

CRIMINALIZATION OF COHABITATION UNDER INDONESIA'S 2023 CRIMINAL CODE: A COST-BENEFIT ANALYSIS PERSPECTIVE

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Abstract

Cohabitation, defined as unmarried couples living together, has recently been criminalized under Article 412 of Indonesia's 2023 Criminal Code. This policy reflects the state's intention to regulate moral conduct and protect social values within society. However, the criminalization of private conduct raises important questions regarding its effectiveness and efficiency, particularly when assessed through a law and economics perspective. This study aims to analyze the criminalization of cohabitation under the 2023 Criminal Code using a cost-benefit analysis framework and to examine its legal consequences within the broader legal system. The research employs a doctrinal legal method, supported by a conceptual approach grounded in law and economics theory. The findings indicate that, from a cost-benefit perspective, the criminalization of cohabitation offers potential benefits, including the protection of social norms, moral values, and the institution of family, as well as the prevention of related social problems. However, these benefits are accompanied by significant costs, such as increased burdens on the criminal justice system, higher state expenditures, and potential socio-economic repercussions. Furthermore, as an absolute complaint offense, the enforcement of Article 412 depends on reports from specific parties, which may limit its practical effectiveness. At the systemic level, this provision also risks creating legal disharmony with existing regulations, including marriage and child protection laws. In conclusion, the criminalization of cohabitation in Indonesia's 2023 Criminal Code reflects a normative commitment to moral regulation but raises concerns regarding its efficiency and coherence within the broader legal framework.

Keywords: *Cost-Benefit Analysis; Cohabitation; Criminalization; Law and Economics; Indonesian Criminal Code*

I. INTRODUCTION

Indonesia, a country with a strong Eastern culture, has its own views on sexual relations between men and women outside of marriage. This act is considered taboo and contrary to religious norms and decency. In reality, sexual relations outside of marriage are often referred to as zina or adultery in society.

The phenomenon of cohabitation or living together without marriage is increasingly visible in people's lives, especially in Indonesia. Acts that were once considered taboo are now increasingly visible with the times. Couples living together in the same house as husband and wife, but without a legal marriage, are becoming more common. Modern Indonesians are trying to keep up with

the times, but their view of modernity contradicts the values of Indonesia. In this country, such actions are considered immoral, against the rules, and against the values of both the individual and the country.

The absence of criminal law rules at the Law level that regulate the punishment of adultery perpetrators has triggered the increasingly widespread practice of cohabitation between men and women. Law, as a collection of norms that regulate people's lives with a compelling and binding nature and contain sanctions, should always be oriented towards the interests of society. Thus, the law can be in harmony with the nation's personality and be able to fulfill legal needs in the community.¹

Cohabitation is two individuals of the opposite sex who live together, where their status is outside the legal marriage bond.² The act of cohabitation is often targeted by citizens for persecution, officially cohabitation was criminalized for the first time by being regulated in article 412 of the 2023 Criminal Code. Prior to this cohabitation regulation, the perpetrator of cohabitation would only be charged with a criminal offense article coupled with the act of cohabitation.³ For example, in

the act of cohabitation coupled with adultery, only the adultery article will be charged, namely Article 284 of the Criminal Code.⁴ Prior to this new Penal Code, there was a legal vacuum regarding the act of cohabitation. The act of cohabitation was criminalized for the first time by being regulated in article 412 of the 2023 Criminal Code.

The criminalization of cohabitation needs to be analyzed through the cost-benefit principle, which weighs the benefits and costs of its implementation. The cost benefit principle is a criminalization criterion expressed by Sudarto. Where the cost benefit principle is explained by Sudarto, efforts to prevent an act by using the means of criminal law need to be accompanied by a calculation of the costs that must be incurred (referred to by Sudarto as social-costs) and the results expected to be achieved. The system of organizing criminal law is financed by the community, so that with the issuance of criminal laws, the burden of the people also increases.⁵

The cost benefit principle put forward by Soedarto above has similarities with the cost benefit principle formulated (conclusion) of the Symposium on Criminal Law Reform

¹ Anton Sudanto, 2017, Penerapan Sistem Pemidanaan Dalam Tindak Pidana Perzinaan Dalam Perspektif Hukum Pidana Materil Di Indonesia, Jurnal Hukum Staatrechts, Volume 1 Nomor 1, hal. 130

² Pahrur Rizal, "Dasar Kriminalisasi Kohabitasi Dalam Pembaharuan Hukum Pidana Indonesia," MEDIA BINA ILMIAH 15, no. 1 (6 Agustus 2020): 3907

³ A. Danardana dan Vincentius Patria Setyawan, "Kriminalisasi Fenomena Penyimpangan Sosial

Kohabitasi (Samenlaven) Dalam Perspektif Hukum Pidana," *Justitia et Pax* 38, no. 1 (29 Juni 2022): 220

⁴ Syamsul Huda, "Zina dalam Perspektif Hukum Islam dan Kitab Undang Undang Hukum Pidana," *Hunafa: Jurnal Studia Islamika* 12, no. 2 (31 Desember 2015): 379

⁵ Dion Valerian, "KRITERIA KRIMINALISASI: ANALISIS PEMIKIRAN MOELJATNO, SUDARTO, THEO DE ROOS, DAN IRIS HAENEN", *VeJ*, Volume 8, Nomor 2, Desember 2022. Hal 423

(1976) which states “Is the cost of criminalization balanced with the results that will be achieved, meaning that the cost of monitoring and law enforcement, as well as the burden borne by victims, and the perpetrators themselves must be balanced with the legal order situation that will be achieved?”⁶ The analysis of the relationship between the criminalization of cohabitation and the cost-benefit principle involves an evaluation of the benefits and costs arising from the policy.

In criminal law policy studies, the effectiveness of a rule of law is often measured through Cost-Benefit Analysis. Cost-Benefit Analysis is an economic concept used in the study of criminal law policy.⁷ This analysis emphasizes the importance of cost and benefit analysis because it realizes the scarcity in the enforcement of criminal provisions.⁸ Thus, policy makers can be more rational and unemotional in prohibiting an act and threatening criminal sanctions for those who commit the prohibited act.

In Indonesia, criminal provisions are increasing every year. Unfortunately, law enforcement suffers from various limitations, including law enforcement (police, prosecutors, judges), related staff and budget.

This makes it difficult for them to enforce the criminal law. In addition, the majority of new criminal provisions are punishable by imprisonment which is inefficient because it consumes too much budget. Imprisonment has also not been able to restore the losses suffered by victims.⁹ Therefore, criminal policy is analyzed based on the cost-benefit principle so that limited resources are used to achieve maximum results (efficiency). This approach to analyzing criminal policy emphasizes not only cost efficiency, but also its effectiveness or success in reducing crime and protecting society. Thus, the criminal policy taken can produce an optimal impact. Referring to the background described above, the problem formulations related to this discussion are:

1. How is the criminalization of cohabitation in the 2023 Criminal Code viewed from the cost benefit principle?
2. What are the legal consequences of the criminalization of cohabitation in the 2023 Criminal Code?

II. RESEARCH METHODOLOGY

This study employs a doctrinal legal research method as its primary approach, focusing on the analysis of statutory

⁶ Salman Luthan, “Asas Dan Kriteria Kriminalisasi”, *Jurnal Hukum*, No. 1 Vol. 16, Januari 2009. Hal 11

⁷ I Made Agus Mahendra Iswara, I Ketut Kartika Widnyana, Made Gede Arthadana, *Kebijakan Pidana Kejaksaan Republik Indonesia Dalam Penanganan Perkara Tindak Pidana Korupsi Dengan Kerugian Kecil (Patty Corruption) Dengan Pendekatan Kemanfaatan*, *Jurnal Hukum Saraswati (JHS)* Volume. 03, Nomor 02, (2021). Hal 47

⁸ Institute For Criminal Justice Reform (ICJR), 2016, *Pengantar Analisis Ekonomi Dalam Kebijakan Pidana di Indonesia*, Editor: Supriyadi Widodo Eddyono.

⁹ Institute For Criminal Justice Reform (ICJR), 2016, *Pengantar Analisis Ekonomi Dalam Kebijakan Pidana di Indonesia*, Editor: Supriyadi Widodo Eddyono.

regulations, legal principles, and relevant doctrines concerning the criminalization of cohabitation under Indonesia's 2023 Criminal Code. The doctrinal approach is complemented by a conceptual approach, particularly drawing on the law and economics framework, to assess the policy through a cost-benefit analysis perspective.

In addition, this research incorporates a limited empirical component to enrich and validate the normative findings. Empirical data were obtained through semi-structured interviews with selected key informants, including judges and law enforcement officers, to capture practical insights regarding the implementation and potential impact of the regulation.

The study applies three main approaches: the statutory approach, examining relevant legislation; the conceptual approach, analyzing legal doctrines and theoretical frameworks; and the economic approach, evaluating the efficiency and implications of criminalization using cost-benefit analysis.

Data are analyzed qualitatively through a systematic interpretation of legal materials, supported by triangulation with interview findings to ensure analytical depth and validity. This integrated method enables a comprehensive understanding of both the normative structure and practical implications of the criminalization policy.

III. DISCUSSION AND RESULTS

3.1 Analysis Of The Criminalization Of Cohabitation In The 2023 Criminal Code In Terms Of The Cost Benefit Principle

1. Cost of Criminalizing Cohabitation

The criminalization of the act of cohabitation in the Criminal Code 2023 carries much deeper and broader social consequences than it might seem at first glance. The impact of this policy stretches far beyond the direct punishment of the offender, creating ripple effects that affect individuals, families, and even the social fabric of society as a whole. An analysis of the costs of criminalizing cohabitation can be done in several aspects, namely:

a) Cost of Law Enforcement

The criminalization of cohabitation in the 2023 Criminal Code raises various implications, especially from the perspective of law enforcement costs. The criminalization of cohabitation in the 2023 Criminal Code has the potential to add a significant burden to the Indonesian criminal justice system.

With the inclusion of cohabitation as a criminal offense, law enforcement officials will be faced with additional workload in conducting investigations and prosecutions. This includes the collection of evidence, interrogation of witnesses, and preparation of case files, all of which require human resources and a significant

budget.¹⁰ In many cases, the act of cohabitation takes place in the private sphere, requiring law enforcement to conduct more in-depth investigations to prove an offense. This increases the time needed to resolve each case. According to the results of the author's interview with Ms. Irma Ikawati as Kanit Idik IV Sat Reskrim Polres KUKAR explained that if the problem of investigating and investigating cohabitation cases takes a long time, we cannot be quick because this cohabitation case is the same as adultery / infidelity cases. The penalties are few but proving that someone has done it takes a long process. From the testimony of temporary witnesses to find sanctions it is not as easy as other cases. Household cases, cases of infidelity, adultery, many people do not want to interfere. This complicated evidentiary process also has the potential to prolong the handling of cases at the police, prosecutor and court levels.

According to the results of the author's interview with Ms. Irma Ikawati as Kanit Idik IV Sat Reskrim Polres KUKAR explained that usually we as police need cooperation from the local community to want to provide actual information related

to cohabitation in their environment, if the local community / religious leaders do not want to cooperate it will complicate our investigation process.

An increase in the number of cases coming to court due to the criminalization of cohabitation will impact on the workload of judges and court staff. This can lead to a backlog of cases and prolong the judicial process, which in turn can reduce the effectiveness of the criminal justice system as a whole..¹¹

The criminalization of cohabitation also has the potential to increase the number of inmates in correctional institutions, which can cause or exacerbate overcrowding. Correctional institutions in Indonesia were already facing overcrowding problems before the criminalization of cohabitation. The addition of new criminal offense categories will further strain this already limited capacity.¹²

Overcrowding can hamper efforts to rehabilitate and reintegrate prisoners. Overcrowded conditions can lead to a decrease in the quality of coaching programs, which in turn can increase the risk of recidivism.¹³ Speaking of

¹⁰ Arief, Barda Nawawi. "Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara." *Jurnal Hukum & Pembangunan* 19.3 (2019): 298-315

¹¹ Mulyadi, Lilik. "Peradilan Bersih dan Bermartabat: Pembaharuan Sistem Peradilan Pidana Indonesia." *Jurnal Hukum & Peradilan* 5.3 (2016): 323-338.

¹² Anggraeni, Dewi. "Dampak Overcrowding pada Lapas dan Rutan di Indonesia." *Jurnal Ilmiah Kebijakan Hukum* 14.2 (2020): 263-284.

¹³ Priyatno, Dwidja. "Sistem Pelaksanaan Pidana Penjara di Indonesia." *Jurnal Dinamika Hukum* 13.2 (2013): 210-221.

rehabilitation, according to the results of the author's interview with Ms. Irma Ikawati as Kanit Idik IV Sat Reskrim Polres KUKAR explained that moreover, government rehabilitation is needed in this case, for example providing rehabilitation places or shelters. This is because in Kukar Regency there is no special shelter for victims of sexual violence. As police, we see this as an urgent need to help victims better.

On the other hand, an increase in the prison population will have a direct impact on operational and maintenance costs. This includes the cost of food, healthcare, and other basic necessities that must be provided by the state.¹⁴

b) Economic Cost

The 2023 Criminal Code reform brings significant changes to the Indonesian criminal law system, including the criminalization of cohabitation. This raises questions regarding the effectiveness and efficiency of the policy in terms of cost-benefit analysis.

In terms of law enforcement budget burden, criminalizing cohabitation has the potential to substantially increase state expenditure. Enforcing the law on this new criminal offense will require the allocation

of additional resources, both in terms of personnel and infrastructure.¹⁵ Law enforcement officers need to be trained to handle cohabitation cases, which require a different approach than conventional criminal offenses. In addition, a budget is needed to investigate, arrest, detain and prosecute cohabiting offenders.¹⁶

Increased workload in the criminal justice system may also result in the need for additional judges, prosecutors, and court staff, which will impact on the state budget.¹⁷ Not to mention the increase in the number of prisoners due to court decisions related to cohabitation cases, which will increase the burden on the correctional system, which is already facing overcrowding problems.¹⁸

Furthermore, the costs that will be incurred by the government in implementing this regulation, such as the cost of conducting a post mortem. According to the results of the author's interview with Mrs. Irma Ikawati as Kanit Idik IV Sat Reskrim Polres KUKAR explained that if someone commits an act of cohabitation, the effects can vary, the effect can be persecution, the effect can be that he experiences sexual violence. By

¹⁴ Sulhin, Iqram. "Filsafat (Sistem) Pemasyarakatan." *Jurnal Kriminologi Indonesia* 7.1 (2011): 134-150.

¹⁵ Becker, G. S. (1968). Crime and punishment: An economic approach. *Journal of Political Economy*, 76(2), 169-217.

¹⁶ Cohen, M. A. (2000). Measuring the costs and benefits of crime and justice. *Criminal Justice*, 4(1), 263-315.

¹⁷ Nagin, D. S. (2013). Deterrence in the twenty-first century. *Crime and Justice*, 42(1), 199-263.

¹⁸ Lappi-Seppälä, T. (2011). Explaining imprisonment in Europe. *European Journal of Criminology*, 8(4), 303-328.

experiencing sexual violence, what is needed is the cost of performing a post mortem.

Furthermore, according to the results of the author's interview with Mr. Arya Ragatnata as a judge of the Tenggara District Court, he revealed that this policy could be supported by socialization to the community. The socialization of the new legal rules regarding the criminalization of cohabitation acts carried out by the local government so that the public knows, although the concept is that when the law is passed, it must be known, but our society has ordinary people who are afraid that some do not understand, so it is necessary to massively inform the new regulations to the lower classes, all including law enforcement officials. So that there are socialization budget costs that will be incurred by the government.

Furthermore, the potential for decreased economic productivity also needs to be considered. Criminalizing cohabitation may affect the social and economic dynamics of society. Individuals directly affected by this policy may experience disruptions in their personal and professional lives, which in turn may affect work productivity.¹⁹ The criminalization of

cohabitation can create social stigma that can potentially affect the employment opportunities and professional relationships of the individuals involved.²⁰ This could result in lost economic opportunities and a decline in their contribution to overall economic growth.

In the context of the reform of the Criminal Code 2023, it is necessary to consider whether the expected benefits of criminalizing cohabitation are worth the economic costs.²¹ Analisis mendalam diperlukan In-depth analysis is needed to evaluate the long-term impact of this policy on public welfare and national economic growth.

In the long run, criminalizing cohabitation could have significant implications for Indonesia's social structure and demographics. It has the potential to alter marriage and family formation patterns, which are the basic units of society. People may tend to marry earlier or delay marriage to avoid the risk of criminalization, which could affect fertility rates and population growth. These changes could in turn impact the composition of the labor force and the dependency burden of the economy in the future.

¹⁹ Grogger, J. (1995). The effect of arrests on the employment and earnings of young men. *The Quarterly Journal of Economics*, 110(1), 51-71.

²⁰ Pager, D. (2003). The mark of a criminal record. *American Journal of Sociology*, 108(5), 937-975.

²¹ Posner, R. A. (1985). An economic theory of the criminal law. *Columbia Law Review*, 85(6), 1193-1231.

In terms of public welfare, this policy may create social and psychological strain. Directly affected individuals may experience prolonged stress and anxiety, which may reduce their quality of life.

c) Social Cost

One of the social costs that cohabiting offenders have to face is societal stigmatization. This can be likened to a label that is so strongly attached that it fundamentally changes the way society views a person. This is what happens when a person is labeled as a "criminal" or "moral offender" due to the act of cohabitation. Howard Becker, in his labeling theory, explains how labels like these can become a person's primary identity, overriding all other aspects of their personality.²²

This label has the power to change the trajectory of a person's life. An individual prior to this label may have been viewed as a productive and respected member of society. But with the label "criminal" attached, they may face rejection in various aspects of life. For example, jobs that were once easy to get are now a major challenge; studies show a 50% decrease in employment opportunities for those with criminal records.²³ Even basic things like

finding housing can be a struggle for cohabiting offenders with landlords reluctant to rent to those with criminal records.²⁴

However, the impact of this stigmatization does not stop at external barriers. It goes further into the psychology of the individual as "self-stigma". The perpetrator will live with the belief that he or she is unworthy and fundamentally flawed or bad. Research shows that this internalization of stigma is strongly correlated with an increased risk of depression, anxiety, and even thoughts of ending one's life.²⁵

Furthermore, this stigma creates huge obstacles in the process of social reintegration. Communities that may have once welcomed them with open arms may now close their doors. Social networks that should be a support system are eroded. The process of rebuilding a difficult life will then create a cycle of marginalization that is difficult to break.²⁶

But this stigma doesn't just stop with the perpetrator. It extends, gripping the entire family in what Goffman calls "association stigma".²⁷ As for the perpetrator's family, children may face

²² Becker, H. S. (1963). *Outsiders: Studies in the Sociology of Deviance*. Free Press.

²³ Pager, D. (2003). The Mark of a Criminal Record. *American Journal of Sociology*, 108(5), 937-975..

²⁴ Thacher, D. (2008). The Rise of Criminal Background Screening in Rental Housing. *Law & Social Inquiry*, 33(1), 5-30.

²⁵ Livingston, J. D., & Boyd, J. E. (2010). Correlates and consequences of internalized stigma for people living with mental illness: A systematic review and meta-analysis. *Social Science & Medicine*, 71(12), 2150-2161.

²⁶ Western, B., & Pettit, B. (2010). Incarceration & social inequality. *Daedalus*, 139(3), 8-19.

²⁷ Goffman, E. (1963). *Stigma: Notes on the Management of Spoiled Identity*. Prentice-Hall.

bullying at school and spouses may face discrimination at work. This is due to actions they did not commit themselves. The family as a whole can experience social ostracization, losing support from the neighborhood.

Trust in the legal system and government can decline if the law is perceived as too invasive or unfair.²⁸ There can even be open conflict between groups supporting and opposing criminalization. This has the potential to create wider social tensions.²⁹

2. Benefits of Criminalizing Cohabitation

The criminalization of cohabitation in the 2023 Criminal Code has significant potential benefits in terms of deterrence, both general deterrence and specific deterrence. General deterrence refers to the deterrent effect that the threat of punishment has on the general public.³⁰ In the context of cohabitation criminalization, general deterrence can be manifested in several ways:

a) Enforcement of Social Norms

By criminalizing cohabitation, the state explicitly affirms that such behavior is contrary to social norms prevailing in society. As, according to the results of the author's interview with Mr. Arya Ragatnata

as a judge of the Tenggara District Court revealed that the act of cohabitation deviates from the values and norms that live in the midst of Indonesian society. The majority of our population is Muslim, with noble values that exist, in fact in my opinion it is not prevalent in our country. By criminalizing cohabitation, it can strengthen the moral and ethical values that have long been embraced by most Indonesians.³¹

b) Psychological Effects

The threat of criminal sanctions against cohabiting offenders can create a psychological effect that inhibits individuals from committing such acts. Awareness of the legal consequences can encourage people to be more careful in their actions and reconsider the decision to commit cohabitation.³²

c) Public Education

The criminalization process of cohabitation in the Criminal Code 2023 can serve as a means of public education regarding the negative impact of such behavior. This is in line with the function of criminal law as a tool of social engineering proposed by Roscoe Pound.³³

Meanwhile, special deterrence focuses on the deterrent effect on individuals who have

²⁸ Tyler, T. R. (2006). *Why People Obey the Law*. Princeton University Press.

²⁹ Putnam, R. D. (2000). *Bowling Alone: The Collapse and Revival of American Community*. Simon & Schuster.

³⁰ Barda Nawawi Arief, "Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara", (Semarang: Badan Penerbit Universitas Diponegoro, 2000), hlm. 35.

³¹ Muladi dan Barda Nawawi Arief, "Teori-Teori dan Kebijakan Pidana", (Bandung: Alumni, 2005), hlm. 16.

³² Romli Atmasasmita, "Teori dan Kapita Selekta Kriminologi", (Bandung: Refika Aditama, 2007), hlm. 67.

³³ Soerjono Soekanto, "Pokok-pokok Sosiologi Hukum", (Jakarta: Rajawali Pers, 2014), hlm. 126.

committed criminal offenses.³⁴ In the context of criminalizing cohabitation, special deterrence can be manifested through:

a. Offender Rehabilitation

Criminal sanctions imposed on cohabiting offenders can be designed to have a rehabilitative element. Rehabilitation programs can help offenders to understand the negative impact of their actions and encourage behavior change.³⁵

b. Prevention of Recidivism

With criminal sanctions, it is expected that offenders who have been convicted will not repeat the act of cohabitation in the future. This is in line with the purpose of punishment to prevent recidivism.³⁶

c. Domino Effect

Punishment of cohabiting offenders can have a domino effect on the offender's social environment, preventing those around them from committing similar acts..³⁷

In the context of criminalizing cohabitation in Indonesia, the aspects of protecting social and moral values and protecting family institutions are the main considerations that need to be studied in depth. These two aspects reflect the state's efforts to

maintain the social and moral order that is considered fundamental to Indonesian society.

The protection of social and moral values through the criminalization of cohabitation can be understood as a manifestation of the state's role in upholding the norms of decency adopted by the majority of Indonesian society. Soekanto (2018) emphasizes that criminal law often functions as an instrument to maintain public moral standards.³⁸ In the context of Indonesia, which is based on Pancasila, this effort can also be seen as a form of harmonization between positive law and religious values that are deeply rooted in society.

Marzuki argues that recognition of the role of religion in social life is one of the considerations in the formation of law in Indonesia.³⁹ Thus, the criminalization of cohabitation can be seen as an effort to align the law with the views of the majority of people who consider sexual relations outside of marriage as immoral.

Furthermore, Arief argues that one of the purposes of criminalization is to prevent moral degradation in society.⁴⁰ In the context of cohabitation, this argument becomes relevant when considering the potential negative

³⁴ M. Sholehuddin, "Sistem Sanksi dalam Hukum Pidana: Ide Dasar Double Track System dan Implementasinya", (Jakarta: Raja Grafindo Persada, 2003), hlm. 31.

³⁵ Bambang Waluyo, "Pidana dan Pemidanaan", (Jakarta: Sinar Grafika, 2008), hlm. 19.

³⁶ Teguh Prasetyo, "Kriminalisasi dalam Hukum Pidana", (Bandung: Nusa Media, 2010), hlm. 78.

³⁷ Mardjono Reksodiputro, "Kriminologi dan Sistem Peradilan Pidana", (Jakarta: Pusat Pelayanan

Keadilan dan Pengabdian Hukum Universitas Indonesia, 1994), hlm. 92.

³⁸ Soekanto, S. (2018). *Sosiologi Suatu Pengantar*. Jakarta: Rajawali Pers, hal. 224-226

³⁹ Marzuki, P. M. (2017). *Pengantar Ilmu Hukum*. Jakarta: Kencana, hal. 158-160.

⁴⁰ Arief, B. N. (2016). *Kebijakan Formulasi Ketentuan Pidana dalam Peraturan Perundang-undangan*. Semarang: Pustaka Magister, hal. 82-85.

impact of the practice on the values of decency and morality upheld by Indonesian society. Moreover, as stated by Soemitro, criminalization can also be seen as an effort to protect the younger generation from behaviours that are considered deviant from social norms.⁴¹

Turning to the aspect of protecting family institutions, the criminalization of cohabitation can be understood as an effort to strengthen the institution of marriage as the foundation of legal family formation. Hadikusuma emphasizes the importance of marriage in the context of Indonesian law and culture.⁴² By threatening criminal sanctions against the practice of living together without marriage ties, the state seeks to encourage people to value and choose the legal marriage route.

The aspect of child protection is also an important consideration in this context. Djamil argues that children born outside of marriage often face social stigma and difficulties in terms of legal recognition and civil rights.⁴³ Therefore, criminalizing cohabitation can be seen as an effort to protect the interests of children by encouraging couples to get legally married.

Soekanto emphasized the important role of the family as the basic unit of society in

maintaining social stability.⁴⁴ In this perspective, the criminalization of cohabitation can be seen as an effort to maintain the traditional social structure based on the nuclear family formed through legal marriage.

Analysis of the benefits of criminalization of cohabitation in the aspect of harm reduction, especially related to the potential reduction of social problems and enforcement of legal norms, is an important consideration in the context of Indonesia's criminal law reform, especially with the 2023 Criminal Code. This approach needs to be critically examined by taking into account the cost-benefit principle in criminal law as well as the criteria for criminalization expressed by Sudarto.

In terms of the potential to reduce related social problems, the criminalization of cohabitation can be seen as an attempt to address the various problems that may arise from the practice of living together without marriage. One of the arguments often put forward is that cohabitation has the potential to increase the risk of pregnancy outside marriage, which in turn can lead to various social problems.⁴⁵ By criminalizing cohabitation, it is hoped to reduce the incidence of out-of-wedlock pregnancies and

⁴¹ Soemitro, R. H. (2015). *Metodologi Penelitian Hukum dan Jurimetri*. Jakarta: Ghalia Indonesia, hal. 143-145.

⁴² Hadikusuma, H. (2017). *Hukum Perkawinan Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama*. Bandung: Mandar Maju, hal. 47.

⁴³ Djamil, M. N. (2018). *Anak Bukan Untuk Dihukum*. Jakarta: Sinar Grafika, hal. 112.

⁴⁴ Soekanto, S. (2019). *Sosiologi Keluarga: Tentang Ikhwal Keluarga, Remaja dan Anak*. Jakarta: Rineka Cipta, hal. 22.

⁴⁵ Nurcholis, M. (2020). "Implikasi Hukum Terhadap Perkawinan Sirri dan Keharusan Pencatatan

the accompanying negative impacts, such as child neglect or social stigma. According to the results of the author's interview with Mr. Arya Ragatnata as a judge of the Tenggara District Court, he explained that the policy of criminalizing cohabitation could minimize the number of new or further crimes such as abortion, unwanted infanticide and baby dumping as a result of the cohabitation act.

Furthermore, criminalizing cohabitation is also seen to contribute to the reduction of sexual and reproductive health issues. Several studies have shown that the practice of cohabitation, especially among adolescents and young adults, correlates with an increased risk of transmission of sexually transmitted diseases.⁴⁶ With the threat of criminal sanctions, it is hoped that people will be more careful in forming intimate relationships, which in turn can reduce the prevalence of sexually transmitted diseases.

However, it should be noted that the effectiveness of criminalization in reducing social problems related to cohabitation is debatable. Some researchers argue that non-penal approaches, such as comprehensive sexual education and increased access to reproductive health services, may be more effective in addressing these problems.⁴⁷ This is in line with the principle of ultimum

remedium proposed by Sudarto, where criminal law should be the last resort after other efforts are ineffective.⁴⁸

In the context of enforcement of legal norms, according to the results of the author's interview with Mr. Arya Ragatnata as a judge of the Tenggara District Court, he explained that when the enforcement of the cohabitation rules runs effectively, there are benefits to public order. In addition, the criminalization of cohabitation in the Criminal Code 2023 can be seen as an effort to strengthen and concretize social norms that have long existed in Indonesian society. Arief Sidharta argues that criminal law has an expressive function, which is to express the views of society about actions that are considered reprehensible and worthy of punishment.⁴⁹ By criminalizing cohabitation, the state gives legal affirmation to the moral and social values embraced by most Indonesians.

Furthermore, the criminalization of cohabitation can also be seen as an attempt to ensure coherence and consistency in the Indonesian legal system. Given that Indonesia recognizes marriage as a legally and religiously valid bond, criminalizing cohabitation can be seen as a logical step to protect the institution of marriage and enforce related legal norms.⁵⁰

Perkawinan". *Jurnal Hukum Keluarga Islam*, 5(1), hal. 35.

⁴⁶ Kusmiran, E. (2019). "Kesehatan Reproduksi Remaja dan Wanita". Salemba Medika, Jakarta, hal. 78.

⁴⁷ Hidayana, I. M., et al. (2018). "Pendidikan Seksualitas: Teori, Penelitian, dan Praktik". UI Press, Jakarta, hal. 112.

⁴⁸ Sudarto. (1986). "Hukum dan Hukum Pidana". Alumni, Bandung, hal. 36.

⁴⁹ Sidharta, B. A. (2017). "Ilmu Hukum Indonesia". Grasindo, Jakarta, hal. 226-228.

⁵⁰ Manan, A. (2018). "Aneka Masalah Hukum Perdata Islam di Indonesia". Kencana, Jakarta, hal. 41

However, it is important to consider the potential negative impact of criminalizing cohabitation on law enforcement as a whole. One concern that is often expressed is that criminalizing cohabitation could burden the criminal justice system and potentially lead to corrupt practices in law enforcement.⁵¹ This needs to be critically evaluated in the context of the cost-benefit principle in criminal law.

Referring to the criteria for criminalization expressed by Sudarto, it is necessary to consider whether the use of criminal law in the context of cohabitation meets the requirements such as the existence of clear victims, proportionality between the objectives to be achieved and the means used, as well as the ability of law enforcement officials to enforce these provisions.⁵² An in-depth analysis of these criteria is needed to ensure that the criminalization of cohabitation in the 2023 Criminal Code truly provides benefits that outweigh its social and economic costs.

In the context of the 2023 Criminal Code, the criminalization of cohabitation needs to be seen as part of a broader criminal law reform effort. It is important to ensure that the provisions on cohabitation are carefully formulated, taking into account the principles of criminal law such as legality, culpability and proportionality.⁵³ A clear definition and strict

limitations on what constitutes cohabitation need to be formulated to avoid overly broad interpretations and potential abuse of power in law enforcement.

Thus, the analysis of the benefits of criminalizing cohabitation in the aspect of harm reduction, both in terms of potential reduction of social problems and enforcement of legal norms, shows that there are arguments that support this approach. However, its implementation in the 2023 Criminal Code must be done very carefully, considering various aspects such as effectiveness, proportionality, and potential negative impacts.

3.2 Legal Consequences Of Criminalizing Cohabitation In The 2023 Criminal Code

Cohabitation is considered a type of Code (KUHP) which clearly regulates the crime because it can trigger new or further crimes (criminogenic factors), such as abortion, unwanted infanticide, or baby dumping as a result of the act. This has led to many cases of cohabitation being resolved in a brutal and vigilante manner (*eigenrechting*) by the community at the scene. In an effort to overcome crimes such as cohabitation, there are various ways or steps that can be taken. One of them is by applying criminal law along

⁵¹ Arief, B. N. (2017). "Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru". Kencana, Jakarta, hal. 28.

⁵² Sudarto. (1983). "Hukum Pidana dan Perkembangan Masyarakat: Kajian Terhadap

Pembaharuan Hukum Pidana". Sinar Baru, Bandung, hal. 93.

⁵³ Moeljatno. (2015). "Asas-Asas Hukum Pidana". Rineka Cipta, Jakarta, hal. 25-27.

with criminal sanctions. In line with this, Barda Nawawi Arief argues that, "policies in crime prevention using criminal law are essentially part of law enforcement policies (especially criminal law)".⁵⁴

Law enforcement to overcome the crime of cohabitation can be done through the means of criminal policy (criminal policy). In general, crime prevention through criminal policy is divided into two paths, namely the Penal path or criminal law, and the Non-Penal path or outside the criminal law.⁵⁵ Currently, law enforcement in Indonesia in overcoming cohabitation, if using the penal route, has been regulated in Law No. 1 of 2023 concerning the Criminal Code (KUHP) which clearly regulates the act of cohabitation or *recht vacuum*. In its implementation, it will certainly bring legal consequences which can be described as follows:

1. Impact on Perpetrators

Criminal Liability.

Criminal responsibility is a form of determining whether a suspect or defendant is responsible for a criminal offense that has occurred.⁵⁶ To be subject to criminal liability, the public prosecutor must be able to prove that the perpetrator of cohabitation fulfills the elements of the article. The elements of the cohabitation crime article, namely:

- a. Any person. Anyone who is a legal subject and whose actions can be held accountable.
- b. Doing life together. Living together in the same house or going about their daily lives.
- b. As husband and wife. A relationship between two people, a man and a woman who carry out roles and responsibilities appropriate to their status as a couple such as supporting each other, loving, caring for, and working together in living a domestic life.
- c. Outside of marriage. A state or relationship between two people who are not bound in a legal marriage.

By fulfilling the elements of the cohabitation crime article, the perpetrator will be punished as stipulated in article 412 of the Criminal Code 2023⁵⁷, subject to imprisonment of up to 6 months or a maximum fine of category II, namely 10 million.

However, this provision is an absolute complaint offense, meaning that it can only be prosecuted if there is a complaint from the husband, wife, parents, or children of one of the cohabiting parties. This distinguishes cohabitation cases from ordinary offenses, which can be processed automatically by the state without the need for a complaint.

⁵⁴ Teguh Prasetya. 2012. *Politik Hukum Pidana (Kajian Kebijakan Kriminalisasi dan Dekriminalisasi)*. Yogyakarta: Pustaka Pelajar. hlm. 19

⁵⁵ I Gusti Agung Gede Krisna Dwipayana. 2020. *Pengaturan Terhadap Perbuatan Kumpul Kebo (Kohabitasi) dalam Pembaharuan Hukum Pidana Indonesia*. *Jurnal Kertha Desa*, Vol. 8 No. 7, Hlm. 3

⁵⁶ Jamba, P. (2023). 3.7. *Pertanggungjawaban Pidana*. *Pengantar Hukum Indonesia*, 61.

⁵⁷ Pasal 412 ayat 1 KUHP 2023 berbunyi "Setiap orang yang melakukan hidup bersama sebagai suami istri di luar perkawinan dipidana dengan pidana penjara paling lama 6 bulan atau pidana denda paling banyak kategori II"

Thus, the criminalization of cohabitation according to Law No. 1 Year 2023 can have legal consequences in the form of punishment, especially if reported by an interested party. However, its application, which is based on an absolute complaint offense, shows that not all forms of cohabitation will automatically face legal proceedings, although the social impact can still be felt.

2. Impact on the Legal System

Harmonization with other laws and regulations.

Contradiction with the Marriage Law: Law No. 1/1974 on Marriage stipulates that marriage is valid if it is conducted in accordance with the provisions of each religion and belief. With the criminalization of cohabitation, there is a potential conflict between the norms that regulate marital relations and the newly emerged norms from the Criminal Code, such as: *nikah siri*, if the requirements according to religion and Islamic beliefs are fulfilled, the marriage is valid, so it is *halal* to share a bed. However, *nikah siri* is not registered / invalid according to positive law. so there will be a conflict of norms with articles governing cohabitation, namely the prohibition of living together as husband and wife but without marital ties, because the definition of "marital ties" according to positive law is a registered marriage or marriage that has a marriage certificate. Whereas *siri* marriage is not recorded, but is religiously valid.

This raises the question of how the state will treat relationships that exist without marriage in the eyes of the law, and whether this could potentially conflict with the principles of the Marriage Law.

d) CONCLUSION

This study demonstrates that the criminalization of cohabitation under Article 412 of Indonesia's 2023 Criminal Code reflects a normative commitment to safeguarding social morality and protecting family institutions. From a cost-benefit analysis perspective, the policy offers potential benefits, including reinforcing prevailing social values, promoting deterrence, and addressing concerns related to non-marital relationships.

However, these benefits are accompanied by considerable costs. The criminalization policy imposes additional burdens on the criminal justice system, increases state expenditures, and generates potential socio-economic consequences. Practical challenges in enforcement, including evidentiary complexity and the risk of prison overcrowding, further question its overall efficiency.

Moreover, as an absolute complaint offense, the effectiveness of this provision is inherently limited, relying on reports from specific parties. At the systemic level, the provision also risks creating legal disharmony with existing regulatory frameworks,

particularly in relation to marriage and child protection laws.

In conclusion, while the criminalization of cohabitation aligns with moral and social objectives, its overall effectiveness and efficiency remain debatable. A more balanced and integrated legal approach is therefore required to ensure coherence, proportionality, and sustainability within Indonesia's broader legal system.

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