Sarakhsī's Doctrine of Juristic Preference *(Istihsān)* as a Methodological Approach Toward Worldly Affairs *(Ahkām al-Dunyā)*

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In the present investigation, we shall develop systematically Sarakhsī's doctrine of Juristic preference from his *Mabsūṭ*, Usūl and *Bāb al-Muwāda'a* of *Sharh al-Siyar al Kabīr* and demonstrate how Sarakhsi establishes its relevance as a methodological approach toward worldly affairs.

The investigation is carried out in four parts:

In the first part, we shall relate Sarakhsī's doctrine of juristic preference *(istihsān)* with his concept of treaties *(muwāda'a)*. According to Sarakhsī *muwāda'a* is an autonomous discipline and its main focus is worldly affairs as relations *(mu'āmalāt)* of Muslims with other nations.

In the second part, it is investigated how Sarakhsī strives to see the justification for the application of the doctrine of juristic preference to it independently of the doctrine of systematic reasoning *(qiyās)* by establishing the *'illa* (effective reasoning) of the doctrine of juristic preference on the basis of *asl* derived from the Qur'ān and Hadīth.

In the third part, we shall discuss how Sarakhsī systematizes the doctrine of juristic preference by analyzing the *'illa* employed by it in various forms and shows that it is connected with *asl*.

Finally, in the fourth part, we shall show how Sarakhsī justifies the employment of the doctrine of juristic preference as a methodological approach toward *muwāda'a* and worldly affairs.

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PART I

SARAKHSĪ'S DOCTRINE OF JURISTIC PREFERENCE *(ISTIHSĀN)* AND THE CONCEPT OF TREATIES *(MUWĀDA'A)*

Section I: Sarakhsī's Doctrine of Juristic Preference and Its Relation with Treaties as Developed in His *Bab al-Muwāda'a* of *Sharh al-Siyar al Kabīr*

Generally, scholars of Islamic jurisprudence assume that Sarakhsī (483 A.H./1090 A.D.) was a follower of Shaybanī (189 A.H./804 A.D.) and, at most, an expounder and commentator of his works, although his stature is raised by some next to those who are in the ranks of associates of Abū J'afar al-Tahāwī (239 A.H./767 A.D.)[1] It is said that he reached the status of Abū J'afar al-Tahāwī (239 A.H./853 A.D.), Abū Bakr al-Khawssāf (291 A.H./903 A.D.), Abū Hasan al-Karkhī (340 A.H./951 A.D.), al-Pazdawī (482 A.H./1089 A.D.) and others;[2] however, such statements are not based upon any systematic analysis of his works. In fact, Sarakhsī derives his material from all these sources, even from Abū Yūsuf (182 A.H./798 A.D.) and Shāfi'ī (204 A.H./820 A.D.). Shaybānī does not like to refer to juristic preference in his works because of the enmity which took place,[3] while others launched a great rebuttal against the upholders of the doctrine. Sarakhsī is not concerned with such matters at all. He states the opinion of Abū Yūsuf whenever he finds it necessary and brings him in support of his own opinion when it differs from the opinion of Shaybānī,[4] and albeit Shāfi'ī is opposed to the doctrine of juristic preference, Sarakhsī occasionally cites the opinions of Shāfi'ī[5] in order to support his own opinion against Shaybānī or others. Sarakhsī's main concern is how to deal with the issues and contents of *muwāda'a* (treaties) from the point of view of the doctrine of juristic preference[6] within the framework

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[1]Khalīl Mays, *Fahāris al-Mabsūt*, (Beirut: Dār al-Ma'ārif, 1980), p. 10.

[2]Ibid., p. 7.

[3]See Hājī Khalīfa, *Kashf al-Zunūn* (Istanbul: Maarif Mat-baasi, 1943), p. 46.

[4]See, for example Sarakhsī, *Sharh al-Siyar al-Kabīr*, Vol. V (Cairo: Dār al-Ma'ārif, 1971), p. 1713, 1884, 1922, 2074; Vol. IV (Hyderabad: Dā'irā al-Ma'ārif, 1335-36 A.H./1916-17 A.D.), p. 18, 129, 152, 245.

[5]Ibid., Vol. V, pp. 2151, 2232-33; Vol. IV, Ibid., pp. 294, 346: and also Sarakhsī, *Usūl al-Sarakhsī* ed. Abū Al-Wafā al-Afghānī (Cairo: Lejnat Ihyā al-Ma'ārif al-Nu'mānīya, 1954), p. 254.

[6]Ibid., Vol. V, pp. 1813, 1816; Vol. IV, Ibid., p. 82, 84. In the latter case, he even asserts that the doctrine of juristic preference is based upon *tawassu'*.

of and on the basis of sharī'ah law, providing formal unity to the subject matter of treaties.[7]

As a matter of fact, the main theme of Sarakhsī's *Bāb al-Muwāda'a* seems to establish the concept of treaties and expound it from the point of view of the doctrine of juristic preference as a methodological approach.[8] In the present investigation, we shall focus on these two main features as they emerge from the analysis of the text. It is appropriate to clarify at this point that Sarakhsī, in his *Mabsūt*, follows Shaybānī based upon the fact that we find parallels with the ordering of chapters and themes as dealt with by *Shaybānī* in his *Jāmi' al-Saghīr* and *Kitāb al-Asl*. But, upon closer investigation it becomes evident that in Shaybānī's *Kitāb al-Asl* and Sarakhsī's *Mabsūt* the chapter on the doctrine of juristic preference is to be found in a different context.[9] The former is followed by discussions regarding laws dealing with religious matters *(ahkām al-dīn)* while in the latter, in contrast to and in anticipation of what Sarakhsī has already laid down in his *Usūl*, we find the discussions followed not only by the laws related to religious affairs, but also by the laws regarding worldly affairs *(ahkām al-dunyā)* such as the laws related to apostates, *dhimmīs*, unbelievers, rebels, etc.[10] In the earlier works, Sarakhsī has not yet brought out the concept of treaties as an autonomous discipline and in juxtaposition with the doctrine of juristic preference. But, in his *Bab al-Muwāda'a*, Sarakhsī directly brings out his views according to the doctrine of juristic preference which is different from the doctrine of systematic reasoning.[11] From this, especially considering Shaybānī's *al-Siyar al-Kabīr* is lost,[12] it is understood that Sarakhsī, in his *Bāb al-Muwāda'a*, uses the doctrine of juristic preference as a methodological approach on the basis of its *'illa* which is of entirely different nature from that of the doctrine of systematic reasoning.

Section II: Basis and Justification of Sarakhsī's Concept of *Muwāda'a* (Treaties)

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[7]For more elaboration see Hans Kruse, "The Foundation of Islamic International Jurisprudence (Muhammad al-Shaybānī-Hugo Grotius of the Muslims)," *Pakistan Historical Society Journal* Vol. III, Part IV, 1955, p. 20, 22, and 27.

[8]See note 6 above.

[9]See Muhammad bin Hasan al-Shaybānī, *Kitāb al-Asl (Bāb al-Istihsān)*, ed. Abū al-Wafā Al-Afghānī, Vol. III. Part II (Hyderabad: Dā'irā al-Ma'ārif 1971), p. 2.

[10]Sarakhsī, *Mabsūt* Vol. X (Beirut: Dār al-Ma'ārif, 1324-31 A.H./1906 A.D.) pp. 2-3.

[11]See note 6 above.

[12]See Munajjid, the editor of *Sharh al-Siyar al-Kabīr,* Vol. I (Cairo: Dār al-Ma'ārif, 1971) (Cairo edition), p. 17. Munajjid states that Shaybānī's text of *Sharh al-Siyar al-Kabīr* is lost. Thus, we have at hand only Shaybānī's *Jāmi' al-Saghīr* which is printed on the margin of Abū Yusūf's *Kitāb al-Kharāj* (Cairo: Būlāq, 1302 A.H./1884 A.D.).

In his *Mabsūt*, Sarakhsī makes it very explicit that *muwāda'a* deals solely with matters concerning mutual relations *(mu'āmalāt)* between Muslims and other nations,[13] although it is to be justified on the basis of sharī'ah law and conducted within its framework. These other nations, according to Sarakhsī, are *dhimmīs*, the inhabitants of enemy territory, apostates, rebels, Jews and Christians.[14]

In his *Bāb al-Muwāda'a*, Sarakhsī focuses on the basis of such a concept of *muwāda'a* and asserts that the perspective of mutual relations between Muslims and other nations, such as the matters of promise of security, dhimma etc., is of a broad nature aimed at facilitating matters.[15]

Thus, in order to establish the concept of an autonomous discipline of *muwāda'a*, Sarakhsī makes a clear distinction between religious affairs *(ahkām al-dīn)*, which, strictly speaking are concerns only of Muslims and the worldly affairs *(ahkām al-dunyā)*,[16] which are not the sole concerns only of Muslims but of other nations as well.

The *muwāda'a* deals with and belongs to worldly affairs. Thus, the *muwāda'a*, by its very nature, demands flexibility to be dealt with on its own accord. The religious affairs are, strictly speaking, meant only for those who are Muslims, wherein the strict enforcement of laws become obligatory, whereas *muwāda'a* is pursued with a wider perspective in mind and thus needs to be conducted with flexibility. This is achieved by what Sarakhsī calls *tawassu'*,[17] which literally means extension. Sarakhsī is consistent in bringing out this concept both implicitly and explicitly in his discussions as well as by stating it as a premise for the establishment of *muwāda'a* as an autonomous discipline. Since the nature of worldly affairs has a broader perspective, it needs to be conducted by extending the doctrine of systematic reasoning and thus, according to Sarakhsī, the need for the doctrine of juristic preference. But, nonetheless, the basis of such a doctrine as a methodological approach should be found within the framework of sharī'ah as is the case with the doctrine of systematic reasoning. Although in his *Usūl* Sarakhsī initially considers the doctrine of juristic preference as a kind of systematic reasoning and as such not different from it, he strives in his *Mabsūt* and *Bāb al-Muwāda'a* of *Sharh al-Siyar al-Kabīr* to find the basis of the doctrine of juristic principle not in the doctrine of systematic reasoning, but in the origins of law itself, namely, the Qur'ān, and Hadīth. Thus, as we shall see later, in his *Mabsūt*, Sarakhsī sets forth the argument for the justification and validity of the doctrine of juristic preference.

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[13]Sarakhsī, *Mabsūt*, Vol. XII (Beirut: Dār al-Ma'ārif, 1324-31 A.H./1906-12 A.D.) pp. 2-3.
[14]Ibid., p. 2.
[15]Op. Cit., *Sharh al-Siyar al-Kabīr*, Vol. V, p. 2210; Vol. IV, p. 332.
[16]Ibid., Vol. V, p. 2282; Vol. IV p. 378: trans. 404.
[17]See note 6.

Section III: Nature of the Treaties *(Muwāda'a)* and its Incorporation Within the Framework of Sharī'ah Law

In the chapters I, II, and V of *Bāb al-Muwāda'a* of *Sharh al-Siyar al-Kabīr*, Sarakhsī discusses the nature of *muwāda'a* as being the legal contract whose main purpose is to facilitate and maintain mutual relations between two parties. The treaty should be signed by both parties specifically stating all the stipulations to be observed and executed during the specific time period before it is signed and sealed. It is conceived in the nature of a binding contract for both parties. Thus, Sarakhsī provides its formal unity and its legal structure and arrangement from the superstructure of sharī'ah law as it emerges from the Qur'ān and Hadīth.[18] In essence, the legal structure of *muwāda'a* is incorporated into sharī'ah law. Sarakhsī shows how to extend and incorporate the *muwāda'a* formally into sharī'ah law in his *Bāb al-Muwāda'a*.

As a methological approach, such matters can only be dealt with by the doctrine of juristic preference, since *muwāda'a* is wider in its perspective and deals with other nations in worldly affairs rather than only in religious affairs. Thus, by necessity, we have to extend the doctrine of systematic reasoning by the doctrine of juristic preference. Sarakhsī does such with the notion of stipulations *(shurt)* of treaty *(muwāda'a)*. Kruse gives an example of it from Sarakhsī *Bāb Al-Muwāda'a*, but does not relate it to the doctrine of systematic reasoning and the doctrine of juristic preference, thus not realizing its import and significance from that standpoint:

> The proposition *'ala* (on, against) indicates the stipulation for a certain condition. When e.g., the *muwāda'a* is entered into for the period of three years *'ala* three thousand dinars, it is a proof that the fulfillment of the *muwāda'a* is the condition for the payment of the tribute agreed upon. There is full accord between the wordings of the treaty and the actual nature of the *muwāda'a* so that in this case nothing would justify a deviation from the rules for the dissolution of a treaty as laid down by *istihsān* (the doctrine of juristic preference). On the other hand, however, the proposition bi (with) denotes that a consideration has been agreed upon. The conclusion of a *muwāda'a* for the period of three years bi-hundred dinars for every year would mean that in this case the tribute is explicitly intended to be a consideration. The *muwāda'a* is a barter contract on the strength of explicit agreement. It can be treated unhesitantingly in analogy *(qiyās)* to a lease.[19]

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[18]See note 7 above. Hans Kruse elaborates on this aspect at great length, but he is not specific enough.

[19]Ibid., p. 31.

Kruse emphasizes the secondary nature of *muwāda'a* when it is to be considered a treaty, and when it is a simple barter contract. This is, no doubt, an important point in the treaty but a more significant aspect of the treaty is that as a part of *muwāda'a*, the former case is dealt with according to the doctrine of juristic preference and the latter according to the doctrine of systematic reasoning. What Sarakhsī shows is that in the matters of *muwāda'a*, as we find it in the former case, the emphasis is upon the fulfillment of treaty and facilitation of mutual relations between the two nations and its basis should be widened and can only be dealt within the doctrine of juristic preference rather than the doctrine of systematic reasoning. What emerges from the treatment of this theme is that the *muwāda'a* is to be approached methodologically by the doctrine of juristic preference, as the *muwāda'a* by its very nature is wider and broader, which forces us to extend it to a different *'illa* not provided in the doctrine of systematic reasoning.

PART II

'ILLA (EFFECTIVE REASONING) OF THE DOCTRINE OF JURISTIC PREFERENCE AND JUSTIFICATION FOR ITS EMPLOYMENT IN *MUWĀDA'A*

Section I: Sarakhsī's Definition of the Doctrine of Juristic Preference and the Basis of its *'Illa* (Effective Reasoning) in the Origins

In his *Mabsūt* Sarakhsī defines *istihsān* (the doctrine of juristic preference) as the abandonment of the opinion to which reasoning, by the doctrine of *qiyās* (the doctrine of systematic reasoning), would lead, in favor of a different opinion supported by stronger evidence and adapted to what is accommodating to the people.[20] Sarakhsī definitely argues for the use of the doctrine of juristic preference only in this sense and seeks support for it directly from the Qur'ān and Hadith. Thus, according to Sarakhsī, such a departure from the doctrine of systematic reasoning is only to be based upon evidence found in the Qur'ān and Hadīth. In anticipation of his *Bāb al-Muwāda'a*, we find that Sarakhsī argues for the doctrine of juristic preference on a different *'illa* (effective reasoning) rather than its employment to be based simply upon *qiyās* (systematic reasoning) or *ijmā'* (general concensus) or *darūra* (necessity) though the latter[21] is not necessarily excluded in the use of the doctrine of juristic preference, as we shall see later.

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[20]Op. Cit., p. 145.

[21]Ibid., Vol. V, pp. 1689, 1694, 1724; Vol. IV, pp. 2, 5, 24.

According to Sarakhsī the *'illa* for its employment in the doctrine of juristic preference is convenience, facilitation and what is accommodating to the people. It strives and seeks for equanimity and flexibility. As a result, hardship is left behind.[22] Sarakhsī provides the evidence for this *'illa* (effective reasoning) first from the Qur'ān and then from the Hadīth. From the Qur'ān he cites, "God intends every facility for you and not hardship,"[23] and narrates the following tradition: "it is better that there is an ease in your religion."[24] Thus, Sarakhsī seeks support for the basis of the doctrine of juristic preference and its independence from the doctrine of systematic reasoning directly from the Qur'ān and the Hadīth.

Section II: *'Illa* (Effective Reasoning) as The Basis for the Differences Between the Doctrines of Systematic Reasoning and Juristic Preference

In his *Usūl*, Sarakhsī, while discussing the nature of *'illa* as employed in the doctrines of systematic reasoning and juristic preference, first subsumes both of them under the general category of ijtihād (exercise of legal reasoning) and brings out support for the use of *qiyās* (systematic reasoning) and *ra'y* (opinion) or what he later calls it as *istihsan* (juristic preference in the technical sense) from several traditions. For instance, "when the Prophet sent *Mu'ādh* to Yemen, he asked: how would you rule the people? *Mu'ādh* replied: by the book of God. The prophet asked him further: if you do not find any guidance in the book of God, what will you do? *Mu'ādh* replied: by the Sunna of the prophet. Thereupon the prophet asked him, if you do not find it in the Sunna, then what will you do? *Mu'ādh* replied: I shall exercise my own individual opinion *(ijtahadu ra'y)*."[25] Thus, when there are no precedents set forth in the Qur'ān and Hadīth, the exercise of individual opinion is allowed. In the section *Qiyās* and *Istihsān* of *Usūl*,[26] Sarakhsī argues for the validity of the doctrine of systematic reasoning *(qiyās)* on the ground of its *'illa* (effective reasoning) as being *zāhir* (apparent),[27] but raises a further point in terms of its being *qawī* (strong) or *ḍa'īf* (weak). The effective reasoning employed in the doctrine of systematic reasoning may be apparent but not necessarily strong. When such is the case, Sarakhsī argues for the exercise of individual opinion *(ra'y)* on the ground of the strength of its *'illa* and concludes that

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[22]Op. Cit., *Mabsūt*, p. 145.

[23]The Holy Qur'ān, Yusuf Ali, trans., (Brentwood, MD: Amana, 1983.

[24]Bukhārī, Imām, 34.

[25]Sarakhsī, *Usūl al-Sarakhsī* Vol. II ed. Abū al-Wafā al-Afghānī (Cairo: Lajnat Ihyā al-Ma'ārif al-Nu'mānīya, 1954), p. 130.

[26]Ibid., pp. 199-223.

[27]Ibid., pp. 200-201.

the abandonment of *qiyās* is allowed in favor of *istihsān* on the ground of stronger evidence *athar*).[28]

In his *Mabsūt*, Sarakhsī asserts that *istihsān* (juristic preference) is a kind of *qiyās* (systematic reasoning) and both are, in fact, not different from each other except that the *'illa* (effective reasoning) employed in both of them is of a different nature; in the former it is apparent *(jallī)* but weak *(da'īf)* in its evidence *(athar)*; in the latter it is concealed *(khafī)* but strong *(qawī)* in its evidence.[29] But, in *Mabsūt*, Sarakhsī goes further and tries to establish that such a nature of *'illa* of the doctrine of juristic preference consists in and is founded upon the notion of comfort, ease, equanimity and what is accommodating to the people.[30] Thus, *'illa* employed in the doctrine of juristic preference is sometimes on stronger ground, and, as a matter of fact, when considered as that which is implicit or concealed from what is explicit or apparent, the course should take precedence according to the latter. Sarakhsī makes this clear by giving an example that "this world" is to be considered as an *'illa* which is apparent but the "other world" is to be considered as an *'illa* which is concealed in the sense of purity and perfection.[31] Thus, when employed as an implicit *'illa*, it takes precedence and prominence over the *'illa* which is apparent and hence, in such a case, when used as an *'illa*, it is to be considered stronger and employed therewith. Thus, the doctrines of systematic reasoning and juristic preference both are similar in the respect that they both are based upon the concept of *'illa* (effective reasoning), but are different in the nature of *'illa* they employ and thus different in their methodological approach.

Section III: Sarakhsī's Defense Against *Shāfi'ī's* Rebuttal of The Doctrine of Juristic Preference on the Basis of the Concept of Effective Reasoning and the Conditions for its Validity

As already known in the history of Islamic jurisprudence, Shāfi'ī (204 A.H./820 A.D.) was the greatest opponent of the doctrine of juristic preference *(istihsān)*. In his *Usūl*, Sarakhsī, while discussing the nature of the doctrines of systematic reasoning and juristic preference, deals with the objections raised by Shafi'ī in the *Ibtāl al-Istiḥsān* (the Rebuttal of the Doctrine of Juristic

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[28]Ibid., p. 201.
[29]Op. Cit., *Mabsūt*, p. 145.
[30]Ibid., p. 145.
[31]Op. Cit., *Usūl al-Sarakhsī*, p. 203.

Preference) of his *Kitāb al-Umm*[32] and *Risāla*[33] and shows by analyzing that *istihsān*, contrary to what Shāfi'ī maintains, is based upon *'illa* or what Shāfi'ī terms as *khabar* (narrative be it the text of the Qur'ān or Sunnah).[34] Perhaps that is one of the reasons that Sarakhsī asserts that the doctrine of juristic preference is, in fact, a kind of *qiyās* or systematic reasoning as Shfi' himself maintains that various kinds of systematic reasoning are included under the term *qiyās*. According to Shafi'ī, "they differ from one another in the antecedence of the analogy of either one of them, or its source or the source of both, or the circumstance that one is more clear than the other.[35] Sarakhsī analyses all these aspects at great length in his *Usūl* and shows that what Shāfi'ī brings out as objections are really no objections.[36] Shafi'ī maintains that "no one (other than the prophet) is allowed to make a decision except by *istidlal*... Nor should anyone make use of *istihsān* (the doctrine of juristic preference), for to decide by *istihsān* means initiating something himself without basing the decision upon a parallel example.[37] It is not permissible for everyone to exercise *istihsān*, for only the scholars *(fuqahā')*—not others—may give an opinion

> and the scholars hold that a narrative (whether it is a text of the Qur'ān or Sunna) must be followed. If narrative is not found, analogy might be applied on the strength of a narrative, for if analogy were abandoned, it would be permissible for any intelligent man, other than the scholars, to exercise *istihsān* in the absence of a narrative.[38]

> If the jurists were to give an opinion *(ra'y)* based neither on a binding narrative nor on analogy, he is more liable to commit a sin than an ignorant person, if it were permissible for the latter to give an opinion. No one is permitted (after the death of the prophet) to give an opinion except on the strength of legal knowledge which includes the knowledge of the Qur'ān, the Sunnah, general consensus, narrative and analogy based upon these (texts)...[39]

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[32]See Muhammad ibn Idrīs Shāfi'ī, *Kitāb* al-Umm, Vol. VII (Cairo: Būlāq, 1331 A.H./1968 A.D.), pp. 267-69.

[33]See Muhammad ibn Idrīs Shāfi'ī, *Risāla*, trans, Majid Khadduri, *Islamic Jurisprudence, Shāfi'ī's Risāla* (Baltimore: The Johns Hopkins Press, 1961), pp. 304-332.

[34]Ibid., 304.

[35]Ibid., p. 308.

[36]Op. Cit., *Usūl al-Sarakhsī*, p. 140.

[37]Op. Cit., *Islamic Jurisprudence*, p. 70.

[38]Ibid., pp. 304-305

[39]Ibid., p. 306.

Shāfi'ī objects very strongly to the doctrine of juristic preference and pronounces its complete rejection on the very basis which the upholders of the doctrine maintain as its justification, as he maintains that it is not valid for the jurists to rule or adjudicate by exercising *istihsān*;[40] for it is solely to be done on the basis of the textual support and *istihsān* cannot be considered as being included in it. It is in order to deal with this issue systematically that Sarakhsī first establishes in his *Mabsūt* that the *'illa* of the doctrine of *istihsān* is based upon and derived from the Qur'ān and Hadīth. Secondly, in order to do away with all the objections which were later raised in very developed form from Shāfi'ī and Mālikī schools of thought, Sarakhsī in his *Usūl* explains that the principle, the circumstances or necessity involved in any decision, whether exercised by *qiyās, ra'y* or *istihsān*, is already accompanied in the command itself and provided in the Qur'ān or the Sunnah and are already inclusive with it,[41] especially in the matters of prayers and religious sanctions *('ibādāt)*. Thus, here the *'illa*, whether based upon circumstances or necessity, is already included and as such it is the part of the *qiyās, ra'y* or *istihsān*. Sarakhsī further analyses the case that, if there is a difference of opinion with regard to the matter, one has to refer to God and his Prophet. Sarakhsī says that in those sources it is already implied that the exercise of *qiyās* is valid, since the difference of opinion itself is with regard to and in relation to the command or sharī'ah law and takes place in the process of considering whether its textual interpretation is based on the Qur'ān or the Sunna. The condition or the circumstances in which the difference of opinion arises is already inclusive and accompanied in *qiyās*; thus, the exercise of it is recognized and necessarily requires that it is inclusive in the *qiyās* itself.[42]

Sarakhsī makes this point more explicit when he comes to discuss the validity of the doctrine of *ijmā'* (general consensus) as opposed to *ra'y*. It is said, Sarakhsī argues, "wherever general consensus exists, it is sufficient and there is no further need for any exercise of opinion *(ra'y), qiyās* or *istihsān*, as the former implies certainty whereas the latter does not."[43] Sarakhsī defends *istihsān* on the basis of *'illa* and the distinction which he has made of apparent and latent *'illa*. According to Sarakhsī, the claim that the general consensus is certain, whereas *ra'y, qiyās or istihsān* is not, is merely a claim without any evidence. There is no evidence found against *ra'y, qiyās* or *istihsān* (in the book of God),[44] as the establishment of it is found in consideration with

[40]Ibid., p. 305.
[41]Op. Cit., *Usūl al-Sarakhsī*, pp. 127-129.
[42]Ibid., pp. 127-129.
[43]Ibid., P. 132.
[44]Ibid., p. 138.

the meaning *(ma'ānī)* based on textual interpretation. He continues that there are two kinds of *'illa*; namely, apparent and concealed; for the understanding of the apparent *'illa*, one depends upon the concealed *'illa*, as the understanding of it depends upon its meaning. For example in the case of gambling, the apparent *'illa* is provided by its form, but the concealed *'illa* depends upon the meaning.[45] Thus, the question of certainty itself is meaningless. It is rather the evidence or the binding proof of the doctrine of *ijmā'* or the kind of *qiyās* which is the heart of the matter. Thus, it is the *'illa* (apparent) of the *qiyās* or the *'illa* (concealed) of the *istihsān* which provides the binding proof (evidence) even if they do not provide the certainty: their exercise is valid and also permitted as we find it also with the doctrine of general consensus, such as, the cases of traveling for the purpose of business or fighting against the enemy, but such things are not matters of knowledge with certainty. With this it becomes evident that any kind of *qiyās* is based upon the binding proof from the origin *(asl)* and derives its laws based upon *'illa* (effective reasoning). In short, Sarakhsī employs the concept of *'illa* for the doctrine of *qiyās* over the certainty of the doctrine of *ijmā'*(general consensus) and the same can be applied for the validity and employment of the doctrine of juristic preference, since it is one kind of *qiyās*, or to put it in other words, an extension of *qiyās* and the sole ground of its *'illa*, which is different in its nature from that of the proper and technical concept of the doctrine of systematic reasoning, and which lies in facilitation, laxity, ease and comfort. Thus, Sarakhsī quite successfully clears the way against Shāfi'ī's position, as once it is established that the *'illa* (effective reasoning) employed in the doctrine of juristic preference is based upon the evidence from the origin *(asl)* and in no case is it arbitrary, contrary to what Shāfi'ī maintains against the doctrine of juristic preference. Additionally, Sarakhsī specifies the following necessary conditions for the validity of the doctrine of systematic reasoning, which are equally applicable to the doctrine of juristic preference. The first four conditions are specified by Sarakhsī in his *Usūl*[46] and the last one in his *Bāb al-Muwāda'a* of *Sharh al-Siyar al-Kabīr.*[47]

I. That the decision *(hukm)* reached by origin *(asl)*, namely, the Qur'ān, itself is not determined on the basis of any other nas (namely, the Sunnah, *ijmā'* or *qiyās*).
II. That the effective reasoning *('illa)* employed to arrive at any kind of *qiyās* is not established in the same measure that

[45]Ibid., pp. 138-139.
[46]Ibid., pp. 149-150.
[47]Op. Cit., *Sharh al-Siyar al-Kabīr*, p. 225.

can be transcend in its *furū'* (the branches of laws) the origin *(asl)* itself.

III. That after the use of effective reasoning, the laws based upon textual interpretation remain the same as they were before.

IV. That effective reasoning is not applied to reject the wordings of the text, as the text itself remains prior in its wordings and meanings.

V. There is no further deduction of systematic reasoning from the previous one, but it should be based upon and derived from the origin *(asl)*. In other words, the *'illa* of any kind of *qiyās* can never become the basis *(nas)* of another decision and, hence, under no circumstances can it take the place of the origin.

Section IV: Constitutive Elements of Treaties *(Muwāda'a)* as the *'Illa* for the Employment of the Doctrine of Jursitic Preference:

Discussions with regard to the doctrine of systematic reasoning *(qiyās)* and the doctrine of juristic preference *(istihsān)* as based upon apparent and concealed notions of *'illa* (effective reasoning) respectively are found in the history of Islamic jurisprudence for the purpose of broadening the scope of Islamic jurisprudence, but they are generally found within the scope of *ahkām al-dīn* (religious affairs). In Sarakhsī's *Bāb al-Muwāda'a*, we find its analysis and application upon relations *(mu'āmalāt)* of Muslim territories with other non-Muslim territories. Here Sarakhsī tries to establish the autonomy of *mu'āmalāt* (relations) using the concept of *tawassu'* (extension),[48] as the nature of *mu'āmalāt* demands it and thus in order to broaden the scope of Islamic jurisprudence we deal with it by the doctrine of juristic preference rather than with the doctrine of systematic reasoning. Sarakhsī, in his treatment of the subject matter, employs the constitutive elements of *'illa* of the doctrine of juristic preference which enables him to deal with the treaties *(muwāda'a)*. Sarakhsī bases this upon the considerations of the nature of treaties and constitutive elements which form them. It is not a single element or the elements themselves of the treaties in isolation which are of significance such as necessity (*darūra* or *hājja*) or welfare of the community *(maslaha)*, but rather any or all elements constituting the *'illa* as a justification for the employment of the doctrine of juristic preference. In the text of Sarakhsī's *Bāb al-Muwāda'a* the following elements can be shown as constituting the *'illa* of the doctrine of juristic preference:

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[48]Ibid., (Cairo edition), p. 1816; (Hyderabad edition), p. 84.

I. The most essential, and, as a matter of fact, the central aspect of treaties as a constitutive element of *'illa* and the basis for the doctrine of juristic preference as it emerges in Sarakhsī's *Bāb al-Muwāda'a* is the disparity of territories *(tabāyun al-dārayn)*. In the thirty second chapter of *Bāb al-Muwada'a*, Sarakhsī does not discuss simply sharī'ah laws applicable within the territory of Islam, we find Sarakhsī dealing with it in conjunction with the idea of disparity of territories from the considerations of treaties *(muwāda'a)* between two territories. Sarakhsī demonstrates with all subtleties the complex problems which arise due to the peculiar circumstances because of treaties (muwāda'a) between two territories, such as, for example, the debt incurred by a dying person is to be paid first to the claimer in the territory of Islam and then to the one who is in the enemy territory, because, as Sarakhsī words it, "the payment of the debt in the territory of Islam carries more weight."[49] Again, according to Sarakhsī, all mutual relations *(mu'āmalāt)* between two territories are to be handled according to their own laws and rules and they vary from one territory to another, as the different territories have their own sovereignty and sovereign power and thus are to be ruled according to their laws.[50]

II. According to Sarakhsī, such mutual relations arising due to treaties belong to worldly affairs *(akhām al-dunyā)*[51] and their main purpose and especially that of *dhimma* (protection)[52] is to create facilitation between two territories in their mutual relations and thus are employed as an *'illa* by the doctrine of juristic preference.

III. Again the idea of reciprocity *(mujāzāt)* constitutes a very integral aspect of mutual relations between two territories, as the nature of such relations arising due to treaties demands that both territories take into account that they deal with each other reciprocally and equally. For example, the amount of one-tenth *('ushr)* to be taken from a passerby to the territory of Islam is determined in the amount equal to what the authorities in his territory take from the inhabitant of the territory of Islam when he passes their territory.[53]

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[49]Ibid., (Cairo edition), p. 2052; (Hyderabad edition), p. 232.
[50]Ibid., (Cairo edition), p. 1900; (Hyderabad edition), p. 139.
[51]Ibid., (Cairo edition), p. 2282; (Hyderabad edition), p. 322.
[52]Ibid., (Cairo edition), p. 2210; (Hyderabad edition), p. 322.
[53]Ibid., (Cairo edition), p. 2134; (Hyderabad edition), p. 283.

IV. Also, according to Sarakhsī, customs and habits *('ādāt)* of the different territories play a great role in determining the mutual relations between two territories, and they should be given due consideration in treaties.[54]

V. Lastly, the concept of necessity *(darūra or hājjat* as Sarakhsī calls it) can also become a determining factor in mutual relations and can determine the mutual agreements in the treaties between two territories. For example, if Muslims are in a weaker position, they are forced to make a treaty rather than annihilate themselves.[55]

Thus, Sarakhsī expounds on these various factors throughout his *Bāb al-Muwāda'a* of *Sharh al-Siyar al-Kabīr* as constituting the *'illa* (effective reasoning) for the employment of the doctrine of juristic preference and shows in his systematic analyses how they are employed in mutual relations arising due to treaties between the territory of Muslims and other territories.

PART III

SARAKHSĪ'S SYSTEMIZATION OF THE DOCTRINE OF JURISTIC PREFERENCE AND JUSTIFICATION FOR ITS EMPLOYMENT TOWARD *MUWĀDA'A* AND WORLDLY AFFAIRS

In this concluding part, we shall discuss the systematic development of Sarakhsī's doctrine of juristic preference from his *Usūl* and *Mabsūt* and its relation to *muwāda'a* from *Sharh al-Siyar al-Kabīr* so that the real significance of Sarakhsī's contention as developed in the first and second parts become clear.

It can be said from what has been discussed in the second part that it is *Abū Hanīfa* who introduced the notion of *istihsān*, but not as a doctrine which is different from *qiyās*. Abū Yūsuf brought it further and initiated it by calling it preferred *qiyās*. Shaybānī makes use of it, but he uses it in the sense of *ra'y* (opinion or personal discretion) as seen from his *Kitāb al-Asl* and *Jāmi' al-Saghīr*. In these works Shaybānī neither defines it nor does he discuss the nature of the doctrine itself, much less relates it to the subject matter of *muwāda'a*.[56] It is Sarakhsī who first defines it. In his *Usūl*, Sarakhsī

[54]Ibid., (Cairo edition), p. 1900; (Hyderabad edition), p. 131.
[55]Ibid., (Cairo edition), p. 1689; (Hyderabad edition), p. 1.
[56]Op. Cit., *Kitāb al-Asl*, p. 2.

first deals with the nature of *qiyās*[57] and then once again discusses the nature of *qiyās* and *istihsān* in the following section separately,[58] while not yet conceiving of it as a doctrine different from *qiyās*. It is in his *Mabsūt* that he discusses *istihsān* separately as a doctrine and provides its definition and the grounds for the justification of its employment on the basis of the shar'ī sources (asl). The point to be especially noted is that it is discussed in *Mabsūt* in connection with the subject matter of *muwāda'a*. Initially, Sarakhsī considers in his *Usūl Istihsān* as a kind of *qiyās* but develops the concept of *'illa* in terms of its being strong although concealed and shows that the nature of *'illa* which *istihsān* employs is different from that of *qiyās*. Sarakhsī establishes here that the ground for employment of *istihsān* is its *'illa* which is stronger although concealed than the *'illa* used in *qiyās* which is apparent but weak. It is on the basis of this distinction of *'illa* that Sarakhsī develops the doctrine of *istihsān* in his *Usūl* and analyses the *'illa* employed by it in the form of *wujh* (aspect), *ta'līl* (inference) and *tarjīh* (preference) and shows that the *'illa* used in these cases is connected with *asl*.

Sarakhsī states that *wujh* (aspect) in any *hukm* (judgment), whether negative or affirmative, does not become binding unless the evidence is provided.[59] The evidence in the affirmative judgment is kept binding because there is no evidence found which nullifies it. So if the claim for its continuing to be held is made, then it is like a claim in which there is no evidence known to be established, wherein the evidence equals its negation in the sense *(m'ānī)* that each of them does not carry the force of binding because of the lack of evidence. Sarakhsī examines the case of an evidence in testimony on the ground of which a slave is considered free: a person testifies that he purchased the slave in lieu of price and set him free and, thereafter, the original owner comes and wants to purchase him (the slave). Although the original owner has prior right to purchase the slave before the second owner can sell him to anyone else, the slave is considered free and cannot be given in the clientage of the original owner, when viewed from the aspect *(wujh)* of the evidence provided in this testimony. Here, as described by Sarakhsī, the evidence that provides the right of ownership to its owner is not the evidence which keeps his ownership but an evidence which nullifies the keeping of his ownership.[60]

Sarakhsī deals with *ta'līl* (inference), wherein apparent *(zāhir) 'illa* is used as concealed *(bātin)* and the concealed one is used as apparent, formulating them in terms of effect *(ma'lūl)*, which is taken as cause *('illa)*

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[57]Op. cit., Usūl al-Sarakhsī, pp. 118-199.

[58]Ibid., pp. 199-245.

[59]Ibid., p. 221.

[60]Ibid., pp. 220-221.

and cause which is taken as effect, when there occurs any change in the judgment. Here, in inference, change occurs by way of evidence, as in the case of prayers such that what is an apparent *'illa* in the judgment in the first bowing *(rukū')* is taken in the second bowing as concealed *'illa*, which was (in the first bowing) effect *(ma'lūl)*, provided that the cases in which the effect *(ma'lūl)* used as *'illa* and the cases in which the *'illa* (cause) was used to arrive at *ta'līl* (inference) are equivalent. Another example given by Sarakhsī is that of fasting. If fasting is considered as obligatory *('ibādah)*, so it should be considered in the case of pilgrimage. There is no change, but rather one infers here applying what is *'illa* in one judgment and using what is inferred *(ma'lūl)* as *'illa* in the second.[61]

Sarakhsī also brings out the wasf (characteristic) in the cases of *ta'līl* (inference), wherein there is a change from one judgment, in which the apparent *'illa* used is taken as concealed 'illa, and another judgment as wasf (characteristic).[62] For example, fasting is to be accompanied by intention and that is equally applicable when one observes the fasting which is missed *(qadā')*, since both of them carry the same characteristic (i.e., fasting), which is employed as an *'illa* in the second case as it was in the first case. There is nothing extra added to it. Such an addition, if it is provided, is in explanation of the judgment on the ground of the acceptance of evidence and not due to any change made therein.[63] It is the strength due to the similarity and equality of wasf in two judgments which is inference *(istidlāl)* unlike the *'illa* which *Shāfi'ī* brings out between the cases of whipping and stoning. Here, there is no equality of characteristics found between two cases.[64] Another example which Sarakhsī cites is the case of performing the ritual of ablution before the prayer in which one does *masha* (cleaning around the head with water) and if one takes a bath, it becomes included in what is required in the ritual of ablution *(wudū')* and thus *masha* is not necessary after taking a bath. This characteristic is used as an *'illa* in both of the cases; in the former it is apparent, but in the latter it is concealed.[65]

The cases of opposite *'illa* in judgments is dealt by Sarakhsī in terms of their being strong though concealed or apparent but weak. According to Sarakhsī, it is done in two ways: one of them is to reject a judgment which mandates change because of *'illa* so that the opposite of it becomes established. Thus, in this sense *(ma'ānī)*the opposite is rejected and is in no way invented by *zan* (speculation) as asl in *'illa*. For example, in the case of superrogatory

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[61]Ibid., p. 238.
[62]Ibid., p. 239.
[63]Ibid., p. 240.
[64]Ibid., p. 239.
[65]Ibid., p. 240.

fasting, if one takes vows that he shall do it, it becomes obligatory by sharī'ah law and its opposite is that if anyone does not take a vow for it, it does not become obligatory. In this sense the rejection of the opposite results, and is not invented as asl in *'illa* by speculation, but is valid as preference for this kind of 'illa in comparison to the *'illa* which is rejected and is not opposite to the *'illa* as such.[66]

The other kind of opposite is that which forces the judgment not on what it mandates but the opposite of an original judgment and that is such as what *Shāfi'ī* justifies by *'illa* in fasting, that it is a form of worship *('ibādah)*, which is not disputed and its *'illa* does not become mandatory by sharī'ah law as in the case of ablution; but the case of pilgrimage is opposite and its *ta'līl* is mandatory in comparison to the previous case. Thus, if we say whatever becomes obligatory by vow concerning worship *('ibādah)*, it is to be abided by sharī'ah law as in the case of *hajj* (pilgrimage). Here, the law of sharī'ah is considered equivalent to the case of intention of superrogatory acts and the judgment is not based upon speculation such as when one says he is going to pilgrimage. In this kind of opposite, there is a form of rejection of *'illa*, wherein the disputor is able to establish the judgment which contradicts the previous judgment but, according to Sarakhsī, the *'illa* on which it is here argued is not strong.[67]

With the cases of contraries, Sarakhsī again bases his discussion on the *'illa* which is concealed. He classifies contraries into two categories: one regarding the judgments in which there is an *'illa* from *asl* and other with regard to the judgment concerning *furū'*.

There are three kinds of contraries with regard to the *'illa* from *asl*. First is the contrary when an *'illa* is mentioned from asl which transcends *furū'*. The second contrary occurs when *'illa* is mentioned which transcends judgments concerning *furū'*. Lastly there is the contrary by mentioning an *'illa* which transcends judgment regarding *furū'* but is different from *asl*.[68] Sarakhsī does not expound further on this aspect, since it is obvious that the *'illa* based upon *asl* transcends all the cases of *furū'*.

There are five kinds of judgments concerning *furū'* in which contrary can occur.[69] First, contrary which is based upon textual evidence against an *'illa* of judgment in a specific case. For example, the case of repeating of masha (three times washing around head by hands) which one performs in the pillar of ablution *(wudū')*, but it is not so in the major ritual ablution, namely, in *ghusl* (washing of the body) and this contrary is valid and therein

[66]Ibid., p. 241.
[67]Ibid., p. 241.
[68]Ibid., p. 242.
[69]Ibid., pp. 242-245.

the textual evidence is contrary to the *'illa* of the judgment in the specific case.

The second kind of contrary is where there is a change which is the explanation of that judgment on the ground of which it was acknowledged. Sarakhsī explains this again with the example of ablution where the three times washing around head by hands is considered a pillar of ablution, and its completion in the required measure is not mandatory in the major ritual of washing the body. This contrary is an explanation for the change in the acknowledged judgment. These two arguments given above necessitate the contrary for its preference, for with the validity of it (contrary) comes the preference.

The third kind is a contrary with a change in which a disorder exists in the posited case. For example, the case of a minor without a father or grandfather in the appointment of patron and whether he could be given in the clientage of his brother. Here the issue is that an orphan is not given in clientage of a relative and is a contrary *'illa* which rejects the clientage by the specific person (i.e., the brother). But Sarakhsī maintains that in this posited case, the establishment of clientage by any relative whether father, grandfather or any relative like the brother is considered the same. This contrary is valid, although Sarakhsī says it is not strong.

The fourth contrary is that which contains a rejection of what was established or not established by the one who made the *'illa*, but is connected in the posited *ta'līl*. This kind of contrary is opposite to what we had in the second kind. For example, if an unbeliever buys a slave who is Muslim, then he is the unbeliever's property by the conclusion of the contract of purchase and upon the slave being taken into possession. Thus, the slave is considered as the property of the unbeliever, as the judgment remains the same from the very beginning of the contract of purchase and afterward when the salve is taken into possession. But according to Sarakhsī, there is contrary established so long as the contrary negates the *ta'līl* that is, the sameness between the original purchase (of contract) and the slave being in his possession does not become connected in the posited case. Thus, this contrary is not valid as seen from this point of view, even if it is shown that the validity was established on the ground or sense of equality between the two judgments.

Lastly, the case of contrary in establishing judgment by *'illa* which is not suitable by the one who establishes the judgment by *'illa*. The example is as Abū Yūsuf says, that if a woman intends to divorce her husband and she observes the waiting period from him and then marries another person and begets a child and then the first husband appears, then the lineage of the child becomes established from him. The *wasf* (characteristic) of the presence of the second husband is in dispute and thus the marriage with him (the second husband) is not acknowledged, as the condition without the *'illa* does not necessitate the judgment to be established. But, as Abū Hanīfa

considers, the acknowledgment of the marriage (with the second husband as without being *'illa*) has nothing to do with the issue under discussion. In this case, the *'illa* as contrary is not connected with *asl* in the judgment. Thus, in two different cases of *furū'*, the *'illa* are determined differently connected with *asl*. The *ta'līl* (inference) in which *'illa* is not connected with the *asl* is *ilghā'* (null and void). Thus, as seen here according to Sarakhsī, the condition of a valid inference is that its *'illa* is not contrary to *asl*.

With regard to *tarjīh*, Sarakhsī first discusses it in relation to *qiyās* and maintains that the *wasf* when used as an *'illa* is to be directed to what is intended by *asl* and thus to be preferred. It is not something added by speculation, as for example in the case of donation. If something is given as a donation, then it is to be considered in terms of its wasf used as an *'illa* what is intended by the *asl*, unlike the cases of giving ten darhams for one out of the goodness of one's heart which can be considered as wasf but it has no resemblance to the previous case. If a *wasf* is preferred, it is not because of its being simply *wasf*, but rather it is being *wasf* which is directed to what is intended in the judgment by *asl*. With this Sarakhsī also maintains that from the very beginning what is valid as an *'illa* for a judgment is not valid for *tarjīh*, as it does not have the validity of an *'illa* which makes judgment obligatory. For example, the case of testimony. If one of the claimers brings two witnesses in a dispute and the other four, then the latter is not preferred because he has four witnesses, as the judgment is established by two witnesses and is binding by *asl*. However, *tarjīh* is given to the cases in which one brings two witnesses who are (positively known to be) of good and veracious character *('udūl)* and the other brings the witnesses who have (simply) blameless records *(mastūr)*. The former is preferred, because it strengthens the *'illa*.[70]

After this general discussion of *tarjīh* (preference) in relation to *qiyās*, Sarakhsī proceeds to relate the notion of *tarjīh* to *istihsān* as a doctrine. There are four grounds on which *tarjīh* can be made: (i) the strength of evidence (ii) the strength of evidence in a judgment which is acknowledged (iii) when there are numerous *usūl* (principles), and (iv) judgment is not made when *'illa* is not found.

As to the first ground, *tarjīh* is made when the *wasf* becomes a binding evidence. No matter how strong the evidence is to justify it, priority is given to the *wasf* of certainty which provides the binding of a judgment, like in the case of evidence by *istihsān* accompanied by *qiyās*; or when there is a conflict in the case of narrations, the priority is given to the narration according to how the narrator of it is reliable and known and not simply how far the narration reaches closer to the Prophet. Shāfi'ī explains the case

[70]Ibid., p. 250.

of wasf by giving an example that when one lets the slave mother (of his children) free, it is forbidden to marry her because in the contract of marriage there is a part of slavery (from him) and thus he is not allowed to marry her as if she is free. This *wasf* is among the evidences, because slavery is considered as equivalent to killing. So in this case it would be considered that he is forbidden to kill his own legitimate son or kill his own son (from a slave mother). This is based upon the strength of evidence derived from the sources of law *(usūl)*.[71]

The second case of *tarjīh* is the assumption that the strength of the acknowledged judgment is established on the ground of its asl based upon textual evidence *(nas)* or *ijmā'*. Thus, whatever becomes established by textual evidence or *ijmā'* is considered firmly established, and so from that aspect whatever appears as having more strength in evidence on the basis of *Usūl* becomes preferable, and, on that consideration, preference becomes binding. Sarakhsī provides here several examples. One of them is fasting and the other pillars in relation to the intention and states that the exact wasf by specification is considered strong as an *'illa* to nullify the condition of (exact) intention. For example, if one gives the alms *(sadqa)* to the poor, then it is not considered as alms tax *(zakāt)*.[72]

The third case of *tarjīh* is when it is accompanied by numerous *Usūl*, because in this sense it becomes *wasf* and therewith binding as in the case of the narration which is well-known and hence it becomes obligatory to accept it.[73]

The fourth case of *tarjīh* is that when *'illa* is not found, the judgment is not made. It is the weakest kind of preference, because it is possible that the *'illa* which is absent could have served as an evidence to establish the link between the judgment and *'illa* and thus provided the certainty.[74]

Sarakhsī describes the general procedure for the above-mentioned cases to avoid any conflicts in establishing the evidence for the preference in the following manner.

Every occurrence exists in a certain form and in its meaning *(m'ānī)*. The circumstances occur and if the evidence of preference contradicts a certain meaning, then the preference is given to the meaning itself. This is because of two reasons: (i) the meaning is more readily available than the circumstances or conditions, so that after preference has occurred for one of them, then meaning does not change necessarily by what has happened, as there is a connection between the judgment and ijtihād (exercise of legal reasoning)

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[71]Ibid., p. 254.
[72]Ibid., p. 259.
[73]Ibid., p. 261.
[74]Ibid., p. 261.

and is to be abided by. (ii) The occurrence takes place with the meaning, and the meaning is asl and what takes place with it is simply circumstances or condition which are viewed as subordinated to asl. The *asl* does not change by subordination to any circumstances.[75]

After this, Sarakhsī concludes that the following kinds of *tarjīh* are null and void:[76]

The first (a) preference of one qiyās over the other, for each one of them is based upon valid *'illa*, (b) the preference of one *qiyās* over the other on the basis of invalid narration, for if one *qiyās* is abandoned in favor of the other, then it is not binding to prefer the latter because the contradiction has occurred between them, (c) the preference of one of the two narrations based upon textual evidence *(nas)*, for narration is not binding when it is contradictory.

The second is when the preference is accompanied by several resemblances. The example of such a resemblance is that if a brother resembles his father in relation of consanguinity precluding marriage and this resemblance is compared to the case wherein he resembles the nephew and, thereby, one concludes the validity of requital from both sides and the acceptance to testimony by each for one another and the permissibility of giving alms tax to each other.

The third invalid case of preference is when the *'illa* is too general. For example, the ruling with regard to interest *(ribā)* in the following cases: (a) primarily in food, because it is too general, as it *(ribā)* can be too much or too little. (b) when the inference is concerned with the specific and if the priority is given to the general, then it is invalid, because establishing a judgment by *'illa* is a part of establishing judgment with *nas*. According to Sarakhsī, preference in *nas* is invalid in reference to general or specific, as the specific in this case would nullify the general. Moreover, the meaning of specific and general is dependent and given only in the context of nas and the *'illa* therein is considered in reference to its effectiveness or non-effectiveness and it has nothing to do with its being general or specific. (c). The *tarjīh* used with insufficiency of *ausāf* (pl. -of wasf). For example, in the ruling of interest the *'illa* has one *wasf*, namely, food, but the sameness of things *(jinsīya)* is a condition and here the *wasf* made as an *'illa* of interest has two qualities. This is invalid, because, as already mentioned before, the establishing of a judgment with an *'illa* is a part of connecting the *furū'* with nas and if that nas contains any figurative interpretation or abridged representation, it is not preferred against that which contains an exact and detailed description. Thus, *'illa* has priority, because it establishes the judgment

[75]Ibid., p. 262.

[76]Ibid., pp. 264-265

with the context of nas and thus achieves the effectiveness which figurative interpretation and abridged representation does not.

After these clarifications concerning *wujh*, *ta'līl* and *tarjīh* as used in *qiyās* and *istihsān*, Sarakhsī proceeds in his *Mabsūt* to deal with the doctrine of *istihsān* independently and seeks justification for its employment by showing that its *'illa* is derived from *asl* and based upon textual evidence *(nas)* as already discussed.

Thus, Sarakhsī in his *Mabsūt* defines the doctrine of *istihsān* from the view that its *'illa* is strong and on the ground of which istihsān is employed abandoning *qiyās*. Here Sarakhsī seems to make a shift, but what he has done in *Usūl* in relation to the subject matter of *muwāda'a* to be followed in *Mabsūt*, then it becomes perfectly clear that he is here concerned with the relations *(mu'āmalāt)* of Muslims with other nations and they belong to *ahkām al-dunyā* (worldly affairs) as in contrast to *ahkām al-dīn* (religious affairs) which he first deals with in *Usūl* and previous volumes of *Mabsūt*. It is true that Sarakhsī in his *Mabsūt* follows Shaybānī and most of his discussions are parallel with what we find in Shaybānī's *Kitāb al-Asl* and also the discussions with regard to *tabāyun al-dārayn* (disparity of territories) in Shaybānī's *Asl* are followed by Sarakhsī in his *Mabsūt*.

PART IV

SARAKHSĪ'S DOCTRINE OF JURISTIC PREFERENCE AND JUSTIFICATION FOR ITS EMPLOYMENT IN *MUWĀDA'A* AND WORLDLY AFFAIRS

It is in *Bāb al-Muwāda'a* of *Sharh al-Siyar al-Kabīr*, Sarakhsī vigorously subjects *muwāda'a* and worldly affairs to the well-defined doctrine of juristic preference and claims for the first time, though modestly in the name of Shaybānī, that the promise of security *(amān)*, the subject matter of *muwāda'a*, is ruled by the doctrine of juristic preference.[77]

The peace agreement is given on the ground of the doctrine of juristic preference although such is not the case by the doctrine of systematic reasoning.[78] The *muwāda'a* is to be based upon the notion of extension *(tawassu')*.[79] Sarakhsī asserts here that the reason for such an extension is the disparity of territories *(tabāyun al-dārayn)*. It is true that the notion of

[77]Op. Cit., *Sharh al-Siyar al-Kabīr*, pp. 82, 84.

[78]Ibid., (Cairo edition), p. 1813; (Hyderabad edition), p. 82.

[79]Ibid.

disparity of territories was first introduced as Schacht observes,[80] by Abū Hanīfa and it can be said of Abū Yūsuf and Shaybānī that they used it in their *Kitāb al-Kharāj* and *Kitāb al-Asl* respectively, but it is Sarakhsī in his *muwāda'a* who establishes and pronounces that the disparity of territory has the efficacy of going beyond the disparity of religion with regard to the matters of *amān* (protection)[81] and *muwāda'a* in general. Even the rulings with regard to marriage and inheritance are to be dealt with not by the congruity of religion, but based upon the contract. The inviolability of religion becomes established only for the one who believes in it; not for the one who does not.[82] The laws of Islam are not applicable to other territories,[83] and equally, they are not under obligation to them, as in the first place they make the treaty with Muslims on the condition that the laws of Islam do not apply to them.[84] The *"dhimma"* is designed for worldly affairs[85] and here the sole concern is the treaty and to abide what is agreed upon. It is incumbent upon Muslims to abide by the treaty and not breach the contract when they enter the other territories; nor are they allowed to take their properties without their consent.[86] Even envoys are under absolute protection unconditionally.[87] With the acceptance of disparity of territories, their laws are also recognized. If there is a dispute between the two parties from those territories in the territory of Islam, then their laws are recognized and it is ruled not according to the laws of Islam, but according to their laws.[88]

Thus, to achieve the purpose of *muwāda'a* one has to abandon the usual doctrine of systematic reasoning, as the affairs of *muwāda'a* are broader and we have to extend it by the doctrine of juristic preference as it is demanded by the very nature of *muwāda'a*. Sarakhsī does this by employing what we have previously called constitutive elements of *muwāda'a* such as: (i) necessity[89] (ii) political authority of the other territories and their laws[90] (iii) customs and habits of the people in different territories[91] (iv) ruling of mutual exchange and reciprocity[92] and (v) reconciliation.[93] According to Sarakhsī, this is due

[80]Joseph Schacht, *Origins of Muhammadan Jurisprudence* (London Oxford University Press 1950), p. 298.

[81]Op. Cit., *Sharh al-Siyar al-Kabīr,* p. 138.

[82]Ibid., (Cairo edition), p. 1885; (Hyderabad edition), p. 129.

[83]Ibid., (Cairo edition), p. 1725; (Hyderabad edition), p. 25.

[84]Ibid., (Cairo edition), p. 1857; (Hyderabad edition), p. 322.

[85]Ibid., (Cairo edition), p. 2196; (Hyderabad edition), p. 322.

[86]Ibid., (Cairo edition), p 1861; (Hyderabad edition), p. 113.

[87]Ibid., (Cairo edition), p. 1788; (Hyderabad edition), p. 66.

[88]Ibid., (Cairo edition), p. 1739, 1741; (Hyderabad edition), p. 35, 36.

[89]Ibid., (Cairo edition), p. 1689, 1694, 1724; (Hyderabad edition), p. 2, 5, 24.

[90]Ibid., (Cairo edition), p. 1996, 1702, 1725; (Hyderabad edition), p. 6, 10, 25.

[91]Ibid., (Cairo edition), p. 1713, 1721, 1724, 1803; (Hyderabad edition), p. 17, 22, 25, 75.

[92]Ibid., (Cairo edition), p. 1790, 1867, 2139; (Hyderabad edition), p. 68, 117, 285.

[93]Ibid., (Cairo edition), p. 224; (Hyderabad edition), p. 341.