



Problems In Regulating Cohabitation as An Offense in Law Number 1 of 2023 Concerning the Criminal Code

Khairil Ikhsan

Faculty of Law, Widya Mataram University, Yogyakarta, Email: khairl.ikhsan10@gmail.com

Abstract

This research discusses the problems arising from the criminalization of cohabitation in Article 412 of Law Number 1 Year 2023 on the Criminal Code (KUHP). Cohabitation, which is defined as living together without marital ties, is regulated as a criminal offense with prison or fine sanctions. This research uses normative legal research methods by examining laws and regulations, legal theories, and related expert opinions. The results show that the criminalization of cohabitation raises various problems, including violations of privacy rights, mismatch of sanctions with the character of the offense, as well as the potential for persecution and discrimination in law enforcement. In addition, this criminalization is considered not in line with the ultimum remedium principle, where criminal law should be the last resort in dealing with social problems. Article 412 of Law Number 1 Year 2023 on the Criminal Code (KUHP) is also considered unclear in formulating time limits and criteria for cohabitation, so it has the potential to be abused by law enforcement. This study concludes that the criminalization of cohabitation needs to be reviewed, by considering non-criminal approaches such as education and counseling, as well as respecting the right to privacy and the diversity of values in society. The recommendation of this research is the need for a more in-depth study of the social, psychological, and human rights impacts of criminalizing cohabitation, as well as a comparative analysis with similar regulations in other countries.

Keywords: Cohabitation; Criminal Code; Criminalization.

A. Introduction

The Draft Criminal Code (RKUHP) was passed into law on December 6, 2022 in a plenary meeting of the House of Representatives. The ratification also marks the end of the journey of the Dutch Wetboek van Strafrecht (WvS), which has been applied in Indonesia since 1918. The New Criminal Code has a transition period of 3 years, which means it will become effective in December 2025. The ratification of the RKUHP into law has reaped pros and cons in the community, this is due to the many articles that are considered controversial, one of which is regarding cohabitation which is regulated in Article 412 of the New Criminal Code. Cohabitation in Dutch is called *Semen Leven* and in the trendy language is *Living Together*, but what is meant is cohabitation.”¹

¹ I Gst Ag Gd Krisna Dwipayana dan A.A Ngurah Wirasila “Pengaturan Terhadap Perbuatan Kumpul Kebo (Kohabitasi) Dalam Pembaharuan Hukum Pidana Indonesia”, *Jurnal Kertha Desa*, Vol. 8 No. 7 Tahun 2020, hal. 2.



Of the various kinds of public welfare organizations and public interests to be protected by law (as legal interests), one of them is a sense of public decency. Indonesian society, which is known as a society that upholds the values of decency in social life, has begun to question the social phenomenon in the field of decency, namely “cohabitation”, namely living together without marital ties. The inclusion of articles on cohabitation in the New Criminal Code has led to the emergence of Pros and Cons opinions that cause conflict both horizontally and vertically. As criticized by Gayus Lambuun, who said that “the issue of decency has never been questioned by the state, because the state has no right to regulate the issue.” “Many countries assert that the state is not questioned about decency and the regulation of cohabitation means that in this case the state has entered the realm of private life.”²

The criminalization of cohabitation included in the New Criminal Code is a result of the reality of Indonesian society which requires the act as a form of social deviation from the values of social and religious life. The act that is called “cohabitation” by the community is essentially contrary to the values that live in the life of the community itself. Values that live in the community believe that living together with different sexes and both adults must be bound by marriage. Marriage is a “sacred bond” (containing the value of sanctity) which is the basis for the formation of a physically and mentally prosperous family, which in Islamic language is a family of “sakinah, mawadah and rahmah”. This is the need for the law to protect the “sanctity” of marriage by criminalizing cohabitation.³

Therefore, there needs to be a response in the form of a rule of law as a tool to overcome an act that is considered deviant by the community, so that the community sees the need for sanctions in the form of criminal sanctions, as a means of protecting the community from crime or a means of overcoming deviant acts. Criminal law is a “rule of law that binds to an act that meets certain conditions as a result in the form of punishment.”⁴

The author in this article will discuss the problems that occur if the cohabitation article is applied as an offense in Law Number 1 of 2023 concerning the Criminal Code?

² Anton Sudanto, S. H. "Penerapan Sistem Pidanaan Dalam Tindak Pidana Perzinahan Dalam Perspektif Hukum Pidana Materiil di Indonesia." *Jurnal Hukum Staatsrechts*, Vol. 1, No. 1 (2017): 130-150.

³ Sulistiyono, Budi, and Hari Purwadi. "Urgensi Kriminalisasi Kumpul Kebo (Cohabitation) Dalam Hukum Pidana Indonesia." *Jurnal Hukum Dan Pembangunan Ekonomi* Vol. 6 No. 2. (2018). Hal 172.

⁴ *Ibid.*



B. Research Methods

Judging from the type, this research is classified as Normative legal research, because in this research the author studies legislation and legal theories that exist in Indonesia to examine research. Problems that occur if the cohabitation article is applied as an offense in Law Number 1 of 2023 concerning the Criminal Code. Primary legal materials, namely materials that have juridically binding force. Such as laws and regulations, court decisions, agreements, and so on. In this writing the author refers to the Criminal Code, Law Number 1 of 2023 concerning the Criminal Code and Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence. Secondary Legal Material, which is material that does not have juridically binding force, in this study secondary data is defined as a legal source that is not binding but explains the primary legal material which is the result of processed opinions of experts or experts who study certain fields, and also materials that provide explanations of primary legal materials including writing books, journals, papers, articles, newspapers, internet related to the object of this writing.⁵

Data collection in this study uses the library search technique “Library Legal Research” or known as “Legal Research or Legal Research Instruction”. In this research, the data obtained, secondary data are analyzed qualitatively and then presented descriptively by explaining, describing, and describing in accordance with the problems that are closely related to this research. In this research the author uses deductive logic, namely in the form of general legal rules described (concretized) in the form of concrete legal regulations, so that they can be interpreted and conclusions can be obtained from the discussion as an effort to find out the answers to the problems that exist in this writing.

C. Research Results and Discussion

1. Criminalization of Cohabitation or Cohabitation

Essentially, every human being has an appetite for sexuality towards the opposite sex. This is the natural nature of humans as God's creation. However, in daily life and social life, everyone lives side by side with the rules that live in society, so that in everyone's efforts to fulfill their sexual desires, humans are limited by the rules that live and are closely held by the community.⁶

⁵ Abdulkadir Muhammad, “*Hukum dan Penelitian Hukum*”, (Bandung: PT. Citra Aditya Bakti, 2004), hlm. 172.

⁶ C.S.T Kansil, 1989, *Pengantar Ilmu Hukum dan Hukum Indonesia*, Balai Pustaka, Jakarta, hlm 34.



A social norm that exists in society if violated will have implications for disharmony in social life. This will cause social turmoil followed by community reactions as a result of the disturbances caused by violations of social norms. Cohabitation or cohabitation which is considered a social deviation in the field of morality will certainly reap a negative response by the community because it is considered to disrupt the balance of social life.⁷ It is important for law enforcers to understand the values that live in society in enforcing the law to avoid rigid law enforcement due to ignorance and incomprehension without regard to the rights of the community.⁸ Often law enforcement is too positivistic and based on rigid texts caused by the failure of law enforcers to understand the law and values that live in society. So that law enforcement becomes less responsive and even looks very refreshing which results in the face of law enforcement as the “oppressor”.

Cohabitation is one of the acts accommodated in the New Criminal Code as a form of expansion of criminal acts of decency in the current Criminal Code.⁹ The inclusion of cohabitation as an offense or a form of criminal offense in the New Criminal Code has received various responses from various groups and has created pros and cons.

The criminalization of cohabitation itself is contained in article 412 paragraph 1 which reads:

Any person who cohabits as husband and wife outside of marriage shall be punished with a maximum imprisonment of 6 (six) months or a maximum fine of category II.

However, in the criminalization of cohabitation or cohabitation, not everyone has legal standing to complain about cohabitation, which is a complaint offense. People or parties who have legal standing in making complaints for cohabitation are those who are bound by birth or marriage. For example, if cohabitation or cohabitation is carried out by people who are not bound by marriage, it can only be complained about by their parents or children, while for those who are

⁷ A. Danardana dan Vincentius Patria Setyawan, “Kriminalisasi Fenomena Penyimpangan Sosial Kumpul Kebo (Samenlaven) Dalam Perspektif Hukum Pidana,” *Justitia Et Pax; Jurnal Hukum*, Vol.38 No. 1 (2022), hal. 217.

⁸ M. Yasin Al Arif, “Penegakan Hukum dalam Perspektif Hukum Progresif”, *Jurnal Hukum Undang*, Vol. 2, No. 1, 2019, hlm. 172.

⁹ Gede Bisma Mahendra, dan I Gusti Ngurah Parwata, 2019, "Tinjauan Yuridis Terhadap Perbuatan Kumpul Kebo (Samen Leven) Dalam Pembaharuan Hukum Pidana Di Indonesia." *Jurnal Kertha Wicara Program Kekhususan Hukum Pidana Fakultas Hukum Universitas Udayana*, Vol. 8, No. 06, Tahun 2019, hlm. 4.



already bound by marriage, those who have the right to complain are their wives or husbands. This is regulated in Article 412 paragraph 2 which reads:

No prosecution shall be conducted for the criminal offense as referred to in paragraph (1) 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.

However, the author does not agree if cohabitation or cohabitation is included as an offense in the Criminal Code, because actually Consensual Sex is a moral problem or immoral act, not a criminal act or an act that disturbs public order. Social deviations or immoral problems that exist in society should be resolved with a more responsive approach instead of through a criminal law approach whose purpose is retaliation. A person who commits cohabitation or cohabitation does not harm society in general. In fact, when viewed from the perspective of the victim, the victim with the greatest loss is actually the perpetrator himself. The usual consequences of cohabitation such as getting pregnant outside of marriage will be suffered by themselves as perpetrators.¹⁰

Respecting the Right to Privacy is something that must be considered by the state, especially by using criminal law instruments as regulations that govern it. The jurisdiction of criminal law, which is basically in the public sphere, has begun to explore the privacy of its citizens. Individuals should be allowed to choose their own lifestyle as long as it is not done with violence and coercion. Cohabitation or cohabitation regulated in Article 412 of the New Criminal Code is a private law area that should not necessarily be transferred to the public law area, especially to criminal law.

Cohabitation is indeed a sinful thing for many religions but should every sinful thing be criminalized?

The criminalization of cohabitation is also not friendly to the government's efforts to overcome the overcapacity of correctional institutions. Where it actually increases the potential overcapacity of correctional institutions that are increasingly booming, the government should be more careful in formulating an act into an offense so that the rules that are born become a solution to the problems experienced instead of becoming a trigger for the emergence or aggravation of existing problems.

2. Discrepancy between Offense Characteristics and Sanctions

¹⁰ A. Danardana dan Vincentius Patria Setyawan, *Op. Cit.*



In the beginning, jurists have divided criminal offenses into three types of actions which they call *crimina atrocissima*, *atrocia* and *levia*, which are not based on certain principles, but only based on the severity of the crime, where the severity of the crime is solely based on the rules of punishment that have been threatened against each crime.¹¹

With the influence of the division of criminal offenses as referred to above, the framers of the Penal Code of 1810 in France then also made a division tripartite or a division into three types of unlawful acts which they have stated in article 1 of the C.P., namely respectively: crime, delict, and contravention which in Dutch are also respectively referred to as *misdaden*, *wanbedrijven* and *overtredingen* which if we translate into Indonesian then the meaning is respectively approximately: crimes, acts that have been reprehensible and violations.¹²

The author argues that the character of the offense of cohabitation or cohabitation is not included in the category of crime but rather a reprehensible act or offense that is more inclined to immoral acts in the field of morality that are not detrimental or disturbing public order. However, Article 412 of the New Criminal Code reads:

“Any person who cohabits as husband and wife outside marriage shall be punished with a maximum imprisonment of six months or a maximum fine of category II or Rp10 million.”

In this article, it is very clear that the form of sanctions or punishment for perpetrators of cohabitation or cohabitation is imprisonment or a fine. Where the author assesses the discrepancy between the character of the offense of cohabitation or cohabitation with the type of sanction applied. Parties involved in cohabitation or cohabitation should not be sentenced to prison but can be resolved in a civil manner, for example, married. Because the reasons for people who do cohabitation are various. For example, to test compatibility or to build financial security before marriage or they cannot legally marry due to religious differences.¹³ Immoral behavior must be resolved with a religious values approach instead of using a criminal law approach to imprisonment, unlike for example a murder case, the perpetrator of murder must be imprisoned to limit the perpetrator's space so that similar actions are not repeated. Another example is money politics

¹¹ P.A.F. Lamintang dan Franciscus Theojunior Lamintang, 2018, *Dasar-dasar Hukum Pidana di Indonesia*, ctk.3 (Jakarta: Sinar Grafika), hal.207.

¹² *Ibid.* hal. 208.

¹³ Gideon Imoke Emeng, *The Social Problem of Cohabitation*, *Journal of Art, Humanity, and Social Studies*, Vol. 1 No. 4 (2021), hal. 36.



carried out by political parties, the legal approach used is not a criminal law approach with prison sanctions or fines but an administrative law approach such as revocation of political rights. This will make them rethink about committing the crime. So the author's point is that the imposition of sanctions on criminal acts or offenses must pay attention to the nature of an offense so that the imposition of sanctions is right on target.

Darryl K. Brown defines overpenalization in relation to criminalization policy. Criminalization policies that are carried out imprudently and are not based on rational arguments have the potential to cause overpenalization in the form of severe (excessive) punishment imposed on minor violations.¹⁴ According to Smith, overpenalization diartikan sebagai ‘....*undermining of the effort to provide just and proportional punishments for offenses...*’.¹⁵ There are two forms of overpenalization according to Smith, namely the setting of special minimum criminal penalties that have nothing to do with the offense or loss caused, and the severity of criminal penalties that are not in accordance with the offense or loss caused.¹⁶ Referring to the violations or losses caused by the act of cohabitation or cohabitation is not proportional to the criminal sanctions threatened.

Consequentialists argue that punishment is justified if it does good, it prevents worse outcomes, and there are no alternatives that can provide equally good (or bad) outcomes.¹⁷ According to Herber L Packer in Suhariyono, he tries to involve himself in two conceptual views, each of which has different moral implications. The first is the retributive view, which presupposes punishment as a negative punishment for any deviant behavior committed by citizens. The second is the utilitarian view, which sees punishment from the aspect of its usefulness and benefits.¹⁸

3. Potential Persecution in Society

Not all behaviors that we don't like should be subject to the criminal law in order to discourage people from doing them. That is not how criminal law norms are formulated. But we have to see whether the behavior does disturb public order or not. Inappropriate formulation of criminal law norms can cause new problems in society. For example, the formulation of

¹⁴ Darryl K. Brown, “Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response”, *Ohio State Journal of Criminal Law*, Vol.6, (2009), hal. 461-463

¹⁵ Stephen F. Smith, “Overcoming Overcriminalization”, *Journal of Criminal Law and Criminology*, Vol.102, (2012), hal. 540.

¹⁶ *Ibid.* hal.537-539.

¹⁷ Suhariyono, “Penentuan Sanksi Pidana Dalam Suatu Undang-Undang”, *Jurnal legislasi Indonesia*, Vol. 6 No. 4 (2009), hal.623.

¹⁸ *Ibid.*



cohabitation as an offense in the new Criminal Code can increase the potential for persecution¹⁹ in the community. It is true that there is a principle of Legal Fiction where people are considered to know the law after a rule is enacted as a law. However, it is just a mere principle that does not see the real reality in society.

In rural communities that are still thick with the values of religiosity and morality in social life. The potential for persecution will easily occur because in rural communities most of them only know the law but do not really understand it so that they can act as they please without paying attention to what is clearly written in the law, what they know is that things like cohabitation or cohabitation are regulated by law so it is legal to take action against the perpetrators of cohabitation without paying attention that this is a complaint offense that can only be complained about by parents or children for those who are not married or husbands or wives for those who are bound by marriage as explained in article 412 paragraph (2) of the new Criminal Code.

The partial understanding of rural communities about the law is very dangerous, because it can trigger repressive law enforcement carried out by the community and not in accordance with existing rules. Often we see how the perpetrators of cohabitation are persecuted in the countryside only based on rumors scattered in the community not from parties who have legal standing in complaining about it.

4. Remedium Criminal Law is Ultimum Remedium Not Primum Remedium

In the legal order, there is the Ultimum Remedium principle. Ultimum remedium is one of the principles contained in Indonesian criminal law which states that criminal law should be the last resort in terms of law enforcement. The Ultimum Remedium principle also contains an element of purpose so that the imposition of criminal sanctions can be given to the right person, because criminal offenders also have human rights including the right to obtain justice, the right to life, and the right to improve themselves. The existence of these human rights ultimately led to the existence of the Ultimum Remedium principle in law enforcement. The application of Ultimum Remedium must be interpreted as an effort (middle way) that can benefit all parties, both as victims, as perpetrators and for the benefit of the wider community.²⁰

¹⁹ Persekusi artinya pemburuan sewenang-wenang terhadap seorang atau sejumlah warga dan disakiti, dipersusah, atau ditumpas.

²⁰ Novita Sari, "Penerapan Asas Ultimum Remedium Dalam Penegakan Hukum Tindak Pidana Penyalahgunaan Narkotika", *Jurnal Penelitian Hukum De Jure*, Vol. 17 No. 3 (2017), hal 353.



In the context of cohabitation or cohabitation, which should be a social disease that must be cured, criminal law is not the right medicine for the social disease. So in the case of cohabitation or cohabitation, the author likens criminal law as a drug that treats symptoms (symptom) instead of being an instrument that treats the cause (causa) of the emergence of the social disease of cohabitation or cohabitation. Like a drug that treats a disease, the drug only reacts to the symptoms experienced but does not become a solution to the disease so that it does not arise again.

The inclusion of cohabitation or cohabitation as an offense in the new Criminal Code indicates that the government tends to use criminal law as *Primum Remedium* or as the main medicine in treating social diseases in society instead of placing criminal law as *Ultimum Remedium* or the last weapon. The application of criminal sanctions/punishment is not the only solution in reducing the number of criminal offenses in society. The government should be more responsive in tackling social ills such as cohabitation or cohabitation, instead of seemingly not bothering to find the right solution and instead incorporating it into the Criminal Code as an offense.

The formulation of the offense of cohabitation or cohabitation in Article 412 of the new Criminal Code does not include a time limit when a person is said to be cohabiting. In law, there is a principle called *Lex Certa* or *Bestimmtheitsgebot*, which means that the legislator must formulate clearly and in detail the act called a criminal offense.²¹ However, in Article 412 of the Criminal Code, the criminal offense of cohabitation or cohabitation is not clearly formulated, such as the time limit for a person to be said to be living together, can one week be said to be living together or one month or one year? The absence of regulations regarding the time regulated in Article 412 of the Criminal Code has the potential to make the article rubber. Law enforcers could have someone only staying in someone's house for 2 or 3 days is said to be cohabiting just because of the unclear formulation in the article. We cannot rule out how law enforcement operates in the community where what is written in the text may not necessarily be a reference in carrying out responsive law enforcement especially if the norms governing it are unclear.

5. Problems in Regulating Cohabitation as an Offense in the New Criminal Code

The essential problem in law enforcement in Indonesia is not only the unresponsive legal products, but also the law enforcement apparatus. To lay the foundation of law enforcement, the

²¹Alfons Zakaria, "Inkonsistensi Asas Legalitas dalam Rancangan Kitab Undang-Undang Hukum Pidana 2005," *Risalah Hukum Fakultas Hukum Unmul*, Vol. 2 No. 2 (2006), hal.136.



main pillar is law enforcers who are able to carry out their duties with integrity and dedication. Because as long as the dirty broom has not been cleaned, then any talk about justice will be mere nonsense.²²

Cohabitation has caused unrest in society because it is considered an act that deviates from the values that exist in society, “The act of cohabitation is considered an act that is inappropriate and incorrect to do and contrary to the morals of Indonesian society.” In this regard, it is emphasized that indeed the act of cohabitation is an act that deviates and contradicts the values and norms that apply in society. The act of cohabitation is considered as one of the crimes, because it is considered that cohabitation can lead to a new or continued crime (criminogenic factor) such as, abortion, infanticide born unwanted or disposal of babies as a result of the act of cohabitation. As a result, many cases of cohabitation are resolved brutally and vigilante (Eigenrechting) by people who find this case in the place where they live and settle.²³

Research/Analysis on Cohabitation as an Offense

No	Problems	Explanation
1	Problematics of Criminalizing Cohabitation	The criminalization of cohabitation in Article 412 of the New Criminal Code has created pros and cons in the community. This article is considered as a state interference that goes too far in the private affairs of citizens.
2	Violation of Privacy Rights	The criminalization of cohabitation is considered to violate individual privacy rights, as the state enters the realm of citizens' private lives.
3	Discrepancy between Sanction and Offense	Imprisonment or fines for cohabitation are considered disproportionate, as cohabitation is more immoral than criminal.

²² Yady, Abdul Razak, Aswanto. 2015. Problematika Penegakan Hukum di Indonesia Menuju Hukum yang Responsif berdasarkan Nilai-Nilai Pancasila, Hasanudin Law Review. Program Pascasarjana Universitas Hasanuddin. <http://pasca.unhas.ac.id/jurnal/files/699413c70548c75a4d377b0c9a623d8f.pdf> diakses pada tanggal 18 Januari 2023 pukul 16:40 WIB.

²³ Sulistiyono, Budi, and Hari Purwadi, *Op. Cit.*



4	Potential Persecution by the Community	The existence of the cohabitation article may trigger persecution by the community, especially in rural areas, due to a lack of proper legal understanding.
5	Vagueness of Article 412 of the Criminal Code	Article 412 does not specify a time limit or clear criteria for when a person is considered to be cohabiting, so it has the potential to be misused by law enforcement.
6	Impact on prison overcapacity	Criminalizing cohabitation could increase the burden on already overcapacity prisons, as it increases the number of prisoners for cases that do not threaten public order.
7	Horizontal and Vertical Conflict	The regulation of cohabitation creates conflict both horizontally (between citizens) and vertically (between citizens and the state), as it is perceived as state interference in private matters.
8	Incompatibility with Community Values	Indonesia is a multicultural country with diverse values. The criminalization of cohabitation is considered not to pay attention to the diversity of values and norms that exist in society.
9	Potential Discrimination in Law Enforcement	Criminalizing cohabitation has the potential to lead to discrimination in law enforcement, especially against certain groups based on religion, social status, or gender.
10	Unclear Cohabitation Time Limits	The absence of a clear time limit in Article 412 of the New Criminal Code on when a person is considered to have committed cohabitation may lead to legal uncertainty and abuse by law enforcement.

D. Conclusion

The formulation of the social offence of cohabitation in the New Criminal Code has generated various reactions in society, with both proponents and critics. The inclusion of



cohabitation as an offense in the New Criminal Code will cause various problems in society. The criminalization of cohabitation is an illustration of how the state intervenes too far in the personal affairs of its citizens so that the right to privacy is no longer privacy. The incompatibility of sanctions with the characteristics of the offense is also one of the things that needs to be reviewed in formulating cohabitation as a criminal offense with prison sanctions. With the new Criminal Code that contains the criminal offense of cohabitation, it will increase the potential for persecution in the community. As well as the unclear formulation of cohabitation in Article 412 of the new Criminal Code makes the article a rubber article which has implications for existing law enforcement. various existing problems will affect the law enforcement of these rules so that the existing rules are less than optimal and responsive.

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