Analysis Of Legal Functions And Maqashid Sharia On Islamic Marriage Law In Indonesia

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Abstrak:

Penelitian ini membahas tentang analisis fungsi hukum dan analisis Maqasid asy-Syariah terhadap Hukum Perkawinan Islam di Indonesia. Metode yang digunakan dalam penelitian ini, penulis menggunakan jenis penelitian normatif dan pendekatan konseptual. Jenis penelitian normatif adalah jenis penelitian yang terfokus pada hal-hal bersifat norma, aturan, undang-undang, dan teoritik. Pendekatan konseptual yang dimaksud adalah sebagai teori untuk menganalisis objek penelitian. Pertanyaan - pertanyaan yang menjadi fokus penelitian ini adalah bagaimana analisis fungsi hukum terhadap hukum perkawinan islam di Indonesia dan bagaimana analisis Maqasid Asy-Syariah terhadap hukum perkawinan islam di Indonesia.

Kata Kunci:

Fungsi Hukum, Maqasid asy-Syariah, Hukum Perkawinan Islam di Indonesia

Abstract

This study discusses the analysis of the function of law and the analysis of Maqasid ash-Syariah on Islamic Marriage Law in Indonesia. The method used in this study, the author uses the type of normative research and conceptual approach. This type of normative research is a type of research that focuses on norms, rules, laws, and theoretical matters. The conceptual approach in question is as a theory to analyze the object of research. The questions that are the focus of this research are how to analyze the legal function of Islamic marriage law in Indonesia and how to analyze Maqasid Asy-Syariah on Islamic marriage law in Indonesia.

Keyword:
Legal Functions, Maqashid asy-Syari'ah, and Islamic Family Law

INTRODUCTION

Islamic Marriage Law or Islamic family law is a rule of law that governs matters related to the family in Islam. Islamic family law includes the law of marriage, divorce, hadhonah, inheritance, waqf and others. The rules are taken from the results of ijtihad of scholars commonly called Fiqh. This jurisprudence is also the result of the ijtihad of the Ulama which is sourced from the Qur'an and Hadith. Therefore, Islamic family law is a Law found in the Qur'an and Sunnah, which was later understood by the Ulama.

Allah as Shari' must have a purpose in all the rules in the Qur'an and Hadith. As with law in general, the purpose of law in Islam is to create social order in society. The purpose of this social order will only be created when the purpose meets the targets of the purpose.

In Islam, the term Maqasid Ash-Shari'ah is known. The purpose of Ash-Shari'ah is to create social order. The Maqasid Ash-Shari'ah consists of several parts. Therefore, the Islamic family law that functions as the law that regulates the family in Islam, must at least fulfill the Maqasid Ash-Shari'ah. This is nothing else, so that Islamic family law can create benefits and social order for the perpetrators.

Talking about the Maqasid Ash-Shari'ah, it is important to first know the meaning of the Maqasid Ash-Shari'ah itself. The meaning of Maqasid Ash-Shari'ah is not only formulated by one Scholar, but by several Scholars. This is important to study, to select the meaning that is more appropriate to the current situation and conditions. These parts of the Maqasid Ash-Shari'ah could also be increased from the initial formulation, because the problems that exist today are getting more complex.

When the understanding has been found, then it is also necessary to discuss the application of Maqasid Ash-Shari'ah in Islamic family law at this time. Regarding its application, it is necessary to talk about the legal function in general. This is so that Islamic family law really benefits the human race. This benefit will not be separated from the current situation and conditions. Therefore, the changes of the times that will never stop, demand that Islamic law is always moving, so that Islamic law is not affected rigidly in regulating human life.

From the presentation above, the writer would like to explore more about the application of the purpose of Islamic family law. The author understands the purpose of Islamic family law which was created from the goal of Maqasid Ash-Shari'ah. This is because the Maqasid Ash-Shari'ah is a situation created to create social order in Islam.

METHOD

The method used in this study, the author uses the type of normative research and conceptual approach. This type of normative research is a type of research that focuses on norms, rules, laws, and theoretical matters. The conceptual approach in question is as a theory to analyze the object of research. The questions that are the focus of this research are how to analyze the legal function of Islamic marriage law in Indonesia and how to analyze Maqasid Asy-Syariah on Islamic marriage law in Indonesia.

A. Legal Function

Humans will not be separated from the rules in their lives. These rules are used to regulate human relations with one another, because humans have reason behind their actions. Human actions taken will be interpreted by other humans. Therefore, every action must have a specific purpose. Actions in the social sphere can be categorized into good actions or bad actions.[1]

Humans tend to feel comfortable with actions that are acceptable to their minds. Humans will not be able to live comfortably by allowing humans to kill each

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[1] Budiyono Kusumohamidjojo, *Ketertiban Yang Adil Problematik Filsafat Hukum,* (Jakarta: Grasindo, 1999) hlm. 121.

other. Humans will not live comfortably with actions that are basically unacceptable to their own minds. This is the most special difference between humans and animals. The above fact has implications for the function of law in human life, namely the function of law must at least contain public order and justice for the community.[2]

1. *Social Institutions*

According to Koentjaraningrat, social institutions are a system of behavior and relationships that are centered on activities, to meet the complexes of special needs in people's lives.[3] From the above understanding it can be concluded that in a social institution there are two main things. First, activities to meet needs and second, norms that govern these activities.

In general, the existence of social institutions in people's lives has several functions:[4]

a. *Maintaining Community Integrity.*

Community life is a system, so that what every member of the community does either directly or indirectly will affect the lives of the surrounding community. The size of the impact depends on the type of activity it does. For example, a member of the community who has never attended a recitation without any reason. If the person does not have an important role in society, then the impact is limited to raising questions about the reason for the absence. If the person has an important role in society, then unrest among the residents begins to appear. Such unrest can threaten the integrity of society. Therefore, social institutions regulate various forms of activity between humans, in order to create a harmonious atmosphere of life.

b. *As a Social Control Society*

Provide guidance to the community to establish a system of social control (social control). This means that it becomes a community monitoring system for the behavior of its members. For example: community leaders, both ulama, village heads, etc., can supervise the community either directly or indirectly, to create harmony in the midst of the community.

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[2] *Ibid,* hlm. 121-122.

[3] Nurmansyah, Gunsu dkk, *Pengantar Antropologi: Sebuah Ikhtisar Mengenal Antropologi*, (Bandar Lampung: Aura Publisher, 2019), hlm. 59.

[4] *Ibid,* hlm. 59.

c. *As a Community Member Guide*

Social institutions provide guidance to community members. Social institutions regulate behavior or attitudes in dealing with problems in society, especially those concerning needs. Social institutions provide direction to each individual regarding carrying out activities in meeting the needs of the community, so as not to cause deviations that can disturb the community and disrupt community harmony. For example, wearing a helmet is one of the norms in traffic regulations.

2. *Public Order (Social Order)*

Obtaining justice and legal certainty is the main goal to be achieved by humans in the implementation of the law. Something that can be said to be fair is always a debate that is getting more and more complex. This is because the problems that grow in human life are increasingly complex.[5] The increasingly complex problems in the midst of society, requires lawmakers to always harmonize existing laws. Realities like this will never stop for the sake of achieving public order.

Public order is a condition that concerns the implementation of human life as a creature that lives together with other humans. Public order is something that is appropriate and orderly so that it can be generally accepted by others. Public order in society does not fall from the sky, but is created by humans themselves. Public order can be created because of the rule of law. Orderly law can create public order, if the legal order contains justice, so that it is supported by the community as a subject of general law. Unlike public order, public order does not always contain justice, because the demands of the authorities can create public order.[6]

Public order here can be reflected in the purpose of implementing Law Number 1 of 1974 concerning Marriage. This law regulates in detail the marriage is nothing but to create public order in society. As is well known, this marriage is not only related to the relationship between the bride and groom, but is also related to the relationship between two families which basically have

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[5] Kudrat abdillah, dkk, *Peran Bahasa dalam Konstruksi Hukum di Indonesia*, Jurnal ash-Shahifah, Vol 1 Nomor 2, Tahun 2021, hlm. 7.

[6] Budiyono Kusumohamidjojo, *Ketertiban Yang Adil Problematik Filsafat Hukum,* (Jakarta: Grasindo, 1999), hlm. 122-126.

different lifestyles. This marriage will also be carried out by everyone regardless of class, therefore it is very important to create definite rules related to marriage.

3. *Justice*

Justice is the substance of the legal order and the main function of the law, which ultimately aims to uphold justice. Justice is also a concept relevant to human relations. In the Big Indonesian Dictionary, justice is the basis for fair treatment of humans who are citizens of society.

There are two kinds of justice, namely individual justice and social justice. The two kinds of justice actually do not have a clear understanding, it can only be described a little from the meaning of the two terms. Individual justice is justice that is created within the scope of an individual nature, namely justice that is realized is not related to humans in general. Social justice is justice that is created in a social scope, namely justice that is realized in the scope of humans in general.

If you look at Islamic family law, for example the husband and wife relationship in the family, which has been able to reflect justice between the two. A husband who has an obligation to provide for his family, is a fair thing for the husband, because from a physical point of view the husband is stronger to work hard to provide for his family than the wife. A wife who is in charge of taking care of the household is also something that is fair, because in general women are more patient than men in domestic matters. Although in the rules as above, in fact the rules do not run rigidly and die. The husband and wife relationship can still be compromised properly for the sake of creating comfort in the family and without any party feeling monopolized.

The purpose of creating social order must meet the targets described in Maqasid Asy-Shari'ah. These goals are realized states to manifest created states. Even these goals must be accomplished first, then the purpose of Islamic family law will be created in the midst of society. Therefore, the next discussion is about the targets contained in Maqasid Ash-Shari'ah.

B. *Maqasid Asy-Syari'ah*

Maqasid Ash-Shari'ah has many versions in terms of understanding. The changing times experienced by the originators of al-

Maqashid have implications for the various meanings and scopes of al-Maqashid itself. There are several famous figures from the 5th century to the 8th century H who are known as the originators of al-Maqashid.[7] These figures are Imam al-Juwayni (the originator of the theory of needs), Imam al-Ghazali (the originator of the levels of Necessity), Al-'Izz 'Abd al-Salam (the originator of the wisdom behind sharia law), Imam al-Qarafi (the originator of the classification of actions of the Prophet SAW), Imam ibn al-Qayyim (the originator of the Shari'ah Essence), and Imam ash-Syatibi (the originator of maqasid as the principles of Islamic law).

Imam al-Juwayni who has a paper entitled al-Burhan fi Usul al-Fiqh describes the theory of the "levels of basic needs" known today. The levels of basic needs are ad-darurah, al-hajah al-'ammah, al-makrumah, al-mandubah, and what cannot be returned to a specific purpose.[8] He also suggested that the goal of Islamic law is al-'ismah (real protection) against faith, soul, reason, the realms of personality and property. Another work of him is giya al-Umam (savior of the people). In this work, he writes about the fundamental principles that underlie and collect all the rules of Islamic law. These principles include "convenience" as the goal of various regulations, lifting the burden of life for the poor (the purpose of various zakat and alms regulations), and mutual agreement as the governing principle of all forms of trade law.[9]

Abu Hamid al-Ghazali as a student of al-Juwayni developed the theory that had been initiated by his teacher. His work is called al-Mustasfa (pure source). He ranks the necessity that has been initiated by al-Juwayli, into: faith, soul, reason, lineage, and property. He also initiated the term al-Hifz (preservation) in necessity. He also suggested

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[7] Jaser 'Audah, *Maqasid al-Shariah: A beginner's Guide,* alih bahasa: 'Ali 'Abdelmon'im, *Al-Maqasid Untuk Pemula* (Yogyakarta: Suka-Press, 2013), hlm. 38.

[8] Al-Juwayni, Abdul Malik, *al-Burhan fi Ushul al-Fiqh,* ed. Abdul-Azim al-Deeb, 4th ed. (Mansurah: al-Wafa', 1418 AH/1998 CE).

[9] *Ghiah al-Umam fi Iltiyath al-Dzulam*, ed. Abdul Azim al-Deeb (Qatar: Wazarah al-Shu'un al-Diniyyah, 1400 AH).

prioritizing the needs that exist in the higher order above the lower order, when there is a conflict in the application of the two.[10]

The next figure is al-Izz ibn 'Abd al'Salam, in which he wrote two small books about maqasid with the nuances of "the wisdom behind the rules of Shari'ah", namely the purposes of prayer and the purposes of fasting. His work that contributed more greatly to maqasid was Qawaid al-Ahkam fi Masalih al-Anam (Basic rules on Human Benefits). His work describes broadly related to benefit and harm, and connects the legality of the law with its purpose and wisdom behind it.[11]

Another scholar is Shihab al-Din al-Qarafi with his work Al-Qarafi. He contributed to the classification of various acts of the Prophet. This aims to sort out the actions of the Prophet that can be applied to cases in general or only to certain cases. He also recommends that the means that can lead to legal goals need to be opened, and vice versa.[12]

Shamsuddin ibn al-Qayyim who was a student of the eminent Imam Ahmad ibn Taymiyah, contributed to the development of Maqasid theory. Al-Qayyim criticizes in detail against al-Hiyal al-Fiqihiyyah (go round and round and circumvent the directives of the Shari'ah. His criticism above is based on its contradictions with the goals of Shari'ah. Examples of this case can be, such as usury and corruption involving is an illegal act, legalized by the perpetrators.

The priest, known as Ash-Syatibi, has more or less in common with al-Juwayni and al-Gazali. Asy-Syatibi in his work al-Muwafaqat fi Usul al-Shari'ah (Harmonization of Shari'ah Principles), develops the theory of al-Maqasid with three important transformations. The three important transformations are: first, al-Maqasid from just "free

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[10] al-Ghazali, Abu Hamid, *al-Mustasfa fi Ilm al-Ushul,* ed. Mohammed Abdul Salam Abdul Shafi vol. I (Beirut: Dar al-Kutub al-Ilmiyyah, 1413), hlm. 39.

[11] Al-Izz ibn Abd al-Salam, *maqasid al-Saum*, ed. Iyad al-Tabba, 2nd (Beirut: Dar al-Fikr, 1995), hlm. 41 – 42.

[12] Shihab al-Din al-Furuq, *al-Dakhirah* , vol.I (Beirut: dar al-Kutub al-Ilmiyyah, 1998), hlm. 44.

mashlahat" to "legal principles". Second, al-Maqasid from "wisdom behind the rules" to "to the basis of the rules". Third, al-Maqasid from "uncertainty" to "belief".[13]

Apart from the history of al-Maqashid above, there is also one of the lexical meanings, namely Maqasid Ash-Shari'ah defined as the intent or purpose of the law in Islam. The Ulama make Maqasid Ash-Shari'ah as an important part in the study of al-Fiqh proposals. Over time, this study experienced developments which then made Maqasid Asy-Shari'ah the main object in the field of Islamic legal philosophy. Subhi Mahmasami in his book falsafatu at-Tasyri 'fi al-Islam says that the term Maqasid Ash-Shari'ah is synonymous with Islamic legal philosophy.[14]

Understanding the Maqasid Ash-Shari'ah can be said to be something that is very necessary for anyone, especially the mujtahids. This is to decide the law that suits the needs at the moment. When the mujtahid does not understand what the Maqasid Ash-Shari'ah itself is, it is feared that laws that have never been established by the Prophet and even the Scholars, do not fulfill the Maqasid Ash-Shari'ah and certainly do not create peace for people.

Another understanding of Maqasid Ash-Shari'ah is also expressed, that Maqasid Ash-Shari'ah is a branch of Islamic knowledge that answers all difficult questions and is represented by a simple word, namely "why". From the understanding above, it shows that the Maqasid Ash-Shari'ah explains the wisdom behind the rules in Islamic Sharia. Maqasid Ash-Shari'ah can also be considered as a number of Divine purposes and moral concepts that underlie the process of drafting laws based on Islamic Shari'a.

In the theory of inevitability, al-Maqashid does not cover the most basic values that are universal, for example related to justice, freedom etc. Al-Maqashid also tends to be deduced from tradition and from the holy texts of the Qur'an and hadith. The classical scope is the

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[13] Ibid, hlm. 46.

[14] Hasbi Umar, *Nalar Fiqh Kontemporer* (Jakarta: Gaung Persada Press, 2007), hlm. 120.

shari'a as a whole, therefore al-Maqashid does not cover the specific purposes of a law/text or a number of texts that regulate certain topics from the shari'a, so the classic al-Maqashid cannot answer the question " why" in detail.[15]

From the definitions above, the author is more inclined towards the meaning presented by Ash-Syatibi, because Ash-Syatibi interprets the Maqasid Ash-Shari'ah more broadly, compared to others. The understanding put forward by ash-syatibi makes the Maqasid Ash-Shari'ah not just as a purpose or purpose, but really should be the basis, foundation and confidence for the community to create social order in the middle of the community.

C. Application of the Maqasid Ash-Shari'ah in Islamic Family Law
Maqasid Ash-Shari'ah generally consists of five objectives, namely:[16]
1. Maintaining Religion (Hifz ad-Din)

The purpose of preserving religion can be categorized into three levels, namely: first, the daruriyah level. At this level, maintaining religion in the sense of carrying out religious obligations, becomes something primary (must be done by humans). Humans who do not fulfill the primary, result in their religion being threatened. Examples at this level, such as the rule in Indonesian law, that marriage must be carried out according to the laws of each religion and belief.[17] This is in order to maintain the religion of each party. When the spouses are of different religions, it is feared that one of the spouses will convert according to the more powerful party in the couple. This will clearly damage the original religion of the party concerned.

Second, the level of hajiyah. At this level, it is intended to avoid difficulties, if this provision is not implemented it will not

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[15] Jaser 'Audah, *Maqasid al-Shariah: A beginner's Guide,* alih bahasa: 'Ali 'Abdelmon'im, *Al-Maqasid Untuk Pemula* (Yogyakarta: Suka-Press, 2013), hlm. 1-5.

[16] Hasbi Umar, *Nalar Fiqh,* hlm. 124-127.

[17] Undang-Undang Nomor 1 Tahun 1974, Pasal 2 ayat 1.

threaten the existence of religion, but will only make it difficult for people who do it. Examples at this level, such as marriage with people who have the same religion, but that person has parents of different religions. This indeed indirectly damages the religion of the couples, but makes it a little difficult for a couple's relationship, because parents have an important role to the couple as well, such as giving advice, sharing complaints and others.

   Third, the level of tahsiniyyah. At this level, it is intended to uphold human dignity while at the same time perfecting the implementation of its obligations to God. When this is not fulfilled, it will not threaten the existence of religion and will not make it difficult for those who do it. Examples at this level, such as inviting people of different religions to a wedding party.

2. Nurturing the Soul (Hifz an-Nafs).

   The purpose of maintaining the soul can be categorized into three levels, namely: first, the daruriyah level. At this level, includes something that is primary (to be done by humans). Humans who do not fulfill this primary thing, resulting in the existence of the human soul is threatened. Examples at this level, such as the prohibition of abortion for mothers, even though the child in the womb is a child out of wedlock. This is to maintain the existence of the soul of the child in the mother's womb.

   Second, the level of hajiyah. At this level, it is intended to avoid difficulties, if this provision is not implemented it will not threaten the existence of human souls, but will only make it difficult for those who do it. Examples of consuming nutritious food for pregnant women, to meet the nutrition of the fetus in the womb.

   Third, the level of tahsiniyyah. At this level, when it is not fulfilled, it will not threaten the existence of the soul and will not complicate one's life. Examples at this level, such as checking the womb to find out the sex of the baby.

3. Maintaining Intellect (Hifz al-'Aql).

   The purpose of maintaining reason can be categorized into three levels, namely: first, the daruriyah level. At this level, includes something that is primary (to be done by humans). Humans who do

not fulfill this primary thing, result in the existence of human reason being threatened. Examples at this level, such as the recommendation to educate children at an early age in a subtle way and do not contain elements of excessive yelling. This is so that the existence of children's minds is threatened from an early age, because at an early age is the formation of character for children.

Second, the level of hajiyah. At this level, it is intended to avoid difficulties, if this provision is not implemented it will not damage the human mind, but will only make it difficult for the person concerned. Examples at this level, such as the recommendation to study, after taking twelve years of compulsory education.

Third, the level of tahsiniyyah. At this level, when it is not fulfilled, it will not threaten the existence of reason directly. Examples at this level, such as avoiding imagining or listening to something that is not useful.

4. Nurturing offspring (Hifz an-Nasl).

The purpose of maintaining offspring can be categorized into three levels, namely: first, the daruriyah level. At this level, includes something that is primary (to be done by humans). Humans who do not fulfill this primary requirement will result in the existence of human descendants being threatened. For example, at this level, it is the obligation of parents to maintain and educate their children as well as possible.[18] This must still happen, even though the husband and wife have divorced.

Second, the level of hajiyah. At this level, it is intended to avoid difficulties, if this provision is not implemented it will not threaten the existence of human descendants, but will only make it difficult for those who do it. Examples in this level, such as meeting all the needs of children who are cared for by parents.

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[18] Undang-Undang No 1 tentang Perkawinan Tahun 1974, Pasal 45.

Third, the level of tahsiniyyah. At this level, when it is not fulfilled, it will not threaten the existence of the offspring and will not make it difficult for the person concerned, this is only related to ethics and human dignity. Examples at this level, such as the khitbah in marriage.

5. Maintaining Assets (Hifz al-Mal)

The purpose of maintaining property can be categorized into three levels, namely: first, the daruriyah level. At this level, includes something that is primary (to be done by humans). Humans who do not fulfill these primary things, will result in the existence of human property being threatened. Examples at this level, such as the regulation of property ownership rules and the prohibition of taking other people's property in an improper way. This can be in the form of rules regarding inheritance and the distribution of joint assets, both in the Compilation of Islamic Law and the Marriage Law No. 1 of 1974.[19]

Second, the level of hajiyah. At this level, it is intended to avoid difficulties, if this provision is not implemented it will not threaten the existence of human property, but will only make it difficult for those who do it. Examples at this level, such as the division of inheritance without being guided by someone who is an expert in sharing, such as the court, ulama, etc.

Third, the level of tahsiniyyah. At this level, when it is not fulfilled, it will not threaten the existence of property and will not complicate one's life. Examples at this level, such as the advice to avoid fraud in the distribution of family property.

Over time, Maqasid Ash-Shari'ah does not only consist of five objectives as described above. There is an opinion that adds one other goal in addition to what has been described previously, namely: maintaining honor. Maintaining honor can include respect for yourself, children, and also family.

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[19] Kompilasi Hukum Islam, Pasal 96-97, BAB II, III, dan V, Undang-Undang Perkawinan No 1 Tahun 1974, Pasal 35-37.

The purpose of maintaining honor can be categorized into three levels, namely: first, the daruriyah level. At this level, includes something that is primary (to be done by humans). Humans who do not fulfill this primary thing, resulting in the existence of his honor is threatened. Examples at this level, such as the legalization of marriage for people who are physically and mentally capable of marriage.

Second, the level of hajiyah. At this level, it is intended to avoid difficulties, if this provision is not implemented it will not threaten the existence of human honor, but will only make it difficult for those who do it. Examples at this level, such as the recommendation to fast for people who already want to get married, but do not have sufficient provisions to do marriage.

Third, the level of tahsiniyyah. At this level, when it is not fulfilled, it will not threaten the existence of honor and will not complicate one's life. Examples at this level, such as the option to remarry for people who have been married before (cause of death or divorce).

Applications of Maqasid Ash-Shari'ah as exemplified above should always be reflected in everyday life in society, so that social order is always created in the midst of society. When the above targets are always considered, social order will always be created in society. The importance of bringing order to the family system is needed, because the family is the smallest part of society. If the smallest part has created social order, then the wider community will create social order.

CONCLUSION

From the presentation of the discussion of the paper above, it can be concluded: *First*, the function of law in general has similarities with the purpose of Islamic family law, namely to create social order and create justice in the midst of society. *Second*, that the application of Maqasid Ash-Shari'ah should always be used as a basis and belief in life for the sake of

creating social order in society, especially families. *Third,* Islamic family law, which has been processed into law in Indonesia, can be said to have fulfilled the maqasid ash-Sharia, although not yet optimally.

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