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Moral Offenses Under Indonesian Criminal Code 2023 in Perspective of Religious Minority

Tindak Pidana Kesusilaan dalam KUHP 2023: Perspektif Kelompok Agama Minoritas

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ABSTRACT: Indonesia, a nation celebrated for its rich diversity of ethnicities and religions, embodies a societal pluralism that deeply influences perceptions of morality and acceptable behavior. The enactment of the 2023 Criminal Code reflects these complexities, particularly in its use of "moral policing" to redefine adultery and criminalize cohabitation as moral offenses. These provisions were integrated into contentious articles during the Code's drafting and discussion phases, sparking significant debate. Proponents claim that the existence of these moral transgressions is consistent with Indonesian society's moral and religious values. Conversely, opponents argue that these provisions as an overreach by the state, infringing upon personal freedoms and disproportionately affecting religious minorities whose beliefs and practices may diverge from the majority. Adultery and cohabitation, the focal points of these provisions, are intrinsically linked to the institution of marriage. In Indonesia, marriage transcends its administrative role and is deeply embedded within religious and cultural traditions. This dual significance renders the issue particularly contentious, as interpretations of marriage vary widely across the country's diverse communities. The ambiguity surrounding the definition of "marriage" within the legal framework raises concerns about potential discrimination. Minority religious groups, particularly those whose marital practices are not formally recognized or registered, may find themselves vulnerable to legal repercussions under the adultery and cohabitation clauses. This article seeks to delve into the nuanced effects of these regulations, focusing on their potential to disproportionately affect religious minorities and the broader question of balancing societal norms with individual liberties in a diverse nation.

ABSTRAK: *Indonesia merupakan negara yang terdiri dari berbagai etnis dan agama termasuk kepercayaan. Pluralisme berdampak terhadap cara pandang masyarakat atas berbagai perilaku, khususnya perilaku yang dipandang tidak bermoral. KUHP 2023 menggunakan argumentasi "kebijakan atas dasar moral" untuk memperluas definisi perzinaan dan mengkriminalisasi perbuatan hidup bersama tanpa pernikahan (kohabitasi) sebagai tindak pidana kesusilaan. Dalam proses perumusannya kedua tindak pidana tersebut termasuk tindak pidana yang dikategorikan sebagai "tindak pidana bermasalah". Kelompok pro berpendapat bahwa pengaturan tindak pidana kesusilaan ini sejalan dengan nilai moral dan agama masyarakat Indonesia; sebaliknya kelompok kontra berpendapat bahwa pengaturan terhadap dua perbuatan ini menunjukkan tindakan berlebihan yang dilakukan oleh negara dalam mencampuri kebebasan warganegaranya, terutama kelompok agama minoritas.*
Perzinaan dan kohabitasi adalah dua tindak pidana yang memiliki hubungan erat dengan perkawinan. Perkawinan sampai saat ini masih merupakan persoalan yang kontroversial di Indonesia, yang mana tidak sebatas persoalan administrative melainkan juga menyangkut persoalan agama atau kepercayaan. Ketidajelasan penafsiran "perkawinan" berdampak pada kelompok agama minoritas yang belum terdaftar secara administrative, termasuk pola-pola perkawinan yang dianggap bertentangan dengan konsep moral, agama atau kepercayaan, sehingga berpotensi dituntut berdasarkan dua tindak pidana perzinaan dan kohabitasi. Oleh karena itu artikel ini akan membahas sejauh mana dampak implementasi kedua tindak pidana tersebut terhadap kelompok agama minoritas.

Keywords:
moral offenses; Indonesian criminal code 2023; minority; religious minority

Kata Kunci:
tindak pidana kesusilaan; KUHP 2023; minoritas; agama minoritas

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1. Introduction

Criminal law and morality are closely related. An act is classified as a crime when it contravenes established legal provisions or is deemed unlawful by the governing legal framework. This intersection of criminal law and morality underscores how legal systems frequently incorporate societal standards to determine what constitutes punishable conduct. However, while morality significantly influences legal principles, not all actions considered immoral by societal consensus are subject to criminal penalties. The divergence between moral judgment and legal enforcement reveals the nuanced and selective approach of criminal law in addressing human behavior.

Certain practices that are widely regarded as morally objectionable, such as prostitution, adultery (including fornication), and cohabitation, exemplify this distinction. These behaviors are often condemned on moral or religious grounds, yet they do not uniformly fall within the scope of criminal act. The reasons for this exclusion are multifaceted, encompassing legal principles of individual autonomy, privacy rights, and the practical challenges associated with criminalizing private behavior. Legal systems may refrain from penalizing such actions to avoid undue intrusion into personal freedoms or to maintain a balance between moral considerations and the protection of individual liberties.

Moreover, the determination of what constitutes unlawful behavior often varies across jurisdictions and cultural contexts, highlighting the influence of societal pluralism on legal frameworks. In some countries, acts like cohabitation and adultery may be criminalized based on moral or religious doctrines, while in others, such conduct is deemed outside the purview of criminal law. This disparity underscores the complexity of aligning universal moral values with the diverse cultural and legal landscapes that exist worldwide.

The inclusion of morality-related provisions in the 2023 Criminal Code has been a focal point of intense public discourse and institutional critique. These provisions, particularly those concerning adultery and cohabitation, have ignited widespread debates over their implications for personal freedoms, societal norms, and the protection of minority rights. Many organizations have raised objections to the expansion and criminalization of morality-based offenses, questioning the balance between the enforcement of moral standards and the principles of individual autonomy. Among the entities voicing strong opposition are the Institute for Criminal Justice Reform (ICJR) and the National Commission on Human Rights Indonesia (Komnas HAM)[1], both of which have highlighted the far-reaching consequences of these articles for marginalized communities.

One of the core concerns articulated by these organizations is the potential for these provisions to lead to the criminalization of marital unions deemed invalid by the state. This includes unions involving "*Penghayat Kepercayaan*," (adherents of belief systems), whose practices often fall outside the scope of legally recognized norms. Such groups risk being unfairly targeted under the expanded definitions of adultery and cohabitation. By broadening the definition of adultery to encompass fornication—understood as consensual sexual relations between unmarried individuals[2]—the legislation risks encroaching upon personal liberties while undermining the fundamental principles underpinning the institution of marriage.

On the other hand, the group that supports it argues that they serve to uphold societal moral values, critics caution against the potential misuse of these vaguely defined provisions to marginalize or prosecute individuals whose lifestyles or beliefs diverge from majority norms. The broader societal and legal implications of these morality provisions warrant careful examination. Their inclusion in the Criminal Code represents a shift toward a more interventionist approach by the state in regulating private behavior, sparking concerns about the erosion of individual freedoms and the imposition of a singular moral standard in a pluralistic society. As Indonesia continues to navigate its complex tapestry of cultural, religious, and social diversity, the challenge lies in crafting legal frameworks that respect and protect this pluralism while addressing the diverse moral values of its citizens. This article will delve into these critical issues, exploring how the criminalization of adultery and cohabitation may disproportionately impact marginalized groups, undermine the principles of equity, and challenge the balance between upholding societal morals and safeguarding individual liberties.

Conversely, proponents of the provisions argue that the expansion of the criminalization of adultery and cohabitation is essential within Indonesia's moral and religious framework. Syarif Nurhidaya, a criminal law expert from the Indonesian Islamic University (UII), asserts that these articles reflect a compromise tailored to Indonesia's deeply eastern and religious cultural identity within the broader global context.[3] This compromise is

1 "Komnas Perempuan-ICJR Tolak Perluasan Pasal Kesusilaan," Hukum Online, 2016, https://www.hukumonline.com/berita/a/komnas-perempuan-icjr-tolak-perluasan-pasal-kesusilaan-lt57c57cd11b227/.

2 See, Salbia Abbas, Muhammad Latif, and Razia Anjum, "Unveiling the Veil: Understanding the Impact of Adultery and Fornication on Societal Discontent and Remedies Suggested in a Pakistani Context: A Comprehensive Study," *Journal of Development and Social Sciences* 4, no. 4 (December 31, 2023): 465, https://doi.org/10.47205/jdss.2023(4-IV)42.

3 Nurhadi Sucahyo, "Salah Paham Pasal Zina Dan "Kumpul Kebo' Di KUHP," voaindonesia.com, accessed April 28, 2025, https://

operationalized through the complaint mechanism, whereby the criminal acts of adultery and fornication are not prosecuted unless a formal complaint is filed by the injured party. Specifically, in cases of adultery, the complaint must be lodged by the spouse, while in instances of fornication, the complainant may be a parent or child of the parties involved.[4]

Proponents of the criminalization of fornication and cohabitation have previously sought to advance this agenda through judicial review mechanisms, as evidenced in the Constitutional Court Decision No. 46/PUU-XIV/2016. This decision pertained to the judicial review of Articles 284, 285, and 292 of the Criminal Code in relation to the 1945 Constitution. However, the Constitutional Court, in its adjudication, dismissed the review on several substantive grounds, including the necessity of clearly defined prerequisites for the criminalization of conduct, the principle of criminal law as the "*ultimum remedium*" (criminal law as the last resort in addressing societal issues), and the recognition that matters pertaining to morality do not inherently warrant resolution through criminal legislation. Notwithstanding the Court's rationale, the promulgation of Law No. 1 of 2023 concerning the Criminal Code (KUHP 2023) marks a legislative departure from this position. The revised Code expands the scope of adultery to encompass fornication and introduces cohabitation as an additional criminal offense within the ambit of morality-based crimes.

This article does not seek to address all criminal acts categorized as moral offenses; instead, it concentrates on the offenses of adultery and cohabitation. The focus on these specific offenses is due to their intrinsic connection to the institution of marriage. In Indonesia, marriage encompasses a complex array of conceptual, religious, cultural, moral, and legal dimensions, giving rise to numerous legal and societal issues, including the determination of marital validity. The interpretation of marital validity often diverges between societal norms and legal frameworks, thereby influencing the procedural requirements for marriage registration. Despite its presumed role as a neutral arbiter in matters of marriage and family law, the state has implemented discriminatory policies, such as Supreme Court Chief Justice Circular (SEMA) No. 2 of 2023, which provides guidance for judges in adjudicating applications for the registration of interfaith marriages. The reform of criminal law, specifically through the expansion of definitions (e.g., adultery) and the inclusion of additional criminal acts (e.g., cohabitation), is fundamentally linked to the issue of marital validity, which serves as the benchmark for classifying acts as either adultery (particularly fornication) or cohabitation.

Additionally, the criminalization of fornication and cohabitation, while ostensibly aimed at protecting society by deterring harmful criminal behavior, carries significant implications for the protection of human rights. These provisions have the potential to infringe upon and restrict fundamental rights, particularly for minority groups. Religious minority communities, which often challenge mainstream interpretations of marital validity, may be disproportionately affected by these regulations, leading to potential discrimination and inequitable treatment under the law.

Indonesia, like many other nations, is characterized by its significant diversity, encompassing a multitude of ethnic, national, religious, and linguistic communities, groups, and sects. This diversity inherently carries a heightened risk of human rights violations, particularly against minority groups. The responsibility of the state to safeguard its citizens' rights to freedom of thought, conscience, and religion, as well as to ensure their protection from discrimination, is enshrined in various international legal instruments. These include, among others, Article 18 of the Universal Declaration of Human Rights (1948) and Articles 4, 26, and 27 of the International Covenant on Civil and Political Rights (ICCPR). Despite these obligations, the state frequently neglects to adequately consider the rights of minority groups in the formulation of criminal provisions. In the context of criminalizing acts such as adultery and cohabitation, the state tends to prioritize moral and religious considerations, often to the exclusion of addressing broader, intersecting policies, such as the administration of marriage—a domain that continues to exhibit discriminatory practices, particularly against religious minorities and adherents of minority beliefs.

Previous studies examining the criminal offense of adultery have largely focused on the interpretation of Article 284 of the Indonesian Criminal Code, as well as its application under "*adat law*"[5] and Islamic law[6]. This

www.voaindonesia.com/a/salah-paham-pasal-zina-dan-kumpul-kebo-di-kuhp-/6875694.html.

4 See Art 411 paragraph 2, 2023 Criminal Code

5 See, Umi Rozah and Erlyn Indarti, "Delik Zina: Unsur Substansial Dan Penyelesaiannya Dalam Masyarakat Adat Madura," *Masalah-Masalah Hukum* 48, no. 4 (October 16, 2019): 366, https://doi.org/10.14710/mmh.48.4.2019.366-375; Zulfiqar Bhisma Putra Rozi, "Perkembangan Delik Zina Dalam Yurisprudensi Hukum Pidana," *Veritas et Justitia* 5, no. 2 (December 27, 2019): 286–301, https://doi.org/10.25123/vej.3612.

6 Nunung Dian Wahyuningsih, "Perbandingan Hukum Perzinahan dalam UU No. 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP) dengan Hukum Islam," *JOLSIC* 11, no. 2 (2023): 97–108, https://dx.doi.org/10.20961/jolsic.v11i2.76466.

article seeks to approach the matter from an alternative perspective, namely the protection of minority religious groups. Adultery and cohabitation present significant challenges that the state must address to fulfil its obligation to protect minority groups, especially those of minority religious communities. This article endeavors to critically evaluate the extent to which the state provides protections or, conversely, infringes upon the rights of religious minorities through the application of criminal provisions categorized as moral offenses.

2. Method

This article constitutes a legal analysis within the domain of criminal law, focusing on the examination of legal issues through a human rights framework. The subject matter of this research pertains to the formulation of the criminal offenses of adultery and cohabitation, as set forth in the 2023 Criminal Code. The research aims to address textual questions concerning the provisions of the 2023 Criminal Code, utilizing human rights theory—specifically minority group theory—as the basis of analysis. This study is classified as socio-legal research, as it seeks to assess the extent to which the criminalization of moral offenses impacts specific segments of society, particularly religious minority groups.[7]

In undertaking this research, the author adopts the position of an academic, employing methods of legal interpretation to ascertain the legislative intent behind the expansion of the offense of adultery and the criminalization of cohabitation. A historical legal approach is further employed to analyze the background and debates surrounding the reformulation of adultery and the inclusion of cohabitation as a criminal offense.

In addition, the research examines judicial decisions pertaining to adultery and cohabitation, with particular emphasis on decisions rendered by higher courts. Notable examples include the Makassar High Court Decision No. 427/Pid/2008/PT.Mks and the Supreme Court Decision No. 666 K/Pid/1984, both of which expanded the definition of adultery under Article 284 of the Criminal Code based on *adat law*. Furthermore, the analysis incorporates Constitutional Court Decision No. 46/PUU-XIV/2016, which rejected the judicial review which aimed to broadening the definitions of adultery, rape, and obscenity as criminal offenses. Beyond the scope of criminal law, the article also evaluates policies in other legal domains, particularly those related to marriage law, to ascertain their influence on the enforcement of the provisions governing adultery and cohabitation.

3. Findings and Discussion

3.1 Adultery and Cohabitation under Indonesian Criminal Code 2023

Before addressing criminal acts pertaining to morality, it is imperative to define the concept of a criminal act within the framework of positive law. A criminal act is normatively understood as conduct that is explicitly prescribed as punishable prior to its commission. Such acts may be deemed sinful, immoral, or injurious to the public good, and if they are codified within legal provisions and subject to sanctions, they are classified as violations of the law. However, this does not imply that all actions regarded as unlawful by societal standards warrant criminal prosecution. This principle aligns with the doctrine of criminal law as an *ultimum remedium*, emphasizing its role as a mechanism of last resort in regulating societal behavior.

The moral dimension of criminal law has long been a subject of legal and philosophical discourse. Lord Devlin[8], for instance, contends that immorality constitutes a legitimate basis for criminalization, provided that such measures can surmount certain limiting factors he identifies. Devlin's framework underscores the importance of balancing competing values and exercising restraint in the application of criminal law.[9] He delineates factors of principle, such as the protection of societal interests, and factors of expediency, such as the practical enforceability of laws, both of which must be considered in the legislative process. In summation, while criminal law and morality are deeply interconnected, the formulation of criminal provisions requires a careful balance between moral imperatives, legal principles, and the protection of fundamental rights.

In Indonesia, the imposition of criminal sanctions for adultery has been codified in positive law since the adoption of the Dutch Criminal Code (*Wetboek van Strafrecht*) into the Indonesian legal system through Law No. 1 of 1946. Accordingly, the regulation of adultery under the Indonesian Criminal Code draws its conceptual framework directly from Dutch legal principles. Article 284 of the Indonesian Criminal Code specifically governs

7 Irianto Sulistyowati, "Memperkenalkan Studi Sosio Legal Dan Implikasi Metodologisnya," in *Metode Penelitian Hukum: Konstelasi Dan Refleksi*, ed. Sulistyowati Irianto and Sidharta (Jakarta: Yayasan Obor Indonesia, 2011), 173–90.

8 Lord Devlin, was one of the most prominent judicial figures of England & Wales in the 20th Century. Devlin's viewpoint in this instance is important to the 2023 Criminal Code's extensive definition of adultery, which is predicated on moral considerations

9 Morris R. Cohen, "Moral Aspects of the Criminal Law," *The Yale Law Journal* 49, no. 6 (April 1940): 990, https://doi.org/10.2307/792227.

adultery, restricting its application to married men and women. However, the enforcement of this provision is not automatic; legal proceedings may only be initiated upon the filing of a formal complaint by the aggrieved spouse, and prosecution is contingent on the dissolution of the marriage through divorce.

Moreover, significant conceptual differences exist between the Bumiputera (indigenous communities of the Indonesian archipelago) and European legal and cultural perspectives on adultery as articulated in Article 284 of the Criminal Code. Within European society, the understanding of adultery is informed by principles such as monogamy, marital fidelity, Christian doctrines, and general moral beliefs, which frame adultery as a breach of emotional commitment and a violation of personal honor. Conversely, in Bumiputera societies, where polygamy is socially and culturally accepted, adultery is construed as an act attributable solely to a wife and is regarded as a direct infringement of the husband's rights. Consequently, adultery within the Bumiputera context is primarily perceived as a violation of proprietary rights rather than as an affront to personal honor.

These divergent conceptual understandings significantly influence the procedural enforcement of adultery laws. The stipulations under Article 27 of the *Burgerlijk Wetboek* (BW), which require divorce as a precondition for prosecution, are applicable only to individuals governed by the provisions of the BW, excluding Bumiputera communities. This differentiation underscores the complexities inherent in the application of a singular legal framework to a pluralistic society with varying cultural and legal norms.[10]

Numerous efforts have been undertaken to broaden the scope of the definition of adultery, one of which involved the judicial review of Article 284 of the Indonesian Criminal Code. Case Number 46/PUU-XIV/2016 was filed before the Constitutional Court by Professor Euis Sunarti of the Bogor Agricultural Institute (IPB) and several other parties. The petitioners sought to challenge the existing provisions of Article 284, requesting the removal of the requirement that at least one of the individuals involved in the act of adultery be married and the elimination of the complaint-based mechanism as a prerequisite for enforcement proceedings. The petitioners contended that the existing provisions should be expanded, arguing that their limited scope jeopardized both family integrity and national resilience. Specifically, they maintained that the adultery provisions failed to address increasingly prevalent practices, such as fornication, casual sexual relations, prostitution, and same-sex relationships.

In its judgment, the Constitutional Court declared that Article 284 of the Criminal Code was consistent with constitutional standards, emphasizing that the Court did not possess the authority to amend or expand the definition of adultery, as such prerogatives fell exclusively within the legislative domain. The Court further underscored the principle that criminal law should function as an *ultimum remedium* (a measure of last resort), to be utilized only when other legal mechanisms prove inadequate. The imposition of criminal liability as the primary means of addressing deviant behavior, it noted, risks oversimplifying complex social issues and may lead to a disproportionate reliance on punitive measures. The Court highlighted that genuine social order cannot be achieved solely through coercion or the threat of criminal sanctions but must be cultivated through moral awareness and a sense of obligation fostered within families, educational institutions, and communities.

Notwithstanding the Constitutional Court's refusal to broaden the definition of adultery, the government and legislature continued to pursue an expanded scope of criminal liability for adultery through the ongoing criminal law reform process. As part of this effort, the 2015 Criminal Code Bill proposed significant changes to the adultery provisions, a trend that persisted in subsequent iterations of the Bill in 2019 and the final draft in 2022. These efforts culminated in the inclusion of provisions expanding the definition of adultery to encompass sexual relations outside of marriage (fornication). These developments provoked considerable reactions from various groups, including human rights advocates, academics, and practitioners of criminal law. Critics argued that the expanded provisions risk over-criminalizing certain groups, such as individuals in polygamous arrangements, couples whose marriages are unregistered with the Religious Affairs Office (KUA) or civil registry, and those in interfaith marriages. Furthermore, the criminalization of sexual relations involving sex workers and their clients has been identified as a potential obstacle to public health initiatives, particularly in the context of HIV prevention efforts.

A significant issue that has garnered substantial public attention is the expansion of the categories of individuals authorized to file complaints in cases of adultery. The broadening of the definition of adultery initially introduced provisions allowing not only legal spouses but also parents, children, and third parties claiming to be aggrieved to lodge complaints regarding sexual relations occurring outside the bounds of marriage (fornication). This proposal sparked intense debate and negotiation, ultimately leading to the removal of the "third party

10 Tristam Pascal Moeliono, trans., *Terjemahan Beberapa Bagian Risalah Pembahasan Wetboek van Strafrecht Dan Wetboek van Strafrecht Voor Nederlandsch Indie: KUHP Belanda Dan KUHP Indonesia* (Jakarta: ICJR, 2021), 627–31, https://www.icjr.or.id/wp-content/uploads/2021/12/8-Des-2021-Final-Draft-Kompilasi-Final-Naskah-Terjemahan-MvT-WvS.pdf.

aggrieved" element from the final provisions. The rationale for excluding this element was rooted in concerns over its potential for multiple interpretations, which could lead to legal ambiguity and, more critically, societal persecution against alleged perpetrators of the offense.[11]

Finally, in the 2023 Penal Code, adultery is regulated in Article 411 with an expanded definition that includes adultery outside of marriage. The final formulation of adultery under Article 411 is:

1. Any person who has sexual intercourse with someone who is note his/her spouse shall be punished for adultery with maximum imprisonment of 1 (one) year or a maximum fine of category II;
2. On the crime referred to paragraph (1), no prosecution is carried out except for complaints from:
   a. husband or wife for individuals who are legally married;
   b. parents or children for individuals who are not legally married
3. The provision referred to in Articles 25, 26, and 30 do not apply to complaints as referred to in paragraph (2);
4. Complaints can be withdrawn if the examination at the trial court has not started.

The KUHP 2023 then provides an interpretation of several terms in article 411, specifically the meaning of "not husband or wife" as:

1. A man who is in a marriage has sexual intercourse with a woman who is not his wife;
2. A woman who is a marriage has sexual intercourse with a man who is not her husband;
3. A man who is in a marriage has sexual intercourse with a woman, even though it is known that woman is in a marriage bond;
4. A woman who is in a marriage has sexual intercourse with a man, even though it is known that man is in a marriage bond'
5. A man or a woman, each of whom is not bound by marriage, have sexual intercourse

As previously noted, the state imposes criminal sanctions not only for adultery but also for fornication, as regulated under Article 411 of the 2023 Criminal Code. The expansion of the adultery provision in Article 411 reflects a variety of viewpoints asserting that the current provisions are insufficiently aligned with societal values, including philosophical, political, and cultural dimensions. This perspective is further supported by arguments advocating for the broadening of the definition of adultery, on the basis that Article 284 of the Indonesian Criminal Code is inconsistent with the moral values, norms, and religious principles that underpin Indonesian society, as mandated by the Pancasila ideology.[12] Additionally, certain viewpoints emphasize that the societal understanding of adultery often corresponds to religious doctrines, which regard it as a sinful act.[13]

In addition to the expanded definition of adultery, Article 411 introduces modifications to the corresponding criminal sanctions. The maximum term of imprisonment has been increased from nine months to one year, with the added provision of an alternative penalty in the form of a Category II fine. Furthermore, the procedural requirements for initiating prosecution under the new adultery provisions have been revised. The necessity of divorce as a precondition for prosecution has been eliminated, and the scope of individuals authorized to lodge complaints has been broadened. Notably, with the expansion of adultery to include acts of fornication, parents or children are now explicitly recognized as parties eligible to file complaints in cases of fornication occurring outside of marriage.

The most recent provisions in Indonesia's criminal law addressing morality-based crimes pertain to the regulation of cohabitation. Cohabitation, is not a term widely recognized among Indonesian society; instead, the term "*kumpul kebo*" is more commonly used to describe this practice. The discussion regarding the criminalization of cohabitation first emerged in the 1977 Criminal Code Bill, which eventually materialized into Article 412 of the 2023 Criminal Code (KUHP 2023).[14] This development reflects the state's ongoing efforts to address behaviors perceived as contrary to societal norms and values.

11 Prianter Jaya Hairi, "Kriminalisasi Tindak Pidana Perzinaan dalam RUU KUHP," *Info Singkat:Kajian Singkat Terhadap Isu Aktual dan Strategis* IX, no. 17/I/Puslit/September/2019 (2019): 5.

12 Mas Putra Zenno Januarsyah et al., "The Renewal Policy of the Adultery Concept in Article 411 of the Law Number 1 of 2023 on the Criminal Code," PJIH 10, no. 1 (2023): 14–15, https://doi.org/10.22304/pjih.v10n1.a1.

13 Indrawan Fajar Bin Zaufi Amri and M. Dachran S. Busthami, "Adultery in the Perspective of Islamic Law and the Criminal Law Legislation a Comparative Study," *IOSR Journal Of Humanities And Social Science* 23, no. 2 (2018): 51–55, https://doi.org/10.9790/0837-2302015155.

14 Girlie. L.A. Ginting, *Modul KUHP 2023:Tindak Pidana Kohabitasi* (Jakarta: ICJR, 2024), https://reformasikuhp.org/data/wp-content/uploads/2024/03/E-book-Modul-Kohabitasi.pdf.

Similar to the regulation of adultery, the criminalization of cohabitation is rooted in the view that such conduct is inherently immoral, incompatible with religious principles, and detrimental to the preservation of cultural values known as "Indonesian Values."[15] These values are often interpreted through the lenses of morality, religion, and the broader ideological framework established by Pancasila, Indonesia's philosophical foundation. By criminalizing cohabitation, the state seeks to uphold moral and cultural integrity, reflecting a societal emphasis on conformity to traditional norms.

Article 412 of the KUHP 2023 does not explicitly utilize the term "cohabitation" within its statutory language. Instead, it criminalizes the act of "everyone who lives together as husband and wife outside of marriage." The term "cohabitation" is referenced solely within the explanatory section of Article 412 of the KUHP 2023. As with the offense of adultery, the prosecution of cohabitation is contingent upon the existence of a formal complaint. Under this provision, the right to file a complaint is granted to certain parties, specifically the spouse, parents, and children of the individuals involved. The criminal sanction for cohabitation is a maximum term of six months' imprisonment, a penalty that is less severe than the sanction prescribed for adultery.

The concept of "cohabitation" is commonly understood, in legal discourse, to refer to the arrangement wherein two individuals, typically in a romantic relationship, reside together in a committed, long-term partnership without formalizing the union through marriage or civil registration. Cohabitation may manifest in various forms, ranging from long-term relationships characterized by significant commitment to temporary living arrangements or partnerships that evolve over time with differing levels of shared responsibilities and mutual obligations.[16]

Conceptually, the issue of cohabitation presents an intriguing subject for analysis within the framework of Indonesia's societal structure. Generally, Indonesian society recognizes cohabitation as a moral issue, perceiving it as incompatible with prevailing social and religious values. However, marriage is not exclusively tied to sexual relations; the choice to marry or not to marry is a matter of individual privacy, protected under international human rights law, notably through the International Covenant on Civil and Political Rights (ICCPR), and accommodated within Indonesia's positive law. In the context of cohabitation in Indonesian society, such arrangements are not solely the result of a couple's decision to forgo marriage, but may also arise due to legal provisions governing marriage recognition. Not all Indonesians who marry or intend to marry automatically receive recognition or validation from the state. Interfaith marriages, as well as marriages conducted in religious or belief systems not recognized by the state, represent forms of unions that lack state acknowledgment. Consequently, even where couples are "married," the absence of formal evidence in the form of marriage registration renders them vulnerable to the provisions on cohabitation under Article 412 of the KUHP 2023.

Unlike adultery, which has long-standing provisions within the current Criminal Code, cohabitation as a new criminal offense lacks sufficient justification for its criminalization. Arguments supporting its inclusion, as outlined in the 2015 Academic Paper of Criminal Code Bill, cite norms derived from "adat law" or the "living law" within society[17]. However, this rationale, according to the author, risks discriminatory outcomes, as not all *adat* communities perceive cohabitation as a violation of societal norms, as evidenced in regions such as Bali, Minahasa, and Mentawai.[18]

The lack of comprehensive information during the formulation process for cohabitation, coupled with the absence of robust empirical data, suggests that lawmakers have predominantly relied on unilateral moral perspectives.[19] This is exemplified by findings from Hafida et al., based on research involving 340 respondents across three universities in Jambi, which indicate that the majority of respondents believe cohabitation should not be criminalized. Respondents view cohabitation as an ethical issue rather than a legal one, arguing that individuals involved should be subject to adequate moral and social sanctions within their communities rather than formal legal penalties.[20]

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15 Yohana Belinda, "As Indonesia Plans to Criminalize Cohabitation, Cohabiting Partners Share Their Stories," thejakartapost.com, January 13, 2023, https://www.thejakartapost.com/paper/2023/01/13/as-indonesia-plans-to-criminalize-cohabitation-cohabiting-partners-share-their-stories.html.

16 See, Gideon Imoke Emeng, "The Social Problem of Cohabitation," *Pinisi Journal of Art, Humanity and Social Studies* 1, no. 4 (2021): 37; Barnty William, "Cohabiting Couples: Insights into Relationship Dynamics and Challenges," December 2024, https://www.researchgate.net/publication/387060290_Cohabiting_Couples_Insights_into_Relationship_Dynamics_and_Challenges#fullTextFileContent.

17 Badan Pembinaan Hukum Nasional, "Naskah Akademik Rancangan Undang-Undang Tentang Kitab Undang-Undang Hukum Pidana (KUHP)," 2015, 238.

18 Supriyadi Widodo Eddyono, cited by Ginting, *Modul KUHP 2023:Tindak Pidana Kohabitasi*.

19 Ginting.

20 Hafrida et al., "Students' Perception of the Criminalization of Cohabitation (Kumpul Kebo) in Indonesia: From Quantitative to Normative Analysis," *Jambe Law Journal* 7, no. 1 (July 22, 2024): 127–47, https://doi.org/10.22437/home.v7i1.340.

Furthermore, the regulation of cohabitation under the KUHP 2023 raises concerns regarding its enforcement in practice. Article 412 of the KUHP 2023 provides an overly vague formulation of cohabitation, stating it as "living together as husband and wife." The explanatory section fails to offer a clear interpretation of this element, resulting in the absence of definitive parameters regarding what constitutes "living together as husband and wife." This ambiguity in legal drafting poses challenges for future enforcement and legal clarity.

Adultery, fornication, and cohabitation as regulated under the KUHP 2023 share similarities and differences. The similarities among these offenses are that they are categorized as morality-based crimes, fall within the scope of marriage-related offenses, and are classified as complaint-based crimes (*delik aduan*). Complaints regarding these offenses may be withdrawn provided that court proceedings have not yet commenced. The parties authorized to lodge complaints include spouses (husband or wife) in cases involving a marital relationship and parents or children in cases where a marital relationship does not exist.

As for the differences, adultery and fornication are distinguished by the element of "sexual intercourse," which is a necessary component for prosecution. Conversely, cohabitation does not require proof of sexual intercourse; instead, the offense is defined by the act of "living together as husband and wife." The criminal sanction for adultery carries a maximum imprisonment term of one year, whereas cohabitation is punishable by a maximum imprisonment term of six months.

3.2 Religious Minority Group in Indonesia

Before addressing the concept of a religious minority, it is essential to define the broader term "minority," as religious minorities fall within the scope of human rights protection afforded under the framework of minority rights. Notably, there exists no universally recognized definition of the term "minority." The identification of a minority is contingent upon a factual determination that encompasses both objective and subjective criteria. Objective criteria include shared characteristics such as ethnicity, language, or religion, whereas subjective criteria require individuals to self-identify as belonging to a national, ethnic, religious, or linguistic minority group.[21]

According to Francesco Capotorti, an Italian lawyer who for a long time served as Italy's representative in the United Nations General Assembly, minority is a group, numerically inferior to the rest of the population of a State, in a nondominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[22] The meaning of minority is relational, contextual, and situational—the latter term referring to specific choices made in given contexts by specific actors based on their respective interests, necessities, and opportunities.[23]

Minority groups are afforded protection under international human rights frameworks, as codified in Article 27 of the International Covenant on Civil and Political Rights (ICCPR). Article 27 stipulates that "in those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Additional protections specific to minority groups, particularly children, are provided under Article 30 of the Convention on the Rights of the Child (CRC), which declares: "In those States in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language." General Comment No. 23, as referenced by Patra M. Zen, further delineates the scope of minority groups within a State or territorial jurisdiction into three distinct categories: (1) ethnicity, (2) religion or belief, and (3) language.

Within the framework of Indonesian law, the 1945 Constitution recognizes and safeguards the human rights of minority groups. Collectively, the religious beliefs and traditional practices of minority communities are acknowledged and respected, as affirmed in Article 18B, paragraph 2. Individually, members of minority groups are protected and recognized as citizens and residents of Indonesia under Article 26, which enshrines citizenship rights as a foundation for ensuring constitutional protections. These constitutional protections oblige the state to uphold a wide range of human rights as guaranteed under Chapter IX of the Constitution. Articles 28A through 28J of the 1945 Constitution (UUD 1945) explicitly provide comprehensive guarantees for the rights of minority

21 United Nations, "Minorities: Inclusion Not Stereotyping," un.org, accessed April 28, 2025, https://www.un.org/en/fight-racism/vulnerable-groups/minorities.

22 Michael Stausberg, Erica Baffelli, and Alexander Van Der Haven, "Religious Minorities: Conceptual Perspectives" (Berlin, Boston: De Gruyter, 2023), https://doi.org/10.1515/rmo.23389320.

23 Stausberg, Baffelli, and Van Der Haven.

groups. Specific protections related to minority rights are articulated in Articles 28A, 28C (paragraph 2), 28E (paragraph 2), and 28I (paragraphs 2 and 3). These constitutional guarantees are further operationalized through legislative enactments.

Minority groups in Indonesia have been afforded legal protection since the issuance of Presidential Instruction No. 26 of 1998 by President B.J. Habibie, which prohibited the use of the terms "indigenous" and "non-indigenous." Further progress in the protection of minority rights was made in 2000, when President Abdurrahman Wahid issued Presidential Decree No. 6 of 2000, thereby revoking Presidential Instruction No. 14 of 1967 concerning Chinese Religion, Beliefs, and Customs. In addition, the enactment of Law No. 23 of 2006 on Population Administration, subsequently amended by Law No. 24 of 2013, formally repealed the administrative classifications based on nationality, race, and religion. The recognition of Chinese cultural identity and group rights was further reinforced through Presidential Decree No. 12 of 2014, which rescinded the Ampera Cabinet Presidium Circular No. SE-06/Pres.Kab/6/1967.

Under Indonesia's positive law, minority groups are defined broadly to include individuals such as transgender persons, gays, lesbians, and those living with HIV/AIDS. For example, the Ministry of Social Affairs categorizes minority groups within the framework of People with Social Welfare Problems (PMKS). According to Minister of Social Affairs Regulation No. 8 of 2012, minority groups are defined as "[...] groups whose social functioning is disrupted due to the discrimination and marginalization they experience, rendering them vulnerable to social problems, including gays, transgenders, and lesbians." The criteria for classifying minority groups include impaired social functioning, experiences of discrimination and marginalization, and behaviors characterized as deviant under prevailing societal norms.

Religious minorities are afforded protection under human rights laws, including the rights to freedom of religion or belief and minority rights. These protections extend to all individuals, irrespective of their religious affiliation.[24] The term "religious minorities" encompasses a broad spectrum of religious communities, both traditional and non-traditional, whether or not officially recognized by the state, regardless of their size, and seeking protection under established minority rights standards. It is essential to acknowledge the diversity inherent in minority religious groups, which may also overlap with ethnic, national, or linguistic minorities.[25]

Based on the foregoing definition of religious minorities, several groups can be identified as falling within this category. Among Indonesia's Muslim population, which is predominantly Sunni, minority subgroups include Shi'ah and Ahmadiyah—two of the largest religious minority groups within Islam in Indonesia.[26] More broadly, according to data from the Directorate General of Population and Civil Registration (Dukcapil) of the Ministry of Home Affairs, Muslims constitute the majority, comprising 86.87% of Indonesia's population. Other religious affiliations in Indonesia's population are distributed as follows: Protestants (7.49%), Catholics (3.09%), Hindus (1.71%), Buddhists (0.75%), Confucians (0.03%), and adherents of other belief systems (0.04%). With Indonesia's population reaching 272.23 million, religious minorities are defined as those practicing religions recognized by the state but whose adherents are numerically fewer than the adherents of the majority religion, as well as belief systems, adherents, and individuals who identify as non-religious.[27]

Pursuant to the provisions of Law No. 1/PNPS/1965, religious minorities in Indonesia may be categorized into five distinct groups:[28]

a. Minority groups within the six "recognized" religions;
b. Religious groups classified as "second religions" or "allowed to exist," as stated in Law No. 1/PNPS/1965, including groups such as Baha'is, Sikhs, and Jews;
c. Numerous indigenous belief systems or *Penghayat Kepercayaan* dispersed across various regions of Indonesia;

24 N. Ghanea, "Are Religious Minorities Really Minorities?," *Oxford Journal of Law and Religion* 1, no. 1 (April 1, 2012): 57–79, https://doi.org/10.1093/ojlr/rwr029.

25 Office of the High Commissioner, United Nation Human Rights, "The Inclusion Of Religious Minorities In Consultative And Decision-Making Bodies," September 2014, https://www.ohchr.org/sites/default/files/Documents/Issues/Minorities/Religious_minorities.pdf.

26 Al Khanif, *Religious Minorities, Islam and the Law: International Human Rights and Islamic Law in Indonesia* (Routledge, 2020). 10.4324/9781003048695

27 Viva Budi Kusnandar, "Lebih Dari 102 Ribu Penduduk Indonesia Menganut Aliran Kepercayaan Pada Juni 2021," databoks.katadata.com, 2021, https://databoks.katadata.co.id/demografi/statistik/fc661f846d7069e/lebih-dari-102-ribu-penduduk-indonesia-menganut-aliran-kepercayaan-pada-juni-2021.

28 Noorhaidi Hasan and Maufur, eds., *Membela Hak-Hak Masyarakat Rentan: Ham, Keragaman Agama Dan Isu-Isu Keluarga* (Yogyakarta: Pascasarjana UIN Sunan Kalijaga Press, 2021), 63–64, https://digilib.uin-suka.ac.id/id/eprint/48373/1/Membela%20Hak-Hak%20Masyarakat%20Rentan.pdf.

d. Religious minority groups that form part of larger mainstream religions but are regarded by majority adherents as heretical sects, such as Shi'ah and Ahmadiyah; and

e. Groups identified as "new religious movements," such as Lia Eden and Gafatar.

In the context of the issues discussed herein, the religious minority groups enumerated above may be particularly vulnerable to prosecution for criminal offenses such as fornication and cohabitation, particularly in instances where such groups face challenges or barriers in obtaining state-sanctioned legal marriage.

3.3 The Impact of Moral Offenses under Indonesian Criminal Code 2023 To Religious Minority Groups in Indonesia

As previously discussed, the debates surrounding the necessity of regulating adultery and cohabitation were prominent and protracted throughout the formulation process of the respective provisions. A significant portion of the opposition to such regulation stemmed from the argument that these offenses pertain fundamentally to issues of individual privacy and morality, which should be considered beyond the scope of state intervention. Critics contended that matters related to private moral choices and consensual relationships lie within the domain of personal autonomy and do not warrant regulation through criminal law—a mechanism traditionally reserved for conduct causing tangible harm to others or society at large. The use of criminal law in such contexts was viewed as an excessive intrusion into personal freedom and an inappropriate means of addressing issues inherently moral or ethical in nature.

The act of criminalizing certain behaviors by the state inherently involves the process of "labeling," whereby the conduct in question is categorized as unlawful or deviant and subjected to penal sanctions.[29] This process of criminalization often has broader social implications, as the classification of specific human behaviors as crimes influences societal perceptions, stigmatizing individuals associated with such conduct and potentially leading to their marginalization. In the case of adultery, fornication, and cohabitation, the criminalization process reflects the imposition of normative standards regarding intimate relationships and sexual conduct. Under these provisions, any sexual activity or cohabitative arrangement resembling a marital union must be premised on the existence of a legally recognized marriage. Conduct falling outside the boundaries of legal marriage is thus labeled by the state as a criminal offense, subjecting individuals engaged in such behavior to legal and social repercussions.

Furthermore, the expansion of criminal provisions to encompass fornication and cohabitation raises significant concerns about the potential for over-criminalization. By establishing legal marriage as the benchmark for legitimate intimate relationships and living arrangements, the state risks creating an overly narrow definition of acceptable behavior, thereby criminalizing diverse forms of relationships and lifestyles. Such regulatory measures may disproportionately impact individuals belonging to minority groups, including those whose marital practices are not formally recognized by the state, such as interfaith marriages, indigenous belief systems, or married formed outside conventional religious frameworks. This approach underscores the importance of balancing legal regulation with considerations of equity, inclusivity, and respect for individual rights.

As elaborated in the preceding chapters, the essential element constituting the offenses under Articles 411 and 412 of the KUHP 2023 is the existence of a legally recognized "marriage." Marriage is a fundamental human right enshrined in the 1945 Constitution and guaranteed by the state. Pursuant to Article 28B, paragraph (2) of the Constitution, every individual is entitled to establish a family and to nurture their children within the bounds of a legally recognized marriage. Under the Marriage Act, marriage is defined as a sacred bond, both spiritual and physical, between a man and a woman as husband and wife, undertaken with the purpose of forming a harmonious, enduring household founded upon faith in the Almighty God.[30]

Historically, issues related to marriage have been predominantly governed by civil law and administrative requirements for civil registration. However, with the enactment of the 2023 Criminal Code, the intersection between marriage and criminal law has gained heightened importance, particularly in light of two newly codified criminal offenses—adultery (inclusive of fornication) and cohabitation. These offenses are intrinsically linked to the legitimacy and legal recognition of marriage. The criminalization of such acts underscores the state's emphasis on formal marriage registration as a determinant of lawful conduct within the realm of intimate and domestic relationships. Some of the issues that arise regarding standards for the occurrence of marriage in relation to the provisions on adultery and cohabitation include:

29 Huge de Barlow, as cited by Salman Luthan, "Asas Dan Kriteria Kriminalisasi," *Jurnal Hukum Ius Quia Iustum* 16, no. 1 (January 2009): 2, https://doi.org/10.20885/iustum.vol16.iss1.art1.

30 See Law No 1 Year 1974 about Marriage Law, Art 1

a. Marriage interpretation and legal proof,

b. Issues with marriage registration for unrecognized religions and "*Penghayat Kepercayaan*"

The simplest means of establishing proof of marriage is through formal documentation, such as a marriage certificate, identification card (*kartu tanda penduduk*), or household card (*kartu keluarga*). As previously outlined, while such regulations are in place, not all citizens are able to easily register their marriages. Consequently, in the absence of formal documentation, even if a couple is legally married, their marriage may be considered unregistered and, thus, invalid in the eyes of the state. This situation exposes couples lacking formal registration to potential prosecution under Article 411 and 412 of the KUHP 2023. Issues surrounding marriage registration are not merely legal in nature but also involve significant social challenges, particularly for marginalized groups such as low-income communities, residents in remote areas, and persons with disabilities who face barriers in accessing marriage registration services.[31]

Pursuant to the Indonesian Marriage Law, marriages must be officiated by authorized officials, including Ministers of Religion, officers of the Civil Registry Office (*Kantor Catatan Sipil*), or officials from the Office of Religious Affairs (*Kantor Urusan Agama*), and must be conducted in accordance with the legal principles of the respective religion. However, the KUHP 2023 does not explicitly define what constitutes a "marriage." Through a systematic interpretation, the legal standard for a valid marriage is determined by the Marriage Law. According to Article 2, paragraph (1) of the Marriage Law, a valid marriage is one conducted in accordance with the laws of the respective religion and belief of the parties involved. Nevertheless, challenges persist in the implementation of this provision.

An examination of the criminal provisions concerning adultery and cohabitation reveals that their direct implications for religious minority groups are not explicitly articulated within the legislative framework. However, the indirect consequences of these provisions on minority communities cannot be overlooked. Religious minority groups often face systemic challenges that undermine their identity and dignity, depriving them of their status as equal rights holders under the law.[32] These groups, as protected under international human rights standards, are entitled to the preservation of their cultural, religious, and social practices; yet, their rights are frequently eroded by regulatory mechanisms that fail to account for societal diversity.

One significant contributing factor to the marginalization of religious minority groups is the state's approach to the legality of marriage. Government policies concerning the recognition of marriage play a pivotal role in shaping the lived realities of minority communities. These policies, which are inherently tied to the legal framework governing fornication and cohabitation, have the potential to disproportionately disadvantage minority groups whose marital practices may not conform to the conventional standards imposed by the state. For instance, religious minorities engaging in interfaith marriages, marriages solemnized under belief systems not officially recognized by the state, or informal marital arrangements are at risk of exclusion from legal acknowledgment. The absence of formal recognition renders these groups vulnerable to accusations under adultery and cohabitation laws, subjecting them to criminal liability despite the legitimacy of their practices within their cultural or religious contexts.

The continued inconsistency and lack of inclusivity in marriage recognition policies exacerbate the challenges faced by religious minority groups. Without clear and equitable standards for marriage legality, these groups become inadvertent targets of criminal law enforcement, particularly under provisions related to morality-based offenses such as fornication and cohabitation. The use of criminal sanctions in these instances raises critical concerns regarding the balance between upholding societal morality and respecting the rights of minority groups. It also highlights the risk of over-criminalization, where individuals are penalized not for the harm their actions cause, but for their inability to meet legal standards rooted in mainstream societal or religious norms.

Moreover, the enforcement of fornication and cohabitation laws poses broader societal implications, as it may perpetuate stigma and discrimination against religious minorities. This dynamic is exacerbated by the labeling effect inherent in criminalization, wherein behaviors and practices deemed "deviant" are categorized as crimes, reinforcing negative stereotypes and social exclusion. In the case of religious minorities, this labeling effect can lead to a disproportionate impact, further marginalizing communities that already contend with limited access to resources, representation, and legal protections.

In conclusion, while the criminal provisions governing adultery and cohabitation do not explicitly address religious minority groups, their implementation has the potential to infringe upon the rights and freedoms of these communities. A more inclusive and consistent approach to marriage legality, coupled with safeguards to prevent

31 Ginting, *Modul KUHP 2023:Tindak Pidana Kohabitasi*.

32 Al Khanif, *Hukum Dan Kebebasan Beragama Di Indonesia* (Yogyakarta: LaksBang Mediatama, 2010), 35.

the discriminatory application of criminal law, is essential to ensuring that religious minorities are afforded equal protection and recognition under the law.

One of the minority groups whose rights are at risk of being violated under the criminal provisions prohibiting fornication and cohabitation is the group referred to as *Penghayat Kepercayaan*. In Indonesia, *Penghayat Kepercayaan* represents individuals who adhere to belief systems outside the six officially recognized religions that are guaranteed and structurally supported by the state. These belief systems are deeply rooted in local traditions, leading this group to often be classified as followers of indigenous religions. The enactment of provisions regulating fornication and cohabitation poses a significant threat to *Penghayat Kepercayaan*, particularly in instances where marriages are unregistered and lack formal documentation.

While Law No. 23 of 2006 concerning Population Administration and Government Regulation No. 37 of 2007 have established mechanisms for the recognition and documentation of marriages performed by *Penghayat Kepercayaan*, these provisions require the presence of recognized leaders from *Penghayat Kepercayaan*, as coordinated by the Ministry of Culture. However, achieving compliance with these legal requirements remains challenging for many members of this group. The challenges are compounded by the fact that not all *Penghayat Kepercayaan* communities possess registered leaders or representatives authorized to officiate marriage ceremonies. Consequently, marriages conducted without the presence of officially registered religious leaders are considered valid only within the framework of customary or belief practices, but not within the context of Indonesia's positive legal system. This lack of formal recognition exposes adherents of *Penghayat Kepercayaan* to legal vulnerability, particularly under Article 411 and Article 412 of the KUHP 2023, which criminalize acts tied to unregistered marital status.

Additional barriers to marriage registration include financial constraints and issues related to geographical accessibility, which disproportionately impact marginalized communities, including low-income groups, individuals residing in remote areas, and persons with disabilities. While efforts by the state to acknowledge and provide a legal framework for *Penghayat Kepercayaan* marriages represent a commendable step forward in promoting inclusivity, the expansion of the definition of adultery and the criminalization of cohabitation further emphasize the need for simplified and accessible marriage registration processes. Ensuring that *Penghayat Kepercayaan* communities have equitable access to registration mechanisms is crucial to mitigating the risk of criminal prosecution arising from non-compliance with legal marriage documentation requirements.

Beyond *Penghayat Kepercayaan*, other religious minority groups also face potential adverse impacts from these criminal provisions. These groups include adherents of religions not formally recognized by Indonesian law, such as Shi'ah and Ahmadiyah. Despite efforts by Shi'ah and Ahmadiyah communities to register their marriages in accordance with legal requirements, significant obstacles persist in the registration process. Previous research on marriage registration among Shi'ah and Ahmadiyah groups highlights ongoing challenges related to administrative hurdles, societal stigma, and limited institutional support, further exacerbating their vulnerability to enforcement under morality-based criminal provisions. In his article Indonesia's New Criminal Code: Indigenizing and Democratizing Indonesian Criminal Law?,[33] Simon Butt highlights the legal uncertainty surrounding marriage registration for individuals adhering to heterodox interpretations of recognized religions or doctrinal systems categorized as "beliefs." As marriage registration constitutes a formal prerequisite for obtaining a legal certificate, couples who enter into such unions may find themselves unable to substantiate their marital status through official documentation. This absence of recognition could expose them to potential legal consequences under the relevant statutory provisions.

In addition to the religious minority groups previously discussed, the author has identified other groups that are potentially impacted by the criminal provisions concerning fornication and cohabitation. These include individuals who are unable to obtain legal recognition of their marriages due to interfaith marriage.[34] The challenges faced by interfaith couples stem from the issuance of Supreme Court Circular (*Surat Edaran Mahkamah Agung* or SEMA) Number 2 of 2023, which prohibits courts from approving applications to register marriages between individuals of differing religions. The issue of interfaith marriage registration highlights regulatory inconsistencies. While Law Number 1 of 1974 concerning Marriage does not explicitly prohibit interfaith marriages, certain provisions within other regulations appear to allow for their recognition. For instance, Article 35(a) of Law Number 23 of 2006 concerning Population Administration provides for the registration of interfaith marriages under specific circumstances.

33 Simon Butt (2023) Indonesia's new Criminal Code: indigenising and democratising Indonesian criminal law?, Griffith Law Review, 32:2, 190-214, DOI: 10.1080/10383441.2023.2243772, p.202

34 According to data from the Indonesian Conference on Religion and Peace, there were 1,425 interfaith marriage in Indonesia from 2005 until early March 2022, See, "Makin Sulit Menikah Beda Agama," tempo.co, August 6, 2023, https://www.tempo.co/arsip/tahapan-menikah-beda-agama-822159.

The stated purpose of SEMA Number 2 of 2023 is to provide judicial guidance aimed at ensuring legal certainty and uniformity in the application of laws related to marriage registration for couples of different religious affiliations. The circular establishes two key directives:

a. A valid marriage is defined as one conducted according to the respective laws of each religion and belief system, as stipulated in Article 2, paragraph (1) and Article 8(f) of Law Number 1 of 1974 concerning Marriage; and

b. The courts are prohibited from granting applications for the registration of marriages between individuals of different religions and belief systems.

The issuance of SEMA Number 2 of 2023 has significant implications for interfaith marriages. While these unions may be deemed valid according to the religious beliefs of the parties involved, they are not always recognized as legally valid by the state. Consequently, similar to the challenges faced by Shi'ah and Ahmadiyah adherents, Indonesian citizens who enter into interfaith marriages often encounter barriers to registration, resulting in the absence of formal legal documentation for their marriages. The lack of formal legality exposes these individuals to vulnerability under Articles 411 and 412 of the KUHP 2023, which criminalize fornication and cohabitation.

Additional obstacles to obtaining recognition for interfaith marriages include refusals by civil registration services and attempts to circumvent these barriers by transferring household cards. Such impediments exacerbate the risk of criminalization under the fornication and adultery provisions, as affected individuals are unable to provide proof of a valid marriage. This situation highlights the broader consequences of discriminatory marriage registration practices, which not only curtail access to administrative and public service rights but also heighten susceptibility to prosecution under morality-based criminal provisions.[35]

These regulatory inconsistencies and discriminatory practices necessitate a reevaluation of marriage registration policies. Addressing these systemic barriers would not only ensure equal access to legal recognition for all couples, regardless of religious affiliation, but also mitigate the disproportionate impact of criminal sanctions on marginalized groups. The implementation of inclusive registration mechanisms is essential to safeguarding the rights and dignity of all individuals under Indonesia's legal framework.

Criminalization constitutes a mechanism through which the state imposes limitations on human rights, as the act of labeling particular behaviors as criminal inherently restricts individual freedoms. Such limitations must be grounded in legitimate and proportionate reasons to comply with legal standards and human rights principles.[36] The process of criminalization necessitates legally justifiable restrictions that align with the parameters established under international human rights law. As outlined in the International Covenant on Civil and Political Rights (ICCPR) and elaborated upon through the principles enshrined in the Syracuse Principles, any restriction on human rights must meet stringent criteria, including necessity, proportionality, and non-discrimination, and must be directed toward achieving a legitimate aim.[37]

When analyzing the relationship between the criminalization of fornication and cohabitation and the issue of marriage legality, it becomes evident that the rationale for criminalizing such acts cannot be predicated solely on a singular perspective, such as morality. Morality is inherently subjective and varies widely across cultures, religions, and individual beliefs, making it an insufficient foundation for the imposition of punitive measures. While proponents of criminalization argue that these measures serve to uphold societal values, safeguard public interests, and deter criminal conduct, such actions often have unintended consequences that exacerbate systemic inequities and disproportionately impact vulnerable groups. Among those most adversely affected are religious minority groups whose marital practices and belief systems may deviate from mainstream norms.

The criminalization of fornication and cohabitation, particularly when tied to marriage legitimacy, risks perpetuating discrimination and exclusion against religious minorities who face structural barriers to formal recognition of their marital status. For example, individuals belonging to religious minority groups may encounter challenges in complying with the legal standards required for marriage registration due to conflicting doctrinal interpretations, discriminatory administrative practices, or socio-economic impediments. In such cases, the absence of formal legality leaves these individuals exposed to criminal prosecution under provisions that equate unregistered marital unions with illicit conduct. This dynamic underscores the broader societal implications of

35 Hasan and Maufur, *Membela Hak-Hak Masyarakat Rentan: Ham, Keragaman Agama Dan Isu-Isu Keluarga*, 79–80.

36 Mahrus Ali, Irwan Hafid, and Kurnia Dewi Anggraeny, "Criminalization Based on the Principle of Human Rights Limitation," *Jurnal Hukum Novelty* 13, no. 1 (July 22, 2022): 98–108, https://doi.org/10.26555/novelty.v13i1.a23606.

37 Zainal Abidin Bagir et al., *Membatasi Tanpa Melanggar:Hak Kebebasan Beragama Atau Berkeyakinan* (Yogyakarta: CRCS, 2019), 8.

criminalization, as it fails to account for the complexities of pluralistic societies and instead reinforces dominant norms while marginalizing minority groups.

Furthermore, the labeling effect inherent in criminalization compounds the discriminatory impact, as acts categorized as crimes are stigmatized, perpetuating negative stereotypes and amplifying the marginalization of affected communities. In the context of morality-based offenses such as fornication and cohabitation, the imposition of criminal sanctions not only restricts personal autonomy but also undermines the dignity and identity of minority groups. This approach raises critical concerns regarding the balance between enforcing societal morality and upholding the principles of equality, inclusivity, and respect for fundamental human rights.

There is essentially no issue in using value-based standards to determine whether an act is reprehensible. However, in the context of a pluralistic society, such value-based standards must be applied in an equitable manner that does not marginalize any particular group, especially religious minorities. In criminalizing cohabitation and expanding the scope of adultery, religious values may indeed serve as a reference point. Nevertheless, the application of such values cannot stand independently but must adhere to the principles established by the constitution. The restriction of rights through criminal law cannot solely rely on religious values but must also be subject to the principle of constitutional supremacy.[38] The executive-legislative actions that disregard the Constitutional Court's rulings on adultery and cohabitation reflect an absence of a culture that upholds constitutional supremacy in Indonesia's legislative drafting practices, which are ostensibly bound by the Constitutional Court's decisions. The process of criminalizing adultery and cohabitation exemplifies that the restriction of human rights through criminal law is not merely a matter of morality but also involves political negotiations and the exercise of political authority, frequently driven by certain groups (including the majority) in imposing such restrictions.[39]

In conclusion, while criminalization is often justified as a means to protect societal interests and deter harmful conduct, its application must be critically examined to ensure compliance with human rights standards, including non-discrimination and proportionality. The adverse effects of criminalizing fornication and cohabitation on religious minority groups illustrate the need for legal frameworks to adopt a more nuanced and inclusive approach. By addressing the inherent inequities in marriage legality policies and refraining from using criminal law as a tool for moral enforcement, the state can better fulfill its obligations under human rights law and promote a legal system that respects the diverse realities of its citizens.

4. Conclusion

The expansion of the adultery provision to include the criminalization of fornication and cohabitation reflects the state's position that moral issues warrant the imposition of criminal sanctions. However, these legislative measures carry significant implications, including the potential infringement of human rights, particularly those of religious minorities. Among the groups most adversely affected by these provisions are religious minorities whose beliefs and practices may not align with the official recognition criteria established by the state. This includes communities whose religious identities are not formally acknowledged as "recognized religions," as well as groups comprising individuals who enter into interfaith marriages. Such marriage, when unregistered, are not considered legally valid under current legal standards and thus fall outside the scope of formal protections.

The criminalization of adultery, fornication, and cohabitation transcends the mere act of labeling individual behaviors as immoral; it raises broader concerns regarding the state's role and obligations in safeguarding the rights of its citizens. Specifically, these provisions highlight the failure of the state to guarantee the legal validity of marriages for all citizens, irrespective of their religious or belief systems. By prioritizing morality as the foundation for criminalization, the state risks marginalizing individuals who are unable to meet the established criteria for formal marriage recognition. This approach disregards critical elements such as the Constitutional Court's unequivocal rejection of the expansion of adultery and overlooks the interplay between morality-based criminal provisions and policies in other areas of law, particularly marriage law. Such oversight has the potential to disproportionately discriminate against vulnerable and marginalized groups within society.

In failing to harmonize legal frameworks, the legislature has inadvertently created conditions that expose certain populations to arbitrary enforcement and unequal treatment under the law. For instance, individuals whose

38 Ahmad Rofii and Nadirsyah Hosen, "The Constitutionalization of 'Religious Values' in Indonesia," in *Constitutional Democracy in Indonesia*, ed. Melissa Crouch, 1st ed. (Oxford University PressOxford, 2022), 256, https://doi.org/10.1093/oso/9780192870681.003.0012.ed. Melissa Crouch, 1st ed. (Oxford University PressOxford, 2022

39 Dian AH Shah, "Constitution-Building and Constitutional Culture: The Case of Malaysia" (Melbourne Forum on Constitution Building, Constitution Transformation Network, 2018), 5–6, https://law.unimelb.edu.au/__data/assets/pdf_file/0007/2987953/Malaysia-DianShah.pdf.

marriages are deemed invalid due to regulatory inconsistencies face heightened risks of prosecution under Articles 411 and 412 of the KUHP 2023. This exposes a systemic gap in the integration of marriage registration policies with morality-based criminal provisions, underscoring the need for legislative reform to address these disparities.

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