

Islamic Law of the Sea

The doctrine of modern law of the sea is commonly believed to have developed from Renaissance Europe. Often ignored though, is the role of Islamic law of the sea and customary practices at that time. In this book, Hassan S. Khalilieh highlights Islamic legal doctrine regarding freedom of the seas and its implementation in practice. He proves that many of the fundamental principles of the pre-modern international law governing the legal status of the high seas and the territorial sea, though originating in the Mediterranean world, are not a necessarily European creation. Beginning with the commonality of the sea in the Qur'an and legal methods employed to insure the safety, security, and freedom of movement of Muslim and aliens by land and sea, Khalilieh then goes on to examine the concepts of territorial sea and its security premises, as well as issues surrounding piracy and its legal implications as delineated in Islamic law.

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Islamic Law of the Sea

*Freedom of Navigation and Passage Rights
in Islamic Thought*

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Preface

Legal historians hold that the foundations of the modern law of the sea date to the first decade of the seventeenth century, when the Dutch jurist Hugo Grotius (1583–1645) extracted chapter 12 of his *De Jure Praedae* (*On the Law of Prize and Booty*) and published it in a single treatise titled *Mare Liberum* (*The Free Sea*), which was published anonymously in 1609. To defend and justify the right of other nations to navigate the seas freely, Grotius contended that, with the exception of limited offshore zones, the seas are not susceptible to appropriation by states. Following his contention, contemporaneous European lawyers sparked a legal debate, some challenging and others concurring with his position, leading to further scholarly contribution to the law of the sea. Both advocates and opponents of the freedom of navigation were inspired either by the Natural Law enshrined in the Justinianic *Institutes* and *Corpus Juris Civilis*, or the Hebrew Bible's concept of sovereignty on the open sea. British legal theoretician John Selden (1584–1654) mentions both in his 1635 *Mare Clausum, Sive de Dominio Maris* (*The Closed Sea, or the Dominion of the Sea*). Astoundingly, whether deliberately or accidentally, seventeenth-century European legal scholars overlooked contributions by “infidels” (non-Europeans, especially Muslims) to the evolution of the customary law of the sea, giving the impression that the Law of Nature and Nations governing access to the sea is solely a European establishment.

With the advent of Islam in the Mediterranean world in the seventh century CE, the semienclosed sea, which had been called by the Romans “*mare nostrum* (our sea)” for a millennium, ceased to be a Roman lake.

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From that time onward, the Mediterranean Sea has continued to be shared by Christians and Muslims, and neither party could consider it to be *mare nostrum*; the eastern, western, and southern shores of the Mediterranean Sea were entirely under Islamic control for several centuries, as have been the Red Sea, the Persian Gulf, and vast littorals of the Indian Ocean until the penetration of the Portuguese into the eastern seas. Eventually, on the eve of the great discoveries, Muslims dominated more than half of the world's maritime possessions. In spite of the importance of the sea in the Qur'ān (mentioned 32 times in comparison to the 13 references made to the land), in hadith literature, in theological, jurisprudential, geographical, and scientific literature, and in the daily life of Muslims throughout history, the theme that this study addresses has failed to attract attention in modern scholarship. For this and other reasons, an attempt will be made to fill the gap left by Renaissance and early modern European lawyers and to explore the Islamic contribution to the development of the customary law of the sea, relying heavily on the Islamic Law of Nature and Nations (*siyar*).

This study comprises three chapters, along with an introduction and a conclusion. The first chapter examines the commonality of the sea in the Qur'ān, legal methods employed to insure the safety, security, and freedom of movement of Muslims and aliens by land and sea, and the historical genesis of the freedom of navigation and its legal implications for Muslim administrations and judicial authorities in the ensuing centuries. The second chapter analyzes the concept of territorial sea and its religious and security premises, describes the right of innocent passage through territorial waters and straits, and explains how legal pluralism could have positive repercussions on the legal protection of individuals and promote local, interregional, and international trade involving subjects of the same and different religious creeds. The third and final chapter deals with piracy and its legal implications, methods employed to combat and reduce sea robbery, punishment, and its socio-economic and cultural impacts on humankind. However, since the time frame of our discussion does not extend beyond the first decades of the sixteenth century, the topic of the Barbary corsairs remains outside the scope of this study.

This book is a revised and expanded version of my JSD dissertation submitted to the School of Law, Saint Thomas University, in Miami, Florida, written under the supervision of Professor John Makdisi, without whose sincere and careful guidance, thoughtful support, and incredible patience this study would never have seen the light. I also extend

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Glossary of Non-English Terms

AH	After the <i>Hijra</i> , the migration of the Prophet from Mecca to Medina; the year it occurred, 622 CE, is the base-year of the Muslim era
actio iniuriarum	action for delict, intentional infringement of a personality right
‘adāla	probity, equality before the law
adat	Malay customary law, probably Persian <i>‘ādāt</i> , from the Arabic <i>‘ādab</i>
admiral	a term derived from the Arabic words <i>Amīr al-Baḥr</i> , literally, “Prince of the Sea,” or the Commander in Chief of the Fleet
amān	a temporary safe-conduct, safe passage, promise of assurance of security to be granted to enemies during war, or individual <i>ḥarbī</i> , who intend to enter or travel through the Abode of Islam
amir	a prince, also a governor of a province
Amīr al-Mu‘minīn	literally, “Commander of the Faithful,” Caliph
‘aqd	pl. ‘uqūd , bilateral or unilateral obligations
baghiyy	sedition; sexual relationship outside marriage
bailli	derived from the generic term <i>bailiff</i> to mean the king’s personal agent or administrative representative
bēt dīn	Jewish rabbinical court
cartaz	a Portuguese word derived from Arabic <i>qirtās</i> or <i>qartās</i> , which is originally derived from ancient

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	Greek <i>χάρτης</i> (<i>chártēs</i>), denoting a writing, book, scroll, document, paper cone, or cornet. It is a trading license issued by a Portuguese commissioner or competent authority to ships sailing in the Indian Ocean; a typical <i>cartaz</i> contains details regarding the place of origin of cargo, a vessel's destination, types of shipments, identities of crews, shippers, and passengers, etc.
Corpus Juris Civilis	Roman compendium of civil law compiled and promulgated by Justinian I (527–565); it consists of four parts, the Institute, Digest, Code, and Novels
Dār al-‘Ahd	Abode of Covenant/Truce, territories/countries that have treaties of nonaggression or peace with Muslims, agreeing to protect Muslims and their clients in that territory and often including an agreement to pay (receive) tribute
Dār al-Ḥarb	Abode of War, territories/countries that do not have treaties of nonaggression or peace with Muslims and where Islamic law is not in force
Dār al-Islām	Abode of Islam, region of Muslim sovereignty where Islamic law prevails; the Hanafi Law School holds that territory conquered by nonbelievers can remain Abode of Islam so long as the qadi administers Islamic law and Muslims and <i>dhimmīs</i> are protected
Dār al-Kufr	Abode of Disbelief, synonymous to the Abode of War where the territory is governed by the laws of infidels and the security is upheld by them
dayyan	literally, a Jewish judge – a well-versed scholar acquainted with rabbinical law, religious rituals, and theology
dhimmī	a Christian, Jew, or Zoroastrian living in the Abode of Islam and acknowledging the domination of Islam
dhirā‘	a measurement of the arm from the elbow to the tip of the middle finger; i.e., a cubit; also the name given to the instrument for measuring it; <i>al-dhirā‘ al-shar‘iyya</i> equals 0.5465 yards/0.49875 meters
faqīh	pl. <i>fuqahā‘</i> , a jurist or jurisconsult well versed in Islamic theology and jurisprudence

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fasād	disturbing peace and spreading evil and mischievous acts on earth; corruption, disorder, turmoil
fatwā	pl. <i>fatāwā</i> , an authoritative opinion on a matter of Islamic law
fiqh	knowledge of Islamic law derived through legal reasoning
gabella	an Old Italian word derived from the Arabic <i>qibālah</i> denoting duty, tribute, levy; tax paid to the state for goods bought or sold; rent of land; a contract given to somebody who tills the earth for which he pays an annual tax; tax on the transaction of a real estate
geniza	a place for storing unusable books, writings, and ritual objects in order to prevent the desecration of the name of God, which might be found in them, while they await burial in a cemetery
ghazw	a military expedition
ghifāra	a heavy tribute paid to pirates to protect commercial vessels from other piratical attacks
ḥadd	pl. <i>ḥudūd</i> , a punishment fixed in the Qur'ān and hadith for crimes considered to be against the rights of God
Ḥaram	literally, “protected/inviolable zone”; the Ḥaram signifies the Holy Sanctuary
ḥarbī	a non-Muslim who does not live under the conditions of the <i>dhimma</i> (<i>dhimmi</i>); if he wants to enter the Abode of Islam, he needs to be equipped with a pledge of <i>amān</i>
ḥarīm	an inviolable zone or reserved space, within which access is either prohibited or restricted to prevent the impairment of natural resources and utilities
ḥirāba	brigandage, banditry, highway robbery, or forcible theft; derived from <i>h.r.b.</i> , meaning “to contend or wage war”
hostis humani generis	enemies of all humankind; the term may have been first used by the Roman statesman Marcus Cicero (106–43 BCE) “ <i>pirata est hostis humani generis</i> (a pirate is the common enemy of humankind).” Historically, it applied to persons whose acts

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	threatened all societies and took them outside national jurisdiction, such as pirates and slavers.
hudna	a temporary truce or armistice
hunarman	a qadi-like official of the Muslims, who judges according to Islamic <i>Sharī'ah</i>
‘ibādāt	performance of religious duties
iḥrām	a state of ritual purity where the Muslim pilgrim dons a special garb consisting of two white unknitted sheets covering the upper and lower parts of the body
imam	an equivalent to Caliph, spiritual and political leadership of the Muslim nation (<i>ummah</i>)
imperium	power or dominion; it implies the right of military command and judicial authority; sovereignty of the state over the individual. The term can also be used with a geographical connotation, designating a state's territorial limits.
jihad	literally, “struggle” or “effort”; in Qur’ānic contexts it denotes striving and struggling in the Path of God; technically in law, rules regulating conduct of war and peace treaties
jus ad bellum	a set of criteria that are to be consulted before engaging in war, in order to determine whether entering into war is permissible; that is, justifications for resorting to war
jus gentium	Law of Nations, the body of law, taken to be common to all civilized peoples, and applied in dealing with the relations between Roman citizens and foreigners
jus in bello	rules regulating the conduct of war
jus naturale	Natural Law/Law of Nature, the laws governing men and people in a state of nature, i.e., in advance of organized governments or enacted laws
kharāj	a tax imposed on agrarian/agricultural land
maghāzī	a genre of early biographical writings on the Prophet Muḥammad, or the Prophet's military campaigns
maḥram	pl. maḥārim , an unmarriageable male kin
ma'man	a place of safety where a person can feel secure
mazālim	Court of Appeal; a court that serves as a tribunal of administrative law where the public directly appear

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	to the ruler or his deputies against the abuse of or failure to exercise power by other authorities, as well as against decisions made by judges
miḥrās	a watchtower functioning to alert local residents against enemy attack from the sea
mīqāt	pl. mawāqīt , a stated place or station at which pilgrims on their way to Mecca are required to purify their souls, don the pilgrim's garb (<i>iḥrām</i>), and declare the intention
mu'allim	literally, "shipmaster" or "pilot/navigator of the vessel"; he was responsible for the appropriate fitting of the ship, inspection of the gear, the stores and the supervision of the loading
muḥārib	a predator or a highway plunderer
mujāhid	pl. mujāhidūn , a fighter in the Cause of God
musta'min	a recipient/grantee of a pledge of safe-conduct; an enemy-alien merchant who is granted an <i>amān</i> pledge to trade and carry out business transactions in the Abode of Islam
naṣṣ	a foundational text, or an explicit textual ruling; the term refers to a text found in either the Qur'ān or hadith
nākhūdhā/nakhoda	a Persian term meaning "captain"; derived from <i>nāv</i> and <i>khudā</i> , meaning "a master of a native vessel," or "Lord of the Ship"
pěrahu	a large sailing boat carrying 15–20 crew members
praeses	a Roman provincial governor
qadhf	a false accusation of immoral behavior
qaṭ' al-sabil	literally, "cut off the highway"; a privately motivated armed robbery
qitāl	literally, "fighting, armed <i>jihad</i> "; <i>qitāl</i> is viewed as a lesser <i>jihad</i>
res communes	joint property of all humankind; things that are common to all, which cannot be owned or appropriated, such as light, air, and the sea
res nullius	things that have no owner/s, or have been abandoned by their owner/s so that their first possessors become their owners; things that are capable of ownership

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res publica	public things; originally used for common as opposed to private property; it covers property of the Roman Empire such as highways, inland rivers, and harbors
ribāṭ	literally, “fortified monastery”; a coastal defense system that consists of watch stations along the coastal frontiers
ridḍa	apostasy, rejection in word or deed of one’s former religion by a person who was previously a follower of Islam
Rūm	Byzantines or Italians; in broader contexts, it refers to Europeans
ṣāḥib al-dīwān	a chief financial official
Sharī‘ah	God’s eternal and immutable will for humanity, as expressed in the Qur’ān and Muḥammad’s Sunna, considered binding for all believers; the <i>Sharī‘ah</i> sometimes applies to all Islamic legislation
shubha	uncertainty about lawfulness in a jurist’s view
shuhūd ‘udūl	trustworthy witnesses
sīra(h)	pl. <i>siyar</i> , Prophet Muḥammad’s life account or biography
stratēgos	a Byzantine governing general
Sufi	a member of an Islamic ascetic and mystical sect, in which the member tries to become united with God through prayer and meditation
ṣulḥ	treaty, reconciliation, or amicable settlement
tanzīmāt	a series of reforms promulgated in the Ottoman Empire between 1839 and 1876; these reforms, heavily influenced by European ideas, were intended to effectuate a fundamental change in the Empire from the old system based on theocratic principles to that of a modern state
terra nullius	a territory not belonging to any particular country
ummah	a common Arabic term denoting a group of people or a nation; it refers to the commitment of the individual to a particular religion and represents a universal world order; the <i>ummah</i> comprises all Muslims throughout the world, regardless of ethnic, racial, and regional origins

Transliteration Scheme

I. CONSONANTS

ء	ʾ	ض	ḍ
ب	b	ط	ṭ
ت	t	ظ	ẓ
ث	th	ع	ʿ
ج	j	غ	gh
ح	ḥ	ف	f
خ	kh	ق	q
د	d	ك	k
ذ	dh	ل	l
ر	r	م	m
ز	z	ن	n
س	s	ه	h
ش	sh	و	w
ص	ṣ	ي	y

2. VOWELS

Short vowels		Long vowels	
اَ	a	اَ	ā
اُ	u	و	ū
اِ	i	ي	ī

*To my wife Ranin
And my children
Samuel, Mariam, and Awaise
This Book
Is
Affectionately Dedicated*