CHAPTER TWO

INTEGRATING MAŞLAḤA INTO LEGAL ANALOGY (QIYĀS)

I. Formal and Substantive Rationality in Incorporating Maşlaḥa into Legal Theory

Al-Juwaynī laid the groundwork for integrating the concept of maşlaḥa into the law-finding process. Future jurisprudents then refined and expanded the two areas of legal theory in which he discussed maşlaḥa—as a criterion to identify the ratio legis in analogy and as a universal legal precept by which the applicability of concrete rulings is judged. Al-Juwaynī’s interpretation of maşlaḥa reflects two different ways of reasoning with which to approach the authoritative texts. When using considerations of maşlaḥa in the form of suitability in the method of analogy, a jurist moves in a deductive fashion from one particular statement/ruling in the texts to another particular. The basis (aşl) as well as the derivation (farʿ) refers to a particular case, and in each legal instance the jurist has to establish that the same ratio legis exists in the new and original case. A different approach is used when postulating maşlaḥa as a universal precept. A jurist extracts inductively from several particular statements in the texts a general ruling that is then applied in law-finding without direct reference to the particular pieces of textual evidence from which it was extracted. For example, a jurist could argue that, taken as a whole, the texts of Qurʾān and Sunna prohibit inflicting harm to a person’s life, and that based on this general statement any act that constitutes harm to life, such as reckless driving or shaking an infant, are prohibited. In contrast thereto, a jurist who applies the procedure of analogy would have to find a specific statement in the textual sources of Islamic law that fits the circumstances of reckless driving or shaking an infant, identify its ratio legis, and then transfer the ruling on account of the existence of a common ratio legis.

These two approaches to the textual sources of the law can be understood as following a formal and substantive legal rationality respectively. My use of these terms follows Max Weber’s typology of
‘formal’ and ‘substantive’ rationality as two categories of legal thought.1 Weber uses formal and substantive rationality as ‘ideal types.’2 Neither formal nor substantive legal rationality exists in its full logical consistency in any concrete legal system; rather, they are categories to analyze a system’s constituent elements.3 In actual legal systems, formal and substantive legal rationality occur as mixed types. With some modification, Weber’s typology of legal rationality provides a fruitful framework to describe and analyze the legal rationality operative in incorporating notions of maṣlaḥa into Islamic jurisprudence.4 Weber describes formal legal rationality as a logic in which “only unambiguous general characteristics of the facts of the case are taken into account.”5 He divides formal rationality into two types. It can be ‘external’ in the sense that only characteristics that are external and perceptible as sense data are considered to be legally relevant, such as the utterance of certain words. Or it may be ‘logical’ in the sense that “the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied.”6 In Weber’s analytical model of formal-logical rationality, decisions of legal problems are influenced by norms obtained through the logical systematization of meanings. The aim of formal rationality is to achieve the highest degree of strict juridical precision in order

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4 For a comparison of Weber’s typology of legal rationality with that of Lawrence Friedman see John Makdisi (“Formal Rationality in Islamic Law and the Common Law,” *Cleveland State Law Review* 34 [1985–86]: 97–112). John Makdisi argues that both Weber and Friedman are erroneous in their classification of Islamic law as non-innovative. With examples from contract law Makdisi shows that Islamic law follows an innovative, logically formal rationality that is concerned with legal uniformity and internal consistency (ibid., 109–12).
6 Ibid., 657.