

## Women's Rights and Law Enforcement: A Family Law Perspective in Addressing Forced Marriage

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**Abstract.** *Forced marriages are frequent in Indonesia for several reasons, including economics and culture. In reality, practically all South Asian countries have the same problem, with poverty and tribal animosity frequently being used to force certain adolescents to marry. The purpose of this study is to examine women's rights in the context of family law in avoiding forced marriage, as well as to examine law enforcement against forced marriage from a family law viewpoint. This research uses normative legal methods with statutory, conceptual, case, and comparative approaches. The findings reveal that respect for and implementation of women's rights have been included in various legal instruments, both at the international and state levels. The protection of women's rights is critical for achieving substantive justice and avoiding forced marriage. However, the combination of social, cultural, and legal concerns continues to challenge law enforcement. As a result, a family consultancy institution in partnership with the judiciary is required, similar to Australia, which has a Family Court to address instances such as forced marriage. With consultants who understand family matters and are experts in their fields, the settlement of cases of forced marriage through non-litigation is expected to be more effective, where the results of the decision can be determined by the court, as is the practice in Australia.*

**Keywords:** *Family Law; Forced Marriage; Law Enforcement; Legal Reform; Women's Rights*

### 1. INTRODUCTION

Violence against women today is not only an individual problem but also a national problem and even a global problem.<sup>1</sup> After the enactment of Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence (*Undang-Undang Tindak Pidana Kekerasan Seksual/UU TPKS*, hereinafter referred to as TPKS Law), the regulation of the crime of sexual violence initially relied on the Criminal Code (*Kitab Undang-Undang Hukum Pidana/KUHPP*), the Criminal Code Procedure (*Kitab Undang-Undang Hukum Acara Pidana/KUHAP*) and was also scattered in several laws such as the Law on Child

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<sup>1</sup> Mohamad Sugiyarto and Umar Ma'ruf, 'Preventive Efforts on Criminal Violence of Women', *Law Development Journal* 2, no. 3 (2020): 257–264.

Protection,<sup>2</sup> Law on the Elimination of Domestic Violence,<sup>3</sup> Law on the Eradication of the Crime of Trafficking in Persons,<sup>4</sup> Law on Pornography,<sup>5</sup> and the Law on Electronic Information and Transaction,<sup>6</sup> has now been specifically regulated in one law (TPKS Law).<sup>7</sup> These changes certainly influence several aspects, especially related to material (substance) and formal (procedural law).<sup>8</sup>

One of the transformations in terms of substance can be seen from the regulation regarding the scope of criminal acts of sexual violence regulated in Article 4, paragraph (1) of the TPKS Law. The article mentions at least nine types of criminal acts of sexual violence, including non-physical sexual harassment, physical, sexual harassment, forced contraception, forced sterilization, forced marriage, sexual torture, sexual exploitation, sexual slavery, and electronic-based sexual violence. One of the intriguing things to be studied in the area of the criminal act of sexual assault in the article *a quo* is regarding forced marriage because it has obtained legitimacy in numerous laws and regulations,<sup>9</sup> but its law enforcement always faces various hurdles.<sup>10</sup> The presence of barriers in the enforcement of the "forced marriage" statute has increased the prevalence of underage marriage and domestic violence.<sup>11</sup> As a result, the present restriction on "forced marriage" in the TPKS Law is anticipated to give more substantial justice to victims of forced marriage, as well as prevent forced marriage.

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<sup>2</sup> Regulated in Law No. 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the Second Amendment to Law No. 23 of 2002 concerning Child Protection into Law.

<sup>3</sup> Regulated in Law No. 23 of 2004 concerning the Elimination of Domestic Violence.

<sup>4</sup> Regulated in Law No. 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons.

<sup>5</sup> Regulated in Law No. 44 of 2008 concerning Pornography.

<sup>6</sup> Regulated in Law No. 1 of 2024 concerning the Second Amendment to Law No. 11 of 2008 concerning Electronic Information and Transactions.

<sup>7</sup> Tiara Nabila. 'Transformasi Hukum Bagi Perlindungan Perempuan Di Indonesia Pasca Sahnya Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual (UU TPKS)', *Lembaga Bantuan Hukum Pengayoman*, last modified 2022, accessed January 11, 2024, <https://lbhpengayoman.unpar.ac.id/transformasi-hukum-bagi-perlindungan-perempuan-di-indonesia-pasca-sahnya-undang-undang-nomor-12-tahun-2022-tentang-tindak-pidana-kekerasan-seksual-uu-tpks/>.

<sup>8</sup> Nurhayati et al. 'Seeking Substantive Justice: The Progressive Spirit of Law on Sexual Violence Crimes', *Jurnal Dinamika Hukum* 23, no. 3 (2023): 556–572.

<sup>9</sup> Various legal instruments, both international and national, have actually provided a legal umbrella related to the protection of "forced marriage", such as in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which was passed by Law No. 7 of 1984, Law No. 39 of 1999 concerning Human Rights, to Law No. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Witness and Victim Protection.

<sup>10</sup> One of the factors that can hinder law enforcement against "forced marriage" is from the regulatory side. In the results of thesis research conducted by Sariyah in 2023, for example, it can be seen that regulatory factors such as the incompleteness of laws and regulations ranging from preventive to repressive aspects are the cause of cases of forced marriage that continue to occur. See Nurun Sariyah, "Sanksi Pidana Pemaksaan Perkawinan Menurut Hukum Islam Dan Undang-Undang Tindak Pidana Kekerasan Seksual Perspektif Masalah" (UIN Kiai Haji Achmad Siddiq Jember, 2023), [http://digilib.uinkhas.ac.id/24924/1/Tesis Watermark\\_Sanksi Pidana PP menurut hkm islam dan UUTPKS pers Masalah\\_Nurun Sariyah.pdf](http://digilib.uinkhas.ac.id/24924/1/Tesis%20Watermark_Sanksi%20Pidana%20PP%20menurut%20hkm%20islam%20dan%20UUTPKS%20pers%20Maslahat_Nurun%20Sariyah.pdf).

<sup>11</sup> Data on Supreme Court decisions during 2018-2022 shows that there were 213 cases of problematic marriages due to forced marriage. Of this number, 119 cases were decided by divorce by religious courts. Meanwhile, the National Commission on Violence against Women (Komnas Perempuan) noted a 300 percent increase in forced marriage cases along with the increase in child marriage cases. See Fathiyah Wardah, "KUPI: Wajib Hukumnya Melindungi Perempuan Dari Kawin Paksa," *VOA Indonesia*, last modified 2023, accessed January 6, 2024, <https://www.voaindonesia.com/a/kupi-wajib-hukumnya-melindungi-perempuan-dari-kawin-paksa/6994073.html>.

Marriage must be based on love and not coercion because marriage is a sacred covenant to form a happy and eternal family.<sup>12</sup> Therefore, the presence of law as an instrument of social engineering in the context of marriage is expected to bring rejuvenation; in this sense, the law is expected to modify societal values.<sup>13</sup> Changes in societal values are, of course, steered by legislation towards a more favorable paradigm. The prevalence of forced marriage or “forced marriage” is also caused by the patriarchal culture that still develops in society.<sup>14</sup> Thereby giving rise to gender inequality and sexism, which have an impact on many facets of human endeavor, including women’s rights.<sup>15</sup>

This article provides theoretical exercises on numerous normative elements contained in the TPKS Law and other important laws and regulations pertaining to women’s rights, which will be significant to the development of national law, particularly in the sphere of family law. Therefore, this article uses the current law (*ius constitutum*) as a reference point for theoretical reflection, and the findings will suggest alternative methods for developing future law (*ius constituendum*). This article opens with a reflection exercise that explores women’s rights in the context of family law and the prevention of forced marriage. The study then moves on to examine features of law enforcement against forced marriage from a family law viewpoint, which will be supplemented by case analysis.

The novelty of this article is that it examines topics of women’s rights and law enforcement about the act of “forced marriage” through the lens of family law. Although there has been a lot of attention to women’s rights in many academic studies,<sup>16</sup> there have not been many studies that specifically place women’s rights as substantive justice that must be fulfilled, especially from the perspective of family law. Given that the most important part of family law is marriage law, the law’s main purpose is to protect the rights and interests of family members, especially women, and ensure justice in living a decent life to prepare for the future.

In several previous studies relevant to this research, similar problems were found related to forced marriage, especially related to the legal culture of the community. This condition is certainly a separate note because there needs to be a strengthening of the legal system, in addition to improving legal culture, as well as the substance and

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<sup>12</sup> Muhammad Kunardi and HM Mawardi Muzamil, ‘Implikasi Dispensasi Perkawinan Terhadap Eksistensi Rumah Tangga Di Pengadilan Agama Semarang’, *Jurnal Pembaharuan Hukum* 1, no. 2 (2014): 209–218.

<sup>13</sup> H. Yacob Djasmani, “Hukum sebagai Alat Rekayasa Sosial dalam Praktek Berhukum di Indonesia,” *Masalah-Masalah Hukum* 40, no. 3 (2011): 365–374.

<sup>14</sup> Sabrina Hidayat et al., “Kebijakan Hukum Pidana Pemaksaan Perkawinan yang Baru Diketahui Setelah Perkawinan Terjadi: The Principle of Proportionality Sexual Intercourse Against Children,” *Halu Oleo Legal Research* 5, no. 2 (2023): 561–575.

<sup>15</sup> Ade Irma Sakina and Dessy Hasanah Siti A., “Menyoroti Budaya Patriarki di Indonesia,” *Share: Social Work Journal* 7, no. 1 (2017): 71–80.

<sup>16</sup> Some previous studies that are also concerned with women's rights, especially regarding the issue of forced marriage are: First, Junita Fanny Nainggolan, Ramlan, and Rahayu Repindowaty Harahap, “Pemaksaan Perkawinan Berkedok Tradisi Budaya: Bagaimana Implementasi CEDAW terhadap Hukum Nasional dalam Melindungi Hak-Hak Perempuan dalam Perkawinan?,” *Uti Possidetis: Journal of International Law* 3, no. 1 (2022): 55–82; Second, 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 (2023): 215–226; and Third, Juvani Leonardo Fiore Mongkaren, Debby Telly Antow, and Rudolf Sam Mamengko, “Tindak Pidana Pemaksaan Perkawinan Menurut Undang-Undang Nomor 12 Tahun 2022,” *Lex Crimen* 12, no. 3 (2023).

structure of the law. The legal substance in question concerns the improvement of regulations and legal instruments governing aspects of marriage. On the other hand, in terms of legal structure, there needs to be institutional improvements to the settlement of cases of forced marriage. These three aspects have not been studied much in previous studies, so this research topic is very important to study.

## **2. RESEARCH METHODS**

This article was written using normative legal research methods since the goal is to uncover legal rules, legal principles, and legal doctrines to address the legal challenges at hand.<sup>17</sup> The approaches used are statutory, conceptual, and comparative. These approaches are used to analyze the juridical and theoretical aspects of women's rights in family and community life to obtain justice for their authority in determining the future. The statutory approach used in this research is Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence, Law No. 39 of 1999 concerning Human Rights, Law No. 1 of 1974 concerning Marriage, and other laws and regulations related to this research. Meanwhile, the conceptual approach used in this research is related to concepts and principles related to aspects of justice and human rights. In order to strengthen the results of the analysis, relevant comparative legal studies at the national and international levels are also described.

Legal materials are collected through literature studies, websites, journals, etc. Literature studies through the websites and journals are focused on official websites of government and non-government institutions and reputable international journals related to the topic. The legal materials that have been collected are then summarized by selecting the main points and focusing on the important things according to the research map. Then, a qualitative analysis was carried out, namely an analysis that describes the legal material obtained in the form of logical sentence descriptions, which are then given interpretation and comparisons.

## **3. RESULTS AND DISCUSSION**

### **3.1. Women's Rights in the Perspective of Family Law to Prevent Forced Marriage: Pursuing Substantive Justice**

Law No. 1 of 1974 concerning Marriage (Marriage Law) states that: "Marriage is a physical and mental bond between a man and a woman as husband and wife to form a happy and lasting family (household) based on the Almighty God." Thus, the politics of marriage law require that marriage is a bond between a man and a woman who are committed to forming a family that is *sakinah, mawaddah, and warahmah*.<sup>18</sup> Marriage is intended to be done once in a lifetime, but in some circumstances, it is done under duress, which frequently results in divorce.

Marriage is a right of every person that must be guaranteed and protected by the state because marriage is a basic and instinctive human right inherent in every person and

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<sup>17</sup> Irwansyah, *Penelitian Hukum: Pilihan Metode dan Praktik Penulisan Artikel*, 3rd ed. (Yogyakarta: Mira Buana Media, 2020).

<sup>18</sup> Istiqomah Sinaga, "Hak Perempuan Dalam Hukum Perkawinan 'Menakar Keadilan Bagi Perempuan yang Dicerai,'" *Mahkamah Agung RI*, last modified 2020, accessed January 12, 2024, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/hak-perempuan-dalam-hukum-perkawinan-oleh-istiqomah-sinaga-s-hi-mh-6-2>.

natural.<sup>19</sup> However, the decision to marry and with whom is inextricably tied to self-determination, which has been recognized as a basic human right in various key international and state law documents.<sup>20</sup> Therefore, without interference or compulsion, everyone has the freedom to marry anyone they want.<sup>21</sup> Nonetheless, the practice of forced marriage is still widespread in Indonesia today and is brought about by several familial circumstances, including unpaid debts, promises, family-arranged weddings, and other triggers. National Commission on Violence against Women claims that because women are viewed as socially inferior, forced marriage disproportionately affects them. One aspect of forced marriage is the use of force or violence against an individual to coerce them into marriage.

In many nations today,<sup>22</sup> there is no assurance that gender equality will be successfully implemented in the social, political, economic, and legal domains and in the most intimate spheres, such as the family.<sup>23</sup> Whereas international legal instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was signed in 1979 at a conference held by the UN Commission on the Status of Women, determine that under Article 16 State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. This includes:

- a. The same right to enter into marriage;
- b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- c. The same rights and responsibilities during marriage and at its dissolution;
- d. The same rights and responsibilities as parents, irrespective of their marital status;
- e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise these rights;
- f. The same rights and responsibilities about guardianship, wardship, trusteeship, and adoption of children;
- g. The same personal rights as husband and wife, including the right to choose a family name, a profession, and an occupation;

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<sup>19</sup> Hasanain Haikal, 'Analisis Yuridis Normatif Dan Hukum Islam Terhadap Putusan Mahkamah Konstitusi Nomor 30-74/PUU-XII/2014 Tentang Batas Usia Perkawinan Anak (Perempuan)', *Jurnal Pembaharuan Hukum* 2, no. 2 (2015): 348–355.

<sup>20</sup> Yaya Alfia, Suriani Bt Tolo, and La Ode Munawir, 'Perspektif Hukum Adat Kawin Lari (Silayyang) Suku Bajau Di Desa La Gasa Kabupaten Muna', *Jurnal Hukum* 37, no. 1 (2021): 24–35.

<sup>21</sup> Ana Fauzia and Fathul Hamdani, 'Aktualisasi Nilai-Nilai Pancasila Dan Konstitusi Melalui Pelokalan Kebijakan Hak Asasi Manusia (HAM) Di Daerah', *Jurnal Indonesia Berdaya* 2, no. 2 (2021): 157–166.

<sup>22</sup> Some of the countries where forced marriages are still rampant, showing the inequality between men and women, are Pakistan, Burkina Faso, India, Somalia, Afghanistan, Yemen, and many others. See Deutsche Welle, "Pernikahan Anak Masih Kerap Terjadi Di Pakistan, Kenapa?," *DW Global Media Forum*, last modified 2022, accessed January 12, 2024, <https://www.dw.com/id/mengapa-pernikahan-anak-masih-lazim-terjadi-di-pakistan/a-63918367>; Amnesty International, "Forced and Early Marriage in Burkina Faso: The Facts," *Amnesty.Org*, last modified 2016, accessed January 12, 2024, <https://www.amnesty.org/en/latest/campaigns/2016/04/burkina-faso-forced-early-marriage-facts/>; Admin, "Negara-Negara Ini Paling Sering Paksa Bocah Kawin Muda," *Merdeka.Com*, last modified 2017, accessed January 12, 2024, <https://www.merdeka.com/dunia/negara-negara-ini-paling-sering-paksa-bocah-kawin-muda.html>.

<sup>23</sup> Ulfah Abdullah, "Hak-Hak Perempuan dalam Keluarga Menurut Pandangan Asma Barlas" (Universitas Islam Negeri Syarif Hidayatullah, 2016), <https://repository.uinjkt.ac.id/dspace/handle/123456789/33536>.

- h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment, and disposition of property.<sup>24</sup>

According to Article 16 of the Convention, women must remember that they have the same rights as men in marriage. Women have the freedom to pick their own husbands, and there should be no forced marriages. Marriage must be founded on the consent of both family members; women have the same rights and obligations as parents to their children and as spouses.

Then, in national legal instruments, such as Law No. 39 of 1999 concerning Human Rights (Human Rights Law), Article 10 states that:

- (1) Every person has the right to form a family and to continue their descendants through legal marriage.
- (2) A valid marriage can only take place with the free will of the prospective husband and the prospective wife, by the provisions of laws and regulations.

Article 10 paragraph 2 of the Human Rights Law states that marriage is only considered lawful if it is performed on the free will of the prospective husband and prospective wife, i.e., without force. Even in Marriage Law, there is a concept that requires prospective husband and wife to be mature in body and soul to engage in marriage, thus, they may fully realize the goal of marriage without divorcing and having excellent and healthy kids.<sup>25</sup> As a result, laws in international law (CEDAW) and national legislation (Human Rights Law and Marriage legislation), as well as its principles, have secured the rights of everyone, particularly women, to build a family based on their conscience and choice, free of compulsion by any party.

The portrayal of Indonesian society, which is largely patriarchal, paints a highly negative picture of women's roles in the household.<sup>26</sup> As a result, respect for the implementation of women's rights as outlined in numerous laws and regulations is critical to achieving substantive justice and preventing forced marriage. This substantive justice is a concept of justice that aims to manifest itself totally and fully in society.<sup>27</sup> Substantive justice, in this case, defines the law as more than only laws and processes, but as principles in family law that should be inspired jointly, such as each family member's human rights.

This substantive justice is sought through the regulation of "forced marriage" as a category of sexual assault in the TPKS Law, transforming this provision into a form of genuine protection for victims of forced marriage. To achieve substantive justice, legal protection must be both preventative and repressive. According to Phillipus M. Hadjon, preventative legal protection seeks to avoid disagreements or issues, such as forced

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<sup>24</sup> UN Women. "Convention on the Elimination of All Forms of Discrimination Against Women." Last modified December 31, 2007. Accessed May 20, 2024. <https://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

<sup>25</sup> See point 4 letter d of the General Explanation of Law No. 1 of 1974 concerning Marriage.

<sup>26</sup> Dede Kania, 'The Rights of Women in Indonesian Laws and Regulations', *Jurnal Konstitusi* 12, no. 4 (2015): 716–734.

<sup>27</sup> Abdul Wahid, 'Keadilan Restoratif: Upaya Menemukan Keadilan Substantif?', *Jurnal Ius Constituendum* 7, no. 2 (2022): 307–321.

marriage. Meanwhile, authoritarian legal protection seeks to resolve disagreements, even through the courts.<sup>28</sup>

First, preventative legal protection can be implemented through community socialization and education, emphasizing women's rights in the family. The Regional Technical Implementation Unit can carry out this socialization and education for the Protection of Women and Children (*Unit Pelaksana Teknis Daerah Perlindungan Perempuan Dan Anak*/UPTD PPA) in Indonesia, a work unit that handles government affairs in the fields of women's empowerment and child protection, as well as an organizer of integrated services for women and children who face violence, discrimination, and other issues as mandated by the TPKS Law.

Dorothee Ingeborg Schulze, a judge and lecturer at the Institute for German and International Family Law, hopes that this preventative effort will safeguard family values and child welfare, which are the goals of Family Law.<sup>29</sup> Furthermore, he stated that the root of the problem is a lack of public awareness of the definition of family and the purpose of marriage itself.<sup>30</sup> As a result, from the standpoint of family law, a basic understanding of the nature of marriage and children's rights as women in the family can serve as a paradigm in combating a patriarchal society, which frequently fails to deliver justice for women. Given that many women are unaware of their rights as a result of unfavorable socioeconomic origins and men's disregard for the necessity of women's participation in family decision-making.<sup>31</sup>

Second, repressive legal protection specifically receives attention and is regulated in the Sixth Section of Articles 42 to 45 of the TPKS Law. Article 42 of the TPKS Law governs the provision of temporary protection to individuals who report criminal acts of sexual violence. Specifically, the police are authorized to offer temporary protection to the victim within a maximum of one twenty-four-hour period. This temporary protection is given based on the temporary protection order for a maximum period of 14 (fourteen) days from the time the victim is handled. The police have the authority to impose mobility restrictions on the offender to provide temporary protection. These restrictions can limit the offender's freedoms or keep them apart from the victim for a certain amount of time. This restriction will be outlined in a temporary protection order.

After obtaining temporary protection, it is further regulated in Article 43 of the TPKS Law, which states that within a maximum period of 1 x 24 (one time twenty-four) hours from the provision of temporary protection, the police are required to submit a request for protection to LPSK which is carried out by the provisions of laws and regulations. In addition, Article 44 of the TPKS Law emphasizes that in terms of providing Temporary Protection and Protection, the Police and the Witness and Victim

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<sup>28</sup> Phillipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia* (Surabaya: PT. Bina Ilmu, 1987), p. 29.

<sup>29</sup> This opinion was conveyed by Dr. Dorothee Ingeborg Schulze at the International Conference held by Maulana Malik Ibrahim State Islamic University Malang, on September 20, 2018. See Abadi Wijaya, "Mengenal Hukum Keluarga Lebih Dalam," *UIN Malang*, last modified 2018, accessed January 13, 2024, <https://uin-malang.ac.id/r/180901/mengenal-hukum-keluarga-lebih-dalam.html>; Also see L. Leigh Westerfield, 'Chipping Away at the State: German Women and Resistance', in *This Anguish, Like a Kind of Intimate Song* (Leiden: E. J. Brill, 2004), 35–55.

<sup>30</sup> *Ibid.*

<sup>31</sup> Arifki Budia Warman, 'KDRT Dan Hukum Keluarga: Peran Hukum Keluarga Islam Dalam Menghindari KDRT', *Ijtihad* 36, no. 2 (2020): 67–76.

Protection Agency (*Lembaga Perlindungan Saksi dan Korban/LPSK*) can cooperate with UPTD PPA.

In addition to regulating temporary protection for victims of sexual violence, one of which is forced marriage, the author argues that the protection provided by the TPKS Law is not only limited to Articles 42 to 45, but more than that, protection can be interpreted as the fulfillment of the rights of victims. Protection in the TPKS Law has been declared as a law that has specificities, one of which is the specificity in emphasizing the rights of victims that victims can easily access, and the state bears the costs. These rights are assembled and organized into a multidisciplinary, coordinated, and sustainable process of handling, protecting, and recovering victims.

The fulfillment of these rights is organized in every stage of criminal justice, including the need to coordinate the implementation of victims' recovery. There are three categories of victims' rights in this TPKS Law, including the following:

- a. Handling Rights: In the general provisions of Article 1 point 17 of the TPKS Law states, "Handling is an action taken to provide complaint services, health services, social rehabilitation, law enforcement, legal services, repatriation, and social reintegration."
- b. Protection Rights: In the general provisions of Article 1 point 18 of the TPKS Law, it states that "Protection is all efforts to fulfill rights and provide assistance to provide a sense of security to Witnesses and/or Victims which LPSK or other institutions must implement by statutory provisions." The fulfillment of the right to protection has the aim of providing a sense of security and safety for victims, victims' families, and property during and after the criminal justice process for sexual violence.
- c. Right to Recovery: In the general provisions of Article 1 point 19 of the TPKS Law, it is stated that "Recovery is all efforts to restore the physical, mental, spiritual and social condition of the Victim." The fulfillment of the right to recovery aims to strengthen, restore, and empower victims and their families to make decisions about their lives during and after the judicial process to be more just, prosperous, and dignified.

The criminal legal protection against forced marriage, as indicated above in the TPKS Law, has been fully controlled, especially oppressive legal protection. For example, if there has been a case of forced marriage that is only known after the marriage has occurred, then in terms of victim protection, namely no later than 1 x 24 (one time twenty-four) hours from the provision of temporary protection as intended, following receipt of the report, the police are required to submit a request for protection to LPSK, which is carried out in line with the requirements of laws and regulations, and they are also entitled to handling rights, protection rights, and recovery rights.

According to the explanation above, the assurance of women's rights legitimizes women's ability to select their own fate inside the family. The provision of these rights is a sort of preventative state protection, whereas repressive state protection involves police enforcement in the case of forced marriage.

Women's rights, which are frequently overlooked, do not align with Indonesian religious culture. Since a family is the foundation of society and the state, marriage, in



a religious culture, is seen as a relationship that creates families.<sup>32</sup> To realize the welfare and happiness of society, it is necessary to have a solid and strong foundation as a starting point for a just and prosperous society, and this is outlined in a Marriage Law that applies to all citizens in the territory of the Unitary State of the Republic of Indonesia.<sup>33</sup> As a result, given that Indonesia is a God-fearing nation, it should adhere to religious beliefs that uphold human rights and cultural growth that promotes respect for human rights, which needs to come after the legal rights granted to women by laws and regulations.<sup>34</sup>

### **3.2. Law Enforcement against Forced Marriage Viewed from the Perspective of Family Law: A Reflection**

Indonesia is a legal state founded on Pancasila, with the national and governmental ethos organized around these ideas. With the intention of preserving and advancing human dignity, the Indonesian state regards the law as the ultimate commander. Justice, legal clarity, and expediency are the three fundamental values of law that the ideal law enforcement system must be able to uphold.<sup>35</sup> Thus, in the case of forced marriage, it is necessary to have clarity both from the aspects of legal certainty, justice, and benefits for victims to maintain their human dignity as citizens who need to be protected.

The criminalization of forced marriage is very important because, in practice, various laws and regulations governing sexual violence have not been able to prevent, protect, provide justice, and restore and fulfill the rights of victims of sexual violence. Although this is understandable, as the TPKS Law is now not even 2 (two) years old since it was passed on April 12, 2022, and every legislation takes longer to have a practical impact, this should actually be a reminder because almost two years after the ratification, the TPKS Law still does not have implementing regulations. In practice, law enforcement officials' understanding of the TPKS Law is still very low. Although the implementation of the law does not need to wait for the issuance of implementing regulations, when there is a TPKS case, not all police apply the TPKS Law on the pretext that there are no implementing regulations.<sup>36</sup>

This is in line with Satjipto Rahardjo's opinion that every time we make a written formulation, we reduce an intact idea into a sentence system. Making written law is not the same as transferring reality perfectly into text so that there is a perfect match, but rather translating reality into sentences. Those sentences reduce a complete idea to a schema, skeleton, or framework.<sup>37</sup> Thus, a human being who was originally a whole in society at the time of writing has been defined into a scheme, where in the

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<sup>32</sup> Firman Hidayat and Akhmad Khisni, "Tinjauan Asas Kepastian Hukum, Keadilan, dan Kemanfaatan dalam Akta Perjanjian Kawin yang Dibuat oleh Notaris," *Jurnal AKTA* 4, no. 4 (2017): 591–599.

<sup>33</sup> Wisda Rauyani Efa Rahmatika and Akhmad Khisni, 'Analisis Yuridis Atas Perjanjian Perkawinan Ditinjau Dari Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan Dan Implikasi Putusan MK No. 69/PUU-XIII/2015', *Jurnal AKTA* 4, no. 3 (2017): 363–372.

<sup>34</sup> Ahmad Rofii, 'The Religiosity of the Indonesian Constitution: Article 29 (1) and Its Interpretation', *Constitutional Review* 7, no. 2 (2021): 203–240.

<sup>35</sup> Walim, 'The Concept of Restorative Justice in the Criminal Legal System: A Breakthrough in Legal Benefits', *International Journal of Law Reconstruction* 8, no. 1 (2024): 100–110.

<sup>36</sup> Sonya Hellen Sinombor, 'Dua Tahun Disahkan, UU Tindak Pidana Kekerasan Seksual Masih Belum Punya Aturan Pelaksanaan', *Kompas.Id*, last modified 2024, accessed April 3, 2024, <https://www.kompas.id/baca/humaniora/2024/03/12/uu-tpks-hampir-2-tahun-diundangkan-peraturan-pelaksana-tak-kunjung-rampung>.

<sup>37</sup> Satjipto Rahardjo, *Penegakan Hukum Progresif* (Jakarta: Kompas, 2010).

process of formulation, there must be aspects that are scattered. This is the situation with sexual assault offenses, which prior to the TPKS Law, were limited to rape, sexual abuse, and sexual harassment. However, as it has evolved, the crime of sexual assault now encompasses nine categories, including forced marriage.<sup>38</sup> Therefore, implementing regulations for the TPKS Law is urgently needed to realize optimal enforcement of the law on marriage enforcement.

Perhaps not a few people respond negatively or reject forced marriage as a criminal violation, particularly those who continue to practice forced marriage. However, it must be realized that a marriage that occurs but is not intended by a person would undoubtedly result in physical and emotional anguish. These consequences need to be considered and prevented early on. According to Article 28H of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), every individual possesses the entitlement to bodily and mental well-being, housing, and a hygienic and safe environment.

As a result, it's essential to apply penalties on offenders that can serve as a deterrent to stop forced marriage and safeguard the rights of victims. Based on Article 10 paragraphs 1 and 2 of the TPKS Law, the perpetrator of forced marriage, which is carried out by abusing his/her power, especially by unlawfully coercing, either based on tradition/culture or coercing the victim with the perpetrator of rape, is punishable by a maximum imprisonment of 9 years and/or a maximum fine of IDR 200,000,000. Thus, courts that oversee cases of forced marriage that have been established legally and persuasively can inflict criminal punishments on the culprits both cumulatively and facultatively, with a maximum jail sentence of 9 years and a maximum fine of 200 million rupiahs.

Even though it has gained legitimacy in various national and international legal instruments, the protection of women's rights does not necessarily guarantee a sense of justice because law enforcement often has obstacles. It shows that there needs to be some kind of improvement in the legal framework that is not only based on norms but also on culture and law enforcement institutions. Thus, in building a harmonious and mutually supportive legal system, it is very important to revitalize the existing legal system as initiated by Friedman. Revitalization of the legal system in order to realize optimal law enforcement in cases of forced marriage cannot be separated from the three elements, namely legal substance, legal culture, and legal structure. The legal structure, according to Friedman, is the framework, and as parts of the law that continue to survive or parts that give some kind of shape and limit to the whole.<sup>39</sup> While the substance or material of law, namely the rules, norms, and patterns of real human behavior within the system. Legal substance also refers to the products produced by people in the legal system, including the decisions they issue and the new rules they formulate. Substances also include living law, not just the rules in the law books.<sup>40</sup> Legal culture is the human attitude towards law and the legal system, as well as their beliefs, values, thoughts, and expectations. Legal culture also includes the

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<sup>38</sup> Ashila Aulia Poetri, 'Content Analysis of Law Number 12/2022 on Sexual Violence Based on Due Diligence Framework', *Contemporary Public Administration Review* 1, no. 2 (2024): 61–93.

<sup>39</sup> Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975).

<sup>40</sup> Lawrence M. Friedman, 'Legal Culture and Social Development', *Law and Society Review: The Journal of The Law and Society Association* 4, no. 1 (1969): 29–44.

social atmosphere of mind and social forces that determine how law is used, avoided, or misused. Without a legal culture, the legal system itself will be powerless.<sup>41</sup>

These three legal systems should be the basis for ensuring law enforcement of women's rights. Thus, in the event of forced marriage, law enforcement is the most important part of ensuring that the rights of victims can be restored. Since there are so many different ways that different cultures react to sexual abuse, including forced marriage, the social reality that exists demonstrates that the barriers to law enforcement are both institutional and cultural. As a result, victims of sexual assault do not always receive acknowledgment of their experiences.<sup>42</sup> The results of the National Commission on Violence against Women's study on culture-based violence against women found that sexual violence experienced by victims is normalized when cultural values and norms consider that it does not violate customary law. Even women get stigmatized by their families and communities because they are considered unable to maintain their honor.<sup>43</sup>

Forced marriages based on customary rules are still common, such as in Lombok,<sup>44</sup> there is a tradition called *merariq*, which in practice is often misused to justify forced marriages.<sup>45</sup> Apart from Lombok, the rest of the Nusa Tenggara islands, all the way to Sumba in East Nusa Tenggara, where forced marriages are still common. In Sumba, the tradition of forced marriage exists in a different form. The element of violence from men is present in a custom popularly known as *kawin tangkap*. In some practices, according to Pastor Aprissa L. Taranau, *kawin tangkap* occurs when a man captures and can even mean kidnapping a woman to be his wife by force.<sup>46</sup> Forced marriages are not unique to Indonesia; almost all countries in South Asia face the same problem, where poverty and tribal hostility are often the reasons why some children are forced to marry even before the age of five.<sup>47</sup>

The cases described above are a reflection that law enforcement against forced marriage has not been maximized. Therefore, there needs to be some kind of establishment of a family consulting institution in collaboration with the judiciary, such as in Australia, which has a Family Court. The consulting institution has consultants

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<sup>41</sup> Teddy Lesmana, 'Pokok-Pokok Pikiran Lawrence Meir Friedman; Sistem Hukum Dalam Perspektif Ilmu Sosial', *Universitas Nusa Putra*, last modified 2021, accessed May 12, 2023, <https://nusaputra.ac.id/article/pokok-pokok-pikiran-lawrence-meir-friedman-sistem-hukum-dalam-perspektif-ilmu-sosial/>.

<sup>42</sup> Sri Wahyuni, *Inovasi Pelayanan Publik: Peningkatan Perlindungan Korban Kekerasan Perempuan Dan Anak* (Malang: PT. Literasi Nusantara Abadi Grup, 2023).

<sup>43</sup> Komnas Perempuan's study on culture-based violence against women in three regions of Indonesia (western, central, and eastern), 2010-2011.

<sup>44</sup> Fathul Hamdani and Ana Fauzia, 'Tradisi Merariq Dalam Kacamata Hukum Adat Dan Hukum Islam', *Jurnal Hukum Lex Generalis* 3, no. 6 (2022): 433-447.

<sup>45</sup> Deutsche Welle, 'Tradisi Kawin Culik Di Lombok Suburkan Praktik Nikah Paksa', *DW Global Media Forum*, last modified 2019, accessed January 20, 2024, <https://www.dw.com/id/tradisi-kawin-culik-di-lombok-suburkan-praktik-nikah-paksa/a-51061239>.

<sup>46</sup> Aprissa L. Taranau in Nurhadi Suchahyo, 'Kawin Paksa: Janji Terucap Karena Tuntutan Adat', *VOA Indonesia*, last modified 2020, accessed January 20, 2024, <https://www.voaindonesia.com/a/kawin-paksa-janji-terucap-karena-tuntutan-adat/5585449.html>.

<sup>47</sup> Tria Dianti, 'Dampak Pernikahan Usia Anak Bagi Generasi Penerusnya', *DW Global Media Forum*, last modified 2023, accessed January 21, 2024, <https://www.dw.com/id/dampak-pernikahan-anak-bagi-generasi-penerusnya/a-64491605>.

who are experts in their fields in solving family problems, including problems related to forced marriage.<sup>48</sup>

In Australia, the Family Court not only hears civil cases but also combines them with criminal cases within the scope of the family. For example, if a divorce is based on domestic violence, it will be decided immediately in the Family Court. In Indonesia, a proposal to establish a family court was actually made, but the Supreme Court rejected this because Indonesia already has religious courts and district courts that handle civil and criminal cases within the family sphere.<sup>49</sup> Therefore, although the establishment of a family court is not necessary because the legal system is also different,<sup>50</sup> it will add to the judicial institutions in Indonesia. However, Indonesia should emulate the practice in Australia, where courts should provide consultants or mediators who are experts in their fields in resolving family problems. Mediation is not limited to procedural mediation as stipulated in Supreme Court Regulation No. 1 of 2016, which requires mediation to be conducted before the examination of the main case because the mediators consist of District Court judges who do not necessarily understand the concepts and models of appropriate mediation.<sup>51</sup>

The court should be a place to solve family problems and not just decide cases. So, the resolution of family cases considers a family approach, provides a sense of justice, primarily fulfills the rights of victims, and encourages changes in the perpetrators of forced marriage. This concept is offered in Australia, where mediation must be conducted before a divorce suit is registered in court.<sup>52</sup> Many institutions and communities provide mediation services. The court's task is only to formalize the decision of the institution or community that provides mediation services after mediation.<sup>53</sup> The concept of integrated family case resolution is what Indonesia needs, where there are consultants who are experts in their fields in solving family problems.

The purpose of marriage, as mandated by Article 1 of the Marriage Law, is to form a happy and lasting family (household) based on God Almighty. As a result, a specific institution in the shape of a Family Court is intended to provide a solution to the complicated problem of forced marriage, which involves customary, religious, and national law difficulties. Through this Family Court, one of the law enforcement methods that can be applied is through mediation. Although mediation has been

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<sup>48</sup> Andrew Shepard and Robert E. Emery, 'The Australian Family Relationship Centres and the Future of Services for Separating and Divorcing Families', *Family Court Review* 51, no. 2 (2013): 179–183.

<sup>49</sup> Andi Saputra, 'Soal Pengadilan Keluarga, MA: Kita Beda Dengan Australia', *Detik.Com*, last modified 2015, accessed April 6, 2024, <https://news.detik.com/berita/d-3057563/soal-pengadilan-keluarga-ma-kita-beda-dengan-australia>.

<sup>50</sup> Australia has two judicial systems, the federal system and the state system. Unlike Indonesia, which is a unitary state, in Australia each state has the authority to regulate its own judiciary. Broadly speaking, the state system divides the courts into three levels, namely the Magistrate Court, the Regional Court and the Supreme Court. While the federal system divides the courts into two types, namely the Family Court and the Federal Court. The Family Court currently has seven judges at the appellate level and 33 judges at the first instance. They serve until retirement at the age of 70. They also receive the same remuneration, except for the chief justice. See John Summers and Janis Lowe, 'The Federal System', in *Government and Politics in Australia* (Melbourne: Pearson Australia, 2014).

<sup>51</sup> Ahmad Bastomi and Pinastika Prajna Paramita, 'Penyelesaian Sengketa Perceraian Melalui Mediasi Program Pusaka Sakinah', *Jurnal Hukum dan Kenotariatan* 5, no. 3 (2021): 490–500.

<sup>52</sup> Lola Akin Ojelabi and Judith Gutman, 'Family Dispute Resolution and Access to Justice in Australia', *International Journal of Law in Context* 16, no. 2 (2020): 197–215.

<sup>53</sup> Peter Murphy, 'Hakim Family Court of Australia Berbagi Pengalaman Di Badilag', *Pengadilan Agama Padang*, last modified 2015, accessed April 6, 2024, <https://pa-padang.go.id/hakim-family-court-of-australia-berbagi-pengalaman-di-badilag/>.

applied as an alternative dispute resolution in family law, there is no uniformity of understanding in the implementation of mediation, especially in resolving disputes over marriage coercion. There is no guidance or guideline on the ideal mediation model to be applied by taking into account the characteristics of the problems in forced marriage cases.<sup>54</sup>

In relation to mediating disputes between spouses, mediators frequently encounter those who believe that the most morally upright and self-centered behaviors are present on both sides,<sup>55</sup> especially for underage couples. In this case, the *facilitative mediation* and *transformative mediation models* can be applied, where the mediator has an important role. For instance, reframing techniques can reduce both parties' emotions and prioritize justice for victims. The reframing technique offers a new perspective on couples who are entangled in forced marriage, and the parties, especially the family, are willing to restore the rights of the victim.<sup>56</sup>

Problem-solving by looking at cause and effect is expected to help the parties introspect themselves so that they can respect the rights of children, especially women in the family, because a harmonious family is the dream of every child.<sup>57</sup> Therefore, the application of the facilitative mediation and transformative mediation models is in line with the legal politics of the Marriage Law because it aims to ensure that marriage is carried out responsibly, and in certain cases where forced marriage is only discovered after a long time, mediation is also aimed at reconciling the parties so that divorce due to underage marriage does not occur. The marriage law mandates that the prospective husband and wife must be mentally and physically mature to enter into marriage and realize the purpose of marriage properly without ending in divorce.

Although there are no studies that specifically explain that the maturity factor of marriage age affects the effectiveness of mediation, some studies, such as those conducted by Hardiyanti,<sup>58</sup> Umam,<sup>59</sup> Saifullah,<sup>60</sup> and Sukri,<sup>61</sup> show that the factors of knowledge about the nature of marriage, intellectuality, and the parties' views on marriage in line with the Marriage Law greatly affect the effectiveness of mediation. Some of the above factors lead to psychological maturity or maturity of mind. So, in cases of forced marriage, there are separate challenges that require a special dispute resolution model or mediation.

In underage marriages due to forced marriage, the emotional control aspects of couples tend to be more unstable than couples who marry at an adult age or marry of their own free will. A person's emotional maturity can be known through how the

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<sup>54</sup> Yayah Yarotul Salamah, 'Urgensi Mediasi Dalam Perkara Perceraian Di Pengadilan Agama', *Ahkam* 13, no. 1 (2013): 81–88.

<sup>55</sup> Connie JA Beck and Lynda E. Frost, 'Competence as an Element of "Mediation Readiness"', *Conflict Resolution Quarterly* 25, no. 2 (2007): 255–278.

<sup>56</sup> Firman Wahyudi, 'Urgensi Teknik Reframing Dalam Mediasi Perceraian', last modified 2020, accessed January 23, 2024, <https://www.pa-bangil.go.id/images/ARTIKEL/urgensi.pdf>.

<sup>57</sup> Chamidah and Akhmad Khisni, 'The Effectiveness of Marriage Age Limit Regulations', *Law Development Journal* 3, no. 4 (2021): 844–851.

<sup>58</sup> Okky Putri Hardiyanti, 'Efektivitas Pelaksanaan Mediasi Dalam Perkara Perceraian Di Pengadilan Agama Kota Malang', *Artikel Ilmiah Fakultas Hukum Universitas Brawijaya* (2014): 1–23.

<sup>59</sup> Fahliil Umam, 'Efektivitas Pelaksanaan Mediasi Dalam Perkara Perceraian Di Pengadilan Agama Bogor Dan Pengadilan Agama Cibinong' (Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2019).

<sup>60</sup> Muhammad Saifullah, 'Efektivitas Mediasi Dalam Penyelesaian Perkara Perceraian Di Pengadilan Agama Jawa Tengah', *Al-Ahkam* 25, no. 2 (2015): 181–204.

<sup>61</sup> Ahmad Sukri, 'Efektivitas Upaya Mediasi Terhadap Penyelesaian Perkara Perceraian Di Pengadilan Agama Kota Mataram Tahun 2019' (Universitas Islam Negeri Mataram, 2021).

couple understands the essence of marriage so that the marriage that is carried out will have the same perception and willingness to face problems and solve problems together. In other words, emotionally mature individuals will face existing problems together and solve them to achieve the goal of a happy family.

If there has been a case of forced marriage, then an appropriate mediation model is needed, as described above. Uniformity of understanding in the implementation of mediation, especially in resolving divorce disputes due to underage marriage, has not been seen at this time. There is no guidance or guidelines on the ideal mediation model to be applied by taking into account the characteristics of the problems in cases of forced marriage, considering that the obstacles faced vary, ranging from the complexity of the case to problems regarding the mediator. However, these obstacles can be overcome if the mapping of mediator competence is made and the case is analyzed prior to mediation (to find the right model). It is because, currently, there is no pattern or uniformity (standard) that can be applied in resolving cases of early marriage, especially as a result of forced marriage.

Therefore, this mixed model (transformative mediation and facilitative mediation) is ideal because the parties are helped to reassess the basis of the situation, reach their own agreement based on the needs and interests of the parties concerned, and seek to resolve the problem based on the root of the problem that occurred. Cases of early marriage due to forced marriage often intersect with psychological factors that are not yet stable and tend to carry a childish nature, so problem-solving often cannot be done properly.<sup>62</sup> With the mixed model (transformative mediation and facilitative mediation), the method that is put forward is through dialog, where the settlement must be carried out with a psychological and sociological approach. Even if one of the parties is not present in the mediation process, this model can also bring benefits because, with the opposing party not present in the dialog, the party present can explain frankly to the mediator judge about his case, his feelings and complaints, and his expectations.<sup>63</sup>

The legal politics of the Marriage Law seeks to prevent marriage between prospective spouses who are underage, namely by equalizing the age of marriage to 19 years, as has been emphasized by the decision of the Constitutional Court.<sup>64</sup> Therefore, when the Marriage Law seeks to prevent underage marriage, the aim is to prevent divorce caused by immature minds. So, if a forced marriage has occurred and there is a dispute, the right model must be obtained in mediating the parties to uphold justice. As analyzed above, the right model is to apply the facilitative and transformative mediation models.

#### **4. CONCLUSION**

International and national legal instruments guarantee women's rights. Internationally, women's right to choose their husbands freely, and there should be no forced marriages, where marriages must be made based on the consent of both parties in the family, is regulated in Article 16 of the Convention on the Elimination of All Forms of

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<sup>62</sup> Fathur Rahman Alfa, 'Pernikahan Dini Dan Perceraian Di Indonesia', *Jurnal Ilmiah Ahwal Syakhshiyah* 1, no. 1 (2019): 49–56.

<sup>63</sup> Andi Hartawati, Sumiati Beddu, and Elvi Susanti, 'Model Mediasi Dalam Meningkatkan Keberhasilan Penyelesaian Perkara Perceraian Di Pengadilan Agama', *Indonesia Journal of Criminal Law* 4, no. 1 (2022): 59–73.

<sup>64</sup> Abdul Mutalip and Rozihan, 'Married Dispensation in Pressing Efforts of Divorce Numbers', *Law Development Journal* 2, no. 3 (2020): 279–286.

Discrimination against Women. Likewise, in the national scope, the Marriage Law and the TPKS Law provide legitimacy to women's rights to prevent forced marriage. From a family law perspective, a fundamental understanding of the meaning of marriage and the rights of children as women in the family can be a paradigm to fight a patriarchal culture that often does not provide justice for women. Given that many women are not aware of their rights due to unfavorable socio-cultural backgrounds and men's indifference to the importance of women's involvement in decision-making in the family sphere. However, in practice, law enforcement against forced marriage is still not optimal, and this can be seen from the rampant cases of forced marriage in several regions in Indonesia.

Indonesia needs to establish a family consulting institution in cooperation with the judiciary. The consulting institution has consultants who are experts in their fields to resolve family problems, including problems related to forced marriage. The various cases of forced marriage in Indonesia are quite complex because they bring together issues of custom, religion, and national law. To avoid overlapping authority between several institutions that have also assisted the mediation process, such as the Police and the Judiciary, it is necessary to establish clear guidelines on the position and flow of family dispute resolution through the Family Consultant Institute, where the court can determine the results of the decision. According to the author, this will be more effective considering that not all resources in the police and judicial institutions understand the appropriate mediation model for resolving cases of forced marriage.

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