

Policy Brief

Revisiting the Concept of ‘Coercion’ as an Element of Rape in Indonesian Criminal Justice

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1. Background

In both the old (1946) and the new (2023) Indonesian Criminal Code, the crime of rape is defined by the existence of coercion by means of violence or threat to violence and not the lack of consent. The legal construction of rape in these Codes is compared in Table 1 below.

Table 1

Comparison of the Legal Construction of Rape in the Old and New Indonesian Criminal Code

Old Criminal Code Article 285	New Criminal Code Article 473
Any person who, by violence or threat of violence, coerces a woman to have sexual intercourse with him outside of marriage, is threatened with a prison sentence of up to twelve years for committing rape.	Any person who, by violence or threat of violence, coerces someone to have sexual intercourse with them, shall be punished for committing rape with a maximum imprisonment of 12 (twelve) years.

By limiting coercion to violence or threat of violence, unwanted sex that occurs without violence cannot be legally acknowledged as rape. Such a narrow definition does not reflect the reality since there are instances where unwanted sex occurs under coercive circumstances in the absence of violence. For example, due to the imbalance of power relation; or the giving of consent under intoxication; or in situations of stealthing—namely the act of removing a condom during sex without the other partner’s consent, despite the use of condom being the basis of agreeing to engage in sex. Furthermore, requiring violence or threat of violence often creates an evidentiary expectation of resistance (Munro, 2010), the lack of which often gives rise to the assumption that the victim acquiesced to have sex, thus putting the victim in a disadvantaged position (Anderson, 2016).

Given the rigid definition of rape in Indonesia's Criminal Code and the lack of further elucidation of 'coercion', this policy brief revisits how the concept of consent is situated in Indonesia's legal construction of rape. This brief is based on prior research that explores how and to what extent the lack of consent is positioned by judges in Indonesia's legal construction of rape under the Criminal Code. Particularly, the research investigates two issues:

- (a) Whether lack of consent can be inferred from the elements of 'violence' and 'threat of violence'?
- (b) In lieu of 'violence' and the 'threat of violence', can lack of consent be accepted to establish coercion for the purpose of proving rape?

2. Methodology

The research was conducted using an empirical method. Purposive sampling was used to select the respondents, namely judges of the courts of first instance in Indonesia who have had experience judging rape cases. The authors relied on convenience sampling and approached judges with whom they are socially acquainted.

A demographic representation of respondents was not required, since this research is not intended to reach a generalized conclusion about the pattern of judicial practices in rape cases. Rather, it is meant to be an in-depth study into the judiciary's legal reasoning when interpreting and deciding on the elements in rape cases. In the end, 14 judges were interviewed, consisting of 5 female and 9 male judges from both Java and outside Java. It was decided that 14 judges were enough as the results had already shown saturated data.

The interviews were semi-structured, based on a list of questions that focused on the judges' views on how and to what extent the lack of consent is reflected in Indonesia's legal construction of rape under the Criminal Code. The bulk of the questions focused on the respondents' interpretation of (1) violence, (2) threat of violence, (3) coercion, and (4) consent. To assist the judges, we presented the respondents with three scenarios that involve non-consensual sex but no physical violence. We then asked each respondent whether they perceived each scenario as rape.

3. Research Results

Lack of consent in the elements of 'violence' and 'threat of violence'

In general, all respondents understood coercion to be dependent on the presence of violence or the threat of violence. In this context, all judges understood ‘violence’ as referring to physical violence. This may encompass, for example, kicking, hitting, and other physical violent contact. Meanwhile, ‘threat of violence’ encompasses a broader spectrum. Some judges continue to associate this element with the threat of physical harm to the victim (e.g., pointing a weapon at the victim). The reason for this narrow interpretation is threefold.

First, some judges believed that the overall reading of the Indonesian Criminal Code requires judges to understand violence in a physical form. This understanding is inferred by reading of, for example, Article 89 of the Code, which equates violence to include actions resulting in an individual becoming unconscious (*pingsan*) or under control (*tidak berdaya*).

Second, some judges consider the challenges in producing evidence for coercion based on non-physical violence or the threat thereof, hence prioritizing physical markers caused by physical violence as evidence. This attitude appears to be more pragmatic rather than a conceptual understanding of violence, which made them more open to accepting a broader understanding of violence, as shown in the latter part of this policy brief.

Third, one judge noted that non-physical violence is not likely to cause coercion in rape. The judge noted that in the absence of physical violence or “threat towards dignity”, victims ought to be able to escape.

However, some judges interpret “threat of violence” not only as physical, but also verbal and psychological, recognizing that this could mentally impact the victims, which in turn contributes to coercion. These judges argued that such an interpretation is based on the interest in ensuring an application of law that meets the modern context.

Despite a diverse understanding of threat of violence, all judges readily determine that violence or threat of violence has occurred, if resistance can be proven. All judges readily accept that physical markers can satisfactorily prove resistance, but are more unsure about non-physical markers.

Given this understanding, the judges viewed that the lack of consent is inherently inferred if victims can prove resistance, often through the evidence of physical markers. For example, one respondent stated that “if a person is physically forced, it can be construed that they did not consent to the sexual activity.” In conclusion, the presence of physical violence or the threat of

violence fundamentally equates to the lack of consent due to the perceived coercive nature of physical violence and the threat thereof.

Following this conclusion, the legal issue remains whether the lack of consent can be accepted to establish coercion when neither violence nor threat of violence occurs. The next section presents the respondents' thoughts on this issue.

Lack of consent to establish coercion in lieu of violence or threat of violence

To explore whether the lack of consent could establish coercion in lieu of violence or threat of violence, respondents were presented with three hypothetical cases. The first scenario concerns stealthing—the act of removing a condom without the other partner's awareness, despite the use of a condom being the basis of consent before the act of sex takes place. The second scenario concerns coercion via asymmetrical power where an employer pressures an employee to engage in sex on pain of demotion. The third scenario concerns refusal to have sex despite having given consent to the first two sexual encounters. All of these scenarios depict a lack of (genuine) consent in the apparent absence of violence or threat of violence.

In responding to these issues, the judges gave varied opinions. Judges who interpret violence or threat of violence as encompassing verbal or psychological violence readily determined the cases to constitute rape, considering that there is coercion, albeit not through physical violence or the threat of physical violence. The concept of consent was central in the determination of coercion for these judges.

However, one judge noted that while there appears to be no genuine consent in the hypothetical cases, the judge did not readily accept that they amounted to rape. On the other hand, judges who take the definition of violence and threat of violence in a narrow sense (i.e. limited almost entirely to physical violence) appeared now to entertain the possibility of acknowledging the lack of consent as another parameter to establish coercion.

However, some persisted in adopting a narrow interpretation. These judges noted that while there may be no genuine consent, there remains no physical violence or threat, which means the cases do not contain the element of rape. All but one judge explained that the cases might fall under other categories of crime, such as obscene acts (*pencabulan*) or under different laws, such as Law Number 12 of 2022 on Sexual Violence. One judge readily highlighted that in those cases, it is the risk that the “victims” must bear, indicating that no crime took place.

In conclusion, the respondents' varied answers show that it is unclear as to whether the lack of consent could establish coercion in lieu of physical violence or threat of violence.

4. The Need to Solidify 'Consent' into the Elements of Rape under the Indonesian Criminal Code

These findings show inconsistencies among judges when positioning consent in Indonesia's legal construction of rape. Considering that cases of rape are becoming more complex, such inconsistency could lead to a misapplication of law or even effectively denying justice for victims. This policy brief argues that to address the issue, there needs to be an effort to establish a uniform interpretation of rape, particularly one that includes lack of consent as an inherent part of rape to respect the agency and autonomy of victims, particularly women.

From the research, some judges readily incorporate consent in their analysis. For judges who are not ready to do so, we identify three barriers: overly strict understanding of the law, prioritizing physical markers of coercion, and unreasonable expectations with respect to victims. We argue that two initiatives are to be considered in addressing these barriers, namely: raising the understanding of the realities of rape victims; and, accordingly, issuing legal instruments to clarify the incorporation of consent in the interpretation of rape.

Raising the understanding of the realities of rape victims

This policy brief highlights the understanding of some judges that creates implications for rape victims. Some judges demonstrate prejudice against victims in rape cases. One narrative was that the victim's sexual history determines whether the victim was coerced during sexual intercourse. An active sexual history is wrongly attributed to the promiscuity of the victim, and thus it becomes reasonable to perceive that there was no coercion. Prior sexual intercourse between the victim and the alleged perpetrator is also often mistakenly taken as evidence that violence or threats of violence were absent, and thus no coercion occurred.

Such understanding does not align with changes in Indonesia's criminal law. The change is reflected in the Law on Domestic Violence, which criminalizes marital rape—recognizing that rape can occur between two people sharing a sexual or intimate history. To reinforce this position, the Supreme Court has even explicitly stated through their Guidelines that sexual history shall not be considered in determining rape (Supreme Court, 2017).

Another narrative that indicates bias against victims of rape that this research identifies is the misunderstanding that only physical forms of violence and threats of physical violence exert enough power to coerce someone. Violence in other forms (e.g. economic and psychological) is perceived to be not sufficiently coercive since victims are expected to be able to escape. This understanding also leads to the prioritization of physical markers as evidence of rape.

Such understanding is harmful as it creates unreasonable expectations regarding the victims. The coercive power of non-physical (e.g. economic and psychological) violence is well recognized in other crimes. For example, Laws on Human Trafficking acknowledge that economic pressure on victims, often from vulnerable backgrounds, is used in human trafficking, coercing victim to obey the will of the perpetrator. In cases of abuse of non-consensual intimate images, reputational harm has been proven to be sufficiently coercive against victims. Laws that create unreasonable expectations regarding the victims risk making the law unenforceable, and such laws can even be complicit in a victimization process.

Judges must take into account these realities in applying the law. Understanding such realities is expected to reduce victim-blaming tendencies in judges while also encouraging them to perceive non-physical markers (eg. psychiatric evaluations or power-relations/gender analysis) as persuasive as physical ones.

Encouraging judges to have a deeper understanding of the realities of victims can be done through capacity building in the form of continuous training. The Judicial Commission (*Komisi Yudisial* or KY) holds a strategic role to enhance judges' capacity in adjudicating rape cases since it provide training for candidate judges and sitting judges.

For the first time, the KY trained judges about engaging with Women in Legal Proceedings with the Law (*Perempuan Berhadapan Dengan Hukum*) in August 2024 (Judicial Commission, 2024). It is unclear whether the training impacted judges' perspectives, as the KY has not studied this. However, this research encourages the training to be done not only to enhance knowledge but also to give the skills and sensitivities towards cases, which in this case must include violence against women.

This policy brief suggests that similar training could help increase judges' awareness of possible biases. There is a growing body of literature on judicial education that provides methods to ensure that judges are equipped to deliver justice. One consideration is to focus from pedagogy to andragogy (i.e. education method for adults) in training approaches. This approach

requires educators/trainers to be facilitators of discussions among training participants, as opposed to being sole sources of knowledge, which assumes the training participants have no prior knowledge. The KY must consider this approach to ensure judges possess critical, yet accurate realities of victims.

Issuing legal instruments to clarify the incorporation of consent in the interpretation of rape

While education is essential to raise awareness, there is still the possibility that some judges would be reluctant to apply consent in interpreting coercion due to the perception that it might violate legal certainty (i.e. the law must be implemented as written). This is because there is no explicit element of consent in the provision relating to the crime of rape. To address this reluctance, this policy brief proposes that the Supreme Court issue a Supreme Court Circular Letter to encourage a uniform understanding of coercion in the crime of rape that incorporates the concept of consent.

The Supreme Court often issues circular letters to ensure a more uniform interpretation of a provision. Circular Letter of the Supreme Court Number 2 of 2023 was issued in response to different interpretations of the requirement for the registration of marriage. Under Law Number 1 of 1974 on Marriage Law, marriage can only be registered with the Court if a "marriage is conducted in accordance to the spouse's respective religion and belief". Traditionally, some judges interpret such provisions to only allow marriage by persons of the same religion and belief. However, there was a growing trend in which judges interpret that if the religion of both spouses does not prohibit inter-faith marriage, such marriage is deemed "conducted in accordance to the spouse's respective religion and belief", allowing it to be registered to the Court. However, in response to such a growing trend, the Supreme Court enacted a Circular Letter of the Supreme Court No. 2 of 2023, which explicitly stipulates that "courts shall not grant the request to register marriage between individuals with different religion and belief". Regardless of its content, this shows that SC Circular Letter are an instrument that can contribute to the uniformity of interpretation of legal provisions.

As for the content of the proposed SC Circular Letter, it should firstly acknowledge that the existence of coercion is inherently related to the concept of consent, mainly in which the absence of genuine consent should be interpreted to mean coercion within the provision criminalizing rape. From this, the SC Circular Letter can begin by discussing the understanding

of genuine consent, referring, for example, to the CRISP (Considered, Reversible, Informed, Specific, and Participatory) framework of consent and the method to determine the existence of genuine consent (Planned Parenthood, 2025).

The elaboration on the framework of consent not only allows a more uniform interpretation but also enhances the preparedness of the law to address specific cases in which the relation between coercion and harm is not apparent, for example, in cases of stealthing (discreetly and without consent, removing a condom during sexual intercourse) or quid pro quo, which is rampant in workplace sexual violence (e.g. supervisors using their influence to ask for sexual favors from their staff). Neither of these cases involve a traditional understanding of coercion, yet harm arises. To provide justice to victims, these cases can be better interpreted through the concept of ‘consent’ instead of a narrow understanding of coercion.

Furthermore, this policy brief also argues that the concept ‘genuine consent’ is not unknown within the Indonesian legal framework. Rather, this concept is found in various laws in Indonesia, such as civil law provisions which stipulate circumstances in which an agreement towards a contract is considered voidable (e.g. the ‘agreement’ is acquired through deception). The new Indonesian Criminal Code has expanded, albeit exhaustively, the definition of rape to include circumstances in which the existence of a consent is not apparent (i.e. penetrative sexual acts against children, against unconscious individuals, and against people with a mental or intellectual disability through the promise of reward, abuse of power, or deception). Under the existing (yet scattered) concept of genuine consent within the Indonesian legal framework, the Supreme Court has a sound legal justification to issue an SC Circular Letter to acknowledge the inherent existence of genuine consent in understanding coercion in rape.

In addition to its legal justification, the SC Circular Letter will also support the development of gender-mainstreaming efforts in Indonesian laws and policies. This includes the Supreme Court's own internal policies (e.g. Supreme Court Regulation Number 3 of 2017 on Guidelines for Adjudication involving Women in Conflict with Law). This policy brief also notes that issuing an SC Circular Letter relating to consent has an important expressive function. The issuance of an SC Circular Letter can demonstrate the willingness of the Supreme Court to respect and protect the bodily autonomy of individuals, in particular women, as victims of rape. This is particularly important in cases of sexual violence since victims often fear retaliation and stigmatization from law enforcers, including the courts.

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