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## Introduction

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# Introduction

Mohammad H. Fadel

## **Abstract**

Fordham International Law Journal's special issue on Islamic law includes articles that present a broad variety of themes, from the historical to the contemporary, from the philosophical to the empirical, and from the theoretical to the practical. In light of the generally poor understanding of Islamic law among American lawyers, one can only hope that a publication such as this succeeds in generating greater intellectual curiosity about Islamic law among readers of American law journals. The authors hope that this collection of Articles will lead to renewed interest in Islamic law and theology as intellectually gratifying topics of inquiry in themselves, in addition to any relevance they may or may not have for transient political circumstances. A cardinal virtue of the lawyer is the ability to extract herself from her own circumstances and view a problem from the perspective of another party, oftentimes an adversary. Hopefully, this special issue will help generate further understanding by affording non-experts in Islamic law an opportunity to better comprehend some of the issues engaging Muslim jurists and theologians in this era.

# INTRODUCTION

*Mohammad H. Fadel\**

It is with great pleasure that I write these introductory lines to the Fordham International Law Journal's special issue on Islamic law. The Articles included present a broad variety of themes, from the historical to the contemporary, from the philosophical to the empirical, and from the theoretical to the practical. In light of the generally poor understanding of Islamic law among American lawyers, one can only hope that a publication such as this succeeds in generating greater intellectual curiosity about Islamic law among readers of American law journals.

No doubt, the most provocative Article in the collection is that of Professor Bernard Freamon, in which he argues that the rise of what he terms "self-annihilatory acts of violence (otherwise known as 'suicide bombings')" can be traced first to a radical transformation in what had previously been the quietest political tradition of the Twelver-Shi'a. The catalyst for this revolution, in the opinion of Professor Freamon, was the twin pressures of colonialism and the militant secularism of the Ba'ath party which dominated Iraqi politics for more than three decades. From its origin in Shi'a theology, the sanctification of martyrdom as a goal in itself was transported to the Sunni Arab world, largely in the context of the Palestinian-Israeli conflict. While one may disagree with some of the details of Professor Freamon's analysis, what is compelling about his argument is the manner in which it weaves theological developments within a larger intellectual and social context, suggesting not only that current conceptions of martyrdom are mutable, but more importantly, that political reform in the region is likely to result in equally dramatic revisions to theological doctrines such as *jihad* and martyrdom.

Perhaps as a corollary to Professor Freamon's Article, there are two Articles on Islam and democracy, one by Professor Khaled Abou El Fadl (along with two short responses) and the other by Professor Sherman Jackson. Whereas Abou El Fadl's

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contribution strikes a highly theological tone, Professor Jackson's is more focused on institutions, their jurisdiction, and what the implications of the jurisdictional claims of the modern State hold for religious Muslims. Professor Abou El Fadl argues that both Islam and democracy require moral commitments from their adherents and for that reason rejects the welfare-based arguments advanced by Muslims as being an insufficient basis for democracy. Professor Jackson's argument suggests that the problem may instead lie in the refusal of modern States to acknowledge sources of legality outside its control.

The two Articles on Islamic finance are also thought-provoking. The first, by Professor Mahmoud El-Gamal, and the second, by Umar Moghul, Esq. and Arshad Ahmed, Esq., provide both theoretical and practical insights into the paradoxes of Islamic financing. Both papers seem to agree that if Islamic finance is to continue its growth into the future, it will have to confront (and solve) the phenomenon of "Shari'ah arbitrage." Whether Muslim jurists will confront these issues, or continue to exploit these arbitrage opportunities for their own enrichment, is a question whose answer will only be revealed in time. In any case, Professor El-Gamal's Article reveals the existence of important debates among Muslim jurists that could result in a revised position on the legitimacy of conventional banking transactions.

Professor Moussa Abou Ramadan's and Professor Amira Sonbol's contributions are the most obviously empirical pieces in the collection. Professor Ramadan's piece is especially interesting: very few people think of Israel as a jurisdiction in which Islamic law is a vital part of the contemporary legal establishment, although as the author points out, the integration of Islamic law into the Israeli legal system is not without profound tensions. Professor Sonbol's Article, based on research derived from Egyptian (and to a lesser extent, Palestinian) court records from the Ottoman era, seeks to refute the myth that Muslim courts did not follow regular procedure or that their decisions were characterized by substantial unpredictability. She also points out that judicial archives offer a wealth of data regarding social and economic life for both Muslim and non-Muslim pre-modern Egyptians. One hopes that other judicial archives from other areas of the Muslim world will be put to use by scholars so as to provide a more accurate portrayal of law and society in the pre-modern era.

Finally, Professor Azizah Y. al-Hibri provides a thoughtful analysis of the issue of a husband's right to discipline his wife according to the revelatory sources of Islam, arguing that the "harmony principle," as a normative matter, ought to (and empirically does) dominate the "chastisement principle," as evidenced by doctrines of Islamic positive law that provide battered wives with remedies against their husbands. In this context, it should be noted that for later Malikis, the legal presumption in cases of spousal violence was that it was abusive and not a legitimate form of discipline, again suggesting that the relationship between the plain meaning of scriptural sources and legal rules are at best complex.

It is my earnest hope that this collection of Articles will lead to renewed interest in Islamic law and theology as intellectually gratifying topics of inquiry in themselves, in addition to any relevance they may or may not have for transient political circumstances. A cardinal virtue of the lawyer is the ability to extract herself from her own circumstances and view a problem from the perspective of another party, oftentimes an adversary. Hopefully, this special issue will help generate further understanding by affording non-experts in Islamic law an opportunity to better comprehend some of the issues engaging Muslim jurists and theologians in this era.