
Academia Open



By Universitas Muhammadiyah Sidoarjo

Academia Open

Vol. 11 No. 1 (2026): June
DOI: 10.21070/acopen.11.2026.13684

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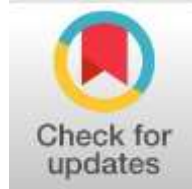
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Academia Open

Vol. 11 No. 1 (2026): June
DOI: 10.21070/acopen.11.2026.13684

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Cohabitation Offences Balance Morality and Privacy in Criminal Code: Delik Kohabitasi Menyeimbangkan Moralitas dan Privasi dalam KUHP

Safrizal W. Yantu, safrizal.yantus2hukum@mahasiswa.ung.ac.id (*)
Master of Law Study Program, Postgraduate University of Gorontalo , Indonesia

Fenty U. Puluhulawa, fentypuluhulawa@ung.ac.id
Master of Law Study Program, Postgraduate University of Gorontalo , Indonesia

Suwitno Yutye Imran, suwitno@ung.ac.id
Master of Law Study Program, Postgraduate University of Gorontalo , Indonesia

(*) Corresponding author

Abstract

General Background Cohabitation regulation in the National Criminal Code reflects a major transformation in criminal law reform by placing morality, marriage protection, legal certainty, and privacy within one normative framework. **Specific Background** Articles 411–412 regulate sexual intercourse outside marriage and living together as husband and wife outside a valid marriage, while positioning both provisions as complaint-based offences with restricted complainants. **Knowledge Gap** The absence of an operational definition of “living together as husband and wife” creates legal uncertainty, multiple interpretations, potential enforcement disparities, and risks of overcriminalization in citizens’ private lives. **Aims** This study describes the configuration of cohabitation offences in Articles 411–412, including offence elements, legal subjects, complaint mechanisms, and enforcement structure, and compares them with morality offences under the old Criminal Code. **Results** The findings show that cohabitation is formulated as living together as husband and wife outside legal marriage and is constructed as an absolute complaint offence, with complainants limited to husband or wife, parents, or children. The National Criminal Code expands the scope of criminalization beyond overspel in the old Criminal Code and shifts the criminal paradigm from an individualistic-colonial model to a communal-nationalistic model. **Novelty** This study clarifies the juridical configuration of cohabitation offences as a compromise between public morality and individual privacy. **Implications** Criminal law should operate as ultimum remedium through precise formulation, strict complaint limits, and proportional enforcement.

Highlights

- Absolute complaints restrict prosecution to parties with direct legal standing.
- Broader criminalization shifts the paradigm from colonial to national values.
- Ambiguous wording creates risks of uncertainty and enforcement disparity.

Keywords

Cohabitation Offences; Criminal Code; Absolute Complaint; Legal Certainty; Public Morality

Published date: 2026-05-19

Introduction

The phenomenon of gathering together or cohabitation in Indonesia shows an increasing trend in recent years and has become the spotlight of the public and academics. This practice is increasingly prevalent, especially in the eastern region of Indonesia which is recorded to have the highest cohabitation rate, triggered by a shift in views on relationships and marriage [1](#). Despite the contradictions of the law and religion, many young couples choose cohabitation due to economic factors and declining interest in getting married formally. Based on PK21 data, around 69.1 percent of cohabitation couples experienced minor conflicts, 0.62 percent faced serious conflicts such as bed separation or house separation, and another 0.26 percent experienced domestic violence (KDRT) [2](#). This condition reflects complex social dynamics, related to the transformation of urban culture and increasing community tolerance [3](#). Some people even consider this trend as a form of criticism of young people against traditional marriage norms. Statistical data also show that the tendency to marry among the younger generation is decreasing, while the practice of cohabitation has increased considerably despite serious attention from religious authorities [4](#). Furthermore, some cases of criminality born from cohabitation relationships, such as the mutilation of a lover after a long time of living together without marriage, show that this phenomenon is not only related to moral and legal aspects, but also has implications for social security [5](#). The crucial problem that emerged was shown through data from the Ministry of Population and Family Development (Kemendukbangga)/BKKBN as a follow-up to the Ministry of Religion's report, which revealed that there are around 34.6 million couples in Indonesia who choose to live together without having a marriage book or in other words undergoing cohabitation practices [6](#).

The ratification of the New Criminal Code through Law Number 1 of 2023 has brought fundamental changes in the Indonesian criminal law architecture, one of which is through the cohabitation regulation in Articles 411-412. This norm is intended to affirm the protection of the institution of marriage by prohibiting the practice of cohabitation outside of a legal marital bond. However, unlike the old Criminal Code which only limited it to the offense of overspel or infidelity, this provision actually expands the scope of criminalization to target the practice of cohabitation, without an adequate explanation of the conceptual limits and normative indicators of "living together as husband and wife." The prohibition of cohabitation in Articles 411-412 of the 2023 National Criminal Code substantially presents a new form of criminalization whose scope is broader than the delinquency of gendak or overspel in the old Criminal Code, because Article 411 paragraph (1) stipulates that every person who has sexual intercourse with a person who is not his or her husband or wife is convicted of adultery with a maximum penalty of imprisonment of 1 (one) year or a maximum fine of category II, Meanwhile, paragraph (2) emphasizes that prosecution can only be carried out on the basis of a complaint, namely by a husband or wife for the perpetrator who is bound by marriage and by the parent or child for the perpetrator who is not bound by marriage; Furthermore, paragraph (3) states that the provisions regarding the limitations and procedures of the complaint as stipulated in Article 25, Article 26, and Article 30 do not apply to the complaint, and paragraph (4) provides the possibility of withdrawing the complaint as long as the examination at the court session has not begun [7](#).

For comparison, the provisions of Article 25 of the Criminal Code regulate the complaint mechanism for victims of criminal acts who are not yet 16 years old, are in the family line, or do not have guardians/parents so that complaints can be filed by families up to the third degree. Article 26 of the Criminal Code extends this rule to victims of criminal complaints who are under the custody of the complainant, where the right to complain lies with the guardian, or if there is none, then by the husband/wife or family in a straight line or a sideways line up to the third degree. Article 30 of the Criminal Code emphasizes that complaints can be withdrawn within three months from the date of submission, but complaints that have been withdrawn cannot be resubmitted. With explicit exceptions to Article 25, Article 26, and Article 30, the cohabitation regulation in Article 411 of the 2023 Criminal Code shows the specificity and narrowing of the subject of complaints only to legal spouses (husband/wife) and parents or children, in contrast to other complaints that have a wider scope [7](#). This confirms the state's restrictive efforts to regulate the criminalization of cohabitation, although in substance it still leaves conceptual problems and the risk of overlapping with other legal norms. Furthermore, Article 412 of the 2023 National Criminal Code also regulates the prohibition of living together as husband and wife outside of marriage while affirming the complaint mechanism, where paragraph (1) states that every person who lives together as husband and wife outside of marriage is punished with imprisonment for a maximum of 6 (six) months or a maximum fine of category II, while paragraph (2) stipulates that prosecution of the criminal act can only be carried out on the basis of a complaint, namely by the husband or wife for a person bound by marriage or by a parent or child for a person who is not bound by marriage; Furthermore, paragraph (3) emphasizes that the provisions as referred to in Article 25, Article 26, and Article 30 do not apply to the complaint, and paragraph (4) provides room for the withdrawal of the complaint as long as the examination at the court session has not begun [7](#).

The prohibition of cohabitation in Articles 411–412 of the 2023 Criminal Code substantially presents a new criminalization that is broader than the delinquency of overspel in the old Criminal Code, because it not only targets sexual relations outside of marriage for parties who are still bound by marriage, but also includes everyone who lives together like husband and wife without a legal bond of marriage. Article 411 paragraph (1) emphasizes the threat of imprisonment for a maximum of six months or a category II fine, while paragraph (2) limits prosecution to only the complaint of the husband/wife for those who are bound by marriage and parents/children for those who are not bound by marriage, so that the relevant parties who have the right to file a complaint are the husband/wife or parents/children, confirming the direct legitimacy of the complainant. Furthermore, paragraph (3) excludes the provisions of Articles 25, 26, and 30 of the Criminal Code which usually expand the right to complain, so that the subject of the complaint becomes narrower and more specific, only the closest party has legitimacy. Article 412 emphasizes the same and adds a provision for the revocation of a complaint before the investigation begins, confirming that the complaint is the absolute basis of legal process. Thus, this arrangement affirms the position of absolute grievance deliction, maintaining a balance between social morality and individual privacy, but still leaves the risk of overcriminalization and overlapping with other norms, while reflecting the paradigm shift of Indonesia's criminal law from

colonial law to national law that accommodates the values of decency, the protection of public morals, and the privacy rights of citizens.

Article 412 of the 2023 Criminal Code concerning the prohibition of cohabitation contains fundamental problems both normatively and practically, because the ambiguity of the concept of "living together as husband and wife" is not accompanied by a clear definition, thus opening up space for multiple interpretations and potentially causing legal uncertainty. If the old Criminal Code only ensnared the delinquent of overspel or adultery committed by a married party, this new provision extends criminalization to unmarried people, raising concerns of excessive criminalization of the private sphere of citizens. Although the nature of complaints appears to serve as a filter, this norm still has the potential to present excessive state intervention on individual life choices and cause social disharmony when positive laws are imposed on diverse social realities. Responding to this, on the other hand, the existence of the criminal offense of cohabitation in the perspective of Article 411 of the National Criminal Code (KUHPN) also needs to be understood from two opposing sides, namely between efforts to enforce the nation's moral values and the protection of the private rights of citizens. In terms of legal standing, this regulation emphasizes that relationships without a marriage bond have legal consequences that can be punished if they meet the elements as referred to in Article 411 of the Criminal Code, which is carried out by a man and woman who live together like husband and wife outside of a valid marriage and accompanied by a complaint from the right party.

The ratio legis of Article 411 of the National Criminal Code was born from the need for lawmakers to reaffirm moral values and public decency as the basis for reforming Indonesian criminal law. This article is intended not only to punish personal acts, but also to maintain social order in a society that upholds religious and customary norms. Cohabitation is seen as an act that causes moral unrest, so the state has an obligation to set the boundary between individual freedom and social responsibility. However, the use of criminal law in this context is carefully placed under the principle of *Ultimate Ratio*, that is, as a last resort when social and moral mechanisms no longer function effectively [8](#). On the other hand, the formulation of Article 411 also shows the prudence of lawmakers in rearranging the structure and language of the law so as not to cause legal uncertainty. Principle *Precision* is one of the important pillars in the formulation of moral norms in the National Criminal Code. Lawmakers strive to ensure that the regulation of cohabitation has clear certainty, both in terms of elements and the scope of its delicacies, so as not to give rise to excessive interpretations such as in the old articles of colonial heritage. Thus, the ratio legis of this article is not only oriented to morality, but also to precise legal certainty so as not to violate the principles of justice and proportionality in criminal law [9](#).

Furthermore, the formulation of Article 411 is the result of a compromise between state values and religious values in the process of forming a national criminal law. In this context, legislators face an ideological tug-of-war between secular views that emphasize individual privacy and religious views that demand the enforcement of public morals. The compromise appears through the regulation of cohabitation as an absolute complaint complaint, where the state can only take action if there are complaints from parties who have moral legitimacy, such as family or legal spouses. This arrangement affirms that the state respects the private space of citizens, but still maintains nationally recognized social and religious values [10](#). The critical view comes from a perspective that highlights the potential for overcriminalization in cohabitation arrangements. The criminalization of private behavior can risk expanding state power into the private sphere, which is contrary to the spirit of modern criminal law. However, by making cohabitation a complaint deliction, the lawmakers have actually affirmed the principle of *Ultimate Ratio*. In practice, that is, placing criminal law only as a last resort after moral and social approaches are no longer effective. Therefore, although normatively this article has the potential to cause controversy, it substantially reflects the prudence of legislators in balancing public morality and individual rights [11](#).

In a broader context, the birth of Article 411 reflects the long journey of national criminal law reform towards a modern system but still rooted in local values. The establishment of this article not only shows the political dynamics of the law, but also illustrates efforts to adapt Indonesia's criminal law to the pluralistic social and cultural reality. Article 411 is a symbol of the transition from positivistic colonial criminal law to a national criminal law that is humanist, moral, and substantive justice. Thus, this norm can be understood as an effort to harmonize public morality, the protection of human rights, and the need for national criminal law reconstruction [12](#). The overall ratio legis of Article 411 of the National Criminal Code on cohabitation shows a synthesis between public moral principles, legal certainty, and prudence in criminalization. This article is not solely aimed at curbing citizens' privacy, but serves to maintain a balance between individual freedom and social responsibility. Through the complaint mechanism, the state affirms the role of criminal law as a tool of proportionate social control and rooted in the nation's moral values. Thus, Article 411 represents the face of modern national criminal law but is still based on the personality of the Indonesian nation [13](#).

From the discourse on the criminalization of cohabitation or cohabitation without the bond of marriage in the new Criminal Code, it has caused quite a wide debate in various circles. Some people consider that this provision reflects the moral values of the nation that are to be upheld through positive laws, especially in an effort to maintain social order and public decency [14](#). However, on the other hand, there is a view that considers that such arrangements have the potential to cause violations of individual privacy rights, especially when law enforcement officials enter the domestic sphere of citizens [15](#). Juridically, the regulation regarding cohabitation or *Collect Cattle* has never been explicitly regulated in the previous Criminal Code, and was only introduced in Law Number 1 of 2023 as part of the national criminal law reform [16](#). This marks a paradigm shift from criminal law which originally emphasized the protection of the public interest to an instrument that also upholds social morality values [17](#). However, it should be noted that this kind of criminalization is not always in line with the principles of modern law that place the state in regulating only actions that actually cause real harm to the other party [18](#).

The existence of the crime of cohabitation in the National Criminal Code (KUHPN) is categorized as a complaint offense, not an ordinary offense, because the act is considered to be related to the realm of morality and private life whose legal impact

does not directly harm the wider community. In this context, the state still provides space for the enforcement of moral values, but does not necessarily position itself as a controller over citizens' personal relationships. Therefore, complaints from parties who feel aggrieved, such as family or legal partners, are the main requirements for law enforcement against cohabitation cases to be carried out [19](#). Normatively, this kind of arrangement seeks to strike a balance between the principle of social moral protection and the principle of legal certainty that affirms the limits of the state's role in the private sphere. This means that the state will only act if there is an official report from a party that has a direct legal relationship with the perpetrator, not based on the supervision of the authorities in general [20](#). This approach also reflects the direction of Indonesia's criminal law reform that seeks to accommodate socio-cultural values without neglecting the development of human rights and modern principles of legality [21](#).

The position of cohabitation placed as a complaint offense in the National Criminal Code triggers the emergence of various interpretations, both in terms of legal construction and practical application. The formulation of offenses in Article 412 of the Criminal Code is considered to have not fully met the principles *lex certa*, namely the clarity of the elements of delinquency in criminal norms, thus creating the potential for multiple interpretations in law enforcement in the field [22](#). This ambiguity is especially evident in the phrase "living together like husband and wife" which is difficult to define objectively, because it depends on the social and cultural norms of the very diverse society in Indonesia. As a result, the enforcement of this article has the potential to present disparities in practice, depending on the interpretation of law enforcement officials and the local social context [23](#).

From the perspective of Islamic criminal law, the position of this article also raises a conceptual debate. In the old Criminal Code, the act of adultery was regulated in Article 284 which focused on relationships outside of legal marriage, while in the new Criminal Code, the range of regulation was expanded to include adultery committed consensually and cohabiting without a valid marital bond [24](#). The construction of the law in Articles 411 and 412 of the Criminal Code not only shows an attempt to codify social morality, but also shows the dilemma between the ideals of religious values, individual freedom, and formal legal certainty. In other words, the placement of cohabitation as a complaint complaint in Articles 411–412 of the Criminal Code reflects a juridical compromise that still leaves wide room for interpretation. On the one hand, its regulation is intended to maintain decency and social order, but on the other hand, its implementation requires prudence so as not to conflict with the principles of substantive justice and citizens' right to privacy.

The lack of definition further sharpens the implementation problem, because law enforcement officials can have difficulty proving the elements of a criminal act, for example in the case of students who simply share a lease or workers who live in company messes. In fact, Law Number 1 of 1974 concerning Marriage has provided normative indicators of marital relations, such as love, loyalty, respect, division of household roles, and inner birth support, but this framework was not adopted in the Criminal Code. When compared to the United Kingdom, which since 1948 has formulated indicators of cohabitation within the framework of the welfare state, the formulation of the 2023 Criminal Code is weak because it leaves a wide scope for interpretation and opens up opportunities for disparities in law enforcement.

This condition shows that there is a normative gap and conceptual disharmony between the purpose of protecting marriage institutions and complex social dynamics, so that Article 412 of the 2023 Criminal Code is not only problematic in terms of legal certainty and the principle of *ultimum remedium*, but also raises serious questions about the suitability of the criminalization of cohabitation with the principle of substantive justice in modern criminal law. Article 412 of the 2023 Criminal Code concerning the prohibition of cohabitation shows a serious normative gap, because on the one hand it is intended to protect the institution of marriage, but on the other hand it poses the problem of overcriminalization and legal uncertainty. The study confirms that this provision is constructed as Absolute Complaint, but does not have operational clarity in practice, both before and after the enactment of the 2023 Criminal Code [25](#). This is even more problematic because the scope of criminalization actually extends to the private realm which should be the domain of individual autonomy, so it has the potential to violate the principle of Fair Trial and principles The ultimate remedy.

By paying attention to the construction of Articles 411 and 412 of the Criminal Code, it appears that the criminalization of cohabitation is not solely a matter of affirming social morality, but a paradigmatic issue related to the direction of reform of Indonesian criminal law. From the perspective of Islamic criminal law, the normative approach to the prohibition of adultery and cohabitation without marriage has a strong moral foundation, but when these values are adopted into positive law, there should be a process of rationalization and harmonization so as not to create tension between religious norms and the principles of modern legal justice. In this context, Articles 411–412 of the Criminal Code appear to be more prominent as an instrument of "moral discipline" than as a legal arrangement that guarantees certainty and substantive justice. The formulation of the absolute complaint delik used seems to be a juridical compromise between collective morality and individual freedom, but it actually leaves a wide scope of interpretation that has the potential to give birth to legal uncertainty and enforcement disparities.

The absence of an operational definition of cohabitation further creates confusion in implementation, because law enforcement officials can be trapped in subjective interpretations in determining whether a relationship can be categorized as "cohabitation" in the context of a criminal act. In fact, Law Number 1 of 1974 concerning Marriage has provided normative indicators regarding marital relations, such as love, loyalty, responsibility, and innate support [26](#). Unfortunately, the normative framework is not integrated into the Criminal Code, so its enforcement has the potential to cause injustice, especially against vulnerable groups such as students, workers, or individuals who simply share a place of residence without sexual relations. This condition shows that there is a conceptual gap between the will to protect the institution of marriage and the developing social dynamics.

Compared to several countries that have arranged the issue of cohabitation through the *welfare state* and social protection

based on a human rights perspective, which considers this norm to be categorized as a crime of decency with moral and religious arguments that are not necessarily in line with the social reality of a pluralistic society [27](#). However, the formulation of the Criminal Code actually impresses as a setback, because it expands criminalization without providing clarity on the boundaries of norms. As a result, this article has the potential to create *Overcriminalization* that goes against the basics *Ultimum Remedium* and opens up the possibility of violations of citizens' privacy rights guaranteed in the constitution. In the context of modern criminal law, criminalization should be the last resort when social and moral mechanisms are no longer effective, rather than being a repressive instrument against the private space of individuals.

Based on various descriptions of problems that have been analyzed in terms of *ratio legis*, juridical implications, and social impacts, it appears that the cohabitation arrangements in Articles 411–412 of the National Criminal Code (KUHPN) give rise to complex conceptual dynamics. On the one hand, the criminalization of cohabitation is intended to maintain the values of morality, decency, and public order as a reflection of the spirit of national criminal law reform. However, on the other hand, this provision raises problems in terms of legal certainty, the principle of *ultimum remedium*, and potential violations of the right to privacy and freedom of individuals in the realm of private life. The absence of a firm definition of cohabitation, as well as the determination of the criminal act as an absolute complaint offense, opens up a wide space of interpretation for law enforcement officials and has the potential to give birth to disparities in the application of the law in the field. For this reason, the focus of this research is to describe the regulation of cohabitation offenses in Articles 411–412 of the National Criminal Code, including the elements of the offense, the subject of the law, the nature of the complaint offense, and the law enforcement mechanism and analyze the difference in the regulation of cohabitation offenses in the 2023 National Criminal Code with the provisions of the decency of morality in the old Criminal Code, especially related to the scope of the act, the basis of the penalty, and changes in the philosophy of criminalization.

Method

This research uses a type of normative legal research. Normative legal research focuses on the analysis of positive legal norms as a coherent and logical system. In normative research, law is positioned as a set of rules that are prescriptive so that researchers can examine logical consistency, hierarchy, and coherence between norms [28](#). The normative approach is relevant to examine the configuration of cohabitation criminal offenses in Article 411 of the 2023 Criminal Code. This is because normative research allows for an in-depth analysis of the normative structure of the crime, including the elements of the crime, the nature of the crime, and the sanctions that are regulated [29](#). For the approach to use, namely; First, the legal approach focuses on the analysis of the applicable written legal provisions. This approach is based on the principle of legality which is reflected in the adage. *nullum delictum nulla poena sine praevia lege poenali* [30](#). Second, the conceptual approach is used because law is not only in the form of written rules, but also contains basic concepts that become the framework of legal thinking [31](#). In this study, the conceptual approach is focused on the analysis of important concepts such as "cohabitation", "sexual relations", "morality", and "public interest". The concept is traced through the doctrine of Indonesian criminal law [32](#). Third, historical enclosurement emphasizes that law is a product of history that cannot be understood without examining the context of its birth. [33](#) Fourth, a comparative approach is used to compare the regulation of cohabitation offenses in the 2023 Criminal Code with laws in other countries. This aims to gain a broader perspective and learn from different legal systems [34](#).

For the source of research data from *First*, Primary legal materials have binding power and are the main basis of research. The primary legal materials used include the 2023 Criminal Code, the Criminal Code of the WvS Netherlands, Law Number 1 of 2023, Law Number 8 of 1981, and court decisions related to moral offenses. Primary legal materials are analyzed to understand the authentic meaning of the applicable legal norms. Analysis is also carried out to assess the consistency of norm formulation and identify existing weaknesses. In addition, the acquisition in this primary data is in the form of comparative analysis of the verdict not to conduct a judgment assessment but the implications of the verdict. *Second*, Secondary legal materials function to provide explanations of primary legal materials. This material includes criminal law textbooks, legal journals, dissertations, theses, scientific articles, and expert comments on the 2023 Criminal Code. Secondary legal materials are used to gain an in-depth understanding of the interpretation of cohabitation offenses. The academic literature helps to enrich the theoretical framework of the research. Law journals and other scholarly works are used to find out contemporary views on Article 411. The nature of secondary materials is the interpretation of the discovery of secondary data to balance primary data in the research [35](#).

Furthermore, tertiary legal materials are used as support to understand primary and secondary legal materials. This material includes legal dictionaries, legal encyclopedias, court judgment indexes, legal writing guidelines, and a glossary of legal terms. Legal and language dictionaries help clarify technical terms. A legal encyclopedia provides concise information on important concepts. The verdict index is used to search for relevant matters. Guidelines for writing laws maintain academic consistency. Meanwhile, glossary of terms serves to clarify the use of foreign or technical terms. Tertiary legal material is the process of discovering an approach that is more oriented towards the interpretation of the term or term to maintain the scientific nature of research in terms of language, especially in legal research. [36](#) For data collection techniques include; Identification of Legal Sources, Selection and Evaluation of Sources, Collection and Documentation, Organization and Classification and Verification and Validation. This identification helps to expand the scope of sources relevant to the research. Every source found is recorded to facilitate further processes in research [37](#).

Source Selection and Evaluation is a critical stage in legal research that involves the process of selecting and assessing legal materials to ensure the quality, relevance, and reliability of the sources to be used in the research. [38](#) In normative research, the collection and documentation are focused on written legal materials (*doctrinal*) Not empirical data from the field [39](#). Organization and classification are a systematic process to organize legal materials in a structured manner that facilitates

analysis and conclusion drawn. This process reflects the values of accuracy and integrity in legal research [40](#). Verification is the process of checking the formal correctness of legal materials, while Validation is an assessment of the substantive quality and relevance of the legal materials [41](#).

For the analysis side, namely; Content Analysis, Narrative Analysis, Comparative Analysis. Content analysis is a research method used to systematically and objectively analyze the content or legal structure contained in primary and secondary legal materials. This method focuses on the presentation and analysis of the normative content of legal texts [42](#). The values underlying the regulation of moral decency can be identified. Narrative analysis is an approach that focuses on understanding narratives or stories that develop in legal discourse. This method does not only see the legal text as a normative rule, but as a narrative construct that contains a specific meaning [43](#). Comparative Analysis is a technique for collecting legal data through a systematic comparison of various legal systems [44](#).

Results and Discussion

A. Regulation of Cohabitation Crimes in Articles 411–412 of the National Criminal Code which Includes Elements of Delicacy, Delicacy, and Complaint Mechanism.

The regulation of cohabitation offenses in the National Criminal Code is part of the reform of the criminal law that aims to adjust legal norms to social, cultural, and moral values that live in Indonesian society. The presence of Article 411 and Article 412 of the National Criminal Code marks the expansion of legal protection for the value of morality and family institutions, as well as showing a shift in the state's approach to regulating the private sphere with a social impact. In this section, it will be described in five aspects of the position of the Cohabitation Crime in Articles 411-412 of the National Criminal Code which includes. The elements of cohabitation offenses in Article 411 and Article 412 of the National Criminal Code consist of elements of acts, elements of circumstances, and elements of intentionality. The element of deeds is reflected in the act of living together in real life between men and women. The circumstance element is indicated by the absence of a valid marital bond between the parties, while the intentional element confirms that the act is done with full will and awareness. With such an elemental construction, the proof of cohabitation offense does not only depend on the physical aspect of the act, but also on the legal condition and intention of the perpetrator.

As the cohabitation formulation in Articles 411-412 of the 2023 Criminal Code substantially presents a new criminalization that is broader than the delinquency or overspel in the old Criminal Code. The provisions of Article 411 stipulate as follows:

1. *"Any person who has sexual intercourse with a person who is not his husband or wife shall be convicted of adultery, with a maximum prison sentence of 1 (one) year or a maximum fine of category II."*
2. *"For criminal acts as referred to in paragraph (1), prosecution is not carried out except on complaints:*
 - a. *husband or wife of a person bound by marriage;*
 - b. *parents or children for people who are not bound by marriage*
3. *"Against complaints as intended in paragraph (2), the provisions as intended in Article 25, Article 26, and Article 30 do not apply."*
4. *"Complaints can be withdrawn as long as the examination at the court hearing has not commenced." 7.*

Furthermore, from the regulation of article 412 also provides information from the side of the complainant which contains the following verses;

1. *"Every person who lives together as a husband and wife outside of marriage is sentenced to a maximum of 6 (six) months in prison or a maximum fine of category II."*
2. *"For criminal acts as intended in paragraph (1), no prosecution shall be carried out except for complaints:*
 - a. *husband or wife of a person bound by marriage; or*
 - b. *Parents or their children for persons who are not bound by marriage."*
3. *"Against complaints as intended in paragraph (2), the provisions as intended in Article 25, Article 26, and Article 30 do not apply."*
4. *"Complaints can be withdrawn as long as the examination at the court hearing has not commenced." 7.*

Elements of criminal offenses cohabitation in Criminal Code 2023 (Law No. 1 of 2023) emphasizing that cohabitation occurs when a couple lives together as husband and wife without a legal marriage bond, as stipulated in Article 412. This action is considered unlawful not only because of its physical aspects, but also the social and moral impact it causes, such as the unclear lineage of children, conflicts of moral norms, and the potential to harm certain parties, especially women and children. This delicacy is Limited Complaints, So that prosecution can only be carried out if there is a complaint from the party who feels aggrieved, affirming a proportionate legal process. The sanctions stipulated are in the form of imprisonment for a maximum of 6 months or a category II fine, provide legal certainty for perpetrators as well as a basis for law enforcement officials to take action against violations. The criminal element also considers the social context, culture, intentions, behaviors, and quality of the couple's relationship, so that cohabitation that causes disturbance of public order or neglects family responsibilities can be categorized as criminal offenses [45](#).

Another element that is the basis for the criminalization of cohabitation is the social and moral impact it causes. Cohabitation often causes ambiguity in children's lineage, causes conflicts of moral norms, and has the potential to

harm certain parties, especially women and children involved. These impacts make the act of cohabitation not only a personal offense, but also a threat to the order and morality of society. Therefore, legal regulations stipulate cohabitation as an act that can be subject to criminal sanctions to protect the public interest and uphold social justice [46](#). In addition, cohabitation criminal offenses are often regulated as complaint offenses, which means that law enforcement depends on complaints from parties who feel aggrieved. This shows that although cohabitation is a violation of the law, the legal process is not automatically carried out without any party raising objections. This complaint mechanism emphasizes the importance of the role of the community in enforcing the law, as well as showing that the criminal law of cohabitation is proportionate and does not oppress arbitrarily [47](#).

The next element is the existence of normative arrangements and clear legal sanctions for perpetrators. With strict regulations, cohabiting couples know the legal consequences of their actions, and law enforcement officials have a legitimate basis to take action against such violations. This arrangement also provides legal certainty, so that the public understands the limits set by the state regarding cohabitation behavior, and prevention efforts can be carried out through adequate legal socialization [48](#). From a family law perspective, the elements of cohabitation criminal offenses also consider the protection of the rights and obligations of the spouse. Legal sanctions are not only repressive, but they must also balance justice for all parties involved, including children and other family members who may be affected. This approach shows that criminal law is not solely punishing, but also serves as a social and moral protection mechanism, so that couples who cohabit are aware of the legal consequences as well as the ethical values that must be upheld in family life [49](#).

Finally, the elements of cohabitation criminal offenses include an understanding of the cultural and social context in which the act occurred. Cohabitation cannot be seen only as an individual action, but also as a social phenomenon influenced by cultural norms, economic pressures, and the development of modern society. By understanding this context, the law can be applied fairly and effectively, emphasizing the protection of public morality, the interests of the child, and the overall order of society [50](#). Certain types of criminal acts can affect the perception and practice of cohabitation because deviant or deviant behavior, such as moral or moral offenses, can mark individuals living together outside of a formal marriage as potential perpetrators of criminal acts. In this context, cohabitation is not just a social relationship, but can be seen as a behavior that has the potential to damage the moral order of society. The element of criminal offenses arises when the behavior of the spouse is considered to be contrary to applicable legal or social norms, for example living together without a valid marriage bond or committing an act that violates public morality, so that the parties involved can be subject to legal sanctions. This study shows that cohabitation involving individuals with a tendency to commit certain moral offenses has a higher risk of being categorized as a criminal offense [51](#).

Cohabitation is not always directly associated with criminal acts, but the type of relationship and the stages of cohabitation greatly determine the chances of violations of the law. Relationships that have no legal recognition or occur in a society with high social pressure tend to pose legal risks, especially if one or both parties engage in activities that violate the law or moral norms. The elements of criminal offenses in this case are more conditional, depending on the behavior, intentions, and social context that accompany the cohabitation. This emphasizes the importance of understanding cohabitation within a broader legal framework, not just seeing the relationship as a mere social phenomenon [52](#).

The elements of cohabitation offenses in the new Criminal Code in 2023 include several important aspects. First, from the side of Deeds (*actus reus*), Cohabitation is defined as living together in one house like a husband and wife without a valid marriage bond, an act that is considered to violate social and moral norms in Indonesia. Second, from the side of Legal Subject, the perpetrator is an adult who is legally responsible and commits an act of cohabitation by deliberately knowing the status of a legally illegal relationship. Third, from the side of Delicacy, cohabitation is a formal offense because the act is immediately criminalized, and can be categorized as a complaint offense or general offense with criminal sanctions in the form of imprisonment or fines. Fourth, Basic Considerations of Criminalization includes the protection of social, moral, and state values, maintaining the integrity of the institution of marriage, and preventing behavior that is considered damaging to the family order, although the appropriateness of sanctions with the character of the act is still a matter of debate [53](#).

The juridical construction of cohabitation in Article 412 of the National Criminal Code requires the fulfillment of specific criminal elements in order to avoid broad interpretations and potential abuse of authority. Normatively, the analysis stage of Articles 411 and 412 is needed to dissect the elements of the crime and the victim protection mechanism that is the essence of the law reform. The main element in this offense is the act of "living together as husband and wife outside of marriage", which technically legally must meet the prerequisites for the fulfillment of the elements of the criminal act without ignoring the limitations of the complaint which is absolute [54](#). The application of this element of cohabitation is closely related to the purpose of national criminal law which seeks to balance legal certainty and protection of citizens' private space [55](#). In a more critical perspective, the fulfillment of the criminal element as stipulated in Article 412 must be carefully examined to prevent potential *Over-criminalization* (overcriminalization), especially when viewed from the principle of *Fair Trial* which guarantees that legal intervention only occurs in acts that actually have a real level of social harm [56](#).

Historically and sociologically, the formation of this element of delik also absorbs the values of traditional delication, such as the concept of *Serendipity* or *Stuttgart*, which shows that national law seeks to legitimize the norms that live in society into the text of the law [57](#). In glasses *Fiqhi Jinayah*, cohabitation involving sexual relations outside of marriage is viewed more rigidly as part of the delinquency of adultery, but in the National Criminal Code, its

formation is more focused on fulfilling the formal elements specified by the relevant article 58. The *Ultimum Remedium Theory* responds to this article by prioritizing more moderate sanctions, especially for cohabitation offenses. This means that the criminalization of legal subjects remains the last resort after other social norms. In this context, "Sanctions in cohabitation offenses should be seen as a last resort that is moderate in order to avoid the negative impact of excessive stigmatization" 59.

The reform of the criminal law through the National Criminal Code (KUHP) is a tangible manifestation of efforts to decolonize the law in order to codify the norms of public decency into a positive legal system. Juridically, the phenomenon of living together as husband and wife outside of marriage is regulated through Article 411 and Article 412 of the National Criminal Code, with the affirmation that this criminal act is classified as an absolute complaint offense (*absolute complaint offence*) which limits state intervention only to complaints of parties with direct legal interests 14. Restricting access to this report is a crucial instrument to ensure that the policy of criminalization does not expand into blind moralism that risks invading citizens' privacy haphazardly. Through restrictions *Legal Standing* The complainant said that the law is actually building a protective barrier between public morality and individual autonomy, so this regulation requires a clear evaluation to measure the level of social harm from the act as well as dissect the regulatory mechanism that underlies the formation of criminal offenses against family rights to remain in harmony with the principles of legal protection 60.

The emphasis on this aspect of the regulatory mechanism is very important because it shows that any criminal norm that enters the domestic space must have a strong sociological basis so that over-criminalization does not occur. In the legal reality in Indonesia, the prohibition against the practice of cohabitation is explicitly stated in Article 412 as part of a legal reform that integrates aspects of adultery and cohabitation in a cluster of national moral norms in order to maintain the dignity of the institution of marriage 15. This integration shows that the state no longer views cohabitation as a mere ordinary immoral act, but rather as a threat to the legally recognized family order, but on the other hand must remain precisely positioned so that the criminal sanctions imposed are subsidiary to the protection of individual legal interests 17. This nature of subsidiarity is a guarantee that criminal intervention will not harm private sovereignty, but rather strengthens the protection of individuals from all forms of coercion in domestic relations that are not legally valid 61. If taken further, the essence of this cohabitation ban must also reflect justice for all levels of society without exception. The enforcement of Article 412 in practice must always be reviewed through the perspective of minority groups to ensure that this codification of morality does not harm the diversity of beliefs and customs that live in Indonesia 62.

This implies the need for very strict complainant limits, which reflect tactical juridical measures to mitigate potential horizontal conflicts as well as vigilante actions (*Own direction*) by the general public 63. By giving the exclusive right to complain only to the nuclear family, Indonesia's criminal law philosophically seems to be "going home" to reorganize the core elements of domestic relations through a more measurable and non-excessive instrument 64. This arrangement of domestic control requires a deep understanding of the evolution of the regulation of privilege in the relationship of couples as a mechanism of social control that remains within civilized boundaries 65. The position of the family as a sovereign entity in the enforcement of this crime becomes a bridge between state law and the law that lives in society. The synergy between the codification of national law and local wisdom is a necessity, where integration with customary criminal law is still needed as an effort to realize cultural-based legal compliance that is in harmony with the values of the local community 66.

This dynamic shows that the definition of cohabitation in modern criminal law codification often absorbs customary law provisions but is still adapted to the needs of human rights protection today. This step is also a symbol of "indigeneness" (*Indigenising*) criminal law that seeks to synchronize the remnants of colonial law with the breath of democratic national sovereignty 67. The firmness of the legal system to defend Article 412 in the midst of public debate shows that there is a consensus that cohabitation is a behavior that requires legal limits in order to maintain a balance of values in the public space 68. More specifically, this protection also includes privileges in the couple's relationship (*uxorial privileges*) that affect the way substantive criminal law treats perpetrators in the context of criminal liability 69.

In the framework of postcolonial social control, the delinquency of cohabitation serves as a form of historicization of criminal practices that balances social control and penal control in one integrated system 70. This synchronization is essential so that the law does not fall into "sex exceptionalism" that tends to separate the regulation of morality from the sociological and natural reality of human relationships 71. Therefore, consistency in maintaining strict criminal procedures must be maintained so that there is no weakening of the guarantee of the rights of suspects in morality offenses 72. All instruments of Articles 411 and 412 must be subject to the general principles of criminal law as the vanguard of justice 73, considering that this classification of delicacies sociologically affects the quality of social relations and community cohesion in the modern order 74.

Table of Findings 1 (*Juridical Construction of Cohabitation Delik in the National Criminal Code*)

Analysis Parameters	Description of Juridical Findings	Synthesis of Shifts

Delik Elements	The act of living together as a husband and wife outside of a valid marriage (Article 412) and intercourse outside marriage (Article 411).	This codification is a manifestation of legal decolonization that synchronizes the remnants of colonial law with the value of "indigenous" (<i>Indigenising</i>) which is based on the sociological values of Indonesian society [62],[70].
Legal Subject	Everyone who cohabits, paying attention to the privileges of the couple's relationship (<i>uxorial privilegēs</i>).	This recognition of the subject of law still respects the autonomy of the individual through the perspective of the protection of minority groups and respect for civilized private boundaries [65],[72].
Delik Nature	Absolute Complaint Delik (<i>Absolute Klachtdelict</i>) which is subsidiary.	This nature of subsidiarity ensures that criminal law functions as a <i>Ultimum Remedium</i> , so that the state does not get caught up in blind moralism that invades the private sovereignty of citizens [63],[61].
Complaint Mechanism	It is strictly limited only to parties who have <i>legal standing</i> (nuclear family: Husband/Wife, Parents, or Children).	These restrictions are a tactical juridical measure to prevent <i>Own direction</i> (play judge himself) and ensure the criminal law "go home" as a measurable instrument of domestic control [66],[67].

The juridical construction of cohabitation offenses in the National Criminal Code (Articles 411–412) can be analyzed through the Principles of Criminalization (*Principles of Criminalisation*), which emphasizes normative evaluation of whether an act is worthy of being made a criminal offense. This theory emphasizes four main principles: *harm principle*, *offense principle*, *legal moralism*, and *dignity principle*, which serves as an evaluation tool in determining the legitimacy of criminalization. First, the element of cohabitation includes the act of living together like husband and wife outside of a valid marriage and intercourse outside marriage. From the perspective of the harm principle, these actions can cause real danger to the socially and psychologically harmed parties, such as legal spouses, children, or affected families. Meanwhile, through *Legal Moralism*, This act is considered to violate the norms of public morality, so that its regulation in the Criminal Code can be morally justified by law. Second, the subject of the law is that every person who cohabitates is recognized as a subject of law, but still pays attention to the privileges of the spouse (*uxorial privilegēs*). Thus, the Criminal Code balances law enforcement and *dignity principle*, namely respect for individual dignity and autonomy. In addition, this principle supports *offense principle*, Because legal protection is given to those who are actually harmed by the act, not just to enforce abstract morality. Third. The nature of the Cohabitation Crime is categorized as an absolute complaint that is subsidiary, so that criminal proceedings can only be carried out if there is a valid complaint from the right party. This configuration is aligned with *offense principle*, because only actions that directly interfere with other parties can be processed, as well as support *dignity principle*, because it prevents legal interventions that violate citizens' privacy. The subsidiary nature also makes criminal law as a *The Ultimate Remedy*, So that the state is not trapped in blind moralism. Fourth, the Complaint mechanism is limited to parties with legal standing (nuclear family: husband/wife, parents, or children). This mechanism emphasizes evaluation based on the offense principle, where only the directly harmed party can file a complaint. In addition, these restrictions support the dignity principle, as they respect the private boundaries of citizens and prevent the practice of vigilante (*Eigenrichtung*) 75.

The regulation of cohabitation offenses in Articles 411 and 412 of the National Criminal Code which includes elements of cohabitation, circumstances without a valid marital bond, and intentional elements shows that legal proof is highly dependent on the legal condition and intention of the perpetrator. Sociologically, these findings are in sync with the fact that a person's level of acceptance for cohabitation is greatly influenced by the type of crime that his or her prospective partner has committed. Although the law provides a standard standard regarding the element of delicacy, society tends to give a subjective assessment that places the perpetrator of sexual crimes as the least attractive figure because it is considered deviant and difficult to rehabilitate. On the other hand, there is a tendency for society to underestimate violent crimes in seemingly harmonious relationships, which has implications for how the complaint mechanism and the nature of this offense are viewed socially. The difference in perception between male perpetrators of violence who are considered worse than female perpetrators shows the existence of a persistent gender bias in cohabitation relations, so that the construction of the law in the National Criminal Code ultimately intersects with the dynamics of morality and the normalization of crime in society 51.

The regulation of cohabitation offenses in Articles 411 and 412 of the National Criminal Code, which focuses on the elements of acts, circumstances, and intentionality in law, intersects with the finding that cohabitation actually has a protective effect against criminal behavior even though its power is under the institution of marriage. This synchronization shows that the stability of relationships in cohabitation, especially those that have been running for more than one year, is able to significantly reduce the rate of violations of the law as well as legal marriages. Although society has a negative perception and finds it difficult to accept sexual offenders as cohabitation partners, the fact that stable cohabitation has a positive impact on the rehabilitation of criminal behavior, especially in women, provides a new dimension to criminal law policy. Thus, law enforcement through complaints in the National Criminal Code needs to consider that cohabitation is not just a violation of norms, but a dynamic relational process which, if carried out with high stability, can be a key factor in reducing crime rates and changing the bad intentions and behavior of individuals 76.

The integration of the legal framework in Articles 411 and 412 of the National Criminal Code with findings on the social function of relationships shows that there is a complex correlation between legality and individual behavior.

The regulation of cohabitation offenses that focuses on the element of cohabitation without legal ties and the existence of an element of intentionality normatively views this practice as a violation of the law, but from a criminological point of view, the relationship has a protective effect that is able to reduce the crime rate. This synchronization shows that relationship stability is a key factor in which cohabitation that lasts for a year or more has been shown to significantly reduce the rate of violations, especially in women, although the impact is not as strong as that of formal marriage institutions. The fact that cohabitation is a dynamic relational process gives a new dimension to the element of intentionality and intention of the perpetrator, because even commitment in informal relationships is able to form a better legal awareness. Therefore, there is an important wedge between law enforcement through complaint deliction and the sociological reality that stability in togetherness, regardless of legal status, still makes a positive contribution to the process of behavioral rehabilitation and the reduction of a person's criminal tendencies [77](#).

In addition, the relationship between legal aspects in Articles 411 and 412 of the National Criminal Code and the dynamics of social behavior shows that cohabitation has a significant functional value in reducing crime rates. Based on empirical data, individuals who live together without a marital bond have a 40 to 65 percent lower risk of being suspected of committing a crime than those who are single, a percentage that doesn't even show a noticeable difference when compared to formal marriage institutions. This gives a new dimension to the element of intentionality in cohabitation, where the decision to live together turns out to have a potential causal effect in reducing the risk of individual criminality by up to 50 percent. However, the effectiveness of this protective is highly dependent on the couple's condition, considering that having a partner with a criminal record can actually trigger up to 11 times the risk of criminal involvement. Thus, although the criminal regulation in the National Criminal Code views cohabitation as a violation of moral and legal norms, this finding proves that the stability of the relationship plays a role as an instrument of social control that is able to shape individual behavior to be more law-abiding, as long as the relationship is lived with a partner who does not have a criminal background [78](#). On the other hand, the comparison between the legal norms in Articles 411 and 412 of the National Criminal Code with the effectiveness of the relationship shows that cohabitation has limitations in suppressing certain types of crimes. Although the element of cohabitation can significantly reduce the rate of property and drug offenses, this practice does not appear to have a significant effect on total cessation (*Withdrawal*) in all three categories of major crimes, including violence. In contrast, the institution of marriage has consistently shown a much stronger and more comprehensive protective effect in facilitating the cessation of criminal behavior on all fronts. This indicates that the element of circumstance, namely the existence of a legal marriage bond, is not merely a satisfaction of the requirements of criminal law, but has a deeper sociological function as a catalyst for behavior change that is more permanent than cohabitation [79](#).

In this position, the regulation of cohabitation offenses in Articles 411 and 412 of the National Criminal Code in 2023 shows a significant legal transformation through new criminalization that is broader in scope than adultery or overspel offenses in the old law. Article 411 specifically targets the act of sexual intercourse between a man and a woman who are not husband and wife with a criminal threat of one year, while Article 412 regulates the act of living together as husband and wife outside of marriage with a criminal threat of six months, where these two articles are constructed as absolute complaints that severely limit the role of the state in prosecuting. The complaint mechanism that is regulated in a limited manner only gives rights to the husband or wife for the parties who are bound by marriage, as well as parents or children for those who are not bound by marriage, automatically closing the gap for third parties or the general public to intervene in the private space of citizens. Through an arrangement stating that the provisions of Articles 25, 26, and 30 are invalid, as well as having room to withdraw complaints before the hearing begins, lawmakers seek to strike a balance between the protection of moral values and respect for family privacy.

B. Comparison of the Regulation of Cohabitation Crimes between the 2023 National Criminal Code and the Old Criminal Code *Wetboek van Strafrecht* Reviewed from the Elements of Delicacy, the Scope of Action, and the Basis of Criminalization.

The comparison between the 2023 National Criminal Code and the Old Criminal Code *Wetboek van Strafrecht* shows a fundamental transformation in viewing the phenomenon of cohabitation, where the National Criminal Code progressively expands criminalization which now includes a common lifestyle as a legal object and not just limiting it to sporadic acts of public decency such as adultery or obscene acts as regulated in the old Criminal Code. This shift indicates that the lawmakers now view cohabitation as a social phenomenon that has a direct impact on public order and the existence of family institutions, so that the basis of punishment is no longer formalistic following colonial law but is oriented towards preventive and symbolic functions to maintain the fundamental moral values of Indonesian society. Despite the expansion of the legal reach, the National Criminal Code cleverly combines it with a restriction mechanism through absolute complaints to ensure that law enforcement remains contextual and adaptive to private dynamics, a criminal policy approach that was not found in the old Criminal Code because it does not recognize cohabitation as an independent offense. The regulation of cohabitation offenses in the 2023 National Criminal Code represents a fundamental paradigm shift compared to the construction of moral offenses in *Criminal Code* (WvS). These differences substantively not only touch on the formal aspects of norm formulation, but also reflect the reorientation of criminal policy that shifts from colonial legacy to a national legal system that is more responsive to the social and cultural values of Indonesian society. A comparative analysis of the two codifications confirms that in the old Criminal Code, the main focus of moral offenses tended to be centered on adultery (*Adultery*) which is very limited in scope, while the National Criminal Code expands its scope to respond to sociological dynamics related to cohabitation outside of legal marital ties [63](#).

This emphasis shows that national law is now more likely to protect the institution of marriage from the threat of

deconstruction of moral values, in contrast to WvS which tends to allow the realm of cohabitation without criminal sanctions as long as it does not involve infidelity in existing marriages. This evolution demands a deep understanding of the criminal capacity of the individual, in which every subject of law in the national system is seen as having a moral responsibility for social harmony, so that violations of the norms of coexistence now have more decisive legal consequences [80](#). Through the perspective of legal decolonization, the presence of the delinquency of cohabitation is basically the result of the strong influence of Islamic law and customary law which consistently views intercourse outside of marriage and cohabitation as an act that violates God's law and community norms [81](#). This shift automatically changes the basis of punishment from previously only individualistic-colonial to more communal-nationalistic, which is in line with the new paradigm of criminal justice in Indonesia which is rethinking penal reform to find a balance between public justice and private autonomy [82](#).

The claim that the National Criminal Code is a means of legal purification from colonial influence is strengthened by the fact that Law No. 1 of 2023 officially replaces the position of the WvS that has been in force for more than a century, including in terms of regulating cohabitation relations [83](#). The integration of moral values into positive law is not without risks, especially related to the potential for victimization in immoral crimes that must be managed carefully through a strict procedural law mechanism.[84](#) In the international comparative context, Indonesia's move to criminalize cohabitation before marriage is seen as a unique decolonization effort, considering that in many other countries there is a trend of decriminalization of similar private behavior [85](#). This confirms that Indonesia has chosen the path of legal "indigenization" to ensure that certain behaviors, such as premarital cohabitation, remain under the control of the state's social control in order to maintain social cohesion [86](#).

The significance of this change can also be seen in the expansion of protection against obscene and immoral acts, including in responding to the behavior of same-sex couples living together, which in the old Criminal Code was only regulated limited to certain legal subjects [87](#). Law enforcement against such domestic offenses requires strict procedural guarantees to prevent the misuse of criminal labels in the prosecution of international and domestic crimes [88](#). A real challenge arises when monolithic criminal law must be applied in a pluralistic society, where morality-based criminal law enforcement is often seen as a challenge to the harmony of diversity.

Table 2 Comparative Findings (Paradigm Shift in Cohabitation Delik in Indonesian Criminal Law)

Comparison Variables	Criminal Code (Criminal Code)	National Criminal Code (Law No. 1 of 2023)	Analysis of findings based on references
Delik Elements	Focusing on infidelity (<i>overspel</i>).	Emphasizing "living together as husband and wife" without a legal bond.	Marking the expansion of coverage to respond to sociological dynamics and national moral values [66].
Scope of Actions	Limited to sexual relations of persons bound by marriage (Article 284).	It includes premarital cohabitation and immoral behavior outside of marriage broadly.	It is an attempt to "settle" (<i>Indigenising</i>) laws to maintain social cohesion from the influence of modern lifestyles.[70],[91].
Criminal Policy	It is individualistic-colonial; only protect the rights of the couple in marriage.	Communal-Nationalistic in nature; protecting God's moral order and laws.	There is a strong influence of Islamic law and customary law in the new national criminal structure [86].
The Justice Approach	It is retributive (retributive) to the violation of the marriage contract.	Humanistic; restore the balance between the perpetrator and the community.	Finding a common ground between public justice and private autonomy through wiser penal reform.[87],[92].
Tolerance & Control	Relatively tolerant of private cohabitation (following Dutch tradition).	Tightening restrictions on cohabitation as a form of protection of moral order.	Reject the trend of global decriminalization in order to maintain the identity and moral authority of the nation[90].

Table 4.2 shows a significant shift between the old Criminal Code (Wetboek van Strafrecht) and the National Criminal Code (Law No. 1 of 2023) in the regulation of cohabitation. This shift can be analyzed through theory *Why Criminalize?* which emphasizes ethical and moral evaluation in the criminalization of acts. First, the old Criminal Code focused on infidelity (*Adultery*), which is a sexual act that violates the marriage bond. While the National Criminal Code regulates cohabitation with a focus on living together as husband and wife without a legal marital bond, the scope of the offense is expanded to respond to sociological dynamics and national moral values. Analysis based on Petersen's theory shows that the new arrangement has a clearer moral justification: the criminalization of cohabitation not only upholds the rule of law, but also protects the moral and social interests of the community, as well as adapts norms to the local context. Second, the Scope of Acts of the old Criminal Code limited the scope only to sexual relations between persons bound by marriage (Article 284). The National Criminal Code expands it to include premarital cohabitation and immoral behavior outside of marriage. This approach is in line with the principle of proportionality, as the expansion of the scope of criminalization is designed to balance the risk of real social harm with the criminal sanctions imposed. Criminalization is not only repressive to certain behaviors, but also considers broader social and moral impacts [89](#). Third, the basis of the old criminal code was individualistic-colonial, only protecting the rights of couples in marriage. On the contrary, the National Criminal Code is communal-nationalistic, taking into account the moral order and the law of God, which is reflected in the influence of Islamic law and customary law. Petersen's perspective emphasizes *legal certainty*, That is, criminal norms must have a clear moral basis and can be accounted for ethically, so that the new cohabitation arrangement is more transparent and legally consistent. Fourth, the justice approach of the old Criminal Code was retributive, focusing on retaliation for violations of the marriage contract. The National Criminal Code adopts a humanistic approach, restoring a balance between the perpetrator and the community. Analysis based on Petersen's theory emphasizes subsidiarity and proportionality: criminal law is used as a last resort (*ultimum remedium*) when non-criminal mechanisms are inadequate, and the sanctions applied are balanced with the degree of error and social consequences caused. Fifth,

the tolerance and control of the old Criminal Code was relatively tolerant of private cohabitation, following the Dutch tradition. The National Criminal Code tightens the limits of cohabitation to protect the moral order of the community. According to Petersen's theory, these restrictions strengthen legal certainty, as society is given clear behavioral restrictions on what is considered criminal and what is allowed, while ensuring criminalization is carried out ethically and proportionately [89](#).

From this comparison, it can be seen that the 2023 National Criminal Code decolonizes the law by shifting the paradigm of cohabitation from a colonial individualistic approach to communal-nationalistic. This shift is reflected in the expansion of the delicacy element, which now not only punishes infidelity of people who are bound by marriage, but also includes a common lifestyle without legal ties, as part of the efforts of legal indigenous people to maintain the social cohesion and morality of the nation amid the influence of modern lifestyles. Although the scope of the act is expanded, the approach to justice applied is more humanistic, seeking to restore a balance between private autonomy and public justice, with strong influence from customary law and Islamic law. This novelty is part of the legal adjustment to regulate the order of community behavior in a more relevant way to the social and cultural context of the nation [90](#). The provision of sanctions in every policy is nothing but preventing violations of the law and protecting victims, as well as restoring justice and educating the public about the limits of behavior accepted by law.

Even if there are differences, this is certainly in harmony with the *huku mind*. Legal ideals are concepts that refer to the basic goals or principles that a legal system wants to achieve. According to Gustaf Radbruch's theory, the "ideal of law" involves three main elements that must be proportionately and inseparably realized: legal certainty (*Rechtssicherheit*), justice (*Gerechtigkeit*), and utility (*Zweckmässigkeit*). Legal certainty ensures a clear and stable legal framework, which allows people to plan their actions with legal predictability. Justice focuses on the fair and equitable application of the law, ensuring fair treatment for every individual. Benefits, on the other hand, aim to optimize social benefits and community welfare through effective and efficient application of the law. These three elements must support each other and be integrated in every legal rule to create an ideal and well-functioning legal system. Cohabitation, or living together without a legal marital bond, is closely related to the concept of household crime if the lifestyle causes violence, discrimination, or treatment that is detrimental to one of the parties, especially women. Just like household crime regulated in Law No. 23 of 2004 concerning the Elimination of Domestic Violence and protected by CEDAW, the practice of cohabitation involving violence or discrimination is also included in the category of violations of the law and human rights.

Conclusion

The regulation of cohabitation offences in Articles 411–412 of the National Criminal Code and its comparison with the old Criminal Code (*Wetboek van Strafrecht*), can be concluded as follows: *First*, the regulation of cohabitation offences in the National Criminal Code (Articles 411–412): The offence of cohabitation is clearly regulated in the National Criminal Code by emphasizing five main aspects, namely the element of offence which includes acts of cohabitation as husband and wife outside of a valid marriage and intercourse outside of marriage, legal subjects that include every person who cohabitates with respect to the couple's *privileges (uxorial privileges)* so as to respect individual autonomy, the nature of the crime in the form of an absolute complaint that is subsidiary which affirms that criminal law is *ultimum remedium* and can only be applied if there is a legitimate complaint, and the complaint mechanism is limited to parties with *legal standing* such as husband/wife, parents, or children as an effort to protect private rights and prevent acts of vigilante (*eigenrichtung*), so that this arrangement emphasizes the balance between the protection of moral norms and individual rights and is in line with modern criminalization principles such as *the harm principle, offense principle, legal moralism, and dignity principle*.

Furthermore, the second is a comparison of the 2023 National Criminal Code with the Old Criminal Code: The shift in regulations shows a transformation of the Indonesian criminal law paradigm, where the element of delinquency shifts from the focus of infidelity (*overspel*) in the old Criminal Code to living together like husband and wife outside of legal marriage in the new Criminal Code, the scope of acts extends from sexual relations limited to couples who are bound by marriage to include premarital cohabitation and immoral behavior outside marriage, the basis of punishment changed from individualistic-colonial to communal-nationalistic that pays attention to public morality and the influence of Islamic law and customs, the approach to justice shifts from retributive to humanistic that balances the interests of the perpetrator and society through the principles of subsidiarity and proportionality, and tolerance and control are tightened to protect the moral order of society and affirm legal certainty and clearer moral justification; Thus, the 2023 Criminal Code shows efforts to decolonize the law, indigenous criminal norms, and adjustments to the sociological and moral values of Indonesian society. The criminalization of cohabitation in the new Criminal Code meets the indicators of *moral justification, proportionality, and legal certainty*, so that it is more ethical, proportionate, and transparent than the old Criminal Code.

In conducting a comparative study of the regulation of cohabitation as formulated in Article 411 and Article 412 of the Criminal Code, a number of countries can be used as a reference because they have the characteristics of a relevant legal system. Brunei Darussalam is an example of a country that still maintains the criminalization of *Cohabitation* and extramarital relationships through the Sharia Penal Code Order 2013, so that illegitimate relationships are considered not only moral violations, but threats to social order and religious values; This model reflects the *Moral Enforcement* as affirmed in the theory that criminal law can be an instrument of the collective value guard of religious society. Meanwhile, Gulf countries such as Saudi Arabia or Qatar implement strict bans on couples living together without a valid marital bond, with sanctions based on sharia law and the principle of family chastity; This approach shows a paradigm *Legal Moralism* which places cohabitation as a form of disruption to the social order and moral structure of society as described in the theory of religion-based social order [91](#).

On the other hand, Singapore before reforming the public morality regulations had a number of provisions which, while not explicitly criminalizing cohabitation, still regulated conduct that leads to illicit relationships and is considered to disturb social order; This model illustrates a typical moderate approach to Asian countries that views morality as part of communal stability, in line with the theory that Asian countries tend to maintain state intervention in public morality in order to prevent social disintegration. The existence of a comparison of the three countries shows a variety of models of criminalization of cohabitation ranging from an absolute religious approach, a moderate public morality approach, to a balanced approach between the protection of values and social order, all of which strengthen the relevance of the analysis to the construction of cohabitation in Article 411 and Article 412 of the Criminal Code [92](#).

The findings also show that, cohabitation arrangements as formulated The first approach uses Modern Criminalization Theory to assess the fairness of criminal arrangements over "unlawful relationships". This theory demands a test of the legitimacy of criminalization: is there any *Public harm* What is clear is whether the elements of the crime are formulated quite clearly, and whether the criminal justice system is the most proportionate instrument to deal with the problem. For verification purposes, the study should explore whether Articles 411–412 meet these criteria or simply adopt moral policing without evidence of measurable social impact; If the Criminal Code formulates "cohabitation as husband and wife outside of marriage" without concrete indicators of public harm, then there is a gap between the theoretical basis of criminalization and the norms of the article which are broad and have the potential to be multi-interpretive [93](#).

The second approach uses Living Law Theory which places customary norms and social practices as sources of legal validity. From this perspective, verification demands a direct comparison between the construction of "invalid" in the Criminal Code and the practice of local legitimacy: are the forms of relationships categorized as "invalid" by the Criminal Code actually recognized or protected by certain customary laws (e.g., serial marriages, community consensus arrangements, or rituals of local legitimacy)? Gaps arise when the Criminal Code criminalizes practices that in certain communities are considered legitimate or regulated by customary mechanisms, situations that cause a conflict of legitimacy between state law and laws that live in the community, so validation must involve ethnographic studies and documentation of customary norms. Verification through living law requires the integration of field findings with written doctrine so that it does not happen *Legal Mismatch* [94](#).

The third approach departs from the Theory of Legal Pluralism which forces an inter-normative analysis: the Criminal Code, the Marriage Law, and religious/customary law operate in parallel and sometimes contradictory. For validation, it is necessary to create a consistency matrix that compares the definition of "legal marriage", the criteria of "invalid", and the legal consequences in each order. Operational GAP is seen when a person is considered legitimate according to one system (e.g. legally religious or customary) but not registered according to the Marriage Law so that it is seen as "invalid" in the realm of the state, this situation creates legal uncertainty and the potential for arrogant enforcement. Verification must therefore be comparative and multi-level, testing whether the Criminal Code article accommodates a plurality of legitimacy or instead applies a single standard that negates the diversity of local norms [95](#).

The fourth approach uses Legal Interpretation Theory (legal hermeneutics) which emphasizes the importance of doctrinal interpretive methods: textual (textual), system (systematic), historical (historical), and objective (teleological). Doctrinal verification requires a textual reading of Articles 411–412 to extract the elements of delicacy, then the application of systematic interpretation by placing the article in correlation with the norms of the Marriage Law and other relevant provisions; Historical tracing is needed to trace the genealogy of legislation (the origin of phrases, amendments, academic texts that form the law) so that it can be ascertained whether the intention of the lawmakers indeed wants widespread criminalization or limited complaint offenses. Gaps are identified if the results of historical interpretation and drafting texts are contrary to current enforcement practices, for example, the legislation text requires family complaints as a condition, but the authorities take action without complaints, then an official interpreter's recommendation or enforcement guidelines are needed. Systematic and historical interpretation is a prerequisite for normative validation [96](#).

The fifth approach prioritizes Jurisprudence Theory and Decision-Based Validation Methods as the final empirical test. This theory asserts that judges' practices and sentencing patterns are important sources for verifying how the concept of "unlawful relationship" is applied in real terms. Validation through jurisprudence means compiling and analyzing Supreme Court, PT, and PN decisions that touch on adultery, gathering kebo, serial marriage, and moral cases; The purpose of the analysis is to identify the consistency of evidence (evidence of cohabitation, family witnesses, digital evidence), the ratio of judges' decidendi, and the difference in treatment between levels of court. Jurisprudential gaps that are often found, such as inconsistencies in the assessment of the status of serial marriages as legalization or not must be documented as the basis for judicial guideline recommendations or normative revisions in order to maintain legal certainty [97](#).

Several types of violations in cohabitation can be categorized as serious, including narcotics or violent crimes, so that cohabitation is not just a moral violation but also has the potential to be a serious crime. The element of criminal offense arises when the behavior of the spouse poses an additional risk to the criminal law, such as involvement in narcotics crimes or domestic violence. This shows that cohabitation can be multifaceted, where criminal acts are not only related to morality, but also to other criminal risks that arise at the same time. It can be said that the elements of criminal offenses in cohabitation can be drawn from various legal studies and related debates, both in the old Criminal Code and the new Criminal Code, and include several important aspects. The first element is the existence of a couple living together in the same house or accommodation without a valid marital bond. This act is at the heart

of the criminalization of cohabitation in Article 412 of the new Criminal Code, under which any individual who consciously chooses to live together outside of an official marriage is considered to be against the law. The second element is related to the social and moral impact it causes, because cohabitation can cause unclear children's lineage, cause conflicts of moral norms, and harm certain parties, especially women and children.

Acknowledgments

The author would like to thank the Postgraduate of the Master of Law Study Program, Gorontalo State University for the academic support and facilities provided during the research and writing process of this article. Appreciation was also conveyed to lecturers and related parties who have provided input, direction, and scientific contributions. Special thanks are expressed to the manager of Jurnal Rechtsidee, University of Muhammadiyah Sidoarjo for the opportunity of publication, editorial assistance, and constructive review process so that this article can be published. The author realizes that the contributions of various parties play a very important role in improving the quality of the substance of this article.

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[ISSN 2714-7444 \(online\)](https://doi.org/10.21070/acopen.11.2026.13684), <https://acopen.umsida.ac.id>, published by [Universitas Muhammadiyah Sidoarjo](https://www.muhammadiyah.ac.id)