

CRIMINALIZING MARITAL RAPE AS A HUMAN RIGHTS OBLIGATION UNDER INTERNATIONAL LAW: A CRITICAL APPRAISAL OF INDONESIA'S LEGAL FRAMEWORK

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ABSTRACT

Marital rape is a form of gender-based violence that is often hidden yet widely prevalent. This article critically examines the Indonesian legal framework in responding to the issue of marital rape, emphasizing the importance of criminalization as a state obligation to meet international human rights standards. Through a normative juridical approach and comparative legal analysis, this article examines the gap between national regulations and international provisions. It was found that despite normative progress, such as the recognition of sexual violence within marriage through national legal reforms. This paper recommends strengthening national criminal law norms through the explicit criminalization of marital rape and the harmonization of national regulations with international human rights standards as a form of the state's commitment to fulfilling its international obligations.

Keywords: marital rape; human rights; gender-based violence.

A. Introduction

Sexual violence is one of the most deeply rooted and difficult-to-reveal forms of gender-based violence, especially when it occurs within the household. In the context of violence against women, sexual violence often occurs within relationships deemed "legitimate" by society and the law, namely within the bonds of marriage. This phenomenon is known as "marital rape," which is a form of violence that often remains hidden behind cultural norms, the legality of marriage institutions, and the power imbalance between husband and wife.

The 2024 Annual Report (Catahu) of the National Commission on Violence Against Women reveals that violence against wives remains the highest reported form of violence in the personal realm, with a total of 5,950 cases received by Catahu partners and 672 cases received directly by the National Commission on Violence Against Women. When combined with violence against girls and violence by other personal relations, domestic violence accounts for 83.7% of all reports in the personal realm. In terms of the form of violence, sexual violence occupies a significant portion, namely 26.94% of the total reported

violence.¹

The high rate of violence against wives reflects the persistent gender inequality in households, rooted in a patriarchal construct that places women in subordinate positions.² This view positions women's bodies as part of the marriage contract, blurring the lines between legitimate intimate relationships and acts of sexual violence. In many cases, the right to bodily integrity of the wife is often overlooked due to the assumption that sexual relations within the marriage bond are the husband's absolute right and the wife's obligation, thereby blurring the lines between legitimate intimate relationships and acts of sexual violence. When this power relation is manipulated to force sexual intercourse without consent, a form of sexual violence known as marital rape occurs. However, culturally and even in law enforcement, this violence is still difficult to acknowledge and rarely reported.

As a result, women who are victims of sexual coercion by their partners often do not receive adequate legal protection. This condition reflects a tension between the traditional conceptions of civil and criminal law regarding the institution of marriage and the development of international human rights standards that place freedom from sexual violence as a fundamental right of every individual, including within the scope of private relationships.

The framework of International Human Rights Law, as regulated in various instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture (CAT), emphasizes that states have a legal obligation to prevent, criminalize, and punish all forms of gender-based sexual violence, including those occurring in domestic spaces. The CEDAW Committee in General Recommendation Number 19 and Number 35 explicitly states that marital rape is a form of discrimination and a violation of women's human rights. The failure of the state to criminalize and address marital rape is viewed as a violation of the principle of due diligence, which is the state's responsibility to prevent and respond to human rights violations committed by non-state actors as well.³

Indonesia, as a party to various international human rights instruments, has shown significant legal developments in regulating domestic sexual violence. The initial recognition of marital rape is reflected in Law Number 23 of 2004 concerning the Elimination of Domestic Violence (UU PKDRT), which was later expanded through Law Number 12 of 2022 concerning Sexual Violence Crimes (UU TPSK). Furthermore, Law Number 1 of

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- 1 Executive Summary "Organizing Data, Sharpening Direction: Reflections on Documentation and Trends in Violence Against Women Cases 2024" Annual Report on Violence Against Women 2024, March 7, 2025.
 - 2 Sonza Rahmanirwana Fushshilat and Nurliana Cipta Apsari "The Patriarchal Social System as the Root of Sexual Violence Against Women," Proceedings of Research & Community Service, Vol 7 No 1, p. 122
 - 3 Melanie Randall y Vasanthi Venkatesh, "El Derecho a Decir No: El Crimen de la Violación Conyugal, los Derechos Humanos de las Mujeres y el Derecho Internacional", Brooklyn Journal of International Law Vol 41 Issue 1, p. 155.

2023 concerning the Criminal Code (KUHP) also includes the coercion of sexual relations within marriage as one form of the crime of rape. However, even though there has been normative recognition, there are still fundamental weaknesses in its implementation. One of them is the classification of this crime as a complaint-based offense (*delik aduan*), as regulated in Article 473 paragraph (6) of the Criminal Code, which places the entire burden of legal initiation on the victim. In practice, this often becomes an obstacle because victims frequently face social pressure, economic dependency, and cultural stigma.

In the perspective of human rights, such provisions are deemed inconsistent with the principle of active protection by the state and can be considered a form of denial of Indonesia's international obligations. Therefore, the study of the gap between the national legal framework and international obligations becomes very important to assess the extent to which Indonesia has fulfilled its legal responsibilities in ensuring women's rights to protection from sexual violence, including within the scope of marriage.

This paper aims to conduct a critical evaluation of the Indonesian legal framework in criminalizing marital rape as part of fulfilling the state's obligations under international human rights law. With a normative juridical approach and comparative legal analysis from other countries, this study will examine the extent to which the harmonization of Indonesia's national law reflects commitment to international standards. Through this framework, this paper is expected to strengthen legal arguments for national law reform, encourage substantive protection for victims, and enrich the academic discourse on gender justice and state accountability in the private realm.

B. Research Method

This research is a normative legal study with a conceptual and comparative legal approach. The research is conducted by examining written legal norms at both the national and international levels.

The approaches used include:

- a. **Statutory Approach:** Examining relevant Indonesian legislation, namely Law Number 23 of 2004 concerning the Elimination of Domestic Violence (UU PKDRT), Law Number 12 of 2022 concerning Sexual Violence Crimes (UU TPSK), Law Number 1 of 2023 concerning the Criminal Code (KUHP).
- b. **International Legal Approach:** Reviewing international human rights instruments such as Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture (CAT),, as well as interpretative documents like General Recommendation No. 19 and No. 35 from the CEDAW Committee;

The legal sources used include the primary legal materials such as national legislation, international treaties, UN official documents and the secondary legal materials

such as scientific literature, legal journals, NGO human rights reports, and international jurisprudence.

The analysis is conducted normatively-critical, by assessing the substance and effectiveness of Indonesian legal regulations in ensuring the protection of marital rape victims' rights and evaluating their compliance with international obligations.

C. Discussions

1. The Concept of Marital Rape: Perspectives of Human Rights Law, International Law, and National Law

a. Definition and Concept of Marital Rape

Terminologically, the term rape comes from the Latin word *rapere*, which means "to take by force."⁴ In the history of law, this definition evolved into the act of forcing someone to engage in sexual intercourse through violence, threats of violence, or without consent. Marital rape is a form of sexual violence committed by one party in a marriage against their partner without consent, usually in the form of forced sexual intercourse.⁵ Marital rape is not a form of violence that occurs outside of legal institutions, but rather takes place within the domestic sphere, which is protected by civil law as a legitimate bond. Therefore, the legal and social complexity lies in the conflict between the protection of personal rights and bodily autonomy versus the protection of the institution of marriage as a social pillar.

In many legal traditions, especially those influenced by Common law, there is the doctrine of marital exemption which assumes that a wife has implicitly given sexual consent to her husband throughout the marriage. Rape is codified as a crime of possession. However, in marriage, the wife is considered the property of the husband, so in the case of rape of a wife (spousal exemption), it is excluded to protect men from their wives' claims.⁶ This doctrine was explicitly introduced by Sir Matthew Hale in the 17th century, who stated that "a husband cannot be guilty of rape upon his lawful wife".⁷ This idea also shaped the criminal justice system in many countries, including those with a civil law tradition, such as Indonesia, through the Dutch colonial legacy.

The issue of marital rape only gained serious attention during the Women's Movement of the 1970s, when feminists began pushing for legal system reforms. One of the key figures in this struggle is Laura X, who played a significant role in bringing attention to the

4 Corinne J. Saunders, *Rape and Ravishment in the Literature of Medieval England* (Boydell & Brewer 2001), P. 20.

5 Kersti Yllo, "Marital rape". *Battered Women's Justice Project*, 1996: p.3.

6 Jennifer McMahon-Howard "Criminalizing Spousal Rape: The Diffusion of Legal Reforms", *Sociological Perspectives*, Vol. 52, No. 4 (Winter 2009), p. 505.

7 Hale, M. (1736). *Historia placitorum coronae: The history of the pleas of the crown*. London: Gyles, Woodward, and Davis in Elaine K. Martin et al., "A Review of Marital Rape", *Aggression and Violent Behavior* · May 2007. P. 331.

murder case of Judy Hartwell⁸. The case became an important legal precedent because it opened the space for women to resist unwanted sexual contact from their husbands. Laura X also served as an advisor in the John Rideout⁹ case in 1978, which was the first time a husband was prosecuted for raping his own wife in the United States. Although the Rideout case did not succeed in criminalizing marital rape in the state of Oregon, Laura X managed to lead a campaign in California that ultimately resulted in the passage of a law criminalizing marital rape the following year.¹⁰

However, in the end, the development of modern law and the understanding of human rights have challenged and questioned the foundation of that doctrine. The main criticism of the marital exemption lies in the assumption that the bond of marriage abolishes the right to bodily integrity and individual consent. In the contemporary Human Rights paradigm, consent is an absolute requirement in every sexual activity, without exception in marital relationships. The absence of consent makes every sexual relationship a form of violence, regardless of the legal status between the perpetrator and the victim.

As a result of this shift in understanding, many countries are beginning to revise the definition of rape in their national laws to no longer exclude marital relationships. Marital rape is now increasingly recognized as a form of criminal offense and a serious human rights violation, on par with other forms of sexual violence.

b. Human Rights Perspective

From the Human Rights Perspective, marital rape is categorized as a form of gender-based violence that violates a number of non-derogable rights, including:

- a. The right to physical and mental integrity;¹¹
- b. The right to be free from torture and cruel, inhuman, or degrading treatment;¹²

8 Kasus Judy Hartwell, <https://aadl.org/node/201193>, accessed on 26 Juli 2025. The Judy Kay Hartwell case (1976) set an important precedent in recognizing women's right to refuse sexual violence in marriage. Hartwell was acquitted of murder charges after killing her husband, who was about to force her into sadistic sexual intercourse. Judge Victor Baum in this case affirmed that women have the right to resist sexual coercion by their husbands, even though at that time Michigan law still excluded marital rape as a crime. This case garnered national attention and marked the beginning of a shift in legal perspectives on the concept of irrevocable consent within the institution of marriage.

9 Whitney M. Woodworth, "Rape and Marriage: A look back at the Rideout case" *Statesman Journal*, <https://www.statesmanjournal.com/story/news/crime/2016/08/13/rape-and-marriage-look-back-rideout-case/88460204/>, accessed on 26 July 2025. The case of John Rideout became a historical milestone because in 1978, he became the first man in the United States to be tried for raping his own wife, following the abolition of the marital exemption defense by the Oregon legislature. Although Rideout was acquitted at the time, the case opened a legal discourse regarding the removal of a husband's immunity against charges of marital rape.

10 Elaine K. Martin et al., "A Review of Marital Rape", *Aggression and Violent Behavior* · May 2007. P. 331.

11 *CEDAW General Recommendation No. 19 (1992)*, paragraf 7 & 24(b) - *CEDAW General Recommendation No. 35 (2017)*, paragraf 10: "Gender-based violence against women impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, including the right to life and the right to physical and mental integrity."

12 The right to be free from torture and cruel, inhuman, or degrading treatment is guaranteed as a non-

- c. The right to protection from gender-based discrimination;¹³
- d. The right to privacy and a safe family life;¹⁴ and
- e. The right to equality before the law.¹⁵

Marital rape is viewed not only as a common criminal act but also as a violation of human rights, as it targets groups that are systematically vulnerable to subordination, namely women in domestic relationships. Various international human rights instruments affirm the obligation of states to prevent, protect, and provide redress to victims of gender-based violence, including marital rape. Some of them include:

1. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979).

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) constitutes the most comprehensive legally binding instrument addressing gender-based discrimination. While the text of the Convention does not expressly mention marital rape, the CEDAW Committee has clarified through its authoritative interpretative practice that violence against women, including domestic violence and marital rape, falls squarely within its ambit. General Recommendation No. 19 (1992) represented a turning point in international human rights jurisprudence, as the Committee recognised that gender-based violence constitutes a form of discrimination under Article 1 of the Convention. Paragraphs 6 and 7¹⁶ explicitly link violence against women—including marital rape—to the systemic subordination of women, noting that such violence impedes women's ability to enjoy rights and freedoms on an equal basis with men. Importantly, this interpretation

derogable right in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the Universal Declaration of Human Rights (UDHR), which states that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment. General Recommendation Number 35 explicitly states that marital rape can be categorized as a form of inhuman treatment that violates human rights standards.

- 13 Marital rape is also a form of gender-based discrimination, which is prohibited under Article 26 of the ICCPR, as well as Articles 1 and 2 of the CEDAW Convention, which obligate states to eliminate all forms of discrimination against women, including in private spaces. The CEDAW Committee also consistently emphasizes that gender-based violence is a form of discrimination that prevents women from enjoying their rights equally.
- 14 Article 17 International Covenant on Civil and Political Rights: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence..."; General Comment No. 16 (1988) – Human Rights Committee: Emphasizes that violations of sexual integrity within the household also constitute violations of the right to privacy; CEDAW General Recommendation Number: 35, paragraphs 9 and 17 State that domestic violence (including marital rape) threatens the security and privacy of women's family life.
- 15 The right to equality before the law is guaranteed in Article 26 of the ICCPR and Article 15 of the UDHR, as well as in Articles 2 and 15 of the CEDAW Convention, which obliges states to ensure that women have equal legal protection and the right to access justice for the violations they experience.
- 16 CEDAW General Recommendation No. 19 (1992) Paragraf 6: "Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. As such, it is a violation of the rights and fundamental freedoms of women and falls within the scope of Article 1 and Article 2 of the Convention."; Paragraf 7 ""Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. For example: ... (c) The right to personal security, and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

reframes domestic and sexual violence not merely as private wrongs but as violations engaging state responsibility under international law.

Building on this foundation, General Recommendation No. 35 (2017) strengthens and updates the Committee's position. It underscores that gender-based violence, including marital rape, may amount to torture or cruel, inhuman, or degrading treatment when it meets the threshold of severity (para. 17)¹⁷. The Recommendation also stresses the obligation of states to eliminate legal and cultural impunity, to enact legislative and policy measures, and to ensure accountability for both state and non-state actors, including intimate partners. Taken together, these authoritative interpretations transform CEDAW into a powerful instrument obligating states to criminalise and prevent marital rape as a form of gender-based discrimination and violence.

2. UN Declaration on the Elimination of Violence Against Women (DEVAW), 1993.

Although not legally binding, the UN Declaration on the Elimination of Violence Against Women (DEVAW) is widely regarded as a seminal *soft law* instrument that has shaped subsequent legal and policy frameworks on gender-based violence. The Declaration is particularly significant because it expressly addresses violence against women in both the public and private spheres, thereby dismantling the long-standing doctrine of the "private sphere" that historically shielded domestic violence and marital rape from state intervention.

Article 2(a) of DEVAW is unequivocal in its scope, defining violence against women to include physical, sexual, and psychological violence occurring within the family, such as battering, sexual abuse of female children, dowry-related violence, marital rape, and other harmful traditional practices. By explicitly naming marital rape, the Declaration symbolically and normatively recognises it as a form of violence against women requiring state action.

DEVAW also articulates a framework of state responsibility that extends beyond direct state action. It imposes upon states the duty to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons" (Article 4(c)). This articulation of the due diligence standard—later reinforced by treaty bodies and special procedures—cements the principle that states cannot avoid responsibility for marital rape by categorising it as a private matter. Rather, failure to enact criminal prohibitions, prosecute offenders, and protect victims amounts to a breach of international obligations under the Declaration's normative framework.

3. Yogyakarta Principles (2006)

Although originally developed as a set of principles to protect the rights of individuals of diverse sexual orientations and gender identities, the Yogyakarta Principles affirm more broadly that consent in sexual relations constitutes an absolute right of every individual.

17 CEDAW General Recommendation No. 35 (2017) Paragraph 17 "Violations of women's sexual and reproductive health and rights, such as ... rape, including marital rape, forced pregnancy ... constitute gender-based violence against women, and may amount to torture or cruel, inhuman or degrading treatment."

Principle 3 states that everyone has the right to bodily integrity and to be free from all forms of sexual violence. This necessarily implies that, even within the marital context, sexual intercourse without consent amounts to a violation of human rights.¹⁸

From the perspective of international law, the normative status of Yogyakarta Principles has been the subject of considerable scholarly debate. As the literature consistently recognises, the Yogyakarta Principles do not constitute a treaty adopted by states but rather a compilation drafted and adopted by a group of experts. They are therefore formally characterised as soft law, that is, non-binding standards which clarify and reaffirm the application of existing human rights law rather than create new legal rights or obligations.

The global dimension of the Yogyakarta Principles is also reflected in their drafting process. Twenty-nine experts from twenty-five countries across all regions participated, and the terminology adopted was carefully negotiated to avoid objections of cultural or regional bias. In this sense, while the Yogyakarta Principles cannot be regarded as formal sources of international law under Article 38 of the ICJ Statute, they are nonetheless recognised by courts and international bodies as persuasive authority that elucidates the scope of states' obligations under existing treaties such as the ICCPR and CEDAW.

Accordingly, in the specific context of marital rape, the Yogyakarta Principles serve a critical interpretative role. By reaffirming the absolute right to bodily integrity and the indispensability of consent, they reinforce the understanding that states are under a human rights obligation to criminalise and prevent sexual violence within marriage. Thus, the Yogyakarta Principles exemplify how non-binding instruments can operate as authoritative standards in the evolving practice of international human rights law.

4. Convention Against Torture (CAT) & International Covenant on Civil and Political Rights (ICCPR)

The prohibition of torture and cruel, inhuman, or degrading treatment enshrined in CAT and ICCPR provides an additional layer of protection that directly encompasses marital rape. Under Article 1 of the Convention Against Torture (CAT), torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted for purposes such as punishment, intimidation, or coercion, and where such suffering is inflicted by, or with the consent or acquiescence of, a public official. While marital rape is typically committed by private actors, international human rights jurisprudence has clarified that state acquiescence may be found where authorities fail to exercise due diligence to prevent, investigate, and punish such acts. In this sense, a state's failure to address marital rape effectively may itself amount to acquiescence, thus bringing it within the scope of CAT obligations.

Complementarily, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides that no one shall be subjected to torture or to cruel, inhuman, or degrading

18 Juliana Santos de Carvalho, "Doing legality as doing drag: the Yogyakarta Principles and the productive power of performing international law-making", *London Review of International Law*, 2024, 12, 155-180.

treatment or punishment. The Human Rights Committee, in General Comment No. 20, emphasises that this prohibition is non-derogable under Article 4(2) and extends to acts of sexual violence, whether perpetrated by state or non-state actors. The Committee has further elaborated that states are under an obligation to protect individuals against such ill-treatment, including when inflicted by private persons within the domestic sphere.

The combined effect of CAT and ICCPR jurisprudence establishes a robust *due diligence* framework: states must enact legislation, provide remedies, and ensure prosecution of marital rape as part of their obligation to prevent torture and inhuman treatment. Inaction or systemic failure to address such violence renders states internationally responsible. Accordingly, marital rape is not merely a matter of criminal law but engages the highest level of international human rights protection, reinforcing the imperative that states criminalise and eradicate it as part of their binding obligations under universal human rights instruments.

The principle of due diligence in international human rights law requires states to take all necessary and appropriate measures to prevent, investigate, punish, and provide redress for human rights violations committed by non-state actors¹⁹, including those occurring within the domestic sphere. This principle affirms that a state's human rights obligations are not limited to refraining from direct violations but also extend to exercising effective measures to address abuses perpetrated by private individuals. Over time, the concept has been elaborated into a due diligence framework that translates this normative obligation into concrete dimensions, commonly identified as prevention, protection, prosecution, and compensation, with some formulations also recognising the provision of services and support for victims as an additional component. Taken together, the principle and the framework jointly establish that marital rape cannot be dismissed as a private matter beyond state concern. On the contrary, a state's failure to criminalise and effectively respond to such violence amounts to a breach of its binding obligations under international human rights law.

c. Perspective of International Law: State Obligations

In the past, state responsibility in public international law was limited to their own actions or the actions of their agents. However, the development of international law later expanded these obligations through the principle of due diligence, which requires states to actively promote, protect, and fulfil human rights.²⁰ This means that the state is obliged to take reasonable steps to prevent human rights violations, including by formulating relevant

19 Zenny R. Dewantary, "States Responsibility to Eradicate Violence Against Women Through the Due Diligence Framework in Human Rights: A Review of Protection and Punishment in the case of Indonesia" Indonesian Journal of International Law, Volume 19 Number 4 Feminist Approach to International Law, p.570.

20 Zarizana Abdul Aziz & Janine Moussa, "Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women,". Due Diligence Proect, p.1.

regulations and policies, as well as prosecuting and punishing the perpetrators if violations occur. The principle of due diligence expands the accountability of the state not only for the actions of the state or its apparatus but also for human rights violations committed by non-state actors.

In the international human rights legal system, states have tiered obligations commonly referred to as the three main obligations: to respect, to protect, and to fulfil.²¹ The first obligation, to respect, requires the state not to directly violate human rights, whether by state institutions or their apparatus. This includes a prohibition against state officials committing discriminatory acts or violence against women, including cases of sexual violence occurring within the household. The second obligation, to protect, requires the state to prevent human rights violations by non-state actors, including husbands in marital relationships, through effective legal systems and policies. This is emphasized in General Recommendation Number 19 and Number 35 CEDAW, which state that the state is responsible for violations committed by individuals if the state fails to prevent and respond to them. The third obligation, to fulfil, requires the state to take affirmative steps to ensure the realization of human rights, through the formation of legislation, allocation of resources, provision of recovery services, and education of officials.

In international law, states are not only responsible for their direct actions but also for negligence in protecting human rights. This provision is regulated in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) by the International Law Commission. Article 1 states that any international act that violates international obligations gives rise to state responsibility. Meanwhile, Article 2 explains that acts or omissions attributable to the state and violating international obligations are grounds for claiming state responsibility, without the need to prove malicious intent or fault (absence of fault requirement).²²

In the context of marital rape, the state's failure to reform laws that still contain spousal exemptions for rape, provide gender-responsive justice mechanisms, and offer adequate protection services, constitutes a form of state omission attributed to the state. The ARSIWA article acknowledges that state negligence can be considered a wrongful act. Furthermore, ARSIWA asserts that state negligence can trigger the obligation to cease the violation (cessation) and provide guarantees of non-repetition (non-repetition), as well as the obligation to provide reparation to the victims²³. This means that a state that fails to

21 Eko Riyadi, *Human Rights Law*, Depok: Rajawali Press, 2018, p 69-71.

22 *Articles on Responsibility of States for Internationally Wrongful Acts*. Article 1: "Responsibility of a State for its internationally wrongful acts: Every internationally wrongful act of a State entails the international responsibility of that State." Article 2: "Elements of an internationally wrongful act of a State: There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

23 *Articles on Responsibility of States for Internationally Wrongful Acts* Article 30: "Cessation and non-repetition: The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

ensure legal protection for victims of marital rape can be held accountable in international forums, including the obligation to amend regulations, provide compensation, and ensure that the violation does not recur. In summary, ARSIWA provides a normative basis that a state's non-compliance with international obligations, whether through actions or omissions, can give rise to international responsibility.

In the issue of marital rape, a state that does not take the measures required by international human rights instruments such as CEDAW and ICCPR can be deemed to be committing an international violation. Therefore, the actions or negligence of the state become a critical aspect in the analysis of state accountability based on international human rights law.

d. National Legal Perspective: Transformation and Limitations

In Indonesian National Law, the recognition of marital rape still faces structural and normative limitations. The old Penal Code (*Wetboek Van Strafrecht*) does not recognize the term marital rape and defines rape in Article 285²⁴ only as the coercion of sexual relations against women who are not one's wife, a definition that explicitly excludes rape within marriage.

Normative progress in Indonesia is beginning to be seen with the recognition of the context of marital rape. Law Number 23 of 2004 on the Elimination of Domestic Violence (UUPKDRT) marks the initial recognition by the state of domestic violence as a criminal act. Although it does not explicitly mention the term marital rape. Article 1, paragraph 1 states that: "Domestic violence is any act against a person, especially women, that results in physical, sexual, psychological suffering, and/or neglect within the household." However, Article 5 mentions that "sexual violence" is also included in domestic violence.²⁵ Furthermore, it is explained again in Article 8 that "the coercion of sexual relations against a person residing within the household and/or the coercion of sexual relations by one party against the other..." constitutes sexual violence. Thus, the coercion of sexual relations by a husband against his wife is implicitly recognized as a form of violence, even though the terminology "marital rape" has not yet been explicitly used. Regarding this violence, the punishment imposed is also considered quite severe, namely a prison sentence of up to 12 (twelve) years or a fine of up to Rp. 36,000,000.00 (thirty-six million Rupiah).²⁶

24 Criminal Code (*Wetboek Van Strafrecht*), Article 285 "Whoever by violence or threat of violence forces a Woman to have sexual intercourse with him outside of marriage, shall be punished for committing rape with imprisonment for a maximum of twelve years."

25 Law Number 23 of 2004 on the Elimination of Domestic Violence Article 5: Everyone is prohibited from committing domestic violence against individuals within their household, in the following ways: a. physical violence; b. psychological violence; c. sexual violence; or d. neglect of the household.

26 Law Number 23 of 2004 on the Elimination of Domestic Violence Article 46: "Anyone who commits sexual violence as referred to in Article 8 letter a shall be punished with imprisonment for a maximum of 12 (twelve) years or a fine of up to Rp 36,000,000.00 (thirty-six million rupiah)."

Then in 2022, the Government enacted Law Number 12 of 2022 concerning Sexual Violence Crimes (Law on Sexual Violence Crimes). This law marks a significant leap in the legal approach to sexual violence because it prioritizes the principle of consent as an essential element in sexual relations. In Article 1, paragraph 1, the crime of sexual violence is defined as: "...any act that demeans, insults, attacks, and/or other acts against a person's body, sexual desire, and/or reproductive function, carried out with violence, threats of violence, coercion, abuse of power, or other means that violate human dignity..."

In the context of the household, Article 4 paragraph (2) explicitly acknowledges that sexual violence can occur within marital relationships. Sexual violence crimes can occur in personal relationships, including domestic relationships, work relationships, education, and others.²⁷ This law opens up space for victims of marital rape to obtain recognition and justice, especially with the principles of non-discrimination and victim recovery that underpin this legislation. The imposition of penalties for sexual violence both within and outside of marriage based on this regulation is imprisonment for 12 (twelve) years and/or a fine of up to Rp300,000,000.00 (three hundred million rupiah).²⁸

And lastly, through Law Number 1 of 2023 concerning the Criminal Code. This new Penal Code is a transformation of the old Penal Code and reaffirms the issue of marital rape. The new Penal Code removes the spousal exemption that has long been a legal obstacle in prosecuting marital rape. The clause in the regulation has emphasized that non-consensual sexual acts constitute a form of violence that threatens the physical and psychological integrity of the victim. In Part Three on Rape in Article 473, it is stated that "any person who, with violence or the threat of violence, forces someone to engage in sexual intercourse with them, shall be punished for rape with a prison sentence of up to twelve years."

Furthermore, in Article 474 paragraph (2), it is stated that the crime of rape, as referred to in paragraph (1), includes acts such as: a. sexual intercourse with someone with their consent, because the person believes that the other person is their legitimate spouse; b. sexual intercourse with a child; c. sexual intercourse with someone, knowing that the other person is unconscious or helpless; or d. sexual intercourse with a person with mental and/or intellectual disabilities by giving or promising money or goods, abusing the authority

27 Law Number 12 of 2022 on Sexual Violence Crimes, Article 4 (2) (2) In addition to Sexual Violence Crimes as referred to in paragraph (1), Sexual Violence Crimes also include: a. rape; b. indecent acts; c. sexual intercourse with a Child, indecent acts against a Child, and/or sexual exploitation of a Child; d. immoral acts against the will of the Victim; e. child pornography or pornography that explicitly contains violence and sexual exploitation; f. forced prostitution; g. human trafficking aimed at sexual exploitation; h. **sexual violence within the household**; i. money laundering crimes where the original crime is a Sexual Violence Crime; and j. other crimes explicitly stated as Sexual Violence Crimes as regulated in statutory provisions.

28 Law Number 12 of 2022 on Sexual Violence Crimes, Article 4 on criminal acts of physical sexual harassment: b. Every person who commits physical sexual acts directed at the body, sexual desires, and/or reproductive organs with the intent to place someone under their unlawful control, **whether within or outside of marriage**, shall be punished with imprisonment for a maximum of 12 (twelve) years and/or a fine of up to Rp300,000,000.00 (three hundred million rupiah).

arising from the relationship, or by deception to induce them to perform or allow sexual intercourse with them, knowing about the disability.

This clause asserts that marital rape is included as part of the broader definition of the crime of rape and no longer distinguishes based on the relationship status between the perpetrator and the victim. This means that the new Criminal Code abolishes legal immunity for perpetrators of forced sexual relations within marriage and normatively recognizes that rape remains rape, even if committed by a husband against his wife or vice versa.

Moreover, there is a heavier penalty if there are elements of physical violence or threats of violence as a prerequisite for punishment, namely 15 (fifteen) years in prison if it results in serious injury and an additional 1/3 (one-third) of the 12-year prison sentence if it results in someone's death.²⁹ However, it should be noted that Article 473 paragraph (6) stipulates that this crime is a complaint offense, which means that the legal process can only proceed based on the victim's report. This still raises criticism because it places the entire burden on the victim, who in many cases faces pressure and stigma not to report.

2. Evaluation of the Gap Between National Law and International Human Rights Law

The criminalization of marital rape is one of the important indicators of a country's seriousness in fulfilling its international human rights obligations, particularly in ensuring the right to freedom from torture, inhumane treatment, and the right to live safely and with dignity. In this context, Indonesia, as a party to various international treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture (CAT), has a positive obligation to ensure the protection of women from all forms of gender-based violence, including sexual violence in the domestic sphere, which has so far tended to be marginalized from formal legal attention.

The reform in the 2023 Criminal Code through Article 480, which states that rape can occur within marital relationships, should be appreciated as a progressive step in the national criminal law reform. With the provision that marital rape can now be prosecuted based on the victim's report, Indonesian criminal law has normatively recognized the existence of imbalanced power relations in marriage that can lead to sexual violence. However, if evaluated from the lens of international standards, the regulation still leaves several fundamental gaps that need to be critically addressed.

29 Article 473 paragraph (7): "If one of the Criminal Acts as referred to in paragraph (1) to paragraph (3) results in Serious Injury, the offender shall be sentenced to imprisonment for a maximum of 15 (fifteen) years." Article 473 paragraph (8): If one of the Crimes as referred to in paragraphs (1) to (3) results in the death of a person, the sentence may be increased by 1/3 (one-third) of the penalty as referred to in paragraph (1).

First, the provision that marital rape reports can only be processed if the victim reports it directly potentially creates structural barriers to accessing justice. In many cases of domestic violence, victims face emotional pressure, economic dependence, and social stigma that prevent them from reporting. In this regard, international standards emphasize the importance of proactive protection mechanisms that do not rely entirely on the victim's initiative. For example, General Recommendation No. 35 from CEDAW states that the state must create a legal system capable of reaching and protecting victims of gender-based violence, including by providing training to law enforcement officers to handle marital rape cases sensitively and effectively, even in conditions of minimal reporting.

Comparative experiences further demonstrate that victims' reports are not always necessary for prosecution. In Sweden, marital rape is treated as a public offence subject to ex officio prosecution, enabling law enforcement authorities to initiate proceedings once sufficient evidence is available, regardless of whether the victim files a complaint.³⁰ Similarly, in the United Kingdom, the landmark decision of *R v R* (1991) abolished the common law doctrine of irrevocable consent and affirmed that rape within marriage constitutes the same offence as rape outside of it. This development marked a fundamental shift in both legal doctrine and societal recognition of women's bodily autonomy, ensuring that marital rape is prosecuted under the same evidentiary and procedural standards as other sexual offences.³¹ Crucially, the removal of the marital exemption also aligned marital rape with the principle of public prosecution in English criminal law, allowing police and prosecutors to proceed on the basis of independent evidence rather than relying exclusively on a victim's complaint. These best practices illustrate that a complaint-driven model is neither necessary nor sufficient to secure accountability for sexual violence in the domestic sphere, and they reflect a proactive mechanism more consistent with international human rights obligations.

Second, the 2023 Criminal Code has not yet fully adopted victim-centered³² and

30 Amnesty International, International Secretariat, "Criminalization And Prosecution Of Rape In Sweden Submission To The Un Special Rapporteur On Violence Against Women, Its Causes And Consequences". <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR4224262020ENGLISH.pdf> accessed 24 September 2025

31 Melisa J. Anderson, "Lawful Wife, Unlawful Sex-Examining The Effect Of The Criminalization Of Marital Rape In England And The Republic Of Ireland" *Georgia Journal of International & Comparative Law* Vol. 27 No. 1 (1998).

32 United Nations, The Rights And Dignity Of Victims Of Sexual Exploitation And Abuse And Sexual Harassment, https://www.un.org/sites/un2.un.org/files/ovratrainingmodule_ppt_2-presentation_2.pdf accessed 26 July 2025. The victim-centered approach is a principle that places the rights, dignity, and safety of victims as the top priority in every effort to prevent and address sexual violence, including sexual harassment, regardless of who the alleged perpetrator may be. This approach prioritizes empathy, respect for the victim's wishes, and the provision of comprehensive, continuous services that are free from judgment or discrimination. In practice, this approach emphasizes the importance of creating a safe and supportive environment so that victims can share their experiences freely, confidently, and confidentially; receive clear information at every stage of the process; and be involved in decision-making that affects them, in order to restore their sense of control and personal dignity. This approach also ensures that victims are protected from stigma, discrimination, retaliation, and re-traumatization.

trauma-informed³³ care principles in handling marital rape cases. There is no emphasis on the importance of confidentiality, protection against intimidation from the perpetrator, or psychological and legal support for the victim. While the Witness and Victim Protection Agency (Lembaga Perlindungan Saksi dan Korban, LPSK) formally provides legal assistance and protection measures under Law Number 31 of 2014 concerning the Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims, in practice its role has been limited to cases that reach the stage of formal investigation and prosecution, and access to its services often requires a formal application process that many victims of domestic violence are reluctant or unable to undertake.

Third, another gap is evident in the aspect of law enforcement and the availability of victim support mechanisms. In Indonesia, although the Law on the Elimination of Domestic Violence (UU PKDRT) has been in place since 2004, the synergy between the Criminal Code, UU PKDRT, and women's protection agencies is still not solid. There is still no integrated system to detect, report, and follow up on marital rape cases across sectors between law enforcement, social institutions, and health services. The absence of such an integrated system is evident in a case documented in National Commission on Violence Against Women's 2023 Annual Report³⁴, where a woman reported repeated sexual coercion by her husband—including forced sexual acts during menstruation and in unsafe locations—yet her complaint was rejected by the police in Depok on jurisdictional grounds, as the acts also occurred in Bogor, leaving her without immediate legal recourse. Similarly, Komnas Perempuan recorded cases involving women from sexual minority groups who suffered sexual and psychological violence by their husbands, but whose reports were either dismissed or stalled at the investigation stage due to lack of coordination between law enforcement, social services, and victim protection agencies. These examples demonstrate how the absence of an integrated and coordinated mechanism continues to obstruct access to justice for survivors of marital rape in Indonesia.

On the other hand, the deeply rooted patriarchal culture in Indonesian society further widens the gap between legal norms and practice. Social norms that still view women's bodies as "property" of their husbands within marriage cause the criminalization of marital rape to not be readily accepted by law enforcement or the wider society. This leads to what the CEDAW Committee refers to as the "structural failure of the state to provide de facto protection for women." Therefore, although the Criminal Code has explicitly recognized marital rape, the implementation of this norm in reality is still far from sufficient to meet the protection standards mandated by international law.

33 Erika Putri Wulandari, "The Use of Trauma-Informed Care Perspective by Social Workers in Accompanying Adolescent Clients with Unintended Pregnancy." PEKSOS: Journal of Social Work Science Vol 21 No 1 June, 2022. p 129.

34 Executive Summary "Violence against Women in the Public and State Spheres: Lack of Protection and Redress" Annual Report on Violence Against Women 2022, March 7, 2023.

Furthermore, Indonesia has not fully implemented its commitments under previous CEDAW recommendations, which urged the government to explicitly eliminate legal discrimination against women in marriage and improve access to justice for victims of sexual violence. The implementation of laws that still relies on victim reporting without adequate support systems reflects the inconsistency between national instruments and international obligations of a *jus cogens* nature in the realm of human rights.

Overall, it can be concluded that although Indonesia has taken an important initial step in criminalizing marital rape through the 2023 Criminal Code, from the perspective of international law, Indonesia's national legal framework still faces various substantive and implementational gaps. Without further reforms that are victim-oriented, consent-based, and supported by a comprehensive and gender-based protection system, such normative recognition risks becoming mere legal symbolism. In this case, Indonesia is required not only to stop at the stage of legal recognition but also to move towards the genuine fulfillment of international obligations in ensuring women's right to be free from all forms of violence, including those occurring behind the walls of households.

D. Conclusion

The phenomenon of marital rape or spousal rape is a form of gender-based violence that is very hidden yet has a very damaging impact on women's basic rights. Although marital relationships are protected as a legal and social status, these relationships should not become a loophole for justifying sexual violence. In the context of international human rights law, the coercion of sexual relations within marriage is explicitly categorized as a violation of the principles of non-discrimination, bodily integrity, and protection from torture and inhumane treatment.

Indonesia as a party to various international human rights instruments, has made progress in recognizing and regulating the issue of marital rape normatively through the Domestic Violence Law, the Sexual Crimes Law, and the 2023 Penal Code. At the substantive level, the abolition of the spousal exemption doctrine and the inclusion of marital rape in the definition of criminal law indicate initial alignment with international principles. However, a critical evaluation of the norms and implementation shows that there are still significant gaps.

One of the main weaknesses is the classification of marital rape as a complaint-based offense, which places the entire burden of legal initiation on the victim. This approach is not in line with the principle of due diligence, which requires the state to be proactive in preventing and addressing human rights violations, including those committed by non-state actors in the private sphere. In addition, support systems for victims, including legal protection, psychological support, and safe and integrated reporting mechanisms, are still very limited. This situation is exacerbated by the deeply rooted patriarchal culture, which not only affects reporting by victims but also shapes biases in law enforcement by the

authorities. Thus, the existence of legal norms without structural and cultural reforms will not be sufficient to guarantee the protection of women's rights.

Therefore, as a form of commitment to international obligations and to ensure substantive justice, the following measures are necessary:

1. Revising the provisions of complaint-based offenses in marital rape cases, so that legal proceedings can begin without the requirement of a formal report from the victim, especially in conditions that threaten the safety and mental well-being of the victim.
2. Adopting a victim-centered and trauma-informed approach in handling cases, including training for law enforcement officers, medical personnel, and social workers.
3. Strengthening the synergy between the criminal justice system and social services such as shelters, counseling, legal aid, and healthcare to ensure holistic recovery for victims.
4. Conducting continuous public education, including the integration of gender equality materials into the curriculum and legal awareness campaigns, to challenge patriarchal norms that support impunity for domestic violence perpetrators.
5. Encouraging independent oversight and monitoring of the implementation of existing regulations, as well as involving NGOs and civil society in promoting legal and cultural changes.

Through these measures, Indonesia not only strengthens its legal position in the international arena but also builds a fair, equitable protection system that upholds the dignity of victims of sexual violence, including in the domestic sphere.

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