CHAPTER ONE

THE EMERGENCE OF MAŞLAḤA AS A LEGAL CONCEPT

I. Maşlaḥa and Istişlāḥ and their Relationship to Juristic Preference (Istiḥsān)

Our knowledge of the history of maşlaḥa as a legal concept prior to the 4th/10th century is very spotty. Most likely, maşlaḥa developed out of the concept of istişlāḥ—literally considering something good and beneficial—a somewhat amorphous method of law-finding that came to be associated with the Mālikī school of law. Up to the late 4th/10th century, the term istişlāḥ is more frequently found in legal writings than maşlaḥa. One may say that istişlāḥ as a legal procedure takes the believers’ maşlaḥa into account; it is similar to the procedure of istiḥsān, usually rendered into English as juristic preference, which deems one ruling preferable over another (see below for the distinction between these concepts). The origin of these words as technical terms in law-finding remains obscure. The terms maşlaḥa and istişlāḥ do not occur in the Qurʾān,¹ and the few times they are mentioned in the major hadīth collections² are unrelated to legal matters. Moreover, references to employing considerations of maşlaḥa in legal reasoning during the first centuries of Islam are often later attributions that prove unreliable upon closer investigation. Nevertheless, decision-making that involved some kind of considerations of maşlaḥa seems to have been part of legal practice quite early, even if not known by this technical term. The decision of the second caliph ʿUmar (r. 13–23/634–44) to keep the land of southern Iraq (al-sawād) under state control, instead of dividing it among the conquering tribes, was driven, according to Abū Yūsuf (d. 182/798), by considering the good (khayr) and general benefit

¹ Other derivatives of the root ṣ-l-h are, however, frequently found throughout the Qurʾān.
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(ʿumūm al-nafʿ) of the Islamic community. Hallaq states that many decisions of early legal authorities that were based on forms of reasoning that did not follow a strict methodology (i.e., raʿy and naẓar) later received theoretical justification in the methodology of istiṣlāh and istiḥsān. The method of istiḥsān is said to be closely related to that of istiṣlāh, or even equivalent to maṣlaḥa mursalā, the maṣlaḥa that is unattested in the authoritative sources of Islamic law. Both methods are similar in their semantic meaning—considering something to be good and beneficial—but are not identical either in their historical development or their procedure. Before presenting some of the textual evidence from the early period of Islam for the terms istiṣlāh and maṣlaḥa, it is necessary to differentiate them from istiḥsān.

A precise history of the early development of istiḥsān has yet to be written. As a legal concept, juristic preference is certainly older than istiṣlāh and maṣlaḥa. However, dating a technical use of juristic preference among legal experts to the early 2nd/8th century, as Paret does, is problematic. Verifying the authenticity of the early legal literature is not an easy or uncontroversial task. Inconsistencies in the transmission and internal structure of these texts raise reasonable questions about who actually authored them and whether one can attribute their present form to the time period of their alleged authors. Norman Calder explains discrepancies in the works ascribed, e.g., to Mālik b. Anas (d. 179/795), Abū Yūsuf, and al-Shāfiʿī (d. 204/820) by noting that the works were school texts that underwent considerable redactional processes before attaining their final form, usually after the mid-3rd/9th century. He has been widely criticized on the grounds that his approach and his source evidence do not warrant such far-reaching

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