CHAPTER THREE

APPLYING MAŠLAḤA IN LEGAL PRECEPTS (QAWĀ‘ID)

I. Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfī

1. Introduction

The previous chapter presented the contributions to the concept of mašlaḥa by al-Ghazālī and al-Rāzī; the former’s definition legitimized it as a tool of law-finding and the latter perfected the integration of mašlaḥa into the procedure of analogy by following a formal legal rationality. This chapter looks at the interpretation of mašlaḥa by the Mālikī jurist Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfī (626–684/1228–1285). Al-Qarāfī’s writings represent an important development in the understanding and application of mašlaḥa in Islamic law. He significantly enlarges the application of mašlaḥa in the law-finding process by using it not only to determine suitable rationes legis in the procedure of analogy but also in the area of legal precepts (qawāʿid) (see below, section 2.). Focusing on mašlaḥa as the purpose of the law that permeates all legal rulings enables him to extend and adapt Islamic law to the changing needs of society without compromising its religious character. He thereby enhances the ability of Islamic law to be relevant to the legal needs of society.

The effort al-Qarāfī put into strengthening the religious law appears to be a reaction to his historical environment. Al-Qarāfī lived in Cairo during the turbulent decades of the 7th/13th century, when the Ayyūbid rule disintegrated, the Mamlūks rose to power, the Mongols sacked Baghdad and put an end to the ʿAbbāsid caliphate there, and Muslim rulers fought sometimes against the crusaders and sometimes joined forces with them against one another.¹ In these volatile political times, al-Qarāfī enjoyed the reputation of a great jurist, despite

(or maybe because of) the fact that he himself never held any official post apart from teaching law.\(^2\) As Jackson has shown in his thorough study of al-Qarāfī’s work, much of his interpretation of Islamic jurisprudence aims at asserting the independence of the different schools of law from the political establishment.

In the ‘tug-of-war’ between the political and religious authorities over the sphere of law, it was the political power holders who seemed to have the stronger pull during al-Qarāfī’s time. The power wielded by the political ruler over the law is exemplified by the far-reaching re-organization of the judiciary. In 663/1265, the Mamlūk Sultan al-Zāhir Baybars (r. 658–76/1260–77) appointed four chief qādīs in Cairo, and later also in other Mamlūk cities, one from each school, with the Shāfiʿī chief judge presiding over the court system.\(^3\) Baybars’ new policies granted quasi-equal status to each of the four schools of law, ending the overpowering dominance of the Shāfiʿī school. The judicial re-organization was of particular significance to the minority schools because the chief Shāfiʿī judge lost his right to rescind rulings handed down by judges from other schools. Strengthening the independence of the individual schools from Shāfiʿī oversight came, however, at the cost of increased school discipline. Apart from being in charge of matters of public treasury and property of orphans, one of the functions of the Shāfiʿī chief judge was to ensure that non-Shāfiʿī judges did not deviate from the legal doctrines espoused by their school of law. A Mālikī judge, thus, had to rule in accordance with accepted Mālikī teaching as expressed in the authoritative textbooks of the school, and Ḥanafīs, Ḥanbalīs, and Shāfiʿīs had to adhere to their respective schools’ body of law.\(^4\) Institutionalizing the four-qādī system and enforcing school discipline—also called taqlīd, following the opinions of previous authorities—had positive effects on the legal system. The regime of taqlīd ensured predictability and legal stability. Furthermore, it enabled the population to circumvent stringent (or lenient) rulings of one school by having their case adjudicated by the judge of another school. In certain cases it was even expected of a

\(^{2}\) Al-Qarāfī taught law at various Cairo colleges and mosques, but apparently did not hold any official office in the judiciary (see Jackson, Islamic Law, 2 and 13–4).


\(^{4}\) Ibid., 217 and 220–3.