

## Cohabitation in the Penal Code Reform in Relation to Religious and Customary Laws

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**ABSTRACT:** The main purpose of this research is to prevent vigilantism, integrate customary law with positive law, and protect the values of decency and morals of Indonesian society. The formulation of the problem includes how customary law and religion affect the view and handling of cohabitation, and how the reform of the Criminal Code can provide solutions to this phenomenon. The research method used is a normative approach, with analysis of relevant literature, laws and regulations, and field data. The contribution of this research lies in filling the void of previous studies that have not specifically examined cohabitation in the reformation of the Criminal Code in relation to religious law and customary law. The novelty of this research is that there is a solution to prevent cohabitation through the approach of customary law and religious law. The findings show that criminalisation of cohabitation is necessary to maintain moral values and prevent further criminal acts. The research also found that the implementation of the new Criminal Code that regulates cohabitation can provide effective protection and prevent vigilantism.

**Keywords:** Cohabitation, Customary Law, Religion



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## INTRODUCTION

One of the issues that received attention in the reform of the Criminal Code is cohabitation behaviour, which is sought to be enforced in order to maintain the moral values of the cultured and divine Indonesian nation in accordance with Pancasila and the 1945 Constitution. This step is taken as part of criminal law policy to respond to social phenomena, with the aim of achieving the national ideals expected by the State of Indonesia (Sholikah et al., 2024).

Philosophically, cohabitation violates cultural values and the legal system, and erodes the trace of Easternness in Indonesian Culture. The loss of influence of religious values on the grounds of freedom, human rights, and economic aspects cannot be used as justification for not criminalising cohabitation, because this has the potential to make Indonesia an immoral country. (Sholikah et al., 2023)

J.C. Vergouwen in his book *Kumpul kebo* or living together without a legal marriage is not allowed for young men and is not in accordance with the norms of relationships between girls and their lovers. However, this practice is still common in areas where regulations and customs are not strong, especially among married parents. It is considered a breach of custom and can be sanctioned by the authorities (Safitri & Wahyudi, 2023). This research focuses on cohabitation as husband and wife without marriage bond in the revised Criminal Code in relation to religious and customary law. More specifically, cohabitation in the revised Penal Code and its prevention solution from the perspective of custom and religion.

The amendment of the Indonesian Criminal Code on Cohabitation aims to prevent vigilantism, integrate customary law with positive law, protect the values of decency and morals of society, and prevent negative impacts such as moral decay and further criminality. In addition, this reform also aims for national legal unification so that the handling of cohabitation cases is uniform throughout Indonesia, as well as providing effective sanctions and protection for perpetrators from vigilantism (Kartodinudjo, 2022).

This research aims to fill the gap of previous studies related to cohabitation in relation to the reformation of the Criminal Code. Although there have been several previous studies that examine cohabitation related to criminal law reform, none of them specifically examine cohabitation in the reform of the Criminal Code in relation to religious and customary law. For example, Patrecia Melenia Yoanda Kartodinudjo, who conducted research in the *Bureaucracy Journal* (2023) with an article entitled 'Review of Criminalisation of Cohabitation in Criminal Law Perspective', has not explained the solution and prevention of cohabitation in the Criminal Code reform. Research by Muhammad Ramadan Kiro and Muhamad Saktiawan in the *Delarev Lakidende Law Review journal* (2024) entitled 'The Application of the Offence of Cohabitation in the National Criminal Code in View of the Objectives of Criminal Law' (Kartodinudjo, 2023). Research conducted by Ana Sholikah, et al in the *Justisi journal* (2024) entitled 'Legal Regulation of the Punishment of People Who Conduct Cohabitation (*Kumpul Kebo*)'. Research conducted by Muhammad Razif in the *Al-Adalah journal* (2023) entitled 'Prohibition of Cohabitation in Law No. 1 of 2023 An Application of *Sadd Dzariah*'. However, there is one important aspect that has not been explored by previous researchers, namely how to prevent cohabitation in the perspective of religious and customary law.

Bibliometric mapping using Vos Viewer shows that aspects of cohabitation prevention from the perspective of religious law and customary law are still under-explored. This research contributes by offering in-depth analyses and more inclusive solutions to integrate customary law, religious law and positive law in cohabitation prevention efforts in Indonesia. This emphasises the urgency and relevance of this research in the context of legal reform in Indonesia.

## METHOD

This research adopted a normative legal approach to analyse the integration of customary law and positive law in the criminalisation of cohabitation in Indonesia. Based on a literature review, document analysis, collecting data from existing legal documents, academic journals, books, and

previous research relating to the criminalisation of cohabitation, religious law, and customary law, this research found that customary and religious law have a significant influence on the perception and treatment of cohabitation. The revised Criminal Code that seeks to regulate cohabitation faces challenges in its implementation due to differences in interpretation and acceptance in various regions. Qualitative and comparative analyses indicate the need for more inclusive solutions that take into account the diversity of customary and religious laws. Recommendations from this study emphasise the importance of harmonious integration between customary, religious, and positive laws to prevent cohabitation and align the law with local values.

## RESULT AND DISCUSSION

### Cohabitation in the Penal Code Reform from the Perspective of Religious and Customary Laws

The principle of *Ubi Societas ibi Ius* emphasises that the existence of law is inseparable from social life. Consequently, the law must continue to develop and adapt to respond to social change. Criminalisation is one form of such adaptation in the context of criminal law reform (Hardiantha et al., 2024).

Criminalisation, or the process of making an act a crime, is formalised through the formation of laws that include criminal penalties for such acts. Criminalisation can also be interpreted as the determination of acts that were previously not categorised as criminal, are now categorised as criminal offences through new legal rules.

The balance of life in society depends on the effective implementation, respect and compliance with the laws that govern it. Violations of social values and customs can cause disharmony and damage inter-community relations. An example of this violation is the phenomenon of cohabitation, (*semen leven*, living in a non-spousal marriage, husband's marriage, cohabitation), which has become a reality in people's lives (Kurniawan et al., 2023).

The practice of cohabitation has sparked debate because it is considered to override certain cultural values and religious teachings that prohibit relationships outside of marriage. Logically, couples who live together in one house and live a family-like life without a legal marriage bond are considered committing an offence. Ultimately, these acts are categorised as criminal offences in the new Criminal Code. This classification is part of the criminal reform to update the law reform.

(cohabitation) triggered concerns regarding its impact on social norms and order, even though there is no regulation that explicitly regulates it. This has prompted the need for stricter regulation, including the possibility of criminalising such behaviour. In some regions and villages, local norms are still applied to regulate non-marital relationships, so that the perpetrators often receive sanctions from village leaders and the surrounding society because they are considered to disturb the comfort of the community (Prasetio, 2021).

The customs of Indonesian society are very diverse and varied as many ethnic groups live there with their own customs. Therefore, determining a standard to judge its sense of decency is very difficult. Nonetheless, we can say that the level of decency can be measured by looking at how much society dislikes an act that is considered deviant from local community values, such as

cohabitation. In the villages, there is still a rule that does not recognise deviant acts, so the perpetrators are often caught red-handed by security and the community feels uncomfortable. The community's sense of decency towards cohabitation is determined by how little the community is willing to take action against the perpetrator(Alrousan & Faqir, 2024).

The act of cohabitation is not in accordance with the noble values of Indonesian culture which upholds the principles of divinity, culture, and decency. Therefore, there is a need for serious action from the government to respond to this matter. The consideration to criminalise the act of cohabitation is based on the violation of moral values and the potential for other criminal acts, such as adultery, rape, molestation, kidnapping, persecution, and murder.

The criminalisation of cohabitation is necessary to preserve the noble values of marriage and create a moral future generation. Cohabitation, which originates from Western culture, is not in line with Indonesian culture and can cause various social problems. Based on the first principle of Pancasila, all actions and rules in Indonesia should reflect divine values, so cohabitation should not be normalised as a pattern of behaviour(Sirjon & Sakti, 2023).

Along with the times, there is a gap between the values of Pancasila and the behaviour of Indonesian society. Lately, we have witnessed a shift in religious and moral values in people's lives, especially regarding sexual freedom. The phenomenon of cohabitation is increasingly prevalent and is considered by most people as a form of sexual deviance. This is contrary to cultural values that uphold marriage as a sacred and legal bond between a man and a woman. Cohabitation, or what used to be known as cohabitation, refers to the act of living together in shared living quarters between unmarried men and women.

In Indonesia, cohabitation or cohabitation is considered an act that does not conform to the norms of decency, religion, and custom. This is mainly because Indonesia upholds these norms. In some areas such as Bali, Aceh, and Batam, cohabitation is regulated by customary law(Hidayatulloh, 2024).

Although half of Indonesian society has norms that do not allow cohabitation, there are customs in Indonesia that still allow cohabitation after a proposal. In the context of Indonesian positive law, Article 1 of the Criminal Code affirms that the law prevailing in society remains binding, as long as it does not contradict the criminal regulations. Positive law, including certain customs, allows unmarried partners to live together, regardless of the status of their affair. However, where this is permitted, it is questionable whether it complies with criminal provisions. If it does, it is a question of how much the extent of criminal reform clarifies generally applicable rules or recognises existing customary law.

Violations of local customs and undermining the local cultural fabric often lead to physical violence against the perpetrators, especially in areas such as Dayak, Aceh and Bali. For example, in some areas, perpetrators of cohabitation can even become victims of violent acts, such as murder, stoning, and even drowning in the sea. This shows that the culture in some areas views cohabitation as a disgrace to society, a behaviour that is considered contrary to the norms of decency and values prevailing in the community(Sa'adi et al., 2023).

Batam is one of the regions that pioneered regulation on cohabitation. In this region, the implementation of such regulation is aimed at cohabiting offenders through the 2002 Local

Regulation No. 6 on 'Social Order'. Rules related to the act of cohabitation are listed in paragraph 3 of Article 7) which states: 'Every person of the opposite sex is prohibited from living and or living under the same roof as husband and wife without being bound by a legal marriage under the Law.' Criminal provisions based on this are found in paragraph 1 of Article 16 which reads: 'Violation of the provisions of this Regional Regulation shall be punishable by imprisonment for a maximum of 3 (three) months and or a maximum fine of Rp.5,000,000,- (Five Million Rupiah).' (Hidayat, 2022)

In Bali Province, the community views that cohabitation violates local norms and customs. The phenomenon of cohabitation in Bali is more common due to migrants who consider that this act is not included in the category of offences of decency. Keep in mind that the Criminal Code has no specific regulation on this matter. Therefore, Balinese people in solving the problem of cohabitation still use customary law, which remains a crime that is rampant in society and can be prosecuted legally, one of which is 'Lokika Sangraha' based on 1951 Emergency Law Number 1 (Putri et al., 2021).

According to the Book of Adhigama, Lokika Sanggraha is a romantic relationship between a man and a woman who are not married under the law and customs. Customary law is a rule that controls things that can hinder social balance and tranquillity, thus needing to be resolved to create a harmonious life. In Bali, the legal structure by cohabiting couples is regulated by customary law, Lokika Sanggraha including customary offences found in Kitab Adi Gama Article 359.

Aceh province strictly prohibits the practice of cohabitation because this region applies Islamic law as a whole. This act, which contradicts norms, customs and religious teachings, is considered zina. The concept of zina in Islam prohibits intimate relationships outside the bonds of legal marriage. There are two categories of zina: zina muhsan, committed by individuals who have been married, and zina ghair muhsan, committed by individuals who have never been married.

In Aceh Province, the jinayah law that regulates adultery is in Qanun Aceh 2014 No 6 paragraph 1 article 33. The application of this regulation is in line with the values of Islamic law and customs in Aceh society. The aim is to maintain and restrain social behaviour that can degrade dignity, inhibit early infidelity, and minimise moral damage (Asmaunizar, 2019).

In the Batam area, cohabitation without marriage is considered a violation of norms and moral values, and has the potential to erode the noble values of the younger generation. This phenomenon is often triggered by negligence and lack of parental attention, or used as an alternative to rush into marriage. Thus, Batam has implemented a regulation on cohabitation which is stated in PERDA 2002 No. 6 on Social Order'. Paragraph 3 of article 1 discusses the Regulation on cohabitation, which explains that 'people of different sexes are prohibited from living together as husband and wife without a legal marriage bond.' (Sulistiyono & Purwadi, 2018)

The act of cohabitation is not considered unlawful where Andi Hamzah and J.E. Sahetapy as well as some legal experts argue that cohabitation without marriage is still practiced in some areas, such as Minahasa and Nias. This shows that traditions and social norms vary from region to region. However, the majority of Indonesians view cohabitation as an act that violates the law and morals, so there is a need for clear regulations to govern this behaviour. The behaviour of living together without the bond of marriage is not considered a normal act in the social life of half of Indonesia.

This is evidenced by the views of people in several regions such as Bali, Java that cohabitation is an act that violates the values of decency and culture of the Indonesian nation, especially as an Eastern nation that maintains morality and civility in social interactions (Dwipayana & Wirasila, 2020).

The consequences of cohabitation can vary greatly depending on the conditions and society's reaction to the practice. In cases where society accredits cohabitation, cohabiting couples may be able to survive and stay together undisturbed by interference from the surrounding community. However, on the other hand, in societies that strongly oppose cohabitation, it is often the case that cohabiting couples will be expelled from the village where they live. Even more cruel acts such as parading and stripping of the perpetrators are not uncommon.

Especially in areas with a strong culture of customary law, cohabiting perpetrators are often the target of physical violence, such as murder, assault with stones, Cohabitation, which defies the norms and noble values of the local community, can trigger anger and condemnation, even encountering serious consequences such as ostracisation and blasphemy. Therefore, when they occur in the midst of society, such acts are felt to be detrimental by society as a whole. Society itself consists of various social institutions formed on the basis of similarities in traditions and culture, which become their identity and identity, enabling them to build a strong community with solid social ties and a sense of brotherhood to create a harmonious social life (Mbedhi et al., 2024).

Communities establish rules for the benefit of the collective and to maintain safety, order and peace in communal life. The aim is to ensure that norms are applied, adhered to and actively practised by all community members in a given community. If someone violates these norms, it can lead to horizontal conflict within the community, often resulting in the community labelling the offender as a criminal (Palni, 2023).

The rules on cohabitation will be in effect for the next three years and are authorised by customary and religious law. These rules do not violate human rights. After the implementation of the cohabitation ordinance, the community is expected to comply with the law (Kiro & Saktiawan, 2024).

Public safety is needed, criminalisation can protect offenders from immoral behaviour. Thus, punishment can provide education to offenders so that they can change their attitudes in accordance with the law and religion, or referred to as special prevention.

Because indigenous peoples dislike cohabitation, there have been a wide range of reactions to cohabitation perpetrators, some of which have been good or bad. Indigenous people's distaste for the practice of cohabitation has been evident in Various incidents in a number of areas in Indonesia have required attention and action to protect the community over the years. One example is the repeated arakan events that have occurred in the sukaler area of Bandung.

### **Efforts to Prevent Cohabitation in Criminal Law Reform**

Cohabitation is still considered taboo by society and is considered a sin according to religion. As a religious figure, Romo Justisianto, in Sidoarjo, is a priest who graduated from the University of Antonianum in Rome, Italy. was concerned about this condition. Various efforts have been made, including reporting the act of cohabitation in the local village. Seeing that cohabitation violates the

values of holiness in the household according to the view of the church, the church tries to urge unmarried couples to enter into a legal marriage, both according to religion and customs adopted. The church also visits cohabiting couples to provide support and help them enter into a legal marriage (Z et al., 2023).

There are various ways that can be used to prevent crimes such as cohabitation. Based on Barda Nawawi Arief's statement, the strategy to deal with criminals through the criminal offence system, including the application of criminal sanctions, is actually an inseparable part of law enforcement efforts, especially in the domain of criminal law. (Sulistiyono et al., 2018)

Criminal politics can be used to deal with the crime of cohabitation. Broadly speaking, criminal politics can divide overcoming cohabitation crimes, namely the penal path and the nonpenal path.

The focus of crime prevention efforts in the penal pathway is repressive action (action, eradication, suppression) after the crime has occurred. The focus of crime prevention efforts in out-of-court channels is prevention, deterrence, and suppression before the act occurs.

In Indonesia, law enforcement faces challenges in dealing with cohabitation when using legal channels. This is due to the fact that, if the cohabitation situation reaches the court, law enforcers will face challenges because there is no regulation that specifically regulates the act in the law or the Criminal Code. This creates a legal vacuum known as *recht vacuum*. Until now, there has been debate on the regulation of cohabitation, also known as cohabitation, as Article 284 only regulates adultery. In the Criminal Law Reform, cohabitation was proposed to be a criminal offence. Law 2023 No. 1 Paragraph 1 and 2 Article 412 stipulates that if cohabitation is committed by a spouse, parent, or child of an individual who is not bound by marriage, it is punishable by imprisonment for a maximum of six months or a fine of category II, which is up to IDR 10 million (UU No. 1<sup>th</sup> 2023).

The regulations that can be applied to prevent this problem are regulations that address minor criminal offences, for example related to community order and security as well as immoral acts regulated in PERDAs. However, some regions have different regulations from others.

Many modern law enforcers use non-penal channels. This is due to the fact that the government has not established a specific policy or law to deal with cohabitation offences using criminal means. Non-judicial legal efforts implemented by law enforcement usually only include data collection, briefing, or socialisation when they find cases of cohabitation, and rarely are these cases brought into the realm of law (Jawa, 2023).

According to Sudarto, Kapita Selektta Hukum in Bandung, Pidana non-penal measures in Indonesia include activities such as patrols, routine raids by the police, as well as activities that focus on public services or socialisation. Nonjudicial resolution can also utilise developments in mass media and technology.

Cohabitation Prevention Strategies in Criminal Law Reform are:

1. The new Criminal Code has provided a means to criminalise the practice of cohabitation through Article 412. This is a new article that has not been regulated in the old Criminal Code. With the existence of Article 412, there is a way to punish the perpetrators of cohabitation more

- severely, considering that previously they could only be subject to social sanctions. Now, those who commit cohabitation can be imprisoned for up to six months.
2. Taking a persuasive approach. The perpetrators are invited to the urban village to discuss their actions and find solutions to their cohabitation. If this approach fails to find a solution, the kelurahan will invite the families of both parties involved in the cohabitation. They will explain the concerns of the local community and discuss the actions of the cohabiting offender with the family, to resolve the issue in a family manner and according to local customs.
  3. Appealing to the local community not to commit acts of cohabitation. The local government also held a meeting with each family head in the neighbourhood to educate family members about sexual relations outside marriage.
  4. Work with religious authorities to approach families so that cohabiting couples can enter into a legal marriage in accordance with their respective religions and beliefs. (Jawa, 2023)
  5. Conducting socialisation and counselling on the 1974 Law No. 1 on Marriage, so that these couples can enter into a legal marriage (Suryawan, 2021).
  6. Cooperate with boarding house owners and landlords to monitor all forms of activity to prevent cohabitation cases in the neighbourhood.
  7. Supervising cohabiting couples, so that after they complete their education, the couples can enter into a legal marriage based on their respective religions and beliefs.
  8. Approaching the families of both parties to find out why the couple's relationship is not approved. After that, the government will find a middle ground and solution so that the couple can get their blessing, so that they can get married legally.
  9. The young couple is also required to declare manopotim before their parents and elders. The situation and the relationship of the couple determines the punishment given to them. The punishment is more severe if the man does not want to take responsibility for the woman he had sex with or if his parents do not want marriage. The young man must pay a purification fee, or pengurusan, and give piso to appease the woman's family (Razif, 2023).

After considering everything mentioned above, criminal offences against decency must be accompanied by:

- 1) a formulation that will limit and outline what an offence of decency is
- 2) Defining these acts as offences against decency, either by taking into account the legislation of other countries or by establishing a new criminal law reform based on religious norms relating to decency
- 3) Correcting pre-existing notions of these offences in legislation. (Mansyah, 2024).

## CONCLUSION

This study aims to analyse the impact of customary and religious laws on the perception and handling of cohabitation in Indonesia, and evaluate the effectiveness of the revised Criminal Code. Based on the analysis of legal documents, it was found that customary and religious laws influence people's views on cohabitation and cause variations in the application of the law. The revised Penal Code has not been fully effective due to different interpretations in different regions. The proposed solution involves better integration between customary, religious and positive laws to ensure more consistent application and in accordance with local values.

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