Constitutionalism Meets Islam
An Interview with Noah Feldman

The Al Noor Staff
Noah Feldman, the Felix Frankfurter Professor of Law Harvard Law School, specializes in constitutionalism and the relationship between religion and law. He received his B.A. in Near Eastern Languages and Civilizations from Harvard College, where he was awarded the Sophia Freund Prize as the highest-ranked undergraduate in his year. He received his doctorate in philosophy studying Islamic political thought as a Rhodes Scholar at Oxford University, and his J.D. from Yale Law School. Feldman was a senior advisor to the Coalition Provisional Authority in Iraq, helping to draft the country’s interim constitution after the fall of Saddam Hussein. He writes a weekly column for Bloomberg View, primarily dedicated to domestic and Middle Eastern politics. Feldman’s books on Islam and the Middle East include The Rise and Fall of the Islamic State (2012), and After Jihad: America and the Struggle for Islamic Democracy (2003).
ew law professors today can claim such diverse expertise or command so much respect as Noah Feldman. Impeccably qualified as a constitutional lawyer—he clerked for Justice David Souter after graduating Yale Law School in 1997—Feldman’s original interest was in the languages, religions, and politics of the Middle East. This dual expertise paid off in 2003, when at the age of 33 he became a leading voice in the construction of Iraq’s provisional constitution as a senior adviser to the Iraqi Governing Council. In 2005, Feldman received a Carnegie Corporation grant to study constitutional change in the Islamic world. His resulting book, *The Rise and Fall of the Islamic State*, which contended that sharia principles are popular in Muslim-majority countries largely because they secure individual rights and the rule of law, drew controversy as well as widespread praise for its originality and rigor. A sought-after
lecturer and a prolific columnist, Feldman has contributed to public discourse on a wide variety of subjects, from Sino-American relations to the Israeli-Palestinian conflict.

Professor Feldman met with the Al Noor staff on December 6, 2017.

A Discussion with Noah Feldman

You published a book in 2004, What We Owe Iraq, with the central argument that “having thrust Iraqis into this situation, we have an obligation to enable them to climb out of it.” What do we owe Iraq today and, by extension, what do we owe Syria to the extent that its problems have stemmed from instability in Iraq, and to the extent that we have involved ourselves in the conflict there?

Noah Feldman: Let me break that into two, because those questions are both challenging in their own right. With respect to Iraq, I think that we never fulfilled our obligation of creating a fully functioning Iraqi state, and part of the evidence for that is the way Iraq was so vulnerable to the ISIS-Daesh takeover of territory. That said, at least in the post-ISIS period it seems like Iraq has a reasonable shot of being at least an effective sovereign state within its own territory. To that extent, I would think that we didn’t have further ongoing obligations with respect to establishing sovereignty. I think that our help with defeating ISIS was necessary; the Iraqi government asked for assistance—primarily air support—and we provided it. It was their choice whether to ask, but we did have an obligation to say yes and we complied with that obligation. I think the Iraqi government has made it very clear to us that they don’t want our participation or intervention in the form of their government and so it’s appropriate for us to be hands-off with respect to internal Iraqi governance.

Now, the Syria question. Syria is a very different situation, because there the US isn’t primarily responsible for the collapse of the state. I don’t mean that our policies didn’t contribute indirectly by adopting a kind of middle-ground policy that did not take the steps necessary to remove Bashar Al-Assad, but did support various parts of the opposition enough to keep the conflict going. We, unintentionally I believe, contributed to the continuation of the civil war, which created conditions for the rise of Daesh. but I don’t think we caused the structure of state collapse. I think that was caused by the combination of the Sunni rising against Bashar and Bashar’s harsh military response to it. The country was cast into a civil war very much by the exercise of the mutual political agency of those actors. So I don’t think the structure of our obligations is really analogous to the way our obligations existed in Iraq where we broke the regime and therefore had an ethical responsibility for what happened later. I think any bystanding country that cares about human life ought to help out if they see something like the tragedy created by Daesh. I also think that if it’s possible for outside countries to be helpful in a circumstance where a country is riven by a terrible civil war, they should—assuming that somebody reasonable is asking for it. I don’t think that the US had or has a clear answer as to how to solve the problems in Syria and I don’t think we have contributed in any substantial way to stabilization there.

Can you discuss your role as an advisor to the members of the Iraqi Governing Council in the creation of the Transitional Administration Law, and how that process was affected by compatibilities or incompatibilities between Western constitutionalism and traditional Islamic law?

Noah Feldman: Well, I would say that in retrospect it’s turned out that there was no incompatibility, at least in practice, between constitutionalism—and I wouldn’t call it Western constitutionalism because there are plenty of non-Western countries are effectively constitutionalist—and a serious commitment to Islamic values which are enshrined both in the Transitional Law and also in the ultimate Iraqi constitution. In fact, once in a while I hear someone, even sometimes someone in the government, refer to the contemporary government in Baghdad as the “secular Baghdad government” and it always makes me smile because of course it’s
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not a secular government. It’s a government run by politicians primarily from the Dawa Party, which was an Islamist Shia political party for many, many years. But because Iraq, for all of its many problems, has a roughly functioning constitutional government in which the presence of Islam is not the impediment to its success, it’s a kind of exemplar of the possibility of actual compatibility. And that I think is easy to forget. It’s especially easy to forget because Iraq has faced so many other problems, but the problems it has faced are not really problems that people would have predicted based on the potential conflict between Islam and democracy. So what I would say is that the formulations in the transitional law that insisted on the compatibility of democratic values and Islamic values, have I think worked insofar as we have not seen in Iraq, among the many other problems and conflicts, a major conflict over the relationship between Islam and democracy. People are committed to the idea of Islam and they’re committed to the idea of democracy, even if either may not be perfectly effectuated.

Do you believe that Middle Eastern countries have any special need for constitutional provisions protecting specific religious groups, or would you say the neutral framework typified by the First Amendment suffices in their case?

Noah Feldman: I don’t think that the US model—that is to say, a model in which we have both strong protection of religious liberty and also a constitutional separation between religion and government—is the model that almost anybody has adopted in the majority Muslim world, or frankly most of the rest of the world either. That’s true in the Middle East as well. Instead, the model there allows for an overt alignment between religion and government while, at least as written, insisting on protection of religious liberty for everybody including religious minorities.

So, bottom line: do you need that? You need that in Muslim countries, as you do in every country. I think the Universal Declaration of Human Rights makes that pretty clear. You need strong protections of religious minorities and that’s true as a normative constitutional matter, it’s also true in practical terms. In any country where there exists a majority of people belonging to one particular religion, you need protection of the religious minority and you need it to be enshrined and institutionalized in order for to have any chance of it being respected. Of course, you can write it and nobody will follow it—that happens also sometimes, but it definitely does need to be written. I don’t think that’s distinctive or unique to a majority Muslim country, I think you need protection of religious liberty in a majority Hindu country for a Muslim minority, you need it in a majority Jewish country for Muslim or Christian minorities, and you need it in a majority Muslim country for non-Muslim minorities.

In the United States, protection for religious liberty takes the form of an abstract constitutional principle, defined by its application in specific cases. But Lebanon, for instance, has a confessional system of government with parliamentary quotas for different groups. So in a country where the religious or ethnic minorities are more discreetly defined, do you think there’s any additional need for constitutional language addressing them by name?

Noah Feldman: There’s always interplay between the way the constitution is written and the way things work on the ground. In the U. S. you’re right to say that, as written, we have an abstract protection but we also have tremendous religious diversity in this country, which as a structural matter helps protect religious liberty. In Lebanon, the confessional system is not actually written into the formal constitution;
you have to look at external documents like the Taif Accords for the unwritten norms of the confessional structure to find it. But there the structural realities of the division of power in society plays some role in what I wouldn’t call “religious liberty,” but at least a balance of religious institutions.

I never think that it’s better a priori to have something written or not, or that it’s better to have something abstract or better to have something concrete. It’s all about the way it actually works on the ground. The British constitution remains one of the world’s greatest, but it doesn’t have a single written document underpinning it. It has documents but there are many of them and their relationship is complex. The American innovation of a written constitution worked for us and it’s worked in some other countries, but we should never make the mistake of thinking it works just because it’s on paper. It works because it’s on paper and it’s also institutionalized in custom and practice and real world political balance.

How do you think that the Trump administration’s intention to move the United States embassy to Jerusalem will affect America’s and Israel’s position in the Middle East?

Noah Feldman: As of the time of this interview, as they say, today President Trump announced this plan to move the embassy and to recognize Jerusalem as the capital of Israel and there have been predictions of potential violence. My first part of the answer is that you'll know a lot more when this interview is published than we know now, and luckily my business doesn’t involve prophecy. That said, I will say that it’s hard to see what the substantial upside for the peace process was in making this move. Israel has been saying that it wants something like this, but it hasn’t made it an absolute requirement for anything going forward and, on the other hand, lots of countries in the region have said really clearly they don’t want it. So the first danger is that this could actually spark violence that could get out of control. As we know from other provocations involving Jerusalem—like Ariel Sharon’s visit in September of 2000 to the Haram esh-Sharif, the Temple Mount, which led to violence which eventually spiraled out of control and produced the Second Intifada—sometimes actions have unintended consequences. That’s the biggest worry that I have, that violence might actually substantially endanger the peace process.

If that doesn’t happen, the question becomes: how does the symbolic move affect the calculus on the ground for the parties? My guess, and it’s just a guess, is that it communicates to the Palestinians that Trump is willing to be more pro-Israel: even more than any previous president, which is saying a lot. That puts some pressure on the Palestinians to agree to a deal, lest Trump approve further annexation by Israel. It also puts some implicit pressure on Israel by saying “Hey, the Trump Administration has given you more than you ever thought you would get. If we put a credible deal on the table you had better not be the ones to say no to it.” So, there is a scenario where the message might enable the US to essentially dictate the terms of a deal. Having lived a long time in anticipation of the possibility of some kind of a deal, and having consistently seen it fail, I know two things. First of all, the probability of success is very small. Second, success will probably require very substantial behind-the-scenes US pressure on both parties. The question, then, is how much leverage the US has,
and we’re going to know a lot more about that in six months that we know now.

Last, we’d be missing a great opportunity if we didn’t ask you—as both a legal scholar and a specialist in American-Islamic relations—about what’s now the third iteration of the Trump administration’s travel ban, which the Supreme Court has allowed to stay in place while it undergoes review in the circuit courts. Through whatever lens you think is most productive, what are your thoughts on the ban and the judiciary’s role in assessing it?

Noah Feldman: There were two really bad things about the ban from the beginning. One was the symbolic islamophobia that it entailed and the other was the practical effects that it will have on actual human beings who can’t unify with family members. The first of those, the symbolic aspect of islamophobia, has I think been addressed pretty effectively by the courts by rejecting the first and second versions of the ban. The third version of the ban, though it’s still problematic and is in some relationship to what came before and could very reasonably be struck down on the same grounds, at least has backed away from the express, open islamophobia that accompanied versions one and two. Again, not perfect, but definitely a big improvement.

To my mind, even if the third version were to be ultimately upheld by the courts, which I hope it won’t be, I think the message would still have been sent very strongly that the administration and the government of the United States cannot openly embrace an islamophobic or other anti-religious or anti-ethnic or anti-national sentiment even when it’s addressing immigration, which is a topic in which the government has a lot of discretion. I hope and believe that the courts have made an important stand on behalf of equal protection and fair treatment for religious liberty in that regard. With respect to the second side, the practical side, this third version will have some, of the same bad effects as the earlier version. That remains unfortunate and I would like to see the ban struck down, but if it survives we’re going to find that it will be harder for Americans to visit those countries that are included in the ban but it also will create a real hardship for people from countries that remain listed countries to get into the US. That will go for students, it will go for family members, and unfortunately it will have a meaningful, practical consequence. I don’t think it’s going to make the United States substantially safer. The dangers of terrorism are not only external; they’re also internal to the United States and in a world where ideas travel, we’re just as vulnerable with immigration coming from these particular countries as we would be without it.