

Review of Law No 12 Of 2022 Concerning the Criminal Action of Sexual Violence Against the Custom Law of Forced Marriage in Indonesia (*Hifdz Nafs* Analysis)

*Ahmad Zaky Nauval¹, Muhammad Syukri Albani Nasution²

^{1,2}Universitas Islam Negeri Sumatera Utara, Indonesia

*muhammadsyukrialbani@uinsu.ac.id

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Abstract

Marriage is not only about forming a family that occurs because of the union of a man and a woman, but marriage is an inner and outer bond between a man and a woman as husband and wife with the aim to forming a family (household) that happy and eternal based on God Almighty. It becomes a problem if marriage is not based on the desire of each partner because the desire and feelings of mutual love are the main basic in carrying out a marriage. In practice, marriage coming from a coercion is not a new thing, in some areas it has even become customary law. By considering it the Indonesian government passed constitution number 12 of 2022 where forced marriage is categorized as a crime of sexual violence. However, there are still many rejections from several parties because of the conflict between the article and the provision of sharia and customary. By using the *juridis-normatif* method, this article will review this conflict. Forced marriages which are categorized as criminal acts in Indonesian have been ruled out in some areas by referring to customary provision that put forward the values of *Maqashid Sharia*. The result is that it is necessary to review Law No. 12 of 2022 that there are positive legal exceptions to customary law that apply in several regions of Indonesia, because the nature of the law itself aims to regulate and measure criminal punishment.

Keywords: *Forced Marriage, Hifdz Nafs, Islamic Law.*



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INTRODUCTION

One in four Indonesians is a teenager (aged 10-24 years), and future youth is a demographic bonus for this country. In the hands of this teenager lies a big responsibility for himself, his family, and his country. In Indonesia around 66.3 million people are teenagers. With this large number, the existence of adolescents can be an opportunity and a challenge for Indonesia (Bappenas., 2021).

Currently, what has become the focus of joint attention, especially gender equality activists, human rights activists, and law-making officials, is regarding forced marriages which are still being carried out in several regions and still have high presentations. There are many factors behind the coercion of the marriage, including the tradition of a custom, family economic conditions, free sex among teenagers, and because of pregnancy out of wedlock. In addition to these factors, the consequences of forced marriage cannot be avoided, including the occurrence of domestic violence (KDRT), early divorce and so on (Ilhami Bisri, 2004: 32)

Responding to existing problems and procedurally, on May 9, 2022, the President of Indonesia passed Law No. 12 of 2022 concerning crimes of sexual violence where the point is that forced marriage is one of the categories of criminal acts of sexual violence. The background

to the formation of this law is because in the provisions of Article 28B of the 1945 Constitution of the Republic of Indonesia, it is stated that everyone has the right to form a family and continue offspring through legal marriage and the state guarantees children's rights to survival, growth and development and entitled to protection from violence and discrimination (Indonesian Constitution No. 12 Crimes of Sexual Violence, 2022)

On the other hand, the Constitutional Court of the Republic of Indonesia has issued Constitutional Court Decision Number 22/PUU-XV/2017 in which one of the Constitutional Court's considerations in the decision is "However, when the differential treatment between men and women impacts or hinders the fulfillment of basic rights or constitutional rights of citizens, whether belonging to the group of civil and political rights as well as economic, educational, social and cultural rights, which should not be differentiated solely on the basis of gender, then such distinction is clearly a discrimination."

However, in its journey, which is considered new, law No. 12 of 2022 concerning the crime of sexual violence, one of which regulates forced marriages, has experienced a lot of opposition from the public, both from the clergy, traditional leaders and even political parties, this law is considered not in accordance with the regulations. -traditional rules and syara that apply in Indonesia. In Islam and customary law in Indonesia, the term forced marriage is well known and even applied if it meets the specified levels.

Several articles related to this issue include the Sinta 2 accredited Indonesian Legal Development Journal with the title "Minutes of Challenges to Law Enforcement of Sexual Violence Crimes After the Birth of Law Number 12 of 2022" with results. First, the TPKS Law is a complement to Indonesian criminal law instruments for tackling TPS. Second, the TPKS Law provides legal protection for victims of systemic sexual violence. Third, the TPKS Law contains penal and non-penal means to deal with criminal acts of sexual violence. (Nurisman, 2022: 170-196).

Based on the article "Forced Marriage under the guise of Cultural Traditions: How is CEDAW Implementation of National Law in Protecting Women's Rights in Marriage?" published in the Uti Possidetis Journal: Journal of International Law. The results of this study indicate that under the CEDAW Convention, everyone has the same right to marry, regardless of the person's gender and gender. However, in implementing it into national law, the implementation is still discriminatory and not yet integrated. (Junita Fanny, 2022: 55-82).

Based on some of the phenomena and problems above, the author aims to examine how forced marriage is categorized as a criminal act under Law No. 12 of 2022 "Concerning the Crime of Sexual Violence Against the Customary Law of Forced Marriage" through the instrument of *onemaqasid As-Shariah* that is *Hifz al-Nafs*.

RESEARCH METHODS

This research was conducted by examining and interpreting theoretical matters concerning principles, conceptions, doctrines, and legal norms, as well as laws relating to the theme of the study. So, this research simply uses the type of juridical-normative research, with a statutory and conceptual approach. That both will be analyzed by looking at the relevant laws and regulations and then providing a legal policy concept for the problem under study. This legal research is doctrinal research. In this doctrinal research, the data to be studied are

secondary data or data obtained indirectly through documentary studies. To understand the problems discussed, this paper uses *conceptual approach*. The collection of legal materials uses document study techniques which are analyzed using qualitative analysis.

RESULT AND DISCUSSION

Humans are social beings, in life they will certainly experience various social processes, starting from association in the family, association at school and in society from childhood to adulthood to the point of finding a partner and building a household in marriage. Marriage is an essential issue for human life, because besides marriage to form a family, marriage does not only contain elements of human relations with humans but also involves civil relations, marriage also contains elements of sacredness, namely the relationship between humans and their God. (Yuningsih, 2017: 1930)

Marriage in its implementation has several important elements, one of which is a marriage guardian because his presence is the validity of a marriage, guardianship in Islamic fiqh literature is called *al-Wilayah*. Guardianship according to the fuqaha as formulated by Wahbah az-Zuhaili, namely "The power/authority (owned) of a person to directly carry out an action on their own without having to depend (be bound) on the consent of others. While marriage is defined as sex relations (*al-Wath'i*) join (*Ad-Dham*) and aqad (*al-Aqd*). In the book of Fiqh 'Ala Mazabihil al-Arba'ah argues that the guardian in marriage is a person who has the pinnacle of wisdom or a decision that for him determines the validity of the contract (marriage), so a marriage is not valid without an authorized guardian (Miftah Faridl, 2006: 75).

Abdurrahman al-Jaziry, stated that the guardian of marriage is divided into two, namely the first wali mujbir who has the right to marry someone who is under his guardianship even without the permission and consent of the person he is guardian; the second is wali ghairu mujbir, for him there is no right as in wali mujbir but the opposite, and it is not legal for him to marry without seizing a person who has the right of guardian (Muhammad, Hussein 2008: 8).

Axiologically, the existence of a wali mujbir gives the potential to give the position of a wali who can enter a marriage with high legality and certain conditions not just coercion. However, in its implementation, the position of the mujbir guardian is very strong without any restrictions on movement and is even allowed to marry his daughter by force; this is what is known in practice as forced marriage (Nuruddun AL-Mukhtar 2006: 77).

Law number 12 of 2022 concerning the criminal act of sexual violence which was just passed has become a hot topic of discussion in discussion forums especially during the draft process it has experienced resistance from several parties. The law comes as a new face which explicitly regulates the issue of forced marriages, in Article 4 paragraph (1) letter e it is stated that forced marriage is one of several acts of sexual violence, then it is clearer in Article 10 paragraph (1) it says that every person unlawfully forces, places a person under his or other person's power, or his power to perform or allow marriage to be carried out with him or with another person, is punished for coercing marriage, with a maximum imprisonment of 9 (nine) years and/or a fine a maximum fine of Rp. 200,000,000.00 (two hundred million rupiah). Further explained in paragraph (2) which includes forced marriage as referred to in paragraph (1):

- a. Child marriage.

- b. Forced marriage in the name of cultural practice; or
- c. Forced marriage between the victim and the perpetrator of the rape.

In the sense that forced marriage is sexual violence carried out in the form of abuse of power by force, threats, deception, series of lies or other psychological pressure so that a person cannot give real consent to enter marriage.

The President of the Republic of Indonesia has passed a new law, namely Law No. 12 of 2022 concerning the crime of sexual violence. One of the basics of this law is the suboptimal regulation that intersects with the crime of sexual violence in providing prevention, protection, justice, and others.

Based on this law, there are several types of actions that fall under the category of sexual violence, in Chapter II of this law precisely in article 4 paragraph (1), the types of sexual violence are:

- a. Non-physical sexual harassment
- b. Physical sexual harassment
- c. Coercion of contraception
- d. Forced sterilization
- e. Forced marriage
- f. Sexual abuse
- g. Sexual exploitation
- h. Sexual slavery; and
- i. Electronic based sexual violence.

Incorporating forced marriages as part of the criminal act of sexual violence, the cause for this is the rise of forced marriages by guardians for reasons that are not linear with the marriage and the interests of the child. However, marriage is based on the interests of the parents with the taming that parents have the right to force their children to marry according to their wishes. Second: There are many customary laws that regulate and bind the community regarding forced marriages.

Article 10 paragraph (2) letter explains that what is included in forced marriage in Law No. 12 of 2022 concerning the crime of sexual violence is forced marriage in the name of cultural practice. Indonesia, which is a country with diverse cultures and customs, in fact has many customary laws that regulate forced marriages.

Forced marriage or *Force Marriage* in Indonesia it is no longer a new thing, the case has existed and continues to occur even in some areas it has become a tradition, such as in Ponorogo, East Java there is the term "Titumbukne" where if there is a man and woman together in the house or somewhere quiet and there the possibility or opportunity of committing adultery will be arrested and married by force or fined.

The tradition of capture marriage in Sumba, East Nusa Tenggara is a situation where the man captures or takes the woman and brings her home to be his wife. The woman can be arrested at her residence or at another place after which the customary marriage process is carried out. The man who arrested the woman had to wear traditional clothes and ride a Sumba horse that was also decorated with traditional clothes, after which the man brought a horse and a Sumba machete to the woman as a symbol of apology and informed that the child was already on the man's side (Abu Bakar, 2013 :12).

Apart from that, in Lombok, West Nusa Tenggara, there is also a tradition of forced marriages that is adhered to by the people, where if the daughter is asked to go out late at night by a man, then the marriage must be carried out immediately (Mohsi, 2020: 24). The island of Sumatra also has a customary law on coercion of marriage, to be precise in the Muara Sipongi area, Mandailing Natal Regency, customary law applies if a man and a woman are caught together at night after 10 o'clock. Then the next day the *ninik-mamak* of that area will immediately marry them.

Several customary laws that apply in Indonesia have been proven to be able to reduce the burden of positive law that has been in effect so far. Returning to the purpose of the law itself which is a regulatory tool as well as a measuring tool for the sanctions received by any wrongdoing by society, customary law also has the same function. Even when viewed from the side of effectiveness itself, customary law is more feared by the community than positive law.

If one examines, the applicable customary law related to forced marriage prioritizes *masalah*, where the punishment carried out is a form of *hifdz nafs* or preserve the soul. Muslims are obliged to take care of themselves and others, Humans are expected to love each other and share love within the framework of Islamic teachings and as exemplified by the Prophet Muhammad SAW. Life safety guarantee (*al-Muhafadzah and al-Nafs*) is a guarantee of safety for the right to an honorable and noble life. Included in the scope of the general meaning of this guarantee, are guarantees for the safety of life, limbs, and guaranteed respect for humanity.

The customary law of forced marriage that applies in Indonesia does not seem to provide space for its people to commit adultery, so that the sanctions for their actions require marriage. There are so many cases of women or men who experience stress and even go crazy because their partners leave them because their relationship is too intimate, not even a few cases that end in suicide. This is like what happened in the East Java region on December 4, 2021, with a girl named N*vi* W*dy*s*r* who committed suicide because of having an intimate relationship, but the man was not responsible.

This event would not have happened if customary law was in force there because, they would immediately marry, whatever the story. The customary law of forced marriage in Indonesia is considered capable of anticipating this, because in principle customary law adopts the aims of *hifdz nafs* namely to maintain the safety of the soul (*al-Muhafadzah ala al-Nafs*).

The forced marriage that occurred was not an error in customary law, the government in this case could elaborate with the customary law of forced marriage to determine positive law. So that positive law products not only punish the perpetrators but create a deterrent effect and self-awareness so that they do not repeat their actions. Law No. 12 of 2022 regulates criminal acts of sexual violence. However, in some places customary law does not see that, if someone makes a mistake or violates customary rules then he can be punished. *Ta'zir* can actually be the basis for strengthening that *Sociological jurisprudence* needed to make Indonesian law cool. Because there is a level of law required by the community itself that is in accordance with the benefits. So, a customary law approach is needed in the determination of positive law in Indonesia.

This legal rate is based on an approach *sociological jurisprudence* according to this approach that if you want the law to be obeyed and accepted, then the law also must not go beyond what is the values that develop in society. Because *Sociological Jurisprudence*

reviewing the causal relationship that exists between law and society, in which the true law is law that is in accordance with the customs and values that develop in society. So according to this school, if the law is to be obeyed and accepted, then the law also must not go beyond what is the values that develop in society. *Ta'zir* is also the basis for strengthening that *Sociological jurisprudence* needed to make Indonesian law cool. Because there is a level of law required by the community itself that is in accordance with the benefits. So, a customary law approach is needed in the determination of positive law in Indonesia. *Ta'zīras 'uqūbah* (punishment) that is stipulated against acts of immorality or violations for which there is no provision *hadad* and neither *atonement*.

Forced marriage if it is appropriate and in accordance with the rules of Maqasid Shariah namely *Hifdz nafs* then it is permissible and does not violate the applicable positive law. Even though it appears outwardly that this approach opposes positive law, in essence it is mutually sustainable and becomes a cool benchmark for the application of the law itself. Therefore, humans are obliged to take care of themselves and others. So as not to injure or kill each other between human beings. In essence, the human soul must always be respected.

CONCLUSION

Forced marriage in Indonesia according to Law No. 12 of 2022 concerning the crime of sexual violence is a crime of sexual violence, but in essence, in parts of Indonesia that still adhere to customary law, criminal acts are considered inappropriate. The law in force regarding forced marriages is considered inconsistent with the community's customary approach. For people who violate customary norms that apply in their territory.

Based on the Muara Sipongi area, North Sumatra, the Lombok region, and Ponorogo, East Java, forced marriages are based on the fault of the couple themselves. Basically, customary law is more binding on people's daily lives than the positive law that applies in Indonesia because it has been passed down and upheld by previous elders.

Hifdz nafsin the view of Islam views that there is a law that applies in nature *Dharuriat* considered that if there is an act of sexual violence, but the couple is not directly married then there is a possibility of suicide by one of the partners. Therefore, it is necessary to review Law No. 12 of 2022 on the criminal act of sexual violence, that there is a positive legal exception to the customary law of forced marriage that applies in some regions of Indonesia, because the nature of the law itself aims to regulate and measure punishment.

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