

Complaint Offense in Cohabitation Regulation Under Law No. 1 of 2023: An Analysis of Criminal Law and Fiqh Jinayah

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Abstract: Law Number 1 of 2023 concerning the Criminal Code fills the legal void (*rechtsvacuum*) that has been attached to the act of cohabitation without a valid marital bond through the criminalization of cohabitation in Article 412, as a manifestation of the philosophical foundation of Pancasila which places the values of religiosity and social order as a foothold for national criminal law reform. However, the construction of an absolute complaint deliction in the article, with the limitation of the complainant's subject to husband, wife, parents, or children and the flexibility to withdraw complaints, raises policy ambivalence that questions the consistency of the direction of criminalization as well as the effectiveness of its enforcement. This research aims to answer three problems: first, how the cohabitation arrangement is constructed in Article 412; second, how the complaint mechanism affects the effectiveness of law enforcement from the perspective of legal certainty, preventive function, and equality before the law; and third, how the complaint system is analyzed from the perspective of *jidaya fiqh*. This research uses normative juridical methods with conceptual and comparative approaches, utilizing primary legal materials in the form of laws and regulations and verses of the *Qur'an*, as well as secondary legal materials in the form of *fiqh jinayah* literature and *siyasah syar'iyah*, which are collected through literature studies and analyzed qualitatively. The results of the study show that Article 412 constructs cohabitation as a formal criminal act whose prosecution is absolutely dependent on the subjective will of the complainant, thus giving birth to a policy paradox that weakens the certainty of enforcement, preventive functions, and the principle of legal equality. From the point of view of *fiqh jinayah*, this system of complaint delik is structurally in accordance with the character of *jarimah ta'zir* which is in harmony with the principles of *sitr al-'aib* and *hifz al-'irdh*, but still leaves a conceptual tension between private interests and collective interests within the authority of *ulil amri*. This study concludes that the effectiveness of Article 412 is largely determined by the design of the enforcement mechanism, not just the formulation of the norms.

Keywords: Cohabitation; Complaint; Article 412 Of The Criminal Code; Fiqh Jinayah; Effectiveness Of Criminal Law.

Abstrak: Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana mengisi kekosongan hukum (*rechtsvacuum*) yang selama ini melekat pada perbuatan hidup bersama tanpa ikatan perkawinan yang sah melalui kriminalisasi kohabitasi dalam Pasal 412, sebagai perwujudan landasan filosofis Pancasila yang menempatkan nilai religiositas dan ketertiban sosial sebagai pijakan pembaruan hukum pidana nasional. Namun, konstruksi delik aduan absolut dalam pasal tersebut, dengan pembatasan subjek pengadu secara limitatif kepada suami, istri, orang tua, atau anak serta fleksibilitas penarikan pengaduan memunculkan ambivalensi kebijakan yang

mempertanyakan konsistensi arah kriminalisasi sekaligus efektivitas penegakannya. Penelitian ini bertujuan menjawab tiga permasalahan: pertama, bagaimana pengaturan kohabitasi dikonstruksikan dalam Pasal 412; kedua, bagaimana mekanisme delik aduan tersebut memengaruhi efektivitas penegakan hukum ditinjau dari kepastian hukum, fungsi pencegahan, dan kesetaraan di hadapan hukum; dan ketiga, bagaimana sistem delik aduan tersebut dianalisis dari perspektif fiqh jinayah. Penelitian ini menggunakan metode yuridis normatif dengan pendekatan konseptual dan komparatif, memanfaatkan bahan hukum primer berupa peraturan perundang-undangan dan ayat-ayat Al-Qur'an, serta bahan hukum sekunder berupa literatur fiqh jinayah dan siyasah syar'iyah, yang dikumpulkan melalui studi kepustakaan dan dianalisis secara kualitatif. Hasil penelitian menunjukkan bahwa Pasal 412 mengonstruksikan kohabitasi sebagai tindak pidana formil yang penuntutannya digantungkan mutlak pada kehendak subjektif pengadu, sehingga melahirkan paradoks kebijakan yang melemahkan kepastian penegakan, fungsi pencegahan, dan prinsip kesetaraan hukum. Dari sudut pandang fiqh jinayah, sistem delik aduan ini secara struktural sesuai dengan karakter jarimah ta'zir yang selaras dengan prinsip *sitr al-'aib* dan *hifz al-'irdh*, namun tetap menyisakan ketegangan konseptual antara kepentingan privat dan kepentingan kolektif dalam kewenangan *ulil amri*. Penelitian ini menyimpulkan bahwa efektivitas Pasal 412 sangat ditentukan oleh desain mekanisme penegakan, bukan semata rumusan normanya.

Kata Kunci: Kohabitasi; Delik Aduan; Pasal 412 KUHP; Fiqh Jinayah; Efektivitas Hukum Pidana.

Introduction

The national criminal law reform through Law Number 1 of 2023 on the Criminal Code has brought significant changes to the landscape of morality-related offenses in Indonesia, one of which is through the criminalization of cohabitation an act previously unrecognized under the colonial-heritage Criminal Code. The legal vacuum (*rechtsvacuum*) that was previously attached to the act of living together without a valid marital bond, commonly referred to as "*kumpul kebo*," is now filled through Article 412 of the new Criminal Code. This serves as a manifestation of the philosophical foundation of Pancasila, which places religious values and social order as the groundwork for national criminal law reform.¹ However, this criminalization does not automatically position the state as an entity that can unilaterally prosecute every act of cohabitation that fulfills the elements of the offense, as Article 412 is designed as an absolute complaint-based offense (*delik aduan absolut*) with strict limitations on eligible complainants, as regulated in paragraphs (2) through (4). Through the criminalization of cohabitation in Article 412 of the new Criminal Code, the condition prior to the enactment of Law No. 1 of 2023 is academically more accurately viewed as the absence of a specific criminal

¹ Nurinda Ika Safitri dan Eko Wahyuni, "Kriminalisasi Perbuatan Kohabitasi Dalam Perspektif Pembaharuan Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia," *Jurnal Ilmiah Wahana Pendidikan* 9, no. 20 (2023): 613.

provision regulating consensual cohabitation rather than an absolute legal vacuum (*rechtsvacuum*), considering that the act previously fell outside the scope of the adultery provisions in Article 284 of the old Criminal Code.

The construction of this complaint-based offense gives rise to legal complexities that are far from simple. On the one hand, cohabitation is categorized as a formal offense, which fundamentally grants broad authority to the state to prosecute once the objective and subjective elements are met. On the other hand, this scope is sharply narrowed by the formal complaint requirement, which restricts complainants exclusively to a spouse, parents, or children, accompanied by the flexibility to withdraw the complaint without a specific time limit.² Such policy ambivalence raises fundamental questions regarding the consistency of the direction of cohabitational criminalization, while simultaneously inviting further inquiry into the extent to which the design of this complaint-based offense is truly effective in achieving legal certainty, the preventive function of criminal norms, and equality before the law for every legal subject committing the same objective act. Regarding its practical implementation, given that Article 412 only came into effect in January 2026, the analysis of its enforcement effectiveness at this stage is normatively focused on the structural potential of its complaint mechanism design, rather than on premature empirical conclusions.

This issue becomes increasingly relevant to examine given that the criminalization of cohabitation in Article 412 sociologically stems from moral-religious values and customary law living within Indonesian society. Consequently, it cannot be detached from the framework of Islamic values that help shape the public's legal consciousness, particularly through *fiqh jinayah* (Islamic criminal jurisprudence) as part of the treasury of Islamic criminal law that has long recognized various forms of *jarimah* (crimes) along with their enforcement mechanisms. *Fiqh jinayah* strictly distinguishes between *jarimah hudud*, which is purely *haqqullah* (the right of Allah) and cannot be extinguished by the subjective will of any party, and *jarimah ta'zir*, whose technical enforcement including potential complaint mechanisms and withdrawals is left to the discretion of the ruler (*ulil amri*) through *siyasah syar'iyah* (governance policy).³ This classification serves as a relevant analytical tool to evaluate whether the construction of the absolute complaint-based offense in Article 412 aligns conceptually with the principles of Islamic criminal law enforcement, or whether it retains specific tensions, as historically debated in classical jurisprudence through the institutions of *li'an* and *qadhaf*.

² Khusnul Fadila, Noenik Soekorini dan Hartoyo, "Tindak Pidana Kesusilaan Dalam Perspektif KUHP Baru: Antara Moralitas dan Hak Privasi," *Syah Kuala Law Journal* 9, no. 3 (2025): 415.

³ Makhrus Munajat, *Fikih Jinayah (Hukum Pidana Islam)* (Yogyakarta: Nawesea Press, 2010): 9.

Studies on cohabitation under Article 412 of the new Criminal Code have been conducted by several prior scholars with varying focuses. Multazam and Mujab (2023) examined the criminalization of the *samenleven* offense (*kumpul kebo*) in the new Criminal Code from a jurisprudential perspective, concluding that categorizing cohabitation as a criminal offense is fundamentally consistent with the principle of *nahi munkar* in Islam, although certain formulations of the article were deemed not fully in line with Islamic values and thus require refinement.⁴ Ritonga and Mukhsin (2024) reviewed Article 412 from the perspective of Islamic criminal law by comparing the penal sanctions between the cohabitation offense and the adultery offense in Article 411, finding that under *fiqh jinayah*, cohabitants should be equated with perpetrators of adultery; hence, the lighter criminal threat in Article 412 was considered not fully aligned with the principles of Islamic criminal law.⁵ A more recent study by Nurozi (2026) analyzed the construction of cohabitation as a complaint-based offense from the perspective of *maqashid syariah*, concluding that limiting eligible complainants to the nuclear family renders the provision restrictive and procedural, thereby leaving tension between the protection of public morality and citizens' right to privacy.⁶

Distinct from these three previous studies which generally evaluated the conformity of Article 412 with Islamic criminal law or *maqashid syariah* separately from its complaint-offense system this research offers a new contribution by positioning the absolute complaint-offense mechanism as the primary object of analysis. It evaluates this mechanism simultaneously from two perspectives: the enforcement effectiveness of positive criminal law (encompassing legal certainty, the preventive function, and equality before the law) and the classification of *jarimah* in *fiqh jinayah* (specifically *hudud* and *ta'zir*). Accordingly, this study does not merely assess the normative alignment of Article 412 with Islamic law, but also evaluates the implications of the complaint-offense design on its enforcement effectiveness, thereby filling a scholarly gap that has been largely unaddressed by prior literature.

Based on the foregoing background, this research addresses three main points sequentially. First, how the regulation of cohabitation is constructed in Article 412 of Law Number 1 of 2023, including the criminal elements and formal complaint requirements therein. Second, how the application of the complaint-based offense mechanism

⁴ Syafiq M. Multazam dan Mujab, "Delik Samen Leven Dalam KUHP Baru Perspektif Fikih," *Syariah: Journal of Fiqh Studies* 1, no. 2 (2023).

⁵ Rahman Sani Ritonga dan Abd. Mukhsin, "Tinjauan Hukum Pidana Islam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kohabitasi," *Legal Standing: Jurnal Ilmu Hukum* 8, no. 3 (2024).

⁶ Ahmad Nurozi, "Kohabitasi sebagai Delik Aduan dalam KUHP Baru: Kontestasi antara Kriminalisasi Moral, Privasi, dan Hukum Islam," *Al-Zayn: Jurnal Ilmu Sosial, Hukum & Politik* 4, no. 1 (2026).

influences the effectiveness of law enforcement against cohabitation, examined through the dimensions of legal certainty, the preventive function, and equality before the law. Third, how the complaint-offense system in Article 412 is analyzed from the perspective of *fiqh jinayah*, particularly regarding the classification of *jarimah*, the principles of *sitr al-'aib* and *hifdh al-'irdh*, and the position of the *ulil amri* within the framework of *siyasah syar'iyah*. Through these three analytical focuses, this study is expected to provide a comprehensive understanding of the consistency of the cohabitation criminalization policy in the new Criminal Code, while enriching comparative studies between Indonesian positive criminal law and the principles of Islamic criminal law.

Method

This research is normative legal research focusing on the analysis of legal norms governing cohabitation under Law Number 1 of 2023 on the Criminal Code, examined as well from the perspective of *fiqh jinayah*. This study utilizes a conceptual approach and a comparative approach.⁷ The legal materials used consist of primary legal materials in the form of statutory legislation and relevant Qur'anic verses as Islamic legal references regarding *qadhaf* and *li'an*, alongside secondary legal materials comprising academic journals, books, classic treatises on *fiqh jinayah* and *siyasah syar'iyah*, and previous research findings relevant to cohabitation and complaint-based offenses. Legal materials were collected through library research and subsequently analyzed qualitatively using a normative approach through deductive reasoning. This analysis aims to examine the regulation of cohabitation in Article 412 of Law Number 1 of 2023, assess the impact of the complaint-offense mechanism on the effectiveness of law enforcement against cohabitation, and analyze the complaint-offense system from the perspective of *fiqh jinayah*.

The first stage of data analysis involved legal material reduction sorting, classifying, and focusing primary legal materials (Article 412 of Law Number 1 of 2023 and Qur'anic references on *qadhaf* and *li'an*) as well as secondary legal materials (literature on *fiqh jinayah*, *siyasah syar'iyah*, academic journals, and academic drafts) to ensure direct relevance to the research problems. This was followed by legal interpretation, which included applying grammatical interpretation to analyze the textual meaning of norms, systematic interpretation to contextualize Article 412 within the broader national criminal law system, and comparative interpretation between positive law and Islamic criminal doctrine. Building upon these interpretive results, the final stage established legal reasoning to evaluate the conceptual alignment between the construction of the absolute complaint-based offense in positive law and the principles of *jarimah ta'zir*, *sitr*

⁷ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenada Media Group, 2005).

al-'aib, and *hifdh al-'irdh*, thereby generating comprehensive conclusions regarding the effectiveness and implications of the cohabitation criminalization policy.

Given that this study employs a normative legal approach based on library research, the validity and trustworthiness of the legal materials were tested against standards of legal academic quality assurance. The initial test of validity was performed through source triangulation of legal materials, specifically cross-verifying positive legislation with the core principles of *fiqh jinayah*, opinions from classical schools of jurisprudence (*mazhab*), and findings from prior research to avoid theoretical bias.

Discussion

A. Regulation of Cohabitation under Law Number 1 of 2023

To comprehend the regulation of cohabitation under Law Number 1 of 2023, it is necessary to first understand that the new Criminal Code is constructed upon the philosophical foundation of Pancasila, which positions religious values and social order as the main pillars of national criminal law reform.⁸ In this regard, cohabitation is criminalized not explicitly because of the sexual act per se, but rather due to the existence of a pattern of cohabitation resembling marriage without legal legitimacy. It is this shift in orientation that renders Article 412 of the new Criminal Code a provision that conceptually demands a more meticulous dissection of its criminal elements.

Prior to examining the normative formulation of Article 412, it is essential to first understand cohabitation conceptually as a form of social association or relationship between two individuals who choose to live together as husband and wife without a valid marriage. In the context of criminal law, this concept is known by various foreign terms, including *samenleven* in Dutch or living together in English, all of which refer to a shared living pattern as a couple in the absence of a valid marital bond. In Indonesia, this practice is more commonly referred to as "*kumpul kebo*".⁹

Prior to the enactment of Law Number 1 of 2023, the old colonial heritage Criminal Code (*Wetboek van Strafrecht*) did not regulate cohabitation as a distinct criminal offense.¹⁰ The closest provision existed under Article 284 of the old Criminal Code regarding adultery (*overspel*), which was a complaint-based offense actionable only if one or both perpetrators were bound by a valid marriage. Consequently, unmarried

⁸ Abdur Rachman Parlindungan Barasa dan Wahyudi Saputra, "Pembaharuan Sistem Hukum Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana," *Indonesia Journal of Criminal Law and Criminology (IJCLC)* 6, no. 3 (2025): 160.

⁹ Habibie Maulana dan Moh. Hatta, "Perspektif Hukum dan Sosial Terhadap Kohabitasi (Samenleven)," *Journal Ilmiah Rinjani (JIR)* 12, no. 2 (2024).

¹⁰ Rhesas Shalata dan Mega Fitri Hertini, "Rekonstruksi Hukum Living Together Sebagai Tindak Pidana Dalam Pasal 412 KUHP baru," *Jurnal Syntax Imperatif: Jurnal Ilmu Sosial dan Pendidikan* 6, no. 6 (2026): 29-30.

couples living together outside of marriage fell beyond the reach of Article 284 of the old Criminal Code,¹¹ resulting in a legal vacuum (*rechtsvacuum*) regarding such cohabitational behavior. This legal vacuum is what the lawmakers subsequently attempted to fill through Article 412 of the new Criminal Code.

Article 412 of Law Number 1 of 2023 defines cohabitation as the act of living together as husband and wife outside of a valid marriage, punishable by a maximum imprisonment of six months or a Category II fine.¹² Contextually, the phrase "living together as husband and wife" comprises two inseparable elements: a factual element consisting of continuous co-residence in a shared dwelling, and a normative element involving the simulation of a legally recognized spousal relationship pattern. It is this second element that imparts a degree of complexity to the offense of cohabitation, as it requires an evaluation of the quality of the parties' relationship rather than merely proving their physical presence in a single residence. Accordingly, not every form of shared living between a man and a woman automatically qualifies as cohabitation under Article 412; rather, it applies exclusively to those who demonstrably conduct their lives like a married couple without a valid marital bond under applicable law.

To avoid conceptual confusion, the formulation of elements in Article 412 must be strictly differentiated into three distinct legal layers: the *elements of offence*, comprising the *actus reus* of continuous physical cohabitation along with the normative requirement of mimicking a spousal relationship without a valid marital bond; the *fault requirement*, serving as the subjective criminal culpability or fault inherent in the perpetrator's awareness; and the formal complaint requirement, acting as a limitation on prosecutorial authority. Through this distinction, mutual intent (*mens rea*) is not conflated with procedural complaint conditions, but is instead positioned as a prerequisite for criminal liability based on the conscious acts of both parties.

Referring to the elaboration of the factual and normative elements above, the cumulative elements of the offense of cohabitation required for conduct to be categorized as such can be formulated as follows. First, the objective element, which is essentially reflected in both aforementioned elements namely, the act of living together in a shared dwelling in a manner resembling a spousal relationship without being based on a valid marriage under applicable law. Second, the subjective element, namely the existence of

¹¹ Raka Indra Pratama, Ade mahmud, dan Chepi Ali Firman Zakaria, "Kebijakan Kriminal Terhadap Tindak Pidana Berdasarkan Hukum Pidana Positif Dan Hukum Pidana Islam," *Al-Jinayah: Jurnal Hukum Pidana Islam* 8, no. 1 (2022): 30.

¹² Pemerintah Republik Indonesia, "Undang-Undang Dasar Negara Republik Indonesia Tahun 1945" (Jakarta: Sekretariat Negara Republik Indonesia, 1945).

mutual consent or intent (*mens rea*)¹³ from both parties to consciously enter into such a relationship. Third, the element of a complaint-based offense as a formal prerequisite for prosecution namely, the existence of an official complaint lodged by parties empowered by law.¹⁴ The absence of any single element be it objective, subjective, or the formal complaint requirement renders an act unprosecutable as the criminal offense of cohabitation.

The formal complaint requirement is detailed in Article 412 paragraphs (2) through (4), which simultaneously constitutes the most prominent feature of this offense's design. Paragraph (2) exhaustively limits the parties entitled to file a complaint to a spouse for perpetrators who are married, or parents or children for perpetrators who are unmarried. Paragraph (3) reinforces that general provisions regarding eligible complainants in complaint-based offenses, as governed under Articles 25 and 26, as well as provisions regarding time limits for complaint withdrawal under Article 30, do not apply to Article 412 due to specific regulations (*lex specialis*) within paragraph (2). Consequently, paragraph (4) stipulates that a complaint against the offense of cohabitation may be withdrawn at any time before court proceedings commence, without specific time restrictions as applicable to general complaint-based offenses.¹⁵ The construction of these four paragraphs demonstrates that the lawmakers deliberately designed the enforcement mechanism for cohabitation as an absolute complaint-based offense with highly restrictive complainant eligibility, aimed at preventing vigilante actions by the public against suspected cohabitants.

Beyond issues of proof, the aspect of criminal penalties in Article 412 carries significant normative implications: maximum imprisonment of six months or a Category II fine places cohabitation within the category of minor offenses in the hierarchy of Indonesian criminal sanctions. When compared with other morality offenses in the new Criminal Code, such as adultery under Article 411 which carries a maximum prison sentence of one year,¹⁶ the criminal threat for cohabitation appears lower despite its conceptually broader scope. This divergence raises questions regarding the consistency of the criminalization policy. It can be interpreted that the answer to this question lies not merely in the logic of penal proportionality, but rather in the actual function the lawmakers intended to achieve through Article 412.

¹³ Lukman Hakim, *Asas-Asas Hukum Pidana: Buku Ajar Bagi Mahasiswa* (Yogyakarta: Deepublish, 2020).

¹⁴ Hakim.

¹⁵ Indonesia, “Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana” (2023) Pasal 412.

¹⁶ Republik Indonesia, “Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana” (2023).

The inception of Article 412 did not occur in a vacuum. The norm against living together outside of marriage essentially originates from customary law or living law within society, rather than being a formulation merely derived from foreign legal doctrines. This sociological root aligns with the broader objective of criminal law reform under the Criminal Code, which seeks a balance in national criminal law based on the religious-moral values of Almighty God as articulated in the first principle of Pancasila.¹⁷ Thus, the criminalization of cohabitation represents not merely an expansion of state authority into citizens' private spheres, but a manifestation of religious values and customary law that sociologically exist and are recognized within Indonesian society as part of a shared moral order.

Regarding its temporal applicability, Law Number 1 of 2023 was enacted on January 2, 2023; however, pursuant to the closing provisions of Article 624, this law only became effective three years later, on January 2, 2026. This three-year period was designated as a transition period (*vacatio legis*) for law enforcement officers and the public to prepare prior to the enforcement of the new norms. Up to the time this research was conducted, Article 412 on cohabitation has come into force and is legally binding as Indonesian positive law, meaning that any act of cohabitation fulfilling its statutory elements from that date onward can be processed under the complaint-offense mechanism as regulated in this Article.

B. Application of the Complaint-Offense Mechanism and Its Impact on Law Enforcement Effectiveness Against Cohabitation

The previous discussion detailed the normative structure of Article 412, including the limitations on eligible complainants in paragraph (2), the exemption from general complaint provisions in paragraph (3), and the flexibility of complaint withdrawal in paragraph (4). In this section, the analysis shifts from *what* the regulation contains to *how* its structural design affects enforcement effectiveness in practice, evaluated across three interconnected dimensions: certainty of legal enforcement, the preventive function of criminal norms, and equality before the law.

The starting point of this analysis rests on the character of Article 412 paragraph (1) as a formal offense a crime considered complete the moment the act of living together as husband and wife outside of valid marriage occurs, without requiring proof of specific consequential damages. This formal character fundamentally provides room for the state to broadly prosecute the conduct once objective and subjective elements are satisfied. However, this scope is subsequently sharply constrained by the complaint mechanism

¹⁷ Badan Pembinaan Hukum Nasional, *Naskah Akademik Rancangan Undang-Undang tentang Kitab Undang-Undang Hukum Pidana* (Jakarta: Badan Pembinaan Hukum Nasional, 2015).

outlined previously; thus, regardless of whether the elements of the offense are met, legal proceedings cannot proceed without the explicit will of the parties restrictively designated by law.

The combination of these two characteristics demonstrates a clear ambivalence in the criminal policy direction embedded within the 2023 Criminal Code. On the one hand, the state views cohabitation as an act contrary to societal morality, making it deserving of criminalization. On the other hand, the state restricts enforcement potential through an absolute complaint-offense framework actionable only by specific individuals within the nuclear family.¹⁸ Such a structure indicates that the criminalization of cohabitation was not entirely designed as an automatically functioning law enforcement instrument, but rather operates as an assertion of state norms regarding shared moral values intended for protection through penal means. This policy paradox the expansion of criminalization scope progressing in tandem with the narrowing of enforcement mechanisms forms the foundation for all subsequent effectiveness challenges discussed below.

In normative legal perspective, the effectiveness of a penal provision is determined not merely by the existence of its norm, but by the degree to which that norm can be consistently applied in practice.¹⁹ Soerjono Soekanto posited that legal effectiveness is influenced by five interconnected factors: the law itself, law enforcement officers, facilities and infrastructure, the community, and cultural factors.²⁰ In the context of cohabitation regulation, all five factors are simultaneously impacted when a complaint-offense mechanism is applied: law enforcement becomes entirely dependent upon the willingness of designated parties to report, causing the state to forfeit its primary role in the criminal enforcement process.²¹ When legal enforcement hinges on personal relationships and the subjective intent of complainants, the applicability of penal norms is no longer dictated solely by the protected legal interest, but is influenced by volatile private dynamics.

Dependence on the complainant's initiative directly impacts the preventive function of criminal law. A penal norm can generate a deterrent effect only when there is

¹⁸ A A Istri Asta Julianingrum Semara dan I Gusti Ayu Stefani Ratna Maharani, "Kohabitasi Dalam KUHP Baru: Studi Dengan Pendekatan Kriminalisasi dalam Kebijakan Hukum Pidana," *Jurnal Kertha Desa* 14, no. 2 (2026): 66–72.

¹⁹ Zul Khaidir Kadir, "KUHP Baru Indonesia Dan Prinsip Legalitas: Apakah Kepastian Hukum Masih Menjadi Fondasi?," *JIH: Jurnal Ilmu Hukum* 2, no. 2 (2026): 105.

²⁰ John Kenedi, *Kebijakan Hukum Pidana (Penal Polity) Dalam Sistem Penegakan Hukum di Indonesia* (Yogyakarta: Pustaka Pelajar, 2017).

²¹ M Rizki Yudha Prawira, "Potensi Overkriminalisasi Pada Pengaturan Tindak Pidana Kohabitasi Dalam Kitab Undang-Undang Hukum Pidana: Perspektif Fair Trial," *Jurnal Hukum Statuta* 4, no. 1 (2024): 34–42.

certainty that every violation will be met with consistent enforcement.²² In the regulation of cohabitation, such certainty is virtually absent because prosecution cannot proceed without a complaint, irrespective of whether the offense elements are fulfilled. Structurally, this condition threatens to weaken the coercive force of the penal norm, even if this cannot yet be empirically proven given that Article 412 only took effect in January 2026 and official field implementation data remains unavailable.

Another issue arising from this Article is the potential for selective and disproportionate law enforcement. Because legal proceedings can only initiate upon a complaint, the application of penal norms against cohabitation is heavily influenced by social conditions and the dynamic personal relations of eligible complainants. In practice, objectively identical acts may be treated differently before the law depending on the presence or absence of a complaint.²³ Two individuals committing objectively identical acts could face divergent legal consequences simply based on whether family members choose to lodge a complaint, thereby conflicting with the principle of equality before the law as guaranteed in Article 27 paragraph (1) of the 1945 Constitution. Consequently, criminal law loses its objective nature as an instrument intended to apply equally to all legal subjects.

These three issues the policy paradox, dependence on complainant initiative, and selective enforcement ultimately converge on a single outcome: the erosion of criminal law's legitimacy. Penal norms that prove difficult to enforce systematically risk widening the gap between *law in the books* and *law in action* the law as written on paper versus the law actually enforced in reality.²⁴ When society observes that an act is officially prohibited by statute yet rarely prosecuted, the authority of the norm gradually diminishes, eroding public trust in the consistency of the criminal justice system.

Based on the overall analysis above, it can be concluded that the complaint-offense mechanism as constructed under Article 412 paragraphs (2) through (4) of the new Criminal Code significantly affects the effectiveness of law enforcement against cohabitation through three interconnected dimensions: weakened enforcement certainty, diminished preventive function of criminal norms, and the emergence of potential selective law enforcement. Cumulatively, these three dimensions demonstrate that the effectiveness of Article 412 depends not merely on its normative wording, but is

²² Kenedi, *Kebijakan Hukum Pidana (Penal Polity) Dalam Sistem Penegakan Hukum di Indonesia*.

²³ Girli L A Ginting, *Modul KUHP 2023: Tindak Pidana Kohabitasi* (Jakarta Selatan: Institute for Criminal Justice Reform, 2024), Modul KUHP 2023: Tindak Pidana Kohabitasi 27-28.

²⁴ Bryan Y F Wowor, Eugenius Paransi, dan Herlyanty Y A Bawole, "Pemberantasan Kohabitasi (Kumpul Kebo) Di Indonesia Dalam Pandangan Hukum Positif," *Lex-Administratum* 12, no. 5 (2024): 9–10.

decisively shaped by the design of the enforcement mechanism selected by the lawmakers.

C. Fiqh Jinayah Review of the Complaint-Offense System in the Cohabitation Regulation under Law Number 1 of 2023

The previous discussion demonstrated that the construction of the absolute complaint-based offense in Article 412 of the new Criminal Code creates a fundamental tension between the ambition to criminalize cohabitation for the protection of collective moral values and its enforcement mechanism, which relies entirely on the subjective will of the complainant. To deepen the analysis of this tension, this section examines the complaint-offense system in Article 412 from the perspective of *fiqh jinayah* (Islamic criminal jurisprudence), evaluating the extent to which the design of this absolute complaint-based offense shares similarities or exhibits tensions with the principles of criminal law enforcement in Islam.

In *fiqh jinayah*, criminal offenses (*jarimah*) are classified into three primary categories based on the source and nature of the protected rights: *jarimah hudud*, *jarimah qisas-diyat*, and *jarimah ta'zir*.²⁵ *Jarimah hudud* refers to offenses whose acts and corresponding punishments are fixed and definitively prescribed by the texts (*nass*) of the Qur'an and Hadith. Consequently, they operate purely as *haqqullah* (the right of Allah), which cannot be extinguished through forgiveness, compromise, or the subjective will of any party once the case has been brought before a judge. *Zina* (adultery/fornication), as a form of *jarimah hudud*, demands exceptionally strict evidentiary standards specifically, the direct testimony of four upright male witnesses who personally witnessed the act of intercourse clearly, or repeated confessions (*iqrar*) by the perpetrator.²⁶

The provision of Article 412 of the new Criminal Code, formulated under the phrase "living together as husband and wife outside of a valid marriage,"²⁷ structurally fails to meet the evidentiary requirements of *jarimah hudud*. The required proof is circumstantial in nature, consisting of the factual co-residence in a shared dwelling and social recognition as a couple, rather than direct proof of forbidden sexual intercourse as required in *jarimah zina*. This condition aligns with the legal maxim in fiqh, *dar'u al-*

²⁵ Makhrus Munajat, *Fikih Jinayah (Hukum Pidana Islam)* (Yogyakarta: Nawesea Press, 2010), 10.

²⁶ Kementerian Agama RI, *Al-Qur'an dan terjemahannya*, QS. An-Nur (24): 2, lihat juga Sulaiman Rasjid, *Fiqh Islam*, 77 ed. (Bandung: Sinar Baru Algensindo, 2017), 430-431.

²⁷ Indonesia, Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana, 2023, Pasal 412 ayat (1).

hudud bi al-shubuhah, which obligates judges to avert *hadd* punishments whenever there is doubt (*shubhah*) in the evidence, no matter how small.²⁸

The complaint-based character inherent in Article 412 further reinforces this conclusion. As a pure *haqqullah*, a *jarimah hudud* that has reached the ruler or judge must be enforced and cannot be remitted by anyone's forgiveness. Conversely, the absolute complaint-offense construction in Article 412, which permits complaint withdrawal under paragraph (4), places the ultimate fate of law enforcement entirely in the hands of the complainant's subjective will. Such flexibility is a hallmark of *jarimah ta'zir* offenses whose definitions and sanctions are not definitively fixed by scriptural texts, thereby delegating their technical enforcement, including complaint mechanisms and potential withdrawals, to the discretion of the ruler (*ulil amri*) through *siyasah syar'iyah* (governance policy).²⁹ Structurally, therefore, the complaint-offense system in Article 412 is more appropriately conceptualized as an embodiment of *ta'zir* policy rather than the enforcement of a *jarimah hudud*.

Beyond the classification of *jarimah*, the complaint-offense system in Article 412 also warrants examination regarding the Islamic legal legitimacy (*shar'i*) of restricting eligible complainants.³⁰ *Fiqh jinayah* recognizes the principle of *sitr al-'aib* (concealing private faults), which encourages that private moral infractions not be exposed or widely publicized, except by parties directly possessing a legitimate interest.³¹ This principle logically parallels the construction of the complaint-based offense in Article 412, which restricts the right to initiate legal proceedings exclusively to a spouse, child, or parent, rather than establishing it as an ordinary offense actionable by anyone or at the direct initiative of law enforcement authorities.

This limitation can also be understood within the framework of *maqashid al-shari'ah*, specifically the principle of *hifdh al-'irdh* (preservation of honor).³² A fundamental objective of Islamic law is to safeguard the honor of individuals and families from unnecessary exposure of private shortcomings. By limiting complainants to the

²⁸ Makhrus Munajat, *Fikih Jinayah (Hukum Pidana Islam)*, (Yogyakarta: Nawesea Press, 2010), hlm 10; lihat juga Kiki Reski et al. Amalia, "The Principle of Al-Hudud Tasqut bisy-Syubuhah," *Al-Rasikh: Jurnal Hukum Islam* 14, no. 2 (2025), 299-314.

²⁹ Ahmad Kholili, "Ta'zir dalam Perspektif Fiqh Jinayah," *Al-Qisthu: Jurnal Kajian Ilmu-ilmu Hukum* 16, no. 2 (2018), 60-64.

³⁰ Indonesia, Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana, 2023 Pasal 412 ayat (2).

³¹ HR. Al-Bukhari, No. 2442, HR.Muslim, No. 2699, tentang anjuran menutup aib saudara sesama muslim; lihat penjelasan Wizarat al-Awqaf wa al-Syu'un al-Islamiyyah Kuwait, *Al-Mausu'ah Al-Fiqhiyyah Al-Kuwaitiyyah* (Wizarat al-Awqaf wa al-Syu'un al-Islamiyyah, n.d.), Juz 24, 169.

³² Muhammad Farikhin, "Maqashid Al-Syar'ah Sebagai Basis Rasionalitas Hukum Islam: Perbandingan Pemikiran 'Izz Al-Din Ibn 'Abd Al-Salam dan Imam Al-Qarafi," *Jurnal Ilmiah Ahwal Syakhshiyyah (JAS)*, n.d.

nuclear family, the design of Article 412 indirectly reflects an effort to balance the enforcement of moral values with the protection of the honor of involved parties a balance conceptually aligned with *hifdh al-'irdh*, even though its formulation originates from a positive criminal law framework rather than directly from scriptural texts.

Another relevant aspect from the viewpoint of *fiqh jinayah* is the complaint withdrawal mechanism governed under Article 412 paragraph (4).³³ Within *jarimah ta'zir*, the principle of forgiveness (*al-'afw*) by the aggrieved party is acknowledged, given that *ta'zir* sanctions are not fixed and their determination is entrusted to the consideration of the *ulil amri* and the directly affected parties.³⁴ From this perspective, the flexibility of complaint withdrawal in Article 412 can be understood as an acknowledgment of the room for forgiveness recognized in the category of *ta'zir*, while reaffirming that Article 412 structurally resides within the domain of *ta'zir* rather than *hudud*.

Nonetheless, this flexibility in withdrawing complaints leaves an unresolved conceptual question within the framework of *fiqh jinayah* itself. *Jarimah ta'zir*, despite lacking fixed sanctions like *hudud*, does not exclusively protect individual interests; a portion of *ta'zir* offenses embodies public interests (*haqq al-jama'ah*) to maintain collective societal moral order. If public interest is embedded within the offense of cohabitation, conditioning its enforcement entirely on the subjective will of complainants which may change at any moment through complaint withdrawal risks diminishing the effectiveness of *ta'zir* in protecting that collective interest. This tension demonstrates that while the absolute complaint-offense design shares structural parallels with the flexibility of *jarimah ta'zir*, it retains an internal inconsistency between the dual nature of *ta'zir* as a defender of both private and public interests.

This conceptual tension is not merely a theoretical issue; it has long been a real debate in classical jurisprudence, as reflected in the two Islamic legal institutions structurally closest to "family-based morality enforcement": *li'an* and *qadhf*. *Li'an*, as governed in Surah An-Nur verses 6–9, is a mutual oath mechanism undertaken by a husband accusing his wife of adultery without being able to produce four witnesses as required in *jarimah hudud*.³⁵ The legal consequence of *li'an* is not the imposition of the *hadd* for adultery, but the dissolution of marriage (*faskh*) without ordinary divorce proceedings. The structural similarity between *li'an* and Article 412 lies in positioning family members as the primary instigators of legal action over alleged moral misconduct,

³³ Indonesia, Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana, 2023 Pasal 412 ayat 4.

³⁴ Kholili, "Ta'zir dalam Perspektif Fiqh Jinayat."

³⁵ Kementerian Agama RI, *Al-Qur'an dan Terjemahannya* (Kementerian Agama RI, n.d.) QS.An-Nur (24): 6-9, tentang ketentuan *li'an*.

rather than surrendering it automatically to state authorities. However, their fundamental distinction must also be emphasized: *li'an* exists precisely due to the absence of proof meeting *hudud* standards, rendering it a procedural recourse rather than criminal enforcement, whereas the complaint-offense mechanism in Article 412 was designed from the outset as a formal prerequisite for an independent criminal offense.

Qadhf, governed in Surah An-Nur verse 4, prescribes eighty lashes for falsely accusing someone of adultery without producing four witnesses.³⁶ The legal status of *qadhf* whether it constitutes a purely private right (*haqq al-'adami*) or a right commingled with the right of Allah (*haqqullah*) presents a debate highly relevant to Article 412. Some scholars view the *hadd* for *qadhf* as a mixed right dominated by *haqqullah*, because it embodies the public good of preventing slander and protecting collective human dignity; thus, once a case reaches a judge, the accused party no longer holds absolute authority to withdraw or forgive the offender. This view is specifically held by the Hanafi school, which mandates the execution of the *hadd* for *qadhf* even if the victim forgives, contrasting with the Shafi'i school which allows room for victim forgiveness.³⁷ This jurisprudence disagreement offers a concrete doctrinal parallel for dissecting Article 412 paragraph (4): should cohabitation, like *qadhf* in the Hanafi view, embody a public interest that cannot be remitted by the subjective will of a complainant, or is it purely *haqq al-'adami* as in the Shafi'i view, such that complaint withdrawal at any point accords with the logic of *fiqh*. This classical debate on *qadhf* provides a concrete doctrinal equivalent to the dual nature of *ta'zir*.

Another aspect requiring analysis is the standing of parties granted the right to complain under Article 412 namely spouses, children, and parents examined through the concepts of *hisbah* and *wilayah* in *fiqh jinayah*. The concept of *wilayah* refers to the authority or standing held by an individual to act or claim on behalf of another or regarding an interest connected to them, whereas *hisbah* refers to the broader authority to command good and forbid evil, which can principally be exercised broadly beyond directly injured parties.³⁸

The expansion of eligible complainants under Article 412 of the new Criminal Code to include children and parents alongside spouses, when viewed through *wilayah*, can be understood as an acknowledgment of the nuclear family's standing to act in defense

³⁶ Kementerian Agama RI QS. An-Nur (24): 4, tentang ancaman hukuman bagi penuduh zina yang tidak menghadirkan empat saksi (*qadzif*).

³⁷ Birro, Tiya et al, "Qadzaf Dalam Hukum Pidana Islam: Analisis Fikih Klasik Dan Tantangan Penyebaran Fitnah Di Era Digital," *Ahsan: Jurnal Ilmiah Keislaman dan Kemasyarakatan* 2, no. 2 (2025).

³⁸ Al-Mawardi, Al-Ahkam As-Sulthaniyyah, sebagaimana dikutip dalam Ahmad Fauzan Abdullah, "Wewenang dan Peran Wilayah Hisbah dalam Pengawasan Pasar dan Ekonomi dalam Perspektif Fiqih Siyasah," *Al-Mabhats: Jurnal Penelitian Sosial Agama* 3, no. 2 (2018), 284-290.

of family integrity and honor, even if they are not the direct victims of the act. However, this expansion remains fundamentally distinct from *hisbah*, as the right to lodge a complaint under Article 412 is strictly limited to nuclear family members and is not extended to the general public or third parties as is typical under *hisbah*. This distinction confirms that the design of Article 412 maintains a private and restricted complaint-offense character, rather than shifting into a collective enforcement mechanism based on *hisbah*.

The standing under *wilayah* and *hisbah* ultimately brings the analysis to a more fundamental question: the consistency between the absolute complaint-offense design in Article 412 and the position of the *ulil amri* as the holder of *ta'zir* authority itself. As established, the enforcement of *jarimah ta'zir*, including its technical complaint mechanisms and withdrawal possibilities, is entrusted to the policy of the *ulil amri* through *siyasah syar'iyah* the authority of the ruler to regulate matters not definitively prescribed by texts in order to realize the public good (*maslahah*).³⁹ This *siyasah syar'iyah* authority is broad and flexible, enabling the *ulil amri* conceptually to design any *ta'zir* enforcement mechanism, including proactive ones independent of private complaints.

The issue is that the absolute complaint-offense construction in Article 412 places a self-imposed restriction on the *ulil amri*'s authority. The state, through law enforcement officers acting on behalf of the *ulil amri*, cannot initiate legal proceedings without the prior express intent of statutorily designated complainants. In other words, the *ulil amri* voluntarily circumscribes its own *siyasah syar'iyah* through the norms it creates. Within *fiqh siyasah*, such a restriction can be understood from two opposing viewpoints. On the one hand, it is justified as a form of *siyasah syar'iyah* itself, as the ruler may determine that a greater public good is achieved by restricting state intrusion into private family spheres, aligning with *sitr al-'aib* and *hifdh al-'irdh*. On the other hand, this restriction conflicts with the fundamental duty of the *ulil amri* to safeguard collective moral order, as a *ta'zir* offense embodying public interest ideally should not be entirely dependent on the subjective will of parties who may choose never to complain.

This tension between the two viewpoints cannot be resolved solely by referencing general principles of *siyasah syar'iyah*, as the answer depends heavily on how the *ulil amri* in this context, the lawmakers of Law Number 1 of 2023 weighs private interests (protecting family privacy and honor) against collective interests (preserving societal moral order regarding cohabitation). The tendency of Article 412 to strictly limit state

³⁹ J. Suyuthi Pulungan, *Fiqh Siyasah: Ajaran, Sejarah, dan Pemikiran* (Jakarta: RajaGrafindo Persada, 1994).

authority indicates that the lawmakers prioritized private sphere protection over maximum collective enforcement. From the perspective of *fiqh siyasah*, this policy choice is legally valid for the *ulil amri* to make, yet it leaves the consequence of weakening the norm's enforceability as an instrument for preserving the collective moral order that was one of the initial goals of criminalizing cohabitation.

Based on the overall analysis above, it can be concluded that the complaint-offense system in Article 412 of the new Criminal Code possesses structural compatibility with the principles of *fiqh jinayah*, particularly in its classification as a *jarimah ta'zir*, its alignment with *sitr al-'aib* and *hifdh al-'irdh*, and its concrete parallels in *li'an* and *qadhaf*, which similarly place family members as the instigators of legal action over morality matters. However, the divergence between the Hanafi and Shafi'i schools regarding *qadhaf* as *haqqullah* or *haqq al-'adami* illustrates that the dual nature of *ta'zir* is a long-standing debate in classical fiqh. Likewise, examining the *ulil amri* within *siyasah syar'iyah* confirms that the absolute complaint-offense design in Article 412 represents a valid policy choice under fiqh, yet incurs the consequence of limiting state authority to enforce the collective interest that was an initial objective of criminalization. Thus, viewed through *fiqh jinayah*, the complaint-offense system in Article 412 is not simply compliant or non-compliant, but reflects a policy choice of the *ulil amri* within the realm of *siyasah ijti'had*, bearing consequences and tensions long recognized and debated within classical Islamic criminal jurisprudence.

Conclusion

Article 412 of Law Number 1 of 2023 constructs cohabitation as a formal offense whose elements are complete upon fulfilling the factual element of continuous co-residence and the normative element of simulating a spousal relationship; however, its prosecution is strictly contingent upon the formal requirement of a complaint-based offense with complainants restrictively limited to a spouse, parent, or child, alongside an unrestricted right of withdrawal prior to trial commencement. Such a construction gives rise to low law enforcement effectiveness, as legal certainty is reduced by dependence on the complainant's subjective will, the preventive function of the penal norm is weakened due to the absence of guaranteed prosecution, and equality before the law is disrupted by potential differential treatment for objectively identical acts based solely on whether a complaint is filed. From the perspective of *fiqh jinayah*, this complaint-offense system cannot be structurally categorized as the enforcement of a *jarimah hudud* given its circumstantial evidentiary standard that falls short of *zina* requirements; rather, it is more accurately understood as an embodiment of *ta'zir* policy whose complaint and withdrawal mechanisms are delegated to the *ulil amri* through *siyasah syar'iyah*, consistent with the

principles of *sitr al-'aib* and *hifdh al-'irdh* and possessing conceptual parallels in the institutions of *li'an* and *qadhaf* in classical jurisprudence. Nonetheless, similar to the doctrinal tension between the Hanafi and Shafi'i schools regarding *qadhaf* as *haqqullah* or *haqq al-'adami*, the absolute complaint-offense design in Article 412 leaves an unresolved conceptual tension between private interests (protecting family privacy and honor) and collective interests (preserving societal moral order). Consequently, the lawmakers' policy choice to prioritize private sphere protection, while valid under *fiqh siyasah*, simultaneously limits the state's authority as *ulil amri* to enforce the collective interest that was one of the primary objectives of criminalizing cohabitation itself. This study is limited by its purely normative nature without empirical data; therefore, further empirical research is strongly recommended following the conclusion of the new Criminal Code's transition period to evaluate the practical effectiveness of Article 412 in court proceedings.

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