Abstract

Living together as unmarried partners, commonly known as cohabitation or “kumpul kebo” in Indonesia, was not prohibited under the old Indonesian Criminal Code (KUHP). However, in light of Indonesia’s cultural emphasis on decency, cohabitation has recently been criminalized. According to Article 412 paragraph (1) of the New KUHP, cohabitation is now considered a criminal offense, punishable by a maximum fine of thirty million rupiahs and imprisonment for up to six months. This legal development sparked significant reactions among university students, who voiced their concerns during protests against the New KUHP. Debates continue regarding the legality of cohabitation, prompting this study to investigate the percep-
tion among students in Jambi Province regarding its criminal status. The findings indicate that 55.3% of the 340 respondents from local universities believe cohabitation should not be illegal. They argue that ethical considerations are more pertinent, suggesting that societal and moral sanctions against offenders suffice. Those who contest such views may resort to customary law for civil proceedings against offenders they deem to have transgressed societal norms.

**Keywords:** Criminalization; Cohabitation; Kumpul Kebo; Students’ Perception; Indonesian Criminal Code (KUHP), Law Reform.

### A. Introduction

“Kumpul kebo”, which is referred to as cohabitation, simply means to live together as a husband and wife without being married. In Indonesia, this act was considered immoral, yet it was not a crime according to the old Indonesian Criminal Code. However, after Law Number 1 of 2023 concerning the Indonesian Criminal Code (the New KUHP/Kitab Undang-Undang Hukum Pidana) was issued, cohabitation was prohibited under Article 412 of the New KUHP. The Article stipulates that cohabitation is a crime and is punishable by jail. A main theme that came up during student demonstrations against the New Criminal Code was that the article has a contentious phrasing. As the prohibition is perceived to be invading someone’s private space, it is seen as exceeding the bounds of criminal policy. This controversy is the subject of this article’s examination.

**Article 412 of the New KUHP:**

(1) Any Person who lives together as husband and wife outside of marriage.

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1 The phrase “kumpul kebo” used to be koempoel gebouw. The word “gebouw” is originally Dutch language which means a building or a house. Therefore, koempoel gebouw means to live together under the same house without a wedlock. However, since the pronunciation of gebouw is quite similar to kebo (bull), such the word has transformed into more pejorative both in term and the perception of it, describing an immoral action and animal sexual behavior. See, Trias Kuncahyono, “Politik “Kumpul Kebo”,” https://www.kompas.id/baca/opini/2019/06/14/politik-kumpul-kebo, accessed in 14 July 2024.

riage shall be sentenced with imprisonment for a maximum of 6 (six) Months or a maximum criminal fine of category II.

(2) The Crime as referred to in paragraph (1) shall not be prosecuted except due to complaints from:

a. the husband or wife, for persons bound by marriage; or

b. parents or their children, for persons who are not bound by marriage.

(3) Toward complaint as referred to in paragraph (2), the provisions of Article 25, Article 26, and Article 30 shall not apply.

(4) Complaints may be withdrawn as long as the examination in court hearing has not yet started.

According to the article’s formulation, cohabitation is a criminal act that carries a possible six-month jail sentence or a maximum category II fine. Under the old KUHP, living together was not illegal. Despite the fact that this act was common and that women were the victims, there was not a single provision in KUHP that governs cohabitation. There was a court case in which cohabitation was penalized by a judge using the Criminal code, but the case was later dropped by the Supreme Court. It was the Medan district Judge, Bismar Siregar, who decided to sentence a male defendant who cohabitated to three years in prison. The defendant’s female partner reported him for breaking the promise to marry her after cohabitating for years. As there was no reference to cohabitation as a criminal act in the KUHP, Bismar instead employed Article 378 of the KUPH regarding fraud as the legal basis for his decision. Bismar argued that the male defendant could be penalized for fraud as he deceived his female partner by breaking his promise to marry her, a promise that he made in exchange for using her “goods” for his sexual pleasure. However, the Supreme Court overturned this Medan District Court’s 1983 decision, stressing that Judge Bismar’s analogy of the female genitalia as “goods” went too far. According to the court, judge Bismar’s arbitrary interpretation of Article 378 has exceeded the limit

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of legal authority and could pose a serious threat to legal certainty.

The New KUHP classifies cohabitation as a criminal act committed against decency. The embarrassment that comes with having a sexual urge is called decency. This concept of “decency” is inextricably linked to laws, conventions, ethics, and values in society. Reference to decency illustrates the existence of a value system in a community regarding right and wrong deeds. A society’s morality emerged as societal assessment of various social behaviors based on its beliefs and values. The outcome of such assessment is then expressed explicitly in the form of legal regulations. Written regulations express the qualities of the law in a clear and firm manner. Community organizations serve as regulators and restorers of relevant ethical principles out of different standards of ethical behavior owned by individuals. Agreements or the customs of the community itself dictate the type of penalties for transgressing certain moral principles; these penalties typically take the form of excommunication, exclusion from paying fines, and so forth. As Tarigan put it “The Article on adultery itself has existed since the Dutch rule in Indonesia, but cohabitation is a new Article that was included to regulate the actions of people who increasingly violate morality”. Furthermore Bakhtiar Ahmadi emphasized that “Fornication and cohabitation is an act of private but has social risk, that is the freedom to have sex can be bad for the development of society and public order, so it must be intervened by the state through criminal law”. In contrast to previous arguments, Nugraha maintains that “criminalization of sex outside marriage and cohabitation constitutes a setback for the maintenance of the privacy right, which covers consensual sexual ac-

tivity between adults in private”.

Whether an act is considered immoral or not will change depending on the circumstances. Furthermore, the social evolution that is happening at the turn of the century will certainly affect the evolution of the societal value system. Therefore, it is not unexpected that a law from antiquity (the age in which the KUHP was drafted, circa 1900) would evolve as the moral standards defining such law has changed at this point of time.

This study explores students’ perspectives on the criminalization of cohabitation. It is prompted by the significant dissent from student groups, who represent the largest demographic opposing the inclusion of cohabitation as a criminal offense under the New KUHP. By examining the extent of students’ objections to cohabitation as defined in Article 412 paragraphs (1), (2), (3), and (4) of the New KUHP, the research delves into the underlying reasons for these perceptions. Furthermore, it investigates potential avenues for reforming criminal law pertaining to cohabitation in the future.

B. Research Methods

Judicial-empirical research (also known as empirical research) was used as the main method of this study. Empirical legal studies look at how the law is used in the community. It is a legal research technique employed to see the law in real settings. Students from three universities in Jambi Province, comprising Universitas Jambi, Universitas Batang Hari, and Islamic State University (UIN) of Sultan Thaha Saifudin Jambi were the subjects of the study. A total of 368 respondents have been surveyed.

C. The Concept of Moral Crime

Morality is a set of values that allow individuals to coexist peacefully

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in groups. It is reference by which the “correct” and “acceptable” behaviors are measured in certain cultural contexts. Serving society often means putting aside one’s own short-term interests for the sake of morality.\(^9\) Morality is frame of reference by which actions are judged as legal or illegal. Nevertheless, it is unlikely that concept of morality can be universally applied to every social context.

Everyone’s perception of morality in a given social setting is primarily connected to decency.\(^10\) Religious values usually serve as main social reference for defining what is decent and what is not. Community norms are built upon these values. The norm is viewed as the fundamental value system that guides the application of law enforcement in the society. Because the form and shape of the values are God-given, the value that influences an individual’s attitude or action is abstract. Its abstract nature does not nevertheless preclude it from being comprehended in a clear or ambiguous manner. If it the values are crystal clear, and the society follow up on the values by taking positive actions, then those values contribute the well-being of the society. What happens if a society, a nation, a neighborhood, or a group have different value systems? If this happens, then it means that the nation is still evolving and its value system is adapting to various changes from times to times, allowing re-evaluation of moral standards that may also change over the time. According to Sahetapy and Marjono Reksodiputro, because social, political and economic development that happens so fast, so does the community perception of the legal significance of a moral standard in a given society.\(^11\) The term “moral crime” typically describes deeds that, while not explicitly prohibited by the law, are viewed as unethical or immoral by society. These behaviors transgress a community’s or society’s moral or ethical standards, and their repercussions may be more social or cultural than legal. Moral offenses frequently have an effect on in-

\(^9\) Srishti Sinha, a student at the Institute of Law, Nirma University, Ahmedabad. https://blog.ipleaders.in/concept-crime-morality-criminal-law/


Integrity, cohesiveness, trust, relationships, reputations, and the moral foundation of a community and society.

The connection between law and morality is that both are meant to regulate social behavior and enable peaceful coexistence. Both are predicated on the notion that each person ought to be granted autonomy and be treated with dignity by others. The link between morality and the law has been a topic of intense dispute since the rebirth of jurisprudence as a scientific study. It is possible that this debate will never come to a resolution. It is a widely held belief that the law exists to protect the conditions that allow men to live moral lives, to promote morality, and to enable people to lead sober and productive lives. “Law represents the formal rules and regulations that have been established by a recognised authority, whereas morality is the informal value system that exists within society. These two concepts are intertwined, as they set the standards for what is considered right and wrong, and they often influence each other in various ways”.12

According to Salman Luthan “From a historical perspective, morality and the law were originally two parts of God’s law, or divine law, rather than two distinct entities. The notions of Jewish law, Canon law, and Islamic law all demonstrate this. The integration of morality and the law as tools for governing communal life is particularly evident in traditional societies, such as impoverished tribes, that have not been significantly impacted by modernization”.13

Legal norms must be able to formulate more concretely the norms’ and values embedded in the society. For example, if the norms of decency in society regulate that “a man and a woman may only have sexual intercourse in a marriage,” then these legal norms must be able to describe more concretely the prohibited actions and the sanctions that can be imposed for violations of these moral norms. The legal norms are expected to be able to regulate

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12 https://www.studysmarter.co.uk/explanations/law/uk-legal-system/law-and-morality/
both social and external aspects of human beings.\(^{14}\) That is consistent with the legal maxim “ubi societas ubi ius,” which means “where there is a community, there is law.” What is required of the law is its ability to ensure public order and certainty. According to the New KUHP, cohabitation carries a maximum category II fine and a maximum six-month jail sentence. According to paragraph (2), this act is a complaint offense, which means that it cannot be prosecuted if the persons who have been wronged, or other interested parties, do not file complaints. The spouse, parents, children, or any family members of the offender may file a complaint.

The formulation of article 412 of the New KUHP, of course, has taken the moral values that live in society into consideration. It begins with the presumption that living together without legal marriage bonds is a morally repugnant act in Indonesian society. The moral principles that permeate society are what constitute morality. A set of standards is required as a life value metric in society to be used to gauge the moral ideals inside a community. These standards may be conventional or religious in nature. The standard of morality that each member of a certain social group share is connected to decency. Our guiding principles are referred to as “morality.” Without adherence to these moral ideals, societies will not be able to flourish and thrive. Each person abides by some kind of moral code to maintain justice and peace within the group, to help us grow as individuals, to build stronger communities, and to maintain our good standing with the force that created us all.

D. Cohabitation in the Perspective of Criminal Law Norms

Students responded rather strongly to the Article that stipulates the illegality of this cohabitation. The media has focused more on the student protest against the prohibition of having sex without marriage and their demands regarding cohabitation.\(^{15}\) Ninety-six percent

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of the 340 respondents to a questionnaire from the three major institutions in the province of Jambi—Universitas Jambi, UIN Sultan Thaha Saifuddin Jambi, and Universitas Batanghari—was familiar with or at least had heard of the term “cohabitation.” At least 95.2% of respondents who opposed cohabitation agreed that it is a behavior that violates social norms and should be penalized; however, they believe that the penalties for transgressing these norms should be social or customary. This research showed that the respondents agreed that a cohabitation is an act that is contrary to the values in society. It is not surprising, considering that Indonesians come from various ethnic and religious backgrounds and share the same good values.

Every human being is always social being in progress; they constantly adapts to the surrounding values. As such, to live in harmony, they must submit and conform to the prevalent social norms by which their action is constantly evaluated by others. Such norm conformity is the precondition for proper and harmonious human interaction and for growing as a member of the community in which they live. Furthermore, cohabitation is accepted as an act or behavior that is against societal norms and values, and those who commit it should be punished on behalf of the interest of maintaining public order and upholding prevailing norms and values. However, most respondents think the penalties that are imposed don’t always have to be criminal ones. Stated differently, cohabitation need not to be addressed by the criminal law. The study findings and the exploration of the debate on cohabitation lead to the conclusion that it is an act that goes against societal norms. The consideration for establishing whether cohabitation is a criminal case should be based on this social normative framework.

The findings also revealed that most respondents agree that the customary punishments or social sanctions approach was somewhat more acceptable than the criminal punishment approach for cohabitation. At least 55.3% respondents said that sanctions associated with cohabitation should be social or customary in nature, while 44.7% respondents maintain that the suitable sanctions for such act should be criminal or legal ones. The discrepancy is intriguing given the fact
that majority opted for customary or social sanctions despite the fact that all respondents agree that cohabitation goes against societal norms and values.

The legal system that exists and evolves in society is known as customary law. Customary law is the tangible legal sentiments embodied in society via communal growth and existence. Respondents believe that using customary law to deal with cohabitation is more effective because, by its very nature, customary law is ever evolving, much like life itself. Customary punishments are an essential component of traditional legal systems that date back thousands of years in many different countries. Based on regional culture, customs, and values that have been passed down from generation to generation, the customary legal system has been used to govern communal behavior.  

Furthermore, customary punishments can take many different forms, from punishing measures like social exclusion or expulsion from society to restorative measures like peace payments or restitution. Alternatives to formal legal systems of the state are frequently considered, including customary punishments. This is particularly true in societies where the legitimacy of customary law is still entrenched.

According to Bagir Manan, Customary law communities are legal communities (rechtsgemeenschap) because the law is based on customs such as villages, clans, Nagari, Gampong, meusanah, huta, negorij, and others. Bagir Manan further adds that the legal community is a community unit that is territorial in nature or also known as genealogical. It is the community that has its own wealth and citizens. Its citizens can be distinguished from other legal community members in the sense that the community can also act internally and externally as a legal entity that is independent and has the ability to govern themselves. Unlike legal crimes, moral crimes are not prosecuted

by the state. Instead, they are judged by societal or community standards. The consequences can include social ostracism, shame, guilt, and damage to one's reputation.

Cohabitation for most religious society is an act of adultery (Zina). Adultery is an act of sexual intercourse between a man and a woman who are not married. In the current KUHP, this act of adultery has been regulated as a criminal offense as stated in Article 284 of the KUHP. Article 284 paragraph (1) letter b of the Criminal Code states that “any married woman who commits adultery” will be imprisoned for maximum nine months, “knowing that Article 27 Civil Code applies to her.” While paragraph (2) states that “this criminal act cannot be prosecuted if it is not based on a complaint from the aggrieved party, namely the husband or wife of the parties who commit adultery.”

As defined by the KUHP, adultery is an act of sexual intercourse outside legal marriage that can be criminally prosecuted if one or both people who involve in the relationship have married and their actions have been complained by certain aggrieved parties. It means that the purpose of this Article is to protect the interests of the aggrieved partner because the adultery concept in the KUHP is a legal rule that aims at preventing the violation of the norms of the marriage institution. Adultery is consensual intercourse between a man or woman who is married with a woman or a man who is not his wife or husband.

This definition of adultery cannot therefore be extended to include cohabitation. In effect, there has been a proposal to extend the scope of this definition in the Constitutional Court. The proposed extension of the definition concerns with a detailed description of the meaning of adultery in the KUHP. From a religious perspective, sexual freedom is a personal and community interest. Therefore, this sexual relationship needs to be strictly regulated in the applicable positive law. Irregular and non-marital sexual relationships are considered as acts that will threaten the order of the community’s social life and even degrade human dignity. In addition, the prohibition of committing adultery is intended to prevent social chaos in the child’s
lineage and the spread of various sexually transmitted diseases.\(^{18}\)

The definition of adultery, while includes acts of sexual intercourse out of the legal institution of marriage, can only be applied to those who have married. Adultery is only assumed as a disloyalty to the institution of marriage and its prohibition provides protection for the aggrieved partner. Furthermore, it is treated as a complaint offense and is only punishable with imprisonment for a maximum of one month. Such definition, according to the Indonesian Ulama Council (MUI), is too narrow and no longer relevant to our times. For MUI, the definition of adultery must be broadened to include any non-marital sexual intercourse in general. The expansion of the meaning of adultery is essential considering that adultery is an act that is carried out by both married and not married couple, and an act that damages the nation’s moral values.\(^{19}\)

**E. Cohabitation in the Framework of Criminal Law Reform**

As society norms and values shift throughout time, so does the understanding of what moral crimes are. For example, some actions that were viewed as immoral before, like living together prior to marriage, might now become more acceptable. Ethical philosophies and religious teachings have an impact on many moral rules. The definition of a moral offense might vary depending on one’s religious or philosophical background. Recognizing the difference between legal and moral duties as well as the ways in which society, culture, and religion influence our sense of right and wrong are necessary to comprehend moral offenses.

Muladi went on to say that there are at least five indicators that should be considered when reforming the criminal code. These indicators include the following. First, although criminal law reform is carried out for sociological, political, and practical reasons, the reform itself must be prepared consciously within the framework of Pancasila as the national ideology. Second, by recognizing that

\(^{18}\) https://news.uad.ac.id/bahaya-zina-dan-hikmah-dilarangnya-zina/

the law permeates society as a source of both positive and negative law, criminal law reform should not exclude elements pertaining to the human situation, the natural world, and Indonesian traditions. Third, universal law tends to emerge in a very complex civilized society. Thus, for the criminal law reform to succeed in a very complex culture and society, it must be embraced and modified in accordance with the social, economic, and cultural contexts in which it is introduced. Fourth, criminal law reform needs to take preventative measures into account, given the severe nature of criminal justice and the prevention as being one of the major aims of punishment. Fifth, to improve the social efficacy of criminal law reform, it must constantly adapt to advances in science and technology. 20

Barda Nawawi Arief, in the meantime, said that a policy and value-based approach might be used to view criminal law reform. He argues that “When it comes to a policy, criminal law reform can be understood as:

1. an attempt to address social issues to accomplish national objectives as part of social policy.
2. as a component of criminal policy whose purpose is to safeguard the society, particularly in terms of crime prevention.
3. as a component of law enforcement policy whose aim is to modernize the text of the law and to make law enforcement more efficient”. 21

When considering the value approach, criminal law reform takes on a more expansive connotation. Using a value-based approach to criminal law reform entails a deeper examination and assessment for reorienting and reevaluating societal values, including socio-political, socio-philosophical, and socio-cultural values. These principles will then serve as the cornerstone for legal reform and as the basis for developing criminal law contents and policies that better reflect the desired criminal law outcome.

As discussed before, cohabitation can be understood in a variety of ways, one of which is as an act that defies societal norms and the principles of the local customary law. There is also an argument for broadening the definition of adultery as a crime, encompassing not only individuals who have married and engaged in sexual activity outside of their legal partnership but also cohabitation or non-marital sexual activity in general. The definition of cohabitation as a criminal offense in the new KUHP provides a tangible example of the criminal law approach towards it. The extension of this definition is a significant step toward reforming the penal code to cohabitation.

Cohabitation is regulated in a separate article, namely in Article 412 of the New KUHP. Paragraph (1) of Article 412 specifies that “any person who lives together as husband and wife outside of marriage shall be punished with a maximum imprisonment of 6 (six) months or a maximum fine of category II.” According to Article 412, paragraph (1), committing an offense is considered a formal offense on grounds of the fact that the prohibited action is done notwithstanding the consequences of the action. This implies that the offender can be punished directly on the basis of the fact that he or she cohabitated, without having to wait for the repercussions of their actions. In this article, “person” refers to a man and a woman who are either married or not married at all. This is not the same as the adultery offense, which was covered under the previous Criminal Code and necessitated a marriage bond for one of or both offenders.

The provisions in the Article 411(2) and 412(2) contain similar features. Both Articles stress that having sex outside of marriage and cohabitation is considered an Antragsdelikt (complaint crime). This means that nobody can start the prosecution without an official complaint from one of the following: a) the spouse or partner for married individuals, or b) the child (who must be at least 16 years old, per the explanatory note) for single individuals. Additionally, before the start of the trial, this official complaint may be withdrawn at any time. Because of this, the criminalization of extramarital and cohabitational sex has theoretically become primarily “symbolic,” meaning that it is exceedingly impossible to implement without the support of first-
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This article highlights the fact that cohabitation is a crime that requires a complaint as a precondition for further investigation (Complaint Crime). This means that an offense cannot be investigated unless someone who has been harmed or feels betrayed reports it. In other words, the offense has its limitations and cannot go beyond the parameters of complaining procedures that are limited to legitimate parties such as parents, kids, spouse, and wife. However, if these interested parties disagree to file a complaint, they can also drop the criminal charges ahead of the trial. The existence of complaint as a requirement for prosecution of cohabitation casts a doubt over the illegality of cohabitation. This is because complaint mechanism opens possibilities that cohabitation may not become criminal case if no parties complain or report the case. It also brings other drawback: if no immediate families report cohabitation case, other actors who are not included in parties who can convey complaint may insist to criminalize the accused on ground of public order or religion. Thus, it may lead to a number of issues at the law enforcement level.

The parents of one of the parties who commits cohabitation and adultery, or the parents of both parties, may file this complaint; if the complaint is filed by a child, it needs only be filed by the child of one of the parties, or by the child of both parties. Moreover, if the village chief lodges the complaint, he or she thus becomes the aggrieved party with the right to file a complaint over the illegal act of cohabitation. Essentially, pleading a complaint is an individual’s right and is a precondition for investigating the violation committed by third parties. A peace agreement and amicable resolution are possible for this complaint offense. Accordingly, only those who are disadvantaged and interested may file a criminal complaint if they agree to handle the case that way. Unlike reports, not everyone can make complaints. Nevertheless, certain circumstances allow for representation for complaints of the victim or the aggrieved parties who are not being adult or under guardianship. This representation is better known as a criminal mediation law. According to William Bakker, “A mutually beneficial agreement between the offender and the victim,
including the agreement to compensate the victim for damages, is the goal of criminal mediation law. A mediator or representatives of the government, law enforcement, non-governmental organizations, and even local leaders could mediate this agreement. Statutory laws define mediation as an institutionalized process of deliberation that often occurs in the field of general law and is utilized mostly for the resolution of civil disputes”.  

In such a condition, it can be represented by the parent or guardian as regulated in Article 72 of the KUHP:

1. As long as the person against whom a crime has been committed, the crime which is to be prosecuted only upon complaint, has not reached the age of sixteen years and is also a minor, or as long as the person otherwise than by reason of prodigality has been placed under guardianship, the person authorized to file the complaint shall be his legal representative in private affairs.

2. If the legal representative is missing, or if he is the person against whom the complaint had to be filed, the prosecution may take place upon complaint of the co-guardian or co-curator, or of the board charged with the co-guardianship or co-curatorship, of the wife, of a blood relative in the direct line, or in the absence of this relative, upon complaint of a blood relative in the side-line until and including the third degree.

The requirements for parties who can make a complaint against criminal activities exclude the head of the village or other terms. Even if other parties may file complaints under specific circumstances, they nonetheless fall under the purview of the family, i.e., blood relatives in the strict sense and third-degree deviants. This restriction suggests that lawmakers are still hesitant to make cohabitation a criminal offense. Without a doubt, cohabitation is an act that is against morality and religion that the society dearly hold. However, it is more reasonable to regard voluntary cohabitation between adult men and women as an agreement by both parties to live together as husband and wife without getting married. They are aware of all

the risks associated with their acts and, therefore, even in the unlikely event that one person breaches the agreement, the act will not fall under the purview of criminal law. As previously indicated, one way to describe human behavior in interpersonal communication is through the lens of transactional analysis. Transactional analysis operates under the premise that all human communication is a transaction between two parties. If cohabitation is a transaction agreement reached voluntarily by two mature adults, the civil law representative can serve as a mediator and can resolve dispute in case disagreements occur between the parties.

Cohabitation is a societal problem that can be prevented. In the context of criminal law reform, therefore, priority should be given to develop prevention initiatives. Excessive control granted by the authorities to their citizens will backfire. When laws and regulations are created, the attention should be paid to the extent to which they benefit the community and safeguard citizens’ rights. This way, when an act is criminalized, the lawmakers should examine whether such decision will benefit the community that they represent. According to Sudarto, criminal law is employed to solve societal issues, hence its application needs to be carefully evaluated as it serves a secondary purpose. It means the application of criminal law will only occur when the problem persists while other legal options have been exhausted.

By acknowledging that customary law can be applied to resolve cases that local communities believe to be violations, Article 2 of the New KUHP has broadened the concept of legality. Article 2(1): Despite not being covered by statutory regulations, the requirements mentioned in Article 1 paragraph (1) do not lessen the legitimacy of laws in a society that decide whether someone should be blamed or not. (2) As long as it is not governed by this law and is based on the values found in Pancasila, the Republic of Indonesia’s 1945 Consti-

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tion, human rights, and general legal principles acknowledged by civilized society, the law that exists in the community mentioned in paragraph (1) shall apply in that location.

Even though cohabitation is declared illegal, using the criminal justice system is not the best course of action. There are grounds to believe so. First, there are better alternatives to criminal punishment. According to Hafrida, one approach that can be used to resolve cohabitation disputes is criminal mediation. Penal Mediation is an institution for case resolution that has its roots in Indonesian customary law tradition.\textsuperscript{25} Suppose that the law does not regulate cohabitation as an offense, if cohabitation still warrants punishment, the customary law still can be used to settle this case. If the conflicting parties decided to take this customary law approach, then a few requirements should be fulfilled and followed. For instance, if an act is said to violate the law, then its punishment depends on whether it has met certain elements such as evidence of an act itself and the actor’s inner nature or intention. Afterall, what move a person to commit a crime is his or her intention or motivation. Therefore, anyone who is suspected of committing crimes cannot be punished solely based on their actions. Their motivation counts. Second, if our law system persists to keep Article 412 of the Criminal Code in place then there will be risks that may come to surface. Among others, conflicts between religious principles and positive legal norms may erupt. For example, if cohabitation is prohibited as illegal based on certain religious principles of the society, then it may not be perceived so by other parts of society who come from different religious traditions. Thus, criminalization of cohabitation may generate conflicting views with regards to morality of cohabitation. Given that Indonesia is extremely religiously and ethnically diverse and multicultural, any decision with regards to criminal law should consider this diversity. Third, this criminalization of cohabitation may invade individual rights for privacy. By making cohabitation as a part of offense by complaint, any parties who feel disadvantaged may feel that they have the right to invade individual

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choice to live in cohabitation in their private life. What should be stressed here is that any decision to devise criminal law should make sure that this law would not conflict with the principle of human rights. In a nutshell, the legal system needs to work to guarantee that everyone, whatever their moral, cultural and religious perspectives, have equal access to justice.

F. Concluding Remarks

Out of the 340 respondents, 55.3% said that cohabitation shouldn’t be prohibited by law. Cohabitation is a matter of ethics. Therefore, it would suffice that the criminals receive adequate moral and social punishment from the community. Parties may file a civil lawsuit under customary law if they feel that the cohabitation arrangement has harmed them. Within the context of criminal law reform, criminalization or classifying cohabitation as a crime is not the best course of action. From the standpoint of transactional analysis, cohabitation is an agreement between two persons who are cognizant of all the risks associated with their choices. In the event that criminal law is applied to address social issues, the harmed party may, therefore, bring a lawsuit through a civil law entity if one of the parties breaches the terms of the agreement. Because criminal law serves a secondary purpose, it is important to exercise caution when applying its provisions. It implies that the application of criminal law will only occur after other legal options have been exhausted and cannot resolve the problem.

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