



## The Theory of Jurisprudence in Islam

Abstract

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This study deals with the development of the theory of jurisprudence in Islam during the first two centuries of Hijrah, and analyses different views that had influence on jurisprudence rulings. This development is reflected in the appearance of two conflicting schools: the school of the *Raa'yā* (personal view), which is based on free rational *Ijtihād*, and the *Hadīth* school which refers to the endeavor of a Muslim scholar to derive a rule of divine law through independent interpretation of the *Qur'ān* and *Hadīth*.

The triumph of *Hadīth* School constituted a sharp turning point in the development of jurisprudential theory, which narrowed the space of rational thought to the advantage of religious texts. It also contributed to the development of sciences and methods that are related to *Hadīth* of the Prophet and keep away from developing freethinking methods. This situation led to the stagnation of the jurisprudential theory, which changed from a theory capable of being developed and subject to criticism into a fixed and stagnant one in both method and content.

**Keywords:** jurisprudence, Islam, *Hadīth*, *Ijtihād*, *Uṣūl al-Fiqh*.

### 1.1 Introduction

The science of *Uṣūl al-Fiqh* (principles of Islamic jurisprudence) began to be formulated after the emigration of the Prophet to *al-Madīnah al-Munawwarah* and the establishment of a new nation that would develop the message of Islam as a new religion distinguished from Judaism and Christianity as two religions that already had a prominent presence on the Arab Peninsula and *Bilad al-Sham* (Syria) as well as from paganism that most tribes accepted and followed. The Prophet wished to introduce a new legislative system based on Islamic values, "In propounding his message, the Prophet plainly wished to break away from pre-Islamic values and institutions, but only insofar as he needed to establish once and for all the fundamentals of the new religion."<sup>1</sup>

In spite of the fact that the Prophet accepted some customs that fit in with Islam, he rejected many of the pre-Islamic customs and traditions that contradict the laws of Islam and its values. This argument disagrees with Schacht's argument that: "Muhammad had little reason to change the existing customary."<sup>2</sup>

The theory of *al-Fiqh* depends on the *Qur'ān*, the Prophet's *Sunnah*, consensus ("*Ijma'*"), and analogical reasoning (*Qiyas*). However, these principles (*Uṣūl*) developed gradually and were not introduced at one go to the Muslims. The *Qur'ān* and *Sunnah* were completed with the death of the Prophet, but the concept of consensus ("*Ijma'*") crystallized only after the Prophet's death. However, *Qiyas* continued its development for several centuries, which means that the sources of law (*Uṣūl*) began early in the Prophet's life and not later, as Motzki argues: "The sequence of the sources of law (*Uṣūl*) serves as a historical framework for the development of law until the middle of the second/eighth century."<sup>3</sup>

These principles constitute the authority of the religious rulings, but these rulings are not equal.

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1 Wael B. Hallaq, *Islamic Legal Theories*, Cambridge: Cambridge University Press, 1977, p.3.

2 Joseph Schacht, *An Introduction to Islamic Law*, Oxford: Oxford University Press, 1982, p. 11.

3 Harald Motzki, *The Origins of Islamic Jurisprudence*, Leiden: Brill, 2002, p.6.



They differ according to their origins and sources. *Qur'ānic* rulings come first, and they are obligatory. They are followed by the Prophet's *Sunnah*, then by consensus, and finally, the rulings that result from analogy (*Qiyas*).

Muslims agree on the issue that *Qur'ānic* rulings are obligatory and certain as a holy text, but they differ in their explanations and interpretations. These differences expand with respect to the Prophet's *Sunnah*, consensus ('*Ijma*'), and analogy (*Qiyas*). These disagreements are known in Islamic history as '*aql* (reasoning) and *Naql* (evidence).

Differences centered on the question whether rulings should be left to mental diligence (*Ijtihād 'aqli*) or passed on as evidence and testimony (*Naql*), especially regarding those issues on which the *Qur'ān* does not give a clear direct text for stating a ruling.

The concept of *Sunnah* led to differences regarding its meaning and essence. One group argued that the intended meaning of the term is the practical *Sunnah*, while another group argued that *Sunnah* includes the Islamic religious laws that are based upon the words and actions of the Prophet Muhammad, which became known later as the *Holy Ḥadīth of the Prophet*.

Differences regarding the *Ḥadīth* and its position in jurisprudential rulings go back to the time of its gathering and editing. Dependence on *Ḥadīth* in the first century Hijrah was slight, and significant interest in the *Ḥadīth* increased after the first century Hijrah. The temporal distance between the Messenger's life and the spread of the *Ḥadīth* led to many doubts about the truth of certain *Ḥadīth*.

I think that considering *Ḥadīth* to be the basis in the process of *Ijtihād* narrowed the space of rational thinking to the advantage of *Naql* i texts that are based on evidence and testimony, and it can be considered a sharp turning in in the history of Islamic thought. Moreover, the triumph of the *Ḥadīth* School over the rational school in general constitutes a significant element in the condition of stagnation that jurisprudence (*Fiqh*) suffers from, and this is negatively reflected in other fields of science and knowledge.

### 1.1 Jurisprudential Ruling during the Time of the Prophet

After the Prophet's emigration to Medina, there was an urgent need to build a legislative system that would organize the new society of Medina. "During the Medinan period, then, the principles of the *Qur'ānic* legislation were developed by the Prophet and his successors to the degree that was required by the practical problems confronting the Muslim community in Madina."<sup>4</sup>

In his rulings, the Prophet depended on the Holy *Qur'ān*, the most important authority, and God's words that were revealed to him to be passed onto people. It is not secret that there is consensus among Moslems about the holiness of this book and its great significance in their souls. The *Meccan Qur'ān* is distinguished by its moral teachings that aim to establish the belief in monotheism. The Medina *Qur'ān* includes legislative rulings that amount to five hundred verses that contain jurisprudential indications. According to Ramadan, these verses represent the authority of jurisprudential rulings. He maintains that "these principles are the point of reference for jurists who have the responsibility, in all places and all times, for providing answers in tune with their environment without betraying the initial orientation".<sup>5</sup>

The other source that the Prophet depended on was personal *Ijtihād* (diligence) that resulted from the work of the mind and the outcome of practical experience that the Prophet gained in his life, as well as the principle of *Shūrā* (consultation) of the Prophet's Companions. It is known that the opinion

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<sup>4</sup> N. J. Coulson, *A History of Islamic Law*, Edinburgh University Press, 1964, p. 26.

<sup>5</sup> Tariq Ramadan, *Islam, West and the Challenges of Modernity*, Nairobi: The Islamic Foundation, 2001, p. 14.



that results from *Ijtihād* / diligence and the *Shūrā* is a result of the intellect and the insights that are gained from practical life. In addition, we should not ignore the effect of knowledge, cultures, and the prevailing traditions on shaping public opinion.

From the Prophet's biography, we gather that, in his rulings, he used to depend on his personal *Ijtihād* in solving urgent problems. "The 'Ulama unanimously agreed on the legality of the Prophet's mental *Ijtihād*, which took place in the reconciliation between Ghanaians and in return for the fruit of Medina, and the pollination of date palms after he came to Medina."<sup>6</sup>

The Prophet's dependence on *Ijtihād* had to do with secular issues that have no texts that deal with them, but this *Ijtihād* did not occur in the same degree as when he dealt with the words of revelation because *Ijtihād* is human speech that can be opposed or discussed and can be true or untrue. Therefore, the Prophet debated with his companions on issues of *Ijtihād*, but the words of revelation were taken for granted and undisputed because they were considered divine and certain knowledge.

A distinction between the words of revelation and the Prophet's *Ijtihād* is expressed in the Prophet's words: "You know more about the issues of your world, and I know more about the issues of your religion."<sup>7</sup> This statement implies that there are two types of knowledge: *certain knowledge*, which is divine knowledge, and *hypothetical knowledge*, which is human knowledge. Umar ibn Al-Khattāb expressed this concept saying: "No one can say: 'I judged with what God showed me, because God made that possible only to His prophet; anyone's opinion is hypothetical and is not certain knowledge'." <sup>8</sup> This means that the field of hypothetical knowledge refers to changing secular worldly matters, while the field of divine knowledge refers to the stable and certain matters that are not subject to change in time and place.

This does not mean that the process of *Ijtihād* is independent of the *Qur'ān* but is complimentary to it. In other words, *Ijtihād* strive to rule on issues for which no clear judgement can be found in the *Qur'ān* in harmony with the entire teachings of the *Qur'ān*, rather than in contradiction to them.

The total rulings that result from *Ijtihād* and *shūrā* are known as *Sunnah Nabawiyya*, which includes the Prophet's sayings and actions that constituted a model that was imposed on the Muslim in his life and after his death. The Muslim's commitment to the *Sunnah* appears in a statement made by Mu'adh ibn Jabal when the Prophet sent him to teach the religion of Islam to the people of Yemen:<sup>9</sup>

The Prophet, God's blessings and peace be upon him, asked him: With what will you judge, *Mu'adh*?

***Mu'adh* said:** With God's book

**The Prophet,** God's blessings and peace be upon him, said:

And if you don't find it?

***Mu'adh* said:** With the *Sunnah* of God's Messenger

**The Prophet,** God's blessings and peace be upon him, said:

And if you don't find it?

***Mu'adh* said:** I *ajtahid* (try hard and use my discretion), and spare no effort.

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6 Al-Shoukani, *Irshad al-Fuhul*, Beirut, Dar Al-Fikr, 1992, p.255.

7 Sahih Muslim: 1836: 4. *Bab Kitab al-Fadha'il*.

8 Fakhr- Al-Din Al-Razi. *Al-Tafsir al-Kabir*, Vol. 11. Dar al-Fikr. 1981, p. 33.

9 Sunana Abu Dawoud, *Kitab al-Aqdhya*, Bab, *Ijtihād al-Ra'y fi al-Qadha'*, Mas'ala 3592.



This *Ḥadīth* confirms the central role of human *Ijtihād* in addition to the religious texts in constructing jurisprudential theory. Furthermore, the early currency of the concept of *Ijtihād* during the time of the Prophet indicates the role of rational thought in coining jurisprudential rulings.

The Prophet's era is considered to be the foundation on which jurisprudence was established. This model is characterized by granting rational thought great latitude that is likely to enrich the jurisprudential theory and leave the door open for the *Mujtahid* to create new methods through which the theory can be renewed in a way that suits the development of human knowledge, and is constantly freed from being isolated and closed in a certain time and place.

## 1.2 Jurisprudential Rulings during the Time of the Companions and the Followers

After the Prophet's death (632), al-Khulafā' al-Rāshidūn (the Rightly Guided Caliphs) depended on the *Qur'ān* and the Prophet's practical *Sunnah* in their rulings and adhered to the principles of *shūrā*, *Ijtihād*, and discretion. This adherence and commitment was in view when 'Uthmān and Ali were asked about their readiness to judge by the *Qur'ān* and the Prophet's *Sunnah* and the career of the two old men, Abu Bakr and *Umar ibn Al-Khattāb*. This event shows 'Uthmān's and Ali's commitment to the *Qur'ān* and *Sunnah* and their disagreement on the *Sunnah* of the two previous caliphs. 'Uthmān showed that he consented to following the *Sunnah* of Abu Bakr and Omar. Ali refused to commit to following them and expressed his preference to his personal *Ijtihād* to the *Sunnah* of the two preceding caliphs.

This commitment reflects the Muslims' obedience to the holiness of the *Qur'ān* and confirms their obedience to the Prophet during his life and after his death as the ideal model for his contemporaries and the following generations. This commitment also points to the role of the *Sunnah* in jurisprudential rulings.

The concept of the Prophet's *Sunnah* differs from one place to the other. For example, the jurists of Medina considered the Prophet's deeds, which represent part of the Prophet's *Sunnah*, as alive among them, and their actions conformed to the Prophet's model. Therefore, those jurists see the great quantity of *Ḥadīths* that spread during the second century Hijrah as having nothing to do with the true *Sunnah*. The Maliki doctrine is considered to be representative of Medina. *Muwatta' Malik* (150h.) contains 898 sayings that are attributed to the Companions and 822 *Ḥadīths* that were attributed to the Prophet. "The *Ḥadīth* is thus illustrative rather than authoritative and the true understanding of Quran and *Sunnah* as sources of Law is achieved (for the Madinans) not so much by studying the texts of the *Qur'ān* and the *Ḥadīth* as by seeing what is done as '*amal*.'"<sup>10</sup>

Since the beginning of the establishment of jurisprudence, we note emergence of two different schools. "[I]n the wake of the Abbasid revolution, which concluded in about 750, the first legal celebrities begin to appear, I would describe this period which extend from about 750- 850, as a heroic age of the Islamic Law. In Kufa, Abu Hanifa (d. 150/767) developed a following whose members came to be identified geographically as committed to analogy and the role of reason in legal interpretation. In Madina, Malik b. Anas (d. 179/795) represented the view that Madina, as the site of the Prophet's successful shepherding of religious movement and founding of a polity, embodied a sacred, living tradition of correct practice that could be used as a reference point for the evaluation of legal doctrine."<sup>11</sup>

However, the people of Iraq, mainly those living in *Kufa*, depended on the Prophet's *Sunnah* that included also the sayings of the Companions who settled in *Kufa* and certain local practices that were

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<sup>10</sup> Yasin Dutton, *The Origins of Islamic Law*, Where? Curzon Press, 1999, p. 178.

<sup>11</sup> Joseph Lowry, *Early Islamic Legal Theory*, Leiden: Brill, 2007, p.6.



common in their territories before Islam. "Defending themselves against the traditionalists, the adherents of ra'y might have relied to some extent on the sophistication of their legal thinking, compared with the traditionalists."<sup>12</sup> Their use of *Ḥadīths* was slight. Abu Hanifa, for example, used a limited number of *Ḥadīths*, which were suspect among the critics of *Ḥadīth*.

Al-Awza'i *madhab* / doctrine of jurisprudence (157 h.) reflects the attitude of Ahl al-Sham (Syria) to the Prophet's *Sunnah*. Al-Awza'i depended on the Prophet's deeds without supporting them by *Ḥadīths*. They are repeated deeds from the time of the Messenger until the time of al-Awza'i.

This period after the first half of the Hejrah century was characterized by the spread of learning among Moslems and the appearance of the translation movement, which affected Islamic thought and jurisprudential research. One of the phenomena of this period is that most of the 'Ulama (scientists) and jurists were *Mawali* (non-Arabs who were converted to Islam.). "Because science is the realization of industry and art, *Mawali* were closer to acquiring them than those who lived among them. The Arabs, however, remained spontaneous, and the *Mawali* were quick to acquire science and art, out of their desire to acquire the virtue of science in order to obtain honor, which would raise their position and status, and their desire to contribute an abundant portion to Islamic culture."<sup>13</sup>

We notice that dependence on the Prophet's *Ḥadīth* in jurisprudence rulings was slight, and it is possible to say that the role of the practical *Sunnah* was prominent and outdid the *Ḥadīth* in the Muslim works in the first two centuries Hijrah. This can be attributed to the Prophet's prohibition against writing down the *Ḥadīths* and the commitment of the *Rashidun* to that prohibition.

In addition to the jurists' dependence on the Prophet's *Sunnah*, they depended on the opinion that is based on the use of the mind (*'aql*), which weakened the influence of the *Ḥadīth* as evidence in jurisprudential rulings. As Halaq argues, "it is clear that that the *Ḥadīth* was not expected to affect the forms of jurisprudential thought that was current at the beginnings of its appearance. Dependence on opinions during the first period continued to nearly the middle of the second century Hijrah."<sup>14</sup>

After this period, i.e., the middle of the second century Hijrah, the jurisprudential conflict between two opposing schools intensified. The first school consists of Ahl al-*Ḥadīth*, who sought to establish their doctrines on the *Ḥadīths* of the Prophet that spread in that period. "All the great compilations of *Ḥadīth* were made over two hundred years after the death of the Prophet, whose sayings and actions they seek to record."<sup>15</sup>

This method was led by the jurists in Iraq, who became well-known in their knowledge of technical jurisprudence and the development of the level of *matn* and *sanad*, which were the two main elements of *Ḥadīth*. The *matn* is the actual words of the *Ḥadīth*, and the *sanad* is the information provided regarding the route by which the *matn* has been reached. The people of the *Ḥadīth* insisted on depending on the *Qur'ān* and the *Ḥadīth* Sharif as it represented the Prophet's *Sunnah* and refused "opinion" in religious issues.

The most important reason for the spread of *Ḥadīth* was probably, the political schisms among the Muslims after the assassination of 'Uthmān bin Affan. Each group tried to support their position through their interpretation of the *Qur'ān* and the *Sunnah*. "If the interpretation was difficult for them,

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12 Christopher Melchert, *The Formation of the Sunni Schools of Law*, Leiden: Brill, 1997, p.36.

13 Manna' al-Qattan, *Tarikh I-Tashri' al-Islami*. Cairo: Maktabat Webi, 1989, p. 327.

14 Wael Hallaq, *Nasha'at al-Fiqh al-Islami wa Tatawwuru*. Beirut: Dar al-Mada al-Islami, 2007, p. 118.

15 Kemal A. Faruki, *Islamic Jurisprudence*, Karachi, 1962, p. 54.



they attributed to the Messenger what he did not say to support their claims."<sup>16</sup> The employment of *Ḥadīth* in service of a political attitude was proportional to the depth of political divisions. These political differences led to the evolution of competitive jurisprudential theories that depend on different *Ḥadīths*.

On the other hand, *Ahl al-Kalām* appeared, and the majority here were *Mu'tazilah*, who considered the *Qur'ān* to be the only source on which rulings should be based. They rejected *Ḥadīths* that were confirmed by only one man, and stipulated that the *Ḥadīth* should be continual and unbroken, and resorted to mental interpretation and human *Ijtihād* based on scientific considerations.

During the second half of the second century Hijrah, interest in the Prophet's *Ḥadīths* increased in the appearance of the class of *Muhaddithun/ Ḥadīth* collectors, and *Ahl al-Ḥadīth*. Thus, *Ḥadīth* became more competitive with the practical *Sunnah*.

At the end of the second century Hijrah, it became clear that *Ḥadīth* and its triumph over the practical *Sunnah*. "Al-Shafi'i (204 h.), who was one of the authorities and defenders of *Ḥadīth* in his period, maintained that it is impossible to define the *Sunnah* except through the Prophet's *Ḥadīth* itself."<sup>17</sup> Al-Shafi'i's doctrine is considered a school between the rational school, which is represented by *Ahl Kalām*, and *Ahl al-Ḥadīth*, because al-Shafi'i based his doctrine on *Ijtihād* on reliable religious texts. It is worth mentioning that *Ijtihād* in this period was distinguished from rational thought that employed methods of *Qiyas*. Makdisi argues that "Shafi'i's purpose was to create for traditionalism a science which could be used as an antidote to *Kalām*, another already well-established science associated with the rationalist *Mu'tazila*, whom he called *Ahl al-Kalām*, the partisans of philosophical theology, and whom he as his adversaries."<sup>18</sup>

During the middle of the second century Hijrah, the use of *Ijtihād* spread in Iraq and Hijaz as a method of thinking characterized by strictness and methodology. This spread of this type of *Ijtihād* led to the loss of the role of "opinion" as a technical term and method of rational free thought in jurisprudential discourse.

The triumph of *Ḥadīth* is attributed to the Muslim belief that *Ḥadīth* represents Islamic religion more than other opinions do. Moreover, the religious emotions and feelings overcame them. "It was an attractive idea to have a fixed basis for the rules of law in the example of the prophet and it was well suited to the general trend of centralizing practices in the empire".<sup>19</sup>

After the triumph of *Ahl al-Ḥadīth*, the *Ḥadīth* started to play a central role in jurisprudential rulings. The centrality of *Ḥadīth* was accompanied by the weakening of the role of opinion and *Ijtihād* because the great quantity of *Ḥadīths* that were attributed to the Prophet and spread during that time narrowed the latitude for reflection since the consideration of *Ḥadīth* as a second legislative source after the *Qur'ān* was reflected in jurisprudential rulings, first because the *Ḥadīth* itself was seen as a jurisprudential judgment and, second, because it was viewed as a source/ origin against which the branches are to be measured.

Disagreement between *Ahl al-Ḥadīth* and *Ahl al-Kalām*, especially the *Mu'tazila*, represents a difference in the logic of thinking, as well as a difference in the knowledge of religious texts and rational rulings. We see that *Ahl al-Kalām* depended on formal logic as an instrument of free thinking that led to correct rulings. "Their method was rational in the sense that they started from a few principles that are stated explicitly or implicitly in the Quran. Then deduced their logical consequences, without too

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<sup>16</sup> Al-Qattan, p. 280.

<sup>17</sup> Wael Hallaq. *Nasha'at al-Fiqh al-Islami wa Tatawwuru*. Beirut, Dar al-Mada al-Islami, 2007, p. 159.

<sup>18</sup> George Makdisi, "The Juridical Theology of Shafi'i Origins and Significance of Usul Al-Fiqh," *Studia Islamica*, 59, 1984, (5-47), p. 12.

<sup>19</sup> Knut, Vikor, *Between God and Sultan*, Oxford: Oxford University Press, 2005, p.25.



much regard to problems of consistency presented by other assertions of the Quran. Their theory of knowledge supported confidently the power of human intellect".<sup>20</sup> However, *Ahl al-Ḥadīth* maintained that the rulings that are mentioned in the religious texts are correct and unobjectionable and cannot be criticized. This does not mean that *Ahl al-Ḥadīth* lacked the instruments of thinking, for they depended on *Qiyas* (analogy) as an instrument of thinking to discuss the new realities that were not dealt with in the religious texts.

Thus, the difference between the two groups is essentially a difference between two types of rational thinking: formal logic and analogical reasoning (*Qiyas*). *Ahl al-Ḥadīth* rejected formal logic and considered it useless for science, adopting *Qiyas* instead as a useful method for jurisprudential issues. These issues are characterized by change and instability and are subject to considerations of the concrete reality of place and time and changing circumstances. Thus, they need an instrument of thinking that is based on probability and relativity in order to suit the changing attributes of jurisprudence. *Formal logic*, however, is based on pure mental realization, which seeks to achieve stable results and certain rulings. Therefore, the difference was not between pure (*a'ql*) mind / reasoning or logic and pure (*Naql*) evidence. In fact, it is more correct to say that the difference was between ways of rational thinking.

### 1.3 Traditions and Jurisprudential Rulings

*Urf* (العرف) is an Arabic term referring to a saying, an act, or behavior that people agree upon as the right thing to do and adhere or not to do and abandon. It is generally called a "custom."<sup>21</sup> To be recognized in an Islamic society, *Urf* must be compatible with Sharia (law).

The Prophet used to judge cases in Medina in reliance on the *Qur'ān* and traditions that prevailed in that period. He acknowledged some traditions that became part of the Prophet's *Sunnah*. "The Messenger made attempts to keep many of the good traditions of *Jahiliyya*, especially those that he, his companions, and his followers adopted and followed after him, and on which the jurists of *al-Amsar* continue to depend up until today; thus, those who tried to outlaw the tradition as a legislative origin source or to raise suspicions about it especially in issues of transactions have no case."<sup>22</sup>

It is clear that the Prophet acknowledged the traditions that do not contradict the spirit of the new religion, fought the other *Jahiliyya* traditions, and substituted new Islamic rulings for them. It appears that the operation of keeping certain traditions or finding substitutions for them took place in accordance with the standards of *Qur'ānic* values. These values, which are general ideals, can absorb different traditions and customs, indicating the stability of general values and origins, and the changing of habits and customs in different Islamic societies.

Jurists differ about the authoritativeness of two statements: the first says that *Urf* is a *hujja* (an argument) and independent legal evidence. It is one of the sources of Islamic law to know the ruling of God, be He exalted, and it is the Hanafiyya and Malikiyya teach. The view of the Shafi'i or the Hanbali is that *Urf* is neither a *hujja* (an argument) nor legal evidence, unless the lawgiver considers it to be in one of the original sources.<sup>23</sup>

We can see that the jurists' attitude reflects the relation between *Urf* and the *Ḥadīth*. *Urf* was considered by the Malikiyya and Hanafiyya to be legal evidence when the use of *Ḥadīth* was slight,

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20 George F. Hourani, *Reason and Tradition in Islamic Ethics*, Cambridge: Cambridge University Press, 1985, p. 7.

21 Abd al-Wahhab Khallaf. *'Ilm 'Usul al-Fiqh*. Cairo. Dar al-Qalam, 1978, p. 89.

22 Muhammad bin Ibrahim, *Al-Ijtihād wa al-'Urf*. Tunis. Dar Sahnoun li al-Nashr wa al-Tawzi', 2009, p.156.

23 Muhammad al-Zahili, *Al-Nazariyyat al-Fiqhiyya*. Damascus, Dar al-Qalam, 1993, p. 171.



but, as the *Ḥadīth* spread during the period of al-Shafi'iy and Ibn-Hanbal, *ʿUrf* was rejected as legal evidence.

There is no doubt that this contradiction between the two previous statements is reflected in jurisprudential rulings because taking *ʿUrf* as legal evidence means the expansion of jurisprudence and the variety of its evidence, which gives jurisprudential theory more flexibility while omission of *ʿUrf* narrows jurisprudence and makes it limited.

*ʿAraaf* (plural of *ʿUrf*) / (traditions and customs) differ according to regions and societies. The people of each society practice their customs and keep them as part of their identity. Moreover, the acknowledgment of social customs is a message of respect to different societies, while ignoring or denying them leads in many cases to clashes between society and *Sharia* / Islamic law.

Ramadan uses the term *al-Waqi* (reality) in the sense of *ʿUrf* (tradition/ custom), and considers it to be one of the sources of *Fiqh* / (jurisprudence) because reality includes *ʿAraaf* (traditions) and active customs that society follows: The "human and social contexts (*al-Waqi*) are mentioned as a necessary reference and an inescapable dimension that must be taken into account in the implementation of law".<sup>24</sup>

#### 1.4 Consensus (*Ijma'*) and jurisprudential rulings

Consensus is the third source of *Fiqh* / jurisprudence after the *Qurʾān* and the *Sunnah*. It indicates the agreement of all the *Mujtahidin* / diligent Muslims in a certain period after the death of the Prophet on a legal ruling in its reality.<sup>25</sup> This agreement turns into a definite legal ruling that cannot be abrogated or invalidated.

The consensus that the *Mujtahidun* / diligent agree on is in reality the consensus of the nation. *Ijma'* in later works of *Uṣūl al-fiqh* was nearly always considered a proof together with and subordinate to revelation – and indeed was frequently understood as *'Ijma' al-ʿUlamā'*.<sup>26</sup>

It is clear that such an agreement cannot be achieved except in great undisputed issues. Consequently, they are general *ʿUsul* (origins) that need no evidence. But we cannot imagine consensus on the issues of legislation and real practical practices.

Some *ʿUlama*/scientists had doubts regarding the possibility of reaching consensus due to the difficulty of meeting its conditions since consensus stipulates agreement among all the *Mujtahidin* on a certain event, with no exception. A majority does not suffice. It is well known that the opinion of the *Mujtahid* is based on supporting evidence. Types of evidence differ from one *Mujtahid* to another, due to the difference between people's mentality and their customs and interpretations of the same event. "The late Shaykh of al-Azhar, Mahmud Shaltut, observes that the conditions of a conclusive *ijma*, especially that which requires the agreement of all the *mujtahidun* of the *ummah*, is no more than a theoretical proposition that never expressed in reality."<sup>27</sup>

#### 1.5 *Qiyas* and Jurisprudential Rulings

The employment of *Qiyas* (analogical reasoning) as a means to arrive at a ruling started in the early period during the Prophet's life, in issues that had no compatible text in *Qurʾān*. The Prophet

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<sup>24</sup> Tariq Ramadan, *Radical Reform*, Oxford: Oxford University Press, 2009, p. 101.

<sup>25</sup> A.Kallaf, *'Ilm 'Usul al-Fiqh*, p. 45.

<sup>26</sup> Norman Calder, "Ikhtilāf and Ijmā' in Shāfi'ī's Risāla", *Studia Islamica*, 1983, 58, (55-81), p.80.

<sup>27</sup> Mohammad Kamali, *Principles of Islamic Jurisprudence*, Cambridge, The Islamic Texts Society, 2003, p.258.



depended on the basic idea of *Qiyas* to arrive at a ruling.

It appears that the method of *Qiyas* that the Prophet adopted was simple in its primary form since it did not include the technical terms and different methods of research that appeared in later centuries. He used the concept of '*Qiyas*' based on analogy between two similar cases and share one attribute or specific '*illa* (cause).

One of the cases that the Prophet depended on *Qiyas* is the issue of hereditary attributes:

It was mentioned that a man from *Fazarah* denied his son, when his wife gave birth to a black son, and the Prophet asked:

Do you have any camels?

He said: Yes.

The Prophet asked. What is their color?

He said: red.

The Prophet asked. Is there any black camel among them?

The man said: Yes.

The Prophet asked: How come?

The man said: probably a tendency in his race.

The Prophet said: and this is probably a tendency in the child's race.<sup>28</sup>

We can conclude from this *Qiyas* that the Prophet made an analogy between the condition of human hereditary attributes and another condition from the world of animals. The *Qiyas* here is between an emergent new condition and a known condition that has been derived from the experiences of reality and the Arab environment in that period of time. This means that the items *compared to* are not only those found in the *Qur'an*; they can be human practical experiences or intellectually trustworthy ones.

The caliphs continued to employ *Qiyas* in their legal rulings, and this approach appeared in the orders that *Umar ibn Al-Khattāb* issued to Abu Mousa al-Ash'ari: "Then understand! Understand well what is told to you, what reaches you, what is not in *Qur'an* or *Sunnah*; then you make an analogy between the issues, recognize the similarities, and then adopt what you see as the most loved by God and closest to the right."<sup>29</sup>

In addition to the *Qur'an*, the *Sunnah* and the *Qiyas*, Omar Ibn al-Khattab adds another source, which was well known among the Arabs before Islam: the wise sayings derived from the experiences of the Arabs and their personal environment. The *Qur'an* also used proverbial parables: "وَتِلْكَ الْأَمْثَالُ نَضْرِبُهَا لِلنَّاسِ لَعَلَّهُمْ يَتَفَكَّرُونَ" (Such are the parables We strike for people so that they will reflect).<sup>30</sup> Proverbial parables are similar to *Qiyas* and can be considered to be a kind of *Qiyas* since both – because they have a specific attribute in common – depend on an analogy between two conditions.

Parables are a comparison of one condition with another, whether by metaphor or direct comparison. Al-Razi says: "The aim of the parable is to compare the implicit to the explicit, the absent with the evident, and thus its entity is assured; the sense becomes identical with the mind at the end of the clarification." This <sup>31</sup> means that proverbial parables constitute an analogous process that depends on sense and deduction that rises to the level of mental ruling. Ali Ibn Abi Taleb says: "The

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28 A.Khallaf, 'Ilm 'Usul al-Figh. p. 57.

29 Ibid., p. 58.

30 Al-Hashr: 21.

31 Fakh-al-Din al-Razi, Al-Tafsir al-Kabir, vo. 2, p. 80.



right thing is known by analogy by those of intelligent minds."<sup>32</sup>

After the death of the Prophet, his Companions followed different methods of *Ijtihād*: "Some of them were diligent to keep within the boundaries of the Book of God and *Sunnah*, and some went beyond those borders, mostly to *Qiyas*, such as Abd Allah Ibn Mas'ud, Ali Ibn Abi Taleb. They felt knowing by analogy was a correct procedure among the Staff of the Scribes."<sup>33</sup>

After the Prophet's death, his Companions used different methods of *Ijtihād*: some of them used *Ijtihād* within the boundaries of the *Qur'an* and the *Sunnah*, while others went beyond those borders mostly to *Qiyas*, such as Abd Alla Ibn Mas'ud and Ali bin Abi Taleb, or mostly to his interest, like Omar Ibn al-Khattab."<sup>34</sup>

It appears that *Qiyas* (analogy) and *Maslaha* (interest) are two different methods. The Prophet's Companions saw that *Qiyas* is suitable to the field of the judiciary and law, while interest is suitable for the field of politics and state administration. "It was observed that, in the administration of the state, *Umar ibn Al-Khattāb* was *Mujtahid*/ diligent in the method of interest that has no compatible text, but he used to order judges to turn to *Qiyas* in issues that that were not mentioned in the *Qur'ān* and the *Sunnah*."<sup>35</sup>

The distinction between interest and *Qiyas* is attributed to the fact that *Qiyas* is based on comparison and similarities between two issues that share a certain *'illa* (cause), while interest is based on a realistic benefit or dealing with corruption. These are renewable and changing issues that had no equivalent or previous, similar issue on which to base analogical reasoning (*Qiyas*).

In spite of the simplicity of the method of *Qiyas* that Muslims used during the period of the Prophet and the Khulafa'a Rashidun, this type of analogical thought constituted a strong foundation for the development of the *Qiyas* method in later periods in the history of Islam. Moreover, jurisprudential rulings in that period were not limited to literal and fixed religious texts; they also depended on interpretation and practical experiences that include proverbs, parables, traditions, customs, and real events. This variety established a rational method that is capable of development and creativity in both method and content.

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32 A. Khallaf, *'Ilm 'Usul al-Figh*, p. 58.

33 Nadia Al-Omari, *Ijtihād al-Rasul*. Mu'sasasat al-Risala., 1981, p. 222.

34 Ibid., p. 222.

35 M. Abu Zahra, *Tarikh al-Mazahib al-Islamiyya*. vol. 2, Cairo, Dar al-Fikr al-Arabi, 1996, p. 236.



## 1.6 Conclusion

It can be concluded from the previous discussion that the jurisprudential theory during the first century Hijrah depended on rational *Ijtihād* that was supported by the Holy *Qur'ān*. It is possible to say that jurisprudential rulings were based on free rational thinking because what mostly characterizes the *Qur'ān* is its total and moral discourse in its treatment of human issues, rarely in detailed discourse. Therefore, it is natural that the new issues do not find a detailed ruling in the *Qur'ān*. As a result, it was necessary to use the intellect and develop the methodology of *Ijtihād* and the tools of "opinion." The need for intellectual *Ijtihād* increased in proportion to new issues that arose in the life of the Muslims and the expansion of the Islamic state after the conquests.

During the second century Hijrah, new changes and developments took place in the lives of Muslims and new issues and realities arose that Muslims were unacquainted with. Such changes required *Ijtihād* because the texts do not deal with them. In spite of that, this period witnessed the beginning of a retreat in rational thinking to the advantage of *Naql* texts: the *Qur'ān* and the *Ḥadīth Sharif*.

This period is characterized by the spread of *Ḥadīth*, which provided solutions to the new issues, and this accounts for the disappearance of *Ijtihād*. In addition, the *Ḥadīth* are characterized more by its engagement in details more than in the entirety of things. The existence of details means the existence of borders, which means that employment of the *Ḥadīth* limited the freedom of *Ijtihād*, especially in view of the adoption of the jurisprudential rule that says there is no *Ijtihād* in the presence of the text. In addition, the operation of promoting the *Ḥadīth* to the level of reliable sources and considering it to be equal to the *Qur'ān* had a negative effect on the employment of the mind.

The reconciliatory theory holds that al-Shafi'i established the role of *Ijtihād* and rational thinking. However, this idea is limited by jurispudent *Naql i* origins and sources. This theory underwent a great development and success after al-Shafi'i and reached its peak in the writings of Ibn Taymiyya (1326-1263). However, Ibn Taymiyya's ideas were rejected in later centuries, and they did not contribute much to finding solutions to the new issues in the lives of Muslims.

The stagnation of the jurispudent theory is attributed to the large number of limits and conditions that *'Ulama* put during several centuries. This accumulation led to the stagnation of the theory and prevented the development of its tools since this theory was no longer able to introduce solutions for the new events and conditions that grew more complicated with the development of human life, which required new tools to suit the new conditions.

Jurisprudential theory passed through several stages and violent conflicts between contradictory opinions, which contributed to the development of the theory and the establishment of the concept of multi-jurisprudence in Islamic culture. The decisive triumph of the people of religious texts and the absence of the other group who adopted the method of free rational thinking led to the stagnation of the theory.