

Criminalization Of Forced Marriage: Perspective Of Positive Law And Maqashid Al-Shariah

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Abstract: *Forced marriage is a form of human rights violation that threatens individual freedom and dignity, particularly for women. This phenomenon not only has social and psychological impacts on victims but also raises legal and ethical issues regarding the protection of personal dignity and an individual's right to choose a life partner. This article aims to analyze the criminalization of forced marriage from the perspectives of positive law and maqashid al-shariah. This study employs a legal-normative method with a legislative and conceptual approach through a literature review. The novelty of this research lies in the effort to integrate criminal sanctions under the Law on Sexual Violence Crimes (UU TPKS) with the framework of the five fundamental principles of maqashid al-shariah, specifically regarding the issue of forced marriage, a perspective that has yet to be deeply explored in studies of Islamic family law in Indonesia. The findings indicate that forced marriage contradicts the objectives of both law and Sharia because it eliminates the element of consent (ridha) and causes harm to the victim. Therefore, criminalizing the perpetrator is viewed as a normative measure that supports the protection of life (hifz al-nafs), honor (hifz al-'irdh), and lineage (hifz al-nasl). Implicitly, this study provides a theoretical foundation for strengthening regulations on the protection of women and can serve as a reference for legal practitioners and academics in reinforcing religious-normative arguments regarding the implementation of the TPKS Law in society.*

Keywords: *Criminalization, Forced Marriage, Positive Law, and Maqasid al-Shariah.*

Abstrak: Pemaksaan perkawinan merupakan bentuk pelanggaran hak asasi manusia yang mengancam kebebasan dan martabat individu, terutama bagi perempuan. Fenomena ini tidak hanya menimbulkan dampak sosial dan psikologis bagi korban, tetapi juga memicu persoalan yuridis dan etis terkait perlindungan kehormatan serta hak seseorang untuk memilih pasangan hidup. Artikel ini bertujuan untuk menganalisis pemidanaan pemaksaan perkawinan dalam perspektif hukum positif dan maqashid al-syariah. Penelitian ini menggunakan metode yuridis-normatif dengan pendekatan perundang-undangan dan konseptual melalui studi kepustakaan. Kebaruan penelitian ini terletak pada upaya mensinergikan sanksi pidana dalam UU Tindak Pidana Kekerasan Seksual (UU TPKS) dengan kerangka lima prinsip dasar maqashid al-syariah secara spesifik untuk isu pemaksaan perkawinan, sebuah sudut pandang yang masih jarang dieksplorasi secara mendalam dalam studi hukum keluarga Islam di Indonesia. Temuan menunjukkan bahwa pemaksaan perkawinan bertentangan dengan tujuan hukum dan syariat karena menghilangkan unsur kerelaan (ridha) dan menimbulkan kemudharatan bagi korban. Oleh karena itu, pemidanaan terhadap pelaku dipandang sebagai langkah normatif yang mendukung perlindungan jiwa (hifz al-nafs), kehormatan (hifz al-'irdh), dan keturunan (hifz al-nasl). Secara implikatif, penelitian ini memberikan landasan teoretis bagi penguatan regulasi perlindungan perempuan dan dapat menjadi rujukan bagi praktisi hukum serta akademisi dalam memperkuat argumentasi religius-normatif terhadap implementasi UU TPKS di masyarakat.

Kata Kunci: *Pemidanaan, Pemaksaan Perkawinan, Hukum Positif, Maqashid al-Syariah.*

1. Introduction

Forced marriage is still a social phenomenon in Indonesian society, particularly in communities that value traditions and patriarchal social structures. Practices such as *Bhakal Eko-Akoaghi* in Madura, *Nikah Bote* in Flores, and arranged marriages in some communities demonstrate that marriage is not always based on both parties' free consent.¹ In many cases, this practice is justified by customs, social pressure, and religious interpretations that prioritize family authority, particularly the guardian's, over individual will. This viewpoint is frequently misinterpreted and used as a foundation for legitimacy by segments of society whose legal understanding is still based on classical fiqh texts, resulting in a culture of forced marriage that is accepted as normal.² As a result, forced marriages are frequently accepted as normal, despite growing public awareness that they violate the principles of freedom and human dignity.³

Normatively, Indonesian positive law emphasizes the importance of consent in marriage. Law Number 1 of 1974 and the Compilation of Islamic Law make consent a fundamental component of the marriage contract, as marriage is a spiritual and physical bond between a man and a woman that forms a happy family based on belief in God.⁴ Additionally, Law Number 12 of 2022 concerning Sexual Violence Crimes (TPKS Law) criminalizes forced marriage as a form of sexual violence, providing victims with legal protection.⁵ However, reality shows that this practice continues to occur due to various driving factors such as patriarchal culture, power relations, and the low understanding of the concept of consent within society. This condition indicates a conflict between formal legal norms and societal practices.

Several previous studies have examined forced marriage from various perspectives, including positive law, human rights, and *maqashid al-shariah*. Normative studies highlight the criminalization in the TPKS Law, while Islamic studies emphasize that forced marriage contradicts the principles of *maslahah* and *ridha* in the marriage contract. Previous studies have mostly been partial, and some have already integrated positive law analysis with the *maqashid al-shariah* approach. However, the *maqashid* studies used tend to still focus on one figure or use two figures to show the transition from the classical protection concept (*dharuriyyat al-khams*) to the contemporary systemic context. There has not yet been any research that integrates the ontological concepts of Jasser Auda, Imam al-Syatibi, and al-Qarafi.

Based on this, this study offers a novelty in the form of an integrative approach between Indonesian positive law and *maqashid al-shariah*, which not only uses the classical framework but also accommodates the development of contemporary *maqashid*. By combining the concept of *al-dharuriyyat al-khams*, the expansion of *hifz al-'ird* (protection of honor) from al-Qarafi, and the systemic approach of Jasser Auda, this research aims to provide a more comprehensive philosophical foundation in viewing the criminalization of forced marriage. This approach not only assesses normative legality but also positions law as an instrument for the holistic protection of human dignity.

¹ Ivada Ilya, "Perlindungan Perempuan Dari Pemaksaan Perkawinan Perspektif Maqashid Syari'ah (Studi Fatwa KUPI Ke-2 No. 06/MK-KUPI-2/XI/2022)," *Al-Manhaj: Jurnal Hukum Dan Pranata Sosial Islam* 5, no. 2 (2023): 2547–2560.

² Ivada Ilya, "Perlindungan Perempuan Dari Pemaksaan Perkawinan Perspektif Maqashid Syari'ah (Studi Fatwa KUPI Ke-2 No. 06/MK-KUPI-2/XI/2022)," 2547–2560.

³ Wildatul Jannah et al., "Dinamika Perumusan Pasal Dalam Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual Terkait Pemaksaan Perkawinan," *Jurnal Restorasi Hukum* 6, no. 2 (2023): 112–129.

⁴ Ery Kurnia and Albar Aliyyus, 'Budaya Perkawinan Dalam Bentuk Pemaksaan Perkawinan Vs Tindak Pidana Dalam Lingkup Perkawinan Menurut Perspektif Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual', *Referendum : Jurnal Hukum Perdata Dan Pidana*, 2 (2025), 51–65.

⁵ Jannah et al., "Dinamika Perumusan Pasal Dalam Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual Terkait Pemaksaan Perkawinan."



Based on the previous background, the problem formulation in this research is: (1) how the regulation and implementation of penalties for forced marriage are discussed in Indonesian positive law, particularly in the TPKS Law; and (2) how these punishments are viewed from the perspective of *maqashid al-shariah*, whether from Jasser Auda, Imam al-Shatibi, or the concept of honor proposed by al-Qarafi.

The objectives of this research are: (1) to analyze the punishments for forced marriage from the perspective of Indonesian positive law; and (2) to examine the consistency of these punishments with the principles of *maqashid al-shariah* to find a normative and philosophical basis for the protection of human rights and dignity.

2. Literature Review

The study of the criminalization of forced marriage cannot be separated from two main theoretical frameworks, namely Indonesian positive law and *maqashid al-shariah*. Within the framework of positive law, forced marriage is considered a form of violence that disregards human rights. Normatively, the act of forced marriage has been criminalized through Article 10 of Law No. 12/2022 on Sexual Violence Crimes (Law No. 12/2022), which explicitly states that forcing someone to marry is a criminal offense that can be punishable by imprisonment and/or fines.

Meanwhile, *maqashid al-shariah*, as the foundation of Islamic law, emphasizes the five main objectives of sharia: the protection of religion, life, intellect, lineage, and property. In the context of forced marriage, such actions are viewed as damaging to the soul, threatening the mind through psychological pressure, harming lineage because the marriage is not based on consent, and contradicting the principle of consent as a condition for a valid marriage. Thus, the criminalization of forced marriage perpetrators not only aligns with national norms but also implements the main objectives of Sharia to uphold human dignity and welfare.

In line with the complexity of the issue, several studies have addressed the issue of forced marriage from various perspectives. Ivada Alya's research emphasizes that forced marriage is an act that undermines the objectives of Sharia, particularly the soul, intellect, and lineage, and therefore must be prevented and can be subject to religious or social sanctions.⁶ Meanwhile, the research by Juvani Leonardo et al. discusses normatively the criminalization of forced marriage in Law No. 12/2022 on Sexual Violence Crimes, which categorizes the act as a form of sexual violence based on power relations.⁷ Another study by Ismail Marzuki et al. shows that the practice of forced marriage violates the principle of consent, the right to personal freedom, and the right to marry freely as guaranteed in national and international human rights instruments.⁸

However, empirical research reveals the complexities of local culture and practices. Aulidina Ratulia's research found that the tradition, although claimed to be customary, fundamentally contradicts human rights principles and constitutes elements of sexual violence crimes.⁹ Bunga's research also revealed that although there are already criminal regulations in place, their implementation faces obstacles such as low reporting rates, cultural bias, and

⁶ Ivada Ilya, "Perlindungan Perempuan Dari Pemaksaan Perkawinan Perspektif Maqashid Syari'ah (Studi Fatwa Kupa Ke-2 No. 06/MK-Kupa-2/XI/2022)," *Jurnal Al-Manhaj*, no. 2 (2023): 2548-2560.

⁷ Juvani Leonardo et al., "Tindak Pidana Pemaksaan Perkawinan Menurut Undang-Undang Nomor 12 Tahun 2022," *Jurnal Lex Crimen*, no. 3 (2023).

⁸ Ismail Marzuki and A Malthuf Siroj, "Pemaksaan Perkawinan Dalam Konteks Kajian Hak Asasi Manusia Dan Undang-Undang Tindak Pidana Kekerasan Seksual," *REUSAM: Jurnal Ilmu Hukum* 10, no. 2 (2022): 215-226.

⁹ Aulidina Ratulia Toriq, "Analisis Yuridis Tradisi Pemaksaan Perkawinan Berdasarkan Perspektif Hak Asasi Manusia (Studi Kasus Kawin Tangkap di Suku Sumba Nusa Tenggara Timur)," *Jurnal Gema Keadilan*, no. 3, September (2023): 138-152.



the victims' dependence on the perpetrators.¹⁰ Meanwhile, Herman et al.'s research emphasizes that customary practices cannot be used as justification for violating women's rights, so criminalization must be optimized to provide a deterrent effect. From the overall research, it appears that forced marriage has been studied from the aspects of Sharia, human rights, customs, and positive law, but there is still room for comparative research that integratively combines the analysis of positive law and maqashid sharia in the context of sentencing.¹¹

A. Maqashid al-Shariah

In contemporary Islamic legal studies, Jasser Auda deconstructs the traditional ushul fiqh approach, which is considered too focused on linguistic aspects and rigid binary logic. Auda offers a systems approach as a new philosophical framework to understand *maqashid al-shariah* in a more functional and relevant way to the challenges of modern civilization.¹²

According to Auda, Islamic law should be viewed as a holistic unity consisting of interacting units to achieve a single grand goal, which is the welfare of humanity. Auda proposes seven main features in the Islamic legal system to optimize legal products to be more valid and effective. *First*, cognitive nature, which emphasizes the separation between revelation (Sharia) that is absolute and human thought products (Fiqh) that are the result of cognitive mental processes and are relative. *Second*, wholeness shifts the focus of Maqasid from the protection of individuals to the welfare of society and humanity at large. *Third*, openness that emphasizes that Islamic law must be a system open to changes in situations and conditions to maintain its existence. *Fourth*, hierarchical interconnection that sees the relationship between various levels of Maqasid (general, partial, and specific) in a tiered manner. *Fifth*, multidimensionality, which understands law not as a one-dimensional entity, but as having various layers of complex interests. *Sixth*, multidisciplinary, which integrates various other disciplines in formulating Islamic legal conclusions. *Seventh*, purposefulness that ensures every legal product has a clear direction to realize the welfare of the community.

Through this approach, Auda critiques the classical concept of Maqasid (*dharuriyat al-khamsah*), which is considered too individualistic and does not yet encompass universal principles such as justice, freedom of expression, and human rights. Thus, this system theory aims to transform the paradigm of Maqasid from simply an instrument of "protection" to an instrument of "development" and "human dignity" comprehensively.

Although using a broad contemporary umbrella, in constructing the theoretical framework of this research, the author refers to the fundamental concepts of *maqashid al-shariah* rooted in the thoughts of Imam al-Ghazali and systematically developed by Imam al-Shatibi. According to Imam al-Shatibi, the main purpose of establishing Sharia is to achieve the welfare of humanity (*jalb al-mashalih*) and to avoid harm (*dar' al-mafasid*). This research remains grounded in the structure of *Al-Dharuriyyat al-Khams* (the five primary needs). The main foundation of this welfare is encapsulated in *al-Dharuriyyat al-Khams* or the five primary needs, which include *Hifdz al-Din* (Protection of Religion), *Hifz al-Nafs* (Protection of Life), *Hifz al-Aql* (Protection of Intellect), *Hifz al-Nasl* (Protection of Progeny), and *Hifz al-Mal* (Protection of Wealth). These five elements are at the level of dharuriyyat, where neglecting them will

¹⁰ Bunga, Dewi, et al. "Praktik Pemaksaan Perkawinan Pasca Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual." *Jurnal Aktual Justice Yurpedumenu: Faculty of Economic and Business, Ngurah Rai University* 8.1 (2023): 47-62.

¹¹ Oheo Kaimuddin Haris, Sabrina Hidayat, and Dwi Nurrohmah Muntalib, "Adat Kawin Tangkap (Perkawinan Paksa) Sebagai Tindak Pidana Kekerasan Seksual Tradition of Arrest Marriage (Forced Marriage) as a Crime of Sexual Violence" 5, *Halu Oleo Legal Research*, no. 1 (April, 2023): 1–12.

¹² M Fakhruddin Al-Razi and Nur Kamelia, "Fitur-Fitur Hukum Islam: Pendekatan Sistem Ala Jasser Auda Dalam Kajian Maqasid Syariah," *Al-Qawaid: Journal of Islamic Family Law* (2024): 116–131.



cause real damage to the pillars of human life.¹³ However, in the contemporary context, the understanding of *al-Dharuriyyat al-Khams* is protective (*hifz/protection*) and differs from the concept formulated by Jasser Auda. However, this research also adopts the development from Shihabuddin al-Qarafi, who added the element of *Hifz al-'Irdh* (Protection of Honor). This addition is crucial in the context of forced marriage, as such actions not only harm the physical (soul) but also destroy human dignity and self-esteem, which are the most fundamental human rights.¹⁴

3. Research Method

This research is a normative-judicial study that is analytical in nature, focusing on the legal norms related to the imposition of sanctions on the practice of forced marriage. The methods used include the legislative approach and the conceptual approach. The approach is utilized to examine the positive legal rules regarding sexual violence crimes regulated in Law Number 12 of 2022, particularly concerning the criminalization of forced marriage. Meanwhile, the conceptual approach is used to study forced marriage from the perspective of *maqashid al-shariah* as a normative foundation in Islamic law.¹⁵

Research data were obtained through a literature study that included primary legal materials such as laws and *maqashid al-shariah* literature, as well as secondary legal materials such as legal literature, scientific articles, and relevant research. All the collected data were qualitatively analyzed using a descriptive-analytical method with a deductive reasoning pattern to assess the extent to which the criminalization of forced marriage aligns with national legal objectives and the principles of *maqashid al-shariah*.

4. Results and Discussion

A. Definition of Forced Marriage

Forced marriage is a marital bond involving two people, without their consent. This is different from arranged marriages because the prospective bride and groom are aware of the process through intermediaries such as parents or third parties, often referred to as matchmakers.¹⁶ Until now, the practice of forced marriage is still found in various traditional activities around the world, especially in South Asia and Africa.¹⁷

In the context of traditional societies, this practice is often carried out due to economic considerations, family honor, or customary agreements. Where the women have no space to reject the family's decision. This shows that marriage is not just a personal matter but also involves power and social control that is not an individual choice.¹⁸

The Convention on the Elimination of All Forms of Discrimination Against Women emphasizes that women and men have equal rights to freely choose their partners and marry only with their own consent.¹⁹ Any form of marriage that takes place without truly free consent is a discriminatory act against women and a violation of human rights. In line with that, the

¹³ Afridawati Afridawati, "Stratifikasi Al-Maqashid Al-Khamsah (Agama, Jiwa, Akal, Keturunan Dan Harta) Dan Penerapannya Dalam Masalah," *Al-Qisthu: Jurnal Kajian Ilmu-Ilmu Hukum* 13, no. 1 (2015): 15–30.

¹⁴ M Lutfi Khakim and Mukhlis Ardiyanto, "Menjaga Kehormatan Sebagai Perlindungan Nasab Perspektif Maqashid Syari'ah," *Nizham Journal of Islamic Studies* 8, no. 01 (2020): 32–41.

¹⁵ Suriah Pebriyani Jasmin, H L Rahmatiah, and Lomba Sultan, "Logika Maqāshid Al-Syarī 'ah Sebagai Paradigma Kritik Dalam Rekonstruksi Hukum Islam," *Ekspose: Jurnal Penelitian Hukum Dan Pendidikan* 24, no. 2 (2025): 349–62.

¹⁶ Nur Hidayati, "Perjodohan dan Kawin Paksa dalam Perspektif Hukum Islam," *Jurnal Al-Ahwal: Hukum Keluarga Islam*, Vol. 13 No. 2 (2021): 122.

¹⁷ "Ethics-forced Marriages: Introduction". BBC. 1 Januari 1970. Diakses tanggal 7 Oktober 2025.

¹⁸ Sylvia Walby, *Theorizing Patriarchy*, (Oxford: Basil Blackwell, 1990), 27.

¹⁹ United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 1979, Article 16 (1)(b).



World Health Organization defines forced marriage as “a marriage in which one or both parties are married without their free and full consent,”²⁰ and categorizes it as gender-based violence because it can impact the physical, psychological, and social conditions of the victim.

In the context of national law, Law No. 12/2022 on sexual violence crimes in Article 10 paragraph (1) emphasizes that anyone who forces another person to marry through violence, threats, abuse of power, deception, or other means can be punished for committing the crime of forced marriage. Based on these provisions, forcing someone into marriage can be categorized as a form of sexual violence; this act is not merely a violation of social or customary norms. Meanwhile, Article 6 paragraph (1) of Law No. 1/1974 on Marriage states that marriage must be based on the consent of both prospective spouses. Therefore, if such consent is absent or obtained through coercion, the marriage does not meet the legal requirements for a valid marriage.

Based on the explanation of the concept of forced marriage, it can be concluded that forced marriage is a practice of marriage that occurs without the free and full consent of one or both prospective spouses. This practice is not in accordance with the basic principles of human rights, which place the freedom to choose a partner as a fundamental right of every individual. Various international instruments such as CEDAW and WHO, as well as legal regulations like the TPKS Law and the Marriage Law, explicitly state that forced marriage is a form of discrimination and gender-based violence that can have serious impacts, whether physical, psychological, or social. Thus, forced marriage is not only a violation of norms and ethics but also an act that violates the law and threatens the dignity and welfare of individuals, especially women.

B. Forced Marriage According to Fiqh

In Islamic jurisprudence, forced marriage is understood as a form of exercising the right of *ijbar* held by the guardian. The term *ijbar* comes from the root word *ajbara-yujbiru-ijbaaran*, which means coercion or the act of coercing in a firm and strong manner. Parents, in this case, have the right or authority to marry off their daughter without needing her consent. Among the types of guardians, there is the guardian who has a blood relationship with the prospective bride (*wali mujbir*). The guardian who is given the authority to arrange the marriage for the woman without her consent. This authority is known as the right of *ijbar*. This concept was initially intended as a form of protection for women, especially at a time when they were considered not to have full capacity in making their own marriage decisions.²¹ Here is the discussion on the right of *ijbar* according to Fiqh scholars.

Table 1. The Concept of Ijbar Rights According to Fiqh Scholars

No	Scholars	Subject who has the right of <i>ijbar</i>	Object (Woman who can be subjected to <i>ijbar</i>)	Conditions
1.	Hanafiyah	The father or guardian does not have the authority to force	All women (girls and widows) must give their consent	The consent of a girl is sufficient with silence, while a widow must give a clear statement
2.	Malikiyah	The father as a <i>mujbir</i> guardian	Only a young girl or an immature girl, while a widow must be asked for permission	There must be a clear benefit (<i>maslahah qath'iyah</i>) and an equal suitor
3.	Syafi'iyah	Father and grandfather as <i>mujbir</i> guardians	An immature girl = can be <i>ijbar</i> ; a mature girl = can be <i>ijbar</i>	There must be a benefit, an equal suitor, a customary dowry, and for a widow, a clear permission

²⁰ World Health Organization, *Understanding and Addressing Violence Against Women: Forced and Early Marriage*, WHO Publication, 2012, 1.

²¹ Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuhu*, Juz 7 (Beirut: Dar al-Fikr, 1989), 33–35.



4.	Hanabilah	Father and grandfather as mujbir guardians	A young girl and a mature girl can be <i>ijbar</i>	There must be an equivalent dowry and an equal suitor
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In the modern context, the concept of the right of coercion (*ijbar*) is largely abandoned because it is considered incompatible with the principles of justice, equality, and the protection of women's human rights. The principle of consent is now viewed as a fundamental element in marriage contracts, in line with the *maqāṣid al-syari'ah*, which emphasizes the protection of life (*hifz al-nafs*) and honor (*hifz al-'ird*).²² Moreover, positive law in many Muslim countries, including Indonesia, has established that marriage must be based on the consent of both prospective spouses. Thus, the practice of the right of *ijbar* is no longer relevant to be applied in contemporary society because it contradicts the values of public welfare and individual freedom rights.²³

C. Criminalization of Forced Marriage According to Law 12/2022 on Sexual Violence Crimes

Forced marriage is a form of gender-based violence that has long been overlooked by Indonesian criminal law. This practice not only takes away a person's freedom to choose a life partner but also causes very severe psychological, social, and economic impacts on the victims, especially women. Before the issuance of Law No. 12 of 2022 on Sexual Violence Crimes (UU TPKS), there was no clear legal basis to handle forced marriage cases. Cases like these are usually resolved based on customary norms or family law, which can actually leave the victims' rights unprotected.²⁴

The TPKS Law brings significant changes to the Indonesian criminal justice system by adding forced marriage as one form of sexual violence, as explained in Article 4 paragraph (1) letter e.²⁵ This article states that anyone who forces someone to marry without the free consent of the person being forced can be subject to criminal penalties. This regulation expands the meaning of sexual violence, not only physical or penetrative acts but also actions that hinder a person's freedom over their body and life. In Article 10, the TPKS Law states that perpetrators of forced marriage can be sentenced to up to nine years in prison and/or fined up to two hundred million rupiah.²⁶ This provision demonstrates the government's commitment to addressing forced marriage as a serious crime, on par with other forms of sexual violence such as exploitation or sexual torture.

In the application of criminal law against perpetrators of forced marriage, there are several challenges faced. *First*, the strong patriarchal culture in various regions makes victims reluctant to report cases because they fear it will be considered a disgrace to the family's dignity.²⁷ *Second*, most law enforcement officers still lack an understanding of the meaning of "free consent," which is an important element in determining this crime. Third, the lack of protective facilities such as safe houses and legal aid services forces victims to return to the same environment, putting them at risk of experiencing repeated violence.²⁸

In practice, the imposition of penalties on perpetrators of forced marriage under Article 10 of the TPKS Law has a broader significance. Criminal law does not only function as a legal

²² Jasser Auda, *Maqashid al-Shariah as Philosophy of Islamic Law* (London, IIIT, 2008), 35.

²³ Husein Muhammad, *Fiqh Perempuan: Refleksi Kiai atas Wacana Agama dan Gender* (Yogyakarta: LKIS, 2001), 114.

²⁴ Fajrin, R. (2023). *Analisis Yuridis Pemidanaan Pemaksaan Perkawinan dalam UU TPKS*. *Jurnal Hukum dan Gender*, 4(2), 55–67.

²⁵ Republik Indonesia. (2022). *Undang-Undang Nomor 12 Tahun 2022 tentang Tindak Pidana Kekerasan Seksual*.

²⁶ UU No. 12 Tahun 2022, Pasal 10.

²⁷ Yuliana, M. (2022). *Tantangan Implementasi UU TPKS di Lapangan*. *Jurnal Sosio-Legal Indonesia*, 7(2), 88–104.

²⁸ Arifin, H. (2024). *Perlindungan Korban Kekerasan Seksual dalam Sistem Hukum Indonesia*. *Jurnal HAM dan Keadilan*, 11(2), 121–138.



tool, but also as a form of protection, prevention, and rehabilitation. This shows that the law is not only for punishment but also for protecting the human rights of victims and changing social patterns that justify gender-based violence. As explained by Arliman (2023), modern criminal law demands a balance between victim protection and offender rehabilitation, especially in cases related to complex cultural and religious values.²⁹ In practice, the application of law to cases of forced marriage must take into account factors such as power relations, the age of the victim, and social pressures that prevent the victim from freely refusing. The affirmation of the element "without free consent" becomes an important marker in the paradigm shift from customary rules to the protection of individual rights in national law. Thus, the application of criminal law in the TPKS Law is not only a tool of justice but also a means of social development toward the elimination of gender-based violence and the fulfillment of human dignity as stated in the constitution.³⁰

D. Criminalization of Forced Marriage According to Maqashid al-Shariah

Forcing someone into marriage is an act that clearly contradicts the fundamental principles of Islamic teachings. In Islam's view, marriage is not merely a social contract but a sacred bond that must be based on the desire and full awareness of both parties. Therefore, any form of coercion in the marriage process is considered a violation of the values of humanity and justice that are upheld in Islamic law. As mentioned in the Qur'an, especially in Surah An-Nisa:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرِهًا... .

"O you who believe, it is not lawful for you to forcefully inherit women..." (QS. An-Nisā' [4]:19).³¹

That verse serves as a very strong argument that the practice of coercion against women in the context of marriage, whether direct or subtle, is a form of oppression that contradicts the spirit of Islam, which upholds the honor of women. Islam prohibits all forms of exploitation against women, including forcing them to accept partners they do not desire, because it undermines their fundamental right to choose.

The Prophet Muhammad ﷺ also emphasized the principles of freedom and consent in marriage through his saying:

قَالَ النَّبِيُّ ﷺ: «الْأَيِّمُ أَحَقُّ بِنَفْسِهَا مِنْ وَلِيِّهَا، وَالْبِكْرُ تُسْتَأْذَنُ فِي نَفْسِهَا، وَإِذْنُهَا صَمَاتُهَا»
(رواه مسلم، رقم 1419)

"A widow has more right to herself than her guardian, and a virgin must be asked for her consent; her silence is her consent." (HR. Muslim, no. 1419).³²

This hadith shows that, from an Islamic perspective, no one has the right to force someone, especially a woman, to marry without her consent. The courage or pleasure of the person getting married is an important condition for the marriage to be valid. Therefore, forcing someone to marry not only violates societal etiquette and morals but also contravenes the rules of Islamic law. This action deprives someone of the right to choose their future, violates the principles of *maqashid al-shariah* that protect life and honor, and contradicts the main purpose of marriage, which is to create tranquility, affection, and happiness, as exemplified in the words of Allah SWT in Surah Ar-Rum [30]:21.

²⁹ Meirani Rubianto and Aman Pratama, "Kebijakan Penal Pemaksaan Perkawinan Pasca Perkawinan: Tinjauan Terhadap Undang-Undang Tindak Pidana Kekerasan Seksual," *Neoclassical Legal Review: Journal of Law and Contemporary Issues* 03, no. 02 (2025): 107–14.

³⁰ Aman P, "Dinamika Perumusan Pasal Pemaksaan Perkawinan dalam UU TPKS," *Jurnal Hukum Syariah* (2023).

³¹ R I Kementerian Agama, "Alqur'an Dan Terjemahnya" (Jakarta, 2016).

³² Muslim ibn al-Hajjaj, *Ṣaḥīḥ Muslim, Kitāb Al-Nikāḥ, No. 1419* (Sunnah.com: Sayings and Teachings of Prophet Muhammad (peace be upon him), n.d.).

“And among His signs is that He created for you spouses from your own kind so that you may incline toward them and find tranquility in them, and He placed between you affection and mercy.”³³

From the perspective of *maqashid al-shariah*, punishing those who force marriages is based on very logical reasons and grounded in rules. This action can harm the five important objectives in Sharia (*al-kulliyat al-khams*), which include the protection of religion (*hifz al-din*), the preservation of life (*hifz al-nafs*), the safeguarding of intellect (*hifz al-aql*), the preservation of lineage (*hifz al-nasl*), and the protection of property (*hifz al-mal*).

1) Hifz al-Nafs (Protection of Life)

Forced marriage causes physical and psychological suffering for the victims, especially women and children. Many victims experience trauma, depression, and even sexual violence in marriage. In *maqashid*, the preservation of life (*hifz al-nafs*) is the priority after faith. Sharia came to reject all forms of harm to human life (*jalb al-maṣlaḥah wa dar' al-mafṣadah*). Therefore, criminalizing the perpetrators of forced marriage can be viewed as a step of *dar' al-mafṣadah*, which means preventing harm to the safety of human life.

This is in line with the research findings of Agustina. The research shows that the application of criminal sanctions against perpetrators of forced marriage has a strong basis in the perspective of *maqashid al-shariah*. Punishment not only serves as an effort to provide a deterrent effect but also acts as a means of protecting the rights of victims, particularly the right to live with safety and dignity. The research emphasizes that the practice of forced marriage often causes physical suffering, sexual violence, and serious psychological trauma.³⁴

Forced marriage, in this case, can cause physical and psychological suffering for the victims. Based on the framework of Imam al-Syatibi, this action is a real *mafṣadah* (corruption) that must be eliminated (*dar' al-mafṣid*) because it threatens the safety of life. However, from the systemic perspective of Jasser Auda, the protection of life is not limited to physical safety but extends to the protection of mental health and the right to a sense of security. This integration is reinforced by Al-Qarafi's concept, where mental suffering due to coercion is considered an attack on human dignity that must be protected by law.

2) Hifz al-Nasl (Protection of Lineage)

The main purpose of marriage in Islam is to continue a legitimate, healthy, and moral lineage. Forcing marriage instead leads to family dysfunction, household instability, and the birth of generations that are not emotionally and spiritually prepared. The Qur'an emphasizes that marriage must be based on tranquility, affection, and mercy, as explained in QS. Ar-Rūm [30]:21. This verse serves as a foundation that forced marriage contradicts the principles of *sakinah mawaddah wa rahmah*.

The practice of marriage that occurs without the consent or willingness of one party can have serious and far-reaching consequences. This indicates that the absence of consent in marriage has the potential for incompatibility, which can lead to the birth of a generation growing up in a family environment that is not harmonious and less conducive to the psychological development of children. Moreover, households built without the foundation of love and willingness often become triggers for various forms of domestic violence, both physical and emotional. In the long term, this situation not only disrupts the welfare of family members but also has the potential to threaten the social and moral stability of society at

³³ R I Kementerian Agama, “Al-Qur’an Dan Terjemahnya,” *Cet. I*, 2012.

³⁴ Arifah Millati Agustina, “Contestation between Fiqh and Culture in Indonesia: The Maqāṣid Al-Sharī’ah Paradigm in Dangers of Forced Marriage against Women,” *Sawwa: Jurnal Studi Gender* 18, no. 2 (2023): 147–68.

large, as an unhealthy family is the beginning of the fragility of the social structure within the community.³⁵

The main purpose of marriage is to realize a stable and happy family welfare as intended in the *maqashid* of Imam asy-Syatibi. Forcing marriage instead creates family dysfunction that contradicts the principles of *sakinah, mawaddah, wa rahmah*. Multidimensionally, this damage not only affects the couple but also disrupts the social system through the birth of a generation that grows up in a violent environment. This also violates the element of honor, as forcing someone into a reproductive relationship without consent is a form of degradation to the dignity of lineage and humanity.

3) *Ḥifẓ al-Din* (Protection of Religion)

Although marriage is part of worship, Islam does not accept forms of marriage that are not based on desire. The practice of forcing someone to marry under the pretext of preserving family honor or "saving face" undermines the very values of the religion itself. Islam emphasizes that any action that degrades human dignity is contrary to the fundamental goals of religion. Punishing the perpetrator based on positive law is an important step to protect the honor of religion from the coercion of religious authorities to justify wrongful acts.

The application of the *maqashid al-shariah* approach, according to Prasetiawati in her interpretation of the Sexual Violence Crime Law in Indonesia, provides a strong basis for understanding forced marriage as a form of *fasad fi al-ard* (corruption on earth) that must be prevented. From the perspective of *maqashid*, the act of coercion in marriage is not only considered a violation of human rights and gender injustice but also a crime that damages social structures and humanitarian values emphasized in Islamic teachings. Therefore, preventing such practices is not only a legal responsibility but also a moral and religious obligation to preserve the authenticity of religious values and to prevent the social and spiritual damage caused by forced marriages.³⁶

Although marriage is an act of worship, it is important to emphasize that every legal obligation (*taklif*) must provide benefit. Forcing someone to marry for the sake of "reputation" or other reasons without the consent of the bride or groom is a distortion of the purpose of religion. Through Jasser Auda's cognitive openness feature, we can understand that religion comes to liberate humans from oppression. Therefore, the prosecution of offenders under the TPKS Law is a tangible effort to preserve the sanctity of religious values from the practice of *fasad fi al-ard* (corruption on earth) and aligns with the effort to position religion as a protector of human dignity.

4) *Ḥifẓ al-'Aql* (Protection of the Mind)

Forced marriage often occurs among minors, women with low levels of education, or women who do not have the capacity to think maturely in choosing their life partner.³⁷ This has the potential to hinder the development of intellect, education, and the independence of the victims. In fact, Islam places great emphasis on the importance of preserving the intellect, as evidenced by the prohibition of *khamr* and actions that impair cognitive abilities. Therefore, criminalizing the perpetrators of forced marriage is a means of protecting the freedom of thought and rational capacity of the victims, so that the decision to marry arises from awareness and free choice.

The criminalization of forced marriage is a concrete form of applying *maqashid al-shariah* in the aspect of *ḥifẓ al-'aql* (preservation of intellect). He believes that coercion in

³⁵ Askana Fikriana and Yudi Agusfinanda, "Analisis Perkawinan Paksa Sebagai Tindak Pidana Kekerasan Seksual Dalam (Rancangan Undang-Undang) Penghapusan Kekerasan Seksual," *Dalihan Na Tolu: Jurnal Hukum, Politik Dan Komunikasi Indonesia* 3, no. 01 (2024): 93–99.

³⁶ Esa Prasetiawati, "Urgensi Undang-Undang Tindak Pidana Kekerasan Seksual (UU TPKS) Dalam Menjaga Keluarga Perspektif Maqashid Syariah" (UIN Fatmawati Sukarno Bengkulu, 2022).

³⁷ Melati Septia Hanafi, "Pemaksaan Nikah Dini Perspektif Sosiologi Hukum (Studi Kasus Di Desa Bedikulon Kecamatan Bungkal Kabupaten Ponorogo)" (IAIN Ponorogo 2024).



marriage prevents someone, especially the victim, from using their intellect and rational judgment to determine the direction of their life and choose a partner. Thus, such actions not only violate individual freedom but also damage the function of reason, which is a gift that must be preserved. Therefore, imposing criminal penalties on the perpetrators is an important step to protect an individual's right to think and freedom to determine their own life, in accordance with the main objectives of Islamic law.³⁸

Forced marriage, especially of children and women, often deprives them of their right to education and personal autonomy. If, according to the *maqashid* of Imam Asy-Syatibi, it emphasizes the protection of the mind from anything that physically damages it to remain conscious and healthy, Jasser Auda expands it to include the protection of freedom of thought and will. The safeguarding of the mind here means ensuring that the victim has full awareness in making life choices. This is closely related to the element of honor, according to Al-Qarafi, as depriving someone of their freedom to think is a serious violation of an individual's intellectual honor, because religion itself commands us to always think.

5) *Hifz al-Mal* (Property Protection)

Forms of forced marriage are often linked to economic motives, such as debt settlement, inheritance, or social transactions. Victims often lose their economic rights and financial freedom. Islam prohibits all forms of property confiscation and economic exploitation, as stated in Allah's words:

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْلُوا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ ۝

“Do not consume one another's wealth unjustly or send it to the rulers so that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know.” (QS. *Al-Baqarah* [2]:188).³⁹

The imposition of criminal sanctions on those who force marriages is not merely a way to uphold the law but can also be viewed from the perspective of *maqashid al-shariah* as an effort to achieve goodness and prevent harm. In this case, the threat of punishment can be considered as part of the goal of *hifz al-mal*, which is to protect property, because the act of forcing marriage often leads to violations of the victim's economic rights. Therefore, punishing the perpetrator is not only to instill fear but also to protect the victim's property rights and economic welfare from various forms of oppression and misuse resulting from the act of forced marriage.

Often, forced marriages are motivated by economic reasons, such as debt repayment or inheritance control. Imam asy-Syatibi prohibited all forms of unlawful acquisition of wealth. In Jasser Auda's systemic view, this is categorized as human exploitation that violates economic human rights. We can understand the central role of *hifdz al-'irdh* here, that humans are not commodities that can be traded. Punishment of the perpetrator is not merely about protecting material assets but an absolute effort to restore the dignity and economic sovereignty of the victim that has been seized.

E. Synthesis of *Maqashid al-Shariah* and Legal Implications

From the five main objectives above, it can be concluded that forcing marriage causes extensive damage to all aspects of protection regulated by Sharia. On the contrary, punishing those who force marriages brings benefits to society. In the context of a modern rule of law country like Indonesia, punishing the act of forced marriage as regulated in Law Number 12 of 2022 on Sexual Violence Crimes is a tangible application of the objectives of Sharia within the positive legal system.

³⁸ M Hendri Agustiawan and Muhammad Abdulloh Rohmad Aziz, “The Islamic Perspective on Criminalization of Forced Marriage In Indonesia,” *Tebuireng: Journal of Islamic Studies and Society* 4, no. 2 (2023): 189–212.

³⁹ Kementerian Agama, “Alqur’an Dan Terjemahnya.”



From the entire discussion, it can be concluded that the principles of Islamic law can be upheld based on the legislative principle: "*Dar' al-mafasid muqaddamun 'ala jalb al-maṣalih*," which means preventing harm takes precedence over obtaining benefits.⁴⁰ This principle emphasizes that in applying Islamic law, the most important thing is to protect the community from various forms of evil and harm that could disrupt the common good. In the case of forced marriage, the imposition of criminal penalties on the perpetrators becomes an effective means to prevent further harm, both to individuals and society.

This punishment aims to prevent the damage caused by the practice of forced marriage. With the imposition of penalties, the state and society together fulfill their moral and spiritual responsibilities in maintaining social harmony in accordance with the values of Islamic law. Therefore, the imposition of punishment on those who force others to marry is not only legally justified but also a form of moral awareness and in accordance with Sharia in achieving justice, preserving human dignity, and fulfilling the main objectives of *maqashid al-shariah*, which are to protect and honor humanity.

5. Conclusion and Recommendations

This study finds that forced marriage is a violation of human rights and Sharia principles because it negates the element of consent (*ridha*) in the contract. From a positive law perspective, the criminalization of perpetrators through Law 12/2022 demonstrates the state's commitment to protecting individual freedom and human dignity. Meanwhile, from the perspective of *maqashid al-shariah*, the imposition of criminal sanctions is in line with the objectives of sharia to protect life (*hifz al-nafs*), offspring (*hifz al-nasl*), honor (*hifz al-'ird*), and social justice.

The principal contribution of this study resides in the harmonization of positive law with *maqashid al-shariah* values in analyzing the criminalization of forced marriage, thereby consolidating the philosophical and moral foundations of law enforcement in Indonesia. This study confirms that the *maqashid al-shariah* approach can serve as a bridge between national law and Islamic law in creating equitable protection for victims of gender-based violence. The main contribution of this study lies in the harmonization between positive law and the values of *maqashid al-shariah* in analyzing the criminalization of forced marriage, thereby strengthening the philosophical and moral basis of law enforcement in Indonesia. This research affirms that a *maqashid al-shariah* based approach can serve as a bridge between national law and Islamic law in establishing equitable protection for victims of gender-based violence.

The limitation of this study is the absence of field studies or empirical analysis regarding the implementation of the TPKS Law in handling cases of forced marriage. Therefore, further research is recommended to take an empirical approach through interviews with law enforcement officials and victims to measure the effectiveness of the implementation of punishment and cultural barriers to law enforcement in society.

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⁴⁰ Dea Nurul Ela Puteri Br Bangun, Faisar Ananda, and Ibnu Radwan Siddik Turnip, "Pernikahan Usia Dini Dalam Hukum Keluarga Islam Dan Perundang-Undangan Indonesia," *Tashdiq: Jurnal Kajian Agama Dan Dakwah* 15, no. 4 (2025): 61–70.



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