

# Legal Review of the Provisions on “Cohabitation” Based on Law Number 1 of 2023 Concerning the Criminal Code

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## ABSTRACT

Cohabitation or kumpul kebo is a popular term in society to refer to people who live together as husband and wife but are not married or outside of a legal marriage as regulated in Law Number 1 of 2023 concerning the Criminal Code. The research method used is normative juridical or library research, by analyzing library materials or secondary data that are relevant to the topic. This research is descriptive analytical, namely data obtained and processed and analyzed to provide a comprehensive picture of the legal regulations on Cohabitation as regulated in Articles 412, 417, 418, 419 with data collection methods through document studies. The results of the study show that the provisions of the laws and regulations governing cohabitation in the new Criminal Code create legal uncertainty and even lead to the criminalization of all perpetrators of sexual intercourse who are not bound by a legal marriage to become a criminal offense that results in the restriction of a person's individual rights which causes the loss of human rights protection as regulated in the 1945 Constitution.

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## 1. INTRODUCTION

The Indonesian nation, which is known to have a noble culture and uphold moral values in social life, (Lubis, 2024) now began to notice the emergence of a new phenomenon that is considered a form of deviation in sexual behavior. One form of deviation is the practice of "kumpul kebo" (cohabitation), which is a situation where men and women live together in one house without any marriage ties. In Dutch, this term is known as semen leven, while in more modern terms it is called living together, but the context in question still refers to kumpul kebo. (Kartodinudjo, 2023)

The term "kumpul kebo" itself comes from traditional Javanese society (especially the older generation). In general, this term refers to unmarried couples who live together, and their behavior is considered to resemble the behavior of buffalo or cows. In the view of society, buffalo are considered as animals that live as they please, so living together without the bonds of marriage is seen as reflecting a free lifestyle without rules.

Based on this, if it is associated with the level of promiscuity in Indonesia, it shows a high

number. According to data obtained by the National Population and Family Planning Agency (BKKN), in 2023, 60% of teenagers aged 16-17 years in Indonesia have had premarital sex. This shows a fairly high number of promiscuity in Indonesia, namely in cases of cohabitation. In 2021 to 2024, dozens of teenagers in their teens cohabited. Cohabitation is the behavior of living together like a household without a legal marriage bond carried out by unmarried couples.

Although the act of cohabitation can also be said to be an act of adultery, the act of cohabitation has a broader scope than the act of adultery or other obscene acts. Obscene acts or free sex are usually carried out by teenagers. In this case cohabitation can also be said to be an act of adultery. (Danardana & Setyawan, 2022) "The Indonesian state system in the legal state norm is carried out by the government to regulate society in matters of personal and/or family protection from perpetrators who deviate from a person's dignity and honor, especially women, which is called adultery and is regulated in the current Criminal Code.

Some reasons that cause people to do cohabitation, namely on the basis of mental unpreparedness in undergoing marriage, uncontrollable lust, the influence of the surrounding environment and even because of financial problems. The act of cohabitation is an act that has a wider scope than adultery or other immoral acts. Acts that can damage the morals of this nation's generation are truly the same as the behavior of free association carried out by teenagers or young people who in this case carry out immoral acts without a legal marriage bond. (Habil ildi qayyum, Yon Efri, 2025)

Cohabitation acts such as living together in lodgings, boarding houses and rented houses without marriage and coercion, especially those carried out by young people in a covert manner, can be felt together as a form of violation of moral and decency norms that live in society. However, what is actually felt as a violation of a norm or rule that lives in society is still very difficult to reach by criminal law or Law No. 1 of 1946 concerning the Criminal Code which is a legacy of the Dutch colonial government.

In comparison, Gayus Lambuun stated that the issue of morality has never been the focus of the state's attention because the state does not have the authority to regulate such issues. He emphasized that many countries state that aspects of morality are not the state's business, and when the state begins to regulate practices such as cohabitation, it means that the state has interfered in a person's personal or private life. However, some countries do include cohabitation in their laws and regulations as a criminal offense. However, the motives or reasons for these regulations vary between countries. For example, in the 1951 Constitution of the State of Yugoslavia (Article 193), cohabitation is considered a criminal offense if it is done with children. Meanwhile, in the Singapore Criminal Code (Article 493), cohabitation becomes a criminal offense when a man lives with a woman who believes that they are legally married, so that the man is considered to have deceived the woman.

## 2. METHODS

Legal research is conducted to find solutions to legal issues arising from the topics discussed in this paper. The research method used is normative juridical. Normative juridical legal research, or library legal research, is conducted by analyzing literature or secondary data relevant to the research topic. (Mahmud, 2005) According to Soerjono Soekanto, Normative legal research consists of: legal principles; legal systematics; Research on the level of legal synchronization; on legal history; comparative law.

Of the five types of normative legal research, those that will be used in this research are research on legal principles and comparative legal research. (Sukanto, 2009) This type of research examines legal norms and principles regarding legal regulations regarding cohabitation as regulated in Law Number 1 of 2023 concerning the Criminal Code.

### 3. RESULTS AND DISCUSSION

#### Legal Regulations Regarding Cohabitation According to Law Number 1 of 2023 Concerning the Criminal Code

The regulation of cohabitation is not only reviewed or viewed from the legal or regulatory perspective that will apply in the future (*Ius Constituendum*), but is also based on current positive law (*Ius Constitutum*). (Harahap et al., 2023) The goal to be achieved is to make a comparison that can be used in the future, namely as input for criminal law reform while remaining oriented towards the cultural and philosophical aspects of the nation. (Setyawan, 2024) In Indonesian positive law there are no definite rules regarding cohabitation, only rules regarding adultery are regulated. Adultery itself is regulated in Article 284 paragraph (1) of the Criminal Code with the following explanation: (Law Number 1 of 1946 concerning the Criminal Code, nd)

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

1. a married man who commits *gendak* (overspel), even though it is known that Article 27 of the Civil Code applies to him; b. a married woman who commits *gendak*, even though it is known that Article 27 of the Civil Code applies to her;
2. a man who participates in committing the act, even though he is known to be married; b. a married woman who participated in committing this act, even though she knew that the person who was also guilty was married and Article 27 BW applies to her."

Law Number 1 of 2023 concerning the Criminal Code (KUHP), according to Barda Nawawi Arief, is essentially an effort to renew, restructure/reconstruct the entire substantive criminal system contained in the provisions of the Criminal Code (WvS) during the colonial era of the Dutch East Indies. "The criminalization policy is a government policy to determine and/or elevate an act that was originally not a criminal act to the category of a criminal act". "The criminalization policy is in the realm of criminal policy, which is a form of criminal law reform (penal reform) which will later be oriented towards national law reform (law reform)." (Dwipayana & Wirasila, 2020)d

Legal reforms in the "Draft Law on the Criminal Code since its issuance in 1964 until now regarding the crime of adultery have undergone significant changes." After being studied, the positive discussion turned out to clarify the understanding that the crime of adultery as stated in the provisions of Article 284 of the Criminal Code has many moral weaknesses. The crime of living together/adultery in the Draft Law on the Criminal Code is currently regulated in Articles 417, 418, and 419. (Wowor, BY, Paransi, E., & Bawole, 2024) The following is the text of the articles:

#### Article 417"

1. "Any person who has sexual intercourse with someone who is not his/her husband or wife shall be punished for adultery with a maximum imprisonment of 1 (one) year or a Category II fine (Rp. 10,000,000,-)."
2. "The criminal acts referred to in paragraph (1) shall not be prosecuted except upon complaint from the husband, wife or child."
3. "The provisions referred to in Article 25, Article 26 and Article 30 do not apply to complaints as referred to in paragraph (2)." (4) "Complaints may be withdrawn as long as the examination in court has not yet begun."

#### Article 418"

1. "A man who has sexual intercourse with a woman who is not his wife with the woman's consent because of a promise to marry her, then breaks that promise, is subject to a maximum prison sentence of 4 (four) years or a maximum fine of Category III."
2. "In the case of a criminal act as referred to in paragraph (1) resulting in pregnancy and the man is unwilling to marry or there is an obstacle to marriage which he is aware of according to the laws and regulations in the field of marriage, the penalty is a maximum of 5 (five) years' imprisonment or a maximum fine of Category IV."
3. "Criminal acts as referred to in paragraph (1) and paragraph (2) shall not be prosecuted except upon complaint from a woman who was promised to be married."

4. Complaints can be withdrawn as long as the hearing in court has not begun."

#### Article 419

"Any person who has sexual intercourse with someone who he knows is a blood relative in a direct or lateral line up to the third degree shall be punished with a maximum imprisonment of 12 (twelve) years."

### Legal Regulations for Cohabitation in Various Countries

In the process of discussing the RKUHP before it becomes a law, the drafting team conducted a comparative study that influenced the discourse of the RKUHP discussion, especially in countries that regulate cohabitation in their Criminal Codes, such as Malaysia, Brunei Darussalam, India, Yugoslavia, China and Canada, which regulate the formulation of cohabitation in crimes against marriage and violations of the rights of wives and husbands, with the following rules:(Girlie, 2023)

No	Country	Policy
1.	Malaysia	<p><b>Article 493</b></p> <p>"A man who deceives a woman who is not legally married to him according to the law, so that she believes that she is legally married to the man and lives with him or has sexual intercourse with him based on this belief, is subject to a prison sentence of 10 years and a fine."</p>
2.	The Kingdom of Darussalam	<p><b>Article 493</b></p> <p>"A man who by tricking/deceiving a woman who is not legally married to him to marry him according to the law, so that she believes that she is legally married to the man and lives together or has sexual intercourse with him based on this belief, is punished with imprisonment of not more than 10 years and also a fine."</p>
3.	India	<p><b>Article 493</b></p> <p>"A man who deceives/tricks a woman who is not legally married to him into marrying him according to the law, so that she believes that she is legally married to that man and lives with him or has sexual intercourse with him based on that belief, is subject to a prison sentence of 10 years and a fine."(Indian Penal Code, 1960)</p>
4.	Yugoslavia	<p><b>Article 193</b></p> <p>1. Adults who live outside of marriage with a child who has reached the age of 14 years, shall be punished with imprisonment of not less than three months.</p>

## 5. China

2. The same criminal penalty is also imposed on parents or guardians who allow or encourage/persuade children over 14 years of age to live together with other people.
3. If the crime in paragraph (2) is committed for personal gain, the maximum penalty is five years imprisonment.
4. If the marriage takes place, the prosecution is not carried out; and if the prosecution has been carried out, the prosecution is not continued.

### Article 259

Anyone who knowingly lives together with or marries someone who is the husband/wife of an active soldier shall be punished with a fixed term of imprisonment of not more than three years or criminal detention.

## 6. Canada

### Article 293

Any person guilty of an indictable offence and liable to imprisonment for a maximum term of 5 (five) years or guilty of committing a crime punishable by a short sentence, namely:

- a. practicing or doing or in any way agreeing or permitting to do or do any form of polygamy or any form of living together as husband and wife with more than one person at the same time, whether or not it is recognized by law as a binding form of marriage; or
- b. celebrate, assist or become a party to any rite, ceremony, contract or agreement intended to sanction the relationship referred to in paragraph (a). (Canadian Criminal Code, n.d.)

When viewed comprehensively, the concept of cohabitation regulation in other countries falls into the section of crimes against marriage and violations of the rights of wives and husbands, with clear limitations related to prohibited acts, for example cohabiting by means of fraud, cohabiting with children, cohabiting by means of polygamy and cohabiting with a wife/husband who is an active member of the armed forces, there are specific limitations that are prohibited, whereas, in the formulation of cohabitation regulated in the Criminal Code, it has a general criminalization content of "living together as husband and wife outside of a legal marriage" there are no limitations, for example fraud, with children, or with active soldiers. By looking at the comparison of policies with these countries, the formulation of cohabitation in the RKUHP should regulate with clear limitations, regarding the specific conditions that are prohibited.

Meanwhile, if we look at the nature of the background of cohabitation regulations in Indonesia, then we must look back at the purpose of the nature, that this criminalization is intended to glorify and

respect the institution of marriage, then it should be possible to include a limitation that this prohibition applies to those who live together by deception have entered into a marriage, not in the context of living together without a clear definition. In the criminal elements contained, there is no explanation of the indicators and standards or limitations related to what is meant by "living together as husband and wife" this will complicate the process of proof. If we see that the goal is to protect the institution of marriage, then it is closely related to sexual relations, while sexual relations outside of marriage itself have also been prohibited by the article on the criminalization of adultery.

### **Indicator of Article 412 of the Criminal Code "Living Together Without a Valid Marriage"**

Article 412 of the 2023 Criminal Code prohibits anyone who lives together as husband and wife outside of a legal marriage, but the indicators of living together as husband and wife are not explained in the Criminal Code. Because as explained in the previous section, if the goal is to protect the institution of marriage, then it is closely related to sexual relations, while sexual relations outside of marriage itself have also been prohibited by the article on the criminalization of adultery. Thus, by not explaining the indicators and standards or limitations related to what is meant by "living together as husband and wife outside of marriage", this will complicate the proof process. Difficulty in determining whether the element of "living together as husband and wife".

Referring to Law Number 1 of 1974 concerning Marriage, it is explained that in the relationship between husband and wife, rights and obligations will arise in it. Furthermore, Article 32 of the Marriage Law explains that in a household there will be a division of roles, namely the husband becomes the head of the family and the wife becomes the housewife. This can be seen in Article 34 of the Marriage Law that the husband has the duty to protect his wife and fulfill the needs of household life and the wife has the obligation to manage household affairs. In addition, the Marriage Law also explains that in the relationship between husband and wife, it is obligatory to love, respect, be faithful and provide physical and spiritual assistance. (Anwar, 2020)

Regarding the definition of living together as husband and wife outside of legal marriage, in the UK, Cohabitation has been part of the law since the beginning of the modern welfare state in 1948 and the term used is "living together as husband and wife outside of marriage". To be considered as "living together as husband and wife", the UK tries to explain the indicators and considerations that can be used to determine what is called "living together as husband and wife". To be said to be a cohabiting couple or "living together as husband and wife", the relationship must be the same as the relationship of a married couple. There is no clear pattern that can explain the dynamics of relationships in marriage, but it is explained that marriage is a stable partnership, not only based on economic dependence but also an emotional relationship of lifelong commitment and not just a relationship of convenience, friendship, or living with a lover.

For example, to be able to prove these indicators must go through the collection of information with strong evidence, in the case of *Fitzpatrick v Sterling Housing Association* the judge called the closest relatives such as family, friends and neighbors to be able to prove these indicators and determine that they are a couple living together. Another country that tries to explain the indicators to determine the husband and wife relationship is India. In the decision in the case of *Indra Sarma v. VKV Sarma* the Supreme Court explained the indicators that can be used to determine the husband and wife relationship are:

- a. There is a long enough time period in a relationship. To maintain a long-term relationship, there will be a division of financial roles and a division of domestic roles which are responsible for taking care of the household.
- b. There is sexual interaction that is not only done for fun but also for emotional support and to continue the lineage by having children.
- c. The presence of children
- d. Declare to the public that they are a married couple

In examining cases related to marriage, the Indian Court has to give an opinion regarding the relationship of one person to another person, then the court can call family members or others who have special knowledge of the conduct and facts of the relationship which can prove the relationship between the subjects of the case.

Based on the Marriage Law which explains the nature of the relationship between husband and wife, the cases of *Fitzpatrick v Sterling Housing Association* and *Indra Sarma v. VKV Sarma* which explain how indicators of husband and wife relationships can be used as a basis for consideration by law enforcement officers to determine whether someone has lived together as husband and wife as regulated in Article 412 of the 2023 Criminal Code. In addition, the practice carried out by judges in the two previous case examples, namely by presenting relevant witnesses such as family, friends and neighbors in proving these indicators, can also help law enforcement officers to obtain information in the evidence process.

#### 4. CONCLUSION

Law Number 1 of 2023 concerning the Criminal Code regulates the terms of cohabitation as stated in Article 417, Article 418, and Article 419. The act of living together (cohabitation) has drawn many opposing views from legal experts and the general public. Because it is considered to have interfered with the personal or private affairs of its citizens. In this case, the state may not deprive its citizens of their freedom or deprive them of their rights such as the right to freedom. And there is also a lack of norms such as in Article 30 paragraph, which does not require an absolute complaint. If the perpetrator of the act of living together (cohabitation) or adultery commits his act again, it is questionable whether a complaint can be made to the authorities for the second time.

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