

Reconstruction of Morality Offenses in the New Criminal Code: A Study of Article 412 from the Perspectives of Positive Law and Islamic Criminal Law

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Abstract

Cohabitation, or living together as husband and wife without a legal marriage bond, is a form of social behavior that is newly regulated in Article 412 of Law Number 1 of 2023 concerning the Criminal Code (KUHP). The presence of this provision has sparked debate because, on the one hand, it is seen as an effort by the state to protect moral values, public morality, and the institution of marriage, but on the other hand, it has the potential to raise issues regarding the limits of state intervention in the private lives of citizens. In addition, the regulation of cohabitation in Indonesian positive law differs conceptually from Islamic criminal law (jurimah jinayah), which does not recognize cohabitation as a stand-alone jarimah but rather links it to the concept of jarimah zina. This study aims to analyze the regulation of cohabitation in Article 412 of the new Criminal Code and examine the perspective of fiqh jinayah on the criminalization of cohabitation. This study employs a normative legal research method, drawing on legislative, conceptual, and comparative approaches. The primary legal material is Law Number 1 of 2023 concerning the Criminal Code, while secondary legal material is obtained from books, scientific journal articles, and relevant Islamic jurisprudence literature. Data collection was conducted through library research, while data analysis employed a qualitative, descriptive-analytical approach. The results of the study indicate that the criminalization of cohabitation in Article 412 of the new Criminal Code constitutes an expansion of the offense of morality aimed at maintaining public morality and social order. However, this regulation is fundamentally different from Islamic jurisprudence, which only provides legal consequences for adultery proven based on strict standards of proof. These differences are evident in the construction of the offense, the object of criminalization, the mechanism of proof, the purpose of punishment, and the form of sanctions. Therefore, the application of Article 412 needs to be carried out proportionally while still considering the principles of legality, legal certainty, the protection of individual rights, and the values of justice in society.

Keywords: Cohabitation, Morality Offenses, Fiqh Jinayah

Abstrak

Kohabitasi atau hidup bersama sebagai suami istri tanpa ikatan perkawinan yang sah merupakan salah satu bentuk perilaku sosial yang mendapatkan pengaturan baru dalam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP). Kehadiran ketentuan ini menimbulkan perdebatan karena di satu sisi dipandang sebagai upaya negara dalam melindungi nilai kesusilaan, moralitas publik, dan institusi perkawinan, namun di sisi lain berpotensi menimbulkan persoalan terkait batas intervensi negara terhadap kehidupan privat warga negara. Selain itu, pengaturan kohabitasi dalam hukum positif Indonesia memiliki perbedaan konseptual dengan hukum pidana Islam (fiqh jinayah), yang tidak mengenal kohabitasi sebagai jarimah yang berdiri sendiri, melainkan mengaitkannya dengan konsep jarimah zinā. Penelitian ini bertujuan untuk menganalisis pengaturan kohabitasi dalam Pasal 412 KUHP baru serta mengkaji perspektif fiqh jinayah terhadap kriminalisasi kohabitasi. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan perundang-undangan, konseptual, dan perbandingan. Bahan hukum primer berupa Undang-Undang Nomor 1 Tahun 2023 tentang KUHP, sedangkan bahan hukum sekunder diperoleh dari buku, artikel jurnal ilmiah, dan literatur fiqh jinayah yang relevan. Teknik pengumpulan data dilakukan melalui studi kepustakaan, sedangkan analisis data menggunakan metode kualitatif dengan pendekatan deskriptif-analitis. Hasil penelitian menunjukkan bahwa kriminalisasi kohabitasi dalam Pasal 412 KUHP baru merupakan bentuk perluasan delik kesusilaan yang bertujuan menjaga moralitas publik dan ketertiban sosial. Namun, pengaturan tersebut berbeda secara mendasar dengan fiqh jinayah yang hanya memberikan konsekuensi hukum terhadap perbuatan zina yang terbukti berdasarkan standar pembuktian yang ketat. Perbedaan tersebut terlihat pada konstruksi delik, objek kriminalisasi, mekanisme pembuktian, tujuan pemidanaan, dan bentuk sanksi. Oleh karena itu, penerapan Pasal 412 perlu dilakukan secara proporsional dengan tetap memperhatikan asas legalitas, kepastian hukum, perlindungan hak individu, serta nilai-nilai keadilan yang hidup dalam masyarakat.

Kata Kunci: Kohabitasi, Delik Kesusilaan, Fiqh Jinayah

A. Introduction

Among the significant reforms introduced by the new Criminal Code is the expansion of provisions relating to morality offenses. In this regard, Article 412 specifically regulates cohabitation by criminalizing the act of living together as

husband and wife without being bound by a legally recognized marriage.¹ Among the significant reforms introduced by the new Criminal Code is the expansion of provisions relating to morality offenses. In this regard, Article 412 specifically regulates cohabitation by criminalizing the act of living together as husband and wife without being bound by a legally recognized marriage.²

Under the previous Criminal Code, cohabitation was not expressly classified as a criminal offense because no specific provision regulated such conduct. The regulation of morality-related offenses was generally limited to acts of adultery and indecency, while cohabitation outside a lawful marriage was predominantly regarded as a matter falling within the domains of religion, customary norms, and societal moral values.³ This approach changed with the enactment of Law Number 1 of 2023, particularly through Article 412, which stipulates that individuals who live together as husband and wife without being legally married may be subject to imprisonment for a maximum period of six months or a Category II fine.⁴ The inclusion of this provision reflects an expansion of the scope of morality offenses in Indonesian criminal law, as it extends beyond the regulation of particular sexual acts to encompass forms of social relationships that are considered incompatible with the legal and social institution of marriage.

The criminalization of cohabitation has generated considerable debate from both legal and societal perspectives. Supporters of this provision argue that the state has a legitimate role in protecting public morality, maintaining the integrity of the family institution, and reinforcing marital values that are widely regarded as essential to Indonesia's social order.⁵ In contrast, critics contend that cohabitation falls within the sphere of private life and does not necessarily result in direct harm to others. From this standpoint, criminal sanctions may be viewed as an excessive extension of criminal law that risks increasing state involvement

¹ S. H. Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Prenada Media, 2016). hlm. 23.

² Bertholomeus Dwiputra, "Kohabitasi Sebagai Perbuatan Pidana Dalam Kuhp Baru : Analisis Yuridis Terhadap Prinsip Proporsionalitas Dalam Hukum Pidana," *Dinamika* 31, No. 2 (2025): hlm. 12576.

³ Hwian Christianto, *Kejahatan Kesusilaan: Penafsiran Ekstensif Dan Studi Kasus* (Suluh Media, 2017). hlm. 41.

⁴ Rahul Sani Ritonga Dan Abd. Mukhsin, "Tinjauan Hukum Pidana Islampasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kohabitasi," *Legalstanding Jurnal Ilmuhukum* 8, No. 3 (2024): hlm 589.

⁵ Dita Melati Putri Dan Abdul Basith Junaidy, "Analisis Yuridis Terhadap Kohabitasi Sebagai Tindak Pidana Dalam Pasal 412 Kuhp Baru," *Media Hukum Indonesia (Mhi) Published By Yayasan Daarul Huda Krueng Mane* 3, No. 4 (2025): hlm. 116.

in matters of personal autonomy and individual freedom.⁶ The controversy is further complicated by the classification of Article 412 as a complaint-based offense (*delik aduan*), under which prosecution can only proceed upon a complaint submitted by parties expressly authorized by law. Although this mechanism is intended to limit arbitrary state intervention, the phrase “living together as husband and wife outside marriage” remains open to varying interpretations and may create practical challenges in determining the evidentiary standards required for effective law enforcement.⁷

The importance of examining Article 412 stems from its position as a newly introduced criminal provision that directly engages with issues of public morality, family integrity, and the protection of individual privacy. In the context of criminal law policy, the decision to criminalize particular conduct should be supported by the existence of a legitimate legal interest requiring protection, a demonstrable level of social harm, and the use of criminal sanctions as a proportionate and necessary means of regulation. From this perspective, the criminalization of cohabitation deserves careful scrutiny to assess whether it is consistent with the broader objectives of Indonesia’s criminal law reform.⁸ At the same time, it is necessary to consider whether the implementation of this provision may give rise to legal uncertainties, interpretative challenges, or practical difficulties that could affect its effectiveness and enforcement in practice.

Beyond its examination within the framework of positive law, the issue of cohabitation also merits analysis from the perspective of *fiqh jinayah*, which establishes the principles and legal norms governing criminal conduct in Islamic law. Within Islamic criminal jurisprudence, cohabitation is not recognized as an independent *jarimah*. Rather, it is generally associated with the offense of *zinā* when there is sufficient evidence indicating the occurrence of sexual intercourse outside a legally valid marriage.⁹ Nevertheless, the standards of proof required to establish *zinā* are exceptionally stringent. A conviction may only be based on a

⁶ M. Rizki Yudha Prawira, “Potensi Overkriminalisasi Pada Pengaturan Tindak Pidana Kohabitasi Dalam Kitab Undang – Undang Hukum Pidana : Perspektif Fair Trial Kitab Undang – Undang Hukum Pidana (Kuhp) Indonesia Direvisi Melalui Undang – Undang No . 1 Tahun 2023 Setelah Melalui Be,” *Jurnal Hukum Statuta* 4, No. 1 (2024): hlm. 39.

⁷ Ahmad Nurozi, “Kohabitasi Sebagai Delik Aduan Dalam Kuhp Baru : Kontestasi Antara Kriminalisasi Moral , Privasi , Dan Hukum Islam,” *Al-Zayn: Jurnal Ilmu Sosial & Hukum*, 2026, hlm. 6143.

⁸ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana:(Perkembangan Penyusunan Konsep Kuhp Baru)*, 2011. hlm 31.

⁹ Nurul Irfan, *Fiqh Jinayah* (Amzah, 2022). hlm. 16.

voluntary confession by the offender or the testimony of four competent witnesses who directly observed the unlawful sexual act.¹⁰ These rigorous evidentiary requirements reflect the principle of prudence that characterizes Islamic criminal law, aiming to safeguard personal honor, protect human dignity, and preserve lineage (*hifz al-nasab*), which is recognized as one of the essential objectives of Islamic law (*maqāṣid al-sharī'ah*).

The regulation of cohabitation under the new Criminal Code has attracted considerable scholarly attention, particularly in relation to the justification for criminalization and the protection of public morality. Existing studies have contributed valuable insights into these issues; however, most of them examine cohabitation either from the perspective of positive law or through the framework of Islamic law independently.¹¹ Comparative studies that systematically analyze the relationship between Article 412 of the new Criminal Code and the concept of *jarimah zinā* in *fiqh jinayah* remain relatively scarce within the current body of literature. This gap highlights the need for a more comprehensive examination that brings both legal frameworks into a single analytical discussion. Accordingly, this study aims to analyze the regulation of cohabitation as provided under Article 412 of the new Criminal Code and to evaluate it from the perspective of *fiqh jinayah*. The analysis focuses on identifying areas of convergence and divergence between the two legal systems, particularly with respect to the rationale for criminalization, the legal construction of the offense, evidentiary requirements, the objectives of punishment, and the forms of sanctions prescribed. Through this approach, the study is expected to contribute to the enrichment of criminal law and *fiqh jinayah* scholarship while also providing a conceptual basis for promoting the fair, proportionate, and effective implementation of Article 412 in practice.

B. Research Methods

This study employs a normative legal research method that focuses on the analysis of legal norms concerning the criminalization of cohabitation within both Indonesian positive law and Islamic criminal law. To achieve this objective, the research utilizes a statutory approach and a conceptual approach. The statutory approach involves an examination of the provisions contained in Law Number 1 of 2023 concerning the Criminal Code, with particular attention given to Article

¹⁰ Topo Santoso, *Asas-Asas Hukum Pidana Islam* (Pt Rajagrafindo, 2016). hlm. 146.

¹¹Orin Gusta Andini. "Criminalization Of Cohabitation Under Indonesia's 2023 Criminal Code: A Cost-Benefit Analysis Perspective." *Jurnal Ilmiah "Advokasi"* 1, No. 2337 (2026): hlm. 64.

412. Meanwhile, the conceptual approach is directed toward exploring the doctrines, principles, and legal concepts of *fiqh jinayah* relating to the *jarimah* of *zinā*. The study relies on both primary and secondary legal materials. Primary legal materials consist of statutory regulations and other authoritative legal instruments, whereas secondary legal materials include books, scholarly journals, and relevant academic publications, particularly those published within the last five years. Data were collected through library research by systematically identifying, reviewing, and classifying legal sources relevant to the research problem. The collected materials were then analyzed using a descriptive-analytical method combined with a comparative approach. Through this method, the regulation of cohabitation under Indonesian criminal law is compared with the principles of *fiqh jinayah* in order to identify points of convergence and divergence, as well as to assess the legal relevance of both systems in shaping and regulating morality-related criminal offenses.

C. Discussion and Research Results

Conceptual Review and Theoretical Framework

The theoretical framework of this study rests on the theory of criminal law policy and the theory of criminal law reconstruction. The theory of criminal law policy posits that the criminalization of conduct should be grounded in the necessity of protecting specific legal interests, including those of individuals, society, and the state. In this context, criminal law must not be applied excessively, since criminal sanctions are fundamentally intended as a last resort, or *ultimum remedium*. Accordingly, any expansion of criminal offenses, including morality-related offenses, must be evaluated based on the principles of legal certainty, expediency, justice, and proportionality.¹²

The theory of criminal law reconstruction is employed to evaluate whether newly formulated criminal norms align with societal developments, living legal values, and the principles of human rights protection. Criminal law reconstruction not only entails the creation of new legal norms but also the reconfiguration of penal policy so that it is not purely repressive, but also preventive, educative, and restorative in nature. Within the context of morality-related offenses, criminal law reconstruction is of particular importance, as issues of morality are inherently situated in a sensitive domain between public morality and individual private autonomy. Accordingly, criminal law is required to strike a balance between

¹² Arief, *Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep Kuhp Baru)*. hlm. 78.

safeguarding societal values and restricting state intervention in the private lives of citizens.¹³

Morality offenses in Indonesian criminal law generally refer to criminal acts involving the violation of norms of decency, propriety, and sexual morality as they are lived and recognized within society. However, the concept of morality is not always easily determined in an objective manner, as moral standards may differ across societies. In criminal law, ambiguity in the standard of morality may give rise to interpretative problems,¹⁴ particularly where the definition of an offense fails to provide clear boundaries. Accordingly, morality offenses require precise and unambiguous formulation in order to comply with the principle of legality, particularly the principle of *lex certa*, which requires criminal provisions to be clear, definite, and not subject to multiple interpretations.¹⁵

Cohabitation, or living together without marriage, can be understood as a situation in which a man and a woman live together in a relationship resembling that of husband and wife without a legally recognized marital bond. In the Indonesian social context, this conduct is often referred to as “*kumpul kebo*” and is considered contrary to religious norms, customary law, and moral values. However, from a criminal law perspective, cohabitation raises legal issues because it takes place within the private sphere and does not always result in direct victims. Therefore, the main debate surrounding cohabitation does not only concern whether the conduct contradicts societal morals, but also whether it is appropriate to criminalize such conduct under criminal law.¹⁶

Within *fiqh jinayah*, the concept of a criminal offense is referred to as *jarimah*, which denotes an act prohibited by Islamic law (*sharia*) and subject to a specified punishment.¹⁷ Jarimah is generally classified into three categories,

¹³ Karolus Charlaes Bego Dkk., *Paradigma Baru Hukum Pidana Nasional : Analisis Normatif Terhadap Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana New Paradigm Of National Criminal Law : Normative Analysis Of Law Number 1 Of 2023 Concerning The Criminal Code* Publisher : Universitas Muhammadiyah Palu, 8, No. 11 (2025): hlm. 7482, <https://doi.org/10.56338/jks.v8i11.9285>.

¹⁴ Khairil Ikhsan. “Problems In Regulating Cohabitation As An Offense In Law Number 1 Of 2023 Concerning The Criminal Code.” *Jurnal Widya Pranata Hukum* 7, No. 1 (2025): Hlm. 73.

¹⁵ Hwian Christianto, *Kejahatan Kesusilaan* (2017). hlm. 65.

¹⁶ S. H. Alfitra, *Hukum Pembuktian Dalam Beracara Pidana, Perdata, Dan Korupsi Di Indonesia* (Raih Asa Sukses, 2011). hlm. 75.

¹⁷ Mustafid Mustafid, “Analisis Fiqih Siyash Terhadap Optimalisasi Fungsionalitas Bpd (Badan Permusyawaratan Desa) Dalam Peningkatan Kesejahteraan Masyarakat Di Desa Sibiruang,” *Jurnal El-Qanuniy: Jurnal Ilmu-Ilmu Kesyariahan Dan Pranata Sosial* 8, No. 2 (2023): hlm. 42., <https://doi.org/10.24952/El-Qanuniy.v8i2.6150>.

namely *jarīmah ḥudūd*, *jarīmah qiṣāṣ-diyāt*, and *jarīmah ta'zīr*. *Jarīmah ḥudūd* refers to criminal offenses whose forms and punishments have been explicitly determined by Islamic law (*sharia*), such as adultery (*zinā*), false accusation of adultery (*qadzaf*), theft, and consumption of intoxicants. *Jarīmah qiṣāṣ-diyāt* relates to offenses against life and bodily integrity, while *jarīmah ta'zīr* refers to acts whose punishments are left to the discretion of the ruler or judge, provided they do not contradict the principles of *sharia*.¹⁸

The most relevant category of *jarīmah* in relation to the discussion of cohabitation is *jarīmah zinā*. In *fiqh jinayah*, *zinā* is defined as sexual intercourse between a man and a woman outside a valid marriage. Accordingly, *fiqh jinayah* does not regard “living together” as an independent *jarīmah*, unless it is proven that the relationship involves the commission of *zinā*. *Zinā* is categorized as a *jarīmah ḥudūd* that is subject to highly stringent standards of proof, requiring either the offender’s confession or the testimony of four eyewitnesses who directly witnessed the act.. The stringent standards of proof demonstrate that Islamic criminal law adopts a highly cautious approach in matters of morality, as allegations of *zinā* can have severe implications for an individual’s honor, dignity, and lineage.¹⁹

An Analysis of Article 412 of the New Criminal Code

Article 412 of Law Number 1 of 2023 provides that any person who engages in cohabitation as husband and wife outside a legally recognized marriage may be punished with imprisonment for up to six months or a fine of up to Category II. This provision represents one of the significant reforms introduced by the new Criminal Code, given that the previous Criminal Code did not expressly regulate cohabitation as a distinct criminal offense.²⁰ Through Article 412, the scope of morality-related offenses has been expanded beyond the traditional focus on adultery and acts of indecency to include the practice of cohabitation outside a legally recognized marriage. As a result, conduct that was previously

¹⁸ Irfan, *Fiqh Jinayah*...hlm. 42.

¹⁹ Fatahuddin Aziz Siregar Dkk., “Fikih Jinayah Kontemporer: Telaah Historis, Perkembangan Dan Penerapan Qanun,” Preprint, Semesta Aksara, 2024. hlm. 51.

²⁰ Kurniawan, Widhie, Kukuh Sudarmanto, Kadi Sukarna, And Mangaraja Manurung. “Kohabitasi Dalam Kuhp 2023 Ternyata Tidak (Perlu) Dipidana.” *Journal Juridisch* 2, No. 3 (2024): hlm. 235.

addressed primarily through religious, customary, or social norms has now been incorporated into the sphere of criminal law regulation.²¹

Article 412 may be regarded as an effort by the state to protect the values of marriage, public morality, and social order. In Indonesian society, marriage functions not only as a legal relationship but also as a social and religious institution that safeguards the family and lineage. Accordingly, cohabitation is often viewed as conduct that resembles a marital relationship without lawful recognition, thereby potentially undermining the institution of marriage.²²

The regulation of cohabitation under Article 412 raises several legal concerns, particularly regarding the interpretation of the phrase “living together as husband and wife outside of marriage.” The provision does not clearly specify whether cohabitation requires shared residence, sexual relations, economic interdependence, or merely the appearance of a marital relationship. This ambiguity may lead to differing interpretations and create challenges in the evidentiary process during law enforcement.

Article 412 is classified as a complaint-based offense (*delik aduan*), meaning that legal action may only be initiated upon a complaint from an authorized party. This mechanism reflects an effort to limit state intervention in the private lives of individuals, as law enforcement authorities cannot pursue alleged cases of cohabitation without a formal complaint. Nevertheless, this approach does not entirely eliminate potential concerns, as the provision may still be susceptible to misuse in the context of family disputes, social pressure, or morality-based criminalization.

Article 412 should be evaluated in light of the principle of proportionality, which requires that criminalization be justified by the protection of a legitimate legal interest, the existence of social harm, and the absence of less restrictive alternatives. In the context of cohabitation, the central issue is whether imprisonment and fines are the most appropriate means of regulation. If the primary aim is to preserve family values and public morality, non-penal measures

²¹ Ridha Fahmi Ananda, Edi Yunara, And Edy Ikhsan. “Perlindungan Hukum Terhadap Anak Sebagai Korban Kejahatan Pelecehan Seksual Dalam Perspektif Viktimologi” 2, No. 1 (2023): hlm. 59.

²²Kaila Intan Fatihah. “Legal Analysis Of Cohabitation And Adultery Delict In Law No . 1 Of 2023 On The Criminal Code.” *Law Researchreview Quarterly* 12, No. 2 (2023): hlm. 835.

such as education, family law mechanisms, or socio-religious approaches may offer more proportionate and effective alternatives.²³

Article 412 of the new Criminal Code reflects a shift in Indonesia's criminal law policy toward greater recognition of societal moral values. Nevertheless, the provision requires careful evaluation to prevent excessive criminalization. While the regulation of cohabitation may be justified as a means of protecting public morality, its enforcement must remain consistent with the principles of legality, legal certainty, privacy protection, and the notion of criminal law as a measure of last resort.

Perspectives of Positive Law and *Fiqh Jinayah*

From the perspective of Indonesian positive law, cohabitation may constitute a morality offense when it satisfies the elements set out in Article 412 of the new Criminal Code. The provision emphasizes the existence of a relationship that resembles marriage and the act of living together outside a lawful marriage, rather than focusing solely on proof of sexual relations. This reflects the view that cohabitation is a socio-moral issue requiring regulation through criminal law.

In contrast, *fiqh jinayah* does not recognize cohabitation as an independent *jarimah*. Cohabitation becomes a criminal matter only when it can be proven to involve *zinā* in accordance with Islamic legal standards. Thus, Islamic criminal law does not punish cohabitation itself, but rather the act of *zinā* when supported by sufficient evidence. This approach reflects the principle of caution in *fiqh jinayah*, which requires strict evidentiary standards and avoids criminalizing conduct based merely on suspicion or circumstances that may lead to *zinā*.²⁴

The two legal systems differ in several respects. Indonesian positive law focuses on cohabitation outside marriage as the prohibited conduct, whereas *fiqh jinayah* centers on the act of *zinā*. Their evidentiary standards also differ, with positive law relying on general criminal procedure rules, while *fiqh jinayah* requires a confession or the testimony of four witnesses. In terms of sanctions, Article 412 imposes imprisonment or fines, whereas *zinā* in *fiqh jinayah* falls

²³ Robi Assadul Bahri, *Rekonstruksi Kebijakan Non-Penal Tindak Pidana Kesusilaan Di Indonesia*, 2, No. 1 (2025). hlm. 39.

²⁴ Pairuz Amanina Dkk., *Hukum Zina Dalam Perspektif Jinayah : Konsep Dan Penerapannya Di Negara*, 1 (2024): hlm. 74.

within the category of *jarimah hudūd*, although its application is subject to exceptionally strict evidentiary requirements.²⁵

Despite their differences, positive law and *fiqh jinayah* share a common objective of protecting the values of marriage, lineage, and social order. Both recognize that sexual relations and family life carry important moral and social implications. The key distinction lies in the scope of criminalization: Article 412 extends criminal liability to cohabitation outside marriage, whereas *fiqh jinayah* limits punishment to proven acts of *zinā* established through strict evidentiary standards.

This distinction highlights the strong principle of caution embedded in *fiqh jinayah*. The stringent evidentiary requirements for proving *zinā* serve to protect human dignity and prevent unfounded accusations. From this perspective, *fiqh jinayah* offers a critical framework for evaluating Article 412, emphasizing that the criminalization of cohabitation should not be applied arbitrarily, rely solely on social suspicion, or result in injustice toward vulnerable individuals.

Reconstruction and Critique

Based on the foregoing analysis, the reconstruction of Article 412 should focus on enhancing legal clarity and limiting interpretative uncertainty. A primary concern is the element of “living together as husband and wife outside of marriage,” which requires a more precise and operational formulation to guide law enforcement authorities in its application. Clearer parameters are necessary to prevent multiple interpretations and to ensure greater legal certainty in the enforcement of the provision.²⁶

The second reconstruction concerns strengthening the limited complaint-based nature of Article 412. Complaints should not function as tools of retaliation, social pressure, or unjust criminalization. Accordingly, the complaint mechanism should be accompanied by a careful preliminary assessment to determine the existence of a legitimate legal interest. Such an approach would help ensure that cases better suited for family, social, or religious resolution are not unnecessarily brought into the criminal justice system.²⁷

²⁵ Muhammad Hafizh Adil Lubis Dan Zaid Alfauza Marpaung, “Alasan Pembuktian Tindak Pidana Perzinahan Dengan Saksi Berjumlah 4 Orang Laki-Laki Dalam Hukum Pidana Islam,” *Justicia Sains: Jurnal Ilmu Hukum* 09, No. 2 (2024): hlm. 82.

²⁶ Hasna Hamidah, And Tajul Arifin. “Kohabitasi Dalam Perspektif H.R. Al-Tirmidzi Dan Pasal 412 Ayat (1) Kuhp.” *Jurnal Hukum, Politik Dan Ilmu Sosial (Jhpis)* 3, No. 3 (2024): hlm. 144.

²⁷ Istri Asta Julianingrum Semara, And I Gusti Ayu Stefani Ratna Maharani. “Pendekatan Kriminalisasi Dalam Kebijakan Hukum Pidana.” *E-Journal Ilmu Hukum Kertha Desa* 14, No. 1 (2023): hlm. 70.

The third reconstruction is to prioritize non-penal measures in addressing cohabitation. In morality-related cases that do not involve direct victims, criminal sanctions should function as a last resort. Greater emphasis may be placed on preventive strategies such as family education, social mediation, community development, and strengthening the institution of marriage. This approach is more consistent with the objective of preserving public morality while reducing the risk of overcriminalization and excessive state intervention in private life.²⁸

The fourth reconstruction is to incorporate the principle of caution reflected in *fiqh jinayah*. In cases involving morality, honor, and private relationships, evidentiary assessment should be based on clear and convincing proof rather than assumptions or social stigma. This principle underscores the importance of protecting individual rights and may serve as a safeguard against the arbitrary application or misuse of Article 412.

A central criticism of Article 412 is the unresolved tension between protecting public morality and safeguarding individual privacy. While the provision may be viewed as reinforcing the values of marriage and morality within Indonesian society, criminal law should not function solely as a means of enforcing moral norms without a clear demonstration of social harm. Excessive state intervention in private matters risks transforming criminal law from an instrument of social protection into a tool of moral control.²⁹

An ideal reconstruction of Article 412 should not disregard the state's interest in protecting public morality, but should ensure that such protection remains proportionate and consistent with fundamental legal principles. The provision should be applied cautiously, restrictively, and only in response to complaints reflecting a legitimate legal interest. In this regard, *fiqh jinayah* offers a valuable comparative perspective by emphasizing prudence, strict evidentiary standards, and the protection of human dignity. Such an approach would enable the regulation of cohabitation to uphold moral values while preserving justice, legal certainty, and individual rights.

D. Conclusion

The criminalization of cohabitation under Article 412 of Law Number 1 of 2023 reflects an expansion of morality offenses aimed at protecting the values of

²⁸ Rhesas Shalatan Dan Mega Fitri Hertini, *Rekonstruksi Hukum Living Together Sebagai Tindak Pidana Dalam Pasal 412 Kuhp Baru*, 6, No. 6 (2026): hlm. 1494.

²⁹ Imera Azzahra Alivia, Prija Djatmika, And Nurini Aprilianda. "Reformulation Of Article 412 Law Number 1 Of 2023 on Cohabitation From A Legal Certainty perspective." *Yurisdiksi Jurnal Wacana Hukum Dan Sains universitas Merdeka Surabaya* 22, No. 1 (2026); hlm. 30.

marriage, public morality, and social order. While Indonesian positive law treats cohabitation as a punishable offense, *fiqh jinayah* links criminal liability to the proven occurrence of *zinā* under stringent evidentiary requirements. Although both legal systems seek to protect family, honor, and lineage, they differ significantly in their construction of offenses, standards of proof, and approaches to punishment. These differences highlight the need for the implementation of Article 412 to remain guided by the principles of legal certainty, proportionality, and the protection of individual rights in order to prevent overcriminalization.

Theoretically, this study contributes to the discourse on the limits of criminalization in morality-related offenses through a comparative analysis of positive law and *fiqh jinayah*. Practically, it highlights the need for caution in the application of Article 412. Legislators should provide clearer guidance regarding the meaning of “living together as husband and wife outside of marriage” and the scope of the complaint mechanism, while law enforcement authorities should apply the provision selectively and proportionately, with criminal law functioning as an *ultimum remedium* to safeguard justice, legal certainty, and the right to privacy.

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