

**SITUATING CLASSICAL LEGAL METHODOLOGY
IN A MODERN CONTEXT: TRACING PATTERNS OF
TALFĪQ IN INDONESIA'S COMPILATION OF
ISLAMIC LAW (KHI)**

A Thesis

**Submitted to the Master's Study Program of Islamic Studies at the
Faculty of Islamic Studies in partial fulfillment of the requirements for
the degree of**

Master of Arts (M.A.)



by:

Nadiya Lil Khairi

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UNIVERSITAS ISLAM INTERNASIONAL INDONESIA

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ABSTRACT

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This thesis examines the historical development of the concept of *talfiq* in pre-modern Islamic legal thought and analyzes how its meaning, function, and significance have been transformed in modern Islamic legal codification projects, particularly in Indonesia. It focuses on the influence of *talfiq* on legal reform in Indonesia through the Compilation of Islamic Law (KHI), investigating the extent to which the KHI aligns with the traditional Shāfi‘ī *madhhab*, Indonesia’s predominant school of law, in some cases, while deviating from it or even departing from the four canonical Sunni *madhhabs* in others. Employing a literature-based qualitative method and applying historical and normative legal analysis, this thesis advances three main arguments. Discussions of *talfiq* have existed since the formative and classical periods of Islamic law. However, in the modern era, reformists have significantly expanded its use in ways not always found in pre-modern discourse. The increasing complexity of modern life has led some reformists to apply *talfiq* even beyond the framework of the four *madhhabs*. More importantly, this study demonstrates that the Indonesian case presents a distinct pattern of adopting *talfiq* compared to pre-modern usage. While earlier applications were primarily motivated by legal convenience and facilitation, the Indonesian context reveals the influence of both modernization and cultural factors in shaping the selective adoption and modification of legal opinions in the KHI. Hence, instead of the pre-modern practice that sought the most lenient opinions across schools (commonly referred to as *tatabbu’ al-rukhas*, or “following the easiest”), this study identifies a triple pattern of *talfiq* in the Indonesian context: cultural-adoptive, modernity-oriented, and facilitative. These three tendencies negotiate together to produce a complex and distinctive legal synthesis within the KHI. Thus, the study demonstrates how the concept of *talfiq* has undergone transformations in modern Indonesia that depart from its classical understanding. This thesis further argues that, in the context of the modern nation-state, Islamic law adopts a different approach to achieving flexibility namely more inter-*madhhab*.

Keywords: *codification, KHI, modernity, talfiq.*

الملخص

تناقش هذه الرسالة دراسة التطور التاريخي لمفهوم التلفيق في الفقه الإسلامي قبل العصر الحديث، وتحلل تحوّل معناه ووظيفته ودلالته في مشاريع تقنين الشريعة الإسلامية المعاصرة، وبخاصة في إندونيسيا. ويسلط البحث الضوء على أثر التلفيق في تجديد التشريع من خلال مدوّنة الأحكام الشرعية الإسلامية (KHI) في إندونيسيا وذلك عبر دراسة مدى التزام هذه المدوّنة بالمذهب الشافعي، وهو المذهب الفقهي الغالب في إندونيسيا، وكذلك مواضع انحرافها عنه أو خروجها حتى عن المذاهب السنيّة الأربعة المعروفة المعتمدة، اعتمدت هذه الدراسة على المنهج النوعي القائم على المصادر المكتوبة، مع توظيف التحليلين التاريخي والنوعي (المعياري) للفقه، وخلصت إلى ثلاثة استنتاجات رئيسية: إن النقاش الفقهي حول التلفيق حاضر منذ فترة التكوين وحتى العصر الكلاسيكي للفقه الإسلامي في العصر الحديث، قام المجددون بتوسيع نطاق استخدامه توسعاً ملحوظاً، ليشمل أحياناً ما هو خارج أطر المذاهب الأربعة، إن الحالة الإندونيسية تكشف عن نمط خاص في تبني التلفيق مقارنةً بالممارسة قبل العصر الحديث. فبينما كان التلفيق في السابق غالباً كان بدافع التيسير ورفع الحرج (تتبع الرخص) فإن سياق صورة التلفيق في إندونيسيا يبرز ثلاثة أنماط رئيسية تبدو أكثر تعقيداً: (١) تكيف ثقافي، يراعي القيم والممارسة المحلية، (٢) توجه نحو الحداثة، استجابة لمتطلبات الدولة القومية المعاصرة، (٣) التيسير، وهو يهدف إلى حل المشكلات الفقهية بطرق ميسرة. تتفاعل هذه الأنماط الثلاثة لتشكّل توليفة فقهية فريدة في إطار المدوّنة. وتؤكد هذه الدراسة أن التلفيق في إندونيسيا المعاصرة قد خضع لتحوّل يختلف عن فهمه الكلاسيكي. وتؤكد هذه الدراسة أيضاً أن في سياق الدولة الحديثة، تتحقق مرونة الشريعة الإسلامية بدرجة أكبر عبر منهج براغماتي عابر للمذاهب.

الكلمات المفتاحية: تقنين, KHI, الحداثة, التلفيق.

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Finally, with humility, I must admit that this thesis is far from perfect. I sincerely welcome constructive suggestions and criticism from readers, in the hope of strengthening the arguments presented in this work.

Transliteration Note

This thesis follows the IJMES (International Journal of Middle East Studies) transliteration system for Arabic terms. For Indonesian terms, standard *Bahasa Indonesia* spelling is used. When an Arabic-origin term has become part of modern Indonesian usage, the Indonesian spelling is retained. For example, I write *wasiat wajibah* rather than *waṣīyya wājiba*.

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CHAPTER I INTRODUCTION

1.1 Research Background

One of the main issues discussed in the discourse of Islamic law is the issue of changes in doctrine in Islamic law, or in other words, Does Islamic law Change? The discussion about change in Islamic law has been a significant focus in academic studies, particularly in the field of Islamic legal studies since the 1980s. Historically, there are at least two paradigms in addressing this issue of change, namely change in Islamic law. Earlier paradigms often suggested that once the *madhhabs*, or legal schools, were established, Islamic law ceased to develop creatively and became disconnected from the realities of society. This view posited that Islamic law was fully formulated in texts and did not adapt to changing circumstances.¹ In other words, after its formative period, Islamic law became largely static and resistant to change.²

This paradigm is carried by three main scholars in Islamic law, namely Joseph Schacht,³ Noel J. Coulson, and Chafik Chehata. They argue that no major changes occurred

¹ Eirik Hovden, 'Understanding and Framing Change in Islamic Law: Potentials and Possible Pitfalls of the Concepts of Canonization and Codification', *Oxford Journal of Law and Religion* 12, no. 3 (2023): 289–313, 291. <https://doi.org/10.1093/ojlr/rwae020>.

² The assumption that Islamic law has become static and stagnant since the formation of the legal schools is closely related to the perception that *ijtihād* is intellectually superior to *taqlīd*. Consequently, a *muqallid* is perceived as a jurist who has not achieved the level of *ijtihād* and whose contributions to the legal system are considered secondary or even slavish. In this regard, they usually believe that the shift from *ijtihād* to *taqlīd* is a sign of the stagnation of Islamic law and they see *ijtihād* and *taqlīd* as a dichotomy. They argue that Islamic law in the *taqlīd* regime is rigid and lacks creativity. Modern Western scholars of Islamic law, along with numerous Muslim jurists from the pre-modern era, appear to have arrived at a similar conclusion about the intellectual inferiority of *taqlīd* compared to *ijtihād*, although their reasons differ. See Mohammad Fadel, 'The Social Logic of Taqlīd and the Rise of the Mukhataṣar', *Islamic Law and Society* 3, no. 2 (1996): 193–233, 193–194 <https://doi.org/10.1163/1568519962599122>.

³ Schacht asserted that around the start of the fourth/tenth century, a consensus emerged gradually suggesting that "from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all". This situation, which he referred to as the "closing of the gate of *ijtihād*," essentially led to a demand for *taqlīd*, which he further described as "the unquestioning acceptance of the doctrines of the established schools". In other words, Schacht's claim implies that the emergence of *taqlīd* was due to the belief that all questions regarding Islamic law had been resolved during the era of *ijtihād*. Consequently, the rise of *taqlīd* reflects a pessimistic perspective on the capabilities of jurists after the fifth century Hijri, or *muqallid*. Schacht described this period as one where Islamic law suffered from a state of "ankylose," indicating a stagnation in legal creativity and development. See Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, 1982). 71 and Sherman A Jackson, "Taqlīd, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory Muṭlaq and 'Āmm in the Jurisprudence of Shihāb al-Dīn al-Qarāfi," *Islamic Law and Society* 3, no. 2 (1996): 165–92. 171.

in Islamic law after the formative or pre-classical period that ended in the 10th century. According to them, the corpus of Islamic law had reached its final stage of development by this period. While there is an acknowledgement that there were changes in legal thought, it is said that these changes did not affect the established positive legal decisions or the classical doctrine of *uṣūl al-fiqh*. According to Baber Johansen in his book, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafīte Legal Literature of the Mamluk and Ottoman Periods*, Joseph Schacht, Noel J. Coulson, Chafik Chehata, and other scholars in this field do not deny that mufti decisions over the centuries have added new material to the corpus juris of Islamic law. However, they seem convinced that the changes that took place after the 10th century concerned only minor matters and details. However, Coulson differs from other scholars who argue that there were no major changes in Islamic law after the 10th century. Coulson recognizes that there were forces in the field of civil transaction that contributed to significant changes, and there were modifications to classical doctrine.⁴

They argue that the main point of the notion that the corpus of Islamic law reached its final stage of development in the tenth century is the issue that the door to *ijtihād* was closed after the maturity of the schools of *fiqh*, and all questions and issues of *fiqh* had been answered by the schools of law. This is what leads to the assumption that Islamic law is considered largely unchanged.

The second paradigm in dealing with the issue of change in Islamic law began to develop in 1984, coinciding with the publication of Wael Hallaq's article entitled *Was the Gate of Ijtihād Closed?* After the publication of Hallaq's article that sparked this debate, historians and scholars of Islamic law tried to refute the arguments of Schacht and other scholars who agreed with him. They began to formulate narratives that innovation could occur in Islamic law under the concept of *taqlīd*. The focus of this second paradigm can be attributed to two main motives. The first motive is to counter the decline narrative, which holds that Islamic law became static and unresponsive to societal changes after its formative period. This narrative has been challenged by scholars who argue that Islamic law has always had mechanisms of change embedded within its structure. The second motive is to show that Islamic law has been, and for some still is, adaptable to different times and places. This adaptability is evident in the use of concepts such as *maṣlaḥah* (interest, utility) and *ʿurf* (custom) as mechanisms of legal change.⁵

⁴ Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafīte Legal Literature of the Mamluk and Ottoman Periods* (Croom Helm, 1988). 1.

⁵ Hovden, "Understanding and Framing Change in Islamic Law." 292.

Sherman Jackson also contributed to this discussion. For example, he contested the notion that *taqlīd* equates to inflexibility, a view often implied in discussions about the closure of the gate of *ijtihād*. He argued that jurists' creative capacities were not exhausted with the rise of *taqlīd*, and that *taqlīd* is “primarily about authority, not content.” According to Jackson, those who practice *taqlīd* are not entirely sincere in their claims, as they often attribute their interpretations to the early founders of the schools of Islamic law (*madhhabs*) to enhance their authority and credibility.⁶ Referring to Alan Watson's concept of “legal scaffolding,” which involves making adjustments through new divisions, exceptions, and distinctions to either broaden or narrow the scope of existing laws, Jackson demonstrates that such innovative modifications were occurring in Islamic law, even after the supposed closure of the gate of absolute *ijtihād*.⁷ Fekry Ibrahim states that “Jackson placed ‘legal scaffolding’ within ‘intra-school *ijtihād*,’ which was the main avenue of legal change within the Sunni school system.”⁸

Historians such as Wael Hallaq in *Authority, Continuity, and Change in Islamic Law*;⁹ Baber Johansen in *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafīte Legal Literature of the Mamluk and Ottoman Periods*;¹⁰ Haim Gerber in *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*;¹¹ and Judith E. Tucker in *Women, Family, and Gender in Islamic Law*,¹² have succeeded in proving that the practical application of Islamic law in different parts of society involves understanding how different aspects of legal literature are used. It has also been shown that the discourse within the schools of Islamic law does not stop at the time of its formation but continues to evolve dynamically in various genres. As Hallaq emphasizes, mechanisms to accommodate legal change are embedded in the structure of Islamic law, allowing jurists to make changes as a matter of course.¹³

⁶ Similarly, al-Marakeby describes this phenomenon in his research as “*taqlīd* in theory and *ijtihād* in practice,” through the concept of *ijtihād* application. See Muhammad Al-Marakeby, “Non-Reformists’ Reform in the Age of Modernity: The Development of Islamic Ethico-Legal Theory in Nineteenth- Century Egypt” (Disertation, The University of Edinburgh, 2021).

⁷ Jackson, “*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory Muṭlaq and ‘Āmm in the Jurisprudence of Shihāb al-Dīn al-Qarāfī.” 167-172.

⁸ Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History*, Middle East Studies Beyond Dominant Paradigms (Syracuse University Press, 2015). 13

⁹ Wael Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge University Press, 2009).

¹⁰ Johansen, *The Islamic Law on Land Tax and Rent: The Peasants’ Loss of Property Rights as Interpreted in the Ḥanafīte Legal Literature of the Mamluk and Ottoman Periods*.

¹¹ Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (State of University New York Press, 1994).

¹² Judith E Tucker, *Women, Family, and Gender in Islamic Law*, Themes in Islamic Law 3 (Cambridge University Press, 2008).

¹³ Hovden, “Understanding and Framing Change in Islamic Law.” 292.

From the literature discussed, it appears that changes in Islamic law remain possible even after the maturity of the schools of *fiqh*, namely through the concept of *taqlīd*. One form of such change is the utilitarian crossing of school boundaries, which was utilized in the project of codifying Islamic law, particularly in the field of Islamic family law in the 20th century.

In recent times, there has been a significant shift in how Islamic legal schools, known as *madhāhib*, are perceived and utilized. Traditionally, these schools had well-defined boundaries in terms of their legal doctrines and methods of legal development. However, in the 20th century, there was a growing sentiment against strict adherence to these conventional boundaries. Many scholars began advocating for the removal or transcendence of these boundaries to better address the challenges posed by modernity, this is done in the *taqlīd* system. They argued that relying on a single *madhhab* was insufficient for tackling contemporary issues. Instead, they suggested that the diverse legal opinions from various schools should be used collectively as a comprehensive resource for addressing legal questions and problems. As Ahmed Gad Makhoul said that “especially in the 20th century, an increasingly hostile attitude towards the attachment to conventional *madhāhib* emerged, and there were calls to abolish or transcend the boundaries of the *madhāhib*,”¹⁴ whether it is in the framework of *takhayyur* or *talfīq*. However, the concept of transcending school boundaries already exists in the discussion of classical jurists in the idea of *tarjīh*, although there are differences with the idea of transcending school boundaries in modern discourse.

Historically speaking, the evolution of Islamic law has been characterized by a dynamic interplay between *ijtihād* and *taqlīd*. While *ijtihād*, or independent legal reasoning, is often highlighted as a key instrument for legal reform, the reality is that many significant legal changes, especially in the 20th-century codification of the *Sharī‘a*, were primarily based on *taqlīd*. This reliance on *taqlīd* involved the strategic selection and combination of legal opinions from different schools, a process known as *takhayyur* and *talfīq*. These methods allowed for flexibility within the framework of *taqlīd*, enabling legal adjustments without departing from established school doctrines.¹⁵ Therefore, it is said that the development of Islamic law meets modernity through *talfīq*. This is in line with what Layish said that one of the contributions of the reformists was the enhancement of the

¹⁴ Ahmed Gad Makhoul, ‘Continuity and Change of Traditional Islamic Law in Modern Times: Tarjīh as a Method of Adaptation and Development of Legal Doctrines’, *Oxford Journal of Law and Religion* 12, no. 1 (25 March 2024): 55–74, 64. <https://doi.org/10.1093/ojlr/rwad010>.

¹⁵ Ahmed Fekry Ibrahim, “School Boundaries and Social Utility in Islamic Law: The Theory and Practice of Talfiq, and Tatabbu’ al-Rukhas in Egypt” (Disertation, Georgetown University, 2011). 20.

doctrines of *talfīq* and *takhayyur*. These doctrines aimed to integrate legal opinions from various Sunni schools to create a more comprehensive legal framework.¹⁶

These reformists promoted the concepts of *takhayyur* and *talfīq*, which had a major influence on the codification of Egyptian law. One of the first figures to propose the use of *takhayyur* to make Islamic law adaptable to new social conditions and the challenges of modernity was Rifāʿa al-Ṭaḥṭāwī (d. 1289/1873), the most influential reformist scholar in the first half of the 19th century. This is explained by John L. Esposito in his work, “He recommended using the principle of *takhayyur*, an accepted method of jurisprudence that permitted a Muslim in a specific situation to go outside his own school of law and follow the interpretation of one of the other Sunni schools. This suggestion was adopted and used extensively by later modernists.”¹⁷

Other reformist scholars who proposed utilizing the diversity of laws existing in legal schools through the concepts of *takhayyur* and *talfīq* were Qāsim Amīn (d. 1326/1908) and Muḥammad ʿAbduh (d. 1323/1905). ʿAbduh adopted an eclectic approach through *talfīq* to find the most appropriate opinion for a particular situation. This was because he saw problems arising from over-reliance on Ḥanafī school references written in later periods. One of the cases discussed by ʿAbduh related to the issue of three divorces being counted as one divorce, following the opinion of Ibn Taymiyya. ʿAbduh applied the theory of *darūra*, which is also found in the Ḥanafī school itself, meaning that the Ḥanafī school, whose rulings have created an environment in which these social issues arise, permits the adoption of opinions from other schools to address the social issues that emerge. For example, in the case of a missing husband, ʿAbduh easily found a solution to this issue by using the opinion of the Mālikī school. ʿAbduh’s thinking made an important contribution to the formation of Egypt’s personal status code, particularly in the field of divorce.¹⁸ Qāsim Amīn rejected the validity of divorce pronounced without intention, referring to opinions outside the Ḥanafī school of thought. He also argued that women should be given the right to file for divorce through legal proceedings based on reasons recognized by schools of thought other than Ḥanafī.¹⁹

¹⁶ Aharon Layish, ‘The Contribution of the Modernists to the Secularization of Islamic Law’, *Middle Eastern Studies* 14, no. 3 (October 1978): 263–77, 263. <https://doi.org/10.1080/00263207808700381>.

¹⁷ John L. Esposito and Natana J. DeLong-Bas, *Women in Muslim Family Law*, 2nd ed, Contemporary Issues in the Middle East (Syracuse University Press, 2001). 48.

¹⁸ Tarek Elgawhary, *Rewriting Islamic Law The Opinions of the ‘Ulamā’ Towards Codification of Personal Status Law in Egypt*, Gorgias’s Modern Muslim World 6 (Gorgias Press LLC, 2019). 99-103.

¹⁹ Layish, “The Contribution of the Modernists to the Secularization of Islamic Law.” 263-264.

Recent research by Ahmed Fekry Ibrahim proposes the idea of pragmatism in Islamic law, or doctrinal eclecticism. Eclecticism refers to the process of drawing upon the doctrines of the four Sunni schools to select the least stringent juristic opinion, a practice known as *tatabbu' al-rukhas* or *takhayyur*. Doctrinal eclecticism also involves combining two juristic opinions in the same legal transaction, a practice known as *talfiq*. This method is part of what Fekry categorizes as “pragmatic eclecticism,” which denotes the use of legal pluralism to achieve practical objectives. Pragmatic eclecticism allows for the adaptation of legal doctrines to meet contemporary social and legal challenges by utilizing the diversity of opinions available within Islamic jurisprudence, not only limited to selecting opinions within a single school, but also includes crossing school boundaries. Fekry said, “I place the three terms (more on them below) associated with this phenomenon under my conceptual category *pragmatic eclecticism*, for they all denote the eclectic utilization of legal pluralism to achieve pragmatic objectives.”²⁰

Scholars have debated the permissibility of three things that Fekry calls pragmatic eclecticism. The most common assumption is that *talfiq*, *tatabbu' al-rukhas*, and *takhayyur* are products of modernity, and therefore forbidden in classical legal literalists. Although some scholars argue that pragmatic eclecticism existed before the 19th century. Wiederhold, for example, when he analyzed an anonymous treatise most likely from the Shāfi'ī school, he found references to 17th-century authors. The treatise mainly focuses on defining the boundaries of the schools of Islamic law and discusses when it is permissible to cross these boundaries under certain conditions. Wiederhold found that the term *talfiq* is mentioned in the early text of this treatise. This finding contradicts the assertion of scholars such as Coulson that the concept of *talfiq* was only discussed in the 20th century. Wiederhold argues that the concept of *talfiq* had been a topic of debate long before the 20th century.²¹

Fekry emphasized that pragmatic eclecticism, which was initially forbidden in juristic discourse during the formative period of Islamic law, became a topic of increasing debate during the Mamluk and Ottoman periods. This shift in discourse led to a change in its status, moving from being forbidden by consensus to gradually becoming permissible within the more fluid *ikhtilāf* paradigm, which refers to the body of legal literature on which jurists from the four Sunni schools of law disagreed. The debates surrounding pragmatic eclecticism also highlighted the nature of juristic discourse and court practices during these

²⁰ Ibrahim, *Pragmatism in Islamic Law*. 4.

²¹ Lutz Wiederhold, “Legal Doctrines in Conflict the Relevance of Madhhab Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on Taqlīd and Ijtihād,” *Brill Islamic Law and Society* 3, no. 2 (1996): 234–304.

periods. One of the key questions addressed was whether the legal pluralism of the Mamluk period conflicted with the early Ottoman attempts at homogenization and codification. The Ottomans initially aimed to transform Egyptian legal pluralism into a uniform Hanafī system, a process known as Hanafization. However, the Ottoman authorities eventually abandoned their strict Hanafization policies and resorted to Sunni legal pluralism to address economic challenges and, in some cases, to protect women's financial rights. This pragmatic approach allowed for a more flexible legal system that could adapt to the diverse needs of society, illustrating the dynamic interaction between legal theory and practice during the Ottoman period.²²

One phenomenon that is interesting to study is that in the modern era, there has been an increasing use of pragmatic eclecticism, which involves crossing school boundaries in favor of less restrictive juridical opinions. This phenomenon reflects a growing emphasis on legal outcomes rather than methodological coherence. Ibrahim argues that in the “age of *taqlīd*,” the relationship between legal methodology (*uṣūl al-fiqh*) and substantive law (*furūʿ*) is increasingly marginalized, with the focus more on the content of law than its process. This is seen in the increasing use of *takhayyur* and *talfīq*, which some scholars argue leads to an incoherent methodology. As Fekry explains, “this assumption explains Nathan Brown’s juxtaposition of *Shariʿa* in the modern period with its pre-nineteenth century counterpart, describing the present era as one in which “the divorcing of the *Shariʿa* and training in a specific school of law has also progressed, and objections to eclecticism in choosing among schools of law (*takhayyur*) have consequently declined.”²³ This happened in Egypt, Morocco, Saudi Arabia, Yemen, Syria, Indonesia, and other Muslim countries.²⁴

In many countries where Muslims form the majority, family laws, also known as personal status laws, have been codified to varying degrees. These laws, whether they exist as separate pieces of legislation or as comprehensive codes, address issues such as marriage, divorce, lineage, and inheritance. Many of these legal texts assert that they are codified versions of the rules from one of the numerous Islamic doctrinal schools, known

²² Ibrahim, *Pragmatism in Islamic Law*. 9-10.

²³ Ahmed Fekry Ibrahim, ‘The Codification Episteme in Islamic Juristic Discourse between Inertia and Change’, *Islamic Law and Society* 22, no. 3 (1 May 2015): 157–220, 159-160. <https://doi.org/10.1163/15685195-00223p01>.

Thus, the decline in rejection of *takhayyur* or the selection of *madhhab* based on eclecticism reflects a change in society's view of *sharīʿa* law, where flexibility and adaptability are more accepted in the context of modern law. See Nathan J. Brown, “Sharia and State in the Modern Muslim Middle East,” *International Journal of Middle East Studies* 29, no. 3 (1997): 359–76.

²⁴ Gad Makhoul, “Continuity and Change of Traditional Islamic Law in Modern Times.” 67.

as *madhhab*. However, they frequently blend these rules using methods of "pragmatic eclecticism," such as *talfiq* and *takhayyur* which involve selecting and combining different juristic opinions.²⁵

Let us look at the example of *takhayyur* used by the Ottoman Law courts in Egypt, where the official school of thought is the Hanafī school, but many Mālikī opinions are used in certain cases, even though the adherents of the Mālikī school in Egypt are not many, and this is not proportional to the number of Mālikī opinions used. The Ottoman Law of Family Rights in 1917 expanded the concept of *takhayyur*, which means selection, by incorporating rulings from various recognized Sunni law schools, not just sticking to one. This approach was further broadened by considering the opinions of individual jurists who were not part of the established schools, provided their views were deemed most suitable for legislation and enforcement. This method of *takhayyur* was used as a tool for flexibility and reform in Islamic family law. For instance, the Hanafī school of law, which generally has restrictive rules on divorce and does not recognize judicial divorce, offers more liberal provisions regarding marriage contracts. According to Hanafī law, an adult can enter a marriage contract without needing a legal guardian. On the other hand, the Mālikī school allows for judicial separation and divorce, which can occur after an unsuccessful attempt at arbitration in marital disputes. The Mālikī school provides a more detailed procedure for arbitration in family disputes compared to other schools. These differing positions between the Hanafī and Mālikī schools enabled modern reformers in the Muslim Middle East and other regions to adopt Hanafī positions on marriage and Mālikī positions on divorce.²⁶

Talfiq has also been applied in modern legislation across various Muslim countries. For example, it has been used in the context of inheritance laws and judicial circulars in Sudan, as well as in the Egyptian Waqf Law of 1947. Additionally, the Syrian Law of Personal Status of 1953 and the Tunisian Law of Personal Status of 1956 have also utilized *talfiq*.²⁷

In Indonesian history, the practice of *talfiq* existed long before the compilation of Islamic law in 1991. Research conducted by Ayang Utriza Yakin examined legal compilations from the 17th to 18th centuries originating from the *qadi* court in the Sultanate of Bantěn, known as “Undhang-Undhang Bantěn” (UUB). In his study, Yakin found that around 52 articles in the UUB adopted Islamic law, with 29 of these articles regulating

²⁵ Baudouin Dupret et al., ‘Filling Gaps in Legislation: The Use of Fiqh by Contemporary Courts in Morocco, Egypt, and Indonesia’, *Islamic Law and Society* 26, no. 4 (18 September 2019): 405–36, 406. <https://doi.org/10.1163/15685195-00264p03>.

²⁶ Mohammad Hashim Kamali, “Sharī‘ah and Civil Law: Towards a Methodology of Harmonization,” *Islamic Law and Society* 14, no. 3 (2007): 391–420. 407.

²⁷ Kamali, “Sharī‘ah and Civil Law: Towards a Methodology of Harmonization.” 408.

Islamic inheritance law under the title *Bāb al-Farā'id*. This chapter refers to the Shāfi'ī school of thought, specifically to the work *Minhāj al-Tālibīn* by al-Nawawī, supplemented by Ibn Ḥajar al-Ḥaytamī's commentary entitled *Tuhfat al-Muḥtāj*. Interestingly, Yakin also notes that the chapter on discretionary punishment (*ta'zīr*) refers to the Mālikī school of thought, through the work *Mawāhib al-Rabbāniyyah* by Shaykh Muḥammad 'Alī Ibn 'Allān Bakrī Makkī, which refers to the Mālikī school (*Mālikiyya*) and quotes the opinion of Imām Mālik (d. 179 AH/796 CE).²⁸

The same thing was found in research conducted by Stijn Cornelis van Huis. Through his research on the *Compendium Freijer*, a collection of Islamic family and inheritance laws compiled in the mid-18th century and used as a source of law in colonial courts for the indigenous population of Indonesia, consisting of 102 articles. He found that Javanese judges in 1938 “agreed to adopt the Mālikī position that when a husband refuses to divorce his wife in *syiqaq* cases, the judge has the authority to delegate the husband's power to pronounce the *khul'* to the negotiators or to himself.” This is not found in the Shāfi'ī doctrine, the majority school of thought in Indonesia. The Shāfi'ī legal doctrine states that in *syiqaq* divorce, the husband must be persuaded to pronounce the *talak* or divorce. Huis continued his explanation: “the *qadi* was entitled to delegate a husband's power to pronounce the *khul'* to the *hakams* or himself - as in Mālikī doctrine. This was long before the 1938 decision by the Association of *Qadis* to standardize this practice on Java.”²⁹

These two studies provide us with historical background on the experience of Indonesian Islamic law in performing *talfīq* by borrowing doctrines from schools of thought other than the majority school of thought in the country, namely the Shāfi'ī school, especially during the pre-colonial period and colonial period.

During the Dutch colonial period until independence, religious courts used references from *Fiqh* books, mainly from the Shāfi'ī school of thought.³⁰ However, the need for a more systematic and state-recognized codification became more pressing in line with social developments and the complexity of community relations. The New Order government approved the enactment of the Compilation of Islamic Law in 1991. This

²⁸ Ayang Utriza Yakin, “Undhang-Undhang Bantèn: A 17th to 18th-Century Legal Compilation from the *Qadi* Court of the Sultanate of Bantèn,” *Indonesia and the Malay World* 44, no. 130 (2016): 365–88, <https://doi.org/10.1080/13639811.2016.1229859>.

²⁹ Stijn Cornelis Van Huis, “Khul' over the Longue Durée: The Decline of Traditional Fiqh-Based Divorce Mechanisms in Indonesian Legal Practice,” *Islamic Law and Society* 26, nos. 1–2 (2019): 58–82, <https://doi.org/10.1163/15685195-00254A05>.

³⁰ Johanna Nilsson, “Indonesian Law - Legal History and Legal Pluralism,” *Faroese Law Review* 6, no. 2 (2007): 10–48. 33.

compilation regulates Islamic law on Marriage Law, Inheritance Law, and Waqf Law. However, it does not fully follow the Shāfi'ī school of thought, as some provisions are derived from the opinions of other Sunni schools of thought.³¹ We can see that Indonesia, which is predominantly Shāfi'ī, also uses *talfiq* by using opinions from other *madhhabs*, demonstrating the continuation of *talfiq* in the modern codification of Islamic law in Indonesia.

1.2 Research Objectives

This thesis aims to examine the historical development of the concepts of *talfiq*, in pre-modern Islamic legal thought, as well as to analyze how *talfiq* have been adapted and utilized in modern Islamic legal codification projects, particularly in the field of family law. This study focuses on how these concepts influenced legal reform in Indonesia through the Compilation of Islamic Law (KHI), by investigating the extent to which the KHI is consistent with the dominant *madhhab* in Indonesia, namely the Shāfi'ī *madhhab* in some cases, while deviating from it, or even abandoning the four canonical Sunni *madhhabs* in some cases. This thesis argues that the Indonesian case represents a unique pattern compared to other Muslim-majority countries, where the use of *talfiq* is generally driven by considerations of legal convenience and responses to modernity. Instead, this study highlights that in the Indonesian context, cultural factors play a very significant role in shaping the selective adoption and modification of legal opinions in the Compilation.

1.3 Research Questions

This research seeks to answer the following questions:

- 1) How has the concept of *talfiq* been discussed and applied in pre-modern Islamic legal thought, and how has it been adapted, transformed, and institutionalized in modern codification projects, particularly in the field of Islamic family law?
- 2) What underlying considerations account for the KHI's strict adherence to the official *madhhab* in certain instances, and its deviation from it in others, and to what extent can we identify specific patterns of *talfiq* in the Indonesian context that are distinct from both pre-modern *talfiq* and its application in other modern Muslim countries?

³¹ Ahmad Imam Mawardi and A. Kemal Riza, 'WHY DID KOMPILASI HUKUM ISLAM SUCCEED WHILE ITS COUNTER LEGAL DRAFT FAILED? A Political Context and Legal Arguments of the Codification of Islamic Law for Religious Courts in Indonesia', *JOURNAL OF INDONESIAN ISLAM* 13, no. 2 (2019): 421–53, 423. <https://doi.org/10.15642/JIIS.2019.13.2.421-453>.

- 3) What insights, more broadly, does this provide into the relationship between Islamic law and the modern nation-state?

1.4 Literature Review

I will divide this literature review into two parts; first, studies that discussing the concept of *talfiq*; second, studies discussing the use of *talfiq* in *the Kompilasi Hukum Islam* (The Compilation of Islamic Law).

- 1) Studies that discussing the concept of *takhayyur* and *talfiq*

The first study is Coulson's work entitled "*A History of Islamic Law*". He discusses this in chapter 13 "*Taqlid and Legal Reform*". Coulson's main argument is that modern reformers in Islamic law have used the concept of *taqlid*, in this context through the institutions of *takhayyur* and *talfiq*, as a cover to justify their reforms, when in fact they have formulated new legal opinions to meet contemporary needs. Initially, reformers claimed that they were merely exercising their right to choose between opinions that were recognized as equally authoritative or equally orthodox by traditional *fiqh*. However, as reformers engaged in the process of *takhayyur* (selection), they began to go beyond the boundaries of traditional *fiqh*. Initially, they could claim that they were exercising their right to choose between views considered equally authoritative or equally orthodox. However, as the process progressed, the reformists began to rely on the opinions of individual scholars who contradicted the dominant doctrines of the four Sunni *madhhabs*. In the third stage, known as *talfiq*, legal rules were constructed by combining and unifying legal opinions from various sources, resulting in new rules that had no authority within the four Sunni *madhhabs*. This approach showed that the claim of *taqlid* had become a mere formality, concealing a real effort to adapt the law to the needs of modern society. Coulson explains that the process of *takhayyur*, or the selection of views based on their compatibility with modern conditions, suggests that traditional principles now appear as obstacles to the further progress desired by modernism.³²

He states that "*When the traditional authorities had to be manipulated in this fashion to yield the required rule, any claim that this process constituted taqlid had become nothing more than a thin veil of pretense, a purely formal and superficial adherence to the established principles of jurisprudence, which masked the reality of an attempt to fashion the terms of the law to meet the needs of society as objectively determined*".³³

³² Noel James Coulson, *A History of Islamic Law*, The New Edinburgh Islamic Surveys Series 2 (Edinburgh University Press, 1964). 182-201.

³³ Coulson, *A History of Islamic Law*. 201.

This research was refuted by Ahmed Fekry Ibrahim in his dissertation entitled “*School Boundaries and Social Utility in Islamic Law: The Theory and Practice of Talfiq, and Tatabbu' al-Rukhas in Egypt*” published in 2011, which was then published in a book in 2015 under the title “*Pragmatism in Islamic Law: A Social and Intellectual History*. He refuted Coulson's argument that I mentioned earlier by proving that the concept of *takhayyur* already existed in the 13th century. Ibrahim said that the term *talfiq* was not known in the 13th century, when it was known as *tatabbu' al-rukhas*. The majority opinion at that time was that almost all scholars rejected this concept. However, after the Sunni *madhhabs* stabilized and the practice of *taqlid* was institutionalized, attitudes toward *tatabbu' al-rukhas* became more relaxed. Some scholars began to adapt legal discourse to social realities, leading to the emergence of groups that supported pragmatic eclecticism. This movement gained strength when, in 1265, Sultan Baybars of Egypt appointed four chief judges from different schools of thought, marking the official recognition of this practice in the judicial system. Along with the acceptance of *tatabbu' al-rukhas*, some scholars began to distinguish between permissible *tatabbu' al-rukhas* and *talfiq*, which was considered prohibited. *Talfiq* was used as a negative symbol of eclecticism, and the majority of scholars agreed that this practice was invalid. However, during the Ottoman period, some scholars began to permit *talfiq* under certain conditions. The main idea Ibrahim seeks to convey is that *takhayyur* and *talfiq* as used in modern times are not merely modern phenomena, but have a long history dating back to the 13th century.³⁴

Further research that also discusses *takhayyur* and *talfiq* is Lutz Wiederhold in his study “Legal Doctrines in Conflict the Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlid* and *Ijtihad*.” Wiederhold, in his research, refutes Schacht's opinion that only Modernists abandon the principle of following the rules of one school when temporarily switching schools, which indirectly means that Schacht wants to say that *takhayyur* and *talfiq* are modern products. Wiederhold notes an interesting point that Coulson's discussion of examples of *takhayyur* is identical to the examples discussed in the texts studied by Wiederhold, indicating that discussions of *takhayyur* had already emerged long before the 20th century. Wiederhold also refutes Coulson's claim that, in his research, *takhayyur* and *talfiq* were characteristic of legal reform in the 20th century, when lawmakers used them to formulate legal codes to address the challenges of modernity. Wiederhold responds to this by saying that the fact that the treatise studied by Wiederhold discusses various cases of *talfiq* that are prohibited, but also mentions modes of *talfiq* that are permitted, shows that *talfiq* had been a topic of discussion

³⁴ Ibrahim, *Pragmatism in Islamic Law*. 230-231.

before the 20th century. Thus, Wiederhold refutes the claim that *takhayyur* and *talfiq* were tools used exclusively in the modern period.³⁵

- 2) Studies discussing the use of *takhayyur* and *talfiq* in *the Kompilasi Hukum Islam* (The Compilation of Islamic Law).

Studies discussing the use of *takhayyur* and *talfiq* in *The Compilation of Islamic Law* are quite rare, with comprehensive context, but I found at least two studies that also discuss *takhayyur* and *talfiq* in The Compilation of Islamic Law. The first is a thesis by Sopa titled “*Talfiq* in the Compilation of Islamic Law: A Study of Book 1 on Marriage Law”. He argued that the opinion of Shāfi’ī is dominant in the KHI, but in some cases the KHI also uses other schools of thought. He cites the example of marriage age restrictions following the opinion of Ibn Shubrumah, divorce must be conducted in court following the Shi’a and Zāhirī schools, the grounds for divorce include the absence of one spouse for two consecutive years following the Ḥanbalī and Mālikī schools, and divorce if the husband is imprisoned for five years following the Mālikī school.³⁶ However, Sopa does not delve further into the patterns where cases in the KHI strictly adhere to the Shāfi’ī school of thought and those that deviate from it, which is the core of my research, namely analyzing these patterns.

Subsequently, further research on this topic was published in a book entitled “Reform of Islamic Family Law: and Its Implications for Women's Rights in Malaysian and Indonesian Marriage Law” by Adawiyah. He discusses the implications of Islamic family law reform on marriage law in Indonesia, presenting thirteen cases related to women's rights and comparing them with Malaysia. He argues that in some cases, the KHI has moved away from the traditional Shāfi’ī school of thought, which is the main school of thought in Indonesia.³⁷ The difference with this study is that Adawiyah's research focuses on reforms to ensure women's rights, which differs from my research, which aims to detect the reasons and patterns within the KHI to what extent they adhere to the Shāfi’ī school of thought and when they depart from it.

³⁵ Wiederhold, “Legal Doctrines in Conflict the Relevance of Madhhab Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on Taqlīd and Ijtihād.” 247.

³⁶ Sopa, ‘*Talfiq* dalam Kompilasi Hukum Islam: Studi atas Buku 1 tentang Hukum Perkawinan’ (Thesis, Program Studi Pengkajian Islam, IAIN Syarif Hidayatullah Jakarta, 1999).

³⁷ Robi’atul Adawiyah, *Reformasi Hukum Keluarga Islam dan Implikasinya Terhadap Hak-Hak Perempuan dalam Hukum Perkawinan Indonesia dan Malaysia* (Nusa Litera Inspirasi, 2019).

1.5 Methods

This research is a qualitative literature-based study using a historical approach and modern legal analysis. The primary sources at this stage include classical texts, as well as the works of scholars who discussed *talfiq* during the classical period and its formation, or before the pre-modern era. Furthermore, comparative analysis approaches are used to examine how these concepts have undergone transformation in the modern context, particularly through Islamic law codification projects in various Muslim countries such as the Ottoman Empire, Egypt, and Morocco. In this section, the research also focuses on the history of Islamic law codification in Indonesia, including the development of Islamic legal reform thought that led to the birth of the Compilation of Islamic Law (KHI). I refer to the works of Indonesian scholars who focus on the discussion of reform and the Compilation of Islamic Law. I also refer directly to the Compilation of Islamic Law document to analyze the articles that will be discussed in this thesis. This thesis uses a genealogical approach in a broad sense, tracing how the concepts of *takhayyur* and *talfiq* developed over time. This approach helps to show that these concepts are not static legal doctrines, but rather concepts that continue to undergo changes in meaning and application according to their context. Through this approach, this study seeks to understand how classical legal methods such as *takhayyur*, *talfiq*, and *tatabbu' al-rukhas* were re-adopted in modern legal codification projects, particularly in the Indonesian context. This approach also provides a way to reinterpret the dynamics of Islamic law, in terms of the continuity of tradition, changes in thought, and its response to modernity and social realities.

1.6 Thesis Structure and Outline

This thesis consists of five chapters. The first chapter is an introduction that includes; the background, research objectives, research questions, literature review, methods, and thesis structure and outline. Chapter two discusses *takhayyur* and *talfiq* in the pre-modern period, beginning with an explanation of the initial discussion related to *takhayyur* and *talfiq*. Here, I also discuss the attitudes of scholars toward *tatabbu' al-rukhas*, which is a fundamental discussion that cannot be separated from the discussion of *takhayyur* and *talfiq*.

Chapter three discusses how *takhayyur* and *talfiq* discussions were used in the modern period through Islamic law codification projects. I begin with the history of Islamic law codification in the Islamic world, and then discuss how this project was also carried out in Indonesia with a project called the Compilation of Islamic Law. Here, I also discuss

how the idea of reform was discussed in Indonesia long before the formation of the Compilation of Islamic Law, and it cannot be ignored that it was these reform ideas that led to the emergence of Islamic law codification.

Chapter four examines cases in the Islamic Law Code that deviate from the Shāfi'ī school of thought and cases that strictly follow the Shāfi'ī school of thought to understand how reform has taken place in Indonesia, particularly in terms of family law, and to see the extent to which this reform has been influenced by *takhayyur* and *talfīq*. This chapter concludes with an analysis that there are at least three reasons that prompted the Compilation to strictly follow the Shāfi'ī school of thought or deviate from it, namely convenience for the community and the public interest, modernity, and cultural factors. Chapter 5, the final chapter, contains the conclusions of this study.

CHAPTER II

PRE-MODERN DISCOURSE ON LEGAL ECLECTICISM: *TAKHAYYUR*, *TALFĪQ* AND *TATABBU' AL-RUKHAS*

2.1 Chapter Introduction

Many reformists argue that the way to make Islamic law compatible with modernity is to take advantage of the diversity of laws that already exist in various schools of law. This is done through the institutionalization of *takhayyur* and *talfiq*. There has been intense debate among scholars regarding the historical origins of these concepts. Some scholars argue that *takhayyur* and *talfiq* are characteristic features of legal reform in the 20th century, while others argue that both already discussed in the pre-modern period. For example Coulson as I discussed in previous chapter, and also Joseph Schacht, in his chapter titled "The Later Schools of Law and Their Classical Theory" from "An Introduction to Islamic Law," notes that it is only the modernists who practice *talfiq*, "it was only the Modernists who abandoned the principle of abiding by the rules of one school when changing one's *madhhab*"³⁸. In contrast, other scholars argue that both already existed much earlier. Wiederhold, for instance, analyzed an anonymous treatise most likely from the Shāfi'ī school and found references to 17th century authors, demonstrating that the concept of *talfiq* had been a topic of debate long before the 20th century.³⁹ This finding contradicts the assertion of scholars such as Coulson and also Schacht that this concept was only discussed in the 20th century.⁴⁰

There is also disagreement regarding the validity of legal eclecticism in pre-modern Islam, through *takhayyur* and *talfiq*. Hallaq, in his study on "Modernization of Law in the Nation-State Era," explains further that "Both devices, it should be noted, had been forbidden in Islamic law, both for jurists and "state authorities."⁴¹ However, Ahmed Ibrahim argues that such eclecticism already existed in pre-modern practice, where the selection of schools of thought across school boundaries was often driven by pragmatic considerations. His research shows that "utilization of eclecticism...in the modern period does not...represent a break with the juristic past" because, in his view, *talfiq* was not

³⁸ Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), 68.

³⁹ Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlid* and *Ijtihad*," *Islamic Law and Society* 3, no. 2 (1996): 234–304

⁴⁰ Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 185-197

⁴¹ Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge university press, 2009). 448.

explicitly prohibited but rather highly contested.⁴² Therefore, in this chapter, I will discuss various opinions regarding *takhayyur* and *talfīq* and trace their origins in pre-modern Islamic legal discourse, as well as examine how these practices were applied and debated during that period.

2.2 The Concept of *Takhayyur* in Pre-Modern Islamic Legal Discourse

To trace the roots of *takhayyur* and *talfīq* in the initial discussion, we must refer to the issue of *taqlīd*, where the idea of crossing the boundaries of *madhhabs* emerged. During the late 3rd century AH/9th century CE and throughout the 4th century AH/10th century CE, a new concept of legal authority known as *taqlīd* emerged. This period marked the maturation of legal schools, which became established and authoritative doctrinal bodies. *Taqlīd* was the outward manifestation of the internal legal dynamics that defined these schools. One of the main roles of *taqlīd* was to preserve legal schools as entities with specific methods and interpretations. These schools were built on clear theoretical and substantive principles. However, they were also defined by boundaries set by specific doctrines. If someone crossed these boundaries, they risked being considered to have left their school.⁴³ And it was in this context of *taqlīd* that the idea of crossing *madhhab* boundaries began to emerge. In the pre-modern discussions, crossing *madhhab* boundaries was initially discussed in the context of *tarjīh*, where the opinion of another *madhhab* was chosen because that *madhhab* was considered to have stronger evidence, known as “*tarjīh* between the *madhāhib*”.⁴⁴

This concept is accepted by almost all scholars, because the selection of a particular *madhhab* is traditionally based on strong legal evidence. However, an important question arises: what if the choice between different *madhhabs* is not driven by the strength of evidence, but rather by considerations of convenience, practical needs, or specific goals? In other words, what happens when crossing the boundaries of *madhhabs* is not driven by *tarjīh*, but by pragmatic goals—such as seeking legal ease or accommodating the needs of modern society? This mode of selection is what many modern scholars refer to as *takhayyur*.

⁴² Ibrahim, *Pragmatism in Islamic Law*. Sanusi Lamido Aminu Sanusi, ‘Codification of Islamic Family Law as an Instrument of Social Reform: A Case Study of the Emirate of Kano and Comparison with the Kingdom of Morocco’ (Dissertation, School of Oriental and African Studies, University of London, 2024), 49-50. <https://doi.org/10.25501/SOAS.00042454>.

⁴³ Wael B. Hallaq, “From Regional to Personal Schools of Law? A Reevaluation,” *Islamic Law and Society* 8, no. 1 (2001): 1–26. 21-22.

⁴⁴ Wiederhold, “Legal Doctrines in Conflict the Relevance of Madhhab Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on Taqlīd and Ijtihād.” 244-247.

The term *takhayyur* in pre-modern times was understood as the act of choosing and prioritizing one of several equally valid legal opinions or arguments, especially when the *tarjīh* process was not possible or when various arguments were considered to have equal strength.⁴⁵

Some earlier scholars have mentioned the term *takhayyur*, such as Ibn al-Ṣalāḥ. He distinguishes between *tarjīh* and *takhayyur*. According to him, *takhayyur* is the selection of legal opinions in a more arbitrary manner, while *tarjīh* is the selection of the strongest opinion in a particular *madhhab*. In addition, he strictly forbids followers of the Shāfiʿī *madhhab* from practicing *takhayyur*. Wiederhold cited the opinion of Tāj al-Dīn al-Subkī in his book *Ṭabaqāt al-Shāfiʿiyya al-Kubrā*, which distinguishes between the act of choosing an opinion within a single school of thought (*tarjīhāt al-madhhab*) and the more general act of choosing the most suitable legal view (*ikhtiyār*). In his other work, *Jamʿ al-Jawāmiʿ*, he states that if there is no evidence to indicate the superiority of one opinion over another, legal scholars may choose the one that appears more suitable, which he refers to as *takhayyur*. He uses the term *rajjaḥa* to determine the most dominant opinion within the Shāfiʿī school of thought. Therefore, Wiederhold argues that the term *takhayyur* in pre-modern period “denotes the practice of choosing a legal opinion or a legal indicator in a more or less arbitrary manner”.⁴⁶

It is clear now how the term *takhayyur* was used and discussed in the pre-modern period, where *takhayyur* was sometimes discussed in the context of when *tarjīh* could not be performed, and sometimes in the context of choosing one opinion based on a more arbitrary manner. This term “*takhayyur*” was used by reformist in the late 19th and 20th centuries when codifying Islamic law.

However, it should be noted that the above discussion only identifies the use of the term *takhayyur* in the pre-modern period. On the other hand, many scholars argue that the practice of *takhayyur* which became the main tool of Islamic legal reform in the modern period, especially in the context of the codification of Islamic law, was first discussed by Shihāb al-Dīn al-Qarāfī ((d. 684/1285) from the Mālikī school of thought, in his book *Sharḥ Tanqīḥ al-Fuṣūl fī Ikhtisār al-Maḥṣūl*⁴⁷, where he refers to it as *al-intiqāl min madhhab ilā*

⁴⁵ Ahmed Gad Makhoul, ‘Continuity and Change of Traditional Islamic Law in Modern Times: Tarjīh as a Method of Adaptation and Development of Legal Doctrines’, *Oxford Journal of Law and Religion* 12, no. 1 (2024): 55–74, 64. <https://doi.org/10.1093/ojlr/rwad010>.

⁴⁶ Wiederhold, “Legal Doctrines in Conflict the Relevance of Madhhab Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on Taqlīd and Ijtihād.” 246.

⁴⁷ Imran Ahsan Nyazee, ‘The Scope of Taqlīd in Islamic Law’, *Islamic Studies* 22, no. 4 (1983): 1–29. 25.

madhhab ākhar (moving from one school of thought to another), or also referred to as switching schools of law.⁴⁸

Al-Qarāfī in his book mentions the opinion of Yaḥyā al-Zunnātī⁴⁹ regarding moving from one school of law to another (*al-intiqāl min madhhab ilā madhhab ākhar*). al-Zunnātī allows *taqlīd* to one school of law and moving from one school of law to another under three conditions: Firstly, it is not permissible for the person doing the *taqlīd* to combine the opinions of the various *madhhabs* in a way that is contrary to the consensus of the scholars, such as a person who enters into a marriage contract without a dowry, without the permission of the guardian, and without witnesses, because such an opinion is not found in the books of *fiqh*. Secondly, the person to be followed should be someone who is trustworthy in the opinion of the follower based on the information that reaches him, and should not be followed arbitrarily. Lastly, it is not permissible for the follower to seek concessions (*rukhaṣ*) from the *madhhabs*.⁵⁰ From this, we can see that according to al-Zunnātī, the permissibility of moving from one school of law to another should not be based on seeking convenience (*rukhaṣ*) among various schools of thought.

However, al-Qarāfī did not entirely agree with al-Zunnātī. Hence, he continued his discussion of *takhayyur* by quoting the words of an unnamed scholar.⁵¹ Fekry Ibrahim suspects that this scholar is Ibn al-‘Arabī (638/1240), whose name might have been disguised due to concerns about his mystical views on Sufism at the time.⁵²

This scholar stated that it is permissible to change and follow another school of law in all matters, provided it does not contradict four things: consensus, *fiqh* rules, the textual sources, or a clear case of analogy. Al-Qarāfī then questioned what Yaḥyā al-Zunnātī meant by his requirement that it is not permissible for followers to seek concessions (*rukhaṣ*) from the *madhhabs*. If al-Zunnātī’s definition of *rukhaṣ* includes those that violate these four points, then his prohibition is correct and must be accepted. However, if by *rukhaṣ* he means all mild opinions, then it is not correct to blame someone who chooses a *rukhaṣ* that is legitimate and recognized by the mujtahids. In short, al-Qarāfī objected to the very strict conditions put forward by al-Zunnātī regarding the matter of switching schools of law or

⁴⁸ Krawietz said that “*takhayyur* is a preliminary leading to *talfīq*.” See Birgit Krawietz, ‘Cut and Paste in Legal Rules: Designing Islamic Norms with *Talfīq*’, *Die Welt Des Islams* 42, no. 1 (2002): 3–40, 12. <https://doi.org/10.1163/157006002760085490>.

⁴⁹ I did not find the date of his death in any biographical books, only that he was one of the leading jurists of the Mālikī school.

⁵⁰ Shihāb al-Dīn al-Qarāfī, *Sharh Tanqih al-Fusul fi Ikhtisar al-Mahsul*, 1st ed. (Sharikat al-Ṭibā‘ah al-Fanniyyah al-Muttaḥidah, 1973). 339. Nyazee, ‘The Scope of *Taqlīd* in Islamic Law’. 25.

⁵¹ al-Qarāfī, *Sharh Tanqih al-Fusul*. 339.

⁵² Ibrahim, *Pragmatism in Islamic Law*. 75.

takhayyur. He refers to the consensus among the Companions that those who received fatwas from Abū Bakr and 'Umar were permitted to seek fatwas from other Companions,⁵³ indicating that moving from one school of law to another based on the pursuit of the easier ruling (*tatabbu' al-rukhas*) is permissible.

Later Shāfi'ī scholars, such as Ibn Ḥajar al-Haytamī (d. 974 H / 1567 M) and others also held similar views. They argue that it is permissible to switch from one school of thought to another among the schools of Islamic jurisprudence, even based solely on personal preference, whether permanently or only in specific cases. This remains permissible even if a person has previously issued a fatwa, established a ruling, or acted in accordance with another school of thought, as long as such *takhayyur* does not lead to *talfīq*.⁵⁴

The same thing was also said by the Shāfi'ī scholar, Taqī al-Dīn al-Subkī (d. 756/1355). He divided people who change *madhhab* into six categories. He stated that "One who transfers from one school to another belongs to different categories First, one who believes that another school doctrine is the most appropriate It is permissible for him to act according to what he considers the most appropriate [school doctrine]. Second, one who does not believe [any school doctrine] to be the most appropriate, this, [likewise], is permissible. Third, one whose objective is to adopt [another school doctrine] in order to seek permission for something he needs because of a desire that has arisen or a necessity that presses him, this is also permissible. Fourth, one whose objective [in transferring from one school to the other] is merely to seek a concession (*tarakhkhus*), this is forbidden because he pursues his own passion rather than religion. Fifth, one who practices [concession seeking] excessively making the pursuit of concessions his religion, for this reason, and for the magnitude of his indecency, it is forbidden. Sixth, one who composes from those [concessions] a new composite [legal] reality, which is forbidden by the consensus of all scholars, this is forbidden." An unknown treatise believed to originate from the Shāfi'ī school of thought in the 17th century, studied by Wiederhold, discusses the issue of crossing school boundaries, citing the opinion of al-Subkī and stating that the stronger opinion (*rājiḥ*) also permits a muqallid to switch to another school, and so on, even if not due to urgent necessity, provided that it does not lead to *talfīq*. This is based on the opinion of al-Nawawī (d. 676/1277), and al-Rāfi'ī (d. 623/1226). Indicating that if moving

⁵³ al-Qarāfī, *Sharh Tanqih al-Fusul*. 339.

⁵⁴ Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī Wa-Adillatuhu*, 4th ed., vol. 1 (Dār al-Fikr, n.d). 95.

from one school to another based on seeking the easiest opinion is also permissible, as long as it does not lead to *talfiq*.⁵⁵

From this, we can conclude that in the initial discussion regarding moving from one school of law to another, there are two important figures who have two different views. The first is al-Zunnātī, who argues that switching *madhhabs* is permissible, but not for the sake of convenience. The second is al-Qarāfī, who argues that moving from one school of law to another is permissible even for the sake of convenience, as long as it does not cause *talfiq*. It is important to note that al-Qarāfī explicitly mentions *talfiq* in his book. It is within this context that most scholars agree the term *talfiq* first gained prominence in the 7th/13th century. Therefore, the emergence of discussions about *talfiq* is closely related to intense discussions about *takhayyur*. That is why Krawietz stated in his research that “*takhayyur* is a preliminary leading to *talfiq*.”

2.3 The Concept of *Talfiq* in Pre-Modern Islamic Legal Discourse

2.3.1 Synchronic and Diachronic *Talfiq*

Talfiq originates from the word لَفَقَ, which means “to combine” or “to join.” In the context of *fiqh*, the term is used to denote something that carries the meaning of combination. However, in terms of terminology, *talfiq* is the act of combining several provisions or opinions from various schools of *fiqh* to form a single legal decision on an issue at the same time, so that the combined result cannot be found in any one school of *fiqh*.⁵⁶

In Islamic legal literature, there are two types of *talfiq*: synchronic *talfiq* and diachronic *talfiq*. A common example used in discussions about synchronic *talfiq* is when someone marries off his daughter without a guardian according to the Ḥanafī school, without witnesses according to the Mālikī school, and without a dowry according to the Shāfi‘ī school, rendering the marriage invalid. This case is referred to as synchronic *talfiq*, where the combination occurs within the same legal transaction. The second type is diachronic *talfiq*, which occurs when an individual follows the doctrine of a *mujtahid* in a legal transaction, then follows another *mujtahid* before the legal effects of the first case have concluded. An example is in the case of the right of refusal (*shuf‘a*), where a person may follow the Ḥanafī school, which grants this right to the nearest neighbor. After

⁵⁵ Wiederhold, “Legal Doctrines in Conflict the Relevance of Madhhab Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on Taqlīd and Ijtihād.”

⁵⁶ Hasan Al-Sa‘īdī, “Al-Talfiq Wa Ḥukmuhu Fī al-Fiqh al-Islāmī,” *Majallat Al-‘Adl*, no. 11 (2008): 1–54. 6.

purchasing the land, the person then follows the Shāfi'ī school in subsequent transactions. Ibrahim argues that synchronic *talfiq* is highly debated by pre-modern scholars because it is done in one type of transaction where the result of combining schools is not found in any school. However, scholars are more flexible toward diachronic *talfiq* because it is done in two different cases. Ibrahim mentions that scholars such as a Ḥanafī jurist al-Timirtāsh (d. 1004/1595), only allow diachronic *talfiq*, with an example of a case where a Ḥanafī judge resolved a dispute in a guarantee contract made under a Mālikī judge.⁵⁷

Therefore, al-Sa'īdī in his research states that many scholars prohibit *talfiq*, but they may allow other forms of *talfiq* that do not involve the direct combination of different *madhhab* opinions at one time. This shows that there are differences of opinion among scholars regarding the forms of *talfiq* that are permissible.⁵⁸

2.3.2 Debates among Classical Jurists

The permissibility of switching from one school of thought to another for the sake of practical convenience, referred to as *takhayyur*, sparked widespread debate about *talfiq* among classical scholars. As Ibrahim notes, when al-Qarāfī allowed switching from one school of thought to another even for convenience, but prohibited *talfiq*, this is where the jurists began to discuss and oppose al-Qarāfī's position on *talfiq*. Here, Ibrahim refers to the phenomenon of switching from one school of thought to another as “simple pragmatic eclecticism”. Al-Qarāfī statement sparked further in-depth discussions on *talfiq*, with some later jurists opposing his position. For example, a Ḥanafī scholar of the Mamluk period, Amīr Bādshāh (d. 972/1564). He critiqued al-Qarāfī's stance that *talfiq* is impermissible. He used the example of someone adhering to the Shāfi'ī view that wiping is not required during *wudhu'* and the Mālikī view that touching a woman without desire does not invalidate *wudhu'*. Bādshāh argued against this, asserting that opponents of *talfiq* had not provided any evidence to forbid such practices. Furthermore, he criticizes this impermissibility of *talfiq* said by al-Qarāfī. His criticism is based on the argument that if a man marries without *sidāq* (dowry) according to one *madhhab*, such a contract will not be invalidated by Malik and vice versa. Hence, the question arises as to why combining all such concessions would be problematic.⁵⁹

⁵⁷ Ibrahim, “School Boundaries and Social Utility in Islamic Law: The Theory and Practice of Talfiq, and Tatabbu' al-Rukhas in Egypt.” 31. 95.

⁵⁸ Al-Sa'īdī, “Al-Talfiq Wa Ḥukmuhi Fī al-Fiqh al-Islāmī.”47.

⁵⁹ Ibrahim, *Pragmatism in Islamic Law*. 109.

In the early Ottoman period, a Ḥanbalī mufti in Egypt named Marʿī ibn Yūsuf ibn Abī Bakr al-Karmī (d. 1033/1623) issued a controversial fatwa permitting the practice of *talfīq*. The first legal case he mentions in his fatwa is a person who performs ablution by wiping his forehead according to the Shāfiʿī school and then touches his private parts, which is permitted only by Abū Ḥanīfa but not by the other three imams. This case, according to most scholars, is a case of *talfīq* and is not permissible. Marʿī explains that many scholars held the view that *taqlīd* should be prohibited if it leads to *talfīq* of any doctrine (*madhhab*) because in such a case, each of the two or more doctrines faces invalidity (*buṭlān*). However, Marʿī refutes this opinion by arguing that prohibiting such behavior as an invalidation of ritual purity would impose undue restriction (*ḥaraj*) and hardship (*mashaqqa*), since laypeople do not have to follow a particular madhab.⁶⁰ Marʿī stated that:

*The view that I favor is that it is permissible to practice talfīq (combining the opinions of several madhhabs on a single issue), as long as it is not done with the intention of seeking concessions. This is because a person who deliberately seeks concessions from different madhhabs is considered to have committed an act of wickedness (fāsiq), because it indicates following one's desires instead of the truth. However, if talfīq happens unintentionally or by chance, it is permissible, especially for laypeople, because they are not able to adhere to one madhhab and often just follow the fatwas they hear or that are available to them.*⁶¹

Marʿī al-Karmī's controversial fatwa made the issue of *talfīq* a very contentious discussion, leading to its recognition as a matter of *ikhtilāf* (disagreement) among jurists. Even another Ḥanafī scholar named Ibrāhīm b. Bīrī (d. 1099/1687) said that there was a difference of opinion among the scholars on this issue. What is interesting is that while Bīrī rejected *talfīq*, he did not claim that there was a consensus in his time regarding *talfīq*. This indicates that even those who rejected *talfīq* were aware of the ongoing debate and the lack of absolute consensus prohibiting it. Bīrī can claim that there is no consensus, of course, because he saw the intense debate between the proponents of *talfīq* and its opponents.⁶²

The other scholar who supported the practice of *talfīq* was still from the Ḥanafī school namely Ibn Mullā Farrūkh al-Makkī (d.1061/1650). He criticized certain Ḥanafī scholars for their rigid adherence to their school, describing them as fanatical. He pointed out that they refused to adopt the Shāfiʿī perspective on combining prayers during travel, a

⁶⁰ Marʿī ibn Yūsuf ibn Abī Bakr al-Karmī, *Risālah Fī Al-Talfīq* (n.d.). 443.

⁶¹ al-Karmī, *Risālah Fī Al-Talfīq*. 444.

⁶² Ibrahim, *Pragmatism in Islamic Law*. 110.

situation that could be resolved through the use of *talfīq*. He argued that such an inflexible stance could lead to missing the Asr prayer entirely, which he viewed as a manifestation of *madhhab* fanaticism and a misunderstanding of the true purpose of the *Sharī‘ah*.⁶³ Ibn Farrūkh’s argument for the permissibility of *talfīq* is based on the opinion of Ibn al-Humām ((d.861/1457) in his *taḥrīr*.⁶⁴

Ibn Farrūkh's opinion was strongly opposed by another Ḥanafī scholar, ‘Abd al-Ghanī al-Nābulusī (d.1143/1731). Al-Nābulusī who argues for the permissibility of *talfīq*, which is based on the opinion of Ibn al-Humām who stated that “Most likely, these objections (to switching from one *madhhab* to another) stem from the scholars' desire to prevent the laypeople from following the *rukhsah* (concessions). If this were not the case, then the layman would take in every matter the opinion of the *mujtahid* whose opinion is the lightest for him.” It is from these statements that Ibn Farrūkh comes to the conclusion of the permissibility of *talfīq*. It is this logic of Ibn Farrūkh that al-Nābulusī opposes, because in essence that is not what Ibn al-Humām meant. In this text, Ibn al-Humām wants to explain the reason for the scholar who forbid switching schools of law, and according to him this reason is so that ordinary people do not carelessly follow the *rukhsah* not problematic according to him. Because indeed the teachings of Islam provide convenience for its people. However, Ibn al-Humām does not automatically say that *talfīq* is permissible because that is not the context.⁶⁵ From this, we can see the intensity of the debate surrounding the permissibility of *talfīq*.

Back to Mar‘ī al-Karmī's controversial fatwa, his fatwa received very strong opposition also from Ḥanbalī scholars, namely al-Saffārīnī (d. 1188/1774). He strongly criticized al-Karmī by saying that his allowance of *talfīq* would undermine the entire *Sharī‘ah*. The practice of *talfīq* in marriage, for example, according to al-Saffārīnī would lead to adultery. For example, if Abū Hanīfah's view that women can marry without a guardian is combined with Mālik's view that no witnesses are needed, then adultery could be formally "legalized". Al-Saffārīnī argues that the permissibility of *talfīq* will result in the destruction of the legal methodology itself.⁶⁶

2.4 *Tatabbu‘ al-rukhas* Discourses in Pre-Modern Period

⁶³ Ibrahim, *Pragmatism in Islamic Law*. 110.

⁶⁴ ‘Abd al-Ghanī al-Nābulusī, *Khulāṣat Al-Taḥqīq Fī Bayān Ḥukm al-Taqlīd Wa-l-Talfīq* (Maktabat al-Ḥaqīqah, 2011). 23.

⁶⁵ al-Nābulusī, *Khulāṣat Al-Taḥqīq Fī Bayān Ḥukm al-Taqlīd Wa-l-Talfīq*. 23-24.

⁶⁶ Krawietz, ‘Cut and Paste in Legal Rules’. 17.18

Tatabbu' al-rukhaṣ is seeking leniency in the law from various schools of thought or following the easiest opinion among the schools of *fiqh*. Therefore, crossing the boundaries of a school of thought or choosing an opinion outside of a school of thought, if the idea is based on *tatabbu' al-rukhaṣ*, then this is done not because of strong arguments, but because of the desire to choose the easiest opinion. This is done usually to fulfill personal needs and desires.

There is a lot of debate in pre-modern period about whether a *muqallid* is permitted to perform *tatabbu' al-rukhaṣ*. In the sense of seeking ease among different *madhhab*s. This discussion is intended in the context, for example, of one case where a *muqallid* follows the Shāfi'ī *madhhab*, and in another case follows the Ḥanafī *madhhab*. Ibrahim, for example, divides the attitude of jurists toward *tatabbu' al-rukhaṣ* into two phases: the phase before the Mamluk period, including the formative and classical period, where the majority of jurists did not allow *tatabbu' al-rukhaṣ*, and the phase during the Mamluk period, where there was a shift in attitude toward *tatabbu' al-rukhaṣ*, where the majority of jurists began to permit *tatabbu' al-rukhaṣ*, allowing the adoption of the easiest opinion among the four schools of thought to meet personal needs and interests.

2.4.1 On the Prohibition of *Tatabbu' al-Rukhaṣ*

Let us explore how the dominant opinion towards *tatabbu' al-rukhaṣ* during the formative and classical period. In this section, I will identify the Islamic legal scholars who opposed *tatabbu' al-rukhaṣ*. In the pre-classical period, *tatabbu' al-rukhaṣ* was largely rejected by the majority of jurists.⁶⁷ The opposition to the legal technique known as *tatabbu' al-rukhaṣ* can be traced back to the early stages of Islamic legal theory. Sulaymān al-Taymī (d. 143/760), who belonged to the generation following the Companions known as the Followers (*tābi'īn*) stated that ““All evil converges on him who takes the less stringent opinions of every scholar.”⁶⁸ Al-Awzā'ī (d. 157/773), reportedly stated that anyone who adheres to the anomalous opinions of scholars is not considered a Muslim. He took measures to avoid the more lenient opinions from various regions to prevent falling into the trap of seeking easier rulings.⁶⁹

The founder of the school, Aḥmad b. Ḥanbal (d. 241/855), stated that if a person selectively follows the most lenient rulings from different school- such as adopting the

⁶⁷ Ibrahim, *Pragmatism in Islamic Law*. At 64.

⁶⁸ Yūsuf 'Abd al-Barr, *Jāmi' Bayān Al-'Ilm Wa-Faḍlihi*, vol. 2 (Idārat al-Ṭibā'ah al-Muniriyyah, n.d.). 927.

⁶⁹ al-Dhahabī al-Dhahabī, *Siyar A'lām Al-Nubalā'*, vol. 7 (Beirut: Mu'assasat al-Risālah, 1988).125.

opinion of the people of Kufa regarding the permissibility of date wine, the view of the people of Medina on music, and the stance of the people of Mecca on temporary marriage (*mut'ah*)- then this person is considered a sinner (*fāsiq*).⁷⁰ This suggests that the early jurist opposed the practice of pursuit of the easier ruling (*tatabbu' al-rukhaṣ*). Later jurists who prohibited *tatabbu' al-rukhaṣ* generally also referred to these opinions namely, Sulaymān al-Taymī, Al-Awzā'ī, and Aḥmad b. Ḥanbal.

The Zāhirī jurist Ibn Ḥazm (d. 456/1063), said that there is a consensus that a person who seeks an easier ruling is considered a sinner (*fāsiq*).⁷¹ The Mālikī scholar Ibn 'Abd al-Barr (d.463/1070), referencing to Sulaymān al-Taymī, stated that it is not permissible for the layman to seek out the most lenient opinions among the various *madhhabs*. Ibn 'Abd al-Barr further stated that he was not aware of any disagreement among jurists on this matter, indicating a consensus on the prohibition. In sum, these two scholars argue that there is consensus on the *fāsiq* status of the layperson who seeks the lenient ruling, no juristic disagreement (*khilāf*).

The great Shāfi'ī jurist Al-Ghazali (d. 505/1111) stated that the layperson should not select opinions from different schools of law based solely on convenience of personal preference. Instead, he argues that such choices should be made with the same care and considerations as a mujtahid would use when dealing with conflicting evidence, namely through the process of *tarjīḥ*.⁷² From the evidence found in al-Nawawī fatwa, there is a question posed to al-Nawawī (d. 676/1278), namely whether it is permissible for someone who follows one *madhhab* to follow another *madhhab* that is more beneficial to him and whether it is permissible to pursue the easier ruling (*tatabbu' al-rukhaṣ*)? al-Nawawī answered explicitly that it is not allowed to pursue the easier ruling *tatabbu' al-rukhaṣ*.⁷³

Al-Zarkashī (d.794/1392), in his commentary on al-Subkī's (d.771/1369) *Jam' al-Jawāmi'*, discusses the ruling on *tatabbu' al-rukhaṣ* and states that the more correct view (*al-aṣaḥḥ*) is that it is prohibited. He references Abū Ishāq al-Marwazī ((d.340/951), who asserts that anyone who engages in *tatabbu' al-rukhaṣ* becomes a *fāsiq* (sinner). In contrast, Ibn Abī Hurayrah (d.345/956) argues that such a person does not become a *fāsiq*. Then al-Zarkashī explains that when we allow a layperson to leave the *madhhab* that he is accustomed to, we stipulate that the layperson should not seek relief by choosing from each

⁷⁰ 'Abd al-Barr, *Jāmi' Bayān Al-Ilm Wa-Faḍlihi*, vol. 2. 927.

⁷¹ Ḥasan ibn 'Ammār ibn al-Shurunbulālī, 'Al-'Aqd al-Farīd Li-Bayān al-Rājiḥ Min al-Khilāf Fī Jawāz al-Taqlīd', *Majallat Jāmi'at Umm Al-Qurā Li-'Ulūm al-Sharī'ah Wa-l-Lughah al-'Arabiyyah Wa-Ādābihā*, 17 (2005). 700.

⁷² Muḥammad ibn Muḥammad al-Ghazālī, *Al-Mustaṣfā*, ed. Muḥammad 'Abd al-Salām 'Abd al-Shāfi, vol. 1 (Dār al-Kutub al-'Ilmiyyah, 1993). 374.

⁷³ 'Alī al-Samhūdī, *Al-'Aqd al-Farīd Fī Aḥkām al-Taqlīd* (n.d.). 111.

madhhab the opinion that is easiest for him. But if the layman engages in *tatabbu' al-rukhaṣ*, it is definitively forbidden (*qaṭ'an*).⁷⁴

Likewise, the majority of scholars of Islamic law from various schools hold the view that *tatabbu' al-rukhaṣ* is prohibited. Although their wording may differ, the underlying intention remains consistent: selecting the easier rulings from different schools is forbidden. The general opposition to the practice of *tatabbu' al-rukhaṣ* by the scholars of the formative and classical periods persisted and continued into the Mamluk period.

2.4.2 On the Permissibility of *Tatabbu' al-Rukhaṣ*

The opposition to *tatabbu' al-rukhaṣ* that I have previously explained persisted and continued until the Mamluk period. However, it was also during the Mamluk period that the arguments against *tatabbu' al-rukhaṣ* began to be challenged by scholars, leading to a breakdown of the consensus against it. The practice of *tatabbu' al-rukhaṣ* started to gain broader support in the 13th century. Although there are references to early authorities who supposedly supported *tatabbu' al-rukhaṣ*, such as the Shāfi'ī jurist Abū Ishāq al-Marwazī (d. 340/951),⁷⁵ it was not until the thirteenth century that scholars began to formulate arguments in favor of this practice. Muḥammad Yusrī Ibrāhīm Ḥusayn for example stated that Abū Ishāq al-Marwazī of the Shāfi'ī school and Ibrāhīm al-Shabrākhītī (d. 1106/1694) of the Mālikī school held the view that *tatabbu' al-rukhaṣ* is permissible. Al-Dusūqī (d.1230/1815), referencing his teacher, stated: “What we heard from our teacher is that the correct opinion (*al-ṣaḥīḥ*) is that it is permissible to seek every easy opinion to alleviate difficulty (*raf' al-mashaqqā*)”.⁷⁶

This indicates that Abū Ishāq al-Marwazī was referenced as an early authority by some scholars for his stance on the permissibility of *tatabbu' al-rukhaṣ*. His perspective is among the few early references supporting this practice, which later received more robust scholarly arguments in its favor during the 13th century.⁷⁷

⁷⁴ al-Zarkashī, *Tashnīf Al-Masāmi' Bi-Jam' al-Jawāmi' Li-Tāj al-Dīn al-Subkī*, ed. Sayyid 'Abd al-'Azīz and 'Abd Allāh Rabī', vol. 4 (Cairo: Maktabat Qurṭubah li-l-Baḥṭh al-'Ilmī wa-Iḥyā' al-Turāth, 1998). 620.

⁷⁵ Ḥasan ibn Muḥammad ibn Maḥmūd al-'Aṭṭār, *Hāshiyat Al-'Aṭṭār 'alā Sharḥ al-Jalāl al-Maḥallī 'alā Jam' al-Jawāmi'*, vol. 2 (Dār al-Kutub al-'Ilmiyyah, n.d.). 441.

⁷⁶ Muḥammad Yusrī Ibrāhīm, *Fiqh Al-Nawāzil Li'l-Aqalliyāt al-Muslima: Ta'ṣīlān Wa-Taḥbīqan*, vol. 2 (Cairo: Dār al-Yusr, 2013). 410.

⁷⁷ Ibrahim argues that among the early jurist who permitted *tatabbu' al-rukhaṣ* was al-Marwazī. However, he also acknowledges differences of opinion regarding al-Marwazī's view on *tatabbu' al-rukhaṣ*. Therefore, it is not surprising that al-Marwazī's name is also included in the section discussing the prohibition of *tatabbu' al-rukhaṣ*, as I mentioned earlier. See Ibrahim, *Pragmatism in Islamic Law*. 73. I assume there is a difference in understanding regarding *tatabbu' al-rukhaṣ* in this context. However, it is important to note that in the codification of Islamic law, the

The first name we must mention is the Andalusian sufi authority Muhyī al-Dīn ibn ‘Arabī (d.638/1240). Given the conditions at that time which are dominantly against the practice of *tatabbu‘ al-rukhaṣ*. Ibn ‘Arabī’s attitude towards *tatabbu‘ al-rukhaṣ* can be said to be an exception. In his remarkable work, *al-Futūḥāt al-Makkīyah*, Ibn ‘Arabī expressed his concerns about contemporary jurists who prohibited laypeople from following the *rukhsah* of various *madhhabs*. He criticized these scholars for viewing the pursuit of *rukhsah* from other *madhhabs* as a manipulation of the law, describing their attitude as "the height of ignorance". Ibn ‘Arabī cited a case in which a Mālikī mufti prevented a Mālikī layman from seeking *rukhsah* from the Shāfi‘ī school. He criticized this practice and argued that the layman has the freedom to seek the lesser juridical opinion among the various *madhhabs*. His view was based on the notion that *rukhsah* is a divine gift.⁷⁸

Another influential figure in the acceptance of the practice of *tatabbu‘ al-rukhaṣ* was the Ayyubid Shāfi‘ī jurist, ‘Izz al-Dīn b. ‘Abd al-Salām (d.660/1262). Ibn ‘Abd al-Salām’s contributions are widely acknowledged in this discourse, as evidenced by the numerous scholars during the Mamluk and Ottoman periods who supported the practice and frequently referenced his statements and arguments.⁷⁹ Ibn ‘Abd al-Salām held the view that it is permissible for laypeople to apply the concessions available from various *madhhab*. He stated that “it is permissible for a layperson to follow any scholar he chooses in any matter, and if he follows one scholar in a particular issue, he is not obligated to follow that scholar in all matters. Whether he opts for a lenient (*rukhsah*) or a strict (*‘azīmah*) opinion, both choices are permissible. This is because if we assert that there is only one truth, we cannot be certain who is specifically correct. Conversely, if we maintain that every *mujtahid* is correct, then there is no basis for disapproving of anyone who follows one of them.”⁸⁰

This opinion of Ibn ‘Abd al-Salām serves as a main reference in refuting the opinion of Ibn Ḥazm who claimed that there is a consensus that a person who seeks an easier ruling is considered a sinner (*fāsiq*). Furthermore, Alī al-Samhūdī al-Shāfi‘ī (d. 911/1506), in *al-‘Aqd al-Farīd fī Ahkām al-Taqlīd* addressed Ibn Ḥazm’s claim by suggesting that “As for what some people quoted from Ibn Ḥazm, regarding his statement about the consensus (*ijmā‘*) of the scholars on the prohibition of following the *rukhsahs* of various *madhhabs*, it is possible he was referring to those who follow the *rukhsah* without

choice of *madhhab* is usually made once for all cases and then applied consistently. Thus, the practice of *madhhab* selection or *tatabbu‘ al-rukhaṣ* in the codification of Islamic law reflects institutionalized flexibility, without giving rise to arbitrary use.

⁷⁸ Ibrahim, *Pragmatism in Islamic Law*. 73.

⁷⁹ Ibrahim, *Pragmatism in Islamic Law*. 75.

⁸⁰ al-Samhūdī, *Al-‘Aqd al-Farīd Fī Ahkām al-Taqlīd*. 115-116.

adhering to the scholars who hold that opinion, or to the *rukḥṣah murakkabah* in a single action.”⁸¹ This suggests that Ibn Ḥazm might not be referring to a *muqallid*, but rather to a layperson who acts according to his own desires without referring to any of the imams of the *madhhab*.

Another influential figure in the acceptance of the practice of *tatabbu’ al-rukḥaṣ* was a Mālikī scholar in Mamluk period namely Shihāb al-Dīn al-Qarāfī (d. 684/1285). He allows moving from one *madhhab* to another *madhhab* based on seeking the easiest opinion.

Another figure who played an important role in advocating the permissibility of *tatabbu’ al-rukḥaṣ* and opposing its prohibition was the Hanafī jurist al-Kamāl Ibn al-Humām (d. 861/1457), as well as his students who agreed with him such as Ibn Amīr Ḥājj (d. 879/1474) and Sayyid Bādshāh (d. 972/1564). Ibn al-Humām stated that “it is permissible to follow the concessions of the various *madhhabs*, as there is no *shar’ī* prohibition against that. A person may adopt the opinion that is easiest for them, provided they have the means to do so and have not previously adopted another opinion on the matter”. The opinion that forbids *tatabbu’ al-rukḥaṣ*, according to Ibn al-Humām, is only an attempt by the scholars to prevent the laypeople from recklessly following dispensations.⁸²

Ibn Amīr Ḥājj in his commentary on Ibn al-Humām’s *al-Taḥrīr fī Uṣūl al-Fiqh* responds to the claim that there is consensus on the *fasiq* status of those who practice *tatabbu’ al-rukḥaṣ* as claimed by Ibn ‘Abd al-Barr. This is because, in the Ḥanbalī school, a narration from Imām Aḥmad, who views the practice of following *rukḥṣah* as sinful (*fāsiq*), presents two perspectives on the impiety of those who pursue *rukḥṣah*. Qāḍī Abū Ya’lā (d. 458/1066) interpreted that this impiety applies only to individuals who lack a *shar’ī* reason, such as not being a *mujtahid* or not performing *ijtihād* on their own, but instead engaging in *tatabbu’ al-rukḥaṣ*. Some Ḥanbalī scholars further assert that if the evidence is strong or the person is a layperson, then they are not considered as a sinner (*fāsiq*). Therefore, the claim that there is consensus on the prohibition of practicing *tatabbu’ al-rukḥaṣ* through the narration of Aḥmad b. Ḥanbal is indeed debatable. Furthermore, Ibn Amīr Ḥājj affirmed the previous opinion by quoting al-Nawawī’s opinion (676/1277) in *Rawḍat al-Ṭālibīn wa ‘Umdat al-Muḥīn* quoted from Ibn Abī Hurayrah that there is no impiety in following the *rukḥṣah*, as long as it does not combine two opinions that cause

⁸¹ al-Samhūdī, *Al-‘Aqd al-Farīd Fī Ahkām al-Taqlīd*. 116. al-Shurunbulālī, ‘Al-‘Aqd al-Farīd Li-Bayān al-Rājiḥ Min al-Khilāf Fī Jawāz al-Taqlīd’. 700.

⁸² Ibn Amīr al-Ḥājj, *Al-Taqrīr Wal Taḥbīr*, vol. 3 (Beirut: Dār al-Kutub al-‘Ilmiyya, 1999). 351.

the invalidation of worship according to all *muftahids*. This is also confirmed by al-Qarāfi that it is not permissible to adhere to two *madhhabs* if the result causes the act of worship to be invalidated according to both.⁸³

The other scholar who contributed significantly to this discussion was the Ḥanafī jurist Abū al-Ikhlāṣ Ḥasan al-Shurunbulālī (d.1069/1658). He wrote a treatise entitled berjudul *al-‘Aqd al-Farīd li-Bayān al-Rājiḥ min al-Khilāf fī Jawāz al-Taqlīd*. This treatise was written when al-Shurunbulālī was asked about the ruling for a man of the Ḥanafī school who experiences bleeding or a similar issue and wishes to adopt the view of Imam Mālik, who stated that such discharge does not invalidate *wudhū*. But at the same time, he still wants to follow Imam Abū Ḥanīfah’s opinion that touching without desire does not invalidate *wudhū*. al-Shurunbulālī answered “Yes, it is valid to follow Imam Mālik’s view that *wudhū* is not invalidated by blood or pus that comes out, whether from an orifice of the body, such as the rectum, or otherwise. However, it is obligatory for a person to perform actions that are considered *sunnah* or *mustaḥabb* according to Imam Abū Ḥanīfah, but are deemed conditions by Imam Mālik”.⁸⁴

In his work, he argues that crossing the boundaries of *madhhab* based on *tatabbu‘ al-rukhaṣ* is permissible. He refutes Ibn Ḥazm’s view that anyone seeking ease from various school of thought is a sinner, citing the fatwa of Ibn ‘Abd al-Salām, which permits a follower of a particular school to seek ease among existing schools of thought. He then argues that, since it is permissible to move from one school of thought to another, and there is no obligation to remain bound to a particular school, it is also permissible to move from one school to another in search of the easiest opinion (based on *tatabbu‘ al-rukhaṣ*). Because, indeed, the idea of moving from one school of thought to another is to find something easier. According to al-Shurunbulālī, there is no religious prohibition against switching from one school of thought to another in search of a more lenient opinion, provided that one continues to follow the opinion of a trusted *muftahid*, or one of the existing opinions of the schools of thought.

Here we can see al-Shurunbulālī’s stance towards *tatabbu‘ al-rukhaṣ*, namely he permits it. However, at the same time, he also criticized those who permitted *tatabbu‘ al-rukhaṣ* when it led to *talfīq*, emphasizing the prohibition of *talfīq* among scholars, particularly the Ḥanafīs. This indicates that Despite the growing acceptance of *tatabbu‘ al-rukhaṣ* during the Mamluk and early Ottoman periods, this did not extend to *talfīq*. Even

⁸³ al-Hājj, *Al-Taqrīr Wal Taḥbīr*, vol. 3. 351.

⁸⁴ Al-Shurunbulālī, ‘Al-‘Aqd al-Farīd Li-Bayān al-Rājiḥ Min al-Khilāf Fī Jawāz al-Taqlīd’. 690-691.

proponents of *tatabbu' al-rukhas* considered *talfiq* to be the only form of *tatabbu' al-rukhas* that was prohibited.

2.5 Conclusion

The discussion in Chapter 2 shows that the practices of *takhayyur* and *talfiq* have been part of the dynamics of pre-modern Islamic law, although the intensity of acceptance and rejection of these practices varied. *Takhayyur* allows a *muqallid* to follow opinions that differ from one or more *madhhabs* based on practical considerations, while *talfiq*—the combination of *madhhab* opinions in a single case—has caused major controversy; pre-modern scholars distinguished between synchronic and diachronic *talfiq*, with the latter being more widely accepted. We will find diachronic *talfiq* in the next chapter in the discussion of the modern period. Meanwhile, *tatabbu' al-rukhas* was initially rejected by the majority of scholars because it was considered seeking ease without basis, but since the Mamluk period, figures such as Ibn 'Arabī, Ibn 'Abd al-Salām, al-Qarāfī, and al-Shurunbulālī began to allow this practice for the general public, provided that it did not cause *talfiq* or violate the basic principles of *fiqh*. This finding confirms that the flexibility of Islamic law, in the form of practical eclecticism, is not only a modern phenomenon. The practices of *takhayyur* and *talfiq* have existed in pre-modern discussion, and their use in the modern period is a continuation and adaptation of existing legal flexibility rather than a break with the past. In the next chapter, we will see how this concept was applied in the modern period through the institution of Islamic legal codification to meet the demands of modern nation-states.

It should be emphasized that in the pre-modern period, the choice between different *madhhabs* was primarily driven by *tatabbu' al-rukhas*, or the search for the easier as I discussed. On the other hand, in the modern period, similar practices in choosing between *madhhab* opinions are often guided by considerations of modernity and compatibility with current social, legal, and state demands. We will also see that, in the case of Indonesia, there are other motives influencing the reasons for choosing a particular *madhhab*.

CHAPTER III

TAKHAYYUR AND TALFĪQ IN MODERN ISLAMIC LEGAL CODIFICATION

3.1 Chapter Introduction

In the previous chapter, I discussed how *takhayyur* and *talfiq* were used and debated in the pre-modern period. This chapter examines how these concepts were applied and conceptualized in the modern era, particularly in the codification of Islamic law. It begins with the Ottoman Empire, illustrating early codification and the initial use of legal eclecticism. The discussion then moves to Egypt, where lawmakers expanded the application of eclecticism and *takhayyur* to address the needs of a modern state. Finally, the chapter explores Indonesia, focusing on the codification of Islamic family law (KHI), which built on earlier reform debates in the country.

3.2 Codification in the Ottoman Empire: Early Eclecticism

In the late 19th century, along with increasing modernization and secularization, there was a trend toward the codification of Islamic law. Scholars who focus on discussing codification always associate the notion of codification of Islamic law with three phenomena, namely the emergence of nation states throughout the Islamic world, legal borrowing, and modernity.⁸⁵

Historically, the earliest and most influential codification of Islamic law was undertaken by the Ottoman Empire in the 19th century, with the creation of the *Mecelle* (also known as the Ottoman *Majallah*), a civil code based on Ḥanafī jurisprudence. This *Mecelle*, is often regarded as the first attempt by a state to codify Islamic law.⁸⁶ This marks a significant change in the history of Islamic law, which Aharon Layish refers to as “*The Transformation of the Shari‘a from Jurists’ Law to Statutory Law*.”⁸⁷ Meaning that the *Mecelle* is recognized as the first codification where its principles were derived from *Shari‘a* but enacted as law by human legislators,⁸⁸ indicating a shift from traditional jurists’

⁸⁵ Guy Burak, ‘Codification, Legal Borrowing and the Localization of “Islamic Law”’, in *Routledge Handbook of Islamic Law*, ed. Khaled Abou El Fadl, Ahmad Atif Ahmad, and Said Fares Hassan, 1st ed. (New York, NY: Routledge, 2019.: Routledge, 2019), 389–99, <https://doi.org/10.4324/9781315753881-25>.

⁸⁶ Burak, “Codification, Legal Borrowing and the Localization of ‘Islamic Law.’” 389-390.

⁸⁷ Aharon Layish, “The Transformation of the Shari‘a from Jurists’ Law to Statutory Law in the Contemporary Muslim World,” *Die Welt Des Islams*, New Series, vol. 44, no. 1 (2004): 85–113.

⁸⁸ J. N. D. Anderson, ‘Modern Trends in Islam: Legal Reform and Modernisation in the Middle East’, *International and Comparative Law Quarterly* 20, no. 1 (January 1971): 1–21, 2. <https://doi.org/10.1093/iclqaj/20.1.1>.

law to statutory law. Although at that time, specifically in 1876, the civil code known as the *Mecelle* did not yet regulate family law, such as marriage, divorce, and inheritance, family law still referred directly to the books of jurisprudence of the Ḥanafī school, they still “applied the dominant Ḥanafī opinion as enshrined in the medieval compendia.”⁸⁹ But the important thing is the existence of this *Mecelle* in the late 19th century marks a new chapter in the development of Islamic law.

The next thing that needs to be mentioned is that the civil code known as *Mecelle* has adopted the idea of eclecticism in its codification, not relying solely on the majority opinion of the Ḥanafī school, which was the preferred school of law by the Ottoman Empire. Instead, this codification adopts an eclectic approach, combining various opinions supported by the Ḥanafī school, even though some of them originate from other sources.⁹⁰ Therefore, it is said that “the *Mecelle* is of interest as the first example of eclecticism in choice of traditional doctrine, for on a few points the official Ḥanafī doctrine was replaced with variant minority Ḥanafī doctrine.”⁹¹ The Ottoman *Majallah*, also known as *Mecelle*, was established over a ten-year period from 1867 to 1877 to codify rules of contract and tort according to the Ḥanafī school, while also incorporating provisions from sources beyond the Ḥanafī school, which expanded the possibilities of ‘acceptable’ selectivity within the Islamic tradition. The principle of selectivity, or *takhayyur*, among equally legitimate doctrines of Islamic law was theoretically accepted for personal compliance but was not practiced in terms of state legislation of general application. By applying this principle through state institutions, the *Majallah* opened the door for more wide-reaching subsequent reforms, despite its initially limited purpose.⁹²

From this explanation, at least the formation of the *Mecelle*, namely the codification of civil code during the Ottoman period, resulted in two major contributions to the development of Islamic law. The first was the formation of the first codification in Islamic history, which resulted in a change in the status of *Shari‘a* from Jurists' Law to Statutory Law. Second, the existence of the *Mecelle* signifies the beginning of the use of an eclectic approach, although its contribution was not yet very significant, as I mentioned

⁸⁹ J. N. D. Anderson, ‘Codification in the Muslim World: Some Reflections’, *The Rabel Journal of Comparative and International Private Law* 30, no. 20 (1966): 241–53. 245-246

⁹⁰ J. N. D. Anderson, “CODIFICATION IN THE MUSLIM WORLD: Some Reflections.” 245.

⁹¹ David Bonderman, ‘Modernization and Changing Perceptions of Islamic Law’, *Harvard Law Review* 81, no. 6 (April 1968): 1169-1193, 1177. <https://doi.org/10.2307/1339260>.

⁹² Abdullahi Ahmed An-Naim, ‘The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law’, *The Modern Law Review* 73, no. 1 (2010): 1–29, 20. <https://doi.org/10.1111/j.1468-2230.2009.00782.x>.

earlier that the *Mecelle* did not include family law, meaning the eclectic approach was not yet applied in family law, which continued to use the official law of the Ḥanafī school.

Entering the 20th century, there were efforts to reform Islamic law. This was motivated by pressure from below, in the sense that there was a need from society that required the reform of Islamic law.⁹³ Using only the Ḥanafī *madhhab* in resolving family law issues is no longer considered sufficient, which has led to attempts to reform Islamic law and begin using an eclectic approach in Islamic family law.

One of the main factors that sparked Islamic legal reform was inevitable social change. In this context, it pertains to the rights of a wife who lives according to the main doctrine in Ḥanafī jurisprudence. As J.N.D. Anderson said, there were two cases that sparked the initial reform of Islamic law, which essentially relates to the absence of women's right to divorce according to the Ḥanafī school. This marks a new chapter in the development of Islamic law and in the discourse on Islamic legal reform. The need for reform has become so urgent, and pressure from below has grown so strong, that it has even penetrated family law, which is considered sacred.⁹⁴

The first case is where unavoidable social conditions at that time, meant that men from all over the world visited Istanbul and married Muslim women from Istanbul who were Ḥanafī, then lived with them during their visit, and in the end they would return home leaving their wives without filing for divorce, which would bind the position of local women in Istanbul, because in their main school, women have no right to divorce. This situation is obviously very disadvantageous for women. On one hand, they no longer receive any benefits from their husbands, and on the other hand, they cannot free themselves from the legal bonds of marriage, so there is no possibility of marrying someone else either. The second case is when a woman marries a man who, unbeknownst to her, suffers from a mental or physical illness that threatens her marriage, but she has no right to do anything about it.⁹⁵ These two cases are urgent reasons for initial reform, where unavoidable social conditions create new cases that are very prejudicial to women. And if we only adhere to the Ḥanafī school, women will always be greatly disadvantaged. In fact, there are solutions to these two cases in other Sunni schools.

These two cases forced the Sultan to take action, and he issued two imperial decrees in 1915 regarding these two cases and these two imperial decrees provide two

⁹³ J. N. D. Anderson, *Law Reform in the Muslim World*, University of London Legal Series 11 (The Athlone Press, 1976). 39

⁹⁴ J. N. D. Anderson, 'The Significance of Islamic Law in the World Today', *The American Journal of Comparative Law* 9, no. 2 (1960): 187-198, 190. <https://doi.org/10.2307/837190>.

⁹⁵ Anderson, *Law Reform in the Muslim World*. 39.

solutions, and ordered the court to act in accordance with this solution. The first case can be resolved through the dissolution of marriage by court order, as advocated by the Mālikī and Ḥanbalī schools. Similarly, the second case has solutions within other Sunni schools. Even if one does not wish to adopt another Sunni school, alternative perspectives within the Ḥanafī school also offer solutions for this issue, although, it should be noted that this solution does not come from the dominant view in the Ḥanafī school.⁹⁶ In other word, the weak opinion of the Ḥanafī school was chosen.

Social pressure and the growing needs of society, particularly regarding family law issues, ultimately led to the enactment of the “Ottoman Law of Family Rights” in 1917. This law is a codification that regulates family law issues, including marriage and divorce. The code was compiled using an eclectic approach, meaning that it was created by taking opinions from all orthodox schools of law, meaning Sunni schools.⁹⁷ As Tucker said “The framers of the OLFR employed the method of *takhayyur* (selection), described above, whereby they studied both majority and minority opinions in the Ḥanafī school, or dominant doctrines in any Sunni school, to choose the rule on any given issue that best seemed to suit modern needs and concerns.”⁹⁸

This Ottoman Law of Family Rights is the first codification of Islamic family law to be enacted, which Coulson said that “the first great monument of reform in the traditional family law.”⁹⁹ Although this codification was only valid for two years, and was repealed in the Ottoman Empire in 1919, it continued to be applied in Syria and Jordan for many years, and still survives in Lebanon in term of family relations of Sunnis.¹⁰⁰

In conclusion, codification efforts in the Ottoman Empire marked an important moment in the modern development of Islamic law. The Ottoman *Majallah*, also known as *Mecelle* made a major contribution to the codification of civil law, particularly contract law and tort law, while introducing an early form of eclecticism by incorporating minority opinions from the Ḥanafī school and, in some cases, perspectives from other sources. On the other hand, the Ottoman Family Rights Code (OLFR) focused more on family law and became the first explicit application of *takhayyur* and *talfiq* in state legislation, particularly to address urgent social needs such as women's rights in marriage and divorce. Together, these two codifications demonstrate that legal reform can remain within the bounds of

⁹⁶ Anderson, “Modern Trends in Islam.” 5.

⁹⁷ J. N. D. Anderson, ‘Codification in the Muslim World: Some Reflections’. 246.

⁹⁸ Tucker, *Women, Family, and Gender in Islamic Law*. 20.

⁹⁹ Coulson, *A History of Islamic Law*. 186.

¹⁰⁰ Anderson, *Law Reform in the Muslim World*. 40.

Islamic doctrine while addressing social needs by leveraging the diversity of legal opinions among the *fiqh* schools through the concepts of *takhayyur* and *talfiq*.

3.3 Egypt: Codification, Reform, and the Use of *Takhayyur* and *Talfiq*

The next phase in the reform of Islamic family law was centered in Egypt.¹⁰¹ It was Egyptian legal experts who took the lead in reforming Islamic law, such as Qāsim Amīn and Muḥammad ‘Abduh, who had progressive ideas.¹⁰² Islamic family law reforms were soon implemented in Egypt. For example, reforms related to marriage were implemented in 1920, 1923, and 1929.

What is interesting about Islamic legal reform in Egypt is that it was not only carried out through an eclectic approach, which took into account the opinions of other orthodox schools besides the official school, but also considered the opinions of so-called heterodox schools of law, or in Bonderman's words, “upon early scholarship and minor, extinct schools.”¹⁰³ For instance, regarding the law of a husband pronouncing divorce once but accompanied by words or signs indicating three divorces, or when divorce is used as an oath or threat without the real intention for it to take effect. The 1929 law reformed Islamic law by abandoning the views of the orthodox schools and choosing to use the opinion of Ibn Taymiyya.¹⁰⁴

Furthermore, Tucker clearly describes the evolution of *takhayyur* in Egypt, which also shaped the codification of Islamic family law in other Middle Eastern countries, he stated that “In subsequent reform codes, promulgated in most Middle East countries over the course of the twentieth century, the framers continued to expand the principle of *takhayyur* to any opinion put forward in one of the Sunni schools; or even to doctrines advocated by early jurists at a time before the schools became crystallized, by one of the Sunni schools which previously existed, but have now become extinct, or by a later jurist of highly independent views ... on some occasions they ventured to adopt a doctrine which was really of Shī‘ī origin, although they seldom, if ever, acknowledged this in regard to legislation promulgated in a predominantly Sunni country.”¹⁰⁵

¹⁰¹ Egyptian neo-traditionalists have used *talfiq* as a method of Islamic legal reasoning that allows flexibility in compiling national codes with the assistance of ‘ulama’. See Clark B Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari’a into Egyptian Constitutional Law* (Brill, 2006). 81.

¹⁰² Anderson, “Modern Trends in Islam.” 6.

¹⁰³ Bonderman, “Modernization and Changing Perceptions of Islamic Law.” 1181.

¹⁰⁴ J. N. D. Anderson, “The Shari’a Today,” *Journal of Comparative Legislation and International Law* 31, no. 3/4 (1949): 18–25. 22.

¹⁰⁵ Tucker, *Women, Family, and Gender in Islamic Law*. 70.

The development of the meaning and use of *takhayyur* is comprehensively explained by Coulson, from its initial implementation to its final phase as seen in the context of family law reform in Egypt. Coulson argues that, the concept of *takhayyur* has been applied through at least three stages in its history. The first stage involves selecting doctrines from within the four established Sunni schools of thought, but outside the official school or the mainstream of the dominant school in a particular region, this is what we found in Ottoman Family Right 1917. The second stage involves selecting opinions from individual scholars whose views may precede or contradict the dominant teachings of the four Sunni schools of thought. This stage is characterized by reliance on doctrines outside the canonical school, such as the doctrines of Ibn Ḥazm and Ibn Taymiyya. Taking opinions outside the canonical school aims to support legal reform. The third stage known as *talfīq*, involves combining and fusing juristic opinions from different schools to create new legal rules. An example is the Egyptian Waqf Law of 1946, which combines Mālikī and Ḥanbalī doctrines to address issues related to the settlement of waqf.¹⁰⁶ This is the final phase of eclecticism in choosing schools of thought.

From here, we can see how the concept of *takhayyur* has evolved from its initial application to its final stage, in modern period. In the 20th century, especially in Islamic law codification projects, its use expanded beyond merely choosing among the four canonical schools, as was the case in its initial use in the Ottoman Family Right.

There has also been a change in meaning in the context of *talfīq* in the modern period. Ibrahim has provided a comprehensive explanation of the debate surrounding the term *talfīq* in the modern context. According to his analysis, confusion about the meaning of *talfīq* in secondary literature arises from various interpretations and applications by different scholars. For example, he explains that Layish and Hallaq distinguish between two types of *talfīq*: diachronic and synchronic. Diachronic *talfīq* involves following the doctrine of one *mujtahid* in a transaction, then switching to another *mujtahid* before the legal effect of the first case expires, while synchronic *talfīq* refers to the combination of two or more legal opinions in the same legal transaction. This understanding is consistent with the definition in the pre-modern period. Ibrahim further notes that Coulson adds to the confusion by defining *talfīq* in two ways: first, as a deviation from one's own school of law to take a decision from another Sunni school, and second, as true *talfīq* as defined in the pre-modern discussion, which involves the combination of doctrines in a single transaction. This, he observes, blurs the distinction between *talfīq* and *takhayyur*, since many of Coulson's Egyptian examples are closer to *takhayyur*, rather than *talfīq*. Ibrahim also cites

¹⁰⁶ Coulson, *A History of Islamic Law*. 185-197.

Albert Hourani's definition, which refers to *talfiq* as a practice that allows judges to choose the interpretation that best suits the circumstances, regardless of the origin of the school of law. He describes 'Abduh's *talfiq* as involving a systematic comparison between the four schools of law. According to Ibrahim, Malcolm Kerr adds to the complexity of the debate by defining *talfiq* in ways that describe of both types of pragmatic eclecticism as *talfiq*. He describes one type as following different schools for different legal issues, such as marriage, inheritance, and waqf, and the other type as combining rules from different schools in a single contract, such as using Hanafī rules on consent and Shāfi'ī rules on dowry in the same marriage contract. Legal scholars before the nineteenth century would have viewed such eclectic choices as simple eclecticism, as articulated by Ibrahim or *takhayyur*, rather than *talfiq*. He concluded that this confusion stems from the overlapping and sometimes interchangeable use of *talfiq* and *takhayyur* in modern interpretations, which were not clearly distinguished in legal discourse before the nineteenth century.¹⁰⁷

Therefore, *synchronic talfiq* — the combination of two or more legal opinions within the same legal transaction — is not found in the codification of Islamic law. What is found instead is what is referred to as *diachronic talfiq*, namely following the doctrine of one *mujtahid* in a transaction and then switching to another *mujtahid* before the legal effect of the first case expires. An example can be seen in the case mentioned by Farag al-Sanhūrī and discussed by Ahmed Fouad: a case of *talfiq* in the codification of Egyptian law regarding inheritance to heirs. This provision adopts the opinion of a Shī'ī jurist permitting inheritance to heirs, while at the same time maintaining the restriction on the freedom to make a will up to one-third of the estate and requiring the consent of the heirs only if the value of the will exceeds one-third, which is the majority opinion of the Sunni schools of thought.¹⁰⁸ Although both opinions are combined in the same legal provision, they apply to separate legal aspects rather than forming a single legal transaction, and therefore fall under *diachronic* rather than *synchronic talfiq*. Similar cases can also be found in the Compilation of Islamic Law (KHI), which will be discussed in Chapter 4.

In summary, in the modern period, *talfiq*—as it was generally understood and discussed in the pre-modern period, namely the combination of two or more opinions in one case—is no longer found in the codification of modern Islamic family law. What is found instead is *diachronic talfiq*, and even that is only in a few cases. Furthermore, what

¹⁰⁷ Ibrahim, *Pragmatism in Islamic Law*. 167-188.

¹⁰⁸ Ahmed Fouad, "Legalizing Bequests to Heirs in Egypt as a Legislative Application of Talfiq: Towards a Purposive Interpretation of Article 37 of Law No. 71/1946," *Yearbook of Islamic and Middle Eastern Law Online* 23, no. 1 (2024): 204–32, <https://doi.org/10.1163/22112987-20230067>.

we refer to as *takhayyur* is often referred to as *talfiq* in the modern period, as explained above. Therefore, I conclude that when the term *talfiq* is used in the context of Islamic legal codification, it no longer has the same meaning as it did in the pre-modern period. Instead, in this context, *talfiq* is understood as *takhayyur* and, in a small number of cases, as *diachronous talfiq*.¹⁰⁹

3.4 Reform and Codification of Islamic Law in Indonesia

The reform movement of Islamic law gained momentum after World War II, gaining strength in most Arab countries. This time, reform was no longer centered only in Egypt, but also in other Arab countries, with the Tunisian reform movement being even more radical in reforming Islamic laws. Various Arab countries have begun codifying Islamic law, in the sense that they are creating codes related to family law while reforming Islamic law. Among the countries that have adopted personal status codes are Jordan in 1951 (replacing Ottoman law), Syria in 1953, Tunisia in 1957, Morocco in 1958, Iraq in 1956 and 1963. It should also be noted that in 1956, Egypt and Tunisia abolished *Shari'a* courts, meaning that this was an attempt to unify the judicial system under one national jurisdiction.¹¹⁰ This movement to reform and codify Islamic law is not limited to Arab countries, but also extends to Southeast Asia. Malaysia is the first country in Southeast Asia to implement Islamic law codification. This codification effort began in with the introduction of the *Muhammedan Marriage Regulation* No. 5 of 1880.¹¹¹

Indonesia is another Asian country that has implemented Islamic law codification, particularly in Islamic family law. The attempt to codify Islamic law in Indonesia has been in progress since 1946, when the government introduced regulations for the registration of marriage, divorce, and reconciliation. The early 1970s witnessed significant advancements in the establishment of Islamic justice institutions in Indonesia, notably with the enactment of the Law of Marriage No. 1/1974 in 1974,¹¹² which began to incorporate reform ideas, aiming to create a more equal rights in marriage by reducing the frequency of polygamy, divorce, and child marriage. The Marriage Law of 1974 introduced reforms such as the *taklik talak*, which allowed women the right to divorce under certain conditions, marking a shift from classical Islamic law where divorce was an absolute right of the husband. As

¹⁰⁹ Therefore, I have chosen to use the term *talfiq* in the title of this thesis, which in the context of this research refers to both *takhayyur* and *diachronic talfiq*.

¹¹⁰ Bonderman, "Modernization and Changing Perceptions of Islamic Law." 1182.

¹¹¹ Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, ICAS Publications Series (Amsterdam University Press, 2010). 19.

¹¹² Nurlaelawati, *Modernization, Tradition and Identity*. 15-16.

Mutaqin stated “This marked a departure from classical Islamic law, according to which divorce was an absolute right of the husband.”¹¹³

A further step in the codification process was the issuance of Presidential Instruction No. 1 of 1991, which introduced *the Kompilasi Hukum Islam* (Compilation of Islamic Law) in Indonesia. This compilation brought together Islamic rules on three key areas of family law including marriage, inheritance, and endowment sourced from a variety of classical *fiqh* texts.¹¹⁴ Consequently, this *Kompilasi Hukum Islam* marked a new phase in the history of Islamic law in modern Indonesia.¹¹⁵

3.4.1 Historical Ideas behind the Making of the *Kompilasi*: Islamic Legal Reform in Indonesia

Historically, the idea behind the making of the compilation was influenced by the Islamic legal reform movement in Indonesia, namely the idea of creating a national *madhhab* initiated by Hazairin and Hasbi ash-Shiddieqy,¹¹⁶ Historically, the formation of Islamic law codification in Indonesia, known as the Compilation, which reformed Islamic law, was the result of the long efforts of Islamic scholars to popularize the discourse on Islamic law reform and *madhhabs* that were in line with the needs of Indonesian society. Therefore, the emergence of the Compilation cannot be separated from the emergence of ideas for renewal in Islamic legal thought in Indonesia, which in this case were initiated by Hazairin and Hasbi ash-Shiddieqy.¹¹⁷

Hasbi ash-Shiddieqy (1904-1975) was one of the Islamic legal scholars who proposed the idea of creating an Indonesian *fiqh*, together with Hazairin, although their ideas and concepts differed. Hasbi argued that, if we want to formulate Indonesian *fiqh*, it must be done through *ijtihad*. However, this contradicts the opinion of most Islamic scholars in Indonesia who believe that the door to *ijtihad* has already been closed. This leads them to reject all ideas that point toward the formation of Indonesian *fiqh*, as the door to *ijtihad* itself is already closed, in particular, since the maturation of Islamic law schools. In support of his reformist ideas, Hasbi believes that *ijtihad* must be practiced, and to realize

¹¹³ Zezen Zaenal Mutaqin, “Culture, Islamic Feminism, and the Quest for Legal Reform in Indonesia,” *Asian Journal of Women’s Studies* 24, no. 4 (2018): 423–45, <https://doi.org/10.1080/12259276.2018.1524549>.

¹¹⁴ Nurlaelawati, *Modernization, Tradition and Identity*. 15-16.

¹¹⁵ Nurlaelawati, *Modernization, Tradition and Identity*. 20.

¹¹⁶ R. Michael Feener, “Indonesian Movements for the Creation of a ‘National Madhhab,’” *Islamic Law and Society* 9, no. 1 (2002): 83–115, <https://doi.org/10.1163/156851902753649298>.

¹¹⁷ Mahkamah Agung Republik Indonesia, *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya* (Perpustakaan Mahkamah Agung, 2011). 19.

this idea, he has taken steps to reopen the possibility of *ijtihād* through his call to "*Return to the Qur'an and Sunnah*." There are four main ideas proposed by Hasbi: eliminating non-Islamic elements from Muslim life, opening the door to *ijtihād* (independent legal reasoning), ending blind imitation (*taqlīd*), and permitting *talfīq*, which is comparative study in *fiqh*.¹¹⁸

Regarding the issues of *taqlīd* and *talfīq*, Hasbi disagrees with blind *taqlīd*, in the sense that he calls for Islamic legal scholars to no longer be bound to a particular school of thought. He argues that *taqlīd* must be balanced with openness to explore the legal pluralism that already exists in the works of various schools of law. From this historical perspective, Hasbi believes that modern Muslims can utilize previous opinions that are relevant to contemporary situations. Legal pluralism already provides four Sunni schools of thought that can be chosen to formulate *fiqh* that is appropriate to the needs of society at a particular time.¹¹⁹ In other words, in formulating Islamic legal reform, Hasbi argues that an eclectic approach is one of the main strategies. Hasbi believes that one way to reform Islamic law is to no longer be bound to a particular school of thought, but to transcend the boundaries of schools of thought, for example by using the concepts of *takhayyur* and *talfīq*.

This approach of transcending the boundaries of *madhhabs* has indeed been used by many Muslim countries in the 20th century to reform Islamic law, especially family law. Egypt, for example, many Egyptians believe that the only way to modernize Egypt is by using an eclectic approach, transcending the boundaries of traditional *madhhabs* that had been established by the doctrines of that time.¹²⁰ Hasbi, who was academically influenced by contemporary Egyptian scholars, encouraged him to reform Islamic law through the notion of transcending the boundaries of *madhhabs*. This was because, at that time, discussions on Islamic legal reform were gaining momentum, especially in Egypt. At least in this regard, Hasbi was influenced by Egyptian reformist thinkers such as al-Marāghī, who called for *ijtihād* to be renewed by transcending the boundaries of established legal schools of thought. This would overcome the limitations of sectarianism or being bound to a particular school of thought. The discussion on reform gained further momentum when Shaltūt continued al-Marāghī's idea by proposing the idea of *muqāranat al-madhāhib*.¹²¹ However, Hasbi's proposal to reform Islamic law was not limited to transcending the

¹¹⁸ Yudian Wahyudi, 'Hasbi's Theory of *Ijtihād* in the Context of Indonesian Fiqh' (Thesis, Canada, Institute of Islamic Studies, McGill University, 1993).

¹¹⁹ Feener, "Indonesian Movements for the Creation of a 'National Madhhab.'" 95-96.

¹²⁰ Aly Abdulrahman Ahmed, 'Dilemma of Applying Islamic Shari'a through Takhayyur and Talfiq Principles in the Modern Egyptian Legal System' (Thesis, The American University, 2016). 4.

¹²¹ Feener, "Indonesian Movements for the Creation of a 'National Madhhab.'" 96.

boundaries of *madhhabs*. Far from it, he wanted to establish a unique *fiqh* system for Indonesia, which he called *Fikih Indonesia* (Indonesian *fiqh*).¹²²

According to Hasbi, the idea of closing the door to *ijtihād* is a major factor in the stagnation of Islamic law in all Muslim countries, including Indonesia. Hasbi and other Indonesian reformists emphasize that the door to *ijtihād* has never actually been closed. They also argue that *taqlīd*, which is an implication of the notion of closing the door to *ijtihād* has caused the decline of Muslims. Reformists believe that adherence to *taqlīd* is what has caused Islamic law in Indonesia to stagnate. Therefore, they seek to transcend the fortress of *taqlīd*, an idea inspired by reformists such as Muḥammad ‘Abduh. Another factor causing Islamic law in Indonesia to stagnate is the opinion that it is not permissible to go beyond the boundaries of a *madhhab*, moving from one *madhhab* to another, which Hasbi refers to as *talfīq*. He believes that this prohibition prevents Islamic law in Indonesia from meeting the needs of modernity and society.¹²³ As Hasbi stated that "it is not correct to force Muslims to follow a certain *madhhab* in all aspects of life, which sometimes could not meet the interest of society, while there existed a basis in other *madhhabs* to accommodate those interests."¹²⁴

In Indonesia, the debate over closing the door to *ijtihād* and adhering to a single school of thought is represented by two major organizations in Indonesia. NU, for example, is considered traditionalist, following only one school of thought.¹²⁵ On the other hand, Muhammadiyah, considered modernist, argues that the door to *ijtihād* has never been closed and believes that *ijtihād* must always be practiced in order to accommodate social changes.¹²⁶

Hazairin (1905-1975) was another reformist scholar who proposed the idea of creating Indonesian *fiqh*, particularly in 1950. Hazairin's background as an intellectual born in Sumatra and educated in the Dutch academic tradition, particularly in the field of *adat* law, which is the study of customary law in Indonesia, greatly influenced his ideas on reforming Islamic law.¹²⁷ He reformed Islamic law by bridging the gap between Islam and

¹²² Feener, "Indonesian Movements for the Creation of a 'National Madhhab.'" 98

¹²³ Wahyudi, 'Hasbi's Theory of *Ijtihād* in the Context of Indonesian Fiqh'. 27-29.

¹²⁴ Hasbi ash-Shiddieqy, *Dinamika Dan Elastisitas Hukum Islam* (Tintamas, 1975). 21.

¹²⁵ Although in its development, there has been a shift in NU regarding its attitude towards the boundaries of *madhhab*. For instance, NU, which initially prohibited birth control in 1938, later accepted various contraceptive method by 2005, by using Ḥanafī *madhhab* ruling, indicating that doctrinal change has occurred within NU itself. Jeremy Menchik, "The Co-Evolution of Sacred and Secular: Islamic Law and Family Planning in Indonesia," *South East Asia Research* 22, no. 3 (2014): 359–78, <https://doi.org/10.5367/sear.2014.0220>.

¹²⁶ Wahyudi, 'Hasbi's Theory of *Ijtihād* in the Context of Indonesian Fiqh'. 27.

¹²⁷ Feener, "Indonesian Movements for the Creation of a 'National Madhhab.'" 102.

custom.¹²⁸ He wanted to bring aspects of Indonesian customary traditions into discussions of Islamic law in Indonesia,¹²⁹ especially in matters of family law, but his most significant contribution was in the matter of inheritance law.

The idea of reforming Islamic law was based on Hazairin's concern that the concept of closing the door to *ijtihād* had taken root in Indonesia at that time, and that there was no official Islamic legal system in place. Therefore, Hazairin proposed the idea of enforcing Islamic law at the institutional level, namely that Islam should be incorporated into the national system, even though Indonesia is a secular state. He emphasized that by incorporating Islamic law into the national system, Indonesia would not become an Islamic state. Although Hazairin's idea did not receive much attention at the time because it was considered too radical, it contributed to the formation of the Compilation of Islamic Law, conceptually.¹³⁰

One of the things criticized by Hazairin is regarding marriage guardians. According to Najib, there are at least two things criticized by Hazairin; first, regarding guardians as a determining factor in the validity of marriage for women who are underage or adults, and second, limiting guardianship to men only. In the case of adult women and marriage guardians, Hazairin pointed out that Indonesian society generally accepts the Shāfi'ī school of thought, which states that every woman must have a guardian when she marries. However, according to him, there are other schools of thought that do not require a marriage guardian for adult women, namely the Ḥanafī and Shī'a schools of thought. So why does Indonesia still adhere to the Shāfi'ī school of thought? This is the first question posed by Hazairin. The second issue concerns marriage guardians being limited to men. He stated that indeed, in the Shāfi'ī school of thought, women are not permitted to be marriage guardians, but he argued that this is because it aligns with the conditions of Arab society, which has a patrilineal kinship system. This differs from Indonesia, which has patrilineal, matrilineal, and bilateral kinship systems. He questioned why Indonesia does not allow women to be marriage guardians, even though the Quran does not explicitly state whether marriage guardians must be men or not.¹³¹ This is one example of how Hazairin attempted to bridge the gap between Islam and custom.

¹²⁸ Nurlaelawati, *Modernization, Tradition and Identity*. 76.

¹²⁹ Feener, "Indonesian Movements for the Creation of a 'National Madhhab.'" 102.

¹³⁰ Sukiati Sugiono, "Islamic Legal Reform in Twentieth Century Indonesia: A Study of Hazairin's Thought" (Thesis, Institute of Islamic Studies, McGill University, 1999).

¹³¹ Agus Moh Najib, 'Reestablishing Indonesian *Madhhab*: 'Urf and the Contribution of Intellectualism', *Al-Jami'ah: Journal of Islamic Studies* 58, no. 1 (31 July 2020): 171–208, 183–184. <https://doi.org/10.14421/ajis.2020.581.171-208>.

3.4.2 The Process of Creating the *Kompilasi*

Regarding who first came up with the idea to create a compilation of Islamic law, this is still debated. It is difficult to determine who first had the idea to create the Compilation of Islamic Law. In this regard, there are at least three opinions; the first group says that the person who first came up with the idea to create the Compilation was Munawir Sjadzali, who at the time served as Minister of Religious Affairs. He proposed this idea in a public lecture at IAIN Sunan Ampel Surabaya in February 1985. However, there are also those who argue that the idea originated from Bustanul Arifin, who at that time served as Deputy Head of Religious Court Affairs. He organized RAKERNISGAB, a technical cooperation meeting involving the Supreme Court, the Ministry of Religious Affairs, and the Supreme Religious Court to develop Islamic law through jurisprudence. The latter group argued that Bustanul Arifin's initiative was merely a response to Ibrahim Hosen's call to compile or codify Islamic law.¹³²

However, according to Euis Nurlaelawati in her research *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, it was *Bustanul Arifin* who proposed the proposal to create a compilation of Islamic law. Bustanul Arifin's role in the development of the *Kompilasi Hukum Islam* was officially recognized through his appointment as the chairman of the Special Chamber in the Supreme Court, which handled judicial appeals from religious courts. This chamber was established through negotiations between the Ministry of Religious Affairs and the Supreme Court, which strengthened their cooperation. This collaboration was crucial in the process leading to the enactment of the Islamic Judicial Law. In fact, the draft Islamic Judicial Law had been prepared during the tenure of Muhammad Dahlan in the 1970s, but it wasn't until 1982 that the government took action. This was initiated by a proposal from the Ministry of Justice to form a committee, with Bustanul Arifin at the helm, to oversee the process.¹³³

Despite the success of the Act, Arifin was not fully satisfied, as the religious courts lacked a systematic and uniform legal reference. To address this, he proposed the creation of a unifying Islamic legal code, supported by Muslim judges and officials. In 1985, Arifin presented the project to the President, taking advantage of the political situation at the time and the need for support for the *asas tunggal* policy. He argued that unifying the various perspectives on Islamic law into a single codified text would protect the national ideology,

¹³² Ahmad Imam Mawardi, *Socio-Political Background of The Enactment of Kompilasi Hukum Islam Di Indonesia* (Pustaka Radja, 2012). 17-18.

¹³³ Nurlaelawati, *Modernization, Tradition and Identity*. 80-81.

Pancasila. This proposal was immediately approved by the President. One important factor why the proposal to form the Compilation of Islamic Law was quickly approved by the President at that time was because the situation at that time required the President to obtain legitimacy from the Muslim community.¹³⁴

After the President approved the project, Bustanul Arifin, supported by Munawir Sjadzali, the Minister of Religious Affairs at the time, wanted to use the word Codification for their project rather than Compilation. However, this sparked debate among Islamic scholars. Finally, it was decided that the word chosen would be “Compilation,” and thus the name of their project became *The Kompilasi Hukum Islam* (The Compilation of Islamic Law).” One of the reasons why the term chosen was Compilation was to eliminate the possibility of further criticism from the scholars and to ensure that the scholars will accept the idea. Nurlaelawati further emphasized that “*More importantly, the definition was intended to avoid the implication that the government was involved in the creation of Islamic doctrine.*”¹³⁵ In other words, the choice of the word compilation rather than “code” is intended to emphasize that the task of the compilers is only to restate and systematize existing doctrines in a more accessible format.¹³⁶

The choice between compilation and codification is very important in this discourse. Although they appear similar, these two terms have very different meanings. In short, compilation is simply the act of compiling and combining existing laws into a document or statute. However, codification goes beyond that; it involves the creation of new legal rules or the modification of existing legal rules to align them with a coherent system. There are many ideas behind the term Codification, such as modernity or alignment with contemporary needs.

Although in the process of formulating the name of this project, the initiators chose the term Compilation to avoid the impression that the government was involved in the formation of Islamic doctrine, the fact remains that this document is more than just a collection of rules from various legal texts. In fact, some scholars argue that the KHI is a new formulation of Islamic law.¹³⁷ Because even though this project uses the word Compilation, there is no doubt that the main idea behind compiling Islamic law, particularly family law, in any Islamic country is to meet the demands of modernization. Similarly, in Indonesia, the main idea behind the compilation was to meet the demands of modernization

¹³⁴ Nurlaelawati, *Modernization, Tradition and Identity*. 81.

¹³⁵ Nurlaelawati, *Modernization, Tradition and Identity*. 82.

¹³⁶ Mutaqin, “Culture, Islamic Feminism, and the Quest for Legal Reform in Indonesia.” 437.

¹³⁷ Mawardi, *Socio-Political Background of The Enactment of Kompilasi Hukum Islam Di Indonesia*. 15.

in Indonesian society, “Therefore, the project was not only to compile Islamic rulings applicable in Muslim society, but also to introduce other various legal opinions, even those from unconventional and liberal *madhhab*.”¹³⁸ This means that this compilation is also an effort to reform and modernize Islamic law in accordance with the needs of society, such as the codification of Islamic law, particularly in the field of family law or personal status law, which has been done in other Islamic countries, especially in the Middle East. Because the trend toward codification is essentially reform itself. Some researchers have concluded that there are at least three objectives of codification and reform of Islamic law: first, to unify the law; second, to improve the status of women; and third, to respond to everything that has emerged from modernity.¹³⁹

In addition, through an interview conducted by Nurlaelawati with Bustanul Arifin, it was mentioned that as the compilation process progressed, ideas for reforming Islamic law began to emerge. Ideas for reforming Islamic law were introduced to the ulama. Extreme and liberal ideas emerged in the discussions, such as Munawir Sjadzali's idea of *re-actualizing Islamic law*, which aimed to encourage the ulama to no longer be bound by the *madhhab* they followed, so that they could see further, especially pluralism in Islamic law. For example, Sjadzali proposed equality in inheritance between men and women. Sjadzali's extreme views encouraged the ulama to study *fiqh* books outside their *madhhab*, and they even began reading books in Indonesian written by several reformist scholars. The main purpose of this was to ensure that the ulama were aware and not surprised that some Islamic legal reforms would be presented in the compilation.¹⁴⁰

Immediately after the Compilation was approved by the President and representatives of Islamic legal scholars, they immediately formulated the Compilation. At least four steps were taken before the contents of the Compilation were finally compiled. The first step was gathering data from various Islamic law books, known *kutub al-fiqh*, which served as the foundation for the Compilation. The formulation of the Compilation involved the use of 38 different books,¹⁴¹ not limited to those from the Shāfi'ī school,

¹³⁸ Nurlaelawati, *Modernization, Tradition and Identity*. 83.

¹³⁹ Khoiruddin Nasution, ‘Menjamin Hak Perempuan dengan Taklik Talak dan Perjanjian Perkawinan’, *Unisia* 31, no. 70 (25 November 2008): 333–42, 33. <https://doi.org/10.20885/unisia.vol31.iss70.art3>.

¹⁴⁰ Nurlaelawati, *Modernization, Tradition and Identity*. 83.

¹⁴¹ The following is a list of 38 *fiqh* books used in the compilation of the Indonesian Islamic Law Book (KHI), which I quoted from the work of al-Mawardi. These sources are not exclusive to the Shāfi'ī school of thought, but also include works from the Mālikī, Ḥanafī, Ḥanbalī, and Zāhirī schools, as well as comparative *fiqh* works: “(1) *Hashiyya Kifāyat al-Akhyār* by Ibrahim ibn Muhammad al-Bājūrī, (2) *Fath al-Mu'in* by Zayn al-Dīn al-Mālibārī, (3) *Sharqāwī 'alā al-Taḥrīr* by 'Alī ibn Ḥijāzī ibn Ibrāhīm al-Shargāwī, (4) *Mughnī al-Muḥtāj* by Muḥammad al-Sharbīnī, (5) *Nihāyat al-Muḥtāj* by al-Ramlī, (6) *Sharqāwī 'alā al-Hudūd* by 'Alī ibn Ḥijāzī ibn Ibrāhīm al-

although most are indeed from this school due to its prevalence in Indonesia. The Compilation also incorporates texts from other Sunni schools, such as the Ḥanafī, Mālikī, and Ḥanbalī schools.¹⁴²

The second step involved conducting interviews with religious scholars. A total of 166 scholars, considered to be representatives of Indonesia's religious authorities, were interviewed in ten different cities. Some of these scholars were representatives of Islamic organizations, while others were independent scholars, mainly from Islamic boarding schools. The interviews were conducted individually and collectively at predetermined locations, where the scholars' opinions on the issues to be included in the Compilation were sought. The third step in the compilation process involved comparative studies with other Muslim-majority countries, particularly Egypt, Turkey, and Morocco, where Indonesian experts in Islamic law were sent. These countries were chosen for their diverse approaches to Islamic law: Morocco follows the Mālikī school, Turkey is a secular state with the Ḥanafī influences, and Egypt adheres to the Shāfi'ī *madhhab*.¹⁴³ The purpose of these studies was to understand how each country applied Islamic law, particularly in areas relevant to the KHI's objectives. This comparative analysis helped in formulating an appropriate framework for Islamic law in Indonesia, taking into account different legal

Shargāwī, (7) *I'ānat al-Ṭālibīn* by Sayyid Bakrī al-Dimyāṭī, (8) *Tuhfat al-Muhtāj* by Shihāb al-Dīn Aḥmad Ibn Ḥajar al-Ḥaytamī, (9) *Targhib al-Mushtāq* by Shihāb al-Dīn Aḥmad Ibn Ḥajar al-Ḥaytamī, (10) *Bulghat al-Sālik* by Aḥmad ibn Muḥammad al-Sāwī, (11) *Al-Farā'id* by Shamsūrī, (12) *Al-Mudawwanāt al-Kubrā* by Sahnūn ibn Sa'īd al-Tanūkhī, (13) *Kanz al-Rāghibīn wa Sharḥuhu* by Jalāl al-Dīn Muḥammad al-Maḥallī, (14) *Faṭḥ al-Wahhāb* by Abū Yaḥyā Zakariyyā al-Anṣārī, (15) *Bidāyat al-Mujtahid* by Ibn Rushd, (16) *Al-Umm* by Muḥammad ibn Idrīs al-Shāfi'ī, (17) *Bughyat al-Mustarshidīn* by 'Abd al-Raḥmān ibn Muḥammad al-'Alawī, (18) *'Aqīdah wa al-Sharī'ah* by Maḥmūd Shaltūt, (19) *Al-Muḥallā* by 'Alī ibn Muḥammad Ibn Ḥazm, (20) *Al-Wajīz* by Abū Ḥamid al-Ghazālī, (21) *Faṭḥ al-Qādir 'alā al-Hidāyah* by Muḥammad ibn 'Abd al-Wāḥid al-Siwāsī, (22) *Al-Fiqh 'alā Madhāhib al-Arba'ah* by 'Abd al-Raḥmān al-Jāzīrī, (23) *Fiqh al-Sunnah* by Sayyid Sābiq, (24) *Kashf al-Qinā' 'an Tadmīn al-Ṣanā'i* by Ibn Raḥḥāl al-Ma'dānī, (25) *Majmū' Fatāwā Ibn Taymiyyah* by Aḥmad ibn Taymiyyah, (26) *Qawānīn al-Shar'īyah* by al-Sayyid 'Uthmān ibn Aqīl ibn Yaḥyā, (27) *Al-Mughnī* by 'Abd Allāh ibn Aḥmad Ibn Qudāmah, (28) *Hidāyah Sharḥ Bidāyat al-Mubtadī* by 'Alī ibn Abī Bakr al-Marghīnānī, (29) *Qawānīn al-Sharḥīyah* by al-Sayyid 'Uthmān ibn Aqīl ibn Yaḥyā, (30) *Mawāhib al-Jalīl* by Muḥammad ibn Muḥammad al-Ḥaṭṭāb, (31) *Hashiyya Radd al-Mukhtār* by Muḥammad Amīn ibn 'Umar Ibn 'Abdīn, (32) *Al-Muwaṭṭa'* by Mālik ibn Anas, (33) *Hashiyya al-Ḍasūqī 'alā al-Sharḥ al-Kabīr* by Ibn 'Arafah al-Ḍasūqī, (34) *Badā'i' al-Ṣanā'i fī Ṭartīb al-Sharā'i* by Abū Bakr Ibn Mas'ūd al-Kasānī, (35) *Tabyīn al-Ḥaqā'iq* by Mu'īn al-Dīn ibn Ibrāhīm al-Farāhī, (36) *Al-Fatāwā al-Hindiyyah* by al-Shaykh Nizām and other scholars, (37) *Faṭḥ al-Qādir* by Muḥammad ibn Aḥmad al-Ṣafāṭī al-Zaynabī, (38) *Nihāyat al-Zayn* by Muḥammad Ibn 'Umar al-Nawāwī." See Mawardi, *Socio-Political Background of The Enactment of Kompilasi Hukum Islam Di Indonesia*. 22-25

¹⁴² Ahmad Imam Mawardi, "The Political Backdrop of the Enactment of the Compilation of Islamic Laws in Indonesia," in *Shari'a and Politics in Modern Indonesia*, ISEAS Series on Islam (ISEAS Institute of Southeast Asian Studies, 2003). 130.

¹⁴³ I assume, what is meant by the statement that "Egypt adheres to the Shāfi'ī *madhhab*" is that the majority of its population follows the Shāfi'ī school. However, it should be noted that, in terms of legislation, the country has historically adopted the Ḥanafī school.

traditions and practices. In addition, historically, these countries were the first to codify Islamic law and reform various issues, especially those related to family law.¹⁴⁴

The fourth step in the process of compiling *the Kompilasi Hukum Islam* (KHI) involved organizing a five-day workshop in Jakarta in 1988. This workshop was inaugurated by the head of the Supreme Court, Ali Said, and the Minister of Religious Affairs. The purpose of the workshop was to discuss and refine the findings from the previous steps, which included gathering data from various Islamic law books, interviews with 'ulama', and comparative studies with other Muslim-majority countries. The workshop served as the final stage before the KHI was officially adopted as a standardized reference for the Religious Courts in Indonesia. In June 1991, the draft was formalized through Presidential Instruction No. 1/1991. This code is divided into three sections. The first section addresses marriage, comprising nineteen chapters and 170 articles. The second section focuses on inheritance, which includes four chapters and 23 articles. The final section pertains to endowment, consisting of five chapters and 14 articles. At this time, an Islamic legal code in Indonesia called *the Kompilasi Hukum Islam* (Compilation of Islamic Law) has been officially adopted as a standardized reference for the Religious Courts in Indonesia, which also signifies that *Sharī'ah* Law has been incorporated into the national legal system.¹⁴⁵

3.5 Conclusion

This chapter has discussed how *takhayyur* and *talfīq*, which are tools that already existed in the pre-modern period, were applied and adapted in the modern era, particularly in the context of legal codification and reform. In the Ottoman Empire, codification marked an important step in the modernization of Islamic law. The Ottoman *Majallah*, or *Mecelle*, made a significant contribution to the codification of civil law, particularly in contracts and torts, while introducing early legal eclecticism by incorporating minority Ḥanafī opinions and, occasionally, perspectives from other schools of thought. At the same time, the Ottoman Family Rights Code (OLFR) addressed family law and represented the first explicit application of *takhayyur* and *talfīq* in state legislation, particularly in response to pressing social issues such as women's rights in marriage and divorce. Together, these codifications demonstrate that legal reform can remain consistent with Islamic principles

¹⁴⁴ Mawardi, "The Political Backdrop of the Enactment of the Compilation of Islamic Laws in Indonesia." 130.

¹⁴⁵ Mawardi, "The Political Backdrop of the Enactment of the Compilation of Islamic Laws in Indonesia." 130-131

while responding to the needs of society by drawing on the diversity of opinions in classical *fiqh*, namely through the use of the institutions of *takhayyur* and *talfiq*.

In the modern period, the traditional concept of *talfiq*—combining two or more opinions in a single case—is rarely found in codified Islamic family law. More common is diachronic *talfiq*, which occurs in only a few cases, and in many cases, what is currently referred to as *talfiq* is actually *takhayyur*. Therefore, the term *talfiq* in modern codifications no longer has its pre-modern meaning; it is primarily understood as *takhayyur* and, in some cases, as diachronic *talfiq*.

By tracing the development of *takhayyur* and *talfiq* from the pre-modern period in the previous chapter to the modern era—from the Ottoman Empire to Egypt, and then to Indonesia—this chapter highlights both continuity and change, showing how classical Islamic legal concepts have been adapted to meet the needs of modern states.

CHAPTER IV

TRACING PATTERN OF *TAKHAYYUR* AND *TALFIQ* IN INDONESIA'S COMPILATION OF ISLAMIC LAW

4.1 Chapter Introduction

In this chapter, I will discuss the cases in the *Kompilasi Hukum Islam* (The Compilation of Islamic Law) that depart from the Shāfi'ī school of thought and the cases that strictly follow the Shāfi'ī school of thought to understand how reforms have taken place in Indonesia, particularly in terms of family law, and to see the extent to which these reforms have been shaped by *takhayyur* and *talfiq*.

4.2 Cases in the *Kompilasi Hukum Islam* that Depart from the Shāfi'ī School of Thought

Through the codification of Islamic law, divorce law reform has been carried out gradually in most Muslim-majority countries, with the primary aim of enhancing the protection of women within marriage. This divorce reform began with the introduction of procedural restrictions limiting the husband's right to pronounce talaq unilaterally. For example, the reform of Islamic family law in Egypt, as stipulated in the Personal Status Law of 1929, states that talaq pronounced by a husband who is drunk or under duress is invalid. Similarly, divorce reform related to triple talaq stipulates that a husband who pronounces talaq three times in one sitting is only counted as one talaq.¹⁴⁶ This is a form of reform undertaken by Egypt to reduce divorces that could be detrimental to women. Egypt achieved this by abandoning the strict Ḥanafī school of thought and even the other three schools of canonization and preferred to adopt principles from Ibn Taymiyya.¹⁴⁷ Therefore, *takhayyur* in this case departed even from the four recognized *madhhabs* to adopt a rare opinion of Ibn Taymiyya.

In addition, divorce reforms began to expand women's rights in the dissolution of marriage. This was achieved by expanding the grounds on which a woman could file for divorce (*taṭliq*) or *khul'*, especially in most countries that follow the Ḥanafī school of thought.¹⁴⁸ Why is the ground for divorce being expanded in countries especially that follow the Ḥanafī school of thought? As Esposito explained, this is because “In the Ḥanafī

¹⁴⁶ Nadia Sonneveld, “Divorce Reform in Egypt and Morocco: Men and Women Navigating Rights and Duties,” *Islamic Law and Society* 26, nos. 1–2 (2019): 149–78, <https://doi.org/10.1163/15685195-00260A01>.

¹⁴⁷ Elgawhary, *Rewriting Islamic Law*. 155.

¹⁴⁸ Sonneveld, “Divorce Reform in Egypt and Morocco.” 150.

school, the authoritative school for Egyptian *Shari'ah* courts, there are virtually no grounds upon which a wife can free herself from an undesirable marriage except for her husband's impotence."¹⁴⁹

This is the only reason in the Ḥanafī school of thought for a woman to request a divorce, which is very disadvantageous for a woman. Therefore, countries that were previously dominated by the Ḥanafī school of thought have borrowed from other *madhhabs* to give divorce access for women, one of them is Egypt. Following the codification of Egyptian law in 1920 and 1929, Egypt introduced new grounds for women to file for divorce, including the imprisonment of the husband for more than three years,¹⁵⁰ using Mālikī school of thought.

The divorce reform has also been implemented in Indonesia. Before 1974, it was very difficult for Muslim women to obtain a divorce. All a wife could do was persuade her husband to utter the word “talak,” or she had to convince a judge that her husband had violated the marriage contract, which in Indonesia is called *ta'liq talak*. Following the example of other Muslim countries, Indonesia passed a national marriage law in 1974, which aimed to control divorce and provide more grounds for women to file for divorce. These provisions were adopted and expanded by the Compilation of Islamic Law, particularly regarding the grounds that women could use to file for divorce.¹⁵¹ One of these is that a woman can file for divorce if her husband has been imprisoned for five years.¹⁵² The Compilation gives the right of a wife to file divorce through the courts if her husband is imprisoned. This is regulated in Compilation Article 116. Furthermore, Article 119 of the KHI stipulates that divorce suits decided by the court are *talak bain sughra*, not *fasakh*.

¹⁴⁹ Esposito and DeLong-Bas, *Women in Muslim Family Law*. 51.

¹⁵⁰ Sonneveld, “Divorce Reform in Egypt and Morocco.” 150.

¹⁵¹ Euis Nurlaelawati, “Muslim Women in Indonesian Religious Courts,” *Islamic Law and Society* 20, no. 3 (2013): 242–71, <https://doi.org/10.1163/15685195-0010A0003>.

¹⁵² There are eight grounds for divorce stipulated by the *Kompilasi Hukum Islam* (Compilation of Islamic Law): “(1) either one of the party committed adultery or drunkard, drug addicted, gambler and the like that are unrecoverable, (2) either one of the party leaves for the period of 2 (two) years in succession with no valid permission of the other party or other things beyond his ability, (3) either one of the party is imprison for 5 (five) year or other severer prison after the marriage, (4) either one of the party does a cruelty or heavy ill treatment which endangers the other party, (5) either one of the party suffer from an illness that unable him or her to perform his/her duty as a husband or a wife, (6) between the husband and the wife there are endless quarreling which cannot guarantee for the achievement of the harmonious life as a family, (7) a husband violates the ‘taklik talak’, (8) religious conversion that causes the disharmony of the family life.” See the English version of KHI at Arskal Salim and Azyumardi Azra, *Shari'a and Politics in Modern Indonesia* (ISEAS–Yusof Ishak Institute, 2003). In this study, I focus on the third ground, namely that women may file for divorce if their husbands are imprisoned.

Thus, the legal implication is that it closes the possibility of reconciliation for the husband even during the *'iddah* period. What can be done is to remarry with a new contract.¹⁵³

In the Shāfi'ī school of thought, which is the dominant school of thought in Indonesia, women can initiate divorce if their husband are unable to provide for them, are impotent,¹⁵⁴ or are missing. Regarding a husband who is imprisoned, as explained by al-Zuhaylī, most scholars, except those from the Mālikī school, do not allow divorce on the grounds of a husband being detained, arrested, or imprisoned, as there is no legal evidence to support it. However, the Mālikī school permits divorce if the husband has been absent for a year or more, regardless of the reason. If a husband is imprisoned for a year or longer, the wife can request a divorce, which is considered as *talak bain sughra*.¹⁵⁵

And if we look at the Compilation, in this case the Compilation has departed from the Shāfi'ī school of thought; it does not follow the Shāfi'ī doctrine in this matter. Instead, it chooses to take an eclectic approach using the *takhayyur* method, which is to choose the Mālikī school of thought. That is, allowing women to initiate divorce on the grounds that their husbands are imprisoned, and this is classified as *talak bain sughra*.

The position taken by the Indonesian Compilation of Islamic Law is similar to that taken by the Moroccan Codification. Morocco had already reformed this in 1958, which expanded the grounds for divorce for Moroccan women. Nadia Sonneveld explains that this is because the official school of law adopted by Morocco, the Mālikī school, is more liberal in granting women the right to file for divorce than the other three Sunni schools. Furthermore, Sonneveld notes that Mālikī law has become the basis for reform, particularly in the area of divorce, in many other Muslim-majority countries.¹⁵⁶ This is due to what is mentioned in the research by Coetsee and al-Marakeby that the Mālikī approach, which is more permissive towards marriage annulment and emphasizes the analogy between marriage and sale, provides greater practical benefits for women to annul their marriages. In addition, they emphasize that in certain situations, a wife can annul the marriage if her husband does not fulfill her expectations or desires. For example, if a husband travels and goes missing, Mālikī scholars argue that the wife can request annulment within a maximum period of four years. On the other hand, the Ḥanafī school requires the wife to wait until her husband's life is expected to end, around ninety years, before she can request annulment and remarry. Additionally, if a wife feels she is not receiving sexual satisfaction due to her

¹⁵³ Ali Trigiyatno, 'Suami Dipenjara Sebagai Alasan Cerai Gugat; Perspektif Fikih dan Legislasi Negeri Muslim', *Arena Hukum* 14, no. 2 (31 August 2021): 390–411, 399.

¹⁵⁴ Youcef L. Soufi, *The Rise of Critical Islam: 10th-13th Century Legal Debate*, 1st ed. (Oxford University Press, 2023), <https://doi.org/10.1093/oso/9780197685006.001.0001>. 40, 46.

¹⁵⁵ Wahba al-Zuhaylī, *al-Fiqh al-Islāmī wa-Adillatuhu*, vol. 9 (Dār al-Fikr, 2006). 7068.

¹⁵⁶ Sonneveld, "Divorce Reform in Egypt and Morocco." 150.

husband's frequent travels and fears she cannot control her sexual desires, the Mālikī school occasionally permits the wife to request the annulment of the marriage from a judge.¹⁵⁷ This also explains Sonneveld's research, which states that the Mālikī school is used by other countries in reforming Islamic law in terms of grounds divorce for women.

Therefore, in this case, the Compilation prioritizes women's welfare over the Shāfi'ī doctrine, because a husband who is imprisoned for 5 years will greatly harm women, as the husband cannot provide for his wife's physical and emotional needs. Therefore, the Compilation adopts a pragmatic eclectic approach to protect the rights of the wife by utilizing the more flexible Mālikī school of thought in matters of divorce. In this case, Indonesia has used the concept of *takhayyur* by borrowing the opinion of the Mālikī school of thought to give women broader grounds for filing for divorce.

The next case in which the Compilation of Islamic Law departed from the Shāfi'ī school of thought and chose to borrow doctrines from other schools, was regarding wasiat wajibah (obligatory bequests). In Indonesia, the concept of wasiat wajibah is used to address the issue of adopted children. This is regulated in the Compilation in Article 209.

Culturally, adopting children has become a common practice in Indonesia, especially in Java. Not only that, they also inherit from each other, which is permitted under customary law. However, this poses a problem in terms of Islamic doctrine. In classical jurisprudence, adoption is permitted, but inheritance between parents and adopted children is not. Therefore, to address this issue, where the Compilation does not wish to abolish customary law and at the same time does not want to deviate from Islamic legal doctrine, the Compilation adopts the concept of wasiat wajibah. With the implementation of this rule, adopted children are entitled to receive one-third of their parents' estate. In other words, in this case, the adopted child does not inherit from the adoptive parents, but the adopted child is entitled to a share of the adoptive parents' estate through the will procedure. It should be noted that the concept used by the Compilation of Islamic Law here is wasiat wajibah (obligatory bequests). The consequence of the wasiat wajibah concept is that if there is no will from the adoptive parents, the adopted child can apply to the Religious Court to obtain a will.¹⁵⁸

In this case, the Compilation explicitly agrees with Ibn Ḥazm's opinion that a will is an obligation for Muslims, and if someone does not make a will during their lifetime, the

¹⁵⁷ M. Coetsee and M. al-Marakeby, "Between Sale and Worship: Consistent Inconsistencies in Classical Hanafī and Mālikī Rulings on Marital Annulments," *Islamic Law and Society* 29, no. 4 (2022): 385–424, <https://doi.org/10.1163/15685195-bja10023>.

¹⁵⁸ Euis Nurlaelawati, "The Debate on Muslim Family Law Reforms in Indonesia: The Case of Representation of Heirs and Obligatory Bequest," *Al-Jami'ah Journal of Islamic Studies* 41, no. 2 (2003): 243–75.

court can grant a will to their family. Ibn Ḥazm refers to the verse about wills, which states that wills are obligatory for relatives. Here, the compilers of the Compilation interpret relatives as close relationships, not just genetic relationships. Therefore, adopted children must have a close family relationship, and the compilers of the Compilation include them in the group of relatives who are entitled to receive a will.¹⁵⁹ Ibn Ḥazm argued that the *wasiat wajibah*, or mandatory will, is a requirement for anyone who leaves behind parents or close relatives who are not entitled to inherit due to factors such as religious differences, slavery, or other reasons that prevent them from being heirs. This obligation persists even if the deceased did not explicitly make a will during their lifetime. In the context of legal codification, the application of *wasiat wajibah* has been narrowed to two specific cases: for orphaned grandchildren and for adopted children.¹⁶⁰

In this way, the Compilation has made a decision even by choosing an opinion outside the canonized school of thought and choosing to adopt Ibn Ḥazm's opinion. The Compilation no longer follows the Shāfi'ī doctrine, which states that bequests to relatives are recommended but not obligatory. Why did the Compilation of Islamic Law abandon the Shāfi'ī school of thought, which states that a will is merely a recommendation and not obligatory, and instead adopt the opinion of Ibn Ḥazm, who states that a will is obligatory for relatives? This is because the Compilation sought to address the issue of adopted children. Instead of relying on customary law, which allows adopted children and adoptive parents to inherit from one another—a practice that violates classical inheritance law—the Compilation adopts eclecticism by abandoning the Shāfi'ī school and adopting opinions outside the four canonical schools. I assume that this was done with two main objectives: *maṣlaḥah mursalah* (public interest) and the desire to resolve this issue using Islamic doctrine itself, by utilizing the legal pluralism that exists within the various schools of Islamic law.

The next case in which the Compilation of Islamic Law departed from the Shāfi'ī school of thought was regarding child custody. In pre-modern doctrine, the four canonical schools of thought agreed that custody of children who are not yet capable of reasoning is the right of the mother. Shāfi'ī al-Nawawī, for example, explains that mothers have custody rights over their children rather than fathers, but only as long as the children do not yet have the ability to reason (*man lā tamyiz lahu*). In other words, as children grow older, they

¹⁵⁹ Nurlaelawati, "The Debate on Muslim Family Law Reforms in Indonesia: The Case of Representation of Heirs and Obligatory Bequest," 266.

¹⁶⁰ Ismail -, "Wills of "Wajibah" and Renewal Thoughts of Islamic Inheritance Law in Indonesia", *INNOVATIO: Journal for Religious Innovation Studies* 21, no. 2 (16 December 2021): 122–33, 127–28. <https://doi.org/10.30631/innovatio.v21i2.141>.

develop greater rational abilities, which legal experts use as a basis for denying mothers custody rights over their children.¹⁶¹ According to the Shāfi'ī school of thought, a mother's custody rights only last until her child reaches the age of seven. After that, the Shāfi'ī school of thought gives the child the right to choose their guardian, whether they want to remain under their mother's care or be cared for by their father. At this age, children are considered to have wisdom (*tamyīz*) and are deemed capable of making choices.¹⁶²

The issue of child custody is one of the main projects in the discourse on the reform and codification of Islamic law. Möller, for example, argues that the state has intervened in child custody rights in recent decades. In Muslim Arab countries that adhere to civil law traditions, regulations regarding child custody have been modified through codification and legislative reform. There are at least two main factors that determine whether a country has reformed child custody issues: first, whether they have expanded the rights of female custodian, and second, whether they emphasize the concept of the best interests of the child. Let's take Egypt as an example. Egypt has modified its child custody laws by extending the period during which women can retain custody. Initially, female custody rights only lasted until the boy was seven years old and the girl was nine years old, but Egypt raised this age limit to fifteen years for both boys and girls.¹⁶³

In addition, some specific regulations have shifted away from pre-modern provisions regarding child custody, discarding the idea that custody of minors is solely a woman's right. This marks a shift from pre-modern legal doctrine, in which child custody was largely viewed as a woman's responsibility. Instead, many modern Muslim jurisdictions have promoted fathers in the hierarchy of potential guardians, positioning them as the second choice. This means that they assume custody if the mother is deemed unfit or unavailable. Here the concept of best interest is used.¹⁶⁴

The regulation of custody after divorce is outlined in the Compilation, Article 105, which assigns custody of children under 12 years to their mothers. For children aged 12 and above, they are given the autonomy to choose either parent as their guardian. I have mentioned earlier that in the Shāfi'ī school of thought, mothers have superior rights to care for their children who are still under the age of puberty, where the Shāfi'ī school of thought

¹⁶¹ Anver M. Emon and Urfan Khaliq, 'Islamic Law and Child Custody', in *Jurisdictional Exceptionalism: Islamic Law, International Law and Parental Child Abduction*, 1st ed. (Cambridge University Press, 2021), 147–217, 159–160. <https://doi.org/10.1017/9781108938693.007>.

¹⁶² Mudasra Sabreen, 'Custody in Islamic Law: A Law Based on Presumptions', *Islamic Studies* 56, no. 3–4 (31 December 2017): 224–43, 230. <https://doi.org/10.52541/isiri.v56i3-4.341>.

¹⁶³ Lena-Maria Möller, 'An Enduring Relic: Family Law Reform and the Inflexibility of Wilāya', *American Journal of Comparative Law* 63, no. 4 (14 December 2015): 893–925, 897–98. <https://doi.org/10.5131/ajcl.2015.0027>.

¹⁶⁴ Möller, "An Enduring Relic." 899–900.

argues that the age of puberty is seven years old. Therefore, in this case, the Compilation has departed from the Shāfi'ī school of thought, because the compilation no longer uses the age of seven as the limit for puberty, but instead uses the age of 12.¹⁶⁵

4.3 Cases in the *Kompilasi Hukum Islam* that Strictly Adhere to Shāfi'ī School of Thought

The first case in the Compilation that uses the Shāfi'ī school of thought is the prohibition of a Muslim man marrying non-Muslim women, including Muslim women, *ahl al-kitāb* (the people of the book). This appears in Chapter VI on the “Prohibition in Marriage”, article 40, point c “a Muslim man is prohibited from marrying a non-Muslim woman”. This is considered the most controversial article in the Compilation. This is because the Compilation takes a narrower approach than the majority opinion in Islamic jurisprudence.¹⁶⁶

The majority opinion in Islamic jurisprudence, including Ḥanafī, Mālikī, and Ḥanbalī, permits a Muslim man to marry a non-Muslim woman, provided she is Christian or Jewish.¹⁶⁷ They refer to the Quranic verse about *ahl al-kitāb* (the people of the book). This differs from the Shāfi'ī school of thought, which narrows the term *ahl al-kitāb* to refer only to Jews and Christians whose lineage go back to the pre-Islamic time. This differs from the opinion of the majority, who interpret the term *ahl al-kitāb* to refer to Jews and Christians in general, without being bound by any changes. This is what is happening in Indonesia. The Compilation adheres to the increasingly narrow definition created by the Shāfi'ī school. The main question is whether Jews and Christians in Indonesia are classified as *ahl al-kitāb*? Based on verse 5:5 of the Quran, followers of both religions are included in this group. However, the evolving reality has led to deviations from the sacred texts of both religions, so they are no longer referred to as *ahl al-kitāb*.¹⁶⁸

It should be noted that the prohibition of Muslim men marrying non-Muslim women has already been discussed by the Indonesian Ulema Council (MUI) in 1980.

¹⁶⁵ ‘Sharia-Based Laws: The Legal Position of Women and Children in Banten and West Java’, in *Islam, Politics and Change*, by Euis Nurlaelawati (Leiden University Press, 2016), 137–66, 149. <https://doi.org/10.24415/9789400602311-009>.

¹⁶⁶ Siti Musdah Mulia, ‘Muslim Family Law Reform in Indonesia: A Progressive Interpretation of The Qur’an’, *Al-Mawarid* 15, no. 2 (14 November 2015): 1–18, 15. <https://doi.org/10.20885/almawarid.vol15.iss2.art1>.

¹⁶⁷ Leena Salah Azzam, “The Regulation of Interfaith Marriages in Islamic Legal Discourse” (Thesis, American University, 2015). 1.

¹⁶⁸ Zubair and Muhammad Faisal Hamdani, ‘The Qur’an and Muslim Men’s Marriages to Women of the People of the Book (*Ahl Kitab*) (an Interpretive Essay of *Ahl Kitab* on Qur’an 5:5)’, *Cogent Arts & Humanities* 12, no. 1 (31 December 2025): 2472542, <https://doi.org/10.1080/23311983.2025.2472542>. 4.

Therefore, the Compilation has the same stance as the MUI in this case.¹⁶⁹ Therefore, it is important to examine the reasons and motivations behind the Compilation and the MUI's prohibition of a Muslim man marrying a non-Muslim woman of the People of the Book, which indicates that the Compilation has strictly adhered to the opinion of the Shāfi'ī school of thought.

The position held by the MUI is considered very strict when compared to the position taken by fatwa institutions in other Muslim countries, such as *Dār al-Iftā' al-Miṣrīyah* in Egypt (the official institution that issues fatwas in Egypt), which allows Muslim men to marry non-Muslim women of the People of the Book, although it is not recommended. The MUI takes this position based on what they believe to be *al-Maṣāliḥ al-Mursalah* (for the public interest or for the benefit of the Indonesian Muslim community). Thus, the principle used by the MUI in this prohibition is the principle of caution and the assessment that the *mafsadat* (harm) of interfaith marriage is greater than its *maṣlaḥah* (benefit), therefore all possibilities of *mafsadat* must be eliminated. The stance of the MUI and KHI is seen (particularly by the progressive scholars) as not reflecting Indonesia's moderate stance. However, the MUI's fatwa and the Compilation of Islamic Law remain the main reference for the state in dealing with interfaith marriages.¹⁷⁰

It is crucial to take into account the religious dynamics and historical context of Indonesian society. In Indonesia, where Muslims constitute the majority, there is still a predominantly negative attitude towards interfaith marriages. The religious convictions of Indonesian Muslims tend to be more pronounced than the interfaith dialogue between different religions.¹⁷¹ I assume that this religious sensitivity is caused by the Shāfi'ī school of thought, which is deeply rooted in Indonesian society, turning the legal opinion as embedded social norm within the social fabric. This is what led the Compilation of Islamic Law and the Indonesian Ulama Council (MUI) to prohibit interfaith marriages with non-Muslim women of the People of the Book.

Instead of choosing the opinions of contemporary scholars who promote concepts that have emerged from nation-states and the imposition of modernity, such as freedom of religion, human rights, and the right to love one another, this compilation chooses to strictly follow the Shāfi'ī school of thought. This compilation prioritizes Indonesian culture over

¹⁶⁹ Atho Mudzhar, "Socio History Approach to Islamic Law," *Al-Jami'ah Journal of Islamic Studies* 61 (1998): 78–88. 85.

¹⁷⁰ Eva F. Nisa, "Interfaith Marriages in Indonesia: Between the Law, State Ideology, and Progressive Muslim Voices," in *Muslim Marriage and Non-Marriage* (Leuven University Press, 2023).

¹⁷¹ Zubair and Hamdani, 'The Qur'an and Muslim Men's Marriages to Women of the People of the Book (*Ahl Kitab*) (an Interpretive Essay of *Ahl Kitab* on Qur'an 5:5). 2.

modern ways of thinking regarding interfaith marriage. In this context, exclusivity in matters of belief has become deeply ingrained in Indonesian culture, which, once again, has been shaped by exclusive interpretations throughout its history.

The second case in the Compilation that uses the Shāfi'ī school of thought relates to the requirement of a wali (Guardian) in a valid marriage. It appears in Chapter IV on the "Conditions and Requirements of Marriage", article 19, "The 'Wali Nikah' in a marriage is a condition to be fulfilled by the bride who will act to give the marriage".

The majority of jurists, particularly from the Shāfi'ī, Mālikī, and Ḥanbalī schools of thought, argue that marriage has no legal force if the guardian does not play a role in the contract. This is based on the ḥadīth of 'Ā'isha, "Marriage is not valid without a guardian and two just witnesses," and also the ḥadīth of Abū Dāwūd, "There is no valid marriage without a guardian." The Compilation refers to both ḥadīth in its stipulation that the guardian is an essential element of marriage. Unlike the majority opinion of scholars, the Ḥanafī school of thought permits marriage without a guardian for adult women. It argues that a guardian in marriage is only necessary for women who are not yet mature in their thinking and have not yet reached puberty. This means that adult women who are mature in their thinking have the right to marry themselves without a guardian.¹⁷²

Let us examine Tunisia's codified law as a comparison. Tunisia is known as one of the Muslim-majority countries that is very radical in reforming Islamic law,¹⁷³ using the concept of *takhayyur*. One example is related to the status of guardians in valid marriages.

Tunisia, which historically follows the Mālikī school of thought, initially viewed the guardian as having significant authority in determining a woman's marriage, in accordance with Mālikī doctrine. However, there has been a shift in this regard. Under Article 3 of the Personal Status Code (PSC), the consent of both prospective spouses is mandatory, which contradicts the Mālikī doctrine, which permits the guardian to force a woman to marry, except in the case of an adult woman who is not a virgin. Additionally, the PSC stipulates that the marriage is conducted by the prospective husband and wife themselves, which contradicts the Mālikī rule stating that the bride's marriage guardian (usually her father) represents her. Thus, Tunisia allows adult women to marry without a guardian, which is a step forward in granting women greater autonomy in matters of marriage. In Mālikī doctrine, women cannot marry without their father's consent, whereas

¹⁷² Ahmad Fernanda, Salma Salma, and Rahmat Hidayat, 'TAQNIN FIKIH: Transformation of Marriage Law in Indonesia', *Istinbath* 23, no. 2 (8 October 2024): 244–58, 250. <https://doi.org/10.20414/ijhi.v23i2.694>.

¹⁷³ For a detailed discussion of Tunisia's legal reforms, See Sarah Grosso, *Judging Women's Rights: Gender & Citizenship in Ben Ali's Tunisia*, vol. 22, *Women and Gender: The Middle East and the Islamic World*, (Brill, 2024).

according to the PSC, they can. This change represents a significant break from the more conservative legal traditions of the past and reflects a shift from the Mālikī school of thought toward a more progressive approach, drawing on the doctrines of the Ḥanafī school.¹⁷⁴

The same situation is found in the codification of Moroccan family law. The codification of Islamic law in Morocco, known as the *Mudawwana*, initially retained strict rules regarding guardianship in marriage and the right of a guardian to force his daughter to marry, which is characteristic of classical Mālikī doctrine, the dominant school of thought in Morocco. According to the *Mudawwana*, a woman cannot marry without a male guardian (*walī*) acting on her behalf, reflecting a more conservative approach compared to the Ḥanafī school of thought, which allows women to marry without a guardian. Moroccan legislators sought to demonstrate reformist intent by stating that the guardian institution aims to protect the interests of the bride, and the right to force a daughter into marriage is limited to cases approved by a judge. Nevertheless, the overall structure of the *Mudawwana* remains consistent with traditional Mālikī principles, resulting in limited reforms compared to the more liberal approach applied in Tunisia's family law code.¹⁷⁵

However, the new code implemented by Morocco in 2004, *Mudawwanat al-Usra*, reformed various aspects, one of which was the institution of guardianship in marriage. Legislators decided to give adult women the opportunity to marry without a guardian (Articles 25-25 Mud). This new law adopts the dominant view in the Ḥanafī school of thought, thus remaining within the bounds of classical law. Under the new 2004 law, adult Moroccan women can marry independently, although they still have the option to seek assistance from a male guardian. From this, it can be seen that the latest code used by Morocco, *Mudawwanat al-Usra*, also allows a woman to marry without a guardian by adopting the doctrine of the Ḥanafī school of thought.¹⁷⁶

The reform of Islamic family law in Morocco is considered one of the most significant in harmonizing Islamic legal principles with concepts of modernity such as freedom of choice and equality, without abandoning Islamic legal authority. For example, through this case, Islamic legal reform in Morocco has adopted marriage regulations that

¹⁷⁴ Maaïke Voorhoeve, *Gender and Divorce Law in North Africa: Sharia, Custom and the Personal Status Code in Tunisia* (I.B. Tauris, 2014). 2, 32, 33.

¹⁷⁵ Léon Buskens, 'RECENT DEBATES ON FAMILY LAW REFORM IN MOROCCO: ISLAMIC LAW AS POLITICS IN AN EMERGING PUBLIC SPHERE', *Islamic Law and Society* 10, no. 1 (2003): 70–131, 73-74. <https://doi.org/10.1163/15685190360560924>.

¹⁷⁶ Léon Buskens, "Sharia and National Law in Morocco," in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010). 113-114.

align with modern demands by employing the concept of *takhayyur*, which involves selecting the Ḥanafī school of thought. This approach achieves two objectives: meeting modern demands while upholding the authority of Islamic law by transcending the boundaries of schools of thought and applying *takhayyur* to the Ḥanafī school. In this way, eclecticism has been employed.

This raises an important question: why does Indonesia still adhere to the Shāfi‘ī opinion in this case which requires the presence of a guardian as an absolute condition for determining the validity of a marriage, and not choose to use the Ḥanafī school of thought, which is more in line with the demands of modernity?

In fact, the Compilation's decision to adhere strictly to the Shāfi‘ī school of thought has also sparked much controversy, especially among feminists and progressive scholars. For example, in the past, there was a proposal to amend several provisions in the Compilation, known as the Counter Legal Draft (CLD). One of the proposals was to remove the requirement for a marriage guardian for women who had reached the age of twenty-one. The main purpose of this removal was to give women greater autonomy in choosing their partners.¹⁷⁷ The feminists and progressive scholars who proposed the CLD-KHI argue that by reinforcing the dominant view in classical *fiqh* regarding the provisions of marriage guardianship, it has placed women as “the second class communities”,¹⁷⁸ because it does not give adult women who have mature thinking rights to be guardians of themselves. However, this proposal was rejected and the KHI continued to refer to the Shāfi‘ī school of thought, namely that a Wali (Guardian) is a requirement for a valid marriage.

Culturally and historically, the idea behind the obligation to have a Wali (Guardian) in marriage is that the guardian is considered a symbol of protection of a woman's dignity (*hifz al-karama*). The presence of a guardian is not only a legal requirement, but also reflects the seriousness and sanctity of the marriage bond. In this case, marriage is not only a private matter between two individuals, but also involves family and society. Therefore, the guardian's permission—for both women and men—is considered a blessing.¹⁷⁹ Another reason is that the Shāfi‘ī school of thought is deeply rooted in Indonesia, so that a guardian is considered an absolute requirement for a marriage to be

¹⁷⁷ Mark Cammack, Adriaan Bedner, and Stijn van Huis, ‘Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia’, *New Middle Eastern Studies* 5 (2015): 1–24. 25.

¹⁷⁸ Mughni Labib Ilhamuddin Is Ashidiqie, “Kritik Atas Peraturan Wali Nikah Dalam KHI dan Fikih Perspektif Gender,” *Al-Mazaahib: Jurnal Perbandingan Hukum* 9, no. 1 (2021): 21, <https://doi.org/10.14421/al-mazaahib.v9i1.2304>. 34.

¹⁷⁹ Deri Eka Putra et al., “Guardian Navigation in Islamic Family Law: From History to Implementation in Indonesia and Muslim Countries,” *MAWADDAH: Jurnal Hukum Keluarga Islam* 3, no. 1 (2025): 21–42. 23.

valid. Regardless of the circumstances, due to Indonesian culture being influenced by the depth of the Shāfi'ī school of thought in Indonesia, marriage cannot ignore the role of a guardian.¹⁸⁰

However, it is important to highlight that in this instance, the Compilation has revised several elements concerning the authority of guardians in female marriages. Specifically, the Compilation no justifies forced marriage, and it does not support a guardian's right to marry off his daughter without her consent. Thus, I argue that, although the Compilation adheres strictly to the Shāfi'ī school of thought regarding the rule that a guardian is essential for the validity of a marriage—without a guardian, the marriage is invalid—and this rule applies even to adult women, the Compilation concurrently reforms certain aspects related to the guardian's authority, specifically that the woman's consent is necessary for the validity of marriage. In this case, the Compilation has departed from the Shāfi'ī school of thought.¹⁸¹ In sum, the Compilation adopted Wali (Guardian) but not adopting the right of *ijbār*, which has an impact on forced marriage.

The compilation has departed from the Shāfi'ī school of thought regarding the authority of the *walī mujbir*, where a guardian may marry off his virgin daughter, whether she is a minor or an adult, without her knowledge or consent. This is regulated in the Compilation of Islamic Law, Chapter IV on the “Conditions and Requirements of Marriage”, article 16, point a, which state that “Marriage is based on the agreement of both parties (the bride and the groom)”. This is further explained in Article 17, point a “Before the wedding ceremony the Marriage Registrar Official is to ask the approval of both the bride and the groom in the presence of two witnesses”. Research conducted by Adawiyah shows that the Compilation of Islamic Law serves as a counter to the common belief among

¹⁸⁰ Abdul Hadi, ‘Fiqh Mazhab Syafi’i dalam Peraturan Perundang-undangan tentang Perkawinan di Indonesia, Brunei, dan Malaysia (1971-1991)’ (Disertation, Yogyakarta, IAIN Sunan Kalijaga, 2001). 222-223.

¹⁸¹ Why I argue that in this case, The Compilation has departed from the Shāfi'ī *madhhab*, and also depart from the doctrinal that already exist in Indonesian society because We see the phenomenon of *walī mujbir*, deeply rooted in Indonesian tradition and is usually referred to as forced marriage. This is where a guardian can marry off his virgin daughter even though she is an adult, without her consent, which is a provision in the Shāfi'ī school of thought. As a result, there are many cases in Indonesian Muslim society where marriages take place without the woman's knowledge. The validity of forced marriage is even supported by the stance of traditionalist groups in Indonesia who strictly follow the Shāfi'ī school of thought, namely NU. Since 1930, NU fatwas have allowed the concept of *walī mujbir*, whereby a girl's consent is not required in marriage, even for adult widows, indicating that the Shāfi'ī school of thought is deeply ingrained in the religious practices of Indonesian Muslims. See Michael B. Hooker, *Indonesian Islam: Social Change through Contemporary Fatāwā*, 1. South Asian ed, Southeast Asia Publications Series (Allen & Unwin, 2003). 139-142.

Indonesian Muslims based on the Shāfi'ī doctrine that forced marriage is permissible, whereby a guardian can force his virgin daughter, even if she is an adult, to marry.¹⁸²

Therefore, the Compilation of Islamic Law has deviated from the long-held doctrine of the Shāfi'ī school, and choosing to use the weak opinion of the Shāfi'ī school of thought, and the doctrine of the Ḥanafī school of thought, that adult virgins or widows have the right to choose their own marriage, and guardians have no authority over women who are mature in their thinking. What is meant by the weak opinion of the Shāfi'ī school of thought is the opinion of al-Juwaynī, which is an alternative opinion of the Shāfi'ī school of thought.

Research conducted by Youcef L. Soufi entitled *The Rise of Critical Islam* discusses, among other things, forced marriage. He says that al-Juwaynī criticized his own school of thought, the Shāfi'ī school, and reviewed the doctrines that had long been upheld in the Shāfi'ī school regarding the issue of forced marriage. He criticized the Shāfi'ī school's position, as explained by al-Shīrāzī, by stating that forced marriage is based on an untenable assumption regarding women's inability to decide their own marriages. Al-Juwaynī's views also touch on the Ḥanafī school, but with a different method. Al-Juwaynī uses the *maṣlaḥa* method to criticize the long-held doctrines of the Shāfi'ī school. According to him, forced marriage has no human value.¹⁸³

The question is why this kind of reform only gained momentum in 1991 in the Compilation?¹⁸⁴ I argue that the reform of this case was partly driven by the voices of Indonesian feminists and progressive intellectuals. In a broader context, the trend of reforming Islamic family law in other Muslim-majority countries was also significant in the 20th century. Through this, the Compilation sought to protect women's rights by making their consent a requirement for the validity of marriage. However, the Compilation ultimately did not dare to go further in reforming the role of guardians in determining the validity of marriage, as Tunisia and Morocco did.

¹⁸² Adawiyah, *Reformasi Hukum Keluarga Islam*.182.

¹⁸³ Youcef L. Soufi, *The Rise of Critical Islam: 10th-13th Century Legal Debate*, 1st ed. (New York: Oxford University Press, 2023), 125-142.

¹⁸⁴ It should be noted that efforts to reform cases related to the authority of guardians in marriage had been made by one of Indonesia's reformers long before the Compilation of Islamic Law, namely Ahmad Hassan. Through his research on twenty-four aḥādīth, he concluded that guardianship was merely a cultural institution and therefore unnecessary, and that adult women had the right to their own marriage. Hassan's argument contained elements of modernity. However, this was not discussed until the Compilation of Islamic Law was introduced. Hooker, for example, states that two of Hassan's reform goals have been partially achieved. He stated "*the question has been definitively settled by the Marriage Law of 1974 and the Kompilasi Hukum Islam (Art. 16) which, while reaffirming the necessity to have a Wali, also makes consent essential. Part, though not all, of Ahmad Hassan's position has been achieved by legislative intervention.*" See Hooker, *Indonesian Islam*. 139-142

Therefore, the Compilation has used pragmatic eclecticism by using *takhayyur* related to the consent of women to determine the validity of marriage, where the Compilation uses the opinion of the Ḥanafī school of thought and the weak opinion of the Shāfi'ī school of thought, which indicates that the Compilation has deviated from the Shāfi'ī school of thought in this matter. But at the same time, the Compilation still strictly adhere to the guardian position regarding the validity of marriage. From this explanation, we can see how the Compilation selectively chooses the *madhhabs*.

4.4 Cases in the *Kompilasi Hukum Islam* that Utilize *Talfiq*

Another case in the Compilation that is very important to discuss in showing how the Compilation selectively chooses *madhhabs* is related to marriage to pregnant women, where the Compilation allows marriage to pregnant women. This is regulated in the Compilation, Article 53; “ (1) a woman who is pregnant from the premarital sex, may legalize her marriage with a man who caused her so. (2) the marriage with the pregnant women as stated in point (1) can be immediately carried out without waiting for the baby to come. (3) organizing a marriage for a pregnant woman means that there will not need to be re-wedding ceremony after the child is born.”

The four canonical schools of thought differ in their opinions on marriage to a pregnant woman. Malik ibn Anas, founder of the Mālikī school of thought, and Abu Yusuf, a prominent student of Abu Hanīfa, hold that marrying a pregnant woman before she gives birth, as her part of the *'iddah* (waiting period), is haram (forbidden). Similarly, Ibn Qudāmah and other Ḥanbalī jurists argue that marrying a women who is pregnant out of wedlock is prohibited. In contrast, the Shāfi'ī school of thought permits marrying a pregnant women before she gives birth in cases where the pregnancy resulted from an extramarital relationship, as this does not establish a blood relationship (*nasab*).¹⁸⁵ Unlike Abu Yusuf, Abū Ḥanīfa argued that marriage between a pregnant woman and her adulterous partner is permissible, but the two are not allowed to have sexual relations until after the woman has given birth to her child.¹⁸⁶

From this, we can conclude that the four canonical schools of thought are divided into two in terms of the law on marrying a woman who is pregnant out of wedlock. First, the group that holds the view that marriage should not be performed until the child resulting

¹⁸⁵ Mawardi, *Socio-Political Background of The Enactment of Kompilasi Hukum Islam Di Indonesia*. 78.

¹⁸⁶ Nurul Afiyah Hikmatul Mutmainah, ‘The Majelis Tarjih Muhammadiyah’s Fatwa on the Pregnant Marriage: A Maqāṣid Approach’, *Ulumuddin Journal of Islamic Legal Studies* 1, no. 1 (17 July 2020): 68–90, 74. <https://doi.org/10.22219/ulumuddin.v1i1.12867>.

from adultery is born, namely the Mālikī and Ḥanbalī schools. Second, the Ḥanafī and Shāfi'ī schools, which permit marrying a woman who has committed adultery without waiting for the birth of the child resulting from adultery first, as both schools hold that there is no waiting period (‘*iddah*’) in such cases. However, they differ in their opinions, where the Ḥanafī school requires that sexual relations should not be engaged in before the child is born, but the Shāfi'ī school does not hold this view; the Shāfi'ī school permits sexual relations before the child is born. And if we look at the Compilation of Islamic Law, there is no prohibition against engaging in sexual relations during pregnancy.

Therefore, from this explanation, it can be concluded that the Compilation follows the Shāfi'ī school of thought in this matter because the Compilation permits a woman who becomes pregnant as a result of sexual relations before marriage to marry the man who caused her pregnancy without having to wait for the baby to be born first, and permits sexual relations during pregnancy. This is the opinion of the Shāfi'ī school of thought, which permits marrying a pregnant woman while she is pregnant and also permits sexual intercourse during pregnancy.

However, there is one other thing we need to note. In the Shāfi'ī school of thought, although marriage to a woman who is pregnant as a result of adultery is permitted, there are legal consequences that accompany it, namely that adultery does not make something that was originally *halal* become *haram*. Furthermore, al-Māwardī in his book *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī* explains that adultery does not create a *mahram* relationship due to *musāharah* (kinship resulting from marriage). In other words, if a man commits adultery with a woman, then, the woman's mother, and her daughter, may still be married to that man, because the act of adultery does not create a prohibition in the context of marital *mahram*.¹⁸⁷ In other words, that the marriage did not result in a blood relationship. In this case, according to the Shāfi'ī school of thought, the child's lineage can only be attributed to the mother.

However, this is not the case with the Compilation of Islamic Law. I realize how the Compilation selectively chooses rules, in this case related to legitimate children. In this case, the Compilation no longer follows the Shāfi'ī school of thought.

Let us examine the Compilation, Article 100, which states that a child born out of wedlock only has a blood relationship with his or her mother and the mother's family. In other words, a child born without a valid marriage has a blood relationship with his or her mother. This is different in the case of a woman who becomes pregnant as a result of

¹⁸⁷ al-Māwardī, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī*, vol. 9 (Dār al-Kutub al-‘Ilmīyah, 1999). 214.

adultery and is then married by the man who impregnated her before the child is born. In this situation, the child is born within a marriage that is valid under state law and the KHI. Therefore, Article 99 of the KHI applies, which states that a legitimate child is a child born within or as a result of a valid marriage. Thus, even though the pregnancy occurred outside of marriage, the child's legal status changes to that of a legitimate child because he or she was born within marriage. Therefore, the child can be associated with the husband (i.e., the biological father), and also has full civil rights, such as inheritance and marriage guardian. This is because the idea used in the Compilation is the idea of marital children.¹⁸⁸ This differs from the Shāfi'ī school of thought, As al-Shāfi'ī said in his *al-Umm*, "*If a woman gives birth to a child from an illegitimate pregnancy, whether the man who impregnated her acknowledges it or not, and she breastfeeds the child she gave birth to, then that child is her child and is attributed to her, and is not considered the child of the man who impregnated her.*"¹⁸⁹

Therefore, it can be concluded that in the case of legitimate children, the Compilation does not adopt the opinion of the Shāfi'ī school of thought. However, the Compilation of Islamic Law borrows the opinion of Ishāq ibn Rāhwayh (d. 853), al-Ḥasan al-Baṣrī (d.728), Sulaimān ibn Yasār (d.725), 'Urwah ibn al-Zubayr (d.713). As explained by Ibn al-Qayyim (d.1350), that Ishāq ibn Rāhwayh argued that a child born out of adultery can be recognized as a legitimate child by the man who committed adultery with the mother, provided that no other man claims to be the father of the child. If the man acknowledges that the child is the result of his adultery, then the child's lineage can be attributed to him. As for the hadith stating "*al-walad li-l-firāsh*" (the child belongs to the owner of the bed), this applies when there is a dispute between the lawful husband and the man who committed adultery with the woman. In such cases, the child is recognized as belonging to the lawful husband. However, if there is no husband or other party with a claim, and the man who committed adultery acknowledges the child as the result of his relationship with the woman, then that acknowledgment can serve as the basis for determining paternity. Thus, an illegitimate child can be attributed to its biological father if he acknowledges it clearly and there are no valid paternity claims. Furthermore, Ibn al-Qayyim argues that this is based on *qiyās*.¹⁹⁰

¹⁸⁸ Euis Nurlaelawati and Stijn Cornelis Van Huis, 'The Status of Children Born Out of Wedlock and Adopted Children in Indonesia: Interactions between Islamic, Adat, and Human Rights Norms', *Journal of Law and Religion* 34, no. 3 (December 2019): 356–82, 368. <https://doi.org/10.1017/jlr.2019.41>.

¹⁸⁹ al-Shāfi'ī, *al-Umm*, vol. 5 (Dār al-Ma'rifāh, 1990). 32.

¹⁹⁰ Ibn al-Qayyim, *Zād Al-Ma'ād*, vol. 5 (Mu'assasat al-Risālah, 1994). 347.

We can see how the Compilation selectively chooses which school of thought to use for this case. In the case of marrying a pregnant woman, the Compilation uses the opinion of the Shāfi'ī school of thought, but the Compilation adopts another opinion on the issue of the validity of the child, where the Compilation uses the opinion of Ishāq bin Rāhwāh and also Ibn al-Qayyim. This means that the Compilation did not take the Shāfi'ī *madhhab* to its end. Instead, it uses it in an ambiguous manner, which is undoubtedly done to achieve a specific purpose. Therefore, in this case, pragmatic eclecticism is practiced through the use of *talfīq*, namely diachronic *talfīq*. From this, it can be concluded that there is inconsistency in the Compilation of Islamic Law.

Then, what motivated the Compilation to do this *talfīq*? According to several studies, this was done primarily to protect the honor of women who became pregnant outside of marriage and also to protect the dignity of the woman's family. Additionally, this was also done to reduce the negative perceptions that might arise if the marriage were to take place after the child born out of wedlock was born. The second purpose of Article 53 of the KHI is to serve as a means for the child in the womb to obtain the right of lineage from his father.¹⁹¹

In sum, the Shāfi'ī school of thought is used to achieve the first purpose, which is to protect the honor of pregnant women. And, the opinions of Ishāq bin Rāhwāh and Ibn al-Qayyim are used to achieve the second purpose, which is to ensure that the child obtains the right of lineage to his father.

4.5 Analyzing Patterns of *Takhayyur* and *Talfīq* in KHI

So far, I have discussed seven cases in the Compilation of Islamic Law (KHI). In this regard, I would like to explain how Islamic legal reform in Indonesia has been influenced by *takhayyur* and *talfīq*. As in other countries, Indonesia also utilizes the pluralism that exists within the *fiqh* schools by employing *takhayyur* and *talfīq*. We have seen which cases remain strictly adhere to the Shāfi'ī school and which cases depart from the Shāfi'ī school. I argue that there are at least three patterns influencing the Compilation to either follow the Shāfi'ī school or deviate from its opinions and choose another school of thought; first, Cultural-adoptive; second, Modernity-oriented; third, Facilitative (convenience for society and public interest).

¹⁹¹ Ibnu Amin, Faisal Efendi, and Hertasmaldi, 'Mashlahah Married Pregnant Perspective Article 53 Compilation of Islamic Law', *Fokus: Jurnal Kajian Keislaman Dan Kemasyarakatan* 7, no. 2 (2022): 103–15. 112.

For example, in terms of culture, KHI deviates from the Shāfi'ī school of thought and borrows the mandatory will of Ibn Ḥazm for cultural reasons, whereby adoptive parents and adopted children inherit from each other. The second issue is the role of the guardian in the validity of marriage. There is some overlap between the Shāfi'ī school and Indonesian culture, where the role of a guardian is deeply ingrained in Indonesian culture. Therefore, we can look at other countries like Morocco and Tunisia. In their codification projects, they adopted the Ḥanafī school of thought in this case, where adult women can marry without a guardian. However, this is not the case in Indonesia. Indonesia will never be able to break away from the Shāfi'ī school of thought in this matter. As I said, there is an overlap between the influence of the Shāfi'ī school of thought and cultural institutions. This is also the case with the prohibition of marrying non-Muslim women of the People of the Book. The main reason is that Indonesian culture is influenced by the Shāfi'ī school of thought, so society has a negative attitude toward interfaith marriage.

In terms of modernity, for example, KHI shows that it deviates from the Shāfi'ī school of thought, which does not require the consent of women to marry. In this case, KHI adopts the opinion of the Ḥanafī school of thought and the minority opinion of the Shāfi'ī school of thought, on the grounds that modern needs must be met in this case, namely that women have the right to determine their marriage. Similarly, in the case of child custody, where the KHI deviates from the Shāfi'ī school of thought, this is done to achieve the best interests of the children, which is one of the demands of modernity.

In terms of convenience for Muslims and the public interest, we can see how KHI deviates from the Shāfi'ī school of thought and adopts the opinion of the Mālikī school, which allows women to file for divorce if their husbands are in prison. This is done to make things easier for women. We also note that KHI engages in *talfīq* regarding the validity of marriage with a pregnant woman and the validity of children born out of wedlock. In this context, KHI follows the Shāfi'ī school of thought regarding the validity of marriage with a pregnant woman, but deviates from the Shāfi'ī school when adopting the opinions of Ishāq ibn Rāhwayh and Ibn al-Qayyim regarding the validity of children born out of wedlock. I assume that the first case was done to protect pregnant women from negative social stigma, while the second case was done to protect the rights of children born out of wedlock, where this was done to achieve the primary goal of the public interest. Below I will make a table to make it easier to summarize what cases strictly follow the Shāfi'ī school of thought and what cases depart from Shāfi'ī school of thought, along with their patterns.

CASES	DEPART FROM SHĀFI'Ī SCHOOL OF THOUGHT / STRICT TO SHĀFI'Ī SCHOOL OF THOUGHT	REASONS
Allowing Women to Initiate Divorce on The Grounds that Their Husband are Imprisoned	Depart	Easiest for people and public interest
Wasiat Wajibah (Obligatory Bequests) for Adopted Children	Depart	Culture
Child Custody	Depart	Modernity
Women Consent	Depart	Modernity
The Prohibition of Muslim Man Marrying Non-Muslim Women, Including Women <i>Ahl al-Kitāb</i> (People of the Book)	Not Depart	Culture
The Requirement of a Legal Guardian	Not Depart	Culture
Permissibility of Marrying Pregnant Women and the Legitimacy of the Child	Following the Shāfi'ī school of thought regarding the validity of marrying a pregnant woman Depart from Shāfi'ī school of thought regarding the Legitimacy of the Child	public interest

4.6 Case Studies on *Takhayyur* and *Talfiq* in Contemporary Indonesian Judicial Practices

In the previous section, I discussed cases in the KHI that follow the Shāfi‘ī doctrine and cases that borrow doctrines from other schools of thought through *takhayyur* and *talfiq*, along with existing patterns. Therefore, for a more comprehensive understanding, it is also important to examine how *takhayyur* and *talfiq* are applied in practice within the contemporary Indonesian judicial practices. Therefore, I will discuss two cases- one related to sexual dissatisfaction as grounds for divorce and another concerning paternal filiation- to show that *takhayyur* and *talfiq* are indeed applied in practical cases in Indonesia.¹⁹²

The first case is sexual dissatisfaction as grounds for divorce. Through his in-depth research on contemporary Indonesian judicial practices, Yakin found a case where sexual dissatisfaction was used as grounds for divorce.¹⁹³

Usually in existing literature, the reason for divorce initiated by women is usually the husband's impotence, which is different from the cases faced by Indonesian judicial practices. Through his research, Tucker examined the legal discourse surrounding marriage in Syria and Palestine in the 17th and 18th centuries, focusing on the role of muftis in shaping gender relations through Islamic law. One of the topics he discussed was the impotence as grounds for divorce. Tucker explains that in the context of Islamic law in Syria and Palestine during the Ottoman period, a wife could file for divorce if her husband was unable to have sexual relations for a long period of time. ‘Abd al-Faṭḥ al-Tamīmī, a mufti from eighteenth-century Jerusalem, responded to a case in which a woman reported that her marriage had been “consummated” but she had not lost her virginity, meaning that sexual relations had not actually taken place. In such a situation, after waiting one year to resolve the issue, the woman could bring the matter before a *qāḍī* and request a divorce. Ibn ‘Ābidīn agreed with this view and added that a woman, to annul her marriage due to her husband's impotence, must testify before a judge that she remained a virgin after living with her husband for one year.¹⁹⁴

¹⁹² It should be noted that my aim here is merely to provide some concrete illustrations of *talfiq* or *takhayyur* in judicial practices where judges have referred to and implemented the *KHI*, as my main focus is the theoretical aspect of the *KHI*. Therefore, further research is needed to concentrate specifically on the practice of *takhayyur* and *talfiq* in religious courts.

¹⁹³ Ayang Utriza Yakin, “Women in the Search of Sexual Pleasure: Divorce on Grounds of Sexual Dissatisfaction in Indonesian Religious Courts,” in *Islamic Divorce in the Twenty-First Century: A Global Perspective* (Rutgers University Press, 2022).

¹⁹⁴ Judith E Tucker, “Muftīs and Matrimony: Islamic Law and Gender in Ottoman Syria and Palestine,” *Islamic Law and Society* 1, no. 3 (1994): 265–300.

Then what about cases where the wife experiences sexual dissatisfaction? The Compilation of Islamic Law (KHI) in Indonesia does not explicitly regulate divorce on the grounds of sexual dissatisfaction, but the KHI states that a wife may file for divorce if her husband suffers from an illness that renders him unable to fulfill his obligations as a husband. However, judges in Indonesian religious courts often grant divorce petitions based on sexual dissatisfaction by referring to the concept of “continuous and irreconcilable disputes” as stipulated in Article 116(f) of the KHI. Judges use the contemporary book *Fiqh al-Sunnah* by Sayyid Sābiq as a reference for handling issues of *shiqāq*, or disputes, in the KHI. Although *Fiqh al-Sunnah* does not specifically address divorce due to sexual dissatisfaction, the book discusses divorce due to harm (*al-taṭlīq li-l-ḍarar*) by citing the views of the Mālikī school of thought. This allows judges to interpret “continuous and irreconcilable disputes” in a broader sense, thereby including sexual dissatisfaction as a valid reason for divorce under Indonesian law. Thus, Indonesian courts effectively adopt aspects of Egyptian law on divorce due to harm, as explained in *Fiqh al-Sunnah*, and indirectly refer to the Mālikī opinion to explain the concept of *shiqāq* in the context of Indonesian legislation.¹⁹⁵

As I mentioned at the beginning of this chapter, there is no doubt that the Mālikī school of thought, which analogizes marriage to a sale, has a broader understanding in determining the grounds for divorce. Thus, we have seen that contemporary Indonesian judicial practice has borrowed the Mālikī school's opinion on the grounds for divorce for certain pragmatic needs.

In his other work, Yakin also found a case where *talfīq* was applied in judicial practice, specifically in a Supreme Court ruling related to paternal filiation. The Indonesian Supreme Court, through the Religious Court Commission, reached an agreement to grant children born out of wedlock the right to receive financial support from their biological fathers and their families. This decision is based on the Hanafī school of thought, which states that biological fathers are obligated to provide financial support for all the needs of their biological children according to their financial capabilities.¹⁹⁶ The Religious Court Commission of the Supreme Court chose this approach because it did not want to legally recognize the lineage of children born out of wedlock or from adultery. However, at the same time, it also did not want these children to lose the care of their biological fathers.

¹⁹⁵ Yakin, “Women in the Search of Sexual Pleasure: Divorce on Grounds of Sexual Dissatisfaction in Indonesian Religious Courts.” 94-99.

¹⁹⁶ Baudouin Dupret et al., ‘Paternal Filiation in Muslim-Majority Environments: A Comparative Look at the Interpretive Practice of Positive Islamic Law in Indonesia, Egypt, and Morocco’, *Journal of Law, Religion and State* 10, nos. 2–3 (2023): 167–217, 184. <https://doi.org/10.1163/22124810-20230002>.

Therefore, the Commission adopted the Hanafī school of thought, which regulates the obligation of biological fathers to provide financial support.

4.7 Analysis

Scholars such as Coulson argue that *takhayyur* and *talfīq* are characteristic features of legal reform in the 20th century. However, several studies show that *takhayyur* and *talfīq* are not new phenomena that only emerged in the 20th century, but rather have genealogical roots in the pre-modern period. Ibrahim and Wiederhold successfully refute Coulson's argument and prove that this discussion actually began in the 13th century. I assume that Coulson's claim that *takhayyur* and *talfīq* are characteristics of legal reform, and not *taqlīd* but rather a new *ijtihād*, is because he sees that in the modern period, the concept of *takhayyur* was expanded, which was not found in the pre-modern period.

I have shown that discussions about *takhayyur* and *talfīq* also existed in the pre-modern period. The initial discussion about *takhayyur* and *talfīq* began with the question of whether a *muqallid* who followed a particular *madhhab* could switch from his original *madhhab*. There are at least two main reasons why someone would switch from their original *madhhab*. The first reason is based on *rājiḥ*, where opinions outside one's original *madhhab* are considered stronger. The second reason is to seek ease, where *muqallid* leaves their original *madhhab* to seek the easiest opinion. The strongest opinion is that switching *madhhabs* is permissible even for convenience, as long as it does not involve *talfīq*, which is combining two opinions from different *madhhabs* in one case, resulting in a ruling that is not found in any *madhhab*. In the 16th and 17th centuries, some scholars permitted certain types of *talfīq* that were indeed permissible, especially diachronic *talfīq*. However, it should be emphasized that the patterns of *takhayyur* and *talfīq* in the pre-modern period sought the easiest opinion for personal gain, which in the pre-modern period was discussed in the concept of *tatabbu' rukhaṣ*.

Pluralism in *fiqh madhhab* was utilized by modern reformers through *takhayyur* and *talfīq*, but their motives were no longer limited to *tatabbu' rukhaṣ*; a new pattern emerged, namely modernity. In the modern period, the change of *madhhab* was undertaken to seek opinions most compatible with modernity, and although the rationale of seeking the easiest opinion remains applicable, it is now applied within a broader and more systematic framework that has been codified. From this, we can see how *takhayyur* and *talfīq* have transformed from the pre-modern period to the modern period.

There are at least two important transformations. The first is *takhayyur* and *talfīq* in the modern period, which were used in the codification of Islamic law with the aim of

reforming Islamic law. The second transformation is the emergence of a new pattern in the selection of *madhhabs*. In the modern period, modernity became the reason for using *madhhabs* other than the official *madhhab* of a country. In this modern period, the meaning of *takhayyur* has been expanded. The use of *takhayyur* is no longer limited to choosing between the four canonical *madhhabs*, but also includes opinions outside the canonical *madhhabs*, the use of individual scholars' opinions, and the use of two different *madhhabs* to resolve a single issue, as found in the arguments of Coulson, Esposito, Al-Sanhouri, Odeh, and others. I also found similar cases in the KHI. However, my argument is much more complicated. While other countries such as Egypt may use *takhayyur* and *talfiq* to find the easiest opinion or the one most suitable for modernity, this is slightly different from the case in Indonesia. This is because here, *takhayyur* does not follow only the *tatabbu' rukhas* or modernity patterns, but there are several interacting patterns. These patterns are: cultural adaptation, modernity orientation, and convenience (seeking the easiest opinion). Therefore, my study introduces a new perspective beyond previous studies. As a result, there is a transformation in the use of *takhayyur* and *talfiq* in the KHI, where culture plays a significant role in determining the choice of *madhhab*.

The thesis further argues that in the modern context, the processes of *takhayyur* and *talfiq* for resolving legal issues have become easier and more pragmatic. This indicates a significant shift from the classical approach, in which legal flexibility was generally achieved through internal strategies within a single school of thought, such as the use of *hiyal* that remained within the methodological corridor of that school. In the pre-modern tradition, scholars tended to maintain the coherence of their school by trying to resolve legal issues within the framework of their own school. In contrast, in modern Islamic legal practice, especially in the context of codification by the state—there is a more open tendency to refer directly to the views of other schools, even when similar solutions can actually be found within the culturally dominant school. This indicates a preference for an inter-school approach that is considered more direct and in line with the objectives of legal reform, rather than maintaining methodological coherence within a single school. In other words, in the modern context, the approach to legal flexibility is more *inter-madhhab* and pragmatic. If a solution from another *madhhab* is available and considered more appropriate to the needs, then there is no need to seek a complicated solution (such as through *hiyal*) just to remain within the boundaries of one's own *madhhab*.

For example, in the case of the KHI, there has been a shift in legal approach, which can be seen in the regulations concerning women's right to file for divorce in the KHI. In the Shāfi'ī school of thought, conditions such as the husband being imprisoned for a long

period of time must usually be included in the form of *ta' līq ṭalāq* (conditional divorce) in order to remain within the framework of that school of thought. However, the KHI explicitly distinguishes between the two. First, the KHI does recognize *ta' līq ṭalāq* as one of the grounds for divorce. However, in another article, the KHI stipulates that a wife has the right to file for divorce if her husband has been imprisoned for five years or more—and this is not constructed as a form of *ta' līq*, but as a separate ground.

This distinction shows that the KHI does not attempt to impose all solutions into the Shāfi'ī legal structure, even though such solutions could actually be made through *ḥiyal* or internal legal constructions. Instead, the KHI directly adopted the view of the Mālikī school, which does allow divorce in such cases. This reflects a pragmatic and *inter-school* approach in *talfīq*.

CHAPTER V CONCLUSION

The challenges of modernity prompted Islamic legal reformers in the 20th century to utilize the pluralism inherent in Sunni legal schools through *talfiq*. Assuming that all Sunni *madhhabs* are equally orthodox, this approach served as an adaptive strategy in the project of codifying Islamic law. However, this study demonstrates that such cross-*madhhab* practices are not entirely novel; they have deep historical roots extending into the pre-modern period. As shown in this study, discussions around *takhayyur* and *talfiq* existed prior to the modern era, and crossing *madhhab* boundaries was frequently employed to select the most lenient opinions among the schools. While this practice was already present in the pre-modern period, the concept of *talfiq* has undergone notable expansion in modern times. In particular, reformist scholars have broadened its scope in ways that were not commonly seen in earlier Islamic legal discourse—such as drawing on opinions from outside the four canonical *madhhabs* or selecting views from marginal or individual scholars. This pattern is observable in several Muslim-majority countries, where the need to respond to the complexities of modern life has led to the strategic use of *takhayyur* and *talfiq* as tools for legal adaptation.

Furthermore, this study argues that Indonesia offers a particularly compelling example in which *talfiq* takes on new and nuanced dimensions. Unlike earlier uses of *talfiq*, which were often motivated by a desire for legal convenience or facilitation (commonly associated with *tatabbu' al-rukhas*, or “seeking the easiest opinion”), the Indonesian context reflects a more layered and context-sensitive engagement with the concept.

This analysis identifies three distinct but interrelated patterns of *talfiq*—or at times, the refusal to adopt *talfiq*—in Indonesia’s *Kompilasi Hukum Islam* (KHI):

1. Cultural-adoptive: reflecting the accommodation of local norms and values. This usually occurs when the KHI adheres strictly to the Shāfi‘ī school, which is deeply embedded in Indonesian legal and religious culture. In these cases, the KHI is cautious not to disrupt well-established cultural and religious sensibilities. For example, in matters such as interfaith marriage, KHI follows the Shāfi‘ī opinion by explicitly prohibiting interfaith marriages, even with non-Muslim *ahl al-kitāb* women, although there are some more permissive views found in other Sunni *madhhabs*, and also in the case of the requirement of a Guardian (Wali) in valid marriage.

2. Modernity-oriented: shaped by the demands of contemporary governance, legal codification, and gender discourse. This approach involves a departure from the traditional Shāfi'ī position, especially in instances where the school's rulings are no longer socially dominant or relevant. For instance, the case related to child custody, in which KHI deviates from the Shāfi'ī school of thought with the aim of achieving the best interests of children, which is one of the demands of modernity.
3. Facilitative: mirroring the classical objective of easing legal burdens by adopting more lenient rulings across schools. This use of *talfīq* aligns with pre-modern motivations but is now applied within a broader and more systematic codified framework. For example, allowing women to file for divorce if their husbands are imprisoned for five years.

These patterns interact dynamically, producing a uniquely Indonesian synthesis that departs from classical frameworks in both methodology and purpose. More broadly, this study highlights how modern reforms, while drawing on classical methodologies of Islamic law, have introduced significant changes in how these methodologies are understood. Therefore, *talfīq* in modern Indonesian law should not be viewed merely as the adoption of a pre-modern technique; rather, it is essential to recognize the transformations that have occurred in its concept, function, and limitations.

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