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Continuity and Change of Traditional Islamic Law in Modern Times: tarjīḥ as a Method of Adaptation and Development of Legal Doctrines

Ahmed Gad Makhlouf *

ABSTRACT

In addition to *ijtihād* (independent legal reasoning), *tarjīḥ* (weighing up and preference) serves as a fundamental instrument of traditional Islamic law's operational work and was used on different levels. In modern times, *tarjīḥ* is still applied not only by individual scholars but also by collective *fiqh* institutions. However, the conception of *tarjīḥ* is undergoing a transformation in its current application. In the scope of this article, the first purpose is to provide a comprehensive overview of the conception and the diverse practical forms of the *tarjīḥ* in traditional Islamic law. The focus then lies on setting out how to apply *tarjīḥ* in modern Islamic jurisprudence. This article also aims to illustrate the conceptual and operational changes of *tarjīḥ*, paying special attention to the relation between *tarjīḥ* and *ijtihād*. Overall, this article intends, on the one hand, to contribute to the study of present Islamic law's developments; on the other hand, it examines the continuity and change of *tarjīḥ* from traditional Islamic law to contemporary *fiqh* institutions. It is argued that *tarjīḥ* in the modern age is not only used as a method of weighing and choosing a legal view that among the diverse views of pre-modern law most closely adapts to the current social circumstances, but that it is also integrated in the process of development of new legal doctrines.

1. INTRODUCTION

In addition to *ijtihād* (independent legal reasoning), *tarjīḥ* (weighing up and preference) serves as a fundamental instrument of the operational work within the framework of the pre-modern Islamic law school system. While *ijtihād* evokes a plurality of probabilities or ambiguities, *tarjīḥ* intends to filter out the opinion with the highest probability. In doing so, *tarjīḥ*

* Ahmed Gad Makhlouf, University Assistant Post Doc, Islamic Jurisprudence, Department of Islamic-Theological studies, University of Vienna, Schenkenstraße 8-10, 1010 Vienna, Austria. Email: ahmed.gad.makhlouf@univie.ac.at

aims to prepare and make applicable the present extensive body of legal material that arose from the largely individually practiced *ijtihād* activities. In this context, Wael B. Hallaq states: 'Both of these constituted the desideratum behind the methodology of legal theory. Much of the energy of theorists was expended on elaborating methods and formulating principles which would be of service to the jurisconsult in the domains of *ijtihād* and *tarjīḥ*.'[1]

The method of *tarjīḥ* plays a prominent role for the development of traditional Islamic law and was applied on different levels. The practice of *tarjīḥ* was not only limited to the micro level as a method for weighing and deciding in the case of a conflict of evidence (*taʿāruḍ al-adilla*), whereby the jurist is supposed to resort to various methods in order to eliminate an existing conflict. Moreover, the process of *tarjīḥ* was used both within a particular *madhhab* (intra-*madhhab*) and between the different *madhāhib* (inter-*madhhab*). Thus, on the one hand, the different views, mainly linked with the founder or a leading scholar of a *madhhab* (Islamic law school, pl. *madhāhib*), or the different legal opinions of various scholars within a single school are the subject of *tarjīḥ*. On the other hand, this type of *tarjīḥ* is used between the diverse *madhāhib* as a collection of the entirety of the norms of each school of law developed on the basis of *ijtihād*. With regard to the work results of the process of *ijtihād*, *tarjīḥ* was used both in the derivation of general norms (*furūʿ*) and in the applicability of these general norms to individual cases, ie in the issuance of legal opinions (*fatāwā*) or judicial rulings (*aḥkām*).[2] In modern times, *tarjīḥ* continues to be applied not only by individual scholars but also by collective institutions of Islamic law. However, the conception of *tarjīḥ* is undergoing a transformation in its current application. Thus, it is not only used as a method of weighing and choosing among several legal views but the most adaptable one when it comes to current social circumstances. Moreover, the application of *tarjīḥ* by contemporary *fiqh* institutions is characterized by a collective manner.

Most previous treatises[3] on *tarjīḥ* in Islamic studies, even though relatively scarce, primarily deal with *tarjīḥ* as a method used by a legal scholar during the procedure of legal finding to resolve a conflict of arguments. It is a subject that is very often discussed in the classical literature of *uṣūl al-fiqh* (Islamic legal theory). In his book *Authority, Continuity and Change in Islamic Law*, Hallaq brings up the aspect of substantive law. He considers the *tarjīḥ* as a method of evening the disagreements that are a characteristic trait of Islamic law. In this context, he focuses on the terms appearing in the writings of substantive law, which are used by the different schools to express the preference of one view to another. The latter are such as *rājiḥ, ẓāhir, ṣaḥīḥ, aṣaḥḥ, ṣawāb*, and *madhhab*.[4] Hallaq draws attention to the application of *tarjīḥ* by the *muftī* (jurisconsult) in another article.[5] However, these writings pay scant attention to some aspects or forms of *tarjīḥ* in pre-modern Islamic law, such as *tarjīḥ* operating in the context of the delimitation between the various *madhāhib*. Of particular relevance to the

[1] Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh* (Cambridge University Press 1997) 154.

[2] For literature on the classical understanding of *tarjīḥ*, see footnote 3.

[3] These treatises include: Birgit Krawietz, 'The Weighing of Conflicting Indicators in Islamic Law' in Urbain Vermeulen und JMF van Reeth (eds), *Law, Christianity and Modernism in Islamic Society* (Peeters 1997) 71–74; Mohd Daud Bakar, 'Conflict of Law and the Methodology of Tarjih – A Study in Islamic Legal Theory' (PhD thesis, University of St Andrews 1994); Bernard G Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (rev edn, University of Utah Press 2010) 721–31; Ulrich Rebstock, 'Abwägen als Entscheidungshilfe in den uṣūl al-fiqh: Die Anfänge der tarǧīḥ-Methode bei al-Ġaṣṣāṣ' (2003) 80 Der Islam 110–21; Birgit Krawietz, *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam* (Duncker & Humblot 2002) 79–82.

[4] See the chapter 'Operative Terminology and the Dynamics of Legal Doctrine' in Wael B Hallaq (ed), *Authority, Continuity and Change in Islamic Law* (Cambridge University Press 2001) 121–65. Similar references to the use of *tarjīḥ* by Hanafi scholars are provided by Rudolf Peters, see 'What Does It Mean to Be an Official *madhhab*? Hanafism and the Ottoman Empire' in Peri Bearman, Rudolph Peters and Frank E Vogel (eds), *The Islamic School of Law: Evolution, Devolution, and Progress* (Harvard University Press 2005) 147–58, here 149ff.

[5] See Wael B Hallaq, 'From Fatwās to Furūʿ: Growth and Change in Islamic Substantive Law' (1994) 1(1) Islamic Law and Society 29–65, here 52ff.

present study is the article "Tarǧīḥ und maḏhab: Zur Rolle des tarǧīḥ-Verfahrens bei der Entwicklung der traditionellen islamischen Rechtsschulen". This article pays special attention to the relation between *tarjīḥ* and the *madhhab* traits, especially the tarjīḥ's role in distinguishing the law schools from each other. In addition, the writer's focus is on the contribution of the *tarjīḥ* to the systematization and application of a *madhhab*.[6] When it comes to the practice of *tarjīḥ* in modern times, there are very few writings that refer to the *tarjīḥ* concept in contemporary *fiqh* institutions, as most notably in *majlis tarjīḥ* of the Muhammadiyah movement in Indonesia.[7] However, the modified application of *tarjīḥ* by more contemporary *fiqh* academies and their methodological *tarjīḥ* procedures are hardly respected.

This article, first of all, intends to outline a rough, yet comprehensive overview of the conception and the diverse practical aspects and forms of the *tarjīḥ* procedure in traditional Islamic law. Based on this overview, the present developments regarding the conception and application of *tarjīḥ* can be grasped. The attention then lies on the different ways of applying *tarjīḥ* in modern Islamic jurisprudence while taking into consideration its conceptual and operational changes caused by contemporary Muslim scholars and *fiqh* institutions. In this context, this article pays special attention to the relation between *tarjīḥ* and *ijtihād*. Overall, it intends, on the one hand, to contribute to the study of contemporary developments in Islamic law; on the other hand, to illustrate the course of development of legal thought and conception of Muslim scholars and *fiqh* institutions about *tarjīḥ* from a legal historical perspective. From this perspective, it examines the continuity and change of *tarjīḥ* from traditional legal theory to contemporary *fiqh* institutions. This study argues that *tarjīḥ* nowadays is not only used as a method of weighing and choosing a legal view possessing the highest adaptability to the current social circumstances among the diverse views of pre-modern law. Moreover, *tarjīḥ* is conceived and used in the present in a modified form, so that it was either integrated in the process of *ijtihād* of the collective *fiqh* body as a final step or it even became a synonym to *ijtihād*.

This article consists of four sections, including the introduction. The second section presents an overview of the several forms of applying *tarjīḥ* in pre-modern law. The main section of this article deals with the diverse developments of *tarjīḥ* in modern times. The latter include the application of *tarjīḥ* in the realm of codification of Islamic law in various Islamic countries as well as the conception and application of *tarjīḥ* by various *fiqh* institutions, particularly in the Middle East and Indonesia. Finally, the last section recapitulates the results of this study.

2. OVERVIEW OF THE CONCEPTION AND APPLICATION OF *TARJĪḤ* IN TRADITIONAL ISLAMIC LAW

Before dealing with the various forms of *tarjīḥ* in traditional Islamic law, a definition of *tarjīḥ* shall be given.

A. The Definition of *tarjīḥ*

Etymologically, the term *tarjīḥ* is derived from the verb *rajaḥa*, which means 'to lower (scale)', 'to be of greater weight', or 'to be very likely'. It forms the verbal noun of the verb *rajjaḥa*, which has the meaning of 'to give preponderance to a thing' or 'to consider

[6] See Ahmed Gad Makhlouf, 'Tarǧīḥ und maḏhab: Zur Rolle des tarǧīḥ-Verfahrens bei der Entwicklung der traditionellen islamischen Rechtsschulen' (2019) 11 ZR&I – Zeitschrift für Recht und Islam/Journal of Law & Islam 13–37.

[7] See Syamsul Anwar, 'Fatwā, Purification and Dynamization: A Study of Tarjīh in Muhammadiyah' (2005) 12(1) Islamic Law and Society 27–44; A Fanani and others, 'Muhammadiyah's Manhaj Tarjih: An Evolution of a Modernist Approach to Islamic Jurisprudence in Indonesia' (2021) 77(4) HTS Theological Studies a6942. <https://doi.org/10.4102/hts.v77i4.6942> accessed 28 October 2021.

probable'.[8] As a technical term of Islamic legal theory, *tarjīḥ* has been defined by many legal scholars in a very similar way. Abū l-Ḥusayn al-Baṣrī (d. 436/1085) considers *tarjīḥ* as increasing the probative value of one of the ways (to obtain the ruling) over the others (lit. *al-shurūᶜ fī taqwiyat aḥad al-ṭarīqayn ᶜalā al-ākhar*).[9] Another definition attributed to Fakhr al-Dīn al-Rāzī (d. 606/1210) stresses 'the increasing in the evidential value of one of the ways (of ruling) over the others, so that the most convincing (of them) is recognized and put into effect, while the other is discarded' (lit. *taqwiyat aḥad al-ṭarīqayn ᶜalā al-ākhar li-yuᶜlam al-aqwā fa-yuᶜmal bih fa-yuṭraḥ al-ākhar*).[10] The final example is the definition of Najm al-Dīn al-Ṭūfī (d. 716/1316) who views *tarjīḥ* as a means to find 'the preference for one of the two ways of obtaining the decision because this way has special probative value' (lit. *taqdīm aḥad ṭarīqaī al-ḥukm li-ikhtiṣāṣih bi-qūwa fī-d-dalāla*).[11]

In this context, it should be noted that the definitions of *tarjīḥ* are mainly provided under the umbrella of the *uṣūl* genre in the chapter on *taᶜāruḍ al-adilla*. Therefore, these definitions primarily refer to *tarjīḥ* in the case of a (possible) collision between the (textual) evidence or to the possible *tarjīḥ* practice by a jurist during the process of legal finding. On the one hand, the main criterion of *tarjīḥ* in the case of *taᶜāruḍ al-adilla*—namely the probative value (or authenticity) of (textual) evidence—can be applied to other *tarjīḥ* forms. With regard to forms concerning the results of the determination of legal rules—such as *tarjīḥ* between the *madhāhib* or between the determined norms—there are other factors that also must be taken into account. The latter include the level of knowledge of a school's founder, his or her adherence to the general foundations and principles of a school, or the consideration of temporal or societal changes.

Throughout this article, *tarjīḥ* stands for a process of weighing up and preference, which—depending on the *tarjīḥ* forms—may refer to the choice between different schools of law, textual evidence or references, diverse traditional views of a single scholar, or various views of different scholars. Accordingly, the decision will fall on one of the weighed positions, which is called the 'preferred' or 'predominant' (*rājiḥ*) one.

B. The Forms of *tarjīḥ* in Traditional Islamic Law

The jurisprudence of the various schools of law was characterized by the association of *ijtihād*, as a general term for the diverse methods applied for deriving norms, with *tarjīḥ*. While *ijtihād* evokes a plurality of probabilities or ambiguities in the form of many numerous legal views—which may even be contradictory—*tarjīḥ* intends to filter out the opinion with the highest probability or legal view. In doing so, *tarjīḥ* aims to prepare the present extensive body of legal material, which arose from the largely individually practiced *ijtihād* activities, and make it applicable.

The subjects of *tarjīḥ* forms include the collided arguments in an *ijtihād* process, the transmitted views of single scholars, the diverse legal views of different scholars of the same school of law, and even the entire school of law. This means that whereas the first *tarjīḥ* forms occur within the *ijtihād* process, the remaining *tarjīḥ* forms concern the results of the *ijtihād* process.

[8] Cf Muḥammad ibn Abī Bakr al-Rāzī, *Mukhtār al-ṣiḥāḥ* (Maktabat Lubnān 1986) 99; Jamāl al-Dīn ibn Manẓūr, *Lisān al-ᶜarab* (Dār Ṣādir 1980) vol 2, 445.

[9] Cf Muḥammad Ibn ᶜAlī Abū Ḥusayn al-Baṣrī, *Kitāb al-muᶜtamad fī uṣūl al-fiqh* (Institut Français de Damas 1965) vol 2, 844.

[10] Cf Fakhr al-Dīn Muḥammad Ibn ᶜUmar al-Rāzī: *al-Maḥṣūl fī ᶜilm al-uṣūl* (Muᵓassasat al-Risāla 1997) vol 5, 397.

[11] Cf Najm al-Dīn al-Ṭūfī, *Sharḥ mukhtaṣar al-Rawḍa* (2nd edn, Wazārat al-Shuᵓūn al-Islāmīya wa-l-Awqāf wa-l-Daᶜwa wa-l-Irshād 1998) vol 3, 673.

(i) Tarjīḥ *within the Process of Finding the Law* (ijtihād)

In general, when it comes to the different forms of *tarjīḥ*, the main concern in the literature of *uṣūl al-fiqh* (Islamic legal theory) is *tarjīḥ* as a method of weighing and resolving a case of a conflict of evidence (*taʿāruḍ al-adilla*),[12] whereby the jurist is supposed to resort to various methods in order to eliminate an existing conflict. This kind of *tarjīḥ* does not refer to definitively proven or unequivocal textual evidence (*adilla qaṭʿīya*) or to the decision between presumptive and definitive evidence, since the primacy of definitive evidence is self-evident. Rather, the jurist deals with presumptively proven references or ambiguous textual evidence (*adilla ẓannīya*).[13] *Tarjīḥ* within the *ijtihād* procedure or in case of a *taʿāruḍ al-adilla* is present in two fields, namely those of textual evidence (*nuṣūṣ*) and those of analogy conclusions (*aqyisa*). The *tarjīḥ* criteria in both areas are summarized below. Based on the components of *qiyās*—the initial case (*aṣl*), the target case (*farʿ*), the legal determination in the initial case (*ḥukm al-aṣl*), and the causa (*ʿilla*)—numerous *tarjīḥ* criteria were set up regarding conclusions by analogy. In this context, a conclusion by analogy whose initial case is based on a consensus is preferred to others that refer to other sources of law. Even in the case of a conclusion by analogy, where the legal determination is definitely proven from the initial case, priority is given to the one with a presumptive determination. When it comes to *nuṣūṣ*, four categories of *tarjīḥ* can be distinguished.

1) Concerning *isnād* (the chain of transmission of a hadith): The *tarjīḥ* criteria between two *isnāds* include, for example—according to the majority opinion contrary to that of the Ḥanafīs—the greater number of transmitters.
2) Regarding the *matn* (the text of a hadith): In this context, for example, a text with a specific content (*khāṣṣ*) is preferred to that with a general content (*ʿāmm*).
3) Concerning the interpretation or meaning (*al-madlūl* or *al-maʿnā*): In this function—according to the majority opinion—a text expressing a prohibition (*ḥaẓr*) is preferable to one expressing a permissibility (*ibāḥa*).
4) Regarding an external factor (*amr khārij*): In this case, it is a question of *tarjīḥ* based on the confirmation or corroboration of a textual evidence by another evidence from the Qurʾan or Sunna and by consensus (*ijmāʿ*) or analogy (*qiyās*).[14]

(ii) Tarjīḥ *Regarding the Results of* ijtihād

Practicing of *tarjīḥ* regarding the norms determined with the help of *ijtihād* took place on different levels, both within a particular *madhhab* (intra-*madhhab*) and between the different *madhāhib* (inter-*madhhab*). Thus, on the one hand, the different views, mainly ascribed to a founder or a leading scholar of a *madhhab*, or the different legal opinions of various scholars within a single school are the subject of *tarjīḥ*. On the other hand, this type of *tarjīḥ* is used between the diverse *madhāhib* as a collection of the entirety of the norms of each school of law developed based on *ijtihād*.[15]

In this context, a distinction between two categories of legal scholars or *mujtahids* should be made. Although there are different views regarding *mujtahid* classes depending on the school of law, they can be summarized as follows: On the one hand, there are legal scholars who have mastered the legal doctrines of their own school and are capable of *tarjīḥ* regarding

[12] For details on this point, see Krawietz (n 3); Bakar (n 3); Weiss (n 3).
[13] Cf Krawietz (n 3) 72; Badr al-Dīn al-Zarkashī, *al-Baḥr al-muḥīṭ fī uṣūl al-fiqh* (Wazārat al-Awqāf wa-l-Shuʾūn al-Islāmīya 1992) vol 6, 132.
[14] Cf al-Zarkashī (n 13) 165–94; Wahba al-Zuḥaylī, *Uṣūl al-fiqh al-islāmī* (Dār al-Fikr 1986) 1188–207; and Muḥammad al-Shawkānī, *Irshād al-fuḥūl ilā taḥqīq al-ḥaqq min ʿilm al-uṣūl* (Dār al-Faḍīla 2000) 1127–56.
[15] CCf Gad Makhlouf (n 6) 18ff and 27ff.

the diverse legal opinions, and on the other hand, there are scholars who are not qualified for this task. Whereas a scholar of the first category should mainly rely on his own *tarjīḥ* results in his finding of law or issuing of fatwa, even if the view he holds differs from his *madhhab*, a scholar of the second category is obliged to follow certain guidelines and rules in his application of *tarjīḥ*.[16]

A jurist's ability to use the *tarjīḥ* corresponds to a specific stage of *ijtihād*, namely the fourth class of *ijtihād*, '*ijtihād al-tarjīḥ*'. This category includes scholars who know their school of law and its evidence by heart. They can also weigh up and evaluate the arguments or legal opinions. Al-Suyūṭī (d. 911/1505) calls the representatives of this group '*mujtahid al-tarjīḥ*' while Tāj al-Dīn al-Subkī calls them '*mujtahid al-futyā*'. This category includes, for example, the Ḥanafī al-Kāsānī (d. 587/1191), the Mālikī al-Māzarī (d. 536/1141), the Shāfiʿī al-Rāfiʿī (d. 623/1226), and the Ḥanbalī Ibn Qudāma (d. 620/1223).[17]

Tarjīḥ in the Context of Different Views of a Single Legal Scholar

In the various schools of law, it often happened that two or more legal opinions were handed down by the founder of the school or by one of his students. In some cases, the scholar concerned himself points to the *rājiḥ* view of his legal opinions, which usually corresponded to the view he developed later.[18] If there was no indication of the *rājiḥ*-view, the different views should first be evaluated chronologically (*tarjīḥ*), provided their chronology was known. In this case, the chronologically later declared opinion was to be considered valid (*rājiḥ*). An illustrative example of this case is set by al-Shāfiʿī, who developed two legal systems, namely an old one (*al-qadīm*) and a new one (*al-jadīd*). In this regard, the Shāfiʿī Yaḥyā ibn Sharaf al-Dīn al-Nawawī (d. 676/1277) states that except for a limited number of cases[19] in which al-Shāfiʿī did not decide on a *rājiḥ* view, the new legal norm is considered valid in every issue. In such cases, a scholar qualified for *tarjīḥ* invokes his own *tarjīḥ* rulings. An essential criterion for this scholar to consider during his *tarjīḥ* procedure is the conformity of the selected view with the general rules of his *madhhab*. However, if that scholar is not qualified for *tarjīḥ*, he should exclusively adopt the new legal system of al-Shāfiʿī or the *tarjīḥ* decisions of another competent Shāfiʿī scholar. In case that there is a dispute among the Shāfiʿī scholars about which of al-Shāfiʿī's views on a question is valid (*rājiḥ*), a scholar incapable of *tarjīḥ* should refer to the *tarjīḥ* decisions of other Shāfiʿī scholars in the following order: adopting the majority opinion, taking on the view of the scholar who has the most knowledge, and finally following the assessment of the scholar who is the most pious. If in doing so no *rājiḥ* view can be found, the opinion of one of the leading disciples of al-Shāfiʿī – al-Buwayṭī (d. 231/846), al-Rābiʿa al-Murādī (d. 270/884), and al-Muzanī (d. 264/878)—is preferable to those of other disciples of al-Shāfiʿī. Among the *tarjīḥ* criteria that a scholar incapable of *tarjīḥ* should consider is the agreement with the majority opinion of the various *madhāhib* or with the opinion of the scholars in general. According to al-Qaffāl al-Marwazī (d. 938/1026), Ibn al-Ṣalāḥ (d. 643/1245), and al-Nawawī, if one of the two different views of al-Shāfiʿī

[16] Cf Muḥī al-Dīn al-Nawawī, *Kitāb al-Majmūʿ sharḥ al-muhadhdhab* (Maktabat al-Irshād 1980) vol 1, 109f; and Peters (n 4) 149ff.

[17] Cf Jalāl al-Dīn ʿAbd al-Raḥmān al-Suyūṭī, *Jazīl al-mawāhib fi ikhtilāf al-madhāhib* (Dār al-Iʿtiṣām 1989) 38–42; al-Nawawī (n 16) 75f; Najm al-Dīn Aḥmad ibn Ḥamdān, *Ṣifat al-fatwā wa-l-muftī wa-l-mustaftī* (al-Maktab al-Islāmī 1380 H. [1961]) 16ff. On this, see Hallaq (n 4) 1–23; and Abbas Poya, *Anerkennung des Iǧtihād – Legitimation der Toleranz. Möglichkeiten innerer und äußerer Toleranz im Islam am Beispiel der Iǧtihād-Diskussion* (Schwarz 2003) 69ff.

[18] Cf Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymīya, *Majmūʿ fatāwā Shaykh al-islām Aḥmad ibn Taymīya* (Mujammaʿ al-Malik Fahd li-Ṭibāʿat al-Muṣḥaf al-Sharīf 2004) vol 20, 228ff; and Benjamin Jokisch, 'Recht und Rechtsschule: Institutionalisierung und Dynamisierung normativen Wissens im klassischen Islam' in Eva Cancik-Kirschbaum and Anita Traninger (eds), *Wissen in Bewegung Institution – Iteration – Transfer* (Harrassowitz 2015) 241–54, here 251.

[19] There is a difference of opinion among the Shāfiʿīs about their number, ranging between 10 and 20 cases.

corresponds to the opinion of Abu Ḥanīfa, this one should take precedence.[20] A similar approach to *tarjīḥ* between different views of a single jurist or imam was followed by other schools of law.[21]

Tarjīḥ within Legal Opinions of Different Scholars of a Single School of Law

This form of *tarjīḥ* serves Islamic legal applications in particular, such as issuing fatwas and jurisdiction.[22] A jurisconsult (*muftī*) or judge (*qāḍī*) is required to perform this *tarjīḥ* as long as there is a difference of opinion, and he may not adopt any view without weighing up (ie, *tarjīḥ*).[23] The motive for practicing this type of *tarjīḥ*—according to al-Nawawī in the introduction to his work *al-Majmūʿ*—is that in the works of the (Shāfiʿī) *madhhab*, there are different legal views, so that one cannot be sure which of these views is the predominant one. The aim of his book *al-Majmūʿ*, according to al-Nawawī, is to weigh up the different views within the (Shāfiʿī) *madhhab*, including also the weak views, and to determine the predominant or authoritative (*rājiḥ*) one.[24]

In order to determine the predominant view (*rājiḥ*) in such cases of disagreement, a jurist capable of *ijtihād* should rely on his own results of *tarjīḥ*. In doing so, the *mujtahid* aims to ascertain the view closest to the rules of this *madhhab*. If a scholar is not capable of applying *tarjīḥ*, he should refer to the *tarjīḥ* rulings of other authorities in his school of law. The hierarchy of these authorities is prescribed in each school of law.[25] For example, within the Shāfiʿī school, the *tarjīḥ* processes carried out by al-Nawawī in his *al-Majmūʿ* and also by al-Rāfiʿī (d. 623/1226), especially in *al-Muḥarrar*, are recognized and form the main sources or the essential decision-making aid in determining the authoritative view (*rājiḥ*) within the *madhhab*.[26]

The Shāfiʿī al-Bakrī al-Dimyāṭī (d. 1310/1893) states the following in his work *Iʿānat al-ṭālibīn* regarding the *tarjīḥ* procedure in his *madhhab*: In case of disagreement among the Shāfiʿī jurists, preferences in the decision-making can be identified in the following sequence: (i) The common unanimous views of al-Nawawī and al-Rāfiʿī. (ii) If they have different views, only the opinions of al-Nawawī are referred to. (iii) Subsequently, the views of al-Rāfiʿī should be taken into account. (iv) The majority opinion of the Shāfiʿīs, (v) the opinion of the jurists who have more knowledge than the others, and (vi) the opinion of the scholar who is more pious or humble compared to the other Shāfiʿī opponents follow.[27] Likewise, the other schools of law have their own *tarjīḥ* hierarchical authorities.[28]

Tarjīḥ between the *madhāhib*

After a phase characterized by independence from a particular legal methodology or certain legal views, from about the end of the fourth or tenth century a tendency developed to follow

[20] Cf al-Nawawī (n 16) 107–11; and ʿUthmān ibn ʿAbd al-Raḥmān Ṣalāḥ al-Dīn Ibn al-Ṣalāḥ, *Adab al-muftī wa-l-mustaftī* (ʿĀlam al-Kutub 1986) 123–29.

[21] Cf Ibrāhīm Ibn ʿAlī Ibn Farḥūn, *Tabṣirat al-ḥukkām fī uṣūl al-aqḍīya wa-manāhij al-aḥkām* (ʿĀlam al-Kutub 2003) vol 1, 53–58; al-Ṭūfī (n 11) 626ff; and Ibn Ḥamdān (n 17) 85ff.

[22] Cf Hallaq (n 5) 49.

[23] Cf Ibn Ḥamdān (n 17) 39ff; and Muḥammad ibn Qayyim al-Jawzīya, *Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿālamīn* (Dār Ibn al-Jawzī 1423 H [2003]) vol 6, 124.

[24] Cf al-Nawawī (n 16) 18.

[25] Cf Ibn Ḥamdān (n 17) 39ff; and al-Nawawī (n 16) 112.

[26] Cf Hallaq (n 4) 84ff.

[27] Cf Abū Bakr Ibn Muḥammad al-Dimyāṭī, *Iʿānat al-ṭālibīn ʿalā ḥall alfāẓ Fatḥ al-Muʿīn bi-sharḥ Qurrat al-ʿayn bi-muhimmāt al-dīn*, li-ʿallāma Zayn al-Dīn al-Malībārī al-Fannānī al-Shāfiʿī (Dār al-Salām li-l-Ṭibāʿa wa-l-Nashr wa-l-Tawzīʿ wa-l-Tarjama 2013) 19.

[28] For the Mālikī school of law, see Muḥammad Ibn Muḥammad al-Ḥaṭṭāb, *Mawāhib al-Jalil li-sharḥ Mukhtaṣar Khalīl* (Dār al-Raḍwān 2010) 50–53. For the Ḥanafi school of law, see Muḥammad Amīn ibn ʿUmar ibn ʿĀbidīn, *Sharḥ al-Manẓūma al-musammāh bi-ʿuqūd rasm al-muftī* (Markaz Tawʿiyat al-Fiqh al-Islāmī 2000) 11ff and 3ff. For the Ḥanbalī school of law, see ʿAlāʾ al-Dīn al-Mardāwī, *al-Inṣāf fī maʿrifat al-rājiḥ min al-khilāf ʿalā madhhab al-imām al-mubajjal Aḥmad ibn Ḥanbal* (1955) vol 1, 16ff.

or imitate exclusively the already existing schools of law. At the same time, the followers of *madhāhib* worked primarily to develop their own school, methodology, and legal doctrines and to justify or demonstrate the precedence of their own school of law.[29] The decision to join and be loyal to one of the then existing *madhāhib* was made on the basis of a *tarjīḥ*. According to Najm al-Dīn al-Ṭūfī, every legal scholar or layperson could choose one of the schools of law, including those outside of the four recognized schools, on the basis of the *tarjīḥ*.[30] Gradually, the *tarjīḥ* was limited to weighing up between the four preferred schools of law, namely the Ḥanafī, the Mālikī, the Shāfiʿī, and the Ḥanbali schools of law.[31] Some scholars, such as ʿIzz al-Dīn ibn ʿAbd al-Salām (d. 660/1262), Ibn Taymīya (d. 728/1328), and al-Suyūṭī (d. 911/1505), restrict the permissibility of the *tarjīḥ* between the *madhāhib* by saying that this *tarjīḥ* ruling should not refer to the entire complex of substantive law or practical issues, but only to individual questions.[32] On the other hand, other scholars such as Fakhr al-Dīn al-Rāzī and al-Ṭūfī hold the view that the *tarjīḥ* between the *madhāhib* can be undertaken both in terms of the complete legal system of the *madhāhib* and the individual issues of the schools.[33]

The practice of the jurists shows a widespread recognition of the *tarjīḥ* between the *madhāhib* among followers of the different schools. A number of *tarjīḥ* writings, as well as several chapters on the *tarjīḥ* of a particular school in legal literature, emerged especially in the disputes between the followers of the schools of law. These writings aimed to defend one's own school from criticism and attack or to accentuate its primacy over the others. The following works can be taken as examples of *tarjīḥ* of the Shāfiʿī school: *Mughīth al-khalq fī tarjīḥ al-qawl al-ḥaqq* by Abū l-Maʿālī al-Juwaynī (d. 478/1085), *Manāqib al-Imām al-Shāfiʿī* by Fakhr al-Dīn al-Rāzī, and *al-Mankhūl min taʿlīqāt al-uṣūl* by al-Ghazālī. The preference for the *madhhab* of Abū Ḥanīfa was propagated by some authors, such as Sibṭ ibn al-Jawzī (d. 654/1256) in his book *al-Intiṣār wa-t-tarjīḥ li-l-madhhab al-ṣaḥīḥ* and al-Bābartī (d. 786/1384) in his book *al-Nukat al-ẓarīfa fī tarjīḥ madhhab Abī Ḥanīfa*. Writings arguing for the precedence of the Mālikī school include, for example, *al-Intiṣār li-ahl al-Madīna* by Ibn al-Fakhkhār (d. 419 H), *Tartīb al-madārik wa-taqrīb al-masālik li-maʿrifat aʿlām madhhab Mālik* of al-Qāḍī ʿIyāḍ (d. 544/1149), and *Intiṣār al-faqīr al-sālik li-tarjīḥ madhhab Mālik* of Muḥammad ibn Ismāʿīl al-Rāʿī (d. 853/1450). The primacy of Ibn Ḥanbal and his *madhhab* is also advocated by some scholars, such as the Ḥanbalīs Ibn al-Jawzī (d. 597/1201) in his work *Manāqib al-Imām Aḥmad ibn Ḥanbal* and Ibn Ḥamdān (d. 695/1295) in his book *Ṣifat al-fatwā wa-l-muftī wa-l-mustaftī*.

It is noteworthy in such writings that in justifying the merits of a particular school over the others, the founder of the law school and his personal traits are brought to the fore. In this context, the scientific competences[34] of the respective founder of the law school—which surpass those of other school founders—as well as his theoretical principles and methodology of law making play a decisive role. Furthermore, this *tarjīḥ* type refers to other external reasons of preferability, for example that many scholars, especially other *madhhab* founders, have commended the founders concerned and their knowledge.[35] These external reasons

[29] Cf Hallaq (n 4) 61ff; and ʿAbd al-Raḥmān ibn Muḥammad ibn Khaldūn, *al-Muqaddima* (3rd edn, al-Madrasa wa-Dār al-Kitāb al-Lubnānī 1967) vol 1, 818ff.

[30] Cf al-Ṭūfī (n 11) 686; as well as al-Zarkashī (n 13) 131ff; and Muḥammad ibn Ismāʿīl al-Rāʿī, *Intiṣār al-faqīr al-sālik li-tarjīḥ madhhab Mālik* (Dār al-Gharb al-Islāmī 1981) 125 ff.

[31] Cf Ibn Khaldūn (n 29) vol 1, 818ff.

[32] Cf ʿIzz al-Dīn Ibn ʿAbd al-Salām, *al-Qawāʿid al-kubrā al-mawsūm bi-qawāʿid al-aḥkām fī iṣlāḥ al-anām* (Dār al-Qalam 2000) vol 1, 277 and vol 2, 274ff; al-Suyūṭī (n 17) 32; Ibn Taymīya (n 18) vol 20, 291ff.

[33] Cf Fakhr al-Dīn Muḥammad Ibn ʿUmar al-Rāzī, *Manāqib al-Imām al-Shāfiʿī* (Maktabat al-Kullīyāt al-Azharīya 1986) 371; and al-Ṭūfī (n 11) 685ff.

[34] These scientific competences concern knowledge, especially in the field of Quranic, Hadith, and legal sciences.

[35] See, for instance, the following statement, which is attributed to al-Shāfiʿī and declares praise for Abū Ḥanīfa's legal knowledge: 'People depend on Abū Ḥanīfa for *fiqh*' (*al-nās ʿiyāl fī l-fiqh ʿalā Abī Ḥanīfa*).

also include the eponymous scholar's origin,[36] lifetime,[37] or hometown.[38] Based on the arguments presented, the superiority of a certain founder of a law school and thus his school over the others should be shown.[39]

3. DEVELOPMENTS OF THE *TARJĪḤ* IN MODERN TIMES

The rise of modernity and the demands of modern life—especially since the end of the 19th century—confronted the Islamic legal system with significant challenges and induced attempts of adaptation and evolution of the Islamic law. In addition, the complexity and diversity of modern issues created obstacles to identify appropriate legal norms for all the new legal cases and issues. Responding to these challenges, many Muslim jurists launched a reform movement, with *ijtihād* at its centre. Hence the demands for a reopening of the door of the *ijtihād*[40] or a continuation of *ijtihād* as an important tool for the renewal of Islamic law and the development of temporally adaptable norms increased. By reopening the gate of *ijtihād*, the needs of modernity should be taken into account.[41]

Furthermore, the challenges of modernity evoked vivid debates about the traditional *madhhab* system and its ability to respond to modern social demands and develop adaptable legal norms. This debate was triggered in many parts of the Islamic world, especially the Arab states, Turkey, and later on further afield, such as Indonesia and India. While some voices advocated the dissolution of the existing *madhāhib* in order to replace them with a unified *madhhab*, others considered the continuation of the pre-modern *madhhab* system necessary. A third group called for a more open-minded approach to Sunni and non-Sunni schools of law.[42] In every case, the *madhāhib* still retain their function as a reference point for the process of legal development.[43] Thus, a debate about the *madhāhib* resulted in

[36] For example: Since al-Shāfiʿī was from Quraysh, the proponents of the Shāfiʿī school carried over to al-Shāfiʿī a tradition of the Prophet that spoke of a (future) scholar from Quraysh whose knowledge will spread everywhere.

[37] Eg, according to followers of the Ḥanbalī school, the fact that Ibn Ḥanbal lived after the other founders of the other *madhāhib* enabled him to review and to weigh their legal opinions and to choose the most convincing opinions.

[38] For example, for the Mālikīs, the decisive factor for Mālik's preference is that he lived in Medina, the place of residence of the Prophet and his companions, which brought Mālik into direct contact with the prophetic traditions that still prevailed in his time.

[39] For detailed justification of the superiority of al-Shāfiʿī and his *madhhab*, see Abū l-Maʿālī ʿAbd al-Malik ibn ʿAbdallāh al-Juwaynī, *Mughīth al-khalq fī tarjīḥ al-qawl al-ḥaqq* (al-Maṭbaʿa al-Miṣrīya 1934) 18–46ff; Abū Ḥāmid al-Ghazālī, *al-Mankhūl min taʿlīqāt al-uṣūl* (Dār al-Fikr 1980) 488–500; al-Rāzī, *Manāqib al-imām al-Shāfiʿī*, 371–432; al-Suyūṭī (n 17) 45–50. For detailed justification of the superiority of Abū Ḥanīfa and his *madhhab*, see Abū l-Muẓaffar Sibṭ ibn al-Jawzī, *al-Intiṣār wa-l-tarjīḥ li-l-madhhab al-ṣaḥīḥ* (Maṭbaʿat al-Anwār 1360 H [1941]), 6–21; and Akmal al-Dīn al-Bābartī, *al-Nukat al-ẓarīfa fī tarjīḥ madhhab Abī Ḥanīfa* (Jāmiʿat al-Malik Saʿūd 1997) 27–44. For detailed justification of the superiority of Mālik and his *madhhab*, see ʿIyāḍ ibn Mūsā, *Tartīb al-madārik wa-taqrīb al-masālik li-maʿrifat aʿlām madhhab Mālik* (Wazārat al-Awqāf wa-l-Shuʾūn al-Islāmīya 1983) 62–103; Abū ʿAbd Allāh Muḥammad ibn al-Fakhkhār, *al-Intiṣār li-ahl al-madīna* (Markaz al-Dirāsāt wa-Abḥāth wa-Ihyāʾ al-Turāth 2009) 196–201; al-Rāʿī (n 30) 128–47 and 236–45. For detailed justification of the superiority of Ibn Ḥanbal and his *madhhab*, see Ibn al-Jawzī, *Manāqib al-Imām Aḥmad ibn Ḥanbal* (Dār Hajar 1988) 660–68; and Ibn Ḥamdān (n 17) 74–80.

[40] That opinion refers to the statement *ghalq bāb al-ijtihād* (closure of the door of *ijtihād*), which claims that *ijtihād* practice was no longer permissible or that there were no longer competent scholars to practice *ijtihād*. For details on this issue, see William Montgomery Watt, 'The Closing of the Door of iǧtihād' (1974) 1(1) Orientalia Hispanica 675–85; Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1982); Wael B Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle East Studies.

[41] Cf Muṣṭafā Aḥmad al-Zarqā, *al-Madhkhal al-Fiqhī al-ʿĀmm. Ikhrāj Jadīd bi-Tatwīr fi-l-Tartīb wa-l-Tabwīb wa-Ziyādāt* (Dār al-Qalam 1998) 248 ff; Bülent Uçar, *Recht als Mittel zur Reform von Religion und Gesellschaft. Die türkische Debatte um die Scharia und die Rechtsschulen im 20. Jahrhundert* [Law as a Means to the Reform of Religion and Society. The Turkish Debate over the Sharia and the Schools of Law in the 20th Century] (Ergon 2005) 93–101; Muḥammad Yūsuf Mūsā, *al-Madkhal li-Dirāsat al-Fiqh al-Islāmī* (Dār al-Fikr al-ʿArabī 2009) 213, 219–24. See also Aharon Layish, 'The Contribution of the Modernists to the Secularization of Islamic Law' (1978) 14 Middle Eastern Studies 263–77, here 264ff; Yūsuf al-Qaraḍāwī, *al-Ijtihād fī l-Sharīʿa al-Islāmīya* (Dār al-Qalam 1996) 14–18.

[42] For an overview of this debate, see Stefan Wild, 'Muslim and Maḏhab. Ein Brief von Tokio nach Mekka und seine Folgen in Damaskus' in Ulrich Haarmann and Peter Bachmann (eds), *Die islamische Welt zwischen Mittelalter und Neuzeit* (Steiner 1979) 675–82; Uçar (n 41) 62–85.

[43] Cf Brinkley Messick, 'Madhabs and Modernities' in Peri Bearman, Rudolph Peters and Frank E Vogel (eds) (n 4) 159–74, here 161; Fachrizal A Halim, 'Reformulating the Madhhab in Cyberspace: Legal Authority, Doctrines, and Ijtihād among

successive changes in the law school system. Among these developments or changes taking place is a shift or abolition of the *madhāhib* boundary established in the pre-modern era, both in terms of inherited legal substance and the methods of legal development that followed. In modern times, 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*. In this way, contemporary legal scholars strove to do justice to the challenges of modernity. For them, such a task cannot be accomplished by a single *madhhab*. The legal materials of the different schools with their abundance of legal views should rather function as a more comprehensive source for the investigation of questions and problems.[44] In connection with this intended inter-*madhhab* investigation or the adoption of legal views of various schools of law, the *tarjīḥ* (or *takhayyur*) as an important methodological tool for dealing with the legal heritage of the *madhāhib* was widely used. However, in modern usage, the *tarjīḥ* is undergoing conceptual changes and is used by various actors, both official and non-official.[45]

Notwithstanding the persistence of the application of the *tarjīḥ* by individual scholars, the modern *tarjīḥ* is characterized by the fact that it is largely carried out by collective *fiqh* bodies. In this section, the question is examined to what extent the *tarjīḥ* and its conception were affected by the legal developments invoked in the modern age. In this course, the focus is on the conception of the *tarjīḥ* by the current *fiqh* institutions, which contribute significantly to the substantial developments of Islamic law in the present. First, however, an outline should be provided of the modern application of the term *takhayyur* (literally selection), which is close to *tarjīḥ* or even considered as a synonym for *tarjīḥ*. In this sense, *takhayyur* is used especially in the field of codification of Islamic law. Another term connected to this discussion is *talfīq* (combination of different doctrines). In this context, *takhayyur* signifies to select from the various views of the schools of law the one most suitable for a certain purpose. *Tarjīḥ* differs from *takhayyur* in that *tarjīḥ* is the preference of one view among several based on soundness of evidence. While in the case of *tarjīḥ* and *takhayyur* it is about selecting and adopting a legal view in its original form without attempting to change it, *talfīq* combines various parts of legal views of different schools, reaching a decision considered the most appropriate.[46]

A. Modern Application in the Sphere of Codification of Islamic Law

In classical Islamic law, *takhayyur* was understood as the selection and preference of one of the (equivalent) mutual legal evidences or legal views when the *tarjīḥ* was not possible or in case these arguments or views were equal. Thus, a *takhayyur* where *tarjīḥ* is possible or before a jurist attempts *tarjīḥ* has been rejected by the vast majority of scholars.[47] This means that *takhayyur* has a complementary function in case of impossibility of *tarjīḥ*. In the context of modern dealing with the inherited legal doctrines of the pre-modern *madhāhib*, the use of

Contemporary Shāfiʿī ʿUlamāʾ' (2015) 22(4) Islamic Law and Society 413–35, here 2; and Ihsan Yilmaz, 'Inter-Madhhab Surfing, Neo-Ijtihad, and Faith-based Movement Leaders' in Peri Bearman, Rudolph Peters and Frank E Vogel (eds) (n 4) 191–206, here 193ff.

[44] Cf al-Zarqā (n 41) 243 ff. and Muhammad al-Atawneh, 'Wahhābī Legal Theory as Reflected in Modern Official Saudi Fatwās: Ijtihād, Taqlīd, Sources, and Methodology' (2011) 18(3–4) Islamic Law and Society 327–55, here 340. Messick (n 43) vol 2, 161ff.

[45] See eg Yilmaz (n 43) 191–206.

[46] Cf Mohammad Hashim Kamali, 'Sharīʿah and Civil Law: Toward a Methodology of Harmonisation' (2007) 14 Islamic Law and Society 406ff.

[47] Cf Wazārat al-Awqāf wa-l-Shuʾūn al-Islāmīya (ed), *al-Mawsūʿa al-fiqhīya* (Wazārat al-Awqāf wa-l-Shuʾūn al-Islāmīya 1988) vol 13, 163ff; Abū l-Maʿālī ʿAbd al-Malik ibn ʿAbdallāh al-Juwaynī, *al-Burhān fī uṣūl al-fiqh* (1399 H [1979]), vol 2, 1145 and 1156ff; Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā fī uṣūl al-fiqh* (Muʾassasat al-Risāla 1993) vol 2, 292ff; al-Ṭūfī (n 11) 682ff; Ibn Farḥūn (n 21) vol 1, 54ff; al-Zarkashī (n 13) 131ff.

the term *takhayyur* due to a modified conception became common in both the official and the unofficial sphere.[48]

Among the first Muslim scholars to refer to the necessity of applying *takhayyur* was Rifaʿa al-Ṭahṭāwī (d. 1289/1873) in the first half of the 19th century, according to John L. Esposito: '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.'[49] Moreover, Esposito confirms that this proposal was adopted by the later modernists and widely put into practice.[50] Furthermore, the application of the term often appears in the official realm during legislation or codification of Islamic law. The beginnings of the use of *takhayyur* in the codification of Islamic law date back to the *Mejelle*, the Ottoman civil code (1869–76). In the introduction of the *Mejelle*, it is stated that the *Mejelle* exclusively sets forth 'the selected legal views' of the Ḥanafī school of law, which takes into account the acute needs or interests of society. However, in individual cases, views outside of the Ḥanafī school were preferred or selected (*ikhtiyār*).[51] In the course of basing the *Mejelle* mainly on the Ḥanafī school of law, the eclectic expedient *takhayyur* was used as 'adoption of legal doctrines of that school on the basis of their conformity to the requirements of the state and society'.[52]

A succeeding step in expanding the application of *takhayyur* was to consider the prevailing doctrine of one of the three other Sunni schools as a possible alternative to existing Ḥanafī law. This tendency manifests itself, for example, in the Ottoman Family Rights Law of 1917. The legislation of the following years in the Arab region, especially in Egypt, takes a step further by incorporating the legal views of individual jurists whose opinions preceded or conflicted with the prevailing teachings of the four Sunni schools as a whole. Frequently after about 1940, the use of *takhayyur* reached its peak in the field of legislation so that conflicting, mutually incompatible teachings of different schools and legal scholars could be patched together (*talfīq*—combination of different doctrines) in a legal provision to find a desirable solution to a particular problem.[53] This cross-legislation is based not only on the views of Sunni *madhāhib* but also on those of diverse *madhāhib*.[54] 'This is done by selecting the opinion preferred by considering the one most suited to modern life, particularly in cases which have no textual evidence and sometimes by selecting the opinion preferred by most where tarjih is a form authorised to do so.'[55] In this process, with the help of *takhayyur* (in the sense of selecting views from the different schools of law) and *talfīq*, some laws have been enacted in Egypt that are not limited to the doctrines of Sunni *madhāhib*, such as in Law No. 25 of the Personal Status Act in 1929, in which the Egyptian legislator draws on different schools of law, even non-Sunni schools.[56] Another example is Egyptian Law No. 71 of the Law of Succession of 1946, which is based (in part) on Ibāḍī law and the Ẓāhirī view of Ibn Ḥazm with regard to the permissibility of obligatory bequest (*al-waṣīya*

[48] Cf Yilmaz(n 43) 194.
[49] John L Esposito, *Women in Muslim Family Law* (2nd edn, Syracuse University Press 2001) 48.
[50] Ibid 48.
[51] Cf Ahmed Cevdet Pasha (ed), *Majallat al-aḥkām al-ʿadlīya* (al-Maṭbaʿa al-Adabīya 1302 H [1885]) 19.
[52] Aharon Layish, 'The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World' (2004) 44(1) Die Welt des Islams 85–112, here 90.
[53] Ibid 94.
[54] Cf Norman Anderson, *Law Reform in the Muslim World* (Athlone Press 1976) 48–56; and NJ Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 185–97.
[55] Bakar (n 3) 155.
[56] Cf al-Zarqā (n 41) 261.

al-wājiba). The Syriac code of 1953 also recognized *al-waṣīya al-wājiba*.[57] There was also 'the recognition of wills in favor of a legal heir in the Egyptian Law of Testamentary Dispositions of 1946'.[58]

In this context, Ihsan Yilmaz emphasizes the application of a modified *takhayyur* in the present in various contexts by individuals and institutions at both official and unofficial levels. Besides using this procedure in legislation to justify the selection of a legal doctrine from different opinions of the four Sunni *madhāhib*, *takhayyur* has been used, according to Yilmaz, by other institutions such as The Directorate of Religious Affairs, Higher Committee of Religious Affairs in Turkey, and The Islamic Shariʿa Council UK.[59]

The review of the use of *takhayyur* in modern times shows some developments. While the *takhayyur* had a complementary function in the case of the impossibility of *tarjīḥ* in the premodern phase, in the modern period the application of the *takhayyur* in a comparable function resembling the *tarjīḥ* has emerged. These developments include the transformation from a pre-modern intra-*madhhab* selection and consideration in the form of *tarjīḥ* to a modern selection of inter-*madhhab* (both Sunni and non-Sunni) in the form of *takhayyur*. Moreover, this use of *takhayyur*, Yilmaz argues, departs from the traditional understanding in which *takhayyur* was the right of the individual Muslim in a particular case, not that of a government, to determine changes for all Muslims.[60] Overall, the increasing application of the *takhayyur* by modern scholars serves as a method to combat *taqlīd* and is thus a step towards *ijtihād*.[61] *Takhayyur* served to liberate from strict adherence to a particular school of law in deriving legal norms as a pure *taqlīd* form and allowed the selection of views even outside the Sunni schools as long as they were more conducive to the common good of society, eg in reforming family law and inheritance law in some Arab countries. Thus, the *takhayyur* also paved the way for the later application of various forms of *ijtihād*.

B. The Conception and Application of the *tarjīḥ* by the Collective *fiqh* Institutions

The application of *tarjīḥ* by contemporary *fiqh* institutions is characterized by a collective manner,[62] ie the decision for the predominant view (*rājiḥ*) is made jointly by several scholars or members of these *fiqh* bodies. This process of *tarjīḥ* refers not only to weighing and choosing between the views of the pre-modern legal literature but also to weighing and choosing between legal views of the individual members of the respective *fiqh* institutions regarding the issue under study. Thus, the present section will outline the application of the *tarjīḥ* in various contemporary *fiqh* institutions, especially in Indonesia and the Arab world. The selection of these regions reflects the fact that several collective fiqh bodies were established there, which particularly employ the concepts of *tarjīḥ* and *ijtihād* in a special relation. Moreover, Indonesia represents the most populated Islamic country. The religious institutes of some important Arab countries such as Saudi Arabia and Egypt, on the other hand, have a great impact in the Islamic world.

[57] Cf Muḥammad Salām Madkūr, *al-Madhkhal li-l-fiqh al-islāmī. Tārīkhuh wa-maṣādiruh wa-Naẓarīyātuh al-ʿāmma* (2nd edn, Dār al-Kitāb al-Ḥadīth 1996) 114; Wahba al-Zuḥaylī, *al-Fiqh al-islāmī wa-adillatuh* (Dār al-Fikr 1985) 121 ff.; and Aḥmad Taymūr, *Naẓra tārīkhīya fi ḥudūth al-madhāhib al-arbaʿa* (Dār al-Qādirī 1990) 32.

[58] Cf Layish (n 41) 269.

[59] Cf Yilmaz(n 43) 192f.

[60] Ibid 194.

[61] Cf Coulson (n 54) 193ff and 196ff.

[62] For details on the term 'collective ijtihād', see: Aznan Hasan, 'Introduction to Collective Ijtihad (Ijtihad Jamaʿi): Concept and Applications' (2003) 20(2) The American Journal of Islamic Social Sciences 26–49; Ahmed Gad Makhlouf, 'Evolution of Islamic Law in the 20th Century: The Conception of Collective Ijtihād in the Debate Between Muslim Scholars,' (2020) 9(1) Oxford Journal of Law and Religion 157–78.

(i) Developments of the tarjiḥ *in the Contemporary* fiqh *Institutions in Indonesia*

The Nahdlatul Ulama (NU),[63] which was established on 31 January 1926, is considered the largest Muslim organization in Indonesia. Among the important organs of the NU is Lajnah Bahth al-Masā'il (LBM). According to Clause 7, Article 16 of the NU's organizational charter, LBM 'has the duty to compile, discuss, and solve problems that are *mawqūf* and *wāqiʿa* and that are in immediate need of legal certainty'.[64] According to Rifyal Kaʿbah, *mawqūf* refers to inconclusive legal cases that lack any legal regulations or indications, while *wāqiʿa* refers to issues that emerge due to contemporary circumstances. Kaʿbah reports that the LBM has performed this task since the first NU congress (*muktamar*) in Surabaya in 1926.[65]

The application of the expedient of *tarjīḥ* is suggested in the first formulated methodology and process of issuing fatwa of the LBM in 1926. The members of the NU state that they would refer to the Shāfiʿī school of law in their work but would still consider the other three Sunni *madhāhib* lawful. In the case of disagreement among the Shāfiʿī scholars, the decision is made according to the following *tarjīḥ* process: First are the common, unanimous views of al-Nawawī and al-Rāfiʿī. Second: If the latter holds different views, reference would be made exclusively to the opinions of al-Nawawī. Third: Subsequently, al-Rāfiʿī's views would be considered. Fourth: The majority opinion of the Shāfiʿī scholars is considered. Fifth is the opinion of the jurist who would have more knowledge than the others. Lastly, the opinion of the scholar who is more pious or humble compared to the other Shāfiʿī opponents is considered. However, this order had not been developed by the NU but originally belonged to the Shāfiʿī scholar al-Dimyāṭī (d. 1310 H) in his book *Iʿānat al-ṭālibīn*.[66]

This approach implied strict adherence to and imitation (*taqlīd*) of the Shāfiʿī school, as the choice between the different legal views (*tarjīḥ*) was not based on the evidential value of the arguments or consideration of the common benefit of society but merely on the hierarchy of scholars within the Shāfiʿī school. Since this method is less capable, especially in dealing with the emerging issues, some members of the NU made attempts at reform in the following decades. Consequently, in 1992, the NU established a new legal system for making decisions called 'Sistem Pengambilan Keptusan Hukum', which brought the NU closer to *ijtihād*, and the conception (and application) of *tarjīḥ* underwent a special development. Thus, the new approach to the development of legal norms begins with an examination of the diverse legal views of previous scholars. In the case of disagreement, the predominant view is to be selected in a collective manner by the various members of the LBM. However, if the issue is not settled in the classical law, the analogy should be made with a similar case that has already been dealt with in the classical law. If no determination could be made in this way either, it was advised to derive an answer by joint deduction (*istinbāṭ jamāʿī*) using the methodology of the (Shāfiʿī) *madhhab*.[67] This marks the point of a transformation from an individual *tarjīḥ* (ie a *tarjīḥ* performed by a single scholar) to a collectively practiced *tarjīḥ*. However, it is not clear whether this is a *tarjīḥ* that encompasses all schools of law or is limited to the Shāfiʿī school.

[63] On Nahdlatul Ulama, see Mitsuo Nakamura and Shalahudin Kafrawi, 'Nahdlatul Ulama' in John L Esposito (ed), *The Oxford Encyclopedia of the Islamic World*, 6 vols (Oxford University Press 2009) vol 4, 206a–212a; Robin Bush, *Nahdlatul Ulama and the Struggle for Power within Islam and Politics in Indonesia* (Institute of Southeast Asian Studies 2009).

[64] Rifyal Kaʿbah, 'Islamic Law in Court Decisions and Fatwa Institutions' in R Michael Feener and Mark E Cammack (eds), *Islamic Law in Contemporary Indonesia* (Harvard University Press 2007) 83–98, here 96.

[65] Ibid 96.

[66] Cf Nadirsyah Hosen, 'Nahdlatul Ulama and Collective Ijtihad' (2004) 6(1) New Zealand Journal of Asian Studies 5–26, here 12; and al-Dimyāṭī (n 27) 19.

[67] Cf Hosen (n 66) 15; and Kaʿbah (n 64) 98.

Another organization in Indonesia that gave a central place to the *tarjīḥ* in its treatment of legal issues is the Muhammadiyah.[68] It was founded in 1912 and is considered one of the most important religious social organizations in Indonesia. Thus, when the Muhammadiyah based its handling and investigation of legal matters on a collective approach, the commission was named after *tarjīḥ*: Majelis Tarjih (lit. 'Council for the Weighing'). The Muhammadiyah decided to create the Majelis Tarjih in 1927 and officially established it in 1928. In 1971, the name of this body was changed to Lajnah Tarjih ('Committee of Consideration') and in 1995 to Majelis Tarjih dan Pengembangan Pemikiran Islam ('Council for *tarjīḥ* and Development of Islamic Thought'). Finally, in 2005, the name changed to *Majelis Tarjih dan Tajdid* (ie 'Council of Pondering and Renewal').[69] Although the Muhammadiyah has changed the methodology and the name of this *majlis* several times, it always keeps the term *tarjīḥ* in the name of its collective legal *majālis*. However, the conception and application of the *tarjīḥ* in the different phases of the Muhammadiyah were not uniform and underwent a particular evolution. The Majelis is responsible for various tasks. These include the issuance of fatwas and the investigation of religious matters, particularly with regard to issues on which there is disagreement within the Muslim community. This involves not only ritual or religious issues but also social and general matters. In addition, this body is concerned with improving the general quality of theology and formulating the ideological foundations of the Muhammadiyah.[70] The Majelis Tarjih produces various Islamic legal texts, including *keputusan* (resolution) and fatwas. The *keputusan* are adopted by the national *tarjīḥ* conferences organized by the Majelis Tarjih and constitute the official position of the organization in general. In contrast, fatwas are issued in response to issues raised by Muslim society. Furthermore, there exists an informal type of *tarjīḥ* products called *wacana tarjīḥ* (*tarjīḥ* discourse). These discourses merely offer ideas or doctrines on current topics.[71]

The methodological approach used by the Majelis Tarjih in developing legal norms, whether in the form of resolutions or fatwas, is called *manhāj tarjīḥ*. 'The manhaj represents the methodological aspect in legal deduction as well as religious understanding.'[72] This *manhāj tarjīḥ* developed gradually and experienced different stages of development over time. Syamsul Anwar, the chairman of the Tarjih Council, defined the *manhāj* as 'a system that contains a set of insights, sources, approaches and certain technical procedures (methods) as guidance in *tarjih* activities'.[73] In the initial phase of the Majelis, the use of *tarjīḥ* was limited to its pre-modern form as a means of weighing the doctrines of various legal scholars on a particular issue in order to select the soundest among them. This was also the reason for selecting the term *tarjīḥ* as the name for the Majelis. Thus, the object of study of the Majelis is the issues studied by the classical *fiqh* scholars and the legal provisions.

In the following decades, on the occasion of the increasing social challenges, the Majelis expanded its scope of work to include the newly emerging issues or the issues not addressed in the pre-modern Islamic law. Hence, a major development of the *manhāj tarjīḥ* took place in 1986, when the Majelis issued expanded principles of *manhāj tarjīḥ*. With this, it now intended to practice *ijtihād* and declared the Quran and the Sunna the main sources of the

[68] For a general overview of the Muhammadiyah, see Deliar Noer, *The Modernist Muslim Movement in Indonesia 1900–1942* (Oxford University 1978) 73–76; Kaʿbah (n 64) 83–98; Anwar (n 7) 27–44; and Herman Beck, 'The Borderline between Muslim Fundamentalism and Muslim Modernism: An Indonesian Example' in Jan Willem van Henten (ed), *Religious Identity and the Invention of Tradition. Papers Read at a NOSTER Conference in Soesterberg, January 4–6, 1999* (Brill 2001) 279–91, here 281–85.

[69] Cf Anwar (n 7) 34; and Kholidah Kholidah, 'Dynamics of Tarjih Muhammadiyah and its Contribution on the Development of Islamic Law in Indonesia' (2021) 2(1) International Seminar of Islamic Studies 760–66, here 762.

[70] Cf Noer (n 68) 80ff; Anwar (n 7) 34; and Kaʿbah (n 64) 90.

[71] Cf Anwar(n 7) 34–38.

[72] Fanani and others (n 7) 4.

[73] Ibid 3.

development of legal norms. These principles recognized three methods of legal deduction: (i) *Ijtihād bayānī*: This is used when a definitive text is available as a legal source, but its meaning is not very clear or is ambiguous. In the latter case, a 'weighing' (*tarjīḥ*) is to be done, choosing the strongest interpretation. According to Kaʿbah, it is actually considered *ijtihād tarjīḥ* rather than *bayānī*. (ii) *Ijtihād qiyāsī*: This is an attempt to apply a ruling of a case already established in the Qurʾan or Sunna to a legal case arising for the first time that is neither ruled in the Qurʾan nor Sunna, provided the two cases have the same *causa*. (iii) *Ijtihād istiṣlāḥī*: Here, the issue is one that is not dealt with in a religious text either by itself or a similar case with the same cause in law. In this case, it is decided according to the common good of society.[74] The later amendment of *manhāj tarjīḥ* in 2000 introduced *bayānī*, *burhānī*, and *irfanī*. 'The *bayani* approach rests on the textual understanding of the al-Quran and prophetic traditions, the *burhani* rests on reason and science, and the *irfani* emphasises heart and religious feeling.'[75]

To sum it up, the meaning of *tarjīḥ* in Muhammadiyah has changed over time. After it initially corresponded to the meaning of classical *tarjīḥ*, however, the meaning of this term has later expanded to include any intellectual effort undertaken to resolve new legal cases that have not yet been addressed by previous jurists. In this way, the term *tarjīḥ* became synonymous, if not identical with *ijtihād*.[76]

(ii) Developments of the tarjīḥ *within the Framework of* fiqh *Institutions in the Middle East or Arab World*

The methodology for developing legal norms within various collective *fiqh* bodies, which in the Middle East were increasingly established in the second half of the 20th century, shows a modified form of application of the *tarjīḥ*. The first basic step of the norm-finding process is a recourse to traditional Islamic law, whereby the views of various schools of law are weighed (*tarjīḥ*) and finally one of them, in many cases the majority opinion, is selected (*takhayyur*). Sometimes, however, in such cases Qurʾanic passages and hadiths on which these old legal opinions are based will be cited. The intention behind this is to lend authenticity to the selected legal opinions. In the event that no solution or explanation for the issue to be addressed can be found in classical law or no analogy to a similar issue or circumstance addressed by previous legal scholars is possible, the attention is directed to identifying an Islamic law norm with the help of an independent *ijtihād*. In some cases, it is pointed out that the issue under discussion has not been settled by source texts yet or has only been dealt with by an ambiguous text. By means of this reference, the scholars intend to draw attention to the fact that the corresponding *ijtihād* attempt concerns a controversial issue or an issue that has not yet been addressed, which contributes significantly to the acceptance of its decision.

The first *fiqh* institution of this category is the Azhar Academy of Islamic Studies, established in Cairo in 1961. In its first conference, held in 1964, the Academy established three methods or stages of finding law. In a first method, the appropriate provision or view of the various schools of law is selected (*takhayyur*). This can take into account the interests of the society and meets the emerging requirements. If *takhayyur* is not available, one uses the second method, namely that of the collective *ijtihād* based on the law-finding rules of (one of) the schools of law (*ijtihād jamāʿī madhhabī*). If this method does not lead to a solution either, an absolute collective *ijtihād* (*ijtihād jamāʿī muṭlaq*) is applied as a third option. Furthermore, as was pointed out, the academy regulates the implementation of the two

[74] Cf Kaʿbah (n 64) 91ff; and Kholidah (n 69) 763ff.
[75] Fanani and others (n 7) 5.
[76] Cf Anwar(n 7) 33.

forms of the collective *ijtihād* so that they can be practiced when necessary.[77] Here, it should be noted that by establishing the Qurʾan and the Sunna as fundamental sources of law, the Azhar Academy explicitly stated that the gate of *ijtihād* is still open and that the Qurʾan and the Sunna are the standard of the legality of a view. Thus, the path of reviewing the previous views of the schools of jurisprudence should be free. However, this is not meant to imply a renunciation of the working results of the schools of jurisprudence. These are referred to in *takhayyur*. Nevertheless, the Azhar Academy facilitates to go beyond the law schools' findings and allows itself to practice the *ijtihād muṭlaq*.

In Saudi Arabia, the Muslim World League (MWL) established its Islamic Fiqh Academy (IFA) in 1978 in Mecca. In its Resolution No. 32:8/3, the IFA emphasizes the subject of *ijtihād* and points out further that classical Islamic law should be taken as the starting point for this *ijtihād*. Thus, the legal opinions of previous scholars on the question under study should be considered first to allow analogy of the new questions to similar cases in classical law before practicing a new *ijtihād*.[78] This approach, which promotes a firm connection with classical Islamic law, is also emphasized by other members of the academy. The Tunisian Mālikī member Muḥammad al-Nayfar al-Shādhilī states that the current *fiqh* academies, as an expression of collective *ijtihād*, form a continuation of the original *ijtihād* mode. This renewed application of the collective *ijtihād* in the present, however, should be based on the Islamic legal heritage of the earlier scholars. This could pave the way for a sound *ijtihād*.[79] The tendency to exercise lower *ijtihād* forms that depend on legal opinions of the classical *madhāhib* manifests itself in the above-mentioned Decision No. 32:8/3. Furthermore, some members speak of the *ijtihād* forms to be applied in the work of the Academy. The former president of the IFA and the Grand Mufti of Saudi Arabia, ʿAbd al-ʿAzīz ibn Bāz (term 1992–99), emphasizes that the constituent council's decision to create the *fiqh* academy emanated from the Muslims' need for insight into the religion and for explaining and establishing the most evidential or authoritative view (*rājiḥ*) on the disputed issues.[80] The required form of *ijtihād* in this case corresponds to *ijtihād tarjīḥ*. This *ijtihād* category in classical law includes those who know their school of law and its proofs by heart. Furthermore, they are qualified to weigh and evaluate the arguments or the legal opinions. However, they show a deficiency in terms of memorizing the views of their school or reasoning and knowledge of the fundamentals.[81] The Saudi member Ṣāliḥ al-Fawzān mentions in a study based on the Ḥanbalī school another *ijtihād* form that the IFA of the MWL exercises: the need for the exercise of *ijtihād* in dealing with the emerging issues. As the absolute *ijtihād*[82] is no longer possible, the *ijtihād* nowadays should be exercised in two forms, ie as *ijtihād madhhabī*, which he characterizes as selecting the predominant view (*rājiḥ*) among the diverse jurists' views and which offers a solution to the problem under study. The second form is *ijtihād juzʾī* (partial *ijtihād*), by which al-Fawzān understands the exercise of *ijtihād* only in certain areas of law that the scholars in question are well versed in. In particular, this *ijtihād* should be practiced in a collective manner within the framework of a *fiqh* academy.[83] In light of the IFA's

[77] Cf Majmaʿ al-Buḥūth al-Islāmīya (ed), *al-Muʾtamar al-awwal li-majmaʿ al-buḥūth al-islāmīya* (Majmaʿ al-Buḥūth al-Islāmīya 1964) 394.

[78] Cf Islamic Fiqh Academy (IFA), *Majallat majmaʿ al-fiqh al-islāmī* 1 (5th edn, Rābiṭat al-ʿĀlam al-Islāmī 2003) 327.

[79] Ibid 301–4.

[80] Ibid 18.

[81] For an exposition of the various levels of *ijtihād* qualifications, see Jalāl al-Dīn ʿAbd al-Raḥmān al-Suyūṭī, *Kitāb al-Radd ʿalā man akhlada ilā l-arḍ wa-jahila anna al-ijtihād fi kulli ʿaṣrin farḍ* (Maktabat al-Thaqāfa al-Dīnīya) 38–42; al-Nawawī (n 16) 75ff; Ibn Ḥamdān (n 17) 16ff; and Ibn al-Qayyim (n 23) vol 6, 125ff. On this, see Hallaq (n 4) 1–23; and Poya, *Anerkennung des Iǧtihād*, 69ff.

[82] This type of *ijtihād* requires a legal scholar who, independent of belonging to a school of law or another scholar, develops his or her own methods for finding law and, accordingly, independently makes his or her own legal decisions. Thus, he or she is able to derive norms directly from the sources of law, the Qurʾan and the Sunna, and to found a school of law.

[83] Cf IFA (n 78) 271ff.

classification in its Decision No. 32:8/3, the above-mentioned norm-finding methods are assigned to the second through fourth *ijtihād* classes, namely *ijtihād fī l-madhhab*, *ijtihād tarjīḥ*, and *ijtihād juzʾī*, and do not relate to the first category, *ijtihād muṭlaq*, which the Academy attributes to the law school founders.[84]

This close connection of the legal finding methodology practiced by the IFA of the MWL to the views of classical Islamic law, however, diverges from the indigenous Wahhābī doctrine held by the majority of its members, namely the Saudis, and especially the president of the academy. Muḥammad ibn ʿAbd al-Wahhāb (d. 1792), founder of the Wahhābī movement, and his early followers criticized or rejected the adoption of views of the older legal scholars. Instead, they had an affection for the practice of *ijtihād* based directly on the Qurʾan and Sunna.[85]

However, this change in the former Wahhābī doctrine was not led by the IFA, but rather imitated. A review of the norm-finding methodology of another indigenous Wahhābī institution that also emerged earlier than the IFA in 1971, namely the Council of Senior Scholars in Saudi Arabia (CSS), reveals a correspondence with that of the IFA. In his study on Wahhābī legal theory based on fatwas issued by the CSS and its permanent Committee for Scientific Research and Legal Opinion (CRLO; *Lajna dāʾima li-l-buḥūth al-ʿilmīya wa-l-iftāʾ*), Muhammad Atawneh states that contemporary Wahhābīs seem to have departed from the classical text-based legal theory of the Ḥanbalīs—which Ibn ʿAbd al-Wahhāb also emphasizes.[86] These Wahhābīs adopt the legal discovery model prevalent in other areas of the Islamic world which relies on Qurʾan, Sunna, consensus, and analogy.[87]

Atawneh also emphasizes the main use of the *tarjīḥ* as a norm-finding method in contemporary Wahhābī legal methodology[88] and the work of the CRLO: 'CRLO jurists approached all of these cases in roughly the same way, reviewing opinions provided by classical jurists and then practicing tarjīḥ in order to determine the preponderant opinion.'[89] Taking into account the evidence that many members of the Academy are scholars from CSS and their Permanent Committee (CRLO) and the fact that this methodology harmonizes with the conception of *ijtihād* by the foreign members of the Academy, this decision can be explained. It allowed the Saudi *fiqh* bodies to be aligned with the views of other Muslim directions, especially the traditionalists who are in favour of adhering to the traditional law school system. On the other hand, the CSS has only Saudi members, the majority of whom are Wahhābī. Its members follow the same methodological orientation, thus, one can perhaps speak of an adaptation of Wahhābī legal theory or a practical implementation, especially within the CSS, to the real circumstances of society. A trigger for this transformation within contemporary Wahhābī legal theory would be the attempt to overcome the challenges of modernity by means of Islamic legal instruments.[90]

In its general features, the methodological orientation of the IFA has similarities with the methodological principles of other international *fiqh* organizations, ie the Academy of Islamic Studies of the Azhar mentioned above and the International Islamic Fiqh Academy (IIFA) of the Organization of Islamic Cooperation (OIC), which was founded in Jeddah in 1981. However, they all have different formulations with regard to certain points. The IIFA of the OIC, for example, issued some basic principles for the research procedure of the issues to be

[84] Cf IFA (n 78) 325ff.
[85] Cf Wild (n 42) 676; Muḥammad ʿĪd ʿAbbāsī, *al-Madhhabīya al-mutaʿaṣṣiba hīya al-bidʿa* (al-Maktaba al-Islāmīya) 13–21; Muḥammad Sulṭān al-Maʿṣūmī al-Khujandī, *Hadīyat al-Sulṭān ilā muslimī al-yābān* (Jamʿīyat Iḥyāʾ al-Turāth al-Islāmī) 39–44; and Natana J DeLong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad* (Oxford University Press 2009) 93.
[86] Cf DeLong-Bas (n 85) 97.
[87] Cf al-Atawneh (n 44) 18.
[88] Ibid 77.
[89] Ibid 24.
[90] Ibid 14.

dealt with by the Academy in the course of its first conference in 1984. One of these principles is that the determination of law should be based on evidential sources of law. In this regard, the legal norms identified should also realize the recognized goals of the Shariʿah (*maqāṣid al-sharīʿa*) and seek facilitation. In addition, the resolution emphasizes that research should be reality-based and guided by the following standards: First, the *ijtihād* should be based on Islamic foundations and take into account the goals of the Shariʿah and interests. At the same time, researchers are required to adhere to the methodology of comparative jurisprudence and to demonstrate objectivity and tolerance in the event of a disagreement by making the decision on the grounds of a majority vote. Furthermore, the legal opinions and studies shall be based on authentic evidence from the Islamic sources.[91] Moreover, according to the resolution (104:11/7), the Academy makes use of another genre of legal literature, namely fatwa literature:

> Making use of the heritage of Fiqh fatwas (Nazilahs) of all their forms in finding solutions to contemporary issues, whether in connection with the methodology of fatwa in the light of the general rules of Ijtihad (personal reasoning), Istinbat (inference), Takhreej (interpretation) and Fiqh rules, or in connection with Fiqh branches which Faqeehs (scholars of Fiqh) had previously dealt with issues similar to them in practical applications in their times.[92]

In addition, experts from other fields of knowledge should be used and consulted, according to the question to be investigated. The promotion of interdisciplinary cooperation with specialists of other fields is emphasized by the IIFA through Resolution No. 153:17/2.[93] In the methodological foundations of the IIFA, its selection between the views of earlier schools relies on the evidential value of the view or the authenticity of its source as well as the realization of the 'aims of the Shariʿah'. These were emphasized as the main criteria, especially in the last century by North African Mālikī scholars, such as al-Ṭāhir ibn ʿĀshūr and ʿAllāl al-Fāsī (d. 1974). Thus, the academy provided a space for the application of *ijtihād* through this balancing process.

In general, the research approaches of the *fiqh* academies in the Middle East are closer to the traditional direction, which vehemently defends the continued existence of the traditional law schools and thereby fosters the use of *tarjīḥ*. It is noteworthy, however, when comparing the methodological approaches of these academies, that only the Azhar Academy explicitly mentioned absolute collective *ijtihād* that leaves the door open to higher levels of *ijtihād*—at least theoretically. In contrast, the other academies—whose headquarters are in Saudi Arabia, especially the IFA of the MWL—show restraint. The latter grants only limited space to the *ijtihād* or its higher levels. Moreover, the analysis of the functioning of the *fiqh* academies or other *fiqh* bodies shows that their exercise of collective *ijtihād* is fundamentally based on the results of the individual *ijtihād* of each member.[94] In this regard, the individual *ijtihād*, in the form of the research results of individual members on the issue at hand, forms the basis or the first step of the entire collective *ijtihād* process. It does not matter whether these results are based on the methods or the legal material of any school of law. It may also happen that only some of the results are arrived at by analogy with earlier views of the schools, and in some cases, they represent newly developed legal views, since a couple of members

[91] Cf IIFA-AIFI, 'Resolution Nr. 153:17/2: Regarding Fatwa: Conditions and Etiquette' in IIFA-AIFI.org (June 2006), <https://iifa-aifi.org/ar/2203.html> accessed 15 May 2022.

[92] *Resolutions and Recommendations of the Council of the Islamic Fiqh Academy* (2000) 240.

[93] Cf IIFA-AIFI (n 91).

[94] Cf Ahmed Gad Makhlouf, *Das Konzept des kollektiven iǧtihād und seine Umsetzungsformen: Analyse der Organisation und Arbeitsweise islamischer Rechtsakademien* (Peter Lang 2018) 186.

did not find a suitable solution in the existing views of the schools. It is furthermore quite possible that all the results will differ from the existing views, especially in the case of newly emerging issues that were not settled by pre-modern schools of law. This process of individual *ijtihād* is carried out by each member in the period before the convening of the (annual) conference of the respective *fiqh* institution. Subsequently, during the meetings, these working results or legal opinions are weighed by all members in the following discussion rounds. This weighing (*tarjīḥ*) is based on mutual consultation among members as well as consultation with experts from other fields of knowledge. The discussions lead to a decision that is either based on one of the different views of the participants or represents a new opinion that has emerged from the exchange of views. At the end of the process, therefore, a unanimous or majority collective decision is reached. In this way, collective *fiqh* bodies link the *ijtihād* with the *tarjīḥ* process and thus apply both in a single process, in contrast to conventional *madhāhib*.[95]

4. CONCLUSION AND OUTLOOK

Islamic jurisprudence practiced within the traditional schools of law was characterized by the linkage of *ijtihād* and *tarjīḥ*. Thus, *tarjīḥ* aims to prepare and make applicable the present extensive body of legal material that arose from the largely individually practiced *ijtihād* activities. On the one hand, this *tarjīḥ* practice was operated in the context of the delimitation between the various *madhāhib* (Islamic law schools) under a general aspect. On the other hand, *tarjīḥ* was essential as well on an internal level within the single *madhhab* that comprises the procedure of legal finding and legal opinions of different scholars of a single school.

In modern usage, *tarjīḥ* is not only a method of weighing and choosing a legal view that among the diverse views of pre-modern law most closely adapts to the current social circumstances. Moreover, *tarjīḥ* is integrated in the process of developing new legal doctrines. In particular, *tarjīḥ* is developed and modified in modern times in the field of codification of Islamic law and through the functioning of the collective *fiqh* institutions. While *takhayyur* had a complementary function in the case of the impossibility of *tarjīḥ* in the pre-modern phase, in the modern period the application of the *takhayyur* method—in a comparable function resembling the *tarjīḥ*—has emerged. In this regard, *takhayyur* (selection) signifies to select from the various views of the schools of law the most suitable position for a certain purpose. While *ijtihād* aims to identify new solutions to social concerns through independent legal reasoning and thus evokes a plurality of probabilities or ambiguities, *tarjīḥ* and *takhayyur* intend to select and adopt a one legal view out of *ijtihād's* outcomes. *Tarjīḥ* differs from *takhayyur* in that *tarjīḥ* is the preference of one view among several based on soundness of evidence.

Within the framework of the *fiqh* institutions that emerged in the 20th century, *tarjīḥ* is subject to conceptual and operational changes, characterized by its collective and interdisciplinary approach. These developments were made progressively during the 20th century and are characterized, by and large, by attempts to dissociate from *taqlīd* (as uncritical adherence to earlier legal views), such as the approach of the LBM of the UN in the first decades in particular or that of the IFA of the MWL. Thus, they mark a step towards *ijtihād*, especially in the work of the Majelis Tarjīḥ of the Muhammadiyah and the IIFA of the OIC. The process of *tarjīḥ* of these collective *fiqh* Institutions refers not only to weighing and choosing between

[95] For detailed account of the workings of various bodies of the collective *ijtihād*, see Ahmed Gad Makhlouf, 'The Doctrinal Development of Contemporary Islamic Law: Fiqh Academies as an Institutional Framework' (2021) 10(3) Oxford Journal of Law and Religion 473–76.

the views of the pre-modern legal literature but also to weighing and choosing between legal views of the individual members of the respective *fiqh* institutions regarding the issue under study. The operation of these *fiqh* institutions combine the *ijtihād* with the *tarjīḥ* and thus apply both in one and the same process. This marks a contrast to conventional *madhāhib* which practiced *ijtihād* and *tarjīḥ* in two chronologically distinct phases. The *tarjīḥ* is further equated with the process of *ijtihād* in the methodology of the Majelis Tarjīḥ of the Muhammadiyah or understood as synonyms. It is also noted that while the Indonesian *fiqh* institutions call themselves 'tarjīḥ councils', they in fact use other *ijtihād* forms. Conversely, while the Arab *fiqh* academies more often apply the term *ijtihād*, they in fact frequently perform modified forms of *tarjīḥ*. This contradictory use of the concepts can be attributed to the different histories of the term 'ijtihād' in the two regions, especially in the last century. While scholars in Southeast Asia are reluctant to apply *ijtihad*, legal scholars in the Arab region—where the movement of Muḥammad ʿAbduh (d. 1905) or Ibn ʿAbd al-Wahhāb originated—strive to apply the concept of *ijtihad*.[96]

A profound survey of the substantive development of Islamic law in the present requires more thorough studying of the work of collective *fiqh* bodies that nowadays are spreading not only in Muslim countries but also in the West. Thus, it is recommended that the resolutions of the *fiqh* academies are analysed in detail as a modern form of Islamic legal discourse. Consequently, the goal of some kind of discourse analysis should be to focus on analysing the working results of these *fiqh* bodies, considering linguistic and legal aspects and addressing possible rhetorical strategies in order to close another gap. With the help of such an investigation, it will be possible to advance further in understanding the substantive–discursive development of Islamic law in the present era. Moreover, such an analysis could provide an outlook on the further development of Islamic norms and their potential adaptation to the coexistence in pluralistic interreligious societies.

[96] See Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age: Religious Authority and Internal Criticism* (Cambridge University Press 2012) 53ff.