

Reformulation of Article 412 Law Number 1 of 2023 on Cohabitation from a Legal Certainty Perspective

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ABSTRACT

The criminalization of cohabitation under Article 412 paragraphs (1) and (2) of Law Number 1 of 2023 on the National Criminal Code raises significant juridical concerns, particularly with regard to legal certainty and proportionality. This study focuses on examining the juridical implications arising from the formulation of Article 412 and on proposing an ideal regulatory framework for the criminal offense of cohabitation in Indonesia in the future. Employing a normative juridical research method with statutory and conceptual approaches, this research analyzes the consequences of ambiguous legal formulations, especially the vague elements of "living together as husband and wife outside marriage," the complaint-based nature of the offense, and the unclear limitation of eligible complainants. The findings indicate that these weaknesses undermine the principle of *lex certa*, create risks of multiple interpretations, and potentially lead to selective criminalization and violations of legal certainty. Furthermore, the study argues that such deficiencies place Article 412 within the category of a voidable norm that may be subject to constitutional review. Accordingly, this research proposes a reformulation of Article 412 by clarifying and operationalizing the elements of the offense, restricting the scope of complaint-based prosecution, and explicitly defining the age limits of child complainants, in order to ensure legal certainty, proportionality, and the protection of human rights.

Keywords: Cohabitation, Criminalization, Legal Certainty, Complaint-Based Offense, National Criminal Code.

1. INTRODUCTION

Human behavior continuously evolves and, in certain contexts, manifests in actions that contradict prevailing social norms. Through social interaction, individuals mutually influence one another, resulting in shifts in collective values and behavioral patterns. One increasingly prevalent form of social deviation in Indonesian society is cohabitation, commonly referred to as *kumpul kebo*, which describes the practice of two individuals living together without a legally recognized marital bond. From a sociological perspective, Kingsley Davis explains that transformations in social values often arise from globalization and cultural diffusion, indicating that cohabitation reflects the adoption of Western cultural practices in which unmarried couples reside together under one household. (Davis, 1960).

Within the Indonesian legal system, marriage occupies a fundamental position that extends beyond private relations and encompasses social, moral, and religious dimensions. Law Number 1 of 1974 on Marriage, as amended by Law Number 16 of 2019, defines marriage as a physical and spiritual bond between a man and a woman aimed at forming a happy and enduring family based on belief in God Almighty. Legal recognition of marriage requires both religious validity and state

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registration, as stipulated in Article 2 paragraphs (1) and (2) of the Marriage Law. Accordingly, the lawful acknowledgment of intimate relationships between men and women under Indonesian law is strictly contingent upon the existence of a valid and recorded marriage.

The growing practice of cohabitation stands in direct tension with the normative framework governing marriage in Indonesia. Empirical findings reveal that cohabitation blurs the distinction between lawful and unlawful relationships, particularly within communities that strongly uphold religious values and Eastern cultural norms. (Mahmudzah, 2022). As a result, cohabitation is widely perceived as undermining moral order and deviating from the essential objectives of marriage, namely the formation of a legitimate, orderly, and dignified family structure. This perception has encouraged the State to frame cohabitation not merely as a private moral issue, but as a social phenomenon warranting regulation through criminal law policy. (Rizal, 2020).

State intervention materialized through the enactment of Law Number 1 of 2023 concerning the National Criminal Code, which introduced the criminalization of cohabitation under Article 412 paragraph (1). The provision penalizes individuals who live together as husband and wife outside a lawful marriage. Furthermore, Article 412 paragraph (2) classifies cohabitation as an absolute complaint-based offense, restricting prosecution to complaints submitted by spouses, parents, or children, depending on the marital status of the individuals concerned. This regulatory model reflects an attempt to protect moral values related to marriage while simultaneously limiting excessive state intervention and preventing vigilantism within society. (Islamy & Katimin, 2021).

Nevertheless, the formulation of Article 412 gives rise to significant juridical implications, particularly in relation to legal certainty. The provision does not clearly define the constituent elements of the phrase “living together as husband and wife,” leaving uncertainty as to whether it refers to shared domicile, sexual relations, social interaction, or other objective indicators. Such indeterminacy contradicts the principle of *lex certa*, which requires criminal norms to be formulated clearly and precisely to ensure predictability and to prevent arbitrary law enforcement. (Iskandar, 2024). Additional ambiguity emerges from Article 412 paragraph (2)(b), when read in conjunction with Article 411 paragraph (2), which establishes only a minimum age threshold of sixteen years for children entitled to submit complaints, without specifying a maximum age limit. This absence potentially broadens the scope of criminalization and places parents and adult yet unmarried children in legally vulnerable positions. (Putri, 2022).

These normative deficiencies demonstrate that Article 412 of the National Criminal Code does not merely raise issues at the level of moral regulation, but also produces concrete juridical



implications that affect the predictability, fairness, and consistency of criminal law enforcement. A criminal provision that lacks clarity in its essential elements risks undermining legal certainty and weakening the function of criminal law as an instrument of social regulation. Accordingly, Article 412 warrants in-depth juridical analysis focusing on its legal implications and the formulation of an ideal regulatory framework for the criminal offense of cohabitation in the future. Normative clarification and potential reformulation are therefore necessary to ensure that the regulation of cohabitation aligns with the principles of *lex certa*, due process of law, proportionality, and the protection of human rights within Indonesia's constitutional legal order.

2. RESEARCH METHOD

This study employs a normative or doctrinal legal research method that focuses on the analysis of legal norms, principles, and doctrines in order to address the legal issues under examination. Normative legal research is *sui generis* in nature, as it emphasizes the prescriptive dimension of law and examines what the law ought to be rather than merely describing empirical social facts. (Marzuki, 2010). The research applies a statute approach by examining constitutional provisions and statutory regulations governing marriage and the criminalization of cohabitation, as well as a conceptual approach by analyzing legal doctrines and principles developed within criminal law theory. (Hadjon et al, 2005; Mertokusumo, 2014). Primary legal materials consist of legislation and official legal documents, while secondary legal materials include legal textbooks and scholarly journals that provide interpretation and doctrinal explanation of positive law. (Efendi & Ibrahim, 2016). Legal materials are collected through library research and analyzed prescriptively using purposive interpretation to construct systematic and coherent legal arguments regarding the definition, *ratio legis*, and juridical implications of the criminalization of cohabitation under Indonesian criminal law. (Kurnia et al, 2013).

3. RESULTS AND DISCUSSION

Problems and Implications of Regulations on the Crime of Cohabitation in the National Criminal Code

a. Problematics of the Regulation of Cohabitation under Article 412 National Criminal Code

The regulation of cohabitation under Article 412 of the National Criminal Code constitutes part of Indonesia's criminal law reform aimed at reaffirming moral, social, and cultural values living within society. Cohabitation is normatively understood as living together between a man and a woman without a lawful marital bond, and its placement within the chapter on crimes against



decency indicates that the state perceives such conduct as extending beyond the private sphere into the realm of public morality. (Setyawan, 2025). This classification reflects the view that decency norms function as collective values rooted in religion, custom, and national philosophy. (Gugu, 2025).

Article 412 paragraph (1) stipulates that “Every person who lives together as husband and wife outside a lawful marriage shall be punished with imprisonment for a maximum of six months or a fine of Category II” based on UU No. 1 of 2023. Paragraph (2) further limits prosecution to a complaint submitted by certain parties, namely spouses, parents, or children, depending on marital status. The explanatory provision clarifies that “living together as husband and wife outside marriage is known as cohabitation” (Explanatory Notes of Article 412 KUHP). This formulation demonstrates the legislature’s intention to regulate cohabitation as a complaint offense while maintaining moral protection.

Prior to the enactment of the National Criminal Code, cohabitation was not explicitly regulated as an independent offense. Under the former Criminal Code (Wetboek van Strafrecht), law enforcement relied on an expansive interpretation of Article 284 on adultery to address cohabitation practices. This approach generated doctrinal problems, as adultery requires marital status and sexual intercourse as core elements, whereas cohabitation emphasizes sustained co-residence resembling marital life without necessarily involving sexual relations. (Putri, 2022). Consequently, enforcement often resulted in evidentiary difficulties and legal uncertainty. (Nugraha et al., 2025).

The formulation of Article 412 KUHP National was intended to address this normative gap by distinguishing cohabitation from adultery as a separate offense. By constructing cohabitation as an autonomous delict, the legislature sought to enhance legal certainty through more specific and objective elements. This approach reflects an effort to avoid analogical interpretation of criminal norms, which is prohibited under the principle of legality. (Prasetyo, 2010). Nevertheless, the effectiveness of this separation depends on the clarity of the elements formulated.

A fundamental problem arises from the absence of operational criteria for the phrase “living together as husband and wife”. Article 412 paragraph (1) does not specify whether indicators such as shared domicile, duration of cohabitation, sexual relations, social recognition, or domestic role division are required. This vagueness constitutes a normative defect, as criminal norms must define the *actus reus* clearly to satisfy the principle of *lex certa*. (Sudibyo & Rahman, 2021). Without such parameters, law enforcement risks relying on subjective moral judgments. (Darmawan, 2014).



The ambiguity is further exacerbated by the use of the phrase “as husband and wife outside marriage”. Conceptually, the status of husband and wife presupposes the existence of a lawful marriage under Law Number 1 of 1974 on Marriage. Linguistic references in the Indonesian Dictionary (KBBI) also define husband and wife as parties bound by marriage. Consequently, attaching the phrase “outside marriage” to “husband and wife” creates terminological inconsistency and weakens doctrinal coherence (UU No. 1 of 1974).

Another significant problem concerns the complaint-based nature of Article 412. Although complaint offenses are designed to limit state intervention in private matters, the lack of clarity regarding the meaning of “marriage” creates the potential for abuse of the right to complain. Unregistered religious or customary marriages may be treated as “outside marriage,” exposing parties to selective criminalization. (Hufron, 2022). This condition undermines the function of criminal law as ultimum remedium. (Prasetyo, 2013).

Further normative ambiguity arises from Article 412 paragraph (2)(b), which refers to the explanation of Article 411 paragraph (2) defining “child” as a biological child aged at least sixteen years. The absence of a maximum age limit leaves the scope of “child” indeterminate, potentially extending complaint rights indefinitely regardless of legal adulthood or independence. This incomplete formulation contradicts the requirement that criminal norms be clear and precise. (Bachmid, 2025).

From the perspective of legal certainty, such vagueness threatens the predictability of criminal law. Legal certainty requires that individuals be able to foresee the legal consequences of their conduct. Gustav Radbruch emphasized that certainty depends on clear formulation and avoidance of interpretative ambiguity. (Yanuarto, 2023). The indeterminate elements of Article 412 undermine this predictive function and risk inconsistent enforcement.

b. Juridical Implications of Article 412 National Criminal Code

The juridical implications of Article 412 stem directly from these normative deficiencies. Doctrinally, the provision cannot be considered null and void automatically, as Indonesian constitutional law adheres to the presumption of constitutionality. A statutory norm remains valid and binding unless declared unconstitutional by the Constitutional Court. (Asshiddiqie, 2010). Therefore, Article 412 operates as a valid but potentially voidable norm.

The unclear formulation of paragraph (1) directly affects the operation of paragraph (2), as the legitimacy of a complaint presupposes a clear definition of the prohibited act and the harm suffered. When the act itself lacks clarity, the standing of complainants becomes uncertain, generating layered legal uncertainty and opening space for selective enforcement (Sinaga, 2024). This condition contradicts the principle of equality before the law. (Kumendong, 2017).



Jan Michiel Otto's concept of realistic legal certainty reinforces this concern. Otto argues that certainty requires not only written norms but also clarity, consistency, accessibility, and predictable enforcement. Article 412 fails at the substantive level, as vague elements hinder public understanding and consistent application by law enforcement. (Suhartoyo, 2025). As a result, the provision risks diminishing public trust in criminal justice.

In constitutional terms, the ambiguities of Article 412 may form the basis for judicial review before the Constitutional Court under Article 24C of the 1945 Constitution. Should the Court find that the provision violates the principle of the rule of law or the right to fair legal certainty under Article 28D paragraph (1), it may declare the norm unconstitutional or conditionally constitutional. (Saragih et al, 2024).

Accordingly, while Article 412 of the National Criminal Code remains formally valid, its unclear elements, ambiguous complaint mechanism, and terminological inconsistencies produce significant juridical implications. Without authoritative interpretation or legislative revision, the application of this provision risks undermining legal certainty, proportionality, and substantive justice within Indonesia's criminal law system.

Ideal Regulations Regarding Cohabitation Crimes in Indonesia in the Future

Although the regulation of the criminal offense of cohabitation in the National Criminal Code (KUHP Nasional) may be understood as part of criminal law policy aimed at protecting moral values, its normative construction still presents fundamental problems that directly affect legal certainty and the protection of human rights. (Renggong, 2021). The core issue does not lie merely in the policy choice to criminalize cohabitation, but rather in how the norm is formulated and operationalized within the criminal justice system, particularly when vague drafting allows excessive interpretative discretion. (Andre et al., 2024). The formulation stage constitutes the most decisive phase of criminal law enforcement, as it provides the foundational framework for subsequent stages of application and execution. (Renggong, 2021). Deficiencies at this stage may generate systemic consequences that undermine the effectiveness, predictability, and fairness of criminal law enforcement in practice. (Zainuddin et al, 2022).

In line with the view that criminal law formulation represents the most strategic phase of penal policy, reform of the regulation of cohabitation must be directed toward fundamental improvements in legislative drafting techniques. (Andre et al., 2024). Such reform should aim to establish objective, measurable, and rational legal boundaries so that criminal norms do not depend on subjective moral assessments or overly broad interpretations by law enforcement authorities. (Dewi, 2024). Accordingly, the elements of the offense must be formulated strictly and precisely to clearly delineate conduct that genuinely warrants criminal qualification. (Zainuddin et al., 2022).



At the same time, this formulation must distinguish punishable conduct from private behavior that does not cause concrete harm to legally protected public interests, ensuring that criminal law operates selectively and proportionally rather than as a broad instrument of moral control. (Andre et al., 2024).

Table 1. Reformulation of the Regulations on the Crime of Cohabitation in the National Criminal Code

Article	Current Regulation	Main Problematics	Recommended Reformulation
Article 412(1)	“Every person who lives together as husband and wife outside marriage shall be punished with imprisonment for a maximum of six months or a Category II fine.”	(1) Fails to meet the principle of <i>lex certa</i> due to the absence of objective legal indicators of “living together” and “as husband and wife”; (2) The phrase “outside marriage” creates normative conflict regarding whether religious, customary, or registered marriages are included.	“Every person who continuously lives together in one residence as a man and a woman resembling a marital relationship, without a lawful marriage recognized by religion and/or state law, shall be punished with imprisonment for a maximum of six months or a Category II fine.”
Explanation	Cohabitation is defined without operational indicators.	Norm lacks operational guidance for law enforcement.	“Living together resembling a marital relationship refers to a man and a woman who reside together continuously in the same dwelling and perform tangible household functions without a lawful marriage recognized by religion and/or the state.”
Article 412(2)	Prosecution only upon complaint by spouse, parents, or children.	(1) No explicit causal link between complainant status and violated legal interest; (2) No maximum age limit for ‘child’.	Complaint limited to spouse, biological parents, or biological children.
Explanation	‘Child’ is defined only as having reached 16 years of age.	Absence of maximum age causes legal uncertainty.	“‘Child’ refers to a biological child aged 16 to under 18 years and not lawfully married.”

a. Rationalization of the Reformulation of Article 412 Clause (1)

The reformulation of Article 412(1) is primarily intended to address the lack of legal certainty (*lex certa*) inherent in the phrase “living together as husband and wife outside marriage,” which is abstract and normative and lacks empirical indicators for objectively identifying prohibited conduct, thereby opening space for subjective interpretation and excessive criminalization of personal relationships beyond the intended scope of criminal law. (Renggong, 2021). The introduction of the elements “continuously,” “living together in one residence,” and



“resembling a marital relationship” functions to narrow the scope of criminalization by excluding incidental or temporary relationships and by providing verifiable factual indicators for evidentiary purposes, while ensuring that criminal liability targets conduct that substantively imitates the institution of marriage without legal legitimacy rather than private intimacy. (Dewi, 2024).

Furthermore, the addition of the phrase “without a lawful marriage recognized by religion and/or state law” is intended to prevent normative conflict with the Marriage Law, given that marriage in Indonesian law constitutes both a religious and legal institution with juridical consequences, and without such clarification the phrase “outside marriage” could generate divergent interpretations, particularly concerning unregistered religious or customary marriages, thereby undermining normative coherence and legal certainty.

b. Rationalization of the Reformulation of Article 412 Clause (2)

The reformulation of Article 412(2) is intended to reaffirm the personal character of cohabitation as a complaint-based offense by limiting the right to file a complaint exclusively to parties with a direct and concrete legal interest, namely spouses, biological parents, or biological children. This restriction ensures that criminal prosecution is oriented toward the protection of familial morality rather than the enforcement of generalized public morals. (Zainuddin et al., 2022). In addition, the reformulation addresses the normative gap concerning the absence of a maximum age limit for children eligible to submit a complaint. The proposed limitation of the child’s age to between 16 and 18 years and the requirement of unmarried status reflect the special legal protection afforded to minors while preventing the indefinite extension of complaint rights against adults who are socially and legally autonomous. (Ali et al., 2024).

Every criminalization policy must comply with strict standards of legal rationality, including clarity of formulation, proportionality, and the protection of identifiable legitimate legal interests. In the context of Article 412 of the National Criminal Code, the fundamental problem does not lie in the legitimacy of protecting moral values, but in the existing norm’s failure to establish clear, objective, and operational legal boundaries, which undermines predictability and invites excessive interpretative discretion in law enforcement practice. (Andre et al., 2024). Consistent with Hoefnagels’ view that legislative and enforcement policies form an integral part of broader social policy, the reformulation of Article 412 should be situated within a comprehensive criminal policy framework that prioritizes selective criminalization and prevention without punishment. Accordingly, state intervention in the private sphere must remain measured, proportionate, and oriented toward substantive justice rather than moral repression. (Dewi, 2024).



4. CONCLUSIONS

The regulation of the criminal offense of cohabitation under Article 412 of the National Criminal Code is intended to fill the normative vacuum left by the former Criminal Code (WvS) and to clearly distinguish between the offense of adultery and the act of living together as husband and wife outside a lawful marriage. The recognition of cohabitation as an autonomous offense constitutes part of Indonesia's national criminal law reform aimed at enhancing legal certainty through the formulation of a standalone norm. Nevertheless, this study demonstrates that Article 412 still contains significant deficiencies in its material substance, particularly the ambiguity of the phrase "living together as husband and wife outside marriage," the unclear meaning of "husband and wife" and "marriage," and the absence of objective normative indicators. These weaknesses prevent the fulfillment of the principle of *lex certa* and create room for multiple interpretations, a condition exacerbated by the classification of cohabitation as a complaint-based offense, especially regarding the legitimacy of complainants and the vague definition of "child," which is limited only by a minimum age without a maximum threshold. As a result, the objectives of legal certainty are not achieved, placing Article 412 paragraphs (1) and (2) in the category of voidable norms that may be subject to constitutional review before the Constitutional Court.

Based on these findings, this thesis recommends a reformulation of Article 412 of the National Criminal Code by clarifying and operationalizing the elements of the offense in a more precise manner. Article 412 paragraph (1) should be revised to explicitly include elements of continuity, shared residence, and the performance of household functions resembling the institution of marriage, accompanied by a clear affirmation of the absence of a lawful marriage recognized by religion and/or state law, and supported by explanatory provisions that function as concrete evidentiary guidelines to ensure compliance with the principle of *lex certa*. Furthermore, Article 412 paragraph (2) should be reaffirmed as a personal and limited complaint-based offense by restricting the right to complain to parties with a direct legal interest, namely spouses, biological parents, or biological children, and by explicitly defining the age of the child complainant as between 16 and under 18 years old and unmarried, in order to ensure legal certainty and prevent disproportionate criminalization.

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