



## Assessing Criminal Penalties in Marriage Law: a Comparative Study of Policy Frameworks within Indonesian and Malaysian Legislation

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**Abstract:** This article examines the policy on criminal sanctions in Islamic marriage law in Indonesia and Malaysia, focusing on a comparative analysis between the two countries. The main objective of this study is to understand how both countries, with their Muslim-majority populations, formulate and apply criminal sanctions in cases of violations of Islamic marriage law. This research employs a library research methodology. The primary sources of data for this study include Law No. 1 of 1974, the Compilation of Islamic Law, the Federal Territories Islamic Family Law Enactment, and Islamic law. The findings of this study indicate that although Indonesia and Malaysia share a common foundation in Sharia law, there are significant differences in the application of criminal sanctions related to Islamic marriage. In Indonesia, the policy on criminal sanctions is more influenced by the secular national legal system, while in Malaysia, Sharia law plays a more dominant role in the state judiciary system. The review of Islamic law related to the application of criminal sanctions for violations of marriage laws remains weak in its implementation. Therefore, stricter sanctions should be established for violators to provide a significant deterrent effect. This approach aligns with al-Ghazali's concept of *maslahah*, which prioritizes good and avoids harm (*mafsadah*).

**Keywords:** Criminal Penalties, Marriage Law, Policy Frameworks, Indonesian and Malaysian Legislation

**Abstrak:** Artikel ini mengkaji kebijakan tentang sanksi pidana dalam hukum perkawinan Islam di Indonesia dan Malaysia, dengan fokus pada analisis komparatif antara kedua negara. Tujuan utama dari penelitian ini adalah untuk memahami bagaimana kedua negara, dengan mayoritas penduduknya yang beragama Islam, merumuskan dan menerapkan sanksi pidana dalam kasus-kasus pelanggaran hukum perkawinan Islam. Penelitian ini menggunakan pendekatan kepustakaan. Sumber data utama untuk penelitian ini meliputi UU No. 1 Tahun 1974, Kompilasi Hukum Islam, Undang-Undang Hukum Keluarga Islam Wilayah Federal, dan hukum Islam. Temuan dari penelitian ini menunjukkan bahwa Indonesia dan Malaysia memiliki dasar yang sama dalam hukum Syariah, terdapat perbedaan yang

signifikan dalam penerapan sanksi pidana terkait perkawinan Islam. Di Indonesia, kebijakan sanksi pidana lebih dipengaruhi oleh sistem hukum nasional yang sekuler, sementara di Malaysia, hukum Syariah memainkan peran yang lebih dominan dalam sistem peradilan negara. Tinjauan hukum Islam terkait penerapan sanksi pidana atas pelanggaran hukum perkawinan masih lemah dalam implementasinya. Oleh karena itu, sanksi yang lebih tegas harus ditetapkan bagi para pelanggar untuk memberikan efek jera yang signifikan. Pendekatan ini sejalan dengan konsep masalah al-Ghazali yang mengedepankan kemaslahatan dan menghindari kemudharatan.

**Kata kunci:** Sanksi Pidana, Hukum Perkawinan, Kerangka Kebijakan, Perundang-undangan Indonesia dan Malaysia

## Introduction

Marriage is a formal union between two people, typically involving a legal and social commitment to live together as husband and wife. The concept of marriage varies across different cultures and religions, but it generally involves the exchange of vows, tokens, or symbols to signify the bond.<sup>1</sup> Marriage also has legal implications related to rights and obligations and plays a crucial role in the context of family, society, and cultural traditions.<sup>2</sup> In many cultures, marriage is considered the foundation for building a family and passing down traditions from one generation to the next.<sup>3</sup>

In Malaysia, the rules regarding marriage are governed by different laws depending on the individual's religion and ethnic group. Two legal systems regulate marriage in Malaysia.<sup>4</sup> First, the Islamic legal system for Muslims. Second, the civil legal system for non-Muslims. For Muslims, marriage in Malaysia is governed by Sharia law and enforced by the state Islamic religious institutions. Each state has its own Sharia laws that regulate marriage, divorce, and other family issues for Muslims.<sup>5</sup>

Among the key regulations in Muslim marriages are the age limits, with the minimum marriage age set at 18 for males and 16 for females. Guardianship and witnesses are also crucial; in a Muslim marriage, a guardian (usually the father or another male family member) must give consent, and two qualified individuals must witness the marriage. The marriage contract, or akad nikah, is a formal ceremony in Islamic tradition, where the groom or the bride's guardian provides a dowry (*mahar*) as part of the marriage process. Polygamy is permitted under Islamic law in Malaysia, but a man

<sup>1</sup> Juwaini Saleh et al., "Marriage Guidance Towards Family Resilience in Aceh: A Study of Islamic Law Philosophy," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (October 2022): 594, <https://doi.org/10.22373/sjhk.v6i2.12448>.

<sup>2</sup> Anthin Lathifah, "State Marriage and Civil Marriage: The Role of State Policy on Interreligious Marriage in Central Java," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 15, no. 1 (June 2020): 1–30, <https://doi.org/10.19105/al-lhkam.v15i1.2689>; Siti Marlina and Haris Mubarak, "Joint Property after Divorce in the Polygamous Marriage: Comparative Research in Indonesia and Malaysia," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 22, no. 2 (December 31, 2022): 273–87, <https://doi.org/10.30631/alrisalah.v22i2.1289>; Nuruddin Nuruddin, Aisyah Wardatul Jannah, and Dwi Martini, "Evaluating the Effectiveness of Age Restriction on Marriage in Indonesia," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 6, no. 2 SE-Articles (December 31, 2023): 313–30, <https://doi.org/10.24090/volksgeist.v6i2.9844>.

<sup>3</sup> Tinuk Dwi Cahyani, *Hukum Perkawinan*, vol. 1 (UMMPress, 2020).

<sup>4</sup> Siti Aminah and Arif Sugitanata, "Genealogy and Reform of Islamic Family Law: Study of Islamic Marriage Law Products in Malaysia," *JIL: Journal of Islamic Law* 3, no. 1 (February 2022): 94–110, <https://doi.org/10.24260/jil.v3i1.556>.

<sup>5</sup> Laila Salikin Wan Ibrahim and Norsuhaida Che Musa, "LEGAL IMPLICATION OF UNREGISTERED POLYGAMOUS MARRIAGES WITHOUT COURT PERMISSION IN NEGERI SEMBILAN," *SALAM Digest* 1, no. 1 (2023): 7; All-Mu'izz Abas and Mohd Al Adib Samuri, "Islamic Legal Perspectives on Refugee Protection and Welfare: A Case Study of Malaysia," *De Jure: Jurnal Hukum Dan Syar'iah* 16, no. 1 (June 30, 2024): 141–60, <https://doi.org/10.18860/j-fsh.v16i1.26507>; Asman Asman and Resali Bin Muda, "Controversy of Marriage Agreements in Indonesia-Malaysia Border Communities in Sambas Regency," *El-Mashlahah* 13, no. 1 (June 30, 2023): 1–16, <https://doi.org/10.23971/el-mashlahah.v13i1.4382>.

who wishes to practice polygamy must obtain permission from the Sharia Court and meet certain conditions, such as ensuring fairness among his wives.<sup>6</sup>

For non-Muslims, marriage is governed by the Marriage and Divorce Act. There are several important aspects of non-Muslim marriage regulations. The minimum age for marriage is 18. Those between the ages of 16 and 18 require written consent from the Chief Minister or an authorized representative. Witnesses and Registration: Marriages must be witnessed by two people and officially registered by a government-recognized marriage registrar. Civil or Religious Marriage: Non-Muslim marriages can be conducted through either civil or religious ceremonies, but they must comply with civil law. Divorce and Annulment: Marriages are governed by the Marriage and Divorce Act of 1976, generally requiring legal proceedings in court.<sup>7</sup>

In Indonesia, which has numerous laws and regulations governing various aspects of society, including marriage, certain actions are considered criminal offenses within the context of marriage. One such offense is underage marriage<sup>89</sup> according to Law No. 16 of 2019, which amends Law No. 1 of 1974 on Marriage, the minimum age for marriage is 19 for both men and women. Marrying below this age without special approval from the court can be considered a criminal offense.<sup>10</sup>

In some cases, marriages require specific permissions. For example, for civil servants (PNS), remarrying without the relevant authority's approval can be considered a disciplinary action, which may lead to criminal charges if document forgery or fraud is involved. Polygamous marriages without permission are also regulated; polygamy is allowed under Indonesian law but requires the consent of the existing wife and the approval of the court.<sup>11</sup> If a man practices polygamy without the required consent, he can face criminal sanctions. Forgery of marriage documents, such as birth certificates, marriage certificates, or other marriage-related documents, is also considered a criminal offense. Forced Marriage, while not explicitly covered under marriage laws, forced marriage can be seen as a form of violence or oppression, and perpetrators can be prosecuted under various laws, such as the Domestic Violence Act (*UU Penghapusan Kekerasan dalam Rumah Tangga - KDRT*). Marrying While Still Legally Married, involves marrying someone else without a legal divorce from the current spouse, which is punishable as a criminal offense.<sup>12</sup>

<sup>6</sup> Zaein Wafa, Ahmad Izzuddin, and Achmad Rosidi, "Age Limit of Marriage in Islamic Family Law: A Comparative Study between Morocco, Pakistan, Malaysia, and Indonesia," *Al-Bayyinah* 8, no. 1 (June 2024): 119–39, <https://doi.org/10.30863/al-bayyinah.v8i1.6351>.

<sup>7</sup> Yeni Salma Barlinti, "Harmonization of Islamic Law In National Legal System: A Comparative Study Between Indonesian Law And Malaysian Law," *Indon. L. Rev.* 1 (2011): 35.

<sup>8</sup> Iswanto Iswanto and Faiq Tobroni, "Rationalization of Islamic Legal Considerations in Marriage Dispensation: A Lesson from Katingan, Central Kalimantan," *Al-Manahij: Jurnal Kajian Hukum Islam*, November 2022, 301–14, <https://doi.org/10.24090/mnh.v16i2.7074>.

<sup>9</sup> Rohmadi Rohmadi et al., "Judges' Considerations in Granting Marriage Dispensation Licenses in Indonesia: Islamic Family Law Perspective," *El-USrah: Jurnal Hukum Keluarga* 7, no. 1 (2024): 326–45.

<sup>10</sup> Edy Lisdiyono, "Reevaluating Legal Policy: Rethinking The Minimum Age Limit for Marriage through The Lens of Islamic Law," *Russian Law Journal* 11, no. 5 (2023): 1194–1201; Iman Fadhilah Iman et al., "Exploring the Monogamy Principle in the Samin Community's Customary Marriages in Kudus: Harmonisation of Tradition and State Law," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 23, no. 2 (January 22, 2024): 281–304, <https://doi.org/10.18326/ijtihad.v23i2.281-304>.

<sup>11</sup> Nurnazli Nurnazli et al., "The Contestation of Islamic Boarding School Womens's View of Wives' Rights in Poligamy," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 24, no. 1 (June 2024): 141–60, <https://doi.org/10.30631/alrisalah.v24i1.1349>.

<sup>12</sup> Amrin Nurfiendi, "The Impact Of Law Number 16 Of 2019 Marriage Dispensation And Child Marriage Gap," *Indonesian Journal of Law and Islamic Law (IJLIL)* 5, no. 2 (December 2023): 50–61, <https://doi.org/10.35719/ijlil.v5i2.330>; Dedisyah Putra and Nuriza Acela, "Human Rights Protection in the Islamic Family Law: A Case Study Concerning Domestic Violences," *El-USrah: Jurnal Hukum Keluarga* 6, no. 1 (2023): 1–16.

Indonesia has established legal penalties for criminal offenses related to marriage. For instance, Article 279 and Article 280 of the Indonesian Penal Code (KUHP) address “*kawin sirri*” (unregistered marriage). These articles prohibit marrying while still legally bound in another valid marriage, with violations punishable by up to five years in prison. Additionally, Articles 332 and 335 of the KUHP address the criminal offenses of kidnapping someone for marriage or forcing someone to marry without their consent. Moreover, Marriage Law No. 1 of 1974, Article 6 about Mutual Consent states that Marriage must be based on the consent of both parties. Marriages without mutual consent are considered invalid and can potentially be criminal offenses. Articles 3 and 4 governing polygamy restriction state that polygamy is allowed under specific conditions but requires permission from the court or authorized officials. Engaging in polygamy without such permission is considered a legal violation. Domestic Violence Act No. 23 of 2004 (*UU KDRT*) regulates the prevention, handling, and penalties for domestic violence offenses. These can include physical, psychological, sexual violence, or neglect. Penalties vary depending on the severity and impact of the violence. Child Protection Law includes offenses related to child marriage, defined as marriage under the legal age (minimum 19 years for both males and females, with exceptions requiring permission from the Religious Court). Child marriage is considered a violation of children’s rights and can result in criminal penalties.<sup>13</sup>

The differences in criminal laws between Malaysia and Indonesia reflect the diversity of their legal systems and the influence of their distinct histories and cultures.<sup>14</sup> While both countries share similarities in many respects, there are also significant differences. One major distinction lies in their legal systems. Indonesia’s legal system is based on a blend of civil, customary, and Islamic law. Civil law derives from Dutch influence, whereas customary and Islamic laws reflect local cultural and religious heritage. In contrast, Malaysia’s legal system is a mix of common law inherited from the British, Islamic law, and customary law. The English colonial legacy has shaped many aspects of Malaysia’s common law. In terms of judicial structure, Indonesia has the Supreme Court as its highest judicial authority, with courts divided into several systems including General Courts, Religious Courts, Administrative Courts, and Military Courts. The Religious Courts in Indonesia handle Islamic legal matters such as marriage, inheritance, and endowments.<sup>15</sup>

Based on the above explanation, there are differences in the penalties for polygamy between Malaysia and Indonesia. In Malaysia, the penalties for polygamous actions are stipulated under the Federal Territories Enactment 303/1984 and similar enactments in states other than Sarawak, with a maximum fine of RM 1000 or imprisonment for up to six months, or both. If a husband acts unfairly, the penalty for polygamy can be a fine of RM 1000 or imprisonment for a maximum of 6 months, or both. In contrast, Indonesia imposes penalties or fines of up to Rp. 7,500,- as per Article 45 Paragraph 1

<sup>13</sup> Hervin Yoki Pradikta, Aan Budiando, and Habib Shulton Asnawi, “History of Development and Reform of Family Law in Indonesia and Malaysia,” *KnE Social Sciences*, April 2024, <https://doi.org/10.18502/kss.v9i12.15863>; Fitriyadi Fitriyadi et al., “Redefining Legal Frameworks: Progressive Methods in Ascertaining Children’s Lineage from Fasid Marriages in Religious Court Proceedings,” *Syariah: Jurnal Hukum Dan Pemikiran* 24, no. 1 (2024): 148–71.

<sup>14</sup> Ahmad Mukri Aji et al., “Weakening Tradition: The Shifting in Same-Clan Marriage Prohibition in Mandailing Batak,” *AHKAM: Jurnal Ilmu Syariah* 21, no. 2 (2021), <https://doi.org/https://doi.org/10.15408/ajis.v21i2.23729>.

<sup>15</sup> Fitriyani Zein, “Kekerasan Dalam Perkawinan Dan Nusyuz Dalam Hukum Keluarga Di Turki, Malaysia, Sudan, Yordan Dan Indonesia,” *SALAM: Jurnal Sosial Dan Budaya Syar-I* 4 (2017): 121–36; Khairina Khairina et al., “Reforming the Rules on the Division of Joint Property: A Progressive Legal Approach,” *JURIS (Jurnal Ilmiah Syariah)* 23, no. 1 (June 30, 2024): 191, <https://doi.org/10.31958/juris.v23i1.11565>.”<http://www.mendeley.com/documents/?uuid=b46caafe-5856-4a60-95bd-4f3409d88105>,”<http://www.mendeley.com/documents/?uuid=0eca9c9e-c469-4282-927d-b4a9ba073da3>”}, {“id”:”ITEM-2”, “itemData”: {“DOI”:”10.31958/juris.v23i1.11565”, “ISSN”:”2580-2763”, “abstract”:”According to Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI



Point a of Law Number 1 Year 1974 concerning Marriage for those who violate polygamy regulations. Additionally, a significant difference between Malaysia and Indonesia lies in the permission for polygamy among civil servants (*Pegawai Negeri Sipil, PNS*). In Malaysia, there is no differentiation based on this status.<sup>16</sup> Therefore, society often does not comply with the legal sanctions established by the government, treating criminal threats as merely administrative measures rather than deterrents for lawbreakers. Consequently, there is a need for policies oriented towards reconstructing existing laws.<sup>17</sup> The methodology employed in this research is normative research,<sup>18</sup> utilizing a legislative approach and Maslahah al-Ghazali theory.<sup>19</sup> This approach normatively examines the laws and norms applied in Muslim-majority countries like Indonesia and Malaysia. The data sources for this study include legislative regulations, Maslahah al-Ghazali theory, and relevant scholarly articles.<sup>20</sup>

### Criminal Laws Regarding Marriage in Muslim-Majority Malaysia

Marriage criminal laws in Malaysia are based on a dual legal system, with Shariah law applying to Muslims and civil law applying to non-Muslims. These two systems have different rules and procedures concerning marriage offenses. Shariah law governs Muslims in Malaysia and encompasses family law, marriage, divorce, inheritance, and specific criminal offenses. Each state in Malaysia has its own Shariah laws and Courts to enforce them. Some marriage offenses under Shariah law include:<sup>21</sup> *First*, Polygamy Without Permission: Under Shariah law, polygamy is permitted, but men seeking to marry multiple wives must obtain permission from the Shariah court. Marrying more than one spouse without permission can be considered a criminal offense. *Second*, Child Marriage: The minimum age for marriage among Muslims in Malaysia is 18 for men and 16 for women. However, child marriages can be allowed with the approval of the Shariah court, which can be controversial. *Third*, Forced Marriage: Shariah law prohibits forced marriages, but its implementation varies depending on the interpretation of Shariah courts in different states. *Fourth*, Domestic Violence (KDRT): Some Shariah laws in Malaysia address protection against domestic violence, and perpetrators of domestic violence can face sanctions.

As for civil law in Malaysia, it governs non-Muslims and pertains to the Law Reform (Marriage and Divorce) Act 1976. These regulations encompass requirements and procedures for marriage, divorce, and spousal rights. Marriage offenses under civil law include:<sup>22</sup> *First*, Poligamy Without Permission: Civil law in Malaysia prohibits bigamy. If someone marries while still legally married to another person, this is considered a criminal offense and can be punishable by imprisonment or a fine. *Second*, Child Marriage: The minimum age limit for marriage under civil law is 18 years old.

<sup>16</sup> Martina Purna Nisa, "Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Laws in Indonesia, Malaysia and the Maldives)," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 16, no. 1 (2021): 1–23.

<sup>17</sup> Siti Musawwamah et al., "Resistance to Child Marriage Prevention in Indonesia and Malaysia," *AHKAM: Jurnal Ilmu Syariah* 23, no. 1 (2023), <https://doi.org/https://doi.org/10.15408/ajis.v23i1.32014>; Henky Fernando, Yuniar Galuh Larasati, and Irwan Abdullah, "Bibliometrics of Family Law Research Trends in Southeast Asia: An Analysis Two Decades 2003-2023," *El-Ussrah: Jurnal Hukum Keluarga* 7, no. 1 (2024): 82–109, <https://doi.org/http://dx.doi.org/10.22373/ujhk.v7i1.22439>.

<sup>18</sup> Jonaedi Efendi and Johnny Ibrahim, "Legal Research Methods: Normative and Empirical," *Jakarta: Kencana Prenamedia Group, Cet 2* (2018).

<sup>19</sup> Suhaimi Suhaimi, "Problem Hukum dan Pendekatan Dalam Penelitian Hukum Normatif," *Jurnal Yustitia* 19, no. 2 (2018).

<sup>20</sup> Kornelius Benuf and Muhamad Azhar, "Legal Research Methodology as an Instrument to Unravel Contemporary Legal Problems," *Gema Keadilan* 7, no. 1 (2020): 20–33.

<sup>21</sup> Ibrahim and Musa, "Legal Implication Of Unregistered Polygamous Marriages Without Court Permission In Negeri Sembilan."

<sup>22</sup> Barlinti, "Harmonization of Islamic Law In National Legal System: A Comparative Study Between Indonesian Law And Malaysian Law."

Marriages below this age can be considered a legal violation. *Third*, Domestic Violence (KDRT): The Domestic Violence Act provides protection for victims and stipulates penalties for perpetrators of domestic violence. This law applies to all Malaysians, including Muslims and non-Muslims. *Fourth*, Forced Marriage: Civil law prohibits forced marriages and ensures that marriages are based on the consent of both parties.

The marriage criminal laws in Malaysia encompass various actions deemed to violate the law, under both Shariah and civil law. Each system has its own set of procedures and requirements, but both aim to ensure justice, protect rights, and uphold legal compliance. If someone experiences or becomes aware of any marriage offenses in Malaysia, it is important to report them to the appropriate authorities, such as the Shariah courts for Muslims or the civil courts for non-Muslims.<sup>23</sup>

### Criminal Laws Regarding Marriage in Indonesia

Criminal laws regarding marriage in Indonesia encompass various actions considered illegal within the context of marriage. Most of these rules are governed by the Marriage Law, the Criminal Code (KUHP), and other laws related to family and household matters.<sup>24</sup> Here are some marriage offenses and the laws that regulate them in Indonesia:<sup>25</sup> *First*, Bigamy: Bigamy is the act of marrying someone else while still legally married without a valid annulment or termination of the previous marriage. Bigamy is considered a criminal offense under the Criminal Code (KUHP). Article 279 of the KUHP prohibits bigamy and stipulates imprisonment for up to five years. *Second*, Polygamy Without Permission: In Indonesia, polygamy is allowed in Islam but requires permission from the religious court. Article 3 and Article 4 of Law No. 1 of 1974 concerning Marriage establish conditions for polygamy, including approval from the court and consent from existing wives. Engaging in polygamy without permission can be considered a criminal offense.

*Third*, Child Marriage: Law No. 1 of 1974 concerning Marriage and the Child Protection Law set the minimum age limit for marriage. The legal age for marriage in Indonesia is 19 years old for both males and females. Marrying below this age without permission from the religious court can be a legal violation. *Fourth*, Forgery of Marriage Documents: Forgery of documents, such as marriage certificates or identity documents used for marriage purposes, is a criminal offense regulated under the Criminal Code (KUHP). Forgery can result in imprisonment or a fine, depending on the severity of the offense. *Fifth*, Forced Marriage: Forced marriage involves coercing someone into marriage without their full and free consent. Article 335 of the Criminal Code (KUHP) addresses the criminal offense of coercion, including within the context of marriage. Forced marriage may involve pressure, threats, or violence. *Sixth*, Domestic Violence (KDRT): Law No. 23 of 2004 concerning the Elimination of Domestic Violence regulates criminal offenses related to domestic violence, including physical, psychological, sexual, and economic violence within the context of household or marriage. Perpetrators of domestic violence can be sentenced to imprisonment or fined, and this law provides protection for victims.

<sup>23</sup> Hendun Abd Rahman Shah, "Modern Slavery and Forced Labour: An Overview of International Law, the Malaysian Law and Islamic Law Perspectives," *AHKAM: Jurnal Ilmu Syariah* 21, no. 2 (2021), <https://doi.org/https://doi.org/10.15408/ajis.v21i2.22543>.

<sup>24</sup> Eva Khumairoh, Ishaq Ishaq, and Muhammad Faisol, "Marital Rape As A Crime Of Sexual Violence In Positive Law In Indonesia," *International Journal of Law, Crime and Justice* 1, no. 2 (2024): 51–66.

<sup>25</sup> Najmah Jaman, "Implications Of Polygamy Practices On Positive Law In Indonesia," *Prophetic Law Review* 2, no. 1 (June 2020), <https://doi.org/10.20885/PLR.vol2.iss1.art2>.

Criminal laws regarding marriage in Indonesia encompass various actions deemed illegal within the context of marriage. These actions can lead to criminal sanctions ranging from imprisonment, fines, to other penalties. Law enforcement aims to protect individual rights, prevent abuses, and ensure the integrity of the institution of marriage. If someone experiences or becomes aware of any marriage-related criminal activities, it is important to report them to authorities such as the police or the courts, and seek appropriate legal assistance.<sup>26</sup>

### **The Diaspora of Implementing Criminal Sanctions for Marriage in Malaysia and Indonesia**

The diaspora of implementing criminal sanctions for marriage in Malaysia and Indonesia involves studying the differences and similarities in the application of laws governing various marriage-related offenses. Both Malaysia and Indonesia have complex cultural and religious contexts that influence how marriage offenses are understood and enforced. Here are some aspects that differentiate the implementation of criminal sanctions for marriage in both countries;<sup>27</sup> *First, Legal System:* Malaysia operates under a dual legal system that includes Shariah law for Muslims and civil law for non-Muslims. Shariah law governs marriage, divorce, and other family matters for Muslims, while civil law applies to non-Muslims. This creates distinct legal frameworks for marriage offenses based on religion. On the other hand, Indonesia has a national legal system where Islamic law and civil law are regulated under one framework. The Marriage Law No. 1 of 1974 and the Criminal Code (KUHP) are the primary legal foundations governing marriage offenses in Indonesia, with specific provisions for Muslims.

*Second, Polygamy:* In Malaysian Shariah law, polygamy is permissible with permission from the Shariah court. Bigamy for non-Muslims is a criminal offense under civil law. Violations of bigamy rules can lead to criminal sanctions. Meanwhile, polygamy is allowed under Islamic law with permission from the religious court, but bigamy (without permission) is considered a criminal offense regulated by the Criminal Code (KUHP). Stricter regulations apply to unauthorized polygamy. *Third, Child Marriage:* Child marriage in Malaysia has different legal age limits under Shariah law and civil law. Shariah law allows child marriage with permission from the Shariah court, while civil law sets the minimum age limit at 18 years. This practice remains controversial in Malaysia. In Indonesia, the legal age for marriage is 19 years old for both males and females, with exceptions requiring permission from the religious court. The practice of child marriage can be considered a legal violation if done without valid permission.

*Fourth, Domestic Violence (KDRT):* Malaysia has the Domestic Violence Act that regulates actions of domestic violence and provides protection for victims. Perpetrators of domestic violence can face criminal sanctions under Shariah law or civil law. Indonesia has Law No. 23 of 2004 concerning the Elimination of Domestic Violence that regulates actions of domestic violence, imposes criminal sanctions on perpetrators, and provides protection for victims. This protection applies to all citizens, regardless of religion or ethnicity. *Fifth, Forced Marriage:* Shariah law prohibits forced marriage, but enforcement of this rule may vary depending on the state and interpretation by Shariah courts. Civil

<sup>26</sup> Anwar Hafidzi et al., "Sirri Marriage Celebration and Its Impact on Social Change in Banjarese Community, South Kalimantan," *Al-Ahkam* 32, no. 2 (October 2022): 153–68, <https://doi.org/10.21580/ahkam.2022.32.2.12789>.

<sup>27</sup> Mesraini Mesraini et al., "Protecting the Rights of Muslim Women in Indonesian Diaspora Marriages in Russia: An Islamic Law Perspective," *HTS Teologiese Studies/Theological Studies* 79, no. 1 (2023): 8488.

law also prohibits forced marriage. In Indonesia, the Marriage Law and the Criminal Code (KUHP) prohibit forced marriage. Forced marriage within the context of marriage can be considered a criminal offense and subject to criminal sanctions.

The implementation of criminal sanctions for marriage in Malaysia and Indonesia reflects both differences and similarities in legal approaches to marriage-related offenses. These differences are influenced by Malaysia's dual legal system and Indonesia's national legal system, as well as cultural, religious, and social practices. While there are similarities in some aspects, such as the handling of bigamy, polygamy, and domestic violence, the enforcement of laws can vary based on the context and legal interpretations in each country.<sup>28</sup>

### **Criminal Sanctions in Marriage Law: Towards Legal Certainty**

Reconstructing the penalties for marriage offenses to achieve legal certainty is an effort to clarify and strengthen laws governing illegal actions related to marriage, ensuring that laws are enforced fairly and consistently. Legal certainty is a principle whereby laws must be clear, predictable, and consistent, providing assurance to society that their rights and obligations are protected and upheld. Steps that can be taken to reconstruct the penalties for marriage offenses to achieve legal certainty include;<sup>29</sup> *First*, Reviewing and Harmonizing Existing Laws: The process of reconstruction begins with reviewing laws and regulations governing marriage offenses such as unauthorized polygamy, forced marriage, child marriage, and domestic violence. This review aims to identify inconsistencies, gray areas, or outdated rules. *Second*, Clarifying and Strengthening Rules: After reviewing existing laws, the next step is to clarify and strengthen the rules. This may involve revising legal language to avoid ambiguity and establishing clearer definitions for key terms. For instance, clarifying the legal age limit for marriage and strengthening the requirements for polygamy permits. *Third*, Strengthening Law Enforcement Mechanisms: Legal certainty depends on effective law enforcement. Therefore, reconstructing penalties for marriage offenses needs to strengthen law enforcement mechanisms such as investigation, prosecution, and judicial processes. Additional training for law enforcement officers and legal service providers can ensure consistent understanding and application of the law.

*Fourth*, Enhancing Protection for Victims: A crucial part of reconstructing penalties for marriage offenses is ensuring protection for victims. This could include improving access to protection services, such as shelters for domestic violence victims, and providing legal protection for those subjected to forced marriage or other forms of coercion. *Fifth*, Increasing Public Awareness and Education: It's important for the public to understand the threats of marriage offenses and their legal consequences. Increasing public awareness through educational campaigns and legal literacy initiatives can help prevent marriage offenses and encourage people to report violations. It can also help change social norms that support illegal marriage-related actions. *Sixth*, Engaging Communities and Religious Institutions: Involving local communities and religious institutions in reconstructing penalties for marriage offenses can help ensure that legal changes are accepted and effectively implemented.

<sup>28</sup> Harry Pribadi Garfes, "Law Enforcement of Unregistered Marriage Practices in Indonesia Lawrence Meir Friedman's Legal Effective Perspective," *Jurnal Ilmiah Kebijakan Hukum* 16, no. 3 (2022): 515–38; Mesraini Mesraini and Nur Rohim Yunus, "Russia's Legal Policy Against Diaspora Marriages in Muslim Communities," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 3 (September 2023): 1536, <https://doi.org/10.22373/sjhk.v7i3.18854>.

<sup>29</sup> Maznah, "Politicization of Islam in Indonesia and Malaysia: Women's Rights and Inter-Religious Relations," in *Gender Trends in Southeast Asia* (ISEAS Publishing, 2009), 95–110, <https://doi.org/10.1355/9789812309563-011>.



Religious institutions often wield significant influence in society, and their involvement can enhance the effectiveness of reconstruction efforts. *Seventh*, Monitoring and Evaluating Law Implementation: Finally, to achieve legal certainty, there needs to be mechanisms for monitoring and evaluating the implementation of laws related to marriage offenses. Ongoing evaluation ensures that laws are applied consistently and provides opportunities for further improvements.

The reconstruction of penalties for marriage offenses aims to establish a clear and consistent legal framework that can prevent violations and ensure justice for victims. Through a comprehensive approach, including legal review, strengthening law enforcement, victim protection, and community involvement, this reconstruction can achieve the legal certainty needed to protect the integrity of marriage institutions and individual rights.

In the contexts of Malaysia and Indonesia, this reconstruction is crucial given the challenges within Sharia and civil law, as well as the social and cultural changes influencing marriage institutions. The sociological approach to Islamic law can help understand how Islamic law can be adapted to meet the needs of contemporary society while maintaining Islamic principles.<sup>30</sup>

### **Reconstruction of Criminal Sanctions for Marriage Violators as Seen from Maslahah al-Ghazali**

Imam al-Ghazali is one of Islamic history's most prominent scholars and intellectuals. His full name is Abu Hamid Muhammad ibn Muhammad al-Ghazali. He was born in 1058 AD (450 AH) in the city of Tus, located in the Khorasan region of present-day Iran. Al-Ghazali is renowned for his significant contributions in theology, philosophy, Islamic law, and Sufism. He began his education in Tus, then continued to Jurjan and later to Nishapur, where he studied under the guidance of Imam al-Haramayn al-Juwayni, a leading scholar of his time. After al-Juwayni's death, al-Ghazali was invited by Wazir Nizam al-Mulk to teach at Nizamiyyah, a prestigious educational institution in Baghdad.<sup>31</sup>

One of the theories proposed by al-Ghazali is Maslahah. Maslahah, or benefit, is a concept in Islamic law referring to actions or policies that bring benefit or goodness to society. Salah satu teori yang digagas al-Ghazali adalah Maslahah.<sup>32</sup> In his theory of Maslahah, Imam al-Ghazali emphasized the importance of Sharia objectives and how these objectives can be used to evaluate specific laws and actions. Al-Ghazali defined Maslahah as anything that brings benefit or prevents harm to humanity. This concept is crucial in Islamic law as it underpins many interpretations and legal decisions.<sup>33</sup>

Imam al-Ghazali stressed that the primary objective of Sharia is to protect five fundamental principles known as "*maqasid al-shariah*." These five principles are: 1) Religion (al-din), Life (al-nafs), Intellect (al-'aql), Progeny (al-nasl), and Property (al-mal). According to al-Ghazali, Maslahah encompasses anything that upholds or promotes these five basic principles. He classified Maslahah into three types, depending on whether it is recognized or not recognized by Sharia:<sup>34</sup> First, Maslahah

<sup>30</sup> Edo Fernando, "Criminal Law Policy on the Protection of the Marriage of the Underage Children," *Indonesian Journal of Law and Society* 1, no. 1 (March 2020): 75, <https://doi.org/10.19184/ijls.v1i1.16758>.

<sup>31</sup> Imam Feisal Abdul Rauf and Imam Feisal Abdul Rauf, "The Maqasid, Reform and Renewal," *Defining Islamic Statehood: Measuring and Indexing Contemporary Muslim States*, 2015, 200–273.

<sup>32</sup> Yogi Kurniawan, "Istihsan and ITS Implementation in the Field of Islamic Economics and Finance.," *Jurnal Indonesia Sosial Teknologi* 5, no. 4 (2024).

<sup>33</sup> Tarmizi Tarmizi, "The Concept of Maslahah According to Imam Al-Ghazali," *Jurnal Al-Dustur* 3, no. 1 (2020): 22–29.

<sup>34</sup> Suansar Khatib, "The Concept of Maqashid Al-SyariAh: A Comparison Between the Thought of Al-Ghazali and Al-Syathibi," *Mizani Scientific Journal: Legal, Economic and Religious Discourse* 5, no. 1 (2018): 20–34.

Mu'tabarrah: This refers to Maslahah that is recognized by Sharia, whether through the Quran, Hadith, or consensus (ijma') of scholars. Actions that bring about this type of Maslahah are considered valid in Islamic law. *Second*, Maslahah Mulghah: This type of Maslahah is rejected by Sharia because it contradicts fundamental Islamic principles. For example, actions that cause harm to one of the five basic principles. *Third*, Maslahah Mursalah refers to Maslahah that is not explicitly recognized or rejected by Sharia. In such cases, scholars may use ijtihad (independent reasoning) to determine whether the action aligns with the objectives of Sharia.

Imam al-Ghazali argued that in cases where Sharia does not provide clear guidance, Maslahah can serve as a basis for ijtihad. Maslahah assists scholars in assessing whether specific actions or policies benefit humanity. Ijtihad, grounded in Maslahah, must consider Sharia objectives and Islamic principles to ensure that decisions bring benefits and prevent harm. Reconstructing marital criminal sanctions from al-Ghazali's Maslahah perspective emphasizes developing laws to ensure societal welfare. Maslahah, or beneficial interest, becomes a crucial framework in evaluating actions, policies, or laws related to marriage, and how they may benefit or prevent harm to society. Imam al-Ghazali, a prominent scholar in Islamic history, defined Maslahah as anything that upholds Sharia's objectives: protecting the five basic principles religion, life, intellect, progeny (family), and wealth.

The primary goal of reconstructing marital criminal sanctions is to ensure protection of the five fundamental principles of Sharia. This reconstruction must address actions or policies that undermine these principles, such as forced marriage, child marriage, bigamy, unauthorized polygamy, and domestic violence. Through the Maslahah approach, the reconstruction should promote the protection of family, intellect, and life, which are integral to the maqasid of Sharia.<sup>35</sup> Maslahah mursalah refers to beneficial interests that Sharia has not explicitly recognized or rejected. In cases of marital criminal offenses, the use of maslahah mursalah becomes crucial when Sharia does not provide clear guidance on addressing contemporary issues. The reconstruction should consider specific actions' benefits and potential harms, opting for solutions that maximize societal well-being.<sup>36</sup>

Al-Ghazali emphasized that maslahah provides the basis for ijtihad (independent reasoning). The reconstruction of marital criminal sanctions should allow flexibility in the interpretation and application of Islamic law, focusing on public interest. This approach enables the law to remain relevant to the needs and challenges of contemporary society. Maslahah, as emphasized by al-Ghazali, asserts that Islamic law should prevent harm or mafsadah (corruption). The reconstruction of marital criminal sanctions must ensure that laws and policies prevent actions that could lead to harm or oppression. For instance, preventing child marriage, forced marriage, and domestic violence, all of which can adversely impact individuals and society.<sup>37</sup>

The reconstruction of marital criminal sanctions should provide protection for victims, in accordance with the principle of maslahah. This could include improving access to legal protection,

<sup>35</sup> Arbanur Rasyid et al., "Dynamics of Childless Marriage Through the Lens of Maqasid Al-Shari'a," *Jurnal Ilmiah Peuradeun* 12, no. 2 (May 30, 2024): 763–86, <https://doi.org/10.26811/peuradeun.v12i2.1182>.

<sup>36</sup> Purnama Hidayah Harahap et al., "Religious Court Decisions Regarding the Revocation of Grant (Hibah) in the Perspective of Islamic Jurisprudence," *Al-Manahij: Jurnal Kajian Hukum Islam*, November 2023, 215–32, <https://doi.org/10.24090/mnh.v17i2.9767>.

<sup>37</sup> Durotun Nafisah et al., "Comparative Analysis of Islamic Family Law and Normative Laws: Examining the Causes of Divorce in Purwokerto, Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (2024): 847–71.

healthcare services, and social support for victims of domestic violence or forced marriage. The aim of this protection is to safeguard the well-being of individuals and families, which is part of the *maqasid syariah*. The reconstruction of marital criminal sanctions should also strengthen law enforcement. Following the *maslahah* approach of al-Ghazali, law enforcement must be effective and fair, focusing on legal certainty and the protection of individual rights. This may require enhancing the capacity of law enforcement agencies, training on gender issues and human rights, and implementing robust oversight mechanisms.

Al-Ghazali identified five primary *maqasid* that should be preserved in Islamic law: protection of religion, life, intellect, progeny, and wealth. When reconstructing marital criminal sanctions based on *maqasid syariah* according to Al-Ghazali, it is important to consider how these laws and sanctions can support these five aspects. Steps for Reconstructing Marital Criminal Sanctions in the Perspective of *Maqasid Syariah*:

1. Protection of Progeny (*Hifz al-Nasl*)

Marriage is an institution aimed at protecting and preserving progeny. Criminal sanctions should be directed towards preventing actions that undermine this principle, such as child marriages, polygamy without valid consent, or infidelity in marriage. The purpose of sanctions here is to ensure family stability and safeguard future generations from negative effects.

2. Protection of Religion (*Hifz al-Din*)

*Maqasid Shariah* also includes safeguarding religious values. Criminal sanctions in marriage should ensure that religious principles are respected, for instance, in terms of honesty, responsibility, and commitment in marriage. Sanctions that violate religious teachings or encourage practices contrary to religious values should be avoided.

3. Protection of Life (*Hifz al-Nafs*)

Protection of life encompasses the physical and psychological safety and security of individuals. Criminal sanctions should protect family members from domestic violence, abuse, or other harmful actions. Sanctions should be sufficiently severe to deter offenders and protect victims.

4. Protection of Intellect (*Hifz al-'Aql*)

*Maqasid Shariah* also emphasizes the importance of preserving sound intellect and reasoning. Criminal sanctions in the context of marriage should consider their impact on the mental and emotional health of family members. Negative influences that impair sound reasoning, such as substance abuse or alcoholism, should be given special attention.

5. Protection of Wealth (*Hifz al-Mal*)

Family wealth should be safeguarded to maintain household economic stability. Criminal sanctions in marriage should encompass actions that jeopardize economic aspects, such as family abandonment, fraud in marriage, or misappropriation of shared assets.

The reconstruction of marital penal sanctions from the *Shariah maqasid* perspective, as Al-Ghazali advocates, should focus on protecting and preserving these five fundamental principles. Effective penal sanctions will consider the need to safeguard religion, life, intellect, lineage, and property, while reducing actions that could potentially harm the institution of marriage and society.

This approach should be holistic, taking into account the impact of sanctions on individuals, families, and society, and balancing the need for justice and righteousness in the legal process.<sup>38</sup>

## Conclusion

This research concludes that the policies regarding criminal sanctions in Islamic marriage laws in Indonesia and Malaysia exhibit significant differences despite both being based on Shariah principles. In Indonesia, these policies are more moderate and influenced by secular national law principles, whereas in Malaysia, they are more conservative and oriented towards strict Shariah interpretations. Each country's social, political, and legal factors play a crucial role in shaping and implementing these policies. This comparative study underscores the need for balanced policy adjustments that uphold both justice and adherence to Shariah principles, while considering local dynamics and human rights protections. The review of Islamic law regarding the enforcement of criminal sanctions for violations of marriage laws is still weak in practice, necessitating stricter penalties for offenders to have a significant deterrent effect.

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<sup>38</sup> Edy Setyawan et al., "Legal Age for Marriage: SDGs and Maslahah Perspectives in Legal Policy Change in Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 17, no. 2 (2023): 183–198, <https://doi.org/10.24090/mnh.v17i2.9506>; Dinda Difia Madina, Ahmad Rezy Meidina, and Anwar Zein, "The Dynamics of Polygamy and Divorce in Muslim Countries," *El-Aqwal: Journal of Sharia and Comparative Law*, 2023, 135–48.

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