

**BACK TO THE FUTURE:
THE PARADOXICAL REVIVAL OF
ASPIRATIONS FOR AN ISLAMIC STATE**
**REVIEW OF *THE FALL AND RISE
OF THE ISLAMIC STATE* BY NOAH
FELDMAN**

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The Fall and Rise of the Islamic State by Noah Feldman (Princeton and Oxford: Princeton University Press, 2008), 189 pp.

When empires fall, they tend to stay dead. The same is true of government systems. . . . There are, however, two prominent examples of governing systems reemerging after they had apparently ceased to exist. One is democracy The other is the Islamic state.¹

Noah Feldman's most recent publication seeks to explain the apparently paradoxical rise of grassroots political movements in the Islamic world (and especially the Arab Middle East) demanding the resurrection of an Islamic state, movements often broadly referred to as "Islamist." In a field that is dominated by specialists who usually write for specialists, his book is a welcome addition to the literature on the modern idea of an Islamic state. It gives a highly readable and accessible account of the history of Islamic law, its relationship to Islamic ideals of governance, and why that history and those ideals remain relevant to large numbers of politically active Muslims in the modern world. Its policy recommendations, specifically the need for the United States (U.S.) to engage positively with Islamic movements committed to the democratized version of Islamic law he describes may be controversial, but he

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Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008) at 1.

argues for them with some force. Feldman argues that a democratized version of Islamic law is being developed by indigenous Muslim elites that, on its own terms, can reasonably be viewed as a progressive development in the governance of those societies, and that to the extent such movements enjoy democratic legitimacy, U.S. opposition to their political success represents a betrayal of U.S. values and, potentially, U.S. interests as well. While features of his account of the classical Islamic state and the history of governance in the Arab/Islamic world in last 150 years are highly problematic (as discussed below), it nevertheless fills an important gap in the nonspecialist literature on the history of the idea of an Islamic state.

Part I of his book — *What Went Right?* — provides a thumbnail sketch of the historical Islamic state's constitution as a state committed to a version of the rule of law that both justified state action and limited it. Key to the success of that constitutional system, according to Feldman, was the role of a class of religious scholars who served as legal specialists (referred to alternatively as "jurists" or "scholars") who acted as a relatively effective check on the arbitrary power of the ruler.

Part II of the book — *Decline and Fall* — analyzes the nineteenth century Ottoman-era legal and constitutional reforms known as the Tanzimat. Feldman argues that these reforms, due to their incomplete nature, succeeded in dislodging the jurists from their privileged constitutional position but as a consequence produced a greatly strengthened executive whose power was left unchecked by either a powerful legislature or an independent judiciary. This led to a thoroughgoing legal positivism becoming the official legal ideology of the successor states to the Ottoman Empire. This transformation, moreover, was largely the endogenous product of the Ottoman Empire's Tanzimat reforms.²

Part III of the book — *The Rise of the New Islamic State* — accounts for the rise of Islamist politics as a consequence of the disastrous effects of the Tanzimat. Feldman makes clear, however, that contemporary Islamists have no intention of restoring the constitutional status quo ante in which the jurists enjoyed a privileged constitutional position; instead, they desire a democratically accountable state that is subject, one way or another, to the rules of Islamic law. Feldman argues that this *democratized* version of Islamic law presents its own set of thorny doctrinal problems from the perspective of Islamic jurisprudence that Islamists have not adequately addressed. Failure

2 *Ibid.* at 60-61.

to resolve these doctrinal problems, Feldman believes, will lessen the chance that Islamists will succeed in their goal of restoring the rule of law to modern Arab states.

By identifying the classical Islamic constitution with a conception of the rule of law, Feldman can argue that the contemporary demand for an Islamic state represents a legitimate demand for constitutional reform in the Muslim world whose goal is support for the rule of law. This forms the basis for his policy argument: that the United States should cease and desist from policies that prop up Arab authoritarian regimes in the face of democratically elected Islamist movements.³ Feldman is not clear, however, in explaining why citizens of the Arab world would believe that an Islamic state — even a reformed Islamic state — should be the preferred route of constitutional reform.⁴ This leaves the impression that some vague combination of nostalgia and the continued salience of religion as a force in Arab societies explains the preference for a religious conception of the state over a liberal one.

Regardless of the wisdom of Feldman's policy recommendations (which I largely agree with), specialists in Islamic legal history, Ottomanists, and modern historians of the Middle East could all legitimately criticize his historical analysis.⁵ The historical accuracy of his claims deserves careful consideration, even if the primary audience for the work is policy makers. Because the idea of an Islamic state continues to enjoy political salience, our theoretical understanding of its constitution may help shape political practice. A more accurate understanding of the normative justification of the Islamic constitution may solve some unresolved tensions inherent in what Feldman calls the "new Islamic state";⁶ however, it may also point out other, perhaps more intractable difficulties in the concept.

This review will proceed in three parts. First, I will provide a normative account of the classical Islamic constitution⁷ that supplements Feldman's

3 *Ibid.* at 150-51.

4 A constitutional democracy that respects human rights, for example, would also seem to be an equally plausible alternative to the constitutional status quo or a reformed Islamic state. See e.g., 'Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, MA: Harvard University Press, 2008).

5 See e.g., Saïd Amir Arjomand, "Why Shariah?" *The Immanent Frame* (28 March 2008), online: SSRIC Blogs <http://www.ssrc.org/blogs/immanent_frame/2008/03/28/why-shariah/>; Haider Ala Hamoudi, "Orientalism and The Fall and Rise of the Islamic State" (2009) 2 *Middle East Law and Governance* (forthcoming) (pointing out the inapplicability of Feldman's analysis to Shi'i Muslims).

6 *Supra* note 1 at 118-22.

7 In referring to the "classical Islamic constitution," I am referring exclusively to Sunni doctrines.

largely positive account in order to determine the legitimacy of the Tanzimat-era codifications. Second, I will challenge Feldman's assertion that the legal positivism of contemporary Arab states is primarily an endogenous development whose roots lie in the Tanzimat. Finally, I will argue that the classical Islamic constitution is doctrinally rich enough to solve the theoretical difficulties Feldman identifies. Islamic coherence, however, comes at the cost of the assumption that the "people" are all Muslims. If it is assumed that non-Muslims are equal citizens, however, a new constitutional theory that goes beyond both the classical and modern Islamic constitution is needed.

I. THE NORMATIVE ISLAMIC CONSTITUTION

Despite Feldman's recognition of the centrality of the rule of law as an ideal in the classical Islamic constitution, his description of how it operated, and in particular how it empowered a class of religious-legal specialists to act as a substantial restraint on the arbitrary power of the ruler, is surprisingly thin. The primary rule he cites in his argument relates to the rules of succession in the Islamic contract of governance (*'aqd al-imama*). Because Islamic law rejected a hereditary principle of succession, jurists were given a practical opportunity to make themselves politically important players in succession battles. The competitive nature of Islamic politics in the premodern age therefore permitted jurists to function as a kind of reputational intermediary, a role that they could leverage to insure that rulers, even if only out of self-interest, substantially complied with the law that the jurists had formulated.⁸

That Muslim jurists functioned to some extent in the manner Feldman describes must certainly be true. On its own this is not sufficient to explain how Islamic law helped further the ideals of the rule of law.⁹ Once the concept of rule of law is tied to a particular balance of power within society, moreover, it surely becomes the case that many complex social and legal factors need to be accounted for, in addition to the rules governing succession.¹⁰ Positive anal-

8 *Supra* note 1 at 29-32 and 34-35. To be fair to Feldman, he also discusses the role of the protection of private property and that the government in the Islamic constitution was required to obtain revenues only through lawful taxation (40-41), but space limitations preclude a discussion of this line of argumentation.

9 *Supra* note 1 at 6.

10 For a general argument that many rules of Islamic law can be understood as attempts to limit the power of government, see Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfi* (New York: E.J. Brill, 1996). One extra-constitutional feature that must have been critical in enabling jurists to maintain their power, for example, was direct access to public funds independently of the government through a system of endowments that was itself justified on questionable legal grounds. Kenneth M. Cuno, "Ideology and Juridical

ysis of the effects of legal rules, while helpful in some respects, can never answer questions of legitimacy. Feldman's argument, however, does not provide us an explanation for what constitutes Islamic legitimacy other than a vague reference to upholding the law by "commanding the good and forbidding the evil."¹¹ Yet, his analysis of the Tanzimat depends on his conclusion that they were illegitimate from the *internal* perspective of Islamic jurisprudence. The only way to determine whether the Tanzimat reforms were legitimate from an Islamic jurisprudential perspective, however, is to engage in a detailed analysis of the relevant normative doctrines of Islamic constitutional law.¹² Detailed normative analysis of legal doctrine, on its own, cannot tell us if those rules were respected (and that is why positive analysis is always necessary); however, without such a normative analysis it is impossible to determine whether the Tanzimat-era reforms were legitimate from the perspective of the Islamic legal system.

For Feldman, the Islamic constitution was essentially a *quid pro quo*: the jurists agreed to confer legitimacy upon the ruler, and in exchange the ruler agreed to uphold the law by "commanding the good and forbidding the evil."¹³ Such a conception of the contract of governance fails to account for the discretionary powers the ruler and other public officials exercise pursuant to the contract of governance, and so, to that extent, is a substantially incomplete description of the classical Islamic constitution. The ruler's discretionary powers, in fact, are probably more important for understanding the jurists' conception of the rule of law than is the model of the "ruler as enforcer." Alongside the obligation to enforce mandatory rules¹⁴ implicit in the concept of commanding the good and forbidding the evil, a task that al-Mawardi mentioned as falling under the responsibility to protect Islamic orthodoxy and

Discourse in Ottoman Egypt: the Uses of the Concept of *Irsād*" (1999) 6 *Islamic Law & Society* 136.

11 *Supra* note 1 at 35.

12 The most well-known source of Islamic constitutional law is *The Ordinances of Government*, which is available in a recent English translation. Ali b. Muhammad al-Mawardi, *The Ordinances of Government: A Translation of Al-Ahkām al-sulṭāniyya wa-l-wilāyat al-dīniyya*, trans. by Wafaa Wahbah (Reading, UK: Center for Muslim Contribution to Civilization; London: Garnet Publishing Ltd., 1996). This translation, however, should be used cautiously. All cites to Mawardi in this essay will be to the Arabic version of the text. 'Ali b. Muhammad b. Habib al-Mawardi, *al-Ahkām al-sulṭāniyya* (Beirut: Dar al-kutub al-'ilmiyya, n.d). Translations from Mawardi's Arabic text are my own.

13 *Supra* note 1 at 35.

14 The number of such rules is quite limited and would leave very little for the state to do since Islamic law does not oblige any punishment, much less a specific punishment, for the violation of the vast majority of its rules.

enforce the *hudud*¹⁵ of God, the ruler is also granted discretionary power to pursue various kinds of public goods on behalf of the Muslim community.¹⁶

The contract of governance and the institutions of governance that are included within its terms establish a legal means to resolve collective action problems inherent in the pursuit of public aims that Islamic law specifies only in general terms. For that reason, the contract of governance gives the ruler and other public officials a legal monopoly over these functions.¹⁷ The contract of governance is therefore the paradigmatic exemplar of what Muslim jurists term a collective obligation (*fard kifaya*).¹⁸ The Islamic state, through its exercise of discretion (*tasarruf bi-l-imama*) in the pursuit of the public good pursuant to the contract of governance, could make positive law that, subject to some minimal substantive restrictions, became morally and politically binding upon the Muslim community. The Muslim jurists of the middle ages referred to this kind of law making generally under the rubric of *siyasa shar'iyya*.¹⁹

The Islamic contract of governance legitimates the state's power to compel individuals' adherence to the law, a power that even the most learned jurists constitutionally lack.²⁰ The state can exercise coercive power because it is the *representative* of the Muslims considered as a collectivity, and to that extent, its lawful decisions are binding upon them as individuals simply because they are the decisions of the Muslims themselves.²¹ The power of the Islamic state

15 *Hudud* (sing. *hadd*) refer to a narrow class of crimes the punishments for which are mandatory and enforcement of which is not subject to the state's discretion, unlike ordinary criminal law which is.

16 These include, *inter alia*, the establishment of a system of courts to resolve disputes and a system to enforce those rulings; provision of physical security to persons within the territory of the Islamic state; defence of the state's frontiers; prosecution of the *jihad* against non-Muslim states not at peace with the Islamic state; appointment and supervision of a competent and honest bureaucracy to administer the affairs of the state; and the organization of the public finances. Al-Mawardi, *supra* note 12 at 18.

17 *Ibid.* at 15.

18 *Ibid.* at 6.

19 Even jurists, however, claimed the power to generate rules based on considerations of *siyasa*. Mohammad Fadel, *Adjudication in the Maliki Madhhab: a Study of Legal Process in Medieval Islamic Law* (Ph.D. dissertation, University of Chicago, 1995) [unpublished] at 79-91 (discussing the systematic role *siyasa*-based rules played in Islamic law in the Mamluk period).

20 The principle difference between a judge, for example, and a mufti, is that the judgments of the former are binding whereas the judgments of the latter are only enforceable to the extent that an individual or individuals voluntarily comply with it.

21 The representative nature of Islamic government is assumed by numerous rules included in the *al-abkam al-sultaniyya*. See e.g., al-Mawardi, *supra* note 12 at 11 (explaining that just as the sitting ruler cannot dismiss his designated successor without legal cause, so too the electors cannot dismiss the incumbent ruler from office without legal cause, because in both cases, they are acting on behalf of the Muslim community, not themselves); and at 15 (explaining that because the ruler has been

to bind individual Muslims through the decisions of its officials is simply the practical manifestation of the collective power of the Muslim community (*wilayat al-muslimin* or *'ammat al-muslimin*).²² Moreover, because the ruler under Islamic law is a representative, his powers are limited by the terms of his appointment.²³ The ruler's actions are therefore generally subject to the rules governing the relationship between an agent and a principal, including the rule that the ruler act for the benefit of the governed.²⁴

Accordingly, the legal conception of the state as the exclusive public representative of the Muslim community permeates the rules regulating the validity of public acts, simultaneously justifying the power public officials exercise, limiting the use of that power to ends that are beneficial to the public, imposing upon public officials an ideal of impartial decision making, and requiring individuals to accept the decisions of those officials that fall under the scope of the contract of governance.

While Feldman correctly points out that, well before the nineteenth century, Muslim jurists had already recognized that the state had the right to promulgate its own rules and regulations within limits prescribed by the *shari'a*,²⁵ his account of the classical Islamic constitution is silent as to the source of the state's power to do so. The failure to account for the state's authority to promulgate law under Islamic law is not unique to Feldman. Scholars of Islamic law have long treated the existence of positive legislation in Islamic legal his-

entrusted with fulfilling the ends of the contract of governance, the ruler has the exclusive right to pursue the ends set out in the contract of governance).

22 See Abu Bakr b. Mas'ud al-Kasani, *Bada'i' al-sana'i' fi tartib al-shara'i'* (Cairo: Zakariyya Ali Yusuf, n.d.) at 4110 (referring to the caliph as the agent of the Muslims whose actions represent the actions of the general Muslim community).

23 Abu Bakr Muhammad b. Abdullah b. al-'Arabi, *Ahkam al-Qur'an* (Cairo: Dar al-Manar, 2002) vol. 2 at 91 (explaining that the ruler lacks authority to waive the property claims of individual victims of a brigand because "the ruler is not an agent [*wakil*] of specific persons among the people with respect to their specific claims. He is only their representative [*na'ib*] with respect to their general, unspecified claims [*huququbum al-mujmala al-mubhama*] which are not specific [with respect to any one person].").

24 Shihab al-Din Ahmad b. Idris al-Qarafi, *al-Dhakhira*, ed. by Sa'id A'rab (Beirut: Dar al-Gharb al-Islami, 1994) vol. 6 at 223-24 and vol. 10 at 43. Qarafi quotes the Prophet Muhammad as saying "Whoever is given authority over any of the affairs of the people, but does not exercise his best efforts on their behalf, nor does he act out of sincere desire for their [benefit], Paradise is prohibited to him." A substantially similar version of this hadith is included in the well-regarded hadith (sayings attributed to the Prophet Muhammad) collection of Muslim, where the Prophet Muhammad is quoted as having said "No ruler who has authority over the affairs of the Muslims and fails to exercise his best efforts for them nor does he act out of sincere desire for their [benefit], except that he shall not enter Paradise with them." Abu al-Husayn Muslim b. al-Hajjaj al-Qushayri al-Nisaburi, *Sahih Muslim* (Beirut: Dar Ibn Hazm, 1995) vol. 3 at 1161.

25 *Supra* note 1 at 49-51.

tory as something of an afterthought if not an outright embarrassment.²⁶ Classical orientalist scholars, for example, have long accepted the notion that in Islamic law God is the only legislator, and accordingly the state is simply the means by which God's laws are carried out.²⁷

Closely related to this conception of Islamic legality is the position that only those rules that are developed by the jurists through their exegetical techniques are genuinely "Islamic."²⁸ This conception of Islamic legality, however, is only partially true, and is limited to those rules of Islamic law that are derived from revelation, either expressly or via juristic interpretation.²⁹ There are other categories of rules that are also Islamically legitimate, specifically those that arise by virtue of ordinary human beings exercising a power, such as a vow, that is granted to them by God.³⁰ Another example is a judge's decision (*hukm*) which, in the absence of fraud or bad faith, has the effect of creating an unassailable legal and moral obligation (on the part of the losing party) and an inviolable legal and moral right (on the part of the prevailing party), neither of which had existed simply by virtue of revelation.³¹ Only in a relatively narrow class of cases — when the rule of law is the object of a universal scholarly consensus — is the role of the judge limited to enforcing (*tanfidh*) the law after finding the legally relevant facts.³²

Discretionary acts of state are another example of legitimate rules of Islamic law that owe their existence to the exercise of a power granted pursuant to law, but not by the law itself. The legal and moral consequences of a discretionary act of state, however, are substantially different than those of

26 See e.g., Amr Shalakany, "Islamic Legal Histories" (2008) 1 Berkeley Journal of Middle Eastern & Islamic Law 2 at 5 (noting that prevailing historiography excludes the study of *siyasa*-based rules from the study of Islamic law proper).

27 Fadel, *supra* note 19 at 79.

28 See, e.g., Wael B. Hallaq, "Can the Shari'a Be Restored?" in Yvonne Yazbeck Haddad & Barbara Freyer Stowasser, eds., *Islamic Law and the Challenges of Modernity* (Walnut Creek, CA: AltaMira Press, 2004) and Wael B. Hallaq, "'Muslim Rage' and Islamic Law" (2002-2003) 54 Hastings Law J. 1705 (casting doubt on the Islamic legitimacy of state-made law).

29 Al-Qarafi refers to these as "rules that God has set forth in His revelation [*ma qarrarahu fi asl shar'ih*]." Shihab al-Din Abu al-Abbas Ahmad b. Idris al-Qarafi, *al-Ihkam fi tamyiz al-fatawa 'an al-ahkam wa tasarrufat al-qadi wa-l-imam*, ed. by Mahmud 'Arnus (Cairo: Maktab Nashr al-Thaqafa al-Islamiyya, 1938) at 4. I will refer to such rules in this essay as "prepolitical."

30 *Ibid.* at 4.

31 Prior to the judge's ruling, both parties could have been acting in good faith pursuant to a legitimate interpretation of God's will. *Ibid.* at 5, 15-16. For a discussion of the public officials who enjoyed the legal power to resolve disputes, see *ibid.* at 44-48. I refer to legitimate rules of Islamic law that are the product of human agency reflecting deliberation and choice — as opposed to simply the product of interpretation of revelation — as "political rules."

32 *Ibid.* at 38.

a legal judgment. A valid discretionary act of state, though legally binding, is not legally or morally unassailable: subsequent decision makers are free to revise, repeal, or affirm the rule.³³ A discretionary act, however, applies generally rather than only to the litigants appearing before the judge. Like the ruling of a judge, a discretionary act of state must find some basis in law (*fatwa*), but unlike a judge's ruling, the public official's promulgation of a rule, even if based on a good-faith interpretation of law, is not *morally* dispositive. Discretionary acts do not, therefore, change the objective moral rule governing the conduct at issue. As a result, individuals — to the extent that the positive law purports to compel certain conduct (or to refrain therefrom) — have to continue to rely on their own moral judgment in determining whether to comply with the positive law.³⁴

We now have a more complete picture of how classical Islamic constitutional law established a state through law and how it then regulated the conduct of that government by law by creating a domain for the political, i.e., human rule making, based on political deliberation, that was bounded by the normative limits implicit in the acceptance of Islam as a *true* religion. As a matter of normative constitutional doctrine, then, neither public officials nor even the scholars themselves have any inherent power. The ruler and other public officials only possessed such powers as could be delegated to them by the Muslim community acting as a collective. Because no individual Muslim — in the absence of exigent circumstances (*darura*) — has the authority to violate the law (since that would contradict his acknowledgment of Islam's truth), so too the state and its agents, who are only representatives of the collectivity of Muslims, lack the power to act in contravention of Islamic law.³⁵

33 *Ibid.* at 48-55 (giving examples of legal decisions that are acts of state and hence subject to revision prospectively).

34 Mohammad Fadel, "The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law" (2008) 21 Canadian J. of Law & Jurisprudence 5 at 58 (individuals obliged to comply with commands of the state unless doing so would entail disobedience to God).

35 See e.g., Muhammad b. Yusuf al-Mawwaq, *al-Taj wa al-Iklil li-Mukhtasar Khalil* (Beirut: Dar al-Fikr, 1992) vol. 3 at 354 (a Muslim prisoner of war held by non-Muslims who is released on condition that he not fight must comply with that condition in contrast to a condition that he not return to the Islamic state because compliance with such a stipulation would cause him to commit a sin).

II. ASSESSING THE ISLAMIC LEGITIMACY OF NINETEENTH-CENTURY OTTOMAN REFORMS

The primary villain for Feldman in the rise of authoritarianism in the Arab world is codification. Elite Muslim jurists who in previous centuries had served as an important check on the arbitrary power of executive authority were now obsolete as a result of codification. They were no longer necessary for law finding or law making, nor were they necessary for the administration of the law. The very act of codification meant that one did not need to undergo the kind of specialized and rigorous learning that had been offered in Muslim seminaries and that had produced in previous centuries elite legal jurists in order to be able to administer competently the modern code. Shockingly, elite Muslim jurists failed to raise any meaningful opposition to codification despite its jurisprudentially suspect nature, and despite the threat it posed to their corporate interests. Finally, while attempts were made to restrain the executive as part of the overall program of legal reforms, e.g., the promulgation of the Basic Law of the Ottoman Empire in 1876, such attempts failed because, having been freely granted by the executive, they could also be, and subsequently were, withdrawn.³⁶ Law in the Ottoman Empire had now come full circle: having originated in a system that rejected the Roman dictum that “[t]he prince is not bound by law,”³⁷ it now seemed to embrace that proposition without debate.

I will address three points raised by this argument, the first addressing the jurisprudential legitimacy of codification, and the remaining two addressing the historical question of whether the acquiescence of the Muslim scholarly class to the Tanzimat’s legal reforms really is a puzzle, and whether responsibility for the authoritarianism of the successor states to the Ottoman Empire can be fairly attributed to endogenous developments in Islamic constitutional doctrine in the nineteenth century rather than exogenous factors, most critically, colonialism and great power interventions.

The Islamic Legitimacy of Codification

Although the notion that codification of Islamic law is inherently repugnant to the ideal of Islamic law, or is at a minimum deeply in tension

³⁶ *Supra* note 1 at 77.

³⁷ *Ibid.* at 54.

with it³⁸ is not unique to Feldman,³⁹ twentieth-century Muslim jurists did not seem to have expressed a *principled* opposition to codification as such.⁴⁰ Feldman himself points out that contemporary advocates of a renewed Islamic state have no use for an uncodified law administered by a group of elite religious scholars.⁴¹ While this may be a consequence of Islamist commitments to egalitarianism,⁴² Feldman fails to consider whether persons committed to Islamic law could also be attracted to codification for reasons that are themselves related to the rule of law. I suggest that a strong commitment to the rule of law could have led Muslim reformers of the nineteenth century, including elite members of the Ottoman judiciary, to support codification of Islamic law, and for several reasons.

First, uncodified Islamic law suffered from a unique source of indeterminacy, namely, the provenance of its rules. Because of the historical uncertainty of legal sources in Islamic law, the risk of even good-faith legal error was significant. The age of Islamic legal sources (Islamic law had by the nineteenth century compiled almost a millennium's worth of jurists' opinions) introduced another source of legal error: many legal opinions were fact-dependent, and although legal theory required that such rules be revised in light of changed factual circumstances,⁴³ many jurists often continued to apply rules without regard to changes in circumstances, rendering those rules obsolete.⁴⁴ Jurists offered no solution to such problems other than to demand that judges do a better job of paying attention to changed circumstances. Codification, however, offered a universal solution by binding judges to the application of only those rules that the state had determined were in conformity with the conditions prevailing in contemporary society.

Second, because of the particular theological commitments that undergirded the normative pluralism of Sunni Islam,⁴⁵ there was no theoretical justification for granting precedential value to a court's decision applying a controversial rule of Islamic law. This meant that the jurists were incapable

38 *Ibid.* at 118.

39 See e.g., Hallaq, *supra* note 28.

40 See e.g., Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (The Hague; London: Kluwer Law International, 2001).

41 *Supra* note 1 at 106.

42 *Supra* note 40.

43 Both of these weaknesses in the traditional Ottoman legal system were discussed in the introductory section of the Majallah called the *Madbata* (*Mazbata* in Turkish). *The Civil Law of Palestine and Jordan*, trans. by C.A. Hooper (Jerusalem: Azriel Printing Works, 1933) vol. 1 at 3-4.

44 Jackson, *supra* note 10 at 126-27, 130 (giving examples of how jurists, by failing to recognize the distinction between law and fact, subverted the rule of law).

45 Fadel, *supra* note 34 at 43-50 (giving overview of Sunni doctrine of ethical pluralism).

of promulgating generally applicable law, even though it had become clear to most nineteenth century Muslim officials that the reform and modernization of Muslim societies required the development of a comprehensive legal system that applied in principle to all persons within the jurisdiction. Promulgation of a code by a state, precisely because it is a human rather than divine artifact, resolves this theological obstacle to the establishment of general law because the restraint required in the interpretation of revelatory texts is not present in the interpretation of human ones.

Third, even pre-nineteenth century Muslim jurists were acutely aware that, because of the indeterminacy of their system of jurists' law, the bad faith of individual legal officials could easily subvert the impartial administration of the law.⁴⁶ The recognition that juristic prerogatives of interpretation could subvert the rule of law led Muslim jurists, in the premodern era, to attempt to limit judges, in the vast majority of cases, to rendering decisions exclusively according to the well-established rule of the judge's particular legal school.⁴⁷ Ottoman-era jurists recognized the legitimacy of jurisdictional provisions which required judges to rule based only the authoritative opinion of the appointee's legal school. In this case, if the judge ruled using another rule, it could be overturned on jurisdictional grounds.⁴⁸ Accordingly, pre-nineteenth century Muslim jurists had already taken steps to organize their law into a more objective system that would further the rule of law by making it more transparent and thus accountable.

Fourth, traditional Islamic law rejected neither the legitimacy of an instrumentalist analysis of legal rules, nor the choice of a particular legal rule based on instrumentalist considerations. The jurisprudential doctrine known as *takhuyyur* (the right of an individual, when faced with contradictory views of what the law required, to choose the rule most suitable to his own ends⁴⁹)

46 Abu Ishaq Ibrahim b. Musa al-Shatibi, *al-Muwafaqat fi usul al-shari'a* (Beirut: Dar al-Kutub al-Ilmiyya, n.d.) vol. 4 at 97-101 (citing examples of jurists who exploited indeterminacy of law to benefit prominent persons, family members and their friends).

47 Mohammad H. Fadel, "The Social Logic of Taqlid and the Rise of the Mukhtasar" 3 *Islamic Law & Society* 193 (discussing how the Maliki school of law attempted to restrict interpretation of legal sources in order to further the ideal of the rule of law). See also Rudolph Peters, "What Does it Mean to be an Official Madhhab? Hanafism and the Ottoman Empire" in Peri Bearman, Rudolph Peters & Frank E. Vogel, eds., *The Islamic School of Law: Evolution, Devolution and Progress* (Cambridge, MA: Harvard University Press, 2005) (stating the Hanafism between the twelfth and sixteenth centuries had evolved into a body of relatively unequivocal legal rules that left little room for judicial discretion and was well-suited for the bureaucratized system of law that applied in the Ottoman Empire).

48 Fadel, *ibid.* at 229-30.

49 This doctrine did not lack its detractors, e.g., al-Ghazali and al-Shatibi. Abu Hamid Muhammad b.

was recognized as permissible so long as a definitive rule of law was not thereby violated.⁵⁰ To be sure, the Islamic state, which is the agent of the collective body of Muslims, would have this right.

The Ottomans, as Feldman notes, had used their power to issue positive laws extensively, regularly issuing legal decrees known as *qanuns*. What was unique about the nineteenth-century Ottoman legal reforms, then, may not have been the executive's claim of a right to make law, but the sheer scale on which the executive asserted that the public good required it to create uniform public law in areas that had historically been the domain of the jurists. Given that jurists had already granted the state the right to promulgate rules on instrumentalist grounds, at least in circumstances where there is no unequivocal rule, it is easy to see why codified law could be attractive to thoroughly orthodox Sunni Muslims. A code would at least require the state to make a public statement regarding its conception of where the public good lies, in the form of generally applicable rules. A code could therefore serve as a relatively effective means of restricting the state's ability to use its power of *takhayyur* arbitrarily, relative to the default rule of the classical Islamic constitution which theoretically allowed the state and its officials to make case by case decisions on grounds of the public interest.⁵¹

Finally, because the state exercises its discretion only as the agent of the Muslim community pursuant to the contract of governance, its power to exercise discretion is limited by the terms of that agreement. The provisions of a code or of a written constitution, from a jurisprudential perspective, could reasonably be understood as representing contractual limitations on the discretionary power of the state to pursue the public good that go beyond the prepolitical restraint of not using delegated power to violate the mandatory rules of Islamic law. Codification, then, from the perspective of the classical Islamic constitutional model, could be understood as simply an attempt to limit the power of the public's agents to engage in discretionary acts of state. From this perspective, the prepolitical rules of Islamic substantive law set the boundaries of permissible political rules, but do not define their substantive content.

Muhammad al-Ghazali, *al-Mustasfa fi 'ilm al-usul* (Beirut: Dar al-Kutub al-'Ilmiyya, 1993) 378-82 and al-Shatibi, *supra* note 46 at 95-97.

50 Ahmad b. Idris al-Qarafi, *Nafa'is al-usul fi sharh al-mahsul*, ed. by 'Adil Ahmad 'Abd al-Mawjud and 'Ali Muhammad Mu'awwad (Riyadh: Maktabat Nizar Mustafa al-Baz, 1997) vol. 9 at 4134-4139.

51 See *e.g.*, *supra* note 46.

The Perhaps Not-So-Puzzling Acquiescence of the Muslim Scholarly Class to Codification

Feldman claims that the Majallah, a comprehensive code of Islamic civil law issued by the Ottomans as part of the Tanzimat, represented the coup de grace for the legal class.⁵² Yet he cites to none of its provisions in support for his claim that the Majallah effected a jurisprudential revolution, nor does he cite the views of any leading Ottoman jurists from that era to that effect. This silence, instead of causing Feldman to reconsider his interpretation of the reforms' Islamic legitimacy, leads him to describe the silence of late-nineteenth century Ottoman jurists in the face of the Majallah as a "puzzle."⁵³ Jurists' acquiescence is only puzzling, however, if one accepts Feldman's view that the classical Islamic constitution did not provide jurisprudential resources sufficient to accommodate the Majallah. The text of the Majallah itself provides empirical evidence that its jurisprudence was consistent with that of traditional Islamic law.

The drafters of the Majallah, it appears, went to some length to ensure that its text did not support "sultanic absolutism." The primary evidence for this proposition is the *Madbata* (Turkish: mazbata), which served as a kind of jurisprudential introduction to the Majallah.⁵⁴ The Mazbata justified the state's authority to promulgate the Majallah on what appears to have been an uncontroversial doctrine of Islamic substantive law (or at least uncontroversial among Hanafi jurists): that the ruler has the power "to bind judges

52 *Supra* note 1 at 62.

53 *Ibid.* at 105. Feldman suggested that the Shi'i jurists of Iran were more prescient in opposing codification than their Sunni counterparts. I am more inclined to interpret the different reactions to codification to differences in Sunni and Shi'i constitutional theory: whereas Sunni constitutional theory envisaged a legitimate role for the state in rule-making, the Shi'a at least prior to the Iranian revolution continued to deny any legitimacy to any state in the period of the occultation of the last Imam. Abbas Amanat, "From *ijtihād* to *wilāyat-i faqīh*: The Evolution of the Shiite Legal Authority to Political Power" in Abbas Amanat and Frank Griffel, eds., *Shari'a: Islamic Law in the Contemporary Context* (Stanford, CA: Stanford University Press, 2007) 120 at 123 (Shiite theory of occultation of the 12th imam rendered all government inherently oppressive, and as a result, they never articulated a theory of a "legal public space").

54 M. Munes Tomeh, *The Mazbata: The Protocols of the Mecelle Committee and Continuity and Change in Islamic Law in the 19th Century Ottoman Empire* (2008) at 8-9 [unpublished, manuscript on file with author] at ("The *Mazbata* does the work of jurisprudence; it does the rhetorical work of explaining, rationalizing, and ultimately, persuading, or attempting to persuade, its audience about the correctness of the Committee's approach to Islamic law in the process of promulgating the *Mecelle*. It is jurisprudence is *Islamic*, even if not entirely Islamic in a classical sense, in that it broadly outlines the protocol or method the Committee followed in selecting from among the ocean of vastly diverse opinions in Islamic law, and particularly in selecting opinions from within the Hanafi school."). For an English translation of the *Mazbata*, see Hooper, *supra* note 43 at 1-15.

in accepting one interpretation of Islamic law over numerous others.⁵⁵ The Mazbata also affirmed the *shari'a*'s status as the general background law of the Ottoman Empire "against which the entirety of the Tanzimat's codes are mere exceptions,"⁵⁶ referring to the *shari'a* alternatively as the Ottoman Empire's "original law"⁵⁷ or as its "fundamental laws."⁵⁸ Tomeh describes the jurisprudential rhetoric of the Mazbata as the "'constitutionalization' of the *shari'ah*."⁵⁹ The Mazbata also limited the right of the state to promulgate specific rules to the so-called "rules of Islamic law derived through interpretation (*al-masa'il al-mujtahad fiha*)" in contrast to the unequivocal rules of Islamic law (*al-ahkam al-qat'iyya*), and limited the sultan's choice of solutions to opinions that had already been expressed by Muslim jurists of the Hanafi school.⁶⁰

Nothing in the express language of the Majallah, therefore, seems to support Feldman's contention that the Majallah's jurisprudential authority derived from the state, rather than from the *shari'a* itself.⁶¹ Accordingly, Feldman produces very little evidence that the Majallah was the turning point in the move toward legal positivism and away from Islamic law in the Arab world that he claims it to be.

The Failure to Develop Effective Checks Against the Executive

Feldman is correct, however, to point out the dramatic institutional changes that were taking place in the administration of the law in the

55 Tomeh, *supra* note 54 at 11. Tomeh points out that this principle is in the background of much of the jurisprudential discussion in the Mazbata, even if it is only explicitly referenced at the conclusion of the Mazbata. It also appears in the substantive provisions of the Majallah itself, in Book XVI on Judgments. Article 1801 provides that, as an example of the kinds of permissible exceptions to the judge's jurisdiction over cases involving Islamic law, where the sultan gives an order "that in a certain matter the opinion of a certain jurist . . . is most in the interest of the people, and most suited to the needs of the moment . . . , and that action should be taken in accordance therewith[. . .] he judge . . . may not act in such matter in accordance with the opinion of a jurist which is in conflict with that of the jurist in question. If he does so, the judgment will not be executory." Hooper, *supra* note 43 at 496. See also, Salim Rustum Baz al-Lubnani, *Sharh al-majalla* (Beirut: Dar ihya' al-turath al-'arabi, 3d ed., 1986) at 1169 (explaining this rule by stating that "when the order of the sultan implicates an issue of *ijtihad*, his command is enforced").

56 Tomeh, *supra* note 54 at 11.

57 *Ibid.*

58 *Ibid.* at 12.

59 *Ibid.*

60 *Ibid.* at 28. See also Peters, *supra* note 47 at 152-53 (noting existence of at least 32 sultanic orders by the sixteenth century directing judges to give judgment based on non-authoritative opinions within the Hanafi madhhab).

61 *Supra* note 1 at 64. See also Tomeh, *supra* note 54 at 28.

Ottoman Empire in the nineteenth century, particularly the creation of a new system of courts that included judges who were not always the products of the traditional Ottoman system of legal education.⁶² Could it be that the creation of these institutions, which included nonjurists, inevitably (though unintentionally) led to the rise of a positivist state in the manner suggested by Feldman?⁶³

Even from a positive perspective, it seems implausible to believe that Ottoman legal reforms, particularly its codification of Islamic civil law, were the proximate cause for the rise of the late-Ottoman/post-Ottoman legal positivism that came to prevail in the Arab world.⁶⁴ More plausible is the possibility that Ottoman political elites were badly divided on the questions of how to reform the Empire's institutions, and whether restraints on the executive were necessary or desirable to further the Empire's survival in the midst of a seemingly never ending chain of crises that buffeted it during the last fifty years of its existence.⁶⁵ Throughout this period the Ottoman Empire continued to lose territories to hostile European powers; it also effectively lost sovereignty over much of its internal affairs as a result of the devastating combination of the capitulations and debt obligations to European creditors. By the latter half of the nineteenth century, it could no longer regulate its own domestic economy, tax foreigners, or even prosecute them in its own criminal courts.⁶⁶ Given the practical limitations on Ottoman rule in this period, a healthy dose of skepticism regarding the effectiveness of these reforms is probably warranted.⁶⁷

62 Feldman appears to have exaggerated the exclusion of traditionally-trained jurists from the new court system. Ruth A. Miller, "Apostates and Bandits: Religious and Secular Interaction in the Administration of Late Ottoman Criminal Law" (2003) 97 *Studia Islamica* 155 (emphasizing that traditionally-trained jurists often staffed both trial courts and courts of appeal in the new courts created by the Tanzimat and that the shari'a and Ottoman secular legislation were perceived as working together rather than existing in two separate spheres).

63 *Supra* note 1 at 77-79.

64 Indeed, the Ottoman constitution was restored in 1908. Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany, NY: SUNY Press, 2002) at 26.

65 *Ibid.* at 25-26 (describing how the process of creating a constitution for the Ottoman Empire sharpened divisions among the Ottoman political elites rather than helping to consolidate the regime and that even after the restoration of the constitution in 1908 with provisions that strengthened the hand of the parliament relative to the executive, the crises facing the Ottoman Empire continued unabated).

66 "Imtiyazat" in 3 *Encyclopaedia of Islam*, 2d ed. 1178b at 1188a-88b. Indeed, by the latter half of the nineteenth century, some non-Muslim Ottoman citizens had been able to obtain privileges that were in theory reserved to citizens of European powers.

67 It would be interesting, for example, to contrast the Ottoman experience following the introduction of the new court system with that of Egypt which adopted the Mixed Court system and the French civil code in substantial part as strategies to preserve independence from outside powers, particularly Great Britain. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and*

The political elites of the Ottoman Empire, moreover, were not the only actors involved or interested in legal reform in the late-nineteenth century and the first half of the twentieth century: so too were European powers, first as creditors, and then often as colonial or quasicolonial administrators of Arab successor states to the Ottoman Empire. In order to protect creditors, the British intervened militarily in Egypt, ostensibly to protect its legitimate ruler, the Khedive Tawfiq, and in the process quashed the Egyptian Constitution of 1882.⁶⁸ And while it is true that Arab states at the conclusion of the First World War often used the Ottoman Constitution of 1908 as a model for drafting their own constitutions,⁶⁹ it is also true that the British, for example, repeatedly frustrated attempts to strengthen constitutional provisions that could have provided for meaningful parliamentary oversight of Arab rulers, preferring to deal with an internally strong but externally weak monarch to one subject to parliamentary oversight, in which nationalist forces would likely dominate.⁷⁰

None of this is to suggest that British or French, or more generally western intervention in the internal politics of the Arab world following the collapse of the Ottoman Empire in 1919 is the sole or even most important cause for the authoritarian regimes prevalent in the Arab world. It does, however, weaken Feldman's claim that jurisprudential developments of the nineteenth century were the primary cause for the rise of authoritarianism in the Arab states.⁷¹

the Gulf (Cambridge; New York: Cambridge University Press, 1997) at 28-30 (stating that Egypt accepted the Mixed Court system as an improvement over the capitulations, despite its limitations on Egyptian independence and that the Egyptian government, in adopting the French civil code, did so more to preserve Egyptian independence in the face of an imminent British invasion rather than out of a desire to break with Islamic law).

68 Brown notes that the domestic process that resulted in the Constitution of 1882, as was the case in the Ottoman Empire, divided local political elites, but that it was the presence of "foreign threats" that led to a decisive break in the two camps. Brown, *Constitutions*, *supra* note 64 at 28. Similarly, the Tunisian constitutional experiment in collapsed in part because of British-French rivalry. *Ibid.* at 18.

69 *Ibid.* at 26.

70 See *e.g.*, *ibid.* at 39 (Britain repeatedly intervened in domestic Egyptian politics in an extraconstitutional manner); *ibid.* at 43-44 (British drafted Iraqi constitution ensured that relationship of Britain to Iraq would be outside of the constitution and thus beyond Parliamentary control); and *ibid.* at 47 (Jordanian constitution allowed British to determine Jordanian policy and legislation at will).

71 *Supra* note 1 at 150. Feldman's analysis of the rise of Arab authoritarianism following the First World War is also odd in that it seems to contradict the basic policy recommendation he offers at the book's conclusion: that intervention to pre-empt Islamist political parties from assuming power pursuant to electoral victories "is likely to backfire, since the public will see it for what it is, and it will reconfirm the view that the Islamist aspiration to justice is opposed by the West and the local autocrats."

III. THE NORMATIVE COHERENCE OF THE NEW ISLAMIC STATE

Feldman, I believe, is largely correct in pointing out that the “new” Islamic state envisioned by Islamist parties suffers from important doctrinal problems. I disagree, however, to the extent he suggests that these problems relate to the question of how the state can be at once democratic and derive its authority from the *shari’a*.⁷² As I suggested in Part I of this review, legislation can be deemed to be a process of regulating the discretionary power of the state, which is merely an agent of the Muslim community, rather than a process of Islamic law interpretation.⁷³

Instead, the constitutional dilemma of the modern Islamic state is unearthed in asking how to square the normative assumptions implicit in the Islamic constitution, whether modern or classical, with the explicit constitutional assumptions of the modern state, in which the state is not the representative of only Muslims but of the “people,” at least some of whom will be non-Muslims.⁷⁴ While it is theoretically coherent for the *shari’a* to serve as a substantive limit on the kinds of actions the state, as an agent of a collective Muslim principal, can take in its name, it is hard to understand why a people — the Egyptian people, for example, an entity that is not defined by religion — would be so bound.

To the extent that the coherence of the democratic Islamic constitution Feldman describes requires a sectarian definition of the body politic, it would appear to represent a dead end in the long run, even if it could very well promote substantial improvements in day-to-day governance in the short- and medium-term. That does not mean, however, that Feldman’s policy recommendations are wrong. It does suggest, however, that if Islamist parties were allowed to govern, the democratized *shari’a* could only be an intermediate step in the long-term constitutional reform of the states comprising the Arab world.

72 *Supra* note 1 at 119-23.

73 This “negative” role for the *shari’a* approaches the method used by the Egyptian Supreme Constitutional Court in interpreting Article 2 of the Egyptian Constitution which makes the *shari’a* the principal source of Egyptian legislation.

74 See for example, the Proclamation to the Egyptian Constitution which speaks in the name of “We, the people of Egypt.” See *Constitution of the Arab Republic of Egypt* online: Egypt State Information Service <<http://constitution.sis.gov.eg/en/2.htm>>. To be fair to Feldman, he raises the problem of equality in another work. See Noah Feldman, *After Jihad: America and the Struggle for Islamic Democracy* (New York: Farrar, Straus and Giroux, 2003) at 62-69 (discussing the problem of equal citizenship within Islamic political thought).

Ultimately, the challenge facing Islamist political movements will be to set out the terms under which Muslims, subject to their ethical commitments to observe the *shari'a*, can agree to be bound by a constitution that also represents non-Muslims on the basis of equality. More theoretically inclined Islamist thinkers, such as the Egyptian historian and retired judge Tariq al-Bishri, for example, already have pointed out that political equality of Muslims and non-Muslims is the *sine qua non* of the long-term success of any Islamist political project.⁷⁵ While the democratized Islamic constitution described by Feldman does not seem to address this concern, it nevertheless represents an important step toward that goal by transforming the *shari'a* from an affirmative source of political obligation to a set of restraints on political outcomes. This conception of the *shari'a* points the way to the kind of a non-Islamic constitution that religiously committed orthodox Muslims could endorse in good faith: if a non-Islamic constitution does not permit political outcomes that violate the moral integrity of Muslims, then it would appear that Muslims could endorse such a constitution, even if it is non-Islamic. Theorizing the outlines of a non-Islamic constitution that would satisfy this requirement is well beyond the scope of this review, but it is a task that urgently deserves the attention of political philosophers and Islamist thinkers committed to the project of a democratized *shari'a*.

75 Leonard Binder, *Islamic Liberalism: A Critique of Development Ideologies* (Chicago: University of Chicago Press, 1988) at 248.

