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The Missing Link in the History of Islamic Legal Theory: The Development of Usul al-Fiqh between al-Shafi'i and al-Jassas during the 3rd/9th and Early 4th/10th Centuries

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The Missing Link in the History of Islamic Legal Theory:  
The Development of Uṣūl al-Fiḥ between al-Shāfi‘ī and al-Jaṣṣāṣ  
during the 3<sup>rd</sup>/9<sup>th</sup> and Early 4<sup>th</sup>/10<sup>th</sup> Centuries

A dissertation submitted in partial satisfaction of the  
requirements for the degree Doctor of Philosophy  
in Religious Studies

by

Ahmet Temel

Committee in charge:

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Professor Juan Campo

September 2014

The dissertation of Ahmet Temel is approved.

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August 2014

The Missing Link in the History of Islamic Legal Theory:  
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Ahmet Temel

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This dissertation is rooted in about a decade long efforts that evolved around my interest in the formation and the early developments of *uṣūl al-fiqh*. Innumerable people contributed to the emergence and development of this interest and its products with various researches during that time. This dissertation is the most comprehensive product of these efforts. It is impossible to mention every single person on this list. I want to begin first with all the scholars of Islamic intellectual history whose writings constituted the subject of my research. With their writings, discussions, and thoughts, they enlightened my mind, widened my scope, increased my knowledge, and became my intellectual inspirations throughout my intellectual journey. May Allah have mercy upon their souls. Harun Baktı and Recep Kabakçı had a considerable impact on the beginnings of my intellectual journey. Our lengthy and

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## ABSTRACT

The Missing Link in the History of Islamic Legal Theory:

The Development of Uṣūl al-Fiqh between al-Shāfi‘ī and al-Jaṣṣāṣ during the 3<sup>rd</sup>/9<sup>th</sup> and  
Early 4<sup>th</sup>/10<sup>th</sup> Centuries

by

Ahmet Temel

The 3<sup>rd</sup>/9<sup>th</sup> and 4<sup>th</sup>/10<sup>th</sup> centuries witnessed significant developments in Islamic intellectual history. Most of the ḥadīth collections that later came to be recognized as canonical were compiled in this period and the major schools of law and certain theological schools also completed their formation during the same period. Despite this continuous progress in other fields of religious sciences, there is an unusual lapse of time between what is widely considered the first work in *uṣūl al-fiqh* (Islamic legal theory) *al-Risāla* by al-Shāfi‘ī (204/819), and what is recognized as the second work *al-Fuṣūl fī-al-uṣūl* by al-Jaṣṣāṣ (370/981). Due to the absence of a major work devoted solely to *uṣūl al-fiqh* from this period, the majority of contemporary scholars considered it as a period of history during which there was little or no intellectual activity in the field of *uṣūl al-fiqh* and where no significant developments took place. This assumption has driven some scholars to assign a new starting point for the field of *uṣūl al-fiqh* and even different definitions of *uṣūl al-fiqh*. The question of what in fact took place during this ‘dark period,’ however, has not been fully or adequately explored.



This dissertation attempts to provide an answer to this question and to shed light on the development of *uṣūl al-fiqh* during this period. It argues that the ostensible ‘gap’ (or absence of scholarly production) between the years (204/819) and (370/981) in the field of *uṣūl al-fiqh* (Islamic legal theory) is in fact illusory. The years mentioned here are the death year of al-Shāfi‘ī, the author of *al-Risāla*, often reckoned to be the first treatise in *uṣūl al-fiqh* and the death year of al-Jaṣṣāṣ (370/981), the author *al-Fuṣūl fī-al-uṣūl*, the next independent treatise in the field. The presence of a gap may be defended only if understood in the sense of the absence of an independent extant work in the category of *uṣūl al-fiqh*. Based upon the results of this examination of extensive documentation, this dissertation argues that the 'gap' period, rather than a one in which no important developments took place, should instead be viewed by scholars as a "period of independent productivity," where the scholars of the time contributed to the topics of *uṣūl al-fiqh* without a strict school affiliation.

I trace the lineage of the debates found in *al-Fuṣūl fī-al-uṣūl* by al-Jaṣṣāṣ (370/981) to earlier works and debates within the century and a half in question to earlier sources. Three sets of sources were examined in this research. The first set consists of a number of manuscripts that have either being ignored by modern scholars or been under-studied as works relevant to the history of *uṣūl al-fiqh*. The second set of sources are works in various fields of the religious sciences, including but not limited to works on *fiqh*, *kalām*, *ḥadīth*, and *tafsir*, which contain scattered information relevant to the study of *uṣūl al-fiqh*. The third set of sources consists of citations from the scholars of the ‘gap’ period found in the later literature of *uṣūl al-fiqh* as well as biobibliographical sources.

I have restricted the topics presented in this dissertation to the discussions of the primary sources of Islamic law due to the predominance of these issues in the documentation

examined. The dissertation therefore consists of four chapters. The first chapter deals with the evolution of the concept of *uṣūl* to *uṣūl al-fiqh*. I examine the topics that were included within that rubric by first tracing the transformations of the term during the gap period and then by comparing al-Shāfi‘ī’s *al-Risāla* and al-Jaṣṣāṣ’s *al-Fuṣūl*. The subsequent three chapters examine the discussions of the period over the use of *khābar al-wāḥid* (solitary report), *ijmā‘* (consensus), and *qiyās* (analogy) as sources of authority for Islamic law. I chose these three issues because the legal theoretical discussions intensified around these topics during this period, and they later came to be considered among “the fundamental sources of Islamic law.”

The dissertation makes significant new claims about the early development, function, and definition of *uṣūl al-fiqh* in the period between al-Shāfi‘ī and al-Jaṣṣāṣ that contradict commonly held opinions. It will therefore be of interest to scholars researching the early history of Islamic law and legal theory, but also to the broader audience who are interested in the authority problem in Islam and the discussions related to orthodoxy and orthopraxy.

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# **INTRODUCTION**



## A. Outline of Research

George Makdisi argued that one of the most important phenomena for the student of Islamic jurisprudence is the lapse of time between *al-Risāla*'s appearance and that of the first independent and comprehensive works of *uṣūl al-fiqh*.<sup>1</sup> When Makdisi pointed out this problem, al-Jaṣṣās's (370/981) manual of *uṣūl al-fiqh* had not yet been discovered. With the discovery of al-Jaṣṣās's *al-Fuṣūl*, we acquired a significant source shedding an important light on this gap in the history of Islamic legal theory. Nonetheless, the gap between al-Shāfi'ī and al-Jaṣṣās remains. This period that covers the 3<sup>rd</sup>/9<sup>th</sup> and early 4<sup>th</sup>/10<sup>th</sup> centuries has still not been analyzed in comprehensive studies with regard to the development of Islamic legal theory. This study is an attempt to contribute toward filling this gap with a diachronic analysis of the theoretical discussions of the time on the sources of *uṣūl al-fiqh*.

Some recent studies have challenged al-Shāfi'ī's (204/819) role as a founding figure of Islamic legal theory (*uṣūl al-fiqh*) with an overarching argument that his contribution to Islamic legal theory had been exaggerated too much in the Orientalist scholarship, and that his treatise cannot be regarded as belonging to the genre of *uṣūl al-fiqh*. Even though I agree with the first part of this argument, I argue that al-Shāfi'ī's treatise *al-Risāla* must be accepted as the first work to directly address the main legal theoretical issues in the history of Islamic legal theory. In other words, al-Shāfi'ī represents a developed stage compared to those who had come before him for the formation of *uṣūl al-fiqh*, but he must be considered

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<sup>1</sup> Makdisi, George, "The Juridical Theology of Shāfi'ī: Origins and Significance of Uṣūl al-Fiqh". *Studia Islamica*, no. 59 (1984): 13. (This period will be referred to as "the gap period" henceforth)

as a modest contributor to the formation of *uṣūl al-fiqh* compared to the later scholars in the field. The content of *al-Risāla* represents the earliest theoretical extant example in this field, and encompasses the fundamental topics of *uṣūl al-fiqh*. The second extant work on *uṣūl al-fiqh* that we have is the Ḥanafī scholar al-Jaṣṣāṣ's (370/980) *al-Fuṣūl fī al-uṣūl* which represents a more developed work than *al-Risāla*, both in terms of content and style.

During the century following al-Jaṣṣāṣ's work, we see an enormously rich production in the literature of *uṣūl al-fiqh*. Among the Hanafīs, al-Dabbūsī (430/1039), al-Saymarī (436/1044), al-Sarāḥsī (494/1090), and al-Pazdawī (493/1089); among the Shāfi'īs, Abū Ishāq al-Shirāzī (476/1083), al-Juwaynī (478/1085), al-Sam'ānī (489/1096); among the Mālikīs, Ibn al-Qaṣṣār (397/1007), Abū Bakr al-Bāqillānī (403/1013), al-Bājī (474/1081); among the Ḥanbalīs, al-Farrā (458/1066), Ibn 'Aqīl (513/1119); among the Mu'tazila, Qāḍī Abd al-Jabbār (415/1024), Abū'l-Husayn al-Baṣrī (436/1044); among the Shi'ī-Zaydīs, al-Nāṭiq bi-al-Ḥaqq (424/1033); among the Shi'ī-Imāmīs, al-Shaykh al-Mufīd (413/1022) and al-Sayyid al-Murtaḍā (436/1045); and among the Zāhirīs, Ibn Ḥazm (456/1064) were among the scholars who contributed to the literature of *uṣūl al-fiqh* within about a century following the work of al-Jaṣṣāṣ. The main questions that this dissertation addresses are therefore the following: Even though we see many extant books written on *uṣūl al-fiqh* right after al-Jaṣṣāṣ, why do we not see one single example between al-Shāfi'ī and al-Jaṣṣāṣ? What exactly was happening during this period with respect to the development of *uṣūl al-fiqh*? My dissertation tries to solve this big problem as well as other related problems, and to fill this gap in the history of Islamic legal theory. Even though my primary investigation will be into the development of *uṣūl al-fiqh* in particular, this dissertation also makes a contribution to the

field of Islamic intellectual history in general.

In the light of my research, I argue that the apparent negligence of uṣūl al-fiqh during the period between al-Shāfi‘ī and al-Jaṣṣāṣ is misleading. Rather, this “dark period” is significant for the development of uṣūl al-fiqh. I make this argument in opposition to some contemporary historians who have described the developments during this stage as rudimentary contributions that are too hard, if not impossible, to be uncovered and reconstructed due to the lack of sources. First and foremost, the high level of development and systematized content of al-Jaṣṣāṣ’s *al-Fuṣūl* in comparison to al-Shāfi‘ī’s *al-Risāla* provides the most important evidence that a significant developmental process was taking place during this period. In addition to this, biographical accounts and various sources in different fields provide sufficient data to see how the scholars contributed to legal theoretical discussions during this period. In the following section, I will describe the sources of my dissertation as well as some of people who constitute the subject of my investigation and their general contributions to the development of uṣūl al-fiqh in the gap period.

The primary method of this research used here is comparative textual analysis of individual textual sources. In addition to making a comparison between al-Shāfi‘ī’s *al-Risāla* and al-Jaṣṣāṣ’s *al-Fuṣūl*, I will focus on the written sources from the period in multiple fields. I delve into those texts from the literature of refutation (*al-Radd*), disagreements (*khilāf or ikhtilāf*), tafsīr, ḥadīth, and kalām, all of which contain important passages providing implications about the development of legal theory. In order to draw an intellectual picture of the period in general, I keep my focus and the scope of my research as broad as possible.

In addition, the preserved citations in the later literature of uṣūl al-fiqh are crucial for

this research. However, this method comes with the risk of falling into anachronism in historical analysis; since the later authors were under the influence of an intellectual terminology and environment that was different from those of earlier scholars, their reports might suffer from backward projection. Therefore, several critiques have appeared in recent scholarship about the use of this method. Christopher Melchert makes one of these critiques. Melchert thinks that using later citations is a backward projection, and is therefore misleading. In his view, only the sources from the analyzed period should be taken into account in historical research. As a result, he criticizes Hallaq's work for falling into the fallacy of backward projection.<sup>2</sup> However, Melchert himself relies heavily on biographical sources that were written in a later stage. There is no reason to think that the later juristic works are more misleading than the biographical sources. Therefore, I do not think that it would be appropriate in such a study to ignore completely those preserved citations found in the later literature. I do agree, however, that they might be misleading sometimes, because the later authors report from earlier scholars by transforming the report into the language of the later stages. For instance, it is not uncommon to see later authors attribute some technical details of certain topics to earlier figures based on deduction, while these discussions did not exist at all during the time of the earlier scholars.

In order to use the most reliable evidence from later sources in my research, I apply the following criteria respectively in selecting citations from later sources. First, if there is

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<sup>2</sup> Melchert, Christopher, *The formation of the Sunnī schools of law, 9th-10th centuries C.E.*, Leiden: Brill, 1997, xxiv.

clear proof that the later author has a book of an earlier scholar that we do not have now and indicates that he relies on this book, I consider these references as the most reliable references, especially when the author provides the quoted text together with its source. For instance, al-Jaṣṣaṣ's quotations from 'Isā b. Abān and al-Zarkashī's quotations from al-Muzanī fall into this category. The second tier of reliable citations in the later sources are those where the later author uses the past tense verb conjugations that imply citing from a written source of the earlier scholar such as *dhakara* or *qāla*. In these instances, the later author most probably quotes from a written text of the earlier scholar, even if he does not mention the book. However, the later author might paraphrase the source from which he cites. I use this type of citation after comparing its content to the characteristics of the scholarly writings of the period. The third tier of reliability consists of those citations in which the author mentions an opinion while attributing it to the earlier scholar; for example, in the form of "wa huwa qawlu fulān" (it is the opinion of X) or "nuqila min fulān" (it has been reported from X). This type of citation requires external evidence to be confidently used in research, or its weakness should be indicated if it is necessary to mention the citation.

The other set of sources I use are biographical, bibliographical and historical sources. Norman Calder has criticized the use of biographical evidence. According to Calder, biographical tradition cannot be considered a known historical fact.<sup>3</sup> He also holds the opinion that the biographical tradition should only be read in light of juristic texts, and not

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<sup>3</sup> Calder, Norman, *Studies in Early Muslim Jurisprudence*, Oxford, UK: Clarendon Press, 1993., 20.

vice versa.<sup>4</sup> By saying that, Calder actually draws attention to an inconsistent method within the Orientalist tradition which advocates an extremely skeptical approach to ḥadīth compilations, but far less skeptical when referring to later biographical sources. As far as I know, no proper method has been suggested in using later sources of this kind, and the basic principle of historical investigation, namely that every case should be examined independently, still seems to be the accepted approach. My general approach will be to prioritize neutral data, which I believe constitutes the majority of the materials we have, and to be more suspicious of descriptions that express commendation or condemnation.

Despite the fact that the existing materials that I collected over the course of my research cover many topics of uṣūl al-fīqh including the sources of law, i.e. consensus (*ijmāʿ*), analogy (*qiyās*), reports (*akhbār*), juristic preference (*istihsān*), earlier revelation-based laws (*sharʿu man qablanā*), hermeneutical principles such as identifying general (*āmm*) and specific (*khāṣṣ*) texts, and abrogation (*naskh*), the limits of this study compel me to restrict the scope of my research to the first three topics. Therefore, the outline of the dissertation will be as follows: The first chapter examines first the development of the concept of uṣūl and then provides a comparison of the topics treated in al-Shāfiʿī's *al-Risāla* and al-Jaṣṣāṣ's *al-Fuṣūl*, in order to portray a rough sketch of developments made during the gap period between the two texts. I will examine three sources of uṣūl al-fīqh in the subsequent three chapters. The second chapter discusses solitary reports, their authority, and the distinct methods for evaluating reports as developed by different groups of scholars of the period.

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<sup>4</sup> Calder, *Studies*, 38.

The third chapter deals with discussions about *ijmā'* by examining the contributions of the scholars in conceptualizing the authority of *ijmā'*, the idea of infallibility that is inherent in the claim of *ijmā'*, the different types of *ijmā'* as they were articulated during this period, and finally the role of assigning authority to the predecessors (*salaf*) in the formation of *ijmā'* as a source of religion. The final chapter traces the development of *qiyās*, *ijtihād* and discussions of *taqlīd*.

## B. Sources, Places, and People

The majority of the scholars under analysis in this research lived in Irāq, especially Baghdād and Baṣra. However, some individuals who contributed to the early development of *uṣūl al-fiqh* settled in different parts of the Muslim world of the time including Miṣr, Hijāz, North Africa, Khurasān, and Transoxiana. I point out the regional origins of these scholars throughout my research. However, Irāq and especially Baghdād remained the center of intellectual life in the Muslim world during the gap period. The gap period, as defined for the sake of this research as being between the years 204/819 and 370/980, witnessed eighteen 'Abbāsīd caliphs beginning with the reign of al-Ma'mūn (197/813-218/833) and ending with the reign of al-Ṭā'i' (363/974-381/991). Even though Samarra temporarily became the political capital between the years 221/836 and 278/892, Baghdād effectively remained the center of the Muslim world. Based on the number of bathhouses in the year 383/993, the population of Baghdād during the gap period can be estimated as between 1,000,000 and

1,500,000.<sup>5</sup> The translation movement, the foundation of Bayt al-ḥikma, and the introduction of paper manufacture in Baghdād in the late 2<sup>nd</sup>/8<sup>th</sup> century were the main factors fueling intellectual life and the production of knowledge.

The gap period was a period in which the formation of schools of law was a continuing process, and independent scholarly contributions were still more prevalent. This is precisely the reason why I call this period as a “period of independent productivity” rather than a gap period in which no significant development took place. However, these independent or semi-independent characteristics of contributions make it harder to label the contributors. In other words, it is difficult to label the scholars of this period who did not have a sense of belonging to a school—a sentiment that emerged mostly in the following centuries—with certain schools that only completed their formation in the 4<sup>th</sup>/10<sup>th</sup> and 5<sup>th</sup>/11<sup>th</sup> centuries. It would be easy to become trapped in anachronistic labels through backward projections. In order to overcome this hardship and to point out the importance of this formative aspect of the period, I have tried to avoid using such labels as Ḥanafī, Mālikī, Shāfi‘ī, Ḥanbalī, Zāhirī, and Ja‘farī for these scholars. Instead, I refer to these scholars either as independent scholars by pointing out their teachers and students, or by employing the group labels that existed in the literature of the time such as Kūfī, Irāqī, member of ahl al-ra’y or ahl al-ḥadīth.

Since some theological schools were already established, I use the labels Mu‘tazilī,

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<sup>5</sup> al-Dūrī, ‘Abd al-Azīz, *TDV İslam Ansiklopedisi*, s.v. “Bağdat”. IV, Istanbul: TDV, 1991., 425-33.



Shi‘ī (or Rāfiḍī), Zaydī and Murji‘ī for those who identified themselves with these schools. However, these labels become tangled and overlap at times depending on the criteria of categorization. For instance, certain Mu‘tazilī scholars are also described as Zaydīs by some authors of the period.<sup>6</sup> In order to emphasize their early contribution to these schools, I preferred using the prefix proto such as proto-Ḥanafī for those who lived in a period closer to the time of the establishment of these schools, or hyphenated descriptions such as Mu‘tazilī-Zaydī; Shi‘ī-Imāmī etcetera.

It should be also emphasized that contribution to the development of uṣūl al-fiqh in the gap period was not restricted to the scholars of ahl al-ra’y and ahl al-ḥadīth as erroneously claimed by many modern historians. Many individual scholars who were affiliated with diverse groups, or who were not affiliated with any group, contributed to the theoretical discussions of the period. This phenomenon will be noted frequently in the body of the dissertation. Having clarified this important point, I will introduce the distinguished scholars of the gap period in chronological order and the sources that I use to reveal their contributions to the development of uṣūl al-fiqh.

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<sup>6</sup> Al-Malaṭī (377/987), a Shāf‘ī jurist and a scholar of Quran recitation (*qirā’a*) who lived during the gap period, mentions Ja‘far b. Mubashshir (234/848), Ja‘far b. Ḥarb (236/850), and Muḥammad b. ‘Abd Allah al-Iskāfī as Zaydīs among the Mu‘tazila, due to their opinions on accepting the imamate of the less excellent (*al-fāḍil*) over the most excellent (*al-aḥḍal*) and the superiority of ‘Alī over other companions. See Abū al-Ḥusayn al-Malaṭī, *al-Radd wa-al-tanbīh ‘alā ahl al-ahwā’ wa-al-bida’*, Ed. Zāhid al-Kawtharī, Miṣr: al-Maktaba al-Azhariyya li-al-Turāth, 34. This argument in favor of ‘Alī is evident in the extant book of al-Iskāfī. See Abū Ja‘far al-Iskāfī, Ed. Muḥammad Bāqir Maḥmūdī, *al-Mi’yār wa-al-muwāzanah fī faḍā’il ‘Alī ibn Abī Ṭālib: wa-bayān afḍaliyatahu ‘al’a jamī’ al-‘ālamīn ba’da al-anbiyā’ wa-al-mursalīn*, Bayrūt: [Dār Maḥmūdī lil-Ṭab‘ wa-al-Nashr], 1981.

I use three sets of sources in my research. The first set consists of recently discovered primary texts both in manuscript and in print. The second set of sources comprises primary texts written during the gap period in various fields including kalām, fiqh, ḥadīth, tafsīr, compilations of agreements and disagreements, biographical and bibliographical sources, and refutations. The preserved citations describing the opinions and contributions of scholars of the gap period in the later sources, mostly in the genre of uṣūl al-fiqh, constitute the third set of sources. In the remaining part of this section, I will describe the scholars of the gap period and the selected sources that I used to reveal their contributions in my research.

‘Isā b. Abān (221/836), the famous disciple of al-Shaybānī and a late contemporary of al-Shāfi‘ī, was an important scholar for the developmental stage of uṣūl al-fiqh in the initial period following al-Shāfi‘ī’s death. He is reported to have written works on various topics of uṣūl al-fiqh such as *Ithbāt al-qiyās*, *Ījtihād al-ra’y*, *al-Hujja al-saghīra*, *al-Hujja al-Kabīra*, and *al-Radd ‘alā Bishr al-Marīsī wa-al-Shāfi‘ī fī-al-akhbār*.<sup>7</sup> Fuat Sezgin indicates that a text titled *al-Hujja al-saghīra* exists in Bankībūr, yet unfortunately this manuscript was not written by ‘Isā b. Abān.<sup>8</sup> In order to reveal his opinions, I made use of the preserved

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<sup>7</sup> al-Ziriklī, Khayr al-dīn b. Maḥmūd. *al-A‘lām: qāmūs tarājim li-ashar ar-rijāl wa-‘n-nisā’ min al-‘arab wa-‘l-musta‘ribīn wa-‘l-mustashriqīn*, aṭ-ṭab‘a 15 ed. Bayrūt: Dār al-‘Ilm li-al-Malāyīn, 2002. V, 100; al-Jaṣṣāṣ, Aḥmad ibn ‘Alī, *al-Fuṣūl fī al-uṣūl*, Kuwayt: Wizārat al-Awqāf al-Kuwaytiyya, 1994. I, 103; III, 35.

<sup>8</sup> Sezgin, Fuat, *Tārīkh al-turāth al-‘Arabī (GAS)*, translated by ‘Arafah Muṣṭafā. Riyādh: Al-Mamlakah al-‘Arabīyah al-Sa‘ūdīyah, Wizārat al-Ta‘līm al-‘Ālī, Jāmi‘at al-Imām Muḥammad ibn Sa‘ūd al-Islāmīyah, 1991., 434.; In a recent article, Murteza Bedir has pointed out that this manuscript must be *al-Hujja a‘lā ahl al-Madīna* of al-Shaybānī not *al-Hujja al-saghīra* of ‘Isā b. Abān. For this claim, Bedir relies on a conference paper presented by an Indian scholar Mawlana ‘Atiq Ahmad al-Bastawi who was able to research the manuscript. See Bedir, Murteza, "An Early Response to Shāfi‘ī: ‘Isa B. Abān on the Prophetic Report (khabar)." *Islamic Law and Society*, 9.3 (2002): 290.

citations attributed to ‘Isā b. Abān in the later literature of uṣūl al-fīqh, particularly those found in al-Jaṣṣāṣ’s *al-Fuṣūl*, in the Zaydī imām and scholar Ibn al-Murtaḍā’s *Minhāj*, and other legal, biographical and bibliographical sources of late Hanafī and Shāfi‘ī scholars.<sup>9</sup>

Bishr b. Ghiyāth al-Marīsī (218/833), a famous Murji‘ī who was in the caliph al-Ma’mūn’s court and was another late contemporary of al-Shāfi‘ī, was an important figure for the early stages of development of uṣūl al-fīqh in the third hijrī century. The bibliographical sources attribute the following titles to Bishr b. Ghiyāth al-Marīsī: *Kitāb al-ma’rifā*, *Kitāb fī-al-akhbār*, and *al-Radd ‘alā al-khawarij*, which must have contained theoretical discussions on uṣūl al-fīqh. His legal theoretical opinions are cited in Abd al-‘Azīz al-Kinānī’s (240/854) *Kitāb al-ḥayda*<sup>10</sup> and al-Dārimī’s (255/868) refutation *al-Radd ‘alā Bishr al-Marīsī*.<sup>11</sup> These refutations are also important in revealing the contributions of al-Kinānī and al-Dārimī, who were identified as members of ahl al-ḥadīth. I have also relied on quotations from Bishr al-Marīsī in the later uṣūl literature such as can be found in *Kitāb al-Mu’tamad*.<sup>12</sup>

There were a number of Mu’tazilī scholars who contributed to the legal theoretical

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<sup>9</sup> Ibn al-Murtaḍā seems to have quoted directly from ‘Isā b. Abān’s book *al-Hujja*. See Ibn al-Murtaḍā, *Minhāj al-Wuṣūl Ilā Mi’yār al-‘uqūl Fī ‘ilm al-Uṣūl*, Ṣan’a: Dār al-Ḥikmah al-Yamānīyah, 1992., 400.

<sup>10</sup> al-Kinānī, ‘Abd al-‘Azīz, *Kitāb al-ḥayda*, edited by ‘Alī b. Muḥammad al-Fiqhī. al-Madina al-Munawwara: Maktabat al-‘ulūm wa-al-ḥikam, 2002.

<sup>11</sup> al-Dārimī, ‘Uthmān ibn Sa’īd, *Naqḍ al-Imām Abī Sa’īd ‘Uthmān ibn Sa’īd ‘alā al-Marīsī al-Jahmī al-‘anīd fīmā iftarā ‘alā Allāh ‘azza wa-jalla min al-tawḥīd*, edited by Rashīd ibn Ḥasan Alma‘ī. al-Ṭab‘ah 1. ed. al-Riyāḍ: Maktabat al-Rushd, 1998.

<sup>12</sup> See for example al-Baṣrī, Muḥammad ibn ‘Alī Abū al-Ḥusayn, *al-Mu’tamad fī uṣūl al-fīqh*, edited by Ḥalīl al-Mays Bayrūt: Dār al-kutub al-‘ilmiyya, 1983., II, 240, 371.

discussions of the first half of the third hijrī century. Bishr b. Al-Mu‘tamir (210/825), Thumāma b. al-Ashras (213/828), Abū Ishāq Ibrāhīm al-Nazzām (220-230/835-840), Ja‘far b. Mubashshir (234/848), Ja‘far b. Ḥarb (236/850), and Muḥammad b. ‘Abd Allah al-Iskāfī (240/854) were important figures of the early third/ninth century. Bishr b. al-Mu‘tamir reportedly wrote treatises entailing his thoughts on uṣūl al-fiqh entitled *Ijtihād al-ra’y*, *al-Radd ‘alā aṣḥāb Abī Ḥanīfa*, *al-Radd ‘alā al-Nazzām* and *Mutashābih al-Quran*.<sup>13</sup> In a book on Ijtihād al-ra’y attributed to Thumāma b. Ashras, the author criticized Abū Ḥanīfa and the entire Kūfī tradition that Abū Ḥanīfa followed for their adherence to ra’y.<sup>14</sup> Ja‘far b. Mubashshir (234/848) is reported to have written refutations including *al-Radd ‘alā aṣḥāb al-hadīth*, *aṣḥāb al-ra’y*, and *Aṣḥāb al-ma‘ārif*.<sup>15</sup> Some of Al-Iskāfī’s theoretical opinions are available in his extant work *al-Mi‘yār*.<sup>16</sup> Even though none of the writings of al-Nazzām have reached us, his controversial opinions on uṣūl al-fiqh are frequently cited by later scholars. His critiques of the authority of qiyās, ijmā‘, and reports reflect his influence on the development of uṣūl al-fiqh. In addition to Abū Ḥusayn al-Baṣrī’s *al-Mu‘tamad*, al-Khayyāt’s work *al-Intiṣār* is an important source for uncovering the legal theoretical thoughts of these earlier Mu‘tazilīs. Some other sources in the literature of uṣūl al-fiqh such

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<sup>13</sup> al-Bābānī, Ismā‘īl Bāshā, *Hadīyat al-‘arīfīn: asmā’ al-mu’allifīn wa-athār al-muṣannifīn*, Iṣtānbūl: Wikālat al-Ma‘ārif, 1951., I, 124.

<sup>14</sup> al-Faḍl Ibn Shādhān, *al-Īdāh*, edited by Jalāl al-Dīn Ḥusaynī Muḥaddis. Tihrān: Mu’assasah-i Intishārāt va-Chāp-i Dānishgāh-i Tihrān, 1972., 524.

<sup>15</sup> al-Khayyāt, Abdarrahim Ibn Mohammed Ibn Osman, *Kitāb al-intiṣār*, edited by Henrik Samuel Nyberg. Second ed. Al-Qahira: Maktabat ad-dār al-‘arabiyya lil-kitāb, 1993., 81.

<sup>16</sup> al-Iskāfī, Abū Ja‘far Muḥammad ibn ‘Abd Allāh al-Khaṭīb, *al-Mi‘yār wa-al-muwāzanah fī faḍā’il ‘Alī ibn Abī Ṭālib: wa-bayān afḍaliyatahu ‘al’a jamī’ al-‘ālamīn ba‘da al-anbiyā’ wa-al-mursalīn*, edited by Muḥammad Bāqir Maḥmūdī, Bayrūt: [Dār Maḥmūdī lil-Ṭab’ wa-al-Nashr], 1981.

as al-Juwaynī's *al-Burhān* contain citations from these scholars. Another important Mu'tazilī scholar, al-Jāhīz (255/868), also transmitted al-Nazzām's legal opinions in one of his works. Josef Van Ess reconstructed the quotations from al-Nazzām in the later literature based on al-Jāhīz's book *Kitāb uṣūl al-futyā*.<sup>17</sup> It is plausible that his book by al-Jāhīz addressed certain topics of uṣūl al-fiqh, but unfortunately, it has not been discovered.<sup>18</sup> Al-Jāhīz describes his book, saying "I have a book in which I collected divergent views on the principles (*uṣūl*) of legal opinions, which lead to differences in furū' and conflicting specific rulings."<sup>19</sup> In my research I used treatises in which al-Jāhīz gives his opinions on several topics in uṣūl al-fiqh including qiyās, reports, and ijmā'.<sup>20</sup>

Abū 'Ubayd al-Qāsim b. Sallām (224/839) is generally listed among traditionalists in the bio-bibliographical accounts, but reportedly studied fiqh under al-Shaybānī (189/804) as well. His contributions to uṣūl al-fiqh are scattered in his extant writings

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<sup>17</sup> van Ess, Josef, *Das Kitāb an-nakt des Nazzām und seine Rezeption im Kitāb al-futyā des Ĝāhiz: eine Sammlung der Fragmente*, 1972.

<sup>18</sup> al-Jāhīz, 'Amr b. Baḥr, *Kitāb al-Ḥayawān*, al-Ṭab'ah 2. ed. Bayrūt: Dār al-Kutub al-'Ilmīyah, 1424.; I, 11.; Pellat claims that it is a book on fiqh. See Pellat, Charles, *The life and works of Jāhīz*, Berkeley: University of California Press, 1969, 50-51.

<sup>19</sup> al-Jāhīz, 'Amr b. Baḥr, *Rasā'il al-Jāhīz*, edited by 'Abd al-Salām Muḥammad Hārūn, al-Qāhirah: Maktabat al-Khanjī, 1964., I, 314.

<sup>20</sup> For instance, al-Jāhīz rejects the authority of *'amal ahl al-Madīna* and summarizes valid sources as Kitāb, agreed upon Sunna, correct reasoning and analogy. He also lists out the chapters of the science of uṣūl as the assessment of akhbār, wa'd and wa'id, particular and general texts (*khāṣṣ-'āmm*), abrogating and abrogated, obligatory and recommended (*farīda* and *nāfila*) sunna and shar'ā, consensus and disagreements (*ijtimā'* and *firqa*). See al-Jāhīz, *Rasā'il*, IV, 277, III, 265.

*al-Nāsikh wa-al-mansūkh, Kitāb al-amwāl, Kitāb al-ṭahūr, and Kitāb al-Īmān.*<sup>21</sup>

The famous Sūfī and traditionalist scholar Hārith al-Muḥāsibī (243/857) also mentioned his opinions on various topics of uṣūl al-fiqh including reports, ijmā‘, qiyās, and abrogation. These opinions are scattered throughout his various works, including *Māhiyat al-‘aql, Fahm al-Qur’ān, and al-Makāsib.*<sup>22</sup>

Aḥmad b. Ḥanbal (241/855), the heroic leader of ahl al-ḥadīth in his time and the eponymous scholar of the Ḥanbalī school, is a crucial figure for the gap period. He is reported to have written on certain topics of uṣūl al-fiqh in some of his works such as *Kitāb al-nāsikh wa-al-mansūkh, Kitāb al-muqaddam wa-al-muakkhkar min al-Quran* and *Kitāb ṭa‘at al-rasūl*, none of which have reached us. However, his refutation of Zanādiqa and Jahmiyya<sup>23</sup> and his debates with Mu‘tazilī theologians that have been preserved in various sources<sup>24</sup> contain material related to our research. Ibn Qayyim reports some of Aḥmad b.

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<sup>21</sup> Abū ‘Ubayd al-Qāsim ibn Sallām, *al-Nāsikh wa-al-mansūkh fī al-Qur’ān al-‘azīz: wa-mā fīhī min al-farā’id wa-al-sunan*. Ed. by Muḥammad ibn Ṣāliḥ Mudayfir. al-Riyāḍ: Maktabat al-Rushd, 1997. See bibliography for the list of full titles of his other books.

<sup>22</sup> al-Ḥārith ibn Asad al-Muḥāsibī, Ed. Ḥusayn Qūwatlī. *al-‘Aql wa-fahm al-Qur’ān*. [Bayrūt]: Dār al-Kindī, 1982.; al-Ḥārith ibn Asad al-Muḥāsibī, *al-Makāsib*, Ed. Nūr Sa‘īd, Beirut: Dār al-Fikr, 1992.; al-Ḥārith ibn Asad al-Muḥāsibī, Ed. Ḥusayn Qūwatlī, *Māhiyat al-‘Aql wa ma‘nahu wa ikhtilaf al-nās fīh*, [Bayrūt]: Dār al-Kindī, 1398/1982.

<sup>23</sup> Aḥmad ibn Muḥammad Ibn Ḥanbal, Ed. Daḡhash ibn Shabīb ‘Ajmī, *al-Radd ‘alā al-zanādiqah wa-al-Jahmiyyah: fī-mā shakka fīhī min mutashābih al-Qur’ān wa-ta’awwalat’hu ‘alā ghayr ta’wīlīh*, al-Kuwayt: Ghirās lil-Nashr wa-al-Tawzī‘ wa-al-Di‘āyah wa-al-I‘lān, 2005.

<sup>24</sup> For instance al-Jāhīz mentions his debate with Ibn Abī Du‘ād. See al-Jāhīz, *al-Rasāil*, I, 224-25.

Ḥanbal's opinions on *uṣūl al-fiqh* in his *I'lām al-Muwaqqi'īn*<sup>25</sup> in which he underlines how Aḥmad b. Ḥanbal favors traditions over legal reasoning, a point cited in many sources.<sup>26</sup> There are also abundant citations, despite falling into the third type of citations that I mentioned earlier, in the later *uṣūl al-fiqh* literature.<sup>27</sup> A letter written by Aḥmad b. Ḥanbal to the caliph al-Mutawakkil that has recently been discovered and published sheds some light on his legal theoretical opinions.<sup>28</sup>

From the early stage of the third century, al-Shāfi'ī's disciple, traditionalist scholar Husayn b. 'Alī al-Karābīsī (248/863) is reported to have written on certain topics of *uṣūl al-fiqh*, even though these works have not reached us.<sup>29</sup> He is also reported to have engaged in debates with the famous Mu'tazilī al-Iskāfī.<sup>30</sup> Al-Jaṣṣāṣ mentions his name together with Dāwūd al-Zāhirī among those who did not actually know *uṣūl al-sharī'a* and focused only on

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<sup>25</sup> Ibn Qayyim al-Jazwiyya, Mūḥammad b. Abū Bakr, *I'lām al-muwaqqi'īn 'an rabb al-'ālamīn*, Ed. Muḥammad 'Abd al-Salām Ibrāhīm, Bayrūt: Dār al-Kutub al-'Ilmiyya. 1991., I, 29-32.

<sup>26</sup> See Ibn 'Abd al-Barr, Abū 'Umar Yūsuf ibn 'Abd Allāh, *Jāmi' bayān al-'ilm wa-faḍlih*, edited by Abū al-Ashbāl al-Zuhayrī. al-Ṭab'ah 1. ed. al-Dammām: Dār Ibn al-Jawzī, 1994., II, 1038.

<sup>27</sup> For some of them see Ibn Taymīyya, 'Abd al-Salām Ibn 'Abdallāh, Aḥmad Ibn Taymīyya, and Abū al-Muḥas 'Abd al-Ḥalīm Ibn 'Abd al-Salām, *al-Musawwada fī uṣūl al-fiqh*, edited by Muḥammad Muḥy al-Dīn 'Abd al-Ḥamīd. Beyrūt: Dār al-Kutub al-'Arabī, n.d., 89, 336; al-Zarkashī, Muḥammad ibn Bahādur. *al-Baḥr al-muḥīṭ*. al-Ṭab'ah 1. ed. Cairo: Dār al-Katbī, 1994., IV, 490; al-Āmidī, 'Alī Ibn-Abī-'Alī, *al-iḥkām fī uṣūl al-aḥkām*, edited by 'Abd al-Razzāq al-'Afīfī. Bairūt and Damascus: al-Maktab al-Islāmī, n.d., IV, 55.

<sup>28</sup> Aḥmad ibn Ḥanbal, Ed. 'Alī Muḥammad Zaynū, *Risālat al-Imām Aḥmad ibn Ḥanbal ilā al-Khalīfah al-Mutawakkil al-'Abbāsī*, Dimashq: Dār al-Nawādir, 2010.

<sup>29</sup> al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn 'Alī, *Tārīkh Baghdād wa dhuyūluhu*, edited by Mustafa 'Abd al-Qādir 'Aṭā. Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1417/1996, VIII, 64; al-Nawawī, Abū Zakariyya Muḥy al-Dīn Yahyā b. Sharaf, *Tahdhīb al-asmā' wa-al-lughāt*, Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1977., II, 283; al-Ziriklī, Khayr al-dīn b. Maḥmūd. *al-'lām: qāmūs tarājīm li-ashar ar-rijāl wa-'n-nisā' min al-'arab wa-'l-musta'ribīn wa-'l-mustashriqīn*. aṭ-ṭab'a 15 ed. Bayrūt: Dār al-'Ilm li-al-Malāyīn, 2002., II, 244.

<sup>30</sup> Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, III, 34.

ḥadīth.<sup>31</sup> Al-Zarkashī's work is an important source that cites Husayn b. 'Alī al-Karābīsī several times.<sup>32</sup>

Some opinions of the famous traditionist al-Bukhārī (256/870) on uṣūl al-fiqh appear in several chapters at the end of his celebrated *Saḥīḥ* such as *Akḥbār al-āḥād*, *al-I'tiṣām bi al-kitāb wa-al-sunna*, *al-Tawḥīd* and his work *Khalq af'āl al-'ibād*.<sup>33</sup> There is also a growing body of secondary literature aiming to reveal more about his legal theory.<sup>34</sup>

The second half of the third century witnessed increasing production of works relating to the topics of uṣūl al-fiqh. The earliest scholars who wrote on this subject were al-Muzanī (264/878) and Dāwūd b. 'Alī al-Zāhirī (270/883). Al-Muzanī's treatise on "al-amr and al-nahy" has reached us.<sup>35</sup> Dāwūd is reported to have written on various topics of uṣūl al-fiqh. Sources attribute several works to him, including *Kitāb al-uṣūl*, *Kitāb al-ijmā'*, *Kitābu ibṭāl al-taqlīd*, *Kitābu ibṭāl al-Qiyās*, *Kitābu khabar al-wāḥid*, *Kitābu khabar al-mūjib li-al-'ilm*,

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<sup>31</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 296.

<sup>32</sup> Zarkashī, *al-Baḥr al-muḥīṭ*, II, 190; III, 322, 323, 452.

<sup>33</sup> See al-Bukhārī, Muḥammad ibn Ismā'īl. Ṣaḥīḥ al-Imām al-Bukhārī: al-musammā al-Jāmi' al-musnad al-ṣaḥīḥ al-mukhtaṣar min umūr Rasūl Allāh wa-sunanihi wa-ayyāmih. edited by Muḥammad Zuhayr ibn Nāṣir al-Nāṣir. Bayrūt: Dār Ṭawq al-Najāh, 1422/2001., 1X: 86-162; al-Bukhārī, Muḥammad ibn Ismā'īl, *Khalq af'āl al-'ibād: wa-al-radd 'alā al-jahmīyah wa-aṣḥāb al-ta'īl*, Bayrūt: Mu'assasat al-Risālah, 1984.

<sup>34</sup> See Lucas, Scott, "The Legal Principles of Muhammad b. Ismā'īl Al-Bukhārī and Their Relationship to Classical Salafī Islam", *Islamic Law and Society*, (2006) 13, no. 3: 289-324; Ghulāmī, Ḥusayn Ghayb, *al-Imām al-Bukhārī wa-fiqh ahl al-'Irāq: dirāsah fī mawqif al-Bukhārī min Abī Ḥanīfah*, Bayrūt: Dār al-I'tiṣām lil-Ṭibā'ah wa-al-Nashr, 2000.

<sup>35</sup> al-Muzanī, Ismā'īl b. Yahyā (263/876), *al-Mas'āl al-Mu'tabara [kitāb al-amr wa-al-nahy]* Ḥahiriyya, Uṣūl al-fiqh:120.; It is also edited and published by Brunschvig, See Brunschvig, "Le Livre De L'ordre Et De La Défense D'al-Muzani" *Bulletin d'etudes Orientales*, Beirut, (1945-46). 145-65.



*Kitāb al-hūjja*, *Kitāb al-khusūs wa-al-'umūm*, and *Kitāb al-mufassar wa-al-mujmal*.<sup>36</sup> We also see plenty of quotations reflecting Dāwūd's thoughts on uṣūl al-fiqh in the later literature.

Toward the end of the third century, interest in uṣūl al-fiqh was growing. Dāwūd's son Abū Bakr b. Dāwūd (297/909) is reported to have written *Kitāb al-wuṣūl ilā ma'rifat al-uṣūl*. A recent study based on Faṭīmī jurist Qādī al-Nu'mān's (363/974) *Ihktilāf uṣūl al-madhāhib* has shown that it was a manual of uṣūl al-fiqh in conception, content and form.<sup>37</sup> The contribution of the Zāhirī school to uṣūl al-fiqh is not only important for the development of uṣūl al-fiqh, it is also crucial to help explain the reasons for the school's disappearance.

Muḥammad b. Ishāq al-Kāshānī (280/893), a former Zāhirī who later became Shāfi'ī, is also reported to have written *Uṣūl al-futyā*, *Kitāb al-radd 'alā Dā'ūd b. 'Alī fī ibtāl al-qiyyās*, *Kitābu ithbāt al-qiyyās*.<sup>38</sup> I cite some of his opinions in the dissertation.

The interest of Mu'tazilī theologians in uṣūl al-fiqh seems to have continued and increased by the late third/ninth century. The most important figures were Abū 'Alī al-Jubbā'ī (303/915) and his son Abū Hashim al-Jubbā'ī (321/933). Abū 'Alī al-Jubbā'ī's

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<sup>36</sup> Ibn al-Nadīm, Muḥammad b. Ishāq, *al-Fihrist li-Ibn al-Nadīm*, edited by Ibrāhīm Ramaḍān. 2nd ed. Bayrūt: Dār al-Ma'rifa, 1417/1997., 267-8.

<sup>37</sup> Stewart, Devin. "Muḥammad b. Dāwūd al-Zāhirī's Manual of Jurisprudence, al-Wuṣūl ilā Ma'rifat al-Uṣūl" in *Studies in Islamic Legal Theory*. Ed. By Weiss, Bernard G. Leiden: Brill, 2002.

<sup>38</sup> Kaḥḥālāh, 'Umar Riḍā, *Mu'jam al-mu'allifīn: tarājim muṣannifī al-kutub al-'Arabīyah*, Bayrūt: Maktabat al-Muthannā, 1983., IX, 41.

recently reconstructed work on tafsīr contains some of his opinions on uṣūl al-fiqh.<sup>39</sup> However, the main sources for their opinions are the works of al-Qādī ‘Abd al-Jabbār (415/1024) and Abū al-Husayn al-Baṣrī (436/1044). Al-Qādī’s *al-Mughnī* and *Faḍl al-i‘tizāl*; Abū al-Husayn’s *al-Mu‘tamad* contains plenty of citations from them. Al-Khayyāṭ (300/913) and his student Abū al-Qāsim al-Balkhī al-Ka‘bī (319/931) were other important Mu‘tazilī scholars of the time. Al-Khayyāṭ’s work *al-Intiṣār* was an important source for the research, both as a source of his opinions and of the opinions of earlier Mu‘tazilī scholars. Al-Ka‘bī’s extant works *Tafsīr*, *Qabūl al-akhbār wa-ma‘rifat al-rijāl* and *Dhikr al-Mu‘tazila ‘an maqālāt al-Islāmiyyīn* are important sources to trace his opinions and legal theoretical shifts within the school.<sup>40</sup>

Within the Kūfī school, Abū Ja‘far al-Ṭaḥāwī (321/935), al-Muzanī’s nephew, appears as an important figure around the end of the third and the beginning of the fourth hijrī centuries in the traditionalizing of Hanafism.<sup>41</sup> Al-Ṭaḥāwī is known more for his extensive works *Sharh ma‘āni al-āthār* and *Sharḥ Muskil al-āthār*, which are the most significant sources for revealing his contribution to the traditionalizing of Hanafism. However, his works *Iktilāf al-fuqahā’* and *Aḥkām al-Quran* are more representative of some

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<sup>39</sup> al-Jubbā’ī, Abū ‘Alī Muḥammad ibn ‘Abd al-Wahhāb, *Tafsīr Abī ‘Alī al-Jubbā’ī*, edited by Khayr Muḥammad Nabhā. Bayrūt: Dār al-Kutub al-‘Ilmīyah, 2007.

<sup>40</sup> See the bibliography for all titles in detail.

<sup>41</sup> Hallaq gives precedence to Muḥammad Ibn Shujā‘ al-Thaljī (266/880) in traditionalizing Hanafism before al-Ṭaḥāwī, however the only source that mentions his name and his contribution to the school with his works on ḥadīth is Ibn al-Nadīm’s *al-Fihrist*. Ibn al-Nadīm attributes the three following titles to him *Kitāb taṣḥīh al-āthār al-kabīr*, *Kitāb al-nawādir*, and *Kitāb al-muḍāraba*. See Ibn al-Nadīm, *al-Fihrist*, 256. For Hallaq’s discussion: See Weiss, *Studies*, 394-95. For the evaluation of Hallaq’s argument see Chapter IV, Solitary report.

of his opinions on *uṣūl al-fiqh*. Al-Qurashī indicates that Al-Ṭahāwī wrote a refutation to the famous follower of Kūfī school ‘Isā b. Abān.<sup>42</sup> Even though this treatise has not reached us, it is likely that al-Ṭahāwī must have criticized ‘Isā’s opinions on solitary reports (*khābar al-wāhid*).<sup>43</sup> Secondary literature is also useful in revealing al-Ṭahāwī thoughts on legal theory.<sup>44</sup>

Another influential figure for Islamic law and legal theory in the late third/ninth century was the famous historian and scholar Muḥammad Ibn Jarīr al-Ṭabarī (310/923). He is reported to have written on *uṣūl al-fiqh* in a manual called *al-Bayān ‘an uṣūl al-aḥkām* on which there is also a recent study aiming to reveal his theory of *uṣūl al-fiqh*.<sup>45</sup>

Muḥammad b. Mundhir al-Nīsābūrī’s (310/923) extant writings, such as *al-Ishrāf ‘alā madhahib al-‘ulamā*, *al-Awṣaṭ fī al-sunan wa-al-ijmā’ wa-al-qiyās*, and his tafsīr,<sup>46</sup> are important sources of my research; in particular, the one on *Ijma’* is an important source that

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<sup>42</sup> al-Qurashī, ‘Abd al-Qadir b. Muḥammad Muḥy al-Dīn, *al-Jawāhir al-muḍīyah fī ṭabaqāt al-Hanaḥīyah*, Karachi: Mīr Muḥammad Kutubkhānah, n.d., I, 105.

<sup>43</sup> For the analysis of al-Ṭahāwī’s approach to reports and its distinct aspects from earlier Kūfī scholars see the section titled “Kūfī approach to Reports: Was There a Traditionalization of Ahl al-ra’y” in the second chapter.

<sup>44</sup> For example see Sharaf, Sa’d Bashīr As’ad, *al-Imām Abū Ja’far al-Ṭahāwī wa-manhajuhu fī al-fiqh al-Islāmī*, ‘Ammān: Dār al-Nafā’is, 1998.; Zāhid al-Kawtharī, *al-Hāwī fī sīra al-Imām Abī Ja’far al-Ṭahāwī*, Karācī: Ayc. Aym. Sa’id Kampanī, 1983.; ‘Abd al-Majīd Maḥmūd, *Abū Ja’far al-Ṭahāwī wa atharuhu fī-al-ḥadīth*, al-Qāhirah: Wizārat al-Thaqāfah, 1975.; Aḥmad, ‘Abd Allāh Nadhīr, *Abū Ja’far al-Ṭahāwī: al-imām al-muḥaddith al-faqīh*, (239 H-321 H). Dimashq: Dār al-Qalam, 1991.; ‘Abd al-Majīd Maḥmūd, *al-Imām al-Ṭahāwī muḥaddith*, al-Qāhirah: Dār al-Muḥaddithīn lil-Baḥth al-‘Ilmī wa-al-Tarjamah wa-al-Nashr, 2008.

<sup>45</sup> Devin Stewart. “Muḥammad b. Jarīr al-Ṭabarī’s *al-Bayān ‘an uṣūl al-aḥkām*” in Montgomery, James E. *‘Abbasid Studies: Occasional Papers of the School of ‘Abbasid Studies*, Cambridge, 6-10 July 2002. Leuven: Peeters, 2004. 321-349.

<sup>46</sup> For the complete titles of his extant works see the bibliography.

shows surviving discussions on the authority and functionality of *ijmā‘* during his time.<sup>47</sup>

The founder of one of the two *Sunnī kalām* schools of Maturidism, Abū Mansūr al-Mātūrīdī (333/944) also reportedly wrote a manual of *uṣūl al-fiqh* entitled *Ma‘ākhidh al-sharā‘ī‘* and another related work *Kitāb al-jadal fī al-uṣūl al-fiqh*.<sup>48</sup> These important works that represent the transoxanian-Ḥanafī School’s earliest *uṣūl al-fiqh* examples unfortunately have not reached us; however, some of his opinions can be found in his *Tawilāt al-Quran* and *Kitāb al-tawḥīd*. I also used existing quotations from him in the later literature.<sup>49</sup>

One of the most important figures of the late third century was Abū al-‘Abbās Ibn Surayj (306/918) who made a significant contribution to the formation of Shāfi‘ism through his teachings, disciples, and writings. In honor of his influential status, he was called “al-Shāfi‘ī al-saghīr” (the little Shāfi‘ī). Ibn Surayj reportedly wrote many books including some on *uṣūl al-fiqh*. However, even al-Subkī (771/1369), who lived only a few centuries after Ibn Surayj’s death, regretfully says that only Ibn Surayj’s two refutations of Ibn Dāwūd and a fifteen-pages-long fragment of *Risālat al-bayān ‘an uṣūl al-aḥkām* that contained the

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<sup>47</sup> Ibn al-Mundhir, Muḥammad ibn Ibrāhīm, *al-Ijmā‘: yataḍammanu al-masā’il al-fiqhīyah al-muttafaq ‘alayhā ‘inda akthar ‘ulamā’ al-Muslimīn*, edited by Fu‘ād ‘Abd al-Mun‘im Aḥmad. al-Ṭab‘ah 1. ed. al-Riyād: Dār al-Muslim lil-Nashr wa-al-Tawzī, 2004.

<sup>48</sup> al-Samarqandī, ‘Alā’ al-Dīn, *Mīzān al-uṣūl fī natā’ij al-‘uqūl: fī uṣūl al-fiqh*, edited by ‘Abd al-Malik al-Sa‘dī. al-Ṭab‘ah 1. ed. Baghdād: Wizārat al-Awqāf wa-al-Shu‘ūn al-Dīnīyah, Lajnat Iḥyā’ al-Turāth al-‘Arabī wa-al-Islāmī, 1987., 3.; Şükrü Özen reconstructed *Ma‘ākhidh al-sharī‘a* in a work. See Şükrü Özen, *Ebu Mansur el-Matüridi’nin fıkıh usulünün yeniden inşası*, n.p.: Istanbul, 2001.

<sup>49</sup> Especially Alā al-Dīn al-Samarqandī (539/1145) and al-Kāşānī (587/1191) quoted directly from al-Mātūrīdī’s works.

opinions of al-Shāfi‘ī, Mālik, Sufyān, Abū Ḥanīfa and his two disciples, and Dāwūd al-Zāhirī on uṣūl al-fiqh were extant in his time.<sup>50</sup> Al-Jaṣṣās reports that Ibn Surayj and al-Qāshānī’s refutations of one another on the topic of qiyās reached to 1000 pages.<sup>51</sup> There are other works (books or treatises) on uṣūl al-fiqh attributed to Ibn Surayj that have not reached us. His dialectical debates with the scholars of other schools, especially Zāhirīs, have been reported in biographical sources. Apparently these debates led to him to write treatises, three of which were against Zāhirī imāms on the authority of qiyās and defending al-Shāfi‘ī: *al-Radd ‘alā Dāwūd al-Zāhirī wa inkārihī al-qiyās*, *al-Radd ‘alā Ibn Dāwud fī al-qiyās* and *al-Radd ‘alā Ibn Dāwud fī masāil i‘taradha bihā al-Shāfi‘ī*. He also seemingly attacked Ḥanafīs by writing *al-Radd ‘alā Muḥammad b. al-Ḥasan*, and *al-Radd ‘alā ‘Isā b. Abān*.<sup>52</sup>

Even though recent scholarship theoretically puts him in a significant place for the formation of uṣūl al-fiqh through the reported writings of his disciples based on biographical sources, his writings have not been studied enough in the current scholarship. There are three extant manuscripts attributed to Ibn Surayj in the contemporary sources. One of them is *Kitāb al-aqsām wa-al-khiṣāl*, which is registered in Chester Beatty Library with the number

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<sup>50</sup> al-Subki, Taj al-dīn, *Tabaqāt al-Shāfi‘iyyah al-kubrā*, edited by Maḥmūd Muḥammad al-Ṭanāḥī, and ‘Abd al-fattāḥ al-Ḥulw. 2nd ed. Cairo: Hijr li-al-Ṭibā‘a wa-al-nashr wa-al-tawzī‘, 1992., III, 38, 456. However, it is not certain that *Risāla al-bayān* was whether about certain fundamental legal topics or was about legal theoretical principles in deriving rulings. It was not uncommon to use the word uṣūl for the fundamental topics of fiqh. (For a discussion of this meaning of uṣūl see Chapter I) Al-Subkī also reports from al-Ghazālī that he studied another work of Ibn Surayj entitled *al-Intiṣār*. This might be seen as another evidence for explanation of certain lost books during the Mongol invasion in the 13<sup>th</sup> century.

<sup>51</sup> al-Jaṣṣās, *al-Fuṣūl*, IV, 32-33. This is another important evidence for the ravage of history in explaining why these important works were lost before the 14<sup>th</sup> century.

<sup>52</sup> Ibn al-Nadīm, *al-Fihrist*, 263.

5515. Nonetheless, after studying a copy of this manuscript, I am confident in asserting that it does not belong to Ibn Surayj but to his disciple whose name is Aḥmad b. ‘Umar Abū Bakr al-Khaffāf (between 340-360/951-970).<sup>53</sup> However, since this work was written in the early third century, it is still an important source for my research and I benefitted from using it as a reference throughout the dissertation.<sup>54</sup> Another text attributed to Ibn Surayj is *al-Ajwiba fī uṣūl al-dīn*.<sup>55</sup> Even though the text *al-Ajwiba fī uṣūl al-dīn* is devoted to theological matters (kalām), it contains some information with respect to ‘ijmā‘. However, the attribution of this text to Ibn Surayj might not be accurate, because the author of the text states at the end that he does not follow al-Mu‘tazila or al-Ash‘ariyya. Even though Mu‘tazila was an established school during the time of Ibn Surayj, Ash‘ariyya was far from being recognized as a school. The eponymous scholar of this theological school, al-Ash‘arī died a few decades after the

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<sup>53</sup> See Ibn Kathīr, Ismā‘īl ibn ‘Umar, *Ṭabaqāt al-fuqahā’ al-Shāfi‘iyyīn*, edited by Aḥmad ‘Umar Hāshim, Muḥammad Zaynahum Muḥammad ‘Azab, and Muḥammad ibn Aḥmad ‘Abbādī. [Cairo]: Maktabat al-Thaqāfah al-Dīniyyah, 1993., 236; Ibn Qāḍī Shuhba, Abū Bakr b. Aḥmad, *Ṭabaqāt al-shāfi‘iyya*. edited by al-Ḥafīz ‘Abd al-‘Alīm Khān. Beirut: ‘Alam al-kutub, 1987., I, 124. The name of author on the manuscript is hardly readable except the part “b. ‘Umar”. After a comparative study in the sources, in an unpublished article of mine, I reached the conclusion that it belongs to Abū Bakr al-Khaffāf. Since Ibn Surayj and Abū Bakr share the same name as well as their fathers (“Aḥmad b. ‘Umar”), biographical sources must have confused the two scholars.

<sup>54</sup> Even though it is a law book (belonging to furu‘ al-fiqh), the introduction includes rich data on uṣūl al-fiqh, especially sources and words. The author uses the term “bayān” instead of bāb or faṣl for chapters. It is probably the influence of al-Shāfi‘ī’s theory of bayān in his *al-Risāla*. The following chapters are discussed in the book: Ḥalāl-Harām; four sources (Kitāb, sunna, ijmā‘, dalīl); authority of Mursal ḥadīth; Ijmā‘; Qiyās; definition and classification of knowledge, fiqh, faqīh, mutafaqqih; amr; ‘ām and khās; ijtihād; disagreements in uṣūl al-fiqh; the definition and ways of bayān from the prophet; mujmal; actions of the prophet; matters related to Ijtihād; nafy; authority of earlier sharī‘ats.

<sup>55</sup> Ibn Surayj, Aḥmad b. ‘Umar Abū al-‘Abbās. *Cüz’ fihī ecvibetü’l-İmāmi’l-‘ālim Ebi’l-‘Abbās Ahmed b. ‘Ömer b. Süreyç fī usūli’-d-dīn* - Süleymaniye Ktp., Şehid Ali Paşa, nr. 2763. The entire treatise is also reported by Ibn Qayyim in his *Ijtima‘ al-juyūsh al-Islāmiyya ‘alā ghazwi al-mu‘aṭṭila wa-al-jahmiyya*. Maṭābi‘ al-farazdaq al-tijāriyya. Riyād: 1988., II, 170-74.

death of Ibn Surayj. Also, Ibn Surayj is reported to have inclined toward al-Mu‘tazila. Consequently, *al-Wadāi‘ li manṣūṣ al-sharā‘i‘* remains as the only reliable extant writing of Ibn Surayj.<sup>56</sup> In *al-Wadāi‘*, Ibn Surayj gives a summary of Shāfi‘ī furū‘ fiqh; however, toward to the end of his book he discusses the following topics of uṣūl al-fiqh in seven chapters: “conditions of judgeship;” “*naskh* and its classification;” “*Sunna* and its classification;” “solitary report and its authority;” “the essence of Ijma‘;” “the authority of qiyās;” and finally “requesting knowledge.”<sup>57</sup>

Ibn Surayj’s disciples reportedly wrote numerous books on uṣūl al-fiqh in the early fourth/tenth century. Abū Bakr al-Ṣayrafī (330/942) is reported to have written *al-Bayān fī dalāil al-a‘lām ‘alā uṣūl al-aḥkām*.<sup>58</sup> Abū al-‘Abbās Ibn al-Qāṣ al-Ṭabarī (335/947) has four extant works that also address certain legal theoretical matters: *Kitāb Nuṣrat al-qawlayn lil-Imām al-Shāfi‘ī*, *al-Talkhīṣ*, *Adab al-Qāḍī* and *al-Tawassuṭ* [bayn al-Muzanī wa al-Shāfi‘ī].<sup>59</sup> Another famous disciple of Ibn Surayj, Abū Bakr Muḥammad b. ‘Alī b. ‘Ismā‘īl al-Qaffāl al-Shashī (336 or 365/948 or 975) is reported to have had books on both *jadāl* (disputation) and uṣūl al-fiqh as well as a commentary on al-Shāfi‘ī’s *al-Risāla*.<sup>60</sup> In the introduction of his extant work *Maḥāsīn al-Sharī‘a*, al-Qaffāl al-Shashī writes about

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<sup>56</sup> Ibn Surayj, Aḥmad b. ‘Umar Abū al-‘Abbās. *al-Wadāi‘ li manṣūṣ al-sharā‘i‘*. Süleymaniye Kütüphanesi, Ayasofya, 1502, [130 vr] It is also published in Saudi Arabia see Ibn Surayj, Aḥmad ibn ‘Umar, *al-Wadā‘i‘ li-manṣūṣ al-sharā‘i‘*, edited by Ṣāliḥ ibn ‘Abd Allāh ibn Ibrāhīm Duwaysh. Saudi Arabia: s.n., 199-], 1990.

<sup>57</sup> Ibn Surayj, *al-Wadā‘i‘*, 122a-128b.

<sup>58</sup> Ibn Nadīm, *al-Fihrist*, 263.

<sup>59</sup> For example, the introduction of *al-Talkhīṣ* is devoted to the discussions of *taqlīd*, *istiḥṣān*, and interrupted reports (*marāsīl*). For the complete titles of the books, see the bibliography.

<sup>60</sup> al-Shīrāzī, Abū Ishāq Ibrāhīm ibn ‘Alī ibn Yūsuf, *Ṭabaqāt al-fuqahā‘*, edited by Iḥsān ‘Abbās. Bayrūt: Dār al-Rā‘id al-‘Arabī, 1970., I, 112.

several topics of uṣūl al-fiqh.<sup>61</sup>

From the Malikī school, the sources attribute the first uṣūl al-fiqh book to Abū al-Faraj al-Malikī (331/942-3) with *Kitāb al-Luma' fī uṣūl al-fiqh*, but the earliest extant text is Ibn al-Qassār's (397/1007) *al-Muqaddima fī uṣūl al-fiqh*. However, Ibn al-Qassār's work contains references to related contributions by earlier figures within the school.

From Shi'ī-Imāmī tradition, the earliest texts on uṣūl al-fiqh appear in the writings of Abū Sahl al-Nawbakhtī (311/923). Al-Nawbakhtī reportedly wrote a refutation of al-Shāfi'ī's *al-Risāla* and on the invalidity of qiyās and ijtihād entitled *Naqdu risālat al-Shāfi'ī, Ibṭāl al-qiyās* and *Naqdu ijtihād al-ra'y*.<sup>62</sup> I also benefitted from al-Sayyid Murtaḍā's *al-Dharī'a* and Shaykh al-Mufīd's *al-Tadhkira*.

Shi'ī-Ismā'īlī scholar al-Qādī Nu'mān's (363/974) extant book *Ikhtilāfu uṣūl al-madhāhib* is not only important for revealing Ismā'īlī contributions and for the defense of Shi'ī principles of uṣūl al-fiqh against Sunnī legal theory in general, but it is also important due to its quotations from third/ninth century Sunnī scholars.

Shi'ī-Zaydī, or, more precisely, Mu'tazilī-Zaydī scholars also contributed to the development of uṣūl al-fiqh. Even though Zaydī scholars are categorized as Shi'ā in most contemporary scholarship as well as in the classical Islamic intellectual literature, their methods, doctrines, and theoretical approaches were distinct from those of Shi'ī-Imāmīs and

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<sup>61</sup> al-Qaffāl, Muḥammad ibn 'Alī, *Maḥāsīn al-sharī'ah: fī furū' al-Shāfi'īyah : kitāb fī maqāṣid al-sharī'ah*, edited by Abū 'Abd Allāh Muḥammad 'Alī Samak. Bayrūt: Dār al-Kutub al-'Ilmīyah, 2007.

<sup>62</sup> Ibn al-Nadīm, *al-Fihrist*, 219-20.



Shi‘ī-Isma‘īlīs. Their theoretical arguments were more in parallel with the arguments of Mu‘tazilī and proto-Sunnī scholars than with the views of their Shi‘ī-Imāmī and Shi‘ī-Isma‘īlī counterparts. This dissertation demonstrates their distinct attitudes toward *ijmā‘* and *qiyās* and the fact that they drew upon the opinions of Mu‘tazilī scholars in legal theory. In addition to some of the aforementioned Mu‘tazilī scholars of Baghdād who were also affiliated with Zaydīs such as al-Iskāfī, al-Qāsim b. Ibrāhīm al-Rassī (246/860) was also an important Zaydī Imām and scholar of the early third hijrī century. Some of al-Rassī’s theoretical opinions are scattered in his treatises.<sup>63</sup> For the late third hijrī century, Zaydī Imām Yahyā b. al-Ḥusayn al-Hādī ilā al-Ḥaqq’s (298/911) treatises are the main sources for tracing Zaydī contributions to the development of legal theory.<sup>64</sup> However, probably the most important work among the early contributions of the Zaydīs to the legal theory, which is also helpful in clarifying their interrelation with Mu‘tazila, is al-Nātiq bi-al-Ḥaqq’s (424/1033) recently published four-volume manual of *uṣūl al-fiqh al-Mujzī fī uṣūl al-fiqh*.<sup>65</sup> This work is also an important source to reconstruct the theoretical opinions of certain scholars of the gap period, especially those of his teacher Mu‘tazilī-Zaydī and Ḥanafī *uṣūl* scholar and theologian Abū ‘Abd Allah al-Baṣrī (369/979). Abū ‘Abd Allah al-Baṣrī was one of the eminent students of al-Karkhī and Abū Hāshim al-Jubbā‘ī and he was a contemporary of al-Jaṣṣāṣ. He is reported to have written on legal theory in his works *al-Uṣūl* and *Naqd*

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<sup>63</sup> al-Qāsim b. Ibrāhīm al-Rassī, *Majmū‘ kutub wa-rasā‘il al-Imām al-Qāsim ibn Ibrāhīm al-Rassī, 169-246 H.*, edited by ‘Abd al-Karīm Aḥmad Jadabān, al-Ṭab‘ah 1. ed. Ṣan‘ā’: Dār al-Ḥikmah al-Yamānīyah, 2001.

<sup>64</sup> al-Hādī ilā al-Ḥaqq, Yahyā ibn al-Ḥusayn, *al-Majmū‘ah al-fākhirah: kitāb fī-hi majmū‘ min kutub al-Imām al-Hādī.* [Yemen]: Maktabat al-Yaman al-Kubrā, 1980.

<sup>65</sup> al-Nātiq bi-al-Ḥaqq, Yahyā ibn al-Ḥusayn, *al-Mujzī fī uṣūl al-fiqh*, edited by ‘Abd al-Karīm Aḥmad Jadabān. 2013.

*al-futyā*. Lastly, Ibn al-Murtaḍā's *Minhāj al-wuṣūl ilā ma'ānī mi'yār al-'uqūl fī 'ilm al-uṣūl* is a source that traces certain legal theoretical opinions of the Mu'tazilī-Zaydī scholars of the gap period, in addition to opinions of other scholars.<sup>66</sup>

Another important figure from the Ḥanafīs of the early fourth/tenth century was Abū al-Ḥasan al-Karkhī (340/951) who was as important in the formation of the Ḥanafī school as Ibn Surayj was in the Shāfi'ī school. Like Ibn Surayj, al-Karkhī had many influential students.<sup>67</sup> He has an extant work entitled *uṣūl*, however, this short treatise contains legal maxims rather than discussions on theoretical topics.<sup>68</sup> His opinions are reported in later Ḥanafī uṣūl literature and there is a secondary study aiming to reveal these opinions.<sup>69</sup> Even though sources do not mention his having authored another work, these rich citations imply that he might have had works on uṣūl al-fiqh or may have expressed his opinions in his teaching circles.

This list of scholars and of the sources I have used to reveal their contributions to the development of uṣūl al-fiqh are representative of the types of data used in my research. The list also provides an outline for the main contributors of the time to the science of uṣūl

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<sup>66</sup> Ibn al-Murtaḍā, Aḥmad b. Yaḥyā, *Minhāj al-Wuṣūl Ilā Mi'yār al-'uqūl fī 'ilm al-Uṣūl*, edited by Aḥmad A. M. Mākhidhī. Ṣan'ā: Dār al-Ḥikmah al-Yamānīyah, 1992.

<sup>67</sup> Ibn Quṭlūbughā, Abū al-Fidā' Zayn al-Dīn. *Tāj al-tarājim*. edited by Muḥammad Khayr Ramaḍān Yūsuf al-Ṭab'ah 1. ed. Dimashq: Dār al-Qalam, 1992., I, 200-202.

<sup>68</sup> al-Karkhī, Ubayd Allāh ibn al-Ḥusayn, *Uṣūl*, in *al-Aqwāl al-uṣūliyah*, [Saudi Arabia]: Ḥ. Kh. al-Jubūrī, 1989., 139-150.

<sup>69</sup> Jubūrī, Ḥusayn Khalaf, *al-Aqwāl al-uṣūliyah li-al-imam Abī al-Ḥasan al-Karkhī*, [Saudi Arabia]: Ḥ. Kh. al-Jubūrī, 1989.

al-fiqh.<sup>70</sup> A detailed list of my sources can be found in the bibliography.

### C. Previous Studies

Several attempts have been made in order to explain this gap in the history of uṣūl al-fiqh literature between the 9<sup>th</sup> and 10<sup>th</sup> centuries. Although Schacht's studies focus on the first two centuries, his paradigmatic theses on al-Shāfi'ī's role in Islamic legal history shed some light on his thoughts about what happened in the centuries following al-Shāfi'ī's death. Schacht argues that the period following al-Shāfi'ī's death was first a time of consolidation which produced the classical system of legal theory, and then a long period of scholasticism.<sup>71</sup> According to Schacht, al-Shāfi'ī not only founded legal theory with its fundamental four sources and an emphasis on the prophetic legal authority embodied in texts, his footsteps had also been followed in legal theory. That is to say that al-Shāfi'ī's legal theory was magnificently superior to the preceding doctrines, and the literature of Islamic legal theory after him can be seen as footnotes on al-Shāfi'ī's legal theory.<sup>72</sup> Schacht thinks that one of the important achievements of al-Shāfi'ī was to make the traditionist thesis, which argues for the formal traditions from the prophet to supersede the living tradition, prevail in legal theory in opposition to ahl al-kalām and ahl al-ra'y.<sup>73</sup> Schacht argues that at the end of the 3<sup>rd</sup>/9<sup>th</sup> century this position taken by al-Shāfi'ī and the traditionists had been generally

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<sup>70</sup> I refer to uṣūl al-fiqh as a science in the meaning of a body of knowledge organized by principles. This description is also in parallel with what is defined in the literature of uṣūl al-fiqh.

<sup>71</sup> Schacht, Joseph, *The origins of Muhammadan jurisprudence*, Oxford: Clarendon Press. 1950., 329.

<sup>72</sup> Schacht, *Origins*, 134-37.

<sup>73</sup> Schacht, *Origins*, 256.

accepted in orthodox Islam, and that this forced other groups, especially the Mu‘tazila, to reconsider their legal theoretical attitudes, particularly in relation to consensus and ra’y.<sup>74</sup> Schacht frequently labels the Mu‘tazila as deniers of reports, and presents their thought on legal theory in matters of consensus, disagreements and systematic reasoning based on a few references to al-Khayyāṭ’s and al-Ka‘bī’s works.<sup>75</sup> Schacht’s account is only interested in the third century, and only with respect to the development of attitudes about ḥadīth.<sup>76</sup> Even though I accept al-Shāfi‘ī’s important role in legal theory, I disagree with Schacht that al-Shāfi‘ī represents the pinnacle of Sunnī legal theory.

Taha Jabir Alwani devotes a chapter to the development of uṣūl al-fiqh after al-Shāfi‘ī in his work *Source Methodology in Islamic Jurisprudence*.<sup>77</sup> After mentioning various texts that are reported to have been written on certain topics of uṣūl al-fiqh based on bibliographical sources and acknowledging al-Shāfi‘ī’s *al-Risāla*’s dominant influence in parallel with Schacht, he argues that it is hard to regard what happened during this period as development. Rather, Alwani claims, these texts seem limited to criticizing, supporting, or commenting on *al-Risāla*.<sup>78</sup> However, he does not provide any quotations from this period citing *al-Risāla*. On the contrary, bibliographical accounts show that the texts written during

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<sup>74</sup> Schacht, *Origins*, 259.

<sup>75</sup> Schacht, *Origins*, 40, 51, 88, 95, 128, 258.

<sup>76</sup> Schacht describes the third century as the second stage of the ḥadīth forgery growth. The first stage is legal works of the second century and the third stage begins with al-Tahāwī and his contemporaries. He also argues that the isnād system reached its perfection in the second half of the third century. (See Schacht, 149, 163.)

<sup>77</sup> ‘Alwānī, Ṭahā Jābir Fayyād, *Uṣūl Al Fiqh Al Islāmī: Source Methodology in Islamic Jurisprudence : Methodology for Research and Knowledge*, Herndon, Va. USA: International Institute of Islamic Thought, 1990.

<sup>78</sup> Alwani, *Source Methodology*, 41-43.

that period were not building on al-Shāfi‘ī’s arguments. Moreover, even if we accept Alwani’s argument that what was written in this period was just commentary on *al-Risāla*, this argument does not necessarily lead to his inference that this period was not a significant developmental stage, especially in light of the fact that building on earlier works has been the main element of development throughout Islamic intellectual history.

Recent scholarship tends to consider this gap as the formational stage of *uṣūl al-fiqh* as opposed to a developmental process, and to shift the pivotal role from al-Shāfi‘ī and from the early third/ninth century to Ibn Surayj and the early fourth/tenth century. Wael Hallaq and Kevin Reinhart are the chief proponents of this thesis. Hallaq gives precedence to Ibn Surayj’s disciples; Kevin Reinhart, however, underscores Ibn Surayj’s own role by attributing to him a manual of jurisprudence.<sup>79</sup> Wael Hallaq explains the lack of literature on *uṣūl al-fiqh* in the ninth century as being because this period represented the initial development of legal theory, which was only to fully emerge as late as a century after al-Shāfi‘ī’s death.<sup>80</sup> He emphasizes the importance of Ibn Surayj and his disciples by assigning them a foundational role in the formation of *uṣūl al-fiqh*.

Wael Hallaq goes further and explains the formation of Islamic legal theory as arising from the great synthesis between *ahl al ra’y* and *ahl al-ḥadīth*. According to Hallaq, the main factor for the emergence of *uṣūl al-fiqh* was the compromise between rationalism and

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<sup>79</sup> Hallaq, Wael B., *A history of Islamic legal theories: an introduction to Sunnī uṣūl al-fiqh*, Cambridge: Cambridge University Press, 1997., 36; Reinhart, A. Kevin, *Before Revelation: The Boundaries of Muslim Moral Thought*, Albany, N.Y.: State University of New York Press, 1995., 14-15.

<sup>80</sup> Hallaq, *A history of Islamic legal theories*, 36.

traditionalism at the end of the third/ninth century. Hallaq does not consider al-Shāfi‘ī’s *al-Risāla* as a true work in uṣūl, and further, he argues that al-Shāfi‘ī had very little to do with the elaboration of uṣūl al-fiqh, claiming instead that al-Shāfi‘ī merely advocated the synthesis in a rudimentary form. He identifies Ibn Surayj (306/918) and his students as the ones who created uṣūl al-fiqh in its “organic and comprehensive form.” His main sources of evidence are reports attributing some works on uṣūl al-fiqh to Ibn Surayj’s students such as Abu Bakr al-Farisi (fl. ca. 350/960), Ibn al-Qass (336/947), Abu Bakr al-Sayrafī (330/942), and al-Qaffal al-Shashi (336/947).<sup>81</sup> Melchert follows Hallaq and explains the evolution of jurisprudence through this same theory of synthesis. According to Melchert, the strict division between ahl al-ra’y and ahl al-ḥadīth in the early third century softened towards the end of the century. Then, in the fourth century, compromised forms emerged between the “Hanbalī school, submitted to the forms of jurisprudence, and the al-Shāfi‘ī, Ḥanafī and Mālikī schools, submitted to the forms of ḥadīth.”<sup>82</sup>

Devin Stewart approaches the problem differently than the above historians. Stewart criticizes the claims that works on uṣūl al-fiqh did not appear in the third/ninth century based on a lack of supporting evidence. He argues that many works mentioned in the biographical sources have been lost and many more have totally escaped mention; therefore, the

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<sup>81</sup> Hallaq, Wael, *The origins and evolution of Islamic law*, (Themes in Islamic law, 1.) Cambridge, UK: Cambridge University Press, 2005., 128.

<sup>82</sup> Melchert, Christopher, *The formation of the Sunnī schools of law, 9th-10th centuries C.E.*, Leiden: Brill, 1997., 31.

third/ninth century must be considered the starting point of *uṣūl al-fīqh*.<sup>83</sup> Even though Stewart shares the opinions of previous historians that *al-Risāla* does not contain characteristic features of later *uṣūl al-fīqh* works, he accepts that *al-Risāla* can be regarded as a work on *uṣūl al-fīqh* in the sense that it aims to provide a comprehensive method for the derivation of rulings for all possible future cases.”<sup>84</sup> He also supports his thesis with two articles that attempt to reveal the contents of two scholars’ books on *uṣūl al-fīqh* from the third/ninth century.<sup>85</sup> Stewart’s approach is more reasonable than those of the other historians mentioned above, but these arguments should be supported through a more comprehensive examination of the period.

In addition to these theses above, two important recent challenges regarding the role of al-Shāfi‘ī need to be discussed. The first is asserted by Norman Calder who argued that the works attributed to al-Shāfi‘ī were actually written by al-Shāfi‘ī’s followers long after al-Shāfi‘ī’s death.<sup>86</sup> The second critique is made by Hallaq about al-Shāfi‘ī’s actual role in the development of legal theory, which is mentioned above. Hallaq claimed al-Shāfi‘ī’s treatise *al-Risāla* should not be accepted as the earliest example of legal theory due to its

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<sup>83</sup> Stewart, Devin J., *Islamic legal orthodoxy twelver Shiite responses to the Sunnī legal system*, Salt Lake City: University of Utah Press, 1998., 31-33.

<sup>84</sup> Stewart, Devin, “Muḥammad b. Dāwūd al-Zāhirī’s Manual of Jurisprudence” in *Studies in Islamic Legal Theory*, 104.

<sup>85</sup> See Stewart, Devin, “Muḥammad b. Dāwūd al-Zāhirī’s Manual of Jurisprudence” in *Studies in Islamic Legal Theory*, 99-158.; and Stewart, Devin, “Muḥammad b. Jarīr al-Ṭabarī’s al-Bayān ‘an *uṣūl al-aḥkām*.” In *‘Abbasid studies: occasional papers of the School of ‘Abbasid studies*, Cambridge, 6-10 July 2002, Leuven: Peeters, 2004. 321-349., 321-349.

<sup>86</sup> Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), chapters 4, 5, and 9.

rudimentary contribution compared to the later developed works on legal theory. Hence, according to Hallaq, al-Shāfi‘ī should not be viewed as the foundational figure for Islamic legal theory.<sup>87</sup> First of all, even though they reach similar conclusions, the dramatic contrast between these two arguments is striking. While Calder argues that the content of *al-Risāla* is theoretically too developed of a work to have been written at the beginning of the third/ninth century, Hallaq argues that *al-Risāla*'s immature content forces us to exclude it from the genre of *uṣūl al-fiqh*. This contrast implies there is a different understanding between the two historians about what *uṣūl al-fiqh* means. From his work, it seems that Calder perceives it as legal theoretical discussion on sources, methods and principles separate from law. Hallaq, however, explicitly says that what he means by *uṣūl al-fiqh* is the legal theory that emerged as the product of the four schools in the fourth/tenth and fifth/eleven centuries.<sup>88</sup> Based on this description, Hallaq compares *al-Risāla* to the later *uṣūl al-fiqh* works developed by the members of the four schools, and excludes it from the genre due to its relatively immature content. Calder's description of *uṣūl al-fiqh* is more accurate. The term 'uṣūl al-fiqh' refers to the source methodology of law. Thus, an inquiry that investigates the development of the science of *uṣūl al-fiqh* must take into consideration every effort related to the development of source methodology. Otherwise, one would have to ignore any contributions made before the complete formation of the science. In other words, one could not ever understand and explain the developmental process. It is for precisely this reason that Wael Hallaq's strict

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<sup>87</sup> Hallaq, Wael B.. "Was al-Shafii the Master Architect of Islamic Jurisprudence?." *International Journal of Middle East Studies* 25, no. 04 (1993): 588.

<sup>88</sup> Weiss, Bernard G., ed., *Studies in Islamic Legal Theory*, Leiden: E.J. Brill. 2002., 393.



understanding of uṣūl al-fiqh leads him to ignore all of the contributions made by Mu‘tazilīs, Murji‘īs, Zāhirīs and other various groups and independent scholars before the fourth/tenth centuries. As the first complete extant work written almost one and a half century before the second extant work, i.e. *al-Fuṣūl*, *al-Risāla*’s relatively immature content, concepts, and structure should not surprise a student of jurisprudence.

Calder’s skepticism about al-Shāfi‘ī’s authorship of *al-Risāla* is also based on *argumentum ex silentio* and erroneous comparison. By following Schacht’s thesis, Calder compares *al-Risāla* with ancient schools and arrives at the conclusion that the legal theory presented in *al-Risāla* is a magnificently consistent and superior system.<sup>89</sup> However, we do not have any extant legal theoretical work dating from the time before al-Shāfi‘ī. He also compares some concepts in al-Shāfi‘ī’s *al-Risāla* with those of Ibn Qutayba’s *Ta’wīl*. For example, he questions the fact that certain technical terminology [khabar al-wāḥid; ‘amm-khāṣṣ] and the theory of naskh are absent from Ibn Qutayba’s work, but appear in *al-Risāla*.<sup>90</sup> Ibn Qutayba’s work is exclusively devoted to the defense of ḥadīth against ahl al-kalām and ahl al-ra’y based on the reconciliation of seemingly contradictory ḥadīths. Thus, it is not surprising that Ibn Qutayba’s *Ta’wīl* does not focus on the theoretical terminology or naskh. On the other hand, earlier works than Ibn Qutayba’s *Tawīl* contained this type of terminology, such as ‘amm and khāṣṣ, including Muzanī’s *al-amr wa-al-nahy* or Kinānī’s

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<sup>89</sup> Calder, *Studies*, 67.

<sup>90</sup> Calder, *Studies*, 222-27.

(240/854) *al-Ḥayda*.<sup>91</sup> A considerable amount of literature dealing with naskh had already been produced as well.<sup>92</sup> Furthermore, a careful study of the early quotations from *al-Risāla*, commentaries on *al-Risāla*, and refutations against al-Shāfi‘ī written before the middle of the third/ninth century support the authorship of al-Shāfi‘ī. This was also the view accepted by the consensus of all the schools, as can be seen in the later literature of uṣūl al-fiqh. The famous Mu‘tazilī theologian, al-Jāḥiẓ cites al-Shāfi‘ī’s *al-Risāla* in his treatise *Risāla Faḍl Hāshim ‘alā ‘Abd Shams*, which was written between 227-230/842-845 during the time of al-Wāthiq.<sup>93</sup> Yahyā b. Sa‘īd al-Qaṭṭān (198/813) is reported to have read *al-Risāla* and praised al-Shāfi‘ī.<sup>94</sup> Al-Muzanī reportedly said to al-Anmā‘ī that he had been reading al-Shāfi‘ī’s *al-Risāla* for fifty years and kept benefiting from it with something new each time.<sup>95</sup> Abū al-‘Abbās Ibn al-‘Aṣam (346/957) reportedly said that he had studied al-Shāfi‘ī’s *al-Risāla* before 270/883.<sup>96</sup> Among the refutations, ‘Isā b. Abān’s (221/836) *al-Radd ‘alā Bishr al-Marīsī wa-al-Shāfi‘ī fī-al-akhbār* is already mentioned above. It is most probably

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<sup>91</sup> See al-Muzanī, *al-Amr wa-al-nahy*, 154.; al-Kinānī, *Ḥayda*, 124-34.

<sup>92</sup> For example see Abū ‘Ubayd al-Qāsim ibn Sallām, *al-Nāsikh wa-al-mansūkh fī al-Qur’ān al-‘azīz: wa-mā fīhī min al-farā’id wa-al-sunan*, edited by Muḥammad ibn Šāliḥ Mudayfir. al-Riyāḍ: Maktabat al-Rushd, 1997.; al-Naḥḥās, Abū Ja‘far, *al-Nāsikh wa-al-mansūkh*, edited by Muḥammad ‘Abd al-Salām Muḥammad. Kuwait: Maktabat al-falāḥ. 1408/1988.

<sup>93</sup> al-Jāḥiẓ relates that in *al-Risāla*, al-Shāfi‘ī mentions that ‘Alī b. al-Husayn accepted the solitary report, when he tries to prove the authority of solitary report. See al-Jāḥiẓ, ‘Amr b. Baḥr, *Rasā’il al-Jāḥiẓ al-Rasā’il al-Siyāsīyah*, edited by Abū Muḥim ‘Alī. Bayrūt: Dār wa-Maktabat al-Hilāl, 1987, 450. In fact, this name does not appear in the existing edition of *al-Risāla*, which might be an indication of the fact that the old edition of *al-Risāla* was in circulation during the time of al-Jāḥiẓ.

<sup>94</sup> al-Nawawī, *Tahdhīb al-asmā’*, I, 84.

<sup>95</sup> al-Subkī, *Ṭabaqāt al-shāfi‘īyyat al-kubrā*, II, 99.

<sup>96</sup> Ibn ‘Asākir, ‘Alī ibn al-Ḥasan, *Tārīkh madīnat Dimashq: wa-dhikr faḍlihā wa-tasmiyat man ḥallahā min al-amāthil aw ijtāza bi-nawāḥihā min wāridihā wa-ahlihā*, edited by ‘Amr Gharāmah ‘Umrawī. Bayrūt: Dār al-Fikr, 1995., LVI, 292.

written against the theory of akhbār that al-Shāfi‘ī presents in *al-Risāla*. Ibn Saḥnūn’s (256/870) *al-Radd ‘alā al-Shāfi‘ī wa-al-‘Iraqiyyīn*,<sup>97</sup> Ḥammād b. Ishāq al-Jahdamī’s (267/880) *al-Radd ‘alā al-Shāfi‘ī*,<sup>98</sup> Ibn ‘Abd al-Ḥakam’s (268/882) *al-Radd ‘alā al-Shāfi‘ī fī mā khālafa fīhi al-kitāb wa-al-sunna*,<sup>99</sup> Ismā‘īl b. Ishāq al-Qādī’s (282/896) *al-Radd ‘alā al-Shāfi‘ī*,<sup>100</sup> Yaḥyā b. ‘Umar al-Mālikī’s (289/902) *al-Radd ‘alā al-Shāfi‘ī*,<sup>101</sup> Yūsuf b. Yaḥyā al-Azadī’s (288/901) *al-Radd ‘alā al-Shāfi‘ī*,<sup>102</sup> and Aḥmad b. Marwān al-Mālikī’s (298/910) *al-Radd ‘alā al-Shāfi‘ī*<sup>103</sup> are works written in refutation of al-Shāfi‘ī during the 3<sup>rd</sup>/9<sup>th</sup> century.<sup>104</sup> The first manuals of uṣūl al-fiqh also cite *al-Risāla* multiple times, which indicates that early scholars of uṣūl al-fiqh were in conversation with earlier books and

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<sup>97</sup> al-Dhahabī, Muḥammad ibn Aḥmad, edited by Muḥammad Ayman ibn ‘Abd Allāh Shabrāwī. *Siyar a‘lām al-nubalā’*. al-Qāhirah: Dār al-Ḥadīth, 2006., XIII, 61.

<sup>98</sup> Kaḥḥāla, *Mu‘jam al-mu‘allifīn*, IV, 72.; Ziriklī, *A‘lām*, II, 271.

<sup>99</sup> Ziriklī, *A‘lām*, VI, 223.

<sup>100</sup> Ziriklī, *A‘lām*, I, 310.

<sup>101</sup> Ibn Ḥajar, *Lisān al-mīzān*, VI, 270.; Ziriklī, *A‘lām*, VIII, 160. There is also a manuscript containing a preserved part of this refutation in Tunisia and Muhammad Ajfūn published an article on it. Based on the content of the article, it seems that Yaḥyā was trying to prove that it was Mālik who adhered to the prophetic ḥadīth more than al-Shāfi‘ī. See al-Ajfān, Muḥammad Abū. “Yaḥyā b. ‘Umar min khilāl kitābih ‘al-ḥujja fī-al-radd ‘alā al-Shāfi‘ī.” *Majallat Ma‘had al-Makḥṭū‘āt al-‘Arabiyya*. 29, no. 2 (1985)

<sup>102</sup> Ziriklī, *A‘lām*, VIII, 257.

<sup>103</sup> al-Dhahabī, *Siyar a‘lām al-nubalā’*, XV, 427.; Kaḥḥāla, *Mu‘jam al-mu‘allifīn*, II, 174.; Ziriklī, *A‘lām*, I, 256.

<sup>104</sup> There is also an extant refutation of al-Shāfi‘ī by Ibn al-Labbād (333/944) who lived in the late third and early fourth hijrī centuries. In this treatise, by following the footsteps of his teacher Yaḥyā b. ‘Umar, Ibn Labbād tries to show that it was al-Shāfi‘ī who was issuing rulings based on ra’y (in his language *ḥīrah*) and Mālik was a strict adherent to the prophetic ḥadīth without adding or removing anything from it. See Ibn al-Labbād, Abū Bakr Muḥammad ibn Muḥammad, *Kitāb al-radd ‘alā al-Shāfi‘ī*, edited by ‘Abd al-Majīd Bin Ḥamdah. Tunis: Dār al-‘Arab li-al-ṭibā‘a, 1986.

treatises in the genre, and that they accepted *al-Risāla* as belonging to the same genre.<sup>105</sup>

Hallaq's thesis also suffers from multiple weaknesses. First of all, Hallaq's thesis aims at depicting al-Shāfi'ī's work *al-Risāla* as insignificant as a reaction to the excessive emphasis on its importance within Orientalist discourse. The position he takes is to describe what happened in the third/ninth century as merely a formational process of *uṣūl al-fiqh* instead of real development. However, the literature of *uṣūl al-fiqh*, especially references to *al-Risāla* in this literature, as well as the content of *al-Risāla* refutes this point.<sup>106</sup> Even those whom Hallaq accepts as the founders of *uṣūl al-fiqh*, such as al-Sayrafi and al-Qaffāl al-Shāshī, reportedly wrote commentaries on *al-Risāla* referring to it as an *uṣūl* work.<sup>107</sup> Hallaq assumes that only two groups, namely ahl al-ra'y and ahl al-ḥadīth, were influential in the formation of *uṣūl al-fiqh*. However, biographical and historical sources confirm that in the third/ninth century there were many different groups, such as Mu'tazila and Zāhirism, involved in *uṣūl* discussions on topics such as the authority of *ijtihād*, *qiyās* and solitary report.

Most of these earlier studies either presented this gap as an insignificant time period for the history of Islamic legal theory, or just a period in which only the first commentaries

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<sup>105</sup> al-Jaṣṣās, *al-Fuṣūl*, II, 336, 340; Abū al-Ḥusayn al-Baṣrī, *al-Mu'tamad*, II, 329; al-Nāṭiq bi-al-Ḥaqq, *al-Mujzī fī uṣūl al-fiqh*, II, 140, 155, 224.

<sup>106</sup> Some *uṣūl* works that have references to *al-Risāla* as follows: Jaṣṣās's *al-Fuṣūl*, Sarakhsī's *al-Uṣūl*; Juwaynī's *Talkhīṣ* and *al-Burhān*; Zarkashī's *al-Baḥr al-muḥīṭ* (Only this work has more than hundred references); Qarāfi's *al-Furūq*, Shāṭibī's *al-Muwafaqāt*, Ibn al-Farrā's *al-'Udda*, Ibn Taymiyya's *al-Musawwada*.

<sup>107</sup> Subkī, *Ṭabaqāt*, II, 167.

on al-Shāfi‘ī’s *al-Risāla* were produced with respect to Islamic legal theory. The first claim motivated its proponents to look for a new starting point for Islamic legal theory and new founding figures. While the second claim resulted from assigning a significant place to al-Shāfi‘ī and his time, and resulted in describing the gap period as the first stage of al-Shāfi‘ī’s influence on Islamic legal theory. Both of these claims are challenged directly in the body of this dissertation.

One of the secondary problems that the dissertation deals with is the formation of the schools. There are several studies exclusively dealing with this problem; however, my primary focus will be on the question of the relationship between the formation and survival of a school and its development of a legal theory which had been relatively neglected. It is clear that those schools of law that survived over long periods of time each produced a distinctive legal theory that was articulated in works of *usul al-fiqh*. The question of whether the production of works on *usul al-fiqh* *contributed* to their longevity is one that can and should be posed by scholars. On the other hand, uncovering the problem of how developing a legal theory affects the formation of a school will enable us to reach a more accurate understanding of Islamic legal history.

Schacht locates the formation of schools at around the middle of the third century. This is when the Iraqi school became completely Hanafī, when Malikī and Shafī‘ī doctrines were crystallized in the respective handbooks of Abu Muṣ‘ab and al-Muzanī, and the

opinions of Aḥmad b. Ḥanbal were collected by his disciples.<sup>108</sup> Coulson identifies al-Shaybānī as "the true founder of Hanafī law" and Ibn al-Qasim as the comparable figure for Malikī law. He also says that Shafi'ites became a school in the generation after al-Shāfi'ī, when only a minority were immediately converted to his views, and that Aḥmad founded the Ḥanbalī school by collecting his Musnad.<sup>109</sup>

Makdisi has identified three stages in the development of schools of law: the regional school, the personal school, and the guild school.<sup>110</sup> Melchert assigns the emergence of the madhhab as a full-fledged legal school to the end of the 9th century and the beginning of the 10th century. He follows the careers of the major jurists of six schools in great detail in order to show that some of these jurists were responsible for founding what he calls the classical schools. Thus, Ibn Surayj (306/918) and his immediate students contributed directly to the formation of the Shafi'ite school; al-Karkhi (340/952) to the Hanafite school; al-Khallal (311/923) to the Hanbalite school; and Ismail Ibn Ishaq (282/896), among others, to the Malikite school. According to Melchert, the establishment of a regular system of education for transmitting legal doctrine, with identifiable teachers and students, was the cause of the formation of the madhhabs. Thus, "Ibn Surayj marked a turning point in the history of Shafi'ism because he was the first to have one identifiable teacher in jurisprudence

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<sup>108</sup> Schacht, Joseph, *An introduction to Islamic law*, Oxford : Oxford University Press, 1982., 57-68.

<sup>109</sup> Coulson, Noel J., *A history of Islamic law*, Edinburgh: University Press, 1964., 48, 70.

<sup>110</sup> Makdisi, George, "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court," *Zeitschrift Für Geschichte Der Arabisch-Islamischen Wissenschaften*, 1 (1984): 233-252.; Makdisi, George, *The Rise of Humanism in Classical Islam and the Christian West: With Special Reference to Scholasticism*, Edinburgh: Edinburgh University Press, 1990., 16-23.; Makdisi, George, "Tabaqat-Biography: Law and Orthodoxy in Classical Islam," *Islamic Studies* (Islamabad) 32 (1993):371-396.

(al-Anmāṭī), on the one hand, [and] a number of identifiable students, on the other.”<sup>111</sup> An exceptional challenge to the historians above has recently been made by Hallaq. Hallaq argues that geographical schools never existed and that the later schools were not personal. Although a transformation did in fact take place, according to Hallaq it was a transformation from individual juristic doctrines to doctrinal schools.<sup>112</sup>

One of the prevalent hypotheses explaining why some schools survived and others did not is that the ones that survived did so because they were supported by caliph patronage. This view can be traced back to the early Islamic legal literature. For example Ibn Hazm states that the Ḥanafī and Malikī schools prevailed because Abū Yūsuf, as chief qādi for Harun al-Rashīd, saw to it that only Ḥanafis were appointed to judgeships anywhere in the empire, while Yaḥya ibn Yaḥya similarly influenced the Umayyad ‘Abd al-Rahmān ibn al-Ḥakam (r. 206-238/822-852).<sup>113</sup> Yet we know of a number of Basran jurists who were appointed to judgeships in Baghdad. ‘Umar ibn Ḥabīb, Muḥammad al-Anṣārī and Yaḥya b. Aktham (242/857) have been counter examples, the latter two appointed as chief qādīs by Harun after Abu Yūsuf.

Another problem that I will deal with is the reason for the split between ahl al-ra’y and ahl al-ḥadīth, and the influence of the split on the evolution of legal theory during these

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<sup>111</sup> Melchert, *The Formation*, 171.

<sup>112</sup> Hallaq, Wael B., "From Regional To Personal Schools Of Law? A Reevaluation." *Islamic Law and Society*, 8.1 (2001): 1.

<sup>113</sup> Ibn Ḥazm, ‘Alī ibn Aḥmad, *al-Iḥkām fī uṣūl al-aḥkām*, edited by Iḥsān ‘Abbās, Bayrūt: Dār al-Afaq al-Jadidah, 1984., IV, 230.

two centuries. Different explanations have emerged in the scholarship to explain this problem. Melchert states that the Iraqī jurists in general, and Abū Hanīfa’s followers in particular represent ahl al-ra’y and he thinks the main reason for this split was the doctrine of the createdness of the Quran. Melchert asserts that al-Shaybānī and Abū Yūsuf promulgated this doctrine early on, then their followers, especially Bishr al-Marīsī, continued this doctrine later in the early third Islamic century.<sup>114</sup> Secondary factors for the split, according to Melchert, were the use of the principle of analogy (qiyās), setting aside known ḥadīth reports in favor of personal opinions, and lack of piety.<sup>115</sup>

Another important - and the most recent - work that needs to be pointed out here is Ahmed Shamsy’s *The Canonization of Islamic Law*.<sup>116</sup> Despite differences of data and scope, certain aspects of Shamsy’s work overlap with my research topics. The overarching argument of the work is that the classical institution of madhhabs (Shafī’ism, Ḥanafism, Mālikism, Ḥanbalism) was rooted in the canonization project of al-Shāfi‘ī. According to Shamsy, earlier legal schools of Madīna and ‘Irāq were fundamentally different from the institution of classical madhhabs as they relied on communal tradition and it was al-Shāfi‘ī who managed to found a coherent legal system exclusively based on canonized sources and independent from communal traditions. Therefore, Shamsy argues that this legal system as developed by al-Shāfi‘ī, and further developed by his students, was followed by other

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<sup>114</sup> Melchert, *The Formation*, 8-9.

<sup>115</sup> Melchert, *The Formation*, 9-13.

<sup>116</sup> Ahmed Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History*, Cambridge: Cambridge University Press, 2014.



scholars and resulted in the formation of the madhhabs as they were known in the classical period. Even though Shamsy successfully demonstrates the different stages of Shāfi‘ism in the process of emerging as a classical madhhab, his larger argument is based on generalization and reductionism. Modern scholarship operates on the assumption that all four sunnī schools had similar or even identical stages in their formation as madhhabs, and that they even emerged as madhhabs at the same time. This ignores the independent and distinct factors in the history of each school. Even though it is true that the scholars of the 3<sup>rd</sup>/9<sup>th</sup> century were in constant interaction, this interaction did not always result in following the same direction. Also, by following the two main theses of Schacht, Shamsy argues that the pre-Shafi‘ī period was the period of communal practices through which the claims of normativity were made, and that al-Shafi‘ī made a significant impact by completely replacing the authority of communal practices with the exclusive authority of textual sources. Shamsy calls this process the canonization of Islamic law.

In my dissertation, I argue that the topics in the field of uṣūl al-fiqh stemmed from dialectical debates among a wide variety of scholars on certain theses of authority and their stratified structure. In this sense, the formation of uṣūl al-fiqh lies in the crisis of authority and the constant theses proposed by certain individuals to solve this crisis. Communal practices, or *‘amal*, which Schacht calls the living tradition, was just one of the theses proposed for establishing normativity. It was only some scholars, such as certain Madīnan jurists, who considered *‘amal* to have an overarching authority, especially in matters of interpretation, and even it was just one source among various other sources for them. An overemphasis on communal traditions during the first two centuries of Islam simply does not

accurately reflect the story of the much more developed discussions on authority and normativity, which Shamsy calls the canonization process. In addition, the overall authority of the text of the Quran was already a matter of agreement, and a majoritarian agreement on the authority of transmitted reports had been growing rapidly long before al-Shāfi‘ī. I agree that al-Shafi‘ī played an important role in the formation of Islamic law and legal theory, but al-Shafi‘ī was only one of the significant contributors of this developmental process.

Even though various studies have helped to explore certain parts of the period, they are far from presenting a comprehensive description of the period with respect to the development of uṣūl al-fiqh. My dissertation differs from earlier studies in several respects. First, it is the only study exclusively devoted to the developmental process of uṣūl al-fiqh in the 3<sup>rd</sup>/9<sup>th</sup> and early 4<sup>th</sup>/10<sup>th</sup> centuries. Earlier studies only focused on certain elements or people from this period. Therefore, we have not had an accurate and comprehensive explanation of this gap in the history of Islamic legal theory yet. Secondly, because earlier studies tend to be so limited in their focus, they suffer from a lack of comparative textual analysis of the sources. My research examines almost all relevant materials that were written during this period. It also encompasses the references provided in the later literature. Besides the texts directly related to fiqh and uṣūl al-fiqh from the period, I use all of the related materials written within the disciplines of Kalām, Ḥadīth, Tafsīr and Khilaf. I also use historical, biographical and bibliographical sources and later uṣūl al-fiqh literature. Thirdly, my study investigates texts that were discovered and published only recently, and which were not available as sources for some of the earlier studies. These include al-Jaṣṣās’s *al-Fuṣūl*, Karkhī’s *al-Uṣūl*, al-Saymarī’s *Masāil al-khilāf*, Muzanī’s *Kitāb al-Amr wa-al-Nahy*,

al-Khaffāf's *Kitāb al-aqsām wa-al-khiṣāl*, al-Qaffāl al-Shashī's *Maḥāsin al-Sharī'a*, Ibn al-Qās's *Tafsir* and *al-Intiṣār*, Ibn Qaṣṣār's *al-Muqaddima* and other materials from the period mentioned earlier in this section, or can be seen in the bibliography.

In the following chapters, I argue that the individual efforts of scholars embodied in dialectic debates, oral or written, to solve the problem of religious authority during the gap period shaped the science of uṣūl al-fiqh significantly and provided its major topics. The different arguments elaborated within these debates competed with each other and constituted the body of uṣūl al-fiqh. Scholars coming from different regions and backgrounds, and later on schools, had to engage in these arguments in order to participate in this genre and support their points of view on the questions of authority. This is precisely the major reason of why exceptional, even heretical opinions, have been preserved in the literature of uṣūl al-fiqh.

Therefore, the following chapters examine the shifts, evolution, and development in the concept of uṣūl; the development between the works of al-Shafī'ī and al-Jaṣṣās; in the articulated discussions on solitary report (khabar al-wāḥid), consensus (ijmā'), analogy (qiyās), legal reasoning (ijtihād), and imitation (taqlīd) during the gap period.

## **CHAPTER I**

The Evolution of Uşūl: What Was It and What Did It Become?

## A. The Concept of *Uṣūl* in the Gap Period

This study argues that *uṣūl al-fiqh* did not emerge with the aim of providing principles and methods restricted to the use of *fiqh*, meaning the derivation of religio-legal rulings from the fundamental sources. Taking into account topics covered in the later literature, one can also argue that it never in fact became a specific legal theory merely for *fiqh*, despite several efforts by certain classical scholars to restrict it in that way.<sup>117</sup> *Uṣūl al-fiqh* arose with the need for theoretical principles that would distinguish correct religious knowledge from heretical (*bid'a*) or inaccurate opinions (*tahakkum*), and reach authoritative and normative solutions. These methodological efforts, though mostly related to practical matters of *fiqh*, were not limited to the realm of *fiqh*. This was precisely because people were in need of normative belief principles and normative views on piety in addition to normative rulings in everyday life. The subsequent chapters will provide evidence for this argument.

This search for authoritative sources of religion as a filtering body discerning correct opinions and beliefs from incorrect ones underwent different stages and entailed a rich, but transforming, terminology that later came to compose the backbone of *uṣūl al-fiqh*. These authoritative sources were denoted by the use of the term '*uṣūl*' in the gap period, a term which would later, toward the end of the gap period, be incorporated into the name for a

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<sup>117</sup> Abū al-Ḥusayn al-Baṣrī, Abū Ya'ālā al-Farrā, and al-Ghazali were among those who were uncomfortable with the scope of *uṣūl al-fiqh* encompassing many topics outside *fiqh* or irrelevant to it. These efforts should be seen as the efforts for giving a new independent character to the new science restricted with the scope of *fiqh*, not for rescuing it from later injections from the fields of other sciences. In other words, *uṣūl al-fiqh* was born as a common source methodology for deriving accurate and normative religious knowledge and filtering those are not.

religious science of source methodology, *uṣūl al-fiqh*. In this chapter, I will explain the history of this transformation of the concept of *uṣūl* into *uṣūl al-fiqh* in the gap period.

A sufficient answer for the question of the formation of *uṣūl al-fiqh* as a source methodology can be found in its functions throughout the early developmental stages, and a comprehensive analysis of the concept of *uṣūl* during these stages is needed to answer the question completely. This answer will also shed some light on its origins and the question of why Muslim scholars needed this science. However, before dealing with the conceptual analysis of *uṣūl al-fiqh*, I want to point out a few different modern definitions of *uṣūl al-fiqh* in the existing scholarship, which, I think, create confusion in the study of Islamic legal history.

### **1. Three Approaches to the Definition of Uṣūl al-Fiqh in Contemporary Scholarship**

In the introduction, I briefly mentioned how the various definitions of *uṣūl al-fiqh* used by contemporary scholars of Islamic legal history inevitably affect their research results. In order to avoid confusion and cacophony, it is essential to clarify what we mean by *uṣūl* and *uṣūl al-fiqh*. Aside from a technical definition of *uṣūl al-fiqh*, which also has varying facets, what I mean here is what the present historians of Islamic legal law and legal theory mean when they investigate the history of this science. Because the term and concept of *uṣūl al-fiqh* had not yet clearly emerged during the gap period, attempts to identify what is and is not *uṣūl al-fiqh* in this period rely upon reading backwards from later works and understandings. The existing conceptual framework on the history of *uṣūl al-fiqh* revolves

around three main approaches.

The first one presents *uṣūl al-fiqh* as the *Sunnī* theory of law that emerged from the great synthesis between reason and tradition achieved by the scholars of *ahl al-ra'y* and *ahl al-ḥadīth*. The proponents of this approach confine their research to those scholars who were described as affiliated with what later came to be recognized as *Sunnī* schools of law, i.e. *Ḥanafīs*, *Mālikīs*, *Shāfi'īs*, and *Ḥanbalīs*. This approach, therefore, ignores the contribution of scholars who were not affiliated with these schools such as *Mu'tazilīs*, *Zaydīs*, *Shi'īs*, and independent scholars of the gap period.

The second approach understands *uṣūl al-fiqh* as a specific genre devoted solely to the theory of law. The scholars who follow this approach look for independent manuals and treatises written on *uṣūl al-fiqh* in this period to trace the early development of this field. Depending on how one recognizes a text as a text of *uṣūl al-fiqh*, this approach can be more restrictive or more encompassing. As mentioned in the introduction, some contemporary scholars argued that *al-Shāfi'ī's al-Risāla* does not belong to the genre of *uṣūl al-fiqh* due to its lacking certain discussions and structures that are present in the later literature of *uṣūl al-fiqh*. In any case, this approach confines the research on the early development of *uṣūl al-fiqh* to a limited range of materials and ignores the scattered discussions on *uṣūl al-fiqh* in various genres.

The third approach is the *masā'il-based* approach and it represents *uṣūl al-fiqh* through the topics and problems it deals with. The scholars of this approach look for any discussions in the earlier periods related to the existing topics in the later literature of *uṣūl al-fiqh*. This approach provides a wider scope in tracing back the early development of *uṣūl al-fiqh*.

al-fiqh and enables researchers to analyze more materials from various fields of religious sciences that contain discussions on the topics of uṣūl al-fiqh. In addition, this approach is also useful to explore the interrelations between uṣūl al-fiqh and other religious sciences during the early developmental stages.

The first two approaches fall short for the aim of uncovering the formation and early development of uṣūl al-fiqh because they restrict the scope of investigation either to certain contributors and a relatively late period, or to a body of writings on theory of law. Both methods fail to account for the many other players from different groups or independent players who were on the stage and contributing in their diverse writings to the discussions of the problems of uṣūl al-fiqh during the early period. Therefore, my research follows the *masā'il*-based approach and tries to discover who contributed to discussions of the problems of uṣūl al-fiqh such as the evaluation of sources and hermeneutical principles. This approach enables the researcher to trace back different periods and scholars as much as possible with a wider scope.

I will begin with an investigation of how an idea relating to the sources of religion developed in the early stages of the gap period and how the concept of uṣūl came to be denoted as identifying these sources. Later, I will discuss how the concept of uṣūl came to comprise a significant part of uṣūl al-fiqh and provided the name for this emerging field of religious science. The following two sub-sections examine the concept of uṣūl emerging vis-a-vis innovation (*bid'a*), arbitrary adjudication (*taḥakkum*) and secondary branches (*furu'*), and the development of the idea of the sources of religion in the sense that uṣūl generally conveys.



## 2. Conceptual History of *Uṣūl*

Uṣūl is the plural of *aṣl*, which means the lower part of something, the foundation and root upon which something else is based. Furū‘ is the plural of *far‘* which means the upper part of something or a branch.<sup>118</sup> In parallel with the lexical meanings, two kinds of relationships between the words uṣūl and furū‘ seem to have been considered, and these were used sometimes slightly differently and sometimes vaguely interchangeably during the gap period: reliance and sequence. As for understanding the relationship in terms of reliance, uṣūl is understood as those things that are needed for the existence of furū‘. In other words, things that are furū‘ emanate from other things that are uṣūl. In this kind of relationship the English equivalent of uṣūl would be sources or causes and of furū‘ would be outcomes or results. For example, when he describes his work *Kitāb uṣūl al-futyā wa-al-aḥkām*, al-Jāḥiẓ underscores this meaning by claiming that the differences in subordinate (*furū‘*) and specific rulings (*aḥkām*) depend on the divergent views on the sources of legal opinions (*uṣūl al-futyā*).<sup>119</sup> The second understanding of the relationship between uṣūl and furū‘ is represented as priority between different entities. In that case, the uṣūl are what is primary to the furū‘ that

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<sup>118</sup> al-Khalīl ibn Aḥmad, *Kitāb al-‘Ayn*, edited by Maḥdī Makhzūmī and Ibrāhīm Sāmarrā‘ī. Beirut: Dār wa-Maktabat al-Hilāl, 1986. ,“a-ṣ-l”, VII, 156, and “f-r-”, II, 126.; Ibn Sīdah al-Mursī, ‘Alī ibn Ismā‘īl, *al-Muḥkam wa-al-muḥīṭ al-a‘zam*, edited by ‘Abd al-Ḥamīd Hindāwī. Bayrūt: Manshūrāt Muḥammad ‘Alī Bayḍūn: Dār al-kutub al-‘ilmīyah, 2000., “a-ṣ-l”, VIII, 352.; al-Fīrūzābādī, Muḥammad Ibn-Ya‘qūb, *al-Qāmūs al-muḥīṭ*, edited by Muḥammad Na‘īm al-‘Iṣṣūsī. Bairūt: Mu‘assasat ar-Risāla, 8th edition, 2005., 961; al-Fīrūzābādī, Muḥammad Ibn-Ya‘qūb, *Tāj al-‘arūs min jawāhir al-Qāmūs*, n.p.: Dār al-hidāya, n.d., “a-ṣ-l”, XXVII, 447 and “f-r-”, XXI, 480; Ibn Manzūr, Muhammad ibn Mukarram, *Lisān al-‘Arab*, Bayrūt: Dār Ṣādir, 3rd edition, 1996., “a-ṣ-l”, XI, 16 and “f-r-”, VIII, 246.

<sup>119</sup> al-Jāḥiẓ, *Rasā’il*, I, 314. This description will be analyzed below in this section.

are secondary, but that are not necessarily based on the primary entities. In the second context, *uṣūl* can be translated as fundamentals or essentials, and *furūʿ* as subordinates and details. For example, al-Māturīdī explains *uṣūl al-dīn* through the categories of belief, the kinds of rituals, the rulings on certain punishments and rights, and good ethics. According to his account, the Quran explains these *uṣūl* that are primary and general, while the prophet explains other kinds of details that are *furūʿ*.<sup>120</sup> Both contexts might implicitly entail the claim of significance; however, sometimes the term *uṣūl* might refer only to significant data in the sense of priorities, without implying a relationship of reliance whatsoever or vice versa. Be that as it may, one thing is common for all these nuances in using these two words: the conviction that *uṣūl* and *furūʿ* should be in accordance with each other. If there is a reliance relationship between *uṣūl* and *furūʿ*, *furūʿ* should not contradict the *uṣūl*; and if there is a sequential relationship, *furūʿ* should not precede *uṣūl*. However, I argue that through a process that Pierre Hadot calls creative misunderstandings and misrepresentations, scholars confused the ideas of a reliance relationship between *uṣūl* and *furūʿ* with the idea of a sequential relationship throughout the early development of Islamic intellectual history. This resulted in looking for an assumed dependence between those things that are deemed primary and those that are secondary, although they may not have that kind of dependence.<sup>121</sup> The efforts to represent *fiqh* and *kalām* as having such a relationship can be explained in the same way. In the remaining part of this section, I trace the usage of the term *uṣūl* in diverse

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<sup>120</sup> al-Māturīdī, Muḥammad ibn Muḥammad, *Taʿwīlāt Ahl al-Sunnah: Tafsīr al-Māturīdī*, edited by Majdī Muḥammad Surūr Bāsallūm. Bayrūt: Dār al-Kutub al-ʿIlmīyah, 2005., VI, 555.

<sup>121</sup> Hadot, Pierre, *Philosophy As a Way of Life: Spiritual Exercises from Socrates to Foucault*, edited by Arnold I. Davidson and translated by Michael Chase. Malden, MA: Blackwell, 1995.

intellectual traditions of Islam during the gap period.

**a. Uṣūl al-Dīn**

Now, I turn to the conceptual history of uṣūl in the intellectual disciplines of Islam. The word uṣūl in relation to religious sciences was used in four main phrases during the gap period, highlighting either a type of relationship based on dependence, or one based on sequence. First, the phrase uṣūl al-dīn was used in multiple contexts. It was used in the sense of *multiple primary and general topics of religion*. As pointed out earlier, al-Māturīdī uses this concept when he mentions an interpretation of the verse “This book was sent down for explaining everything (*tibyānan li kulli shay’in*)” by explaining the generality of the meaning of the verse in terms of uṣūl al-dīn. In this usage, he is using uṣūl al-dīn to include belief (*īmān*), kinds of rituals (*anwā’ al-‘ibādāt*), the rulings on certain punishments and rights (*al-aḥkām ma’a al-ḥudūd wa-al-ḥuqūq*), and good ethics (*makārim al-akhlāq*). According to this interpretation, these topics of uṣūl al-dīn are explained by the Quran, while other topics outside of uṣūl al-dīn, however, are explained by the prophet.<sup>122</sup> Along similar lines, uṣūl al-dīn was used for those *significant primary topics of religion* that one should necessarily know about. Abū Ja‘far al-Naḥḥās (338/950), for instance, uses the phrase uṣūl al-dīn with this meaning when he defines islam and iman and where he mentions pilgrimage (*ḥajj*); these

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<sup>122</sup> al-Māturīdī, *Ta’wilāt ahl al-sunna*, VI, 555.

are things about which, according to him, one must not be ignorant.<sup>123</sup> The third sense in which the concept of *uṣūl al-dīn* has been deployed was as a synonym for *kalām*, in reference to *Islamic theology*. This sense of the concept is seen increasingly after the late third century after the hijra.<sup>124</sup> Al-Jaṣṣāṣ uses the same concept for religious beliefs about which disagreement is not acceptable, and which are the same as were expressed in the earlier revelations such as the Torah.<sup>125</sup> In this sense, *uṣūl al-dīn* meant the belief principles of religion, which are primary in contrast to the rulings (*aḥkām*), which are secondary. Belief principles were regarded as the most important topics of religion, but there was not necessarily a sort of reliance between belief (*i'tiqād*), which is more important, and practical matters of religion, such as *fiqh* for example.<sup>126</sup> The last and probably the most important meaning used for the concept of *uṣūl al-dīn* during the gap period is the most relevant to our discussion. This is the sense of *uṣūl al-dīn* as *the sources of religion*. For instance, al-Malaṭī (377/987), a Shāfi'ī jurist and contemporary of al-Jaṣṣāṣ, mentions *ijmā'* as one of the

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<sup>123</sup> al-Naḥḥās, Abū Ja'far Aḥmad ibn Muḥammad, *I'rāb al-Qur'ān*. edited by 'Abd al-Mun'im Ibrāhīm. Bayrūt: Dār al-Kutub al-'Ilmīyah, 2001., I, 164.; al-Naḥḥās, *al-Nāsikh wa-al-mansūkh*, 134. See also page 497 where al-Naḥḥās mentions the topic of religious identities such as Mushrik, Muslim, and Munāfiq among the topics of *uṣūl al-dīn*.

<sup>124</sup> The earliest examples can be located in the following sources. See al-Ṭaḥāwī, *Matn al-ṭaḥāwīyya*, 31;

<sup>125</sup> al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, II, 288, 314-15,

<sup>126</sup> However, later on, increasing use of the context of dependence for *uṣūl* and *furū'*, scholars tended to look for such dependence and a necessity of coherence between *kalām*, *uṣūl al-fiqh*, and *fiqh*. For example, one can recall the efforts of al-Ghazālī, who tried to reconcile Shāfi'ī *uṣūl al-fiqh* with Ash'arī *kalām* principles, and 'Alā al-Dīn al-Samarqandī, who tried to remove Mu'tazilī identity from the Ḥanafī school of transoxiana and replace it with the *kalām* of al-Mātūrīdī.

sources of religion (*aṣḥun min uṣūl al-dīn*).<sup>127</sup>

### **b. Uṣūl al-Tawḥīd**

The second use of the term uṣūl in relation to the religious sciences of Islam was *uṣūl al-tawḥīd*. This term was used in relation to theology. Despite the fact that the more common term for theology during that time was kalām, the belief principles of Islam were also identified by categories termed *‘ilm al-tawḥīd* or *ma‘rifat al-tawḥīd*. Based on this, a concept such as uṣūl al-tawḥīd can be identified in certain texts of the time. In his introduction to his work *Aḥkām al-qur‘ān*, Al-Jaṣṣāṣ uses this concept to refer to “significant topics of *ma‘rifat al-tawḥīd* that everyone should know”. Unfortunately, although the main text of this work is available, there are no known extant texts of his introduction.<sup>128</sup> Before al-Jaṣṣāṣ, al-Qāsim b. Ibrāhīm al-Rassī devoted a treatise to *Uṣūl al-‘adl wa-al-tawḥīd*, in which he uses the concept of uṣūl to refer to the agreed upon components of the sources of truth. According to him, ‘aql, kitāb, and the reports from the prophet have an aspect of convergence through *ijmā‘* that constitutes uṣūl, and a divergent part, constituting of *furū‘* which should be regulated by uṣūl. In other words, al-Qāsim b. Ibrāhīm argues that *ijmā‘* must be the litmus test to distinguish primary components from secondary components. The primary components are those matters of agreement upon which *ijmā‘* occurred.<sup>129</sup> This distinction between uṣūl and *furū‘* and the claim of evaluating *furū‘* based on uṣūl is the most crucial

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<sup>127</sup> al-Malaṭī, *al-Tanbīh*, I, 30.

<sup>128</sup> al-Jaṣṣāṣ, Aḥmad ibn ‘Alī, *Aḥkām al-Qur‘ān*, Bayrūt: Dār Iḥyā’ al-Turāth al-‘Arabī, 1985., I, 5.

<sup>129</sup> al-Qāsim b. Ibrāhīm, *Majmū‘*, I, 631. For the analysis of his theory of sources, see the second section below

factor for understanding the origins of the concept of *uṣūl* and why it became the name of the science of *uṣūl al-fiqh*. This idea was circulating in the late second and early third centuries as an important proposal of reason-based theologians and scholars for establishing normativity and minimizing disagreements as opposed to the proposal of ahl al-ḥadīth that argues for independent authority of the transmitted reports of reliable narrators over all other sources.

### c. *Uṣūl al-Futya/Uṣūl al-Fiqh*

Thirdly, the term *uṣūl* was used in relation to *fiqh* in the form of *uṣūl al-fiqh* or *uṣūl al-futya* referring to the fundamental topics of *fiqh* such as prayer and alms giving (*zakāt*), or to certain common and distinct aspects and/or maxims among these rulings. Ibn al-Nadīm, for instance, uses *uṣūl al-fiqh* to refer to certain topics of *fiqh* when he attributes certain texts to scholars.<sup>130</sup> Abū Yūsuf uses this phrase together after mentioning ablution (*wuḍūʿ*) and sitting in prayer (*tashahhud*) in the sense of well-known topics of *fiqh* and al-Shāfiʿī cites Abū Yūsuf in his *al-Umm*.<sup>131</sup> The Mālikī scholar Muḥammad b. al-Ḥārith al-Khushanī (361/971) wrote a book with the title “*uṣūl al-futya fī fiqh ‘alā madhhab Mālik*” in which he tries to show common and differing aspects within certain topics in *fiqh*, a pursuit which later

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<sup>130</sup> For example, he mentions a book of punishments and contracts in *uṣūl al-fiqh* “*kitāb al-ḥudūd wa-al-‘uqūd fī uṣūl al-fiqh*” see Ibn al-Nadīm, *al-Fihrist*, 289.

<sup>131</sup> See Abū Yūsuf Yaʿqūb b. Ibrāhīm al-Anṣārī, *al-Radd ‘alā siyar al-Awzāʿī*, edited by Abū al-Wafā al-Afgānī. [al-Qāhira]: Lajnat Ihyāʾ al-Maʿārif al-Nuʿmāniyya. 1938., 21.; al-Shāfiʿī, Muḥammad ibn Idrīs, *al-Umm*, Beirut: Dār al-Maʿrifa, 1990., VII, 356.

became a distinct genre called *furūq* or *al-ashbāh wa-al-naẓā'ir*.<sup>132</sup> Even though these uses of *uṣūl* in relation to *fiqh* were not referring to “theoretical discussions on the sources of *fiqh*”, they did entail the general approach of reason-based scholars in distinguishing primary components from the secondary ones and the relation of dependence between them. Also, it should be mentioned that al-Jāḥiẓ’s lost work *Kitāb uṣūl al-futyā wa-al-aḥkām* did include certain main topics of *uṣūl al-fiqh* such as the direct causes of disagreements in the details of *fiqh*. The contribution of al-Jāḥiẓ to the development of the concept of *uṣūl* will be analyzed below.

#### ***d. Uṣūl al-Sunna***

The last use of *uṣūl* in the religious sciences of Islam during the gap period was *uṣūl al-sunna*. The term *sunna* was probably one of the main multivalent terms of the time that underwent different stages and was fixed with the authority of the prophet in religion and the reports representing this authority. The term *uṣūl al-sunna*, therefore, was used by the traditionalists of the gap period. However, this use, as opposed to what one might suppose, was also unrelated to the later use of *uṣūl al-ḥadīth* which means the science dealing with the methods and principles of *ḥadīth* criticism. *Uṣūl al-sunna* appears to have been used by the traditionalists in the sense of theoretical principles of religion combined with topics related to belief that are filtered through the normativity apprehended via chained reports. This sense was an alternative to the use of *uṣūl al-dīn* and *uṣūl al-tawḥīd* by their adversaries, who were

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<sup>132</sup> al-Khushanī, Muḥammad ibn al-Ḥārith, *Uṣūl al-futyā fī al-fiqh ‘alā madhhab al-Imām Mālik*, [Tripoli, Libya]: al-Dār al-‘Arabīyah lil-Kitāb: al-Mu’assasah al-Waṭanīyah li-al-Kitāb, 1985.

mostly Mu‘tazila and Murji’a. The first known work with a title using the phrase *uṣūl al-sunna* is attributed to Abū Bakr al-Ḥumaydī (219/834), who was known as the pupil of Sufyān b. Uyayna and the teacher of al-Bukhārī.<sup>133</sup> In his treatise, al-Ḥumaydī covers the following topics: belief (*īmān*) in predestination (*qadar*), increase and decrease in belief, respect for all of the companions, the nature of the Quran as the word of God, the vision of God in the hereafter, the proof of the attributes of God, the difference between ahl al-sunna and al-khawārij on the excommunication of a major sinner, the pillars of Islam and the situation of abandoning them, and theological opinions of Sufyān b. Uyayna on the nature of the Quran and belief. Based on its content and the fact that this treatise follows al-Ḥumaydī’s *al-Musnad*, it is clear that by *uṣūl al-sunna* al-Ḥumaydī refers to “the most significant topics of belief thorough the lens of transmitted reports.”

The second work on *uṣūl al-sunna* is attributed to the famous traditionalist Aḥmad b. Ḥanbal. Even though he does not provide a definition for the term, the components in his description of *uṣūl al-sunna* clearly refer to the main theoretical principles in religion according to ahl al-ḥadīth, according to his understanding. Aḥmad b. Ḥanbal states that “according to us, the principles of the sunna (*uṣūl al-sunna*) are:

- Adhering to the practice and the way of the companions of the prophet and following them.
- Abstaining from innovation (*bid‘a*) which is aberration (*ḍalāla*), and from debating

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<sup>133</sup> al-Ḥumaydī, Abū Bakr ‘Abd Allāh ibn al-Zubayr. *Uṣūl al-Sunnah*. edited by Mash‘al Muḥammad al-Ḥaddādī. Kuwait: Maktabat Ibn Athīr, 1997.



in the matters of religion.

- The sunna that entails the signs of the Quran explains the Quran
- There is no *qiyās* in sunna as it cannot be used a source of analogy, [since] there is no role to reason, or personal desire, because it [sunna] is just something to be obeyed and for which personal desire should be put aside.
- It is from the necessary sunna to believe in destination (*qadar*) both its evil and good and to confirm the reports about it. If one does not accept or believe all these reports, one does not deserve to be associated with sunna.
- This belief should be without asking why and how. And confirming belief-related reports is enough for those who do not know the explanation of reports and cannot grasp them. They are only obliged to confirm these reports such as those about predestination or vision of God (*ru'yat Allah*).
- One cannot reject even a letter of a report as long as it is transmitted by reliable narrators, regardless of the text of the report being appalling.
- It is condemned and prohibited to debate or to learn dialectics of *kalām* for these topics (predestination, the vision of God, and the Quran).
- One cannot be from ahl al-sunna unless one believes in reports and refrains from dialectics.”<sup>134</sup>

This quotation clearly indicates that what Ahmad b. Ḥanbal meant by *uṣūl al-sunna* was not about *ḥadīth* criticism and not limited to the realm of belief; rather, it was used to

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<sup>134</sup> Aḥmad b. Ḥanbal, *Uṣūl al-sunna*, 14-17.

refer to theoretical principles of religion based upon the acceptance of transmitted reports as the overarching principle. It is a known fact that the Mu‘tazila named themselves *ahl al-tawhīd wa-al-‘adl* and ahl al-ḥadīth also referred themselves as *ahl al-sunna*, as well. It should not be a coincidence that these two concepts were also the most salient aspects of religion according to these groups respectively. It seems to have been one of the few agreements between the two camps that the realm of faith is more significant than other components of religion to the extent that in this field believers should not disagree. This is why we see such emphasis on belief-related topics. Ibn Qutayba (276/889), a well-known member of ahl al-ḥadīth, articulates this clearly by emphasizing that “fiqh is a field in which disagreements are permissible, but the disagreements of ahl al-kalām fall into the realm of belief (*tawhīd*), the attributes of God (*ṣifāt*), and alike about which even a prophet would not know anything without revelation.”<sup>135</sup>

Ibn Baṭṭa al-‘Ukbarī (387/997), a Ḥanbalī contemporary of al-Jaṣṣāṣ, wrote a book known by its abbreviated title *al-Ibāna al-sughrā*. However, the full title is *al-Sharḥ wa-al-ibāna ‘ala uṣūl al-sunna wa-al-diyāna*.<sup>136</sup> Ibn Baṭṭa explains in his introduction to the book that his reason for writing it is the increase of disagreements based on predilections and innovations and the need for adherence to sunna, as represented by transmitted reports, to

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<sup>135</sup> Ibn Qutayba, *Ta’wīl mukhtalaf al-ḥadīth*, 63.

<sup>136</sup> Ibn Baṭṭa, ‘Ubayd Allah al-‘Ukbarī. *Kitāb al-sharḥ wa-al-ibāna ‘alā uṣūl al-sunna wa-al-diyāna wa mujānabat al-mukhālifīn wa mubāyanat ahl al-ahwā’ al-māriqīn*. Riyāḍ: Dār al-amr al-awwal li-al-nashr wa-al-tawzī‘, 1433/2012.

prevent these disagreements.<sup>137</sup> He also describes the content of the work, in which, as he hints by using the term *uṣūl* in the title, he identifies the agreed upon (*ijmā‘ al-a‘imma*) topics that every Muslim necessarily has to know about and follow in order to be considered belonging to ahl al-sunna. After introducing the necessity of following the sunna that is embodied in reports, Ibn Baṭṭa first presents belief (*kalām*) topics and then ethico-legal (*fiqh* and *adab*) topics with a sub-section beginning with the phrase “it is from sunna that” (*min al-sunna*). He ends the book with a section dealing with the things that are *bid‘a* (innovation). Ibn Baṭṭa uses sunna as the opposite of *bid‘a* throughout the work.

Ibn Abī Zamanayn (399/1008), a late Andalusian-Mālikī contemporary of al-Jaṣṣāṣ, wrote the last known work with the phrase *uṣūl al-sunna* in its title during the gap period.<sup>138</sup> This work examines the belief-related topics and the problem of *imāma* from the perspective of ahl al-ḥadīth based on reports.

Among these four uses of the concept of *uṣūl* in the intellectual disciplines of Islam, the use closest to the topics of later *uṣūl al-fiqh* was obviously in the sense of sources of religion, and is related to the concepts of *uṣūl al-dīn* and *uṣūl al-tawḥīd*. According to this use, the *uṣūl* constitute the foundations of religion and the sources one should consult to verify anything subordinate in religion (*furū‘*). It was with this meaning that *uṣūl al-fiqh* emerged as a distinct topic of study. Together with *uṣūl*, *ḥujja* (pl. *ḥujaj*), *dalīl* (pl. *adilla*), *burhān* (pl.

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<sup>137</sup> Ibn Baṭṭa, *al-Ibāna ‘alā uṣūl al-sunna*, 22, 23.

<sup>138</sup> Ibn Abī Zamanayn, Muḥammad b. ‘Abd Allah, *Uṣūl al-sunna*, “*Riyāḍ al-janna bi takhrīj uṣūl al-sunna*”, edited by ‘Abd Allah b. Muhammad, Madīna: Maktabat al-ghurabā’ al-athariyya, 1<sup>st</sup> edition, 1415/1994.

*barāhīn*), and *tarīq* (pl. *ṭuruq*) were also used to refer to these sources both during and after the gap period. The fourth section will identify how these terms were used during the gap period and why the term *uṣūl* became the most prevalent among them. In the following section, however, I will trace the transition from *uṣūl* as a concept encompassing sources of normativity to *uṣūl al-fiqh* as a field of religious science. This transition was manifested in the discussions surrounding the dichotomy of *aṣl* (fundamental) versus *far‘* (subordinate).

### 3. Transition from Uṣūl to Uṣūl al-Fiqh

One of the earliest sources that mention this dichotomy of *aṣl* versus *far‘* is Abū Yūsuf’s *Kitāb al-kharāj*. Abū Yūsuf gives two example cases: whether one eats from the crops that his field produced in an amount reaching five *wasāq* (an amount equivalent to 300 *sa‘*, which is equal to about 850 kilograms), or a thief steals that amount from the crops, one still is obliged to pay one tenth of the remaining part as *zakāt* if the crops are watered naturally, or half of that as *zakāt* if the owner made an extra effort or paid for watering. Abū Yūsuf concludes that “these are the fundamental (*uṣūl*) cases and subordinate (*furū‘*) cases are to be solved based on them”<sup>139</sup>

In al-Shāfi‘ī’s language, *uṣūl* was not a common word and *uṣūl al-fiqh* as a phrase does not appear even once, except when he cites Abū Yūsuf, which was mentioned above. The dichotomy between *uṣūl* and *furū‘* appears in *al-Risāla* only when al-Shāfi‘ī defines

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<sup>139</sup> Abū Yūsuf, Ya‘qūb b. Ibrāhīm al-Anṣārī, *Kitāb al-kharāj*, edited by Ṭāhā ‘Abd al-Ra’ūf Sa‘d, and Sa‘d Ḥasan Muḥammad. [Cairo]: al-Maktabah al-Azharīyah lil-Turāth, 1999., 64.

*al-Bayān* as follows: “al-bayān is a noun that entails both joining fundamental meanings and disjoining subordinate meanings” [*ismun jāmi‘un li-ma‘āni mujtami‘a al-uṣūl wa mutasha‘‘iba al-furū‘*].<sup>140</sup>

One of the most relevant examples of this dichotomy between *aṣl* and *far‘* and its relations with *uṣūl* and *fiqh* can be seen in the works of al-Jāhiz (255/869) who makes a distinction between the science of ruling (*‘ilm al-fatwā* i.e. *fiqh*) and the science of theology (*‘ilm al-kalām*). According to al-Jāhiz, *kalām* is fundamental (*aṣl*) and *fiqh* is subordinate (*far‘*). The theologians, he claims, learned this subordinate science as well, in order to combine *aṣl* and *far‘* together and out of caution, so that they could avoid any deficiency in the study of theology.<sup>141</sup>

Al-Jāhiz was an important scholar for the early development of the concept of *uṣūl al-fiqh*. According to the available data of this research, he was among the earliest persons who used the concept of *uṣūl* encompassing certain topics of *uṣūl al-fiqh* in his work *Kitāb uṣūl al-futyā wa-al-aḥkām*. He describes his work as a book “that collected divergent views on the principles of legal opinions (*uṣūl al-futyā*), which lead to differences in subordinate rulings (*furū‘*) and conflicting specific rulings (*aḥkām*)”<sup>142</sup> Unfortunately, the entire text of *Kitāb uṣūl al-futyā wa-al-aḥkām* has not yet been discovered; however, this quotation from the letter he wrote to Ibn Abī Du‘ād (240/854), the vizier of the time, suffices to prove three

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<sup>140</sup> al-Shāfi‘ī, *al-Risāla*, 21.

<sup>141</sup> al-Jāhiz, *Rasā‘il*, IV, 250.

<sup>142</sup> al-Jāhiz, *Rasā‘il*, I, 314. (‘indī kitābun jāmi‘un li-ikhtilāf al-nās fi-uṣūl al-futyā allatī ‘alayhā ikhtalafat al-furū‘ wa taḍāddat al-aḥkām)

significant facts. First, al-Jāhiz uses the concept of *uṣūl* in the sense of principles. Second, he identifies that subordinate rulings (*furūʿ*) and theoretical principles (*uṣūl*) have a direct relationship. Third, he argues that it was this relationship which was the cause of disagreements in the realm of *fatwā* (legal opinion) and *ḥukm* (legal valuation). The fourth and probably the most important fact is that al-Jāhiz claims that he collected the different approaches and opinions in *uṣūl al-futyā*, which means there had been enough discussions to be collected before al-Jāhiz wrote this book.

The preserved citations from al-Jāhiz's *Kitāb uṣūl al-futyā wa-al-aḥkām* in the later literature provide us sufficient data to show that certain topics of *uṣūl al-fiqh* were certainly discussed in the book, and one of the contributors to these topics was al-Jāhiz's teacher al-Nazzām, whose opinions are analyzed in the subsequent chapters. These topics included reliability of reports, the authority of *qiyās*, *ijmāʿ*, and the opinion of a companion.<sup>143</sup> However, it is not clear whether al-Jāhiz discusses these topics at the theoretical level; according to the preserved citations, he instead gives long quotations from al-Nazzām. It is unfortunate that very little of his own voice can be identified in the preserved citations from *Kitāb uṣūl al-futyā wa-al-aḥkām*.

It seems that during the fourth century after *hijra*, the phrase *uṣūl al-fiqh* was still being used by many in its second meaning, namely, those fundamental topics of *fiqh* upon which secondary rulings are based. Abū Jaʿfar al-Naḥḥās (338/950) mentions a *ḥadīth* on

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<sup>143</sup> al-Sharīf al-Murtaḍā, *al-Fuṣūl al-mukhtāra*, edited by al-Sayyid Nur al-Dīn al-Iṣbahānī et. al., n.p., 1993, 204-240.

stoning (*rajm*) as an aṣl of uṣūl al-fiqh.<sup>144</sup> Ibn Abī Zayd al-Qayrawānī (386/996) describes his famous treatise of fiqh as containing uṣūl al-fiqh.<sup>145</sup> Both scholars are using the term in the sense of certain significant evidence or rulings directly restricted to fiqh topics, rather than a theoretical discussion on the sources and methods of deriving rulings.

Abū al-Ḥasan al-Karkhī (340/951), the famous Ḥanafī scholar, is known for his contribution to the topics of uṣūl in the Ḥanafī school. His opinions are extensively cited in the later literature, especially in al-Jaṣṣās's *al-Fuṣūl* and Abū al-Ḥusayn al-Baṣrī's *al-Mu'tamad*. One treatise attributed to him has the title *al-Uṣūl*. However, this treatise includes legal maxims (*qawā'id*) of the Ḥanafī school, rather than theoretical discussions of uṣūl al-fiqh.<sup>146</sup> This demonstrates that the concept of uṣūl was used in the sense of maxims and was not solidified as uṣūl al-fiqh even in the language of a well-known uṣūlī scholar of the first half of the fourth hijrī century.

The shift from a more general discussion of sources of normativity to the restricted understanding of uṣūl al-fiqh as a religious science seems to have occurred in the fourth/tenth century. In addition to al-Jaṣṣās, for instance, in his celebrated work *Mafatīḥ al-'ulūm*, written in the same century, al-Khawārizmī (387/997) defines uṣūl al-fiqh as the sources of

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<sup>144</sup> al-Naḥḥās, Abū Ja'far, *al-Nāsikh wa-al-mansūkh*, edited by Muḥammad 'Abd al-Salām Muḥammad. Kuwait: Maktabat al-falāḥ. 1408/1988., 308.

<sup>145</sup> Ibn Abī Zayd al-Qayrawānī, 'Abd Allāh ibn 'Abd al-Raḥmān, *Matn al-Risāla*, edited by Maḥmūd Maṭrajī. Beirut: Dar al-Fikr, 1994., 170

<sup>146</sup> This treatise is published multiple times. See for example al-Karkhī, 'Ubayd Allāh ibn al-Ḥusayn. *Uṣūl*, in *al-Aqwāl al-uṣūlīyah*. [Saudi Arabia]: Ḥ. Kh. al-Jubūrī, 1989., 139-150.

fiqh, such as the kitāb, sunna, and ijma‘.<sup>147</sup> However, Abū al-Ḥusayn al-Baṣrī (436/1044) provides a clearer explanation of this shift. He first remarks that he will discern the topics of uṣūl al-fiqh according to the jurists (*fuqahā’*) from the topics of kalām. This was opposed to the use of the term by his teacher Qāḍī ‘Abd al-Jabbār, who frequently included the topics of kalām in his *‘Umad*. Again he carefully defines fiqh in the technical vocabulary of the jurists as “the body of sciences on the valuations of sharī‘a (*jumla min al-‘ulūm bi aḥkām shar‘iyya*).” His analysis of uṣūl and uṣūl al-fiqh is more important for our discussion:

As for uṣūl, it literally means what another thing is based upon and what it is extended from. As regards uṣūl al-fiqh, it literally means the things that fiqh branches out into such as tawḥīd, ‘adl, proofs of fiqh; however, in the language of jurists it means the reasoning on the sources of fiqh (*turuq al-fiqh* [as *dalīl* and *amāra*]) in a theoretical manner (*‘alā tarīq al-ijmāl*), regarding how to infer rulings from them (*istidlāl*) and the subordinate tools needed for this inference. If it is asked ‘why did you restrict [*uṣūl*] to what you said and did not include other things [that fiqh is established upon]?’ we would respond by saying that there is no doubt that in the language of jurists uṣūl means the theoretical sources (*al-turuq al-mujmala*) and how to infer rulings from them, because they do not include other things among the uṣūl for fiqh even if those can generate fiqh such as [the principles of] the oneness of God (*tawḥīd*), justice (*al-‘adl*), prophethood (*al-nubuwwāt*), as well as

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<sup>147</sup> al-Khawārazmī, Muḥammad Ibn-Aḥmad, *Mafātīḥ al-‘ulūm*, edited by Ibrāhīm al-Ibyārī. Bairūt: Dār al-Kitāb al-‘Arabī, 1984., 21.



the particular proofs of fiqh (*adillat al-fiqh al-mufaṣṣala*).<sup>148</sup>

It seems that the jurists of the fourth/tenth century turned all these theoretical discussions about the sources of authority into an independent field of religious science for their specific purposes and tried to define this newly emerged religious science through their own conceptual restrictions. Even theologians who had been working with the same theoretical topics had to come to terms with these restrictions, and came to identify this field with fiqh. However, discursive topics of *uṣūl al-fiqh* mixed with *kalām*, *tafsīr*, *ḥadīth*, *mantiq*, and language remained in the literature, and a constant critique of some scholars who tried to restrict *uṣūl al-fiqh* to the realm of fiqh can be observed throughout history. The following section will complete the discussion of the conceptual development of *uṣūl* and *uṣūl al-fiqh* with an investigation of the development of the theory of sources under the rubric of *uṣūl*.

#### **4. The Development of the Theory of Sources**

Another important factor in revealing the early conceptual development of *uṣūl al-fiqh* is to trace back the formation of the theory of sources. By the theory of sources, I mean various sets of sources suggested as the sources of religion by different scholars. These sources were fixed later in *Sunnī* legal theory with four fundamental sources and other secondary sources in varying numbers. The overarching idea of identifying authoritative sources for the claims of normative beliefs, rulings, and pieties paved the way for the

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<sup>148</sup> Abū al-Ḥusayn al-Baṣrī, *al-Mu'tamad*, I, 3-5. I translated *ijmāl* and *mujmal* with “theoretical”, because the literal meaning “general” does not fully cover what the author means.

scientific discipline of *uṣūl al-fiqh*. The significant part of this topic for our discussion in this chapter is that the scholars of the gap period referred to these sources with diverse concepts in the early stages of the gap period, but they increasingly adopted the concept of *uṣūl* for these sources in the later stages of the gap period. This section traces the attempts to identify various sources of authority throughout the gap period by revealing scholars' opinions during the period on the sources of religion. The chronological examination of these ideas will reveal both the transformation of ideas about sources of authority during the gap period, and also some of the diverse suggestions for authoritative sources which appeared during the gap period, before the sources were fixed to four in Sunnī legal theory.

Abū Hilāl al-‘Askarī (395/1005) mentions Wāṣil b. Aṭā’ (131/748) as the first person who said that “the truth (*al-ḥaqq*) is known through four ways (*wujūh*): The preaching kitāb, the agreed upon report, the evidence of reason, and *ijmā‘*.”<sup>149</sup> He is also reported to have been the first person who divided reports into categories such as *ṣaḥīḥ* and *fāsid*, and *khāṣṣ* and *‘āmm*.

Al-Shāfi‘ī uses the concept *jihat al-‘ilm* referring to the sources that discern ḥalāl from ḥarām. According to him, *al-khabar* (transmission) in the kitāb and sunna, *ijmā‘*, and *qiyās* constitute *‘ilm*, and these are used to claim the permissibility or prohibition of something.<sup>150</sup> Even though al-Shāfi‘ī did mention *qiyās* and *ijmā‘* among the four ways through which the knowledge of *ḥalāl* (permissible) and *ḥarām* (prohibited) can be derived,

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<sup>149</sup> al-‘Askarī, Abū Hilāl, *al-Awā‘il*, edited by Muḥammad al-Sayyid Wakīl. Ṭanṭā: Dār al-Bashīr, 1987., 374.

<sup>150</sup> al-Shāfi‘ī, *al-Riṣāla*, 39.

it took well over three more centuries to solidify the four fundamental sources of law in Sunnī legal theory as the kitāb, the sunna, ijmā, and qiyās.

Al-Jāhiz mentions that “an agreement of a local place does not establish *halāl* (permission) or *ḥarām* (prohibition). Permission or prohibition can be known only through the preaching kitāb (*al-kitāb al-nāfiq*), agreed upon sunna (*al-sunna al-mujma‘ ‘alayha*), correct reasoning (*al-‘uqūl al-ṣaḥīha*) and accurate analogies (*al-maqāyīs al-muṣībā*).”<sup>151</sup> Al-Jāhiz mentions these sources in a slightly different manner when he argues for the permissibility of eating uromastix (a dabb lizard): “A thing cannot be prohibited (*al-shay‘u lā yuḥarram illā min jihatīn*) unless through the way of the kitāb, or ijmā‘, or rational evidence (*ḥujjat ‘aqlīn*), or analogy (*jihat al-qiyās*) to the original case (*aṣl*) that exists the kitāb or ijmā‘.”<sup>152</sup> Elsewhere in *Kitāb al-ḥayawān*, he gives a similar list among the sources that he relies on for his discussion of the permissibility of eating elephant, including the “preaching kitāb (Quran), true report (*al-khabar al-ṣādiq*), known reports (*al-āthār al-ma‘rūfa*), parables (*al-amthāl al-maḍrūba*), and correct experiences (*al-tajārub al-ṣaḥīha*).”<sup>153</sup>

Al-Ḥārith al-Muḥāsibī (243/857) points out certain sources several times in his extant works. Even though he usually does not use a specific term, he considers them the authoritative sources on which one should rely and with which one should not contradict. He

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<sup>151</sup> al-Jāhiz, *Rasāil*, IV, 276.

<sup>152</sup> al-Jāhiz, *al-Ḥayawān*, VI, 360.

<sup>153</sup> al-Jāhiz, *al-Ḥayawān*, VII, 45.

denotes the words *hujja* and *aṣl* to refer to these sources in two instances. He once lists out the sources of his evidence as “the kitāb, the sunna, ijmā‘ al-umma or apparent derivation or qiyās for the matters in which the application of qiyās is permissible when there is no bayān in the text.”<sup>154</sup> He also claims that his adversaries (i.e. the Mu‘tazilīs) are in contradiction with the following three sources “the kitāb, the sunna and ijmā‘ of the ages from the first generations and later generations.”<sup>155</sup> Elsewhere al-Ḥārith al-Muḥāsibī criticizes an opinion contrary to “*the kitāb*, and *the sunna*, and the practice of the great *companions* and of all the *successors* who came after them.”<sup>156</sup> He also indicates that when one cannot find a solution for something “one should go back to the kitāb and sunna and those who are sincere. If one still cannot reveal the solutions, one should take the opinion of someone whom one trusts regarding his piety and reason.”<sup>157</sup> In all these instances al-Muḥāsibī does not denote a specific term for the sources, he just lists them out and states that one should not contradict them.

Al-Ḥārith al-Muḥāsibī indicates the role of the companions and the successors as follows: “This is our evidence (*hujja*) from the kitāb, and the sunna, and from the practice of the great companions of the prophet. The successors whom we are supposed to imitate and to derive from also were like that. They were those whom Allah ordained that we obey in his

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<sup>154</sup> al-Ḥārith al-Muḥāsibī, *Māhiyat al-‘aql*, 235.

<sup>155</sup> al-Ḥārith al-Muḥāsibī, *Fahm al-Qur’ān*, 385, 389, 390.

<sup>156</sup> al-Ḥārith al-Muḥāsibī, *al-Makāsib*, 41 and 46.

<sup>157</sup> al-Ḥārith al-Muḥāsibī, *Risālat al-Mustarshidīn*, 84.

verse ‘Obey Allah and his messenger and ulu’l-amr from you.’<sup>158</sup> They were the companions of the prophet Muḥammad and those who came after them who were sincere and eminent scholars.”<sup>159</sup> Elsewhere al-Ḥārith al-Muḥāsibī uses the term *aṣl* when he narrates from Abū al-‘Āliya al-Riyāhī (90/708) that “the root of true path (*aṣl al-istiḳāma*) is in three things: the kitāb, the sunna, and sticking to the jamā‘a”<sup>160</sup>

Abu Ubayd al-Qasim b. Sallam (224/838-39) is reported to have used the term *uṣūl* referring to the sources of law in the following statement:

The sources of legal rulings (*uṣūl al-aḥkām*) that a qāḍī should not contradict by following other sources are: the kitāb, the sunna, and what the great jurists and righteous people have adjudged based on consensus and *ijtihād*. There is no fourth source. *Ijtiḥād*, according to us, means choosing from these opinions if they differ or conflict.<sup>161</sup>

The Zaydī scholar al-Qāsim b. Ibrāhīm al-Rassī (246/860) mentions four fundamental sources (*ḥujja / hujaj*) as *al-‘aql* for the knowledge of ma‘būd (the worshipped one, i.e. God) and through ‘aql following two sources can be known, *al-kitāb* for the knowledge of ta‘abbud (the belief of worship), *al-rasūl* for the knowledge of ‘ibāda (the ritual of worship), and *al-ijmā‘* comprising all three previous sources. He assigns *aṣl* and *far‘* for the first three

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<sup>158</sup> The Quran, 4:59.

<sup>159</sup> al-Ḥārith al-Muḥāsibī, *al-Makāsib*, 38.

<sup>160</sup> al-Ḥārith al-Muḥāsibī, *Risālat al-Mustarshidīn*, 128.

<sup>161</sup> al-Qāḍī al-Nu‘mān, *Ikhtilāf*, 213.

sources in the sense of having primary and secondary components decided by *ijmāʿ*.<sup>162</sup>

Another Zaydī Imām Yaḥyā b. al-Ḥusayn al-Hādī ilā al-Ḥaqq (298/911) uses again the word *wajh* (way) for the source and *haqq* (truth) for the purpose to be derived from the source: “Know that the truth can be known only through three ways: the preaching book (*kitabun nātiq*), the consensus of the umma about what they transmit from the sunna of the prophet who brought it from God, and the thing that reason (*ʿaql/ʿuqūl*) explicates, confirms, infers its truth and demonstrates its right.”<sup>163</sup>

Al-Qādī al-Nuʿmān states the following concerning the sources of rulings: “...for this matter, we did not find in the book of Allah any prohibition, and we took the problem to the sunna of the prophet. When we did not find any report among people, we took it to the ones whom Allah ordained us to follow. Then we found that Muḥammad al-Bāqir (115/732) prohibited it.”<sup>164</sup>

Al-Qādī al-Nuʿmān narrates from Muḥammad b. Dāwūd (297/910) that he mentioned: “For me or any scholar, it is not right to say that something is permissible or prohibited or to give one’s right to another unless he finds evidence in the texts of the kitāb, or the sunna of the prophet, or *ijmāʿ*, or a binding report... A mufti should not issue a fatwa unless he knows the kitāb with its abrogating and abrogated texts, general and specific texts,

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<sup>162</sup> al-Qāsim b. Ibrāhīm, *Majmūʿ*, I, 631.

<sup>163</sup> al-Hādī ilā al-Ḥaqq, Yaḥyā ibn al-Ḥusayn, *al-Majmūʿah al-fākhirah: kitāb fī-hi majmūʿ min kutub al-Imām al-Hādī*, [Yemen]: Maktabat al-Yaman al-Kubrā, 1980., 684.

<sup>164</sup> al-Qādī al-Nuʿmān, *Ikhtilāf*, 162.

obligatory and recommended rulings; also he needs to be knowledgeable of the sunan [rulings] of the prophet and the opinions of the earlier and present scholars (ahl al-‘ilm); and of Arabic language to be able to identify similitudes and to comprehend qiyās. ”<sup>165</sup>

Abū al-‘Abbās b. Al-Qāṣ is reported to have made the following statement: “the sources (*al-uṣūl*) are seven: intuition (*al-ḥiss*), reason (*al-‘aql*), the kitāb, the sunna, ijmā‘, exemplary comparison (*al-‘ibra*) and language (*al-lughā*).<sup>166</sup>

From the Mālikīs, Abū ‘Ubayd al-Jubayrī (378/988) in his *al-Tawassut*, which was written upon the request of al-Hakam al-Mustanṣir (ruled between 350-366), made the following statement: “If there is no text in the kitāb, sunna, the agreement of the umma, and the consensus of Madīna, *al-‘ibra* should be deployed, which is comparing the new case [to the old case] due to [the common effective cause/aspect] that determined the ruling of the old case”.<sup>167</sup>

## B. A Comparison between *al-Risāla* and *al-Fuṣūl*

A comparison between the first extant work in uṣūl al-fiqh, al-Shāfi‘ī’s *al-Risāla*, and the second extant work, al-Jaṣṣāṣ’s *al-Fuṣūl fī-al-uṣūl* is necessary for our study focusing on the gap between these two works. Such a comparison will give us a useful starting point for the larger research on what exactly happened during this period in

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<sup>165</sup> al-Qāḍī al-Nu‘mān, *Ikhtilāf*, 172-73.

<sup>166</sup> al-Sam‘ānī, *Qawāṭi‘ al-adilla*, I, 22.

<sup>167</sup> al-Jubayrī, *al-Tawassuṭ* in “*al-Muqaddima*”, 212.

terms of which topics continued to be discussed and which new topics had been added. Comparing *al-Risāla* and *al-Fuṣūl* could be an independent dissertation topic itself. Therefore, this comparison will be relatively short, and will focus on the most relevant aspects to the broader topic of this dissertation.

In this chapter, we will first examine the categorization and topics of the two works, then look at the methods that they follow. However, the main purpose of this examination will be to discuss the content of these works pertaining to the major theoretical debates of the time, which are on hermeneutical tools, i.e. general (*amm*) and specific (*khass*) texts and the theory of naskh; Qiyās, ijtihād and istihsan; prophetic exemplar (*sunna*) in particular and reports in general; and finally the theory of consensus (*ijmā'*). In conclusion, we will try to relate the results of this comparison to our broader research.

### **1. Categorization and Topics**

Al-Shāfi'ī's *al-Risāla* consists of 3 parts and is divided into 55 chapters.<sup>168</sup> The classification of the chapters in *al-Risāla* differs than the standards later, mature works in the literature of uṣūl al-fiqh. Al-Shāfi'ī begins his treatise with *al-bayān* and its classifications [1-6]. Then he deals with general and specific texts (*'āmm-khāṣṣ*) and the function of sunna in the specification of general Quranic texts [7-11]. The following

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<sup>168</sup> Muhammad b. Idris al-Shafi'i, *al-Risāla*, Ed. by Ahmad Muhammad Shakir (Beirut: Dar al-Kutub al-Ilmiyya, n.d.)



three chapters are devoted to the authority of sunna as an independent and explanatory source [12-14]. Shāfi‘ī then discusses abrogation (*naskh*), sample cases and the function of sunna in abrogation [15-18]. In the last chapters of the first part and first two chapters of the second part [19-28] al-Shāfi‘ī examines *naṣṣ* (manifest) texts in the Quran and sunna, and *jumal/mujmal* (unelaborated) texts and the function of sunna in explaining them. After discussing various hermeneutic problems in ḥadīth including abrogation within ḥadīths, and his methodology in interpreting seemingly contradicting ḥadīths and example cases, [29-43] Shāfi‘ī presents his epistemology [44] as an introduction to his discussion of the value of solitary reports, which occurs in the following chapter. The examination of solitary reports (*khabar al-wāḥid*) constitutes the longest topic of the treatise. In it al-Shāfi‘ī defends the authority of *khabar al-wāḥid* and his conditions for accepting a certain report in the form of theoretical debate with an interlocutor [45-46]. This is the last section with a title in the original manuscript; the following nine chapters were entitled by either the commentator of *al-Risāla*, Ibn Jamā‘a, or the editor, Ahmad Muhāmmad Shākir, based on the content of the chapters. After mentioning his critiques of the vaguely used concept of *ijmā‘* and his stance regarding it [47], al-Shāfi‘ī deals with *qiyās* and *ijtihād* in the following chapters [48-49] where he explains the authority of *qiyās* and equates *ijtihād* with *qiyās*. This is followed by the refutation of *istiḥsān* as a kind of *ijtihād* [50]. Following his discussion on *ijtihād*, al-Shāfi‘ī responds to his interlocutors’ questions regarding legal disagreements and how to approach them in three chapters along with sample cases [51-53] in which al-Shāfi‘ī divides disagreements into prohibited disagreements, where obvious evidence exists in the Quran and sunna; and permissible disagreements, where there is not such obvious evidence. Then, after

clarifying his point of view concerning the disagreements of the companions where he argues that one should not make an *ijtihād* outside of these disagreements [54], al-Shāfi‘ī ends his treatise with a discussion on the hierarchy of the four fundamental sources, *kitāb*, *sunna*, *ijmā‘* and *qiyās* [55].

Al-Jaṣṣāṣ’s *al-Fuṣūl fī-al-uṣūl* written approximately 150 years later consists of four parts and is divided into 105 chapters that have detailed subchapters and are longer than those of *al-Risāla*.<sup>169</sup> Al-Jaṣṣāṣ begins his work with the linguistic examination of the aspects of the Quranic text. He first discusses general and specific texts (*‘āmm and khāṣṣ*). Then he continues with the various ways of specifications, elaborated (*mufassar*) and unelaborated (*mujmal*) texts, real and metaphorical meanings, and definitive (*muḥkam*) and obscure (*mutashābih*) texts. In this part al-Jaṣṣāṣ also mentions more specific tools such as the function of the negation particle (*ḥarf al-naḥy*) and deals with several specific theoretical problems within the aforementioned topics that were, apparently, being discussed during his time [1-21]. The second part continues the discussion about texts, other kinds of classifications related to them and hermeneutic tools. Al-Jaṣṣāṣ next begins with the definition, classification and aspects of *al-bayān*, which was the core topic in *al-Risāla* [22-26]. Then he deals with the definitions and related theoretical problems related to command (*amr*) and prohibition (*nahy*) [27-33], which is followed by a detailed discussion of abrogation (*naskh*) and relevant problems

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<sup>169</sup> Abu Bakr al-Rāzī al-Jaṣṣāṣ, *al-Fuṣūl fī-al-usul*, Ed. by Ajil Jasim al-Nashami (Kuwait: Wizarat al-awqaf, 1985, 1988, 1994)

such as abrogation of the Quran by sunna which was also an important problem discussed in *al-Risāla* [34-44]. In the third part, after a brief discussion on the authority of the laws of earlier prophets [45], al-Jaṣṣāṣ presents a long examination on solitary reports (*akhbār al-āhad*) like al-Shāfi‘ī does in *al-Risāla*. We see more technical problems in accepting and classifying solitary reports, and a summary of the various approaches of the earlier scholars in al-Jaṣṣāṣ’s examination [46-58]. He then devotes four chapters [59-62] to the practices of the prophet, the classification of sunna as *farḍ* (obligation), *wājib* (requirement) and *nadb* (recommendation), and on the problem of whether the prophet engaged in *ijtihād*. After briefly mentioning the well-known problem of the value of things before revelation, which was also a theological problem [63], al-Jaṣṣāṣ goes on with his theory of *ijmā‘* with significant details on specific cases regarding *ijmā‘* and refutes several *ijmā‘* claims in the subsequent chapters [64-76]. After accepting and discussing the theory of imitating the opinion of companions [77], al-Jaṣṣāṣ champions reason (*naẓar*) over imitation (*taqlīd*) in general by confronting the Zāhirī Dawūd b. ‘Ali in the following chapter [78]. The third part ends with a discussion on the denier (*nāfi‘*) of a ruling (*ḥukm*) and debates whether he needs to provide evidence for his denial [79]. Apparently, this discussion addresses a method in legal theoretical debates. The last part of the book begins with the authority of *qiyās* and *ijtihād* in which al-Jaṣṣāṣ strongly criticizes Zāhiri arguments against *qiyās* and *ijtihād*. Then he continues with the classification and aspects of *qiyās* [80-95], which is followed by two chapters [96-97] on defending *istiḥsān* and its definition. After mentioning the specification of the effective causes of rulings (*‘ilal al-aḥkam*) in two chapters [98-99], al-Jaṣṣāṣ ends his manuscript with a discussion on the mujtahid’s status, conditions for

being a mujtahid and whether every ijtihād is correct [100-105].

This comparison on the topics of the two works shows us that the following major topics continued to constitute the main discussions within the discourse on legal theory:

- Hermeneutics of the Quran, especially ‘āmm (*general*) and khāṣṣ (*specific*) texts, specification of a general text, command and prohibition, elaborated and unelaborated texts, bayān, and abrogation (*naskh*).
- Sunna-ḥadīth and its function, solitary reports and the conditions to accept them.
- Qiyās, ijtihād and istiḥsān.
- Ijmā‘

In addition to the technical depth added to the topics above, al-Jaṣṣāṣ’s work includes the following new significant topics:

- Al-Shāfi‘ī’s discussion on naṣṣ and jumal is transformed to mufassar and mujmal.
- The topics on muḥkam and mutashābih.
- More detailed classification of aḥkām as farḍ, wājib and mandūb.
- The discussion of taqlīd and its refutation.
- The topic of the denial of a ḥukm.

## 2. Method

Al-Shāfi‘ī usually does not give the definition of a concept at the beginning of a topic; instead he clarifies his stance based on relevant examples from the Quran or sunna. Al-Jaṣṣāṣ usually begins with a definition; however, he also tends to base his discussion on examples. This type of example-based writing can be characterized as the method of the jurists (*fuqahā*) according to Ibn Khaldūn’s categorization of the genre of *uṣūl al-fiqh*.

Both al-Shāfi‘ī and al-Jaṣṣāṣ present their ideas through the use of dialectical debates with an interlocutor in their work; however, al-Shāfi‘ī uses this method more than al-Jaṣṣāṣ. Al-Jaṣṣāṣ usually clarifies his theoretical stance first in detail, and then engages in possible critiques against his points. Al-Shāfi‘ī uses this mode embedded with his theoretical opinions. Some of these debates can even be seen as hypothetical; however, most of them have clear evidence reflecting actual debates. This mode of writing in legal theory will be examined later in our research, as well as its significance in understanding the formation of *uṣūl al-fiqh*.

Al-Jaṣṣāṣ frequently cites earlier scholarship. ‘Isā b. Abān (221/836) and Abū Ḥasan al-Karkhī (340/952) are the authors he cites most frequently from the Ḥanafī school, and al-Jaṣṣāṣ refers to them by the term “*ashābunā*” (our fellow scholars). He

also responds to and criticizes earlier scholars including al-Shāfi‘ī himself.<sup>170</sup> Al-Shāfi‘ī does not mention any name; however, he presents his thoughts usually within a dialectical debate, in which his interlocutor seems to belong to ‘Irāqī/Kūfī circles. Al-Shāfi‘ī uses some general titles when he wants to support his opinion such as people of knowledge (*ahl al-‘ilm*).<sup>171</sup>

### 3. Content

Both works are described in relation to the “the meanings of the Quran” and the authoritative sources. According to a report at the beginning of *al-Risāla*, al-Shāfi‘ī wrote his treatise upon the request of Abd al-Rahmān b. Mahdī who asked him to write a book that explains: “the meanings of the Quran, the authority of akhbār and conditions to accept them, the authority of ijmā‘, and abrogating and abrogated texts from the Quran and sunna.” At the very beginning of his work, Al-Jaṣṣāṣ explicitly states that “uṣūl al-fiqh includes the knowledge of methods of deduction for the meanings of the Quran, extraction of its proofs, valuations of its texts and the functions of the Arabic language, linguistic nouns, and legal-religious (*shār‘ī*) phrases on it.”<sup>172</sup>

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<sup>170</sup> al-Jaṣṣāṣ rejects the claim that al-Shāfi‘ī was considered one of the linguistic scholars of his time. See al-Jaṣṣāṣ, *al-Fuṣūl*, I, 306.; Elsewhere he criticizes him in abrogation by referring to his treatise *al-Risāla*. See al-Jaṣṣāṣ, *al-Fuṣūl*, I, 399, 401, 402.; He also criticizes his theory of bayān. See al-Jaṣṣāṣ, *al-Fuṣūl*, II, 8-18.,

<sup>171</sup> al-Shāfi‘ī, *al-Risāla*, 60.

<sup>172</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 40.

**a. Hermeneutics of the Quran**

*i. 'Āmm-Khāṣṣ*

Excluding al-Shāfi'ī's preliminary description and categorization of al-bayān in the beginning of his treatise, both authors discuss first the general (*'āmm*) and specific (*khāṣṣ*) texts. As we will see in a full chapter devoted to the different stages and development of this discussion in multiple fields in the 9<sup>th</sup> and 10<sup>th</sup> centuries (Chapter III), *'āmm* and *khāṣṣ* occupied the core of hermeneutical debates. Since the strongest evidence in debates was usually a text from the Quran, one party criticized the other's Quranic evidence with specification or abrogation claims. Abrogation critiques required external evidence such as a report indicating the abrogation, while a specification (*takhsīs*) critique was easier to make. Therefore, scholars tried to establish certain principles to prevent arbitrary claims about the specification of a general text. However, the topic of *'āmm* and *khāṣṣ* was broader than that during that time. Some other topics about text in *uṣūl al-fiqh* were discussed under the rubric of *'āmm* and *khāṣṣ/takhsīs* such as literal (*ẓāhir*) - metaphorical (*bāṭin* or *majāz*); ambiguous (*mujmal* or *mushkil*); and certain (*muḥkam*) - unknown (*mutashābih*).

Al-Shāfi'ī takes the concepts of general and specific texts for granted and does not deal with definitions nor with linguistic explanations in detail, such as we can see in the later literature in discussions about certain particles or prepositions that give a phrase general meaning. He only points out the linguistic form by using the term *ẓāhir*, meaning texts that seem general, but are actually specific. He is interested in the general texts

with which a specific meaning is intended based on evidence from the Quran, sunna and Arabic language.<sup>173</sup> Al-Shāfi‘ī also points out the function of specification in revealing whether the intended meaning in the text is literal (*ẓāhir*) or metaphorical (*bāṭin*). His examples are not necessarily related to legal matters; rather he examines Quranic texts in general. For instance, he mentions the verse “*How many a town, that were unjust, have We crushed and raised up after them another people!*”<sup>174</sup> and says that it is clear that a town, in literal sense, cannot be unjust, the intended meaning should be understood to refer to the inhabitants of the town.<sup>175</sup> Another emphasized topic for which al-Shāfi‘ī provides several examples is the function of sunna in specification of a Quranic general text.<sup>176</sup>

Al-Jaṣṣāṣ’s examination of the topic of general and specific texts is much broader than that of al-Shāfi‘ī. However, he also does not define what ‘āmm or khāṣṣ is right at the beginning of the discussion; rather, by the same token, he focuses more on the conditions of specification and different subcategories within the topic. However, he provides definitions when he tries to distinguish mujmal from āmm later.<sup>177</sup> The topic of ‘āmm and khāṣṣ begins with the discussion of literal meaning and metaphorical meaning in which he labels literal meaning as the norm.<sup>178</sup> Instead of *ẓāhir* and *bāṭin*, al-Jaṣṣāṣ uses *haqīqa* (literal) and *majāz* (metaphorical), which became common technical terms

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<sup>173</sup> al-Shāfi‘ī, *al-Risāla*, 54-60.

<sup>174</sup> The Qur’an, 21:11

<sup>175</sup> al-Shāfi‘ī, *al-Risāla*, 63.

<sup>176</sup> al-Shāfi‘ī, *al-Risāla*, 64-79.

<sup>177</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 64.

<sup>178</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 46.



for these concepts later in the literature. Al-Jaṣṣāṣ clearly distinguishes mujmal from ‘āmm which was somewhat ambiguous and used interchangeably in *al-Risāla*. Al-Jaṣṣāṣ refers to ‘Isā b. Abān as the one who used these terms synonymously. Al-Jaṣṣāṣ divides mujmal into two types and describes the first as closer to the meaning of ‘āmm, while the second means a general text that cannot be used in its general meaning because it needs clarification for its intended meaning in sharī‘a, which is different from its linguistic meaning.<sup>179</sup>

Al-Jaṣṣāṣ discusses the authority (*ḥukm*) of a general text in detail and mentions the earlier disagreements and various opinions within the scholarship.<sup>180</sup> The first opinion, which he says his school supports, accepts a general text with its general meaning unless there is an external evidence for specification, while the second opinion claims every text should be considered limited to certain units that the meaning entails unless there is an external evidence for its generality. The third opinion suspends the result until there is evidence both for generality or specificity.<sup>181</sup> He also includes the discussion on whether the text is a command (*amr*) or a report (*khabar*).<sup>182</sup>

Al-Jaṣṣāṣ extensively discusses the specification of a general text (*takhṣīṣ*) with its different types. He understands specification as a kind of making exception(s)

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<sup>179</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 64-7.

<sup>180</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 100.

<sup>181</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 99-100.

<sup>182</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 101.

(*istithnā'*) from the scope of the general texts.<sup>183</sup> He also defines specification as “explaining the authority (*ḥukm*) of a certain text.” He adds specification of the general text by consensus (*ijmā'*), by rational indication (*dalālāt al-‘aql*)<sup>184</sup>, by solitary report (*khābar al-wāḥid*)<sup>185</sup> and by analogy (*qiyās*) as other ways of specification in addition to what Shāfi‘ī discusses as the specification of general text by the Quran and sunna.<sup>186</sup> Al-Jaṣṣāṣ also makes a distinction within sunna based on certainty and distinguishes established sunna (*al-sunna al-thābita*) from solitary report (*khābar al-wāḥid*).

Al-Jaṣṣāṣ further includes some additional discussions on ‘āmm and khaṣṣ. He discusses what the rule (*ḥukm*) is for the things remaining outside of specification in a general text, and he also mentions several earlier opinions on the similarities and differences between metaphorical text (*majāz*), exception (*istithnā'*) and specified text.<sup>187</sup> Al-Jaṣṣāṣ also devotes a whole chapter to the meanings and functions of conjunction in hermeneutics.<sup>188</sup>

## ii. *Naskh*

Al-Shāfi‘ī does not define *naskh* in his *al-Risāla* whereas al-Jaṣṣāṣ points out

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<sup>183</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 139.

<sup>184</sup> al-Jaṣṣāṣ deals with a long debate with the one who claims there is no difference between accepting reason as a source for specification from accepting it as a source for abrogation. See al-Jaṣṣāṣ, *al-Fuṣūl*, I, 149-152.

<sup>185</sup> Here al-Jaṣṣāṣ deals with a long discussion on the authority of *khābar al-wāḥid* and necessity for *arḍ al-Qur’an* and sunna *thābita* before accepting a solitary report. See al-Jaṣṣāṣ, *al-Fuṣūl*, I, 155-209.

<sup>186</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 141-155.

<sup>187</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 243-54.

<sup>188</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 81-96.

different models scholars have used to explain naskh (*naql, ibtāl, izālah*), then he decides that the aforementioned suggestions for naskh should be understood in metaphorical terms rather than literally: “A ḥukm cannot be invalidated via naskh; naskh is a declaration (*bayān*) of the temporal validity of a ḥukm.” Al-Jaṣṣāṣ defines naskh as “explaining the duration of the first command.”<sup>189</sup>

Al-Shāfi‘ī’s theory of naskh focuses on the problem of abrogation between the Quran and sunna, and he explicitly states that since these two sources are independent one cannot abrogate the other. Al-Jaṣṣāṣ devotes an independent chapter to the problem and states the Ḥanafī stance that it is possible for abrogation between the two sources. However, he makes a distinction between established sunna via corroborated reports (*tawatur*) and sunna based on solitary report, and only allows an established sunna to abrogate the Quranic ruling. A ruling based on solitary report can be abrogated by another solitary report or a stronger source (i.e. the Quran or an established sunna). Al-Jaṣṣāṣ justifies the position of his school by describing sunna as a form of revelation (*waḥy*), whether it is waḥy matluw (*recited revelation*) or waḥy ghayr matluw (*non-recited revelation*). This later became the main justification within legal theory, including among Zahirītes. Accordingly, since Quran and sunna belong to the same category, the question of abrogation between them no longer poses a dilemma.

Al-Jaṣṣāṣ deals with newer and more detailed problems regarding naskh. He

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<sup>189</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 143.

refutes the rejection of naskh by Jews and some Muslims, whose views, he argues, should not be considered important. He discusses different positions on whether a ruling can be abrogated by a more difficult ruling and he answers in the affirmative, as opposed to some other scholars, by arguing in terms of *maslaḥa* (utility), and pointing out that utility might sometimes be achieved for people through an easier ruling and sometimes through a difficult one. He also discusses new questions, such as considering a Quranic text abrogated in form, but not its ruling, as in the case of stoning in adultery (*rajm*) and expiation of oaths (*kaffarāt al-yamīn*). Al-Jaṣṣāṣ also deals with addition in a ruling (*ziyāda fī-al-ḥukm*) and states that if it is not attached to an earlier ruling in the same text, it means abrogation. Al-Jaṣṣāṣ does not stipulate knowing the chronological order of rulings for making a claim of abrogation. He argues that if the order of rulings is not known and there is an obvious contradiction between two texts which cannot be reconciled without abrogation, the one that is closer to the sources (*ashbahuhuma bi al-uṣūl*) should be considered; for instance, the ruling that is applied among Muslims and commonly accepted by scholars should be considered as the abrogating rule based on *ijmāʿ*. In addition to the practice of Muslims, al-Jaṣṣāṣ mentions several principles to decide the abrogating rule. If two contradicting texts require either permissibility (*ibāḥa*) or prohibition (*ḥaẓar*), the prohibiting one should be considered the abrogating text. In this principle, he follows Abū Ḥasan al-Karkhī and leaves opinion of ʿIsā b. Abān, who thinks in that case both texts become useless in terms of ruling and we cannot take one of them as abrogating. Another principle is applying analogy and reasoning (*naẓar*) to determine which is the abrogating text.

Al-Jaṣṣāṣ's examination of naskh constitutes one of the longest discussions in his work, which indicates the significant role of naskh in legal theory in the gap period between al-Shāfi'ī and al-Jaṣṣāṣ.

***b. Sunna-Ḥadīth/Solitary Reports***

Al-Shāfi'ī's emphasis on sunna in *al-Risāla* led some contemporary scholars to think that establishing sunna as the only other authoritative source other than the Quran was his actual purpose in writing this treatise. It would not be unfair to say that al-Shāfi'ī wanted to emphasize the role of sunna embodied in the chained reports and that this was an overarching aspect of his theory; however, *al-Risāla* was not limited to this purpose. It is even impossible to say that al-Shāfi'ī was the first scholar emphasizing the role of sunna in law. What can be said is that al-Shāfi'ī's work represents a significant effort towards giving more space to solitary reports in law. For instance, he seems to take the authority of qiyās for granted; however, he devotes one of the longest chapters in his treatise to the authority of solitary reports. Both scholars make a distinction between established sunna (*al-sunna al-thābita*) and solitary report (*khābar al-wāḥid*). The first one is seen certain, while the second one falls into probability. Al-Jaṣṣāṣ gives a more detailed and technical categorization of *khābar al-wāḥid*, where he takes the text of the report into account. In his more general analysis of *khābar al-wāḥid*, al-Jaṣṣāṣ divides solitary reports depending on whether they must be understood as providing certain knowledge or merely probable knowledge. He mentions the reports of the prophet about

his revelation, or the ones confirmed by the prophet or *ijmā'*, and witnesses in criminal cases (*ḥudūd*) as the examples of the type that establish certain knowledge.<sup>190</sup> He discusses *khavar al-wāḥid* as it is known in *uṣūl* discourse under the title of solitary reports in religious matters (*khavar al-wāḥid fī-al-diyānāt*) where he devotes a long chapter to the authority of *khavar al-wāḥid* by referencing 'Isā b. Abān and rejects the claim that two narrators at least are required before a report is accepted.<sup>191</sup> Al-Jaṣṣāṣ relies heavily on the writings of 'Isā b. Abān on solitary reports, most probably on *al-Radd 'alā Bishr al-Marīsī wa-al-Shāfi'ī fī al-akhbār*.<sup>192</sup>

As opposed to most other topics, al-Shāfi'ī provides a sort of definition of *khavar al-khāṣṣah*, which is another expression that he uses along with *khavar al-wāḥid*, in the beginning and says: "It is the report of one person from another until it reaches to the prophet or someone before the prophet [i.e. to a companion or a successor]." <sup>193</sup>

Al-Shāfi'ī lists the conditions of a transmitter as follow: He should be reliable in his religion; known for honesty in his speech; comprehending the meanings of what he is transmitting; should relate ḥadīth text-based not meaning-based; should have a reliable memory or book that he is relating from; should not relate from someone he did not meet (*mudallith*); and should not be in contradiction with those who are known as reliable in transmitting from the prophet. All the narrators in a certain chain should carry these

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<sup>190</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 64-69.

<sup>191</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 75-109.

<sup>192</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 103.

<sup>193</sup> al-Shāfi'ī, *al-Risāla*, 369-70.

conditions.<sup>194</sup> Then Shāfi‘ī engages in a long discussion about the differences between narrators of ḥadīth and witnesses in law with his interlocutor. In contrast, al-Jaṣṣāṣ examines witnesses within the general categorization of khabar al-wāḥid.<sup>195</sup> Al-Jaṣṣāṣ devotes a chapter to the conditions for accepting a solitary report, which he begins by reiterating that the value of a solitary report depends on establishing a probable knowledge about the memorization ability and righteousness of its narrators.<sup>196</sup> Then he lists the defective aspects (*‘ilal*) of reports that necessitate denial of these reports in the Ḥanafī School. The first thing he mentions is being in contradiction with the established sunna (*al-sunna al-thābita*) or the Quranic passages that have a clear, definite meaning. Then al-Jaṣṣāṣ points out the problem of *‘umūm al-balwā*, the text of a solitary report pointing out something that, if it were correct, should reasonably have been expected to be known and related by many people.<sup>197</sup> He also mentions narrators whose practices contradict what they narrate<sup>198</sup> and the narration being contradictory to necessary results of reason.<sup>199</sup> Al-Jaṣṣāṣ discusses the role of qiyās and ijtihād in accepting a report as well; even though, hierarchically, an authentic solitary report is considered binding before qiyās, however, in the process of evaluating the acceptability of a solitary report qiyās should be applied.<sup>200</sup> These five criteria regarding the text of a report are

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<sup>194</sup> al-Shāfi‘ī, *al-Risāla*, 370-71..

<sup>195</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 66-68.

<sup>196</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 113.

<sup>197</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 112, 114.

<sup>198</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 113-14.

<sup>199</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 121-22.

<sup>200</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 129.

considered to be as important as chain critique (*‘adl* and *ḍabt*) in early Ḥanafī legal theory.

*c. Qiyās, Ijtihād and Istihṣān*

Al-Shāfi‘ī’s discussion of qiyās focuses on drawing a line in declaring legal opinion. Al-Shāfi‘ī strives for a consistent method that is attached to the textual sources instead of arbitrary discretion. Hence he sets forth qiyās as evidenced opinion in sharī‘a. He does not deal in depth with the question of why qiyās is a valid method or with refuting arguments against its validity. Most probably, this kind of attack was not that common during his time. However, al-Jaṣṣāṣ begins with the issue of authority and devotes a significant amount of space to brutally trivializing the arguments against qiyās made by Zāhirīs, especially Dāwūd.

Al-Shāfi‘ī does not give a technical definition of qiyās or ijtiḥād, rather he focuses on equating the two as pointed out frequently by earlier scholars. However, through his descriptions, one can understand that al-Shāfi‘ī held the opinion that every Muslim jurist is obliged to apply ijtiḥād in order to express a legal opinion based on valid evidence. This is a description of analogy (*qiyās*);<sup>201</sup> therefore, ijtiḥād is a different name for qiyās.<sup>202</sup> Both classical uṣūl scholars and contemporary scholars have criticized this explanation because it restricts ijtiḥād to qiyās. However, a careful

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<sup>201</sup> al-Shāfi‘ī, *al-Risāla*, 491.

<sup>202</sup> al-Shāfi‘ī, *al-Risāla*, 477.



analysis of al-Shāfi‘ī’s use of these terms reveals that al-Shāfi‘ī uses the term qiyās in a general sense in such a way that it enlarges the meaning of qiyās to ijtihād. In the second and early third centuries, the term qiyās was not used only to mean analogy. Al-Shāfi‘ī’s writings developed in this era, and he describes ijtihād and qiyās as follows: “ijtihād, that is, qiyās, is looking for evidence to reach the correct ruling if there is no direct ruling in revelation.”<sup>203</sup> “Ijtiḥād cannot be anything but questioning [searching for a ruling]; questioning cannot be answered by anything other than evidence, and the evidence is qiyās.”<sup>204</sup>

As opposed to al-Shāfi‘ī, al-Jaṣṣāṣ begins his discussion with the definition of key terms related to qiyās: dalīl, ‘illa [distinct reason for a ruling], istidlāl, qiyās and ijtiḥād. His aim seems to have been distinguishing these concepts that were used interchangeably before clarifying what qiyās is. One of the main developments in his work relates to the ‘illa. This concept was described as ma’na in al-Shāfi‘ī, obviously ‘illa became an established term during al-Jaṣṣāṣ’s time.<sup>205</sup> Al-Jaṣṣāṣ gives a general definition for qiyās as follows: “qiyās is ruling on something based on its having a shared ‘illa with another ruling”<sup>206</sup>

Al-Shāfi‘ī also deals with the question of whether every ijtiḥād is correct, though not in detail. Basically, he points out that there is subjectivity in ijtiḥād and makes a

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<sup>203</sup> al-Shāfi‘ī, *al-Risāla*, 477.

<sup>204</sup> al-Shāfi‘ī, *al-Risāla*, 505.

<sup>205</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 9.

<sup>206</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 9.

distinction between three subjects: the one who applies *ijtihād*, other scholars, and God. According to the one who applies *ijtihād*, his result is correct, other scholars might or might not confirm his result, but God knows who is actually correct.<sup>207</sup> He discusses the topic in *ijtihād* in terms of what is seen/apparent (*ẓāhir*) and what is unseen (*bāṭin*) and says that *ijtihād* has to establish truth in things where reaching certainty (*ihāṭa*) is possible, such as directing oneself toward the ka‘ba in masjid al-haram. However, the realm of *ijtihād* usually deals with uncertainty, which is unseen. In such cases, one is only required to exert effort towards determining truth.<sup>208</sup> Then he continues with the case of disagreement caused by *ijtihād/qiyās*. Al-Shāfi‘ī divides *qiyās* into two types. In the first one there is no disagreement, because “the thing [the ruling in the new case] itself is entailed within the meaning (*‘illa*) of old case [*asl*], whereas in the second type a similar element exists within the old case; therefore, it falls into the realm of disagreement.”<sup>209</sup>

Al-Jaṣṣāṣ also addresses what al-Shāfi‘ī discussed using the terms *ihāṭa* (certainty) and *ijtihād* regarding matters classified either as *ẓāhir* and *bāṭin* as being two distinct types of *istidlāl*. According to al-Jaṣṣāṣ, the first type of *istidlāl* falls into *‘aqliyyat* and establishes *‘ilm* (certain knowledge); therefore, we are required to determine the truth in this realm. The second type, however, requires only *ghalabat al-ra’y* (probable knowledge) instead of certain knowledge; therefore, we are not obliged

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<sup>207</sup> al-Shāfi‘ī, *al-Risāla*, 479.

<sup>208</sup> al-Shāfi‘ī, *al-Risāla*, 480-82, 500.

<sup>209</sup> al-Shāfi‘ī, *al-Risāla*, 479.

to determine the truth definitively in such matters.<sup>210</sup> Similarly, al-Jaṣṣāṣ's distinction between 'aqliyyat and naqliyyāt directs him to classify two types of qiyās as well. As al-Shāfi'ī divided qiyās into two types in terms of certainty, al-Jaṣṣāṣ also divides it in a similar way. The first type refers to logical qiyās, which is syllogism entailing real 'illa that necessitates the result, while the second type refers to analogy between the rulings of new cases to the textual sources and to the topics of agreements. Ijtihād means exerting the utmost effort for things whose rulings were not indicated by Allah in a way that establishes certain knowledge.<sup>211</sup> Al-Jaṣṣāṣ elaborates on the distinction between ijtihād and qiyās by classifying qiyās as one type of ijtihād. The second type of ijtihād does not involve a qiyās application such as searching for the direction of the Ka'ba.<sup>212</sup> The third type of ijtihād is called *istidlāl bi-al-uṣūl* (deduction based on the principle rulings) and means giving the same ruling to a certain case as the ruling of the principle case to which it belongs.<sup>213</sup>

Al-Shāfi'ī's critique of *istiḥsān* (legal discretion) has been studied by many scholars. Al-Shāfi'ī clearly describes *istiḥsān* as the opposite of ijtihād. As mentioned above, his description of ijtihād/qiyās is based on the argument of *evidence*, hence, he describes *istiḥsān* as claiming an opinion without *evidence*.<sup>214</sup> Therefore, al-Shāfi'ī's

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<sup>210</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 10.

<sup>211</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 10-11.

<sup>212</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 11-12.

<sup>213</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 217-19.

<sup>214</sup> al-Shāfi'ī, *al-Risāla*, 504.

single word definition of istiḥṣān is “self-indulgence” (*taladhdhudh*).<sup>215</sup> Al-Jaṣṣāṣ refutes this understanding without mentioning al-Shāfi‘ī’s name by saying the opponents of istiḥṣān actually misunderstood the way Ḥanafīs used this term. He first establishes a justification of using this word for this concept through examples from the Quran and sunna, as well as from earlier non-Ḥanafī authorities such as Mālik and al-Shāfi‘ī, who used this word in their works.<sup>216</sup> Then al-Jaṣṣāṣ elaborates two meanings for the term istiḥṣān in the language of the Ḥanafīs. The first one refers to the second type of ijtihād, which deals with deciding amounts in certain cases such as gifts for a divorced woman, a topic in which al-Shāfi‘ī also used the word istiḥṣān.<sup>217</sup> The second and more common use of istiḥṣān refers to “avoiding qiyās in favor of some other superior evidence in a certain case.”<sup>218</sup> However, in his long discussion, al-Jaṣṣāṣ tries to justify this usage by earlier Ḥanafīs through deduction and his theorization does not seem completely accurate. His second definition of istiḥṣān does not explain, for instance, cases where Ḥanafīs mention two solutions, one of which is achieved through qiyās and one through istiḥṣān, and in which they accept the qiyās solution over the one resulting from istiḥṣān. To account for this, he had to describe this istiḥṣān as another type of qiyās. His understanding then produced the categories of apparent (*jalī*) qiyās and hidden (*khafī*) qiyās in Ḥanafī legal theory.

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<sup>215</sup> al-Shāfi‘ī, *al-Risāla*, 507.

<sup>216</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 229.

<sup>217</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 234.

<sup>218</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 234.

The conditions for the mujtahid in ijtihād/qiyās, which al-Shāfi‘ī discusses as the devices that are needed for qiyās and al-Jaṣṣāṣ calls the prerequisites for ijtihād, can be summarized in the two texts as follow:

Al-Shāfi‘ī’s <i>al-Risāla</i> <sup>219</sup>	al-Jaṣṣāṣ’s <i>al-Fuṣūl</i> <sup>220</sup>
<ul style="list-style-type: none"> <li>◆ Knowing the rulings of kitab [the Quran], including those that are obligatory or recommended; abrogating and abrogated ones; general, specific, and indicative (<i>irshād</i>) ones; the interpretation of certain texts that need interpretation through sunna or ijmā‘ or qiyās.</li> </ul>	<ul style="list-style-type: none"> <li>◆ Knowing kitab, established sunna, and solitary reports; knowing the continuous rulings and abrogated ones derived from them; general and specific texts; literal and metaphorical meanings; classification of texts and having ability to put them in appropriate classes.</li> </ul>
<ul style="list-style-type: none"> <li>◆ Knowing the previous rulings (<i>sunan</i>) and opinions of first generations (<i>salaf</i>)</li> </ul>	<ul style="list-style-type: none"> <li>◆ Knowing the rulings of reason and what calls for it as well as what is possible to achieve through it and what is not.</li> </ul>
<ul style="list-style-type: none"> <li>◆ Knowing the consensus of people and their disagreements</li> </ul>	<ul style="list-style-type: none"> <li>◆ Knowing the consensus of the companions, successors and earlier</li> </ul>

<sup>219</sup> al-Shāfi‘ī, *al-Risāla*, 509-11.

<sup>220</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 273-78.

<ul style="list-style-type: none"> <li>◆ Knowing Arabic language</li> </ul>	generations that lived before him.
<ul style="list-style-type: none"> <li>◆ Having a fair mind that distinguishes similar cases and prevents from premature judgments</li> </ul>	<ul style="list-style-type: none"> <li>◆ Knowing <i>istidlāl</i> and legal analogy (<i>maqāyis al-shar‘iyya</i>) not only syllogism (<i>maqāyis al-‘aqliyya</i>).</li> </ul>
<ul style="list-style-type: none"> <li>◆ Listening to the one who disagrees with him</li> </ul>	<ul style="list-style-type: none"> <li>◆ Being righteous and reliable (<i>‘adl</i>).</li> </ul>
<ul style="list-style-type: none"> <li>◆ Exerting utmost effort with fair-mindedness (<i>inṣāf</i>) to the extent that he knows why he accepts what he accepts and why he rejects what he rejects.<sup>221</sup></li> </ul>	<ul style="list-style-type: none"> <li>◆ The mujtahid does not have to know all the texts in the Quran, established sunna or solitary reports.<sup>222</sup> Even for a certain case, he does not have to know all the related texts.</li> </ul>

In addition to detailed discussion on the factors of analogy, especially on the ‘illa, al-Jaṣṣāṣ deals with the problem of imitation (*taqlīd*) and justifies imitation by lay people of scholars.

#### ***d. Ijmā‘***

The discussion on *ijmā‘* begins with a question asked by the interlocutor in

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<sup>221</sup> al-Shāfi‘ī, *al-Risāla*, 510-11.

<sup>222</sup> al-Jaṣṣāṣ engages in a long discussion to prove his point on this. Apparently, he responds to some certain scholar(s) who argued for these conditions. See al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 276-78.

*al-Risāla*: “Why do you accept what people agree upon as a binding source in the matters where there is no indication in the Quran and they do not relate anything from the prophet? Would you argue that, as some others do, it must have been based on an established sunna even though they do not relate it explicitly?”<sup>223</sup> Al-Shāfi‘ī says that it does not mean that it necessarily depends on a sunna, but it is impossible to think that they establish an agreement on error or in contradiction with sunna.<sup>224</sup> Then he mentions two proofs for its authority from prophetic reports. On the other hand, this conversation shows that some people used to understand consensus as the implicit established sunna and to justify its authority through reference to sunna. Even though al-Shāfi‘ī does not want to cut the relationship between consensus and sunna completely; he argues that the agreement does not have to arise out of a sunna, because all of them cannot agree on error. Since al-Shāfi‘ī mentions the famous ḥadīth praising earlier generations (companions and successors), he seems to have understood *ijmā‘* as the consensus of earlier generations.

Al-Jaṣṣāṣ begins his discussion on *ijmā‘* by addressing the authority of *ijmā‘*. He points out the disagreement between jurists (*fuqahā*) and some theologians (*mutakallimūn*) and states that there is no disagreement among jurists on the authority of consensus among the first generation (*al-ṣadr al-awwal*), but that some theologians rejected that claim as well as the more general claim of *ijmā‘* among later generations in

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<sup>223</sup> al-Shāfi‘ī, *al-Risāla*, 471.

<sup>224</sup> al-Shāfi‘ī, *al-Risāla*, 472-3.

the umma.<sup>225</sup> We can infer from what al-Jaṣṣāṣ says that when al-Shāfi‘ī mentioned *ijmā‘*, he was interpreting it as being limited to the agreement of earlier generations.

Al-Jaṣṣāṣ bases his theory of consensus on an attribute of this umma described in a verse of the Quran<sup>226</sup> as ‘*wasat*’, which he interprets as ‘just.’ Then he also mentions several other verses that support this idea. He also refers to the same prophetic report that al-Shāfi‘ī mentioned about the value of earlier generations. However, al-Jaṣṣāṣ points out some other ḥadīths that are absent in *al-Risāla* and later became main references for the authority of *ijmā‘* in Islamic legal theory such as “my umma will not agree on misguidance.”<sup>227</sup>

The main difference between the two investigations of *ijmā‘* is the obvious emphasis on the umma in general in al-Jaṣṣāṣ’s work. Al-Jaṣṣāṣ repeatedly stresses that *ijmā‘* is not limited to a certain time and earlier generations, rather it is a universal aspect of this umma given by God. He also devotes a chapter entitled *ijmā‘u ahl al-a‘ṣār* (consensus of different ages) and attributes this opinion to the earlier authorities in the Ḥanafī school of law through deduction.<sup>228</sup> He engages in a debate with those who claim that if everyone individually may fall in error, it means all can fall in error. As a response, he makes a distinction between declaring individual opinion and following an

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<sup>225</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 257.

<sup>226</sup> The Qur’an, 2:143: “We have made you [believers] into a just community, so that you may bear witness [to the truth] before others and so that the Messenger may bear witness [to it] before you.”

<sup>227</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 265.

<sup>228</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 271.



opinion altogether, then he makes a comparison between mutawatir khabar (*continuously recurrent report*) and *ijmā'* by stressing the fact that the individuals are not the same when they come together and constitute a whole.<sup>229</sup>

#### 4. Concluding Remarks

One of the main conclusions of this comparison is the significant development in al-Jaṣṣāṣ's *al-Fuṣūl* in terms of topics, methods and content compared to *al-Risāla*. However, al-Jaṣṣāṣ's work represents a further step within the same field, rather than the product of a genre independent from that of *al-Risāla*. The contents of both *al-Risāla* and *al-Fuṣūl* reflect earlier and contemporary discussions on legal theory. Hence, since *al-Risāla* represents basic discussions on the interpretation of textual sources and methods for deriving rules from them, it is difficult to justify the arguments that appeared in recent scholarship against recognizing this treatise as the first extant work on legal theory. Nonetheless, this does not mean it was the first work on *uṣūl al-fiqh*. Even though al-Shāfi'ī does not reference any earlier work in his treatise, his discussions with his interlocutors demonstrate that these discussions existed and that multiple positions had already emerged among different groups of scholars in diverse topics within this field. Furthermore, al-Shāfi'ī's references to opposing legal-theoretical stances and the evidence in al-Jaṣṣāṣ's work from that period, including references to 'Isā b. Abān and others, indicate that the general tendency towards presenting this gap period as one in

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<sup>229</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 266-67.

which the only activity was commentary on al-Shāfi‘ī’s *al-Risāla* deserves more critical investigation. Despite its rich content reflecting both its own time and the gap period, *al-Fuṣūl* only gives us a starting point from which to understand what happened in the gap period. On the other hand, al-Jaṣṣāṣ’s references are centered mostly in his own school and most of his attributions to groups of scholars, such as some theologians (*mutakallimūn*), also need further research to provide clarification about these groups and their time periods. In other words, it suffices to say that this comparison gives us a rough image of the development within this period, but does not provide a complete picture of the groups, schools, and the aspects of various stages, which is the main task of the following chapters.

## **CHAPTER II**

The Solitary Report (Khabar al-wāḥid): The Uṣūlī Approach vs. the Traditionalist  
Approach to the Authority of Single-chained Transmissions

## A. Introduction

This chapter deals with the development of and contributions to the theoretical discussions of the gap period for *akhbār* (reports). The main importance of the gap period for the chained prophetic reports lies in the fact that it was this period in which they were equated with the authority of *sunna* and in which they gained an overarching authority to influence the centuries to come until the present day. The body of chained reports, largely under the rubric of *sunna*, became the second fundamental source of Islamic law. It is true that the importance of the chained reports goes back to earlier times, but becoming a paradigmatic source happened during the gap period. In other words, certain *ḥadīth* compilations that later came to be recognized as canonized sources were still in the initial phases of the canonization process during this period, and at the same time many theoretical debates were taking place. Therefore, what distinguishes this period from later periods is its significantly rich discussions on the core problems of the chained reports and the various ways to approach them.

The third *hijrī* century witnessed an epistemic conflict regarding the value and authority of reports (*akhbār*) in religion. Even though this conflict has been studied mainly between *ahl al-ra'y* and *ahl al-ḥadīth* in recent scholarship, the sides of the debate were certainly more than two. Despite the generality of the titles, *ahl al-ra'y* referred to a specific group, mostly *Kūfī* scholars of the time and those who share so-called *Kūfan* jurisprudence, while *ahl al-ḥadīth* referred to those who gave the *ḥadīth* reports overarching authority in comparison to other sources. Besides these two groups, there were different groups of scholars and independent scholars who chose a position falling somewhere in a spectrum between the two extreme positions. On the one side of the spectrum, some scholars argued for the certainty

of any solitary reports and rejected any role of reason in religion such as those who were called as *hashwiyya* (literally redundant group) by their opponents.<sup>230</sup> On the other side, some scholars rejected even the authority of mutawātir (consecutive) reports such as certain Mutazili scholars.

The scope of the investigation, therefore, on the chained reports in this chapter is not limited to the scholars of ahl al-ra'y and ahl al-ḥadīth, because the theoretical discussions did not occur only between these two groups. The titles of the works written on the topic of transmitted reports during the gap period persuasively demonstrate the significant diversity in the affiliation of the scholars who contributed to the topic. For instance, 'Īsa b. Abān wrote a book entitled "*al-Radd 'alā Bishr al-Marīsī and al-Shāfi'ī fī al-akhbār*" refuting the theories of khabar of both al-Shāfi'ī, who was known a traditionalist to many at that time, and Bishr al-Marīsī, a Murji'ī who was known for his critical stance toward reports.<sup>231</sup> Therefore, in order to examine the conflict between two general parties, it would be more accurate to classify the contributing scholars under reason-based and report-based scholars, with a keen eye for certain nuances among these two groups.

It might be beneficial to give an outline of different approaches to the chained reports before the gap period. The majority of scholars including ahl al-ra'y and most of the Mu'tazila

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<sup>230</sup> The word *hashwiyya* is one of the words whose meaning is unclear and has been contested by many such as *nābīta*. It was a common derogatory word used mostly by the reason-based scholars of the first centuries of Islam for their adversaries, who adopted a strict report-based approach and rejected any role of reason in religion. See Yurdagür, Metin, *TDV İslam Ansiklopedisi*, s.v. "Haşviyye" İstanbul: TDV, XVI, 426-27.

<sup>231</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, I, 103.

came to an agreement on the importance of reports in religion from the earlier generations onward. Therefore, we see an increasing interest in studying reports and producing a relevant literature from all these groups. Madīna became a well-known center of ḥadīth-based teaching as early as the second hijrī century to the extent that many students and scholars travelled from different territories to Madīna to acquire knowledge of ḥadīth and that its scholars became known as *aṣḥāb āthār*.<sup>232</sup> The most prominent student of Abū Ḥanifa, Muḥammad b. al-Ḥasan al-Shaybānī, for instance, travelled to Madīna and stayed there for approximately three years to hear ḥadīth from Mālik, the eminent ḥadīth scholar of the time and the eponym of the Mālikī school as it would come to be known. One of the extant transmissions of *al-Muwattā* was compiled by al-Shaybānī. In a narration, he complains that people in Kūfa were more eager to hear the ḥadīths in circulation among the scholars of Madīna than the ḥadīths of the scholars of Kūfa. This shows that before the gap period, there had been already an agreement between different schools of thought regarding the importance of the reports. In addition, different groups of scholars had already developed sets of principles distinguishing authentic and functional reports from fabricated and nonfunctional ones.<sup>233</sup> It leaves us an important question though: what was the difference between their approaches regarding the reports then? The evidence under examination of this chapter demonstrates that the problem relied on their different approaches to the authority of textual sources and their interaction with reason. On

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<sup>232</sup> al-Shaybānī, *al-Hujja*, I, 222.

<sup>233</sup> I use the word functional deliberately to point out the fact that authenticity was not the only criterion for accepting a ḥadīth. A ḥadīth that passed chain and text criticism might not be functional in certain matters and can be discarded. To be an authentic ḥadīth comprises the first condition of evaluation of accepting a ḥadīth, not the only one.

the one side of the spectrum some scholars considered texts as playing the role of ‘subject’, and regarded the followers of religion as ‘objects’ who should follow “the speaking texts” which resulted in over emphasis on the literal meaning of the texts and holding fast to this meaning as a necessary requirement of piety. On the other side of the spectrum, some scholars regarded texts as completely silent objects and the followers of the religion as the subject who are responsible to issue religious principles and rules. However, the majority of the scholars tried to establish principles to put limits from both sides in finding the accurate role of the texts in religion in general and in certain matters of religion in particular. This effort and discursive relationship with the texts constructed the main body of principles in establishing authority, i.e. Islamic legal theory. Toward the end of the gap period and later on, the authority of the chained reports was not only accepted by the vast majority of Muslim scholars, but moreover, those who were arguing for different methods in the authentication of these reports eventually submitted to the methods of so-called traditionalists (*ahl al-ḥadīth*), who were also traditionalists (*muḥaddithūn*). This process can be called “traditionalization” and the sixth section of this chapter examines the traditionalization of Kūfī school in detail.

Before beginning the examination of the theories of reports in the gap period, it might be useful to mention certain concepts that are used to signal reports. A fixed term for the reports within this period was not yet in existence. Most common words referring to reports were *athar*, *khbar*, and *ḥadīth*. Determining the term ḥadīth for the reports did not happen during this period. The equation of sunna with reports was supported by the traditionalists, especially in light of the verse that reads as “you who believe, obey Allah, the Messenger, and those in command among you. If you disagree about something, refer it back to Allah and the

Messenger”<sup>234</sup> and the Quranic concept of ḥikma.<sup>235</sup> Al-Shāfi‘ī, al-Bukhārī and Yaḥyā al-Kinānī, for instance, were among those who based their arguments on one of these two proofs to give the reports on the prophetic sunna the second place only after the Quran in their authority.<sup>236</sup>

Different categories of reports emerged during the gap period and remained influential in the discussions related to the chained reports in the following centuries. For our discussion in this chapter, it is essential to define three categories. In the later literature of uṣūl al-fiqh, two categories of reports are discussed based on establishing certainty: *mutawātir* (consecutive report) and *khbar al-wāḥid* (solitary report, also known as *āḥād*). The *mutawātir* report is defined as a report that has a number of transmitters to the extent that they cannot be imagined to collaboratively agree on lie. The transmission of the entire Quran, for instance, is accepted as *mutawātir* among Muslims. *Khbar al-wāḥid* is defined as any transmission that does not reach the level of *mutawātir* among the majority of Muslim scholars. This type of transmission establishes probable knowledge (*ẓann*) according to the vast majority of scholars. Most reports in the existing ḥadīth compilations fall into the category of solitary reports. Ḥanafīs identify a third category between *mutawātir* and *khbar al-wāḥid*, the *mashhūr*, which falls in between these two categories and establishes satisfaction (*iṭmi’nān*). This chapter traces back the formation of these different categories, which still affect Islamic intellectual traditions, in the

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<sup>234</sup> The Quran, 4:59.

<sup>235</sup> The Quran, 2:151; The Quran, 4:113.

<sup>236</sup> al-Shāfi‘ī, *al-Risāla*, 73; al-Shāfi‘ī, *Jimā‘ al-‘ilm*, 6-7; al-Bukhārī, *Kitāb tafsīr al-Qur’ān*, bāb 148. (VI, 117); Yaḥyā al-Kinānī, *al-Ḥayda*, 32. (al-Bukhārī refers Mujāhid’s, a famous scholar belonging to the generation of the successors, interpretation of al-ḥikma as sunna in the report he narrates.)



theoretical discussions of the period.

The following three sections explore the discussions of the gap period on the authority of reports, their epistemic categories, and the conditions and interpretations of solitary reports. The last two sections analyze the live discussions in modern scholarship on the traditionalization of the Kūfan school and on the dominance of ḥadīth-based scholarship that emerged within the gap period.

## B. The Authority of Solitary Reports

The solitary report (*khābar al-wāḥid*) is defined by al-Shāfi‘ī as “the report of one person from another until it reaches the prophet or someone before the prophet [to a companion or a successor]”<sup>237</sup> Even though, the distinction between solitary and consecutive reports is an old topic of discussion, almost entire compilations of ḥadīths fall into the category of solitary report. Therefore, the discussion on the solitary report is also a discussion on the theory of reports in general, unless there is a distinguishing label for *mutawātir* [and *mashhūr* for Ḥanafīs].

In addition to the materials entailing the discussions on the authority of solitary reports that we will examine below, the reported titles of texts written during the period also point out the fact that the authority of the solitary report was one of the significant discussions of the time. Bio-bibliographical sources assign certain writings to the following scholars. Īsā b.

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<sup>237</sup> al-Shāfi‘ī, *al-Risāla*, 369-70.

Abān (221/836) is reported to have written *Kitāb khabar al-wāhid*,<sup>238</sup> ‘Alī b. Mūsā al-Qummī (305/917) a Kufī scholar and student of Ibn al-Thaljī reportedly wrote a book entitled *Kitāb ithbāt al-Qiyās wa-al-ijtihād wa-khabar al-wāhid* in which he argued for the authority of *khabar al-wāhid*.<sup>239</sup> Dāwūd b. ‘Alī (270/883) is attributed two works on reports as *Kitāb khabar al-wāhid* and *Kitāb khabar al-mūjib li-al-‘ilm*.<sup>240</sup> The latter appears to be on the reports that establish certainty from its title. Mālikī scholar Abū Sa‘īd al-Qayrawānī (372/983), a contemporary of al-Jaṣṣāṣ, is reported to have written *al-Shawāhid fī ithbāt khabar al-wāhid* (The Indications of the Authority of the Solitary Report).<sup>241</sup>

Notwithstanding certain criticisms directed at solitary reports, an overall categorical rejection was not prevalent in the first centuries of Islam. Even though some scholars pointed out such claims for overall rejection in their writings, a closer look at the sources reveals that the discussion revolves around the theoretical reliability of reports as the authoritative sources of knowledge. For instance, al-Shafī‘ī mentions a group that reject the entire reports (*akhbār*) in his *Jimā‘ al-‘ilm*.<sup>242</sup> His interlocutor criticizes al-Shafī‘ī in using a report to interpret legal rulings of the Quran different to the literal meaning of the text even though is only based on a chain of transmitters who were subject to the criticisms of even the proponents of reports with weak memory or unrighteousness. His interlocutor clarifies his stance by saying that “he does not accept anything established based on reports, unless he would be as sure as he is about each

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<sup>238</sup> Ibn al-Nadīm, *Fihrist*, 255.

<sup>239</sup> Ibn al-Nadīm, *Fihrist*, 257.

<sup>240</sup> Ibn al-Nadīm, *Fihrist*, 268.

<sup>241</sup> al-Dhahabī, *Siyar a‘lām al-Nubalā*, XIII, 360.

<sup>242</sup> al-Shafī‘ī, *Jimā‘ al-‘ilm*, 4.

letter of the Quran for the content of report.”<sup>243</sup> This argument is almost identical to the arguments of al-Nazzām and Dirār b. ‘Amr that we will discuss below. In fact, this argument does not reject reports entirely, but rejects the criteria of the proponents of reports, namely ahl al-ḥadīth, for accepting reports. It is not an attack on reports per se, but rather a more comprehensive attack on accepting probable knowledge (*ẓann*) in understanding and interpreting the revelation, which constituted a sort of proto-Zāhirī stance. Along the same lines, the interlocutor of al-Shāfi‘ī underlines the perfection and clarity of the Quran when criticizing reports. In *al-Risāla*, al-Shāfi‘ī says that no jurist disagreed on the authority of solitary reports before, which might be taken as an indication for al-Shāfi‘ī seeing these reactions as a new phenomenon with general attacks on the independent authority of the chained reports as well as excluding the opponents of the chained reports from the class of “jurists.”<sup>244</sup>

Before the gap period and al-Shāfi‘ī’s death, al-Shaybānī (189/804) had discussed the authority of solitary reports under the title of “On giving testimony in matters of religion” (*bāb al-shahāda fī amr al-dīn*).<sup>245</sup> Several reports that he mentions in this section have been used in the later literature for the authority of solitary reports. For example, he mentions that the prophet sent Diḥya al-Kalbī alone to the Byzantines with his letter inviting the emperor to

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<sup>243</sup> al-Shāfi‘ī, *Jimā‘ al-‘ilm*, 4-5.

<sup>244</sup> al-Shāfi‘ī, *al-Risāla*, 453.

<sup>245</sup> al-Shaybānī, *al-Aṣl*, II, 243-49. Elsewhere I discussed the opinions of al-Shaybānī on the solitary report. See Ahmet Temel, *Imam Muhammed’in el-Hücce Adli Eseri Ekseninde şer’i Deliller*, unpublished MA thesis, 34-53. The editor *al-Aṣl* discusses this topic and states that al-Shaybānī can be considered as the first known scholar who listed out evidence for the authority of solitary reports under the title of “On giving testimony in matters of religion” (*bāb al-shahāda fī amr al-dīn*) See Ertuğrul Boynukalın, al-Madhkal in *al-Aṣl*, 192-93.

Islām. Another report was about how the companions accepted only one person's report in announcing the prohibition of wine and they broke the potters of wine.<sup>246</sup> These two reports were used later by al-Bukhārī and the second one by al-Shāfi'ī, where they discuss the authority of khabar al-wāḥid.<sup>247</sup>

However, after mentioning eleven reports and his rationale for accepting one witness in the matters of religion, al-Shaybānī concludes that it is *permissible* to accept the testimony of a Muslim woman or man regardless of being free or slave as long as he or she is reliable (*thiqa*)<sup>248</sup> (my emphasis). This shows that what al-Shaybānī is trying to prove is not the necessity of using testimony of one person in the matters of religion, but rather the permissibility to use it as evidence in reaching a verdict. Certain conditions that he mentions also prove that point. For example, al-Shaybānī states that the testimony of only one person for seeing the crescent of the month of al-Shawwāl should be rejected, due to certain benefits that he or she might have considered such as receiving gifts for announcing it. Al-Shaybānī seems to have given a large room for ijtihād in evaluating individual reports, whose developed version we see in the theory of 'Īsā b. Abān.

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<sup>246</sup> al-Shaybānī, *al-Aṣl*, II, 247-48.

<sup>247</sup> al-Shāfi'ī, *al-Risāla*, 409; al-Shāfi'ī uses three other reports that al-Shaybānī mentioned in that section, as well. See al-Shāfi'ī, *al-Risāla*, 426, 429, 430; al-Bukhārī, *Saḥīḥ*, *Bāb mā jā'a fī ijāzat khabar al-wāḥid al-ṣadūq*; *Bāb mā kāna yab'ath al-nabī min al-umarā wa-al-rusul wāḥidan ba'da wāḥid* (In the introduction he wrote for *al-Aṣl*, it was Ertuğrul Boynukalın who first pointed out this influence of al-Shaybānī on al-Shāfi'ī and al-Bukhārī see Boynukalın, Ertuğrul, *Introduction in Kitāb al-Aṣl*, 192-93.)

<sup>248</sup> al-Shaybānī, *al-Aṣl*, II, 249.

## 1. Early Critiques of Solitary Reports during the Gap Period: Mu‘tazilis

From the later scholars, al-Juwaynī attributed the denial of the authority of solitary reports to some fractions among the Shi‘īs (*Rawāfiḍ*) and from the Mu‘tazila who followed them.<sup>249</sup> ‘Abd al-Qāhir al-Baghdādī also attributes such rejection of the authority of the solitary report to some of the Mu‘tazila (*Qadariyya*).<sup>250</sup>

A vehement critique of the independent authority of chained reports before al-Nazzām had been made by Ḍirār b. ‘Amr’ (200/815), who is reported to have written a book on the contradictions of ḥadīths entitled *Kitāb tanāquḍ al-ḥadīth*.<sup>251</sup> Ibn Rāwandī also claims that Mu‘tazilī scholars were praising his book *al-Taḥrīsh*.<sup>252</sup> In this book, Ḍirār argues for the invalidity of reports by pointing out the fact that there were supporting reports for every

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<sup>249</sup> al-Juwaynī, *al-Burhān*, I, 228.

<sup>250</sup> ‘Abd al-Qāhir al-Baghdādī, al-Ustadh Abū Maṣṣūr Ibn Ṭāhir, *Kitāb uṣūl al-dīn*, al-Ṭab‘ah 1. ed. Istānbūl: Madrasat al-Ilāhīyāf bi-Dār al-Funūn al-Tūrkiyah, 1928., 20. al-Āmidī mentions al-Kāsānī, Ibn Dāwūd, and Shi‘ā among those who accepted the rational permissibility of applying solitary reports but rejected the rational necessity for the application of solitary reports, which is a much more advanced discussion. al-Āmidī, *al-Iḥkām*, II, 51.

<sup>251</sup> Ibn al-Nadīm, *al-Fihrist*, 215.

<sup>252</sup> A manuscript of this work has been found in Yemen. Hasan Ansari and Wilfred Madelung have been working on a critical edition of it. In this manuscript Ḍirār uses a sarcastic language in imaginary conversations with the adherents of different groups of the time to demonstrate contradictions within ḥadīths. He narrates many ḥadīths in favor of the each group such as Murji‘a, Khawārij, and ahl al-ḥadīth that irreconcilably disagree one with another. See Riḍwan al-Sayyid, *Ḍirār b. ‘Amr’ bayn al-Taḥarrush wa-al-Taḥrīsh*, <http://www.aawsat.com/details.asp?section=17&article=584698&issueno=11599#.UwbtTkJdUXZ> Accessed in February 20, 2014

existing group of the time within the collections of reports.<sup>253</sup> The affiliation of ʿDirār with the Muʿtazila has been contested and al-Khayyāt rejected his affiliation with the Muʿtazila by claiming that ʿDirār was a follower of Jahm b. Safwān (128/745).<sup>254</sup>

Among early the Muʿtazilīs, al-Nazzām was an important figure for casting doubt on the chained transmissions. According to what is reported from him, instead of the chain of a report, the content of the report and its context were more important. If the content leaves no doubt for the listener, it is not important whether one person or a large amount of people transmit the report.<sup>255</sup> Ibn Rāwandī gives further details about al-Nazzām’s thoughts on solitary report. He reports that al-Nazzām did not see any difference between the solitary report of an unbeliever and a Muslim. Al-Nazzām argued that solitary report of an unbeliever might indicate necessary knowledge if the content of the report is something perceivable.<sup>256</sup> A fragment from al-Nazzām’s writing sheds important light on his opinions about the reports. In this piece, al-Nazzām harshly criticizes those who accept the reports of people based on their reliability. Al-Nazzām argues that the obvious contradictions in those reports are evidence for their unreliability in what they report and gives many examples of contradicting reports by the

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<sup>253</sup> Ibn Rāwandī, *Kitāb faḍā’ih al-Muʿtazila*, ‘reconstructed by ‘Abd al-Āmir al-‘Aṣamm’, 152. See also al-Khayyāt, *Intiṣār*, 136. It is still not possible to definitively attribute the idea of the invalidity of entire ḥadīths to ʿDirār because many scholars criticized this type of contradictions in ḥadīths, but still did not refrain from using solitary reports.

<sup>254</sup> Al-Khayyāt relates a piece of poem written by Bishr b. al-Muʿtamir in which Bishr excludes the followers of Jahm from Muʿtazila. See al-Khayyāt, *Intiṣār*, 133-34.

<sup>255</sup> al-Kaʿbī, *Faḍl al-iʿtizāl*, 71; al-Nāṭiq bi-al-Ḥaqq, *al-Mujzī*, II, 83-85.

<sup>256</sup> Ibn Rāwandī, *Kitāb faḍā’ih al-Muʿtazila*, ‘reconstructed by ‘Abd al-Āmir al-‘Aṣamm’, 121.

same transmitters.<sup>257</sup>

Al-Juwaynī reportedly mentions in his *Sharḥ al-Risāla* that before al-Nazzām, Hishām b. al-Ḥakam (179/795), who was first a follower of Jahm then became a follower of Ja‘far al-Sādiq and Mūsā al-Kāzim, had not accepted solitary reports unless they had certain indications that establish certain knowledge to the extent that God creates in one’s heart knowledge of its authenticity. For al-Juwaynī, such claims are contrary to the established *ijmā‘* on the authority of solitary reports.<sup>258</sup>

There is not a uniform agreed upon opinion on the authority of solitary reports within the Mu‘tazila, as is the case for many other theoretical topics. If one has to classify different viewpoints regarding the authority of solitary reports, Mu‘tazilī scholars favor a stance that falls in between those of more skeptical scholars such as al-Nazzām and of ḥadīth proponent such as al-Ka‘bī (319/931). Al-Qāḍī ‘Abd al-Jabbār singles out the works of al-Ka‘bī entitled *Naqd al-Siyarjānī* and of Abū Ja‘far al-Iskāfī (240/854) entitled *al-Qāḍī bayn al-Mukhtalifa*, when al-Qāḍī ‘Abd al-Jabbār rejects the critiques of the Mu‘tazila with ignorance of ḥadīth. He argues that it was not because they did not know the rules discerning authentic ḥadīth, but rather that they did not rely on solitary reports as a source of knowledge, because in solitary

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<sup>257</sup> Ess, Josef . "Ein Unbekanntes Fragment Des Nazzam." (1967), in *The Orient in Research* published by Wilhelm Hoenerbaoh, 171-79. (This fragment contains a passage from “*kitāb al-akhbār*” by al-Jāḥiẓ who transmits the opinions of his teacher al-Nazzām about reports)

<sup>258</sup> From the Shāfi‘īs Abū al-Ḥusayn b. al-Labbān al-Farḍī (402/1012) follows the same opinion as al-Nazzām and Hishām and al-Juwaynī says that he hopes that al-Farḍī repented for this opinion before he died, because this is something an *ijmā‘* occurred upon, hence it makes the one who contravenes it an unbeliever. See al-Shawkānī, *Irshād al-fuḥūl*, I, 135.

reports the possibility of lie, error, forgetfulness, change, and exchange remains. Therefore, al-Qāḍī ‘Abd al-Jabbār claims, they, notwithstanding the chained ḥadīths, accepted only evident reason, the certain sunna, and ijma‘.<sup>259</sup> Al-Qāḍī ‘Abd al-Jabbār’s statement is misleading, because this generalization operates on the assumption that the Mu‘tazila had the same stance regarding solitary reports. Moreover, most likely he was referring to solitary reports as a source of knowledge in theology. However, it is important to see that he acknowledged the fact that some Mu‘tazilī scholars were comprehensively involved in ḥadīth criticism and dealt with the religious sciences for evaluating transmitters.

In addition to *Qabūl al-akhbār fī ma‘rifat al-rijāl*, Al-Ka‘bī (319/931) is reported to have written *Kitāb fī ḥujjat akhbār al-āḥād* which was reportedly a refutation of his teacher al-Khayyāt.<sup>260</sup>

Despite a gradually increasing involvement in ḥadīth criticism, Mu‘tazilī scholars were known for their rational emphasis on the evaluation of transmitted texts. It is reported from Abū ‘Alī al-Jubbā’ī (303/915) that he would accept a ḥadīth with a particular chain of transmission, and reject a different one with the same chain, on the basis of the contradiction to the kitāb, ijma‘ and *dalīl al-‘aql* (rational evidence).<sup>261</sup> Abū ‘Alī al-Jubbā’ī held an exceptional criterion in accepting reports. It is reported that he accepted only two transmitters narrating from two other transmitters until the the prophet for regular legal matters based on

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<sup>259</sup> al-Qāḍī ‘Abd al-Jabbār, *Ṭabaqāt al-Mu‘tazila*, 44.

<sup>260</sup> Ka‘bī, *Faḍl al-i‘tizāl*, 52.

<sup>261</sup> Ibn Murtaḍā, *Ṭabaqāt al-mu‘tazila*, 81.



the rules of testimony; however, if the content of the report were about adultery he required four transmitters for the report.<sup>262</sup> Stipulating at least two transmitters in every generation excludes the authority of a large portion of the existing reports and gives a broad capacity for non-textual sources.

The sources do not give details about Murji'ī scholars' approaches toward solitary reports. Among them, Bishr b. Ghiyāth al-Marīsī (218/833) is reported to have not accepted solitary reports.<sup>263</sup>

As it is clear from abovementioned critiques, the reaction against solitary reports focused on its authentication and certain weaknesses in transmission rather than a categorical denial. The necessity of considering solitary reports was widely acknowledged, but giving an independent authority to solitary reports over reason-based sources was contested. The details of these arguments will be discussed in the sections below about the epistemic value of reports and the conditions of evaluating solitary reports.

## **2. The Traditionalist Stance on the Proofs of the Authority of Solitary Reports**

As mentioned earlier, traditionalist scholars strived for establishing the independent authority of solitary reports in the early phase of the gap period. In response to the attacks of their rivals, they sought to provide proofs for the overarching authority of solitary reports vis-a-vis reason-based suggestions for achieving true Islamic results.

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<sup>262</sup> Ibn Murtaḍā, *Minhāj*, 403.

<sup>263</sup> al-Saymarī, *Akhbār Abī Ḥanīfa wa-aṣḥābih*, 148.

The famous traditionalist scholar al-Bukhārī (256/870) devotes a chapter in his hadīth collection to the authority of solitary reports.<sup>264</sup> He begins with the following verse from the Quran: “Yet it is not right for all the believers to go out to battle together: out of each community, a *ṭā’ifa* should go out to gain understanding of the religion, so that they can teach their people when they return and so that they can guard themselves against evil..”<sup>265</sup> Depending on another verse,<sup>266</sup> al-Bukhārī argues that *ṭā’ifa*, in spite of being understood as a group, might also mean one person only. He also mentions another verse that urges Muslims to search for truth first when a sinful person (*fāsiq*) brings news, which was later used frequently for the authority of the solitary report by many.<sup>267</sup> It is evident that he argues that if a righteous person transmits something, one should accept it without further rational investigation about the content. This is exactly the point of the counter argument by the rationalist camp in evaluating reports, which will be examined in the following sections below. Throughout his chapter on solitary reports, al-Bukhārī relates certain reports that aim to show how the prophet and the companions accepted a single person’s claim and concludes the chapter with that both single male and single female persons have the same authority.

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<sup>264</sup> al-Bukhārī, *Ṣaḥīḥ: Kitāb akhbār al-āḥād*, Bābs 1-6. (IX, 86-90.)

<sup>265</sup> The Quran, 9:122

<sup>266</sup> The Quran, 49:9. “If two *ṭā’ifas* of the believers fight, you should try to reconcile them; if one of them attacks the other after this attempt for reconciliation, fight the oppressors until they submit to God’s command, then make a just and even-handed reconciliation between the two of them: God loves those who are even-handed.”

<sup>267</sup> The Quran, 49:6. After mentioning certain solitary reports, al-Bukhārī also relates the verse “Do not enter the houses of the prophet, before you are given a permission” (The Quran, 33:53). Al-Bukhārī claims that only the permission of one person would be enough. See al-Bukhārī, *Ṣaḥīḥ: Kitāb akhbār al-āḥād*, Bāb 4 (IX, 88-89.)

The proofs that al-Bukhārī lists out in his work were in circulation and extensively used and articulated in the debates of scholars on the authority of solitary reports. Al-Bukhārī uses some reports that had been used by al-Shāfi‘ī such as the one about announcing the change in qibla and by al-Shaybānī earlier than that such as the one sending Diḥya alone to the Byzantine emperor.<sup>268</sup>

Traditionalist scholars tended to translate the critiques of their rivals regarding the authority of solitary reports to a blind denial of the entire corpus of ḥadīths or conformist approaches. The traditionalist Ibn Qutayba’s criticism of Abū Ḥanīfa was his reluctance to accept a ḥadīth that contradicts his opinion.<sup>269</sup> His critique is not limited to a local school; rather he criticizes an attitude known as qiyās or ray-based thinking, because he also criticizes Rabī‘a b. Abd al-Raḥman, who was a Madinan scholar.<sup>270</sup> The same set of descriptions for the attitudes of rationalists regarding the solitary reports can be observed when Ibn Qutayba attacks al-Jāḥiẓ by claiming that al-Jāḥiẓ made fun of certain ḥadīths and fabricated some others.<sup>271</sup>

In the late third hijrī century, we see more theoretically organized discussions on the proofs of the authority of solitary reports from the side of traditionalists. Ibn Surayj (306/918) argues for the authority of solitary reports from the Quran, sunna and ijmā‘. From the Quran, he mentions the same verse (49/6) that necessitates investigation of a report if the reporter

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<sup>268</sup> al-Bukhārī, *Ṣaḥīḥ*: Kitāb akhbār al-āḥād, Bāb 1. (IX, 87.)

<sup>269</sup> Ibn Qutayba, *Ta’wīl mukhtalaf al-ḥadīth*, 105-8.

<sup>270</sup> Ibn Qutayba, *Ta’wīl mukhtalaf al-ḥadīth*, 109.

<sup>271</sup> Ibn Qutayba, *Ta’wīl mukhtalaf al-ḥadīth*, 112.

(*rāwī*) is unrighteous and concludes that this verse does not only verify its authority, it also requires us to accept the report of the righteous without pause (*tawaqquf*). Ibn Surayj mentions also a rare verse in the topic that reads as “They say that he listens to anything”,<sup>272</sup> which Ibn Surayj interprets as the prophet used to listen to everyone even if it were only one person and accept the report, such as the bedouin who bore witness for seeing the crescent of Ramaḍān.<sup>273</sup> Another proof from the sunna, according to Ibn Surayj, is that the prophet sent Mu‘ādh, ‘Alī and Ibn Mas‘ūd to Yemen. As for the evidence from *ijmā‘*, Ibn Surayj argues that any report the umma does not dispute should be accepted; therefore, this includes the acceptance of solitary report.<sup>274</sup>

His student Abū Bakr al-Khaffāf (d. between 340-60/952-70), however, takes its authority for granted and deals with its place in the typology of reports instead.<sup>275</sup> This might be a result of an overwhelming acceptance of the authority of solitary reports and a shift from the discussions on their authority to the discussion of their place within the typology of reports in the first half of the fourth/tenth century.

I will conclude this section with the statements of a late contemporary of al-Jaṣṣāṣ. Mālikī scholar Ibn al-Qaṣṣār (397/1007) mentions a verse<sup>276</sup> for the authority of solitary

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<sup>272</sup> The Quran, 9:61

<sup>273</sup> Ibn Surayj, *al-Wadā‘i‘*, II, 671.

<sup>274</sup> Ibn Surayj, *al-Wadā‘i‘*, II, 672.

<sup>275</sup> Abū Bakr al-Khaffāf, *al-Aqsām wa-al-khiṣāl*, 7a.

<sup>276</sup> The Quran, 49:6: “If a fasiq comes to you with news, verify it not to harm people in ignorance.”

reports in establishing a requirement for practical matters, i.e. law,<sup>277</sup> and based on the same verse he refutes those who claim that the principle should be to pause initially until making sure that the content of the report is correct.<sup>278</sup>

This section has demonstrated that discussions on the authority of solitary reports meant for the traditionalists the independent authority of solitary reports without rational evaluations of the content of the report. However, the rationalist scholars argued for the permissibility of using solitary reports and deficiency of only using chain criticism in order to conclude the authenticity of solitary reports. They put the emphasis on reason and argued that the authority of reports is tied to this.

### C. Epistemic Categories of Reports with Respect to Certainty

The main questions that this section addresses are how and when the classification of reports based on certainty and probability began and evolved. In relation to this, how and when scholars argued first for a distinction between using solitary reports in law (*yūjib ‘amalan*) and not in theology (*lā yūjib ‘ilman*).

One of the salient aspects of the division among the scholars in terms of the categorization of reports depending on certainty was dual, i.e. *mutawātir* and *khobar al-wāḥid*, and triple, with the addition of the category of *mashhūr* in between. The former was more common among the traditionalist circles, while the latter was more common among the circles

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<sup>277</sup> Ibn al-Qaṣṣār, *Muqaddima*, 68.

<sup>278</sup> Ibn al-Qaṣṣār, *Muqaddima*, 69-70.

of Mu‘tazila, Murji’a, and proto-Ḥanafīs.

The earliest known division among the reports regarding their epistemic value is attributed to Wāṣil b. Atā (131/748) who made a distinction between khabar al-‘amma and khabar al-khāṣṣa. Al-Jaṣṣāṣ reports that there are those who claim mutawātir reports carry acquisitive certainty rather than compelling certainty.<sup>279</sup>

‘Īsā b. Abān (221/836) divides reports into three categories. The first category consists of the reports whose correctness is known with compelling certainty (*iḍtirār*). The second category includes the reports whose incorrectness is known by a compelling certainty. The third category encompasses the reports for which both correctness and incorrectness are possible. The first category refers to the mutawātir, which give certain knowledge and the denial of which results in disbelief. According to ‘Īsā b. Abān there is not a specific requirement for the number of transmitters in a mutawātir report. He adds that even twenty people may not establish mutawātir status. The second category refers statements that have inherent and evident indications of incorrectness based on reason, such as the one who claims that he saw a building without a builder. The last category refers to a solitary report or a report that does not reach the level of tawātūr. This kind of reports can be used in law despite its uncertainty, if the narrator is known apparently with righteousness. If the narrator is known apparently with unrighteousness and lying, the report cannot be used in law.<sup>280</sup>

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<sup>279</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 47.

<sup>280</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 35-37.

Al-Nazzām is famously known for his claim that a mutawātir report does not necessarily establish certainty, because of the remaining possibility for a conspired lie. He is also reported to have held that a solitary report might establish certainty if the narrator knows it by certainty and the report carries indications of certainty.<sup>281</sup> Al-Nazzām clarifies what he means by these indications with a few examples. According to al-Nazzām, when a person relates the death of his mother or father who was suffering from mortal illness, his report establishes certainty. Likewise, the report of a midwife who announces the birth of a baby right after the birth, or the report of a person who informs the death of another person in the sight of a funeral, will be considered correct with certainty.<sup>282</sup> This approach of al-Nazzām is in parallel to the general approach of the rationalists in putting the emphasis on the rational evaluation of the reports rather than the righteousness of the transmitters.

Al-Jāhiz divides reports into three types based on certainty. The first type is mutawātir reports that necessitate the one who hears it to accept it; for this type it is irrelevant whether the reporter is an enemy or friend, righteous or unrighteous. The second type is the reports of a group that cannot be accepted without investigation, yet after investigating the reporters, it becomes clear that they could not agree on forgery due to their disassociation from one another. The third type is the report of one person or two persons who could be either truthful or not in their reports. The truthfulness of this report is related to one's heart, depending on one's positive assumption (*ḥusn al-zann*) regarding the reporter's good character and

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<sup>281</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 32; al-Saymarī, *Masā'il*, 144.

<sup>282</sup> Abū Ya'lā al-Farrā, *al-'Udda*, III, 905.

reliability. This last type is the weakest type of all. The first two types establish certainty, while *khbar al-wāḥid* establishes only assumption (*ḥusn al-ẓann*) and probability based on trust (*i timān*).<sup>283</sup>

It seems that Mu‘tazilī scholars criticized Shi‘ī scholars for rejecting mutawātir reports. Ibn Rāwandī refutes the Mu‘tazilī’s generalization about the Shi‘a rejecting the possibility tawātur and mentions Hishām b. al-Ḥakam as one who accepts tawātur, and gives a list of some Mu‘tazilī scholars who also reject it. Al-Khayyāṭ relates the Shi‘a’s rejection of mutawātir report to their doctrine of imāma and as a result claims that they are not qualified to hold such a disputed discussion among scholars.<sup>284</sup> Ashārī is also reported to have written a refutation of Ibn Rāwandī on the invalidation of tawātur.<sup>285</sup>

Among those who claimed that solitary reports lead to certainty are al-Ḥusayn b. ‘Alī al-Karābīsī (245/859)<sup>286</sup>, Dāwud b. ‘Alī (271/884), and al-Ḥārith al-Muḥāsibī (243/857).<sup>287</sup> A work entitled *Kitāb khbar al-mūjib li-al-‘ilm* is attributed to Dāwud and probably contained his opinions on the certainty of reports.<sup>288</sup> It is also reported that Ibn Khuwayz Mandād narrates this opinion from Mālik, but this is unlikely due to the fact that during Mālik’s time

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<sup>283</sup> al-Jāḥiẓ, *al-Rasā’il al-siyāsiyya*, 82-83. Ibn Rāwandī also reports that according to Jāḥiẓ one’s report or witness cannot establish certainty (qat‘). See Ibn Rāwandī, *Kitāb faḍā’ih al-Mu‘tazila*, ‘reconstructed by ‘Abd al-Āmir al-‘Aṣamm’, 152.

<sup>284</sup> al-Khayyāṭ, *al-Intiṣār*. p. 157-8.

<sup>285</sup> “Kitāb fī naqḍ ‘alā Ibn Rāwandī fī ibṭāl al-tawātur” and “[kitāb] fīmā yata‘allaq bihi al-ṭā’inūn ‘alā al-tawātur.” see Shihāb al-Dīn al-Lablī (691/1292), *Fihrist al-Lablī*, 119.

<sup>286</sup> Āl Ibn Taymiyya, *al-Musawwada*, 244.

<sup>287</sup> Ibn Ḥazm, *al-Iḥkām*, I, 108.

<sup>288</sup> Ibn al-Nadīm, *al-Fihrist*, 303.



such a discussion does not appear in the sources.

The famous traditionalist scholar, Abū ‘Ubayd al-Qāsim b. Sallām (224/838), does not explicitly mention a category of *khavar al-wāḥid* in his published works. However, he does point to the concept of *mutawātir*. For instance, he mentions certain reports as evidence for his claim on the increase of *īmān*.<sup>289</sup> Even though he describes these reports as *mutawātir* in this meaning (*al-āthār al-mutawātira fī hādha al-ma‘nā*), what he narrates are actually different solitary reports with similar meanings. He probably means that all these different reports support the claim on the increase of *īmān* in their meaning in a way that is *mutawātir*, what is later called *mutawātir bi-al-ma‘nā*.

Aḥmad b. Ḥanbal was not willing to make a distinction in the authority of reports. It is related that he was once asked about those who say that the [chained] report (*khavar*) would not establish certainty (*‘ilm*), but establish probability (*‘amal*), and he responded by saying that “he does not understand what this is.”<sup>290</sup> Based on this approach, the initial followers of Aḥmad b. Ḥanbal are reported to have argued for the certainty of solitary report. However, It seems that at the time of Abū Ya‘lā al-Farrā (458/1066) this distinction, and the idea that the solitary report does not establish certainty, became prevalent among different schools; hence, he strives to prove that Aḥmad b. Ḥanbal’s opinion can also be understood along the line of the majoritarian opinion. This agreement over the epistemic probability of a solitary report reached the extent that claiming epistemic certainty of solitary reports was regarded irrational.

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<sup>289</sup> al-Qāsim b. Sallām, *al-Īmān*, 13.

<sup>290</sup> Abū Ya‘lā al-Farrā, *al-‘Udda*, III, 899.

Therefore, Abū Ya‘lā al-Farrā first engages in an analysis to re-interpret the dominant opinion within the Ḥanbalī circles with certain conditions to give it a theoretical foundation. As supporting evidence, he interestingly mentions al-Nazzām’s similar opinion, a well-known adversary of traditionalists, who argued for the possibility of certainty in solitary reports.<sup>291</sup> This is also a good example of both how the theoretical opinions of the gap period continued to influence the literature of uṣūl al-fiqh and of the interrelations among different schools despite their distinct theoretical principles.

Al-Bukhārī (256/870) does not make a distinction between legal and theological topics in the chapter in which he deals with the authority of solitary reports. Even though the majority of the reports he relates fall into the realm of fiqh, he also relates a report for assigning a prophet to a certain people to teach the principles of faith.<sup>292</sup>

The rare examples of making a distinction between the use of solitary reports in practical matters and theological matters among the traditionalists can be traced back to the late thirdh hijrī century. Abū Sa‘īd al-Dārimī (280/894), a famous proponent of ahl al-hadīth, makes a distinction between using a report for a simple legal matter (*adnā fariḍatin*) and a theological matter (*ibtāl al-‘arsh wa-al-tawḥīd*) and clarifies that one should be more strict when it comes to the matters of theology.<sup>293</sup> This can be seen as an indication of the gradual development during which this distinction became more apparent in the second half of the

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<sup>291</sup> Abū Ya‘lā al-Farrā, *al-‘Udda*, III, 898-906.

<sup>292</sup> al-Bukhārī, *al-Ṣaḥīḥ*: Kitāb akhbār al-āḥād, Bāb 5. (IX, 90.)

<sup>293</sup> Abū Sa‘īd al-Dārimī, *Naqd*, 452.

third hijrī century.

Another way of reducing the authority of reports was to restrict certain categories within the existing collections of reports as establishing authority. Al-Dārimī engages in a discussion with his opponent on Abū Yūsuf’s exclusion of the opinions of the successors from the definition of *athar*. Al-Dārimī argues that the correct way to put it is that the disagreement of the successors is not a binding sunna as opposed to the sunna of the prophet or his companions.<sup>294</sup> Despite saying that, he also claims that the opinions of the successors are still more binding (*alzam*) than those of Abū Yūsuf or his followers due to the verse in the Quran that points out their virtuousness.<sup>295</sup>

Traditionalist scholars, however, continued to use solitary reports in theological matters, despite the growing agreement on the solitary reports carrying probable knowledge, not certain knowledge. Ibn Jarīr al-Ṭabarī (310/923) considers solitary reports authoritative with regards to matters of theology such as the signs of the last day. When he was trying to reconcile apparently contradicting reports about who will witness the last day, he distinguishes himself from those who do not accept solitary reports of righteous transmitters.<sup>296</sup> The fact that he does so without pointing out any difference in accepting solitary reports in theology or law might be seen as an indication that this was not an emphasized distinction of his time.

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<sup>294</sup> Abū Sa‘īd al-Dārimī, *Naqd*, 593.

<sup>295</sup> Quran, 9:100: “Allah is pleased with the predecessors from anṣār (Madīnan Muslims) and muhājir (immigrant Muslims from Mecca) and with those who followed them in the right manner.”

<sup>296</sup> al-Ṭabarī, *Tahdhīb al-āthār*, II, 832.

Different practical results of categorizing reports based on their epistemic value were discussed during the late third and early fourth hijrī centuries. Abū Ja‘far al-Ṭaḥāwī (321/933) makes a distinction between community report (*khābar al-jamā‘a*) and solitary report (*khābar al-wāḥid*) and claims that the one who denies the content of the first one will become an unbeliever, while the one who denies the content of solitary report will not.<sup>297</sup> However, he does not refrain from using solitary reports in his famous work on theology.<sup>298</sup> This must be an indication of a different perception regarding the value of solitary reports in accepting the authority of solitary reports in matters of theology, despite their probability. However, al-Ṭaḥāwī seems to have stipulated the necessity of certain knowledge only for the matter of excommunication. This understanding does not consider the entire realm of belief as the realm of certainty. In this sense, solitary reports can be used for the matters of belief, but one would be able to deny them. However, if something, be it a matter of practice or belief, is established with the community reports that establish certainty, one is not able to deny its authority and content.

Further categorization of reports based on certainty and probability developed in the early fourth hijrī century. Ibn Surayj’s student Abū Bakr al-Khaffāf (d. between 340-60/952-70) divides reports into five categories depending on a mixture of certainty and the topic of the reports. According to this categorization 1) *The reports of the prophets* due to their dependence on miracles and 2) *Mutawātir reports* establish necessary knowledge and the one

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<sup>297</sup> al-Ṭaḥāwī, *Sharḥ mushkil al-āthār*, VIII, 128.

<sup>298</sup> See al-Ṭaḥāwī, *Takhrīj al-‘aqā’id al-Ṭaḥāwīyya*, Ed. Nāṣir al-Dīn Albānī, Beirut: al-Maktaba al-Islāmī, (1414), 70.

who receives these reports is obliged to accept them. 3) *Khabar al-wāḥid* and 4) *The reports of witnesses* establish only probability. Accepting 5) *the reports of permission or gifts* and alike in transactions depends on the one who receives them. One is free to accept or reject this kind of report.<sup>299</sup>

It seems that an overarching agreement on the solitary reports establishing only probable knowledge was arrived at in the fourth hijrī century. Mālikī scholar Ibn al-Qaṣṣār (397/1007), a late contemporary of al-Jaṣṣāṣ, states that the solitary report does not establish certainty and requires only action (*‘amal*). He says that all jurists agreed upon this.<sup>300</sup> Ibn al-Qaṣṣār also makes an analogy between a solitary report and a witness in terms of being incapable to verify the truth.<sup>301</sup>

The data examined in this section has shown that classification during that period of the existing reports based on certainty was offered by the rationalists in an attempt to restrict the authority of reports. This proposal was not at first welcomed among the traditionalist circles, who were reluctant to accept any claim that would diminish the authority of the chained reports. However, intense theoretical debates compelled them to accept such a division. The most important result of this was a majoritarian agreement on the probability of solitary reports that constitutes most of the compilations of reports. This agreement might seem to have decreased the authority of reports significantly on a theoretical level. However, another

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<sup>299</sup> Abū Bakr al-Khaffāf, *al-Aqsām wa-al-khiṣāl*, 7a.

<sup>300</sup> Ibn al-Qaṣṣār, *Muqaddima*, 67.

<sup>301</sup> Ibn al-Qaṣṣār, *Muqaddima*, 68.

majoritarian agreement that gives the authority of probable knowledge a large place in religion repulsed this attempt and consolidated the authority of solitary reports in the realm of law, and for many in the realm of belief. The practical outcome of these theoretical discussions was the acknowledged right of denial of a specific solitary report without accusations of excommunication and the necessity of looking at reports individually, as opposed to as a whole, to identify authenticity. This resulted in an emphasis on the conditions for accepting solitary reports instead of categorical rejection and theoretical attacks on reports, which is examined in the following section.

#### D. Conditions and Interpretation of Solitary Reports

Since there was an agreement to accept the authority of solitary reports, although in to different extents, the focus of the debates shifted toward the conditions and interpretation of the solitary reports. Two main stances were competing in the early phases of the gap period for accepting a solitary report. The first stance was that of the traditionalists focusing on the chain criticism and considering this enough to come to a judgment for the authenticity of a report. The second stance was that of the rationalists who consisted of ahl al-ra'y, Mu'tazila, and Murji'a focusing on the textual (*matn*) criticism and being more skeptical about the chain criticism just as the proponents of the first stance were regarding those who argue for *matn* criticism, suspecting them of invalidating reports based on their desires. The first stance became victorious as early as the second half of the third hijrī century. However, the second stance also had an impact on later ḥadīth criticism. What follows will give details and nuances of these two stances and their influence.

## 1. Traditionalist Ḥadīth Criticism: ‘Adāla and Ḍabṭ

Traditionalist ḥadīth criticism was based on the theoretical principle for the supremacy of the independent authority of ḥadīth reports over other sources. According to them, orthodoxy and normativity can be established by the Quran and ḥadīth reports. However, because most of the text of the Quran is subject to interpretation, another more detailed textual source would suffice us to explore both the intended meaning in the text of the Quran and things that the text of the Quran does not cover. In order to be a conclusive measure for normative authority, these reports need to be weighted by themselves without the help of subjective human reasoning which is, in the eyes of traditionalists, the ultimate reason for disagreements in the community. Therefore, the traditionalists based the authentication of reports on the reliability of transmitters rather than the rational evaluation of the text of reports.

Since the principles of chain criticism according to the traditionalists have been studied in many works, the principles of non-traditionalists are more relevant for this research. It will suffice us to give a few examples from the gap period, in order to show the emphasis on the chain criticism among the traditionalists. For instance, Abū ‘Ubayd al-Qāsim b. Sallām (224/838), an independent scholar with traditionalist leaning, does not accept a report as evidence due to a narrator in the chain who did not actually meet the person he reports from.<sup>302</sup>

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<sup>302</sup> al-Qāsim b. Sallām, *al-Nāsikh*,

Abū Sa‘īd al-Dārimī (280/894) rejects the reports of certain people by questioning their righteousness. Simply following the Jahmiyya, and being an unknown transmitter to other scholars, constitutes unrighteousness for him. He rejects, for example, the reports of Ibn al-Thaljī based on the critiques of him in transmission and piety, and scarcity of people who followed him or narrated from him. However, when he rejects the reports of Abū Yūsuf, one of the famous founding scholars of the Kūfī-Ḥanafī school, he criticizes him with three claims, namely that Abū Yūsuf was not from among the successors, he did not pray behind those who criticize the Jahmiyya, and he argued for the createdness of the Quran.<sup>303</sup>

## **2. Uṣūlī Ḥadīth Criticism: Evaluation of Ḥadīth Content Based on Primary Sources**

As opposed to traditionalist argument for the independent authority of ḥadīth reports in establishing normative authority and, hence, orthodoxy and orthopraxy, the other camp that consists of theologians (mostly Mu‘tazila, Murji’a) and jurists (fuqahā’) argued for a more complex way based on stratified checks and balances within the various sources and methods to determine normative solutions. It seems from the discussions of the period that this camp applied this source methodology in evaluating reports as well. Even though they did not specifically label this set of criteria for evaluating ḥadīth reports as using uṣūlī criticism, an analysis of these criteria reveals that they require the text of the reports to be in coherence with some primary sources. According to the majority of the rationalist camp, it will be still

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<sup>303</sup> Abū Sa‘īd al-Dārimī, *Naqd*, 542.



permissible (*jā'iz*) to use ḥadīth reports as evidence, but not necessary (*wājib*); this is a nuance between the two camps that does not find mention in the current scholarship. However, this distinction also changed later in favor of the arguments of traditionalists toward the necessity of using reports.

From the post-gap period, al-Dabūsī lists four methods for criticizing a report after chain criticism:<sup>304</sup>

- 1) Comparing the content of the report to the Quran. If it coincides, it is accepted. If it does not, it is rejected.
- 2) Comparing the content of the report to the established sunna (al-sunna al-thābita) either with *tawātur*, or *istifāḍa*, or *ijmā'*.
- 3) Comparing the content to '*umūm al-balwā*' (widespread practice). If the content is in contradiction with widespread practice, the report becomes *shādh* (isolated) and is rejected.
- 4) Likewise, if the content of report is something disagreed upon among the predecessors, (*salaf*) and they did not relate a ḥadīth about the topic, the report should also be rejected.<sup>305</sup>

The data from the gap period demonstrates that these criteria were extensively

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<sup>304</sup> Al-Dabūsī gives the following title to the section where he discusses these criteria: "The section on the criticism of uninterrupted or interrupted reports after their verification from the prophet peace be upon him" (bāb al-qawl fī intiqād khabar al-wāḥid ba'da thubutih 'an al-rasūl 'alayhi salām musnadan aw mursalan) See al-Dabūsī, 'Abdallāh Ibn 'Umar, *Taqwīm al-adilla fī uṣūl al-fiqh*. edited by Ḥalīl Muḥyi-'d-Dīn al-Mais. Bairūt: Dār al-Kutub al-'Ilmīya, 2001, 196-200.

<sup>305</sup> al-Dabūsī, *Taqwīm al-'adilla*, 196.

discussed among the scholars. The rationalist camp argued for applying some of these criteria after chain criticism before accepting a solitary report. While the traditionalist camp responded to these arguments in different ways. This section discusses these debates around text criticism during the gap period.

This general method of evaluating reports based on *uṣūl* is theoretically pointed out by the Zaydī imam al-Qāsim b. Ibrāhīm al-Rassī (246/860). Al-Qāsim b. Ibrāhīm underlines the bitter partition between the traditionalists and rationalists with respect to the reports and the need for evaluating reports based on the *uṣūl of reports that are agreed upon*:

“The *aṣl* (basis) of sunna that is embedded in the words of the prophet is that upon which an *ijmā‘* occurred among the people of qibla. The *far‘* (subordinate) of sunna is what they disagreed upon. The second type of the reports from the prophet that is subject to disagreement should be compared to the *aṣl* (agreed upon part) of the Qur’ān, of ‘aql, and *ijmā‘*”<sup>306</sup>

Qāsim b. Ibrāhīm suggests in a concise theoretical statement what ‘Īsā b. Abān and other reason-based *uṣūlī* scholars detailed extensively in their works. This approach finds mention in the later *uṣūl* literature as rejecting a report that is in contradiction with the clear *uṣūl* sources (*al-uṣūl al-mumahhida*) that are non-abrogated clear texts of the kitāb, sunna, and *ijmā‘*. Ibn al-Murtaḍā claims that the majority of *uṣūlīs* and traditionists (*muhaddithīn*) accept

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<sup>306</sup> al-Qāsim b. Ibrāhīm al-Rassī, *Majmū‘*, I, 632.

this principle; while aṣḥāb al-ḥadīth reject.<sup>307</sup> This might be taken as another indication of how the developed conditions of evaluation of reports during the gap period remained beyond the gap period in some non-Sunnī sources.<sup>308</sup>

Another reason-based critique of the traditionalist approach to the corpus of reports is made by the famous Mu‘tazilī scholar al-Iskāfī (240/854) in his *al-Mi‘yār*. Al-Iskāfī claims that traditionalists (*al-mansūbūn ilā l-riwāya*) engage in the study of transmitters and transmission itself, instead of grasping the text of the report. Therefore, according to al-Iskāfī, they fail to distinguish authentic reports from inauthentic ones. The following statements of al-Iskāfī demonstrate the heated debates on evaluating reports in the early third hijrī century and the role of reason in evaluating reports:

“O you followers of reports and adherents of the narrations of the prophet! We knew that you do not have the ability to derive knowledge, reason that would solve your needs, and inference that would take you to the intimate knowledge. You do not accept tools of reasoning, but at the same time argue that your opinions more accurate. How is that possible while if someone mentions the word reasoning [*naẓar*], you become like an angry donkey. If, as a comparison, we raise your status to the level of pharmacists who do not know anything but the names of drugs and are ignorant about the diseases and their treatments, the people of reasoning [*ahl al-naẓar*] would be the doctors... If

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<sup>307</sup> Ibn al-Murtaḍā, *Minhāj*, 462.

<sup>308</sup> As mentioned earlier, the aspects of this distinct approach can be located within the writings of some uṣūl scholars in the Ḥanafī school.

one keeps himself away from reasoning, how would he know how to evaluate authentic reports [*taṣḥīḥ al-khabar*] when he hears them?”<sup>309</sup>

What we have seen in the section on the authority of reports concerning al-Nazzām’s critiques confirms the search for reason-based verifications other than the mere superficial reliability of narrators. Al-Nazzām argues that one should not accept a report unless the report compels one to accept it with its inherent indications, or if one has external knowledge that indicates the correctness of the report, or if there is an analogical sign that shows the correctness of the report.<sup>310</sup> Al-Nazzām also criticizes the overly optimistic expectation of the traditionalists that if one is trustworthy and righteous, one’s transmission will be authentic. He states that there are many people known for their trustworthiness but who nevertheless tried to trick people by playing with the narrators in the chain [*tadlīs*] by claiming to narrate from someone they did not meet. This fact has become known, al-Nazzām continues, when some of these individuals in their death beds have confessed what they claimed about the reports throughout their lives to be lies, after having benefitted from these lies through leadership and consuming others’ property.<sup>311</sup> Al-Nazzām might have followed Hishām b. al-Ḥakam in his critiques of reports. In addition to searching for compelling evidence to accept the solitary reports, Hishām, like al-Nazzām, does not distinguish between the reports of believers and

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<sup>309</sup> al-Iskāfī, *al-Mi’yār*, 203-5.

<sup>310</sup> Ess, Josef . "Ein Unbekanntes Fragment Des Nazzam." (1967), in *The Orient in Research* published by Wilhelm Hoenerbaoh, 171.

<sup>311</sup> Ess, Josef . "Ein Unbekanntes Fragment Des Nazzam." (1967), 171-72.

unbelievers in establishing certainty.<sup>312</sup>

The effects of interrelations between the two approaches of ḥadīth authentications that emerged in the second/eight and early third/ninth centuries can be traced in the writings of the late third/ninth and early fourth/tenth centuries. For instance, al-Dārimī, as will be mentioned in the following section, does not categorically reject comparing a report to the text of the Quran. In the valuable introduction to his *al-Khiṣal* where he discusses theoretically the topics of uṣūl al-fiqh, Abū Bakr al-Khaffāf (d. between 340-60/952-70) mentions eight criteria to accept a report as authentic and use it as evidence for actions (*'amal*), five of them for the chain and three of them for the text of the report:

- 1) All narrators in the chain must be righteous (*'adl*) up to the prophet Muhammad;
- 2) Each narrator must mention the earlier narrator he narrates from (*'an fulān*);
- 3) Each narrator must have met the person he narrates from (*adrakahu*);
- 4) Each narrator must have directly listened to the one from whom he narrates (*al-samā' minhu*);
- 5) Each narrator must use one of the following expressions in his narration to establish a valid transmission: “he told us” (*haddathanā*); or “it was recited to us” (*quri'a 'alaynā*); “we recited to him (*qara'nā 'alayhi*)”; or “it was recited to him and I was listening” (*quri'a 'alayhi wa-ana asma'u*).

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<sup>312</sup> Ibn Rāwandī, *Kitāb faḍā'ih al-Mu'tazila*, 'reconstructed by 'Abd al-Āmir al-'Aṣamm', 161.

- 6) The content of the report must not be irrational (*khārijun min al-ma‘qūl*);
- 7) The content must not be abrogated;
- 8) The content must not have contradicting evidence.<sup>313</sup>

The sixth and eighth conditions are clear indication of the influence of the rationalist camp. The eighth condition entails the general principle of the rationalist camp that is to compare the content of the solitary report to other superior sources of the known reports and the Quran.

Now I will turn my attention to the certain principles of rationalist scholars in evaluating reports. I will examine the ways in which they apply textual comparisons in addition to chain criticism.

***a. Comparing Solitary Reports to the Known Reports (al-Akhbār al-Mashhūra) and the Role of Ijmā‘***

One of the main procedures of the rationalist camp in the process of authenticating reports was comparing the content of solitary reports to the known reports. What I translate with “the known” I mean *mashhūr* or *ma‘rūf* reports and the reports that are supported with *ijmā‘*. We have seen already how the Zaydī imam al-Qāsim b. Ibrāhīm stipulated comparison

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<sup>313</sup> In fact, al-Khaffāf claims for nine criteria, but mentions only eight. He must have meant to split the expressions that are needed to be used, or just simply miscounted the number. See Abū Bakr al-Khaffāf, *al-Aqsām wa-al-khiṣāl*, 7a.

of the contents of the disagreed reports to that of the agreed upon reports before. We also see the early theorization of what later became fixed as *al-ḥadīth al-mashhūr* among the Ḥanafīs as a distinct and intermediary category between consecutive (*mutawātir*) reports and solitary reports throughout the gap period. Independent studies on the concept of *al-ḥadīth al-mashhūr* sufficiently examine the mature form of this ḥadīth category among Ḥanafīs. The examination below, however, deals with this concept as it was used as a condition for determining the authenticity of solitary reports.

The claims over *ijmāʿ*-supported reports and *maʿrūf* reports are not distinct from one another. The rendering of the known reports in the passive voice points out the same vagueness of *ijmāʿ* claims: ambiguous subjects. The subjects who know the reports are absent in the concept, which enables the proponents of this method to enjoy unclear arguments loaded with bold claims, but makes their arguments vulnerable to possible attacks from their rivals at the same time. The known reports refer to the accumulated reports within the Kūfī scholarly tradition. The earliest examples of this usage can be seen in the writings of Abū Yūsuf and al-Shaybānī.<sup>314</sup>

However, it was ʿĪsā b. Abān who theorized this category, as mentioned above in the section of epistemic categories of reports, and underlined as a condition for the evaluation of solitary reports.

Al-Ṭaḥāwī (321/933) argues that among Ḥanafī scholars including Abū Yūsuf there

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<sup>314</sup> For a few examples see al-Shaybānī, *al-Ḥujja ʿalā ahl al-Madīna*, I, 182-87.;

were those who rejected using a certain report based on three criteria. According to this report, Ibn Mas‘ūd said that on the night of Jinn the prophet made a *wudū’* (ablution) with *nabīdh* (fermented fruit drink) and said that it is purifying (*tahūr*). The three criteria that al-Ṭahāwī mentions are as follows: First, the report did not come through valid ways (*turuq*) that would make a report evidence for those who accept the authority of solitary report. Second, the report did not come with an evident narration (*al-majī’ al-zāhir*) with multiple chains (*tawātarat al-riwāyāt*) that obliges one to act upon it, this being because one is *required to use a report, only when it has multiple chains*. Third, there are other reports that meet the criteria of both sides stating that Ibn ‘Abbās was not with the prophet during that night.<sup>315</sup> The first criterion is directly related to the quality of the reporters in the chain, which is shared by many, especially ahl al-ḥadīth. However, he mentions that the final reporter should be evaluated based on whether he is well-known for his knowledge about the topic that the report covers, which is a different type of evaluation for the reporters than that of ahl al-ḥadīth who evaluate the reporter on whether he heard from the one who is speaking in the text, i.e. *inqitā’*.<sup>316</sup> The second criterion and how al-Ṭahāwī puts it are crucial to understanding the Ḥanafī approach to reports. He uses the word *tawātara*, which is the verb form of *mutawātir* (consecutive). Yet, it seems that he uses it in its literal meaning, i.e. to occur consecutively, which is in parallel with what later Ḥanafīs called al-ḥadīth al-mashhūr. To say it is not incumbent to use such reports means that the jurists are free to use them or not, which is in clear contradiction with the approach of ahl al-ḥadīth who assign an independent binding authority to reports. According to this

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<sup>315</sup> al-Ṭahāwī, *Sharḥ ma‘āni al-āthār*, I, 95.

<sup>316</sup> al-Ṭahāwī, *Sharḥ ma‘āni al-āthār*, I, 96.



criterion that al-Ṭahāwī points out, only those reports that have multiple chains would have such binding authority. The last criterion he mentions is also important, because it is another indication of how text criticism plays an important role in evaluating a report among reason-based circles.

Hilāl b. Yahyā (245/860), a student of Abū Yūsuf, prefers reports approving religious endowments due to their abundance and amplexness (*akthar wa a‘amm*) in opposition to Abū Ḥanīfa who bases his invalidation on the reports from the Qādī Shurayh.<sup>317</sup>

Abū Ja‘far al-Iskāfī, the famous Mu‘tazilī scholar, argues that the text of a report should remain in its literal meaning and generality. The specification (*takhṣīṣ*) claims for a report invalidate the report as evidence unless there is another proof of specification explicated in the text or in another authentic report. As an example, he mentions that those who support the virtue of Abū Bakr report that he said that “I am not the most virtuous one of you, even though I became your leader.” They place a specification after virtuous “in terms of lineage”, and this is in contradiction to the generality of the text and its literal meaning.<sup>318</sup>

***b. Comparing the Solitary Report to the Quran (‘Arḍ khabar al-wāḥid ‘alā al-Qur’ān)***

One of the distinct conditions of Kūfī scholars in evaluating reports was to review the text of the solitary report based on the content of the Quran. The literature of uṣūl al-fiqh points

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<sup>317</sup> Hilāl al-Ra’y, *Aḥkām al-waqf*, Ḥaydarābād: Dā’ira al-Ma‘ārif al-‘Uthmāniyya, 1355 AH, 12-13.

<sup>318</sup> al-Iskāfī, *al-Mī’yār wa-al-muwāzana*, 39.

out ‘Īsā b. Abān as the earliest person who indicated this as a necessary condition for evaluating solitary reports during the gap period.<sup>319</sup> ‘Īsā b. Abān argues that even if other conditions are met, the content of the report still needs to be compared to the Quran based on the reports from the prophet as “The transmission claims from me will increase in the future. What coincides with the content of the book of God is from me; what contradicts it is not.”<sup>320</sup> Multiple sources claim that his contemporary Yaḥyā b. Ma‘īn (233/848) rejected this report and argued that infidels (*zanādiq*) fabricated this ḥadīth. However, in his *Tā’rīkh*, he relates this report from Abū Hurayra with no comment.<sup>321</sup>

Nevertheless, it seems that a discussion on the Kūfīs’ criterion had been present before ‘Īsā b. Abān. In *al-‘Ālim wa-al-muta‘allim*, a treatise attributed to him, Abū Ḥanīfa points out the necessity of consistency between the Quran and the reports transmitted from the prophet.<sup>322</sup> Nonetheless, he does not mention the prophetic report that was used by his followers. Al-Shāfi‘ī mentions this discussion and refutes the narration that the Kūfīs used as evidence.

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<sup>319</sup> Abū al-Ḥusayn al-Baṣrī, *al-Mu‘tamad*, II, 154.; Fakhr al-Rāzī, *al-Maḥṣūl*, IV, 438.; al-Sam‘ānī, *Qawāfi‘ al-adilla*, al-Zarkashī, *al-Baḥr al-muḥīṭ*, VI, 263; al-Isnawī, *Tamhīd*, I, 367.

<sup>320</sup> Ibn al-Murtaḍā, *Minhāj*, 442-43. (Innaha satakthur ‘alayya-l-akhbār. Famā wāfaqa kitab Allahi fa-huwa minnī, wa-mā khālafahu fa-laysa minnī)

<sup>321</sup> Yaḥyā b. Ma‘īn, *Tā’rīkh*,

<sup>322</sup> Abū Ḥanīfa, al-Nu‘mān b. Thābit, *al-‘Ālim wa-al-muta‘allim: riwāyat Abī Muqātil ‘an al-Nu‘mān b. Thābit Abū Ḥanīfa: wa-yalīhi risālat Abū Ḥanīfa ilā ‘Utmān al-Battī: thumma al-Fiḥ al-absāṭ riwāyat Abī Muṭī’ ‘an Abī Ḥanīfa*, edited by Muḥammad Zāhid al-Kawtharī, Cairo: Maṭba‘at al-Anwār, 1368/1949, 24-25. The attribution of *al-‘Ālim wa-al-muta‘allim* to Abū Ḥanīfa has been contested by some scholars in the West including Schacht and Madelung. Yusuf Şevki Yavuz persuasively rejects their arguments and demonstrates certain proofs for the authenticity of attribution. See Yavuz, Yusuf Şevki, *TDV İslam Ansiklopedisi*, s.v. “el-Ālim ve’l-müteallim”. II, Istanbul: TDV, 1989. 461-63. ch. Joseph Schacht. 1964. "An Early Murci’ite Treatise: The Kitāb Al-‘Ālim wal-Muta‘allim". *Oriens*. 17: 96-117.; Even if it was Abū Muqātil (d. 208/823) who authored the treatise as Schacht argues, the time of the treatise would precede ‘Īsā b. Abān in any event.

This narration is different in wording from the previous one, but has the same meaning. It reads as “If a word reaches you from me, compare it to the book of Allah. If it fits it, this shows that I said it. If it does not, then I did not.”<sup>323</sup> As counter evidence, he narrates another report in which the prophet prohibits those who receive an order from the prophet and say that “I do not understand. If I see it in the Quran I would follow it.”<sup>324</sup>

From the early third hijrī century, al-Jāhiz relates a similar report from Abū Hurayra without a chain with some additional details as follows:

“Verily the reports from me will increase after me, just as happened to the prophets before me. Whatever claim comes to you from me, compare it to the book of God. If it coincides with it, it is from me regardless of whether I said it or did not say it.” (Inna al-aḥādīth satakthur ‘annī ba‘dī kamā kathurat ‘an al-anbiyā’ min qablī. Fa-mā jā’akum ‘annī fa-‘riḍūhu ‘alā kitāb Allāhi. Fa-mā wāfaqa kitāb Allāhi fa-huwa ‘annī qultuhu aw lam aqulhu.)<sup>325</sup>

Al-Jāhiz also relates a more common wording of the report elsewhere as ““The lie will disseminate after me. Compare the sayings to the Quran.” (Sayafshū al-kidhb ba‘dī. Fa-mā

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<sup>323</sup> al-Shāfi‘ī, *al-Risāla*, 224. (Mā jā’akum ‘annī fa-‘riḍūhu ‘alā kitāb Allāhi. Fa-mā wafaqahu fa-ana qultuh. Wa-mā khālafahu fa-lam ‘aqulhu.)

<sup>324</sup> al-Shāfi‘ī, *al-Risāla*, 225-229.

<sup>325</sup> al-Jāhiz, *al-Bayān wa-al-tabayīn*, II, 20. (Inna l-aḥādīth satakthur ‘annī ba‘dī kamā kathurat ‘an al-anbiyā’ min qablī. Fa-mā jā’akum ‘annī fa-‘riḍūhu ‘alā kitāb Allāhi. Fa-mā wāfaqa kitāb Allāhi fa-huwa ‘annī qultuhu aw lam aqulhu.)

jā'akum min al-ḥadīth fa-'ridūhu 'ala kitāb Allāhi.)”<sup>326</sup> This clearly demonstrates that this criterion was not limited to Kūfan scholars of the time.

Another recorded response from the traditionalist camp to this method comes from al-Dārimī (280/894). In his refutation written in the dialectical debate format with a follower of Bishr al-Marīsī, his interlocutor relates the abovementioned report from the famous jurist Abū Yūsuf as follows: “Sayings transmitted from me will disseminate. Those that coincide with the Quran are from me; those that do not are not from me.” (Sayafshū al-ḥadīth 'annī. Fa-mā wāfaqa minhā l-Qur'ān fa-huwa 'annī. Wa-mā khālafahu fa-laysa 'annī.)<sup>327</sup> Al-Dārimī does not reject the report, rather interprets it differently. He argues that his interlocutor relates this report to discourage people from the reports (*āthār*). However, he continues, this report points out the fact that the reports will circulate among different kinds of people including righteous individuals and liars, or those who are exact (*mutqin*) in their memories as well as those who deceive (*mughfil*). This is something traditionalists already accepted and forced them to only accept reports after criticism. Even though al-Dārimī claims that his interlocutor uses this report to inform the overall critique of reports in general, al-Dārimī accepts the method based on the verification of the Quran for the contents of hadīth (*'arḍ al-riwāyāt 'alā al-Qur'ān*). Nonetheless, according to him, only those who are well-known traditionalist jurists and critics (*al-Fuqahā' al-jahābidha al-nuqqād*) are eligible for such a verification process, such as Ma'mar, Mālik b. Anas, and Sufyān al-Thawrī who are famous with their

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<sup>326</sup> al-Jāhīz, *al-Rasā'il*, I, 287.

<sup>327</sup> al-Dārimī, *Naqd*, II, 600.

knowledge on reports and their meaning. He attacks Bishr al-Marīsī, al-Thaljī, and al-Lu'lu'ī who used to advocate this method and reject reports based on it, and were the predecessors of his interlocutor, claiming that they were incompetent in applying such a method due to their lack of knowledge about both the reports and the supporting evidence for the reports from the Quran.<sup>328</sup>

The last critique of this criterion from the ahl al-ḥadīth during the gap period comes from Ibn Baṭṭa al-‘Akbarī (387/997). Ibn Baṭṭa relates the prophetic report with the full chain, and reports the critiques of al-Sājī (307/920) and ‘Alī b. al-Madīnī (234/849), who claimed that the alleged prophetic report was fabricated. Al-Akbarī ironically argues that this prophetic report contradicts the Quran, authentic ḥadīth, and the established sunna (sunna māḍiya).<sup>329</sup> Then instead of dealing with chain criticism of the report, he lists out what he believes are “authentic reports” that demonstrate the incorrectness of this report.

The discussions between both parties show that the rationalist camp insisted on this method as a reaction to independent authority of solitary reports and to restrict their authority as much as possible in establishing normativity, because they argued for a more complex and stratified way for determining normativity based on sources. On the other hand, the traditionalist camp rejected the claim of the possibility of inconsistency between an authentic solitary report based on chain criticism and the content of the Quran, in order to retain the overarching independent status of solitary reports for determining normativity.

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<sup>328</sup> Abū Sa‘īd al-Dārimī, *Naqd*, II, 602.

<sup>329</sup> Ibn Baṭṭa, *al-Ibāna al-kubrā*, I, 265.

### 3. Ta'wīl of Contradictory Reports

Interpretation of existing reports became more important after majoritarian acceptance of solitary reports. Once the gate of rejecting reports categorically was closed, interpretive tool was used by the so-called rationalists to decrease the authority of a particular report that is in contradiction with the established theological or juristic system. On the other side, the proponents of the independent authority of reports also had to develop interpretive explanations against the critiques of their opponents for apparently contradictory reports. These efforts resulted in the emergence of a sub-field called reconciliation of the contradictory reports (*ta'wīl mukhtalaf al-ḥadīth*). One of the earliest examples of these critiques of contradictions in reports was given by al-Nazzām who argued for the fabrication of hadīths even by righteous transmitters. He said, for instance, “Those who transmitted that the prophet said that ‘the best generation is the generation I live in’ are the same people who transmitted that the prophet said that ‘My umma is just like rain; it is not known whether its beginning is better or its end.’”<sup>330</sup> Al-Jāḥiẓ argues that one of the main problems of available reports is that they are often narrated without any information about their contexts, which makes them ambiguous; hence, their literal meanings are in need of accurate interpretation and contextualization before jumping to conclusions based on literal meanings alone.<sup>331</sup>

One of the tools used for interpretation of reports was naskh, i.e. abrogation. It was not uncommon to solve contradictory reports that meet the aforementioned certain conditions on

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<sup>330</sup> Ess, Josef . "Ein Unbekanntes Fragment Des Nazzam." (1967), 173.

<sup>331</sup> al-Jāḥiẓ, *al-Ḥayawān*, I, 225.

the basis of abrogation. Yet, abrogation claims should also rely on principles and be free from arbitrary arguments. ʿĪsā b. Abān, for instance, reportedly used later practices of the companions as the sign of abrogation when they are in contradiction with the reports from the prophet. He gives the example of what Ubāda b. Al-Ṣāmit reported from the prophet for including banishment with the ḥadd punishment. Yet, due to the practices of ʿAlī and ʿUmar in contradiction with this prophetic report, ʿĪsā concludes that the report must have been abrogated.<sup>332</sup>

Another important principle was to specify the generality of a report on the basis of the juristic preference of its first narrator. ʿĪsā b. Abān is reported to have held this opinion and gave Abū Hurayra’s hadīth and his specifying ruling as an example. According to this hadīth, the prophet ordered the washing of a vessel from which a dog had drunk seven times; however, Abū Hurayra himself argued that the prophet emphasized recurring washings, not a specific number, hence it is sufficient to wash three times.<sup>333</sup> The same example appears in al-Ṭaḥāwī’s collection and he interprets Abū Hurayra’s own opinion in contradiction with his report from the prophet as an indication of abrogation. He also states that between two contradictory reports the one with the most elements to it should take precedence as a response to traditionalists who reject the abrogation claim, yet take the report of Abū Hurayra and instead of the report of ʿAbd Allah b. Al-Mughaffil, whose report requires eight washings with the

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<sup>332</sup> Bāqillānī, *al-Taqrīb wa-al-Irshād al-Saghīr*, III, 226-27.

<sup>333</sup> Bāqillānī, *al-Taqrīb wa-al-Irshād al-Saghīr*, III, 215-16.

eighth washing including dirt.<sup>334</sup>

Muḥammad b. Shujā‘, a reason-based follower of the Kūfī school, was reported to even have attempted to interpret the reports that he did not accept as authentic. Abū Sa‘īd al-Dārimī criticizes Ibn Shujā‘ for this with the following words: “Wo to you! We defend the ḥadīth, but criticize it too [for obvious reasons]; but even though you disgrace the ḥadīth, then you verify it, interpret it and try to find ways to reconcile it (*taltamis lahu l-makhārij*) in order to maintain it. If this ḥadīth is denied (*munkar*), your interpretation should be denied even more.”<sup>335</sup> It is clear that al-Dārimī was trying to prove that his group, ahl al-ḥadīth, have accurate criteria to evaluate ḥadīth and these people (al-Thaljī and the like) cannot even distinguish between obviously fabricated reports and then they try to interpret them. We do not exactly know al-Thaljī’s reason in this particular instance, but bringing to mind other similar examples, one can see that rationalists or more precisely those who were critical of ḥadīths, were engaging in a preemptive interpretational process for reports that might be possibly defended by some scholars based on certain criteria.

This section discussed the rich debates on the conditions of solitary reports and their interpretation. It has demonstrated that along with the increasing role of solitary reports in the gap period after the majoritarian approval of their authority, the discussions intensified around the conditions for the authenticity of solitary reports. The traditionalist camp insisted on the sufficiency of looking for conditions that reveal the reliability of the transmitters in the chain.,

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<sup>334</sup> al-Ṭahāwī, *Sharḥ ma‘āni al-āthār*, I, 23.

<sup>335</sup> Abū Sa‘īd al-Dārimī, *Naqd*, 662-63.



while the rationalists suggested certain other conditions in relation to the text of the reports for accepting the authenticity of solitary reports in addition to the reliability of transmitters. The motives behind these two approaches can be explained with their overall approaches to the issue of text versus reason. The traditionalists strived to preserve the authority of reports independent from reason, while the rationalists strived to give a secondary role to the texts that attain only probability and applied their stratified method that is based on evaluating secondary sources with primary ones.

#### E. The Kūfī Approach to Reports: Was There a Traditionalization of Ahl al-ra'y?

The Kūfan school, the so-called ahl al-ra'y, has been frequently portrayed as having more or less an anti-ḥadīth inclination. This general classification affects researchers in evaluating different schools, hence results in inaccurate conclusions. The common explanation within the field in terms of the relationship between different scholarly groups during the first centuries of Islam is that they approached one another through a synthesis between ra'y and ḥadīth. The formation of the schools is also explained with the same theory.<sup>336</sup> However, this theory suffers from sweeping generalization and anachronism. If such a synthesis ever happened between rationalists and traditionalists, one would not argue for this after the second hijrī century. In this section, I will evaluate the claims on the traditionalization of ahl al-ra'y.

In his work *Authority, Continuity and Change in Islamic Law*, Hallaq argues that

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<sup>336</sup> Wael Hallaq, *A History of Islamic Legal Theories*, 32-35; Melchert, *Formation*, 70.

Muḥammad b. Ibn Shujā‘ al-Thaljī (266/879) was the first person who accomplished the substitution of ḥadīth with ra’y in Ḥanafī legal thinking based on a sentence in Ibn Nadīm’s (438/1047) account.<sup>337</sup> Hallaq translates what Ibn Nadīm says as the following “He was the one who flipped (*fataqa*) Abū Ḥanīfa’s legal thought upside down, brought evidence for it, demonstrated its reasons and reinforced it with ḥadīth.”<sup>338</sup> However, the famous Baghdādī Mu‘tazilī al-Ka‘bī (319/931) uses exactly the same words for Abū ‘Abd Allah b. Abī Duwād (240/854), the well-known chief qādī of al-Ma’mūn, “He was the one who *fataqa* Abū Ḥanīfa’s legal thought, provided evidence for it, demonstrated and reinforced it with ḥadīth.”<sup>339</sup> Two scholars shared the same teknonym (*kunya*) as Abū ‘Abd Allah, but had no reported relationship other than that. Therefore, if one should be given credit for traditionalizing Ḥanafism due to these words, Ibn Abī Duwād should deserve this more than Ibn Shujā‘. Nonetheless, Hallaq mistranslates the word *fataqa*. Let us put the actual meaning of the word aside for a moment; translating it as “He was the one who turned the legal thought of Abū Ḥanīfa upside down” stands contrary to the context of the phrase that is filled with praise for the accomplishment of the person in question. Therefore, I think, the actual meaning of *fataqa* should be “make a breakthrough” in the sense of development based on its literal meaning,<sup>340</sup> hence the meaning of the phrase should be “He was the one who made a breakthrough in Abū Ḥanīfa’s legal thought.” Muḥammad b. Shujā‘ was certainly one of the

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<sup>337</sup> Wael Hallaq, *Authority*, 215.

<sup>338</sup> Ibn al-Nadīm, *al-Fihrist*, 256.

<sup>339</sup> al-Ka‘bī, *Faḍl al-i‘tizāl*, 105.

<sup>340</sup> The literal meaning is to break, to crack, to cleave something. See al-Fīrūzābādī, *Qāmūs al-muḥīṭ*, “f-t-q”, 916.

important scholars who contributed to the ḥadīth scholarship of the reason-based camp of the third hijrī century. Nonetheless, his influence on the traditionalization of Kūfī-Ḥanafī school was insignificant. We will discuss his contribution below.

One of the main elements that blurs the discussion is the fact that what is meant by the traditionalization of ahl al-ra'y is vague. Is it accepting ḥadīth categorically as a way of knowledge? Is it giving more importance to ḥadīth in legal reasoning? Is it accepting solitary reports (*khābar al-wāḥid*) in law? Is it championing ḥadīths over all other sources in legal reasoning? Is it accepting prophetic (*marfu'*) ḥadīth over other reports from the companions and successors? Is it accepting chained ḥadīth as the only or the main way of reproducing knowledge in Islamic sciences as ahl al-ḥadīth tend to do? These questions address different approaches toward ḥadīth and would change the answer we look for concerning the traditionalization of ahl al-ra'y. At face value, it appears that with the current explanations the first two questions are what is meant in the traditionalization of ahl al-ra'y. Since the above-mentioned portrayal of ahl al-ra'y inaccurately describes it as anti-ḥadīth, researchers try to speak to the time it took for the categorical acceptance of ḥadīth and their usage in legal thinking. I argue that an accurate analysis for the question of whether there was a traditionalization of the Ḥanafīs can be achieved by looking at whether the significance of reports increased in Ḥanafī legal thinking in terms of both the quantity of reports and any changes in criteria for accepting reports. If these factors, especially the latter one, resemble the approach of ahl al-ḥadīth we can argue for the traditionalization of Ḥanafīs. In what follows I will try to provide such an analysis based on the accounts of proto-Ḥanafī and Ḥanafī scholars about their own approaches and the perceptions of ahl al-ḥadīth scholars regarding the

approaches of their adversaries.

One of the important facts skipped in modern scholarship is that early reason-based scholars (including Ḥanafī founding figures from among the ahl al-ra’y, Mu‘tazilīs, and Murji‘īs) were not unfamiliar with hadīth reports and did not reject these reports categorically, as demonstrated above within this chapter. Narrations were always a part of the scholarship produced within those circles. However, they were not eager to give privileged superior authority to the solitary reports than existing well-known practices, widely accepted or well-known reports, and certain rational principles including but not limited to qiyās that evolved over time as opposed to their adversaries in the Ḥijāz and later in ‘Irāq. On the other hand, the traditionalist scholars criticized the subjectivity of reason and found it safer to stick to earlier authorities, in order to protect the “true religion” and achieve sound results within this frame. Hence, reports, including solitary reports were the best tools to derive this authority to solve existing legal, theological, and religio-ethical problems. The difference between the traditionalist and reason-based camps was this distinct approach to the existing collections of hadīth in terms of authority and different criteria that resulted from these approaches in evaluating these reports.

One of the discussions from the gap period that sheds some light on the approaches of proto-Ḥanafīs and the responses of ahl al-ḥadīth is the aforementioned discussion about Abū Yūsuf’s exclusion of the opinions of the successors from the definition of *athar*. Al-Dārimī argues that the correct way to put it is that the disagreement of the successors is not a binding

sunna as opposed to the sunna of the prophet or his companions.<sup>341</sup> Despite saying that, al-Dārimī also claims that the opinions of the successors are still more binding (*alzam*) than those of Abū Yūsuf or his followers due to the verse in the Quran that points to their virtuousness.<sup>342</sup>

As this criticism of Abū Yūsuf by a member of the traditionalist demonstrates, what early figures of ahl al-ra'y were trying to do is to develop an evaluative method for existing reports distinct from that of the traditionalists. This method had different factors, but they all served to give jurists more room to enjoy ijtihād and to give less binding authority to reports. The main factors can be summarized as follows: First, they restricted the authority of reports based on the first speaking person in the reports. Abū Yūsuf's exclusion of the reports of the successors from the realm of *athar* was aiming at that. He and his colleague al-Shaybānī used these reports in their works though, but not as independently authoritative texts, but rather as supporting texts that a jurist can decide to use or not to use. Second, despite not rejecting solitary reports categorically, they stipulated that the text of solitary report should not contradict with the Quran, the established practices (sunna), and well-known reports (*mustafīd* or *mashhūr*). This condition was what constituted the main distinct approach to reports between ahl al-ra'y and ahl al-ḥadīth, because it was up to the jurist to decide how exactly a report is in contradiction with these other sources.

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<sup>341</sup> Abū Sa'īd al-Dārimī, *Naqd*, 593.

<sup>342</sup> Quran, 9:100: "Allah is pleased with the predecessors from anṣār (Madīnan Muslims) and muhājir (immigrant Muslims from Mecca) and with those who followed them in the right manner. "

The founding scholars of the Kūfī-Ḥanafī school showed a significant interest in reports, which can be easily seen in the extant works of Abū Yūsuf and al-Shaybānī who compiled their reports in their books entitled *al-Āthār* and reported frequently from their master Abū Ḥanīfa in these works. Zufar b. Huzayl was reported to have been from aṣḥāb al-ḥadīth and Ḥasan b. Ziyād (204/819) is reported to have written more than 12000 reports about legal matters from Ibn Jurayj, and Khafṣ b. Ghiyāth al-Qāḍī (194/810) is reported to have narrated more than 4000 reports from his memory.<sup>343</sup> As I have shown elsewhere, al-Shaybānī's certain works were abundant in report content no less than his traditionalist colleagues, such as Mālik or al-Shāfi'ī. Based on his works, I argue that despite having a vague methodology for chain criticism similar to the traditionalists, we can observe distinct aspects in the proto-Ḥanafī scholars. For example, they developed a specific interest in text criticism and mostly regarded it as more important than chain criticism. Another distinct aspect was the significance of well-known reports and the reports supported by existing practices in proto-Ḥanafī approaches to reports. Later in the literature, this interest was turned into a different category between consecutive reports and solitary reports as famous report (*al-ḥadīth al-mashhūr*). As for the criteria for preferring one solitary report over the other, we see the significance of well-known reports again. These principles in evaluating ḥadīth did not seem to have changed during the gap period.

In the remaining part of this section, I will attempt to analyze the contributions of three

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<sup>343</sup> al-Shirāzī, *Tabaqāt al-fuqahā'*, 135.; al-Dhahabī, *Siyar a'lām al-nubalā'*, VIII, 211.; Ibn Sa'd, *al-Ṭabaqāt al-Kubrā*, VI, 362.; al-Khaṭīb al-Baghdādī, *Tārīkh al-Baghdād*, IX, 76.

scholars who are more likely to have role in the traditionalization of the Kūfī school and have been subjects of certain pieces research about reports: ʿĪsā b. Abān, Ibn Shujā al-Thaljī, and al-Ṭaḥāwī. However, before dealing with this, I want to point out the famous Kūfī scholars known for their knowledge of ḥadīths to provide a rough sketch with regard to their contributions. Identifying the contributions of the followers of the Kūfī tradition to the discussions and theory of khabar in this tradition is not an easy task. Zāhid al-Kawthārī gives a list of traditionists and memorizers of ḥadīth in a treatise.<sup>344</sup> However, many of the names that appear in his list do not actually belong to the Kūfī tradition. In the following list, I will try to provide Kūfī scholars who were mentioned with their knowledge of reports in the biographical and bibliographical accounts during the 3<sup>rd</sup>/9<sup>th</sup> and 4<sup>th</sup>/10<sup>th</sup> centuries:

From the second generation:

◆ Muʿallā b. Manṣūr al-Rāzī (211/826)<sup>345</sup> was probably one of the exceptional Kūfī scholars who was seen as a reliable transmitter by the famous traditionists.

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<sup>344</sup> It is published at the end of al-Zaylaʿī's *Naṣb al-Raʿya*.

<sup>345</sup> He was a student of Abū Yūsuf and has an extant work entitled *al-Nawādir*. He is regarded among the reliable transmitters. Among traditionists, Ibn Abī Shayba, Muslim b. Ḥajjāj, Tirmidhī, Ibn Māja, Abū Dāʿūd, al-Nasāʿī, and al-Dāraquṭnī report from him in their compilations. See Abū al-Ḥasan al-ʿIjlī (261/875), *Tārīkh al-thiqāt*, 435.; Ibn Abī Shayba, *Muṣannaḥ*, I, 150, 403; VI, 322; VII, 281; Muslim, *Ṣaḥīḥ*, I, 384; III, 1176; IV, 2221.; Tirmidhī, *Sunan*, IV, 244; V, 38.; Ibn Māja, *Sunan*, I, 353; III, 407; IV, 184.; Abū Dāʿūd, *Sunan*, I, 227; III, 445.; al-Nasāʿī, *Sunan*, V, 398.; al-Dāraquṭnī, *Sunan*, I, 32.

◆ ‘Isā b. Abān (221/836)<sup>346</sup>

◆ ‘Alī b. al-Ja‘d (230/845) was one of few traditionists of Baghdād affiliated with the Irāqī tradition and has a ḥadīth compilation.<sup>347</sup> Even though he narrates from Abū Yūsuf and his reports are narrated by al-Ṭaḥāwī, he was inclined more to the traditionist scholars of Irāq such as al-Shu‘ba (160/776) and Sufyan b. ‘Uyayna (198/814).<sup>348</sup> Some famous traditionists including al-Bukhārī, Abū Khātim, and Abū Dāwūd narrated his reports in their compilations.

◆ Muḥammad b. Sammā‘a (233/848)<sup>349</sup> was also mentioned in the sources with his study in the field of ḥadīth. But, only a few traditionists mentioned his reports in their collections.

• Ibn Shujā al-Thalji (266/880)

From the third generation:

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<sup>346</sup> al-Saymarī, *Akhbāru Abī Hanīfa wa aṣḥābih*, 147-54. Despite his influence on later Ḥanafī texts, I cannot identify any traditionist compiler transmitting from him.

<sup>347</sup> This compilation is known with various titles including al-Ja‘diyyāt and Musnad ‘Alī b. al-Ja‘d. The transmission of al-Baghawī of this compilation has been edited and published by Abd al-Mahdī ibn ‘Abd al-Qādir in a doctoral dissertation project. See ‘Alī Ibn al-Ja‘d, ‘, ‘Ed. ‘Abd al-Mahdī ibn ‘Abd al-Qādir Ibn ‘Abd al-Hādī, *Musnad ibn al-Ja‘d*, Transmission of Abd Allāh ibn Muḥammad al-Baghawī. al-Kuwayt: Maktabat al-Falāh, 1985.

<sup>348</sup> See ‘Alī b. al-Ja‘d, *Musnad*, 733-767; 896.; al-Ṭaḥāwī narrates more than 20 reports from ‘Alī b. al-Ja‘d. See for a few examples al-Ṭaḥāwī, *Sharḥ ma ‘āni’ al-āthār*, I, 221, 438, 451.

<sup>349</sup> He was born in 130/748 and learnt from Abū Yūsuf and al-Shaybānī. He became a qāḍī in the western district of Baghdād and is regarded as a memorizer of ḥadīth and reliable transmitter (*thiqāt*) and is praised by many including Yahyā b. Ma‘īn (233/848) al-Khaṭīb al-Baghdādī. See Wakī‘, *Akhbār al-quḍāt*, III, 282.; al-Khaṭīb al-Baghdādī, *Tārīkhu Baghdād*, III, 298. Among the traditionist al-Ṭabarānī transmits from him in his compilation. See al-Ṭabarānī, *al-Mu‘jam al-awsaṭ*, III, 31.



- Aḥmad b. Abī ‘Imrān (280/893) was a scholar of ḥadīth and a student of Muḥammad b. Sammā‘a (233/848) and Bishr b. al-Walīd (238/853). He was appointed to Miṣr as a qāḍī. He was relating reports from Muḥammad b. Sammā‘a, Ibn Shujā‘a, and ‘Alī b. Al-Ja‘d from Kūfī scholars as well as from Ibn Abī Shayba and Abū ‘Ubayd al-Qāsim b. Sallām from traditionists.<sup>350</sup> Al-Ṭaḥāwī relates more than 30 reports from him in *Sharḥ mushkil al-āthār*.

- Bakkār b. Qutayba (270/884) was a student of Ḥilāl al-Ra’y, who was a student of Abū Yūsuf and Zufar, and Bakkār was also one of the teachers of al-Ṭaḥāwī.<sup>351</sup> He related reports from Abū Dāwūd al-Ṭayālīsī (204/819), an early ḥadīth memorizer and a student of the famous Baṣran traditionist al-Shu‘ba b. al-Ḥajjāj (160/777), among others. Al-Ṭaḥāwī relates more than 200 reports from Bakkār b. Qutayba in *Sharḥ mushkil al-āthār* and 17 reports in *Sharḥ ma‘āni’ al-āthār*.

- Abu Ḥāzim al-Qāḍī (292/905)<sup>352</sup> was also a student of Hilāl al-Ra’y. Al-Ṭaḥāwī narrates four reports from him in *Sharḥ ma‘āni’ al-āthār*.<sup>353</sup>

From the fourth generation:

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<sup>350</sup> See ‘Abd al-Raḥmān al-Ṣadaḥī (347/958), *Tārīkh Ibn Yūnus al-Miṣrī*, (Beirut: Dār al-kutub al-‘ilmiyya) I, 21; II, 27-28.; al-Saymarī, *Akḥbāru Abī Ḥanīfa wa aṣḥābih*, 165.

<sup>351</sup> He was born in 184/800 appointed as a governor by al-Mutawakkil to Miṣr in 246/860 and remained in his post for about 24 years, then was imprisoned by Aḥmad b. Tūlūn. See al-Kindī, *Kitāb al-wulāt wa-al-quḍāt*, 339-40.

<sup>352</sup> He learnt from ‘Īsā b. Abān and Ibn al-Musannā and became a qāḍī He was known for his knowledge of ḥadīth and was one of the teachers of al-Ṭaḥāwī.

<sup>353</sup> al-Ṭaḥāwī, *Sharḥ ma‘āni’ al-āthār*, I, 310, 331; IV, 41, 250.

- Abū Ja‘far al-Ṭaḥāwī (321/933)

‘Īsā b. Abān (221/836) is probably one of the most famous Kūfī scholars well-known for his knowledge on ḥadīth. According to what al-Ṣaymarī relates in his work, ‘Īsā was a friend of Ibn Sammā‘a and Ibn Sammā‘a invited him to join the circle of al-Shaybānī. He was at first hesitant to join, because he was under the influence of traditionalist propaganda against the Kūfī tradition on the accusation of contradicting reports.<sup>354</sup> ‘Īsā is reported to have written a refutation of al-Shāfi‘ī and Bishr al-Marīsī on the topic of reports entitled *al-Radd ‘alā Bishr al-Marīsī wa-al-Shāfi‘ī fi l-akhbār*.<sup>355</sup> Al-Ṭaḥāwī cites ‘Īsā b. Abān’s interpretation of certain reports on a few occasions, but does not actually relate any report of his.<sup>356</sup> In his work, ‘Īsā b. Abān stands more as a theoretician and exegete of reports as a jurist than as a mere transmitter. In the richest source for the opinions of ‘Īsā b. Abān, *al-Fuṣūl*, al-Jaṣṣāṣ also portrays him in a similar light, describing his theoretical statements regarding reports.<sup>357</sup> Development of distinct approaches of the Kūfī school to the reports owes much to ‘Īsā b. Abān. ‘Īsā b. Abān represents a loyal adherent of the Kūfī school’s methods in evaluating reports and was far from accepting the superiority of the traditionalist methods for evaluating and interpreting reports. He maintains the superiority of various tools of reasoning vis-a-vis the independent authority of the literal meaning of reports.

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<sup>354</sup> al-Ṣaymarī, *Akhbāru Abī Hanīfa wa-aṣḥābih*, 132, 147-54.

<sup>355</sup> Zirīklī, *A‘lām*, V, 100; Jaṣṣāṣ, *al-Fuṣūl*, I, 103; III, 35.

<sup>356</sup> al-Ṭaḥāwī, *Sharḥ ma‘āni’ al-āthār*, IV, 14, 18, 32.

<sup>357</sup> I mentioned his contributions in the theoretical level above in this chapter. For another examination of his thoughts on reports see Bedir, Murteza, "An Early Response to Shāfi‘ī: ‘Īsā B. Abān on the Prophetic Report (Khabar)" *Islamic Law and Society*, (2002) 9, no. 3: 285-311.

Ibn Shujā‘ was a student of Ḥasan b. Ziyād al-Lu‘lu‘ī (204/819), who was one of the eminent students of Abū Ḥanīfa. He is largely known for his knowledge of Quranic recitation and fiqh.<sup>358</sup> The Ḥanafī historians al-Saymarī and al-Qurashī point out his knowledge of ḥadīth in addition to fiqh and qirā’a, as well.<sup>359</sup> Among his works, *Kitāb taṣḥīḥ al-āthār* appears like a work in which he explained his evaluating criteria for reports.<sup>360</sup> However, his name appears only five times in al-Ṭaḥāwī’s works. In all instances, either al-Ṭaḥāwī mentions the opinions of Ibn Shujā‘ or Ibn Shujā‘ reports an opinion from earlier scholars. No single marfū‘ (prophetic) or mawqūf (from a companion) report that Ibn Shujā‘ relates exists in these works.<sup>361</sup> In the bibliographical records of manuscripts, only one work of Ibn Shujā‘ is available, entitled *Kitāb al-kaffārāt* and catalogued with the number 05 ba 197 in Amasya Beyazıt. However, I discovered in my research on this manuscript that this attribution to Ibn Shujā‘ is erroneous and the book is just a copy of al-Bukhārī’s section of *Kitāb al-Kaffārāt* in his *al-Ṣaḥīḥ*. Hence, in order to trace the thoughts of Ibn Shujā‘ regarding reports and his contribution, if any, to the traditionalization of Ḥanafī school, we have only the later sources that cite his opinions.

Al-Ṭaḥāwī (321/933) is probably one of more likely candidates to look at for his role in

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<sup>358</sup> al-Dhahabī, *Siyar a‘lām al-nubalā’*, X, 72. al-Dhahabī also points out that “Ibn Shujā‘ was inclined to the view of the createdness of the Quran, despite being a pious person.”

<sup>359</sup> al-Saymarī, *Akhbāru Abī Ḥanīfa wa-aṣḥābih*, 164.; al-Qurashī, *Jawahir al-muḍīyya*, II, 60.

<sup>360</sup> Ibn al-Nadīm, *al-Fihrist*, 291. Other works mentioned in bio-bibliographical accounts were *al-Manāsik*, *Kitāb al-nawādir*, *Kitāb al-muḍāraba*, and *al-Radd ‘alā al-Mushabbaha*.

<sup>361</sup> I checked al-Ṭaḥāwī’s *Aḥkām al-qur’ān*, *Sharḥ ma‘āni’ al-āthār*, and *Sharḥ mushkil al-āthār* and found his name only in the following pages of *Sharḥ ma‘āni’ al-āthār*. See al-Ṭaḥāwī, *Sharḥ ma‘āni’ al-āthār*, I, 12, 159, 318; 384; II, 51.

traditionalizing the Ḥanafī school due to his works in the field of ḥadīth and abundant existing secondary studies that try to reveal his contribution to this field.<sup>362</sup> He was al-Muzanī's nephew, the well-known disciple of al-Shāfi'ī, and is known for his contribution to the literature of ḥadīth with his works such as *Sharḥ ma'āni al-āthār*, *Sharḥ Mushkil al-āthār*, and *al-Sunan al-ma'thūra* (his narration of al-Shāfi'ī's *Sunan* from his uncle al-Muzanī). He is also reported to have written a book entitled “*Ikhtilāf al-riwāyāt 'alā madhhab al-Kūfīyyīn*”, whose title implies that it was a book on the reconciliation of reports based on the methods of the Kūfan school.<sup>363</sup> According to what is reported from him, before inclining toward the Kūfī tradition, he had been first under the influence of his uncle and used to prefer al-Shāfi'ī's opinions until he met Aḥmad b. Abī 'Imrān (280/893), a follower of the Kūfī tradition and a scholar of ḥadīth, who came to Miṣr as a qāḍī.<sup>364</sup> Many scholars including the Shāfi'ī scholars al-Nawawī and al-Dhahabī mentioned al-Ṭaḥāwī as one of the leaders of ḥadīth during his time.<sup>365</sup> However, some proponents of traditionalists criticized him. For instance, al-Bayḥaqī (458/1066) makes important statements when he criticizes al-Ṭaḥāwī and his evaluation of reports:

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<sup>362</sup> Following secondary sources examine al-Ṭaḥāwī as a ḥadīth scholar. See Zāhid al-Kawtharī, *al-Hāwī fī sīrat al-Imām Abī Ja'far al-Ṭaḥāwī*, Karācī: Ayc. Aym. Sa'īd Kampanī, 1983.; 'Abd al-Majīd Maḥmūd, *Abū Ja'far al-Ṭaḥāwī wa-atharuhu fī l-ḥadīth*, al-Qāhirah: Wizārat al-Thaqāfah, 1975.; Aḥmad, 'Abd Allāh Nadhīr, *Abū Ja'far al-Ṭaḥāwī: al-imām al-muḥaddith al-faqīh*, (239 H-321 H). Dimashq: Dār al-Qalam, 1991.; 'Abd al-Majīd, 'Abd al-Majīd Maḥmūd, *al-Imām al-Ṭaḥāwī muḥaddith*, al-Qāhirah: Dār al-Muḥaddithīn lil-Baḥth al-'Ilmī wa-al-Tarjamah wa-al-Nashr, 2008.; Harun Reṣit Demirel, *Ebu Ca'fer et-Tahāwī Hayatı-Eserleri ve Meāni'l-Āsār ile Müşkilü'l-Āsârındaki Hadisçiliği* (1990, yüksek lisans tezi, SÜ Sosyal Bilimler Enstitüsü).

<sup>363</sup> al-Qurashī, *Jawāhir*, I, 105.

<sup>364</sup> 'Abd al-Raḥmān al-Şadafi (347/958), *Tārīkh Ibn Yūnus al-Miṣrī*, (Beirut: Dār al-kutub al-'ilmiyya) I, 21; II, 27-28.

<sup>365</sup> See al-Nawawī, *al-Majmū'*, I, 95, 114, ; al-Dhahabī, *Siyar a'lām al-nubalā'*, XI, 361.

When I began to write this book, one of our fellows from ahl al-‘ilm sent me a letter in which he complained about the book of al-Ṭaḥāwī, may Allah have mercy upon us and him, saying that he [al-Ṭaḥāwī] criticizes authentic reports of traditionalists (*ahl al-‘ilm bi-l-ḥadīth*) when they contradict his opinion and he authenticates their weak reports when they are in parallel with his opinion. And he asked me to respond to what he follows in evaluation of reports (*al-taṣḥīḥ wa-al-ta‘līl*). I asked Allah to help me in reaching the better conclusion in this work of mine in looking at and responding to his evaluation methods. In fact, the answer to this scholar (*al-shaykh*) in most of what he argues for and against the reports when he equates the reports to his opinion by either criticizing authentic reports or authenticating weak reports exists in the word of al-Shāfi‘ī, may Allah have mercy upon him.<sup>366</sup>

This criticism, despite having a biased tone, includes also a claim that al-Ṭaḥāwī derived his knowledge from traditionalists. Even though this claim might be partially true, because there were traditionalist scholars among his teachers and he did narrate ḥadīths from traditionalists, al-Ṭaḥāwī mostly relied on the reports available in the Kūfī tradition and followed its method in evaluating reports. His rejection of the independent authority of reports seems to have been taken as preferring reports based on arbitrary reasoning by al-Bayḥaqī and his fellow traditionalists. This quote also shows that the impact of the distinct evaluation methods of the Kūfī tradition was still alive during the early fifth hijrī century to the extent that traditionalist scholars compelled themselves to respond to these methods.

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<sup>366</sup> al-Bayḥaqī, *Ma‘rifat al-sunna wa-al-āthār*, I, 217.

Al-Bayhaqī occasionally tries to respond to the claims of al-Ṭaḥāwī in this work. These refutations also show that al-Ṭaḥāwī was applying chain criticism and was knowledgeable of this type of ḥadīth criticism. For instance, al-Ṭaḥāwī criticizes a report in which the famous Ibn Shihāb al-Zuhrī reports from ‘Urwa b. al-Zubayr, while it is apparent from other reports that he actually heard it from ‘Abd Allah b. Abī Bakr who related it from ‘Urwa. Since Ibn Shihāb’s transmission from ‘Urwa is regarded as more authentic than Abd Allah b. Abī Bakr’s narration from ‘Urwa, someone in the chain must have removed ‘Abd Allah b. Abī Bakr. Al-Ṭaḥāwī notes that and criticizes the report with *tadlīs* (adding a person into the chain or removing a person from it).<sup>367</sup> Al-Bayḥaqī responds to this claim by saying “What happens if he adds someone known and reliable into the chain? A report becomes weak, when a reliable transmitter adds someone unknown or unreliable between him and the earlier narrators. If he adds someone reliable, the ḥadīth remains in its authenticity as evidence.”<sup>368</sup> Similarly, al-Ṭaḥāwī rejects a report on the basis that one narrator is not known to have definitely met the person from whom he narrates. Al-Bayḥaqī argues that if the narrator is reliable, not accused with *tadlīs*, and there is a possibility of the meeting of the two narrators, the report should be accepted according to the criteria of ahl al-‘ilm and fiqh, i.e. the traditionalists.<sup>369</sup>

Another example of how al-Ṭaḥāwī discards a report which is sound according to the criteria of ahl al-ḥadīth was a report on necessity to wash vessels seven times if they come

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<sup>367</sup> al-Ṭaḥāwī, *Sharḥ ma‘āni al-āthār*, I, 71.

<sup>368</sup> al-Bayḥaqī, *Ma‘rifat al-sunna wa-al-āthār*, I, 401.

<sup>369</sup> al-Bayḥaqī, *Ma‘rifat al-sunna wa-al-āthār*, XIV, 287.

into contact with dog saliva. Al-Ṭaḥāwī relates this report, but says that in another report it is transmitted that the narrator Abū Hurayra himself ruled that washing such a container only three times is enough, which al-Ṭaḥāwī sees as an indication of abrogation.<sup>370</sup> However, al-Bayḥaqī criticizes him in accepting a report that has a lower status for the abrogation of a report that has a higher status narrated by many reliable transmitters of traditionalists.<sup>371</sup>

In another topic, al-Ṭaḥāwī prefers a report that is in parallel with the opinions of the founding scholars of the Kūfī tradition, Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī and rejects a report of the traditionalists due to the equivocal meaning of a word (*qullatayn*) in the report. He also criticizes them with inconsistency in their claims of taking the literal meaning (*ẓāhir*) in the report, while they add some other conditions to be applied to the literal meaning of the text.<sup>372</sup> What al-Ṭaḥāwī implies is that one has to understand possible meanings of the report beyond its apparent (*ẓāhir*) meaning by applying various tools of reasoning, in order to derive accurate rulings from it. Even though traditionalists argue for sticking to the apparent meaning, they fail to do so. Al-Bayḥaqī responds to the critique of al-Ṭaḥāwī with an accusation of ignorance for the meaning of the word and states that his own ignorance does not decrease the

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<sup>370</sup> al-Ṭaḥāwī, *Sharḥ ma'āni al-āthār*, I, 23. Similarly, al-Ṭaḥāwī makes a claim of abrogation in the matter of the superior time for the dawn prayer between contradicting reports and prefers that which is in support of the opinion of the Kūfī scholars. See al-Ṭaḥāwī, *Sharḥ ma'āni al-āthār*, I, 184. ch. al-Bayḥaqī, *Ma'rifat al-sunna wa-al-āthār*, II, 302. For other claims of abrogation and the responses of al-Bayḥaqī see al-Bayḥaqī, *Ma'rifat al-sunna wa-al-āthār*, II, 428, 444,

<sup>371</sup> al-Bayḥaqī, *Ma'rifat al-sunna wa-al-āthār*, I, 401.

<sup>372</sup> al-Ṭaḥāwī, *Sharḥ ma'āni al-āthār*, I, 16.

authority of the report.<sup>373</sup>

Another important element that is crucial to revealing whether al-Ṭaḥāwī has an inclination toward traditionalism and a role in traditionalizing the Kūfī school in his *al-Sharḥ ma'āni' al-āthār* and *Sharḥ mushkil al-āthār* is to identify the transmitters he narrates from. He narrates from his uncle al-Muzanī 30 reports all of which are from al-Shāfi'ī. Another important traditionalist Aḥmad b. Ḥanbal is mentioned with his reports in *Sharḥ mushkil al-āthār* many times and al-Ṭaḥāwī acknowledges his authority in the science of ḥadīth, but his name appears only twice in *Sharḥ ma'āni' al-āthār*.<sup>374</sup> The name of the famous traditionist al-Bukhārī appears many times as a historian and a critic of transmitters in the science of chain criticism with his work *al-Tārīkh*, rather than as a ḥadīth compiler.<sup>375</sup> Therefore, this shows that al-Ṭaḥāwī heavily relied on the critiques of transmitters within the traditionalist literature, obviously due to the absence of such works in the Kūfī tradition.

Ibn Taymiyya (728/1328) points out this distinctness of al-Ṭaḥāwī where he makes a comment about the al-Ṭaḥāwī's scholarship on ḥadīth and his lack of knowledge about chain criticism, which also supports my argument for his convoluted role in the traditionalization of Ḥanafīs:

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<sup>373</sup> al-Bayḥaqī, *Ma'rifat al-sunna wa-al-āthār*, II, 92.

<sup>374</sup> See al-Ṭaḥāwī, *Sharḥ mushkil al-āthār*, II, 68; IX, 139; al-Ṭaḥāwī, *Sharḥ ma'āni' al-āthār*, II, 221; III, 280.

<sup>375</sup> See al-Ṭaḥāwī, *Sharḥ mushkil al-āthār*, II, 105, 108, 109; III, 8, 114; IV, 23, 390, 391; V, 288; VI, 48, 81, 156; VII, 122; VIII, 37, 42; IX, 70, 237; X, 240, 436, 437; XI, 151; XII, 26, 328; XIV, 488; XV, 5,342. I noticed that al-Ṭaḥāwī points out al-Bukhārī's narration from Aḥmad b. Ḥanbal once to support his point. See al-Ṭaḥāwī, *Sharḥ mushkil al-āthār*, II, 127.



And al-Ṭaḥāwī's method in the critique of ḥadīth was not the same of that of people of knowledge [*ahl al- 'ilm*]. Therefore, he narrates in his “*Sharḥ ma ‘āni al-āthār*” various reports and prefers mostly those that are in parallel with qiyās that he sees as evidence. His preferred reports are mostly criticized in their chains and are not authentic. Despite narrating many reports, being a scholar and a jurist, his knowledge on the chain was not like that of people of knowledge.<sup>376</sup>

This quote is another indication of how al-Ṭaḥāwī, despite his involvement in and relationship with traditionalist scholars and sharing certain criteria in chain criticism, differs from them with certain other criteria in ḥadīth evaluation, especially his emphasis on text criticism. He remained loyal to certain methods of evaluating reports developed within the generations of ahl al-ra'y, however, also followed the literature of traditionalists to a considerable extent. Al-Qurashī notes that al-Ṭaḥāwī also wrote a refutation of the famous follower of the Kūfī school ‘Isā b. Abān, which has not survived or has not been discovered.<sup>377</sup> Taking into account ‘Isā b. Abān's contribution to the theory of report within the school, this refutation most likely aimed at certain opinions of ‘Isā b. Abān regarding the reports. Based on the data provided in the writings of al-Ṭaḥāwī, we can safely argue that while accepting the superior authority of traditionalist scholars in reports began in the early fourth hijrī century with al-Ṭaḥāwī, certain principles and criteria were nonetheless retained.

The complete traditionalization of the Ḥanafī school in the sense of accepting the

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<sup>376</sup> Ibn Taymiyya, *Minhāj al-sunna*, VIII, 196-97.

<sup>377</sup> al-Qurashī, *al-Jawāhir*, I, 277.

authority of traditionalist scholars, their ḥadīth compilations, and evaluation criteria for reports over those of the Kūfī tradition indeed occurred, but relatively later in periods when the victory of the traditionalists in the field of ḥadīth had been by and large accepted by the scholars of the Ḥanafī school. Beginning with the 4<sup>th</sup>/10<sup>th</sup> century, many Ḥanafī scholars, especially scholars of transoxania (*Mā warā al-nahr*), were increasingly labelled as traditionists in the sense of a ḥadīth scholar, transmitter, and memorizer (*ḥāfiẓ*) such as Aḥmad b. ‘Ismā‘īl al-Samarqandī (321/933), Ismā‘īl b. Ya‘qūb (331/943), ‘Abd Allah b. Muḥammad al-Badīlī (343/955) Abū al-Qāsim Ḥusayn b. Muḥammad (395/1004) Ismā‘īl b. Muḥammad al-Ḥajjājī (471/1078), and ‘Alī b. ‘Abd Allah al-Tājir (476/1084).<sup>378</sup> These scholars seldom used the collections of ḥadīth existing in the Kūfī-Ḥanafī tradition.

However, al-Sarakhsī (483/1090) still supported the criteria of reviewing solitary reports based on the Quran and mashhūr sunna, and criticized those who began to ignore these criteria and muddled the order of sources by elevating solitary reports over the Quran or mashhūr sunna in the late 5<sup>th</sup>/11<sup>th</sup> century.<sup>379</sup>

In his book *Naṣb al-ra‘ya*, the famous Ḥanafī jurist and ḥadīth scholar al-Zayla‘ī (762/1360) identifies the sources and the authenticity of the ḥadīths used in the famous legal text of the school al-Marghinānī’s *al-Hidāya*. Indeed, all of the sources he uses are the collections of traditionalist scholars including the Kutub al-sitta, Mālik’s *al-Muwaṭṭā*, Aḥmad b. Ḥanbal’s *al-Musnad*, and even *Muṣannaḥ* of Ibn Abī Shayba who wrote one of the earliest

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<sup>378</sup> al-Qurashī, *al-Jawāhir*, I, 61, 159, 161, 217, 283,

<sup>379</sup> al-Sarakhsī, *Uṣūl*, I, 367.

refutations of Abū Ḥanīfa. He does not use the collections of reports of the earlier figures such as *al-Āthār* of al-Shaybānī, or *Sharḥ ma ‘āni’ al-āthār* of al-Ṭahāwī.

I conclude this section by pointing out the influence of Kūfī scholars in the field of ḥadīth for the following centuries. It is true that the Kūfī school and other adversaries of ahl al-ḥadīth were gradually more influenced by the arguments of ahl al-ḥadīth especially in the superiority of the chain criticism in the evaluation methods. However, they also influenced traditionalist scholars in two main areas. First, they won a decisive victory in restricting the authority of solitary reports with establishing only probable knowledge. As discussed in the earlier sections, even Ḥanbalīs had to come to agree with this theoretical conclusion. The second area was the adding of a middle category to the categorization of reports between the solitary report and the consecutive report. Kūfī scholars, beginning with ‘Īsā b. Abān, developed a middle category, *mashhūr* (*ma‘rūf* and *mustafīd* are also used), that establishes satisfaction (*iṭmi’nān*) between probability and certainty. This category, despite some modifications, was either followed or at least mentioned in the later literature.<sup>380</sup>

## F. The Ḥadīth-Dominated Paradigm Shift in the Gap Period

The analysis above demonstrated that the gap period witnessed the victory of

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<sup>380</sup> ‘Abd al-Qāhir al-Baghdādī (Abū Maṣṣūr) mentions the *mustafīd* report between *āḥād* and *tawātur*, but closer to *tawātur*. According to him, *tawātur* establishes certainty (*‘ilm*) with necessary knowledge (*ḍarūrī*), but *mustafīd* report establishes certainty with acquired knowledge (*muktasab*). He mentions reports about the beatific vision in the hereafter, intercession (*shafā‘a*), stoning (*rajm*) for adulterers, and wiping over the socks (*khuffayn*) in ablution (*wudū’*) as reports that were solitary first, but later reached to the level of *tawātur* and became *mustafīd*. See ‘Abd al-Qāhir al-Baghdādī, *Kitāb uṣūl al-dīn*, 12-13.

traditionalists in forcing their adversaries to accept the independent authority of the chained solitary reports with the criteria heavily based on their own. The subsequent generations of reason-based scholars followed heavily the literature evolved around traditionalist arguments. This process is described by many contemporary scholars as the great synthesis. However, what seems to have been the case was that the dominant school grew from a struggle. The questions remain why did the reason-based scholars eventually agree with these arguments? What is it exactly ḥadīth-dominated paradigm shift? To what extent did this paradigm become influential?

In the third hijrī century, the traditionalists strived to make chained transmission the common language of scholarly literature. Instead of hearing the voice of the author, one would hear only long chains and reports from the prophet, a companion, and a successor. Transmitting the knowledge of the predecessors was accepted as the safest and the most genuine way to preserve the core of the religion by the traditionalists. It was this mindset that resulted in ḥadīth-based writing, which was disseminated in the fields of law, exegesis of the Quran, and even intellectual polemics.

The political and social reasons behind the ḥadīth-dominated paradigm shift are not the subject of our investigation. Some historians have argued for the influence of the caliph al-Mutawakkil and his counter-miḥna movement as the main reason for this significant shift. Its influence is undeniable; however, the key reason must have relied somewhere close to the overall inclination of the majority of the Muslim society. As this research analyzed below, most of the Mu‘tazilī arguments such as the createdness of the Quran were not welcomed by the majority. Ibn Rāwandī informs us that Mu‘tazilī opinions were contrary to the ijma‘ of the

umma. Therefore, the key reason was ironically not other than what reason-based scholars argued for vis-a-vis the authority of reports: *ijmā‘* and the idea of a common denominator that lies in the core of *ijmā‘* theory. The common denominators that both reason-based scholars and *ḥadīth*-based scholars shared eventually led more people to incline toward *ḥadīth*-based arguments. These common denominators were the appreciation of the earlier authorities (especially the generation of the prophet and the companions), the need for existing reports to draw on the accumulated knowledge of earlier generations, and the reliability of transmitters as the most important condition for the authenticity of reports.

In Islam, utopia is not a fiction; rather it is something that happened in history. The ideal age was the age of the prophet, “the age of happiness” (*‘aṣr al-sa‘āda*) as put in Islamic thought, and ideal society was his society, namely his companions. As the prophet himself was represented as the perfect example in the Quran, his companions constituted the perfect society for the following Muslim generations.<sup>381</sup> Things were given value based on their nearness to “the utopic age.” Putting aside certain critics of the companions such as al-Nazzām, both rationalist scholars and traditionalist scholars agreed on the overarching significance of this age. For instance, al-Shaybānī makes the following statement: “The knowledge is the knowledge of earlier people; *fiqh* is their *fiqh*. They were more knowledgeable about the practice of the prophet and they exercised more effort than us.”<sup>382</sup> Along the same lines, al-Ḥārith al-Muḥāsibī (243/857) indicates the role of the companions and the successors as

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<sup>381</sup> The Quran, 33/21

<sup>382</sup> al-Shaybānī, *al-Ḥujja*, I, 290-91.

follows: “These are our proofs from the kitāb, and the sunna, and from the practice of the great companions of the prophet. The successors who we are supposed to imitate and to derive from were also like that. They were those whom Allah ordained us to obey in his verse ‘Obey Allah and his messenger and ulu’l-amr from you.’<sup>383</sup> They were the companions of the prophet Muḥammad and those who came after them who were sincere and eminent scholars.”<sup>384</sup>

In an attempt to distinguish the approaches of traditionalists from those of the rationalists, Hallaq argues that, "The traditionalists were primarily concerned with the study of transmitted sources and their literal interpretation, while denying human reason any right to be exercised in *ijtihād* or in the process of legal reasoning." Hallaq's explanation is based partly on his restricted definition of *ijtihād* with *qiyās*.<sup>385</sup> However, it seems that some mutakallims also opposed *ijtihād* in general while some others (some traditionalists and mutakallims) denied only the authority of analogy. For example, al-Nazzām and Ja‘far b. al-Mubashshir from the Mu‘tazila were entirely against *ijtihād*.<sup>386</sup> On the other hand, Dawūd al-Zahirī is reported to have written books against both *taqlīd* and *qiyās*, which indicates he rejected *qiyās* but he did use some other *ijtihād* tools like *faḥwā l-khiṭāb*.<sup>387</sup> Accordingly, the distinct aspect of the traditionalists seems more to have been the independent authority that they give to the solitary reports based on their own chain criticism vis-a-vis the reason-based evaluation methods of

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<sup>383</sup> The Quran, 4:59.

<sup>384</sup> al-Ḥārith al-Muḥāsibī, *al-Makāsib*, 38.

<sup>385</sup> Wael B. Hallaq, "Was the Gate of *Ījtihād* Closed?" *International Journal of Middle East Studies* 16 (1984):3-41.

<sup>386</sup> Al-Khayyāt, *al-Intiṣār*, 44, 71.

<sup>387</sup> Ibn al-Nadīm, *Fihrist*, 217.

their adversaries.

## G. Conclusion

The analysis of the developments with regards to the reports in this chapter demonstrated that the gap-period witnessed an intellectual, at times political, struggle between different scholarly groups and independent scholars: The traditionalist scholars (ahl al-ḥadīth), Kūfī jurists (so-called ahl al-ra'y), Mu'tazilī scholars, Murji'ī scholars, Shi'ī-Zaydī, and Shī'ī-Imāmī scholars. The wide spectrum among these scholars has gradually narrowed down more in favor of the arguments developed by the traditionalist scholars. Certain scholars, especially from the Kūfī School, attempted to challenge these arguments by developing distinct approaches to the reports with their methods and categorizations, and were successful to an extent in the theoretical categories of reports and their epistemic value at least. However, three big scholarly achievements led the traditional discourse of ahl al-ḥadīth to victory in terms of the authority within the realm of reports. First, they persuaded other scholars to equate chained reports with the authority of prophetic sunna. Second, they won the argument against the so-called rationalist camp consisting of Kūfī jurists (ahl al-ra'y), Mu'tazilīs, and Murji'īs in that the literal meaning of the chained solitary reports narrated by the reliable transmitters should have independent authority over the tools of independent reasoning in evaluating the reports. Finally, once they produced sub-genres related to ḥadīths, in addition to the abundant compilations of ḥadīth, such as the errors of ḥadīth (*'ilal al-ḥadīth*), reconciliation of contradictory ḥadīths (*ta'wil al-mukhtalaf al-ḥadīth*), and more importantly the critique of transmitters (*jarḥ wa-al-ta'dīl* or *Tārīkh al-rijāl*), the criteria and methods of traditionalists became predominant and authoritative. This development eventually compelled so-called

rationalist scholars to deal with these genres and acknowledge the authority of their adversaries in the field of ḥadīth.



## CHAPTER III

Consensus (*Ijmā'*): Whose Agreement Matters? Why?

## A. Introduction

Ijmā‘ is broadly defined as “the unanimous agreement of Muslim scholars of a generation after the death of the prophet on a religious matter ” and is considered the third source of Islamic law in the literature.<sup>388</sup> Much disagreement appears regarding its definition, its requisite conditions (e.g., the identity of the participants in ijmā‘ and the nature of the matter agreed upon) and even its very authority at least in the early sources, which are the subjects of the following examination in this chapter.

Unfounded ijmā‘ claims raised doubt about the possibility, value, and conditions of ijmā‘. These same unfounded ijmā‘ claims also considerably contributed to the subsequent development of the theory of ijmā, its definition, conditions, and frequency of its occurrence.

By the 4<sup>th</sup>/10<sup>th</sup> century, the principle of *ijmā‘*, or consensus, had become widely recognized as the third of the primary “sources” (*uṣūl*) of Islamic law after the Quran itself (*kitāb*) and the practices and sayings (*sunna*) of the Prophet Muhammad as transmitted in the *ḥadīth*. Indeed, by the 4<sup>th</sup>/10<sup>th</sup> century, it was widely held that disagreeing with *ijmā‘* could lead to the charges of “unbelief” (*kufṛ*). But how did *ijmā‘* come to have such authority in Islamic law? What were the scholarly discussions that led to the concept of *ijmā‘* evolving into the formulation in which it came to be so widely accepted? Although there is a great deal of modern scholarship on various aspects of *ijmā‘*, there has not yet been a thorough study of the development of this concept in the gap period between al-Shāfi‘ī’s *Risāla* and

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<sup>388</sup> al-Zarkashī, *Baḥr al-muhīt*, III, 487.

the writings of al-Jaṣṣāṣ, that is, between the early period in which *ijmāʿ* was a rather restricted idea and the later period when it had gained nearly universal acceptance.<sup>389</sup>

I will argue here that understanding the developments in legal thought regarding the principle of *ijmāʿ* in the gap period is critical to understanding both the historical evolution of the very concept of *ijmāʿ* and its eventual acceptance as one of the primary sources of Islamic law. The second half of the third and early fourth hijrī centuries witnessed the emergence of a particular genre devoted to scholarly agreements in theology or law such as the works of Ibn

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<sup>389</sup> Contemporary scholars mostly focus on *ijmāʿ* in the fully developed genre of Islamic legal theory to give an outline. Schacht focuses on the relationship between living tradition and consensus in his works. He also suggested that the authority of *ijmāʿ* was based on *ijmāʿ* itself; therefore the theory of *ijmāʿ* suffers from circularity. See Schacht, *Origins*, 82-97. It was this last point that some other researchers dealt with. Hurgronje and Coulson repeated the same claim. See C. Snouck Hurgronje, "The Foundations of Islamic Law," in Selected Works, eds. G.-H. Bousquet and J. Schacht (Leiden, 1975) and N. J. Coulson, *A History of Islamic Law* (Edinburgh, 1964) Hourani rejected the idea that the authoritativeness of *ijmāʿ* lies in a circular argument in his article. See Hourani, "The Basis of Authority of Consensus in Sunnīte Islam" *Studia Islamica*, No. 21 (1964) 13-60.; Hallaq contributes to the same topic with a detailed analysis of classical Sunnī sources to support Hourani's point. See Hallaq, "On the Authoritativeness of Sunnī Consensus" *International Journal of Middle East Studies*, Vol. 18, No. 4 (Nov. 1986), 427-454. Another discussion was the relationship between orthodoxy in Islam and the doctrine of *ijmāʿ*. One of the earlier scholars who pointed out the relationship between *ijmāʿ* and orthodoxy was Hamilton Gibb. Since Gibb stated this relationship within a comparison to Christian council and presented *ijmāʿ* as a tool of the political power, i.e. the caliphate, his argument has received many criticisms (see for example Luis Vittor, *Shīʿite Islam: Orthodoxy or Heterodoxy?*, 167-180). Although limited contributions have been made before and after, Ahmad Hasan's *The Doctrine of Ijmaʿ* still stands out as the most comprehensive in-depth research in English that delves into significant aspects of the topic including its development, authority, and relation to orthodoxy. See Ahmad Hasan, *The Doctrine of Ijmaʿ: [a Study of the Juridical Principle of Consensus]*, Islamabad: Islamic Research Institute, 1978. Even though Hasan points out a few people from the gap period in this work, he does not offer an in-depth examination of this period.

al-Mundhir (319/931), al-Jawharī (circa 350/961), and Abū Ḥasan al-Ash‘arī (324/936);<sup>390</sup> and the corresponding genre of juristic disagreements (*ikhtilāf al-‘ulamā* or *ikhtilāf al-fuqahā*) such as the works of al-Ṭahāwī (321/933), al-Marwazī (294/906), and al-Ṭabarī (310/923).<sup>391</sup> During the same period, we see a significant place given to *ijmā‘* in legal theoretical works, to the extent that it became the topic that appears first in the legal theoretical manuals.<sup>392</sup> In the final analysis, the gap period was formative in shaping the nature of the genre of Islamic legal theory overall, and placing the *ijmā‘* as the third source of the law.

In this chapter, I will therefore:

(1) provide an historical overview of the origins of the concept of *ijmā‘* in the early period in the writings of Abū Ḥanīfa, Mālik, al-Shaybānī, Abū Yūsuf, and al-Shāfi‘ī and touch upon subsequent developments in the 4/10<sup>th</sup> and 5/11<sup>th</sup> centuries;

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<sup>390</sup> In addition to *al-Risāla ila ahl al-thaghr*, which will be cited later, Ash‘arī is also reported to have written a book entailing sample cases proving the authority of *ijmā‘* entitled “*al-masā’il fī ithbāt al-ijmā‘*.” see Shihāb al-Dīn al-Lablī (691/1292), *Fihrist al-Lablī*, 119-20.

<sup>391</sup> From Mu‘tazila Ibn al-Akhshīd (326/938) and Zāhiriyya the founder Dāwud b. ‘Alī (270/883) are reported to have written a book on *ijmā‘* as “*kitāb al-ijmā‘*” see Ibn al-Nadīm, *al-Fihrist*, 210 and 267. Ibn al-Nadīm attributes “*kitāb al-ma‘rifa fī al-ijmā‘*” to al-Ḥusayn al-Najjār, a theologian from Mujbira who was a contemporary of al-Nazzām, see Ibn al-Nadīm, *al-Fihrist*, 223; and “*kitāb al-ijmā‘ wa-al-ikhtilāf*” to Abū Bakr al-Ṣayrafi (330/941) see Ibn al-Nadīm, *al-Fihrist*, 263. Abu al-Ḥusayn b. Yūnus, a follower of al-Ṭabarī, is also reported to have written a book “*kitāb al-ijmā‘ fī al-fiqh*.” See Ibn al-Nadīm, *al-Fihrist*, 288.

<sup>392</sup> Devin Stewart reconstructed the chapter titles of the lost legal theoretical manuals written by Dāwud b. ‘Alī, Muhammad b. Dāwud and al-Ṭabarī. According to this, all of them put the chapter of *ijmā‘* in the beginning of their works. See Devin Stewart, “Muḥammad b. Dā‘ūd al-Zāhirī’s Manual of Jurisprudence” in *Studies in Islamic Legal Theory*, 111.; Devin Stewart, “Muhammad b. Jarīr al-Ṭabarī’s al-Bayān ‘an uṣūl al-aḥkām” in *‘Abbasid studies*, 337.

(2) discuss in detail the debates surrounding the concepts of the ‘Infallibility of the Umma’ and the ‘Authority of *Ijmā‘*’ in the gap period; and, finally,

(3) treat the various definitions of *ijmā‘* articulated by writers within that period, particularly the various attempts to delimit who must participate in *ijmā‘* for it to be authoritative: All Muslims? A majority of Muslims? All or a majority of scholars (*ulamā‘*)? All non-heretical scholars? The scholars of Mecca and Medina? The members of the first generations of Muslims (*al-Salaf*)? Or as Ibn Surayj and Shī‘a claimed could a single scholar speak with the authority of *ijmā‘* if he spoke the truth?

(4) led by sections 2 and 3, I delve into a reflection on the concept of al-salaf which emerged from the debates of the infallibility of the umma and the participants in *ijmā‘*.

I will conclude with a summary of these developments and argue that they are highly significant for an understanding of *Uṣūl al-Fiqh* from the 4<sup>th</sup>/10<sup>th</sup> century onward.

## B. Historical Outline: Early Centuries and Beyond

The earliest works written before al-Shafī‘ī that discuss *ijmā‘* and give a special value to it were by Abū Ḥanīfa, Mālik, al-Shaybānī, and Abū Yūsuf, albeit there are several

transmissions referencing earlier people in the later literature.<sup>393</sup> In *al-Fiqh al-akbar* attributed to Abū Ḥanīfa, the author speaks out the most important things to know about religion as the faith in Allah, the basic rulings and practices, the crimes and punishments, and finally the issues that are subject of agreement and that are subject of disagreement among the umma.<sup>394</sup> Abū Ḥanīfa here offers a more practical view of agreements and disagreements. This statement also entails the implicit vague idea that one should refrain from going against the agreements of the umma. This idea presumably arose in the first century of Islām after the death of the prophet and remained as the main foundation of vague *ijmā'* claims to the present time.

Mālik's use of agreements confused scholars. Even though some of his agreement claims can be understood referring to more universal agreements, he usually argues for local Madīnan agreement which is understood as *'amalu ahl al-Madīna* and considers it authoritative for every Muslim. His idea of giving a special status to the Madīnan practice for determining normative doctrines and practices can be seen clearly in his letter written to Layth b. Sa'd. In this letter, Mālik suggests Madīnan practice, which he describes usually as "the agreed upon practice" (*al-amr al-mujtama' alayh*) and is understood as Madīnan consensus by later scholars, as the true source of normativity, due to the special status of

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<sup>393</sup> al-Nawbakhtī (ca. 310/922) mentions al-Faḍl al-Raqqāshī, Abū Shamr, Ghayalān b. Marwān, Jahm b. Ṣafwān from Murji'a as holding the following conditions for being Imam: Being knowledgeable about the Quran and sunna, and elected through the consensus of the umma. Similarly Mu'tazila held, according what Nawbakhtī attributes to them, the *ijmā'* condition for electing imam as well. See al-Nawbakhtī, *Firaq al-Shī'a*, 22-3.

<sup>394</sup> Abū Ḥanīfa, *al-Fiqh al-akbar*, 82.

Madīna with respect to preserving the pure doctrine and practices of Islām. As it is apparent, Mālik actually defines normativity as the preserved pure doctrines of religion. All his opponents seemingly shared this definition of normativity. His suggestion is different (from Abu Hanīfa and Layth b. Sa‘d whom we mentioned, and from al-Shaybānī and al-Shāfi‘ī whom we will mention) in restricting the possibility of preserving pure doctrines and practices in Madīna. However, Mālik does not clearly define what exactly he means by “the agreed upon practice of Madīna” and prefers to keep it vague.<sup>395</sup> It was these vague claims of normativity that were targeted by al-Shaybānī, Abū Yūsuf and al-Shāfi‘ī as early as the late second hijrī century.

In his refutation of Maliki doctrines *al-Hujja ‘ala ahl al-Madīna*, al-Shaybānī refutes all these vague claims of Mālik and ahl al-Madīna by accusing them with establishing arbitrary rulings in religion.<sup>396</sup> Similarly Abū Yūsuf criticizes al-Awzā‘ī for his arbitrary use of “*ahl al-‘ilm*” by comparing it to Madīnan use of “*maḍat al-sunna*” (this practice was followed) without valid evidence.<sup>397</sup> Al-Shāfi‘ī was also against these arbitrary agreement claims and required a definition of *ijmā‘* from his opponents.<sup>398</sup> A close examination of their

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<sup>395</sup> Mālik uses concepts like “our practice (*al-‘amal ‘indanā*)” and similarly “*al-amr ‘indanā*”, “*al-amr al-mujma‘/mujtama‘ ‘alayh*.”

<sup>396</sup> al-Shaybānī says: “If we accepted this as evidence, what would we say those Baṣrans if they claim the opposite” see al-Shaybānī, *al-Hujja*, II, 514. He also says: “And your saying “according to our practice” means nothing [for evidence] (*fa ammā qawlukum hādhā al-amru ‘indanā falaysa bi shay’in*).” See al-Shaybānī, *al-Hujja*, II, 622. al-Shaybānī also criticizes accepting the role of political powers such as Saghīr b. Abd Allah, ‘Abd al-azīz b. Muṭṭalib, and Mu‘āwiya in considering Madīnan practice. See al-Shaybānī, *al-Hujja*, II, 623.; IV, 417.; IV, 351.; I, 84. Similar examples: II, 575.

<sup>397</sup> Abū Yūsuf, *al-Radd*, 41-42.

<sup>398</sup> al-Shāfi‘ī, *al-Umm*, VII, 278.

works demonstrates that they use such claims of scholarly agreements in order to support their point of view in legal matters. In such examples they use phrases like “majority of scholars” (*ajma ‘at al- ‘āmmat min ahl al- ‘ilm*).<sup>399</sup>

There is enough evidence that there existed the concept of “the consensus of the umma” and jurist even tried to define it. Al-Shaybānī argues, “the true/authentic narration is the one which is closer to what the all Muslims hold [as practice]” and that one should not contradict to the umma.<sup>400</sup> According to al-Jaṣṣāṣ, al-Shaybānī’s words concerning *ijmā‘* as “what Muslims consider good is good” point out the authority of consensus of later ages in addition to the consensus of the companions.<sup>401</sup> Despite all these implications, we do not see a clear detailed discussion of *ijmā‘* encompassing different types and conditions in the writings of al-Shaybānī. Rather al-Shaybānī reiterates the fact that “Kitāb and any narration from the prophet or from one of his companions.” are higher than the consensus of the umma, which implies an understanding of consensus extending beyond the generation of the companions.<sup>402</sup>

We see more elaborate treatment of the subject in the writings of al-Shāfi‘ī. In the dialectical debates on *ijmā‘*, al-Shāfi‘ī is in a respondent position criticizing his interlocutor’s already established theory. The identity of his interlocutor is not clear, but the interlocutor

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<sup>399</sup> Abu Yūsuf, *al-Radd*. 91.

<sup>400</sup> al-Shaybānī, *al-Hujja*, IV, 262.; II, 732.

<sup>401</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 271.

<sup>402</sup> al-Shaybānī, *al-Hujja*, II, 563.



must have been a scholar from ‘Irāq.<sup>403</sup> Different stages and details of al-Shāfi‘ī’s understanding of ijmā‘ have been studied by many over the last few decades; for our topic it suffices to mention the limits of ijmā‘ discussions of his time to understand later development accurately.<sup>404</sup> According to the Irāqi opponent of al-Shāfi‘ī, an established understanding of ijmā‘ was to consider the impossibility of agreement except upon established sunna even if they did not mention a narration explicitly from the prophet.<sup>405</sup> In other words, ijmā‘ would have the same level as the agreed upon sunna and cannot be based on personal opinion, since there would be no agreement on personal opinions.<sup>406</sup> The Irāqi interlocutor of al-Shāfi‘ī carefully assigns textual basis for seemingly non-textual, opinion-based agreements. Also, he asserts that ijmā‘ comes before every other source, since it is preserved from error and it leads to certainty. It is important that al-Shāfi‘ī also distinguishes this ijmā‘ from jumal al-farā’id, namely self-evident teachings of Islam such as daily prayers and fasting in Ramaḍān that are based on successive transmission and are known even by lay people.<sup>407</sup> Ijmā‘ in his language is the agreement of scholars.<sup>408</sup> Lay people (‘awām) have to follow the agreement of these scholars. Also if there is an ijmā‘ among scholars, it is a clear sign that this ijmā‘ occurred in earlier generations as well and no need for textual proof. The Iraqi opponent points out that the more accurate qiyās is the one

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<sup>403</sup> Ahmed El Shamsy argues that his interlocutor was Ibrāhim b. ‘Ulayya (218/832), a disciple of Mu‘tazilī al-Aṣamm (200/ 816). See Shamsy, *From tradition*, 53-4.; Shamsy, *The Canonization*, 55-63.

<sup>404</sup> See Schacht, *Origins*, 88-94.; Zysow, *Economy*, 207-8.; Lowry, *Legal theoretical content of al-Risāla*, 426-471.

<sup>405</sup> al-Shāfi‘ī, *Risāla*, 471

<sup>406</sup> al-Shāfi‘ī, *Jimā‘ al-‘ilm*, 22.

<sup>407</sup> al-Shāfi‘ī, *Jimā‘ al-‘ilm*, 21-2.

<sup>408</sup> al-Shāfi‘ī, *Jimā‘ al-‘ilm*, 23.

closer to these agreements, a point made by al-Shaybānī above.<sup>409</sup> Even though it seems an established source in his language, he stretches his description of *ijmā‘* and accepts, for instance, the agreement of majority as *ijmā‘*, then fails to answer al-Shāfi‘ī’s questions on how to define majority and whether one should consider scholars of *kalām* among the participants of *ijmā‘* some of whom rejected *rajm* (stoning) punishment for adultery [from *al-khawārij*].<sup>410</sup>

Al-Shāfi‘ī’s view toward *ijmā‘* is complex and nuanced. He seems to reject any *ijmā‘* claim theoretically except what is called *jumal al-farāid* in *jimā‘ al-‘ilm*.<sup>411</sup> He implies that *ijmā‘* claims based on the majority of scholars are just rhetorical claims which have no ground, since there is no way to know which opinion is held by the majority and usually

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<sup>409</sup> Cf. al-Shāfi‘ī, *Jimā‘ al-‘ilm*, 23. and al-Shaybānī, *al-Hujja*, II, 732.

<sup>410</sup> al-Shāfi‘ī, *Jimā‘ al-‘ilm*, 25. *Khawārij*, or *kharijites* is a general term describing a group that formerly had supported ‘Alī, but left him and accused both ‘Alī and Mu‘āwiya with disbelief after the event of arbitration in the battle of Siffin and later developed into a theological school distinct from Sunnism and shiism. They were known with their different ideas and beliefs from these two mainstream groups. The *kharijites* called themselves *al-shurāh*, referring to a quranic description for those who bought the other life from God by trading this life.

<sup>411</sup> al-Shāfi‘ī, *Jimā‘ al-‘ilm*, 29.

these claims do not reflect reality.<sup>412</sup> He champions uninterrupted chain of narrations from the prophet over the claims of scholarly consensus or practice.<sup>413</sup> However, he also makes the same *ijmā‘* claims in the sense of the agreement of the scholars to back up his legal opinions. He mentions *ijmā‘* as a valid source after *kitāb* and *sunna*, and before a binding report and analogy based on this kind of reports.<sup>414</sup> In short, during al-Shāfi‘ī’s time, there was a theory of *ijmā‘* established at least in Irāq differentiating it from successive reports (*mutawātir*), defining it exclusively with the agreement of scholars, even majority of scholars and considering it as the first source above anything else in terms of leading to certainty, i.e. the fundamental source of orthodoxy and orthopraxy. On the other hand, we see that a reaction, mostly from the traditionalists, emerged against *ijmā‘*, on the ground of its definition, conditions, and authority.

If we look at the post-gap period, It seems that from Andalusia, with the writings of the Zāhirī ibn Ḥazm (456/1063), to Samarqand, with the works of al-Pazdawī (482/1089),

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<sup>412</sup> al-Shāfi‘ī, *Jimā‘ al-‘ilm*, 25. al-Shāfi‘ī targets his opponent’s claims on the basis of majority:

Sh: Do you describe the minority whom you do not consider [in your *ijmā‘* claims] as less than half of the people or one third of the people or one fourth of them?

Op: I cannot put a limit on them, but they are just majority.

Sh: Are ten people more than nine?

Op: These two numbers are close each other.

Sh: Then, define them whatsoever you want to define.

Op: I am not able to define.

Sh: It seems that you want to keep it without a limit to be able to argue when you hold an opinion on a matter of disagreement that “Majority is opinion of that” or to accuse your opponent with holding minority’s opinion. Would you be satisfied if other people argue against you with such claims. al-Shāfi‘ī also lists out some *ijmā‘* claims of ‘Irāqis where there were actually disagreements. See al-Shāfi‘ī, *al-Umm*, VII, 266-7.

<sup>413</sup> al-Shāfi‘ī, *al-Umm*, VII, 268.

<sup>414</sup> al-Shāfi‘ī, *al-Umm*, VII, 276.

the principle that someone who rejects an agreed upon matter in religion can be accused of unbelief (*kufṛ*) was well established in the early fifth hijrī century.<sup>415</sup> From the gap period, as early as the time of the caliph al-Ma'mūn, there is evidence in the work of al-Kinānī that the phrase *ijmā' al-umma* was being used with disbelief claims.<sup>416</sup> From the late third hijrī century, al-Khayyāt (298/910) mentions *ijmā'* as an indicator of the normative teachings of Islam in marriage and criticizes Shī'a in the matter of temporary marriage.<sup>417</sup> Ibn Surayj (306/918) gives a more explicit link between *ijmā'* and orthodoxy after mentioning the authority of the consensus of the scholars, he argues that *ijmā'* actually can be established with only one scholar if he says the "truth" (*al-ḥaqq*), since the actual meaning of *ijmā'* is "true opinion."<sup>418</sup> Al-Ash'arī calls those who agreed upon the principles in his theology as *ahl al-ḥaqq* (the people of the truth). Interestingly enough, in about one hundred year later, Shī'ī scholar al-Shaykh al-Mufīd also referred to the agreement of the people of the truth, but this time the term represented Shi'a.<sup>419</sup> In *Ma'alim al-sunan*, al-Khaṭṭābī (388/998) differentiates between those who reject a consensus on a "well-known" religious matter by common people such as five times daily prayers or prohibition of wine can be considered as unbeliever, and those who reject a consensus that only scholar is expected to know such as

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<sup>415</sup> 'Abd al-'azīz al-Bukhārī, *Kashf al-asrār*, III, 385.; Ibn Ḥazm, *Marātib al-ijmā'*, 7. For a detailed discussion of what types of rejection of *ijmā'* can be declared with unbelief see al-Zarkashī, *Baḥr al-muhīt*, III, 366-69.

<sup>416</sup> al-Kinānī, *al-Ḥayda*, 64-6.

<sup>417</sup> al-Khayyāt, *al-Intiṣār*, 90.

<sup>418</sup> Ibn Surayj, *al-Wadā'i li mansūṣ al-shara'i*, II, 274.

<sup>419</sup> Shaykh al-Mufīd. *Tadhkira*, 28.◊ Another shī'ī, al-Sayyid al-Murtaḍā uses exactly the term *ijmā'*, not *ittifāq*. See al-Sayyid al-Murtaḍā. *al-Dharī'a*, II, 802-3.

marrying a woman and her aunt at the same time cannot be accused with disbelief.<sup>420</sup> The problem remains as to how the idea of consensus acquired such value in determining normativity in Islam. What follows examines different stages of this process through formation of the idea of infallibility of the umma and debates on the authority of *ijmāʿ*. After that I will focus on the different types of *ijmāʿ* that developed during the gap period.

### C. The Authority of *Ijmāʿ* and The Idea of Infallibility of the Umma

As we have seen in the previous chapter, each claim for authority was expected to have a textual basis. *Ijmāʿ* was not an exception. The proponents of *ijmāʿ* tried to support the authority of *ijmāʿ* theoretically with certain Quran verses. For the authority of *ijmāʿ* two verses of the Quran were in circulation during the gap period. The first one was from the chapter al-Nīsā:

If anyone opposes the Messenger, after guidance has been made clear to him, and follows a path other than that of the believers, We shall leave him on his chosen path— We shall burn him in Hell, an evil destination.

Ibn al-Murtaḍā states that al-Shāfiʿī and ʿĪsā b. Abān were the first two scholars who represented this verse for the authority of *ijmāʿ*.<sup>421</sup>

The second verse was from the chapter of al-Baqara as follows: “We have made you

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<sup>420</sup> al-Khaṭṭābī, *Maʿālim al-sunan*, II, 9.

<sup>421</sup> Ibn al-Murtaḍā, *Minhāj al-Wuṣūl*, 558.

[believers] into a middle (wasat) community, so that you may bear witness before others and so that the Messenger may bear witness before you.” This verse was represented as evidence by Abū ‘Alī al-Jubbā’ī and al-Ka‘bī.

The central element in the doctrine of *ijmā‘* is the claim for the infallibility of the *umma*. Even though some scholars tried to establish the authority of this source with the texts from the Quran, it is hard to believe, and even harder to establish that the earliest generations of Islam had the idea of infallibility of the *umma*. Thus, Abū Hāshim and al-Ghazālī refuted the arguments for the authority of *ijmā‘* based on abovementioned verses.<sup>422</sup> This is not to say that the earliest generations of Islam did not see themselves in a specific status. They thought that they represented the truth, or more precisely that they had it, since they had the last revelation. One cannot fail to see, also, that they were motivated by this revelation, which also has certain passages that give a special status to the followers of the prophet Muhammad. However, the first generations were far from having a theoretical idea of an infallible *umma* directly from those texts.<sup>423</sup> It was rather a source invented out of need. The question remains why and when did the scholars invent the idea of the infallibility of the *umma* and what was the need for infallibility? What does it mean? In which matters was the *umma* infallible and who represents the *umma*?

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<sup>422</sup> Ibn al-Murtaḍā, *Minhāj al-Wuṣūl*, 560.

<sup>423</sup> Schacht claims that the idea of infallible *umma* was so natural that the question of foreign influence, which he likes much to explain the origins of Islam as much as possible, does not arise. It seems that Schacht confused truth claim of Islam and theoretical idea of “infallible *umma*.” Schacht finds the theory of scholarly consensus more interesting and deserving a careful analysis, though he does not suggest anything for how and why he differentiates these two kinds. See Schacht, *Origins*, 83.

The rise of the idea of the infallibility of the umma has been taken for granted in modern scholarship. Schacht and those who followed him were of opinion that the idea of general consensus of community arose naturally without foreign influence, but the idea of the consensus of scholars originated from the principle of “*opinion prudentium*” in Roman law-the view shared by those who enjoy good judgment in a certain area, prudence being characteristic of equitable and reasonable judgment-.<sup>424</sup> Schacht claimed that it was al-Shāfi‘ī who formulated *ijmā‘* as the strict unanimity of the umma on certain fundamentals and rejected the idea of an *ijmā‘* limited to scholars’.<sup>425</sup>

In the literature of *uṣūl al-fiqh*, if we put aside some verses praising the Muslim umma,<sup>426</sup> the main source providing authority for *ijmā‘* and the idea of the infallibility of the umma is *ḥadīth*, especially the *ḥadīth* that says “my community does not agree on error.” To know when exactly this phrase began to circulate among people would provide us also beginnings of “the theorization of the infallible umma.” Such a *ḥadīth* does not appear in the works written in the 2<sup>nd</sup>/8<sup>th</sup> century. The closest narration to such an idea is possibly what al-Shaybānī narrates from the prophet as “what Muslims consider as good is good according

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<sup>424</sup> Schacht, *Origins*, 83. See a longer discussion in Naqshbandī, *The doctrine of ijmā‘*, 53-55.

<sup>425</sup> Schacht, *Origins*, 90-93.

<sup>426</sup> Some *uṣūl* scholars have also contested expressing these verses as valid evidence. *al-Juwaynī* says all the textual evidence concerning *ijmā‘* is far from establishing a certain validity. See Juwayni, *al-Burhān*, 262. Following is the list of these verses: 2:143 (We appointed you as a middle umma); 4:115 (Whoever follows a way other than the way of believers); 3:110 (You are the best community raised up for all people); 31:15 (Follow the way of him who turns to me); 9:16 (take no friends except Allah, his messenger and the believers); 22:78 (You be witness for mankind); 57:19 (those who believe in Allah and his messenger are the sincere and the witnesses)

to Allah”<sup>427</sup>, which later became one of the main narrations shown as evidence in the literature. Al-Shaybānī is also reported to have mentioned “What Muslims see as good” as one of the sources of Islam, which was also used by al-Jaṣṣāṣ to attribute the idea of universal consensus (*ijmā‘ ahl al-a‘ṣār*) to al-Shaybānī.<sup>428</sup>

Mālik does not mention such a ḥadīth in his ḥadīth compilation. Al-Shāfi‘ī says that “the majority of scholars do not agree on something against the sunna of the prophet, nor on error,”<sup>429</sup> but does not attribute this idea to the prophet. Al-Shāfi‘ī’s interlocutor, possibly Ibrāhīm b. ‘Ulayya (218/832),<sup>430</sup> in *Jimā‘ al-‘ilm* claims that he considers *ijmā‘* as “the agreed upon sunna” for which there is no possibility of error, and it does not stem from ra’y. However, he does not relate a prophetic report for this idea. One of the earliest compilers of ḥadīth, Ibn Abī Shayba (235/850) narrates a similar phrase in four different narrations all from Ibn Mas‘ūd in which Ibn Mas‘ūd answers a question about what to do during great divisions among the community as “You should stick to the community. Allah does not allow the community of Muḥammad to agree on misguidance.”<sup>431</sup> Some other compilers including Aḥmad b. Ḥanbal (241/856)<sup>432</sup>, Dārimī (255/869)<sup>433</sup>, Abū Dāwud (275/889)<sup>434</sup>, Tirmīdhī

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<sup>427</sup> Mālik, *al-Muwattā*, “al-Shaybānī’s narration”, I, 91.

<sup>428</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 271.

<sup>429</sup> al-Shāfi‘ī, *Risāla*, 471.

<sup>430</sup> See El Shamsy, *From tradition*, 53-4.

<sup>431</sup> Ibn Abī Shayba, *Muṣannaḥ*, VII, 456, 508, 516, 551,

<sup>432</sup> Aḥmad b. Ḥanbal, *Musnad*, IV, 200. In these versions of the narration, the prophet is reported to have prayed Allah not to let his umma agree on misguidance and his prayer was accepted.

<sup>433</sup> Dārimī, *Sunan*, I, 200.

<sup>434</sup> Abū Dāwud, *Sunan*, IV, 98.



(279/892)<sup>435</sup> narrated ḥadīths having similar meanings from the Prophet Muhammad; however, the exact version that became famous in the literature of uṣūl al-fiqh was narrated in Ibn Mā'ja's (273/887) *Sunan*.<sup>436</sup> Interestingly, the other ḥadīth, “What Muslims consider good is also good according to God,” was narrated as the words of Ibn Mas'ūd by many scholars including Aḥmad b. Ḥanbal,<sup>437</sup> which seems more likely, that is, that Ibn Masud is the ultimate source of this statement.<sup>438</sup> Beginning with al-Jaṣṣāṣ, many uṣūl scholars have mentioned the ḥadīth both from the prophet and Ibn Mas'ūd.<sup>439</sup> All these approve that the central narrations used as evidence for the authority of ijmā' were not in circulation in the first two centuries, when the idea of infallibility of community arose. This idea was not based on textual evidence, rather later scholars used textual evidence for establishing retroactive basis.

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<sup>435</sup> Tirmīdhī, *Sunan*, IV, 36.

<sup>436</sup> Ibn Mā'ja, *Sunan*, II, 1303. The exact wording is as follows, “My community does not agree upon misguidance.”

<sup>437</sup> Aḥmad b. Ḥanbal, *Sunan*, VI, 84. Later, in the 4th/10th century, al-Bukhtarī al-Baghdādī (339/952), Ibn al-A'rābī al-Baṣrī (340/953), al-Tabarānī (360/971), al-Kalābādhī (380/990), and Ḥākim al-Nīsābūrī (405/1015) also relate these words from Ibn Mas'ūd. See Abū Ja'far al-Bukhtarī al-Baghdādī, *Majmū'*, 136.; Ibn al-A'rābī al-Baṣrī, *Kitāb al-Mu'jam*, II, 443.; al-Tabarānī, *al-Mu'jam al-awṣaṭ*, IV, 58.; al-Kalābādhī, *Baḥr al-fawā'id*, 150.; Ḥākim, *al-Mustadrak*, III, 83. The earliest sources that relate this ḥadīth from the prophet other than al-Shaybānī's account go back to the early 5th/11th century such as Abū al-Muẓaffar (483/1090), *al-Intiṣār li aṣḥāb al-ḥadīth*, 27.

<sup>438</sup> Famous Ḥanafī al-Zayla'ī (762/1360) was also of opinion that the ḥadīth belonged to Ibn Mas'ūd, not to the prophet. See Zayla'ī, *Naṣb al-rāya*, IV, 133-4. After a long analysis of this ḥadīth, al-Laknawī concludes that the only chained transmission attributing the ḥadīth to the prophet was narrated through Anas b. Mālik. However, a narrator, Sulayman b. 'Amr al-Nakha'ī is accused by all as a liar who used to fabricate ḥadīth; therefore, attribution of this ḥadīth to the prophet is false. See 'Abd al-ḥayy al-Laknawī, *al-Ta'līq*, I, 630-34.

<sup>439</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 227.; Ibn Ḥazm rejects its attribution to the prophet, but accepts it as a mawqūf ḥadīth from Ibn Mas'ūd as an evidence of the type of ijmā' that makes its deniers non-Muslim. See Ibn Ḥazm, *al-Iḥkām*, VI, 19. Abū Ya'lā (458/1066) does not bother to mention the source of narration and transmits it in passive form 'ruwiya'. See Ibn al-Farrā, *al-'Udda*, IV, 1076.

Al-Khayyāt discusses the infallibility of the umma and assigns it to umma in “what the umma narrates from the prophet.” He asks a rhetorical question to Ibn Rāwandī whether he accepts this doctrine and answers himself that he has to accept it, because of the doctrine of the infallibility of the imām who is a member of umma.<sup>440</sup> This idea becomes the foundation for reconciliation the doctrine of ijmā‘ with the doctrine of imāma in Shi‘ī tradition beginning with the fourth/tenth century. The rich discussion provided by al-Khayyāt in *al-Intiṣār* shows us an important relationship between the idea of tawātur and ijmā‘; hence a key factor laying in the joint origins of the idea of infallible umma in kalām and fiqh.

#### D. Attacks on the Authority of Ijmā‘

In the first half of the third hijrī century, the theory of ijmā‘ as probably established by some rationalist ‘Irāqīs received serious criticisms including the core idea of ijmā‘, i.e. infallibility of the umma, an idea al-Shāfi‘ī was not against. There is enough evidence that the theory of the infallibility of the umma was well established during the time of al-Nazzām, a contemporary of al-Shāfi‘ī who makes no reference to al-Shāfi‘ī, but does mention the ḥadīth “my community will not agree on error.” It means that this saying was in circulation, but was considered as a prophetic ḥadīth in the first half of the third hijrī century. Ibn al-Rāwandī (298/911) is said to have indicated that except for al-Nazzām (ca. 230/845) and his followers, all of the Mu‘tazila accepted “it is not possible for umma to agree on error.”<sup>441</sup>

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<sup>440</sup> al-Khayyāt, *al-Intiṣār*, 94-95.

<sup>441</sup> al-Khayyāt, *al-Intiṣār*, 94; Ibn Rāwandī, *Kitāb faḍāih al-Mu‘tazila*, ‘reconstructed by ‘Abd al-Amīr al-‘Asam’, 136.

One of the most repeated sentences in the literature of Sunnī legal theory when the authority of *ijmāʿ* is discussed is that “al-Nazzām, khawārij (secedes) and some of rawāfiḍ (shi‘a) deny the authority of *ijmāʿ*.” In addition to his denial of *qiyās*, Ibrāhīm al-Nazzām is well-known for his denial of *ijmāʿ*.<sup>442</sup> As for the reason, since we do not have the direct words of al-Nazzām, different explanations have been suggested. al-Nazzām is said to have denied the possibility of a true consensus on a matter that is not known by necessity.”<sup>443</sup> Even if it was possible, according to what is reported view of those who deny the authority of *ijmāʿ* in the literature, since all the participants are individually liable to error, they could all also agree on error.<sup>444</sup> The closest source that provides his thoughts on the matter is al-Jāhiz’s writings, where al-Nazzām said that it is possible for the Muslim community, as is for other earlier communities, to agree on error, despite what had been narrated in the ḥadīth.<sup>445</sup> Furthermore, in respect to *ijmāʿ*, al-Nazzām argues that the way in which the Quran was transmitted was exactly the same as with earlier revelations. Al-Khayyāt (298/910) reports from Ja‘far b. al-Mubashshir (234/848) that he accepts *kitāb*, *sunna* and *ijmāʿ* as the sources of his legal thought in his books. However, according to what Ibn Rāwandī reports, Ja‘far did not consider *ra’y*-based-*ijmāʿ* valid. Ja‘far, Ibn Rāwandī claims, accused the companions and the

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<sup>442</sup> See the second chapter of this dissertation.

<sup>443</sup> al-Shawkānī, *Irshād al-fuḥūl*, I, 194. Some mentioned al-Qāshānī from deniers. See ‘Abd al-‘azīz al-Bukhārī, *Kashf al-asrār*, III, 373.

<sup>444</sup> ‘Abd al-‘azīz al-Bukhārī, *Kashf al-asrār*, III, 374. The claim that *ijmāʿ* actually refers to a text was also rejected by the deniers, because in this case, they argued, the text would be the source, not *ijmāʿ*. see ‘Abd al-‘azīz al-Bukhārī, *Kashf al-asrār*, III, 374.

<sup>445</sup> al-Sharīf al-Murtaḍā, *al-Fuṣūl al-mukhtāra*, 239. Since Sharīf cites al-Nazzām’s thoughts directly from al-Jāhiz’s work, especially from *Kitāb al-futyā*, I consider these citations reliable.

successors with erring, because they agreed on the beating of wine-drinker.<sup>446</sup> al-Khayyāt (298/910) himself also sees *ijmāʿ* as a valid source, yet without giving much detail.<sup>447</sup>

In the Shīʿī tradition, the development of the theory of consensus followed a somewhat discursive process. We should also distinguish Zaydīs from Imāmīs and Ismāʿīlīs. Zaydī scholars were among the earliest supporters of *ijmāʿ*. The Zaydī scholar al-Qāsim b. Ibrāhīm al-Rassī (246/860) gives an overarching authority to *ijmāʿ* over other sources of reason (ʿaql), kitāb, and rasūl. He argues that it is *ijmāʿ* that divides agreed upon *uṣūl* of these sources from disagreed *furūʿ* part of them.<sup>448</sup> Al-Nāṭiq bi-al-Ḥaqq (424/1033) also discusses the theory of *ijmāʿ* in his *uṣūl* work and supports its authority extensively following the authority of Abū Hāshim al-Jubbāʿī (321/933) and Abu ʿAbd Allah al-Baṣrī (369/979).<sup>449</sup>

However, for Shiʿī-Imāmīs, this theory was difficult to accept, but was impossible to reject at the same time for Shīʿīs. Apparently, despite certain positive implications in the third hijrī century, the initial response was rejecting the theory that transfers the singular authority of the imām to the whole community; however, they faced the criticism that they cannot reject the idea, because the imām was also a member of the *umma*.<sup>450</sup> This criticism is apparent in al-Khayyāt’s language. He asks Ibn al-Rāwandī a rhetorical question that is

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<sup>446</sup> Ibn Rāwandī, *Kitāb faḍāih al-Muʿtazila*, ‘reconstructed by ʿAbd al-Amīr al-ʿAsam’, 132.

<sup>447</sup> al-Khayyāt, *al-Intiṣār*, 90.

<sup>448</sup> al-Qāsim b. Ibrāhīm, *Majmūʿ*, I, 631-32.

<sup>449</sup> al-Nāṭiq bi-al-Ḥaqq, Yaḥyā ibn al-Ḥusayn, *al-Mujzī fī uṣūl al-fiqh*, II, 405-40; III, 5-205.

<sup>450</sup> al-Faḍl b. Shādhān mentions *ijmāʿ* when he refutes the opinion on the lowest limit of dowry (*mahr*) as 10 dirham that this opinion does not rely on kitāb, sunna, or *ijmāʿ*. He also criticizes the claims of *ijmāʿ* by his adversaries by saying that they make this claim, but they are actually in disagreement. See al-Faḍl b. Shādhān, *al-Īqāh*, 249.

whether he accepts this doctrine and answers himself that Ibn al-Rāwandi has to accept it, because of the doctrine of the infallibility of the imām who is a member of the umma.<sup>451</sup> This idea becomes the foundation for the reconciliation of the doctrine of ijmā‘ with the doctrine of the imāma in the imāmī school of Shī‘a beginning with the fourth/tenth century.

In one of the earliest Shī‘ī-Imāmī uṣūl sources, *al-Tadhkira*, al-Shaykh al-Mufīd (413/1022) does not mention ijmā‘ among the sources of law. The text editor explained this with the fact that al-Shaykh al-Mufīd did not consider ijmā‘ as an independent source.<sup>452</sup> However, al-Shaykh al-Mufīd does mention the concept of ijmā‘ on various occasions, for instance he claims that through ijmā‘ it should be evident that ‘Umar apostated once due to his suspicion about the prophethood of the prophet Muhammad during the Khaybar event and that through ijmā‘ Abū Bakr confessed the invalidity of his caliphate by saying that he needed guidance from other people, while the umma agreed that the imam does not need another imam.<sup>453</sup>

Another Shī‘ī scholar from the late fourth and early fifth hijrī century, al-Sayyid al-Murtaḍā (436/1044) does mention ijmā‘ and even reconciles it with the idea of the imāma and discusses matters relevant to ijmā‘ to the same extent as in al-Jaṣṣāṣ’s discussion. He

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<sup>451</sup> al-Khayyāt, *al-Intiṣār*, 94-95.

<sup>452</sup> See al-Shaykh al-Mufīd, *al-Tadhkira*, 7 and 28.

<sup>453</sup> al-Sharīf al-Murtaḍā, *al-Fuṣūl al-mukhtāra*, 25. al-Mufīd claims that umma agreed on that an imam does not need another imam, whereas Abū Bakr confessed that he was in need of guidance of other people. Also umma agreed upon that whoever confesses a suspicion about the prophethood of the Prophet Muhammad becomes unbeliever and they also agreed upon that in narration ‘Umar confessed that he doubted about the prophethood of the prophet when he promised to go Mecca, but they could not during the treaty of Hudaibiya in 628.

points out that one should refrain from making arbitrary claims of *ijmā‘* if there is disagreement.<sup>454</sup> According to him the difference between them [Shī‘a] and the people of *al-ijmā‘* is in reasoning (*ta‘līl*) and evidence.<sup>455</sup> Another Shī‘ī scholar of the fifth century, al-Shayk al-Ṭūsī (460/1067) mentions *ijmā‘* as added by some people to the fundamental sources in *uṣūl al-fiqh* and repeats what al-Sayyid al-Murtaḍā theorized earlier in reconciling *ijmā‘* with the *imām*.<sup>456</sup>

From Shī‘ī schools, *Ismā‘īlīs* are generally represented as having rejected the theory in its entirety. One of the most extensive accounts for the counter-proofs of the deniers of *ijmā‘* from the gap period is provided by al-Qāḍī al-Nu‘mān (351/962) in his *Ikhtilāf uṣūl al-madhāhib*. In his critiques, he targets first the ambiguity of the meaning of *umma* that could mean a particular group or even only one person.<sup>457</sup> Then he goes on to explain the *umma* with Ibrāhīm, since he is described as *umma* by himself in the Quran,<sup>458</sup> and his blood-related descendants among whom the Prophet Muhammad and his descendants, the *imams*, of course.<sup>459</sup> Even though al-Qāḍī al-Nu‘mān's harsh language toward the defenders of *ijmā‘* implies that he is against the theory in its entirety, what he does is to reconcile the established theory based on the theory of the *imāma* by reinterpreting the meaning of the *umma*.

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<sup>454</sup> al-Sayyid al-Murtaḍā, *al-Dharī‘a*, I, 143.

<sup>455</sup> al-Sayyid al-Murtaḍā, *al-Dharī‘a*, I, 605.

<sup>456</sup> al-Shaykh al-Ṭūsī, *Udda al-uṣūl*, I, 37

<sup>457</sup> al-Nu‘mān, *Ikhtilāf*, 84-5.

<sup>458</sup> The Quran, 16:120: “Abraham was an *umma* obedient to Allah, by nature upright, and he was not of the idolaters”

<sup>459</sup> al-Nu‘mān, *Ikhtilāf*, 98-9.

By the end of the gap period, it appears that the authority of *ijmāʿ* was overwhelmingly established among the majority of schools and/or independent scholars. *Shīʿī* scholars who had rejected or had been reluctant to accept this doctrine, had to reconcile it with their own source methodology due to the great influence of the supporters of *ijmāʿ* and the theoretical basis of *ijmāʿ*. *Ibrāhīm al-Nazzām* from the *Muʿtazila* was the only one who rejected the theory in its entirety.

#### E. Different types of *ijmāʿ*: Those who constitute *Ijmāʿ*

In the works of the 9<sup>th</sup> and 10<sup>th</sup> centuries, we see discussions on whether every member of the *umma* is meant in the doctrine of *ijmāʿ al-umma* or whether the scholars/*mujtahids* represent the *umma*. Is *ijmāʿ* restricted to the companions or Muslims of every age? Should every person from *ahl al-qibla* taken into account in *ijmāʿ* both those who follow the truth and those who follow the innovation? Can only one person constitute *ijmāʿ*? In what follows, we will examine how the scholars of the gap period discussed these problems.

As it is clear from *al-Shāfiʿī*'s writings, during his time the types of *ijmāʿ* were preserved consensus of everyone on *jumal al-farāʿid* a concept close to *mutawātir* in meaning, the consensus of the companions, and the consensus of the majority of scholars in different cities of Muslim world. We see that discussions continued over these types and new topics were added to the topic throughout the 9<sup>th</sup> and 10<sup>th</sup> centuries.

The debates over the participants in *ijmāʿ* are related, in one way or another, to the definition of the *umma* or *jamāʿa*. The idea of the infallibility of the agreement of the *umma*

began with the idea that one should not contravene the umma. Accordingly, the question of who represents the umma also mostly determines who has the authority in expressing the orthodox beliefs and practices in Islām. Therefore, even those who rejected the theory of *ijmā‘* altogether, al-Qādī al-Nu‘mān for instance, had to reformulate the definition of umma. After attacking the ways that the supporters of *ijmā‘* interpreted the concept of umma in the verses and prophetic reports they brought up as evidence, he concludes that the umma and *jamā‘a* are the certain descendants of the Prophets Ibrāhīm, Ismā‘īl and Muḥammad, namely the imāms, based on what he narrates from the Imām Ja‘far b. Muḥammad.<sup>460</sup> His early contemporary al-Ka‘bī (319/931) defines umma as those who confess the prophethood of Muḥammad and regard his teachings as true.<sup>461</sup> While a group from ahl al-hadīth reportedly defined umma as those who believe *jumal al-farāiḍ*.<sup>462</sup>

In the first half of the third hijrī century, we see an emerging restrictive response, similar to what we have seen in al-Shāfi‘ī’s argumentation, toward suggested types of *ijmā‘* by rationalists of ‘Irāq. Al-Shāfi‘ī was opinion of restricting “actual” *ijmā‘* with *jumal al-farāiḍ*, though he considered the inferred shared opinions of the earlier scholars of cities as valuable, he refrained from labeling it as *ijmā‘*. Ahl al-hadīth, going along similar lines, was inclined to restrict the theory of *ijmā‘*. Al-Kinānī (240/854) mentions *ijmā‘* of the companions of the prophet several times in *al-Ḥayda* where he compiles his debates with Bishr b. Ghiyāth al-Marīsī (218/833), as a source one should not contradict after the kitāb

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<sup>460</sup> al-Qādī al-Nu‘mān, *Ikhtilāf uṣūl al-madhhāhib*, 89-104.

<sup>461</sup> al-Khaṭīb al-Baghdādī, *al-Farq*, 141-42.

<sup>462</sup> al-Khaṭīb al-Baghdādī, *al-Farq*, 141-42.



and the sunna.<sup>463</sup> Aḥmad b. Ḥanbal (241/855) is said to have held that *ijmāʿ* is the consensus of the companions, since after them no consensus occurred.<sup>464</sup> He even went beyond that and labeled those who claim *ijmāʿ* on individual cases as liars.<sup>465</sup>

However, the broader theory of consensus entailing all scholars or a majority of them seems to have found supporters outside the rationalists of ʿIrāq, as well. Eventually, this type of *ijmāʿ* determined the standard definition of *ijmāʿ* in the later legal theory. Though considered from ahl al-hadīth, al-Qāsim b. Sallām (224/838) and al-Ḥārith al-Muhāsibī (243/857) mention *ijmāʿ* in the sense of the inferred agreement of the majority of scholars.<sup>466</sup> Also, we see a concrete example of the use of “the consensus of the umma” in al-Muhāsibī’s writings, where he accuses a group of reciters (*al-qurrāʾ*), ascetics (*al-nussāk*) and some *khawārij* as “rebels” with renouncing “the ruling of the umma.”<sup>467</sup> Al-Jāḥiẓ’s (255/869) writings have enough evidence for the idea of “the consensus of the umma” in general terms.<sup>468</sup>

Another discussion on the participants in *ijmāʿ* that continued during this period was concerning the claim on the consensus of Madīna and Hijāz. As we mentioned above, al-Shaybānī and al-Shāfiʿī were the ones who criticized this claim in the second half of the

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<sup>463</sup> al-Kinānī, *al-Ḥayda*, 58

<sup>464</sup> Aḥmad b. Ḥanbal, *al-ʿAqīda*, 123.

<sup>465</sup> Ibn Ḥazm, *al-Iḥkām*, IV, 188.

<sup>466</sup> al-Qāsim labels considering non-Arabs as a whole in the category of ahl al-kitāb by the scholars as *ijmāʿ* see al-Qāsim b. Sallām, *Amwāl*, 651. and al-Muhāsibī mentions that there is a consensus about abrogation of the prohibition of war during the ḥaram months see Muhāsibī, *Fahm al-Quran*, 435 and 461.

<sup>467</sup> al-Muhāsibī, *Makāsib*, 92.

<sup>468</sup> al-Jāḥiẓ, *al-Bukhālā*, 17.

second hijrī century. Though it is known more with Mālik, this claim goes back to the successors' (*Tābi'ūn*) era and became an established way of argument among Madīnan scholars in the early second century. In the third century, we see some supporting ideas from the followers of Mālik for Madīnan consensus and some others for hijāzian consensus. Saḥnūn (240/854), the compiler of *al-Mudawwana*, stipulated that Meccans and Madīnans together constitute *ijmā'*.<sup>469</sup> Somewhat surprising support to the consensus of Hijāz was given by the famous traditionist al-Bukhārī (256/870). He discusses the topic in his *Kitāb al-i'tisām* and remarks that the scholars should agree on what has been agreed upon in Mecca and Madīna.<sup>470</sup> In this sense, al-Bukhārī saw that the general *ijmā'* can occur only through accepting normative value of hijāzian *ijmā'*.

As time went on, Mālikī scholars had to face the critiques by the supporters of the general theory of *ijmā'* and seemingly were forced to interpret Madīnan consensus somewhat less authoritative than general consensus. Apparently, there appeared a disagreement with respect to authority of Madīnan consensus. A group of scholars continued to consider it as authoritative such as the Baṣran scholar Aḥmad b. al-Mu'adhhal (between 231-40/846-54), who was a follower of Madīnan scholar 'Abd al-Malik b. al-Mājishūn (213/828), the famous jurist of Madīna in his time Abū Muṣ'ab Aḥmad b. Abī Bakr (242/856), Abū al-Ḥasan ibn abī 'Umar (352/963), and a group of Maghribī (northwest African and Andalusian)

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<sup>469</sup> Ibn Ḥajar, *Fath al-bārī*, XV, 242-3.

<sup>470</sup> Bukhārī, *Kitāb al-i'tisām*, bāb 16.

Mālikis.<sup>471</sup> As early as the early third century, Mālik’s followers seem to have begun classifying Madīnan consensus into two kinds as transmission-based and ijtihād-based consensus, and majority of Mālikīs including the Egyptian jurist Yaḥyā b. Bukayr al-Makhzūmī (231/846), another Egyptian Abū Ya‘qūb al-Rāzī (304/916), Andalusian jurist al-Qāḍī Abū Bakr b. al-Salīm (367/978) , and Baghdādī judge Abū Bakr al-Abharī (375/985) have not mostly argued for the authority of the latter since then.<sup>472</sup> This shift can be seen clearly in the writings of Abū ‘Ubayd al-Jubayrī (378/988) in his *al-Tawassut*,<sup>473</sup> and Ibn al-Qaṣṣār (397/1007) in his *al-Muqaddima*,<sup>474</sup> Qāḍī Abd al-Wahhāb (422/1032) wrote a treatise in which he defended the theory of general consensus against attacks on its authority due to the fact that it relies upon solitary reports. He concluded that its authority is based on collaborative narration in doctrine even if not in text,<sup>475</sup> a point crystallized concerning the authority of ijma‘ in the more mature uṣūl manuals, such as those of Ghazālī (505/1111) and Āmidī (631/1234). Al-Jaṣṣāṣ sees this claim for Madīnan consensus as a later innovation that had not existed even during the time of the successors.<sup>476</sup>

Despite his strong arguments, al-Shāfi‘ī’s suggestion of restricting ijma‘ to the strictest sense of ijma‘ was apparently not accepted even by his followers, the scholars rather discussed ijma‘ in broader terms. Even Zāhirīs of the second half of the third centuries,

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<sup>471</sup> al-Qāḍī ‘Abd al-Wahhāb, *Ijmā‘u ahl al-Madīna*, “in *al-Mulakhkhaṣ in al-Muqaddima*”, 255.

<sup>472</sup> al-Qāḍī ‘Abd al-Wahhāb, *Ijmā‘u ahl al-Madīna*, 254.

<sup>473</sup> al-Jubayrī, *al-Tawaṣṣuṭ* “in *al-Muqaddima*”, 212.

<sup>474</sup> Ibn al-Qaṣṣār, *al-Muqaddima fī-al-uṣūl*, 45-48, 75-80, and 159-66.

<sup>475</sup> al-Qāḍī ‘Abd al-Wahhāb, *Ijmā‘*, “in *al-Muqaddima*”, 275-76.

<sup>476</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 322.

who were influenced by the writings of al-Shāfi‘ī by and large and who went further in restricting ijtihād by rejecting analogy altogether, seem to have criticized al-Shāfi‘ī’s approach for not giving its deserved role to ijmā‘ in his theory.<sup>477</sup> In Zāhirī understanding ijmā‘ has to be based on reports, more precisely restricting ijmā‘ to the companions’ era and rejecting the idea of ijmā‘ of every age. Zāhirī evidence for restricting ijmā‘ with the companions is in parallel with their general historicity claim that is the verses that signal out infallibility of the umma were revealed about the companions directly, whoever say that they are more general than that should establish evidence.<sup>478</sup> Ibn Ḥazm states that ijmā‘ occurs in only evident things (*jumal al-farāiḍ*) such as five daily prayers or fasting in Ramaḍān; he rejects the idea that ijmā‘ might occur in individual cases for the things a contradicting opinion is not known and labels those who make such claims as liars.<sup>479</sup> He also points out Bishr b. Ghiyās al-Marīsī and al-Aṣamm among the earliest scholars who were attacking this idea.<sup>480</sup>

Ibn Surayj (306/918) clearly indicates that the participants of ijmā‘ are the scholars, not the lay people.<sup>481</sup> His disciple Abū Bakr al-Ṣayrafi (330/941) repeated this argument.<sup>482</sup> However, it was Ibn Surayj who went against the restriction of the eponymous figure of

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<sup>477</sup> al-Juwaynī, *al-Burhān*, 40.

<sup>478</sup> al-Khaṭīb al-Baghdādī, *al-Faqīh wa-al-mutaḥaqiqih*, I, 427.

<sup>479</sup> Ibn Ḥazm, *al-Iḥkām*, IV, 188-90.

<sup>480</sup> Ibn Ḥazm relates Aḥmad b. Ḥanbal’s words against Bishr and al-Aṣamm in the exactly opposite meaning as those who made such ijmā‘ claims; however, Ibn Ḥazm defends them against this accusation. See Ibn Ḥazm, *al-Iḥkām*, IV, 188-89.

<sup>481</sup> Ibn Surayj, *al-Wadā‘i‘ li manṣūṣ al-shara‘i‘*, II, 274.

<sup>482</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, III, 514.

Shāfi‘ī school with his independent and interesting idea that even with one scholar’s opinion *ijmā‘* can be established, because he defines *ijmā‘* as the true opinion.<sup>483</sup> This is in parallel with what was narrated from al-Nazzām. This is probably one of the most interesting opinions from a Shāfi‘ī/proto-Sunnī scholar of this period. The reconciliation of Shī‘ī scholars between the authority of imam and *ijmā‘* is relatively known more and outside from shī‘īs only al-Nazzām has been cited for his defining *ijmā‘* "with any opinion based on a valid evidence."<sup>484</sup> Ghazālī explains this definition of al-Nazzām, and Āmidī follows it, with trying to refrain from what had become common among scholars as "it is prohibited to contradict *ijmā‘*"<sup>485</sup> In other words, the effect of the word "*ijmā‘*" became stronger than its meaning to the extent that those who reject the common meaning had to load another meaning to the word. Nevertheless, Ibn Surayj's definition needs a more detailed explanation, since Ibn Surayj does not reject the common meaning of *ijmā‘*, i.e. consensus, and further, he tries to establish the authority of *ijmā‘* with the same arguments of common supporters of the doctrine of *ijmā‘*. Ibn Surayj bases this claim on Abū Bakr’s declaration of war against Banū Hanīfa when they rejected his *zakāt* request. *Ijmā‘* was established, according to Ibn Surayj, since Abū Bakr held the truth in his request.<sup>486</sup> His example is meaningful. It seems that Ibn Surayj was responding to an idea that had been already established. As discussed above, Shī‘ī scholars' used the idea of "holding truth" when they reconcile the authority of *ijmā‘* and

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<sup>483</sup> Ibn Surayj, *al-Wadā‘i‘ li manṣūṣ al-sharā‘i‘*, II, 274.

<sup>484</sup> al-Ghazālī, *al-Mustasfā*, I, 137.;

<sup>485</sup> al-Ghazālī, *al-Mustasfā*, I, 137.; Āmidī, *al-Iḥkām*, I, 195. This explanation was also mentioned by Ḥanbalī scholars al-Maqdisī and al-Ṭūfī see al-Maqdisī, *Rawḍat al-nāẓir*, I, 379.; al-Ṭūfī, *Sharḥ al-rawḍa*, III, 14.

<sup>486</sup> Ibn Surayj, *al-Wadā‘i‘ li manṣūṣ al-sharā‘i‘*, II, 275.

imām, an idea that no one would disagree due to the result and purpose of consensus. Similarly to what Ghazālī said about famous principle among scholars "not to disagree with ijmā'", equation of ijmā' with "truth" and flipping its definition with its result had already become common among scholars. Ibn Surayj was, probably, responding to Shī'ī argument by accepting their general theory, but discerning his idea with an example taken from Abu Bakr who was not a much-respected companion among the shī'īs.

Another discussion concerning the participants of ijmā' was whether scholars who have "heretic" beliefs should be included among the participants of ijmā'. This discussion existed already in the writings of al-Shāfi'ī who asked his interlocutor whether the khawārij, the only group that denied the punishment of stoning, should be considered as a part of umma in ijmā' claims. His interlocutor tends to include them as the participants of ijmā' and al-Shāfi'ī seems to have held that they are part of the umma.<sup>487</sup> This discussion continued in the following two centuries and we see that two distinctions were made on the basis of heresy and unbelief, and kalām and fiqh. Some scholars saw that as long as a scholar certainly did not become an unbeliever, he should be considered in ijmā', since he would be still from *ahl al-ḥall wa-al-'aqd* whose report about himself is acceptable.<sup>488</sup> Abū Manṣūr al-Mātūrīdī (333/944) claimed that "Ahl al-sunna says that the approval or disapproval of the innovators, Qadarīs, Rawāfiḍa, and Khawārij are not considered in ijmā' on a legal topic,

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<sup>487</sup> al-Shāfi'ī, *Jimā' al-'ilm*, 25.

<sup>488</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, III, 515.

even they are considered in a theological topic.”<sup>489</sup> Zarkashī claims that this opinion has been narrated from the eponymous scholars including Mālik, al-Awzā‘ī, Muḥammad b. al-Ḥasan and of ahl al-hadīth, which is unlikely since such a distinction does not appear during their times.<sup>490</sup> Abū Ḥasan al-Ash‘arī points out two different opinions on whether disagreement of people of astray (*ahl al-ahwā*) should be taken into account in ijmā‘ claims; on consensus after a disagreement, and whether ijmā‘ is possible if there is a disagreement on a similar case in his *Maqalāt al-Islāmiyyīn*.<sup>491</sup> Abū Bakr al-Ṣayrafī (330/941) repeats the attitude toward excluding heretics from the participants of ijmā‘ based on the fact that those group are not qualified to be considered in ijmā‘ on a legal matter.<sup>492</sup> Al-Qādī al-Nu‘mān also points out that due to its purpose, one cannot claim that the community of error (*ahl al-bāṭil*) can be considered among ijmā‘ participants, because ijmā‘ leads to truth and the community of error cannot have it.<sup>493</sup> However, he questions this inherent claim of the supporters of ijmā‘ and criticizes how they label certain groups with heresy and legitimize their judgments against those through ijmā‘.<sup>494</sup>

The majoritarian consensus was one of the discussions of the time. As indicated earlier, al-Shāfi‘ī’s interlocutor did not insist on the strict consensus in which every member of umma participated. Al-Shāfi‘ī was criticizing this attitude due to the fact that minority

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<sup>489</sup> al-Zarkashī, *al-Baḥr al-muḥīṭ*, III, 515.

<sup>490</sup> al-Zarkashī, *al-Baḥr al-muḥīṭ*, III, 515. Also al-Jaṣṣāṣ states that he has not heard any opinion regarding this topic from earlier scholars in the madhhab. See al-Jaṣṣāṣ, *al-Fuṣūl*, III, 293.

<sup>491</sup> al-Ash‘arī, *Maqalāt al-Islāmiyyīn*, II, 357-8.

<sup>492</sup> al-Zarkashī, *al-Baḥr al-muḥīṭ*, III, 515.

<sup>493</sup> Qādī al-Nu‘mān, *Ikhtilāf uṣūl al-madhhāhib*, 104.

<sup>494</sup> Qādī al-Nu‘mān, *Ikhtilāf uṣūl al-madhhāhib*, 107-8.

might have the truth. From proto-Sunnīs, Muḥammad b. Jarīr al-Ṭabarī (310/923) is reported to have held that if there is only one contradicting scholar to the rest of the scholars, this contradiction is not taken into account and the opinion of the majority establishes *ijmāʿ*.<sup>495</sup> Apparently, based on this definition of *ijmāʿ*, al-Ṭabarī claims that al-Shāfiʿī contradicted with more than four hundred *ijmāʿ* cases.<sup>496</sup> Another form of majoritarian *ijmāʿ* as accepting *ijmāʿ* of the first four caliphs is reported from a proto-Ḥanafī judge Abū Ḥāzim.<sup>497</sup> Al-Jaṣṣāṣ rejects the idea of majoritarian consensus and calls those who accept it *hashaw*.<sup>498</sup> Al-Qādī al-Nuʿmān also mentions majoritarian consensus and labels those who accept as "the majority of the hashawiyya and nawāṣib."<sup>499</sup> Since ahl al-hadīth and zāhirīs tend to restrict *ijmāʿ* with the age of companions, those who accept majoritarian consensus should have been a different fraction. Even though al-Qādī al-Nuʿmān seems attributing the idea to the majority of proto-Sunnīs with the term "nawāṣib," it is not clear who were those people mentioned by both al-Jaṣṣāṣ and al-Qādī.

In the first half of the fourth hijrī century, another Al-Shāfiʿī al-Khaffāf (d. between 340-60/952-70), reportedly a disciple of Ibn Surayj, lists out different types of *ijmāʿ* in six categories:

The first one is *ijmāʿ* in which lay people and scholars are equal such as the

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<sup>495</sup> Ibn Ḥazm, *al-Iḥkām*, IV, 145.

<sup>496</sup> Ibn Ḥazm, *al-Iḥkām*, IV, 189.

<sup>497</sup> Jaṣṣāṣ, *al-Fuṣūl*, III, 301-02.

<sup>498</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 315.

<sup>499</sup> Qādī al-Nuʿmān, *Ikhtilāf uṣūl al-madhhāhib*, 109.



number of prayers and units (raka'āt) of each prayer and fasting Ramaḍān. The Second one is ijmā' of scholars, lay people are not considered in this kind such as ijmā' on the amount of blood money (*diyya*) and on the amount of blood money of a concubine is half of the amount of blood money of free woman. The third one is the ijmā' of the companion(s) that occurs through both saying and practice. The fourth one is their ijmā' on a matter based on ra'y. The fifth one is ijmā' of every age (*ijmā' al-a'ṣār*.) The sixth one is when a companion expresses an opinion and this spreads to the extent that an opponent of this idea is not known and it becomes ijmā'.<sup>500</sup>

It appears that in the fourth century these categories, though probably having a hierarchy, were commonly accepted. The most detailed examination of the fourth century was provided by al-Jaṣṣāṣ. In his examination, he points out different attitudes of jurists and theologians, as well. Al-Jaṣṣāṣ states that authority of Ijmā' of the first generation is accepted by all jurist and majority of theologians.<sup>501</sup> Ijmā' of the every age is accepted by Ḥanafīs and most of the other jurists.<sup>502</sup> He states that there are two general types of ijmā' the first one is ijmā' on jumal al-farā'id in which both scholars and lay people participate and the second one is ijmā' of the scholars.<sup>503</sup> Al-Jaṣṣāṣ also mentions that he has not heard a discussion from early Ḥanafī authorities on whether “people of aberration” (*ahl al-dalāl*) should be

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<sup>500</sup> Abū Bakr al-Khaḥfāf, *al-Aqsām wa-al-khiṣāl*, 7b. (I would like to thank to Ahmed Shamsy who shared his edition in progress of this manuscript with me)

<sup>501</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 257.

<sup>502</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 271.

<sup>503</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 285.

considered in *ijmā‘* or only “people of truth” (*ahl al-ḥaqq*) should be considered.<sup>504</sup> It indicates that this discussion was introduced by non-ḥanafīs during the gap period. Also, it seems that restricting participants of *ijmā‘* with orthodoxy became prevalent, because al-Jaṣṣāṣ shares the opinion of his predecessors that we mentioned earlier on this topic. Al-Jaṣṣāṣ rejects the idea of *ijmā‘* of the majority with strong words attributing this idea to al-ḥashaw.<sup>505</sup> He states that if this agreement is not unanimous, the truth might be with the minority which completely invalidates inherent truth claim of *ijmā‘*.<sup>506</sup> Al-Jaṣṣāṣ discusses al-Khaffāf’s third and fourth categories, albeit in a broader sense not restricting with the companions and concludes that *ijmā‘* might be based on report as well as on *ra’y*.<sup>507</sup> He also discusses the sixth category of al-Khaffāf that opinion of a companion upon which no disagreement transmitted can be considered *ijmā‘* and narrates the disagreement of Ḥanafī scholars within the madhhab concerning the topic. According to Abū Ḥasan al-Karkhī (340/952) this idea can be traced in the rulings of Abū Yūsuf, but al-Karkhī does not see it as a valid principle, while Abū ‘Umar al-Ṭabarī and Abū Sa‘īd al-Barda‘ī mentions this as a valid principle to the extent that it overrides analogy in the hierarchy.<sup>508</sup>

In the late fourth/tenth century, *ijmā‘* became the common term for any scholarly

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<sup>504</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 293.

<sup>505</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 315.

<sup>506</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 315.

<sup>507</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 277.

<sup>508</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 361-2.

agreement in the matters of theology, law, exegesis of the Quran and even language.<sup>509</sup> In the fifth hijrī century it seems that there some suggestions for hierarchy among different types of *ijmā‘* appeared in terms of the certainty value of *ijmā‘*. Pazdawī is said to have classified *ijmā‘* into three levels. The first level which holds the degree of certainty (*qat‘*) like *kitāb* or *mutawātir khabar* is the consensus of the companions; the second level which holds the degree of serenity (*iṭmi’nān*) like *mashūr hadīth* is the consensus of later generations; and the third level which holds the degree of probability (*ẓan*) like *khabar al-wāḥid* is the consensus upon on an earlier disagreement.<sup>510</sup>

One of the discussions related to *ijmā‘* was whether an *ijmā‘* could abrogate a revelation-based ruling. Al-Qāsim b. Sallām (224/838) does mention *ijmā‘* of both old and new scholars on abrogating the will to legal inheritors,<sup>511</sup> though he clearly indicates that *ijmā‘* is just a sign of prophetic sunna here.<sup>512</sup> ‘Īsā b. Abān (221/836), one of the earliest Ḥanafī scholars who wrote on legal theoretical topics, sees that what people are on,<sup>513</sup> which *al-Jaṣṣāṣ* interpreted as *ijmā‘*, can be taken as a sign of abrogation between two contradicting

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<sup>509</sup> In his commentary of the Quran, *Jāmi‘ al-bayān*, Abū Ja‘far al-Ṭabarī (310/923) says “All of umma, those people of the commentary, agreed upon” (*ajma‘at al-umma min ahl al-ta’wīl jamī’an*) to indicate a consensus of exegetes. See al-Ṭabarī, *Jāmi‘ al-bayān*, I, 170.; Abū a-Faṭḥ al-Mawṣilī (392/1002) mentions the “*ijmā‘ of ahl al-‘arabiyya*” and sees it valid based on the hadīth “my community shall not agree on error.” see al-Mawṣilī, *al-Khaṣāiṣ*, I, 190.; Bāqillānī (403/1013) also refers to “*ijmā‘ ahl al-lughā*” see Bāqillānī, *Tamhīd*, 250.

<sup>510</sup> See al-Zarkashī, *al-Baḥr al-muhīṭ*, III, 493.

<sup>511</sup> In the Quran it is ordained that if one is about to die he should leave wealth to the parents and relatives see 2:180.

<sup>512</sup> al-Qāsim b. Sallām, *al-Nāsikh wa-al-mansūkh*, 425.

<sup>513</sup> “wa-al-nāsi ‘alā aḥadihimā”

reports.<sup>514</sup> Even though one can claim that al-Jaṣṣāṣ's argument about 'Īsā's opinion suffers from strained interpretation, it shows, at least, two things: First, scholars saw a direct link between what have become famous among people and *ijmā'*; second, *ijmā'* gained an authority to the extent that it could abrogate the Quran as long as *ijmā'* is based on a text during al-Jaṣṣāṣ's time. In the late third century, it seems that abrogation of the Quran by *ijmā'*, as long as *ijmā'* is based on a text, was accepted, though there is evidence that there were those who tried to refrain from calling it abrogation and preferred to say “effacement.”<sup>515</sup>

## F. The Role of al-Salaf on the Doctrine of *Ijmā'*

We discussed the role of the idea of preserving what was emerged during the time of the companions on developing a narration-based language in the religious sciences of Islam in the second chapter.<sup>516</sup> One of the most important results of historical conflicts beginning with the caliphate of 'Uthmān<sup>517</sup> was emerging different groups who began to accuse some of the companions of the prophet with apostasy or unbelief. It became a common practice to curse on 'Alī from the pulpit in Friday prayers during 'Umayyads. Khawārij accused both 'Alī and Mu'awiya, while Rawāfiḍa (Shī'a) accused almost all

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<sup>514</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, II, 290.

<sup>515</sup> Abū Ja'far al-Naḥḥās, *al-Nāsikh wa-al-mansūkh*, 744. al-Naḥḥās mentions that there are those scholars who said that al-Mumtaḥina, 60:12 was abrogated by *ijmā'* of the scholars. He also cites from Abū Ḥātim his “effacement” (*itlāq al-tark*) suggestion instead of abrogation.

<sup>516</sup> See Chapter III: The Role of Prophetic Authority Embedded in Reports

<sup>517</sup> One can claim that it began with the problem who will be the leader of the community after the death of the Prophet Muḥammad, namely with the caliphate of Abū Bakr.

companions except a few who supported ‘Alī.<sup>518</sup> This harsh attitude toward the companions by both the political authority and certain groups caused a counter response appreciating the first generation of Muslims in any cost. This response became a standard for normativity claims in Islam and effected overall Islamic thought ranging from authority of narrations from earlier generations to taqlīd of earlier scholars that resulted in formation of schools. The fact that the perfect community, utopic society in a sense, for Muslims was the first generation of the Muslims who witnessed the revelation in the past paved the way for the idea that the true understanding and interpretation of Islam was available to them. Therefore, the true Islam, the orthodox Islam so to speak, means the pure and preserved teachings of Islām as practiced by this generation. Al-Shaybānī expresses this idea as follows: “*No one came more knowledgeable than the first-generation. All the knowledge belongs to them, since they were more knowledgeable of the practice of the prophet, may Allah bless him and his family, and closer to him in their effort than us.*”<sup>519</sup>

This idea also affected the doctrine of ijma‘ in appreciation of al-salaf for the claims of normative doctrines to the extent that some scholars argued that the consensus was truly only possible limited to the time of the companions. As we mentioned earlier, some suggested that even though al-Shāfi‘ī claims the opposite, the conditions that he brought up for consensus actually indicate the consensus of the companions only. Here we will discuss to what extent this idea was effective in emerging ijma‘ as a source and character of ijma‘

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<sup>518</sup> Malaṭī mentions Salmān, Miqdād, ‘Ammār, and Abū Zarr. See Malaṭī, *al-Tanbīh*, 13.

<sup>519</sup> al-Shaybānī, *al-Hujja*, I, 290-91.

between ijtihād and taqlīd.

Al-Kinānī (240/854) mentions ijmā' of the companions of the prophet several times in *al-Ḥayda* where he compiles his debates with Bishr b. Ghiyāth al-Marīsī, as a source one should not contradict after the kitāb and the sunna.<sup>520</sup> The famous theologian Abū Ḥasan al-Ash'arī (324/936) provides a good example of the connection between the authority of salaf and the idea of consensus in his treatise *al-Risāla ila ahl al-thaghr*. In his treatise, Abū Ḥasan al-Ash'arī (324/936), claims that he lists out 51 agreements of the predecessors (al-salaf) on the principles (al-uṣūl), upon which they were commanded to follow during the time of the Prophet Muhammad.<sup>521</sup> Though the editor suggested that the term al-salaf is used ambiguously. It appears from the title that with al-salaf, he seems to have meant the companions and with al-khalaf he must have meant those righteous people who came after this generation. Putting aside only a few of them, the principles that al-Ash'arī claims resulted out of consensus of the companions in this treatise are actually his theological principles written in the form of “the first consensus”, “the second consensus” so on and so fort. These principles are obviously written against the theological principles of Mu'tazila or Muslim philosophers. What al-Ash'arī tries to do is to represent his theology as the same of that of the companions; therefore, these principles, he argues, represent orthodox beliefs and

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<sup>520</sup> al-Kinānī. *al-Ḥayda*, 58

<sup>521</sup> Ash'arī, *al-Risāla ila ahl al-thaghr*, 117. This treatise was written, according to its author, in 268/881 (see page 75.) the editor of the book says that this date must be wrong, since al-Ash'arī was born in 260/873. The editor argues in the introduction that this date might have been added deliberately by a late follower of al-Ash'arī or a Mu'tazilī to negate his theology, as opposed to what the orientalist scholar Alar says that this date must be just a scribal error and the correct date might be 298 h. instead of 268h. Putting aside the reason of this date in the treatise, both the editor and Alar agrees that it belongs to al-Ash'arī.

those who do not follow them are heretic innovators. Ijmā‘ referring to the age of the companions was being used again in al-Ash‘arī’s language serving for the claim of the orthodoxy in favor of a particular belief/opinion among different opinions of the later times. Al-Ash‘arī does not even bother himself to support his claims with evidence for whether these agreements actually occurred during the time of the companions. This might be due largely to the fact that this treatise was written particularly upon request of the people of al-thaghr, who already accepted his authority and were not probably eager to see that kind of evidence. A similar use of ijmā‘ al-umma together with apostasy claims appears in his *maqālāt al-islāmiyyīn* a few times.<sup>522</sup>

Al-Zarkashī gives a significant reason for excluding khawārij from the participants of ijmā‘: “they are not qualified to be considered in ijmā‘, because they do not have a source to derive from due to the fact that they accused our predecessors from whom we derived the principles of our religion.”<sup>523</sup>

## G. Conclusion

The first generation of Muslims after the Prophet Muḥammad’s death did not have to struggle with many questions regarding how their religions should govern their life, because the majority of the answers were readily available due to the established practices and lack of problems. However, the disagreements among people built up over time corresponding to the

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<sup>522</sup> Ash‘arī, *Maqālāt*, 143, 151, 477,

<sup>523</sup> al-Zarkashī, *al-Baḥr al-muhīt*, III, 493.

dissolution of unity of the community after internal conflicts beginning with the caliphate of ‘Uthmān along with the expansion of Muslims to the extent that certain things in the established practices began to be challenged. Disagreements began to appear even in things on which establishing a second opinion should have been really difficult due to constantly repeated practices such as the words in call for prayer, *adhān*, that must have had been repeated five times a day.<sup>524</sup> These significant differences reached over the line of what had been respected as scholarly opinions. It was not uncommon to see one group cursing on ‘Alī, while another one claiming his divinity or prophethood. The civil wars among the companions created the debate on the situation of the grave sinner, because intentionally killing of a Muslim is considered a great sin. Since various groups accused different companions, the reliability of the companions as a whole was questioned by some. Some from later generations must have questioned how they could rely on the companions who killed one another in what they transmitted from the prophet? Some Shī‘ī groups apparently extended this questioning to their reliability on the transmission of the Quran itself, since even the first two caliphs, Abū Bakr and ‘Umar who usurped ‘Alī’s right for caliphate held the power and must have altered the text of the Quran by adding certain passages or removing certain others. These attacks created a backlash from the majority of the community and established the idea of infallibility of the first Muslim generation who witnessed the revelation as a whole in transmitting the fundamentals of religion including the

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<sup>524</sup> Shī‘a agree on to add “*ḥayyā ‘lā khayr al-‘amal*” after “*ḥayya ‘lā al-falāḥ*” in *adhān* as opposed to Sunnīs. However, even in Sunnī sources it is narrated that Ibn ‘Umar and ‘Alī b. Ḥusayn used to add this phrase. See Mālik, *Muwaṭṭā‘*, “Shaybānī’s narration”, I, 55.; Ṣan‘ānī, *Muṣannaḥ*, I, 464.; Ibn Abī Shayba. *Muṣannaḥ*, I, 195-96.



words of the Quran despite the fact that they might have been able to make mistakes or sins. This idea was supported with the numbers of companions based on the fact that if one would have tried to alter the religion, other would have prevented it happen, and it was motivated with verses of the Quran praising this generation.

Ijmā‘ claims appear to have been made for two different purposes between use and misuse in the gap period. The first purpose, as the term implies, was to create a neutral, unbiased arbiter over schism that emerged among diverse groups. Within the body-politic of Muslim community, the lowest common denominator was needed to determine the values of diverse beliefs and opinions, because of the excessive disagreements. The extent of these disagreements were indicated by the Shī‘ī scholars that “every group relate something from the prophet contradicting what another group narrate from him. Since we are obliged to follow what the prophet brought, there must be an imām ordained by God, who is free from changing or distorting and able to inform us what we need to know and do for our religion.”<sup>525</sup> The second purpose, based on the first one, was to use ijmā‘ claims to champion one’s own sect/school by claiming normative stance based on orthodoxy. Therefore, ijmā‘ was used both to overcome schism and to serve to schism at the same time.

One of the significant results of this examination is the evidence it provides about the character of uṣūl al-fīqh. Ijmā‘ was not only a legal term, as opposed to what it became later. In the debates, for instance, between Ibn Rāwandī and al-Khayyāṭ where both sides accuse

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<sup>525</sup> al-Khayyāṭ, *al-Intiṣār*, 158.

the other with remaining outside of *ijmā'*, they discuss both theological and juristic matters including the position of the grave sinner and the number of daily prayers.<sup>526</sup> This demonstrates that *uṣūl al-fiqh* emerged as a source methodology shared by different Islamic disciplines.

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<sup>526</sup> al-Khayyāt, *al-Intiṣār*, 163-65.

## **CHAPTER IV**

Analogy, Legal Reasoning, and Imitation (Qiyās, Ijtihād and Taqlīd): The  
Evolution of Reasoning in Legal Theory and Its Limits

## A. Introduction

One of the most heated discussions we see in the literature of the gap period was the reason's capacity in deriving religious rulings and whether these rulings were certain (*qatī*) or probable (*ẓannī*). A spectrum—encompassing the position of thinking that reason arrives at new solutions, the position of limiting law to what textual sources indicate, and positions in between—was formed. Scholars of the time chose a stance within that spectrum.

In this chapter, I will examine the development in the gap period of the two forms of legal reasoning identified as *ijtihād* and *qiyās* in the later literature. The chapter will show that, even though legal reasoning is discussed under the rubric of *ijtihād* (exertion for the derivation of ruling) in the later literature of *uṣūl al-fiqh*, and *ijtihād* was a known term even before the gap period, the debates of the time were overwhelmingly occupied with *qiyās*, which later was considered the fourth fundamental source of Sunnī Islamic law. Therefore, I will focus more on the development of *qiyās* and related debates, in order to reveal the reason behind the emphasis on *qiyās* during that period and the different aspects of it as gradually developed until it became recognized by the majority of Sunnīs. I will first give a brief survey of the use of *qiyās* before the gap period. The goal of this survey is to allow the specific developments that occurred during the gap period to be identified easily. I will then turn my attention toward the debates on the authority of *qiyās*, and specific topics including elements and types of *qiyās*, as these progressed within the period. Finally, I will deal with other discussions on *ijtihād* and *taqlīd* (imitation), especially the effect of *taqlīd* in the formation of schools.

Ijtihād became a fixed term encompassing different types of legal reasoning including *qiyās* (analogy), *ra’y* (independent-educated reasoning), *istihsān* (juristic preference of exception over the rule due to a compelling reason), or *istiṣlāḥ* (interest-based legal reasoning) in the late uṣūl al-fiqh. However, this overarching agreement on the term ijtihād seems not to have occurred during the gap period. Scholars used all these different concepts and among them the term *ra’y* was more like an umbrella term for others. We also see that a specific composite word that combines both ijtihād and *ra’y* became common in the gap period as *ijtihād al-ra’y*. *Qiyās* among these types of reasoning, however, occupied the legal theoretical discussions between the supporters of it and those who were critical about it.

The discussion of taqlīd was also related to the discussions of ijtihād and *qiyās*. The adherence of ahl al-ḥadīth to earlier authorities was constantly criticized under the accusation of taqlīd by their rationalist adversaries such as Mu‘tazila, Zaydiyya, Murji’a, or ahl al-ra’y. However, the scholarly circles that evolved around teacher-student relationships among these rationalist groups led to the adherence of the developed opinions based on ijtihād. The students narrated the opinions of their master teachers. This reality gradually paved the way for taqlīd accusations in a negative sense. As a result, taqlīd was condemned as the opposite of ijtihād, but adherence to the accumulated knowledge of earlier scholars within a certain group was carefully distinguished from taqlīd and justified. The following sections will examine these discussions in detail.

## B. *Qiyās* before the Gap Period

*Qiyās* as a method in Islamic law went through different stages before its

fully-developed form in the mature Islamic legal theoretical works. However, in its simplest meaning as comparing new cases to old ones based on similarity, it had been known in the pre-gap period as an application that the companions did not hesitate to apply. One of the earliest examples of this application appears in what had been narrated from the letter of ‘Umar b. al-Khaṭṭāb to the governor Abū Mūsā al-Ash‘arī as a recommendation in solving problems if there is no direct solution in the Quran or sunna.<sup>527</sup> There is no categorical critique of this application reported from the first century of Islam. In the literature of Islamic legal theory the first refutation of qiyās is attributed to al-Nazzām (ca. 230/845). We will see that al-Nazzām had predecessors. It seems that once this application turned into a famous method of ahl al-ra’y under the heading of ra’y applications in the second hijrī century, the opponents of ra’y began to criticize qiyās as a continuation of their general critiques of ra’y.

Al-Qādī al-Nu‘mān narrates a few discussions between Ja‘far al-Šādiq (148/765) and Abū Ḥanīfa (150/767), in one of which Ja‘far criticizes Abū Ḥanīfa by saying “it was satan who made qiyās for the first time and erred, when he compared his nature to the nature of Adam.”<sup>528</sup> There are some other reports by the same token from Ja‘far and early Shi‘ī imāms. Yet the critiques were not limited to them. Some early figures associated with ahl al-ḥadīth are also mentioned among those who criticized the use of qiyās openly. Ibn Qutayba relates that Āmir al-Sha‘bī (104/722), a Kūfan successor well-known with his

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<sup>527</sup> Al-Shaybānī, *al-Ḥujja*, II, 570.

<sup>528</sup> al-Qādī al-Nu‘mān, *Ikhtilāf*, 158.

ḥadīth-based thought, sarcastically and pejoratively attacked qiyās.<sup>529</sup> However, Kūfa was the center of qiyās applications due especially to the presence of Abū Ḥanīfa and his students. Extensive use of qiyās in the works of al-Shaybānī gives sufficient evidence for early development of this method in pre-gap period.<sup>530</sup> Al-Shāfi‘ī’s discussion of qiyās represents a crucial stage that affected the debates of the gap period to a considerable extent. Since this work discussed his contribution earlier<sup>531</sup> and there are important studies<sup>532</sup> devoted to explaining al-Shāfi‘ī’s understanding and application of qiyās, it suffices to mention the limits of his influence in the gap period throughout the chapter.

All these developmental stages show that the pre-mature form of qiyās applications had been apparent in religio-legal thought as early as the time of the companions and the jurists had already begun to develop certain conditions and principles to free qiyās applications from arbitrary rulings before the gap period. However, in addition to criticisms of ra’y, there had been scholars, albeit few in number, who criticized use of qiyās or showed explicit distaste toward it in the second hijrī century. It is safe to argue that the gap period can be seen just as a continuation of these different attitudes with significant and more nuanced contribution by both sides, i.e. the proponents and opponents of qiyās.

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<sup>529</sup> Ibn Qutayba, *‘Uyūn al-akhbār*, I, 45; Ibn Qutayba, *Gharīb al-ḥadīth*, II, 651-52.

<sup>530</sup> For further investigation of qiyās as a source of law according to Al-Shaybānī see Ahmet Temel, *Imam Muhammed’in el-Hücce Adlı Eseri Ekseninde şer’i Deliller*, unpublished MA thesis, 96-110.

<sup>531</sup> See Chapter 1.

<sup>532</sup> See Fahd b. Sa‘d Jahnī, *al-Qiyās ‘inda al-Imām al-Shafi‘ī*, Riyāḍ: Jāmi‘at Imām Muḥammad b. Su‘ūd al-Islāmiyya, 1424/2003; Soner Duman, *Şafi‘î’nin kıyas anlayışı*, İstanbul: Türkiye Diyanet Vakfı İslam Araştırmaları Merkezi (İSAM), 2009.

## C. Debates on the Authority of Qiyās during the Gap Period

### 1. Early Antagonists of Qiyās among Mu‘tazila

The deniers of qiyās are classified in Sunnī legal theoretical works mostly as al-Nazzām, Shi‘ā, Zāhirīs and some of Khawārij. Ibrāhīm al-Nazzām (ca. 230/845) is portrayed as the first person who rejected the authority of qiyās and even went further to condemn the companions who applied qiyās.<sup>533</sup> A study aiming to reconstruct al-Nazzām’s book *al-Nukat* through largely later citations through another lost book *Uṣūl al-futyā* by al-Jāhiz proved this point.<sup>534</sup> According to this work, al-Jāhiz narrated from al-Nazzām that he had stated that “the companions applied qiyās either by assuming erroneously that it was valid for them or they did this as dictating rulings to make themselves leaders, commanders, and predecessors [to be followed].”<sup>535</sup> As a matter of fact, al-Nazzām makes a clear distinction between theological and legal matters concerning the authority of qiyās. He sees that the application of qiyās as inevitable in matters of theology such as divine reward and punishment, divine justice or injustice, and affirming or rejecting similarity between God and his creation; however, it is not allowed, according to al-Nazzām, in legal matters and

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<sup>533</sup> al-Jaṣṣāṣ mentions him as the first person See al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 23.

<sup>534</sup> See Josef van Ess, *Das Kitāb an-Nakt des Nazzām und seine Rezeption im Kitāb al-Futyā des Ĝāhiz: eine Sammlung der Fragmente mit Übersetzung und Kommentar von Josef van Ess. Abhandlungen der Akademie der Wissenschaften in Göttingen / Philologisch-historische Klasse, F. 3, 79. 1972.*

<sup>535</sup> Josef van Ess, *Das Kitāb an-Nakt*, 20. ‘Abd al-Qāhir al-Baghdādī mentions this from al-Nazzām in a slightly different phrase as “Those who issued judgment based on ra’y from the companions either supposed it was permissible for them and did not know that issuing judgment based on ra’y was prohibited or they desired to be remembered with disagreements in order to be assigned as the leaders of different schools [madhhāhib].” See ‘Abd al-Qāhir al-Baghdādī, *al-Farq beyn al-firaq*, 134.



inheritance laws.<sup>536</sup>

Al-Nazzām rejects qiyās because, he argues, the law-giver sometimes equates the rulings and cases where reason can find differences and distinguishes cases that reason can judge as similar. For instance, the law-giver decreases half units of the four-unit-prayer, but not for two-unit prayer for the traveler despite their resemblance; while he ordains the same amount of expiation for three different violations (murder, intercourse during a Ramadan day, and *zihār* [vowing not to touch one’s wife as if one’s mother]), despite their distinctness.<sup>537</sup> This reasoning is in parallel with what had been narrated from him as distinguishing reason-based matters from revelation-based matters regarding the application of qiyās and his condemnation of ra’y applications of the companions.

However, this restrictive understanding of revelation in legal matters seems to contradict the general principle of the Mu‘tazila about *ḥusn* (good) and *qubḥ* (evil) and is closer to the Ash‘arī stance with respect to the topic of *ta’līl* (causality) in *aḥkām* (rulings).<sup>538</sup> Al-Shahristānī narrates that al-Nazzām did hold that one must act in accord with what is good and what is bad on the basis of reason before revelation.<sup>539</sup> The contradiction arises from cyclical explanation of causality apparent in the writings of some Mu‘tazilī scholars. Al-Juwaynī explains al-Nazzām’s denial of qiyās with a similar reasoning. He states that

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<sup>536</sup> al-Nazzām narrates the word of ‘Umar as “If this religion came by qiyās, it would have been wiping the under of the khuffayn [leather socks of sorts] instead of their top” and says that this opinion valid only for legal matters [aḥkām] not theological matters. See Josef van Ess, *Das Kitāb an-Nakt*, 22.

<sup>537</sup> al-Āmidī, *al-Iḥkām*, IV, 7-8.

<sup>538</sup> Apaydın, Yunus, *TDV İslam Ansiklopedisi*, s.v. “Ta’lil” İstanbul: TDV, XXXIX, 512.

<sup>539</sup> Shahristānī, *al-Milal wa-al-nihal*, I, 58.

according to al-Nazzām, God did not ordain qiyās for us based on the principle of al-aṣlah (God necessarily does everything for the best); hence, we know through his silence that he knew that qiyās is not advantageous for his servants.<sup>540</sup> Al-Shahristānī, in explaining the reason for al-Nazzām’s denial of qiyās, narrates that for al-Nazzām the only valid source establishing rulings would be the opinion of an innocent imām.<sup>541</sup> However, since this opinion is not attributed to him in other sources and because of his other critiques of every single caliph among the first four caliphs, this attribution is probably erroneous.

By taking into account al-Nazzām’s general emphasis on free thinking, I argue that al-Nazzām saw theological matters as unchangeable and certain, where qiyās and reasoning would provide better understanding in reaching the truth by comparing matters one to another, hence this would maximize free theoretical thinking in theology independent from textual sources; however, he considered legal matters as changeable and non-transferable, because transferring them to new cases would add new commands and prohibitions that would minimize freedom in actions, in addition to the existing commandments and prohibitions in the textual sources.<sup>542</sup> His denial of solitary reports also seems to have had

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<sup>540</sup> al-Juwaynī, *Talkhīṣ*, III, 155-56.

<sup>541</sup> Shahristānī, *al-Milal wa-al-nihal*, I, 57; A study dealing with al-Nazzām’s life and thoughts tried to understand the denial of qiyās with this attributed idea of innocent imām and argued that al-Nazzām might have been influenced by the writings of Ibn Muqaffa’ in which Ibn Muqaffa’ suggests that only imām can put an end to the legal disagreements stemmed from solitary reports or personal opinions (ra’y). See Muḥammad ‘Abd al-Hādī Abū Rīdah, *Ibrāhīm ibn Sayyār al-Nazzām wa-ārā’uhu al-kalāmīyah al-falsafīyah*, al-Qāhirah: Maṭba‘at Lajnat al-Ta’līf wa-al-Tarjamah wa-al-Nashr, 1946, 29-30.

<sup>542</sup> al-Nazzām’s and Mu‘tazila’s general inclination toward drinking nabīdh is another indication of this argument. See below for how the famous Mu‘tazilī scholar al-Jāhīz treated the matter of drinking nabīdh.

the same reason.<sup>543</sup>

A group of Baghdādī theologians reportedly followed al-Nazzām in rejecting the authority of qiyās.<sup>544</sup> However, instead of condemning the companions, they tried to explain the application of the companions in a different way. They argued that the qiyās applications of the companions were in the manner of arbitration between the litigants to resolve problems, not in the manner of reaching to a certain judgment and adjudicating their conclusions.<sup>545</sup> Al-Nazzām rejects this explanation by saying that “this cannot be defended through arbitration, because arbitration is different from ruling. How can one say this, while ‘Umar was saying that he ruled [*innī qaḍaytu*].”<sup>546</sup>

Apparently this tendency of rejecting the authority of qiyās and more generally reason-based ruling in legal matters grew stronger over the course of the early third hijrī century among some Mu‘tazilī theologians. The problem was how to explain numerous narrations that indicate the applications of the companions based on qiyās. Some theologians strived to preserve their respect toward the companions by explaining their application in the manner of arbitration rather than establishing a rule, but al-Nazzām rejected this explanation as well. It seems that al-Nazzām did not even put the authenticity of these narrations in question despite his known unconformity regarding solitary reports, instead he took it for granted and openly condemned those companions.

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<sup>543</sup> See Chapter III for the detailed analysis on his denial of solitary reports.

<sup>544</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 23.

<sup>545</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 24.

<sup>546</sup> Josef van Ess, *Das Kitāb an-Nakt*, 22.

Unraveling the identity of these particular Baghdādī Mu‘tazilīs who rejected the authority of qiyās would provide a clearer understanding.<sup>547</sup> Al-Khayyāt mentions Ja‘far b. Mubashshir (234/848) with laudatory words that “He [Ja‘far] relied on the apparent meaning of the kitāb, sunna and ijmā‘, and refused to issue rulings based on ra’y or qiyās.”<sup>548</sup> al-Khayyāt’s words about Ja‘far also signify an understanding of piety related to adhering exclusively to the texts by rejecting ra’y and qiyās during his time. Ja‘far is also reported to have written a refutation against *Aṣḥāb al-ra’y wa-al-qiyās*, which probably included his arguments for the rejection of qiyās.<sup>549</sup> Among Baghdādī Mu‘tazilīs, Ja‘far b. Ḥarb (236/850)<sup>550</sup> and Muḥammad b. ‘Abd Allah al-Iskāfī (240/854) are also reported to have rejected qiyās.<sup>551</sup> Nonetheless, some other Baghdādī Mu‘tazilīs, among whom Bishr b. al-Mu‘tamir (210/825), the founding name for the school of Baghdādī Mu‘tazila; Abū Bakr al-Aṣam (201/816), and Al-Nazzām’s uncle Abū al-Hudhayl al-‘Allāf (227/841) are reported

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<sup>547</sup> People and ideas appear confusing to some extent in the mature legal theoretical works. Even though al-Qāḍī Abū Ya‘lā (458/1066) attributes the opinion that qiyās is not permissible by reason, but it is permissible by revelation/law (shar‘an) to Baghdādī Mu‘tazilīs including al-Iskāfī (240/854), Ja‘far b. Mubashshir (234/848), Ja‘far b. Ḥarb (236/850), and Ibrāhīm al-Nazzām (221/836), it seems this attribution is erroneous due to the vast evidence for the thoughts of al-Nazzām and some of the aforementioned scholars. Probably, he must have meant the vice versa, meaning qiyās is not applicable in the matters of law, but it is applicable in the matters of reason including kalām as we mentioned earlier about the distinction that al-Nazzām makes between legal and theological matters regarding the application of qiyās. Al-Juwaynī also divides the deniers of qiyās in this way and mentions al-Nazzām and his followers among those who rejected qiyās only in legal matters, while he attributes the entire rejection of qiyās in both theology and law to Ḥashaw and Zahirīs. Abū Ya‘lā attributes the idea that qiyās is not permissible by both reason and revelation to Dāwud b. ‘Alī. See Abū Ya‘lā, *al-Udda*, IV, 1282-3; and *al-Juwaynī, al-Burhān*, II, 8. For other works that address those people who rejected qiyās in general in *shar‘iyyāt* (legal matters) see also Abū Ishāq al-Shirāzī, *al-Ṭabṣira*, 419.

<sup>548</sup> al-Khayyāt, *al-Intiṣar*, 89.

<sup>549</sup> al-Khayyāt, *al-Intiṣar*, 81.

<sup>550</sup> Ālu Taymiyya, *al-Musawwada*, 390.;

<sup>551</sup> al-Shawkānī, *Irshād al-fuhūl*, II, 94.

to have accepted the authority of qiyās.<sup>552</sup>

It seems that the strict reaction against the application of qiyās in legal matters must have appeared in Baṣra with al-Nazzām, and also remained limited with him and probably some unknown members of his circle in Baṣra.<sup>553</sup> It also appeared among certain theologians of Baghdādī Mu‘tazila from the third generation of the Baghdādī school,<sup>554</sup> since there is no report from Thumāma b. Ashras (213/828) or Abū Mūsā (226/841) concerning the authority of qiyās. Ja‘far b. Mubashshir’s student al-Khayyāt (298/910) also seems to have rejected qiyās from his aforementioned words about the denial of qiyās of his teacher. Yet, his student Abū Qāsim al-Balkhī (319/931), also known as al-Ka‘bī, mentioned qiyās in his extant works with no rejection.<sup>555</sup>

Ibn Ḥazm mentions two other individuals who rejected qiyās - ‘Īsā al-Murād and Abū ‘Ifār- in addition to Ja‘far b. Ḥarb, Ja‘far b. Mubashshir, and al-Iskāfī.<sup>556</sup> Since there is no information about them in the sources under these names, they may be ‘Īsā b. al-Haytham al-Ṣūfī, the disciple of Jā‘far b. Ḥarb and Abū ‘Affān al-Nazzāmī, the disciple of

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<sup>552</sup> Ibn Ḥazm, *al-Iḥkām*, VII, 203. Ibn ‘Abd al-Barr (562/1167) narrates also from the uṣūl work of Abū al-Qāsim ‘Ubayd Allah b. ‘Umar (502/1108) that he said that even Abū al-Huzayl and Bishr b. Mu‘tamir rejected al-Nazzām’s idea and accepted the authority of qiyās. See Ibn ‘Abd al-Barr, *Jāmi‘ bayān al-‘ilm*, II, 856.

<sup>553</sup> It is probable that Abū ‘Affān al-Nazzāmī was one of them. The following paragraph discusses some possible followers of al-Nazzām.

<sup>554</sup> Ibn Murtaḍā mentions them in the 7th level of Mu‘tazila. See Ibn Murtaḍā, *Ṭabaqāt al-mu‘tazila*, 73-77.

<sup>555</sup> Al-Juwaynī mentions al-Balkhī as the leader of some Baghdadian Mutazilis who rejected qiyās. See Juwaynī, *al-Talkhīs*, III, 155. However, al-Balkhī does mention qiyās in his works.

<sup>556</sup> Ibn Ḥazm, *al-Iḥkām*, VII, 203.

al-Nazzām.<sup>557</sup> Al-Juwaynī mentions that the majority of Shi‘ā, Ibādiyya, Azāriqa, and the majority of Kharijīs except al-Najdāt rejected the authority of qiyās.<sup>558</sup>

This tendency among some Mu‘tazilī scholars, however, apparently did not spread over even the majority of Mu‘tazilī scholars. For instance, al-Jāhiz (255/869) who was a student of al-Nazzām and the only student of his through which we have access to al-Nazzām’s opinions, did not follow his teacher strictly on this matter. When he states the legal sources upon which prohibitive and permissive rulings are established, he mentions “correct analogies” (*al-maqāyīs al-muṣība*) and “true reason” among the valid sources.<sup>559</sup> Even though al-Jāhiz rejects prohibition of *nabīdh* (a type of fermented drink made of dates or grapes), which was ruled based on qiyās according to some scholars of the time, his reasoning was based on the argument that this prohibitive ruling was based on a false qiyās rather than rejecting the authority of qiyās altogether.<sup>560</sup> The indications of its falsehood according to al-Jāhiz were first the fact that when the law-giver prohibits something, he also permits other similar kinds such as permission of eating goat, sheep, and camel, despite the prohibition of pig; the second was the disagreement about the ruling of *nabīdh* that goes

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<sup>557</sup> See Ibn Murtaḍā, *Ṭabaqāt al-mu‘tazila*, 78-9.

<sup>558</sup> al-Juwaynī, *al-Burhān*, II, 7.

<sup>559</sup> al-Jāhiz, *Rasāil*, IV, 277. Even though al-Jāhiz mentions *al-maqāyīs al-muṣība*, which literally means the correct measurements, the word is the plural form of miqyās that derives from the same root of qiyās and the word *al-maqāyīs* is frequently used to mean applications of qiyās in the literature of uṣūl al-fiqh together with ijtihād based on ra’y. For a few examples see al-Jaṣṣāṣ, *al-Fuṣūl*, III, 296, 364-65, 391; IV, 53, 58, 62.

<sup>560</sup> There is also a prophetic report prohibiting every intoxicating drink that reads as “every intoxicating is prohibited” (*Kullu muskirin ḥarāmūn*)

back to the earlier generations.<sup>561</sup> From Baṣran Mu‘tazilīs Abū ‘Alī al-Jubbā’ī (305/915) and his son Abū Ḥāshim (321/933) are frequently cited as having various opinions regarding the application of qiyās, some of which will be discussed below.<sup>562</sup>

## 2. Ahl al-ḥadīth: The Reluctant Approaches toward Qiyās

Even though the authority of qiyās is generally accepted among the later Ḥanbalīs, many reports transmitted from Aḥmad b. Ḥanbal, the heroic leader of ahl al-ḥadīth, demonstrate his reluctance in accepting qiyās as a valid method. *Uṣūl al-sunna*, a work attributed to Aḥmad b. Ḥanbal, begins with the following statement on the definition of “the roots of sunna:”

According to us, the principles of the sunna are adhering to what the companions of the Prophet were practicing and obeying them; abstaining from innovation which is aberration, and from debating in the matters of religion. The sunna that entails signs of the Quran explains the Quran and **there is no qiyās in it as it cannot be used a source of analogy**, [since] there is no role to reason, or personal desire, because it is just something to be obeyed and for which personal desire should be put aside.<sup>563</sup> [Emphasis mine]

In certain legal topics, Aḥmad b. Ḥanbal points out that he abandons qiyās for the

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<sup>561</sup> al-Jāhiz, *Rasāil*, IV, 275-77.

<sup>562</sup> For a few example see Abū Ishāq al-Shirāzī, *al-Ṭabṣira*, 395, 414.; Abū Ishāq al-Shirāzī, *al-Luma‘*, 37.

<sup>563</sup> Aḥmad b. Ḥanbal, *Uṣūl al-sunna*, 14-17.

sake of the reports from the companions.<sup>564</sup> In another report, he states that qiyās is comparing something to the original, when one makes qiyās, he does nothing but dismantle the original.<sup>565</sup>

A similar attitude can be observed in al-Bukhārī's *al-Ṣaḥīḥ*. Al-Bukhārī devotes a sub-chapter to “the condemning of independent opinion (*ra'y*) and the burden of analogy (*qiyās*) in which he relates only two reports” (bāb mā yudhkaru fī dhammi al-ra'y wa takalluf al-qiyās).<sup>566</sup> The first narration is the following prophetic ḥadīth: “Allah does not take away knowledge by taking it away directly from the people, but He takes it away by the death of the scholars till when none of them remains, then people will take as their leaders ignorant persons who, when consulted, will give rulings without knowledge [on the basis of ra'y]. So they will go astray and will lead the people astray.” The second report is from a companion, Sahl b. Ḥunayf, who suggests people to condemn independent opinion and to favor religion instead.<sup>567</sup> These two reports show that al-Bukhārī was following the arguments of ahl al-ḥadīth in condemning independent opinion and qiyās, though he did not delve into the details of qiyās. It is apparent that he was regarding the reports as the sole source of authoritative knowledge, i.e. sunna, after the Quran (which he also emphasized in the title of

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<sup>564</sup> Aḥmad b. Ḥanbal, *al-Wara'*, 51; Abū Dā'ud, *Masā'il al-Imām Aḥmad*, 20.

<sup>565</sup> Aḥmad b. Ḥanbal, *Musnad* (Muqaddima), 18

<sup>566</sup> al-Bukhārī, *al-Ṣaḥīḥ*: Kitāb al-i'tiṣām bi al-kitāb wa-al-sunna, Bāb 7. (IX, 100.)

<sup>567</sup> According to the report, Sahl b. Ḥunayf says that if he could disobey the prophet, he would have disobeyed for the incident of Abu Jandal, who came to the Muslims right after the treaty of Hudaibiya and the prophet had to return him to the polytheists due to the condition of the treaty and the Muslims were became very sad for not being able to help him. However, Sahl implies that this incident turned into a blessing for them later by obeying to the prophet. See al-Bukhārī, *al-Ṣaḥīḥ*: Kitāb al-i'tiṣām bi al-kitāb wa-al-sunna, Bāb 7, [7308]. (IX, 100.)



his chapter as ‘to hold fast the kitāb and sunna’). However, he preferred to describe this stance with *dhamm* (condemning) as opposed to a more categorical refutation such as *radd* (refuting).

Another traditionalist al-Qāsim b. Sallām (224/838) does not openly reject *qiyās*, but he also does not support it explicitly in his books. A few examples even show that al-Qāsim b. Sallām was reluctant to use this method and tended to keep cases separate where other scholars apply *Qiyās*. For instance, in the case of whether the saliva of predators makes water unclean; he reports that Mālik b. Anas and Madīnans made an analogy between the predators and cats and argued that the saliva of predators does not make water unclean; while Sufyān al-Thawrī and ‘Irāqīs made an analogy between the predators and dogs and argued that the saliva of predators may make water unclean, hence it is reprehensible. Al-Qāsim b. Sallām makes the following statement about these analogical reasoning:

“I do not think applying *qiyās* for one of the views is appropriate here. Both cases about dog and cat are reported from the prophet separately. If one inclines to one of them, one would leave the other, while one of them does not deserve to be followed more than the other. Therefore, in the case of their saliva, there is nothing reported from the prophet, hence it became something disputed in which one should refrain from using it for cleaning unless there is necessity.”<sup>568</sup>

Qāsim b. Sallām follows the same approach in criticizing his opponent who makes

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<sup>568</sup> al-Qāsim b. Sallām, *al-Tahūr*, 286-87.

analogy between who is in debt of animals and who is in debt of money in excluding the amount of debt from alms-giving (zakāt) by saying that “*he makes analogy between them, but the sunna separated the two cases.*”<sup>569</sup> He also criticizes his ‘Irāqī opponent in applying qiyās between two original cases with the following statement:

Fundamental rulings (*sharā’i’*) of Islam cannot be a subject of analogy for one to another... If you regard sale (*bay’*) as the original case [major term] and charity (*sadaqa*) as the new case [minor term] in order to apply an analogy; I can regard the charity as the original case and the sale as the new case. This is not right. Each obligatory ruling (*fard*) has its own aspect and detailed rulings.<sup>570</sup>

Even though this last quote does not invalidate qiyās entirely, it definitely shows his reluctance and restrictive attitude toward qiyās.

Two different approaches toward qiyās embodied within the arguments of two traditionalist scholars paved the way for distancing from reluctant approach toward either a more inclined approach, or a complete rejection. These two scholars were al-Ḥārith al-Muḥāsibī (243/857) and al-Ḥusayn b. ‘Alī al-Karābīsī (245/859).

Among the members of ahl al-ḥadīth in the first half of the thirh hijrī century, the famous ascetic al-Ḥārith al-Muḥāsibī differs from his fellow traditionalists concerning the authority of qiyās. He neither rejects its authority, nor does he condemn it. Al- Muḥāsibī

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<sup>569</sup> al-Qāsim b. Sallām, *al-Amwāl*, 536.

<sup>570</sup> al-Qāsim b. Sallām, *al-Amwāl*, 1464.

indicates that qiyās can be used *for the matters in which the application of qiyās is permissible when there is no bayān in the text* of kitāb, sunna, ijma‘ al-umma and apparent derivation (*istinbāt bayyin*) from textual sources.<sup>571</sup>

The only other person from the first half of the third hijrī century mentioned among the deniers of qiyās in the sources is al-Ḥusayn b. ‘Alī al-Karābīsī, a follower of al-Shāfi‘ī and one of his disciples who transmitted his “old opinions” in the madhhab.<sup>572</sup> Yet, beside al-Jaṣṣāṣ, there is no other source indicating his rejection of qiyās. The only other piece of evidence is that al-Ka‘bī mentions that Dāwud b. ‘Alī al-Aṣbahānī listed al-Karābīsī among the qadarīs in his book, which al-Ka‘bī interpreted as having a Mu‘tazilī inclination.<sup>573</sup> This attribution must have been related to the fact that he is also represented as the first person who claimed that the recitation of the Quran is created, even though the wording of the Quran is uncreated. Al-Karābīsī is followed by Abū Thawr (240/854), Dāwud b. ‘Alī (271/884), and Hārith al-Muḥāsibī (243/857) in this regard. This opinion about the createdness of the recitation reportedly triggered the enmity between al-Karābīsī and Aḥmad b. Ḥanbal (241/855), who had been close friends before.<sup>574</sup>

This particular stances of al-Muḥāsibī and al-Karābīsī, in fact, hint beforehand how the reluctance toward the application of qiyās among ahl al-ḥadīth resulted in two different approaches among traditionalists in the second half of the third hijrī century. Some

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<sup>571</sup> al-Ḥārith al-Muḥāsibī, *Māhiyat al-‘aql*, 235.

<sup>572</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 296.

<sup>573</sup> Ka‘bī, *Faḍl al-i‘tizāl*, 105. Ka‘bī traces back Mu‘tazilī lineage of earlier times based on qadarī attributions.

<sup>574</sup> See al-Dhahabī, *Siyar a‘lām al-nubalā*, IX, 471; Ibn ‘Abd al-Barr, *al-Intiqā’*, 106.

traditionalists were inclined more towards qiyās in legal matters despite their reservations in the realm of theology. Some others, later to be called as *Zāhirīs*, completely rejected the authority of qiyās.

Ibn Qutayba (276/889), the prolific defender of ahl al-ḥadīth in the second half of the third hijrī century, for example, mentions qiyās as a valid method and distinguishes it from ra'y that is invalid.<sup>575</sup> However, probably influenced by the reluctance of earlier scholars of ahl al-ḥadīth, Ibn Qutayba borrows the argument of al-Nazzām and points out the unreliability of qiyās due to many cases that resemble one another, yet have different rulings in religion. He gives the examples of cutting off the hand of a thief if he steals only ten dirham, but not the hand of a usurper when he usurps ten-hundred-thousand dirham; and the waiting period (*'idda*) is three menstrual periods for free women, while it is one menstrual period for female slaves.<sup>576</sup> Elsewhere he retains this lighter reluctance toward qiyās when he defends ahl al-ḥadīth by saying that “Those who adhere to the book of God and the sunna of his prophet illuminate themselves, open the door of maturity, and request the truth from its source. No one can blame ahl al-ḥadīth with this, because they do not establish anything in religion based on *istiḥsān* (juristic preference), qiyās, *naẓar* (reasoning), the books of the ancient philosophers and the late people of kalām.”<sup>577</sup> All these critiques of qiyās of Ibn Qutayba should be understood as a reaction to ahl al-ra'y who deploy qiyās and accept

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<sup>575</sup> Ibn Qutayba, *al-Ikhtilāf fī-al-lafz*, 62.

<sup>576</sup> Ibn Qutayba, *Ta'wīl mukhtalaf al-hadīth*, 111.

<sup>577</sup> Ibn Qutayba, *Ta'wīl mukhtalaf al-hadīth*, 142.

transmitted reports only if they are in parallel with reason in the matters of fiqh.<sup>578</sup> Ibn Qutayba points out this difference of attitudes toward ḥadīth with respect to fiqh between ahl al-ḥadīth and ahl al-ra’y when he responds to the critiques of the opponents of ahl al-ḥadīth about a ḥadīth that commands killing black dogs by saying that “Things like that cannot be comprehended based on naẓar, qiyās, and reason. What the prophet said, or a companion of his who witnessed him and listened to what he said should be followed. They [our opponents] also do not rule out things like that unless there is a narration from the prophet or a companion; or an authentic report from earlier books, because it is not a matter of farāiḍ [law of inheritance] or sunan [legal rulings].<sup>579</sup>” Another distinction he makes is between theological matters, which he calls *uṣūl*, and juristic matters with respect to the application of qiyās. He explicitly states that if ahl al-kalām deploy qiyās, naẓar, or istiḥsān in the topics of fiqh that would not matter, but they use these methods in theology, where disagreements are not allowed.<sup>580</sup>

Murji‘ī scholar Bishr b. Ghiyās al-Marīsī (218/833) is reported to have claimed that qiyās is applicable only if the umma agreed upon the effective cause of the actual case.<sup>581</sup> Since his name does not appear among the denier camp, it is safe to assume that he accepted the authority of qiyās. However, how this restriction stands in his overall understanding of qiyās is not clear from extant works containing reports about Bishr b. Ghiyās.

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<sup>578</sup> Ibn Qutayba reports from his opponents that they deploy qiyās in authenticity critique of a ḥadīth. See Ibn Qutayba, *Ta’wīl mukhtalaf al-ḥadīth*, 220-21 and 372.

<sup>579</sup> Ibn Qutayba, *Ta’wīl mukhtalaf al-ḥadīth*, 208.

<sup>580</sup> Ibn Qutayba, *Ta’wīl mukhtalaf al-ḥadīth*, 63.

<sup>581</sup> Abū al-Ḥusayn al-Baṣrī, *al-Mu’tamad*, II, 240.

### 3. Zāhirī Denial of Qiyās: From Traditionalist Reluctance to Complete Denial

Toward the second half of the third hijrī century, the debates over the authority of qiyās reached its peak with the appearance of al-Zāhirīs. We see abundant writings both supporting the authority of qiyās entitled as *ithbāt al-qiyās*,<sup>582</sup> and rejecting its authority entitled as *ibtāl al-qiyās*,<sup>583</sup> written during that time. Dā'ūd b. 'Alī (271/884) is probably the second most cited person among the deniers of qiyās after al-Nazzām. As a member of ahl al-ḥadīth, Dāwud's rejection might have had different reasons than that of al-Nazzām; however, the relationship between these reasons has remained untouched in the present scholarship. In the genre of uṣūl al-fiqh, al-Jaṣṣās implies that Dāwud did use the reasoning of al-Nazzām and the Baghdādī theologians in their rejection of qiyās as a source, albeit with a great deal of confusion. Al-Jaṣṣās explains how Dāwud b. 'Alī rejected qiyās in the following rigorous words:

Then an ignorant man from this rubbishy group (*ḥashaw*) followed them in rejecting qiyās and ijtihād by picking up something from al-Nazzām's arguments and something from Baghdādī theologians' arguments, even though he did not know what al-Nazzām said, nor what those theologians said in addition to his ignorance about the

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<sup>582</sup> As for the authority of qiyās, there are these titles in bibliographical sources: from Ḥanafīs 'Īsā b. Abān 'Alī b. Mūsā al-Qummī, from Shāfi'īs Ibn al-Mundhir. Also there is a book reportedly written by Zāhirī al-Qāshānī for the validity of qiyās, which will be discussed below. See Ibn Nadīm, *al-Fihrist*, 255, 257, 265, 263.

<sup>583</sup> As for the invalidity of qiyās, there are these reported titles from Shi'ā, al-Nawbakhtī, al-Sharīf al-Murtaḍā; from Zāhirīs Dāwud, al-Ḥasan b. 'Ubayd Abū Sa'd al-Nahrabānī, al-Ḥasan b. Al-Ḥusayn al-Bashkirī (276/889), Abū al-Ṭayyib Ibn al-Khallāl, Ibrāhīm b. Aḥmad al-Rubā'ī (370/980). See Ibn Nadīm, *al-Fihrist*, 220, 268, 269, 270..; al-Dhahabī, *Siyar a'lām al-nubalā*, XI, 520; and XIII, 231.; al-Baghdādī Ismā'il Pasha, *Hadiyyat al-'Arifīn*, I, 268.

arguments of the supporters and the deniers of the qiyās. He put himself in the level of animals even worse by claiming that there is no role for reason altogether in understanding religious sciences. As god almighty mentioned<sup>584</sup> “they are like animals, even worse than them.”<sup>585</sup>

Elsewhere al-Jaṣṣāṣ indicates that Dāwud’s rejection of qiyās and ra’y relies on his general rejection of reason. This reaction against reason reaches to the extent that Dāwud, according to al-Jaṣṣāṣ, claimed that the indications existing on Earth or in our selves do not prove the existence of God or monotheism; rather he knows this through reports.<sup>586</sup> Therefore, according to al-Jaṣṣāṣ, people like him are not worth being considered in ijmā, because they would not be regarded as scholars.

This demonstrates that despite using their reasoning to a certain extent, Dāwud’s rejection differs from earlier rejections of qiyās with his overall rejection of reason in religious matters both theological and legal. The motive for the rejection also appears to differ with that of Mu‘tazilīs, who rejected the qiyās. As we have seen earlier, the rejection of qiyās by Mu‘tazilī scholars was due largely to their demand for ruling-free space in the realm of actions together with their strict distinction between theology and law in transitional nature. Even though the motive of adherence to the revelation as a sign of piety does not seem to operate explicitly in al-Nazzām’s thinking, various reports describing

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<sup>584</sup> The Quran, 25:44.

<sup>585</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 24.

<sup>586</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 296.

Ja‘far b. Mubashshir and Ja‘far b. Ḥarb imply such a motive in their thinking. Dāwud’s motive seems to have originated from his strict adherence to the texts, especially to the chained-reports. Dāwud’s thinking of religion and religious sciences is completely based on the idea that the religion provides the answers, and the duty of scholar is just to narrate what the answer of religion is. We will see below the details of this, what I call, perfected-religion based Zāhirī thought of Dāwud and his son Abū Bakr b. Dāwud.

Another scholar mentioned among the Zāhirīs who rejected the authority of qiyās was Muḥammad b. Ishāq Abū Bakr al-Qāshānī (280/894). Al-Qāshānī was an interesting figure, who had been first al-Zāhirī and had written about invalidity of qiyās, then reportedly became a al-Shāfi‘ī and wrote books entitled *Kitāb al-radd ‘alā Dāwud fī ibtāl al-qiyās* and *Kitāb ithbāt al-qiyās* according to Ibn Nadīm’s account.<sup>587</sup> However, other sources do not mention this conversion and list him among Zāhirī scholars despite his critiques of Dāwud.<sup>588</sup> Al-Nahrawānī (390/999) is also mentioned together with al-Qāshānī in rejecting qiyās unless the efficient cause (*illa*) is mentioned evidently in the textual sources.<sup>589</sup> The opinion that considers this kind of application of qiyās just as a general text that needs to be implemented

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<sup>587</sup> al-Jaṣṣās mentions that al-Qāshānī relied upon a verse “Does it not suffice for them that we have sent a book to you to be recited to them” [29:51] in his attacks to the authority of qiyās. See al-Jaṣṣās, *al-Fuṣūl*, IV, 32. See also al-Zarkashī, *al-Baḥr al-muḥīt*, VII, 28-9; Ibn al-Nadīm, *al-Fihrist*, 263.; al-Qāshānī is also mentioned together with Dāwud in the camp rejecting qiyās. See Abū Ya‘laā, *al-Udda*, III, 861.

<sup>588</sup> He is mentioned as belonging to Dāwudī school in *Hadiyyat al-‘arīfīn*. Ismail Paşa al-Baghdādī, *Hadiyyat al-‘arīfīn*, II, 20. al-Shirāzī also mentions him among Zāhirī scholars and states that another Zāhirī Abū al-Ḥasan Ibn al-Mughallīṣ (324/936) reportedly responded to al-Qāshānī’s critiques of Dāwud in *al-Qāmi‘ li-al-mutahāmīl al-tāmi‘*. See Abū Ishāq al-Shirāzī, *Ṭabaqāt al-fuqahā’*, 176. Probably following al-Shirāzī’s account Ibn Ḥajar also calls him as a Zāhirī scholar. See Ibn Ḥajar, *Ṭabṣīr al-muntabah*, III, 1147.

<sup>589</sup> Abū Ishāq al-Shirāzī, *al-Ṭabṣīra*, 436; See also al-Ghazālī, *al-Mustaṣfā*, I, 302.



whatever it entails also is attributed to al-Nazzām,<sup>590</sup> though as mentioned above, al-Nazzām’s denial appears to entail legal matters in general without any restriction in his reported words. Also, this distinction between explicitly mentioned effective cause and non-mentioned cause does not appear in the early third hijrī century.

This scholarly camp which opposed the authority of qiyās did survive for a long time. Abū ‘Abd Allah Muḥammad b. ‘Īsā al-Maghrībī (400/1010), who is reported to have stated that qiyās is prohibited by revelation<sup>591</sup> represents the fact that this tendency against qiyās survived until Ibn Ḥazm, who is frequently portrayed in recent studies as the one who revived this zāhirī argument.<sup>592</sup>

#### 4. Shi‘ī Denial of Qiyās

The denial of qiyās in Shi‘ī tradition seems to have resulted largely from the fundamental doctrine of imāma. Since there is the authority of the imām, who can ordain and prohibit religious rulings, qiyās was not needed. As for the reason of rejection, Shi‘ī scholars pointed out the fact that the different applications of qiyās are the main cause for disagreements among Muslims, which is discouraged, even condemned in the Quran.<sup>593</sup> The understanding of perfected religion with the Quran and sunna that includes the practices of the imams as well seems to have been operating among Shi‘ī circles in denying qiyās. Lastly,

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<sup>590</sup> See al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 122; Abū Ya‘lā, *al-‘Udda*, IV, 1372; Abū Ishāq al-Shirāzī, *al-Ṭabṣira*, 436.

<sup>591</sup> al-Shawkānī, *Irshād al-fukhūl*, II, 94.

<sup>592</sup> al-Shawkānī, *Irshād al-fukhūl*, II, 94.

<sup>593</sup> al-Āmidī, *al-Iḥkām*, IV, 8-9.

the evidence also shows that there was a general rejection of effective cause for the prohibited and permitted actions in Islam.

The earliest figure among the Shi‘a to whom attributed the critiques of qiyās and ra’y were Ja‘far al-Şādiq (148/765) who made the following statement, “The people of qiyās demanded knowledge through qiyās which took them further away from the truth. The religion of Allah cannot be obtained through qiyās.”<sup>594</sup> He also reportedly answered a question whether one is allowed to use reasoning (*naẓar*) if there is no text in the book of God or in sunna in the negative by saying that “If you hit the truth based on reasoning you would not have got reward, if you did not hit it, you would have lied on behalf of Allah.”<sup>595</sup> His son Mūsā Kāẓim (183/799) is reported to have severely criticized Abū Ḥanīfa when responding to a question asked by Muḥammad b. Ḥakīm, who was indirectly trying to get permission for the application of qiyās. Mūsā said that Abū Ḥanīfa used to say, “Alī said that, but I said this... Allah is not accountable for how he prohibited and permitted things.”<sup>596</sup> After him, Hishām b. al-Ḥakam (179/795), who is also reported to have written *Kitāb al-alfāz*, reportedly a book on Islamic legal theory, is reported to have indicated that knowledge as a whole is necessary, i.e. *a priori*, it appears only after *naẓar* (rational consideration) and *istidlāl* (rational deduction.)<sup>597</sup> Al-Ash‘arī mentions this opinion as one of the eight different opinions for the authority of qiyās and reasoning that appeared in the

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<sup>594</sup> al-Kulaynī, *al-Kāfī*, I, 57.

<sup>595</sup> al-Kulaynī, *al-Kāfī*, I, 56.

<sup>596</sup> al-Kulaynī, *al-Kāfī*, I, 56-57.

<sup>597</sup> al-Ash‘arī, *Maqalāt al-Islāmiyyīn*, 52.

tradition of Rāfiḍīs (*Shi'a*). However, al-Ash'arī also states that the majority of Rāfiḍīs held that “qiyās and reasoning do not lead to certainty, hence God did not command to deploy them.”<sup>598</sup> Abū Sahl al-Nawbakhtī (311/924) is reported to have written a book entitled *Kitāb ibṭāl al-qiyās*.<sup>599</sup>

The Ismā'īlī scholar al-Qāḍī al-Nu'mān (351/962) provides an extensive account for the rejection of qiyās and ra'y in his work *Ikhtilāf uṣūl al-madhāhib*. The arguments he brings up are almost identical with those of Zāhirīs. He mentions<sup>600</sup> well-known verses about the completeness of religion such as “We did not neglect anything in the kitāb” and “This day have I perfected your religion for you and completed my favor unto you, and have chosen for you Islām as religion.”<sup>601</sup> After mentioning a few other verses and a hadīth, al-Qāḍī al-Nu'mān accuses the supporters of ra'y, naẓar and qiyās with ascribing rulings to God without knowledge.<sup>602</sup> He continues his methodic critiques by attacking his opponents' arguments from the Quran and hadīth, and then he uses these arguments against them on the basis of weakness and incapability of human beings and the absence of authority for prohibiting and permitting things without revelation.<sup>603</sup> According to al-Qāḍī al-Nu'mān, the strongest argument of the supporters of qiyās is the well-known formula “even the deniers of *naẓar* (reasoning) have to use reasoning to deny it.” Hence, he devotes a significant amount

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<sup>598</sup> al-Ash'arī, *Maqalāt al-Islāmiyyīn*, 51.

<sup>599</sup> Ibn al-Nadīm, *al-Fihrist*, 219-20.

<sup>600</sup> al-Qāḍī al-Nu'mān, *Ikhtilāf*, 138.

<sup>601</sup> The Quran, 6:38 and 5:3.

<sup>602</sup> al-Qāḍī al-Nu'mān, *Ikhtilāf*, 139. For the verses see The Quran, 16:43 and 4:85. The hadīth reads as “[you believer] Obey, do not make innovations”

<sup>603</sup> al-Qāḍī al-Nu'mān, *Ikhtilāf*, 140-41.

to establish that he does not deny its authority based on reasoning, but based on the kitāb and sunna.<sup>604</sup> Ultimately the discussion goes back to ḥusn and qubḥ and al-Qādī al-Nu‘mān strives to prove that “we know good and evil by the report, not through reason”, a stance closer to that of al-Ash‘arī in ḥusn and qubḥ.<sup>605</sup> The role of ‘aql (reason), he says, is to obey what is revealed by God and the people of the reason (*ahl al-‘aql*) are those who obey the word of God and sunna of the prophet.<sup>606</sup> Al-Qādī al-Nu‘mān deploys another known Zāhirī argument that the revelation explains itself, thus it does not need reason. The duty of scholars is to transmit the knowledge (*ḥamalāt al-‘ilm*) not to derive it or deduce it.<sup>607</sup>

Al-Qādī al-Nu‘mān divides the opinions pertaining to the authority of qiyās into three categories: (1) accepting its authority in both theology (tawḥīd) and law (rulings); (2) accepting its authority only in theology, not in law; and (3) rejecting its authority in both theology and law.<sup>608</sup> By citing frequently the verses like “ask those who are the people of remembrance”<sup>609</sup> and “obey those who are in charge (*ūlu al-amr,*)”<sup>610</sup> he points out the authority of imām rather than reasoning.<sup>611</sup> Another argument, with which we are familiar from al-Nazzām is that God ordained different rulings for similar actions; and the same

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<sup>604</sup> al-Qādī al-Nu‘mān, *Ikhtilāf*, 141-44.

<sup>605</sup> al-Qādī al-Nu‘mān, *Ikhtilāf*, 144.

<sup>606</sup> al-Qādī al-Nu‘mān, *Ikhtilāf*, 149.

<sup>607</sup> al-Qādī al-Nu‘mān, *Ikhtilāf*, 150-51.

<sup>608</sup> al-Qādī al-Nu‘mān, *Ikhtilāf*, 155-56.

<sup>609</sup> The Quran, 16:43 and 21:7.

<sup>610</sup> The Quran,

<sup>611</sup> al-Qādī al-Nu‘mān, *Ikhtilāf*, 156.

ruling for different actions.<sup>612</sup>

Al-Qādī al-Nu‘mān also points out the subjectivity of the application of qiyās by saying that every group or person identifies different aspects as the effective cause for the same problem, for instance in interest; hence, each one attributes the truth to himself or his group without being able to provide a certain cause that everyone accepts.<sup>613</sup>

Another core theological and legal-theoretical discussion also brought about in qiyās-related debates is whether God’s rulings have the effective causes. As will be mentioned below, some deniers of qiyās tend to accept that if the effective cause is explicitly mentioned in the textual sources. In this case, according to them, this text should be regarded a general (*‘āmm*) text and other cases should take the same ruling due to the generality of the text, not because of qiyās. However, the idea of rejection of qiyās lies in the rejection of causality in God’s rulings. Since there are no effective causes in the prohibitions or commandments of God, it is not possible to compare one case to another on the basis of the effective cause. Al-Qādī al-Nu‘mān rejects causality and supports his argument with the well-known changes between the rulings of Islam and the rulings of the earlier revelations. For instance, he mentions that wine, which is prohibited in the Quran, was not prohibited in earlier revelations of the people of book, while animal fat, which is permitted in Islam was prohibited in the earlier revelations. Then he asks “So, was wine not intoxicating and became

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<sup>612</sup> al-Qādī al-Nu‘mān, *Ikhtilāf*, 158.

<sup>613</sup> al-Qādī al-Nu‘mān, *Ikhtilāf*, 160.

intoxicating later? And what changed in the effective causes of animal fat?”<sup>614</sup>

In *al-Tadhkira*, a work attributed to al-Shaykh al-Mufīd (413/1022), *qiyās* and *ra’y* are mentioned as invalid and not leading to knowledge, or establishing truth; therefore, they cannot specify a general text and cannot generalize a specific text.<sup>615</sup> Whoever relies on *qiyās* or *ra’y*, according to the author of this text, has gone astray.<sup>616</sup>

Al-Sayyid al-Murtaḍā (436/1044) states that *qiyās* is not a valid source, even though rationally it would be possible to be a source, if God ordained so.<sup>617</sup> Al-Sayyid al-Murtaḍā first rejects the idea that the preference (*ikhtiyār*) of the prophet or of a scholar was valid for establishing a legal ruling and there was no need for revelation for every legal ruling, which

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<sup>614</sup> al-Qāḍī al-Nu‘mān, *Ikhtilāf*, 171.

<sup>615</sup> Shaykh al-Mufīd, *al-Tadhkira*, 38. Wilfred Madelung attributed *al-Tadhkira* to Abū Ṭālib Yāhyā b. al-Ḥusayn al-Nāṭiq bi al-ḥaqq, a Zaydī imām and rejected the attribution to al-Shaykh al-Mufīd. However, the content of the recent publication of *al-Mujzī fī uṣūl al-fiqh* by al-Nāṭiq bi al-ḥaqq shows that the two books could not be written by the same person due to the vast differences between the two texts with respect to the sources of law as well as style. See al-Nāṭiq bi-al-Ḥaqq, Yaḥyā ibn al-Ḥusayn, *al-Mujzī fī uṣūl al-fiqh*, edited by ‘Abd al-Karīm Aḥmad Jadabān. 2013.

<sup>616</sup> Shaykh al-Mufīd, *al-Tadhkira*, 43.

<sup>617</sup> al-Sayyid Murtaḍā, *al-Dharī‘a*, II, 657. Abū al-Ḥusayn al-Baṣrī also relates this opinion about possibility of *qiyās* being a valid method to Muways b. ‘Imrān. See Abū al-Ḥusayn al-Baṣrī, *al-Mu‘tamad*, II, 57. Elsewhere al-Baṣrī gives more details about this stance and mentions that Abū ‘Alī al-Jubbaī used to see it is permissible to apply *qiyās* only for the prophets if Allah ordained them, then abandoned this opinion. Muways saw that it permissible for both the prophets and other scholars, if Allah ordained them. Al-Shafī‘ī saw that this permissible for only the prophet depending on the confirmation from God. Al-Qāḍī ‘Abd al-Jabbār rejected the idea altogether. See Abū al-Ḥusayn al-Baṣrī, *al-Mu‘tamad*, II, 329. Al-Razī mentions the topic as whether it is possible for God to say for a prophet or a scholar: “Rule, you would rule only with truth.” He mentions Muways and the majority of the Mu‘tazila for the opposite opinions regarding the matter, but attributes suspension for permissibility or prohibition of this to al-Shafī‘ī. See al-Razī, *al-Maḥṣūl*, VI, 137.

he attributes to Muways b. ‘Imrān<sup>618</sup> a Murji‘ī-Mu‘tazilī friend of al-Jāhiz, and his followers.<sup>619</sup> Al-Sayyid al-Murtaḍā identifies five different reasons that led to five positions that emerged among the deniers of qiyās:

(1) Qiyās rationally cannot be a valid way to reach to the knowledge of legal rulings, due to the fact that it depends on probability (*ẓann*), or that it leads to contradiction in legal rulings.

(2) Qiyās is invalid, because there is no way to know, certainly or even probably, the actual cause of the original ruling, due to the absence of indication and marking that necessitate certain ruling.

(3) Those, including Ibrāhīm al-Nazzām, who think that it is rationally possible for qiyās to be a source, but it is not valid due to the fact that the legal rulings were ordained in different ways [despite similarities], which demonstrates that qiyās is not applicable.

(4) Those, including some of the followers of Dāwūd who think that it is not permissible to think that God ordained a ruling in a lower expression [lack of clarity],

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<sup>618</sup> al-Ka‘bī, *Bab dhikr al-Mu‘tazila*, 74., al-Qadi ‘Abd al-Jabbār, *Faḍl al-i‘tizāl*, 279.; al-Khayyāṭ states that one should hold all five principles of al-Mu‘tazila to be called Mu‘tazilī. Since Muways is known for his rejection of *al-manzila bayn al-manzilatayn*, the Mu‘tazila do not consider him Mu‘tazilī. See al-Khayyāṭ, *al-Intiṣār*, 126-27.; Al-Dāraqutnī mentions that al-Jāhiz narrated Muways’s ideas in his *Uṣūl al-fuyā*, which was probably the source of al-Sayyid al-Murtaḍā, as well. See al-Dāraqutnī, *al-Mu‘talif wa-al-mukhtalif*, IV, 2166.

<sup>619</sup> al-Sayyid al-Murtaḍā, *al-Dharī‘a*, II, 658-69.

while he was able to ordain it in a superior expression [including every element in the ruling].

(5) Those who think that it is possible both rationally and religiously for qiyās to be valid, but there is no evidence for its authority, while there is evidence for its invalidity.<sup>620</sup>

### 5. Khārijī Denial of Qiyās: al-Azāriqa

The third group who denied authority of qiyās as indicated in Sunnī legal theoretical literature was the Khārijīs. We have little information about their motives and reasons in their rejection of qiyās as is the case pretty much about all their contribution, if any, to the intellectual history of Islam. Al-Ash‘arī assigns two different positions to Kharijīs. The only group who rejected ijtihād in legal matters was al-Azāriqa. The majority of them, including al-Najdāt, accepted ijtihād al-ra’y.<sup>621</sup> He also states that al-Azāriqa followed only the apparent meaning of the Quran (*zāhir al-Quran*), which implies an inclination against ijtihād and qiyās.

Ibn al-Nadīm assigns two works entitled *Kitāb al-radd ‘alā Abī Hanīfa fī-al-ra’y* and *Kitāb al-radd ‘alā al-Shāfi‘ī fī al-qiyās* to Abū al-Faḍl al-Quratlūsī, who reportedly lived in ‘Akbarā’ a city between Baghdād and Mawṣil in the east of Tigris river.<sup>622</sup> It appears from

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<sup>620</sup> al-Sayyid Murtaḍā, *al-Dharī‘a*, II, 674-75.

<sup>621</sup> al-Ash‘arī, *Maqalāt al-Islāmiyyīn*, I, 110.

<sup>622</sup> Ibn al-Nadīm, *al-Fihrist*, 291.



the titles that al-Quratlūsī was criticizing the use of ra’y (reasoning) and qiyās by attacking the most famous proponents of these two methods during the second hijrī century.

## 6. The Proponents of Qiyās in the Late 3<sup>rd</sup> and Early 4<sup>th</sup> Hijrī Centuries

Despite the fact that the opponents of qiyās among Mu‘tazilī scholars decreased significantly toward the end of the third hijrī century, the literal traditionalists (later to be called as Zāhirīs) attacked this method by borrowing the arguments of early Mu‘tazilīs. The proponents of qiyās were in the position of responding to these Zāhirī arguments concerning qiyās. From the late third and early fourth hijrī century, Ibn Surayj deals with the authority of qiyās first and mentions four verses and a prophetic report to establish its authority.<sup>623</sup> However, it is reported that he was also opinion of that qiyās is a valid tool through reason (*‘aql*).<sup>624</sup> Ibn Surayj defines qiyās as “the derivation by comparing the new case (*far‘*) to the original case (*aṣl*) due to the common similarity between them.”<sup>625</sup> Ibn Surayj is also reported to have accepted the restriction of textual sources by “obvious qiyās”, (*al-qiyās al-jalī*) though not by hidden qiyās (*al-qiyās al-khaft*).<sup>626</sup>

Ibn Surayj reportedly mentioned a debate in his treatise *Ithbāt al-qiyās*, according to

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<sup>623</sup> The Quran, 4:83; 2:26; 3:89; 3:90. Ibn Surayj relates the following ḥadīth “What is reported from the prophet when he said to al-Khath‘amīyya: “What would you do, if there was a debt on you father [who had died].” She said: “I would pay for him.” The prophet responded, “The debt of Allah deserves more to be paid.” Seemingly, Ibn Surayj attributes applying analogy to the prophet himself. See Ibn Surayj, *al-Wadā‘i‘*, II, 676-77.

<sup>624</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, I, 184.

<sup>625</sup> Ibn Surayj, *al-Wadā‘i‘*, II, 676.

<sup>626</sup> al-Āmidī, *al-Iḥkām*, II, 337.; al-Rāzī, *al-Maḥṣūl*, III, 96.

which the deniers of *qiyās* asked the supporters in legal theoretical terms “Tell us, is *qiyās* a *farḍ* (obligatory) or *nadb* (recommended). If you say it is *nadb*, you would adjudicate something that does not exist in religion, if you say it is *farḍ*, we do not find it.” Ibn Surayj responds to this by saying, “It is obligatory (*farḍ*), because Allah commanded us to provide the living expenses of our wives, including food, and he commanded us to fast for killing game [in the sacred place], and taking *jizyah*, but he did not clarify the amounts of all these, hence we are obliged to use our reason to decide for their amounts. Since it is the action [method] to implement the command of Allah, it is not called *aṣl* nor *far‘*.”<sup>627</sup> Al-Jaṣṣāṣ also points out that a question about whether *qiyās* is an *aṣl* or *far‘* posed by Dāwud b. ‘Alī is an indication of his ignorance, then similarly he says that *qiyās* cannot be subject to such a question, because it is just a tool of whoever uses it. The correct question should be “Is accepting authority of *qiyās* or jurisdiction through *qiyās aṣl* or *far‘*?”<sup>628</sup>

Another Shāfi‘ī from the late third and early fourth hijrī century, Abū Bakr al-Ṣayrafi (330/941) pointed out how the deniers of *qiyās* are confused between syllogism (*qiyās fī-al-‘aqliyyāt*) and analogy (*qiyās fī-al-shar‘*). According to him, they misunderstood these two things and once they saw that analogy does not lead to certainty they rejected it.<sup>629</sup>

Al-Mātūrīdī (333/944), the famous Ḥanafī theologian from the same period, rejects the claim of the deniers that *qiyās* means arguing for something upon which one does not

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<sup>627</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, VII, 35.

<sup>628</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 95.

<sup>629</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, VII, 82.

have knowledge, which is contrary to the meaning of a verse in the Quran and was used by the deniers of qiyās frequently.<sup>630</sup> It apparently suffices for him to refer the application of qiyās and ra’y to the companions of the prophet and to exclude the realm of ijtihād from the meaning of the verse.<sup>631</sup>

Al-Jaṣṣāṣ first tries to provide a textual basis for ijtihād in the sense of using reason to assign certain amounts for certain rulings whose amounts were not clarified in the textual sources<sup>632</sup> and identifying the direction of qibla for prayers.<sup>633</sup>

#### D. Development of the Elements of Qiyās

Four elements of qiyās are discussed in the later mature works of Islamic legal theory: *aṣl* (the old case), *far’* (the new case), *ḥukm al-aṣl* (the rule of the old case), *illa* (*ratio legis*). Al-Jaṣṣāṣ does not devote a separate topic discussing elements of qiyās, but he uses all these terms per se in his definition of qiyās.<sup>634</sup> Even though Ibn Abī Ḥātim claims that al-Shāfi‘ī also had the idea of *aṣl* and *far’* in qiyās, these terms are missing in al-Shāfi‘ī’s works.<sup>635</sup> A recent study on qiyās in Shāfi‘ī’s understanding demonstrated that Shāfi‘ī did not use these terms consistently per se. Yet, he deployed descriptive concepts instead of these developed

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<sup>630</sup> The Quran, 17:36: “Do not stand out about something you do not have knowledge”

<sup>631</sup> al-Mātūrīdī, *Ta’wilāt ahl al-sunna*, VII, 46.

<sup>632</sup> The Quran, 2:233: “Mothers shall suckle their children for two whole years; (that is) for those who wish to complete the suckling. The duty of feeding and clothing nursing mothers *in a seemly manner* is upon the father of the child... If they desire to wean the child by mutual consent and (after) consultation, it is no sin for them” For the other verses that al-Jaṣṣāṣ mentions: 2:236, 2:241, 2:144, 2:220, 2:229, 33:49.

<sup>633</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 25.

<sup>634</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 17.

<sup>635</sup> Ibn Abī Ḥātim, *Ādāb al-Shāfi‘ī wa Manāqibuhu*, I, 178.

terms. Instead of *aṣl* he mentions “*ḥukm lillah aw lirasūlih*” (ruling of Allah and his messenger); instead of the term *far‘*, he uses “*nazilatun*” (the new case), and as for the *‘illa* he prefers “*ma‘na*” (meaning).<sup>636</sup> This shows that the terminology around the elements of *qiyās* developed in the gap period.

The most fundamental element of *qiyās* is *‘illa*. In what follows, I will try to examine historical development of this concept and to find answers for questions like why it was needed by legal theorists, who used this term first, and who contributed to its development.

Literally *‘illa* means illness, sickness, disease, defect, cause, reason.<sup>637</sup> This word had been used only in these literal senses until the third hijrī century,<sup>638</sup> after then it turned into four different terms in four different sciences: grammar, hadīth, kalām, and uṣūl al-fiqh.

In grammar, *‘illa* was used to mean the linguistic cause of different states of verbs, nouns and adjectives in the system of case endings (*i‘rāb*). In his *al-Idāh fī ‘ilal al-naḥw*, al-Zajjājī (337/949), after separating grammatical *‘illa*, that is inferred, from rational *‘illa*, that is necessary, divides the causes of grammar (*naḥw*) into three kinds from more general to more specific as instructive cause (*al-‘illa ta‘līmīyya*), analogical cause (*al-‘illa qiyāsiyya*),

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<sup>636</sup> Soner Duman, Şafii'nin kıyas anlayışı, 75. ch. al-Shāfi‘ī, al-Risāla, 512.

<sup>637</sup> [‘-l-] See Khalīl b. Aḥmad, *Kitāb al-‘ayn*, I, 88; al-Fīrūzābādī, *Qāmūs al-muḥīt*, 1035.

<sup>638</sup> See for examples Mālik, *Muwattā‘*, II, 155; al-Shaybānī, *Āthār*, I, 272; al-Şan‘ānī, *Muṣannaḥ*, I, 295.

and argumentative cause (*al-‘illa al-jadaliyya*).<sup>639</sup> In addition to al-Zajjājī’s work, Abu ‘Ali al-Baṣrī Quṭrub (206/821), Ibn al-Ḥā’il (290/903), and Ibn al-Warrāq (381/991) are reported to have written books entitled *Kitāb al-‘ilal fī-al-naḥw*.<sup>640</sup>

In the tradition of hadīth, ‘illa was used to describe a defect or a mistake in a seemingly authentic chain of transmission in parallel to its main literal meaning. We see abundant use of the term in the works of hadīth during the third and fourth hijrī centuries.<sup>641</sup> This concept turned into the name of a specific genre within the sciences of hadīth to which ‘Alī b. Al-Madīnī (225/839), Aḥmad b. Ḥanbal (241/855), Muslim b. al-Ḥajjāj (264/875), al-Ashram (270/883), al-Tirmidhī (279/892), ‘Abd Allah b. Muḥammad al-Balkhī (294/907), Ibn Abī Shayba (297/909), al-Khallāl (311/923), al-Baghawī (317/929), Ibn Abī Ḥātim (327/938), al-Dāraquṭnī (385/995) are reported to have contributed with their books entitled *Kitāb al-‘ilal* or *‘Ilal al-hadīth*.<sup>642</sup>

In kalām, ‘illa became the key concept explaining causality among the theologians of

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<sup>639</sup> For example, for the sentence of “Indeed Zayd is standing” (inna Zaydan qāimun/إن زيدا قائم), the question of “why is the noun Zaydan written as mansub here?” asks for the instructive cause, which is “since it is preceded by *inna*”. The question of “why *inna* makes the following word mansub” asks for the analogical ‘illa, which is “since *inna* and its sisters replace transitive verbs and become effective like them making the following noun object (maf’ūl). All other nuanced questions after this level such as “which kind of verbs these letters (*inna* and its sisters) replace? Past, future or present verbs?” ask for the argumentative cause. See al-Zajjājī, *al-īdāh fī ‘ilal al-naḥw*, 64-65.

<sup>640</sup> Ibn al-Nadīm, *al-Fihrist*, 78, 111,; al-Bābānī, *Hadiyyat al-‘arīfīn*, I, 448, 470; II, 209

<sup>641</sup> al-Tirmidhī, *Sunan*, VI, 230; al-Bazzār, *Musnad*, I, 184, 196, 208; III, 36; VI, 273; VIII, 25; X, 180; Ibn Khuzayma, *Ṣaḥīḥ*, I, 25; II, 54, 57, 150; IV, 322; al-Ṭahāwī. *Sharḥ ma ‘āni’ al-āthār*, III, 142.

<sup>642</sup> Ibn Nadīm, *al-Fihrist*, 320, 322, 325; al-Dhahabī, *Siyar a’lām al-nubalā*, XIV, 159; Ziriklī, *A’lām*, IV, 118; Kaḥḥāla, *Mu’jam al-muallifīn*, V, 163; Kātib Çelebi, *Kashf al-ẓunūn*, II, 1440; al-Bābānī, *Hadiyyat al-‘arīfīn*, I, 48, 670, 684; II, 19, 432

the third hijrī century. Abū al-Ḥasan al-Ash‘arī (324/936) lists ten different opinions regarding whether ‘illa, in the sense cause, comes before the effect (*ma‘lūl*) or together with the effect.<sup>643</sup> He mentions the names of Bishr b. al-Mu‘tamir (210/825) and al-Iskāfī (240/854) among those who contributed to the topic, who lived in the late second and early third centuries. The main theological discussion was whether potency (*istiṭā‘a*) is the ‘illa of the action (*fi‘l*).<sup>644</sup> Al-Tujjār (220/835), a theologian of al-Mujbira, is reported to have written *Kitāb al-‘ilal fī-al-istiṭā‘a*.<sup>645</sup>

It seems that ‘illa began to emerge as a concept of uṣūl al-fiqh, as early as the late second and early third centuries. Even though al-Shāfi‘ī mostly prefers *ma‘nā* instead of ‘illa, he also uses ‘illa close to its terminological meaning in *al-Umm*,<sup>646</sup> and his Maḍīnan interlocutor uses ‘illa as a cause of ruling in a debate narrated in *al-Risāla*.<sup>647</sup> One of al-Shāfi‘ī’s contemporaries, Yahyā b. Ādam (203/818) is reported to have used the term ‘illa as the reason for a prohibition.<sup>648</sup> The use of *ma‘nā* to mean ratio legis continued well until al-Jaṣṣāṣ. Even though al-Jaṣṣāṣ uses ‘illa more, he uses *ma‘nā*, as well. He also mentions, for instance, *ma‘nā* when he divides ratio legis in a text two kinds as obvious-apparent

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<sup>643</sup> al-Ash‘arī, *Maqālāt*, II, 289-90.

<sup>644</sup> Ibrāhīm al-Najjārī claims that potency is the ‘illa of the action, while ‘Ubbād b. Sulaymān rejects that. See Ash‘arī, *Maqālāt*, I, 390.

<sup>645</sup> al-Bābānī, *Hadiyyat al-‘arifīn*, I, 304,

<sup>646</sup> al-Shāfi‘ī, *al-Umm*, I, 27, 59, 95, 306; II, 105, 188, 247; III, 17, 53, 199; IV, 198; V, 62; VI, 147, VII 15, 214, 345.

<sup>647</sup> al-Shāfi‘ī, *al-Risāla*, 535.

<sup>648</sup> al-Ṭahāwī, *Sharḥu ma‘āni’ al-āthār*, I, 384.

(*jaliyyun zāhirun*) and hidden-concealed (*khafiyyun ghāmidun*).<sup>649</sup>

The use of the term ‘illa to mean ratio legis accrued during the third hijrī century. Al-Jaṣṣās reports from Abū Bakr al-Aṣamm (201/816), Bishr b. Ghiyāth (218/833) and Ibn ‘Ulayya (218/833), all from ‘Irāq, that they argued that there is a single ‘illa inherent in each textual case (*aṣl*) enabling qiyās for every new case (*hāditha*).<sup>650</sup> Another confusing use of that period is using *aṣl* to mean ‘illa. Bishr b. Ghiyāth reportedly said, “Qiyās can only be performed on an agreed upon and known *aṣl*.”<sup>651</sup> An early Ḥanafī jurist, ‘Isā b. Abān (220/835) is reported to have written a book entitled *Kitāb al-‘ilal fī-al-fiqh*.<sup>652</sup> Al-Jāhīz (255/869) uses the term exactly to mean ratio legis when he explains permissibility of consonance in poetry due to “the absence of ‘illa” as opposed to early prohibition by the prophet because of its use by the clairvoyants during jāhiliyya (the time of ignorance).<sup>653</sup> He repeatedly uses the phrase “When the ‘illa is removed the ruling of prohibition is removed.”<sup>654</sup> Al-Ḥārith al-Muḥāsibī (243/857) uses the term ‘illa when he discusses the

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<sup>649</sup> al-Jaṣṣās, *al-Fuṣūl*, IV, 73.

<sup>650</sup> al-Jaṣṣās, *al-Fuṣūl*, IV, 295.

<sup>651</sup> al-Jaṣṣās, *al-Fuṣūl*, IV, 146. Al-Jaṣṣās understands this as to agree upon a text that has ‘illa (*ma‘lūl*). See al-Jaṣṣās, *al-Fuṣūl*, IV, 147.

<sup>652</sup> Kātib Ḥelebi, *Kashf al-zunūn*, II, 1440. Katib mentions Ibn Abī Ḥiatim’s book as *al-‘ilal al-mabūb fī abwāb al-fiqh*.

<sup>653</sup> “فوقع النهي في ذلك الدهر لقرب عهدهم بالجاهلية، ولبقيتها فيهم وفي صدور كثير منهم، فلما زالت العلة زال التحريم”

“The prohibition took place at that time, because their time was close to the time of ignorance whose effect remained within them and many ages from them. When the ‘illa is removed the ruling of prohibition is removed.” See al-Jāhīz, *al-Bayan wa-al-tabyīn*, I, 241-42.

<sup>654</sup> al-Jāhīz, *al-Bayan wa-al-tabyīn*, I, 241-42. al-Jāhīz uses ‘illa also in a general sense meaning the necessary reason for the existence of result. He, for instance, says that envy does not perish unless the thing envied that is ‘illa of envy perishes. See al-Jāhīz, *al-Rasā‘il*, I, 345.

types of abrogation and says that if the ruling of a verse depended on a ‘illa and this ‘illa does not exist anymore, the verse should be deemed as abrogated.<sup>655</sup> This all shows that the word ‘illa began to replace the word *ma‘nā* for the concept of ratio legis in the first half of the third hijrī century.

Wael Hallaq gives a historical outline of this concept by examining its stages in the writings of al-Shāfi‘ī, al-Fārābī, Abu al-Ḥusayn al-Baṣrī, and al-Ghazālī.<sup>656</sup> Hallaq argues that a sophisticated and detailed theory of ‘illa emerged by the end of the third/ninth century and the beginning of the fourth/tenth century, after modifying the principles of analogy, deduction, and induction in the works of Greek logic that were translated in the first decades of the third century.<sup>657</sup> Our research confirms this conclusion for the time of the developed theory of ‘illa; however, the claim for the influence of Greek logic should be discussed in detail. Aforementioned textual evidence showed that the word ‘illa to mean ratio legis had been there even in the works of al-Shāfi‘ī and some other works of the late second and early third centuries. Also, al-Fārābī (339/950) uses the term *al-ma‘nā al-kullī* (the general meaning), which was a modified use of earlier jurists, instead of ‘illa in analogy (*tamthīl*).<sup>658</sup> Al-Fārābī reports that the people of his time used the term ‘illa for the middle term (*al-ḥadd al-awṣaṭ*) in the application of the inference of absent through present (*al-istidlāl bi al-shāhid*

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<sup>655</sup> al-Ḥārith al-Muḥāsibī, *Fahm al-Qur‘ān*, 409.

<sup>656</sup> Hallaq, "The Development of Logical Structure in Islamic Legal Theory," *Der Islam*, 64, 1 (1987), 42-67. Reprinted in *Islamic Law and Legal Theory*, ed. Ian Edge (The International Library of Essays in Law and Legal Theory, series editor Tom D. Campbell) (Hampshire: Dartmouth Publishing Co., 1993)

<sup>657</sup> Hallaq, "The Development of Logical Structure in Islamic Legal Theory", *Der Islam*, 44.

<sup>658</sup> al-Fārābī, *Kitāb al-qiyyās* "in al-Manṭik ‘inda al-Fārābī", Ed. by Rafiq al-‘ajam, Beirut: Dār al-Mashriq, 36.



'*alā al-ghā'ib*).<sup>659</sup> This shows that using the term 'illa in reaching a judgment of an absent matter had been there before al-Fārābī presented his terminology around syllogism and analogy to the extent that he had to use this term in addition to his own term, which was a literal translation of the middle term as *al-ḥadd al-awṣaṭ*.

This common use of synonyms, e.g. 'illa, *al-ḥadd al-awṣaṭ* and *al-ma'nā* for the middle term; and homonyms, e.g. *qiyās* for both syllogism and analogy; and 'illa for both ratio legis and the middle term, created confusion to the extent that some jurists needed to point out and clarify the distinction in the late third and early fourth hijrī centuries. Abū Bakr al-Ṣayrafī (330/941), as we mentioned above, explains the reason for rejection of *qiyās* as confusing rational *qiyās* that is syllogism with legal *qiyās*, which is analogy.<sup>660</sup> Al-Jaṣṣās provides an extensive explanation and attempts to clarify legal 'illa by separating it from rational 'illa. He defines rational 'illa as the *ma'nā* whose presence necessitates the presence of judgment like the movement of something necessary to judge that the thing is moving.<sup>661</sup> However, despite calling them 'illa, legal 'illas, he states, do not necessitate the presence of the *ma'lūl*. They are called 'illa metaphorically. They are actually *amāra* (indicants) of religio-legal judgments.<sup>662</sup>

From the late second and early third hijrī century, the Ḥanafī theologian Abū Maṣṣūr al-Māturidī (333/944) also mentions 'illa of rulings several times in a fully developed

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<sup>659</sup> al-Fārābī, *Kitāb al-qiyās al-saghīr* in Farabi'nin Bazı Mantık Eserleri, Ankara: AKM Yayını, 1990,, 77.

<sup>660</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, VII, 82.

<sup>661</sup> al-Jaṣṣās, *al-Fuṣūl*, IV, 9.

<sup>662</sup> al-Jaṣṣās, *al-Fuṣūl*, IV, 10.

meaning.<sup>663</sup> He, for instance, says that “rulings are established based on ‘illa, if ‘illa of a certain ruling is annulled this ruling becomes void, as well.”<sup>664</sup> Māturīdī also stated that if ‘illa fails in concomitance (*iṭṭirād*), ‘illa becomes null.<sup>665</sup>

Al-Ash‘arī’s (324/936) account demonstrates that three different stances regarding the causality of legal rulings were fully crystallized during the late third hijrī century:

1- Those who held that Allah ordained and prohibited things however he willed not based on a ‘illa. They, therefore, rejected qiyās.

2- Those who argued that even though Allah prohibited something without ‘illa (‘ibādāt), he prohibited also things based on ‘illa where a qiyās can be applied if there is a causal textual case (*aṣl ma‘lūl*), that has an ‘illa concomitant (*taṭṭarid*) within the new case.

3- Those who said that Allah ordains and prohibit things based on only a certain ‘illa of interest<sup>666</sup>. If the two things are similar in a meaning, qiyās can be applied due to this common meaning.<sup>667</sup>

The question remains why these jurists needed to develop a theory of ‘illa during that time. As we discussed in the preceding sections above, the late third century witnessed

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<sup>663</sup> al-Māturīdī, *Ta‘wilāt*, I, 629; II, 161; III, 251, 616, 635; IV, 274, 290.

<sup>664</sup> al-Māturīdī, *Ta‘wilāt*, II, 161. See also III, 251, 635; IV, 274, 290.

<sup>665</sup> al-Māturīdī, *Ta‘wilāt*, V, 42.

<sup>666</sup> In al-Ash‘arī’s work the word is *al-maṣaḥḥa* which means the place of health and does not fit in this context. There must be a scribal mistake and the word should be *al-maṣlaḥa* meaning interest or well-being. See al-Ash‘arī, *Maqalāt*, I, 470.

<sup>667</sup> al-Ash‘arī, *Maqalāt*, I, 669-70.

heated debates over the authority of legal qiyās. These critiques of qiyās, some of which were compiled in al-Qādī al-Nu‘mān’s (351/962) work, probably paved the way for strict conditions and typology on the basis of ‘illa. Instability of the resemblance that lies in the core of qiyās was at the center of the critiques. A passage from al-Qādī al-Nu‘mān’s account provides us further clarification about the reasons for the development of the theory of ‘illa:

Then we asked the people of qiyās its meaning. We found them saying ‘resemblance of something to another thing; likening one another, one ruling to another ruling.’ We tell them that ‘this resemblance or likening you are talking about must be a comparison between two different things. If [they say that] they share every aspect, meaning, and cause, they would invalidate their case because there is absolutely nothing in the world resembling another thing in every aspect in those matters of prohibition and permission where you deploy analogy. If they say that qiyās resembles two things if they share only certain aspect, despite some other distinct aspects, they would also invalidate their case, because everything in the world resembles one another in some aspects, differs in others... However, Allah differentiated the rulings and gave distinct rulings for different things... If they say that we consider two things that share more aspects than others, we would ask they might share many aspects, but they might have different rulings, for which aspects you would transfer the ruling of something to another, despite the fact that there is no limit known for defining few or many aspects? Hence, those who argue on the basis

of ‘many’ aspects or ‘certain aspect’ have no evidence. <sup>668</sup>

It is clear from this quote and similar arguments against the applications of qiyās that the proponents of qiyās developed the theory of ‘illa in response to these critiques. Instead of superficial similarity that might be subject to the attacks of arbitrariness, a common ‘illa was required between two cases in order to apply qiyās.

Particularization of ‘illa (*takhṣīṣ al-‘illa*) was another discussion that developed in the late third and early fourth centuries. It means that the ratio legis can be particular in certain cases, in other words, it might exist, but might not carry the ruling of original case to some new cases. This discussion is closely connected to the difference between the particularization of ‘illa and division of ‘illa as textual (*manṣūṣa*) and derivational (*mustanbaṭa*) are discussed in the writings of al-Jaṣṣās.<sup>669</sup>

Inconsistent use of original and new cases (*aṣl* and *far‘*) in analogical reasoning was also subject to criticism. As we mentioned earlier, al-Qāsim b. Sallām was criticizing his ‘Irāqī opponent in applying qiyās between two original cases mentioned by the texts by saying “fundamental rulings (*sharā‘i*) of Islam cannot be subject to analogy for one to another... If you make sale (*bay‘*) the original case and charity (*sadaqa*) the new case in order to apply an analogy; I can make the charity the original case and the sale as the new case. This is not right. Each obligatory ruling (*farḍ*) has its own aspect and detailed

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<sup>668</sup> al-Qāḍī al-Nu‘mān, *Ikhtilāf*, 156-57.

<sup>669</sup> al-Jaṣṣās, *al-Fuṣūl*, II,337.

rulings.”<sup>670</sup>

## E. Varieties of Qiyās

Al-Shāfi‘ī divides qiyās into two types: In the first type, *ma‘nā* (‘illa) of something is identical and obvious with what is in the text (*aṣl*); therefore, every scholar must agree on the first type. While the second type is based on similarity and is open to disagreements.<sup>671</sup>

Al-Shāfi‘ī also adds another type of qiyās based on clarity and strength. He points out what later known as the superior qiyās (*qiyās al-awlā*) that is known as a fortiori inference as follows:

The strongest type of qiyās is when Allah, in his book, or his messenger prohibit a little amount of something; it is known that a large amount of it is also prohibited. Likewise, if a little amount of ritual practice is praised, a large amount of it deserves to be praised more so. Similarly, if God allows a large amount of something, a lesser amount of it should be even more permissible.<sup>672</sup>

Even though al-Shāfi‘ī mentions this as a type of qiyās, he also notes that some scholars consider this as the meaning of the text unrelated to qiyās, a point articulated in later

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<sup>670</sup> al-Qāsim b. Sallām, *al-Amwāl*, 1464.

<sup>671</sup> al-Shāfi‘ī, *al-Risāla*, 479.

<sup>672</sup> al-Shāfi‘ī, *al-Risāla*, 513. Based on above mentioned citations Hallāq notes that al-Shāfi‘ī had these three kinds of qiyās in mind and Lowry follows Hallāq on that. See Hallāq, *Legal theories*, 29; Lowry, *Early Islamic legal theory*, 143.

legal discussions, especially between *Zāhirīs* and *qiyās* supporters.<sup>673</sup> *al-Shāfi‘ī* was probably referring to *Irāqī* jurists and some other *qiyās* deniers such as *al-Nazzām*, because late *Ḥanafīs* do not consider this as a type of *qiyās*. *Al-Jaṣṣās* reports that *al-Nazzām* rejected this being a kind of *qiyās* and rather said that it is inferred from the meaning of the general text.<sup>674</sup> *Zāhirīs* also do not call this *qiyās*; rather, for them it is the meaning of the text.

It seems that the late typology as *qiyās al-‘illa* and *qiyās al-shabah* on the basis of strength of *qiyās* was not there during the gap period. Rather, the question was what kind of similarity should have been taken into account in deciding the ‘*illa* of a ruling. Different approaches to this question later crystallized under this typology. For instance, even though we have seen that *Abū Bakr al-Aṣamm* (201/816) held that there is a single ‘*illa* for each ruling, he also considered formal similarity as ‘*illa*. By formal similarity, he means belonging to a category such as *dhikr*. *Dhikr* is a term that encompasses words of exaltation such as “*Allahu akbar*” or encompasses the recitation of the *Quran* such as *al-Fātiḥa*. Against the consensus of jurists *Aṣamm* would argue that reciting the *Fatiḥa* could not be obligatory, because it so much resembles pronouncements such as “*Allahu akbar*” or “*subḥāna rabbiya al-‘azīm*” etc.

*Al-Jaṣṣās* reports several of his applications of this type of *qiyās*:

There are those people who consider only similarity in form and essence between the

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<sup>673</sup> *al-Shāfi‘ī*, *al-Risāla*, 515-16.

<sup>674</sup> *al-Jaṣṣās*, *al-Fuṣūl*, IV, 122.

old case and the new case. And there are those who consider their similarity with their parallel rulings. For the former, for instance the opinion of Abū Bakr al-Aṣamm that avoiding the last sitting of a prayer does not invalidate the prayer, because there is an agreement that avoiding the first sitting does not invalidate the prayer. There is nothing else, to him, more similar to the last sitting than the first sitting of prayer in a given prayer. Hence, [al-Aṣamm argues that] it is necessary to make qiyās between them. He also rejects the obligatoriness of recitation of the Quran in prayer based on the agreement that other repetitive recitations (*adhkār*) such as the ones said during bowing, prostration, the first sitting, and the beginning of prayer are not obligatory in prayer. Therefore, the recitation of the Quran should not be obligatory, because it is also a repetitive recitation (*dhikr*). Likewise, exaltation of Allah (*takbīrāt*) in the beginning of the prayer should not be obligatory, since other exaltations in the prayer are not obligatory. The most similar thing to the exaltation of Allah in the beginning of the prayer is the following exaltations in the prayer.<sup>675</sup>

On the other hand, al-Jaṣṣās claims that al-Shāfi‘ī also applied qiyās of similarity based on what two cases share in common regarding similar rulings. Al-Jaṣṣās states that al-Shāfi‘ī made an analogy between slaves and freemen in the case of expiation, because they share the obligation of worship. Al-Shāfi‘ī made another analogy between slaves and animals in the case of damage by neglect, because they both can be sold and purchased.<sup>676</sup> Al-Jaṣṣās

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<sup>675</sup> al-Jaṣṣās, *al-Fuṣūl*, IV, 145.

<sup>676</sup> al-Jaṣṣās, *al-Fuṣūl*, IV, 145.

says that al-Shāfi‘ī’s applications resemble to al-Aṣamm’s applications in taking apparent similarity into account, but they differ in taking closer rulings into account instead of the closer form of the cases. This distinction was later crystallized as similarity in creation (*shibh khalqī*) and similarity in ruling (*shibh hukm ī*) in the literature of Islamic legal theory.<sup>677</sup>

Ibn Surayj is reported to have mentioned eight different types of qiyās and to have accepted the authority of *qiyās al-shabah*.<sup>678</sup> One of his students, Abū Bakr al-Qaffāl, followed him, while his other students al-Ṣayrafī and Abū Ishāq al-Marwazī rejected *qiyās al-shabah*.<sup>679</sup>

In the early the fourth hijrī century, a Shafī‘ī scholar, Abū Bakr al-Khaffāf (d. between 340-60/952-70) divides analogy into three types. The first type is the stimulating (*munabbih*) qiyās on the meaning of text, also known as *faḥwā al-qawl* and *dalīl* according to Zāhirīs. The second is the comparison of two things due to the common aspect (*‘illa*) between them. The last type of qiyās is the qiyās of predominant (*al-ghālib*) that is based on predominance of similarity.<sup>680</sup> We see that as early as the fourth century, a tendency rendering Zāhirīs’ rejection of qiyās meaningless arose by presenting what they call *al-dalīl* or *faḥwā al-khiṭāb* as just a type of qiyās.

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<sup>677</sup> Ibn al-‘Arabī, *al-Maḥṣūl*, 126; Juwaynī, *al-Burhān*, II, 55; Sam‘ānī, *Qawāṭi‘ al-adilla*, II, 254. Sensual similarity (*shibh ḥissī*) is also used instead of similarity in creation. See *al-Juwaynī*, *al-Burhān*, II, 54.

<sup>678</sup> Sam‘ānī claims that all these different types can be reduced to qiyās al-khafī and qiyās al-jalī. See Sam‘ānī, *Qawāṭi‘ al-adilla*, II, 126; and al-Zarkashī, *al-Baḥr al-muḥīt*, VII, 48.

<sup>679</sup> al-Juwaynī, *al-Talkhīṣ*, III, 236-7.

<sup>680</sup> Abū Bakr al-Khaffāf, *al-Aqsām wa-al-khiṣāl*, 7b.



## F. Further Discussions on Qiyās and Ijtihād

One of the discussions of the time was whether qiyās is applicable in language in the matter of names, i.e. extension of meaning from one word to another due to a common aspect. The majority of scholars are said to have denied this; however, according to what is narrated from al-Shāfi‘ī scholars Ibn Surayj and Ibn Abī Hurayra (345/957), it is possible when it is a religio-legal (*shar‘an*) matter, but not in language per se.<sup>681</sup> Based on this principle, Ibn Surayj issued that *nabīdh* can be called *khamr* and homosexual relationship can be called *zīnā* (fornication or adultery) and they carry the same ruling.<sup>682</sup>

Another discussion was whether qiyās can abrogate a ruling based on textual sources. Even though majority of scholars rejected this, Ibn Surayj was reported, in one of narrated opinions of his, to have accepted this type of abrogation. His teacher al-Anmā‘ī (288/901) reportedly, and Ibn Surayj in another narration, said that “*qiyās al-shabah*” cannot abrogate any ruling based on textual sources, but a qiyās that is extracted directly from the Quran can abrogate a ruling based on the Quran, a qiyās that is extracted directly from sunna can abrogate a ruling based on sunna.”<sup>683</sup> However, his student al-Ṣayrafī does not accept abrogation by qiyās.<sup>684</sup>

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<sup>681</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, II, 257.

<sup>682</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, II, 260.

<sup>683</sup> al-Sarakhsī, *Uṣūl*, II, 66.; Ibn Taymiyya, *al-Musawwada*, 225.; al-Zarkashī mentions that “the Shi‘ī author of *al-Maṣādir*” (Maḥmūd b. ‘Alī al-Ḥimṣī who died after 600/1200) relates this opinion to Ibn Surayj. See al-Zarkashī, *al-Baḥr al-muḥīt*, V, 290.

<sup>684</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, V, 289.

Similar views can be seen for the topic of restriction of general text through qiyās. Ḥanafī ‘Isā b. Abān accepts it on the condition that the restricted text must have had been already restricted by another certain text.<sup>685</sup> Mu‘tazilī scholar Abū ‘Alī al-Jubbā’ī (303/915)<sup>686</sup> rejects this type of restriction, while his son Abū Hāshim al-Jubbā’ī (321/933), later Baṣran Mu‘tazilī Abū al-Ḥusayn al-Baṣrī (436/1044) famous theologian al-Ash‘arī (324/936) accepted this type of specification without any reported condition.<sup>687</sup> Ibn Surayj is reported to have accepted the restriction of textual sources with qiyās, if it is strong (*jalī*) qiyās.<sup>688</sup>

One of the discussions related to qiyās was whether one can name the ruling based on qiyās as *dīn* (religion). Abū al-Huzayl (227/841) is reported to have said that it cannot be called *dīn*, because the name *dīn* should be used for something solid and unchanging. Abū ‘Alī al-Jubbā’ī (303/915) held that only an obligatory ruling reached through qiyās can be named as *dīn*; not a recommended ruling.

Another important discussion, which apparently began in the third hijrī century, was whether every mujtahid is correct in his ijtihād. Kūfan school (later classified as Ḥanafīs), the followers of Mālik and Ibn Surayj held that every ijtihād is correct, while majority of al-Shāfi‘īs accepted that even though mujtahid would be sinner if his ijtihād is wrong, there is

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<sup>685</sup> al-Bāqillānī, *al-Taqrīb wa-al-irshād*, III, 195.

<sup>686</sup> Abū Ishāq al-Shirāzī, *al-Luma’*, 37; al-Shawkānī, *Irshād al-fuḥūl*, I, 391.

<sup>687</sup> Ibn Amīr Ḥājj, *al-Taqrīb wa-al-taḥbīr*, I, 287.

<sup>688</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, IV, 489.

only one correct ijtihād.<sup>689</sup> However, some scholars claimed that there is only one correct ijtihād and if a mujtahid is wrong in his ijtihād, he would be sinner. This last view is attributed to Murji'ī scholar Bishr al-Marīsī and Mu'tazilī scholar al-Aṣamm, also to a al-Shāfi'ī scholar Abū 'Alī b. Abī Hurayra (345/957).<sup>690</sup> Ibn Qutayba relates an opinion from his opponents, whom he labels sometimes ahl al-ra'y sometimes ahl al-kalām, that since ijtihād means exertion, the exertion reaching to truth has the same value as the exertion reaching to error. Therefore, they criticize ḥadīths that reward more those who reach to truth out of their exertion than those who err.<sup>691</sup> However, Ibn Qutayba says that ahl al-ḥadīth makes a distinction between those who reach to truth and those who do not, in accord with the ḥadīths they narrate.<sup>692</sup>

Another important problem was the place of Qiyās among other sources. Ibn Ḥazm claims that Abū Ḥanīfa said that qiyās cannot be applied, if there is a *mursal* ḥadīth or weak ḥadīth from the prophet, and in the matters of expiations, punishments and amounts. Also, he claims that Abū al-Faraj (330/941), who reportedly had a manual on uṣūl al-fiqh, and his disciple Abū Bakr al-Abharī (375/986), who also reportedly had a manual on uṣūl al-fiqh from Mālikīs, were the first ones who claimed that qiyās precedes solitary reports regardless of being *mursal* or *musnad*.<sup>693</sup>

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<sup>689</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, VIII, 285.

<sup>690</sup> al-Zarkashī, *al-Baḥr al-muḥīt*, VIII, 286; al-Jaṣṣās, *al-Fuṣūl*, IV, 295.

<sup>691</sup> Ibn Qutayba, *Ta'wīl mukhtalaf al-ḥadīth*, 221.

<sup>692</sup> Ibn Qutayba, *Ta'wīl mukhtalaf al-ḥadīth*, 221-22.

<sup>693</sup> Ibn Ḥazm, *al-Iḥkām*, VII, 54.

Ibn Qutayba (276/889) lists *qiyās* as a valid method after searching for a *hadīth* and imitating a scholar whose imitation is considered acceptable.<sup>694</sup>

Mālikī al-Jubayrī indicates that *qiyās* can be applied if all other superior sources, the Quran, Sunna, agreement of the *umma*, and *ijmā‘* of ahl al-Madīna, exhausted.<sup>695</sup>

## G. Ijtihād vs. Taqlīd

Taqlīd (imitation) and its effect in Islamic legal history occupy a central discussion in modern scholarship, and taqlīd is frequently portrayed as the cause of the stagnation of Islamic law in relation to the so-called closure of the gate of *ijtihād*. The gap period was the period in which the first theoretical discussions concerning taqlīd appeared; hence an analysis of these discussions provides sufficient answers for the questions around its role in legal history.

Taqlīd derives from the root q-l-d. The noun *qilāda* means the halter of animal and it derived from the same root. Taqlīd linguistically means leading someone or something to a desired place.<sup>696</sup> In this sense, taqlīd is the act of the one being followed rather than the follower. As a term it is defined as following someone’s saying or act on the belief that it is true without reasoning or searching for evidence.<sup>697</sup> In the literature of Islamic legal theory,

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<sup>694</sup> Ibn Qutayba, *al-Ikhtilāf fī al-lafz*, 62.

<sup>695</sup> al-Jubayrī, *Muqaddima in Muqaddima fī al-uṣūl*, 212.

<sup>696</sup> Zayn al-Dīn al-Rāzī, *Mukhtār al-ṣiḥāḥ*, 259; al-Fīrūzābādī, *Qāmūs al-muḥīt*, 312; al-Zabīdī, *Tāj al-‘arūs*, IX, 69; Ibn Manẓūr, *Lisān al-‘arab*, III, 367.

<sup>697</sup> al-Jurjānī, *al-Ta‘rīfāt*, 64.

the common definition is accepting opinion of another person without evidence.<sup>698</sup>

It seems that taqlīd in the sense of following entire jurisprudence of a particular scholar, which is the essence of madhhab institution, was a new phenomenon of the fourth/tenth century. Ibn Ḥazm even claims that the scholars of the first three centuries tacitly agreed upon the invalidity of such taqlīd.<sup>699</sup> Therefore, the discussions over taqlīd of the gap period were closely related to the foundations of madhhabs. It can be argued that the presence of scholarly traditions and a sort of affiliation of certain scholars to these traditions were already there in the third/ninth hijrī century. An example of which can be seen in the writings of Ibn Ḥazm who calls Abū Ḥāzim ‘Abd al-‘Azīz b. ‘Abd al-Ḥamīd (292/905) with the title of al-Ḥanafī.<sup>700</sup> Nonetheless, in the sense of following entirely a particular scholar or a body of scholars that constitute a tradition after eponymous figures resulted from acknowledging the value of taqlīd in this sense in the fourth/tenth century. The discussions of taqlīd during the gap period revolved around the question of whether one should follow

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<sup>698</sup> al-Juwaynī, *al-Waraqāt*, 30; al-Ghazālī, *al-Mustaṣfā*, 370; Ibn al-‘Arabī, *al-Maḥṣūl*, 154; al-Āmidī, *al-Iḥkām*, IV, 221.

<sup>699</sup> Ibn Ḥazm, *al-Iḥkām*, IV, 190.

<sup>700</sup> Ibn Ḥazm, *al-Iḥkām*, IV, 191; Ibn Ḥazm reporting from al-Jaṣṣāṣ claims that ‘Abd al-‘Azīz b. ‘Abd al-Ḥamīd issued a universal fatwā to be sent to all territories of ‘Abbasids that he revoked the ijtihād of Zayd b. Sābit who permitted the state to be inheritor for the rest of the inheritance of a person by claiming the ijmā‘ of other companions. ‘Abd al-‘Azīz b. ‘Abd al-Ḥamīd had been qādī of Damascus, Palestine and Kūfa before he became the qādī of eastern Baghdād in 283 after Ismā‘īl b. Ishāq, the famous Mālikī judge. Al-Wakī‘ describes ‘Abd al-‘Azīz b. ‘Abd al-Ḥamīd as a follower of a group of scholars belonging to the Baṣran Irāqī jurisprudence. He died in 292 when he was in his nineties. There is a disagreement in his title between Abū Ḥāzim and Abū Khāzim. Earlier sources mention him as Abū Ḥāzim. See Jaṣṣāṣ, *al-Fuṣūl*, III, 302; al-Mas‘ūdī, *Murūj al-dhahab*, II, 162; al-Wakī‘, *Akhbār al-Qudāt*, III, 293. His name appears in *al-Jawāhir* as ‘Abd al-Ḥamīd b. ‘Abd al-Azīz Abū Khāzim see al-Qurashī, *al-Jawāhir al-muḍiyya*, I, 296.

another person theoretically. These discussions provided the theoretical basis for one of the most important institutions of Islamic thought that is madhhab. What follows below examines these discussions to discover turning points in a wide range of diverse thoughts that enabled the formation of madhhabs.

Al-Shafī‘ī does not discuss the taqlīd topic in his legal theoretical treatise in the new *al-Risāla*, but he mentions it in his older edition of *al-Riṣāla* and *al-Umm* and clarifies his stance in a several passages. Al-Shafī‘ī states in the older edition of *al-Risāla* that “It is not permissible for someone to imitate another person except the companions. In the case of disagreement among them, the opinion that a caliph favors is preferable.”<sup>701</sup> In *al-Umm*, he uses the word well-known when he takes an opinion or deed of a companion as evidence.<sup>702</sup> He also engages in a discussion whether a judge can decide a case based on someone else’s authority (who is a contemporary of the judge and responds in the negative, even if the other person is more knowledgeable or with a higher reasoning capacity).<sup>703</sup> He states that a judge can consult other scholars, because someone else might point out certain sides of the case that the judge might have missed, but he cannot accept their opinions without understanding it with its evidence from the kitāb, sunna, ijmā‘ or qiyās, and seeing it as more accurate than his own qiyās.<sup>704</sup>

Al-Jaṣṣās, however, deals with the issue extensively in his manual of uṣūl al-fiqh

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<sup>701</sup> Ibn al-Qāṣ, *al-Talkhīṣ*, 74.

<sup>702</sup> al-Shafī‘ī, *al-Umm*, IV, 109; VII, 280, 335

<sup>703</sup> al-Shafī‘ī, *al-Umm*, IV, 219.

<sup>704</sup> al-Shafī‘ī, *al-Umm*, IV, 219-20.

under three sections as *On Following the Authority of a Single Companion Where a Contrary Opinion is Unknown*,<sup>705</sup> *On the Necessity of Reasoning (Nazar) and Disparaging (Dhamm) the Blind Imitation*,<sup>706</sup> and *On Following the Authority of the Mujtahid*.<sup>707</sup> Even though al-Jaṣṣāṣ discusses imitation in general critically vis-a-vis reasoning where he attacks those who deny reasoning in religious sciences and accept only what is narrated from the predecessors such as Dāwūd b. ‘Alī,<sup>708</sup> he surprisingly argues for the authority of following the authority of companions,<sup>709</sup> the authority of the scholars for lay-people<sup>710</sup> and for a scholar following another if the former is convinced of the latter’s correctness.<sup>711</sup> Interestingly, as opposed to al-Jaṣṣāṣ’s accusations against Dāwūd, the only book on refutation of taqlīd entitled *Ibtāl al-taqlīd* that Ibn Nadīm mentions in his bibliographical work belongs to Dāwūd b. ‘Alī.<sup>712</sup> It is safe to assume that al-Jaṣṣāṣ mixed up his criticisms on the attacks against ration-based legal reasoning with supporting taqlīd of the salaf and mentioned the most popular figure of these groups with a term which had a negative connotation already. The late Zāhirī scholar Ibn Ḥazm’s writings also indicate the invalidity of taqlīd in Zāhirī thinking, which might give us an outline of nonexistent work of Dāwūd.

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<sup>705</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 361.

<sup>706</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 369.

<sup>707</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 281.

<sup>708</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 369-84.

<sup>709</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 361-63.

<sup>710</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 281-82.

<sup>711</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 283-84.

<sup>712</sup> Ibn al-Nadim, *al-Fihrist*, 304.

In the Shī'ī tradition, al-Kulaynī (329/941) narrates three reports under the title of taqlīd. Two of them are from Ja'far al-Şādiq and one from Musā al-Kāẓim. Ja'far interprets the well-known verse about how the People of the Book assigned a divine role to their scholars and says that “they did not literally worship them rather they regarded whatever these scholars adjudicated as divine prohibition or permission.”<sup>713</sup> Musā al-Kāẓim makes a comparison between the taqlīd of the Shi'a and that of the Murji'a, and states that the Murji'īs are more loyal in their adherence to the taqlīd of their imām than the Shī'īs.<sup>714</sup> Even though we do not see a reference to taqlīd in al-Shaykh al-Mufīd's works, al-Sayyid al-Murtaḍā discusses the topic and states that “the necessity of taqlīd for lay-people is established by ijma' both in the past and the present.”<sup>715</sup>

Ibn Surayj is reported to have said that “If there is a legal problem that is urgent, I am allowed to imitate another person who is more knowledgeable than me. If its evidence is not available to me and if I am afraid of missing an obligation, it is not permissible for me to issue fatwā based on that taqlīd for other people.”<sup>716</sup> This shows that during the time of Ibn Surayj a distinction between following a person without knowing the evidence and knowing the evidence.

Abū Bakr al-Khaffāf (d. between 340-60/952-70) argues that there are ten different kinds of taqlīd that are permitted: Taqlīd of what narrated from the prophet, taqlīd

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<sup>713</sup> The Quran, 9:31: “They have taken their rabbis and monks as lords beside Allah”

<sup>714</sup> al-Kulaynī, *al-Kāfi*, I, 53.

<sup>715</sup> al-Sayyid al-Murtaḍā, *al-Dharī'a*, II, 796-97.

<sup>716</sup> Ibn al-Qāṣ, *al-Talkhīṣ*, 74.



of what narrated from other than the prophet, taqlīd of a scholar by lay-person, taqlīd in the matter of muqawwimāt, taqlī of what al-Shāfi‘ī said in hayawān [a chapter in al-Umm] about the taqlīd of Uthmān; taqlīd of what al-Shāfi‘ī said in his old *al-Risāla* [taqlīd of one companion]; there is no taqlīd of someone after the prophet; taqlīd of qā’if [the professional who traces family heritage]; taqlīd of scholar by a scholar when the latter does not have knowledge of the former’s proof; and taqlīd of the news about vision of crescent for Ramaḍān.<sup>717</sup>

Al-Jaṣṣās’s account shows that the discussions over imitation evolved around three main topics during the gap period:

1) Following the authority of companions, which had some detailed nuances such as following a companion without restriction, following a companion’s opinion where a contrary opinion from another companion is not known, and following a companion on the amounts of certain entities, because these amounts need a divine prescription and cannot be known with ijtihād.

2) Following the authority of a scholar by another scholar, when the latter thinks the former is more knowledgeable than him.

3) Finally, following the authority of scholars by lay-people.

The following sections outline the contributions made during the gap period to

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<sup>717</sup> Abū Bakr al-Khaffāf, *al-Aqsām wa-al-khiṣāl*, 5A.

these three types of taqlīd as developed within the period.

### 1. Following the Authority of Companions

The authority of companions was probably one of the rare disagreements among different groups of scholar during the time. It was just another way of expressing the acknowledgment of the authority of the predecessors. The traditionalist camp was indeed supporting the authority of companions, due to the fact that following the predecessor was one of the fundamental principles of the traditionalists (ahl al-ḥadīth). They also frequently represented the Quran as the source of authority of the companions. Al-Ḥārith al-Muḥāsibī, for instance, states that, “We should follow the successors in addition to the companions, because Allah ordains us to follow them in the verse<sup>718</sup> “Obey Allah and obey the prophet and those among you who are in authority (*‘ulū al-amr*).”<sup>719</sup>

Since the authority of the companions was already there for the traditionalists, one wonders the approach of rationalist camp, especially Kūfī tradition. The role of companions was acknowledged among the founding figures of the Kūfī tradition, albeit not as clear as in the traditionalist camp. Nonetheless, we see that some later scholars in the Kūfī tradition later challenged early preliminary consideration of the authority of the companions. Abū Ḥasan al-Karkhī (340/953) states that Abū Yūsuf used to see that the opinion of a companion, when a contrary opinion from another companion is not narrated, is superior to

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<sup>718</sup> The Quran, 4:59

<sup>719</sup> al-Ḥārith al-Muḥāsibī, *al-Makāsib*, 38.

qiyās. However, al-Karkhī disagrees with Abū Yūsuf.<sup>720</sup> Al-Karkhī argues that only if the opinion of a companion is about something outside the realm of ijtihād, it can be a valid source (*hujja*), because it must have relied on divine prescription (*tawqīf*).<sup>721</sup> However, if it is on something in the realm of ijtihād, it is not a valid source to be followed. It is clear that al-Karkhī was inclined to distinguish the source of authority from the mere righteousness of the companions. He was underlining that the authority was actually the revelation itself, not the companions; hence, their authority can be acknowledged as long as it is directly related to the revelation, not to them. Al-Karkhī’s older contemporary Abū Sa‘īd al-Barda‘ī (317/930), however, thinks that in the presence of a companion’s opinion, qiyās should be left, because the qiyās of the companions are more preferable than our own qiyās due to their direct knowledge of the texts from the prophet.<sup>722</sup>

Al-Ṭahāwī (321/933), though not critical as much as al-Karkhī was, restricts the authority of companions. He states that if there is no known contrary opinion from other companions, one should follow the opinion of a companion; however, if there is, one is free to choose.<sup>723</sup> He also makes preferences as to which authority to follow within the different companions and successors.<sup>724</sup>

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<sup>720</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 361.

<sup>721</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 363.

<sup>722</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 362.

<sup>723</sup> al-Ṭahāwī, *Aḥkām al-qur’ān*, I, 392.

<sup>724</sup> al-Ṭahāwī, *Sharḥ al-ma‘āni’ al-āthār*, I, 78. He, for example, says that “following Sa‘īd b. al-Musayyab is more preferable than following Muḥammad b. Ka‘b” See al-Ṭahāwī, *Sharḥ al-ma‘āni’ al-āthār*, III, 45.

## 2. Following the Authority of a Scholar by Another Scholar

One of the key topics that influenced the formation of schools was whether a scholar could follow another scholar. Even though following the scholars for lay people was accepted by the overwhelming majority, there was a disagreement whether a scholar can follow another. This question was heavily related to the formation of the schools of law named after the eponymous scholars such as Abū Ḥanīfa, Mālik, and al-Shāfi‘ī. The discussions over taqlīd in the 3<sup>rd</sup>/9<sup>th</sup> and early 4<sup>th</sup>/10<sup>th</sup> centuries were actually different responses to this new phenomenon.

According to what had been narrated from them, al-Shāfi‘ī and Abū Yūsuf rejected following anyone except the companions; Abū Ḥanīfa and al-Shaybānī allowed it without any restriction. In the third hijrī century, it appears that a third opinion emerged. In a particular case, if a jurist performs his reasoning under time pressure where he could not research an issue thoroughly, some uṣūlī scholars argued that he could imitate another scholar. However, if there is abundant time, one is not allowed to follow another scholar. This opinion is attributed to Ibn Surayj.<sup>725</sup> Abu Ḥasan al-Karkhī reports that Abu Ḥanīfa held the same opinion, while al-Shaybānī and Abū Yūsuf ruled the impermissibility of following another scholar.<sup>726</sup> Al-Jaṣṣāṣ clarifies the apparent contradiction of what is reported from al-Shaybānī through another report saying that al-Shaybānī allowed following

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<sup>725</sup> Abū Ya‘lā, *al-Udda*, IV, 1230-1.

<sup>726</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, IV, 283.

another scholar if he is more knowledgeable than himself.<sup>727</sup>

Ahl al-hadīth in general were against the idea of imitating a scholar, since they thought that was another way of transferring the authority of the salaf, i.e. what had been narrated from them. Aḥmad b. Ḥanbal is reported to have answered a question about whether al-Awzā‘ī deserves to be followed more than Mālik as follows: “Do not imitate any of them for your religion. Take whatever you have from the prophet or his companions. As for the successors, one is free.”<sup>728</sup>

Al-Ḥārith al-Muḥāsibī indicates that when one cannot find a solution for something “one should go back to the kitāb and sunna and those who are sincere. If one still cannot discover the solutions, one should take the opinion of someone whose piety and reason he trusts.”<sup>729</sup>

Bishr al-Marīsī (218/833) was another early scholar who dealt with the problem of taqlīd and rejected it entirely for scholars until they know the source of the issue in kitāb, sunna, or ijma‘, but accepted for lay-people who are ignorant of the sources.<sup>730</sup>

Ibn Qutayba (276/889) mentions imitation of a scholar whose imitation is considered appropriate as a valid way after searching for a hadīth and even before applying a qiyās.<sup>731</sup>

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<sup>727</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 362.

<sup>728</sup> ‘Abū-Dāwūd, *Masā’il al-imām Aḥmad: riwāya*, [al-Qāhira]: Maktabat Ibn Taymīyya, 1999, 369.

<sup>729</sup> al-Ḥārith al-Muḥāsibī, *Risālat al-Mustarshidīn*, 84.

<sup>730</sup> Abū Sa‘īd al-Dārimī, *Naqd*, II, 663-64.

<sup>731</sup> Ibn Qutayba, *al-Ikhtilāf fī-al-lafz*, 62.

He also states that other topics of interest outside the science of religion, ḥalāl and haram such as knowledge about other nations can be taken from any one; however, religion (*halāl* and *ḥarām*) is based on divine sanction (*isti'bād*) and taqlīd, hence one can only take knowledge from someone who has authority without falling into doubt.<sup>732</sup> As an example, after indicating different definitions of hand (*yad*) to shoulder, elbow, and wrist; to put a limit for the punishment of stealing, i.e. amputation of hand, he requires “taqlīd of someone who has authority to be imitated.”<sup>733</sup>

Al-Ṭahāwī (321/933) argues that in the presence of reports and opinions of leading scholars (*a'immat ahl al-'ilm*), one should leave his own opinion based on his qiyās and should imitate them.<sup>734</sup>

Abū Ḥasan al-Karkhī (340/952) sees that imitation of one scholar by another scholar is not exactly an imitation; rather it is a kind of ijtihād when the latter holds that the former is stronger and more reliable based on ijtihād.<sup>735</sup> This differentiation of al-Karkhī later became another intermediary term in the literature of Islamic legal theory between ijtihād and taqlīd as *ittibā'* (*following*). It was this understanding of taqlīd that paved the way for legitimate following of earlier scholars; hence, the formation of schools of law.

It is clear from the above discussions that a particular type of authority closely related

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<sup>732</sup> Ibn Qutayba, *Uyūn al-akhbār*, I, 48.

<sup>733</sup> Ibn Qutayba, *Gharīb al-ḥadīth*, III, 224.

<sup>734</sup> al-Ṭahāwī, *Sharḥ al-ma'āni' al-āthār*, IV, 84.

<sup>735</sup> al-Jaṣṣāṣ, *al-Fuṣūl*, III, 362.

to the concept of taqlīd between scholars began to emerge among the scholarly circles in the third hijrī century. The common appropriation of the first generation of Islam and the common perception of deterioration by time empowered the idea of following certain scholars of the past in order to attain reliable and authoritative knowledge within a tradition. However, evident teachings of Islam prohibiting blind-following (also known as taqlīd) led scholars to distinguish conscious-following from blind-following. This compromise paved the way for justified and rationalized following of the past generations by the later generations.

### **3. Imitation of Scholars by Lay-people**

Despite all negative approaches toward taqlīd, a majority of the scholars of the time were in agreement on accepting the taqlīd of scholars by lay-people. Only Baghdādī Mu‘tazilīs reportedly held that it is not permissible for anyone to imitate another person, including lay-people. Abū ‘Alī al-Jubbā‘ī, however, allowed it for the matters in the field of ijtihād.<sup>736</sup>

Al-Ash‘arī states that according to the majority of ahl al-ijtihād a mustafti, i.e. the one who seeks religious ruling, should imitate what a mufti, i.e. the one who issues religious ruling, says. Yet, according to some scholars from “ahl al-qiyās” the mere imitation is not permissible, a mustafti should also ask for evidence until the truth becomes apparent for

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<sup>736</sup> al-Rāzī, *al-Maḥṣūl*, VI, 73.

him.<sup>737</sup>

Al-Ṭabarī (310/923) remarks that “those who do not have necessary knowledge about the reports from the prophet, what the predecessor scholars agreed upon, what the late scholars agreed upon, and what the umma narrated deriving from their prophet should not issue a fatwa. Rather, they should imitate (*taqlīdan*) the scholars of the umma and follow (*ittibā’an*) some of them like a lay-man does.”<sup>738</sup>

## H. Conclusion

Qiyās as a method in Islamic legal theory, acquired a primary place within the sources of law compared to the other ways of reasoning to the extent that it is considered one of the four fundamental sources of law as formulated in the later literature with the exception of *Zāhirīs*, *Imāmīs*, and *Ismā’īlīs*. The gap period witnessed the significant part of the development of this method including the discussions on its authority, conditions, elements, and its different types. All these discussions demonstrate the important contribution made during the gap period and support the overall thesis of this research concerning the significance of this period for the development of *uṣūl al-fiqh*.

The authority of *qiyās* occupied the center of these discussions. Initially, in its simplest meaning the applications of *qiyās* were known under the rubric of *ra’y*. First criticisms appeared among certain *Mu’tazilīs* in the late second and early third *hijrī* centuries.

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<sup>737</sup> al-Ash‘arī, *Maqalāt al-Islāmiyyīn*, II, 360.

<sup>738</sup> al-Ṭabarī, *Tahdhīb al-āthār*, 230.



However, this approach did not spread over majority of Mu'tazilīs. The traditionalists (ahl al-ḥadīth) expressed reluctance toward qiyās applications in the early third hijrī century by criticizing excessive use of qiyās and borrowing from the arguments of the antagonists of qiyās. The apparent motive was protecting the independent authority of reports. It seems from the above examinations in this chapter that al-Shāfi'ī was not that influential in the topic of qiyās during that time to the extent that his championing of qiyās was not welcomed among the traditionalist circles. Later on, in the late third hijrī century, literalist traditionalists (Zāhirīs), Shi'ī Imāmīs, and Ismā'īlīs continued the opposition of qiyās. Kūfī school was This chapter identified four main arguments regarding the authority of qiyās. Diverse approaches that emerged within the gap period can be summarized as follows:

1-The first group denied qiyās entirely. They included the Zāhirīs, Shi'īs and Azāriqa from Khārijīs.

2-The second group are some Mu'tazilīs such as al-Nazzām and Ja'far b. Mubashshir who rejected qiyās in legal matters, but accepted and even claimed necessity for its application in theological matters.

3-The third group consists of some other Mu'tazilī-oriented Ḥanafī scholars, such as al-Karkhī and al-Jaṣṣāṣ who accept its authority in both theology and law.

4-The fourth group is the proto-ahl al-sunna that consisted of scholars from ahl al-ḥadīth, some Ḥanafīs, Shāfi'īs, and Mālikīs who rejected qiyās in theological matters, but

accepted it in legal matters.<sup>739</sup>

Another important phenomenon that still weighs in the contemporary discussions on Islami law and that was one of the main theoretical discussions of the period was taqlīd. Despite the majoritarian recognition of the authority of the salaf (predecessors), taqlīd was initially discussed having a default negative meaning. This negative approach toward taqlīd emanated from the emphasis on preserving the authority of the fundamental sources of the Quran and Sunna, and condemnation that these textual sources expressed for the imitations of earlier people in pre-Islamic period. Taqlīd was also condemned as the antithetical of reasoning by some scholars in the discussions of the role of reason in religious matters. The evidence analyzed in this chapter demonstrates that the attacks on taqlīd were used by many groups to criticize other groups and did not aim at attacking the mere following the early scholars per se. Every group justified taqlīd of the earlier scholars as a way of ijtihād and this approach was later transformed to intra-madhhab ijtihād that became the main legal activity of the jurists after the formation of schools.

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<sup>739</sup> al-Shawkānī describes only three groups and does not mention the third group in the list among them. See al-Shawkānī, *Irshād al-fuḥūl*, II, 94.

## CONCLUSION

The early centuries of Islamic intellectual history can be described as a period of constant struggles among different scholarly groups and independent scholars in asserting various solutions for the problem of authority in religion. The questions of who speaks for Islam and which opinion, whether theological or legal, should be considered normatively Islamic were the central issues. The authority of the Quran was universally agreed upon; however, the text of the Quran either did not cover some of the problems that were then starting to appear, or was not clear enough to solve all the problems of the early Muslim society. This also led to a variety of discussions relating to the interpretation of ambiguous texts. Diverse suggestions for addressing the problem of authority appeared in the second/eighth century. Suggested sources included: independent reasoning among some rationalists; the preserved practices of the city of the prophet (*'amal ahl al-Madīna*) among some Madīnan scholars; the agreements of the community (*ijmā'*) among some 'Iraqī rationalist scholars; and the independent authority of the chained reports among traditionalists (*ahl al-ḥadīth*). The supporters of these abovementioned sources of authority exchanged their ideas with their opponents and affected one another through theoretical and dialectical debates. Existing evidence demonstrates that some of these important theoretical discussions took place in the correspondences among scholars such as between Mālik and Layth b. Sa'd, or between Abū Ḥanīfa and Uthmān al-Battī, and in the refutations written by scholars, such as al-Shaybānī's *al-Ḥujja 'alā ahl al-Madīna* and Abū Yūsuf's *al-Radd 'alā siya al-Awzā'ī* in the second/eight century. Similar debates also took place in the realm of theology in determining the authority of certain sources. These intellectual debates paved the

way for the development of a stratified source methodology that enables one to decide whether an argument is valid and acceptable in religion. This source methodology was based on the idea of hierarchical checks and balances among certain sources and principles, insisting, for example, that the inferior or secondary (*far'*) element should be consistent with the superior or primary ones (*uṣūl*).

The first five centuries of Islam witnessed constant attempts to redefine, through theoretical discussions, what would establish orthodoxy and orthopraxy in Islam. The accumulated body of these theoretical discussions among different groups of scholars constituted a new genre of scholarly writing. Beginning with oral discussions, this genre consisted primarily of refutations, individual treatises that were devoted to certain theoretical topics such as *al-Nāsikh wa-al-mansūkh* (the abrogating and the abrogated), *Ithbāt al-qiyās* (the authority of qiyās), or *Radd al-qiyās* (the denial of qiyās); and certain sections, especially the introductions, of particular legal, exegetical, or theological books throughout the gap period, such as Abu Bakr al-Khaffāf's *al-Khiṣāl*.

This dissertation has argued that the apparent gap between the works of al-Shafī'ī and al-Jaṣṣāṣ has to do with different perceptions of what constitutes *uṣūl al-fiqh*. Identifying *uṣūl al-fiqh* only through the mature examples of manuals in the later literature might lead to the exclusion of al-Shafī'ī's *al-Risāla* and even al-Jaṣṣāṣ's *al-Fuṣūl* from the genre due to their lack of certain discussions, or a certain kind of organization, or for not using *uṣūl al-fiqh* as the title of the discipline. In fact, some contemporary scholars have argued for such exclusion. This approach, however, does not help us understand the formation and early development of *uṣūl al-fiqh* as a religious science. *Uṣūl al-fiqh* is a field of religious science

that examines a set of sources and interpretive techniques for the bilateral purpose of inferring normative conclusions and checking the normativity of existing conclusions. The efforts to restrict the scope of these conclusions within the realm of fiqh in history did not even succeed completely. Hence, a more accurate examination of the formation and early development of uṣūl al-fiqh needs to take a topic-based approach in defining uṣūl al-fiqh and identifying those who contributed to its developments with their discussions. Accordingly, research aimed at revealing early developments within the field of uṣūl al-fiqh must examine any piece of writing that deals with source methodology and textual interpretive techniques. In addition, the fact that certain authors did not identify their writing with the concept of uṣūl al-fiqh should not exclude such writings from the genre of uṣūl al-fiqh. The same can be said about other religious sciences that evolved in the early period of intellectual history of Islam. For instance, nowhere in *Siyar al-saghīr* does al-Shaybānī refer to the science of fiqh, however, no scholar argues that this book does not belong to the genre of fiqh. Similarly, certain writings that deal with individual topics of uṣūl al-fiqh cannot be excluded from the genre of uṣūl al-fiqh.

In addition, this research has shed important light on various contemporary discussions about the essence, origins, and purpose of uṣūl al-fiqh and its interrelation with other disciplines, especially kalām. It has argued that uṣūl al-fiqh originated from the debates that focused on evaluating particular attempts to establish orthodoxy and orthopraxy in Islam. Its main purpose was not to provide the essential tools for jurists to derive religious legal rulings; furthermore, it never completely became such a scholarly discipline despite increasing efforts beginning with the fourth/tenth century to make it so. As for the

relationship between kalām and uṣūl al-fiqh, this dissertation has demonstrated that the relationship between uṣūl al-fiqh and kalām was not a hierarchical one. Rather, the close relationship between these fields was due to their common interest in theoretical topics dealing with normativity and authority, which were relevant to discussions of both belief and law. For instance, theoretical discussions on general (*‘amm*) and specific (*khāṣṣ*) texts, the definition of *ijmā‘*, the conditions for accepting transmitted reports, or the authority of analogy were crucial for both belief-related issues and legal problems. The reason for using the term ‘fiqh’ instead of using, say uṣūl al-kalām or uṣūl al-sunna, as the title of this theoretical discipline had to do with gradually increased attention to the field of fiqh and the predominance of fiqh related questions compared to the other disciplines, which had yet developed into independent fields. This helps to explain, in large part, the reason for belief-related or ḥadīth-related topics remaining in the literature of uṣūl al-fiqh.

This research revealed early developments in the field of uṣūl al-fiqh within the so-called gap period in three main topics. This was accomplished by using both extant writings of the time and preserved citations in the later literature that imparted information about the lost writings of the period. In the topic of solitary reports, the scholars of the gap period reached a majoritarian agreement on the authority of solitary reports. The debates revolved around the extent of this authority and the conditions for solitary reports to be considered authoritative. Traditionalists argued for the independent authority of solitary reports, as long as the transmitters in its chain were free from negative critiques. Since their focus was on the transmitters, they developed a rich literature on topics dealing with the investigation of transmission chains, including the critical analysis of narrator biographies

(*rijāl*), chain historicity (*tārīkh*), and attention to any defects (*'ilal*) that would weaken the reliability of the report. Abundant production of this literature was the main cause for gaining the upper hand in identifying authentic reports from inauthentic ones vis-a-vis their reason-inclined rivals. They dealt with content criticism only when they were in a dialectical debate with their opponents for the sake of argument. The reason-inclined scholars, however, were not comfortable with the independent authority of solitary reports that would take away the agency of reason. They tried to restrict its authority with various conditions in a stratified (*uṣūlī*) manner by comparing the content of the solitary report to the content of superior sources such as kitāb (i.e. the Quran), and widely acknowledged or agreed upon reports. They also identified certain types of deficiencies within a report that can reveal its inauthenticity, such as the report having been transmitted solitarily while dealing with a topic in which a wide recognition must be expected (*'umūm balwā*).

The gap period witnessed a significant increase in the attention given to the topic of *ijmā'*. *Ijmā'* was initially based on the simple idea that building on already agreed upon matters and comparing disagreements to these agreements would provide normative results. Irāqī reason-inclined scholars preferred claims based on *ijmā'* over solitary reports. Moreover, the distinction between consecutive (*mutawātir*) transmission and solitary transmission resulted from the application of *ijmā'* in the authentication process of transmitted reports. In the late second and early third hijrī century, the traditionalists were critical of this proposal, seeing it as a threat that would diminish the independent authority of solitary reports. However, in the second half of the third century they came to agree with the importance of *ijmā'* as long as it embodied the authority of the past predecessors, especially

the companions. The nature of *ijmā‘* and its conditions underwent various reinterpretations and additions through dialectical debates that took place among the scholars of the time. As a result, *ijmā‘* as an ambiguous concept was widely accepted, but each group, and even some individual scholars, defined it and restricted the scope of agreements differently. The present day confusion around the concept of *ijmā‘* originates in this diversity of reinterpretations, most of which emerged during the gap period.

The topic of *qiyās* was a central theoretical debate during the gap period. All the major counter arguments rejecting the authenticity of *qiyās* occurred during the gap period, beginning with some Mu‘tazilī scholars and later articulated by *Zāhirī* (literalist traditionalists) and some Shi‘ī scholars. The chapter on the development of *qiyās* demonstrated interrelations among different groups of scholars in both supporting and rejecting the authority of *qiyās*. It also showed different stages within the gap period in the development of the elements of *qiyās* and the types of *qiyās*. This topic was also important for tracking the influence of al-Shāfi‘ī on the later developments of *uṣūl al-fiqh*. Although *qiyās* is given a significant role in al-Shāfi‘ī’s theory, his fellow traditionalists seem not to have thoroughly accepted his arguments. Ironically, for instance, one of the earliest biographers of al-Shāfi‘ī, Dāwud b. ‘Alī, who passionately praised al-Shāfi‘ī, was also a traditionalist of the gap period who enthusiastically rejected the authority of *qiyās*. The fact that the rivals of the traditionalists were championing *qiyās* in their theory seems to have had more weight on shaping the approaches of the traditionalists than the arguments of al-Shāfi‘ī.

Rather than being a period in which no significant discussion or writing about *uṣūl al-fiqh* were found, this dissertation has argued, from several different types of evidence, that



the period between al- Shāfi‘ī and al-Jaṣṣāṣ was a period of independent production on uṣūl al-fiqh through oral and written debates. The major topics of uṣūl al-fiqh consolidated during this period of independent contribution and shaped the structure of the following literature of uṣūl al-fiqh. Therefore, this period as a period of independent contributions was highly significant and fueled the intellectual production of the following centuries in the history of uṣūl al-fiqh.

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