



Criminalization of Cohabitation in the New Criminal Code (A Philosophical Review in Legal Pluralism and Privacy Rights)

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Abstract

The criminalization of cohabitation under Article 412 of Law No. 1 of 2023 on the Criminal Code has sparked debate over the legitimacy of government interference in individuals' private domains. This study aims to analyze the philosophical basis of criminalizing cohabitation through the perspectives of legal pluralism and privacy rights, assess its proportionality within a democratic constitutional order, and explain the legal and sociological consequences of implementing this article. This research is a normative legal study with a qualitative, descriptive-analytical approach, utilizing normative and philosophical legal methods by examining primary, secondary, and tertiary legal materials. The results indicate that criminalizing cohabitation does not meet the principles of proportionality and harm in modern criminal law, because consensual relationships between two adults do not cause concrete harm to third parties. Furthermore, it violates privacy rights protected under Article 28G (1) of the 1945 Constitution and Article 17 of the ICCPR, and creates tension within Indonesia's pluralistic legal landscape. The application of this article has the potential to trigger overcriminalization and social stigmatization, thus requiring a reinterpretation of the complaint offense and the prioritization of the principle of ultimum remedium to maintain a balance between public morality norms and individual human rights guarantees within a democratic rule of law framework.

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Introduction

Cohabitation, also known as living together, is a relationship between two individuals who live together as if they are married without a legally recognized marriage bond. This has become a controversial issue in Indonesian criminal law, especially after the enactment of the new Criminal Code (KUHP) through Law Number 1 of 2023, which criminalizes cohabitation under Article 412. Alongside social transformation in Indonesia, the trend of cohabitation has increased significantly, particularly in urban areas and among the working-age population (Wicaksono, 2025) (Wicaksono, 2025). Cohabitation is viewed as a social deviation because it is considered to violate existing norms and ethics, potentially having a negative impact on the morality of the younger generation (Mutia, 2025). Cohabitation is a complex issue because it involves various dimensions of law, morality, and human rights. (Hafrida et al., 2024). Legally, cohabitation creates a fundamental dilemma for the country in balancing efforts to protect societal moral values with guarantees of human rights and individual privacy. This becomes increasingly complex because Indonesia is a pluralistic country with diverse legal systems, cultures, and religious beliefs.

The Indonesian Criminal Code (KUHP), in effect since the Dutch colonial period, derives from the *Wetboek van Strafrecht voor Nederlandsch-Indië* of 1918 and is deemed inconsistent with the nation's philosophical tenets rooted in Pancasila and the 1945 Constitution. The process of decolonizing criminal legislation has entailed protracted ideological, political, and scholarly discourse. The promulgation of Law Number 1 of 2023 on the Criminal Code, effective January 2, 2023, signifies the apex of initiatives to overhaul domestic penal law. This revised KUHP not only updates the core tenets of criminal law but also embodies a transformative approach to criminalization strategies within Indonesia. A pivotal alteration involves broadening the ambit of moral infractions that encroach upon individuals' personal spheres. Specifically, the new KUHP (Law No. 1 of 2023) penalizes cohabitation under Article 412, characterizing cohabitation as spouses without a legal marriage as an offense punishable by up to 6 months' imprisonment or a Category II fine. This clause addresses a lacuna in the prior KUHP (*Wetboek van Strafrecht* 1918), which solely regulated adultery among wedded parties without encompassing extramarital unions broadly. Set to take effect in 2026, this provision epitomizes a reform in national penal law that has ignited debates concerning personal privacy and legal pluralism.

According to Kurniawan, the criminalization of cohabitation in the 2023 Criminal Code apparently need not be punishable because such acts do not cause real harm to society and are more of a personal moral issue (Kurniawan et al., 2024). This aligns with the harm principle in legal philosophy, which holds that the state may intervene in individual freedoms only if the act causes concrete harm to others. On the other hand, according to Muslihuddin, criminalization can be justified from the perspective of *Maqāṣid as-Syarī'ah as-Syāṭibī* because it aims to protect honor (*hifẓ al-ʿird*) and lineage (*hifẓ an-nasl*), which are fundamental objectives of Islamic law (Muslihuddin et al., 2023). This approach reflects a systematic effort to integrate religious values into the national criminal law framework, in line with the views of the majority of Indonesian society. However, in research, Rawira contends that the penalization of cohabitation-related conduct in the revised Criminal Code risks engendering overcriminalization, as it sanctions behaviors that lack immediate victims and occur in intimate settings (Prawira, 2024). This notion contravenes the *ultimum remedium* doctrine (criminal law as the ultimate recourse), potentially squandering judicial capacities and inflicting unwarranted social ostracism. Article 412 of the new Criminal Code (KUHP) classifies cohabitation as a complaint offense, prosecutable only upon a formal complaint by authorized parties, such as spouses or guardians. Akitha & Rinwigati explain that this criminalization can be viewed as a mechanism to protect the perpetrator's

human rights from acts of vigilante justice or *eigenrichting* (Akitha & Rinwigati, 2025). However, Dita criticizes the formulation of the norm itself, highlighting vagueness in the definition of cohabitation and its standard of proof (Putri & Junaidy, 2025). Such imprecision is deemed to infringe upon the *lex certa* principle (clarity in law), a cornerstone of legality enshrined in the Criminal Code and the 1945 Constitution.

The criminalization of cohabitation in the National Criminal Code demonstrates a significant complexity in integrating diverse moral values into a single national criminal law system. (MAHARANI et al., 2025). This directly reflects the challenges faced by a pluralistic country like Indonesia in creating laws that not only accommodate diversity but also maintain social cohesion. Following the endorsement of the International Covenant on Civil and Political Rights (ICCPR) through Law No. 12 of 2005, Indonesia is committed to Article 17 of the ICCPR, which shields individuals' privacy from capricious or illicit encroachments, including violations of personal, familial, domiciliary, communicative spheres, and integrity or standing. This entails the state's duty to furnish juridical safeguards for such rights. Consequently, the criminalization of cohabitation may conflict with these overarching human rights doctrines, notably in delineating the permissible scope of governmental intrusion into citizens' private domains.

The criminalization policy on cohabitation in Indonesian criminal law reflects a tension between traditional moral values and modern human rights principles (Atmadi, 2019). This illustrates the challenges faced by many developing countries as they try to modernize their legal systems while maintaining traditional values and cultural identities. Several countries with different legal and cultural backgrounds have experienced similar debates regarding the criminalization of cohabitation. In Western European countries such as the Netherlands, cohabitation has been legally recognized since 1998 through the Civil Solidarity Pact. Conversely, in Asian countries with strong cultural, traditional, and religious influences, cohabitation generally does not receive legal recognition and is even criminalized. This comparison shows that regulations concerning cohabitation are heavily influenced by each country's social, cultural, political, and legal historical contexts.

Based on the above background, this research aims to fill a gap in the literature. It adopts a comprehensive approach to present a philosophical review of the legitimacy of criminalization. Unlike previous studies that focus solely on normative-dogmatic aspects or a single perspective, this research analyzes using contemporary legal philosophy theories (such as the harm principle), explores the dimensions of legal pluralism to examine the interaction between the new Criminal Code (KUHP Baru) and other legal systems (customary/religious), and provides a comprehensive analysis of privacy rights protection as a fundamental human right. Through this analysis, the study is expected to make significant theoretical and practical contributions to the development of Indonesian criminal law.

Methods

This constitutes a normative legal inquiry employing a qualitative, descriptive analytical methodology, leveraging normative juridical and philosophical perspectives to scrutinize the penalization of cohabitation under Article 412 of Law Number 1 of 2023 on the Criminal Code, through the lenses of legal pluralism and privacy entitlements. The normative juridical method facilitates an examination of the formulation of enacted legal principles. In contrast, the philosophical lens assesses the validity of such criminalization against modern legal philosophy doctrines, encompassing John Stuart Mill's harm principle, state paternalism, Patrick Devlin's legal moralism, and individual autonomy. The data sources consist of primary data in the form of Law Number 1 of 2023 on the Criminal Code, the antecedent Criminal Code (*Wetboek van Strafrecht*), the 1945 Constitution

of the Republic of Indonesia, and global human rights instruments like the International Covenant on Civil and Political Rights (ICCPR) and secondary data includes scholarly journals, prior empirical studies, legal treatises on penal law and jurisprudence, expert commentaries, academic publications, and official records pertinent to Criminal Code deliberations.

Data collection techniques are conducted through library research, gathering, identifying, and inventorying data from official documents, academic literature, national and international scientific journals, and legal sources related to the criminalization of cohabitation, legal pluralism, and privacy rights. Data analysis techniques use qualitative methods with an interpretive approach and legal hermeneutics to explore the philosophical meaning and social-historical context of the criminalization regulations. Then, critical analysis evaluates the justification for the prohibition from various theoretical perspectives and legal arguments, yielding logical and systematic conclusions. The research results are presented descriptively-analytically to answer the main questions regarding the philosophical legitimacy of criminalizing cohabitation, its interaction with Indonesian legal pluralism, and its impact on privacy rights as human rights.

Results and Discussions

1. The Philosophical Basis of Criminalizing Cohabitation in the New Criminal Code

a. Philosophical Foundation of Criminalizing Cohabitation

Law Number 1 of 2023 (New KHUP), particularly Article 412, which criminalizes cohabitation, has sparked a doctrinal debate regarding the limits of the state's legitimacy to intervene in citizens' private affairs (Pribadi & Simangunsong, 2025). Philosophically, the criminalization of cohabitation can be viewed through two major paradigms in criminal law philosophy that are in opposition: legal moralism and the harm principle. Legal moralism, as Patrick stated, argues that criminal law can uphold societal morality, even against consensual acts conducted in private without an apparent victim (Devlin, 1965). Communal ethics function as a pivotal adhesive sustaining collective existence, thereby vesting society with the prerogative to shield itself from ethical fragmentation. The criminalization of cohabitation is part of the state's effort to uphold public morality grounded in religious values and customary traditions that are alive in Indonesian society (Kartodinudjo, 2022). From this perspective, the state not only has the right but also the obligation to intervene in private behavior that is considered to threaten the moral foundations of society, even if it does not cause tangible material harm that can be specifically identified.

On the other hand, this contradicts the harm principle proposed by John Stuart Mill. This principle holds that government authority over individual freedom is justified only if an action causes a concrete harm to others. (Kadir, 2025). Cohabitation does not need to be criminalized because such actions do not cause real harm to society and are more of a personal moral issue that should be left to individual autonomy (Kurniawan et al., 2024). Acts that only violate morals but do not harm others should be outside the scope of criminal law, even though the majority of society considers them immoral. The damages claimed by supporters of criminalization, such as moral degradation or threats to family institutions, are abstract and speculative rather than concrete harms that can be identified as required by the harm principle.

The difference between these two views shows that the New Criminal Code adopts a moralistic model. Indonesian criminal law tends to base criminalization on religious moral values (Soponyono, 2013). This tendency reflects the dominance of legal moralism, supported by Pancasila values, in which the state actively seeks to protect the moral order of society and family institutions from actions considered to violate norms, even if carried out privately (Feka et al., 2023).

b. The Mechanism of Complaint Offense as a Philosophical Compromise

The absolute complaint offense framework within cohabitation criminalization represents a juridical equilibrium balancing the safeguarding of societal ethics with deference to individual liberty. The criminalization of cohabitation as a complaint offense serves to protect the human rights of perpetrators from acts of vigilantism or extrajudicial actions (Akitha & Rinwigati, 2025). Criminalization of cohabitation, but requiring a complaint from a party with a special relationship to the perpetrator, the state has created a social control mechanism and prevented society from taking violent or persecutory actions against couples living together outside of marriage.

The complaint mechanism shows that lawmakers have a space between public and private interests. The state indicates that not all cohabitation cases should be criminalized to uphold morality. By granting the right to complain to specific individuals (husband, wife, parents, and children), the state positions these parties as the ones who decide whether the cohabitation act will be prosecuted (Mutia, 2025). This is different from a general offense that the state can process *ex officio* without requiring a complaint. The implementation of the absolute complaint offense mechanism in criminal acts of cohabitation in the latest Criminal Code creates a disconnect in moral law perspectives. There is a contradiction between the state's ambition to uphold public morality and the law enforcement procedures that are, in fact, highly private. Delegating prosecution authority to family members indicates that the protected interests are no longer public moral values but rather personal interests, so cohabitation is no longer viewed as a pure crime (*mala in se*) but only as an administrative moral violation (*mala prohibita*). This policy is not a form of pure moral enforcement but a pragmatic compromise. The state uses criminal law not as a means to uphold public justice but as a mediating tool for family interests, which theoretically weakens the essence of criminal law as a public law.

2. Legal Pluralism and the Complexity of Coexistence Regulations

The penalization of cohabitation in the revised Criminal Code reveals profound challenges in assimilating varied ethical norms into a cohesive nationwide penal system. As a pluralistic nation, Indonesia operates three concurrent and interdependent legal frameworks: statutory law, religious jurisprudence, and customary law. This scenario embodies Sally Engle Merry's notion of legal pluralism, wherein disparate legal regimes coexist within a shared societal milieu (Merry, 1988). The interplay among these three systems fosters robust legal pluralism, characterized by mutual coexistence, influence, and rivalry in governing societal domains (Griffiths, 1986). Achmad Hariri and Basuki Babussalam underscore that legal pluralism denotes the simultaneous presence of multiple legal orders in a society, encompassing state, customary, and religious laws. This reflects Indonesia's intricate socio-cultural fabric and facilitates more equitable administration (Hariri & Babussalam, 2024). The National Criminal Code (KUHP) demonstrates a high degree of complexity in integrating diverse moral values into a single criminal law system that applies nationwide (MAHARANI et al., 2025).

The prohibition on cohabitation exemplifies Roscoe Pound's legal theory of social engineering, in which societal interests (public interest) are accorded precedence over individual interests, thereby deeming the regulation of cohabitation essential to upholding national morality and character rather than prioritizing personal liberty (Muslihuddin et al., 2023). From the standpoint of criminal law reform, the criminalization of cohabitation necessitates acknowledgment of the value pluralism inherent in Indonesian society, where diverse community groups do not uniformly endorse this practice (Feka et al., 2023). The imperative to revise the provisions on cohabitation within the National Criminal Code

to align with the principle of legal certainty, while factoring in cultural diversity and prevailing societal values (Muntini et al., 2025).

Table 1. Differences in the Perspectives of Legal Pluralism on Coexistence

Legal System	Views on Cohabitation	Applied sanctions	Legitimacy of Regulations
State Law (New Criminal Code)	Criminal acts that can be prosecuted	Maximum imprisonment of 6 months or a fine	Based on public interest and public morality
Islamic Law	Zina or sinful acts that are forbidden	Moral and social sanctions within the community	Based on Sharia law and the Quran
Customary Law	Varies, some tolerate (traditional marriage), while others reject it.	Customary sanctions in the form of fines or exclusion	Based on local values and norms
International Human Rights Law	Part of an individual's privacy rights	No sanctions, protected as a human right	Based on individual autonomy and personal freedom

The table above shows the differences between various legal systems in Indonesia. According to the weak legal pluralism theory, the state recognizes the existence of other legal systems but still affirms the supremacy of the state's law (Griffiths, 1986). Article 412 of the new Criminal Code reflects this approach by enforcing moral uniformity through criminal law, ignoring the diversity of practices and values that exist within society. However, this uniformity approach is problematic in the context of Indonesia's pluralistic society. Werner Menski developed the concept of the legal pluralism triangle, which places state law, religious law, and social values in a balanced position (Menski, 2006). Criminalizing cohabitation based solely on a moral perspective tends to overlook the socio-cultural complexities of Indonesia's diverse society.

3. Privacy Rights and State Intervention Limits

The penalization of cohabitation pursuant to Article 412 of the revised Criminal Code potentially clashes with the right to privacy enshrined in Indonesia's national constitution and the international human rights treaties it has ratified. This practice occupies a nexus between criminal law and human rights, engendering conflict between the state's prerogative to enforce public morality and the safeguarding of personal privacy and autonomy (Wicaksono, 2025). The right to privacy constitutes a core fundamental right safeguarded by constitutional provisions and global human rights frameworks. Specifically, Article 28G, paragraph (1), of the 1945 Constitution assures every individual protection for their personal affairs, family, honor, dignity, and property. Beyond these domestic assurances, Indonesia is obligated by the International Covenant on Civil and Political Rights (ICCPR), ratified via Law Number 12 of 2005, which, in Article 17, stipulates that no one shall endure arbitrary or unlawful intrusions into their privacy, family, home, or correspondence.

The concept of the right to privacy in modern legal theory has evolved from the right to be let alone, as proposed by Samuel Warren and Louis Brandeis, into a broader concept encompassing individual autonomy in making personal decisions without disproportionate government intervention (Warren & Brandeis, 1890). Cohabitation is an act carried out in the private domain, namely, inside the home or personal residence of the individuals involved, without exposure to the public.

Criminalizing acts in the private domain requires a more substantial justification than criminalizing acts in the public domain, because it risks violating privacy rights protected by the Constitution and international law.

Cohabitation in the latest Criminal Code emphasizes that criminal legal intervention into private life, through the criminalization of cohabitation, may violate the privacy rights guaranteed by the constitution, because consensual relationships between two adults are part of the private domain that should be free from government intervention (Iranti, 2025). Furthermore, from a human rights perspective, cohabitation is a personal choice that must be respected as part of the right to self-determination, provided it does not harm third parties (Wicaksono, 2025). Overall, Article 412 of the Criminal Code demonstrates a transformation in the state's role from guarantor of personal rights to an authority overseeing morality within the family. In fact, human rights instruments require states to respect individuals' autonomy in their private lives to preserve human dignity. As a result, the criminalization of cohabitation becomes a critical legal issue because it creates a direct conflict between state intervention and constitutionally protected individual freedoms, including the right to privacy (Putri & Junaidy, 2025).

4. Analysis of the Proportionality of Criminalizing Cohabitation

The principle of proportionality is a fundamental principle in modern criminal law that requires a balance between the objectives to be achieved and the means used to achieve them. In Dwiputra's research, it was found that criminalizing cohabitation does not meet the standards of proportionality because the criminal sanctions imposed are not commensurate with the level of social harm caused. (Dwiputra, 2025) Article 412 of the New Criminal Code (KUHP Baru) represents a form of legal paternalism in which the state assumes responsibility for protecting citizens from choices deemed immoral or self-harming. Joel Feinberg distinguishes between hard paternalism, which forces individuals for their own good, and soft paternalism, which only intervenes when individuals are unable to make rational decisions (Joel Feinberg, 1988). Criminalizing cohabitation is a form of harsh paternalism that cannot be justified in a modern democratic society.

Gerald Dworkin argued that legal paternalism can be justified only if specific criteria are met: the presence of a serious threat, the individual's inability to make rational decisions, and the absence of less invasive alternatives. In the case of cohabitation, none of these criteria are fulfilled. A consensual relationship between two adults living together does not pose a danger to third parties, is carried out by capable adult individuals who can consent, and there are many alternative regulations that better respect privacy, such as sexual education or strengthening the institution of marriage through positive incentives. From a utilitarian perspective, Jeremy Bentham argued that criminalizing cohabitation does not outweigh the harms it causes to both the individuals involved and to society as a whole (Lase et al., 2025).

5. Legal Comparison with Other Countries

The 2023 Law No. 1, particularly Article 412 concerning the criminalization of cohabitation, shows that Indonesia differs from countries that follow Civil Law and Common Law systems. Countries like the Netherlands or the United States have criminal laws strictly limited by the principle of the Right to Be Let Alone, under which the state has no legitimate authority to intervene in consensual private relationships because they are considered not to meet the harm principle threshold. Conversely, compared with countries that rigidly enforce Sharia law, such as Saudi Arabia, there are fundamental differences in offenses. In Saudi Arabia, cohabitation is considered a public offense, where the state

has absolute authority to prosecute automatically without requiring a complaint. Meanwhile, Indonesia adopts an absolute complaint-based offense mechanism, where cohabitation is regarded as a moral violation, but enforcement depends on the subjective judgment of families. This approach is quite different from the Filipino model, which focuses more on protecting the exclusivity of the marriage institution rather than comprehensive control over sexual morality.

This comparison shows that Indonesia's criminal policy is a pragmatic compromise that attempts to balance the demands of the majority's religious morality with the realities of a pluralistic society, but it risks creating legal uncertainty. The existence of a complaint-based offense indicates that the protected interest is no longer public morality of a communal nature, as in Saudi Arabia, but merely internal family harmony. This position places Indonesia under diplomatic pressure and international criticism regarding global human rights standards, because state intervention through Article 412 is considered not to meet the proportionality standard in protecting the right to privacy. Countries that still maintain the criminalization of cohabitation are generally those with legal systems heavily influenced by religious law or authoritarian states that use criminal law as a tool for social control (Feka et al., 2023).

6. Proportional Regulations that Respect Privacy Rights

Based on the analysis conducted, this study recommends several steps to address the issues related to the criminalisation of cohabitation. First, a material review of Article 412 of the New Criminal Code (KUHP) should be submitted to the Constitutional Court, particularly on the grounds that the provision may violate the right to privacy as guaranteed under Article 28G of the 1945 Constitution and the principle of equality before the law as stipulated in Article 27 paragraph (1) of the 1945 Constitution. In examining this provision, the Constitutional Court should apply a proportionality test to determine whether the criminalisation of cohabitation fulfils the requirements of a legitimate aim, necessity, and proportionality in the strict sense. Such a test is important to assess whether the objective of protecting public morality can be achieved through less restrictive and less invasive means than criminal punishment, particularly when the conduct in question belongs to the sphere of individual privacy.

Furthermore, there is a need to develop a legal understanding that clearly distinguishes between private morality and public morality. The state has legitimacy to regulate public morality only when it directly affects the public interest, rather than private morality, which falls within the domain of individual autonomy. This distinction is essential to reconstruct the concept of cohabitation in the Criminal Code on a more principled basis, grounded in legal certainty and substantive justice. In the long term, Indonesia also needs to develop a more inclusive concept of legal pluralism by recognising that, in a modern democratic society, no single moral system should be imposed on all citizens. The state must remain neutral towards the diverse conceptions of life held by its citizens. Therefore, Indonesian criminal law reform should better accommodate the plurality of values within society and avoid moral uniformity, which may instead create injustice.

Conclusion

In this study, the criminalization of cohabitation under Article 412 of the Indonesian Criminal Code signifies a reconfiguration of the nation's penal framework toward a conservative-moralistic archetype, wherein safeguarding collective ethos supersedes the harm principle and personal liberty. Philosophically, the legitimacy of this article is considered problematic because it intervenes in the private sphere without concrete harm, and it ignores the principle of legal pluralism through uniform moral policies that risk causing disharmony with customary and religious legal systems. Although the absolute complaint mechanism is adopted as a pragmatic compromise, its existence creates doctrinal

inconsistencies that reduce public criminal law to a mere tool of domestic social control, thereby systematically violating the right to privacy as guaranteed by the Constitution and international human rights standards.

The long-term implications of this regulation pose a risk of overcriminalization, which not only burdens judicial resources but also may be discriminatory against vulnerable groups and distance Indonesia from its commitments to global human rights protections. Therefore, this study recommends a comprehensive review of Article 412 before its effective implementation in 2026, considering decriminalization or strengthening the *lex certa* aspect to prevent abuse of authority. A more holistic and accommodating approach that prioritizes civil protection and respects diverse moral views in a pluralistic society is essential to ensure that the reform of national criminal law remains aligned with the legal ideals (*rechtsidee*) that uphold human dignity and legal certainty.

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