#v=onepage&q&f=false>.

40 Mustafa Lutfi, "Legal Politics of Implementing State Personnel Requirements in the Selection Process for Candidate Constitutional Judges Mustafa" (UII Yogyakarta, 2023).

41 Mahfud Md, *Legal Politics in Indonesia*, (Jakarta: PT Rajagrafind Persada, 2019), 368.

42 Soerjono Soekanto, *Introduction to Legal Research* (Jakarta: University of Indonesia (UI-Press), 2014), 43

legal issues.⁴³ Examining relevant legal concepts and doctrines. Specifically, Mahfud MD's political theory of law, Philippe Nonet and Philip Selznick's responsive legal theory, and Jamaluddin Athiyah's theory. Maqashid al-Shariah theory. Meanwhile, the legal approach, namely research on legal products,⁴⁴ Reviewing all laws and regulations related to the legal problems and issues being studied. ⁴⁵A comparative approach. In addition, in this case, the research was conducted in several countries such as Malaysia, Pakistan, Tunisia, and Egypt, specifically regarding the regulation of *marital rape*. The analysis process of normative legal research is different from empirical legal research. A significant difference from empirical legal research is that normative legal research examines whether the normative requirements of the legal norms being studied have been fulfilled according to their provisions. Furthermore, the analysis process does not use statistics because normative legal research is a pure legal study ⁴⁶. In this study, the researcher uses a qualitative normative legal method, namely by interpreting the processed legal material.⁴⁷

DISCUSSION

Legal Politics of the Formulation and Ratification of Marital Rape in Law Number 12 of 2022

Historically, *marital rape* began to be recognized in 17th-century England through Sir Matthew Hale's statement in *Historia Placitorum Coronae* (1736)⁴⁸ "A husband cannot be held guilty of the rape he himself committed against his lawful wife, because by their marital consent and agreement, the wife has given herself in this respect to her husband, which cannot be revoked." A husband cannot be held guilty of the rape he himself committed against his lawful wife, because by their marital consent and agreement, the wife has given herself to her husband in this respect, which cannot be revoked." This doctrine is based on the concept of *marital unity*, where the wife's identity is "fused" with her husband, as well as the view that the wife is the husband's

43 Peter Mahmud Marzuki, *Legal Researcher* (Jakarta: Prenadamedia Group, 2005).

44 Bambang Sunggono, *Legal Research Methods* (Jakarta: Rajawali Press, 2010), 41

45 Muhaimin, *Legal Research Methods* (Mataram: Mataram University Press, 2022), 56

46 Bahder Johan Nasution, *Legal Research Methods*, 1st ed. (Bandung: CV. Mandar Maju, 2008). 87

47 Muhaimin, *Legal Research Methods* (Mataram: Mataram University Press, 2020). 68

48 Siegel, "The Marital Rape Exemption: Evolution to Extinction."

“property” so that rape is not a violation of the individual woman but rather a violation of the male’s ownership interests. According to Foucault, men have been shaped into owners of ‘power’ who determine the direction of society’s ‘discourse of knowledge’.⁴⁹

In treasury jurisprudence *turāṣ*, discussion about violence sexual in House stairs (*marital rape*) not yet become the attention of the *fuqahā*. In fact, in study jurisprudence in the modern era problem This Still escape from the attention of thinkers and scholars Muslim. Referring to a number of existing literature, fiqh scholars more Lots emphasize discussion on aspects connection sexual (in term jurisprudence often called *jimā*, *waṭa*, or *altamattu*) as right husband who must filled his wife and at the same time obligation husband who must He cash it out.⁵⁰ The term marital rape became things that are not found in *lietarul fiqh*. In Arabic terminology found term *al- ightishab az-zauj* which means with do connection with force to spouse / wife. The term *marital rape* or *al- ightishab az-zauj* Lots popularized by contemporary scholars or scholars other Muslims in field science outside jurisprudence.⁵¹

In a way politically, the TPKS Law was born through a long process that begins from encouragement public civil and institutional independent since early – mid 2010s. Academic Draft of the PKS Bill (2017) in general explicit mention this bill as a “breakthrough” and effort improvement system law to accommodate victim experience.⁵² In the 2021–2022 phase, acceleration, Academic Draft of the TPKS Bill version Baleg (2021) becomes the basis for harmonization formation of a new bill (change nomenclature / approach from the PKS Bill). The Government send Surpres and DIM for discussion, which clarifies support executive and open formal acceleration path.⁵³ Discussion marathon at Baleg /Panja (March–April 2022) recorded in treatise meeting that shows exchange argumentation, position government, and dynamics fraction.⁵⁴

49 Foucault, Michel. (1997). *Sex and Power: A History of Sexuality*. Rahayu S. Hidayat (Translator). Jakarta: Gramedia Pustaka Utama, 83

50 Andy Litehua, “Marital Rape Dalam Perspektif Fikih Klasik,” *Jurnal Pro Justicia* 2, no. 2 (2022): 1–11.

51 Sheila Fakhria dan Rifqi Awati Zahara, “Membaca Marital Rape Dalam Hukum Keluarga Islam Dan Rancangan Undang-Undang Penghapusan Kekerasan Seksual (P-KS),” *Jurnal Ijtihad* 37, no. 2 (2021): 12.

52 Dewan Perwakilan Rakyat Indonesia, “Naskah Akademik Rancangan Undang-Undang Republik Indonesia Tentang Tindak Pidana Kekerasan Seksual Badan Legislasi,” 2021, 1–140.

53 https://news.detik.com/berita/d-5944935/surpres-dim-ruu-tpks-diteman-dpr-baleg-diizinkan-bahas-saat-reses?utm_source=chatgpt.com

54 Badan Legislasi Dewan Perwakilan Rakyat Republik Indonesia, “RISALAH BADAN LEGISLASI DPR RI - RAPAT PANJA PEMBAHASAN RUU TENTANG TPKS (31 Maret 2022),” 2022, 1–131, <https://www.dpr.go.id/dokakd/dokumen/BALEG-RJ-20220615-100833-1523.pdf>.

In the old Law Number 23 of 2004 concerning the Elimination of Domestic Violence,⁵⁵ its implementation still faces major challenges, especially in the areas of procedural law and evidence, where victims often have to face social stigma and complicated legal processes.⁵⁶ Therefore, a normative approach in this study is important to evaluate the effectiveness of existing laws and regulations and identify legal loopholes that still leave a gray area in the protection of *victims of domestic rape*, which indicates the need for more progressive legal harmonization.⁵⁷ The birth of Law Number 23 of 2004 is a significant legal reaction to the increasing cases of domestic violence, which previously tended to be limited in its handling if only relying on the old Criminal Code⁵⁸ and Law Number 23 of 2004. Under Law No. 23 of 2004 concerning Domestic Violence, the handling of *marital rape cases* relies on judicial interpretation, resulting in very weak legal consistency.⁵⁹ As an update, Law No. Law Number 12 of 2022 explicitly includes *marital rape* as a form of sexual violence, with a penalty of up to 12 years in prison and/or a fine of IDR. 300 million (Article 6 letter b). "Anyone who commits a physical sexual act directed against the body, sexual desire, and/or reproductive organs with the intention of placing someone under his/her unlawful control, whether within or outside of marriage, shall be subject to a maximum prison sentence of 12 (twelve) years and/or a maximum fine of Rp. 300,000,000 (three hundred million rupiah)." However, the enforcement of the law does not automatically guarantee access to justice. Its implementation still faces challenges, such as consensual evidence, social stigma, and the capacity of law enforcement.⁶⁰

Confirmation chapter about marital rape in Law no. 12 of 2022 in line with the values contained in The 1945 Constitution of the Republic of Indo-

55 Dahato Fontana Sinaga Sinaga and Maria Novita Apriyani, "Legal Protection for Women Victims of Rape in Arbitrary Marriages," *UNES Law Review* 6, no. 4 (2024): 10169–80.

56 Efren Nova and Edita Elda, "Legal Protection for Women from Sexual Violence," *Jurnal Keadilan Swara Unes* 7, no. 4 (2024): 1308–20, <https://doi.org/10.31933/ujsj.v7i4.444>.

57 Lailatul Qadriah, "Differences in judges' decisions regarding marital rape as a crime of sexual violence from the perspective of positive law and Islamic law," *Law Study Program, Faculty of Sharia and Law, UIN Syarif Hidayatullah Jakarta* (2023),

58 The enactment of Law Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as the National Criminal Code) has expanded the meaning of rape, as stated in Article 473 Paragraph (2) letter a, which recognizes that rape is not only committed by strangers or those who are not legally bound by a relationship, but also by those who are legally bound by marriage.

59 Sinaga and Apriyani, "Legal Protection for Victims of Marital Rape Crimes Against Women in Hidden Marriages."

60 Nova and Edita Elda, "Legal Protection for Women from Sexual Violence."

nesia (UUD 1945), particularly Article 28G and Article 28H which regulate right basic human rights (HAM). Article 28G paragraph (1) states that everyone has the right on protection self personal, family, honor, dignity, and property objects below state power. Furthermore, Article 28H paragraph (1) regulates that everyone has the right on prosperous life body and soul, located stay, and get environment a good and healthy life, and entitled get service health. In general specifically, Article 6 letter b criminalizes actions sexual physical directed at the body / desires sexual / reproductive organs with Meaning put someone below power perpetrator in a way oppose law, "both within both inside and outside marriage" ⁶¹From the phrase the functioning as clarification normative For close interpretation space that relation marriage can become base justification or *immunity* against coercion sexual. This is important Because the practice of "domestication" of violence sexual — placing violence as affairs private House stairs — often become obstacle structural for enforcement law. Thus, the formulation of Article 6(b) works as **affirmation** principle: *marital status No eliminate characteristic oppose law* when action sexual used as instrument coercive control or domination

In framework political Mahfud's law, choice explicit editorial like This is indicator that the country is direct policy law For **shift configuration** protection: from models that are tolerant of violence in realm private towards a model that places integrity the body and dignity of the victim as interest protected law in a way firm. ⁶² So that No Again will minimize domestic violence, but in practice, some communities still ignore the sexual dimension of domestic violence, ⁶³focusing only on visible physical violence. ⁶⁴From a social perspective, a patriarchal culture ⁶⁵that places men as heads of families

61 Undang-Undang Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual," *Kementerian Sekretariat Negara Republik Indonesia* 1, no. 69 (2022): 5–24, https://jdih.setkab.go.id/PUUdoc/176736/Salinan_UU_Nomor_12_Tahun_2022.pdf.

62 Moh Mahfud MD, *Politik Hukum Di Indonesia*, 8th ed. (Rajagrafindo Persada, 2018), <https://www.rajagrafindo.co.id/produk/politik-hukum-di-indonesia-mahfud-md/>.

63 Apri N U R Listiani, "Respons Hakim Di Lingkungan Peradilan Agama Terhadap Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual (Studi Di Pengadilan Agama Banyumas Dan Pengadilan Agama Purwokerto)." (2023).

64 Faidyah Nur Ainina, "The concept of rape in marriage according to Indonesian law, thesis."

65 Patriarchy is a form of family system that places great importance on the paternal line. In social, cultural, and religious systems, patriarchy is an ideology that states that men have a higher status than women, and women are considered men's property. Patriarchal culture places men in a dominant position and has the authority to make decisions. This is embedded in all societal systems, including in the social, cultural, educational, linguistic, political, economic, and legal fields, which

and holds the highest authority in the household is a major obstacle to the implementation of legal protection for victims of domestic rape ⁶⁶.

Regulation of Rape in Marriage from the Perspective of Responsive Legal Theory

Responsive Legal Theory, developed by Philippe Nonet and Philip Selznick in their work, *Law and Society in Transition* (1978), positions law as a social institution in constant transformation. In this view, law is not simply a collection of neutral and formal rules, but rather a tool influenced by social values, public morals, and societal needs. Responsive law is oriented toward substantive justice and the protection of vulnerable groups ⁶⁷. A fundamental characteristic of responsive law is that it must address real social problems, transcend legal formalism, and focus on their impact on victims and society. Law can no longer be relied upon as a tool for change and as a means of achieving substantive justice. Warning signs of this erosion of authority and the stagnation of substantive justice have become the focus of legal criticism.⁶⁸

Nonet and Selznick divide the development of legal systems into three phases. *First*, repressive law is law that functions as an instrument of power, is oppressive, and enforces compliance through coercion. *Second*, autonomous law is characterized by an emphasis on the rule of law, certainty, formal procedures, and the objectivity of legal officials. *Third*, responsive law, namely law that prioritizes social goals and moral values ⁶⁹and encourages public participation in its formation and implementation. This study uses this typology to examine whether Law No. 12 of 2022 has moved towards the characteristics of responsive law, particularly in regulating marital rape.

often makes women's position weak and discriminatory. See Mahkamah Agung Republik, *Pedoman Mengadili Perkara Perempuan Yang Berhadapan Dengan Hukum*, 1st ed., vol. 2 (Jakarta : Mahkamah Agung Republik Indonesia bekerja sama dengan Australia Indonesia Partnership for Justice 2, 2018).¹⁶

⁶⁶ Imam Mahdi, "Sexual Equality in the Perspective of the Qur'an: A Solution to Sexual Domination" (Master of Qur'an and Tafsir Study Program, Postgraduate Exegesis, PTIQ University, Jakarta, 2024).

⁶⁷ In discussing responsive law, Nonet & Selznick pay special attention to variables related to law, namely: the role of coercion in law, the relationship between law and politics, the state, moral order, the position of discretion, the role of objectives in legal decisions, participation, legitimacy, and conditions of compliance with the law.

⁶⁸ Philippe Nonet & Philip Selznick. *Responsive Law: Choices in Times of Transition*. Translator: Rafael Edy Bosco. (Jakarta: Ford Foundation-HuMa, 2003).

⁶⁹ M Aunul Hakim, "The Morality of Commercial Advertising Broadcast in Indonesian Television According to Islamic Economic Law Perspective," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 3 (2024), <https://doi.org/10.22373/sjkh.v8i3.19475>.

Nonet and Selznick argue that repressive, autonomous, and responsive law are not only different types of law but also, in some respects, stages of evolution in the relationship of law to the social and political order in society. They further refer to these stages of evolution as developmental models. To explain this evolutionary development, these stages can be based on key socio-political moments in a country's history, which provide a contextual framework.⁷⁰

By observing the three types of law that are the core of Nonet and Selznick's theory, it can be said from the perspective of the relationship between law and politics, that if politics takes over law or law is subject to politics, then it will dominantly give birth to a repressive type of law, which can be shown by the expression "the law is like a knife, sharp downwards blunt upwards" which means the law is cruel to ordinary people, but soft towards those in power, both political and financial. However, if the law is neutral from politics, then it will give birth to an autonomous type of law, especially characterized by "freedom of judicial power", and "court judges may not interfere with the power of political institutions and political activities", even the court may not test the law even if the law is unfair and unconstitutional. Finally, the responsive type of law, the act of harmonious interweaving between law and politics or "law and politics go hand in hand", meaning that politics must be based on legal legitimacy, and law must be strengthened by politics, this type of law is assumed to be born in a democratic political system; the ideal type of responsive law.⁷¹

Responsive law has several characteristics: (1) goal-oriented law, (2) paying attention to the moral values of society, (3) providing space for community participation, and (4) prioritizing substantive justice. The operational principles of responsive law include: Victim-centered policies, namely legal policies must place victims as the center of attention, both in substance, judicial processes, and recovery. Law as a means of social change, namely law must encourage improvements in social conditions and combat discrimination. Substantive justice above formalism, where the real impact on victims is more important than technical procedures. Benefits for society, namely law must aim to realize protection, welfare, and justice for the wider community.

The goal of Indonesian legal policy, as stated by Philippe Nonet and Philip Selznick in their book "Law and Society in Transition: Towards a Responsive Law," is to create a national law that is acceptable, open, democratic, autonomous, and responsive to the evolving aspirations and expectations of society, rather than an oppressive, orthodox, and reductionist legal system.⁷² Marital rape is an issue that embodies an imbalance of power, a patriarchal

⁷⁰ Armaya Azmi, *Politik Hukum Islam Pergumulan Politik Dalam Legislasi Hukum Islam Di Indonesia* (Medan, 2021).

⁷¹ I Dewa Gede Atmadja, *TEORI-TEORI HUKUM* (Malang: Setara Press, 2018).

⁷² Philippe Nonet and Philip Selznick, *Law and Society in Transition:*

cultural construct, and a deep stigma against victims. Therefore, its analysis cannot be conducted solely with a formal legal approach. Responsive Legal Theory provides a framework that allows for assessment of whether the law truly provides substantive protection for victims, as well as assessing the extent to which the law is able to change discriminatory social values. The gap between legal norms and social reality in the issue of marital rape demands a responsive approach so that the law truly fulfills its humanitarian function.

Law, like water, tends to find a level surface. This level surface varies not only from society to society, but also within each society. From ⁷³this, it can be understood that the development of national laws demonstrates two main models for understanding the concept of *marital rape*: *First*, "Generally" includes *marital rape* in the general definition of rape by removing all exceptions for husbands, so that any sexual intercourse without consent, whether inside or outside of marriage, is punished as rape; *second*, "specifically" which does not call *marital rape* as rape but includes it as a form of sexual violence or domestic violence with a narrower special article.⁷⁴

The use of this theory in normative legal research is carried out through the following analytical indicators: Assessing whether Law 12/2022 guarantees victim empowerment, including reporting mechanisms, assistance, and recovery; Assessing the legislative process of Law 12/2022, whether it involves civil society, survivors, women's organizations, and expert groups; Assessing the conformity of norms related to marital rape with the legal needs of society and international human rights principles; Assessing the possibility of implementation, whether law enforcement officers can work responsively to cases of marital rape. These indicators will be used to assess whether Law 12/2022 has fulfilled the principle of responsive law or is still trapped in the logic of autonomous or even repressive law.

The concept of Mu'asyarah bill Ma'ruf in Islamic family law refers to the obligation of husband and wife to treat each other well, fairly, and with dignity. This principle is not only normative and moral; it also has a substantive dimension because it demands the realization of just and equal relationships in family life. In this context, Mu'asyarah bill Ma'ruf can be understood as a religious foundation that aligns with Philippe Nonet and Philip Selznick's ideas on Substantive Justice within a Responsive Legal Framework.

In the theory put forward by Nonet and Selznick, substantive justice emphasizes that the law must not only enforce formal rules; it must also consider the values, social goals, and sense of justice actually experienced by

Towards Responsive Law (New York: Harper and Row, 1978) in Solikhul Hadi, *The Influence of Government Political Configuration on Legal Products*, 385.

⁷³ Daniel S. Lev; Priyono, *Hukum Dan Politik Di Indonesia : Kesenambungan Dan Perubahan*.197

⁷⁴ Melanie and Venkatesh, "The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law."

society. The principle of Mu'asyarah in the Ma'ruf bill has a similar character because it not only regulates behavior formally but also demands the realization of quality relationships based on mutual respect, justice, and the absence of detrimental treatment. Therefore, this concept functions as an ethical-religious norm that encourages the application of family law substantively, not just procedurally. Furthermore, the Mu'asyarah in the Ma'ruf bill provides a value framework that allows the law to respond to the social dynamics of family life. This principle emphasizes propriety, justice, and maslahah (the common good) in family relationships, thus opening up space for contextual legal interpretation. From this perspective, the values embedded in the Mu'asyarah in the Ma'ruf bill can serve as a normative foundation for implementing laws that are responsive to the need for justice in the family, especially in societies where religion serves as an important source of social ethics. In the Indonesian context, the effectiveness of responsive law cannot be separated from the religious character of society. Consequently, laws that are responsive to social needs often also need to align with the religious values prevalent within the community. Within this framework, it can be argued that a form of "responsive law" in Indonesia tends to be more effective when it also possesses a "religiously responsive" dimension—that is, a legal system capable of integrating socially recognized religious values into a substantive justice orientation.

Marital Rape from the perspective of Maqāsid al-syarī'ah

Maqā'id al-syarī'ah is the goal or purpose to be achieved from the establishment of sharia law. Ulama, especially al-Syā'ibī, formulated that the essence of maqā'id is to create benefits (ma'la'ah) and avoid losses (mafsadah).⁷⁵ This benefit is realized by maintaining the five main principles (al-kulliyāt al-khams), Hif' al-dīn (guarding religion), Hif' al-nafs (guarding the soul), Hif' al-aql (guarding reason), Hif' al-nasl (protecting offspring), and Hif' al-māl (guarding property).⁷⁶ Thus, maqashid sharia becomes a universal principle in realizing justice, freedom and prosperity in various aspects of life.⁷⁷

Jamaludin Athiyah is one of the maqashid sharia thinkers who discusses maqashid. Usrah. Jamaludin Athiyah was born on 12 May 1928 AD, coincid-

⁷⁵ Abdul Waid et al., "TEORI MAQASHID AL-SYARI'AH KONTEMPORER DALAM HUKUM ISLAM DAN RELEVANSINYA DENGAN PEMBANGUNAN" 04 (2020): 191-205.

⁷⁶ Universitas Ibrahimy Situbondo, "MAQASHID AL-SYARI'AH DAN KETAHANAN KELUARGA: MENJELAJAHI KONSEP WASAIL DALAM PEMIKIRAN JAMALUDDIN 'ATHIYYAH," *Journal of Islamic Thought and Philosophy (JITP)* 4, no. 1 (2025): 78-105.

⁷⁷ Asmuni. "Study of al-Maqasid Thought (Efforts to Find the Foundation of Dynamic Academic Ijtihad)". *Mawarid Journal*, Edition XIV, 2005.

ing with 12 Dzulqā'dah 1346 AH. During his educational journey, he studied undergraduate studies at the Faculty of Law, Fu'ad al-Awwal University and graduated in 1948 AD. Then he continued his studies in the takhassus program in the field of sharia. In his work, which is contained in his book *Nahw Taf'il Maqashid al-Syariah*⁷⁸ Maqāṣid al-Shari'ah is generally understood as the objectives of Islamic law established to achieve human well-being and prevent harm. These objectives are often grouped into five main safeguards (al-ḥifẓ al-khams), namely the protection of religion (ḥifẓ al-dīn), life (ḥifẓ al-nafs), reason (ḥifẓ al-'aql), honor/dignity (ḥifẓ al-'irdh), and offspring (ḥifẓ al-nasl). In the context of family law and sexual violence in marriage, the protection of life, honor, and offspring occupies a central position because it is directly related to bodily integrity, human dignity, and reproductive relations within the household.⁷⁹

Jamaluddin Athiyah is one of the contemporary Muslim scholars who emphasizes that maqāṣid does not only function as a theoretical concept, but must be used as an instrument of legal reform (tajdīd al-fiqh) in responding to modern social problems. Athiyah specifically develops the idea that the realization of maqāṣid is measured through the law's ability to maintain human safety, dignity and well-being in its context, not just based on literal adherence to the text.⁸⁰ Athiyah rejects the Islamic jurisprudential approach that justifies practices that degrade women in the name of domestic traditions. Instead, she asserts that maqāṣid is the ethical legitimacy to dismantle cultural structures and legal rules that normalize women's subordination if it causes harm (Athiyah, 2001). This view demonstrates the *human-centered nature of maqāṣid*, which places the physical and psychological safety of individuals as the highest priority in legislation.

The relevant Athiyah for analyzing the issue of marital rape can be summarized as follows: The consumption of maqāṣid must be assessed from its social impact, not just the legitimacy of its text., Protection of life (ḥifẓ al-nafs), dignity (ḥifẓ al-'irdh), and offspring (ḥifẓ al-nasl) must be prioritized in the formulation of family law., Maslahah should not be sacrificed for cultural norms or patriarchal structures if these norms result in harm and violence., The national law of a Muslim country can be a vehicle for realizing maqāṣid, so the state is obliged to realize the protection of human dignity in legislation.⁸¹ Thus, Athiyah thinking places maqāṣid as a normative basis for public

78 Jamaludin Athiyah, *Nahwa Taf'il Maqashid al-Shariah*, (Dar al-Fikr: Damascus, 2003), 142.

79 Ghazali, A.H. (1937). *Al-Mustafa min' ilm al-ushul*. Al-Maktabah al-Tijariyyah al-Kubra. (Original work, 11th century)

80 Athiyah, J. (2001). *Nahw taf'il maqasid al-shari'ah* [Towards activating maqasid al-shariah]. Dar al-Fikr.

81 Athiyah, J. (2001). *Nahw taf'il maqasid al-shari'ah* [Towards activating maqasid al-shariah]. Dar al-Fikr.

policy and positive law. In the context of this research, the Athiyah Maqā'id framework is used to assess whether national legal policies – particularly the criminalization of marital rape in Law No. 12 of 2022 – are in line with the objectives of sharia in building a safe and dignified family.

Highlighting the transformation from family practices during the Jahiliyah Era to Islamic family law norms demonstrates that, from its inception, Islam introduced a reform agenda that effectively limited the husband's absolute authority and elevated women's position within the family.⁸² Consequently, the development of modern legal frameworks aimed at protecting victims of violence can be understood as a continuation of the normative reform trajectory that began in the early period of Islamic civilization. During the Jahiliyah Era, family relations tended to be highly patriarchal, with the husband exercising dominant authority. Practices such as unilateral divorce without restrictions, unfair treatment of wives, and minimal protection for women indicate that the husband's "rights" were rarely limited by legal norms protecting the wife's interests. Early Islam introduced significant limitations on this authority. Through the principle of Mu'asyarah (the principle of the law in Ma'ruf), marital relations were no longer based on unilateral domination, but on the obligation of husband and wife to treat each other with kindness, justice, and dignity. Normatively, this principle asserts that power within the family must be governed by ethical standards and fairness. In other words, Islam not only preserved the existing family structure but also reformed social practices that disadvantaged women.

The book *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* by Jasser Auda explains that Islamic law should be understood through the framework of *maqāsid al-sharī'ah*, namely the fundamental objectives of the Sharia that aim to realize human welfare and justice. Auda proposes a systems approach that emphasizes interconnectedness, openness, multidimensionality, and purpose-oriented reasoning in interpreting Islamic law, so that legal rulings are not applied in a rigid textual manner but are understood holistically in accordance with justice, human rights, and social well-being.⁸³ This perspective shifts the classical understanding of *maqāsid* from merely protecting basic interests toward promoting human dignity and the fulfillment of fundamental rights. In the context of sexual violence within marriage, particularly marital rape, the *maqāsid* approach highlights that forced sexual relations contradict the objectives of Sharia because they violate

82 dkk Amania Fitriah, "Perlindungan Dan Hak Korban Kekerasan Dalam Rumah Tangga Perspektif Hukum Islam Dan Hukum Pidana," 2025.

83 Jasser Auda, "Maqasid Al-Shariah As Philosophy," *The International Institute of Islamic Thought*, 2008, 1-348.

the protection of life (*ḥifẓ al-nafs*), dignity and lineage (*ḥifẓ al-nasl*), and human honor. Therefore, within a maqāṣid-oriented framework that prioritizes justice and human welfare, marital rape cannot be normatively justified since it contradicts the fundamental purposes of Islamic law to safeguard human dignity, safety, and well-being.⁸⁴

Within the framework of Maqasid al-Shari'ah, these limitations aim to protect family welfare and human dignity. Protecting the life, honor, and well-being of family members is a fundamental goal that must be upheld by legal norms.⁸⁵ From the perspective of contemporary legal developments in Indonesia, this protective orientation finds resonance in modern regulations such as Law Number 12 of 2022 concerning Criminal Acts of Violence. This law strengthens the protection of victims of violence by emphasizing that social relationships, including within the family, must not become a space that legitimizes acts that demean human dignity. In this context, legal protection for victims can be interpreted as a continuation of early Islamic normative orientation, which limits the husband's authority and emphasizes the principle of fair and respectful treatment within the family.

Marital rape fundamentally contradicts the core purpose of the family in Islam as formulated in the Maqashid al-Usrah framework, namely the formation of a family based on Sakinah, Mawaddah, and Rahmah.⁸⁶ These three concepts represent a normative orientation that indicates that marital relations in Islam must be built on tranquility, compassion, and respect for the dignity of each partner. From the perspective of Maqashid al-Usrah, the family is formed to create inner peace (*sakinah*) for both partners. Sexual relations carried out through coercion actually cause fear, trauma, and insecurity for the person being forced. Such conditions not only eliminate the dimension of tranquility in the family but also damage the psychological foundation that is the main purpose of family formation in Islam.

The interpretation of Islamic family law is not singular; rather, it is shaped by varying social, political, cultural, and state policy contexts. In many cases, the relationship between husband and wife is still understood within a framework of patriarchal authority that often places women in subordinate positions, particularly in relation to bodily autonomy and sexual relations within marriage.⁸⁷ At the same time, there has been a growing development

84 Mazen Hashem, *Stages in the Development of the Discourse on Maqāṣid Al-Sharī'ah, Maqāṣid Al-Sharī'ah: A Civilizational Perspective*, 2023.

85 Mirwan, "Maqā Ṣ Id Al-Sharī ' Ah and Family Resilience : Exploring the Concept of Wasā ' Il in Jamaluddin ' aṭhiyyah ' S Thought," *Journal of Islamic Thought and Philosophy (JITP)* 4, no. 1 (2025): 78-105.

86 Mirwan.

87 "Family Law in Islam : Divorce, Marriage and Women in the Mus-

of family law reforms aimed at strengthening the protection of women's rights and reinterpreting the principle of justice within marital relationships. In this context, the phenomenon of marital rape can be understood as a form of violence arising from unequal power relations within the household, and the practice of forced sexual relations within marriage contradicts the principles of justice, mutuality, and the protection of human dignity that constitute the normative objectives of marriage in Islam. Therefore, reforms in Islamic family law in various countries are increasingly directed toward recognizing women's bodily autonomy and preventing sexual violence within marriage as part of broader efforts to uphold human rights and gender justice.⁸⁸

The concept of mawaddah emphasizes love and emotional attachment that grows through relationships characterized by mutual respect. Sexual coercion cannot produce a relationship based on love because it is based on domination and the imposition of one's will. Consequently, this practice contradicts the principle of reciprocity that is at the heart of mawaddah within the family.⁸⁹ Meanwhile, the principle of rahmah conveys the meaning of affection and concern for the well-being of the partner. Within this framework, the marital relationship should reflect empathy, protection, and respect for the physical and psychological well-being of the partner.⁹⁰ Forced sexual relations clearly contradict the value of rahmah because it disregards the safety, comfort, and dignity of the partner.

Furthermore, the principle of Mu'asyarah Ma'ruf, which is the basis of marital relations in Fiqh literature, emphasizes the obligation to treat one's spouse with kindness and dignity.⁹¹ Sexual relations within marriage are essentially intended to foster emotional and spiritual intimacy between partners, not to become a space that legitimizes coercion. Therefore, sexual relations that occur without the consent of the spouse contradict the principle of good and dignified treatment, which is an ethical standard in Islamic family law. From the perspective of

lim World : Free Download, Borrow, and Streaming : Internet Archive," accessed April 16, 2026, <https://archive.org/details/familylawinislam0000unse/page/n5/mode/2up>.

88 Hammudah 'Abd al 'Ati, "The Family Struture in Islam," n.d.

89 Masduki Masduki, B. Syafuri, and Ahmad Hidayat, "The Legal Challenge of Marital Rape: Bridging Islamic Law and Indonesia's Anti-Violence Statute," *KARSA Journal of Social and Islamic Culture* 33, no. 2 (2025): 536–62, <https://doi.org/10.19105/karsa.v33i2.21648>.

90 Rica regina Novianty, "IMPLEMENTASI KONSEP MAWADDAH WA RAHMAH DALAM KELUARGA ISLAM MODERN," *Andrew Law Juornal* 4, no. 1 (2025): 10–14.

91 Putri Kharidatun Nisa, "KONSEP MU'ASYARAH BIL MA'RUF DALAM RELASI SUAMI ISTRI" (2025).

Maqasid al-Shari'ah, such acts can also violate the protection of human dignity, bodily integrity, and the psychological well-being of family members.⁹² Thus, the practice of marital rape not only contradicts the ethical foundations of family relations in Islam but also hinders the realization of the goals of Sharia in building a harmonious and dignified family.

It is true that in classical formulations, Hifdz al-Nafs within the framework of Maqasid al-Shari'ah is often understood as the protection of human life in the physical sense, namely protecting a person from unlawful loss of life.⁹³ However, in the development of modern Islamic legal thought, the meaning of this protection is increasingly interpreted more broadly. It no longer refers only to biological survival but also includes the protection of human bodily integrity and mental health. Conceptually, the primary purpose of Hifdz al-Nafs is to preserve the existence and dignity of humans as creatures honored by God⁹⁴. Protection of life cannot be separated from the protection of the individual's physical and psychological conditions, as both are integral elements of a dignified human life. Therefore, actions that harm the body or cause serious psychological suffering can also be understood as violating the purpose of protecting life.

In the book *Women in Muslim Family Law* by John L. Esposito, the position of women in Islamic family law is discussed, particularly in relation to marriage, divorce, and family relations in Muslim societies. Esposito explains that the practice of family law is not derived solely from religious texts but is also influenced by scholars' interpretations, social traditions, and state policies that often shape patriarchal relational structures. In some contexts, the relationship between husband and wife is understood through obligations that place women in a less equal position, especially in sexual relations within marriage. However, Esposito emphasizes that the fundamental values of Islam actually promote justice, shared responsibility, and respect for women's dignity. From this perspective, the phenomenon of marital rape can be understood as a form of violence arising from unequal power relations within the household. Forced sexual relations within marriage contra-

92 Suja'i Syarifandi Lenny Guspidawati, Hidayatullah Ismail, "Tafsir Maqāshidī Atas Ayat-Ayat Keluarga Dan Relevansinya Bagi Problematika Rumah Tangga Muslim Indonesia," *Nusantara: Jurnal for Southeast Asian Islamic Studies* 21, no. 2 (2025): 178–90, <https://doi.org/10.24014/nusantara.v20i1.38526>.

93 Agus Hermanto, *MAQASHID AL-SYARI'AH Metode Ijtihad Dan Pembaruan Hukum Keluarga Islam*, vol. 2 (Malang: Literasi Nusantara Abadi, 2021).

94 Nurun Nida Waddiny and Anwar Hafidzi, "The Purpose of Islamic Law in the Context of Human Rights Protection in Indonesia : Study of Maqashid Al-Syari ' Ah," nd, <https://ojssulthan.com/makkah/article/view/749/448>.

dict the principles of justice, compassion, and the protection of human dignity that constitute the normative objectives of marriage in Islam. Therefore, reforms in Islamic family law are increasingly directed toward strengthening the protection of women's rights and preventing sexual violence within the household.⁹⁵

In the context of modern Islamic civilization, the maqasid approach increasingly emphasizes the holistic dimension of human well-being. Protection of life is no longer interpreted merely as preventing death, but also as protecting physical safety, mental health, and freedom from violence that degrades human dignity. In this sense, the concept of *Hifdz al-Nafs* can be understood as an effort to maintain human physical and mental integrity. This expanded interpretation is consistent with the methodological character of *Maqasid al-Shari'ah*, which is dynamic and oriented towards the realization of *maslahah* (human well-being). Contemporary maqasid scholars emphasize that the objectives of *Sharia* must be able to respond to modern social realities, including the increasing awareness of the importance of protecting mental health and bodily integrity in human life.

CONCLUSION

The legal politics in the formulation and enactment of the marital rape law in Law Number 12 of 2022 (the TPKS Law) are rooted in the philosophical foundation of the constitutional mandate to protect human dignity, the sociological increase in cases of sexual violence against women (2008–2019) and the stigmatization of victims, and the inadequacy of the Criminal Code and sectoral laws such as Domestic Violence which are limited in scope, resulting in a comprehensive prevention-action-recovery policy with specific pro-victim activities. The dynamics of its enactment reflect a discursive contestation between supporters of victims' rights and opponents who criticize it as "liberalization," but crystallized in the state's choice to be present in the domestic sphere to prevent sexual coercion in marriage as a violation of bodily autonomy. From the perspective of Responsive Legal Theory, the TPKS Law can be read as an effort to address real social needs through prevention, action, and recovery of victims, rather than simply increasing the criminal threat. However, a responsive approach still demands consistent implementation: law enforcement officials must interpret the norms in a pro-victim manner and ensure effective access to services and protection so that the objectives of the law are not limited to its text alone. From the perspective of *Maqashid al-Shariah*, the regulation of marital rape aligns with the objectives of protecting life (*hifz al-nafs*), honor/dignity, and offspring (*hifz al-nasl*) because it prevents physical and psychological harm as well as repro-

⁹⁵ "Women in Muslim Family Law : Esposito, John L : Free Download, Borrow, and Streaming : Internet Archive," accessed April 16, 2026, <https://archive.org/details/womeninmuslimfam0000espo/page/n1/mode/2up>.

ductive impacts that can arise from sexual coercion. Therefore, the criminalization and reparation mechanisms in the TPKS Law can be understood as a form of realizing benefits and preventing damage (daf' al-mafsadah) within the family institution.

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