

Criminal Law Policy in an Effort to Hand the Criminal Act of Cohabitation Without Marriage Family from the Perspective of Indonesian Criminal Law Reform

Adhi Priyotomo Aadilah ¹⁾ & Eko Sopyono ²⁾

¹⁾Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia, E-mail: adhipriyotomoaadilah.std@unissula.ac.id

²⁾Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia, E-mail: ekosopyono@unissula.ac.id

Abstract. *The rapid evolution of criminal behavior has drawn considerable public attention to the issue of cohabitation without legal marital ties. Up to the year 2025, criminal law policy in Indonesia has not yet specifically regulated the criminal act of cohabitation. However, in its development, the practice of cohabitation has undergone significant changes in both form and manner. This legal study addresses two main issues: first, how criminal law policy regulates the criminal act of cohabitation under the current Indonesian positive law; and second, how criminal law policy should address the criminal act of cohabitation from the perspective of Indonesian criminal law reform. This research employs a normative juridical method to answer both of these issues. The data collection method used is a literature study based on primary legal materials. The findings of the study indicate that, to date, criminal law policy concerning the offense of cohabitation has not been expressly regulated and has only been associated with offenses against decency or adultery. However, in the upcoming Indonesian Criminal Code (Law No. 1 of 2023), specifically Article 412, there is a provision that regulates the criminal act of cohabitation, which can serve as a legal basis for law enforcement in handling this offense. In the future, the idea of criminal law reform through the reformulation of provisions on the criminal act of cohabitation should involve classifying cohabitation as an ordinary offense and imposing heavier criminal sanctions, while taking into account sociological, historical, and comparative approaches.*

Keywords: *Criminal Law Policy; Criminal Law Reform; Cohabitation.*

1. Introduction

The Unitary State of the Republic of Indonesia is a state of law, as stated in Article 1 paragraph (3) of the Constitution of the Republic of Indonesia, which explains that a state of law is a state that has binding regulations and provides strict sanctions for any violations. This means that in carrying out aspects of life, it must be based on law and statutory regulations and their derivatives with the aim of guaranteeing justice for all levels of society so that the law is created to humanize humans.

Human-made laws, particularly those in Indonesia, are inseparable from the norms, values, and culture of the Indonesian nation itself. Indonesia, as a great nation, is renowned for its rich culture and upholds moral values in its daily life. However, a new phenomenon in society is emerging: sexual crimes. One such violation is the act of a man and a woman living together without the bonds of marriage, known as cohabitation.

Historically, the Criminal Code that is in force to date (2025), namely the Republic of Indonesia Law No. 1 of 1946 concerning Criminal Law Regulations in Indonesia or our Criminal Code, which is a "legacy" of the colonialists (the Netherlands), has not threatened with criminal sanctions against people who have sexual relations outside of a legal marriage, if it is done by an adult or both parties are not bound by marriage to another person and is done without coercion.¹ However, in the Draft Law on the Criminal Code which has been approved and ratified as Law of the Republic of Indonesia No. 1 of 2023 concerning the Criminal Code (which will only come into effect in 2026), namely Article 412 of the Criminal Code regulates the act of living together without the bonds of marriage by requiring the qualification of the criminal act to be a complaint offense and the threat of punishment which is still considered low gives rise to a sense of inequality of justice in society.

So far, in some rural areas there are still many couples who live together without marriage so that this creates an anomaly in community life at the village level, also in some places with the act of living together without marriage will form the assumption of "disease" in an area, but unfortunately with the current criminal law, people at the village level cannot do anything, especially in terms of reporting, so that often what happens is punishment. This takes the form of social norms that reject the moral and ethical violations of cohabitation. The response from communities in these remote areas is quite firm, with cohabitants often being apprehended by officers (Hansip) and by residents disturbed by the immoral behavior.² However, the opposite condition occurs in urban areas which are more individualistic and allow this cohabitation.

¹Sudarto, *Criminal Law and the Development of Society*, (Bandung: Sinar Baru, 1983), p. 53

²Barda Nawawi Arief, .2005, *Criminal Law Anthology*, Alumni, Bandung, p. 9

Based on these phenomena and the societal response to cohabitation, it is clear that there are differing views on cohabitation from both rural and urban perspectives. These differing views are based on the values held by particular communities. Values, as a view held firmly by a community, can naturally vary and are influenced by many factors. Considering these two phenomena and the differing societal responses, moral norms alone are insufficient to address cohabitation, necessitating the need for a criminal law policy regarding cohabitation as a means of protecting the interests of society as a whole.

Faced with such problems, many parties have proposed that sexual crimes, such as cohabitation, be prohibited and subject to criminal sanctions. The imposition of criminal sanctions for cohabitation should still take into account the religious and sociocultural aspects of the Indonesian nation. This is deemed necessary because many people have been disturbed by the lack of action by law enforcement officials against perpetrators of adultery, particularly cohabitation.

Cohabitation has long been associated with the crime of adultery, but in reality, cohabitation encompasses a broader scope than adultery or other indecent acts. Cohabitation fundamentally contradicts deeply held and lived values within society. These values, embedded within society, believe that living together between two adults of different sexes must be bound by the bonds of marriage. Marriage is essentially a sacred bond (containing religious values) that forms the basis for a happy and prosperous family, both physically and spiritually. Therefore, within the realm of legal norms, it is necessary to regulate this cohabitation, namely through a step called criminal law policy.

The basic rules of Indonesian criminal law currently in force (before the enactment of Law of the Republic of Indonesia No. 1 of 2023 concerning the Criminal Code in 2026) are historically Dutch-made for their colony (the Dutch East Indies/Indonesia). The Criminal Code is enforced based on the principle of concordance. As a product of colonial law, this Dutch-inherited Criminal Code is based on values that differ from those lived by Indonesian society. One of these is cohabitation. The Dutch-made Criminal Code does not regulate it, this is due to the liberal ideology it adheres to as a western nation. As an adherent of liberalism, the Netherlands certainly provides the broadest possible freedom for the lives of its citizens.

Therefore, seeing the phenomena that occur in Indonesian society, legal reform, especially in the context of criminal law reform, needs to be based on the national spirit and values that are firmly held in the life of society as a whole in order to realize justice for all people. A Dutch literature entitled *Rechts als model van rechtvaardigheid* states that efforts to realize justice are very meaningful instruments/tools in implementing legal rules. This is enough to describe that if

the Indonesian state is called a state of law, then *mutatis mutandis* we say that the law is a rule of just law or fair law.³

2. Research Methods

Method The approach used in writing this law is normative juridical, namely research conducted based on secondary data. In this study, data was obtained from library research using a juridical approach method, namely analyzing the problem from the perspective/according to applicable legal/legislative provisions.⁴ This research was conducted with the aim of understanding legal materials which include legal principles, legal rules, and statutory regulations,⁵ which is related to the renewal of criminal law policy regarding the crime of cohabitation (Cohabitation) in Indonesia.

3. Results and Discussion

3.1. Criminal Law Policy Regarding the Crime of Living Together Without Marital Bonds (Cohabitation) in Current Indonesian Positive Law

Humans are social creatures with the understanding that in everyday life humans cannot live alone (they need other people) so it is not imaginary because it is based on the inner nature of humans, one of which is human sexual desire will always want to be close to the opposite sex, but in everyday life and social life, every human being lives side by side with various rules that are strictly adhered to by society. Therefore, in fulfilling their sexual desires, humans are regulated and limited by the rules made by the society. These rules have provided guidelines or instructions on what can be done, what must be done, and what is prohibited or should not be done.

Nowadays, cases of couples cohabiting freely are common. They reflect the current reality, often engaging in actions that exceed appropriate boundaries. As this phenomenon becomes more widespread, people's lives are increasingly disrupted and their daily routines become more uncomfortable. Legally, there are currently no clear criminal laws that threaten someone living together in the same house without a valid marriage, especially for those who are both unmarried.

Cohabitation is literally called *Samenlaven* in Dutch, while in modern terms it is also known as *Living Together*. In Indonesian, "Cohabitation" is a phrase derived from a term coined by traditional Javanese society. This term refers to a man and

³Budi Sulistiyono, Hari Purwadi, and Hartiwiningsih, "The Urgency of Criminalizing Cohabitation in Indonesian Criminal Law," *Journal of Law and Economic Development*, Vol. 6, No. 2, 2017, p. 169.

⁴Salim HS and Erlies Septiana Nurbani, *Application of Legal Theory in Thesis and Dissertation Research*, (Jakarta: RajaGrafindo Persada, 2013), page 12.

⁵Soerjono and Sri Mamudji, *Normative Legal Research: A Brief Review*, (Jakarta: PT Raja Grafindo Persada, 2014), p.1.

a woman who live together in one house without the bonds of marriage. This concept originates from a metaphor: if two lovebirds live together without the bonds of marriage and engage in sexual intercourse, they are likened to buffalo, which do not require a legal marriage to engage in sexual intercourse.

In fact, current law enforcement in Indonesia is not feasible if it uses criminal sanctions to address cohabitation. This is because if a cohabitation case is discovered and then brought to court, law enforcement will face difficulties, as there is no single article in the Criminal Code or any other statutory regulation that clearly regulates cohabitation, known as a legal vacuum. Some regulations that are closely related to cohabitation in criminal law (the current Criminal Code) include:

Article 281

Threatened with a maximum prison sentence of two years and eight months or a maximum fine of four thousand five hundred rupiah:

1. anyone who intentionally and openly violates morality;
2. whoever deliberately and in front of other people is there against his will, violates decency.

In the application of the article regarding this crime, it states that the acts that fall into the criminal act are acts related to sexual relations between women and men, carried out to increase desire or excitement, openly interpreted as acts carried out in a place that can be seen by many people or a place that can be visited by the public or a location that can be seen, heard, or witnessed by many people, both those in that place and in other places, considered as excessive actions, and can make other people feel uncomfortable or embarrassed. However, even though it is related to the crime of Cohabitation, this regulation is still too far from the reality of life, the crime of Cohabitation is carried out by living together consecutively and sometimes as if hidden so that therefore the elements in this regulation still do not cover as much as the acts in the crime of Cohabitation.

Another regulation closely associated with the crime of cohabitation is the crime of adultery. Adultery itself is the act of sexual intercourse between a man and a woman who are not married or not legally married. This is regulated and then analyzed as per Article 284 of the Criminal Code, which reads:

Article 284 of the Criminal Code:

- 1) "Threatened with a maximum prison sentence of nine months:

1. a. a married man who commits adultery, even though it is known that Article 27 of the Civil Code applies to him;

a married woman who commits adultery, 2nd. a. a man who participates in the act, even though he knows that the other person is married;

b. an unmarried woman who participates in committing the act, even though she knows that the person who is also guilty is married and Article 27 BW applies to her.

2) No prosecution is carried out except upon a complaint from the husband/wife who is being sullied, and if Article 27 of the Civil Code applies to them, within three months this is followed by a request for divorce or separation from bed and board for that reason as well.

Below, we will explain each section of Article 284 of the Criminal Code one by one:

a) Article 284 paragraph 1

Article (1) of Article 284 of the Criminal Code consists of two numbers, each consisting of two letters, namely:

a. a married man who commits adultery, even though it is known that Article 27 of the Civil Code applies to him.

b. a married woman who commits adultery,

In this first provision it can be interpreted that a man can be accused of committing adultery if:

a. The man is married;

b. The man was aware that Article 27 BW applied to him.

In the formulation of the criminal provisions regulated in Article 284 paragraph (1) number 1 letter a, the law requires that the perpetrator know that the provisions regulated in Article 27 of the Burgerlijk Wetboek apply to a man who has committed adultery with a female perpetrator.

Article 27 Burgerlijk Wetboek (BW) is intended as follows:

"At the same time, a man is only allowed to have one woman as his wife, a woman only one man as her husband."

This article is one of the elements of the crime of adultery, if in the court examining the perpetrator's case, knowledge of the application of Article 27 BW cannot be proven by the public prosecutor or the judge, then the judge must give an acquittal or *vrijspraak* verdict against the perpetrator. However, the application of this element occurs when a man is subject to the application of the BW book on himself. In addition, the formulation of Article 27 BW adheres to the

principle of absolute monogamy, where this article only applies to Indonesian citizens whose religion adheres to the principle of absolute monogamous marriage.⁶Meanwhile, for Indonesian citizens who are Muslim, the principle of open monogamy applies.⁷This open monogamy allows for a husband practicing polygamy as long as it meets the conditions stipulated in the law, especially in the Law on Marriage. However, if there is a possibility that Article 27 BW does not apply to a man, then the man can be charged with Article 284 paragraph (1) number 2 letter a of the Criminal Code, namely if the man knows that the woman who committed adultery with him is married to another man, where this provision does not require the woman to be subject to Article 27 BW.

Article 284 paragraph (1) number 1 letter b stipulates a prohibition for married women to commit adultery with a man. This can be interpreted as meaning that the only element that a woman can be accused of committing adultery is if she is bound by a marriage, so there is no requirement that the woman must comply with Article 27 BW as is required of a man.

2nd a. a man who participates in the act, even though he knows that the other person is married.

Article 284 paragraph (1) number 2 letter a above regulates the prohibition of a man from committing adultery with a woman who is bound by marriage, where in this provision a man can be threatened with nine months in prison on the basis of having participated in (medepleger) adultery if:

- 1) The man is not married to another woman, or is married but Article 27 BW does not apply to him.
- 2) The man knew that the woman he was with was already bound in marriage.

In the provisions of this article, there is no requirement that the woman is bound by Article 27 BW.

Article 284 paragraph (1) number 2 letter a also requires that a man must know that the woman he has committed adultery with is bound by a marriage.

2. b. an unmarried woman who participated in the act, even though she knew that the person who was also guilty was married and Article 27 BW applied to her.

Article 284 paragraph (1) number 2 letter b stipulates a prohibition for an unmarried woman to participate in adultery with a man, who she knows is bound in a marriage to another woman and the provisions regulated in Article 27 of the Civil Code apply to the man.

⁶ Absolute monogamy is a condition where there is only one partner in a marriage system.

⁷ Neng Djubaedah, Op.cit. p.72

The provisions of this article also require the woman to have knowledge. This is almost the same as Article 284 paragraph (1) number 1 letter a, but in this case, the woman must know that Article 27 of the Civil Code applies to the man. If it is later proven during the court hearing in the case that the woman did not know, the judge must issue an acquittal (*vrисpraak*) for the woman.

Based on the formulation of the criminal provisions regulated in Article 284 paragraph (1) number 1 letters a and b of the Criminal Code above, people can see that only married men and women can commit adultery, while unmarried men and women, according to the formulation of the criminal provisions regulated in this article, are only seen as people who participate in committing adultery by married people.

Article 284 paragraph (1) of the Criminal Code stipulates that the crime of adultery or *overspel* is an *opzettelijk delict* or a crime that must be done intentionally. The element of intention must be proven in the perpetrator, so that it can be declared proven to have fulfilled the element of intention in committing one of the crimes of adultery from the crime of adultery regulated in Article 284 paragraph (1) number 1 letter a or b and number 2 letter a or b of the Criminal Code.

b) Article 284 paragraph (2) of the Criminal Code

The text of Article 284 paragraph (2) of the Criminal Code is as follows:

"Prosecution is not carried out except upon the complaint of the husband/wife who is being sullied, and if Article 27 of the Civil Code applies to them, within three months it is followed by a request for divorce or separation - table and bed for that reason too."

In the provisions stipulated in Article 284 paragraph (2) of the Criminal Code, it is stipulated that perpetrators of the crime of adultery as stipulated in Article 284 paragraph (1) can only be prosecuted or prosecuted if the husband and wife, as subject to Article 27 BW, within three months the complaint must be followed by a request for divorce or separation from bed and table, which occurs as a result of the adultery.

The wording of Article 284 paragraph (2) of the Criminal Code means that the crime of adultery in this Criminal Code is an absolute complaint crime (*absolute klachtdelicten*), meaning that the crime of adultery under any circumstances is a complaint crime where the complaint is filed by the husband/wife. The reason for prosecution of the perpetrator of the crime of adultery by law is dependent on the existence of a complaint from the party who feels that he/she has been harmed by the perpetrator's actions.

Apart from that, another reason for making the crime of adultery a crime is that the perpetrator can only be prosecuted if there is a complaint, because if the party who feels aggrieved by the perpetrators does not have the desire to file a divorce suit from the dining table and bed, then there is no strong basis for giving the party the authority to ask the state apparatus so that the parties who have caused the loss can be prosecuted through criminal law.

The absolute complaint offense in this crime of adultery has an unsolvable nature or has an onsplitsbaar nature which means that the prosecution does not only apply to the person named by the complainant, but also to other people as participants in the crime even though their names are not mentioned in the complaint. For example, a husband who has reported to the police about the act of adultery that has been committed by a man with his wife with a request that the man be prosecuted for violating Article 284 of the Criminal Code. Because the act is an absolute complaint offense, even though his wife is not mentioned in the complaint, perhaps because of his love for his wife, the complaint also applies as a complaint to his wife who has committed adultery with the man.⁸

Law enforcement officers have the authority to conduct investigations not only against the person whose name has been mentioned by the complainant in his complaint, but also against other people involved in the crime in question. This was stated by the Hoge Raad in its decision dated 24 October 1932, NJ 1932 page 379, W.12557, among other things, deciding that:⁹

"This crime can only be prosecuted upon a complaint, not because of any personal relationship between the offended person and the perpetrators, but rather because of the specific nature of this crime. Anyone involved in it in any form of participation, including those who encouraged the perpetrators to commit this crime, can only be prosecuted upon a complaint."

This shows that later the complaint can also concern people who have a role in the occurrence of the crime of adultery, such as the person who ordered it to be done (doen plegen), the person who participated in it (medeplegen) or the person who encouraged (uitlokken) the complainant's wife or husband to commit adultery with a woman or the person who provided assistance, so that adultery could occur.

Article 284 paragraph (4) of the Criminal Code reads as follows:

"This complaint can be withdrawn as long as the examination in the trial has not yet begun."

⁸Lamintang, *Basics of Indonesian Criminal Law*, (Sinar Grafika: Jakarta, 2016) p. 207

⁹Lamintang, *Special offenses for crimes violating moral norms & norms of propriety*, Op.cit, p.89

This article provides an opportunity for the party complaining of adultery to withdraw their complaint. The law stipulates that withdrawal of a complaint is permitted until the court hearing has begun or before the first hearing. However, in practice, before the hearing begins, the judge will question the complainant once more regarding the clarity or sufficiency of their complaint. If the complaint remains unanswered, a new initial hearing may begin.

The beginning of the examination, namely the court examination regarding the crime of adultery, where at the beginning the presiding judge will open the trial and declare the trial to be open and closed to the public because the crime of adultery falls into the category of morality. This is regulated in Article 153 paragraph (3) of the Criminal Procedure Code which reads:

" For the purposes of the examination, the presiding judge opens the trial and declares it open to the public except in cases concerning morality or where the defendant is a child.

In this case, it is then explained in the next verse that if at the beginning of the examination the judge forgets or neglects to convey it, this will result in the decision being cancelled by law.

In the provisions regulated in Article 284 (5) of the Criminal Code, the law has basically determined that if for a husband and wife whose harmony or household harmony has been disturbed by an incident of adultery committed by one of the parties between them (either the husband or the wife who committed it), the provisions of Article 27 of the Civil Code apply, then the complaint from the party who feels aggrieved will not proceed if it is not accompanied by a divorce decision from the court related to their marital bond or it can also be said that if the divorce application from the dining table or bed submitted to the court does not have permanent legal force (*inkracht van gewijsde*).

Regarding Article 284 paragraph (5) of the Criminal Code, according to Simons, the provisions of Article 274 paragraph (5) of the Criminal Code are new provisions added to the *Wetboek van Strafrecht* by Law dated January 16 1886, namely before the *Wetboek van Strafrecht* was formed in 1881 and was effectively implemented in the Netherlands in 1881.¹⁰

In terms of criminal liability in Article 284 of the Criminal Code, liability is related to the subject of the crime, namely a human being as the individual where the human being is held responsible for his mistakes or the principle of culpability. Article 284 of the Criminal Code requires that the crime of adultery must be committed intentionally. Although in the Criminal Code there is no explanation whatsoever about intention, there is a little explanation in the *Memorie van Toelichting* (MvT) that intentionally committing a prohibited act is "willed" and

¹⁰Simons in the book Lamintang, Op.cit, p. 92

"knowing".¹¹ In relation to the regulation regarding adultery in Article 284 of the Criminal Code, the element of "intended" in this intentional means that the act of adultery committed with the opposite sex is an act that is desired, while the element of "known" means that he actually knows that Article 27 of the Civil Code binds him.

If we look more deeply into the analysis of Article 284 of the Criminal Code, the act of adultery, which is currently identified as an act similar to cohabitation, has a narrower scope because it has the meaning as a form of protection for marriage, namely respecting the bonds of marriage in which one or both parties have been bound in a temporary sacred bond, while cohabitation is actually broader in scope than the act of adultery or other indecent acts. This is because the act of cohabitation is an act of adultery that is committed repeatedly or continuously with the same partner. This is different from the act of adultery that is only done once. In addition, cohabitation can also require that the couple be bound by one or both parties in marriage or both parties are single (the relationship between the two parties is not legally bound as husband and wife).

Given the lack of clear regulations governing the crime of cohabitation, this has created confusion among law enforcement officials in each region. The only regulations that can be used to address this issue are those governing minor crimes, such as the Regional Regulation on Public Order and Security or the Regional Regulation on Immoral Acts. However, not all regions have such regulations, and each region has its own regulations that vary. In the applicable Regional Regulations on Public Order and Security or Immoral Acts, some regulate cohabitation, but others do not mention it.

One of the areas that regulates the crime of cohabitation is the Batam area, based on Regional Regulation No. 6 of 2002 concerning "Social Order". The rules regarding the act of gathering in the form of a buffalo are regulated in Article 7 paragraph (3), which reads:

"Every person of the opposite sex is prohibited from living and/or residing under one roof as husband and wife without being bound by a legal marriage based on the Law. Regarding criminal provisions, this is contained in Article 16 paragraph (1) which reads: "Violations of the provisions in this Regional Regulation are punishable by imprisonment for a maximum of 3 (three) months and/or a maximum fine of Rp. 5,000,000 (Five Million Rupiah).

The applicable criminal law policy regarding the crime of cohabitation when viewed from the existing legal system theory, according to Lawrence M.

¹¹Lamintang, Basics of Indonesian Criminal Law, Op.Cit p. 268

Friedman, this legal system is studied into three interrelated elements, namely legal substance, legal structure, and legal culture.¹²

3.2. Criminal Law Policy Regarding the Crime of Living Together Without Marital Bonds (Cohabitation) from the Perspective of Criminal Law Reform

1. Criminal Law Policy on Cohabitation Crimes in Other Countries (Comparative Study of Other Countries)

Comparative law plays a vital role in both national and international law. It offers numerous benefits, including its importance in international relations, particularly in law enforcement. According to Randall, the purpose of comparative law is to gather information on foreign law and to explore the experiences gained in foreign legal studies for legal reform.¹³ One piece of information available regarding foreign law concerns the crime of cohabitation. In several countries, such as the Netherlands and Turkey, many of the provisions regarding this crime have been abolished, for various reasons, such as the fact that sex is a private matter. (Thus, there is enforcement of human rights for individuals), and the application of criminal sanctions is considered ineffective, especially after a divorce. However, several countries still regulate policies regarding the formulation of adultery crimes in their national criminal codes, including:

a. Yugoslavia Criminal Code (until 2003)

The Criminalization Policy of "Cohabitation" in Yugoslav legislation Article 193 states that:

- 1) Children who have reached the age of 14 years are subject to a sentence of not less than 3 months in prison;
- 2) The same penalty is also imposed on parents or guardians who allow or encourage/persuade children over 14 years of age to cohabit with other people;

From the explanation of the article above, it is clear that the policy on cohabitation in Yugoslavia stipulates that the perpetrators of this act can be adults with children over the age of 14. In this case, parents or guardians who permit, encourage, or invite children over 14 to cohabit with another person will also face legal sanctions. Moreover, if this act is carried out for personal gain, the penalties will be even more severe.

b. Singapore and Malaysian Criminal Code

¹²Lawrence M. Friedman, *Op cit*, p.12

¹³Munir Fuady, *Comparative Legal Studies*, (Refika Aditama: Bandung, 2007) p. 19

In Chapter XX on "Offences Relating to Marriage", there is an Article that threatens criminal penalties. There is a provision that threatens penalties for a man who lives with a woman as a married couple (cohabitation), or who has sexual relations with a woman who, due to being deceived, believes that she (the woman) is legally married to the man. (Article 493) In Article 493 of the Singapore Penal Code which reads:

"Any man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to a fine." Which means: "Any man who by deceit causes a woman who is not his lawful wife to believe that she is his lawful wife, and to cohabit or have sexual intercourse with her based on that belief, shall be punished with imprisonment for not more than ten years and also a fine."

Then in the Malaysian Tort Code (KUHP) Article 493 regulates: Any man who, through deception, causes a woman who is not legally married to him under the law to believe that the woman is married to him legally according to the law and to enter into marriage or have sexual intercourse with him based on that belief, shall be tortured by imprisonment for a period which may be up to twenty (sic.) years, and fines may also be imposed." Which means: "A man who, by deceiving or deceiving a woman who is not legally married to him, into believing that she is legally married to that man, and living together or having sexual intercourse with him based on that belief, is threatened with imprisonment for not more than 20 (sic. 10 years) and also a fine."

Therefore, based on the formulation of articles in the Singapore and Malaysian Criminal Codes, the act of cohabitation is a clear and obvious crime that is punishable by imprisonment.

1. Criminal Law Policy on Cohabitation Crimes (Cohabitation)

Indonesian criminal law is a legal legacy from the Dutch colonial era, during their attempts to colonize Indonesia. Over time and through a fierce struggle, the Indonesian people declared themselves independent on August 17, 1945. Therefore, Indonesian criminal law should be a product of the Indonesian people themselves. However, in reality, Indonesian criminal law still uses the Dutch legacy. Politically and sociologically, the implementation of this Dutch legacy is no longer in line with the values of society, so it is important to reform the criminal law to align it with the values of the Indonesian nation, especially the values of Pancasila.

One of the regulations that received the criminal law update is regarding the crime of cohabitation. The regulation regarding Cohabitation itself is in Law of the Republic of Indonesia No. 1 of 2023 concerning the Criminal Code. Although

this Law has been stipulated and enacted on January 2, 2023 (*de jure*), but *de facto* (in reality) as stated in Article 624 of Law of the Republic of Indonesia No. 1 of 2023 concerning the Criminal Code, especially the regulation regarding the crime of cohabitation will only come into effect on January 2, 2026 (3 years after its enactment) therefore the author includes the regulation regarding the crime of cohabitation in Law of the Republic of Indonesia No. 1 of 2023 concerning the Criminal Code as a regulation that will apply to the future Criminal Code.

The regulations regarding cohabitation are regulated in the fourth part regarding adultery, namely in Article 412 as follows:

Article 412

(1) Any person who lives together as husband and wife outside of marriage shall be punished with a maximum prison sentence of 6 (six) months or a maximum fine of category II.

(2) No prosecution shall be carried out for criminal acts as referred to in paragraph (1) except upon a complaint from: a. husband or wife for people who are married; or b. parents or children for people who are not married.

Next, the formulation of the criminal act of cohabitation in Law No. 1 of 2023 will be explained as follows:

From the formulation of the article above, the elements can be explained as follows:

1. Every person, meaning an element of the crime which is a part of the core crime, which in this case can be interpreted as a living creature (human individual), both male and female, without mentioning age limits in it.
2. Living together as husband and wife, meaning that they sleep together under one roof (house / boarding house / hotel room / etc.)

Below, we will explain each section of Article 412 of Law No. 1 of 2023 one by one:

a) Article 412 paragraph (1) of the Republic of Indonesia Law No. 1 of 2023

In the formulation of criminal provisions regulated in Article 412 paragraph (1), the law has determined the prohibition for a man and woman to act as husband and wife but they do not have a marriage bond. This can be interpreted as the element of "outside of marriage" being the main element because many people claim to have been married both religiously and statelily but in fact they cannot be proven to be husband and wife, they gather or live for days to have sexual intercourse or intercourse.

Article 412 paragraph (1) of the Criminal Code stipulates that the crime of cohabitation is an *opzettelijk* delict or a crime that must be committed intentionally. The element of intent must be proven in the perpetrator, so that it can be declared proven that the element of intent has been fulfilled in committing one of the crimes of cohabitation.

b) Article 412 paragraph (2) of the Republic of Indonesia Law No. 1 of 2023

Article 412 paragraph (2) reads as follows:

"(2) No prosecution shall be carried out for criminal acts as referred to in paragraph (1) except upon a complaint from: a. husband or wife for people who are married; or b. parents or children for people who are not married."

In the provisions stipulated in Article 412 paragraph (2), it is stipulated that the perpetrator of the crime of cohabitation as stipulated in Article 412 paragraph (1) can only be prosecuted or prosecuted if they are husband and wife, parents or children (if not bound by marriage). The deadline for complaints as per Article 29:

- 1) 6 (six) months from the date the person entitled to complain becomes aware of the existence of a criminal act if the person entitled to complain resides in the territory of the Unitary State of the Republic of Indonesia; or
- 2) 9 (nine) months from the date the person entitled to complain becomes aware of the existence of a criminal act if the person entitled to complain resides outside the territory of the Unitary State of the Republic of Indonesia.

The text of Article 412 paragraph (2) of the Criminal Code means that the crime of adultery under Law of the Republic of Indonesia No. 1 of 2023 is an absolute complaint offense (*absolute klachtdelicten*), meaning that the crime of adultery under any circumstances is a complaint offense where the complaint is filed by the husband/wife/parent/child. The reason for the prosecution of the perpetrator of the crime of adultery by law is dependent on the existence of a complaint from the party who feels that he or she has been harmed by the perpetrator's actions.

The absolute complaint offense in the crime of adultery has an unsolvable nature or has an *onsplitsbaar* nature which means that the prosecution does not only apply to the person named by the complainant, but also to other people as participants in the crime even though their names are not mentioned in the complaint. For example, a husband who has reported to the police about the act of cohabitation that has been committed by a man with his wife with a request that the man be prosecuted for violating Article 412 of this Law. Because this act is an absolute complaint offense, even though his wife is not mentioned in the

complaint, perhaps because of his love for his wife, the complaint also applies as a complaint to his wife who has cohabited with the man.¹⁴

In exercising their rights and freedoms, every person is obliged to submit to the restrictions established by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and fulfilling just demands in accordance with moral considerations, religious values, security and public order in a democratic society.

So of course the reflection of the meaning of the value of this article is used by law makers to shape the attitude of humans or society towards the law itself, that the form of attitude of society that obeys the law will create balance in society to respect each other.

A good relationship between the three studies of the elements in the legal system, if carried out optimally, can create regulations regarding the crime of Cohabitation in the future that are in accordance with the objectives of the law, especially criminal law, namely to provide justice for all parties. For the general public, they will no longer feel uneasy about actions that are contrary to morality, religion and decency that are polluted or disturbed in their living environment, while it is hoped that the perpetrators of Cohabitation themselves will receive a deterrent effect from the rules imposed on them so that they will not do it again in the future.

Viewed through the theory of criminal law policy, the inclusion of the formulation regarding the crime of Cohabitation in Law of the Republic of Indonesia No. 1 of 2023 is a step by the government to reform criminal law, especially in the Crime of Cohabitation, in order to realize justice based on Pancasila values.

In its operationalization, criminal law policy at the formulation stage shows that the criminal legislation that has been made determines the actions that are prohibited according to criminal law, namely... living together as husband and wife outside of marriage, meaning this is related to the criminalization process that regulates all unlawful acts, how someone can be prosecuted, and the types of sanctions that can be carried out, both in the form of punishment and other actions. After the criminal legislation is formed, it will proceed to the implementation/application stage, namely when the judge can later apply it as...the imposition of appropriate penalties on the perpetrator and this regulation becomes the basis for law enforcement officers such as the police and prosecutors in executing (the police in terms of investigation and inquiry while the prosecutors are in the prosecution and execution phase). Thus, criminal law policy (penal) is needed in overcoming crime, because criminal law is one of the

¹⁴Lamintang, Basics of Indonesian Criminal Law, (Sinar Grafika: Jakarta, 2016) p. 207

means of social policy to channel public dislike or social disapproval/hatred ("social disapproval social abhorrence") which is also expected to be a means of social protection (social defense) and by including the crime of cohabitation in Law of the Republic of Indonesia No. 1 of 2023 is a step taken by the government in providing social protection for Indonesian citizens based on Pancasila values.

Although in the future based on Law of the Republic of Indonesia No. 1 of 2023 the act of cohabitation is included in the formulation of criminal acts, but according to the author it has not maximally created a sense of justice in the midst of society, especially in the formulation requiring the crime of cohabitation to be included in the complaint offense and the threat of imprisonment for 6 (six) months is considered very light for the perpetrator of cohabitation. Based on the analysis of the theory of the legal system based on the social reality that exists in the community, that on average the cohabiting couple enters an area/area that is far from the reach or taboo of their family so that therefore the family (husband/wife/father/mother and child) does not know the actions carried out by the perpetrator so that the people around the area are worried or upset, but with the provisions regarding this complaint offense, local residents cannot make complaints to the police so that in the aspect of legal culture, the reality that will occur will not create a culture to respect the law but instead lead to vigilante actions, this will certainly make it increasingly difficult for the work of the legal structure aspect carried out by law enforcement officers. On the other hand, the maximum prison sentence threatened is only 6 (six) months, which gives the impression that the government is not serious about handling criminal acts, even though Indonesia is known as a country that upholds religious values in daily life, especially regarding the sanctity of marriage, and when compared with Article 411 of the Republic of Indonesia Law No. 1 of 2023 which discusses the crime of adultery, there it regulates the threat of a prison sentence of 1 (one) year, even though this act of cohabitation can occur for days, weeks or even years, while the crime of zina can occur in a short period of time, so that when analyzed through the legal substance aspect, analyzed together through the theory of criminal law policy, it is better if in the future there is a new criminal law policy regarding the crime of cohabitation, it is better if this crime/crime is made as an ordinary crime, this has actually been in the draft of the Draft Law from 2005 to 2015 which states that cohabitation is no longer a complaint offense (*klacht delik*) but is made an ordinary crime. So that in its prosecution no longer wait for a complaint from the injured party, but officers can act before or without a complaint from the injured party as long as the act pollutes the community and the threat of imprisonment for 5 (five) years and a maximum imprisonment of category III because in fact the problem of criminal law policy or making legal substance is not only about making legal rules. When making legal rules/criminal legislation, it is not only done in a normative juridical and dogmatic system, but also requires a legal factual approach that can be a sociological, historical, and comparative approach. In addition, a comprehensive

approach from various other social fields is also needed as well as an integrated approach with social policy and national development in general.¹⁵ So that from a combination of various approaches, regulations can be created that are in accordance with the values that exist in society.

4. Conclusion

Based on the results of the discussion regarding the crime of cohabitation in the previous chapter, the following conclusions can be drawn: 1. Currently, the Criminal Law Policy regarding the crime of Cohabitation in positive law in Indonesia, namely Law of the Republic of Indonesia No. 1 of 1946 concerning the Indonesian Criminal Law Regulations, has not been clearly regulated, but the act of Cohabitation is related to criminal acts of morality and criminal acts of adultery which have the characteristics of individualistic-liberalistic views/paradigms of westerners. 2. The Criminal Law Policy regarding the crime of cohabitation in the reform of criminal law in Indonesia is regulated in Article 412 of Law of the Republic of Indonesia No. 1 of 2023 which is a criminal law policy to realize social protection for Indonesian citizens based on Pancasila values by then providing updated ideas regarding the categorization of the crime of cohabitation into an ordinary crime and the threat of increased criminal law by taking into account sociological, historical, and comparative approaches. In comparative study material, it can be seen that the Criminal Code of Singapore, Malaysia and Fiji places the qualifications for regulating the crime of cohabitation based on the ideology or views of each country.

5. References

Journals:

- Bobi Handoko, Penerapan Sanksi Pidana Adat Terhadap Pelaku Zina di Wilayah Kenagarian Garagahan Kecamatan Lubuk Basung Kabupaten Agam, JOM Fakultas Hukum Volume II Nomor 2 Oktober 2015, hlm.7
- Eko Sponyono. Kebijakan kriminalisasi “ Kumpul Kebo ” Dalam Pembangunan Hukum Pidana Indonesia. Jurnal Hukum. Vol 42. No.2, Juli 2013. 127.
- Handrawan, Sanksi Adat Delik Perzinahan (Umoapi) Dalam Perspektif Hukum Pidana Adat Tolaki, Perspektif, Volume XXI No. 3 Tahun 2016 Edisi September, hlm.207
- Irwansyah, kriminalisasi kumpul kebo (Samen leven) menurut rancangan kitab undang-undang hukum pidana, JOM Fakultas Hukum Volume III No.2 Oktober 2016. hlm.3

¹⁵Barda Nawawi Arief, Anthology of Criminal Law Policy (Development of the Drafting of the New Criminal Code) 2nd edition. Bandung: Citra Aditya Bakti, 2018, p. 24

Laila Mulasari, Kebijakan Formulasi Tentang Tindak Pidana Kesusilaan di Dunia Maya dalam Perspektif Hukum Islam, Jurnal Hukum, Vol.41, Nomor 1,2012,hlm.107

Books:

Abdul Moqsit Ghozali dkk. 2002. Seksualitas dan Kedaulatan Perempuan , Yogyakarta: Rahma.

Amin Suma, Muhammad . 2001. Pidana Islam di Indonesia : Peluang, Prospek dan Tantangan. Jakarta: Pustaka Firdaus.

Aziz Dahlan, Abdul et al. 2006. Ensiklopedia Hukum Islam jilid 2. Jakarta: Ichtiar Baru van Hoven.

Bjubaedah, Neng. 2010 .Perzinaan dalam Peraturan Perundang-undangan di Indonesia Ditinjau dari Hukum Islam. Jakarta: Kencana

C.S.T. Kansil dan Christine S.T. Kansil. 2004. Pokok - Pokok Hukum Pidana : Hukum Pidana Untuk Semua Orang .Jakarta: PT. Pradnya Paramita.

Chazawi, Adami. Tindak Pidana Pornografi, Jakarta:Sinar Grafika.

David, Thomas E. 2012. Nilai-nilai Dasar di dalam Hukum. Yogya : PallMal Yogya

Friedman, Lawrence M. 2009. Sistem Hukum perspektif ilmu sosial. Bandung: Nusa Media.

Fuady, Munir. 2007. Perbandingan Ilmu Hukum. Bandung: Refika Aditama.

Hamzah,Andi. 2001. Perbandingan Hukum Pidana Beberapa Negara (terj). Jakarta:Sinar Grafika.

Huraerah, Abu. 2006 Child Abuse (Kekerasan Terhadap Anak), Bandung: Nuansa.

Husin, Kadri. 2000. Politik hukum. Fakultas Hukum Universitas Lampung.

Lamintang, P.A.F. 2011. Delik - delik khusus: Kejahatan Melanggar Norma Kesusilaan & Norma Keadilan. Jakarta: Sinar Grafika.

Maramis,Frans. 2000. Perbandingan Hukum Pidana. Jakarta: Pusataka Sinar Harapan.

Mertokusumo, Sudikno. 2008. Mengenal Hukum : Suatu Pengantar. Yogyakarta: Liberty.

Moeljatno. 2011. KUHP: Kitab Undang-Undang Hukum Pidana, cet.29, Jakarta:Sinar Grafika.

Muladi dan Barda Nawawi Arief. 2010. Teori-Teori dan Kebijakan pidana. Jakarta:P.T Alumni

Muladi. 2005, Lembaga Pidana Bersyarat, cetakan ketiga. Bandung : Alumni.

Mulyadi, Mahmudi. 2008. Criminal Policy : Pendekatan Integral Penal Policy Dan Non -Penal Policy Dalam Penanggulangan Kejahatan Kekerasan. Medan: Pustaka Bangsa Press.

Nawawi Arief, Barda. 2005. Pembaharuan Hukum Pidana. Bandung: Citra Aditya Bakti.

Poerwadarminta, W.J.S. 2006. Kamus Besar Bahasa Indonesia . Jakarta: Balai Pustaka

Prodjodikoro, Wiryono. 2003. Tindak - tindak Pidana Tertentu Di Indonesia . Bandung: PT. Refika Aditama.

Ramli, Ahmad M. 2004. Cyber Law dan Haki – Dalam Sistem Hukum di Indonesia .Bandung: PT Refika Aditama.

Remmelink, Jan. 2003. Hukum Pidana :Komentar Atas Pasal-Pasal Terpenting Dari Kitab Undang-Undang Hukum Pidana Belanda Dan Padanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia .Jakarta: PT Gramedia Pustaka Utama.

Salim HS dan Erlies Septiana Nurbani. 2014. Penerapan Teori Hukum Pada Penelitian.Jakarta: Rajawali Pers

Salman, Otje Anthon F Susanto. 2007. Teori Hukum. Bandung: Refika Aditama.

Santoso, Topo. 2003. Seksualitas dan Hukum Pidana. Depok: Ind-Hillco.

Regulation:

Law Number 1 of 1946 concerning Criminal Law Regulations.

Republic of Indonesia Law Number 1 of 2023 concerning the Criminal Code.

The 1945 Constitution of the Republic of Indonesia.

Internet:

<https://www.bkkbn.go.id/po-content/uploads/lakip-BKKBN-2018.pdf>