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**Manchester Journal of Transnational Islamic Law & Practice**

## About:

*The MJTILP (formerly the Journal of Islamic State Practices in International Law) was founded in 2005. The Journal is independent of any State or institutional affiliation with a truly diverse and global editorial board. It is published twice a year by Electronicpublications.org Ltd; and available both in electronic and printed forms.*

## Aims of the Journal:

The principal objectives of the Manchester Journal of Transnational Islamic Law & Practice (MJTILP) are to provide a vehicle for the consideration of transnational forms of Islamic law and practice. Transnationalism in Islamic law is taken broadly as communications and interactions linking Islamic thoughts, ideas, people, practices and institutions across nation-States and around the globe. In recent times, research in Islamic law has shaped narratives based on nation-States, demographics, diasporic communities, and ethnic origins instead of developing around a central core. Contemporary issues of Islamic law are increasingly linked to geographical locations and ethnic or parochial forms of religious beliefs and practices. Expressions like American, European, British, Asian and Arab Islam have widely gained acceptance.

Despite the growing importance of dialogue to develop shared understandings of issues facing Islamic law and proposing coordinated solutions, the contemporary research and scholarship has not developed harmoniously and remains piecemeal and sporadic. Researchers and practitioners of Islamic law are drawn from a wide variety of subjects and come from various regions of the world but have insufficient institutional support for sharing information and comparing experiences. Innovation in various strands and paradigms of Islamic law and practice is stifled because there are limited spaces where evolutionary, collaborative and interdisciplinary discourses can take place. This in turn hampers the ability to build on past research and record best practices, negatively impacting a consistent and orderly development of the field. There is a need to constitute a world community of Islamic law scholars based on interactions and aspirations moving across linguistic, ethnic, geographical and political borders.

The MJTILP is inspired by the need to fill these gaps. It provides a platform to legal and interdisciplinary scholars and researchers for critical and constructive commentaries, engagements and interactions on Islamic law and practice that are built upon configurations in contemporary contexts. It welcomes contributions that look comparatively at Islamic law and practice that apprise and inspire knowledge across national boundaries whether enforced by a State or voluntarily practiced by worldwide Muslim communities. We are equally interested in scholarships on encapsulated cultural worlds, diaspora, identity and citizenship that are embedded and circumscribed by religious ties. As it has been the practice of the journal since its establishment in 2005, it also has a specific interest in issues relating to the practice of Muslim States in international law, international law issues that may concern Muslim countries, and all aspects of law and practice affecting Muslims globally.

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# *Islamic Law and International Law: Peaceful Dispute Resolution* Emilia Justyna Powell, Oxford University Press, New York, 2020, 314 p. ISBN-13: 9780190064631

**Cecilia M. Bailliet***

Emilia Justyna Powell believes that the identification of areas of conflict and convergence between Islamic Law and International Law within the context of Islamic Law States is important to promote the understanding of the plurality of international law (p. 6). She is an Associate Professor of Political Science and Law at the University of Notre Dame who proposes that increased recognition of pluralism will help bring about peace within the world. Powell explains that Islamic Law States have varying degrees of incorporation of secular law and religious law in governance; and this is under constant evolution similar to International Law which also under a parallel development in relation to the international community (pp. 8 & 24). She describes traditional Islamic Law's use of reconciliation, apology, and constructive dialogue, in addition to a preference for amicable informal settlement, as similar to international non-binding third party mechanisms as opposed to use of formal courts (p. 11). Powell relies on largely qualitative analysis to ground her arguments, in addition to interviews and review of caselaw and literature (p. 19).

Specifically, Powell explores "how the presence of Islamic law in the domestic legal systems of Islamic law states affects these states' views of international venues for dispute resolution" (p. 25). She underscores the commitment to peaceful resolution of international disputes as one which invites plurality in means - given that the UN Charter Article 33 recognizes negotiation, enquiry, mediation, conciliation, arbitration, and judicial settlement in addition to other peaceful means of dispute resolution.

In Chapter 2, Powell describes Islamic International Law as lacking incorporation into a coherent body, instead consisting of the evaluation by Muslim jurists of whether Muslim State actions are consistent with Islamic law. She identifies a type of *siyar* as analogous to *jus gentium*, but carrying spiritual authority to ground religious sanction relevant to treaty obligations, maritime exploration, and protection of diplomatic agents. She cites the historic work of Muhammad ibn al hasan al Shaybani, *Kitab al-Siyar al Kabir* (Introduction to the Law of Nations) which was written in the Middle Ages. Moreover, Mohammed Fadel is quoted as observing that Islamic rules of international law regulate state conduct in the absence of treaty commitments with non-Muslims and enable the state to enter into peaceful relations with non-Muslims (p. 41). Islamic justice includes submission to God and does not recognize the practice of identifying rules as practiced by states, because the practice may not be in accordance with God's will (p. 42). Powell gives an overview of the complexity of understanding what is an Islamic Law State due to the variance in the relationship between religious and secular law within the domestic systems (p. 45). She claims to be interested in the "consonance and dissonance between Islamic law and international law" and that there is a link between the domestic law and the interstate law (pp. 47-48). Powell suggests that examination of the domestic legal configurations of secular and religious law impact choice of international conflict management venues (p. 48). She describes how in most Islamic Law States, Sharia addresses personal status law, while secular law addresses penal law, commercial law, and torts (p. 52). Examples of the range are given, such as Saudi Arabia, Qatar, Bahrain, and Indonesia's

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Sharia courts addressing family law (including marriage and divorce) and inheritance and Iran's Guardian Council (composed of Muslim theologists and jurists) and Mauritania's High Council of Islam (composed of six Imams) that determine whether legislation is in conformance with Islam. Bahrain also has secular courts that address commercial and civil law cases of non-Muslims (p. 56). Kuwait has civil courts that apply Islamic law in personal status cases. In short, she concludes that Islamic Law States tend to apply secular law in non-personal status areas in order to have coherence and consistency according to standardized procedures (p. 80). Powell provides a graph demonstrating the amount of references to Sharia in national constitutions and finds that there may be a backlash against secularization as there appears to be a pattern of increased references over time in several countries. Nevertheless, she also shows that women are increasingly being included as judges in secular courts and there is an increase in reference to the aim of peaceful resolution of disputes in the constitutions (p. 76-77). Powell recognizes that "the respect for state sovereignty and national interest may challenge and at times trump consideration for Islamic norms" (p. 82). Yet, Islamic Law State leaders are expected to respect Islamic values which includes upholding *pacta sunt servanda* (p. 122).

In Chapter 4, Powell distinguishes between "nonconfrontational practices of conflict management embraced by the Islamic legal tradition and the confrontational litigation culture present in the West" (p. 126). She argues that there is "a powerful drive on the part of the Islamic milieu to settle their international disputes according to procedures embraced by Sharia" (p. 126). She suggests that the Islamic Law States which have domestic legal systems that are deeply infused with Islamic law are likely to choose conciliation and mediation because they resemble traditional Islamic law. In contrast, Islamic Law States which have domestic legal systems with more secular features will be more open to arbitration and adjudication. She concludes that the balance between Islamic law and secular law at the domestic level impacts the choice of venue for international dispute resolution (p. 127). Powell notes that Islamic Law States may have uncertainty about using adjudication or arbitration, because the Islamic milieu has not participated in the creation of the venues, the majority of judges are trained in the West, and the values of the system are largely linked to Western legal traditions (p. 137). She suggests that Islamic Law States consider four features of social interaction in the international sphere: a unique logic of justice, non-confrontational dispute resolution, collective embeddedness of the third party, and incorporation of Islamic principles in the resolution process (p. 138). Islamic Law States tend to hire Western lawyers to represent them before the International Court of Justice (ICJ) and the ICJ rarely refers to Islamic law or recognizes it as a source of state obligations (p. 150). Powell describes attributes of Islamic law that favor conciliation and mediation, such as oral process, consideration of mutual benefits, societal needs, restoration of relationships through reconciliation, and forgiveness. She provides many examples of domestic institutions, such as the *jirga* and *shura* in Afghanistan and the reconciliation committees of Oman and Jordan's tribal mediation system, and Malaysia's mediation system for banking, labor, and family disputes. She explains the value of having a mediator who is considered "an insider" in the sense of a common Islamic heritage in the case of the Algerian mediation of the Iran and Iraq conflict (p. 149). Similarly, Algeria successfully mediated accords between Iran and the United States pursuant to the taking of hostages and refusal of Iran to take part in the litigation of the case at the ICJ. Powell suggests that just solutions may involve reparations or restoration of interstate friendly relationships that may be not determined by law (p. 150). There are tensions when domestic Sharia law conflicts with international law because Islamic Law State governments need to adhere to Islamic Law as part of the collective identity of the nation (p. 162). Powell does not discuss the UN Convention on the Elimination of Discrimination

Against Women and the many reservations held by Islamic Law States.[1] This is an issue which merits discussion, as states grapple with the legitimacy of returning refugee women and girls to Afghanistan after the return of the Taliban.

In Chapter 5, Powell recognizes ongoing territorial disputes involving Islamic Law States, including the Jammu-Kashmir dispute between Pakistan India, the Helmand River water rights dispute between Iran and Afghanistan, and the Golan Heights dispute involving Syria, Lebanon, and Israel. She notes that arbitration and adjudication have been used in the Pakistan-India disputes over the Rann of Kutch and Kashmir, or the Hawar Islands dispute between Bahrain and Qatar. Nonetheless, she suggests that Brunei, Comoros, Oman, and Yemen prefer informal dispute resolution venue, and Saudi Arabia has served as a mediator in other Islamic Law States disputes but avoids formal dispute resolution venues. She notes Saudi Arabia's offer of its monarchy to provide bilateral talks for Bahrain and Qatar (p. 165). She provides tables showing that between 1945-2012, Islamic Law States made 526 attempts to pursue peaceful resolution of disputes, Bilateral Negotiations are the first choice (selected by 344 states), followed by non-binding third party methods as the second choice (Good Offices, Inquiry, Conciliation, and Mediation), and binding methods (arbitration and adjudication) are the last choice (p. 169). Powell notes that both Islamic Law States and Non-Islamic Law States overwhelmingly prefer negotiating territorial disputes (p. 170). She suggests that Islamic Law States are more likely to resort to non-binding third party methods than Non-Islamic Law States because it relates to Islamic values of brotherly settlement (p. 170). Powell identifies Algeria, Bahrain, Malaysia, Qatar, and UAE as seeking non-binding third party venues as viable dispute resolution options. She also confirms that Islamic Law States at times pursue various peaceful dispute resolutions mechanisms at the same time. She eloquently presents the failure of the ICJ to recognize Islamic conceptions of *dar-al-islam* (the territory of Islam) or the ties of nomadic peoples and religious allegiance to the Moroccan Sultan in the *Western Sahara Advisory Opinion (1975)*. Nor did the ICJ recognize arguments regarding religious authority exercised over people by the Caliph in the Aouzou strip in the *Territorial Dispute Libya v. Chad Case (1994)*, or personal ties over territorial ties in the *Sovereignty over Pulau Ligitan and Pulau Sipadan Indonesia v. Malaysia Case (2001)*. Powell notes that the Permanent Court of Arbitration recognized inconsistency between tribalism and territoriality in the *Eritrea-Yemen Arbitration (1998)* (p. 179). This section could have been expanded to include a broader discussion of reference to Islamic traditions and history in the separate opinions of the ICJ judges.

In Chapter 6, Powell explores whether the ICJ is able to garner support among Islamic members of its audience? She seeks to understand which configurations of Islamic law and secular law at the domestic level support recognition of ICJ jurisdiction? Powell suggests that countries representing Islamic Law traditions are usually skeptical to sign international treaties with compromissory clauses. She notes that Islamic Law States which have secular courts will be more likely to accept ICJ jurisdiction; similarly, those which constitutional mention of peaceful dispute resolution and rule of law are also more likely to accept the jurisdiction of the ICJ (p. 205). In contrast, Islamic Law States which have Sharia based education and religious requirements placed on leaders are less likely to accept the jurisdiction of the ICJ.

Powell is rightly critical of the fact that most of the lawyers and judges on the ICJ are Western and/or Western educated and that Islamic law based legal arguments will only appear in the jurisprudence if there is a judge with knowledge or comprehension of Islamic law (p. 207). She finds that out of 160 contentious cases and advisory opinions involving Islamic Law States,

[1] See Irene Pietropaoli, 'Islamic Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (2019) 83 Human Rights 14.

only 1 case mentioned Islamic law (*Bahrain/Qatar Case* (p. 208). However 14 separate opinions referred to Islamic Law (p. 214). Powell provides a table which lists the cases, type of opinion, name of the Judge, percent of Islamic law reference, case summary, and Islamic law mention (such as the principle of equity, sovereignty, weight of intention over written agreement, inviolability of envoys, land as a trusteeship for people.) This table leaves the reader with a genuine interest to read the opinions, although she mentions that it is only the dissenting opinion of Judge Salah El Dine Tarzai in the *US Diplomatic and Consular Staff in Tehran (1980)* case and the separate opinion of Judge Alphonse Boni in the *Western Sahara Advisory Opinion* (1975) that are substantial in length (p. 214). This section reveals a possible drawback of focusing on quantitative methodology. It may be argued that application of qualitative methodology would help to illuminate the value of reference to Islamic Law within International Law.

In Chapter 7, Powell examines whether Islamic schools of jurisprudence matter in how Islamic Law State view international conflict management methods? She also examines whether there are regional variations in how Islamic Law States view these methods. She indicates that the position of legal schools in the Islamic milieu have weakened over time as jurist scholars are increasingly marginalized in law-making which is developed by the state institutions, while regional customs regarding dispute resolution have strengthened. Powell provides a table and a map to show which countries follow the different schools- 4 Sunni- Hanafi, Hanbali, Maliki, and Shafi; 2 Shia legal schools- Jafari and Zaidi. She claims that the Middle Eastern states are more likely to attempt mediation and conciliation in territorial disputes.

Powell describes the Middle East as having a culture based on negotiation, brotherly understanding, constructive dialogue, honesty, trust, solidarity, and equitable solution which favors non-binding third party methods (p. 250). Regarding African Islamic Law States, Powell notes that the region regained trust due to the *Nicaragua* case and the *Burkina Faso-Mali frontier dispute*. Similarly, African Islamic Law States appreciated the Permanent Court of Arbitration's award in the *Eritrea-Yemen case* on the Harish Islands which recognized Islamic notions of sovereignty. In like manner, the Islamic Law States in Asia/Oceania appear to be open to the ICJ given the *Malaysia-Singapore Case over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (2008) and the *Sovereignty over the Palau Ligitan and Pulau Sipadan case between Indonesia and Malaysia* settled in 2002.

Powell states that Middle Eastern Islamic Law States are three times more likely to pursue negotiations than their counterparts in Africa or Asia/Oceania (p. 269). African Islamic Law States are more likely to sign compromissory clauses. Powell does not discuss the possible influence of the African Union system which may influence the African Islamic Law States due to the African Commission of Human Rights and the African Court of Justice and Human Rights.[2]

This part may be considered less grounded, as the African Islamic Law States cannot be generalized, there is a need for more specialized knowledge regarding each state. There is similar concern regarding the description of the Islamic Law States of Asia/Oceania.

Powell concludes that "creating constructive ways of making Islamic milieu more comfortable with modern international law can prove beneficial to global peace. Perhaps if the courts are open to Islamic law in their jurisprudence, the gap between domestic law and international law can be bridged more effectively" (p. 288). She points out that mediation and conciliation enable Islamic Law States to refer to Sharia in dispute resolution and thus create a synergistic

[2] See <https://www.african-court.org/wpafc/basic-information/#ratification> accessed 23 September 2022.

relationship between tradition and international mechanisms (p. 291). Hence, it may be suggested that there should be more attention given to the non-binding third party mechanisms of peaceful dispute resolution, rather than be marginalized, perhaps they should receive more funding and support given the interest of the pluralistic global community in their function.

This book is a novel contribution to the debates regarding the legitimacy of the international system and it provides a coherent argument for expanding the understanding, recognition, and participation of different legal cultures in the international order.