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“Legal Pluralism in an Islamic State: Reflections on the Afghan Constitution”

This paper addresses the importance of legal pluralism as an essential feature of Islamic government. Drawing on legal and political concepts from pre-modern Muslim systems and jurisprudence, the author explains the importance of differentiating between two types of law in an Islamic context: (1) “siyasa,” made by the state in furtherance of the public good; and (2) “fiqh,” made by religious legal scholars based on interpretation of the Qur’an and Sunnah. The separation of fiqh from siyasa has existed in Muslim societies for centuries, but has disappeared in the modern period. The European nation-state model of government, in which all lawmaking power is centralized with the state, has become the norm in most Muslim-majority countries, leaving most Muslims unaware of the classical history of fiqh as a separate legal sphere with different legal authorities. Without a clear differentiation of siyasa from fiqh, modern Muslim countries run the risk of “legislating” Shari’a, which eliminates the fiqh pluralism that was inherent to the fiqh realm and creates dangerous near-theocratic forms of government. The author articulates a way to translate the pre-modern fiqh-siyasa separation of powers into a contemporary model for Islamic constitutionalism and analyses some features of the current Afghan Constitution from this perspective.