

Inclusion of Cohabitation Law in Article 412 of Law Number 1 of 2023 in the Perspective of Applicable Norms in Indonesia

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ABSTRACT

This endeavor will also facilitate the restoration of relationships, particularly those between adult men and women living together within the sanctity of marriage, governed by Article 412. The objective of this research is to examine the legal implications arising from Criminal Code Article 412. The study shows that using Article 412 of the Criminal Code might clash with religious, moral, and legal rules. It may also clash with Law Number 1 of 2023, which says that national law and regional rules may have different interpretations of legal rules. This recognition of coexisting legal systems within the community creates numerous legal ambiguities that may pose challenges for society.

INTRODUCTION

The dynamics of modern society there is a concept of relationships between individuals that has undergone significant transformation. One increasingly prominent phenomenon is cohabitation, a form of relationship in which couples live together without formal marital ties. Cohabitation is living together in one house between a man and a woman without the official bond of marriage (Wiranata and Ibrahim, 2013: 2). As a shift against conventional marital traditions, cohabitation challenges cultural norms and offers new perspectives on romantic relationships. The decision to live together without marriage reflects the evolution of society's view of marriage, economic independence, and personal values. Individuals who choose cohabitation often seek a balance between deep emotional involvement and flexibility in designing their relationships. The choice to live together without marriage not only reflects a change in perspective towards marriage, but also reflects individual independence and adjustment to changes in social and economic dynamics. While cohabitation can occur in a variety of contexts, from couples preparing for marriage to individuals deliberately avoiding marital commitment, this phenomenon raises interesting questions about the meaning and shape of relationships in the contemporary era.

Hence, efforts to amend the Criminal Code have come to fruition. Legal reform encompasses the readiness of the public to embrace changes across all realms of law, scrutinize legal matters, and formulate strategies for reform in order to establish an international legal framework that upholds justice, truth, and the rule of law while safeguarding human rights. A legal void exists in cases of cohabitation, where the perceived legal incapacity to address this issue sometimes serves as motivation for community members to resort to acts of vigilantism. To address this matter, a revision of the existing national criminal code was undertaken, resulting in the enactment of Republic of Indonesia Law Number 1 of 2023. This endeavor is also expected to promote reconciliation, particularly among adult males and females cohabiting within the sacred institution of matrimony. Subsequently, through the institution of marriage, a harmonious and thriving family can be established, enriched with divine blessings from the Almighty.

Prior to the enactment of Law Number 1 of 2023 on the Criminal Code, the national Criminal Code did not address acts of cohabitation. Therefore, the application of the law is grounded in the legal framework of Article 284, paragraph (1) of the Criminal Code, which pertains to the offense of adultery (overspell). Law Number 1 of 2023, specifically Article 412, governs the Criminal Code with regards to cohabiting couples who are not married. According to this article, such couples could face a maximum prison sentence of 6 months or a maximum fine of Category II (10 million), as well as charges that the family may pursue. Problems arise when this cohabitation article intersects with people who have different points of view, some view this as criminalizing adult couples but some see this as a form of weakening the norm, because the formulation of the complaint offense used and the subject who can complain is determined in a limited way. There will be inclusion in the application of this rule of law which

will have an impact on its collision with the norms that live in society. This concern was also cited by detik.com Warga-Satpol PP Now Can't Just Play Raid Perverted Couples due to the application of this article with absolute complaint offenses. (Detik.com, 2023) In this study, the purpose is how legal inclusion will occur if article 412 of the Criminal Code applies later to several perspectives of norms in Indonesia.

METHODOLOGY

The type of research used in this study is doctrinal legal research (Widodo, 2020: 51). This study focuses on examining and evaluating or assessing the concept of cohabitation in article 412 of the new Criminal Code on legal inclusion that will occur in the perspective of existing norms in Indonesia. The research approach is a form of model or way of conducting research so that the author gets information from various aspects to find the issue the answer is seeking (Arikunto, 2002: 23). This study used a case approach (*Case Approach*) which is done by examining the laws and regulations with religious norms, decency and laws in Indonesia. To analyze the data, researchers use descriptive and evaluative analysis methods based on Law Number 1 of 2023 which already has legal force in Indonesia. The method of descriptive analysis is to describe the existing circumstances in the form of presentation so that only the phenomenon or situation under study is described and its characteristics (Widodo, 2020:149). This method is used to explain information in the form of aspects of legal inclusion to norms that live in Indonesia. The evaluative method is the process of assessing whether a regulation is in accordance with the desired moral, political, economic goals. This method is used to evaluate Law Number 1 of 2023 in its future application that meets the aspects of justice and there are no legal loopholes.

DISCUSSION

The Indonesian nation, which is famous for its high culture and upholds moral values in everyday life, is now beginning to question the emergence of new phenomena in public life, especially forms of deviation from life in the sexual field. One such moral deviation is the act of "living together", in which men and women live in the same house without the bond of marriage known in the new National Criminal Code, namely Cohabitation. Article 412 reads:

1. **“Any person who lives together as husband and wife outside marriage shall be punished with a maximum imprisonment of 6 (six) months or a maximum fine of category II.**
2. No prosecution shall be carried out for criminal acts as referred to in paragraph (1) except on complaints:
 - a. husband or wife for a person who is bound by marriage; or
 - b. Parents or children for people who are not bound by marriage.
 - 1) Complaints as referred to in paragraph (2) do not apply to the provisions of Article 25, Article 26, and Article 30.
 - 2) The complaint may be withdrawn as long as the hearing at the court hearing has not yet begun.”

Hence, efforts to amend the Criminal Code have come to fruition. Legal reform encompasses the readiness of the public to embrace changes across all realms of law, scrutinize legal matters, and formulate strategies for reform in order to establish an international legal framework that upholds justice, truth, and the rule of law while safeguarding human rights. A legal void exists in cases of cohabitation, where the perceived legal incapacity to address this issue sometimes serves as motivation for community members to resort to acts of vigilantism. To address this matter, a revision of the existing national criminal code was undertaken, resulting in the enactment of Republic of Indonesia Law Number 1 of 2023. This endeavor is also expected to promote reconciliation, particularly among adult males and females cohabiting within the sacred institution of matrimony. Subsequently, through the institution of marriage, a harmonious and thriving family can be established, enriched with divine blessings from the Almighty.

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In the application of this article, there are several perspectives that will lead to legal inclusion of existing laws in Indonesia. Legal inclusion refers to efforts to create and maintain justice in the legal system by ensuring that all individuals, regardless of social, economic, or other personal characteristics, have equal access and fair treatment before the law. Legal inclusion seeks to eliminate discrimination and inequality in due process and ensure that all citizens can enjoy equal rights and protections under the law. The first inclusion will occur in the norm, religious norms are rules of life in the form of commandments and prohibitions, which according to adherents come from God Almighty. This rule not only regulates the vertical relationship, between man and God (worship), but also the horizontal relationship, between man and fellow man. In general, every religious believer believes that anyone who follows God's commands and shuns His prohibitions will be rewarded. On the contrary, anyone who violates will commit a crime and will be punished. Attitudes and actions that show obedience in carrying out his orders and avoiding his prohibitions are called *taqwa*. The religious norm upheld by most Indonesian people is Islam. In Islam, adultery is classified as uncivilized sex because it deviates from the concept of Islam. Before the entry of Islam, adultery was not a forbidden act. As mentioned above, legal sex is sex sanctioned by Islamic Sharia law. The context of Indonesian society that upholds the values and norms that exist in life leads to actions that are prohibited in Islam and also in accordance with those regulated in Islamic law. However, this perspective would be incongruous with the principles of human rights, which emphasize that coexistence falls within the realm of personal privacy and

should not entail arrangements leading to penalties. Article 412 of the National Criminal Code links the private sphere to societal norms, prioritizing the protection of human rights. This aligns with Article 12 of the Universal Declaration of Human Rights, which prohibits arbitrary interference in personal matters, family, home, or correspondence, as well as the violation of one's reputation and good name. Every individual is entitled to legal safeguards against any form of interference or infringement. Article 412, addressing complaint offenses, specifies that cohabitation can be penalized if the complainant is a family member of the offender who feels wronged. However, if no complaint is filed, cohabitation cannot be legally addressed.

The second consideration will be made in accordance with the principles of propriety. The norm of decency is a moral principle that guides appropriate conduct and manifests as an internalized "whisper" or inner voice stemming from one's conscience. Every individual's awareness inherently possesses the capacity to uphold moral ideals in accordance with human nature. This is analogous to the fundamental rights that every individual inherently possesses by virtue of their humanity, bestowed upon them as a divine endowment. Human consciousness, as the repository of moral values, can be considered the origin of moral standards due to its inherent potential. In this case, the application of article 412 of the national Criminal Code will also be able to bump into moral norms, that the behavior of living together in Indonesia will face challenges to people who feel that this is wrong, cohabitation behavior in society that is considered to violate moral norms sometimes gives birth to the concept of vigilantism, The community has encountered problems related to couples who carry out cohabitation not a few will ask / force the couple to leave or move out of the area because it is considered to have disturbed order and created a bad example in society, a new national criminal code was born this community that considers the expulsion of perpetrators who violate the norms of decency for carrying out cohabitation practices can be punished and encounter problems because it is regulated in article 448, which reads Sentenced to a maximum imprisonment of 1 (one) year or a maximum fine many categories II,

Any Person who:

- a. **unlawfully compel another person to do, not do, or condone something, by Violence or Threat of Violence, either against himself or others; or**
- b. forcing others to do, not do, or condone something with a defilement or libel bill.

R. Soesilo in his book entitled The Criminal Code (KUHP) and its Complete Commentaries Article by Article, *related to this article, said that what must be proven in this article is (Soesilo. 1991)*

1. That there are people who against the right are compelled to do something, not to do something, or to allow something;
2. Coercion is carried out by the use of force, or threats of violence, either against that person, or against others.

Furthermore, R. Soesilo explained that what is meant by "force" is to tell people to do something in such a way, so that the person does something against their own will.

Article 412 will relate to article 448 if people do not understand the practice of expulsion of cohabited couples. Because the community will be faced with punishment. Community efforts in reporting cohabitation practices are also limited because in article 412 of the National Criminal Code paragraph (2)

Against Criminal Acts as referred to in paragraph (1) no prosecution is carried out except on complaints:

- a. **husband or wife for a person who is bound by marriage; or**
- b. **Parents or children for people who are not bound by marriage.**
- 3) Complaints as referred to in paragraph (2) do not apply to the provisions of Article 25, Article 26, and Article 30.
- 4) The complaint may be withdrawn as long as the hearing at the court hearing has not yet begun.

So that people who commit cohabitation cannot necessarily be complained or reported to law enforcement officials, except for the aggrieved family, and no prosecution can be carried out if the complainant is not the family who has the right to make a complaint. The third inclusion will occur in legal norms, according to Hans Kelsen, legal norms are rules, patterns or standards that need to be followed. Then it is further explained that the function of legal norms is (Yuliandri, 2010: 21):

- a) Rule
- b) Forbid
- c) Empower
- d) Allow
- e) Deviate from the terms

Hans Kelsen proposed a theory known as the *Stufentheorie*, which pertains to the hierarchy of legal rules. According to Kelsen, legal norms are organized in a hierarchical structure, with each lower norm being derived from and dependent on a higher norm. This pattern continues until reaching a hypothetical and fictional norm known as the Basic Norm (*Grundnorm*), which cannot be further traced (Hans Kelsen, 1945:113). The practical implementation of Article 412 concerning cohabitation will inevitably lead to various interpretations of legal regulations, as the explanation provided in the paragraph is ambiguous. This section supersedes the rules and regulations pertaining to cohabitation outside of marriage unless specifically addressed in special legislation. Examining specific places with unique characteristics, Law Number 11 of 2006, also known as the Government of Aceh, defines Qanun Aceh as provincial legislation that governs the administration and daily life of the Acehnese population. The district or city of Qanun is a regional regulation in Aceh that governs the administration and daily lives of the district or city's residents. Law No. 13 of 2012, also known as the DIY Privileges Law, stipulates that the DIY exceptional region regulation is a local regulation created by the DIY DPRD (Regional People's Representative Council) and the Governor. Its purpose is to govern the use of exceptional powers. This special authority differs from the privileges granted to DIY based on historical and ancestral rights, as it represents

an additional authority that DIY possesses in addition to the authority specified in the local government law. The authority of DIY as an autonomous region encompasses jurisdiction over the DIY Regional Government as outlined in the regional government law, as well as jurisdiction over the privileges specified in the Privileges. The Special Regional Regulation (Perdasus) is a regulation specific to the Papua Province that aims to implement specific provisions outlined in Law Number 21 of 2001, which pertains to the special autonomy of the Papua Province. The Papuan People's Representative Council (DPRP) develops and establishes Perdasus in collaboration with the Governor while taking into account and obtaining the approval of the Papuan People's Council (MRP).

Some of these special and special rules can only be applied to some regions as above, but Law Number 1 of 2023 will apply throughout Indonesia, including regions that do not have special and special autonomy, referring to existing legal norms, local governments are not special or special that want to regulate cohabitation is not a criminal offense will be difficult, or eliminate the criminalization of cohabitation will be deadlocked, also applicable if in the application discussed above which reads the complaint offense makes it difficult for the community to report, when in fact it has violated religious norms and moral norms. Local governments that do not have special and special autonomy cannot regulate the change of offenses to ordinary because in the structure of legal norms by Hans Kelsen that the rules under it must not conflict with the rules above it. So that there will be chaos between regions that want cohabitation to be changed or regulated more flexibly in reporting with the provisions of Law Number 1 of 2023 which will clearly override the regulation.

It was mentioned again that the obstacles that will be experienced by local governments who want to oppose this law will be hindered by Article 613 paragraph (1) which reads "At the time this Law comes into force, every Law and Regional Regulation containing criminal provisions must conform to the provisions of the First Book of this Law". So to maintain synchronization between local regulations and national criminal policy, the policy is closely related to the implementation of the principle of "*lex superior derogat legi inferiori*". This principle results in a law of a higher position abolishing the law below it, or in other words a law of a lower level must conform to the provisions above it. Therefore, the Criminal Code must expressly state that the qualification of crimes and violations referred to in Regional Regulations must be interpreted as criminal offenses as long as they do not violate the regulations in the Criminal Code, this is in accordance with the principle of "*lex superior derogat legi inferiori*". Material aspects of criminal law or criminal acts listed in the Regional Regulation are recognized by the Criminal Code with certain limits and conditions. Actually, in Law Number 1 of 2023, there are also weaknesses in further regulations in the Regional Regulation, as regulated in Book One chapter I article 2 paragraphs (1) and (2) related to the enactment of laws that live in society which determine that a person should be punished even though the act is not regulated in this Law and the law that lives in society as referred to in paragraph "(1) applies in the place where the law lives and as long as it is not regulated in the Law this and in accordance with the values contained in Pancasila, the 1945 Constitution of the

Republic of Indonesia, human rights, and common law principles recognized by the community of nations. The existence of customary law communities in Indonesia factually dates back to the time of the ancestors until today. Customary law communities are territorial or genealogical community units that have their own wealth, have citizens who can be distinguished from other legal community citizens and can act inward or outward as a legal entity (legal subjects) that are independent and govern themselves" (Husein Alting, 2010: 31). Debate among professionals exists regarding the differentiation between indigenous peoples and customary law communities. Indigenous peoples refer to specific populations characterized by distinct attributes. On the other hand, "customary law communities" refer to groups living in particular areas (ulayat) who share a common living environment, have wealth, and are under the control of leaders who are in charge of defending the group's interests both internally and externally. These communities have their own legal systems and governance structures (Taqwaddin, 2010:34). The 1945 Constitution of the Republic of Indonesia recognizes the presence of customary law communities. Article 18B, paragraph (2) of the 1945 Constitution, based on the Second Amendment, acknowledges and honors the cohesion of society based on customary law and traditional rights, as long as they remain relevant to the current era.

However, amid this clash of legal norms, several issues arise that may create legal ambiguities. The government continues to employ legal terminology subject to multiple interpretations within society. Given these circumstances, it is advisable for the government to adhere strictly to customary law to establish a clear and legitimate understanding of prohibited actions based on customary law. The delegation of criminal law regulation to individual regions presents a second challenge, undermining the goal of legal consolidation through the Criminal Code. Each district may establish its own criminal code, posing potential risks. Transferring jurisdiction for legal cases within the community to district courts would increase judges' workloads. The recognition of customary law remains a challenge in Indonesia's criminal justice system. Therefore, a comprehensive arrangement is necessary rather than delegating the entire responsibility to each zone. Distinct regulations are required to govern customary criminal matters. This pertains to the provisions and mechanisms established by legislation for acknowledging the rights of indigenous peoples. The legal form and content of these rules remain ambiguous, resulting in certain entities being subject to legal rules along with overarching regional regulations outlined in respective regional legislation.

Debate may arise regarding the inclusion of criminal sanctions in regional regulations, as it currently subjects law enforcement agencies such as the police and prosecutors to the Criminal Code and Criminal Procedure Code. If regional regulations introduce different criminal laws, it could complicate the enforcement process and potentially lead to law enforcement officials interfering in local customary or legal matters.

CONCLUSIONS AND RECOMMENDATIONS

Legal inclusion that arises when applying Article 412 of the Criminal Code may give rise to conflicts of interest with religious norms. This is particularly pertinent in Indonesia, a country known for its cultural and religious diversity. The application of this provision can potentially sow discord within communities when juxtaposed with the concept of privacy rights and the offense of complaints. However, it is important to note that such practices are an integral part of community life, and they must be approached in a manner that upholds the fundamental human rights of all Indonesian citizens. Furthermore, the inclusion of moral norms adds another layer of complexity to the situation, as the community's values may be at odds with the perceived indecency of such practices. Yet, the legal system must strive to ensure equal access to justice, even in cases where the community imposes complaints. This balancing act requires a nuanced approach, taking into account the diverse cultural and religious norms within Indonesian society. Additionally, the legal norms outlined in Law Number 1 of 2023 exhibit a certain level of interpretational ambiguity, which can be attributed to the *Stufentheorie*, a concept that distinguishes between national laws and local regulations. This ambiguity can potentially create numerous legal loopholes, posing challenges for the future implementation of this law. Recognizing the coexistence of various legal systems within the community further complicates the legal landscape and may require comprehensive reforms to ensure a coherent and effective legal framework for Indonesia's future.

ADVANCED RESEARCH

When writing this article, the researcher realized that there were still many shortcomings in language, writing style and presentation format, considering the limitations of his own knowledge and abilities. Therefore, in order to complete this paper, researchers expect constructive criticism and suggestions from various parties.

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