

The Risk of Criminalization of Unregistered Married Couples Under the Definition of Cohabitation as a Criminal Offense in the National Criminal Code

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ABSTRACT

Law Number 1 of 2023 concerning the National Criminal Code contains a new provision that has attracted attention from various parties, namely Article 412 concerning the crime of cohabitation. This article threatens criminal penalties for anyone living together as husband and wife outside of marriage. This formulation raises particular concerns because it has the potential to ensnare couples in unregistered marriages, a practice that has long existed in Indonesian society and is considered valid under religious law, even though it is not yet registered under state law. This article aims to address two questions: first, how should the phrase "outside of marriage" in Article 412 be interpreted when dealing with unregistered couples; and second, to what extent does the application of this article risk criminalizing them. This study uses a normative juridical method with a statutory and conceptual approach. The results show that textually and systematically, the lack of registration can place unregistered marriages at risk for the application of the phrase "outside of marriage," although the lack of registration does not necessarily prove that all elements of the crime have been met. Teleologically, room for exceptions remains open if the elements of religious validity are proven to be met, such as a guardian, witnesses, a dowry, and the appropriate time for the marriage contract. However, in practice, the risk of criminalization remains real, particularly because the absolute complaint mechanism has the potential to be misused as a pressure tool by families who disapprove of a relationship, with the most severe impact being felt by women and children. This article recommends the need for technical guidelines that provide clear parameters to distinguish genuine cohabitation from authentic unregistered marriages.

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1. INTRODUCTION

Unregistered marriages, more commonly known as nikah siri (unregistered marriages), are a structural problem that has

long plagued Indonesia's family law system. The National Socioeconomic Survey in recent years revealed that in some regions, more than a third of couples of childbearing age

marry without state registration, with the proportion often exceeding 40 percent in rural areas, suggesting that this problem is not simply an occasional administrative error but a recurring and chronic situation [1]. The Ministry of Religious Affairs report also noted the high number of couples who use accelerated marriage confirmation services each year, indicating that the public's need for formal recognition of their family relationships is far greater than reflected in official registration figures [1].

The root of this problem lies in the dualism of validity adopted by the Indonesian marriage legal system. A marriage is declared valid if it is conducted according to the laws of each religion and belief, but this validity only gains full legal force before the state after being registered by a Marriage Registrar, as repeatedly emphasized in the Marriage Law and the Compilation of Islamic Law [2]. A *siri* marriage, which only meets the first requirement without the second, has long placed the couples who undergo it, especially the wife and children, in a vulnerable position in various civil aspects, ranging from legal status as husband and wife, inheritance rights, to the management of joint property.

This pre-existing tension entered a new phase when Indonesia passed the national criminal law reform through [3] concerning the Criminal Code. One of the most widely publicized provisions was the introduction of the crime of cohabitation in Article 412, a provision that criminalizes the act of living together as husband and wife outside of marriage, something previously unknown in the colonial-era Criminal Code [4], [5]. Juridical studies of this provision initially focused on the phenomenon of cohabiting with partners who were not in any relationship, as is commonly found among young urbanites [6]. However, the formulation of the article which uses the general phrase "outside of marriage", without further explanation regarding the criteria for "marriage" in question, turns out to have a much broader reach than initially thought, because it has the potential to also ensnare couples who have had unregistered marriages, namely marriages which in

substance have fulfilled the pillars and requirements according to religious law, but have not been registered according to state law.

The intersection of cohabitation and unregistered marriage is not merely a theoretical possibility. The news story about the case involving celebrities Inara Rusli and Insanul Fahmi serves as a concrete illustration of the complex legal status of unregistered marriage. Couples in unregistered marriages can still be reported for adultery if one party is still legally married to the other, even if their unregistered marriage is considered valid according to sharia [7]. Cases like these demonstrate that the legal status of unregistered marriages exists in a gray area, potentially subject to more than one criminal investigation, depending on the circumstances.

Amid these issues, academics and legal practitioners are divided in their responses to Article 412. Some studies emphasize Article 412 as a legitimate instrument for maintaining public morality and social order, while others question its potential violation of privacy rights and the risk of disparity in its implementation in practice [8]. Unfortunately, these two schools of thought rarely come face-to-face in the context of unregistered marriage. Few studies have truly explored the meaning of this offense in depth and explored its impact on vulnerable groups, leaving a gap that needs to be filled.

Based on this gap, this study formulates two questions. First, how should the phrase "outside of marriage" in Article 412 of the National Criminal Code be interpreted in relation to unregistered married couples. Second, what is the risk of criminalization of unregistered married couples in the application of Article 412 of the National Criminal Code, specifically in terms of the absolute complaint offense mechanism, the evidentiary elements of the offense, and the protection of vulnerable groups. These two questions are answered through a multi-layered legal interpretation, then concluded with an explanation of what this means for legal certainty and the protection of

vulnerable groups amidst the current reform of national criminal law.

2. METHODS

This research uses a normative juridical method, namely research that places law as a written norm and examines it through a review of legal materials in the library. The approach used includes a legislative approach to examine Law Number 1 of 1974 concerning Marriage and its amendments, the Compilation of Islamic Law, and [3] concerning the National Criminal Code, as well as a conceptual approach to dissect the idea of dualism of marriage validity, the principle of *ultimum remedium*, and the teaching of the unlawful nature of material law. The legal materials used consist of primary legal materials in the form of relevant laws and regulations, and secondary legal materials in the form of journal articles, legal expert opinions, and credible legal media coverage. All materials were collected through a literature study, then analyzed descriptively and analytically by mapping the developing arguments into two opposing groups of views, before finally being concluded to answer the two proposed problem formulations.

3. RESULTS AND DISCUSSION

3.1 Interpretation of the Element of "Outside of Marriage" in the Crime of Cohabitation, Article 412 of the National Criminal Code

The provisions regarding the crime of cohabitation are regulated in Article 412 of [3] concerning the Criminal Code. Article 412 paragraph (1) states: "Any person who lives together as husband and wife outside of marriage shall be punished with imprisonment for a maximum of 6 (six) months or a maximum fine of category II". This provision is supplemented by paragraph (2) which confirms the absolute complaint nature of the crime of the article: "For criminal acts as referred to in paragraph (1) no prosecution shall be carried out, except upon complaint: a. husband or wife for people who

are bound by marriage; or b. parents or children for people who are not bound by marriage" (Republic of Indonesia, 2023).

From this formulation, several elements of the crime can be outlined. First, the legal subject is formulated generally through the phrase "Every Person", without limiting whether the perpetrator is single, married to another party, or one or both parties are bound by a previous marriage. Second, the prohibited act is "living together as husband and wife", which is a continuous state, not a momentary act such as sexual intercourse which is an element of the crime of adultery [9]. Third, the phrase "outside of marriage" functions as a negative condition that determines whether a relationship is categorized as prohibited or not. Fourth, this crime is formal, meaning it is considered complete once the elements of the act are fulfilled without requiring certain consequences, so there is no need to prove any loss to any party. Fifth, this crime is an absolute complaint crime because prosecution can only be carried out upon complaints from parties who are limitedly referred to in paragraph (2), namely the legal husband or wife, or parents and children.

Among these five elements, the phrase "outside of marriage" is crucial, determining the extent of this article's scope in addressing social phenomena. Article 412 does not provide further explanation of what is meant by "marriage" in this phrase, whether it simply refers to a marriage valid under religious law or whether it must also meet the requirements for registration under state law. This lack of official explanation opens up wide scope for interpretation and is the reason why the phrase requires further analysis through grammatical, systematic, and teleological interpretation before being applied to the concrete reality of unregistered marriages [10].

3.1.1 Grammatical Interpretation

Grammatical interpretation examines the meaning of a word based on everyday language and standard terms in legal dictionaries as a preliminary step before exploring the systematic and teleological meaning of a norm. Within this framework, two key words in Article 412 require separate examination: "cohabitation" as the name of the offense, and "marriage" as a normative measure marking the negative boundary of prohibited acts.

Etymologically, the term cohabitation is derived from the English word cohabitation, which in the Cambridge Advanced Learner's Dictionary is defined as the behavior of living together and having a sexual relationship with someone to whom one is not married [4]. The Great Indonesian Dictionary standardizes this term with the definition "regarding living together without marital ties." In Dutch, the term used is *samenleven*, which literally means living together and has been used since the discussion of the Criminal Code Bill to refer to the same offense before being formulated as Article 412 [6]. These three language references consistently place the element "without marital ties" as the core meaning of cohabitation, thus confirming that the phrase "outside of marriage" is not an additional element that can be ignored, but rather a definitive element of the offense itself.

The problem is, the word "marriage" does not have a single definition that automatically requires registration. Article 1 of Law Number 1 of 1974 concerning Marriage defines marriage as "a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family or household based on the One Almighty God" [11]. This definition is substantive-theological, discussing the purpose and nature of the bond without addressing the administrative requirements of registration. The requirement for registration only appears in the next article, namely Article 2 paragraph (2), which is literally separate from the definition of marriage itself.

If this grammatical definition is applied literally to unregistered marriage, the results actually strengthen the position that unregistered marriage is considered a "marriage" in the sense of the word itself. An unregistered marriage is a marriage that has fulfilled the pillars and requirements according to religious law, namely the presence of a prospective husband and wife, a guardian, witnesses, a marriage contract (*ijab kabul*), and a dowry [7]. This type of marriage is substantively "a physical and spiritual bond... based on the One Almighty God" as formulated in Article 1 of the Marriage Law, so grammatically it is difficult to say that the relationship is not "marriage" at all. In other words, a purely linguistic test of the phrase "outside of marriage" does not automatically exclude unregistered marriage from the category of "marriage," because the word itself is read as it is, does not require registration.

An important point needs to be emphasized here. Recent legal studies have highlighted that Article 412's formulation does not provide clear parameters for the indicator of "living together as husband and wife," including not defining what constitutes a "legal marriage," thus leaving room for multiple interpretations in its application [12]. This lack of definition makes a mere grammatical interpretation insufficient to address the issues raised, as the article's text does not address any administrative requirements. To determine whether this textual gap was intentional on the part of the legislators or whether it should be read in conjunction with other provisions outside the Criminal Code, the interpretation needs to proceed to a systematic interpretation stage.

3.1.2 Systematic Interpretation

Systematic interpretation does not read a norm in isolation, but rather as part of a legal system interconnected with other laws and regulations governing the same subject. Because Article 412 of the National Criminal Code does not provide a separate definition of the word "marriage," interpretation must proceed by reading that provision in conjunction with Law Number 1 of 1974

concerning Marriage and its amendments and the Compilation of Islamic Law as the substantive law governing marriage for Muslims in Indonesia.

Article 2 paragraph (1) of the Marriage Law states that a marriage is valid if it is conducted according to the laws of each religion and belief, while paragraph (2) of the same article adds that every marriage must be registered according to applicable laws and regulations. At first glance, these two articles appear to stand alone, as if registration is merely an additional administrative requirement separate from the requirements for validity. However, these provisions need to be read in conjunction with the Compilation of Islamic Law as the implementing law for Muslims. Article 4 of the Compilation of Islamic Law reaffirms that a marriage is valid if it is conducted according to Islamic law as per Article 2 paragraph (1) of the Marriage Law, while Article 5 of the Compilation of Islamic Law states that "in order to ensure orderly marriages for the Muslim community, every marriage must be registered," which is carried out by a Marriage Registrar. Article 6 of the Compilation of Islamic Law then explicitly states the legal consequences, namely that marriages must be conducted in the presence and under the supervision of a Marriage Registrar, and marriages conducted outside of such supervision have no legal force.

This system of norms shows that the validity of marriage under Indonesian law is actually two-layered. The first layer is material validity, namely the fulfillment of the pillars and requirements of marriage according to religious law. The second layer is formal validity, namely the registration of the marriage by an authorized official. A marriage is only considered to have full legal force before the state if both layers are fulfilled simultaneously. Conversely, a marriage that only fulfills the first layer without the second layer, as is the characteristic of unregistered marriage, remains valid from a religious perspective but does not have legal force according to Article 6 paragraph (2) of the Compilation of Islamic Law [2], a

characteristic also emphasized in the general description of unregistered marriage [7].

Recent legal studies have identified this issue as a systemic contradiction between the state's formal law, which relies on administrative registration, and the community's living law, which relies on validity according to religious and customary law [13]. The tension between these two normative systems then spills over into the criminal realm when Article 412 uses the word "marriage" without further explanation. If Article 412 is read as one system with the Marriage Law and the Compilation of Islamic Law (KHI), as is commonly the case with systematic interpretations, then the word "marriage" intended by the legislators should refer to a marriage that fulfills both levels of validity simultaneously, namely, valid according to religion and registered according to state law. Consequently, unregistered marriages, which definitively only fulfill the first level, systematically and textually have the potential to fall into the category of "outside of marriage" as referred to in Article 412, because the lack of registration makes them legally void before the state according to Article 6 paragraph (2) of the KHI. This provisional conclusion is of course not final. As will be explained in the section on teleological interpretation, this kind of purely textual systematic interpretation has become a point of criticism in judicial practice because it ignores the possibility that judges assess not only the fulfillment of formal requirements, but also the religious substance and good faith of the parties.

3.1.3 Teleological Interpretation

Teleological interpretation examines a norm from the perspective of the goals the legislators intended to achieve, not simply the wording or its systematic arrangement. The question that must be answered at this stage is what interests Article 412 actually seeks to protect: the institution of legal marriage, general social order, or simply public morality. These three possibilities are not always compatible, and a reading of the legal ratio of Article 412 shows that the legislators were actually targeting all three

simultaneously, albeit with different emphases.

The latest legal study identifies the legal ratio of Article 412 based on three main considerations, namely the protection of moral norms as part of the constitutionally justified limitation of rights as long as it is based on moral considerations, religious values, security, and public order as mandated by Article 28J paragraph (2) of the 1945 Constitution, the prevention of vigilante actions through structured criminalization with an absolute complaint offense mechanism, and harmonization between formal state law and existing laws in society [13]. Of these three considerations, the two most relevant to answering the issue of unregistered marriage are the prevention of vigilantism and the protection of the institution of marriage, while the protection of public morality tends to be a more general philosophical background, not an operational goal that directly determines the limits of the application of the article.

A study by the National Legal Development Agency confirms that before Article 412 was formulated, the lack of legal norms explicitly regulating cohabitation often led to communities resorting to raids, evictions, or even parades against couples deemed to be violating local moral norms [9]. From this perspective, the purpose of Article 412 is not merely to punish cohabitants, but rather to provide a formal and measurable legal channel so that the resolution of this phenomenon is no longer left to vigilante justice, which could potentially give rise to greater collective violence. This article limits it to an absolute complaint offense that can only be processed upon a complaint from a husband, wife, parent, or child. In line with this goal, the state provides a legal mechanism, but does not automatically make every cohabitation a public domain that can be intervened by anyone.

The goal of preventing vigilantism, however, is at odds with another equally important goal, namely preventing excessive criminalization of relationships that are in fact legitimate in religious substance. Judge Fikrinur Setyansyah, in his writing on the

official website of the Supreme Court, emphasized that Article 2 of the National Criminal Code opens up space for the recognition of living law in society, or living law, as a reference for assessing criminal law, but this space is not intended to create arbitrary punishment based on majority morals, but rather as a corrective instrument so that criminal law is not uprooted from a living sense of justice. In his view, the assessment of such cases cannot stop at fulfilling the formal elements of the offense alone, but must also assess whether there is a material unlawful nature, namely whether the essence of the reprehensible act that Article 412 aims to prevent is truly fulfilled in the concrete case [10].

These two goals, preventing vigilantism on the one hand and preventing excessive criminalization on the other, actually stem from the same root, namely the desire to position criminal law as an orderly and measured instrument, not a tool used arbitrarily, either by society through vigilantism or by the state through the rigid application of articles without considering the substance of the relationship being examined. Other studies also emphasize that the regulation of cohabitation in the National Criminal Code basically reflects an orientation of minimal criminalization that limits itself to the threat of minor penalties and an absolute complaint offense mechanism, as an effort to balance the moral values of society with the principle of limiting state intervention in private life [14]. Thus, teleologically, Article 412 cannot be read as an instrument to reach every form of cohabitation without blind registration, but rather as an instrument whose goal is achieved when its application is selective and proportional, leaving room for interpretation for judges to distinguish pure cohabitation from relationships that in substance religiously have fulfilled the pillars and requirements of marriage.

The three methods of interpretation outlined above yield multiple conclusions, rather than a single, straightforward conclusion. Grammatically, the word "marriage" does not explicitly require

registration, so that a siri marriage that meets the pillars and requirements according to religious law appears at first glance to fall into the category of "marriage" according to the meaning of the word itself. However, when the phrase "outside of marriage" is systematically read in conjunction with Article 2 paragraphs (1) and (2) of the Marriage Law and Articles 4 to 6 of the Compilation of Islamic Law, the conclusion shifts, so that the validity of a marriage in the Indonesian legal system is two-layered: material validity according to religion and formal validity because it is registered, and both layers are essentially required simultaneously for the marriage to have full legal force before the state. Because a siri marriage definitively fulfills only the first layer, grammatically and systematically, the phrase "outside of marriage" in Article 412 can be interpreted as the failure to fulfill both of these valid requirements simultaneously, so that a siri marriage formally has the potential to fall into the category of acts covered by this article.

This formal conclusion, however, does not stop there as a final word. Once the interpretation proceeds to the teleological stage, namely tracing the actual goals intended by the legislators, different interpretative opportunities open up. The legal ratio of Article 412 is not solely intended to cover every administratively unregistered relationship, but rather to prevent vigilantism on the one hand, while respecting the substance of religiously legitimate relationships on the other. In other words, fulfilling the formal elements of the offense alone is not sufficient for criminalization; an assessment of the material unlawful nature is also required, namely whether the essence of the reprehensible act that this article aims to prevent is truly present in the concrete case being examined.

From the synthesis of these three interpretation methods, it can be concluded that textually and systematically, unregistered marriages have the potential to fulfill the element of "outside of marriage" in Article 412 because they are not registered, so that formally, unregistered marriage couples

are at risk of criminal prosecution. However, teleologically, this risk is not absolute, because the purpose of this article is to open up room for exceptions for relationships that in religious substance have fulfilled the pillars and requirements of marriage, as long as there is no indication of misuse of the unregistered marriage status to avoid legal entanglements. This gap between textual certainty and teleological flexibility is the core issue that must be answered further, regarding the extent to which this gap truly protects unregistered marriage couples in practice, and the extent to which it actually opens up room for unexpected disparities in the application of the law.

3.2 The Legal Position of Siri Marriage in the Crime of Cohabitation and the Risk of Criminalization

Based on the synthesis of interpretations in Sub-chapter A, the legal status of unregistered marriage in Indonesia can be formulated explicitly, namely that it is materially valid according to religious law, but not formally valid according to state law. Unregistered marriage has fulfilled the pillars and requirements of marriage according to Islamic law, namely the presence of a prospective husband and wife, a guardian, two witnesses, a marriage contract, and a dowry, so that religiously the relationship is recognized as valid. However, because it was not carried out in the presence and under the supervision of a Marriage Registrar, the marriage does not have legal force as stated in Article 6 paragraph (2) of the Compilation of Islamic Law. Consequently, the state does not recognize unregistered marriage as a legal event that gives rise to full legal consequences, even though socially and religiously the couple is accepted as husband and wife.

This lack of state recognition has three consequences that are most frequently questioned in practice. First, in terms of inheritance, couples in unregistered marriages cannot inherit from each other due to the lack of a marriage certificate as proof of marriage; inheritance rights can only be

claimed if the marital status is first confirmed through a marriage confirmation (*isbat nikah*) at the Religious Court. Recent legal studies have even highlighted that this lack of certainty over inheritance rights has the potential to be misused as a tool of pressure in family conflicts, where legitimate heirs can exploit the unregistered status of the marriage to disqualify the inheritance rights of spouses or children from unregistered marriages [13]. Second, in terms of child status, the civil relationship of children born of unregistered marriages is only attached to the mother and the mother's family, as affirmed by Constitutional Court Decision Number 46/PUU-VIII/2010, unless the blood relationship with the biological father can be proven separately through separate legal channels [15]. As a result, children may face obstacles in processing birth certificates that include the father's name, as well as access to public services that require proof of family relationships. Third, in the aspect of joint property, the absence of authentic evidence of marriage prevents couples from directly filing a lawsuit for the division of joint property with the Religious Court, such a request must be preceded by a marriage confirmation determination to confirm the marital status, and as long as this determination is not available, the party who feels entitled to the property, especially the wife, is in a weak legal position in providing evidence [16].

These three consequences demonstrate that the legal vulnerability of unregistered couples existed long before the issue of cohabitation under Article 412 emerged. Since its inception, unregistered marriages have placed couples, especially wives and children, in a structurally weak position under civil law, and now this long-standing vulnerability has the potential to be compounded by new criminal vulnerabilities under Article 412.

The next issue is how the risk of criminalization of unregistered marriages manifests itself in practice. Unregistered marriages have the potential to be considered "extramarital" and therefore punishable under Article 412, but this potential is conditional, not absolute, depending on

whether the application stops at merely formal requirements or takes into account the religious substance of the relationship. Applying the results of the interpretive synthesis in Sub-chapter A to the concrete facts of unregistered marriages, it can be asserted that the answer is not a single one, but rather a multifaceted one depending on the interpretative method used.

Grammatically, the word "marriage" in Article 412 does not explicitly require registration, so that unregistered marriages, which have fulfilled the pillars and requirements according to religious law, can at first glance be considered "marriage" according to the meaning of the word itself. However, once the phrase is read systematically together with Article 2 paragraphs (1) and (2) of the Marriage Law and Articles 4 to 6 of the Compilation of Islamic Law, the conclusion shifts. Full validity before the state requires two layers at once, namely legality according to religion and registration according to state law. Because unregistered marriages definitively only fulfill the first layer, then formally and textually unregistered marriages have the potential to fall into the category of "outside of marriage" as referred to in Article 412, because the lack of registration makes them legally void before the state.

This formal conclusion, as outlined in Sub-chapter A, is not the final word. Once the interpretation proceeds to the teleological stage, namely exploring the true purpose of Article 412, an exception arises for relationships that are already legally religious in substance. This exception was explicitly formulated by Judge Fikrinur Setyansyah in his writing on the official Supreme Court website. He emphasized that the assessment of such cases cannot stop at fulfilling the formal elements of the offense alone, but must also assess whether or not there is a material unlawful nature [10]. If the trial proves that the unregistered marriage actually occurred legally according to religious law, with the presence of a guardian, witnesses, and a dowry, and was not simply engineered to avoid legal entanglements, then the essence of the reprehensible act that Article 412 aims to

prevent is essentially not fulfilled, so that criminal punishment is no longer a proportionate option.

The verification requirements proposed by Judge Fikrinur Setyansyah are important to examine in more detail because they serve as distinguishing parameters between pure cohabitation and authentic unregistered marriages. First, the presence of a marriage guardian, a mandatory pillar of marriage according to Islamic law and impossible to fulfill in a cohabitation relationship that lacks any ties at all. Second, the presence of a marriage witness serves as social proof that the marriage contract was truly carried out, not merely a unilateral claim after the relationship is legally challenged. Third, the provision of a dowry, which signifies a serious intention to form a marital bond, not simply an agreement to live together without commitment. Fourth, although not explicitly mentioned as a fourth element, it is implied in the emphasis on efforts to avoid legal smuggling, consistency between the time of the marriage contract and the start of living together as husband and wife, so that the contract is not made later solely to build a defense after the legal process has begun.

These four parameters collectively distinguish two categories of relationships that appear identical from the outside in the form of living together without official registration. Pure cohabitation does not have any of these four elements, so that the essence of the reprehensible act that Article 412 aims to prevent, namely a relationship resembling marriage without any legitimate basis, is truly fulfilled. In contrast, a unregistered marriage that meets these four parameters is essentially a valid marriage according to religious law, so that the application of Article 412 to it, although formally and textually possible, is contrary to the purpose of the article itself as outlined in the teleological interpretation in Sub-chapter A.

Thus, the answer to the question of whether unregistered marriages are considered "outside of marriage" is conditional, not categorical. Unregistered marriages have the potential to fall into this

category if they are assessed purely based on compliance with formal registration requirements, but they can potentially be excluded if the judge materially deems that the four parameters of religious validity mentioned above are met. This pivot point then becomes the entry point for the next question: how this risk of criminalization can concretely manifest itself in law enforcement practice, given that such material assessments can only be made after the legal process has commenced, not at the complaint or initial investigation stage.

Despite the material exceptions outlined in the previous paragraph, the risk of criminalization remains real in practice, because these exceptions can only be applied by the judge after the case has been examined in court, not at the complaint or initial investigation stage. As long as the legal process has not reached that stage, the factually fulfilled element of "living together as husband and wife," plus the existence of a party filing a complaint, is sufficient to open criminal proceedings against a couple in a secret marriage with the threat of a maximum prison sentence of six months or a maximum fine of category II as formulated in Article 412 paragraph (1) of the National Criminal Code.

The absolute nature of the complaint offense in Article 412 paragraph (2), which limits the right to file a complaint only to the legal husband or wife, or parents and children, was originally intended as a limiting instrument so that the state does not intervene in the private sphere of citizens without a strong reason, as described in the teleological interpretation in Sub-chapter A. However, in the context of unregistered marriage, this limitation actually has the opposite consequences from its original purpose. A study in the *Mabahits Journal* found that the absence of an authentic deed makes the perpetrator of unregistered marriage administratively-formally considered not bound by marriage, thus fulfilling the objective elements of this complaint offense. The implication is that a gap arises known as "criminalization across relatives", namely the potential for misuse of criminal instruments by the nuclear family who do not approve of

a relationship, by using the right to report as a coercive tool to imprison couples who are actually legally married according to religion [17]. In other words, the parties who are legally given the authority to file a complaint, namely parents, have the potential to become actors who abuse Article 412 not to protect family order, but to impose their personal will on their child's choice of partner.

The scale of this potential risk cannot be underestimated when viewed from the data on the exposed population. The Ministry of Religious Affairs noted that by the end of 2025, approximately 34.6 million marriages had taken place in Indonesia but were not registered by the state, far exceeding the 1,479,533 officially registered marriages during the same period [10]. This data indicates that the population potentially exposed to the risk of criminalization under Article 412, to the extent that some of these 34.6 million unregistered marriages are unregistered marriages, is not a small group that can be ignored in the formulation of criminal policy.

The scale of this risk becomes even more apparent when linked to data on the geographic distribution of unregistered cohabitation and cohabitation practices. The LK2 FHUI study cited data from the 2021 Family Data Collection from the National Population and Family Planning Agency, which showed that the practice of cohabiting without formal marriage ties was most prevalent in eastern Indonesia, with perpetrators tending to be in a weak socio-economic bargaining position [18]. This geographic concentration and socio-economic profile are important to examine because they indicate that the impact of Article 412, including the potential criminalization of couples in unregistered marriages, is not evenly distributed across Indonesia, but rather risks disproportionately burdening certain groups already structurally vulnerable, both due to limited access to marriage registration services and limited economic capacity to pursue formal legal channels such as marriage confirmation before their cohabitation is criminally challenged.

The issue of criminalizing unregistered couples does not stop at Article 412. The legal status of a single unregistered marriage can shift to different categories of offenses, depending on whether or not one of the parties has previously had a valid marriage. Therefore, unregistered couples face risks from several directions, not just the crime of cohabitation.

The first possibility arises when one party in a secret marriage is still bound by a legal marriage to another person that has not been legally dissolved. In this situation, the relationship has the potential to be categorized as adultery and is threatened under Article 411 of the National Criminal Code, no longer the crime of cohabitation. The news about the case involving celebrities Inara Rusli and Insanul Fahmi is a clear illustration that shows the complexity of the problem because a secret marriage does not have the legal standing of a legal marriage in the eyes of the state. Couples who are in a secret marriage can still be reported for alleged adultery if one of them is still bound by a legal marriage to another party, even though their own secret marriage is valid according to sharia. Indonesian marriage law adheres to the principle of monogamy, so as long as there is no court ruling dissolving or permitting polygamy in a previous marriage, the marriage remains considered binding and the injured party still has the authority to file a complaint for adultery, regardless of the status of the later secret marriage.

The second possibility arises from the category of marital offenses themselves, which specifically regulate violations of the procedures and administrative obligations of marriage. Criminal sanctions may apply if a secret marriage or polygamy is carried out while one party is still legally married to another person without court permission, or by concealing their marital status from the new partner, as stipulated in the provisions regarding obstacles to marriage in Articles 402 and 403 of the National Criminal Code. In addition, perpetrators of a secret marriage who fail to fulfill the obligation to report their marriage to authorized officials can be punished with a maximum fine of category II

under Article 404. This category of offenses demonstrates that the administrative obligations of marriage, which were originally purely civil in nature under the Marriage Law, now also have their own criminal consequences beyond the crime of cohabitation.

The possibility of prosecuting unregistered couples through criminal channels is not a new concept that emerged with the National Criminal Code. Long before the enactment of Article 412, criminal law expert Chairul Huda had argued that unregistered marriages could essentially be subject to Article 279 of the old Criminal Code concerning impediments to marriage, which substantially prohibits marriages when there are still obstacles to a valid marriage. However, he noted that the application of this article in court has been considered inconsistent. This precedent of inconsistent application is important to examine because it indicates that the issue of disparity in law enforcement regarding unregistered marriages is not a new risk arising from Article 412, but rather an old pattern that has the potential to repeat itself, now with a broader scope through a combination of Articles 411, Articles 402 to 404, and Article 412.

Thus, the same unregistered marriage event, depending on the supporting facts, has the potential to be examined through at least three different criminal channels: as adultery if there is a previous valid marriage that has not been dissolved; as a violation of the marriage crime if the elements of polygamy without permission or failure to report are met; or as cohabitation if it is deemed not to meet the material qualifications for a valid marriage according to religion as described in Sub-chapter A. The uncertainty regarding which channel will be applied by law enforcement officers to the same event is one of the main sources of the risk of legal disparity for unregistered marriage couples.

The descriptions in the previous paragraphs demonstrate that the risk of criminalization of unregistered couples is not a matter of unanimous agreement. There are two opposing views on how the state should

treat the intersection of unregistered marriage and the crime of cohabitation, each based on different premises regarding the function of criminal law itself.

The first group emphasizes the legitimacy of the current regulations and considers concerns about potential abuse to be overblown. A study by the National Legal Development Agency defends the legitimacy of Article 412, asserting that the limitation of parties entitled to file complaints through the absolute complaint mechanism is sufficiently protective to prevent widespread abuse of the law. While concerns about its impact on specific groups, such as foreign tourists or the investment sector, are deemed overblown because this article essentially does not change any administrative provisions in those sectors. A similar view comes from those who focus more on the broader social impact of unregistered marriages. Vargholly asserts that unregistered marriages empirically cause more harm than good, citing data on domestic violence and children without marriage certificates as evidence. Therefore, the introduction of Article 412 in the National Criminal Code is seen as an opportunity to close the legal loophole that has been exploited by some parties to legitimize unequal relationships, including polygamy without clear legal procedures. For this group, criminal instruments are needed as a coercive force to encourage people to pursue official registration, rather than allowing them to resort to unregistered marriages as a shortcut without any consequences.

The second group highlighted the risk of excessive criminalization and emphasized that criminal instruments are not the right answer to the issue of unregistered marriages. The Head of the Indonesian Ulema Council's Fatwa Division, Prof. KH Asrorun Ni'am Sholeh, emphasized that marriage is essentially a civil event, so that resolution of any issues that arise should be pursued through civil, not criminal, channels. A more appropriate approach is to raise public awareness about registering marriages through educational means, rather than through threats of punishment. A similar view was expressed by Religious Court Judge

Muhamad Isna Wahyudi, who emphasized the importance of distinguishing perpetrators of unregistered marriages based on their good intentions. Those who do not have an element of intent or malicious intent, but are hampered by factors beyond their ability, such as physical, geographical, or economic limitations in accessing registration services at the Office of Religious Affairs, need legal protection because their actions cannot be automatically categorized as unlawful [19].

More pointed criticism comes from academic studies. A study in the journal *Al-Zayn* criticized the criminalization of unregistered marriage through the *maqashid sharia* test and called it a form of "administrative panic," namely an excessive state response to administrative problems that could actually be resolved without resorting to criminal law because they are not necessarily in line with the objectives of *sharia* in preserving descendants and family honor [10]. In line with this criticism, the LK2 FHUI study highlighted the ambiguity of Article 412, which does not provide a clear definition of the scope of "legal marriage," thus opening the risk of legal uncertainty for couples who are socially and religiously considered married. Judge Fikrinur Setyansyah added emphasis on the principle of *ultimum remedium*, namely that criminal law should be used as a last resort, not the first instrument used without considering the material unlawful nature of the act being examined.

Comparing these two camps, their starting point is essentially the same: the recognition that unregistered marriages create real vulnerabilities for the parties involved, particularly women and children, as previously described. The fundamental difference lies in the instruments deemed appropriate to address these vulnerabilities. The legitimacy group believes that criminal instruments are necessary as a preventative coercive force that encourages compliance with registration, while the excessive risk group believes that criminal instruments actually risk worsening the position of those they are intended to protect by adding the threat of punishment on top of pre-existing civil vulnerabilities. This tension ultimately

boils down to differing perspectives on the function of criminal law itself: whether it is a preventative instrument used broadly to encourage administrative compliance, or an instrument of last resort, used selectively and only when other mechanisms have proven to be ineffective.

Thus, the risk of criminalization of unregistered marriage couples under Article 412 is not merely a theoretical possibility, but a real problem that reaches a very large population scale in Indonesia. With an estimated 34.6 million unregistered marriages in Indonesia by the end of 2025 [10], and the majority of these likely to be unregistered marriages, millions of couples are potentially vulnerable to investigation through one of several criminal channels outlined above, whether as cohabitation, adultery, or a violation of a marriage offense, depending on the facts surrounding their relationship.

The most obvious impact of this risk is felt by women, who are already structurally weak from the beginning of the unregistered marriage. A study analyzing Article 412 from a criminological-victimological perspective found that unregistered wives face what is known as a "double vulnerability." The first vulnerability is civil, namely the lack of legal protection regarding maintenance, inheritance, and child status due to the lack of official records. The second vulnerability is criminal, namely the new risk of the woman being reported for cohabitation violations by third parties, including family or relatives, or even being criminalized by her husband for her own unregistered status as a tool of intimidation in domestic disputes [20]. The study challenges the narrative that the absolute complaint offense is "safe" because it limits the complainant and instead finds that this mechanism can strengthen the husband's bargaining power in an already structurally unequal relationship, potentially shifting the state from a protector to an actor that exacerbates domestic oppression.

A concrete manifestation of this dual vulnerability is a phenomenon known as double punishment. The fear that a woman's cohabitation or unregistered marriage will be revealed if she reports the violence she has

experienced has the potential to discourage victims from filing domestic violence reports, fearing that the report will be used as a gateway to an investigation into their own status as an unregistered couple. Consequently, instead of providing additional protection, this regulation, intended to regulate the institution of marriage, risks increasing women's vulnerability to unreported violence, a consequence that directly contradicts one of Article 412's philosophical objectives: protecting family order and harmony.

The impact on children is no less significant. The lack of parental marriage registration directly impacts the difficulty of obtaining a birth certificate listing the father's name, access to education, and social security, as described in the previous section. Constitutional Court Decision No. 46/PUU-VIII/2010 has indeed opened the way for the recognition of civil relations between children and their biological fathers through the presentation of evidence in court. However, this mechanism remains repressive, as it can only be accessed after a dispute arises and requires a separate evidentiary process, rather than preventative protection from the child's birth. With the introduction of Article 412, this burden has the potential to increase. Criminal proceedings involving one or both parents, as described regarding the risk of criminalization across relatives, can disrupt the stability of a child's upbringing while the child's own civil status remains unclear.

The overlap of long-standing civil vulnerabilities with the newly emerging criminal vulnerabilities of Article 412 demonstrates that this issue cannot be left to rest at the level of merely normative debate. Further legal certainty is needed, both in the form of binding interpretative guidelines for law enforcement officials and updates to the norms themselves, so that the instrument

intended to regulate the institution of marriage does not turn into an instrument that actually burdens the parties it should protect most, namely women and children in unregistered marriages.

4. CONCLUSION

The phrase "out of wedlock" in Article 412 of the National Criminal Code cannot be read solely from the registration requirements, but rather needs to be traced to its material unlawful nature, namely the presence or absence of a guardian, witnesses, dowry, and the timeliness of the contract with the start of cohabitation. From this perspective, unregistered marriages that truly fulfill the pillars and religious requirements should be exempt from the scope of the article. However, in practice, this distinction does not necessarily work as intended, because the civil vulnerabilities long attached to the unregistered status of unregistered marriages are now aggravated by new criminal threats that are prone to abuse through the absolute complaint mechanism, especially by families who do not approve of a relationship. As a result, the article, originally intended to maintain order, has the potential to turn into an additional burden for those it should protect, especially women and children. The framework for distinguishing between pure cohabitation and authentic unregistered marriages formulated in this study can serve as a reference for developing guidelines for the more proportional implementation of Article 412. However, this study still relies on secondary legal materials without directly examining judicial practices, so that further research needs to test this framework through a study of court decisions or a socio-legal approach, in order to see to what extent this distinction is truly alive in everyday law enforcement.

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