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978-1-107-06150-7 - The Transformation of Islamic Law in Global Financial Markets

Jonathan G. Ercanbrack

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## THE TRANSFORMATION OF ISLAMIC LAW IN GLOBAL FINANCIAL MARKETS

The role of global capital in relation to human social systems has assumed enormous proportions in liberalised, deregulated markets. States attempt to nationalise it, financial centres spring up in its wake, and INGOs attempt to deal with its de-territorialising, supranational characteristics. A global adjudication system (arbitration) has been introduced to safeguard and buttress its flow.

The power of Islamic capital has generated numerous sites of legal contestation and negotiation, ranging from gateway financial centres, international law firms and transnational financial institutions, all of which interact in the production of Islamic financial law (IFL). The process of producing IFL illustrates complex fields of action driven by power dynamics, neoliberal paradigms and the institutional momentum of the global economy. The municipal legal systems under study in this book (the United Kingdom, Bahrain, United Arab Emirates and the Dubai International Financial Centre) illustrate globalisation's acceleration of legal, economic and social production.

JONATHAN G. ERCANBRACK is Lecturer in the Law of Islamic Finance and Deputy Director of the Centre for Islamic and Middle Eastern Law at SOAS, University of London.

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My PhD thesis, entitled 'The Law of Islamic Finance in the United Kingdom: Legal Pluralism and Financial Competition' dealt mostly with the challenges of articulating and implementing Islamic finance in the United Kingdom. As with all my research, however, I quickly realised its limitations and indeed the limitations of my understanding of the global and theoretical dimensions of the subject. I have attempted to augment

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these with this book. The book advances a conceptual argument concerning the nature of Islamic financial law (IFL) that was developed by examining a much broader set of jurisdictions, international actors and transformative legal processes than was possible in the thesis.

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United Nations Convention on Contracts for the International Sale of Goods (United  
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ABBREVIATIONS

AAA	American Arbitration Association
AAOIFI	Accounting and Auditing Organization for Islamic Financial Institutions
AFIB	Alternative finance investment bond
ALI	American Law Institute
BCBS	Basel Committee on Banking Supervision
BCDR-AAA	Bahrain Chamber for Dispute Resolution
BD	Bahraini Dinar
BFH	Bahrain Financial Harbour
BIS	Bank for International Settlements
BRIC	Brazil, Russia, India and China
CAR	Capital Adequacy Requirement
CBB	Central Bank of Bahrain
CE	Common Era
CDO	Collateralised Debt Obligation
CIS	Collective Investment Scheme
CIS	Commonwealth of Independent States
CISG	United Nations Convention on Contracts for the International Sale of Goods
CRCOM	credit risk capital requirement
DCR	displaced commercial risk
DFSA	Dubai Financial Services Authority
DIFC	Dubai International Financial Centre
DIFX	Dubai International Financial Exchange
ECAI	external credit assessment institution
EEA	European Economic Area
ESCA	Emirates Securities and Commodities Authority
ESFS	European System of Financial Supervisors
ESRB	European Systemic Risk Board
ESUA	Exchange in Satisfaction and User Agreements
EU	European Union
FCA	Financial Conduct Authority
FDI	Foreign Direct Investment
FSA	Financial Services Authority
FSCS	Financial Services Compensation Scheme

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FSMA	Financial Services and Markets Act 2000
GCC	Gulf Cooperation Council
GDP	Gross Domestic Product
HJ	<i>hamish jiddiyyah</i> : a security deposit that is held as collateral by the bank
HMRC	Her Majesty's Revenue and Customs
HPP	Home Purchase Plan
HSA	higher sharia authority
IAH	investment account holders
IBB	Islamic Bank of Britain
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICG	individual capital guidance
ICTA	Income and Corporations Tax Act
IFI	Islamic financial institution
IFL	Islamic financial law
IFRS	International Financial Reporting Standards
IFSB	Islamic Financial Services Board
IFSL	International Financial Services London
IIC	Islamic investment company
IIFM	International Islamic Financial Market
IILM	International Islamic Liquidity Management Centre
IINGO	Islamic International Non-governmental Organisation
IMF	International Monetary Fund
INCEIF	International Centre for Education in Islamic Finance
INCOTERMS	International Commercial Terms
INGO	International Non-governmental Organisation
IOSCO	International Organization of Securities Commissions
IRB	internal ratings-based
IRR	investment risk reserve
ISA	Individual Savings Accounts
ISDA	International Swaps and Derivatives Association
LIBOR	London Interbank Offered Rate
LLR	lender of last resort
LMA	Loan Market Association
LMC	Liquidity Management Centre
MATP	master agreement for treasury placement
MENA	Middle East and North Africa
MPO	<i>murābahah</i> to the purchase orderer
NASDAQ	National Association of Securities Dealers Automated Quotations (second-largest stock exchange in the world by market capitalisation, after the New York Stock Exchange)
NS&I	National Savings & Investments
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of the Petroleum Exporting Countries
PER	profit equalisation reserve

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LIST OF ABBREVIATIONS

PLS	profit- and loss-sharing
PLSIA	profit- and loss-sharing investment account
PRA	Prudential Regulatory Authority
QFC	Qatar Financial Centre
RAO	Regulated Activities Order
SDLT	Stamp Duty Land Tax
SG	Symphony Gems
SOAS	School of Oriental and African Studies
SPL	Sanghi Polyesters Ltd
SPV	special purpose vehicle
SSB	Sharia Supervisory Board
SSM	Single supervisory mechanism
TID	The Investment Dar Company
TII	The International Investor
TMA	<i>Tahawwut</i> Master Agreement
TNC	Transnational Corporation
UAE	United Arab Emirates
UCC	Uniform Commercial Code
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
VAT	Value Added Tax
WTO	World Trade Organisation

# ARABIC-ENGLISH GLOSSARY

Note: The transliteration of Arabic words into the Roman script has been undertaken according to the Library of Congress transliteration standard. For the sake of simplicity, most singular Arabic words have been given an English ‘s’ to denote the plural form. Words such as *sukuk*, however, which are often used in modern financial markets, are used in the plural. Finally, Arabic words that, according to the Oxford English Dictionary, have been borrowed into the English language have not been transliterated or italicised. Such words include the sharia, fatwa, Hadith and Sunna.

<i>‘Ādat at-tujjār</i>	practice of the merchant/trader
<i>‘Adhāb</i>	punishment, chastisement
<i>Aḍḍāfan muḍḍā‘afatan</i>	(sum that is) doubled and multiplied
<i>Aḥḍad</i>	solitary
<i>‘Ahd</i>	obligation, covenant, treaty, agreement
<i>Ahkām</i>	legal rules
<i>‘Amal</i>	labour; action, performance
<i>Amānah</i>	trust, faithfulness
<i>‘Aqd</i>	contract, covenant
<i>Ārbāb al-māl</i>	a group of financial institutions
<i>‘Ariyah</i>	loan
<i>Arkān (pl.)</i>	component(s), pillar(s) (of a contract)
<i>‘Ayn</i>	a corporeal matter, substance
<i>Bāṭil</i>	void (legal)
<i>Batīn</i>	inner meaning or interpretation
<i>Bay‘</i>	sale
<i>Bay‘ al-dayn</i>	sale of debt
<i>Bay‘ al-dayn bi al-dayn</i>	sale of a debt for a debt
<i>Bay‘ al-salam</i>	a forward sale in which the price of a commodity is paid upfront
<i>Bay‘ bithaman ajil</i>	deferred payment sales
<i>Bay‘ ghā‘ib</i>	contract of sale for an absent thing or object
<i>Bay‘ al-‘inah</i>	double sale used to circumvent the prohibition of lending with interest
<i>Bay‘ al-wafā‘</i>	a contract in which the owner of property (house or land) sells it, with the condition that he will repurchase the property for a larger sum than the original price
<i>Bayān</i>	a legal method used to reveal or elaborate legal rules on the basis of the holy texts (Quran and Sunna)

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<i>bi-kayfiyah la yaqūl bihā mujtahid</i>	a rule of law that no qualified legal interpreter teaches
<i>Dalīl</i>	sign, indication
<i>Dar al-ḥarb</i>	abode of war
<i>Dar al-islām</i>	abode of peace
<i>Ḍarūrah</i>	necessity, need
<i>Darūriyāt</i>	‘the essentials’ (type of <i>maṣlaḥah</i> )
<i>Dayn</i>	obligation, debt; also expresses the idea of ‘claim’ or right
<i>Diyet</i>	blood money
<i>Dīwān</i>	historical records including court registers
<i>Dhimmah</i>	capacity, personal responsibility or obligation
<i>Fā’idah</i>	interest; growth
<i>Faqīh</i> (sg.) / <i>Fuqhā’</i> (pl.)	expert in Islamic jurisprudence ( <i>fiqh</i> )
<i>Farḍ</i>	obligatory
<i>Farḍ kifāyah</i>	divine communal obligation
<i>Fāsid</i>	defective (legal)
<i>Faskh</i>	rescission of a contractual bond
<i>Fiqh</i>	Islamic jurisprudence
<i>Fiṭra</i>	the native ability to know of God’s existence
<i>Furū’</i>	branches of jurisprudence; whereas the <i>uṣūl al-fiqh</i> indicates the roots of the law
<i>Gharar</i>	risk/speculation
<i>al-gharar al-kathīr</i>	excessive risk/speculation
<i>al-gharar al-yasīr</i>	minimal risk/speculation
Hadith	narration of the words and deeds of the Prophet Muhammad
<i>Ḥājah</i>	a need
<i>Hājiyat</i>	‘the complementary’ (type of <i>maṣlaḥah</i> )
<i>Halakha</i>	Jewish law
<i>Ḥalāl</i>	lawful
<i>Ḥarām</i>	forbidden
<i>Ḥawālah</i>	transfer of debt
<i>Hibah</i>	gift
<i>Hijra</i>	the emigration of the Prophet Mohammed from Mecca to Medina in 622 CE
<i>Hikmah</i>	God’s infinite wisdom
<i>Ḥīlah</i> (sg.)/ <i>hiyal</i> (pl.)	legal stratagem
<i>Hukm</i>	underlying cause of the legal ruling
<i>‘Tbādāt</i>	devotional worship (e.g. prayer, fasting)
<i>Ibāhah</i>	permissibility
<i>‘idah</i>	promissory
<i>Ijāb</i>	offer
<i>Ijārah</i>	lease
<i>Ijārah wa-iqtinā’</i>	financial lease
<i>Ijmā’</i>	scholarly consensus

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<i>Ijtihād</i>	independent reasoning
<i>Ikhtilāf</i>	disagreement, difference of opinion
<i>Ikhtiyār</i>	option, choice, preference
<i>ʿIllah</i>	effective cause. The element utilised in establishing a connection between the holy sources, the Quran and Sunna, and a novel case requiring independent juristic reasoning ( <i>ijtihād</i> )
<i>Insidād bāb al-ijtihād</i>	‘the closing of the gate of <i>ijtihād</i> ’
<i>Irādah</i>	human will
<i>Isnād</i>	chain of authorities (of a Hadith)
<i>Istiḥṣān</i>	juridical or personal preference
<i>Istiṣlah</i>	public benefit (technical legal term)
<i>Istiṣnāʿ</i>	contract of hire, manufacture
<i>jāʿiz</i>	permissible contract
<i>Jāhiliyyah</i>	time of ignorance; pre-Islamic
<i>Jahl</i>	want of knowledge; ignorance
<i>Jawāz</i>	basic legality
<i>Jins</i>	Saleh’s definition of genus
<i>Juʿālah</i>	reward
<i>Kafālah</i>	guarantee
<i>Kanun</i>	the laws of the Ottoman rulers
<i>Khiyār al-ʿayb</i>	the option of voiding a contract due to a defect
<i>Khiyār al-ruʿyah</i>	the option of inspection
<i>Khultah</i>	mixed type of partnership
<i>Kitāb</i>	book
<i>Kitāb al-ḥiyal</i>	book of <i>ḥiyal</i>
<i>Kuffār</i>	unbelievers
<i>Maʿdūm</i>	non-existent subject matter
<i>Madhhab/Madhāhib</i>	schools of law (Sunni schools of law: Shāfiʿi, Mālikī, Ḥanafī, and Ḥanbalī)
<i>Maṣṣadah</i>	evil
<i>Majallah</i>	gazette
<i>Majlis</i>	(noun of place) indicating a session or meeting, assembly
<i>Majlis al-hukm</i>	sharia court(less frequently: <i>majlis al-qaḍā</i> )
<i>Makhraj</i> (sg.)/ <i>Makhārij</i> (pl.)	exit(s); Ḥanafī term for <i>ḥiyal</i>
<i>Makrūh</i>	reprehensible
<i>Māl</i>	property
<i>Mandūb</i>	meritorious, recommended
<i>Manfaʿah</i>	usufruct
<i>Maqāṣid al-shariʿa</i>	objectives of the sharia/ of the law
<i>Maqṣad</i> (sg.)/ <i>maqāṣid</i> (pl.)	God’s purpose
<i>Masālik al-ʿillah</i>	method devised by jurists to identify God’s true intentions
<i>Maṣlaḥah</i>	public interest
<i>Maṣlaḥah mursalah</i>	unattested <i>maṣlaḥah</i>

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<i>Maysir</i>	gambling
<i>Mohatra</i>	from the Arabic, <i>mukhāṭarah</i> , meaning risk
<i>Muʿāmalāt</i>	transactions
<i>Mubāh</i>	permissible, licit
<i>Muḍārabah</i>	an investment partnership; also known as <i>muqarāḍah</i> and <i>qirād</i>
<i>Muḍārib</i>	investment agent
<i>Mujmaʿ ʿalayh</i>	law in which unity prevails
<i>Mujtahid</i>	Islamic scholar who possesses the aptitude of performing <i>ijtihād</i>
<i>Mukhāṭarah</i>	legal stratagem ( <i>ḥilah</i> ), commonly associated with <i>bayʿ al-ʿinah</i>
<i>Mukhtalaf fih</i>	law in which there is disagreement
<i>Murābahah</i>	a sale with a mark-up (profit)
<i>Mushārakah</i>	contractual partnership; participation financing
<i>Mustaḥabb</i>	recommendable
<i>al-mutaʿarif</i>	the usual practice of the people
<i>Muzabana</i>	the sale of fresh fruit without measure for another commodity of unknown weight/value
<i>Muzāraʿah</i>	agricultural partnership
<i>nakaḥa</i>	to marry
<i>Namā</i>	extension, growth
<i>Naṣṣ</i>	a text whose presence in the Quran or Hadith must be demonstrated
<i>Niyyah</i>	intention
<i>Nizām</i>	parallel body of secular law in Saudi Arabia (‘regulations’)
<i>Pashas</i>	governors
<i>Qabḍ</i>	possession
<i>Qabūl</i>	acceptance (contractual relation)
<i>Qāḍī</i>	judge
<i>Qarḍ</i>	loan
<i>Qarḍ ḥasan</i>	loan, a charitable loan (without interest)
<i>Qaṣd</i>	human intention
<i>Qirād</i>	sleeping partnership, also known as <i>muḍārabah</i> and <i>muqarāḍah</i>
<i>Qisās</i>	right of retaliation
<i>Qiyās</i>	analogical reasoning (one of the four sources of Islamic law according to orthodox Sunni Islam)
<i>Rabb al-māl</i>	investor (a partner in the <i>muḍārabah</i> contract)
<i>Raʿy</i>	discretion (legal reasoning)
<i>Ribā</i>	usury
<i>Ribā al-faḍl</i>	<i>ribā</i> of excess
<i>Ribā al-jahiliyyah</i>	the <i>ribā</i> (doubled and multiplied)
<i>Ribā al-nasiʿah</i>	<i>ribā</i> by delay
<i>Ribāwī</i>	<i>ribā</i> -based; illicit
<i>Riḍā</i>	the fact of being pleased or contented; approval



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<i>Rukn</i> (sg.)	component(s), pillar(s) (of a contract)
<i>Sabab</i>	cause
<i>Sadaqah</i>	voluntary charitable contribution
<i>Sadd al-dharāʾiʿ</i>	blocking the means (legal principle) (literally: closing the gates to evil)
<i>Sakk</i> (sg.)/ <i>sukuk</i> (pl.)	cheque; Islamic bond; Islamic investment certificate
<i>Salam</i>	a forward sale (fungible commodity)
<i>Ṣaḥīḥ</i>	valid (legal)
<i>Shahādah</i>	witness; the declaration by which a believer professes belief in the Islamic faith
<i>Sharia</i>	literally, the way; Islamic law
<i>Sharik</i>	partner
<i>Shirkah/Sharikah</i>	partnership
<i>Shurūṭ</i> (sg. <i>shart</i> )	legal formularies; also conditions or appendages to contracts
<i>Ṣiḡḥah</i>	form of a contract
<i>Sukuk</i>	Islamic bonds
<i>Sukuk al-ijārah</i>	Islamic securitisation based on a lease
<i>Sunna</i> (pl. <i>sunan</i> )	the living tradition; the sayings and doings of the Prophet Muhammad (holy source)
<i>Sūrah</i>	chapter or segment indicating the way in which the Quran has been organised
<i>Taḥawwuf</i>	a profit-rate derivative product
<i>Taḥsin</i>	improvement
<i>Taḥsinīyāt</i>	‘the embellishments’ (type of <i>maṣlaḥah</i> )
<i>Takāful</i>	Islamic insurance
<i>Takhayyur</i>	eclectic choice (legal)
<i>Ṭalāq</i>	pronunciation of divorce (by the man)
<i>Talfiq</i>	patching (a legal technique used to derive a novel legal opinion)
<i>Tanzimat</i>	series of rapid reforms in the Ottoman Empire
<i>Taqīd</i>	juristic conformity in the period after the ‘gates of <i>ijtihād</i> ’ were said to have been closed
<i>Tashrīʿ</i>	refers to modern statutory legislation that incorporates elements of the sharia
<i>Tawarruq</i>	sale and re-sale transaction used to generate cash/liquidity
<i>Tawātur</i>	requirement of multiple transmission or recurrence in order to lower the uncertainty surrounding a hadith’s origins
<i>Thaman</i>	price
<i>Thawāb</i>	merit; compensation offered where not required
‘ <i>Ulemāʿ</i> ’	religious scholars
‘ <i>Umlah</i> ’	commission
<i>Ummah</i>	community
‘ <i>Urf</i> ’	custom
‘ <i>Urbun</i> ’	downpayment sale
<i>Uṣūl al-fiqh</i>	the principles of jurisprudence (methodology)
<i>Wadiʿah</i>	safekeeping, deposit

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<i>waʿd</i>	promise
<i>Wadīʿah yad ḍamānah</i>	guaranteed safekeeping
<i>Wājib</i>	acts that are obligatory in the second degree; these acts are established by probable knowledge
<i>Wajīh al-tijārah</i>	general manner of commerce
<i>Wakīl</i>	agent
<i>Wakālah</i>	agency; investment contract in which agent represents investor(s)
<i>Waqf</i>	charitable endowment
<i>Waṣf</i>	attribute
<i>Wūjuh</i>	credit
<i>Zakāh</i>	obligatory charitable contribution (Islamic law)
<i>Ẓāhir</i>	outward meaning of a word, language or event
<i>Ẓāhir al-riwāyaʿ</i>	basic texts of Ḥanafī jurisprudence, which include the <i>Kitāb al-Aṣl</i> , <i>al-Jāmiʿ al-kabīr</i> and <i>al-Jāmiʿ al-ṣaghīr</i> . The <i>ẓāhir al-riwāya</i> contains the three major scholars of the Ḥanafī school: <i>Abū Ḥanīfah</i> (eponym of the school), <i>Abū Yūsuf</i> , and <i>Shaybānī</i>
<i>Zawwāja</i>	to marry
<i>Ziyādah</i>	increase, augmentation