

THE TRANSFORMATION OF ISLAMIC LEGAL PRINCIPLES IN NATIONAL LEGISLATION: A COMPARATIVE ANALYSIS OF LEGAL HARMONIZATION

Amir Bin Wan Harun¹ Harianza Arfath²

¹ Bahagian Pengajian Islam, School of Humanities, USM bidang Fiqh Halalan Toyyiban & Perubatan Nabawi

²Universitas Islam Negeri Sumatera Utara Medan, Indonesia

Email: amirwan@usm.my harianzaarfath082@gmail.com

Info Articles	Abstract
Article History Received : 08-13-2026 Revised : 09-18-2026 Published : 10-01-2026 Keywords: <i>Comparative law; Harmonization; Islamic law; Legal transformation; Taqnīn.</i> Kata Kunci: <i>Harmonisasi; Hukum Islam; Hukum perbandingan; Taqnīn; Transformasi hukum.</i>	The incorporation of Islamic legal principles into the statutory law of modern nation-states has changed both the form and the authority structure of the sharī'a, yet legislative practice across Muslim-majority jurisdictions remains methodologically unarticulated and constitutionally uneven. This study aims to explain how Islamic legal principles are transformed when they are absorbed into contemporary national legislation, to construct a comparative typology of harmonization models, and to formulate normative criteria for principle-based harmonization. The research applies normative juridical research combining doctrinal analysis, statutory, conceptual and case approaches with a functional comparative method and an uṣūl al-fiqh reading of the maqāsid al-sharī'a, drawing on primary legal materials from Indonesia, Malaysia, Morocco and Egypt and on secondary materials from peer-reviewed literature. The findings show that transformation is not merely a change of format but a relocation of interpretive authority from jurists to legislatures, regulators and constitutional courts, and that three distinct models can be identified: harmonization by absorption, harmonization by jurisdictional dualism, and harmonization through a constitutional supremacy clause. The justice deficit produced by harmonization correlates less with the substantive content of the norms than with the procedural opacity and hierarchical irregularity of the instruments through which they enter positive law. The study recommends a harmonization framework built on hierarchy conformity, explicit maqāsid-based reasoning, rights-compatibility testing, participatory norm formation and the availability of judicial review.

I. INTRODUCTION

In almost every Muslim-majority state today, the sharī'a reaches ordinary citizens not through the manuals of the jurists but through statutes, codes, ministerial regulations and the judgments of state courts. A woman contesting a divorce in Medan, a bank customer disputing a murābahah margin in Kuala Lumpur,

or a husband seeking authorisation for a second marriage in Rabat encounters Islamic legal principles only in the form the legislature has given them. This displacement of the jurist by the statute is the single most consequential development in Islamic legal history since the nineteenth century, and it is not a neutral change of packaging.¹ Codification, or *taqnīn*, converts a plural, argumentative and probabilistic discursive tradition into a finite set of binding provisions enforced by the coercive apparatus of the state.²

Ideally, harmonization between Islamic law and national legislation should achieve two things at once. It should preserve the normative substance and internal reasoning of the *sharīʿa*, so that what the statute enacts is recognisably a product of Islamic legal method rather than an arbitrary selection dressed in religious vocabulary. It should equally satisfy the demands of the modern constitutional order: legal certainty, hierarchical coherence, equality before the law, and reviewability of state action. Harmonization, in other words, is simultaneously a problem of Islamic legal theory and a problem of legislative design.³

The actual condition departs from this ideal in instructive ways. Legislatures routinely practise selective borrowing across schools, combining positions from different madhhabs through *takhayyur* and *talfīq* without publicly stating the methodological grounds for the choice.⁴ Religious authority is invoked to legitimate policy decisions whose real drivers are fiscal, electoral or administrative. Norms of Islamic provenance enter positive law through instruments of doubtful hierarchical standing, such as presidential instructions, circulars or the regulatory transposition of fatwas issued by non-state bodies. The result is a legal order in which the religious pedigree of a rule is asserted loudly while the legal pedigree of the instrument carrying it remains obscure.

Indonesia illustrates the pattern with unusual clarity. Article 2(1) of Law Number 1 of 1974 concerning Marriage renders the validity of a marriage dependent on the law of each religion, creating a constitutional *renvoi* from state law to religious law.⁵ The Compilation of Islamic Law, the working code of the Religious Courts for more than three decades, was promulgated by Presidential Instruction Number 1 of 1991, an instrument that does not appear in the hierarchy

¹ Wael B. Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 443–445.

² Aharon Layish, “The Transformation of the Sharīʿa from Jurists’ Law to Statutory Law in the Contemporary Muslim World,” *Die Welt des Islams* 44, no. 1 (2004): 85–113, <https://doi.org/10.1163/157006004773712686>.

³ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought, 2008), 192–196.

⁴ Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 182–186.

⁵ Law Number 1 of 1974 concerning Marriage, Article 2(1).

of laws and regulations established by Law Number 12 of 2011.⁶ In Islamic finance, the fatwas of the National Sharia Board of the Indonesian Ulama Council acquire binding force only once they are transposed into regulations of the Financial Services Authority.⁷ Each of these arrangements works in practice; none of them is hierarchically tidy.

Comparable tensions appear elsewhere in different constitutional clothing. Malaysia allocates Islamic law for Muslims to the constituent states and, since 1988, has insulated the shari'a courts from review by the civil High Courts, producing a dualism that displaces conflicts rather than resolving them.⁸ Morocco reformed its family code in 2004 through an explicitly *ijtihad*-based process convened under royal authority.⁹ Egypt, since the 1980 amendment to Article 2 of its Constitution, has developed a judicial methodology for testing legislation against the principles of the shari'a.¹⁰ Four jurisdictions, four techniques, and no shared account of what successful harmonization would look like.

The scholarly literature addressing this field falls into three broad strands. The first is the transformation thesis, associated most strongly with Hallaq, Layish and Messick, which argues that codification and state enforcement did not modernise the shari'a but dismantled it, replacing a community-based, jurist-led and epistemically humble system with a state-centred instrument of governance.¹¹ This literature is analytically powerful but largely diagnostic; it explains what was lost without offering criteria by which a legislature might do better.

The second strand is socio-legal and pluralist. Otto's comparative survey of sharia incorporation, Lukito's account of legal pluralism in Indonesia, Bowen's ethnography of reasoning in the Religious Courts, and Nurlaelawati's study of judicial practice under the Compilation of Islamic Law all show that incorporation is negotiated rather than imposed, and that judges, litigants and local communities continue to shape the meaning of codified norms.¹² Nurlaelawati's finding that religious court judges frequently depart from the Compilation when its provisions conflict with classical fiqh or local expectation is particularly significant, because it

⁶ Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law; Law Number 12 of 2011 concerning the Formation of Laws and Regulations, Article 7(1).

⁷ Law Number 21 of 2008 concerning Sharia Banking, Articles 1(12) and 26(2)–(3).

⁸ Federal Constitution of Malaysia, Ninth Schedule, List II, item 1; Article 121(1A).

⁹ Law Number 70.03 concerning the Family Code (*Mudawwanat al-Usra*), promulgated by Dahir Number 1.04.22 of 3 February 2004.

¹⁰ Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law* (Leiden: Brill, 2006), 173–180.

¹¹ Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993), 54–58; Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2013), 37–48.

¹² Jan Michiel Otto, ed., *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010), 613–630; Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (London: Routledge, 2013), 41–58.

demonstrates that codification does not settle interpretive authority; it merely relocates the site of contestation.¹³

The third strand is constitutional and comparative. Lombardi's reconstruction of the Egyptian Supreme Constitutional Court's interpretive method, Hosen's analysis of sharia and constitutional reform in Indonesia, Moustafa's account of the Malaysian rights-versus-rites binary, and the quantitative mapping of constitutional Islam by Ahmed and Ginsburg have established that constitutional text alone predicts very little about legal outcomes.¹⁴ What matters is the institutional machinery through which religious norms are identified, authorised and reviewed.

Read together, these strands leave a discernible gap. The transformation literature theorises without prescribing; the pluralist literature describes practice without engaging legislative technique; the constitutional literature analyses adjudication but rarely follows the norm upstream to the drafting table. Very few studies evaluate harmonization across jurisdictions using a single analytical grid that connects three variables simultaneously: the doctrinal technique of incorporation, the hierarchical status of the instrument used, and the institutional location of continuing interpretive authority. The maqāṣid literature, for its part, is rich in normative ambition but has seldom been translated into operational criteria that a drafting team or a constitutional court could actually apply.¹⁵

This article addresses that gap. Its novelty lies in constructing a comparative typology of harmonization derived from the technique of incorporation rather than from the degree of religiosity of the resulting text, and in converting the maqāṣid framework into a set of testable legislative criteria. Three research questions guide the analysis. First, how are Islamic legal principles transformed when they are incorporated into contemporary national legislation, and what are the epistemic and institutional consequences of that transformation? Second, what models of harmonization can be identified comparatively across Indonesia, Malaysia, Morocco and Egypt, and how do they differ in doctrinal technique and constitutional structure? Third, what normative criteria should govern principle-based harmonization so that legal certainty and substantive justice are secured simultaneously?

The significance of these questions is not confined to doctrinal curiosity. Indonesia is currently debating the elevation of religious material law into statutory

¹³ Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010), 201–214.

¹⁴ Dawood I. Ahmed and Tom Ginsburg, "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions," *Virginia Journal of International Law* 54, no. 3 (2014): 615–695; Tamir Moustafa, *Constituting Religion: Islam, Liberal Rights, and the Malaysian State* (Cambridge: Cambridge University Press, 2018), 27–45.

¹⁵ Muhammad Khalid Masud, "Islamic Law and Social Change," *Islamic Law and Society* 10, no. 1 (2003): 12–15.

form, expanding the jurisdiction of the Religious Courts over Islamic economic disputes, and absorbing living law into the new Criminal Code enacted by Law Number 1 of 2023.¹⁶ Each of these projects is an act of harmonization, and each will succeed or fail according to whether the legislature can articulate the method by which religious norms become state norms. The stakes are therefore practical: they concern the quality of justice delivered to litigants who have no choice but to receive the *sharīʿa* in whatever form the state has legislated.

II. RESEARCH METHODS

This research is normative juridical research, treating law as a system of norms, principles and doctrines whose internal coherence is the object of inquiry rather than as a social fact to be measured empirically.¹⁷ It is doctrinal in the classical sense: legal materials are read, systematised, interpreted and evaluated against criteria internal to the legal order. Because the questions posed are partly evaluative, the study also has a prescriptive dimension, ending with criteria the author defends as normatively preferable rather than merely describing existing arrangements.

Four approaches are combined. The statutory approach examines the text, hierarchy and internal consistency of constitutions, statutes, regional *qanun* and delegated regulations. The conceptual approach reconstructs the theoretical vocabulary of harmonization, *taqnīn*, *siyāsa sharʿiyya* and *maqāṣid al-sharīʿa* from the literature of *uṣūl al-fiqh* and contemporary legal theory. The case approach analyses the reasoning, not merely the outcome, of selected constitutional and appellate decisions. The comparative approach, finally, places four jurisdictions side by side.

The comparative method used is functional rather than formal. Following the standard position in comparative law, institutions are compared according to the problem they are designed to solve rather than according to the labels they carry, which permits a Malaysian jurisdictional clause and an Egyptian constitutional clause to be treated as functional equivalents in the management of religious normativity.¹⁸ Jurisdiction selection is purposive: Indonesia as the largest Muslim-majority democracy with a non-confessional constitution; Malaysia as a federal system with formal jurisdictional dualism; Morocco as a case of substantive reform argued from within Islamic legal method; Egypt as the paradigm of constitutional supremacy of *sharīʿa* principles under judicial control.

Legal materials are classified conventionally. Primary materials comprise constitutions, statutes, presidential instructions, regional *qanun*, regulations of

¹⁶ Law Number 1 of 2023 concerning the Criminal Code, Article 2(1)–(2).

¹⁷ Peter Mahmud Marzuki, *Penelitian Hukum*, rev. ed. (Jakarta: Kencana, 2017), 55–60.

¹⁸ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd ed., trans. Tony Weir (Oxford: Oxford University Press, 1998), 34–36.

financial authorities, regulations of the Supreme Court, and judicial decisions. Classical Islamic legal sources, principally the works of al-Ghazālī, al-Qarāfī, Ibn Qayyim al-Jawziyya and al-Shāṭibī, are treated as primary materials of Islamic legal method, since the argument concerns how their methodology is or is not carried into modern legislation.¹⁹ Secondary materials consist of peer-reviewed articles, monographs and reports published predominantly within the last fifteen years.

Analysis proceeds in three stages. Materials are first subjected to qualitative content analysis to identify the technique by which each jurisdiction converts a religious norm into a state norm. The results are then arranged in a comparative matrix along three axes: constitutional anchoring, instrument of incorporation, and institutional locus of continuing interpretation. Finally, the matrix is evaluated against maqāṣid-derived criteria to generate prescriptive conclusions. Two limitations should be acknowledged. The study relies on sources available in Indonesian, English and Arabic translation, and it does not include original fieldwork, so claims about implementation rest on the empirical findings of others rather than on data generated here.

III. RESULTS AND DISCUSSION

A. From Jurists' Law to Statutory Law: The Architecture of Taqnīn

The first finding concerns the nature of the transformation itself. Classical fiqh was a scholarly discourse organised around probability. Outside a small core of definitively established rules, juristic conclusions were understood as *ẓannī*, probable rather than certain, and the coexistence of divergent opinions within and between schools was regarded not as a defect but as evidence of the tradition's epistemic honesty.²⁰ A mufti gave an answer; he did not issue a command. Enforcement, where it existed, belonged to the ruler under *siyāsa sharʿiyya*, a domain explicitly distinguished from the domain of juristic determination.²¹

Statutory enactment reverses each of these features. A code selects one position and makes it exclusive; probability becomes bindingness. The judge ceases to be a jurist choosing among defensible readings and becomes an official applying a text, with interpretive latitude bounded by rules of statutory construction rather than by *uṣūl al-fiqh*. Interpretive authority migrates from a dispersed scholarly community to a legislature and, in most systems, to an apex court. This is the core of Layish's transformation thesis, and the comparative evidence assembled here confirms it as a structural rather than incidental effect of codification.

¹⁹ Abū Ishāq al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharīʿa*, ed. Mashhūr Ḥasan Āl Salmān (Riyadh: Dār Ibn ʿAffān, 1997), 2:17–21.

²⁰ Abū Ḥamid al-Ghazālī, *al-Mustaṣfā min ʿIlm al-Uṣūl*, ed. Ḥamza b. Zuhayr Ḥāfiẓ (Medina: n.p., 1993), 2:350–354.

²¹ Ibn Qayyim al-Jawziyya, *Iʿlām al-Muwaqqiʿin ʿan Rabb al-ʿĀlamīn*, ed. Mashhūr Ḥasan Āl Salmān (Dammam: Dār Ibn al-Jawzī, 2002), 4:372–375.

Two epistemic costs follow. The first is the flattening of *ikhtilāf*. Where the pre-modern system allowed a litigant to seek a ruling within a different school, codification converts plurality into error: a position not enacted becomes, for legal purposes, no longer law at all. The second cost is the monopolisation of *ijtihād*. When the legislature selects among juristic positions without publishing the methodological grounds of its selection, the exercise of *ijtihād* is not abolished but concealed, which makes it unreviewable. Concealed *ijtihād* is the central pathology of contemporary harmonization, and it is a problem of procedure rather than of theology.

It would nevertheless be an error to read the transformation as pure loss, and here the analysis departs from the more pessimistic readings in the literature. Codification delivers goods that the pre-modern system could not: equality of treatment among litigants who previously depended on the school affiliation of the available judge, predictability sufficient to support commercial planning, and the possibility of review when an official acts beyond authority. These are not Western impositions; they are recognisable instantiations of *ḥifẓ al-māl* and the protection of legitimate expectation, and al-Shāṭibī's insistence that the law exists for ascertainable human welfare supports rather than resists them. The debate over *taqnīn* among Muslim jurists since the Ottoman Majalla of 1877 has never been a simple division between authenticity and modernity; it has been a disagreement about who may bind whom, and on what procedural terms.²²

B. Indonesia: Harmonization by Absorption

Indonesia's constitutional settlement is neither theocratic nor secular. Article 29 of the 1945 Constitution establishes belief in the One and Only God as a foundation of the state while guaranteeing religious freedom, and the deletion of the seven words of the Jakarta Charter in 1945 foreclosed any obligation on Muslims to obey *sharīʿa* as such by virtue of the Constitution itself.²³ Islamic norms therefore enter Indonesian law not by constitutional command but by ordinary legislative absorption, one subject matter at a time. This is the defining feature of the Indonesian model.

Absorption operates through at least four distinct instruments, each with a different hierarchical weight. The first is direct statutory *renvoi*, exemplified by Article 2(1) of the Marriage Law, which incorporates religious law wholesale for the purpose of determining validity without specifying its content. The second is quasi-codification by executive instrument, exemplified by the Compilation of Islamic Law. The third is transposition of private religious opinion through delegated regulation, exemplified by the conversion of fatwas of the National Sharia Board into

²² Layish, "The Transformation of the *Sharīʿa*," 92–95.

²³ Nadirsyah Hosen, *Shari'a and Constitutional Reform in Indonesia* (Singapore: ISEAS Publishing, 2007), 195–203.

regulations of the Financial Services Authority. The fourth is judicial regulation, exemplified by the Compilation of Sharia Economic Law issued under Supreme Court Regulation Number 2 of 2008 to guide judges deciding the new class of disputes transferred to the Religious Courts by Law Number 3 of 2006.²⁴

Evaluated against the criterion of hierarchical conformity, this architecture is unstable. A presidential instruction is by nature an internal administrative directive; it binds subordinate officials, not citizens. Yet the Compilation of Islamic Law has functioned for over three decades as the operative material law of the Religious Courts, determining inheritance shares, the validity of marriages and the consequences of divorce for millions of litigants. The practical consequence is that a norm affecting fundamental rights cannot be challenged through judicial review in the manner available for statutes, because the instrument carrying it is not a statute. Nurlaelawati's finding that judges regularly depart from the Compilation where it conflicts with classical fiqh confirms that its authority is sociological rather than juridical.

The Islamic finance channel raises a different and equally instructive problem. The National Sharia Board is an organ of a civil society organisation, and its fatwas are, in themselves, non-binding religious opinions. Once transposed into a regulation of the Financial Services Authority, however, their content becomes enforceable against banks and, indirectly, against customers who never participated in their formation and cannot readily contest their reasoning.²⁵ The arrangement solves a genuine problem of technical expertise, since financial regulators lack the competence to determine the sharia compliance of structured products. It solves it, however, by delegating normative power to a body outside the constitutional chain of accountability, without a published procedure governing how a fatwa is to be assessed, adapted or rejected before transposition.

Aceh represents the fifth and most contested channel. Special autonomy legislation, culminating in Law Number 11 of 2006, authorises the implementation of Islamic law through regional qanun, and Qanun Number 6 of 2014 on the Jinayat established offences and corporal penalties operating alongside the national criminal law.²⁶ Two harmonization deficits arise. Vertically, the qanun occupies an uncertain position relative to the national principle of criminal-law unity and to constitutional guarantees against inhuman treatment. Horizontally, differential criminalisation based on territory and religion produces inequality between citizens of the same state. The recent recognition of living law in Article 2 of the new Criminal Code sharpens rather than resolves the question, because it makes the identification

²⁴ Law Number 3 of 2006 concerning the Amendment to Law Number 7 of 1989 concerning Religious Judicature, Article 49; Supreme Court Regulation Number 2 of 2008 concerning the Compilation of Sharia Economic Law.

²⁵ Law Number 21 of 2008 concerning Sharia Banking, Article 26(2)–(3).

²⁶ Law Number 11 of 2006 concerning the Governing of Aceh, Articles 125–127; Qanun Aceh Number 6 of 2014 concerning Jinayat Law.

of unwritten criminal norms a matter for regional regulation without supplying a national standard for the exercise.

C. Malaysia: Harmonization by Jurisdictional Dualism

Malaysia approaches the same problem from the opposite direction. Rather than absorbing Islamic norms into a unitary legal order, the Federal Constitution partitions jurisdiction: Islamic law and personal and family law for Muslims fall within state competence under item 1 of List II of the Ninth Schedule, and each state maintains its own shari'a courts and enactments. The insertion of Article 121(1A) in 1988 removed matters within shari'a court jurisdiction from the jurisdiction of the civil High Courts.

The technique is elegant on paper and produces acute difficulty in practice. Because jurisdiction is determined by subject matter and religious status, a dispute involving parties of different religions or contested religious status falls into a gap that neither forum can comfortably occupy. Conversion and custody litigation has repeatedly demonstrated that a civil court declining jurisdiction and a shari'a court lacking jurisdiction over a non-Muslim party can leave a litigant with no effective remedy at all.²⁷ What is displaced is not the conflict but its adjudication.

The deeper structural point is that dualism converts substantive disagreement into a contest over forum, and in doing so it politicises religious identity. Moustafa's analysis of how Malaysian public discourse came to be organised around an opposition between rights and rites shows that jurisdictional architecture shapes the way citizens understand the relationship between Islam and law.²⁸ For comparative purposes, Malaysia demonstrates that avoidance is not neutrality: a constitutional decision not to harmonise is itself a harmonization policy, with distributive consequences borne disproportionately by women, converts and religious minorities.

D. Morocco and Egypt: Reform from Within and the Supremacy Clause

Morocco offers the clearest example of substantive reform argued in explicitly Islamic terms. The 2004 Family Code raised the minimum age of marriage, placed polygamy under judicial authorisation conditioned on objective justification, replaced the wife's duty of obedience with joint responsibility for the family, and reorganised judicial divorce. Crucially, the reform was presented not as a departure from the shari'a but as an exercise of ijtihad oriented to the maqasid, argued before parliament and the public on those grounds.²⁹

²⁷ Moustafa, *Constituting Religion*, 81–96.

²⁸ Moustafa, *Constituting Religion*, 27–45.

²⁹ Léon Buskens, "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere," *Islamic Law and Society* 10, no. 1 (2003): 70–131, <https://doi.org/10.1163/156851903321196876>.

Two lessons follow. The first is positive: codification can be a vehicle for substantive justice precisely because the drafting process forces the methodological argument into the open, where it can be examined and contested. The second is cautionary. Implementation research has shown that judicial discretion retained under the Code, particularly the power to authorise marriage below the statutory age, has been exercised in ways that substantially reduce the reform's practical effect.³⁰ Harmonization achieved at the level of text is not harmonization achieved at the level of justice, and any evaluative framework that stops at the statute book will systematically overstate success.

Egypt supplies the fourth model. Article 2 of the Constitution, as amended in 1980, makes the principles of the Islamic sharī'a the chief source of legislation, and the Supreme Constitutional Court has since developed an interpretive method that gives the clause operative content without immobilising the legal system. The Court distinguishes rules whose authenticity and meaning are definitive, which bind the legislature absolutely, from the far larger body of rules that are speculative in transmission or meaning, in respect of which the legislature may exercise *ijtihād* guided by the general purposes of the sharī'a.³¹

This technique deserves attention beyond Egypt because it is the only one of the four that states its method publicly and applies it consistently. Its weaknesses are nonetheless real. Determining what is definitive is itself an act of *ijtihād* performed by judges whose training is in constitutional rather than Islamic law, and the doctrine is capable of legitimating almost any legislative outcome that a court is inclined to uphold. The Egyptian model therefore secures methodological transparency at the price of concentrating interpretive authority in a single, politically exposed institution.

E. Comparative Synthesis and Criteria for Principle-Based Harmonization

Table 1. Comparative Matrix of Harmonization Models

Jurisdiction	Constitutional anchoring	Main instrument of incorporation	Locus of continuing <i>ijtihād</i>
Indonesia	No supremacy clause; religious foundation in Article 29	Ordinary statutes, presidential instruction, regulator transposition of fatwas, regional qanun	Legislature, Financial Services Authority, National Sharia Board, religious court judges
Malaysia	Federal division of powers; Article 121(1A)	State enactments applied by separate sharī'a courts	State legislatures, state fatwa committees, sharī'a courts

³⁰ Ziba Mir-Hosseini, "Justice, Equality and Muslim Family Laws: New Ideas, New Prospects," in *Gender and Equality in Muslim Family Law*, ed. Ziba Mir-Hosseini et al. (London: I.B. Tauris, 2013), 7–34.

³¹ Lombardi, *State Law as Islamic Law*, 174–178.

Morocco	Islam as state religion; reform under royal authority	Comprehensive family code enacted by parliament	Legislature at drafting stage; first-instance judges through discretion
Egypt	Article 2 supremacy clause	Ordinary legislation reviewed for conformity	Supreme Constitutional Court

Source: Processed from primary legal materials, 2026.

The matrix supports three analytical findings. The first is that the models differ far more in procedure than in substance. The rules of marriage, divorce and inheritance applied in the four jurisdictions are broadly similar in content; what differs radically is who decides, through what instrument, and subject to what review. Comparative debate that asks how Islamic a given system is therefore poses the wrong question, because the variable that actually determines outcomes for litigants is institutional rather than doctrinal.

The second finding is that the justice deficit produced by harmonization correlates with procedural opacity rather than with religious content. Indonesian sharia finance regulation and the Compilation of Islamic Law are substantively defensible in Islamic terms, yet both are carried by instruments that place their reasoning beyond effective contestation. Malaysian dualism generates its harms not through the content of state enactments but through a jurisdictional rule that denies a forum. Morocco's reform was substantively progressive yet is undercut by an unreviewed discretion at first instance. In each case the failure is procedural.

The third finding is that concealed *ijtihād* is systematically more damaging than contested *ijtihād*. Egypt's approach, whatever its defects, states its method and thereby exposes it to criticism and development. Where the method remains unstated, as in most Indonesian absorption, the resulting norm carries religious authority it has not earned and legal authority it cannot justify, and the two deficits reinforce each other. This is the central theoretical contribution of the present analysis: harmonization should be assessed as a problem of the accountability of interpretation, not as a problem of the quantity of religious law in the statute book.

From these findings six criteria for principle-based harmonization can be derived. First, hierarchy conformity: a norm restricting rights or determining civil status must be carried by an instrument of statutory rank, so that ordinary avenues of review apply. Second, methodological transparency: the academic manuscript accompanying a bill should state which juristic positions were considered, which was adopted, and on what *maqāṣid*-based grounds, converting concealed *ijtihād* into public reasoning. Third, a rights-compatibility test conducted before enactment rather than after litigation. Fourth, participatory norm formation, which in the Indonesian context means a published procedure for the assessment of fatwas prior to regulatory transposition, including consultation with those bound by the resulting rule. Fifth, empirical evaluation after a defined interval, on the Moroccan lesson that textual reform without implementation data produces illusory success.

Sixth, guaranteed judicial review, including of regional qanun, since no interpretive authority within a constitutional order should be unreviewable.

These criteria are not external constraints imposed on Islamic law. They follow from within it. Al-Shātibī's account of the purposes of the law presupposes that welfare is ascertainable and therefore contestable; Ibn Qayyim's treatment of *siyāsa sharʿiyya* presupposes that the ruler's discretion is bounded by justice and therefore assessable against it; the classical insistence on *taʿlīl*, the giving of reasons, is precisely a demand for transparency of method.³² A legislature that conceals the grounds of its selection among juristic positions is not being more faithful to the tradition than one that publishes them; it is being less so.

For Indonesia specifically, three implications follow. The Compilation of Islamic Law should be elevated to statutory form through the long-pending bill on applied law in the Religious Courts, which would simultaneously cure the hierarchy defect and open its provisions to constitutional review. The fatwa-to-regulation pathway in Islamic finance should be formalised by a regulation specifying the assessment procedure, the criteria of review and the consultation requirement. And the relationship between regional qanun and national constitutional standards requires a settled doctrine, particularly now that the living-law provision of the new Criminal Code invites further regional norm production without supplying a standard against which it can be measured.

IV. CONCLUSION

This study set out to explain how Islamic legal principles are transformed by incorporation into national legislation, to map the models through which that incorporation occurs, and to identify criteria for doing it well. The answer to the first question is that transformation is fundamentally a relocation of interpretive authority. Codification converts probable juristic opinion into binding state command, flattens the plurality that gave the tradition its epistemic humility, and transfers *ijtihād* from a dispersed scholarly community to legislatures, regulators and courts. The change is neither a betrayal nor a modernisation; it is a redistribution of power that carries genuine gains in equality and certainty alongside genuine losses in pluralism and methodological candour.

The answer to the second question is that four jurisdictions yield three distinct models: harmonization by absorption, in which religious norms enter positive law piecemeal through instruments of varying rank, as in Indonesia; harmonization by jurisdictional dualism, in which conflict is displaced to a separate court system rather than resolved, as in Malaysia; and harmonization through a constitutional supremacy clause administered by judicial doctrine, as in Egypt, with Morocco

³² Shihāb al-Dīn al-Qarāfī, *al-Furūq*, ed. Muḥammad Aḥmad Sarrāj and ʿAlī Jumʿa (Cairo: Dār al-Salām, 2001), 1:206–210.

representing a distinctive variant in which substantive reform is achieved through openly argued legislative *ijtihād*.

The answer to the third question, and the principal contribution of the article, is that the quality of harmonization depends on the accountability of interpretation rather than on the religious density of the text. Six criteria operationalise this conclusion: hierarchy conformity, methodological transparency in the drafting record, pre-enactment rights-compatibility testing, participatory norm formation, post-enactment empirical evaluation, and guaranteed judicial review. Theoretically, this reframes harmonization as a question of legislative accountability within *maqāṣid* reasoning. Practically, it yields a checklist that drafting teams, national sharia boards and constitutional courts can apply.

Three recommendations follow for Indonesian legal development: enactment of the applied material law of the Religious Courts in statutory form; a formal, published procedure governing the transposition of fatwas into binding financial regulation; and a settled constitutional doctrine on the review of regional *qanun*. Further research should test these criteria empirically, examining whether jurisdictions scoring highly on procedural transparency in fact deliver better outcomes for the litigants whose lives the harmonised norms govern.

REFERENCES

- Ahmed, Dawood I., and Tom Ginsburg. "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions." *Virginia Journal of International Law* 54, no. 3 (2014): 615–695.
- Auda, Jasser. *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach*. London: International Institute of Islamic Thought, 2008.
- Bowen, John R. *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning*. Cambridge: Cambridge University Press, 2003.
- Buskens, Léon. "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere." *Islamic Law and Society* 10, no. 1 (2003): 70–131. <https://doi.org/10.1163/156851903321196876>.
- Coulson, Noel J. *A History of Islamic Law*. Edinburgh: Edinburgh University Press, 1964.
- al-Ghazālī, Abū Ḥāmid. *al-Mustasfā min 'Ilm al-Uṣūl*. Edited by Ḥamza b. Zuhayr Ḥāfiẓ. Medina: n.p., 1993.
- Hallaq, Wael B. *Shari'ā: Theory, Practice, Transformations*. Cambridge: Cambridge University Press, 2009.
- Hallaq, Wael B. *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*. New York: Columbia University Press, 2013.
- Hooker, M. B. *Indonesian Syariah: Defining a National School of Islamic Law*. Singapore: ISEAS Publishing, 2008.

- Hosen, Nadirsyah. *Shari'a and Constitutional Reform in Indonesia*. Singapore: ISEAS Publishing, 2007.
- Ibn Qayyim al-Jawziyya. *I'lām al-Muwaqqi'īn 'an Rabb al-Ālamīn*. Edited by Mashhūr Ḥasan Āl Salmān. Dammam: Dār Ibn al-Jawzī, 2002.
- Layish, Aharon. "The Transformation of the Sharī'a from Jurists' Law to Statutory Law in the Contemporary Muslim World." *Die Welt des Islams* 44, no. 1 (2004): 85–113. <https://doi.org/10.1163/157006004773712686>.
- Lombardi, Clark B. *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a into Egyptian Constitutional Law*. Leiden: Brill, 2006.
- Lukito, Ratno. *Legal Pluralism in Indonesia: Bridging the Unbridgeable*. London: Routledge, 2013.
- Marzuki, Peter Mahmud. *Penelitian Hukum*. Revised edition. Jakarta: Kencana, 2017.
- Masud, Muhammad Khalid. "Islamic Law and Social Change." *Islamic Law and Society* 10, no. 1 (2003): 12–15.
- Messick, Brinkley. *The Calligraphic State: Textual Domination and History in a Muslim Society*. Berkeley: University of California Press, 1993.
- Mir-Hosseini, Ziba. "Justice, Equality and Muslim Family Laws: New Ideas, New Prospects." In *Gender and Equality in Muslim Family Law*, edited by Ziba Mir-Hosseini, Kari Vogt, Lena Larsen, and Christian Moe, 7–34. London: I.B. Tauris, 2013.
- Moustafa, Tamir. *Constituting Religion: Islam, Liberal Rights, and the Malaysian State*. Cambridge: Cambridge University Press, 2018.
- Nurlaelawati, Euis. *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*. Amsterdam: Amsterdam University Press, 2010.
- Otto, Jan Michiel, ed. *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*. Leiden: Leiden University Press, 2010.
- al-Qarāfī, Shihāb al-Dīn. *al-Furūq*. Edited by Muḥammad Aḥmad Sarrāj and 'Alī Jum'a. Cairo: Dār al-Salām, 2001.
- al-Shāṭibī, Abū Ishāq. *al-Muwāfaqāt fī Uṣūl al-Sharī'a*. Edited by Mashhūr Ḥasan Āl Salmān. Riyadh: Dār Ibn 'Affān, 1997.
- Zweigert, Konrad, and Hein Kötz. *An Introduction to Comparative Law*. 3rd ed. Translated by Tony Weir. Oxford: Oxford University Press, 1998.
- Federal Constitution of Malaysia. Ninth Schedule, List II, item 1; Article 121(1A).
- Law Number 1 of 1974 concerning Marriage (Republic of Indonesia).
- Law Number 3 of 2006 concerning the Amendment to Law Number 7 of 1989 concerning Religious Judicature (Republic of Indonesia).
- Law Number 11 of 2006 concerning the Governing of Aceh (Republic of Indonesia).

Law Number 21 of 2008 concerning Sharia Banking (Republic of Indonesia).

Law Number 12 of 2011 concerning the Formation of Laws and Regulations (Republic of Indonesia).

Law Number 1 of 2023 concerning the Criminal Code (Republic of Indonesia).

Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law (Republic of Indonesia).

Qanun Aceh Number 6 of 2014 concerning Jinayat Law.

Supreme Court Regulation Number 2 of 2008 concerning the Compilation of Sharia Economic Law (Republic of Indonesia).

Law Number 70.03 concerning the Family Code (Mudawwanat al-Usra), promulgated by Dahir Number 1.04.22 of 3 February 2004 (Kingdom of Morocco).