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POLITICAL LEGITIMACY AND THE "PUBLIC GOOD" IN ISLAMIC JURISPRUDENCE

Adrian Kreutz

Abstract

Campaigns highlighting the alleged incompatibility of the Islamic polity with principles of democratic self-governance are longstanding. The basic assumption of the incompatibalist proposition runs as follows: Political legitimacy in Muslim polities can be reduced to a principle of conformity with a set of divinely given rules and norms, the Sharīʿa, occasionally supplemented, and interpreted, by Islamic legal scholars and practitioners. In short, political Islam recognizes the Sharīʿa and *Usūl al-fiqh* (or, for the purposes of this essay, *fiqh*, for short) as the Islamic polity's foundations—those are deemed incompatible with democratic participation. In response, Mohammad Fadel (2018) has argued that the legal instrument of *maṣlaḥa*, which Fadel summarizes as considerations of the "public good" or "general interest," can establish the democratic accountability mechanism that critics see missing in political authorities of Sharīʿa–grounded polities. Fadel supports this normative view with reference to some select classical Sunni jurisprudence, particularly the *Usūl al-fiqh*. I contest this view in two ways: Firstly, on a conceptual level, most thorough analyses of democracy acknowledge responsiveness and active involvement as fundamental components of democratic self-rule. Fadel's idea of *maṣlaḥa* does not entirely align with this notion. Secondly, from a doctrinal standpoint, Fadel's argument is confined solely within the classical Sunni context. That means, Fadel's argument is contingent upon a significant departure from numerous (potentially the majority) sources within a comprehensive lineage of *maṣlaḥa*.

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I. Introduction: Can *maṣlaḥa* solve the problem of political legitimacy?

Campaigns highlighting the alleged incompatibility of a Sharīʿa polity with principles of democratic self-governance are longstanding.[1] The basic assumption of the incompatibalist proposition can be outlined as follows: Political legitimacy in Islamic polities can be reduced to a principle of conformity with a set of divinely given rules and norms, the Sharīʿa, occasionally supplemented by, and always interpreted through, Muslim legal scholars and practitioners.[2] In short, political Islam contains the Sharīʿa and *Usūl al-fiqh* (or, for the purposes of this essay, *fiqh*, for short) as the Islamic polity's jurisprudential foundations.

On most established accounts of Islamic jurisprudence, political legitimacy within the Islamic polity stems from the establishing of coherence with, and abidance to, these norms through political means, i.e., through governance.[3] Abidance to norms through governance, it has been suggested, precludes meaningful democratic political participation: either democratic participation is redundant, because the individual's conduct already aligns with the norms (assuming that the citizenry is the devout Muslim community) or it precludes democratic participation if the norms imposed by governance are not aligned with accepted interpretations of Sharīʿa (rendering those imposed norms *ultra vires*). Some commentators claim to have identified this misalignment in the events of the "Arab Spring."[4]

With reference to some select pre-modern Sunni context, Mohammad Fadel has argued that the legal instrument of *maṣlaḥa*, i.e., considerations of the "public good" or "general interest," offers a potential remedy to the argument of democratic deficit: As the concept of *maṣlaḥa* has long been utilized within the Islamic legal tradition to foster democratic participation, Fadel argues that Political Islam and democracy can be reconciled.

I challenge this view, not to highlight the incompatibility of Political Islam with substantive democratic values, but to look into the broader genealogy of

1. For a popular discussion of the incompatibility argument, *see, e.g.*, Khaled Abou El Fadl, Islam and the Challenge of Democracy (2003).

2. I admit, this can perhaps be seen as an ahistoric and overly simplistic conception of political legitimacy in this context, but it serves as shorthand for the subsequent discussion. A more thorough and complex discussion, considering the literature on Siyasa Sharīʿa, for instance, is required than what I can deliver in this short paper, so for now this narrow view will suffice.

3. *See* Muhamad Nazeer Ka Ka Khel, *Legitimacy of Authority in Islam*, 19(3) Islamic Stud. 167–182 (1980); Hamid Behzadi, *The Principles of Legitimacy and the Principle of Influence Upon the Muslim Political Theory*, 10(4) Islamic Stud. 277–90 (1971); Mehdi Mozaffari, *Authority in Islam: from Muhammad to Khomeini*, 16(4) Int'l J. Pol. i–127 (1986).

4. *See* Bassam Tibi, The Sharia State: Arab Spring and Democratization (2013); Valentine M. Moghadam, *What is Democracy? Promises and Perils of the Arab Spring*, 61(4) Current Socio. 393–408 (2013).

the legal concept of *maṣlaḥa*, I argue that jurisprudential discussions relating to *maṣlaḥa* have focused on the recognition of an ethical "good," i.e., that *maṣlaḥa* answers to ethical concerns on the part of the ruler.[5]

I contest this view in two ways. Firstly, on a conceptual level, most thorough analyses of democracy acknowledge responsiveness and active involvement as fundamental components of democratic self-rule. Fadel's idea of *maṣlaḥa* does not entirely align with this notion. Secondly, from a doctrinal standpoint, Fadel's argument is confined solely within the pre-modern Sunni context, thereby contingent upon a significant departure from numerous (potentially the majority) sources within a comprehensive lineage of *maṣlaḥa*.

I begin by outlining Fadel's interpretation of *maṣlaḥa*, emphasizing its roots in the pre-modern Sunni context. I then proceed to both support and challenge this interpretation by examining the broader historical trajectory of this legal concept. Through this exploration, I identify two fundamental aspects relating to *maṣlaḥa*: Firstly, the primary function of *maṣlaḥa* is that of an ethical principle, urging decision-makers to consider the broader ethical "good." Secondly, I note the absence of a political dimension within the *maṣlaḥa* framework that could address Fadel's proposed democratic solution. I conclude that while *maṣlaḥa* underscores the importance of ethical considerations, it typically does not encompass pivotal aspects of democratic governance such as responsiveness, representation, and direct participation.

II. *Maṣlaḥa* in pre-modern Sunni Islam.

Mohammad Fadel has dedicated considerable effort to exploring various facets of pre-modern Sunni Islam. In a prior publication, Fadel contended that existing scholarly discourse implies the absence of a coherent theory of political legitimacy within Sunni political thought. Instead, he proposes that the works of pre-modern Sunni jurists and theologians predominantly offered retrospective justifications for the prevailing socio-political order.[6]

5. For the ethical reading, *see* Rami Koujah, *Maṣlaḥa as a Normative Claim of Jurisprudence*, *in* Locating the Sharī'a: Legal Fluidity in Theory, History and Practice 127–50 (Sohaira Siddiqui ed., 2019). To be clear, Fadel's claim is not that under all understandings of *maṣlaḥa*, political Islam is compatible with democracy. Instead, his claim is that there are resources that make political Islam compatible with democracy in the premodern Sunni tradition. I agree with that, but I challenge the ethical over the political reading proposed in this argument by widening the view, distinguishing between doctrinal and conceptual readings. Some may respond that Fadel is clearly a modernist, and so do I position this essay, too, so why would a disagreement with classical sources be a counterargument? In response, I say that the purpose of this essay is not to challenge the modernist view by pointing out incompatibilities with the classical view, but rather to carve out the ethical and political connections and differences in both, moving in small steps towards a more global understanding.

6. Mohammad Fadel, *State and Sharia*, *in* The Ashgate Research Companion to Islamic Law 93–107 (Peri Bearman & Rudolph Peter eds., 2014).

In a later text, however, Fadel qualifies his previous conclusions and suppositions.[7] The legitimating idea of pre-modern Sunni political thought, he argues, was centrally one of agency in the pursuit of the Muslim community's "common good." The ruler, along with all subordinate public officials, was expected to wield their authority while keeping in mind the broader interests of the Muslim community. Thus, whoever possessed political power did so with the duty to serve the community.

In his most recent paper, Fadel takes this proposition further and explores "the practical political implications that flow from this notion of political legitimacy."[8] He argues that an electoral democratic regime best suits the pre-modern Sunni ideals of political legitimacy. This democratic structure, Fadel thinks, will "make effective the Sunni ideal of self-government under the ideals of divine law."[9] As such, the Sunni ideal of self-governance serves as the essential link connecting Political Islam with democracy.

The polity's structure and hierarchies are envisioned and qualified with reference to the jurisprudential work of Ibn ʿAbd al-Salām, who argued that moral obedience arises if "the recipient of the command ascertains that revelation permits the command."[10]

For Fadel, Ibn ʿAbd al-Salām's statement suggests a democratic accountability mechanism, however one that limits legitimate authority to Imams, judges and rulers who hold the right moral entitlement. Obedience on this view, says Fadel, "is only due to a legitimate ruler, and a ruler's commands are legitimate only to the extent that they do not contravene Islamic law."[11]

This presupposes that pre-modern Sunni jurisprudence was responsive to matters of legitimacy. Whether this recognition of legitimacy and obedience already amounts to a robustly political concept can be questioned. Fadel himself recognizes that this alleged duty to obey must be conceived as first and foremost a *moral* duty—a moral duty that derives from the divine law. Although perhaps only a moral demand, in any case the basic assumption that authority needs legitimation—the seeds of concerns for political legitimacy—had clearly been recognized, argues Fadel:

> How are we to know whether a person who purports to command us is in fact a legitimate Imām, judge or ruler, and therefore entitled to our obedience, or if he is just an ordinary person, or even worse, a thug, and accordingly, is owed

7. Mohammad Fadel, *Islamic Law Reform: Between Reinterpretation and Democracy*, 18(1) Y.B. Islamic and Middle E. L. Online 44–90 (2017).

8. Mohammad Fadel, *Political Legitimacy, Democracy and Islamic Law: The Place of Self-Government in Islamic Political Thought*, 2(1) J. Islamic Ethics 61 (2018).

9. *Id.*

10. ʿIzz al-Dīn Ibn ʿAbd al-Salām, 2 *Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām* 157.

11. Fadel, *supra* note 8, at 64.

> no duty of obedience, therefore became a matter of urgency for Sunnīī thinkers. It is the function of the Sunnīī theory of the caliphate to answer this question.[12]

Within the Sunni context, then, Fadel argues that political rules were crucial not on their own, but because those rules, the argument goes, "enabled the community to live out its moral ideals."[13] The creation of the state, and the hierarchies of ruling, the Sunni community considered a necessity. The creation of the political state "provided the only realistic means for the achievement of the ends that Islam imposed on Muslims, collectively and individually."[14] Those obligations thereby created were qualifiedly *political*, argues Fadel, because those demands were obligations that are teleologically-charged—unlike the demand for prayer, for instance, political obligations were created *not only for their own sake*.[15] Rather, argues Fadel,

> Sunniīs were able to take this theologically tolerant and inclusive position because of their belief that the unity and continuity of the community was a result of its common adherence to the rules of Islamic law.[16]

Fadel persists in drawing from the Sunni context a collection of principles that are being posited as constituting a normatively significant theory (or, at the very least, a normatively significant concept) of political legitimacy. An analysis of the Sunni jurist texts, and particularly al-Aḥkām al-Sulṭāniyya, must result in the following normative conclusions:

> First, creation of the political order is a collective obligation (*farḍ kifāya*), and no individual Muslim may decline to accept his role in that community. (al-Māwardī n.d., 17). Those who refuse to accept the legitimacy of the political order, at least in certain circumstances, can be legitimately fought as rebels (*ahl al-baghy*) and coerced into obedience (al-Māwardī n.d., 74).
>
> Second, although recalcitrant parties may be coerced into the contract, the contract's terms must be reasonably beneficial to all the contracting parties. This feature of the contract is reflected in several features of its provisions. For example, the electors, *ahl al-ḥall wa'l-ʿaqd*, do not act in a personal capacity, but rather are expressly charged with acting in a representative capacity on behalf of the entire Muslim community.[17]

From this, we might infer that the Sunni political structure possessed a robust understanding of political legitimacy. However, the above observation alone does not yet vindicate "the Sunnīī ideal of self-government as articulated

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12. *Id.*
13. *Id.* at 63.
14. *Id.*
15. This assumption is grounded in Fadel's reading of al-Ghazālī, Abū Ḥāmid Muḥammad b. Muḥammad. *See* Iḥyāʾ ʿUlūm al-Dīn Vol 1. 28–29 (Dār al-Kutub al-ʿIlmiyya 1986).
16. Fadel, *supra* note 8, at 63.
17. *Id.* at 65.

in the ideal theory of the caliphate."[18] Yet, Fadel suggests, the notion of accountability does.

To that end, Fadel retraces the roots of the concepts of accountability within, again, the pre-modern Sunni context. The argument asserts that if the caliph and other public representatives serve as advocates for the collective welfare, then it stands to reason that the Muslim community holds "an inalienable right to hold its agents accountable for their actions."[19]

From a doctrinal perspective, Fadel discusses two versions of accountability anchored in the textual sources—unrestricted agency (*wikāla muṭlaqa*) and restricted agency (*wikāla muqayyada*)—and concludes that

> [t]he ideal of agency therefore places inherent moral limits on how political power can be used: it can only be used for ends that are lawful and reasonably calculated to be beneficial to the public as determined from the internal perspective of Islamic law. But the ideal of agency does more than limit the power of the state: it also authorizes the state to act in furtherance of the common good, even if it means compelling those under its jurisdiction in circumstances where they would not otherwise be bound.[20]

The final step of Fadel's project of unearthing the traditional root of democracy in Sharīʿa-grounded polities is to propose that these two forms of accountability mechanism give

> the public the freedom, through the exercise of its collective deliberation, to choose how it operationalizes various provisions and values of the Sharīʿa in positive law in relation to its own determination of its own rational good (*maṣlaḥa*).[21]

We observe that, according to this perspective, the determination of the concept of *maṣlaḥa* is rooted in and overseen by the governed rather than being the sole concern of those in positions of governance. This, indeed, indicates what is commonly regarded as a democratically governed populace.

The mechanisms of accountability, argued Fadel, will eventually give rise

> to the Islamic justification for elections and democratic choice of rulers: [. . .] "the people," must have an effective means of holding its representatives accountable for their actions in a fashion that is consistent with the public's right to a peaceful and stable public order.[22]

The combination of those accountability mechanisms, alongside the empowerment of the governed with the responsibility for *maṣlaḥa*, constitutes the democratic core of Fadel's proposal. He reinforces the democratic nature of this arrangement with the following observation:

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18. *Id.* at 68.
19. *Id.*
20. *Id.* at 67.
21. *Id.* at 59.
22. *Id.* at 70.

> [. . .] the Quran expressly praises the practice of mutual deliberation as a means to resolve disputed questions of the common good. (al-Shūrā, 42:38). It even commanded the Prophet Muḥammad, despite his status as a prophet, to consult his companions before resolving any matter of public concern. (Āl ʿImrān, 3:159).[23]

III. The History of *Maṣlaḥa* outside pre-modern Sunni Islam

Fadel implies that in classical Sunni Islam, *maṣlaḥa* primarily manifested as an accountability mechanism, involving collective deliberation and agency in implementing the values and provisions of the Sharīʿa within the political sphere. This, indeed, mirrors a strong and robust understanding of democratic life, structured along the lines of direct participation, representation, and accountability.

Fadel's account is perhaps not far removed from what is commonly perceived as the foundation of Sunni Islam. Muslims who questioned personal leadership and advocated for a more meritocratic concept of legitimate authority, emphasizing the necessity for authorities to demonstrate excellence (*faḍl*), eventually became known as *ahl al-Sunnia wa'l-jamāʾa*, or the Sunnis.[24] At the same time, the Sunni theology rejected the political perfectionism of the Shīʿa, which foreclosed *faḍl* (the attainment of a degree of excellence) from large swaths of the Muslim community. The foundations of democratic principles are undeniably embedded within the theological ethos of Sunni Islam.

Both within and without the Sunni tradition, however, key-judiciaries commonly held a more restricted view of *maṣlaḥa*. According to Wael Hallaq, the concept of *maṣlaḥa* appeared in Islamic legal discourse some time at the end of the third century.[25] In fact, Hallaq and numerous modern scholars have examined the significance of *maṣlaḥa* in both Sunni and non-Sunni jurisprudential traditions.[26] Perhaps the most comprehensive treatment of *maṣlaḥa* can be found in a Shīʿa text, the Kitāb al-Muwāfaqāt, a treatise on the principles of Islamic law written by the Andalusian scholar Ibrāhīm b. Mūsā al-Shātiḅi.[27] The argument presented there posits that *maṣlaḥa* is universally ingrained in all Islamic legal judgments and stands as one of the fundamental principles for preventing *mafsada*, or "harm."

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23. *Id.* at 72.

24. *See* Bernard Weiss, *Esotericism and Objective in Islamic Jurisprudence*, 1(1) Islamic L. and Juris. 53–71 (1990).

25. *See* Wael B. Hallaq, The Origins and Evolution of Islamic Law (1994); Daniel Brown, Rethinking Tradition in Modern Islamic Thought (1996).

26. For a comprehensive contemporary analysis, *see* Felicitas Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*, 12(2) Islamic L. and Soc'y 182–223 (2005).

27. *See* Ahmad al-Raysuni, Imam Al Shatibi's Theory of the Higher Objectives and Intents of Islamic Law (2005).

Many of the relevant discussions within the historical primary sources gravitate towards an epistemic question: Is it at all possible for the human intellect to discern *maṣlaḥa*, particularly where the scriptural sources of the law are imprecise or missing? This question falls into a wider jurisprudential discussion about the necessity of concrete indication in the Qur'an, the Sunnia, and the Ijmd.[28] The Kitāb al-Muwāfaqāt, for instance, assured that *maṣlaḥa* could be found without concrete indication. Yet, the numerous methods of discerning *maṣlaḥa*—a *maṣlaḥa* that also remains aligned with divine will—remained an enduring and ongoing subject of jurisprudential debate.[29]

On the question of who "holds" *maṣlaḥa*, however, the sources are surprisingly univocal. The Shīʿa sources discussed in the secondary literature, and many of the Sunni sources quoted elsewhere, suggest that *maṣlaḥa* must be arrived at through a jurisprudential process of discovery, independent juristic reasoning (*ijtihad*), or in other words, a *ratio legis*. As Opwis has argued with reference to the key-judiciaries above:

> The logic of formal and substantive rationality is displayed with regard to the concept of maṣlaḥa in the following manner. A jurist who emphasizes formal reasoning in order to attain a ruling that approximates legal certainty incorporates considerations of maṣlaḥa primarily into the procedure of legal analogy; whereas a jurist who tends toward substantive rationality employs maṣlaḥa as an independent standard to which a legal ruling has to conform.[30]

In the jurisprudential discourse, there are naturally numerous disagreements regarding which values should form the basis of this *ratio legis*.[31] According to al-Butil, for instance, the jurist will arrive at the correct *maṣlaḥa* by constructing a weighted means of five essential necessities of human existence.[32] Malcom Kerr, on the other hand, argued, that contemporary jurisprudents like Rashid Rida, who were active after the early reformist movement, challenged the predominant accounts al-Butil and al-Tuft, which the reformers considered unduly utilitarian.[33]

Beyond the doctrinal differences, this goes to say that outside the narrow scope of the Sunni jurisprudence referenced in Fadel's argument, authority over *maṣlaḥa* itself was strongly tied to the jurists. On this view, and contrary to Fadel's account, the *maṣlaḥa* becomes an ethical concern *of* the ruler *towards* the ruled.[34] This view, then, suggests a preclusion of the ruled from directly

28. *See* Fadel, *supra* note 7.
29. *See* Opwis, *supra* note 26.
30. *Id.* at 190.
31. Hallaq, *supra* note 25, at 112.
32. Opwis, *supra* note 26, at 216.
33. Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida*, 62(3) Am. Pol. Sci. R. 153–223 (1966).
34. This aligns with Koujah, *supra* note 5 at 127–50. Koujah reads *maṣlaḥa* as a normative, yet ethically normative, claim within Islamic jurisprudence.

shaping the *maṣlaḥa*—which otherwise would be, indeed, a sign of democratic participation.

Similarly, Bernard Lewis has posited that classical Muslim jurisprudence restricts the scope of *maṣlaḥa* strictly to that of a legal instrument—the instrument of *maṣlaḥa* would help the jurist deduce new rules and norms from textually unregulated grounds. Hence, on Lewi's view, *maṣlaḥa* is effectively an extension of the practice of *fiqh*. Only modern scholars, argues Lewis, have tried to bestow the concept of *maṣlaḥa* with a broader meaning and political function. In this modern capacity, argued Lewis, *maṣlaḥa* has often been mentioned in questions concerning the development of modern Muslim-majority nation-states.[35] However, Lewis thinks this modern intervention is wrong: "The idea of people participating not just in the choice of a ruler but in the conduct of government, is not part of traditional Islam", he says.[36]

IV. Conclusion

In conclusion, historical jurisprudential debates surrounding *maṣlaḥa* have primarily revolved around the acknowledgment of an ethical "good", indicating that *maṣlaḥa* addresses ethical considerations on the part of the ruler. However, beyond this ethical aspect, the *maṣlaḥa* framework lacks a distinct political dimension. The ethical concern of *maṣlaḥa* is not usually recognized to account for central elements of democratic life, like responsiveness, representation, and direct participation.

Mohammad Fadel's suggestion for a normative democratic solution follows a line of thought that Bernard Lewis has identified as a distinctly modern occurrence in Islamic discourse: the attempt to reconcile traditional Islamic jurisprudence with contemporary ideals of democratic governance. Fadel's proposal shows how Sunni sources can effectively support the compatibility of (some) traditional Islamic jurisprudence with the (some) central values of democratic life, especially the accountability relations between ruler and ruled. However, many other values that are typically mentioned in the conceptual analysis of democracy—representation, for instance, or direct access to decision making processes—have not been discussed or located within those historical sources.

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35. *See, e.g.*, Nathan J. Brown, *Shari'a and State in the Modern Muslim Middle East*, 29(3) Int'l J. Middle E. Stud. 359–376 (1997); Aharon Layish, *The Transformation of the Sharī'a from Jurists' Law to Statutory Law in the Contemporary Muslim World*, 44(1) Die Welt des Islams 85–113 (2004); Abdullahi Ahmed An-Nacim, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73(1) Mod. L. Rev. 1–29 (2010).

36. Bernard Lewis, *Freedom and Justice in the Modern Middle East*, 84(3) Foreign Affairs 40 (2005).

What is more, Fadel's argument is not only conceptually limited, but limited to the pre-modern Sunni context, too. I therefore think that Fadel's compatibility conclusion should be restricted both in its historical breadth and normative impact. In essence, although certain traditional sources may align with the compatibility thesis, they are confined to a particular era of Islamic thought and do not encapsulate the broader, diverse landscape of Islamic jurisprudence.