On Democracy as a Shar'I Moral Presumption:
Response to Khaled Abou El Fadl

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Abstract

Khaled Abou El Fadl has done more in his Article than simply argue the possibility of democracy in the Muslim world. He reminds us that Islam is not a monolithic idea lacking varying contours, possibilities, and dispositions. Whether in talking about an Islamic legal system or an Islamic political system, the most frequent mistake is assuming that there is an ideal vision of such systems that precludes debate, difference, and the continued search for possibilities. Another common mistake is to presume that the limits of an "Islamic political system" are inherent in the existing practice of so-called Muslim States. To generalize from the mere examples of modern Muslim Nation-States is to take away the dynamism of an intellectual tradition that has generated debate and discourse extending well beyond the existence of Muslim Nation-States in the modern world. Abou El Fadl's argument suggests that when one discusses the relationship between Islam and democracy, one necessarily argues in the expansive arena of ideas. Moreover, by positing democratic institutions as possibilities within an Islamic context, Abou El Fadl makes room for dynamism, difference, and debate within the empirical context. Central to Abou El Fadl's argument is the need for Muslims to make a premoral commitment to democracy. Such a premoral commitment is not simply a function of political expediency or opportunism. Rather, as the Islamic tradition suggests, the human agent plays a significant role in the determination of that premoral commitment on the basis of a rational investigation into the various signs of God's creation. Whether one inquires into law or political science, Shari'ah's discourses empower the human agent to come to terms with the Divine Will in light of the totality of existence and creation. The resulting governmental structure may not necessarily be what God wills, but that is not what humanity is obligated to determine. We are charged with the search. And as Abou El Fadl rightly points out, the search for the harmony between Islam and democracy begins with a premoral commitment to democracy.

ON DEMOCRACY AS A SHAR'I MORAL PRESUMPTION: RESPONSE TO KHALED ABOU EL FADL

*Anver M. Emon**

Khaled Abou El Fadl has done more in his Article than simply argue the possibility of democracy in the Muslim world. He reminds us that Islam is not a monolithic idea lacking varying contours, possibilities, and dispositions. Whether in talking about an Islamic legal system or an Islamic political system, the most frequent mistake is assuming that there is an ideal vision of such systems that precludes debate, difference, and the continued search for possibilities. Another common mistake is to presume that the limits of an "Islamic political system" are inherent in the existing practice of so-called Muslim States. To generalize from the mere examples of modern Muslim Nation-States is to take away the dynamism of an intellectual tradition that has generated debate and discourse extending well beyond the existence of Muslim Nation-States in the modern world. Abou El Fadl's argument suggests that when one discusses the relationship between Islam and democracy, one necessarily argues in the expansive arena of ideas. Moreover, by positing democratic institutions as *possibilities* within an Islamic context, Abou El Fadl makes room for dynamism, difference, and debate within the empirical context.

Clearly, Muslim countries today have an interest in bringing Islam into their constitutional and political orders. Numerous countries with majority Muslim populations provide explicitly in their constitutions that Islamic law [Shari'ah] is either *a* source or *the* source of law.[1] Syria's constitution stipulates that the pres-

1. *See, e.g.*, BAHRAIN CONST. art. 2; COMOROS CONST. pmbl.; EGYPT CONST. art. 2; IRAN CONST. art. 4; KUWAIT CONST. art. 2; MALDIVES CONST. art. 38; OMAN CONST. pt. 1,

ident of the country must be Muslim.[2] Saudi Arabia's Basic Law
not only makes the Qur'an and Sunnah of the Prophet Muham-
mad foundational documents of its legal system, but also invokes
the Islamic principle of enjoining the good and forbidding the
evil [*al-amr bi al-maʿruf wa al-nahy ʿan al-munkar*] as a motivating
principle of government and society.[3]

The role of Shariʿah is of both symbolic and substantive
value in these societies. Shariʿah, vulgarly translated as Islamic
law, is a system of thought that aspires to address all aspects of
human behavior. It deals not only with substantive law, but also
with the ways we think in light of various indicators around us.
Such indicators include sacred texts, such as the Qur'an and
Sunnah, but they can also include other aspects of creation.
God consistently reminds Muslims that the truth He wants Mus-
lims to understand can be found and understood through the
various signs of creation.[4] To read Shariʿah as simply dealing
with "law" in the positivist sense of the term is therefore reduc-
tive.

In a sense, Shariʿah's discourses reflect similar patterns of
thought and function to those found in contemporary debates
on virtue ethics and natural law theory. For Aristotle, virtue
guides a person's dispositions, which are themselves grounded
in human nature. Nature provides the moral foundation for the
normativity of virtue, as well as the possibilities among which
humans make moral choices.[5] Virtue exists in man by reason of
his nature as man, but virtue alone does not make for moral
choice. Virtue sets in man dispositions toward behavior, and act-
ing together with prudence, yields positive behavior. As Aristotle
states: "Virtue then is a settled disposition of the mind determin-
ing the choice of actions and emotions, consisting essentially in
the observance of the mean relative to us, this being determined
by principle, that is, as the prudent man would determine it."[6]
Alisdair MacIntyre, relies heavily on the Aristotelian model of

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art. 2; QATAR CONST. art. 1; SAUDI ARABIA CONST. art. 3; SUDAN CONST. art. 65; SYRIA
CONST. art. 3(2); UNITED ARAB EMIRATES CONST. art. 7; YEMEN CONST. art. 2.

    2. SYRIA CONST. art. 3(1).

    3. BASIC LAW OF SAUDI ARABIA art. 23.

    4. *See, e.g.,* QUR'AN 2:118, 145, 248; 3:41, 49; 5:114; 6:4, 25; 7:106-07; 10:96-97.

    5. ALISDAIR MACINTYRE, AFTER VIRTUE (1984).

    6. ARISTOTLE, THE NICOMACHEAN ETHICS 41 (Harris Rackham trans., Wordsworth
Editions Limited 1996).

dispositions to assert the existence of virtues.[7] He writes about the importance of the social roles people play and how such roles can provide a basis for the determination of morality. Such roles establish what might be called dispositions, i.e., dispositions of what someone in that particular role would do under certain circumstances. For MacIntyre, the moral agent is one who is immersed in a social context. It is that social context that produces both the dispositions of the individual and the moral foundation upon which such dispositions lead to normative behavior. The soul is therefore very much connected to its social context; it is that context which provides both the normative foundation and epistemological objectivity of moral action. MacIntyre seems to suggest that virtues like justice, for example, do change in content with changed circumstances and times. Such change and difference does not undermine the enduring value of notions of justice.[8]

In many ways, Abou El Fadl's argument about democracy follows similar lines of thought. To follow God's command and to look to nature for His will and guidance makes nature a basis for further moral determinations. The knowledge of democracy, as a virtue, can be inductively gleaned from the vast array of human experience. Human nature and its experience provide both the context of analysis, as well as the foundation for the normativity of democracy as a virtue.

Thus, the point here is that just as virtue ethicists may look to nature to provide guidance on the determination of virtues, such as justice or democracy, God has instructed Muslims to make a similar inquiry in order to understand His will. Shari'ah is not simply about weighing and balancing competing precedents of law in positivist fashion. It is a process that, by a foundational sense of nature, guides one in the construction and determination of moral action in light of the totality of circumstances presented.

Premodern Muslim jurists argued that the natural dispositions within humanity can be the basis for establishing the grounds of moral behavior. For example, the premodern jurist al-Dabbusi (d. 430/1039) writes that acts are presumptively permissible. To justify his point, he relies on a theory of human

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7. *See* MacIntyre, *supra* note 5.
8. Alisdair MacIntyre, Whose Justice? Which Rationality? (1988).

nature that posits nature as a normative foundation for obliga-
tion. He states:

> God places in [human] nature dispositions from among the
> desires such that rational animals engage in certain acts by
> reason of the law of nature. When we notice this fact from
> those things we do by nature, which constitute the substance
> of life experiences, then it is not permitted to say that [what
> we are] disposed to is prohibited, except by counter evidence
> that changes the rule of the situation. So permissiveness is
> the fundamental presumption [of obligation] and prohibi-
> tion is a rebuttal [of that presumption] except when what is
> considered a right of ours conflicts with an obligation upon
> us. It is in this sense that we described permissibility.[9]

Contemporary virtue ethics have been criticized for failing
to provide clarity on the notion of moral obligation. While
MacIntyre writes in support of Aristotelian notions of disposi-
tions, teleology, and virtue, he has been criticized for failing to
adequately theorize about how one actually makes moral deci-
sions.[10] In the quest for an Islamic democracy, Muslims are
forced, according to Abou El Fadl, to make a moral commitment
to democracy. From that starting point, they make decisions
that obligate them to certain behaviors in light of the various
historical possibilities within the Islamic tradition. I would argue
that the commitment to democracy is not a moral commitment
that necessarily implies obligation, but rather guides subsequent
interpretation in light of particular contexts and circumstances.
Thus, obligation arises only after the virtue of democracy has
been established. Following John Finnis and Germain Grisez,
one might call the commitment to democracy a premoral com-
mitment.[11] The commitment to democracy in and of itself does
not carry obligations for humanity. Rather, it is a disposition to-
ward human governance that sets in motion a variety of interpre-
tive processes that result in obligations consistent with the com-
mitment to democracy. These later interpretive processes are
what Finnis, Grisez, and others would call practical reasoning,

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9. ABU ZAYD 'UBAYD ALLAH B. & 'UMAR B. 'ISA AL-DABBUSI AL-HANAFI, TAQWIM AL-
ADILLA FI USUL AL-FIQH 449 (Khalil Muhyi al-Din al-Mis ed., 2001).

10. *See, e.g.*, Russell Hittinger, *Natural Law and Virtue: Theories at Cross Purposes, in*
NATURAL LAW THEORY: CONTEMPORARY ESSAYS, 42-70 (Robert P. George ed., 1992).

11. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 101-03 (1993); 1 GERMAIN
GRISEZ, THE WAY OF THE LORD JESUS 115-40 (1997).

which leads to moral decision-making.[12] It is only through the application of context-sensitive practical reasoning that moral decisions are made about rights, duties, and obligations. Finnis states:

> The principles that express the general ends of human life do not acquire what would nowadays be called a 'moral' force until they are brought to bear upon definite ranges of project, disposition, or action, or upon particular projects, dispositions, or actions. How they are to be brought to bear is the problem for practical reasonableness.[13]

Notably, Finnis and Grisez do not adopt the Aristotelian approach to virtue and obligation that is rooted in nature as a moral foundation. They rely on an intuitive sense of virtue which presumes that such virtues are self-evident. Effectively, Finnis and Grisez do not offer a theory of virtue, as does MacIntyre, but rather they offer a theory of practical reasoning which, in a sense, compliments a theory of virtue by providing a mechanism for moving beyond virtue to moral obligation.

Beyond the human determination of the virtue of democracy lies the determination of moral action in light of that commitment to democracy. Muslim jurists have argued about the role of the human agent in the determination of good and evil. At the heart of their debates on good and evil was the question of moral obligation. In much of the contemporary literature on this issue, scholars identify this issue as a theological one, and further argue that premodern Muslim theologians broke down into two camps. On the one hand were the voluntarists who argued that good and bad were functions of God's legislation. If God commands X, then X is by definition good, and hence obligatory. If He prohibits Y, then Y is by definition evil, and hence prohibited. On the other hand were the ethical rationalists, who held that humans can make rationally based determinations of good and evil where there is no revelational scripture.[14]

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12. *See* FINNIS, *supra* note 11, at 100-33; *see also* GRISEZ, *supra* note 11, at 178-83. *See generally* MARK C. MURPHY, NATURAL LAW AND PRACTICAL RATIONALITY (2001); MARTIN RHONHEIMER, NATURAL LAW AND PRACTICAL REASON: A THOMISTIC VIEW OF MORAL AUTONOMY (Gerald Malsbary trans., Fordham University Press 2000).

13. *See* FINNIS, *supra* note 11, at 101.

14. *See generally* George Makdisi, *Ethics in Islamic Traditionalist Doctrine*, *in* ETHICS IN ISLAM 47-63(Richard G. Hovannisian ed., 1985); *see* also George F. Hourani, *Divine Justice and Human Reason in Mu'tazilite Ethical Theology*, *in* ETHICS IN ISLAM, *supra*, at 73-84.

However, a closer scrutiny of premodern sources on this is-
sue suggests that this dichotomy was not as strict or as distinctive
as contemporary scholarship suggests. Analyzing these views
from the perspective of jurisprudential literature rather than
theological literature, reveals that jurists of different theological
persuasions often argued that humans are able to make certain
moral claims independently of any text on the matter in light of
the totality of circumstances. For instance, whether one looks to
the Mu'tazili Abu Bakr al-Jassas (d. 981) or the Ash'ari Sayf al-
Din al-Amidi (d. 1233), one will find that both argue that
humans make moral judgments in a manner consistent with con-
temporary discourses on practical reasoning. For al-Jassas, uni-
versal moral judgments include the obligation of belief and the
prohibition against disbelief. Not all such decisions are necessa-
rily of universal import. According to al-Jassas, in such cases one
must look to the benefit [*intifa'*] accorded by a certain issue to
determine its shar'i value. He couches his determination of
moral obligation in terms of the benefit such a matter produces
for humanity, in light of a contextual inquiry into nature, crea-
tion, and the circumstances of human goods.[15]

Al-Amidi approaches this issue from a different perspective.
Like most voluntarists, he admits that good and evil are known
from God's legislation. But he also asserts that one can know
whether a matter is good or evil on the basis of the purpose
[*gharad*] that it satisfies. Alternatively one can also know
whether a matter is good or evil based on one's knowledge and
capacity to do an act that ultimately removes hardship.[16] What is
important is that both authors recognize that the human agent is
very much involved in the determination of morality. Good and
evil, and thereby moral obligation, are not simply legislated by
God, but are determined by individuals using their practical rea-
son to make determinations of moral obligation, in light of the
totality of circumstances in which a particular act arises.

If we consider Abou El Fadl's argument in light of the above
analysis, it becomes clear that democracy can be conceived of as
a virtue by reference to an inductive analysis of human nature
and experience. It is a philosophical assumption that one must

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15. 2 ABU BAKR AHMAD B. 'ALI AL-JASSAS, USUL AL-JASSAS 100 (2000).
16. 1 SAYF AL-DIN ABU AL-HASASN 'ALI B. ABI 'ALI B. MUHAMMAD AL-AMIDI, AL-IHKAM
FI USUL AL-AHKAM 61 (1997).

make before ever approaching the historical Islamic tradition. Muslim apologists have often referred to the same premodern concepts that Abou El Fadl cites to argue for the unity of Islam and democracy, such as the institution of Shura. What distinguishes Abou El Fadl from these apologists, and what makes his argument more honest than theirs, is that he identifies the need to make the premoral commitment to democracy. Once the commitment is made, then the mechanisms of practical reasoning within the Islamic tradition can support the existence of democratic institutions in a Muslim society. The Islamic historical tradition therefore provides possibilities, but Muslims themselves must make the premoral commitment to democracy before democracy can ever be implemented in their society.

This necessarily suggests that between the ideals of Islam and democracy, and the reality of Muslim States, lies a role for human agents in an interpretive process by which both ideals are actualized into a human reality of government and society. The role of the human agent in such an interpretive process is not only admitted by Shari'ah discourses, but it is in fact indispensable to the very understanding of the limits of interpretation in the face of the perfection of the Divine. As Abou El Fadl indicates, premodern Muslim jurists inquired into issues of legal determinacy. They asked whether or not every jurist was correct in his interpretation. The Mukhatti'a school, relying on the Prophetic tradition that those who are correct get two rewards and those who are incorrect get one reward, argued that the law is determinate, but it is not clear whether any particular answer is necessarily God's law. In either case, the jurist is rewarded for the effort of investigation. The Musawwiba school argued that every jurist was correct in his interpretation. What mattered was not whether there was a specific divine intent as to a particular legal outcome [*hukm mu'ayyan*] but rather that the jurist, in engaging in a thorough investigative process, coupled with his belief in the rightness of his determination, arrives at God's law.[17] In both cases, the schools were making a claim about the objectivity of the law. Both claimed that God's law was potentially attainable. But the Mukhatti'a school argued for a conception of

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17. Besides Abou El Fadl's Article and his *Speaking in God's Name*, which outline these arguments carefully, see also 2 ABU AL-HUSAYN MUHAMMAD B. 'ALI B. AL-TAYYIB AL-BASRI, AL-MU'TAMAD FI USUL AL-FIQH 372-96 (1983).

legal objectivity that held that God has a specific intent as to particular rules of law. Whether one was capable of actually knowing that specific intent, however, was a different matter. The Musawwiba school, on the other hand, argued for a different conception of legal objectivity that made the law's objectivity dependent not on a notion of divine specific intent, but rather on epistemology. The jurist, according to the Musawwiba school, was deemed to have engaged in the best epistemological inquiry possible, and hence through that epistemology, he arrives at God's law. Objectivity is therefore a function of epistemological exertion, and therefore interpretation.[18]

But what is crucial is that in both cases what is arrived at is very much a human determination. Both schools of jurists may aspire to reach God's law, but whether it is in fact God's law is beyond human comprehension. What is left, therefore, is simply human understanding, or *fiqh*. The Shari'ah, as the ideal of God's law, is therefore a metaphysical entity distinct from human attempts to comprehend it. It is a goal to aspire towards, but not a goal to be actualized.

The necessity of the human agent in the interpretive process, however, extends beyond the determination of law. As noted above, Shari'ah is not simply about substantive law, but rather is a way of thinking about the relationship between the Divine will, human interpretation, and human reality. As Abou El Fadl suggests, one can apply this Shari'ah discourse to determine the nature of an Islamic political system. The creation of Islamic institutions of power is very much a negotiated product. God's will as to a governmental structure, just as His law ruling human behavior, lies beyond the certainty of human comprehension. It is at most an aspirational ideal that motivates human negotiation and interpretation. But what is important to Abou El Fadl's argument is that the type of political system Muslims create and justify, whether monarchical, dictatorial, or democratic, depends on their premoral philosophical presuppositions. These presumptions exist prior to their interpretation of the Islamic tradition, and their negotiative efforts to construct a political order through practical reasoning.

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18. *See* Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 549-650 (1993) (discussing the idea of legal objectivity as a function of epistemology).

Central to Abou El Fadl's argument is the need for Muslims to make a premoral commitment to democracy. Such a premoral commitment is not simply a function of political expediency or opportunism. Rather, as the Islamic tradition suggests, the human agent plays a significant role in the determination of that premoral commitment on the basis of a rational investigation into the various signs of God's creation. Whether one inquires into law or political science, Shari'ah's discourses empower the human agent to come to terms with the Divine Will in light of the totality of existence and creation. The resulting governmental structure may not necessarily be what God wills, but that is not what humanity is obligated to determine. We are charged with the search. And as Abou El Fadl rightly points out, the search for the harmony between Islam and democracy begins with a premoral commitment to democracy.