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Criminal Sanction Disparity Between Marriage-Impediment Offences and Cohabitation under Indonesia's New Criminal Code: A Comparative Study of Muslim-Majority Jurisdictions

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Abstrak

Artikel ini menganalisis disparitas ancaman pidana antara tindak pidana perkawinan yang terhalang secara sah dalam Pasal 402 dan kohabitasi dalam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 tentang KUHP. Penelitian ini menolak penyederhanaan Pasal 402 sebagai delik "poligami tanpa izin" karena unsur pidananya mensyaratkan adanya perkawinan yang menjadi penghalang sah, pengetahuan pelaku, dan pada bentuk diperberat, penyembunyian keadaan tersebut. Dengan penelitian hukum normatif, pendekatan perundang-undangan, konseptual, dan perbandingan fungsional, penelitian membandingkan Indonesia dengan Arab Saudi, Uni Emirat Arab, Wilayah Persekutuan Malaysia, Pakistan, dan Iran menggunakan variabel yang sama: syarat otorisasi perkawinan jamak, akibat ketidakpatuhan, bentuk perbuatan intim di luar perkawinan yang dikriminalisasi, mekanisme penuntutan, ancaman pidana, kepentingan hukum yang dilindungi, dan perlindungan korban. Hasil penelitian menunjukkan bahwa perbedaan ancaman pidana dapat dijelaskan oleh perbedaan kepentingan hukum dan tingkat kesalahan, tetapi masih terdapat persoalan fair labelling, kepastian unsur, dan proporsionalitas. Reformasi sebaiknya menegaskan unsur delik melalui undang-undang atau penafsiran yudisial, membedakan pengaduan dari pemberian informasi, menghindari mediasi wajib, dan memperkuat pemulihan keperdataan keluarga tanpa memperluas delik melalui peraturan pelaksana.

Kata Kunci: Pasal 402 KUHP; Pasal 412 KUHP; perkawinan berhalangan; kohabitasi; perbandingan hukum.

Abstract

This article examines the disparity between the penalties for marriage-impediment offences under Article 402 and cohabitation under Article 412 of Indonesia's Law Number 1 of 2023 on the Criminal Code. It rejects the shorthand description of Article 402 as an "unauthorized polygamy offence" because criminal liability requires an existing marriage that constitutes a lawful impediment, the offender's knowledge of that impediment, and, in the aggravated form, concealment of it from the other party. Using normative legal research with statutory, conceptual, and functional-comparative approaches, the study compares Indonesia with Saudi Arabia, the United Arab Emirates, the Federal Territories of Malaysia, Pakistan, and Iran through common variables: prior authorization for plural marriage, consequences of non-compliance, the type of non-marital intimate conduct criminalized, prosecution triggers, penalty ranges, protected legal interests, and victim protection. The comparison shows that

penalty differences partly reflect distinct protected interests and degrees of culpability, but problems of fair labelling, certainty of offence elements, and proportionality remain. Reform should clarify criminal elements through legislation or lawful judicial interpretation, distinguish the legal complaint required for Article 412 from the provision of information to authorities, avoid compulsory mediation, and strengthen family-law remedies without expanding criminal offences through subordinate regulation.

Keywords: *Article 402 Criminal Code; Article 412 Criminal Code; marriage impediment; cohabitation; comparative criminal law.*

INTRODUCTION

Indonesia's national Criminal Code, enacted through Law Number 1 of 2023 and effective from 2 January 2026, recodifies offences concerning family status, sexual morality, and private life within a single national code.[1] Two provisions have attracted particular attention. Article 402 concerns a person who enters into a marriage while knowing that an existing marriage constitutes a lawful impediment to the new marriage, with an aggravated form where the impediment is concealed from the other party. Article 412, by contrast, criminalizes living together as husband and wife outside marriage and makes prosecution dependent on a complaint from specifically enumerated family members.[2] The striking difference between the maximum custodial penalties in these provisions has generated a public narrative that the new Code punishes "unlicensed polygamy" much more severely than cohabitation. That narrative, however, compresses two legally distinct questions and can obscure the actual elements of the offences.

The first distinction is between family-law authorization and criminal liability. Indonesian marriage law adopts monogamy as the general rule while allowing a court to authorize a husband to have more than one wife under specified grounds and conditions.[3] A failure to obtain such authorization may have significant registration, civil, and family-law consequences, but it is not automatically synonymous with every element of Article 402. The criminal provision focuses on knowingly marrying despite a lawful impediment, and its aggravated form adds concealment of that impediment. Accordingly, this article uses the label "marriage-impediment offence" for Article 402 and discusses unauthorized polygamy only where the family-law facts actually create the statutory impediment.

The second distinction concerns the legal consequences for family members. Earlier descriptions of unregistered or unauthorized polygamous marriages

[1] Indonesia, Law Number 1 of 2023 on the Criminal Code, promulgated 2 January 2023 and effective 2 January 2026; see the official legislation database, JDIH BPK, https://peraturan.bpk.go.id/Details/234935/uu-no-1-tahun-2023.

[2] Indonesia, Law Number 1 of 2023 on the Criminal Code, arts. 402 and 412. Article 402 regulates marriage despite a known lawful impediment and aggravated concealment; Article 412 regulates living together as husband and wife outside marriage and conditions prosecution on a complaint from specified family members.

[3] Indonesia, Law Number 1 of 1974 on Marriage, arts. 3-5, as amended by Law Number 16 of 2019. The Marriage Law adopts monogamy as the general principle and permits a court to authorize a husband to have more than one wife subject to statutory grounds and conditions.

sometimes suggested that a second wife and children automatically lose maintenance, property, inheritance, or civil status. The position is more differentiated. Supreme Court chamber guidance has restricted enforceable consequences between spouses in certain bad-faith unlicensed polygamy situations, while separate judicial routes remain available to protect children; Constitutional Court Decision Number 46/PUU-VIII/2010 also prevents a categorical denial of a child's civil relationship with a biological father when paternity can lawfully be proved.[4] The protected interests implicated by Article 402 must therefore be analyzed in terms of legal status, deception, reliance, and institutional integrity rather than by presuming total civil erasure of the later family.

The third distinction is between cohabitation and sexual intercourse outside marriage. Article 412 uses the phrase "living together as husband and wife outside marriage"; it is not drafted as a general offence of fornication or adultery.[5] This matters for comparative law. Several Muslim-majority jurisdictions criminalize sexual intercourse, zina, khalwat, or other indecent acts, but those categories are not automatically functionally equivalent to household-like cohabitation. A credible comparison must identify the conduct element in each jurisdiction before comparing sanctions.

Prior scholarship has examined Indonesian polygamy regulation, the criminalization of cohabitation, and family-law reform across Muslim jurisdictions.[6] Yet the literature often compares maximum penalties without first matching offence elements, procedural triggers, or the legal interests protected. This article contributes a narrower functional comparison by asking three questions: (1) what conduct and protected interests distinguish Articles 402 and 412; (2) how do selected Muslim-majority jurisdictions structure plural-marriage authorization and criminalize non-marital intimacy; and (3) what forms of reform can improve legality, fair labelling, proportionality, and family protection without creating new criminal elements through subordinate regulation?

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[4] Supreme Court of the Republic of Indonesia, chamber formulations concerning unlicensed polygamy, including SEMA Number 2 of 2019; Constitutional Court of the Republic of Indonesia, Decision Number 46/PUU-VIII/2010, 17 February 2012, https://jdih.mkri.id/produk-hukum/putusan.

[5] Indonesia, Law Number 1 of 2023 on the Criminal Code, art. 412. The statutory phrase is “hidup bersama sebagai suami istri di luar perkawinan” (living together as husband and wife outside marriage), not a general formulation of sexual intercourse outside marriage.

[6] Danial Achmad and Zainal Arifin, “Relasi Hukum Positif dan Hukum Islam dalam Pengaturan Poligami: Analisis Pasal 402 dan Pasal 403 KUHP Nomor 1 Tahun 2023,” Halaqah: Journal of Multidisciplinary Islamic Studies 3, no. 1 (2026): 77-97, https://doi.org/10.62509/hjis.v3i1.428; Frinza Akitha and Patricia Rinwigati, “Kriminalisasi Kohabitasi dalam Pasal 412 Undang-Undang Nomor 1 Tahun 2023,” Khatulistiwa 5, no. 2 (2025): 206-220, https://doi.org/10.55606/khatulistiwa.v5i2.5837; Lia Noviana, Risma Wigati, and Nurulaini Halimatus Sakdiyah, “The Dynamics of Family Law Reform in Asia and Africa,” Al-Syakhsiyyah 4, no. 2 (2023): 187, https://doi.org/10.21154/syakhsiyyah.v4i2.5895.

RESEARCH METHOD

This study is normative legal research using statutory, conceptual, and functional-comparative approaches. The statutory analysis centers on Articles 402 and 412 of Law Number 1 of 2023, the Marriage Law as amended by Law Number 16 of 2019, and relevant judicial and administrative instruments. The conceptual framework operationalizes four criminal-law ideas. Rechtsgut analysis asks what legal interest the offence protects; the harm principle asks whether punishment responds to legally cognizable harm to others rather than moral disapproval alone; legal moralism identifies the extent to which community morality itself is treated as a legitimate basis for prohibition; and fair labelling asks whether the name, elements, and severity of an offence accurately communicate the wrong and the offender's culpability.[7] These concepts are used as analytical criteria rather than as abstract labels.

The comparative jurisdictions were selected purposively rather than as a claim that they are statistically representative of the Muslim world. Saudi Arabia and the United Arab Emirates illustrate personal-status systems in which plural marriage up to four wives is accommodated without a prior judicial authorization model equivalent to Indonesia's. The Federal Territories of Malaysia and Pakistan provide express ex ante authorization mechanisms for additional marriages, but through different institutions and sanctions. Iran is included because its Shi'i family-law and penal framework creates a distinct configuration of permanent and temporary marriage and non-marital intimacy. The selection therefore maximizes legal variation along two axes: control of plural marriage and criminalization of non-marital intimate conduct.[8]

Each jurisdiction is examined through seven common variables: (1) whether prior authorization is required for an additional marriage; (2) the legal consequences of non-compliance; (3) the exact non-marital conduct criminalized, distinguishing cohabitation from sexual intercourse or other intimate acts; (4) whether prosecution depends on a complaint; (5) the statutory penalty range; (6) the protected legal interest; and (7) the availability of civil or family-law protection. Primary legal materials are prioritized. Where authoritative English-language primary criminal materials are incomplete, particularly for Saudi Arabia, the limitation is expressly acknowledged and no precise functional equivalence is asserted.

[7] Joel Feinberg, Harm to Others (New York: Oxford University Press, 1984); Patrick Devlin, The Enforcement of Morals (Oxford: Oxford University Press, 1965); James Chalmers and Fiona Leverick, “Fair Labelling in Criminal Law,” Modern Law Review 71, no. 2 (2008): 217-246; Andrew Ashworth and Jeremy Horder, Principles of Criminal Law, 7th ed. (Oxford: Oxford University Press, 2013).

[8] Konrad Zweigert and Hein Kotz, An Introduction to Comparative Law, 3rd ed. (Oxford: Oxford University Press, 1998). The jurisdictions in this study are selected purposively to maximize functional variation, not to rank legal systems or claim statistical representativeness.

RESULTS AND DISCUSSION

Article 402: A Marriage-Impediment Offence, Not a Stand-Alone Ban on Unlicensed Polygamy

Article 402(1) criminalizes entering into a marriage while knowing that an existing marriage constitutes a lawful impediment to that marriage. The provision also covers a person who marries another while knowing that the other person's existing marriage constitutes such an impediment. Article 402(2) aggravates the offence where the offender conceals from the other party that the existing marriage is a lawful impediment.[9] The statutory explanation links "lawful impediment" to marriage law. This structure matters because the offence is not drafted as "a husband who has not obtained court permission commits a crime." Knowledge, the existence of a legally relevant impediment, and, for the aggravated form, concealment remain central to criminal attribution.

Family law nevertheless provides the context in which such an impediment may arise. Article 3 of the Marriage Law establishes the monogamy principle and allows the court to authorize a husband to have more than one wife. Articles 4 and 5 provide the grounds and conditions for that authorization, including the procedural involvement and protection of the existing wife or wives.[10] For Muslim marriages, the Religious Courts exercise the relevant jurisdiction, and marriage-registration rules require evidence of court authorization for polygamous registration. The proper doctrinal sequence is therefore: family law determines whether and under what conditions an additional marriage may lawfully proceed; criminal law then asks whether the facts satisfy Article 402. Collapsing those steps risks overcriminalization and weakens lex certa.

This distinction also improves the analysis of harm. The most serious Article 402 scenarios involve more than breach of an administrative step: they can involve deception toward the later spouse, circumvention of an existing spouse's legally protected position, manipulation of civil status, and uncertainty in property or maintenance relations. Those harms provide a plausible Rechtsgut explanation for a substantially higher maximum penalty than an offence that does not require deception or a pre-existing formal legal relationship. However, a high maximum remains justifiable only where the prosecution proves the statutory impediment and culpability; the label "illegal polygamy" should not substitute for proof.

Civil protection must also be stated with precision. Supreme Court guidance has treated claims arising from unlicensed polygamous marriages differently depending on legality and good faith, and SEMA Number 3 of 2018 directs courts to declare applications for isbat nikah of siri polygamy inadmissible even when framed in the child's interest, while allowing a separate application to determine the child's origin.[11] Constitutional Court Decision Number 46/PUU-VIII/2010 further confirms

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[9] Indonesia, Law Number 1 of 2023 on the Criminal Code, art. 402 and its official explanation. The explanation treats an existing marriage that legally prevents the subsequent marriage under marriage law as the relevant lawful impediment.

[10] Indonesia, Law Number 1 of 1974 on Marriage, arts. 3, 4, and 5, as amended by Law Number 16 of 2019; see also Minister of Religious Affairs Regulation Number 30 of 2024 on Marriage Registration.

[11] Supreme Court of the Republic of Indonesia, SEMA Number 3 of 2018, Religious Chamber formulation: an application to validate a siri polygamous

that a child born outside a registered marriage cannot be categorically denied a civil relationship with the biological father when that relationship is proven through science, technology, or other lawful evidence.[12] These authorities show why victim protection should not be reduced to the proposition that all later-family rights disappear automatically.

Article 412: Cohabitation, Complaint Standing, and the Boundary of Private Morality

Article 412 criminalizes living together as husband and wife outside marriage, with a maximum custodial sentence of six months or a Category II fine. The offence is complaint-based. Where the person is already married, the complaint holder is the husband or wife; where the person is not married, the complaint holder is the parent or child. The Code further provides that general complaint rules in specified provisions do not apply and that the complaint may be withdrawn until examination at trial begins.[13] This design deliberately narrows state intervention by making prosecution dependent on a close-family complaint rather than open-ended public enforcement.

The complaint requirement should be distinguished from the practical act of giving information to police or other authorities. A neighbor, community leader, or other third party may be capable of conveying information about suspected conduct, but such information does not replace the legally required complaint from a person granted standing by Article 412. Using "who may report" and "who may complain" as synonyms obscures the procedural safeguard created by the legislature. The valid complaint is the condition that activates prosecution; outside information is evidentiary or investigative information only and cannot enlarge statutory standing.

The conduct element must also remain distinct from fornication. "Living together as husband and wife" implies a household-like relational pattern, whereas consensual sexual intercourse may occur without co-residence and co-residence can raise evidentiary questions beyond a single sexual act. Indonesian commentary has therefore highlighted uncertainty about operational indicators of the statutory phrase.[14] That uncertainty creates a fair-labelling and legality concern: police,

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marriage must be declared inadmissible even if submitted for the child's interest, while a separate application to determine the child's origin may be filed, https://jdih.mahkamahagung.go.id/legal-product/sema-nomor-3-tahun-2018/ detail.

[12] Constitutional Court of the Republic of Indonesia, Decision Number 46/PUU-VIII/2010, 17 February 2012. The Court held that a child born outside marriage may have a civil relationship with the biological father and his family where the blood relationship can be established through science, technology, or other lawful evidence.

[13] Indonesia, Law Number 1 of 2023 on the Criminal Code, art. 412(1)-(4). For a person bound by marriage, the complaint holder is the husband or wife; for a person not bound by marriage, the complaint holder is the parent or child. The complaint may be withdrawn until examination at trial begins.

[14] Frinza Akitha and Patricia Rinwigati, "Kriminalisasi Kohabitasi," 206-220; Dita Melati Putri and Abdul Basith Junaidy, "Analisis Yuridis terhadap Kohabitasi sebagai Tindak Pidana dalam Pasal 412 KUHP Baru," Zenodo (2025), https://doi.org/10.5281/zenodo.17594893.

prosecutors, and courts should not treat any private intimate encounter as cohabitation unless the facts satisfy the statutory language.

From the harm-principle perspective, Article 412 is more difficult to justify than Article 402 when the conduct involves consenting adults and no deception, coercion, or property harm. Its strongest justification lies in the legislature's protection of family order and relational interests of the limited complaint holders, not in a claim that all consensual intimacy produces the same concrete harm. The absolute complaint design and low maximum penalty can therefore be read as internal limiting mechanisms that temper legal moralism with privacy and family autonomy.[15]

Table 1. Functional Comparison of Articles 402 and 412 of the Indonesian Criminal Code

Variable	Article 402	Article 412
Core conduct	Knowingly entering a marriage despite a lawful marriage impediment; aggravated by concealment	Living together as husband and wife outside marriage
Family-law context	Existing lawful marriage and the legal impediment defined through marriage law	Marital status determines who may lodge the complaint
Culpability / aggravation	Knowledge is essential; concealment aggravates	No statutory fraud element; household-like cohabitation must be proven
Prosecution trigger	Ordinary prosecution subject to general criminal procedure	Valid complaint from the spouse, or from a parent/child where the person is unmarried
Maximum imprisonment	4 years 6 months; aggravated form 6 years	6 months
Maximum fine	Category IV	Category II
Principal protected interests	Integrity of marital status, reliance, legal certainty, and protection against deception	Family order, relational interests of complaint holders, and legislatively protected morality/private-life boundary

Source: Authors' analysis of Law Number 1 of 2023 and Indonesian marriage law.

Functional Comparison Across Muslim-Majority Jurisdictions

The comparative inquiry does not reveal a single "Islamic" model. Instead, family law and criminal law are combined in different ways. The key methodological point is to compare like with like. Prior authorization for an additional marriage is a family-law variable. A criminal rule against zina, fornication, khalwat, or indecent conduct is a separate penal variable. A jurisdiction may be permissive on plural marriage while highly restrictive on non-marital sex, or may require institutional authorization for plural marriage while using lower-level or complaint-based sanctions for non-marital conduct.

Saudi Arabia

Saudi Arabia's 2022 Personal Status Law expressly treats combining more than four wives as a temporary prohibition on marriage. The reviewed positive-law text does not create a prior judicial authorization mechanism for a second wife equivalent

[15] Feinberg, Harm to Others; Devlin, The Enforcement of Morals. These frameworks are used here to distinguish concrete harm-based justifications from criminalization grounded primarily in the enforcement of shared morality.

to Indonesia's Articles 3-5 Marriage Law or Malaysia's court-permission model.[16] This makes Saudi Arabia useful as a comparator for plural-marriage authorization, but it should not be described simply as "unregulated" or "based only on classical fiqh" because a codified personal-status statute now governs relevant family-law questions.

For the non-marital-conduct axis, caution is required. Saudi criminal adjudication retains a strong Sharia-based structure, but the official primary materials reviewed for this study do not provide a single codified offence that can be equated directly with Indonesia's Article 412 household-like cohabitation. Accordingly, Saudi Arabia is treated as a borderline comparator on this axis. The study does not assign a precise statutory "cohabitation penalty" or repeat secondary-source claims about hadd punishments as though they were a directly comparable Article-412 provision. This methodological limitation responds to the need to separate positive law, fiqh doctrine, and criminal practice.

United Arab Emirates

The UAE Personal Status Law issued by Federal Decree-Law Number 41 of 2024 lists "marrying more than four women" as a temporary prohibition, thereby accommodating plural marriage up to four within the personal-status framework without establishing a general prior-court-authorization model comparable to Indonesia.[17] On the criminal side, the federal Crimes and Penalties Law regulates consensual sexual intercourse outside marriage in Article 409 under specified conditions. That is an intercourse offence, not a cohabitation offence. The distinction is essential: a penalty attached to a sexual act cannot be placed in the same table as Article 412 without identifying the different actus reus.[18]

Malaysia (Federal Territories)

Malaysia must be qualified because Islamic family and Syariah criminal law vary across states and Federal Territories. For a controlled comparison, this article uses the Federal Territories. Section 23 of the Islamic Family Law (Federal Territories) Act 1984 requires prior written permission of the Syariah Court for a further marriage, while section 123 makes contracting another marriage without that permission an offence punishable by a fine not exceeding RM1,000, imprisonment not exceeding six months, or both.[19] The scheme thus separates substantive validity

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[16] Saudi Arabia, Personal Status Law, Royal Decree M/73 of 2022, art. 26, official text at the Bureau of Experts at the Council of Ministers, https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/4d72d829-947b-45d5-b9b5-ae5800d6bac2/1. Article 26 temporarily prohibits combining more than four wives.

[17] United Arab Emirates, Federal Decree-Law Number 41 of 2024 on the Issuance of the Personal Status Law, art. 32(4), official English text at UAE Legislation, https://www.uaelegislation.gov.ae/en/legislations/2770/download.

[18] United Arab Emirates, Federal Decree-Law Number 31 of 2021 Promulgating the Crimes and Penalties Law, art. 409, official English text at UAE Legislation, https://www.uaelegislation.gov.ae/en/legislations/1529/download. The provision concerns sexual intercourse/sexual conduct under specified conditions and should not be labelled a cohabitation offence.

[19] Malaysia, Islamic Family Law (Federal Territories) Act 1984 (Act 303), secs. 23 and 123. Section 23 requires prior written court permission for another marriage;

under Hukum Syarak, court authorization, registration, and penal consequences, rather than treating every irregular plural marriage as a serious general-criminal offence.

Non-marital conduct in Malaysia should not be reduced to a single national "cohabitation" offence. Syariah criminal offences, including khalwat and sexual offences, are regulated through Federal Territory or state enactments and apply within constitutionally defined personal and subject-matter jurisdiction. The comparative value lies in the institutional dualism: matrimonial non-compliance is sanctioned in the Syariah family-law system, while different intimate-conduct offences operate in the Syariah criminal sphere. Recent Malaysian scholarship on unauthorized polygamy confirms that enforcement questions are closely linked to court authorization and registration practices.[20]

Pakistan

Pakistan's Muslim Family Laws Ordinance 1961 provides one of the clearest ex ante authorization models. Section 6 prohibits a man from contracting another marriage during an existing marriage without prior written permission of the Arbitration Council. The application must state reasons for the proposed marriage and whether the existing wife or wives consent; the Council considers whether the proposed marriage is necessary and just. Non-compliance triggers immediate payment of the entire dower due to existing wife or wives and, upon complaint and conviction, may result in simple imprisonment up to one year, a fine, or both.[21]

Pakistan's criminal law separately defines fornication in section 496-B of the Penal Code as willful sexual intercourse between a man and woman not married to each other, with a maximum of five years' imprisonment and a fine.[22] Again, the conduct element is sexual intercourse, not living together as husband and wife. Pakistan therefore demonstrates why a cross-country table should contain separate columns for plural-marriage authorization and non-marital sexual offences rather than a single column labelled "cohabitation." The post-2006 legal reforms also

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section 123 provides a fine not exceeding RM1,000, imprisonment not exceeding six months, or both for polygamy without the court's permission.

[20] Nurin Hidayati Nordin, Suhaizad Saifuddin, and Fatimah Yusro Hashim, "Unauthorised Polygamy Offences: A Study in the Syariah Courts of Selangor," International Journal of Law, Government and Communication 11, no. 43 (2026): 409-423, https://doi.org/10.35631/IJLGC.1143027; Anis Shuhaiza Md Salleh et al., "Islamic Family Law on Polygamous Marriage in Malaysia: Between Roses and Thorns," Jurnal Pembangunan Sosial 27 (2024): 25-49, https://doi.org/10.32890/jps2024.27.2.

[21] Pakistan, Muslim Family Laws Ordinance 1961, sec. 6, official text at Pakistan Code, https://pakistancode.gov.pk/pdffiles/administratordf5df7bd70945d88e28f6a85c1a9ef6b.pdf; West Pakistan Rules under the Muslim Family Laws Ordinance 1961, rule 14.

[22] Pakistan, Pakistan Penal Code, sec. 496-B, official text at Pakistan Code, https://pakistancode.gov.pk/pdffiles/administratord5622ea3f15bfa00b17d2cf7770a8434.pdf. The section defines fornication through consensual sexual intercourse between persons not married to each other.

illustrate the continuing interaction between Sharia-oriented offences, evidentiary safeguards, and general criminal procedure.[23]

Iran

Iranian law also requires careful separation of categories. Article 221 of the Islamic Penal Code defines zina in terms of sexual intercourse between a man and a woman who are not married to each other, while Book Five, Article 637 addresses certain indecent acts between unmarried persons other than zina.[24] Neither provision is a direct analogue of Article 412's household-like cohabitation language. On the family-law axis, Iran's legal treatment of permanent and temporary marriage reflects the Ja'fari legal tradition and differs structurally from Indonesia's court-authorization model. Contemporary comparative studies accordingly describe Iran as a distinct model rather than a simple "permissive polygamy" category.[25]

Table 2. Heuristic Mapping of Plural-Marriage Control and Non-Marital Intimacy Offences

Jurisdiction	Prior authorization for additional marriage	Consequence of non-compliance	Non-marital conduct used for comparison	Procedure / trigger	Functional caution
Indonesia	Court authorization under marriage law	Family-law consequences; Article 402 applies only if its marriage-impediment elements are proved	Cohabitation: living together as husband and wife outside marriage	Complaint by enumerated spouse or parent/child	Do not equate unlicensed polygamy automatically with Article 402
Saudi Arabia	No equivalent prior-court-permission model identified; max four wives under Personal Status Law	Personal-status rules; no directly comparable general offence identified in reviewed law	No single codified Article-412 analogue established in reviewed official materials	Sharia-based criminal adjudication; comparison limited	Borderline comparator on criminal-conduct axis

[23] Tabinda Mahfooz Khan, "Public Debates on Sharia and the 'Savages-Victims-Saviors' Metaphor of Human Rights: The Case of the Hudood Ordinances and Their Reform in Pakistan, 1979-2010," Journal of Islamic Law 6, no. 1 (2025).

[24] Iran, Islamic Penal Code, art. 221 (definition of zina), and Book Five (Ta'zirat), art. 637 (certain indecent acts other than zina). The provisions regulate sexual or intimate acts rather than household-like cohabitation as formulated in Indonesia's Article 412.

[25] Zainab Ejresh, "A Comparative Study of the Legal Status and Legislation of Polygyny in Iran and Selected Islamic Legal Systems," International Journal of Multicultural and Multireligious Understanding 13, no. 1 (2026); Mohsen Borhani and Mohammadamin Radmand, An Intrinsic Sharia-Based Approach to Reducing Hudud Capital Punishments in Iran (2025).

Jurisdiction	Prior authorization for additional marriage	Consequence of non-compliance	Non-marital conduct used for comparison	Procedure / trigger	Functional caution
UAE	No general prior-court-permission model equivalent; max four wives	Personal-status rules	Consensual sexual intercourse outside marriage under federal penal law	Complaint limitations apply to specified cases	Intercourse is not cohabitation
Malaysia - Federal Territories	Prior written Syariah Court permission	Section 123: fine and/or up to 6 months	Khalwat/ other Syariah intimate-conduct offences under separate legislation	Syariah enforcement and court jurisdiction	State/Federal Territory variation must be acknowledged
Pakistan	Prior written Arbitration Council permission	Dower consequences plus complaint-based penalty up to 1 year/fine	Fornication = sexual intercourse outside marriage	Complaint/ court procedure under relevant criminal procedure	Fornication is not cohabitation
Iran	Distinct permanent/temporary marriage framework	Family and penal consequences vary by category	Zina and indecent acts other than zina	Penal procedure and proof depend on offence	Zina/indecent acts are not household cohabitation

Source: Authors' analysis of the primary legal materials cited in the text. The mapping is heuristic and categories are not treated as mutually exclusive.

Reassessing Disparity through Rechtsgut, Harm, Legal Moralism, and Fair Labelling

The comparative results support a more precise explanation of Indonesia's disparity. Article 402 is capable of addressing a wrong that combines status manipulation, breach of an existing legal relationship, knowledge of a marriage impediment, and potentially concealment. Article 412, at its core, can apply to consensual adults whose conduct does not necessarily contain deception, coercion, or direct economic injury. From a harm-principle perspective, those differences can justify a substantial divergence in maximum penalties. The fact that both conduct categories are morally connected to marriage does not make their culpability or social harm identical.

Legal moralism nevertheless remains visible in Article 412 because the prohibited conduct concerns a socially and religiously contested form of intimate life even in the absence of an individually identifiable victim. The legislature moderates that moral intervention through complaint standing and a relatively low penalty. The model therefore cannot be described as either complete privatization or complete moral criminalization. It is a hybrid design in which the state recognizes family morality but restricts the initiation of prosecution to closely affected family members.

Fair labelling produces the strongest critique of common descriptions of Article 402. Calling it the "crime of polygamy without court permission" implies that the absence of permission itself completes the offence and may encourage investigators to skip proof of the lawful impediment and knowledge. A more accurate label is "marriage despite a known lawful impediment," with an aggravated form for concealment. This label tracks the statutory wrong and reduces the risk that religious or family-law controversy substitutes for criminal proof.[26]

Proportionality also requires attention to the internal range of Article 402. The aggravated six-year maximum is easier to justify where concealment induces another person to enter a legally defective marriage and creates foreseeable civil consequences. Cases without concealment may present a lower level of culpability. Sentencing practice should therefore differentiate the seriousness of actual deception, the duration and consequences of the unlawful status, economic harm, efforts to repair family rights, and the vulnerability of affected spouses or children rather than rely on the mere label "polygamy."

Directions for Legal Reform

First, clarification of Article 402 should respect the principle of legality. A government regulation or ministerial regulation should not create an "authentic" criminal-law element such as a new definition of concealment, a new presumption of impediment, or a new category of offender. Indonesian legislation on law-making reserves criminal provisions to appropriate legislative instruments, and the Criminal Code itself requires legality and sufficient certainty.[27] If recurring ambiguity remains, the preferred routes are legislative amendment, authoritative judicial interpretation in concrete cases, and non-norm-creating prosecutorial or police guidance limited to evidence and case administration. Executive guidance may standardize proof collection but cannot expand the offence.

Second, Article 412 requires procedural clarity that preserves its complaint-based character. Guidance should distinguish a report or information supplied by a third party from the valid complaint required from the statutory spouse, parent, or child. It should also clarify evidentiary indicators of "living together as husband and wife" without converting ordinary private association or a single sexual encounter into cohabitation by presumption. Any clarification must remain anchored to the statutory wording rather than introduce a broader morality offence.

Third, compulsory mediation should not be made a precondition for lodging or processing an Article 412 complaint. Mandatory mediation can delay access to justice, expose a vulnerable complainant to pressure, and effectively add a procedural barrier not created by the Criminal Code. Restorative dialogue may be offered voluntarily after a valid complaint where safety, informed consent, and power balance permit it, but refusal to mediate should never invalidate the complaint. The Code already allows withdrawal of the complaint until trial

[26] Chalmers and Leverick, “Fair Labelling in Criminal Law,” 217-246; Indonesia, Law Number 1 of 2023, art. 402. Fair labelling requires the offence description to reflect the conduct and culpability actually required by statute.

[27] Indonesia, Law Number 12 of 2011 on the Formation of Laws and Regulations, as amended, concerning the placement of criminal provisions in authorized legislative instruments; Indonesia, Law Number 1 of 2023 on the Criminal Code, art. 1, on the principle of legality.

examination begins, which provides a statutory space for reconciliation without coercive mediation.[28]

Fourth, family protection should rely first on enforceable family-law and civil remedies rather than symbolic penal severity. Courts and administrative institutions should improve access to maintenance, property protection, child-origin determinations, birth registration, and other civil remedies for persons affected by irregular marriages. Criminal punishment cannot substitute for the practical enforcement of economic and status rights. This is especially important because children must not bear the legal consequences of adult non-compliance.

Fifth, the earlier idea of creating a "family security fund" directly from criminal fines should not be implemented through a ministerial rule. Earmarking public fines for a dedicated fund would require an explicit statutory and budgetary basis, a designated manager, transparent eligibility rules, audit safeguards, and a clear relationship with existing social-assistance and victim-compensation schemes. Without that architecture, the proposal risks conflicting with public-finance principles and creating expectations that criminal fines are private compensation. Direct maintenance orders, civil execution, and properly authorized social protection are institutionally clearer.

Finally, reform should preserve the distinction between marriage law and criminal law. Family law determines permission, validity, registration, maintenance, and property consequences. Criminal law should intervene only where clearly defined culpable conduct warrants penal condemnation. The comparative jurisdictions demonstrate that Muslim-majority states choose markedly different institutional combinations; none supplies a ready-made transplant. Indonesia should therefore calibrate its model through domestic constitutional commitments to legality, equality, family protection, and privacy rather than by matching the harshest foreign penalty.

CONCLUSION

The apparent disparity between Articles 402 and 412 becomes more intelligible once the offences are correctly labelled and their elements are separated from family-law shorthand. Article 402 is not a stand-alone criminal prohibition of polygamy without court permission. It addresses marriage despite a known lawful impediment and aggravates liability when that impediment is concealed. The family-law requirement of court authorization for polygamy remains highly relevant, but prosecutors must still prove the criminal elements. Article 412, by contrast, criminalizes household-like cohabitation outside marriage, carries a lower maximum penalty, and can only be prosecuted on a complaint from the family members identified by statute.

The comparison with Saudi Arabia, the UAE, the Federal Territories of Malaysia, Pakistan, and Iran shows no single model linking plural marriage to non-marital intimacy. Prior authorization ranges from no equivalent judicial-permission requirement to court or Arbitration Council approval. On the criminal side, the comparator laws variously regulate sexual intercourse, zina, khalwat, or indecent acts, none of which should be automatically equated with cohabitation. The resulting

[28] Indonesia, Law Number 1 of 2023 on the Criminal Code, art. 412(4), which permits withdrawal of the complaint until examination at trial begins.

matrix is therefore heuristic, not a ranking and not a set of mutually exclusive categories.

Indonesia's reform priority should be doctrinal precision rather than merely equalizing maximum penalties. Article 402 should be interpreted according to its impediment, knowledge, and concealment elements; Article 412 should preserve narrow complaint standing and a defensible meaning of cohabitation. New criminal elements should not be created through subordinate regulation, compulsory mediation should be avoided, and family-law remedies should be strengthened. These steps better align punishment with harm, culpability, fair labelling, and the protection of spouses and children.

This study is limited by its doctrinal and functional-comparative design. It does not measure enforcement rates or sentencing outcomes, and official English-language criminal materials are uneven across jurisdictions, particularly Saudi Arabia. Future research should test how Articles 402 and 412 are interpreted by police, prosecutors, and courts after the 2026 commencement of the Code, and should compare actual case outcomes rather than statutory maxima alone.

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