

## **The Urgency of Crime Prevention Policy to Control Rape in Marriage (Marital Rape)**



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**ABSTRACT:** Rape, according to the Criminal Code, is forcing sexual relations outside of marriage so that if rape occurs in marriage, it is not rape. Marital rape has become a case of domestic violence in which few victims want to speak up. This writing uses a normative juridical method by using a literature study. Indonesia regulates the issue of Marital rape by using Law Number 23 of 2004 concerning the Elimination of Domestic Violence, this law provides sanctions for perpetrators of rape, but with many assumptions that in domestic relations, it is natural for sexual relations to occur, this invalidates the assumption that husband can rape the wife. This left many victims speechless. Therefore, a countermeasures policy is needed to provide a way out through penal means using legal channels and non-penal means by using settlements outside the law. The integration between penal and non-penal means can reduce marital rape cases.

**KEYWORDS:** Marital rape, crime prevention policies, Criminal

### **I. INTRODUCTION**

Article 1 paragraph 3 of the 1945 Constitution in the third amendment has stated that the Indonesian state is a state of law (rechstaat) and not a state of power (maachstaat). The rule of law is a feature of countries that use the Civil Law legal system that has been used in Continental European countries, besides that, there is the term Rule of Law used by Anglo Saxon countries. (Sari & Budoyo, 2019) Indonesia, which is a state of law, must uphold the welfare of the people where all of that is the meaning of a state of law, this can be seen from the people and rulers who are subject to the laws currently in force. One of the characteristics that Indonesia is a state of law can be seen, among others, Pancasila which is the spirit of every law and also its implementation, the existence of a familial nature which is the starting point of the rule of law, courts that do not get pressure from power, people who want to participate, and protection of the human rights of all human beings. (Arifin & Lestari, 2019)

Legislation must have Pancasila as the spirit so that the law can be implemented in society. In the first precepts of Pancasila which contains the value of the One Godhead, it means that the establishment of the state is part of the embodiment of human beings as a form of creation of the One Godhead. (Yanto, 2016) Marriage Law Number 1 of 1974, which was changed to Law Number 16 of 2019 concerning changes to Marriage Law Number 1 of 1974 states that marriage is an inner and outer bond that binds a man and a woman. become husband and wife in order to form a happy family based on God Almighty. (Nugraheni, 2021) So that the ultimate goal of marriage is the formation of a family, this has to do with offspring, maintaining and educating offspring as a form of responsibility from husband and wife. The marriage law has the aim of being able to create a happy family and produce offspring who have parental characteristics. (Nurhayati, 2015) This is in accordance with humans by nature choosing to live together because humans are social creatures. (Marzuki & Faridy, 2020)

As the marriage progresses, it will face problems that will be a challenge for husbands and wives, but not all problems can be resolved properly. In marriage, violence often occurs between husband and wife, sometimes with a lot of consideration, the wife will not report the violence she has experienced. One example of violence by a husband that rarely gets attention is the rape experienced by his wife.

Rape is common not only in an environment that has family ties, blood or marriage. Rape may also occur in a personal way which means that the perpetrator may be related by blood, family, marriage, or dating the victim. Rape can occur in the immediate environment or can be carried out by the victim's partner. Marital rape or marital rape is a reality faced by many wives, but in reality, marital rape is not mentioned much and is even ignored. This happens because of the husband's view that he has the right to be able to do anything to his partner, so the wife has an obligation to submit to her husband who indirectly ensnares his wife to report the violence she has experienced. (Erlytawati & Lukitasari, 2015)

The view that the wife is obliged to submit to her husband is part of the learning given from a young age and is an inheritance passed down from previous generations. This seems to justify the husband when he threatens or commits violence

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against his partner. It is natural for a husband to "educate" his wife. This shows that in a marital relationship, there can be situations where one partner dominates the other and is considered "allowed to happen." Article 285 of the Criminal Code states that rape only occurs to unmarried women, so the word "married" means that there is no rape in marriage.

In Indonesian society, where there are still many patriarchal systems where women have to serve men and religious reasons often talk about the glory that the wife will get if she serves her husband well, the concept of a "serving" wife is what causes Marital rape victims to be reluctant to ask for help. There is an assumption that asking for help or reporting cases of violence received by the victim by her partner is an internal problem that must be resolved by the parties so that the victim has little support.

The case of marital rape is proof that the law still cannot reach places that are protected by the community. Marital rape will continue to emerge and there will be no solution that can be given if the state takes no action as the person in charge of public welfare. In order to suppress the occurrence of marital rape from the point of view of crime prevention policies, it is necessary to look at how to solve the problem of marital rape with two means, namely by penal and non-penal methods. So that a criminal policy is needed to solve the problem of marital rape. The implementation of crime prevention policies is important to find answers to why the problem of marital rape occurs, namely because of the different positions of the perpetrators and victims which may make marital relations unequal. Crime prevention policies can be formulated into penalties to provide legal certainty for perpetrators or can be in the form of actions without punishment that can provide a more peaceful solution that is expected to reduce the number of crimes. This writing uses the Library Research method or literature study, explores literature and scientific writings that are related to the problem, namely marital rape to produce theoretical and legal foundations related to marital rape. (Abdurrahman, 2003) In this paper, a normative juridical approach is used in order to answer the formulation of the problem. This approach uses secondary data in the form of legislation, scientific literature in the form of books and journals that are related to the problem of marital rape. Soerjono Soekanto stated that normative juridical is legal research that is made by conducting research on library materials and secondary data that are the basis for research using a search on legislation and literature related to the issue of marital rape. (Madmuji, 2004) Based on the introduction, the issues are :

1. How is marital rape regulated in Indonesian law?
2. How do crime-fighting policies address marital rape?

## II. DISCUSSION

### A. Legislation regarding marital rape in Indonesia

Marriage is a sacred relationship between a man and a woman that is recognized both religiously and legally. Forming a healthy family is the goal of a marriage because marriage has a legal umbrella, namely Law Number 16 of 2019, which is an amendment to Law Number 1 of 1974, concerning Marriage. All of this is to realize the right to form a family which is stated in the 1945 Constitution of the Republic of Indonesia, Article 28B, which reads "Everyone has the right to form a family and continue their offspring through a legal marriage."

The Indonesian state provides a legal basis to provide certainty to everyone who wants to form a strong family. This is in line with the purpose of law Number 1 of 1974, which is to form a happy and eternal family (household) based on the One Godhead. But as the journey of marriage, not everything went smoothly. It does not rule out the possibility of a rift in a marriage and does not rule out the possibility of violence in the course of a marriage. Rape in marriage is one example of violence that occurs in the household (marital rape).

A criminology academic, Mulyana WK argues that there are six types of rape, namely: (Ardi Ari & Dharma Jaya, 2019)

- 1) Sadistic Rape, this rape has a destructive characteristic. Perpetrators get pleasure not from sex but from attacks aimed at victims both on the body and genitals of the victim,
- 2) Anger Rape, the perpetrator uses violence in sexual intercourse on the victim to vent his anger and make the victim's body his enemy,
- 3) Donor Rape, the perpetrator in the rape feels that he is a stronger figure than the victim so that the perpetrator has a sense of superiority over the victim. The purpose of this act is to sexually subjugate, hurt and have sexual intercourse with the victim at the same time,
- 4) Seductive Rape, this rape occurs because of a situation that evokes stimulation both to the perpetrator and the victim. So that the victim feels that intimacy does not have to go beyond separation, and without having to reach a physical act, the perpetrator forces the victim to have sex with the perpetrator without any guilt,
- 5) Victim Precipitated Rape, in this rape where the act occurs as a result of the victim's own actions,
- 6) Exploitation Rape, this rape occurs because the victim has a less favorable position than the perpetrator so that the perpetrator gets an advantage. In this case the victim can be socially and economically dependent on the perpetrator.

From the explanation given by Mulyana, it can be concluded that the case of marital rape is close to the meaning of exploitation rape where in marriage the positions of husband and wife have different positions with respect to their functions in society. Marriage culture in society requires wives to be able to obey their husbands, which many people understand that wives

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must submit to their husbands. The wife's submission to her husband makes the wife have a dependency that makes the position of husband and wife different. Exploitation Rape requires a different position between the victim and the perpetrator, where the victim has a low bargaining value so that the perpetrator can dominate the victim.

Marital rape is a fact that is still widely found in the community, unfortunately many cases of marital rape are not exposed. The community understands the phenomenon of marital rape as a domestic problem that must be resolved in the household. This is exacerbated by the many victims of marital rape who are silenced by the perpetrators or by their closest relatives. Unfortunately, many still think that marital rape is just a lie. The opinion that it is natural to have sexual relations between husband and wife becomes the basis for the general public to judge that there is no act of rape in marriage. The culture in society assumes that after marriage, husband and wife are allowed to have sex and it is considered rape if two people who are not bound by marriage have sexual relations in which one of the parties forces sexual intercourse. This is what makes many victims of marital rape as if they do not have the right to voice. Because the culture in society allows it, therein lies the justification for the perpetrators to force sexual intercourse against the victim.

In Latin, the word rape is "rapere" which means to take illegally, to do by force, to take away, or to seize. According to the Big Indonesian Dictionary, rape has its origin from the word "rape" which means to have sex with violence. In addition, the word rape has the meaning as a process, operation, act of rape or intercourse with violence. (Siburian, 2020) From this definition, it can be seen that rape is coercion to commit acts of sexual intercourse by one party.

The Criminal Code, which is a codification of criminal law in Indonesia, classifies the notion of rape as a matter of decency so that rape is regulated in chapter XIV which is in articles 285, 286, 287, and 288 of the Criminal Code. The word decency comes from the word *susila* which means civilized, ethical or good culture, so that decency has a meaning that is close to polite manners. (Maghfiroh, 2019) Moral offenses are all actions that can result in penalties for the provisions regulated by law. Rape, which is part of a decency offense can be defined as: (1) threatening acts accompanied by violence by forcing a woman to have sex outside of marriage; and (2) threatening acts accompanied by violence by forcing a woman who is not his wife to have sexual intercourse as stated in the law, has been regulated in article 285 of the Criminal Code.

From these two things, the elements of rape are: (Maghfiroh, 2019) (1) Acts of violence or violent intimidation so that the victim cannot refuse; (2) There is a compulsion experienced by the victim when having sexual intercourse; and (3) The existence of bodily relations that are carried out clearly.

Article 285 of the Criminal Code reads, "Anyone who by force or threat of violence forces a woman to have sex with him outside of marriage, is threatened with rape with a maximum imprisonment of twelve years."

Article 285 of the Criminal Code states that the formulation of rape must be seen as an act outside marriage. This creates a consequence that there is no rape that occurs in marriage. In marriage, as long as the victim and perpetrator are still bound in marriage, there is no forced sexual intercourse. Siburian, "Shifting the Contra Paradigm Against the Criminalization of Domestic Rape."

This is in line with the culture in society which tends to assume that there is no forced sexual intercourse that occurs between husband and wife. So that if there is a rape in a marriage, it is unlikely that the perpetrator can be punished by using Article 285 of the Criminal Code. Therefore there is a need for an article that accommodates rape in marriage. Due to the legal vacuum regarding marital rape, Law Number 23 of 2004 concerning the Elimination of Domestic Violence was issued. There is an article that supports marital rape in Law Number 23 of 2004 concerning the Elimination of Domestic Violence, namely Article 8 Letter A concerning sexual violence which reads, "Forcing sexual relations carried out against people who live within the scope of the household."

From the definition provided by Law Number 23 of 2004 concerning the Elimination of Domestic Violence in Article 8 Letter A, it is known that forced sexual relations within the household can occur. However, in the process of proving in court that there was forced intercourse in a marriage, it is very difficult to prove, so that most cases of marital rape use articles on domestic violence. There is no basis that can explain how coercion occurs when sexual intercourse occurs so that marital rape can only be placed in the article on domestic violence.

It takes a criminal law policy (criminal policy) which is an integral part of social policy (social policy) as an effort to overcome crime through the formation of criminal laws as part of community protection efforts. (Siburian, 2020)

### ***B. How crime prevention policies address marital rape***

To be able to say that an action turns into a criminal act must be based on morals. In essence, efforts to tackle crime are an integral part and change part of efforts to protect the community (social defense) and efforts to achieve welfare in society (social welfare). (Arief, 2017)

Criminal policy changes everything about crime prevention and formulates it into criminal matters. Mac Ancel is of the opinion quoted by Barda Nawawi Arief that criminal policy is a science and an art which ultimately aims to provide positive legal ways to be formulated as well as provide guidelines for courts and lawmakers to implement. Sudarto explained that crime prevention policies have the meaning of achieving good criminal law results that fulfill justice and also usefulness. Crime prevention policies have the aim of being able to provide protection to the community in order to prosper the community itself. So

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that in an effort to tackle crime, it is possible to use two forms of means, namely repressively in the form of a penal or criminal law application, but can also use non-penal means or prevention without punishment. (Kenedi, 2017)

If you look at the problem of marital rape from the point of view of crime prevention policies, you must look at what is the cause of marital rape so that you can make criminal policies that are expected to suppress the occurrence of marital rape. Create criminal policies to suppress marital rape crime in the form of penal and non-penal means and see how these two facilities can minimize the occurrence of marital rape.

### **1. Marital Rape In Penal Means**

If you are going to use penal means, this crime prevention can be in the form of repressive actions or in the form of law enforcement actions if a crime occurs which will ultimately lead to non-criminal countermeasures. Article 1 Paragraph 3 of the 1945 Constitution of the Republic of Indonesia states that all kinds of actions must have a legal basis. (Al-Syamsi, 2019)

However, the penal tool cannot continue to be relied on to tackle crime because when the penal tool works in society, it has limitations that are impossible to apply to minimize crime. Many jurists reveal the shortcomings of the means of penal or criminal law in tackling crime. One of these experts is Muladi, who said that to enforce criminal law in the concept of the criminal justice system it is not the most effective main means, because there is still the possibility that there are perpetrators of criminal acts outside the judicial circle. (Muladi, 1995)

The United Nations Convention Against Corruption (UNCAC) supports an approach with non-penal means and becomes a priority for solving problems if a crime occurs. This is because of the comparison of preventive measures that can support the prevention of criminal acts compared to repressive measures. (AN, 2015) There are two main problems when using penal facilities in the context of crime prevention, namely: (Muladi, 1995)

- 1) Actions that will be criminal acts; and
- 2) The punishment that can be given to the maker.

Looking at these two problems that cannot be separated from criminal policy, social policy and development policy leads to determining how to solve the main problem in relation to the main objective of the social and political policy using policy tools (policy oriented approach). (Arief, 2017)

If solving the problem of marital rape through penal means in the form of law enforcement through the courts, it will only have the effect of separation between husband and wife relationships and there is no solution to solve the problem of marital rape. (Mahmud, 2018) The impact of the separation of husband and wife will be felt on the children so that children who are still underage must be under guardianship. (Khair, 2020) This is to provide life guarantees for the children of divorced husbands and wives which have been previously regulated in the Constitution. (Said, 2018)

The characteristic of crime prevention policy is to use a rational way with the policy method (a rational total of the responses to crime). With a rational policy, it can animate the norms and values that apply and develop in society by using products in the form of policies. Social policy already exists in the preamble of the 1945 Constitution which is composed of welfare policies as well as policies to protect the community, so that in order to realize the main goal of crime prevention, a rational method is used, known as criminal policy. To be able to make crime prevention policies run smoothly, it is necessary to have cooperation between criminal policies that include penal and non-penal efforts as well as social policies. (Kenedi, 2017) Sudarto mentions that crime prevention uses more of a repressive route if a crime has occurred and uses preventive means before a crime occurs, preventive action is also meant in a broad sense. (Arief, 2017)

Judging from Sudarto's opinion, the penal facility will be used as the first method in the event of marital rape, but the penal facility is not the answer to the problem of marital rape because similar problems will continue to occur and the penal facility will only punish the perpetrators of marital rape who will not provide a way out so it is necessary to see the means of prevention policies in the form of prevention. Sentencing is not only about punishing the perpetrator but also includes coaching and rehabilitation. This is so that the perpetrator can change and be accepted by the community. The place for perpetrators who have been sentenced to spend the time of their sentence is a correctional institution which has the function and duty to provide guidance to the perpetrators after being released from their sentences, they are able to return to society with piety are able to obey the law. All kinds of guidance and guidance are at the heart of activities in correctional institutions as well as a means of reform that is implemented for perpetrators in prisons as an effort to encourage crime prevention policy goals. (Disantara, 2021) The main purpose of coaching has a meaning related to criminal politics and policies related to social protection which are also integrally related to policies related to public welfare. (Intermediate, 2021)

### **2. Marital Rape in Non-Penal means**

Society always has problems about evil deeds that occur in a continuous period of time. Evil acts are undeniably a nuisance that often occurs because they can disrupt security and also make people restless, this is also because people want a safe, calm and secure environment without disturbing the community itself. The state must therefore react to such ill-intentioned acts in order to fulfill the ultimate goal of protection. (Winarni, 2016) Crime prevention policies are an integral part of socio-political policies in order to achieve social welfare, therefore there needs to be an approach in terms of: (Arief, 2017)

- a) Must have an integral policy between criminal policy and socio-political policy.



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b) There must be coherence between penal and non-penal means.

Crime prevention policies must be able to equate steps between law and other aspects such as education, social, economic, and others. With adjustments to other aspects of life, therefore will be able to maximize other means of crime prevention policies, in this case there must be an integration between penal and non-penal means. To make a criminal policy, it is important to look at what the problems are and the relationship between crime and other aspects of life, such as the health aspect that should be given by the state to the community which is not accepted by some people, so that a gap arises which results in community dissatisfaction which can take the form of crime. If you look at the problem of marital rape with other aspects of life, it can be in the form of a weak party and a strong party in a marriage so that the strong party can rule over the weak party.

The international community identifies domestic violence as a form of crime that often occurs in marriages. This phenomenon is also seen as a form of cruelty that is too difficult to monitor. (Winowoda, 2015) Women who are victims of sexual violence have two meanings, namely, from a general point of view in the form of violence based on gender or gender based violence, the second is seen from a special perspective in the form of a special form of violence against women. From this explanation, gender-based violence requires pain and suffering directed at women in terms of sexuality. Violence in marriage or domestic violence, which is more specifically violence against the wife or wife abuse, is a "secret in marriage" that is impossible for law enforcement to reach. This happens because of religious interpretations that allow husbands to beat their wives. (Mahmud, 2018)

To be able to tackle crime with crime prevention policies, two efforts must be used, namely penal and non-penal, so that they can run together integrally. Penal uses the means of law enforcement in addition to non-penal using the means of social policy so that it can follow the dynamic movement of society. (Son, 2016)

Prioritizing non-penal methods means prioritizing problem solving with the help of a third person. Resolving the problem of marital rape is not an easy thing because it involves a sensitive issue. To resolve it, mediation can be used with the help of the family or a mediator who can direct both husband and wife to find a way out. However, the victim has submitted the issue of marital rape by using law enforcement, so it can be tried using penal mediation with the help of the police and the families of both parties.

### III. CONCLUSIONS

Marriage is a sacred relationship between a man and a woman that is recognized both religiously and legally. However, marriage does not always run smoothly, domestic violence often occurs. The community understands the phenomenon of marital rape as a domestic problem that must be resolved in the household. This is exacerbated by the many victims of marital rape who are silenced and silenced by the perpetrators or by their closest relatives. . The opinion that it is natural to have sexual relations between husband and wife becomes the basis for the general public to judge that there is no act of rape in marriage. Due to a large number of cases of marital rape, a criminal policy is needed as a means to overcome the occurrence of marital rape. Article 285 of the Criminal Code states that the formulation of rape must be seen as an act outside marriage; this creates the consequence that no rape occurs in marriage. So that if there is rape in a marriage, it is unlikely that the perpetrator can be punished by using Article 285 of the Criminal Code. Therefore, Law Number 23 of 2004 concerning the Elimination of Domestic Violence emerged, which handles problems in marriage. However, in the process of proving that there was forced intercourse in a marriage, it is challenging to prove, so that most cases of marital rape use articles on domestic violence. It takes a criminal law policy (criminal policy) which is an integral part of social policy ( social policy) as an effort to overcome crime through the formation of criminal laws as part of community protection efforts.

Criminal policy changes everything about crime prevention and formulates it into criminal matters. Efforts to tackle crime can use two forms of facilities, namely repressive in the form of a penal or criminal law application. Still, they can also use non-penal means or prevention without punishment. So that if a marital rape crime occurs using a correctional facility, it will be directed to the court, which can be the reason for a divorce between husband and wife, and this does not provide a solution if using non-penal means it must prioritize the interests of all parties to find ways to resolve the problem, Non-penal has flexibility in its application in society when it is associated with marital rape, non-penal means can solve the problem of husband and wife without divorce.

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