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# Indonesian Law Journal

## TOPIC OF THIS EDITION

“SEXUAL OFFENDING AND THE LAW”

Providing Legal Aid to Gen Z  
of Sexual Violence in Medan City  
in Access to Compliance  
and Justice (A Study at LBH Medan)

**Nabila Afifah Salwa, Fahrizal S. Siagian,  
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The Repression of Marital Rape  
in Malagasy Law: A Tension Between  
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**Andriamaharitra Paul Alberti**



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SEXUAL OFFENDING AND THE LAW



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The Indonesian Law Journal (ILJ) is proud to present Volume 18, Number 1, with the theme: **Sexual Offending and The Law** that gathers critical perspectives from scholars across Indonesia and beyond to examine these complexities through comparative, normative, and empirical lenses. Sexual violence continues to challenge not only the conscience of society but also the responsiveness of legal systems.

In ILJ Volume 18 No. 1 of 2025, 6 (six) writers with various backgrounds discuss this matter. Start with the first article, **“Providing Legal Aid to Gen Z of Sexual Violence in Medan City in Access to Compliance and Justice”** the authors explore how structural legal aid institutions such as LBH Medan play a vital role in strengthening access to justice for young victims of sexual violence. The study emphasizes the importance of legal awareness among Generation Z and the government’s obligation to ensure equality before the law through inclusive, well-supported legal aid mechanisms.

The theme of gender-based violence in the domestic sphere is further developed through several comparative and human rights analyses. **“Marital Rape and the Limits of Criminal Law: A Comparative Critique of Legal Gaps in Indonesia and Singapore”** and **“Criminalizing Marital Rape as a Human Rights Obligation under International Law: A Critical Appraisal of Indonesia’s Legal Framework”** both interrogate the persistence of legal and cultural barriers that hinder protection for victims within marriage. These works collectively argue that the criminalization of marital rape is not merely a matter of legal reform but a fundamental human rights obligation.

Complementing these perspectives, **“The Repression of Marital Rape in Malagasy Law: Between Legal Recognition and Social Denial”** extends the discussion to a comparative global context, showing how the tension between legal recognition and social acceptance of marital rape remains a universal struggle across legal systems.

Meanwhile, **“Regulation and Legal Protection of Sextortion as Electronic-Based Sexual Violence in Indonesia”** draws attention to the rapidly evolving forms of digital sexual crime. The article critiques the inadequacy of existing law enforcement approaches and emphasizes the need for consistent application of the Sexual Violence Crimes Act (UU TPKS) to safeguard victims in the digital realm.

As always, the Indonesian Law Journal remains committed to advancing legal scholarship and fostering dialogue on national, regional, and international issues. We extend our gratitude to the contributors, peer reviewers, and editorial team whose dedication has made this edition possible.

We invite our readers to engage with the thought-provoking analyses presented in this volume and contribute to the ongoing discourse on strengthening the rule of law in addressing global challenges.

***Editor of Indonesian Law Journal***

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## PROVIDING LEGAL AID TO GEN Z OF SEXUAL VIOLANCE IN MEDAN CITY IN ACCESS TO COMPLIANCE AND JUSTICE (A STUDY AT LBH MEDAN)

**Nabila Afifah Salwa<sup>1</sup>, Fahrizal S. Siagian<sup>2</sup>, Rosmalinda<sup>3</sup>,  
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### ABSTRACT

Legal aid plays a crucial role in ensuring equality before the law by providing access to justice for underprivileged individuals. This study focuses on the Gen Z community's concerns about their preparedness in handling legal issues, particularly in cases of sexual violence. Using a normative-empirical method, combining legal norms with empirical data, the research highlights the important function of Legal Aid Institutes in preventing the abuse of power and protecting clients' interests to achieve fair court decisions. LBH Medan offers structural legal aid to Gen Z in Medan city, aiming to foster structural transformation toward greater legal compliance and justice. The study recommends that the City Government support Legal Aid Institutions by providing assistance that ensures the independence and effective operation of legal aid programs, thus reinforcing access to justice and promoting fairness in the legal system.

**Keywords:** Compliance; Justice; Legal Aid; Sexual Violence.

### A. Introduction

Respect for human rights, including the rights of victims and suspects is often neglected in the Indonesian criminal legal system. In these situations, legal aid is needed to protect poor people from potential torture, inhumane treatment, and humiliation of human dignity by law enforcement officials.<sup>1</sup>

Women are commonly positioned as victims of sexual abuse. Spousal abuse and sexual assault are the two most common types of sexual violence. Victims overcome many challenges that complicate the situation. The factors consist of the victim's psychological condition, the victim's dependence on the perpetrator, lack of support from family and the

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1 Mara Ongku Hsb, "Ham Dan Kebebasan Berpendapat Dalam Uud 1945," *AL WASATH Jurnal Ilmu Hukum* 2, no. 1 (2021): 29–40, <https://doi.org/10.47776/ALWASATH.V2I1.135>.

surrounding environment, stigma given by the community (patriarchy), bias of the authorities (for example, the victim is considered guilty or complicit), and even the inability of the state to provide protection to victims through the legal system and social systems that support the perpetuation of violence.

In these conditions, the government must take great responsibility for the welfare of the community to achieve equality in treatment before the law, without discrimination (equality before the law), so that in the context of human rights the government has a very important role.<sup>2</sup> Therefore, the government needs to protect, respect and fulfil the rights of the people as rights holders. Legal aid has an important position in every criminal justice system, and Indonesia is no exception. Legal Aid is therefore a practical necessity in the judicial process that can contribute to achieving 'due process of law'.<sup>3</sup>

Due process of law should be interpreted as the protection of the liberty of a citizen who is a suspect or accused.<sup>4</sup> In situations where his or her legal status changes after being arrested or detained, his or her rights as a citizen should not be deprived. The right to a fair hearing, to be accompanied by an advocate (legal counsel), to present a defence, to collect evidence and meet with witnesses, and to be tried by a fair, honest and impartial court, are rights that must be respected and guaranteed. His guilt must be proven through a fair trial.

The purpose of legal aid programmes provided to poor or illiterate individuals is to ensure equal access to justice. One form of legal aid is to provide defence or assistance from an advocate from the investigation stage until the trial in court. The provision of legal aid by advocates to protect the rights of individuals, especially for suspects or defendants, is a basic right that must be fulfilled by society. When such rights are not fulfilled, this can be considered as discrimination against their basic rights, as discrimination is against the principle of justice stated in the 1945 Constitution.

Often, the judiciary, which is supposed to act as the last bastion of justice, is unable to deliver the justice that is expected. This leads to a lack of respect and trust for the judiciary, so people tend to avoid taking their legal issues to court. When citizens seeking justice face obstacles due to complicated, unclear and vague procedures, this indicates that the state has separated the primary rule from the secondary rule. As a result, justice will not be achieved because the bureaucracy in the initial stage has become a barrier.<sup>5</sup>

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2 Arios Valentino Taghupia et al., "Problematika Praperadilan Dalam Rangka Pemenuhan Hak-Hak Tersangka," *PAMALI: Pattimura Magister Law Review* 2, no. 2 (2022): 96, <https://doi.org/10.47268/pamali.v2i2.773>.

3 Arie Elcaputera and Asep Suherman, "Pelaksanaan Bantuan Hukum Bagi Masyarakat Tidak Mampu Dalam Memperoleh Akses Keadilan Di Kota Bengkulu," *Jurnal Kertha Semaya* 9, no. 10 (2021): 1777-95.

4 M.Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP: Penyidikan Dan Penuntutan* (Sinar Grafika, 2003).

5 Budi Sastra Panjaitan, *Dari Advokat Untuk Keadilan Sosial* (Deepublish, 2022).

Legal protection based on the principles of Pancasila includes the provision of legal aid to the community, in accordance with the provisions in Article 1 paragraph (2) of the 1945 Constitution which states Indonesia as a state of law that has the responsibility to protect and recognise the human rights of each individual or citizen. Government efforts to provide legal aid, protect and recognise human rights are part of efforts to realise law enforcement, which is an important element in order to achieve justice.<sup>6</sup>

The value contained in the fifth principle is the importance of realising justice in social life. This justice comes from the nature of humanity, which includes human relationships with themselves, with fellow humans, with society, nation, state, and relationships with God. The value of justice must be realised in the state order to achieve the state's goals. The value contained in the fifth principle is the importance of realising justice in social life. This justice comes from the nature of humanity, which includes human relationships with themselves, with fellow humans, with society, nation, state, and relationships with God. The value of justice must be realised in the state order to achieve the state's goals. The value contained in the fifth principle is the importance of realising justice in social life. This justice comes from the nature of humanity, which includes human relationships with themselves, with fellow humans, with society, nation, state, and relationships with God.<sup>7</sup> The value of justice must be realised in the state order to achieve the state's goals.

Generation Z, which is a group of people born around the mid-1990s to early 2010s, when viewed from the birth range, is currently still in the adolescent stage. In this period, there is a concern that they are not fully capable of resolving legal issues that will be faced by them. In a survey entitled "Public Perceptions and Expectations of Public Services, the Quality of Executive and Legislative Leaders, and Media Content" organized by Praxis from March 13 to 18, 2023 that 90.8% of Generation Z respondents consider law enforcement in Indonesia to be unsatisfactory. Some Gen Z who are categorised as underprivileged also have an expectation that they can immediately overcome the legal problems they face. Therefore, this study aims to analyse the role of the Legal Aid Institute (LBH) Medan in providing legal aid to underprivileged Gen Z victims of sexual abuse communities to achieve compliance and justice.

## B. Research Method

The method used in this research is the normative-empirical method, which is the result of a combination of a legal approach that focuses on norms with the addition of various empirical elements.<sup>8</sup> This research aims to identify legal principles or legal doctrines that

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6 Ibnu Alwatan et al., "Tinjauan Asas Equality Before the Law Terhadap Penegakan Hukum Di Indonesia," *Verfassung: Jurnal Hukum Tata Negara* 1, no. 2 (2022): 123–42, <https://doi.org/10.30762/vjhtn.v1i2.186>.

7 "Survei Praxis: 90,8 Persen Gen Z Belum Puas Terhadap Penegakan Hukum," KPPOD, accessed March 3, 2024, <https://www.kppod.org/berita/view?id=1196>.

8 Margie Gladies et.al Deassy J.A. Hehanussa, *Metode Penelitian Hukum*, in *Jurnal Widina Bhakti Persada*, ed. Elan Jaelani, vol. 4, no. 3 (Widina Bhakti Persada Bandung, 2023).

apply positively, as well as to examine aspects of identifying unwritten laws based on legal practices that exist in Indonesian society. This research focuses on how the law functions and is applied in people's lives through an approach that combines normative analysis with empirical data collection. By gathering information from several sources and using a descriptive data collection strategy, this study employs a descriptive qualitative approach. Barda Nawawi Arief defines the descriptive method as a problem-solving process that is studied by describing the current condition of the article's topic or object based on the facts that exist or as they are.<sup>9</sup> Without the use of statistics, qualitative research describes a situation as it is. Doctrinal or normative juridical research is the kind of study that is employed.<sup>10</sup> Empirical data collection in this research involves collecting data directly from the field through interview and observation techniques by the Legal Aid Institute (LBH) Medan.

## C. Discussion

### 1. Advocacy for the Provision of Legal Aid in Indonesia

An important and well-recognised issue today is the need for legal development. In the international community, this development has begun with the organisation of a number of very important conferences and the establishment of specialised bodies that can promote and support legal development. In the legal societies of developing countries, legal development is even more complex, involving not only the provision of new laws, but also the reform of concepts and almost all components of the legal system.<sup>11</sup> Legal development is therefore a global rather than a local issue. One of the essential elements of development is change in society. The desired changes in society in the context of development are changes that occur in an orderly, controlled, and effective and efficient manner. In the global dimension, development is seen as an effort to transform society into a more orderly one, with the aim of improving human civilisation and enhancing the quality of life. This includes improvements in various aspects, such as health, intelligence, welfare, and human life satisfaction. The essence of the concept of development is the transformation of the quality of human life from a low level to a higher level.<sup>12</sup>

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9 Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana (Perkembangan Penyusunan Konsep KUHP Baru)* (Kencana Prenada Media Group, 2008).

10 Muhaimin, *Metode Penelitian Hukum* (Mataram University Press, 2020).

11 Selamat Tambunan and Bambang Heri Supriyanto, "Advocate Immunity Rights in Indonesian Principles, Concepts, Legislation," *International Journal of Social Science* 2, no. 5 (2023): 2275-94, <https://doi.org/10.53625/ijss.v2i5.5008>.

12 Ratna Juwita, "Good Governance and Anti-Corruption: Responsibility to Protect Universal Health Care in Indonesia," *Hasanuddin Law Review* 4, no. 2 (2018): 162-80, <https://doi.org/10.20956/halrev.v4i2.1424>.

In a legal society, planning and countermeasures are carried out by utilising the law. Firstly, law is a product of human reflection and experience in organising their lives. Law is considered to be the most ancient form of organising human life, but in the 20th century, law was considered to be the most modern and representative design and organisation of human life. Almost all countries have a state of law. This is because law is an integral part of regulating people's lives, including regulating changes that occur or are desired by society. Almost all countries have a state of law.

This is because the law becomes an integral part in regulating people's lives, including regulating changes that occur or are desired by society. Second, the function of regulating is supported by the basic potential contained in the law, which is not only limited to the function of regulating, but also acts as a provider of certainty, safety, protection, and balancing. Its nature is not only adaptive and flexible, but also predictive and anticipatory. Third, the function of law as a regulatory tool is supported by its basic potential that goes beyond merely regulating, namely providing certainty, protection, and balance, which is not only adaptive and flexible, but also predictive and anticipatory. This potential is reflected in the two main dimensions of the legal function, namely the preventive and repressive functions. The preventive function aims to prevent the occurrence of violations of the law (prevention regulation) essentially the law is the design of every action to be carried out by society

In the development of law, Legal Aid Organisations (LBH) have become a practical necessity in the legal process. The birth of a legal aid organisation which was later referred to as the Legal Aid Institute (LBH) occurred at the third congress of the Indonesian Advocates Association (PERADI) in 1969 in Jakarta. based on history from the YLBHI website A decree from PERADI acknowledging the establishment of the Legal Aid Institute of DKI Jakarta was then issued on 28 October 1970, and LBH DKI Jakarta was physically established on 1 April 1971, this also underpinned legal reform in Indonesia.<sup>13</sup> This gives the impression that the government has realised and affirmed its commitment to provide the right of access to legal aid as optimally as possible to justice seekers.

The continuation of legal aid is not only happening among practitioners, but also among theoreticians, especially in law faculties of both public and private universities. Agencies are established not only to provide advice to justice seekers, but also as a place for students to practice their knowledge, so that they can experience the difference between theory and practice in court.<sup>14</sup> To make it easier for justice seekers, legal aid organisations set up legal aid posts at court offices or at representative posts in neighbourhoods or community associations, so that people's complaints can be addressed and served quickly. In each legal aid organisation, several legal scholars are placed, either as director, chairperson,

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13 Maritman Prodjohamidjojo, *Penasihat dan Organisasi Bantuan Hukum* (Ghalia Indonesia, 1984).

14 Farahwati, "Peran Advokat Selaku Penasihat Hukum Tersangka Atau Terdakwa Atas Dasar Pasal 56 Ayat(1) Kitab Undang-Undang Hukum Acara Pidana," *Jurnal Untag*, no. 1 (2021): 28-47.

or vice-chairperson, with the task of managing legal aid, providing legal services to justice seekers.

Typical services include legal advice, explanation of the parties involved, the position and status of the case, legal consequences, court judgements, settlements, and so on. They also act as advocates in criminal cases, both at the investigation stage and in court. Therefore, any assistance or service must be provided with high legal skills and a sense of responsibility. However, the provision of such assistance should not create an expectation on the part of the recipient that their case will definitely be won.<sup>15</sup>

Various backgrounds or main factors that cause unachieved access to justice in the justice-seeking community need to be explored in order to achieve access to justice for the entire community without exception. So the extent of the role of legal aid institutions as a forum for access to justice in the implementation of legal aid in Indonesia also needs to be explored. Legal aid is often associated with compassion for the poor by society.<sup>16</sup> However, legal aid should not only be seen in a limited sense, but also in a broader sense. Apart from helping the poor, legal aid is also a moral movement that fights for human rights. The right to be defended by an advocate or legal counsel (access to legal counsel) and to be treated equally before the law (equality before the law) are human rights for everyone, including the poor or justice for all. This is reflected in the fact that legal aid is preceded by charity from the government and the elite.

The development of legal aid as an activity of free legal services to the poor and the legally ill has indeed shown a significant increase in Indonesia. In Indonesia, in 2025-2027 the total number of legal aid organizations that have been verified and accredited by the National Legal Development Board (BPHN) there are 597<sup>17</sup> Legal Aid Institutions (LBH) that are active in legal service programmes to the poor and legally ill, indicating a great commitment to providing access to justice for those who need it.<sup>18</sup> This is a positive indication of efforts to improve access to justice in Indonesia. One of the factors driving the development of legal aid activities for the poor in Indonesia is the widespread understanding of constitutionalism. Constitutionalism is a view that encourages the purification of the rule of law in accordance with the principles contained in the applicable constitution. This understanding emerged as a response to the condition of the state under the guided

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15 Arif Arif et al., "Tantangan Dan Harapan Gugus Tugas Diversi Dan Keadilan Restoratif Dalam Perlindungan Anak Yang Berkonflik Dengan Hukum Di Kota Medan," *Talenta Conference Series: Local Wisdom, Social, and Arts (LWSA)* 1, no. 1 (2018): 150–54, <https://doi.org/10.32734/lwsa.v1i1.156>.

16 Elcaputera and Suherman, "Pelaksanaan Bantuan Hukum Bagi Masyarakat Tidak Mampu Dalam Memperoleh Akses Keadilan Di Kota Bengkulu."

17 Humas dan Kerja Sama, "BPHN Verifikasi dan Akreditasi Ulang 597 Pemberi Bantuan Hukum untuk Periode 2025-2027," Official Release, BPHN, 2024, <https://bphn.go.id/berita-utama/bphn-verifikasi-dan-akreditasi-ulang-597-pemberi-bantuan-hukum-untuk-periode-2025-2027>.

18 BPHN, "Organisasi Bantuan Hukum: Daftar Organisasi Bantuan Hukum Terakreditasi," Official Website, BPHN, 2025, <https://bphn.go.id/layanan/bantuan-hukum/obh>.

democratic government which was considered to have deviated from the principles of the rule of law contained in the 1945 Constitution. Thus, the understanding of constitutionalism encourages legal aid activities to ensure that the principles of justice and alignment with the poor are carried out in accordance with the constitution. The notion of constitutionalism is supported by several groups, including jurists, intellectuals, youth, students, and even military elements. They want a re-purification of the state ideology of Pancasila and the application of appropriate laws enshrined in the 1945 Constitution.

Referring to Article 5 paragraph (1) of the Law on legal aid, recipients of legal aid are individuals or groups who are in very poor economic conditions, which must be proven in accordance with predetermined criteria. The state recognises that every individual, especially the poor, has rights in the economic, social, cultural, civil and political spheres, so constitutionally, poor individuals have the right to be assisted and defended both in and out of court (access to legal counsel). Legal aid for poor individuals is described in Article 34 paragraph (1) of the 1945 Constitution. Therefore, legal aid is a right for individuals who cannot afford it and can be obtained free of charge (*pro bono publico*), which is an elaboration of the principle of equality before the law.

Article 34 paragraph (2) and paragraph (4) of the 1945 Constitution affirms that the state must develop a social security system for all people and empower vulnerable and underprivileged communities in accordance with the principles of human dignity as regulated in the Law on Legal Aid. This is in line with the existence of Law No. 16/2011 on Legal Aid (UUBH), which was established as a foundation for the state to ensure that citizens, especially the underprivileged, can gain equal access to the justice system and experience justice before the law. Legal aid organisations can be considered as a collection of advocates who carry out their duties in accordance with the provisions contained in Law No. 18/2003 on Advocates.

In line with this, Law No. 18/2003 on Advocates also mandates that an advocate or legal advisor must provide legal aid to underprivileged people free of charge, in accordance with the provisions stipulated in the Law. If an advocate does not fulfil his/her obligation to provide legal aid to the underprivileged, the advocate will be subject to sanctions in accordance with the applicable provisions in the Law.

The concept of legal aid itself, which is based on the notion of constitutionalism, is that legal aid aimed at the poor needs to be implemented by taking into account broader efforts and objectives such as:

- a. Increasing awareness of the rights of the poor as subjects of law;
- b. The enforcement and development of human rights values as the main foundation for the sustainability of the rule of law;

This type of legal aid has a more proactive nature, where it not only provides legal assistance to individuals but also to community groups collectively. The approach used is not

only through formal legal processes, but also through political channels and negotiations. This means that the resolution of legal issues does not always rely on conventional legal processes, but also through political efforts and negotiations.

Based on the definition of the poor, those who are eligible to receive free legal aid are:<sup>19</sup>

- a. Individuals who are unable to meet the needs of adequate clothing;
- b. Individuals who are unable to meet the needs of adequate food;
- c. Individuals who are unable to meet the needs of adequate shelter or housing;
- d. Individuals who are unable to meet the needs of adequate health and normative needs. Individuals who are unable to fulfil their health and normative needs' and;
- e. Individuals who despite working and trying, their income is insufficient to fulfil their needs properly.

Two concepts related to legal aid are legal aid and legal assistance.<sup>20</sup> The term legal aid usually refers to the provision of legal services to individuals involved in a case free of charge, especially to those who are financially incapable. Meanwhile, legal assistance refers to legal aid in a broader sense, as in addition to providing assistance to those who cannot afford it, it also includes legal services provided by lawyers who receive fees or honoraria from clients. Legal Aid Institutions, often abbreviated as LBH, are a manifestation of one of the main principles affirmed in the Criminal Procedure Code (KUHAP), namely the accusatoir principle. This principle emphasises that a defendant on trial is not only considered as an object, but also as a subject in the judicial process. The accusatoir principle indicates the need for an open examination where anyone can attend or witness the trial. In this context, the defendant has equal rights with the public prosecutor, while the judge acts as an arbitrator above both parties to resolve criminal cases in accordance with applicable law.

The role of Legal Aid Institutions in providing free legal aid to indigent individuals in criminal proceedings is regulated in the Criminal Procedure Code. It explains that for individuals who are incapacitated and do not have their own legal counsel, authorised officials at all levels of examination in the judicial process are obliged to appoint legal counsel for them. This provision is regulated in Article 56 Paragraph (2) of KUHAP which reads: 'Every legal advisor appointed to act as referred to in Paragraph (1) shall provide his assistance free of charge'.

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19 Kantor Wilayah Sulawesi Selatan Kementerian Hukum dan HAM Republik Indonesia, "Golongan Yang Berhak Menerima Bantuan Hukum," Official Website, Kanwil Kemenkumham Sulsel, 2024, <https://sulsel.kemenkumham.go.id/pusat-informasi/artikel/4449-golongan-yang-berhak-menerima-bantuan-hukum>.

20 Arif et al., "Tantangan Dan Harapan Gugus Tugas Diversi Dan Keadilan Restoratif Dalam Perlindungan Anak Yang Berkonflik Dengan Hukum Di Kota Medan."

A significant role of Legal Aid Institutions is to assist their clients to prevent abuse of power by the authorities, as well as to defend their interests in material aspects, in the hope of achieving court decisions that are closer to the concept of justice. In the context of financing Legal Aid Institutions, the responsibility is assigned to the State Budget (APBN). APBN funds are allocated to support the implementation of legal aid, which is a government obligation, and is channelled through the budget of the Ministry of Law and Human Rights of the Republic of Indonesia. Apart from the APBN, sources of funding for legal aid can also come from the Regional Government level I (Province) and level II (Regency, City), but the accreditation and verification process still follows the standards set by the Ministry of Law and Human Rights of the Republic of Indonesia. Furthermore, the procedures for the distribution of legal aid funds are regulated by Government Regulation.<sup>21</sup>

Article 14 of Law No. 16/2011 on Legal Aid states that to obtain Legal Aid, the applicant must fulfil the following requirements:

- a. Submit a written application containing at least the identity of the applicant and a brief description of the subject matter for which Legal Aid is requested;
- b. Submit documents relating to the case; and
- c. Attach a certificate of poverty from the lurah, village head, or equivalent official at the place of residence of the Legal Aid applicant.

## **2. The Provision Of Legal Aid To Gen Z Victims of Sexual Abuse in Medan City in Access To Compliance And Justice**

The provision of legal aid involves three interrelated aspects, namely the formulation of legal rules, the monitoring of the implementation of the rules to ensure compliance, and the education of the public to promote compliance with the rules. Fundamentally, the purpose of legal aid is to provide legal protection to all citizens of the Republic of Indonesia regardless of religion, race/tribe, descent, place of birth, or economic background, education, and other factors such as generation.

Generation Z, also known as Gen Z, refers to individuals born between 1995 and 2012. What sets Gen Z apart from previous generations is their view of technology and information. The development of technology has greatly influenced Gen Z's behaviour in communicating, developing thoughts, forming communities, and utilising knowledge sources in their education.<sup>22</sup>

Although Generation Z has experienced rapid change, sometimes they still do not have an adequate understanding of the law. Legal awareness refers to an individual's

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21 Inggal Ayu Noorsanti and Ristina Yudhanti, "Kemanfaatan Hukum Jeremy Bentham Relevansinya Dengan Kebijakan Pemerintah Melalui Bantuan Langsung Tunai Dana Desa," *Sultan Jurisprudence : Jurnal Riset Ilmu Hukum* 3, no. 2 (2023): 183–93.

22 Nur Iftitah Isnantiana, "Hukum Dan Sistem Hukum Sebagai Pilar Negara," *Jurnal Hukum Ekonomi Syariah* 2, no. 1 (2019): 19, <https://doi.org/10.30595/jhes.v2i1.4470>.

understanding or values of existing or expected laws. It encompasses abstract thinking about the balance between rules and the desired or supposed peace. Legal awareness also highlights people's views on the role of law in social life.

Legal awareness also involves understanding the actions that should be taken or avoided towards other individuals. It implies the recognition of our legal responsibilities towards others. Therefore, legal awareness is an abstract concept that encompasses the law-related values that must be adhered to in order to create the desired balance between order and peace. As such, individuals are aware of the actions they should take or avoid taking towards others, particularly those that may harm themselves and others. If a person lacks legal awareness, they are more likely to commit an act against the law or face legal problems.<sup>23</sup>

In 2022, the Gen Z community made complaints to LBH Medan's office through online media as in the interview with the Deputy Director of LBH Medan, there were nearly 200 people who contacted LBH Medan's WhatsApp account from November 2021-November 2022. Based on data that has been manually inventoried by LBH Medan, there were 24 (twenty-four) legal aid applicants who made complaints directly to LBH Medan's office. There were 2 (two) that underwent the consultation stage and 22 (twenty-two) of them were cases that were further assisted either in litigation, non-litigation or both. There were 40 (forty) beneficiaries both in the form of individuals and families or families represented.

Based on data from the Ministry of Women's Empowerment and Child Protection, the number of reported cases of violence against women and children shows an upward trend, from 11.057 reports in 2019, increasing to 11.278 in 2020, and reaching 14.517 cases in 2021.<sup>24</sup> In 2021, according to LBH Medan's Year-End Note (CATAHU), the organization handled 3 cases of sexual violence. Meanwhile, in 2022, LBH Medan assisted 7 cases of sexual violence. This condition is one of the important reasons for the need to issue a regulation, namely Law of the Republic of Indonesia Number 12 of 2022 on the Crime of Sexual Violence, which aims to provide justice, legal certainty, and legal benefits for the parties involved in the issue of sexual violence.

In LBH Medan's Annual Report (CATAHU) in the last 2022-2023, LBH Medan often faced legal processes at the police, prosecutor's office and court levels that were very unfair, especially in terms of fulfilling the civil rights of both victims and defendants. Efforts to present a just legal process and the difficulty of legal certainty are obtained, many Law Enforcement Officials (APH) have not worked properly in accordance with applicable regulations. APH is still reluctant to provide appropriate legal certainty for the problems of

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23 Restitution Resource Center, "Restitution Law & Practice Compilation of Resources," in *National Crime Victim Law Institute* (2019).

24 Endang Prastini, "Kekerasan Terhadap Anak dan Upaya Perlindungan Anak Di Indonesia," *Jurnal Citizenship Virtues* 4, no. 2 (2024): 760-70, <https://doi.org/10.37640/jcv.v4i2.2043>.

the community or victims who are seeking justice, for people who are suspects, APH is still often negligent in considering social, economic and psychological aspects that have an impact on families and livelihoods and even education.

Sexual violence is defined as any form of action that humiliates, insults, harasses, or attacks an individual's body and reproductive functions, resulting from power imbalances and/or gender differences. These actions can have an impact in the form of mental and physical suffering, including interference with reproductive health, as well as preventing the opportunity to get a safe and maximum education.<sup>25</sup>

The concept of legal aid has an important role in efforts to prevent sexual violence. The implementation of structural legal aid patterns carried out by LBH Medan in preventing sexual violence in Medan City can be seen as a realization of the principles contained in various national and international legal instruments. Law Number 12 of 2022 on Criminal Acts of Sexual Violence emphasizes the need to provide legal assistance to victims as part of their rights. In addition, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Indonesia has ratified, also emphasizes the importance of legal protection and access to justice for victims of sexual violence.<sup>26</sup>

According to Government Regulation No. 42 of 2013 concerning the Terms and Procedures for Providing Legal Aid and Distributing Legal Aid Funds in carrying out the provision of Legal Aid through litigation Advocates are responsible, with the possibility of assistance from Lecturers, Paralegals, and Law Students, but this does not eliminate the responsibility of Advocates to provide free legal aid in accordance with applicable legal provisions. The provision of Legal Aid through litigation includes several stages, namely:

- a. Assistance and/or enforcement of legal rights starting from the investigation and prosecution stages;
- b. Assistance and/or enforcement of legal rights in the trial process;
- c. Assistance and/or enforcement of legal rights for Legal Aid Recipients at the State Administrative Court.

Meanwhile, Non-Litigation Legal Aid includes various activities, such as legal counselling, legal consultation, case investigation, both through electronic and non-electronic media, legal research, mediation, negotiation, community empowerment, out-of-court assistance, and preparation of legal documents. According to LBH Medan's data inventory, there were 8 (eight) litigation cases, 5 (five) non-litigation cases and 11 (eleven) cases of both litigation and non-litigation, with the most common litigation options being criminal with 15 (fifteen) cases, industrial relations with 5 (five) cases, followed by civil proceedings with 4 (four) cases.

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25 Ni Putu et al., "Mewujudkan Access To Justice Pada Korban," *Jurnal Media Akademik (Jma)* 3, no. 3 (2025).

26 Rasina Padeni Nasution, "Pola Bantuan Hukum Dalam Mencegah Terjadinya Tindak Pidana Kekerasan Seksual," *Legal Standing : Jurnal Ilmu Hukum* 8, no. 3 (2024): 522-34, <https://doi.org/10.24269/lis.v8i3.9487>.

Thus, it can be noted that in order to obtain legal aid or pro bono from an advocate, a certificate of poverty or a certificate of indigence issued by an authorised official is required. This requirement is a prerequisite for obtaining legal services. However, if the legal aid applicant is unable to fulfil these criteria, the legal aid law instructs the legal aid provider to assist in the process of fulfilling these requirements. From this, it can be concluded that the purpose of the legal aid law is to ensure that the provision of free legal aid to the poor is maximised. Without government intervention for underprivileged or marginalised groups of individuals, they will find it difficult to experience the principle of equality before the law. Through the Legal Aid Law, everyone who can prove that they are in a deprived condition will receive legal aid. This is in line with what was stated by the Deputy Director of LBH Medan that when an underprivileged person is in need of legal aid, the LBH Medan team will help direct them to the administrative stage of the process by submitting a certificate of incapacity issued by the local government in the kelurahan, village or other evidence that equates to a Certificate of Incapacity (SKTM), such as a KIS card obtained from the government or a certificate from the social service office of Medan city. Author has the opinion that legal aid is a constitutional right of every citizen guaranteed by Article 28D paragraph (1) and Article 28H paragraph (2) of the 1945 Constitution. These articles emphasize that every individual has the right to obtain recognition, protection, guarantees, and fair legal certainty. To protect this right, the state has provided a mechanism for providing legal aid through Law No. 16/2011 on Legal Aid. The regulation emphasizes that legal aid is intended for those who are classified as poor, so it is important to carry out a verification process to ensure that assistance is provided to those who are truly entitled.

Article 14 of Law No. 16/2011 requires that applications for legal aid must be accompanied by supporting documents such as a Family Poverty Card (SKTM) issued by an authorized official. Legally, the obligation to provide legal aid for the poor is regulated in this law, with SKTM or other documents stating incapacity being the administrative basis for the application. An alternative document could also be a social benefit card, such as the family poverty family card or community health insurance card. As such, the SKTM is an administrative instrument that proves the applicant's status as a beneficiary, although it is not the only requirement as the law also accommodates substitute documents.

Therefore, SKTM is required but not absolute. SKTM is important to ensure that assistance is well-targeted and prevent misuse, but this administrative requirement should not be an obstacle for the poor to access justice. Legal aid institutions must still prioritize the principle of substantive justice by providing alternative verification mechanisms for applicants who do not have SKTM.

Based on the interview, LBH Medan also provides structural legal aid to the Gen Z community in Medan city. Structural Legal Aid is an attempt to create a situation that allows structural transformation towards justice. The goal is for the legal system and its application

to ensure equality in legal and political aspects. This concept is closely related to structural poverty, where the focus is on addressing the root causes of poverty by changing the fundamental social, economic and political structures. Providing structural legal aid aims to address these structural factors and create a structural transformation in society so that all members of society can obtain their legal rights fairly and equitably.

The provision of legal aid structurally at LBH Medan gives the impression that it refers to conflict-regulerende rechtshulp, which is legal aid that seeks to proactively address concrete legal problems faced by underprivileged communities, as well as diagnostic legal aid (diagnostiek rechtshulp), where LBH Medan provides legal advice commonly known as legal consultation to underprivileged communities and provides preventive legal aid, which is legal counselling provided to the general public to provide explanation and understanding of various aspects of the law.

In the context of structural legal aid, the provision of legal aid must be more proactive. This entails an active campaign in the community to find and collect legal cases that often occur in underprivileged communities and are often less recognised by the general public. At the national level, within the framework of the concept of structural legal aid, legal aid activists should be actively involved in influencing and creating conditions that favour the development of more progressive laws that favour the interests of the underprivileged.<sup>27</sup>

The provision of legal aid organised by LBH Medan has had a dynamic effect on the Gen Z community, increasing the legal awareness of the Gen Z community in the hope that this programme will encourage the community to better understand the law. When individuals understand the substance and intent of legal norms, they realise the existence of the law itself. Legal awareness in society is influenced by people's understanding of the applicable legal regulations. Basically, every citizen should have an understanding of the laws of our country. To increase legal awareness, individuals must realise the existence as well as the substance of the law. The prevailing principle is that this is considered a basic assumption of the law. Therefore, the role of Legal Aid Institutions (LBH) becomes very important in raising legal awareness, with the aim of making people understand the importance of legal awareness. By doing so, it is expected that people's attitudes and actions will reflect respect for the law, as well as an understanding of legal rights and obligations. Legal awareness also has a role in achieving order, peace, tranquillity and justice in human interactions with each other.

Legal awareness is connected to legal compliance, but the difference lies in the fact that legal compliance occurs due to the threat of sanctions. On the other hand, legal awareness is not sustained by sanctions, but is the result of a scientifically formulated evaluation of the legal community. It includes the values that individuals have in relation to existing or

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27 Muhammad Haekal et al., "The Effectiveness of the Implementation of the Principle of Simple Court Procedures, Fast and Low Cost in a Case of Divorce Lawsuit," *International Journal of Contemporary Islamic Law and Society* 2, no. 1 (2020): 81–100, <https://doi.org/10.24239/ijcils.vol2.iss1.16>.

expected laws. Public legal awareness affects the level of compliance with the law, either directly or indirectly. In developed societies, the legal awareness factor directly affects the level of compliance with the law. Individuals obey the law because they consciously realise that the law is necessary and serves a good purpose, and that it governs society correctly, fairly and effectively.

Creating a law-aware and law-abiding society is the goal of adopting norms that advocate for justice in society. This is expected to strengthen cultural values which in turn will lead to the establishment of a social system that values equality among individuals.<sup>28</sup> Therefore, compliance with the law is essentially the result of people's awareness and loyalty to the applicable law as the rules of the game in collective life. This loyalty is reflected in behaviour that shows obedience to the law. When all members of society have a strong legal awareness, the implementation of a new legal regulation will be realised. Awareness of the applicability of the law becomes the foundation for the implementation of the law itself.

The achievement of legal awareness that LBH Medan has provided to Gen Z is so that people can distinguish between permissible and impermissible actions. On that basis, the development of a country can be reflected in the level of legal awareness and the level of public compliance with the law itself. If the legal awareness of a country's population increases, the social and state life order will improve, which in turn will lead to the achievement of justice and prosperity for the community naturally.

The availability of protection as a right of the victim can be started from the first level, starting with the investigation, which has a positive impact on the criminal justice process and can also create a sense of justice for the citizens of the community, especially for victims of crime.

Author considers that to provide for the needs of victims there is still a slight shortage because the State is still busy with deterrent effects aimed at perpetrators without seeing and paying attention to the physical and / or psychological of the victim. It often happens that victims to treat their trauma by requiring counseling to a psychologist all at their own expense, even very difficult for victims of sexual violence to get legal assistance from the state. Given that victims of sexual violence often face feelings of shame, stigmatization, and fear of how society will view them, it should be expected that in order to achieve victim satisfaction, victims should still be assisted by professionals in treating their trauma, however, legal aid agency staff may experience a significant increase in workload and experience an increase in workload due to their involvement in handling cases related to sexual violence. As a result, this may adversely affect the overall quality of services they are able to provide. limited resources, which may hinder their efforts to effectively respond to

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28 Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975).

the needs of victims. the government should not only provide financial assistance, but more actively collaborate with other relevant government agencies and organizations, fostering support networks that strengthen their impact.

With the enactment of Government Regulation (PP) Number 29 of 2025 on the Victims of Sexual Violence Assistance Fund (TPKS) on June 18, 2025. The enactment of this Government Regulation confirms the state's commitment to providing compensation for victims of sexual violence who have suffered losses that the perpetrator is unable to fulfill in full. The presence of compensation departs from the paradigm that arrangements that only focus on imposing restitution on the perpetrator will only make victims dependent on the ability of the perpetrator and the state is absent in efforts to restore victims. Compensation is considered as a form of state presence for the state's inability to present, guarantee, and fulfill the right to security of every citizen from every act of sexual violence.

Therefore, the state must strengthen its role in providing protection and recovery to victims of sexual violence through comprehensive policies and cross-sectoral involvement. The government should not only provide funding, but also foster a network of collaboration with various professional institutions so that victims receive maximum protection in the form of legal, psychological and social assistance. Therefore, it is hoped that victims can feel fully supported and obtain true justice without having to face prolonged stigma or injustice in order to fulfill the expectations of victims.

#### **D. Conclusion**

Legal aid provided to indigent individuals is available free of charge (*pro bono publico*), which is an interpretation of the principle of equality before the law. Legal Aid Institute (LBH) Medan currently applies the principle of equality before the law. An applicant who wishes to apply for Legal Aid must fulfill the requirements set out in Article 14 of Law Number 16 Year 2011 on Legal Aid. Currently, LBH Medan has provided free legal aid to the community, especially Gen Z who often experience legal problems in accordance with applicable legal provisions. LBH Medan also provides structural legal assistance to Gen Z citizens in Medan city. The legal aid provided by LBH Medan has had a dynamic impact on Gen Z community who is being exposed to sexual violence members by increasing legal awareness among them. It is hoped that this programme will encourage them to have a better understanding of the law. The role of legal awareness is also important in achieving order, peace, tranquillity and justice in human interactions. Forming a society that has legal awareness and obeys the law is the goal of accepting norms that fight for justice in society. This has actually been implemented by the Legal Aid Institute (LBH) Medan well.

It seems that legal institutions that focus on upholding human rights expect not only the public, but also law enforcement officials to have awareness and compliance with the law. This is based on the belief that in order to create justice, certainty and equality before

the law for Indonesians dealing with the law, it is important for all parties, including law enforcement officials, to understand and comply with the law.

However, in reality, the state rarely provides sufficient funds to support legal aid. This is reflected in LBH Medan, where according to information obtained, the assistance provided by the state is far from sufficient. To fulfil this financial need, LBH Medan relies on voluntary donations from volunteers.

The humanitarian impulse needs to be focussed on strengthening people's understanding of their rights and responsibilities as the first step in achieving the goals of a rule of law and democratic society. Therefore, it is hoped that legal aid programmes will not only be limited to providing assistance to the underprivileged, but also develop into community education programmes that will lead to structural changes towards social justice. For this reason, the City Government should also pay attention and provide assistance to Legal Aid Institutions (LBH) so that legal aid programmes can run smoothly by paying attention to LBH's independence from government influence and not binding LBH, so that LBH will be able to present itself more clearly and sensitively to the needs of the community at a lower level.

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## MARITAL RAPE AND THE LIMITS OF CRIMINAL LAW: A COMPARATIVE CRITIQUE OF LEGAL GAPS IN INDONESIA AND SINGAPORE

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### ABSTRACT

Marital rape is a crucial issue in Indonesia and Singapore, influenced by patriarchal culture and legal loopholes. This study aims to analyse the comparison of marital rape laws between the two countries, identifying significant differences in legal systems, definitions, and criminal sanctions. Unlike the Indonesian Criminal Code, which does not explicitly recognize marital rape, Singapore has reformed its laws through the Criminal Law Reform Act 2019 to criminalize such acts. This study finds that Singaporean law can contribute to Indonesia, particularly in terms of arrest procedures, victim protection systems, and the concept of consent. Using a normative-juridical approach with comparative methods, this study provides recommendations for the modernization of Indonesian law, emphasizing the need for more specific regulations and the establishment of special family courts to ensure better protection for victims.

**Keywords:** marital rape; criminal law; Legal systems.

### A. Introduction

The world's legal systems are divided into civil law and common law. The civil law system, also known as the continental or Romano-Germanic legal system, is found on all continents and covers about 60% of the world. This system is based on concepts, categories, and rules derived from Roman law, with influences from canon law, and sometimes significantly supplemented or modified by local customs or culture.<sup>1</sup> Some alien features of the civil law Clear expression of rights and duties, so that remedies are self-evident; Simplicity and accessibility to the citizen, at least in those jurisdictions where it is codified; Advance disclosure of rules, silence in the code to be filled based on equity, general principles, and the spirit of the law; Richly developed and to some extent transnational academic doctrine inspiring the legislature and the judiciary.<sup>2</sup>

Conversely, the common law system originated in England and is based on previous court decisions as its legal foundation; in this system, judges have the authority to create

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1 LSU Law, "What is Civil Law?", <https://law.lsu.edu/clo/civil-law-online/what-is-the-civil-law/>

2 *Ibid*

laws<sup>3</sup>. Indonesia adheres to a civil law system, primarily grounded in the 1945 Constitution. This legal framework includes a codified system, which encompasses the Criminal Code. In contrast, Singapore operates under a common law system, defined by an adversarial process, where both parties in a dispute present their cases before a judge with the assistance of their lawyers<sup>4</sup>. Regardless of the differences between the civil law and common law systems, both systems face major challenges in responding to increasingly complex crimes and violations, such as rape.

Rape is a serious crime that affects human rights on a global scale. First article *Universal Declaration of Human Rights* (UDHR) declare that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood<sup>5</sup>. Many women are victims of violence or sexual abuse by their husbands (marital rape). The impact of rape not only harms victims psychologically, physically, and socially; however, it also has the potential to increase the “fear of crime” and disrupt public order<sup>6</sup>.

The United Nations (UN), as an international organization, pays special attention to the issue of sexual violence, including rape. This attention is manifested through the establishment of various international legal instruments designed to serve as guidelines for its member states. Indonesia and Singapore have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which is an international agreement regarding discrimination against women, and governments should take responsibility to solve it<sup>7</sup>. Both countries also signed the Declaration on the Elimination of Violence against Women (DEVAW), which seeks to prevent violence against women in all its forms.

Despite existing and ratified legal provisions, legal protection for victims of sexual violence at the national level still faces significant challenges. It is evident from statistical data showing that rape is a common form of sexual violence in Indonesia and Singapore. According to data obtained from the Annual Report of the National Commission on Violence Against Women for the period 2022-2023, there were 2,228 cases of sexual violence against women and 622 cases of marital rape in Indonesia<sup>8</sup>. Based on rape statistics by country obtained from wisevoter.com, Indonesia ranks 134th out of 144 countries with a

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3 Nurul Qamar, *Perbandingan Sistem Hukum dan Peradilan Civil Law Sytem dan Common Law System*, (Pustaka Refleksi, 2010), 47.

4 *Ibid*

5 Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, (Kencana, 2008), 58.

6 Suhita, D. R., Ratih, T., & Priyanto, B. “Psychological Impact on Victims of Sexual Violence: Literature Review”. *STRADA: Jurnal Ilmiah Kesehatan* 10 no. 1, (2021): 1414-1416.

7 *Breathe Studio*, “CEDAW”, Scwo.or.sg, 22 December 2016, accessed 14 September 2023, <https://www.scwo.org.sg/resources/cedaw/>.

8 Komisi Nasional Anti Kekerasan Terhadap Perempuan, “Catatan Tahunan Komnas Perempuan Tahun 2023 Kekerasan terhadap Perempuan di Ranah Publik dan Negara: Minimnya Perlindungan dan Pemulihan”, [komnasperempuan.go.id](https://komnasperempuan.go.id), 7 Maret 2023, accessed 13 September 2023, <https://komnasperempuan.go.id/download-file/949>

rate of 0.48 cases per 100,000 people. Singapore ranks 76th with 5.95 cases per 100,000 people. Singapore's Minister of Law and Home Affairs, K. Shanmugam, recorded 11,868 reports of sexual violence from January 2018 to November 2022, including marital rape, sexual violence involving penetration, and sexual offenses involving children and vulnerable victims<sup>9</sup>.

Cases of sexual violence, especially rape, in Indonesia and Singapore show alarming figures. Many rapes occur within the private sphere, with perpetrators often being family members, husbands, or the victim's partner. Marital rape is violence committed by a husband against his wife to engage in sexual activity, often accompanied by threats or coercion when the wife refuses to comply. Wives who experience marital rape do not immediately receive protection because this topic is usually avoided in discussions.<sup>10</sup> Husbands or wives often prioritize their rights and neglect their obligations, which can lead to domestic violence when someone feels their rights are violated. Many marital rape cases in Indonesia are not prosecuted due to fear of public opinion, shame, and a lack of options. Empirical studies establish that stigma from a culture and a lack of legal awareness significantly deter victims from seeking legal recourse despite available legal protections. Victims often internalize societal norms tilting marital rape into a problem that is limited to a sphere that is private, thus further silencing their voices in a legal framework. Moreover, social beliefs that justify a husband's sexual rights over his wife widen the reluctance to access judicial remedy.<sup>11</sup>

Every country has different legal frameworks, including definitions, legal provisions, and penalties related to marital rape. The differences and similarities in these legal frameworks can serve as a foundation for legal development that promotes the creation of a better legal framework and advances legal progress across all countries. The process of legal development must collaborate with advancements in various fields and regulations from other countries to address legal changes.

The Criminal Code (KUHP) does not define marital rape but emphasizes the phrase "forcing" a woman who is not his wife to have sexual intercourse or copulate with him. Sexual violence regulated in the PKDRT Law means that the PKDRT Law prohibits all types of sexual violence in the household, including sexual violence that occurs between husband and wife.<sup>12</sup> Law No. 23 of 2004 on the Elimination of Domestic Violence (UU PKDRT) and Law No. 12 of 2022 on Sexual Violence Crimes (UU TPKS) classify marital rape as

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9 Yee Loon, "11,868 sexual assault cases recorded over past five year, 932 allegedly committed by family members or relatives, said K Shanmugam", *Theonlinecitizen.com*, 10 February 2023, accessed 19 September 2023, <https://www.theonlinecitizen.com/2023/02/10/11868-sexual-assault-cases-recorded-over-pastfive-year-932-allegedly-committed-by-family-members-or-relatives-said-k-shanmugam/>.

10 Rahma, S. F. M. "Legal Protection for Victims of Marital Rape from the Perspective of Indonesian Law". *Journal of Public Representative and Society Provision* 4 no. 3, (2024): 144.

11 Fatimmah Denalian and Besral. "Public Perception of Marital Rape in Yogyakarta: Study Qualitative Method". *Malang Journal of Midwifery (MAJORY)* 6 no. 2, (2024): 83-84. <https://doi.org/10.31290/majory.v6i2.4968>

12 Laely Wulandari dan Lalu Saipudin. "Marital Rape in a Comparative Perspective of Indonesian Criminal Law and Islamic Criminal Law", *UNRAM Law Review* 5 no. 1, (2021): 44, <https://doi.org/10.29303/ulrev.v5i1.139>

sexual violence within the family. The criminal penalties for perpetrators of sexual violence or abuse under the PKDRT Law and the TPKS Law have the same criminal provisions, namely a maximum of 12 years' imprisonment or a fine of up to Rp36,000,000.00 under Article 46 of the law on the Eradication of Domestic Violence and Rp300,000,000.00 under Article 6(b) of the TPKS Law. Singapore adopts the common law system, which places greater emphasis on case law. Singapore's criminal law system shares similarities with the civil law system, which is based on statutes.<sup>13</sup> However, the rape law of Singapore has been fundamentally changed by the Criminal Law Reform Act<sup>14</sup>. The 2007 amended version of the Singapore Penal Code sets limits for husbands who engage in sexual relations without their wives' consent, especially if there are marital breakdown indications<sup>15</sup>.

Since the enactment of the Criminal Law Reform Act 2019, a husband in Singapore can be found guilty of raping his wife without consent. Previously, many husbands felt immune from marital rape charges except under certain conditions, as stipulated in Section 375(4) of the Singapore Penal Code<sup>16</sup>. This immunity is subject to the Penal Code (Amendment) Act 2007, which provides an exception if the rape happens during a marital breakdown. Rape perpetrators against victims over the age of 14 in Singapore can be punished with 8 to 20 years in prison, as well as fines or caning<sup>17</sup>. Given the high incidence of marital rape, it is necessary to examine other aspects related to definitions, legal regulations, and penalties between Indonesia and Singapore, which are slightly different as outlined above.

## B. Research Method

This research uses a normative legal approach as a primary approach and a comparative approach. The normative legal approach is carried out through a review of theoretical concepts, legal principles, and legislation related to this study (literature or secondary materials).<sup>18</sup> The comparative law approach is one of the methods used in normative research to compare the laws of one country with those of another. Legal comparison is essentially a philosophical activity, thus becoming a study in comparing the intellectual concepts, whether from one or more foreign legal systems.<sup>19</sup> Based on this comparative approach, the author will compare the legal regulations on marital rape

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13 Jeffrey Pinsler SC. "Revisiting Similar Fact Evidence in Criminal and Civil Cases and Proposals for Reform", *Singapore Academy of Law Journal*, 33, (2021): 537.

14 S M Solaiman, "Physical Elements of Rape under the Core Criminal Laws of Malaysia, Singapore, Pakistan and Australia: A Comparative Review", *Journal of Law, Policy and Globalization* 132 no. 4. (2023).

15 *Chapter XVI of the Penal Code (Cap. 224, 2008 Rev. Ed.)*.

16 "Rape Laws in Singapore and How Offenders Can Be Punished", Singaporelegaladvice.com, 18 January 2021, *Online*, Internet, accessed 19 September 2023, <https://singaporelegaladvice.com/rape-laws-singapore-offenders-punished/>

17 Rahimah Rashith, "Penal Code Review Committee: Husbands May Soon Have No More Marital Immunity For Rape", *Straits Times*.com, 9 September 2018, accessed 19 September 2023, <https://www.straitstimes.com/singapore/penal-code-review-committeehusbands-may-soon-have-no-more-marital-immunity-for-rape>.

18 Muhaimin, *Metode Penelitian Hukum*, (Mataram University Pers, 2020), 129.

19 Barda Nawawi Arief, *Perbandingan Hukum Pidana*, (Rajawali Pers, 2020), 3-4.

applied in Indonesia and Singapore.

The data were collected through library research, consisting of primary legal materials like Indonesian and Singapore regulations. Moreover, secondary legal materials by means of books, journal articles, and scholarly writings. The collected materials were analyzed using legal interpretation and a comparative approach to identify similarities and differences between Indonesian and Singaporean regulations on marital rape.

## C. Discussions

### 1. Comparison of Current Legal Regulations for Marital Rape Crimes in Indonesia and Singapore

This comparative legal study between Indonesia and Singapore is designed to identify the strengths and weaknesses of each legal system, their normative contributions, and explore ways in which these transformations can be applied. This comparative analysis is based on systematic aspects (civil law/common law), substantive aspects (definition and elements of crime), law enforcement mechanisms and support for victims, as well as factors considered essential in legal reform in this study. Mochtar Kusumaatmadja highlights the methods of law enforcement by the legislature and the judiciary (jurisprudence). For example, Indonesia has revised its national criminal law with the 2023 Criminal Code, which will come into effect in 2026, while Singapore revised its Constitution in 2022.<sup>20</sup>

There are fundamental differences in the regulations on marital rape between the two countries, where the subject and object of marital rape are examined. Indonesia itself does not differentiate between subject and object based on gender. This is the concept in the relationship between husband and wife, it can be concluded that marital rape behavior in a husband and wife relationship is something that is considered abnormal that tries to leave the values in the relationship.<sup>21</sup> This contrasts with Singapore, where men can be the subject or perpetrator, while women can be the object or victim.<sup>22</sup> This civil law system applies a top-down approach, where regulations are drafted by the government for the benefit of society and serve as the main guideline for judges. Meanwhile, Singapore, which adheres to the common law tradition with the doctrines of *stare decisis* and binding jurisprudence, has undergone significant legislative reforms, including the abolition of marital immunity for penetrative acts since 2020. Although the formation of norms in this system is often bottom-up, based on social practices that are then integrated into positive law, Singapore's criminal

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20 Lilik Mulyadi, 2017, "Teori Hukum Pembangunan dari Mochtar Kusumaatmadja", *Mahkamahagung.go.id*, 3, accessed 13 October 2023, [http://badilum.mahkamahagung.go.id/upload\\_file/img/article/doc/kajian\\_deskriptif\\_analitis\\_teorinya\\_hukum\\_pembangunan.pdf](http://badilum.mahkamahagung.go.id/upload_file/img/article/doc/kajian_deskriptif_analitis_teorinya_hukum_pembangunan.pdf).

21 Eva Khumairoh, et al., "Marital Rape As A Crime Of Sexual Violence In Positive Law In Indonesia", *International Journal of Law, Crime and Justice* 1 no. 2, (2024): 63. <https://doi.org/10.62951/ijlcv1i2.59>.

22 Trachel Fragma Sari, et al., "Pengaturan Tindak Pidana Perkosaan Dalam Perkawinan Menurut Hukum Pidana Indonesia Dan Hukum Pidana Singapura", *Delicti: Jurnal Hukum Pidana Dan Kriminologi* 2 no. 2, (2024): 37. <https://doi.org/10.25077/delicti.v2.i.2.p.37-46.2024>.

and family law also relies heavily on legislation. This hybrid approach makes Singapore's legal system relevant for comparative study.<sup>23</sup>

In a broader context, marital rape is defined as forced sexual intercourse without the consent of one's spouse (whether wife or husband), unwanted sexual intercourse, and sexual intercourse under threat of violence. Based on this definition of marital rape, the types of rape within marriage are categorized as involving the physical or mental unpreparedness of the wife, coercion by the husband without regard for his wife's condition, variations in sexual practices, and threats of violence that may result in injury. It is important to note that the forms and types of rape within marriage can evolve and vary over time

Violence between spouses often occurs for various reasons, including a lack of attention to this issue.<sup>24</sup> Marital rape in Indonesia is taboo to discuss because spouses have consented to sexual relations after marriage. These sexual relations are not considered rape and protected by marital rights. Based on interviews with Prof. Rika Saraswati, sexual relations require mutual consent. When there is tension between spouses or within the family, coercion or violence often occurs. Refusing to engage in sexual relations with one's spouse is acceptable, as individuals have the right to express their desires or lack thereof. Although sexual relations are a marital right, their fulfillment should be based on mutual consent, and refusals must be respected. Marital rape is an act of violence or coercion by a husband/wife against a partner who is obliged to engage in sexual activity within the marriage regardless of the partner's status.<sup>25</sup>

The legal provisions governing marital rape in Indonesia are set out in Law No. 1 of 1946 on Criminal Law (KUHP), Law No. 23 of 2004 on the Elimination of Domestic Violence (UU PKDRT), Law No. 12 of 2002 on Sexual Violence Crimes (UU TPKS), and Law No. 1 of 2023 on the Criminal Code (UU KUHP), which will come into effect in 2026. Singapore regulates marital rape provisions in the Singapore Penal Code 1871, Women's Charter (Cap. 353), and the Criminal Law Reform Act (CLRA) 2019.

The second reason for this comparison is to explore the differences in the definition of marital rape in Indonesian and Singaporean regulations. The initial focus is on the regulation of rape in Indonesia in the Criminal Code. Article 285 of the Criminal Code explains that rape occurs when a woman is threatened or forced to have sex outside of marriage. Articles 286 and 287 of the KUHP complement Article 285 by regulating situations where the woman is helpless and the victim is under 15 years old. Article 287 sets a maximum

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23 Eugene K.B. Tan dan Gary K.Y. Chan, "The Singapore Legal System", *Laws of Singapore*, (2015, 9) [https://ink.library.smu.edu.sg/sol\\_research/466/](https://ink.library.smu.edu.sg/sol_research/466/).

24 Anindya I. Devi dan Mujiono Hafidh, "The Urgency of Crime Prevention Policy to Control Rape in Marriage (Marital Rape)", *International Journal of Social Science and Human Research* 5 no 6 (2022), 2165, <https://doi.org/10.47191/ijsshr/v5-i6-21>

25 Astuti Vitria Utami Ningsih dan Syaiffudin Zuhdi "Comparative Study Of Marital Rape As A Reason For Divorce In Indonesia, Malaysia And Singapore", *International Conference Restructuring and Transforming Law* 2,1 (2023) 61.

penalty of nine years and can only prosecute upon complaint against a perpetrator who has sexual intercourse with a woman under 15 years old. Article 288 of the Criminal Code involves rape within marriage but provides limited protection if the victim is a minor. Taken together, these articles limit the definition of rape to sexual intercourse involving a woman outside of marriage with the perpetrator. These limitations are insufficient to protect victims, especially in cases of digital rape or penetration with foreign objects. Other elements, such as “committed with a woman outside of marriage,” do not reflect current developments in crime, including marital rape. These limitations make it difficult for wives to report their husbands, who instead face charges of assault with lighter penalties.

Marital rape is considered a personal matter that must be resolved internally. Indonesia has taken initial steps in preventing domestic violence by formulating it in the PKDRT Law. The PKDRT Law was specifically created to deal with cases of violence involving family members, including marital rape. The PKDRT Law was created with consideration for the right of every individual to be free from violence. However, the PKDRT Law does not provide a specific definition of marital rape. Article 8(a) of the PKDRT Law lists the forced sexual relations committed against someone living in the same household. The categorization of marital rape as a form of domestic violence in the PKDRT Law is described as an act involving coercion, intimidation, and control over the victim, with the majority of victims being wives and the perpetrators being husbands. Types of sexual violence within the household include neglecting the wife's emotional needs, sexual intercourse without consent, and forcing the wife to engage in prostitution or similar acts.

Article 2, paragraph (1) of the PKDRT Law defines “domestic sphere” as including husband, wife, children, parents, in-laws, siblings, or relatives by blood, guardianship, and domestic workers. Marital rape in the PKDRT Law, specifically in Article 53, states that law enforcement officials handle such cases based on complaints from the victim, whether the husband or wife. The term “rape” is not explicitly mentioned in this law, but sexual violence has a broad meaning, so marital rape can be classified under it. Prof. Rika Saraswati emphasizes the importance of systematic interpretation and proposes amendments to make a comprehensive PKDRT Act. Although some communities refuse to acknowledge marital rape, complaints from wives indicate the presence of sexual violence, by Article 53 of the PKDRT Act.

Law No. 12 of 2022 on Sexual Violence Crimes (TPKS Law) strengthens legal regulations related to marital rape, which were previously regulated in the PKDRT Law. The UU TPKS aims to provide a broader legal framework regarding sexual violence, particularly to protect the rights of the public, especially women. This law establishes nine types of sexual violence crimes, including those that were previously not considered crimes. Unfortunately, the provisions of Article 4(2)(h) of the TPKS Law do not clearly describe the act of marital rape and only refer to it as sexual violence within the family context. The article-by-article explanation in the law states that each section of Article 4 is deemed clear without requiring

further clarification.

Even though there is a law that recognizes sexual coercion in the household as a crime, there are still legal loopholes that define the rights and obligations of marriage. Women's rights are often not protected because they are considered a private matter<sup>26</sup>. Informal handling by authorities limits the human rights of women who report cases, creating stigma and fear for victims. The importance of ending victim blaming is also highlighted, because sexual coercion in marriage is still sexual violence, and victims should not be blamed. Victim blaming creates a negative stigma that causes many victims to choose not to report their cases.

Following developments in the law related to the issue of sexual violence in the household, particularly marital rape in Indonesia, there is a need for updates to the relevant criminal law. Current developments in criminal law focus on victim rehabilitation through a restorative justice approach that reflects the principles of swift justice, emphasis on effectiveness, efficiency, and affordability. This approach aims to rebuild the concept of modern criminal law by emphasizing a balance between the perpetrator, the victim, and society's interest. TPKS Law reflects restorative justice principle, which regulates the rights of victims, restitution and compensation, law enforcement, and rehabilitation.

The definition of marital rape is further regulated in Law Number 1 of 2023 (KUHP Law), which was passed in January 2023 and will come into effect in 2026. Marital rape in the KUHP Law is treated similarly to ordinary rape because it is considered a form of rape within the household. The difference lies in the context of rape "outside of marriage" and rape "within marriage." Although the term "marital rape" is not mentioned, Article 473, paragraph (2), of the Criminal Code refers to sexual intercourse within marriage involving the consent and trust of a lawful husband/wife. The provisions regarding marital rape in this law are reinforced by Article 473(6), which stipulates that criminal charges for marital rape can only be brought upon the victim's complaint. The existence of this complaint-based offense often allows perpetrators to escape punishment, as victims may feel threatened or consider it an internal matter, making them reluctant to report it. This provision is designed to align with Article 53 of the Domestic Violence Act, which classifies sexual violence against a spouse as a complaint-based offense.

The categorization of marital rape as a complaint offense raises concerns about the possibility of perpetrators escaping punishment. This categorization takes into account special protection for victims of sexual violence to avoid damaging the victim's dignity if the case becomes public. Prof. Rika Saraswati emphasizes the relevance of complaint offenses, given the psychological aspects of the victim and the stigma. Sexual violence as a criminal offense requires special treatment, and the victim's consent is a priority. Marital

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26 Ulfa Fitriyah, *Telaah Marital Rape Dalam Undang-Undang No. 23 Tahun 2004 Tentang Penghapusan Kekerasan Dalam Rumah Tangga (TPKDRT), dan Undang-Undang No. 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual (TPKS) Perspektif Feminisme*, Tesis: UIN Kiai Haji Achmad Siddiq Jember (2023), 76.

rape perspective arises from a husband's control over his wife's rights, which addressed through the provisions of the Criminal Code, but this does not mean that such provisions prohibit sexual relations between husband and wife; rather, they aim to prevent and protect victims from violence or coercion.

The definition of marital rape that exists and applies in Singapore's current regulations is regulated in the Singapore Penal Code 1871 (2020 Revised Edition). Article 375, paragraphs (1) and (1A), stipulates that rape is the penetration of the penis into the vagina, mouth, or anus of a person by a man. Although this section covers acts committed by men against women, Section 376(2) expands the scope of the law by regulating sexual violence or forced sexual intercourse by a woman against a man. Section 375(4) states that a man cannot be found guilty of penetration against his wife with her consent unless she is under 14 years old. Meanwhile, Article 376(2) covers sexual violence through penetration using digits (e.g., fingers) or other objects, including cases where a woman penetrates her husband without his consent.

Consent to sexual relations is significant because it relates to the violation of sexual rights. Consent is permission given by a person in a conscious state to engage in sexual activity. Consent is not valid if given under threat, while intoxicated, or under the influence of drugs. These conditions can affect the understanding of the implications of consent<sup>27</sup>. Unlike Indonesia, which categorizes marital rape as domestic violence, Singapore's Women's Charter does not explicitly recognize marital rape as a form of domestic violence. Section 64 of the Women's Charter describes domestic violence as acts of abuse or ongoing torture. Both of these acts allow victims to seek protection under Article 65 of the Women's Charter.

The third comparison lies in the criminal provisions for perpetrators of marital rape in Indonesia and Singapore. The current criminal provisions (*ius constitutum*) for perpetrators of domestic sexual violence or marital rape in Indonesia are regulated in Article 46 of the PKDRT Law, Article 6 letter b and Article 15 of the TPKS Law, and Article 473 paragraph (1) of the Criminal Code. Violations of Article 8(a) of the PKDRT Law or marital rape may be subject to the penalties under Article 46 of the PKDRT Law, which imposes a maximum prison sentence of 12 years or a fine of up to Rp36,000,000.00. Article 6(b) of the TPKS Law sets out penalties for violations of Article 4, particularly regarding marital rape, with a maximum prison sentence of 12 years and/or a fine of Rp300,000,000.00. This article protects against sexual violence in marriage, including husbands who force their wives to have sex or vice versa. The interpretation of the term "against the law" needs further explanation, especially in the context of intimate relations between husband and wife, so that there is no misinterpretation. Perpetrators who violate Article 6, especially against family members, can be subject to an additional  $\frac{1}{3}$  penalty (of the main penalty). Article 473(1) of the Criminal Code stipulates that perpetrators of marital rape who violate Article

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27 "Rape Laws in Singapore and How Offenders Can Be Punished", Singaporelegaladvice.com, 18 January 2021, accessed 26 October 2025, <https://singaporelegaladvice.com/rape-laws-singapore-offenders-punished/>.

473(2)(a) and (6) may be sentenced to a maximum of 12 years imprisonment; however, for paragraph (6), this penalty applies only if the victim reports the act of marital rape by their spouse and the perpetrator is proven guilty. Only under such conditions can criminal penalties be imposed.

Singapore uses imprisonment and fines as criminal penalties, which are divided into general criminal penalties and aggravated penalties. Caning applies as an aggravated criminal penalty. Perpetrators of rape against victims 14 years old or older in Singapore may be sentenced to up to 20 years in prison, with the possibility of additional fines or caning, by Section 375(2) and Section 376(3) of the Singapore Penal Code 1871 (Revised Edition 2020). Rape involving more serious offenses carries a sentence ranging from eight to 20 years in prison and a minimum of 12 strokes of the cane. Rape is considered serious if it involves assault or threats of violence, is committed against a victim under 14 years old without consent, or is committed against a victim under 14 years old who has an exploitative relationship with the perpetrator, even if the victim consented to the act.

Caning is considered a quick way to deter criminals. The instrument used is a long, thick rattan cane. There are more than 30 offenses, including rape, robbery, and illegal residence, that are punishable by caning. This punishment is mandatory and applies to prisoners who commit offenses in prison as an administrative measure. Regulated under the Criminal Procedure Code 2010, flogging in Singapore has a gender aspect, exempting women and men over 50 years old from imprisonment for up to 12 months. Boys under 16 years old may also be flogged, by Singapore's criminal responsibility age of 10 years.

Indonesia and Singapore have several similarities in the marital rape regulation. One of them is related to patriarchal culture (Indonesia) and marital rape immunity (Singapore). Patriarchal culture emphasizes the view that women must submit to men, considers men as symbols of leadership in social life, and has a primary influence in enhancing the dignity of women<sup>28</sup>. This culture has existed since ancient times, often placing women in a weaker position, especially in the household context. Indonesian society tends to accept the idea that a wife must serve her husband, so marital rape is considered impossible. Patriarchal culture can hinder the achievement of a happy and lasting marriage due to gender inequality, thereby triggering conflicts between husbands and wives. Although the Marriage Law emphasizes the equality of rights between husbands and wives, societal perceptions often justify violence as a means to discipline wives who refuse to fulfill their husbands' sexual desires. A shift away from patriarchal culture is necessary to ensure gender equality, particularly in cases of sexual violence, including marital rape. Prof. Rika Saraswati emphasizes the need to respect and equal treatment.

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28 Fransiska Novita Eleanora and Edy Supriyanto. "Violence against Women and Patriarkhi Culture in Indonesia". *International Journal of Multicultural and Multireligious Understanding (IJMMU)* 7, no. 9 (2020): 44-45, <http://dx.doi.org/10.18415/ijmmu.v7i9.1912>.

Criminal law reform is needed to address the issue of marital rape in Indonesia, influenced by patriarchal culture. This reform must align with restorative justice principles and emphasize victims' rehabilitation. The TPKS Law and Article 54 of the Criminal Code reflect these principles by regulating victims' rights, restitution, compensation, and consideration of forgiveness from victims<sup>29</sup>. Restorative justice methods involving mediation between victims and perpetrators do not necessarily provide justice for victims of sexual violence or rape, given the various losses and complexities involved in healing trauma. Nevertheless, efforts to resolve marital rape are beginning to emerge.

Marital rape immunity as stipulated in the Singapore Penal Code 1871 has led to an increase in cases of marital rape. Section 375 of the Singapore Penal Code 1871 (Chapter 224) states that forcing a wife to have sexual intercourse is not considered rape, except in certain situations such as sexual intercourse without consent or consent obtained through threats, or if the woman is under 13 years old or in a special condition. It is clear that this section grants legal immunity to husbands who engage in non-consensual sexual intercourse with their wives, provided the wife is over 13 years old. This indicates that Singaporean criminal law does not classify such acts as rape within the context of marriage, raising concerns about legal protection for victims of marital rape in the country.

In 2007, Singapore's senior minister of home affairs, Ho Peng Kee, brought the issue of immunity for husbands who commit marital rape to parliament. Ho Peng Kee argued that immunity would not be abolished entirely but instead proposed a new law that would provide special protection for women whose marriages were ending or had ended, indicating that they no longer consented to sexual relations with their husbands or ex-husbands<sup>30</sup>. This proposal resulted in an amendment to the provisions on marital rape in the Singapore Penal Code, which removed protection for husbands who forced sexual intercourse without their wives' consent, especially if they had been legally separated by court order or written agreement. Although this amendment was passed, some parties criticized that the protection provided was still not optimal for women in such marital situations. This amendment is regulated in the Penal Code (Amendment) Act 2007 (No. 51 of 2007), which repeals and replaces several articles in the previous Penal Code.

The provisions regarding marital rape were amended by Section 375(4) of the Singapore Penal Code (Amendment) Act 2007 by adding an exception that revokes such immunity if it is proven that the marriage is on the verge of or has already broken down. Regardless of the conditions outlined in the provisions of the section and subsection, sexual intercourse without consent within marriage is considered rape. The Singapore Parliament is currently seeking to amend the Penal Code, particularly regarding the marital rape immunity provision. In response to this, the Minister for Social Development and

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29 Henny Saida Flora, "Keadilan Restoratif pada KUHP Baru di Indonesia: Suatu Studi Hukum Profetik", *Rechtsidee* 11, (2022), no.2, 7, DOI: <https://doi.org/10.21070/jjhr.v11i0.836>

30 *Parliamentary Debates Singapore: Official Report*, vol 83 at col 2175 (22 October 2007).

Family, Mr. Tan Chuan-Jin, stated that the government is actively reviewing the clause, acknowledging that marital rape constitutes a form of sexual violence<sup>31</sup>. The statement focused on the need for equal legal protection for married women. In February 2019, the Criminal Law Reform was submitted to parliament, highlighting the end of marital immunity. The bill was subsequently passed as the Criminal Law Reform Act 2019 (Criminal Law Reform Act No. 15 of 2019), which criminalizes marital rape in Singapore and removes the previous exemption, replacing it with the provision that “(4) No man shall be guilty of an offense under subsection (1)(b) or (1A)(b) for an act of penetration against his wife with her consent.” Translation: “(4) No man shall be guilty of an offense under subsection (1)(b) or (1A)(b) for an act of penetration against his wife with her consent.”

Following the enactment of the CLRA 2019, Singapore underwent a vital transformation of reforms initiated by parliament. The CLRA 2019 amendments and the Protection from Harassment (Amendment) Act, which came into effect on January 1, 2020, led to significant changes on Singapore's Penal Code<sup>32</sup>. One of them is the removal of marital immunity for acts of rape to protect all women from sexual violence. The exception for marital rape and sexual assault has been removed by the CLRA 2019, which adds a definition of rape that also includes non-consensual acts involving penile penetration into the mouth and anus. Section 375(4) of the Singapore Penal Code 1871 (2020 Revised Edition) no longer allows the defense of marital rights.

Both Indonesia and Singapore have ratified the Convention on the Elimination of All Forms of Discrimination Against Women, demonstrating their seriousness about the issue of domestic violence. Indonesia ratified CEDAW through Law No. 7 of 1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, while Singapore did so in 1995, as evidenced by periodic country reports such as in 2007, which reformed several laws such as the Singapore Penal Code (Amendment) Act 2007 and the Women's Charter Act (2011). CEDAW emphasizes women's human rights, stating that women have the same rights as men. Both countries are also required to ensure that every woman can enjoy equal rights and freedoms. It is especially important to remember as a state party it is legally bound by CEDAW, although the Convention remains marginalised as an instrument of change within the country.<sup>33</sup>

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31 Siau Ming En, 2018, “Review of Laws on Attempted Suicide and Other Areas to be Completed This Year”, Todayonline.com. 9 January 2018, Online, accessed 26 March 2025, <https://www.todayonline.com/singapore/review-laws-attempted-suicide-and-other-areas-be-completed-year>.

32 Neo Rong Wei, 2019, “Criminal Law Reform Bill: A look at key changes in the Penal Code”, Todayonline.com, 6 Mei 2019, Online, accessed 25 Oktober 2023, <https://www.todayonline.com/singapore/criminal-law-reform-bill-look-key-changes-penal-code>.

33 Christine Chinkin and Keina Yoshida. “The CEDAW Committee: Global leader in tackling violence against women and girls”. *European Human Rights Law Review* (4), (2020): 3. Available from <https://eprints.lse.ac.uk/106594/>

Article 2(a) of DEVAW stipulates that violence against women includes various forms, such as physical violence, psychological violence within the family, sexual abuse of girls, harmful traditional practices, marital rape, and violence related to exploitation.

## **2. The Contribution of Singapore's Marital Rape Law on Rape to the Future of Indonesian's Marital Rape Law**

Singapore can make an essential contribution to Indonesia on the issue of marital rape by increasing awareness of these cases. The aim is to protect victims and deter perpetrators, as well as to change public perceptions so that forced sex within marriage is no longer visible as a trivial matter or an ordinary practice, but as a criminal act.

First, Singapore has regulations regarding the arrest of perpetrators without a warrant. Singaporean regulations classify rape as a serious crime that can be arrested without a warrant, as stated in the third column of the first schedule of the Criminal Procedure Code Singapore, in the table titled "FIRST SCHEDULE Tabular statement of offences under the Penal Code 1871." For violations of Section 375(2) of the Singapore Penal Code (2020 Revised Edition), the police may arrest a man without a warrant if they have strong reasons to believe that he has committed rape, taking into consideration factors such as the seriousness of the offense, the risk of flight, or the prevention of interference with evidence. A search of the suspect and their property conduct after arrest. Additionally, female police officers have the special right to conduct searches of arrested women under the provisions of Sections 78 and 83 of the Singapore Criminal Procedure Code.

The official warrant will be issued by a judge after finding valid grounds, ordering the arrest of the suspect, and bringing them to court. This warrant is valid until revoked by the court that issued it. This document is marked with the official seal of the court and the signature of the presiding judge. In serious crimes such as rape, bail requirements may be stricter, and the warrant may stipulate that the perpetrator cannot be released on bail. Violations of criminal acts of rape, under the Singapore Penal Code, cannot be avoided by paying bail. Singapore has also established special police units to handle sex crimes professionally. Such units also have complementing medical and psychological assistance to enable faster and better treatment of victims compared to Indonesia. Such an integrated approach demonstrates Singapore's commitment to ensure that its justice system does not only prosecute criminals but is also concerned with recovering victims and securing their safety.<sup>34</sup>

Secondly, Singapore can contribute to the protection of victims of domestic violence by encouraging the implementation of additional protection orders, as stipulated in Articles 65 and 66 of the Women's Charter. In addressing the issue of domestic violence, Singapore

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34 Sigit Kamseno and Agam Sakti Hidayat. "Perbandingan Hukum Pidana Tentang Kejahatan Kekerasan Seksual di Indonesia dan Singapura". *Jurnal Ilmu Pertahanan, Hukum, dan Ilmu Komunikasi* 1 no. 4. (2024): 413. <https://doi.org/10.62383/konsensus.v1i4.334>.

emphasizes the importance of this issue as a social issue and not merely an internal family matter. Singapore stresses the need for a swift response to the situation of victims to prevent further violence by providing additional protection for victims of domestic violence through<sup>35</sup>:

- a. Personal Protection Orders (PPO): orders prohibiting perpetrators from committing violence against victims or other family members, as stipulated in Section 65 of the Women's Charter (Cap. 353). All Singapore citizens or residents who qualify as family members may apply for a PPO from the Family Justice Courts and Family Violence Specialist Centres. The requirements are that the applicant must be over 21 years of age and legally competent. If the applicant does not meet the age or legal competence requirements, a guardian/relative may apply on their behalf. Individuals under the age of 21 who are married are also eligible. The court issues a PPO after determining that the perpetrator is likely to commit violence and that the order is necessary to protect the applicant or family members. A PPO may include a prohibition on the perpetrator inciting or aiding domestic violence. If the parties no longer live together and further communication is unlikely, the court may determine that a PPO is not necessary.
- b. Domestic Exclusion Orders (DEOs) prohibit an individual from residing in the same household. These can be submitted with a Personal Protection Order (PPO) application, as outlined in Article 65 paragraph (5) letter (a) of the Women's Charter (Cap. 353). Courts issue DEOs at the trial's conclusion, barring the perpetrator from entering all or part of the victim's or protected family members' residence. DEOs are particularly appropriate when violence persists and both parties continue to live together.
- c. An Expedited Order (EO) has a similar function to a PPO, namely to provide emergency protection when victims face imminent danger as stipulated in Section 66 of the Women's Charter (Cap. 353). An EO application can be filed along with a PPO application, and the court will consider the urgency of the application based on the situation faced by the victim. An EO is issued to the perpetrator before the PPO decision is made and remains in effect for 28 days or until the first day of the PPO hearing, with the possibility of extension by the court if deemed necessary. The issuance of an EO requires a request from the victim and the court's belief in the existence of imminent danger due to domestic violence against the victim.
- d. Mandatory Counselling Orders (CGO) Section 65(5)(b) of the Singapore Women's Charter allows the court to issue a CGO. A CGO may order the petitioner or the protected individual to attend counselling sessions at an institution designated by the Ministry of Social and Family Development. After issuance, the court reviews

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35 Low Jin Liang and Dorothy Tan, "Dealing with Family Violence", [Pkwalaw.com](https://pkwalaw.com), accessed 23 May 2025, <https://pkwalaw.com/family-violence/>.

the case every six to nine months, evaluates the progress of the parties based on the counselling institution's report, and decides whether the obligation to attend counselling is necessary.

The third contribution relates to the Family Court in Singapore, which could serve as an example for Indonesia. The Family Court in Singapore adopts the principles of therapeutic justice with a focus on maintaining healthy and constructive family relationships, even in situations of disharmony and breakdown<sup>36</sup>. The legal basis used in the Family Court is the Family Justice Act 2014 and the Family Justice Reform Bill 2023. The court structure consisted of the High Court Family Division, the Family Court, and the Juvenile Court, which aim to handle various family issues. The Family Court promotes the resolution without hostility, focusing on matters such as adoption, divorce, child custody, child and youth protection, family counseling, guardianship, international child abduction, and protection against domestic violence. This approach promotes healthier and more constructive family relationships.

The principle of therapeutic justice in family court emphasizes multifunctional services: counseling, psychotherapy, and social services, to improve individual well-being and repair relationships. Based on this concept, parties involved in a case are not merely seen as claimants of legal rights but are expected to receive justice while striving to understand the context. Family Courts in Singapore handle family disputes, including issues related to children, finances, and domestic violence, under one judicial roof. Indonesia is encouraged to adopt a similar model so that family issues are not solely dependent on religious or general courts, and to synchronize the relevant laws. To effectively address these issues, the UU PKDRT requires strengthening and broader application. Professor Rika Saraswati further underscores the importance of refining the Marriage Act, alongside the crucial need for increased public understanding of their rights.

The final contribution concerns consent in sexual relations (sexual consent), which emphasizes the importance of communication and voluntary consent. Any action taken without consent constitutes a violation of a person's right to privacy and sexual freedom. The Singapore Penal Code, although it does not define consent, outlines several situations that are considered unlawful. Such invalid consent includes consent given under threat or misunderstanding, as stipulated in Section 90 of the Singapore Penal Code (Revised Edition 2020). Regulations on sexual consent in Indonesia are not yet specific, as the TPKS Law does not include the concept of sexual consent. The TPKS Law only explains sexual consent regarding sexual violence and how a person cannot freely give consent due to power and/or gender inequality. In this law, the concept is a degrading and coercive act that can cause physical, psychological, and other forms of suffering. Unfortunately, the law

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36 Dorothy Tan, "*Therapeutic Justice - A New Approach to Divorce in Singapore*", Pkwlaw.com, accessed 19 June 2025, <https://pkwalaw.com/therapeutic-justice-divorce/>.

does not yet contain specific provisions regarding consent in the context of sexual relations. Both countries have defined consent or sexual consent in their legal regulations, as such a definition is crucial for understanding what is meant by consent in sexual relations and to what extent such actions can be considered consent or not.

#### **D. Conclusion**

Marital rape is the act of forcing sexual intercourse within marriage without the consent of the spouse. The differences in the legal regulation of marital rape between Indonesia and Singapore currently lie in the legal system, legal subjects and objects, definitions, and criminal penalties, including the use of caning in Singapore. Both countries share similarities in patriarchal culture (Indonesia) and marital rape immunity (Singapore), which have led to a lack of criminal regulations on the matter. Both have ratified CEDAW and interpret marital rape as domestic violence, protecting victims through the PKDRT Law and TPKS Law (Indonesia) and the Women's Charter (Singapore). A change in public perspective is needed so that society recognizes marital rape as a criminal act. Both countries are advised to establish more specific regulations or supplement existing regulations on marital rape. Singapore is expected to seek more humane alternatives to caning in the future, while still adhering to human rights principles. Singapore, as a member of the United Nations, should comply with and respect the human rights standards outlined in the United Nations Charter, the Universal Declaration of Human Rights (UDHR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Convention Against Torture).

Singapore can contribute to Indonesia's future regulations by guiding the arrest of rapists without a warrant, based on Singapore's Criminal Procedure Code. Second, there is additional protection for victims of domestic violence through PPO, DEO, EO, and CGO protection orders. Third, there are regulations on situations that do not consider consent in Singapore's Criminal Code. Fourth, the existence of the Singapore Family Court, which in particular handles family matters, including domestic violence cases. Indonesia's legal regulations could consider addressing situations involving consent. Both countries could also consider incorporating definitions and boundaries of consent into the law. The hope is that Indonesia could establish a family court like Singapore's, specifically handling domestic violence and rape cases.

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## REGULATION AND LEGAL PROTECTION OF SEXTORTION AS ELECTRONIC-BASED SEXUAL VIOLENCE IN INDONESIA

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### ABSTRACT

Electronic-based sexual violence in Indonesia has increased compared in prior years, one of which is sextortion. Practice of handling sextortion cases in Indonesia show that law enforcement institution only focus on the dissemination of victim sexual content, without following up with extortion and threats to perpetrators, also the absence of victims protection. Victims comply with the wishes of perpetrators and not brave enough to report because victims are worried that victim sexual content will be disseminated. Normative legal research is a research method are used by analyzing literature research, statutory research, and case study. The research results show that Article 14 Law Number 12 of 2022 on Sexual Violence Criminal Act can be used in handling sextortion cases because it has a more accommodating formulation and form of punishment, also provides comprehensive protection of victims.

**Keywords:** Sextortion; Electronic-Based Sexual Violence; Sexual Offences

### A. Introduction

Gender-based violence has increased compared in prior years, according to data from the CATAHU Tahun 2023 Komnas Perempuan. Data shows that violence in the cyberspace is the highest, based on Komnas Perempuan data.<sup>1</sup> Cyberspace and public spaces are the most unsafe places for gender-based violence. Furthermore, the most frequently reported forms and types of violence are sexual violence, with numerous cases of electronic-based sexual violence.<sup>2</sup> Besides violence against women, data on child victims of violence also shows that sexual violence are the highest number of cases involving children as victims. It means, sexual violence are the highest number of violence cases against women and children.<sup>3</sup>

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1 Komnas Perempuan, *Catatan Tahunan Tentang Kekerasan Terhadap Perempuan 2022: Kekerasan Terhadap Perempuan Di Ranah Publik dan Negara: Minimnya Perlindungan dan Pemulihan* (Jakarta: Komnas Perempuan, 2023), 60-62.

2 *Ibid.*

3 KPAI, "Catatan Pengawasan Perlindungan Anak Di Masa Transisi Pandemi; Pengasuhan Positif, Anak Indonesia Terbebas Dari Kekerasan," Komisi Perlindungan Anak Indonesia, 2023, <https://www.kpai.go.id/publikasi/catatan-pengawasan-perlindungan-anak-di-masa-transisi-pandemi-pengasuhan-positif-anak-indonesia-terbebas-dari-kekerasan>.

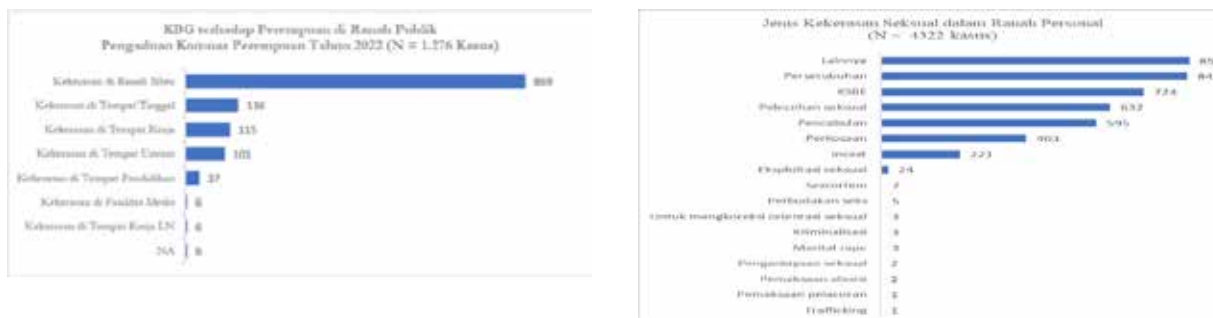


Diagram 1. Gender-based Violence Against Women 2022



Diagram 2. Cases of Child Victims of Violence

Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence (Law on Sexual Offences) introduced in May 2022 has refined the definition of criminal acts of sexual offences and criminalized its forms and types, one of which is electronic-based sexual violence. Facility of communication and information access through internet has resulted in cases occurring in the cyberspace, including electronic-based sexual violence, which is technological harassment of the victim's gender or sexual identity.<sup>4</sup> Most frequently reported of electronic-based sexual violence involves the dissemination of sexual explicit photos or videos of the victim. One of the most sexual offences cases of electronic-based sexual violence in Indonesia is sextortion.

Sexual offences is the most common case against women and children, and electronic-based sexual violence cases against women and children have increased with facility of access to information and communication. The urgency of this paper is because in practice, handling sextortion cases as electronic-based sexual violence only focuses on the act of extortion as a crime against property, whereas sextortion as electronic-based sexual violence is Law on Sexual Offences, where the perpetrator requests sexual content from the the victim, even sexual intercourse. The victim complied with the perpetrator's demands and not brave enough to report because she was deeply concerned about the distribution of the victim sexual content. Furthermore, overlapping laws regarding the handling of sextortion cases potentially complicate matters for law enforcement.

4 Hikmawati, P., "Pengaturan Kekerasan Berbasis Gender Online: Perspektif Ius Constitutum dan Ius Constituendum," *Negara Hukum*, Vol. 12, No. 1 (2021): 61. <https://dx.doi.org/10.22212/jnh.v12i1.2124>.

There is no equivalent for the word sextortion in kamus bahasa Indonesia, but it can be defined as extortion involving sexual content obtained through hacking or provided by the victim. The perpetrator then misuses the victim's sexual content as a threat to extort the victim for sexual content or material.<sup>5</sup> There has even been the distribution of sexual explicit photos or videos of the victim, often in the form of deepfake porn, where the perpetrator takes the photo or video from the victim's social media and then edits it to appear as if the photo or video contains the victim's face, thus creating a sexual image. Various motives and chronologies for victims of sextortion cases exist, including friendships or relationships, sudden calls from strangers, and the perpetrator immediately exposing their genitals while pretending to be on a WhatsApp video call.<sup>6</sup>

There are several decisions regarding the practice of handling sextortion cases in Indonesia, First, court number 217/Pid.B/2018/PN Bna. Second, court number 466/Pid. Sus/2021/PN Bks. Third, court number 71/Pid.Sus/2023/PN Pdl. Based on the court decisions regarding sextortion cases, law enforcement institution handling sextortion cases use Article 368 Paragraph (1) of the Criminal Code and Article 27 Paragraph (1) of The Law on Electronic Information and Transactions. Based on the facts from the court decisions regarding sextortion cases, the victim complied with the perpetrator's wishes to create sexual content and engage in sexual intercourse due to the perpetrator's threats of violence.

Sextortion is regulated in Article 14 of Law on Sexual Offences. The problem in the practice of handling sextortion cases is the element of "extortion or threats, coerce" in sextortion differs from extortion under the Criminal Code as a crime against property. This contrasts with the reality that sextortion perpetrators not only demand money, but also sexual content from the victim and even sexual intercourse. Furthermore, law enforcement institution in the practice of handling sextortion cases only focus on the dissemination of sexual content from the victim, rather than on the extortion and threats of the perpetrator. Furthermore, the victims do not report sextortion perpetrators because they are very worried about the victim sexual content will be uploaded. Finally, the overlap between laws in handling sextortion cases has the potential to make it difficult for law enforcement and the victims to achieve justice, even though Law on Sexual Offences is based on the principles of justice and the best interests of the victims in Article 2 of Law on Sexual Offences. These things certainly do not optimize the victim protection, as well as punishment and rehabilitation for perpetrators.

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5 Jordy Herry Christian, "Sexstorsi: Kekerasan Berbasis Gender Online Dalam Paradigma Hukum Indonesia," *Binamulia Hukum*, Vol. 9, No. 1 (2020): 84, <https://doi.org/10.37893/jbh.v9i1.364>.

6 Nisa Hanifah Nur Syarifa dan Yasmine Nathifa Zahira, "Mengungkap Kengerian Sextortion: Ketika Privasi Diperdagangkan untuk Mengintimidasi," *Medium*, 2023, <https://economica.medium.com/mengungkap-kengerian-sextortion-ketika-privasi-diperdagangkan-untuk-mengintimidasi-5e2db427264b>.

This research will focus on sextortion as a form of electronic-based sexual violence under Law on Sexual Offences, both in terms of its legal basis and legal consequences. The following research has been conducted, First, “Pertanggungjawaban Pidana Pelaku Sextortion dalam KBGO,” a study that examines sextortion as electronic-based sexual violence according to law before Law on Sexual Offences introduced and focuses on the criminal liability of sextortion perpetrators as electronic-based sexual violence. This study was written by Fikri Chandra Permana. Second, a study by Eko Nurisman about “Risalah Tantangan Penegakan Hukum TPKS Pasca Lahirnya UU TPKS,” examines criminal legal instruments regarding Law on Sexual Offences and focuses on protecting victims in general.

This research will discuss about the application of Law on Sexual Offences in handling sextortion cases as electronic-based sexual violence in Indonesia, as well as legal protection for the victim. First, the regulation and legal protection of sextortion as electronic-based sexual violence in Indonesia. Second, analysis of sextortion cases and the application of Law on Sexual Offences in handling sextortion as electronic-based sexual violence.

## **B. Research Method**

Normative legal research is a research method in this legal writing through the search and review of literature or secondary data with a descriptive analysis. The data used are primary and secondary data, using qualitative analysis through a criminal law approach. Primary data is used as long as it supports secondary data, while secondary data consists of primary, secondary and tertiary legal materials. The data used include laws, court decisions, other library data, and interviews related sextortion cases in Indonesia. Based on this data, legal interpretation and legal reasoning are then conducted through legal arguments explaining the regulation and legal protection of sextortion as electronic-based sexual violence in Indonesia.

## **C. Discussions**

### **1. The Regulation and Legal Protection of Sextortion As Electronic-based Sexual Violence in Indonesia**

Crime is defined as a criminal event or a criminal circumstance by the Hoge Raad.<sup>7</sup> In addition to the act or behavior and the error (schuld), offender's mental state at the time of a crime is also required in a criminal act. Furthermore, this definition also addresses criminal responsibility that can be sought if the perpetrator's guilt is proven.

Sextortion can be defined as a threat to the victim to comply with the perpetrator's wishes, which is not always about money or financial. It can also involve the victim not complying with the perpetrator's wishes, leading the perpetrator to upload explicit content material as revenge. Sextortion is a cybercrime that exploits sexual content to extort material

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<sup>7</sup> P.A.F. Lamintang & Franciscus Theojunior Lamintang, *Dasar-Dasar Hukum Pidana Indonesia* (Jakarta: Sinar Grafika, 1984), 191.

or sexual favors from the victim.<sup>8</sup> If the perpetrator and the victim are related by marriage or marriage, intimate photos and/or videos of the victim are used by the perpetrator to threaten the victim not to proceed with divorce or end the relationship.<sup>9</sup> A study by ECPAT International that the characteristics of sextortion by the perpetrator against the victim include a power relationship, psychological violence, generally in the form of threats, requests for sexual activity, and access to the victim's sexual content to harm the victim. In some cases, the victims also experience physical violence, intended to intimidate them into complying with the perpetrator's wishes.<sup>10</sup> Furthermore, the victims of sextortion may find it difficult to return to online or in-person activities.

There is no law that regulates sextortion as electronic-based sexual violence. Law enforcement institutions use the Criminal Code or Law on Electronic Information and Transactions. First, Articles 281 to 299 of the Criminal Code, as well as Article 368 Paragraph (1) of the Criminal Code regarding extortion in sextortion cases by exploiting the victim's sexual content. Second, The Law on Electronic Information and Transactions, which regulates the prohibition on the public dissemination of content containing indecency. Acts of extortion and threats of violence are regulated in Article 27B Paragraph (1) and Article 45 Paragraph (8) of The Law on Electronic Information and Transactions and Article 27B Paragraph (2) and Article 45 Paragraph (10) of The Law on Electronic Information and Transactions regarding the prohibition on the dissemination of content for personal gain accompanied by threats of violence to induce the victim to comply with the perpetrator's material desires. Furthermore, The Law on Electronic Information and Transactions regulates the actions of perpetrators who send content containing threats of violence and intimidate their victims.

The Law on Electronic Information and Transactions are not yet comprehensive enough to regulate sextortion. The Law on Electronic Information and Transactions only focuses on the dissemination of content that violates decency for public access, as the Criminal Code requires that such acts occur in an open space or public place.<sup>11</sup> This means that the definition of violating decency must be referred to the Criminal Code's section on crimes against decency.<sup>12</sup>

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8 Hikmawati, P., *Op.Cit.*, 63.

9 Wulansari, Tenaga Ahli Pemenuhan Hak Korban UPT P2TP2A Dinas PPAPP Provinsi DKI Jakarta.

10 Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, *Buku Panduan Internet Aman untuk Anak Pencegahan Eksploitasi Seksual Anak di Internet* (Jakarta: Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, 2019), 23.

11 R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Bogor: Politeia Bogor, 1988), 206.

12 Adami Chazawi, & Ardi Ferdian, *Tindak Pidana Informasi & Transaksi Elektronik Penyerangan Terhadap Kepentingan Hukum Pemanfaatan Teknologi Informasi dan Transaksi Elektronik* (Malang: Media Nusa Creative, 2015), 38.

Article 27B Paragraphs (1) and (2) of the Law on Electronic Information and Transactions concerning extortion and threats contain unclear provisions because the elements of extortion and/or threats are two distinct elements.<sup>13</sup> The definition of extortion and/or threats refers to the Criminal Code, where the perpetrator's goal is to get the victim to provide something or to pay a debt. Furthermore, extortion and threats are categorized as crimes against property under the Criminal Code. Perpetrators of sextortion may consent to photographing the victims naked or recording sexual acts, but they do not expect these photos and/or videos to be used to threaten, blackmail, or control them into complying with the perpetrator's wishes.<sup>14</sup> In this case, the victims are vulnerable to re-victimization and criminalization because they are also exposed to the sexual content, as defined by the Law on Electronic Information and Transactions and the Pornography Law. This creates legal uncertainty because law enforcement institution use subjective judgments regarding the victim's sexual content, created and owned by the victim.

Indonesian positive law is not enough to protect the victims of sextortion. Handling sextortion cases involves not only regulating the act of sextortion, but also ensuring justice and legal certainty for the victims. The victims are trapped in a vicious cycle of criminal prosecution if they report the perpetrator using the Law on Electronic Information and Transactions, but they are actually afraid of being reported back using the Law on Electronic Information and Transactions.<sup>15</sup> Furthermore, the legal process in this case remains very weak, including issues with providing evidence, jurisdictional issues, limited sextortion experts, victim-blaming in the handling of sexual offences cases, limited availability of digital forensic tools, and the understanding or attitudes of law enforcement institution regarding sextortion.<sup>16</sup>

Law on Sexual Offences has refined the definition and criminalized various forms of sexual offences. Examining Article 1 number 1 of Law on Sexual Offences, there are two aspects related to sexual offences in Indonesian law.<sup>17</sup> First, sexual offences can be identified or classified into nine forms, including Electronic-Based Sexual Violence. Second, all acts under other laws that also criminalize sexual offences. Sextortion focuses on the victim's sexual content, followed by threats to force the victim to comply with the perpetrator's wishes. While not all forms of Electronic-Based Sexual Violence are regulated by Article 14 of Law on Sexual Offences, it can at least cover several common acts, namely distributing or transmitting sexual content through recording, stalking, or tracking, which is

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13 Maidina Rahmawati, *Menelisis Pasal Bermasalah dalam UU ITE: Pasal 27 (4) tentang Pemerasan dan Pengancaman* (Jakarta: Institute for Criminal Justice Reform, 2021), 9.

14 Ratna Batara Munti, Emma Mukarramah, & Maidina Rahmawati, *Laporan Penelitian Needs assessment: Analisis Tantangan Implementasi dan Kebutuhan Operasionalisasi Undang-Undang Tindak Pidana Kekerasan Seksual (UU TPKS)* (Jakarta: International NGO Forum for Indonesian Development, 2022), 88.

15 Maidina Rahmawati, *Loc.Cit.*

16 Wulansari, *Tenaga Ahli Pemenuhan Hak Korban UPT P2TP2A Dinas PPAPP Provinsi DKI Jakarta.*

17 R. Valentina Sagala, *100 Tanya Jawab Seputar Kekerasan Seksual (Sejak Diberlakukannya Undang-Undang Tindak Pidana Kekerasan Seksual)* (Jakarta: Penerbit Gramedia Pustaka Utama, 2022), 4.

used as threats, and deceiving the victim.

The facts found in the field regarding sextortion are far more complex. First, the victims do not report the perpetrators of sextortion because they are powerless and deeply worried that the perpetrators will share their sexual content on social media with their parents and friends. Consequently, the victims comply with the perpetrator's wishes to prevent the distribution of the sexual content. Second, the victims need is to protect the victim's sexual content from the perpetrator, such as by removing and/or blocking access to the victim's sexual content. Third, the reality is that when sextortion perpetrators photograph and/or record the victim, they may consent, but the victim does not expect the photos and/or videos to be used to threaten or control the victim into complying with the perpetrator's wishes.<sup>18</sup> Furthermore, the element of threats or coercion in sextortion differs from extortion under the Criminal Code, which is a crime against property. This contrasts with the reality in the field where sextortion perpetrators not only demand money, but also sexual content and sexual intercourse.

The explanation above illustrates how sextortion, as a form of sexual offences, is carried out and its regulation under Indonesian positive law. Regarding the reality in the field, the complexity of sextortion cases presents obstacles to their handling by law enforcement institution. The following sub-discussion will outline and analyze the handling of sextortion cases in Indonesia and the application of law on sexual offences.

## **2. Analysis of Sextortion Cases and The Application of Law on Sexual Offences In Handling Sextortion As Electronic-based Sexual Violence**

Sextortion is categorized in several countries, such as the United States, which adheres to Anglo-Saxon law, as a cybercrime. Regulation of sextortion in some states is still not optimal due to disparities in handling sextortion cases between the federal and state levels. In Indonesia and France, which adhere to civil law, there are no specific regulations regarding sextortion. However, sextortion can be linked to money laundering, extortion, and corruption.<sup>19</sup>

In handling sextortion cases, law enforcement institution use Article 368 paragraph (1) of the Criminal Code (KUHP) as a crime against property through violence and threats intended to benefit the perpetrator. The definition of violence and threats as using force or power refers to Article 89 of the Criminal Code. This can be exemplified by using weapons, hitting, and similar means with the aim of rendering the person unconscious.<sup>20</sup> Regarding this, the Hoge Raad also argues that threats are also given, such as to shoot the victim if the perpetrator's demands are not met.<sup>21</sup>

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18 Ratna Batara Munti, Emma Mukarramah, & Maidina Rahmawati, Op.Cit, 88.

19 Ceren Küpeli, "Legal Analysis of Sextortion Crime in The Comparative Law And Turkish Law," *Journal of Scientific Perspectives*, Vol. 3, No. 5 (2019): 90, <https://doi.org/10.26900/jsp.3.045>.

20 R. Soesilo, Op.Cit, 256-257.

21 P.A.F. Lamintang & Theo Lamintang, *Delik-Delik Khusus Kejahatan Terhadap Kepentingan Hukum Negara* (Jakarta: Sinar Grafika, 2010), 72.

The case from Banda Aceh District Court Number 217/Pid.B/2018/PN Bna is a sextortion case that use Article 368 of the Criminal Code Paragraph (1) of the Criminal Code. The victim was photographed by the Defendant in a nude state at the victim's house during their dating relationship. At one time, the Defendant sent the nude photos to the victim, the victim's child, and the victim's family with a request for three million four hundred thousand rupiah to the victim. If the victim cannot comply with these wishes, the perpetrator used the nude photos as a threat to be spread on social media. Then, the Defendant invited the victim to meet. The victim agreed to meet and gave the amount of money requested by the Defendant at a coffee shop. However, after the money was given, the Defendant did not delete the nude photos of the victim from the Defendant's cellphone, also the nude photos that have been distributed.

In the sextortion case at the Banda Aceh District Court, the panel of judges in this decision sentenced the Defendant to two years in prison because the crime of extortion with Article 368 Paragraph (1) of the Criminal Code. Article 368 Paragraph (1) of the Criminal Code cannot be used in handling sextortion cases. First, the violence referred to in this provision is the use of force to render someone unconscious or an act using strong force with great strength. This contrasts with the violence in the sextortion case. Therefore, photos and/or videos of the victim containing sexual content used for extortion do not fall within, or are difficult to define as, violence as defined by Article 368 Paragraph (1) of the Criminal Code. This provision also focuses only on general threats. Second, the crime of extortion does not provide the victim protection. The victim do not get their rights in mental and social rehabilitation. The victim also does not get any guarantee from law enforcement institution to removing and/or blocking access to the nude photos that have been distributed.

In other sextortion cases, the Law on Electronic Information and Transactions is used in handling sextortion cases because the law enforcement institution focus on the distribution of the victim sexual content to the public as the Electronic Document and Information. The case from Bekasi District Court Number 466/Pid.Sus/2021/PN Bks with the Law on Electronic Information and Transactions. The defendant and the victim were dating through social media, and he asked the victim to take nude selfies in front of a mirror, which the victim sent via Line. On one occasion, the defendant became angry and forbade the victim from attending school, demanding that the victim send him money, credit, and internet data. On another occasion, the defendant frequently asked the victim to make nude video calls with him, either in the bathroom or in her bedroom, and he also instructed the victim to perform oral sex during these video calls. He threatened her and promised not to share previous selfies if she agreed to participate in another nude video call.

The defendant, who had access to the victim's Instagram account, posted a semi-nude photo of the victim and changed the account name. He also sent a video of the victim's oral sex to her friends via Direct Message on her Instagram account. As a result of these posts,

the victim's school asked her to withdraw from the school. Based on these facts and the panel of judges considerations, the defendant was sentenced to two years and six months in prison and a fine of one hundred million rupiah. The public prosecutor in his indictment did not charge defamation and extortion accompanied by threats. Furthermore, considering the impact on the victim, the perpetrator could be subject to a more severe sentence.

The panel of judges should be able to impose a maximum sentence considering the impact on the victim as children, also the perpetrator committing sextortion more than once against the victim as children. With Article 14 of Law on Sexual Offences, the perpetrator can get a sentence of up to eight years in prison and a penalty of four hundred million rupiah because the perpetrator continued to distribute sexual content about the victim to the public without regard for whether the victim complied with the perpetrator's wishes. In this case, the law enforcement institution used the Law on Electronic Information and Transactions, which focuses solely on the distribution of sexual content about the victim, without any subsequent acts of threats. In addition to the Law on Electronic Information and Transactions, the Law on Sexual Offence can be applied in this case. Article 70 of The Law on Sexual Offence provide the victim protection such as medical and social rehabilitation, restitution, provision of educational facility, and removing and/or blocking access to the victim sexual content.

Another sextortion case that also use the Law on Electronic Information and Transactions is the Pandeglang District Court Number 71/Pid.Sus/2023/PN Pdl. Two sexually explicit videos of the victim during their relationship were recorded and stored on the Defendant's cellphone. One occurred in 2020, when the victim was studying together at the Defendant house. Another occurred in 2021, when the victim went to the Defendant house to confide in him because her parents had just left her. Afterward, the victim was forced to drink alcohol.

While the victim was in Jakarta, the Defendant asked her to return to Pandeglang because he wanted to have sex with her, but she refused. The Defendant then demanded that the victim make a sexually explicit video of herself, but she refused. The video, taken before, was used as a means of threatening the victim, so she agreed to make and record a sexually explicit video of herself in the bathroom, touching her genitals, which was sent via WhatsApp. The victim then asked to end the relationship. The victim's previously sexually explicit video was then used as a tool to threaten the victim not to end their relationship because the Defendant did not want to end their relationship. Ultimately, the Defendant distributed the victim's sexually explicit video content via Instagram direct messages to the victim's friends and relatives because he was annoyed that the victim always asked to break up with them, and threatened to also distribute it to the victim's lecturer because he was annoyed that the victim was busy with his studies. Finally, the panel of judges in this decision sentenced the Defendant to six years in prison and to pay one billion rupiah.

The panel of judges has imposed the maximum sentence on the Defendant using Article 45 Paragraph (1) Juncto 27 Paragraph (1) The Law on Electronic Information and Transactions because the Defendant was proven to have distributed content that violated morality. The panel of judges also considering that the Defendant purpose was to threaten the victim witness physically, verbally, and sexually, also distributing the victim sexual content was to prevent the victim from breaking off their relationship and fulfill the Defendant sexual desire. However, Article 14 of Law on Sexual Offences is more appropriate to use in this sextortion case because the purpose of the Defendant purpose in threatening and distributing the victim sexual content is fulfill the Defendant sexual desire.

Based on the facts at trial in the sextortion case at the Pandeglang District Court, the victim complied with the perpetrator's wishes to create sexual content and engage in sexual intercourse due to the perpetrator's threats of violence. The victim did not dare to report the perpetrator due to the lack of protection, even though protecting the victim would have a multiplier effect because protection not only fulfills the victim's rights but also exposes the perpetrator's actions through the victim's courage to report.<sup>22</sup> The Law on Electronic Information and Transactions used in this case only focuses on the element of disseminating indecent content, which the Criminal Code requires must be done in an open and public place.<sup>23</sup> The Law on Electronic Information and Transactions also preventing the judge from being able to impose a maximum sentence, because there is no additional penalties in The Law on Electronic Information and Transactions. Dissimilar with Article 14 of Law on Sexual Offences with six years in prison and a penalty of three hundred million rupiah that can be added additional penalties for perpetrator under Article 15 of Law on Sexual Offences shall be increased by 1/3 (one third). The reason the perpetrator can be added additional penalties because the perpetrator committing sextortion more than once against the victim and use the sexual content for threatening and spreading to prevent the victim from breaking off their relationship and commit another sexual crime, also the victim suffered serious injuries and severe psychological impact.

Law on Sexual Offences has a formulation that better accommodates sextortion cases. The victims can still report recordings of sexual content without their consent that will be used to threaten them, without the perpetrator having to first disseminate the content to the public. Sextortion is not specifically mentioned in the Law in Sexual Offences, but in a discussion meeting between the Government Working Committee and the House of Representatives in 2022, sextortion was explained as a criminal act included in the formulation of Article 6 letter c of the Law on Sextortion Offences.<sup>24</sup> This can be related to the facts in the sextortion case at the Pandeglang District Court, where the perpetrator

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22 Lies Sulistiani, *Hukum Perlindungan Saksi dan Korban: Telaah pada Regulasi, Kelembagaan, Teori Maupun Praktik Perlindungan Saksi dan Korban Tindak Pidana di Indonesia* (Bandung: Refika Aditama, 2023), 12.

23 R. Soesilo, *Op.Cit.*, 206.

24 R. Valentina Sagala, *Op.Cit.*, 19-20.

used the victim's sexual content to solicit sexual intercourse, ask the victim to record their sexual activity, and ask the victim not to end their relationship with the perpetrator. From these facts, sextortion as electronic-based sexual violence can be qualified under Article 14 of Law on Sexual Offences. Electronic-based sexual violence is a complaint offense, but is excluded if the victim is a child. In addition, the element of being against the will or without the victim's consent is also removed if the victim is a child.

The reality on the ground regarding electronic-based sexual violence is that the element of sexual consent or non-consent in Article 14 of Law on Sexual Offences conflicts with the facts on the ground. The perpetrator may have consented to photographing and/or recording the victim, but the victim does not expect the photos and/or videos to be used to threaten, blackmail, or control the victim into complying with the perpetrator's wishes.<sup>25</sup> This is not a problem and can still be prosecuted under Article 14 of Law on Sexual Offences. If, in a sextortion case, the perpetrator and the victim create sexual content with the victim's consent, and then at some point the perpetrator threatens to use the sexual content, the act can still be categorized as electronic-based sexual violence. Furthermore, Article 14 of Law on Sexual Offences can still criminalize perpetrators who, even if they do not make threats, but distribute sexual content without the victim's consent.

One issue following the enactment of Law on Sexual Offences in handling sextortion cases is the concern about overlap between the The Law on Electronic Information and Transactions and Law on Sexual Offences, which could make it difficult for law enforcement institution and the victims to seek justice. The Law on Electronic Information and Transactions, concerning sexual or immoral content, stipulates that the act of disseminating immoral content must occur in an open space or public place.<sup>26</sup> Furthermore, Article 27B Paragraphs (1) and (2) of the Law on Electronic Information and Transactions, which prohibits the dissemination of content for personal gain accompanied by threats of violence to induce the victim to comply with the perpetrator's material desires, also differs from the facts in sextortion cases. The formulation of the threat of violence refers to the perpetrator using force or power, so it does not constitute a threat of violence in sextortion cases, as in the three previous sextortion case decisions. Finally, the victims sometimes become trapped in the criminal cycle of the Law on Electronic Information and Transactions due to the dilemma and fear of being reported back by the perpetrator under the Law on Electronic Information and Transactions, resulting in a lack of protection for the victims in this regard.

Chapter II of Law on Sexual Offences contains two elements: Article 14, which regulates electronic-based sexual violence and the provision of aggravated criminal penalties.<sup>27</sup> Article 14 Paragraph (1) comprises three forms of sexual harassment: first, recording and/or taking sexually explicit images or screenshots against the will or without the consent of the

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25 Ratna Batara Munti, Emma Mukarramah, & Maidina Rahmawati, *Op.Cit*, 88.

26 R. Soesilo, *Op.Cit*, 206.

27 R. Valentina Sagala, *Op.Cit*, 34-37.

person being recorded. Furthermore, the means of extortion in these provisions are carried out with violence and threats of violence, namely efforts to make someone unconscious or an act using strong forces with great strength. This is different from extortion carried out in sextortion cases, namely using technology or information and/or electronic documents. If referring to the definition of extortion in the Criminal Code, sextortion cannot be categorized as extortion because it does not always involve wealth. Furthermore, the element of sexual consent or without sexual consent in Article 14 Paragraph (1) of Law on Sexual Offences has the potential to hinder the handling of electronic-based sexual violence. It can be seen from the three decisions in handling sextortion cases that at the time of recording, the victim may have agreed, but the victim does not expect the recording to later become a tool of threat to blackmail the victim.<sup>28</sup> Furthermore, the formulation of criminal sanctions in Law on Sexual Offences is more accommodating in this case because it use an alternative-cumulative formulation system. Article 17 of Law on Sexual Offences stipulates that perpetrators can be subject to sanctions in the form of rehabilitation in addition to criminal sanctions.

Law on Sexual Offences, in addition to defining criminal offenses and forms of punishment, also addresses the need for the victim protection during the judicial process. Three decisions in sextortion cases demonstrate that the victims often refrain from reporting perpetrators due to a lack of protection. The victims choose not to report for fear of sexual content being disseminated and re-victimization. The victims needs should be met at every stage of the judicial process: pre-trial (investigation), trial (prosecution and trial), and post-trial.<sup>29</sup> Feeling protected throughout the judicial process, particularly during the pre-trial phase, will foster self-confidence, leading to the belief that reporting the perpetrator was appropriate.<sup>30</sup> This protection must also be consistent throughout the post-trial phase to prevent re-victimization and ensure the victims receive their rights related to restitution, including compensation for losses caused by the perpetrator. More specific or accommodating protection is provided to the victims of electronic-based sexual violence as stipulated in Articles 46 and 47 of Law on Sexual Offences concerning sexual content shared by perpetrator. This regulation authorizes the government and prosecutors, in the public interest, to remove and deactivate any sexual content that has been disseminated. Articles 46 and 47 of Law on Sexual Offences are a response to the victims needs. As evidenced by the three sextortion decisions discussed, the victims reasons for not reporting the perpetrators and following their desires to hand over money, create sexual content, and engage in sexual intercourse are due to their powerlessness and intense fear that the perpetrators will share their sexual content on social media with the intention of exposing their parents and friends.

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28 Ratna Batara Munti, Emma Mukarramah, & Maidina Rahmawati, *Op.Cit*, 88.

29 Lies Sulistiani, *Op.Cit*, 205.

30 Lies Sulistiani, *Op.Cit*, 212.

The victims hesitate to report sextortionists not only because of concerns about the perpetrators spreading their sexual content but also because of a lack of protection. They fear re-victimization during the legal process, especially if they are involved in the sexual content. This naturally leads the victims to choose not to report sextortionists for fear of re-victimization. Article 57 of Law on Sexual Offences is a response to the victims fears of re-victimization, requiring law enforcement institution not to include sexual content in case files, such as indictments. This is certainly an effort to protect and respect the dignity and privacy of electronic-based sexual violence victims. Furthermore, Article 23 of Law on Sexual Offences further protects the victims by stating that restorative justice cannot be implemented in sexual violence cases unless the perpetrator is a child.

Law on Sexual Offences is better for accommodates the victims needs in sextortion cases by regulating, First, the victim's right to treatment is contained in Article 68. Second, the victim's right to protection is contained in Article 69. Third, the victim's right to recovery is contained in Article 70. These the victims rights are comprehensively regulated at every stage of the judicial process: pre-trial, trial, and post-trial. Regulations regarding the victims rights should be fulfilled at every stage to provide the victims with access to the judicial process by creating conducive, safe, and comfortable conditions so that justice, legal certainty, and the best interests of the victims can be realized.<sup>31</sup>

#### **D. Conclusion**

Sextortion is carried out by exploiting the victim's sexual content followed by blackmail and threats so that the victim fulfills the perpetrator's wishes to ask for sexual content, ask for sexual relations, and ask not to end the relationship. Based on the facts from the practice of handling sextortion cases in Indonesia, law enforcement institution use, First, Article 368 Paragraph (1) of the Criminal Code with problems in the element of "blackmail or threats, coercion" refers to the Criminal Code as a crime against property where the perpetrator asks not for money, but asks for the victim's sexual content. Second, Article 27 Paragraph (1) of The Law on Electronic Information and Transactions which only focus on the dissemination of sexual content of the victim, without following up with extortion and threats to the sextortion perpetrator's, also the absence of the victim protection. The victim complied with the perpetrator's wishes to create sexual content and engage in sexual intercourse due to the perpetrator's threats of violence. The victim not brave enough to report because she was deeply concerned about the distribution of the victim sexual content. It is appropriate to use Law on Sexual Offences in handling sextortion cases because it has a formulation that is more accommodating with the existence of 3 (three) forms of electronic-based sexual violence, as well as regulations on aggravating crimes regarding blackmail and threats. More specific or more accommodating protection is provided to the victims of

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31 Lies Sulistiani, *Op.Cit*, 213.

electronic-based sexual violence in Articles 46, 47, 57, and 68 of Law on Sexual Offences, which makes the victims brave enough to report. The conclusion is Article 14 of Law on Sexual Offences should be used in handling sextortion cases because have a maximum sentence with additional penalties that can be increased by 1/3 (one third) and provide the victim protection for rehabilitation, restitution, and removing and/or blocking access to the victim sexual content.

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# 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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."<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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".<sup>7</sup> 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

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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 Hartwell<sup>8</sup>. 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 Rideout<sup>9</sup> 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.<sup>10</sup>

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;<sup>11</sup>
- b. The right to be free from torture and cruel, inhuman, or degrading treatment;<sup>12</sup>

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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;<sup>13</sup>
- d. The right to privacy and a safe family life;<sup>14</sup> and
- e. The right to equality before the law.<sup>15</sup>

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 7<sup>16</sup> 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

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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)<sup>17</sup>. 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.

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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.<sup>18</sup>

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

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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 actors<sup>19</sup>, 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.<sup>20</sup> This means that the state is obliged to take reasonable steps to prevent human rights violations, including by formulating relevant

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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.<sup>21</sup> 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).<sup>22</sup>

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 victims<sup>23</sup>. This means that a state that fails to

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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 285<sup>24</sup> 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.<sup>25</sup> 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).<sup>26</sup>

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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.<sup>27</sup> 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).<sup>28</sup>

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

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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.<sup>29</sup> 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.

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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.<sup>30</sup> 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.<sup>31</sup> 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-centered<sup>32</sup> and

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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](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-informed<sup>33</sup> 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 Report<sup>34</sup>, 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.

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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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## THE REPRESSION OF MARITAL RAPE IN MALAGASY LAW: A TENSION BETWEEN LEGAL RECOGNITION AND SOCIAL DENIAL

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### ABSTRACT

Despite the adoption of Law No. 2019-008 of January 16, 2020, which formally criminalizes marital rape in Madagascar, the offense remains socially invisible and judicially neglected. This article explores the contradiction between legal recognition and the persistent lack of enforcement. It investigates how entrenched cultural norms, particularly the presumption of perpetual spousal consent, hinder the acknowledgment and prosecution of marital rape. Relying on a multidisciplinary methodology—legal analysis, sociocultural inquiry, and review of judicial practices—the study identifies systemic obstacles, from patriarchal ideology to institutional inertia. It highlights the gap between the symbolic presence of the norm and its weak application. The article argues for a holistic approach to reform, including the training of legal actors, public awareness on consent within marriage, and the deconstruction of harmful gender norms. By critically analyzing the social and legal reception of this crime, the study contributes to the broader debate on gender-based violence and legal effectiveness in Madagascar.

**Keywords:** Marital rape; consent; Malagasy law; domestic violence.

### A. Introduction

Marital rape has long been overlooked in criminal law, relegated to the private sphere and excluded from the category of sexual offenses. In Madagascar, this phenomenon gained belated legal recognition with the promulgation of Law No. 2019-008 of January 16, 2020, on the fight against gender-based violence. This text explicitly criminalizes rape between spouses, thus breaking with the traditional conception that sexual relations within marriage are based on permanent and irrevocable consent.

However, legal recognition is not enough to ensure the effective repression of this form of violence. Despite the existence of the legal framework, cases of marital rape are rarely prosecuted, due to a host of structural, social, and cultural obstacles. The silence of victims, the weight of patriarchal norms, the inertia of judicial institutions, and the general public's low awareness contribute to the invisibility of this violence. In practice, marriage continues to constitute a legally and symbolically separate space, where sexual violence remains trivialized, even justified.

This situation reveals a paradox: while the legislature has taken an important step by criminalizing marital rape, social representations and judicial practices resist this normative advance. The treatment of marital rape thus creates tension between two normative orders: the positive legal order on the one hand, and the social order, deeply marked by patriarchal representations of the couple and sexuality, on the other.

Although some international and regional studies have examined gender-based violence, there is still little specific scholarly literature addressing marital rape in the Malagasy legal and cultural context. This gap underscores the need for a targeted analysis that situates the Malagasy experience within broader academic debates.

This study questions this gap between law and reality. It analyzes the factors that hinder the full implementation of the law, while highlighting institutional and cultural resistance to the effectiveness of the repression of marital rape. More specifically, the article focuses on three key legal issues: the clarity and enforceability of the new law, the responsiveness of judicial institutions, and the weight of sociocultural barriers impeding prosecution. Through a critical and multidisciplinary approach, the article aims to propose avenues for reform, both on the legal and societal levels, so that the legal recognition of marital rape becomes a real tool for protecting victims. Accordingly, the central research question guiding this study is: what factors hinder the effective implementation of law No. 2019-008 on marital rape in Madagascar?

## **B. Research Method**

This research is based on a qualitative and multidisciplinary approach, combining legal analysis, comparative law studies, and socio-anthropological reflection. It aims to understand why, despite the legal recognition of marital rape by Law No. 2019-008, its repression remains marginal, if not nonexistent, in judicial practice and social discourse.

First, a doctrinal analysis was conducted based on Malagasy domestic law, notably the Penal Code as amended by Law No. 2019-008, as well as the Constitution and international commitments ratified by Madagascar. Attention was focused on the protection mechanisms offered to women, the legal definitions of rape, and the conditions for their application in the marital context. This doctrinal method follows the classical approach of legal scholarship, which interprets and systematizes normative texts.<sup>1</sup>

Next, a comparative perspective was adopted, examining the legislation of several states that have incorporated the concept of marital rape into their criminal law: Rwanda, South Africa, France, and Canada. This comparison sheds light on legal and institutional models likely to inspire more effective implementation of Malagasy law.

Finally, a sociological and anthropological approach helped contextualize the issue of sexual consent in Malagasy marriage. Research from the sociology of gender, legal

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1 cf. H.L.A. Hart, *The concept of Law*, 1961; A. Watson, *Legal Transplants*, 1974.

anthropology, and feminist studies was used to identify cultural barriers to reporting marital rape, including the weight of patriarchy, social pressure, and victim stigmatization.

This cross-methodology sheds light on the dynamics of lawlessness, showing that the problem is no longer legal, but deeply rooted in a social fabric that is reluctant to recognize the sexual autonomy of married women. It thus opens up concrete avenues for legal, institutional, and educational reform.

## **C. Discussion**

### **1. A little-used legal framework: between formal recognition and practical inoperability**

Marital rape, long considered a legal non-issue, is now increasingly recognized in several legal systems. This recognition is based on evolving understandings of marriage, sexual consent, and fundamental human rights. This section aims to outline the main legal foundations on which states have relied to criminalize marital rape, with a particular focus on comparative law, particularly African, European, and North American law.

#### **a. A Recent but Tentative Legal Recognition**

Contrary to a belief still widespread in certain judicial circles and within Malagasy society, marital rape is now formally criminalized by law. Law No. 2019-008 of January 16, 2020, relating to the fight against gender-based violence (GBV), constitutes a major legislative turning point. Its Article 6, paragraph 2, provides: “Any spouse who, by violence, constraint, threat or surprise, imposes a sexual act on the other spouse shall be punished with imprisonment of two to five years and a fine of 100,000 to 1,000,000,000 Ariary.”

This provision thus unambiguously establishes the criminalization of marital rape. However, it should be noted that this offense does not appear in the Malagasy Penal Code or in the texts relating to marriage, which limits its dissemination, its readability and its integration into the professional reflexes of those involved in the criminal justice system. In addition, the explicit expression “marital rape” is not used by the legislator, which can create terminological ambiguity in the interpretation or legal classification of the facts by magistrates.

#### **b. A poorly applied text: the weight of judicial practices**

Although the law has existed for over five years, cases of marital rape treated as such remain extremely rare in Malagasy courts. This situation reveals a considerable gap between the written norm and its practical application. Several factors explain this lack of implementation:

On the one hand, the majority of female victims are unaware of the very existence of this text, or do not perceive their experiences as falling within the realm of criminal offenses, due to a culture strongly marked by marital submission and

marital sexual duty.

On the other hand, some judicial police officers and magistrates themselves are reluctant to legally classify a non-consensual sexual act within a couple as rape, often preferring to use lesser definitions such as “domestic violence” or “domestic disturbances,” or even to settle out of court.

Thus, the formal existence of the text is not sufficient to guarantee its effectiveness. Analysis of case law shows a near absence of specific convictions for marital rape, which perpetuates the feeling of impunity and undermines victims’ trust in judicial institutions.

c. Social taboo as a persistent barrier

Beyond purely legal or procedural obstacles, it is above all the weight of patriarchal cultural norms that hinders the social recognition of marital rape. The idea that marital duty includes the unconditional sexual obligation of the wife towards her husband remains deeply rooted in the Malagasy collective imagination. In many communities, the sexual act is perceived as a natural right of the husband, and not as a space of permanent consent between spouses.

This taboo breeds widespread silence: few women dare to report their partners, for fear of being stigmatized, accused of family betrayal, or simply disbelieving that their experience could be legally classified as “rape.” This silence is compounded by the absence of psychosocial support, the lack of training for health and justice professionals, and the ineffectiveness of reporting mechanisms.

Consequently, even in the presence of a law, marital rape remains an invisible offense, tolerated or even denied in the private and public spheres. Criminalization on paper alone fails to break through the wall of social denial.

## 2. The fragility of sexual Consent in Marriage: Between Legal Ambiguity and Symbolic domination

At the heart of the issue of marital rape lies the question of sexual consent, whose significance appears to be diluted within the marital framework. Although modern law upholds the principle of free and informed consent for any sexual act, the reality of conjugal life frequently opposes this notion with the concept of a “sexual duty” owed by the wife to her husband. This idea, inherited from deeply entrenched patriarchal traditions, renders consent both invisible and socially taboo to challenge.<sup>2</sup>

While Law No. 2019-008 of January 16, 2020, introduced the recognition of marital rape into Malagasy law, it does not sufficiently clarify the renewable and revocable nature of consent within marriage.<sup>3</sup> This legal ambiguity contributes to a broader symbolic obstacle:

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2 See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 174.

3 Law No. 2019-008 of January 16, 2020 on the fight against gender-based violence, official Journal on the Republic, 2020.

acknowledging that a forced sexual act may occur within a legally valid marriage is often perceived, in the collective imagination, as undermining the very foundation of marriage itself.<sup>4</sup>

Consequently, sexual violence in marriage is frequently normalized or denied, even by the victims themselves, due to the lack of a clear social and legal framework that would allow them to articulate their suffering.<sup>5</sup> This helps explain the chronic underreporting of cases and the general inaction of judicial institutions when such violence is alleged.<sup>6</sup>

Sociological and legal studies conducted in various jurisdictions have demonstrated that integrating a culture of consent—explicitly including within intimate relationships—can significantly shift social attitudes and strengthen prevention policies.<sup>7</sup> In the Malagasy context, such an approach should be promoted alongside criminal law reform, to assert that marriage can never constitute a perpetual sexual license.<sup>8</sup>

### 3. Institutional Denial and the Challenges of Judicial Practice

Despite the formal inclusion of marital rape in the Malagasy legal system, judicial institutions continue to demonstrate a marked reluctance to address such cases in practice. This denial is not merely a result of legal gaps, but is deeply rooted in institutional cultures marked by gender stereotypes and power asymmetries.<sup>9</sup> Prosecutors, judges, and law enforcement agents may trivialize or dismiss complaints related to marital rape, often invoking cultural norms or questioning the credibility of the victim.<sup>10</sup>

Such practices reinforce the impunity of perpetrators and further isolate victims, who fear not being believed or facing backlash from their community.<sup>11</sup> In many regions of Madagascar, the judicial process remains inaccessible for women due to logistical barriers (costs, distance to courts), but also due to the hostile or condescending attitude of some justice actors.<sup>12</sup> Training and awareness-raising for justice professionals are essential to break this cycle.<sup>13</sup> Without a gender-sensitive interpretation of the law and a proactive application of protective measures, the recognition of marital rape remains largely symbolic.<sup>14</sup>

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4 Rebecca Cook, Bernard Dickens, and Mahmoud Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford: Clarendon Press, 2003), 98.

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9 Michel Miaille, *Sociologie du droit* (Paris: Dalloz, 2001), 192.

10 Amnesty International, *Madagascar: Justice Gagged – Gender-Based Violence and Impunity* (London: Amnesty International, 2020), 14.

11 UNFPA Madagascar, *Enquête nationale sur les violences basées sur le genre* (Antananarivo: UNFPA, 2021), 26.

12 Sarah J. White, “Gender, Justice and the State in Africa,” *African Affairs* 113, no. 450 (2014): 257–277.

13 Human Rights Watch, *Justice for Women: Gender Bias in Judicial Systems* (New York: HRW, 2019), 17.

14 CEDAW Committee, *General Recommendation No. 33 on Women’s Access to Justice*, UN Doc. CEDAW/C/GC/33 (2015).

A reform of legal practice is therefore crucial, not only through legislation, but through institutional transformation and the internalization of international human rights norms.<sup>15</sup>

#### **4. Criminal treatment of marital rape in Madagascar: between formal recognition and social resistance**

While many legal systems have gradually integrated the criminalization of marital rape, Madagascar has taken a decisive step with the adoption of Law No. 2019-008 of January 16, 2020 on the fight against gender-based violence. From now on, marital rape is explicitly recognized as a criminal offense, punishable by a sentence of two to five years of imprisonment, accompanied by a fine of 100,000 to 1,000,000,000 Ariary<sup>16</sup>. However, this legislative advance coexists with strong cultural and legal resistance, which hinders the effectiveness of criminal protection for victims.

a. Recent legislative recognition but facing implementation obstacles

Prior to 2020, marital rape was not explicitly named in the Malagasy Penal Code. Article 332 of this code defined rape as “any act of sexual penetration, of whatever nature, committed against the person of another by violence, coercion, threat or surprise”<sup>17</sup>. This general definition, although open, had never been applied in a meaningful way to non-consensual sexual relations between spouses, due to the lack of clear recognition of sexual autonomy within marriage.

With the entry into force of the 2020 law, the legal vacuum has been formally filled. However, prosecutions remain rare. The new criminal provision still appears to be little known to the general public and even to professionals in the criminal justice system. In practice, complaints of marital rape continue to be suppressed or reclassified as ordinary violence or domestic disputes.

Some legal experts denounce the fact that the dominant legal culture remains reluctant to consider the wife as a legitimate complainant against her own husband in sexual matters<sup>18</sup>. In other words, the existence of a criminal law standard is not enough to guarantee its application, especially when social stereotypes remain powerful.

b. The persistence of stereotypes in jurisprudence and judicial practice

The weakness of Malagasy case law in matters of marital rape is therefore no longer due to the silence of the legal text, but rather to an institutional and cultural reluctance to recognize the sexual autonomy of married women. Marriage often continues to be perceived as an institution in which the wife has

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15 United Nations, *Declaration on the Elimination of Violence against Women*, UN Doc. A/RES/48/104 (1993).

16 Law No. 2019-008 of January 16, 2020 on the fight against gender-based violence, Article 6: “Any non-consensual sexual penetration, including within the framework of marriage, constitutes rape.”

17 Criminal Code of Madagascar, Article 332, current version.

18 Rakotondratsimba, Lova, “The judicial treatment of domestic violence in Madagascar”, *Revue Juridique Malgache*, n°14, 2022, p. 87

permanently consented to any sexual relationship. Several recent court cases (often unpublished) show that judges still invoke notions such as “conjugal duty” to refuse to investigate complaints of marital rape<sup>19</sup>.

Furthermore, judicial police officers, prosecutors and even some judges remain poorly trained in the specific realities of sexual violence in domestic situations. This results in a strong tendency to dismiss complaints without further action or to refer cases to family mediation, without regard for the rights of the victim<sup>20</sup>.

Finally, social pressure remains a major obstacle: women who denounce their husbands are often perceived as breaking the family bond, and find themselves isolated, stigmatized, or even rejected by those around them.

c. Implicit legislative resistance

The adoption of the 2020 law marks a turning point, but should not obscure structural obstacles. While marital rape is now criminalized, no landmark case law has yet truly signaled a change in approach within the courts. At the same time, legislative initiatives aimed at strengthening prevention and support for victims still encounter obstacles, particularly in the name of “family stability.” Tension remains strong between two visions of law and society: one based on gender equality and respect for physical and moral integrity, the other attached to a patriarchal conception of marriage and the family. As long as these barriers are not overcome through strong political will, increased training for judges, and awareness-raising in civil society, the offense of marital rape risks remaining symbolic on paper but mute in the courts.

## 5. Social taboo: a barrier to reporting and recognizing marital rape

The legal recognition of marital rape in Madagascar, although formally granted since 2020, remains hampered in its effectiveness by a set of deeply rooted social and cultural barriers. This resistance stems from traditional representations of marriage, the reluctance to expose the private sphere to judicial intervention, and the fear of social rejection. The silence surrounding marital rape is not so much the product of ignorance as that of a persistent taboo.

a. The conjugal imagination and the weight of patriarchal norms

In the Malagasy collective imagination, marriage is often viewed as a moral contract in which the wife implicitly accepts her husband’s sexual control. This conception is based on a patriarchal interpretation of the marital role, in which female submission is normalized, and demanding consent is perceived as an

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19 Testimony of a defense lawyer, criminal hearing, Tuléar Court, March 2024.

20 National Independent Human Rights Commission (CNIDH), 2023 Annual Report on Gender-Based Violence, pp. 21-23

affront to marital authority<sup>21</sup>.

Consequently, the very idea of rape within a couple appears to be at odds with the perception of marriage in many traditional circles. Marital sexuality is shrouded in a collective silence, making it difficult to challenge violent or non-consensual behavior. This representation contributes to blaming victims, who sometimes doubt the legitimacy of their suffering.

b. Fear of stigma and rejection

Women who experience marital rape often face a double trauma: on the one hand, the sexual violence itself; on the other, the rejection, shame, or indifference of those around them when they dare to break the silence. Several testimonies collected in the context of university research or association reports show that victims are sometimes blamed by their own families for having filed a complaint, accused of tarnishing the image of the home or damaging the reputation of the husband<sup>22</sup>.

The weight of the community, particularly in rural areas, also discourages women from speaking out. Recourse to customary dispute resolution methods or family mediation is often preferred to legal action, even in serious cases. Thus, the domestic sphere remains largely impervious to criminal sanctions, reinforcing the feeling of impunity.

c. The silence of religious and customary institutions

Religious and customary institutions play an ambivalent role: while they can sometimes provide a space for listening or mediation, they also tend to reinforce patterns of gendered domination. The dominant religious discourse often emphasizes the indissolubility of marriage and the need to preserve the unity of the couple, even at the cost of sacrificing the wife's physical and psychological integrity<sup>23</sup>.

As for customary authorities (*ray aman-dreny*, *mpanolo-tsaina*), their mediation prioritizes reconciliation over protecting the victim. In many cases, their influence can even lead to a withdrawal of the complaint or a settlement involving symbolic compensation, but without real reparation for the harm suffered<sup>24</sup>.

This institutionalized silence indirectly legitimizes sexual violence within couples and makes it difficult for a genuine public debate to emerge around marital rape.

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21 Randriamaholy, Fanja, "Marriage, sexuality and the status of women in rural areas of Atsimo-Andrefana", *Malagasy Studies Notebooks*, No. 12, 2020, p. 41

22 Women and Men Actors of Madagascar, *Field report on intrafamily sexual violence in the Southwest, 2022*, p. 14-17.

23 Interview conducted with a pastor of the Reformed Church (FJKM) in Toliara, March 2023.

24 Rakotomanga, Hery, "Customary justice and violence against women: between mediation and denial", *National Conference on Human Rights, 2021*, pp. 33-34.

## 6. Prospects for the Evolution of Malagasy Law on Marital Rape

The inclusion of marital rape in Malagasy criminal law, through Law No. 2019-008 on gender-based violence, marks a significant legal advance. However, legal recognition alone is not enough to guarantee effective enforcement or efficient protection for victims. It is now important to consider future developments in the law, not only by strengthening the regulatory framework, but also by a more profound transformation of judicial, educational, and social practices.

a. Clarify and strengthen the criminal justice system

The 2020 law, while innovative, remains relatively general in its articulation. The article criminalizing marital rape is often interpreted within a broader framework of sexual violence, without specific provisions on evidence, aggravating circumstances, or procedural safeguards adapted to domestic violence<sup>25</sup>.

A desirable development would be to explicitly detail, in the Malagasy Penal Code, the constituent elements of marital rape, following the example of certain French-speaking countries that have provided for distinct qualifications and adapted evidentiary regimes<sup>26</sup>. The objective would be to reduce legal ambiguity and promote better understanding of the text by legal practitioners.

b. Training judicial and police actors

Effective law enforcement depends largely on the training of magistrates, police officers, and court officials. However, numerous reports still denounce a lack of understanding of marital rape even within police stations and courts. Some victims are refused permission to register their complaints, on the grounds that it is not a “real rape” due to the marital relationship<sup>27</sup>.

It is therefore urgent to make training modules on gender-based violence more widespread in judicial and police training institutes. This would help combat gender stereotypes and ensure a dignified and professional welcome for victims, without judgment or re-victimization.

c. Promote legal education and community awareness

The fight against marital rape cannot be exclusively judicial. It also requires a change in mentalities through education, awareness campaigns, and community action. Too many women are still unaware that sexual intercourse forced upon them by their spouse constitutes a punishable crime, and many do not dare to file a complaint out of fear or shame<sup>28</sup>.

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25 Law No. 2019-008 of January 16, 2020 relating to the fight against gender-based violence, Official Journal of the Republic of Madagascar, No. 4494, article 5

26 See in particular Article 222-22-1 of the French Penal Code, amended by Law No. 2006-399 of April 4, 2006, which specifies that rape can be committed “between spouses.”

27 Report by the NGO ENJAM (Etoile des Jeunes et des Mères), “Access to justice for women victims of violence in the Atsimo-Andrefana and Anosy regions”, 2023, p. 21.

28 Testimonies from the participatory survey conducted by Gender Links Madagascar, Community Impact Report on GBV, 2021, p. 37.

NGOs, women's associations, community leaders, and the media have a key role to play in this civic education, particularly in rural areas. The widespread dissemination of legal texts in local languages, accompanied by testimonies and community discussions, would help break the social silence and encourage victims to assert their rights.

d. Create specialized support structures

Finally, any legal reform must be accompanied by institutional mechanisms to support victims: listening centers, safe shelters, psychosocial support, free legal assistance, etc. In Madagascar, these structures are still too rare, often concentrated in large cities, and insufficiently funded<sup>29</sup>.

Strengthening cooperation between the state, local authorities, and civil society organizations would allow for the development of an integrated protection network, guaranteeing not only punishment for the crime, but also the rehabilitation of victims' dignity and autonomy.

## D. Conclusion

Marital rape, long ignored by legal systems dominated by a patriarchal vision of marriage, today constitutes a real challenge for the recognition of women's fundamental rights, including in African societies like Madagascar. The evolution of Malagasy law, embodied by Law No. 2019-008 of January 16, 2020, marks a decisive step in the criminalization of this particular form of sexual violence. This legal recognition, although belated, constitutes a historic turning point: for the first time, consent within marriage is legally taken into account and protected.

However, this normative progress cannot disguise the persistent limitations of the law's effectiveness. Cultural obstacles, social perceptions rooted in marital submission, the reluctance of courts, and insufficient institutional resources hamper the practical application of existing criminal provisions. Marital rape thus remains an underreported, undertreated, and often misunderstood offense, both by those involved in the justice system and by the population itself.

It is therefore imperative to consider a more comprehensive and coherent reform: clarifying the legislation, strengthening professional training, raising community awareness, and, above all, ensuring genuine access to justice for victims, regardless of their marital or social status. Such an approach is not solely a matter of criminal law: it engages society as a whole in a process of deconstructing sexist norms and promoting a legal order based on equality and dignity.

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29 Ministry of Population, Social Protection and the Advancement of Women, National Action Plan for the Elimination of Gender-Based Violence (2022-2027), p. 18.

Ultimately, marital rape is neither a mere legal debate nor a private matter: it is one of the most serious symptoms of the structural violence suffered by women. In light of this, Malagasy law is called upon to go beyond mere normative recognition to become a true instrument of social transformation, capable of breaking the silence, restoring victims, and building truly equitable justice, even in the intimacy of marital relations.

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