

# *The Fall and Rise of the Islamic State*

by Noah Feldman, Princeton University Press, 2008, 200 pp.

## Samuel Helfont

Noah Feldman is one of the most prolific public intellectuals in the United States today. Fluent in Arabic, with a law degree from Yale and a D.Phil in Islamic thought from Oxford, he is a uniquely qualified participant in the battle of ideas surrounding Islam and the Middle East. Indeed, he is one of the few academics who had the courage to go beyond intellectual debates and offer to help solve America's Middle Eastern woes. At the outset of the Iraq War in 2003, many academics with considerable knowledge and ability refused to have anything to do with the war or its practitioners. They preferred to remain comfortably on the sidelines, offering criticisms but very seldom solutions. There were a handful, however, who recognised that whatever their qualms with the war, they had an obligation to help alleviate the suffering, if not of the American administration, then at least of the Iraqi people. Noah Feldman was one such academic. He worked for the Coalition Provisional Authority in Baghdad and he had an advisory role in the development of Iraq's post-war constitution. Feldman's return to academia after such an endeavour should be heartening to those who argue that supporting American foreign policy is incompatible with the leftist atmosphere on many university campuses. In an incident that should (but almost certainly will not) help to quell the indignation of some parts of the American right, Feldman's return to the halls of academia after serving in Iraq was not met with protests or black-listing. Instead he left his position at NYU to take up a new post at Harvard.

Since leaving Iraq, Feldman has been a powerful voice reminding Americans of the responsibility they have for their nation's foreign policy. On the pages of *The New York Times Magazine*, and in books such as *What We Owe Iraq* (2004), he has highlighted the struggle to stabilise Iraq. In his latest work, *The Fall and Rise of the Islamic State*, Feldman continues with these good intentions. He draws on his considerable knowledge of both legal and Islamic history to outline many of the structural legal problems facing the Middle East. In a long and very detailed analysis of the *Sharia* during the Ottoman period (14th – early 20th centuries), he shows that it was more a system of thought than a codified legal code. Feldman maintains that there were no books in which Islamic scholars could look up precise laws that would have to be followed to the letter. Instead, in handing down legal decisions

the scholars would draw on their vast knowledge of Islamic history. Nevertheless, Feldman maintains the *Sharia* as a legal system was far from the disorderly mayhem that is often portrayed in Western scholarship. The *Sharia* courts had a clear role which was defined by unambiguous and understood principles. Moreover, the absence of a codified law placed further emphasis on scholarship and learning. This in turn furnished the scholars with real power. Not only could they not easily be replaced, their status was determined by the quality of their scholarship and the respect of their peers, not the dictates of the sultan. When one considers that the legitimacy of Islamic rulers was, according both to their populations and their own justifications, based on their upholding the *Sharia*, it is clear that an independent class of scholars offered an important check on the power and legitimacy of the ruler.

According to Feldman, [1] this relationship began to deteriorate in the 19th century. In response to the Ottoman decline vis-à-vis the western powers, the empire instituted a number of military and legal reforms. Some of the legal reforms resulted in the codification of the *Sharia*. This had two larger effects on the status of the Islamic legal institution. First, it reversed the balance of power within the legal philosophy of the Islamic state. Whereas previously the *Sharia* had determined the legitimacy of the state, now it was the state that legitimised the *Sharia*. Second, codification made determining the law as simple as opening a law book. This task could be done by any capable public official and no longer required a lifetime of training. Thus, the scholars lost much of their influence, not only over the *Sharia*, but also as an independent check on the executive. Henceforth, the law would be determined by judges appointed not by their peers, but by the executive they were supposed to regulate. What we find then is that over the past century, the Middle East has been ruled almost exclusively by unchecked executives.

#### **Feldman's mistreatment of Islamist thought**

Feldman's legal approach to the development of authoritarianism in the Middle East is both timely and refreshing. It also highlights the deficiencies in approaches that downplay the agency of Middle Eastern peoples. Indeed, Feldman takes issue specifically with the idea that all problems in the Middle East emanate from the experience of colonialism (pp. 79-80, 86). But despite Feldman's solid analysis of early modern legal history in the Islamic world, his depictions of more recent manifestations of *Sharia* and those who want to impose it are problematic.

Feldman makes important distinctions between fringe organisations such as al-Qaeda and other groups, such as the Muslim Brotherhood, which enjoy considerable popular support. Nevertheless his depiction of the ideologies of these more popular groups, and of their understanding of Islamic law, is wanting. In addition to the usual platitudes claiming that these Islamist groups ‘embrace democratic elections and basic rights’ (p. 3), there are deeper problems in the picture that Feldman sketches. [2] He presents contemporary Islamists’ as believing *Sharia* is a loose set of guidelines that will help to guide a democratic state. He asserts that Islamists consider the *Sharia* ‘either as “the source of law” or “a source of law”’ (p. 119). The latter half of this statement is peculiar. One of the main arguments employed by Islamists against states such as Egypt, which indeed uses the *Sharia* as a source of law, is that *Sharia* as ‘a’ and not ‘the’ source of law is completely insufficient. This is a standard claim made by Islamists throughout the Middle East. So, I was curious which Islamists call for the use of the *Sharia* as ‘a’ source of law. I checked Feldman’s endnote only to find that the two examples he gives are Hamas’ Legislative Elections Platform and the Muslim Brotherhood’s 2007 political platform. But neither of these groups would downgrade the *Sharia* to ‘a’ and not ‘the’ source of law. Strangely, Feldman quotes the relevant sections of both of these documents, which both employ the definite article when discussing *Sharia*, as the source of law. I bring this up not as a minor quibble about endnotes that undermine instead of support an argument, but because it highlights an important misrepresentation of modern Islamist thought on Feldman’s part. In his depiction of what Islamists mean when they call for the implementation of *Sharia*, Feldman portrays Islamists as arguing for a more open interpretation of Islamic law than they are actually committed to. He presents the *Sharia*, not as those who call for its implementation present it, but as he would like them to.

In reading *The Fall and Rise of the Islamic State*, one gains the impression that all the Islamists are calling for is, as Feldman puts it, the ‘constitutionalisation’ of the *Sharia* (p. 12) whereby Islamic law is used as a rough framework in which democratic legislation can be passed. The problem is that while Islamists do often use the language of constitutionalism, they rarely stop at that. Most Islamists in fact call for the implementation of *Sharia* not as a general guideline but as an all-encompassing system that regulates every aspect of a Muslim’s life. Take for example Yusuf al-Qaradawi, who is probably the most influential living Islamist thinker. He asserts that Islam ‘is a comprehensive course of life for man’ [3]. Further, as opposed to the idea of the *Sharia* as a constitution, Qaradawi asserts that the *Sharia* is the basis for legislation. [4] So, whereas in a democracy the constitution outlines the framework

in which the people, as the source of legislation, enact laws, in Qaradawi's and indeed most Islamist political thought, legislation is divine. The people act only as the judiciary interpreting a divine law, which can only be given by God. Qaradawi makes the place of Islamic law very clear: 'It goes without saying that it is the responsibility of every Muslim to lead his life in an Islamic state governed by the Qur'an and Sunnah and in a society that is established on the Shari'a.' [5]

Feldman misses one of the key dilemmas facing the implementation of the *Sharia*, namely that it is extremely difficult for a modern Muslim to actually live his life in accordance with the *Sharia*. The problem can only be understood by looking deep into Islamic history.

#### The *Sharia* in History

Islamists often refer back to a mythical period, early in Islamic history, when the *Sharia* was said to rule all matters, spiritual and political. Hence the commonly heard declaration that in true Islam there is no separation between religion and politics. While Feldman fails to mention Islamists' claims that Islamic law is all encompassing, he shares with them the view that the *Sharia* was in place at the very beginnings of Islamic history. 'From the time of the Prophet Muhammad' Feldman argues, Muslims were ruled by the *Sharia* (pp. 1-2). This assertion ignores some of the most important secular scholarship on early Islamic history to emerge in the past few decades.

In the traditional, religious account of Islamic history, the Prophet Muhammad was both the political and the religious authority. When the Prophet died, political authority was passed to the caliphate but religious authority remained with Muhammad. What this meant was that those who studied Muhammad's sayings and actions (the same scholars who were writing the history) could best lead the Muslims in religious matters. As Feldman correctly notes, the traditional role of the religious scholars therefore has been to provide guidance to the ruler on matters dealing with the *Sharia*. But this telling of Islamic history contains a clear contradiction. On one hand we are told Islamic law governs all aspects of human life, and then on the other we are told that following the death of Muhammad, the scholars inherited religious but not political authority. How can this be?

Over the past several decades, western scholarship on early Islamic history has done a great deal to clear up this dilemma. The research of several prominent historians

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has shown that counter to the traditional version of events, both political and religious authority passed from Muhammad to the caliphs. [6] The *Sharia* scholars were not part of the equation until much later. Essentially, this becomes a debate about how and when religious and political authority was separated in Islam.

The first four caliphs were close companions of the Prophet so they were able not only to lead politically, but also to relate the sayings and actions of the Prophet most reliably. Therefore, even the scholars would recognise that they held both political and religious authority. So the problem of a separation between the religious and the political does not arise until the establishment of the Umayyad dynasty in Damascus in the second half of the seventh century. While the traditional Islamic rendition of events states that this was when the scholars gained control of religious matters, secular scholarship has shown that both religious and political authority remained with the caliphs. A good way of understanding the role of the caliphate is to examine the meaning of the word caliph itself. It comes to us from the well-known Arabic title *khalifat Allah*, which the caliphs used to describe themselves. The word *khalifah* means either successor or deputy. Therefore *khalifat Allah* means either Successor of God or Deputy of God. It would be against even a remotely monotheistic view to argue that the caliph was a Successor of God; therefore the only logical definition of this title is Deputy of God. Contrary to the traditional Islamic rendition, the title Deputy of God had obvious religious connotations. Indeed, it appears that the caliphate was viewed in the beginning as possessing both religious and political authority. Thus, like Muhammad, the early caliphs were able to judge both political and religious matters. Because they felt religious authority was bestowed upon them by God as his deputies, they did not feel the need to look to Muhammad's example. Muhammad gave them the Koran, and there his role in religious matters ended. [7]

During the Umayyad Dynasty and its immediate successor the Abbasid Dynasty (8th-13th centuries), scholars gradually became a type of shadow authority on religious matters. The caliph continued to rule on religious matters, but over time the scholars gained popularity and began to demand that the caliph defer to them on religious matters. This conflict came to a head in the ninth century when the Abbasid caliph al-Mamun attempted to crush the scholars' claim of religious authority with a brutal inquisition. However, al-Mamun died before he could accomplish his goals. The scholars emerged victorious and would thus forth be the sole authority on Islamic religious law. [8]

Here we have a situation in the ninth century whereby Islam is supposed to unite religious and political authority, as it did in the time of Muhammad and the early caliphs, but in reality political and religious authority are split between the caliph and the scholars. Essentially this has remained the case until today. The scholars, having gained control of spiritual matters, then wrote themselves back into Islamic history to justify their position. They also reinterpreted the caliphate as a strictly political office with no religious authority. Muhammad, not the caliph, would henceforth be the sole legitimate religious authority in what became Sunni Islam. [9]

### Sharia and Qanun

And what does this rendition of a rather obscure topic in early Islamic history have to do with the modern Islamic state? To begin with, it had a tremendous effect on the development of the *Sharia*. The *Sharia* was developed by the scholars in the early centuries of Islam, but because the scholars recognised that political power was in the hands of the caliph they concerned themselves mostly (but not exclusively) with religious matters. Thus there were wide sections of temporal law that the *Sharia* never addressed.

On matters that the *Sharia* did not address, the caliphs, and then their successors in the various Islamic sultanates, emirates, and empires developed another system of law that existed alongside the *Sharia* called the qanun. Unlike the divine *Sharia*, the qanun was administrative law that the ruler enacted by decree. Feldman acknowledges that the *Sharia* was unable to deal with many of the problems of the state and he even asserts that the ‘bulk’ of criminal law in the Ottoman Empire was governed by the qanun not the *Sharia* (p. 49).

Modern Islamists, however, do not recognise the religious role that the early caliphs played, so when they refer to the mythical period when political and religious authority was unified, they assume this must have taken place under the *Sharia*. Islamists take the *Sharia*’s ability to govern all aspects of life during this mythical period as proof of its ability to address all facets of a Muslim’s existence. Unlike Feldman, they believe that the *Sharia*’s ability to do so has remained intact throughout history. Instead of recognising the limitations of the *Sharia*, Islamists argue that the reason Muslims in recent history have not been ruled by the *Sharia* alone is due to inept rulers who were not fit to head Islamic states. Often this leads to the snowball effect that Paul Berman outlined in *Terror and Liberalism*.

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Islamists turn to the *Sharia* as the solution to all their problems. When this proves insufficient, they double down, demanding ever-stricter interpretations. The result is a spiralling extremism. [10]

Feldman does not recognise that modern Islamists are calling for the implementation of *Sharia* not as 'a' source of law, but as a comprehensive system that governs all aspects of life. Therefore, he misses a major dilemma that has characterised recent Islamist political philosophy. If Islamic law is supposed to cover all aspects of life, and the scholars are considered best qualified to interpret Islamic law, then why shouldn't the scholars rule? This is precisely what Khomeini argued in his famous treatise, *Velayat-e Faqih* (usually translated as, *Islamic Government*), and more recently it is what Sunni groups such as the Muslim Brotherhood have suggested in their political tracts.

Feldman ignores this dynamic. He admits that in earlier Islamic history the scholars began to see themselves as the 'heirs to the prophet' (p. 26) but he fails to ask what the role of the ruler is if the scholars are the heirs of a prophet who had both religious and political authority. As a legal scholar and an expert on Islamic thought, Feldman would no doubt have much to contribute to our understanding of the dichotomy between scholarly and temporal rule in Islam. Unfortunately this subject is overlooked.

### Analytical Acrobatics

Rather than discuss the deficiencies of *Sharia* as an all-encompassing law, Feldman suggests the real problem is that *the scholars do not have enough power*. He avers that when the scholars acted as a check on the executive, the rule of law existed. In order to re-establish the rule of law in the Middle East, therefore, Feldman maintains that the scholars' place needs to be restored. When Feldman is critical of Sunni Islamists such as the Muslim Brotherhood, it is on this issue. Throughout the work, he repeatedly asserts that Sunni Islamists want to replace the scholars with laymen, and that paradoxically they want *Sharia* without the influence of the scholars (p. 11, pp. 108-9, pp. 116-7). This is a peculiar argument. He is forced to perform analytical acrobatics, brushing aside the two most prominent recent examples of Sunni states with Islamist ideologies, Saudi Arabia, and Afghanistan under the Taliban. In both, scholars played, and in the case of Saudi Arabia still play, an important role in the state. Instead he focuses on the Muslim Brotherhood and its affiliates. This is even more bizarre because the Brotherhood does not call

for marginalising the scholars. In fact they want to empower them to a level that is unprecedented in Sunni Islam.

It is true that the Brotherhood had previously been averse to the rule of scholars. In the 1950s and 1960s, when the Brotherhood turned against the secular regimes in the Middle East, they never went as far as to call for the scholars to take power. Nevertheless, over the past several decades there has been considerable development in the direction of scholarly rule. For example, in the Muslim Brotherhood's 2007 political platform, a document that Feldman refers to repeatedly, the Brotherhood calls for the creation of a '*majles ulema*', or a council of scholars. As in the current Iranian regime, this undemocratic council would probably be responsible for ensuring that all aspects of the state are in accordance with *Sharia*. [11] This, counter to Feldman's assertions, would give the scholars considerable power. As in Iran, they would essentially have control of the state, [12] and one unchecked executive would be replaced by another.

### **An idealised depiction of Sharia**

But let us, for a moment, forget all of this. Let's imagine that Islamists are not calling for the implementation of *Sharia* as a comprehensive system; that all they want is the implementation of the *Sharia* as 'a' source of law. In this scenario, as Feldman outlines it, a case could be brought to court to determine whether a law is in accordance with *Sharia*. In Feldman's idealised depiction, he argues that these cases would not be initiated by the courts. The judges would be asked to rule on a matter and only then would they issue judgement. Feldman maintains that the courts would 'have this responsibility because the constitution says so, not because it inheres in the Shari'a itself' (p. 12). Feldman claims that when understood this way, judgements based on *Sharia* would be in accordance with constitutional democracy.

If we set aside our critical thinking for a moment and accept that this is actually what the Islamists are arguing for, does Feldman really think that this would be beneficial? Yes, *Sharia* may bring the rule of law, but what would be the consequences of such a law? Does he think that this would be a step forward for Islamic societies? Feldman does not ask these questions.

One telling example of what would result from Feldman's proposed arrangement took place in Egypt in the 1990s. As mentioned above, Egypt recognises the *Sharia*



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as a source of law, and theoretically it can be used in court. It was, in fact, used in exactly this way against the prominent Egyptian writer and academic Nasr Hamid Abu Zeid and his wife Ibtihal Younis. Because of Abu Zeid's secular scholarship, Egyptian Islamists branded him an apostate. According to the *Sharia*, a Muslim woman cannot remain married to an apostate. Thus, Islamists, citing an obscure Islamic legal principle called *hisba*, whereby any Muslim can seek actions from a court to stop actions deemed harmful to Islamic society, brought a case to the Egyptian courts demanding the divorce of Abu Zeid from his wife. Initially this case was thrown out, but on appeal that decision was overturned. To maintain their marriage, Abu Zeid and his wife were forced to flee the country. [13]

Here we have a case (and there are countless others) where the *Sharia* is used exactly as Feldman proposes it should be. [14] Does Feldman really think that rulings such as this will be productive in opening up Islamic societies? One should consider that, in reality, this case is fairly mild when compared to other dictates found in the *Sharia*. Islamic law after all, can be used to justify domestic violence, public whippings, and the killing of homosexuals and converts. Would Feldman condone these practices if they were implemented under the rule of law? Is the rule of law the only standard we have for escaping authoritarianism and creating a just society?

Feldman has considerable experience and ability, as well as what seems to be a strong moral compass, so one would have expected *The Fall and Rise of the Islamic State* to address many of these issues. One would have hoped that Feldman would have achieved his stated goal to get 'behind the slogans' (p. 3). Unfortunately, in this respect the book is a disappointment.

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### Notes

- [1] This view is shared by other reliable scholars as well. See for example, Nathan Brown 1997.
- [2] The problem with depicting the Muslim Brotherhood and its sister movements as democratic is that the Muslim Brotherhood's political platform, released in 2007, excludes women and religious minorities from running for certain offices, including the head of state. Therefore, the most minimal requirement of democracy, that any competent citizen can put himself forward in competition for elected office is not met. Then, of course, there are groups such as Hamas that have armed wings and do not recognise the Weberian ideal of a state holding a monopoly on the use of force. It is hard to imagine a democracy that lacks this basic characteristic.
- [3] Helfont 2009, p. 81.
- [4] Helfont 2009, p. 81 (emphasis added).
- [5] Helfont 2009, p. 82.
- [6] For example, Patricia Crone, Martin Hinds, and Ira Lapidus among others.
- [7] Crone and Hinds 2003, Lapidus 1975, Lapidus 1997.
- [8] For more on al-Mamun and the inquisition see Nawas 1996, Yucesoy 2002, and Cooperson 2005.
- [9] Shia Islam is somewhat different. Theoretically the Imams, similar to the early caliphs, enjoyed both religious and political authority. In mainstream Shiism, the last Imam disappeared in the ninth century. Afterwards a similar dichotomy emerged between the scholars as guardians of the sacred history and the political rulers of various states.
- [10] Berman 2003. A recent example of this occurred in December 2008 when Hamas responded to its failure to improve the life of Palestinians in Gaza by drafting a bill that would authorise, among other things, whippings, hangings, and crucifixions. It also imposes the death penalty on Palestinians who would 'damage Palestinian moral.' See: Fathi Sabah, *al-Hayat*, 24 December 2008 (in Arabic) [http://www.alhayat.com/arab\\_news/levant\\_news/12-2008/Article-20081223-654db2bc-c0a8-10ed-0088-d0c1183f108f/story.html](http://www.alhayat.com/arab_news/levant_news/12-2008/Article-20081223-654db2bc-c0a8-10ed-0088-d0c1183f108f/story.html)
- [11] Muslim Brotherhood 2007.

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[12] This manifestation of Islamic rule is very similar to what Khomeini proposed in *Islamic Government*. Only after the revolution was underway did Khomeini introduce the idea of one supreme leader. Previously he had called for a council of scholars to lead the state.

[13] Ajami 1998, pp. 212-21.

[14] It is worth noting that despite cases such as this in Egypt where the *sharia* is used as a source of law, the Egyptian Islamists, including the Muslim Brotherhood are not remotely satisfied. This should dispel Feldman's assertion that all they desire is to be able to go to a court and cite the *sharia* as a source of law.