

Criminalization of Cohabitation in the Perspective of Positive Criminal Law: A Normative Study of the Old Criminal Code and the New Criminal Code

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Received: 24-05-2026 Reviewed: 16-06-2026 Accepted: 03-07-2026

Abstract

This study examines the criminalization of cohabitation under Indonesia's positive criminal law by comparing its regulation under the Old Criminal Code and the New Criminal Code (Law Number 1 of 2023), while also evaluating its compatibility with the principles of legality, ultimum remedium, and Islamic criminal jurisprudence. The study employs normative juridical research using statutory, conceptual, comparative, and Islamic law approaches. The findings demonstrate that Article 412 of the New Criminal Code represents a significant expansion of morality-based criminalization by introducing cohabitation as a limited complaint-based offence. Nevertheless, the provision raises substantial doctrinal concerns because the phrase "living together as husband and wife" lacks sufficient legal certainty (lex certa), thereby creating the potential for arbitrary interpretation and selective enforcement. From the perspective of ultimum remedium, the criminalization of consensual cohabitation is not supported by sufficient penal necessity, as alternative non-penal mechanisms remain available to address the underlying social concerns. Furthermore, Islamic criminal jurisprudence does not automatically equate cohabitation with the ḥadd offence of zinā but recognizes the possibility of state regulation through ta'zīr, provided that such criminalization fulfils the objectives of maqāṣid al-sharī'ah, legal certainty, proportionality, and public benefit (maṣlaḥah). This study concludes that although the legislative objective of protecting marriage and public morality is normatively legitimate, the current formulation of Article 412 requires further refinement to ensure consistency with the principles of legality, proportionality, constitutional rights, and the broader objectives of both modern criminal law and Islamic criminal jurisprudence.

Keywords: Cohabitation, Criminalization, Islamic Criminal Jurisprudence, Legality Principle, Ultimum remedium.

Abstrak

Penelitian ini bertujuan untuk mengkaji kriminalisasi kohabitasi dalam hukum pidana positif Indonesia melalui perbandingan pengaturannya dalam KUHP Lama dan KUHP Nasional (Undang-Undang Nomor 1 Tahun 2023), sekaligus menilai kesesuaiannya dengan asas legalitas, asas *ultimum remedium*, dan perspektif hukum pidana Islam. Penelitian ini merupakan penelitian hukum normatif dengan menggunakan pendekatan perundang-undangan, konseptual, perbandingan, dan hukum Islam. Hasil penelitian menunjukkan bahwa Pasal 412 KUHP Nasional merupakan perluasan kriminalisasi terhadap delik kesusilaan dengan menjadikan kohabitasi sebagai delik aduan terbatas. Namun demikian, ketentuan tersebut masih menimbulkan persoalan yuridis karena frasa "hidup bersama sebagai suami istri" tidak memenuhi standar kepastian hukum (*lex certa*), sehingga berpotensi menimbulkan penafsiran yang berbeda serta penerapan hukum yang selektif. Dari perspektif asas *ultimum remedium*, kriminalisasi terhadap hubungan konsensual di luar perkawinan belum didukung oleh kebutuhan pemidanaan yang memadai karena masih tersedia berbagai mekanisme non-penal. Sementara itu, dalam perspektif hukum pidana Islam, kohabitasi tidak serta-merta dipersamakan dengan jarimah zina yang dikenai sanksi *hadd*, melainkan dapat diatur sebagai bentuk *ta'zīr* sepanjang memenuhi tujuan *maqāṣid al-syarī'ah*, kepastian hukum, proporsionalitas, dan kemaslahatan. Penelitian ini menyimpulkan bahwa meskipun tujuan pembentuk undang-undang untuk melindungi institusi perkawinan dan moralitas publik memiliki legitimasi normatif, rumusan Pasal 412 masih memerlukan penyempurnaan agar selaras dengan asas legalitas, proporsionalitas, hak konstitusional, serta tujuan hukum pidana modern dan hukum pidana Islam.

Kata Kunci: Asas Legalitas, Hukum Pidana Islam, Kohabitasi, Kriminalisasi, *Ultimum remedium*.

Introduction

The reform of Indonesia's new criminal law constitutes a major agenda within the national legal system. This process reached a significant milestone with the enactment of Law Number 1 of 2023 concerning the Criminal Code, which replaces the colonial-era Criminal Code inherited from the Dutch legal system. Within this new codification, several provisions have sparked public debate, one of which is the criminalization of cohabitation, namely the act of living together between a man and a woman outside a lawful marriage.

Cohabitation, commonly referred to in everyday language as “kumpul kebo,” has become a social phenomenon that cannot be overlooked.¹ Particularly in urban areas, this practice is not merely a lifestyle choice, but also a response to economic factors, cultural dynamics, and gender inequality. Rapid social changes driven by globalization, digitalization, and modernization have further contributed to the proliferation of this phenomenon. However, when the state, through the new Criminal Code, chooses to classify cohabitation as a criminal offense, a fundamental legal question arises: is such conduct appropriate to be criminalized within the framework of positive criminal law?

This question can be examined through Article 412 of the new Criminal Code, which stipulates that a man and a woman who live together as husband and wife without a lawful marriage may be subject to criminal sanctions upon complaint by family members.² This provision reflects the intrusion of the state into the private sphere of individuals. In modern legal systems, however, criminal law is not intended to function as a primary instrument for enforcing morality, but rather as a last resort (*ultimum remedium*), employed only when social norms and non-legal mechanisms have failed.

According to Prawira (2024), as published in the Statuta Law Journal, the existence of this provision has the potential to lead to overcriminalization, a condition in which the state excessively criminalizes conduct that does not necessarily cause concrete harm to society.³ He emphasizes that this norm opens opportunities for abuse of law and may violate the right to privacy as well as the principle of legal certainty (*lex certa*).

¹ Patrecia Melenia Yoanda Kartodindjo, “Tinjauan Kriminalisasi Perbuatan Kohabitasi Dalam Perspektif Hukum Pidana,” *Sosialita* 1, no. 1 (2022): 80–89.

² Rahul Sani Ritonga, “Tinjauan Hukum Pidana Islam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kohabitasi,” *LEGAL STANDING JURNAL ILMU HUKUM* 8, no. 3 (2024).

³ M Rizki Yudha Prawira, “Potensi Overkriminalisasi Pada Pengaturan Tindak Pidana Kohabitasi Dalam Kitab Undang-Undang Hukum Pidana: Perspektif Fair Trial,” *Jurnal Hukum Statuta* 4, no. 1 (2024): 31–49.

Similarly, Akitha and Rinwigati (2025), in *Khatulistiwa: Jurnal Pendidikan dan Sosial Humaniora*, argue that the criminalization of cohabitation should not be viewed solely as a restriction on individual liberty, but also as a legislative compromise intended to balance the protection of human rights with Indonesia's prevailing social and moral values.⁴ They contend that Article 412 reflects the State's effort to provide a legal framework capable of preventing vigilante justice (*eigenrechting*) while ensuring that the enforcement of morality-related offences remains subject to due process of law.

Furthermore, Marwandi (2023), in his study at the University of Jambi, highlights that the criminalization of cohabitation may adversely affect vulnerable groups, including women and children in non-formal relationships, as they may be deprived of legal protection when subjected to domestic violence.⁵ When the state fails to recognize such relationships, victims may encounter significant obstacles in accessing legal remedies.

From a constitutional perspective, Article 412 of the Criminal Code potentially conflicts with Articles 28G and 28I of the 1945 Constitution, which guarantee the right to personal security, privacy, and freedom from discriminatory treatment. Within the framework of a democratic rule-of-law state, criminal law must adhere to the principle of proportionality and must not infringe upon civil liberties without compelling justification.⁶ Comparative legal perspectives further demonstrate that most developed countries, including the Netherlands and Germany, do not criminalize cohabitation, as it is regarded as part of an individual's right to private life, provided that it does not harm others. Instead, these jurisdictions tend to regulate cohabitation through administrative or civil law mechanisms, offering legal protection to cohabiting partners.

In modern criminal law, the principle of legality requires that criminal offenses be formulated with clarity and precision, avoiding ambiguity and multiple interpretations. Article 412 of the Criminal Code is considered to violate this principle due to the use of vague terminology such as "living together as husband and wife," which lacks a clear legal definition and may lead to arbitrary enforcement. In addition, the principle of *ultimum remedium* dictates that criminal sanctions should only be applied when no other legal measures are available or effective. Although Article 412 constitutes a limited complaint-based offense, which theoretically aims to restrict enforcement, in practice it still creates room for selective criminalization. Complaints may be initiated by parents, children, or legal spouses, which, sociologically, may be driven by personal conflicts rather than objective legal considerations.

Philosophically, Indonesia's Criminal Code should reflect the values of Pancasila, which uphold human dignity, social justice, and human rights protection. By criminalizing cohabitation without adequately considering social context and pluralism within Indonesian society, the Criminal Code risks contradicting the spirit of progressive and just legal reform. Consequently, many scholars advocate for a constitutional review of this provision before the Constitutional Court to ensure its consistency with the principles of a democratic rule-of-law state.

Although the criminalization of cohabitation has predominantly been debated from the perspective of constitutional law and modern criminal law principles, a comprehensive

⁴ Frinza Akitha and Patricia Rinwigati, "Kriminalisasi Kohabitasi Dalam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana Sebagai Upaya Perlindungan Hak Asasi Manusia Pelaku Dari Tindakan Main Hakim Sendiri (*Eigenrechting*)," *Khatulistiwa: Jurnal Pendidikan Dan Sosial Humaniora* 5, no. 2 (2025): 206–20, <https://doi.org/10.55606/khatulistiwa.v5i2.5837>.

⁵ Vira Pratika Juniar Marwandi, 'Kebijakan Hukum Pidana Terhadap Cohabitation (Kumpul Kebo)' (UNIVERSITAS JAMBI, 2023).

⁶ Uu Nurul Huda et al., *Data Pribadi, Hak Warga, Dan Negara Hukum : Menjaga Privasi Di Tengah Ancaman Digital* (Penerbit Widina, 2024), <https://www.penerbitwidina.com/>.

assessment of this issue within the Indonesian legal system also requires consideration of religious legal values, particularly those reflected in Islamic criminal law.⁷ As a plural legal system that accommodates constitutional, customary, and religious values in the development of national law, Indonesia provides space for legal discourse that examines criminal law not only through constitutional and statutory principles but also through the normative perspectives of religious law.⁸ Consequently, the debate concerning Article 412 of the New Criminal Code should not be limited to whether the provision satisfies the principles of *lex certa* and *ultimum remedium*, but should also consider whether its criminal policy reflects the legal objectives pursued within Islamic criminal jurisprudence.

Within this broader legal discourse, Islamic criminal jurisprudence provides an important normative framework for evaluating the legitimacy of criminalizing cohabitation. From the perspective of Islamic criminal jurisprudence (*fiqh al-jināyah*), cohabitation outside a lawful marriage is not merely regarded as a private moral issue but is closely associated with the protection of lineage (*hifz al-nasl*), family integrity, and public morality as integral objectives of *maqāṣid al-sharī'ah*.⁹ Nevertheless, classical Islamic jurisprudence does not automatically equate every act of cohabitation with the offence of *zinā*, since the imposition of *hudūd* punishment requires exceptionally strict evidentiary standards.¹⁰ In circumstances where such evidentiary requirements are not fulfilled, Islamic law recognizes the possibility of imposing *ta'zīr*, allowing the legitimate authority to formulate proportionate sanctions based upon considerations of public interest (*maṣlaḥah*), prevention of harm (*dar' al-mafāṣid*), and the realization of justice.¹¹

Accordingly, this study differs from previous scholarship by integrating positive criminal law and Islamic criminal jurisprudence within a single doctrinal framework for evaluating the legitimacy of Article 412. Rather than analysing these perspectives separately, this study examines their interaction through the principles of legality (*lex certa*), *ultimum remedium*, and *maqāṣid al-sharī'ah*, thereby providing a more comprehensive normative framework for assessing morality-based criminalization in Indonesia.¹² By integrating these perspectives, this study seeks to complement existing scholarship by providing a normative assessment of Article 412 through the combined framework of positive criminal law and Islamic criminal law, thereby offering a more comprehensive basis for evaluating its legitimacy within Indonesia's legal system.

Despite these important contributions, existing scholarship has not yet systematically integrated the principles of legality (*lex certa*), *ultimum remedium*, and Islamic criminal

⁷ Muhammad Zul, Andi Mulyono, and Alice Ance Bonggoibo, "Cohabitation in the Penal Code Reform in Relation to Religious and Customary Laws," *Legalis: Journal of Law Review* 2, no. 3 (2024): 83–92, <https://doi.org/10.61978/legalis.v2i3.253>.

⁸ Brian Septiadi Daud and Awaluddin Awaluddin, "Aspek Religius Dalam Pembaharuan Hukum Pidana Melalui Politik Hukum Nasional," *Journal of Judicial Review* 23, no. 1 (2021): 27–40, <https://doi.org/10.37253/jjr.v23i1.4334>.

⁹ Sukataman et al., "Maqāṣid Al-Sharī'ah and the Prohibition of Incest in Indonesian Legislation: An Analysis of the Protection of Lineage and Public Morals," *Al-Manahij: Jurnal Kajian Hukum Islam* 19, no. 2 (2025): 205–26, <https://doi.org/10.24090/mnh.v19i2.14989>.

¹⁰ Rahmad Akbar, Abd. Haris Nasution, and Askahar Askahar, "Zina Dalam Al-Quran Analisis Hermeneutika Muhammad Syahrur," *Reslaj: Religion Education Social Laa Roiba Journal* 7, no. 12 (2025), <https://doi.org/10.47467/reslaj.v7i12.10223>.

¹¹ Muhammad Mawardi Djalaluddin et al., "The Implementation of Ta'zīr Punishment as an Educational Reinforcement in Islamic Law," *Samarah* 7, no. 1 (2023): 399–417, <https://doi.org/10.22373/sjhk.v7i1.15101>.

¹² Shulhan Iqbal Nasution, "Mono-Dualistic Theory and the Principle of Balance: A Conceptual Framework for Criminal Law Reform in Indonesia," *Jurnal Mahkamah: Kajian Ilmu Hukum Dan Hukum Islam*, 2025, 533–44, <https://doi.org/10.25217/jm.v10i2.6649>.

jurisprudence into a single doctrinal framework for evaluating the legitimacy of Article 412.¹³ Consequently, the interaction between the principle of legality, particularly the requirement of *lex certa*, the principle of *ultimum remedium* as a limitation on criminalization, and the objectives of Islamic criminal jurisprudence has not been comprehensively examined within a single analytical framework.¹⁴ This fragmentation leaves an important doctrinal gap in assessing whether the criminalization of cohabitation under Article 412 satisfies the fundamental requirements of legitimate criminalization in Indonesia's plural legal system.

Building upon this gap, the present study offers a different analytical approach by integrating positive criminal law and Islamic criminal jurisprudence within a single normative framework. Rather than merely comparing the regulation of cohabitation under the Old Criminal Code and the New Criminal Code or discussing Article 412 from a single doctrinal perspective, this study evaluates the legitimacy of criminalization through the cumulative application of the principles of legality, *ultimum remedium*, and the objectives of *maqāṣid al-sharī'ah*. Through this integrated approach, the study seeks to provide a more comprehensive doctrinal assessment of Article 412 while contributing to the broader discourse on morality-based criminalization and future criminal law reform in Indonesia.

Accordingly, this study addresses two primary issues. First, how is cohabitation regulated under the Old Criminal Code and the New Criminal Code, and does this regulation represent a significant normative shift? Second, is the criminalization of cohabitation consistent with the principles of legality, *ultimum remedium*, and Islamic criminal jurisprudence? By addressing these questions, this study aims not only to enrich academic discourse on criminal law reform but also to provide a normative framework that may serve as a reference for evaluating future legislative policies concerning morality-based offences.

Research Methods

a) Type of research

This study employs normative juridical (doctrinal) legal research, which examines legal norms as they are embodied in legislation, legal principles, judicial doctrines, and scholarly opinions. Normative legal research seeks to evaluate the coherence, consistency, and legitimacy of legal norms rather than empirical legal behaviour. Accordingly, this study analyses the criminalization of cohabitation under Article 412 of Law Number 1 of 2023 by examining its compatibility with the principles of legality, particularly *lex certa*, *ultimum remedium*, constitutional principles, and Islamic criminal jurisprudence. To achieve these objectives, the research applies statutory, conceptual, comparative, and Islamic law approaches. The statutory approach is used to examine the legal framework governing cohabitation under the Old Criminal Code, the New Criminal Code (Law Number 1 of 2023), and relevant constitutional provisions, while the conceptual and comparative approaches are employed to analyze criminal law doctrines and compare Indonesia's regulatory framework with selected foreign jurisdictions. In addition, the Islamic law approach is adopted to examine the criminalization of cohabitation from the perspective of Islamic criminal jurisprudence (*fiqh al-jināyah*), particularly the principles of *maqāṣid al-*

¹³ Prawira, "Potensi Overkriminalisasi Pada Pengaturan Tindak Pidana Kohabitasi Dalam Kitab Undang-Undang Hukum Pidana: Perspektif Fair Trial"; Ritonga, "Tinjauan Hukum Pidana Islam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kohabitasi"; Frinza Akitha and Patricia Rinwigati, "Kriminalisasi Kohabitasi Dalam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana Sebagai Upaya Perlindungan Hak Asasi Manusia Pelaku Dari Tindakan Main Hakim Sendiri (Eigenrechtling)."

¹⁴ Ritonga, "Tinjauan Hukum Pidana Islam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kohabitasi."

sharī'ah, *ta'zīr*, and the protection of lineage (*ḥifẓ al-nasl*), in order to provide a comprehensive normative evaluation of Article 412 of the New Criminal Code. Accordingly, normative legal research aims to analyze the law *in concreto* through a systematic, doctrinal, and theoretical examination of applicable legal norms within Indonesia's plural legal system.

b) Research Approaches

This research employs four complementary legal approaches. The statutory approach is used to analyse the regulation of cohabitation under the Old Criminal Code, Law Number 1 of 2023 concerning the New Criminal Code, and relevant constitutional provisions. The conceptual approach examines criminal law doctrines relating to the principles of legality, *lex certa*, *ultimum remedium*, criminalization, and proportionality. The comparative approach is employed to compare Indonesia's criminal law policy with selected foreign jurisdictions concerning consensual cohabitation outside marriage. Finally, the Islamic law approach analyses the legitimacy of criminalization through the concepts of *maqāṣid al-sharī'ah*, *ta'zīr*, and the protection of lineage (*ḥifẓ al-nasl*).

c) Source of Legal Materials

The legal materials employed in this study consist of primary, secondary, and tertiary legal materials. Primary legal materials include the Old Criminal Code, Law Number 1 of 2023 concerning the Criminal Code, the 1945 Constitution of the Republic of Indonesia, and other relevant statutory regulations. Secondary legal materials comprise books, accredited national journals, reputable international journals, judicial decisions where relevant, and scholarly opinions concerning criminal law and Islamic criminal jurisprudence. Tertiary legal materials include legal dictionaries, encyclopaedias, and other supporting reference materials.

d) Collection of Legal Material

Legal materials were collected through a systematic literature study by identifying, selecting, classifying, and analysing relevant legal sources. Priority was given to authoritative legislation, judicial decisions, legal doctrines, and recent scholarly publications discussing Article 412, criminalization theory, legality, *ultimum remedium*, constitutional law, and Islamic criminal jurisprudence.

e) Analysis of Legal Materials

The collected legal materials were analysed qualitatively using doctrinal legal analysis. The analysis employed grammatical, systematic, teleological, and comparative interpretation to evaluate the consistency of Article 412 of Law Number 1 of 2023 with the principles of legality, particularly *lex certa*, *ultimum remedium*, constitutional guarantees, and Islamic criminal jurisprudence (*fiqh al-jināyah*). Comparative analysis was further employed to assess Indonesia's criminal law policy in relation to selected foreign jurisdictions, while doctrinal analysis of Islamic criminal jurisprudence examined the relevance of *maqāṣid al-sharī'ah*, *ta'zīr*, and the protection of lineage (*ḥifẓ al-nasl*) in evaluating the legitimacy of criminalizing cohabitation. Through this integrated analytical framework, the study assesses the legitimacy, proportionality, and normative coherence of Article 412 within Indonesia's plural legal system.

Result and Discussions

Regulation of Cohabitation under the Old and New Indonesian Criminal Codes

Indonesia's criminal law has undergone a significant turning point following the enactment of Law Number 1 of 2023 concerning the Criminal Code, which replaces the colonial-era Criminal Code that had been in force for more than a century. One of the most controversial issues arising from the New Criminal Code is the criminalization of cohabitation, which has generated diverse responses from both the public and legal scholars.¹⁵ This development does not merely represent a substantive transformation in criminal law, but also reflects the evolving relationship between the state, morality, and individual rights in contemporary Indonesian society.

Under the Old Criminal Code (*Wetboek van Strafrecht voor Nederlandsch-Indië*), which came into force in 1918 pursuant to *Staatsblad* 1915 Number 732, cohabitation was not explicitly regulated. The provision most commonly associated with cohabitation was Article 284 of the Old Criminal Code, which governed the offense of adultery. However, this provision applied only where one or both parties were legally married.¹⁶ In essence, adultery referred to sexual relations involving a married person and another individual who is not their lawful spouse, rather than merely living together outside marriage.¹⁷

Since Article 284 of the Old Criminal Code regulated adultery as a complaint-based offense subject to specific conditions, many instances of cohabitation fell outside the scope of criminal law and were instead regarded as moral or social matters.¹⁸ In this regard, the Old Criminal Code did not classify cohabitation as an independent offense against morality, except where it was accompanied by other criminal acts such as sexual offenses involving minors or coercion. Thus, it can be concluded that the Old Criminal Code adopted a narrow approach to morality-based offenses and did not recognize cohabitation as a standalone criminal offense. This approach is consistent with classical criminal law principles, which only criminalize conduct that genuinely harms legally protected interests (*rechtsbelangen*), rather than mere deviations from moral norms.¹⁹

In contrast, the New Criminal Code explicitly regulates cohabitation as a criminal offense under Article 412, which provides that any person who lives together as husband and wife outside a lawful marriage may be subject to criminal sanctions upon complaint by a spouse, parent, or child of one of the parties.²⁰ This provision represents an expansion of morality-related offenses under the Old Criminal Code and introduces cohabitation as a limited complaint-based offense, meaning that prosecution may only proceed upon a report by specific parties. This model is often characterized as a compromise between the enforcement of moral norms and the protection of individual privacy rights. Nevertheless, this criminalization has been widely criticized as a form of state intrusion into individual freedom, particularly within the private sphere. In modern rule-of-law systems, it is generally accepted that criminal law

¹⁵ Dita Melati Putri and Abdul Basith Junaidy, "Analisis Yuridis Terhadap Kohabitasi Sebagai Tindak Pidana Dalam Pasal 412 KUHP Baru," *Media Hukum Indonesia (MHI)* 3, no. 4 (2025).

¹⁶ Teguh Kurniawan, Adelina Mariani Sihombing, and Aurelia Berliane, "Konstruksi Politik Hukum Pidana Terhadap Delik Perzinaan Dalam Rancangan Kitab Undang-Undang Hukum Pidana," *Binamulia Hukum* 12, no. 1 (2023): 11–24.

¹⁷ Ritonga, "Tinjauan Hukum Pidana Islam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kohabitasi."

¹⁸ SAIFUL Hadi, "Ketentuan Sanksi Terhadap Pelaku Tindak Pidana Zina Dalam KUHP Dan Qanun Hukum Jinayat" (UIN Ar-Raniry, 2022), [https://repository.ar-raniry.ac.id/id/eprint/26798/%0Ahttps://repository.ar-raniry.ac.id/id/eprint/26798/1/Saiful Hadi, 170106017, FSH, IH.pdf](https://repository.ar-raniry.ac.id/id/eprint/26798/%0Ahttps://repository.ar-raniry.ac.id/id/eprint/26798/1/Saiful%20Hadi,%20170106017,%20FSH,%20IH.pdf).

¹⁹ Suhariyono AR, "Penentuan Sanksi Pidana Dalam Suatu Undang-Undang," *Legislasi Indonesia* 6, no. 4 (2009): 615–66, <https://e-jurnal.peraturan.go.id/index.php/jli/article/view/337/221>.

²⁰ Kartodinudjo, "Tinjauan Kriminalisasi Perbuatan Kohabitasi Dalam Perpektif Hukum Pidana."

should not be employed to regulate personal moral conduct unless such conduct causes tangible harm to society or third parties.²¹

The inclusion of Article 412 in the New Criminal Code reflects a deliberate legislative policy to expand the scope of criminal law in safeguarding not only the institution of marriage but also broader social and moral values recognized within Indonesian society.²² Unlike the Old Criminal Code, which primarily criminalized adultery involving married persons, Article 412 extends criminal liability to consensual cohabitation outside a lawful marriage, thereby demonstrating a shift in the protected legal interests (*rechtsbelangen*) from marital fidelity alone toward the preservation of public morality and family values.²³

Article 412 of the New Criminal Code is also criticized for normative ambiguity, as it fails to provide a clear definition of the phrase “living together as husband and wife.” It remains unclear whether merely residing in the same household constitutes cohabitation, or whether proof of a sexual relationship is required. This ambiguity opens the door to subjective interpretation by law enforcement authorities, thereby increasing the risk of arbitrary application in practice. The absence of a statutory definition also creates uncertainty regarding the evidentiary threshold required to establish the offence, thereby reducing legal predictability and increasing the potential for inconsistent judicial interpretation.

From a normative perspective, there is a fundamental difference between the Old and New Criminal Codes in regulating cohabitation. While the Old Criminal Code was primarily repressive toward formal adultery, the New Criminal Code extends criminalization to consensual relationships outside marriage, even in the absence of any prior marital bond.²⁴ This reflects a shift from a negative (permissive) approach to a positive (interventionist) approach in criminal law.

Table 1. Normative Comparison of Cohabitation Regulation under the Old Criminal Code and the New Criminal Code

Aspect	Old Criminal Code	New Criminal Code
Legal basis	Article 284	Article 412
Protected legal interest	Marital fidelity	Marriage, family values, and public morality
Criminal act	Adultery	Cohabitation
Nature of offence	Complaint offence	Limited complaint offence
Scope of criminalization	Married persons	Unmarried cohabitation
Criminal law policy	Restrictive	Expansionist/interventionist

From the standpoint of criminal law policy, the reform embodied in Article 412 demonstrates that Indonesia's criminal law no longer adopts a purely reactive approach aimed

²¹ Dody Setyawan, “Urgensi Kriminalisasi Kohabitasi Dalam Sistem Hukum Pidana Indonesia,” *Recidive: Jurnal Hukum Pidana Dan Penanggulangan Kejahatan* 13, no. 3 (n.d.).

²² Agilber Gamaliel Lase, Rizkan Zulyadi, and Ridho Mubarak, “Perspektif Kemanfaatan Hukum Terhadap Kejahatan Kohabitasi Pasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana,” *JUNCTO: Jurnal Ilmiah Hukum* 7, no. 1 (2025): 14–22, <https://doi.org/10.31289/juncto.v7i1.6065>.

²³ Lase, Zulyadi, and Mubarak.

²⁴ Akbar Sani, “Tinjauan Yuridis Terhadap Pasal Kontroversial Tentang Perzinaan Dalam KUHP Baru Dan Dampaknya Terhadap Penegakan Hukum Pidana,” *Jurnal Fakta Hukum* 2, no. 2 (2024): 103–13, <https://doi.org/10.58819/jfh.v2i2.152>.

solely at protecting individual legal interests but increasingly incorporates preventive objectives directed toward preserving public morality and social cohesion.²⁵ Such a legislative orientation reflects the broader transformation of Indonesia's criminal law reform, which seeks to balance individual rights with collective social values. Nevertheless, this expansion of criminalization simultaneously raises important questions regarding the appropriate limits of state intervention in private life and the extent to which moral values may legitimately serve as the basis for criminal prohibition. These issues have become central themes in contemporary debates on criminal law reform, particularly concerning the risk of overcriminalization and the proportional exercise of penal power.²⁶

The permissive approach in criminal law refers to the classical view that limits criminalization to conduct that causes direct harm to others. Within the Old Criminal Code, this approach is reflected in Article 284, which restricts the offense of adultery to married individuals and operates as a complaint-based offense.²⁷ In this framework, the state refrains from intervening in private matters unless there is a clear violation of the rights of others. Conversely, the New Criminal Code demonstrates a shift toward an interventionist approach, granting the state broader authority to criminalize cohabitation and consensual sexual relations outside marriage.²⁸ This approach reflects the view that the state has a role in preserving morality and social order, even when such conduct occurs within the private sphere. This shift signifies a transition from the principle of *nullum crimen sine iniuria* (no crime without harm) to *nullum crimen sine norma* (no crime without violation of social norms). This paradigm shift has attracted considerable scholarly attention because it reflects a broader transformation in Indonesia's criminal law policy concerning the relationship between morality, individual autonomy, and the legitimate scope of criminalization.²⁹

Nasiri (2023) argues that the criminal law approach to cohabitation in the New Criminal Code is rooted in a paradigm of preserving cultural and religious values as part of national identity.³⁰ However, they also criticize this approach as inconsistent with the principles of a *rechtsstaat* and the protection of constitutional rights, as guaranteed under Article 28I of the 1945 Constitution.

In academic discourse, the criminalization of cohabitation is also viewed as having a political dimension. The state is perceived as engaging in the moralization of private life as a means of strengthening social control. Kadir (2025) describes this phenomenon as “penal populism,” referring to the use of criminal law to gain political legitimacy from conservative majority groups.³¹ Meanwhile, Marhaendra et al (2025) highlight that the New Criminal Code

²⁵ Afifah Firdaus and Indra Yugha Koswara, “Pembaharuan Hukum Pidana Di Indonesia: Analisis Tentang Pidana Pengawasan Dan Asas Keseimbangan,” *Lex Renaissance* 9, no. 1 (June 28, 2024): 1–22, <https://doi.org/10.20885/jlr.vol9.iss1.art1>.

²⁶ Zul Khaidir Kadir, “Populisme Punitif Dan Erosi Nilai-Nilai Hukum : Mengupas Kebijakan Kriminal Di Tengah Polarisasi Sosial,” *Jurnal Riset Rumpun Ilmu Sosial, Politik Dan Humaniora* 4, no. 4 (2025): 264–83, <https://doi.org/10.55606/jurrih.v4i4.5241>.

²⁷ Fuadi Isnawan, “Fenomena Swinger Dalam Konteks Hukum Pidana Indonesia,” *DIVERSI: Jurnal Hukum* 10, no. 1 (2024): 1–34.

²⁸ Muhammad Misbahul Munir, “PARTISIPASI MASYARAKAT DALAM PEMBAHASAN RANCANGAN UNDANG-UNDANG KITAB UNDANG-UNDANG HUKUM PIDANA” (Fakultas Syariah dan Hukum Universitas Islam Negeri Syarif Hidayatullah Jakarta, n.d.).

²⁹ Ica Karina et al., “The Development of Criminal Law in the Context of Human Rights Protection: Analysis and Implementation,” *Jurnal Sosial Humaniora Dan Pendidikan* 4, no. 1 (2025): 702–14, <https://doi.org/10.55606/inovasi.v4i1.4587>.

³⁰ Nasiri Nasiri, “Tinjauan Kriminologis Terhadap Delik Perzinaan Dan Gelandangan Dalam KUHP Baru: Antara Dekriminalisasi Dan Rekriminalisasi,” *The Jure: Journal of Islamic Law* 1, no. 1 (2023): 73–82.

³¹ Zul Khaidir Kadir, “Populisme Punitif Dan Erosi Nilai-Nilai Hukum : Mengupas Kebijakan Kriminal Di Tengah Polarisasi Sosial.”

not only introduces new norms but also alters the structure of criminal law principles to be more accommodating of moral values, thereby blurring the boundary between morality and legality.³²

These regulatory differences have significant implications for the enforcement of criminal law and the protection of individual rights. Ridwan (2025) notes that the application of Article 412 may disproportionately target vulnerable groups, such as young women or economically disadvantaged couples who cohabit due to limited access to formal marriage. In such cases, criminalization does not achieve justice, but instead exacerbates social vulnerability.³³ Shafira et.al (2022) further emphasize that the divergence between the Old and New Criminal Codes is not merely textual, but reflects a deeper philosophical shift in the relationship between the state and its citizens.³⁴ While the Old Criminal Code tended to avoid interference in private matters lacking public harm, the New Criminal Code adopts a more active role in regulating individual behavior based on dominant moral values.

The foregoing comparison demonstrates that the criminalization of cohabitation under Article 412 represents a significant departure from the regulatory approach adopted in the Old Criminal Code. Beyond expanding the scope of morality offences, the new provision reflects a broader transformation in Indonesia's criminal law policy concerning the extent of state intervention in private conduct. Nevertheless, whether this legislative policy satisfies the fundamental requirements of legitimate criminalization cannot be determined solely through a comparison of statutory provisions. It must also be assessed against the principles of legality and *ultimum remedium*, which are examined in the following section.

Compatibility of Article 412 of the New Criminal Code with the Principles of Legality and *Ultimum remedium*

The criminalization of cohabitation under the New Criminal Code (Law No. 1 of 2023) constitutes a controversial criminal policy among academics, legal practitioners, and civil society. Cohabitation, defined as living together between a man and a woman outside marriage, is now explicitly criminalized under Article 412, with a penalty of up to six months' imprisonment or a fine, and is categorized as a limited complaint-based offense.³⁵ This policy raises a fundamental normative question: does such criminalization align with the basic principles of criminal law, particularly the principle of legality and the principle of *ultimum remedium*?

The principle of legality represents the most fundamental doctrine in criminal law. It is enshrined in Article 1(1) of both the Old and New Criminal Codes, which provides that no act shall be punishable except by virtue of prior statutory provisions. This principle guarantees legal certainty and prevents arbitrary punishment. Arianti et.al (2026) emphasizes that the legality principle encompasses four essential elements: *nullum crimen sine lege*, *nulla poena sine lege*, *lex scripta*, and *lex certa*.³⁶ In the context of Article 412, the key issue is whether the

³² Riski Elan Marhaendra, Timothy Johan Putra, and Muhammad Alif Dzaky Mediansyah, "Perbandingan Substansi Hukum Pidana Antara KUHP Baru Dengan KUHP Lama: Dekolonisasi, Demokratisasi, Dan Pemenuhan Hak Asasi Manusia," *Jurnal Riksa Cendikia Nusantara* 1, no. 4 (2025).

³³ Syawal Ridwan, "Pernikahan Tanpa Pencatatan: Kegagalan Negara Dalam Melindungi Hak Sipil Perempuan Dan Anak," *Jurnal Ilmiah Gema Perencana* 4, no. 1 (2025): 77–96, <https://doi.org/10.61860/jigp.v4i1.196>.

³⁴ Maya Shafira et al., "Hukum Pemasarakatan Dan Penitensier," *PUSAKA MEDIA Anggota IKAPI No. 008/LPU/2020* (Pusaka media, 2022), [http://repo.iain-tulungagung.ac.id/5510/5/BAB 2.pdf](http://repo.iain-tulungagung.ac.id/5510/5/BAB%202.pdf).

³⁵ Patrecia Melenia and Yoanda Kartodinudjo, "Tinjauan Kriminalisasi Perbuatan Kohabitasi Dalam Perspektif Hukum Pidana," *Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance* 3, no. 2 (2023): 2023.

³⁶ Arianti, Renaldy Saputra, and Ika Ayudyanti, "Asas Legalitas Terhadap Penerapan Living Law Dalam UU Nomor 1 Tahun 2023 Tentang KUHP," *Judge: Jurnal Hukum* 6, no. 7 (2026): 2083–92.

phrase “living together as husband and wife outside a lawful marriage” satisfies the requirement of *lex certa*. Unfortunately, this phrase is not clearly defined within the New Criminal Code, resulting in normative ambiguity that potentially violates the principle of legal certainty.

Beyond the formal requirement that criminal offences be established by prior legislation, the principle of legality also requires that criminal norms be formulated with sufficient clarity and precision to enable individuals to reasonably foresee the legal consequences of their conduct. The requirement of *lex certa* therefore serves not merely as a technical drafting standard but as a substantive guarantee against arbitrary state power. Where statutory provisions rely upon vague or indeterminate terminology, excessive interpretative discretion is transferred to law enforcement authorities and courts, thereby undermining legal certainty and the predictability that constitute essential elements of the rule of law.³⁷

Setyawan (2024) further criticizes this ambiguity, arguing that vague terms such as “living together” open the possibility for subjective interpretation by law enforcement authorities, thereby contradicting the principle of *lex stricta*. Moreover, there is no clear normative guidance on how cohabitation should be proven in legal proceedings—whether through shared residence, social recognition, or evidence of sexual relations.³⁸

The principle of *ultimum remedium*, on the other hand, requires that criminal law be used only as a last resort, after all other legal and social mechanisms have proven inadequate. This principle is grounded in the understanding that criminal law is inherently coercive, punitive, and capable of infringing upon fundamental rights, and therefore must be applied selectively and proportionately.

Within contemporary criminal law theory, the principle of *ultimum remedium* requires legislators to demonstrate that criminal sanctions constitute the most appropriate and proportionate mechanism for addressing a particular social problem. Criminal law should only be employed where non-penal instruments, including civil regulation, administrative measures, education, or community-based interventions, are demonstrably insufficient to achieve the intended legal objectives. Consequently, the legitimacy of criminalization depends not only upon the importance of the protected legal interest but also upon the necessity and proportionality of employing penal sanctions as the primary regulatory response.³⁹

In the context of cohabitation, Wahyudi and Safitri (2023) argue that such conduct should be addressed through social, cultural, and religious mechanisms rather than through criminal sanctions.⁴⁰ The use of criminal law in this domain risks exacerbating social tensions and encroaching upon the private sphere protected by the constitution. Similarly, Kamil (2024) asserts that the principle of *ultimum remedium* must serve as a guiding standard in criminal law policy, particularly when regulating moral conduct.⁴¹ He emphasizes that criminalizing private morality without demonstrable public harm constitutes a form of overcriminalization inconsistent with modern criminal law paradigms.

³⁷ Ahmad Nur Shadiq and Muhammad Ali Alladuniah, “The Principle of Legal Certainty in the Shadow of Discretion: A Critical Review of the Criminal Investigation Stage,” *International Journal of Multidisciplinary Research and Analysis* 08, no. 05 (2025), <https://doi.org/10.47191/ijmra/v8-i05-60>.

³⁸ Setyawan, “Urgensi Kriminalisasi Kohabitasi Dalam Sistem Hukum Pidana Indonesia.”

³⁹ Prawira, “Potensi Overkriminalisasi Pada Pengaturan Tindak Pidana Kohabitasi Dalam Kitab Undang-Undang Hukum Pidana: Perspektif Fair Trial.”

⁴⁰ Eko Safitri, Nurinda Ika Wahyudi, “Kriminalisasi Perbuatan Kohabitasi Dalam Perspektif Pembaharuan Kitab Undang-Undang Hukum Pidana (Kuhp) Di Indonesia Nurinda Ika Safitri 1, Eko Wahyudi 2 Fakultas Hukum, Universitas Pembangunan Nasional ‘Veteran’ Jawa Timur,” *Ilmiah Wahana Pendidikan* 9, no. 20 (2023): 612–25.

⁴¹ Hutrin Kamil, “Politik Hukum Pidana Dalam Konstitusi Indonesia,” in *Politik Hukum Pidana*, 2024, 61.

Article 412 of the New Criminal Code can therefore be considered inconsistent with both principles. From the perspective of legality, the provision contains vague and open-ended norms that are susceptible to multiple interpretations. It fails to clarify whether “living together” encompasses sexual relations, social status, or mere co-residence, thereby creating opportunities for abuse of power and selective enforcement. From the perspective of *ultimum remedium*, there is no clear evidence that cohabitation produces concrete harm requiring penal intervention. Maulana (2023) notes that the criminalization of cohabitation does not significantly contribute to public order, and instead risks exacerbating the marginalization of socially and economically vulnerable groups.⁴²

Furthermore, Prawira (2024) identifies the potential for overcriminalization inherent in this provision.⁴³ Although the limited complaint-based nature of the offense theoretically restricts enforcement, in practice it may still function as a discriminatory tool of social control, particularly when complaints arise from personal or familial conflicts rather than objective legal considerations. Accordingly, the existence of a complaint requirement does not, in itself, eliminate the possibility of overcriminalization. Rather, it merely limits the initiation of prosecution without resolving the more fundamental question of whether the criminalization of consensual cohabitation satisfies the principles of necessity and proportionality that underlie modern criminal law.

Comparative legal analysis reveals that many jurisdictions, including the Netherlands, Germany, and most parts of the United States, do not criminalize cohabitation. Instead, they provide legal protection to cohabiting couples through civil law mechanisms such as civil partnerships or domestic cohabitation agreements.⁴⁴

The comparative experience of these jurisdictions should not be understood as requiring Indonesia to adopt identical criminal law policies. Rather, comparative legal analysis functions as an evaluative benchmark for assessing whether criminalization satisfies the principles of necessity, proportionality, and legal certainty. Several jurisdictions demonstrate that the protection of marriage and family institutions may be achieved through civil or administrative legal mechanisms without extending the reach of criminal punishment into consensual private relationships.⁴⁵ Accordingly, comparative law provides valuable guidance in determining the appropriate limits of criminalization within a democratic rule-of-law state. This comparative perspective demonstrates that the necessity of criminalization should be assessed not solely on the basis of moral considerations but also by reference to empirical social needs, legal effectiveness, and respect for constitutional rights.

Prabowo (2023) observes that global criminal law trends are moving toward the decriminalization of morality-based conduct and the recognition of such matters as part of the private sphere, except where violence or exploitation is involved.⁴⁶ In this regard, Indonesia appears to diverge from these global developments, which may have implications for its constitutional reputation and human rights protection.

⁴² Fitrah Maulana, “POLITIK HUKUM SANKSI PIDANA ATAS PERBUATAN KOHABITASI DI INDONESIA Studi Terhadap Pasal 412 KUHP Tentang Hidup Bersama Sebagai Suami Istri Di Luar Perkawinan” (Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2023).

⁴³ Prawira, “Potensi Overkriminalisasi Pada Pengaturan Tindak Pidana Kohabitasi Dalam Kitab Undang-Undang Hukum Pidana: Perspektif Fair Trial.”

⁴⁴ Grace J Anderson, “The Continued Relvance of Domestic Partnerships in the Post-Obergefell United States,” *Minnesota Journal of Law & Inequality* 41 (2023): 133, <https://doi.org/10.24926/25730037.656>.

⁴⁵ Zulham Wahyudani, Oyo S. Mukhlas, and Atang Abdul Hakim, “Aspek Pidana Dalam Hukum Keluarga Dan Penyelesaiannya Pada Lembaga Hukum Di Indonesia,” *Legalite : Jurnal Perundang Undangan Dan Hukum Pidana Islam* 8, no. 1 (2023): 75–90, <https://doi.org/10.32505/legalite.v8i1.6197>.

⁴⁶ Sigit Eko Prabowo, “Urgensi Kebijakan Kriminalisasi Terhadap Perbuatan Homoseks Dan Transgender Sebagai Upaya Pembaharuan Hukum Pidana Indonesia,” 2023.

The criminalization of cohabitation also carries significant constitutional implications. Ritonga (2024) argues that Article 412 potentially conflicts with Articles 28G and 28I of the 1945 Constitution, which guarantee the right to privacy, personal autonomy, and protection from discriminatory treatment.⁴⁷ Halim (2024) further contends that this policy reflects a conservative legal approach that seeks to merge religious norms with legal norms without adequately considering societal pluralism.⁴⁸ From a constitutional perspective, the legitimacy of criminal law ultimately depends upon its ability to reconcile the protection of public interests with the preservation of individual constitutional freedoms. Accordingly, criminalization that disproportionately interferes with private autonomy requires particularly strong normative justification. In the long term, such an approach may intensify tensions between the state and progressive social groups and undermine public trust in the criminal justice system.

Based on the normative analysis of the principles of legality and *ultimum remedium*, it can be concluded that the criminalization of cohabitation under the New Criminal Code is not fully consistent with the fundamental principles of modern criminal law. The ambiguity of the provision, the lack of penal necessity, and the potential for discrimination demonstrate both juridical and normative weaknesses.

Accordingly, the foregoing analysis demonstrates that the criminalization of cohabitation under Article 412 cannot be justified solely by reference to moral considerations or legislative policy. Its legitimacy must ultimately be assessed against the fundamental principles governing the exercise of criminal law, particularly legal certainty, proportionality, and the subsidiary character of penal sanctions. While the objective of protecting marriage and public morality constitutes a legitimate legislative concern, the formulation of criminal offences must remain consistent with the principles of legality and *ultimum remedium* in order to prevent excessive criminalization and arbitrary law enforcement. These normative considerations also provide an important basis for examining whether the criminalization of cohabitation is compatible with broader legal values recognized within Indonesia's plural legal system, including the perspective of Islamic criminal jurisprudence, which is discussed in the following section.

It should also be acknowledged that the normative concerns surrounding Article 412 remain largely prospective, as the provision has not yet generated a substantial body of judicial decisions capable of clarifying its constituent elements through case law. Consequently, important concepts, particularly the phrase "living together as husband and wife," have not yet received authoritative judicial interpretation, leaving considerable uncertainty regarding the evidentiary standards required for criminal liability. This transitional situation places particular responsibility upon judges to interpret Article 412 consistently with the principles of legality, especially the requirement of *lex certa*, while ensuring that criminal law continues to function as an instrument of *ultimum remedium*. Future judicial practice will therefore play a decisive role in determining whether the application of Article 412 preserves legal certainty, respects constitutional rights, and prevents arbitrary or disproportionate criminalization.

In this respect, the future legitimacy of Article 412 will depend not only upon its legislative formulation but also upon the consistency of judicial interpretation in reconciling morality-based criminalization with the constitutional principles of legal certainty, proportionality, and the protection of fundamental rights. These implementation-oriented considerations further reinforce the need to evaluate Article 412 not only through the

⁴⁷ Ritonga, "Tinjauan Hukum Pidana Islam Pasal 412 Undang-Undang Nomor 1 Tahun 2023 Tentang Kohabitasi."

⁴⁸ Abdul Halim, "POLITIK HUKUM PIDANA DI INDONESIA: KONTESTASI NEGARA DAN SYARIAH DALAM PROSES LEGISLASI UNDANG-UNDANG NOMOR 1 TAHUN 2023 TENTANG KITAB UNDANG-UNDANG HUKUM PIDANA Diajukan," 2024, 1–126.

framework of positive criminal law but also through broader normative values that influence Indonesia's legal system, including Islamic criminal jurisprudence.

Criminalization of Cohabitation from the Perspective of Islamic Criminal Jurisprudence

The criminalization of cohabitation under Article 412 of the New Criminal Code may also be examined through the perspective of Islamic criminal jurisprudence (*fiqh al-jināyah*), which constitutes one of the normative traditions influencing the development of legal thought in Indonesia. Unlike positive criminal law, which primarily emphasizes statutory formulation and constitutional principles, Islamic criminal jurisprudence evaluates criminalization based on the objectives of the Sharī'ah (*maqāṣid al-sharī'ah*), the protection of fundamental human interests, and the proportionality of punishment. Within this framework, the legitimacy of criminal sanctions is assessed not merely by the existence of a legal prohibition but also by whether the prohibition serves the realization of *maṣlaḥah* (public interest) and the prevention of *mafsadah* (harm).⁴⁹ Accordingly, an evaluation of Article 412 from the perspective of Islamic criminal jurisprudence is intended neither to replace the positive criminal law analysis nor to subordinate one legal system to another, but rather to provide a complementary normative framework for assessing whether the criminalization of cohabitation reflects the broader objectives of justice, legal certainty, and social welfare.

From the perspective of *fiqh al-jināyah*, cohabitation is not recognized as an independent criminal offence under classical Islamic criminal law. Rather, legal liability depends upon whether the conduct fulfils the constituent elements (*arkān*) of *zinā*. Mere co-residence between an unmarried man and woman does not automatically constitute *zinā* unless it is established that unlawful sexual intercourse has occurred. Moreover, the offence of *zinā* is subject to exceptionally stringent evidentiary requirements, requiring either a voluntary confession (*iqrār*) or the testimony of four competent witnesses who directly observed the act of penetration.⁵⁰ These rigorous standards demonstrate that Islamic criminal jurisprudence distinguishes between moral suspicion and criminal liability, ensuring that criminal punishment is imposed only where the prohibited conduct has been established with a very high degree of certainty. Consequently, the mere existence of cohabitation cannot, by itself, justify the imposition of criminal sanctions under classical Islamic criminal law.

Although cohabitation does not necessarily constitute the *ḥadd* offence of *zinā*, Islamic criminal jurisprudence recognizes that certain forms of conduct detrimental to public morality and social order may be regulated through *ta'zīr*. Unlike *ḥudūd* offences, which are expressly determined by the Qur'an and Sunnah and require strict evidentiary standards, *ta'zīr* offences fall within the discretionary authority (*ulū al-amr*) of the state to formulate appropriate sanctions in pursuit of the public interest (*maṣlaḥah*).⁵¹ Accordingly, the criminalization of cohabitation may be understood as a form of *ta'zīr*-based criminal policy, provided that its formulation, enforcement, and sanctions satisfy the principles of justice, proportionality, and legal certainty. This demonstrates that Islamic criminal jurisprudence does not categorically reject state intervention in regulating conduct associated with immorality, but instead requires

⁴⁹ Abdul Karim Ibrahim et al., "Child Maintenance Assessment in Shariah Courts: Integrating Maslahah and Mafsadah for Fairer Outcomes," *International Journal of Research and Innovation in Social Science (IJRISS)* 10, no. 4 (2026).

⁵⁰ Hassan M. Ahmad, "Re-Assessing the Evidentiary Threshold for *Zinā* in Islamic Criminal Law: A de Facto Exemption Proposal," *Muslim World Journal of Human Rights*, Muslim World Journal of Human Rights, 18, no. 1 (2021): 103–32, <https://doi.org/10.1515/mwjhr-2020-0021>.

⁵¹ Danial, "Criminalization in Islamic Penal Code: A Study of Principles, Criminalization Methods, and Declining Variations," *Jurnal Ilmiah Peuradeun* 11, no. 3 (2023): 1005–26, <https://doi.org/10.26811/peuradeun.v11i3.1058>.

that such intervention remain consistent with the objectives of Sharī'ah and the broader protection of society.

Viewed through the framework of *maqāṣid al-sharī'ah*, the objective of criminalizing cohabitation under Article 412 may be regarded as consistent with the protection of lineage (*hifẓ al-nasl*), family integrity, and public morality, all of which constitute recognized objectives of Islamic law. Nevertheless, the achievement of these objectives depends not solely upon the existence of criminal sanctions but also upon whether the legal formulation effectively realizes *maṣlahah* while avoiding unnecessary harm (*mafsadah*).⁵² A criminal provision that lacks sufficient legal certainty or permits inconsistent enforcement may ultimately undermine these objectives by creating legal uncertainty, selective prosecution, and social injustice. Accordingly, while the legislative objective underlying Article 412 may be compatible with the values of *maqāṣid al-sharī'ah*, its normative formulation and practical implementation remain subject to critical evaluation in light of the principles of justice, proportionality, and legal certainty that equally underpin Islamic criminal jurisprudence.

The foregoing analysis demonstrates that Islamic criminal jurisprudence neither categorically rejects nor unconditionally endorses the criminalization of cohabitation. Rather, it provides a normative framework through which such criminalization may be evaluated according to the objectives of Sharī'ah, the principles of justice, and the discretionary authority of the state in formulating *ta'zīr* offences. From this perspective, the legislative objective of protecting marriage, family, and public morality under Article 412 may be regarded as legitimate. Nevertheless, the legitimacy of that objective ultimately depends upon whether the criminal provision is formulated and enforced in a manner that ensures legal certainty, proportionality, fairness, and the realization of *maṣlahah* without generating greater social harm (*mafsadah*).⁵³ Accordingly, the integration of positive criminal law and Islamic criminal jurisprudence does not produce conflicting conclusions but instead supports a balanced approach in which the protection of moral values remains compatible with the fundamental requirements of justice and the rule of law.

Although Article 412 of Law Number 1 of 2023 has not yet generated substantial judicial interpretation due to the transitional period before its full implementation, its future application presents important doctrinal challenges. The absence of judicial precedents means that the interpretation of key elements, particularly the phrase "living together as husband and wife," remains uncertain. This condition places significant responsibility on judges to interpret the provision consistently with the principles of legality, especially *lex certa*, while ensuring that criminal law remains a measure of last resort (*ultimum remedium*). Consequently, future judicial practice will play a crucial role in determining whether Article 412 can be applied in a manner that preserves legal certainty, protects constitutional rights, and avoids arbitrary or excessively broad criminalization.

Conclusion

This study demonstrates that the regulation of cohabitation under Indonesia's New Criminal Code represents a significant departure from the approach adopted in the Old Criminal Code. Whereas the former Criminal Code limited criminal liability to adultery

⁵² Adi Syahputra Sirait et al., "Assessing Criminal Penalties in Marriage Law: A Comparative Study of Policy Frameworks within Indonesian and Malaysian Legislation," *Al-Manahij: Jurnal Kajian Hukum Islam* 18, no. 2 (2024): 255–70, <https://doi.org/10.24090/mnh.v18i2.11208>.

⁵³ Moh Safik and Mu'tashim Billah, "Justice Beyond Legal Formalism: A Maslahah-Oriented Reading of Criminal Law Enforcement in Indonesia through Rawls and Hamka," *Rule of Law Studies Journal* 1, no. 4 (2025): 204–12, <https://doi.org/10.64780/rolsj.v1i4.167>.

involving married persons, Article 412 of Law Number 1 of 2023 extends criminalization to consensual cohabitation outside marriage as a limited complaint-based offence. From the perspective of positive criminal law, however, the formulation of Article 412 raises important normative concerns regarding its compatibility with the principles of legality and *ultimum remedium*. The absence of a precise statutory definition of the phrase “living together as husband and wife” creates uncertainty in legal interpretation, while the extension of criminal sanctions into consensual private relationships raises questions concerning the necessity and proportionality of penal intervention.

From the perspective of Islamic criminal jurisprudence, cohabitation is not automatically equated with the *hadd* offence of *zinā*, but may fall within the discretionary sphere of *ta'zīr*, provided that criminalization serves the objectives of *maqāṣid al-sharī'ah* and promotes *maṣlaḥah* through just, proportionate, and legally certain regulation. Accordingly, this study argues that the legitimacy of criminalizing cohabitation should not be assessed solely by reference to moral values or positive legal norms independently. Rather, both positive criminal law and Islamic criminal jurisprudence converge in requiring that criminalization be supported by clear legal formulation, proportionality, legal certainty, and the protection of the public interest. This integrated normative approach constitutes the principal contribution of the study by offering a more comprehensive framework for evaluating criminal law reform concerning morality-based offences within Indonesia's plural legal system.

Future legislative reform should provide a clearer statutory formulation of Article 412, particularly by defining the constituent elements of the phrase “living together as husband and wife,” in order to satisfy the requirement of *lex certa* and minimise the risk of arbitrary or inconsistent interpretation. At the same time, judicial interpretation should apply Article 412 consistently with the principle of *ultimum remedium*, ensuring that criminal sanctions remain a measure of last resort and are imposed only where the statutory requirements are clearly established. Such an approach would better reconcile the protection of marriage and public morality with constitutional guarantees of legal certainty, proportionality, and individual rights, while strengthening the legitimacy of Indonesia's criminal law reform within both positive criminal law and Islamic criminal jurisprudence.

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