



## Examining Muslims' Aspirations in Drafting the New Criminal Code: Analyzing Criminal Law Policy in Indonesia from a *Maslaha* Perspective

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**Abstract:** Indonesia is a Muslim-majority country that has enacted Law Number 1 of 2023 concerning the Criminal Code as a common ideal between the state and its citizens in creating harmony in life. In a democratic country, the law-making process must open to public participation as a form of manifestation of the determination of the society's living values, and as providing legitimacy for the formation of a law. This study focuses on discussing how much the aspirations of Muslims are adopted by the state in drafting the new Criminal Code, especially on issues related to Islamic morality, such as pornography, displaying contraceptives, adultery, cohabitation, abortion, and blasphemy. This study uses qualitative research methods with *maslaha* theory approach. The data sources are in the form of laws and regulations, minutes of DPR sessions, and the aspirations of the Islamic community. This study concludes that the new Criminal Code shows an increase in meaningful participation, which includes three prerequisites: the public has the right to be heard, the right to have their opinions considered, and the right to receive an explanation. The drafting of the new Criminal Code is at the "partnership" level and is in the "degrees of citizen power" category in the ladder of citizen participation scheme. At this level, the public has direct access to interact with policy makers regarding the new Criminal Code.

**Keywords:** *Muslim aspirations; participation; drafting of the Criminal Code; Criminal Law; maslaha theory*

**Abstrak:** Indonesia merupakan negara mayoritas Muslim yang telah menetapkan Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-undang Hukum Pidana sebagai cita-cita bersama antara negara dengan warganya dalam menciptakan keharmonisan hidup. Dalam negara demokrasi, proses pembuatan undang-undang harus membuka partisipasi Masyarakat sebagai bentuk perwujudan dari penetapan nilai-nilai yang hidup di masyarakat, dan sebagai pemberian legitimasi terhadap pembentukan suatu undang-undang. Kajian ini membahas aspirasi umat Islam di Indonesia dalam penyusunan KUHP baru. Kajian ini memfokuskan pada pembahasan seberapa banyak aspirasi umat Islam diadopsi oleh negara dalam penyusunan KUHP baru, terutama dalam isu-isu yang berkaitan dengan moralitas Islam, seperti pornografi, mempertunjukkan alat kontrasepsi, perzinahan, kohabitasi, aborsi, dan penodaan agama. Kajian ini menggunakan metode penelitian kualitatif dengan pendekatan teori *maslahah*. Sumber data berupa aturan perundang-undangan, risalah sidang DPR, dan aspirasi masyarakat Islam. Kajian ini berkesimpulan bahwa KUHP baru menunjukkan

adanya peningkatan partisipasi masyarakat bermakna (*meaningful participation*), yang mencakup tiga prasyarat: masyarakat memiliki hak untuk didengar, hak untuk dipertimbangkan pendapatnya, dan hak untuk mendapat penjelasan. Penyusunan KUHP baru berada pada tingkat “*partnership*” dan berada pada kategori “*degrees of citizen power*” dalam skema *the ladder of citizen participation*. Pada tingkat ini, masyarakat memiliki akses langsung untuk berinteraksi dengan pembuat kebijakan terkait KUHP baru.

**Kata kunci:** *Aspirasi Islam; partisipasi; penyusunan KUHP; Hukum Pidana; teori masalah*

## Introduction

Indonesia constitutes a predominantly Muslim nation operating within a secular democratic framework. Therefore, the involvement of Muslims in the legislative process holds significant importance.<sup>1</sup> In a representative democratic system, it is imperative to incorporate the aspirations of Muslim constituents, as this fosters inclusivity and upholds the principles of democracy.<sup>2</sup> Following democratic tenets, Indonesia has instituted a legislative entity termed the House of Representatives (DPR), entrusted with the mandate of representing the citizenry. Possessing the prerogative to promulgate legislation, the DPR undertakes the scrutiny of draft laws, striving for consensus through dialogues with the President.<sup>3</sup>

The formulation of laws within the legislative assembly embodies a collective ideal foundational to political accords. Law, fundamentally, is construed as the embodiment of the people's will through representative institutions, namely the legislative body.<sup>4</sup> The significance of the legislative institution is paramount in the context of democratization endeavours. The legislative process, within these institutions, serves as a yardstick for assessing a nation's democratic maturity.<sup>5</sup>

As a nation committed to democratic principles, Indonesia prioritizes the incorporation of the populace's aspirations as the cornerstone for legislative decision-making.<sup>6</sup> This is the domain where legislation derived from the aspirations of the populace serves as a means to accomplish state objectives, commonly referred to as legal politics. Law, functioning as a social norm, remains intricately intertwined with the prevailing societal values; indeed, it can be posited that law embodies and materializes the values entrenched within society.<sup>7</sup> Within a democratic framework, the state no longer unilaterally dictates laws and political policies behind closed doors; rather, the community is afforded the opportunity to participate in shaping every political and legal directive. This participatory process is known as deliberative democracy.<sup>8</sup>

The formulation of Law Number 1 of 2023, commonly known as the new Criminal Code, exemplifies a convergence of shared aspirations between the state and its populace, aimed at fostering societal

<sup>1</sup> Mark R Woodward, “Indonesia, Islam, and the Prospect for Democracy,” *SAIS Rev. Int'l Aff.* 21 (2001): 29.

<sup>2</sup> Ank M.B. Michels, “Citizen Participation and Democracy in the Netherlands,” *Democratization* 13, no. 2 (2006): 323–39.

<sup>3</sup> Jimly Asshiddiqie, *Konstitusi Dan Konstitusionalisme Indonesia*, 2nd ed. (Jakarta: Sinar Grafika, 2021), 152–162.

<sup>4</sup> Tom R Tyler, “Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform,” *Am. J. Comp. L.* 45 (1997): 871.

<sup>5</sup> Balakrishnan Rajagopal, “Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination,” *Wm. & Mary L. Rev.* 49 (2007): 1347.

<sup>6</sup> Udaya Wagle, “The Policy Science of Democracy: The Issues of Methodology and Citizen Participation,” *Policy Sciences* 33, no. 2 (2000): 207–23.

<sup>7</sup> Daniel S. Lev, *Hukum Dan Politik Di Indonesia (Kesenambungan Dan Perubahan)* (Jakarta: LP3ES, 1990), 8.

<sup>8</sup> Joshua Cohen, “Deliberative Democracy,” in *Deliberation, Participation and Democracy: Can the People Govern?*, ed. Shawn W. Rosenberg (London: Palgrave Macmillan, 2017), 219–36.

harmony. Throughout the legislative process of crafting this law, there is a discernible metamorphosis of the envisioned goals, missions, and values desired by both the legislative institutions and the society, culminating in the codification of legal principles.<sup>9</sup> In essence, the Indonesian populace collectively consented to the formulation of a new Criminal Code to supplant the colonial-era Criminal Code.<sup>10</sup> Following an extensive drafting process dating back to 1963, the new Criminal Code was officially ratified on January 2, 2023.<sup>11</sup> It is scheduled to take effect within the subsequent three years, specifically in 2025.

In lieu of the Dutch colonial-era Criminal Code, the drafting of a new Criminal Code necessitates alignment with the distinctive character and identity of the Indonesian nation.<sup>12</sup> This endeavour entailed the comprehensive integration of citizens' aspirations spanning religious, cultural, ethnic, and traditional diversities. Consequently, the legislative process demands a broad opening for community engagement, as participation serves as a conduit for articulating societal values. Moreover, community involvement confers legitimacy and garner support for the legislative formation process.<sup>13</sup> The significance of legislation lies not solely in its regulatory content but also in the process of lawmaking itself.<sup>14</sup> Furthermore, citizen engagement in the legislative process embodies the principles of good governance and underscores the functionality of the social contract between the populace and their elected representatives.<sup>15</sup>

Public participation constitutes an integral component of citizens' human rights, safeguarded by Law Number 12 of 2011 on the Establishment of Legislative Regulations, as amended by Law Number 13 of 2022. Article 96 of Law Number 13 of 2022 stipulates in paragraph 1 that "The public has the right to provide input verbally and/or in writing at every stage of the Formation of Legislative Regulations", and in paragraph 6 that "To fulfil the rights as referred to in paragraph 1, makers of Legislative Regulations can carry out public consultation activities through: a. public hearings; b. work visits; c. seminars, workshops, discussions; and/or d. other public consultation activities". Through the nine paragraphs of Article 96 of Law Number 13 of 2022, it can be inferred that public participation must be conducted in an open, transparent, and inclusive manner, accessible to the entire community.

This research endeavours to elucidate the extent of aspirations among Muslims in Indonesia concerning the formulation of the new Criminal Code. The emphasis on Muslim aspirations in this

<sup>9</sup> Joakim Ekman and Erik Amna, "Political Participation and Civic Engagement: Towards a New Typology," *Human Affairs* 22, no. 3 (2012): 283–300.

<sup>10</sup> Sriwiyanti Sriwiyanti, Wahyu Saefudin, and Siti Aminah, "Restorative Justice for Juvenile Offenders in Indonesia: A Study of Psychological Perspective and Islamic Law," *Journal of Islamic Law (JIL)* 2, no. 2 SE-Articles (August 4, 2021), <https://doi.org/10.24260/jil.v2i2.335>.

<sup>11</sup> Marcus Priyo Gunarto, "Asas Keseimbangan Dalam Konsep Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana," *Mimbar Hukum* 24, no. 1 (2012): 83–97.

<sup>12</sup> Muhammad Ruhly Kesuma Dinata et al., "Good Governance and Local Wisdom in Law Enforcement," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 5, no. 2 SE-Articles (December 19, 2022): 227–42, <https://doi.org/10.24090/volksgeist.v5i2.6740>. even though restorative justice is an approach that aims to build a criminal justice system that is sensitive to the problems of victims. Restorative justice which means a glorification of relationships and making amends that the perpetrator of the crime (his family

<sup>13</sup> Samantha Besson and José Luis Martí, "Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation," *Jurisprudence* 9, no. 3 (2018): 504–40.

<sup>14</sup> Fitra Arsil, Ariesy Tri Mauleny, and Ryan Muthiara Wasti, "Law Making Activities during Lame Duck Sessions in Indonesia (1997–2020)," *Parliamentary Affairs* 76, no. 2 (2023): 421–42.

<sup>15</sup> Gustav Muller, "Conceptualising 'meaningful Engagement' as a Deliberative Democratic Partnership," *Stellenbosch Law Review* 22, no. 3 (2011): 742–58.

discourse is predicated on historical contexts wherein Islamic groups, constituting the majority populace in Indonesia, have concurrently sought to imbue the country's foundations with Islamic nuances. Muslims are endeavouring to mitigate the remnants of colonial-era influences, such as the Snouck Hurgonje's *receptie* theory, within the Indonesian legal framework. Since attaining independence, Muslims have sought to reinstate the prominence of Islamic law as the legal system applicable to Indonesian Muslim society.<sup>16</sup>

This study concentrates on assessing the extent to which the aspirations of Muslims were integrated by the state during the formulation of the new Criminal Code, particularly concerning matters pertaining to Islamic morality such as pornography, the public display of contraceptive devices, adultery, cohabitation, abortion, and religious blasphemy. Employing qualitative research methodologies, the study draws upon data sources comprising statutory regulations, transcripts of discussion sessions on the Draft Criminal Code, and the expressed aspirations of the Islamic community regarding issues of Islamic morality within the Draft Criminal Code. Data analysis is conducted through the lens of Sherry Arnstein's ladder of citizen participation theory.<sup>17</sup> The primary objective of this research is to address the inquiry regarding the level of involvement of the Islamic community in the drafting process of the new Criminal Code, as assessed through Arnstein's participation ladder theory.

### Citizens' Aspirations in Drafting Laws

The engagement of citizens in the legislative process is increasingly recognized as pivotal for enhancing the legitimacy and efficacy of such endeavours. In contemporary times, this has emerged as a yardstick for assessing the democratic credentials of nations, extending beyond domestic considerations to garner support from constitutional law scholars and the international community at large.<sup>18</sup> By definition, a democratic state incorporates mechanisms enabling leaders to heed the perspectives of their populace. Consequently, a democratic nation necessitates a compulsory exchange mechanism between legislative leaders and the public, ensuring mutual engagement and dialogue.<sup>19</sup>

As previously stated, Indonesia is a nation characterized by a predominantly Muslim population, operating within a democratic framework for its governance and political affairs.<sup>20</sup> In accordance with this democratic system, the Indonesian constitutional framework can integrate religious values into the public sphere, reflecting the aspirations of the populace. Consequently, Islam holds a central position in the daily lives of a vast majority of Indonesians, affirming its considerable political influence in shaping the preferences of Indonesian citizens. Numerous Islamic organizations have

<sup>16</sup> Arskal Salim, "Adat and Islamic Law in Contemporary Aceh, Indonesia: Unequal Coexistence and Asymmetric Contestation," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021): 529–51. mendeley:{"formattedCitation": "Arskal Salim, \"Adat and Islamic Law in Contemporary Aceh, Indonesia: Unequal Coexistence and Asymmetric Contestation,\" <i>Samarah: Jurnal Hukum Keluarga Dan Hukum Islam</i> 5, no. 2 (2021)

<sup>17</sup> Sherry R Arnstein, "A Ladder of Citizen Participation," *Journal of the American Institute of Planners* 35, no. 4 (1969): 216–24. Sherry R Arnstein, "A Working Model for Public Participation," *Public Administration Review* 35, no. 1 (1975): 70–73.

<sup>18</sup> Tom Ginsburg, Zachary Elkins, and Justin Blount, "The Citizen as Founder: Public Participation in Constitutional Approval," *Temple Law Review* 81 (2008): 361.

<sup>19</sup> Karen Syma Czapsanskiy and Rashida Manjoo, "The Right of Public Participation in the Law-Making Process and the Role of Legislature in the Promotion of This Right," *Duke J. Comp. & Int'l L.* 19 (2008): 1.

<sup>20</sup> Bani Syarif Maula, "The State Legal Policies on Sharia Application in Changing Pattern of Indonesia's Islamic Movements," *Al Hurriyah: Jurnal Hukum Islam* 7, no. 1 (2022): 15–30.

persistently advocated for an expanded and more influential role for Islam within Indonesia's political landscape.<sup>21</sup>

In alignment with democratic principles, Indonesia underscores the centrality of people's aspirations in the legislative process. Legislation stemming from such aspirations serves as a means to realize state objectives, often referred to as legal politics. Law, functioning as a societal norm, is inseparable from prevailing values, essentially reflecting and embodying the societal ethos.<sup>22</sup> Within a democratic framework, legislative and political decisions are no longer monopolized by the state behind closed doors; rather, the community is afforded the opportunity to contribute to the formulation of every political and legal policy. This participatory process is commonly referred to as deliberative democracy.<sup>23</sup>

This concept of deliberative democracy arises as a response to the limitations of the representative democracy model, which often sidelines constituents from the broader law-making process. Under this model, constituents exercise their political rights solely by electing parliamentary candidates, after which their constitutional role is deemed fulfilled. However, the treatment of people post-election holds greater significance. The essence of deliberative democracy underscores that people's voices should not be confined to electoral processes alone; rather, individuals must actively participate in all facets of governance and public decision-making facilitated through government-provided public forums. Democracy, therefore, transcends mere electoral procedures; it constitutes a political system that responsively accommodates societal needs.<sup>24</sup>

Deliberative democracy places a significant emphasis on the procedures governing the enactment of laws,<sup>25</sup> advocating for the expansion of public discourse to enable citizen participation and expression of their aspirations regarding proposed legislation. Lawmaking processes should not be monopolized solely by authorized bodies but should also provide avenues for involvement from non-state actors. Public forums serve as vital channels of communication between the state and its citizenry. Deliberative democracy underscores the importance of the legislative process, suggesting that decisions are improved with greater deliberation. In this context, if lawmaking processes involve broad public engagement, resulting laws are more likely to be responsive, reflecting principles of justice and meeting societal expectations.<sup>26</sup>

The engagement of citizens in the development of regulations constitutes a fundamental right that can be exercised during both the preparatory and deliberative phases. Each citizen's entitlement engenders corresponding responsibilities for the government within the realm of human rights. The concept of citizen participation correlates with the principle of openness, which is considered a constitutional imperative governing the legitimate exercise of authority. Various measures can be

<sup>21</sup> Bani Syarif Maula, "Post-Islamisme Dan Gerakan Politik Islam Dalam Sistem Demokrasi Indonesia," *Al-Daulah: Jurnal Hukum Dan Perundangan Islam* 9, no. 1 (2019): 90–116.

<sup>22</sup> Lev, *Hukum Dan Politik Di Indonesia (Kesinambungan Dan Perubahan)*.

<sup>23</sup> Timo Duile and Jonas Bens, "Indonesia and the 'Conflictual Consensus': A Discursive Perspective on Indonesian Democracy," *Critical Asian Studies* 49, no. 2 (2017): 139–62.

<sup>24</sup> Roberto Frega, "The Fourth Stage of Social Democracy," *Theory and Society* 50, no. 3 (2021): 489–513, <https://doi.org/10.1007/s11186-020-09424-y>.

<sup>25</sup> Ahmad Faisal et al., "Sociological and Political Constraints of Islamic Sharia Enforcement in South Sulawesi Indonesia," *JURIS (Jurnal Ilmiah Syariah)* 22, no. 1 (2023): 159–69.

<sup>26</sup> Moh. Mahfud MD, *Politik Hukum Di Indonesia* (Jakarta: Rajawali Press, 2011), 32.

implemented to facilitate citizen participation in regulatory formation, including the organization of hearings or other forums aimed at eliciting citizens' aspirations.<sup>27</sup>

Legislation exerts significant influence on the affairs of a nation and its governance, as it has the capacity to curtail citizens' freedoms and rights, impose financial burdens on them, and govern expenditures by state officials. Consequently, the process of legislating is typically governed by constitutional provisions, with the formation of laws in Indonesia also being regulated within the Indonesian Constitution.<sup>28</sup> According to Article 5, paragraph 1 of the Indonesian Constitution, "The President is authorized to propose draft laws to the People's Representative Council", while Article 20, paragraph 1 stipulates that "The People's Representative Council possesses the authority to enact laws". The process of legislating typically involves several stages, including proposal, deliberation, approval, and ratification.

The proposal stage is an integral part of the planning process, involving the submission of a bill to be included in the national legislative program. Once established, the national legislative programs are disseminated to engage the public and stakeholders through mass media channels. This dissemination may occur prior to the establishment of the National Legislation Program, ensuring that the public and stakeholders are informed and can provide input. Each bill must be accompanied by an academic manuscript, comprising research findings or legal analyses, and other scholarly studies addressing a specific issue that can be scientifically substantiated. The requirement for academic texts is waived for the State Revenue and Expenditure Budget Bill, Government Regulations in Lieu of Laws adopted as Laws, and the repeal of Laws or Government Regulations in Lieu of Laws. However, when submitting these three types of bills, they must be accompanied by information outlining the main ideas and content being regulated.<sup>29</sup>

Upon proposal or submission, a bill undergoes a deliberative process by the House of Representatives alongside the President to secure mutual approval. This protocol is enshrined in Article 20, paragraph 2 of the Constitution, which stipulates that "Every bill is deliberated by the House of Representatives and the President to obtain joint approval", and in Article 20, paragraph 3, which asserts that "If the bill fails to garner mutual approval, it may not be resubmitted for deliberation by the People's Representative Council during that session". During the deliberation phase, both the House of Representatives and the President hold equivalent positions. This signifies that each possesses equal authority to express agreement or dissent regarding the bill's content under consideration.<sup>30</sup>

Following the deliberation process and attaining mutual approval, the bill will proceed to enactment and be signed by the President. If the approved bill is not signed by the President within thirty days, it automatically becomes law and must be promulgated in the state gazette. As per Jimly Asshiddiqie, the President's signature to ratify an approved bill is a strictly administrative and formal procedure; the substantive significance lies in the mutual agreement reached during the bill's approval.<sup>31</sup>

<sup>27</sup> Robert A Dahl, "A Democratic Dilemma: System Effectiveness versus Citizen Participation," *Political Science Quarterly* 109, no. 1 (1994): 23-34.

<sup>28</sup> Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid II* (Jakarta: Konstitusi Press, 2006), 32-33.

<sup>29</sup> Article 122 Article 13 paragraph 2 Regulation of the House of Representatives of the Republic of Indonesia Number 1 of 2020 concerning Rules of Procedure.

<sup>30</sup> Rahayu Prasetyaningsih, "Menakar Kekuasaan Presiden Dalam Pembentukan Peraturan Perundang-Undangan Menurut Undang-Undang Dasar 1945," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 4, no. 2 (2017): 263-80.

<sup>31</sup> Jimly Asshiddiqie, *Perihal Undang-Undang* (Jakarta: Konstitusi Press, 2006), 297.

During the proposal stage outlined previously, members of the public and stakeholders are afforded the opportunity to contribute by expressing their aspirations as input for the content of the bill under discussion. All segments of society are granted ample opportunity to provide input in the process of legislation formation.<sup>32</sup> The engagement of citizens in the development of laws and regulations embodies the application of the principle of transparency, which constitutes one of the foundational principles in the crafting of effective legislation.<sup>33</sup>

The inclusion of public participation is imperative in the legislative process to enable the expression of public aspirations. Facilitating opportunities for participation is a fundamental community right, fostering a more inclusive and equitable society while bolstering democratic institutions. Furthermore, community involvement in law formation can enhance the legitimacy and quality of resultant legislation, improve prospects for successful implementation, promote voluntary compliance with laws and regulations, and broaden avenues for citizen partnership.<sup>34</sup>

Citizen participation constitutes an integral aspect of citizens' rights, encompassing the right to express their opinions (the right to be heard), the right to have their opinions taken into account (the right to be considered), and the right to receive explanations or responses to their opinions (the right to be explained). These rights, particularly in the context of law drafting, are collectively referred to as meaningful participation. The fulfilment of meaningful participation serves as a yardstick for assessing a legal product that is not only structurally sound but also resonates with the sense of justice sought by society.<sup>35</sup>

The entitlement of the public to have their opinions acknowledged and acted upon underscores that individuals are not merely granted the liberty to hold opinions, but that their viewpoints must be actively acknowledged and given due consideration, particularly in the realm of law formation. Meaningful participation in the legislative process epitomizes the principles of good governance. Moreover, the social contract theory provides a robust justification for advocating for active and inclusive public participation from all segments of society in the legislative process.<sup>36</sup>

Assessing the degree of public participation or meaningful participation can be accomplished utilizing Sherry Arnstein's ladder of citizen participation theory, which delineates eight levels (or ladders) of participation based on the extent of community influence in planning and decision-making processes. These levels include manipulation, therapy, informing, consultation, placement, partnership, delegated power, and citizen control. Subsequently, these levels are categorized into three overarching forms: non-participation (encompassing manipulation and therapy), degrees of tokenism (comprising informing, consultation, and placement), and degrees of citizen power (consisting of partnership, delegated power, and citizen control). An illustration of the ladder of community participation as conceptualized by Sherry Arnstein is depicted as follows.<sup>37</sup>

<sup>32</sup> Rahendro Jati, "Partisipasi Masyarakat Dalam Proses Pembentukan Undang-Undang Yang Responsif," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 1, no. 3 (2012): 329-42.

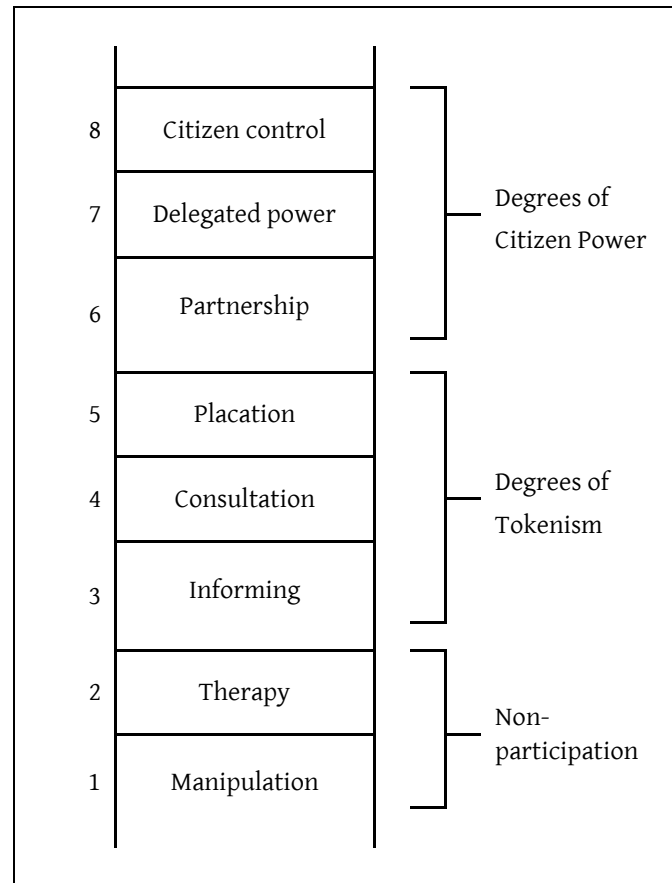
<sup>33</sup> Article 5 Letter g Law Number 12 of 2011 concerning the Establishment of Legislative Regulations.

<sup>34</sup> Dragan Golubovic, "An Enabling Framework for Citizen Participation in Public Policy: An Outline of Some of the Major Issues Involved," *Int'l J. Not-for-Profit L.* 12, no. 4 (2009): 38.

<sup>35</sup> Angela M Gius, "Dignifying Participation," *NYU Rev. L. & Soc. Change* 42, no. 1 (2018): 45-91.

<sup>36</sup> Muller, "Conceptualising 'meaningful Engagement' as a Deliberative Democratic Partnership."

<sup>37</sup> Arnstein, "A Ladder of Citizen Participation."



“Arnstein’s ladder” of citizen participation

The table above delineates the progression of citizens’ participation across various stages. In the manipulation phase, the community is relegated to a role of mere consent-givers, while governmental entities assume full control, portraying them as instruments of the government with minimal participation. Transitioning to the therapy stage, participation is superficially implemented as a form of remediation to mitigate past democratic demands. Moving on to the informing phase, the community is positioned as passive recipients of one-way information regarding their respective responsibilities, lacking avenues for feedback and thus limiting their influence on policy formulation. As for the consultation stage, although a two-way dialogue between authorities and the citizens is initiated, its efficacy remains low due to the absence of assurances that community aspirations will be heeded. Advancing to the placation level, some consideration is given to citizens’ aspirations by authorities, yet only a fraction of these voices is realized, often due to their relatively marginalized position or limited numbers. Conversely, at the partnership level, consensus can be achieved between the citizens and governing bodies, indicating a convergence of interests. Progressing further to the delegated power phase, the community garners increased trust from authorities, thereby being granted authority to make decisive determinations on specific plans or programs. Finally, at the citizen control level, the community assumes authority to regulate programs or institutions related to their interests.<sup>38</sup>

<sup>38</sup> Arnstein, “A Working Model for Public Participation.”



### Citizen Participation according to *Maslaha* Theory

The *maslaha* theory, also known as the theory of public interest or common good (*maslaha mursalah*), is a principle in Islamic jurisprudence that allows for the consideration of public welfare and interests when deriving legal rulings.<sup>39</sup> This theory recognizes that the ultimate goal of Islamic law (*Sharia*) is to promote the well-being of individuals and society as a whole. As such, it acknowledges the importance of taking into account the aspirations and needs of citizens when drafting laws.<sup>40</sup>

In the context of evaluating citizens' aspirations in legislation drafting, the *maslaha* theory encompasses several fundamental principles. One of these principles is the advancement of public welfare. At its core, the *maslaha* theory aims to enhance the welfare and interests of the community. This involves taking into account citizens' needs, concerns, and aspirations during the formulation of laws to ensure they contribute positively to societal well-being. Another key principle is the flexibility in legal interpretation. The *maslaha* theory allows for adaptable legal reasoning to accommodate evolving societal conditions and emerging challenges. Islamic jurists may interpret legal texts and derive rulings based on considerations of public interest, thereby addressing the changing needs and aspirations of citizens.<sup>41</sup>

Furthermore, there is the principle of reconciling conflicting interests. In lawmaking, the *maslaha* theory necessitates the balancing of various interests and priorities to maximize societal benefit. This may entail harmonizing individual rights with communal interests and resolving conflicts among different societal groups. Consultation and participation represent another vital principle. Islamic legal traditions underscore the significance of consultation (*Shura*) and inclusive decision-making processes in governance. Accordingly, the *maslaha* theory encourages policymakers to engage citizens, experts, and stakeholders to solicit their input and integrate their aspirations into the legislative framework. The principle of *Shura* emphasizes the importance of consultation and deliberation in decision-making processes. In the context of drafting laws, this entails involving citizens, experts, and stakeholders in discussions and seeking their input on legislative matters. Decision-makers are encouraged to consult with relevant groups to gather diverse perspectives and insights, which can inform the drafting process.

The last key principle pertains to ethical considerations. While striving for public welfare, the *maslaha* theory upholds ethical principles and moral values inherent in Islamic teachings. Laws formulated under this theory should not only serve utilitarian purposes but also align with the broader ethical framework of Islam. In this regard, citizen participation involves engaging the broader public in the legislative process. This may include conducting public hearings, forums, or surveys to solicit feedback on proposed laws and gather input from individuals and communities affected by the legislation. By actively involving citizens in these discussions,

<sup>39</sup> Andi Luhur Prianto et al., "Faith-Based Organizations' Humanitarian Work from the Disaster Risk Governance Perspective: Lessons from Covid-19 Pandemic in Indonesia," *Mazahib* 22, no. 1 SE-Articles (June 27, 2023), <https://doi.org/10.21093/mj.v22i1.6317>.

<sup>40</sup> Jasser Auda, *Maqasid Al-Shari'ah as Philosophy of Islamic Law: A Systems Approach* (Herndon: International Institute of Islamic Thought (IIIT), 2022), 9. Mohammad Hashim Kamali, "Maqāṣid Al-Sharī'ah: The Objectives of Islamic Law," *Islamic Studies* 38, no. 2 (1999): 193–208.

<sup>41</sup> Ali Murtadho Emzaed, Ibnu Elmi A S Pelu, and Shakhzod Tokhirov, "Islamic Law Legislation in Indonesia: Anomalies of the Relationship between Political Configuration and Zakat Legal Product during the Reform Era," *Al-Manahij: Jurnal Kajian Hukum Islam* 17, no. 1 (May 2023): 97–112, <https://doi.org/10.24090/mnh.v17i1.7815>.

policymakers can ensure that the laws reflect the needs, concerns, and aspirations of the people they are intended to govern.<sup>42</sup>

The *maslaha* theory of Islamic law provides a framework for considering the aspirations of citizens in drafting laws by prioritizing public welfare, promoting flexibility in legal reasoning, balancing conflicting interests, encouraging consultation and participation, and upholding ethical principles. By integrating these considerations, policymakers can develop laws that are responsive to the needs and aspirations of the community while remaining faithful to Islamic legal principles.<sup>43</sup>

In the context of Islamic law, the appreciation of citizens' participation in legislation varies based on different interpretations and legal systems. Here are some key points: Firstly, Islamic Law and Democracy. Sharia law (Islamic law) guides the personal religious practices of Muslims worldwide. However, the extent to which it should influence modern legal systems is a matter of debate. Some Islamic scholars argue that Sharia should be the sole source of legislation, while others advocate for a more flexible approach that incorporates both religious principles and democratic norms.<sup>44</sup> Secondly, Citizens' Participation. Muslims, like any other citizens, have the right to propose policies or legislation based on their religious beliefs. However, the appreciation of such proposals depends on whether they align with the concept of "public reason" rather than merely asserting them as required by Sharia. In other words, citizens can propose laws informed by their faith, but they must also justify these proposals using secular reasoning that considers the broader public interest.<sup>45</sup>

Since 1998 in Indonesia, Islamic parties and candidates have not fared well in Indonesian elections. Surprisingly, there has been a surge in Islamic laws at the local level, often championed by vote-hungry candidates from non-Islamic parties. This highlights short-term strategizing and competition among political elites, regardless of their intention for Indonesia to become an Islamic state.<sup>46</sup> Therefore, Islamic law appreciates citizens' participation in legislation, but it often intersects with broader political dynamics and democratic principles. The balance between religious values and public reason remains a complex issue in various contexts.<sup>47</sup>

Citizen participation in drafting laws according to the *maslaha* theory of Islamic law involves promoting consultation, engaging the public, ensuring transparency and accessibility, facilitating community representation, and establishing feedback mechanisms. By incorporating these principles into the legislative process, policymakers can promote greater legitimacy,

<sup>42</sup> Felicitas Opwis, "New Trends in Islamic Legal Theory: Maqasid Al-Shari'a as a New Source of Law?," *Necmettin Erbakan Universitesi Hukuk Fakultesi Dergisi* 3 (2020): 121. Wildani Hefni, Rizqa Ahmadi, and Imam Mustofa, "Reinventing the Human Dignity in Islamic Law Discourse: The Wasatiyah Approaches from Khaled Abou El-Fadl to the Interreligious Relation," *Al-Manahij: Jurnal Kajian Hukum Islam* 16, no. 2 (November 2022): 239–54, <https://doi.org/10.24090/mnh.v16i2.6928>.

<sup>43</sup> Auda, *Maqasid Al-Shari'ah as Philosophy of Islamic Law: A Systems Approach*, 12.

<sup>44</sup> Abdullahi Ahmed An-Na'im, "Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights," in *Asian Perspectives on Human Rights*, ed. Claude E. Welch Jr. and Virginia A. Leary (London: Routledge, 2021), 31–54.

<sup>45</sup> Bani Syarif Maula, "Post-Islamism and the Rise of Sharia Laws in Contemporary Indonesia: Aspirations of Implementing Islamic Laws in a Democratic Era," *International Journal of Social Science and Religion (IJSSR)* 4, no. 2 (2023): 163–84. Asifa Quraishi-Landes, "Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible," *Rutgers JL & Religion* 16 (2014): 553.

<sup>46</sup> Khamami Zada, "Sharia and Islamic State in Indonesia Constitutional Democracy: An Aceh Experience," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 23, no. 1 (2023): 1–17.

<sup>47</sup> Zuly Qodir, "Post-Islamism And Reform Islamic Law: The Challenges And Future Of Political Islam In Indonesia," *Ahkam: Jurnal Ilmu Syariah* 23, no. 2 (2023): 281–306.

accountability, and effectiveness in crafting laws that serve the common good and uphold Islamic values.<sup>48</sup>

### The provisions of the New Criminal Code originated from the aspirations of Muslims

The Criminal Code Bill was ratified during the DPR Plenary Session on Tuesday, December 6, 2022, becoming Law Number 1 of 2023 concerning the Criminal Code (KUHP). This legislation supersedes the *Wetboek van Strafrecht*, also known as The Criminal Code, established under Law Number 1 of 1946 concerning Criminal Law Regulations. Various societal groups harbor divergent perspectives and aspirations concerning the contents of the new Criminal Code, encompassing issues pertaining to Islamic law, including articles rooted in Islamic teachings. The advent of the new Criminal Code, replacing the Dutch colonial Criminal Code, was widely perceived as a national milestone by many. However, a considerable number also offered nuanced critiques on several issues. With regard to Islamic law, numerous community groups have played an active role in shaping the new Criminal Code, including Islamic entities, both individuals and institutions such as the Indonesian Ulema Council, civil society organizations like the National Alliance for Criminal Code Reform, the National Commission on Violence Against Women, and the Advocacy Alliance for Criminal Offenses on Religion and Beliefs. Below are mentioned articles originating from the aspirations of Muslims.

#### 1. Pornography (Article 407)

According to Article 407, Paragraph 1 of the new Criminal Code, individuals engaging in the production, creation, reproduction, duplication, dissemination, broadcasting, import, export, offer, sale, rental, or provision of pornography shall face penalties, which include imprisonment for a minimum duration of six months and a maximum of ten years, or fines ranging from at least category IV to a maximum of category VI. This exception to the criminal offense is applicable to individuals producing pornographic content for purposes deemed as works of art, culture, sports, health, and/or science, as stipulated in Paragraph 2. Additionally, this exception encompasses the creation of pornographic material for personal use or private interests, as elucidated in the Explanatory section of Article 407. The definition of pornography is tailored to conform with the prevailing societal norms and standards at a specific time and location (contemporary community standards).<sup>49</sup>

The stipulations within this pornography article reflect the aspirations of Muslims as articulated in the anti-pornography legislation (Law Number 44 of 2008 concerning Pornography). However, the government has incorporated this provision into the new Criminal Code. The content of the pornography article has garnered criticism, notably from the National Commission on Violence Against Women, which contends that the article effectively diminishes legal protections for victims of sexual exploitation.<sup>50</sup>

<sup>48</sup> Bambang Iswanto and Miftah Faried Hadinatha, "Sharia Constitutionalism: Negotiating State Interests and Islamic Aspirations in Legislating Sharia Economic Law," *Ahkam: Jurnal Ilmu Syariah* 23, no. 1 (2023): 235–58.

<sup>49</sup> Hanugrah Titi Habsari and Ladito Risang Bagaskoro, "Pornography in Indonesian Criminal Regulation: A Disharmony of Rules," in *12th UUM International Legal Conference 2023 (UUMILC 2023)* (Atlantis Press, 2024), 250–58.

<sup>50</sup> Anshori Anshori, "Islamic Criminal Substance in the RUU-KUHP (Review of Legal Politics of RUU-KUHP)," *Syiah Kuala Law Journal* 7, no. 1 (2023): 107–20. Agnes Kusuma Wardadi, Gracia Putri Manurung, and Natasya Fila Rais, "Analisis Keberlakuan RKUHP Dan RUU-PKS Dalam Mengatur Tindak Kekerasan Seksual," *Lex Scientia Law Review* 3, no. 1 (2019): 55–68.

## 2. Demonstrating a contraceptive device (Articles 408-410)

The new Criminal Code, delineated within Chapter XV on Crimes of Morality, stipulates regulations regarding the exhibition of contraceptives to children. According to Article 408, individuals openly showcasing, offering, broadcasting writings, or demonstrating the accessibility of contraceptives to minors will face penalties, including fines of up to category I. However, there are certain exceptions to this provision where fines cannot be imposed if the display of contraceptive devices serves educational or informative purposes. As articulated in Article 410, Paragraph 1, no criminal offense shall be charged if the individual exhibiting contraceptives to a child is an authorized officer designated for the delivery of family planning initiatives, prevention of sexually transmitted diseases, or for educational and health education objectives. Furthermore, Article 410, Paragraph 3 affirms that authorized officers encompass proficient volunteers appointed by designated officials.

The provisions outlined in Articles 408-410 reflect the aspirations of Muslims aimed at curbing instances of promiscuity among minors. However, alternative viewpoints, such as those held by the National Alliance for Criminal Code Reform, regard these articles as counterproductive to endeavours aimed at HIV control.<sup>51</sup>

## 3. Adultery (Article 411) and Cohabitation (Article 412)

Adultery is addressed in Articles 411, 412, and 413 of the New Criminal Code, encompassing sexual relations between individuals not married to each other (Article 411), cohabitation or residing together as if married outside wedlock (Article 412), and sexual intercourse with relatives (Article 413). Article 411, Paragraph 1 stipulates that “Any individual engaging in sexual intercourse with someone other than their spouse shall be liable for adultery, punishable by a maximum imprisonment of one year or a fine not exceeding category II”; while Paragraph 2 outlines that “Regarding offenses as delineated in Paragraph 1, prosecution shall only proceed upon complaints lodged by: a. the spouse in cases of marriage, or b. parents or children in instances where no marriage exists”.

Article 412, in its Paragraph 1, stipulates that “Any individual cohabiting or residing together as if married outside of wedlock shall be subject to punishment, with a maximum imprisonment of six months or a fine not exceeding category II”; while Paragraph 2 specifies that “Prosecution for offenses as outlined in Paragraph 1 shall only proceed upon complaints lodged by: a. the spouse in cases of marital union; or b. parents or children in situations where no marriage exists”. Meanwhile, Article 413 dictates that “Any individual engaging in sexual intercourse with a known member of their immediate family shall be liable for punishment, with a maximum imprisonment of ten years”.

The aforementioned articles represent the aspirations of Muslims and were sanctioned by the government based on the rationale that the inclusion of provisions pertaining to adultery and cohabitation is necessary within the new Criminal Code. This decision stems from Indonesia's recognition as a nation that values religion and possesses a societal framework characterized by ethical conduct, religious principles, and cultural norms. Henceforth, sexual relations outside the confines of marriage, regardless of mutual consent, are deemed unjustifiable within the ethical, cultural, and religious framework upheld by Indonesian society. These articles aim to uphold the sanctity of marriage and discourage individuals from engaging in promiscuous sexual conduct.

<sup>51</sup> Nurini Aprilianda, Mufatikhatul Farikhah, and Liza Agnesta Krisna, “Critical Review Selecting a Proper Law to Resolve Sexual Violence against Children,” *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (2022): 954–74.

Notably, both provisions classify as complaint offenses, wherein only the suspect's spouse, parents, or children possess the prerogative to report such violations to the legal authorities.<sup>52</sup>

Nevertheless, the National Alliance for Criminal Code Reform contends that the state has encroached excessively into citizens' private domain. It posits that offenses reliant on parental complaints may exacerbate the prevalence of child marriages, as this provision could potentially incentivize child marriage as a means to evade punishment. It is observable that 89% of child marriages in Indonesia transpire due to parental apprehensions, influenced either by economic constraints or the assumption that their children have engaged in extramarital relationships.<sup>53</sup>

#### 4. Abortion (Articles 463-465)

Abortion is addressed in Articles 463, 464, and 465 of the legislation. According to Article 463, Paragraph 1, "Any woman who undergoes an abortion shall face imprisonment for a maximum duration of four years"; while Paragraph 2 specifies that "The aforementioned provisions do not apply in cases where a woman is a victim of rape or other forms of sexual violence resulting in pregnancy, provided that the gestational age does not exceed fourteen weeks or there are indications of a medical emergency". Meanwhile, Article 464, Paragraph 1 stipulates that "Any individual who conducts an abortion on a woman: a. with the woman's consent, shall be subject to a maximum imprisonment of five years; or b. without the woman's consent, shall face imprisonment for a maximum duration of twelve years".

The provisions pertaining to abortion reflect the aspirations of Muslims, yet they have garnered support from various community groups, contingent upon exceptions for abortions resulting from rape or other criminal acts of sexual violence. The government has duly accommodated these exceptions, incorporating them into the new Criminal Code which has undergone passage in the legislative body, as noted previously.<sup>54</sup>

#### 5. Blasphemy (Articles 300-305)

The new Criminal Code encompasses provisions addressing criminal offenses of blasphemy within Chapter VII, dedicated to criminal acts against religion, belief, and religious practices or convictions. This chapter comprises two distinct sections. The initial section pertains to criminal offenses against religion and belief (Articles 300, 301, and 302), while the subsequent section addresses criminal acts against religious practices or convictions and places of worship (Articles 303, 304, and 305). Article 300 stipulates that "Any individual in public who: a. engages in hostile actions; b. expresses hatred or hostility; or c. incites hostility, violence, or discrimination against another person's religion, belief, class, or group based on religion or belief in Indonesia, shall face a maximum imprisonment of three years or a maximum fine of category IV".

The blasphemy article, representing the aspirations of Muslims, has been endorsed by the government. According to the government, this provision embodies the foundational principle of

<sup>52</sup> Endrianto Bayu Setiawan et al., "The Indonesian Criminal Law System's Progression in Sexual Assaults Regulation," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 5, no. 2 (December 2022): 161–77, <https://doi.org/10.24090/volksgeist.v5i2.6690>.

<sup>53</sup> Pista Simamora, "RKUHP Seperti Apa Yang Kita Butuhkan?," *Aliansi Nasional Reformasi KUHP*, April 2022.

<sup>54</sup> Hesti Armiwulan, "Rights to Abortion, Pro-Choice vs. Pro-Life: Case of Indonesia and the USA," *International Journal of Criminal Justice Sciences (IJCS)* 17, no. 2 (2022): 128–39.

Pancasila, which is Belief in One Almighty God, and it is essential for maintaining religious harmony.<sup>55</sup> Moreover, the government asserts that religion holds paramount importance in Indonesian societal fabric, and thus, insulting a religion in Indonesia warrants punishment as it is deemed disrespectful and offensive to the sentiments of individuals adhering to religious beliefs within society.<sup>56</sup>

While the government acknowledges the aspirations of Muslims concerning the blasphemy article, the National Criminal Code Reform Alliance holds a divergent perspective. The Alliance contends that this provision contravenes the standards of religious freedom outlined in the International Covenant on Civil and Political Rights (ICCPR). Additionally, they argue that this article offers protection solely to religions officially recognized in Indonesia, posing potential repercussions for minority groups.<sup>57</sup>

### Measuring Muslim Citizens' Aspirations in Deliberations on the New Criminal Code

The deliberation of the Criminal Code Bill concluded at the Level I discussion phase in 2019. However, as it approached the Level II discussion stage, it encountered substantial opposition from various segments of society, comprising individuals, non-governmental organizations, and student bodies. Consequently, the bill did not progress further and is slated for reconsideration in the subsequent DPR period (2019-2024). The articles advocated by Islamic groups have elicited both support and opposition as they were incorporated by the government into the draft Criminal Code Bill. Notably, these articles pertain to adultery, cohabitation, abortion, and religious blasphemy. Concerns have been raised regarding the potential of these articles to criminalize specific segments of society, including children, women, marginalized groups, individuals with disabilities, traditional law communities, as well as religious or belief minority groups.

Indeed, these articles have been subjects of debate since the inception of Level I discussions, both within the DPR and in society. However, internal debates within the DPR can only be resolved once the Level I discussion of the Criminal Code Bill is concluded, signifying agreement on all articles between the DPR and the Government. The final decision lies with the Level II Discussion during the Plenary Meeting. Nevertheless, diverse perspectives persist among the public. At that time, there was still a consensus among some stakeholders that these articles warranted further discussion, leading to the rejection of passing the Criminal Code Bill. Consequently, this sparked widespread public opposition, manifesting in demonstrations both in the capital and across various regions. Consequently, the Criminal Code Bill was not advanced to Level II discussion, and the deliberations are set to resume in the next DPR period, namely, the present term. During Level I Discussion, the articles' substance is thoroughly examined, unlike in Level II discussion, which solely focuses on decision-making without further substantive discourse on the articles.

Indonesia is characterized by its diversity, encompassing various ethnic, religious, and racial groups. Consequently, this diversity leads to a multitude of perspectives and opinions. An effective legal framework is one that resonates with society, addressing its legal requirements adequately.

<sup>55</sup> Bani Syarif Maula and Vivi Ariyanti, "The Application of the Principle of Judges' Independence in Blasphemy Cases in Indonesia's Post-Reform Era," *Al-Istinbath: Jurnal Hukum Islam* 6, no. 2 (2021): 313-40.

<sup>56</sup> Melissa A Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law* 7 (2011): 1-46.

<sup>57</sup> Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?," *Griffith Law Review* 32, no. 2 (2023): 190-214.

Thus, the formulation of such laws must facilitate public participation and incorporate societal aspirations. The provision of participation platforms is essential to enable communities to identify and rectify any perceived shortcomings in the legal framework. Mahfud MD emphasized the importance of developing national law through democratic and nomocratic means. This entails fostering participation and incorporating the aspirations of the broader community through fair, transparent, and accountable procedures and mechanisms.<sup>58</sup>

According to Law Number 12 of 2011 regarding the Establishment of Legislative Regulations, citizens are entitled to submit their input either orally or in writing through various means such as Public Hearing Meetings, site visits, outreach activities, seminars, or discussions. The term “community” here refers to individuals or groups with a vested interest in the content of the Draft Legislative Regulations. Within the governmental framework, Presidential Regulation Number 87 of 2014 addresses the implementation guidelines for Law Number 12 of 2011 regarding the Establishment of Legislative Regulations. This regulation stipulates that the procedures for conducting public consultations are governed by Ministerial Regulations, specifically Minister of Law and Human Rights Regulation number 11 of 2021 concerning the Implementation of Public Consultations in Legislative Formation.

Similarly, Regulation of the House of Representatives of the Republic of Indonesia number 1 regarding Rules and Procedures governs public engagement throughout the entirety of the legislative regulation formation process, including the discussion phase. These DPR regulations specify that the public may offer feedback on the draft legislation under discussion, either verbally or in writing, to DPR members or the council’s leadership, via informal gatherings or public hearings. Subsequently, the council’s leadership will communicate information regarding the community’s input for further action.

The series of statutory regulations outlined above underscores the formal provision of extensive opportunities by both the DPR and the government for public involvement in the statutory regulation formation process. However, the mechanisms for addressing conveyed aspirations have not been clearly defined by Indonesian regulations. Consequently, the acceptance or rejection of people’s aspirations in substance largely hinges on the political disposition of legislators.

In summary, concerning the articles reflecting the aspirations of Muslims, the new Criminal Code exhibits notable advancements over its predecessor. However, it is evident that the formulation of the new Criminal Code involved a significant degree of compromise. Alongside the civil society organizations highlighted earlier, additional factions, including conservative religious groups, have advocated for more stringent regulations. In October 2022, the Indonesian Ulema Council convened a session with the Ministry of Law and Human Rights alongside various Islamic mass organizations. During this session, the Indonesian Ulema Council advocated for the retention of the blasphemy article while also presenting proposals concerning articles related to adultery and cohabitation.<sup>59</sup> The dynamic between religion and the state has been a longstanding topic of discourse in Indonesian history, often leading to compromises, even in the process of legislative formation.

<sup>58</sup> Ahmad Rofii and Nadirsyah Hosen, “The Constitutionalization of ‘Religious Values’ in Indonesia,” in *Constitutional Democracy in Indonesia*, ed. Melissa Crouch (Oxford: Oxford University Press, 2022), 241.

<sup>59</sup> Tongat Tongat, “The Ambiguous Authority of Living Law Application in New Indonesian Penal Code: Between Justice and the Rule of Law,” *International Journal of Criminal Justice Sciences* 17, no. 2 (2022): 188–209.

## Meaningful Participation in the Deliberation of the New Criminal Code

The ladder of citizen participation theory, conceptualized by Arnstein in 1969, provides a framework to assess the degrees of community involvement in decision-making processes. This theory is frequently applied across diverse contexts, including public policy formulation. Through this framework, the various levels of community engagement can be delineated, ranging from minimal to maximal involvement. Utilizing this theory enables an evaluation of the degree to which community participation is integrated into the formulation and decision-making processes concerning the new Criminal Code.

Upon analysing the data, it is evident that the development of the new Criminal Code aligns with the sixth level, known as the partnership level, within the overarching category of degrees of citizen power. At this stage, the public enjoys direct engagement with policymakers regarding the New Criminal Code. Evaluation criteria can focus on the degree of open dialogue and discourse between policymakers and the community.

The degree of citizen participation correlates significantly with the concept of meaningful participation. Meaningful participation is manifested when citizens engage at elevated tiers, particularly from partnerships to citizen control. Within meaningful participation, citizens assume authentic and influential roles in the decision-making process.<sup>60</sup> Their viewpoints and contributions carry weight and directly influence results. Meaningful participation necessitates transparent communication, equitable distribution of authority, and a dedication to integrating citizens' viewpoints into decision-making procedures. It empowers individuals and communities, cultivates trust between citizens and governing bodies, and results in more efficient and enduring outcomes.<sup>61</sup>

Meaningful participation in the formulation of Indonesia's new Criminal Code pertains to the active engagement of diverse stakeholders, including citizens, legal professionals, civil society entities, and representatives of marginalized demographics, in the process of crafting or amending the nation's criminal legislation. This entails guaranteeing these individuals or groups the chance to offer their viewpoints, expertise, and apprehensions, and ensuring that their contributions are duly taken into account in moulding the ultimate rendition of the Criminal Code.

Here are several fundamental elements of substantive involvement in the progression of formulating the draft Criminal Code Bill: transparency, accessibility, inclusivity, consultation and dialogue, thorough consideration of input, feedback mechanisms, and iterative processes.<sup>62</sup>

1. Transparency is imperative, necessitating a clear and transparent process delineating the stages, timeline, and objectives of the drafting endeavour. Comprehensive dissemination of pertinent information, including draft proposals, must be accessible to the public, enabling informed and engaged participation.
2. Accessibility must be prioritized to facilitate the inclusion of all stakeholders, including marginalized communities, in the drafting process. This entails measures such as translation services, conducting public consultations across diverse locales, and leveraging multiple communication platforms to engage a broad spectrum of participants.

<sup>60</sup> Czapanskiy and Manjoo, "The Right of Public Participation in the Law-Making Process and the Role of Legislature in the Promotion of This Right."

<sup>61</sup> Arnstein, "A Working Model for Public Participation." Cass R Sunstein, "Participation, Public Law, and Venue Reform," *The University of Chicago Law Review* 49, no. 4 (1982): 976–1001.

<sup>62</sup> Arnstein, "A Ladder of Citizen Participation." Ciara Fitzgerald et al., "Citizen Participation in Decision-Making: Can One Make a Difference?," *Journal of Decision Systems* 25, no. sup1 (2016): 248–60.



3. Inclusivity is paramount, necessitating the incorporation of diverse viewpoints and interests from a wide array of stakeholders. This entails engaging representatives from civil society organizations, legal scholars, human rights activists, academics, and individuals who could be directly affected by the proposed Criminal Code.
4. Consultation and dialogue are indispensable elements of meaningful participation, necessitating the establishment of avenues such as public hearings, focus group discussions, or expert consultations. These platforms enable stakeholders to articulate their viewpoints, offer input on draft provisions, and suggest alternatives or enhancements.
5. Thorough consideration of input is paramount, wherein recommendations and contributions from participants are meticulously evaluated in the drafting process. Decision-makers must conscientiously review and assess the suggestions and concerns raised, offering sound justifications for their acceptance or dismissal.
6. The drafting process ought to incorporate mechanisms for furnishing participants with feedback regarding the consideration of their input and the reasoning behind any decisions taken. This practice fosters trust and upholds transparency throughout the process.
7. Meaningful participation acknowledges that drafting intricate documents like the Criminal Code frequently demands an iterative method. Multiple rounds of consultation and revision might be imperative to polish and enhance the proposed provisions in accordance with the feedback received.

By integrating these principles, the formulation of Indonesia's new Criminal Code can capitalize on a diverse array of viewpoints, ensure the safeguarding of human rights, promote legal certainty, and enhance public trust in the resultant legislation. The endeavours of Muslim communities to embed moral precepts rooted in religion have been acknowledged by policymakers, namely the government and the DPR, in the crafting of the new Criminal Code, now enacted as Law Number 1 of 2023.

Meaningful participation in the discussion of Indonesia's New Criminal Code Bill, from the perspective of *maslaha* theory in Islamic Constitutional Law, revolves around the concept of *maslaha* or public interest. In Islamic jurisprudence, *maslaha* refers to the preservation and promotion of public welfare, and it serves as a guiding principle in legislation and governance. In the context of the New Criminal Code Bill, meaningful participation would entail active involvement of citizens, legal experts, scholars, and stakeholders in the discussion process, with a focus on identifying and prioritizing public interests. This participation should aim to ensure that the proposed laws align with the principles of justice, fairness, and the well-being of society as a whole.

Under the *maslaha* theory, meaningful participation would also involve considering the values and objectives of Islamic law (Sharia) in the formulation of criminal laws. This includes addressing issues related to morality, social justice, and the protection of individual rights within the framework of Islamic legal principles. Moreover, meaningful participation would entail transparent and inclusive deliberations, where diverse perspectives and concerns are taken into account. It would involve seeking consensus and striving to balance competing interests while upholding the overarching goal of promoting the common good.

## Conclusion

The discourse surrounding the new Criminal Code Bill has formally embraced public involvement, albeit with some deficiencies in substance. From a normative legal standpoint, the aspirations of the Muslim populace concerning Islamic ethics and morality have been integrated into the drafting process of the new Criminal Code, particularly evident in its provisions pertaining to matters such as pornography, the display of contraceptives, adultery, cohabitation, abortion, and religious blasphemy. The enactment of Law Number 1 of 2023 concerning the Criminal Code signifies a notable uptick in meaningful community engagement. This involvement is underpinned by three fundamental prerequisites: the community's entitlement to have their opinions heard, to have their opinions duly considered, and to receive explanations or responses to the opinions they express. As per the "ladder of citizen participation" framework, the development of the new Criminal Code is positioned at the "partnership" level, denoting the lowest tier within the top category of "degrees of citizen power." At this juncture, the public enjoys direct engagement with policymakers concerning the new Criminal Code.

Meaningful participation in the discussion of Indonesia's New Criminal Code Bill, guided by the *maslaha* theory of Islamic Constitutional Law, emphasizes the importance of engaging stakeholders to ensure that the proposed laws reflect the values, needs, and interests of society while also adhering to Islamic legal principles. Concerning the provisions reflecting the aspirations of Muslims, the new Criminal Code demonstrates several enhancements in contrast to its predecessor. Nevertheless, it is evident that the new Criminal Code represents a compromise arising from diverse aspirations and interests. While the House of Representatives (DPR) and the government have formally extended ample opportunities for public engagement in the legislative process, the mechanisms for addressing conveyed aspirations remain unregulated by legislative instruments. Consequently, in its substantive execution, the acceptance or rejection of public aspirations is contingent upon the political will of legislators.

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