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Transformation of Kafā'ah in Modern Islamic Family Law: A Study on the Shift of Meaning from Fiqh to Legislation

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ABSTRACT
This article examines the transformation of the concept of kafāʾah from its classical fiqh construction into modern family law systems in several Muslim countries and its implications for the reform of Indonesian marriage law. In classical fiqh, kafāʾah functions as a principle of social and moral compatibility aimed at safeguarding marital harmony. However, the codification of Personal Status Laws (PSL) across Muslim jurisdictions demonstrates a process of reduction and simplification of its traditional parameters. This research aims to explain how such transformation occurs and to position Indonesia within the contemporary constellation of Muslim family law. Employing a normative-juridical method with conceptual and comparative approaches, this study analyzes selected PSL texts alongside Indonesia's marriage law framework. The findings reveal that modern legislation does not eliminate kafāʾah, but rather transforms it by prioritizing religious commitment and moral integrity, maintaining it as a protective principle rather than a validity requirement of marriage. Indonesia represents a model of explicit non-codification, where kafāʾah persists as a living social norm. The article proposes a normative formulation that institutionalizes religious and moral compatibility as an ethical-religious principle within the framework of ius constituendum.

Keywords: Kafā'ah; Islamic Family Law; Legal Transformation; Muslim Legislation

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INTRODUCTION

Marriage in Islam is understood not merely as a legal bond, but also as a moral and social institution aimed at building a family characterized by *sakinah* (tranquility), *mawaddah* (love), and *rahmah* (mercy) (Arjani et al., 2025). In the classical fiqh tradition, one concept related to this objective is *kafā'ah*, the principle of compatibility between prospective husband and wife believed to support marital harmony and continuity. The *fuqahā'* (jurists) discussed *kafā'ah* across a fairly broad spectrum, encompassing religious, moral, lineage, occupational, and even intellectual dimensions (Al-Bantani, n.d.), in accordance with the structure of Muslim society at the time.

However, the development of modern Muslim societies shows significant structural change, as the modern state constructs family law systems through legislation, administration, and adjudication. In a number of Muslim countries, the formation of Personal Status Laws (PSL) has created a new arena in which fiqh concepts, including *kafā'ah*, undergo a process of epistemic transformation. Legislation requires norms that can be administered, verified, and enforced by the state (Taufiqurrahman, 2022), whereas fiqh operates within the logic of *'urf* (custom), *maqāṣid* (higher objectives), and social tradition (Hayati et al., 2025). It is at this juncture that *kafā'ah* undergoes simplification, selection, or modification as it is transformed into positive legal norms.

From the 1970s to the 2020s, at least dozens of Muslim countries have codified family law (Idham et al., 2022). Qatar, Sudan, Yemen, Saudi Arabia, the United Arab Emirates, Oman, Bahrain, and Kuwait are among the states that regulate *kafā'ah* within their PSL, with varying formulations and legal structures. This variation indicates that the normative transformation from fiqh to legislation is not uniform, but instead follows each country's social configuration, family politics, legislative ideology, and orientation toward women's protection.

Previous studies show that discussions of *kafā'ah* remain dominated by two approaches. First, classical fiqh studies that treat *kafā'ah* as a normative doctrine. Afrizal's (2022) research, for instance, examines the understanding and practice of *kafā'ah* among the people of Pidie Regency based on Shāfi'ī fiqh, finding inconsistency in the community's application of the *kafā'ah* concept according to their adopted school of thought, thereby necessitating the development of more contextual *kafā'ah* criteria. Other research conducted by Nikmah and Arianto (2023), as well as by Asrori and Mahfudz (2023), likewise examines *kafā'ah* within a normative framework by assessing the relevance of the *kafā'ah* concept according to particular scholars or schools of fiqh in contemporary contexts. In all three studies (Afrizal, 2022; Asrori & Mahfudz, 2023; Nikmah & Arianto, 2023), the unit of analysis is a school of thought, a single scholar's text, or a community's reading of one school; none of them traces what happens to the doctrine once the state converts it into statutory text, so the parameters they evaluate are never followed across legal systems. Second, sociological studies that investigate the practice of *kafā'ah* within Muslim communities. Research by Shodiq and Ridho (2021), for example, discusses the reactualization of the *kafā'ah* concept amid social change in Lamongan Regency and shows a shift in public understanding of *kafā'ah* alongside the social transformation taking place. Similarly, research by Sulfiyah and Tahir (2021) examines the concept of *kafā'ah* in marriages among members of the Indonesian National Armed Forces (TNI) from an Islamic legal perspective, highlighting the influence of occupational factors and institutional structure on the application of *kafā'ah*. Both studies (Shodiq & Ridho, 2021; Sulfiyah & Tahir, 2021) are confined to a single Indonesian locus, a regency and a military institution, and observe *kafā'ah* as social practice; neither compares it with its statutory treatment in other jurisdictions nor asks why a state codifies it or leaves it uncodified. Meanwhile, studies situating *kafā'ah* within the context of state legislation and comparing variations in its codification across PSL remain relatively limited. Yet legislation constitutes an important arena of transformation for family fiqh within the modern state (Sulastri & Hafizi, 2025).

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The central question that emerges is how *kafā'ah* is transformed from fiqh into the state's positive legal system within PSL, and how Indonesia is positioned within that constellation. This question is relevant not only theoretically but also in terms of policy. Indonesia has faced dynamics of family law reform over the past two decades (Muwaffika et al., 2025), while the concept of *kafā'ah* continues to live on as living law within *pesantren* communities and traditional Muslim society. At this juncture, Indonesia represents a model of non-codification, in contrast to Middle Eastern countries that have opted for codification.

A number of previous studies have discussed the codification of Islamic family law across various Muslim countries (Noviana et al., 2022) as well as the dynamics of marriage law reform (Idham et al., 2022). Related studies examine how Islamic family law is transformed into Indonesia's national legal system and which social forces drive that change (Muwaffika et al., 2025; Sulastri & Hafizi, 2025). In these works, however, the object of analysis is family law as a whole, or a different issue altogether, as in the comparison of polygamy regulation across five countries (Noviana et al., 2022); *kafā'ah* is not treated as an analytical object. Likewise, the call to move from textual-conservative to progressive-contextual fiqh (Nasrulloh, 2014) is made at the level of epistemological argument and is not tested against a specific concept and its legislative treatment. However, studies that specifically trace the transformation of the *kafā'ah* concept from its classical fiqh construction into modern legislative form—while comparing it with systems that do not explicitly codify it—remain relatively limited. To our knowledge, none of the studies discussed above traces *kafā'ah* in this way. Many studies stop at describing legal articles or differences between countries, without analyzing the shift in normative meaning that occurs within the legislative process.

This article stems from an academic concern that changes in the formulation of the *kafā'ah* concept within modern family law are often mistakenly understood as an obscuring or even elimination of classical fiqh teachings. In fact, across various Muslim countries, this concept remains present, albeit in a more limited, simplified, or functionally shifted form. This research therefore aims to explain the transformation of *kafā'ah* from fiqh into the positive legal system through a comparative study of several Muslim countries, to situate Indonesia within that constellation, and to translate the comparative findings into a draft provision for the reform of Indonesian marriage law. Epistemically, the transformation of *kafā'ah* from fiqh to legislation reveals a negotiation between *maqāṣid*, *ʿurf*, legal administration, and family politics. Fiqh is therefore relative in the sense of being contextual and dynamic, requiring reconstruction so that it remains relevant to the development of society and the modern legal system (Nasrulloh, 2014).

Against this background, the present study departs from the ten studies above in four respects. First, in its object: rather than assessing *kafā'ah* within a school, a single scholar, or a local community (Afrizal, 2022; Asrori & Mahfudz, 2023; Nikmah & Arianto, 2023; Shodiq & Ridho, 2021; Sulfiyah & Tahir, 2021), it follows each of the concept's parameters (religion, morality, lineage, occupation, wealth, and social status) as it passes from fiqh into statutory text. Second, in its level and scope: where the sociological studies are confined to one Indonesian locus (Shodiq & Ridho, 2021; Sulfiyah & Tahir, 2021) and the codification and reform studies stay at the level of family law in general (Idham et al., 2022; Muwaffika et al., 2025; Noviana et al., 2022; Sulastri & Hafizi, 2025), this article compares the *kafā'ah* provisions of eight PSLs and sets Indonesia, Pakistan, India, Malaysia, and Brunei beside them as non-codifying systems. Third, in its analytical claim: it treats non-codification not as a legal vacuum but as a distinct institutional model in which *kafā'ah* persists as living law, case law, or social practice, and it shows that codification narrows the parameters to religion and morality while retaining the status of *luzūm*, the right of the woman and her guardian to object, and, in some jurisdictions, the *fasakh* mechanism. Fourth, in its outcome: it converts this comparative finding into a draft provision (*ius constituendum*) for Indonesian marriage law, a step that, to our knowledge, none of the doctrinal, sociological, or reform-oriented studies discussed above takes for *kafā'ah*. The article thus contributes a transformation-based account of *kafā'ah* that links fiqh doctrine, comparative legislation, and law reform in one analytical sequence, and that corrects the assumption that legislative simplification amounts to the elimination of classical teachings.

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METHODS

This research employs a normative-juridical method with statutory, conceptual, and comparative approaches. The analysis is conducted on family law texts in several Muslim countries as well as the marriage law framework in Indonesia, positioning fiqh literature as the conceptual basis. Through this approach, the article argues that the transformation of *kafā'ah* shows a pattern of narrowing parameters toward religious and moral dimensions, as well as a shift from an instrument of social stratification to a principle of family protection. This phenomenon shows that legislation does not replace fiqh, but rather adapts it to serve the interests of modern law.

The comparative object consists of two sets of jurisdictions. The codification set comprises eight Arab jurisdictions selected purposively (criterion-based sampling) rather than exhaustively: Qatar (*Qatar Personal Status Law*, 2006), Sudan (*Sudan Personal Status Law for Muslims Act of 1991*, 1991), Yemen (Republican Decree Law No. (20) of 1992 on Personal Status, 1992)), Saudi Arabia (*Nidhom Al-Ahwal Asy-Syakhsyiyah*, 2022), the United Arab Emirates (*Federal Personal Status Law*, 2005), Oman (Personal Status Law (1997), 1997), Bahrain (Family Law (Part One), 2017) and Kuwait (Personal Status Law, 1984), that is, the six Gulf Cooperation Council states together with Sudan and Yemen. A jurisdiction was included only if it met four criteria. First, codification: it has a national Personal Status Law enacted as a statute or an executive or royal decree, so that the norm is administered and enforceable by the state. Second, explicit regulation: the PSL contains a dedicated provision or chapter on *kafā'ah*, so that its transformation can be read from the legal text rather than inferred from practice. Third, textual comparability: the statute is drafted in Arabic and draws on fiqh terminology, which allows its parameters to be mapped onto the classical baseline set out in Section 3.1. Fourth, variation in formulation: the set includes both fuller regulation (*kafā'ah* as a condition of *luzūm* with a *fasakh* mechanism) and reduced regulation (religion and morality only), so that patterns of selection and simplification can be compared. The non-codification set (Indonesia, Pakistan, India, Malaysia, and Brunei) (Islamic Family Law Act, 1999; Muslim Family Laws Ordinance, 1961; Kusrin et al., 2024; Muwaffika et al., 2025; Nizamuddin Ahmad Siddiqui, 2021; Nurhuda, 2022; Syahroni et al., 2025) consists of jurisdictions whose family-law regime contains no explicit statutory *kafā'ah* clause, and serves as the contrast group. Each PSL was analysed along the same four dimensions: the parameters retained, the legal status of *kafā'ah* (validity or *luzūm*), the holder of the right to object, and the remedy available. The findings are limited to the selected jurisdictions and are not claimed to represent all Muslim countries. For Indonesia, the analysis of living law draws on a supporting field study at one *pesantren* (Afifuddin, 2026); it is used to illustrate the working mechanism, not to measure its prevalence.

RESULTS AND DISCUSSION

Kafā'ah within the Construction of Classical Fiqh

Etymologically, *kafā'ah* means equality, balance, or compatibility (Ad-Damiri, 2004). In Arabic linguistic literature, the term is used to denote equivalence in status, strength, and nobility. When used in the context of marriage, *kafā'ah* refers to the compatibility between a prospective husband and wife in certain respects deemed conducive to marital harmony (Muṣṭafā et al., n.d.). Thus, the meaning of *kafā'ah* in marriage does not merely denote formal equality, but rather social propriety and value congruence that enable a stable husband-wife relationship.

In fiqh terminology, the *fuqahā'* define *kafā'ah* as a balance between two prospective spouses so that married life may be spared serious social conflict (Al-Zuhaylī, 2024). This concept arises from the awareness that marriage is not merely a personal relationship, but also a social event involving family and community. Compatibility is therefore regarded as one factor that can minimize potential tension within the household. The most important focus of *kafā'ah* lies in creating harmony, propriety, and family stability, particularly in the religious and moral dimensions (Rahmi Mutiara Dalimunthe & Nawir Yuslem, 2025).

Within the framework of classical Islamic law, *kafā'ah* is positioned not as a condition for the validity of the marriage contract, but as a condition for its continuity (*luzūm*). This means that a marriage remains valid even in the absence of compatibility, but the woman or her guardian retains the right to object if the

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incompatibility is feared to cause harm. With this construction, *kafā'ah* functions as a preventive protective mechanism, particularly for women, so that they are not drawn into a marriage with the potential to produce injustice or marital breakdown (Anas et al., 2023).

The normative basis of the *kafā'ah* concept can be traced in the Qur'ān and hadith. Q.S. al-Nūr [24]: 26 is often understood as an indication of moral compatibility between men and women, wherein good people are paired with good people. This verse does not speak of social structure, but rather emphasizes the moral dimension as the basis of relational harmony (Lestari et al., 2024). In line with this, the hadith of the Prophet (peace be upon him) stating that a woman is married for four reasons—wealth, lineage, beauty, and religion—and recommending that one choose based on religion, shows that religious quality is a primary consideration in building a household. Several other narrations recommending marriage to a compatible (*sekufu*) partner are understood as reinforcing the ethic of social propriety in marriage, although not all of these narrations rank among strongly authenticated hadith (Ghina Sofia Mahfuzah et al., 2025).

Scholars differ regarding the parameters of compatibility. According to the Ḥanafī school, there are six: sound religious practice, being Muslim, being free (not enslaved), lineage, wealth, and occupation (Al-Nasafī, 2011). According to the Mālikī school, there are two: sound religious practice and *ḥāl* (Al-Mawwāq, 1994), namely the state of being free from defects or blemishes (Al-Wādānī, 2017). According to the Shāfiʿī school, there are five: sound religious practice, being free, lineage, freedom from defects that would give the right to object, and occupation (Al-Nawawī, 2005). The Ḥanbalī school likewise recognizes five: sound religious practice, being free, lineage, wealth, and occupation (I. M. Al-Maqdisī, 1997).

Religion (*diyānah*) is the only criterion on which all four schools agree. It is understood as being Muslim and free from immoral conduct (*fisq*), so that a morally corrupt (*fāsiq*) man is not compatible with a righteous (*ṣāliḥah*) woman, because a woman bears greater disgrace from her husband's immorality than from his low lineage (Al-Zuhaylī, 2024). The Ḥanafī jurists are not unanimous on this point: Muḥammad al-Shaybānī holds that immorality does not preclude compatibility unless it is openly extreme, while Abū Yūsuf holds that only openly displayed immorality does (Al-Kāsānī, 1910). The Ḥanafī school also uniquely measures being Muslim by the Islam of one's ancestors, a criterion applied only to non-Arabs, since Arabs continue to take pride in lineage rather than in the Islam of their forebears (Al-Ḥaṣkafī, 2002).

Beyond religion, the Ḥanafī, Shāfiʿī, and Ḥanbalī schools make free status a condition of compatibility, with the Ḥanafī (Al-Kāsānī, 1910) and Shāfiʿī (Al-Nawawī, 1991) schools adding freedom of origin (*ḥurriyyat al-aṣl*), so that even a manumitted former slave is not compatible with a woman of original free status. These three schools also make lineage a criterion, though with differing explanations: the Ḥanafī school restricts it to marriages among Arabs (Sulaymān, 1910), the Shāfiʿī school measures it through the paternal line and ranks Arabs in three hierarchical tiers (Hāshimī-Muṭṭalibī, non-Hāshimī Qurayshi, and non-Qurayshi Arabs) (Al-Shirbīnī, 1994), and the Ḥanbalī school follows the Ḥanafī principle under the term *manṣib* (Ibn Qudāmah, 1968). The Ḥanafī and Ḥanbalī schools add financial capacity, meaning the ability to pay the dower and support one's wife rather than abundant wealth (Al-Zuhaylī, 2024), whereas the Shāfiʿī school in its soundest view (Al-Shirbīnī, 1994) and the Mālikī school (Al-Qarāfī, 1994) reject it. Occupation is a criterion for the Ḥanafī, Shāfiʿī, and Ḥanbalī schools, but whether an occupation is lowly is a matter of *ʿurf* rather than an absolute standard, and may change across eras and places (Al-Shirbīnī, 1994; Al-Zuhaylī, 2024).

The Mālikī school, by contrast, does not make free status, lineage, wealth, or occupation a criterion, and Wahbah al-Zuhaylī considers this the more accurate view, since Islam rejects racial and tribal discrimination and the Prophet's own practice shows numerous cross-lineage marriages (Al-Zuhaylī, 2024). Freedom from defects that give the right of choice (*khiyār*) is a criterion for the Shāfiʿī (Ad-Damiri, 2004) and Mālikī (Al-Wādānī, 2017) schools, while the Ḥanafī (Al-Humām, 1970) and Ḥanbalī (ʿAbd al-Raḥmān bin Abī ʿUmar Ibn Qudāmah Al-Maqdisī, 1983) schools do not treat it as a criterion yet still grant the right of choice to the woman herself, since the harm falls upon her alone (Ibn Qudāmah, 1968).

Differences of opinion among scholars regarding the parameters of *kafā'ah* show that this concept is heavily influenced by the social context in which fiqh developed. Some scholars include elements such as lineage, free status, occupation, and wealth as considerations of compatibility, while others place greater emphasis on the religious dimension (Al-Zuhaylī, 2024). This variation confirms that *kafā'ah* is not a rigid concept, but rather a social instrument formulated to safeguard household welfare in accordance with the structure of society at a given time (Anas et al., 2023).

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Thus, within the construction of classical fiqh, *kafāʾah* functions as an ethical-social principle aimed at maintaining family harmony and preventing conflicts that could damage a marriage (Al-Bantani, n.d.). It is not intended as an absolute tool of discrimination, but rather as a protective mechanism grounded in social and moral propriety. Understanding this flexible character is essential as a foundation for examining how the concept of *kafāʾah* subsequently underwent transformation when it interacted with different legal systems and social realities in the modern era.

As Muslim societies entered the phase of the modern institutionalized state, fiqh concepts, including *kafāʾah*, were not automatically adopted in their original form. The interaction between religious norms and the demands of state law gave rise to a process of selection, simplification, and reinterpretation (Idham et al., 2022). It is in this process that *kafāʾah* shifted from its classical social construction toward a new form more suited to the logic of modern legislation. This change did not eliminate the protective substance it carried, but rather changed the way that norm is presented and operated within the legal system. On this basis, this article asserts that the transformation of *kafāʾah* reflects a negotiation between fiqh and the state, in which the values of Islamic law are not lost, but reconstructed so that they can survive within the contemporary legal system without losing their orientation toward *maqāṣid al-sharīʿah* in preserving family integrity.

Legislation of *Kafāʾah* within the Personal Status Laws (PSL) of Muslim Countries

The transformation of *kafāʾah* from fiqh into the Personal Status Laws (PSL) of Muslim countries shows that the legislative process selects from among the spectrum of parameters found in fiqh doctrine. In classical fiqh, the parameters of *kafāʾah* encompass religion, morality, lineage, occupation, wealth, and social status (Al-Zuhaylī, 2024). However, when the state undertakes codification within its PSL, this spectrum undergoes epistemic reduction, and only some parameters are retained in the legislation. In the context of Gulf countries, the parameters of religion and morality receive priority, while other parameters such as lineage and occupation are not explicitly adopted. This simplification of parameters aligns with the administrative and judicial needs of the modern family law system, which requires norms that can be verified, administered, and enforced by state authorities.

The PSLs of Qatar (*Qatar Personal Status Law*, 2006) and Sudan (*Sudan Personal Status Law for Muslims Act of 1991*, 1991) show a legislative continuity with the structure of fiqh through their regulation of *kafāʾah* as a condition of *luzūm* and as a right of the woman and her guardian. In addition, a *fasakh* (judicial annulment) mechanism is provided as a judicial instrument for dissolving a marriage in the event of incompatibility. The existence of this mechanism reflects that *kafāʾah* does not function merely as a preventive instrument at the partner-selection stage, but also as a corrective instrument at the post-contract stage. The provision of a *fasakh* mechanism within the PSL shows that legislation does not eliminate the protective function of *kafāʾah* for women as found in fiqh. In this context, the legislation adapts the fiqh structure that positions *kafāʾah* as a condition of *luzūm* and grants the right of *fasakh* to the woman or her guardian in the event of harmful incompatibility (Ad-Damiri, 2004).

On the other hand, the PSLs of Saudi Arabia (*Nidhom Al-Ahwal Asy-Syakhsyiyah*, 2022), the United Arab Emirates (*Federal Personal Status Law*, 2005), Oman (Personal Status Law (1997), 1997), Bahrain (Family Law (Part One), 2017), and Kuwait (Personal Status Law, 1984) show a further degree of simplification through the reduction of the *kafāʾah* parameter spectrum to religion and morality alone. This simplification does not eliminate the structure of rights held by the woman and her guardian to object to incompatibility, but does not always provide a detailed *fasakh* mechanism as found in the PSLs of Qatar, Sudan, and Yemen (Republican Decree Law No. (20) of 1992 on Personal Status, 1992). This simplification can be understood as a form of legislative standardization toward norms that are administrable at the state level. The religious parameter can be verified based on religious identity and status, while the moral parameter can be assessed through *ʿurf*. The recognition of *ʿurf* in moral assessment shows that the legislation is not closed off to social and cultural dynamics (Irfandi, 2025).

The regulation of *kafāʾah* within the PSLs of Gulf countries shows that legislation chooses to retain parameters connected to *maqāṣid* and verifiable through the judicial system. Within the *maqāṣid* framework, the parameters of religion and morality are closely connected to *ḥifẓ al-dīn* (the preservation of religion) and *ḥifẓ al-ʿirḍ* (the preservation of honor), which is why legislators tend to retain both parameters. Meanwhile, social parameters such as lineage and occupation are connected to *ʿurf* but are difficult to establish as a

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judicial basis within a modern legal system. States choose not to adopt these parameters due to administrative limitations and the risk of discrimination within legislation.

The reduction to religion and morality is not only a matter of administrative convenience; it also reflects the sociological position of lineage and status in Gulf societies and the way the modern state has handled it. In classical fiqh, the parameters of lineage, occupation, and wealth encode a social order of descent, occupational standing, and economic rank (Al-Zuhaylī, 2024). In the Gulf, descent has also been constitutive of the political community itself: before the modern state, society was organized around kinship units, and citizenship in Qatar, Saudi Arabia, and the United Arab Emirates is still transmitted through parental lineage (Ali & Cochrane, 2024), while the hierarchy of citizenship has been described as resting on tribal, familial, economic, sectarian, and gender factors (Abu-Ras et al., 22 C.E.), Where such a hierarchy is socially salient, status-based parameters left to judicial discretion can be invoked by guardians against marriages that the state has no interest in obstructing. Codification offers a way of containing this risk: the 2022 Saudi PSL, for example, has been analysed as an effort to standardize rulings and reduce judicial discretion in personal status matters (Giladi, 2025). By limiting the enforceable parameters to those that can be proven before a court and defended on scriptural grounds, the legislator separates the social practice of marrying within one's tribe or status group, which continues, from its legal enforcement, which is withdrawn. In this sense the reduction is not the disappearance of social *kafāʾah* but a redrawing of the boundary between social norm and state law, and the PSLs that reduce *kafāʾah* to religion and morality do not treat lineage as a ranking criterion in marriage (Federal Personal Status Law, 2005; Nidhom Al-Ahwal Asy-Syakhsyiyah, 2022; Personal Status Law, 1984; Personal Status Law (1997), 1997).

From the standpoint of legal politics, two considerations help explain the convergence. First, family-law codification in the Gulf is an instrument of state-building and of defining the national community. Because citizenship itself rests on descent(Ali & Cochrane, 2024), the state has little reason to let family courts rank its citizens by tribal or occupational standing, a hierarchy that sits uneasily with a legal order premised on equal citizenship. Bahrain's Family Law, for instance, requires the consent of the guardian of a Bahraini wife when a marriage contract is legalized, even where the contract is valid under the law of the place where it was concluded (Family Law (Part One), 2017), a provision framed around nationality rather than social rank. The reduction therefore does not remove lineage from public law; arguably it leaves lineage to operate through nationality law rather than through the family court, while the PSL keeps only the parameters, religion and morality, against which every citizen can be measured on the same terms. Second, the technique of drafting favors reduction. Codifiers select among madhhab opinions rather than following a single school: the UAE PSL, as amended in 2023, directs the judge first to the Mālikī school and then to the Ḥanbalī, Shāfiʿī, and Ḥanafī schools, yet adopts Ḥanafī rules on particular matters such as dowry (Fazari et al., 2024). Bahrain's Family Law likewise directs a judge applying Sunni jurisprudence to the Mālikī school first (Family Law (Part One), 2017), Because the Mālikī school recognizes only religion and freedom from defects, as shown in Section 3.1, a legislator working from Mālikī sources has doctrinal ground to drop lineage, wealth, and occupation. Madhhab selection cannot, however, explain the Saudi case, because the Kingdom's legal tradition is Ḥanbalī and its classical parameters are broader. There the 2022 codification is presented as part of the Vision 2030 reform agenda, which aims to strengthen marriage and widen women's rights, a political program in which narrowing the grounds on which guardians may obstruct a marriage is coherent, although how far the law achieves these aims is debated (Giladi, 2025).

These explanations are analytical inferences drawn from the statutory texts and the secondary literature, not findings about the legislators' declared intent. This study did not examine the drafting records or explanatory memoranda of the PSLs analysed, so the account above should be read as a pattern to be tested in further research. It also does not imply that status-based marriage preferences have disappeared in society; a comparison of legal text with social practice remains the necessary next step.

Beyond the parameters, the structure of rights is an important aspect of the transformation of *kafāʾah*. Within PSLs, *kafāʾah* is generally positioned as a right belonging to the woman and her guardian. This positioning reflects continuity with the structure of fiqh, in which the woman and her guardian hold the legitimacy to assess the compatibility of a prospective partner (Al-Muṭīʿī, n.d.). However, the legislation translates this structure of rights through formal recognition within the text of the PSL and by providing access to the courts

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as a dispute-resolution mechanism. This change shows that the legislation does not eliminate the role of family or *ʿurf*, but instead provides a judicial channel in the event of conflict.

The legal status of *kafāʾah* within PSLs likewise shows consistency with fiqh. Within the PSLs of Gulf countries, *kafāʾah* is positioned as a condition of *luzūm*, not a condition of validity. Thus, a marriage remains legally valid even if incompatibility occurs, but the aggrieved party may raise an objection or file a petition for *fasakh* (Muḥammad ibn Maḥmūd ibn ʿAbd al-Karīm al-Kurdarī, 2017). This status shows that legislators retain the structure of fiqh within the framework of *maqāṣid* and women's protection, while also providing stability to the validity of the marriage contract.

This legislative transformation shows a relatively consistent pattern among Gulf countries. In the context of Indonesia, however, the position of *kafāʾah* differs fundamentally. Indonesia does not regulate *kafāʾah* in either the Marriage Law or the Compilation of Islamic Law. Within the Indonesian context, *kafāʾah* operates as a social norm and as living law within *pesantren* communities and *santri* families. This norm is carried out without state intervention and without formal judicial mechanisms. This position makes Indonesia a model of non-codification, one that depends not on state legislation but on the social and religious structure of society.

From a comparative perspective, the absence of legislation does not eliminate *kafāʾah* as a norm, but rather shifts the locus of its regulation to the social sphere. This shows that the relationship between fiqh and the state is not deterministic. Legislation is not the sole form of fiqh implementation (Sulhati & Siregar, 2024). Within a pluralistic Muslim country such as Indonesia, the absence of legislation actually opens up flexibility in determining partner compatibility based on local context and family preference. Within the *pesantren* context, *kafāʾah* operates through the social networks of *santri* and the culture of religious education, allowing the social norm to function without bureaucracy.

The claim that *kafāʾah* lives on as living law in *pesantren* communities is supported by the first author's field study at one *pesantren*, Mambaus Sholihin in Gresik. The study drew on 19 informants, namely five *masyayikh*, five teachers, three students, five alumni, and one guardian of a student, interviewed between February and July 2026 and supplemented by participant observation and documents. Informants did not frame *kafāʾah* through the classical list of lineage, wealth, and occupation. A student argued that lineage guarantees nothing and wealth can change, so that only religious quality matters. A teacher listed five classical considerations but held that only religion and morals are crucial, the rest being negotiable, and that *kafāʾah* is used to filter, not to judge. A guardian added that a *santri* background is a plus but not obligatory (Afifuddin, 2026).

What turns this shared understanding into a working norm is not a written rule. One *masyayikh* informant stated that no written procedure exists, only an ethic of seeking the *kiai*'s blessing before marriage. Four institutional mechanisms carry the norm. First, the *kiai* actively encourage and arrange marriages between *santri*, one calling it a pity (*eman*) when a *santri* does not marry a fellow *santri*, because the aim of spreading knowledge is then unmet for lack of a shared vision. Second, a weekly study of a family-life text, *Adabul Islam fi Nidhomil Usroh*, prepares *santri* for married life. Third, the *kiai* themselves take sons-in-law from among their *santri*: all of the sons-in-law in the head caretaker's family have a *santri* background, and seven of twelve studied directly under him. Fourth, a mass marriage ceremony has been held since 1998 on the twenty-first night of Ramadan, with 47 couples in 2015–2019 and 11, 8, and 12 couples in 2024, 2025, and 2026. In it, the bride's guardian delegates guardianship (*taukil wali*) to the *kiai*, and the dower ranges from cash and gold to books (Afifuddin, 2026).

This living law differs from the Gulf PSLs in how it binds, but not in what it retains. It binds through legitimation, example, and ritual, not through sanction, and it gives no role to a court. Yet it operates alongside state law rather than against it: couples first ask the caretaker's permission and then register their marriage at the Office of Religious Affairs, because the caretaker does not agree to unregistered marriage (Afifuddin, 2026). Indonesian law itself touches *kafāʾah* only marginally, in Article 61 of the Compilation of Islamic Law, which bars preventing a marriage for lack of *kafāʾah* except for difference of religion. In substance, the *pesantren* thus applies informally the same parameters that the Gulf PSLs retain formally, religion and morality. The evidence comes from a single *pesantren*, so it illustrates how the mechanism works and does not establish how common it is across Indonesian *pesantren*.

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Through a comparative reading of eight PSLs and Indonesia, it is evident that legislation reduces the spectrum of fiqh parameters and retains only the religious and moral parameters. Legislation also retains the mechanisms of guardianship and *fasakh* in several countries as protective instruments for women. The status of *luzūm* is preserved through the structure of the right to object, without disturbing the validity of the contract. Indonesia, meanwhile, separates *kafā'ah* from state legislation and places it within the social domain as living law.

This phenomenon of non-codification is not unique to Indonesia, but is also observed in the family law systems of Pakistan and India. Pakistan has not established a PSL as a comprehensive family code, undertaking reform only through the Muslim Family Laws Ordinance (1961), which contains no *kafā'ah* clause (*Muslim Family Laws Ordinance*, 1961) and is concerned mainly with the procedural side of marriage, leaving substantive questions to the courts (Mehmood & Hashim, 2021). *Kafā'ah* therefore survives chiefly as Ḥanafī doctrine rather than as an applied legal condition: precedents validate the marriage of an adult woman without her guardian's consent on Ḥanafī grounds, yet the courts have been criticized for not requiring the accompanying conditions of *kafā'ah* and *mahr al-mithl* (Hafeez, 2022, 2023; Syahroni et al., 2025). In this context, *kafā'ah* is neither a legislative norm nor a consistently applied judicial one, but a doctrinal reference whose application is left to judicial discretion. India, meanwhile, retains Muslim Personal Law in a non-codified form and relies on Ḥanafī fiqh texts and court rulings to determine partner compatibility (Nizamuddin Ahmad Siddiqui, 2021). This shows that *kafā'ah* can survive within a modern legal system without legislation and without codification, through the mechanism of case law.

In Malaysia and Brunei, the family law structure shows a pattern of partial codification. Malaysia has a family law system based on state-level legislation (Nurhuda, 2022), but has not established a national PSL that explicitly regulates *kafā'ah*. Reviews of the Islamic Family Law Enactments likewise note the absence of any specific *kafā'ah* provision (Jailan & Kusrin, 2023). The state's role instead enters through guardianship: under the Federal Territories Act, the marriage requires either the *wali*'s consent or the Syariah judge's consent as *wali* where the *wali* refuses without sufficient reason (Mehmood & Hashim, 2021). *Kafā'ah* is present through social practice and family judgment (Kusrin et al., 2024), rather than through legislative text. Brunei has codified part of its family law, but does not explicitly include a *kafā'ah* clause within its PSL structure (*Islamic Family Law Act*, 1999). This codification operates within a highly centralized model of Islamic legal authority and a dual Syariah–civil court system (Kamaluddin et al., 2026; M. Nur et al., 2025). Both countries show a variant of administrative non-codification, in which the state's legal structure regulates marriage but does not intervene in the assessment of compatibility.

The phenomenon of non-codification in these four countries shows that *kafā'ah* does not automatically enter the sphere of legislation when a state forms family law. On the contrary, *kafā'ah* can continue to operate within the social, cultural, or judicial sphere. In this context, the relationship between fiqh and the state is not deterministic. Legislation is one form of the institutionalization of fiqh, but not the only one. Comparative scholarship likewise treats codification as a transformative process that reshapes classical doctrine into state law, not a neutral recording of it (Kamaluddin et al., 2026; Lukito & Az-Zahra, 2026). Muslim family law systems can preserve fiqh through case law, fatwa, or living law without forming a PSL (Sulhati & Siregar, 2024). Thus, within the panorama of contemporary Muslim family law, there are two major models: the codification model seen in the PSLs of Gulf countries, and the non-codification model seen in Indonesia, Pakistan, India, Malaysia, and Brunei.

Normative Recommendations for Reforming the Regulation of *Kafā'ah* in Indonesian Marriage Law

The transformation of the *kafā'ah* concept from fiqh into the modern legal system shows that the substance of compatibility remains relevant, but its parameters and form of regulation need to be adjusted to the principles of national law. Reform of Indonesia's marriage law can therefore be directed toward regulating compatibility on the basis of religious and moral values as a principle of family protection, rather than as an instrument of social stratification.

First, the regulation of *kafā'ah* in Indonesia should be affirmed as an ethical-religious principle in marriage, not as a condition for the validity of the contract. This affirmation is important to maintain consistency with fiqh doctrine, which treats *kafā'ah* as pertaining to household suitability and welfare, not to the validity of

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the marriage (Al-Zuhaylī, 2024). Thus, the resulting norm functions as a principle of family formation and harm prevention, rather than as an instrument of automatic annulment.

Second, the compatibility parameters that merit institutionalization within positive law should be limited to religious compatibility and moral integrity (Putra et al., 2025). These two elements have a strong foundation in the fiqh tradition while also aligning with the goal of family protection within the modern legal system (Fathurrahman & Azhari, 2022). Parameters based on lineage, social class, or occupation need not be incorporated into legislation, as they risk conflicting with the principle of citizens' equality before the law.

Third, the norm of *kafā'ah* can be formulated as a principle of preventive protection, namely through mandatory premarital guidance that emphasizes religious readiness, moral responsibility, and understanding of spousal rights and obligations (Ramadhan, 2025). With this approach, the state does not control citizens' choice of partner, but rather ensures that every marriage is built upon readiness of values and responsibility.

Fourth, the law needs to provide room for limited judicial intervention when the moral unreadiness or behavioral deviance of one party is seriously proven to endanger the safety or continuity of the household. This intervention is not meant to assess the social status of the couple, but to protect family welfare as the primary purpose of marriage law.

Fifth, the regulation of *kafā'ah* within the Indonesian context must continue to recognize the existence of living law within Muslim society, particularly the tradition of partner selection based on shared religious vision within *pesantren* communities. Legislation need not replace this social function, but need only provide a legal framework that supports the formation of a *sakinah* family grounded in religious and moral values.

With this orientation, the reform of Indonesia's marriage law does not mean literally adopting the classical construction of *kafā'ah*, but rather transforming its substance into a contextual, non-discriminatory legal norm oriented toward family protection. This approach allows fiqh values to remain alive within the national legal system without conflicting with modern principles of justice.

Formulation of a *Kafā'ah* Provision from the Perspective of *Ius Constituendum*

As a follow-up to the normative analysis, the concept of *kafā'ah* that has undergone transformation can be formulated as a contextual legal norm for the Indonesian legal system. This formulation is not intended to revive social stratification found in classical fiqh, but rather to affirm the protective function of *kafā'ah* as an ethical-religious principle in family formation.

Article X

Marriage shall be conducted to establish a family based on *sakinah*, *mawaddah*, and *rahmah*, grounded in religious values, morality, and responsibility.

Prospective spouses shall ensure that the marriage is entered into on the basis of compatibility in: a. religious commitment; b. moral integrity; and c. readiness to fulfill the rights and obligations of marriage.

The absence of compatibility under paragraph (2) shall not affect the validity of a marriage that satisfies the pillars and conditions prescribed by law.

The legal consequences of the absence of compatibility under paragraph (2) shall be governed exclusively by Article Y.

Article Y

The religious court may grant a petition for the prevention of a marriage if it is proven before the court that one of the prospective spouses: a. does not fulfill the religious obligations required for conducting family life; or b. engages in conduct that seriously endangers the safety or continuity of family life.

The religious court may grant a petition for the annulment (*fasakh*) of a marriage on the grounds stated in paragraph (1), if those grounds are proven before the court after the solemnization of the marriage.

A petition under paragraph (1) or (2) may be filed only by: a. the prospective spouse or spouse; b. the guardian; or c. a family member in the direct line of ascent or descent.

The examination of the petition shall follow the procedural law applicable in the religious courts.

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CONCLUSION

The transformation of the *kafā'ah* concept from classical fiqh into the modern family legal system shows that Islamic norms do not remain static as textual doctrine, but undergo a process of selection, adaptation, and contextualization when interacting with the structure of state law. Within fiqh, *kafā'ah* functions to maintain social balance and household harmony through various parameters of compatibility. However, in the course of modern legislative development, some of these parameters have undergone reduction, while their protective substance is retained.

The comparative study shows that Muslim countries that codify family law tend to retain *kafā'ah* in a simplified form, focusing on the religious and moral dimensions and positioning it as a principle of protection rather than a condition for the validity of marriage. Indonesia, meanwhile, represents a model of explicit non-codification, in which the value of *kafā'ah* continues to live as a social and cultural norm within Muslim society, particularly within *pesantren* communities, without being formalized in law.

These findings confirm that the relationship between fiqh and state law is transformative in nature. Modern legislation does not literally copy fiqh doctrine, but rather takes up the normative substance most relevant to the principles of justice, equality, and family protection. In this context, religion and moral integrity emerge as the core value of *kafā'ah* most adaptable to the contemporary legal system.

Based on this analysis, this article proposes a normative formulation of *ius constituendum* in the form of a legal provision that positions religious and moral compatibility as an ethical-religious principle in family formation and protection. This formulation does not revive social stratification within marriage, but rather transforms the spirit of *kafā'ah* into an instrument for strengthening family resilience in line with *maqāṣid al-sharīʿah* and the principles of national law.

Thus, the reform of Islamic family law in Indonesia need not proceed through the literal adoption of other countries' legislative models, but rather through the strengthening of substantive values already alive within society. The transformation of *kafā'ah* shows that Islamic law can remain relevant within the modern legal system when understood as a protective value oriented toward family welfare, rather than as a mechanism of social restriction.

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