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## Criminalization of Cohabitation Based on The Approach of Pancasila Values in The National Criminal Law

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**ABSTRACT:** Cohabitation in the current Indonesian National Criminal Code has not become a delicacy, This is because the old Criminal Code was based on secularism, liberalism, and colonialism. In fact, there are many legal facts in the community that denounce cases of adultery in general and cohabitation in particular. Rejection in the form of raids to the naked parade of the perpetrator in the community. This invites the urgency of cohabitation to be regulated in the upcoming National Criminal Code. The values of Pancasila, which are embodied in the name of divinity, humanity, unity, populism and social justice, have prohibited gatherings. The National Criminal Code which will take effect in 2026 has included cohabitation as a crime, but only as an absolute crime that can only be complained about by the victim's husband/wife and/or parents. Community protection is still not optimally accommodated in the formulation of cohabitation offenses in the new Criminal Code. Sanctions that are lighter than adultery also make cohabitation appear to be a half-baked offense in the new Criminal Code. Therefore, it is necessary to reformulate the cohabitation in particular and the immoral delicacy in general to build an *ius constituendum* that is more based on Pancasila as the basis of the Indonesian state and as the source of all sources of law.

**KEYWORDS:** Criminalization, Cohabitation, Pancasila Values, Criminal Law, Reformulation.

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### I. INTRODUCTION

The Indonesian Criminal Code (KUHP) is a legal codification that contains rules on what actions are considered criminal acts according to Indonesian law. In early 2026, a new Criminal Code will take effect as an original product from the Indonesian legal system replaced the old Criminal Code which was a "legacy" from the Dutch colonial period. The new National Criminal Code certainly contains several new rules that are different from the old rules. One of the novelties is the criminalization of cohabitation or gathering in the National Criminal Code.

The urgency of writing this article is to explain the approach in the criminalization of co-conspiracy in the National Criminal Code. Because the criminalization process should also have an integral approach and rational policies. Where every criminalization of an act must have a standard of value adhered to by the community who agree to criminalize an act. So that it is necessary to know whether the development of cohabitation into a criminal act is in line with the values in Pancasila as the basis of the state and then of course the basis of the values of all laws in Indonesia.

Therefore, it is necessary to know what are the reasons that make cohabitation need to be criminalized in national criminal law from the perspective of the integralistic approach of Pancasila.

### II. DISCUSSIONS

General cohabitation in more formal language is often referred to as cohabitation which in the Great Dictionary of the Indonesian Language (KBBI) is given the meaning as being a matter of domestic violence without marital ties. Pahrur Rizal defines cohabitation as "cohabitation without the bond of marriage between a man and a woman where they live together in the same house".

Cohabitation comes from the English language, namely cohabitation which can be interpreted as dwelling together, or intimate relationships as husband and wife, or living together as husband and wife or also means sexual relations or intercourse. Cohabitation is considered not to reflect the culture of the state and is considered a despicable act according to all religions. This act is also not allowed or prohibited by religion because it is related to the act of adultery. Logically, when a couple of lovers live together in the same residence as a family but there is no legal marriage bond, the act is considered not in accordance with the unwritten norms that are closely held by the Indonesian nation.

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Cohabitation in the positive national criminal law that is now in force is not considered a criminal offense. This is because in 284 of the National Criminal Code only imposes the crime of adultery for sexual intercourse if one of the perpetrators is bound by marriage. In fact, if you look at the existing social facts, there are many people who reject the existence of adultery even though the two are not bound by other marriages.

Data from Institute of Criminal Justice Reform (ICJR) presented several legal facts about the rejection of cohabitation in the community such as in Ponorogo Regency, East Java. Residents parade cheating couples who have been caught many times gathering together on November 14, 2017. Then on January 19, 2017 in Tangerang, a group of couples who were having sex in a rented house were raided. On November 13, 2017, a perverted couple was found in Cikupa, Tangerang, who was finally stripped naked and paraded. Until in Tuban, there was a man who was paraded by the community because he was caught inside the house of a woman who was left dead by her husband without clothes on March 11, 2017.

Some of the above social facts conclude that there is a very strong rejection from the Indonesian people towards cohabitation even though it is not regulated in the old Criminal Code, but the social norms embraced by religious Indonesian people strongly condemn the gathering. Especially with the sanction of vigilante by residents in the form of being stripped naked and paraded, making the anger of residents uncontrolled and needs to be regulated in accordance with the values that live in society. In particular, the need for a criminal legal basis to punish cohabitation perpetrators procedurally legally.

This indicates that the Indonesian nation is a religious nation and adheres to values, especially the values of Pancasila in regulating the behaviour of the Indonesian people. Pancasila with its five precepts that animate each other becomes a standard in criminalizing an act, including cohabitation which is finally included as a criminal act in Law number 1 of 2023 concerning the Criminal Code.

If you look at the constitution of the Indonesian state, namely the Constitution of the Republic of Indonesia in 1945 with the fourth amendment (1945 Constitution of the Republic of Indonesia). Every citizen is obliged to protect moral values in the life of society. This information is in line with the vulnerability of article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia which mandates that every citizen has the right to live a prosperous life in birth and mind, to live and to have a good living environment. When there is a community that cohabitates, residents feel that their social life becomes unsettled, inwardly and the gathering has the potential to damage the proper living and social environment for religious Indonesian people.

If you look at the origins of the act of living together, most of them are from countries on the European continent and the United States. In most of these countries, it is very common for a person who is over the age of adulthood and capable of thinking to determine his or her own destiny to have sexual relations with another person without the presence of a registered marital relationship by the state first. Some of them even live together, get pregnant, and raise children without marital ties. Their parents mostly do not care about marriage affairs which are considered ceremonial or administrative matters, but are more concerned with the happiness of their children first. Only when they feel confident and suitable will both couples register their marriage with the state authorities.

However, if you look deeper, it is indeed legal that the cohabitation of adults without the bond of marriage without coercion is not prohibited in western countries that adhere to ideas based on the value of freedom (liberalism) and the separation between state and religious affairs (secularism). At the farthest, adultery becomes a complaint if one of them is tied to marriage, which has become a characteristic of the law of a liberal country. The difference in the basic understanding of these values will certainly be different from other countries that have different value bases as well. This statement is directly proportional to the opinion that criminal acts in every country can be equated except in terms of immorality, harassment, and crimes related to religion.

Indonesia as a country that has the basis of the Pancasila state is certainly far different from a country based on liberalism and secularism in looking at an action. So, in order to make an act an act that is threatened with a criminal offense called criminalization. Criminalization in Indonesia is based on a variety of reasons, including the socio-cultural and socio-philosophical underpinnings of a national legal system. This reason is obtained from research and tracing of the noble values of a country that are rooted in Pancasila and values in social life, such as cultural values, religious values, and customary values.

The next study is whether Pancasila, which has five precepts, each of which animates each other's precepts, prohibits cohabitation? The study one by one starts from the first precept to the fifth precept. The first precept briefly emphasizes the value of divinity or religiosity. The second precept emphasizes the value of humanity. The third precept emphasizes the value of unity. The fourth precept emphasizes the importance of populist values while the fifth precept emphasizes the value of social justice. These five values are the guidelines for community life as described in customary law.

The first precept about divinity can be interpreted that every action of a citizen must be in line with divine values in the sense that it does not violate the rules of God in the rules of the holy books embraced by religious believers in Indonesia. All officially recognized religions and beliefs in Indonesia prohibit cohabitation activities without a valid marriage, because it is considered a violation of religious and moral norms, and is considered adultery. In Islam, the act of adultery included in it is cohabitation

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regulated and prohibited with the threat of severe sanctions for the perpetrator. The basis for the punishment is in the Qur'an, surah a nuur verses 2-3, the essence of which is the command to abuse (beat) men and women who have committed adultery a hundred times each.

Then in Christianity, Protestantism and Catholicism, the prohibition of adultery, including gathering, is in the Gospel of Matthew, verses 27 to 32, which essentially reads that there is a command of Allah not to commit adultery. It is even equipped to keep an eye on the fact that whoever sees a woman and desires her, has committed adultery with her in his heart.

As for Hinduism, it is explained in the Vedic Book of Smerti, Parasara Dharmasastra X.30, it is explained that "A woman who obtains a pregnancy with her unmarried lover (not through a marriage ceremony), ... must be expelled to a foreign kingdom (out of the territory)." This clearly indicates that pregnancy outside of marriage, including sexual intercourse, is a crime that deserves to be expelled from a holy society and upholds Hindu religious values.

In Buddhism, it is emphasized that adultery is prohibited based on the 3rd (three) Precept of Buddhist Pancasila, which reads: "Kāmesu micchācārā veramanī sikkhāpadaṃ samādiyāmi" or in Indonesian means, "I am determined to train myself to avoid adultery."

Likewise, in Confucianism, as stated in the Holy Book Si Shu (Holy Word XII: 1-2), it is emphasized that immoral acts should not be seen, heard, talked about, or committed. This shows that Confucianism also does not condone adultery activities, including cohabitation. Therefore, all official religions recognized in Indonesia condemn the activity of adultery and cohabitation because it is considered to violate the provisions of the scriptures and is an act that causes sin.

Then in terms of humanity, gathering is prohibited to respect the dignity and dignity of human beings themselves. When compared to divine values that focus on the relationship with the creator, human values emphasize more on the relationship between humans and others. So that the human protection that exists in the prohibition of adultery is the protection of the rights of vulnerable parties in extramarital relationships, namely to protect women's rights.

Usually, a relationship without marriage does not have a clear commitment and there is no clear determination of rights and obligations for husband and wife such as a marriage bond. Including the recognition of the child conceived also becomes weak, especially with the non-recognition of the out-of-wedlock child to inherit to his father in Islam. The prohibition of adultery is also to maintain the destiny or offspring where with the existence of a marriage relationship, a person becomes clear whose child he is and has rights and obligations to whom. However, with the cohabitation it becomes unclear and there is a possibility that one of the parties will escape responsibility because there is no clear bond.

From the perspective of the value of unity, adultery, including cohabitation, is considered something despicable and damages the order of society. Almost all Indonesian people who hold fast to religious values do not want their family members to be entangled in immoral cases, including cohabitation. Likewise in the order of life of a united community. The community is so strongly against gathering so that no one of their family members or neighbours is infected with immoral cases, including gathering together.

The value of unity is a milestone to prevent division and disintegration of the nation. Do not let the case of cohabitation make the community "play by themselves" which will later be contrary to human values. The value of unity from the community needs to be engineered not to judge the perpetrators of the gathering but as a support for law enforcement officials to enforce the criminal law. This is because unity is the shared responsibility of the entire community, not only the government.

The fourth precept reflects the values of Indonesian democracy. This principle of democracy is in line with the essence and dignity of human beings as creatures in society who express themselves personally who are obliged to respect and treat others with dignity, fairness and respect. So, democracy is only wishful thinking if it does not respect human dignity and protect human rights. Indonesia's typical democracy is Pancasila democracy which is different from liberal democracy. Therefore, substantially, the fourth precept is the spirit of democracy that remains bound to certain values, namely responsibility to God, humanitarian principles, and the identity of Indonesian unity. Although in practice, universal democratic systems are still implemented, such as government that comes from the community, by the community, and for the community.

Regarding the value of the people, cohabitation is very contrary to the value of the people. The value of the people of Indonesia is close to the value of democracy that breathes Pancasila. There have been many agreements between residents, both complex level regulations and village regulations that prohibit immoral acts in general to gatherings in particular. It is often found in residential complexes or boarding houses that if the maximum visiting hours are certain hours and there is a room where the opposite sex is not allowed to enter and guests are only allowed in the living room of the boarding house.

Quite interesting things are found in the Regulation of Betooyoguci Village, Manyar District, Gresik Regency number 5 of 2016. In the village regulation, sanctions for adulterers are differentiated based on marital status. For adulterers who are still single, the sanction is that they are required to get married and are subject to a fine in the form of 3 trucks of building sand. Meanwhile, for married adulterers, the sanction is a fine of 5 sand trucks.

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Social justice in Pancasila not only includes economic equality and development, but also ensures horizontal and comprehensive access to law and justice for every Indonesian citizen. Social justice is the right of every citizen living together in this country, so there is no difference in legal treatment between the upper and lower classes. Everyone has the same right to access law and justice.

This is in line with the opinion of John Rawls who introduced the theory of justice which states that the consequences of living together in society must create the value of justice, including distributive justice, legal justice, and commutative justice. Social justice is the treatment of the law in a fair way. Talking about cohabitation means that if we have agreed with the four previous values that prohibit cohabitation, then it must be fairly levelled that everyone who performs cohabitation must be punished in line with the applicable regulations. This is in accordance with the legal principle of equality before the law, which means that anyone who violates the criminal law must be treated equally fairly before the law.

Pancasila, which consists of five precepts with the characteristic of animating and imbued with each other, opposes the existence of cohabitation as a whole. Then the conflict needs to be included in the article on criminal acts in the Criminal Code. Where the national criminal code that is currently in force in Indonesia is a Dutch heritage (*Wetboek van strafrecht*) which is characterized by liberalism, secularism and colonialism so that it does not accommodate cohabitation as a criminal act. Furthermore, in the latest National Criminal Code which takes effect in 2026, the crime of cohabitation is included as a criminal act which will be discussed in the next discussion.

The criminalization of an act is carried out through careful calculation. It means that not carelessly including an act can be threatened with criminal sanctions. There needs to be really deep thinking and an integral approach in crime prevention policies through criminal law. Soedarto defines criminalization as the determination of all activities of a person that can be subject to criminal sanctions through the making of regulations or laws with the aim of ensuring that the desired actions can be imposed with criminal sanctions.

According to Moeljatno, the process of criminal law reform must take into account three important criteria in criminalization:

- a. Determination of an act as a prohibited act (criminal act): The first criterion is to determine a certain act as an act prohibited by the provisions of criminal law in a country.
- b. Threat of criminal sanctions and criminal imposition to avoid violations of prohibited acts: The second criterion involves establishing the threat of punishment for those who violate the prohibition. This threat of punishment is intended to prevent people from committing prohibited acts.
- c. The government's ability to carry out criminal threats: The third criterion considers whether the government can actually carry out criminal threats if the prohibition is violated. This includes the readiness of state tools and law enforcement systems to deal with violations and carry out punishments according to the provisions of the law.

Furthermore, Sudarto explained about the three conditions of criminalization in his book entitled "Criminal Law and Community Development", namely:

- a. It was established first, that the act was not desired or rather disliked by the community. The measure for it is, among other things, that the act is detrimental or brings victims.
- b. Criminalization must consider the "cost benefit principle", which means that efforts to criminalize an act must be balanced with the results. Social costs or "social costs" should not be ignored, especially if the cost for development is indeed "small".
- c. Criminalization adds to the burden on law enforcement officials, especially investigative tools. Do not let this agency be "overburdened", carrying too heavy a burden so that the regulation is no longer effective

Criminalization is carried out with a value approach, namely because the value changes because it is caused by acts that were not initially considered reprehensible and cannot be subject to criminal sanctions, becoming acts that are considered reprehensible and can be imposed criminal sanctions. The value approach in criminalization also needs to be carried out comprehensively and holistically. Thinking in one comprehensive unit is referred to by Barda Nawawi as integrative thinking in criminal law. The criminalization of co-consciousness aims to maintain human dignity and dignity. The guard in question is in the sense of distinguishing humans from animals that have sexual intercourse with anyone at will without knowing the rules.

Regarding criminalization, Umi Rozah explained that criminalization needs to be careful because it will use criminal sanctions for an act, therefore justifying punishment must involve a combination of rationality in the penal system and rationality in the entire system. It involves different levels in the penal system, including criminalization, criminalization, and execution. In addition, a distinction must be made between the "why" question (the purpose and reasons for the use of the penalty) and the question of "how" (the proper and effective way of carrying out the punishment). This combination aims to ensure that the use of criminal justice meets the objectives of justice and maintains balance in the legal system.

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Criminalization is part of criminal policy or criminal policy, where criminal policy is part of legal policy and legal policy is part of social policy. So that the policies that are the authority of the state should be integrated with each other with a close relationship that supports each other.

Relating to criminalization is also included in the development of the national legal system. Where the national legal system is a legal system based on Pancasila values, which if further described is Pancasila which is based on the value of balance between divine values (religious morality), human values (humanistic), and social values (nationalistic, democratic, and social justice).

The value of balance also needs to be put forward in the development of the national Criminal Code. Especially in the value of the balance of customary law and national law. Law number 1 of 2023 concerning the Criminal Code (new Criminal Code) recognizes the existence of material legality as a counterweight to formal legality. If it is contextualized with cases of adultery, especially cohabitation, there are a lot of customary laws, village regulations, and regional regulations that prohibit it. Then by criminalizing cohabitation in article 412 of the Criminal Code, it will kill customary law that prohibits adultery, especially cohabitation.

The penal system in Indonesia consists of the principles and objectives of penalty, as well as penal rules and guidelines. The penal system in order to criminalize the gathering needs to be integrated with the values of Pancasila and the value of balance. Because in Indonesia there is a law that will apply (*ius constituendum*) regarding cohabitation, namely in article 412 paragraph (1) to (4) of the new Criminal Code which reads:

### Article 412

(1) Every person who lives together as a husband and wife outside of marriage is sentenced to a maximum of 6 (six) months in prison or a maximum fine of category II.

(2) Against the Criminal Acts as intended in paragraph (1), no prosecution shall be carried out except on complaints: a. husband or wife of a person bound by marriage; or b. Parents or their children for persons who are not bound by marriage.

(3) For complaints as intended in paragraph (2), the provisions of Article 25, Article 26, and Article 30 do not apply.

(4) Complaints can be withdrawn as long as the examination at the court hearing has not commenced.

If you examine these provisions, the characteristic of the criminalization of cohabitation is the delicacy of complaints, which means that prosecution can only be carried out if there are people who feel aggrieved according to article 412 paragraph (2) of the new Criminal Code, namely a husband or wife if the perpetrator is bound by marriage and can be complained about by the perpetrator's parents if the person who commits cohabitation does not have a marital bond. This makes the role of the community less strong because people who feel anxious cannot become complainants in the event that there is a gathering in their area and can only report to the perpetrator's parents or use the living law to arrest the perpetrator. This crime is included in the absolute complaint that can only be complained about by certain people, of course it will reduce the role of the community in dealing with cohabitation crimes.

Complaints are also soft because they can be withdrawn if there has been no court hearing. Then an explanation of article 412 paragraph (3), namely the non-applicability of the provisions in article 25 of the new Criminal Code where complaints can be made if there are no parents or if the victim is not yet 16 years old by the guardian, blood family in a straight line, blood family sideways up to the third degree, to the victim's companion.

Article 26 of the new Criminal Code also does not apply if the victim in custody can be represented by a blood family in a straight line or a blood family in a lateral line up to the third degree. Including article 30 of the new Criminal Code which allows withdrawal by the person who complains a maximum of 3 (three) months from the day the complaint is filed and cannot be filed again after being withdrawn is also invalid. This implies that the complainant must be a parent or husband/wife or the perpetrator absolutely, or in practice can give power of attorney to the advocate.

Then look at the principles and goals of cohabitation criminalization in the new Criminal Code. There are two principles of punishment in criminal law, namely the principle of legality (the source of law) with another name, the principle of community, and the principle of culpability (the principle of error) with the other name, the principle of humanity. The principle of legality of legal sources in the Criminal Code only recognizes legal sources in laws and laws that live in society. Talking about the criminalization of cohabitation, if the new Criminal Code regulates cohabitation as an absolute complaint offense, then there are still laws that live in the community such as customary law, village regulations, to regional regulations on the prohibition of immorality with limited sanctions. Even with limited sanctions, it is hoped that it can overcome the delinquency of living together. Regarding the basis of guilt, it is not explained openly in the new Criminal Code. Although only implicitly, the principle of error is interpreted as that a criminal act is considered to exist if there is no reason for the removal of the crime in the form of a justification or a forgiving reason. If you look specifically at the context of the cohabitation offense, then the absolute complaint can be a reason for criminal elimination if there are no complaints from special parties listed in the new Criminal Code.

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The purpose of the criminalization of cohabitation offenses, if it is associated with the basic idea of the criminal justice system, can be linked to the idea of a balance between monodualism, the balance of the general public and individual interests. In the past, the old Criminal Code did not accommodate the crime of cohabitation unless there was a marriage bond, but in the new Criminal Code it accommodates the interests of the community by being able to report it to parents if the perpetrator is still single. However, according to the author, this idea of balance is still biased towards individual interests because the general public or represented by the village head cannot report this crime to investigators for the benefit of the general public.

Likewise, the purpose of the criminal investigation is about the idea of a balance between social welfare (social welfare) and social protection (social defence). The criminalization of cohabitation aims to protect the community from promiscuity based on liberalism. This is in line with the understanding of Pancasila, namely divinity and humanity where the protection of people's descendants from lines outside marriage as well as the commandments of the scriptures are in accordance with the purpose of social defence criminalization. Related to the basic idea of social welfare is related to a safe, comfortable, and peaceful life in a society that avoids promiscuity that supports the delicacy of living together.

Regarding the rules and guidelines for criminalization, there is something quite strange in the arrangement of gatherings in the new Criminal Code. The article of cohabitation is essentially a burden of adultery, because what is meant by living together as husband and wife means having committed adultery many times over a long time. However, the maximum punishment for cohabitation perpetrators is 6 (six) months imprisonment, only half of the maximum penalty for adultery which is 1 (one) year in prison, even though the fine is the same in category II (two).

Pancasila is crowned as the core of all legal sources, so it should be the legal basis for the criminalization of gatherings. Pancasila is the basic norm (*Grundnorm*) which became a foothold for other legal norms according to Hans Kelsen's opinion. Pancasila as a Basic standard is the basis of all legal developments both in theoretical and practical perspectives. Pancasila as a Basic standard It is also an enlightenment and compass for every form of activity related to the development of the legal system.

### **III. CONCLUSIONS**

Cohabitation is very important to be criminalized in Indonesia's national criminal law. This is related to the Pancasila value system embraced by Indonesia which is different from the value system of liberalism, secularism, and colonialism in the old Indonesian Criminal Code. The basis of the value of criminalizing gathering based on Pancasila is based on the divine value of all official religions in Indonesia prohibiting adultery, let alone cohabitation. In terms of human values, the prohibition of gathering is to protect human dignity, especially from legitimate lineages and the rights of children and the obligations of their parents. In terms of the value of unity, cohabitation disturbs people who uphold the value of religiosity so that cohabitation based on extreme liberality can disintegrate the nation. Regarding the value of the people, Pancasila democracy should be accommodated by the law, so that there is no "vigilance" and excessive public sanctions. Then related to the value of social justice, the criminalization of cohabitation makes customary law and laws that live in community life, both in the form of customary law and religious law, to be accommodated by national law, especially in the prohibition of cohabitation. The accommodation of the delinquency of cohabitation in the new Criminal Code does not fully have an internalist approach to the value of Pancasila in it. There are still many philosophical weaknesses that have been manifested as practical weaknesses in the enforcement of the crime of gathering together in the new Criminal Code, such as the absolute complaint of only the wife/husband and parents. The threat of lighter prison penalties for perpetrators of gathering together is more important than adultery.

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