

## THE CRIME OF FORCED MARRIAGE AGAINST CHILDREN IN THE PERSPECTIVE OF CRIMINAL LAW

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### Abstract

Child marriage is a phenomenon that still occurs frequently in Indonesia today. After the promulgation of The Law of the Republic of Indonesia Number 12 Year 2022 concerning Crimes of Sexual Violence (TPKS Law), child marriage is categorized as a criminal act of sexual violence based on forced child marriage. The criminal provisions related to forced child marriages, the TPKS Law is disharmony with The Law of the Republic of Indonesia Number 16 Year 2019 concerning Amendments to The Law of the Republic of Indonesia Number 1 Year 1974 concerning Marriage (Marriage Law), in which the law accommodates the possibility of filing a dispensation with age and cultural considerations. Meanwhile, this is very inconsistent with the principles adhered to in the TPKS Law. So that this can lead to *obscuur libel* (obscurity) in law enforcement in the future. Given that the TPKS Law still does not have to implement regulations, it is still classified as an aspired law (*ius constituendum*).

**Keywords:** child marriage, forced marriage, sexual violence crime

## INTRODUCTION

Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One and Only God (*Vide*: Article 1 point 1 of Law Number 1 Year 1974 concerning Marriage as amended by Law Number 16 Year 2019 concerning Amendments to Law Number 1 Year 1974 concerning Marriage hereinafter referred to as the Marriage Law).

Regarding the legality of marriage, it is regulated in Article 2 paragraph (1) of the Marriage Law, namely that marriage is legal if it is carried out according to the laws of each religion and belief. In addition, Article 33 of the Marriage Law emphasizes that a husband and wife must love each other, respect, be loyal and provide physical and spiritual assistance to one another. Referring to the provisions of the Marriage Law, it is known that there is an obligation between husband and wife to love and respect each other. If it is violated, it can eliminate the essence of marriage.

The phenomenon of forced marriage in Indonesian society is still a polemic that has not yet found a resolution to the problem. This is of course influenced by several factors, one of which is the cultural factor of the people who still maintain consistent ancestral traditions. What's more, Indonesia is known as a multicultural country, so it is very possible that this will actually happen in the socio-cultural environment.

South Sulawesi is one of the provinces that have a very strong community culture with its marriage customs. The people of South Sulawesi are mostly inhabited by Bugis and Makassar tribes. The two tribes have cultures that still survive and are carried out by the community to this day. One of them is related to marriage through arranged marriages.

Based on data from the Regional Secretary of the Indonesian Women's Commission (Komisi Perempuan Indonesia/KPI) of South Sulawesi, Marselina May shows that in 2020, child marriages in South Sulawesi reached 11.25 percent. This figure is above the national figure, which is 10.35 percent (Muin, 2021). Meanwhile, data from the Office for Women's Empowerment, Child Protection, Population Control and Family Planning (Dinas Pemberdayaan Perempuan Perlindungan Anak, Pengendalian Penduduk dan Keluarga Berencana/DPPPA-Daldukk KB) of South Sulawesi Province, noted that in 2021 there were 3,713 child marriages in South Sulawesi. With details, 3,183 women and 530 men.<sup>1</sup>

If you use a cultural lens, of course, this can be considered as something that corresponds to the values that live in a society with all its considerations. However, when referring to the provisions of Article 10 paragraph (1) and (2) of Law Number 12 of 2022 concerning Crimes of Sexual Violence (TPKS Law), child marriage is part of the qualifications of a crime.

Referring to the above, it can be seen that child marriage is part of the criminal act of sexual violence which is included in forced marriage according to the elements contained in the provision. So this should be known by the public in general. Nevertheless, the TPKS Law is a legal product that will only be issued in 2022, so it still does not have to implement regulations, Based on this description, the problem that will be discussed in this paper is how are the qualifications and arrangements for crimes of sexual violence against forced marriages against children in Indonesia from a criminal law perspective?

## METHOD

The type of research used in this paper is normative legal research. Legal research (*rectsonderzoek*) is a know-how activity carried out to solve the legal issues at hand.<sup>2</sup> Legal research (*rectsonderzoek*) is a process to find legal rules, legal principles, and legal doctrines in order to answer the legal issues faced.<sup>3</sup> In this study using the type of normative or doctrinal legal research. According to Terry Hutchison<sup>4</sup> the definition of doctrinal law research is: "Doctrinal research: research which provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future development."

Meanwhile, according to Peter Mahmud Marzuki,<sup>5</sup> referred to as normative legal research

<sup>1</sup> Syamsi Nur Fadhila, 2022, *Duh! Angka Perkawinan Anak di Sulsel Masih Tinggi, Ini Datanya*, see <https://makassar.sindonews.com/read/787529/710/duh-angka-perkawinan-anak-di-sulsel-masih-tinggi-ini-datanya-1654243566>

<sup>2</sup> M. Aris Munandar, Audyna Mayasari Muin, and Hijrah Adhyanti Mirzana, "Telaah Ketentuan Pidana Kekarantinaan Kesehatan Berdasarkan Undang-Undang Nomor 6 Tahun 2018 bagi Kesehatan Notaris dan Masyarakat Era Pandemi Covid-19", *Jurnal Hukum dan Kenotariatan*, Vol. 5. No. 1, February 2021, p. 78; see also Peter Mahmud Marzuki, *Penelitian Hukum (Edisi Revisi)*, Kencana Prenadamedia Group, Jakarta, 2017, p. 60

<sup>3</sup> *Ibid.*, see also Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta, 2010, p. 35

<sup>4</sup> *Ibid.*, p. 32

<sup>5</sup> *Ibid.*, see also Agus Yudha Handoko, *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial*, Kencana Prenadamedia Group, Jakarta, 2010, p. 38

because this type of research is carried out by analyzing legal norms (existing provisions). This research is also research that discusses systematically, analyzes the relationship between provisions, and examines and predicts possible developments in the future. This study has research objects, namely norms, legal concepts, legal principles, and legal doctrine. Thus, this study focuses more on literature research, meaning that it is more dominant to study secondary legal materials resulting from research.<sup>6</sup>

The approach in this study is the statutory approach (statute approach). In the statutory approach, the researcher conducts a study of laws and regulations related to the legal issues studied, as well as looks for a legal ratio and ontological basis for the birth of law.<sup>7</sup> The legal material used consists of primary legal material, namely TPKS Law, and secondary legal material, namely all publications about laws that are not official documents. Publications on law include textbooks, legal dictionaries, law journals, and comments on a court decision that are closely related to the issue being studied.<sup>8</sup> As well as non-legal materials, namely in the form of books on political science, economics, sociology, philosophy, culture, or non-legal research reports and non-legal journals as long as they have correlation and relevance to the topic being researched.<sup>9</sup>

## RESULTS AND DISCUSSION

One form of violation of human dignity is the case of sexual violence which often occurs against vulnerable groups such as women and children. Although the issue of the degree of human dignity is not clearly explained, both in the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) and the laws and regulations that regulate the elimination of sexual violence, in principle, the meaning of human dignity in this is respect for oneself and one's self-esteem related to integrity and empowerment physically and psychologically.<sup>10</sup>

Several experts provide definitions of sexual violence. The following is the interpretation of several experts regarding sexual violence. Among others:<sup>11</sup>

- a) Rubenstein argues that sexual violence is violence that occurs because of an element of sexual will that is forced and results in violence by the perpetrator, and is unwanted and offensive to the victim.<sup>12</sup> The perpetrator in this case will look for various ways to take action to fulfill his sexual desires by forcing the victim accompanied by violence against the victim.
- b) According to M. Irsyad Thamrin and M. Farid, sexual violence is all forms of threats and sexual coercion.<sup>13</sup> In other words, sexual violence is unwanted sexual contact by either party. The essence of sexual violence lies in threats (verbal) and in the form of coercion (action).
- c) Richard J.G also argues regarding the issue of sexual violence by more generally defining violence, especially what happens to children, he says that violence against children is an intentional act and can cause harm to victims who are children both physically and emotionally.<sup>14</sup> There are various forms of violence against children, namely physical, psychological, social and also sexual violence. Sexual violence against children is any act that tends to force sexual relations in an unnatural and disliked manner.

At least currently there are at least four types of laws that regulate criminal acts related to sexual violence, namely the Criminal Code (KUHP), Law Number 23 Year 2002 as amended by Law Number 35 Year 2014 concerning Child Protection, Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, Law Number 21 Year 2007 concerning Acts of Trafficking in Persons and Law Number 12 Year 2022 concerning Crimes of Sexual Violence. The Criminal Code does not provide a specific explanation or understanding of crimes related to sexual violence but instead describes them directly according to the formulation of the article, including rape and obscenity, as well as the Child

<sup>6</sup> M. Aris Munandar, Audyna Mayasari Muin, and Hijrah Adhyanti Mirzana, *Loc.Cit.*

<sup>7</sup> Peter Mahmud Marzuki, 2017, *Op.Cit.*, p. 133-134

<sup>8</sup> *Ibid.*, p. 181

<sup>9</sup> *Ibid.*, p. 183-184

<sup>10</sup> M. Aris Munandar, et.al., 2022, *Hukum Pidana Kekerasan Seksual*, Penerbit KBM Indonesia, Yogyakarta, p. 2; see also Ninik Rahayu, "Politik Hukum Penghapusan Kekerasan Seksual di Indonesia", *Bhuana Ilmu Populer*, 2021, p. 9; see also Harkristuti Harkrisnowo, "Pancasila Sebagai Paradigma Pembangunan Nasional Bidang Hukum dan Hak Asasi Manusia".

<sup>11</sup> *Ibid.*, p. 3-4

<sup>12</sup> *Ibid.*, see also Zahrotul Uyun, "Kekerasan Seksual Pada Anak: Stres Pasca Trauma", *Proceeding Seminar Nasional: Selamatkan Generasi Bangsa dengan Membentuk Karakter Berbasis Kearifan Lokal*, 2015; see also Eny Kusmiran, *Kesehatan Reproduksi Remaja dan Wanita*, Salemba Medika, Jakarta, 2011.

<sup>13</sup> *Ibid.*, see also Ismantoro Dwi Yuwono, *Penerapan Hukum Dalam Kasus Kekerasan Seksual Terhadap Anak*, Medpress Digital, Yogyakarta, 2015.

<sup>14</sup> *Ibid.*, see also Abu Hurairah, *Kekerasan Terhadap Anak*, Nuasa Press, Bandung, 2012.

Protection Act which only refers to the Criminal Code. Whereas Law Number 21 Year 2007 concerning the Crime of Trafficking in Persons (TPPO Law) only regulates violence in the context of human trafficking for the purpose of sexual exploitation.<sup>15</sup>

Law Number 12 of 2022 concerning Crimes of Sexual Violence (TPKS Law) also explains the definition of sexual violence. Article 1 point 1 of the TPKS Law reads: "Criminal acts of sexual violence are all acts that fulfill the elements of criminal acts as regulated in this law and other acts of sexual violence as regulated in-laws as long as they are determined in this law."

Then, the forms of criminal acts of sexual violence as referred to in Article 1 Point 1 above include non-physical sexual harassment, physical sexual harassment, forced contraception, forced sterilization, forced marriage, sexual torture, sexual exploitation, sexual slavery, and electronic-based sexual violence.<sup>16</sup> What is meant by non-physical sexual harassment in Article 4 paragraph (1) letter an above is statements, gestures, or activities that are inappropriate and lead to sexuality with the aim of humiliating or humiliating. Meanwhile, physical sexual harassment in question is a sexual act aimed at the body, sexual desires, and/or reproductive organs with the intention of demeaning a person's dignity based on sexuality and/or decency.<sup>17</sup>

Indonesia as a country with a relatively high population certainly has the potential for child marriage to occur. This is according to the data presented by the Ministry of Women's Empowerment and Child Protection (Kementerian Pemberdayaan Perempuan dan Perlindungan Anak/KPPPA) of the Republic of Indonesia that requests for the dispensation of child marriages in 2021 recorded 65 thousand cases and in 2022 there were 55 thousand applications.<sup>18</sup> One of the provinces in Indonesia, namely South Sulawesi, in particular, is still experiencing a significant phenomenon of child marriage. Based on data from the Office for Empowerment, Protection of Women and Children, Population Control and Family Planning (DP3AP2KB) of South Sulawesi Province, it was revealed that child marriages were still high in four districts in South Sulawesi in the last four years, namely the period 2018 to 2021.<sup>19</sup> The percentage of each of the four regions is Pangkep Regency (26.80%). Wajo (24.04%), Barru (21.11%), and Tana Toraja (19.49%).<sup>20</sup>

The data shows that there are still many child marriage phenomena in Indonesia today. Even though clearly and clearly (*expressis verbis*) in 2022 TPKS Law has been issued. Where one of the things regulated in it is related to the criminal act of forced marriage. This is regulated in Article 10 paragraphs (1) and (2) of the TPKS Law. Here is a description:<sup>21</sup>

- (1) Everyone unlawfully coerces, places a person under his or another person's authority, or abuses his power to perform or allow marriage to be carried out with him or with another person, shall be punished for forced marriage, with imprisonment for a maximum of 9 (nine) years and/or a maximum fine of Rp. 200,000,000.00 (two hundred million rupiahs);
- (2) Including forced marriage as referred to in paragraph (1):
  - a) Child marriage;
  - b) forced marriages in the name of cultural practices; or
  - c) forced marriage between the victim and the perpetrator of the rape.

Referring to the provisions above, it can be understood that child marriage in the context of criminal law in Indonesia has been accommodated as a crime of sexual violence. The elements of the crime are:<sup>22</sup>

- a) Subjective Element: Everyone;
- b) Objective Elements:
  - against the law;
  - coerce, place someone under his or others' control, or abuse his power;
  - do or let;

<sup>15</sup> M. Aris Munandar, et.al., *Op.Cit.*, p. 3-4

<sup>16</sup> Article 4 paragraph (1) of the TPKS Law

<sup>17</sup> Article 6 letter a of the TPKS Law

<sup>18</sup> Biro Hukum dan Humas Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, 2023, *KEMEN PPPA : Perkawinan Anak Di Indonesia Sudah Mengkhawatirkan*, see <https://www.kemenpppa.go.id/index.php/page/read/29/4357/kemen-pppa-perkawinan-anak-di-indonesia-sudah-mengkhawatirkan>

<sup>19</sup> Nur Suhra Wardyah, 2022, *DP3AP2KB Sulsel Perkawinan Anak Masih Banyak Di 4 Daerah*, see <https://www.antaraneews.com/berita/3050757/dp3ap2kb-sulsel-perkawinan-anak-masih-banyak-di-4-daerah>

<sup>20</sup> *Ibid.*

<sup>21</sup> M. Aris Munandar, et.al., *Op.Cit.*, p. 41

<sup>22</sup> *Ibid.*

- performed marriage with him or with others.

In general, a common thread can be drawn, that children are the object of regulation in the TPKS Law, especially in matters of forced marriages. It can be interpreted strictly (*lex stricta*) that anyone who allows or even forces a child to enter into a marriage can be charged with a criminal act of sexual violence based on forced marriage. The legal snares that can be given are imprisonment for a maximum of 9 (nine) years and/or a maximum fine of Rp. 200,000,000.00 (two hundred million rupiahs).

The legal subject that can be subjected to sanctions is every person. By definition, people can be interpreted as anyone, including the child's parents. As an illustration, if A is the parent of B (the child), force B to marry C when B does not want this to happen. Then person A as the parent of person B can be charged with Article 10 paragraph (2) letter b of the TPKS Law. This is because person A forces the marriage to occur, which is not wanted by person B as a child.

Referring to this, it cannot be denied that when the TPKS Law is enacted, it is hoped that forced marriages of various types can be prevented. Including child marriage and forced marriage in the name of culture. Even though normatively, disharmony actually occurred between the TPKS Law and Law Number 1 of 1974 concerning Marriage as amended by The Marriage Law.

As Article 7 paragraph (2) of the Marriage Law emphasizes that in the event of a deviation from the age provisions in the Marriage Law, the parents of the man and/or the parents of the woman can request a dispensation from the Court with very urgent reasons accompanied by supporting evidence. sufficient. Based on the General Explanation of Article 7 paragraph (2) of the Marriage Law that what is meant by "very urgent reasons" is a situation where there is no other choice and it is very forced to have a marriage. Furthermore, in the General Explanation of Article 7 paragraph (3) of the Marriage Law, it is explained that the granting of dispensation by the Religious Courts for those who are Muslim and the District Courts for those of other religions is based on the spirit of preventing child marriage, considerations of morals, religion, customs and culture, psychological aspects, health aspects, and the impact it causes.

If interpreted, it can be seen that referring to Article 7 paragraph (2) of the Marriage Law it is permissible to carry out marriages for everyone under the age of 19, including children. Through a dispensation mechanism that considers cultural aspects. This is of course a cross argument with Article 10 paragraph (2) of the TPKS Law which strictly stipulates that child marriage is not permitted, and can even be subject to criminal sanctions in prison and/or fines. The child in question is someone who is not yet 18 (eighteen) years old, including children who are still in the womb (*Vide*: Article 1 point 1 of Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection, hereinafter referred to as Child Protection Law).

The provisions of Article 10 paragraph (2) of the TPKS Law can be categorized and qualified as material offenses. That is, child marriage must first occur so that it can be processed in the criminal justice system as a crime of sexual violence. Apart from that, this provision is also classified as a relative complaint offense, namely an impure commission offense (*delicta commissionis per ommissionem commisiona*) that occurs if a consequence is not desired by law. This consequence arises because of the negligence of the perpetrator. One example is allowing child marriage to occur, so it can be considered as ignoring the criminal provisions for the prohibition of child marriage

## CONCLUSION

Normatively, the criminal provisions for forced marriage against children have been qualified in TPKS Law. With the element of the criminal act of coercing child marriages, it is possible to apply for a marriage dispensation for children who will enter into marriage. This can give rise to a new social phenomenon, that even in an urgent situation it is very risky to apply for a marriage dispensation. Because if you are still forced to submit a marriage dispensation, then there are signs that must be considered, namely Article 10 paragraph (2) letter b of the TPKS Law which expressly prohibits child marriage. As has been qualified as a crime of sexual violence.

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