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ISLAMIC LAW AND INDONESIA'S NEW CRIMINAL CODE: A CRITICAL ANALYSIS BASED ON MAQĀṢID AL-SHARĪ'AH

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ABSTRACT: Indonesia's New Criminal Code (Law Number 1 of 2023) has reignited debates that criminal law scholars and civil society have long been circling, where exactly does the state's reach into private conduct end, and what legitimizes that reach in the first place. The provisions on presidential insult (Articles 218–220) and sexual morality, adultery and cohabitation outside marriage (Articles 411–412), have attracted the sharpest criticism, not just from human rights advocates but from practitioners who know how vague criminal provisions behave in politically sensitive environments. This article runs those provisions through *maqāṣid al-sharī'ah*, not as theological endorsement or refutation, but as a proportionality framework with genuine teeth. The approach is normative and doctrinal. What the analysis consistently finds is that the contested provisions criminalize conduct without adequately showing what harm they prevent, a gap that maqāṣid theory does not overlook, and that criminal law doctrine cannot responsibly ignore.
Keywords: Islamic Law; New Criminal Code; Maqāṣid al-sharī'ah; Criminal Law; Criminal Law Reform

ABSTRAK: *Pemberlakuan Kitab Undang-Undang Hukum Pidana (KUHP) Baru melalui Undang-Undang Nomor 1 Tahun 2023 menandai fase penting reformasi hukum pidana nasional dan memunculkan perdebatan luas di kalangan publik maupun akademik. Sejumlah ketentuan menimbulkan kekhawatiran terkait kebebasan berekspresi, pengaturan moralitas, dan kriminalisasi kritik terhadap otoritas negara, terutama dalam kaitannya dengan kepastian hukum dan kemaslahatan publik. Artikel ini mengkaji KUHP Baru dari*

perspektif hukum Islam dengan menggunakan kerangka maqāṣid al-sharī'ah. Penelitian ini menggunakan metode penelitian hukum normatif–konseptual melalui pendekatan doktrinal dan studi kepustakaan. Data dikumpulkan melalui studi dokumen terhadap peraturan perundang-undangan, literatur hukum Islam, dan kajian akademik, kemudian dianalisis secara kualitatif melalui interpretasi dan evaluasi norma hukum berdasarkan prinsip-prinsip maqāṣid. Temuan penelitian menunjukkan bahwa KUHP Baru memperluas kriminalisasi hingga ke ranah kebebasan berekspresi dan moralitas pribadi, yang menimbulkan ketegangan antara kewenangan negara, nilai moral masyarakat, dan perlindungan terhadap kebebasan dasar warga negara. Melalui perspektif maqāṣid al-sharī'ah, penelitian ini menegaskan bahwa kebijakan hukum pidana seharusnya lebih mengutamakan proporsionalitas, pencegahan kemudaratan, dan kemaslahatan umum, daripada penggunaan sanksi pidana secara berlebihan.
Kata Kunci: *Hukum Islam; KUHP Baru; Maqāṣid al-sharī'ah; Hukum Pidana; Reformasi Hukum Pidana.*

INTRODUCTION

The Wetboek van Strafrecht was a colonial inheritance, dutch criminal law carried over after independence because nobody could agree on what should replace it. For decades, that agreement proved elusive. Drafts appeared, generated controversy, and were shelved. Law Number 1 of 2023 finally changed that. Credit where it is due, replacing the Wetboek van Strafrecht after decades of failed attempts required sustained institutional effort across administrations and the result is a genuinely Indonesian criminal code rather than a colonial document with cosmetic edits that matters.[1]

But the new code contains provisions that don't hold up well under examination, and the discomfort they have generated has come from sources that are hard to dismiss. Articles 218–220, which criminalize public insults against the President and Vice President, revive offenses that the Constitutional Court had already struck from the previous code in Decision No. 013-022/PUU-IV/2006 finding them incompatible with democratic governance. Their return, in modified form, raised immediate questions about whether the Constitutional Court's reasoning had been genuinely absorbed or merely worked around. Then Articles 411 and 412 extended criminal liability for adultery to unmarried individuals and introduced a new cohabitation offense, pushing criminal law into territory that the old code had left to social norms and family pressure.[2] The Institute for Criminal Justice Reform filed formal objections. Komnas HAM flagged human rights concerns. Legal academics wrote at length about statutory vagueness and what vague criminal provisions tend to produce when prosecutorial discretion meets

[1] Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?," *Griffith Law Review* 32, no. 2 (2023): 190–214, https://doi.org/10.1080/10383441.2023.2243772.
[2] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana," n.d., https://peraturan.bpk.go.id/Details/234935/uu-no-1-tahun-2023.

political pressure.[3] These are not procedural quibbles. They raise the foundational question of what criminal law is actually supposed to do.

Islam's position in this picture needs careful framing. Indonesia is a Muslim-majority country, and laws regulating morality, family, and social conduct will inevitably be evaluated against Islamic ethical standards, not because Islamic law governs the state, but because a substantial portion of the population takes those standards seriously and reads new legislation through them. Several provisions of the new code appear to draw on Islamic moral frameworks, or at minimum occupy the same normative territory. That creates a genuine question: do these provisions actually satisfy Islamic legal criteria. Or do they merely borrow Islamic vocabulary while departing from what the tradition actually requires.[4]

Maqāṣid al-sharī'ah is the most useful framework for that question. Al-Shāṭibī built it in *al-Muwāfaqāt fī Uṣūl al-Sharī'ah* as a way of evaluating legal norms not by their textual pedigree alone, but by their demonstrated capacity to promote human welfare (*maṣlaḥah*) and prevent harm (*mafsadah*).[5] The five essential objectives, protection of religion, life, intellect, lineage, and property, function as substantive benchmarks, not automatic endorsements of whatever a legislature with Muslim-majority support decides to enact.[6] *Maqāṣid* is among other things a framework for saying no, and saying why. Applied carefully to the provisions at issue here, it asks questions that constitutional law[7] and human rights,[8] frameworks have already been asking from a different direction, with different grounding. This article therefore uses maqāṣid not as a rhetorical justification for Islamizing positive law, but as a critical evaluative framework. Its function is to test whether the legal provisions under discussion genuinely protect the essential interests of human beings or instead produce harm under the language of religious legitimacy. In this sense, maqāṣid analysis provides a normative bridge between Islamic legal theory, constitutional reasoning, and contemporary human rights discourse.

Existing scholarship on the new code is substantial and, on the constitutional and human rights dimensions, already rich. The application of *maqāṣid* specifically to Indonesia's criminal law reform is thinner. This article tries to contribute something to that gap, not by treating *maqāṣid* as an alternative to constitutional analysis, but by showing what a welfare-and-harm-prevention standard reveals when applied to provisions whose harm rationale is precisely what is in dispute.

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[3] Institute for Criminal Justice Reform (ICJR), "Catatan Kritis Terhadap KUHP Baru" (Jakarta, 2023).
[4] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana."
[5] Abū Isḥāq Ibrāhīm ibn Mūsā al-Syāṭibī, *Al-Muwāfaqāt Fī Uṣūl Al-Sharī'ah* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2004). p. 8-20.
[6] Ahmad Badrut Tamam, "Penelitian Agama: Sebuah Pengantar," *Madinah: Jurnal Studi Islam* 3, no. 1 (2016): 9–23, https://ejournal.iai-tabah.ac.id/index.php/madinah/article/view/171/138.
[7] Vicella Kesya Galuh Iranti and Andrie Irawan, "Kohabitasi Dalam KUHP 2023: Analisis Yuridis Atas Intervensi Hukum Pidana Terhadap Kehidupan Pribadi," *Journal Of Islamic And Law Studies* 9, no. 1 (2025): 1–17, https://doi.org/10.18592/jils.v9i1.16187.
[8] Kaharuddin et al., "Perbandingan Substansi Hukum Pidana Antara KUHP Baru Dengan KUHP Lama : Dekolonisasi , Demokratisasi , Dan Pemenuhan Hak Asasi Manusia," *Jurnal Riksa Cendikia Nusantara* 1, no. 4 (2025): 1–9.

METHOD

The research design is normative-conceptual. That choice is appropriate, not evasive, the core question, whether specific criminalization choices can be justified under *maqāṣid* standards, is a normative question. Empirical data about enforcement patterns would matter too, but it can not substitute for analysis of what the provisions actually say and what objectives they can plausibly claim to pursue. A proper assessment of compliance can only be conducted after establishing a clear understanding of the applicable legal requirements.[9]

Three provision clusters form the primary focus: Articles 218–220 on presidential insult, Article 411 on adultery, and Article 412 on cohabitation outside marriage. The selection was deliberate. These are the provisions where the tension between state authority, moral regulation, and individual freedom is most visible and where the gap between declared legislative intent and plausible real-world effects is most worth examining closely.[10]

Primary legal materials are the statutory text of Law Number 1 of 2023, read alongside the Constitutional Court decision (No. 013-022/PUU-IV/2006) relevant to predecessor provisions. Secondary materials include al-Shāṭibī's *al-Muwāfaqāt* and classical Islamic legal texts, contemporary *maqāṣid* scholarship from Ibn 'Āshūr, Jasser Auda, and Mohammad Hashim Kamali, Indonesian criminal law scholarship from Barda Nawawi Arief and Eddy O.S. Hiariej, comparative criminal law theory from Douglas Husak and Andrew Ashworth, Simon Butt's work on Indonesian legal reform, and peer-reviewed scholarship specifically addressing the new code. ICJR's critical notes are used not as legal authority but as records of how practitioners received specific provisions, that reception is itself analytically relevant.

Data collection was conducted through documentation and literature review techniques. Legal documents, statutory regulations, scholarly books, journal articles, and academic commentaries relevant to criminalization policy, morality-based offenses, freedom of expression, and *maqāṣid* theory were systematically identified, classified, and examined according to their thematic relevance to the research problem. The data collection process emphasized authoritative legal and academic sources to ensure the reliability and relevance of the normative analysis.[11]

The analytical framework of this study is grounded in *maqāṣid al-sharīʻah*, which is employed as both a conceptual and evaluative framework. Its theoretical foundation derives primarily from the works of Abū Isḥāq Ibrāhīm ibn Mūsā al-Shāṭibī, particularly his conception of the Sharīʻah as a system aimed at realizing human welfare (*maṣlaḥah*) and preventing harm (*mafsadah*). In this study, *maqāṣid* are operationalized through the five essential objectives (*al-ḍarūriyyāt al-khams*),

[9] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2017). p. 35-37.
[10] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana."
[11] Johnny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2013).

namely the protection of religion, life, intellect, lineage, and property.[12] These objectives function as normative benchmarks for assessing the rationality, proportionality, and social implications of criminalization within the New Criminal Code.

To strengthen methodological rigor, this study also incorporates reflexivity in the analytical process. The author recognizes that the interpretation of legal norms, particularly those related to morality and Islamic legal values, cannot be entirely separated from broader socio-religious, constitutional, and intellectual contexts. Therefore, the analysis seeks to maintain a critical balance between Islamic legal perspectives, principles of criminal law, constitutional values, and contemporary human rights discourse. Reflexivity is applied by critically evaluating both the normative objectives and the potential consequences of criminal law reform, thereby avoiding purely apologetic or purely positivistic interpretations.[13]

The validity of data in this research is ensured through source triangulation and doctrinal consistency. Source triangulation is conducted by comparing statutory provisions, Islamic legal literature, scholarly opinions, and academic discussions concerning criminal law reform. Meanwhile, doctrinal consistency is maintained by examining the coherence between legal norms, criminal policy objectives, and the theoretical principles of *maqāṣid al-sharī'ah*.[14] This approach enables the study to produce a systematic, coherent, and academically accountable normative analysis.

The analysis is conducted in three stages. The first is descriptive, what do the provisions say, what interests do they identify as protected, and how does their scope differ from the prior code. The second is evaluative, and it is where the *maqāṣid* criteria actually do the work, do the identified interests, and the criminal means chosen to protect them, satisfy the requirements of proportionality and harm prevention. The third stage pulls back, what does the pattern across these provisions tell us about the overall direction Indonesia's criminal law reform is taking.

One methodological note that should be stated rather than concealed: Interpreting criminal law through Islamic jurisprudence in a pluralistic constitutional democracy involves interpretive choices that cannot be made neutral. The analysis tries to hold *maqāṣid* principles, constitutional values, and human rights discourse in productive tension, checking claims in any one framework against the others, rather than treating any single tradition as automatically decisive.

RESULTS AND DISCUSSION

The research findings presented in this section are derived from a normative analysis of selected provisions of Law Number 1 of 2023 on the Criminal Code that have generated significant legal and public debate in Indonesia. Rather than

[12] Abū Isḥāq Ibrāhīm ibn Mūsā al-Syāṭibī, *Al-Muwāfaqāt Fī Uṣūl Al-Sharī'Ah*.
[13] Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008).
[14] Lexy J Moleong, *Metodologi Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2018).

providing an exhaustive review of the New Criminal Code, the analysis focuses on provisions that reflect broader shifts in criminalization policy and reveal underlying assumptions regarding the role of criminal law in regulating morality, public order, and state authority. The findings are intended to identify the structural orientation of the New Criminal Code and to provide the analytical foundation for the subsequent discussion through the framework of *maqāṣid al-sharī'ah*.[15]

Table. Summary of Normative Problems in Selected Provisions of Indonesia's New Criminal Code

Article(s)	Type of Offense	Core Problem	Absence of Specific Harm
218–220	Insult against the President/Vice President	Vague phrase "attacks the honor or dignity" lacks clear legal criteria; risks criminalizing political criticism	No identifiable harm to specific individual or public interest is specified in the provision
411	Adultery (including unmarried persons)	Criminalizes consensual sexual relations between unmarried adults; broadened from previous code	No defrauded spouse or injured party exists when both are unmarried; no concrete victim
412	Cohabitation outside marriage	Creates new offense for unmarried couples living together; previously regulated only by social/religious norms	No identifiable harm to any legally recognized interest; punishment appears disproportionate

The findings are organized thematically to capture several dimensions of criminal law reform, namely the orientation of criminalization policy, the protection of state authority, morality-based offenses, and the rationality of punishment. At this stage, the analysis remains descriptive and doctrinal by focusing on the construction of legal norms, the scope of criminalization, and the protected legal interests reflected in the statutory provisions.[16]

Orientation of Criminalization Policy in the New Criminal Code

Indonesian criminal law theory has long treated the harm principle as foundational. Criminal liability requires conduct causing concrete harm to identifiable individuals or recognized social interests. Barda Nawawi Arief's

[15] Peter Mahmud Marzuki, *Penelitian Hukum*. P. 55-58.
[16] Soerjono Soekanto, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: RajaGrafindo Persada, 2018). 13-15.

treatment of criminal policy in the Indonesian context makes this explicit. Against that baseline, Articles 411 and 412 sit uncomfortably. [17]

Article 411 paragraph (1) provides:

> *"Any person who engages in sexual intercourse with a person who is not his or her spouse shall be punished for adultery with imprisonment of up to one year or a fine of category II."*[18]

Article 412 paragraph (1) provides:

> *"Any person who lives together as husband and wife outside marriage shall be punished with imprisonment of up to six months or a fine of category II."*[19]

Neither provision names a victim. Two unmarried adults in a consensual relationship harm no one whose interests criminal law ordinarily recognizes, no defrauded spouse, no violated contract, no individual who has suffered identifiable damage. The harm being addressed is moral and social, conduct that violates shared norms about marriage and sexual ethics. That is a genuine concern in many communities, and the concern should not be dismissed just because it does not map neatly onto the injury paradigm of liberal criminal theory. But it is different in kind from what criminal law has traditionally been built to address. The difference matters for what follows.

Regulation of Insults against the President and Vice President

The Constitutional Court's 2006 decision (No. 013-022/PUU-IV/2006) annulled the former Criminal Code's presidential insult provisions, finding them incompatible with freedom of expression in a democratic state. Their return in the new code, structurally similar though differently packaged, has consequently attracted sustained attention.

One of the most debated findings concerns the re-regulation of offenses related to insults against the President and Vice President under Articles 218–220 of Law Number 1 of 2023. These provisions effectively reintroduce offenses that had previously been annulled by the Constitutional Court under the former Criminal Code.[20]

Article 218 paragraph (1) provides:

> *"Any person who, in public, attacks the honor or dignity of the President or the Vice President shall be punished for insult with imprisonment of up to three years or a fine of category IV."*[21]

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[17] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Jakarta: Kencana Prenada Media Group, 2016). 23-26.

[18] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana." Pasal 411.

[19] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana." Pasal 412.

[20] "Keputusan Mahkamah Konstitusi Nomor 013-022/PUU-IV/2006 Tentang Peninjauan Yudisial Atas Pasal-Pasal Penghinaan Terhadap Presiden Dan Wakil Presiden Dalam Kitab Undang-Undang Hukum Pidana." (n.d.).

[21] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana." Pasal 218.

The protected legal interest under this provision is the honor and dignity of the presidential office. However, the statutory formulation employs broad and abstract terminology, particularly the phrase "attacks the honor or dignity," without further clarification regarding its legal boundaries.

Article 219 further stipulates:

> *"The offenses referred to in Article 218 and Article 219 may only be prosecuted upon complaint by the President or the Vice President."*[22]

In addition, Article 220 provides:

> *"Acts referred to in Article 218 and Article 219 shall not constitute criminal offenses if committed for the public interest or self-defense."*[23]

Article 219 restricts prosecution to complaints filed personally by the President or Vice President. Article 220 establishes an exception for conduct "committed for the public interest or self-defense."

The definitional problem in Article 218 is straightforward. "Attacks the honor or dignity" covers an enormous range of conduct from personal defamation to political satire to sustained factual criticism of government policy. Nothing in the provision separates these. The public interest exception in Article 220 acknowledges the problem without solving it, the exception creates a defense, but no criteria for its application, leaving that determination to prosecutorial and judicial judgment in cases that may be precisely the cases where that judgment is least reliable.

Expansion of Morality-Based Offenses: Adultery and Cohabitation

Another major finding concerns the expansion of morality-based offenses under Articles 411 and 412 of the New Criminal Code. Compared to the former Criminal Code, which criminalized adultery only when at least one party was legally married, the New Criminal Code broadens criminal liability to include consensual sexual relations between unmarried adults.

Article 411 paragraph (1) provides:

> *"Any person who engages in sexual intercourse with a person who is not his or her spouse shall be punished for adultery."*[24]

Article 412 paragraph (1) provides:

> *"Any person who lives together as husband and wife outside marriage shall be punished with imprisonment of up to six months or a fine of category II."*[25]

The former Criminal Code criminalized adultery only when at least one party was legally married. That limitation had internal logic, the recognizable harm, to whatever extent criminal law could claim it, was the harm to an existing marriage. Article 411 removes that anchor entirely. Sexual intercourse outside marriage is now criminal regardless of marital status, which means two unmarried adults, with no

[22] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana." Pasal 219.
[23] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana." Pasal 220.
[24] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana."
[25] "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana."

legal obligations to anyone, are now subject to criminal liability for a consensual private act.

The New Criminal Code also limits prosecution through complaint-based mechanisms. Article 411 paragraph (2) stipulates that complaints may only be submitted by the husband, wife, parent, or child of the accused party. Similar restrictions apply to Article 412 concerning cohabitation offenses.

Article 412 creates a cohabitation offense with no real predecessor in the old code. Couples living together without marrying face criminal liability under a provision that addresses conduct previously regulated, to whatever degree it was regulated at all, by social norms and community pressure rather than the state's penal apparatus.

Article 411 paragraph (2) does limit who can file a complaint, the accused's spouse, parent, or child, which is a meaningful practical constraint. But it does not resolve the more fundamental question: should this conduct be criminal at all? The criminal designation changes the normative landscape independently of whether prosecution follows. It produces stigma, creates leverage for complaint-based pressure, and shapes behavior even for people who are never charged.

These provisions expand criminal liability into areas of private and consensual conduct previously regulated primarily through social and religious norms. The provisions also extend the scope of criminal regulation concerning family-related and morality-based conduct within Indonesian criminal law.

Rationality of Punishment and Protection of Legal Interests

Across all three provision clusters, the same gap recurs. The statutory language is broad, the protected interest is vague or primarily symbolic, and there is no articulated account of what specific harm the criminal sanction is meant to prevent. Presidential dignity is identified as the interest protected by Articles 218–220, but the provisions don't explain how that interest is harmed by political criticism, what severity threshold must be crossed, or what distinguishes insult from ordinary democratic contestation. Moral norms about sexual conduct are the evident basis for Articles 411 and 412, but neither provision explains what identifiable harm results from consensual adult conduct or why imprisonment is a proportionate response to it.

Eddy O.S. Hiariej's work on criminal law principles treats definitional vagueness of this kind as a doctrinal problem with direct practical consequences: it undermines legal certainty, because individuals cannot reliably determine when their conduct crosses the criminal threshold, and it renders proportionality review almost impossible, because without a specified harm there is no baseline against which the severity of the sanction can be measured.

Overall, the findings show that the New Criminal Code introduces broader forms of criminalization related to morality, public order, and institutional authority. The analyzed provisions reflect expanded state regulation in areas concerning expression, private conduct, and symbolic protection of public institutions within Indonesia’s contemporary criminal law framework.

The findings above demonstrate that the New Criminal Code reflects a broader transformation in Indonesia's criminal law policy, particularly regarding the relationship between state authority, morality, and individual freedom. These developments require evaluation not only from the perspective of positive law, but also through a normative framework capable of assessing the ethical orientation and social consequences of criminalization. In this regard, *maqāṣid al-sharī'ah* provides an important analytical framework for examining whether criminal law policy genuinely promotes public welfare (*maṣlaḥah*) and prevents harm (*mafsadah*).[26]

Unlike purely doctrinal approaches, the *maqāṣid* framework evaluates legal norms according to their substantive objectives, proportionality, and practical consequences. The following discussion therefore analyzes the findings through the perspectives of *ḥifẓ al-'aql* (protection of intellect), *ḥifẓ al-nasl* (protection of lineage), and contemporary *maqāṣid*-oriented criminal law policy, while also comparing the present findings with previous scholarship on criminal law reform and Islamic legal theory.[27]

The *maqāṣid* framework does not care about legislative intent. Good intentions matter morally, but what matters legally on *maqāṣid* terms is whether the provisions, as written and as they will operate in practice, promote welfare and prevent harm in ways proportionate to the means used. On those terms, the contested provisions of the new code run into serious difficulties.

Freedom of Expression and the Protection of Intellect (*Ḥifẓ al-'Aql*)

Within *maqāṣid al-sharī'ah*, the protection of intellect (*ḥifẓ al-'aql*) encompasses not only the protection of cognitive capacity but also the preservation of rational inquiry, critical thought, and responsible public expression.[28] From this perspective, freedom of expression functions as an essential mechanism for accountability and public participation in governance.[29]

Ibn 'Āshūr's reading of *ḥifẓ al-'aql* that it protects not just cognitive capacity but the social conditions for rational agency, including freedom of expression has concrete implications for insult provisions. The Islamic tradition has not historically treated criticism of rulers as presumptively impermissible. The principle of *amr bi al-ma'rūf wa nahy 'an al-munkar* has been interpreted across the jurisprudential tradition as establishing an affirmative duty to speak against unjust governance, not a liability for doing so. Ibn 'Āshūr was direct about this: freedom of opinion is a condition for realizing justice within governance, not a threat to it. [30]

Articles 218–220 don't straightforwardly violate Islamic law. There is genuine support in the tradition for protecting the dignity of legitimate authority. The problem is in implementation. A provision that criminalizes any public "attack" on presidential honor, without distinguishing defamation from political criticism,

[26] Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach*, 45–47.
[27] Kamali, *Principles of Islamic Jurisprudence*, 121–124.
[28] Kamali, 394–396.
[29] Mohammad Fadel, "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law," *Chicago Journal of International Law* 8, no. 1 (2007): 8–12.
[30] Muḥammad al-Ṭāhir ibn 'Āshūr, *Maqāṣid Al-Sharī'ah Al-Islāmiyyah*, 102–105.

protects institutional dignity maximally and maximum institutional protection is exactly what tends to suppress the critical discourse that *ḥifẓ al-'aql*, on Ibn 'Āshūr's reading, requires the legal system to safeguard. The Article 220 exception does not resolve this. It creates a defense that will be adjudicated by prosecutorial and judicial discretion precisely in cases where that discretion is under the most pressure to favor the institution being protected over the person criticizing it.

Simon Butt's observation about the new code, that it reflects a persistent state-centered conception of authority sitting uneasily with democratic constitutionalism, maps directly onto this concern. Chilling legitimate political expression is itself a harm. It is a harm to *ḥifẓ al-'aql*.[31]

The provisions concerning insults against the President and Vice President under Articles 218–220 potentially create tension with this objective due to their broad and abstract formulation. Although intended to protect institutional dignity, such provisions may indirectly discourage legitimate criticism and public discourse.

Morality-Based Offenses and the Protection of Lineage (*Ḥifẓ al-Nasl*)

The *maqāṣid* principle most directly relevant to Articles 411 and 412 is *ḥifẓ al-nasl* the protection of lineage and family structure. Nothing in classical or contemporary *maqāṣid* scholarship treats state regulation of sexual conduct as inherently impermissible. The prohibition on zina is real, and its connection to *ḥifẓ al-nasl* is well established. That is not the contested point.

The contested point is al-Shāṭibī's proportionality constraint, which receives insufficient attention in policy discussions about morality-based criminalization. Legal rules must not generate hardship disproportionate to the harm they are meant to prevent. Applied to Articles 411 and 412, this means asking not whether adultery and cohabitation violate Islamic norms most Islamic scholars would say they do but whether criminal law is the right regulatory instrument in this specific social and political context, and whether the costs it generates are proportionate to the welfare it secures.[32]

The comparative literature on morality-based criminalization is consistent on a few empirical points that a *maqāṣid* analysis of the contextually sensitive kind that Jasser Auda describes cannot ignore, enforcement is selective, prosecution follows social power more reliably than legal principle, and the presence of a criminal prohibition does not reliably produce the deterrence claimed for it. A provision that fails to effectively prevent the intended harm, while producing its own distributional harms through selective enforcement and the unequal distribution of vulnerability, women bearing disproportionate exposure when family members can file complaints, cannot be justified by *maqāṣid* standards on the strength of its moral intentions alone.[33]

The complaint mechanism in Article 411 paragraph (2) is an acknowledgment, written into the statute itself, that direct state enforcement of sexual morality is problematic. But criminalization changes the social landscape whether or not

[31] Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018), 201–203.
[32] Abū Isḥāq Ibrāhīm ibn Mūsā al-Syāṭibī, *Al-Muwāfaqāt Fī Uṣūl Al-Sharī'Ah*, 18–20.
[33] Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach*, 65–69.

prosecution actually follows. Being designated criminal produces stigma, creates leverage for complaint-based coercion, and narrows the space of private life for people who may never see the inside of a courtroom. That is not a cost the provision's defenders have adequately reckoned with.

The New Criminal Code also includes provisions regulating morality, such as adultery, cohabitation, and the protection of family structures. Within the framework of *maqāṣid al-sharī'ah*, the protection of lineage (*ḥifẓ al-nasl*) constitutes an essential objective that may serve as a legitimate basis for moral regulation. However, a normative approach that fails to consider social context, proportionality, and human rights implications risks generating injustice and practical implementation problems.[34]

***Maqāṣid*-Based Synthesis and Criminal Law Policy Orientation**

The synthesis between the findings and the *maqāṣid* framework demonstrates that Indonesia's New Criminal Code seeks to integrate moral values, social order, and institutional authority into national criminal law policy. Conceptually, this orientation is not inherently inconsistent with Islamic law, since the Sharī'ah itself recognizes the protection of religion, life, intellect, lineage, and property as essential objectives.[35]

Al-Shāṭibī's three-tier hierarchy, ḍarūriyyāt, ḥājiyyāt, taḥsīniyyāt, carries a specific implication for criminal law that tends to be underplayed, coercive penal intervention belongs primarily at the first level. Conduct threatening essential interests warrants criminal response. Conduct violating complementary needs or social embellishments may warrant regulatory attention, but criminal sanction is a blunt and expensive instrument, morally expensive, as Douglas Husak puts it whose use at levels below ḍarūriyyāt requires increasingly strong justification.[36]

Presidential dignity provisions address an interest that sits, at most, at the level of *taḥsīniyyāt*, matters of institutional decorum and social propriety. Adultery and cohabitation provisions address conduct that violates widely held moral norms, but the harm is diffuse, victims are hard to identify, and no argument in the statutory text establishes that criminal law achieves what less coercive approaches, educational, social, religious, could not achieve at lower cost. Douglas Husak's argument that overcriminalization is not just a policy error but a moral wrong, because it deploys coercive state power without adequate justification, converges with this *maqāṣid* concern. Andrew Ashworth's insistence on criminal law as ultimum remedium reaches the same conclusion from a different direction. These are not liberal impositions on Islamic legal thought. They are, on careful reading, what the tradition itself requires.[37]

[34] Muḥammad al-Ṭāhir ibn 'Āshūr, *Maqāṣid Al-Sharī'ah Al-Islāmiyyah*, 110–112.
[35] Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), 121–124.
[36] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2008), 3.
[37] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford: Oxford University Press, 2013).

Eddy O.S. Hiariej has made a similar point about the direction of Indonesian criminal law expansion: moving into symbolic and moral domains without clear harm-based justification weakens rather than strengthens the legal order. What this analysis adds is the argument that *maqāṣid* does not merely permit this critique, it demands it. The framework is not available as a rubber stamp for criminalization that happens to invoke Islamic moral vocabulary. It is available as a critical standard that such criminalization must actually meet.

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Previous studies on Indonesia's New Criminal Code have generally focused on constitutional law, human rights, democratic governance, and criminal policy reform. Most of these studies analyze the New Criminal Code primarily within the framework of positive law and constitutional democracy. In contrast, this study contributes by positioning *maqāṣid al-sharī'ah* not merely as a source of moral legitimacy, but as a critical evaluative framework for assessing criminalization policy itself. The study therefore extends existing scholarship by integrating Islamic legal philosophy with comparative criminal law analysis and contemporary debates on overcriminalization.[39]

This study is limited by its normative–conceptual methodology and does not incorporate empirical data concerning the implementation of the New Criminal Code in judicial practice. As a result, the analysis focuses primarily on statutory construction, criminal policy orientation, and theoretical implications rather than practical enforcement patterns. In addition, the study concentrates only on selected provisions related to freedom of expression and morality-based offenses. Other controversial provisions within the New Criminal Code, including those concerning cybercrime, religious offenses, and national security, remain beyond the scope of this research.

The limitations of this study should be acknowledged directly. Normative analysis cannot tell us how courts will interpret these provisions in practice, who will actually be prosecuted, or how enforcement costs will be distributed across social groups. Those questions are empirical and they matter enormously for any honest assessment of what the new code will actually do. Comparative research across Muslim-majority jurisdictions, Malaysia, Pakistan, Jordan, Morocco, would situate Indonesia's choices within a broader field of approaches to the same policy dilemmas, and would likely reveal instructive variation. Both lines of research would substantially deepen what this analysis can only begin to sketch.

[38] Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach*, 65–69.
[39] Auda, 65–69.

CONCLUSION

The New Criminal Code is a genuine legislative achievement. Replacing the Wetboek van Strafrecht after decades of failed attempts took sustained political effort across multiple administrations, and the result gives Indonesia a criminal code it can actually call its own. That is worth saying clearly.

But Articles 218–220 revive presidential insult liability in a form that the Constitutional Court had found incompatible with democratic governance and revive it without the statutory precision needed to distinguish protected political expression from punishable defamation. Articles 411 and 412 push criminal liability into private consensual conduct for which the harm rationale remains, charitably stated, contested, and where the costs of criminalization selective enforcement, unequal vulnerability, chilling effects on private life may well exceed whatever welfare the provisions deliver.

What *maqāṣid al-sharī'ah* finds objectionable here is not the regulation of morality or the protection of institutions. The tradition is perfectly capable of both. What it finds objectionable is the absence of proportionality, criminal sanctions are deployed without an adequate account of the harm being prevented, and without serious consideration of whether less coercive means could achieve the same or better results. That requirement, proportionality, criminal law as last resort, welfare over symbolic enforcement is not imposed on Islamic legal thought from outside. It is what the tradition, taken seriously on its own terms, actually demands.

Repeal is not the only response to a flawed provision, and it is probably not the realistic one. This analysis suggests is reform through precision. Article 218 needs statutory criteria that separate defamation from political criticism, criteria that may be applied consistently by courts in cases where institutional pressure will push hard toward expansive interpretation. Articles 411 and 412 need a genuine policy examination of whether criminal sanctions are actually advancing *ḥifẓ al-nasl's* objectives, or whether social, educational, and non-penal regulatory approaches would achieve the same goals at lower cost to the people they affect. These are not radical proposals. They are what proportionality requires, and they would make the code more defensible both as a matter of constitutional law and as a matter of Islamic legal principle. In Indonesia's specific context, that convergence is not accidental. It reflects the fact that both traditions, taken seriously rather than instrumentally, are pressing the same underlying question: does this law actually do what it claims to do.

Accordingly, the study concludes that criminal law reform in Indonesia should be guided not merely by moral symbolism or institutional protection, but by a proportional and welfare-oriented criminal policy consistent with the substantive objectives of *maqāṣid al-sharī'ah*.

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