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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















