



## ***Maqāṣid al-Sharī'ah* and the Prohibition of Incest in Indonesian Legislation: An Analysis of the Protection of Lineage and Public Morals**

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Submitted	: 02-04-2025	Accepted	: 12-08-2025
Revision	: 06-08-2025	Published	: 18-09-2025

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**Abstract:** The phenomenon of incestuous marriage in Indonesia continues to occur despite being strictly prohibited by Islamic law and national positive law. This paper discusses the issue of incest from the perspective of *maqāṣid al-sharī'ah*, highlighting how the principles of *ḥifẓ al-nasab* (protection of lineage) and *ḥifẓ al-'ird* (protection of morality and honour) serve as the normative and ethical basis for the prohibition of incestuous marriage. This study uses a qualitative approach based on normative and comparative legal analysis of classical Islamic legal sources, national legislation such as the Marriage Law, KHI, and KUHP, and developing social phenomena. The results of the study show that the *maqāṣid al-sharī'ah* approach uses *ṣalah al-uṣūl al-khamsah*, *ḥifẓ al-nasl*, to formulate the prohibition of incest. *Ḥifẓ al-nasl* consists of two elements: *wujūd* (productive) and *'adam* (protective). The prohibition of incest is a form of protective behaviour, similar to the prohibitions of adultery and *qazf*. The application of *maqāṣid al-sharī'ah* to positive law can offer new possibilities for Indonesian law, which is expected to encompass legal, social, and moral aspects.

**Keywords:** incest, *maqāṣid al-sharī'ah*, *ḥifẓ al-nasab*, family law, public morality

**Abstrak:** Fenomena perkawinan sedarah (*incest*) di Indonesia terus terjadi meskipun secara tegas dilarang oleh hukum Islam dan hukum positif nasional. Tulisan ini membahas permasalahan *incest* dari perspektif *maqāṣid al-sharī'ah* dengan menyoroti bagaimana prinsip *ḥifẓ al-nasab* (perlindungan keturunan) dan *ḥifẓ al-'ird* (perlindungan moral dan kehormatan) dijadikan dasar normatif dan etis dalam pelarangan perkawinan sedarah. Kajian ini menggunakan pendekatan kualitatif berbasis analisis normatif dan yuridis-komparatif terhadap sumber-sumber hukum Islam klasik, legislasi nasional seperti UU Perkawinan, KHI, dan KUHP, serta fenomena sosial yang berkembang. Hasil penelitian menunjukkan bahwa pendekatan *maqāṣid al-sharī'ah* menggunakan *ṣalah al-uṣūl al-khamsah*, *ḥifẓ al-nasl*, untuk merumuskan larangan incest. *Ḥifẓ al-nasl* terdiri dari dua unsur: *wujūd* (produktif) dan *'adam* (protektif). Larangan incest merupakan bentuk perilaku protektif sebagaimana larangan berzina dan *qazf*. Pengaplikasian *maqāṣid al-sharī'ah* ke dalam hukum positif dapat memberikan

tawaran baru untuk hukum Indonesia yang diharapkan dapat mencakup aspek hukum, sosial, dan moral.

**Kata Kunci :** *incest, maqāṣid al-sharīah, ḥifẓ al-nasab*, hukum keluarga, moral publik

## Introduction

Recently, Indonesian society has been shocked by a community group called “*fantasi sedarah*” (incest fantasy), which has approximately 41,000 members. This group has become a topic of widespread discussion because it recounts the experiences and incidents experienced by children who are close relatives within the family environment, with most incidents involving fathers and their daughters.<sup>1</sup> Not only do members share the experiences of those who commit such acts, but they also discuss engaging in incestuous relationships. This phenomenon highlights the lack of public awareness regarding the prohibition and enforcement of penalties for incestuous marriages, with the term “*incest*” being used instead.

Data from the Ministry of Women’s Empowerment and Child Protection (Kemen PPA) shows that as of January 1, 2025, the majority of violence victims were women, with 8,613 cases. Of these cases, 33% involved victims under the age of 18 (between 13 and 17 years old), and 61% of the incidents occurred within the household.<sup>2</sup> Kemen PPA also reported that the form of violence experienced by the victims was predominantly sexual violence, totaling 4,391 cases. Of particular concern is that the perpetrators were close family members of the victims, with 1,134 being parents, ranking third after boyfriends/friends and husbands/wives.

The high incidence of violence against women and children, particularly within households and involving perpetrators close to the victims, highlights structural vulnerabilities within the family institution, which is supposed to provide protection. Incestuous marriages, one of the most extreme forms of this violation, infringe upon the victims’ rights as well as societal and moral norms. This situation requires serious attention, especially in terms of religious laws and regulations, as incest is not merely a legal violation but also contradicts the principles of lineage protection and human dignity as stipulated by Indonesian positive law and Islamic sharia rules.

Marriage in Indonesian positive law and Islamic law is strictly regulated by laws that specifically address marriage. One of the prohibitions in the law is incestuous marriage. Incest is a sexual relationship between people who are related by blood or close relatives, which is considered a violation of customs, law, and religion.<sup>3</sup> This definition covers three areas: a) parental incest, which is sexual relations between parents and children, for example, a father with his daughter or a mother with her son; b) sibling incest, which is relations between siblings; and c) family incest, which refers to sexual relations between close relatives who have authority over children and share a blood relationship, whether through direct descent, ascending lineage, or collateral lineage, such as uncles, aunts, grandparents, grandchildren, cousins, or siblings of grandparents, all of whom maintain a blood-related family bond.

<sup>1</sup> Esti Widiyana, “Grup FB ‘Fantasi Sedarah’ Jadi Bukti Ruang Aman Untuk Anak Makin Terkikis,” *detik.com*, May 17, 2025, <https://www.detik.com/jatim/berita/d-7918259/grup-fb-fantasi-sedarah-jadi-bukti-ruang-aman-untuk-anak-makin-terkikis>.

<sup>2</sup> “SIMFONI-PPA,” [kemenpppa.go.id](https://kemenpppa.go.id), January 1, 2025, <https://kekerasan.kemenpppa.go.id/ringkasan>.

<sup>3</sup> Alimatul Qibtiyah et al., *Kajian 21 Tahun, Catatan Tahunan Komnas Perempuan, Tahun 2001-Tahun 2021*, 1st ed. (Jakarta: Komnas Perempuan, 2023), 41.

Incestuous behaviour can be identified in various forms, including: 1) rape, 2) molestation, 3) forced contraception, 4) forced anal sex by a biological father towards his child, and 5) forced abortion by the mother due to sibling incest.<sup>4</sup> Incest is categorised as sexual violence or is often classified as statutory rape in the eyes of the law, and is categorised as severe sexual violence. Under Law No. 35 of 2014, which regulates the rights, provisions, and penalties for children and perpetrators of crimes against children, if the act results in severe injuries, the perpetrator may be sentenced to a maximum of 5 (five) years in prison and/or a fine of up to one hundred million rupiah. Meanwhile, perpetrators who cause the death of a child may be sentenced to a maximum of 15 (fifteen) years' imprisonment and/or a fine of up to three billion rupiah. The emphasis is on the following provision: if the perpetrator is a parent, the criminal penalties may be increased further.<sup>5</sup>

As a result of the actions committed by perpetrators of incest, victims suffer various adverse effects that continue to affect their lives in the future. It is not uncommon for victims to die from genital infections. Incest crimes in Indonesian society are difficult to prosecute in court. Victims of this crime often face silence, making it difficult for them to testify that they have been victimised, a situation exacerbated by the lack of support from their immediate families. Additionally, the absence of sufficient evidence to prosecute the perpetrators of incest often leads to the suspension of investigative proceedings in many cases.<sup>6</sup>

In Islamic law, marriage between individuals who are related by blood (descendants) is strictly prohibited based on the Qur'anic verse of QS. *al-Nisā'* [4]: 23-24 and is considered a definitive ruling (*dalil qat'ī*). This prohibition is not only based on normative texts but also on the objectives of Islamic law (*maqāṣid al-sharī'ah*) in preserving life (*ḥifẓ al-nafs*), maintaining lineage (*ḥifẓ al-nasab*), and safeguarding public morality.<sup>7</sup> In Indonesian positive law, consanguineous marriage is a form of deviance prohibited by Law No. 1 of 1974 on marriage, and reinforced in the Compilation of Islamic Law (KHI). However, in practice, the phenomenon of consanguineous marriage still occurs in various regions, either conducted in secret or as part of deviant cultural practices, which then poses challenges in enforcing the law and protecting victims.<sup>8</sup> This phenomenon has sparked debate about the effectiveness of the law and the urgency of a normative approach that integrates *maqāṣid al-sharī'ah* in the formulation and implementation of national legislation.

So far, studies on incest tend to focus on three main aspects. First, research highlights the causes of incest in dysfunctional families and weak legal systems. A lack of understanding of religious and moral values within the family, as well as weak law enforcement and a lack of comprehensive prevention systems, are the leading causes of incest against children.<sup>9</sup> Similar studies offer preventive measures against incest by emphasizing the importance of early education and separate sleeping arrangements

<sup>4</sup> Aflina Mustafainah et al., "Pengembangan Dari CATAHU (Catatan Tahunan Kekerasan Terhadap Perempuan) Tahun 2018-2021" (Jakarta, 2021).

<sup>5</sup> Pemerintah Pusat Indonesia, "Undang-Undang (UU) Nomor 35 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak," Pub. L. No. 35, <https://peraturan.bpk.go.id/Details/38723/uu-no-35-tahun-2014> (2014), Pasal 80.

<sup>6</sup> Qibtiyah et al., *Kajian 21 Tahun, Catatan Tahunan Komnas Perempuan, Tahun 2001-Tahun 2021*.

<sup>7</sup> Mohammad Hashim Kamali, "History and Jurisprudence of the Maqāṣid: A Critical Appraisal," *American Journal of Islam and Society* 38, no. 3-4 (August 8, 2021): 8-34, <https://doi.org/10.35632/AJIS.V38I3-4.3110>.

<sup>8</sup> Peter Choate and Radha Sharan, "The Need to Act: Incest as a Crime Given Low Priority—A View with India as an Example," *Social Sciences* 2021, Vol. 10, Page 142 10, no. 4 (April 16, 2021): 142, <https://doi.org/10.3390/SOCSCI10040142>.

<sup>9</sup> Tateki Yoga Tursilarini et al., "Examining Child Victims of Incest in Indonesia: Between the Legal System and Family Dysfunction," *JURIS (Jurnal Ilmiah Syariah)* 23, no. 1 (2024): 129-42, <https://doi.org/10.31958/JURIS.V23I1.12341>.

for children.<sup>10</sup> Second, research that focuses on the psychological dynamics and trauma perceptions of child victims of incest within family relationships. Analysis of images of child victims identifies family emotional dynamics and role imbalances within the family.<sup>11</sup> The existence of manipulative power dynamics and the exploitation of emotional bonds create opportunities for incestuous acts.<sup>12</sup> Third, studies that explore the family profiles of incest perpetrators and relational characteristics among family members. Patterns of prolonged conflict, violence, and role imbalance between the father and mother are important aspects that shape the families of incest perpetrators.<sup>13</sup> However, some of the above literature still bases its analysis on medical or psychological perspectives, without deeply linking it to the framework of Islamic social ethics and law. Therefore, this study seeks to complement the research above by examining incest as a form of prohibited behavior through the *maqāṣid al-sharīah* approach, particularly in the context of protecting lineage and public morality in Indonesian legislation.

This study aims to examine the prohibition of consanguineous marriage from the perspective of *maqāṣid al-sharīah* and assess how this approach is adopted or ignored in Indonesian legislation. Through this research, the article argues that the integration of *maqāṣid al-sharīah* in legal policy can strengthen the protection of individual rights and family structures desired by the purpose of marriage, namely a family that is *sakīnah*, *mawaddah*, *wa-rahmah*, and provide more ethically and contextually sound solutions to social problems.

### Revisiting the Purpose of Marriage

The word “marriage” etymologically comes from the Arabic words *nakaha* and *zawwaja*, which mean marriage contract and sexual intercourse. Epistemologically, it is a marriage bond (*‘aqd*) carried out according to the provisions of law and religious teachings.<sup>14</sup> The use of *nikah* in Islamic teachings is mandatory to refer to marriage. Marriage itself is defined as the fulfillment of a mutual agreement between a man and a woman that legalizes their relationship, and its implementation must be without coercion to create happiness in their household, filled with mutual love and peace, according to Islamic teachings.<sup>15</sup>

Marriage is not merely a physical or spiritual bond, but encompasses both. The physical bond allows the husband and wife to engage in sexual relations, while the spiritual bond reveals the

<sup>10</sup> Lateef Omotosho Adegboyega, Samuel Kolawole Ajiboye, and Shakiru Abdulkareem, “Incest: A Threat to Family Security,” *Canadian Journal of Family and Youth / Le Journal Canadien de Famille et de La Jeunesse* 15, no. 1 (2023): 63–76, <https://doi.org/10.29173/CJFY29912>. societies have classified certain forms of sexual intimacy as unlawful in the family setting. These are punishable under religious rules and government status. Incest is sexual intercourse between close relatives. It is a social taboo and can be illegal or in some cases legal depending on the jurisdiction. Genetic Sexual Attraction (GSA

<sup>11</sup> Oya Sevcan Orak, Nurten Gülsüm Bayrak, and Elif Güzide Emirza, “‘Silent Screams’: Family Perceptions in the Drawings of Incest Victim Children,” *Journal of Pediatric Nursing* 73 (2023): e624–31, <https://doi.org/10.1016/J.PEDN.2023.11.008>.

<sup>12</sup> Emanuela Bianciardi et al., “The Incest and the Psychopathological Family,” *Trends in Andrology and Sexual Medicine Part F2332* (2023): 85–99, [https://doi.org/10.1007/978-3-031-47892-5\\_7](https://doi.org/10.1007/978-3-031-47892-5_7).

<sup>13</sup> Susan Alexa Pusch, Thomas Ross, and María Isabel Fontao, “The Environment of Intrafamilial Offenders – A Systematic Review of Dynamics in Incestuous Families,” *Sexual Offending: Theory, Research, and Prevention* 16 (2021): 1–20, <https://doi.org/10.5964/SOTRAP.5461>.

<sup>14</sup> Badan Pengembangan dan Pembinaan Bahasa, “Hasil Pencarian - KBBI VI Daring,” kemendikbud.go.id, 2025, <https://kbbi.kemdikbud.go.id/entri/nikah>.

<sup>15</sup> Tinuk Dwi Cahyani, *Hukum Perkawinan*, ed. Halimatus Khalidawati Salmiah (Malang: UMM Press, 2020).

informal and invisible aspects.<sup>16</sup> These two elements form the foundation for building a family.<sup>17</sup> The purpose of forming a family through marriage is to create a household that is *sakinah, mawad-dah, wa-rahmah*,<sup>18</sup> which in the Marriage Law is interpreted as creating an eternal and happy marriage by God's will.<sup>19</sup>

Meanwhile, the Marriage Law in Indonesia includes at least four elements: first, a spiritual and physical bond, meaning not only the exchange of vows but also the sincere consent of both parties to create a happy and lasting family, and second, adhering to the principle of monogamy and third, forming a happy and lasting family to achieve peace, joy, comfort, and tranquility in married life's physical and spiritual aspects. Fourth, based on religious provisions.<sup>20</sup>

The history of Islamic marriage law in Indonesia has experienced ups and downs. Before the enactment of Islamic marriage law, Indonesia already had a national law applicable to all Indonesian citizens, namely the Marriage Law. Before the implementation of this law, the government had enforced marriage regulations stipulated in the Criminal Code (BW), the Indonesian Christian Marriage Ordinance (Huwelijks Ordonansi voor de Christens Indonesiers) Staatsblaad 1933 No. 74, and the Mixed Marriage Regulation (Regeling op de gemengde Huwelijken), Staatsblaad 1898 No. 158. In addition to the above laws, the government enacted the Marriage, Divorce, and Reconciliation Registration Law (NTR) in State Gazette 1954 No. 32 and the Minister of Religion's regulations regarding its implementation.<sup>21</sup>

Before the marriage law came into effect on October 1, 1975, several marriage laws applied to all citizens in various regions, including: 1) customary marriage laws that regulated marriage for indigenous Indonesians, the purpose of which was to preserve and continue the lineage according to the line of descent. Therefore, this marriage involves the entire family and even the surrounding community. 2) Islamic marriage laws that apply to indigenous Indonesians who embrace Islam, so that marriage practices use Islamic principles. 3) The Civil Code (Burgerlijk Wetboek), which applies to people of European, Chinese, and other nationalities. 4) According to the Indonesian Christian Marriage Ordinance (HOCI), the marriage law applies to Indonesians who adhere to Christianity. 5) Mixed Marriage Regulations. 6) Regeling op de Gemengde Huwelijken is a marriage regulation for Indonesians who marry non-Indonesian descendants.<sup>22</sup>

The various marriage laws in Indonesia and the dynamics involved are all intended to achieve the goal of marriage, which is to have children to preserve and develop the human race in carrying out its duty as caliphs on earth. The offspring produced from marriage, as mentioned by Ibn Abbas, can bring happiness to the married couple and serve as the smallest unit of society that can assist and support one another among family members.<sup>23</sup>

<sup>16</sup> Arbanur Rasyid et al., "Dynamics of Childless Marriage Through the Lens of Maqasid Al-Shari'a," *Jurnal Ilmiah Peuradeun* 12, no. 2 (May 30, 2024): 763–86, <https://doi.org/10.26811/PEURADEUN.V12I2.1182>.

<sup>17</sup> K. Wantjik Saleh, *Hukum Perkawinan* (Jakarta: Ghalia Indonesia, 1980), 14–15.

<sup>18</sup> In Islamic legal literature, the goal of marriage in the form of *sakinah mawaddah wa rahmah* is one of many goals of marriage. Other goals of marriage that are rarely mentioned include increasing offspring, protecting oneself from immoral acts, and building a pious family. See: Ahmad Khoiruddin, "Konsep Sakinah, Mawaddah Dan Rahmah Dalam Pernikahan - Lembaga Penelitian Dan Pengabdian Masyarakat," Lembaga Penelitian dan Pengabdian Kepada Masyarakat Universitas Islam Negeri Siber Syekh Nur Jati Cirebon, September 1, 2022, <https://lp2m.uinsscc.ac.id/?p=1758>.

<sup>19</sup> Cahyani, *Hukum Perkawinan*.

<sup>20</sup> Jamaluddin and Nanda Amalia, *Buku Ajar Hukum Perkawinan*, ed. Faisal (Lhokseumawe: Unimal Press, 2016), 19–20.

<sup>21</sup> A. Hamid Sarong, *Hukum Perkawinan Islam Di Indonesia* (Banda Aceh: Pena, 2010), 24–25.

<sup>22</sup> Jamaluddin and Nanda Amalia, *Buku Ajar Hukum Perkawinan*.

<sup>23</sup> Zaprulkhan, 97–98.

Meanwhile, in Christian teachings, marriage aims to unite two individuals with many human weaknesses, so that through marriage, the two individuals become a team that can accept each other's shortcomings. Even in the New Testament, marriage is likened to the relationship between Christ and the church, in which both must love and be committed to their partner.<sup>24</sup> Paul's agreement clearly states that marriage is a partnership in which both individuals need each other.<sup>25</sup>

The sacred purpose of marriage is not only emphasised in religious teachings, but also by indigenous communities. Before the arrival of the Abrahamic religions, Indonesian communities viewed marriage as a guardian of cultural values and traditions passed down from generation to generation.<sup>26</sup> Therefore, it is unsurprising that certain rituals are included in wedding ceremonies, such as traditional ceremonies, dances, and songs adapted to the local culture.<sup>27</sup>

### **The Concept of Maqāṣid Sharī'ah in the Protection of Lineage**

The term *al-maqāṣid* is the plural form of the Arabic word *Maqṣad*, which means goal, target, desired outcome, or ultimate purpose. In Islamic jurisprudence, *al-maqāṣid* refers to *al-hadaf* (purpose), *al-gharaḍ* (target), *al-maṭlūb* (desired outcome), or *al-ghāyah* (ultimate goal) of Islamic law.<sup>28</sup> Terminologically, the meaning of *maqāṣid al-sharī'ah* has evolved from its initial simple form to a more holistic sense. The first scholars to provide a theoretical definition of *maqāṣid al-sharī'ah* were *al-Shāṭibī* in his book entitled *maqāṣid al-sharī'ah*. Although before *al-Shāṭibī*, there were already those who discussed *maqāṣid* by equating it with the wisdom of law, the objectives of law, the meanings of law, and achieving (*al-maṣāliḥ*) benefits and rejecting *mafasadat* (*al-mafāsīd*).<sup>29</sup>

The development of *maqāṣid al-sharī'ah* after *al-Shāṭibī* experienced a long period of stagnation, as it was believed that *maqāṣid al-sharī'ah* had found its perfect form as conceived by *al-Shāṭibī*, leading to stagnation for approximately six centuries. *Maqāṣid al-sharī'ah* began to resurface in Islamic intellectual circles after *Ṭāhir Ibn 'Āshūr* established it as an independent field of study.<sup>30</sup>

*Maqāṣid al-sharī'ah*, as categorized by *al-Shāṭibī*, is divided into three levels: 1) *ḍarūriyyāt* (essential), defined as everything that must exist to achieve human welfare, both for worldly and spiritual purposes. The objectives of Islamic law in the form of *al-ḍarūriyyāt* require the preservation of *al-ḍarūriyyāt al-khams*, which include religion, life, intellect, lineage, and property. 2) *ḥājiyyāt* (complementary) means everything humans need but does not reach the level of *ḍarūriyyāt*, yet its existence is necessary to facilitate human life. 3) *Taḥsīniyyāt* (tertiary), meaning everything that should exist to beautify human life, whose absence does not harm or complicate life. However, their existence is intended for moral excellence and the common good.<sup>31</sup>

<sup>24</sup> Antonius, S. (2020). Pernikahan Kristen Dalam Perspektif Firman Tuhan. *Jurnal Pionir LPPM Universitas Asahan*, 6(2).

<sup>25</sup> Paath, J., Zega, Y., & Pasaribu, F. (2020). Konstruksi pernikahan Kristen alkitabiah. *Scripta*, 8(2), 181-202.

<sup>26</sup> Solihan et al., "Legal Syncretism in Practice: Acculturation of Islamic and Customary Norms in the Tunggu Tubang Marriage Tradition of Semende," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 25, no. 1 (June 2, 2025): 185-99, <https://doi.org/10.19109/NURANI.V25I1.25060>.

<sup>27</sup> Yarham, M. (2023). Tradisi Adat Jawa dalam Pelaksanaan Pernikahan Perspektif Hukum Islam. *Al Maqashidi: Jurnal Hukum Islam Nusantara*, 6(2), 58-73.

<sup>28</sup> Zaprulkhan, *Rekonstruksi Paradigma Maqāṣid Al-Sharī'ah*, 1st ed. (Yogyakarta: IRCiSoD, 2020), 60.

<sup>29</sup> Some scholars who discuss *maqāṣid* with the above interpretation include *al-Bannānī*, *al-Asnawī*, *al-Samarqandī*, *al-Ghazālī*, *al-Āmidī*, and *Ibn al-Ḥājjib*. See: Zaprulkhan, *Rekonstruksi Paradigma Maqāṣid Al-Sharī'ah*.

<sup>30</sup> Ahmad Imam Mawardi, *Fiqh Minoritas* (Yogyakarta: LKIS, 2010), 180-82.

<sup>31</sup> Zaprulkhan, *Rekonstruksi Paradigma Maqāṣid Al-Sharī'ah*.

The protection of the five necessities (*al-ḍarūriyyāt khums*) encompasses five main things: the preservation of religion, life, intellect, lineage, and property. The conservation of religion in this context means granting every individual the freedom to choose their religion according to their beliefs without any coercion whatsoever. Freedom to choose one's religion without coercion is the foundation of Islamic law, as stated by Ibn 'Āshūr.<sup>32</sup>

In the matter of consanguineous marriage, Islam seeks to preserve life and lineage. This preservation is achieved by imposing penalties on those who violate the text's provisions by marrying a blood relative. In addition to causing genetic abnormalities, consanguineous marriage is also considered adultery, so that the offspring do not receive the rights they would have if the marriage had been performed with a valid contract recognized by Islam.

Preserving offspring is one of the purposes of marriage, alongside other purposes. Therefore, marriage in Islam is strictly regulated, consisting of pillars, conditions, and prohibitions. If any of these are not fulfilled, it will have consequences both vertically (towards Allah) and horizontally (towards society), where children born from an invalid marriage have no honor.<sup>33</sup> Conversely, children born from a valid marriage will receive recognition and rights from the religion, such as inheritance, kinship, etc.

Preserving lineage in Islam is considered valuable and essential for every individual, so it is obligatory to uphold this honor. In the position of *al-ḍarūriyyāt*, the preservation of lineage in the form of a valid marriage contract and marriage registration occupies the position of *al-ḥājiyyāt* to protect the rights of individuals in the future.<sup>34</sup> Celebrating the marriage contract by inviting relatives, neighbors, and the surrounding community is a form of *al-taḥsīniyyāt* in preserving lineage.<sup>35</sup>

### Consanguineous Marriage in the Perspective of the Qur'ān

Two verses in the Qur'an discuss the prohibition of marrying people who are related by blood (descendants), breastfeeding, and marriage (*muṣāharah*) in *Sūrah al-Nisā'*: 23-24.

*Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your step-daughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not consummated the marriage with them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your loins, and that you take two sisters simultaneously in marriage, except for what has already occurred. Indeed, Allah is ever Forgiving and Merciful.*

*And [also prohibited to you are all] married women except those your right hands possess. [This is] the decree of Allah upon you. And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property, desiring chastity, not unlawful sexual intercourse. So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation. And there is no blame for what you mutually agree to beyond the obligation. Indeed, Allah is ever Knowing and Wise.*

<sup>32</sup> Zaprul Khan.

<sup>33</sup> Busyro, *Maqāṣid Al-Sharī'ah Pengetahuan Mendasar Memahami Masalah* (Jakarta: Prenada Media, 2019), 124–25.

<sup>34</sup> Qadriani Arifuddin, "Registration of Marriage as Fulfillment of Marriage Requirements According to Islamic Principles," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 24, no. 2 (October 10, 2024): 317–28, <https://doi.org/10.19109/NURANI.V24I2.24529>.

<sup>35</sup> Achmad Muzammil Alfian Nasrullah, *Maqāṣid Al-Sharī'ah: Konsep, Sejarah, Dan Metode* (Malang: Literasi Nusantara Abadi, 2024), 10–11.

Early Muslim scholars such as *al-Ṭabarī* provided explanations regarding the two verses above by quoting the opinion of *Ibn ‘Abbās* that seven people are forbidden due to nasab and seven people are banned due to marriage.<sup>36</sup> *Ibn al-Mundhir* emphasized that the last seven parts forbid marriage and also *raḍā‘ah* (breastfeeding). The prohibition of marriage due to blood ties in the above verse also includes marrying one’s biological mother or child, whether traced upward or downward, including paternal and maternal grandparents, and downward blood ties such as children and grandchildren.<sup>37</sup>

According to *al-Rāzī*, the prohibition against marrying one’s mother and children has been established since the teachings of Prophet *Adam* until the teachings of Prophet *Muhammad*, and no heavenly religion permits marrying either of them. As for the history of permissibility mentioned by Prophet *Ziradiste*, a Zoroastrian prophet, Islamic scholars agree that it is false. The permissibility of marrying a sibling during the time of Prophet *Adam* was due to necessity, although this remains a debate among Islamic scholars.<sup>38</sup> Some groups claim that the one married to *Adam*’s son was not his sibling, but rather an angel sent by Allah from heaven to be married. Still, this opinion is refuted and considered a false interpretation.

The prohibition against marrying one’s mother is because sexual relations are something shameful and despicable, and should only be done in private. Since it is a disgraceful act, it is obligatory to protect one’s mother from such an act, as a mother’s kindness toward her child is the most excellent form of kindness, and it is therefore obligatory to protect her from such dishonor. Similarly, the prohibition against marrying one’s daughter is because a daughter is part of her father, as the hadith states that *Fatimah* is part of the Messenger of *Allah*, so it is obligatory to protect her from such a despicable act, and the same applies to the prohibition against others. The prohibition in this verse is eternal and permanent until the Day of Judgment.<sup>39</sup>

In the above verse, the Qur’an uses the phrase *hurrimat*, which means it’s not okay to marry the 14 people mentioned. The Qur’an also uses similar wording to say that certain foods are not okay to eat. The prohibition in this verse, in the field of *uṣūl al-fiqh*, is referred to as *al-nahy’ anḥā ‘alā al-jam’i* (a complete prohibition), which implies that something that is prohibited can be avoided by all people.<sup>40</sup> Even so, there are things that are permissible for humans to do, such as marrying someone who is not a mahram or eating permissible foods.

The wisdom behind the prohibition of the fourteen people mentioned in the verse above is to facilitate marriage and avoid disputes among relatives.<sup>41</sup> The prohibition of marrying mahrams indirectly opens the possibility of *shahwah*, leading to marriage aimed at increasing offspring, which is the primary purpose of marriage. *Ibn ‘Ashūr* states that *shahwah* should not arise when faced with one’s mahram.

<sup>36</sup> Abū Ja‘far Muḥammad ibn Jarīr al-Ṭabarī, *Jāmi’ Al-Bayān ‘an Ta’wīl Āy Al-Qur’ān*, ed. ibn ‘Abd al-Muḥsin, al-Ūlā, vol. J. 8 (Turki: Dār Hajr , 2001), 140.

<sup>37</sup> Abū Bakr Muḥammad ibn Ibrāhīm Ibn al-Mundhir, *Kitāb Tafsīr Al-Qur’ān*, ed. Sa’d Ibn Muḥammad, al-Ūlā, vol. J. 2 (al-Madīnah al-Nabawīyah: Dār al-Mā’āthir, 2002), 621–22.

<sup>38</sup> Fakhr al-Dīn Al-Rāzī, *Mafātīḥ Al-Ghayb*, al-thālīthah, vol. J. 28 (Bayrūt: Dār Iḥyā’ al-Turāth al-‘Arabī , 1999), 23.

<sup>39</sup> Al-Rāzī, *Mafātīḥ Al-Ghayb*.

<sup>40</sup> Abu Husain Muḥammad al-Mu’tazili, *al-Mu’tamad fi ushul al-Fiqhi*. (Beirut: Dar al-Kutub al-Ilmiyyah, 1403 H). J. 1, hlm. 169.

<sup>41</sup> Muḥammad aṭ-Ṭāhir Ibn ‘Ashūr, *At-Tahrīr Wa at-Tanwīr*, vol. J. 4 (Tūnis: Ad-Dār at-Tūnisiyyah, 1984), 298.

## Consanguineous Marriage: The Perspective of Positive Law in Indonesia

The 1945 Constitution does not mention any prohibition on consanguineous marriage. However, section 28, paragraph 1 can be used to determine whether consanguineous marriage is prohibited. The wording “*every person has the right to form a family and continue their lineage through legal marriage*” can be interpreted to mean that every Indonesian citizen has the same right to marry.<sup>42</sup> Meanwhile, marriages between Indonesian citizens are considered valid if they comply with the law, religion, customs, and applicable regulations. Therefore, it is necessary to establish a law as a derivative regulation that accommodates marriage issues.

Law No. 1 of 1974 on Marriage was the government’s initial awareness of the need for legal provisions to address issues arising from marriage. An improper marriage can lead to internal family conflicts and other matters arising from violations of religious or faith-based laws. For example, cases of incest often raise public moral concerns. This is because such relationships violate established humanitarian norms and may result in unclear lineage in the future. Section 8(a-f) states that “*marriage is prohibited between two people who are related by blood, whether through direct descent, ascendance, lateral descent, adoption, breastfeeding, marriage to a spouse’s sibling, or any other relationship explicitly prohibited by religion and applicable regulations.*”<sup>43</sup> Such provisions are imperative and generally binding, so anyone who enters a consanguineous marriage violates the positive law in force in Indonesia. Rather than being imperative, these provisions are intended to prevent individuals from deviating from religious norms through family relationships, which would affect the legitimacy of their offspring. Not only that, but consanguineous relationships (incest) can also cause psychological distress to individuals and genetic abnormalities.

Furthermore, such actions significantly impact the fate of the children born to them. Children often become victims of the negative consequences of immoral acts or actions that violate marriage norms. On that basis, the government enacted Law No. 16 of 2019, amending Law No. 1 of 1974, to guarantee that citizens can form families and continue their lineage through legal marriage.<sup>44</sup> Specifically, it guarantees the survival of children and their protection from violence and social discrimination. Although the amendment to the law does not touch on Section 8 regarding incest, this decision can be seen as the government’s swift response to preventing the dangers of defective marriages that violate religious norms. Specifically, it protects the fate of children and offspring who are often targeted due to wrong marriages.

On the other hand, as a significant responsibility for the implementation of marriage, the government introduced Government Regulation No. 9 of 1975 as a legal record to strengthen the legality of marriage and preventive measures against future marriage violations.<sup>45</sup> Attention to marriage law appears to have prompted Islamic legal experts to create specific guidelines for handling marriages according to Islamic law. Thus, three draft guidelines for Islamic law were formed, known as the Compilation of Islamic Law, as a basis for resolving issues, one of which is the Marriage Law

<sup>42</sup> Majelis Permusyawaratan Rakyat Republik Indonesia, “Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,” Pub. L. No. Pasal 28, [https://mpr.go.id/file/1610334013\\_file\\_mpr](https://mpr.go.id/file/1610334013_file_mpr) (2020), Section 28 Article 1.

<sup>43</sup> Pemerintah Pusat Indonesia, “Undang-Undang (UU) Nomor 1 Tahun 1974 Tentang Perkawinan,” Pub. L. No. 1, <https://peraturan.bpk.go.id/Details/47406/uu-no-1-tahun-1974> (1974), Section 8.

<sup>44</sup> Pemerintah Pusat Indonesia, “Undang-Undang (UU) Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan,” Pub. L. No. 16, <https://peraturan.bpk.go.id/details/122740/uu-no-16-tahun-2019> (2019).

<sup>45</sup> Pemerintah Pusat Indonesia, “Peraturan Pemerintah (PP) Nomor 9 Tahun 1975 Tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan,” Pub. L. No. 9, [peraturan.bpk.go.id/Details/67678/pp-no-9-tahun-1975](https://peraturan.bpk.go.id/Details/67678/pp-no-9-tahun-1975) (1975).

Book. The emergence of these guidelines was supported by Presidential Instruction No. 1 of 1991 as a reaffirmation by the government to implement the proposed laws. It is clear in Chapter VI, Section 39, and Chapter XI, Section 70(d), that marriages between blood relatives (*incest*) are strictly prohibited.<sup>46</sup> Furthermore, such marriages are deemed invalid for violating established religious and state norms. If an incestuous marriage is conducted in secret, neither the positive law of the state nor Islamic Sharia law recognizes such a marriage.

Incestuous relationships greatly affect the moral degradation of families and are considered serious offenses. This is especially true when it involves abuse by family members or children under the age of 18.<sup>47</sup> Such cases can result in serious criminal charges against the perpetrator. The Child Protection Law states that the criminal penalty for perpetrators is a minimum of five years and a maximum of fifteen years in prison. Similarly, Section 418 of the Criminal Code states, “*If the perpetrator commits acts of sexual abuse against a child, whether it be their biological child, stepchild, or foster child, the punishment is imprisonment for a maximum of 12 (twelve) years.*”<sup>48</sup> Furthermore, Section 419 of the Criminal Code reiterates, “*If a person facilitates or facilitates acts of sexual abuse against a biological child, stepchild, adopted child, or child under their supervision, they shall be punished with imprisonment for a maximum of nine years.*”<sup>49</sup> It is clear here that the government strongly condemns actions leading to incestuous relationships, whether forced or not. It must be emphasized again that any intimate relationship between blood relatives is strictly prohibited under Indonesian positive law. Of course, incestuous marriages are condemned, let alone intimate acts outside of a valid marriage.

Therefore, the Minister of Religion has tightened the implementation of marriage registration regulations by recently issuing new regulations. This regulation revises Minister of Religion Regulation No. 20 of 2019, which was deemed no longer aligned with legal developments and societal needs.<sup>50</sup> As law is a matter of certainty, it must accommodate all contextual issues in every era. For example, Section 6 stipulates stricter verification of marriage requirements to ensure marriages do not violate established rules.<sup>51</sup> If these requirements are not met or are obstructed by legal regulations in marriage, then someone seeking to marry will be rejected by the local KUA (Religious Affairs Office) head. The PPN (Marriage Registrar) will notify the rejection in writing and the reasons for the refusal. This is stated in Section 28 of the Ministry of Religious Affairs Regulation No. 22 of 2024.<sup>52</sup> Therefore, marriages between close or blood relatives that violate legal regulations will surely be rejected by the Marriage Registrar at the KUA. However, even if the marriage between blood relatives is based on mutual consent between the two parties, positive law regulations explicitly reject it.

The Directorate General of Islamic Community Guidance issued Technical Guidelines for Implementing Marriage Registration No. 473 of 2020 to prevent the possibility of prohibited marriages

<sup>46</sup> Pemerintah Pusat Indonesia, “Instruksi Presiden (Inpres) Nomor 1 Tahun 1991 Tentang Penyebarluasan Kompilasi Hukum Islam,” Pub. L. No. 1, peraturan.bpk.go.id/Details/293351/inpres-no-1-tahun-1991 (1991), Section, 39, 70.

<sup>47</sup> Pemerintah Pusat Indonesia, “Undang-Undang (UU) Nomor 23 Tahun 2002 Tentang Perlindungan Anak,” Pub. L. No. 23, peraturan.bpk.go.id/Details/44473/uu-no-23-tahun-2002 (2002).

<sup>48</sup> Pemerintah Pusat Indonesia, “Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana,” Pub. L. No. 1, peraturan.bpk.go.id/Details/234935/uu-no-1-tahun-2023 (2023), Section 418.

<sup>49</sup> Pemerintah Pusat Indonesia, Undang-undang (UU) Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

<sup>50</sup> Kementerian Agama Indonesia, “Peraturan Menteri Agama Nomor 22 Tahun 2024 Tentang Pencatatan Pernikahan,” Pub. L. No. 22, peraturan.bpk.go.id/Details/313022/peraturan-menag-no-22-tahun-2024 (2024).

<sup>51</sup> Kementerian Agama Indonesia.

<sup>52</sup> Kementerian Agama Indonesia.

between blood relatives.<sup>53</sup> This regulation is considered important as a reference for all relevant parties, especially those interested in marriage, to understand the implementation of permitted and prohibited marriages.<sup>54</sup> The mechanisms outlined in the guidelines are the administrative and preventive implementation of normative law. Such measures are taken to avoid the legalization of incestuous marriages, which damage the image of the family and its integrity in the eyes of society. In practice, incestuous marriages often disregard the law, both positive law and religious law. At least two aspects need to be considered before deciding on a law regarding incestuous marriages: first, whether the marriage was entered into intentionally or unintentionally; second, whether the marriage was entered into under duress or by mutual consent.

Consanguineous marriages that are deliberately entered into are null and void and not recognized under positive law, resulting in adultery. Both parties are subject to Section 22, which violates the valid requirements under the law, and may therefore be annulled by the court.<sup>55</sup> Under Section 402 of the Criminal Code, “any person who (a) enters into a marriage, while knowing that the existing marriage constitutes a valid obstacle to the marriage, or (b) enters into a marriage, while knowing that the existing marriage of the other party constitutes a valid obstacle to the marriage.”<sup>56</sup> This means that through legal channels, a marriage between blood relatives is considered to have never existed. If the marriage is conducted, it violates Section 402 of the Criminal Code regarding the conduct of a marriage that violates the legal requirements, namely, an impediment to the conduct of a marriage under the law. Furthermore, a marriage that is intentionally annulled and results in adultery may be subject to Section 411 if there is a complaint from the husband, wife, parents, or children.<sup>57</sup>

Additionally, whether a government official or not, anyone who acts as a witness or officiates the marriage may face sanctions if they intentionally marry the couple. Under Section 16 (1) and Section 20 of Law No. 1 of 1974, marriage registration officers may be subject to administrative sanctions and/or disciplinary action.<sup>58</sup> Therefore, the Criminal Code includes Section 403, which states that “any person who conducts a marriage and does not inform the other party that there is a valid impediment shall be punished with a maximum of 6 (six) years’ imprisonment or a fine of Category IV.”<sup>59</sup> Specifically for government marriage officials, Section 539 of the Criminal Code (2) states, “An authorized official who conducts a marriage for someone, even though they know that there is a valid impediment to the marriage other than the impediments referred to in paragraph (1), shall be punished with imprisonment for a maximum of 5 (five) years.”<sup>60</sup> This means that an official who marries someone related by blood is subject to a five-year prison sentence.

The legal status of consanguineous marriages involving elements of unintentionality is different. A consanguineous marriage that occurs unintentionally, or a marriage between two individuals who were previously unaware of the prohibition on marriage due to their blood relationship, is considered

<sup>53</sup> Direktur Jenderal Bimbingan Masyarakat Islam Kementerian Agama Republik Indonesia, “Keputusan Direktur Jenderal Bimbingan Masyarakat Islam Nomor 473 Tahun 2020 Tentang Petunjuk Teknis Pelaksanaan Pernikahan,” Pub. L. No. 473, kalteng.kemenag.go.id (2020).

<sup>54</sup> Direktur Jenderal Bimbingan Masyarakat Islam Kementerian Agama Republik Indonesia.

<sup>55</sup> Jumni Nelli and Alfi Hasanah, “Fasakh Perkawinan Sedarah Dan Status Hukum Terhadap Anak Dalam Perspektif Hukum Islam Di Indonesia,” *Yustisi* 11, no. 2 (May 29, 2024): 184–200, <https://doi.org/10.32832/YUSTISI.V11I2.16674>.

<sup>56</sup> Pemerintah Pusat Indonesia, Undang-undang (UU) Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

<sup>57</sup> Pemerintah Pusat Indonesia.

<sup>58</sup> Pemerintah Pusat Indonesia, Undang-undang (UU) Nomor 1 Tahun 1974 tentang Perkawinan.

<sup>59</sup> Pemerintah Pusat Indonesia, Undang-undang (UU) Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

<sup>60</sup> Pemerintah Pusat Indonesia.

valid at the time. However, if it is discovered that the two spouses are related by blood during family life, then it can be declared as a relationship of doubt (*syubhat*) in the eyes of the law.<sup>61</sup> Therefore, both parties need to know how to prove the clarity of the relationship between them with valid data (laboratory DNA tests), and the relevant parties can file for annulment of the marriage.<sup>62</sup> The legal process in such cases is referred to as *fasakh*, which is regulated in Chapter IV, Sections 22 to 28 of the Marriage Law and the Compilation of Islamic Law (KHI) Chapter XI, Sections 70 to 76.<sup>63</sup> Generally, the provisions outlined in these sections regulate the conditions and grounds for annulling a marriage and the annulment procedures. Thus, the legal status of an unintentional consanguineous marriage is null and void, and both parties must divorce due to the defect in the validity of the marriage.

Meanwhile, consanguineous marriages entered into under duress may constitute a criminal offense under the Criminal Code. Legal action may be taken if the consanguineous marriage involves coercion against the spouse, children, or the use of violence, seduction, exploitation, or the dissemination of pornography. For example, one of the partners is intimidated or forced to marry under threat, and one of the partners is a minor.<sup>64</sup> As per Section 454 regarding the abduction of children and women and Section 473 regarding rape. Section 454 (1) and (2) state that anyone who takes away a child with elements of control over the child can be punished with a maximum of 7 (seven) years in prison. Meanwhile, anyone who takes away a woman with deception or threats with elements of control over her can be punished with a maximum of 9 (nine) years in prison. However, the imposition of punishment may be based on a complaint filed by the child, the parents, or the guardian, and the woman or her husband seeking justice.<sup>65</sup> In such cases, forced marriage or the abduction of the bride may be brought before the court on charges of kidnapping.

Section 473 reinforces the criminal offense of incest committed under threat, stating that “any person who, by force or threat, compels another person to have sexual intercourse with them shall be punished for rape with a maximum imprisonment of 12 (twelve) years.”<sup>66</sup> The criminal penalties under this provision include sexual intercourse with a person with their consent, sexual intercourse with a child, sexual intercourse with an unconscious or helpless person, or with a person with disabilities. Additionally, the Criminal Code emphasizes that criminal acts committed against children in cases of incestuous marriage, whether involving coercion or not, shall be punished with a minimum of 3 (three) years and a maximum of 15 (fifteen) years in prison. However, when the marriage has been carried out in this case, a complaint from the victim of the incestuous marriage is required. Thus, incestuous marriage based on coercion may be punished with a maximum of 24 (twenty-four) years in prison if there are elements of threat and abduction.

<sup>61</sup> Nelli and Hasanah, “Fasakh Perkawinan Sedarah Dan Status Hukum Terhadap Anak Dalam Perspektif Hukum Islam Di Indonesia.”

<sup>62</sup> Afifah and Lilik Andar Yuni, “Penetapan Konstitusi Dan Hukum Islam Terkait Tes DNA Sebagai Dalil Keabsahan Anak,” *Maqasid: Jurnal Studi Hukum Islam* 13, no. 2 (2024): 88–97.

<sup>63</sup> Mahkamah Agung Republik Indonesia, *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam* (Jakarta: Perpustakaan dan Pelayanan Informasi Biro Hukum dan Humas Badan Urusan Administrasi MA RI, 2011), Section 70-76; Pemerintah Pusat Indonesia, Undang-undang (UU) Nomor 1 Tahun 1974 tentang Perkawinan.

<sup>64</sup> Dewi Agustina, “Polres Kutim Dalami Dugaan Hubungan Sedarah Pelajar Di Sangatta, Si Perempuan Kini Hamil 5 Bulan - TribunNews.Com,” *tribunnews.com*, September 4, 2019, <https://www.tribunnews.com/regional/2019/10/04/polres-kutim-dalami-dugaan-hubungan-sedarah-pelajar-di-sangatta-si-perempuan-kini-hamil-5-bulan>.

<sup>65</sup> Pemerintah Pusat Indonesia, Undang-undang (UU) Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

<sup>66</sup> Pemerintah Pusat Indonesia.

Similarly, consanguineous marriage based on mutual consent may be subject to legal action due to the presence of adultery. A consanguineous marriage that has been legally annulled is considered adultery if the couple lives together as husband and wife. In such cases, even if there is no element of coercion or the marriage is consensual, it violates Section 412 of the Criminal Code, which states that “any person who engages in sexual intercourse with someone who is not their spouse shall be punished for adultery with a maximum sentence of one year or a fine of Category II.”<sup>67</sup> However, this provision applies only if there is a complaint from one of the married parties (husband or wife) or their parents or children. This means that a consanguineous marriage can be brought before the courts only if there is a complaint and strong evidence regarding the elements above. Such regulations reflect the government’s caution in imposing penalties. The punishment is only intended as a deterrent for the perpetrator, while the specific purpose of the regulation, particularly regarding marriage, is to protect lineage and public morality.<sup>68</sup>

Consanguineous marriage undermines both of these essential aspects, particularly the protection of lineage, which directly threatens the legal status of a child. Entering into a consanguineous marriage creates new legal conflicts related to inheritance rights, civil identity, and family responsibilities. For example, confusion over the legal status of a child in cases where a marriage has been annulled (*fasakh*) by the court due to a known blood relationship. Although the child’s status is considered valid and can be attributed to the biological father because the marriage was entered into out of ignorance, the annulment decision requiring divorce also impacts the child’s future psychological and social well-being.<sup>69</sup> Moreover, a consanguineous marriage conducted knowingly can result in another legal status that affects the lineage of a child. Such a case occurred in the Banyumas Religious Court Decision No. 1160/Pdt.G/2018/PA.BMS on November 22, 2018, which granted the annulment of the marriage due to a blood relationship between the two parties, namely the husband and wife.<sup>70</sup> As a result, the previous marriage was deemed to have never occurred, and the impact on the child is that the father cannot serve as the marriage guardian for that marriage due to the lack of legal clarity regarding the lineage of an incestuous marriage. However, the child born from that marriage is still legally valid because the previous consanguineous marriage occurred unintentionally.<sup>71</sup>

On the other hand, incestuous marriages can damage social structures and lead to deviant sexual practices. In particular, marriages based on illicit relationships or coercion reflect a domestic family environment involving unequal power relations between fathers and children, or between close relatives. As in the case in 2019, in Bulukumba Regency, a brother married his biological sister. This marriage, which violated the law, damaged the moral image of their family in the eyes of the Salemba community. Reportedly, the two perpetrators were cursed by their family and were no

<sup>67</sup> Pemerintah Pusat Indonesia.

<sup>68</sup> Katie J Hughes and Laura Batten, “The Development of Social and Moral Responsibility in Terms of Respect for The Rights of Others,” *Jurnal Ilmiah Peuradeun* 4, no. 2 (May 28, 2016): 147–60, <https://doi.org/10.26811/PEURADEUN.V4I2.93>.

<sup>69</sup> Angling Derry Kesuma et al., “A Progressive Effort to Strengthen the System of Interconnection of Court Decisions on the Rights of Women and Children After Divorce,” *Nurani: Jurnal Kajian Syari’ah Dan Masyarakat* 25, no. 1 (June 26, 2025): 280–93, <https://doi.org/10.19109/NURANI.V25I1.24759>.

<sup>70</sup> Pengadilan Agama Banyumas, “Putusan PA BANYUMAS Nomor 1160/Pdt.G/2018/PA.Bms Tentang Pembatalan Perkawinan,” Pub. L. No. 1160, Direktori Putusan Mahkamah Agung Republik Indonesia (2018).

<sup>71</sup> Mohamad Bagja Azhari and Liza Priandini, “Akibat Hukum Dari Pembatalan Perkawinan Sedarah (Putusan Pengadilan Agama Banyumas Nomor 1160/Pdt.G/2018/PA.Bms),” *Mizan: Journal of Islamic Law Journal of Islamic Law* 9, no. 3 (December 16, 2021): 425–34, <https://doi.org/10.32832/MIZAN.V9I3.20320>.

longer considered members of the family.<sup>72</sup> This is because the case had damaged the family's honor in the public sphere. Moreover, there is the case of an extramarital incestuous relationship, such as the case of an older brother impregnating his younger sister in Rejang Lebong District, Bengkulu.<sup>73</sup> Strangely, both parents attempted to condone the relationship by keeping it hidden from the public. Meanwhile, the younger sister suffered from severe depression, indicating the presence of threats or coercion by the perpetrator. Similarly, a recent case of incestuous fantasy has spread widely in the public sphere, resulting in fatal consequences.<sup>74</sup> Media coverage can alter public perceptions of immorality and public morality, necessitating repressive measures against the perpetrator and deterrent actions to prevent society from tolerating such cases.

### Conceptual Analysis of the Principles of Maqāṣid Al-Sharī'ah and Positive Law

According to the basic principles of *maqāṣid al-sharī'ah*, the protection of life (*ḥifẓ al-naḥs*) and offspring (*ḥifẓ al-ʿird*) are essential components in maintaining the welfare of families and society. The concept of *ḥifẓ* in Islam has evolved in line with developments in human rights issues, such as *ḥifẓ al-ʿird* evolving as the preservation of human dignity and family care within a proposed civilized Islamic social system.<sup>75</sup> In this context, consanguineous marriage is considered a threat to these two *maqāṣid* because it can lead to chaotic lineage identity, genetic abnormalities, and family structure breakdown.<sup>76</sup> Islam strictly prohibits marriage between mahram nasab. These prohibitions are a consequence of social and ethical values, not just ritual law. The aim is to prevent transgressions, or *mafsadah*, in society.<sup>77</sup> Thus, the *maqāṣid* approach acts as both prevention and protection, and as a link between the text and social reality.

Meanwhile, Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI) prohibits consanguineous marriage in Indonesia. Under Section 8 of the Marriage Law, marriage between two individuals with a direct blood relationship upwards and downwards and a parallel relationship is prohibited.<sup>78</sup> KHI Section 40 expands the scope of this prohibition based on the principles of *fiqh maḍhab al-Shāfiʿi*, which is dominant in Indonesia. Normatively, there is harmony between *maqāṣid* and positive law in preserving lineage and family ethics. However, because Indonesian positive law does not explicitly use the *maqāṣid* framework in its formulation, its approach tends to be legalistic. It does not thoroughly examine the ethical and philosophical aspects underlying the prohibition.<sup>79</sup>

<sup>72</sup> Rachmawati, "Kronologi Kakak Adik Sekandung Menikah Di Bulukumba," *kompas.com*, July 2, 2019, <https://regional.kompas.com/read/2019/07/02/07300061/kronologi-kakak-adik-sekandung-menikah-di-bulukumba?page=1>.

<sup>73</sup> Maya Citra Rosa, "Terungkap Hubungan Inses Kakak Adik Di Bengkulu, Hamil Dan Punya Anak Berusia 2 Tahun," *kompas.com*, March 22, 2024, <https://lipsus.kompas.com/pameranotomotifnasiona2025/read/2024/03/22/164703078/terungkap-hubungan-inses-kakak-adik-di-bengkulu-hamil-dan-punya-anak?page=all#page2>.

<sup>74</sup> Ryan Maulana, "Viral Grup Facebook Fantasi Sedarah, KPAI Koordinasi Dengan Polri Dan Komdigi | Tempo.Co," *tempo.co*, May 19, 2025, <https://www.tempo.co/video/arsip/viral-grup-facebook-fantasi-sedarah-kpai-koordinasi-dengan-polri-dan-komdigi-1483883>.

<sup>75</sup> Jasser Auda, *Maqāṣid Al-Sharī'ah as Philosophy of Islamic Law: A Systems Approach* (London: IIIT, 2008), 248.

<sup>76</sup> Mohammad Hashim Kamali, *Maqāṣid Al-Sharī'ah, Ijtihad and Civilisational Renewal* (Washington: The International Institute of Islamic Thought, 2012), 22.

<sup>77</sup> Shihāb al-Dīn al-Qarāfī, *Anwār Al-Burūq Fī Anwā' Al-Furūq*, vol. J. 3 (al-Qāhirah: Ālam al-Kutub, 1998), 145–46.

<sup>78</sup> Pemerintah Pusat Indonesia, Undang-undang (UU) Nomor 1 Tahun 1974 tentang Perkawinan.

<sup>79</sup> Rifdah Alifiyah and Isa Anshori, "Legal Protection for Children in Cases of Domestic Violence in the Indonesian Households," *El-Ussrah: Jurnal Hukum Keluarga* 6, no. 2 (December 30, 2023): 348–61, <https://doi.org/10.22373/UJHK.V6I2.19153>.

The weak legal response to hidden consanguineous marriage practices occurs in society,<sup>80</sup> Especially in indigenous communities that normalize such practices due to cultural reasons or legal ignorance due to the absence of a clear *maqāṣid* framework in national law.<sup>81</sup> However, the *maqāṣid* approach can bridge the gap between legal texts and social dynamics and provide a more adaptive and contextual normative framework.<sup>82</sup> Integrating *maqāṣid* into the national legal framework will strengthen the protection of human values and expand the scope of the law to be more inclusive and reflective of today's social realities.<sup>83</sup>

### Implications of the Principle for the Protection of Lineage and Public Morals

The application of the principle of *maqāṣid al-sharī'ah* to the legality of family relationships and the protection of lineage in the context of Indonesian legislation is increasingly relevant when linked to the development of progressive legal discourse in religious courts.<sup>84</sup> For example, in a case in the South Kalimantan Religious Court, some judges dared to recognise the parentage of children from invalid marriages on the basis that child protection is a fundamental right that the mistakes of parents cannot compromise.<sup>85</sup> This approach is in line with the function of *maqāṣid*, particularly *ḥifẓ al-nasl*, which views nasab not only as a formal legal matter, but also as social and psychological protection for children.<sup>86</sup> In this context, the flexibility of *al-maslahah* is key in determining the priorities of *maqāṣid* amid contemporary social challenges.<sup>87</sup> Therefore, the protection of offspring can be prioritised over administrative formalities for the sake of greater welfare. This paradigm emphasises that the prohibition of incest not only prevents biological damage, but also avoids the emergence of marginalised children with legal status.<sup>88</sup>

Furthermore, *maqāṣid al-sharī'ah* has evolved into a new approach developed by KUPI, namely *maqāṣid cum-mubādalah*.<sup>89</sup> This approach strengthens public moral protection (*ḥifẓ al-'ird*) through

<sup>80</sup> Gabriela Popescu et al., "Social and Demographic Determinants of Consanguineous Marriage: Insights from a Literature Review," *Genealogy* 2025, Vol. 9, Page 69 9, no. 3 (July 4, 2025): 69, <https://doi.org/10.3390/GENEALOGY9030069>.

<sup>81</sup> Mahmoud Jaraba, "Rethinking Consanguineous Marriages in a Diasporic Setting: A Case Study of Ar-Rashidiyya Kinship Community in Germany," *Journal of Family History* 50, no. 1 (January 1, 2025): 97–114, <https://doi.org/10.1177/03631990241252056>.

<sup>82</sup> Mohammad Fadel, "Muslim Modernism, Islamic Law, and the Universality of Human Rights," *Emory International Law Review* 36 (2022), <https://heinonline.org/HOL/Page?handle=hein.journals/emint36&id=731&div=&collection=>.

<sup>83</sup> Tamyiz Mukharrom and Supriyanto Abdi, "Harmonizing Islam and Human Rights Through the Reconstruction of Classical Islamic Tradition," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 1 (March 31, 2023): 40–57, <https://doi.org/10.22373/SJHK.V7I1.16436>.

<sup>84</sup> Amal Fathullah and Muhammad Abduh, "The Relationship of Children and Their Biological Father (Comparative Study of Positive Law of Indonesia, Thailand and Jordan)," *Syariah: Jurnal Hukum Dan Pemikiran* 22, no. 2 (December 19, 2022): 213–30, <https://doi.org/10.18592/SJHP.V22I2.8918>.

<sup>85</sup> Fitriyadi et al., "Redefining Legal Frameworks: Progressive Methods in Ascertaining Children's Lineage from Fasid Marriages in Religious Court Proceedings," *Syariah: Jurnal Hukum Dan Pemikiran* 24, no. 1 (May 28, 2024): 148–71, <https://doi.org/10.18592/SJHP.V24I1.12894>.

<sup>86</sup> Azni Azni et al., "Pseudo-Maslahah and Epistemological Failure in Marriage Dispensation at Indonesian Religious Courts," *Jurnal Ilmiah Peuradeun* 13, no. 2 (May 30, 2025): 1399–1420, <https://doi.org/10.26811/PEURADEUN.V13I2.2047>.

<sup>87</sup> Zahrul Mubarrak et al., "The Urgency of the Islamic Law and Contemporary Societal Challenges: The Flexibility of Al-Maslahah in Determining the Hierarchy of Maqāṣid Al-Sharī'ah," *El-Usrah: Jurnal Hukum Keluarga* 8, no. 1 (June 30, 2025): 344–65, <https://doi.org/10.22373/PXYDD884>.

<sup>88</sup> Bukhari Ali, Nur Wulandari, and Nahara Erianti, "Status of Children Born Out of Wedlock: A Study of Constitutional Court Decision and Its Relevance to the View of Ibnu Taimiyah," *El-Usrah: Jurnal Hukum Keluarga* 7, no. 1 (June 30, 2024): 406–26, <https://doi.org/10.22373/UJHK.V7I1.24200>. this decision has faced significant controversy among Muslims, who constitute the majority religious group in Indonesia. The majority of ulema (Muslim scholars

<sup>89</sup> Faqihuddin Abdul Kodir et al., "Maqāṣid Cum-Mubādalah Methodology of KUPI: Centering Women's Experiences in Islamic Law for Gender-Just Fiqh," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 19, no. 2 (2024): 519–45, <https://doi.org/10.19105/AL-LHKAM.V19I2.16617>. often neglecting the lived experiences of women. This article examines innovative methodology proposed by the Indonesian Congress of Women Ulama (Kongres Ulama Perempuan Indonesia, or KUPI

recognition of the victim's experience as a source of legal legitimacy. Such a methodology is relevant to living fiqh in the practice of child marriage, where harm, both in terms of reproductive health,<sup>90</sup> psychological, and social costs, far outweigh the benefits gained.<sup>91</sup> Such an analysis confirms that *ḥifẓ al-'ird* in the modern context is not sufficient to emphasise symbolic honour alone, but must be realised in preventive, educational, and rehabilitative legal mechanisms,<sup>92</sup> especially for vulnerable groups such as female victims of incest.<sup>93</sup> Incest prevention policies from a maqāṣid perspective must be participatory, involve victims, and transcend the boundaries of the law to address the social realities faced.<sup>94</sup>

The implications of the maqāṣid approach can be indirectly found in Constitutional Court Decision No. 46/PUU-VIII/2010. They set an important precedent that the determination of lineage can be done through scientific evidence, such as DNA testing, even if the birth occurred outside of a legal marriage.<sup>95</sup> This view represents a contemporary development in *maqāṣidiyyun* thought, proposing a shift from *ḥifẓ al-nasl* alone to *ḥifẓ al-usrah* as the basis for comprehensive family protection. Integrating *ḥifẓ al-nasl* and *ḥifẓ al-'ird* through scientific instruments, the flexibility of *al-maslahah*, and a progressive legal approach that takes into account the context of living *fiqh* constitutes a reformulation of the law. Indonesian legislation has the opportunity to establish a marriage law system that is responsive to the complexities of modern society while remaining grounded in sharia principles. This approach affirms that the protection of lineage and public morality in national law need not be static but can evolve in accordance with broader public interest considerations.<sup>96</sup>

## Conclusion

The issue of consanguineous marriage in Indonesia is not only a violation of the law but also reflects a severe degradation of family integrity, lineage purity, and public morality. Based on the analysis in this study, the prohibition of incest in both Islamic law and Indonesian national legislation is rooted in the same ethical principles, namely safeguarding *maqāṣid al-sharī'ah*, particularly *ḥifẓ al-nasab* (protection of lineage), *ḥifẓ al-nafs* (protection of life), and *ḥifẓ al-'ird* (protection of honor). However, in practice, enforcement of this prohibition remains weak due to cultural tolerance, legal loopholes, and a lack of preventive and educational mechanisms in society.

Islamic law not only prohibits incestuous relationships textually, but also through a more

<sup>90</sup> G. Temaj, N. Nuhii, and J. A. Sayer, "The Impact of Consanguinity on Human Health and Disease with an Emphasis on Rare Diseases," *Journal of Rare Diseases* 2022 1:1 1, no. 1 (December 7, 2022): 1–7, <https://doi.org/10.1007/S44162-022-00004-5>.

<sup>91</sup> Edi Kurniawan et al., "Early Marriage, Human Rights, and the Living Fiqh: A Maqasid Al-Shari'a Review," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 20, no. 1 (May 28, 2020): 1–15, <https://doi.org/10.30631/ALRISALAH.V20I1.565>.

<sup>92</sup> Ezzieddin Elmahjub, "Islamic Jurisprudence as an Ethical Discourse: An Enquiry into the Nature of Moral Reasoning in Islamic Legal Theory," *Oxford Journal of Law and Religion* 10, no. 1 (November 13, 2021): 16–42, <https://doi.org/10.1093/OJLR/RWAA023>. which aims to achieve an ethical state of affairs expressed as *maslahah*: A (social good

<sup>93</sup> Yusrizal Hasbi et al., "Criminalising Women, Silencing Victims: Human Rights and Sharia Enforcement in Aceh," *De Jure: Jurnal Hukum Dan Syar'iah* 17, no. 1 (June 6, 2025): 175–203, <https://doi.org/10.18860/J-FSH.V17I1.29635>.

<sup>94</sup> Kutbuddin Aibak, Uin Sayyid, and Ali Rahmatullah Tulungagung, "Implementation of Maqāṣid Sharī'ah in Reform of Case Management of Violence against Women and Children," *De Jure: Jurnal Hukum Dan Syar'iah* 15, no. 1 (July 13, 2023): 82–98, <https://doi.org/10.18860/J-FSH.V15I1.20666>.

<sup>95</sup> Ali, Wulandari, and Erianti, "Status of Children Born Out of Wedlock: A Study of Constitutional Court Decision and Its Relevance to the View of Ibnu Taimiyah." this decision has faced significant controversy among Muslims, who constitute the majority religious group in Indonesia. The majority of ulema (Muslim scholars

<sup>96</sup> Syaza Shukri and Meor Alif Meor Azalan, "The Application of Maqasid Al-Shariah in Multicultural Malaysia: Developing Strong Institutions for Interethnic Unity," *Contemporary Islam* 17, no. 3 (October 1, 2023): 433–50, <https://doi.org/10.1007/S11562-023-00528-7/METRICS>.

profound and more comprehensive ethical framework of *maqāṣid*. This framework aims to maintain family welfare, victims' mental health, and lineage's legitimacy as an essential element in social order. Meanwhile, although Indonesian positive law explicitly prohibits consanguineous marriage in various regulations, it has not fully utilized the *maqāṣid* approach in formulating and implementing its rules.

Therefore, this study recommends the integration of *maqāṣid al-sharī'ah* as a normative and interpretative foundation in formulating future family law policies. Additionally, synergy between religious authorities, academics, and legal policymakers is needed to build a more holistic legal and social system: repressive, educational, and preventive. Further research can be directed toward the application of *maqāṣid al-sharī'ah* in other areas of family law, as well as exploring the potential of a human rights-based *maqāṣid* framework in protecting vulnerable groups.

## Acknowledgements

This research was made possible thanks to the full support of the Education Fund Management Institution (LPDP) of the Indonesian Ministry of Finance. The author expresses his profound gratitude for the funding and academic facilitation during the research process.

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