

# The Scope of Comparative Studies Between Islamic Law and Positive Laws: Issues and Applications

## *An Epistemological, Methodological, and Applied Inquiry*

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### Abstract

This study investigates the epistemological and methodological foundations governing comparative legal research between Islamic Sharia and positive law, elucidating the structural divergences between the two systems. Islamic Sharia constitutes a divinely revealed framework that holistically integrates legal normativity, ethical imperatives, and devotional dimensions. In contrast, positive law emanates from human legislative agency, evolving dynamically in response to socioeconomic transformations and secular public welfare. The paper sheds light on the most profound methodological challenges confronting comparative research, notably the conceptual conflation between immutable Sharia (divine revelation) and adaptable Fiqh (human jurisprudence), terminological and semantic asymmetries between Western and Islamic legal traditions, and the lack of an objective, unified comparative benchmark. Furthermore, the findings demonstrate that functional compatibility varies significantly across distinct legal branches: while financial and commercial transactions exhibit substantial flexibility and practical convergence, criminal law and personal status reflect deep philosophical divergences. The study concludes by advocating a rigorous, context-sensitive functional methodology that systematically decouples categorical, definitive rulings (thawabit) from contingent jurisprudential deductions (mutaghayyirat), thereby providing an indispensable epistemological tool for contemporary legislative drafting, legal reform, and institutional development.

**Keywords:** Positive Law; Legal Epistemology; Functional Approach; Jurisprudential Characterization (Takyif Fiqhi); Legislative Harmonization; Comparative Jurisprudence; Sharia and Fiqh.

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## **1. Introduction**

Comparative legal studies constitute one of the most intellectually vibrant yet methodologically intricate fields within legal scholarship. The discipline presupposes the feasibility of placing distinct legal systems—disparate in origin, foundational philosophy, and historical trajectory—into a comparative equilibrium to deduce points of convergence and divergence, evaluate legislative models, and enrich domestic legal drafting. While this scholarly endeavor is relatively accessible when conducted among positive legal traditions sharing common anthropological and rational origins, the complexity intensifies exponentially when juxtaposing Islamic Sharia—as a divinely revealed legislative paradigm imbued with both temporal and eschatological dimensions—with positive legal orders forged exclusively by human reason within specific historical, sociological, and ideological contexts (David, 1982; Al-Sanhuri, 1953).

The late nineteenth and early twentieth centuries witnessed the genesis of this civilizational and epistemological encounter between Islamic jurisprudence (fiqh) and Western continental codes. This interaction emerged through initial scholarly attempts aimed either at demonstrating the precedence of Islamic law in anticipating modern legal doctrines or at rationalizing the borrowing, adaptation, and domestication of European codes. However, this intellectual confrontation remained perpetually constrained by an array of methodological fallacies and epistemological bottlenecks, which frequently culminated in ideologically biased comparisons that ignored the systemic uniqueness of each legal order (Arafa, 2002; Yaqout, 2002).

The profound significance of this investigation is manifested across several core dimensions:

1. **Identity and Universal Synthesis:** It directly addresses the vital nexus between preserving the legislative identity of the Muslim world and engaging constructively with universal human achievements in social organization, overcoming ideological polarization that oscillates between assertions of absolute superiority and allegations of inherent obsolescence.

2. **Contemporary Constitutional Transformations:** It accompanies ongoing legislative and constitutional developments in Islamic nations, particularly regarding constitutional repugnancy clauses, the hierarchy of legal sources, and the harmonization between international treaty commitments and domestic Sharia-derived norms.

3. **The Heritage of Modern Codification:** It connects directly with the modern codification movement—inaugurated by the Ottoman Majallat al-Ahkam al-Adliyyah and culminating in Abd al-Razzaq al-Sanhuri's monumental enterprise in the Arab civil codes—which represented an epochal applied laboratory for synthesizing Islamic jurisprudential principles with modern civil law codification techniques (Al-Sanhuri, 1952, 1953).

## **Problem Statement and Research Questions**

This research proceeds from a primary foundational problematic encapsulated in the following core inquiry:

What is the methodological and epistemological scope that legitimately governs comparative research between Islamic Sharia and positive legal systems? What normative criteria must anchor this comparison, and how can inherent epistemological obstacles be dismantled to construct an objective, scientifically rigorous comparative paradigm?

This central problematic generates the following subsidiary research questions:

- What fundamental philosophical and epistemological foundations distinguish the Islamic normative paradigm from secular positive legal orders?
- What are the most prominent methodological pitfalls and cognitive traps confronting the comparative jurist in current scholarship?
- How can operational, disciplined criteria be formulated to ensure analytical neutrality, scholarly integrity, and contextual validity in comparative outcomes?

### **Research Objectives**

This study aims to achieve five core objectives:

1. Demarcating Epistemological Frameworks: Systematically mapping the distinct epistemological and philosophical assumptions that characterize Islamic Sharia as an autonomous legislative system compared to positive jurisprudence.
2. Diagnosing Methodological Pathologies: Identifying, classifying, and critically deconstructing the prevalent methodological dysfunctions and anachronisms in past and contemporary comparative literature.
3. Examining Applied Paradigms: Providing structured illustrative case studies across substantive legal domains (family, financial contracts, penal theory, and succession) to substantiate conceptual divergences and functional convergences.
4. Formulating a Disciplined Comparative Methodology: Establishing the epistemological pillars of a context-sensitive, functional methodology that reconciles fidelity to normative identity with pragmatic benefit from global legal innovations.
5. Evaluating Contemporary National Legislation: Providing evaluative criteria for assessing modern legislative borrowing and judicial characterization in Muslim-majority jurisdictions.

### **Research Methodology**

To rigorously resolve the research problematic, a tripartite methodological framework is deployed:

- Analytical Method (Al-Manhaj al-Tahlili): Applied to deconstruct core concepts, linguistic structures, and philosophical foundations underpinning both Sharia and positive law.
- Comparative Method (Al-Manhaj al-Muqaran): Employed to analyze structural intersections, functional equivalents, and divergence points between both traditions, tested against concrete legal cases (David, 1982; Salim, 2003).

- Theoretical-Critical Method (Al-Manhaj al-Nazari al-Naqdi): Used to evaluate previous comparative literature, exposing underlying ideological biases, lexical mischaracterizations, and structural imbalances.

## **2. Conceptual Framework of Comparative Legal Studies**

### **2.1 The Concept of Islamic Sharia: Distinguishing Revelation from Jurisprudence**

In the classical lexicon of Usul al-Fiqh (legal theory), Islamic Sharia is defined as the comprehensive totality of divine rulings, principles, and guidance ordained by God Almighty for humanity across doctrinal belief ('aqidah), practical conduct ('amal), and moral character (akhlaq). It encompasses three holistic relational spheres: the individual's relationship with the Creator, with the self, and with society (Khallaf, 1978; Al-Qaradawi, 1993). Consequently, Sharia possesses a substantially broader scope than Fiqh (jurisprudence), which is technically restricted to the derived knowledge of subsidiary practical rulings deduced from their detailed scriptural proofs (al-ahkam al-shar'iyyah al-'amaliyyah al-muktasabah min adillatiha al-tafsiliyyah).

Fiqh embodies the product of human cognitive effort, interpretive hermeneutics (ijtihad), and temporal contextualization in applying scriptural texts to changing historical realities. Whereas Sharia in its revealed inception is characterized by perfection, sacredness, and immutability, Fiqh—being a human cognitive endeavor—remains inherently probabilistic (zanni), fallible, dynamic, and open to continuous reassessment and evolution (Madkour, 1964; Moussa, 1958).

#### **◆ EPISTEMOLOGICAL MAXIM**

*Epistemological Maxim: In comparative legal research, the counterpart to modern positive law is virtually never 'Sharia' in its absolute, divine transcendence, but rather 'Fiqh' in its historical schools, interpretive diversity, and human jurisprudential deductions. Conflating divine revelation with human juristic scholarship is the root cause of widespread methodological distortion.*

### **2.2 The Concept of Positive Law and Major Legal Traditions**

In modern legal theory, positive law (al-qanun al-wad'i) denotes the codified and recognized corpus of enforceable rules governing human conduct and interpersonal relations within an organized political society. These rules are promulgated through human legislative authority and derive their binding validity, coercive sanction, and institutional enforceability from the sovereign authority of the state via executive and judicial institutions, divorced from any claim to transcendent metaphysical authority or eschatological ends (Mansour, 2003; Yaqout, 2002).

Contemporary positive legal systems belong predominantly to major legal traditions:

- The Romano-Germanic (Civil Law) Tradition: Grounded fundamentally in comprehensive written codification, structured deductive abstraction, and parliamentary supremacy, descending historically from Roman law and the Napoleonic Code of 1804.

- The Anglo-Saxon (Common Law) Tradition: Anchored in judicial precedents, inductive judicial pragmatism, adversarial procedure, and customary evolution (*stare decisis*).
- Mixed and Hybrid Legal Systems: Formations that blend codified civil traditions, common law precedents, and indigenous customary or religious personal status laws, such as those present across numerous Middle Eastern, North African, and Asian jurisdictions.

It is imperative to emphasize that within serious Islamic jurisprudential and intellectual discourse, the term 'positive law' carries no pejorative, disparaging, or theological condemnation. It is fundamentally an operational, descriptive designation employed to delineate enactments originating from human convention and institutional deliberation (*wad' al-bashar*) from transcendent rulings communicated via divine revelation. Regrettably, popular and ideological polemics often conflate this neutral descriptive category with value-laden ideological prejudices.

### **2.3 Concept and Objectives of Comparative Law**

Comparative law is far more than a mere juxtaposed inventory of foreign statutory provisions; it represents a systematic investigative methodology. As seminal French comparative jurist René David (1982) elucidated, comparative law is the disciplined study of disparate legal systems aimed at comprehending their historical lineages, structural paradigms, and underlying socio-philosophical contexts, thereby illuminating zones of harmony and discord to advance domestic legislative modernization and cross-border harmonization (Salim, 2003).

The overarching objectives of legal comparison traditionally crystallize into three distinct dimensions:

1. Pure Cognitive / Epistemological Objective: Deepening theoretical comprehension of legal rules by situating them within their broader anthropological and civilizational context.
2. Applied Reformist Objective: Modernizing and refining domestic statutory systems through the critical assimilation of superior foreign legislative drafting, judicial doctrines, and regulatory mechanisms.
3. Harmonization Objective: Bridging discrepancies between diverse legal systems to facilitate international commerce, regional treaties, and cross-border commercial transactions.

Within the specific sphere of comparing Islamic Sharia with positive law, this scholarly discipline emerged as a distinct academic domain under the crucible of profound historical upheavals, particularly Western colonial hegemony and subsequent state-modernization initiatives across the Islamic world. This encounter confronted Muslim scholars and modern jurists with decisive questions: Does Islamic jurisprudence possess the systemic resilience, institutional capacity, and technical sophistication necessary to address the needs of the modern constitutional state? And can Islamic law be placed on an equal epistemological footing with Western codes in a balanced, rigorous comparative inquiry?

### **2.4 Genesis and Historical Evolution of the Field**

The genesis of comparative Sharia-positive law scholarship traces back to the late nineteenth century, coinciding with the establishment of modern faculties of law in intellectual capitals such as Cairo, Istanbul,

and Beirut. The introduction of European jurists—predominantly French and Italian scholars—to teach continental codes alongside traditional Islamic jurisprudence created an urgent practical demand for comparative analytical mechanisms enabling practitioners and judges to navigate between Islamic legal heritage and imported civil codes (Al-Sanhuri, 1953; Yaqout, 2002).

This foundational era produced a remarkable generation of bilingual jurists who integrated classical training from historic centers of learning (such as Al-Azhar and Al-Zaytuna) with modern European doctoral qualifications. At the vanguard stood the eminent jurist Dr. Abd al-Razzaq al-Sanhuri (1895–1971), whose pioneering multi-volume treatise, *Masadir al-Haqq fi al-Fiqh al-Islami* [Sources of Rights in Islamic Jurisprudence] (1953), provided an unprecedented rigorous framework for conducting symmetrical, balanced comparisons between classical Islamic contract law and the French, German, and Swiss civil traditions.

Throughout the twentieth century, the field underwent structural expansion. Specialized scholarly treatises emerged, conducting exhaustive comparisons between Islamic criminal doctrine and modern penal philosophy (e.g., 'Awdah, 1992; Mansour, 1976), and between Islamic matrimonial regimes and Western family codes (e.g., Abu Zahra, 1957). The discipline attained full institutional maturation with the founding of peer-reviewed journals, specialized university chairs, and dedicated doctoral programs across legal faculties throughout the Muslim world.

## **2.5 Terminological Demarcation: Comparative Fiqh vs. Comparative Law**

A recurrent conceptual ambiguity within contemporary research is the conflation between two superficially similar yet methodologically divergent disciplines: Comparative Fiqh (*Al-Fiqh al-Muqaran*) and Comparative Law (*Al-Qanun al-Muqaran*).

- **Comparative Fiqh:** Strictly denotes the internal, intra-systemic examination of the divergent rulings, hermeneutical arguments, and evidentiary interpretations across the established Sunni and Shia schools of jurisprudence (e.g., Hanafi, Maliki, Shafi'i, Hanbali, Ja'fari, Zahiri). The comparative exercise remains strictly endogenous, governed entirely by shared foundational epistemology—namely, the divine authority of the Quran, Sunnah, and recognized Usuli principles (Al-Zuhayli, 1997; Khallaf, 1978).
- **Comparative Law:** Denotes an exogenous, inter-systemic methodology that examines legal systems rooted in radically distinct civilizational, ontological, and philosophical traditions. It is within this broader macro-comparative rubric that the comparative analysis of Islamic jurisprudence and Western positive law properly resides (David, 1982; Salim, 2003).

In university curricula, the designation 'Comparative Fiqh with Law' (*Al-Fiqh al-Muqaran bi-al-Qanun*) is frequently utilized as a hybrid pedagogical bridge. While scientifically acceptable, researchers must maintain acute consciousness of this dual taxonomy to avert category mistakes and methodological conflation.

### **3. Epistemological and Methodological Foundations of the Comparative Problematic**

#### **3.1 Epistemological Divergence in the Source of Obligation and Authority**

The paramount structural divergence distinguishing Islamic Sharia from positive law lies in the ultimate source of normative obligation and legislative sovereignty. Islamic jurisprudence operates upon an ontological premise wherein sovereign legislative authority belongs fundamentally to the Divine Creator (In al-hukmu illa lillah). The sources of Islamic legislation bifurcate into primary agreed-upon sources (al-masadir al-asliyyah: Quran, Sunnah, Ijma' [consensus], and Qiyas [analogical deduction]) and secondary interpretive sources subject to scholarly debate (al-masadir al-taba'iyyah: Istihsan [juristic preference], Maslahah Mursalah [unrestricted public interest], 'Urf [custom], Istishab [presumption of continuity], and Sadd al-Dhara'i' [blocking the means]) (Khallaf, 1978, 1993; Al-Shatibi, 1975).

All these interpretive instruments perform an epistemic discovery function: they are analytical mechanisms designed to uncover, deduce, and actualize the Divine Will regarding novel factual situations, rather than inventing autonomous human legislation detached from divine teleology.

Conversely, positive law derives its normative authority and coercive sanction exclusively from the sovereign will of the human legislator, institutionalized through parliamentary assemblies, constitutional referenda, and statutory enactments. While this legislative will may be influenced by prevailing custom, natural justice, or judicial doctrine, it remains an exclusively human product, divested of any claim to sacrosanctity, divine immunity, or ontological infallibility (Mansour, 2003; David, 1982).

This divergence carries profound implications for legislative amendment and abrogation (naskh). The positive legislator possesses sovereign, plenary authority to amend, repeal, or replace any legal text whenever perceived social utility or political shifting dictates. In contrast, the categorical imperatives of Sharia (al-ahkam al-qat'iyyah) are permanently immutable, enduring across temporal and spatial shifts, while adaptable dynamic jurisprudence (ijtihad) is strictly channeled within speculative texts (al-zanniyyat) and unregulated temporal novelties.

#### **3.2 Divergence in Teleological Purpose and Ultimate Ends**

The divergence between the two systems extends beyond sources into the overarching teleology (Maqasid) and ultimate purpose of the legal enterprise. Islamic Sharia is anchored in a comprehensive, holistic conception of the human condition, harmoniously balancing temporal welfare with spiritual and eschatological salvation. Classical Usul al-Fiqh systematically articulated this via the doctrine of the Five Essential Objectives (Al-Maqasid al-Khamsah al-Daruriyyah): the preservation of Religion (Din), Life (Nafs), Intellect ('Aql), Progeny/Lineage (Nasl), and Property (Mal) (Al-Shatibi, 1975; Ibn al-Qayyim, 1991). Consequently, the moral-legal spectrum of Halal (permissible) and Haram (prohibited) is not a mere procedural apparatus, but an organic normative matrix connecting inner ethical consciousness with external legal compliance.

Positive jurisprudence, by contrast, is fragmented among contending Western legal philosophies:

- Legal Positivism (Austin, Kelsen, Hart): Strictly severs law from morality, asserting that a legal rule's validity depends solely on formal enactment by recognized sovereign authority rather than its intrinsic justice.

- Natural Law: Subordinates positive validity to immutable transcendent principles of universal reason and natural human rights.

- Sociological Jurisprudence and Legal Realism (Pound, Holmes): Conceives law as an instrument of social engineering and an empirical reflection of evolving social struggles and communal exigencies.

This internal pluralism within positive legal philosophy imposes a rigorous duty upon the comparative scholar: one must explicitly define the exact school of jurisprudence with which Islamic law is being contrasted, avoiding false generalizations that treat 'Western law' as an undifferentiated, philosophically monolithic entity.

### **3.3 Holism versus Specialized Fragmentation**

A core structural contrast resides in the holistic integration characteristic of Islamic Sharia versus the compartmentalized specialization of positive law. In classical Islamic compendia, procedural, civil, and commercial transactions (mu'amalat) are structurally interwoven with devotional worship ('ibadat), family relations (munakahat), penal sanctions ('uqubat), and ethical exhortations (adab), without rigid ontological barriers between the 'strictly legal' and the 'religio-moral' (Al-Zuhayli, 1997; Madkour, 1964). Modern positive law, conversely, is constructed upon modular, specialized autonomy: rules are strictly segmented into self-contained domains—civil, commercial, criminal, administrative, and constitutional—each operating with internal doctrinal logic.

This structural divergence produces a significant methodological dilemma: Can a specialized branch of Islamic jurisprudence—such as commercial transactions or homicide—be legitimately excised from its broader theological and ethical matrix and compared to a modular branch of positive law, without distorting the organic integrity of the Islamic system? Ignoring this holistic interrelationship invariably yields severed, reductionist comparisons that misrepresent the internal cohesion of the Sharia.

### **3.4 The Religion-State Dynamic and Institutional Differentiation**

Modern positive legal orders matured in Europe alongside secularization, emerging from prolonged conflict between ecclesiastical authority and temporal sovereigns, which culminated in the institutional separation of church and state and the establishment of neutral procedural legality rooted in popular sovereignty. Islamic historical experience did not witness an equivalent structural bifurcation into competing temporal and spiritual realms, as Islam recognizes no sacerdotal ecclesiastical hierarchy. Nevertheless, classical Islamic political jurisprudence (Al-Siyasah al-Shar'iiyyah) instituted a sophisticated functional and operational differentiation between three institutional spheres (Al-'Awwa, 1998; Ibn al-Qayyim, 1991):

1. Fatwa: Epistemic elucidation of non-binding universal divine rulings by qualified jurists (muftis).

2. Qada: Authoritative, binding adjudication of civil and criminal disputes by state-appointed judges (qudah).
3. Imarah / Siyasa Shar'iyyah: Discretionary governance, administrative regulation, and public welfare management exercised by political authorities within the boundaries of Sharia objectives.

Consequently, uncritically projecting Western concepts of 'theocracy' onto historical or conceptual Islamic governance represents a grave category error. The Islamic polity constitutes neither an absolutist sacerdotal theocracy nor a secularized neutral state, but a constitutional order bound by the rule of transcendent law (Nomocracy).

**Table 1: Structural Comparison of Epistemological and Methodological Foundations**

| Comparative Dimension        | Islamic Sharia / Fiqh Paradigm                                                          | Positive Legal Orders (Civil & Common Law)                                           |
|------------------------------|-----------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|
| Ultimate Source of Authority | Divine Revelation (Wahy); interpretive derivation through Usuli hermeneutics.           | Human sovereign legislative agency (parliaments, courts, conventions).               |
| Teleological Purpose         | Holistic balance of temporal welfare and eschatological salvation; Maqasid al-Shari'ah. | Temporal social order, economic utility, human rights, and individual liberties.     |
| Systemic Structure           | Holistic and integrative; interwoven legal, ethical, and devotional dimensions.         | Specialized and modular; sharp separation between public, private, and moral realms. |
| Mechanism of Evolution       | Duality of immutable categorical texts (Thawabit) and dynamic ijtihad (Mutaghayyirat).  | Linear legislative amendment, statutory repeal, and evolving judicial precedent.     |

## 4. Methodological Challenges in Comparative Legal Studies

### 4.1 The Dilemma of Legal Terminology and Translation

One of the most persistent methodological traps in comparative research is the linguistic and conceptual translatability of legal terms. Central legal terms such as 'contract' ('aqd), 'ownership' (milkiyyah), 'legal capacity' (ahliyyah), and 'liability/tort' (daman) appear deceptively congruent on the lexical surface be-

tween Islamic jurisprudence and positive civil law. However, in substantive application, each concept carries deeply divergent conditions, underlying rationales, and legal effects forged within its native epistemological soil (Al-Sanhuri, 1953; Salim, 2003).

A quintessential example is translating 'Law' or 'Droit' as 'Qanun', while Islamic jurisprudence operates with the foundational concept of 'Hukm Shar'i'. A Hukm Shar'i embodies a sophisticated multidimensional taxonomy comprising both defining rulings (Ahkam Taklifiyyah: Obligatory [Wajib], Recommended [Mandub], Permissible [Mubah], Reprehensible [Makruh], and Prohibited [Haram]) and declaratory rulings (Ahkam Wad'iyyah: Cause [Sabab], Condition [Shart], and Impediment [Mani']) (Khallaf, 1978). This rich normative continuum cannot be reduced to the binary coercive imperative that characterizes modern positive legal norms.

To resolve this semantic asymmetry, contemporary comparative methodology demands adherence to the Functional Approach (Zweigert & Kötz, 1998; David, 1982). Rather than engaging in superficial literal translations, the comparative scholar must investigate the operational social function and practical problem the legal institution was designed to resolve within its respective socio-legal ecosystem.

#### **4.2 The Benchmark Standard and Relativity of Comparative Systems**

A vital epistemological question in any comparative enterprise concerns parity and the standard of comparison (*tertium comparationis*): Is Islamic jurisprudence being compared with modern positive law in its idealized theoretical formulations or its empirical judicial application? And is Sharia represented by its definitive primary scriptural texts, or by historical, context-bound jurisprudential commentaries (*shuruh* and *hawashi*)? The absence of a transparent, objective benchmark often renders comparative findings hostage to subjective scholar biases rather than rigorous empirical inquiry (Salim, 2003; Yaqout, 2002).

Furthermore, positive law does not constitute a monolithic bloc. Sharp doctrinal divergences exist within Western jurisdictions—such as divergent regulations regarding abortion, assisted dying, punitive damages, and freedom of contract across French, German, and Anglo-American systems. Consequently, rigorous scholarship demands contextual specificity (*al-tahdid al-siyaqi*): replacing vague generalizations regarding 'Western law' with precise comparisons focused upon a specific positive code, in a defined jurisdiction, during an exact historical epoch.

#### **4.3 Scientific Neutrality and Ideological Biases**

The integrity of comparative research has historically been impaired by ideological polarization, which predominantly manifests in two opposing tendencies:

1. **Reductionist Orientalist Discourse:** Historically depicted Islamic jurisprudence as a static, archaic, or casuistic compilation incapable of addressing the institutional needs of modern statehood. This approach constructed asymmetric comparisons between 7th-century historical rulings and 20th-century European statutory codes, completely ignoring socio-historical context ('Arafa, 2002).

2. Apologetic and Anachronistic Discourse: Emerged as a defensive reaction within contemporary Muslim writings, employing retroactive projection (anachronism) by projecting modern legal doctrines—such as contemporary constitutionalism, separation of powers, and international human rights treaties—onto early classical juristic texts, making unwarranted claims of absolute legislative precedence.

Rigorous comparative scholarship requires an objective scholarly posture that examines each legal system strictly within its authentic historical and normative context, evaluating institutional functions rather than indulging in ideological vindication or uncritical disparagement.

#### **4.4 Historical Evolution and the Philosophy of Legislative Temporality**

Islamic Sharia and positive law embody radically distinct philosophies regarding temporal evolution. While positive law adheres to linear secular evolutionism, where laws change whenever political constellations or socioeconomic structures shift, Islamic jurisprudence operates upon an equilibrium between:

- The Immutable Core (Al-Thawabit / Al-Muhkamat): Definitive textual rulings governing core devotional acts, foundational moral prohibitions, and fixed rights, which preserve systemic identity across civilizational eras.
- The Dynamic Periphery (Al-Mutaghayyirat / Al-Zanniyyat): Speculative rulings, customary applications, and discretionary policies governed by the maxim 'Legal rulings change with the change of times and places' (Taghayyur al-ahkam bi-taghayyur al-azman wa-al-amkan) (Ibn al-Qayyim, 1991; Al-Shatibi, 1975).

A Western jurist may misinterpret this balance as dogmatic rigidity, whereas an Islamic jurist perceives it as an indispensable safeguard reconciling stability with adaptive vitality. Methodologically, the scholar must utilize the rich internal instruments of renewal native to Islamic Usul—such as Istihsan, Maslahah Mursalah, and Sadd al-Dhara'i'—rather than assessing Islamic law solely through obsolete historical compilations.

#### **4.5 Legislative Diction and Degree of Systemic Abstraction**

Structural drafting techniques differ substantially between the traditions. Continental civil codifications formulate legal norms through highly abstract, general, and hierarchically structured provisions. Conversely, classical Islamic Fiqh compilations reflect an inductive, casuistic approach, examining concrete factual cases (nawazil) and methodically deriving overarching legal maxims (qawa'id fihiyyah) ex post facto (Al-Sanhuri, 1953; David, 1982).

The modern movement toward the codification of Fiqh (taqnin al-fiqh)—exemplified by the Ottoman Majallah and Sanhuri's Arab civil codes—was not merely a neutral transposition of Fiqh into numbered articles. It was an impactful substantive intervention that required juristic selection (takhayyur) and eclectic synthesis (talfiq), which altered the fluid, pluralistic nature of classical jurisprudence into rigid statutory mandates.

## **5. Applied Case Studies in Comparative Analysis**

The aforementioned epistemological and methodological challenges become vividly palpable when shifting from abstract theory to substantive applied domains. This section evaluates four representative legal fields illustrating the varying degrees of conceptual harmony and philosophical divergence.

### **5.1 Family Law and Matrimonial Regimes**

In Islamic jurisprudence, marriage is conceptualized as a 'solemn covenant' (mithaqan ghalidha) fusing contractual consent with sacred devotional responsibility, directed toward achieving mutual tranquility (sakinah), affection (mawaddah), and familial preservation (Abu Zahra, 1957; Al-Zuhayli, 1997). In contrast, contemporary Western positive codes conceive marriage strictly as a secular civil contract governed predominantly by individual autonomy and dissoluble at will.

This foundational divergence explains the ongoing polarization regarding divorce procedures, maintenance (nafaqah), custody (hadanah), and matrimonial property. While Western codes increasingly adopt unilateral no-fault divorce and immediate community of property, Islamic law maintains a balanced regime of differentiated rights, preserves complete financial independence for the wife, and provides structured judicial divorce mechanisms (talaq, khul', and tatliq) under protective procedural safeguards.

### **5.2 Contract Law and Financial Transactions**

Islamic contract law is governed by the foundational presumption of permissibility (al-asl fi al-'uqud al-ibahah), balanced by strict ethical-legal prohibitions against usurious interest (riba), excessive contractual ambiguity (gharar), gambling/speculation (maysir), and unjust enrichment (Al-Sanhuri, 1953; Hammoud, 1976). Conversely, classical positive contract law is built upon the unfettered Autonomy of the Will (sultan al-iradah), wherein interest-bearing credit forms the institutional engine of modern financial capitalism.

This domain presents the most fertile territory for constructive comparative synthesis. The rapid global emergence of Islamic finance demonstrates how functional comparative analysis enables the structuring of sophisticated non-usurious investment instruments (such as Murabahah, Musharakah, Mudarabah, and Ijarah) that fulfill contemporary commercial functions while rigorously conforming to Sharia objectives (Hammoud, 1976).

### **5.3 Criminal Law and Penal Theories**

Islamic penal philosophy balances individual deterrence, public social protection, and spiritual expiation to safeguard the Five Essential Objectives. The penal architecture is structured hierarchically into:

1. Hudud: Mandatory, non-negotiable prescribed penalties safeguarding fundamental public interests.
2. Qisas and Diya: Restorative and retributive justice governing homicide and bodily injury, subordinating punishment to the victim's or family's right of pardon.

3. Ta'zir: Discretionary rehabilitative penalties determined by the legislative and judicial authorities to confront emerging social offenses ('Awdah, 1992; Mansour, 1976).

Comparative jurists highlight profound convergence in fundamental guarantees, such as the Principle of Legality ('No crime and no punishment without a prior legal text') and the presumption of innocence expressed in the prophetic maxim: 'Avert fixed penalties (hudud) through doubts' (Idra'u al-hududa bi-al-shubuhah)—which anticipated the modern doctrine that ambiguity must be resolved in favor of the accused ('Awdah, 1992). Nevertheless, profound philosophical divergence persists regarding fixed corporal sanctions when evaluated against modern Western human rights discourse. Methodologically, scholars must distinguish between the substantive theoretical deterrence of these penalties and their strict procedural evidentiary thresholds, which render physical execution historically exceptional.

#### **5.4 Estates, Succession, and Inheritance Regimes**

The Islamic law of inheritance (Mirath / 'Ilm al-Fara'id) is comprehensively delineated in categorical, immutable Quranic verses, leaving virtually no room for speculative interpretation or testamentary alteration (Abu Zahra, n.d.). The Islamic division of estates is grounded in an intricate multi-factor matrix:

- Degree of kinship (al-qarabah): Proximity to the deceased.
- Generational position: Descendants entering life with future obligations receive greater shares than surviving ascendants.
- Financial burden (al-taqlif al-mali): The structural allocation of lifetime financial responsibilities, wherein male relatives bear non-reciprocal legal duties of marital dower (mahr) and family support (nafaqah).

In contrast, modern positive inheritance laws divide into the Civil Law tradition (which enforces absolute formal equality among children alongside mandatory reserved shares) and the Common Law tradition (which champions absolute Freedom of Testation, empowering the testator to disinherit direct descendants entirely). The comparative impasse here does not stem from simple mathematical ratios, but from conflicting ontologies: Is an estate an instrument of mandatory familial social solidarity, or an extension of unfettered post-mortem private property rights?

***Table 2: Comparative Analysis of Applied Legal Domains***

| Legal Domain                              | Islamic Jurisprudence (Fiqh)                                         | Positive Law (Civil / Common Law)                   | Degree of Functional Compatibility                         |
|-------------------------------------------|----------------------------------------------------------------------|-----------------------------------------------------|------------------------------------------------------------|
| <b>Financial Transactions (Mu'amalat)</b> | Presumption of permissibility; rigorous ban on Riba, Gharar, Maysir. | Autonomy of will; interest-based credit structures. | High (Broad scope for asset-backed financial structuring). |

|                                            |                                                                              |                                                                               |                                                                       |
|--------------------------------------------|------------------------------------------------------------------------------|-------------------------------------------------------------------------------|-----------------------------------------------------------------------|
| <b>Family Law (Mu-nakahat)</b>             | Solemn covenant; balance of reciprocal rights; female financial autonomy.    | Secular civil contract; dissoluble at will; community of property.            | Moderate-to-Low (Significant philosophical divergences).              |
| <b>Criminal Law ('Uqubat)</b>              | Threefold hierarchy (Hudud, Qisas, Ta'zir); strict evidentiary hurdles.      | Secular social rehabilitation; custodial sentences; legality principle.       | Moderate (Shared legality; divergence on corporal sanctions).         |
| <b>Succession &amp; Estates (Mawarith)</b> | Fixed divine shares; multi-factor distribution; reciprocal financial duties. | Compulsory equal fractions (Civil) or absolute testamentary freedom (Common). | Low (Categorical divine texts vs. secular egalitarian/liberal norms). |

## 6. Conclusion and Policy Recommendations

### 6.1 Principal Research Findings

This epistemological and comparative inquiry has demonstrated that comparative studies between Islamic Sharia and positive legal systems represent an unavoidable, highly consequential discipline. The enterprise places two autonomous legal architectures into juxtaposition—systems that diverge in ultimate source of authority, teleological ends, systemic abstraction, and the philosophy of temporal evolution. Consequently, authentic comparative research cannot be reduced to superficial statutory cross-referencing or mechanistic alignment tables.

The primary findings of the study are summarized as follows:

1. **Structural Epistemological Divergence:** The chief obstacles governing this field are ontological and terminological: source discrepancies, conceptual mistranslations, ideological biases (oscillating between defensive apologetics and aggressive reductionism), and the failure to contextualize historical legal rules.
2. **Viability of Functional Methodology:** Overcoming these methodological impasses is scientifically achievable through a rigorous, context-sensitive functional methodology that interprets legal rules within their holistic normative environment and cleanly separates immutable revelation (Sharia) from fallible, dynamic human jurisprudence (Fiqh).
3. **Sectoral Asymmetry of Convergence:** The relationship between the two legal systems defies sweeping binary characterizations of absolute incompatibility or identical equivalence. Financial and commercial law provides vast potential for functional integration, whereas criminal sanctions

and inheritance law reflect profound philosophical divides that cannot be erased through superficial semantic reframing.

## **6.2 Methodological Recommendations for Future Scholarship**

In light of these findings, the study puts forward the following actionable recommendations for comparative scholars, academic institutions, and legislative drafting bodies:

- **Adoption of the Functional Approach:** Prioritize uncovering the socioeconomic and regulatory functions fulfilled by legal rules in their respective societies, rather than dwelling on superficial literal terminology.
- **Strict Epistemological Neutrality:** Approach comparative legal research with an exploratory, deconstructive mindset rather than seeking to validate pre-conceived ideological claims; accept instances of irreducible substantive contradiction where they legitimately exist.
- **Reliance on Primary Sources:** Deduce Islamic jurisprudential principles directly from classical authoritative references and primary Usuli treatises, avoiding distorted secondary commentaries or unverified translations.
- **Prevention of Historical Anachronism:** Avoid the uncritical retrojection of contemporary legal, constitutional, and human rights frameworks onto medieval jurisprudential rulings, respecting the temporal conditions of each era.
- **Rigorous Internal Differentiation:** Consistently distinguish categorical divine texts (Thawabit) from context-dependent ijihad (Mutaghayyirat) within Islamic law, while abandoning the depiction of 'positive law' as a homogenous monolith.
- **Promotion of Micro-Comparative Research:** Encourage specialized, in-depth micro-comparisons addressing precise legal issues (e.g., electronic contract formation, third-party beneficiary rights, consumer protection) rather than vague macro-comparative surveys.
- **Multidisciplinary Training of Scholars:** Establish integrated academic curricula that train jurists possessing dual competence in both classical Islamic Usul al-Fiqh and modern Western positive legal theory.
- **Development of Specialized Comparative Lexicons:** Compile authoritative, trilingual comparative legal dictionaries (Arabic, English, French) that rigorously map the semantic boundaries, conceptual distinctions, and functional equivalents of legal terms.
- **Empirical Judicial Investigations:** Expand field research into the actual judicial practice of modern commercial, civil, and personal status courts in Muslim jurisdictions to bridge the persistent gap between theoretical jurisprudence and living law.

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