

EMILIA JUSTYNA POWELL, ISLAMIC LAW AND INTERNATIONAL LAW:  
PEACEFUL RESOLUTION OF DISPUTES  
(OXFORD UNIVERSITY PRESS 2020)

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## I. INTRODUCTION

In her monograph, Emilia Justyna Powell takes Shari'ah law seriously. As she explains, there is 'pressing need for people, communities, and policymakers to understand the Islamic legal tradition and how it relates to Western notions of legal authority'.<sup>1</sup> Since Islamic law is applied in 29 countries, it must be taken as a reality of international relations. There is a need to dedicate in-depth research to the topic and, in this regard, Powell's work is certainly a milestone.

The question at the core of Powell's work is *What is the attitude of Islamic Law States towards peaceful resolution of conflict?* It is a clear and well-thought-out research question. It calls for an unambiguous definition of Islamic Law States (ILS) – a challenging yet necessary step that the author undertakes in a very acute manner. The research question narrows down the topic to peaceful resolution of conflict, a field of international law which is too often seen as excluding ILS. 'Why would ILS use international instruments to solve their conflicts?', is the question that Powell asks, in essence, in her introduction, the same instruments which have been portrayed as rooted in a long-standing Christian tradition. The reality, as so often when it comes to international relations, is far more complex. This is suggested in the use of 'attitude' in the research question. 'Attitude' is broad enough to incorporate variation, complexity, and nuance. And that is exactly what the author aims to do: deconstructing a series of widespread clichés about ILS. Her objective is to challenge an unitarian vision of ILS that seeks to explain their common

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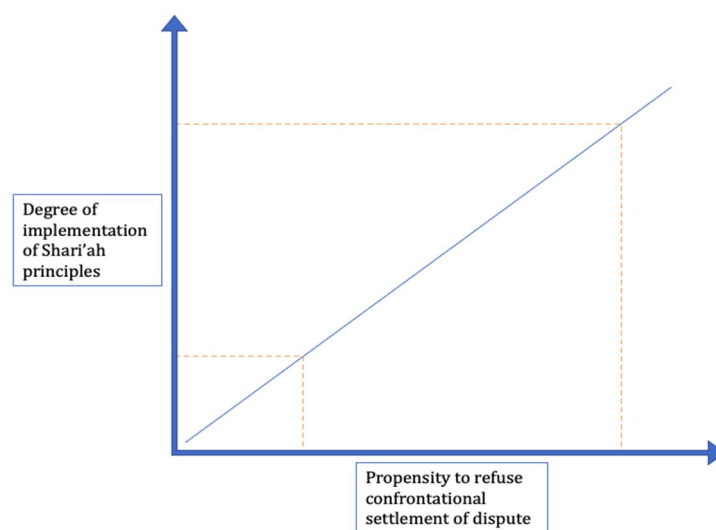
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<sup>1</sup> Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes* (Oxford University Press 2020) 286.

rejection of public international law's instruments of resolution of conflict. In this review, I will first describe the content of the book, looking more specifically at the hypothesis, the methodology, and the structure of the argument. I then move to the substantial review of the work to conclude that, despite some shortcuts in the analysis, Powell's work has the great merit of offering a workable definition of ILS and, therefore, to take Shari'ah law seriously.

## II. HYPOTHESIS, METHODOLOGY, AND STRUCTURE OF THE ARGUMENT

Powell's starting point is to acknowledge the diversity of ILS. Such diversity, she supposes, should influence their choice between non-confrontational practices and confrontational practices to peacefully settle inter-state disputes. ILS, Powell explains, are a heterogenous community of states. Some states integrate Shari'ah principles into their legal systems more than others. Since Shari'ah law is mostly based on non-confrontational practices, countries in which Shari'ah law prevails should prefer mediation or conciliation for the peaceful resolution of disputes. On the contrary, countries which are more secular, i.e. those in which Shari'ah is not the major legal source, should be more geared towards arbitration and litigation to settle their disputes with other states. The syllogism can be sketched out in the following way:



**Figure 1:** Powell's main hypothesis of research (graph based on reviewer's elaboration)

Powell's ambition is to propose 'a theoretical leap forward in the study of the Islamic milieu'<sup>2</sup> in order to provoke change in Western perceptions of Islam, ranging from academic discussions to political debates.<sup>3</sup> Powell first answers her research question in theoretical terms. She then uses statistical techniques (predictive probabilities) and interviews with judges or Shari'ah law professionals to explore the nexus of Islamic law and international law in a dynamic way, 'one that presents both these legal systems as uniquely rich and vibrant, and as dynamic systems that have changed over time and will continue to evolve'.<sup>4</sup>

The structure of the book reflects an ambition to discuss the attitude of ILS towards peaceful resolution of conflicts in a deliberate and careful manner. Chapter 1 contains all the elements of a good introduction: setting out the relevance of the topic, presentation of the argument, ambition of the work, and methodology. In chapter 2, Powell defines the core concepts of her work: international law and peaceful resolution of conflict, Islamic law, and Islamic Law States. Chapters 3 and 4 should be read, in my opinion, as a single piece. In chapter 3, Powell narrows down the discussion to the similarities between international law and Islamic law. In Chapter 4, she formulates her theory on the preferences of ILS with respect to international conflict management venues. Chapters 5, 6 and 7 are dedicated to quantitative analysis. Powell uses predicted probabilities to determine if there is a systematic way to predict the behavior of ILS when facing an international dispute. She draws on predicted probabilities in three areas: mechanisms used in the context of territorial disputes (chapter 5), attitudes of ILS towards the jurisdiction of the International Court of Justice (ICJ) (chapter 6) and the influence of legal schools and geography on the preferences of ILS (chapter 7). Chapter 8 concludes the book.

### III. TAKING ISLAMIC LAW STATES AND SHARI'AH LAW SERIOUSLY

*Islamic Law and International Law* is undoubtedly a theoretical leap forward in the study of the Islamic milieu. Shari'ah law is a topic known to cause controversy, and that is prone to fall victim to over-simplification. Those who

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<sup>2</sup> Ibid 17.

<sup>3</sup> Ibid 285-286.

<sup>4</sup> Ibid 16.

know more about the topic, either because of academic interest or by virtue of professional experience, will have encountered the uneasiness in the eyes of their interlocutor when the word 'Shari'ah' is mentioned. Terrorist attacks, the Islamic State of Iraq and the Levant, or violations of basic human rights in some Islamic Law States can certainly explain gross misconceptions of what Shari'ah Law is actually about, even amongst social science scholars.

Powell is not one of them. She demonstrates a tremendous knowledge of Islamic law based on an impressive and diverse bibliography. Even more important is her capacity to tackle the complexity of Islamic law without falling in the trap of over-simplification. Powell always maintains a high level of clarity and pedagogy when she discusses topics such as the secularization of Islamic law, the role of scholars and jurisprudence, the Islamic conception of justice and peaceful resolution of disputes, as well as Islamic legal schools and geographic diversity of ILS.<sup>5</sup>

Powell's definition of ILS can be considered a benchmark for future studies on the topic. She defines an ILS as a 'state with an identifiable substantial segment of its legal system that is charged with obligatory implementation of Islamic law and where Muslims constitute at least 50% of the population'.<sup>6</sup>

She rightly looks at the degree of incorporation of Islamic law in a given legal system: Shari'ah law can no longer be analysed as a sole expression of natural law. It has been secularized worldwide, either in constitutions or in legal codes. A consequence of this secularization is that trends exist across ILS regarding the degree of incorporation of Shari'ah principles into legal instruments. The identification of these trends is certainly a good starting point for a comparative study on ILS.

The main added value of Powell's definition is the use of precise criteria of identification.<sup>7</sup> She first identifies six criteria to evaluate the degree of incorporation of Islamic law in the legal system: (1) the mention of Islam or Shari'ah in the constitution, (2) the oath taken by the judiciary and other institutions, (3) the requirement of having a Muslim head of state, (4) the supremacy of Shari'ah, (5) a Shari'ah-based education, and (6) the importance

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<sup>5</sup> Ibid respectively 37-38, 112-115, 121-123 and 140-147, 241-255.

<sup>6</sup> Ibid 42.

<sup>7</sup> Ibid 58-79.

of customary law. She also identifies another set of five criteria which prove the secularisation of an ILS: (1) the mention of the rule-of-law, (2) the importance given to supreme court and appeal mechanisms, (3) the recognition of secular courts, (4) the presence of women in the judiciary, and (5) a reference to international peaceful resolution of disputes.

One can question the choice of some criteria – for example, why is a reference to peaceful resolution of disputes in the constitution necessarily a proof of secularisation? Similarly, the population criterion of the definition of ILS could be fine-tuned: legal norms apply first and foremost on a territory, irrespective of the composition of the population. For example, the prohibition of alcohol in Saudi Arabia applies also to the non-Muslim population. This is also the case for the wearing of a headscarf and other Islamic legal norms. As any other legal system, territorial jurisdiction of Shari'ah law takes precedence over personal jurisdiction.<sup>8</sup> For this reason, I do not think that the population criterion is relevant to define an ILS.

Yet, criticism of Powell's effort of classification cannot take away from the main contribution of her book. The main added value is to define an 'ideal type' ILS. It will be up to future research to use, challenge, and eventually refine or improve on her definition and corresponding criteria.

#### IV. ARE PREDICTED PROBABILITIES THE BEST APPROACH TO THEORY-TESTING?

*Islamic Law and International Law* is situated at the crossroads of law and political sciences. As the author explains on the very last page of her work, 'in order to generate insights into how the Islamic milieu behaves toward institutionalized international law, one must draw equally on the international relations literature and the international law literature'.<sup>9</sup>

The book will be of interest to both international relations and international law scholars. It serves as a good reminder for the former that international relations are not exclusively political. The essence of law is to influence

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<sup>8</sup> Personal jurisdiction can be relevant in some cases. For example, in the Philippines, Islamic legal norms apply to the Muslim population only. As a consequence, only Muslim citizens can divorce.

<sup>9</sup> Powell (n 1) 291.

political choices. Therefore, international law shapes many decisions taken by international actors. On the other hand, *Islamic Law and International Law* reminds international law scholars that the world of international relations is not a coherent set of binding norms, and that despite the effort of the post-WWII international community to legalize international relations, ultimately some decisions remain political.

Emilia Justyna Powell's approach is courageous. Looking at Islamic Law States' behaviour towards international peaceful resolution of conflict is a complex issue and she embraces this complexity. Advocates of positivism (in international law) and of realism (in international relations) will probably find a lot to criticise in her work, but wrongfully so in my opinion: to understand today's world, especially inter-state relations, social science researchers must go beyond their specialty and embrace multi-disciplinarity. That is why her approach must be welcomed and encouraged.

However, while chapters 1 to 4 are models of multi-disciplinary work, I have some serious concerns about chapters 5, 6, and 7. In these chapters, Powell abandons multi-disciplinarity in favour of an exclusively quantitative approach. She uses the method of predicted probabilities to test her theoretical syllogism. The objective of predicted probabilities is to anticipate the probability of an event by using calculations based on the data available. In Powell's work, the objective is to predict the attitude of ILS towards peaceful settlement of international disputes. She conducts a multinomial logistic regression for the predicted behavior of ILS regarding peaceful resolution of disputes (chapter 5). She does a negative binomial regression and logistic regression for the predicted acceptance by ILS of the ICJ's compromissory jurisdiction (chapter 6), as well as to discuss the influence of regions and the Islamic school of jurisprudence (chapter 7).

In chapter 5, Powell conducts a multinomial logistic regression between ILS and non-ILS attempts at arbitration and adjudication from 1945 to 2012 and descriptive statistics on Islamic law and secular legal features. In chapter 6, she performs a negative binomial regression and logistic regression to predict the attitude of ILS regarding the ICJ's compulsory and compromissory jurisdictions. In chapter 7, she links the number and type of cases brought by a given ILS to the ICJ from 1945 to 2014 to its geographic location and the dominant Islamic school of jurisprudence.

The first question a lawyer might ask is: what do predicted probabilities actually prove? One cannot rely exclusively on predictions to draw conclusions on a topic which is so country-dependent. I do not reject the use of quantitative research per se. As Ran Hirschl explains, quantitative analysis in comparative law can be helpful to identify trends or, indeed, probabilities. Yet, to avoid the 'so what' question which one is tempted to ask Powell regarding most of her findings, a quantitative analysis should be paired with 'a detailed examination of crucial or indicative cases'.<sup>10</sup> Without a closer consideration of individual case studies, it is impossible to conclude if Powell's probabilities are accurate or not.

A second objection concerns the internal logic of chapters 5 to 7. These chapters are written like journal articles.<sup>11</sup> Each contains a very long conceptual part, followed by a presentation of the methodology and the quantitative analysis. In a monograph, such a structure leads to repetition, for example regarding the methodology or the theoretical assumptions. It also forces the reader to digest a lot of information before the presentation of the results. Because of that, the structure of *Islamic Law and International Law* loses its consistency.

Whereas chapters 1 to 4 were logically articulated, chapters 5, 6, and 7 seem to be separated from the rest of the monograph. The articulation of the themes that connect these chapters lacks consistency. In chapter 5 and 6, Powell tries to assess whether the degree of incorporation of Shari'ah Law in ILS influences, first, their choice of mechanism to settle territorial disputes (chapter 5), and second, their recognition of the jurisdiction of the International Court of Justice (chapter 6). Yet, because of the general competence of the ICJ, 15 out of the 29 ILS cases before the Court concerned territorial disputes. The structure of chapters 5 and 6 lacks a fine-tuned logic. It would perhaps have been better to reverse the order of these two chapters

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<sup>10</sup> Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (1st edn, Oxford University Press 2014) 277.

<sup>11</sup> In fact, both chapters 5 and 6 were published separately prior to the publication of the book. Chapter 5 was published as Emilia Justyna Powell, 'Islamic Law States and Peaceful Resolution of Territorial Disputes' (2015) 69(4) *International Organization* 777. Chapter 6 was published as Emilia Justyna Powell, 'Islamic Law States and the International Court of Justice' (2013) 50(2) *Journal of Peace Research* 203.



so as to start from a more general claim (recognition of the ICJ) to subsequently move to a more specific one (territorial disputes).

I have a similar objection regarding the way Powell discusses the influence of legal schools and geographic areas on ILS preferences for resolution of conflict (chapter 7). These two elements are treated marginally whereas they could or should have been the starting point of the comparison. Imagine if, for instance, Qatar and Saudi Arabia had to settle an international dispute. Legal schools and geography would certainly be a greater factor of influence than the level of incorporation of Shari'ah law in their respective legal orders. It is surprising that an international relations scholar such as Powell does not pay much attention to these factors. The author could have chosen to use geography and legal schools as a first filter for the comparison and then to apply more specific criteria such as recognition of the ICJ or territorial disputes. It would have given the reader an interesting mapping of the tendencies of ILS towards peaceful resolution mechanisms as well as a range of case studies to test the predictive probabilities.

Finally, chapters 5 to 7 give the impression that the author uses the flexibility of quantitative methodology to confirm rather than to confront her hypotheses. Powell claims to use predicted probabilities to test her hypothesis of research, i.e. whether the degree of secularization of Shari'ah law influences the choice of peaceful resolution mechanisms. The first part of her work sets up the framework for theory-testing and justifies her approach. This approach, until the end of chapter 4, is deductive: predicted probabilities should validate or invalidate her theoretical assumption. Yet, throughout chapters 5 to 7, inductive research progressively replaces deductive research. She seems to be using predicted probabilities to feed her theoretical assumption, giving a feeling of circular reasoning and confirmation bias. Chapter 7 is symptomatic of this. When looking at the potential influence of legal schools on the attitude of ILS, her hypothesis is that there is no such influence ... and the predictive probabilities prove her right.<sup>12</sup>

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<sup>12</sup> She first asks: 'Do Islamic schools of jurisprudence matter in how ILS view international conflict management methods?', to then argue that '[t]here is no inherent reason why geographic regions or association with a particular legal school should travel together with the position of ILS on the secular law-Islamic



## V. CONCLUSION – TWO OBJECTIVES AND AN INCENTIVE TO DO MORE

*Islamic Law and International Law* has both a scientific and a political objective. The scientific objective is to prove that the degree of incorporation of Shari'ah law influences Islamic Law States' attitudes towards peaceful resolution of conflicts. Despite the shortcuts in the quantitative methodology, Powell has written a very solid piece of theoretical work. The author comes up with a workable definition of ILS and a series of criteria which will certainly be used for further research on the topic.

Her general hypothesis of a cross-influence between the legal systems of ILS and international law also has the potential to inspire further research. Her work is limited to peaceful resolution of conflict, but it paves the way for a full range of large-n comparative studies. One can think of the attitude of ILS towards Islamic banking: is it a purely economic phenomenon or could we explain it by using Powell's theory of degrees of secularization? A similar approach could also suit a quantitative analysis on reservations to treaties. Popular opinion often presents ILS as a unified block, for example with regard to the recognition of Israel, but perhaps there is more to that if one looks at objective factors such as degrees of secularization, geography or the Islamic school of thought?

The political objective of the monograph is to deconstruct widely diffused negative views of Islam and its relationship with Western standards of justice. This is certainly the biggest added value of Powell's work: to promote tolerance towards a vision of law which rules over dozens of millions of persons, and to prove that similarities between the Islamic world and the Western world exist. Powell makes this point in the most beautiful and well-written way:

(anti-Islam) rhetoric, seemingly embraced by several state leaders, is inciting an atmosphere of intolerance [...] This book makes the case that the Islamic legal tradition is not ab initio, across the board, in fundamental contradiction with international law. In fact, these two legal systems share more

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law scale. Perhaps these three factors affect ILS' preferences in a non-corresponding manner', and finally concludes that '[t]hough it comes as no surprise that Islamic schools of jurisprudence have no palpable impact on ILS' views of international conflict management'. Powell (n 1) 240 and 271 respectively.

similarities than they are given credit for by the policy word, as well as by a large portion of the scholarship. This key message, which is in itself a crucial policy point, might be somewhat unanticipated news.<sup>13</sup>

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<sup>13</sup> Powell (n 1) 286.