



Synchronization of Marital Rape Regulations in Indonesian Criminal Law with International Standards in CEDAW

Sinkronisasi Pengaturan Marital Rape dalam Hukum Pidana Indonesia terhadap Standar Internasional dalam CEDAW

Gemilang Ayu Maulida¹, Dhiana Puspitawati², Herman Suryokumoro³

¹Corresponding author: gemilangayu@student.ub.ac.id

¹²³Faculty of Law, Brawijaya University, Malang
East Java, Indonesia – 65145

Abstract: The criminalization of marital rape under Article 473 of the National Criminal Code still leaves legal ambiguity due to the absence of parameters regarding consent. This triggers a structural conflict between the right to bodily autonomy under the criminal law regime and the interpretation of the “duty to serve” in family law, thereby preventing the substantive achievement of the due diligence standard for the protection of women. This article aims to analyze the alignment of Indonesia’s legal framework on marital rape with CEDAW’s principle of non-discrimination and to reconceptualize the concept of affirmative consent in order to harmonize the national criminal legal system. This study is normative legal research employing legislative, conceptual, and comparative approaches. The findings indicate that the concept of consent must be interpreted dynamically and harmonized with the values of living law, such as the principle of equal partnership (*garwo*) and the principle of mutual consent (*mu’asyarah bil ma’ruf*). This study recommends the need for an amendment in the form of adding an explanatory clause regarding indicators of “lack of consent” to Article 473 of the National Criminal Code, as well as integrating it complementarily with the procedural legal instruments in the TPKS Law to ensure victim-centered procedural protections in the judicial process.

Keywords: Affirmative Consent; CEDAW; Marital Rape; National Criminal Code; Victim Protection

DOI : 10.47006/ijlres.v%vi%i.30944

INTRODUCTION

The criminalization of domestic sexual violence, particularly *marital rape*, presents a sharp clash of norms within the Indonesian legal system, where the boundaries between the exercise of civil rights within marriage and the protection of human rights regarding bodily autonomy are blurred (Marion Bethel, 2023). The enactment of Law No. 1 of 2023 on the Criminal Code (KUHP) has progressively recognized *marital rape* through Article 473, paragraphs (1) and (6), but the absence of clear parameters regarding the form of *consent* creates a conflict with Law No. 1 of 1974 on Marriage (Saputra & Ronaboyd, 2025, p. 274). Articles 31 and 34 of the Marriage Law,

which mandate the provision of “material and emotional support,” are often reduced to a justification for permanent sexual consent (implied consent), thereby blurring the line between the fulfillment of marital obligations and the criminal act of sexual coercion (Masduki et al., 2025, p. 541). This normative conflict becomes even more critical when considered in light of Indonesia’s international obligations as a state party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), under which the standard of due diligence requires the state to eliminate zones of impunity within the domestic sphere (Setyowati, 2021, p. 127).

The significance of resolving this conflict of norms rests on CEDAW’s mandate as a living instrument, which requires the harmonization of national laws with international human rights standards (Vijayarasa, 2021, p. 64). Through General Recommendation (GR) No. 35 (2017), the CEDAW Committee explicitly calls for a paradigm shift from requiring the presence of extreme physical violence to proving the lack of freely given consent (UN. Committee on the Elimination of Discrimination against Women, 26). Within the sociological and legal reality in Indonesia, the classification of marital rape as a complaint based offense in the National Criminal Code (KUHP) and the Law on the Elimination of Domestic Violence (PKDRT) often leads to a dead end for justice, as evidenced by the low reporting rates which represent the iceberg phenomenon due to patriarchal cultural barriers (Wahdah & Harefa, 2025, p. 19). Therefore, a legal framework that assumes the existence of perpetual consent within marriage not only reduces women to objects who have lost ownership of their physical integrity but also constitutes a failure of state legislation to fulfill the principle of due diligence.

Previous studies have sought to unravel the complexities of sexual violence and legal inequalities in Indonesia from various perspectives. Hapriyanto and Syamsiah highlight the inconsistency of Law No. 1 of 1974 on Marriage with the principles of CEDAW, particularly regarding gender role inequality in Article 31, which legitimizes discrimination within the household (Hapriyanto & Syamsiah, 2024, p. 8522). From a policy perspective, Asikin, A. S. found that various legal instruments related to sexual violence, including Law No. 12 of 2022 on Criminal Acts of Sexual Violence (TPKS Law), often fail to integrate a comprehensive gender perspective and still overlook structural intersectional inequalities (Asikin, 2025, p. 44). Furthermore, Syavica et al. emphasize that the protection of victims’ rights remains hindered by the positivistic nature of criminal law (KUHP), in which the formulation of crimes is oriented toward violations of decency and morality, rather than centered on protecting the dignity of victims (Syavica et al., 2025, p. 1219). Although these three studies sharply criticize the

weaknesses of national law and its inconsistency with women's human rights, there remains a fundamental gap in the research (gap analysis). Previous studies have primarily focused on macro-level policy evaluations and critiques of structural discrimination within marriage in general, yet they have failed to dogmatically dissect the essence of "consent" within spousal sexual relations which constitutes the primary point of conflict between the criminal law regime and family law. A commonality with previous studies is that they all rely on CEDAW's due diligence standard to demand the elimination of gender discrimination within the Indonesian legal system. The distinction and the novelty of this research lies in its effort to reconstruct explicit and dynamic parameters of consent specifically regarding the offense of marital rape, thereby filling the gap in the legal definition within the National Criminal Code.

To overcome this impasse, this study offers scientific novelty through a reconceptualization of the parameter of consent one that is conscious and dynamic, yet remains in harmony with the nation's cultural philosophy. Rather than adopting Western liberal concepts wholesale, this study bridges the dynamic concept of consent from CEDAW with the principle of equal partnership (*garwo*) in customary law and the principle of mutual consent (*mu'asyarah bil ma'ruf*) in the theological dimension. The scientific value of this study lies in its conceptual formulation, which positions the marriage contract not as an absolute surrender of bodily autonomy (*blank check*), but rather as the institutionalization of sexual autonomy that rejects coercion a framework that can eventually be integrated as an explanatory tool for the reform of national criminal law.

Based on this background and significance, this article comprehensively examines two fundamental issues. First, this study aims to analyze the alignment of Indonesia's criminal law provisions on marital rape with the standards of due diligence and the principle of non-discrimination under CEDAW. Second, this study aims to analyze and define the concept of *consent* within marriage in order to fully harmonize the legal framework governing marital rape within Indonesia's criminal justice system. Through this prescriptive analysis, it is hoped that legal certainty will be established to protect women's sexual integrity without undermining the sanctity of the marital bond.

This study employs a normative legal research methodology focused on examining vertical and horizontal synchronization among regulations, as well as evaluating positive legal norms based on the principles of justice (Fathoni, 2006, p. 43). To achieve these objectives, this study applies three main approaches: the statutory approach to analyze the harmonization of national and international legal instruments, the conceptual approach to reconstruct the fundamental

meaning of the term “consent” in marital relations, and the comparative study approach to compare national criminal law with the global protection standards mandated by CEDAW.

RESULTS AND DISCUSSION

Aligning Provisions on Marital Rape with Due Diligence Standards and the Principle of Non-Discrimination in CEDAW

Recognition of the right to bodily autonomy has evolved from a mere moral discourse into an absolutely binding legal standard in international human rights law (Smith, 2018, p. 198). From a natural law perspective, sovereignty over sexual integrity is inherently vested in the individual, so the institution of marriage has no legitimacy to curtail that sovereignty without valid consent (Locke, 1980). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) establishes this fundamental obligation through the systemic unity of Articles 1 and 2 (Benedek, 2012, p. 253). Article 1 explicitly defines discrimination “regardless of marital status,” indicating that the protection of women’s fundamental freedoms must not be diminished once they enter the domestic sphere. The act of marital rape is therefore an extreme form of restriction and nullification that reduces a woman’s status from that of a free legal subject to that of a mere object of sexual gratification (Freeman et al., 2012, p. 73.) To address this, Article 2 provides an imperative mandate in the form of obligations of conduct requiring the state to intervene in the domestic sphere to amend or abolish customary regulations and practices that perpetuate discrimination, including rejecting the doctrine of implied consent that hides behind patriarchal values (Cook, 2012, p. 211).

Given that the original text of CEDAW (1979) contains a normative gap regarding sexual violence specifically, this convention must be understood through the doctrine of the “treaty as a living instrument” (Shaw, 2017, p. 244). This normative evolution became evident when the CEDAW Committee issued General Recommendation (GR) No. 19 (1992), which successfully dismantled the dichotomy between public and private law by positioning gender-based violence as a form of direct discrimination (UN Committee on the Elimination of Discrimination Against Women, 1992, p. Paragraph 6). This progressive development reached its culmination through GR No. 35 (2017), which established the prohibition of violence against women as a norm of customary international law (customary international law) (UN Committee on the Elimination of Discrimination Against Women, 1992, p. paragraph 2). Through the mandate of General Recommendation No. 35, Paragraph 29(a), the Committee instructs State parties to immediately criminalize all forms of sexual coercion, including marital rape, regardless of the nature of the relationship between the perpetrator and the victim.

As a State Party that has ratified CEDAW through Law No. 7 of 1984, Indonesia is bound by the principle of *pacta sunt servanda*, which requires the full incorporation of these international norms into the national legal system (Gunawan & Ruqmana, 2024, p. 01002). Within this framework, compliance with international obligations is measured using the standard of due diligence, which must not be focused solely on the downstream stage (law enforcement on the ground) but must also be grounded in the legislative obligation at the upstream stage (obligation to legislate) (Benninger-Budel, 2009, p. 45). A state is considered to have failed and to have committed “original failure” if its national legal texts still perpetuate gender stereotypes and normative gaps that place victims in a position of discrimination. Based on the principle of good faith, neither national legal sovereignty nor the pretext of preserving patriarchal culture can be used to justify evading the obligation to incorporate the protection of sexual autonomy into domestic criminal law provisions.

When viewed in light of Indonesia’s positive law, the legal framework regarding *marital rape* still reflects a systemic inconsistency with the principle of non-discrimination. Legally speaking, Indonesia has demonstrated *formal compliance* through the recognition of the criminal offense of sexual coercion within the household under Law No. 23 of 2004 (Domestic Violence Act) and the expansion of its criminalization under Article 473 of Law No. 1 of 2023 (National Criminal Code) (Wahdah & Harefa, 2025, p. 12). Nevertheless, substantive compliance has not been achieved because the formulation of these offenses leaves a gap in the operational parameters regarding the qualification of sexual consent. The absence of these parameters triggers a fundamental conflict of norms: the guarantee of the right to bodily autonomy within the criminal law regime clashes sharply with the sociological interpretation of the “duty to serve/provide emotional support” as enshrined in Articles 31 and 34 of No. 1 of 1974 on Marriage, as well as the concept of Tamkin in the Compilation of Islamic Law (KHI) (Raihan, 2023, p. 8). This structural conflict results in impunity for perpetrators, as a wife’s refusal of sexual relations is often framed as a breach of marital obligations (disobedience), rather than being recognized as the exercise of her fundamental right. This dynamic underscores that the standard of due diligence in protecting women has not yet been fully integrated into the codification of national legislation.

From the perspective of the Theory of the Relationship Between International Law and National Law, the nature of CEDAW’s progressive mandate requires the adoption of laws that go beyond the classic debate between the schools of monism and dualism (Q.C, 2017, p. 98). Through formal ratification, Indonesia is bound by broad positive obligations to protect

(obligation to protect) and fulfill (obligation to fulfill) women's rights, not merely to refrain from discriminatory actions (obligation to respect) (Moeckli et al., 2022, p. 94). However, substantive compliance cannot be achieved if the foundation of the law enforcement system namely, the substance of national legislation continues to perpetuate systemic discrimination, for example, through the requirement of physical evidence. The failure of lawmakers to formulate criminal law provisions that are fair, precise, and free from gender-stereotypical bias constitutes an original failure of the principle of due diligence, which directly contributes to the persistence of impunity for perpetrators of domestic violence.

Furthermore, the existence of provisions criminalizing sexual coercion in Law No. 23 of 2004 on Domestic Violence, as well as their extension in Article 473 of Law No. 1 of 2023 on the National Criminal Code, in practice only reflects a level of formal compliance (*formal compliance*) (Nasrudiansyah & Alijaya, 2023, p. 61). This compliance leaves a gap in operational parameters regarding the boundaries of consent, which in turn triggers a structural *conflict of norms* within the national legal system. The guarantee of protection for the right to bodily autonomy within the criminal law regime is diametrically opposed to conventional interpretations in family law, particularly the interpretation of the "duty to serve" or the provision of "emotional support" under Law No. 1 of 1974 on Marriage, as well as the application of the concept of Tamkin in the Compilation of Islamic Law (KHI) (Fasihuddin et al., 2023, p. 634). This doctrinal inconsistency results in a critical legal impasse, in which the essence of sexual coercion is often reduced and justified as merely the fulfillment of marital obligations, thereby undermining the substantive protection mandated by the global standards of CEDAW.

The Concept of Consent in Marriage to Harmonize the Regulation of Marital Rape in Indonesian Criminal Law

Analyzing the discourse on marital rape within the Indonesian legal system requires a dogmatic reconceptualization of the meaning of consent, which has often been interpreted in a static manner. Referring to international standards, the concept of affirmative consent is built upon elements of consent that are explicit, conscious, voluntary, and dynamic or situational (Masduki et al., 2025, p. 536). The transformation of this concept into national law is not achieved by simply transplanting liberal values wholesale, but rather by contextualizing them through the "living law" values embedded within Indonesian society. Legally, the marriage contract is recognized as the highest form of consent to legitimize the institution of marriage; however, the essence of this contract does not automatically negate bodily autonomy but rather requires respect for the physical integrity of each party in its implementation (Islamia et al., 2026, p. 117). Philosophically, this dynamic concept of consent can be harmonized to realize contextual justice,

as it is fundamentally aligned with the principle of mutual consent (*mu'asyarah bil ma'ruf*) in Islamic law and the value of equal partnership (*garwo*) in customary law (Anisa, 2025, p. 244).

At the level of national criminal law, the concept of *affirmative consent* must be translated into practical provisions. A crucial step in legal reform is to formulate a normative amendment by adding a clause to the Explanatory Memorandum of Article 473 of Law No. 1 of 2023 on the National Criminal Code (Rahmadianto, 2023, p. 41). The addition of this explanatory provision serves to establish objective indicators regarding the definition of "lack of consent," so that the burden of proof in future cases will no longer rely solely on the prerequisite of physical violence (Pradnyamita & Widhiyaastuti, 2026, p. 190). Furthermore, there is a strategic opportunity to integrate these explanatory provisions as complementary provisions within the framework of Law No. 12 of 2022 on Sexual Violence Crimes (TPKS Law), with the aim of ensuring that case handling can utilize procedural rules that are more victim-centered. As a final step, to address the relative nature of complaint-based offenses, the formulation of parameters for procedural legal protection is absolutely necessary to mitigate the risk of power imbalances in domestic relationships as well as the psychological barriers that haunt victims throughout the judicial process.

Dogmatically speaking, the adoption of the concept of affirmative consent requires a paradigm shift from a static understanding of consent toward one that is explicit, conscious, voluntary, and situational or dynamic. Concerns that this international human rights standard will disrupt the sanctity of marriage can be mitigated through efforts to harmonize it with Indonesia's "living law" in order to achieve contextual justice. Legally, the marriage contract is recognized as the highest form of consent (*consent*) that serves to legalize the institution of marriage; however, the essence of this contract does not thereby legitimize the disregard for the physical integrity of either party. The fulfillment of marital obligations remains bound by limits that require respect for each party's bodily autonomy in their execution. Therefore, this concept of dynamic consent actually finds its solid philosophical foundation in the principle of equal partnership (*garwo*) within the epistemology of customary law, and resonates strongly with the principle of mutual consent (*mu'asyarah bil ma'ruf*) in Islamic law.

At the level of formulating the national criminal legal system, this conceptual harmonization must be realized through precise normative engineering. The recommended strategic step is to draft a normative amendment in the form of an explanatory clause added to the Explanatory Memorandum of Article 473 of Law No. 1 of 2023 (National Criminal Code). The addition of this clause is of critical urgency for establishing objective indicators of the element of

“lack of consent,” thereby providing law enforcement officials with clear boundaries for interpretation. Through these objective indicators, proving the criminal act of marital rape is expected to no longer rely solely on the existence of empirical evidence in the form of extreme physical violence, but rather to comprehensively assess the absence of free consent on the part of the wife

The effectiveness of substantive law enforcement under the National Criminal Code absolutely requires the support of responsive procedural instruments. There is an opportunity to analyze the integration of these explanatory norms as complementary provisions within Law No. 12 of 2022 on Sexual Violence Crimes (TPKS Law). This integration is crucial to leverage the procedural legal framework of the TPKS Law, which is demonstrably more victim-centered. Given that the offense of *marital rape* is often classified as a relative complaint-based offense, establishing parameters for procedural legal protection is imperative. These parameters serve an essential function in mitigating the risk of power imbalances within domestic relationships and breaking down the psychological barriers victims face during legal proceedings, ensuring that access to justice is not hindered by the complainant’s subordinate position within the household.

CONCLUSION

The current regulation of marital rape in Indonesia’s criminal justice system specifically through the Law on Domestic Violence (PKDRT) and Article 473 of the National Criminal Code (KUHP) has only achieved a level of formal compliance and has not yet been substantively aligned with CEDAW’s standards of due diligence and the principle of non-discrimination, due to a lack of operational parameters that leads to a conflict between these norms and family law. To resolve this inconsistency, this study emphasizes the need to reconceptualize the form of *consent* within marriage shifting from a static understanding toward affirmative consent that is explicit, conscious, voluntary, and dynamic which is philosophically harmonized with the value of equal partnership (*garwo*) and the principle of mutual consent (*mu’asyarah bil ma’ruf*) to reject coercion without diminishing the sanctity of the marriage contract. As a concrete recommendation, lawmakers (the House of Representatives and the Government) are urged to immediately draft a normative amendment by adding a clause specifying the objective indicator of “absence of free consent” to the Explanatory Memorandum of Article 473 of the National Criminal Code so that the burden of proof does not depend solely on evidence of extreme physical violence. Furthermore, law enforcement officials and judicial institutions are recommended to apply this explanatory norm in a manner complementary to the procedural legal instruments under the Law on Domestic Violence (UU TPKS), to ensure the implementation

of victim-centered procedural protection measures aimed at mitigating power imbalances within domestic relationships throughout the legal proceedings for complaint-based offenses.

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