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**Noah Feldman: The Fall and Rise of the Islamic State**

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## I N T R O D U C T I O N

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WHEN EMPIRES FALL, they tend to stay dead. The same is true of government systems. Monarchy has been in steady decline since the American Revolution, and today it is hard to imagine a resurgence of royalty anywhere in the world. The fall of the Soviet bloc dealt a deathblow to communism; now no one expects Marx to make a comeback. Even China's ruling party is communist only in name.

There are, however, two prominent examples of governing systems reemerging after they had apparently ceased to exist. One is democracy, a form of government that had some limited success in a small Greek city-state for a couple of hundred years, disappeared, and then was resurrected some two thousand years later. Its re-creators were non-Greeks, living under radically different conditions, for whom democracy was a word handed down in the philosophy books, to be embraced only fitfully and after some serious reinterpretation. The other is the Islamic state.

From the time the Prophet Muhammad and his followers withdrew from Mecca to form their own political community until just after World War I—almost exactly thirteen hundred years—Islamic governments ruled states that ranged from fortified towns to transcontinental empires. These states, separated in time, space, and size, were so Islamic that they did not need the adjective to describe themselves. A common constitutional theory, developing and changing over the course of cen-

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turies, obtained in all. A Muslim ruler governed according to God's law, expressed through principles and rules of the shari'a that were expounded by scholars. The ruler's fulfillment of the duty to command what the law required and ban what it prohibited made his authority lawful and legitimate.

In the nineteenth century, distinctively Islamic government began to falter. The Ottoman Empire, whose ruler claimed to lead the Islamic world as caliph, adopted a series of new governing arrangements championed by internal reformers and pressed by Western debt-holders. Though the empire remained formally Islamic, epochal changes like a legislature and a legislative code shook the foundations of the traditional, unwritten constitution that had prevailed under traditional Islamic rule. When the Ottoman Empire collapsed in the wake of its defeat in World War I, its lands were divided into Western spheres of influence, guided, if not governed, by France and England. The new Turkish government that eventually established itself on the Ottoman Empire's Anatolian rump declared itself secular and abolished the caliphate. In both symbolic and practical terms, the Islamic state died in 1924.

Yet today the Islamic state rides again. Its reach is not limited to fascinating anomalies like Saudi Arabia, which claims to adhere to the ancient Islamic constitution in its purest form. By revolution, as in Iran, or by constitutional referendum, as in Iraq and Afghanistan, governments in majority-Muslim countries are increasingly declaring themselves Islamic. Their new constitutional regimes replace secular arrangements adopted over the last century with government based in some way on the shari'a. The trend is with them. In Muslim countries running the geographical span from Morocco to Indonesia, substantial majorities say that the shari'a should be a source of law for their states; and in important and populous countries like Egypt and Pakistan, large majorities say that Islamic law should

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be the *only* source of legislation.<sup>1</sup> Wherever democratic elections are held in Muslim countries, large numbers of citizens vote for shari‘a-oriented political parties that are best characterized as Islamist. The programs of these parties differ little from place to place. They embrace democratic elections and basic rights. They promise economic reform, an end to corruption, and above all, the adoption of the shari‘a as a source or the source of law.<sup>2</sup>

This movement toward the Islamic state is riding a wave of nostalgia, but it is also looking forward. The designers and advocates of the new Islamic state want to recapture the core of what made the traditional Islamic state great. They declare their allegiance to the shari‘a, while simultaneously announcing an affinity for democracy.<sup>3</sup> This means that the new Islamic state will be different from the old one. There is no turning back the clock of history, no matter what anyone says.

The Islamists’ aims are both religious and worldly. To be sure, they seek to follow God’s will. But they also explicitly say that they want to restore just government and world significance to the countries in which they live. Without these stated goals—and the chance that it might be possible to accomplish them—the Islamists would have little or no popular support. Political actors in the contemporary Muslim world, from ordinary voters to elites, take Islam seriously as a basis for government only to the extent that they believe it can make a practical difference in places where both the state and society itself have fallen on hard times.

Can the new Islamic state succeed? This question has enormous implications for the residents of Muslim countries and for the rest of the world that must engage with Islamic states and movements that promote Islam as a political solution. To answer it requires getting behind the slogans that characterize both sides of the debate. In the first place, we must get a clearer

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sense of what the traditional Islamic state actually was, and why it worked so well for so many centuries until it ultimately declined and fell. Only then will we see fully why the idea of the Islamic state is so popular today. We will also then be able to figure out whether the new Islamic state might be able to recapture some relevant features of the old state that would make it work. Most important, we will be able to identify the major challenges that will face the new Islamic states—challenges that will shape their behavior toward their own citizens and toward the rest of the world.

### *Toward a New Interpretation of Islamic Constitutional History*

The fall of the Islamic state and its unlikely rebirth form the topic of this book. My purpose, though, is not only historical. I want to propose an interpretation of the Islamic constitution in its old and new forms that will help clarify where we are today and where we are going with respect to government in the Muslim world. The future of the Islamic state is very much under formation—but so is its past, which is not really over so long as its meaning is being debated and its outcome remains undetermined.

In this sense, my approach takes seriously the arguments of those Muslims who are trying to reconstruct an Islamic state that will succeed in the face of contemporary conditions. For them, the past of the Islamic state is not some dead hand but the living, breathing material from which the future will be built. The medieval scholars whose ideas I will have occasion to discuss are as good as alive, and their writings and lives provide guidance for action.

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There is nothing unique to Muslims about this active and continuing engagement with the constitutional past. Madison, Jefferson, and Hamilton continue to shape the American constitutional tradition from beyond the grave. It is impossible to understand arguments about the American Constitution today without taking these founding fathers into account, and no one would maintain that this makes constitutional debate in the United States premodern. Yet much analysis of the Muslim world insists on an artificial distinction between the historical past, the preserve of a professional guild of historians, and forward-looking political analysis, itself divided between university political scientists and think tank or government analysts.

To be sure, the collapse of the traditional Islamic state is part of the reason for the divide between history and the present in thinking about the constitutional structure of the Muslim world. This rupture with the past, a break sometimes rather portentously called “modernity,” undeniably did take place. The caliphate really was abolished. As we shall see, the shar‘ia lost its formal preeminence, and the scholars who were the keepers of the law were correspondingly demoted and displaced. The new states that replaced the old proclaimed their discontinuity with their predecessors.

All these events will play a central role in our story of fall and rise. But accepting the historical law that dead empires do not rise again may lead us to miss what is probably the single most important aspect of the new Islamic state, namely, its aspiration to reclaim the glories of the old one. An account of how the new Islamic state will fare in its struggle to achieve this aspiration has to transcend the divide between past and present, just like the Islamic state as conceived by its proponents.

I begin in Part I by asking why the idea of the Islamic state looks so attractive today to people whose own grandparents

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rejected such a state as a relic of the failed past. Of course the call for a return to the shari‘a is complex, shaped by factors including the failure of secular autocracy, the appeal of socially conservative religion in an uncertain world, and the yearning for spiritual revitalization. The very word “shari‘a” conjures images of social control through severe criminal punishment and the regulation of sexual morality, especially that of women. Some advocates of the shari‘a are no doubt motivated by the desire to achieve such goals. But what is less often noticed is the basic fact that the ideal of the shari‘a invokes the core idea of law in terms that resonate deeply with the Islamic past. The Islamic state is preeminently a shari‘a state, defined by its commitment to a vision of legal order.<sup>4</sup> The state historically organized under what I shall call the classical or the traditional Islamic constitution—a constitution that, like the English constitution, was unwritten and ever-evolving—was a *legal* state in both meanings of the term.<sup>5</sup> The system was justified *by* law, and the system administered basic government *through* law.<sup>6</sup>

Both elements of this constitutional structure depended crucially on a balance between the authority of the ruler and the law itself. But the law was no abstraction. It was analyzed, discussed, applied, discovered, and (an outsider would say) made by the members of a distinct social-political grouping known as the scholars, or in Arabic *‘ulama*. From this scholarly class came not only theologians and other intellectuals but the appointed judges who decided concrete cases and independent jurists who opined as to the meaning of the law. Through their near monopoly on legal affairs in a state where God’s law was accepted as paramount, the scholars—especially those of them who focused on law<sup>7</sup>—built themselves into a powerful and effective check on the ruler. To see the Islamic constitution as containing the balance of powers so necessary for a functioning, sustainable legal state is to emphasize not why it failed, as

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all forms of government eventually must, but why it succeeded so spectacularly for as long as it did.

In Part II, I give my own reasons for the collapse of this old order. The source of the collapse, I suggest, was not only the very real crisis that faced the Ottoman Empire in the mid-nineteenth century when it realized that Western states were beginning, for the first time, to outpace their Eastern counterparts in state building. That crisis certainly called for a response; and the Ottoman reformers who ushered in the period of change known as the Tanzimat were on the right track in thinking that political liberalization and fiscal responsibility would improve the economic state of the empire and thus rescue it from second-class status.

The key to the disaster was the incomplete manner in which the Ottoman reforms were adopted. The single most durable feature of the reforms turned out to be the removal of effective lawmaking authority from the scholars through the substitution of written legal codes for the common law of the shari'a. Around the same time, a constitution was promulgated creating a legislature. The legal authority of the constitution could potentially have substituted for the role classically played by the shari'a in ordaining the rule of law. The legislature could have functioned as an institutional check on the authority of the ruler, and thereby substituted for the historic role of the scholars in keeping the ruler's executive authority in check. But the constitution and legislature were effectively retracted and abolished by Sultan Abdulhamid II. That left behind the legal codes, eventually reconceived as state law emanating from the sovereign, not the preserve of scholars independently interpreting God's will.

With no constitution and no legislature, and with the scholars removed from control over the law, no check whatever remained on the authority of the sultan.<sup>8</sup> Earlier Islamic dynasties

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had been replaced by later ones without destroying the form of the Islamic state; but the half-accomplished Ottoman reforms sank the whole system. When the Ottoman Empire was defeated in World War I, the governments that replaced it—including those under Western colonial influence—preserved the essential function of the Ottoman law codes and the late-Ottoman innovation of relegating the scholars to the role of minor religious functionaries. Outside the former empire's domains, a similar tendency toward codification often managed to displace the scholarly class from its traditional role in shaping the legal order, with similar results. The scholars and their shari'a never again regained their lost status as the legitimating source of constitutional authority. The constitution of the classical Islamic state had passed from the scene.

In the light of this account of the fall of the Islamic state, I then go on in Part II to discuss the distinctive limitations and pathologies of the modern states that arose to replace it in the Muslim world. The governments of these states have proved to be surprisingly skilled at preserving political order within specified borders. They have been disastrously bad, however, at creating conditions that would make them seem morally legitimate to their own citizens. For that they would have to deliver basic political justice: the sense among ordinary people that the system treats them as they deserve to be treated, not depriving them of opportunities available to other peoples elsewhere or of their fair share of the economic pie.

The absence of political justice, I argue, is a result of the failure of these modern states to establish themselves as legal states in the twin senses of being justified by law and governing through it. Their rulers have had conscious reasons to avoid submitting to the conditions of legality; but this is not the only cause of the nonlegal character of most of these states. An equally significant problem has been the failure of lawyers and

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judges to become a political class capable of shaping the course of events in their countries.

The reasons for this failure are complex, connected to the strength of the military and secret police, and to economic distortions introduced by oil into the Middle Eastern region in particular. They are also connected, though, to the scholarly class who were the guardians of the law in the classical Islamic state. The lawyers have not, for the most part, sought to emulate or replace these scholars. Under the classical system, the scholars sometimes served the state; but they served the state in the name of the law. By contrast, the lawyers of the modern Muslim world have, with some exceptions, mostly embraced an instrumental, European-origin view of the law and so served the law only in the name of the state.

The failures of the modern states that are to be found in majority-Muslim countries help explain the surprising renaissance of Islam not only as a faith but as a powerful political force in the last quarter century—the topic of Part III. It has been widely noticed that a central theme in contemporary Islamic political argument is the demand for justice, a demand driven both by the language of the Qur'an and by the striking absence of justice in actually existing political arrangements. What has not been as well understood, however, is the intimate link between the demand for justice and the core Islamic political goal of establishing shari'a. In the minds of Westerners and even some secularized Muslims, shari'a often stands for the covering of women and the administering of corporal punishment for thieves and adulterers. But the true meaning of shari'a is, of course, law itself—and just not any law, but the divine Law that governed the Islamic state through the centuries of its success.

The call for an Islamic state is therefore first and foremost a call for law—for a legal state that would be justified by law and govern through it. The advocates of the new Islamic state often

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say that it was the abandonment of the Islamic legal order that led to the collapse of the traditional Islamic state. Although this is only partly true, it is certainly the case that the abandonment of law as an organizing political force is what doomed the modern, non-Islamic states to fail along the dimension of political justice. The reason why such a broad public in the Muslim world finds the call to an Islamic state so resonant—even when they may not personally wish to embrace a life of rigorous Islamic piety—is that they understand that the failures of their states can be remedied only by a renewed commitment to the idea that law creates the ruler, not the other way around.

The problem with the prescription of returning to the shari‘a is that law itself is not a brooding omnipresence that can be invoked with a word. Law is, rather, a set of social practices, a particular way of using language and reason to deploy force. It can operate only through the regular, repetitive conduct of people acting in concert. The vehicles for such coordinated group action are the mysterious things we call institutions.<sup>9</sup> They include formal government bodies like courts, but they also extend to schools, colleges, and universities where ideas are inculcated and exchanged, and to professional offices where habits and practices are learned. Institutions are no substitute for legal ideas or values, but without them, law is homeless and thus is not really law at all.

So when advocates call for the creation of an Islamic state, they need to figure out what actual institutions will develop and apply the Islamic law they seek to renew. Outside of Saudi Arabia—where the scholars occupy a version of their traditional role in a system rendered radically different from the old one by its oil wealth—the class of the scholars as it once existed in the Sunni Muslim world has been decimated.<sup>10</sup> It would today be impossible simply to announce that the scholars were being returned to their traditional role as keepers of the law. In

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Shi'i Iran, Ayatollah Ruhollah Khomeini dealt with this problem by introducing a vast range of new, scholar-dominated institutions when he gave life to the revolutionary Islamic state. Khomeini did revive the position of the scholars.<sup>11</sup> But instead of restoring the balance between the ruler and the scholars, he sought to merge these two separate institutions under a single supreme jurist-ruler—and the failures of the Islamic Republic of Iran are the legacy of this megalomaniacal mistake.

That is why today's Islamists—those who seek to design the new Islamic state—do not call for the resumption of the authority of the scholars. In the Sunni world, they typically see the scholars as they exist now as weak and compromised, simultaneously co-opted by unjust regimes and rendered toothless by them. In Shi'i-majority Iraq, the fear is that the Shi'i scholars may overreach in the Iranian manner. What is more, although contemporary Islamists are committed to the idea of divine law, many also want to draw upon democratic principles, and the idea of conferring substantial political power on unelected scholars usually does not seem very appealing to them.

The approach taken so far by governments that are trying to create themselves as new Islamic states has been to adopt the structures of liberal constitutional democracy and to try to fuse them with Islamic principles. The written constitutions of both Iraq and Afghanistan, for example, guarantee equality for men and women and boast elected legislatures with lawmaking power. Both set up high courts with the power to declare that laws violate the constitution. Both, though, establish Islam or Islamic law as the principal source of legislation.<sup>12</sup>

This arrangement is very different from putting all legal power into shari'a courts. Neither the Iraqi nor the Afghan constitution does that. Instead, they follow the well-established trend in the Muslim world of giving the shari'a courts jurisdiction only over personal matters such as marriage, divorce, and

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inheritance. In other words, the new Islamic states are not seeking to re-create the institutional authority that the scholars held in the old Islamic state. They are, rather, adopting an experimental approach of *democratizing* the shari‘a by calling on the legislature to draw upon it in passing laws. Once adopted, those laws would have validity and force primarily because the legislature enacted them, not because they came from God. This is an attempt—however underdeveloped—to make the legislature into an institution that would engage with the ideal of law, not just the application of power.

Similarly, the constitutions of Iraq and Afghanistan both prohibit the legislature from passing any law that violates core tenets of Islam. In effect, this amounts to the *constitutionalization* of the shari‘a. The highest judicial bodies in these countries will have the power to say definitively whether ordinary laws passed by the legislature do or do not contradict Islam, just as they rule on whether ordinary laws violate the principles of the constitution itself. These courts are certainly being conceived as institutions with responsibility to Islamic law. Their responsibility, however, arises obliquely: their job is not to begin by saying what Islamic law requires, but rather to evaluate legislation that has been challenged and only then issue an opinion as to whether that legislation conforms to the dictates of the shari‘a. And they have this responsibility because the constitution says so, not because it inheres in the shari‘a itself.

The democratization and constitutionalization of the shari‘a contemplated by the new Islamic states represent an attempt to resuscitate the Islamic state as a legal state through institutions that would both justify it by law and allow it to govern through law. But they introduce in a powerful new way a tension that was much less salient in the constitutional thought of the classical Islamic state: the potential conflict between divine law and human law. The scholars who shaped the classical con-

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stitution were very well aware that human law existed. They acknowledged the right of the ruler to enact binding regulations that did not contradict the shari'a, and they also were closely acquainted with tribal, customary laws that in some places provided most of the legal regulation necessary for organizing daily life. But the formal structure of their constitutional theory was that the shari'a authorized these other types of law, and that these laws could under no circumstances contradict the shari'a as they interpreted it. In this way, the scholars allowed for the existence of plural types of law without conceding their power as sole interpreters of the fundamental law that authorized the others.

In the new Islamic state, what is going on is more complicated. From the perspective of the shari'a as a totalizing legal methodology, it can be claimed that the written constitution of the state is legitimate only to the extent that it makes the shari'a paramount. This viewpoint would assimilate the new Islamic state into the logical structure of the old. But from the standpoint of the written constitution, matters are much less clear, because the meaning of the shari'a is explicitly being made the province of the legislature and the courts of the state.<sup>13</sup> This confusion—does the shari'a come before the state or the state before the shari'a?—is in fact a version of a familiar problem in the constitutions of liberal states. Americans have never fully resolved the question of whether the inalienable rights of life, liberty, and property preexist the U.S. Constitution or derive from it. It is more than possible to run the constitutional system of a legal state without resolving this thorny and ever-controversial difficulty.

The greatest challenge facing the new Islamic constitution derives from the uncertainty about identifying who is in charge of specifying the meaning of the shari'a and by what authority. In the old Islamic state, it was the scholars, and their authority

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derived from the shari‘a itself. But who is it to be now? Is it the public, who elects the legislature? If so, what authorizes the public as a whole to interpret the divine law? Is it the legislature itself, authorized by the constitution? What about the judges of the high court? Finally, let us not forget about the scholars themselves, who still exist today, albeit in much reduced circumstances.

In a book published just before U.S. troops entered Iraq in 2003, I argued that it was in principle possible to resolve the tensions between Islam and democracy by means of a constitution that was both Islamic and democratic.<sup>14</sup> Whatever the disastrous practicalities of governance in Iraq or the limitations of the central government in Afghanistan, the constitutional processes in these two countries demonstrate that a constitution of Islamic democracy is indeed possible. The question I am raising here is the logical sequel to that claim: can the new Islamic state succeed?

The answer, I conclude, depends on finding an institutional authority with the capacity to stand up and check executive power in the name of the law. If the new Islamic state can find an institution to fill the role traditionally played by the scholars, it has a reasonable chance of establishing political justice and, through it, popular legitimacy. This could be a legislature, if it can succeed in climbing out from under the weight of executive dominance to oversee and limit executive power. It could also, in theory, be a judicial body exercising the power of constitutional review and supervisory authority over a legal system freed of systemic corruption.

Each of these options will be extremely difficult to accomplish for Islamist political parties seeking to gain a share of power. If they win elections outright, Islamists are subject to the same temptations and distortions that face any other victorious political movement. If, as is generally the case, they gain power

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piecemeal, they will face opposition not only from still-powerful executives in their own countries, but from Western nations suspicious of the Islamist program in its domestic and foreign-policy manifestations.

If Islamists take the reins of government but cannot manage to institutionalize the balance of powers and restore the rule of law, we are all in for a rough ride. The aspiration to an Islamic state will be there, but, like the Islamic Republic of Iran, the state will end up disappointing its supporters and alienating the rest of the world. Isolated and angry, it may turn against its own citizens or outward against its neighbors, both near and far. Just now, the Islamist promise of the rule of law offers the only prospect for meaningful political justice for many Muslims. If it, too, fails, the alternative may well be worse.