

TERAJU

Jurnal Syariah dan Hukum

Teraju: Jurnal Syariah dan Hukum
Volume 08 Nomor 01, Maret 2026
DOI: <https://doi.org/10.35961/teraju.v8i01.2800>

Criminalization of Cohabitants in Indonesia: An Attempt at a Compromise Between Positive Law and Islamic Law

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Abstrak

Fenomena hidup bersama di Indonesia semakin meningkat seiring dengan perubahan sosial dalam masyarakat modern, yang cenderung lebih terbuka terhadap hubungan di luar pernikahan. Situasi ini memunculkan permasalahan hukum terkait batas-batas antara ranah privat individu dan kewenangan negara dalam mengatur moralitas publik. Berdasarkan ketentuan Kitab Undang-Undang Hukum Pidana (UU No. 1 Tahun 2023), hidup bersama dikategorikan sebagai tindak pidana dalam kondisi tertentu, sehingga memicu perdebatan di masyarakat. Penelitian ini menggunakan metode hukum normatif dengan pendekatan legislatif dan pendekatan konseptual. Sumber data yang digunakan terdiri dari bahan hukum primer, sekunder, dan tersier yang dianalisis secara kualitatif. Pertanyaan penelitian meliputi bagaimana kriminalisasi hidup bersama diatur dalam hukum positif Indonesia. Selain itu, penelitian ini mengkaji perspektif hukum Islam mengenai hidup bersama. Isu lainnya adalah mengapa perdebatan muncul terkait kriminalisasi hidup bersama di Indonesia. Hasil penelitian menunjukkan bahwa kriminalisasi kohabitasi dalam hukum positif Indonesia diatur sebagai tindak pidana aduan, sehingga penegakan hukum dibatasi pada pihak-pihak tertentu. Dari perspektif hukum Islam, kohabitasi merupakan perbuatan terlarang karena termasuk dalam kategori zina, yang bertentangan dengan prinsip-prinsip Syariah. Perdebatan muncul akibat konflik antara nilai-nilai moral dan agama dengan prinsip-prinsip hak privasi dan kebebasan individu dalam sistem hukum modern.

Kata kunci: *Kriminalisasi, Hidup Bersama, Kitab Undang-Undang Hukum Pidana, Hukum Islam, Hak Privasi*

Abstract

The phenomenon of cohabitation in Indonesia is becoming increasingly prevalent, in line with social changes in modern society, which tends to be more open to relationships outside marriage. This situation raises legal issues concerning the boundaries between the private sphere of the individual and the state's authority to regulate public morality. Under the provisions of the Criminal Code (Law No. 1 of 2023), cohabitation is classified as an offense punishable under certain conditions, thereby sparking debate within society. This study employs a normative legal methodology using both a legislative and a conceptual approach. The data sources consist of primary, secondary, and tertiary legal materials analyzed qualitatively. The issues addressed in this study include how the criminalization of cohabitation is regulated under Indonesian positive law. Furthermore, this study examines the perspective of Islamic law on cohabitation. Another issue is why there is debate regarding the criminalization of cohabitation in Indonesia. The research findings indicate that the criminalization of cohabitation under Indonesian positive law is regulated as a complaint-based offense, limiting law enforcement to specific parties. From an Islamic law perspective, cohabitation is a prohibited act as it falls under the category of zina, which contradicts the principles of Sharia. The debate arises due to a conflict between moral and religious values and the principles of privacy rights and individual freedom within the modern legal system.

Keywords: *Criminalization, Cohabitation, Criminal Code, Islamic Law, Right to Privacy*



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Introduction

The phenomenon of cohabitation—living together without a valid marital bond—is increasingly evident in the dynamics of modern society, including in Indonesia. This change cannot be separated from the influence of globalization, modernization, and the rise of individualistic values that provide greater space for personal freedom in determining the form of social relationships.¹ In many cases, cohabitation is viewed as an alternative to the institution of marriage, which is considered no longer relevant for certain

groups in urban society.² Nevertheless, this practice continues to raise serious issues, particularly within societies that still hold religious norms and moral standards in high regard. It is this tension between traditional and modern values that forms the backdrop for the emergence of legal discourse regarding cohabitation, particularly in relation to the legitimacy of state intervention in the private sphere of individuals.

In the context of national law, the state, through the reform of criminal law, has incorporated provisions regarding

¹ William J. Goode, *World Changes in Divorce Patterns* (New Haven: Yale University Press, 2003), 87–90.

² Andrew J. Cherlin, “The Deinstitutionalization of American Marriage,” *Journal of Marriage and Family* 66, no. 4 (2004): 848–861.

cohabitation into the Criminal Code (KUHP), which was enacted via Law No. 1 of 2023. These provisions classify cohabitation as a criminal offense, although its application is limited to being a complaint-based offense. This indicates that the state is striving to balance the protection of social norms with respect for individual privacy rights.³ On one hand, this criminalization is viewed as a step to maintain social order and public morality. On the other hand, this approach has also drawn criticism as it is seen as opening the door to state intervention in citizens' private lives.⁴ Thus, the regulation of cohabitation in the new Criminal Code represents a compromise between various conflicting legal interests.

From an Islamic law perspective, cohabitation is explicitly categorized as a prohibited act because it is closely linked to the concept of zina, which carries broad moral and social implications. This prohibition is based not only on the normative texts of the Qur'an and hadith but also on the objectives of Islamic law in safeguarding lineage and human dignity. Within the framework of maqashid al-sharia, cohabitation is viewed as a practice that has the potential to undermine social order and threaten the survival of the family institution.⁵ Islamic law places strict limits on relationships between men and women to safeguard the welfare of the community. This approach demonstrates that morality serves as the primary foundation for determining the legality of an act under Islamic law.

The difference in approach between positive law and Islamic law toward cohabitation highlights a complex area of debate within the Indonesian legal system. On the one hand, positive law seeks to balance public interests and private rights through a complaint-based offense mechanism that limits state intervention.⁶ On the other hand, Islamic law treats the prohibition on cohabitation as an absolute, non-negotiable norm because it relates to the protection of morality and lineage. This difference reflects the plurality of legal systems coexisting within Indonesian society, where religious values and modern legal principles often find themselves in a state of incomplete harmony.⁷ This situation poses challenges in formulating legal policies capable of proportionally accommodating various interests.

Given this background, it is important to conduct a comprehensive study on the criminalization of cohabitation under both positive law and Islamic law in Indonesia. This study not only focuses on the normative aspects of each legal system but also highlights the dynamics of the debate arising from the differing paradigms employed. Furthermore, this research is expected to contribute to enriching the body of legal scholarship, particularly in understanding the relationship between state law and religious law within the context of a pluralistic society.⁸ Thus, this research holds both academic and practical urgency in formulating a more proportional and

³ Tim Lindsey, "Indonesia's New Criminal Code," *Bulletin of Indonesian Economic Studies* 59, no. 2 (2023): 245–252.

⁴ Simon Butt, *The New Indonesian Criminal Code* (Sydney: Sydney Law School, 2023), 45–48.

⁵ Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), 124–130; Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 78–82.

⁶ M.B. Hooker, *Indonesian Sharia: Defining a National School of Islamic Law* (Singapore: ISEAS, 2008), 112–115.

⁷ Mark Cammack, "Legal Pluralism in Indonesia," *Asian Journal of Comparative Law* 5, no. 1 (2010): 1–30.

⁸ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 137–140; Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2006), 75–78.

just legal approach toward the phenomenon of cohabitation.

Studies on cohabitation from legal and social perspectives have been extensively conducted by academics, particularly in the context of changes in modern family structures. Several studies indicate that cohabitation is a phenomenon that has emerged alongside increasing individualization and the decline in the sacredness of marriage within modern society.⁹ In this context, cohabitation is often understood as a form of adaptation to broader social changes. Furthermore, other studies also highlight that states tend to continue regulating such practices to maintain social order and prevailing moral values.¹⁰ This indicates that cohabitation is not merely a social issue but also a subject of debate within the legal sphere.

From an Islamic legal perspective, studies on cohabitation are generally linked to the concept of zina and the objectives of Islamic law in safeguarding the public interest. Islamic legal scholars emphasize that the prohibition against extramarital relationships has a strong foundation both normatively and philosophically. Additionally, the maqashid al-sharia approach is frequently employed to explain that Islamic law aims to protect fundamental values in human life, including honor and lineage.¹¹ These studies demonstrate that Islamic law adopts a comprehensive approach in regulating social relations, including those between men and women. This Islamic

legal perspective offers a distinct moral dimension compared to positive law.

This paper has a clear distinction from previous research because it not only discusses cohabitation as a social phenomenon or merely as an object of legal regulation but also specifically highlights the debates arising from the criminalization of cohabiting couples in Indonesia.¹² Unlike previous studies that tend to be descriptive or partially normative, this paper combines the analysis of positive law and Islamic law within a comprehensive framework of study. Furthermore, this paper situates the issue of cohabitation within the context of the tension between moral values, religious norms, and individual privacy rights. It also offers a more in-depth and critical analytical approach to understanding the evolving legal dynamics within society.

This paper employs a normative legal method using both a statutory approach and a conceptual approach. The statutory approach involves analyzing various regulations related to cohabitation, particularly within the Indonesian Criminal Code (KUHP).¹³ Meanwhile, the conceptual approach is used to understand the principles of Islamic law relevant to the issue of cohabitation, including the concepts of zina and maqashid al-syariah. This paper utilizes primary legal sources in the form of legislation as well as secondary legal sources in the form of relevant books and scholarly journals. The analysis is conducted qualitatively by systematically examining various legal sources to gain a comprehensive understanding of the issues under study.

⁹ Kathleen Kiernan, "Unmarried Cohabitation and Parenthood," *Population Trends* 96 (1999): 15–26.

¹⁰ Arland Thornton, *Reading History Sideways* (Chicago: University of Chicago Press, 2005), 102–105.

¹¹ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law* (London: IIIT, 2008), 21–25; Ahmad Al-Raysuni, *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law* (London: IIIT, 2005), 45–49.

¹² John R. Bowen, *Islam, Law, and Equality in Indonesia* (Cambridge: Cambridge University Press, 2003), 67–70; Lawrence M. Friedman, *Law in America* (New York: W.W. Norton, 2004), 89–92.

¹³ Peter Mahmud Marzuki, *Legal Research* (Jakarta: Kencana, 2017), 35–40.

Data collection was conducted through a literature review by examining various works relevant to the topic of cohabitation and its criminalization. The data obtained were then analyzed using a descriptive-analytical method to identify the relationship between legal concepts used in positive law and Islamic law. Additionally, this study employs a comparative approach to compare the two legal systems' perspectives on cohabitation.¹⁴ Through this approach, it is hoped that a clear picture of the differences and similarities between positive law and Islamic law in regulating cohabitation can be obtained. This approach also enables the researcher to formulate a more objective and systematic analysis.¹⁵

Based on the background and conceptual framework outlined above, this paper presents three main research questions to be examined in depth. First, how is the criminalization of cohabitation regulated under Indonesian positive law, particularly in the provisions of the current Criminal Code (KUHP)? Second, what is the perspective of Islamic law on cohabitation in relation to the concept of zina and the objectives of Islamic law? Third, why is there a debate regarding the criminalization of cohabitation in Indonesia that involves a conflict between moral values, religious norms, and individual privacy rights? These three research questions form the primary focus of this study to produce a comprehensive and in-depth analysis.

The Criminalization of Cohabitation in Indonesian Positive Law

¹⁴ Johnny Ibrahim, *Theory and Methodology of Normative Legal Research* (Malang: Bayumedia, 2006), 295–298.

¹⁵ Soerjono Soekanto, *Introduction to Legal Research* (Jakarta: UI Press, 2014), 52–55; Amiruddin and Zainal Asikin, *Introduction to Legal Research Methods* (Jakarta: RajaGrafindo, 2012), 118–121.

The criminalization of cohabitation in Indonesian positive law is grounded in legal provisions within the Criminal Code (KUHP), enacted through Law No. 1 of 2023. Under these provisions, cohabitation is explicitly defined as an act subject to criminal sanctions, particularly in the article addressing living together as husband and wife outside of a valid marriage. This regulation reflects a shift in the national criminal law paradigm, which is no longer solely oriented toward protecting individual interests but also takes into account the social and moral values prevalent in society. The existence of this norm indicates that the state still plays a role in maintaining social order through criminal law instruments.¹⁶ Thus, the criminalization of cohabitation can be understood as part of criminal law policy aimed at maintaining a balance between social norms and individual freedom.

The provisions on cohabitation in the new Criminal Code cannot be separated from the criminal law reform process, which aims to align the law with the values of Indonesian society. In this regard, lawmakers have sought to incorporate moral norms into the criminal justice system as a form of protection for public morality.¹⁷ This regulatory process is not carried out absolutely, but rather through certain limitations that demonstrate caution in criminalizing private behavior.¹⁸ This aligns with the principle that criminal law should not be overused in regulating societal life. The inclusion of the cohabitation provision in the new Criminal Code reflects a compromise between societal moral

¹⁶ Eddy O.S. Hiariej, *Principles of Criminal Law* (Yogyakarta: Cahaya Atma Pustaka, 2016), 61–65; Barda Nawawi Arief, *A Collection of Essays on Criminal Law Policy* (Jakarta: Kencana, 2010), 118–121.

¹⁷ Muladi, *Selected Topics in the Criminal Justice System* (Semarang: UNDIP, 2002), 30–34.

¹⁸ Jimly Asshiddiqie, *Introduction to Constitutional Law* (Jakarta: Rajawali Press, 2010), 210–214.

demands and modern legal principles that uphold individual freedom.

Although it has a clear legal basis, the provision regarding cohabitation in the new Criminal Code continues to give rise to various interpretations among legal scholars and practitioners. Some view this regulation as a response to public concerns about moral degradation, while others regard it as excessive state intervention in individuals' private lives. These differing viewpoints indicate that the criminalization of cohabitation is not merely a legal issue but is also tied to complex social and cultural aspects. Therefore, it is important to understand these provisions not only from a normative perspective but also within the social context that underlies them.¹⁹

One of the key characteristics of the cohabitation provisions in the new Criminal Code is their classification as a complaint-based offense, meaning a criminal act that can only be prosecuted if a complaint is filed by a specific party.²⁰ This concept indicates that the state does not automatically enforce the law against all cases of cohabitation but instead grants the aggrieved party the authority to determine whether a particular act warrants legal prosecution. In the criminal justice system, complaint-based offenses are typically applied to cases involving private interests, thereby limiting state intervention to maintain a balance between public interests and individual rights.²¹ The application of complaint-based offenses in cohabitation cases reflects a more flexible and adaptive legal approach to societal dynamics.

In the context of cohabitation, the parties entitled to file a complaint are generally limited to immediate family members or parties with a direct legal relationship to the perpetrator. This restriction aims to prevent the abuse of the law by uninterested parties, as well as to ensure that the legal process remains within the bounds of legitimate interests. Furthermore, this provision also reflects respect for family values, which are an integral part of Indonesian society.²² By granting the right to file a complaint to specific parties, criminal law serves as a tool to protect individual interests without neglecting broader social aspects. The complaint-based offense mechanism in cohabitation cases can be understood as a form of limited social control.

The implications of applying complaint-based offenses to cohabitation are significant in law enforcement practice. On one hand, this mechanism can reduce the burden on law enforcement officials since not all cases need to be processed automatically. On the other hand, the effectiveness of law enforcement becomes highly dependent on the awareness and courage of the parties entitled to file a complaint.²³ This can lead to disparities in the application of the law, where certain cases are not processed even though they normatively meet the elements of a criminal offense. The mechanism for applying complaint-based offenses in cohabitation cases must be balanced with appropriate policies to ensure that legal objectives can still be achieved optimally.

The criminalization of cohabitation in Indonesian positive law is fundamentally aimed at protecting the moral values

¹⁹ Sudarto, *Law and Criminal Law* (Bandung: Alumni, 2007), 52–55; Satjipto Rahardjo, *Legal Science* (Bandung: Citra Aditya Bakti, 2006), 80–84.

²⁰ Andi Hamzah, *Principles of Criminal Law* (Jakarta: Rineka Cipta, 2014), 150–153.

²¹ Roeslan Saleh, *Criminal Acts and Criminal Liability* (Jakarta: Aksara Baru, 1983), 97–100.

²² Adami Chazawi, *Introduction to Criminal Law* (Jakarta: RajaGrafindo Persada, 2011), 203–206; Teguh Prasetyo, *Criminal Law* (Jakarta: Rajawali Pers, 2015), 89–92.

²³ Didik Endro Purwoleksono, *Criminal Law* (Surabaya: Airlangga University Press, 2014), 121–124; Chairul Huda, *No Crime Without Guilt* (Jakarta: Kencana, 2006), 67–70.

embedded in society. In this context, criminal law is used as an instrument to maintain social order and prevent behavior deemed contrary to standards of decency. This approach indicates that the state still views the role of law in regulating the moral aspects of societal life as significant.²⁴ However, the use of criminal law for such purposes must be exercised with caution to avoid infringing upon individual rights. Therefore, it is important to assess whether the criminalization of cohabitation is truly effective in achieving the goal of protecting public morality.

On the other hand, the criminalization of cohabitation can also be understood as a form of restriction on individuals' private behavior. In the perspective of modern law, there is a tendency to limit state intervention in the private lives of citizens, especially in matters that do not cause direct harm to others.²⁵ The regulation of cohabitation in criminal law is often viewed as a controversial measure.²⁶ This debate highlights the tension between a morality-based legal approach and a human rights-based legal approach. In this context, the state is required to balance these two interests proportionally.

Considering both perspectives, it can be concluded that the purpose of criminalizing cohabitation is not entirely singular. On one hand, there is an effort to protect public morality, while on the other hand, there is a need to safeguard individual freedom. The approaches used in regulating cohabitation tend to be compromising, as seen in the application

of complaint-based offenses. This approach allows the state to uphold social values without having to excessively intervene in the private lives of citizens.²⁷ Thus, the criminalization of cohabitation can be understood as a form of legal policy that seeks to balance various conflicting interests.

Based on the above discussion, the criminalization of cohabitation in Indonesian positive law demonstrates the state's effort to regulate social behavior through criminal law instruments while still considering certain limitations. The provisions in the new Criminal Code classify cohabitation as a complaint-based offense, reflecting caution in entering the private sphere of individuals. On the other hand, the purpose of this criminalization is not only related to the protection of public morals but also demonstrates an effort to balance social interests with individual freedoms. Thus, the regulation of cohabitation in Indonesian positive law can be understood as a compromise between the moral values embedded in society and modern legal principles that uphold the right to privacy.

The Prohibition of Cohabitation from an Islamic Law Perspective

From the perspective of Islamic law, cohabitation is viewed as a prohibited act because it falls under the category of adultery or acts that lead to it. This prohibition has a strong normative basis in the primary sources of Islamic law, namely the Qur'an and the Hadith. One of the verses frequently cited is the prohibition against approaching zina, which encompasses not only the act of zina itself but also any behavior leading to it, including living together without a valid

²⁴ Moeljatno, *Principles of Criminal Law* (Jakarta: Bina Aksara, 2008), 140–143; R.M. Jackson, *The Machinery of Justice in England* (Cambridge: Cambridge University Press, 1989), 56–59.

²⁵ H.L.A. Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963), 30–34.

²⁶ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 266–270.

²⁷ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1996), 170–174; John Stuart Mill, *On Liberty* (London: Penguin Books, 1985), 68–72.

marital bond.²⁸ Cohabitation is viewed not only as a moral violation but also as a legal violation within the framework of Sharia. This demonstrates that Islamic law adopts a preventive approach in safeguarding individual dignity and social order.

In addition to the Qur'an, the Hadith of the Prophet Muhammad (peace be upon him) also reaffirms the prohibition against adultery and all forms of behavior that lead to it. In various narrations, the Prophet emphasized the importance of preserving one's dignity and avoiding promiscuous relationships that could lead to adultery.²⁹ This reaffirms that cohabitation, as a form of relationship without a marital bond, is considered contrary to these principles. In this context, Islamic law functions not only as a normative set of rules but also as an ethical guide regulating individual behavior in daily life.³⁰ The prohibition against cohabitation in Islamic law has a broader dimension, encompassing legal, moral, and social aspects.

The prohibition against cohabitation is also closely linked to the concept of protecting the family institution in Islam. Marriage is viewed as the only legitimate way to establish a relationship between a man and a woman, as well as the primary foundation for building a harmonious society. Any form of relationship outside of marriage is considered to have the potential to undermine social order and family values. In this regard, Islamic law positions the family as an institution that must be safeguarded and protected

through various strict rules.³¹ This means that the prohibition on cohabitation is not only intended to regulate individual behavior but also to maintain overall social stability.

In Islamic law, the prohibition against cohabitation has distinct characteristics compared to positive law. This prohibition is absolute because it is based on the principles of Sharia, which cannot be altered by humans. In this regard, cohabitation is viewed not only as a violation of social norms but also as a violation of God's command. Consequently, Islamic law places strong emphasis on moral and spiritual aspects in regulating human behavior.³² The prohibition on cohabitation does not depend on a complaint from a specific party but is an obligation that every Muslim individual must adhere to.

In addition to being absolute, the prohibition on cohabitation in Islamic law also has a strong preventive dimension. This is evident in the prohibition against approaching adultery, which encompasses various forms of behavior that may lead to such acts.³³ In this context, cohabitation is viewed as a form of behavior with a high potential to lead to adultery, and thus must be prevented from the outset. This preventive approach demonstrates that Islamic law focuses not only on punishment but also on preventing violations from occurring.³⁴ Thus, the prohibition on cohabitation is part of an

²⁸ Wahbah al-Zuhaili, *Islamic Jurisprudence and Its Evidence* (Damascus: Dar al-Fikr, 1985), 7:33–36; Sayyid Sabiq, *Fiqh al-Sunnah* (Cairo: Dar al-Fath, 1999), 2:410–413.

²⁹ Abu Ishaq al-Shathibi, *Al-Muwafaqat fi Usul al-Shariah* (Beirut: Dar al-Kutub al-Ilmiyyah, 2003), 2:8–11.

³⁰ Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam* (Cairo: Al-Falah Foundation, 1994), 152–155.

³¹ Ibn Qudamah, *Al-Mughni* (Riyadh: Dar Alam al-Kutub, 1997), 9:490–493; Muhammad Abu Zahrah, *Al-Ahwal al-Syakhsbiyyah* (Cairo: Dar al-Fikr al-Arabi, 1957), 45–48.

³² Abdul Wahhab Khallaf, *The Science of Usul al-Fiqh* (Cairo: Dar al-Qalam, 1978), 96–99; Taqiyuddin al-Nabhani, *The Islamic Personality* (Beirut: Dar al-Ummah, 2001), 3:112–115.

³³ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law* (London: IIIT, 2008), 45–48.

³⁴ Ahmad al-Raisuni, *The Theory of Maqasid According to Imam al-Shatibi* (Cairo: Dar al-Kalimah, 1995), 120–123.

effort to uphold the overall morality of society.

On the other hand, the enforcement of prohibitions in Islamic law also takes into account the strict evidentiary requirements in cases of adultery. This indicates that while the prohibition is firm, the imposition of penalties is not carried out arbitrarily. In practice, proving adultery requires very high standards, such as the presence of witnesses or a confession, making it difficult to impose a punishment. Islamic law always strives to maintain a balance between law enforcement and the protection of individual rights. This indicates that the prohibition on cohabitation does not automatically lead to punishment but places greater emphasis on prevention and moral guidance.³⁵

The primary purpose of the prohibition on cohabitation in Islamic law can be understood through the concept of *maqashid al-sharia*, namely the objectives that the sharia seeks to achieve in regulating human life. One of these primary objectives is the preservation of lineage (*hifz al-nasl*), which relates to the protection of clear lineage and family honor. Cohabitation is viewed as a threat to this objective because it can lead to uncertainty regarding a child's status and undermine family structure.³⁶ In other words, the prohibition on cohabitation is part of the effort to ensure the continuity of legitimate and orderly generations.

In addition to preserving lineage, the prohibition on cohabitation also aims to preserve honor (*hifz al-'ird*) and societal morality. In Islam, the honor of individuals and families is a highly important value that must be protected.

Cohabitation, as a form of relationship outside of marriage, is considered capable of damaging that honor, both for the individuals involved and their families. Islamic law pays special attention to behaviors related to relationships between men and women.³⁷ Thus, the prohibition on cohabitation is not only related to legal aspects but also to efforts to uphold human dignity.

Furthermore, the prohibition of cohabitation in Islamic law also aims to create a harmonious social order. By regulating relationships between men and women through the institution of marriage, Islam seeks to build a stable and orderly society. In this context, cohabitation is viewed as a form of deviation that can disrupt the social order.³⁸ Therefore, this prohibition is not only intended for the benefit of the individual but also for the benefit of society as a whole. Thus, Islamic law positions the prohibition on cohabitation as part of the effort to realize the public interest (*maslahah*) in social life.

Based on the above discussion, it can be concluded that the prohibition on cohabitation in Islamic law has a strong normative basis and a comprehensive objective in maintaining morality and social order. This prohibition is explicit and does not depend on complaint mechanisms, unlike the approach in positive law. Furthermore, Islamic law also emphasizes preventive measures and strict standards of proof, thus focusing not only on sanctions but also on the moral development of individuals. Consequently, the prohibition on cohabitation from an Islamic legal perspective can be understood as part of a

³⁵ Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003), 267–270; Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 178–181.

³⁶ Al-Ghazali, *Al-Mustashfa min 'Ilm al-Usul* (Beirut: Dar al-Kutub al-Ilmiyyah, 1993), 1:286–289; Jasser Auda, *Maqasid al-Shariah*, 52–55.

³⁷ Ibn Ashur, *The Objectives of Islamic Shariah* (Tunis: Dar al-Salam, 2006), 104–107; Fazlur Rahman, *Islam and Modernity* (Chicago: University of Chicago Press, 1982), 23–26.

³⁸ Abu Zahrah, *Usul al-Fiqh* (Cairo: Dar al-Fikr al-Arabi, 1958), 278–281; Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld, 2008), 142–145.

legal system aimed at maintaining a balanced public interest for both individuals and society.

An Attempt at Compromise Regarding the Cohabitation Between Moral-Religious Values and the Right to Privacy

The criminalization of cohabitation in the Indonesian context cannot be separated from the strong influence of moral and religious values that are deeply rooted in society. As a country with a religious social character, moral norms often serve as the foundation for the formulation of laws, including criminal law. From this perspective, cohabitation is viewed as behavior that deviates from religious and cultural norms that uphold the institution of marriage.³⁹ The criminalization of such behavior is considered a legitimate step to uphold public morality. This approach demonstrates that the law functions not only as a regulatory tool but also as a means to enforce values deemed important by society.

This morality-based approach is also supported by the view that the law has an educational function in shaping societal behavior. By classifying cohabitation as a criminal offense, the state indirectly sends a message that such behavior is inconsistent with the values embraced by society. In this context, criminal law is used as an instrument to foster collective moral awareness.⁴⁰ This approach often draws criticism, particularly from those who argue that the law should not intrude too deeply into the realm of individual

morality. This debate highlights the tension between the moral and legal functions within modern legal systems.

Furthermore, the justification for criminalizing cohabitation is often linked to the need to maintain social order. In societies that highly value family, cohabitation is seen as potentially undermining existing social structures. Criminal law is used as a tool to prevent social changes deemed negative. However, this approach also faces challenges in increasingly pluralistic and open societies, where not all individuals share the same views on morality. This means that the use of criminal law to enforce moral values becomes a complex issue requiring a cautious approach.⁴¹

On the other hand, the criminalization of cohabitation is also debated from the perspective of privacy rights and individual freedom. In modern legal systems, there is a principle that the state should not interfere in the private lives of citizens as long as it does not cause harm to others. Cohabitation, in this context, is viewed as part of an individual's life choices within the private sphere. State intervention through criminal law is considered a violation of the right to privacy. This perspective emphasizes the importance of limiting state power to prevent it from infringing on individual freedoms.⁴²

Furthermore, a human rights-based approach also emphasizes that every individual has the freedom to determine their life choices, including in matters of personal relationships. In this context, the criminalization of cohabitation is seen as contrary to the principle of individual

³⁹ Mary Ann Glendon, **Rights Talk: The Impoverishment of Political Discourse** (New York: Free Press, 1991), 67–70; Robert P. George, **Making Men Moral** (Oxford: Oxford University Press, 1993), 45–48.

⁴⁰ Joel Feinberg, *The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1984), 12–15; Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), 9–12.

⁴¹ Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 162–165; Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 96–99.

⁴² Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967), 32–35; Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890): 193–196.

autonomy, which is one of the main pillars of modern law.⁴³ Therefore, many argue that criminal law should not be used to regulate consensual behavior between adults. This debate reflects a paradigm shift from morality-based law toward rights-based law.

However, the application of the principle of privacy rights in the context of cohabitation is not absolute. In practice, the state retains the authority to limit individual freedoms when deemed necessary to protect broader interests. The debate over the criminalization of cohabitation concerns not only individual rights but also the limits that the state may impose.⁴⁴ The main challenge is finding a balance between the protection of privacy rights and broader social interests.

The debate between moral values and privacy rights in the criminalization of cohabitation highlights two distinct approaches to understanding the function of law. On one hand, there is a perspective emphasizing the importance of law as a tool to uphold morality, while on the other hand, there is a perspective emphasizing the protection of individual freedoms. Both approaches have strong foundations and cannot be simply dismissed. Ultimately, an approach is needed that can accommodate both interests in a balanced manner.⁴⁵ Criminal law must be formulated by considering various aspects, including social and cultural values, as well as human rights.

One form of compromise observable in Indonesia's regulations on cohabitation is the application of complaint-based offenses. This mechanism allows the state to regulate behavior deemed deviant without having to intervene directly in every case. Thus, complaint-based offenses can be understood as a middle ground between the moral approach and the privacy rights approach.⁴⁶ The effectiveness of this approach remains a subject of debate, particularly regarding consistency in legal enforcement. Continuous evaluation of this policy is necessary to achieve the intended objectives.

In the context of an increasingly pluralistic society, the debate over the criminalization of cohabitation is expected to continue to evolve. This is due to differing views on morality and individual freedom that are not easily reconciled. Therefore, it is crucial for lawmakers to continually consider existing social dynamics when formulating legal policies. Thus, the law serves not only as a tool for regulation but also as a means to foster justice that is acceptable to all segments of society.⁴⁷

Based on the above discussion, it can be concluded that the debate over the criminalization of cohabitation reflects a tension between moral-religious values and the principle of privacy rights in modern law. Both perspectives have strong foundations and influence one another in the formation of legal policy. Therefore, a balanced approach is needed to accommodate both interests. The application of complaint-based offenses in Indonesian positive law can be

⁴³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2003), 78–81; Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), 210–213.

⁴⁴ Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996), 24–27; Isaiah Berlin, *Two Concepts of Liberty* (Oxford: Oxford University Press, 1969), 121–124.

⁴⁵ Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), 249–252; Nicola Lacey, *State Punishment* (London: Routledge, 1988), 134–137.

⁴⁶ Douglas Husak, *Overcriminalization* (Oxford: Oxford University Press, 2008), 98–101; Andrew Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 2009), 56–59.

⁴⁷ Amartya Sen, *The Idea of Justice* (Cambridge: Harvard University Press, 2009), 56–59; Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 142–145.

understood as a form of compromise that attempts to bridge these differences. However, the effectiveness of this approach still requires further evaluation so that it can truly reflect justice in society.

Conclusion

Comprehensively, it can be concluded that the criminalization of cohabitation in Indonesia reflects the state's effort to balance the protection of moral-religious values with respect for privacy rights within the framework of modern law. In positive law, the regulation of cohabitation in the Criminal Code (KUHP) as a complaint-based offense demonstrates a compromising approach by limiting state intervention to specific conditions, while from an Islamic law perspective, cohabitation is explicitly prohibited as an act approaching adultery to uphold morality and social order. This difference in approach has given rise to a debate that is not only legal in nature but also philosophical and sociological, particularly regarding the limits of state authority in regulating the private sphere of individuals. Future policies on the criminalization of cohabitation must be formulated proportionally, taking into account the evolving dynamics of values in society, so as to create a balance between justice, legal certainty, and public benefit.

References

- Abu Zahrah, Muhammad. *Al-Ahmal al-Syakhsbiyyah*. Cairo: Dar al-Fikr al-Arabi, 1957.
- Abu Zahrah, Muhammad. *Principles of Islamic Jurisprudence*. Cairo: Dar al-Fikr al-Arabi, 1958.
- Al-Ghazali. *The Essentials of Usul al-Fiqh*. Beirut: Dar al-Kutub al-Ilmiyyah, 1993.
- Al-Nabhani, Taqiyuddin. *The Islamic Personality*. Beirut: Dar al-Ummah, 2001.
- Al-Qaradawi, Yusuf. *The Lawful and the Prohibited in Islam*. Cairo: Al-Falah Foundation, 1994.
- Al-Raisuni, Ahmad. *The Theory of Maqasid According to Imam al-Shatibi*. Cairo: Dar al-Kalimah, 1995.
- Al-Shatibi, Abu Ishaq. *Al-Muwafaqat fi Usul al-Shariah*. Beirut: Dar al-Kutub al-Ilmiyyah, 2003.
- Al-Zuhaili, Wahbah. *Islamic Jurisprudence and Its Evidence*. Damascus: Dar al-Fikr, 1985.
- Arief, Barda Nawawi. *A Collection of Criminal Law Policies*. Jakarta: Kencana, 2010.
- Ashworth, Andrew. *Principles of Criminal Law*. Oxford: Oxford University Press, 2009.
- Asshiddiqie, Jimly. *Introduction to Constitutional Law*. Jakarta: Rajawali Press, 2010.
- Auda, Jasser. *Maqasid al-Shariah as Philosophy of Islamic Law*. London: IIT, 2008.
- Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. Oxford: Clarendon Press, 1996.
- Berlin, Isaiah. *Two Concepts of Liberty*. Oxford: Oxford University Press, 1969.
- Chazawi, Adami. *Lessons in Criminal Law*. Jakarta: RajaGrafindo Persada, 2011.
- Coulson, Noel J. *A History of Islamic Law*. Edinburgh: Edinburgh University Press, 1964.
- Devlin, Patrick. *The Enforcement of Morals*. Oxford: Oxford University Press, 1965.
- Donnelly, Jack. *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press, 2003.
- Dworkin, Ronald. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.
- Dworkin, Ronald. **Freedom's Law**. Cambridge: Harvard University Press, 1996.

- Emerson, Thomas I. *The System of Freedom of Expression*. New York: Random House, 1970.
- Feinberg, Joel. *The Moral Limits of the Criminal Law*. New York: Oxford University Press, 1984.
- Fuller, Lon L. *The Morality of Law*. New Haven: Yale University Press, 1969.
- George, Robert P. *Making Men Moral*. Oxford: Oxford University Press, 1993.
- Hallaq, Wael B. *An Introduction to Islamic Law*. Cambridge: Cambridge University Press, 2009.
- Hamzah, Andi. *Principles of Criminal Law*. Jakarta: Rineka Cipta, 2014.
- Hart, H.L.A. *Law, Liberty, and Morality*. Stanford: Stanford University Press, 1963.
- Hiariej, Eddy O.S. *Principles of Criminal Law*. Yogyakarta: Cahaya Atma Pustaka, 2016.
- Huda, Chairul. *No Crime Without Guilt*. Jakarta: Kencana, 2006.
- Husak, Douglas. *Overcriminalization*. Oxford: Oxford University Press, 2008.
- Ibn Ashur. *The Objectives of Islamic Sharia*. Tunisia: Dar al-Salam, 2006.
- Ibn Qudamah. *Al-Mughni*. Riyadh: Dar Alam al-Kutub, 1997.
- Jackson, R.M. *The Machinery of Justice in England*. Cambridge: Cambridge University Press, 1989.
- Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. Cambridge: Islamic Texts Society, 2003.
- Kamali, Mohammad Hashim. *Shari'ah Law: An Introduction*. Oxford: Oneworld, 2008.
- Kelsen, Hans. *Pure Theory of Law*. Berkeley: University of California Press, 1967.
- Khallaf, Abdul Wahhab. **Ilm Usul al-Fiqh**. Cairo: Dar al-Qalam, 1978.
- Lacey, Nicola. *State Punishment*. London: Routledge, 1988.
- Mill, John Stuart. *On Liberty*. London: Penguin Books, 1985.
- Moeljatno. *Principles of Criminal Law*. Jakarta: Bina Aksara, 2008.
- Muladi. *Selected Topics in the Criminal Justice System*. Semarang: UNDIP Press, 2002.
- Packer, Herbert L. *The Limits of the Criminal Sanction*. Stanford: Stanford University Press, 1968.
- Prasetyo, Teguh. *Criminal Law*. Jakarta: Rajawali Pers, 2015.
- Purwoleksono, Didik Endro. *Criminal Law*. Surabaya: Airlangga University Press, 2014.
- Rahardjo, Satjipto. *Legal Science*. Bandung: Citra Aditya Bakti, 2006.
- Rahman, Fazlur. *Islam and Modernity*. Chicago: University of Chicago Press, 1982.
- Raz, Joseph. *The Authority of Law*. Oxford: Clarendon Press, 1979.
- Saleh, Roeslan. *Criminal Acts and Criminal Liability*. Jakarta: Aksara Baru, 1983.
- Sabiq, Sayyid. *Fiqh al-Sunnah*. Cairo: Dar al-Fath, 1999.
- Schacht, Joseph. *An Introduction to Islamic Law*. Oxford: Oxford University Press, 1964.
- Sen, Amartya. *The Idea of Justice*. Cambridge: Harvard University Press, 2009.
- Sudarto. *Law and Criminal Law*. Bandung: Alumni, 2007.
- Sunstein, Cass R. *Designing Democracy*. Oxford: Oxford University Press, 2001.
- Tamanaha, Brian Z. *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press, 2001.
- Waldron, Jeremy. *Law and Disagreement*. Oxford: Oxford University Press, 1999.
- Warren, Samuel D., and Louis D. Brandeis. "The Right to Privacy." *Harvard Law Review* 4, no. 5 (1890): 193–220.
- Westin, Alan F. **Privacy and Freedom**. New York: Atheneum, 1967.