

**CONCEIVING THE ROLE OF *AL-MASLAHA AL-MURSALAH*
IN THE CONTEMPORARY POLITICAL MODELS: *SHŪRĀ*
AND DEMOCRATIC SYSTEM OF GOVERNANCE IN FOCUS**

Muhammad Tahir Yahya*

Abstract

It is a common problem, particularly in countries contending with intersection of multiculturalism, multi-ethnicity and legal pluralism that Sharia has being reduced to rules of law, devoid of institutional systems of analysis and application, and dribbled in a post-colonial quest for identity. Without doubt, Sharia has been configured in a form that limits the extent of substantive change and adaptation especially in politics and governance. It is against this background that this paper seeks to argue that Sharia needs to redeem its status by invoking the institutional structure to give its doctrine substance and meaningful force. It is with this mind-set that the paper picked one of these principles '*maslaha mursalah*' while qualitatively investigating its role in the contemporary period to see whether it can be used as a tool to achieve Sharia objectives particularly within the so-called democratic systems of governance in comparison with the *shūrā* system that is already known to Sharia. Consequently, the paper revealed that subject to some conditions and qualifiers, *maslaha mursalah* is a very important principle sanctioned by the majority of jurists to admit several political institutions when compared and contrasted with *shūrā* system. However, it is recommended that this principle cannot be easily applied until conscious *Ulamas* begin to resolve to develop or form in their mind a critical thinking of influencing every political mode and institutional structure one finds himself with the Sharia doctrines and flexibilities.

Keywords: *Maslaha Mursalah, Shūrā, Democracy*

1. Introduction

This paper commences discussion with conceptual clarification of *maslaha mursalah*, then goes on to justify the use of *maslaha* according to the scholarly provisions, outlines its scope and conditions, and its relation with *shūrā* and democracy. The paper finally concludes with some recommendations.

2. Conceptual Clarification of *Al-Maslaha Al-Mursala*

Lexically, the compound term can be broken into two; “*maslaha*” and “*mursala*”. *Maslaha* is the singular form of “*masālih*” and “*salah*”- (interest) which is the opposite of “*fasād*”- (harm). *Maslaha* is synonymous to the word “*manfa’a*” in both verbal pattern (*wazn al-fi’il*) and meaning. The verbal pattern of the word *maslaha* and *manfa’a* is “*maf’alah*” while their meaning can be interest, benefit, gain, utility and usefulness.¹

Technically speaking, *maslaha* has no unanimous definition among the *usūlī* jurists, but rather a general understanding of what *maslaha* could comprise. For example, according to Khawārizimī’s definition as quoted by Zarkashī in his book, *maslaha* refers to the principle of compliance with or adherence to the intended purposes of Sharia, specifically in the context of mitigating harm to individuals and society (*daf’ al-mafāsīd*).² This definition limited its scope in the tail end which mentioned only prevention of detriment without mentioning its counterpart i.e. attainment of benefits. The above definition argued that prevention of harm has an underneath implication of suggesting benefit attainment. In other words, one can only prevent harm when there is benefit to be attained indirectly and it goes without say. According to Ghazālī, the concept of *maslaha* fundamentally pertains to the pursuit of benefits and the prevention of harm, interpreted through the framework of Sharia and its overarching objectives. These objectives encompass the preservation and enhancement of essential human interests, specifically those related to an individual's religion, life,

*LL. B (BUK) BL. (Abuja) LL. M. (BUK) Lecturer I, Faculty of Law, Bayero University, Kano. mtyahya.isll@buk.edu.ng - 07032954381

¹ Al-Būtī Muhammad Sa’īd Ramadan, *Dāwābit al-Maslaha fi al-Shari’ah al-Islamiyyah* (4th ed. Dār al-Fikr, Damashq, 2005) 37

² Zarkashī Badruddīn Muhammad, *al-Bahr al-Muhīt fi Usul al-Fiqh* (Juz’ 4) 377

intellect, progeny, and wealth.³ Ghazālī's definition is wider when it goes further to show how attainment of benefit and averting harm are generally allowed provided it reinforces the five (5) objectives of Sharia and not otherwise seeking attainment of selfish human benefits or preventing harm that would offend these objectives while hiding behind *maslaha*. However, his definition, unlike the earlier definition, considers *maslaha* in its own right but has thrown *maslaha* into the *maqāsid* parlance with even a narrow perspective of limiting it to the five (5) objectives without considering other classifications such as *tahsīniyyāt* (embellishments) and *hājiyyāt* (complementary benefits). On the other hand, Tūfī conceptualizes *maslaha* as a causal factor that facilitates the realization of the objectives of Sharia, specifically in the domains of *ibādah* (worship) and *ādah* (custom). This concept, for Tūfī, is further delineated into two categories based on the Lawgiver's intentions: the first pertains to that which is inherently rightful, exemplified by *ibādah*, while the second encompasses those aspects that serve as beneficial and situational directives for the welfare of creatures, characterized by customary practices.⁴ Tūfī believes *maslaha* is only a cause to achieving the Lawgiver's intent and may not be the actual intention of the Lawgiver. Lastly, Ibn 'Āshūr defines the concept of *maslaha* as a characterization of actions undertaken primarily to serve a predominant beneficial purpose, whether for the majority or a minority group.⁵ This definition highlights the ethical considerations involved in decision-making processes, emphasizing the importance of aligning actions with the greater good of the community. However, the definition gives less emphasis on whether *maslaha* is there to protect Sharia objectives or not but moved on to argue that *maslaha* is not an act itself but a description for an act that is usually triggered (specially and systematically) to harness certain predominant benefits for the majority or minority.

Mursalah, the other component of the compound term, is derived from the word "*irsāl*" (i.e. to release) or "*itlāq*" (discharge) or "*khilyah*" (let out). Arab speakers will say: I have a bird which I release (*arsaltuhu*), discharge (*atlaqtuhu*) or let out (*khallaituhu*) of its aviary every

³ Al-Ghazālī Abu Hāmid, *al-Mustasfah* (1st ed. Juz' 1, Dār al-Kutub al- 'Ilmiyyah, Beirut, 1413) 174

⁴ Hassan H. Hāmid, *Nazariyyah al-Maslaha fi al-Fiqh al-Islāmī* (Maktabah al-Mutanabbī, al-Qohirah, 1981) 10 -11

⁵ Ibn 'Āshūr M. Tohir, *Maqāsid al-Shari'ah al-Islamiyyah* (Dār al-Nafā'is) 203 - 204

morning.⁶ A point to note in this literal sense is, the term *mursala* denotes *itlāq* ‘to release’ and not *ihmāl* ‘to ignore or disregard’ as some jurists purported in their literal definition.⁷ Relying on the latter denotation (i.e. *ihmāl*) will actually lead to absurdity when giving its technical connotation. *Mursala* in its technical sense is often viewed as the same with *maslaha* connotations given earlier. However, the term ‘*mursalah*’ is jealously retained by the experts because it signifies a cause for releasing the Sharia to options or letting out Sharia to explore other means outside the known analogy of *qiyās* for determining legal issues, attaining benefits and averting harms in issues affecting the public.⁸ The primary function of this approach is to reinforce the objectives of Sharia, ensuring that its fundamental principles are upheld rather than overlooked, marginalized, or neglected in favour of alternative options driven by disrespect or self-serving motives.

Therefore, *maslaha mursalah* in its conjunctive sense is defined by some *usūlī* experts as an interest or benefit that is oriented towards the public good, whose validity or invalidity, as well as its conformity or lack thereof to Islamic law, cannot be substantiated by specific or general evidence derived from Sharia sources.⁹ In other words, the process of legal deduction presented is grounded in a thorough understanding of legal principles and adheres to the tenets of sound reasoning. However, it operates independently of a specific technical foundation or universally recognized original evidence within the legal corpus.¹⁰ The jurists dissected the concept and particularly laid much emphasis on *maslaha* lacking a foundational basis (be it general or specific) in the source in order to differentiate it from *qiyās* (analogical deduction) otherwise, there will be no serious difference between the two and hence become redundant. To other portion of the jurists, they posit that *maslaha* can stand as an independent source of Sharia such as other popular sources, rules and general objectives. However, Shātībī, Shankītī and many other hadith scholars have argued that while *maslaha* may lack explicit textual evidence to support its claims, it

⁶ Ibn Manzūr M. Mukarram, *Lisān al-Arab bāb al-rā’i wa al-Sīn Juz’* (1st ed. Dār al-Sādir, Beirut) 11 - 285

⁷ Al-Shāshāwī Abu Ali Hussein, *Raf’u al-Niqāb ‘an Tanqih al-Shihāb* (1st ed. Juz’ 6 Maktabah al-Rushd Nāshirūn, Riyādh, 2004) 351

⁸ Al-Ghazālī (n 3)

⁹ Al-Ghazālī (n 3)

¹⁰ Abu Al-Ma’ālī AbdulMalik, *al-Burhān fī Usūl al-Fiqh* (4th ed. Juz’ 2, Dār Al-Wafā’ al-Mansura, Misr) 721

should not be perceived as diverging significantly from the core principles of Sharia. They believe that there is no way an issue will be completely unfounded in the original sources of Sharia hence the need to always justify *maslaha* with at least general authority in the sources no matter the novelty of the new issue.¹¹

In a nutshell, the concept of *maslaha* cannot be dismissed without substantiating evidence, regardless of whether this evidence is remote, general, or holistic in nature. Furthermore, it is essential that there are no indications of specific authority impacting the so-called novel issue; otherwise, it can no longer be appropriately classified as *maslaha mursalah*. Thirdly, of course the issue or the event must be indeed novel and challenging without Sharia basis for it. With the combine effect of the juristic definitions outlined so far, one can safely conclude that *maslaha mursalah* refers to the interest that is neither explicitly sanctioned nor prohibited by the Lawgiver within specific legal parameters. Instead, it is derived from the overarching principles of Sharia, as interpreted by a qualified jurist (mujtahid).

3. Legal Justifications for *Al-Maslaha Al-Mursalah*

3.1 Proponents:

It is interesting to note that Companions of the Messenger of Allah R.A were the first to apply and give reverence to *maslaha mursalah* especially after the demise of the Apostle SAW. The individuals in question demonstrated a prompt inclination to ground their well-informed decisions on the principle of *maslaha* whenever they encountered situations lacking explicit guidance from the Quran and Sunnah. This approach was essential for effectively navigating the complex challenges arising from the substantial responsibilities associated with governing the Muslim *ummah*¹² For instance, the decision to undertake the compilation of the Quranic text, alongside the hadith and various other religious sources, exemplifies the frequent application of *maslaha mursalah*.¹³ Beside the Companions R.A, the

¹¹ Abu Zahrah Muhammad, *Usūl al-Fiqh* (Dār al-Fikr al-‘Arabī) 267; Al-Shanqīṭī Muhammad Al-Amīn, *al-Masālih al-Mursala* (1st ed. Maktabah Ibn Taymiyya, al-Qohirah, 2003)

¹² Al-Būṭī (n 1) 365

¹³ Al-Bukhārī Muhammad Ismā’īl, *Sahīh al-Bukhārī; Bāb Jam’ul Qur’ān al-Karīm*; No. 4701(Juz’ 3 Dār Ibn Kathīr al-Yamāmah, Beirut, 1987) 1907

four eponyms also have their individual opinions regarding the justification of *maslaha mursalah*. Imam Malik R.A championed the use of *maslaha* more than any other school of thought. In fact, he considered it to be an independent source of law that a *mujtahid* could use to validate a point of reference. He also subsumed *istihsān* under it as a branch of law to achieve *maslaha*.¹⁴ The discourse on *maslaha mursala* by Imam Malik and his disciples reveals a complex scholarly debate, with critics arguing that their use of this principle may be weakly connected to the objectives of Sharia (*maqāsid al-sharia*) and established texts. However, it is important to note that Imam Malik and the Maliki school of thought employed *maslaha* with a deliberate intent to uphold and reinforce the principles of Sharia, rather than to undermine or contradict them. Some examples of Imam Malik's application of *maslaha mursalah* can be seen in the following instances: a) His allowance for the execution of a group of individuals for the murder of a single person; b) His acceptance of the obligatory imposition of a tax on the wealthy when the *bayt al-māl* (the treasury) lacks sufficient funds to address the government's financial needs. This tax can be reassessed as necessary, depending on the pressing circumstances and the severity of hardship experienced in the region; c) His approval of pledging allegiance to a *mafdūl* (a person appointed by the incumbent caliph to succeed him, deemed the most worthy and deserving of loyalty and obedience after himself).¹⁵ The legal articulated by Imam Malik and his disciples, while subject to critique from various scholars, has been posited as not inherently contradicting the specific authorities of Sharia as highlighted by his critics.

On the other hand, some portion of the Hanbali jurists technically agree and justify the use of *maslaha mursalah* to settle challenging issues. For example, Ibn Taymiyya argued that a study of Sharia's nature is largely built and simply described in these verses; '...but whoever is forced (by necessity), neither desiring (it) nor transgressing (its limit), there is no sin upon him...' ¹⁶ And '...But whoever is forced by severe hunger with no inclination to sin – then indeed, Allah is Forgiving and Merciful'. ¹⁷ In other words, Ibn Taymiyya believes that essential needs

¹⁴ Abū Zahrah Muhammad, *Mālik Hayātuhu wa 'Asruhu-Arā'uhu wa Fiq'uhu* (Dār al-Fikr al-Arabī, Al-Qohirah, 1997) 318

¹⁵ Al-Shātībī Ibrahim Musa, *Al-Muwāfaqāt* (Juz' 2 Dār al-Ma'rifah, Beirut) 37

¹⁶ Qur'ān 2 Verse 173 to be cited subsequently as Q2:173; Translation Source: Al-Qur'ān (Tafsīr & By Word) v 1.29.3 (App. website; <https://gtaf.org/apps/quran>)

¹⁷ Q5:3

for survival should never be denied or prohibited, although it is important to uphold obligatory demands and not to justify what is considered haram.¹⁸ The description supports the application of *maslaha mursalah*, particularly when aligned with Sharia principles and general evidential standards. This ensures its relevance and ethical grounding in addressing contemporary issues within an Islamic jurisprudential context. Moreover, Ibn al-Qayyim also made a supporting statement and passed some verdicts with the use of *maslaha mursalah* but took it as an advance *qiyās* and not as an independent source. He posited that the incorporation of *maslaha* within the framework of Sharia is grounded in a well-informed analytical approach that primarily emphasizes public welfare, sustenance, and considerations pertaining to the afterlife.¹⁹ It is noted that Hanbalī jurists mostly apply *maslaha mursalah* in Islamic political chapters.²⁰ Ibn Qudāma, on the other hand, refutes the use of *maslaha* to arrive at a legal conclusion. However, most of the contemporary jurists like Abū Zahra, Mustapha Shalabī, Mustapha Zayd and Būtī argued that *maslaha* is a valid source of law so far it neither contradicts the primary sources including hadith provisions that are solitary (*āḥād*)²¹ and hurried (*mursal*)²² in nature, nor contradicts companion's opinion (*qawl saḥābī*).

Imam Shāfi'ī also followed suit in allowing *maslaha mursala* that is firmly guided by Sharia authorities. Although one might be inclined to think that Shāfi'ī did not permit *maslaha mursala* to serve as a source of law from the outset, this perception arises from two main points: a) his strong acknowledgment and expansion of *qiyās* as a legal source. He argued that *qiyās* would adequately address any *maslaha*; b) his complete rejection of *istihsān*, which was the term initially used to refer to what is now known as *maslaha mursala*. Nevertheless, his disciples,

¹⁸ Ibn Taymiyyah Taqiyyuddīn Ahmad Al-Harānī, *Majmu' al-Fatāwa* (Juz' 37, al-Maktabah al-Tawfiqiyah, Al-Qohirah) 41 - 42

¹⁹ Ibn Al-Qayyim Shamsuddīn Muhammad, *A'lām al-Muwaqqi'in 'An Rabb al-'Ālamīn*, (Juz' 4, Dār al-Kutub al- 'Ilmiyyah, Beirut, 1993) 11

²⁰ Al-Būtī (n 1) 380 - 381

²¹ *Āḥād* hadith is one which is narrated by either a single reporter (i.e. *gharīb*) at some stage of *isnād* (chain of transmission), or only two reporters (*azīz*) are found narrating at any stage of *isnād*, or a large group subsequently narrated this report from a single or two reporters (*mashhūr*)

²² *Mursal* hadith is a situation where the link between the successor and the Prophet SAW is missing in a particular narration. For example, when a successor says, "The Prophet said..."

including Imam al-Haramayn, Ibn Al-Subkī, Ibn al-Hammām, and Ibn al-Hājb, maintain that he is also a proponent of *maslaha mursala*.²³

Imam Abu Hanīfa was also an indirect proponent of *maslaha mursala* because he is an ardent user of *istihsān* as a source of law. *Istihsān* is a legal methodology that prioritizes public interests by setting aside *qiyās* (analogical reasoning) for more advantageous outcomes for the community. It emphasizes flexibility in legal rulings to align with Sharia's principles of justice and societal welfare, highlighting the need to adapt interpretations to better serve the populace.²⁴ He relied on the verse which says ‘...Allah intends for you ease and does not intend for you hardship and (wants) for you to complete the period and to glorify Allah for that (to) which he has guided you...’²⁵ What could be more conducive to *maslaha* than the aforementioned concept, derived from the synonyms of *maslaha mursalah*, namely *istihsan* and *istislah*?

3.2 Opponents:

A segment of scholars argues that *maslaha mursalah* should be disallowed due to its lack of proper validation within the framework of Sharia provisions. Proponents of this view include notable figures such as Qādī, Ibn Hājb, and Āmidī, as well as certain Shi'ite sects, although the latter may accept it under specific stringent conditions.²⁶ In contrast, certain jurists assert that although *maslaha mursalah* may not receive explicit validation from specific authorities, it is significantly supported by general authorities and the foundational principles of Sharia.²⁷ The second aspect of their argument revolves around the definition of the term “*maslaha mursalah*.” This group contends that the meaning of *maslaha mursalah* implies that the authority to determine new developments is predominantly entrusted to human intellect, without adequate checks from Sharia provisions. In response, counterarguments have been put forth, asserting that the intellectual

²³ Abu Zahra, *Al-Shāfi'ī Hayātuhu wa 'Asruhu -Ārā'uhi wa Fiq'uhu* (2nd ed. Dār al-Fikr al-Arabī, al-Qohirah, 1996) 265 - 270

²⁴ Abu Zahra (n 12) 294

²⁵ Q2:185

²⁶ Hassān (n 4) 537-547; Khallāf AbdulWahhāb, *Masādir al-Tashri' fī mā lā Nassa Fīhi* (6th ed. Dār al-Qalam, Kuwait, 1993) 90; Shalabī Muhammad Mustapha, *Ta'līl al-Ahkām 'Arad wa Tahlīl li Tariqah al-Ta'līl watatowwuratihā fī 'Usūr al-Ijtihād wa al-Taqlīd* (Dār al-Nahdah al-Arabiyyah, Beirut) 331 - 364

²⁷ Al-Qarāfi A. Shihābuddīn, *Sharh Tanqih al-Fusūl fī Ikhtisār al-Mahsūl fī al-Usūl* (1st ed. Dār al-Fikr, al-Qohirah 1973) 394

capacity of humans aligns with that of a certified mujtahid, who bears the responsibility of upholding the principles of Sharia and its provisions as necessary.²⁸ Thirdly, this group of scholars argues that *maslaha mursalah* is a redundant and unnecessary source of law, as its main essence is adequately addressed by *qiyās* and *maqāsid al-shari'ah*. They maintain that *maslaha mursalah* lacks significance when it comes to examples that fall outside the scope of these established legal sources.²⁹

4. Scope and Conditions for the use of *Al-Maslaha Al-Mursalah*

4.1 Scope of *Al-Maslaha Al-Mursalah*:

A Muslim subject (*mukallaf*) is required to navigate through these two modes;

1. Acts of Worship (*Ibādāt*): these are acts that regulate the relationship between God and His subjects. The unequivocal rule is for the subject to worship God without complain. Al-Shātībī emphasizes that acts of worship should focus on the act itself rather than its meanings. The Lawgiver's intent promotes a singular interpretation that limits *ijtihad* (legal reasoning) and encourages direct engagement with the prescribed worship.
2. Act of Mundane Practices (*'Adāt*): these are the acts relating to the subjects and their relationship with one another. And the rule, according to Al-Shātībī, allows for the consideration of the import or signification and the reason behind its provisions.³⁰

This implies that the scope of *maslaha mursalah* and its application is primarily confined to mundane practices, as the interests derived from them can be examined, altered, and scrutinized. In contrast, acts of worship are considered exclusive rights of God and are therefore strictly protected; any alteration can only be justified through corresponding evidence. *Maslaha mursalah* is used in *mu'āmalāt* (financial and marital transactions) and *'ādāt* (political and economic practices) to tackle modern challenges. This approach highlights the

²⁸ Al-Būtī (n 1) 87

²⁹ Al-Ghazālī Abu Hāmid, *Shifa' al-Ghalīl fī Bayān al-Shubh wal Mukhayyal wa Masālik al-Ta'līl* (1st ed. Dār Al-Kutub al-'Ilmiyyah, Beirut 1999) 101

³⁰ Khallāf (n 22) 85

flexibility of Islamic jurisprudence in addressing contemporary societal issues.³¹

The concept of *maslaha mursalah* is important in cases where Sharia is silent or allows (*ibāhah*) for subjective interpretation. Some scholars suggest that this flexibility can become obligatory if it effectively protects public interest. This highlights the need to balance established legal principles with contemporary societal demands.³² For example, some laws of war (*aḥkām al-ḥarb*) are elevated to the highest degree of obligation (*wājib*) in a positive legal demand to secure public interest; using a sound system to call *adhān* is elevated to *mandūb* (recommended) status for public interest; dealing on hard drugs or narcotics is elevated to *haram* (prohibition) and so on.³³

However, it is important to acknowledge certain exceptions to the application and relevance of *maslaha mursalah*. First, in specific aspects of *mu'amalāt* (transactions) that are intrinsically linked to matters of faith and worship (*umūr ta'abbudiyyah*), *maslaha mursalah* is neither applicable nor pertinent. For instance, *riba* (usury) and *mīrāth* (inheritance) are distinctly addressed within the primary sources of Sharia, leaving no room for *ijtihād*. *Al-Shātībī* emphasizes that these issues fall squarely within the realm of *ibādat* (acts of worship) and therefore warrant complete adherence to the directives of specific authorities.³⁴ Secondly, there are exceptions to the general prohibition against applying *maslaha mursalah* in matters of faith and worship, particularly when new challenges influence the form of an act rather than its substance. Justification for applying *maslaha mursalah* in such cases can be derived from general authorities in Islamic sources, rather than from specific authorities that might undermine its legitimacy. Examples include the practice of paying *zakāt al-fitr* in monetary form, adapting certain Hajj rituals during periods of congestion, modifying

³¹ Al-Būṭī (n 1) 419

³² Al-Zuhailī Wahbah, *Nazariyyah al-Darūrah al-Shar'iyyah* (3rd ed. Mu'assasah Al-Risālah, Beirut, 1982) 43

³³ Ibid

³⁴ Al-Shātībī (n 13) 308

the timing for *ramy al-jamra*, and allowing *tawāf* prayers to be performed anywhere within the grand mosque.³⁵

4.2 Conditions for the Use of *Al-Maslaha Al-Mursalah*

Although the use of *maslaha mursalah* is justified by the majority of the scholars, to effectively address concerns regarding *maslaha mursalah*, it is essential to consider opposing arguments and fears of allowing incompetent individuals into the field. Thus, regulating *maslaha mursalah* requires the establishment of specific conditions to ensure its integrity and effectiveness:

1. it must not contradict definitive textual provision (*naṣṣ qat'ī*);
2. it must be in conformity and compatible with the general objectives of Sharia;
3. its application must be restricted to the issues of transactions (*mu'amalāt*), customs (*adāt*); and not to the acts of faith/worship (*ibādat*);
4. its effect must be thoroughly examined and verified before its application so that there will be no room for doubt and uncertainty;
5. it must be carried out by a duly certified *mujtahid* i.e. a person who satisfies all the basic requirements of a *mujtahid* as laid down by the scholars.³⁶

5. *Maslaha Mursalah* between the Political Systems of *Shūrā* and Democracy

5.1 The Concept of Politics, *Shūrā* and Democracy:

5.1.1 Politics:

For the purpose of this paper, politics or study of government or political science is simply the science dealing with the organization and

³⁵ AbdulHamīd Alī Mahmūd, *al-Maslaha al-Mursalah wa Tatbīquha al-Mu'āsirah fī al-Hukm wa al-Nuzum al-Siyāsiyyah* (Masters Dissertation, Faculty of Higher Education, Najah University, Nablus-Palestine, 2009) 76

³⁶ Shalabī Muhammad Mustapha, *Usul al-Fiqh al-Islāmī*, (Dār al-Nahdah al-'Arabiyyah, Beirut) 294 -295; Al-Būtī (n 1) 215 - 202

government of states.³⁷ It is a science because of its accumulated and accepted knowledge which has been systematized and formulated with reference to the discovery of general truths or the operation of general laws. The scope of politics was outlined by Herman in terms of governmental actions, phenomenon, and organisations before it delves into how politics essentially interface with other social sciences such as law, history, economics and sociology. Its scope, according to Herman:

...includes every phase of human activities which manifest themselves through political or governmental action. Every aspect of the creation, machinery and functioning of the state as a political phenomenon comes within the purview of political science. The nature of state, the form of its government, and its relation to the individual, as well as its relation to other states, all constitute objects of investigation and study of political science... the form of government, the share of the individual in its constitution, the influence of political parties, the system of local government...the study of the state in action...makes laws which govern all its inhabitants...³⁸

The above conceptual clarification of the term politics is not radically different from the ones given by the Islamic scholars too. Ibn ‘Aqīl, for example, embraced Ibn al-Qayyim's definition of politics (*siyāsah*) as any governmental administration established by the people that brings benefits to them and wards off harm, even if it is not explicitly prescribed by Divine law or the Prophet SAW.³⁹ Ibn Nujaim articulated the concept as a governance system designed to regulate and safeguard the economic and cultural practices of the populace.⁴⁰ Politics, as understood by both Western thinkers and Islamic scholars, aligns in its focus on creating a government that effectively manages the affairs of the people. Additionally, there is the concept of Sharia politics (*al-Siyāsa al-Shar’iyyah*), which refers to politics that are guided by the overarching principles and laws of Sharia, even in the absence of

³⁷ Herman G. James, The Meaning and Scope of Political Science, *The Southwestern Political Sciences Quarterly Journal*, (June, 1920, Vol. 1 No. 1) 3 - 16

³⁸ Ibid.

³⁹ Ibn Al-Qayyim (n 19) 284

⁴⁰ Ibn Nujaim, *al-Bahr al-Rā’iq Sharh Kanz al-Raqā’iq* (Juz’ 5) 76; Al-Tā’i Ahmad, *Al-Muwāzanah Bain Al-Masālih*, (1st ed. Dār Al-Nafā’is, al-Urdun, 2007) 191-199

specific authorities directly overseeing it.⁴¹ The primary objective of Sharia politics is to realize the overarching aims of Islamic law, adapting to various characteristics and stages.

5.1.2 *Shūrā*

In etymology, the term '*shūrā*' originates from the root word *shāra*. – (to pick or select from a lot), *ashāra/shawwara* – (allude to or hint at something), *istashāra* – (to ask or seek advice or consult).⁴² The term *shūrā* encompasses dual interpretations: it refers to the expression of individual opinion while also embracing superior perspectives from others.⁴³ *Shūrā* can be defined in two main ways: generally and specifically.

In its general sense, *shūrā* involves the deliberation among knowledgeable individuals to analyse opinions on a specific issue to determine the most accurate or actionable viewpoint. In a political context, it specifically refers to the assessment of public preferences or the viewpoints of representatives regarding matters of public concern.⁴⁴

5.1.3 Democracy

Various definitions have been proposed regarding the concept of democracy.⁴⁵ According to the socialists, this decision to surrender absolute individual freedom for the society to function undergirds the basic tenets of democracy. It is the existence of an unwritten contract between the members of a society by which each member had surrendered a fraction of their freedoms so that the society can thrive.⁴⁶ Furthermore, democracy is the rule by people which is sometimes

⁴¹ Al-Qardāwī Yusuf, *al-Siyāsah al-Shar'iyyah fī Dau' Nusūs al-Shari'ah wa Maqāsidiha* (1st ed. Mu'assasah Al-Risālah, Beirut, 2000) 28

⁴² Al-Maany (Arabic-English) Dictionary App: <https://play.google.com/store/apps/details?id=com.almaany.aren>

⁴³ Al-Khālidi Salah, *al-Shūra fī al-Islam*, (al-Majma' al-Fiqhī li Buhūth al-Hadārah al-Islāmiyyah, 'Ummān, 1989) 51

⁴⁴ Ibn al-Qayyim (n 35) 284

⁴⁵ Due to the time and space of the paper, the paper will not go into the detail of defining democracy as it is found in the opinion of the leading thinkers such as Lowell, Lincoln, Seely, and Lord Bryce

⁴⁶ Goonetilleke, R., *Public Interest Litigation: A Specie of Direct Democracy and Good Governance* (2014) <<https://sljda.sljol.info/articles>> accessed on 26 October, 2024

called “popular sovereign” and can refer to direct, participatory, and representative forms of rule by the people.⁴⁷ In other words, government in a democratic setting should be run on behalf of the people through representatives who are of high principle and trust upon fundamental principles as opposed to uniform practices.⁴⁸ Basically, the most convincing argument canvassed in favour of ‘democracy’ or ‘constitutional democracy’ is that it is the most effective check against autocracy and tyranny based on a well-articulated legal and political document called Constitution.⁴⁹

Democratic ideals are characterized by inclusive justice that is demonstrated through citizens’ involvement in decision making, a system of representation, the rule of law, an electoral system that is democratic, some degree of equality among citizens, some degree of liberty or freedom granted to or retained by the citizens and education.⁵⁰ Like they say, justice is best achieved when the laws are established by the very people who must obey them.⁵¹ All these democratic ideals inform us that democracy provides institutions for the expression and the supremacy of the people or popular will on basic issues bordering on socio-political decisions and policy-making.

It is important to note that the conception of democracy should not be limited to the above ideals that may not be universally accepted. What the research seeks to show is the need for the imperfect democratic ideals to evolve and adapt to various cultural and religious contexts, particularly in places where traditional notions of democracy may not resonate or align with local values. This is possible because of the potential for creating hybrid systems that blend democratic governance with Islamic principles.⁵²

⁴⁷ Library of Congress, *The Principles of Democracy* <<https://www.sjsu.edu/people/ken.nuger/courses/pols120/Ch-3-Principles-of-Democracy.pdf>> accessed on 23 October, 2024.

⁴⁸ Ibid

⁴⁹ Nwabueze, B.O., *Judicialism and Good Governance in Africa*, (Nigerian Institute of Advanced Legal Studies, Abuja 2009)

⁵⁰ *The Principles of Democracy* (n 41).

⁵¹ Howard Cincotta, *Democracy in Brief*, <https://kr.usembassy.gov/wp-content/uploads/sites/75/2017/04/Democracy-in-Brief_kor-1.pdf> accessed on 23 October, 2024

⁵² What is important to the researcher is the focus on achieving public interest affecting Muslims while there may be valid points in the original argument regarding

5.2 *Shūrā* and *al-Maslaha al-Mursalah*

Muslim jurists are divergent in defining the ruling of *shūrā*. The initial perspective posited that the engagement in *shūrā* (consultation) is *wājib* (obligatory) for the Imam or those in positions of authority. Certain segments of the Shāfi'ī school and Ibn 'Atiyyah argued that the failure to partake in *shūrā* constitutes a valid justification for the deposition of an Imam. Qurtubī and Ibn Taymiyya argued that an Imam should be removed if he neglects to consult knowledgeable experts regarding religious and societal issues. This underscores the necessity for rulers within an Islamic State to seek scholarly counsel when faced with uncertainties pertaining to religious, military, or leadership matters. They relied on the following authorities: in the Quran:

So, by mercy from Allah, (O Muhammad), you were lenient with them. And if you had been rude (in speech) and harsh in heart, they would have disbanded from about you. So, pardon them and ask for forgiveness for them and consult them in the matter. And when you have decided, then rely upon Allah. Indeed, Allah loves those who rely (upon Him).⁵³

The Prophet (SAW) is commanded to consult his companions on various matters. The term '*shāwirhum*' is considered by *usūlī* experts to be a command word, reflecting a significant positive legal obligation (*wājib*) that stands without any evidence to counteract it. Furthermore, this principle of consultation is not limited to the Prophet alone, but extends to all believers, as highlighted in Surah al-Shūrā. '...and those who have responded to their Lord and established prayer and whose affair is (determined by) consultation among themselves, and from what We have provided them, they spend'⁵⁴ The Prophet Muhammad (SAW) emphasized consulting others, often seeking advice from his

the complexity and varied interpretations of democracy in the context of Islam, it's crucial to recognize the potential for diverse democratic practices that reflect local values while still adhering to core democratic principles. For instance, while the secular nature of democracy is prominent in the West, there are various successful models of democracy around the world that incorporate religious principles. Countries like Indonesia and Turkey offer examples where Islam and democracy coexist, demonstrating that it is possible to create a functioning democratic framework that respects religious values.

⁵³ Q3:159

⁵⁴ Q42:38

companions, especially the four (4) rightly guided Caliphs, which played a role in their selection for *khilāfah*. Some argue, on the other hand, that *shūrā* is not obligatory but recommended, citing examples like the Treaty of *Hudaibiyah* and the Battle of *Tabuk*, where the Prophet made decisions without consulting others.⁵⁵ The argument posits that instances where the Prophet Muhammad (SAW) and his companions bypassed consultation weaken the obligatory nature of such practice, suggesting that these precedents diminish its legal requirement within a positive legal framework.⁵⁶

However, it is the view of this researcher that considering the arguments presented on both sides, the first perspective is more compelling and credible, as it is backed by specific authorities in the Quran and Sunnah. In contrast, the second perspective is primarily supported by circumstantial evidence from the history of the Prophet and his companions, which can be contended. This contention arises because those instances may not necessarily represent the domain in which *shūrā*, as defined by the jurists of the second perspective, would apply. Moreover, the relationship between *shūrā* and *maslaha mursalah* can be interpreted to support the perspective that *shūrā* is obligatory rather than merely desirable (*mandub*). The concept of *maslaha mursalah* emphasizes the significance of attaining benefits and preventing harm. Consequently, decisions that emerge from *shūrā* are inherently more effective and powerful in realizing these goals, as they stem from a collective effort rather than the arbitrary judgment of a single individual. Additionally, it is worth noting that the specifics of *shūrā* as a governance method such as its structure, components, qualities, and conditions, have not been fully articulated in Islamic legal texts. Instead, it is up to each society to develop a framework that aligns with their unique context, provided that it is oriented toward achieving *maslaha*.

At this point, an important question arises: Is the decision derived from *shūrā* persuasive or binding for the Imam? The first perspective suggests that the Imam, or those in positions of authority, is not obligated to follow the decision of *shūrā*, viewing it as merely

⁵⁵ Al-Ansārī AbdulHamīd, *al-Shūrah wa Āthāruha fī al-Daimokratiyyah, Dirāsah Muqārana*, (Dār al-Fikr al- ‘Arabī, al-Qohirah 1996) 132

⁵⁶ Instances are the sole decision taken on Usama RA and the decision of Abubakar to fight the apostates

persuasive and subject to his subsequent approval or disapproval. They relied on the same Q3:159 quoted above with specific reference to ‘...and when you have decided (*‘azamta*), then rely upon Allah...’

Some exegetes argued that the Prophet SAW possesses the authority to make autonomous decisions and take action, even after consulting his allies in the aforementioned verse. In line with this perspective, Imam Qurtubī emphasized that *shūrā* involves gathering diverse opinions on a specific issue, suggesting that the Imam should consider these views in decision-making without feeling required to adopt all of them.⁵⁷ The second perspective, in contrast, contended that *shūrā* is binding rather than merely persuasive. They also referenced the same verse mentioned earlier to challenge the majority interpretation of the phrase “*‘azamta*,” arguing that it signifies the Prophet should make decisions based on the best available counsel rather than acting independently of *shūrā*. Moreover, they supported their stance with historical examples where the Prophet (SAW) and the Companions (RA) after him acted in accordance with the advice provided by the majority.⁵⁸ The most compelling perspective is that *shūrā* is binding on the Imam. This is supported not only by interpretations of verses that favour this view, but also by numerous instances where the Prophet and his Companions relied on *shūrā* as a crucial tool sanctioned by the Lawgiver in Islam. Additionally, *shūrā* represents the collective choice of the majority, which is inherently more beneficial than a singular viewpoint that faces considerable dissent. Notable scholars such as Imam Ghazālī, Shaltūt, and others have concurred with this latter perspective.⁵⁹

5.3 Democracy and *Al-Maslaha Al-Mursalah*

It is noted earlier that democracy provides institutions for the expression and the supremacy of the people or popular will on basic issues bordering on socio-political decisions and policy-making. Democracy also guarantees political freedom, happiness and equality. Before delving into the relationship between democracy and *maslaha mursalah*, it is essential to note from the outset that there is generally no evidence in the Sharia sources, both primary and secondary, that mandates a specific form or mode of governance. Each community must determine what is most suitable for its unique circumstances. The

⁵⁷ Al-Ansārī (n 48) 111

⁵⁸ Ibid. 197

⁵⁹ Ibid. 206

chosen model must align with the principles of Sharia as ordained by Allah, the Most High, and must not conflict with Islamic law and its fundamental tenets. This assertion highlights the necessity of validating any governance model through the principle of *maslaha mursalah*, provided it meets the rigorous standards set by the overarching principles and evidentiary foundations of Islamic jurisprudence. This validation process is critical in ensuring that governance adheres to the ethical and legal provisions outlined by Islamic law. Furthermore, it allows for the realization of benefits and the prevention of hardships that could arise from adhering to a rigid form or mode of governance.

Moreover, some may advocate for the governance model established by the Companions of R.A., particularly during the era of the four rightly guided Caliphs (*al-Khulafa' al-Rāshidūn*). While there is no explicit evidence mandating the adoption of their governing approach, one could argue that their chosen format represents one among various alternatives that can be employed to achieve justice and fairness, similar to them. This is a fundamental reason why their model concluded with them, leading to new formats introduced by the subsequent caliphs, highlighting the fact that each society has the autonomy to select any system as long as it upholds the protection of Sharia and its core principles. This underscores the significance of *maslaha mursalah* and its two key tenets realizing benefit and averting harm for Muslims, regardless of where they reside or under whom they live.

Consequently, the topic of democracy and its interpretation within the context of Islamic law has been extensively debated among Muslim jurists. Some jurists contend that participating in a democratic system, regardless of its form or appearance, is impermissible for Muslims. They argue that such a system is rooted in disbelief.⁶⁰ Other jurists, however, support integrating democratic ideals with Sharia principles, emphasizing the need to align democracy with Sharia objectives and modify conflicting concepts for compatibility.⁶¹ Moreover, while it is acknowledged that democracy possesses inherent advantages and disadvantages, particularly given its foundations in human reasoning,

⁶⁰ Halamī Mahmūd, *Nizām al-Hukm al-Islamī Muqārranan bi al-Nuzum al-Mu'āsirah* (1st ed. Dār al-Fikr al-Arabī, 1970) 147

⁶¹ Al-Qardāwī Yusuf, *Min Fiqh al-Dawlah fī al-Islām* (4th ed. Dār al-Shurūq, al-Qohirah, 2005) 137

it is essential to highlight that a significant majority of Muslim jurists advocate for its implementation within Muslim societies. This stance is informed by the potential for *ijtihad*, or independent reasoning, within democratic frameworks. Furthermore, such a position can be justified through the application of established principles that, while historically rooted, can align with contemporary democratic ideals. Qardāwī, for instance, contended that embracing a foreign system or ideology, such as democracy, can be considered acceptable, provided that such adoption does not conflict with the provisions of Islamic law or established principles of Sharia.⁶²

However, it is the duty of a conscientious Muslim to continually refine original ideals and discard undesirable philosophies to align with the principles of Sharia. Abdul Malik has also emphasized that Muslims bear the responsibility of crafting a form of democracy that is rooted in Sharia ideals. This is essential because Sharia is dynamic and can incorporate aspects of democracy that are in harmony with its teachings, without resorting to a blind imitation of Western democratic systems.⁶³ Lastly, on this point, Muhammad Kāmil argued that it is reasonable to assert that democracy, by its nature, aims to safeguard the interests of the majority and reinforce the will of the populace. Consequently, it can be posited that there is no inherent conflict for Muslims to engage fully in democratic processes without reservation or indifference.⁶⁴ Working with the majority decision is common-sensical and valid in the eyes of Sharia because there is never going to be a ‘full agreement’ on a single matter without exceptions and minority reservations.⁶⁵ Secondly, democracy also tries to ensure right to voters’

⁶² Ibid. 138

⁶³ Murtād, Abdul Malik, *al-Islām wa al-Qadāyā al-Mu’āsirah* (2nd ed. Azminah lil Nashr wa al-Tawzi’, 2004) 24 -27

⁶⁴ Al-Rīs Muhammad Diyā’uddīn, *al-Nazariyyat al-Siyāsiyyah* (3rd ed. Maktabah al-‘Anjelu al-Misriyyah 1960) 334

⁶⁵ Although this could raise an interesting point about the relationship between democracy and the teachings of the Qur’an regarding knowledge and belief (as emphasised in some verses that: many people do not know, and many people do not believe – Q7:187, Q12:21, 40 and 68, Q16:38 and so on). In other words, democracy, on one hand, is rooted in the idea that every individual has a voice and the capacity to contribute to the decision-making process, regardless of their level of knowledge or belief. This inclusivity is fundamental to democratic principles, where diverse perspectives are valued. On the other hand, the emphasis in the Qur’an on the idea that many people lack knowledge or belief could suggest a more critical view of the ability of individuals to make informed decisions. It raises questions about whether

equality in making political decisions that affects them notwithstanding probable differences in qualities. Thirdly, another constant premise of Sharia is the constitutional right of the majority to remove ineffective leadership at the conclusion of their designated term. Again, for those contending why we should emulate Western ideals when they do not adhere to Sharia? The response is seen in certain historical events where the Prophet SAW is noted to have emulated non-Muslims on specific matters, particularly where such actions do not conflict with Sharia norms. Examples include the Prophet SAW's recommendation to Muslim refugees to seek safety from the then-Christian ruler of Habasha and the advice given to the Prophet by a non-Muslim to dig the trench (*al-Khandaq*) prior to the loyal battle of *Khandaq*.⁶⁶ Qurtubī posits that there may be parallels in matters characterized as *maslaha*, which do not necessarily impinge upon established principles of Sharia. Imam al-Nawawī extends this argument, asserting that proscribing such similarities equates to the suspension of a secondary source of Islamic law, namely *shar'u man qablana* (the legal prescriptions embedded in prior scriptures). This is particularly relevant in instances where these earlier laws do not stand in contradiction to our own Sharia.⁶⁷ In essence, a foreign idea or doctrine can be adopted in sharia so far it procures a great deal of *maslaha* to the Muslims and there is neither specific evidences in the sources proscribing such an idea, nor is there contradiction of it with any established principle of Sharia.

5.4 *Maslaha* between Election and Nomination under Democracy and *Shūrā*

The *shūrā* ways of choosing a leader is through *al-bay'ah* (Oath of allegiance) which is a sort of pledge or selection process made by the consensus and ijtihad of the people in authority (*ahl al-hil wal 'iqd*) to submit themselves to the authority of whoever they choose as their

all voices should be treated equally in a democratic system, especially if some individuals may be misinformed or lack awareness of crucial issues. On this point, it is the humble view of the researcher that, ultimately, it's a matter of balancing the ideals of democracy with the need for an informed citizenry. While it's essential to uphold democratic values of inclusivity, it's also vital to encourage education, awareness, and critical thinking among the populace to support effective governance.
⁶⁶ Al-Qurtubī, *al-Jami' li Ahkām al-Qur'ān* (Juz' 20, Dār al-Sha'b, Al-Qohirah) 129; Ibn Hishām Abdul Malik, *al-Sīrah al-Nabawīyyah*, Vol 1, (1st ed. Juz 2, Dār al-Hadīth, Al-Qohirah 1996) 266

⁶⁷ Al-Nawawī Yahya Sharaf, *Sharh Sahīh Muslim* (Juz' 15, Dār Ihya' Al-Turāth al-'Arabī, Beirut) 90 - 91

leader. It is the pledge of the influential people in authority that the masses follow to also put in their pledge for the chosen leader. This was the typical method used in choosing the first Caliph of the Muslim *ummah*. Secondly, choosing a leader by *al-‘ahd* (entrustment) which is a situation whereby the incumbent leader seeks to entrust the leadership to his chosen candidate so that the anointed candidate will take over after him. In this type of arrangement, there will be no need for fresh pledge from the people in authority or the masses as that is overridden by the incumbent assent. An example was the nomination of second Caliph by Caliph Abubakar.⁶⁸

Democratic leadership selection occurs mainly through monarchy and elections. Monarchies feature hereditary leadership from a single lineage, which can raise legitimacy concerns. Conversely, electoral systems allow for greater participation and accountability.⁶⁹ On the other hand, election is the process of selecting a representative from various candidates within formally registered parties through voting.⁷⁰ Elections can be conducted in three primary ways: a) Allowing the populace to formally and freely choose their preferred leader, either directly or indirectly, depending on the specific laws established for such purposes; b) Selecting a leader through a parliamentary process, which may consist of a one- or two-chamber system; c) Combining both systems (popular and parliamentary) to ultimately determine a leader.⁷¹

In the final analysis, both traditional and contemporary methods of selecting leadership allow for mass participation, albeit in diverse ways. These approaches also facilitate the assignment of responsibilities at all levels through legislative measures while safeguarding rights. Consequently, it is reasonable to suggest that since Sharia lacks a definitive textual authority outlining a specific method

⁶⁸ Ibn Taymiyyah Taqiyyuddīn Ahmad Al-Harānī, *Iqtida’ al-Sirāt al-Mustaqīm li Mukhālafah Ashāb Al-Jahīm* (1st ed. Jam’iyyah al-Turāth al-Falastīnī, Kuwait, 2000) 311; Ibn Qutaibah Abdullahi Muslim, *al-Imāmah wa al-Siyāsa* (Juz’, Mu’assasah al-Halabī) 25

⁶⁹ Abu Ya’alah Muhammad Hussein, *al-Ahkām al-Sultāniyyah* (Dār al-Fikr, Beirut, 1994) 30 - 31

⁷⁰ ‘Atiyyatullah Ahmad, *al-Qāmus al-Siyāsī* (Dār, al-Nahdah, al-Qohirah 1968) 547

⁷¹ Mūsā Muhammad Yusuf, *Nizām al-Hukm fī al-Islām*, (2nd ed. Dār al-Ma’rifah, al-Qohirah, 1964) 69 - 70; Abu Al-Ma’ali AbdulMalik, *Giyyāth al-‘Umam fī al-Tayath Min al-Zulm* (1st ed. Dār al-Mihrāb, Kanda, 2002) 39; Al-Bagdādi AbdulQodir Tohir, *al-Farq Baina al-Firaq*, (Maktabah Muhammad Ali Sobih, Misr) 349

for appointing leaders, each community should determine what best suits its circumstances, as long as the chosen approach aligns with the core principles of Sharia as established by Allah the Most High. This flexibility is consistent with the concept of *maslaha mursala*, which serves as a valuable framework in various governance models.

6. Conclusion/Recommendations

Islamic law places significant emphasis on the public interest through the endorsement of the principle of *maslaha mursalah* in both primary and secondary sources. Although scholars may differ in their application of this principle to sanction issues not explicitly covered by established authorities, it is crucial to examine the characteristics and conditions of each issue authorized by *maslaha* to ensure alignment with the spirit of Sharia. This is particularly relevant when scholars invoke *maslaha* to accept certain aspects of democratic governance, such as the right of the populace to elect a leader for a limited term and the regulations surrounding the electoral process. Scholars find this acceptance tenable after a thorough analysis of the well-documented practice of *shūrā* in Islamic history, which reveals that *shūrā* is not a rigid framework mandated by Islamic law, allowing for the potential incorporation of other governance systems when necessary.

Therefore, this paper recommends the following:

1. Ulama need to develop a critical thinking influencing every contemporary political modes and institutional structures they find themselves in with the principle of *maslaha* and its flexibilities.
2. There is the need to integrate *maslaha mursala* with democratic principles. This can only be achieved by either contextualising *maslaha* within democratic values (such as equality, justice etc.) or striking a balance between individual rights and collective interests.
3. There is need to create an opportunity to apply *maslaha* in policy-making probably through stakeholder engagement and experts or through regular review, accountability and evidence-based decision making.
4. When considering a long-term public interests', legislature can incorporate *maslaha mursala* in law-making while the judges

and executives also review and prioritise decisions for consistency with democratic principles and public interest.

There is need to clearly define public interest and its constituents because of the potential for abuse and exploitation for selfish reasons. This will assist in balancing competing interest between different public interest especially in diverse cultural and national interest.