Exploring God's law: Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī on *zakāt*

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I

Literary works within the genre of *furūᶜ al-fiqh* are characterised by two major hermeneutical constraints. The primary constraint is that of loyalty to tradition *(madhhab)*. Of jurists who produced lasting works, the vast bulk were consciously allied to a school tradition and wrote in submission to it. They were not alone before revelation (in a position of interpretative freedom or licence), but heirs to, guardians of and interpreters of a tradition of interpretation. The second constraint is that of justification by reference to revelation. The school tradition as it was understood or presented by individual jurists had to be defensible by reference (primarily) to Qur'ān and hadith. Most of the literature of the law and many of its formal elements can be characterised by reference to this dual hermeneutical activity. The formal structures of commentary, gloss, supercommentary, multiple citation of authority, and jigsaw puzzle composition (where new works were created by the juxtaposition of phrases, sentences and paragraphs derived from earlier authorities, as in the *Al-Baḥr al-Rā'iq* of Ibn Nujaym[1] or in the *Fatāwā Hindiyya*[2]) are all symbolic of the school-based hermeneutical engagement that gripped and inspired the Muslim jurists.

The individuality of particular works – their thinness or density of texture, their vitality, complexity, capacity to engage the intellect or the imagination etc. depended on a number of other tendencies which were differentially exploited by different writers at different times and places, and are much less easy to define or quantify. Language for example (at

[1] Ibn Nujaym, Zayn al-Dīn b. Ibrāhīm al-Miṣrī (d. 970/1563), author of *Al-Baḥr al-Rā'iq*, a commentary on the *Kanz al-Daqā'iq* of ᶜAbdallāh b. Aḥmad Ḥāfiẓ al-Din al-Nasafī (d. 710/1310).

[2] The *Fatāwā Hindiyya* or the *Fatāwā ᶜĀlamgīrī*, a work of Ḥanafī *fiqh* compiled under the patronage of Aurangzēb in the years 1664 - 72, its chief author being Shaykh Niẓām Burhānpūrī.

the level of word or sentence) or presentational elegance and coherence (at the level of paragraph) might be foregrounded to the point of virtuosity. There were infinite gradations of interest between a practical sense of the real consequences of the law and an imaginative exploration of its logical (or analogical) possibilities. Some jurists were at ease with a dialectical and exploratory presentation of the law; others tended towards a static monovalency. Unsurprisingly, since the world of literature is not identical with the world of everyday problems (the teaching *faqīh* is not at the same time a *muftī*) the works that have been promoted by the tradition as valuable tend to display qualities of virtuosity (of language, structure, content) that elicit reader responses that are literary (intellectual, imaginative, playful) and not merely practical. It is an evidently inadequate reader-response to treat the linguistic virtuosity of the Mālikī jurist Khalīl b. Isḥāq[3], or the densely textured argument of the Ḥanafī jurist Sarakhsī, as if these writers intended to produce simply a list of instructions.

The Ḥanafī jurist Muḥammad b. Aḥmad b. Abī Sahl Abū Bakr al-Sarakhsī (d. ca. 490/1097[4]) has long been perceived by Western scholars as, in some way, a distinctive writer, though little has been done in the way of characterising his distinction.[5] His method, approach and achievement will hardly be illustrated by one brief sondage, such as is attempted here, but without some beginning he will not be appreciated at all. Merely to cite Sarakhsī's preferred opinions about the law – which has been done often enough – will not uncover his peculiar genius. Something appropriately complex (and correspondingly revealing) is required. The passages translated below illustrate the play of thought and argument in that part of Sarakhsī's discussion of *zakāt* where he perceives certain tensions arising between the demands of God and the rights and

[3] Khalīl b. Isḥāq (d.776/1374), author of the famous *Mukhtaṣar*, frequently published.

[4] The *Kitāb al-Jawāhir al-Muḍiyya* (Ḥaydarābād, 1332/1912) by ʿAbd al-Qādir b. Abī al-Wafā' Muḥammad al-Qurashī (d. 775/1373) gives his date of death at ca. 490/1097; vol. 2, 29 (no. 85). The *Fawa'id al-Bahiyya* (Beirut? 1323) of Muhammad ʿAbd al-Hayy al-Laknawī repeats this and adds the alternative *(wa-qīla)* of ca. 500/1107; p. 158. This is probably derived from Ibn Qutlubughā, *Tāj al-tarājim*, (ed. Flügel, Leipzig, 1862), no. 157. F Sezgin gives 483/1090 *(Geschichte des Arabischen Schrifttums*, Leiden, 1967, vol. 1, p. 443), possibly following Heffening in EI[1], ad Sarakhsī. Se now "Sarakhsī" in EI[2].

[5] See Heffening in EI[1] ad Sarakhsī. Baber Johansen is probably the best of those who frequently cite Sarakhsī, but he too tends to use this work as a source of rules, rather than to discover his (Sarakhsī's) literary aims. See e.g. *The Islamic law on land tax and rent* (Croom Helm, London, 1988) passim.

duties of the *zakāt* donors, *zakāt* recipients, tax-collectors and governor. In relation to the wide span of interests represented in a work of *fiqh,* or even in those parts of it which deal with *zakāt,* that is a small topic. It has however the merit of being fairly easily defined and separated from other issues, and its problems are less intractable to 20th century analysis than some.

Sarakhsī's *Mabsūṭ* is a commentary on the work known as *Al-Kāfī* by Muḥammad ibn Muḥammad al-Ḥākim al-Marwazī[6]. That work dictates the organisational structure of Sarakhsi's work and provides a framework of basic rules. These are expanded by Sarakhsī, often by pointing to acknowledged dispute *(ikhtilāf)* within the Ḥanafī tradition or across the major schools, and by the provision of justificatory or explanatory argument. The chapter headings for discussion of *zakāt* relate to property which can be the subject of ownership: camels, sheep and goats, cattle, gold and silver, trade goods, minerals, agricultural produce. The quality of Sarakhsī's discussion might be described as ritualistic: it involves an intense and unsparing focus on detail, on typologies of goods, on nomenclature, on modes of ownership, timing of payments, expressions of intention etc., much of which is impractical, and inimical to the social end of *zakāt* (if indeed it is conceded to have one, other than accidentally). The mode of discussion is juristic but its quality is ritualistic and religious and can perhaps be accounted for by the unarticulated but pervasive sense that this is God's law, deserving of unsparing effort and constantly sharpened focus.

The nexus of responsibilities as between donor, recipient, tax-collector and governor first becomes an issue in the section on camels. The arguments there are understood to cover all pastoral animals, and not to cover gold, silver and trade goods as long as these are kept at home. If gold, silver and trade goods are carried from city to city or in any other way through the customs barriers set up by governors, they are legitimately subject to a tax conventionally termed *ʿushr,* though not necessarily realised as a tithe.[7] In this case the rules that have been stated for camels come into effect again, for it is understood that, in some way or another – and it is a matter of considerable complexity – the private religious duty of *zakāt* takes on some aspects of a public duty in so far as the governor

[6] Died 334/945, or, possibly, 344/955. Both dates are given in Laknawī, *Fawā'id,* 185.

[7] Sarakhsī, *Mabsūṭ,* vol. 2, 199. The *ʿushr* for Muslim traders is here specified as one fortieth.

plays his role in providing the property owner with protection (or in so far as the governor is a deputy of God etc.)[8]. (The distinction is formally between *ẓāhir* or apparent goods, and *bāṭin* or hidden goods. Curiously, this terminology, though certainly current in some juristic discussions at this time, is not alluded to by Sarakhsī.) The following discussion is based on two citations from Sarakhsī. The first, taken from the section on camels, represents an exploratory and idealistic statement of the potential rights and duties of donors, recipients, tax-collectors and governor. The second, from a later part of the same section, shows Sarakhsī coming to a narrower focus on the actual governors of his day and on the way their activities affect the actual and current fulfillment of this ritual duty. A full analysis of Sarakhsī's views, even on this limited topic, would require this analysis to be extended in order to cover also customs duties and agricultural produce, but this will not be attempted here.

II

In the following passage Sarakhsī conceives of (in fact inherits from Marwazī[9]) three situations in which the owner of camels (or other pastoral animals), faced with a demand from a tax-collector, may refuse to pay.

> 1.1. The collector arrives. The owner says, I have not had these animals for a whole year, or, I owe a debt which is greater than their value, or, These animals are not mine. He then swears that this is so. He is believed in all cases.
>
> 1.2. This is because he is responsible *(amīn)* for *zakāt* duties that are obligatory on him. *Zakāt* is an act of worship purely for the sake of God *(ʿibāda khāliṣa li-llāh)*, and the word of a responsible person is always acceptable in regard to acts of worship that are obligatory [solely] as

[8] Ibid., 199-200.

[9] The printed text of Sarakhsī's *Mabsūṭ* does not indicate the limits of the text inherited from Marwazī. It can be guessed at, and sometimes fairly securely recovered. I have not however tried to impose my guesses here on the reader. Punctuation, paragraph structure, and the provision of numbers for ease of reference have been added to the translated passages and are part of an effort at interpretative understanding.

being due to God. Hence if the owner denies that *zakāt* is obligatory, for any of the reasons just given, the collector must believe him. He is however required to swear.

1.3. The requirement to swear is not specified in one tradition from Abū Yūsuf. He said, No oath is required because oaths are irrelevant in regard to acts of worship *(ʿibādāt)*. It is like one who says, I have fasted, or, I have prayed; he is believed without an oath. But according to the main tradition *(ẓāhir al-riwāya)*, Abū Yūsuf said, Required is the affirmation of a responsible person, together with an oath *(al-qawl qawl al-amīn maʿa 'l-yamīn)*. In other acts of worship oaths are not relevant because there is no-one who might be deemed to be calling the worshipper a liar. But here the collector is [implicitly] denying the claim put forward by the donor. Hence he is required to swear.

2.1. The owner says, Another collector has already taken my *zakāt;* and he swears that this is so. If there has not been another collector in that year his word is not accepted.

2.2. This is because a responsible man is believed if he affirms what is probable; but if he affirms what is improbable, he is not believed. In this case, the owner affirms what is improbable. If there has been another collector that year, his word stands.

2.3. This is true whether or not the owner brings forward a certificate of payment. So, in the *Mukhtaṣar* [i.e. of Marwazī]. This is the tradition as derived from the *Kitāb al-Jāmiʿ al-ṣaghīr* [of Shaybānī].

2.4. In the *Kitāb al-zakāt* however Shaybānī says, If he brings forward a certificate of payment. This implies that showing a certificate of payment is a condition for believing the owner in this case. This is the tradition from Ḥasan b. Ziyād from Abu Ḥanīfa. The reason for this is that the owner has affirmed something and brought evidence of its being true. The custom is that when a collector takes *ṣadaqa,* he gives a certificate of payment. Hence the owner's affirmation is accepted if accompanied by this evidence. Otherwise it is rejected. It is like the case of a woman who affirms that she has given birth: if the midwife also bears witness to it, her word is accepted, otherwise not.

2.5. The other view [that a certificate is not required] – which is the more valid view – rests on the fact that a certificate is in writing, and all writing is similar. Also the owner may inadvertently neglect to take the certificate, or may lose it subsequently. So it should not be made decisive in this matter. The rule is that the owner's word is accepted if accompanied by an oath.

3.1. The owner says, I have paid my *zakāt* directly to the poor. He is not believed and, according to our tradition, *zakāt* is taken from him [i.e. a second payment].

3.2. According to Shāfiʿī, he is believed. This is because *zakāt* is obligatory only for the sake of the poor, as proved by (Q9.60), *Ṣadaqāt* are only for the poor, the miserable etc. Furthermore God says (Q51.19), On their wealth is a claim for the beggar and the deprived. Hence, if the due sum is transferred to the rightful recipient, and the rightful recipient has the capacity to receive that due sum, the duty of the donor is fulfilled *(bari'at dhimmatu-hu)*. It is like the case of one who buys something from an agent, and then transfers the price directly to the one who appointed the agent. In this case, the collector receives the *zakāt* in order to pass it to the poor, and the donor has relieved him of this burden by placing it directly where it belongs. So there can be no claim against him [by the collector].

3.3. The argument for our view is as follows. *Zakāt* is a financial duty implemented in full by the imam by virtue of legitimate *(sharʿī)* authority. The person subject to the duty does not have the capacity to deprive the imam of his right to implement it. It is like the case of one subject to *jizya* [the poll tax, deemed to be specified for purposes of defence] who decides to pay it directly to the soldiers; [this is not permitted].

This argument may be explained in two ways

3.3.1. *Zakāt* is due solely for God's sake *(maḥḍ ḥaqq Allāh)*. So it can be implemented only by one who is appointed as deputy for the implementation of what is due to God *(man yuʿayyan nā'iban fī istīfā' ḥuqūq Allāh)*. This is the imam. Accordingly, the duty of the donor is not fulfilled *(lā tabra'u dhimmatu-hu)* except by transfer of his *zakāt* to the imam. On the basis of this argument we affirm that even if the donor is

known to be telling the truth when he states that he paid the *zakāt* directly to the poor, it is taken from him a second time. His duty, as between him and God, is not fulfilled by direct payment to the poor. This is the preferred view of one/some of our shaykhs, namely, that the imam has the right of choice in deciding where to distribute the *zakāt,* and the donor may not deprive the imam of this right of choice.

3.3.2. The collector is deemed agent *(ʿāmil)* to the poor. What is collected is due to the poor. But the right of collection has been transferred to the collector so that the poor do not retain the right of demand on their own behalf. Nor is it obligatory to pay them, if they request it. It is like the case of a debt due to a minor: if the debtor pays it to the minor and not to the minor's guardian [it is not valid]. According to this analysis, we affirm that a man is deemed to have fulfilled his duty as between himself and God if he pays directly to the poor.

3.3.3. The plain meaning of the phrase "he is not believed" [as used by Marwazī, author of the text which Sarakhsī is commenting on] is an indication of this position. It means that if the donor is known to be telling the truth the collector should not interfere with him. This is because the poor have the capacity to receive what is their due; though it is not obligatory to pay them on their demand. Deeming the collector to be a representative of the poor is to give him a capacity of supervision under the law. Accordingly, if the donor pays directly to the poor, when the latter make no demand on the former, the aim of the duty of *zakāt* has been achieved. It is different from the case of the minor, for he does not have the capacity to receive what is due to him, so the duty is not fulfilled by paying him directly.[10]

Each of these three paragraphs contains a rule, some kind of defence of the rule, and an item of *ikhtilāf* which, also provided with a justificatory defence, permits further exploration of the rule. The first result of this format, in relation to the base text of Marwazī, is that a relatively simple statement of the Ḥanafī code (Marwazī) is brought back into the sphere of argument and discovery - where it is assumed to have come from. The *ikhtilāf* items which are the primary generator of this phenomenon may

[10] Id. *Mabsūṭ,* vol. 2, 161-2.

be derived from inside the Ḥanafī tradition (paras. 1 and 2) or from outside it (para. 3) – a fact which has implications both for the Ḥanafī code and for the global concept of Islamic law (or *sharīʿa*). The concise statement of the law is presumed to be distilled from a matrix of argument (Ḥanafī and Islamic) which, rediscovered and reasserted, engages the reader in the process of creative discovery – but does not offer him the licence of choice, since loyalty to the tradition is presupposed.

A second result of the commentary, in this passage, is that rules are measured against a causal nexus which, at least potentially, explains them. All three rules here are to a degree measured against the idea that *zakāt* is a pure act of worship, for the sake of God, and consequently a private responsibility (1.2). That idea is however discovered to be not sufficient to explain the rules. The duty of *zakāt*, which is ideally pure and for the sake of God, necessarily, by the internal logic of its nature, creates rights which accrue to the poor, or the tax-collector, or the imam, and so derogate from the expected rights of the donor. Since neither the rules nor the concomitant possible structures of rights are definitive, the message that can be recovered from all this is, to say the least, complex.

Para. 1 is based on a set of logical possibilities that derives directly from the rules governing the individual's liability to *zakāt*. Here, at first, responsibility is left entirely with the individual, and is justified by reference to *zakāt* as an act of worship solely for the sake of God. The need for an oath however is deemed to be a matter of *ikhtilāf*, permitting *zakāt* to be seen as precisely like other private acts of worship (prayer, fasting), or as significantly different – based on a functional right accruing to the tax-collector and so derogating from the potential full rights of the donor. Sarakhsī prefers the latter rule.

Para. 2 is also based on a logical possibility, arising out of the nature of tax-collecting on camels. Here, initially, the factual improbability of a claim is made to derogate from the private rights of the donor (2.2). In the end however Sarakhsī restates this rule so as to bring it into line with para. 1: the owner's word is accepted if accompanied by an oath (2.5). The *ikhtilāf* item focuses on a certificate of payment. The rejected view acknowledges that this can be a relevant support to a claim of this kind. The preferred view (based on grounds that would be as unsatisfactory to a medieval as to a modern administrator, 2.5) tends to bolster the idea of *zakāt* as a private responsibility and a religious one rather than merely (!) an administrative and social obligation.

Para. 3 is the most complex. In the end Sarakhsī here almost reverses

the law that he inherited. As he inherited it, the donor who claimed to have paid the poor directly, was not to be believed, and would be forced to pay a second time (3.1). In his final résumé however, the donor's act will be effective "if he is known to be telling the truth"(3.3.3) . That leaves a considerable and unexplored stress on "knowing". In order to reach that conclusion, Sarakhsī first introduced an *ikhtilāf* item from Shāfiʿī (3.2). He then stated the Ḥanafī position as he understood it (3.3). He then offered two explanations of the Ḥanafī position, implying that even if not compatible with one another (as they are not) they were both compatible with the overall Ḥanafī position. This is not obvious in the case of the second explanation which makes no overt link to the crucial concept of the imam and his legitimate authority. Sarakhsī may be assumed to be forcing the tradition more than a little when he uses the second of these explanations as a means to understand his base text. The result of course is to minimise the role of the governor/imam, in relation to what it might have been (had Sarakhsī for example chosen to use 3.3.1 instead of 3.3.2 in order to understand the base text). In the final preferred position, the donor, paying by himself, is secure as between himself and God, absolutely (3.3.2) and secure, as between himself and the tax-collector, if known to be telling the truth (3.3.3). It is not an accident that, in this paragraph, Sarakhsī introduces the Shāfiʿī view prior to providing a defensive analysis of the Ḥanafī tradition. For the concepts which he eventually prefers as an explanation of the Ḥanafī view (at 3 3.2 and 3.3.3) are, in part, derived from the Shāfiʿī analysis.[11]

Throughout this passage Sarakhsī is quite clearly partisan; in favour of a concept of *zakāt* which makes it a highly personal duty, between

[11] When, in the context of customs duties *(ʿushur)*, Sarakhsī recapitulates this problem, he follows the mood of this passage at least to the extent of giving full rights of personal distribution to the donor, thereby, in this context, depriving the Imam of any.

> If a Muslim says, I have paid the *ṣadaqa* (on trade goods) direct to the poor, he is believed, as long as he swears an oath to that effect. This is different from the situation with regard to pastoral animals because on trade goods the right of payment is delegated to the owner prior to his passing through any customs barrier. [I.e. since the owner of trade goods has the general right of personal distribution it is perfectly reasonable for him to have executed that right prior to his passing through the customs barrier, and so, making that claim, he is believed – if he accompanies the claim with an oath.] But in pastoral animals the right of collection belongs to the Imam *(kāna ḥaqq al-akhdh li-l-imām. Mabsūṭ,* vol 2, p. 200.)

Just how little and how much that right of collection could mean depends on the different analyses of 3.3.1 and 3.3.2-3.

individual worshippers and God. Its social functions are, in the preferred readings, accidental (though acknowledged to be primary in a view attributed to Shāfiʿī and therefore within the possibilities of Muslim juristic argument). The emergence of rights in others (the poor, the tax-collector) and the consequent derogation of rights in the donor is also accidental, and deemed to have no implications that *zakāt* is for the sake of the poor (a view attributed to Shāfiʿī) or for the sake of the imam (as deputy to God, a Ḥanafī view acknowledged, but displaced in favour of an alternative, which is less obviously in line with the Ḥanafī tradition as presented at 3.3). By embedding his preferred views in a reticulation which contains also rejected positions, Sarakhsī gives expression to a concept of law which is dialectical, exploratory, suggestive and intellectually stimulating. The exploratory approach to *zakāt* requires the reader, more or less simultaneously, to see and consider varied possibilities. Perspective however is achieved by insisting on a dominant approach, that which is asserted to be the Ḥanafī tradition (which is nonetheless quite obviously developed/changed both at para. 2 and at para. 3). The complexity of Sarakhsī's discourse is ensured by the number of structures he brings into correlation. First, the rules of the base-text (Marwazī); then the items of *ikhtilāf;* then the explanatory framework. In addition to all this there is a trailing set of analogies (at 2.4; 3.2; 3.3; 3.3.2; 3.3.3) which compares the relationships set up in a context of *zakāt* to the relationships set up in a number of other legal situations.

This type of discussion is obviously not (directly) practical. These rules and the discussion around them do not conform to the tax-collecting situation as it existed in Sarakhsī's time, and probably could not be brought into line with any realistic social approach to tax-collecting. The passage as a whole points to ways of thinking about *zakāt,* and urges a suitable complexity of approach(es). It does not tell anyone what to do. Even the rules which initiated the commentary were not practical (a point acknowledged by Sarakhsī; see Section III, below). They were derived through logical (though not exhaustive or inevitable) processes of thought about the implications of certain hypothetical eventualities, and they gave rise to abstract thinking about the nature of *zakāt* and its capacity (whether essentially or accidentally) to engender a network of rights and duties.

III

Reflection on rules and on their implications for the nature (or natures) of *zakāt* (and for the nature or natures of political authority in respect of *zakāt*) etc. might of course serve immediate practical ends and generate a simple rule of conduct. In the following passage, Sarakhsī eventually focuses on the situation of *zakāt* donors in his own time and place. The rule he discovers however is significantly not provided by the tradition, but drawn by him out of the conceptual possibilities of the law, with evident and considerable ingenuity.

1.1 Outlaws *(khawārij)* conquer one of the lands of the People of Justice and collect the alms *(ṣadaqa)* due on their property. Subsequently the imam re-conquers the land. He may not collect these dues a second time. This is because he has failed to provide protection and "collection depends on protection" – *al-jibāya takūn bi-sabab al-ḥimāya.*

1.2 This ruling is different from that of the merchant who passes the customs officer *(ʿāshir)* of a rebel people *(ahl al-baghy)* and is taxed. If he subsequently passes the customs officer of the People of Justice he may be taxed a second time. This is because the owner exposed his own property to the rebels when he took it through their land. So he is not excused. In the former situation however the owner of property did nothing. Rather, the imam failed in his duty of protection, so he may not collect a second time.

1.3 However the ruling is issued that the owner of property in case of conquest by outlaws should pay, as between himself and God, a second time. This is because they do not collect our wealth as *ṣadaqa,* but through mere lawlessness. They do not distribute it as *zakāt* should be distributed. Hence the owner should pay what is incumbent on him for the sake of God. Whatever they took from him was mere injustice.

1.4 Likewise with respect to the Dhimmi community: if the outlaws take their poll tax, the imam may not extract from them further taxation, because he has failed to provide protection.

2. As to the collections made by the sultans of our time, these tyrants *(hā'ulā'i al-ẓalama),* whether alms, tithes, *kharāj* or *jizya,* Marwazī

[author of the work Sarakhsī is commenting on] did not deal with them. Many of the religious leaders of Balkh promulgate the ruling that payment is required a second time, as between the owner of goods and God, as in the case of land conquered by rebels. This is because we know that they do not distribute the collected wealth as it should be distributed.

2.2 Abū Bakr al-Aʿmash used to say that on *ṣadaqāt* they rule that repetition is required but on *kharāj* this is not so. This is because the rightful recipients of *kharāj* are the military, and these are the military: if an enemy appeared they would defend *Dār al-islām*. *Ṣadaqāt* however are for the poor and the needy, and they do not give it to the poor and the needy.

2.3 The more valid view is that these illegitimate collections fulfill for the owners of wealth the duty of *zakāt* – as long as they formulate at the time of payment the intention of giving alms to them [i.e. to the unjust sultans]. This is because the wealth that they possess is the property of the Muslims, and the debts they owe to Muslims are greater than their own wealth. If they returned to the Muslims what they owe them, they would possess nothing. Accordingly they have the status of the poor [and are therefore legitimate recipients of *zakāt*]! Muḥammad b. Salama said of ʿAlī b. ʿĪsā b. Yūnus b. Māhān, the Governor of Khurasan, that it was permissible for him to receive alms. He was a prince in Balkh who needed to perform atonement for an oath he had sworn (and failed to keep). He asked the *fuqahā'* how he should perform atonement. They issued the ruling that he should fast for three days [which is the mode of atonement due from a poor man; a rich person would normally be expected to feed a certain number of the poor or to free a certain number of slaves.] He wept and complained to his retinue, They say that my debts are greater than my wealth and my oath-atonement is that due from one who owns nothing. The same considerations are valid in the case of exactions collected today, as long as the donor formulates the intention at the time of payment that this is his tithe or his *zakāt*. This is permissible along the lines we have just enunciated.[12]

[12] Id., vol. 2, 180

Here too a set of rules is inherited and embedded in a causal nexus wherein the primary element is that collection depends on protection - a rule provided in a satisfyingly apophthegmatic and rhyming form (1.1). (A similar apophthegmatic form was given to the assertion, attributed to Abū Yūsuf, that, Required is the affirmation of a responsible person together with an oath – *al-qawl qawl al-amīn maʿa al-yamīn.)* Throughout para. 1 (1.1 – 1.4) the conceptual structure offers distinctions between legitimate rulers (imams) and outlaws or rebels *(khawārij, ahl al-baghy),* between pastoral peoples (who are overtaken by outlaws) and itinerant traders (who voluntarily submit themselves to the power of rebels), and between the imam's right to collect (lost if he fails to provide protection) and the donor's duty to pay (not in fact fulfilled through payment to rebels). The rules related to *zakāt* are extended also to *jizya,* the poll tax paid by non-Muslims. The whole is an abstract structure which does not describe the reality of any particular system, and provides no clues as to how to distinguish legitimate and illegitimate rulers in the real world. It does however provide an initial set of concepts for thinking about the real world, specifically in relation to *zakāt* payments (and with subsidiary reference to Dhimmis).

The principle that provision of protection is a means whereby the imam gains rights of collection is obviously of some importance. Curious then that it was not specified in the context of the previous section. There the most explicit legitimating theory in relation to the imam was that he functioned as deputy of God in the context of a duty that was owed to God (3.3.1). The activities of the tax-collectors were justified also by the contrasting assumption that they were agents to the poor (3.3.2). It is just possible that the most general statement of the imam's rights as understood within the Ḥanafi tradition (that *zakāt* is a financial duty implemented by the imam through *sharʿī* authority – *ḥaqq mālī yastawfī-hi al-imām bi-wilāya sharʿiyya,* 3.3 above) is compatible with any one of those (as indeed Sarakhsī claims) and with the further notion that collection depends on protection. It is precisely the search for compatibility between rules (potentially varied) and explanation (delicately balanced) that provides a significant part of the intellectual dynamic of Sarakhsī's text. It is not absolutely clear that generalising statements which work for one set of rules are intended to be recalled when a different set of rules is at issue. Though, no doubt, obvious contradiction would be felt to be unsatisfactory.

Para. 2 exemplifies the way in which inherited concepts may serve the

need to describe and assess the real world. At 2.1, Sarakhsī states his personal conviction that the governors of his time were tyrants, belonging therefore neither to the category of legitimate imams nor to the category of rebels and outlaws. He has effectively opened up a third category which was not given him by the tradition. Tradition, represented by "many of the religious leaders of Balkh", had in fact assimilated the local rulers to outlaws and rebels (2.1). Abū Bakr al Aʿmash had distinguished between *ṣadaqa* and *kharāj* (2.2), implying a fragmented concept of legitimacy: the rulers were legitimate recipients of *kharāj*, illegitimate recipients of *zakāt*. Sarakhsī's own view depends on a juristic device, a *ḥīla*, whereby the tyrants could be perceived, juristically, as poor – because their wealth was stolen and could not be counted as legitimate property – and therefore potentially legitimate recipients of *zakāt*. This was not a new device, Sarakhsī had found it prefigured in a ruling by Muḥammad b. Salamah, but, applied in this context, it proved both amusing and effective. The tyrants were recognised as thieves and robbers, neither their legitimacy nor their capacity to protect (hardly evidenced in a context where they were robbers) being conceded. But the exactions forced upon a subject people could be recognised as a legitimate fulfillment of a personal duty to God.

Here we see a remarkable example of the way in which the transformation of rules into a pattern of sophisticated and subtly discriminating concepts makes possible a number of different readings of the world. Sarakhsī has a preferred reading and a preferred set of consequences but the major alternative possibilities offered by the tradition remain explicitly present and Sarakhsī's own effort may be thought an incentive to further conceptual distinctions which might lead to different consequences. As so often with this writer, the reader is left not with a sense of the law as a determinative structure, but with a sense of the law as a structure for thinking with, a structure that encourages sharply focused and conceptually sophisticated thinking.

IV

A survey of conclusions that might be gleaned from this study prompts the initial observation that Sarakhsī is not merely making a list of practical rules. It may be possible to elicit such from his work, and he demonstrates, on occasion, how this might be done. That is, by measuring the world against the conceptual possibilities implicit within the

Ḥanafī juristic tradition. This is not the same as taking a rule and obeying it; what seems to be required is to take a set of logically related rules and to understand them in relation to the tradition, each other, variant rules, and one or several conceptual explanations of their form. This may give rise to a practical rule of conduct. But it may not. Once this process of intellectual exploration is started, the discovery of a rule ceases to be an adequate end: the process offers such obvious rewards, of intellectual stimulation and literary pleasure, that it cannot be adequately explained in terms of a practical interest – which is frequently, in any case, not in evidence. Many passages of this work and of other works of *fiqh* do not result in any obvious rule of conduct. Does the process point perhaps to some other end or set of ends?

What is most obviously demonstrated in a work of *fiqh* I have already stated in the first paragraph of this study: it is loyalty to a particular tradition. It is reasonable to assume that this is not simply a fact but a message, or part of a message. Thinking Muslims, those who study *fiqh*, are being urged, or even compelled, to see themselves as committed to the past of a particular tradition, that is to the efforts of that tradition to understand God's law. By virtue of this commitment they are deprived of two freedoms: the freedom to interpret revelation for themselves as an *ab initio* activity, and the freedom simply to choose amongst variant possibilities. At least in medieval times, a Ḥanafī (whether so by virtue of birth, geography or education) did not simply set aside the teachings of the past in favour of his own study and interpretation of revelation, nor did he abandon a Ḥanafī ruling in favour of a Mālikī ruling simply because it might be convenient or desirable to do so. The positive message here is of course about authority: authority lies with tradition (represented by the scholars of a particular school) and not with the texts of revelation (important though these undoubtedly were)

Somewhat qualifying this message of particularity is the message of plurality. Sarakhsī's responses to Marwazī's more or less monovalent text include, as a primary act, the provision of a pluralist matrix for these rules. The pluralism covers both the Ḥanafī tradition, where dispute is articulated by reference to the founding fathers (Abū Ḥanīfa, Abū Yūsuf, Shaybānī and other authorities), and the non-Ḥanafī traditions of juristic thinking (Shāfiʿī, Mālikī etc.). The message thus becomes more complex. For we are required to note that the interpretative possibilities of revelation are (and have historically been) many; and of that many, some (those governed by a tradition of authority similar to that of the

Hanafī school, i.e. Shāfiʿīs, Mālikīs etc.) offer valid, effective, and justified systems of rules which are recognised as challenging the Ḥanafī system. Within the context of Sarakhsī's work (and of all other Ḥanafī works of *fiqh)* the superiority of the Ḥanafī tradition is assumed. (And within the Ḥanafī system, it is assumed also that the major tradition is superior to minor traditions.) These things are known in advance and only require demonstration. This is the function of revelation: to be organised and interpreted in such a way that it defends and justifies a pattern of rules whose superiority was never in doubt, and was guaranteed within an ongoing school tradition.

The demand for loyalty to a particular school is then not dogmatic, in the sense of excluding others; though it is real, in the sense of being, precisely, a demand for loyalty. The relationship between the schools (and between variant traditions within a school) is dialectical. It rests on their common acknowledgement of revelation and on a common system of argument. Or so it is implied by Sarakhsī, whose systematic presentation of the views of his own school and of others is embedded in a context of explicit argument.

In many contexts of course the argument takes the form of reference to Qur'an and hadith. In the passages I have cited however the arguments are predominantly conceptual and reflect on the possibilities of relating inherited rules to the discovery of coherence within a conceptual structure. This is the loosest and most inventive part of Sarakhsī's thinking. The processes involved are at times almost uncontrolled and arbitrary. The provision of analogies of relationship between different topics of the law for example (3.2; 3.3; 3.3.2; 3.3.3) is controlled by nothing but the convenience of the writer and his ability to perceive and articulate similarities. At other times the process is controlled by a clearly desired and more or less explicit practical end (so in Section III above). At still other times, the play between inherited rules, generalising abstractions, and conceptual patterning is loose and exploratory, leading to a plurality of structures for understanding the law and/or the world (so, perhaps in Section II above). Loyalty to the tradition clearly does not mean blind loyalty, but rather thinking loyalty, or interpretative loyalty; and it does not exclude deliberate and conscious manipulation of the tradition for particular ends. (This is of course conceded in the literature of *ḥīlas,* devices for, legally, getting round the law.)

That complex of messages suggests an overarching framework (maybe a theology?) within which, topic by topic, bundle by bundle, the in-

herited rules of law are, on the one hand, drawn back to revelation and, on the other, drawn out into conceptual structures whose function is (apparently) to be used for thinking with. Those structures are explicitly pluralist. In so far as the problems of the law are moral (the word might be legitimately used for the problems discussed in this paper, though much of the subject matter of juristic discourse cannot possibly be brought under this heading) this has the interesting consequence that though a final moral position may be available to a juristic thinker, it will be final primarily because it is sanctioned by authority and not because it is (incontrovertibly) the right answer. It is as if only the essentially arbitrary fact of loyalty to a tradition can decide between the various interpretative possibilities that are the products of human ingenuity. The forms and structures of Sarakhsī's literary style enable his readers to play – at least in appearance – with all the inherited possibilities of the Muslim tradition, while finding some comfort in the stasis (but only relative stasis, for the interpretative process is ongoing) of the Ḥanafī tradition.