Ulumuna
Vol. 24, No. 2, 2020, p. 232-265
Journal of Islamic Studies Published by State Islamic University Mataram
p-ISSN 1411-3457, e-ISSN 2355-7648, available online at https://ulumuna.or.id

APPROACHING *IJMĀʿ*: Sociological, Theological and Legal Dimensions of Consensus in Islam

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Abstract: Presenting the emergence and development of *ijmāʿ*, this paper aims to epistemologically critique the articulation of *ijmāʿ* in modern Western scholarship on Islam. The article argues that to understand *ijmāʿ*, we need to explore its social context, theological foundations, and practical consequences. A tolerance of the difficulty in identifying truth, an understanding of the law as being built on uncertainty, and employing *jamʿ*, as an assemblage are essential dynamics in the formation of the law and Muslim societies. The corpus of classical literature on *ijmāʿ* is expectedly contradictory, and full of gaps. Rather than seeing this as problematic, the article recognizes it as normative. Against the argument that *ijmāʿ* was the "foundation of foundations," or that it was a well-defined concept that gained political power against adversaries, the article argues that in practice *ijmāʿ* remained marginal, and confined to the minimum necessary for each individual to be a member in the Muslim community.

Keywords: *ijmāʿ*, *fiqh*, theology, consensus.

DOI: https://doi.org/10.20414/ujis.v24i2.413

IJMĀʿ, or consensus, is a curious Islamic concept. There are Muslim scholars who argued that it is the most important source of legislation, next to the Qurʾān and Ḥadīth, and there are Muslim scholars who, on the contrary, held that it is the least significant concept of all. In the following lines, I will present, first, a brief review of its emergence in early Islam, second, its structure, and function in Islamic classic legal theory, and third, a brief discussion of its socio-cultural, and theological background.

The Emergence of *Ijmāʿ*

Ibn al-Qayyim (1292-1349 CE) relates the earliest practices of *ijmāʿ* to the first Caliph, Abū Bakr al-Ṣiddīq (R. 632-634 CE.) He is said to look into the Qurʾān to decide on different matters. If he does not find the solution in the Qurʾān, he looks in Sunnah[1]. If the solution is still missing, he questions *al-nās*, the people, to see if they know how the Prophet decided about a similar case. Eventually, he would consult *rūʾasāʾ al-nās*, the chiefs of people, so if they *ijtamaʿa raʾyuhum*, had consensus, on something, he would rule according to it.[2] He relates the same story to the second Caliph ʿUmar ibn al-Khaṭṭāb (R. 634-644 CE) as well. Ibn al-Qayyim mentions also the letter of ʿUmar to Judge Shurayḥ, in which he instructs him to judge *bimāʾajmaʿa ʿalayhi al-nās*, with what people had consensus upon.[3] In the same source we find a letter from the fourth Caliph, ʿAlī ibn Abī Ṭālib (R. 656-661 CE), to the same Judge, asking him to keep the same way of ruling, as he hates dissidence, so that *yakūna li al-nās jamāʿah*, people would have a collectivity.[4]

M. M. Bravmann reflects on two passages related to the third Caliph, ʿUthmān ibn ʿAffān (R. 644-656 CE,) to conclude that "The two passages make it clear that originally, in early times, the body that creates, or adopts, a practice by 'consensus' (*ijmāʿ*) is 'the people', that is: the community (in the characteristic early cases, including the present ones, the people of Medina), and not 'the scholars', as seemed to be widely assumed."[5] Equally interesting in those passages is the use of *sunnah* to mean the practice of people. *Ijmāʿ* here is synonymous to *sunnah*, which is the practice of people or their tradition. This is the understanding, which Wael Hallaq introduces in *The Origins and Evolution of Islamic Law*. Hallaq admits that in early Islam consensus lacked a fixed technical term.

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[1] The technical use of *sunnah* here casts doubt on the reliability of the narrative that he quotes from Abū ʿUbaydah al-Baṣrī (728-824), *Kitāb al-Qaḍāʾ*.

[2] Muḥammad ibn Abī Bakr Ibn Qayyim al-Jawziyyah, *Iʿlām al-Mūwaqiʿīn ʿAn Rabb al-ʿĀlamīn* (Cairo, Egypt: Maktabat al-Kulliyāt al-Azhariyya, 1968), 61.

[3] Ibid., 60.

[4] Ibid., 61.

[5] M.M. Bravmann, *The Spiritual Background of Early Islam* (Leiden: E. J. Brill, 1972), 197.

However, he states that it "does not mean that during this period the notion of consensus was rudimentary or even underdeveloped; on the contrary, it was seen as binding and, furthermore, determinative of *ḥadīth*."[6] Consensus, however, did not refer to its technical definition, as it is known in the classic theory. Rather, according to Hallaq, it "implied the agreement of scholars based on the continuous practice that was, in turn, based on the consensus of the Companions."[7]

What is important here is the continuity and identification of two concepts that will be separated later on: *ʿurf* as the social and cultural practices of the community, and *ijmāʿ* as a legal source of a *ḥukm sharʿī*, religio-legal verdict.

Hallaq, however, argues that "the consensus of the Companions, *ipso facto*, was an attestation of Prophetic practice and intent."[8] He, therefore, concludes that consensus was placed in diametrical opposition to *raʾy*.[9] This conclusion contradicts a number of historical records. Consensus was, it seems, a conflation of both unconscious, and premeditated, practices. A lack of a known Qurʾānic, or Prophetic instruction about a matter would simultaneously make it the business of the group to decide about it. A consensus would be based on either a collective practice, or collective *raʾy*, that is consultation. In addition, it is less likely that we can talk about one consensus, for there could be many consensuses practiced in different geographical regions. In *Sunan al-Dāramī*, we find that ʿUmar ibn ʿAbd al-ʿAzīz (R. 717-720) was asked *lawu jamaʿta al-nās*, if you bring people together, on one opinion, or a consensus? He replied that it does not please him if people would not differ among themselves. Then he wrote to different countries that each people should rule according to the consensus of their own jurists.[10] This localized understanding of

[6] Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 110.

[7] Ibid., 111.

[8] Ibid.

[9] Ibid., 110.

[10] Zuhayr Shafiq Kabbī, *Al-Ijmāʿ* (Beirut: Dār al-Muntakhab al-ʿArabī, 1993), 17. I could not find it in different editions of *Sunan al-Dāramī*. He wrote that it is volume 1, page 151, but that was not true in all the editions that are available to

consensus meets the early tolerance of different readings of the Qurʾān, based in different tribal dialects. Here, I am not arguing of unintentional localized consensuses that had to be reformed into one universal consensus in the tenth century. I argue of *intentional* localization of consensuses that meets the cultural, and social understanding I have proposed, and, not the least, an earlier norm of Islam. This norm had to be reinvented long centuries later on in the form of *ʿurf* that was finally sanctioned as a legitimate source of legislation.

From these early, and scanty materials to the classic theory we find the writings of the four founders of Sunni schools as a juncture between a fluid sociocultural, and a relatively concrete legal *ijmāʿ*. There is no documented statement of Abū Ḥanīfa (699-767 CE) about *ijmāʿ*. His students related to him only one point about *ijmāʿ*—that is for consensus to be valid, there should not be an earlier dispute about the concerned question.[11] Aḥmad ibn Ḥanbal (780-855 CE) had a comment that whoever claims *ijmāʿ* is a liar.[12] If Abū Ḥanīfa avoided consensus to open more space for *raʾy*, Ibn Ḥanbal's intention was more likely to ground rulings in *naṣṣ*, text. Writings about *ijmāʿ* from this time refer usually to Shāfiʿī, Mālik, and the famous exchange of arguments Shāfiʿī had with the Mālikʾs students. *ʿAmal Ahl al-Madīnah*, or the tradition of the people of Medina, is commonly attributed to Mālik, as a main source of legislation. It should, more correctly, be attributed to some of his students, who are confused, themselves, about what really the Imām meant by this phrase. This is not the place to further elaborate on this issue, but it is sufficient here to highlight that there are occasions, in which he ruled against the tradition of Medina. Abū ʿAbbās al-Qurṭubī (D. 1258 CE) concludes that Mālik would prefer the tradition of Medina whenever there is a dispute.[13] In his commentaries on *al-Mustaṣfa*, Ḥamza Ḥāfiẓ writes, "No doubt that Mālik frequently relied on the sayings and doings of the people of Medina. For instance, Abū Yūsuf said to him: *tūʾadhinūn bi al-tarjīʿ* without having a Prophetic *ḥadīth*? So, Mālik

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[11] Ibid., 42.

[12] Ibn Qayyim al-Jawziyyah, *Iʿlām al-Mūwaqiʿīn*, 248.

[13] Kabbī, *Al-Ijmāʿ*, 43.

turned to him, and exclaimed: I never saw something stranger than this! The call to prayer is cried out in public five times every day, transmitted from a generation to a generation since the Prophet till now; do we need this and that person, *fulān wa fulān*? This is more correct than *ḥadīth*."[14]

In fact, no one of the four founders of law schools elaborated on consensus as much as Shāfiʿī did. Nevertheless, he too is neither clear, nor decisive. Schacht explains Shāfiʿī's rejection of the Medina consensus as rooted in its anonymity. He quotes him as saying, "I wish I knew who they are whose opinions constitute consensus, of whom one hears nothing and whom we do not know, Allah help us!"[15] Schacht points to Shāfiʿī's hostility toward the use made of consensus by the older schools. Patiently, Schacht tries to trace the concept throughout *al-Umm*, and rightly concludes that the text is "composite, containing passages of different dates and partly revised."[16] However, he states that late Shāfiʿī, his final concept of consensus, was a consensus of the community at large without being "able to dispense completely with the idea of consensus of the scholars."[17] Schacht writes that Shāfiʿī merges the consensus of the community with that of the generality of scholars: *ʿawāmm ahl al-ʿilm*, and opposes the later to that of the special among them.[18]

Devin J. Stewart recognizes this merging, but to conclude, on the contrary, that "most of al-Shāfiʿī's discussions of consensus likely refer to the consensus of Muslim jurists."[19] Stewart interprets *ʿāmmatahum*, their generality, as the generality of scholars, not the commoners of Muslims. As Shāfiʿī uses *ʿāmmah* to refer sometimes to Muslims, and sometimes to the generality of scholars, we have to put phrases like those in a larger context of Shāfiʿī's text.

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[14] Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *Al-Mustashfā min 'Ilm al-Uṣūl*, ed. Muḥammad 'Abdus Salām al-Shāfi (Beirut: Dār al-Kutub 'Ilmiyyah, 1993), 348.

[15] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1959), 84.

[16] Ibid., 94.

[17] Ibid., 93.

[18] Ibid.

[19] Devin J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City: The University of Utah Press, 1998), 40.

We have, so far, three understandings of consensus: first, sociocultural consensus, or *ʿurf*, second, consensus of the Medinese, in a sense that it could be traced back to the *sunnah* of the Prophet, and third, the consensus of the scholars. Shāfiʿī never attends to the first communal consensus, and Schacht's understanding is, in fact, wrong. Shāfiʿī, however, is truly confusing because he uses consensus sometimes to refer to the second understanding, and sometimes to the third one. In the second understanding *ʿāmmatahum* means the people of Medina, not all Muslims; in the third understanding *ʿāmmatahum* is a reference to the scholars, as Stewart stated. In the lexicon of Shāfiʿī there are two terms: *khabar*, and *raʾy*; the consensus of Medinese is *khabar*; that of the scholars is *raʾy*.

Mālik, Aḥmad, and Shāfiʿī had an identical project: documenting the *Sunnah* of the Prophet to use it in the building up of a growing, and to-be-comprehensive, legal system. No one of them seems to attend to the cultural aspects of the community, or to the right of the community to create new legislation, at least when discussing consensus. Hallaq's definition of consensus as the consensus of Companions, which attests to the Prophetic tradition is true. It is during the time of those scholars, not earlier, that we can find proof of this understanding. In *al-Risālah*, Shāfiʿī writes,

> Someone told me … what is your evidence in following what people have consensus upon, when there is no Qurʾānic text, and they did not relate it to the Prophet? Do you claim what the others[20] say that their consensus could be based but on a definite piece of *Sunnah* even though they do not mention it? So, I said to him: what they had consensus upon, and they stated that it is related to the Prophet, then it is as they said, God willing. What they did not state that it is related to the Prophet could be, or could be not, related to the Prophet. But it is impermissible to take it as related to the Prophet, for it is not permissible to relate to him something except by hearing; and it is not permissible to relate to him something by speculation that could be wrong. So, we used to follow their sayings, knowing that *Sunnah* of the Prophet would not be unknown to *ʿāmmatahum*, though it may be unknown to some of them. And we know that *ʿāmmatahum* does not get consensus that contradicts the *Sunnah* of the Prophet, or that goes wrong, God willing.[21]

[20] It is most likely a reference to students of Mālik.

[21] Muḥammad ibn Idrīs Al-Shāfiʿī, *Al-Risālah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, n.d.), 471–472.

It is clear from the above passage that Shāfiʿī refers to the generality of Companions, and/or the Medinese, and in a sense that their practice should have been based on Prophetic *Sunnah*. In other words, it is a sort of *khabar*.

Shāfiʿī, however, uses consensus to refer to the consensus of scholars too. For instance, he wrote, "Since it [a certain piece of *ḥadīth*] could have one of two meanings, the *ahl al-ʿilm*, people of knowledge, should not give it a special, rather than a general, meaning without evidence: of *Sunnah* of the Prophet, or a consensus of *ʿulamāʾ al-Muslimīn*, the scholars of Muslims, who could not have consensus that contradicts his *Sunnah*."[22] It is important to notice here that Shāfiʿī understands the function of scholars' consensus, not in terms of creating a new rule, but only in terms of *raʾy* that interprets the *khabar* of *Sunnah*. Shāfiʿī in another passage writes that

> If one of the people may have said, within the knowledge of special scholars, *fī ʿilm al-khāṣṣah*: Muslims, past and present, have had a consensus to approve the *Sunnah* related by one individual, *khabar al-wāḥid*, and recognize it, for it has been known that everyone of Muslims' jurists, *fuqahāʾ al-Muslimīn*, has approved it, I would accept it. However, I [personally] would rather say: I do not recall that Muslims' jurists have disputed the approval of *khabar al-wāḥid*, to indicate that they all approve it.[23]

Here, Shāfiʿī uses *Muslims* to mean only scholars, but he has already clarified his context: *fī ʿilm al-khāṣṣah*. This use clearly meets Stewartʾs definition of Shāfiʿī's consensus. However, we should keep two reservations, for Shāfiʿī here is, first, restricting the function of consensus to the interpretation of text, second, showing awkwardness toward using the concept of scholars' consensus that he explicitly says that even though he would accept it from other people, he would personally prefer to put it in the negative style: I do not know that they disputed it. This is, by the way, the same strategy of Aḥmad. In fact, this awkwardness could turn into frank hostility towards those who over-use the term. He writes, "Neither I, nor any one of the people of knowledge, say: there is consensus upon this, except for that which you hear from every scholar you meet ever, and he relates it to those who

[22] Ibid., 322.

[23] Ibid., 457–458.

preceded him, like *al-Ẓuhr* Prayer is four [*rakʿa*], wine is prohibited, and the likes."[24] In this sense, we must ask: what difference would it make to be a scholar or a commoner?

From this point, I want to move to show that Shāfiʿī, indeed, used consensus in a third sense: that of the community at large. However, this is not the older sociocultural communal consensus that actively sanctioned legislation. This is the passive minimum consensus among Muslims. Those who do not agree with it cannot be members of the community. This easier, if dangerous, consensus is not manufactured, or monopolized by the scholars as Stewart may have argued.

Stewart's central argument is twofold. First, consensus came to be the corner stone of Islamic Law, and the norm, according to which the membership in Muslims' community could be accepted, or denied. Second, consensus has been the business of scholars, a means of power they used to control, and regulate their societies. Stewart contrasts his argument to those of Goldziher, Watt, and Lewis. He writes,

> To Goldziher, however, *ijmāʿ* seems a diffuse and nebulous principle, which he describes as "a nearly unconscious "*vox populi*." Bernard Lewis remarks that Islam has no ecclesiastical hierarchy and no councils or synods to decide questions of heresy, but only *ijmāʿ*, the workings of which are "barely definable." Watt realizes that *ijmāʿ* played a role in defining heresy, but like Goldziher sees it as an ill-defined group feeling, though he notes that the *ʿulamāʾ* were the ones empowered to decide specific cases. In his view, the dynamics of Islamic orthodoxy and heresy are reminiscent of a tribal system; what determines whether a believer's unusual views are acceptable is merely the "feeling" of the community's members, embodied in the principle of consensus. He concludes that "there is more communalistic thinking in Islam than is usually realized."[25]

Stewart is not happy with this vague, and soft picture portrayed of *ijmāʿ*. For him, these analyses miss the rigorous, and determinative nature of this crucial principle. He states, "While Goldziher, Watt, and others take consensus to be something like popular opinion, in actuality it is a well-defined legal principle cited, contested, and referred to constantly within the community

[24] Ibid., 534–535.

[25] Stewart, *Islamic Legal Orthodoxy*, 37–38.

of legal scholars."[26] I will discuss those two theses after presenting the classic theory of *ijmāʿ*. Here, I only want to point out to two key-terms in the above passages: ill-defined, and well-defined. A presentation of the classic theory would make it easier for us to understand the nature of consensus, and whether it is ill, or well-defined. Before leaving this part, however, we must briefly review the sociopolitical background, on which *ijmāʿ* emerged, and developed.

Ijmāʿ is not only a concept, or a legal principle; it is a social discourse. To understand its emergence, we have to situate it in its sociopolitical context: the sociopolitical context of Islam in its first two centuries, especially after the death of the Prophet. This context, as we know, was a context of political conflict, ideological dissidence, and social turbulence. *Ijmāʿ* emerged within contexts of civil war, major and acute social structural changes, economic transformations, cultural and religious encounters and confrontations with a variety of non-Arab and non-Muslim nations, ideological skepticism, theological polemics, doctrinal fragmentation, and two-times complete re-organization of the caliphate system. Moreover, the social organization, be it tribal or otherwise, the political conflicts over authority, and the religious argumentation, and sectarianism were all so amalgamated and interconnected that it was impossible to articulate or solve one problem of them at a time.

Central to these conflicts, and their eventual solution, were the two political questions of administration, and representation. In his book *al-Islām wa Falsafat al-Ḥukm*, Muḥammad ʿImāra argues that ruling in early Islam was conducted through a consultation council of seventy members, and a more restricted forum of ten Companions. This organization of representation, and consultation collapsed gradually, and disappeared by the erection of the Umayyad Caliphate.[27] This approach helps us understand the complex negotiation of political authority rather than reducing it to either autocracy, or communalism. ʿImāra is arguing of three

[26] Ibid., 38.

[27] Muḥammad ʿImāra, *Al-Islām wa Falsafat al-Ḥukm* (Cairo, Egypt: Dār al-Shurūq, 1989), 54–68.

concentric circles of *al-ʿAsharah*, *al-Muhājirūn-al-Awwalūn*, and *al-Muhājirūn-wa-al-Anṣār*—that is the Ten, the First Emigrants, and the Emigrants and the Medina Alliances. Those circles are circles of consultation, and representation. The death of the Prophet added a religious function to these political circles. *Al-Muhājirūn-wa al-Anṣār*, and a larger circle of the Companions became the reference in matters of religion: theological questions, ethical principles, and legal regulations.

The above system of representation, and consultation had to transform into a new system, where new spaces are created, and differentiated, new techniques of administration had to grow, and develop, new rules of representation had to settle down, new social groups had to be included, new classes had to consolidate, and new knowledge had to be produced and legitimized. *Ijmāʿ* was being created throughout this trans-formative context. To conceptualize the final settlement, we should, theoretically at least, recognize a ruler, who, unlike al-Maʾmūn, does not busy himself by theological discussions, a more developed bureaucratic administrative system that includes people of different competing ethnic, and religious groups, and a complex elite made of high-rank officials, generals, tribal chiefs, representatives of religious communities, traders, intellectuals, and religious scholars. Historically, among the most important struggles that had to be crossed before a settlement could be realized was the crisis of *khalq al-Qurʾān*, or the Creation of Qurʾān. It is in this crisis that we see the last major war political rulers had to fight over religious authority. It is also in this crisis that we can see the defeat of the scholars who allied themselves with the political rulers, and the victory of those who grounded their authority, not in monopoly over religious authority, but in their representative power of the community at large. The Shāfiʿī's text reflects images of these transformations: consensus of Medinese, of scholars, and of community at large. The frequent fusion of the last two consensuses is a reflection of the assumed representative role of the scholars. The fading away of the earlier consensus, and its transformation into *khabar* is also telling. The later resolution of this important crisis in early Islam left a political ruler chosen basically by his own house but approved by both the state's elite

and the community at large. It also left behind an administrative apparatus that was, at least by the standards of that time, relatively technical and objective. However, it also left two consensuses: one of the qualified scholars, and one of the community at large.

The community consensus became the space where the minimum standards of the membership of the Muslim community are defined—for instance, Dhuhr is four rakʿah and wine is prohibited, to use Shāfiʿī's examples. All factions and sects including those that were severely condemned by scholars, *al-Muʿtazila* for instance, and the schools that never complied to the four *orthodox* schools, *al-Ẓāhirīya* for instance, could not have their membership denied. Community consensus was the minimum required by every man or woman to be a Muslim, not a scholarly-written, detailed description of what makes someone a Muslim. Here, I am denying neither a scholars' consensus, nor a power played by them. I will discuss in the next section the scholars' consensus as it came into existence in classic theory of *fiqh*. However, my point now is that the scholars exercised their power, not through the principle of *ijmāʿ*, but through, first, creating a space of religious knowledge that has relative independence from political authority, and second, through the creation of a comprehensive, and detailed body of *fiqh*. On the one hand, they distinguished a sphere of religion from the sphere of politics, and, on the other hand, they perpetually expanded the religious sphere to include all other aspects of social life. *Religion* was being transformed from a limited number of *ḥudūd*, basic principles of ethics, a few regulations of market and family matters, and a larger area of ritual instructions to a comprehensive, and rational system that invades the minutest spaces of social and personal life. The more the scholars could expand this knowledge through their daily interaction with the people's reality, and their use of a set of developed legal methods and techniques, the less *direct* access the state had to the personal and social lives of its subjects. The more they rationalize this knowledge, thanks to Greek philosophy, and its decisive means: analogy, the more they could control it, and expand it even beyond the limits of the Qurʾānic and Ḥadīth texts.

Both the communalist and democratic pictures of *ijmāʿ* that Goldziher presents, and the elitist picture of it, where a consolidated, and unified class of scholars monopolize *ijmāʿ*, and consequently their societies, which Stewart presents, are right. We need not choose one of them; we must only integrate them. Scholars have always exercised power. They have to do this, not by enforcing a principle of *ijmāʿ*, but by bringing their subject willingly to an extensive, indeed ever-expanding, sphere of knowledge, which only scholars are qualified enough to comprehend it. They exercise their power, not by providing the right interpretation, but by creating, administering, and, not infrequently, inter-disputing the *sphere* of interpretation—that is by developing the legitimate means of legal reasoning.

Classic Theory of *Ijmāʿ*

Ijmāʿ has a number of contesting definitions. In *al-Mustaṣfa*, al-Ghazālī (1058-1111 CE) defines it as "the consensus of the Muslim community, *ummat Muḥammad*, on a religious matter, *amr min al-umūr al-dīnīya*."[28] Al-Zarkashī (1344-1391 CE) in *al-Baḥr al-Muḥīṭ*, defines it as "the consensus of the qualified scholars of the Muslim community, *mujtahidī ummat Muḥammad*, after his [the Prophet] death, in a precedent, *fī ḥādithah*, on a matter of matters, *amr min al-umūr*, in a time of times, *fī ʿaṣr min al-aʿṣār*."[29] Though both al-Ghazālī and al-Zarkashī belong to the Shāfiʿī School of *fiqh*, they still have their difference in defining *ijmāʿ*. Is it the community at large, or the qualified scholars; does it cover all matters, or only the religious of them; and what is the time framing of *ijmāʿ*? All those questions are subject to further negotiations within the same school. It is true, nevertheless, that a more restrictive definition, in terms of, first, *who* can practice *ijmāʿ*, and second, *what* areas can be covered with it, have dominated a majority of classic writings.

Central to the definition of *ijmāʿ* is the definition of those who have the authority to create it. They are called *mujtahid*, scholars of the community, *ahl al-ḥil wa al-ʿaqd*, or *ahl al-raʾy wa al-ijtihād*. Al-

[28] al-Ghazālī, *Al-Mustashfā min 'Ilm al-Uṣūl*, 294.

[29] Abū ʿAbd Allāh Muḥammad ibn Bahādir Al-Zarkashī, *Al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh* (Kuwait: Wizārit al-Awqāf wa al-Shūʾūn al-Islāmīyah bi-al-Kūwait, 1988) vol. 4, 436.

Zarkashī states that commoners are not to be considered.[30] However, he follows his statement with a lengthy discussion, in which he quotes a number of scholars who choose to include commoners in consensus, like some *mutakalimūn*, Āmidī, Qāḍī Abū Bakr, and Imām al-Ḥaramayn. Al-Ghazālīʾs choice is *ummat Muḥammad*. However, his explanation of this choice makes it all complicated. In his typical style, he writes that apparently it includes all Muslims, but every apparent thing, he argues, has two extremes, and a middle. The two extremes he proposes are the *mujtahid*, whose inclusion is beyond any doubt, and the children, the embryos, and the insane, whose exclusion is also beyond any doubt. Then, he makes a long list of those whose position lies in the middle between these two defined extremes. His opinion could be expressed in this passage.

> It is possible to imagine the inclusion of the commoners in consensus. Sharīʿah is divided into what could be comprehended by the commoners and the specialists, like the five prayers, the commandments of fasting, charity and pilgrimage, there is consensus upon, and where commoners and specialists agree upon it. In Sharīʿa, there is also what could be comprehended only by specialists, like the details of the way of praying, trade … So, what the specialists have consensus upon, the commoners have *accepted*, knowing the truth is what *ahl al-ḥil wa al-ʿaqd* have consensus upon. They never dispute it, as they too agree upon it. It is better to call it the consensus of the entire community.[31]

Al-Ghazālī, here, is arguing that, *in reality*, it does not happen that the commoners would object something that the entire community of scholars have accepted. In this way, the infallibility of *ummah* would be invited to support that consensus of scholars. He, nevertheless, proposes the hypothetical question: will the consensus be sanctioned if a commoner objected to it? Ghazālī evokes the two logical answers, yes, and no, but goes for no! He writes that this case is beyond imagination, for there could not be a sane commoner who objects to the consensus of all scholars![32] Āmidī and Bāqillānī chose clearly to include the commoners.[33]

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[30] Ibid., 461.

[31] al-Ghazālī, *Al-Mustashfā min ʾIlm al-Uṣūl* 2, 324.

[32] Ibid., 326.

[33] ʻAlī bin Muḥammad al-Āmidī, *Al-Ihkām fī Uṣūl al-Ahkām* (Riyad: Dār al-Ṣumīʿī, 2003), 299.

Āmidī invites six arguments of not considering the commoners and refutes them one by one.

The specialists, too, were subject to further discussions in the classic theory. The differentiation of different sciences under the rubric of Islamic scholarship made scholars like al-Shawkānī to conclude that the consensus in each science is the consensus of the corresponding scholars of this specific science.[34] Al-Ghazālī includes both the *faqīh* and *uṣūlī*, but not the logician, or the grammarian.[35] Al-Zarkashī concurs that all specialists of each art, *fann*, should be included in each consensus concerning this art.[36] Interesting questions were raised about the *mujtahid*, especially those about his *ʿadālah,* or integrity. The issue of *ʿadālah* is controversial, but, interestingly, the majority of scholars do not consider it a condition for those who make *ijmāʿ*. Al-Ghazālī states that both the *fāsiq*, and *mubtadiʿ*, or the immoral, and the eccentric must be considered in consensus. Al-Zarkashī gives space to all the multiplying opinions in his text. It seems from his discussion that the problem is not whom we will allow to join consensus, but rather, whom we can allow to block it. He includes women and slaves if they were *mujtahid*. Both Ghazālī, and Zarkashī include *al-tābiʿī al-mujtahid* within the consensus of the Companions. In other words, their consensus must include him, as the merit of being included is *ijtihād,* not the companionship. Al-Ghazālī considers neither the consensus of the four *Rāshidūn*, nor that of the four founders of law schools as a sufficient *ijmāʿ*.

As it is not realistic to expect an individual explicit confirmation from every *mujtahid* on a certain legal ruling, scholars debated if an anonymous consensus, where the *mujtahid* will not object would be enough. There are many scholars, like Ghazālī, Rāzī, and Āmidī, who considered it as a *relative* consensus that does not rise to the level of *absolute* consensus; and it seems that this was the opinion of Shāfiʿī as well.[37] However, the majority of scholars seem to accept it with a few conditions. Al-Zarkashī, for

[34] ʿAlī ʿAbd al-Rāziq, *Al-Ijmāʿ fī al-Sharīʿa al-Islmīya* (Cairo, Egypt: Dār al-Fikr al-ʿArabī, 1947), 50.

[35] al-Ghazālī, *Al-Mustashfā min ʾIlm al-Uṣūl* 2, 330.

[36] Al-Zarkashī, *Al-Baḥr al-Muḥīṭ*, 75.

[37] ʿAbd al-Rāziq, *Al-Ijmāʿ*, 75.

instance, stipulates that the consensus has to be well-known in public, that enough time should pass for the *mujtahid* to ponder it, and that signs of neither satisfaction, nor rejection had shown up.[38] Some of those scholars interpreted the Shāfiʿī's statement that an opinion cannot be attributed to the silent, as the silent in a meeting, *al-sākit fī al-majlis*.

The time frame of consensus was also controversial. It is understood that consensus is to be held during a certain time. They frequently call this time *ʿaṣr*, which is age, or a generation. How long should we stay before it is sanctioned? Some scholars suggested that we wait until all the *mujtahids* who made this consensus die. Al-Ghazālī reduced this time period to one moment.[39] Al-Zarkashī too wrote that consensus could be held immediately, and he rejected the condition that requires the death of all *mujtahids*. He did not grant the scholar who accepted consensus the right to reverse his opinion. The whole discussion is theoretical, because we know a meeting of all scholars never happened. However, the discussion is still relevant because it has strong connotations with the issue of *al-sākit*, or the silent scholar. We have to give those silent scholars, whose opinions they have not declared, enough time to ponder the issue discussed and decide about it. This is why Al-Ghazālī writes again that if the to-be-consensus has spread long enough to be known, and they are still silent, then, their silence is a confirmation, so that a consensus could be possible. Ḥasan al-ʿAṭṭār (1766-1835 CE) writes that it could be any time, short or long, as new *mujtahid* scholars will continuously join the community of consensus, making this waiting continues to the end of times.[40] In fact, it is impossible to find a clear statement that makes a practical sense about the time frame. On the one hand, there is the theoretical assumption that one moment is enough. However, it is enough if it could happen at all. On the other hand, *reasonable* time should pass, so that it is likely that every one of the community of consensus has already known about it, thought about it, and accepted it. There is no need

[38] Al-Zarkashī, *Al-Baḥr al-Muḥīṭ* 4, 503-507.

[39] al-Ghazālī, *Al-Mustashfā min 'Ilm al-Uṣūl*, 373.\

[40] Ḥasan Al-ʿAṭṭār, *Ḥāshīyat al-ʿAṭṭār ʿala Jamʿ al-Jawāmiʿ* (Beirut: Dār al-Kutub al-'Ilmiyah, n.d.), 215–220.

for a declaration to confirm the acceptance. It is the other way around: we need a declaration of the rejection.

The above discussion evokes a crucial question: is it possible at all that a consensus could be sanctioned? This question is in the heart of every scholar's discussion of *ijmāʿ*. There are three questions about its possibility: could all *mujtahids* have consensus on a matter; could it be known; and could it be transmitted? Al-Zarkashī evokes an anonymous argument that people cannot have consensus on eating one kind of food.[41] It seems this argument was known, for Al-Ghazālī too writes that yes, it is possible that all people would have consensus on eating raisins![42] Al-Zarkashī says impulses and food-taste are not like *aḥkām*, legal rulings, for they have different motivations. He, however, concurs that there could be no consensus on *khabar*, but it is possible to have consensus of *raʾy*. This consensus of *raʾy* is exactly what other scholars had to justify, for it is unexpected for different people to have one *raʾy*, opinion, on a certain issue.

Al-Ghazālī makes an interesting argument. He writes that "*dalīl taṣawūrih wūjūduh*," or the evidence of its being imaginable is its [actual] existence.[43] For him, the evidence that it is *possible*, or *imaginable*, is its very existence in matters like the consensus of Muslims to pray five times daily. To further encounter the raisins-argument, he puts it in the negative form, and writes that it is *not impossible* for them to eat raisins simultaneously. I will come to his curious logic in my brief discussion of the classic theory later on. Both al-Ghazālī, and al-Zarkashī agree that it is possible to know it, *al-iṭṭilāʿ ʿalayhi*, as well as to transmit it. It is important here not to confuse opinion with analogy, for Ghazālī concurs that agreement of analogy, *qīyās*, is less likely to happen. More important than their agreement about its possibility is the terminology they are using in constructing their argument. As I said, I will come to this point later on, but I want now to only include some of these terms: *mumkin ʿādatan, imkānuh ʿādatan, lā tamnaʿ al-ʿādah*, and *taṣawūr wūjūdih*. This entire terminology is

[41] Al-Zarkashī, *Al-Baḥr al-Muḥīṭ*, 437–438.

[42] al-Ghazālī, *Al-Mustashfā min ʾIlm al-Uṣūl*, 305.

[43] Ibid., 304.

theological, and speculative. They refer to its "ordinary possibility," and "the possible imagining of its existence." The sphere they are moving into, however, is not the usual sphere of legal rationality; it is theological, speculative, and theoretical rather than practical.

The scholars who moved into the expected sphere of legal rationality could not comprehend the possibility of *ijmāʿ* to exist. Some logicians, Shiite scholars, and possibly al-Naẓẓām (775-845 CE) denied the logical possibility of making consensus, when geographical, and intellectual factors are taken into consideration. Al-Rāzī restricts its possibility to the time of the Companions.[44] Al-Āmidī presents the argument of its denial, and, interestingly, uses the same speculative theological terminology. He writes, "*al-ʿādah tuḥīl*, it is *usually* (or normally, or ordinarily) impossible, that they agree on one opinion, exactly as it is normally impossible for them to eat the same food in the same day."[45] However, he agrees with the majority that it is possible for consensus to exist using al-Ghazālī's logic: "*al-wūqūʿ dalīl al-taṣawūr*," or its real existence is the evidence of imagining it.[46]

It is curious to review how the scholars legalized *ijmāʿ*. Basically, there were three different sources of legalizing *ijmāʿ*: Qurʾān, Ḥadīth, and reason. No one of them was absolutely convincing or accepted. The list of quoted Qurʾānic pieces was growing. There were pieces that attribute to Muslims integrity, goodness, allegiance with God, being the righteous witnesses on other peoples, etc. to justify their power to sanction new *aḥkām*. Scholars do not have *ijmāʿ* on any piece of them. Al-Āmidī discusses the Qurʾānic evidence in twenty-five pages to eventually state, "Know that holding on these *āyāt*, though they are good for pondering, *mufīda li-al-ẓann*, they are not good to provide certainty. That who claims certainty to the matter [*ijmāʿ*], must not count on the doubtful to prove it. It is good for only those who think it [*ijmāʿ*] is doubtful, *ẓannīyyah*, and rational, *ijtihādīyyah*."[47] By *ẓannī*, al-Āmidī means the text is ambiguous; its meaning is not

[44] ʿAbd al-Rāziq, *Al-Ijmāʿ*, 23.

[45] al-Āmidī, *Al-Ihkām fī Uṣūl al-Ahkām*, 263.

[46] Ibid., 264.

[47] Ibid., 290.

clear; its indication of the legislation of *ijmāʿ* is not obvious; other available interpretations of those verses are more convincing.

Scholars searched *ḥadīth* to find their evidence. There are two directives in the reports they selected: a Muslim must not step away from *al-jamāʿah*, the community, and the Muslims' community cannot agree on an error or falsehood. The first directive of sticking to the group was critiqued by many scholars for being, like the Qurʾānic quotations, *ẓannī*. The directive for Muslims to come together does not immediately mean a scholars' consensus is a source of legislation. The second directive, which comes in different phrasing, and wording, is clear and decisive: if Muslims come together into one body that has one opinion, this opinion is infallible. The text is clear and decisive; its meaning cannot be *ẓannī*. However, what makes it still *ẓannī* is its *sanad*. A thorough examination of the chain of transmitters of these reports immediately reveals embarrassing problems. A scholar is not supposed to tolerate such a *sanad*. He is especially not supposed to tolerate it in sanctioning a *source* of legislation.

After searching the Qurʾān and Ḥadīth, scholars turned to reason. The basic argument is that it is normally impossible, *mustaḥīl ʿādatan*, that all scholars would have consensus on something that is false, and they have an agreement that *ijmāʿ* is a legitimate source of legislation.[48] This argument is circular: the evidence of consensus is the consensus of scholars. Therefore, it was frequently rejected. Al-Āmidī introduces a curious argument: the reports of *ḥadīth* are reliable, not because of their *sanad*, but because it is normally impossible, *al-ʿādah al-muḥīlah*, for all those scholars to accept them, and make them the basis of *ijmāʿ* unless they are true reports. It simply means he is grounding the evidence of *ijmāʿ* not in *ijmāʿ* itself. He insists that it is *al-ʿādah al-muḥīlah*, not consensus itself, that validates those reports.[49] In other words, it is the credibility of those reports that validate consensus –credibility that is rooted in the acceptance of scholars to these reports!

In *al-Mankhūl*, al-Ghazālī writes,

[48] ʿAbd al-Rāziq, *Al-Ijmāʿ*, 39–40.

[49] al-Āmidī, *Al-Ihkām fī Uṣūl al-Ahkām*, 294–297.

> So if it is asked: what is your choice in proving *ijmāʿ*, we will say there is no hope in a method of reason, as there is nothing there that could be indicative. And it [*ijmāʿ*] was supported with neither the method of *samʿ*, report of *ḥadīth*, with *khabar mutawātar*, text that is transmitted by many people, nor with a text of the Book. And proving *ijmāʿ* with *ijmāʿ* is *tahāfut*, ridiculous. And the surmised analogy has no place in *al-qaṭʿiyyāt*, the definitive. Those are the sources of rulings. Nothing is left behind but *masālik al-ʿurf*, ways of customs.[50]

Left with only *ʿurf*, al-Ghazālī explains that what he means with *ʿurf* is not what this concept refers to in *uṣūl*—that is the customary culture and habits of Muslims. He means *ṭard al-ʿādah*, or the perpetual nature of things. In the normal course of life, people will not gather, all of them, to make a lie. It just does not happen! Is it *ḥujjah*, a legal evidence? Al-Ghazālī says: yes, it is called evidence metaphorically, *yusammā ḥujjah majāzan*.[51] It seems al-Ghazālī was not happy with this end. In *al-Mustaṣfa*, he further refines his argument. He calls the previous argument *ʿilm al-istidlāl*, knowledge of deduction. He keeps it, and considers that consensus as relying on *mustanad marfūʿ*, a report from the Prophet that its *sanad*, or chain of transmitters, is unknown. However, he introduces a new argument that he calls *al-ʿilm al-ḍarūrī*, or the necessary knowledge. Each of those reports is not, *sanad*-wise, reliable, but the whole of them is reliable. There are many of them; too many to be baseless. This is not an uncommon method in *fiqh*.[52] He writes, "It is like what is known by a number of presumptions, each of them is probable, but all of them are beyond probability. [This is how] the necessary knowledge could be available."[53]

Al-Ghazālī is fully aware of the danger that Stewart points out: excluding a Muslim from the community of believers on the basis of denying *ijmāʿ*. *Ijmāʿ* has to be followed; it is obligatory. Is not fasting obligatory too? Will a Muslim become unbeliever for missing this commandment? Stewart answers this question too. If you deny that fasting is a commandment, you are excluded from

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[50] Abu Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *Al-Mankhūl fī Taʾlīqāt al-Usūl* (Damascus: Dār al-Fikr, 1980), 305.

[51] Ibid., 306–310.

[52] al-Ghazālī, *Al-Mustashfā min ʾIlm al-Uṣūl*, 298–305.

[53] Ibid., 305.

the community of believers. If you just miss the commandment, even though you fully recognize its significance, you are still a Muslim. Therefore, *denying* consensus is such a serious matter. Al-Ghazālī is clear about who could be excluded from the community. He lists the reasons of exclusion and makes this statement the last passage in his book. He writes,

> If it is said: what makes him an unbeliever? … It goes to three kinds: The first is what is unbelief in itself, like denying the Creator, and His attributes, and denying prophethood. The second is what embracing it blocks the recognition of the Creator and His attributes, and recognizing His messengers … The third is what is known to come from only a non-Muslim, like worshiping fire, prostration to idols, denying a chapter from Qurʾān, denying some messengers, regarding adultery and drinking wine as permissible, and quitting prayer. In short, it is denying what has been known of Sharīʿah by *tawātur*, transmission, and *ḍarūrah* necessity.[54]

This is not a unique position to al-Ghazālī. Ḥasan al-ʿAṭṭār wrote,

> He said in *al-Burhān* that it is spreading on jurists' tongues that the denier of consensus is an unbeliever. It is certainly false, for that who denies *aṣl al-ijmāʿ*, consensus as a source, does not become an unbeliever. Calling people unbeliever and excommunicating them is not an easy thing. … The denier of that which has consensus upon, which is known of religion by necessity, *al-mujmaʿ ʿalayhi al-maʿlūm min al-dīn bi-al-ḍarūrah*, becomes an unbeliever, not because of his denial of *al-mujmaʿ ʿalayhi*, but because of his denial of *al-maʿlūm min al-dīn bi-al-ḍarūrah*.[55]

In fact, we find a similar discussion in al-Zarkashī, in which he quotes a number of earlier scholars. It is interesting in this discussion that the classification of Muslims into commoners and specialists runs to the advantage of the commoners. A commoner is not required to know the consensus of the specialists. If he denies it, he will still be a member of the community of believers. There is a quotation of al-Jūwaynī (D. 1040 CE) in which he states that it is the scholar who would be excluded from the community of believers, if he denies the consensus of scholars.[56]

Scholars had to decide about a crucial question: is the rule of *ijmāʿ* definitive, or probabilistic, *qaṭʿī*, or *ẓannī*? The answer is not easy. The *qaṭʿī-ẓannī* is a frequent question in classic literature of

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[54] Ibid., 335–336.

[55] Al-ʿAṭṭār, *Ḥāshīyat al-ʿAṭṭār*, 238–239.

[56] Al-Zarkashī, *Al-Baḥr al-Muḥīṭ*, 526.

Islam. Sometimes, it is contrasted to another dichotomy of *thubūt-dalālah*, which refer to the historical *authenticity* of the text versus its *meaning*. A verse of the Qurʾān is always *qaṭʿī al-thubūt*, authentic, but it is usually *ẓannī al-dalāla*, its meaning is uncertain. *Ḥadīth* has frequently occupied the opposite position; being *ẓannī al-thubūt*, uncertain in its authenticity, but *qaṭʿī al-dalāla*, certain in its meaning. For *ijmāʿ*, the two questions had to be answered. First, is there really *ijmāʿ* about this issue? Many scholars, especially in a context of heated polemics, use *ijmāʿ* to validate their own opinion, and deny their adversary, casting him as *shādh*, or eccentric. We have, therefore, to be careful when you decide that there is *ijmāʿ* about a certain matter. The *thubūt* of *ijmāʿ*, its authenticity, is always a matter of investigation. There are some works that tried to document collections of *ijmāʿ*, like *Marātib al-Ijmāʿ* of Ibn Ḥazm, and *al-Ijmāʿ* of Ibn al-Mundhir. Rather than reflecting the possibility of the task, they showed the size of *khilāf*, or dispute. The text of these works was critiqued by other scholars, and the parts that went undisputed were either too insignificant to raise a dispute, or too significant not to be known.

Scholars had then to answer the legally important question: the question of *dalālah*, or significance; is it *qaṭʿī*, or *ẓannī*? There are those who decided *ijmāʿ* is *qaṭʿī al-dalālah*, which means its rule is absolute, or ultimate. Al-Shawkānī (1759-1834 CE) attributes this opinion to a number of scholars like: al-Ṣayrafī, Ibn Burhān, al-Dabbūsī, Shams al-Aʾimmah, and al-Aṣfahānī.[57] He also attributes the opposite position to other scholars, like al-Rāzī, and al-Āmidī, who thought *ijmāʿ* is *ẓannī al-dalālah*.[58] Most of scholars, it seems, and that what Al-Shawkānī concurs, held that it is *qaṭʿī* if *ṣarīḥ*, that is explicitly confirmed by all the *mujtahids*, and it is *ẓannī* if it was only *sukūtī*, or anonymous. Al-Zarkashī evokes the same discussion and reaches the same conclusion, that it is definitive if explicitly confirmed, and probabilistic if it is anonymous.[59] He also invites a curious argument, which he seems to accept:

> Al-Bazdawī, and a group of *Ḥanafiyyah* said: *ijmāʿ* is differentiated into a number of levels. *Ijmāʿ* of the Companions is like the Book, and *al-khabar al-*

[57] ʿAbd al-Rāziq, *Al-Ijmāʿ*, 91.

[58] Ibid.

[59] Al-Zarkashī, *Al-Baḥr al-Muḥīṭ*, 443.

> *mutawātir*, the most authentic report of *ḥadīth*. *Ijmāʿ* of those who come after them is like *al-ḥadīth al-mashhūr*, the well-known report of *ḥadīth*, even that its publicity does not stand to its *sanad*-wise authenticity. The *ijmāʿ* that was preceded by *khilāf*, dispute, in an earlier generation is like *khabar al-wāḥid*, a report of *ḥadīth* transmitted by one person.[60]

In another passage, al-Zarkashī discusses the anonymous *ijmāʿ*. He presents thirteen different opinions that spread an entire spectrum from its being *qaṭʿī* and *wājib*, and down to its not being even a legitimate *ijmāʿ*.[61]

The definitiveness, or probabilistic nature of *ijmāʿ* has serious consequences when it comes to its relationship to both the text, and *ijtihād*. The majority of scholars maintained that *ijmāʿ* is based in *raʾy*, so it is inferior to *khabar*, and cannot have authority over it, in terms of *naskh*, abrogation. Other voices, however, argued that *ijmāʿ* can, and did, abrogate the Qurʾān, and *Sunnah*. They find their evidence in ʿUthmān's ruling to give the mother one sixth of inheritance instead of one third, as the Qurʾān says. Asked by ibn ʿAbbās for an explanation, he said that it is the rule of "your people, boy!"[62] They also rely on Abū Bakr's changing of the regulations of distributing *zakāt*, which were mentioned explicitly in the Qurʾān.[63] It seems, nevertheless, that scholars were more tolerant of *takhṣīṣ*, or considering the case as particular rather than general, than they had been with *naskh*, or abrogation. Al-Āmidī simply states that "I do not know about any dispute in *takhṣīṣ* the Qurʾān, and Sunnah by *ijmāʿ*.[64] However, we should not rush into conclusions, for a careful review of the literature of those scholars reveals that they hold *ijmāʿ* valid, when it is supported by, or relying on, *khabar*. The *ijmāʿ* that is completely based on *raʾy* would not count for them. Nevertheless, *ijmāʿ* is still put in priority to text, in terms of practicality. Before reviewing the text, a scholar has to check *ijmāʿ* first. If he finds the solution of his problem, the ruling he is trying to make, then *ijtihād* will be unnecessary. In

[60] Ibid.
[61] Ibid. 494.
[62] ʿAbd al-Rāziq, *Al-Ijmāʿ*, 97.
[63] Ibid., 97–98.
[64] Ibid., 98.

addition, unlike text, *ijmāʿ* itself can be subjected to neither abrogation, nor *takhṣīṣ*.[65]

That brings us to the interesting question of: could *ijmāʿ* be changed by a newer *ijmāʿ*? The easy, and common answer is no! Once sanctioned, *ijmāʿ* is supposed to be observed forever. After all, what would be the point of creating *ijmāʿ*, and casting it with shadows of infallibility if it is subject to change in the future? Some scholars, however, decided that if *ijmāʿ* is based on *mustanad*, a document, which means a textual evidence, then it could be changed if a newer evidence is found. Moreover, a new *ʿillah*, legal reason, of the text could be thought of, and, therefore, a new analogy could emerge with a new *ijmāʿ*.[66] A related, and important, question is about the possibility of sanctioning *ijmāʿ* at all if the issue concerned was subject to study and dispute in an earlier generation. To sum up a long discussion, we can conclude that it was and remains very controversial.

The Legal, Sociological and Theological Dimensions of *Ijmāʿ*

I want to articulate the issue of *ijmāʿ* from legal, sociological, and theological angles. Legally, *ijmāʿ* has not been, in terms of practice, central to the body of *fiqh*, not if measured to, for instance, *qīyās*. The famous book of ibn al-Mundhir (856-930 CE) that supposedly collects the articles of *ijmāʿ* is a small book that has a collection of rulings, which were found to be agreed upon by scholars. A thorough review into the collection of ibn al-Mundhir reveals *regulations* like: they had consensus that ablution with water is permissible.[67] Even with this nature of text, the editor of the work had to correct these *ijmāʿ* claims by writing in the footnotes the *khilāf* about them. *Ijmāʿ*, as far as law is concerned, was an issue for the *uṣūlī*, not the *faqīh*. It is not an issue for the jurist to help him make a *fatwa*; it is an issue for the *uṣūlī* to discuss it within a different universe of discourse. The discourse of *uṣūlīs* is not mainly concerned with the rulings; it is concerned with the *philosophy* of law, and its rationalization. The *uṣūlī* was

[65] Al-Zarkashī, *Al-Baḥr al-Muḥīṭ*, 447.

[66] ʿAbd al-Rāziq, *Al-Ijmāʿ*, 98, 101, 103, 108.

[67] Abū Bakr Muḥammad ibn al-Mundhir Al-Nīsābūrī, *Al-Ijmāʿ* (ʿAjmān: Maktabat al-Furqān, 1999), 32.

distinguished from the *faqīh* in the discussion of *ijmāʿ*. For instance, al-Ghazālī stated that the sanctioning of *ijmāʿ* is the work of the *uṣūlī*. He tolerated the *faqīh* only if he is *mubarraz*, prominent. It is important to situate *ijmāʿ within the right* discourse, to which it belongs. It belongs to the theoretical discussion of law, its academic sphere, not to its practicality, and use.

Ijmāʿ has also a very important function within the whole structure of law. There has to be a concept that balances, if not in reality, then at least in theory, the growing, and ever-expanding concept of *khilāf*. It completes, from the rational point of view, the theoretical structure of law. Besides, it provokes significant discussions within the community of the *uṣūlīs.* The contestation of different ideas about consensus helps scholars to develop, rationalize, and concretize their different schools. That does not make it a less significant concept; it just does not make it the most applied concept in the philosophy of law.

Sociologically, the political system of Muslims had to develop from concentric circles of representation, and consultation that have the Prophet/Caliph in its center to a more de-centralized system that helps distributing and regulating spheres of authority and socialization. The model of the Prophet who has the political and religious power, who guides the community because of his relation to the divine could not continue for long decades. His power, like *ijmāʿ*, went to the companions, and from them down to the next generation. New generations of scholars were emerging and replacing older authority figures not because of their connection to an earlier generation, or the Prophet himself, but because of their scholastic skills. Politically, there was a Caliph who was trying helplessly to maintain the older nature of authority, which the Prophet, or the *Rāshidūn* enjoyed. Shiite Islam opened a space to articulate infallibility through the Imamate system. That was not the case in Sunni Islam, where it was limited to a theoretical space: *ijmāʿ al-ummah*. If the Shiites have the house of the Prophet, the Sunnis have *al-jamāʿah*; they are *ahl al-sunnah wa al- jamāʿah*.

Ijmāʿ emerged on a background of civil war, as I wrote earlier. Sociologically, it had to project a central value in Islam: social unity. In his talking about *ijmāʿ* al-Shāfiʿī wrote,

> He said: so, what is the meaning of the Prophet's directive to abide to their group, *jamāʿah*? I said: it has but one meaning. He said: how could it have only one meaning? I said: if their group is spreading in different countries, then no one can be with a group whose bodies are dispersed. And bodies when exist they exist with bodies of Muslims and non-Muslims; pious, and immoral. So, gathering as bodies has no meaning [as *jamāʿah*,] for it is impossible, and because the gathering of bodies signifies nothing. This gathering has no meaning. It is [the abide to] what their group embraces of knowing the permissible, and the forbidden, and the obedience in these matters [that matters.] That who holds what the group of Muslims says is gathering with this group. That who disobeys what the group says will be leaving the group he was ordered to abide to.[68]

This is, then, the social unity that was not possible physically, but could project in the moral imagination of the group. In this sense, *ijmāʿ* played a role similar to that of modern national identity: creating a discourse of unity that is rooted in the social *imaginaire* of the group.

Scholars did possess power and did exercise it. However, that never happened in a social vacuum, where scholars make a formidable class that can take final, and indisputable decisions. The exploration of the classic theory of *ijmāʿ* reveals the great size of *khilāf* among scholars themselves. The community had different proposals, and without their confirmation *ijmāʿ* cannot pass. Community leaders too, some of them were ṣūfī leaders, frequently challenged the authority of the scholars. With no modern bureaucracy, and modern means of administration, scholars had to appeal to the community at large to get their authority approved. Dissidence among scholars did happen and was condemned by scholars. However, dissidents had at their disposal a number of means to negotiate the scholars' *ijmāʿ*. For instance, they had the literature of *khilāf* of the scholars themselves. Ibn Ḥazm regularly relied on this strategy to the point that made some of his students confused about his own doctrine, as he used to refute some scholars' claims by using other scholars' claims, giving a false impression that those claims are his own. Dissidents could also appeal to the community, or segments of it. They could ally to different political powers. They could appeal to

[68] Al-Shāfiʿī, *Al-Risālah*, 475–476.

those who have the economic means to support their work. More importantly, they could always rely on the *naṣṣ*, which is less likely to fail them. The *ẓannī* meaning of *Quʾārn*, and the *ẓannī thubūt* of *ḥadīth* would make it easier for them to initiate new doctrines. Ibn Ḥazm, Muḥammad ʿAbdul-Wahhāb (1703-1792 CE), and modern scholars, like Muḥammad ʿAbduh (1849-1905 CE) are but a few examples of creating schools outside the realm of consensus. Goldziher wrote about the community's power to sanction consensus through the social tradition. He reflected on *al-mawlid al-nabwī* as an example of *bidʿah*, or an innovation, that through social consensus turned into *sunnah*, or tradition.[69] He also explained the dual position of al-Ghazālī using *ijmāʿ* to create *sunnah*, and ibn Taymīyah (1263-1328 CE) using *sunnah* to refute *ijmāʿ*, a strategy ibn ʿAbdul-Wahhāb would use centuries later on.[70]

The theological aspect of *ijmāʿ* is no less curious. Goldziher, in *Introduction to Islamic Theology and Law*, introduces a bi-fold argument: *ijmāʿ* came to be the central determinative factor of making the orthodox community; and Sunni Islam is based on *ijmāʿ* as much as Shiite Islam is based on authoritarian principle.[71] Stewart explains, develops, and modifies this argument. He agrees with Makdisi that *ijmāʿ* was used in the negative sense: not to state who could be included within the orthodox community, but to exclude those who would not be a part of it. However, he finds it partially true, as "for the majority of jurists in the recognized Sunni *madhhabs* from the tenth century on, consensus represented orthodoxy. As the legal profession gained in power and influence, this version of orthodoxy, one among several espoused by claimants to religious authority, came to dominate Islamic religious discourse."[72] He further stresses his argument by writing, "While it is true that Islam does not have sacraments, a priesthood, or an ecclesiastical hierarchy, many well-defined groups, including that of the jurists, have acted as religious authorities during one

[69] Ignaz Goldziher, *Introduction to Islamic Theology and Law* (Princeton: Princeton University Press, 1981), 232.

[70] Ibid., 240, 244–245.

[71] Ibid., 50, 191.

[72] Stewart, *Islamic Legal Orthodoxy*, 44–45.

historical and geographical context or another. They may have disagreed with other competing groups as to their legitimacy and jurisdiction, but they nevertheless have claimed, and exercised, the right to decide questions of acceptable and unacceptable belief."[73] We cannot agree any more with Stewart, except that he does not tell us to whom their decisions of belief and unbelief will be directed. The essential question is: was this power exercised in terms of writings and discussions, or in terms of interrogating political institutions that have the power to subject individuals to confessions, and, then, execute punitive measures against the unbelievers of them. The latter case did happen, indeed, but, never in any institutionalized manner, and always within a specific, more important political context.

Stewart also introduces a compelling argument: the orthodoxy/orthopraxy dichotomy proposed by some scholars to argue that in Christianity theology is the main concern, while in Islam it is law, this dichotomy, is baseless. He refers this confusion to the wrong conflation of two dichotomies: theology/law, and belief/practice.[74] We can accept the first dichotomy, but not the second. Stewart wants to rescue the belief element within the law. He introduces the example of drinking alcohol: if a Muslim believes drinking it is permissible, then he would be excluded from the community; if he just drinks it, he will only be sinful.[75] Again, we cannot agree more with Stewart. However, we have to accept his invitation to explore this belief element in Muslims' law.

Three areas, I argue, can display the penetration of theology to the corpus f law. First, there is the area of terminology. We brought earlier these phrases: *mumkin ʿādatan*, *al-ʿādah tuḥīl* and *al-taṣawūr*. All these phrases had their roots in theological discussions. Theologians argued that in Islam we may find what is *mustaḥīl ʿādatan*, usually, normally or ordinarily impossible, but never what is *mustaḥīl ʿāqlan*, rationally or logically impossible. Here, the possible and the impossible are posed in intersection with the regular and the rational. Jurists wanted Muslims to *believe*

[73] Ibid., 45.
[74] Ibid., 46–47.
[75] Ibid., 47.

in the possibility and legitimacy of consensus—that is the possibility of an agreement on a certain issue by a united ummah, not necessarily the *practice* of it. Their method of sanctioning consensus as a source of legislation had to go through theology. It is *belief*, after all, that made the *Qurʾān* and *sunnah* sources of legislation. Other sources, like *qīyās*, could be authorized because they are rooted in these two textual sources. *Ijmāʿ* failed this test. Jurists were aware that the basic problem of *ijmāʿ* is how to situate it in theology –how to make it an element of *belief*, since it could not be clearly rooted in the text. They had to rely on the lexicon and methods of speculative theology, not rational law. Believing in *ghayb*, the basic argument went: it could be *mustaḥīl ʿādatan*, but it is not *mustaḥīl ʿāqlan*. Like *ghayb*, *ijmāʿ* was considered to be not impossible rationally, *mustaḥīl ʿāqlan*, if it is impossible ordinarily, *mustaḥīl ʿādatan*.

In discussing consensus, theology is significant in a second area. It is the fine distinction between *ʿilm* and *ʿamal*, or belief and practice. After framing *ijmāʿ* in theological terms, jurists had to reverse the process, and study the effect of *ijmāʿ* on theology itself. Al-Zarkashī writes that al-Bazdawī[76], and some *Ḥanafī* jurists put *ijmāʿ* of Companions, *ijmāʿ* of next generation, and *ijmāʿ* preceded by *khilāf* in the status of *mutawātar*, *mashhūr*, and *āḥād* of *Ḥadīth* consequently. In regard to the two questions of *ʿilm* and *ʿamal*, there are four opinions: both of *ʿilm* and *ʿamal* are *wājib*; none of them is wājib; *ʿilm* is *wājib* if there is an absolute agreement about it; and *ʿilm* is *wājib* if it is the *ijmāʿ* of Companions. What is at stake here is a cautious and calculated use of *ijmāʿ*, so that it maintains its moral power in the possibility of a united community protected from falling error, but without abusing its power in the realm of law or theology.

The third area that needs further study is the concept of *ḥaqq*, truth, a concept that makes the heart of theology. Al-Zarkashī raises the traditional question about *ḥukm*, ruling, is it *qaṭʿī* or *ẓannī*? Does a ruling of law reflect *truth* or not? The agreement of

[76] I checked it in *Kashf al-Asrār*, and it seems Bazdawī's argument was not that *ijmāʿ* which was preceded by *khilāf* is in the status of *ḥadīth āḥād*, but that *ijmāʿ* transmitted by one person is like *ḥadīth* transmitted by a one person, that is *āḥād*.

jurists is that rulings could be based on *ẓann*, but their sources have to be *qatʿī*. Things go all complicated with *ijmāʿ*. The ruling of this source had to be true, because *al-ummah*, in its wholeness, is supposedly protected from falling in error, but the source itself is, unfortunately, ẓannī. The only way to get out of this problem is to base the source in its own practice. This is the ugly circular argument, whose inconsistency could not be ignored by jurists. This is why Al-Zarkashī decided that *ijmāʿ* had to be based on *mustanad*. He wrote, "If [*ijmāʿ*] was sanctioned without *mustanad,* it would be a creation of religion after the Prophet; and it is false."[77] Al-Zarkashī, however, was not particularly interested in this angle while discussing the truth of *ḥukm*. In this passage, the theological question of truth is brought to the ruling of law, not to one of its foundations. Al-Zarkashī quotes ibn Burhān in his statement that *al-ḥukm* is always *qaṭʿī.* Ibn Burhān states that *al-ẓann* in *al-sharʿīyāt* occupies the same status as that of *al-ʿilm al-qaṭʿī* in *al-qaṭʿīyāt*. Al-Zarkashī objects and states that *al-ḥukm* could be either *qaṭʿī* or *ẓannī*. It is no problem that *Sharīʿah* is full of *ẓannīyāt*, for they eventually rely on *qatʿīyāt*. He refers to the reliance of probabilistic rulings on definitive foundations of legislation. This discussion immediately invites a series of theological questions, for instance, what is *al-ḥukm* of God; could God have a more than one *true* ruling in a single situation; and what is the required work of us, *al-taklīf al-wājib*? After a long discussion, he decides that God has one true *ḥukm.* The *mujtahids* have to exercise *ijtihād* to know it. Once they know it, *al-taklīf al-wājib* will be to submit to this ruling. However, if they miss it, they will be submitted to a different *ḥukm* because this is now a new situation; the new situation is conditioned with their missing the first *ḥukm.* Accordingly, they will have a new *taklīf wājib* to submit to it. In short, *"wujūb al-ʿamal bimuqtaḍa al-ẓann qaṭʿī,"*[78] or the obligation to work according to uncertainty is certain!

[77] Al-Zarkashī, *Al-Baḥr al-Muḥīṭ*, 450.

[78] Ibid., 123–125.

Conclusion

There are three points that I want to highlight in this conclusion. First, there is obviously a large corpus of contradictions relevant to each aspect of *ijmāʿ*, whether its authority, textual foundations, identifying those who issue it, its recognition, or its timeframe. Facing these contradictions, the modern, mostly Western, scholarship seems exhausted as it desperately tries to identify the essence of *ijmāʿ* and define its truth, so that it reaches what is called a well-defined and concrete *ijmāʿ*. I am saying neither that this scholarship has been selective in presenting *ijmāʿ* as theorized and debated among Muslim scholars, nor that the arguments and statements that developed out of this presentation lacked strong evidence. Take the issue of *ʿiṣmah*, infallibility, as an example! George Hourani writes that "with all these faults, it did not fall entirely out of sight, for it did support, however vaguely, the major idea in classical thought about consensus, the idea of its infallibility."[79] Wael Hallaq explains that Hurgronje furthers this argument much more. Hallaq writes, "In sum, Hurgronje's contention seems to be that in the final analysis consensus was the ultimate authority on interpreting, understanding, and authenticating the Qurʾān and the Sunna, and that the 'foundation of foundations' of Islam was the self-proclaimed infallibility of the community."[80] We move from a claim that in spite of the obvious weakness of *ijmāʿ*, there came to existence a concrete principle of infallibility, to a much stronger claim that this principle of infallibility became the foundation of foundations of Islam. Hallaq takes the argument one further step by granting *ijmāʿ* political power, as it is claimed by several modern scholars. Hallaq writes, "Unlike the theory of Shāfiʿī, which recognized as infallible only the consensus of the community when based on a reliable text, the great majority of later jurists held that infallible consensus is the consensus of the *mujtahids* (the qualified jurists who are authorized to discover the

[79] George F. Hourani, "The Basis of Authority of Consensus in Sunnite Islam," *Studia Islamica*, no. 21 (1964): 20.

[80] Wael B. Hallaq, "On the Authoritativeness of Sunni Consensus," *International Journal of Middle East Studies* 18, no. 4 (1986): 429.

law) on any case of law, including case solved by means of qiyas which may take its premises from ahadi traditions."[81] Hallaq quotes Shawkānī (1759-1834 CE) in *Irshād*, but the quote, that is placed in the footnotes, reads, "Consensus is the agreement of the mujtahids of the community of Muḥammad … on a certain matter in a certain age." Where is any mention of *ʿiṣmah* here?

What this article finds problematic is a movement within the modern and Western scholarship, a movement that we see quite frequently, a movement to turn a corpus of tradition that includes gaps and contradictions into a set of coherent conclusions that turn quickly into political power so that everything becomes self-explained: this group produced these ideas so that it monopolizes this power and exercises it against its competitors. *ʿIṣmah* was indeed mentioned in classical texts, but in passing, in a context of contradictory arguments and never to claim any divine infallibility to the community. Where in Sunni fiqh or theology, could we find a separate and coherent discussion of *ʿiṣmah*? In articulating *ʿiṣmah*, Hallaq quotes al-Qarāfī (1228-1285 CE). Al-Qarāfī, however, discusses *ijmāʿ* in long pages, brings all arguments that support or deny infallibility equally, and admits the lack of a single evidence on *ijmāʿ* that is strong enough to legitimize it by writing that its legitimacy is grounded in the induction of several pieces of texts from the Qurʾān and Ḥadīth in addition to the lives of the Companions.[82] The community, even in its generality, is not sacred, or a site for a historical revelation of divinity as it is in Judaism. Al-Shāṭibī in *Al-Muwāfaqāt* explains *ʿiṣmah* by arguing that the *Ummah* is protected from error because God promised the preservation of His religion, and *not leaving it to the people*. It is God, again, Shāṭibī argues, who is responsible for making scholars, and who take care of each of the Islamic sciences.[83] The repeated notion that *ijmāʿ* was used to legalize new rulings and guarantee their perpetual validity is absurd, since in reality it only confirmed

[81] Ibid., 433.

[82] Aḥmad Al-Qarāfī, *Tanqīḥ al-Fuṣūl fī Ikhtiṣār al-Maḥṣūl fī al-Uṣūl* (Beirut: Dār al-Fikr, 2004), 255.

[83] Abū Isḥāq Ibrāhīm ibn Mūsā al-Gharnatī al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharīʿah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2004), 251–253.

the already recognized minimum necessary for each individual to claim Islam.

The second point is an emphasis on the significance of theology in understanding *ijmāʿ*. As I showed above, theology can be found in the terminology that is used in discussing *ijmāʿ*, in the distinction between belief and action, as well as in the articulation of the notion of truth. In *Al-Mustaṣfa*, al-Ghazālī, responding to the question of authenticity of *aḥādīth al-āḥād*, writes, "Sanctioning an action, once there is *khabar*, narration, (that dictates this action) is one thing; whether this *khabar* is true or a lie is a different thing."[84] In other words, *taklīf*, legal responsibility, is grounded in the mere existence of *khabar*, not in its truthfulness, once your best guess is that this *khabar* is likely true.[85] Muslim jurists established several legal principles that circle around *ghālib al-ẓann*, or 'predominant probability." For instance, there is this rule: what should be considered is the predominant, the most frequent, not the rare.[86] When two elements mix, the rule is based on the predominant. The legal examples are countless. People are expected to lose focus in praying for sometime, to go to pilgrimage, and not forget to buy gifts and commodities that are not available in their native country, or to use water to perform ritual purity, even though the water is obviously not clear. In all these cases, the legal ruling is based on the predominant probability, *ghālib al-ẓann*. Interestingly, al-Ghazālī argued that even the rational evidence, that is deduction, is based on probability, since the universal is deducted from an examination of many, or perhaps most, but never all, of its particulars.[87] Unlike this relaxed position that admits and tolerates the lack of *truth*, we find a relentless chasing of such a truth in the modern Western scholarship of Islam. What Muslims have repeated for centuries about *ijmāʿ* is identical to their statements on *ghayb*: it is ordinarily impossible, but logically not impossible, or *mustaḥīl ʿādatan ghayr mustaḥīl ʿaqlan*. Their focus was not the

[84] al-Ghazālī, *Al-Mustashfā min 'Ilm al-Uṣūl*, 185.

[85] Ibid., 183.

[86] Al-Raysūnī Al-Raysūnī, *Naẓariyyat al-Taqrīb wa al-Taghlīb wa Taṭbīqātuhā fī al-ʿUlūm al-Siyāsiyyah* (Al-Manṣūrah, Egypt: Dār al-Kalimah, 2010), 102.

[87] Abu Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *Miʿyār al-ʿIlm fī Fann al-Manṭiq* (Cairo, Egypt: Al-Maṭbaʿah al-ʿArabiyyah, 1927), 160.

truth of *ijmāʿ* but its practical consequences, and that leads us to my third point.

The third point is the emphasis we find in the writings on *ijmāʿ* on its practical aspects, not its ontological essence. The main question that busy Muslim scholars is not about *ʿiṣmah* and whether it reveals the true intention of God. The main question is what should we do have all Muslims agreed upon a ruling? The simple answer is to follow them, for accurately identifying the intention of God is not a requirement in *ijtihad*. The assemblage of several evidences, none of them is strong enough to prove *ijmāʿ*, might not be enough to our modern standards. However, this assemblage, this *jamʿ*, which is more important than *ijmāʿ* as I argued in my upcoming article on *jamʿ*[88], is enough to legalize *ijmāʿ*.

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[88] Mohamed Mosaad Abdelaziz Mohamed, "The Linguistic and Sociological Dimensions of the Concept of Jamʿ: A Deleuzian Approach," *Islamology*, no. 2 (2020).

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