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## Why Shariah?

By NOAH FELDMAN

Last month, Rowan Williams, the archbishop of Canterbury, gave a nuanced, scholarly lecture in London about whether the British legal system should allow non-Christian courts to decide certain matters of family law. Britain has no constitutional separation of church and state. The archbishop noted that “the law of the Church of England is the law of the land” there; indeed, ecclesiastical courts that once handled marriage and divorce are still integrated into the British legal system, deciding matters of church property and doctrine. His tentative suggestion was that, subject to the agreement of all parties and the strict requirement of protecting equal rights for women, it might be a good idea to consider allowing Islamic and Orthodox Jewish courts to handle marriage and divorce.

Then all hell broke loose. From politicians across the spectrum to senior church figures and the ubiquitous British tabloids came calls for the leader of the world’s second largest Christian denomination to issue a retraction or even resign. Williams has spent the last couple of years trying to hold together the global Anglican Communion in the face of continuing controversies about ordaining gay priests and recognizing same-sex marriages. Yet little in that contentious battle subjected him to the kind of outcry that his reference to religious courts unleashed. Needless to say, the outrage was not occasioned by Williams’s mention of Orthodox Jewish law. For the purposes of public discussion, it was the word “Shariah” that was radioactive.

In some sense, the outrage about according a degree of official status to Shariah in a Western country should come as no surprise. No legal system has ever had worse press. To many, the word “Shariah” conjures horrors of hands cut off, adulterers stoned and women oppressed. By contrast, who today remembers that the much-loved English common law called for execution as punishment for hundreds of crimes, including theft of any object worth five shillings or more? How many know that until the 18th century, the laws of most European countries authorized torture as an official component of the criminal-justice system? As for sexism, the common law long denied married women any property rights or indeed legal personality apart from their husbands. When the British applied their law to Muslims in place of Shariah, as they did in some colonies, the result was to strip married women of the property that Islamic law had always granted them — hardly progress toward equality of the sexes.

In fact, for most of its history, Islamic law offered the most liberal and humane legal principles available anywhere in the world. Today, when we invoke the harsh punishments prescribed by Shariah for a handful of offenses, we rarely acknowledge the high standards of proof necessary for their implementation. Before an adultery conviction can typically be obtained, for example, the accused must confess four times or four adult male witnesses of good character must testify that they directly observed the sex act. The extremes of our own legal system — like life sentences for relatively minor drug crimes, in some cases — are routinely ignored. We neglect to mention the recent vintage of our tentative improvements in family law. It sometimes seems as if we need Shariah as Westerners have long needed Islam: as a canvas on which to project our ideas of the

horrible, and as a foil to make us look good.

In the Muslim world, on the other hand, the reputation of Shariah has undergone an extraordinary revival in recent years. A century ago, forward-looking Muslims thought of Shariah as outdated, in need of reform or maybe abandonment. Today, 66 percent of Egyptians, 60 percent of Pakistanis and 54 percent of Jordanians say that Shariah should be the only source of legislation in their countries. Islamist political parties, like those associated with the transnational Muslim Brotherhood, make the adoption of Shariah the most prominent plank in their political platforms. And the message resonates. Wherever Islamists have been allowed to run for office in Arabic-speaking countries, they have tended to win almost as many seats as the governments have let them contest. The Islamist movement in its various incarnations — from moderate to radical — is easily the fastest growing and most vital in the Muslim world; the return to Shariah is its calling card.

How is it that what so many Westerners see as the most unappealing and premodern aspect of Islam is, to many Muslims, the vibrant, attractive core of a global movement of Islamic revival? The explanation surely must go beyond the oversimplified assumption that Muslims want to use Shariah to reverse feminism and control women — especially since large numbers of women support the Islamists in general and the ideal of Shariah in particular.

### **Is Shariah the Rule of Law?**

One reason for the divergence between Western and Muslim views of Shariah is that we are not all using the word to mean the same thing. Although it is commonplace to use the word “Shariah” and the phrase “Islamic law” interchangeably, this prosaic English translation does not capture the full set of associations that the term “Shariah” conjures for the believer. Shariah, properly understood, is not just a set of legal rules. To believing Muslims, it is something deeper and higher, infused with moral and metaphysical purpose. At its core, Shariah represents the idea that all human beings — and all human governments — are subject to justice under the law.

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In fact, “Shariah” is not the word traditionally used in Arabic to refer to the processes of Islamic legal reasoning or the rulings produced through it: that word is *fiqh*, meaning something like Islamic jurisprudence. The word “Shariah” connotes a connection to the divine, a set of unchanging beliefs and principles that order life in accordance with God’s will. Westerners typically imagine that Shariah advocates simply want to use the Koran as their legal code. But the reality is much more complicated. Islamist politicians tend to be very vague about exactly what it would mean for Shariah to be the source for the law of the land — and with good reason, because just adopting such a principle would not determine how the legal system would actually operate.

Shariah is best understood as a kind of higher law, albeit one that includes some specific, worldly commands. All Muslims would agree, for example, that it prohibits lending money at interest — though not investments in which risks and returns are shared; and the ban on Muslims drinking alcohol is an example of an unequivocal ritual prohibition, even for liberal interpreters of the faith. Some rules associated with Shariah are undoubtedly old-fashioned and harsh. Men and women are treated unequally, for example, by making it hard for women to initiate divorce without forfeiting alimony. The prohibition on sodomy, though historically often unenforced, makes recognition of same-sex relationships difficult to contemplate. But Shariah also

prohibits bribery or special favors in court. It demands equal treatment for rich and poor. It condemns the vigilante-style honor killings that still occur in some Middle Eastern countries. And it protects everyone's property — including women's — from being taken from them. Unlike in Iran, where wearing a head scarf is legally mandated and enforced by special religious police, the Islamist view in most other Muslim countries is that the head scarf is one way of implementing the religious duty to dress modestly — a desirable social norm, not an enforceable legal rule. And mandating capital punishment for apostasy is not on the agenda of most elected Islamists. For many Muslims today, living in corrupt autocracies, the call for Shariah is not a call for sexism, obscurantism or savage punishment but for an Islamic version of what the West considers its most prized principle of political justice: the rule of law.

### **The Sway of the Scholars**

To understand Shariah's deep appeal, we need to ask a crucial question that is rarely addressed in the West: What, in fact, is the system of Islamic law? In his lifetime, the Prophet Muhammad was both the religious and the political leader of the community of Muslim believers. His revelation, the Koran, contained some laws, pertaining especially to ritual matters and inheritance; but it was not primarily a legal book and did not include a lengthy legal code of the kind that can be found in parts of the Hebrew Bible. When the first generation of believers needed guidance on a subject that was not addressed by revelation, they went directly to Muhammad. He either answered of his own accord or, if he was unsure, awaited divine guidance in the form of a new revelation.

With the death of Muhammad, divine revelation to the Muslim community stopped. The role of the political-religious leader passed to a series of caliphs (Arabic for "substitute") who stood in the prophet's stead. That left the caliph in a tricky position when it came to resolving difficult legal matters. The caliph possessed Muhammad's authority but not his access to revelation. It also left the community in something of a bind. If the Koran did not speak clearly to a particular question, how was the law to be determined?

The answer that developed over the first couple of centuries of Islam was that the Koran could be supplemented by reference to the prophet's life — his *sunna*, his path. (The word "*sunna*" is the source of the designation Sunni — one who follows the prophet's path.) His actions and words were captured in an oral tradition, beginning presumably with a person who witnessed the action or statement firsthand. Accurate reports had to be distinguished from false ones. But of course even a trustworthy report on a particular situation could not directly resolve most new legal problems that arose later. To address such problems, it was necessary to reason by analogy from one situation to another. There was also the possibility that a communal consensus existed on what to do under particular circumstances, and that, too, was thought to have substantial weight.

This fourfold combination — the Koran, the path of the prophet as captured in the collections of reports, analogical reasoning and consensus — amounted to a basis for a legal system. But who would be able to say how these four factors fit together? Indeed, who had the authority to say that these factors and not others formed the sources of the law? The first four caliphs, who knew the prophet personally, might have been able to make this claim for themselves. But after them, the caliphs were faced with a growing group of specialists who asserted that they, collectively, could ascertain the law from the available sources. This self-appointed group came to be known as the scholars — and over the course of a few generations, they got the caliphs to

acknowledge them as the guardians of the law. By interpreting a law that originated with God, they gained control over the legal system as it actually existed. That made them, and not the caliphs, into “the heirs of the prophets.”

Among the Sunnis, this model took effect very early and persisted until modern times. For the Shiites, who believe that the succession of power followed the prophet’s lineage, the prophet had several successors who claimed extraordinary divine authority. Once they were gone, however, the Shiite scholars came to occupy a role not unlike that of their Sunni counterparts.

Under the constitutional theory that the scholars developed to explain the division of labor in the Islamic state, the caliph had paramount responsibility to fulfill the divine injunction to “command the right and prohibit the wrong.” But this was not a task he could accomplish on his own. It required him to delegate responsibility to scholarly judges, who would apply God’s law as they interpreted it. The caliph could promote or fire them as he wished, but he could not dictate legal results: judicial authority came from the caliph, but the law came from the scholars.

The caliphs — and eventually the sultans who came to rule once the caliphate lost most of its worldly influence — still had plenty of power. They handled foreign affairs more or less at their discretion. And they could also issue what were effectively administrative regulations — provided these regulations did not contradict what the scholars said Shariah required. The regulations addressed areas where Shariah was silent. They also enabled the state to regulate social conduct without having to put every case before the courts, where convictions would often be impossible to obtain because of the strict standards of proof required for punishment. As a result of these regulations, many legal matters (perhaps most) fell outside the rules given specifically by Shariah.

The upshot is that the system of Islamic law as it came to exist allowed a great deal of leeway. That is why today’s advocates of Shariah as the source of law are not actually recommending the adoption of a comprehensive legal code derived from or dictated by Shariah — because nothing so comprehensive has ever existed in Islamic history. To the Islamist politicians who advocate it or for the public that supports it, Shariah generally means something else. It means establishing a legal system in which God’s law sets the ground rules, authorizing and validating everyday laws passed by an elected legislature. In other words, for them, Shariah is expected to function as something like a modern constitution.

### **The Rights of Humans and the Rights of God**

So in contemporary Islamic politics, the call for Shariah does not only or primarily mean mandating the veiling of women or the use of corporal punishment — it has an essential constitutional dimension as well. But what is the particular appeal of placing Shariah above ordinary law?

The answer lies in a little-remarked feature of traditional Islamic government: that a state under Shariah was, for more than a thousand years, subject to a version of the rule of law. And as a rule-of-law government, the traditional Islamic state had an advantage that has been lost in the dictatorships and autocratic monarchies that have governed so much of the Muslim world for the last century. Islamic government was legitimate, in the dual sense that it generally respected the individual legal rights of its subjects and was seen by them as doing so. These individual legal rights, known as “the rights of humans” (in contrast to “the rights of God” to

such things as ritual obedience), included basic entitlements to life, property and legal process — the protections from arbitrary government oppression sought by people all over the world for centuries.

Of course, merely declaring the ruler subject to the law was not enough on its own; the ruler actually had to follow the law. For that, he needed incentives. And as it happened, the system of government gave him a big one, in the form of a balance of power with the scholars. The ruler might be able to use pressure once in a while to get the results he wanted in particular cases. But because the scholars were in charge of the law, and he was not, the ruler could pervert the course of justice only at the high cost of being seen to violate God's law — thereby undermining the very basis of his rule.

In practice, the scholars' leverage to demand respect for the law came from the fact that the caliphate was not hereditary as of right. That afforded the scholars major influence at the transitional moments when a caliph was being chosen or challenged. On taking office, a new ruler — even one designated by his dead predecessor — had to fend off competing claimants. The first thing he would need was affirmation of the legitimacy of his assumption of power. The scholars were prepared to offer just that, in exchange for the ruler's promise to follow the law.

Once in office, rulers faced the inevitable threat of invasion or a palace coup. The caliph would need the scholars to declare a religious obligation to protect the state in a defensive jihad. Having the scholars on his side in times of crisis was a tremendous asset for the ruler who could be said to follow the law. Even if the ruler was not law-abiding, the scholars still did not spontaneously declare a sitting caliph disqualified. This would have been foolish, especially in view of the fact that the scholars had no armies at their disposal and the sitting caliph did. But their silence could easily be interpreted as an invitation for a challenger to step forward and be validated.

The scholars' insistence that the ruler obey Shariah was motivated largely by their belief that it was God's will. But it was God's will as they interpreted it. As a confident, self-defined elite that controlled and administered the law according to well-settled rules, the scholars were agents of stability and predictability — crucial in societies where the transition from one ruler to the next could be disorderly and even violent. And by controlling the law, the scholars could limit the ability of the executive to expropriate the property of private citizens. This, in turn, induced the executive to rely on lawful taxation to raise revenues, which itself forced the rulers to be responsive to their subjects' concerns. The scholars and their law were thus absolutely essential to the tremendous success that Islamic society enjoyed from its inception into the 19th century. Without Shariah, there would have been no Haroun al-Rashid in Baghdad, no golden age of Muslim Spain, no reign of Suleiman the Magnificent in Istanbul.

For generations, Western students of the traditional Islamic constitution have assumed that the scholars could offer no meaningful check on the ruler. As one historian has recently put it, although Shariah functioned as a constitution, "the constitution was not enforceable," because neither scholars nor subjects could "compel their ruler to observe the law in the exercise of government." But almost no constitution anywhere in the world enables judges or nongovernmental actors to "compel" the obedience of an executive who controls the means of force. The Supreme Court of the United States has no army behind it. Institutions that lack the power of the sword must use more subtle means to constrain executives. Like the American constitutional balance of powers, the traditional Islamic balance was maintained by words and ideas, and not

just by forcible compulsion.

So today's Muslims are not being completely fanciful when they act and speak as though Shariah can structure a constitutional state subject to the rule of law. One big reason that Islamist political parties do so well running on a Shariah platform is that their constituents recognize that Shariah once augured a balanced state in which legal rights were respected.

### **From Shariah to Despotism**

But if Shariah is popular among many Muslims in large part because of its historical association with the rule of law, can it actually do the same work today? Here there is reason for caution and skepticism. The problem is that the traditional Islamic constitution rested on a balance of powers between a ruler subject to law and a class of scholars who interpreted and administered that law. The governments of most contemporary majority-Muslim states, however, have lost these features. Rulers govern as if they were above the law, not subject to it, and the scholars who once wielded so much influence are much reduced in status. If they have judicial posts at all, it is usually as judges in the family-law courts.

In only two important instances do scholars today exercise real power, and in both cases we can see a deviation from their traditional role. The first is Iran, where Ayatollah Khomeini, himself a distinguished scholar, assumed executive power and became supreme leader after the 1979 revolution. The result of this configuration, unique in the history of the Islamic world, is that the scholarly ruler had no counterbalance and so became as unjust as any secular ruler with no check on his authority. The other is Saudi Arabia, where the scholars retain a certain degree of power. The unfortunate outcome is that they can slow any government initiative for reform, however minor, but cannot do much to keep the government responsive to its citizens. The oil-rich state does not need to obtain tax revenues from its citizens to operate — and thus has little reason to keep their interests in mind.

How the scholars lost their exalted status as keepers of the law is a complex story, but it can be summed up in the adage that partial reforms are sometimes worse than none at all. In the early 19th century, the Ottoman empire responded to military setbacks with an internal reform movement. The most important reform was the attempt to codify Shariah. This Westernizing process, foreign to the Islamic legal tradition, sought to transform Shariah from a body of doctrines and principles to be discovered by the human efforts of the scholars into a set of rules that could be looked up in a book.

Once the law existed in codified form, however, the law itself was able to replace the scholars as the source of authority. Codification took from the scholars their all-important claim to have the final say over the content of the law and transferred that power to the state. To placate the scholars, the government kept the Shariah courts running but restricted them to handling family-law matters. This strategy paralleled the British colonial approach of allowing religious courts to handle matters of personal status. Today, in countries as far apart as Kenya and Pakistan, Shariah courts still administer family law — a small subset of their original historical jurisdiction.

Codification signaled the death knell for the scholarly class, but it did not destroy the balance of powers on its own. Promulgated in 1876, the Ottoman constitution created a legislature composed of two lawmaking bodies — one elected, one appointed by the sultan. This amounted to the first democratic institution in the Muslim

world; had it established itself, it might have popularized the notion that the people represent the ultimate source of legal authority. Then the legislature could have replaced the scholars as the institutional balance to the executive.

But that was not to be. Less than a year after the legislature first met, Sultan Abdulhamid II suspended its operation — and for good measure, he suspended the constitution the following year. Yet the sultan did not restore the scholars to the position they once occupied. With the scholars out of the way and no legislature to replace them, the sultan found himself in the position of near-absolute ruler. This arrangement set the pattern for government in the Muslim world after the Ottoman empire fell. Law became a tool of the ruler, not an authority over him. What followed, perhaps unsurprisingly, was dictatorship and other forms of executive dominance — the state of affairs confronted by the Islamists who seek to restore Shariah.

### **A Democratic Shariah?**

The Islamists today, partly out of realism, partly because they are rarely scholars themselves, seem to have little interest in restoring the scholars to their old role as the constitutional balance to the executive. The Islamist movement, like other modern ideologies, seeks to capture the existing state and then transform society through the tools of modern government. Its vision for bringing Shariah to bear therefore incorporates two common features of modern government: the legislature and the constitution.

The mainstream Sunni Islamist position, found, for example, in the electoral platforms of the Muslim Brotherhood in Egypt and the Justice and Development Party in Morocco, is that an elected legislature should draft and pass laws that are consistent with the spirit of Islamic law. On questions where Islamic law does not provide clear direction, the democratically chosen legislature is supposed to use its discretion to adopt laws infused by Islamic values.

The result is a profound change in the theoretical structure underlying Islamic law: Shariah is democratized in that its care is given to a popularly elected legislature. In Iraq, for example, where the constitution declares Shariah to be “the source of law,” it is in principle up to the National Assembly to pass laws that reflect its spirit.

In case the assembly gets it wrong, however, the Islamists often recommend the judicial review of legislative actions to guarantee that they do not violate Islamic law or values. What is sometimes called a “repugnancy clause,” mandating that a judicial body overturn laws repugnant to Islam, has made its way into several recent constitutions that seek to reconcile Islam and democracy. It may be found, for example, in the Afghan Constitution of 2004 and the Iraqi Constitution of 2005. (I had a small role advising the Iraqi drafters.) Islamic judicial review transforms the highest judicial body of the state into a guarantor of conformity with Islamic law. The high court can then use this power to push for a conservative vision of Islamic law, as in Afghanistan, or for a more moderate version, as in Pakistan.

Islamic judicial review puts the court in a position resembling the one that scholars once occupied. Like the scholars, the judges of the reviewing court present their actions as interpretations of Islamic law. But of course the judges engaged in Islamic judicial review are not the scholars but ordinary judges (as in Iraq) or a mix of judges and scholars (as in Afghanistan). In contrast to the traditional arrangement, the judges’ authority comes not from Shariah itself but from a written constitution that gives them the power of judicial

review.

The modern incarnation of Shariah is nostalgic in its invocation of the rule of law but forward-looking in how it seeks to bring this result about. What the Islamists generally do not acknowledge, though, is that such institutions on their own cannot deliver the rule of law. The executive authority also has to develop a commitment to obeying legal and constitutional judgments. That will take real-world incentives, not just a warm feeling for the values associated with Shariah.

How that happens — how an executive administration accustomed to overweening power can be given incentives to subordinate itself to the rule of law — is one of the great mysteries of constitutional development worldwide. Total revolution has an extremely bad track record in recent decades, at least in majority-Muslim states. The revolution that replaced the shah in Iran created an oppressively top-heavy constitutional structure. And the equally revolutionary dreams some entertained for Iraq — dreams of a liberal secular state or of a functioning Islamic democracy — still seem far from fruition.

Gradual change therefore increasingly looks like the best of some bad options. And most of today's political Islamists — the ones running for office in Morocco or Jordan or Egypt and even Iraq — are gradualists. They wish to adapt existing political institutions by infusing them with Islamic values and some modicum of Islamic law. Of course, such parties are also generally hostile to the United States, at least where we have worked against their interests. (Iraq is an obvious exception — many Shiite Islamists there are our close allies.) But this is a separate question from whether they can become a force for promoting the rule of law. It is possible to imagine the electoral success of Islamist parties putting pressure on executives to satisfy the demand for law-based government embodied in Koranic law. This might bring about a transformation of the judiciary, in which judges would come to think of themselves as agents of the law rather than as agents of the state.

Something of the sort may slowly be happening in Turkey. The Islamists there are much more liberal than anywhere else in the Muslim world; they do not even advocate the adoption of Shariah (a position that would get their government closed down by the staunchly secular military). Yet their central focus is the rule of law and the expansion of basic rights against the Turkish tradition of state-centered secularism. The courts are under increasing pressure to go along with that vision.

Can Shariah provide the necessary resources for such a rethinking of the judicial role? In its essence, Shariah aspires to be a law that applies equally to every human, great or small, ruler or ruled. No one is above it, and everyone at all times is bound by it. But the history of Shariah also shows that the ideals of the rule of law cannot be implemented in a vacuum. For that, a state needs actually effective institutions, which must be reinforced by regular practice and by the recognition of actors within the system that they have more to gain by remaining faithful to its dictates than by deviating from them.

The odds of success in the endeavor to deliver the rule of law are never high. Nothing is harder than creating new institutions with the capacity to balance executive dominance — except perhaps avoiding the temptation to overreach once in power. In Iran, the Islamists have discredited their faith among many ordinary people, and a similar process may be under way in Iraq. Still, with all its risks and dangers, the Islamists' aspiration to renew old ideas of the rule of law while coming to terms with contemporary circumstances is bold and



noble — and may represent a path to just and legitimate government in much of the Muslim world.

*Noah Feldman, a contributing writer for the magazine, is a law professor at Harvard University and an adjunct senior fellow at the Council on Foreign Relations. This essay is adapted from his book “The Fall and Rise of the Islamic State,” which will be published later this month.*

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