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Hanafite Freedom of Apostasy in Islamic Jurisprudence as Reflected by Shams al-Din al-Sarakhsî (400/1009-483/1090)

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Özet

Dinden dönme (Apostasy) çoğu dinde büyük bir günah olarak Kabul edilmiş ve ona Ortaçağlarda en ağır ceza uygulanmıştır. Özgürlükler çağı olan günümüzde, üzerinde en çok tartışılan konu, bireyin dinini terk etme özgürlüğüdür. Bu bağlamda İslam Hukuku'nun bu meseleye bakışı önemlidir.

Geleneksel olarak bilindiği şekliyle İslam Hukuku, İslam dinini terkeden (mürted)e ölüm cezası vermektedir. Bu müesses ölüm cezasının, Hanefi fukahası incelendiğinde, daha onbirinci asır ulemasında bile mesela Karahanlılar döneminin Maveraünnehir bölgesinin alimi olan Türk fakih Serahsi'de ince bir hukuki akıl yürütme ve usul tartışması ile, nasıl yumuşatılarak kaldırılmaya doğru geliştirildiği görülecektir.

Serahsi'ye gore, erkek mürted ölüm cezasına çarptırılır, kadın ise sadece hapsedilir. Erkek mürtede ölüm cezası verilmesinin hukuki sebebi, irtidad etmesi durumunda hemen düşman ülkesine ve saflarına geçerek Müslümanlara karşı savaşan biri olduğu içindir. Kadın mürtede ölüm cezası verilmemesinin hukuki sebebi ise, onun savaşçı olmamasıdır. Bu hukuki illetten hareketle Serahsi, eğer erkek mürtedin, Müslümanlara karşı savaşması, ömürboyu hapis veya başka yollarla önlenirse, öldürülmesi gerekmez sonucuna vardığını, tartışmasındaki usluptan çıkarabilmek mümkün görünmüştür.

Fıkıh, mürted erkeğin ve kadının mülkiyet haklarını da detaylı bir şekilde tartışmış ve karara bağlamıştır. İdam edilen mürtedin terekesi varisleri arasında feraiz hükümlerine gore dağıtılır. İdam edilmeden düşman ülkesine sığınan mürted, hakikaten ve hükmen ölmüş sayılır. Böylece ülke ayırımı gerçekleştiği için Müslüman ülkenin vatandaşı olmaktan çıkar. Fakat mürted, hiç bir durumda akrabasına varis olamaz. Müesses hükme gore, mürtedin irtidad döneminde icra ettiği bütün hukuki işlemleri geçersizdir. Serahsi, bu meseleye de, onun tasarruf haklarını dört kategoriye asıtrarak bir yumuşama getirerek ona bazı haklarını korumasını sağlamaktadır. Bu durumda mürtedin de tasarruf hakları vardır. Bu haklar, irtidad nedeniyle kaybolmaz.

Serahsi'nin Fıkıh metodolojisini şöyle özetlemek mümkündür: Onun, Hanefi Fıkhı'nın Iraklı koluna mensup olduğu unutulmamalıdır. Bu okulun kurucusu şüphesiz Ebu Hanife'dir. Ondan sonraki iki önemli şahsiyeti ise Ebu Yusuf ve İmam Muhammed'dir. Serahsi, İmam Muhammed zincirinin kendi zamanındaki halkasıdır. Kendi zamanının durumlarına çözümleme bulabilmek için, gerektiğinde zikrettiği mezhebin bu kurucularının fikirlerini terkederek, istihsan ve istislah tekniklerini kullanarak kendi görüşünü ortaya koyar. Bu fikirler, kıyas gibi daha öncelikli tekniklere zıt olabilmektedir. Böyle yaparak İslam Hukuku'nun gelişmesine büyük katkıda bulunmaktadır. Bu tekniği mahirane kullanmakla Serahsi, kendisinin müstakil müctehid olduğunu açıkca sergilemektedir.

Anahtar Sözcükler

Serahsi, din terketme özgürlüğü, irtidad, mürted, istihsân, istislâh.

APOSTASY

Apostasy is a term derived from Greek apostasia (defection, revolt) and (rebel in a political sense). However it is a term generally employed to describe the formal leaving, abandonment or renunciation of one's religion. In religious sense is to signify rebellion and rebels against God and the Law. It should occur in public and not in private. One who commits apostasy is an apostate, or one who

apostatizes. Many religions, from their outset consider it a vice (sin) and punish apostates.[67] In the Middle ages utmost severe punishments had been applied to this crime. Historically as well as currently, the offense can be punishable by death. The Catholic Church may in certain circumstances respond to apostasy by excommunicating the apostate. Both Judaism[68] and Islamic Law demand the death penalty for apostates.[70]

The Arabic word murtadd denotes the apostate, and irtidâd or riddah "returning back" apostasy which commonly defined as the rejection or repudiation of Islam in word or deed by a person who has been a Muslim.[71] Apostasy is different from heresy (dalâla). The difference between apostasy and heresy is that the latter refers to rejection or corruption of certain doctrines, not to the complete abandonment of one's religion. Heretics claim to still be following a religion whereas apostate rejects it entirely. This essay will not be concerned with the second heading, namely the heresy. This essay will be concerned with apostasy as reflected by Shams al-Dîn al-Sarakhsî.

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67 F.J. Foakes-Jackson, "Apostasy", *Encyclopaedia of Religion and Ethics*, I/623; H.P. Kippenberg, "Apostasy", *Encyclopedia of Religion*, ed. Mircea Eliade, I/353; Artcl. "Apostasy and Apostates from Judaism" in *The Jewish Encyclopedia*, II/12.

68 "*If thy brother, the son of thy mother, or thy son, or thy daughter, or the wife of thy bosom, or thy friend, which [is] as thine own soul, entice thee secretly, saying,* Let us go and serve other gods, *which thou hast not known, thou, nor thy fathers; [Namely], of the gods of the people which [are] round about you, nigh unto thee, or far off from thee, from the [one] end of the earth even unto the [other] end of the earth; Thou shalt not consent unto him, nor hearken unto him;* neither shall thine eye pity him, *neither shalt thou spare,* neither shalt thou conceal him: But thou shalt surely kill him*; thine hand shall be first upon him to put him to death, and afterwards the hand of all the people. And thou shalt stone him with stones, that he die; because he hath sought to thrust thee away from the LORD thy God, which brought thee out of the land of Egypt, from the house of bondage.*" Deuteronomy 13/6-11. It must be remembered that the crucifiction of Jesus Christ, the Son of God, was a punishment of apostasy in Judaism.

69 Islam also does enforce harsh penalties for apostasy. However the Qur'an speaks repeatedly of people going back to unbelief after believing (*ridda, irtidâd*) but is silent on the punishment for apostasy and does not confirm that they should be killed or punished.

70 There is no concept of an apostate in Hinduism and Buddhism, and there is no Hindu or Buddhist procedure that defines apostasy.

71 W. Heffening, "Murtadd", *Encyclopedia of Islam*, 2.nd ed., VII/635.

AL-SARAKHSÎ

Muhammad b. Abu Bakr Shams al-Din al-Sarakhsi (400/1009-483/1090) hails from the vicinity of ancient city of Khorasan, called Sarakhs, an old town laid between Mashad and Marw. There is no information about his childhood or family background. He was a long-time and most prominent disciple of Abd al-Aziz al-Halwânî in Bukhara, and later on he formed a study-circle therein and educated many students. His most prominent students are 'Umar b. Habîb, grandfather of al-Marghînânî, the author of al-Hidâya, and Abdalaziz al-Uzcandî, grandfather of Qâdıkhân.[72]

He is one of the outstanding forerunners of the Turkish Hanafi classical period jurists in Transoxania, outside Baghdad, inheriting and developing the juristic tradition in that region. He followed the line of Muhammad al-Shaybânî (d. 189/804), and wrote many books on Hanafite jurisprudence in his line. Al-Sarakhsî reintroduced and explored the rules of al-Shaybânî, and imcorporating information related to local Hanafî and other schools of fiqh.[73] He was the champion of the legal reasoning and a strong advocate of the methodology of istihsan, which he describes as abandonment of systematic reasoning of the scriptures in favor of a different opinion supported by stronger evidence and more accommodating of the population's needs. However, Sarakhsî's istihsan is also bound by certain criteria and conditions which accompany reasoning of any kind.[74] Sarakhsî is greatly admired for his phenomenal memory as evidenced from his accurate recollection of the classics while being held in prison. This feature of his is conspicous in his voluminous work al-Mabsût.

He lived under the Qarakhanids (Turkish, Karahanlılar) (920-1212), a Hanafite Muslim Turkish dynasty of Transoxania in Central

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72 N. Calder, "Al-Sarakhsî", *Encyclopedia of Islam*, 2.nd edit. 9/36. I have to express my whole-hearted gratitude to N. Calder, the author of this article for being my Ph D. supervisor in Manchester University. And I am also deeply sorrowed for losing him at his academically early age in 1998. N. Kahveci.

73 N. Calder, Encyclopedia of Islam, 35.

74 For further information about Sarakhsî see Haci Khalifa (d. 1067), *Kashf al-Zunûn*, 11/1012; Muhammad Lakhnawî, *Kitab al-Fawaid al-Bahiyya fî Taracimi'l-Hanafiyya* (Beyrut, Dâr al-Ma'rifa, 1906); Muhammad al-Kurashî (d. 775/1373), *al-Cevâhir al-Mudıyya* (Haydarâbâd, 1332) 11/29. al-Kâsim Ibn Kutlubughâ (d. 879/1474), *Tâc al-Tarâcim* (Leipzig, 1862), 38; et-Temîmî al-Ğazzî (d.1010), *al-Tabakâtu's-Saniyye fî Tarâcimi'l-Hanafiyya*, III/175; Brockelmann, *GAL*, I/460, Suppl. I/638; Sezgin, *GAS*, i/423.

Asia. They became Muslim in the middle years of the tenth century,[75] circa a half century prior to Sarakhsi's birth and continud throughout the tenth and eleventh century. Islam was first embraced by Satûq Bughrâ-khân (d. 344/955).[76] Qarakhanids spread Islam around Transoxanian, and Tarim basin and the northern steppes region. The rulers accepted the nominal authority of Abbasid Caliphs. At the same time The Saljûq Empire was beginning to emerge as a great power, and in 1055 Saljûqî sultan Tughrul Beg defeated the Buwayhids and seized the control of Baghdad and the Caliphate, and their rulers were named as Sultans and became rulers of a new Middle Eastern empire from Khurasan to Iraq.[77] Under the Qarakhanids the Hanafî school of law and Mâturîdy school of theology were established in Transoxania. It is the Qarakhanids Dynasty where the two of the earliest famous works of written Turkish stem, the Qutadghu Bilig of Yusuf Khâss Hâjib (1017-1077) and the Dîwân Lughât al-Turk of Mahmud Kâshghârî (1008-1105).

Sarakhsî laid considerable stress on the need for functioning political authority but did not relinquish the right to criticize the government and influence that authority even at the expense of his personal liberty.[78] He himself was a reactionarist and opposition to the government.[79] Sarakhsi recognized the political power, because only with efficient government and stability can Islam be prosper and fitna (factionalism) within the Islamic community can be avoided.[80] But he frequently criticized the Qarakhânîds, for example the tax collection unjustly (zulman) and not taking it by right.[81] He was jailed in 466/1073 during the reign of Khaqân Nasr Shams al-Mulk (1068-1080) for criticizing the government, and was thrown into prison. And after fifteen years of imprisonment was released in 480/1087 by Khâqân Ahmad (1081-1089). He died soon after completing al-Siyar al-Kabîr. Most authors agree that he died in the year 1090 A.D.

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75 C. E. Bosworth, *The Islamic Dynasties* (Edinburgh 1967), 112.

76 W. Barthold, *Turkestan Down To The Mongol Invasion* (Oxford, 1928), 255.

77 Ira M. Lapidus, *A History of Islamic Societies* (Cambridge 1989), 140-2.

78 Norman Calder, "Friday Prayer and the Juristic Theory of Government: Sarakhsi, Shirazi, Mawardi" *Bulletin of the School of Oriental and African Studies (SOAS), University of London*, Vol. 49, No. 1, in Honour of Ann K. S. Lambton (1986), pp. 35-47, 39.

79 W. Barthold, *Turkestan Down To the Mongol Invasion*, 310-320.

80 Calder, passim, 38.

81 Calder, ibid, 40.

MURTADD in al-SARAKHSÎ

Sarakhsî placed the chapter (Bâb) defining the legal status of murtadd under the book (Kitâb) of al-Siyar, where scholastic compendia of jurisprudence (fiqh) discussed the international law or the law of war.[82] Sarakhsî's discussion of the murtadd confines itself to a formal listing of its modes.

PUNİSHMENT OF THE MALE MURTADD

Sarakhsî begins to discussion of subject-matter with the punishment of the murtadd. He points out that when a muslim turned back from Islam or apostatized (irtadda), Islam is offered to him, if he turns to Islam, then he is okay, otherwise he is to be slain at his place, with the condition that if he requests respite, he should be given three days of opportunity to repent. The main evidences for the obligatory death penalty Sarakhsî adduced are; the first is the verse of the Qur'an saying, "Fight them until they become Muslim,"[83] for that verse fighting them is obligatory duty (fard) on Muslims, and second evidence cited in the Mabsût, as a fundamental hadîth establishing the obligatory nature of the punishment of the murtadd, Prophet saying, "Slay him who changes his religion." There are traditions of practices, as the third evidence of killing the murtadd, transmitted via some Companions such as Mu'âz b. Jabal.[84] The justificatory explanation al-Sarakhsî gives is by analogy with a legal maxim related to Arab polytheists. He states that this is because the murtadd is in the same position with Arab polytheists, even graver

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82 We studied his most famous work *al-Mabsût* completed in 477/1084 in over 30 volumes, is a gloss of al-Hakim al-Shahîd Abu'l Fadl Muhammad al-Marwazî (d. 334/945)'s text *Kitab al-Kâfi* which is a commentary or epitome on Muhammad al-Shaybani's *al-Asl*, the foundational texts of Hanafî tradition. Al-Mabsût remained a source of reference for the developing Hanafî furû' tradition till today. We used *Kitab al-Mabsût*, Mısr, 1324, Matba'a Sa'âda edition.

83 Qur'an 48/16. However Sarakhsî substantiated his verdict of killing the *murtadd* with a Qur'anic verse which holds a very general verdict, the Qur'an keeps silent regarding the punishment of the *murtadd* in this world. In the Qur'an the apostate is threatened with punishment in the next world only, Qur'an 17/108-9, and severe punishment (*'adhâb*), see Qur'an 3/80 ff., 4/136, 5/59, 9/67. Contrary to the Qur'an, we find death penalty for the *murtadd* in the collection of the hadîths of the Prophet. Cf. Sunan Ibn Mâja, *Kitab al-Hudûd*; Musnad Ibn Hanbal I/409, 430, 464-5; al-Bukhârî, *Istitâba al-Murtaddîn*; al-Tirmîzî, *Hudûd*; Abû Dâvûd, *Hudûd*, etc..

84 Sunan Ibn Mâja, *Hudûd, bâb* 25; Abû Dâwûd, *Hudûd, bâb* 1. al-Mabsût, 10/117.

(aghlaz) than them in criminality. Verily the Arab polytheists are relatives of the Messenger of Allah, and the Qur'an was sent in their language. They do not comply with this right when they apostatize. And this murtadd was from the people of the religion of the same Messenger of Allah, and the beauties of his sharî'a have been acknowledged and recognized, when he apostatized, it means that he did not comply with that. Hence just as accepted from the Arab polytheists either the Islam or the sword, so likewise is from the murtadd.[85] The evidentiary cause adduced by Sarakhsî for he is to be killed rests upon the legal principle that "due to the ridda he becomes a harbî"; a citizen of the abode of the war (dâr al-harb).[86] The penalty of ridda; defection from Islam, occurs because of the return from the admission (iqrâr) of the truth (the Islam) is the biggest crime. The crime of ridda is heavier (aghlaz) from the crime of original disbelief. Hence killing the murtadd is purely the right of Allah (haqq-Allah).[87]

Equation of the murtadds with Arab polytheists based upon the legal principle that they are regarded as perpetrators on the kinship of the Messenger of Allah, hence just as not the protection (dhimma) and peace (sulh) is acceptable for the Arab polytheists, likewise is for the murtadds.[88] but they are invited to Islam, if they do not accept it they are killed, and their women and progeny are enslaved. Sarakhsî distinguished the original and later disbelievers. If their women and children are original muslim, they are forced to return to Islam.[89] If they are not original muslims, they are not forced to Islam, but are enslaved. Sarakhsî adduces an argument might be classified as an example of istihsân and istislâh and he rests his opinion on juristic criterion of "public interest":[90] "The original nonbelievers are left on their existing legal status for the benefit of Muslims (manfa'a al-muslimîn) as a property and labor. The enslavement is valid for the women and the children, and the poll-tax (jizya) is a duty on the grown up males (bâligh)."[91] It is

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85 al-Mabsût, 98.

86 al-Mabsût, 10/106.

87 al-Mabsût, 10/109.

88 al-Mabsût, 10/117.

89 al-Mabsût, 10/117.

90 *Istihsân* is the principle of jurisprudence that in particular cases not regulated by any incontrovertible authority of the Qur'an, *hadîth* or *ijmâ'*. *Istislâh* is the principle of jurisprudence that "consideration of the public interest" is a criterion for the elaboration of legal rules. N.J. Coulson, *A History of Islamic Law* (Edinburgh, 1990), 237.

91 al-Mabsût, 10/118.

obvious that Sarakhsî is in favour of the capital punishment, also known as the death penalty or death sentence for the crime of irtidâdd established by the main stream of Hanafî school of law.

THREE DAYS

Lacking the Qur'anic and hadith injunctions, based on the narratives from Caliph 'Umar quoted from al-Shafi'î who made the "three day-respite" a prerequisite to kill the murtadd because of he may repent, "the murtadd is not to be slain immediately after he apostatized. If he demands respite, he will be given only three days. This may be he apostatized due to a doubt befell him about Islam, and it is for us to relinquish this doubt.[92] Or he may be in need of thinking for the truth to manifest to him, this is impossible but with respite. If he demands respite the imam[93] has to give him this time." The prescribed period is three days in the shari'a, imam should not exceed this duration." If the murtadd does not request this time, he is killed at that moment. According to Abû Hanîfa and Abû Yûsuf, no matter the murtadd demands respite or not, giving him respite for three days is recommendable (mustahâb) for the imam. If it becomes manifest that he has a doubt and there is a sign he will repent when his doubts are relinquished, then abandonment of giving respite and not asking him for repentance is abhorred (makrûh).[94] Three day respite is a try to restore the apostate to his community again, by removing his doubts and persuading him the truth of Islam. This shows that in Sarakhsî the aim in criminal punishment is the "restoration" (ıslâh) of the disorderly behaviour of the culprit.

REPENTANCE-OBSTİNACY

Sarakhsî adapting the traditional law to the circumstances of his contemporary society he points out that, "in our time the verdict of the religion has been established and the truth has been manifest, so polytheism can only come about in obstinacy. However it can be because of the suspicion befell on him as well. The sign of this suspicion is his request of respite. If he does not demand respite, the discerned situation (zâhir) is that he is obstinate in irtidâdd, then killing him does not matter. Notwithstanding this fact, Sarakhsî

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92 As cited by al-Sarakhsî according to al-Shâfi'î, it is obligatory on the imam to give three-day respite, and it is not lawful to him to kill him before. al-Mabsût, 10/98-9.

93 The term *imam* used to designate the governor, or a neutral term indicating only someone in political charge.

94 al-Mabsût, 10/99.

makes and exclusion for in a degree of recommendable (mustahab), the asking him for repentance, by placing him in the status of a unbeliever (kâfir) whom the invitation to Islam (da'wa) reached him, and renewal of the invitation about him is mustahab, but not obligatory (wâcib).[95] If he repents, his way is open. His repentance must come with the phrase of shahâda as oral testimony, and to acquaint himself from all religions except Islam, or to be acquainted from what conveyed to him. Sarakhsî specifically mentions two religions, namely Judaism and Christianity. This may imply that because in his time these two religions have intensified their missionary activities on the community of Sarakhsî and the conversion ratio could be high. He says, "Because the complete Islam requires for the Jewish to be acquainted from Judaism and for the Christian from the Christianity. The murtadd must acquaint himself from all nations-religions (milla) other than Islam, because there is no benefit (manfa'a) for the murtadd from other religions. If the murtadd is acquainted from what is conveyed (intaqala) to him, then what is aimed has come about."[96] The paraphrase of "what is conveyed (intaqala) to him" is the most outspoken passage for missionary activities on Muslims in the time of Sarakhsî. I well may for that reason construe that Sarakhsî felt a need to make a specific legal clause for his time. The primary aim for Sarakhsî was to secure the integrity of his Islamic community. This might have also been considered as a key example for integrating the theoretical discussions of fiqh into the actual forms of political practice.

REPETİTİON OF IRTİDÂDD

If he apostatizes second or third time, above mentioned procedure is applied to him in each time.[97] Sarakhsî used a Qur'anic verse of, "...but if they repent, and establish regular prayers and practice regular charity, then open the way for them.."[98] But this verse is neither about the murtadd nor the repeat of the repudiation of Islam. This style of Sarakhsî heralds the concession he is going to make very soon, or at the end of his discussion.

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95 As quoted by al-Sarakhsî according to al-Shâfi'î, adjournment for three days by the *imam* is wajib. It is not lawful to slay him before this period. Al-Mabsût, 10/99. It may be suggested that al-Sarakhsî implied that al-Shafi'î is wrong.

96 al-Mabsût, 10/99.

97 al-Mabsût, 10/99.

98 Qur'an, 9/5.

Sarakhsî, deprecates Ali and Ibn 'Umar who holds that "if he repeats it for the forth time, his repentance is unacceptable and killed in any case, because it becomes manifest that he is scornful and mocker, and unrepentant", and they adduced with Qur'anic verse of "Those who believe, then reject faith, then believe (again) and (again) reject faith, and go on increasing in unbelief, Allah will not forgive them..."[99] Sarakhsî construed that this verse is about who increased the unbelief. He stated that if he believed and expressed the repentance and the submission, his position in the fourth time, is like his position before that. Hence if he becomes Muslim, acceptance of this from him is obligatory (wâjib) due to the word of Allah, "say not to any one who offers you a salutation: "You art none of a believer!" and a Prophetic hadîth, prohibited killing a person who uttered the kalima shahâda.[100] If the murtadd is resilient to be Muslim, he is to be slain.[101]

FEMALE MURTADD

Contrary to male, female murtadd is not killed but imprisoned and kept under compulsion to return Islam. Shâfi'î holds contrast opinion that she is killed if she does not return to Islam.[102] Abu Yûsuf also held this view at the beginning but later on he returned. Abu Hanîfa held that she is sporadically exposed to ta'zîr (torture) with thirty nine lashes then returned to the prison until she repents or died. Sarakhsi using Abu Hanîfa's discussion remarks that there is difference between original unbeliever and murtadd, the evidence is that after ridda she is imprisoned, tortured and forced to return Islam, this is not done to her in the original disbelief (al-kufr al-asliyy).[103]

Sarakhsi with the reference to two Prophetic hadith prohibiting the killing of the women explicitly stated that the Prophet made it clear that the deservingness of the killing for nonbelievers rests on the cause of war (qıtâl), and the women are not killed because they do not make war. Sarakhsî construes with legal reasoning based on these Prophetic Traditions that there is no difference between the

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99 Qur'an, 4/137.

100 Qur'an, 4/94.

101 al-Mabsût, 10/99-100.

102 Shâfi'î derived his opinion from a Prophetic *hadîth* denotes that, "Kill whoever changes his religion", and he construed that this statement is enclosure of the male and female *murtadd.* Killing is the penalty on the *ridda.* al-Mabsût, 10/108-9.

103 al-Mabsût, 10/109.

original (aslî) and the casual (târi') disbelief.[104] Sarakhsî, in clear contrast with Shâfi'î held that killing is not penalty on the ridda, on the contrary it is a deservingness with respect to the obstinacy on the disbelief, "do not you see that if he becomes Muslim the penalty falls due to eviction of the obstinacy. The deserved penalty does not fall with repentance like the hudûd. Changing religion and the essence of the disbelief are from the greatest crimes, but this is between the human and the God, hence her punishment is adjourned to the dâr al-jazâ' (the abode of the punishment, that is the Next World). The penalty imposed in this world is for legitimate-administrative reasons (siyâsatan) for the welfare (maslaha) returned to the humanbeing; like retaliation (qısâs) to protect the lives, and the penalty (hudûd) of the adultery to protect the ancestral lineages (ansâb), and the penalty of slander of false accusation of sexual intercourse to a woman (qadhf) is to protect the chastity, and the penalty of intoxication is to protect the Reasons etc.[105] With the obstinacy on the disbelief he becomes muhârib (warrior) against Muslims, hence he is killed to repulse the war (muhâraba). When the killing is due to the muhâraba has been established and the woman has no intent suiting to muhâraba, she is not killed when she is an original unbeliever nor in the casual disbelief, but she is imprisoned, the imprisonment is legitimate about her in the original disbelief, she is enslaved, and the enslavement means imprisonment.[106] The female murtadd is also enslaved if she escapes to dâr al-harb.[107] Sarakhsî implicitly implies that the imprisonment must be preferred to killing, not only for the woman but for the male murtadd as well. I assume he made the following remark that, "the imprisonment is legitimate about all who returns from what he confessed, as it is in other rights (huqûq), this should not be restraint only with the disbelief and the muhâraba."[108]

There is no compensation for an individual if he kills a free female murtadd, because she is like a harbî, and the harbî is not killed but if someone kills her there is no penalty on him.[109] If the murtadds demand to be granted the right of dhimma (protection responsibility) of Muslims, it is not accepted, because dhimma is

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[104] al-Mabsût, 10/109.
[105] al-Mabsût, 10/110.
[106] al-Mabsût, 10/110.
[107] al-Mabsût, 10/111.
[108] al-Mabsût, 10/110.
[109] al-Mabsût, 10/112.

accepted from whose enslavement is lawful. Enslavement of a Muslim even though he is a murtadd is not lawful.[110]

FREEDOM OF POSSESSİON (MİLKİYYA) ON THE PROPERTY

THE INHERİTANCE OF THE MALE MURTADD

One of the most important regulations concerning the apostates Sarakhsî discussed at length is their inheritance left behind when they are killed for the crime of ridda. He holds that the inheritance of murtadd is distributed amongst his Muslim heirs in accordance with Islamic law of inheritance. This is in explicit contrast with al-Shâfi'î's opinion.[111] Sarakhsî demonstrated two religious evidences for the justification of the decree he made, one of which is the word of Allah, says: "If a man is annihilated (halak), leaving a sister but no child, she shall have half the inheritance."[112] The murtadd is considered annihilated (hâlik) as mentioned in the cited verse, because he committed an offense that deserved his life to be perished. The other evidence is the practice of the Prophet, that he distributed the property of murtadd Abdullah b. Ubay Salûl amongst his Muslim heirs. And also Ali killed a murtadd and distributed his wealth amongst his Muslim heirs. This means that when a person is annihilated his heirs succeed him in his estate just like a Muslim died. The actualization of this phrase is that the ridda means annihilation (helâk). The murtadd by ridda becomes the people of the war (ahl al-harb), and concerning the rights of the Muslims he is like a deceased. The completion of his annihilation factually comes about with the killing him or his death. When this is completed, the inheriting (tawrîth) based on the outset of the

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110 al-Mabsût, 10/117.

111 Shâfi'î holds, as Sarakhsî cited, is that the inheritance of the *murtadd* is *fay'*, hence it is put into the Treasury of the Muslims for the Prophet has said, "The Muslim cannot inherit the unbeliever." The *murtadd* is an unbeliever, so the Muslim cannot inherit him. And the *murtadd* cannot inherit anybody, and anybody cannot inherit the *murtadd*. al-Mabsût, 10/100.

112 The full text of the verse is: "They ask you for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If a man is annihilated, leaving a sister but no child, she shall have half the inheritance: If (such a deceased was) a woman, who left no child, Her brother takes her inheritance: If there are two sisters, they shall have two-thirds of the inheritance (between them): if there are brothers and sisters, (they share), the male having twice the share of the female. Thus doth Allah make clear to you (His law), lest ye err. And Allah hath knowledge of all things." Qur'an 4/176.

apostasy, which he was a Muslim at this time, so his Muslim heir succeeds him in his estate, and this becomes inheriting of the Muslim from the Muslim.[113] By this discussion Sarakhsî secured to prove that the murtadd lawfully leaves his estate as inheritance as an individual right, so not to be as public property which can be put to the Treasury. This type of property cannot be a property of the Treasury, because this property was protected (muhraz) by dâr al-Islam. Likewise is the estate of the murtadd is protected by the abode of Islam (dâr al-Islâm). This protection is not nullified because of his ridda. The property protected by the abode of Islam cannot be a fay'. With this argument the establishment of the right of the heirs on it appears. This right remains after the ridda as it is before it. If it is said that it must be a fay' for the Muslims deserved this property due to Islam, the answer Sarakhsî gives is that his heirs are equivalent with Muslims in Islam and they are preferred for the lineal relationship hence spending it to them is better.[114]

WHO İS RİGHTFUL TO INHERİT THE MURTADD

Only the Muslim heirs of the murtadd can lawfully inherit him. Judging from the criterion of that "the crime of ridda eliminates the right of possession on the property", Sarakhsî extending this criterion on losing the life immunity by the ridda. But by legal reasoning he decides that since inheriting the murtadd is considered as inheriting of the Muslim from the Muslim, the unbeliever heirs of the murtadd cannot inherit him. He reaches to this decision with the established legal maxim-principle that "the unbeliever cannot inherit the Muslim."[115]

The time of obtaining the heirship (tawrîth) has been a controversial matter amongst the jurists. Abu Hanîfa's opinion via Abu Yusuf is that whoever was his heir at the time of his ridda and lived until the death of the murtadd, he inherits him. The later heirs cannot inherit him, even though some of his agnate relatives become muslim after his ridda or any other later relationships (ʿulûq hâdith) following his ridda, because the reason of the tawrîth is the ridda, whoever was not existing during this reason, because the ridda is in the verdict of the tawrîth like the death. Sarakhsî in clear contrast with Abu Hanîfa and Abu Yûsuf, by following Muhammad pre-empting their opinion, holds that no matter the time of the ridda,

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113 al-Mabsût, 10/100 -1.
114 al-Mabsût, 10/101.
115 al-Mabsût, 10/101.

who are considered as his heirs until he dies or is killed by the penalty imposed are his legal heirs.[116]

WHOM THE MURTADD INHERİTS

Murtadd does not inherit anybody due to the ridda crime he committed. Sarakhsî by analogy equated the murtadd with the murderer of his agnate relative; he is like a homicide who does not inherit his agnate relative he murdered, due to his crime, but the murdered becomes the heir of his murderer when he dies before the murdered.[117]

THE USUFRUCTUARY RİGHTS OF THE FEMALE MURTADD

If she usufructs on her property after the ridda, her usufruct is effective as long as she remains in dar al-Islam, because she usufructed on her pure possession contrary to male murtadd. The immunity of the property is appertain to the self, and with the ridda, the immunity of her life does not disappear so that she is not killed, likewise is her property, contrary to male murtadd. After her escape to dar al-harb she becomes equivalent with man on the usufruct, because her immunity of property vanishes due to her escape such that she can be enslaved, and enslavement is annihilation (itlâf) legally, likewise is immunity of her property.[118]

If she dies in the prison after the ridda, or escaped to dar al-harb her property is distributed amongst her heirs. It is equal, in this respect, what she earned during her Islam and ridda, because the immunity is continuing after her ridda. Nonetheless her husband does not inherit her, because due to her ridda she is separated from him, hence her husband may marry her sister after she escaped to dar al-harb before her waiting period ('idda) finished, because she becomes as harbî, hence she became like a flesh about him, and after her death he has the right to marry her sister, because when she becomes harbî there remains no waiting period.[119]

ESCAPE TO DAR AL-HARB

Escape of the murtadd to dar al-harb resulting to differentiate his legal status. This is because difference of the countries (tabâyun al-dâreyn) leading to differentiation of citizenship and loss of

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[116] al-Mabsût, 10/102.
[117] al-Mabsût, 10/102.
[118] al-Mabsût, 10/111.
[119] al-Mabsût, 10/112.

protective responsibilities of the State. Contrary to al-Shâfi'î[120] Sarakhsî holds that if the apostate escapes into the dâr al-harb, imam distributes his estate amongst his heirs. His escape to dâr al-harb is equivalent to the status of his death.[121] He became a harbî de facto (haqîqatan) and de jure (hukman) because he nullified his life due to dâr al-harb as a warrior against Muslims. And the harbî in dar al-harb is like a dead from the standpoint of the right of the Muslims. Sarakhsî brings to the surface the legal maxim of the "differentiation of the two countries" (tabâyun al-dârayn) and based on it a reason, and saying "for another reason that he went out of the power of the imam in reality (haqîqatan) and legally (hukman)." He argues that if he was in imam's power, his death would have been haqîqatan for he would kill him and distribute his estate. When imam is disabled to impose this penalty due to harbî's exit from his power, his death becomes legally (hukman) then he distributes his estate amongst his heirs."[122] Sarakhsî recognizes the government's power to decide the status of the fugitive, saying, "The qadi must decide the escape to dar al-harb, then he is considered as deceased person."[123] Sarakhsî seems a staunch pro-government authority to be effective in his country. Hence he builts the legal status of a fugitive on the capability of the imam to impose penalty (iqâmat al-hudûd) and to implement laws (tanfîdh al-ahkâm) on him.

RETURNİNG BACK FROM DAR AL-HARB AS PENİTENT

According al-Sarakhsî's discretion (ra'y) if the murtadd turns back from dâr al-harb as penitent, whatever the dispositions the ruler (imam) did about the murtadd during his escape are valid, but what the substance of his property the imam finds in the hands of his heirs, imam takes it from the heir,[124] because according to the legal maxim of that "the inheritance is succession" (al-warâtha khilâfa). And the successor falls when the original appears, and when he comes penitent he becomes alive legally. The heir's succession only to him in this property has become like his death legally, and when the successor (khalaf) disappeared the verdict of the original (al-asl) comes out. This is according to a legal principle-

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120 Shâfi'î holds, as al-Sarakhsî cited, that the property the fugitive to the *dar al-harb* remains as suspended (*mawqûf*) after his escape as it is before his escape, because his escape to *dar al-harb* is considered as *ghayba* (absence) and he is an absentee (*ghâib*). al-Mabsût, 10/103.

121 al-Mabsût, 10/102.

122 al-Mabsût, 10/103.

123 al-Mabsût, 10/108.

124 al-Mabsût, 10/103.

maxim that "the successor (khalaf) disappears when the original (al-asl) appears." If he comes back from dar al-harb as penitent, he becomes as alive legally (hukman); he receives all his property what still exists; but the heirs are not liable for compensation (damân) for they have given damage to his property, because the property was purely (khâlisan) for the heir and he had done on what was a pure right for him and he used his full usurfactory rights on this property at that time, and he did what he had right to do. Hence his damage cannot be a reason of compensation. If the imam exerted no disposition on the property of the murtadd, he combines all his property for himself, if he returned penitent. Hence he restore his legal status to his position before the ridda, because the escape before the court injunction is considered as ghayba, and he and the hesitant (mutaraddid) in dar al-Islam have same verdict (hukm).[125] This discretion obviously is a very significant incitement for the apostates to return from the apostasy.

THE USUFRUCTUARY RİGHTS OF THE MURTADD

Sarakhsî discusses the question whether the murtadd has any usufructuary rights. By quoting the matn of al-Hakim al-Shâhîd al-Marwazî' Kitab al-Kâfi, he points out that all the legal activities done by the murtadd during his ridda situation is void and null (bâtıl) if he escaped to dâr al-harb, and the imam distributed his wealth; such as selling, buying, emancipation, enslaving etc.. Nonetheless Sarakhsî proposes a heterogenous types of usufructory rights. He classified the usufructs of the murtadd into four kinds. 1- One of them is effective (nâfidh) with unanimity of the jurists, like having children (istîlâd). If his slave-girl (jâriya) gives birth for a child and claimed his lineage with him, then his lineage is to be established from him, and this child is to be heir of him. Then this slave-girl becomes umm walad that is she gets her freedom, because she is suspended (mawqûfa) on his possession; for when he becomes Muslim she becomes his slave (mamlûka). 2- The other usufruct is what is null and void unanimously; like marriage and animal sacrifice, because the lawfulness of them is dependent on the religion-nation (milla), and there is no milla for the murtadd, and he left what he was on (as milla). 3- The other one is what is to be suspended (mawqûf) unanimously; like the mufâwada partnership in business; when he becomes a partner with someone else as a partner, the characteristic (sıfa) of the partnership becomes suspended. 4- The controversial ones amongst the jurists on whether they are suspended whether

[125] al-Mabsût,10/104.

they are effective when he returns to be Muslim or void if he dies or killed on ridda or joined do dar al-harb. These are his other usufructs.[126] When he returns to be Muslim the suspension (tawaqquf) turns into nothing (ka-an lam yakun).127 The ridda is incompatible with the possessive rights.[128]

In any case the murtadd is from the people who have usufructuary rights. This right does not disappear due to the ridda. But ridda removes the right of possession on his estate obtained before ridda. Since whatever he gained during his Islam, and his heirs have no right on what he earned during his ridda, this wealth becomes fay' when he is killed.[129]

The debts of murtadd are paid out of his wealth earned during his Islam, if it is insufficient, then from his gain earned after his ridda, because payment of the debt is from the possession of the indebted. The murtadd does not deserve alleviation (takhfif) in the penalties for his crimes hence if he kills someone he must pay blood-money (arsh). Hence whatever the murtadd destroyed or damaged, or forfeited from the property of the people, they are all debts on him to be repaid.[130]

The capital offence inflicted on the murtadd by an individual has no value (hadar), because the consideration of the capital offence is for the protection ('isma) of his life, but due to his ridda this protection disappeared. 'Isma is a condition for the recompense of the damage.[131]

THE CHARACTER OF THE PENALTY

This is because killing is not a penalty on the ridda, on the contrary it is a deserved penalty from the point of view of insistence on the disbelief. It is conspicuous from that if a person returns to Islam, the penalty falls for disappearance of the insistence on the disbelief. The reason is that what is deserved as a penalty does not fall with the repentance (tawba); like the hudûd. After the reason of the crime becomes manifest to the imam, the penalty does not fall with tawba. And also the hadd of the highway robbers does not fall with tawba; on the contrary his tawba is to return the goods (mâl) to

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126 al-Mabsût, 10/104.
127 al-Mabsût, 10/108.
128 al-Mabsût, 10/106.
129 al-Mabsût, 10/105-6.
130 al-Mabsût, 10/106-7.
131 al-Mabsût, 10/107.

its owner before he is captured and the cause of the crime became manifest to the imam.[132] Sarakhsi wants to say that the punishment of the ridda is not properly a hadd, however it is a haqq-Allah.

Changing religion and the essence of the disbelief are from the greatest crimes, but it is between the man and his God. Thereof the punishment on the woman is adjourned to the next world (the abode of the punishment-dâr al-jazâ'). The punishment executed in this world is for a legal political reason for a benefit returns to the people; like the retaliation (qısâs) because of the protection of life, and the hadd of the adultery is for protection of the kinship, and the hadd of the theft is to protect the property, and the hadd of false accusation of fornication (qadhf) is to protect the chastity, and the hadd of the intoxication is to protect the minds.[133]

By the persistence on the disbelief he becomes a warrior against the Muslims, then he is killed to repulse the warring. When it is established that killing is due to fight, then if the woman has no a suitable intention for the fight, then she is not killed in the original disbelief nor in the casual disbelief. But she is imprisoned, the imprisonment is legal about her in the original disbelief; she is enslaved, and the enslavement is imprisonment in itself. The murtadd is in the status of the harbî without protection (amân), thereof she can be enslaved if she is in dâr al-Islam. If she usufructs on her property after the ridda, it is effective as long as she is in dâr al-Islam, contrary to male apostate, because the immunity of the property is appurtenant to the immunity of the life. Because of the ridda the immunity of her life does not vanish because of the ridda, hence she is not killed, and likewise her property, contrary to the male murtadd. But when she is escaped to the dar al-harb, she is equalized with the male murtadd in the usufruct after escaping to the dar al-harb, because her life immunity disappears with her escape, and likewise her immunity of property, hence she is enslaved, and the enslavement is annihilation (itlâf) in verdict (hukman). If she dies in the prison or escaped to dar al-harb, her property is distributed amongst her heirs, because her immunity is continuing after her ridda. She becomes harbî after escaping the dar al-harb and becomes like a flesh about her husband, hence as after her death he can marry her sister, because there is no waiting period (idda).[134]

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[132] al-Mabsût, 10/110.
[133] al-Mabsût, 10/109.
[134] al-Mabsût, 10/110-112.

CONCLUSIVE ANALYSIS

The fact that Islamic law, as exposed by Sarakhsî seems to express an ideology of submission; submission to Allah and to His political system under the name of the religion of Islam. However the codification of Islamic law is regulated by the jurists and applied by the secular government, it is a God-given law and the political system is of His. Everybody, including the ruled and the ruler, is bound with the obedience to the law of Islamic political system; the Law of God, as reflected by the jurists. Sarakhsî, by making regulations for the apostasy concerning the culprit and the governor, he is pointing out that the imam too is subject to the duties and constraints imposed by divine law. Imam is allowed to be tolerant to the culprits as far as the Islamic law, or the jurists allowed him to be. Therefore the juristic criterion of "siyâsatan" introduced by the jurists gives power to the government supplementing the doctrine of the jurists by "administrative measures and regulations". In fact by giving authority to the government Sarakhsî's main aim, as the majority of the jurists, is not to justify the social and political status quo, but to preserve the independence and effectiveness of the jurisprudence and may be the jurists.

Where there is no clear separation between the state and the prevailing religion, the edicts of the religion may be codified as law of the State and enforced by its political and judicial authorities. In this kind of State willful apostasy is, of course, an inexpiable offence. Islamic Jurisprudence, in general, in no way is tolerant to the crime of apostasy; leaving religion, and considered it even heavier crime than the original disbelief (kufr). Notwithstanding the fact that apostasy, however is named as a religious disobedience, it is to the same degree is a rejection of whole political system and the Islamic country and all the Muslims. Since apostasy meant the rejection of submission to the political authority under the disguise of God's authority, meant the exit from the religion, and it means expatriation from the State. Expatriation means death. The found out juristic cause for death penalty is not a purely religious one but it consisted political, justified and legitimized by social cause related to the benefit of the Muslims (istihsân, istislâh).

The reason ('illa) of the death penalty based on that the offender is ranked with the enemy (harîb) and his activity as war-murder (muqâtala) to the Islam, the Muslims and the State. Apostasy becomes a political offence visavis religious punishable by the governing authority; political because it represents a direct challenge to the government and the political system in power and injurious to

the general population or the State. A state may perceive it threatening if individuals advocate the change of the established political and social order. Hence is accepted as one of the most severe political crimes. This graveness of the crime suffices to justify the greatest punishment, namely the death sentence imposed by the State, in order to dismiss the damages (daf' mazarrât).

The criminality of abetment has been recognized is Islamic law. Abetment is causing crime not by itself but with some aid, this is the cause ('illa) of crime. The abetment does not by itself causes death directly, but brings about death indirectly with the aid of the act. This is valid for woman apostate if she incites the people to make war against Muslims. 'Illa is regarded in Islamic Jurisprudence as the effective cause which is an essential step in the process of legal reasoning by analogy (qiyâs); a legal principle established by an original case is extended to cover new cases on the ground that they possess a common 'illa.

Sarakhsî's dilemma, as common amongst all Hanafi jurists, lies in the excluding the female murtadd from death punishment with the legal cause ('illa) of circumvention her from giving harm to Muslims. This 'illa may well easily be applied to male murtadd, then he is shun from being killed. On the contrary he is left between the adoption of Islam or death. Sarakhsî, however deprecative of other sources of Islamic law (adilla shar'iyya), by using istihsân and istislâh even though implicitly implies that male murtadd may not also be killed, instead to be imprisoned, since the cause to kill the murtadd is to be suiting to the qıtâl and to repulse his assumed harms to the Muslims. This repulse is possible by imprisonment, may be by life imprisonment. In fact the threat of being the murtadd a muqâtil (warrior) against Muslims perhaps is a theoretical construct designed to emphasize the need for killing the apostates was made a legal cause to kill the apostates, because neither in the Qur'an nor in the Prophetic Traditions the cause of killing the murtadd has been stated.

We discovered a two-scale punishment, namely three-day imprisonment and death penalty. In the first scale the punishment of imprisonment includes the work to reform and rehabilitate the wrongdoer to restore his disorder so that he will not commit the offense again. This is distinguished from deterrence, in that the goal here is to change the offenders' attitude to what they have done, and make them come to accept that their behaviour was wrong. In the second scale, by making the punishment severe enough as the death sentence, is for deterrence but not for the punishee-culprit but for

dissuading others (ibrah) from future wrongdoing and thus serves for a "greater good" of the community (masâlih al-muslimîn) preventively.

Repentance was of avail as regard the penalties incurred by apostasy. Being the penitence acceptable in this crime provides a chance to the apostate to be re-admitted to the community. This peculiarity makes the irtidâd different from the haqq-Allah and the pure hudûd. That is a pardonable crime while the others are unpardonable in Islamic Jurisprudence. Sarakhsî does his best to keep the suspect murtadd within the community and to readmit him after due penitence.

Sarakhsî is in favor of giving to the ruler more power to prevent the apostasy. By making the respite to the murtadd to be given by the ruler as mustahab, he seems he is in favor of giving more authority to the ruler not to kill the murtadd. If the murtadd keeps his apostasy in private, there is no regulation made to punish him. Also being intolerant in this respect holds an indication that, in his time, in his country there must be intensive missionary activities towards Muslims to proselytize them by the followers of other religions, whether individually or institutionally. Sarakhsî by spending endeavour to prevent his Muslim community from disentanglement. In his century, even carried out since centuries before, the missionary activities by almost all religions has been a common practice to convert people to their religion. By conversion, nations have been formed. Especially a novel religion Islam had formed its community through the spread by peaceful conversions with the contacts and the preaching of Muslim missionaries. These strict rules about murtadd aimed at a protective umbrella over Muslim communities.

The first prerequisite for obtaining the citizenship of the state is to confess the religion by oral testimony. Hence in order to enjoy the full citizenship rights of an Islamic state one has to be a Muslim. Differentiation of religion by irtidâdd debars a person from citizenship and makes him a subject of another, most frequently, of the enemy country. Hence irtidâdd differentiates the country of the actor legally. If he becomes a fugitive to a country of enemy, he gets out of Muslim country's citizenship factually. In this case the immunity of the property and life provided by the state ceases. The murtadd always keeps his usufructuary rights on his property. Hence his heir has the right on his inheritance. Sarakhsî is against confiscation of the property of the murtadd by the state as making it fay', a portion for the Treasury. Nonetheless the murtadd is not

allowed to transfer his wealth out of the Muslim country neither by taking it with him nor by selling it.

It is appropriate to mention briefly the usûl al-fiqh; technical methodology of jurisprudence Sarakhsî used in this text. Although al-Sarakhsî belongs to the Irâqian line of Hanafî School of law and pays a certain degree of personal allegiance to Abû Hanîfa, Abu Yûsuf and al-Shaybânî, he ofttimes abandons their opinion and exposes his own opinion as the deciding one. By doing so he obliterates their opinions and modernizes the Islamic Jurisprudence and makes it applicable to the situations of his time. However sometimes, when he sees suiting, he elaborates or sometimes refers as a referential base their opinions, then states of his. Occasionally he tries to reach compromise between their conflicting opinions. In order to reach his aimed verdict, he chooses one of the conflicting opinions and building on it his discussion. For this respect he chooses a legal principle and a legal maxim established by the authoritative jurists then by analogy with it he derives his opinion. Although his opinions mostly are based on istihsan and istislâh which the Iraqians accustomed to use, he cites Prophetic traditions as evidence. As we derive from al-Sarakhsi's usage of the istihsân and istislâh are from the sources of law (adilla or masâdir al-shar'iyya) and is a personal choice guided by his idea of appropriateness. It is a breach of strict analogy (qiyâs) reasoning of public interest, convenience or similar considerations. He sometimes gives analogical reasoning without using the term qiyâs and istihsân, because an act may be valid by istihsân but may be against qiyâs. Obviously the usage of istihsân and istislâh require ijtihâd; the use of individual reasoning (ra'y). By using this technique Sarakhsî explicitly demonstrates that he is a qualified-independent mujtahid.