



The Intersection Between Normative and Empirical: Madhhab Orientation in Marriage and Divorce Law in Indonesia

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Abstract: The codification of Islamic law (*taqin*) is crucial in providing legal certainty in marriage and divorce in Indonesia while maintaining the relevance of *shari'ah* values amidst social changes. This study aims to examine the implementation of Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI) in the context of madhhab pluralism. The research employs a qualitative descriptive method with normative and empirical analysis approaches. The findings reveal that the codification of Islamic law faces challenges in accommodating diverse fiqh perspectives, ensuring gender justice, and addressing the administrative needs of society. The *maqasid al-shari'ah* approach is an essential foundation for an inclusive transformation of Islamic law, particularly in aligning classical fiqh values with modern legal norms. This study recommends harmonizing Islamic law principles with the national legal system to create just, relevant, and beneficial regulations for Indonesian society.

Keywords: *Codification of Islamic Law, Compilation of Islamic Law (KHI), Maqasid al-Shari'ah, Pluralitas Madhhab, Taqin.*

Introduction

Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI) are two legal products that play an important role in regulating marriage governance in Indonesia, including provisions on divorce, the rights and obligations of husband and wife, and other legal implications arising from marriage and divorce events (Aziz, 2024). As a country with a Muslim-majority population, which generally follows the Shafi'i school of thought, these two regulations are expected to reflect Islamic values and meet the Indonesian society's need for fair and equitable legal certainty. However, despite these goals being stated in the regulations, in practice, there is a significant gap between these regulations and the views and practices of the Indonesian Muslim community, particularly regarding issues of marriage and divorce (Rahman & Abidin, 2024).

As a national legal product, Law No. 1 of 1974 was designed to apply universally across Indonesia without distinguishing between religions or specific schools of thought (Djufri, 2024). This has caused some provisions of this law, especially those related to family law, not to fully represent values that align with the teachings of the Shafi'i fiqh. For example, the KHI is often called the codification of Islamic law in Indonesia. Although efforts have been made to adjust Islamic law to meet the contextual needs of Indonesian society, many community groups feel that some provisions in the KHI are still not entirely in line with the teachings of the Shafi'i school of thought, which is dominant in Indonesia (Wahid, 2001).

One example of this misalignment is evident in the context of divorce (Miftahuddin & Nafi'ah, 2024). The KHI provides broader opportunities for women to file for divorce through the Religious Courts, which is seen as a progressive step in offering protection for women.

However, for conservative groups adhering to Shafi'i fiqh, this provision is considered contrary to Islamic legal traditions that place the husband in a dominant position in divorce decisions (Maulana, 2021). Moreover, the administrative requirements in divorce proceedings are often perceived as burdensome for rural communities, who still practice local customs and traditions rooted in Islamic law (Fakhria, 2020).

In addition, Law No. 1 of 1974 is often regarded as overly secular by some Muslim groups. For example, Article 7, which regulates the minimum marriage age, was amended through Law No. 16 of 2019, increasing the age from 16 to 19 (Rosdiana & Suprihatin, 2022; Kurniawati, 2021). Although this amendment aims to prevent child marriage, it often conflicts with the views of specific Muslim communities that refer to classical fiqh traditions, which emphasize mental and spiritual maturity over biological age (Hatta, 2016; Fadhilah & Rahmah, 2012). This disparity reflects the gap between formal regulations and the beliefs or practices upheld by Indonesian Muslim communities.

Another significant gap in law practice in Indonesia is the disregard for the diversity of opinions within the existing madhhab fiqh traditions (Takdir, 2019). Although the majority of Indonesian Muslims adhere to the Shafi'i madhhab, groups such as the modernist Muhammadiyah, the more traditional Nahdlatul Ulama (NU), and other religious organizations with strong madhhab traditions feel that Law No. 1 of 1974 and the KHI inadequately accommodate the plurality of fiqh perspectives they study and practice (Kurniawan, 2022). This has become a source of dissatisfaction and has reduced trust in the prevailing marriage and divorce legal system, particularly regarding the mandatory registration of marriages. These divorces can only be carried out through the Religious Courts and regulations concerning polygamy (Nasution, 2018).

This phenomenon raises important questions about how Law No. 1 of 1974 and the KHI can bridge differences between the demands of national law, the values of Shafi'i madhhab fiqh, and the diverse interpretations of Islamic law in Indonesia. Moreover, there is a need for a deeper study to improve these regulatory approaches to be more inclusive of the needs of Indonesian Muslims without neglecting the universal principles of justice and equality embedded in national law (Gunawan et al., 2024).

This study aims to examine the implementation of Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI) in the context of madhhab pluralism and the gap between formal regulations and the practices of Muslim communities.

Literature Review

Studies related to this theme cover several key topics, including madhhab fanaticism in the reform of Islamic law, the transformation of Islamic law into national law, and the concept of Indonesian fiqh. Research by Anam and Nelli (2021) revealed that fanaticism toward classical madhhab poses challenges in the reform of Islamic law, particularly in the context of divorce as regulated by the Marriage Law (Law No. 1/1974) and the Compilation of Islamic Law (KHI). Although their study provides valuable insights into these dynamics, its focus is limited to the issue of divorce without comprehensively addressing other aspects of marriage.

On the other hand, Syarif et al. (2020) proposed a model for the transformation of Islamic law using *bayani*, *'irfani*, and *burhani* approaches. While they emphasize the importance of these approaches in adapting Islamic law in Indonesia, they also express concerns about the potential loss of the sacredness of classical texts in this transformation process. This highlights the tension between efforts to modernize Islamic law and preserve classical fiqh traditions (Wagiarto, 2017).

Tohari (2017) introduced the concept of Indonesian *fiqh*, which is oriented toward the local context of Indonesian society. This approach seeks to adapt the principles of *fiqh* to the social and cultural conditions of Indonesia while preserving the essence of Islamic teachings. Meanwhile, Fallah (2022) focused on a comparative analysis between Islamic law and the Marriage Law No. 1 of 1974, particularly on the challenges in adapting these laws. However, Burlian (2019) did not provide deeper solutions on how the adaptation process could be conducted flexibly and contextually (Thohari, 2020; Burlian, 2019).

Suprayogi's (2021) study discusses the reform of Islamic marriage law in Indonesia through the *istinbath* method, which combines written and unwritten legal sources. This approach aims to provide more precise solutions to the challenges of Islamic marriage law in Indonesia while considering existing local values.

Tohari (2017) explored the concept of *fiqh Indonesian* oriented toward the local context of Indonesian society. Burlian (2019) analyzed the comparison between Islamic law and Law No. 1/1974, focusing more on obstacles rather than adaptive solutions. Furthermore, Suprayogi (2023) also delved into reforming Islamic marriage law in Indonesia, emphasizing modernization by integrating the *istinbath* method and written and unwritten legal sources.

This research goes beyond previous studies by integrating *madhhab fiqh* into the Marriage Law and the KHI through the *Taqnin* Theory approach. As a novel contribution, this study focuses on the government's prioritization of a specific *madhhab* amidst clashes with other *madhhab fiqh*. It highlights the importance of legal adaptation to create public benefit (*maslahat*) for the nation. Using this approach, the study aims to contribute to developing a more inclusive and contextual legal framework for Indonesian society without neglecting the diverse values of *fiqh*.

Methods

This study utilizes a descriptive qualitative approach, eschewing statistical generalization, to provide an in-depth description of the phenomenon (Creswell, 2013). This approach integrates normative and empirical analysis of *nikah* and *ṭalaq* laws based on the orientation of *fiqh* schools in Indonesia. Consequently, this research facilitates an exhaustive investigation of Islamic marriage law through diverse methodologies, encompassing a literature review, an analysis of legal texts, positive legal documents, legal history, and a comparative legal analysis. The normative data collection process entailed a literature review, which included an examination of Marriage Law No. 1 of 1974, Government Regulation No. 9 of 1975, the Compilation of Islamic Law (KHI), and its derivative regulations. Concurrently, empirical data was collected through in-depth interviews with academics, clerics, judges, and legal practitioners to understand their responses to the application of prevailing legal norms. The data collection method in this study consists of two main approaches. *First*, a literature review was conducted by examining positive legal documents, legal history, and other legal texts that form the basis for the formulation of Islamic marriage law in Indonesia. *Second*, in-depth interviews were conducted with academics, clerics, Religious Court judges, and legal practitioners to explore their perspectives on the application of prevailing legal norms. The main data from these interviews was then supplemented with secondary data obtained from legal literature and previous research. The data analysis in this study went through several stages. Initially, content analysis was employed to examine the legal norms of marriage, including an analysis of each article and its relationship to the *fiqh of munakahat* (marriage contract) as embraced by various schools of thought. Subsequently, qualitative analysis was utilized to interpret the meaning of legal texts by considering the social and cultural context

and their relevance to Muslim communities in Indonesia. Thirdly, the accuracy and validity of the data were verified through triangulation, by comparing normative sources, interview findings, and supporting literature to ensure the consistency and reliability of the research results. Fourthly, a comparative analysis was applied by comparing legal norms in formal regulations with the *fiqh* of marriage and divorce from various schools of thought to identify harmony or potential conflicts between the two.

Results and Discussion

The Urgency and Process of Codifying Islamic Law (*Taqnīn*) in Marriage and Divorce

The codification of Islamic law (*taqnīn*) in Indonesia not only seeks to provide legal certainty but also addresses the complexities arising from the coexistence of different legal traditions. During the colonial period, Dutch authorities implemented a dual legal system that incorporated customary laws alongside colonial regulations, often marginalizing Islamic law. This created inconsistencies in the application of marriage and divorce laws among Muslim communities across the archipelago. With the enactment of Marriage Law No. 1 of 1974 and the Compilation of Islamic Law (*KHI*), Indonesia sought to bridge this gap by unifying Islamic legal principles with national legal standards. However, challenges persist, particularly in reconciling classical *fiqh* interpretations with contemporary legal frameworks (Wahid, 2001).

One significant challenge in *taqnīn* is balancing the plurality of *madhhab* perspectives with the need for a standardized legal system. While the Shafi'i school remains dominant in Indonesia, the incorporation of principles from other *madhhab*—such as the Ḥanafī, Mālīkī, and Ḥanbalī schools—demonstrates an effort to create a more adaptable and inclusive legal framework. This multi-*madhhab* orientation allows Islamic law to remain flexible in addressing diverse societal needs. For instance, the regulation of *talaq* in *KHI* adopts an approach that combines classical *fiqh* with modern legal considerations, requiring that divorces be processed through the Religious Courts to ensure fairness and legal accountability (Tanuri, 2024). Despite these reforms, conservative groups argue that such modifications deviate from traditional Islamic legal practices, particularly regarding the husband's unilateral right to pronounce *talaq* (Maulana, 2021).

Moreover, the transformation of *fiqh* principles into codified law raises concerns about the potential rigidity of *taqnīn*. Islamic law has historically evolved through *ijtihād* (independent legal reasoning), allowing scholars to adapt legal rulings to changing social contexts. Some scholars caution that rigid codification may limit *ijtihad*, reducing the law's ability to respond to contemporary challenges dynamically. Muhammad Sa'id al-'Ashmāwī warns that excessive reliance on codification could lead to political manipulation, compromising the ethical and spiritual dimensions of Islamic law (al-Ashmawy, 1994). Similarly, Taha Jabir al-'Alwānī argues that *taqnīn* should not undermine the role of *ijtihād* as the foundation of legal dynamism within Islamic jurisprudence (Firdaus, 2020). Thus, an effective *taqnīn* process must strike a balance between legal certainty and interpretative flexibility.

In addition to jurisprudential debates, administrative challenges also complicate the implementation of marriage and divorce laws in Indonesia. The dual authority structure, where the Office of Religious Affairs (*KUA*) oversees marriage registration while the Religious Courts handle divorce cases, often leads to bureaucratic inefficiencies. For example, cases of *isbat nikāḥ* (marriage legalization) for unregistered marriages require legal validation from both institutions, creating obstacles for individuals seeking legal recognition of their marital

status. The requirement for a non-registration certificate from KUA before a court can legalize a marriage exemplifies these administrative complexities (Mas'ari & Syamsuatir, 2018). Furthermore, the regulation of marriage dispensations under Law No. 16 of 2019, which raises the minimum marriage age to 19, has sparked debates about the balance between child protection policies and the cultural realities of early marriage practices in some regions (Judiasih et al., 2020).

The concept of "indigenization of Islamic law" (*pribumisasi* Islam), as introduced by Abdurrahman Wahid (Gus Dur), presents a potential solution for aligning *sharī'ah* principles with local socio-cultural contexts. This approach advocates for a legal framework that integrates classical *fiqh* values with Indonesia's pluralistic legal traditions. In the context of marriage and divorce, this means recognizing the necessity of legal formalization while also respecting traditional practices that remain influential within Muslim communities. The requirement that talaq be pronounced before a court, as stipulated in Article 39 of the Marriage Law and reinforced by KHI, illustrates an attempt to harmonize Islamic principles with the modern legal system. While some Islamic scholars argue that this contradicts classical *fiqh*, which allows private pronouncement of talaq, others view it as a necessary legal safeguard to prevent injustice, particularly for women (Salehudin, 2019).

Despite ongoing debates, the evolution of Islamic marriage and divorce law in Indonesia reflects an effort to balance legal certainty, gender justice, and religious integrity. The harmonization of *fiqh* values with national legal norms continues to shape the trajectory of *taqni'n*, demonstrating the adaptability of Islamic law in a modern nation-state. As An-Na'im has emphasized, the transformation of Islamic law requires continuous reinterpretation to ensure that it remains relevant within a pluralistic society while maintaining its foundational ethical principles (Ali & Puspita, 2023). Moving forward, greater scholarly engagement, judicial reforms, and community participation will be essential in refining Indonesia's approach to *taqni'n*, ensuring that it serves both the spiritual and legal needs of its Muslim population.

Integration of Madhhab Perspectives and Transformation into Positive Law

One of the primary challenges in integrating diverse *madhhab* perspectives into Indonesia's national legal framework is ensuring that legal reforms remain inclusive while adhering to Islamic jurisprudential principles. The dominance of the Shafi'i *madhhab* has historically shaped the country's legal interpretations, but growing awareness of gender justice and human rights has necessitated broader engagement with principles from the Ḥanafī, Mālīkī, and Ḥanbalī schools. The reformation of *fiqh* on marriage and divorce, particularly through the KHI, illustrates Indonesia's efforts to reconcile Islamic traditions with contemporary social realities. By mandating judicial oversight for talaq and implementing minimum marriage age regulations, Indonesian lawmakers aim to prevent injustices that disproportionately affect women and children (Tanuri, 2024).

The legal requirement for court validation of talaq, as stipulated in Article 39 of the Marriage Law and reinforced in the KHI, has been a point of contention among scholars. Traditional jurists argue that talaq is valid upon pronouncement by the husband, while modern legal scholars emphasize the necessity of court intervention to ensure procedural fairness and prevent abuse. This legal reform is grounded in the *maqāṣid al-sharī'ah* (objectives of Sharī'ah), particularly the principles of justice (*'adl*) and public welfare (*maṣlaah*), which prioritize the protection of vulnerable parties in marital disputes (Qurrata'Ayun et al., 2024). Critics from classical schools of thought, however, argue that these modifications impose

unnecessary bureaucratic hurdles on individuals seeking divorce, highlighting the tension between textual fidelity and pragmatic governance (Farkhani et al., 2022).

Similarly, the revision of the Marriage Law through Law No. 16/2019, which raised the minimum marriage age to 19 and required judicial dispensation for underage marriages, underscores the state's role in regulating personal status laws. Advocates of this reform argue that it aligns with global child protection standards and helps mitigate the socio-economic risks associated with early marriage, such as educational disruption and domestic violence (Judiasih et al., 2020). However, conservative jurists critique this policy for deviating from classical *fiqh* interpretations that permit marriage upon reaching puberty, arguing that Islamic law prioritizes mental and spiritual maturity over biological age (Muqaffi et al., 2021). These debates reflect broader discussions on the extent to which *taqni*n should accommodate evolving social norms while maintaining the theological essence of Islamic jurisprudence.

The *'iddah* regulation under Article 153 of the KHI is another example of how Indonesia has formalized Islamic legal principles to ensure gender equity. The waiting period prescribed for divorced women—three menstrual cycles for those still menstruating and a fixed duration of 90 days for those who have stopped menstruating—aims to provide clarity and legal certainty. While this rule follows classical *fiqh* rulings, its legal codification strengthens women's rights by preventing hasty remarriages and allowing for the resolution of financial and custodial matters (Salehudin, 2019). Nevertheless, some scholars argue that legal codification risks reducing the interpretive flexibility of *fiqh*, potentially limiting *ijtihad* (independent reasoning) in adapting to unique circumstances (Firdaus, 2020).

Despite these criticisms, Indonesia's approach to *taqni*n demonstrates the viability of harmonizing *shari'ah* with local and global legal standards. Gus Dur's concept of "indigenization of Islamic law" (*pribumisasi* Islam) provides a relevant framework for understanding how Islamic principles can be integrated into national legislation without compromising their theological identity. By incorporating judicial oversight in *talaq* cases, regulating early marriages, and defining clear *'iddah* periods, Indonesia is effectively bridging the gap between classical Islamic jurisprudence and modern legal expectations. This process not only strengthens legal protections for marginalized groups but also reinforces the adaptability of Islamic law in addressing contemporary societal needs (Ali & Puspita, 2023).

Moving forward, continued engagement between scholars, policymakers, and religious leaders will be essential in refining these legal frameworks. The balance between legal certainty and *ijtihad* must be maintained to ensure that *taqni*n remains a tool for justice rather than a rigid mechanism that stifles interpretative growth. As Indonesia navigates these complexities, its experience offers valuable insights into how Islamic law can be codified in a way that respects tradition while embracing progressive legal reforms. Through ongoing dialogue and legal adaptation, the integration of *madhhab* pluralism within Indonesia's national legal system can serve as a model for other Muslim-majority countries seeking to harmonize *shari'ah* with modern governance structures (Gunawan et al., 2024).

Implementation Challenges and the Flexibility vs. Legal Certainty Debate

Administrative dualism in Indonesia's marriage and divorce laws presents significant challenges, particularly in cases requiring legal validation, such as *isbat nikah* (marriage legalization). The division of authority between the Office of Religious Affairs (KUA), which registers marriages, and the Religious Courts, which handle divorce and marriage disputes, often results in bureaucratic inefficiencies. For instance, individuals seeking marriage legalization must obtain a non-registration certificate from KUA before the court can validate

their marital status. This requirement not only prolongs the legal process but also poses difficulties for rural communities where unregistered marriages are common due to socio-cultural traditions (Mas'ari & Syamsuatir, 2018).

The debate over *taqnīn* (codification of Islamic law) further complicates the implementation of marriage and divorce regulations. Advocates of codification, such as Wahbah al-Zuhaylī, argue that formalizing *fiqh* principles into state law ensures legal certainty, uniformity, and accessibility (Suleman, 2016). By contrast, critics like Muhammad Sa'īd al-'Ashmāwī and Taha Jabir al-Alwānī caution against the rigid application of codified laws, emphasizing that excessive legal formalism can undermine *ijtihād* (independent legal reasoning) and reduce Islamic law's capacity to evolve with social change (al-Ashmawy, 1994; Firdaus, 2020). These concerns highlight the ongoing struggle to balance legal stability with interpretative flexibility.

One key issue in this debate is the potential politicization of codified Islamic law. In some cases, state-driven *taqnīn* has been leveraged to serve political agendas rather than to uphold the core objectives of *sharī'ah* (*maqāṣid al-sharī'ah*). Scholars warn that governments may manipulate legal codification to justify policies that align more with political interests than with the principles of justice (*'adl*) and public welfare (*maṣlahah*). This concern is particularly relevant in the context of marriage and divorce laws, where legislative changes such as the increase in minimum marriage age under Law No. 16/2019 have been both praised for promoting child protection and criticized for diverging from classical *fiqh* traditions (Judiasih et al., 2020; Muqaffi et al., 2021).

Given these complexities, ensuring that *taqnīn* remains a dynamic and inclusive process requires integrating *ijtihād* as an essential component of legal development. Rather than viewing *taqnīn* and *ijtihād* as opposing forces, legal scholars propose a synergy where codification provides a structured legal framework while *ijtihād* facilitates adaptability to evolving social conditions. This approach would allow marriage and divorce laws to maintain their relevance without becoming excessively rigid or disconnected from contemporary realities (Gunawan et al., 2024).

A practical solution to these challenges lies in the active involvement of religious scholars (*ulama*) and community leaders in legal socialization efforts. The caretaker of Nahdotul Ulum Islamic Boarding School has emphasized the importance of engaging religious authorities in educating the public about positive law. This effort can help bridge the gap between classical *fiqh* traditions and modern administrative requirements, fostering greater acceptance of codified Islamic law among communities that remain deeply rooted in traditional jurisprudence (Mas'ari & Syamsuatir, 2018). By incorporating local religious figures into legal education initiatives, the state can facilitate smoother implementation of marriage and divorce laws while preserving the cultural and religious sensitivities of the population.

Ultimately, the effectiveness of Indonesia's marriage and divorce law reforms depends on the ability to navigate the intersection of legal codification, *ijtihād*, and administrative practicality. Ensuring that marriage and divorce regulations remain both just and accessible requires a legal system that is not only rooted in *sharī'ah* principles but also responsive to the socio-cultural realities of Indonesian Muslims. Moving forward, legal policymakers must continue refining *taqnīn* to uphold both legal certainty and interpretative flexibility, fostering a legal framework that harmonizes Islamic law with modern governance).

Conclusions

This study affirms that the codification of Islamic law (*taqnīm*) in the fields of marriage and divorce in Indonesia is a strategic step to provide legal certainty while maintaining the relevance of *sharī'ah* values in the modern context. As a predominantly Muslim country following the Shafi'i school of thought, this codification faces the challenge of accommodating the plurality of *fiqh* perspectives without sidelining the principles of *maqāṣid al-sharī'ah*, such as justice and the protection of women's and children's rights. Furthermore, the role of religious scholars and community leaders is crucial in socializing positive law so that it can be more readily accepted by communities still adhering to local traditions.

However, administrative challenges and the gap between positive law and social practices remain significant concerns. Mechanisms such as marriage registration and divorce management are often perceived as burdensome, especially for communities firmly rooted in customary traditions. Therefore, a more inclusive approach is needed to align community needs with national legal principles. This study recommends harmonizing *fiqh* values with modern legal norms to create beneficial (*maslahat*) regulations that are adaptive to changing times.

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