THE CONCEPT OF *IJMĀ*ᶜ IN THE MODERN AGE
With Particular Reference to Muḥammad ᶜAbduh

by

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A Thesis submitted to
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INSTITUTE OF ISLAMIC STUDIES
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ABSTRACT

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TITLE OF THESIS   : THE CONCEPT OF *IJMĀʿ* IN THE MODERN AGE

                    : With Particular Reference to Muḥammad ʿAbduh

DEPARTMENT   : Islamic Studies, McGill University, Montreal

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This thesis is an attempt to study ʿAbduh's methodological approach in Islamic legal theory, with particular reference to the concept of *ijmāʿ*. *Ijmāʿ* according to him, is not a matter of truth or falseness, as it has been viewed by the classical and medieval jurists, but rather it is a mechanism which must demonstrate a dynamic ability in dealing with new problems on the basis of the public interest (*maṣlaḥa*). In order to obtain a proper public interest in any matter, religious considerations alone are not sufficient, rather each matter must be considered from many different angles and disciplines such as sociology, the environment and politics. One should also take into consideration the fact that *ijmāʿ* is not only an informal decision, as has the case after the *Rāshidūn* caliphate period, but that it has become part of the legal system of government and as such demands obedience from everybody. Not surprisingly, ʿAbduh believed that *ijmāʿ* should be carried out and regulated by the elected members of parliament. This thesis not only analyses the thoughts of Muḥammad ʿAbduh on this matter but also includes the thoughts of classical and medieval jurist, as well as the view of modern scholars such as Muhammad Iqbal, Kemal A. Faruki, Fazlur Rahman, Ḥasan Turābī.

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AUTEUR   : Khoiruddin Nasution

TITRE   : Le concept de l'ijmā à l'époque moderne avec une attention particulière
                    à la pensée de Muhammad ʿAbduh.

DEPARTEMENT : Institut des Etudes Islamiques, Université Mc Gill, Montréal.

DIPLOME   : Maîtrise en Arts

Ce mémoire tente d expliqur l'appoache méthodologique de Muhammad ʿAbduh au sein de la théorie légale islamique; plus particulièrement le concept de l'ijmāʿ. Selon le théoricien, l'ijmāʿ n'est pas une question reliée à l'idée du vrai et du fauz- telle que perçue par les juristes musulmans classiques at médiévaux- mais plutôt un mécanisme qui doit démontrer une capacité dynamique pauvant résoudre less problèmes contemporains selon l'intérêt public (maṣlaḥa). Pour obtenir cet intérêt de façon adéquate dans tous less cas, les considérations religieuses ne sont pas suffisantes, chaque question devant être considérée à partir de différents angles et d'autres disciplines telles que la sociologie, l'environnement, la scinces politique, etc. On doit aussi prendre en considération que l'ijmāʿ n est pas seulement usne réglement ation informelle, commece fur le cass a l'époque des Califes Rashidun mais aussi l'ijmāʿ est une partie intégrante du système légal des gouvernements mudulmans et qui exige l'obéissance de tous. Il n'est pas surprenant que Muhammad ʿAbduh croyait que l'ijmāʿ était appliqué et réglementé par les membres élus du parlement. Ainsi, non selement ce mémoire analyse le pensée de Muhammad ʿAbduh concernant l'ijmāʿ mais aussi l'opinion des juristes classiques et médiévaux de même que le point de vue dess intellectuels musulmans contemporains tels que Kemal A. Faruki, Hazairin, Hasbi ash-Shiddiquy, Falzlur Rahman et Ḥasan Turābī.

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Institute of Islamic Studies
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TRANSLITERATION TABLE

<u>Consonants</u>: ' initial: unexpressed ' medial and final: '

Arabic	Persian	Turkish	Urdu		Arabic	Persian	Turkish	Urdu
ب b	b	b	b		ص ṣ	ṣ	ṣ	ṣ
پ	?	p	p		ض ḍ	ẓ	ẓ	ẓ
ت t	t	t	t		ط ṭ	ṭ	ṭ	ṭ
ٹ			ṭ		ظ ẓ	ẓ	ẓ	ẓ
ث th	s̲	s̲	s̲		ع ʿ	ʿ	ʿ	ʿ
ج j	j	c	j		غ gh	gh	ġ	g̲ẖ
چ	ch	ç	ch		ف f	f	f	f
ح ḥ	ḥ	ḥ	ḥ		ق q	q	ḳ	q
خ kh	kh	ẖ	ḵẖ		ك k	k	k	k
د d	d	d	d		گ	g	g	g
ڈ			ḍ		ڭ		ñ	
ذ dh	z̲	z̲	z̲		ل l	l	l	l
ر r	r	r	r		م m	m	m	m
ڑ			ṛ		ن n	n	n	n
ز z	z	z	z		ں			ṉ
ژ	zh	zh	zh		ه h	h	h	h
س s	s	s	s		و w	v	v	v
ش sh	sh	ş	sh		ي y	y	y	y

<u>Vowels, diphthongs</u>, etc. (For Ottoman Turkish vowels etc. see separate memorandum.)

short: ´ a; ‸ i; ´ u.

long: ا ā; و ū, and in Persian and Urdu also rendered ō; ي ī, and in Urdu also rendered by ē; ے (in Urdu) ē.

<u>alif maqṣūrah</u>: ى á.

<u>long with tashdīd</u>: ّي īya; ّو ūwa.

diphthongs: ي´ ay; و´ aw.

<u>tā' marbūṭah</u>: ة ah; in <u>iḍāfah</u>: at.

TABLE CONTENTS

CHAPTER ONE: THE CONCEPT OF *IJMĀᶜ* IN TRADITIONAL JURISPRUDENCE

CHAPTER TWO: THE CONCEPT OF *IJMĀ͑* ACCORDING TO ͑ABDUH AND OTHER ISLAMIC MODERNISTS

INTRODUCTION

Modern Muslim intellectuals are generally divided into two main groups. The first group comprises those who adhere strictly to tradition and custom without trying to interpret the principles of Islam in accordance with the current demands and the new conditions of the twentieth century. The second group consists of those who believe in the necessity of taking account of the current conditions and of the reasons for Muslim backwardness, as well as studying ways and means of liberating Islamic thought from ignorance, blind imitation and stagnation. Members of the second group are the modernists, who seek to achieve their goal by considering new exigencies and to reinterpret Islam accordingly.[1]

The modernists consider reform of Islamic Law to be essential for the development of society and for resolving its numerous problems. This reform can be achieved by reexamining and reinterpreting Islamic legal theory in accordance with the need of the present time and environment and in the spirit of the Qur'ān and the *Sunna* of the Prophet.[2]

Muhammad ʿAbduh (1849-1905)[3] was one of those who concerned themselves with legal reform. Even though he did not write on Islamic legal theory as such, his method of

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[1] Subḥī Maḥmaṣānī, "Muslims : Decadence and Renaissance, Adaptation of Islamic Jurisprudence to Modern Social needs, " *The Muslim World* 44 (1954): 186.

[2] Ḥasan Turābī, *Tajdīd Uṣūl al-Fiqh al-Islāmī* (Beirūt: Dār al-Fikr, 1980), 7.

[3] This birth date was accepted by the friends and followers of Muḥammad ʿAbduh, although the magazine, *al-Ḍiyā*, gives his birth date as 1842. For the most extensive record of information on ʿAbduh's life and work see Rashīd Riḍā, *Tārīkh al-Ustādh al-Imām al-Shaikh Muḥammad ʿAbduh* (Cairo: Dār al-Manār, 1931), particularly, vol. I; Charles C. Adams, *Islam and Modernism in Egypt : A Study of the Modern Reform Movement*

interpreting the Qur³ān in his monumental *Tafsīr al-Manār* (edited by Rashīd Riḍā,[4]) and his concern to resolve the legal and other problems of his time have a direct bearing on the questions of legal theory.

This thesis will attempt to analyze ꜥAbduh's methodological approach in Islamic jurisprudence, with particular reference to the concept of *ijmāꜥ*. His concerns on the matter are contained mainly in his *Tafsīr al-Manār*, particularly, in his discussion of Qur³ān 4: 59. In order to place ꜥAbduh's views in perspective, it will be necessary to describe the views of the classical and medieval jurists, such as *imām* Mālik, al-Shāfiꜥī,[5] ꜥAbd al-Jabbār al-Asadabādī,[6] Abū Husain al-Baṣrī,[7] Ibn Hazm al-Ẓāhirī,[8] al-Shīrāzī,[9] al-Bājī,[10] al-

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Inaugurated by Muḥammad ꜥAbduh (London: Oxford University Press, 1933); idem, "Muḥammad ꜥAbduh the Reformer," *The Muslim World*, 19 (1929): 264- 273; Mahmudul Haq, *Muḥammad ꜥAbduh : A Study of a Modern Thinker of Egypt* (Calcutta: The Little Flower Press, 1970); Malcolm H. Kerr, *Islamic Reform : The Political and Legal Theories of Muḥammad ꜥAbduh and Rashīd Riḍā* (Los Angles: University of California Press, 1966), 104; Albert Hourani, *Arabic Thought in the Liberal Age* (Cambridge: Cambridge University Press, 1962), particularly, 130-160.

[4] It should be cited that 'Tafsīr al-Manār' was written by ꜥAbduh until chapter 4 (*al-Nisā³*); 125, while the rest was written by his pupil Muḥammad Rashīd Riḍā. See Muḥammad ꜥAbduh, *Tafsīr al-Manār*, ed. Rashīd Riḍā (Miṣr: Dār al-Manār, 1373), vol. I, 14.

[5] Muḥammad ibn Idrīs al-Shāfiꜥī, *al-Risālah*, ed. Aḥmad Muḥammad Shākir (Miṣr: Muṣṭafā al-Bābī al-Halabī, 1358/1940), particularly, 471-486; idem, *al-Umm*, vol. VII (Cairo: Maktabat al-Kullīyāt al-Azharīya, 1381/1961), 273-286.

[6] ꜥAbd al-Jabbār al-Asadabādī, *al-Mughnī fī Abwāb al-Tawḥīd wa al-ꜥAdl*, ed. Amin al-Khūlī (Cairo, n.p., 1382/1963), particularly, vol. XVII; 153-245.

[7] Abū Husain Muḥammad ibn ꜥAlī al-Baṣrī, *Kitāb al-Muꜥtamad fī Uṣūl al-Fiqh* (Damascus: al-Maṭbaꜥat al-Khatulikīya, 1384/1964), particularly, vol. II, 457-540.

[8] Muḥammad ibn Hazm al-Ẓāhirī, *al-Iḥkām fī Uṣūl al-Aḥkām* ed. Aḥmad Shākir (Miṣr: Maṭbaꜥat al-Imām, 1345), particularly, vol. IV, 501-559.

[9] Abū Isḥāq Ibrāhīm al-Shīrāzī, *Sharḥ al-Lumaꜥ*, ed. ꜥAbd al-Majīd Turkī (Beirūt: Dār al-Gharb al-Islāmī, 1408/1988), particularly, vol. II, 665-751.

[10] Abū al-Walīd al-Bājī, *Iḥkām al-Fuṣūl fī Aḥkām al-Uṣūl*, ed. ꜥAbd al-Majīd Turkī (Beirūt: Dār al-Gharb al-Islāmī, 1407/1986), particularly, 433-504.

Sarakhsī,[11] al-Ghazālī,[12] al-Āmidī,[13] al-Ṭūfī [14] and others, on the issue of *ijmāᶜ* and the principles governing them, as well as the ideas of the Islamic modernists, such as Muḥammad Iqbal, Kemal A. Faruki, Fazlur Raḥman and others.

The thesis will be divided into two chapters. The first chapter will deal with the concept of *ijmāᶜ* in the thought of classical and medieval jurists. In this chapter the definition, the principles and the authoritativeness of *ijmāᶜ* according to the classical and medieval jurists will be discussed. The second chapter will treat the concept of *ijmāᶜ* according to Islamic modernists. In this chapter the definition, the principles and the authoritativeness of *ijmāᶜ* according to ᶜAbduh will be analyzed. The views of some other Islamic modernists, including Muḥammad Iqbal, Kemal A. Faruki and Fazlur Rahman will also be discussed. The final part of this thesis is the conclusion.

ᶜAbduh is the focus of the discussion in this thesis for two main reasons. First of all, he is the first modern scholar who promotes this new formulation of *ijmāᶜ* to accommodate the modern needs.[15] Secondly, no exclusive study is yet known to have been made on this subject. Yet before discussing the subject, it is necessary to provide a short biography of Muḥammad ᶜAbduh so that his ideas will be understood properly.

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[11] Muḥammad ibn Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī* ed. Abū al-Wafāʾ al-Afghānī (Cairo: Dār al-Kitāb al-ᶜArabī, 1372), particularly, vol. I, 293-333.

[12] al-Ghazālī, *al-Mustaṣfā min ᶜIlm al-Uṣūl* (Baghdād: Maktabat al-Muthannā, 1970), particularly, vol. I, 173-181.

[13] Sayf al-Dīn al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām.* (Cairo: Dār al-Kutub al-Khidīwīya, 1332/1914), particularly, vol. I, 280-407.

[14] Najm al-Dīn al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah* (Beirūt: Muʾassasat al-Risāla, 1991), particularly, vol. III, 5-143.

[15] Aharon Layish, "The Contribution of the Modernists to the Secularization of Islamic Law," *Middle Eastern Studies* 14: 3 (October 1978): 263-277.

As stated before, it is commonly believed that Muḥammad ʿAbduh was born in 1266/1849, in one of the villages of the Gharbīyah province in the Egyptian Delta.[16] His father, ʿAbduh ibn Ḥasan Khair Allāh, had built a house for his family there, after moving from his native village Maḥallat Naṣr (in the district of Shubrākhīt, Buḥayrah province). He married ʿAbduh's mother, Junaynah, who was a widow,[17] and who came from a village near Ṭanṭā in the Gharbīyah province.

The birth of Muḥammad ʿAbduh coincided with the oppressive conditions that the Egyptians endured during Muḥammad ʿAlī Pasha's reign. ʿAbduh's father was one of the Egyptians who attacked the government's tyrannical policy and its confiscation of peasant lands through very high taxes. Consequently, his farther was exiled for fifteen years.[18] His father later returned to Maḥallat Naṣr, where ʿAbduh grew up and spent most of his childhood there. He learnt reading and writing from his father as the first step of his education at the age of ten (1276/1859). Then, in 1279/1862, his father sent him to the Aḥmadī mosque *(al-masjid al-Aḥmadī)* in Ṭanṭā to broaden his Qurʾānic reading until he got the title *al-Qāriʾ* and *al-Ḥāfiẓ*. He was able to memorize the entire Qurʾān within two years. This was regarded as an unusual achievement and the credit is usually given to the teacher. He continued his study at Ṭanṭā at an advanced level, in 1281/1866. ʿAbduh, however, had little interest in study because the teaching method did not encourage him and he escaped from that school. "I studied one and half years, but I did not understand anything," ʿAbduh said later. The teacher were accustomed to technical phrases of grammar and jurisprudence and made no effort to explain their meaning to those who did

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[16] Adams, *Islam and Modernism*, 19; Hourani, *The Arabic Thought*, 130.

[17] Muḥammad ʿAbduh, *al-Iḥtifāl bi Iḥyāʾ Dhikrā al-Ustādh al-Imām al-Shaikh Muḥammad ʿAbduh* (Miṣr: Maṭbaʿat al-Manār, 1922), 10.

[18] Mahmudul Haq, *Muḥammad ʿAbduh*, 19.

not know them. It was as if he spoke a foreign tongue. Finally, ᶜAbduh returned to Maḥallat Naṣr and got married in 1282/1865.[19]

During that time, ᶜAbduh's uncle, Shaikh Darwīsh played an important role in introducing his nephew to the religious sciences. ᶜAbduh learnt Sufism from him and later said that his uncle was the only spiritual guide and director of his conscience. Darwīsh opened his eyes to the important knowledge of people. Thus, Sufism was a turning point in Muḥammad ᶜAbduh's life. It freed his mind from *taqlīd*, i.e., blind acceptance of authority, and led to a belief in the liberty of the mystic and his union with God.[20]

After he got married in 1865, his father advised him to go back to school, which he did, because by this time he realized his mistake. Thus he returned and continued his studies at the Aḥmadī mosque in Ṭanṭā for four more years. After he completed his studies there, he entered al-Azhar university, where he stayed from February, 1869, till 1877.[21] However, he was not satisfied there either. Consequently, ᶜAbduh went through an inner crisis. He was seen indulging in ascetic exercises and even trying to isolate himself from society. Fortunately, the wise advice of Shaikh Darwīsh helped him emerge from this mystical crisis. The Shaikh encouraged him to study such subjects as logic, mathematics and geometry, which were not offered at al-Azhar.[22] Thus, he left a profound impression upon ᶜAbduh is thought and character, particularly concerning Sufi orders. He was closer to the sophists than the jurists, because he did not like the rigid jurists. He also had great tolerance and freedom of thought which were unusual traits among his contemporary jurists.

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[19] Riḍā, *Tārīkh al-Ustādh*, I, 20.

[20] Hourani, *Arabic Thought*, 131.

[21] Ibid.

[22] Riḍā, *Tārīkh al-Ustādh*, I, 24.

While he was still at al-Azhar university, he met Jamāl al-Dīn al-Afghānī, who came to Egypt in 1286/1871.[23] The latter was already a famous figure who advocated religious and political freedom. ᶜAbduh was a student of al-Afghānī between 1871-1879. Al-Afghānī was a particular influence on ᶜAbduh's nationalistic feelings. Not surprisingly, ᶜAbduh pursued many interests and actives outside al-Azhar. He was particularly interested in the political relationship between the East and the West, and he became an advocate of the Nationalist party (*Ḥizb al-Waṭan*). ᶜAbduh was one of the most brilliant of al-Afghānī's disciples and showed his enthusiasm for the latter in his first work, *Risālat al-Wāridāt* (Mystic Inspiration), written in 1290/1873. In addition, in 1293/1876, he began writing journal articles pertaining to cultural matters. He wrote a series of articles on social and political affairs for *al-Ahrām* (the Pyramids), a weekly journal established in Cairo. His second work published in 1292/1875, when he was twenty six years old, was entitled *Aqāᶜid al-ᶜAḍudīyah*; it contained a collection of glosses on the commentary of Jalāl al-Dīn al-Dawwānī.[24]

By virtue of strenuous effort, ᶜAbduh ultimately passed a hard examination and obtained an *ᶜĀlimīyah* diploma in 1294/1877 from al-Azhar. This degree granted him the right to use the title of *al-ᶜālim*. He was considered a scholar who is fit to teach.[25] After he completed his diploma at al-Azhar university in 1877, he received the right to teach logic, theology and ethics. He also held informal classes in his own house. Soon afterwards, in 1878, he began teaching at *Dār al-ᶜUlūm*, a new college established to provide a modern education for students of Azhar, who wished to become judges or teachers in government schools. At *Dār al-ᶜUlūm*, he lectured on Ibn Khaldūn's

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[23] Ibid.

[24] Mahmudul Haq, *Muḥammad ᶜAbduh*, 4-5.

[25] Riḍā, *Tārīkh al-Ustādh*, I, 102-103; Nadav Safran, *Egypt in Search of Political Community* (Cambridge: Harvard University Press, 1961), 62.

Muqaddima,[26] which had been published in Cairo in 1857 under the interest of Rifā'a al-Ṭahṭāwī,[27] and at his own home, he lectured on the ethics of Miskawayh, *Tahdhīb al-Akhlāq*, and on the Arabic translation of Guizot's History of Civilization. He was also appointed teacher of Arabic in the Khedive's school of languages.[28]

In 1296/1879, he was selected Professor of history at the college of *Dār al-'Ulūm* and professor of literature at the school of languages. He performed his new functions, while still continuing his work at al-Azhar university. During this period he became involved in journalism together with al-Afghānī. In 1879, for reasons which are not clear, he was dismissed by the Khedive Tawfīq Pāshā and confined to his native village, Maḥallat Naṣr. But in 1880, the Prime Minister, Riyāḍ Pāshā, recalled him and appointed him one of the editors of the official gazette, *al-Waqā'i' al-Miṣrīyah*.[29] He later became its chief editor.[30] This was an influential position which afforded him the opportunity to articulate his ideas and to propagate his enlightened views further. He also had the opportunity to criticize the other newspapers published in Egypt. Hence, this newspaper became the mouth piece of the liberal party which was under Muḥammad 'Abduh's control.

Unfortunately, this journal did not last long. 'Abduh worked as its editor for only eighteen months; in May 1882 'Urābī Pāshā blocked 'Abduh's activities and terminated the journal's existence. When Egypt was occupied by Great Britain, 'Abduh joined the nationalist party and actively participated in the rebellion. This participation led to his exile

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[26] Riḍā, *Tārīkh al-Ustādh*, I, 135-136.

[27] Hourani, *Arabic Thought*, 132.

[28] Mahmudul Haq, *Muhammad 'Abduh*, 6.

[29] Ibid., 7.

[30] Jamal Mohammed Ahmed, *The Intellectual Origins of Egyptian Nationalism* (London: Oxford University Press, 1960), 19-20; Hourani, *The Arabic Thought*, 133.

to Syria for three years. At the end of 1882, he left Syria and settled down in Beirūt.[31] In 1884 he left Syria to join al-Afghānī, then living in Paris, and to work for the freedom of Egypt.[32] In Paris they together founded a society and published *al-ʿUrwah al-Wuthqā* (the indissoluble link).[33] This was a political weekly devoted to reporting the political situation of Muslims and the struggle of the people against both foreign domination and indigenous despotism; the journal was particularly concerned with voicing opposition to the occupation of Egypt by the British. *Al-ʿUrwah* was the first Arabic journal to appear in Europe. The founding of this journal was meant to unite true Muslims all over the world and to free Islamic countries from foreign penetration and native tyranny. They urged Muslims to reject their own local brand of nationalism which made them forget the greater issue of Islamic unity. They also published a journal of the same name, which appeared, from March 13, 1884 to October 10, 1884. In it, al-Afghānī and ʿAbduh made a spirited call for the unity of Muslims against the encroachment of the West. After fifteen issues, however, the paper was suppressed because of the radical outlook.[34]

After *al-ʿUrwah al-Wuthqā* stopped its publication, ʿAbduh returned to Beirut, in 1303/1885; soon afterwards, he was made a teacher in a theological school. During that period he wrote an important book called *Risālat al-Tawhīd*.[35] This book has been translated into many different languages, such as English, French, German and Indonesian. In this book, ʿAbduh presents a theological argument that Islam occupies a unique place among the monotheistic religions because it is able to reconcile reason and revelation. He

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[31] Riḍā, *Tārīkh al-Ustādh*, I, 274.

[32] Hourani, *The Arabic Thought*, 109-110.

[33] Ibid., 134.

[34] Mahmudul Haq, *Muḥammad ʿAbduh*, 7-8.

[35] Muḥammad ʿAbduh, *Risāla Tawhīd*, trans. by Isḥāq Mūsā and Kenneth Cragg, *The Theology of Unity* (London: George Allen & Unwin LTD., 1966), 11.

also tried to encounter the proponents of secularism, such as Faraḥ Anṭūn, who derided ʿAbduh in the pages of Egyptian newspapers.

In 1888, ʿAbduh was allowed by the Khedive to return to Egypt and was appointed judge in the native court.[36] Then in 1890, he became a counselor at the court of appeal (Maḥkamah al-Istiʾnāf) in Cairo.[37] There, he tried to introduce important reforms to the institution. As a magistrate he became know for his sense of equity and the independence of his spirit, which was never encumbered by the forms of judicial procedure. In 1894 he was appointed a member of a committee of administration at al-Azhār which was aimed at reforming that institution. ʿAbduh became its moving spirit, but the opposition of the conservative ʿulamāʾ, supported by the Khedive, frustrated his work.[38]

On June 3, 1899 he was selected as the grand mufti of Egypt. On June 25, 1899, he became a permanent member of the legislative council and was one of the founders of the Muslim Benevolent Society whose aims included the opening of a private school.[39] Besides that, he worked for the reform of the religious court (maḥākim al-Sharʿīya). His report on the reform of religious courts was very influential and remained the basis for future reforms of the judicial system. He also wanted to improve the material circumstances of judges, so as to raise the intellectual and moral standards of future judges. He also reorganized the method of their recruitment. The idea of creating a school for religious judges (al-Qaḍāʾ al-Sharʿīya) was also put forth by him.

Later, in 1900, ʿAbduh became involved in a polemic with Gabriel Hanotaux, the French Ministry of Foreign Affairs, who had criticized Muslims. ʿAbduh responded in the

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[36] Jamal Mohammed, The Intellectual, 35.

[37] Riḍā, Tārīkh al-Imām, III, 21.

[38] Safran, Egypt in Search, 62.

[39] Mahmudul Haq, Muḥammad ʿAbduh, 9-10.

form of a book entitled, *al-Islām wa al-Naṣrāniyah* (Islam and Christianity) which constitutes a valuable piece of modern Muslim apologetics. That same year he also was appointed as the highest state authority on the interpretation of Islamic law-*muftī* in Egypt.[40] ʿAbduh was among the founders of the Egyptian University. Finally, ʿAbduh passed away on July 11, 1905.[41]

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[40] Ahmed, *Intellectual*, 35.

[41] Mahmudul Haq, *Muḥammad ʿAbduh*, 10.

CHAPTER ONE

THE CONCEPT OF *IJMĀᶜ* IN TRADITIONAL JURISPRUDENCE

A. Definition of *Ijmāᶜ*

Classical and medieval Muslim jurists held different views concerning the definition of *ijmāᶜ*. The views can be divided into two main groups. The first group maintains that *ijmāᶜ* means the agreement of the *mujtahids* only.[1] The second group contends that *ijmāᶜ* is the prerogative of the *umma* as a whole, since the infallibility of the *umma* is the basis of *ijmāᶜ*.[2] They argue that if the *mujtahids* single-handedly determine *ijmāᶜ*, this act would constitute a clear contradiction between the concept of *ijmāᶜ* and its formal definition, since *ijmāᶜ* is based upon the concept of the infallibility of the community as a whole.

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[1] al-Shīrāzī, *al-Lumaᶜ*, II, 665; *Imām* al-Ḥarmayn al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, ed. ᶜAbd al-ᶜAẓīm al-Dīb, 2nd edn. (Cairo: Dār al-Anṣār, 1400), II, 684; al-Juwaynī notes that *ahl al-ijmāᶜ* must be humble Muslims (*Muslim wariᶜ*); al-Sarakhsī, *Uṣūl al-Sarakhsī, I*, 311-312; Ḥasan al-ᶜAṭṭār, *Ḥashīyah ᶜAlā Sharḥ al-Jalāl al-Maḥallī ᶜAlā Jamᶜ al-Jawāmiᶜ* (Cairo: al-Maṭbaᶜat al-ᶜIlmīyah, 1316), II, 192; Aḥmad ibn Idrīs Shihāb al-Dīn al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl fī Ikhtiṣār al-Maḥṣūl* (Beirūt: Dār al-Fikr, 1393/1973), 322; Kamāl al-Dīn Muḥammad ibn Humām, *al-Taḥrīr fī Uṣūl al-Fiqh* (Miṣr: Muṣṭafā al-Bābī al-Ḥalabī, 1351), 399; Ibn Amīr demands the agreement of all the *mujtahids* and holds that the agreement of one *mujtahid* only is of no account. See, Ibn Amīr al-Ḥājj, *al-Taqrīr wa al-Taḥbīr* (Miṣr: al-Maṭbaᶜat al-Amīrīya, 1317), III, 80; Muḥammad ibn ᶜAlī al-Shawkānī, *Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min ᶜilm al-Uṣūl* (Miṣr: Muṣṭafā al-Bābī al-Ḥalabī, 1356/1938), 71; al-Taftāzānī, *al-Tawḍīḥ wa al-Talwīḥ* (Cairo: n.p., 1226), II, 506.

[2] Ibn Ḥazm and the Ẓāhirī school are included in this group, even though they limit the definition of *ijmāᶜ* to the community of the Companions only. See their definition in Ibn Ḥazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, ed. Aḥmad Shākir (Miṣr: Maṭbaᶜat al-Imām, 1345), IV, 501-502; al-Pazdawī argues that the meaning of the Prophetic tradition "*ᶜalaykum bisawād al-aᶜẓam*" signifies the *umma* as a whole. See ᶜAbd al-ᶜAzīz al-Bukhārī, *Kashf al-Asrār ᶜalā Uṣūl al-Imām ᶜAlī ibn Muḥammad al-Pazdawī* (n.p., al-Maktabat al-Sināyaʾ, 1307), III, 946 and 966. Al-Pazadawī's work is printed on the margin of al-Bukhārī's commentary.

Moreover, even if one argues that the scholars represent the community, they still constitute only a small part of that community. In addition, those who define *ijmā*ᶜ as the agreement of the common people (*al-ᶜawwām*) argue that the *mujtahids'* agreement will not be valid unless the common people also agree on the matter at hand. *Ijmā*ᶜ, they argue, is the agreement of the common people of the Prophet's *umma*.[3] By common people, they mean every legally major (*bāligh*) sane (*ᶜāqil*) Muslim.[4].

Due to the diversity of opinions on this matter, this thesis will now embark upon a brief description of the thought of some of the most outstanding classical and medieval scholars. The first of these scholars is al-Shāfiᶜī (d. 204/820), who divided *ijmā*ᶜ into two main genres. The first is the *ijmā*ᶜ of the community and the second is that of the *ᶜulamā*ᵓ, who are the legal specialists. The *ijmā*ᶜ of the community is again sub-divided into two types. The first is based on the Qurᵓān and the *Sunna* of the Prophet as transmitted "from generation to generation," while the second type is not based on revelation. According to him, only the first type, which is reached on the basis of the Qurᵓān and the *Sunna* of the Prophet as transmitted by generations of Muslims, can yield certain knowledge of the law decreed by God.[5]

Abū Bakr al-Jaṣṣāṣ (d. 370/980) holds that if the majority of scholars agree, by verbal expression, on a certain point and their agreement is accepted by the community, while a minority of scholars remains silent, then *ijmā*ᶜ would be definitely established. He

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[3] ᶜAbd al-Jabbār also divides *ijmā*ᶜ into that of the jurists and that of the community as a whole. See ᶜAbd al-Jabbār, *al-Mughnī*, XVII, 156.

[4] ᶜAlī ᶜAbd al-Rāziq, *al-Ijmā*ᶜ *fī al-Sharīᶜa al-Islāmīya* (Miṣr: Dār al-Fikr al-ᶜArabī, 1366/1947), 7-8.

[5] al-Shāfiᶜī, *al-Risālah*, 431; idem, *al-Umm*, VII, 279; Norman Calder, "Ikhtilāf and Ijmāᶜ in Shāfiᶜī's Risāla," *Studia Islamica* 58 (1984): 76-77.

contends that it is practically impossible for all individuals to express their consent.[6] It is significant to note that al-Jaṣṣāṣ does not mention anything on the validity of an *ijmāᶜ* that is expressly opposed by a minority. He maintains, however, that people generally keep their silence when in agreement. He, therefore, supports the theory of total *ijmāᶜ* and disregards the disagreement of one or two scholars.

The third scholar is al-Baṣrī (d. 436/1044). Although he does not define *ijmāᶜ* explicitly, one can deduce from his writings that he held the involvement of all *mujtahids* a prerequisite to any agreement. Yet he asserts that the disagreement of one or two *mujtahids* should not be taken into account. His argument is that in Arabic, words may denote a plurality while they are in fact a metaphor *(majāz)* for a few, while in some other cases an idiom may seem to signify a majority while, in fact, it is used to refer to a whole.[7] In addition, al-Baṣrī differentiates between *khabar* and *ijmāᶜ*. For him, the former represents a mere piece of information while the latter is a well-thought out opinion based upon a strong *dalīl*.[8] Therefore, only the *mujtahids*, who are known for their superior thinking ability, are qualified to perform *ijtihād.* Moreover, he disagrees with the opinion that the obligations such as prayer and fasting were stipulated through *ijmāᶜ* as argued by the majority jurists; according to him, they are all based upon *dalīls.*[9]

Similarly, Ibn Ḥazm (d. 456/1064) does not define *ijmāᶜ* explicitly. He states that the only recognized *ijmāᶜ* is the one derived from a *naṣṣ*, since *ijmāᶜ* is *ḥaqq* (true) and

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[6] Ahmad Hasan, *The Doctrine of ijmāᶜ in Islam* (Pakistan: Islamic Research Institute, 1976), 79. Since some parts of al-Jaṣṣāṣ's *Uṣūl al-Fiqh* which deal with *ijmāᶜ* are still in manuscript and are not available to me, my analysis of Jaṣṣāṣ's theory will go as far as the material quoted by Hasan will follow.

[7] al-Baṣrī, *al-Muᶜtamad*, II, 486.

[8] Ibid., 488-489.

[9] Ibid., 481.

whatever is not a *naṣṣ* is *bāṭil* (wrong).[10] He further divides *ijmāʿ* into two kinds: (1) the *ijmāʿ* agreed upon by the whole Muslim community which has been transmitted from one generation to another, such as the obligatory prayers, fasting; (2) the *ijmāʿ* understood by only the Companions, such as the action of the Prophet in Khaybar when he gave a Jewish man some plants and dates. In this instance, the *ijmāʿ* of the people would have been different from that of the Companions, thus resulting in the possibility of right and wrong opinions appearing. Therefore, Ibn Ḥazm concludes that any *ijmāʿ* other than the above mentioned must be false. To prove this last statement, he cites Q.11: 46; Q.45: 32; Q.6: 116; Q.10: 66; Q.53: 23 and 28.[11]

According to the traditions of previous jurists, Abū Bakr al-Baghdādī (d. 463) also divided *ijmāʿ* into two main types. His aim was to emphasize the obligation of obeying the *ijmāʿ* al-ʿāmm, which is the *ijmāʿ* reported and maintained through the ages, for such instances as the method of performing prayers and the proper method of fasting.[12]

Al-Shīrāzī (d. 467./1083) was yet another notable scholar who defined *ijmāʿ* as the agreement of the *ʿulamāʾ* on a certain new matter at a certain time.[13] Interestingly, he argues that when *ijmāʿ* is achieved it should have priority over *al-khabar al-wāḥid*, *al-khabar al-mutawātir* and the Qurʾān since the *umma* had already agreed to do so.[14] Al-Shīrāzī also declared that only the *mujtahid* could be fully involved in *ijmāʿ*. For him, the involvement of the theologians *(mutakallimūn)* and legal theorists *(uṣūliyūn)* should be

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[10] al-Ẓāhirī, *al-Iḥkām*, IV, 501.

[11] Ibid., 531.

[12] Abū Bakr Aḥmad ibn ʿAlī ibn Thābit al-Khaṭīb al-Baghdādī, *Kitāb al-Faqīh wa al-Mutafaqqih* (Damascus: Dār Iḥyāʾ al-Sunna al-Nabawīya, 1395/1975), I, 172.

[13] al-Shīrāzī, *al-Lumaʿ*, II, 665.

[14] Ibid., 682.

restricted to the provision of general explanations and their involvement is recommended but not obligatory. The reason he gives is that the *mutakallimūn* and *uṣūliyūn* do not know the decisive evidences of the Sharīᶜa *(al-adilla al-sharᶜīya)*. Interestingly, he classifies other experts, such as doctors and literary scholars in the same category as children and madmen *(majānīn)*.[15] In other words, their opinion is not solicited at all in the arduous task of *ijmāᶜ*.

Even though he does not state his opinion explicitly, one can deduce that al-Shīrāzī is in favor of the agreement of all *mujtahids* in cases of *ijmāᶜ*. This can be seen from his response to those who argue for the infallibility of an *ijmāᶜ* which was disagreed upon by one or two Companions. According to him, such a consensus does not constitute *ijmāᶜ*. Disputes, in his opinion, should be solved by returning to the Qurʾān and the *Sunna* of the Prophet,[16] as was the case during Abū Bakr's fight against the *ridda*. Even though the majority refused to take up arms, Abū Bakr's idea was finally implemented due to a tradition of the Prophet recommending Abū Bakr's opinions and actions.[17] Another example are the cases of Ibn ᶜAbbās who disagreed with the Companions on five matters and Ibn Masᶜūd who disagreed with them on four matters. The solution in those cases was to return to the *Sunna* of the Prophet and not to the opinion of the majority. Thus al-Shīrāzī concludes that a valid *ijmāᶜ* is the one based upon the agreement of all *mujtahids*. The question emerges then, if this theory is applied, would not the *tawātur* number assume priority? To which he replies by stating that *tawātur* is significant in the listing of information *(khabar)* on the Prophet but not in *ijmāᶜ* since in *ijmāᶜ* everybody has the same

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[15] Ibid., 724-725.

[16] Based on the Qurʾān, 4; 59.

[17] The evidence normally cited is the *Sunna* of the Prophet, where instructions are found to fight those who refuse to be Muslims.

possibility to err because the information is of a hypothetical nature (*zan*). Therefore, requiring a majority agreement is not unreasonable after all.[18]

In response to a tradition of the Prophet stating that two or more individuals constitute a *jamāʿa*, and that *Shayṭān* is only with one person, and far from two or more, al-Shīrāzī holds that the former refers to prayers. This opinion is based on the tradition of the Prophet stating that a person must not say "the *ijmāʿ* of two people is *ḥujja*."[19] The latter concerns information *(khabar)*, which is also based on a similar tradition stating that a person must not say "the statement of two people is *ijmāʿ*.'[20] Moreover, he refuses to acknowledge that ʿAlī and Saʿd disagreed with the election of Abū Bakr. According to him, ʿAlī agreed by acceptance *(riḍā)*, as Saʿd did when he was reminded that the *imām* was from *Quraysh*.[21]

On the other hand, al-Bājī (d. 474/1081) espouses the idea of community *ijmāʿ*. He believes that the possibility to err would be drastically reduced if the whole *umma* were to take part in decision making. Of course, for the Muslim community, the possibility of error always exists, as took place in other religions. A case in point is the Jewish denial of later messengers of God. Yet, the guarantee by God of the infallibility of the Muslim community reduces this possibility. Thus, it would be safe to assume that al-Bājī believes in the infallibility of the *umma*.[22]

Similar to al-Shīrāzī, al-Sarakhsī (d. 483/1090) also argues that only *mujtahids* can perform *ijmāʿ*. His viewpoint is principally based on his interpretation of the word

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[18] al-Shīrāzī, *al-Lumaʿ*, II, 705-709.

[19] *Anna aḥadan lā yaqūlu inna ijmāʿ al-ithnayn ḥujja*; al-Shīrāzī, *al-Lumaʿ*, II, 708-709.

[20] *Anna aḥadan lā yaqūlu inna qawla al-ithnayn ijmāʿ*; Ibid.

[21] Ibid., 708-709.

[22] al-Bājī, *Iḥkām al-Fuṣūl*, 435.

"wasafa" in the Qur'ānic verse 2: 143,[23] as anybody who is al-khair (good), al-ʿadl (trustworthy), who can be called upon to act as a shāhid (witness) and to invite the people to righteousness. All these qualifications, in al-Sarakhsī's view, can only be fulfilled by the mujtahids, and not by the whole umma. Therefore, even though ijmāʿ is commonly understood as the ijmāʿ of the community, it should be restricted to the knowledgeable (ʿulamā') and to scholars (mujtahidūn).[24] Al-Sarakhsī, on the other hand, remarks that the disagreement of one or two mujtahids does not influence the establishment of ijmāʿ, as Ibn ʿAbbās, Abū Mūsā and others had at times held different opinions from the Companions and this difference was tolerated. Al-Sarakhsī quotes the following Sunna of the Prophet in support of his viewpoint: "Allah's hand is on the jamāʿa (majority)," "ʿalaikum bi sawād al-aʿzam."[25] Thus, in line with the rest of his thought, al-Sarakhsī deems tawātur unnecessary. His reasoning is based on a differentiation between ijmāʿ and information (khabar). Tawātur, he states, is required in the quest for information in order to avoid lies (kadhb), whereas for the former a number of mujtahids are sufficient to avoid errors (akhtā').[26]

Al-Pazdawī (d. 482/1082), on the other hand, strikes a middle course by allowing for the involvement of laymen and the masses, depending on the nature of the question on which ijmāʿ is to be reached. He asserts that the ability to exercise ijtihād is not needed for all problems. Indeed, the agreement of the masses is necessary, alongside that of the

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[23] Qur'ān 2: 143 "We made of you an Ummat justly balanced that ye might be witnesses over the nations, and Apostle a witness over yourselves." Abdullah Yusuf Ali, The Holy Qur'ān : Text, Translation and Commentary (Washington, D.C.: American International Print.co., 1946), 57-58.

[24] al-Sarakhsī, Uṣūl al-Sarakhsī, I, 311-312.

[25] Ibid., 316-317.

[26] Ibid., 312.

jurists, in questions relating to the fundamentals of religion, such as the transmission of the Qurʾān and the essentials of the Sharīʿa *(ummahāt al-Sharīʿa)*.[27]

In a similar vein, al-Ghazālī (d. 505/1111) defines *ijmāʿ* as the agreement of the whole *umma* on a certain religious matter.[28] To clarify this view, he distinguishes between two aspects of the Sharīʿa. The first aspect comprises obligations relating to the common people, such as prayer, fasting, performing *hajj*, while the second aspect of the Sharīʿa pertains to the elite *(khawāṣ)*. It includes such things as a detailed law of prayer and matters related to *muʿāmalāt* (such as transactions). In the former case, *ijmāʿ* is attained by the agreement of both scholars and the masses, while in the latter case, the masses must concede that the truth lies in the agreed upon opinion of the scholars. The scholars, in their turn must not hide any disagreement they might have. This way, the masses would agree with the scholars on questions of a technical nature, and the *ijmāʿ* of the scholars would come to be considered the *ijmāʿ* of the entire community.[29]

Similarly, al-Ghazālī denies the right of the layman to object to the agreement of scholars; he declares that such dissension is invalid for two reasons. First, the layman is not competent to search for and to determine the truth; he is like a child or a lunatic lacking those qualities that are prerequisite to the quest for truth and knowledge. Hence, the infallibility of the community comes to indicate the infallibility of the person of whom it can be conceived, i.e., he who has the capacity to attain the truth. The second and more important reason is that the Companions had agreed that the opinion of a layman would not be considered *ijmāʿ* due to the fact that the layman does not know what he is saying. Thus, the latter is ineligible to assent to or to dissent from the consensus of scholars. Indeed, the

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[27] al-Bukhārī, *Kashf al-Asrār*, III, 946/966.

[28] al-Ghazālī, *al-Mustaṣfā*, I, 173.

[29] Ibid., 181.

masses are only qualified to consult the scholars, but they are not qualified to give their opinion on legal questions.[30]

Based on the definitions of earlier jurists, al-Āmidī (d. 632/1234) defines *ijmāʿ* as the agreement of all those who "bind and loosen" in the community of Muḥammad, at a given time, and on a ruling about a particular matter.[31] Moreover, he disregards the opinion of minors *(sibyān)* due to their lack of knowledge.[32]

A later jurist, al-Ḥāfiẓ al-Dīn al-Nasafī, (d. 710/1310) advocates the *ijmāʿ* of the *mujtahids*. He, however, emphasizes the necessity of justice/trustworthy *(ʿadāla)* and knowledgeability *(ahi al-ijtihād)* in all *mujtahids*.[33] Like the majority of his predecessors, he also divides *ijmāʿ* into two main kinds: (1) the *ijmāʿ* of the *ʿawwām* (common people) and (2) the *ijmāʿ* of the *mujtahids*. The involvement of the *ʿawwām*, in his view, is similar to that of madmen since they do not possess any knowledge.[34]

In a similar manner, al-Taftāzānī (d. 792/1390) also requires all Muslims to agree with the opinions expressed by the *mujtahids*. The latter fulfill their duties by expressing their honest opinions, especially when in disagreement with others, as it is forbidden for them to remain silent on an issue they disagree upon.[35] Moreover, he divides *ijmāʿ* into two main types: (1) the *ijmāʿ* of the whole community, which includes the good, bad and unfair *(ḥusn, qabīḥ, ẓulm)* elements of society; (2) the *ijmāʿ* of the *mujtahids (khawāṣ al-*

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[30] Ibid., 182.

[31] al-Āmidī, *al-Iḥkām*, I, 281-282.

[32] Ibid., 327.

[33] al-Ḥāfiẓ al-Dīn al-Nasafī, *Kashf al-Asrār* (Cairo: al-Maṭbaʿat al-Kubrā al-Amīrīya, 1316), II, 103.

[34] Ibid., 106.

[35] al-Taftāzānī, *al-Tawḍīḥ*, II, 498-499.

umma). The latter's *ijmāᶜ*, he argues, has to be adhered to as it is forbidden to disagree with them. He grounds this obligation on two main reasons: revelation (*naql*) and reason (*ᶜaql*). For the former, he cites some verses: Q.98: 4; Q.3: 105, and Q.9: 122, all of which, according to him, indicate one's obligation to follow the agreement of contemporary *mujtahids.* He also argues that in using one's reason, one will conclude that even though revelation (*waḥy*) has already been revealed the Sharīᶜa must be continued in order to address any new issues. Consequently, only *mujtahids* can derive legal dictums, since they are the experts and the *ulū al-amr.*[36]

Akin to al-Nasafī, Ibn Humām and his commentator, Ibn Amīr al-Ḥājj (d. 879/1474) emphasizes that the requirement of justice/trustworthiness (*ᶜadāla*) be present in every *mujtahid.* Because the *umma* bestows its trust and *karāma* on *mujtahids.* The latter's possession of justice becomes a prerequisite for the validity of their *ijmāᶜ.* To support his point, Ibn Amīr cites Qurʾān 49: 6.[37]

Lastly, it should be said that al-Ṭūsī (d. 672/1274) and al-Ṭūfī (d. 716/1316) follow in al-Ghazālī's footsteps by maintaining that the status of a child (*ṣaghīr*), and a madman (*majnūn*) makes him ineligible for the quest after truth and knowledge.[38]

In short, even though the majority of the classical and medieval jurists divide *ijmāᶜ* into two classifications, one can conclude from these various definitions that *ijmāᶜ* has five component parts; namely, (1) an agreement; (2) people to tackle the issue; namely those

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[36] al-Taftāzānī also argues that *mujtahids* are always given *ilhām* (inspiration). This based on Q. 91: 7-9. See al-Taftāzānī, *al-Tawḍīḥ,* II, 512-513.

[37] Ibn Humām, *al-Taḥrīr,* 404-405; Ibn Amīr, *al-Taqrīr,* 95.

[38] Muḥammad al-Ḥasan al-Ṭūsī, *ᶜUddat al-Uṣūl* (Bombay: Duttprasad, 1318), II, 71; al-Ṭūfī, *Sharḥ Mukhtaṣar,* III, 33.

who bind and loosen in the community[39]; (3) membership of the Prophet's community; (4) a period of time; (5) a particular issue at hand.[40] All of these components will be discussed below.

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[39] Other jurists use the term *mujtahid* instead of *ahl al-ḥall wa al-ʿaqd*. See for example Ibn Humām, who defines *ijmāʿ* as an agreement of *mujtahids*.

[40] al-Āmidī, *al-Iḥkām*, I, 281-282.

B. The Principles of *Ijmāᶜ*

a. The Agreement

As noted above the first condition of *ijmāᶜ* is an agreement. Al-Baṣrī remarks that the agreement can be reached by expression, by action or acceptance *(riḍā)*.[41]

Concerning agreement, al-Sarakhsī divides *ijmāᶜ* into *al-ᶜazīma* and *al-rukhṣa*. *Al-ᶜazīma* is the *ijmāᶜ* stated or unanimously performed by everybody, like the prohibition of *zinā* or *ribā*. *Al-rukhṣa*, on the other hand, is the *ijmāᶜ* of a number of *mujtahids* on an issue at a particular time, while the rest of their colleagues do not volunteer any comments on the issue at hand. This latter classification is famously called *ijmāᶜ sukūtī*. Both of them, according al-Sarakhsī, are classified as *ijmāᶜ*.[42] Al-Sarakhsī argues that if the view of some scholars on a disputed question spreads throughout the community and the rest of the scholars accept it by verbal expression or by silence, then an agreement is said to have been reached on that problem, since it is not allowed for *mujtahids* to remain silent if they disagree with a particular issue. He argues that, if the opinion of every single *mujtahid* was solicited, then *ijmāᶜ* would never be reached.[43]

The issue of silence is further elucidated by al-Pazdawī who maintains that *ijmāᶜ* by silence is valid on two conditions; (1) when the opinion of a single scholar or a group of scholars has reached all the remaining scholars; (2) when the time of consideration for a certain problem has elapsed and no opinion had been raised against it during that time.[44]

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[41] al-Baṣrī, *al-Muᶜtamad*, II, 479.

[42] al-Sarakhsī, *Uṣūl al-Sarakhsī*, I, 303.

[43] Ibid., 305.

[44] al-Bukhārī, *Kashf al-Asrār*, III, 948.

Al-Ghazālī remarks that, if a *mujtahid* states his opinion on a certain matter and the rest of the common people follow it, then this opinion acquires the status of *ijmāᶜ*.[45] But if some *mujtahids* state a rule on a certain case, and the rest of their peers do not respond to it, then this silence could not be said to constitute or to justify an *ijmāᶜ*, since the latter must indicate that their silence is indeed a sign of approval. An unequivocal response must be given in cases of *ijmāᶜ* and *fatwās*, he declares.[46]

Similarly al-Sarakhsī, al-Nasafī and al-Taftāzānī divide *ijmāᶜ* into *al-ᶜazīma* and *al-rukhṣa*, and explain them in almost the same terms as their predecessors did. Al-Nasafī, however, deems the duration of three days is sufficient for a *mujtahid* to formulate an opinion. If he does not question the decision of his colleagues during these three days, he forfeits the right to do so later, and his silence is taken as a sign of agreement.[47]

Al-Nasafī, is yet another scholar who does not require the statement of every *mujtahid* for *ijmāᶜ* since, according to him, if such a statement is required, *ijmāᶜ* will never be achieved. By contrast, he argues that any disagreement must be stated, since, disagreeing with *ijmāᶜ* is similar to the duty of inviting people to righteousness and calling them away from *al-faḥshāʾ* (vileness). Consequently, those who do not state their disagreement could be said to be neglecting their duties.[48]

In discussing the possibility of disagreement with an *ijmāᶜ*, al-Nasafī states that this is allowed before an *ijmāᶜ* is reached, but once it becomes an *ijmāᶜ*, this possibility is denied and becomes similar to disagreeing with a *naṣṣ*.[49]

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[45] al-Ghazālī, *al-Mustaṣfā*, I, 188.

[46] Ibid., 191.

[47] al-Nasafī, *Kashf al-Asrār*, II, 103-104; al-Taftāzānī, *al-Tawḍīḥ*, II, 499.

[48] al-Nasafī, *Kashf al-Asrār*, II, 104.

[49] Ibid., 106.

If there are two contending stands regarding a certain matter, is it possible to disregard both and to adopt a third opinion? Al-Baṣrī remarks that it is not. According to him, an opinion must be chosen from the two.[50] The basis for this is the precedent set by the Companions in their election of Abū Bakr, as well as the example set by the *tābiʿīn* (immediate successors) in solving the dispute over the sale of slave-mothers (*ummahāt al-awlād*).[51]

Similarly, al-Shīrāzī also states that, when the opinion of the Companions is divided into two groups, future Muslim are to adopt either of the two and under no circumstances are they to devise a third opinion. This argument is based on Qurʾān 4: 59, which states that controversies *(tanāzuʿāt)* should be solved by a direct referral to the Qurʾān and the *Sunna* of the Prophet. Thus, during the *ridda*, when Abū Bakr's motion was contrary to that of the *jamāʿa* (majority), the Companions solved this dispute by a recourse to the *Sunna* of the Prophet, where instructions were found to fight those who refuse to be Muslims. Moreover, as already mentioned, Ibn ʿAbbās held different opinions from the other *mujtahids* in five matters, while, Ibn Masʿūd differed in four. These differences in opinion were settled by a return to the *Sunna* of the Prophet or by *qiyās* from which it was discovered that contrary opinions were not valid.[52] In cases of disagreement, however, al-Shīrāzī applies two different methods. The first recommends looking at an *athar* (revelation evidence), while the second advocates the adoption of the opinion of the *mujtahids*. The latter is applied when the first method is not found. In addition, *mujtahids* disagreeing on an *ijmāʿ* must adopt either of these two. Al-Shīrāzī also requires the passage of time in particular cases.[53] Later, when his opponent argued that disagreement constituted a

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[50] al-Baṣrī, *al-Muʿtamad*, II, 504.

[51] Ibid., 517-518.

[52] al-Shīrāzī, *al-Lumaʿ*, II, 706.

[53] Ibid., 726; 738.

permission to perform *ijtihād*, and to derive a third opinion, he retaliated by declaring that it is only permitted to adopt one of the two opinions because only one of them is valid.[54] To this his opponents cite Qurʾān 4: 115 which does not state whether or not there were any disagreements before the coming of *ijmāʿ*. Al-Shīrāzī answers this by remarking that at the time an agreement had already been established among the Companions that Muslims would be allowed to follow only one of the Companions' opinions. He also affirms that future Muslims are duty bound to follow them.

Another argument proposed by al-Shīrāzī's opponent is that an *ijmāʿ* is a *ḥujja* but that a disagreement is not *ḥujja*. Thus the opposition to a disagreement should not constitute a refutation of a *ḥujja*. To which al-Shīrāzī answers that there is a marked difference between new cases and cases that had already been delved into and that an *ijmāʿ* becomes automatically a *ḥujja* when there is no previous disagreement to a similar case. His opponent then argues that adopting one opinion is the same as dropping the other, to which he retorts that an opinion was only dropped when it had fallen into disuse by the Companions themselves. But if both opinions had been followed by the Companions, both can be considered valid.[55] Lastly, his opponent argues that if an opinion is dropped, this would be similar to allowing the revocation (*baṭl*) of an *ijmāʿ*. His answer is that there is no revocation since there is no *ijmāʿ* yet.[56]

Al-Bājī is another jurist who speaks of the impossibility of adopting a third opinion in cases of disagreement among the Companions. His reasons bear a strong resemblance to those of al-Shīrāzī and are strengthened by the mention that all Mālikites are of the same

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[54] Ibid., 738.

[55] Ibid., 730-734.

[56] Ibid., 727.

conviction.[57] He, however, believes in the necessity of the immediate successors of the Companions adopting either of the previous stands. The reason he cites is Q. 4: 115 which speaks only to those alive at the time of the Companions. It could be argued that there is a difference between the case of the immediate successors and that of the Companions, for in the former case there was a stated disagreement, while in the latter case there was not, and consequently, in the former case, the immediate successors have to follow the *ijmāᶜ* of some of the Companions, while in the latter case, only one of the Companions had to adhere to the agreement of the others. He answers to this argument by stating that disagreement does not negate a given *ijmāᶜ*, but rather that there are some *mujtahids* who chose not to state their opinion. This can be proved, according to him, by the precedent of the Companions who did not consider that they had reached an *ijmāᶜ* when some of their peers had stated their disagreement or remained intentionally silent. However, al-Bājī's opponent argue that, since the Companions had held two opinions, both must be equally valid. The answer is that both opinions are on the right path but a third option is not permitted. His opponent goes on to argue that by adopting only one opinion the immediate successors would uphold one opinion over the other, while the Companions agreed on the validity of both opinions. Al-Bājī then replies by stating that during the Companions' era some cases were not yet finalized but were still hypotheses (*ẓan*). Therefore, it was still permissible to refute a statement of deed, unless it had become certain (*qaṭᶜī*); when the immediate successors had agreed upon a matter, it then became certain (*qaṭᶜī*). Similarly, a jurist who uses a *qiyās* before finding a *naṣṣ*, but later finds an opposing *naṣṣ*, would have his *qiyās* immediately refuted. In addition, when the immediate successors agreed on a given matter, this becomes the norm in deciding all future cases. Moreover, if the

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[57] al-Bājī, *Iḥkām al-Fuṣūl*, 496-497.

*mujtahid*s disagree on a topic, then the next generation is allowed to adopt any of the dictums of the previous *mujtahid*s on this topic, which would then become certain *hujja*.[58]

The derivation of a third opinion is permitted by al-Āmidī, as long as it contains elements from the two previous ideas. In other words, it should draw upon the rationales of previous dictums and adopt certain points from these previous rulings. A case in point are the two opinions concerning motive/intention (*nīya*) in *ṭahāra*. The first holds that there must be a motive for every part of *ṭahāra*, while the second rejects this. Thus, a third opinion permitted is *nīya* to some but not to all parts of *ṭahāra*.[59] To those who argue that disagreement is a basis for permitting the attainment of a third idea, al-Āmidī answers by allowing for *ijtihād* and by refusing to permit a third ruling. Unfortunately, he does not give sufficient reason for his refusal. He simply states that after the age of the Companions a third *dalīl* and hence a third idea were allowed. But the third *dalīl* must only be employed in assuring the *umma* but not in creating a third opinion.[60]

Al-Nasafī does not differentiate between an *ijmāʿ* preceded by a disagreement and one that was not. He maintains that when there is an agreement *ijmāʿ* is achieved, but when an *ijmāʿ* is achieved and a disagreement later arises, such an act will not influence the result. He then argues that the opinion to be taken into account is that of those who are still alive, since the basis of *ijmāʿ* is the best *umma* who enjoin the good and shun the evil (*taʾmurūn bi al-maʿrūf and tanhawna ʿan al-munkar*). This duty, he warns, is only for those who are still alive. In this respect, al-Nasafī seems to apply the theory of abrogation.[61]

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[58] Ibid., 492-495.

[59] al-Āmidī, *al-Iḥkām*, I, 387.

[60] Ibid., 389-390.

[61] al-Nasafī, *Kashf al-Asrār*, II, 107.

Similarly, Ibn Humām also argues that the basis of judging the validity of an *ijmāᶜ*, must not rely on the precedence of disagreement or agreement by previous Companions. For him, disagreement at a certain point in time does not affect the next generation.[62]

b. The Qualifications of a *Mujtahid*

The second condition for *ijmāᶜ* is membership within the Muslim community. This condition is unanimously upheld and agreed upon by all jurists, and it excludes members of the other communities, such as Christians and Jews. In other words, the *ijmāᶜ* of the Muslim community alone is acceptable and not the consensus of the other communities. Moreover, even though some jurists require the involvement of the common people in *ijmāᶜ*, in practice only *mujtahids* are really involved. Thus, strict requirements and qualifications were demanded by jurists for a person to qualify as a *mujtahid*.

There is a plethora of definitions concerning the nature and the role of a *mujtahid*. The latter are characterized as lawyers *(al-fuqahāʾ)*;[63] scholars of the community *(ᶜulamāʾ al-umma)*;[64] the people of loosening and binding *(ahl al-ḥall wa al-ᶜaqd)*;[65] and the people of opinion and legal interpretation *(ahl al-raʾy wa al-ijtihād)*.

Al-Baṣrī seems to be the earliest jurist who discusses the qualifications of a *mujtahid* in his book *Kitāb al-Muᶜtamad fī Uṣūl al-Fiqh*. He lists several requirements to be fulfilled by a *mujtahid*, such as knowledge of the Qurʾān, the *Sunna* of the Prophet and the principles of inference *(istidlāl)* and *qiyās*. A second requirement is the ability to examine

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[62] Ibn Humām, *al-Taḥrīr*, 402-403.

[63] al-Shīrāzī, *al-Lumaᶜ*, II, 665.

[64] Ibn Ḥazm, *al-Iḥkām*, I, 281.

[65] al-Bukhārī, *Kashf al-Asrār*, III, 957; al-Ghazālī, *al-Mustaṣfā*, I, 181; Ibn Amīr uses the phrase *ahl al-ḥall wa al-ᶜaqd* instead of *mujtahid*, and in a following explanation, he states that he meant by *ahl al-ḥall wa al-ᶜaqd*, the *mujtahids*. See idem, *al-Taqrīr*, II, 147-148.

the paths of transmission of a *Sunna* and the trustworthiness of transmitters, so that verification of the credibility of the *akhbār* (Prophetic reports) can be carried out. Al-Baṣrī also emphasizes the necessity of understanding *qiyās* as an indispensable tool in any undertaking of *ijtihād*. Therefore, knowledge of all the rules relating to *ʿilla, aṣl, farʿ* and *ḥukm* is a third prerequisite. To master all of the above, the jurist must know the principles of *majāz* (metaphor), and particularization (specifying the meaning of a passage from another) and *nāsikh-mansūkh* (abrogation). Familiarity with the Arabic language is also a must, especially with the *khāṣṣ* (particular) and the *ʿāmm* (general). Moreover, to be able to determine God's law in the light of the exigencies of human life, the jurist must be familiar with customary law (*ʿurf*) as well as the dictums of earlier *ijmāʿ*; as he is not allowed to reinvestigate a case for which a ruling has already been derived. This implies that whoever intends to practice *ijtihād* must first be certain that it has not been treated before.[66]

Another erudite scholar, Abū Bakr al-Baghdādī, presents further requirements of a *mujtahid*. Besides being a *bāligh* (major) and an *ʿadl* (trustworthy), a *mujtahid* must understand the Sharīʿa and everything related to it, such as *uṣūl al-fiqh* and *furūʿ*. By *uṣūl* he meant the four subjects dealing with: (1) understanding the Qurʾān, such as *muḥkam* and *mutashābih*, *ʿāmm* and *khāṣṣ*, *mujmal* and *mubayyan* and *nāsikh-mansūkh*; (2) knowledge of the *Sunna* of the Prophet, such as the transmission of the *Sunna* of the Prophet; (3) knowledge of earlier *ijmāʿs*; (4) knowledge of *qiyās*. He also cites the necessity of a *mujtahid* to be knowledgeable in contemporary *ʿurf*.[67]

According to al-Shīrāzī a *mujtahid* must possess the following: (1) knowledge of the Qurʾān, particularly those provisions that have a direct relevance to the Sharīʿa; (2) knowledge of the *Sunna* of the Prophet, and especially of (i) transmission (*ṭarīq al-riwāyat*)

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[66] al-Baṣrī, *al-Muʿtamad*, II, 930 line 2 and 931 line 9-10.

[67] al-Baghdādī, *al-Faqīh*, II, 156-158.

and (ii) the *Sunnas* related to the Sharīʿa; (3) knowledge of *ijmāʿ* and *qiyās*; (4) knowledge of the principles of the Arabic language, such as *ḥaqīqat* (essence) and *majāz*, *ʿāmm* and *khāṣṣ*, *mujmal* and *mubayyan*, *mutlaq* (absolute) and *muqayyad* (limited) et cetera; (5) knowledge of the *ijmāʿ* of the *salaf*; (6) knowledge of the sequence of *dalīl* (evidence); and (7) knowledge of what is reliable (*thīqah*) among the *Sunna* of the Prophet.[68]

The requirements of a *mujtahid*, according to al-Pazdawī are: (1) knowledge of the Qurʾān; (2) knowledge of the *Sunna*; (3) knowledge of the way of *qiyās*.[69]

Al-Shahrastānī (d. 568/1153) cites five conditions for a *mujtahid*, namely, (1) good knowledge of Arabic, by which he can differentiate between contexts that are *ʿāmm* and *khāṣṣ*, *mutlaq* and *muqayyad*, et cetera; (2) knowledge of *tafsīr*, especially that related to the Sharīʿa ; (3) knowledge of the *Sunna* of the Prophet; (4) knowledge of the *ijmāʿ* of the Companions and the followers; (5) an aptitude to constantly seek divine guidance (*istirshād*).[70]

According to al-Ghazālī a *mujtahid* must (1) demonstrate a thorough knowledge of the 500 verses needed in law, although committing them to memory is not a prerequisite; (2) know the relevant *Sunna* of the Prophet, though a *mujtahid* need only have a reliable copy of Abū Dāwud's or Bayhaqi's collection rather than memorize their contents; (3) know the substance of *furūʿ* works and the points subject to *ijmāʿ*, so that he does not deviate from the established laws. If he cannot fulfill this requirement, he must ensure that the legal opinion he derives does not contradict any opinion of a renowned jurist; (4) know the methods by which legal evidence is derived from the texts; (5) know the Arabic language; though complete mastery of its principles is not a prerequisite; (6) know the rules

[68] al-Shīrāzī, *al-Lumaʿ*, II, 1033-1035.

[69] al-Bukhārī, *Kashf al-Asrār*, II, 135.

[70] Shahrastānī, *al-Milal wa al-Niḥal* (Cairo: Muassasat al-Ḥalabī, 1968/1387), II, 4-5.

governing the doctrine of abrogation. However, the jurist need not be thoroughly familiar with the details of this doctrine; it is sufficient to show that the verse or the *Sunna* of the Prophet in question had not been repeated. The mujtahid must (7) be able to investigate the authenticity of the *Sunna* of the Prophet. However, if the *Sunna* of the Prophet had been accepted by Muslims as reliable, it may not be questioned. These requirements are for those who intend to conduct *ijtihād* in all areas of substantive law. Those who want to specialize in one area, e.g., family law, or a single matter, such as divorce, need not fulfill these requirements, but must understand the methodological principles and textual material needed to solve the particular problem they are concerned with.[71]

Al-Āmidī maintains that a *mujtahid* should be able to derive a law (*ḥukm*) from the sources. In order to do so, a *mujtahid* must understand the transmission of the *Sunna* of the Prophet, *jarḥ* and *taʿdīl*, (criticism of *ḥadīth*), the circumstances in which the Qurʾān was revealed (*asbāb al-nuzūl*), abrogation, language and *naḥw* (grammar), so that he can differentiate between *muṭlaq* and *muqayyad*, *ʿāmm khāṣṣ*, *ḥaqīqat* and *majāz*. The only exigency al-Āmidī adds to what previous jurists had already laid down, is that a *mujtahid* must be familiar with *tawḥīd*, such as the existence of God, His characteristics (*awṣāf*), the Prophetic characteristics. All of those requirements however are for the *mujtahid* muṭlaq absolutely necessary. A less competent *mujtahid*, on the other hand, is allowed to deal with legal issues without meeting all of the above requirements, as long as he possesses the immediate tools that would enable him to deal with the issue at hand.[72] The idea of the classification of *ijtihād* into absolute (*muṭlaq*) and limited (*muqayyad*) can be traced back to al-Ghazālī's *Mustaṣfā*.

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[71] al-Ghazālī, *al-Mustaṣfā*, II, 353-354.

[72] al-Āmidī, *al-Iḥkām*, III, 204-205.

Al-Isnawī (d. 772/1370), who comments on Bayḍāwī's *Minhāj*, follows the same general outline as given by al-Ghazālī. However, he considers a familiarity with the entire text of the Qur'ān rather than with the 500 verses indispensable.[73] Al-Subkī considers that a *mujtahid* need not know the path of transmission of the *Sunna* of the Prophet or the credentials of transmitters, since reliance on a good *ḥadīth* collection will suffice.

Similarly, Ibn Amīr al-Ḥājj, in his commentary on Ibn al-Humām's *Taḥrīr*, argues against the unreasonable demands of *ḥadīth* knowledge imposed on the *mujtahid*. Ibn Amīr sets the number of *Sunnas* of the Prophۥ ۥ *mujtahid* must know at 1200, but even these are not necessarily to be committed to memory.

Unfortunately, al-Anṣārī (d. 1119/1707) and his commentator Ibn ʿAbd al-Shakūr (d. 1225/1810) add nothing to what had been previously outlined. Though al-Shawkānī, disputes the authority of Abū Dāwūd's collection of the *Sunna* of the Prophet, a view already suggested by al-Ghazālī and a number of other scholars, al-Shawkānī also requires a more encompassing knowledge of the *Sunna* and suggests that a *mujtahid* must be conversant with the contents of the six known collections of *the Sunna* of the Prophet and must know, when needed, how to access an opposing *Sunna* of the Prophet. More important in this context, is the divisibility *(tajzi'a)* of *ijtihād* that come to be recognized as lawful in *Sunnī* law as well as the recognition that a limited knowledge of *uṣūl* was sufficient to allow a jurist to determine individual cases.[74] Lastly, only al-Baṣrī and al-Shīrāzī applied the divisibility of *ijtihād* to all areas of law.

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[73] Jamāl al-Dīn al-Isnawī, *Nihāyāt al-sūl fī Sharḥ Minhāj al-Wuṣūl* (Miṣr: Maṭbaʿat al-Tawfīq al-Adabīyah, n.d.), III, 307-313.

[74] al-Shawkānī, *Irshād al-Fuḥūl*, 232-237.

c. Time

i. *Ijmāᶜ* of Every Generation

The third condition for *ijmāᶜ* refers to time. The viewpoints of jurists on this matter can be generally divided into several groups. The first view point which is represented by the majority of jurists recognizes the validity of *ijmāᶜ* in every generation as a valid *ḥujja*.[75]

Abū Bakr al-Baghdādī argues that the verse *yattabiᶜ ghaira sabīl al-muʾminīn* (Q.4: 115) does not refer to the Companions in particular, but to the entire *umma*. In addition, the two verses *khaira umma* and *ummatan wasaṭā* (Q.3: 110; Q.2: 143) address the entire community, just as other obligations such as praying, alms tax, and fasting, contain regulations to be observed by every Muslim. Moreover, he contends that the infallibility of *ijmāᶜ* must be grounded in its acceptance by the entire Muslim body and not just a few Companions.[76] In other words, if the above verses and the *Sunna* of the Prophet are addressed to the Companions only, other obligations such as praying and fasting would also only be mandatory for the Companions.[77] Therefore, the valid *ijmāᶜ* is not only the *ijmāᶜ* of the Companions, but rather the *ijmāᶜ* of every generation.

In addition to what has been presented by al-Baghdādī, al-Bājī cites several *Sunna* of the Prophet which indicate that in every generation there is a group of people who reverently maintain the truth. He also comments on the *Sunna* of the Prophet, "my

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[75] ᶜAbd al-Jabbār, *al-Mughnī*, Vol. XVII, 169; al-Baṣrī, *al-Muᶜtamad*, II, 492; al-Baghdādī, *Kitāb al-Faqīh*, I, 169; al-Bājī, *Iḥkām al-Fuṣūl*, 435. al-Pazdawī in *Kashf al-Asrār's* margin, 969; al-Taftāzānī, *al-Tawḍīḥ*, II, 512.

[76] al-Baghdādī, *Kitāb al-Faqīh*, I, 169.

[77] al-Qāḍī al-Nuᶜmān, *Ikhtilāf Uṣūl al-Madhāhib*, ed. Muṣṭafā Ghālib (Beirūt: Dār al-Andalus, 1393/1973), 106.

Companions are like stars," by revealing that this *dalīl* advocates the emulation of the good example of the Companions. Having bestowed the needed respect on the Companions, he goes on to argue that even if the above traditions are perfectly *ṣaḥīḥ* as *dalīls* of the *ḥujja* of the *ijmāᶜ* of the Companions, this does not mean that the *ijmāᶜ* of other Muslims is not equally valid. Similarly, the saying that "my Companions are *Muᵓmin*," does not indicate that future Muslims are not *Muᵓmins* either. Al-Bājī answers to the argument that the Companions knew the Prophet and *waḥy* better, by saying that the ability to seek *ijtihād* is found equally among the Companions and the immediate successors. In addition, the *ijmāᶜ* of the Companions becomes *ḥujja* not because of their understanding of the *maqāṣid* of the Prophet, but rather because of their agreement on it. His response to the *Sunna* "The best of you are my peers, then their successors"[78] is that this *Sunna* does not bestow a religious superiority on the Companions, but rather that their reward (*thawāb*) is much more than their descendants. Similarly, the *Sunna* "*Abū Bakr khairun min ᶜUmar*" means that Abū Bakr's *thawāb* is much more than that of ᶜUmar. Consequently, al-Bājī came to believe that the opinion of the Companions is not the only correct paradigm and that the thoughts of later Muslims are not inherently erroneous either.[79]

Al-Sarakhsī is another supporter of the *ijmāᶜ* of every generation. In promulgating his theory, he cites Q.2: 257, which according to him, indicates the method used by God to protect *al-muᵓminīn* by leading them from *kufr* and *bāṭil* to *imān* and truth. This is the basis for his statement that the truth is something already agreed upon (*ijmāᶜ*) in every generation.[80] In addition, al-Sarakhsī argues that the purpose of *ijmāᶜ* is to protect the teachings of the Sharīᶜa from error. This can only be done by those who belong to the

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[78] *Khairukum qarni al-ladhīna buᶜith-tu fīhim thumma al-ladhīna yalīna-hum.*

[79] al-Bājī, *Iḥkām al-Fuṣūl*, 486-491.

[80] al-Sarakhsī, *Uṣūl al-Sarakhsī*, I, 300.

present generation and not by those who have passed away.[81] Quoting the statement of the

Prophet that "the best people are those who join me and their successors and then their

successors," al-Sarakhsī states that each generation has its own notion of what constitutes

the best. The Sharīʿa, it is held, will survive until the end of time through the *ijmāʿ* of each

period.[82]

Still in the same vein, al-Ghazālī and al-Āmidī argue that the authority of *ijmāʿ* is

established on the basis of the Qurʿān, *Sunna* and reason. These three sources, they add,

do not differ from one generation to the next. Thus, the agreement of the successors has to

be deemed an *ijmāʿ* of the whole community.[83] Moreover, other jurists argue that *ijmāʿ* did

not take place during the Prophet's era, but only after his death.[84]

Al-Ṭūfī also remarks that just as other religious obligations do not cease with the

death of some people and the birth of others, *ijmāʿ* too must not cease with the evolution of

time.[85] Consequently, the *ijmāʿ* of every generation must be taken into account. Similarly,

Ibn Amīr also argues that the article 'al' in "al-muʿminīn" fulfills the function of ʿāmm and

speaks to its contemporary Muslims as well as to ones who follow.[86]

On the question of whether or not the passing of an age (al-ʿaṣr) is a condition for the

ḥujja of *ijmāʿ*, al-Baṣrī considers that it is not, for the following reasons : (1) the basis for

ijmāʿ, both *naṣṣ* and reason, does not require the passage of time; (2) the basis for *ijmāʿ*

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[81] Ibid., 320; al-Subkī in Ḥasan al-ʿAṭṭār, *Ḥashīyah ʿalā Sharḥ Jamʿ al-Jawāmiʿ*, II, 192.

[82] al-Sarakhsī, *Uṣūl al-Sarakhsī*, I, 313.

[83] al-Ghazālī, *al-Mustaṣfā*, I, 121-122; al-Āmidī, *al-Iḥkām*, I, 328-332.

[84] See for example, al-Shawkānī, *Irshād al-Fuḥūl*, 71; al-Rāziq, *al-Ijmāʿ*, 9.

[85] al-Ṭūfī, *Sharḥ Mukhtaṣar*, III, 50.

[86] Ibn Amīr, *al-Taqrīr*, III, 162-163.

does not require the death of *mujtahids* either; (3) if it had been taken into account, *ijmāᶜ* would have never been achieved, since there is no demarcation line between the end of one generation and the beginning of another. A case in point are the successors who were already born and active during the lifetime of the Companions.[87]

Time, al-Baṣrī says, provides ample opportunity for one to reflect and to derive new ideas and interpretations. This happened to Companions like ᶜAlī who modified his opinion on the sale of slave-mothers, and ᶜUmar who reassessed his stand on the practice of equal distribution of booty and the *ḥadd* punishment for drinking. Another change in public opinion presented by al-Baṣrī involves the sale of slave-mothers which was sanctioned during ᶜUmar's caliphate. The latter is renowned for judging cases on an individual basis. Lastly, al-Baṣrī questions the requirement of waiting for the death of an elder generation before recognizing an *ijmāᶜ* that had already been accepted during their lifetime.[88]

Similarly, al-Shīrāzī does not require the passage of time since the basis for *ijmāᶜ* does not stipulate so. Requiring the passage of an era, according to al-Shīrāzī, is similar to requiring the death of a *mujtahid*, a condition not demanded by the Prophet.[89] To those who argue that the Qurʾān 2: 143 requires the passing of an age, since it states *shuhadāʾ ᶜalā al-nās* and not *shuhadāʾ ᶜalā al-muslimīn*, al-Shīrāzī answers by declaring that the purpose of these words is to demonstrate that witnesses are not just obtained from the one group. In addition, these witnesses are not just in this world but also in the here-after.[90] Moreover, al-Shīrāzī answers those who argue that the Companions modified their

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[87] al-Baṣrī, *al-Muᶜtamad*, II, 502-503.

[88] Ibid., 504.

[89] al-Shīrāzī, *al-Lumaᶜ*, II, 697.

[90] Ibid., 699.

opinions after some time as is the case with ᶜAlī, by explaining that this took place on an individual basis and not in cases of *ijmāᶜ*. In addition, the meaning of the statement "your opinion together with that of the community as a whole is more beloved than your own personal opinion"[91] does not refer to *ijmāᶜ*, even if one assumes that this tradition refers to *ijmāᶜ*, the *ijmāᶜ* here is that of the majority of the Companions but not of all of them.[92]

To those who argue that the passage of time must be allowed because a *mujtahid* might have died before expressing his opinion, al-Shīrāzī retorts that only in cases of immediate death can a review be carried out. His rationale is that death could have prevented a unanimous ijmāᶜ. If however an *ijmāᶜ* had already taken place before the death of a certain *mujtahid*, then a review should not carried out.[93]

Al-Sarakhsī is another jurist who opposes the time requirement for several reasons: (1) the basis used for the validity of *ijmāᶜ* does not distinguish between extinction or not;[94] (2) if this requirement is enforced, *ijmāᶜ* would never take place because every generation will differ from the previous one, in spite of being equally competent in the realm of *ijtihād* and the use of the same tools; (3) Qurʾānic verses and the *Sunna* of the Prophet do not stipulate any condition of time; (4) some Successors like Ibn ᶜAbbās used to express their

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[91] *"raʾyuka maᶜa al-jamāᶜati aḥabbu ilaynā min raᶜyika waḥdaka."* This statement was said when ᶜAlī changed his mind from prohibition to permission concerning the sale of slave-mothers. It was assumed that all Companions, including ᶜAlī, had agreed on the prohibition of the sale of slave-mothers. Later on ᶜAlī changed his idea and permitted such a sale. According to al-Shīrāzī, this is not the *ijmāᶜ* of the whole Companions but rather the *ijmāᶜ* of the majority.

[92] al-Shīrāzī, *al-Lumaᶜ*, II, 700.

[93] Ibid., 702-703.

[94] See Qurʾān 4: 115; Q.3: 110; Q.2: 14 and the Prophetic tradition "my community shall not agree on an error." al-Baṣrī, *al-Muᶜtamad*, II, 502-503; al-Pazdawī, see al-Bukhārī, *Kashf al-Asrār*, 963; al-Sarakhsī also argues that *ijmāᶜ* is similar to the *naṣṣ*, in which there is no connection with time, any time it is coming when a problem appears, idem, *Uṣūl al-Sarakhsī*, I, 315; al-Taftāzānī, *al-Tawḍīḥ*, II, 507.

opinion freely and were not hampered by their difference with the other Companions. Moreover, if such a condition had indeed been espoused, the *ijmāᶜ* of the Companions would have never materialized. In addition, al-Sarakhsī backs his opinion with the Prophet's command to adhere to the opinion of the majority.[95]

The same point of view is advocated by al-Ghazālī who does not require the passage of time. Since, according to him, the *ḥujja* of *ijmāᶜ* does not depend on the death of *mujtahids*, but on the agreement itself. In other words, authority lies in an agreement which should function independently of the death of scholars or the withering away of a generation. In addition, the basis for *ijmāᶜ* and the *ijmāᶜ* of the Companions does not stipulate such criterion either.[96] To those who would argue that time must be provided to allow one to reflect, to search for new reasons and interpretations and to react to recently discovered prophetic traditions, al-Ghazālī answers in the negative by prohibiting such acts as they create divisions within the *jamāᶜa*.[97]

Al-Āmidī is yet another jurist who does not require the passing of an age. He argues that the agreement is the requirement of the *dalīl*. Therefore, whenever an agreement is achieved *ijmāᶜ* becomes valid.[98] To his opponents who argue that Qurʾānic verse 2: 143 permits the withdrawal of an opinion of *ijmāᶜ* by its stipulator and by subsequent generation, al-Āmidī answers that this claim depends on the verse in question and that every generation is more competent in dealing with its problems and in reaching suitable agreements for itself than its predecessors or successors will be. In answering the argument that differences of opinion existed during the Companions' lifetime, as already

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[95] al-Sarakhsī, *Uṣūl al-Sarakhsī*, I, 315-317.

[96] al-Ghazālī, *al-Mustaṣfā*, I, 191-192.

[97] Ibid., 192-193.

[98] al-Āmidī, *al-Iḥkām*, I, 369.

mentioned in the cases of ꜥAlī and ꜥUmar, al-Āmidī illustrates that the issues at hand had been rigorously debated before ꜥAlī or ꜥUmar had appraised them (and that they had continued to do so for some time). A case in point is Jābir ibn ꜥAbd Allah's permission to sell slave-mothers; which was the issue evaluated by ꜥAlī. Thus, due to the presence of various opinions, the above issue remained unresolved well into ꜥUmar's caliphate. The same is true of the second example which had remained problematic until ꜥUmar broke his silence on it after the caliphate of Abū Bakr. Interestingly, al-Āmidī's rationale was scrutinized by other scholars, who opposed it and called for the permission to change one's idea after an agreement had been reached, as ideas mature and develop with deep and repeated consideration. Moreover, the idea that a change of opinion is permitted before the reaching of an agreement remained speculative. In addition, al-Āmidī was asked whether the opinion of a jurist would be nullified after his death, if his opinion had not received due attention during his lifetime, when ijmāꜥ has reached. In answer, he offered two distinct responses; either it is necessary to re-establish the previous jurist's view or it is not imperative to do so due to the previous total disregard of this view. In addition, to the argument that the Prophet often changed his mind before his death, al-Āmidī retorts that in these cases change occurred between one decisive rule and another equally decisive rule. However, ijmāꜥ cannot be changed from a decisive rule to a speculative one based on individual reasoning. Lastly, he declares that the decisions of the ꜥulamāʾ must not be changed by new traditions as an act of agreement has already taken place.[99]

Dealing with the way to know any ijmāꜥ, jurists contend that an ijmāꜥ may be known through a statement (qawl), through reason, through evidence or through listening or seeing the actions of others. That is why, according to al-Baṣrī, if a ruling on a certain matter spreads and knowledgeable people disagree with it, they are not allowed to keep their

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[99] Ibid., 369-374.

silence, since silence is a sign of agreement (*riḍā*).[100] Thus, to avoid ambiguities and lack of knowledge, Muslims are duty bound to spread the word and circulate any new piece of information they glean; just as the Prophet did with the obligations (*farāid*).[101]

According to al-Shīrāzī, knowledge may be derived from a statement or a deed agreed upon by all, such as prayers, or through the intentional silence of others. He, however, advocates the necessity of everybody understanding all problems. However, according to al-Shīrāzī, when some people declare their position by word or deed and others do not, this constitutes *ijmāʿ* and *ḥujja*. The reason he gives is that it is not custom (*ʿādat*) to remain silent if a *mujtahid* disagrees with a problem. Therefore, silence is interpreted as acceptance (*riḍā*). Additionally, the Companions always stated their disagreements.[102]

Others, however, believe that silence may indicate possibilities other than acceptance. Some may remain taciturn because: (1) they accept the argument as it is; (2) they are afraid, as was Ibn ʿAbbās during ʿUmar's era; (3) they believe that each idea is true; (4) they are still thinking. Al-Shīrāzī, however, swiftly and decidedly affirms that it is *ʿādat* (custom) that a rule must be applied. Therefore, when somebody understands a problem, he has to give his opinion. In addition, those who are afraid may allow the passage of a reasonable amount of time before they voice their opinion, even though they should be brave enough to do so in the beginning.[103] Moreover, it is forbidden to remark that each *mujtahid* is right, since the Companions did not believe so. When a *mujtahid* disagrees with other *mujtahids*, he has to state his disagreement. One or two days are adequate for reflection,

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[100] al-Baṣrī, *al-Muʿtamad*, II, 531-532.

[101] Ibid. 538.

[102] al-Shīrāzī, *al-Lumaʿ*, II, 691-693.

[103] Ibid., 693.

while death as a limitation to thought is not a part of *ᶜādat*. Moreover, al-Shīrāzī also relies on customs to negate the notion that some *mujtahids* remained purposefully silent or did not answer due to their ignorance of *ijtihād*.[104]

In discussing cultural differences and the impossibility of *ijmāᶜ* among different cultures, environments and places, al-Shīrāzī, maintains that it is possible to determine differences by soliciting the help of those present and those familiar with the creeds of different governments (*adyān al-mulūk*).[105]

As regards the possibility of *ijmāᶜ*, the majority of Sunni *fuqahāʾ* believe that it takes place.[106] Conversely, Ibn Ḥazm rejects the possibility of any *ijmāᶜ* taking place after the time of the Companions' period for two main reasons. The first is the impossibility of all *ᶜulamāʾ* convening at the same time and the same place, as they are scattered all over the world. The second reason is that it is the nature of human beings to differ in their opinions and characters. Therefore, it is impossible for them to agree on a certain matter in a certain *ḥukm*.[107] Ibn Ḥazm's view is similar to one view of Aḥmad ibn Ḥanbal (d. 241/855). But according to another view, Aḥmad ibn Ḥanbal accepts the *ijmāᶜ* of the majority, if there is no challenge from the minority.

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[104] Ibid., 696.

[105] Ibid., 667.

[106] Al-Juwaynī expresses concern with the possibility of establishing *ijmāᶜ*, although he maintains that it is possible to do so. Even though the territory of Islam is extensive it is still possible to gather *mujtahids (al-ᶜulamāʾ)* for the discussion of problems. See Imām Ḥarmayn al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, ed. ᶜAbd al-ᶜAẓīm al-Dīb, 2nd edn. (Cairo: Dār al-Anṣār, 1400), 673.

[107] Ibid., 502-503.

ii. The *Ijmāᶜ* of the Companions

Traditional theory renders that the Ẓāhirīs, the Shīᶜis and one view of Aḥmad ibn Ḥanbal accepted the *ijmāᶜ* of the Companions only. The reasons for such acceptance are, according to Ibn Ḥazm, as follows; (1) they were witness to the *naṣṣ/tawqīf* of the Prophet, which is the only true *ijmāᶜ* because it is based on *naṣṣ*; (2) they were all Muslims. Therefore, their *ijmāᶜ* was the *ijmāᶜ* of the whole Muslim community. Any *ijmāᶜ* after that is only of part of the community, since again the only true *ijmāᶜ* is that of the whole Muslim community; (3) the number of Companions was limited. Therefore, it was possible for them to meet and to discuss each other's theories. The same could not be carried out by their descendants. To those who remark that the *ijmāᶜ* of the Companions is not the *ijmāᶜ* of the whole Muslim community, Ibn Ḥazm retorts that their *ijmāᶜ* is the *ijmāᶜ* of the Companions in Mecca before any of them had died. In addition, if any Companion had died, the rest were still sure that he or she knew the revelation (*waḥy*) or the Prophetic tradition pertaining to a particular dictum. Therefore, the result would have been the same for them, but different for succeeding generations.[108]

Al-Baṣrī holds that their *ijmāᶜ* is a true and valid *ḥujja* since they were the whole *umma* of their time. Similarly, the meaning of 'whole' according to those who stress the function of the article 'al' in the word "*al-muʾminīn*" in the Qurʾān 4: 115 means those who are alive when a particular event took place. In answering the argument limiting excellence to the Companions only, al-Baṣrī remarks that the meaning of the Prophetic tradition "My Companions are like stars ...." is that the *ijmāᶜ* of each generation is a valid *ḥujja*. Similarly, al-Baṣrī renders that being a witness to revelation does not in itself constitute an axiomatic

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[108] Ibn Ḥazm, *al-Iḥkām*, IV, 509-510.

condition for accepting their *ijmāᶜ* as a *ḥujja*. In addition, a preponderance of events and religious queries affecting the Muslim *umma* take place after the Companions' era.[109]

Al-Shīrāzī answers to those who remark that the basis for *ijmāᶜ* (Qurʾān 3: 110) was given to the Companions only by declaring that this verse is addressed to all Muslims, just as other verses pertaining to other religious duties like praying, fasting, and alms tax are also addressed to the whole *umma* and not to a particular generation. Similarly, to those who argue that the infallibility of the *umma* is based on the Sharīᶜa (*tawqīf*) and that this infallibility extends to the Companions only, al-Shīrāzī retorts by asserting that infallibility extends to all Muslims.[110]

Al-Shīrāzī also addresses the argument that *ijmāᶜ* after the Companions is impossible because subsequent *mujtahids* live in many different areas. He asserts that if *mujtahids* voice their opinions, then they will surely have different opinions. However, if they find solid *dalīls* and are able to perform *ijtihād* properly, then *ijmāᶜ* would be achieved. This, in fact, happens all the time and in many matters.[111]

Al-Ghazālī is another jurist who disagrees with the limitation of *ijmāᶜ* to the Companions only. He maintains that *dalīls*, whether revelation (*naql*) or rational thoughts (*ᶜaql*), do not differ with the passage of time. Moreover, he answers those who base such a limitation on the fact that during the Companions' era the whole *umma* was still limited and intact, by declaring that such a statement is false! He reasons that death claimed the lives of a number of Companions during the years of revelation and hence it is incorrect to maintain that *ijmāᶜ* had been unanimously maintained by all at the same point in time.[112]

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[109] al-Baṣrī, *al-Muᶜtamad*, II, 483-486.

[110] al-Shīrāzī, *al-Lumaᶜ*, II, 704.

[111] Ibid., 667.

[112] al-Ghazālī, *al-Mustaṣfā*, I, 189-190.

After answering arguments supporting the *ijmāᶜ* of the Companions, al-Āmidī, like his predecessors, tackles other arguments. They are: (1) many cases did not take place during the Companions era; (2) the basis of *ijmāᶜ* does not differentiate between one generation and another; (3) the opinion of every *mujtahid* is known and can be easily recognized; (4) if the Companions were in dispute over a certain case, there would be no agreement over it by the next generation. But if they had agreed that a certain point is open to *ijtihād*, then there would be no opposition to it if successors voiced an opinion concerning it; (5) if a Companion died before voicing his opinion on a certain case, the *ijmāᶜ* pertaining to that matter would be considered final; (6) similarly, if a Companion did not state his opinion and an *ijmāᶜ* was reached by his peers, then such an *ijmāᶜ* should be accepted.[113] Furthermore, al-Āmidī argues that any *ijmāᶜ* of the Companions which is not supported or agreed upon by a successor is not considered *ijmāᶜ*. He bases his argument on the fact that in the Companions' period the opinions of the successors were often solicited and taken into consideration.[114]

In refuting the *ijmāᶜ* of the Companions, the Shiᶜite and the Medinese, and the necessity for the passage of time, al-Nasafī only states that the basis of *ijmāᶜ* is not the prerequisite of a particular *naṣb*, place or age.[115] Similarly, al-Ṭūfī, the Ḥanbalite, affirms that the majority of Ḥanbalites believe in the validity and *ḥujja* of the *ijmāᶜ* of every generation.[116] Like al-Nasafī, al-Taftāzānī remarks that, in *ijmāᶜ*, such factors as time, place and descent are not taken into account, rather it is the ability to conduct *ijtihād* that is of primary importance.

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[113] al-Āmidī, *al-Iḥkām*, I, 330-336.

[114] Ibid., 344-346.

[115] al-Nasafī, *Kashf al-Asrār*, II, 106

[116] al-Ṭūfī, *Sharḥ Mukhtaṣar*, III, 47.

iii. The *Ijmāᶜ* of Shiᶜite

Concerning the *ijmāᶜ* of the Shiᶜites, al-Shīrāzī refutes the argument maintaining the *ḥujja* of such an *ijmāᶜ*. According to him, the verse Q. 4: 115 requires one to following the Muslim path as a whole and not only a part of that path. In addition, there are many cases on which ᶜAlī held different opinion than the Companions and which had not been considered by his peers as a valid *ḥujja*. As for Qurʾān 33: 33,[117] which is always used as an evidence to support the *ijmāᶜ* of Shiᶜite, al-Shīrāzī affirms that this verse refers to the Prophet's wives and family as *ahl al-bait*. In fact, he says, no body can argue that the *ijmāᶜ* of the Prophet's wives is an *ijmāᶜ*. In addition, the meaning of *al-rijs* in the above mentioned verse is *al-ᶜār* and *al-qabāḥa*, not error.[118]

Although al-Sarakhsī lauds the excellence of Shiᶜite he disagrees with the notion that their *ijmāᶜ* is the *ijmāᶜ* to be followed by all Muslims. For him, one has the obligation to follow the way of all Muslims and not the way of some of them.[119]

The polemic over the authority of Shiᶜite was a topic discussed at some length by al-Ṭūfī. The arguments he cites for refusing the previously mentioned notions are as follows. First of all in response to verse Q. 33: 33, he says that this verse is addressed to the wives of the Prophet and does not indicate that their *ijmāᶜ* is the one to be followed. Secondly, the meaning of *al-rijs* here is disbelief *(kufr,)* suffering *(al-ᶜadhāb)* or *al-najāsah*, none of which refer to the infallibility of their *ijtihād*. Lastly, even if the meaning of *rijs* here is *al-*

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[117] The meaning of the verse is : "and God only wishes to remove all abomination from you, ye Members of the Family, and to make you pure and spotless. Yusuf Ali, *The Holy Qurʾān*, 1115-1116.

[118] al-Shīrāzī, *al-Lumaᶜ*, II, 717-718.

[119] al-Sarakhsī, *Uṣūl al-Sarakhsī*, I, 315.

khaṭa² (error), it was used in the singular form *(mufrad)* and does not refer to all of them.[120]

The Shiʿite responded to the first question by asserting that (a) this verse is addressed to both male and female since the *ḍamīr* (personal pronoun) here is both *mudhakkar* (male) and *muannath* (female). For example, *qar-na, tabarraj-na, wadhkur-na* and *ʿan-kum* refer to both sexes. However, al-Ṭūfī answers that such an issue had not been contested and had already been agreed upon.[121] The Shiʿite also assert that there are numerous Prophetic traditions stating that not only the wives of the Prophet are Shiʿite,[122] to which al-Ṭūfī retorts by saying that in Arabic and also in the Qurʾān some words are stated in general terms but have a specific meaning, for, example, Q. 16: 34, 12: 51-52, 3: 121-139. Therefore, verse 33: 33 is directed at the wives of the Prophet, as stated in many different traditions.[123]

The Shiʿite's response to the second matter concerning the meaning of *rijs* is that one of the meanings of *"rijs"* is an error. Al-Jawharī, for instance, maintains that the meaning of *rijs* is filth *(qadhar)*, which refers to ugliness. This ugliness could be either physical and tangible like dirt or it could be intangible and perceived by the mind, like a mental deficiency for example, which can leads to error. Similarly, al-Farrāʾ also remarks that the meaning of *al-rijs* in Q. 10: 100 is punishment and a sign of God's anger. To which he

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[120] al-Ṭūfī, *Sharḥ Mukhtaṣar*, III, 108.

[121] Ibid., 109)

[122] One of the *Sunna* of the Prophet cited by al-Ṭūfī is that, once Qurʾānic verse 33: 33 was revealed, the Prophet called Fāṭimah, ʿAlī, Ḥasan and Ḥusain and covered them with a piece of clothing. Then he said: "Oh God, they are the people of my house *(ahl al-bait)*, remove any *rijs* from them and purify them well." Another Sunna is that whenever the Prophet passed by Fāṭimah's door at the time of the *Fajr* prayer, he used to say: "Prayer oh people of the house." See al-Ṭūfī, *Sharḥ Mukhtaṣar*, III, 109.

[123] al-Ṭūfī, *Sharḥ Mukhtaṣar*, III, 110.

answers that Shiᶜite are immune from punishment and anger and that error can be a cause of either. Therefore, this negation is impossible.[124]

The Shiᶜite responded to the third issue by saying that the majority of *fuqahāʾ* had agreed that the infallibility of *al-rijs* here included all of Shiᶜite and that the end of this verse, y*uṭahhira-kum taṭhīra*, according to them, indicated that if *ṭuhr* and *rijs* are put together, *ṭuhr* will function as *taʾkīd* (assurance) which demands all of them. If they are separated, *ṭuhr* would still indicate an inclusion of everything. The difference is that if the word *"rijs"* carries a general meaning, it can be quoted and used as an argument. If however, it is not, then one must resort to Q.10: 100 which carries two meanings. First of all, if *"taṭhīr"* is mentioned together with the name of whatever causes *"rijs,"* then one can assume that purity is required from the thing that it was mentioned with. Secondly, if purity was mentioned without the name of the dirtying agent, then general cleanliness and purity will be required.[125]

The second response directed at those of a Shiᶜite inclination is that the *Sunna* of the Prophet, explicitly demands following the Qurʾān and the family *(al-ᶜitr)*. However, according to those who disagree with the *ijmāᶜ* of Shiᶜite, the command to follow the family of the Prophet *(ᶜitr)* is taken to indicate following the family together with the Qurʾān, but not choosing one of them over the other. In addition, the Qurʾān exhorts Muslims to follow the general Muslim path and not to limit themselves to part of it.[126] Furthermore, the original meaning of the word *ᶜitr* is the "children of man," and al-Jawharī considers Abū Bakr to be part of the family of the Prophet.[127] Similarly, al-Qarāfī maintains that Q. 33:

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[124] Ibid., 111.

[125] Ibid., 113.

[126] See Q.4: 115.

[127] al-Ṭūfī, *Sharḥ Mukhtaṣar*, III, 115.

33 is a *majāz* indicating everything in the world. Additionally, the word *innamā* in the above mentioned context serves as an assurance *(ta'kīd)* not limitation *(ḥaṣr)*. Also this word sometimes signifies a global characteristic, not a particular detail. Lastly, if Muslims were to follow the way of Shiʿite, this would be in direct contrast to the tradition of the Prophet, which upheld the necessity of following the majority number.[128]

After citing the arguments of those in favor of and those opposed to the *ijmāʿ* of Shiʿite, al-Āmidī concludes that the purpose of verse 33: 33 is to maintain the excellence of Shiʿite. Religious dictums, however, should be settled according to *ijtihād*.[129]

Lastly in refutation of the *ijmāʿ* of Shiʿite, Ibn Amīr cites Q.33: 32-33 and 33: 34, from which, according to him, it can be concluded that the Prophet's family consists of his wives only. In addition, there is no indication in these verses that the *ijmāʿ* of the Prophet's family is a valid *ḥujja*. He, moreover, argues that the tradition which demands following the family of the Prophet is dubious and singular *(aḥad)* in transmission. Therefore, this tradition must not be used.[130]

iv. The *Ijmāʿ* of the Medinese

Imām Mālik (d. 179/795), on the other hand, is commonly quoted, as limiting *ijmāʿ* to the Medinese.[131] He thus bases his criteria on geographical location.

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[128] Ibid., 115-116.

[129] al-Āmidī, *al-Iḥkām*, I, 352-355.

[130] al-Sarakhsī, *Uṣūl al-Sarakhsī*, I, 314. As an argument against the validity of the *ijmāʿ* of Shiʿite, al-Sarakhsī states that *ijmāʿ* constitutes an obligation to understand the *naṣṣ* and its meaning, and that such as obligation is not limited to Shiʿite. See al-Sarakhsī, *Uṣūl al-Sarakhsī*, I, 314-315; Ibn Amīr, *al-Taqrīr*, 171-172.

[131] Jurists hold different opinions on what Mālik might have meant by the superiority of the Medinese. He might have meant: (1) preference of the *ḥadīths* reported by the Medinese

The arguments in favor of the *ijmāᶜ* of the Medinese are as follows: (1) Medina is the best city, by virtue of several traditions which mention the merits of that city. Medina is also the place of revelation, the place to which the Prophet immigrated, the seat of Islam and the abode of the Companions; (2) the Medinese have more knowledge and are more familiar with the *Sunna* of the Prophet; (3) the Medinese were witness to the revelation, they knew the abrogated verses and they also knew the Prophet more than others; (4) the transmission of the *ḥadīth* by Medinese narrators is preferable to that of others. Moreover, the Medinese's *riwāya* should have priority over others. According to Mālik this declaration is based on *khuṣūṣ al-sabab* and not *ᶜumūm al-lafaẓ*.[132]

However, al-Baṣrī refutes the *ijmāᶜ* of the Medinese as a *ḥujja* and remarks that (1) places carry no weight in *ijmāᶜ*; (2) the tradition of the Prophet referring to the goodness of Medina does not indicate that the *ijmāᶜ* of its people is *ḥujja*, but rather that the town is praiseworthy; (3) the place in which the Qurʾān was revealed does not mean that the *ijmāᶜ* of its people is valid; (4) there is no difference between the transmission of those who lived in Medina and others. The possibility, he cites, of the superiority of the Medinese probably lies in their mastery of the method of transmission and not in their birth place.[133]

Similarly, Ibn Ḥazm states that the material discussed in *ijmāᶜ* are the general principles related to judicial matters and issues that are unrelated to the excellence of the town, whether Medina, Mecca or Kufa. In addition, if the criteria on excellence is considered, then Mecca also has many special qualities. It was the place where the Prophet was born, and where Zamzam and the Kaʾba are located. Moreover, Ibn Ḥazm refutes the notion that the Medinese are the most knowledgeable and the people most capable of

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to those reported by others; (2) their agreement was preferable, though opposition to them was allowed; (3) the *ijmāᶜ* of the Companions. See al-Āmidī, *al-Iḥkām*, I, 349.

[132] al-Ṭūfī, *Sharḥ Mukhtaṣar*, 105; ᶜAbd Allāh ibn ᶜAbd al-Muḥsin Turkī, *Uṣūl Madhhab al-Imām Aḥmad ibn Ḥanbal* (Cairo: Maṭbaᶜat al-ʾ niᶜa ᶜAyn Shams, 1974), 359.

[133] al-Baṣrī, *al-Muᶜtamad*, II, 492-493.

dealing with rules *(ahkām)*. The most knowledgeable people, in his view, are the Companions, whether they lived in or outside of Medina. Moreover, when he was reminded that the Medinese are *ahl al-fiqh wa al-ʿilm*, Ibn Ḥazm argues that *imām* Mālik was not better than those Companions who lived outside of Medina. Ibn Ḥazm also affirms that the transmission of the *Kūfiyūn*, is in some cases more reliable than those of Medina. Surprisingly, according to Ibn Ḥazm, Mālik himself does not propagate the *hujja* of the *ijmāʿ* of the Medinese, except in a little more than 40 cases *(nayfu wa arbaʿīna masʾalatan)*. All these 40 matters, according to Ibn Ḥazm can be divided into two categories: (1) the few matters which are not disagreed upon at all, either by the Companions in Medina or the inhabitants of other towns; (2) matters disagree upon among the Companions inside and outside of Medina. In this case, he asks, how could the *ijmāʿ* of the Medinese be considered superior to that of the others? The aim of this question is to negate the excellence of the *ijmāʿ* of the Medinese. In addition, the acceptable *ijmāʿ*, in his opinion, is that which had been transmitted by another *ijmāʿ*, or at least by a *tawātur* number. Thus, the *ijmāʿ* of the Medinese falls short as it had been transmitted by one *ʿālim* only, namely, Mālik ibn Anas.[134] From this, one can conclude that Ibn Ḥazm considers Mālik to be the only more reliable and brilliant scholar in Medina, while others are considered not different from other Companions inside or outside Medina.

In answer to the possibility that there are certain *ahkām* which had been reported *(tablīgh)* in Medina only, Ibn Ḥazm declares that this is not true since the Prophet was commanded to voice all issues and not to hide any revelation. However, Ibn Ḥazm concedes that there might be some statements made in Medina that had not been made elsewhere. Similarly, there might also be statement or deeds that taken place outside of

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[134] Ibn Ḥazm, *al-Iḥkām*, IV, 553- 559.

Medina and that had not occurred in it. He, therefore, concludes that there is no difference between Medina and other towns.[135]

Al-Shīrāzī is yet another jurist who refutes the *ḥujja* of the *ijmāʿ* of the Medinese. Al-Shīrāzī's answer to the argument that since the *riwāya* of the Medinese is to be prioritized, so also should their *ijtihād*, is that there is no sufficient evidence to support such an inclination. Moreover, the fact that their *riwāya* assumes priority in *khabar* does not confer upon their *ijtihād* a similar distinction since any *khabar* requires the presence of people close to the Prophet, to witness it, whereas *ijmāʿ* does not require such proximity. Lastly, to the argument that the *ijmāʿ* of *ahl* al-Ḥarmayn is a valid *ḥujja* on the basis of being the place where the Prophet had been born, where the *manāsik* should be performed, where Ismāʿīl was born, *maqām* Ibrāhīm, et cetera, al-Shīrāzī retorts by affirming that the ability to perform *ijtihād* is not dependent on or a prerequisite of a particular geographical setting.[136]

Al-Bājī, the Mālikite, classifies the statements of the Medinese into two categories: (1) statements such as those based on *naql*, such as *adhān* and the measure (*ṣāʿ*); and (2) statements based on traditions transmitted through an *aḥad* line of transmitters or rules produced through mental reasoning. According to al-Bājī, *imām* Mālik had considered the former to be a decisive or final (*qatʿī*) and a *ḥujja* because it is based on traditions continuously reported from the time of the Prophet, by an overwhelming majority of the people of Medina, while in the case of the latter *imām* Mālik did not differentiate between the Medinese and people from other cities.[137] Thus, it can be seen that *imām* Mālik favors the statements based on *naql* but not any others.

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[135] Ibid., 559.

[136] al-Shīrāzī, *al-Lumaʿ*, II, 711-715.

[137] al-Bājī, *Iḥkām al-Fuṣūl*, 480-48.

After citing the reasons used to support the *ijmā* of the Medinese, al-Sarakhsī maintains that the excellence of the Medinese, as stated in the *Sunna*, does not lie in the place but rather in the people who lived in it at the time. Indeed, after the *hijra* Medina housed nearly the whole Muslim population. Consequently, Medina at that time had become the place where Muslims lived, while places like Mecca were places where *Mushriks* (polytheists) resided.[138] In a similar vein, al-Pazdawī argues that *ijmā* is a *karāma* bestowed upon the whole *umma*, and is not limited to a select few.[139] Al-Ghazālī also maintains that all the evidence used in support of the *ḥujja* of the *ijmā* of the Medinese only indicates the excellence of these people and not that their agreement is to be passively and obediently adopted as *ijmā*.[140]

After noting the reasons used in support of the *ijmā* of the Medinese, al-Āmidī follows in the footsteps of his predecessors by explaining that all of the arguments in favor of the Medinese show their excellence but do not stipulate that their agreement is to be a binding *ḥujja* on all Muslims. After citing the rationale of his opponents, al-Āmidī answers as follows: (1) Even though the *ḥadīth* upheld the purity of the *khabar* of the Medinese, this does not mean that everything they say or do is pure. Moreover, the *ḥadīth* does not explicitly state that their *ijmā* is *ḥujja*. Rather, the *ḥadīth* only points to the excellence of the Medinese. As for rational arguments, he states that (i) Mecca too has some excellent qualities since it includes *al-bait al-ḥarām*, Zamzam, and so forth. This excellence, however, does not confer upon it the distinction of having its *ijmā* blindly accepted by others. (ii) The Companions knew *al-ta'wīl* (interpretation) whether they lived in or outside of Medina. In addition, the *ḥadīth* articulating that " My Companions are like stars, whomsoever you follow, you will receive guidance from," does not specify particular

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[138] al-Sarakhsī, *Uṣūl al-Sarakhsī*, I, 314.

[139] al-Bukhārī, *Kashf al-Asrār*, III, 962.

[140] al-Ghazālī, *al-Mustaṣfā*, I, 187.

places. (iii) Although the Medinese are undoubltly more reliable in matters pertaining to the *Sunna*, yet there is a vast difference between memorizing the *Sunna* and exercising one's reason and performing *ijtihād*. Thus, the latter should not be limited to a particular place since it does not vary according to one's geographical setting.[141] Moreover, Ibn Humām considers the *ijmāᶜ* of the Medinese as a probable *ḥujja* (*ḥujja al-ẓannīya*) but not *ijmāᶜ*. Therefore, it can only be used when it is not contradictory to any other *ḥujja*.[142]

Lastly, al-Shawkānī conducts an extensive study of this problem and quotes al-Qāḍī ᶜAbd al-Wahhāb (d. 422), who considers the *ijmāᶜ* of the Medinese in the same terms as al-Bājī.[143]

v. The *Ijmāᶜ* of the First two Caliphs

Al-Shīrāzī argues that historical facts do not support the belief in the priority of the *ijmāᶜ* of the first two caliphs. Examples of such facts include Ibn ᶜAbbās's disagreement with the Companions on five matters and Ibn Masᶜūd's disagreement on four matters. Moreover, al-Shīrāzī believes that the following *ḥadīth* are to be applied only to recommended matters: "Hold my *Sunna* and the *Sunna* of the caliphs after me," and "Follow the people after me; Abū Bakr and ᶜUmar."[144]

Al-Āmidī's comment on the *ijmāᶜ* of the first two caliphs is that it is not a *ḥujja*, since the *ḥadīth* "Hold my *Sunna* and the *Sunna* of the caliphs after me" is addressed to all caliphs, and does not specify the first two in particular. Moreover, another *ḥadīth* bestows excellence on all the Companions *(aṣḥābī ka al-nujūm)* not only on the two who later

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[141] al-Āmidī, *al-Iḥkām*, I, 349-352.

[142] Ibn Humām, *al-Taḥrīr*, 407.

[143] al-Shawkānī, *Irshād al-Fuḥūl*, 72-73; al-Bājī, *Iḥkām al-Fuṣūl*, 480-485.

[144] al-Shīrāzī, *al-Lumaᶜ*, II, 715-716.

became caliphs.[145] As for the Ḥanbali school, its members are divided concerning the *ijmāᶜ* of the first two caliphs. While some recognize such an *ijmāᶜ*, others do not. According to al-Nuᶜmān (d. 351) there was even a group of jurists who remark that the only *ijmāᶜ* which is a *ḥujja*, is that of Mālik, Abū Ḥanīfa, al-Shāfiᶜī and al-Auzāᶜī and those who hold to their *ijmāᶜ*. The reason for their *ḥujja* is their knowledge and excellence over others.[146] Unfortunately, he does not cite the name of the jurists he quotes.

Al-Ṭūsī and al-Khayyāṭ assert that the *ijmāᶜ* of the *umma* (Muslim community) is a valid *ḥujja*, since, in their view, the opinion of the infallible *imām* must have been included in that *ijmāᶜ*. Indeed, they believe that there is no era without its infallible *imām* who acts as a guardian of the Sharīᶜa.[147] In fact, *ijmāᶜ*, according to al-Ṭūsī, is the unanimity of the *ᶜulamā*ᵓ of the Shīᶜi sect. As cited by Ibn Amīr, al-Ṭūsī believes that *ijmāᶜ* does not become *ḥujja* because it is an agreement, but because it is a statement of the infallible *imām (al-imām al-maᶜṣūm).*[148]

To sum up, the main reason for refusing the *ijmāᶜ* of the Companions, of the Shiᶜite, of the Medinese and of the first two caliphs, is that the basis of *ijmāᶜ* is not limited to a particular group of people, place or era.

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[145] al-Āmidī, *al-Iḥkām*, I, 357.

[146] al-Nuᶜmān, *Ikhtilāf*, 127.

[147] al-Ṭūsī, *ᶜUddat al-Uṣūl*, II, 64; Abū al-Ḥasan ᶜAbd al-Raḥīm al-Khayyāṭ, *Kitāb al-Intiṣār* (Cairo: Dār al-Kutub, 1344/1925), 94-95.

[148] Ibn Amīr, *al-Taqrīr*, 154.

d. The Subject Matter

The last condition pertaining to *ijmāᶜ* deals with its subject matter. Generally, the jurists agree that only matters of religious intent should be allowed.[149] Others, however, argue that *ijmāᶜ* should include both *dunyā* (worldly matters) and *dīn* (religious matters).[150] Hence, some jurists further divide the subject matters into Sharīᶜa, *ᶜaqlīya* and *ᶜurf* (custom) matters. However, *ᶜaqlīya* and *ᶜurf* can be classified under one heading.[151]

A case in point is al-Baṣrī who divides *ijmāᶜ* into two categories. The first category includes the *ijmāᶜ* whose truth can be understood if the truth of the matter itself is understood, for example, the justice of God. The second category deals with the *ijmāᶜ* whose truth can be understood without understanding the truth of the matter itself. This is divided into two areas, worldly matters and religious matters, all of which, according to al-Baṣrī, are subsumed under the umbrella of *ijmāᶜ*.[152]

On the same line, al-Shīrāzī divides subject matters into three kinds: (1) Sharīᶜa matters including *ᶜibādāt* and *muᶜāmalāt*, (2) *ᶜaqlīya* and (3) worldly matters. The second type is further divided two ways; into matters that can be understood before understanding

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[149] For example, al-Ghazālī in *al-Mustaṣfā;* ᶜAbd al-ᶜAzīz Bukhārī in *Kashf al-Asrār*, III, 946-947, but ᶜAbd al-ᶜAzīz adds that religious matters are both *ᶜaql* and Sharīᶜa.

[150] Ḥasan al-ᶜAṭṭar, *Sharḥ Jamᶜ al-Jawāmiᶜ*, 207.

[151] There are many different illustrations given by jurists concerning the matter of *ijmāᶜ*. For example, see al-Baṣrī, who differentiates between *dunyawī* and *dīnī*. The former can be disagreed upon by the next generation but not the latter. He adds that if an *ijmāᶜ* has been established in a certain generation, the next generation is not allowed to disagree with the same case, since, following the Muslims' path is obligatory, al-Baṣrī, *al-Muᶜtamad*, II, 494- 495. In addition, he cites that it is allowable to achieve *ijmāᶜ* in a certain generation from the disagreement of the earlier generation. Ibid., 497; also al-Baydawī's definition in *Minhāj*; that certain matters derive from many matters (*ᶜalā amr min al-umūr*); al-Shawkānī, al-Qarāfī and Ṣadīq Khāmi and Ibn al-Ḥājib's statement; on a certain matter, or in *Jamᶜ al-Jawāmiᶜ*; *ᶜalā ay amr kāna*, Shihāb al-Dīn al-Qarāfī, *Sharḥ Tanqīḥ*, 322; al-Rāziq, *al-Ijmāᶜ*, 9.

[152] al-Baṣrī, *al-Muᶜtamad*, II, 493-494.

the Sharīʿa, such as the attributes of the God and matters which one is not obliged to understand before understanding the Sharīʿa. For example, the allowance of *ruʾya*, which is probably similar to *ijtihād* matters. Al-Shīrāzī then states that matters allowed in *ijmāʿ* can pertain to either Sharīʿa or *ijtihād* topics. However, a prophetic tradition is later used to exclude the inclusion of worldly matters under the scope of *ijmāʿ*. This tradition is "you know better the matters of your world."[153] Not surprisingly, al-Ghazālī limits the scope of *ijmāʿ* to religious matters only.[154] However, from his classification of *ijmāʿ*, it can be concluded that he interprets the religious matters in a broad sense, which includes *ʿibādāt* and *muʿāmalāt*.[155]

e. The Necessity of *Dalīl*

Jurists again have different views on the necessity of evidence *(dalīl)* for the validity of *ijmāʿ*. Some argue that evidence is necessary but others maintain that it is not. Ibn Ḥazm remarks that *ijmāʿ* should be derived from a *naṣṣ*, since *ijmāʿ* is *ḥaqq* (true) and whatever is not a *naṣṣ* is wrong *(bāṭil)*. Hence, the *ijmāʿ* based on *qiyās* and *ijtihād* are *bāṭil* because not all people accept *qiyās*. Therefore, how can one agree on something which is disagreed upon? Moreover, if *mujtahids* use their reason in *ijtihād*, the result will be refuted since it is not based on a *naṣṣ*.[156] Interestingly, al-Sayrafī (d. 330) remarks that the matter is exactly the reverse. For his part, he disputes the validity of any *ijmāʿ* which does not refer to evidence.[157]

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[153] *Antum aʿlamū biumūri dunyākum*, al-Shīrāzī, *al-Lumaʿ*, II, 688-689.

[154] al-Ghazālī, *al-Mustaṣfā*, I, 173.

[155] Ibid., 181.

[156] Ibn Ḥazm, *al-Iḥkām*, IV, 501- 503.

[157] al-Shawkānī, *Irshād al-Fuḥūl*, 70.

By contrast, al-Baṣrī supports the opinion that *ijmāᶜ* based on speculative evidence is valid. Speculative evidence, according to him, is a means of deriving a rule and resembles decisive evidence (*dalālah*). He also supports the majority opinion that *ijmāᶜ* is not valid without an evidence. Evidence, according to him, can be either decisive (*dalālah*) or speculative (*imārah*). He, therefore, concludes that evidence is paramount in the performance of *ijmāᶜ*. In reply to those who cite a number of past *ijmāᶜs* which were not based on evidence, he argues that there must have been some kind of evidence, even though it was not transmitted.[158]

Concerning the *ijmāᶜ* which is the result of *ijtihād*, al-Baṣrī argues that one is not allowed to disagree with it, since it is part of the Muslim path (*ṭarīq al-muslimīn*) and hence should be rigorously followed.[159] The reason given by al-Baṣrī is that *ijtihād* is the way to derive a rule (*ḥukm*) just as *dalīl* does. To those who maintain the impossibility of achieving an *ijmāᶜ* on an *ijtihād* due to the different interests, environments and so forth of Muslims, al-Baṣrī answers that such an impossibility does not exist because many have already been settled through *ijmāᶜ*, even though there is a conflict of interest involved. In answer to those who argue that some people abrogate the *ḥukm* by their *ijtihād* (*imārah*), al-Baṣrī states that this happens among contemporary Muslims but did not occur at the time of the Companions who maintained that the *ijmāᶜ* of the *ijtihād* is a *ḥujja* and an *ijmāᶜ*. As for those allowing disagreement as a result of an *ijtihād*, al-Baṣrī concedes that this is permissible in the case of an individual *ijtihād*, but not when *ijtihād* becomes *ijmāᶜ*. This is similar to the *ijtihād* of a Companion, which became an *ijmāᶜ* and a truth when it was upheld by the Prophet. As for the statement that *ijtihād* is not an original rule (*ḥukm al-aṣl*) nor a final (*maqfūq*) one either, al-Baṣrī declares that this is true when it is still an individual *ijtihād*, but when all the *mujtahids* agree on it, it becomes final and true. In addition, this

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[158] al-Baṣrī, *al-Muᶜtamad*, II, 520-222

[159] Ibid., 495.

had already happened in many cases. The punishment (*ḥadd*) on drinking, the fight against the *ridda*, and the election of Abū Bakr are but a few cases in point.[160]

Al-Shīrāzī asserts that evidence is needed to obtain validity for an *ijmāʿ*. This evidence, according to him, can be either rational (*ʿaql*), *naṣṣ* or any other type already employed in *ijtihād*.[161] As for those who argue that the validity of *ijmāʿ* must lie in evidence from the Qurʾān or the *Sunna* of the Prophet in order to be unanimously agreed upon, al-Shīrāzī remarks that it is not necessary in *qiyās* because it is indicated by an *ʿilla*, as in the matter of the *qibla*. Again this had already happened before, as is apparent in the *ijmāʿ* to fight the *ridda* which was compared to the *ṣalāt*, in the election of Abū Bakr which was based on the Prophet's request of Abū Bakr to replace him in prayer (*imām*), and in the *qiyās* prohibiting pig hair which was based on the prohibition of the animal's flesh. Moreover, an argument is raised that *qiyās* will be disagreed upon by future generation, to which al-Shīrāzī holds that as the Companions used *qiyās*, it is allowable to use it also. To those who refute *ijmāʿ* due to the vast difference in ideas, intelligence, behavior and so forth among Muslims, al-Shīrāzī maintains that all of these enrich *ijmāʿ* and provide valuable means of deriving rules. Hence, *mujtahids* are allowed to use them all. In addition, he recognizes that an individual *qiyās* is uncertain (*ẓan*), but when it becomes *ijmāʿ*, this uncertainty is removed. Moreover, it is possible that even though *mujtahids* have different opinions, behaviors and so forth, they can agree on issues once valid evidence is shown to them.[162] In those who argue that *qiyās* is an implicit method and therefore cannot result in an explicit *ijtihād*, the answer is given that finding a rule (*ḥukm*) through *qiyās* is easier, because the latter only requires understanding. In addition, not all cases can be settled or

[160] Ibid., 524-530

[161] al-Shīrāzī, *al-Lumaʿ*, II, 683.

[162] Ibid., 684- 686.

understood by *naṣṣ*, and it is imperative to resort to *qiyās*.[163] As for al-Bājī, he adds nothing to what al-Shīrāzī has already elucidated.[164]

According to al-Pazdawī, there is no need for *ijmāᶜ* to be supported by a decisive evidence *(qaṭᶜī)* derived from either the Qurʾān or the *Sunna* of the Prophet. Indeed, the authority of *ijmāᶜ* is not provided by the evidence but by the *ijmāᶜ* itself. *Ijmāᶜ* is the privilege of the community and is a gift from God. In response to al-Pazdawī, al-Taftāzānī cautions that one should not jump to the conclusion that *ijmāᶜ* is not permissible on a question based on decisive evidence. The true conclusion is that *ijmāᶜ* based on decisive evidence is redundant in the sense that it does not originally establish a rule, but only confirms it. *Ijmāᶜ* of course establishes the certainty of a rule in the case of speculative evidence such as analogy or a solitary tradition. What al-Taftāzānī attempts to say is that there is no sense in disputing the permissibility of *ijmāᶜ* on a rule which is already based on decisive evidence.[165] ᶜAbd al-ᶜAzīz al-Bukhārī observes that al-Pazdawī's statement apparently suggests that he denies the validity of *ijmāᶜ* when decisive evidence is available. However, that is not the case and al-Bukhārī later explains the matter in terms similar to al-Taftāzānī's.[166] Al-Sarakhsī maintains that *ijmāᶜ* is permissible on all sorts of questions, whether the evidence is decisive or speculative.

Similarly, al-Ghazālī also holds that the *ijmāᶜ* of *ijtihād* and *qiyās* is a *ḥujja*. The reason he cites is that many cases, which were not stated in the Qurʾān and the *Sunna* of the Prophet, have already been settled through these two processes. Cases in points include measures for the maintenance *(nafaqāt)* and the justice of the ruler (government). To those

[163] Ibid., 687.

[164] al-Bājī, *Iḥkām al-Fuṣūl*, 500-503.

[165] al-Taftāzānī, *al-Tawḍīḥ*, II, 51-52.

[166] al-Bukhārī, *Kashf al-Asrār*, III, 984-85.

who argue that people differ in their behavior, knowledge, environment, etc. and that such a difference can lead to error or to disputes and hence *ijmāᶜ*, based on *ijtihād* can never be either valid or achieved, al-Ghazālī answers that an individual *ijtihād* can be erroneous, but when it becomes *ijmāᶜ*, infallibility will be extended to it just as it had been for the *ijtihād* of the Prophet.[167]

Al-Āmidī remarks that *ijmāᶜ* based on *ijtihād* and *qiyās* is a *ḥujja* and hence it is forbidden to disagree with it. The arguments he gives are based on the previous cases that had been settled through *ijmāᶜ*, such as the election of Abū Bakr, the fight against the *ridda*, and the punishment (*ḥadd*) of drinking in ᶜUmar's era.[168] He answers those who argue that in every generation there will be people to reject *qiyās*, by stating that such logic does not constitute an argument for the impossibility of *ijmāᶜ*, since disagreement can be either solitary or might never arise in the first place. Therefore, he affirms that *ijmāᶜ* could be achieved by *ijtihād*. To those who argue that *qiyās* is probable and not a definitive body of knowledge, he answers that if *mujtahids* approach it sincerely, without basing it on personal interests, then the result will be certain. In answering the argument that *ijmāᶜ* is certain *(maqṭūᶜ)* while *ijtihād* is probable *(maznūn)* and hence *ijmāᶜ* cannot be based on *ijtihād*, al-Āmidī asserts that when people agree on a certain matter, this probability *(zan)* becomes a certainty *(maqṭūᶜ)*. In addition, when it comes from one person it is probable but when it comes from all people it becomes certain *(qaṭᶜī)*. To the argument that *qiyās* can be erroneous while *ijmāᶜ* is infallible and that it is not allowed to base an infallible argument on something which could be wrong, he retorts that the *ijmāᶜ* from *qiyās* is not based on a branch of law *(furūᶜ)* but on the Qurʾān and the *Sunna*. In answering the

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167 al-Ghazālī, *al-Mustaṣfā*, I, 196-198.

168 al-Āmidī, *al-Iḥkām*, I, 379-380.

argument that *ijmāʿ* could be contested by any *mujtahid*, he affirms that this is indeed allowed for an individual *ijtihād* but not for the *ijtihād* of the *umma*.[169]

In addition, al-Ṭūfī remarks that both groups, those for and against *ijmāʿ*, actually hold the same view, that *ijmāʿ* has to be based on a *dalīl*. The difference is that for the former each case has to have its *dalīl*, while for the latter the *dalīl* can be a general argument, the *ijmāʿ* thus, becoming the *dalīl*.[170] Al-Taftāzānī remarks that an *ijmāʿ* which is based on *ijtihād* and *qiyās* is a *ḥujja* since the *ḥujja* of the *ijmāʿ* is not based on the *dalīl* but rather on the *ijmāʿ* itself which is a *karāma* to the *umma*.[171] Ibn Humām maintains that, if there is no evidence, all baseless questions would be considered right in Islam through *ijmāʿ*. He emphasizes the necessity of inspiration from God. Mere human opinion might lead to error, but with divine inspiration, this possibility can be avoided. Therefore, an evidence is a must for the establishment of *ijmāʿ*.[172]

Lastly, Ibn Amīr notes that some of the Ḥanafites argue for the necessity of *qiyās* in *ijmāʿ*, particularly after the Prophet's death, since so many novel problems had started to appear. In the Prophet's era this *qiyās* was not needed because the Prophet dealt with queries as they cropped up. In addition, this is why, according to Ibn Amīr, *ijmāʿ* is a *karāma* to the *umma*.[173]

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[169] Ibid., 281-284.

[170] al-Ṭūfī, *Sharḥ Mukhtaṣar*, III, 120.

[171] al-Taftāzānī, *al-Tawḍīḥ*, II, 516.

[172] Ibn al-Humām, *Taḥrīr*, 411.

[173] Ibn Amīr, *al-Taqrīr*, III, 111-112.

B. The Basis of *Ijmāᶜ*

Various views again appear dealing with the basis used by the classical and medieval jurists to justify the validity of *ijmāᶜ*. First of all, Mālik[1] bases his *ijmāᶜ* on Q. 9: 100 and Q. 39: 18, but he recognizes only the *ijmāᶜ* of the Medinese as a whole, for it was in Medina that the Qurʾān, which deals with law, was revealed, for example, making what is permissible to be permissible, and what is prohibited to be prohibited. In addition, he argues that the people living in Medina followed what they had come to know and asked others about matters which they did not know and they always accepted the best doctrine.[2]

Muḥammad ibn Ḥasan al-Shaybānī (d. 189/804), who was among the architects of Ḥanafī jurisprudence,[3] seems to be the first jurist who justified *ijmāᶜ* on the basis of a *Sunna*. The *Sunna* he invokes is the following: "what the Muslims deem to be good is good in the sight of Allah."[4]   Even though it contained the name of ᶜAbd Allāh ibn Masᶜūd, the *isnad* of this *Sunna* is cited by some scholars as incomplete.[5] Yet, it should

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[1] Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, 4th edn. (London: Oxford University Press, 1964), 23.

[2] Zafar Ishaq Ansari, "Islamic Juristic Terminology Before Shāfiᶜī : A Semantic Analysis with Special Reference to Kūfa," *Arabica* 19 (Oct. 1972): 284-285; Edwin R. A. Seligman, ed. *Encyclopedia of the Social Sciences*, 8 (New York: The Macmillan Company, 1932), s.v., "Islamic Law," by Joseph Schacht: 345-346. To understand the different points of view held by the Medinese and Iraqis, see Joseph Schacht, *The Origin of Muhammadan Jurisprudence* (London: Oxford University Press, 1950), 83-87.

[3] Fyzee, *Outlines*, 23.

[4] I. Goldziher, *Muslim Studies*, ed. S. M. Strern, trans. C. R. Barber and S. M. Stern (New York. 1971), II, 133; Schacht, *The Origin*, 86; Ahmad Hasan, *The Doctrine of Ijmāᶜ*, 37.

[5] George F. Hourani, "The Basis of Authority of Consensus in Sunnite Islam," *Studia Islamica* 21 (1964): 20.

be said that there are many verses in the Qur'ān which indicate the true meaning of this Sunna.

Al-Shāfi'ī, the founder of the Shāfi'ī school of law, bases his argument on Q. 4: 115: "If anyone contends with the Apostle even after guidance has been plainly conveyed to him, and follows a path other than that becoming to men of faith, we shall leave him in the path he has chosen, and land him in hell."[6] He also quotes two Sunnas. The first is : "Three things the heart of the Muslim shall not hate : sincerity of action for the sake of God, good advice for (fellow) Muslims and adherence to their community." The second Sunna he quotes is: "he who wishes to reside in Paradise must hold fast to the community, for Shaytān comes close to one person but does not as close to two."[7] However, al-Shāfi'ī does not mention the foregoing Qur'ānic verse when he discusses ijmā' in his book al-Risālah. On the contrary, the Sunnas of the Prophet appear on more then one occasion. We are, therefore, justified in assuming that he does not think of the verse as an important argument.[8]

The next jurist under consideration here, is Abū Bakr al-Jaṣṣāṣ, from the Ḥanafī school. Besides the Qur'ānic verse and the Sunna of the Prophet used by al-Shāfi'ī, he cites four other verses and five Sunnas. The first verse is Q.2: 143 :"Thus have We made of you an Ummat justly balanced, that ye might be witnesses over the nations, and the Apostle a witness over yourselves."[9] By equating 'middle nation' with uprightness and rectitude, he concludes that the community should be described as infallible and as such it is

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[6] Yusuf Ali, The Holy Qur'ān, 217.

[7] al-Shāfi'ī, al-Risālah, 471-476; idem, al-Umm, vol. VII, 191-193. Schacht notes that this verse is not found in any of Shāfi'ī's discussion on the authority of ijmā'. See Schacht, The Origin, 90-91.

[8] Ignaz Goldziher, Introduction to Islamic Theology and Law, trans. Andras and Ruth Hamori (Princeton: Princeton University Press, 1981), 51.

[9] Yusuf Ali, The Holy Qur'ān, 57-58.

appointed to witness the deeds of other people just as the Prophet witnessed the deeds of his community. The second verse quoted is Q.4: 115 as cited by al-Shāfiʿī. He also cites Q.9: 16 :"Or think ye that ye shall be abandoned, as though God did not know those among you who strive with might and main, and take none for friends and protectors except God, His Apostle and (the community of) Believers ? But God is well acquainted with (all) that ye do." The third verse is Q.3: 110: "Ye are the best of people, evolved for mankind, enjoining what is right, forbidding what is wrong and believing in God."[10] Finally he cites Q.31: 15: "....and follow the way of those who turn to Me (in love)...."[11]

The *Sunnas* which he cites, besides those already quoted by al-Shāfiʿī, are the following: "A section of my community will continue to follow the truth, one who feels hostile to them will do them no harm until the divine decree comes down"; "My community will not agree on an error"; "The hand of God is over the community"; "Whoever separates himself from the Muslim community even a span, throws away the tie of Islam from his neck," and finally, he cites the *Sunna* in which Ḥudhayfah is reported to have asked the Prophet, "What can save me from it (schism)? He replied, "the community of Muslims and their leader."[12]

Al-Nuʿmān is the next jurist who took part in discussing *ijmāʿ*. He invokes three verses, which are ; Q.8: 181; Q.22: 78 and Q.57: 19. The general meaning of these three verses is identical to Q.2: 143 and Q.3: 103, which describe the midmost nation and the best nation.[13]

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[10] Ibid., 151.

[11] Ibid., 1083.

[12] Hasan, *The Doctrine of Ijmāʿ*, 40.

[13] Wael B. Hallaq, "On the Authoritativeness of Sunni Consensus," *International Journal of Middle East Studies* 18 (1986): 434.

The next jurist to be discussed is ʿAbd al-Jabbār al-Asadabādī (d. 415/1024). He bases his conclusive authoritativeness (ḥujja qaṭʿīya) about ijmāʿ on the Qurʾān and the Sunna of the Prophet. From the Qurʾān he quotes Q.4: 115 and Q.2: 143. The former verse has already been cited by al-Shāfiʿī and al-Jaṣṣāṣ. The difference is that al-Jabbār undertakes a lengthy explanation of this verse. He considers God's warning, not to dissent from the line of the Prophet and believers, as meaning that following their lead is the right thing to do. In regard to the opponents' argument that the warning against breaking away from the path of the Prophet and believers does not necessarily mean that such a path should be followed, al-Jabbār argues that the meaning of the statement is clear. If dissenting from something is prohibited, then following a different thing is also prohibited. Therefore, he warns, the only choice is to adhere to the path of the Prophet and believers.[14] He also uses this verse as an evidence (dalīl) to argue that the ijmāʿ of every generation is ḥujja. Since, according to him, the obligation to follow the Muslims' way is not restricted to a certain time, as is stated in Q.3: 104: "Let there out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong,"[15] and Q.2: 143.[16]

Another verse used by al-Jabbār to justify ijmāʿ is Q.2: 143. The meaning of 'middle' here, in his view, is an indication of the quality of justice. God's choice of appointing these witnesses, al-Jabbār insists, leads us to conclude that God accepts their word as reliable and truthful. Furthermore, in the second part of this verse, the Prophet is also said to be a witness because he is just and his utterances are authoritative. From all of these citations it is concluded that the collective decision of the community constitutes an authority.[17]

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[14] Ibid.

[15] Yusuf Ali, The Holy Qurʾān, 149-150.

[16] al-Jabbār, al-Mughnī, XVII, 169.

[17] Ibid., 171-178.

In response to those who argue that this verse is not relevant to *ijmāᶜ* because its apparent meaning does not respond to reality, while the community as a whole appears to be described as just, al-Jabbār argues that the meaning of 'community' applies to those who qualify as believers and does not necessarily describe all members of the community. To support this interpretation al-Jabbār cites Q.2: 49 and Q.2: 55, in which collective nouns are used in a restrictive sense.[18]

To those who consider that 'middle nation' (*ummatan wasaṭa*) is addressed to the Companions only, al-Jabbār cites a number of Qurʾānic verses, from which it is clear that those who are appointed witnesses are the Muslims as a whole.[19]

Al-Jabbār, on the other hand, dismisses Q.31: 15 and he argues that this verse refers not only to a specific group, but to mankind. He also dismisses Q.3: 103; Q.3: 110; Q.4: 59; Q.7: 181 and Q.9: 118. He points out that these verses bear various meanings, and are not necessarily relevant to *ijmāᶜ*.

Al-Jabbār then cites ten *Sunnas* of the Prophet with an explanation that there were several reported versions of these *Sunnas*. After answering his opponents' question dealing with the transmission of the *Sunnas*, al-Jabbār says that the validity of the *Sunnas* is not determined by *ijmāᶜ* but by custom (*al-ᶜādat al-jāriya*).[20] Al-Jabbār, therefore, proves the *mutawātir* character of the *Sunna* of the Prophet within custom (*ᶜādat*). Moreover, even though he tries at length to prove the *mutawātir* characer of the *Sunna* of the Prophet, al-Jabbār does not take the *Sunna* evidence to be as important as the Qurʾān.

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[18] Ibid., 172-173.

[19] See Qurʾān 22: 77-78; Q.57: 19; Q.39: 69; Q.11: 18; Q.40: 51. In order to understand the address of the middle nation (*ummatan wasaṭa*), all these verses should be heard in their entirety. Then it can be concluded that the middle nation is not only the Companions, but all Muslims. See al-Jabbār, *al-Mughnī*, XVII, 174-175.

[20] Ibid., 186.

He then considers the Qur³ānic verse 4: 115, which was discussed by him, as the strongest of all pieces of evidence.[21]

The basis of al-Baṣrī's argument in *al-Muʿtamad* are these verses from the Q. 2:143; Q.3: 110 and Q.4: 115, while he rejects Q.3: 103 and Q.4: 59. He also utilizes some *Sunnas* of the Prophet, from which he then adopts an argument based on *aḥadi Sunnas* of the Prophet, but without claiming that at the time of the Companions they were *mutawātir.* Al-Baṣrī answers the argument that even though the *Sunnas* are *aḥadi* in transmission, they are as a whole *mutawātir* in meaning (*maʿnā*) as many *Sunnas* have the same meaning. By saying that some of these *Sunnas* are not genuine, consequently, their accuracy cannot be checked with absolute certainty.[22]

Ibn Ḥazm bases *ijmāʿ* on Q. 4: 115. But he interprets this verse in a quite different way than others do. To him, this verse indicates that Allah did not give His promise (threat) to the non-Muslims' way, except for their opposition to the Messenger of Allah, and this came after guidance had been manifested unto him. In addition, there is no alternative but for the believers to obey the Qur³ān and the *Sunna* of the Prophet; creating law (*ijmāʿ*) without *naṣṣ* is the way of infidelity.[23] Another verse he quotes in this regard is Q.4: 59. This verse, according to Ibn Ḥazm, proves that *ijmāʿ* should be based on *naṣṣ*. The community should obey the *ulū al-amr* if their injunctions are based on *naṣṣ* from the Qur³ān and the *Sunna* of the Prophet. The *ulū al-amr* for him are the *umarā³* and *ʿulamā³*.[24] The *Sunna* of the Prophet "There will remain a group (*ṭā³ifah*) in my community which knows the truth and which will not be harmed by those who desert it,

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[21] Ibid., 203.

[22] al-Baṣrī, *al-Muʿtamad*, II, 471-472.

[23] Ibn Ḥazm, *al-Iḥkām*, IV, 497.

[24] Ibid., 498.

until the decree of Allah comes to pass," and "my community shall not agree on error," is interpreted by Ibn Ḥazm as an indication of the existence of disagreement every time.[25]

Abū al-Walīd al-Bājī is another jurist who discusses the basis of *ijmāʿ*. He bases the *ḥujja* of the *ijmāʿ* on two main concepts; (1) rational reason (*ʿaql*); and (2) revealed reason (*naṣṣ*). Within rational reason, he argues that *waḥy* (revelation) had already ceased to continue with the passing away of the Prophet, but the Sharīʿa should be continued until the here-after. The only way to preserve the continuity of the Sharīʿa is by guaranteeing infallibility to the whole *umma*. Moreover, regarding *naṣṣ*, al-Bājī cites Qurʾānic verses and the *Sunna* of the Prophet. From the Qurʾān he quotes Q.4: 115; Q.3: 110 and Q.2: 143. He spends a dozen pages explaining the meaning of Qurʾān 4: 115, in which, according to him, the obligation to follow the way of *Muʾmin* is made clear. On the other hand, he gives no explanation for the last two verses.[26] He argues that a number of *Sunna* of the Prophet (*al-akhbār*) clearly explain the infallibility of *ijmāʿ* from the *mutawātir al-maʿnā*. He cites *Sunnas* of the Prophet and argues that, even though the words (*lafẓ*) of the *Sunna* of the Prophet are different, it is *mutawātir* in *maʿnā* (*wain ikhtalafat al-fāẓuhā fainnahā mutawātiratun ʿalā al-maʿnā*).[27]

Imām al-Ḥarmayn al-Juwaynī quotes Q. 4: 115, and thinks that one of the meaning of makes a breach with the messenger is succession from Islam altogether. He points out that this verse is capable of more than one interpretation. He also quotes the basis from the *Sunna* of the Prophet "my community shall never agree on an error"[28] and notes that there are at least two major interpretations which can be made of this *Sunna*. The first is the

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[25] Ibid., 496-497.

[26] al-Bājī, *Iḥkām al-Fuṣūl*, 437-446.

[27] Ibid., 447-448.

[28] al-Juwaynī, *al-Burhān*, II, 677-679.

infallibility of *ijmā*. The second is that the community shall never agree to apostasy until the day of judgment. Yet, it should be pointed out that in Juwaynī's view *ijmā* is not universally authoritative.[29]

Like al-Bājī, al-Pazdawī cites two concepts as the basis of *ijmā*, *naql*, and *ʿaql*. For *naql* he cites the Q. 4: 115; Q.3: 110 and Q.2: 143 and the *Sunna* of the Prophet. From the first verse, according to him, it can be understood that the way of the *Muʾmin* is truthful (*ḥaqq al-yaqīn*). In addition, to be a *shahīd* (pl. *shuhadā*) requires truthfulness. The *Sunnas* of the Prophet he uses are : "my community shall not agree on an error," and "what the Muslims deem to be good is good in the sight of Allah." From *ʿaql*, he, moreover, cites that the Prophet has already passed away while the Sharīʿa must be continued till the here-after.[30]

In his book *al-Mankhūl min Taʿlīqat al-Uṣūl*, which he wrote while under the influence of his teacher *imām* al-Ḥaramayn al-Juwaynī, al-Ghazālī repeats al-Juwaynī's view that *ijmā* is based on Q.4: 115,[31] and the *Sunna* of the Prophet', "my community shall not agree on an error."[32]

On the other hand, in his book, *al-Mustaṣfā*, al-Ghazālī justifies a greater reliance on *Sunna* of the Prophet than on the Qurʾān. Al-Ghazālī cites a large number of verses as having been cited by other early jurists to establisn the validity of *ijmā*: Q.3: 110; Q.2: 143 and Q.4: 115. He, then, adds some other verses; Q.7: 181: "Of those We have created are

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[29] Ibid., 676.

[30] al-Bukhārī, *Kashf al-Asrār*, III, 973-980.

[31] Abū Ḥāmid Muḥammad al-Ghazālī, *al-Mankhūl min Taʿlīqāt al-Uṣūl*, ed. Muḥammad Ḥusain Haytu (n.p., n.d.,), 314; George F. Hourani, "The Chronology of Ghazālī's Writing," *Journal of American Oriental Society* 79 (1959): 226.

[32] Ibid., 317.

people who direct (others) with truth and dispense justice therewith;"[33] Q.3: 103: "And hold fast, all together, by the Rope which God (stretches out for you), and be not divided among yourselves;"[34] Q.42: 10: "Whatever it be wherein you differ, the decision thereof is with God;"[35] Q.4: 59: "if you differ in anything among yourselves, refer it to God and His Apostle."[36]

Q. 4 : 115, in his opinion, is the most indicative of the authority of *ijmā*, for it obliges adherence to the collective path of the believers. As for the Prophet's *Sunna* "My community will not agree on error nor will it stray," it is stronger and more explicit in indicating the authority and validity of *ijmā* than the "adherence to the path of believers" verse. But al-Ghazālī realizes that this *Sunna* of the Prophet is not transmitted by way of *tawātur* as the Qurʾān is.[37]

Al-Ghazālī also cites eleven *Sunnas* which are related to *ijmā*: "My community shall not agree on a misguidance (al-ḍalāl)"; "my community will not be unanimous in error (al-khaṭaʾ)"; "Allah will not let my community come together on an error"; "I beseech Almighty God not to bring my community to the point of agreeing on *ḍalālā*, and He granted this to me"; "Those who seek the joy of residing in Paradise will follow the community, for *Shayṭān* can chase an individual but he stands far away from two people"; "*Shayṭān* accompanies the loner, he is remoter from two"; "Allah's hand is on the community"; and "Allah gives no attention to the divergence of one who splits (from the community)"; "Whosoever secedes from the community or separates even the span of a

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[33] Yusuf Ali, *The Holy Qurʾān*, 396.

[34] Ibid., 149.

[35] Ibid., 1307.

[36] al-Ghazālī, *al-Mustaṣfā*, I, 174-175.

[37] Ibid., 175; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Text Society, 1991), 179.

hand, he has doffed the noose of Islam from his neck"; "One group shall always remain predominating over truth, unharmed by whosoever disagrees with them"; "The disagreement of whosoever differs with them shall not harm them, except for the hardship that confronts them"; "Whosoever separates from the community and dies, his death is in ignorance."[38]

Al-Ghazālī shows in effect that there are numerous *Sunna* of the Prophet on the immunity of the community from error. Each of these *Sunna* alone might be dubious, but the same cannot be said of all of them as an aggregate. The support which each *Sunna* gains from the others makes it improbable that all of them together are doubtful. Thus, like the *mutawātir Sunnas*, these *Sunnas* as a whole lead to certainty.[39]

To prove the theory of *tawātur al-maʾnā*, al-Ghazālī, moreover, explains further that they are reported on the authority of "the notable and most reliable companions', such as Ibn Masʿūd, Ibn ʿAmr, Abū Saʿīd al-Khudrī, Anas ibn Mālik, Abū Hurayrah, Ḥudhayfah ibn al-Yamān. In addition, these reports have remained continuously from the time of the Companions until the present day, and they are accepted both by those who acknowledge the validity of *ijmāʿ* and those who do not.[40] Al-Ghazālī, consequently concludes that the common meaning of these *Sunnas* is certainly authentic (*mutawātir bi al-maʿnā*). In this case he regards convention (*ʿurf*) as the strongest proof for the authority of *ijmāʿ*. Therefore, the main point of al-Ghazālī's theory is his acceptance of the notion of *al-tawātur bi al-maʿnā* in supporting of an authoritative *ijmāʿ*.

Opponents claim that neither the generation of the Companions nor its successors has left any record that they quoted these *Sunnas*, especially as evidence for the validity of

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[38] al-Ghazālī, *al-Mustaṣfā*, 175.

[39] Ibid., 176.

[40] Ibid., 175.

ijmāʿ. Other scholars assert that these *Sunnas* lead only to conjecture, but not to certain knowledge.

Al-Ghazālī answers, first of all, that the sum of the Prophet's statements exalting the position of the Muslim community and vouching for its infallibility indeed impart necessary knowledge. We have gained certain knowledge through isolated reports about ʿAlī's bravery, Ḥālim's generosity, Shāfiʿī's brilliance in Fiqh and al-Ḥajjāj's eloquence. We necessarily know them, even though the individual reports about these matters do not fulfill the requirement of *tawātur*. For one may object to an individual report, but not to the total body of reports to this effect. They constitute *tawātur* and therefore yield certain knowledge.

Secondly, the *ḥujja* of *ijmāʿ* can be referred to in two other ways. First of all, it is known that the above mentioned *Sunna* of the Prophet on the infallibility of the community were widely known among the Companions and their successors, who relied on them to justify *ijmāʿ* as a source of the Sharīʿa. Until the time of al-Naẓẓām, none had a different idea about that matter or opposed it. Secondly, given the diversity of human disposition and the disparate ambitions and points of view of people with respect to accepting something or rejecting it, it is impossible in the normal course of events for a living community to promulgate from generation to generation something that is baseless. The justification of *ijmāʿ* as the authority which determines the correct interpretation of the Qurʾān and the established *Sunna* implies that there must have been some positive evidence.[41]

Al-Sarakhsī is another classical jurist who examines the theory of *tawātur bi al-maʿna*. He also cites two points in support of the *ḥujja* of *ijmāʿ* as his predecessors had.[42] Frcm

[41] al-Ghazālī, *al-Mustaṣfā*, 176.

[42] al-Sarakhsī, *Uṣūl al-Sarakhsī*, I, 300.

naṣṣ he cites Q. 3: 110; Q.4: 115; Q.25: 68; Q.9: 16 and Q. 2: 143. The meaning of '*khair*'
in Q.3: 110 is the best, which is *ijmāᶜ* itself, since they (people who are the best or *khair)*
ask people to enjoin right conduct and forbid what is wrong. Similarly, Q.4: 115; Q.25: 68
and Q.9: 16, according to him, refer to those who do not befriend Muslims parallel to those
who do not befriend the Prophet. His explanation of Q.2: 143, was definitely the same as
the explanation of al-Jaṣṣāṣ. He, then, cites some other verses : Q.4: 41; Q.16: 84; Q.5: 44
and Q.3: 99. According to him, the word *liyakūnū* means *karāma* (nobility), so that their
(believers) statement (*qawl*) becomes *ḥujja* for all people in the right of Godly. After citing
several *Sunnas* of the Prophet, he then states that taking individually these *Sunnas* may be
dubious, but as a whole the *Sunnas* can be probably accepted as a *mutawātir* report.[43]
Consequently, even though al-Sarakhsī does not mention the expression *tawātur bi al-*
maᶜnā, it is abundantly clear that he meant this type of *tawātur bi al-maᶜnā* rather then
tawātur al-lafẓī.

Similarly, al-Baghdādī also advances this theory of *tawātur bi al-maᶜnā.* He even
states explicitly that those *Sunnas* in this guarantee of *ijmāᶜ* are a *tawātur* in *ṭarīq al-maᶜnā.*
This *tawātur bi al-maᶜnā,* according to him, is not just in the *ijmāᶜ* but also applies to law in
general.[44] When discussing the validity of the *ijmāᶜ* of every generation, he, also cites Q.4:
115; Q.3: 110 and Q.2: 143. By doing so it can be understood that he also uses these
verses as the basis of *ijmāᶜ.*[45]

Al-Ṭūfī is another jurist who should be considered in discussing this theory of
tawātur al-maᶜnā. After quoting some Qurᶜānic verses: Q.4: 115; Q.2: 143 and 110, and
some *Sunnas,* one of which is "what the Muslims deem to be good is good in the sight of

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[43] Ibid., 296-299.

[44] al-Baghdādī, a'-*Faqīh,* 160-168.

[45] Ibid., 169.

Allah," he concludes that there are two main ways to indicate the *ḥujja* of the *ijmāʿ*. First it may be indicated on explicit (*ẓāhir*) basis by Qurʿānic verses, which are not certain (*qaṭʿī*) in *dalāla*. Second it may be indicated by *tawātur al-maʿnā* from the *Sunna* of the Prophet.[46] Therefore, even though his explanation is not more than al-Ghazālī's, he at least considers this theory of *tawātur bi al-maʿnā* as a basis of the *ijmāʿ* more than Qurʿān does concern to the *dalāla*, but they are not certain (*qaṭʿī*) within *ẓāhir*. Similarly, he also appears to want to say that the *Sunna* of the Prophet is more reliable and direct to the subject than Qurʿānic verses, but they are still doubtful in the *sanad*.

Al-Āmidī, provides five Qurʿānic verses and several *Sunnas* of the Prophet to support the authority of *ijmāʿ*: First of all he cites Q.4: 115, from which he extrapolates that God threatened those who follow a way different than that of the believers. Furthermore, it is unfair to combine in the same threat both lawful and unlawful things, as it is unfair to combine disbelief and belief. Thus, the pursuit of the way other than that of believers is as unlawful as opposing the Prophet.[47] Another verse cited by al-Āmidī is Q.2: 143. With this verse he maintains that to make believers binding on the people, just like the decisions of the Prophet, indicates of believers' justice (*ʿadāla*) and simultaneously the infallibility of every person of the Muslim community.[48]

The third verse cited by al-Āmidī is Q.3: 110. The meaning of this verse is that whatever the Muslim community commands is collectively right and good. The Muslim community thus cannot command anything wrong and forbid anything right. The function

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[46] al-Ṭūfī, *Sharḥ Mukhtaṣar*, III, 21-22.

[47] al-Āmidī, *al-Iḥkām*, I, 286-302.

[48] Ibid., 302-306.

of the article *al* in this verse *al-maʿrūf* and *al-munkar* is to indicate a general meaning, indicating all Muslims in every period.[49]

Al-Āmidī also cites Q.3: 102 as a basis of *ijmāʿ*. This verse reads: "And hold you fast to God's bond, together, and do not scatter," from which he contends that this verse forbids the opposite of adhering to *ijmāʿ*, since God prohibited disagreement, and opposing *ijmāʿ* means disagreement. To those who contend that "God's bond" does not clearly refer to *ijmāʿ*, al-Āmidī answers that such a reference is not necessary to the argument, since there is no reason to link the prohibition against scattering with the command to hold fast to God's bond. The phrase 'do not scatter' is not added merely for the sake of emphasis (*taʾkīd*), but it is rather an independent injunction (*taʾsīs*). Prohibition of disagreement in this verse includes many other things besides *ijmāʿ*. Moreover, this command and prohibition are addressed to persons of all generations, not just to those who lived in the time of the Prophet.[50]

The last verse that he cites as a basis for *ijmāʿ* is Q.4: 59: 'If you should quarrel on anything, refer it to God and the Messenger." From which he argues that the obligation to refer to God and the Messenger arises on the occurrence of a quarrel. When there is no dispute on a certain question, then by implication there is an *ijmāʿ*, and that *ijmāʿ* is adequate, removing the need to refer to a higher authority.[51]

Al-Āmidī also cites several *Sunnas* of the Prophet as having been cited by his predecessors. He adds other *Sunnas*, such as "I asked God not to let my community agree on an error, and He granted it to me." Another *Sunna* is, "The Muslim community will be separated into seventy groups and just one of which will go to paradise, the one who

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[49] Ibid., 306-309.

[50] Ibid., 309-311.

[51] Ibid., 311-312.

follows *jamā'a* (majority) while the others will fall to Hell." From all of which can be concluded, therefore, that even though the transmitters are not all reliable, the number of *Sunnas* indicate the reliability of this report.[52]

After spending a dozen pages explaining the meaning of these verses, al-Āmidī then remarks that the totality of the verses do not lead to the certain knowledge which is required in *ijmā'*. The *Sunnas* of the Prophet are, moreover, the surest way to prove beyond doubt the *ḥujja* of the *ijmā'*. He also remarks as al-Ghazālī does that all these *Sunnas* are *aḥādis* within the transmission, but they are *mutawātir* through *ma'nā* (*mutawātir al-ma'nā*). He argues further that certain knowledge occurs in the *aḥādi Sunnas* when it is supported by *qarā'in*, that is, by circumstantial evidence including other *Sunna* handed down through various and unconnected channels of transmission or various types of Qur'ānic verses.[53]

Through rational argument, al-Āmidī argues that when we maintain that the scholars of an earlier generation unanimously agreed upon a legal judgment, that judgment must be presumed to have been based on conclusive textual evidence. This is due to the number involved being equal or greater in numbers than the *tawātur* in transmission of the *Sunna*. As previously noted, the *tawātur* number cannot agree on a falsehood or a forgery. Therefore, an *ijmā'* is considered a *ḥujja* when the number of scholars is *tawātur* number in participating in *ijmā'*.[54]

Al-Nasafī cites Q.3: 110 and Q.2;143, and he explains these verses as his predecessors did. He then states that the *tawātur* number of the *Sunnas* of the Prophet can be used to guarantee the *ḥujja* of *ijmā'*. From a rational reason, he also only follows the

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[52] Ibid., 313-314.

[53] Ibid., 317.

[54] Ibid., 319.

earlier jurists' argument.[55] Similarly, al-Ṭūsī cites three verses as the basis of *ijmāᶜ*: Q. 3: 110; Q.31: 15 and Q.7: 181. With the first verse, he explains, that if Muslims are in error, it must be excluded from *khair*, since it is in contrast to the meaning of this verse. Moreover, according to him, the second verse indicates that every Muslim must hold an *ijmāᶜ*. Similarly, the meaning of the last verse can be understood as a basis of the authority of *ijmāᶜ* of all *umma* in future time (*mustaqbal*) not just the *ijmāᶜ* of the Companions.[56]

On the same lines, the basis of *ijmāᶜ*, for al-Taftāzānī, is Q.4: 115 and Q.3: 110. The meaning of *khaira umma* is *al-ḥaqqīya* (truth). Therefore, their agreement must be *al-ḥaqq* (truth), the opposite of which is *al-ḍalāl* (error). This is shown by another verse, Q.10: 32. Thus the error in *umma (al-ẓālim al-umma)* is not *khair umma*, who asks people to do right and forbid from wrong. *Umma wasaṭa*, which is stated in Q.2: 143, is related to another verse Q.68: 28 (*awsaṭuhum*), all of which, according to him, indicate an excellence or superiority (*al-faḍāil*) of the *umma*. He explains further that the head (*ruᵓūs*) of *al-faḍāᵓil* is *al-ḥikma* (wise), ᶜ*affā* (forgiveness), *sajāᶜa* (courageous) and ᶜ*adāla* (honesty). All of which, he considers, indicate *awsaṭa*. He also cites two *Sunnas*: "my community shall not agree on an error," and " whatever the believers consider good is good in the eyes of God, and whatever they consider evil is evil in His eyes." [57]

In addition, Ibn Amīr cites: Q.4: 115 and Q2: 143 as a basis for his argument. He gives a long explanation for the former verse. The meaning of "*wasaṭa*" in the latter verse is the obligation of infallibility on matters large or small, of the *muᶜmin* both in deed and statement.[58]

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[55] al-Nasafī, *Kashf al-Asrār*, II, 109-110.

[56] al-Ṭūsī, ᶜ*Uddat al-Uṣūl*, 73-74.

[57] al-Taftāzānī, *al-Tawḍīḥ*, 508-511.

[58] Ibn Amīr, *al-Taqrīr*, 155-163.

CHAPTER TWO

THE CONCEPT OF *IJMĀ^c* ACCORDING TO ^cABDUH
AND OTHER ISLAMIC MODERNISTS

A. The Definition and the Principles of *Ijmāc*

^cAbduh defines *ijmā^c* as the consensus of the entire Muslim community in a particular generation. The community as a whole is represented by the *ulū al-amr* (men in authority) in the broader sense of the phrase, since gathering the entire community together is not practically possible. The *ulū al-amr*'s agreement will serve as the agreement of the whole community. This agreement will be obeyed by the community as a whole, on account of public interest (*maṣlaḥa*) and not because of the infallibility of such an agreement. This public interest can be different in different places, times and environments.[1]

This agreement of the *ulū al-amr* is the *ijmā^c* of the entire community. It is, according to ^cAbduh, supported by the following Q. 4: 59: "Oh ye who believe ! Obey God, and obey the Apostle, and those charged with authority among you.."[2] and Q.4: 83: "When there comes to them some matter touching (public) safety or fear, they divulge it. If they had only referred it to Apostle, or to those charged with authority among them...."[3] ^cAbduh criticizes and refutes the generally accepted classical and medieval jurists' definition of *ijmā^c* as the agreement of jurists in a particular generation after the death of the Prophet.

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[1] ^cAbduh, *al-Manār*, vol. V, 208-209; Hasan, *The Doctrine of Ijmā^c*, particularly, 226-258.

[2] Yusuf Ali, *The Holy Qur'ān*, 198.

[3] Ibid., 203.

According to ʿAbduh, the classical jurists definitions' were not conversant with the socio-political interests of the community, such as problems of peace and war, finance and administration.[4]

He explains further that *ijmāʿ* means literally, "putting the things together, determining upon an affair, and resolving or deciding upon a matter." For example *ajmaʿa al-amr wa al-raʾy* means that a thing or opinion is composed and settled, which had earlier been unsettled, or an affair is determined, resolved or decided so as to make it formally settled.[5] Such a determined and settled decision is reached after mature thought and reflection, and a close study of *shūrā.*[6]

ʿAbduh also notes that a certain point can be decided by the opinion of a single person or body. To support this idea, he cites some verses from the Qurʾān; e.g., Q.10: 71: "... get ye then an agreement about your plan and among your partners....,"[7] Q.12: 15; "So they did take him away, and they all agreed to throw him down to the bottom of the well:....,"[8] Q.12: 102: "...when they concerted their plans together....,"[9] Q.20: 64: "Therefore concert your plan, and then assemble in (serried) ranks:...,"[10] and a number of instances from the *Sunna* of the Prophet. ʿAbduh argues that the word *ijmāʿ* occurring in

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[4] ʿAbduh, *al-Manār*, V, 205; Kemal A. Faruki, *Ijma and the Gate of Ijtihad* (Karachi: Pakistan Herald Press, 1954), 27, in which he states that many aspects of *ijmāʿ*, as formulated by the classical and medieval jurists, are still questionable.

[5] See also Ibn al-Mandhūr, *Lisān al-ʿArab* (Beirūt: Dār Ṣadir, 1375/1956), vol. VIII, 57-58; al-Shawkānī, *Irshād al-Fuḥūl*, 71.

[6] ʿAbduh, *al-Manār*, V, 207.

[7] Yusuf Ali, *The Holy Qurʾān*, 503.

[8] Ibid., 554.

[9] Ibid., 588.

[10] Ibid., 802.

these statements does not mean the agreement of the jurists, but carries a non technical meaning, of firm determination on a matter. He quotes the example of ᶜUmar who derived rules from the Qurʾān and the *Sunna* of the Prophet, and if they could not be found there, he derived them through *ijmāᶜ* or from the righteous people (*ṣāliḥūn*).[11]

The word *ulū al-amr* in verse Q.4: 59 was interpreted by ᶜAbduh in a wider context. *Ulū al-amr*, according to him, designates well-known people in every nation, every town and every tribe. This view is also supported by the form of the word *ulū al-amr* in this verse, which is in the plural and which indicates a number of *ulū al-amr*. These *ulū al-amr* should be well-known in the community.[12] They are all the men on whom people's reliance is put out of respect for their understanding of religious and temporal matters and because of their wider knowledge and sound opinions. To support this opinion, ᶜAbduh quotes a fact from the lifetime of the Prophet. He states that in the lifetime of the Prophet, there was a body of people in Medina whom people consulted on the matter of taking an oath of allegiance (*bayᶜa*), in regards to *shūrā*, and on political, administrative and judicial matters.[13] But ᶜAbduh does not mention, however, whether or not the appointment of Abu Bakr as the first caliph was also an act of *ijmāᶜ*, as claimed by the majority of the jurists.

ᶜAbduh argues that the phrase *ulū al-amr* is sometimes taken to mean kings and despots. But it should be noted that the verse was revealed during the time of the Prophet when no kings or despots existed in Islam. It implies, therefore, that this verse indicates the necessity of a body of such people in a particular community who possess acumen on social and political affairs and are competent to derive rules from the Qurʾān and the *Sunna* of the Prophet. This body was known in early Islam as *ahl al-shūrā* and *ahl al-ḥall wal-*

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[11] ᶜAbduh, *al-Manār*, V, 207-208.

[12] Ibid., 200.

[13] Ibid., 195.

ʿaqd. The phrase *ahl al-amr (ulū al-amr)* actually referred to experts on the affairs of the umma', on law as well as on matters of public interest.[14] This terminology is probably similar to Maḥmaṣānī's terminology, who states that scholars (*ʿulamāʾ*) were experts in all departments of ancient knowledge.[15]

Historically, according to ʿAbduh, in the period of the *Rāshidūn* caliphate, for example, and particularly under the first two caliphs, the *ulū al-amr* were the leaders of the community (*ruʾūs al-nās*) and scholars (*ahl al-ʿilm*) who were experts in religious matters and *muʿāmalāt*,[16] and they decided everything on the basis of public interest, equity and justice.

In the Umayyad period, however, the interest of the *ulū al-amr* became confined to the interests of a particular family/clan, the Umayyads. In the Abbasid period, the community was represented mostly by non-Arabs (*ʿajam*), particularly from Persia. The result, therefore, was not obedience to God and the Prophet as happened in the era of the *Rāshidūn* caliphate, but the promotion of a particular community's interests.[17]

What ʿAbduh attempts to explain here is that in the era of the Prophet and the *Rāshidūn* caliphate, especially the first two caliphs, the *umarāʾ* and the *ʿulamāʾ* were working together at the same level in solving new problems. They both criticized and

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[14] ʿAbduh, *al-Manār*, vol. III, 11-12; Muhammad Nazeer Ka Ka Khel, "The Conceptual and Institutional Development of Shura in Early Islam," *Islamic Studies* 19 (1980): 271-282.

[15] Maḥmaṣānī, "Muslims : Decadence and Renaissance," 187.

[16] ʿAbduh, *al-Manār*, V, 197; Muhammad Y. Faruqi, "The Development of Ijmāʿ : The Practices of the Khulafāʾ al Rāshidūn and the Views of the Classical Fuqahāʾ," *The American Journal of Islamic Sciences* 9:2 (Summer 1992): 173-187.

[17] ʿAbduh, *al-Manār*, V, 198.

advised one another freely. In other words, the leaders of the community and ʿulamāʾ were not two distinct bodies as became the case later.

Hasan Turābī is another modern scholar who emphasizes the necessity of returning the proper and previous function of the *mujtahids* to as it was the case in the time of the Prophet and in the period of the *Rāshidūn* caliphate. He cites that one of the most important principles in Islam is the Unity between law and morality, between matters of this world and the here-after. Turābī states;

> In the earlier model of the early Caliphs period, the jurists were quite independent of the *khalifa*. But they were not away from him; he would associate them in his *shura*, and he would probably pronounce their consensus as the ultimate consensus of society. But they were very critical of him. They were very autonomous of him, and society did maintain that degree of autonomy.[18]

Moreover, later on, he reminds, there was almost a complete divorce between the government and jurists. He argues that there was a divorce even between jurists and society.[19] On another occasion, Turābī, again emphasizes the necessity of the relationship among government, jurists and society. He cites Q.4: 59 to prove that it is obligatory to obey the *ulū al-amr* which is made up of the government and jurists. He, moreover, remarks that all decisions have to be within the acceptance (*riḍā*) of Muslims. This can be done, he reminds, only through *shūrā*.[20]

Returning back to ʿAbduh's theory of necessary changes in the form of this body, i.e., the institution of *ulū al-amr*, ʿAbduh cites that the institution of *ulū al-amr* can be made to work according to the changing demands of social life and circumstances. The men in

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[18] Hasan Turabi, *Islam, Democracy, the State and the West*, ed. Arthur L. Lowrie (Florida: The World & Islām Studies Enterprise, 1993), 38.

[19] Ibid.

[20] Hasan Turābī, *Tajdīd al-Fikr al-Islāmī* (Marocco: Dār al-Qarāfī li al-Nashr wa al-Tawzīʿ, 1993), 14.

authority (*ulū al-amr*) in modern times are the eminent (religious) scholars, army commanders, tradesman, leaders, people working in the public service departments, directors of the companies and societies, leaders of political parties, celebrated writers, physicians, advocates, managers and editors of important journals. In short, they are people in whom the community lays its confidence over important affairs, and whom they consult about the problems of daily life.[21] If these people come to an agreement concerning a matter, this agreement should be obeyed by all Muslims as long as all these representatives are Muslims and this agreement is in accordance with the Qur³ān and the *Sunna* of the Prophet. This agreement should also be in the public interest (*maṣāliḥ al-ʿāmm*). Finally, this agreement can take place only in *muʿāmalāt*, but not in matters of *ʿibādāt.*[22]

In order to ensure the requisite qualities of the members comprising the *ulū al-amr*, ʿAbduh suggests conducting free elections. The community should be fully acquainted with the purpose of the election and the quality of the members. Likewise, Faruki also suggests electing those whom the people consider competent and trustworthy among themselves.[23] *Ijmāʿ*, according to ʿAbduh, is achieved after the exercise of *ijtihād*. A mistake in conducting *ijtihād* cannot be taken which strays from the right path and the truth (*dalāl*). In performing *ijtihād*, a *mujtahid* might be right or wrong. A mistake in *ijtihād* is equal to the mistake of a person who misses the right direction of prayer despite his best effort.[24] For the method of achieving *ijmāʿ* for the Muslim community throughout the world, ʿAbduh suggests that *ijmāʿ* should take the format of an institution which consists

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[21] ʿAbduh, *al-Manār*, V, 199; Kerr, *Islamic Reform*, 162.

[22] ʿAbduh, *al-Manār*, V, 181; Maḥmaṣānī, "Muslims : Decadence and Renaissance," 187.

[23] Faruki, *Ijma*, 33.

[24] ʿAbduh, *al-Manār*, V, 209.

of experts from many different disciplines and through which people's problems can be overcome.

As a continuation of free election and to provide permanency, as argued by ʿAbduh, Muhammad Iqbal (d. 1938) offers a permanent institution. According to him, *ijmāʿ*, as the third source of Islamic law, is perhaps the most important legal notion in Islam. However, it is strange that this important notion practically remained a mere idea and rarely assumed the form of a permanent institution in any Islamic country. Possibly its transformation into a permanent legislative institution was contrary to the political interests of the kind of absolute monarchy that grew up in Islam immediately after the fourth caliph ʿAlī ibn Abī Ṭālib. This was probably the main reason why the Umayyad and Abbasid caliphs encouraged individual *mujtahids* rather than forming a permanent assembly which might become too powerful.[25] But, according to Musa, historical facts refute this theory, since the *mujtahids* themselves are known to have resisted the caliphs in their move to recognize their legislative status. Ibn al-Muqaffāʾ could not succeed in his attempts to influence the caliph to eliminate the conflicting individual judgments of the *mujtahids* for fear of public opinion led by the ʿulamāʾ against him.[26]

According to Iqbal, the only possible form of *ijmāʿ* in modern time would involve the transfer of the power of *ijtihād* to a Muslim legislative assembly. Thereby, *ijmāʿ* would also secure contributions from laymen who possess insight into relevant affairs. A difficulty will arise, however, with regards to an assembly which would also include non-Muslims, for such an assembly could hardly exercise *ijtihād*.[27]

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[25] Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: Shakh Muhammad Ashraf Press, 1951), 173-174.

[26] S.M. Musa, *Studies in Islamic History and Culture* (Lahore: Institute of Islamic Culture, 1970), 217.

[27] Muhammad Iqbal, *The Reconstruction*, 174.

To ensure the proper functioning of the assembly, which is to serve as the instrument of *ijmāᶜ*, it should, according to Iqbal, be representative of both the elite and the *ᶜulamāᵓ*. The *ᶜulamāᵓ* should guide the assembly for matters relating to religious matters. In addition, in order to avoid a misinterpretation of the main sources of Islamic law, the Qurᵓān and the *Sunna* of the Prophet, adequate steps should be taken, e.g., rebuilding the system of legal education in Muslim countries, so that its sphere is broadened and it is combined with the intelligent study of modern jurisprudence.[28]

Another modern scholar who discusses the issue of *ijmāᶜ* intently is Faruki. Unfortunately, he does not define *ijmāᶜ* explicitly, but from his discussion it can be concluded that he agrees with the definition given by Mufti Shafi,[29] which is the agreement of the *mujtahids* (competent people) on particular matters on which no clear verdict is to be found in the Qurᶜān and/or the *Sunna* of the Prophet.[30]

To distinguish competent people from ordinary ones, Faruki suggests beginning with Qurᵓānic verse 4: 58: "God doth command you to render back your Trusts to those to whom they are due."[31] From this verse can be understood, according to him, that there are two main qualities which an individual must possess, integrity/honesty and knowledge. To understand and make deductions on the legal aspects of the Qurᵓān and the *Sunna* of the Prophet, a competent person should possess not only knowledge of his own Islamic system but should also possess a comparative knowledge of other systems. Moreover, a competent person should also possess an understanding of temporal and materialistic

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[28] Ibid., 176.

[29] There was a dialogue between Faruki and Maulana Mufti Mohammed Shafi over a series of letters and meeting from February 21, 1953 to December 15, 1953, and his previous book, *Ijma and the Gate of Ijtihad*, is actually based on this discussion.

[30] Faruki, *Ijma*, 11.

[31] Yusuf Ali, *The Holy Qurᵓān*, 197.

matters. In support of this requirement, he cites, as a representative quotation, Q. 30: 22: "And among His signs is the creation of the heavens and the earth, and the variations in your languages and your colors : verily in that are Signs for those who know."[32] Therefore, the competent people, according to him, are those who have both religious and secular knowledge. To gain comparative knowledge, he suggests working together with people from different religions and ideology, just as Iqbal did.[33]

An-Naim is another scholar who argues that the involvement of Muslims and non-Muslims in consensus is necessary. This involvement is not specific only to worldly matters but also in religious matters. When discussing constitutionalism in a more general context, an-Naim notes that the aim of this involvement is to be appreciated as a contribution to the totality of human experience and knowledge from which Muslims and other people may adopt and adapt whatever they deem fit in light of their own religion and cultural traditions.[34]

With regard to the relationship between competent people (*mujtahid*/learned) and the community, Faruki also agrees with Shafi, who has no doubt that the Qur²ānic verses and the *Sunna* of the Prophet on which the *ijmā*c is based refers to the community as a whole and not a particular group. However, in all matters, in fact, technical erudition and a high degree of knowledge is required; experts should have the ability to investigate and find out everything needed to achieve the law from the sources. For this particular *ijmā*c, the *mujtahids* are the experts, who have sufficient ability.[35] Thus, competent people are

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[32] Faruki, *Ijma*, 18-19.; Yusuf Ali, *The Holy Qur²ān*, 1056.

[33] Faruki, *Ijma*, 19-20. Compare to Iqbal, *The Reconstruction*, 174; Abdullahi Ahmed an-Na²im, *Toward an Islamic Reformation* (New York: Syracuse University Press, 1990), 69-70.

[34] an-Na²im, *Toward an Islamic Reformation*, 69-70.

[35] Faruki, *Ijma*, 11-12.

representatives of the community as a whole chosen for their knowledge both in religious and secular matters. On the necessity of having this knowledge in doing this research, Faruki cites several verses from the Qur'ān which support the idea that some particular people have ability to understand Islam well. For example, it is stated in Q.12: 44,[36] where the term *ʿālim* or its plural form *ʿālimīn* is used. In one instance, the *ʿulamāʾ* were asked by the Egyptian king to explain the significance of his dream. After they have confessed their inability to do so, Joseph interprets it. Another reference is the *ʿulamāʾ* in Q.26: 197,[37] where the *ʿulamāʾ* of the Israelites are stated to have realized that the Qur'ān confirms the ancient scriptures. The third reference and a more relevant one is in Q.29: 43,[38] in which it is asserted that the parables in it can only be understood by the learned (*ʿālim/ʿālimūn*). The fourth reference is in Q.35: 28,[39] in which it is asserted that only those who are "firmly rooted in knowledge" can understand the allegorical parts of the Qur'ān.[40]

Dealing with the process of *ijmāʿ*, Faruki maintains that *ijmāʿ* should be started by an *ijtihād* from a *mujtahid* on a certain issue, and *ijtihād* would be applied by the *mujtahid* (in Faruki's own words a doctor of law). Then more and more *mujtahids* would come to accept one particular interpretation of that particular case. Over a period of time, which might last for several generations, and finally, looking back, it could be said that *ijmāʿ* had

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[36] The meaning of the verse is "They said : "A Confused medley of dreams : and we are not skilled in the interpretation of dreams." Yusuf Ali, *The Holy Qur'ān*, 567.

[37] The meaning is "Is it not a Sign to them that the learned of the Children of Israel knew it (as true) ?" Yusuf Ali, *The Holy Qur'ān*, 970.

[38] The meaning is "And such are the Parables we set forth for mankind, but only those understand them who have Knowledge." Yusuf Ali, *The Holy Qur'ān*, 1040.

[39] The meaning is "...those truly fear God, among His Servants, who have knowledge..." Yusuf Ali, *The Holy Qur'ān*, 1161.

[40] Kemal A. Faruki, *Islamic Jurisprudence* (Karachi: Pakistan Publication House, 1962), 69.

been reached on that particular *ijtihād*.[41] It is clear, therefore, that *ijmāᶜ* for Faruki is the *ijmāᶜ* of the *mujtahid* which is then followed by the community as a whole. Since, in fact, according to him, there is no further stage after the *ijmāᶜ* of the *mujtahids* because of the lack of knowledge of the common people. From this explanation it is also clear that the *ijmāᶜ* is achieved by a natural process.

Faruki states further that there are two possible ways to operate *ijmāᶜ*, namely, through legislation or by judicial precedent. Neither of these methods in themselves is Islamic or non-Islamic. The most important thing, however, is the existence of an institution, whatever its nature, through which *ijmāᶜ* can be achieved. If the principle of *ijmāᶜ* can operate better through legislation than through judicial precedent, then, legislation, becomes the more Islamic method. Conversely, juridical precedent is better and becomes more Islamic if *ijmāᶜ* can operate well through it.[42] But it should be noted, he warns, that the problem in the judicial one is related to some questions, such as, what is the way of the believers ?; when is *ijmāᶜ* mathematically considered to have been reached ?; what are its time and space requirements ?; how is the way of the believers as a totality to be ascertained ? and how is it to be related constitutional to the competent?. He, consequently, concludes that the legislation method becomes more acceptable than the judicial one.[43] This is in accordance with a later book, _Islamic Jurisprudence_, where he states that *ijmāᶜ* should be started by an *ijtihād* from a *mujtahid* on a certain issue. If *ijtihād* were applied by the *mujtahid*, then more and more *mujtahids* would come to accept one particular interpretation of that certain case. This process would take place over a period of time which might last for several generations.

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[41] Ibid., 71

[42] Faruki, *Ijma*, 25.

[43] Ibid., 27-28.

Hazairin (d. 1975) and Hasbi ash-Shiddieqy from Indonesia are two other jurists who discuss the *ijmā*ᶜ of the *ulū al-amr*. Hazairin does not define *ijmā*ᶜ explicitly. But when discussing the *ijmā*ᶜ of the *ulū al-amr*, he divides it into two kinds of *ijmā*ᶜ; *ijmā*ᶜ which is achieved easily through analogy, for the *ᶜilla* (cause) from the old case to the new one can be found easily (for example, the obligation of the alms tax (*zakāt*) of the rice is analogized to wheat), and *ijmā*ᶜ regarding new cases, for which the *ᶜilla* from the old case could not be found (for example, the rule (*ḥukm*) of deceit is not stated in the original sources, al-Qurʾān and the *Sunna* of the Prophet, or even it is hard to find an old case which has the same *ᶜilla*). The first kind of *ijmā*ᶜ, in his view, is possibly done by mere jurists who are a part of the *ulū al-amr*. The second kind of *ijmā*ᶜ, moreover, is achievable only by the *ulū al-amr* as a whole through *shūrā*. He explains further that the requirements which have to be considered, in performing *ijmā*ᶜ, as stated in Qurʾān are trustworthiness (*ᶜadl*), equity (*qisṭ*), and perfection (*iḥsān*). He, then, cites Q. 42: 38 to show the necessity of *shūrā*, and Q.4: 58 to show the necessity of experts (*ahl*) in doing *shūrā*.[44] From them it can be understood, therefore, that *ijmā*ᶜ, in his view, is started from *ijtihād*, which is interpreted by him as *qiyās* within analogy. In addition, he also emphasizes the necessity of *shūrā* from the experts in many different field of studies. Even though it is not clearly stated, he seems to be a jurist who classifies *ijmā*ᶜ into public opinion which aims to overcome a new problem. Consequently, the matter in this case is not whether something is true or false but rather can a problem be solved or not.

On the other hand, what was formulated by ᶜAbduh is classified by ash-Shiddieqy (d.1975) as a collective *ijtihād* (*ijtihād jamāᶜī*). To support the idea of a collective *ijtihād*, he cites the tradition of the Prophet "If a certain matter arises, collect for it the *ᶜulamāʾ* from among the Muslims, and settle it on the basis of *shūrā* and do not settle it on the basis of a

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Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qurʾan dan Hadith* (Jakarta: Tintamas, 1982), 65-68

single opinion."[45] In addition, he quotes the historical fact that ʿAbduh had previously

quoted and which maintains that when Abū Bakr and ʿUmar found a problem they solved it

by asking the leaders of the community and the scholars to discuss the matter at hand.

Moreover, ash-Shiddieqy cites some examples from the Companions' era which show the

practice of collective *ijtihād*. For example, the election of Abū Bakr as the first caliph and

the suggestion of ʿUmar to write the Qurʾān were decided through this form of *ijmāʿ*.[46]

Unlike the majority of modern scholars, Fazlur Rahman (d. 1988) defines *ijmāʿ* as

being co-extensive with the *Sunna* after the time of the Prophet, viz., the *Sunna* of the

Prophet and the interpretation of it,[47] or as the *ijtihād* of the *ʿulamāʾ* and the ruling of

political authorities in their day-to-day administration.[48] He cites:

> Now we should show (1) that while the above story about the development
> of the Sunnah is essentially correct,[49] it is correct about the content of the
> Sunnah only and not about the concept of the "Sunnah of the Prophet", i.e.,
> that the "Sunnah of the Prophet" was a valid and operative concept from the
> very beginning of Islam and remained so throughout; (2) that the Sunnah-
> content left by the Prophet was not very large in quantity and that it was not
> some thing meant to be absolutely specific; (3) that the concept of Sunnah
> after the time of the Prophet covered validly not only the Sunnah of the
> Prophet himself but also the interpretations of the Prophetic Sunnah;(4) that
> the "Sunnah" in this last sense is co-extensive with the Ijmāʿ of the
> Community, which is essentially an ever-expanding process; and finally (5)

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[45] *Ijmaʿū lahu al-ʿālimīn min al-muʾminīn fa ijʿalū shūrā bayna-kum wa lā taqḍū fīh bi
raʾyi wāḥid.*

[46] Hasbi ash-Shiddieqy, *Pengantar Hukum Islam*, vol. 1 (Jakarta: Bulan Bintang,
1372/1953), 177-178.

[47] Fazlur Rahman, *Islamic Methodology in History* (Karachi: Central Institute of Islamic
Research, 1965), 6.

[48] Ibid., 30.

[49] what he means by 'correct' here, as cited above, is that (i) a part of the content of the
Sunna is a direct continuation of the pre-Islamic customs; (ii) the greater part of the content
of the *Sunna* was the result of the free thinking activity of the legists of the Islam; (iii) in the
later period when the *Sunna* of the Prophet developed into an overwhelming movement in
the second and especially in the third centuries, the entire content of the early *Sunna* came to
be known as the *Sunna* of the Prophet. See Rahman, *Islamic Methodology*, 5.

that after the mass-scale Ḥadīth movement the organic relationship between the Sunnah, ijtihād and Ijmāʿ was destroyed.[50]

To clarify this concept, Rahman, takes the *Muwaṭṭaʾ* of Mālik as an example. Mālik quotes a *ḥadīth* either from the Prophet, if available, or from the Companions, particularly from the first four Caliphs. This is usually followed by a remark; "and this is also the *Sunna* with us," or "the *Sunna* with us is....," or more frequently, "our practice (*amr* or *ʿamal*) is ..." or still more frequently "our agreed practice (*al-amr al-mujtamaʿ ʿalayh*) is ...."[51]

The process of this *Sunna*, in the view of Rahman, is also to clarify the concept of *Sunna* itself. It has been held since the time of the Prophet that the necessary instrument whereby the Prophet's model was progressively developed into a definite and specific code of human behavior by the early generation of Muslims was responsible personal free-thinking, which is called *raʾy*. The *raʾy* produced a number of legal religious and moral ideas during the first century and a half of the Muslim era. The result of earlier *raʾy* was the slow arrival at a point where iˑ was fairly uniformly accepted by the Companions, at least in regional communities, like Ḥijāz, Iraq and Egypt. Therefore, both terms *Sunna* and *ijmāʿ* are equivalent and were applied by Mālik to a body of opinion. When the *Sunna* came to designate only the *Sunna* of the Prophet, the agreed practice of the Companions was still called *Sunna al-ṣaḥāba*. The agreement of the Companions is both *Sunna* of the *ṣaḥāba* and *ijmāʿ* of the *ṣaḥāba*. This *Sunna* or *ijmāʿ* of the Companions slowly came to be commonly accepted by the consent of the community.[52] Thus, the *Sunna* and the *ijmāʿ* literally interact with one another and are, in actual fact, materially identical.[53] It can be

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[50] Ibid., 6.

[51] Ibid., 13.

[52] Ibid., 14-15.

[53] Ibid., 18.

concluded, therefore, that the process of *ijmāᶜ*, according to Rahman, started from an *ijtihād* of a *mujtahid* regarding a certain case, despite the fact that the material of *Sunna* and *ijmāᶜ* in the period of the Companions is identical. After a certain period of time, when the rest of the *mujtahids* agree on the same matter, then *ijmāᶜ* is achieved.

Therefore, it should be abundantly clear by now that the actual content of the *Sunna* of the early generation of Muslim was largely the product of *ijtihād*; this *ijtihād*, through an incessant interaction of opinion, developed the character of general acceptance by the consensus of the community, i.e., *ijmāᶜ*.[54]

Based on the above explanation, it seems to be right to conclude that *ijmāᶜ*, according to Rahman, is *ijmāᶜ* of the *mujtahids*. This conclusion is made clearer when he discusses the necessity of *ijmāᶜ* at any time. Rahman notes:

> There is no evidence, however, that the *Hadith* was compiled in any form even at this stage. The reason, again, seems to be this, viz., that whatever *Hadīth* existed as the carrier of Prophetic *Sunnah* existed for practical purposes, i.e., as something which could generate and be elaborated into the practice of the Community. For this reason, it was interpreted by the rulers and the judges freely according to the situation at hand and something was produced in course of time which we have described as the "living *Sunnah*".[55]

Since *ijmāᶜ* comes from an *ijtihād*, consequently, according to Rahman, an *ijmāᶜ* can be right and wrong, or partly right and partly wrong, rather than true and false. The community, indeed, cannot take itself for granted in claiming theoretical infallibility. It must always aspire both to understand and to do right.[56]

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[54] Ibid., 18.

[55] Ibid., 32.

[56] Ibid., 77.

Similar to his predecessors' view point, Rahman also raises the possibility of using democratic processes in *ijmāᶜ*. Simultaneously, he criticizes the *ijmāᶜ* of al-Shāfiᶜī, which, according to him, is classified as an imposed or manufactured static concept.[57]

Hasan Turābī from Sudan is another figure, who discusses the concept of *ijmāᶜ* in modern times. *Ijmāᶜ*, according to him, is an agreement which has to be obeyed for the resolution of all important public issues. As an effect of the Muslim expansion, Muslim were then to be found all over the world, and there was no practical way of consulting everyone of the general *umma* today. Therefore, the *ᶜulamāʾ* posed as representatives of the people and maintained that their consensus was a form of indirect representation of indirectly binding *ijmāᶜ*.[58]

There at least two important points which can be taken from his explanation. First, he argues that *ijmāᶜ* is an agreement of the community as a whole. Yet their large number and their location in many different kinds of countries make it impossible to obtain a direct *ijmāᶜ*. Consequently, a representative way is the best way to conduct this *ijmāᶜ* and simultaneously to overcome the problem. Another important point that he discusses is that the *ijmāᶜ* is a rule which has to be obeyed. From the latter point, it can be concluded that *ijmāᶜ*, according to him, is a government rule. This idea is in accordance with ᶜAbduh's ideas.

Turābī, then, cites Q. 4: 115 and some *Sunna* of the Prophets, as the classical jurists did, to prove that *ijmāᶜ* is by necessity the *ijmāᶜ* of the Muslim community and that it is

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[57] Ibid., 23.

[58] Turābī, *Tajdīd al-Fikr*, 13; idem, "Principles of Government, Freedom and Responsibility in Islam," *The American Journal of Islamic Social Sciences* 4: 1 (September 1987): 3-4.

necessary to follow it. He simultaneously quotes Q. 4: 59 to prove that it is obligatory to obey *ijmāᶜ* as an application of obeying the *ulū al-amr*.[59]

While discussing the members of Parliament in his article, Turābī defines an *ᶜālim* (*ᶜulamāʾ*) as possibly being a chemist, an engineer, an economist or a jurist, since all knowledge, according to him, is divine and religious. Thus, an *ᶜālim* is anyone who knows anything well enough to relate it to Allah.[60]

In contrast, some other scholars are opposed to the idea that *ijmāᶜ* can work through a legislative assembly. S.M. Musa, for example, has three objections to this idea. First of all, the number of *mujtahids* are indeterminable; it is different from time to time and place to place in accordance with the nature and extent of education and culture. Secondly, the qualities of the *mujtahids* are not won through a counting of votes or the award of a certain certificate. Rather, a *mujtahid* is recognized by the people through his personal qualities as revealed during a whole lifetime and not on the eve of a hectic election campaign. Thirdly, the process of *ijmāᶜ* is slow, sometimes very slow -- it may take a generation or even more and nobody can set the pace of it. When the *mujtahids* give their opinions on a certain point, it passes through the process of conflict and survival of the fittest. It is immeasurable in mathematical phrases. Consequently, Musa doubts the usefulness of a legislative assembly for *ijmāᶜ* and he is skeptical if this assembly will contain the best representatives from the community. Achievement of *ijmāᶜ* really takes a long time, since once *ijmāᶜ* is achieved there remains no dissident minority waiting for its turn to impose its own point of view. That is probably why there have been very few instances of later generations refuting the *ijmāᶜ* of a previous generation. He concludes, therefore, that theoretically the

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[59] Turābī, *Tajdīd al-Fikr*, 14.

[60] Ibid., 5.

possibility of *ijmāᶜ* through a legislative assembly does exist, but practically it is difficult to achieve.[61]

Musa also notes that during the early centuries of Islam, Islamic culture and civilization reached their zenith. The corpus of Islamic law developed to the extent that it could be applied later to all the needs of family life, public activity, highly developed industry, crafts, international commerce and international relations. The law became static because the society in medieval times was itself static. It was not moving as rapidly as in our own times. The medieval era was one of decline, both for the Muslims as well as for non-Muslims. The Muslims then were more aware of their needs than the Muslims of today.[62] Musa does support the necessity of *ijtihād* to meet new challenges, but does not agree with the kind of *ijmāᶜ* proposed by modern scholars. Another reason he has to disagree with, particularly to Iqbal, is to propose the involvement of laymen in *ijtihād*. According to Musa, a layman has no right to conduct such *ijtihād*. Rather, *ijtihād* in Islam has to be based on the spirit of the Qurʾān and the *Sunna* of the Prophet. So only the scholars (*ᶜulamāʾ*) are competent to undertake it.[63]

ᶜAbduh does not directly describe the relationship between caliph and *ahl al-ḥall wal-ᶜaqd*. He merely states that cooperation is necessary because the isolated individual is weak and shortsighted even in discerning his own best interest, let alone those of the group. Consequently the extent of the consultation necessary is commensurate with one's responsibilities and authority.

According to Rashīd Riḍā (d. 1935), *khilāfa, imāma ᶜuzmā* and *imārat al-muʾminīn* are three phrases with the same meaning. They signify the leadership of Islamic

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[61] Musa, *Studies in Islamic History*, 212-213.

[62] Ibid., 214.

[63] Ibid., 215-216.

government combining interest in religion and worldly life. As Fakhr al-Dīn al-Rāzī (d. 606/1209) stipulates, Riḍā argues that the office must be confided to a single individual as "a safeguard for the entire community in case they should have to remove the *imām* for evildoing;" since without the caliph the law cannot be enforced nor the welfare of the community protected.[64] The *ahl al-ḥall wal-ʿaqd* must possess effective influence in the community so that their decision will be assured of enforcement and so that the *ahl al-ḥall wal-ʿaqd* are the final authority, speaking for the full body of believers.[65]

The *ahl al-ḥall wal-ʿaqd* have replaced the caliph as the human agency whose function is to determine the matters from religion and temporal considerations and the caliph has become their executive officer. But if *ahl al-ḥall wal-ʿaqd* should meet and pass other decisions opposed to the ruler's policy, these are binding on him, since they are the deputy of the community (*umma*) and it is they who have the right to select the caliph.[66]

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[64] Kerr, *Islamic Reform*, 159.

[65] Ibid., 161.

[66] Ibid., 164-165.

B. The Basis of *Ijmāᶜ* According to ᶜAbduh and Other Islamic Modernists

With regard to the basis of *ijmāᶜ*, ᶜAbduh invokes Q.4: 59 and Q.4: 83. Unlike early jurists, he rejects the use of Q.4: 115 because this verse, according to him, does not relate to *ijmāᶜ*.[67] In explaining this verse (Q.4: 115), ᶜAbduh divides the explanation into ten parts, none of which deal with *ijmāᶜ*.[68] He also denies the relevance of the well known tradition "my community will not agree on an error." ᶜAbduh maintains that this tradition does not speak of *ijmāᶜ* at all.[69]

Shah Walīy Allah is another contemporary Islamic thinker who denies the existence of this tradition as a basis of *ijmāᶜ*. According to him, the meaning of this tradition is that the Prophet might have meant that in the community there will always remain people who will continue to perform their duty (i.e., search for truth). He contends further that this tradition did not mean *ijmāᶜ* at all.[70]

As regards Q.2: 143 and Q.22: 78: "...that the Apostle may be a witness for you, and ye be witnesses for mankind...,"[71] according to ᶜAbduh, they are a call to be a witness to the qualification of trustworthiness (ᶜadl) and they are not related to *ijmāᶜ*.[72]

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[67] For ᶜAbduh's rejection to the basis used by the classical and medieval jurists see ᶜAbduh, *al-Manār*, V, 417. For a comparison of the matter see Hallaq, "On the Authoritativeness of Sunni Consensus," 427-454; Hourani, "The Basis of Authority of Consensus," 13-60.

[68] ᶜAbduh, *al-Manār*, V, 410-416.

[69] Ibid., 201.

[70] Shah Walīy Allāh, *al-Tafhīmāt al-Ilāhīyah* (Bijnōr, Madīnah Bargi Press, 1936), II, 118; Ahmad Hasan, "Ijmāᶜ in the Early Schools," *Islamic Studies* 6 (1967): 123.

[71] Yusuf Ali, *The Holy Qurᵓān*, 872.

[72] ᶜAbduh, *al-Manār*, V, 213-214.

"Jamāᶜah" means the *ahl al-ḥall wal-ᶜaqd* in every generation. But, according to Kirmani, it is those experts in various fields of knowledge (*ahl-al-ᶜilm*) who are trustworthy (*ᶜadl*) are similar to *ahl al-ḥall wa-ᶜaqd.* Those in whom people place their trust for settling their affairs are not merely those who are just, as argued by the earlier jurists.[73] ᶜAbduh, therefore, proposes that part of the obligation to follow *ijmāᶜ* is the obligation to obey the *ulū al-amr.* In addition, the obligation to follow *ijmāᶜ* is not based on the obligation to follow the path of *Muʾmin* nor due to the guarantee of God of the infallibility of the *umma,* but rather due to the consideration of the agreement of 'those in authority' (*ulū al-amr*) who are experts (*ahl*) on the matters.

Another scholar who bases his *ijmāᶜ* on Q.4: 59 as ᶜAbduh does and explains it as such is Fahr al-Dīn al-Rāzī in which, according to him, God commanded unquestioning obedience to "those in authority" (*ulū al-amr*). The judgment of a person whose obedience is commanded by God must be immune from error. This is because God cannot command one person to obey someone who is apt to fall into error, for committing an error is prohibited by God Himself. Therefore, it is definitely proven that those in authority mentioned in this verse are infallible. Al-Rāzī held that the meaning of "those in authority" in this verse are *ahl al-ḥall wa al-ᶜaqd* (people who bind and loose) and they represent the community.[74]

In addition, Shawkānī also noted Q.4: 59 as a basis for the authority of *ijmāᶜ,* while he simultaneously disputes Q.4: 115 as a basis of *ijmāᶜ* for two main reasons. The first reason is that the phrase *ghaira sabīl al-muʾminīn* here, according to him, means unbelievers, since this verse was revealed (*nuzūl*) to men who were apostates (*murtād*).

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[73] Ibid., 213-214.

[74] Fakhr al-Dīn al-Rāzī, *al-Tafsīr al-Kabīr (Mafātiḥ al-Ghayb)* (Miṣr: al-Maṭbaᶜāt al-Bahīya, 1357/1938), vol. X, 144.

This verse does not speak of *sabīl al-ṣāliḥīn*. The second reason is that the word *sabīl* here is *ḥaqīqat*, and means a way or street used for walking, not agreement (*ittifāq/ijmāʿ*).[75]

Similarly, Hazairin also cites Q. 4: 59 as a basis of the *ijmāʿ* of the *ulū al-amr* which has to be followed by the *umma*.[76] He, moreover, warns that the *ijmāʿ* has to be in accordance with the spirit of Qurʾān and the *Sunna* of the Prophet. He also cites Q. 5: 44 to emphasize the same point, i.e., the necessity of the *ijmāʿ* must be in accordance with the spirit of Qurʾān and the *Sunna* of the Prophet.[77]

To clarify the meaning of *ahl al-ḥall wal-ʿaqd* as argued by ·Abduh being another phrase of *ulū al-amr*, it is necessary to observe the view points of the earliest scholars, such as al-Rāzi, al-Bāqillānī, al-Māwardī, al-Ghazālī, Ibn Jamāʿah and Ibn Khaldūn, as ʿAbduh's ideas are similar to those of earlier scholars. Historically, the phrase *ahl al-ḥall wal-ʿaqd* seems to have been used interchangeable with other phrases, such as *ahl al-shūrā, ahl al-ijtihād, ahl al-ikhtiyār;* it is also likely that this phrase was designated for the same people who are called the *ulū al-amr*, an expression founded in the Qurʾān. Fakhr al-Dīn al-Rāzī, in his tafsīr *Mafātih al-Ghayb* states that the *ahl al-ḥall wal-ʿaqd* are identical with the *ahl al-ijmāʿ*,[78] while according to Ibn Khaldūn, the *ahl al-ḥall wal-ʿaqd* are a combination of the *umarāʾ, ʿulamāʾ* and *Qāḍīs*.[79] Moreover, al-Bāqillānī, al-Māwardī and al-Ghazālī utilize the phrase *ahl al-ḥall wal-ʿaqd* when they discuss the appointment of the *imām*. According to the first two, there are two possible ways to establish the *imāmate*. The first way is the

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[75] al-Shawkānī, *Irshād al-Fuḥūl*, 75.

[76] Hazairin, *Hukum Kewarisan*, 64.

[77] Ibid., 68.

[78] al-Rāzī, *al-Tafsīr al-Kabīr*, X, 144.

[79] Mahdī Faḍl Allāh, *al-Shūrā : Tabīʿat al-Ḥākimīya fī al-Islām* (Beirūt: Dār al-Andalus, 1404/1984), 186.

designation by the ruling *imām* and the second way is election (*ikhtiyār*) by the electoral college, '*ahl al-ḥall wa'l-ʿaqd'* (those who loosen and bind).[80] Al-Bāqillānī asserts that the latter way is valid even if contracted by a single man qualified to be among those 'who loose and tie' in favor of someone who fits the *imāmate*, but he stipulates that a group of Muslims must be present to witness the *bayʿa* when it is performed and to make it publicly known.[81] He simultaneously refutes the Shīʿi doctrine of designation (*naṣṣ*). For him, Abū Bakr was freely selected (*ikhtiyār*) at the roofed gallery of the Banū Sāʿida by the best men (*afāḍil*) among 'those who loosen and tie' (*ahl al-ḥall wal-ʿaqd*) viz., ʿUmar ibn al-Khaṭṭāb, Abū ʿUbayda ibn Jarraḥ and others.[82]

Al-Māwardī has stipulated some requirements for the electoral college. This electoral college should consist of persons who possess trustworthiness (*ʿadāla*) with all its conditions, knowledge, by means of which one is able to recognize who merits the office of the *imām*, in the light of its acknowledged requirements and individual good sense and wisdom that can lead to electing the candidate who is most suitable for the *imāmate* and who will be the most competent and most knowledgeable about conducting the affairs of the people.[83]

In discussing the *ahl al-ḥall wal-ʿaqd*, in his book *al-Mustaṣfā*, al-Ghazālī explains that the *mujtahid*ᵔ are the *ahl al-ḥall wal-ʿaqd*.[84] To clarify this view, al-Ghazālī distinguishes two aspects of the Sharīʿa. The first aspect comprises obligations which are

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[80] al-Māwardī, *al-Aḥkām al-Sulṭānīyah*, ed. M. Enger (Medīna: n.p., 1269/1853), 4; Faḍl Allāh, *al-Shūrā*, 73.

[81] Faḍl Allāh, *al-Shūrā*, 74.

[82] Yusuf Ibish, *The Political Doctrine of al-Baqillani* (Beirut: n.p., 1966), 111.

[83] al-Māwardī, *al-Aḥkām*, 5.

[84] al-Ghazālī, *al-Mustaṣfā*, I, 181.

related to the common people, such as praying, fasting and performing the *hajj*. The second aspect of the Sharīᶜa relates to the elite (*khawāṣ*) only, for example, the detailed law of prayer, and matters related to *muᶜāmalāt*, such as transactions. Therefore, *mujtahidūn* and *ahl al-ḥall wal-ᶜaqd* for him are two different names with the same meaning, namely the elite, on whom people rely for their problems.[85]

Unlike al-Ghazālī, Ibn Jamāᶜa gave a more detail explanation. According to him, the *ahl al-ḥall wal-ᶜaqd* included the *umarāʾ*, *ᶜulamāʾ*, *ruʾasāʾ* and leading people (*wujūh al-nās*), who could easily be present in the town of the *imām*.[86] Corresponding to this, Faḍl Allāh included among the *ahl al-ḥall wal-ᶜaqd*, the *ᶜulamāʾ*, the *qāḍī*, *ruasāʾ* and leading people.[87]

Similarly, al-Taftāzānī claims that the statement according to which leadership belongs to the *umma*, as proposed by Fakhr al-Dīn al-Rāzī, must be understood in the context of *ahl al-ḥall wal-ᶜaqd*, who represent the community by virtue of their rank and prominence.[88] Riḍā agrees with this interpretation, and according to him, this is the correct interpretation. He supports this idea by citing historical precedent from the Prophet's time. The *ahl al-ḥall wal-ᶜaqd* were not just the jurists, princes and governors, but also those leaders of the Muslims who were consulted by the Prophet.[89] Authority, therefore, belongs to the representatives and not to the community as a whole.[90]

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[85] Ibid.

[86] Faḍl Allāh, *al-Shūrā*, 141.

[87] Ibid., 184.

[88] Ibid., 162.

[89] Ibid., 162; Riḍā, *al-Khilāfa*, 24-25/15.

[90] Ibid.

For Riḍā, the qualification of effective influence is essential.[91] The *ahl* must possess effective influence in the community so that their decisions will be assured of enforcement; the *ahl* are the final authority, speaking for the entire body of believers.[92] The required qualifications of the electors, according to Riḍā, are the same as those required by al-Māwardī: (1) moral integrity/trustworthiness (*ʿadāla*); (2) knowledge (*ʿilm*) of the required qualifications of the candidate; and (3) judgment and wisdom (*raʾy wa ḥikma*) to apply knowledge.[93]

In the political field, the *ahl al-ḥall wal-ʿaqd*, according to Riḍā, also have the duty to remove the ruler, if necessary by force of arms, if he is tyrannical and if verbal recommendations do not suffice to turn him from his evil ways. In practice, however, the *ahl al-ḥall wal-ʿaqd* had no formal organization for the taking of such a decision and no force at their disposal to put such a decision into operation.[94]

Not very differently from his predecessors, Maḥmūd Shaltūt defines the *ahl al-ḥall wal-ʿaqd* as a group of people who enjoin right conduct and forbid indecency. These people are experts (*ahl*) both in religious and temporal matters. The main goal of this body is to ensure peace (*sulḥ*) for Muslims both in their daily life and in the hereafter.[95] As for the *ulū al-amr*, Shaltūt defines them as people who are expert in many different kinds of community problems so that through them the community is able to achieve peace. He explains further that the community's problems can differ in different environments, places and times. Therefore, membership in the *ulū al-amr* will depend on the community's

[91] Kerr, *Islamic Reform*, 160.

[92] Ibid., 161.

[93] Ibid.

[94] Faḍl Allāh, *al-Shūrā*, 311-312.

[95] Maḥmūd Shaltūt, *Min Tawjīhāt al-Islām* (Cairo: Dār al-Qalam, n.d.), 563.

problems. Shaltūt also put *ulū al-amr* parallel to *ahl al-ijmāʿ* [96] and emphasizes the importance of *fuqahāʾ* or *mujtahid* as members of the *ahl al-ijmāʿ*. [97]

In his *tafsīr* <u>*Jāmiʿ al-Bayān*</u>, al-Ṭabarī differentiates between the *ulū al-amr* in the Q. 4: 59 and Q. 4: 83. Discussing the former verse, he divides scholars into three groups who hold different views. The first group argues that this term refers to the *umarāʾ*. The second group argues that it refers to the *ahl al-ʿilm* and *ahl al-fiqh*. The last group holds that it refers to the Companions of the Prophet. The *ahl al-ʿilm* might be those who are expert in temporal matters, while the *ahl al-fiqh* are experts in religious matters. These different ideas are based entirely on traditions (*riwāyat*) from the Prophet. [98] The meaning of *ulū al-amr* in the latter verse refers, according to al-Ṭabarī, to *ʿulamāʾ* or *fuqahāʾ*, who are expert either in religious or temporal matters. [99]

Like al-Ṭabarī, al-Zamakhsharī in his *tafsīr* <u>*al-Kashshāf*</u>, interpreted the words *ulū al-amr* in Q. 4: 59 as meaning right rulers or government or *ʿulamāʾ* [100] and interpreted Q.4: 83 as referring to the great Companions, who were well-acquainted with temporal matters and at the same time were a source of religious knowledge. [101]

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[96] Maḥmud Shaltūt, *al-Islām : ʿAqīdah wa Sharīʿah* (Cairo: Dār al-Qalam, n.d.),454-455.

[97] Ibid., 456.

[98] There are some *Sunna* of the Prophet which explain the meaning of *ulū al-amr* in this verse. Some of them state that *ulū al-amr* here is parallel to *ahl al-fiqh*, while some others identify it with *ahl al-ʿilm*. See Abū Jaʿfar Muḥammad ibn Jarīr al-Ṭabarī, *Jāmiʿ al-Bayān fī Tafsīr al-Qurʾān* (Makah: Dār al-Maʿārif, n.d.), vol. VIII, 496-501; Muḥammad al-Khiḍr Ḥusayn, *Naqd Kitāb al-Islām wa Uṣūl al-Ḥukm* (Cairo: al-Maṭbaʿat al-Salafīya, 1344), 27.

[99] al-Ṭabarī, *Jāmiʿ al-Bayān*, 572.

[100] Abū al-Qāsim Maḥmūd ibn ʿUmar ibn Muḥammad al Zamakhsharī, *Al-Kashshāf* (Beirūt: Dār al-Kitāb al-ʿArabī, 1947), vol. 1, 524.

[101] Ibid., 540; Faḍl Allāh, *al-Shūrā*, 159.

It should be clear, therefore, that the *ahl al-ḥall wal-ʿaqd* are those prominent people who act as representatives of the Muslim community and look after its needs and interests. Al-Ghazālī seems to limit himself to people prominent in only religious matters. In addition, al-Māwardī emphasizes their function in political matters. Other scholars, on the other hand, take a more general view and explicitly include those prominent in temporal matters. It can be stated, moreover, that ʿAbduh's idea on the meaning of *ulū al-amr* is similar to the earlier and modern jurists.

Faruki is another modern Islamic scholar who discusses the basis of *ijmāʿ*. He discusses the concept of 'protection from error' on which jurists generally based their *ijmāʿ*. He cites three verses of the Q. .6: 59: "With Him are the keys of the unseen, the treasures that none knoweth but He. He knoweth whatever there is on the earth and in the sea. Not a leaf doth fall but with His knowledge : There is not a grain in the darkness (or depths) of the earth, nor anything fresh or dry (green or withered), but is (inscribed) in a record clear (to those who can read),"[102] Q.20: 110: "He knows what (appears to His creatures as) before or after or behind them: but they shall not compass it with their knowledge,"[103] and Q.31: 34: "Verily the knowledge of the Hour is with God (alone). It is He Who sends down rain, and He Who knows what is in the wombs."[104] All these verses show the omniscience and omnipresence of God and simultaneously the weakness of human beings. The first verse deals with the limits of knowledge in phrases of space, the third verse is concerned with knowledge in phrases of time, while the second deals equally with both time and space. There is also, particularly in the third verse, a reference to the limits to knowledge both in extension and in intention.[105]

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[102] Yusuf Ali, *The Holy Qurʾān*, 304.

[103] Ibid., 813.

[104] Ibid., 1089.

[105] Faruki, *Ijma*, 15; idem, *Islamic Jurisprudence*, 154-156.

Faruki concludes that;

Here then is the border or limits of the knowledge of anything or anyone other than God-- including the consensus of the community --- on the one side and the Omniscient Infallibility of God on the other. It is fact that God is Omnipresent than other things and persons — including the community --- are limited in their 'presence'. Thus the 'protection from error' which is deduced from the Qur'ānic verse and the ḥadith is limited to the limited 'presence' of the Community, whether this is evaluated in phrases of time or space, extensionally or intentionally. Thus as the limit of the Community's presence' alter, the legal deduction made from the Qur'ān and *Sunna* must be re-examined and if necessary altered by fresh processes of *ijtihād*, if the Community is to continue to enjoy God's assurance of 'protection from error.'[106]

In a clearer explanation, Faruki identifies a pure (infallible) *ijmā'* with *shirk*. He

notes:

In earlier times, *shirk* took other forms such as the worship of graven images by people when they knew fully well of a Higher Power than the store figures. Later, there came the *shirk* of worship of human beings in similar manner, and to this day, the *shirk* of worship of one's particular tribe or nation exists. Yet, an identical risk of *shirk* arises in the case of concepts and institutions. If, to the concept of *ijmā'*, we ascribe an infallibility unbounded by any limits, temporal or special, which necessarily implies omniscience, and, therefore, logically omnipotence, assuredly a "rival to Allah" has been set up.[107]

In other words, to ensure 'protection from error' people have to alter previous *ijmā'*

with fresh *ijtihād* and come to fresh *ijmā'* on the same problem, if necessary. There is no

obligation to follow the previous *ijmā'* if it is not acceptable because of differences in time

or place.

As regards the Qur'ānic verses 2: 143, 3: 102 and 4: 115, these were normally

considered by the classical and medieval jurists to form the basis of *ijmā'*. Faruki asserts

that to recall the Qur'ānic verses is not to be over-subtle, but to remind ourselves of the

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[106] Faruki, *Ijma*, 16.

[107] Faruki, *Islamic Jurisprudence*, 73.

danger of *shirk* or pluralism in the form of concept or institution.[108] Faruki then cites two verses in order to warn about the danger of the *shirk*. These are Q.9: 31: "They take their priests and their anchorites to be their lords in derogation of God, and (they take as their Lord) Christ the son of Mary; yet they were commanded to worship but One God : there is no god but He. Praise and glory to Him: (Far is He) from having the partners they associate (with Him),"[109] and Q.25: 43: "Seest thou such as a one as taketh for his god His own passion (or impulse)? Couldst thou be a disposer of affairs for him?"[110]

Therefore, Faruki emphasizes, although *ijmā⁽* has been guaranteed by some Qur'ānic verses and the prophetic traditions, it is not meant to be eternally infallible. Rather, it should be interpreted that God, the All-Powerful, has the power and gives the assurance that He will protect the consensus of the community from error. Those who interpreted these verses and traditions into the eternal infallibility of *ijmā⁽* are classified by Faruki as committing *shirk* or pluralism.[111] In other words, the infallibility of *ijmā⁽*, in Faruki's view, is not merely based on the infallibility of *ijmā⁽* itself, but rather on the guarantee of the omnipotence and omniscience of God.

In his letter to Mufti Shafi, Faruki also cites other possible interpretations of the verses used as the basis of *ijmā⁽*. He suggests, therefore, that these verses and the *Sunna* of the Prophet are addressed to the community as a whole and not only to the competent, and that it aims to provide the necessity of an election system to choose competent people. Without giving detail explanations of what he means by this election system, he criticizes the western system of election, which, according to him, provides no conditions for

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108 Ibid., 73.

109 Yusuf Ali, *The Holy Qur'ān*, 448.

110 Faruki, *Islamic Jurisprudence*, 70; Yusuf Ali, *The Holy Qur'ān*, 935.

111 Faruki, *Ijma*, 11.

assessing character and obliterates the Islamic emphasis on Islamic and comparative knowledge and empirical learning by its unhealthy obsession with a party system and provincial considerations.[112] He then writes that the main difference between the Islamic and the western electoral system is that the Islamic system treats Islamic knowledge as its basic and supreme foundation and materialistic and secular interests as secondary.[113] Consequently, even though Faruki emphasizes the significance of secular interests, he also reminds one that religious interests should have a first priority.

Rahman criticizes two of the traditions of the Prophet used by early scholars such as al-Shāfiʿī as a basis for *ijmāʿ*. They are *luzūm al-jamāʿa* and *falyalzim al-jamāʿa*. These two *Sunna*, according to him, have no historical basis.[114] He also criticizes Q.2: 103 as a basis for *ijmāʿ*. He remarks that although this verse is a command for unity, it is not exactly *ijmāʿ*; for *ijmāʿ* unanimously arrives at a decision.[115] It can be concluded, therefore, that Rahman criticizes most of the points used by classical and medieval jurists. In contrast, he does not offer an alternative basis for *ijmāʿ* as ʿAbduh, Shawkānī and Faruki do.

Turābī does not discuss the basis of *ijmāʿ* at length either. He only cites Q. 4: 115 and a few of *Sunna* of the Prophet such as "my community will not agree on an error" and "what the Muslims deem to be good is good in the sight of Allah." For him, this verse and the *Sunnas* of the Prophet show the necessity of the *ijmāʿ* to be the *ijmāʿ* of the Muslim community as the classical and medieval jurists did. In addition, these verses and the *Sunnas* of the Prophet show the obligation to follow the Muslims way. Interestingly, Turābī, cites Q.4: 59 as an evidence to show that it is obligatory to obey the *ulū al-amr*,

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[112] Ibid., 19-20.

[113] Ibid., 20.

[114] Rahman, *Islamic Methodology*, 50-52.

[115] Ibid., 76.

under which the obligation of *ijmāᶜ* has to be obeyed. Moreover, Turābī cites Q.42: 38: "Those who hearken to their Lord, and establish regular prayer; who (conduct) their affairs by mutual Consultation."[116] Turābī cites this verse as aiming to emphasize the significance of *shūrā.*[117]

From the above discussion, it seems that Turābī is trying to show the necessity of following the Muslim way, the obligation to obey the *ulū al-amr* and the significant of the *shūrā.* The obligation to obey the *ulū al-amr*, to Hasan Turābī, seems to be in accordance to the obligation to obey *ijmāᶜ.* However, before coming to *ijmāᶜ* the opinion of society which is represented by *mujtahids,* in broad meaning, should be absorbed through *shūrā.* Therefore, *ijmāᶜ* is achieved after consideration of the all aspects of society. The purpose of this, for Turābī, is probably to avoid a separation between society, jurists and government as has happened after the period of the *Rāshidūn* caliphate. For him, society, jurists and government should be united.

To show the necessity of the *ahl al-ḥall wa al-ᶜaqd,* as the representative of the Muslim community, ᶜAbduh further argues that problems can be solved by discussions (*shūrā*), within the *ahl al-ḥall wa al-ᶜaqd* which is guided by public interest and an *ijmāᶜ* created through such discussions. In this regard, ᶜAbduh cites the verse Q.2: 159: "Those who conceal the clear (Signs) We have sent down, and the Guidance, after We have made it clear for the People in the Book, - on them shall be God's curse, and the curse of those entitled to curse."[118] Another Qurᵓānic verse he cites is Q.42: 38. He explains further that

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[116] Ibid., 1317.

[117] Turābī, *Tajdīd al-Fikr*, 13-14.

[118] Yusuf Ali, *The Holy Qurᵓān*, 63. When discussing Q.3: 159 ᶜAbduh emphasizes the weakness of a single opinion, even when it is the opinion of a leader (*al-rāᵓis*). Conversely, he stresses the significant of *shūrā* on worldly matters on the basis of *maṣlaḥa.* As a comparison of how important is *shūrā* on worldly matters in the view of ᶜAbduh, see ᶜAbduh, *al-Manār*, III, 124.

this *shūrā* does not necessarily comprise all the people, but those only among them who are representative of the people as a whole.[119] Therefore, the obligation to follow *ijmāʿ* is not based on the obligation to follow the path of *Muʾmin* nor the guarantee of God of the infallibility of *umma* as argued by classical and medieval jurists, but rather is due to the consideration of the agreement of the *ulū al-amr* who are experts (*ahl*) on the matters. In addition, any agreement should be based on public interest. This public interest differs according to environment and time.[120]

According to ʿAbduh the way Abū Bakr overcame problems which faced the community was by seeking guidance from the Qurʾān, and if he could not find the answer in the Qurʾān, by having recourse to the *Sunna* of the Prophet. If he still failed to solve the problem at hand, he asked the leader of the community (*raʾīs al-Muslimīn*) and scholars (*ʿulamāʾ*) to discuss (*shūrā*) the problems. ʿUmar also followed the same way. The difference between the two was that ʿUmar tried to find precedents in Abū Bakr's decisions before asking the *ʿulamāʾ* and leaders of Muslims to discuss the matter. Unfortunately history does not tell us what Abū Bakr and ʿUmar did in such matters where there was no agreement.[121]

Faruki does not expresses a direct point of view on the status of the *ijmāʿ* of the Companions and whether it is binding on the later generations. He only states that both the past and the present *ijmāʿ* are protected from error within their respective time and space context and indeed *ijmāʿ* is limited by each context.[122]

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[119] ʿAbduh, *al-Manār*, V, 188-189.

[120] Ibid., 208-209.

[121] Ibid., 195-196.

[122] Ibid., 157.

Iqbal argues that the *ijmāᶜ* of the Companions is binding in some cases but not in all. He distinguishes between *ijmāᶜ* related to points of fact and *ijmāᶜ* related to points of law. The binding character of the former should be recognized, since the only people who possess knowledge on such issues as whether or not the two small *sūras* known as 'maᶜūzatayn' formed part of the Qurʾān, are the Companions. But it is not binding on points of law because such matters involve competent people who can interpret things for themselves. Iqbal supports this point by citing Karakhi, according to whom, "The *Sunna* of the Companions is binding in matters which cannot be cleared up by *qiyās*, but it is not so in matters which can be established by *qiyās*.[123]

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[123] Iqbal, *The Reconstruction*, 175.

CONCLUSION

Although *ijmāᶜ* as had been formulated by the classical and medieval jurists is logical, systematic and well-thought out, it holds little relevance for contemporary Muslims. Moreover, it is practically impossible to secure an *ijmāᶜ* involving the entire Muslim community or all of its *mujtahids*. This is due to the growing diversity in the environments, places, problems and needs that Muslims face. Each country, or even, each town has its own set of problems which may be quite different from those of other countries or even from other cities in the same country. This conclusion is heavily grounded in the belief that the only workable and flexible *ijmāᶜ* is that of the Companions.

In addition, the *ijmāᶜ* which had been formulated by the classical and medieval jurists seems to be *ijmāᶜ* that is not binding. This is because their *ijmāᶜ* is usually only an informal decision behind the government's decision. Moreover, it often happens that in some countries, such as Indonesia, some *mujtahids* (*muftīs*) produce an *ijmāᶜ* or a *fatwā* and at the same time, the government would produce a contrary decision and consolidate the latter with the force of law.

Finally, what ᶜAbduh attempts to do is to build a workable mechanism of *ijmāᶜ*. He hopes that this concept would generate an Islamic law capable of settling new problems as they arise. This mechanism, of course, would only attempt to overcome social problems related to *muᶜāmalāt* matters and not to the *ᶜibādāt*. Through this method, problems would be viewed from different angles, not only from the theological point view, so as to insure the maximum benefit for the *umma*. Another purpose of ᶜAbduh's effort is to give *ijmāᶜ* the power to be obeyed and followed by the people and to be used as a standard for judging all manner of problems.

In other words, ʿAbduh attempts to institutionalize *ijmāʿ*. He, therefore, proposes the combination of electors (*ahl al-ḥall wa al-ʿaqd*), of the participants in the process of consultation (*shūrā*), of persons of authority (*ulū al-amr*) and of *mujtahids* into a single body in which the sovereign powers of the community would lie and whose executive would be the caliph.[1]

What has been attempted by ʿAbduh is, I believe, an effort to take into account of the dynamics of a changing society. He has attempted to make the law responsive to the changing needs, purposes and interests of society. This is in accordance with the ideas of such legal theorists (*uṣūlīyūn*), as the Shāfiʿīte ʿIzz- al-Din ibn ʿAbd al-Salām, the Ḥanbalite Ibn Qayyim al-Jawziyya[2] and the Mālikite Abū Isḥāq al-Shāṭibī.[3] All of them agreed that legal rules are based on causes and purposes which are founded on the interest of human beings in this life and the life hereafter.

Consequently, all rules, even those based on legal texts, should cease to apply when the effective causes on which they are based and which provide their raison d'être, no longer exist. This is in accordance with the original principle that the legal rule based on an effective cause depends for its existence on the existence of its effective cause.[4] As a logical consequence of this principle, legal rules change with the change of their effective causes and purposes. Therefore, it is undeniable that laws change according to change in time, place and conditions.

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[1] Kerr, *Islamic Reform*, 197.

[2] Ibn Qayyim al-Jawziyya, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 4 vols. (Miṣr: al-Maktabat al-Tijārīya al-Kubrā, 1955).

[3] Abū Isḥāq al-Shāṭibī, *al-Muwāfaqāt*, 4 vols. (Miṣr: al-Maktabat al-Tijārīya, n.d.).

[4] Maḥmaṣānī, "Muslims : Decadence and Renaissance," 198.

An example regarding this general rule is the caliph ʿUmar ibn al-Khaṭṭāb's abolition of the share of alms allotted by the Prophet to those whom the Prophet wanted to win for Islam. By giving them a share of alms, he sought to gain by their great reputation among the people. This was in accordance with Q.9: 60. ʿUmar based his action on the cessation of the effective cause that constituted the raison d'être of the Qurʾānic text, namely, the need to promote Islam at its beginning. For in the days of ʿUmar this effective cause ceased to be relevant, given that Islam had beccme powerful.[5]

Another example is the decision of Abū Yūsuf,[6] chief justice of Baghdad that barley and wheat should be considered among the commodities measurable by weight. He took this decision in compliance with the usual custom in his days and in violation of the Prophet's saying which considered barley and wheat as commodities to be dealt with by measures of capacity, in accordance with the custom that was prevalent during the time of Prophet.[7]

From these examples it appears that legal opinion can change according to the change of effective causes or of the custom on which they were based. Thus the interpretation of many texts concerning legal transactions has undergone a change, together with many legal views and opinions as a result of changes in social interests and needs.[8]

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[5] Ibid.

[6] Abū Yūsuf Yaʾqūf, *Kitāb al-Kharrāj* (Beirūt: Dār al-Shurūq, 1405/1985).

[7] Ibid.

[8] Faruki, *Ijma*, 24.

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