Constructing an Islamic Legal Narrative: A Study of Classical Ḥanafī Legal Theories

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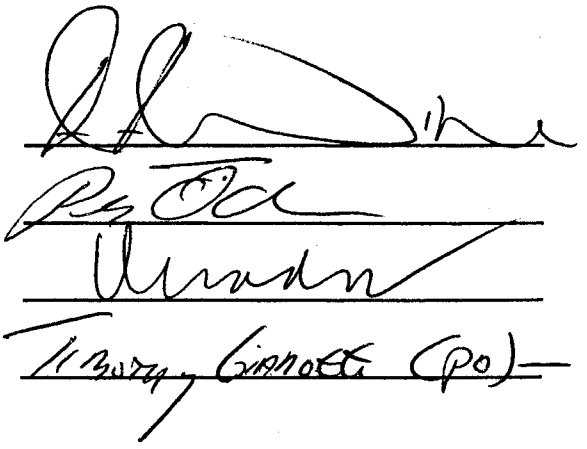

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Abstract

This study compares the legal theories of two 5th/11th century Islamic legal scholars, Abu Zayd al-Dabūsī (d. 430/1039) and Abu Sahl al-Sarakhsī (d. 483/1090). Both Central Asian Hanafīs who trace their ideological heritage through the Hanafī scholars in Baghdad, the two jurists articulated significantly different theories of law despite maintaining the dominant Hanafī paradigms of their time. This study analyzes the causes behind those differences through a survey of the definitions they accorded to technical terms in their legal theories. It is suggested that the observations of this study defy prevalent conceptions of Islamic Studies scholars regarding Islamic legal theory in the 5th/11th century, known as the 'Classical' period. These conceptions are critiqued through the methods provided by Critical Legal Studies. The narrative approach of Hans Frei is suggested as a promising method for understanding the articulation of Islamic legal theory in the Classical period.

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For my wife,

who made this journey possible

and in the process

showed me the meaning of love.

1.0 Introduction

Islāmic jurisprudence (*fiqh*) is one of the oldest Islāmic sciences. Although Muslim jurists were deriving novel substantive law at the very advent of Islām, this law did not achieve a level of formalization until the 2nd/8th century[1]. During this time, legal scholars with competing conceptions of jurisprudence coalesced in different regions of the Muslim empire and around prominent jurists. *Fiqh* as practiced in different locales and as attributed to different prominent jurists was far from homogeneous and these groups of legal scholars often held conflicting opinions. Yet, each group claimed that the jurisprudence they were articulating was genuine and 'Islāmic'[2]. Jurists from within these groups began to develop arguments that justified their juridical opinions and defended them as accurately derived from the sources of jurisprudence. In the 3rd/9th century, these arguments began to be systematized into works of legal theory (*uṣūl l-fiqh*) and by the 4th/10th century every major group of legal scholars had produced multiple structured legal theory manuals[3]. It has been generally assumed that by the 5th/11th century, known as the 'classical' period of Islāmic jurisprudence, works of legal theory had achieved uniformity such that they presented a singular, official version of the legal methodology of their respective legal groups[4].

As a result of this assumed uniformity, legal theory – particularly that written after the 4th/10th century – has received scant attention in modern Western scholarship[5]. Until recently, there was a tacit consensus amongst Western and non-Western scholars alike that legal theory works were dispassionate second-order reflections on the jurisprudence articulated within a legal school[6]. Their purpose was to give credence to the jurisprudence derived by a legal school through systematic argumentation. Legal theory,

thus, was seen as a descriptive and defensive enterprise and works of *uṣūl l-fiqh* were not considered to be practical manuals according to which jurisprudence was derived. To the contrary, legal theory was thought to be uncreative in its articulation and irrelevant in the formation of jurisprudence[7]. The only function of detailing a legal methodology was thought to be in providing arguments that would assert the superiority of a particular legal school's approach to deriving juridical opinions and buttress existing jurisprudence with rational proofs.

Recently, however, close examinations of *uṣūl l-fiqh* manuals have uncovered heterogeneity in legal theories across time, space and juridical affiliations. Scholars have found that Muslim jurists who detailed their legal methodologies were motivated by more than a simple desire to provide an impartial description of how jurisprudence is derived and argue for the dominance of their legal school's methodology. Instead, these jurists were observed as promoting particular conceptions of *uṣūl l-fiqh* based on certain modes of association. Islāmic Studies scholars have depicted these associations either as incidental and latent or as contrived and manifest. In either case, it was assumed that discrete associations determined the thrust of a jurist's work on the subject of legal theory.

Several recent attempts have been made to define the dominant associations that determined the legal methodologies of jurists. One such attempt, championed by Joseph Schacht and Christopher Melchert, suggested that regional affiliations determined the legal output of a jurist[8]. This approach argues that jurisprudence in the 2nd/8th century was developed based on local concerns and that the dominant approaches to deducing juridical opinions in different cities determined the character of the jurisprudence

articulated in that locality[9]. According to these scholars, the 3rd/9th century witnessed the rise of a concerted effort to attribute the views of regional schools to prominent legal figures like Abu Ḥanīfa (d. 150/767) and al-Shafi ʿī (d. 204/820). This effort, known as reverse-attribution, was performed with the intention of consolidating and giving credence to the thought of regional schools by attributing their views to authority figures[10]. Regardless of the reverse-attribution, this theory posits that the jurisprudence of individual jurists after the 3rd/9th century retained the character of the locale in which they studied and taught. Thus, their regional affiliation determined, to an extent, the jurisprudence that they articulated.

Another approach posits that, despite the reality of reverse-attribution, the concern of jurists was never with regional affiliations[11]. Scholars utilizing this approach argue that jurists in the classical period defined themselves based on the lineage of their legal thought. That is to say that jurists of a particular legal school would identify with certain strains of thought held by earlier eminent legal figures who interpreted the jurisprudence that was attributed to the founder of their school[12]. The argument states that classical jurists were trained in the jurisprudence of a legal school based on a particular understanding that was promulgated by these eminent legal figures. Therefore, the thought of the legal figures that a classical jurist held to be authoritative would determine the law articulated by the classical jurist.

Yet another, quite creative and nuanced identification of deterministic associations holds that the doctrinal affiliation of the jurist determines their law. Aron Zysow's careful and expansive study of Ḥanafī legal thought in the classical period argues that doctrinal concerns (*aqāʾid*) often shaped and influenced legal methodologies that jurists adhered

to and defended[13]. Jurists, therefore, who belonged to the same doctrinal school would join with their doctrinal cohorts to promote an understanding of legal theory that was in concert with their professed doctrine[14].

In all of the approaches mentioned above, there is an assumption that some scheme of association determined the legal methodologies of jurists in the classical period. Such an approach is described as 'objectivist' in the field of Critical Legal Studies[15]. In contradistinction to the objectivist approach to Islāmic legal theory, some Islāmic Studies scholars, particularly Sherman Jackson and Anver Emon have argued for the primacy of the individual in articulating law[16]. This approach, described in Critical Legal Studies as a 'formalist' approach', argues that no school or association determined the legal methodologies articulated by classical jurists[17]. Rather, the preconceptions that were particular to the jurists lead them to conclusions that may not be shared by any of their contemporaries[18]. "Legal theory", then, "is anterior and/or exterior to the presuppositions that inform what and how one hears, reads and 'sees'." [19] Therefore, in order to fully understand a legal theory, one must first understand the motivations of its author. The formalist approach privileges the jurist as an individual shaped and influenced by external associations, but irreducible to any one of them[20].

The current study assesses the validity of the objectivist and the formalist approaches to legal theory in the classical period through a case study of two classical jurists. The two jurists to be considered, Abu Zayd al-Dabūsī (d. 430/1039) and Abu Sahl al-Sarakhsī[21] (d. 483/1090), are particularly well-suited to test objectivist and formalist approaches. They were both claimed that they advocated Ḥanafī jurisprudence and were highly respected jurists in the 5th/11th century. Within historical Ḥanafī scholarship, the

two jurists regularly traced the lineage of their ideas through the Baghdadi jurisprudents Abu Bakr al-Jaṣṣāṣ (d. 370/981) and Abu al-Ḥasan al-Karkhī (d. 340/952). The fact that Dabūsī and Sarakhsī rarely cited other major figures, like the Egyptian Ḥanafī Abu Ja'far al-Ṭaḥāwī (d. 323/935) or the Basran Ḥanafīs Abu Khāzim ibn 'Abd al-'Azīz (d. 292/905) and Abu Sa'id al-Barda'ī (d. 317/929) suggests that they both had a particular affinity to the Baghdadi Ḥanafīs. Also, they had the same regional affiliation, since they lived, studied and taught in Central Asia. Finally, they both professed adherence to the Māturīdī doctrinal school[22], which was prevalent and popular in Central Asia at the time[23]. In an objectivist approach, the consonance of Dabūsī and Sarakhsī's jurisprudential, doctrinal, and regional affiliations coupled with their affinity for Baghdadi Ḥanafīs would suggest that their legal methodologies would be almost identical in format and content. This study observes that the formats of Dabūsī and Sarakhsī's legal methodologies were indeed very similar. However, the content of the material presented in the same format was markedly different. Through an analysis of the differences in the contents of Dabūsī and Sarakhsī's works, this study observes that their preconceptions of the jurists regarding theology, jurisprudence and society figured heavily in their works of legal theory.

This study will also demonstrate, however, that the legal theories articulated by Dabūsī and Sarakhsī were not solely reflections of their preconceived notions. Rather, their associations determined certain parameters of debate and discourse. While these parameters did not determine their legal theory, they did constrain it within specific boundaries. Thus, a purely formalist approach would prove inadequate in describing the

articulation of Dabūsī and Sarakhsī's legal theories. Given the deficiency of both objectivist and formalist approaches to legal theory in explaining the observations of this study, a new conception of describing legal theory will be presented.

1.1 Methodology

This study belongs to the genre of historical-critical Islāmic Studies as it is a detailed exposition of the legal theories of al-Dabūsī and al-Sarakhsī. The first four chapters concern their conceptions of key terms as they pertain to the four sources of Ḥanafī law: the Qur'ān, *sunnah*, Consensus (*ijmā'*) and Considered Opinion (*ra'y*). These sources are approached in that order, which reflects the Baghdadi Ḥanafī ordering of these sources from most authoritative to least[24]. Dabūsī and Sarakhsī's particular understandings of these sources are extrapolated through a careful analysis of the definitions they accorded to foundational terms and concepts germane to each source. This analysis discloses their conceptions of the relationship of the source and jurist in the derivation and application of Islāmic jurisprudence. Consequently, it is possible to assess the role of the source of law in the legal theory of the jurist.

After a close study of Dabūsī and Sarakhsī's understanding of a term, a brief comparative analysis is provided. This analysis highlights the differences and similarities between the two jurists and assesses the influence of their associations on their stated opinions. At the end of each chapter, a brief summary underscores the particularities of Dabūsī and Sarakhsī's respective conceptions of the source of law as a whole. Special attention is given to the jurists' view of the source of law and its relationship to their larger conception of Islāmic law itself.

Chapter 2 discusses the nature of the Qur'ān as a source for deriving jurisprudence. An analysis of Dabūsī and Sarakhsī's definitions of key terms with regard to three topics provide insight into their conception of the Qur'ān as a legal document and its role in the jurisprudential life of the community. These topics are: the inimitability of the Qur'ān, clear and ambiguous verses, and abrogation theory. Dabūsī is characterized as viewing Qur'ānic injunctions as constrained by context and Sarakhsī as viewing Qur'ānic injunctions as radically transcendent and universally applicable. With regard to some of their definitions, the two jurists are observed to promote the views of their historical predecessors, and in others their definitions are unique.

Chapter 3 addresses the issue of the *sunnah* as a basis for normative practice. Competing conceptions of the *sunnah* in the Muslim community are assessed and Dabūsī and Sarakhsī are identified as working within but not in complete accord with traditional Ḥanafī approaches to the *sunnah*. Their conceptions of the *sunnah* were predicated on the accessibility to the Prophetic example through reports (*aḥadīth*) of varying authenticity. As such, their views of the *sunnah* are borne out through a study of their classifications and definitions of *aḥadīth* based on the strength of their transmission; whether transmitted through multiple-uninterrupted chains (*mutawātir*), well-established *aḥadīth*, or transmitted through a single transmission (*khabar l-wāḥid*). The relationship of the *sunnah* as accessible through *aḥadīth* to the Qur'ān in terms of abrogation theory is then surveyed to assess its relative authority. Dabūsī is found to have limited the authoritativeness and universal applicability of much of the *sunnah* as accessible through *aḥadīth*, whereas Sarakhsī held the *aḥadīth* to be the fundament of a universal

jurisprudence. Dabūsī is described as displaying an affinity for early Iraqi Ḥanafīs, but departs from their precedent as well, whereas Sarakhsī makes subtle, yet far-reaching changes to the views of later Iraqi Ḥanafīs.

Chapter 4 assays Dabūsī and Sarakhsī's approach to Consensus (*ijmāʿ*) through a study of their understanding of the authoritativeness of Consensus and the individuals whose consensus constitutes a valid *ijmāʿ*. Dabūsī is observed to have argued for limiting authoritative Consensus to the Consensus of the Companions of Muḥammad, and Sarakhsī argued that the Consensus of any generation is authoritative for all succeeding generations. Neither Dabūsī nor Sarakhsī's views can be found in their exact form in the Ḥanafī legal precedent.

Chapter 5 concerns that final source of Islāmic jurisprudence, Considered Opinion (*raʾy*), which Dabūsī and Sarakhsī essentially held to be confined to analogy (*qiyās*). Hence, the use of *qiyās* in deriving juridical opinions will be examined, as will the issue of uncritically accepting juridical opinions so derived (*taqlīd*), and the 'correctness' (*taṣwīb*) of a jurist in deriving juridical opinions. Dabūsī defined the terms connected with *raʾy* such that there was a radical distinction between the Divine Truth and the juridical opinion derived by the jurist and claimed that the following the proper method of legal methodology of deriving opinions, regardless of the correctness opinion derived, was of central importance. Sarakhsī, by contrast, held that properly executing the correct legal methodology would always result in the correct opinion and that acting upon the correct opinion was of central importance. Though in general Dabūsī sided with the positions offered by early Ḥanafīs, he also departs from their example at times. Also,

while Sarakhsī often agreed with later Ḥanafīs, his position on *ra'y* is unique to his conception of Islāmic jurisprudence.

The final chapter offers a conclusion that underlines the inability for either the objectivist or formalist approaches to adequately describe the legal methodologies promoted by Dabūsī and Sarakhsī. This inadequacy is explained through terms provided by Critical Legal Studies. Critical Legal Studies theorists are actively searching for a description of legal theory that avoids both objectivism and formalism. As a result, the critique of legal theory that they advance is relevant to the present study. However, the admitted shortcomings of Critical Legal Studies preclude it from providing an exhaustive description of the observations of this study. We suggest in the concluding chapter that Hans Frei's theory of the *sensus literalis*, when coupled with the critique of legal theory provided by Critical Legal Studies, helps us understand the key differences in the articulation of legal theory observed in the cases of Dabūsī and Sarakhsī.

1.2 Assumptions

This study cannot be undertaken without maintaining a number of assumptions. The major assumptions are:

1) The works of Dabūsī and Sarakhsī are accurate reflections of their personal opinions regarding Islāmic jurisprudence. They did not intend to write surreptitiously or for any self-conscious purpose other than conveying their thoughts on the subject.

2) The works of Dabūsī and Sarakhsī are consistent and coherent. Except in the case of egregious contradictions, it will be assumed that the two jurists were presenting arguments that are internally consistent.

3) The works under study are accurately attributed to their authors and not later texts that were falsely attributed to chronologically preceding legal figures. This assumption is made in light of an absence of evidence suggesting that the texts are falsely attributed.

1.3 The Ḥanafī Scholars

Prior to engaging the content of this study, a minimal understanding of the Ḥanafī historical scholarship and the prominent personalities being studied is required. The eponym of the school, Nuʿmān ibn Thābit Abu Ḥanīfah, was a jurist whose positions, both legal and doctrinal, have been disputed throughout Muslim history. His views were captured by his most prominent students, Muḥammad al-Shaybānī and Abu Yūsuf, though the three were often at odds with one another. Scholars from various regions of the Muslim world at the time came to identify with the views of these three jurists, usually promoting the views of one over another. Muḥammad al-Shaybānī, in particular, found favor amongst Ḥanafī scholars of Baghdad and Central Asia, but these scholars produced multiple commentaries and occasionally offered conflicting accounts of his opinions. Thus, by the 4th/10th century there were multiple conceptions of Ḥanafī thought that were being promulgated by Ḥanafī scholars. The scholarship produced by Ḥanafīs from Baghdad proved to be the most influential in shaping classical Ḥanafī thought. More importantly for this study, Dabūsī and Sarakhsī identified most with the Ḥanafī scholars from Baghdad.

1.3.1 Baghdadi Ḥanafīs

The Baghdadi Ḥanafīs originally coalesced around the Mu ʿtazilite – loosely translated as 'Rationalist' – Abu al-Ḥasan al-Karkhī. Karkhī authored several works of law, most of them commentaries on the works of Muḥammad al-Shaybānī. He authored one short treatise on legal theory, which was mostly a collection of responsa[25]. His significant contribution to the development of Ḥanafī thought concerns the status of singular narrations vis-à-vis Considered Opinion (*raʾy*) and is discussed in Chapter 3. Karkhī taught many prominent students, though undeniably the most prominent was Abu Bakr al-Jaṣṣāṣ. Jaṣṣāṣ, in turn, taught many students who are considered by contemporary Ḥanafī scholars to be seminal figures in Ḥanafī jurisprudence[26], and his influence spread far beyond Baghdad. Non-Ḥanafī historians branded Jaṣṣāṣ as a Mu ʿtazilite[27] though recent scholarship has questioned this ascription[28]. A cursory study of his work reveals that he cannot be easily categorized doctrinally. It has been argued that his greatest contribution was in systematizing Ḥanafī legal theory into an analytical science independent from detailed reflections on responsa[29]. Central Asian Ḥanafīs, like Dabūsī and Sarakhsī, were particularly beholden to Jaṣṣāṣ and produced works that acknowledged his influence.

1.3.2 ʿUbayd Allāh ibn ʿUmar ibn ʿĪsā Abu Zayd al-Dabūsī

Little is known about Abu Zayd al-Dabūsī's life and studies. He was reported to have been born in 367/987[30] and his date of death is disputed, though most place the year as 430/1038[31]. He spent the majority of his life in Transoxiana and though the extent of his travels are unknown, he was presumed to have studied and worked in Transoxiana[32]. Although all his teachers are not known, he was known to have studied in the school of

Abu Ja ʿ far Muḥammad ibn ʿ Abd Allāh al-Hinduwānī (d. 362/973). Abu Ja'far himself studied in Iraq with Jaṣṣāṣ, though the former settled in Central Asia. Hinduwānī wrote a commentary on Muḥammad al-Shaybānī's *al-Jāmi ʿ l-Ṣaghīr* and was reported to have promoted the views of Karkhī and Jaṣṣāṣ. Dabūsī also studied under Abu Bakr Ja ʿ far al-Astarūshinī (d. unknown)[33], who received his education from Jaṣṣāṣ[34].

Dabūsī produced several works on Islāmic sciences[35], most of which are not extant, including a commentary on Shaybānī's *al-Jāmi ʿ l-Kabīr*. His other lost works include *al-Anwār fi Uṣūl l-Fiqh*, *al-Nudhum fi l-Fatāwā*, *Tanjīs l-Dabūsī*, and *Khizānah l-Hudā*. The extant works of Dabūsī include: *Ta ʾ sīs l-Naẓar*, which surveys differences of opinion amongst the founders of the Ḥanafī school, *al- ʿ Amal l- ʾ Aqṣā*, a treatise on spiritual athleticism (*taṣawwuf*), *Kitāb l-Nikāḥ min l-Asrār*, a text on the law of marriage, and the treatise that will be the foundation of the present study, *Taqwīm l- ʿ Adillah fi Uṣūl l-Fiqh*. This last text is a detailed exposition of legal theory with an explicit aim of identifying valid indicants (*dalā ʾ il*) in Islāmic law so as to derive authoritative evidence for extrapolating a juridical decision (*ḥujjah*).

Dabūsī was considered one of the leaders of the Ḥanafīs in the 5th/11th century[36] – he was also well-known amongst his contemporaries and he had several high-profile students in Central Asia. However, his influence waned by the 7th/13th century and thereafter references to him were mostly relegated to biographical dictionaries.

1.3.3 Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī

There is no credible date of birth ascribed to Sarakhsī and thus no way to gauge his lifespan[37]. The date of his death is disputed, though a survey of the rulers he

interacted with suggests that he died in the final decade of the 11th century. It is most likely that he spent his entire career in Central Asia. Though Meron argued that Sarakhsī traveled to Aleppo to teach in the *Ḥalawiyya*[38], this argument is untenable given that Nūr al-Dīn al-Zangī did not establish the school as a center for Shafi ʿī study until 543/1149[39]. Sarakhsī was born in Transoxiana, all his teachers were Central Asian and his final days were spent in Central Asia, hence there is no evidence to suggest that he left for any appreciable time in between his study and his death.

Sarakhsī was most deeply influenced by "his Shaykh", ʿAbd al-ʿAzīz ibn Aḥmad al-Ḥalwānī (d. 456 or 7/1063 or 4)[40], who was known by his title, *Shams l-Aʾimmah* (splendor of the religious authorities). Ḥalwānī lived and taught in the Central Asian city of Bukhara where he elaborated on a commentary of Muḥammad al-Shaybānī's legal positions entitled *al-Mabsūṭ*. He also composed commentaries on al-Shaybānī's *al-Jāmiʿ l-Kabīr* and his *al-Jāmiʿ l-Saghīr*. While in Bukhara, he met and taught Sarakhsī, who soon became his star pupil. On Ḥalwānī's death, his title of *Shams l-A'immah* was transferred to Sarakhsī, who settled in Uzjand, a town near Farghana in Transoxiana[41].

Sarakhsī was a prolific scholar of Ḥanafī law and authored many works on law and theology, including four commentaries on works by Muḥammad al-Shaybānī[42]. Sarakhsī had a formal relationship with the ruling Qarā-Khānids, which was not surprising since they regularly sought counsel with religious scholars[43]. In 466/1074, Sarakhsī was imprisoned in an underground dungeon[44] by the local Khan, Shams al-Mulk. The circumstances surrounding this imprisonment are disputed, it has been argued that it was due to Sarakhsī espousing ideas thought to be heretical[45], or his encouraging

the non-payment of a tax[46], or the most popular explanation, Sarakhsī's offering the Khan unwelcome advice (*naṣīḥāh*) in the form of a juridical opinion that censured the Khan for the method in which he married a woman[47]. For whatever reason, Sarakhsī was confined to his prison until 480/1088. While in prison, it is reported that he dictated several books to his students who were listening to his teachings from aboveground[48]. These books included the bulk of his expansive legal commentary, *al-Mabsūṭ*, and the beginning of his book on legal theory, *al-Muḥarrar fī Uṣūl l-Fiqh*, also known as *Uṣūl al-Sarakhsī*. Upon his release from prison, Sarakhsī moved back to Bukhārā and completed *al-Muḥarrar fī Uṣūl l-Fiqh*, which for the present study serves as the wellspring for his thought concerning legal theory. Sarakhsī continued to teach and write in Bukhārā until his death, most probably around 483/1090[49].

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[1] Hallaq, *A History of Islāmic Legal Theories*, 16

[2] Goldziher, *Muslim Studies vol. 2*, pg. 22

[3] Hallaq, *A History of Islāmic Legal Theories*, 33-35

[4] Sherman Jackson, "Social Taqlīd, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory", 168

[5] Nabil Shehaby, Hallaq, Kamali and others make this claim in the articles referenced in this work.

[6] Hallaq, "Model Shurut Works and the Dialectic of Doctrine and Practice", 110

[7] ibid, 110

[8] Melchert, "Notes Et Documents", 309

[9] Melchert, *The Formation of the Sunni Schools of Law*, xxvi

[10] ibid, 48

[11] Hallaq, "From Regional to Personal Schools? A Reevaluation", 26

[12] ibid, 26

[13] Zysow, "Mu ʿ tazilism and Māturīdism in Hanafī Legal Theory", 235

[14] ibid, 264

[15] Finnis, *The Critical Legal Studies Movement*, 5

[16] Emon and Jackson are leading examples of this approach, and Fadel to a lesser extent.

[17] ibid, 8

[18] Emon, "Natural Law and Natural Rights in Islām", 390

[19] Jackson, "Toward a Functional Analysis of Uṣūl al-Fiqh", Studies in Islāmic Legal Theory, 184.

[20] ibid, 201

[21] Also spelled 'Sarkhasī'. I agree with Taj al-Din ibn al-Maktum and Ibn al-Salah that the most likely Persian pronunciation was 'Sarakhsī'.

[22] Although Zysow rightly points out that Dabūsī's theology cannot be reduced to Māturīdism, Dabūsī nevertheless is in closer accord to Māturīdism than any other theological doctrine.

[23] Zysow, "Mu ʿtazilsim and Māturīdism in Hanafī Legal Theory", 239

[24] Melchert, *The Formation of the Sunni Schools of Law*, 129

[25] This is found as an appendix to Dabūsī's *Kitab Ta'sis l-Nazar*

[26] Reinhart, *Before Revelation*, 54

[27] see for example, Dhahabi, *Tarikh*, 26/432

[28] Melchert, *The Formation of the Sunni Schools of Law*, 59

[29] Reinhart, *Before Revelation*, 45

[30] Kavacki, *Fiqh, Islāmic Law and Usul al-Fiqh*, 126

[31] Ibn Abi Wafa, *al-Jawahir al-Mudiyah*, 499

[32] Ibn Qutlubugha, *Taj l-Tarajim*, 192,

[33] "Tarjumah l-Mu'allif", *Taqwim l-'Adillah*, 7

[34] Kavacki, *Fiqh, Islāmic Law and Usul al-Fiqh*, 56

[35] For a full list, "Tarjumah l-Mu'allif", *Taqwim l-'Adillah*, 7-8

[36] Ibn Abi Wafa, *al-Jawahir al-Mudiyah*, 500

[37] Although Osman Tastan and Muhammad Hamidullah hazard his date of birth to be 400/1010, *The Jurisprudence of Sarakhsi*, 19, I find this highly unlikely. This would not only place him at an advanced age during Halwani's ascendancy, but it would mean that he was jailed between the ages of 66 and 80. If indeed he were imprisoned in an underground dungeon, then it is unlikely that his health would not only endure during his 14-year imprisonment, but for 3 years beyond.

[38] Meron, "The Development of Hanafi Legal Thought", 86-87

[39] see Osman Tastan's excellent discussion on the topic, *The Jurisprudence of Sarakhsī*, 21ff

[40] a minority opinion holds his death to be in 448 or 9/1056 or 7, Ibn Qutlubugha, *Taj l-Tarājim*, 189.

[41] Tastan, *The Jurisprudence of Sarakhsī*, 20

[42] for a full list, see Kamal 'Abd al-Aziz al-'Anani, "Muqaddimah", *al-Mabsut*, 1/48

[43] Tastan, *The Jurisprudence of Sarakhsi*, 16

[44] Though Tastan doubts that the jail was an underground dungeon (*jubb*), I see no reason to doubt that, particularly given the level of detail provided by students of Sarakhsī regarding the placement and dimensions of the dungeon.

[45] Schacht, "Notes", 3-4

[46] Tastan, *The Jurisprudence of Sarakhsi*, 22

[47] Ibn Qutlubugha, *Taj l-Tarajim*, 234-235

[48] ibid, 235

[49] ibid, 234

2.0 Multivalency in Qur'ānic Interpretation

Synopsis – The inimitability of the Qur'ān; the juridical inapplicability of clear and ambiguous verses of the Qur'ān; the juridical applicability of literal and figurative language in the Qur'ān; the abrogation of Qur'ānic verses by other verses; the relationship of Dabūsī and Sarakhsī to historical precedent and their conception of Islāmic jurisprudence in light of the juridical applicability of verses of the Qur'ān.

The Qur'ān is viewed as the penultimate source of Islāmic law by all major legal schools of both the Sunni and Shī'ī traditions[50]. Although what constituted the Qur'ān was a matter of debate in early Muslim history, there was unanimous agreement that it was a book of the collected revelations from God to the Prophet Muḥammad that the latter authorized, in his lifetime in a particular form, as an eternal codex. There was early controversy regarding whether the codex as sanctioned by the Prophet was preserved exactly in the authoritative version of the Qur'ān commissioned by the third caliph 'Uthmān. However, by the 4th/10th century, Muslims almost unanimously agreed that the codex was authentic[51]. Regardless of these debates, the collection of revelations from God to Muḥammad was considered to be an exceptional source of law that sat atop the hierarchy of legal sources[52]. The Ḥanafīs in particular took pains to emphasize the radical difference between the Qur'ān and all other sources of law. This distinction was not so marked in the Shafi'ī legal thought, where the Qur'ān and the *sunnah* appeared, at times, interchangeable[53]. In response to what they perceived as an adulteration of the pristine status of the Qur'ān by Shafi'ī and others, the Ḥanafīs argued forcefully that the Qur'ān was a miracle unlike any other and was the definitive source of all law. The nature of this miracle, however, was a matter of dispute amongst Ḥanafī juridical scholars. The classical Ḥanafī school witnessed lively debates concerning the taxonomy

of the Qur'ān as the speech of God, the proper method of its explication and its universal or particular applicability[54].

The results of these debates had direct implications for juridical scholars regarding the manner in which they derive law from the Qur'ān and the applicability of the law derived. If, for example, the Qur'ān was primarily a 7th century Arab phenomenon then the legal application of verses did not necessarily extend beyond the Arabian context. On the other hand, if the Qur'ān was a universal text, then legal verses were intended to be applied in all contexts. There were several key issues that served as fulcrums of the debate and this chapter will highlight three that Dabūsī and Sarakhsī attend to in detail. These issues are: 1) the inimitability of the Qur'ān, 2) clear verses and ambiguous verses, and 3) abrogation theory. These three issues were central to Dabūsī and Sarakhsī's respective approaches to the Qur'ān. In their definitions of technical terms associated with these issues, Dabūsī and Sarakhsī revealed their particular, underlying preconceptions of the nature of revelation, its purpose in the world and the ideal relationship between the jurist and the Qur'ān for the purposes of deriving jurisprudence.

2.1 The Miraculousness and Inimitability of the Qur'ān (*mu'jizah wa i'jaz al-Qur'ān*)

The issue of the inimitability of the Qur'ān (*i'jāz l-Qur'ān*) arose out of polemical debates concerning the miraculous nature of the Qur'ān. Criticism from non-Muslim circles argued that Muḥammad did bring a miracle like the Prophets before him

that would attest to his prophethood. The overwhelming response by Muslim scholars to this criticism was that the Qur'ān was itself the miracle that proved the prophethood of Muḥammad. This miracle proved itself in many ways, including prophesying the future and its internal consistency. However, the most touted proof of the Qur'ān's miraculous nature was its inimitability (*i'jāz*). Muslim scholars cited the unmet challenge in the Qur'ān to, "If you are in doubt concerning what We have revealed unto our servant, then bring on chapter like it [Qur'ān, 2:23]." Hence, the Qur'ān, in its inimitability, is an abiding miracle.

Muslim scholars disagreed, however, on where the inimitability of the Qur'ān is to be located. The most popular position held that the Qur'ān was inimitable in its exact ordering (*naẓm*). In this case, the exact wording of the Qur'ān is inimitable and no one could match the eloquence or the composition of the Qur'ān. Another view held the inimitability to be in the inner meaning imparted by the text (*ma'nī*). In this case, the words were not inimitable, but the meaning that the words imparted was. Thus, the challenge of the Qur'ān meant that no one could produce a work whose meaning would be comparable to the meaning of the Qur'ān.

The legal issue surrounding this subject is one of authority. If the Qur'ān is inimitable in its ordering, then there may be multivalent meanings within the text that are not inimitable. If inimitability is to be found in the meaning of the Qur'ān, then qualified interpreters would be required to elucidate that meaning and present it as inimitable. If the inimitability is in both the ordering and the meaning, then that would suggest that the

ordering of the text discloses a particular meaning to qualified interpreters, but that cannot be explained authoritatively. That is because the explanation of the meaning, if it claimed to be an exact reflection of the meaning within the Qur'ān, would compete with wording of the Qur'ānic text in providing that meaning. Since the wording of the Qur'ān is inimitable, it would be impossible for a different wording to convey the same meaning.

Different Ḥanafī juridical scholar advocated each of the three positions mentioned above. Their conclusions regarding inimitability as the miracle of the Qur'ān reflected their ethos regarding the extrapolation and articulation of jurisprudence from the Qur'ānic text. Dabūsī and Sarakhsī held different opinions that were inspired by their legal forbears, but were not in perfect consonance with them.

2.1.1 Dabūsī

Dabūsī defined the Qur'ān as that which "has been passed down to us through multiple, uninterrupted chains of transmission (*mutawātir*) between the bindings of the redacted copies (*maṣāḥif*) in the seven known readings (*aḥrāf*)."[55] The rescension of the Qur'ān through *mutawātir* transmission ensured that the copy of the Qur'ān passed down through the generations was the same as that which was given to Muḥammad by God. However, some of Dabūsī critics questioned whether transmission, whether *mutawātir* or not, compromised the authenticity of the received text. Rather, they argued, if the Qur'ān was indeed the eternal Word of God and therefore miraculous, then it would not be dependent on human transmission to ensure its integrity. Thus, the

incorporation of *mutawātir* transmission in the definition of the Qur'ān would be superfluous and undermined the miraculous nature of the Qur'ān.

Dabūsī responded to his critics by asserting that the story of the revelation of the Qur'ān is phenomenologically predicated on a theory of transmission[56]. That is to say that Gabriel spoke to Muḥammad who then repeated what he heard to his Companions. It was only after the verse was transmitted from Muḥammad to his Companions that it was established as revelation to the community. Therefore, the idea of transmission through transmission was an essential element of revelation from the outset. Further, Dabūsī mentioned that the Companions of the Prophet required verification from multiple transmitters when they redacted the Qur'ān into an official volume after the death of the Muḥammad[57]. At that time, if a Companion of the Prophet claimed that a verse was recited by Muḥammad and should be included in the official redaction, but could not find other Companions to support that claim, then the proposed verse was not accepted into the official codex. Once the codex was completed, it was memorized and disseminated across the Muslim Empire. Dabsūsī concluded that the fact that the Qur'ān was preserved at the very outset and then further preserved throughout the ages was a miracle in and of itself. *Mutawātir* transmissions, therefore, were the conduit for the miracle of the Qur'ān being preserved with the exact wording revealed to the Prophet[58]. Furthermore, *mutawātir* transmission meant that the verses of the Qur'ān generated indubitable knowledge (*yūjib ʿilm l-yaqīn*) for believers in the veracity of the verses as the Word of God revealed to Muḥammad.

Having established the authenticity of the Qur'ān, Dabūsī turned his attention to the contents of the Qur'ān. According to Dabūsī, the verses of the Qur'ān were all inimitable (*i'jāz*) in the wordings exactly as found in the official codex. No human could produce a work like the Qur'ān nor could any of the verses be reworded. This meant that words within a verse could not be substituted for others, regardless of whether the general meaning of the verse was retained. In this regard, Dabūsī made a critical distinction between *tafsīr* and *ta'wīl* as methods of interpretation. He defined *tafsīr* as "an explanation that claims to leave no doubt as to its verity" (*bayān lā yabqā fīhī shakk*) [59]. Dabūsī argued that this type of interpretation was impermissible, since it would suggest that two wordings – that found in the redacted text and that articulated through *tafsīr* – were equally veracious. Since the Qur'ān generated indubitable knowledge (*'ilm l-yaqīn*) in its veracity, a *tafsīr* that claimed to similarly vitiate all doubt in its veracity would be imitating the Qur'ān. Thus, Dabūsī concluded that the inimitability of the text precluded any *tafsīr* of the Qur'ān from being an authoritative expression of the meaning (*ma'nā*) of the text. He did allow, however, for an interpretation known as *ta'wīl*. This is a more tentative, non-authoritative attempt to explain the intention of verses. This distinction will be further examined in Chapter 2.1.2.

Dabūsī was unambiguous that the Qur'ānic verses were inimitable and generated indubitable knowledge in their veracity. He did not conflate, however, the inimitability of the contents of the Qur'ān with their miraculousness. Dabūsī argued that a miracle was something that serves as a sign that verifies a person's claim of prophethood. Jesus

raising the dead and the staff of Moses were miracles that established the veracity of their prophethood and thus the miracle of the Qur'ān should accomplish the same end[60]. Specifically, the miracle should result in the witness to the miracle acceding to the performer's claim of prophethood. Dabūsī noted that individual verses of the Qur'ān, especially short verses, do not lead a reader to believe that Muḥammad was a Prophet. Therefore, he concluded that not all verses of the Qur'ān were miracles (*kulli āyah minhu laysah bi mu'jizah*)[61].

Dabūsī delineated particular verses that were miraculous and as opposed to those that did not result in the reader concluding that the messenger who related the verse was a Prophet. Those that were miraculous, he said, were 'clear' (*muḥkam*) and discussed the nature and attributes of God. Dabūsī clarified that these clear verses led well-intentioned readers to recognize the prophethood of Muḥammad, though they do not compel this reaction[62]. Rather, a reader must think about the verses and upon reflection (*ta'ammul*) realize that the messenger was indeed a Prophet[63]. Dabūsī argued that if the clear verses compelled this realization without any reflection on it's meaning, then Divine reward and punishment would be capricious at best[64]. Reward and punishment, he said, only makes sense in a system wherein the individual is free to choose correctly or erroneously, a capacity that is removed if compulsion is introduced. Furthermore, Dabūsī acknowledged some individuals do not recognize the prophethood of Muḥammad despite being exposed to the miraculous verses of the Qur'ān, but he dismissed such people as ignoramuses[65]. This ignorance may have been due to either an honest misreading of the text or the mendaciousness of the reader. In Dabūsī's system the result of proper

reflection is always recognition of the prophethood of the messenger, the absence thereof being evidence that the reader has reasoned incorrectly[66]. Thus reflection is a necessary step in acknowledging the messenger as a Prophet and, by extension, the supernatural origin of the message. Once the message is acknowledged as supernatural, it must be considered, by definition, inimitable. For Dabūsī, that inimitability meant that it would be impermissible to reword or rephrase the Qur'ān with any authoritativeness.

The primary juridical consequence of Dabūsī's conception of the inimitability of the Qur'ān was that all legal verses could be known with indubitable knowledge as the Word of God. Thus, the jurist, in applying legal verses to his context, could have the utmost confidence in the veridicality of his application. However, interpretations or rewordings of the text could not inspire a similar level of confidence. Inimitability meant that only the exact text of the Qur'ān could be applied with impunity and all interpretations of the text generated an inferior level of certitude. For all practical purposes, he held that the inimitability of the Qur'ān was therefore found in its ordering (*naẓm*), though Dabūsī himself did not employ this term, nor does *naẓm* capture the nuance of his position on inimitability.

2.1.2 Sarakhsī

Sarakhsī took a different approach to the miraculous nature of the Qur'ān. Like Dabūsī, he defined the Qur'ān as that which had been passed down through *mutawātir* transmission and said that any religious teachings transmitted through such a methodology would generate indubitable knowledge[67]. Sarakhsī posited that among completely transmitted texts it is only the Qur'ān that can claim to have been passed

down so rigorously, from the codex of the Companions to all contemporary copies. For him, the copious means of transmission itself was the miracle of the Qur'ān for contemporary readers[68]. He argued that no other teaching would have been preserved so carefully and the preservation of the Qur'ān is itself proof of the veracity of Muḥammad's prophetic claim. However, Sarakhsī made clear that this miracle does not appertain to the meaning of the Qur'ān or any reaction it might generate in a reader. Rather, the *mutawātir* transmission of the Qur'ān is a miracle that is exterior to the text, one that merely requires the reader to have indubitable knowledge that the text is preserved. Thus, the miracle of *mutawātir* transmission ensures that the Qur'ān read by contemporary readers has a supernatural origin. Sarakhsī concluded that the supernatural origin of the text suggests, by definition, an aspect of inimitability of the text.

Sarakhsī offered two possible loci wherein the Qur'ān could be considered inimitable. The Qur'ān, he said, might be inimitable in either its ordering (*naẓm*) its inner meaning (*ma'nī*)[69]. In the case of inimitability being located in the ordering, the text as a whole, as compiled by the Companions of the Prophet and passed down through *mutawātir* transmissions, would be inimitable. In that case, only the exact redacted copy, with its particular chapter and verse sequence with the exact Arabic wording would be admissible in legal proceedings or in ritual obligations requiring recitation of the Qur'ān. If the verses were re-ordered or translated into some other language then the inimitability would no longer obtain and the new text would not be considered Qur'ān. Sarakhsī initially gave credence to this view when he acknowledged that individual verses are not all, in and of themselves, inimitable. Short verses in particular, he said, are not inimitable

until they are read within the context of the chapter (*sūrah*) to which they belong[70]. It is the chapter, Sarakhsī posited, that is inimitable, not its constituent parts. The individual verses are still considered to be revelation and the reader must have indubitable knowledge of their status as such, but they are not inimitable. While his argument is similar to Dabūsī's in that individual verses do not result in the reader acknowledging the prophethood of the messenger, his argument is different in that Dabūsī nevertheless considered the individual verse inimitable, if not miraculous. For Sarakhsī, by contrast, an individual verse is not miraculous without the context of the chapter in which it is situated.

Sarakhsī pointed out that considering the chapter as a whole as inimitable admits the possibility that it is not the ordering of the constituent verses of the chapter that is inimitable, but the meaning (*maʿnī*) that the chapter imparts[71]. That is, it may be that the ordering of the verses in the chapter is merely a particular method utilized to produce a certain meaning which in inimitable. This meaning, once understood, might then be reworded or retranslated in a way that preserves the meaning but changes the ordering. If, in fact, the meaning imparted by the ordering is the miracle intended by God, then the *naẓm* is incidental to the fact that the Qurʾān was revealed to Muḥammad in 7th century Arabia and could, at least in theory, be reworded while maintaining the inimitability of the meaning. In summary, then, Sarakhsī's argument that the inimitability of the Qurʾān is to be found only in the chapter as a whole meant that the chapter was not inimitable in the exact ordering of its constituent verses in Arabic as received through *mutawātir* transmissions, but in that the meaning that the chapter imparts was inimitable.

Sarakhsī conceded that both positions on the issue, one holding the Qur'ān to be inimitable in its *naẓm* and the other in its *ma'nī*, are meritorious and not necessarily mutually exclusive. Certainly, he wrote, the ordering of the Qur'ān was done by design and was intended by God to impart a specific meaning[72]. It is therefore not surprising that many people claimed that the Qur'ān was inimitable in its exact redacted order in Arabic. However, he pointed out that Arabic is a language: languages being a system of signs that humans create in a certain time and space. Sarakhsī warned that to equate the Word of God to something that is created would be to engage in anthropomorphism, which was to be avoided at all costs[73]. Since God Himself spoke the words of the Qur'ān, that speech must be beyond time and space, and certainly beyond anything created. If the Word of God is radically other than all creation, then one must accept that the Word of God is not contingent upon any language for its expression. Therefore, due to the theological constraints that Sarakhsī said were of paramount importance, he decreed that "the signification of inimitability is [to be located] in the entirety of the meaning" (*ma'ni al-i'jāz fī l-ma'nī tām*)[74]. Sarakhsī acknowledged that the logical consequent of this position is the controversial claim that the Qur'ān could be translated into other languages and still retain its inimitability.

Sarakhsī was undaunted by criticism of his position and responded to his critics in detail. The major criticism to the idea of translations of the Qur'ān maintaining the inimitability of meaning called attention to the "undisputed fact" that no non-Arab (*ajamī*) can produce any work in Arabic comparable to the Arabic Qur'ān[75]. Therefore, the critics contend, the inability ('*ajz*) of the translator precludes the possibility of an

exact translation. Sarakhsī dismissed this argument by questioning the applicability of the premise. He conceded that no non-Arab could produce something like the Qur'ān in Arabic, but argued that it is also true that no non-Arab could produce poetry in Arabic comparable to great Arab poets like Imr al-Qays. That inability of production does not mean that non-Arabs cannot understand Imr al-Qays in translation, nor does it mean that the poetry of Imr al-Qays is somehow inimitable[76]. Moreover, the Prophet was sent for all of humankind, for individuals who speak Arabic and for those who do not. The existence of non-Arabic speaking peoples is therefore further proof that the inimitability of the Qur'ān must reside in the entirety of its meaning, else the mission of the Prophet would be restricted to Arabs[77].

Sarakhsī said that it is for the reasons mentioned above that Abu Ḥanīfa allowed non-Arabic speaking Persians to recite the Qur'ān in Persian during obligatory prayers[78]. Although this position was disputed even within the Ḥanafī school, Sarakhsī used it to establish a strong legal pedigree for his position. Nevertheless, he cautioned that the translation must be precise. Exegesis of the Qur'ān was not permitted in prayer and so the translator must be certain that the word utilized in Persian refers to its exact cognate in Arabic[79]. While Sarakhsī noted that Muḥammad al-Shaybānī and Abu Yūsuf held that the Qur'ān was inimitable in both its *naẓm* and *ma'nī*, he provided ways in which their position could be reconciled with Abu Ḥanīfa's such that, for all practical purposes, the inimitability of the Qur'ān is confined to its *ma'nī*[80]. Sarakhsī stressed that the Qur'ān must transcend any anthropomorphic qualities, and so inimitability must be confined to the *ma'nī*, regardless of the consequence of translatability, lest one be guilty of heresy.

The legal ramification of Sarakhsī's position is that the inimitable inner meaning of the Qur'ān requires elucidation by individuals who can understand and apply that inner meaning to legal matters. This implies that the inner meaning of the Qur'ān is disclosable in its inimitable form to scholars utilizing a proper legal hermeneutic. Sarakhsī argued that legal scholars (*'ulamā'*) could therefore extrapolate this inner meaning from the Qur'ān and apply it authoritatively in legal matters. He embraced the idea that *tafsīr* and *ta'wīl*, when practiced by jurists, could produce an interpretation of legal verses that could claim to be an indubitable manifestation of the inimitable meaning inherent in Qur'ānic legal verses.

2.1.3 Comparative Analysis

Dabūsī and Sarakhsī's different conceptions and definitions of *i'jāz l-Qur'ān* led them to conflicting positions on the miracle and inimitability of the Qur'ān as well as on the authority of interpretation. For Dabūsī, the Qur'ān was a document that was inimitable in its wording and ordering, the veracity of which the believer has indubitable knowledge. Hence, in his conception, the jurist can apply the legal texts of the Qur'ān to any situation with absolute confidence. However, interpretations of the Qur'ān are not accorded a status as inimitable and thus cannot be as authoritative as the precise juridical dictates found in the official codex of the Qur'ān.

For Sarakhsī, on the other hand, the codex of the Qur'ān is miraculous, but not inimitable in its wording. Since the inimitability of the Qur'ān was found in its inner meaning, jurists would be required to extrapolate that meaning and apply it. Since the

meaning so extracted would be inimitable, the meaning could then be applied in legal cases with absolute confidence in its veracity. Since Sarakhsī spoke of an inner meaning of the chapters of the Qur'ān and not inner meanings, it is safe to assume that he believed there to be one inner meaning for any given set of verses. Thus, the disclosable inner meaning would be singular, and presumably, only one hermeneutic method would properly extract that meaning. As a result, only one juridical interpretation could be admitted to represent the one inner meaning of the Qur'ān. All other interpretations would be false, most probably the result of a jurist utilizing an improper hermeneutic.

Based on Dabūsī and Sarakhsī's separate approaches to the subject of *i'jāz l-Qur'ān*, the Qur'ān as a legal document, then, had separate purposes in the articulation of law. For the former, it contained some verses that lead a reader to assent to the prophethood of the messenger and others that dictate specific juridical injunctions, the veracity of which are known with indubitable knowledge. For the latter, the proper interpretation of the inner meaning of the Qur'ān was an authority in legal matters, which both required jurists to extract the law and validated their extraction as authoritative. These separate conceptions of result in markedly different positions on the role of the Qur'ān in the formation of law and the role of jurists in that formulation.

Though Dabūsī and Sarakhsī were widely divergent in their discussions on *i'jāz l-Qur'ān*, they were nevertheless rooted in their received Ḥanafī tradition. Dabūsī's conception was in line with Muḥammad al-Shaybānī and Abu Yūsuf's description of inimitability, while Sarakhsī aligned his view with that of Abu Ḥanīfa. Dabūsī and Sarakhsī did not view themselves as outside of their own tradition and, in fact, credited

the tradition with the positions that they held. Neither promoted the exact same views as their predecessors, yet the thrust of their arguments were predicated on the positions of foundational Ḥanafī scholars. The tradition, therefore, provided the parameters for the discussion on the inimitability of the Qur'ān, though the positions provided therein did not determine the positions of either Dabūsī or Sarakhsī.

2.2 The Clear and the Ambiguous in the Qur'ān (*muḥkamāt wa mutshābiḥāt*)

The debates about what differentiates a clear verse from an ambiguous one are prompted by the following verse:

> "He it is Who has sent down to you the Book – in it are verses that are clear (*muḥkamāt*), they are the foundation of the book (*umm al-kitāb*), and others that are ambiguous (*mutashābihāt*). But those in whose hearts is perversity follow the part thereof that is ambiguous, seeking discord and seeking its interpretation (*ta'wīlihi*). And none know its interpretation except for Allāh. And those endowed with knowledge say, "We believe in it, the whole of it is from our Lord." And none pay heed except the people of understanding." (Q. 3:7)

There is a history of lively debate amongst exegetes regarding the meaning of this verse as well as its proper reading. For example, there is disagreement about whether the portion of the verse that discusses the 'interpretation' (*ta'wīl*) of ambiguous verses should be read as above or as, "And none know its explanation except for Allāh and those endowed with knowledge. Say, 'We believe in it, the whole of it is from our Lord."[81] In the former reading, none know the interpretation of the Qur'ān except for God, while in the latter God and those endowed with knowledge know the interpretation of the Qur'ān. The issue of dispute concerns authority, specifically, who has the authority to interpret the Qur'ān? Based on the previous chapter, one would assume that Dabūsī would endorse

the former reading and Sarakhsī the latter. In fact, Dabūsī and Sarakhsī both agreed that the proper reading is the former. However, their reading of the verse is reconciled with the conception of *iʿjāz l-Qurʾān* due to their definition and classification of verses that are clear (*muḥkam*) and ambiguous (*mutashabih*).

By discussing the modes of interpretation of verses that are more or less ambiguous, Dabūsī and Sarakhsī defined the relative authority that jurists have in advancing their interpretations in relation to the clarity of the verse being interpreted.

2.2.1 Dabūsī

For Dabūsī, clear verses require no elaboration and are applicable in all times and all places. Therefore, these verses must refer to something that was always true and will always be true. Hence, Dabūsī said that all verses that refer to God and His attributes are undeniably clear. He cited as an example of a clear verse the phrase, "And God is knowledgeable of all things." [29:62], claiming it to be a timeless statement that imparts its meaning without any need for further explanation[82]. Since the human intellect is incapable of cognizing God, any explanation of these verses presupposes an understanding of God's nature. Thus, Dabūsī forbade any interpretation of clear verses. He said that both the individual words and the meaning of these verses were clear, hence interpretation was disallowed on both the entire verse and its constituent words. The phrase can never be abrogated, nor can the meaning fail to obtain regardless of time and place. It is for this reason, said Dabūsī, that God designates these verses as the "foundation (*umm*) of the Book"[83]. Dabūsī did not elaborate on the function of these verses nor was he required to because they were not relevant to law.

Ambiguous verses are similarly beyond the pale of hermeneutics for Dabūsī. Being the "opposite of clear" [84], these verses are merely to be believed in exactly as they are worded, without any consideration of meaning or legal applicability. The believer will be tested by God concerning his belief in the literal wording of ambiguous verses and will only pass if he believes in their literal wording apart from any exegesis[85]. Dabūsī did not provide a rubric for identifying ambiguous verses, nor did he provide examples of them. This is particularly curious given Dabūsī's affinity for Abu Bakr al-Jaṣṣās, who wrote extensively on this topic. Jassās asserted that all verses of the Qur'ān could be clearly divided into verses that are ambiguous and clear. For him, ambiguous verses are those that are abrogated and clear ones are those that abrogate[86]. He discussed competing definitions and classifications of clear and ambiguous verses, and while giving them various levels of credence, ultimately concluded that the terms refer primarily to abrogation. Dabūsī's approach differed from Jassās' most significantly in that, according to Dabūsī, the verses of the Qur'ān could not be classified as either clear or ambiguous. That is, Jaṣṣās believed that all verses could be neatly divided and labeled as either clear or ambiguous. For Dabūsī, however, only some verses of the Qur'ān fall into these categories; in fact, the majority of verses cannot be classified as either 'clear' or 'ambiguous'[87]. Since Dabūsī exempted clear and ambiguous verses from hermeneutical and juridical inquiry, it would seem that he could not classify all verses as either clear or ambiguous without exempting the entire Qur'ān from interpretation. In his system, both clear and ambiguous verses were only to be believed in, not expounded upon. Dabūsī

thereby relegated clear and ambiguous verses to the margins of Qur'ānic interpretation theory.

For verses that could be subject to interpretation, Dabūsī introduced a middle term, *mu'awwalāt*, that describes verses that are on a spectrum of more or less clarity[88]. He said that these constitute the majority of the verses in the Qur'ān and they require interpretation in order to ascertain their meaning and juridical application. Based on their wordings, the *mu'awwalāt* are on a spectrum of clarity – those that are clearer require less interpretation and those that are less clear require more interpretation. For Dabūsī, the key indicator of a verse's relative clarity was the use of words within the verse that are either literal (*ḥaqīqī*) or figurative (*majāzī*).

Dabūsī briefly defined the literal word as that which presents an obvious meaning to the reader[89]. This obvious meaning is manifested when the intention/sense (*irād*) of the word utilized unambiguously points the reader to its referent (*waḍ'*)[90]. So long as the reader is able to ascribe a literal meaning to a word without compromising the intended meaning of the sentence, that word functions as *ḥaqīqī*. The reader can tell whether the intention of the sentence is retained if the sentence still makes sense after a literal reading. If a passage does not make immediate and unambiguous sense to the reader, the reader must conclude that the intention of the author was to use figurative language[91]. Interpretation, therefore, is only required when the intention of a word used in the Qur'ān points to other than its literal referent. Understanding requires a link between a word and its referent (*ittiṣāl baynahumā*), a link that is obvious when the word is literal.

In the case of figurative language, however, the link is established through some internal logic (*bi wajhin mā*)[92] that needs to be discerned by the reader.

Dabūsī used the example of metaphor (*isti'ārah*) to demonstrate figurative use of language. If one were to describe a person who is brave as a 'lion', the speaker would be using metaphor in that the literal referent of 'lion' – an animal of the species *panthera leo* – is not what was intended by the speaker. In this case, however, the interpreter understands the speaker because they both participate in a shared vernacular (*samā'*)[93]. Thus, the interpretation required is minimal and the intended reference of 'lion' is obvious to the interpreter as 'brave'. Dabūsī said that the process involved here is more of word substitution in ordinary language than engaged interpretation[94]. When the speaker creates metaphors and allusions (*ibdā' isti'ārāt wa ta'rīḍāt*), as opposed to utilizing metaphoric conventions that are part of the vernacular, a deeper level of interpretation is required. This deeper interpretation requires the reader to use reason (*ra'y*) and analogy (*qiyās*) in order to determine a meaning.

Once the reader begins to use analogy, Dabūsī recognized that there is room for error in determining a referent. It may well be, he acknowledged, that the referent determined by the reader is different from the one intended by the speaker. This, he said, is an insurmountable problem. In the absence of the speaker, the interpreter is forever denied the actual authorial intention. The intention is therefore hidden (*bāṭin*) and will remain so unless it somehow becomes clear on its own (*taẓhirū bi ṭarīquhā*)[95]. Through this move, Dabūsī absolved interpreters from needing to find an exact referent. In fact, he

gave this exoneration theological overtones by saying that, "God does not burden us with that which we cannot bear"[96], a clever play on verse Q. 2:286.

Since Dabūsī claimed that exact referents for verses needing interpretation cannot be found – and he further stated that most verses require interpretation – he was thereby presented with a problem regarding the derivation of law from the Qur'ān. He could conclude either that law cannot be derived from any verses that are not composed entirely of literal words, or that anyone who used reason or analogy to derive the law could claim any reading they pleased to be accurate. The former option renders most of the Qur'ān juridically impotent and the latter allows for caprice. Dabūsī conceded that, initially, reason must be used to come to a possible explanation of an unclear verse[97]. After possible interpretations have been suggested, though, knowledgeable individuals need to determine which possibility is preponderant (*rājiḥ*) over all others. Dabūsī elsewhere went into some detail as to how the process of determining preponderance occurs, but ultimately concluded that preponderance (*rajḥān*) was an inexact science. What is most important, he said, is that the interpreter be honest in their interpretation with an aim to genuinely understand the Sharī'ah, not simply to justify his whims (*hawā*)[98]. He did not restrict interpretation if figurative language in the Qur'ān to the purview of juridical scholars, though he did say that the interpretation of legal verses could only be undertaken by juridical scholars.

Dabūsī anticipated that his detractors would balk at the imprecise nature of law derived by his proposed practice. It is conceivable, based on Dabūsī's theory, that two lawyers could come up with completely different readings of a passage and both claim

authenticity. Dabūsī embraced this criticism and agreed with its implication. Because the authorial intentions of figurative language are hidden, he said, no one can ever know if their interpretation is correct and therefore verses that are not clear do not necessitate uniform action[99]. Rather, one is permitted to act in accordance with interpretations that can be effectively argued to be preponderant. This process gives the interpreter some basis for action, which Dabūsī called apparent knowledge (*ʿilm ẓāhir*), that does not reach the level of certainty (*yaqīn*) or even complete comprehension (*iḥāṭah*), but compels the interpreter to act nonetheless[100]. That this may result in differing opinions and actions did not seem to be of concern for Dabūsī. He was content so long as the process of preponderance was followed and the interpreter was aware that his interpretation might not correspond to the exact authorial intention. To those who would say that the entire enterprise of interpretation should be done away with for the sake of a unified exposition of Islām, Dabūsī gave a curious reply. "If [interpretation] were not permitted," he argued, "we would not be able to respond to the attacks of those who heresy against the Qurʾān."[101] It is interesting that Dabūsī did not seem concerned about arguing in defense of the approach of his school, but rather arguing against heretics. Differing interpretations that do not involve heresy appear to have been perfectly acceptable to Dabūsī. Hence, it may be concluded that for Dabūsī, maintaining the integrity of the Qurʾānic message despite interpretation, was less about generating a linear interpretation than about good-natured, well-reasoned interpretation itself.

2.2.2 Sarakhsī

Sarakhsī made a move similar to Dabūsī's when defining the clear (*muḥkam*) and the ambiguous (*mutashābih*) verses. He defined the clear verses as those that cannot be abrogated and do not allow interpretation[102]. He used the same example for a clear verse as Dabūsī, "And God is knowledgeable of all things." Sarakhsī said that such passages could not be reworded or explained; they are simply to be accepted, maintained, and believed in based on their literal form and meaning[103]. Sarakhsī gave scant attention to ambiguous verses, but provided slightly more detail than Dabūsī. Like Dabūsī, he said that ambiguous verses are those that humans cannot hope to understand. He provided an example in Q. 75: 22-23, "On that day faces will be bright, looking toward their Lord." Obviously, Sarakhsī said, the literal meaning of this verse could not be what was intended here, because God has no direction and thus humans cannot look toward Him[104]. However, humans are limited in their understanding and cannot think beyond directionality (*jihha*). Since no reading of this verse could be both intelligible and maintain Sarakhsī's conception of theological integrity, it must therefore be ambiguous. As such, the verse must be believed in but cannot be understood, nor should anyone attempt to explain it in the hopes of making it understandable. Similar verses, such as those pertaining to the face or hand of God, are similarly to be believed in as ambiguous and that belief should be sufficient for the believer (*huwa mutashābih wa huwa kāfiyyah*) [105].

Sarakhsī introduced several middle terms that described verses that fall in between the categories of clear and ambiguous. These verses have various levels of clarity and ambiguity, a spectrum similar to that proffered by Dabūsī. Also similar to Dabūsī, clarity and ambiguity hinged on words being understood as literal (*haqīqī*) or

figurative (*majāzī*). Sarakhsī defined literal words as those with a primary referent (*mawduʿ fi al-aṣl*) that is known (*maʿlūm*) to the author and reader. A figurative word, by contrast, was defined as one that is used metaphorically (*musta'ār*) to connote something other than its primary referent[106].

The figurative word is, for Sarakhsī, that which a speaker uses to metaphorically allude to an intended referent. He often equated figurative language (*majāz*) with metaphor (*istiʿārah*), and in fact used them interchangeably throughout his work. The former was often utilized as a technical descriptor that related more to the structure of language than its performance. Sarakhsī went on to say that figurative language is found throughout literature, including the Qurʾān and the Hadith, such that figurative language is often more prevalent than literal language[107]. This did not pose a problem for Sarakhsī, because he detailed methods that could be employed to understand metaphors in any context.

According to Sarakhsī, the Arabs used two exhaustive processes that would successfully connect a figurative word with its proper referent. He called the first process a formal connection (*ittiṣāl ṣūrah*), wherein a figurative word would be related to its proper referent by describing something that is essential to the form of the referent[108]. For example, Sarakhsī said that Arabs would use the word 'sky' when referring to 'rain'. This is understandable, he said, partly because Arabs called everything above them 'sky', but also because rain comes from the clouds that are in the sky. Thus, the literal referent of the word 'sky' is connected to rain through a formal, physical relationship. In this scheme, the literal reading of a word is not erased through metaphor, but is used to

determine the intended referent. The second type of connection that figurative words have with their intended referents is a connection in meaning (*ittiṣāl al-maʿnī*)[109]. This type of connection is found not in some physical link between the literal referent of a word and its intended referent, but in the literal referent sharing or describing a characteristic of the intended referent. Sarakhsī employed the same example as Dabūsī by using the word 'lion' to connote 'brave'. The literal referent of 'lion' is an animal that displays both strength (*quwwah*) and bravery (*shūjāʾ*). Therefore, the word 'lion' can be used as a substitute or metaphor for those two qualities. By utilizing either of these two methods, those of formal connection and connection in meaning, a person can come to be certain of the referent intended by the author[110]. Reflection (*taʾammul*) is required on the part of the reader in the search (*ṭalab*) for the intended referent, in contrast to the process by which literal words are understood, but the reader can nonetheless hope to know the referent with certainty[111]. Once the reader has obtained this certainty, the figurative word becomes, for all intents and purposes, literal for the reader[112].

Sarakhsī overtly linked the processes of finding the literal referent of a metaphor and finding the reason (*sabab*) behind injunctions (*aḥkām*) of the *Sharīʿah*. He set up this link by appealing to the rules of ordinary language. In ordinary language, he contended, the reader can know the intended referent by thinking about the characteristics, either formally or in meaning, it shares with a figurative term[113]. The figurative word, however, is the limiting term. Though the intended referent may be known through the specific qualities it shares with the figurative word, the opposite is not true. That is, a figurative term cannot be derived by simply enumerating the qualities of

its intended referent. In practical terms, while a reader can deduce bravery from 'lion', one cannot deduce 'lion' from bravery[114]. The connection, it would seem, only moves one way. Further, Sarakshi pointed out that the figurative word utilized has many characteristics – in the case of our 'lion' example, characteristics like 'animal', 'large', 'menacing' – which may or may not be appropriate for denoting bravery. Hence, there is something special about the word 'lion' that it signifies bravery, and only bravery, to the reader. Sarakshi did not detail how these connections are established, but took it for granted that language works in the way he suggests. These points are foundational to the parallel Sarakhsī made between ordinary language and the derivation of law.

For Sarakhsī, the example of metaphor maps exactly the process of understanding the paradigmatic case (*aṣl*) of the law from its branches of application (*furū'*)[115]. The intended referent is compared to the paradigmatic case, and the figurative word is compared to its application. By reflecting on the applications of law, that is, the specific injunction laid down in Ḥanafī *fiqh*, one can understand the paradigmatic case that underlies that injunction. There is a special connection, Sarakhsī posited, between the injunction and its paradigmatic case, where the injunction can point to the paradigmatic case if sufficient thought is given to it. The paradigmatic case, however, can never directly signify the injunction, nor can it be used to establish novel injunctions[116]. The connection from injunction to paradigm only moves one way, just like the connection between the figurative word and the intended referent. It would appear, then, that knowing the paradigmatic case of an injunction is merely an academic exercise, a helpful bit of information that can aid someone in understanding an injunction completely, but is not necessary knowledge for acting upon the injunction. It is assumed, however, that

some paradigmatic case does lie behind each injunction. Thus, a person can, in theory, act on an injunction without ever having understood it, yet trusting that there is a paradigmatic case behind it that would be unearthed through sufficient thought. Sarakhsī embraced this notion and said that, in fact, prior to knowing the paradigmatic case of an injunction, that injunction acts like a figurative word with the intended referent unknown[117]. Similar to the way metaphor works, once the paradigmatic case is known, the injunction no longer functions like a figurative word and becomes more like a literal word. This knowledge, though, is unnecessary for accepting and acting upon the injunctions laid down in Ḥanafī jurisprudence[118].

Through his study of figurative language, Sarakhsī developed a key concept that pervades much of his work. That is the notion that something might necessitate action, even if it is not understood. He developed this idea later in his discussion of single-narrator *aḥadīth* (*khabar al-wāḥid*), but his discussion of metaphor clearly provides a backdrop for his theory regarding that which necessitates action but not knowledge (*yūjib l-ʿamal lā al-ʿilm*). Action, in this framework, is not predicated on understanding, but on belief. Once an individual believes that an injunction has a divine origin, this belief is enough to act upon the injunction, trusting that there is wisdom behind it. Metaphorical passages function similarly, necessitating action as laid down in the branches of law as described by – presumably Ḥanafī – scholars of jurisprudence. The believer need not understand the meaning of the passage except in its manifestation in the legal tradition. What this means for the interpretation of the Qurʾān is that – other than the verses that are ambiguous (*mutashābih*), specifically those that deal with God's attributes – all verses

are potentially literal and their intended meaning can be known. The wording of the verse may be figurative, but reflection will always remedy (*tuṣliḥ*) any ambiguity created by metaphor and provide the intended meaning[119].

Sarakhsī argued that Ḥanafī juridical scholars have already determined most of these intended meanings. These intended meanings were then elucidated by the scholars and captured in the Ḥanafī juridical tradition. Reflection upon the injunctions that these scholars enumerated will lead one to understand the paradigmatic cases behind them, though such reflection is unnecessary for acting upon them. In summary, then, Sarakhsī held that the verses of the Qur'ān that utilize figurative language could be read literally if their intended referent were located. The Ḥanafī scholars of the past already located the intended referents of the figurative verses and, when these referents were relevant to jurisprudence, captured them in their manuals of *fiqh*. Any verse of the Qur'ān that could not be read literally dealt with God's attributes which humans have no capacity for understanding anyway. By analogizing jurisprudence with his conception of ordinary language, Sarakhsī's argues for a system wherein the jurists are the arbiters of the Qur'ān and who, through their juridical injunctions, make the Qur'ān clear to the rest of mankind.

2.2.3 Comparative Analysis

The views of Dabūsī and Sarakhsī on the clear and the ambiguous provide further insight into their conception of the Qur'ān and its juridical applicability. For Dabūsī, the Qur'ān is a book that, for the most part, requires interpretation. He did not suggest that the Qur'ān has only one authentic interpretation nor does he argue for any particular

interpretation over another. Reason and analogy played a large part in his framework, and the fallibility of the interpretive enterprise he described resulted in a vagueness that Dabūsī accepted as a necessary reality. Though Dabūsī treated the text as static and redacted, he admitted that interpretation of the text in varying times and places would produce different meanings. These meaning should be judged to determine which is preponderant, but none are absolutely authoritative. Thus, the text is performative in the life of the legal community and jurists were not limited in their extraction of meaning from the text by the jurisprudence of their forbears.

Dabūsī limited the scope of interpretation, however, in his discussion of clear and ambiguous verses. Clear and ambiguous verses cannot be subject to interpretation, and must retain the same meaning to all people. Likewise, Dabūsī said that miraculous verses of the Qur'ān cannot be interpreted and were meant to generate the same response in all readers: affirming the prophethood of the messenger. Taking into account his discussion on *i'jāz l-Qur'ān*, it is tempting to equate 'miraculous' verses with those that are 'clear'. Though Dabūsī did not make this connection overtly, the similarity in definition is unmistakable. Miraculous verses lead a person to recognize God, result in indubitable knowledge, and cannot be interpreted. Dabūsī characterized clear verses as dealing with God, able to result in indubitable knowledge, and as the foundation – though a hermeneutically irrelevant one – of the Qur'ān. Though the definitions are not identical, there are obvious correlations. What this intimates is a commitment to a particular message in the Qur'ān that Dabūsī held to be central to the revelation. Thus far, this commitment manifests itself in knowing the God-head and recognizing His intervention

in history. The legal verses do not appear to be similarly central to the message of the Qur'ān, which may help to explain the multi-valent readings that Dabūsī allows for verses that can be subject to interpretation.

Sarakhsī's conception of the meanings of the Qur'ān was far more reified than Dabūsī's. Not only are there particular meanings that most verses of the Qur'ān are meant to convey, but those meanings are also ascertainable and have already been delineated by jurists in the past. Therefore, the interpretive process has, for the most part, ceased with the coalescence of the Ḥanafī juridical thought. The jurisprudence that is proffered by Ḥanafī scholars reflects the true meaning, or at best, possible meanings that the text imparts. Sarakhsī addresses the issue of conflicting opinions in his discussion on *ijmā'*, which will be covered in Chapter 4. Under the present topic heading it suffices to say that revelation, apart from the ambiguous verses, was for Sarakhsī fully coherent and cognizable, especially in the form of jurisprudence.

Once again, Sarakhsī demonstrated his dedication to the primacy of maintaining his view of doctrinal integrity. He first demonstrated this in his discussion on inimitable verses when he refused to admit the possibility of inimitability being located in the ordering of the Qur'ān, since such a possibility might be anthropomorphous. Sarakhsī made plain his departure from Mu'tazilites who would explain verses dealing with God's attributes metaphorically, but toed a particularly Māturīdī line in saying that ambiguous verses cannot be interpreted in a certain way. In the example of Q. 75:22-23, Sarakhsī denied the possibility of a literal interpretation when he argued that the meaning of this verse could not be that humans will actually look towards God. This position was

staunchly opposed by strict literalists who affirmed the literal reading of the passage 'without [asking] how' (*bi lā kayf*). The doctrinal stances and justifications that Sarakhsī provided for his views are in stark contrast to Dabūsī, who rarely engaged interlocutors on a doctrinal level. Thus we may surmise that while Sarakhsī said that the meanings of the Qur'ān were clearly laid out in Ḥanafī jurisprudence, he held certain doctrinal concerns to be paramount and argued that jurisprudence must, at least nominally, conform to these doctrinal concerns.

It is interesting to note that in the discussion of clear and ambiguous, Dabūsī and Sarakhsī departed from the associations they explicitly embraced. As mentioned above, Dabūsī not only disagreed with Abu Bakr al-Jaṣṣās' conception of clear and ambiguous verses but did not even address it as a possible understanding. Similarly, Sarakhsī's contention that the verses of the Qur'ān are mostly clear and that meaning is laid down in the injunctions in Ḥanafī jurisprudence goes against the dominant view of Ḥanafī's and Māturīdī's alike. Sarakhsī's Māturīdī forbear, al-Bāqillānī, held that Qur'ānic verses are irremediably vague and that they are partial expressions from which the Divine Will is inferred[120]. It is therefore certain that the doctrinal concerns that Sarakhsī held paramount were at least in part concerns that did not conform to the major doctrinal school of the Ḥanafī's, to which Sarakhsī himself claimed allegiance. The same can be said for Dabūsī, whose discussion cannot be classified as wholly belonging to any doctrinal or juridical tradition.

2.3 The Abrogating and the Abrogated (*al-nāsikh wa-l mansūkh*)

The Qur'ān contains within itself a self-conscious concept of abrogation (*naskh*). It states that some verses abrogate others and that God intended for some verses to either be forgotten or not included in the canon. The most referenced verse that deals with the topic of abrogation, though not the only one, is Q. 2:106[121], "We do not abrogate a verse or cause it to be forgotten except that We replace it with something that is better or similar to it." The eminent jurist and exegete Abu al-Qāsim al-Khū'ī (d. 1317/1899) provided a concise definition of abrogation as a technical term,

> Technically, the term *naskh* signifies the abolition of an ordained matter in the Sharī'ah because of the passage of its period [of applicability], regardless of whether this abolished matter is related to the divinely ordained injunctions or to noncanonical laws; or whether it is related to the divinely ordained positions or other matters that revert to God, because of His being the Lawgiver.[122]

He noted, however, that abrogation as applicable to the Qur'ān concerns only matters related to the *sharī'ah*. Therefore, abrogation occurs when one injunction found in a verse of the Qur'ān abrogates another injunction. Exactly which verses abrogate and which are abrogated is a contested issue. While Muslim scholars have attempted to enumerate the verses that abrogate, the number has historically fluctuated from 5 to over 500[123] based on the abrogation theory employed. The number of abrogated verses that a jurist enumerated directly affected the law that he would then derive. The abrogated verses would be invalid as evidence in legislation, thus the more verses that the jurist considered to be abrogated meant less valid evidence would be available to him for use in deriving law.

In modern times, abrogation theory has taken a leading role in revivalist and reformation movements. For example, Medinan-based abrogation is championed by

those who contend that Islām is primarily a socio-politico-economic system that demands establishment in the form of a nation-state[124]. In the Medinan-based framework, the more legal and antagonistic verses revealed in Medina abrogate the Meccan verses which, on a political level, called for passive civil disobedience. Counter to this theory, many reformists suggest that the more universal Meccan verses are the core of the religion and the Medinan verses were but a limited juridical instantiation of the principles laid down in Mecca[125]. When the time and place changes, those instantiated verses are abrogated and new instantiations have to be derived from the Meccan verses apropos to the novel circumstances. Other figures have argued that abrogation is meant to be understood as 'specification' (*takhṣīṣ*)[126], meaning that God altered the conditions or stipulations of previous juridical commands without actually removing them, or that abrogation only applied to previous scriptures[127]. While abrogation did not enjoy as central a role in the 5th century, these theories were present and hotly debated. Though Dabūsī and Sarakhsī addressed and acknowledged them as independent theories, they worked within the particular Ḥanafī abrogation theory that their juridical scholars upheld at the time.

Historically, jurists within each of the four Sunnī schools of law had diverse conceptions of the nature and scope of abrogation theory, but the schools as a whole each came to represent particular theories. Shafi ʿī scholars, for example, held that, in theory only a verse from the Qurʾān could abrogate the Qurʾān and only the *sunnah* could abrogate another *sunnah*[128]. The Qurʾān could not abrogate a *sunnah* nor vice-versa. By contrast, Ḥanafī scholars held that the Qurʾān could abrogate a *sunnah* and further that a

sunnah could abrogate the Qur'ān[129]. Scholars from both schools agreed that personal opinion (*ra'y*) and analogy (*qiyās*) could play no role in abrogation[130]. Despite the seemingly reified theory of abrogation presented by scholars of a legal school, nuanced definitions of abrogation within the Ḥanafī framework lead to vastly different conclusions regarding the juridical ramifications of abrogation.

2.3.1 Dabūsī

Dabūsī claimed that there were four ways for a revealed text to be abrogated, all of which dealt with the text (*naṣṣ*) itself and the injunction (*ḥukm*) that the text – whether abrogated or not – imparted on its readership. The first possibility is that both the injunction and the reading (*tilāwah*) of the text that imparted that injunction were abrogated. This is the case with previous scriptures, particularly those of Abraham and David[131]. While the Qur'ān speaks of the "pages (*suḥuf*) of Abraham" [132]and the *zabur* of David[133], these scriptures are lost forever, as are their injunctions. However, these 'lost scriptures' could also include the Torah, whose original text was believed by Muslims to have been corrupted and therefore lost. In any case, Dabūsī argued that all these texts – their injunctions and their readings – were abrogated by the arrival of Muḥammad and the Qur'ān[134]. This presents two immediate theological problems relating to the temporality (*muddat al-baqā'*) of God's commandments. First, implicit in the assertion that a Divine command is temporal is the idea that God's speech does not address all peoples for all times. Rather, a command that might be relevant for one community might be injurious to another. This possibility opens the door for the argument that the Qur'ān was meant only for 7th century Arabia and may not be relevant

to other societies. The second major theological problem that the temporality of God's command raises, which is related to the first problem, is that God may command an action that is good (*ḥasan*) for one peoples yet may be evil (*qabīḥ*) to another. For the reader who would be committing evil by following the command, God is seen as commanding evil, which Dabūsī said is not possible. Dabūsī dedicated the majority of his writing on the topic of abrogation to responding to these two problems.

In response to those who would claim that the Sharī'ah of Muḥammad was applicable only temporally, Dabūsī was unambiguous. He began one of his chapters on abrogation by stating:

> The *sharī'ah* of Muḥammad is established (*thābitah*) after [his death] forever because it cannot be abrogated except by a revealed text (*khabar*) from God Most High. And it is established by the text that [Muḥammad] is the last of the Prophets. Therefore, we can be sure of the perpetuity (*dawām*) of [the Shari'ah] because there is no Prophet after him.[135]

He ended the same chapter in a similarly unambiguous manner, maitaining that the injunctions (*aḥkām*, sing. *ḥukm*) of the Qur'ān abide until the Day of Judgment[136]. However, Dabūsī made a deft move in between these two statements by discussing the role of the precipitating causes (*asbāb*, sing. *sabab*) of the *sharī'ah*. Every injunction, he argued, is built (*binā'*) upon a precipitating cause, and the text almost always specifically delineates that cause[137]. For example, the declination of the sun from its zenith is the precipitating cause for the necessity of praying the noon prayer. Also, the month of Ramaḍān is the precipitating cause for the necessity of fasting. Fornication (*zinā*), likewise, is the precipitating cause for enacting the punishment for fornication. In each of these cases, the cause gives rise to an instance where the injunction (*ḥukm*)

should be enacted and the text that prescribes the injunction also discusses its cause, though not always overtly. If, for whatever reason, the cause does not obtain in a particular circumstance, then the injunction cannot be applied[138]. Dabūsī took pains to clarify that the cause must obtain in its entirety, as meticulously defined by its exact description and relationship to its injunction given in the Qur'ān as it was understood in the time of Muḥammad. If only a part of the cause obtains in a scenario, then, once again, the injunction cannot be applied. For example, the punishment for fornication can only be applied if the cause – the witnessing of fornication – obtains in totality. Based on the Qur'ānic stipulations, this means that sexual penetration between an unmarried man and an unmarried woman must be attested to by four witnesses. If the cause does not obtain in its entirety, like the four witnesses not observing the actual penetration, or if there were fewer than four witnesses, then the injunction cannot be applied. Furthermore, since the precipitating cause for the injunction is an unmarried woman and man engaging in intercourse, homosexuality does not fall under the jurisdiction of the cause and, therefore, the injunction[139]. By linking the injunction to its stated cause, Dabūsī effectively argued that God's injunctions in the Qur'ān are established forever, but at the same time those injunctions cannot always be applied in all circumstances.

As to the second major problem that Dabūsī faced, that of God prescribing what is evil, Dabūsī centered his discussion on God's purpose (*ḥikmah*). Behind every command that God enjoins upon mankind is a higher purpose that leads people closer to God[140]. He believed that the most instructive example of this purpose is in the case of Abraham when he was commanded to sacrifice his son. Sacrificing one's son is an evil action under any

other circumstances, and if indeed Abraham had killed his son then he would have committed an evil act. At the point at which he was going to kill his son, though, God sent down a lamb to be sacrificed in place of the son. This story gives the impression that God recognized that His original command was evil and thereafter changed the command to one that was good. Dabūsī, while acknowledging the apparent (*ẓāhir*) reading of the story, warned that God does not change His mind and knows all things. What is hidden (*bāṭin*) in the story is the purpose of God in that He wished to bring Abraham closer to Him. God knew that He would replace the child with the lamb, but wanted to use the pretext of Abraham sacrificing his son to test Abraham. This testing in the form of willingness to sacrifice succeeded in causing Abraham to be closer to God (*mutaqarriban bihi bi dhibḥihi*)[141]. Once Abraham was close to God, the test was concluded and the sacrifice could change, at which point sacrificing the lamb would bring Abraham closer to God. After the conclusion of the test, the command to kill the son became evil and the command to sacrifice a lamb was good. However, throughout the story, the purpose behind both the commands remained the same: bringing Abraham closer to God.

Dabūsī argued that each injunction has a particular purpose (*ḥikmah*) that informs that injunction. Again in the case of fornication, Dabūsī said that the purpose of punishment by one hundred lashes – as prescribed by the Qur'ān – is admonition (*zājir*), not annihilation (*talaf*). The guilty parties, therefore, are to be reformed, not destroyed by the punishment. If the result of the punishment were not reformation but annihilation, then the punishment would not achieve its intended purpose. Thus, Dabūsī said that if, for example, the guilty party was extremely sick and lashing might cause death, then the punishment could not be exacted because it would not accomplish the intended purpse[142].

If after trying to enact an injunction (*ishtaghal l-ʿabd bi l-iqāmah*) the purpose cannot be fulfilled, then God may choose to abrogate the injunction entirely[143]. Dabūsī was adamant, however, that every injunction from God could be, at one time or other, enacted by humans. If an injunction was impossible to enact or was never meant to be enacted, then it would seem that God prescribes meaningless (*abʿath*) injunctions. Therefore, Dabūsī said that an injunction would not be abrogated unless it was possible for humans to enact it[144]. Once the injunction is manifest through action, it fulfills the purpose that God intended and can then be abrogated if conditions change. He said that this was the case of previous revelations that God abrogated in both their injunctions and their wordings through new revelations.

After discussing the manner in which complete abrogation of both injunction and wording takes place, Dabūsī described partial abrogation, starting with the case of the injunction (*ḥukm*) being abrogated, but not the wording[145] (*tilāwah*) that establishes that injunction. Dabūsī provided precious little elaboration on this form of abrogation. He discussed the example of the punishment of fornication in the Qurʾān, and pointed out that the Qurʾān at one time commanded confinement and rebuke of the guilty party and then later commanded their lashing. Dabūsī stated that the verse commanding lashing abrogated the verse calling for confinement and rebuke. He based his view on the principle that an injunction is to be established for all times unless there is a compelling proof for its cessation (*ḥattā yaqūmu dalīl al-zīwāl*)[146]. The verse of lashing in this case is compelling proof for the cessation of confinement and rebuke, despite the fact that the verse regarding confinement and rebuke remained in the codex. Dabūsī did not attempt

to explain why the verse remained in the codex, but he did argue that the existence of a verse does not mean that the injunction it contains is always applicable. For him, the official wording of the Qur'ān merely establishes what can be recited in the prescribed prayers and what constitutes the Qur'ān as inimitable[147]. Dabūsī did not elaborate on the reasons for abrogated text being included in the codex, but simply suggested that the abrogated injunctions serve as starting points for the law and are important to know, despite their having been abrogated by other verses[148]. Dabūsī emphasized the fact that the abrogated injunctions and verses could only be abrogated by the Qur'ānic text itself and that nothing outside of the Qur'ānic text should be allowed to have a role in this type of abrogation.

The form of abrogation wherein the injunction is abrogated by not the reading was the most commonly referenced mode of abrogation and the one that had the most significant effect on jurisprudence. In effect, Dabūsī was endorsing the notion that certain injunctions found within the Qur'ān were not to be enacted nor were they to be used as evidence when deriving law. Though this was a commonly accepted practice, the legal effect of claiming such an abrogation was quite severe. It meant that the abrogated verse could never become operative again, since God Himself abrogated it. It is unsurprising, therefore, that the identity of the abrogation of verses in their injunction but not their reading was the most contested form of abrogation. Dabūsī, though acknowledging that such abrogation occurred, did not attempt to enumerate the verses that abrogate and those that were abrogated.

The next form of abrogation that Dabūsī covered was abrogation wherein the wording is abrogated, but the injunction is still operative in jurisprudence. To describe how this form of abrogation works, Dabūsī first enumerated two types of revelation. The Qur'ān as redacted contains a revelation that is called 'recited revelation' (*waḥy al-matlū*). There was, however, additional revelation sent to the Prophet that was divine, yet for some reason was not considered to be a part of the Qur'ān, known as 'unrecited revelation (*waḥy ghayr matlū*)[149]. This latter type of revelation may not have been included due to a dictate from the Prophet, because either it was lost or because multiple transmitters could not be found. Through his analysis of unrecited revelation, Dabūsī explored abrogation of the reading but not the injunction. He introduced the subject by mentioning that the copy (*muṣḥaf*) of the Qur'ān owned by Ibn Mas'ūd, a Companion of the Prophet, had a slightly different wording than the redacted Qur'ān regarding the expiation of an unfulfilled oath. Whereas the redacted Qur'ān prescribed one seeking expiation to "fast for three days" in Q. 5:89, Ibn Mas'ūd's rendition ordered the person to "fast for three days in succession (*mutatābi'īn*)". Dabūsī said that this is an example of the reading being abrogated but the injunction remaining. Despite its absence from the codex, he maintained that it is proper for a person to fast for three days in succession as expiation. This is because when the reading as 'recited revelation' is abrogated, what remains is 'unrecited revelation', which is still revelation[150]. It is worth noting that based on Dabūsī's own theory of the Qur'ān, only that which was passed down through multiple (*mutawātir*) transmissions could be accepted as the Qur'ān. He could not, therefore, equate Ibn Mas'ūd's version of the Qur'ān with the codified Qur'ān, since

Ibn Mas'ūd's version was not narrated though multiple transmissions. However, Dabūsī had to account for the fact that Ibn Mas'ud was a reliable transmitter and a respected Companion of the Prophet. Therefore, Dabūsī argued that the abrogated text was the 'intended injunction' (*ḥukm maqṣūd*) – suggesting that the injunction contained in Ibn Masʿūd's text was preferred – though God allowed humans to act only upon the injunction in the redacted copy of the Qurʾān[151]. In this way, Dabūsī sought to preserve both the integrity of Ibn Masʿūd and the integrity of the redacted copy of the Qurʾān.

The final method of abrogation that Dabūsī considered was addition to the text (*ziyādat ʿalā l-naṣṣ*). Addition to the text occurs when an injunction is made more specific or strict than the text itself calls for through the lens of interpretation. He warned that tampering with the text in this manner is not allowed, and stated that while most scholars believe that it is not allowed, they nonetheless promote such a practice under the guise of specification (*takhṣīṣ*)[152]. That is, he claimed that scholars added to the text regularly while maintaining that they were simply elucidating the restrictions or additions inherent in the text. For example, the text states that freeing a slave is a method for expiating an unfulfilled oath. Dabūsī chided juridical scholars who insisted that the slave being freed must be a believer, a condition that is not specified in the text[153]. Along the same lines, Dabūsī cited some scholars who claimed that the punishment of lashing for fornication must be accompanied by banishment (*nafī*), another stipulation not found in the text. Some of these specifications were taken from the *sunnah* of the Prophet or from the practice of the Companions. Regardless, according to Dabūsī, if the specifications are found anywhere other than in the text of the Qurʾān itself, then the scholars promoting

the specification are in fact adding to the text[154]. He said that the danger in adding to the text goes back to the issue of the reasons (*asbāb*) of the law. Every injunction has a cause that necessitates the injunction. If the cause is not found in its entirety, then the injunction cannot be established. Similarly, if the injunction is not established exactly as stipulated in the text, then the purpose (*ḥikmah*) of the injunction does not obtain. Adding to the text, Dabūsī argued, can change either the cause or the purpose, both of which invalidate the injunction[155]. He believed that it was for this reason that Abu Ḥanīfah and Abu Yūsuf were so careful when they dealt with the injunction on consuming alcohol. The text, they noted, forbade both drinking grape-wine (*khamr*) in particular and intoxication (*sakr*) in general. Therefore, if someone were to consume a drink that was fermented, but not in the manner in which grape-wine is fermented – either through the use of different ingredients or a different fermenting process – and were not to drink it in enough quantity to cause intoxication, then neither the injunction concerning the drunk nor injunction concerning the consumer of grape-wine could obtain[156]. Dabūsī clearly agreed with this approach, which was rejected by the majority of his Ḥanafī contemporaries, if only to preserve the cause and purpose connected with injunctions.

Dabūsī's reliance on the cause and the purpose when discussing abrogation theory belies his appreciation for considering circumstance as important when discussing injunctions. The jurist must take circumstance into account before determining whether the cause of the injunction obtained or if the injunction will fulfill its purpose. Failure to consider circumstance might result in a jurist erroneously applying an injunction found in the Qur'ān. Hence, Qur'ānic injunctions cannot be applied without careful

consideration of both their status as either abrogated or abrogating and their applicability given the circumstances surrounding their application.

2.3.2 Sarakhsī

Sarakhsī defined abrogation narrowly, such that it dealt only with licitness or illicitness (*ḥalāl wa ḥarām*). "Abrogation", he said, "is nothing except [God] forbidding what is permitted or permitting what is forbidden."[157] Nevertheless, he followed the same approach as Dabūsī in outlining the possible methods of abrogation. He began with the scenario of both the reading (*tilāwah*) of a text as well as its injunctions (*aḥkām*) being abrogated, as was the case with the texts of the Prophets Abraham and David. Like Dabūsī, Sarakhsī was forced to confront the difficulties raised by the prospect of such abrogation. The two major issues that Sarakhsī dealt with in this vein are similar to those attended to by Dabūsī – namely, why does God send down a injunction if only to rescind it later, and how can something that God commands be in one instance good (*ḥasan*) and in another evil (*qabīh*)? As to the first question, that of the divine wisdom behind injunctions, rather than discuss the temporality of injunctions, Sarakhsī asked the reader to reconsider the purposes (*maqāṣid*) of divine injunctions. He rejected those, such as Dabūsī, who said that the purpose of an injunction is to incite a believer to engage in particular action that will bring him closer to God. Rather, he posited, the purpose of God's commands is to test His subjects as to who will have a firm conviction (*ʿaqd l-qalb*)[158] that the injunction is the truth from God (*al-haqqiyyah*)[159]. Passing the test, therefore, is not contingent on successful action upon the injunction, but rather it is contingent on believing it to be a divine injunction that should be acted upon. Sarakhsī cited the example of ambiguous verses to prove his point. Ambiguous verses cannot be

comprehended nor acted upon but are merely to be believed. If the slave of God believes, then he passes the test posed by the ambiguous verse[160]. Similarly, the underlying and primary injunction for any of God's particular commands is not to act upon the command, but to have firm conviction in the injunction's origin and applicability. The primary purpose of an injunction, therefore, is to have this firm conviction (*ʿaqd l-qalb huwa l-ḥukm l-aṣlī*). Thus, abrogation can only occur after the reader is afforded the ability to have firm conviction in the divine injunction, not, as Dabūsī claimed, after reader has the ability to act upon that injunction.

Firm conviction in God's injunctions is the bedrock of Sarakhsī's abrogation theory. He repudiated anyone who claimed that the purpose of an injunction is anything other than producing firm conviction. He cited as "misguided" those who, like Dabūsī, claim that there is some intended purpose that acting upon a particular injunction gives rise to. Sarakhsī further charged with heresy those who, like Dabūsī again, claimed that abrogation could only take place only after the commanded party has the ability to enact the injunction, equating them with his doctrinal rivals, the Muʿtazilah[161]. Sarakhsī tried to divorce God and his injunctions from any contingency upon human action (ʿamal) as much as possible, seemingly in an effort to sanctify the Godhead from any anthropomorphic qualities. "Action", he wrote, "is only desired by someone who seeks to profit from [that action], and God is above that." [162]For Sarakhsī, then, God is a commanding being whose commands require no justification or understanding. God can command something and negate that same command without any need for humans to understand the logic of the change. Nor is there any need on God's part for humans to act

a certain way. Given Sarakhsī's position regarding the absolute transcendence of God and His logic, it is a simple move for him to thereafter claim that all of God's actions are good (*ḥasan*) regardless of time, place or circumstance and can never be classified as evil (*qabīḥ*)[163]. Abrogation of an injunction does not admit to the vileness of the injunction, since the purpose of the injunction in the first place was that the readership believe in it. After the abrogation, so long as people believe that it was from God, the injunction achieves its purpose and is, therefore, good.

By asserting the primacy of firm conviction, Sarakhsī created a platform for himself from which he could explain the idea of the abrogation of wordings and injunctions in a rather straightforward manner. Humans are charged with believing that certain wordings and injunctions existed in the past, but that God, for whatever reason, willed for them to be forgotten or destroyed[164]. He briefly mentioned that God sent down different injunctions for different times and places, but did not elaborate on the reasoning behind God's action[165]. Sarakhsī instead devoted the majority of his discussion on this topic to establishing the enduring quality of Qur'ānic injunctions. He maintained on pain of heresy that after the death of the Prophet no abrogation could take place. Citing the verse, "Certainly we have sent down the Reminder, and indeed We are surely its Guardian" (Q. 15:9), Sarakhsī argued that the codex is under Divine protection and will never be compromised[166]. After this brief discussion he moved on to consider the abrogation of a verse's injunction while its reading remains extant.

The agreed upon reading (*tilawah*) of the Qur'ān that comprises the codex, argued Sarakhsī, serves two purposes. Like Dabūsī before him, Sarakhsī posited that

first, the official reading of the Qur'ān determines what can be read during the prescribed prayers, and second, it is integral for the inimitable ordering of the text[167]. The fact that injunctions are present in the reading does not testify to their enduring applicability. To the contrary, injunctions may be abrogated even though the reading remains if only so that they can be read during prayers and maintain the inimitable ordering of the Qur'ān. Once again, Sarakhsī cited ambiguous verses as an example of how a verse may serve only the purpose of recitation in prayer as well as maintaining the order of the Qur'ān and nothing more[168]. Of course, this meant that Sarakhsī had to reconcile his stance that the reading has an inimitable ordering such that the codex is correct in its order with his earlier position that the ordering of the Qur'ān is not inimitable. He did so by saying that when the Companions of the Prophet thought "it was good to begin committing the reading to written form upon these two stipulations [of codifying both what can be read in prayer and the inimitable ordering of the Qur'ān], only the first [stipulation, that of denoting what can be read in prayer,] remained."[169] Thus, the Qur'ān in the time of the Prophet had an inimitable ordering that did not retain its inimitability in the codex compiled by the Companions. Since abrogation took place during the lifetime of the Prophet, it was irrelevant that the ordering did not remain inimitable. Regardless of this caveat, Sarakhsī made clear that the reading of the Qur'ān may remain though the injunction is abrogated. In contrast to Dabūsī's lack of explanation for this phenomenon, Sarakhsī argued that this abrogation took place for the purpose of properly executing religious rituals.

The third method of abrogation that Sarakhsī considered involves the abrogation of the wording of an injunction in the codified Qur'ān while the injunction that the abrogated wording established remains operational in jurisprudence. Just as Dabūsī had done, Sarakhsī used the example of fasting as expiation of an unfulfilled oath to demonstrate this type of abrogation. To quickly review this issue, whereas the codified Qur'ān mentions that one must fast for three days to expiate an unfulfilled oath, Ibn Mas'ūd's reading of the same verse added that the fasting must be for three consecutive days. Sarakhsī was faced with the same challenge as Dabūsī, that is, of preserving both the integrity of the Qur'ān and the integrity of Ibn Mas'ūd. "There is no doubt", said Sarakhsī, "of the moral probity (*'adalah*) of Ibn Mas'ūd... [therefore] we believe in [his wording's] status as recitation (*matlu*), that it is Qur'ān, and that it is the Word of God."[170] Sarakhsī continued to say that if a wording was at any time considered as part of the Qur'ān, then it maintains forever the status of revelation that must be believed in. For some reason, however, God decided to cause this particular wording to be lifted from all hearts other than that of Ibn Mas'ūd[171]. Sarakhsī provided no explanation for God's action and, given his discussion in the previous two subsections of abrogation, he does not need to provide one. What mattered to Sarakhsī is that revelation – whether recited (*matlū*) or not (*ghayr matlū*) and whether in the codex or not – is applicable to all persons.

What is curious is that Sarakhsī accepted Ibn Mas'ūd's version of the wording of the Qur'ān at face value. He admitted that the wording that Ibn Mas'ūd presented could not be authenticated through multiple transmissions (*mutawātir*)[172], which Sarakhsī

earlier posited as a necessary prerequisite for a verse to be considered as part of the Qur'ān. To overcome this dilemma he brought together two of his fundamental positions: deference to the juristic tradition and the absolute transcendence of God. He defended a juridical opinion that is ensconced in the Ḥanafī tradition by appealing to God's inscrutable will. It is the position of "our scholars", he said, that establishes that the fasting of expiation must be three consecutive days[173]. The prescriptive nature of this injunction, as opposed to the more suggestive nature of Dabūsī's position, required Sarakhsī to classify a non-*mutawātir* account of Ibn Mas'ūd as equivalent to the Qur'ān. Sarakhsī attributed this anomaly to the will of God, citing Q. 17:86 in his defense: "And if We willed, We could take back that which We revealed unto you." God chose to abrogate the wording of Ibn Mas'ūd while retaining the injunction if only because He willed it to be so. Sarakhsī was, therefore, not trying to make sense of Divine abrogation, but sought to explain its workings through the received tradition. That is, the existence of the injunction in the legal tradition was evidence that the wording did indeed exist as unrecited revealtion, whether or not it was narrated through multiple transmissions or codified in the Qur'ān.

Sarakhsī's discussion of the fourth type of abrogation, addition to the text (*ziyadat 'ala l-nass*) is remarkable in its similarity to Dabūsī's. The examples he used are identical, as are the conclusions he reached. Sarakhsī repudiated any addition to the text after the death of the Prophet, which included adding stipulations to injunctions that are unstipulated. To do so, he warned, would be to fail in enacting the injunctions of God as

they were intended to be enacted[174]. While Sarakhsī's discussion is longer than Dabūsī's, the content is almost exactly the same.

2.3.3 Comparative Analysis

The most striking difference between these two juridical scholars in their approach to abrogation is based in their conception of the purposes (*maqāṣid*) of juridical injunctions. For Dabūsī, laws are intended to bring the believer closer to God through acting upon the injunction. It is understandable then, that Dabūsī would hold action and practice central to his theory. Abrogation, he said, cannot take place before humans are able to act upon the injunction, lest the injunction become meaningless. Furthermore, if an injunction could not be practiced such that it conforms exactly to its precipitating cause or does not fulfill the purpose intended by the injunction, then it cannot be enacted. Believers, while bound by the text, are forced to interact with it so as to act appropriately.

For the jurist, Dabūsī's conception of abrogation requires the jurist to be attentive to the circumstances surrounding every injunction in the text to assess how they apply to the circumstances surrounding its application. Thus, every new circumstance requires a fresh look at the injunction. Jurisprudence, therefore, is not a static science, despite the presence of clear textual injunctions.

Sarakhsī, by contrast, held firm conviction to be the centerpiece of his theory. The believer is expected first and foremost to believe in the injunction as divinely ordained and to believe that it should be enacted regardless of circumstance. In Sarakhsī's framework, the level of reflection upon the circumstances surrounding an injunction and its application required is significantly less than in Dabūsī's. God may abrogate or not at will; Sarakhsī clarified at one point that God's abrogation follows no standard or

methodology that humans can comprehend. As he claimed in his discussion of clear and ambiguous verses, believers need to understand God's commands to act upon them. Sarakhsī also built upon his earlier deference to the Ḥanafī juristic tradition. His belief that historically derived injunctions contained the full exposition of the Divine Will finds its expression in his abrogation theory when he holds that the traditional Ḥanafī understanding of the expiation for an unfulfilled oath is a justification unto itself. That is not to say that Dabūsī did not show great deference to the Ḥanafī tradition, but he did not justify the tradition self-referentially.

Despite their stated deference to the Ḥanafī tradition, particularly to the jurisprudence that they inherited, Dabūsī and Sarakhsī's discussion of abrogation does not fully conform to any of the *uṣūl al-fiqh* models of their Ḥanafī predecessors. Jaṣṣās, for example, said that abrogation occurs when God eases a command that was previously difficult[175], a position that both Dabūsī and Sarakhsī disavow[176]. The theory of precipitating causes (*asbāb*), which Dabūsī discussed in the 'clear and the ambiguous' section and which Sarakhsī discussed in the present one, appears to be a novel idea in that it did not exist in Ḥanafī thought prior to the 5th/11th century and was repudiated even by their contemporaries. Al-Sam'ānī (d. 489/1095) said of Dabūsī's theory of *asbāb*, "[it] is an error and invention (*khaṭā'wa ikhtira'*), which, I think, no one before him has espoused."[177] Abu l-Yusr al-Pazdawī, normally an ally of Sarakhsī, rejected his theory of *asbāb* outright as unnecessary and misleading[178]. Dabūsī and Sarakhsī's frameworks and deference to received jurisprudence paid homage to the Ḥanafī juridical tradition, but departed on the theoretical level in ways that make it possible to create new and novel methods of interpretation and, at least theoretically, novel jurisprudence.

2.4 Conclusion

By analyzing some of Dabūsī and Sarakhsī's thoughts on the workings of basic Qur'ānic concepts we are afforded some insight into their understanding of revelation, its purpose in the world and the jurist-God relationship. As for the purpose of revelation, we are presented with two competing theories. Dabūsī suggested that revelation is meant to elicit different responses in the reader. The miraculous verses that are clear are intended to prove to the reader that the messenger is a Prophet. The verses that are less clear require the jurist to understand how best to enact them based on circumstance. This enacting is informed by different hermeneutical devices, such as those gleaned from abrogation theory regarding the precipitating causes and purposes of injunctions. A pragmatic concern seems to underpin Dabūsī's approach to the Qur'ān. His repudiation of interpretation of the Qur'ān as an indubitable disclosure of its meaning and his wariness of any external source abrogating the Qur'ān reflects a fear of articulating a binding injunction upon something of dubious origin. If a binding injunction is to be based upon anything, that source should be beyond reproach, which for him can only be revelation that has been transmitted through *mutawātir* transmissions.

The relationship between the jurist and God that Dabūsī proffered in this discussion is one in which jurists actively try to comprehend and enact the injunctions of God as appropriate to their particular circumstances. Despite having indubitable knowledge concerning the Divine origin of the Qur'ān, jurists must be constantly engaged in interpreting the Qur'ān in a bid to act and judge in accordance with God's

will. Dabūsī intimated that God's will with regard to action changes based on time and place, a stance that will become more pronounced in later chapters.

Sarakhsī, by contrast, appears to have regarded revelation as a definitive set of injunctions and regulations that are passively received by believers and jurists alike. One need only to believe in the revelation and its commanding nature to fulfill the purpose behind an injunction. It is not only revelation, however, to which Sarakhsī accorded such a relationship with jurists. The jurisprudential tradition also demands such a passive reception: the jurist can try to understand the tradition if he so desires and will find in it sound principles, but that understanding is not necessary and, ultimately, superfluous. Similarly, the Qur'ān is mostly clear, excepting the few ambiguous verses of which understanding is unnecessary. Regarding verses of the Qur'ān that are unclear, though not ambiguous, the tradition provides the clarity required to understand their literal intent. Sarakhsī's distaste with a pragmatic relationship to the Qur'ān has been noted by other scholars[179], and it is clear that he considers a believer to be primarily one who submits entirely to the message, not one who interacts with it creatively. Based on his approach to the Qur'ān, it appears that Sarakhsī espoused a vision of Islāmic jurisprudence as total, transcendent, and universally applicable.

It is important to note that these two visions of the Qur'ān are expressed using almost identical frameworks. Both juridical scholars used the Ḥanafī terminology at their disposal to discuss Qur'ānic issues in their legal sense and both worked within the juridical structure that represented Ḥanafī thought in their time. The topic headings of *i'jāz l-Qur'ān*, clear and ambiguous verses and abrogation theory were sciences that had

been heavily discussed amongst Ḥanafī scholars. For the most part, Dabūsī and Sarakhsī held views that had been articulated by Ḥanafī scholars that preceded them. However, the two jurists did not bind themselves to the Ḥanafī tradition, nor were they simply selecting juridical positions that had been previously articulated. Their definitions of technical terms were sometimes unprecedented, despite the rhetoric of Sarakhsī that frowned upon novel interpretations.

Although Dabūsī and Sarakhsī worked within a particular structure, their understanding of the meaning and function of these structures are clearly very different. Moreover, their definitions were predicated on their particular conceptions of function of Islāmic law in the life of the community – conceptions that cannot be reduced to any one of their regional, juridical or doctrinal affiliations. Their approaches to other legal sources similarly speak within the overarching Ḥanafī structure, but from that position the two scholars promoted particular points of view that did not conform to a firm jurisprudential or doctrinal rubric and were motivated by their particular preconceptions regarding the source of law in question.

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[50] Dutton, Yasin. *The Origins of Islāmic Law*, 157

[51] Hossein Modarressi, "Early Debates on the Integrity of the Qur'ān", 33

[52] Fazlur Rahman, *Islām*. 69

[53] Christopher Melchert, "Qur'ānic Abrogation Across the Ninth Century", 84

[54] see for example Melchert. "Hanafism in Kufa and Traditionalism in Medina", 330.

[55] Dabūsī. *Taqwīm al-'Adillah*, 20

[56] ibid, 20

[57] ibid, 20

[58] ibid, 20

[59] ibid, 169

[60] ibid, 13

[61] ibid, 20

[62] note here that Dabūsī's position is neither Mu ʿtazilī (see ʿAbd al-Jabbār *Mughnī* 12/65) nor Māturīdī (see al-Bāqillānī *Insāf,* 14)

[63] ibid, 14

[64] ibid, 14

[65] ibid, 14

[66] ibid, 443

[67] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 1/210

[68] ibid, 1/210

[69] 1/211

[70] 1/211

[71] 1/211

[72] Sarakhsī, *al-Mabsuṭ*, 1/138

[73] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 1/211

[74] ibid, 1/211

[75] ibid, 1/211

[76] ibid, 1/211

[77] ibid, 1/211

[78] Sarakhsī, *al-Mabsuṭ*,1/137

[79] Sarakhsī, *al-Mabsuṭ*, 1/139

[80] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 1/211

[81] Suyuti, 1/642

[82] Dabūsī. *Taqwīm al-ʿAdillah*, 117

[83] ibid, 117

[84] 117

[85] ibid, 118

[86] Jassās, *al-Fuṣūl fī ʿilm l-Uṣūl*, 2/2

[87] Dabūsī. *Taqwīm al-ʿAdillah*, 173

[88] ibid, 169

[89] ibid, 95

[90] ibid, 119

[91] ibid, 120

[92] ibid, 119

[93] ibid, 119

[94] ibid, 95

[95] ibid, 100

[96] 101

[97] 169

[98] 169

[99] 100

[100] ibid, 169

[101] ibid, 169

[102] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 1/124

[103] ibid, 1/124

[104] ibid, 1/127

[105] ibid, 1/127

[106] ibid, 1/127

[107] ibid, 1/128

[108] ibid, 1/133

[109] ibid, 1/133

[110] This similarity between Sarakhsī's 'connections' and Aristotle's primary and secondary qualities is not lost on us. However, we are hesitant to explore Aristotle's influence on Sarakhsī. This is primarily because historical literature on the topic often confuses our Aḥmad ibn Abī Sahl Sarakhsī with Aḥmad ibn Ṭayyab Sarakhsī (d. 285/899), the disciple of al-Kindī (d. ca. 259/873) and champion of Aristotelian thought. Aristotle's influence on our Sarakhsī, however, is palpable and would be interesting for futher study.

[111] ibid, 1/134

[112] ibid, 146

[113] ibid, 1/135

[114] ibid, 1/136

[115] ibid, 1/135

[116] ibid, 1/135

[117] ibid, 1/136

[118] ibid, 1/136

[119] ibid, 1/137

[120] David Vishanoff, "In Defense of Ambiguity: The Legal Hermeneutics of Abu Bakr Muḥammad b. al-Tayyib al-Bāqillānī" *American Oriental Society*, Houston, March 23, 2002.

[121] John Burton, Naskh

[122] al-Khu'ī, Prolegomena to the Qur'ān,187

[123] Waliullah, *al-Fawz l-Kabīr*, 53-60

[124] insert later

[125] Abdullahi an-Na'im, *Towards an Islāmic Reformation*, 18

[126] Muhammad Ghazali, *A Thematic Commentary of the Qur'ān*, 40

[127] David Powers, "The Bequest Verses", 247

[128] Melchert, "Qur'ānic Abrogation Across the Ninth Century", Studies in Islāmic Legal Theory, 86

[129] Murtaza Bedir, "An Early Response to Shafi'ī: 'Isa b. Aban on the Prophetic Report", 304

[130] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 2/51

[131] Dabūsī. *Taqwīm al-'Adillah*, wim, 231

[132] Qur'ān, 87:19

[133] Qur'ān, 4:163

[134] Dabūsī. *Taqwīm al-'Adillah*,, 231

[135] ibid, 235

[136] ibid, 238

[137] ibid, 236

[138] ibid, 236

[139] ibid, 134

[140] ibid, 229

[141] ibid, 237

[142] ibid, 237

[143] ibid, 237

[144] ibid, 237

[145] I translate *tilāwah* as 'wording', following the practice of John Burton, as opposed to the more literal translation of 'reading'. I found that 'reading' became unwieldy in English, and 'wording' allowed for greater descriptional clarity.

[146] ibid, 232

[147] ibid, 232

[148] ibid, 232

[149] ibid, 232

[150] ibid, 232

[151] ibid, 232

[152] ibid, 233

[153] ibid, 233

[154] ibid, 234

[155] ibid, 233

[156] ibid, 234

[157] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 2/44

[158] ibid, 2/49

[159] ibid, 2/51

[160] ibid, 2/51

[161] ibid, 2/49

[162] ibid, 2/51

[163] ibid, 2/48

[164] ibid, 2/61

[165] ibid, 2/47

[166] ibid, 2/61

[167] ibid, 2/63

[168] ibid, 2/63

[169] ibid, 2/63

[170] ibid, 2/63

[171] ibid, 2/63

[172] ibid, 2/63

[173] ibid, 2/63

[174] ibid, 2/64

[175] Jassās, *al-Fuṣūl fī ʿilm l-Uṣūl*, 1/59

[176] Dabūsī does not mention it and Sarakhsī rejects it, *Muharrar*, 2/49

[177] Aron Zysow, "Muʿtazilism and Māturīdism in Ḥanafī Legal Theory, 260

[178] ibid, 261

[179] Y. Meron, "Marghinānī, His Method and His Legacy", 413

3.0 The *Sunnah* as *Ḥadīth* and the *Ḥadīth* as *Sunnah*

Synopsis – The juridical meaning of the *sunnah* as accessible through the *ḥadīth*; the juridical application of *mutawātir* and well-established *aḥadīth*, *ḥadīth* with a single transmission; the scope and limitations of the *sunnah* abrogating the Qur'ān; the relationship of Dabūsī and Sarakhsī to historical precedent and their conception of Islāmic jurisprudence in relation to the understanding of the *sunnah*.

The second most authoritative source in classical Islāmic legal theory is the *sunnah*, which Juynboll defined as "normative practice". Normative practice presupposes an historical precedent that defines model behavior. Every society claims to adhere to certain values and practices that precedent defined as normative. Pre-Islāmic Arabia, for example, held idol-worship, manliness (*muruwwā*) and infanticide of girls among many other values and practices to be a part of their *sunnah*. However, with the advent of Muḥammad and Islām, those patterns of behavior were supplanted by the dictates of the Qur'ān and the practice of Muḥammad. There is evidence to suggest that Muḥammad was self-consciously replacing the *sunnah* of the pagan Arabs with a new, Islāmic *sunnah*. This *sunnah* did not only emanate from Qur'ānic injunctions, but from the practice of the Prophet himself. Muḥammad stated, "The book was given to me, as well as something that is (in extent or importance) similar to it." [180] This statement was unanimously understood in Muslim scholarship as referring to the speech and actions of Muḥammad. Thus, the actions and statements of the Prophet abrogated the *sunnah* of the pagan Arabs and defined normative practice for the life of the Muslim community[181]. Thereafter, the actions and statements of the Prophet were known as the *sunnah*.

The justification that Ḥanafī scholars of the 5th/11th century gave for considering the *sunnah* of the Prophet to be normative concerned a particular understanding of the

Prophet being 'protected' (*ma'sūm*) from persistent error. Their doctrine of protection held that, first and foremost, the Prophet could not err (*ẓālah*) in reciting the text of the Qur'ān as revealed by God.[182] Thus, the integrity of the Qur'ān was maintained and beyond reproach. However, the jurists admitted that the Prophet could be incorrect (*khata'*) concerning judgments involving his personal opinion (*ra'y*) regarding matters both religious and secular. However, since the Prophet was the conduit of revelation (*ṣāḥib l-waḥy*), God would correct any mistake he made through means of revelation. Hence, though the Prophet could err, he could not persist (*qarra*) in that error because God would rectify his actions. Therefore, the Muslim community could be certain that any action that the Prophet persisted in had implicit Divine sanction. As a result, the *sunnah*, defined as the actions and statements of Muḥammad, should be considered by the Muslim community as Divinely sanctioned and thus normative for believers.

Although the *sunnah* ideally constituted the observed words and the deeds of Muḥammad, the scholars of the 5th/11th century were hamstrung by the temporal disconnect between themselves and the prophet. The nature of this disconnect required narrators from the generation of the Prophet to report what they heard the Prophet say or what they saw him doing to the next generation. That generation would then convey those reports to the next, and so on for four centuries. The only *sunnah* of the Prophet available to later generations was encapsulated in these reports, known as *ḥadīth* (pl. *aḥadīth*)[183]. After a concerted effort by the Umayyad caliph 'Umar ibn 'Abd al-Azīz to record Propethic sayings as a reflection of the *sunnah*, the two terms became effectively

intertwined. *Aḥadīth* were viewed as the embodiment of the *sunnah* and enacting the *sunnah* was seen as commensurate to acting upon the *aḥadīth*.

Jurists, therefore, looked to the *ḥadīth* literature in order to elucidate normative practice. Given the vast number of *aḥadīth* available and the multifarious aspects of rituals and social life that they addressed, the *ḥadīth* served as the basis for the majority of Islāmic jurisprudence. Despite a reliance on *aḥadīth* for conveying the *sunnah*, the jurists recognized that some *aḥadīth* may not be authentic reports of the Prophetic example[184]. To gauge the reliability of these reports, two sciences of *ḥadīth* criticism emerged, known as *ʿilm l-riwāyā* and *ʿilm l-dirāyā*. The first examined the chain of transmission (*ṣanad*) through which each *ḥadīth* was narrated[185]. A sub-science known as *ʿilm l-jarḥ wa l-taʿdīl* developed wherein every narrator in the chain was scrutinized in an attempt to establish their moral probity (*ʿadālah*), their memory (*ḍabṭ*) and the probability of their interaction with the narrators they claimed to have heard the *ḥadīth* from. If all of these factors were proven to be sound, then the *ḥadīth* was considered sound (*ṣaḥīḥ*). If not, then the *ḥadīth* was accorded a dubious status, which some jurists nevertheless considered to be an admissible form evidence to be used in deriving jurisprudence. The second science of *ḥadīth*, *ʿilm l-dirāyā*, was far less prevalent and concerned the text (*matn*) of the narration. In this mode of criticism, the text of the *ḥadīth* would be examined based on its internal composition and its consistency with other Islāmic sciences. Different scholars had different standards for assessing the accuracy of the text of *aḥadīth*, but more often than not, if the chain of transmission was sound, the *ḥadīth* was accepted at face value[186]. A common refrain amongst *ḥadīth*

scholars and jurists alike became, "accepting *ḥadīth* means knowing the men [in the chain of transmission] (*ʿilm l-rijāl*)"[187].

Jurists had diverse standards by which they would judge the soundness and subsequent applicability of *aḥadīth* based on their chain of transmission[188]. The result of their judgment determined the relationship that they had with the jurisprudential applicability of the prophetic example in their era and locale. If they were to judge the majority of *aḥadīth* to be sound then the corpus of *ḥadīth* literature would be seen as an accurate reflection of the *sunnah*. In that case, juridical application of the *sunnah* would be synonymous with applying the dictates found in the *aḥadīth*. If, however, jurists judged only a small number of *aḥadīth* to be sound, then the *sunnah* would be not find its full expression in the *aḥadīth*. In that case, the articulation of jurisprudence would require greater reliance on the Qurʾān, Consensus and human reasoning. In summary, the ability for jurists to define the *sunnah* as a legal category depended on the extent to which they viewed the *aḥadīth* as a reliable source for determining the *sunnah*.

Despite the superficial similarities in their discussions on the *sunnah*, Dabūsī and Sarakhsī had divergent views towards its practical application which center around their understanding of *ḥadīth*. A close reading of their discourses on three issues will highlight their shared rhetoric and dissimilar conclusions. These issues are: defining the *mutawātir* and the *mashhūr*, the juridical import of single transmissions, and the potential for the *sunnah* to abrogate the Qurʾān.

3.1 *Multiple-Chained Transmissions (mutawātir) and Well-Established (mashhūr) Transmissions*

The Ḥanafī school divided *ḥadīth* transmissions into three categories of transmission: *mutawātir*, well-established (*mashhūr*) and narrated by a single authority (*aḥād*). These categories reflected levels of reliability that were afforded a *ḥadīth* given the number of its chains of transmission (*ṭuruq*). Of the three, single transmissions were given the most scholarly attention and generated the most controversy. By contrast, there was a general consensus amongst Ḥanafī scholars regarding *mutawātir aḥadīth*. This was reflected in the writings of Dabūsī and Sarakhsī, whose chapters on the subjects read almost identically. The same authorities were invoked, the same criticisms were considered and rejected, and the same examples were provided as proofs. Though Sarakhsī's treatment of *mutawātir* transmission was more verbose, the ideas presented were exactly the same. Their only point of departure concerned the well-established (*mashhūr*) *aḥadīth*, which they discussed alongside and in conversation with the *mutawātir*. The difference in their understanding of the *mashhūr* appeared slight, but had a significant impact on their articulation of Islāmic law.

3.1.1 The *mutawātir* in the thought of Dabūsī and Sarakhsī

The two juridical scholars defined *mutawātir* transmissions as conforming to three criteria. First, the narration must have been heard directly by the narrator in such a way that their audition (*samāʿ*) was not compromised in any way. Second, there must be a continuous chain of narrators, all of whom heard the narration directly, understood it and transmitted exactly what they heard. Finally, the narration must simultaneously be reported by different individuals in so many different places so the multiple chains of transmission (*ṭuruq*) vitiate any claims of fabrication. If such a report were to be present in the Muslim community, it would reach the status of *mutawātir*. Once so classified, the

content of the narration would generate indubitable knowledge (*ʿilm l-yaqīn*) on the part of the believers. According to both thinkers, the Qurʾān was the only other source of law that could generate indubitable knowledge, precisely because it was narrated through *mutawātir* transmissions. Dabūsī and Sarakhsī argued that the *mutawātir aḥadīth* and the Qurʾān are therefore on par with each other both as miracles and as sources of knowledge. Therfore, prophetic transmissions that were passed on through *mutawātir* transmissions are to be considered miraculous and accorded a legal status equivalent to the Qurʾān.

Conspicuously missing from Dabūsī and Sarakhsī's discussion was any mention of text (*matn*) criticism of *mutawātir* transmissions. Interestingly, they did not delve into the issue surrounding the meaning (*maʿnī*) of a *mutawātir* transmission and its wording (*lafẓ*), a discussion that was present in the treatises of their contemporaries. Some scholars at their time held that only the meaning of a *mutawātir* transmission could be taken into account juridically, as widespread transmissions almost certainly have different wordings. Others argued that only transmissions that have the exact same wording can be considered as *mutawātir* and thus their exact wordings are authoritative for deriving juridical opinions. Most, however, attempted to delineate an allowable level of divergence between the wordings of *aḥadīth* that would lead two comparable *aḥadīth* to be seen as either cognates or as disparate. Dabūsī and Sarakhsī only briefly alluded to the fact that different wordings of a narration do not negate the veracity of the transmission because it would be unrealistic to expect that all the transmissions would have the exact same wording. Though they clearly believed that the text of the transmissions needed

only conform to a uniform meaning and not conform to a uniform wording, they did not explore the issue further or deal with criticisms of their position. The reason for this will not be speculated upon, but what is important is that the thrust of Dabūsī and Sarakhsī's discussion was on the status of the *mutawātir* transmissions as legally authoritative evidence (*ḥujjah*) for extrapolating a judicial decision. Their concern was primarily to defend the particular Ḥanafī utilization of *mutawātir* transmissions in legal theory, not to define its internal structure.

It is also noteworthy that Dabūsī and Sarakhsī did not hold that the *mutawātir* required criticism of the narrators in its chain of transmission (*iṣnād*). Although both jurists gave the issue of *iṣnād*-criticism much import in other discussions, they presumed that the widespread nature of the *mutawātir* transmission precluded lying and conspiracy. It is not in the nature of humans, they argued, to perpetuate conspiracies and hide the truth. Dabūsī explained, "It is not feasible for a person to hide his secrets (*katmān sirruhu*). He eventually divulges it to a close friend, who then tries to keep the secret but then divulges it to his close friend. That friend then tells another, and [thereby] the secret becomes public."[189] They wrote that in order for a narration to achieve the status of *mutawātir* that narration would require a high level of plausibility since so many different people not only narrated it, but believed it to be authentic. After all, said Sarakhsī, someone might be able to convince a small colony of people that he was present in Makkah to divorce his wife and was present in Kufa to free a slave on the same day, but that story would not be believed by people in a neighboring town due to its implausibility[190]. Therefore there is a self-critical system in place that demands *a priori* authenticity for a transmission to reach *mutawātir* status to begin with. If a *ḥadīth* is

mutawātir, then it is, *ipso facto*, reliable and trustworthy. This absolved Dabūsī and Sarakhsī from demanding that all the narrators in all the chains of transmission of a *mutawātir ḥadīth* be reliable and trustworthy – a process that would preclude almost all reports from reaching *mutawātir* status and render the subject purely theoretical.

While this trust in humanity's transmission-vetting capabilities allowed for a larger number of reports to reach *mutawātir* status, it also allowed for a broader range of narrators to have their transmissions accepted. Elsewhere, Dabūsī and Sarakhsī stated that legitimate narrators must be Muslim, trustworthy, reliable, sane, and have attained an age where they can use reason (*bāligh*), among other stipulations if their transmissions all to be accepted. All these stipulations were dropped in the case of the *mutawātir* out of necessity. As stated earlier, criticism of the chain of transmission would render most all *mutawātir aḥadīth* invalid. However, there was a major unintended consequence of accepting narrators without qualifications. If being Muslim was not a prerequisite for having one's transmissions accepted, then theoretically, other widespread, often competing non-Muslim narratives could as a result be considered *mutawātir* and therefore legally binding upon believers. The most obvious competing narrative that Dabūsī and Sarakhsī considered was the crucifixion of Jesus. While the Jewish and Christian *mutawātir* reports claimed that Jesus died on the cross, the Qur'ān states in Q. 4:157, "They did not kill [Jesus] and they did not crucify him, but it was made to appear to them [that they had done so]." The Qur'ān continues to say that Jesus was lifted to God, which most led most commentators to believe that another person was killed in Jesus' place whom God caused to look like Jesus. However, since the reports of the Jews

and the Christians reached the level of *mutawātir*, they would have the same status as the Qur'ān and thus necessitate certain knowledge in their veracity. In Dabūsī and Sarakhsī's conception of *mutawātir*, it would seem, diametrically opposed claims both generated certain knowledge.

Dabūsī and Sarakhsī responded to this criticism by reminding their detractors of the premises of their theory. In order to be considered *mutawātir*, the narrators of a transmission must have witnessed what they narrated themselves, understood it, and then transmitted it exactly. In the case of Jesus' torture, the two legists said that Jesus' torturers did not know him well enough to definitively identify whom they were torturing. Furthermore, Jesus' close associates were not present at the time of his torture to make a positive identification. Therefore, the people who were reporting about his torture were not in a position to make a definitive claim about who was tortured. However, regarding the crucifixion, Dabūsī and Sarakhsī admitted that the general populace could see Jesus on the cross, including his close associates. By way of explanation, Dabūsī and Sarakhsī said that after the torture, the body was so mutilated that even Jesus' close associates would not be able to definitively recognize him were he the one on the cross. Therefore, since the original narrators of the crucifixion did not conclusively witness his torture and death, the Jewish and Christian claims of Jesus' death are not considered *mutawātir*.

Although Dabūsī and Sarakhsī preserved their theory of *mutawātir* against the above criticism, they raised questions about God's machinations as a result. While defending their view of *mutawātir* transmissions, the two scholars in essence argued that God knowingly misled two nations: the Jews and the Christians. Even if Muḥammad eventually came with the truth to clear up the matter, the 600 years between the disputed

crucifixion and the advent of Muḥammad's prophethood would be characterized not only by ignorance (*jahiliyyah*) but by God's willful misguidance. Sarakhsī explained that God achieves His will by sometimes obfuscating the reality of a situation, like when He caused the Makkans to underestimate the strength of the Madinan army. Dabūsī linked the issue with the purpose (*ḥikmah*) that underlies all of God's rulings. He suggested that the main purpose behind the crucifixion was for God to deliver Jesus from his enemies to Himself (*al-daf' a ḥikmah ' aẓīmah*). By creating a likeness of Jesus to be killed, God was able to subtly deliver Jesus (*al-tashbih daf' a laṭīf*), because God works in subtle ways to deliver people. The collateral result of this subtle deliverance, however, was the misguidance of the people surrounding the event. This might have been regrettable, but both he and Sarakhsī argued that God was only increasing in misguidance people who were already misguided because of their own actions. This position demonstrated both Dabūsī and Sarakhsī's low regard for the followers of Jesus and their regard for Islām as a pristine message that has no equal. Their understanding of the *mutawātir* also esteems the Muslim community above other communities since the *mutawātir* transmissions of other nations may be the result of Divine misguidance. The Muslim community, however, was protected from such misguidance, a theme that will be explored in our chapter on Consensus (*ijmā'*).

The juridical effect of Dabūsī and Sarakhsī's conception of *tawātur* was that *mutawātir* transmissions were to be accepted and applied juridically without consideration of either transmission (*riwāyā*) or content (*dirāyā*) criticism. The impossibility of conducting narrator-criticism of *mutawātir* transmissions precluded

riwāyā criticism and the inscrutability of God's purpose precluded *dirāyā* criticism. Hence, *mutawātir* transmissions were to be applied in jurisprudence with impunity and the jurist can have indubitable knowledge in the veracity of that application.

3.1.2 The *mashhūr* in the thought of Dabūsī and Sarakhsī

After having agreed on the definition of the *mutawātir*, Dabūsī and Sarakhsī dealt with well-established (*mashhūr*) *aḥadīth* slightly differently. The difference appears small, but it has palpable ramifications in their discussions of the *sunnah* abrogating the Qur'ān. Dabūsī said that *mashhūr aḥadīth* were transmissions that were transmitted through several various chains. Whereas the *mutawātir* were of such common knowledge that neither uniform text nor sounds chains of transmission were necessary to establish their veracity, the *mashhūr* were *aḥadīth* that were not quite so widespread and thus were to be subject to both text (*matn*) and chain of transmission (*iṣnād*) criticism. Some of these *mashhūr aḥadīth* were narrated with the same wording in such numbers that would warrant them having the legal status of the *tawātur* (*'ala ḥadd al-mutawātir*). That is to say, though they were not *mutawātir aḥadīth*, they are nevertheless treated as such juridically because of the high likelihood of their authenticity. As a result, believers must have indubitable knowledge of the veracity of this subgroup of *mashhūr aḥadīth*. The majority of *mashhūr aḥadīth*, however, did not reach the level of *tawātur* and were therefore to be accorded the same juridical status as a single transmission. Dabūsī said that these inferior transmissions do not impart indubitable knowledge, but believers can have peace of mind (*ṭamaninah l-qalb*) in their contents. Therefore, since believers are only required to follow that which necessitates indubitable knowledge, believers need

only follow those *mashhūr aḥadīth* that reach the level of *tawātur*. Dabūsī did not clearly delineate the difference between the *mashhūr* that are at the level of *mutawātir* and those that are not, though he intimated in another discussion that a *mashhūr ḥadīth* becomes *mutawātir* if there are over ten identical transmissions. The difference between the *mashhūr* and the *mutawātir*, though, was left vague and Dabūsī did not delve into the subject in detail[191].

Sarakhsī provided even less detail and clarity on the *mashhūr aḥadīth* than did Dabūsī. He offered no clear definition of the *mashhūr* and often used the term interchangeably with *mutawātir*. Like the *mutawātir*, Sarakhsī said that the *mashhūr* imparted indubitable knowledge and that believers were obliged to believe in them. This position is distinct from Dabūsī's who said that the majority of *mashhūr aḥadīth* did not attain the level of *mutawātir*. In contrast, Sarakhsī did not clarify the distinction between *mutawātir* and *mashhūr aḥadīth* and in fact regularly categorized a *ḥadīth* as *mutawātir* in one discussion and the same *ḥadīth* as *mashhūr* in another.

The result of this undefined relationship of two juridically equivalent categories was that Sarakhsī had two types of *ḥadīth* that he could claim generated indubitable knowledge. If he felt that a *ḥadīth* did not attain the level of *mutawātir*, or if others would deem it so, then he could retain its function as producing indubitable knowledge by arguing that it was *mashhūr*. Indeed, Sarakhsī did so when defending traditional Ḥanafī opinions regarding the *sunnah* abrogating the Qur'ān. In the same discussion, Dabūsī was hampered by the dearth of *aḥadīth* that generated indubitable knowledge at his disposal.

In summary, Dabūsī held that *mashhūr aḥadīth* were those with more than a single chain of transmission. When the chains of transmission reach a certain number, possibly ten or more, then though the transmission is not *mutawātir* in a technical sense, it is treated as *mutawātir* in that it generated indubitable knowledge in its veracity. Sarakhsī, by contrast, defined the *mashhūr aḥadīth* as those with more than a single chain of transmission, but did not differentiate between those that reached the level of *tawātur* and those that did not. Hence, any transmission that had more than a single chain of transmission could potentially generate indubitable knowledge. In that case, the *mashhūr ḥadīth* could be applied in jurisprudence with impunity.

3.2 *Single transmissions (al-khabar al-wāḥid)*

The role of the single transmission in the articulation of Islāmic law is one of the most debated subjects amongst juridical scholars. The single transmission referred to a *ḥadīth* ascribed to the Prophet that was narrated by only one Companion of the Prophet. At the heart of the matter is the potential for single transmissions to contain either truth or falsehood (*yaḥtamul l-ṣidq wa l-kidhb*) with equal probability. Sunnī scholars did not believe that a Companion could lie about the Prophet, but were rather concerned that someone in a later generation could capriciously invent a prophetic saying and then reverse-attribute the saying to the Prophet by way of a Companion. Since single transmissions by definition do not have cognates in transmissions from other Companions, they cannot be externally verified through comparison to other reports. They are, again by definition, unable to demonstrate the level of reliability that *mutawātir* and *mashhūr* transmissions afford through their wide circulation. The Shafi ʿīs often tried to mitigate this shortcoming of the single transmissions by attempting to determine

whether all the narrators in the chain of transmission (*ṣanad*) of a *ḥadīth* were trustworthy characters. If such a chain were established, most Shafi ʿīs believed that the *ḥadīth* would then be sound (*ṣaḥīḥ*), barring patently fabricated text (*matn*) within the *ḥadīth*. In this case, the *ḥadīth* would be considered to accurately reflect the words of the Prophet and thus would command obedience from a believer.

The Ḥanafīs, however, were largely unimpressed by the Shafi ʿī methodology. Their major objection was that if a transmission could be accepted with certainty as accurately reflecting the words of the Prophet then that transmission would be considered *waḥy ghayr matlū*. For all intents and purposes, then, Ḥanafīs argued that single transmissions would have the same legal status as the Qurʾān and the *mutawātir*. This meant not only that the status of the Qurʾān and the *mutawātir* would be diminished as a result, but that the single transmission would be sufficient to abrogate the Qurʾān if the two were in conflict. Further, rejecting a *ḥadīth* that was transmitted through a sound single transmission would therefore be tantamount to rejecting the Qurʾān. The Shafi ʿīs, of course, did not accept the Ḥanafī criticism and rejected it as an extreme characterization of their position. Despite the Ḥanafī's criticism and radical distinction between the Qurʾān and single transmissions, there was a tension between their position on the single transmissions as an inferior source of jurisprudence and the dominant methodology they used to derive law.

Many Ḥanafī juridical scholars articulated legal theory by starting with jurisprudence and working backward. That is, from the legal applications (*furūʿ*) that were recognized as established juridical positions of the school, scholars inferred the

paradigmatic cases (*uṣūl*) behind that law. Oftentimes, it was impossible to provide a paradigmatic case for an established law without recourse to single transmissions. This was not problematic, except when the established law was inconsistent with an imperative from a source with a higher status than the single transmission, such as the Qur'ān. The proposed solutions for this tension by Dabūsī and Sarakhsī will be examined later, but their respective understandings of the single transmissions underpin that later discussion and provide greater clarity with regard to their approach to the *sunnah* in general.

3.2.1 Dabūsī

Dabūsī's major concern regarding single transmissions was their ability to function as authoritative evidence (ḥujaj, sing. *ḥujjah*) for extrapolating juridical injunctions. If it were possible to deem a single transmission as a *ḥujjah*, then all single transmissions would necessitate action (*yūjib l-'amal*) upon their meaning. If single transmissions were not considered *ḥujaj*, then the bulk of Ḥanafī jurisprudence would be founded on conjecture (*ẓann*). Dabūsī admitted that the conjectural nature of the single transmission was unmistakable and unavoidable. Regardless of the content of a *ḥadīth* or the reported soundness of its narrators, the possibility of falsehood seeping into the report or the report being fabricated entirely must be acknowledged. Precisely because single transmissions trace their lineage back to a single Companion, they cannot be verified by comparison to other, similar *aḥadīth*, nor can the overwhelming sentiment of the believing community attest to their veracity. Single transmissions, since they are not *mutawātir*, do not have the overwhelming approval of the community behind them, nor

do they enjoy the miraculous protection given by God to *mutawātir* transmissions. Given the inability to definitively prove that a transmission is either authentic of fabricated, Dabūsī said that the methods for determining certainty (*yaqīn*) in the veracity of these reports are forever closed (*masdūd*).

Dabūsī warned that if single transmissions were to have a high level of certainty then believers would be required to act upon them. In that scenario, single transmissions could obligate (*faraḍa*) believers to carry out certain acts such that if the believer refused to enact them then she would be charged with disbelief. Given the immense number of single transmissions, this would lead to a situation where innumerable actions would be obligatory upon believers. Believers would assuredly be unable to fulfill the dictates of all single transmissions, whether through ignorance or through incapacity. Dabūsī explained that instead of focusing on the minutiae that are found in the single transmissions, believers are first and foremost required to fulfill the rights that God has over His servants (*ḥuqūq Allāh*), like prayer and the prescribed charity (*zakāh*). These rights, however, were only enumerated in the sources in which there is indubitable knowledge – the Qur'ān and the *mutawātir* traditions – not in single transmissions. Dabūsī argued that whatever information the single transmissions might contain was not of primary importance, and thus the content of those transmissions could not oblige believers to action.

Dabūsī added that believers are not only exempt from acting upon single transmissions, but that they should not use single transmissions as a basis for action in foundational matters. He cited Q. 17:36, "And do not pursue that of which you have no knowledge" to argue that single transmissions cannot be used as an authoritative evidence

(*ḥujjah*) in extrapolating juridical injunctions. If one cannot be certain of the veracity of single transmissions, then any action based upon them is not founded on indubitable knowledge. Dabūsī claimed that in matters that are foundational to Islām, action without knowledge is invalid (*al-ʿamal bi ghayr ʿilm bāṭil fi l-aṣl*). Foundational matters for Dabūsī were those that dealt with the rights of God, including rituals due to Him and belief in Him. However, as mentioned above, these rights were only enumerated in the sources in which one can have indubitable knowledge. Thus, single transmissions should have no role in defining the foundational issues of Islām, apart from which a believer is not required to act.

Nevertheless, Dabūsī mentioned that there are certain rights between humans (*ḥuqūq al-ʿibād*) that are guided by Islāmic principles. These include codes of action (*muʿammalāt*) and social laws. The details of these laws as articulated by Ḥanafīi scholars were almost entirely founded upon single transmissions. Regardless, Dabūsī said that if the veracity of a report is not known with indubitable knowledge, it cannot be considered as authoritative evidence (*ḥujjah*) in any arena, including the *ḥuqūq al-ʿibād*. Dabūsī was left then, to explain how social laws were to be established if not by the content of single transmissions. He posited that if there were an absence of evidence from the Qurʾān and *mutawātir* transmissions that discussed a particular social matter, one could use a single transmission to justify a particular position. This utilization, however, was completely at the discretion of the jurist to establish his point. If another jurist were to choose a conflicting single transmission to prove a different point, they would be at liberty to do so. The decisions so justified by these jurists, however, would

not be viewed as authoritative. Moreover, jurists were encouraged to reject the use of single transmissions when arguing a position in two cases. In the first case, a single transmission should be rejected if there is evidence for a conflicting position that is expressed in the Qur'ān, the *mutawātir* transmissions, or a strong analogy (*qiyās*). In the second case, a single transmission should be rejected if it causes some kind of constraint (*ḥaraj*) on the community. Dabūsī argued that Q. 22:78, "God does not desire to place upon you any constraint (*ḥaraj*) in the religion (*al-dīn*)" meant that whatever is from God does not constrain believers, and thus what can be known with certainty to be divinely sanctioned is beyond indictment as constraining. Therefore, if a single transmission resulted in constraint for the community, it must be rejected since it would violate God's desire not to create constraint. Dabūsī did not elucidate what type of limitation classified as "constraint", but the indictment of a single transmission as causing constraint would be proof that it was not divinely sanctioned. "Whatever does not generate certainty", wrote Dabūsī, "is repudiated by [its resulting] constraint."

3.2.2 Sarakhsī

Sarakhsī disagreed with Dabūsī's approach to single transmissions significantly. In particular, he questioned the prevalent underlying assumption that single transmissions generate conjecture (*ẓann*). For Dabūsī, single transmissions were irremediably conjectural because there was no way to tell whether narrators introduced fabrications or not. Sarakhsī, on the other hand, argued that it was fallacious to doubt the veracity of single transmissions simply because of the possibility of falsehood. Instead, he said that believers are commanded to have a positive opinion (*ḥusn l-ẓann*) of one another and hence narrators should be accorded a positive opinion in the absence of evidence to the

contrary[192]. Therefore, a narrator's transmission should be rejected only if he proves himself to be an unrepentant sinner (*fāsiq/fāsiqah*). Barring such proof, however, one should assume that the narrator and the transmission are on the side of truth (*bi jānib al-ṣidq*)[193]. In defense of this assertion, Sarakhsī invoked a *ḥadīth* that explained that God aided and endowed with knowledge those who propagated His message[194]. Consequently, Sarakhsī reasoned, if an individual were conveying God's message, then he must be the beneficiary of Divine blessing. This Divine blessing endowed upon the narrator buttressed the argument that narrators should be accorded a positive opinion (*ḥusn l-dhann*). As a result, Sarakhsī contended that the moral probity (*ʿadālah*) of the narrators should be assumed as a fact.

While the character of the narrators was presumed to be scrupulous, this character did not speak to the memory of the narrator (*ḍabṭ*) with regard to their precision in narrating. The possibility remained that a narrator may have been righteous, yet forgetful (*ghāfil*) and as a result transmitted *aḥadīth* incorrectly. Sarakhsī defended the narrators by describing two levels of memory. The first, he said, was perceptible memory (*ḍabṭ ẓāhir*), wherein a person memorized the exact wording (*lafẓ*) of transmissions properly contextualized[195]. The second and more important memory was the concealed memory (*ḍabṭ bāṭin*), in which a narrator retained the inner meaning (*maʿnī*) of a transmission, particularly its relation to the injunctions of the *sharīʿah* as manifested in substantive jurisprudence (*fi ma yabtanī ʿalayhī aḥkām l-sharʿ wa huwa l-fiqh*)[196]. Sarakhsī said that this relationship of the meaning of the *ḥadīth* to its juridical application was established only after the narrator thought about the transmission and its relation to law.

Once so cognized, the narrator then transmitted the juridical meaning of the transmission as they understood it, though not necessarily with the exact words they heard.

Sarakhsī claimed that a strong concealed memory was all that was required of a trustworthy narrator[197]. He said that it would be unrealistic to expect narrators to have remembered the exact words of their transmissions as they heard them and added that it was unnecessary for them to do so. The words of the Prophet, Sarakhsī argued, were inimitable neither in their wordings nor in their ordering (*naẓm*). Thus, as long as the meaning of his sayings was preserved, the transmission would have been accurately delivered[198]. By extension, he said that transmissions by juridical scholars would preserve the meaning of transmissions better than those of non-juridical scholars, if only because juridical scholars are better able to make apt connections between transmissions and substantive jurisprudence[199]. However, he clarified that transmissions of juridical scholars do not contradict (*muʿāriḍ*) transmissions from non-juridical scholars, even if they are superior (*rājiḥ*) to them in the weight they hold in legal arguments[200]. Hence, in Sarakhsī's framework it was assumed that transmissions were trustworthy and communicated the meaning the Prophet intended to convey, unless the narrator was proven to be an unrepentant sinner.

Single transmissions are therefore, on the whole, trustworthy sources of the prophetic message for Sarakhsī. However, since there is still a possibility that some transmissions might have a measure of fabrication, he conceded that believers could not have indubitable knowledge (*ʿilm l-yaqīn*) regarding their veracity[201]. Sarakhsī addressed this issue by pointing out that there are other types of knowledge than

indubitable knowledge. The type of knowledge that the single transmissions impart, he said, is one that creates tranquility of the heart (*ṭam'anīnah l-qalb*)[202]. This tranquility in the veracity of the transmissions is a type of knowledge that allows a believer to be confident that prophetic imperatives are contained in single transmissions that are not propagated by unrepentant sinners. If a believer is afforded this level of confidence, argued Sarakhsī, then receiving an imperative in the form of a single transmission is similar to receiving that imperative from the Prophet directly[203]. Since believers are required to obey the Prophet, they are likewise required to obey the contents of single transmissions. Single transmissions, then, were not considered to be in the same category as sources in that they generated indubitable knowledge, but they produced similar results.

The fact that single transmissions did not generate indubitable knowledge did have one major practical implication, however. Sarakhsī previously established that the foundations of the religion (*uṣūl l-dīn*) could only be established by sources that generate indubitable knowledge. Consequently, single transmissions were not to be used to discuss the foundations of the religion. Sarakhsī enumerated these foundations to comprise of God's unity (*tawḥīd*), God's attributes (*ṣifāt Allāh*) and the institution of prophethood (*ithbāt l-nubuwwah*)[204]. Nevertheless, Sarakhsī argued that while single transmissions did not generate indubitable knowledge of their veracity, they could generate action (*yūjib l-'amal lā al-'ilm*)[205] with confidence on the part of the believer. Therefore, he concluded, all matters other than those related to the foundations of the religion should be decided upon based on single transmissions. Sarakhsī maintained that

the jurist must make use of single transmissions in pronouncing judgment whenever possible, so long as the transmissions did not contradict the Qur'ān or *mutawātir* transmissions[206]. This meant that single transmissions were meant to take precedence over juridical analogy (*qiyās*), the jurist's intellect or any contextual considerations other than those required by necessity (*ḍurūriyāt*)[207]. The single transmission was, therefore, an authoritative evidence (*ḥujjah*) that could and should be used in the formation of juridical codes in all times and all places[208].

Sarakhsī passionately defended his position by placing it within the larger prophetic narrative. He provided two examples of how the Prophet intended his message to be spread through single transmissions. First, if the Prophet charged one of his Companions with a task, that Companion was obliged to act without having to wait for multiple transmissions from the Prophet. Moreover, if a Companion told another Companion about a task that the Prophet commanded, they would both be obligated by that command, despite the latter only hearing of the prophetic command through a single transmission[209]. In the second example, Sarakhsī contended that the mission of the Prophet required that single transmissions be accepted as authoritative evidence. Failure to authorize them as such would mean that the Prophet failed in his duty. Sarakhsī posited that,

> ...the single transmission generates action [upon it], because the Prophet was raised for all of mankind. [God] the Most High said, "And We have not sent [Muḥammad] except for all mankind". There is no dispute that he completed his mission, [though] it is known for certain that he did not come to each person and preach to him directly. Rather, he preached to [his] nation himself and then sent some [people] from his nation out to [preach to] others, and sent some out with letters. That he sent letters to the kings of remote regions (*mulūk l-āfāq*) is well-known and cannot be denied. So if the single transmission was not authoritative evidence, then he [would not be able to] convey the message of his Lord through these means to all of mankind. Furthermore, many far off

> lands like Yemen and Bahrain were conquered through means of treaties, and [Muḥammad] did not come to them himself, but rather dispatched emissaries (*'āmil*) to all corners [of the land] to teach the people there the Islāmic injunctions (*al-aḥkām*).[210]

If single transmissions could not be used as authoritative evidence, then those whom the Prophet did not reach himself would not know Islāmic injunctions with any level of certitude. Sarakhsī made a clear link between the injunctions of Islām and the overall message of the Prophet. Individual injunctions were part and parcel of the prophetic mission for Sarakhsī, and failure to impart them would result in an incomplete message. Having the complete message required utilizing single transmissions as legal proofs to reconstruct and imitate the intended message as established in "Muḥammad's nation". Sarakhsī therefore rested his argument for using single transmissions as authoritative evidence on the necessity to use them as such in order to maintain his conception of the prophetic mission.

3.2.3 Comparative Analysis

In their discussions of the single transmission, the relationship between the *sunnah* and Islāmic law that Dabūsī and Sarakhsī were positing becomes clearer. Dabūsī approached the single transmission as a helpful guide. The transmissions were advantageous in the justification of a particular injunction, but he did not hold that they were a valid basis for deriving injunctions. Instead, he seemed concerned that the single transmissions not serve as an impediment to context-specific jurisprudence. His mention of constraint (*ḥaraj*) as a valid barrier for applying single transmissions demonstrated his commitment to the beneficiaries of jurisprudence over the received jurisprudence itself. In this discussion, he reiterated his assertion that the foundations of the religion (*uṣūl l-dīn*) were of paramount importance and that Islāmic law was meant for humans in all

times and all places as a means of living in fidelity with the *uṣūl l-dīn*. Jurisprudence, therefore, was a creative enterprise that helped move communities toward a realization of the *uṣūl l-dīn* in their context.

Sarakhsī concluded almost the exact opposite in his discussion on the topic. He defended the trustworthy nature of narrators and argued that believers were compelled to follow their single transmissions. It is interesting to note that for Dabūsī, the *mashhūr aḥadīth* caused peace of mind (*ṭam'anīnah l-qalb*) for the believer such that he could act on them with a degree of confidence, if not certainty. For Sarakhsī, on the other hand, it was single transmissions that gave the believer peace of mind. Thus, not only are believers compelled to act on the single transmissions, they should be at ease allowing these transmissions to dictate the bulk of jurisprudence. Furthermore, Sarakhsī explicitly stated that the aim of the prophetic mission was to create juridically uniform societies based on single transmissions. In fact, he said that if these societies were not so created, the prophetic mission would have been a failure. In contrast to Dabūsī, then, jurisprudence in relation to single transmissions was seen as a largely applicative enterprise that enacted pre-existing injunctions regardless of context.

The issue of single transmissions brings the difference in the understanding of the *sunnah* between Dabūsī and Sarakhsī into particularly sharp relief. It is also one of the rare instances wherein they utilized different terms and categories to discuss an issue, as opposed to defining similar terms differently. Dabūsī spoke of the permissibility of using single transmissions and enumerated instances wherein they should be avoided. That is to say, for Dabūsī, single transmissions generated neither knowledge nor action. Sarakhsī resolutely held the position that single transmissions generate action, though not

knowledge. This severe divide in their approaches to the subject mirrored an earlier split amongst Ḥanafī scholars. Dabūsī's stance reflected an early Ḥanafī opinion which no other major Ḥanafī scholar held after ʿIsā ibn Abān (d. 221/836). Sarakhsī's position was in-line with the dominant Ḥanafī opinion from the time of Jaṣṣās and which persists to the modern day. It may have been that the burgeoning popularity of the Shafiʿī school of thought after ʿIsā ibn 'Aban's time fundamentally shifted the discussion, which in turn affected Sarakhsī's opinion. The Shafiʿīs held a deep regard for the single transmissions and questioned the faith of anyone who rejected them. ʿIsā ibn Abān, by contrast, was well-known for saying that one does not become a heretic by rejecting even the *mashhūr aḥadīth*. Dabūsī, however, did not overtly align himself with ibn Abān, though he mentioned his positions. Perhaps this was because by that time ibn Abān had been repudiated by major scholars including the Ḥanafī al-Ṭaḥāwī (d. 323/935)[211], al-Shafiʿīs main disciple ibn Surayj (d. 306/918)[212] and the literalist Dawūd ibn Khallāf al-Ẓahirī (d. 296/909)[213]. Dabūsī knew that the ideas he was presenting were unpopular and that to align himself with the early Ḥanafiīs would earn him rebuke. Yet to assign the single transmissions any higher status would mean to compromise the system and the vision of jurisprudence that he was promoting with regard to other topics. Sarakhsī, by contrast, was able to appropriate popular ideas to buttress his overall thesis regarding law and the purpose of prophethood.

There is no doubt that Dabūsī and Sarakhsī were promoting particular ideas that were articulated before them. However, their positions cannot be reduced to those exact conformity with any of them. Dabūsī was in congruence with ʿIsā ibn Abān with regard

to single transmissions, but not with regard to rejecting a *mashhūr ḥadīth* for an analogy. Sarakhsī's position was in agreement with the majority of his contemporary Ḥanafīs, but divereged from the positions of the early Ḥanafīs. It is certain that the two jurists worked within the Ḥanafī paradigm and advocated positions that were attributable in part to eminent Ḥanafī juridical figures. However, the particularities of their thought are evident and appear to have been shaped by their unique perspectives on the function of Islāmic law with regard to single transmissions.

3.3 *Abrogation of the Qur'ān through the Sunnah*

The Ḥanafīs were in good company regarding their theory of abrogation as it pertained to the Qur'ān. Every other major school of thought agreed that parts of the Qur'ān could abrogate other parts. The differences between the schools on this issue concerned the proper method for applying that abrogation. In the case of abrogation theory as it pertained to the *sunnah*, however, the Ḥanafīs were mostly alone in granting it the authority to abrogate the Qur'ān. Though it can be argued that the other schools abrogated the Qur'ān with the *sunnah* in practice, at least in rhetoric they argued that the Qur'ān and the *sunnah* were two separate and incomparable entities. They held that the *sunnah* might specify a Qur'ānic imperative (*takhṣīṣ*) or explain it, but the practice of the Prophet could never completely abrogate the Word of God. The Ḥanafīs disagreed with that position and, indeed, they were forced to do so in order to maintain some of the injunctions that they held to be normative in jurisprudence which could not be defended except by recourse to the *sunnah* abrogating the Qur'ān. They were therefore required to

demonstrate both why the abrogation was sanctioned as well as how the abrogation should be applied practically.

3.3.1 Dabūsī

Following the position of his juridical school, Dabūsī affirmed that the Qur'ān could abrogate a *sunnah* and vice-versa. He established the permissibility of the Qur'ān abrogating the *sunnah* by appealing to the doctrine of prophetic infallibility (*'iṣma'*). This doctrine held that God did not allow the Prophet to persist in an error, He sent revelation to correct the Prophet's actions when they were erroneous. In this manner, the Qur'ān would abrogate a *sunnah* that was incorrect (*khaṭa'*) and replace it with something better (*akhyar*). Dabūsī recognized, however, that it was harder to argue that the *sunnah* could abrogate the Qur'ān. The major obstacle to this argument was that the *sunnah* was passed down through transmissions, some of which may have contained falsehood. A general principle that Ḥanafī scholars maintained was that what is conjectural in nature cannot abrogate something which generates indubitable knowledge. Therefore, the Qur'ān could only be abrogated by something that likewise generated indubitable knowledge. Dabūsī thereby concluded that only the *mutawātir* or the well-established (*mashhur*) *aḥadīth* that reached the level of *tawātur* could abrogate the Qur'ān, since they both generate indubitable knowledge.

Dabūsī further stipulated that in order for a *mutawātir* or *mashhūr* transmission to abrogate the Qur'ān, the text of the abrogating transmission must be unrecited revelation (*waḥy ghayr matlū*). This additional stipulation was the result of his position on prophetic opinion. Since the Prophet's opinion is not a binding authority, his sayings

cannot abrogate a Qur'ānic imperative on their own. Rather, the saying must be revelation that was for some reason not included in the official codex. Hence, if the Prophet conveyed unrecited revelation that specified or contradicted a Qur'ānic imperative, then that Qur'ānic imperative would be considered abrogated. During the Prophet's lifetime, a single transmission of this unrecited revelation would have been enough for believers to act upon since they could immediately verify the authenticity of the transmission. However, Dabūsī argued that after the death of the Prophet the transmission would have to be proven to be beyond reproach before being accepted as an authentic prophetic saying. Thus, for Dabūsī, a transmission must have the status of the *tawātur* and contain unrecited revelation in order to abrogate a Qur'ānic imperative.

These stipulations significantly limited the scope of the transmissions that could be used to abrogate the Qur'ānic text. It would be difficult, therefore, for Dabūsī to defend several well-known and foundational Ḥanafī injunctions that were based on the *sunnah* abrogating the Qur'ān. The *aḥadīth* that the Ḥanafīs typically used to justify their positions were of insufficient status for the abrogation of the Qur'ān since they did not reach what Dabūsī considered to be *tawātur* status. He was thus forced to either abandon those Ḥanafī juridical positions or explain them in a different way. Abandoning the positions would have put Dabūsī on precarious footing amongst the Ḥanafīs. That is because the juridical positions in question were of the most staunchly defended injunctions and were often used to differentiate adherents of other schools of thought from the Ḥanafīs. Dabūsī's treatment of three such positions will be examined here: the

punishment for adultery, bequests for children and relatives, and wiping over footgear during ritual ablution.

The dominant Ḥanafī opinion regarding the punishment for adultery is that the adulterers should both be stoned, despite the Qur'ānic imperative to either confine the adulterers to their houses or to lash them one hundred times. The verse calling for confinement, Q. 4:15, states, "As for those guilty of lewdness from among your women, bring forth four witnesses from amongst you against them. And if they so testify then confine them in their houses until death reaches them or Allāh appoints a way for them." The verse of lashing, Q. 24:2, says, "The male fornicator and the female, lash them both with one hundred stripes." The Ḥanafīs traditionally argued that these verses from the Qur'ān were abrogated by the *ḥadīth*, "Indeed Allāh has appointed a way for [fornicators]: For the virgin [who had intercourse] with a virgin, one hundred lashes. And for the married person [who had intercourse] with a married person, strike them one hundred times and stone them."

Since the abrogating *ḥadīth* was not considered to be *mutawātir* by Dabūsī, he was forced to employ a creative explanation to justify the position of his school. He cited the saying of 'Umar ibn al-Khattab, the close companion of the Prophet and the second Caliph, who claimed that there existed a verse that commanded stoning in the Qur'ān, but that at some point it was no longer recited. Dabūsī deduced from this report that the imperative to stone the fornicator was actually unrecited revelation. Thus, the abrogation taking place would actually be unrecited revelation abrogating recited revelation, not *sunnah* abrogating the Qur'ān. This deduction, however, was not enough for Dabūsī to

allow for abrogation of the Qur'ānic imperative, because the saying of 'Umar was not *mutawātir*. Nevertheless, Dabūsī maintained the integrity of the Ḥanafī position by stating that the *ḥadīth* did not actually abrogate the Qur'ānic verse, but rather explained it (*bayyanahu*). He suggested that the *ḥadīth* was the fulfillment of the end of the Q. 4:15, "or Allāh appoints a way for them." The way shown by God was contained in the *ḥadīth* of stoning. The *ḥadīth*, therefore, did not abrogate, but elaborated on the verses of the Qur'ān. Dabūsī demonstrated his own discomfort with his explanation by stating that while this argument established the permissibility of stoning, it did not mandate it. The punishment stipulated in the Qur'ān is foundational, he said, though the jurist can justifiably choose to stone based on the reasoning above. In this way, Dabūsī found a way to maintain the dominant Ḥanafī position, but not violate his own theoretical framework by leaving the decision for punishing adulterers up to the discretion of individual jurists.

Dabūsī used a similar method for discussing bequests for children and relatives. The two major verses that deal with bequests and inheritance law respectively are Q. 2:180 and Q. 4:11-12. While Q. 2:180, known as the 'bequest verse' (*ayah l-waṣiyyah*), discusses leaving a legacy after one's death in broad terms, Q. 4:11-12, known as the 'inheritance verse' (*ayah l-irth*), makes specific stipulations regarding how one should divide an inheritance amongst parents and relatives. The established Ḥanafī opinion held that the bequest verse was abrogated by a *ḥadīth* that forbade bequests. The bequest verse reads, "It is prescribed for you that when death approaches that you make a bequest (*waṣiyyah*) to parents and relatives (*aqrabīn*)". The *ḥadīth* that forbade bequests reads,

"Indeed Allāh [by His revelation of the inheritance verse] has bestowed upon all who have the right [to inheritance, including parents and relatives,] their right, so [make] no bequest to the inheritors." According to the majority of Ḥanafīs, bequests were nullified by this *ḥadīth* and so the bequest verse was considered abrogated. In summary, the Ḥanafī juridical position argued that, to begin with, the inheritance verse only expounded on the bequest verse, but did not necessarily abrogate it. Theoretically, it would still be possible to create a bequest for parents and relatives and abide by the stipulations of the inheritance verse. The *ḥadīth*, however, clarified that the inheritance verse was meant to nullify all bequests to parents and relatives, thereby abrogating the bequest verse. Without the *ḥadīth*, the bequest verse would not necessarily be abrogated.

The *ḥadīth* nullifying bequests posed a problem for Dabūsī because it also did not conform to his definition of a *mutawātir* transmission. Thus, the *ḥadīth* should not be able to abrogate a Qur'ānic imperative. In an attempt to maintain the Ḥanafī position that bequests were not to be made to inheritors and also keep the non-*mutawātir ḥadīth* from abrogating the Qur'ān, Dabūsī sought to give new meaning to the text of the *ḥadīth*. The Prophet, he said, was not issuing an imperative, but rather interpreting the relationship between the bequest verse and the inheritance verse. Through his interpretation (*tafsīr*), the Prophet was remarking on how the inheritance verse made the bequest verse unnecessary. The *ḥadīth* should therefore be understood as saying, "Since God bestowed on all who have the right [to inheritance] their right, there is therefore no need to make a bequest to inheritors." In this new reading, Dabūsī said that the Prophet was not abrogating the bequest verse, but noting how "the right [of inheritance] that was

[previously] established by bequests for parents and relatives became clear stipulations in the inheritance [verse]." The Prophet, he said, was commenting on the method in which the Qur'ān provided detail for its own mandates.

Dabūsī acknowledged that the majority of Ḥanafī scholars held that the *ḥadīth* being discussed abrogated the bequest verse. Nevertheless, he appeared undisturbed by this reality since his method of interpretation maintained the conclusion of the Ḥanafīs even if by different means. Although he cited Abu Bakr al-Jaṣṣās as also denying the abrogation of the bequest verse through the *ḥadīth*, Jaṣṣās' methodology for proving that point was markedly different from Dabūsī's. Jaṣṣās used a legal loophole to argue that the bequest verse was not abrogated, while Dabūsī used reinterpretation. The result was that Dabūsī's argument maintained the Ḥanafī juridical position regarding bequests to parents and relatives, while Jaṣṣās was forced to deviate from the dominant Ḥanafī position slightly. It may have been a commitment to Ḥanafī jurisprudence that led Dabūsī to argue in the manner he did. By contrast, Jaṣṣās was known for occasionally crafting novel jurisprudence that differed from mainstream Ḥanafī opinion, though these novel opinions were often discredited by later Ḥanafīs.

The final Ḥanafī position to be examined endorsed abrogation of the Qur'ān by the *sunnah* in the issue of wiping over footgear (*masaḥ 'alā l-khuffayn*). Q. 5:6 says, "O you who believe, when you rise up for prayer...wipe...your feet up to the ankles." However, there are reports of the Prophet and his Companions wiping over the footgear covering their feet instead, though these reports did not attain Dabūsī's standard of *mutawātir*. In this case, the practice of the Prophet departed from the letter of a Qur'ānic

imperative, choosing to wipe over footgear rather than wiping the feet up to the ankles. In his section on additions to the text (*ziyādah ʿalā l-naṣṣ*), Dabūsī said that such a departure and reinterpretation was tantamount to abrogation. The only sources of abrogation in this case, however, were transmissions that did not reach Dabūsī's conception of *tawātur*. This posed a problem, because Ḥanafīs in particular were staunch defenders of wiping over footgear and their position on this issue became one of the hallmarks of their school. Wensinck suggested that this attitude was in response to the views of the Khārijīs and Shi'īs who did not hold wiping over footgear to be permissible. 158 Early on, the Ḥanafīs elevated the matter to a theological level, such that if believers did not uphold the permissibility of wiping over footgear, they were as a result suspect believers, if not unbelievers. The apocryphal creed of Abu Ḥanifā, the *al-Fiqh l-Akbar II*, included the permissibility of wiping over footgear as its ninth tenet. The creed is prefaced with the statement, "the foundation of God's unity and that which is correct conviction consists of [the following]". The permissibility of wiping over footgear is lodged in between "We do not proclaim any Muslim to be an unbeliever on account of any sin, however great, unless he deem [the sin] to be permissible" and "We do not say that sins will not harm the believer, nor do we say that they will cause him to remain in hell indefinitely, even if he leaves the world in a state of sin." Moreover, the widely accepted creed by the Ḥanafī scholar al-Ṭaḥāwī included the permissibility of wiping over footgear as its 76th tenet out of 105 "fundamentals of the religion and faith in the Lord of the Worlds."

Given the emphasis on the permissibility of wiping over the footgear amongst Ḥanafī scholars, it is very surprising that Dabūsī made no mention of it at all. In fact, he

did not discuss it in any of his extant works, which include books of *uṣūl al-fiqh*, jurisprudence, and spiritual athleticism (*taṣawwuf*). This absence is in stark contrast to the ubiquitous presence of the issue of wiping over footgear in similar works by Dabūsī's contemporaries. It can be safely surmised that Dabūsī did not hold the opinion of his fellow Ḥanafī juridical scholars, but were he to make that known he would be accused of heresy. Such prudence was well-founded, as Sarakhsī quoted al-Karkhī as saying, "I fear heresy is upon whomsoever rejects wiping over the footgear."[214] It would be nearly impossible to harmonize the Ḥanafī opinion on the issue – which requires that a non-*mutawātir* transmission abrogate the Qur'ān – with Dabūsī's conception of abrogation. Being so unable to create an accord, we may infer that Dabūsī chose not to discuss the issue at all.

Dabūsī's position on the *sunnah* abrogating the Qur'ān is a curious one. His position does not seem to have any Ḥanafī juridical precedent, yet he maintained major injunctions advocated by Ḥanafī jurists despite needing to engage in hermeneutical acrobatics to do so. It would seem that straightforward juridical applications of his theory would result in injunctions that he would not be comfortable with. Thus he articulated a position that was unique and in keeping with his overall conception of the role of the *sunnah* in Islāmic law, yet qualified his position so as to remain in fidelity with prominent injunctions in Ḥanafī jurisprudence.

3.3.2

Sarakhsī closely followed the formula of the Ḥanafī school when he professed that the Qur'ān could abrogate the *sunnah* and vice-versa[215]. He, like Dabūsī, quickly

justified the Qur'ān's ability to abrogate the *sunnah* through an appeal to prophetic infallibility (*'iṣmā'*). The Prophet could not persist in an error, and revelation would correct him when he was wrong, thus the Qur'ān would abrogate a *sunnah*[216]. However, the issue of the *sunnah* abrogating the Qur'ān needed more extensive justification.

Sarakhsī held that the *sunnah* could, in fact, abrogate the Qur'ān precisely because of the implications he deduced from prophetic infallibility. He concluded from the doctrine of *'ismā'* that all Prophetic actions and opinions were, in fact, unrecited revelation (*waḥy ghayr matlū*). That was because God protected the Prophet from persisting in error, so that if the Prophet made a statement or held an opinion that was incorrect, God would correct him through revelation. Hence, if revelation did not come to correct the Prophet, his opinion or saying had implicit Divine sanction. Thus, Sarakhsī defended his position that the *sunnah* could abrogate the Qur'ān because the *sunnah* was merely another type of revelation on par with the Qur'ān[217].

Still, Sarakhsī recognized that the actual sayings of the Prophet and the *ḥadīth* that reported his sayings were not one and the same[218]. In order for a *ḥadīth* to abrogate the Qur'ān, one would have to have indubitable knowledge of its veracity. This status, according to Sarakhsī, was only conferred upon *ḥadīth* that were either *mutawātir* or well-established (*mashhūr*)[219]. As stated earlier, Sarakhsī did not provide details about the difference between *mutawātir* and *mashhūr aḥadīth*, but rather used the terms interchangeably. Without a clear definition of *mashhūr*, he was able to pronounce any *ḥadīth* that he believed warranted that status as *mashhūr*, so long as it had more than one chain of transmission. As a result, he was able to proclaim verses of the Qur'ān to be

abrogated by the *sunnah* due to the presence of a *mashhūr ḥadīth*. Sarakhsī's approach to abrogation in the cases of fornication, bequests and inheritance, and wiping over footgear reflected the flexibility of definition that he accorded to *mashhūr aḥadīth* and their resulting ability to abrogate the Qur'ān.

The punishment for fornication laid down in the Qur'ān of confining the fornicators to their houses, said Sarakhsī, was abrogated by the prophetic practice of stoning[220]. He enumerated some *aḥadīth* that commanded stoning the fornicator, but dismissed them as weak transmissions that cannot abrogate a Qur'ānic imperative. Instead, like Dabūsī, he focused on the statement of 'Umar ibn al-Khaṭṭāb wherein he claimed that the command for stoning was originally found in a verse of the Qur'ān. Though that verse was not included in the codex, Sarakhsī nevertheless accepted its existence as a fact and accorded it the status of *waḥy ghayr matlū*[221]. Thus the imperative for stoning was actually unrecited revelation that abrogated the imperatives of confinement and lashes found in the recited revelation. Unlike Dabūsī, Sarakhsī did not consider the authenticity of 'Umar ibn al-Khaṭṭāb's report as being either *mutawātir* or *mashhūr*, but rather assumed that the report accurately represented the wording of unrecited revelation. He did not explain his reasons for assuming the report to be true, nor did he consider any possible objections to his methodology. As a consequence, Sarakhsī was able to provide a simple theoretical justification for the traditional Ḥanafī injunction that proclaimed that stoning abrogated the Qur'ānic punishment for fornication while avoiding the complexity inherent in his defense.

With regard to the bequest verse and the inheritance verse, Sarakhsī was unambiguous. He said that the *ḥadīth* of the Prophet, "...so make no bequest to inheritors" abrogated the bequest verse completely[222]. This was so because Sarakhsī granted the *ḥadīth* the status of *mashhūr*[223]. He did not explain why the *ḥadīth* was considered *mashhūr*, but stated it as fact. Moreover, he repudiated those who would say that the *ḥadīth* only explained the bequest verse rather than completely abrogating it. He was adamant that the verse was forever abrogated and could never be put into the practice because of the presence of the *mashhūr ḥadīth* that nullified its application[224]. Sarakhsī thereby established the abrogating power of *mashhūr aḥadīth* as well as maintained the traditional Ḥanafī juridical opinion on the matter.

Wiping over the footgear was a seminal matter for Sarakhsī as it was for most Ḥanafī scholars. He mentioned it in several places in his *uṣūl al-fiqh* work as well as in his works on jurisprudence[225]. Sarakhsī said he considered wiping over footgear to be a practice with a self-evident justification. He used the *ḥadīth* permitting wiping over footgear as proof that the *sunnah* can abrogate the Qur'ān. "We hold that it is permissible for the Qur'ān to be abrogated by the *sunnah*," he said, "...because of the example of the *mashhūr* report [that sanction] wiping over the footgear."[226] Thus, the permissibility of wiping over the footgear was used as a proof in and of itself for the permissibility of the *sunnah* abrogating the Qur'ān, even if it was a proof that authenticated the principle that established it. The example of wiping over footgear also highlights the fact that, for Sarakhsī, the line between *mutawātir* and *mashhūr* was nebulous. Whereas in the above quote he described the report of wiping over the

footgear as *mashhūr*, he elsewhere described it as *mutawātir*[227]. While this could have been a simple writing error, the inexact nature of the nomenclature that Sarakhsī utilized lent itself to imprecise categorization of *ḥadīth* reports. There is no instance in which Sarakhsī explained why a *ḥadīth* was considered *mashhūr*, he simply attached the descriptor to *aḥadīth* at his discretion. It cannot be known whether or not this was done by design, but it is an invaluable tactic for abrogating the Qur'ān through the transmitted *sunnah*.

3.3.3 Comparative Analysis

The treatment of *mashhūr aḥadīth* in the above discussion highlights the importance of nomenclature. Dabūsī stated that the *mashhūr aḥadīth* were a type of transmitted *ḥadīth*, some of which could rise to the level of *tawātur* and therefore generate indubitable knowledge (*yūjib ʿilm l-yaqīn*). Once that level is achieved, the *mashhūr aḥadīth* can abrogate the Qur'ān. Sarakhsī did not make a similar claim that some *mashhūr ḥadīth* can rise to the level of *mutawātir*. Rather, he treated all *mashhūr aḥadīth* uniformly and treated them as on par with *mutawātir aḥadīth*. Therefore, he was able to say that, like *mutawātir aḥadīth*, all *mashhūr aḥadīth* generated indubitable knowledge. Consequently, all *mashhūr aḥadīth* could abrogate the Qur'ān. Also, refraining from defining the qualities that make a *ḥadīth mashhūr* except to say that it is not a single transmission allowed Sarakhsī leeway in classifying any *ḥadīth* with two or more transmissions as *mashhūr*. As a result, he had a far larger corpus of *aḥadīth* at his disposal that he could then claim abrogated the Qur'ān than did Dabūsī. As a result, *ḥadīth* attained far more prominence in Sarakhsī's system than in Dabūsī's. More

importantly, more *ḥadīth* could therefore qualify and specify the Qur'ān through abrogation without having to resort to 'addition to the text' (*ziyādah ʿala l-naṣṣ*), which both Dabūsī and Sarakhsī agreed was impermissible. The consequence of this was that Sarakhsī's articulation of law could be more concise, reified and binding by specifying and abrogating vague or multivalent Qur'ānic verses through use of the *ḥadīth*. Dabūsī's system of law, by contrast, retained vagueness and resisted specification.

3.4 Conclusion

As with their treatment of Qur'ānic subjects, Dabūsī and Sarakhsī utilized almost identical terms and worked within almost identical frameworks to come to disparate conclusions. At this point, one can begin to see underlying commitments that drive their respective theories. In Dabūsī's case, there appears to be a devotion to the recipients of the law as seekers of the Divine. He overtly claimed to want to use law as a creative means for individuals in novel situations to know God. Dabūsī's treatment of the *sunnah* typified that desire. In his system, the Prophet was a guide whose example left only a few, but sufficient authoritative and normative standards for future generations. These standards restricted the creativity of jurisprudence, but were necessary for a society to properly know God. It appears that for Dabūsī, the overall aim of legal theory was to be minimal so that the jurisprudence could adapt to circumstance. Minimal legal theory meant fewer restrictions on the articulation of jurisprudence. The only true authoritative and normative sources in Dabūsī's system are the *mutawātir* transmissions and the *mashhūr aḥadīth* that reach the level of *tawātur*. All else can be applied or discarded as circumstance dictates. Still, it cannot be ignored that Dabūsī defended many Ḥanafī

positions in preference to the novel conclusions his system affords, and which incidentally would require less hermeneutical acrobatics. However, given his atypical justifications for holding these positions, his defense may be seen as a function of his circumstance as a jurist working within the Ḥanafī framework who wishes to maintain his credibility as a Ḥanafī jurist.

Sarakhsī's devotion appears to be a devotion to the Law Giver. The right that God has over humans is that they acknowledge the need to obey Him in all things and thus they get closer to Him through their acquiescence. Note that humans do not get closer to God by obeying him, but rather by acquiescing to His will, particularly His will as articulated in law. Sarakhsī made clear in his discussions on the Qur'ān that humans do not come closer to God through obedience itself, but through a willingness to be obedient. This pre-understanding is vital for comprehending Sarakhsī's system, and in fact he said as much himself[228]. It would clearly be impossible to enumerate all the laws found in single transmissions and apply them to all places and all times. However, for Sarakhsī, only the motivation and desire to have one's society accurately mirror the Madīnan paradigm is sufficient for a person to be close to God. It is also clear that he believed that the best life was one in which the pristine jurisprudence articulated by his Ḥanafī predecessors plays a central role in community practice. His framework allowed for the possibility of such a society to come into being and preserved a singular standard for all societies, present and future.

The unique concerns of Dabūsī and Sarakhsī are palpable in their legal theory. However, those concerns did not operate without boundaries. Those boundaries were provided by the Ḥanafī milieu within which they were articulating legal theory. Hence,

neither their Ḥanafi milieu nor their personal concerns determined the content of their legal theory. Rather it appears that they were approaching the *sunnah* through their preconceptions as shaped by the Ḥanafī discourse. Since both jurists presented their theories as authentically Ḥanafī conceptions of legal theory, it would appear that they were not self-consciously formulating legal theory in consonance with their preconceptions in the language of Ḥanafī discourse. Instead, it seems that they viewed their approach to the *sunnah* as a genuine reading of the text that fit within the Ḥanafī framework. This observation will be elaborated upon in the following chapters.

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[180] Juynboll, *Muslim Traditions*, 58

[181] Yasin Dutton, "Amal vs. Hadith", 14

[182] see Shahab Ahmed's excellent discussion of the development of this doctrine in light of ḥadīth studies and polemics in "Ibn Taymiyyah and The Satanic Verses"

[183] Rahman, *Islām*, 54

[184] Jassās, *al-Fuṣūl fī ʿilm l-Uṣūl*, 1/273,

[185] Rahman, *Islām*, 54

[186] Melchert, "Traditionist-Jurisprudents and the Framing of Islāmic Law", 398

[187] Juynboll, *Muslim Traditions*, 161

[188] ibid, 383

Bedir, "An Early Reply to Shafiʿī", 295

Hallaq, "The Authoritativeness of Sunnī Consensus", 19. Hallaq suggests that Sarakhsī meant ma'ni and I agree, but it is important that the technical term is neither used nor alluded to in his dicussion.

[189] Dabūsī. *Taqwīm al-'Adillah*, 208

[190] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*,, 1/214, Dabūsī. *Taqwīm al-'Adillah*, 209

[191] It should be noted that *mashhūr* transmissions are normally associated with reports whose authenticity is established by widespread practice of the content of the report. Although this was a common conception in classical Islāmic law, I did not find evidence of it in either Dabūsī or Sarakhsī

Josef van Ess, "Ḍirar b. 'Amr und die "Jahmiyya": Biographie einer vergessenen Schule", 40-47.

Hallaq, "The Authenticity of Prophetic Ḥadīth: A Pseudo-Problem", 82

Kamali, *A Textbook of Hadīth Studies*. 57

ibid, 4

Kamali, *Principles of Islāmic Jurisprudence*, 9

Hallaq, "The Authenticity of Prophetic Ḥadīth", 88

Dabūsī. *Taqwīm al-'Adillah*, 170

ibid, 173

ibid, 172

ibid, 173

ibid, 172

ibid, 170

ibid, 168

ibid, 170

ibid, 178

ibid, 168

ibid, 174

ibid, 197

ibid, 173

ibid, 173

[192] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*,, 1/259

Although the term *fāsiq* connotes 'corruption', I have used the translation utilized in by Wilfred Madelung ("Early Muslim Doctrine Regarding Faith", 253) as it accurately reflects they way in which Sarakhsī used the term

[193]Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 1/259

[194] ibid, 1/244

[195] ibid, 1/261

[196] ibid, 1/261

[197] ibid, 1/261

[198] ibid, 1/262

[199] ibid, 1/255

[200] ibid, 1/262

[201] ibid, 1/241

[202] ibid, 1/247

[203] ibid, 1/247

[204] ibid, 1/242

[205] ibid, 1/241

[206] ibid, 1/243

[207] ibid, 1/254

[208] ibid, 1/261

[209] ibid, 1/242

[210] ibid, 1/243

[211] Bedir, "An Early Reply to Shafi'ī", 294

[212] ibid, 294

[213] Khatib al-Bahdadi, *Tarikh*, 6, pg. 289

Dabūsī. *Taqwīm al-'Adillah*, 240

ibid, 239

Bedir, "An Early Reply to Shafi'ī", 310

Dabūsī. *Taqwīm al-'Adillah*, 246

ibid, 244

ibid, 249

ibid, 232

ibid, 246

J.N.D. Anderson, "Invalid and Void Marriages in Hanafi Law", 362; Asaf A. A. Fyzee, "Aspects of Fatimid Law", 90; Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of Madhhab Boundaries to Legal Reasoning in Light of an Unpublished Treatise on Taqlid and Ijtihad", 282

Burton, "The Exegesis of Q. 2:106", 452

Although the relative pronoun used in this verse is feminine, the possibility of the verse addressing lesbians had been roundly rejected by the 5th/11th century. The last reported individual to have raised this possibility was Abu Muslim al-Isfahani (d. circa 322/934) as reported by Everett Rowson, "Straight or Gay? The Curious Exegetical History of Qur'ān 4:15-16" *Annual Meeting of the American Oriental Society*, March 18, 2005.

Muslim, 29:1690 *Sharh Sahih al-Muslim*, 337

Muslim, 29:1691, *Sharh Sahih al-Muslim*, 338

Dabūsī. *Taqwīm al-'Adillah*, 242

ibid, 242

ibid, 135.

Sunan Abū Dawūd, vol.2, No. 2864, pg. 808

David S. Powers, "On the Abrogation of the Bequest Verses", Arabica, pg. 254

Dabūsī. *Taqwīm al-'Adillah*, 241

ibid, 241

ibid, 240

Jassās, *al-Fuṣūl fī 'ilm l-Uṣūl*, 1/481

Jamal al-Din al-Qasimi, *Tufat al-Ahwazi*, 1/277

Dabūsī. *Taqwīm al-'Adillah*, 233

AJ Wensinck, *The Muslim Creed*, 55

ibid, pg. 54

ibid, 55

Tahawi, *al-'Aqīda l-Ṭaḥāwī*, 12

ibid, 5

[214] Sarakhsī, *al-Mabsuṭ*, 1/229

[215] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 2/52

[216] ibid, 2/53

[217] ibid, 2/53

[218] ibid, 2/60

[219] ibid, 2/60

[220] ibid, 2/56

[221] ibid, 2/55

[222] ibid, 2/54

[223] ibid, 2/54

[224] ibid, 2/55

[225] He devoted an entire chapter to the subject in *al-Mabsuṭ*, 1/227-241.

[226] ibid, 2/60

[227] ibid, 1/220

[228] ibid, 1/7

4.0 The Inclusiveness and Exclusiveness of Consensus (*ijmāʿ*)

Synopsis – The status of Consensus as authoritative evidence for deriving juridical opinions; who represents the community; determining the community represented in Consensus; the relationship of Dabūsī and Sarakhsī to historical precedent and their conception of Islāmic jurisprudence in light of Consensus.

Overwhelmingly, contemporary juridical scholars consider Consensus (*ijmāʿ*) to be a major source of Islāmic jurisprudence, hierarchically below only the Qurʾān and the *sunnah*. Clear conceptions of *ijmāʿ* as a technical term, however, were first proffered by juridical scholars in the 4th/10th century[281]. Though it was considered a major source of Islāmic jurisprudence, *ijmāʿ* as a concept or technical term does not find its roots in either the Qurʾān or the *sunnah*. Rather, juridical scholars inferred it as a means of provide legitimacy to the communal practice of the believing community. The justifications for this inference varied amongst juridical scholars, but in every case the consensual juridical posturing of the believing community or a subsection of the community was seen as reliable and thus would be considered as authoritative evidence (*ḥujjah*) for extrapolating juridical injunctions. Therefore, if the community agreed upon the validity of an injunction, belief, or narrative, that agreement would generate indubitable knowledge in its veracity and would require application in the lives of all believers.

Given the breadth of the Muslim community in the 4th/10th century, it was patently impossible to poll all members of the community to determine a Consensus. Therefore, juridical scholars of time suggested that a representative body should come to a Consensus on an issue on behalf of the community. If this representative body came to a

Consensus, then that Consensus would be binding upon all believers. Predictably, different scholars defined the members of this representative body differently. The Madīnans, for example, held that the *sunnah* was embodied in the Madīnan community and therefore argued that the Consensus of the scholars of Madīnah should be considered a *ḥujjah*[282]. Imāmī Shī'īs, by and large, held that the family (*'itrah*) of the Prophet and the Imāms who descended from them were infallible (*ma'ṣūm*)[283]. Thus, they argued the statement of an Imām is, on its own, a *ḥujjah*. However, since the opinions of the Imāms were not all recorded, jurists argued for different positions that they believed the Imāms held. If the jurists were in consensus in arguing for a particular opinion held by an Imām, then that was considered an *ijmā'* and the opinion becomes binding on the community[284]. While these two views of *ijmā'* may have reflected the beliefs of the two groups that held them, non-Shī'īs living outside Madīnah felt them to be inadequate reflections of their doctrinal beliefs.

Apart from the above two conceptions of Consensus, there were two other major views of *ijmā'* that were popular amongst Sunnīs living outside the Ḥijāz. The first defined *ijmā'* as the Consensus of the Companions of the Prophet only. Ḥanbalī scholars who argued for strict adherence to the practice of the Companions were particularly beholden to this theory[285]. The second view of *ijmā'* held that Consensus was only authoritative if it was a consensus of the contemporaneous community (*ahl kulli 'aṣr*). By and large, Ḥanafī and Shafī'ī jurists argued that this last definition of *ijmā'* was correct. However, they often added stipulations that led them to define 'contemporaneous community' differently. Some argued that only designated

representatives of the believers needed to be in Consensus for it to be a *ḥujjah* for the rest of the community, while others held that all believers needed to participate in a consensual process. Some defined 'contemporaneous community" as meaning that each generation comes to its own Consensus which is only applicable to their generation[286] while others held that 'contemporaneous community' was predicated on the precedent of previous communities, hence the representative believers throughout the history of community needed to be in Consensus for it to be authoritative[287]. Also left undefined were questions of who represents the 'contemporaneous community' and what criteria excluded one from that community. Dabūsī and Sarakhsī defended the traditional Ḥanafī opinion that the Consensus of the *ahl kulli ʿaṣr* needed to be in agreement on a juridical opinion for it to be a *ḥujjah*. However, their definitions of this term differed significantly and resulted in disparate conceptions of *ijmāʿ*.

4.1 *Ijmāʿ* as a *Ḥujjah*

4.1.1 Dabūsī

Dabūsī stated that *ijmāʿ* made the community infallible (*maʿṣūm*) and justified his position by citing verse Q. 3:110, "You are the best nation raised for mankind, you instate what is good and prevent what is evil"[288]. Dabūsī interpreted this verse to mean that the faith community was chosen and protected by God so long as they engaged in instating the good and preventing the evil (*amr bi l-maʿrūf wa nahy ʿan l-munkar*). If the faith community were to abandon this task, then they would no longer have the protection of God and would be liable to error. Nevertheless, the presence of the verse in

the Qur'ān, which Dabūsī considered to be an eternal text, implied that God decreed that there would always be members of the community who would instate the good and prevent the evil throughout the life of the community[289]. Thus the community could be assured that there would forever be a group of individuals who instated the good and prevented the evil, regardless of time, place and context.

Dabūsī concluded that if the individuals who commanded the good and forbade the evil all concurred on a particular juridical opinion regarding commanding the good and forbidding the evil, then that juridical opinion must have Divine sanction[290]. Since God was protecting this group, they could not agree upon an error on an issue that pertained to their task. Therefore, if this group of individuals agreed upon an injunction that they deemed to either instate the good or prevent the evil, then that injunction must be an 'incontrovertible fact' (*al-ma'rūf l-muṭlaq*) that God sanctioned[291]. Dabūsī warned that God's sanction did not extend to matters beyond determining juridical opinions that concerned instating the good and preventing the evil. That is, the community could not determine an incontrovertible fact regarding theological concerns, even if they were to all agree on a particular interpretation, because that knowledge resides only with God and humans can only conjecture about it[292]. However, believers could articulate incontrovertible facts with regard to the proper course of action for instating the good and preventing the evil in their time and place through their consensus. In Dabūsī's framework, then, if all those who instated good and prevented evil were to come together and agree upon a particular injunction as a 'fact', then that action is an 'incontrovertible fact' for that community[293]. The particularity of the 'incontrovertible fact' to the

contemporaneous community that comes to a Consensus is important and Dabūsī stressed this particularity throughout his work. That is to say that the 'incontrovertible fact' that particular community might agree upon is absolutely good for that contemporaneous community only and is not binding on any future community. It is also important to note that though the 'incontrovertible fact' applied to the contemporaneous community as a whole, only those members of the community who instated the good and prevented the evil were considered authorities in the formation of an *ijmā'*[294].

Dabūsī identified the individuals who engaged in commanding the good and forbidding the evil as coming from one of two groups: jurists (*ahl l-ijtihād*) and/or just authorities (*ahl l-'adālah*)[295]. Although Dabūsī did not expressly define whom the 'just authorities' were, we can speculate on his definition with a degree of confidence. Given the cordial and active relationship between scholars and rulers in Transoxiana, we can assume that he was referring to righteous court-sanctioned scholars who managed the mosques. These mosque leaders (*a'immah*, sing. *imām*) were not jurists in that they could not articulate novel injunctions, but they were learned in the legal sciences and were righteous individuals. Hence, absolute goodness could only be known if all the jurists and all just authorities agreed that a particular juridical opinion was good. This meant that the juridical opinion to be considered as good needed to first be articulated by jurists and then disseminated far and wide so that all jurists and just authorities could hear of it. If the position were not spread to all corners of the land, then the position would not be eligible for *ijmā'*, as some jurists would have been unable to voice their dissent[296]. If, however, the position were ubiquitous in the community, then, in the absence of any

deterring opinion, the position would qualify as being agreed upon by Consensus. Jurists would not need to express a formal agreement with the opinion being assented to in order for the opinion to reach the level of *ijmā'*, it would be enough if jurists simply knew about it and did not dissent[297].

Express dissension by any qualified jurist in the contemporaneous community would be grounds for invalidating an *ijmā'*[298]. Since Dabūsī defined *ijmā'* as being the consensus of every jurist and just authority of the community, the dissension of one jurist or just authority would be enough to nullify the *ijmā'*. Dabūsī gave the lone dissenting voice a great deal of power in the formation of an *ijmā'* and insisted that *ijmā'* could only be serve as authoritative evidence – and could also only determine an absolute truth – if all relevant members of the community agreed to it. It should be noted here that Dabūsī restricted the representatives of the contemporaneous community to a particular group of jurists and effectively rendered the dissent of just authorities, a move that will be discussed in the next section. Nevertheless, Dabūsī held that a lone dissenting opinion from a jurist whom he claimed to represent the contemporaneous community could invalidate a Consensus. While this position elucidated the power of dissent in the formation of a novel *ijmā'*, it did not address the possibility of dissent from an *ijmā'* that was inherited from a previous generation. Nor did his position directly address the power of dissent inherited from previous generations when later generations attempt to form an *ijmā'*.

The issue of dissent raised two major questions of historical precedent for Dabūsī. First, can scholars of a later era dissent from the *ijmā'* of jurists from a preceding era?

Second, if the *ijmāʿ* of later jurists expressed an 'incontrovertible fact', then what does that say about jurists from previous generations who might have issued dissenting opinions – were they misguided in their opinions? Regarding the first question, Dabūsī equivocated. He stated that the Companions and the believers who immediately succeeded them, known as the Successors (*tābiʿīn*), comprised two generations that were particularly blessed by God and that they both instated the good and prevented the evil at a paradigmatic level[299]. This level could not be matched by any generation thereafter. Thus, he argued that the *ijmāʿ* of the Companions was a *ḥujjah* and generated certain knowledge in its veracity[300]. However, he also proposed that their *ijmāʿ* spoke to their context and instated good and prevented evil in the best way possible given the concerns of their lifetime[301]. Dabūsī explained that *ijmāʿ* was meant to serve the needs of believers in a particular time period and applied only to the people living in that era. "The community of Muḥammad", he wrote, "is alive in every era", and concluded that *ijmāʿ* was intended to be expressed independently in every era.[302] Although he championed the contextual limitations of *ijmāʿ*, Dabūsī did not explicitly negate the notion that the *ijmāʿ* of the Companions and the Successors was binding upon all subsequent generations. As a result, he left open the question of whether the *ijmāʿ* of one generation is eternally binding. Though a conclusive argument about Dabūsī's position cannot be made, it is safe to assume that he agreed with Muḥammad al-Shaybānī, whom he cited extensively in this regard. Al-Shaybānī held that the *ijmāʿ* of one generation is not eternally binding except for the *ijmāʿ* of the Companions and the Successors, which is a *ḥujjah* for all succeeding generations[303]. This position is

consistent with Dabūsī's overtures to the opinions of the Companions in this discussion and provided a compromise between his position on the privileged status of the Companions and his insistence on the temporality of an *ijmā'* to the generation of its formation.

The second question related to historical precedent that Dabūsī dealt with concerned the status of previous generations who failed to form a Consensus on an issue that later generations agreed upon with *ijmā'*. If, in fact, the Consensus of all the jurists of an era articulated the absolutely good, then it is possible that dissenting jurists from previous generations were misguided. Dabūsī countered this notion by citing examples from Companions who held opinions that were at variance with positions that later generations agreed upon by Consensus. He pointed out that it was dogmatically impermissible to call any of the Companions misguided, regardless of the *ijmā'* of later generations[304]. Dabūsī concluded, therefore, that the *ijmā'* of a later generation does not say anything about jurists who dissented in previous generations. *Ijmā'*, he repeated, is only relevant to instating the good and preventing the evil. If a subsequent generation expresses a particular method of accomplishing that end and agrees upon it with Consensus, then only the people who are living at the time in which the Consensus was formed are obligated by it[305]. The deceased are exempt from instating the good and preventing the evil and therefore the *ijmā'* of later generations does not apply to them. Since the *ijmā'* did not apply to them, previous generations could be held accountable for either conforming to or dissenting from inapplicable standards[306].

As a result of his views on historical precedent, it is logical that for Dabūsī *ijmāʿ* requires perpetual reestablishment if it is to continue from one generation to the next. The only exception to this rule might be the *ijmāʿ* of the Companions and the Successors, which is potentially binding upon all future generations. The *ijmāʿ* of the Companions and Successors, however, can only be known to later generations through transmissions. People would report that the Companions and Successors held a certain juridical opinion upon which they agreed, but reliability of the transmitted reports is based on different criteria. Dabūsī stated that for an *ijmāʿ* of the Companions and Successors to be viewed as authoritative evidence, the transmission that claims the *ijmāʿ* would have to impart indubitable knowledge as to the veracity of its contents. Practically, that meant that the method of transmission of the *ijmāʿ* would need to be *tawåatur*[307]. A very widespread recognition of the *ijmāʿ* would be required to mitigate claims of fabrication and distortion. If the transmission failed to achieve this status, then the *ijmāʿ* would not generate indubitable knowledge in its veracity, and thus it would not be authoritative[308].

The result of predicating any authoritative historical *ijmāʿ* on *mutawātir* transmissions is that only few precedents of Consensus from the Companions could bind the community upon a single course of action. Inherited *ijmāʿ*, then, was a rare event in the life of the believing community. The operative Consensus that was more relevant to the community was the one that was agreed upon by the living community and thus considered authoritative evidence. Since a single dissenting juridical opinion could stymie this Consensus, *ijmāʿ* would simply be a reflection of the jurists' mores and

disposition as a whole and thus it would be instructive to view this *ijmāʿ* as descriptive rather than authoritative. For Dabūsī then, *ijmāʿ* was a descriptor of the jurists' shared juridical opinions. Further, *ijmāʿ* ensured that the community's collective, consensual action with regard to instating the good and preventing the evil in any particular era was beyond reproach and protected by God as the correct course of action in that time.

4.1.2 Sarakhsī

For Sarakhsī, the verse "You are the best of nations raised for mankind, you instate what is good and prevent what is evil" described the entire Muslim community, past and present, equally[309]. He did not distinguish, as did Dabūsī, the era of the Companions and the Successors from all subsequent generations in their ability to instate the good and prevent the evil. To the contrary, he posited that all generations were equally capable of engaging in this instating and preventing. Thus, when any generation came together on a specific course of action, they exemplified what it meant to be 'the best of nations'. Therefore, when any community came to a Consensus, the 'good' that they commanded could be known unambiguously as 'incontrovertible fact' (*al-māʿrūf al-muṭlaq*)[310]. This incontrovertible fact was not relative to time and place as in Dabūsī's conception, but was absolute for all times and all places[311].

Sarakhsī posited that when the community of believers, at any time in history, held a consensus on a matter, then one could have indubitable knowledge that their position was authoritative evidence for extracting juridical positions for all subsequent generations[312]. For example, if the Companions held a Consensus upon a matter, then the issue was settled for all future generations. Likewise if the Successors, or any generation

after them, came to a Consensus, that *ijmā'* would become authoritative evidence thereafter. Sarakhsī said that *ijmā'* uncovers the laws of the *sharī'ah* that are not readily apparent in the Qur'ān and the *sunnah*[313]. He continued to say that the secondary purpose of *ijmā'* was to preserve those laws once uncovered, making the *ijmā'* eternal thereafter[314]. Hence, once an *ijmā'* uncovers a law of God, it becomes indubitable authoritative evidence. For jurisprudence, then *ijmā'* is a legal device on par with revelation and claims the status of a revealed source in that it generates indubitable knowledge. To contradict an *ijmā'* would be like contradicting a verse in the Qur'ān, and Sarakhsī explicitly said that one who contradicts an *ijmā'* is guilty of heresy[315].

Sarakhsī said that an *ijmā'* could be formed at any time, so long as the contemporaneous community agreed upon an idea or principle. What is procedurally required for this agreement is that a juridical opinion be articulated and made renowned without any opposition[316]. If no one from the scholarly community objects to the juridical opinion, then it is assumed that they either agreed to it or could not come up with a well-reasoned argument against it. In either of those cases, the juridical opinion would be accorded the status of being agreed to by Consensus, and thus become irrefutable thereafter[317]. Consequently, the juridical opinion could be viewed as an injunction of God that has been uncovered through the juridical posturing of the community. Thereafter, the injunction will always manifest an incontrovertible fact for the faith community. Once the community is in consensus on the juridical opinion, that Consensus becomes immediately binding upon all believers, present and future. Therefore, after having had the chance to refute a juridical opinion, a jurist cannot later

change his mind and speak against the Consensus on pain of heresy[318]. Nor can any future generation depart from the *ijmāʿ* of the preceding generation because the preceding generation actually uncovered an incontrovertible fact, making their *ijmāʿ* on par with God's revelation. As can be seen, historical precedent played an authoritative and binding role for the community in Sarakhsī's treatment of *ijmāʿ*.

The final scenario that Sarakhsī considered regarding historical precedent concerned issues upon which the Companions expressed their disagreement. In this case, even if a later generation were to come to a Consensus about an issue upon which the Companions disagreed, Sarakhsī argued that later Consensus would not reach the level of authoritative evidence[319]. The concern that Sarakhsī had with this scenario involved the way in which Companions would be perceived if a later Consensus was established upon a matter in which they disagreed. Sarakhsī believed that if a later Consensus were reached, then the community would have uncovered an incontrovertible fact, which transcends time and space. If a Companion expressly disagreed with something that was an incontrovertible fact, then that Companion would be misguided. Since Sarakhsī disallowed perceiving any Companions as misguided, the Consensus of the later generation would not be a true Consensus[320]. Sarakhsī said that this later Consensus was merely a descriptor for the views of the later community and did not carry with it any of the juridical ramifications of a true *ijmāʿ*[321]. In this case, anyone could disagree with that later *ijmāʿ* and not be accused of heresy, nor would the *ijmāʿ* be binding upon future generations. The only *ijmāʿ* that could be viewed as a *ḥujjah* for Sarakhsī was one that

was either agreed upon by the earliest generations or for which no conflicting opinion from the earliest generations could be found.

The above system is thus predicated on being aware of the opinions and *ijmā'* of previous generations. The *ijmā'* of previous generations can only be known, according to Sarakhsī, through transmissions[322]. An *ijmā'* that was transmitted through either *mutawātir* or *mashhūr* transmission generated, for the community, indubitable knowledge in its veracity. The *ijmā'* so transmitted becomes a *ḥujjah* on all subsequent generations. Sarakhsī pointed out that only a strong chain of transmission that at least reached the level of *mashhūr* could establish an *ijmā'* that generated indubitable knowledge[323]. Nevertheless, he said that an *ijmā'* that was transmitted by a single transmission (*khabar l-wāḥid*) was also admissible for the community to base its actions upon. Similar to his position on the single transmissions themselves, Sarakhsī held that an *ijmā'* transmitted by a singular narration did not generate indubitable knowledge in its veracity, but could generate action (*yūjib l-'amal*) upon it nonetheless[324]. He stated that this level of *ijmā'* was lower than that of an *ijmā'* transmitted by a *mutawātir* or *mashhūr* transmission, but that it could still dictate the actions of believers. This weaker *ijmā'*, however, was not considered authoritative evidence for all times and places. It could, therefore, be rejected in the face of other, conflicting evidence. If, however, such conflicting evidence were not presented, then the *ijmā'* as transmitted by a single transmission should be followed by subsequent generations[325].

The single transmission played a crucial role in Sarakhsī's conception of the *ijmāʿ* of the earliest generations. Single transmissions abounded concerning the statements and views of the Companions and the Successors. Recall that Sarakhsī posited that if a juridical opinion was widespread and there was no dissenting opinion that contradicted it, then an *ijmāʿ* of the community was assumed. In this vein, Sarakhsī reasoned that if a Companion or Successor gave a speech to a large gathering, then it could be safely assumed that the speech many other Companions and Successors were in the audience, thus meaning that the speech was widespread[326]. If there were no reports of Companions objecting to the content of the speech, then due to the combination of being widespread and unchallenged, the speech would constitute an *ijmāʿ* of the Companions[327]. Thus, general speeches from individual Companions like Friday sermons and government addresses whose contents were not contradicted by opposing reports from other Companions were considered agreed upon by Consensus. However, since the vast majority of these sermons and addresses were reported through single transmissions, they could not generate indubitable knowledge in their contents. Nevertheless, they could generate action upon their contents if there was no conflicting evidence from other sources.

Sarakhsī thereby constructed a legal system wherein the *ijmāʿ* of the earliest generations played a formative role in jurisprudence. This early *ijmāʿ* was both accessible to and authoritative for later generations. It is unsurprising, then, that Sarakhsī often justified his positions in jurisprudence through recourse to the *ijmāʿ* of the Companions. Though the majority of reports regarding *ijmāʿ* were transmitted through

single transmissions, those transmissions were sufficient for justifying juridical opinions. Moreover, given Sarakhsī's position on the *mashhūr aḥadīth*, if more than one narrator reported a well-known position of a Companion that was not contradicted by an opposing report from another Companion, then that transmission would be considered an *ijmāʿ* that generated indubitable knowledge, deviance from which would result in heresy. Thus, *ijmāʿ* was a powerful legal tool that could be used often to justify and maintain juridical positions in Sarakhsī's framework.

4.1.3 Comparative Analysis

The role that *ijmāʿ* is deemed to play in the life of the faith community is very different in the conceptions of Dabūsī and Sarakhsī. For Dabūsī, *ijmāʿ* is mostly descriptive of the issues that contemporaneous communities agreed upon. In only one rare case, that of the *ijmāʿ* of the Companions that is narrated through *mutawātir* transmissions, would the *ijmāʿ* be eternally authoritative for the faith community. *Ijmāʿ*, in practice, was almost a tool for assuaging the conscience of the Muslims, holding that if they all agreed to a juridical opinion regarding instating the good and preventing the evil, then that juridical opinion was the best course of action. It affirmed the collective action of the historical Muslim community, but did not extend that collective action as authoritative for future generations. By contrast, Sarakhsī posited that *ijmāʿ* was an authoritative and uniting force throughout the history of the community and uncovered unrevealed laws of God. As a result, *ijmāʿ* was itself a form of revelation that the community could base their actions and extrapolate jurisprudence, similar to the ways in which it was to use the Qurʾān and the *sunnah*.

In terms of formulating jurisprudence, *ijmā'* could not play a pivotal role in Dabūsī's system. It could sanction a present course of action, but does nothing other than describe a juridical opinion that the community already holds to be true as Divinely sanctioned. To the contrary, *ijmā'* is much more influential in determining jurisprudence in Sarakhsī's system. In his legal theory, *ijmā'* is wielded as a legal tool both positively and negatively. *Ijmā'* can be used to positively to justify juridical opinions and elevate them to a status wherein they are unquestionable. In the case where there is opposition to an issue that was agreed upon by *ijmā'*, Sarakhsī can negatively appeal to the eternally authoritative nature of *ijmā'* to suppress the opposition. Though both Dabūsī and Sarakhsī argue that *ijmā'* is the fulfillment of Q. 3:110, "Indeed you were the best nation raised from mankind, you enjoin what is good and forbid what is evil", they present polar opposite applications of *ijmā'* in the life of the believing community

4.2 The Members of the Believing Community Who are Included in an *Ijmā'*

Although *ijmā'* technically means Consensus, historically only a minority of Muslims suggested that *ijmā'* was a consensus of all the Muslims[328]. Rather, they often argued that *ijmā'* should be constituted only by the consensus of certain groups from amongst the Muslims. The *ijmā'* of this group would then be authoritative for the rest of the Muslim community. Muslim juridical scholars presented several theories about whom from amongst the community should represent the rest, and, conversely, who should be excluded from the formation of *ijmā'*. The different arguments speak to the

broader questions of who represents the community, who has the authority to articulate jurisprudence and who does not belong to the Muslim community.

4.2.1 Dabūsī

Dabūsī quite clearly did not believe that the entire believing community took part in *ijmāʿ*. Rather, he proposed a representative body of knowledgeable Muslims whose *ijmāʿ* would constitute a *ḥujjah* for the remainder of the community. This representative body consisted entirely of the scholars (*ʿulamāʾ*) from amongst the faith community[329]. Interestingly, Dabūsī defined the scholars in question as individuals from the 'just authorities' (*ahl l-ʿadālah*) and 'people of independent legal reasoning' (*ahl l-ijtihād*)[330], or, jurists. That Dabūsī referred to these groups separately indicates that he did not view jurisprudence to be the exclusive purview of jurists and believed that *ijmāʿ* required a consensus between both groups. Although the two groups were distinct, the distinction was not radical. The *ahl l-ijtihād* could be from the *ahl l-ʿadalāh*, but the opposite was not true. That is to say, the *ahl l-ijtihād* included just authorities, whom we earlier suggested to be righteous court-appointed mosque administrators (*aʾimmah*, sing. *imām*), but was restricted to jurists, whereas the *ahl l-ʿadālah* potentially included a larger swath of scholars from the Muslim community[331].

When discussing the *ahl ll-ʿadālah*, Dabūsī was careful to point out that they must be righteous (*ʿādil*) individuals. Dabūsī defined righteousness mostly through its antonym, *fisq* (corruption). A person was considered righteous if he fulfilled two conditions related to *fisq*. The first pertained to his intellect and religion (*dīn*). If his intellect was uncorrupted and his beliefs did not include any illicit (*ḥarām*) or heretical

ideas, then the individual fulfilled the first condition of righteousness[332]. The second condition required that the individual not engage in enormities, which Dabūsī described as 'severe lewdness' (*fāḥishah l-kabīrah*)[333]. The distinction between enormities and minor acts of corruption is an important one. Dabūsī said that a believer could engage in minor acts of corruption and still be considered righteous[334]. Enormities, however, resulted in revocation of one's status as upright. Though he did not provide examples of enormities, Dabūsī's use of the term *fāḥishah kabīrah* is undoubtedly a reference to the 'major sins' (*kabā'ir*) that scholars have historically enumerated as being between 7 and 70[335]. These sins include murder, adultery, stealing and the like. For Dabūsī, then, as long as someone was not corrupt in their beliefs and did not engage in enormities, they were to be considered righteous (*'ādil*).

Dabūsī's conception of the *ahl l-ijtihād* will be discussed in more detail in the next chapter, but for now it is sufficient to describe them as jurists and assess their relationship to the *ahl l-'adālah*. Jurists comprise the second major group that was to be involved in *ijmā'* primarily because Dabūsī believed that *ijmā'* could only be a *ḥujjah* with regard to matters of jurisprudence. Thus, jurists are required to articulate a particular position before it can be agreed upon by Consensus or disagreed with[336]. Theoretically, the agreement would have to take place amongst both the *ahl l-'adālah* and the *ahl l-ijtihād*, even though the former are unable to articulate jurisprudence since they are not jurists. Conceptually, if the *ahl l-'adālah* disagreed on an issue despite the agreement of the *ahl l-ijtihād*, then there would be no Consensus. This is purely a theoretical conception, however, because the former are not jurists. The *ahl l-'adalāh*,

due to their lack of legal training, could not devise a contrary juridical response to an issue with which they disagreed. Therefore, since there would be no competing juridical opinion to the one devised and agreed to by the *ahl l-ijtihād*, that position would be assumed agreed upon by Consensus. Dabūsī's theoretical commitment to the laity in the formation of an *ijmāʿ* is palpable, though in practice it appears that the jurists are the only group that truly matters in the construction of a Consensus.

There were two types of jurists whose opinions Dabūsī believed should be excluded from either contributing to or detracting from an *ijmāʿ*. The first type of jurist is the one whose testimony would not be accepted in court[337]. This legal inadmissibility may be due to any number of factors including incapacity, mental disabilities, or otherwise having been proven himself to be outside of the *ahl l-ʿadālah*. In any of these situations, the opinion of this jurist is not to be considered in the creation or negation of an *ijmāʿ*. Dabūsī said that this is so because, "Matters of the religion (*dīn*) are superior to matters of the world (*dunyā*)."[338] So, if a jurist's testimony is inadmissible in matters of the world, his testimony should carry even less weight regarding matters of faith. The second type of jurist who does not contribute in any way to an *ijmāʿ* is the one who is nebulously described as a 'person of desire' (*ṣāḥib l-hawā*)[339]. This jurist allows his whims to dictate the law he articulates to conform to a desired outcome, over and against the dictates of the Qurʾān and the *sunnah*. Dabūsī did not go into detail about these jurists but said that regardless of their legal education they were neither righteous nor true jurists[340]. This may well have been a roundabout reference to jurists retained by the court who overtly articulated law that coincided with the wishes of the authority under which

they served. Even in that case, it would be difficult to accuse a particular jurist as being a 'person of desire'. Nor, presumably, would Dabūsī encourage the application of this eponym, since it would provide a forum for disagreeing jurists to slander one another. Understandably, Dabūsī did not furnish details about this type of jurist beyond saying that their opinions should not be considered in the formation of *ijmā'*. Therefore, he only concretely excluded one type of jurist from *ijmā'* – the one whose judicial testimony is inadmissible due to either physical incapacity or corrupt nature, that is, by having proven himself to be outside of the *ahl l-'adālah.*

Besides rejecting the opinion of the corrupt scholar described above, Dabūsī said that two groups were categorically excluded from *ijmā'*. Neither did their opinions on jurisprudence support an issue towards Consensus, nor did their opposition to an opinion serve to negate an *ijmā'*. The first group of this type was the Khawārij[341], who were known in the Sunnī community for their doctrinal and juridical heresies[342]. Of particular offense to Sunnīs was their position on sin. The Khawārij held that engaging in a major sin resulted in apostasy. The Khawārij concluded, therefore, that any Muslim who committed a major sin should be killed as an apostate. Dabūsī did not fault them for this position and specifically said that he did not consider them heretics for their juridical errors[343]. However, the position of the Khawārij on apostasy and major sin led them to label 'Alī ibn Abī Ṭālib, the fourth Caliph and cousin of Muḥammad, an apostate for agreeing to arbitrate with their nemesis, Mu'awiyah. The Khawārij considered Mu'awiyah to be an apostate as well, so 'Alī agreeing to arbitration made him a traitor and an apostate in their eyes. It was this impugning and rejection of 'Alī that Dabūsī

took issue with, not their position on apostasy and major sin[344]. As a result of the attitude of the Khawārij towards ʿAlī, Dabūsī concluded that their opinions were to have no bearing on *ijmāʿ*.

Dabūsī had a similar objection to the second group that he excluded from *ijmāʿ*. This group was the Rawāfiḍ[345], who were strong partisans of ʿAlī and believed that he should have been the first Caliph[346]. They were also doctrinally at odds with Sunnīs regarding the nature of *aḥadīth* and the status of the family of the Prophet. Dabūsī, however, did not take exception to their doctrinal beliefs, but rather faulted their rejection of the first Caliph, Abu Bakr. It was their vilification of his character and disavowal of his Caliphate that Dabūsī said exempted them from the *ijmāʿ* of the Sunnī community[347]. In both cases of the Khawārij and the Rawāfiḍ, Dabūsī held that disavowal of the early political heritage of the Sunnī community resulted in exclusion from legal Consensus. It is not clear whether he believed that these groups had their own *ijmāʿ* that could uncover an 'incontrovertible fact' that would be relevant to them, nor is it clear as to whether Dabūsī was referring to the Rawāfiḍ at the time of Abu Bakr or if he meant to include the Imāmī Shīʿīs that were contemporary to him. It is clear, however, that he viewed the Rawāfiḍ neither as important interlocutors nor as having any juridical bearing for his intended audience. Only rigthteous scholars who affirmed the Sunnī narrative of history and position on the moral probity of the Companions were considered part of the faith community that Dabūsī was addressing.

It is instructive to point out major groups that Dabūsī did not expressly exclude from *ijmāʿ*. The first group of interest is the Zaydīs[348]. These were partisans of ʿAlī

who believed that ʿAlī should have been the first Caliph. They did not hold, however, that Abu Bakr was of questionable character and asserted the legitimacy of his Caliphate, though the believe that ʿAlī would have been preferable. The Zaydīs at the time of Dabūsī had several doctrinal differences with the Sunnīs, but it appears that their affirmation of the Sunnī political narrative led to their inclusion into the process of *ijmāʿ*. The second group of note that was not explicitly excluded from *ijmāʿ* is the Muʿtazilah. These Rationalists who were later denounced by all major Sunnī schools of thought were at odds with the dominant theological positions of the Sunnī schools at Dabūsī's time[349]. As noted in the introductory chapter, though Dabūsī held some Muʿtazilī positions, he was clearly not a Muʿtazilite. Yet, he did not expressly consider them to be outside the circle of the faith community with regard to *ijmāʿ* formation. It can be speculated that it was the shared sense of history and position on the moral probity of the Companions that led Dabūsī to that conclusion[350]. At the very least, it is important to note that the scope of Dabūsī's community of *ijmāʿ* extended beyond the range of the traditional Sunnī schools of thought.

In summary, Dabūsī theoretically included the opinions of all Muslim juridical scholars whose righteousness was not in question into the formation of *ijmāʿ*. He excluded the Rawāfiḍ and the Khawārij from the community due to their censure of certain companions and their negation of the Sunnī political narrative. He also excluded the vaguely-defined 'person of desire' who derived jurisprudence based on whim rather than text and logic. It can be argued that Dabūsī cast the widest possible net for an *ijmāʿ*

that included many voices but was still palatable to the sensibilities of his contemporary Sunnīs.

4.2.2 Sarakhsī

Sarakhsī was unequivocal in his stance that only the juridical opinions of Muslim jurists were to be considered in the formation of an *ijmāʿ*. That, he said, was because the aim of *ijmāʿ* was to uncover the injunctions of God and maintain those injunctions once uncovered. The only individuals that he considered to be qualified to know the injunctions once discovered were the jurists[351]. These jurists had to be of the highest caliber in terms of their training and ability to exercise independent legal reasoning (*ijtihād*). Anyone who did not reach this status was unable to participate in the formation of *ijmāʿ*[352]. Amongst jurists, however, there was a moral gradation that determined their eligibility for contributing to an *ijmāʿ*. The jurists had to be free of any corruption (*fisq*) that would taint their character. This corruption could be either manifest (*ẓāhir*) or concelaed (*bāṭin*)[353]. A jurist who was manifestly corrupt did not follow the injunctions of the *sharīʿah* and consciously departed from them in either word or deed. Concealed corruption was harder to identify, but the result of hidden corruption was that the jurist would derive law based on his desires. Sarakhsī held that it would be impossible to judge a person's concealed corruption[354]. Nonetheless, he insisted that there existed jurists who had the highest legal acumen, yet were of suspect moral character, and would therefore derive jurisprudence based on personal whim. While he acknowledged that there was no way to positively identify such people, he argued that these jurists were in a minority, and thus he cautioned against following minority opinions[355].

Minority opinions, though not dismissed out-of-hand, warranted doubt because of their deviance from the majority[356]. As a result of the Consensus of the community being blessed and expressing 'incontrovertible fact', a minority opinion could never be an incontrovertible fact, else the chosen community would have agreed to it with *ijmā'*. Thus, minority opinions could only ever be conjectural. Sarakhsī argued that the conjectural nature of minority opinions should therefore give them little credence as viable juridical opinions and should not be cause for negating an *ijmā'*[357]. That is, if all but one or two jurists of the community agreed upon one opinion, then the one or two dissenting voices should not negate the intentions of the vast majority, because the minority opinions were only conjectural juridical opinions to begin with.

Further, since minority opinions were inherently conjectural, Sarakhsī questioned the integrity of the scholars who articulated them. If the blessing of God is on the community as a whole, then jurists, if they want to be blessed, should always strive for unity of thought and action. If they propose juridical opinions that are deviant from the norm, then Sarakhsī said that the jurists proposing these positions are, quite simply, deviant and bound for the fire of Hell[358].

Due to his stance on minority opinions, Sarakhsī qualified his conception of *ijmā'* from his original statement that *ijmā'* was comprised of a consensus of the "contemporaneous jurists" to "the majority (*'āmmah*) of contemporaneous jurists."[359] Sarakhsī added that practical constraints, not just his distaste for minority opinions, forced him to hold that position. "If we stipulated [that a lone dissenter could negate an *ijmā'*], then we would never agree upon an *ijmā'*. That is because certainly [for any

issue of *ijmāʿ*] there would be one jurist from amongst the jurists of all ages who did not hear the juridical opinion (*fatwā*) [that was being considered for *ijmāʿ*] properly, and as a result, he issued a dissenting opinion."[360] This practical concern, however, was tacked on to Sarakhsī's larger argument that minority dissenting opinions should not be considered to negate an *ijmāʿ* based on the inherent weakness of the minority opinion itself.

Sarakhsī built on this approach to minority opinions and used it to exclude groups of Muslims from the formation of *ijmāʿ*. The first group that he excluded was the Khawārij. This, he justified on two counts. The first was their disavowal of ʿAlī and other Companions of the Prophet, which for Sarakhsī was doctrinally unjustifiable[361]. He added that the Khawārij position on sin – that engaging in a major sin causes a Muslim to become an apostate – was a false position. This false position not only excluded them from the formation of *ijmāʿ*, but from the community as a whole, making them disbelievers (*kuffār*)[362]. In sum, Sarakhsī barred the Khawārij from the Muslim community due to both their rejection of some Companions and their opinion concerning major sins.

Unlike al-Dabūsī, Sarakhsī did not discuss the Rawāfiḍ explicitly, but he did address them by proxy through his treatment of the Zaydīs. The Zaydīs held that the Caliphate of Abu Bakr was legitimate, though less desirable than a Caliphate headed by a member of the Prophet's family. Sarakhsī rejected this position by an appeal to *ijmāʿ* itself. If Abu Bakr was agreed upon as the leader of the Muslim community, then there must have been an *ijmāʿ* of the Companions that assented to his Caliphate. If anyone at the time objected and questioned Abu Bakr's character, then they would be part of the

Khawārij and their opinion would not matter anyway. Therefore, the Zaydī position that Abu Bakr was not the ideal candidate for being the first Caliph goes against the *ijmā'* of the Companions, and so must be false[363]. Because of their position on the Caliphate, Sarakhsī entirely disregarded the juridical opinions of the Zaydīs concerning *ijmā'*[364]. It can be safely concluded that if he summarily excluded Zaydī opinions from *ijmā'*, then he similarly excluded the opinions of the Rawāfiḍ and his contemporary Shī'a.

Also of interest was that Sarakhsī did not mention the Mu'tazilah in his discussion. His discussion of the theologians (*mutakallimūn*), however, can be extended to apply to the Mu'tazilah as well. Sarakhsī denounced theologians for their use of opinion and analogy in deriving jurisprudence. He argued that the theologians were not learned in the science of *uṣūl al-fiqh* and that they did not understand how to properly manipulate juridical proofs (*al-'adillah l-sharī'ah*) to derive injunctions[365]. Also, theologians elevated opinion and analogy to levels that discomforted Sarakhsī , which he then cited as evidence that prove that they were not learned in the proper methods of deriving injunctions[366]. If theologians could not properly derive injunctions, then they were not true jurists and were therefore excluded from contributing to the formation of *ijmā'*. Given that the Mu'tazilah held the intellect to be of even higher stature in the derivation of injunctions and knowing God than many theologians, it can be concluded that Sarakhsī excluded their opinions from *ijmā'* formation as well.

In summary, Sarakhsī allowed only a select group of jurists to take part in the consensual practice of *ijmā'*. These jurists had to affirm the dominant Sunnī narrative, be scholars of *uṣūl l-fiqh*, and had to espouse positions held by a large number of other

jurists so as not to be charged with being a minority voice. These limitations can be seen not only as an argument for proper *ijmāʿ* formation, but for religious authority in the Muslim community. Since the majority opinion (*akbar l-raʾy*) is the right one, members of the community should gravitate towards jurists who affirm the status quo. Dissidents, whether political like the Zaydīs or intellectually and theologically like the Muʿtazilah, are to be avoided at all costs, as are dissident juridical opinions. For Sarakhsī, *ijmāʿ* appears to be a tool for promoting conformity to the majority, both amongst jurists and the laity, by sanctioning the views of the majority as Divinely protected.

4.2.3 Comparative Analysis

The question of who represents the community in the consensual practice of *ijmāʿ* was answered differently by Dabūsī and Sarakhsī and the difference is significant. Dabūsī held that righteous jurists were responsible for determining *ijmāʿ*, and that their consensus as a whole would speak for the community. Sarakhsī also held that righteous jurists represented the community, but he added that only a consensus of the majority was required. In Dabūsī's system, minority opinions are very powerful and can prevent an *ijmāʿ*. In Sarakhsī's system, minority opinions are suspicious and contemptuous, and should not serve to detract from the *ijmāʿ* of the majority. The difference between the entirety of righteous jurists and the majority of righteous jurists forming an *ijmāʿ* is not a mere academic point; it changes the discourse surrounding *ijmāʿ*. Whereas for Dabūsī, *ijmāʿ* is a reflection of the community's complete accord, for Sarakhsī it is a means for promoting obedience to the mainstream.

The question of who belongs to the community that contributes to an *ijmāʿ* is an interesting one and one that we cannot fully answer here. Although we can enumerate particular groups that Dabūsī and Sarakhsī explicitly and implicitly excluded, the reasons for their exclusion cannot be exhaustively known. This is partially because both authors provided precious little detail about their reasons, but it is also because there are not enough examples of excluded groups to make any definitive conclusions. It appears that a major rationale for exclusion involved rejection of the dominant Sunnī political narrative surrounding the first Caliphs[367]. Regardless, what can be concretely observed is that Dabūsī included a larger swath of Muslims as belonging to the community than did Sarakhsī. As a result, Sarakhsī's *ijmāʿ* was an activity of a more select group of jurists and therefore applied to a smaller community. If Muʿtazilī jurists, for example, were not included in the formation of *ijmāʿ*, then the resulting *ijmāʿ* would not speak to the Muʿtazilī laity. Conversely, by making *ijmāʿ* the activity of a larger group of jurists, Dabūsī's conception of *ijmāʿ* would affect a larger group from the Muslim laity. It may be inferred, then, that Dabūsī believed that the relevant community of believers included more individuals from different strains of thought than did Sarakhsī.

4.4 Conclusion

In this chapter, it has been made Abundantly clear that Dabūsī and Sarakhsī held significantly divergent views regarding the scope and juridical applicability of *ijmāʿ*, despite their shared view that *ijmāʿ* is comprised of the Consensus of the 'contemporaneous community' (*ahl kulli ʿaṣr*). What is of further interest is that their conceptions of *ijmāʿ* differed from those of their predecessors. Although *ijmāʿ* as a

technical term was relatively novel to the era of Dabūsī and Sarakhsī[368], they often attributed their positions to previous Ḥanafī juridical personalities and 'our scholars' (*'ulamā'unā*). Despite these attributions, their views on the whole do not find exact cognates in prominent historical Ḥanafī juridical scholarship. The only two elements of their thought that were in lockstep with previous prominent Ḥanafīs were that *ijmā'* consists of the consensus of the 'contemporaneous community' and that *ijmā'* uncovered 'incontrovertible facts' decreed by God. Aside from these two positions, however, Dabūsī and Sarakhsī only exhibited more or less affinity to their legal forbears[369].

On the issue of the inter-generational applicability of *ijmā'*, Dabūsī's position does not find roots in Ḥanafī juridical scholarship. Though the position was mentioned by Jaṣṣāṣ with regard to *ijmā'*, he summarily dismissed it as weak and maintained that once an *ijmā'* is formed, it is a *ḥujjah* for all future generations[370]. With regard to inter-generational *ijmā'*, Jaṣṣāṣ along with 'Isa ibn Abān promoted the same ideas as Sarakhsī. It may be argued that Dabūsī based his position on Karkhī, who wrote of the *ijmā'* of different groups being binding only upon those groups[371]. However, there is not enough material from the extant, published works of Karkhī to make a definitive statement about this[372]. In any case, the meager evidence of Karkhī still does not provide a solid precedent for al- Dabūsī's views. Dabūsī was clearly siding with an opinion that, though possibly articulated prior to his time, was not a recognized Ḥanafī juridical opinion.

On the issue of excluding members of the community from the consensual practice of *ijmāʿ*, Jaṣṣāṣ stated that there was particularly little to be found in the way of historical precedent[373]. He argued, though, that *ijmāʿ* must be formed by jurists who are righteous. Jaṣṣāṣ was vague on this topic except to exclude certain individuals by name that he said were corrupt. The only group that he categorically excluded from the formation of *ijmāʿ* was the Khawārij[374], who impugned the Companions as heretics. The problem Jaṣṣās had with their stance concerning the Companions was that it undermined the system of narrating traditions from the Prophet. Jaṣṣāṣ argued that since the bulk of communal practice was based upon transmissions from the Companions, anyone who denounced those transmissions was not part of the community[375]. This practical justification differed from the justifications provided by Dabūsī and Sarakhsī for excluding the Khawārij and he did not discount the opinion of any other groups explicitly. Jaṣṣāṣ did not mention the Rawāfiḍ nor the Muʿtazilah by name and therefore one can only conjecture about his stance towards them. Jaṣṣāṣ did mention the theologians (*mutakallimūn*) and discussed them in a favorable light[376]. Expressly, then, Jaṣṣāṣ' community of *ijmāʿ* formation was more inclusive than either Dabūsī's or Sarakhsī's.

Finally, on the issue of minority opinions, the Ḥanafī historical tradition was unequivocal. ʿIsa ibn Abān, Karkhī and Jaṣṣāṣ[377] all agreed that a single dissenting jurist would nullify an *ijmāʿ*. Sarakhsī's opinion that a few dissenting voices did not nullify an *ijmāʿ* was explicitly denied by his forbears. Though he recognized that Karkhī held an opposing view, Sarakhsī said that his position was endorsed by Jaṣṣāṣ. The best that

could be said about Sarakhsī in this matter is that he misunderstood Jaṣṣāṣ, and at worst he knowingly misrepresented him. Jaṣṣāṣ was unambiguous in his stance that *ijmāʿ* required the assent of every member of the community and that even a lone voice could nullify an *ijmāʿ*. Furthermore, he defended minority opinions, using evidence from the Qurʾān and the *ḥadīth* to argue that often the minority opinion is the correct one[378]. The closest that Jaṣṣāṣ came to promoting Sarakhsī's view was his advice to the laity with respect to competing positions. Jaṣṣāṣ said that if one is confronted with two competing positions, then one should side with the majority since that is the safer course[379]. He did not, however, extend the applicability of this discussion to *ijmāʿ*, nor did he make any conclusions about the moral probity of jurists who articulated minority opinions. With regard to minority opinions, the historical Ḥanafī precedent favored Dabūsī over Sarakhsī.

Though the positions of Dabūsī and Sarakhsī on *ijmāʿ* sometimes found their roots in Ḥanafī precedent, they just as often did not. They were quite clearly working within the confines of the Ḥanafī legal framework and utilizing common Ḥanafī technical terms in their discussions. However, they defined these terms in different, often unique ways that led to radically different conclusions about the issues that surround *ijmāʿ*. It may be argued that, once again, Dabūsī was arguing for a more fluid, and less binding conception of *ijmāʿ*, whereas Sarakhsī was arguing for the exact opposite. This trend is consistent with their approaches to the Qurʾān and the *sunnah*. At this point it can be safely said that al-Dabūsī and Sarakhsī were defining technical legal terms in novel and idiosyncratic ways that resulted in divergent but internally consistent understandings

concerning the applicability of the sources of Islāmic law. However, these definitions were not contrived to conform to their personal understandings. Rather, they were extrapolations and explanations of opinions held by eminent Ḥanafī jurists that preceded them. Thus, both Dabūsī and Sarakhsī would be justified in claiming that their thought was authentically Ḥanafī, yet their thought was at the same time reflective of their personal understandings of the role of Islāmic legal theory and jurisprudence in the life of the community.

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[281] Hallaq, "Authoritativeness", 433

[282] Ansari, Zafar Ishaq, "Islāmic Legal Terminology" *Arabica*, 284

[283] Arjomand, Said Amir, "The Crisis of the Imamate and the Institution of Occultation in Twelver Shiism: A Sociohostorical Perspective", 497

[284] Sachedina, Abdulaziz. *Islāmic Messianism*, 140

[285] al-Matroudi, Abdul Hakim. *The Hanbali School and Ibn Taymiyyah: Conflict or Conciliation*, 34

[286] Hourani, George F., "The Basis of Authority of Consensus in Sunnite Islām" *Studia Islāmica*, 13

[287] Kamali, Mohammad Hashim, "Methodological Issues in Islāmic Jurisprudence" *Arab Law Quarterly*, 23

[288] Dabūsī. *Taqwīm al-'Adillah*, 23

[289] ibid, 24

[290] ibid, 26

[291] ibid, 23

[292] ibid, 23

[293] ibid, 24

[294] ibid, 23

[295] ibid, 28

[296] ibid, 30

[297] ibid, 28

[298] ibid, 33

[299] ibid, 31

[300] ibid, 32

[301] ibid, 32

[302] ibid, 32

[303] ibid, 31

[304] ibid, 33

[305] ibid ,32

[306] ibid, 32

[307] ibid, 25

[308] ibid 24

[309] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 1/222

[310] ibid, 1/222

[311] ibid, 1/223

[312] ibid, 1/236

[313] ibid, 1/226

[314] ibid, 1/227

[315] ibid, 1/238

[316] ibid, 1/231

[317] ibid, 1/228

[318] ibid, 1/232

[319] ibid, 1/240

[320] ibid, 1/237

[321] ibid, 1/240

[322] ibid, 1/238

[323] ibid, 1/239

[324] ibid, 1/239

[325] ibid, 1/239

[326] ibid, 1/231

[327] ibid, 1/231

[328] Kamali, "Methodology", 24

[329] Taqwim, 28

[330] ibid, 28

[331] ibid, 185

[332] ibid, 186

[333] ibid, 186

[334] ibid, 186

[335] Dhahabi, *Kabā'ir*, 5

[336] Taqwim, 28

[337] ibid, 29

[338] ibid, 29

[339] ibid, 30

[340] ibid, 30

[341] ibid, 30

[342] see Levi Della Vida, G. "Kharidjites" *Encyclopedia of Islām.* <http://www.brillonline.nl/subscriber/entry?entry=Islām_COM-0497>

[343] Dabūsī. *Taqwīm al-'Adillah*, 30

[344] ibid, 30

[345] ibid, 30

[346] see Kohlberg, E. "al-Rafida or al-Rawafid" *Encyclopedia of Islām* <http://www.brillonline.nl/subscriber/entry?entry=Islām_SIM-6185>

[347] Dabūsī. *Taqwīm al-'Adillah*, 30

[348] see Madelung, W. "Zaydiyya" *Encyclopedia of Islām* <http://www.brillonline.nl/subscriber/entry?entry=Islām_COM-1385>

[349] Gimaret, D. "Mu'tazila" *Encyclopedia of Islām* <http://www.brillonline.nl/subscriber/entry?entry=Islām_COM-0822>

[350] Further research needs to be conducted before this can be safely concluded.

[351] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 1/222

[352] ibid, 1/222

[353] ibid, 1/233

[354] ibid, 1/233

[355] ibid, 1/233

[356] ibid, 1/237

[357] ibid, 1/237

[358] ibid, 1/237

[359] ibid, 1/237

[360] ibid, 1/237

[361] ibid, 1/233

[362] ibid, 1/233

[363] ibid, 1/237

[364] ibid, 1/238

[365] ibid, 1/233

[366] ibid, 1/233

[367] The justification for this position can only be guessed and requires further research

[368] Ansari, Zafar Ishaq, "Islāmic Juristic Terminology Before Shāfi'ī", *Arabica*, 283

[369] Interestingly, none of the juridical scholars examined here recognized the irony of differing conceptions of *ijmā'* within the Ḥanafī school

[370] Jassās, *al-Fuṣūl fī 'ilm l-Uṣūl*, 2/107

[371] ibid, 2/117

[372] al-Karkhi, *Aqwal*, 97 is the closest he comes to discussing this, but here Karkhi does not discuss inter-generational applicability directly.

[373] Jassās, *al-Fuṣūl fī 'ilm l-Uṣūl*, 2/132

[374] ibid, 2/133

[375] ibid, 2/133

[376] ibid, 2/107

[377] Jassās, *al-Fuṣūl fī 'ilm l-Uṣūl*, 2/137 and Karkhi, *al-Aqwāl l-Uṣūliyya*, 100

[378] Jassās, *al-Fuṣūl fī 'ilm l-Uṣūl*, 2/146

[379] ibid, 2/148

5.0 The Limits of Considered Opinion (*ra'y*)

Synopsis – The historical debates concerning the role of *ra'y* in Islāmic jurisprudence; determining the effect cause of an analogy; the function of "uncritical acceptance"; "imputing correctness" to the jurist his use of independent legal reasoning; the relationship of Dabūsī and Sarakhsī to historical precedent and their conception of Islāmic jurisprudence given their understanding of the juridical applicability of *ra'y*.

The use of *ra'y* in the derivation of Islāmic jurisprudence, known as asserting independent legal reasoning (*ijtihād*), was a hotly contested issue in the 5th/11th century[380]. The harshest critic of the use of *ra'y* was the school of Ibn Dāwūd ibn Khalaf (d. 294/909). Known as 'the literalist school' (*al-Ẓāhiriyyah*), these scholars contended that the Qur'ān and the *sunnah* provided adequate guidance for the whole of humanity for all times. They advocated strict reliance on a literal reading of the texts and sought to remove any subjectivity from the practice of *fiqh*[381]. The clearest exposition of Ẓāhirī *uṣūl l-fiqh* came in the form of Ibn Hazm's (d. 456/1064) *al-Iḥkām fī Uṣūl l-Aḥkām*. In this treatise he condemned the Ḥanafīs, Shafi'īs and the Mu'tazilah alike for distorting the application of Islāmic jursiprudence through their use of *ra'y*[382]. Though Ibn Hazm provoked many prominent jurists into debates regarding the validity of *ra'y* in legal reasoning, his voice was a marginal one[383]. The bulk of the debate surrounding the use of *ra'y* in the 5th/11th century concerned the divergent approaches of the Shafi'īs and the Ḥanafīs[384].

The early Ḥanafī legal scholars distinguished themselves by embracing *ra'y* as a means for deriving Islāmic jurisprudence when the Qur'ān, *sunnah* and *ijmā'* – hereafter referred to as the 'texts' (*nuṣūṣ*) – were silent on a legal matter[385]. This use of *ra'y* manifested itself in two major legal concepts: *qiyās* and juristic preference (*istiḥsān*).

Qiyās is normally translated as 'analogical reasoning' on par with the use of syllogism in philosophy. Though a minority of legal scholars, especially the Mu ʿtazilah, promoted such a view of *qiyās*, Ḥanafīs tended to confine *qiyās* to a comparison of novel legal cases to statutes established by the text[386]. As will be made clear in the following sections, *qiyās* was not afforded the capacity to manipulate and establish axioms as is the case with syllogisms utilized in dialectical theology and philosophy. *Qiyās*, therefore, was a particular legal tool whose definition and application did not extend beyond the realm of jurisprudence.

Early Ḥanafīs allowed, however, for *qiyās* to be abandoned in favor of an injunction that facilitated ease for the laity[387]. If the *mujtahid* felt that an injunction that resulted from a *qiyās* was overly harsh or irrelevant to the case, he was free to abandon it in favor of passing a more lenient judgment, so long as it did not contradict the texts[388]. In this case, the *mujtahid* would 'prefer' an injunction that promotes ease over an injunction that causes difficulty, a process known as juristic preference (*istiḥsān*). This position elicited censure from the Shafi ʿīs, who asserted that the use of *ra'y* should be limited to *qiyās* alone. They argued that the use of *ra'y* must be restricted in order for jurisprudence to stay true to the texts and they feared that an over-reliance on the opinions would introduce corrupt interpretations[389]. Many Shafi ʿīs equated the Ḥanafī doctrine with that of the Mu ʿtazilah, which was tantamount to proclaiming the Ḥanafīs to be heretics for promoting *istiḥsān*[390]. In the face of this criticism, the Ḥanafī conception of *isiḥsān* changed drastically. By the end of the 3rd/9th century, the majority Ḥanafī opinion held that *istiḥsān* actually involved preferring one *qiyās* over another based on

circumstance, rather than abandoning *qiyās* in favor of an injunction that promotes ease[391].

The result of *istiḥsān* being relegated to an arbiter of competing *qiyās*' was that *ijtihād* as a whole began to be seen amongst Ḥanafī scholars as little more than *qiyās*. Dabūsī, for example, did not reference *ijtihād* outside of *qiyās* and Sarakhsī openly warned against using reasoning apart from *qiyās*[392]. The diminished role of *ijtihād* coincided with the rise of the concept of uncritical acceptance (*taqlīd*) of historical precedent[393]. Those who promoted the senescence of *ra'y* in legal reasoning argued that *ra'y* could be further supplanted by uncritically accepting the findings of legal masters in previous generations. The logic of this argument manifested itself in different ways, but the intent was to limit the need for producing new judgments based on *ra'y* because it bore the potential for error. This issues of *qiyās*, *taqlīd* and the capacity for the *mujtahid* to be correct (*muṣīb*) in his judgments will be examined in this chapter to shed light on Dabūsī and Sarakhsī's position on *ra'y* and its relationship to Islāmic jurisprudence.

5.1 Determining the *'illa*

The classical Ḥanafī conception of *qiyās* consisted of four major constitutive elements. The first is the legal injunction (*ḥukm*) from a text from the Qur'ān, *sunnah* or *ijmā'* – which functioned as the major premise (*kubrā*), the "known". The *mujtahid* would examine the injunction and try to determine the *ratio legis* (*'illa*) that supported the injunctions and revealed God's purpose in it[394]. This *ratio legis*, or, effective cause is the second element of *qiyās*, which is then applied to the third element: a novel legal case that the text does not directly address and that functions as the minor premise (*ṣughrā*) –

the "unknown". The *mujtahid* determines which effective cause derived from major premise applies to the novel case. By linking the effective cause from the established legal injunction to the novel case, the *mujtahid* can argue that the same effective cause that applies to the original case should apply to the novel case[395]. Thus the *mujtahid* may argue by means of a common effective cause that a new injunction based on the original legal injunction should apply to the novel case. This new injunction is the fourth element of *qiyās* and functions as the conclusion (*natīja*) of the syllogism. The process is then repeated for all new cases regarding which the texts either do not explicitly address or are silent altogether[396].

The most controversial element of *qiyās* concerns determining the Divine *ratio legis* (*ʿilla*) behind the legal injunctions in the text. Ḥanafī theorists historically differed about how to determine the effective cause, whether the extrapolated effective cause was an accurate reflection of the Divine intention, and the extent to which believers were bound to accept and follow new laws derived from that effective cause through *qiyās*[397]. Essentially, the argument surrounding the effective cause concerned the status of new laws derived from it as compared to those laws that are found in the texts (*nuṣūṣ*). The extent to which scholars viewed the effective cause as an accurate reflection of the Divine intention influenced the status that they accorded to *qiyās* as a source of Islāmic jurisprudence.

5.1.1 Dabūsī

At its most basic level, Dabūsī defined *qiyās* as positing a link between two apparently uncommon items[398]. He recognized the important uses of *qiyās* in dialectical theology and philosophy commonly known as categorical syllogism, but stated that *qiyās*

plays a different role and has different rules when applied to religious practice (*ʿibādāt*). The first line of distinction concerned the application of *qiyās* to matters of divinity. Dabūsī prohibited the use of *qiyās* to any matters pertaining to God or His attributes[399]. Rather, *qiyās* could only pertain to matters that had practical ramifications for personal and societal laws (*muʿāmalāt*)[400]. Another point of distinction between categorical syllogism and *qiyās* as utilized in jurisprudence was that syllogisms were based either on axioms that they viewed as self-evident or on corollaries derived from other syllogisms that were themselves based on axioms. In contrast, Dabūsī held that *qiyās* in Islāmic jurisprudence could only use as its source (*aṣl*) a text from the Qurʾān or *sunnah* or an *ijmāʿ* of the Companions of the Prophet[401]. The use of any other source as a foundation would invalidate the *qiyās* in terms of its application in Islāmic law. Hence, *qiyās* as utilized in jurisprudence was different in principle and purpose than categorical syllogisms. Moreover, Dabūsī restricted *qiyās* to one iteration – the result of a *qiyās*, no matter how valid, could not be used as a basis for another *qiyās*[402]. All analogy had to stem from the revealed texts (*nuṣūṣ*) and the legal opinion resulting from *qiyās* did not itself become a source on par with revealed texts. The one exception occurred if the *qiyās* were to be agreed upon by the contemporaneous community with Consensus. In that case, Dabūsī said that the *qiyās* be treated as *ijmāʿ* with regard to its application in jurisprudence. That *ijmāʿ* could then be used as the basis for a future *qiyās*.

The sources to be used in *qiyās* were restricted to the Qurʾān, *sunnah* and *ijmāʿ* because all injunctions contained within those sources were considered to be expressions of the Divine Will. Thus, it was assumed that due to this Divine intentionality, each

injunction contained therein had a religiously valid effective cause (*ʿillā*) that underpinned it. Dabūsī contended that the effective cause is a divinely sanctioned rationale, of which particular injunctions (*aḥkām*) are mere instantiations[403]. In its application to legal cases, the effective cause is not bound by the instantiation, just as a *ratio decidendi* is not bound by the judgment it determines. Theoretically, then, if one could ascertain the Divine effective cause behind a particular injunction, then the effective cause could be brought to bear on novel legal cases of which a *mujtahid* could not find explicit legal prescriptions in the text. By examining the effective cause that relates to the novel case, the *mujtahid* could produce a new injunction that couples the new law with the effective cause through *qiyās*.

Dabūsī proposed that the effective cause be determined by examining the revealed texts (*nuṣūṣ*) and finding within them attributes (*awṣāf*, sing. *waṣf*) characterizing their injunctions[404]. The *waṣf* contained in a particular legal verse of Qurʾān or *hadīth* of the Prophet would invariably point to the effective cause behind the injunction contained in the text. However, Dabūsī acknowledged that determining the effective cause, despite knowing the *waṣf*, is inherently an inexact science. For any particular injunction and its *waṣf* there is indeed one effective cause that is known by God that generates indubitable knowledge in its veracity (*ʿilla huwa wāḥid ʿinda Allāh taʿālā mūjib li l-ʿilm qaṭʾan*) [405]. However, humans can only conjecture as to what that effective cause is through their understanding of the *waṣf* and may be incorrect in their conjecture. Given this reality, Dabūsī compared the *waṣf* to a report (*khabar*) from the Prophet and the effective cause to the original Prophetic saying that the *khabar* purports to relate[406]. The original

Prophetic saying generated indubitable knowledge as to its veracity and if one were to hear it first-hand then they would be bound to accept it and act upon it. However, when the reports are passed down from generation to generation, they admit an element of conjecture due to the vagaries of the reporters. Thus, the transmitted report cannot generate action (*lam yajib al-ʿamal bi hā*)[407] because of its conjectural nature unless it is authenticated through the acknowledged methods in the science of *ḥadīth*. Similarly, Dabūsī said that one can never be certain that the effective cause one has determined through reflection (*taʾamul*) on the *waṣf* is the true effective cause because of the limitations of intuitive reasoning. As a result, he said that *qiyās* based on the effective cause could not be used as authoritative evidence in extrapolating juridical injunctions and thusly generating action[408]. Rather, *qiyās* can provide peace of mind (*ṭamʾanīnah l-qalb*) for the believer who wishes to live in fidelity with Divine law[409]. It should here be noted that, as will be made clear later in this chapter (section 5.3.1), Dabūsī cited practical reasons for saying that *qiyās* generates action upon the *mujtahid* who formulated the *qiyās* and those who follow him. Amongst the *mujtahid*s, however, Dabūsī held that the *qiyās* determined by one *mujtahid* is not authoritative and does not generate action for another *mujtahid* and his followers.

Given that the effective cause cannot be known with perfect certainty, Dabūsī provided rules for determining the relative veracity of a possible effective cause. He instructed *mujtahid*s to rely on the *waṣf* in the body of the text to determine the effective cause whenever possible[410]. Sometimes the *waṣf* provided in the text points to the effective cause in an obvious manner and minimal reflection (*aqal al-taʾammul*) is

necessary to determine the effective cause that establishes the injunction. According to Dabūsī, this was the case with the text that established the need for ritual ablution due to bleeding. Ā ʿishah, the wife of the Prophet reported,

> "Fāṭimah bint Abī Ḥubaysh approached the Prophet and said, 'O Messenger of God, I am a woman with a prolonged period (*istiḥāḍah*) so I am ritually unclean. Should I leave off prayer?' So the Prophet responded, '[The bleeding] is not [because of] a prolonged period, indeed it is blood from a burst vein (*ʿirq infajar*), so perform ritual ablution for every prayer." (Tirmidhī: Purity, 93)

In this case, Dabūsī said that it is clear that the *waṣf* was the bleeding due to a burst vein that caused the flow of blood. The flow of blood from the burst vein was the effective cause, therefore for ritual impurity. The ritual impurity, in turn, was the effective cause for requiring ritual ablution[411]. Once having determined the effective cause, a jurist can use *qiyās* to formulate judgments in cases regarding the need for ritual ablution due to bleeding due to a burst vein from other parts of the body. For example, if a vein in one's arm burst and resulted in bleeding, one could use *qiyās* based on the effective cause of the burst vein found in the *hadīth* to say that ritual ablution would be necessary. However, the *qiyās* would not extend to a woman on her menses because the effective cause of the burst vein is not present. Despite the fact that the explicit *waṣf* in the text determined the effective cause in this case, Dabūsī stated that the effective cause is not known with absolute certainty because the articulation of the effective cause still involved reflection and thought upon the *waṣf*[412]. Nevertheless, he said that extrapolation from the text itself was the most straightforward and dependable way to determine an effective cause and should be utilized whenever possible.

Dabūsī recognized, however, that the *waṣf* usually does not appear in the text itself and often the effective cause has to be extracted through discursive reasoning

(*naẓar*). Dabūsī likened the process of extracting the effective cause under such circumstances to determining the intended referent (*waḍ*ʿ) in a metaphor (*istiʿārah*)[413]. Just as the referent in a metaphor can only be inferred by someone with an intimate knowledge of language, so can the effective cause only be inferred by a scholar of the law (*ṣāḥib l-sharīʿah*). However, just as one can never have absolute certainty regarding the intended referent in a metaphor (see Chapter 2.2.1.), likewise Dabūsī said that the *mujtahid* can never be certain that he has determined the correct effective cause [414]. As a result, the *qiyās* that results from such an effective cause was far removed from generating either indubitable knowledge or action. To the contrary, he said that this *qiyās* is relegated to the level of verses of the Qurʾān that admit multiple interpretations (*muʾawwalāt* – see Chapter 2.2.1) and single transmissions from the Prophet (*khabar l-wāḥid* – see Chapter 3.2.1)[415]. As such, a *mujtahid* can only try to determine whether or not there is a strong probability of their veracity (*ghalabah l-raʾy*)[416]. In essence, the jurist can only reach a conjectural decision based on *qiyās*, unlike the certainty generated by the legal case that is presented by the revealed texts (*nuṣūṣ*).

Regarding determining the probability of the effective cause's veracity, Dabūsī said that the most reliable measure of an effective cause's probability is the effect (*taʾthīr*) it has in jurisprudence[417]. This effect is evaluated based on two criteria. First, the injunction derived through considering the effective cause must not contradict an explicit text (*naṣṣ*) from the Qurʾān, *sunnah*, or *ijmāʿ*. Since determining the effective cause required the use of reflection, the injunction derived therefrom was seen as inferior to that found in the text[418]. Therefore, if the *qiyās* contradicted a text, then that

contradiction was seen as proof that the *qiyās* was invalid (*fāsid*). Second, the effective cause must serve as a subsidiary cause (*muta'addī*) to all other related cases in Islāmic jurisprudence[419]. It must be the case that once the effective cause has been determined based on extraction from an injunction that it serve as a subsidiary cause to all comparable injunctions. In the example of fasting, the text states that eating invalidates the fast. Given the *waṣf* in the text, it is easy to conclude that the effective cause for invalidating the fast is the ingestion of some foodstuff. Once that effective cause is determined, then ingestion of any and all foodstuff must, in all circumstances, invalidate the fast without exception. Failure for the effective cause to serve as a subsidiary cause to all related cases would constitute evidence of the invalidity of the effective cause (*fasd l-'illa*) and would prove that the *mujtahid* derived the wrong effective cause from the text[420]. The principle of concomitance (*iṭrād*) encapsulated this idea by holding that when the effective cause for an injunction was known then all similar injunctions would possess the same effective cause[421].

Dabūsī argued for an important, and ultimately controversial, caveat to the doctrine of concomitance. He recognized that there were instances wherein applying an effective cause derived from a *waṣf* to a novel situation would result in an injunction that contradicted another injunction found in the texts. In the example of the causes that invalidate the fast, the effective cause derived from the Qur'ānic text was determined to be ingestion. Accordingly, for the effective cause to serve as a subsidiary cause, ingestion of food in all circumstances would invalidate the fast. However, if the fasting individual ate out of forgetfulness, then his fast would not be invalidated according to the *ḥadīth*,

"Whoever forgets he is fasting and eats and drinks [out of forgetfulness] is to complete his fast, for it is Allāh who fed him and gave him drink" [Muslim 6:2575]. If the effective cause of invalidating the fast as derived from the Qur'ān were applied in the case of the unmindful, then the text of the *ḥadīth* would be violated. Given that an effective cause must serve as a subsidiary cause for all similar rulings, this would normally signal that the effective cause was invalid. Nevertheless, Dabūsī argued that the effective cause of ingestion invalidating the fast was valid and that, at the same time, eating out of unmindfulness did not invalidate the fast[422]. Dabūsī reconciled this apparent contradiction of the principle of concomitance by first maintaining that the effective cause of ingestion invalidating the fast was correctly determined because it was derived directly from the *waṣf* in the text. He then suggested that the problem in application was not with the effective cause, which he claimed was sound, but with an impediment (*māni'*) that inhibited the application of an otherwise sound effective cause[423]. The *māni'* in the above case is the unmindfulness of the faster. The effective cause remained operative in that ingestion violates the fast, but because of the impediment of unmindfulness on the part of the faster, the injunction resulting from the effective cause could not be applied. Dabūsī explained that many jurists erroneously assumed that concomitance meant that a soundly derived effective cause would always produce a related injunction whenever the cause obtained, regardless of circumstance. To the contrary, he countered that due to an impediment, the effective cause may obtain though not its injunction (*mawjūd 'illa wa lā ḥukm*)[424]. The impediment does not invalidate the effective cause because the effective cause is determined without concern for

impediments or degenerate[425] circumstances (*al-ʿilla tūjid ṣaḥīḥah dūn l-ḥukm li māniʿ aw nuqṣān shay'*)[426].

For example, ownership of taxable property is an effective cause for the payment of tax. Therefore, Dabūsī pointed out, ownership of property obliges one to pay the minimal tax (*al-niṣāb*) on that property[427]. However, the effective cause requiring the payment of taxes is present even before the tax year (*ḥawl*) concludes. Therefore, the remaining time until the tax year concludes is an impediment (*mānīʿ*) to paying taxes although the effective cause is present due to the ownership of taxable property[428]. In this case, as with the case of fasting, Dabūsī said that impediments and degenerate circumstances do not affect the soundness of the effective cause. If the impediment were removed, then the effective cause would be applicable[429]. In other words, the effective cause is determined and serves as a subsidiary cause only in ideal cases. Dabūsī said that it should not be supposed that the effective cause is unsound or was improperly derived because of impediments, but rather that it has been limited (*takhaṣṣa*) due to circumstance. Dabūsī concluded that circumstance can cause a limitation of the effective cause (*taskhṣīṣ l-ʿilla*) which does not invalidate the effective cause itself[430].

In summary, Dabūsī held that for every injunction there is an effective cause that is known by God. *Mujtahid*s can try to determine the effective cause, preferably through a *waṣf* in the text, though, failing that, they can attempt to derive the effective cause by applying independent reasoning (*ijtihād*) to the text. The probability of the veracity of an effective cause derived through *ijtihād* is judged by its concordance with texts from the Qurʾān, *sunnah* and *ijmāʿ*, as well as its legal effect (*taʾthīr*), most notably in its ability

to serve as a subsidiary cause (*muta ʿaddī*) to all analogous injunctions. Though the effective cause must serve as a subsidiary cause, its injunction might be exanimate if circumstantial impediments prevent the application of the effective cause. This situation, known as 'limitation of the cause' (*takhṣīṣ l-ʿilla*), does not invalidate the effective cause because the effective cause is derived independently of circumstantial concerns.

Dabūsī's conception of the effective cause suggests a disconnect between the ideal law with God and jurisprudence as practiced in society. He held that God knows the effective causes that underlie all injunctions, but jurists can never know those effective causes with certainty. Furthermore, even after conjecturing about the effective cause and proffering a *ratio legis* that applies to all analogous cases, circumstance may prevent its application. Dabūsī did not view this as problematic and instead appears to have taken it for granted that the jurisprudence that the *mujtahid*s articulate is unable to accurately reflect the jurisprudence God intended. Nevertheless, as will be made clear in the following sections, he viewed the resulting imperfect jurisprudence as meritorious in the sight of God.

5.1.2. Sarakhsi

In his description of determining the *ʿilla*, Sarakhsī mirrored Dabūsī almost step for step. He, too, posited that behind every legal injunction in the Qurʾān, *sunnah* and *ijmāʿ* was a Divine *ratio legis*, or, effective cause (*ʿilla*) that provided the underlying logic for the injunction. This effective cause could not be known with certainty, but could be derived from the *waṣf* present in the text through a *mujtahid*s reflection (*taʾammul*). Though the effective cause thus determined could not generate indubitable

knowledge in its veracity, a jurist could have peace of mind (*ṭam'anīnah l-qalb*) that it was correct. The effective cause could then be applied to all analogous cases through *qiyās*. Though the true effective cause for any case cannot be known with certainty, its probability can be measured through its effect (*ta'thīr*). The effect of an effective cause lies in its non-contradiction of the texts (*nuṣūṣ*) and in its serving as a subsidiary cause (*muta'addī*) to all analogous cases. Sarakhsī was a staunch proponent of the doctrine of concomitance (*iṭrād*) and argued that whenever the effective cause is known, all analogous injunctions (*aḥkām*) must be operative.

On the face of it, Sarakhsī's conception of determining the effective cause appears to mirror Dabūsī's. However, the crucial point of departure is that whereas Dabūsī speaks of a jurist having peace of mind in the soundness of the *qiyās* he derived, Sarakhsī says that a *mujtahid* can have peace of mind in the effective cause he determined. The difference is subtle, but far-reaching. Sarakhsī describes the process of determining the effective cause from the *waṣf* as a transformative event for the *mujtahid*. He conceded that though the *waṣf* was apparent (*ẓāhir*) in a legal text, the effective cause was unseen (*ghā'ib*) from a sensory (*maḥsūs*) perspective. However, whereas pure *intellectus* (*ra'y*) would be unable to determine the effective cause from the *waṣf* with any measure of certainty, "the mind is able to perceive the unseen through reflection (*ta'ammul*)"[431]. Sarakhsī argued that reflection can ultimately lead a jurist to "perceive" the effective cause with a level of certainty that grants him peace of mind. This method begins with a sincere *mujtahid* who reflects on the text searching for the effective cause. He continues this reflection on the inner meanings of the text until his bosom is set at ease (*ta'ammul*

fīl-ma ʿnī l-manṣūṣ ḥattā waqif ʿalayhi inshirāḥ ṣadrihi). This ease arrives because "the light that God placed in the bosom of every Muslim" perceives by means of reflection the light that "God placed [within] the *sharīʿah*"[432]. Once this link is established, the *mujtahid* can have peace of mind regarding the effective cause he determined. The fact that the effective cause will then be articulated only through the aid of reflection prevents it from being known with indubitable knowledge. Nevertheless, the fact that peace of mind is achieved means that, though it cannot generate indubitable knowledge, the effective cause can generate action upon all analogous legal injunctions derived from the effective cause through *qiyās*[433].

The manner in which Sarakhsī described the derivation of the effective cause– through a connection forged by reflection between the light within and the light in the *sharīʿah* – indicates that the *sharīʿah* speaks directly to the human condition. As a result of this connection between the effective cause as latent in the text and the effective cause as perceived by the mind, Sarakhsī was deeply suspicious of anything the suggested that the effective cause determined was somehow dissolute in its effect (*taʾthīr*) in serving as a subsidiary cause. If God intended the effective cause both in the texts and in the bosom of the *mujtahid*, then any restriction on that effective cause in serving as a subsidiary cause would be seen as an impugning of Divine potency. In that spirit, Sarakhsī railed against proponents of the doctrine of 'limitation of the cause' (*takhṣīṣ l-ʿilla*). He argued that by saying that degenerate circumstances (*nuqṣān*) limited the effective cause, these scholars were in fact limiting the Divine Will. For Sarakhsī, the ability of the effective cause to serve as a subsidiary cause was a reflection

of Divine ability and so must not be limited in any way. In particular, he was arguing for a strict adherence to the doctrine of concomitance. He repeatedly asserted that "the non-existence (*in ʿidām*) of the injunction (*ḥukm*) [analogous to a derived effective cause is evidence of] the absence of the effective cause"[434] and, of course, vice-versa. This, he said, was because the *sharīʿah* discloses the effective cause and therefore saying that the effective cause cannot be applied to an analogous injunction due to some impediment suggests that the *sharīʿah* itself is degenerate[435]. According to Sarakhsī, this was the position of the Muʿtazilah and "those who oppose the *ahl l-sunnah*"[436].

Sarakhsī explained that situations that appear to require *takhṣīṣ l-ʿilla* are actually explained through the use of juristic preference (*istiḥsān*). In the case of fasting, for example, the effective cause taken from the Qurʾānic text is the ingestion of foodstuff, which then results in invalidating the fast. Sarakhsī points out that the action (*fiʿl*) of eating enacted by the faster results in invalidation of the fast in all cases. However, he points out that the *ḥadīth* regarding this issue says that if one eats out of unmindfulness his fast is valid because God fed him. In the *ḥadīth*, Sarakhsī explained, a separate effective cause of unmindful eating results in an injunction (*ḥukm*) that affirms the validity of the fast. He said that this was because the action (*fiʿl*) of eating was enacted by God, not the faster. Thus, by arguing that this second effective cause is operative in the case of the unmindful faster, Sarakhsī was able to argue that the effective cause was not limited, but rather misidentified. He placed the onus on the *mujthaid* for choosing the correct effective cause over all other possible effective causes that could be applicable in any given situation. Through certain criteria, including promoting ease and ensuring that

derived injunctions do not contradict the texts, the jurist is to use *istiḥsān* to determine which effective cause should be used in diverse cases.

5.1.3 Comparative Analysis

There are two major points of divergence between Dabūsī and Sarakhsī on the issue of determining the effective cause. The first concerns the relationship of the *mujtahid* to the effective cause. In Dabūsī's system, the *mujtahid* conjectures concerning the possible effective cause given his intellectual capabilities and reflection on the *waṣf* in the text. For Sarakhsī, the jurist is determined the effective cause through reflections upon the texts such that he perceives the unseen with a level of certainty that generates peace of mind. The former system creates a radical indeterminacy regarding the effective cause while the latter promotes an intimate knowledge that the *mujtahid* attempts to capture in legal language. For Dabūsī, then, the effective cause is a possibility amongst possibilities and the resulting injunctions derived from the effective cause so conceived are irremediably conjectural. Sarakhsī, on the other hand, promoted a conception of the effective cause as known intimately by the *mujtahid*, if not perfectly articulated, and the jurisprudence that results is a close expression to the Divine will. This may explain why, for Dabūsī, the *qiyās* that is based upon the effective cause does not generate action, whereas the opposite is true for Sarakhsī.

The issue of the intimacy and knowledge of the effective cause helps explain the second point of divergence between the two scholars, that of *takhṣīṣ l-ʿilla*. Dabūsī viewed *takhṣīs l-ʿilla* as unproblematic and did not think it was in conflict with *istiḥsān*, to which he devoted very little discussion. He mentioned that the *mujtahid* may choose

to abandon a *qiyās* (*tark l-qiyās*) in cases when circumstance dictates for a more relevant, competing *qiyās*. He described this abandonment as *istiḥsān* and saw it working in tandem with *takhṣīṣ l-ʿillа* based on the particularities of a given situation. Sarakhsī, on the other hand, clearly viewed *takhṣīṣ l-ʿillа* as heresy. It may be rightly pointed out that Sarakhsī manipulated semantics to produce similar legal injunctions through slightly different means. However, his repudiation of *takhṣīṣ l-ʿillа* and championing of *istiḥsān* discloses a deeper trend in Sarakhsī's thought. He regularly argued for the integrity of the *sharīʿah* as a consistent and consistently applicable extension of the Divine will. Failure to enact it in its entirety represented a failing of the *mujtahid* rather than a failing of the *sharīʿah*. Sarakhsī, therefore, could not abide by any institutionalized limitation of any aspect of the *sharīʿah*. Dabūsī did not demonstrate that he shared Sarakhsī's concern about the universal applicability of the *sharīʿah* and thus was not constrained by such concerns. Both Dabūsī and Sarakhsī believed that the laws of the *sharīʿah* were underpinned by a Divine logic, yet their views on the ability to grasp and apply that Divine logic set the two apart.

Neither Dabūsī nor Sarakhsī can be said to have upheld traditional Ḥanafī positions regarding *takhṣīṣ l-ʿillа*. Although Abu Bakr al-Jaṣṣāṣ did not the validity of limiting the effective cause, he mentioned that the early Ḥanafīs and some of his contemporaries (*aṣḥābinā*) held it to be an important and unproblematic legal device. For his part, Jaṣṣāṣ argued that limitation of the effective cause was an unnecessary theory[437]. He, like Sarakhsī, maintained that a proper understanding of *istiḥsān* mediated all problems concerns with limitation of the cause[438]. Matūrīdī, likewise, repudiated any use

of *takhṣīṣ l-ʿillа* as ascribing incoherence (*tanāquḍ*) to God[439]. Therefore, Dabūsī, in promoting *takhṣīṣ l-ʿillа* was consistent with early Ḥanafīs, but not with later ones. Sarakhsī, by contrast, advocated for the dominant Ḥanafī opinion of his time against the dominant opinion of the early Ḥanafīs. It would therefore be impossible to say that either of them were either promoting from or departing from Ḥanafī precedent in this issue. Rather, it can be said that they agreed with historical positions that affirmed their particular approaches to Islāmic jurisprudence.

5.2 *Taqlīd* of the *Mujtahid*

Just as there was a difference of opinion amongst Ḥanafī scholars regarding the nature of *ijmāʿ*, the issue of *taqlīd* evoked many different theories from Ḥanafīs. *Taqlīd* can be loosely translated as "uncritical acceptance"[440] and concerns the adherence to opinions that are formulated outside the confines of the Qurʾān, *sunnah*, and *ijmāʿ*. A hallmark of Twelver Shīʿīs[441] and Sufī groups[442], *taqlīd* was heavily debated amongst the Sunnīs. Some argued that believers need to engage in *taqlīd* of major legal personalities[443], others argued that one can only engage in *taqlīd* of the Companions of the Prophet[444], and yet others argued that *taqlīd* cannot be engaged in at all[445]. What is of interest in this discussion is *taqlīd* as it pertains to law formation. As such, Dabūsī and Sarakhsī will be critically examined regarding their views on the need for *mujtahid*s to engage in *taqlīd* and the opinions that the *mujtahid*s should be uncritically accepting. At stake in this issue is the freedom for the *mujtahid* to formulate law and the extent to which he is bound by historical precedent and/or the positions of eminent legal personalities.

5.2.1 Dabūsī

As mentioned earlier (see Chapter 4.1.1.), Dabūsī did not consider the *ijmā'* of previous generations to be authoritative evidence for future generations. The one exception to this rule, however, was the *ijmā'* of the Companions of the Prophet. Their *ijmā'* was "authoritative evidence like the verses from the Book of Allāh Most High"[446] and applied uniformly to all subsequent generations. The *ijmā'* of a subsequent generation, though, would not be authoritative for any other generation. Dabūsī addressed the subject of historical precedence with regard to *ijtihād* in a manner similar to his treatment of *ijmā'*.

Dabūsī differentiated between the need for laypersons and jurists to engage in *taqlīd*. He encouraged laypersons to identify a jurist to follow in matters of dispute and uncritically accept their judgments[447]. He did not detail the characteristics of an archetypal *mujtahid* whom the laity should seek out, but simply said that they should follow one who was just (*'ādil*)[448]. Laypersons are then bound by the *ijtihād* of the *mujtahid* that they follow, if only because they are not equipped to weigh the merits of competing juridical opinions. However, when discussing the need for the *mujtahid*s themselves to engage in *taqlīd*, Dabūsī held the *mujtahid*s to a different standard than he did the laity. He contended that the *ijtihād* of any jurist living in a generation after the Companions was not binding upon any other jurist[449]. Hence, the *mujtahid* was not to engage in *taqlīd* of any personality who lived after the generation of the Companions. Despite encouraging laypersons to identify a jurist to follow in matters of dispute, that jurist himself was not bound by the *ijtihād* of anyone who succeeded the Companions.

Dabūsī acknowledged that his position ran counter to those of some of the Ḥanafī legal masters (*mashāyikhunā*), who held that, at the very least, a jurist should engage in *taqlīd* of the Successors to the Companions in addition to *taqlīd* of the Companions themselves[450]. Some argued further that eminent Ḥanafī jurists should also be objects of *taqlīd*. Dabūsī responded by pointing out that that there was no indication in the revealed texts (*nuṣūṣ*) that the Successors to the Companions were exceptional in comparison to any other generation and thus their opinions were not to be accorded any special status[451]. By extension, then, the founders of legal schools and eminent legal figures were also not given special status and were therefore not to be objects of *taqlīd*, even by self-identified members of their school. This meant that self-identified members of a school of law were not bound by the opinions of their school regarding any issue of dispute and could either promote the opinion of a past authority or construct a novel opinion to address an issue[452]. Thus the jurist was given maximal latitude in determining jurisprudence and was not restricted by conformity to the thought of personalities or loyalty to a legal school. This leads to the conclusion that what set jurists of one school apart from those of another school is located not in adherence to the jurisprudence that their predecessors derived, but rather the methodology that they utilized to derive jurisprudence.

As he did with *ijmā'*, Dabūsī made an exception for the generation of the Companions regarding the issue of the *taqlīd* of the *mujtahid*. He acknowledged that amongst Ḥanafī scholars there was much debate surrounding the status of individual opinions from the Companions as authoritative evidence for extrapolating juridical opinions. The debating parties agreed that the Consensus of the Companions was a *ḥujjah* for all times, but there was a multiplicity of views regarding the authoritativeness

of individual opinions that the Companions did not agree upon by *ijmāʿ*. He cited Abu Saʿīd l-Bardaʿī (d. 317/929) as arguing that the *taqlīd* of the Companions is obligatory (*wājib*) and as a result one should abandon a competing *qiyās* from a later *mujtahid*[453]. Al-Karkhī on the on the other hand, claimed that it was impermissible to engage in *taqlīd* of the Companions except when a *mujtahid* is unable to formulate a relevant *qiyās*[454]. Dabūsī took a nuanced approach to this subject that addressed the debates and concerns of his predecessors, but was not consanguineous with any of them.

Dabūsī argued that the Companions were a special generation for two reasons. First, they enjoyed the company of the Conduit of Revelation (*ṣāḥib l-waḥy*) and received their religious instruction directly from him[455]. Second, the Prophet himself described them as "stars: whomsoever you follow, you will be guided" [ʿAjlūnī: 1/132][456]. Thus the Companions were blessed people and should be considered as sources of guidance. Dabūsī cautioned, however, that the ability to guide does not imply infallibility. The Companions, he said, were fallible and were not to be followed in every matter[457]. The frequent disagreements amongst the Companions attested to their fallibility and thus it would be difficult, if not impossible, for later jurists to determine the preponderance (*tarjīḥ*) of one Companion's opinion over another[458]. Therefore, a *mujtahid* could not uncritically accept an opinion of a Companion with impunity and base authoritative judgments upon it alone. Nevertheless, given their special status, the opinions of the Companions were not on par with the opinions of *mujtahid*s who succeeded them. Since the opinion of a Companion is accorded an irremediable preponderance over an opinion of a later *mujtahid*, Dabūsī concluded that the juridical opinions of Companions of which

no conflicting opinion of another Companion could be found should refute (*radd*) a *qiyās* reached by a jurist in a succeeding generation[459]. Competing opinions from the Companions concerning a juridical opinion was considered evidence that their generation did not come to an authoritative conclusion regarding the opinion and thus their views do not exhaust the possibilities of judgment regarding it. Therefore, if the Companions were in disagreement about a juridical opinion, then the *mujtahid* was free to either follow any of their opinions or suggest a different course of action through the use of *qiyās*[460].

Dabūsī warned that it is difficult to determine whether a juridical opinion of a Companion does or does not conflict with the opinion of another[461]. First, one would have to know all of the sayings of the Companions regarding that particular issue. Second, one would have to determine whether or not the Companion changed his or her mind after issuing their opinion. Finally, the report containing the opinion of the Companion would have to have been reliably transmitted so as to mitigate concerns about the authenticity of the report. Dabūsī did not suggest that this was an impossible task, but rather emphasized the need for jurists to be well-versed in the opinions of the Companions in order to properly conduct *qiyās*. Failure to engage in such research might result in the proposition of a *qiyās* that would otherwise have been refuted by an opinion of a Companion of which there were no conflicting opinions from other Companions. Alternatively, poor research might lead a jurist to erroneously refute a *qiyās* with a Companion's opinion, not knowing that the Companion later reversed their opinion or that the Companion's position was contested by other Companions[462]. By pointing out these possibilities for error, Dabūsī set a high standard for aspiring *mujtahid*s to attain before they could issue juridical opinions. However, through these strictures he also

limited the cases in which a *mujtahid* would be bound by the opinion of a Companion to instances wherein either only one opinion from a Companion exists on a given subject or if they were in Consensus regarding a juridical opinion.

5.2.2 Sarakhsī

Sarakhsī agreed with Dabūsī that the Companions were of a special generation that was blessed by God and His Prophet. No one in any subsequent generation could hope to attain their status, neither as spiritual nor legal guides. Sarakhsī also cited the tradition of the Prophet comparing his Companions to stars and said that the Companions were the ultimate source for guidance after the texts (*nuṣūṣ*) themselves[463]. This did not, however, mean that one could choose any Companion as an object of *taqlīd*, if only because the Companions often disagreed on issues. Moreover, there was an internal stratification of Companions wherein which they would consult one another in matters of jurisprudence and some Companions would serve as judges over others. Sarakhsī said that the penultimate example of this stratification was the case of the first four caliphs of the early community serving as arbiters and judges for the rest of the Companions[464]. He said that these caliphs, known as the "Rightly Guided" caliphs (*al-khulafā l-rāshidīn*) on account of a Prophetic tradition to that effect, were to be objects of *taqlīd* by all Muslims. Their opinions should be followed in all times and in any circumstances, except when necessity (*ḍarūrah*) precludes that possibility[465].

Sarakhsī added that all other Companions, though not objects for *taqlīd*, should nonetheless be seen as guides for later generations. Thus, their opinions should outweigh the opinions of any later jurists. Hence, Sarakhsī said that the juridical opinion of any Companion should refute (*radda*) a *qiyās* of a later *mujtahid* that addresses a similar

issue[466]. Regardless of whether the Companions agreed or disagreed on any issue, the fact that the Prophet likened them to stars meant that following any of them should result in guidance. Therefore, adjudication based on the statement of any Companion was a reliable method of producing valid judgments and was more reliable than the use of independent reasoning through *qiyās*. *Qiyās* could only be engaged in, then, if the injunction with which it is concerned was not previously addressed by a juridical opinion of a Companion. If there were multiple opinions on a subject from the Companions, then the *mujtahid* was free to choose one and be confident that the ensuing judgment would produce guidance[467].

By extension of the logic concerning opinions of the Companions, Sarakhsī argued that *mursal aḥadīth* were preferable sources of law to *qiyās*[468]. A *mursal* transmission is a report attributed to the Prophet, but which was actually determined to be a saying of a Companion. A *mursal hadīth* was so misattributed either out of genuine misunderstanding or a concerted effort to strengthen the chain of transmission of a report by suggesting that the Prophet himself uttered it[469]. This misattribution led many jurists to discount *mursal aḥadīth* from contributing to the articulation of jurisprudence because either the narrator misremembered the chain of transmission or intentionally sought to falsify it. In either case, the dubiousness of the narrator often led the content of the *aḥadīth* to be viewed with suspicion. Sarakhsī, however, embraced *mursal aḥadīth* as accurate reflections of the opinions of the Companions. He concluded that since the purported *hadīth* was actually a saying of a Companion it was therefore preferable to the *qiyās* of a later jurist[470]. The opinions of the Companions were to be sought out and

adhered to, even if the narrators who transmitted the reports were not reliable transmitters.

The justification that Sarakhsī's provided for his approach to the opinions of Companions discloses a larger ethos to which he was beholden. He argued that, because of their proximity to the conduit of revelation (*ṣāḥib l-waḥī*), the opinions of the Companions were "furthest removed from containing error" (*ab ʿad ʿan iḥtimāl l-khata'*) when compared to individuals from subsequent generations[471]. This position suggests that chronological distance from the time of the Prophet is concomitant with degenerate reasoning and thus a higher probability of error. Sarakhsī embraced this ethos, arguing that jurists should defer not only to the opinions of the Companions, but also to the opinions of jurists before them[472]. If opinions were provided by jurists of previous generations, the later jurist should not deviate from the possibilities already proffered. The jurist may select from amongst the previous opinions, but should not offer a new injunction unless out of necessity (*ḍarūrah*)[473]. Again, the ethos that underlies this thought is that historically established juridical opinions are further from error than more contemporary ideas – a view that will be explored further in the next section. Sarakhsī captured this frame of mind by saying, "the best thing is imitation, the worst is invention."[474]

Sarakhsī institutionalized the power of historical juridical opinions in his treatment of *majhūl aḥadīth*. *Majhūl aḥadīth* are reports attributed to the Prophet wherein at least one of the narrators in the chain of transmission is an unknown individual. Sarakhsī preferred these transmissions with one or more unknown narrators to the use of *qiyās*[475] in any given situation. When a *ḥadīth* is *majhūl*, it is impossible to

conduct a thorough criticism of the narrators within the chain of transmission because some narrators are not known[476]. Therefore, it is impossible to tell whether the *ḥadīth* is sound or not. Nevertheless, it is certain that the unknown narrator lived in a previous generation, else they would be known. For Sarakhsī, the fact that the narrator lived in a previous generation seems to be the only qualification necessary for his or her narration to be preferred over the *qiyās* of a qualified *mujtahid* of a later generation.

Sarakhsī appears to have held a deep suspicion not only of the intellectual capabilities of his contemporary *mujtahid*s, but also a misgiving about individuals chronologically removed from the time of the Prophet. Proximity to the Prophet seems to be a self-sustaining check on deviance for Sarakhsī, and history is only a degeneration of the pristine example set forth by the Prophet and emulated by his Companions. Whenever possible, then, later jurists should attempt to recreate the pristine example by uncritically accepting the opinions of the Companions, and should only venture beyond them if prodded by necessity. If the pristine early example cannot be replicated exactly, the jurist should try to replicate the example of jurists chronologically closest to the pristine example. Failing this, the jurist may engage in *qiyās* out of necessity. If this still does not produce relevant results, the jurist may engage, again out of necessity, in *istiḥsān*[477]. However, this is the last resort to be used only if history cannot provide a relevant injunction.

5.2.3 Comparative Analysis

Although both Dabūsī and Sarakhsī advocated for the *mujtahid* to engage in *taqlīd*, their conceptions of that *taqlīd* were markedly different. Dabūsī limited the *taqlīd* to the opinions of the Companions of which no contradictory statement can be found.

This allows the *mujtahid* some freedom in formulating novel law when the texts are silent. Though Dabūsī mentioned competing historical positions in Ḥanafī scholarship on the subject, he did not mention that his view coincides almost exactly with that of Abu Bakr al-Jaṣṣāṣ[478]. This omission may have been because he was trying to align his view primarily with the early founders of the school, whom he said endorsed his position.

Dabūsī's position on the opinions of the Companions may be seen as an extension of his discourse on *ijmāʿ*. He held that the *ijmāʿ* of the Companions was authoritative evidence for all subsequent generations, but he did not describe how that *ijmāʿ* was formed as did Sarakhsī. Through the present discussion, it may be concluded that the *ijmāʿ* of the Companions was, for all intents and purposes, formed when a juridical opinion of a Companion was reliably transmitted and no competing opinion from a Companion was similarly transmitted. This system of *ijmāʿ* formation is similar to the one advocated by Sarakhsī. Therefore, Dabūsī's most significant point of departure from Sarakhsī lies in his approach to generations that succeeded the Companions. Historical precedent plays a minute role in Dabūsī's system – it is not authoritative, nor should it guide the actions of later *mujtahid*s. It is noteworthy that Dabūsī does not at any point identify Ḥanafī jurisprudence as authoritative. This suggests that he viewed much of the law as fluid and not as a canonized system. Further, it suggests that he viewed a school of law as promoting a particular legal theory, not as commanding adherence to a particular set of injunctions.

Sarakhsi viewed historical precedent as far more relevant to law formation than did Dabūsī. Interestingly, he also invoked early Ḥanafī legal scholars on the subject –

whom Dabūsī cited for support – but quoted them as supporting his position. For Sarakhsī, there was an understanding that the legal school was designed to preserve and pass on legal opinions that were to be followed by later jurists. Given his discussion on *ijmāʿ*, disagreement within the school would be done away with through an appeal to the majority whereby those holding the minority opinion would be proved incorrect *de facto*. The subsequent generations would be charged with maintaining the dominant opinions and perpetuating them. Therefore, *taqlīd* of historical legal figures of the legal school was an integral part of Sarakhsī's conception of Islāmic jurisprudence.

5.3 *Taṣwīb* of the *Mujtahid*

One of the most contested issues amongst Ḥanafī scholars concerning matters of independent legal reasoning was the doctrine of *taṣwīb* of the *mujtahid*. *Taṣwīb* has been translated as "imputing correctness" and "infallibility"[479], but it is more complicated than either of those terms imply. The Muʿtazilah are reported to have believed that there were multiple divine truths and therefore a *mujtahid* was certain to be correct, or, *muṣīb* in his judgment regardless of the content of his opinion[480]. Early Iraqi Ḥanafīs like Abu al-Ḥasan al-Rustughfānī (d. 350/961) and the ʾAshʿarīs held that the Divine Truth is singular, yet since the *mujtahid* cannot ascertain the Divine Truth, he is therefore considered to be correct in all of his judgments regardless of his conclusions[481]. That does not mean that he is objectively articulating the Divine Truth, but that inaccessibility to the Divine Truth for verification forces him to be viewed as *muṣīb*. Later Ḥanafīs, like al-Māturīdī (d. 333/944) argued that a *mujtahid* who articulates an incorrect opinion is wrong "both in the beginning and in the end"[482], suggesting that he is neither correct in

this life nor rewarded for his efforts in the next. Several other Ḥanafīs defined positions that fell in between the ones enumerated above. The conclusions of these jurists spoke to their outlook on the link between articulating a particular jurisprudence and Divine reward and punishment. In the case of the Muʿtazilah, different laws may reflect truth, and so multiple opinions on a single issue may merit reward. In the case of al-Māturīdī, however, the *mujtahid* would only be rewarded if he articulated and followed a particular, correct legal opinion on an issue. The issue of *taṣwīb* was a medium for discussions on whether obedience to God lay in enacting specific legal injunctions or in attempting to articulate a Truth that may be instantiated through multiple channels.

5.3.1 Dabūsī

Dabūsī described his position regarding the *taṣwīb* of the *mujtahid* as mediating two extremes. The first, held by "a group of theologians", held that every *mujtahid* is *muṣīb* in attaining the truth[483]. This meant that despite differences in opinions, all *mujtahid*s articulated Divine Truth when they attempted to articulate Islāmic jurisprudence. The conclusion that these theologians came to was that Divine Truth was composed of diverse, equally valid truths (*al-ḥaqq ʿinda Allāh ḥuqūq l-tasāwī*) that could be expressed by context-specific Islāmic injunctions. Dabūsī rejected this position and said that, to the contrary, there is a singular Divine Truth that *mujtahid*s are constantly attempting to articulate through Islāmic jurisprudence[484]. The second extreme that Dabūsī attempted to moderate held that since the Divine Truth is singular there can be only one true articulation of Islāmic jurisprudence[485]. Those who held this opinion argued that any articulation of Islāmic jurisprudence that does not reflect the singular

Divine Truth must be erroneous (*khata'*) and action upon such an erroneous jurisprudence is, by definition, erroneous. Dabūsī faulted these two extreme positions for creating false expectations concerning the role of the *mujtahid*. Both assume that the *mujtahid* is expected to articulate the Divine Truth when formulating a juridical opinion. Dabūsī countered that the *mujtahid* is instead only expected to use the tools of *uṣūl l-fiqh* to provide an opinion that has a strong probability (*ghalabah l-ra'y*) of reflecting the Divine Truth[486].

Dabūsī suggested that the error in logic that governed the two extreme positions was a false understanding of the commission (*taklīf*) of the *mujtahid*. God, he said, had sole knowledge of Divine Truth and no human is able to grasp it in its entirety. Thus, it would be outside of the capacity (*wus'*) of the *mujtahid* to know and articulate the Divine Truth with certainty. Therefore, Dabūsī said that the *mujtahid* was not commissioned to articulate the Divine Truth (*lā yukallifuhum iṣābah l-ḥaq 'inda Allāh*) [487]. Rather, the *mujtahid* was commissioned to engage in *ijtihād* to approximate the Divine Truth. Most importantly, Dabūsī held that God will not judge the *mujtahid* based on his ability to articulate the Divine Truth, but on his properly executing a sound process of deriving injunctions[488]. Whether the injunction accurately reflected the Divine Truth was a secondary matter for Dabūsī. He cited a Prophetic tradition to argue that if the injunction that the *mujtahid* derived was incorrect (*khata'*) then he would still receive a reward (*ajr*) from God for his effort, and if he were correct (*aṣāba*) then he would be doubly-rewarded (*ajrān*) by God[489]. He further argued that only God can assess the validity of a juridical opinion (*fatwā*) and therefore humans should be concerned with the

process rather than the injunctions themselves[490]. Dabūsī thereby mediated the two extreme positions by affirming that there is only one Divine Truth concerning a legal matter, but arguing that the Divine Truth can never be known with certainty.

Dabūsī defended his proposed mediation by appealing to the logical consequences of the various theories under consideration for the layperson (*ʿāmmī*). If there were multiple truths then laypersons would have license to pick and choose injunctions in accordance to their desires (*hawā*) and would have no incentive to follow a particular group of jurists. Moreover, it was likely that the laity would advocate for positions that accord with their desires and also would not execute a sound methodology of deriving injunctions. To prevent a glut of poorly-reasoned juridical opinions, Dabūsī said that the laity must have confidence that *mujtahid*s are *muṣīb* in their judgments and that the business of approximating Divine Truth should be left to them. It is interesting that though Dabūsī did not call on *mujtahid*s to engage in *taqlīd*, he insisted that the laity uncritically follow some group of jurists. Based on his discussion here, his concern appears driven by a fear of legal anarchy should the laity be free of *taqlīd*. To some extent, then, the *ʿulamā'* are expected to provide some ordered authoritative community to which the laity can have recourse when they have questions or disputes. The *mujtahid*s were therefore uniquely capable of articulating the singular Divine Truth, even if they did not always succeed in doing so.

It was necessary for Dabūsī to emphasize that all *mujtahid*s were not always articulating the Divine Truth itself in order for him to avoid the pitfalls of the other extreme. If the *mujtahid*s were expected to produce only the Divine Truth, then when

there existed multiple opinions from the jurists on an issue the laity would be commissioned with determining which juridical opinion actually reflected the Divine Truth. Once that was determined, all competing opinions would be seen as false (*bāṭil*) and contrary to the Divine Truth. This would not only place a burden on the laity beyond their capacity, but would result in a rigid and polarized legal environment. Therefore, out of a concern for upholding the reality of the Divine Truth, alleviating the *mujtahid*s from exceeding their capacity, and maintaining a functioning social hierarchy, Dabūsī claimed that the *mujtahid* is always *muṣīb* and that he is only expected to approximate the Divine Truth through his legal posturing.

Since the juridical opinion of a *mujtahid* does not necessarily correspond to the Divine Truth, it might be concluded that juridical opinions should not be authoritative given their conjectural natures. Dabūsī gave some credence to this opinion, if only because he could not defend the authoritativeness of something that did not generate indubitable knowledge in its veracity without violating the principles he laid out earlier. He did, however, present a practical argument concerning the authoritativeness of a juridical opinion that made it an effective legal tool. The *mujtahid*, he said, was only *muṣīb* if he truly believed that the juridical opinion he was promoting was the result of sound reasoning and was convinced that it had a strong probability of reflecting the Divine Truth. Hence, since the *mujtahid* is convinced of the probity of his own opinion, he is required to act upon his own *qiyās* (*alzamnā l-mujtahid l-ʿamal bi qiyāsihī*). Because the process of reaching a *qiyās* was of paramount importance, Dabūsī dictated that the *mujtahid* must act upon his own *qiyās* despite the knowledge that it might not directly correlate to the Divine Truth (*amarnā bi l-ʿamal bi l-qiyās wa innahu lā yūṣilnā*

ila l-haqq alladhī ʿinda Allāh). By extension, the *muqallid*s of the *mujtahid* who believe him to be a competent jurist are, due to their affiliation, bound by his *qiyās*, if only because they cannot produce a competing argument.

Dabūsī continued through this line of argumentation to question the nature of incorrect actions. Many of his contemporaries and his predecessors argued that if the *qiyās* of a jurist were correct, then acting upon it would merit reward (*maʾjūr*). However, if the *qiyās* were incorrect (*khataʾ*) then individuals would be blameless (*maʿdhūr*) for acting upon it, since they thought it was the correct course of action. Dabūsī said that if an action were proven to be incorrect (*yatabayyin l-khataʾ*), then one must leave that action and repent properly. However, until that time, the individual is acting with the intention of pleasing God. If reward and punishment is based not on acting according to the Divine Truth but on enacting a process that attempts to approximate Divine Truth, then those who are enacting that process should be subject to reward, regardless of being correct or incorrect. Therefore, Dabūsī concluded that if the actors who are unaware of their errors – which he called 'concealed error' *(al-khataʾ l-khafā)* –should not be considered blameless (*maʿdhūr*) but rather rewarded (*maʾjūr*) for their actions[491]. With this conclusion, Dabūsī was able to cogently argue that despite the existence of a singular Divine Truth, human attempts to articulate Islāmic jurisprudence need only approximate that Truth. If the attempt itself is the basis for reward, then the results of a well-intentioned approximation of the Divine Truth in the form of a legal opinion is not only of secondary concern, it is irrelevant.

5.3.2 Sarakhsī

Sarakhsī mentioned the position of eminent Ḥanafī legal scholars and agreed that the *mujtahid* must be considered *muṣīb* concerning his *ijtihād*[492]. He conceded that a *mujtahid* might produce a legal opinion, thinking it to be valid (*ṣaḥīḥ*), yet it may in fact be invalid (*fāsid*)[493]. The issue of validity, for Sarakhsī, concerned the correlation between a juridical opinion and the Divine Truth. He argued that the Divine Truth is singular and only action that reflects that truth is to be considered valid. The role of the *mujtahid* and his ultimate aim, then, is to disclose the Truth (*aẓhar l-haqq*) and formulate judgments based on it[494]. Despite the aim of disclosing the Truth, Sarakhsī granted that *mujtahid*s might fall short of their aim. He maintained, however, that properly following the rules and methodology of *uṣūl l-fiqh* would invariably lead one to the Truth and that failure to reach the Truth is a result of faulty reasoning[495]. Faulty reasoning is due to a lack of knowledge (*ʿilm*) regarding the sources of law, the presence of which will always produce injunctions that accurately reflect the Truth[496].

Sarakhsī justified his position by describing the contemporary *mujtahid* as an historical being. That is, the history that preceded the *mujtahid* provides him with almost all the necessary tools for articulating the Truth with accuracy and precision. In his discussion of *taqlīd*, Sarakhsī said that the Companions of the Prophet provided a wealth of juridical opinions that the *mujtahid* can select from for legal application and cannot contradict. The Companions were a special generation and they were *muṣīb* regarding their juridical opinions. Interestingly, Sarakhsī explained why they were *muṣīb* by appealing to the impossibility of persisting in error (*qarr ʿala khataʾ*) with which he described the infallibility of the Prophet[497]. The Prophet, he said, could not persist in an

error of judgment because God would eventually send him revelation correcting his actions. Similarly, the Companions were unable to persist in error. During the lifetime of the Prophet, if they erred then the Prophet would correct them. After his lifetime, if they erred then the Rightly-Guided Caliphs whom the Prophet blessed as objects of *taqlīd* would correct their error[498]. For this reason alone, the Companions were *muṣīb* in all of their juridical judgments. Therefore, the contemporary *mujtahid* can choose from any of the statements of the Companions as a basis for law and be assured that the opinion they are perpetuating is *muṣīb*.

Furthermore, in his discussion of *taqlīd*, Sarakhsī held that the contemporary *mujtahid* is not allowed to contradict the juridical opinions of righteous *mujtahid*s that came before him (*lā yada' a l-mujtahid fī zamāninā ra' yihi li ra' y man huwa muqaddim 'alayhi*)[499]. This was because of the degenerate nature of later generations as well as because to workings of the Divine in history. Sarakhsī, in his discussion on the blessed nature of the faith community (see chapter 4.1.2) said that God would not let the community agree upon error. Since he argued that the community should disregard minority opinions, only majority opinions would survive through the generations. These majority opinions were accorded the status of *ijmā'* in Sarakhsī's system, and were therefore considered as having Divine sanction. History, then, is a vetting process by which minority – and therefore incorrect – opinions are cast off and only the Truth remains. Sarakhsī explained that the process of *taqlīd* gave the contemporary *mujtahid* a bonanza of juridical opinions that are *muṣīb* from which he can choose from to apply to his situation[500]. Further, *taqlīd* of transmitted texts, the opinions of the Companions and

the opinions of the majority of jurists provides the *mujtahid* with enough knowledge (*ʿilm*) to produce correct judgments that are accurate reflections of Divine Truth. The fruit of *taqlīd*, then, is that the *mujtahid* need never judge without knowledge (*lā ḍarūrah lahu ilā qaḍāʾ bi ghayr ʿilm*)[501]. As stated earlier, Sarakhsī held that a judgment based on knowledge always produces an injunction that discloses the Truth (*alladhī qaḍā bi ʿilmihi aẓhar l-haqq bi ḥukmihi*)[502]. Therefore, if a *mujtahid* properly engages in *taqlīd*, he can be assured that he will always be *muṣīb* in his legal pronouncements.

Sarakhsī did acknowledge that there would be situations wherein one cannot arrive at an answer to a problem through *taqlīd*, such as when determining the direction for prayer while traveling. In that case, the *mujtahid* would have to use his best judgment using the tools at his disposal[503]. Sarakhsī permitted the *mujtahid* to pass judgment when *taqlīd* is not possible, but he should use every means at his disposal to come to the correct judgment. In the case of determining the correct direction in which to pray, the *mujtahid* should use the sun or the stars or the direction of the wind to determine the correct direction. After such deliberations, prayer in the direction that is determined is permissible (*jāʾiz*)[504]. Upon returning from the journey, Sarakhsī said that one should try to determine if the direction in which he prayed was indeed correct. If it is proven that he prayed in the wrong direction, then the prayer is invalid (*fāsid*) and he must repeat it[505]. However, because of the lack of resources and knowledge that led to the incorrect decision, the *mujtahid* is blameless (*maʿdhūr*) for his incorrect judgment[506]. The fact that he attempted to pray in the correct direction is irrelevant for Sarakhsī. The action was incorrect and thus no reward is to be given. Far from holding that the action could

be rewarded, he feared that someone who prayed in the wrong direction might be guilty of disbelief (*kufr*) because he prayed in a direction other than that with which he was commanded[507]. Sarakhsī eventually concluded that because of the lack of knowledge, the prayer was merely defective (*khalāl*) which warranted repetition (*iʿādah*) upon learning of the defect but did not warrant a charge of disbelief[508].

In summary, Sarakhsī held that the *mujtahid* was charged with disclosing the Divine Truth. This Truth could almost always be disclosed through the practice of *taqlīd* because of the *muṣīb* nature of the Companions and majority opinions of later generations. By engaging in *taqlīd*, the *mujtahid* was assured that he would be *muṣīb* for judging based on the juridical opinions of earlier generations. In the case in which the *mujtahid* was forced to use his own reasoning, he was *muṣīb* if he used all the analytical tools at his disposal and was rewarded if his opinion disclosed the Truth. If, however, he was incorrect in his judgment, then he was blameless (*maʿdhūr*) though not rewarded for his efforts. For Sarakhsī, the reward for *ijtihād* comes only from either maintaining the dominant opinions of the past or producing the correct opinion – which cannot differ from any legal opinion held by jurists from a previous generation of believers. In both these cases, the opinion discloses the Truth and action upon that Truth is the only basis for reward.

5.3.3 Comparative Analysis

Dabūsī upheld the dominant opinion of his Ḥanafī predecessors by describing the *muṣīb* nature of the *mujtahid*s juridical opinions. He departed from many of them, however, with regard to the issue of rewarding action based on an incorrect *qiyās*.

Dabūsī claimed that a *mujtahid* would be rewarded for action based on an incorrect *qiyās* because the soundness of the *qiyās* is only secondary to the soundness of the process that derived it. The process, then, is an end unto itself of which that derived injunctions is merely a byproduct. As a result, despite the content of an injunction failing to reflect the Divine Truth, it may yet be a vehicle for Divine reward. Dabūsī thereby undermined any claim that only action upon a discrete, correct juridical opinion would lead to a reward in the afterlife.

Though he also promoted the position that held the *mujtahid* as *muṣīb,* Sarakhsī's interpretation of the position differed vastly from Dabūsī. Of note is his opinion that the soundness of the derived injunction regarding its correspondence with the Divine Truth was the ultimate arbiter of reward and punishment. If the juridical opinion was correct then action upon it warranted reward and if incorrect then action upon it warranted neither reward nor punishment. The only way for a *mujtahid* to attain reward, then, was to produce and act upon correct juridical opinions. Sarakhsī stated unambiguously regarding this issue, "those who know and judge with the Truth acquire praise in this world and merit in the next" (*alladhī ya ʿlamu wa yaqḍā bi l-ḥaqq yaktasib l-maḥmūdah fi l-dunyā wa thawāb fi l-ākhirah*)[509]. Erroneous judgments may not elicit censure, but they certainly do not lead to felicity in the hereafter. Sarakhsī made a definitive link between accurately articulating the Divine Truth and attaining reward from God.

5.4 Conclusion

There are three major observations that can be made regarding the theories of Dabūsī and Sarakhsī concerning considered opinion (*raʾy*) that are pertinent to the thesis

of this work. First, Dabūsī and Sarakhsī were not merely reproducing well-established Ḥanafī legal theories. Though they accepted and promulgated the idea that *ra'y* was a source of law, their conceptions of how *ra'y* was to be used often differed not only from one another, but from their historical predecessors as well. Second, the jurists often defined their positions as historically grounded and regularly appealed to earlier authorities to buttress their positions. Third, and most importantly to our study, the positions that Dabūsī and Sarakhsī held regarding *ra'y* disclosed an underlying ethos that they believed in regarding the role of Islāmic jurisprudence.

Dabūsī presented a conception of Islāmic jurisprudence as a reflection of the Divine Truth that is radically detached from the jurist. The Divine Truth can never be known and jurists are merely trying to approximate it. With the exception of the generation of the Companions, the radical distance between a jurist and the Divine Truth meant that no articulation of the Divine Truth through *qiyās* by a *mujtahid* could be authoritative for another *mujtahid*. However, because the *mujtahid* can never know if he has accurately articulated the Divine Truth or not, his effort of independent legal reasoning (*ijtihād*) is rewarded regardless of the correspondence between the resulting injunction and the Divine Truth. The articulation of Islāmic jurisprudence, then, is a creative process wherein non-linear solutions are presented based on the relationship between the texts, the *mujtahid*, and prevailing circumstances.

Sarakhsī proffered a markedly different conception of Islāmic jurisprudence wherein the Divine Truth is intimately known by the *mujtahid*. The *mujtahid* reflects on the *sharī'ah* until such time as the Divine light within it becomes clear to him. He can

thereafter articulate injunctions that are accurate reflections of the Divine Truth. This Divine Truth was most accessible to the generation of the Companions and the accessibility waned with each succeeding generation. Thus the *mujtahid* was enjoined to uncritically accept the injunctions of prominent jurists of the past rather than hazard the use of Considered Opinion (*ra'y*). If, however, the jurist were to use Considered Opinon, he would need to reflect so as to disclose the Divine light and then engage in *qiyās* so as to derive the correct injunction that was intended by God. Failure to do so would result in no reward for the *mujtahid*, since an incorrect injunction that does not correspond to the Divine Truth is not truly 'Islāmic' jurisprudence.

These observations find their cognates in the previous chapters. These are regular themes that pervade the thought of Dabūsī and Sarakhsī. Each jurist's model of *ra'y* fits into the larger framework that they established with their discussions on the Qur'ān, *sunnah* and *ijmā'*. What this suggests is that the jurists were framing an overarching conception of Islāmic jurisprudence in accordance with particular principles that guide their study yet are authentic Ḥanafī readings of the sources of law in. The implications of this notion will be explored in the following chapter.

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380 Hallaq, "Was the Gate of *Ijtihad* Closed?", 19

381 Vadet, J-.C. "Dawud ibn Khalaf" *Encyclopedia of Islām*

382 Ibn Hazm, *al-Iḥkam fī Uṣūl l-Aḥkām*, 2/359ff

383 Arnaldez, R. "Ibn Hazm", *Encyclopedia of Islām*

384 Hallaq, Islāmic Legal Theories, 107-8

385 ibid, 107

386 Hallaq, "Non-Analogical Arguments in Sunni Juridical *Qiyās*", 288

387 Sarakhsī, *al-Mabsuṭ*, 10/151

388 Hallaq, Islāmic Legal Theories, 107

389 ibid, 108

[390] This despite the similarity to *istiḥsān* of the Shafi ʿī theory of *istiṣlāh*. See Hallaq, *Islāmic Legal Theories*, 112ff

[391] ibid, 108

[392]Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*

[393] Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhtasar", 194

[394] Shehaby, "Illa and Qiyas in Early Islāmic Legal Theory", 34

[395] Hallaq, "The Logic of Legal Reasoning", 88

[396] Hallaq, "Non-Analogical Reasoning", 287

[397] Zysow, "Muʿtazilism and Maturism in Hanafi Legal Theory", 248

[398] Dabūsī. *Taqwīm al-ʿAdillah*, 278

[399] ibid, 190

[400] Shahaby, "Illa and Qiyas", 44

[401] Dabūsī. *Taqwīm al-ʿAdillah*, 279

[402] ibid, 279

[403] ibid, 272

[404] ibid, 270

[405] ibid, 273

[406] ibid, 273

[407] ibid, 273

[408] ibid, 272

[409] ibid, 272

[410] ibid, 304

[411] ibid, 292

[412] ibid, 272

[413] ibid, 268

[414] ibid, 286

[415] ibid, 269

[416] ibid, 269

[417] ibid, 270

[418] ibid, 280

[419] ibid, 271

[420] ibid, 294

[421] ibid, 312

[422] ibid, 314

[423] ibid, 310

[424] ibid, 312

[425] I have translated *nuqṣan* as 'degenerate' based on the *fiqhi* principle of the *nuqṣān* of property, which Baber Johansen's translates as 'deterioration' in Johansen, "A Response to Ann Elizabeth Mayer", 554

[426] Dabūsī. *Taqwīm al-ʿAdillah*, 310

[427] ibid, 310

[428] ibid, 310

[429] ibid, 315

[430] ibid, 312

[431] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 100

[432] ibid, 100

[433] ibid, 122

[434] ibid, 157

[435] ibid, 156

[436] ibid, 153

[437] Jassās, *al-Fuṣūl fī ʿilm l-Uṣūl*, 2/356

[438] ibid, 2/357

[439] Zysow, "Hanafism and Maturidism", 249

[440] Sherman Jackson, "Taqlid, Legal Scaffolding and the Scope of Legal Injuntions in Post-Formative Theory", 170

[441] Sachedina, *The Just Ruler in Shīʿīte Islām*, 236

[442] Margaret Malamud, "Sufi Organizations and Structures of Authority in Medieval Nishapur", *435*

[443] Ghazzali, *Mustaṣfā*, 368

[444] Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhtasar", 20

[445] Rahman, *Islām*, 196

[446] Dabūsī. *Taqwīm al-ʿAdillah*, 270

[447] ibid, 413

[448] ibid, 413

[449] ibid, 256

[450] ibid, 256

[451] ibid, 257

[452] ibid, 257

[453] ibid, 256

[454] ibid, 256

[455] ibid, 257

[456] ibid, 256

[457] ibid, 258

[458] ibid, 259

[459] ibid, 258

[460] ibid, 258

[461] ibid, 257

[462] ibid, 258

[463] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 2/83

[464] ibid, 2/82

[465] ibid, 2/82

[466] ibid, 2/85

[467] ibid, 2/83

[468] ibid, 2/87

[469] Juynboll, "Some Notes of Islām's First Fuqaha Distilled From early Hadith Literature", 287

[470] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 2/83

[471] ibid, 2/85

[472] ibid, 2/84

[473] Sarakhsī, *al-Mabsuṭ*, 16/82

[474] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 1/10

[475] ibid, 2/87

[476] Kamali, *A Textbook of Hadith Studies*, 186

[477] Sarakhsī, *al-Mabsuṭ*, 16/98

[478] Jassās, *al-Fuṣūl fī ʿilm l-Uṣūl*, 174

[479] Zysow, "Muʿtazilism and Maturidism in Hanafi Legal Theory", 239ff

[480] ibid, 244

[481] ibid, 240

[482] Samarqandi, *Mizān al-Uṣūl*, 2/1051

[483] Dabūsī. *Taqwīm al-ʿAdillah*, 407

[484] ibid, 408

[485] ibid, 407

[486] ibid, 408

[487] ibid, 410

[488] ibid, 412

[489] ibid, 409

[490] ibid, 412

[491] ibid, 415

[492] Sarakhsī, *al-Mabsuṭ*, 16/87

[493] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 2/87

[494] Mabsut, 16/82

[495] ibid, 16/82

[496] Sarakhsī, *al-Muḥarrar fī Uṣūl l-Fiqh*, 2/87

[497] ibid, 2/83

[498] ibid, 2/83

[499] ibid, 2/84

[500] ibid, 2/84

[501] Sarakhsī, *al-Mabsuṭ*, 16/82

[502] ibid, 16/82

[503] ibid, 10/197

[504] ibid, 10/199

[505] ibid, 10/200

[506] ibid, 16/87

[507] ibid, 10/200

[508] ibid, 10/201

[509] ibid, 16/85

6.0 Conclusion

Based on the analysis of Dabūsī and Sarakhsī's treatment of the sources of Islāmic jurisprudence, two major conclusions emerge. The first is that both of these jurists saw themselves as articulating legal theory from within and in conversation with the Ḥanafī jurisprudential tradition. The second is that though they both presented their positions as historically grounded in the Ḥanafī tradition, they regularly departed from that tradition in subtle yet significant ways. In almost all of the subjects covered in this study, Dabūsī and Sarakhsī appealed to historical Ḥanafī authorities to buttress their views. They often described the foundational Ḥanafī scholars – Abu Ḥanīfa, Abu Yūsuf and Muḥammad al-Shaybānī – as holding opinions congruous to their own, but just as often they appealed to later figures like al-Karkhī, ʿIsā ibn Abān, and Abu Bakr al-Jaṣṣāṣ. This reverse-attribution of juridical opinions, whether the attributions were accurate or not, discloses an attitude regarding historical scholarship in the milieu within which Dabūsī and Sarakhsī produced their work. The two jurists assumed that their audience would view appeals to the juridical opinions of eminent Ḥanafī legal figures as valid and sufficient corroborating evidence for the positions being argued. The fact that Dabūsī and Sarakhsī rarely failed to mention some historical precedent suggests that lack of historical precedent would be seen as detrimental to their argument. This attitude lends credence to Melchert's view of legal works in the Classical period as primarily the reproduction of the ascribed views of foundational figures within a legal school[510]. However, the ascription of juridical opinions to a major legal personality ensured neither that the ascription was accurate nor that the jurists considered the juridical opinions that were referenced to be normative. Quite the contrary, in our study we observed a self-conscious

recognition of the plurality of valid opinions available from within Ḥanafī legal scholarship. Furthermore, Dabūsī and Sarakhsī actively agreed or disagreed with their predecessors, sometimes privileging the position of a particular jurist and sometimes producing a novel opinion. What is noteworthy is that the two jurists were at times aware that they were at odds with the historical views of their school, as was the case with Dabūsī's interpretation of the bequest verse and Sarakhsī's position on 'limitation of the cause'.

Self-conscious deviance from the established juridical opinions of a legal school runs counter to prevailing notions of law in the 5th/11th century. This period was described by pre-modern Islāmic sources and modern Western sources alike as "the settling down of the schools of law" (*istiqrār l-madhāhib*)[511]. It was generally assumed that this period represented the end of unrestricted *ijtihād* (*al-ijtihād l-muṭlaq*) with regard to both legal theory and jurisprudence[512]. Instead, *mujtahid*s of this era were presumed to only choose the best juridical position from amongst those that were made available to them by the prominent historical legal figures of the school of law. Deviance from the established positions of the school would not be tolerated and would be viewed as tantamount to rejecting the school altogether. More severe accounts of this period argue that the *mujtahid*s actively sought to limit the number of opinions available to the school in order to promote the appearance of singularity in thought[513].

The examples of Dabūsī and Sarakhsī, however, demonstrate that there was no singularity of thought in the Ḥanafī school in the 5th/11th century regarding the definitions of technical terms utilized in legal theory, nor is there evidence of any motivation on the part of the jurists to feign such a singularity. Instead, the jurists worked within the Ḥanafī

framework to define technical terms in different, often novel ways. With regard to jurists beyond the Ḥanafī school, there is evidence to suggest that the plurality of legal opinions and novel approaches to law in the 5th/11th century was not unique to the Ḥanafīs. Though further study needs to be done on the topic, a cursory survey of the legal theories of jurists from other legal schools indicates that technical terms were defined in discrete and variegated ways. Abu Ḥāmid al-Ghazzālī (d. 505/111) and Abu Isḥāq al-Shirāzī (d. 476/1083), for example, were two Shafi ʿī jurists whom the Niẓām al-Mulk of Baghdad considered interchangeable[514]. They were both prominent Shafi ʿī legal scholars who taught in the same academy and regularly disagreed with each other and their predecessors. Ghazzālī, for example, argued that the admissible evidence (*dalā'il*) derived from *ijmāʿ* should be given more legal weight than those derived from the Qurʾān and *sunnah*, an unprecedented opinion at his time[515]. On the subject of dialectical theology (*kalam*), Shirāzī held that it served no function in *uṣūl l-fiqh*[516] whereas Ghazzālī argued that the positive aspects of *kalām* – particularly doctrines that addressed the valuation of human action and agency – should be appropriated into law[517]. Furthermore, Ghazzālī embraced the use of rational proofs as a valid legal methdology[518] while Shirāzī argued that results derived through any form of *raʾy* could only be admissible in jurisprudence if they were expressly condoned by a corresponding *sunnah*[519]. Such examples of variegated understandings of legal theory – both those with historical precedent and those without – are prevalent in *uṣūl l-fiqh* works in the 5th/11th century across the legal schools.

Despite the presence of diverse juridical opinions in law manuals of the 5th/11th century, there was also a marked systematization of the structure of *uṣūl l-fiqh* works. For Ḥanafī scholars prior to al-Jaṣṣāṣ, *uṣūl l-fiqh* works were not structured legal manuals that outlined or enumerated legal theory proper. Rather, they were collections of legal responsa (*masā'il*)[520] with brief second-order reflections on the responsa. From amongst the extant works of Muhammad al-Shaybānī, al-Khaṣṣāf, and al-Karkhī, the closest cognates to 5th/11th century *uṣūl l-fiqh* literature are responsa-based treatises that briefly discuss legal methodologies only when germane to particular instantiations of jurisprudence. By the 4th/10th century, however, responsa and *uṣūl l-fiqh* were separate genres[521]. This distinction between the genres became widespread after the publication of Jaṣṣāṣ' comprehensive treatise on legal theory. Thereafter, *uṣūl l-fiqh* literature of Ḥanafī legal scholars achieved a streamlined structure within which ideas were discussed under reified topic headings. Topics concerning the inimitability of the Qur'ān, the nature of *ijmā'*, the limits of *qiyās* and the like were mainstays *uṣūl l-fiqh* literature that no Ḥanafī jurist discussing legal methodologies after Jaṣṣāṣ neglected to address directly. Under these headings, jurists debated conflicting historical viewpoints and often offered novel approaches to these subjects, though their approaches were often presented in a manner that suggested that they were grounded in historical precedent.

It may be that the streamlined appearance of *uṣūl l-fiqh* works and the reverse-attributions of the opinions held by their authors to historical legal figures that may have led later scholars of *uṣūl l-fiqh* to assume that the 5th/11th century legal literature represented a consolidation and reification of legal theory within particular schools.

However, as our case study illustrates, systematization of the structure of discourse does not coincide with a reification of legal opinions. Rather, jurists used the structures of discourse and the terminology that developed therein to promote new ways of understanding the structure. By defining terms in diverse ways, the jurists were able to shape diverse understandings of the entire enterprise of *uṣūl l-fiqh*. These diverse understandings offered methods for comprehending the meaning of Divine law and the application of that law in heterogeneous circumstances.

No doubt, what was observed in the cases of Dabūsī and Sarakhsī was an instance of jurists discussing similar terms under similar headings but according those terms distinct and disparate meanings. Terms like 'clear and ambiguous', 'singular narrations', ijm*ā*ʿ, and *taqlīd* were taken for granted as components of *uṣūl l-fiqh* and as sources of law. However, the definitions given to them by the jurists determined their function in their legal methodology. These discrete definitions of common terms, when viewed within a jurists larger framework, promoted a particular vision of legal theory and its application in the social order. Dabūsī, for example, defined the technical terms endemic to Ḥanafī *uṣūl l-fiqh* such that his legal methodology would give rise to a distinctive jurisprudence based on circumstance. Sarakhsī, by contrast, defined the same terms so as to promote a jurisprudence that applies universally and would only differ from the majority opinions of the past in the case of necessity. These distinct narratives regarding the function of legal theory are predicated and argued for based on discrete definitions of technical terms utilized in *uṣūl l-fiqh*. Thus, a description of how and why the jurist comes to promote these definitions needs to be illustrated in order to understand the motivations of the jurists in advocating a particular conception of *uṣūl l-fiqh*.

Several explanations have been offered by modern scholars of Islāmic legal theory to describe the motivations behind particular expositions of legal theory in the 5th/ 11th century. The most prevalent of these are known in legal theory parlance as 'objectivist' approaches to law, wherein some scheme of association determines the thrust of the jurisprudence articulated by the jurist[522]. As mentioned in the introductory chapter, most Islāmic Studies scholars have posited that regional or doctrinal associations were the primary motivators of legal theorists. In the case of Dabūsī and Sarakhsī, and indeed in the case of Ghazzālī and Shirāzī, an objectivist approach fails to explain how members of the same doctrinal school who lived in the same region came to espouse such dissimilar views of *uṣūl l-fiqh*. Although some jurists may be seen as promoting a particular association through their legal theory, other jurists with the same associations may espouse different legal theories. Thus, the association itself is an insufficient descriptor for the motivations of jurists in advocating a particular conception of *uṣūl l-fiqh*. For legal scholars in the 5th/11th century, we may conclude with Roberto Unger that "no one scheme of association has conclusive authority" [523] in determining legal theory.

The logical counterpart to an objectivist conception of *uṣūl l-fiqh* wherein an association determines a jurist's legal methodology is a more 'formalist' approach. In this mode of reasoning, the individual jurist has a preconceived vision of a rightly-ordered world that is expressed through his legal theory[524]. Thus, legal discourse is merely a conduit for expositing the juridical effect of the jurist's preconceived notions. The allure of this position is that it does not require associations to explain how legal theories are determined. In fact, associations are incidental to the exposition of legal theory and may aid only in explaining the preconceived worldview of the jurist.

However, such an approach would be unwarranted in the case of Dabūsī and Sarakhsī in that it would ignore their allegiance to certain associations. Their adherence and faithfulness to the structure and terminology of the Ḥanafī school is palpable in their work and cannot be dismissed. To posit that their legal theory was exclusively an exposition of their preconceptions would be to suggest that their allegiance to their school was contrived in an effort to manipulate Ḥanafī jurisprudence such that it would reflect their unique viewpoint. The texts of Dabūsī and Sarakhsī do not authorize such a reading and they demonstrated a loyalty – though not a loyalty that determined their articulation of *uṣūl l-fiqh* – to the Ḥanafī school, eminent historical Ḥanafī legal figures and the dominant Ḥanafī mode of legal discourse including many of its assumptions and constraints. Despite their occasional departures from the received Ḥanafī legal tradition, the two jurists often rooted their juridical opinions in historical Ḥanafī thought. Furthermore, they appeared to regard their own works as authentic expressions and interpretations of Ḥanafī legal theory. A formalist approach imputes a mendacity on the jurists that, apart from being unjustified, fails to explain the close adherence to many principles and ideals of the Ḥanafī school.

It should be noted that in negating the adequacy of objectivist and formalist approaches, we are simultaneously affirming their import and relevance to the jurists in our study. The most tangible influence on the Ḥanafī legal scholars was the legal discourse and boundaries provided by Ḥanafī legal precedent. This legal precedent not only provided the terminologies to be utilized in jurisprudential discussions, but also limited the scope of debate surrounding legal theory. If one argues, for example, that Dabūsī was promoting a system of law that promoted maximal creativity and minimal

historical limitation, then the self-constraints that Dabūsī placed upon his own work would prove problematic. If his primary concern was juridical creativity, then he would have had no cause to give any weight to the precedent of the Companions, nor did he have to restrict the use of *ra'y* to *qiyās*. Instead, he could have argued for positions more akin to the Mu'tazilah, or abandoned Ḥanafī principles altogether. However, in using the discourse in which he was educated, Dabūsī was constrained by certain limits imposed by his scheme of association.

Similarly, Sarakhsī's strong aversion to rationalism and rhetorical deference to historical precedence bore more affinity to Shafi'ī conceptions of Islāmic law than to the majority of his Ḥanafī predecessors. Yet Sarakhsī, too, articulated jurisprudence in the discourse in which he was educated and the legal tradition to which he bore allegiance to. These observations bear witness to the power of associations in guiding legal discourse and cannot be discounted. However, in affirming the guiding force of associations as opposed to their determining force, we affirm the presence of a type of formalism at work. The divergent opinions of Dabūsī and Sarakhsī, despite their shared background, is proof that they were not automatons, hostage to their sociohistorical conditions. Rather they were theoretically free agents in that they could, and did, diverge from the dominant paradigms of their context. Nevertheless, they almost always framed their methodologies within the paradigms provided by their sociohistorical contexts. This did not appear to be so much of a conscious choice on their part as a fact of their reading and interpreting within a community of discourse. This community provided a shared language of discourse, but by the very definition of an open language system, did not – and could not

– circumscribe the possibilities of interpretation and articulation inherent in language. Thus, Dabūsī and Sarakhsī were neither determined by their context, nor were they applying only their autonomous intentionalities to the text. Rather, it can be said that they, as agents shaped by their sociohistorical contexts, read earnestly 'through' their contextualization. Put another way, "the individual who was constituted by historical and cultural forces [is able] to 'see through' those forces and thus stand to the side of his own convictions and beliefs."[525] This is not a 'seeing through' in the sense of 'seeing beyond', but in the sense of seeing through a uniquely colored lens – the coloring being provided by a particular sociohistorical context, which is not by any means a static concept. In this framework, the individual's own self-articulated convictions and beliefs are themselves influenced by his context. The individual is not erased in this 'seeing', nor are contextual factors determining. However, the individual as shaped by the constraints and concerns of context is affirmed. This acknowledges aspects of objectivism and formalism as relevant to our study, but also judges them to be ultimately unsatisfying means of explaining our findings.

Given the inadequacy of objectivist and formalist approaches in explaining the observations of this study, a different scheme of understanding the formation of legal theory is required. What is needed is an identification of the motivating factors of legal theorists of the 5th/11th century jurists that avoids "positing an origin for autonomously investigable doctrinal activity" while also avoiding "valorizing a posited transcendental subject."[526] This description must be able to simultaneously account for Dabūsī and Sarakhsī's pious readings of the source material, their adherence to the Ḥanafī school, and their occasional departures from its historical precedents.

To my knowledge, there is no description of jurisprudence and legal theory that adequately satisfies the requirements outlined above. The admitted shortcoming of critical legal theories is an inability to account for the kind of faithfulness to a tradition regularly demonstrated by modern and pre-modern jurists alike. Critical Legal Studies scholars, in fact, view a "dependence upon the starting points provided by a particular tradition" as a "weakness" in their methodology[527]. As a result, this dependence is usually glossed over and uninvestigated. By contrast, the faithfulness of Dabūsī and Sarakhsī to the sources of law as starting points and to Ḥanafī precedent as a legitimating authority, if not exhaustively so, is both manifest and palpable. An accurate description of the motivating forces of 5th/11th century jurists must therefore embrace some level of dependency on tradition-provided starting points without viewing them as deterministic.

Even a cursory analysis of Dabūsī and Sarakhsī's relationship to the sources of law bears out their level of dependency on starting points. They were explicit in citing the Qur'ān, *sunnah*, *ijmā'*, and *ra'y* as valid sources of law and contended that they should be relied upon exclusively to determine jurisprudence. Each source was given a relative weight and precise definitions were accorded to relevant terminologies. The respective weights and definitions so accorded by Dabūsī and Sarakhsī were in many instances incommensurate. Nevertheless, they both assumed that the sources of law were normative bases from which jurisprudence ought to be derived. Thus, if the jurists are not to be inculpated for surreptitiously advancing the views of a particular doctrine through their legal theories, then it is prudent to assume that the jurists did not self-consciously perceive a doctrinal lens through which they approached the normative sources of law. Therefore, in the absence of evidence to the contrary, it must be

concluded that *in the jurist's conception*, his approach and explanation of the normative sources of *uṣūl l-fiqh* presented their most obvious, 'plain sense' meanings. To argue otherwise would suggest that the jurists held another, undisclosed source to be truly normative and to which the sources of law must conform. Such an argument would require evidence that is not forthcoming in the texts under study. The only recourse, then, is to assume that the jurists approached the sources of law as self-disclosing and self-defining authorities in and of themselves and viewed the project of *uṣūl l-fiqh* as explicating their literal reading of these sources.

To say that the jurists were reading the text in its literal or 'plain sense' is not to succumb to a naïveté concerning the preconceptions involved when approaching any text. Rather, it is to say that for the jurists, their reading of the text was not self-consciously underpinned by a discrete and coherent doctrine or philosophy. It is, indeed, only to assume that the explanation of those texts by the jurists represents their self-described literal reading of them. The jurists in this conception are simply reading and explaining what Hans Frei calls the "*sensus literalis*" of the text.

The *sensus literalis*, according to Frei, represents two modes of interpreting the text. In the first mode, the interpreter approaches the text as directly applicable to the interpreter. That is to say that the text does not describe some abstract or possible world for the jurist. Rather, that which the text "signifies" requires enactment by the "signifier" [528]. For the jurist, then, there is no disconnect between the law presented in the text and the jurisprudence that affects the personal practice of the jurist. The literal sense of the text speaks directly to the experiences and the world of the jurist such that the grammatical and syntactical meaning of the text corresponds to the jurist's own narrative

conception of the text's relationship to his practice[529]. Therefore, the result of a literal reading of the text is that the world of the text and the world of the jurist are unified in a narrative that claims a harmony between the two. This narrative is particular to the jurist and informs how he reads the text and the relationship he envisions between the text and formal practice[530].

This notion of narrative, while mitigating objectivist views of legal theory, threatens to valorize a posited transcendental subject. To do so in the present study would neglect the distinct Ḥanafī orientation of Dabūsī and Sarakhsī. Frei describes a second mode of interpreting the *sensus literalis* that accounts for the context and communal affiliation of scholars. This second mode of interpreting concerns "the sense of the text in its sociolinguistic context – liturgical, pedagogical, polemical, and so on."[531] Frei cites Charles M. Wood to explain this contextual reading:

> The literal sense – this "natural," "plain," obvious meaning which the community of faith has normally acknowledged as basic, regardless of whatever other constructions might also be properly put upon the text – is grounded in the community's own experience with the text. As those adjectives suggest, it is the sense whose discernment has become second nature to the members of the community.[532]

The community of interpreters thus provides a common discourse within which the literal sense is understood and debated. This discourse is not determinate, but it minimally sets the parameters for acceptable debate. In our study, Ḥanafī legal scholars accepted as a fact that the four sources of the Qur'ān, *sunnah*, *ijmā'* and *ra'y* were normative and exclusive means for deriving jurisprudence. Despite the differences between the jurists in this study regarding the use of these sources, none questioned their status as normative and exclusive. Moreover, they all used the terminologies indigenous to Ḥanafī discussions on jurisprudence to promote their particular understandings.

At a deeper level, the Ḥanafī discourse established that the study of legal texts was *about* the application of law. When the jurists approached the texts, they did not primarily conjecture about hermeneutical theory or about the meaning "behind" the text. Their central concern was the application of legal texts to daily life. This concern was the *sensus literalis* of legal texts provided by their sociolinguistic context – specifically, the Ḥanafī legal school. It was within this context that the jurists debated about the proper use of the sources of law and through which competing legal theories emerged. Regardless of the particularities of these legal theories, the primary concern of the discourse itself – one could even say the motivation behind the debate – was *about* the application of Islāmic law. In sum, the debates regarding the derivation of jurisprudence from normative texts were in service to a particular narrative conception of legal applicability. This concern with the legal applicability of normative texts serves as a 'starting point', in Critical Legal Studies terms, for the study of Ḥanafī legal theories.

The sociolinguistic aspect of the *sensus literalis* provides the parameters of the dialogue, the *aboutness* of the legal interpretive project. Meanwhile, the syntactical/ grammatical and narrative meanings gleaned from literal readings by individual jurists express arguments for discrete legal theories. Working backwards, then, a legal theory is the expression of a jurist's narrative understanding of normative texts and their legal application. Such a view of legal theory avoids objectivism by privileging the narrative understanding of the jurist and simultaneously avoids formalism by rooting the interpretive project in its sociolinguistic context.

The most conspicuous shortcoming of explaining legal theory as interpretation of the *sensus literalis* is the ambiguity it renders onto the composition of the actual narrative

of the jurist itself. Certainly, a jurist's narrative will be influenced by doctrine, locale, politics, history, temperament and innumerable other concerns. However, simply positing the presence of a narrative understanding of legal sources does not address the level and import of these influences in the articulation of any particular legal theory. The reader is left to hypothesize about the relative strength of external influences on a case-by-case basis. Since the results of such hypothesizing can never be verified, the idea of a "narrative understanding of the *sensus literalis*" cannot be viewed as describing a state-of-being of the jurist that can be phenomenologically uncovered. Rather it is simply a description of the project and process of jurists in articulating legal theories.

This description of the legal project and process successfully subsumes the observations made regarding Dabūsī and Sarakhsī's legal theories. Their primary concern for the applicability of the law and their deference to the Ḥanafī tradition is accounted for in the sociolinguistic aspect of the *sensus literalis*. Furthermore, their individual understandings of the law and its application are accounted for in the narrative aspect of the *sensus literalis*. In addition, it allays the major concern of Critical Legal Studies theorists in that it provides starting points for legal theories but does not accord any scheme of association conclusive authority in determining law.

Despite providing a tidy description of the phenomena observed in this study, it may be argued that such a description is largely unsatisfying in that the narrative understanding of the jurists are left unexamined. Such an argument would hold that the narrative of the jurist must be deconstructed in order to fully understand and appreciate his legal theory. While such an argument is technically accurate, to conclusively define any aspect of a jurist's narrative would be to either posit an association as essential to the

jurist or to define a mode of thinking that is particular to and determining for a jurist. The former option is, in fact, objectivism and the latter is formalism. Objectivism and formalism are not used here as pejoratives, but as we have demonstrated above, they fail to account for the observations of this study. Therefore, those wishing to avoid either logical consequent of deconstructing the narrative of a jurist must be content with the narrative as a description of the project and process of legal theory.

The narratives of Dabūsī and Sarakhsī can be described in broad terms based on their legal theories. However, we cannot define them with exactness. Nevertheless, we posit that the concept of legal theory as a reflection of a narrative understanding of the *sensus literalis* of normative texts effectively described their undertaking in the field of *uṣūl l-fiqh*. Furthermore, we hypothesize that a narrative reading of the *sensus literalis* could effectively describe the undertakings of other jurists in the 5th/11th century and beyond. This hypothesis must be verified through further study of juridical explanations of technical terms provided by jurists from diverse backgrounds and with diverse schema of associations working within legal schools. If these studies support our hypothesis, then narrative readings of the *sensus literalis* may then be viewed as an effective tool for describing contemporary expositions of Islāmic legal theory in the Muslim community.

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[510] Melchert, *The Formation of the Sunni Schools of Law*, 33

[511] Jackson, "Taqlīd, Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory", 168

[512] Hallaq, "Was the Gate of Ijithād Closed?" Hallaq himself does not hold this view, but cites others who do.

[513] Meron, "The Development of Legal Thought in Ḥanafī texts", 78

[514] Makdisi, "The Juridical Theology of al-Shafi ʿī", 27

[515] Lutz Weiderhold, "Legal Doctrines is Conflict", 245

[516] Makdisi, "The Juridical Theology of al-Shafi ʿī", 29

[517] Makdisi, "Ash'ari and Asha'rites in Islāmic Religious History", 50

[518] Ghazzali, *al-Mustaṣfā*, 285

[519] Makdisi, "The Juridical Theology of al-Shafi ʿī", 20ff

[520] Translated thus based on Spectorsky, "Aḥmad Ibn Ḥanbal's Fiqh"

[521] This separation is evidenced in the works of Dabūsī and Sarakhsī. Dabūsī's *Kitāb l-Nikāḥ* and *Kitāb Ta'sīs al-Naẓar* are notoriously devoid of legal theory. Similarly, Sarakhsī's *al-Mabsūṭ*, while at times referencing legal theory, only does so when relevant to explaining how a particular law was derived and understood.

[522] Unger, *The Critical Legal Studies Movement*, 5

[523] ibid, 18

[524] ibid, 8

[525] Stanely Fish, "Anti-Professionalism", pg. 676 as quoted in Cornell, *Tranformations*, 22

[526] David Kennedy, "Critical Theory, Structuralism and Contemporary Legal Scholarship", 215

[527] Unger, *The Critical Legal Studies Movement*, 18

[528] Frei, "Theology and the Interpretation of Narrative", 112

[529] ibid, 103

[530] Frei, "The 'Literal Reading' of Biblical Narrative" 146

[531] Frei, "Theology and the Interpretation of Narrative", 104

[532] Wood, *The Formation of Christian Understanding*, 43

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