In contemporary times, the Usuli legal maxim of Maslahah has become increasingly relevant to the public discourse. This is especially the case in both colonial and post-colonial times as there emerged a number of thinkers, like Mohammed Abdu and Mohammed Rashid Rida who used this maxim to make a sociological or even a political case for 'Islamic Reform'. Perhaps the reason why such thinkers, and others like them, utilise this particular maxim is because of its practical malleability and susceptibility to subjective value judgements. In terms of definition Lisan Al Arab defines Maslaha as 'manfa'ah' meaning 'utility'.The word itself comes from the etymological root word 'salaha' meaning fixing or amending' (Ibn Manthoor:1980). Terminologically, Al-Ghazali defines Maslaha as promoting welfare and removing harms (Al-Ghazali, 2008:480). Having said this, this essay will focus on the following. Firstly, I will outline the different kinds of Maslaha - with a particular emphasis on Al-Maslah Al-Mursalah with reference to the four major schools of thought and key Usuli scholars. After that, I will dedicate an entire section to Najm ul Deen al Toofi's conception of Maslahah making critical evaluations of it as I go along. I will then assess the Usuli implications of Al-Maslahah on other legal maxims and categories of Ahkaam (rulings). Finally, I will comment on some issues concerning the connection between Maslahah and 'aql' (human intellect), a wider philosophical discussion on 'reason', 'Sharia consequentialism', and other such relevant ideological points. I will focus entirely on Sunni Usul as Shii Usul would require a separate research.

Usulis typically divide Masalahah into three types; firstly, that which is in line with the agreed upon

sources of legislation, namely textual evidences from both the Qur'an, sound Tradition and 'Ijma - and thereby acceptable – secondly, that which is opposed to it, and thereby unacceptable, and finally, that which the agreed upon evidences has not essentially taken it into consideration nor has it opposed it, 'Al Maslahah al Mursalah' (which is accepted by most). Al Shatibi makes the point that the entire Sharia was sent for the Maslahah of people both in the short term and long term (Al-Shatibi,1991:8-9). Most jurists, including al-Shatibi, link the idea of Maslaha to the 5 necessary things that Islam came to protect, namely religion, life, intellect, lineage and wealth (Al-Shatibi,1991:31). In relation to the unacceptable type of Maslahah, or Al-Maslahah Al-Mulghaa, Al-Ghazzali says that allowing for such a Maslahah would allow for the whole religion to be changed (Al-Ghazali, 2008: 479). The strongest case made for the legal consideration of Masaalih (pl of Maslaha) is that which relates to situations of daroorah ('necessity'). For Al-Ghazali, three conditions must be fulfilled in order for a Maslahah to be legitimate, and allow for takhsees (specifying) of the textual evidences; firstly, that it must be Kulli (allow for entire communal benefit), Qati' (meaning most assuredly going to happen) and Daroori (completely necessary). It is a kind of takhsees – specifying- (Al-Ghazali would maintain) and not 'taqdeem' (or prioritising the maslahah over the textual evidences) as the Maslahah itself would be text based, or in category in one in the aforementioned categories- excluding Al-Maslah Al-Mulgha (Al-Ghazali, 2008:493). In this, Al-Ghazzali uses two examples to illustrate the point. The first example relates to Al-Taturrus (combatant human shielding with Muslim innocents) and suggests that attacking enemy combatants who shield themselves in this way is legitimate as not doing so would create more mafsadah from a Sharia perspective. Throwing someone off a ship - if that is required for survival, on the other hand, is illegitimate for Al-Ghazali because it is not Kulli (in the interest of the entire Muslim

community) but only the few other - would be beneficiary survivors - on that ship. From this, one can already start to notice that Al-Ghazali becomes more morally consequentialist when the entire Muslim community is implied in the equation, perhaps if all Muslims were represented on the ship, al-Ghazali would have a different attitude to the killing of one of them to save the other two. Although not always explicitly instantiated in the writings of the books of Usul, Sheikh Hussein Hamid Hassan, who wrote his PHD thesis on this matter, argues that all mathaahib (Sunni schools of thought) make some use of this. Commenting on Al-Shafii's Risaalah (which doesn't make mention of Maslahah as a distinct source of legal ruling) Hassan says that al-Shafii does make 'implicit use of maslahah in his principles' (Hassan, 1971:302). Hassan makes a similar argument for Hanafi Usul (Hassan,1971:466) by giving examples of circumambulation of the Kaba without purification and its connection with facilitating ease for the pilgrim. As for Hanbalis then the case is much easier to make as many Hanbalis, like Ibn Qudaamah al Maqdisi, unequivocally make mention of Maslahah albeit in a category of 4 principles which there is difference of opinion on, Ibn Qudaamah - despite this - maintains the view that Maslahah is a legitimate source for extrapolating rulings so long as it is in line with the textual evidences (Ibn Qudaamah,1998:478). From this, Maslahah - although somewhat controversial - could be a fixed part of the Usuli discourse in the Sunni school of thought especially in the Maliki and Hanbali schools.

Having started this essay with a discussion about 'Islamic revivalists' or 'reformers' like Abdu and Rida it is perhaps most interesting to note that many of them would perhaps draw inspiration from a student of Ibn Taymiyyah - Najm ul Deen al Toofi. Al-Toofi expounded a 'theory' of Maslahah which seemingly went beyond the normative traditionalist (Sunni) position of Maslahah being a subordinate category to the

textual evidences. Al-Toofi though, explicitly gives precedence to the Quran and Sunnah over anything else (Toofi, 2002:280) and even agrees with Al-Shatibi (quoted above) in that God knows best what the Masaalih of people are (Toofi,2002: 278). Al-Toofi though crucially makes a distinction between three kinds of transactions (worship, hudood - or punitive laws - and muamalaat - or transactions/interactions). In the case of category one and two, al-Toofi maintains that only Allah has the authority to let us know what is best for us, whereas in the third category some ijtihaad is required using 'customs and intellect' (Toofi,2002:280). Ironically, and perhaps even contradictorily, al-Toofi uses - as evidence of this - the famous hadith (which he was commenting on) of "La dharar wa la dhirar" (or 'there is no harming nor reciprocating harm'. The point of irony relates to the circularity of positing that the hadith is the primary source of authority (for the principle of Maslahah) but that the Maslahah Mursalah (in the category of muamalaat) must be prioritised over hadiths. One may also wonder what in particular - from either intellect or textual evidences - enabled al-Toofi to make a distinction like this between the three categories mentioned above. Al-Toofi seemingly contradicts himself further in elaboration of this, saying that there are three categories of maslahah related hukm (legal rulings), one that is a 'pure maslahah' another that is ' a pure mafasadah' (or harm) and the third which is a mixture of both (Al-Toofi,2002 :282). It is the third category which is most problematic, as if a hukm has any overall mafaasid it would contradict the fact that the sharia was sent for masaalih of the people. It is for this reason that Abd Al-Wahab Al-Khallaf said that Al-Toofi's position constitutes an 'totally subjective and purely his opinion, which opens the door to the abrogation to the Quran and Sunnah'(Khallaf, 1954:108). Al-Buti makes similar kinds of criticism saying that 'Al-Toofi started off by maintaining that the Quran and Sunnah are stronger pieces of evidences then proceeded to sayng that maslahah is stronger, is there any contrradiction

clearer than this?' (Buti,1977:208). But where Buti could be said to be reasonable in his initial assertion, he seems to weaken his case by stating 'he[al Toofi] states that ijmaa' (consensus) can be specified by maslahah but that is not possible due to the ijmaa' being qati (clear cut) (Buti,1977:210). Buti even goes as far as to say that maslahah cannot do any kind of takhsees (or specifying) in any case (note al Buti doesnt make specific mention to the maslahah mursalah). This is a problematic for Buti ad he intentionally projects his own academic understanding of ijmaa' on Toofi (namely the degree of its possibility and its leading to certain knowledge in all cases) on Toofi who doesnt have the same view (see Al-Toofi's discussion on Ijmaa' in his explanation of 'Rawda al Nathir'). What is also puzzling is that unlike al-Shatibi (who seems to equate 'aql' with logical principles – (Shatibi, 1991:27)) Al-Toofi doesn't give us a systematic way systematic way of rationalising Masaalih. Sheikh Hussein Hassan, in commenting on al-Toofi (Hassan,1971:547/548), seems not to see his work as exceptionally aberrational since Al-Toofi does make an effort to give primacy to the Quran and Sunnah albeit with some convolutions involving the aql along the way. Buti makes his most compelling case against Toofi when he makes reference to the fact that al-Toofi believes that the Maslahah is independent from the textual evidences and ijmaa' and haqiiqiyah (i.e. true in their essence and not in the mujtahid's understanding of them) (Buti, 1977:213/214). This is probematic, al Buti points out, as if we assume this then it is tantamount to assuming that the truth can be many in number and not one in number (as the Musawibbah – a group of Usuli scholars who believe in this would maintain to a large extent). Buti gives an analogy of three people all doing ijtihaad to find the Qiblah, all of them pray in different directions, and yet all of them being correct (Buti,1977:214). In terms of Maslahah you would similarly have – the argument goes – more than one mujtahid doing ijtihaad and coming to different conclusions (using aql and customs) all

of which will claim to be correct in and of themselves (Buti,1977:214). In the case of Maslahah this may lead to mujtahids philosophising (Buti, 1977:214,24 and 36) (as secular philsophers have for example) to come to truth and so, assumedly the primacy of religion would be undermined.

There could be said to be an extensive overlap between Al-Maslahah - Al-Maslahah al Mursalah in particular - and other legal maxims and categories. Take for example the category of Ibaahah or general permissibility. It would be contradictory to assert that something is Mubah and Mustahab at the same time as this would mean that one thing can have two separate ahkaam (rulings). Al-Maslahah al-mursalah would allow such contradiction if we consider that both are non-contextual rulings. This is as an event, say painting lines on the mosque floor, which may be mubaah aslan (defaultly) would be potentially raised from the status of ibaahah to istihbaab (or rewardable/non compulsory) on the basis of Maslahah mursalah. This contradiction can only be solved if we consider the ruling of painting lines on the masjid floor, for example, only mustahab in the context of that particular masjid and not as a default state. It is this point that Al-Qaraafi (Al-Qaraafi, 1973:67) and the subjective nature of defining a maslahah mursalah is also highlighted by al Shatibi (Shatibi, 1991:65). Going back to al Toofi – who as we have seen presupposes an intrisinc or essential truth to maslahah independent from textual evidences – one of two things would have to be true, either the default state is 'al-bara'ah al usliyah' (the default position in mu'malaat that something is halal until proven haram - a concept which al-Toofi affirms) or that the default position is one which is undefined until the mujtahid determines the maslahah of it. In other words, going back to our drawing lines on the masjid floor example, that act could potentially (from a maslahah perspective) be any of the five ahkaam (five key rulings ranging from obligatory to not

permissible), and that the ruling is only found out by intellectual (non textual) type of ijtihaad (which would actually be philsophising). What is impossible is that the default state could be al baraa'ah al usliyyah and potentially haram (non-permissible) at the same time in any objective sense. Maslahah musalah as well as mulaamah could also be said to be connected with 'al-bida' al idaafiyah' or (an auxiliary innovation) since it has some kind of usl (foundation) in the religion but has no specific evidence – the extent to which this is the case needs to be researched in its own right and cannot be given justice in this space. The concept is also connected to Istihsaan another disputed maxim meaning (to improve) as one can effectively use Maslahah to do istihsaan so long as - most would argue - it doesn't go against the textual evidences (Hassan,1971:257). It is also connected to ‘sad al tharii’ or ‘blocking the pathways (to evil)’ as such a thing would require as assessment of the mafaasid (the antonym of masaalih) (Hassan,1971:359). The connection with Maslahah and Qawl al Sahabi (the sayings of a companion) is also an interesting one, as some have claimed that the compilation of the Mushaf as well as the decision to not give particular sympathetic non-Muslim tribes (Muallafah qulubuhum) zakat wealth, was done by way of Maslahah. This, however, can be argued to be Maslahah Mursalah in the sense that they did not have any specific text, but also mulaamah (in line with the text) as Umar - the Caliph in charge at the time could be said to have interpreted the Quranic verses to influence the decision to do both things mentioned above. Moreover, Maslahah is connected to ‘aam verses and hadiths insomuch as it may be able to do takhsees (specify) such verses. This is in cases where the maslahah in question is in line with the text (Maslahah Mulaamah). If it is against the text then, most scholars - with the exception of al Toofi in the case of muamalaat - would conclude that such a maslahah is illegitimate. The issue of postulating otherwise would be to suggest that a non-textual source - in this case either the maslahah mulghaa or

mursalah - can specify an otherwise generic ruling. This issue is compounded if one believes - as some Usul scholars do - that takshees (or the process of specification) is a kind of naskh (or abrogation). In effect - it would suggest - that naskh (abrogation) can be done (as Khallaf above indicated in the case of Toofi) from non-textual sources. It is through this kind of logical deduction that what is referred to as a 'secularisation of religion' is - to some extent - achieved. From this, it is easier to realise how Islamic fuqahaa (jurists) can sometimes use principles of jurisprudence to further particular text based agendas, on those who are more 'liberal' or 'progressive' (like Abdu and Rida) have used maslahah to (in their thinking) justifiably arrive at value judgements.

Throughout this essay we have seen the extent to which the classical notion of Maslahah has been used to inform much of Islamic law. What is deeply connected to Maslahah is the extent to which Muslim jurists have been allowed to use their aql, intellect (or even rationality) in arriving at fiqh conclusions. The greatest issue of all is defining 'intellect', 'reason' or 'rationality' in any meaningful way. The Aql has a very broad definiton used by the vast majority of Islamic scholars as a 'ghareezah' or 'definiting feature' that can sometimes distinguish human beings from animals (Ibn Taymiyyah,2002:224). Ibn Taymiyyah anticipated issues with this as the method of 'rationalising' is sometimes painfully unobvious to us and would, in fact, force a 'truth seeker' to philosphise in order to come to conclusions. In the case of Maslahah, apart from formal logical principles which al-Shatibi mentions throughout his 'Muqadimaat', mathematics or even science (Ibn Taymiyyah,2002:124) what counts as 'rational' remains largley unregulated or otherwise subjective. Many jurists, especially in a liberal post-colonial world- may just resort to a kind of philsophical hedonism (or even utilitarianism) (Buti,1977:24/36) although this was

never the daabit (criteria) of measurement for earlier jurists. What should not be assumed though, as is by many Western situational ethics and consequentialist philsophers, is that Islamic divine command theory works in the same way as Kantian categorical imperatives. As we have seen with al-Ghazali in the second paragraph Islamic laws, through Maslahah and especially considering the 5 daroraat, have an in-built flexibility that allow for, what I call, a kind of Sharia consequentialist reasoning. Having said this, most Sunni scholars accept the reality of an objective usl (default position) or ideally true ethic and exceptions to such ethic which become legitimate with the fulfillment of certain conditions or shuroot and the removal of 'preventers' or mawanii (see Ghazali's discussion in paragraph 2).

Bibliography

*Dates in parenthesis indicate publisher publication dates.

Al-Buti, Mohammed Ramadan. (1977) *Dawaabit Al-Malahah Fi Al-Sharia Al-Islamiyah*. Beruit: Muassah Al Resalah,

Al-Ghazali, Abu Hamid Mohammed.(2008) *Al Mustasfah Min Ilm Al Usul.* Beirut: Dar al Ulum al Hadethah.

Al-Qarafi, Ahmed. (1973) *Sharh Tanqeeh al Fusul*. Cairo :Daar al Fikr

Al-Shatibi, Abu Ishaaq Ibrahim. (1991) *Al-Muwafaqaat fi Usul al Ahkaam*. Volume 1 and 2. Cairo: Matba' al Madani.

Al-Toofi, Abd Al Qawi. (2002) *Al-Taieen Fi Sharh al Arbaeen*. Beruit: Maktabah Makkiyah

Hassan, Hussein Hamid. (1971) *Nathiriyah al Maslahah fi Al Fiqh Al-Islami*. Cairo: Al-Maktabah al Shamilah.

Ibn Manthoor, Mohammed bin Mukarram. (1980). *Lisan al Arab*. Dar Al-Sadir. Beruit.

Ibn Taymiyyah, Ahmed bin Abdul Haleem. (2002) *Al- Radd ala al-Muntiqyeen* : Al Kotob al Ilmiyyah

Ibn Qudaamah, Abdullah Bin Ahmed. (1998) *Rawdah Al-Nathir* :Al-Maktabah al Mekkiah. Mekkah.

Khallaf, Abd al Wahab (1954). *Ilm Usul al Fiqh.* Cairo : Mutbahah Al-Nashr

Rida, Mohammed Rashid.(2002). *Muhawaraat al Muslim wa al Muqallid.*: Dar al Manaar