DOI: https://doi.org/10.67203/abulj.2019.hxyuyxei

AN EXAMINATION OF THE USE OF HUMAN REASONING (*IJTIHAD*) AS A SOURCE OF LAW IN THE EARLY PERIOD OF DEVELOPMENT OF ISLAMIC LAW

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1.1 Introduction

In Islamic law, the express textual injunction in the Quran and Sunnah are limited in number, while the incidents and problems of life are unlimited and unending. It would therefore be unreasonable and illogical to assert that all the problems and exigencies of life will be covered by the textual injunction. Reason demands that rules of law should be derived from the primary sources by scientific and methodological means.

The position of *ijtihad* is one that has generated a lot of controversies among Muslims, both past and present. The disagreement over the use of human judgement or rational opinion in deriving rules of the Shariah is further accentuated by the ever changing nature of the human community and the corresponding need of the law to cater for emerging issues, some of which were neither contemplated nor covered explicitly by the Shariah.

Thus, while some Muslims are at home with the application of 'juristic common sense' in matters of the law, others have declared that resort should always be made to the Qur'an and Sunnah as the only valid sources of Islamic law. The latter group has made assertions that neither the Qur'an nor the Prophet SAW and the early generation of Muslims ever made recourse to the use of rational opinion in matters of the law.

It is in the light of the foregoing that this paper aims to examine the use of opinion by the Prophet and the early generation of Muslims. This is with a view to correctly determine the position of human reasoning within the context of Islamic Law

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1.2 Meaning of Ijtihad bil Ra'y

Etymologically, Ijtihad is derived from jahd which means "strive". Ijtihad therefore literally means to strive. Technically, Al- Amidi defines Ijtihad as the total expenditure of effort in the search for an opinion as to any legal rule in a manner that the individual senses within himself an inability to expend further effort[1]. In its literal sense, *ra'y* means opinion and judgement. Technically, it is defined as a decision which the mind arrives at after thinking, contemplation and genuine search for truth in a case where indications are conflicting[2]. It is used in pre- Islamic Arabia to denote firmness in opinion. People of sound opinion whose view in matters are considered valuable are therefore referred to as *dhu'l ra'y.* People not in this category are considered to be of weak mind and are called *mufannad*[3]. The Arabs were therefore conversant with the use of *ra'y* and consequently it is not new in Islam to employ its use. Indeed, the term as used in the *Quran* reflects its use in pre-Islamic Arabia in one place. The people of Noah we are told in the *Quran* referred to his followers as people of weak judgement who are weak and lowly[4]. The term *'badi al- ra'y'* means devoid of sound opinion.

The use of the term in other places indicates that Allah sanctions the use of opinion[5]. This is obvious from the fact that the *Quran* consistently urges Muslims use their mental faculties, to think deeply, to reflect and ponder over the meaning of the words of Allah[6].

Ijtihad have been in use during the early days of Islam. For example, in the tradition of Muadh bin Jabal on the occasion of his departure to Syria said "*ajtahidu ra'yi*"[7] meaning I will use my own discretion. Umar was reported to have said "the matter is easy; we exercised Ijtihad *(qad ijtahadna)*"[8]. This was in response to reports related to him that the sun was seen again in the sky after Umar thinking the sun had set declared the end of fast. Malik was also reported to have frequently used the term in matters where no precedent was available from

[1] Al- Amidi, A. M (2010) *Al- Ihkam fi Usul al- Ahkam,* al-Maktabah al- Shamilah, Makkah, vol. 4, p.169; see also Al- Shirazi, I. A (1995) Al- *Lam'u fi Usul al-Fiqh,* Dar ibn Kathir, Beirut, Lebanon, p.198

[2] Ibn Qayyim, J. (2010) I'lam al-Muwaqqi'in an Rabbi al-Alamin, al-Maktabah al- Shamilah, Makkah, vol. 1, p. 24

[3] Hasan, A. op.cit, p. 1

[4] *Qur'an 11: 27*

[5] *Qur'an 4: 105*

[6] *Qur'an 44: 24*

[7] Al-Sajastany, A.S. (2009). *Sunnan abi-Dawood,* Dar al-Risalah al-Alamiyyah, v:5, p. 286

[8] Anas, M. (1951) *Al- Muwatta,* Dar Ihya al-Kutub al-Arabiyyah, Cairo, vol.1, p.303

the prophet[9]. It should be pointed out that *ra'y* was the instrumentality of Ijtihad. Ijtihad was used in the form of *ra'y*[10]. Ra'y therefore is integral in the discourse of the evolution of Islamic legal theology.

1.3 The use of *Ra'y* During the Time of the Prophet SAW

The use of *ra'y* started from the time of the Prophet. Not only did he use it but he encouraged its use. Some examples as to use of *ra'y* in this period will buttress this point. The prophet exercised his personal opinion in situations where there is no revelation. In one of such cases he stationed his army in a particular spot before the commencement of hostilities in the battle of badr. Hubab bn al-Mundhir asked the prophet if he had chosen the place in obedience to divine revelation or on his own personal judgement *(ra'y)*. The prophet replied that he it was his personal opinion. Hubab then suggested a better place to which in agreement, the Prophet replied 'You have made a sound suggestion' *"laqad asharta bi'lra'y*[11].

In another instance, he asked Sa'ad bn Muadh to decide the fate of *Banu Quraiza*. The prophet was reported to have said to Muadh, "render your judgement over them"[12]. This was an open invitation for Muadh to make recourse to his personal opinion. The tradition of Muadh bin Jabal cited earlier is also relevant in this context. The use of ra'y by the prophet and the fact that he sanctions and encourages his companions to use personal opinion is justified by the command of Allah to the prophet to seek counsel from his companions in matters of social policy[13]. The companions therefore were on many occasions asked to give their opinion on very crucial matters. For example, the problem of how to deal with the prisoners of war captured at the battle of badr was thrown to the companions[14]. The various instances that have been cited presuppose that that exercise of personal opinion was prevalent even during the time of the prophet.

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[9] ibid. Imam Malik accepted the use of Ijtihad to decide the compensation for an injury to a blind eye and amputation of paralyzed limb.
[10] Hasan, A. op.cit, p. 1
[11] Ibn Hisham, (1990) *Seeratu al-Nabi*, Matba'ah Hijazi, Cairo, vol. 2, p210
[12] Ibn Kathir, (2000) *al- Sirah al- Nabawiyyah* (An English Translaion) Garnet Publishing, UK, vol.3, p. 169
[13] *Qur'an* 2: 158
[14] Ibn Kathir, op.cit, vol. 2, p. 345

1.4 The use of *Ra'y* During the Period of the Companions

Available evidence supports the prevalence of the use of opinion by the companions after the demise of the prophet. In fact the Muslim community was more in need of the exercise of opinion when revelation ended with the death of the prophet. This was because the increase in the population of Muslims through conquest and expansion occasioned an equal increase in the needs of Muslims to find answers the numerous problems brought about by the growth and development of Islam. Even in cases that were covered by the text of the *Quran*, human criterion must be applied to correctly determine which verse is applicable to a specific case[15]. The use of hadith was much more in need of the application of human reasoning[16]. It will have to first be established that a tradition attributed to the prophet is not fabricated before it can be used. Furthermore there are instances where the text of the *Sunnah* appears to be contradictory and human judgement must be used to resolve such contradictions. Hence the companions according to the needs of the Muslims made ample use of *ra'y* to determine the correct approach to resolve these issues.

The earliest use of *ra'y* after the demise of the prophet was on the question of who will assume the mantle of leadership of the Muslims. Umar argued that Abubakar was most suited for the position. He in the absence of any clear instruction from the prophet as to who succeeds him, drew an analogy from the appointment of Abubakar by the prophet to lead the Muslims in prayer and asserted that if Abubakar can lead in religious matters then, why not in worldly matters[17]. This is an example of the use of reason to resolve a matter not covered by the text of *Qur'an* or *Sunnah*. Abubakar's nomination of Umar to succeed him is also another example of the use of opinion to arrive at a decision. Abubakar had made consultation with some of the companions before finally taking the decision to nominate Umar[18].

Umar made extensive use of *ra'y*. In fact some scholars referred to him as the master of the use of *ra'y* for it was he, who would give an opinion in the absence of revelation and when an injunction concerning the matter is eventually revealed, his opinion would be in accord with Allah's injunction[19]. He made use of *ra'y* not only in making laws but in social, economic and public administrative affairs of the Muslims. When Khalid who was a Governor under Umar

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[15] Hasan, A.(1994) *The Early Development of Islamic Jurisprudence*, Islamic Research Institute, Islamabad, Pakistan, p. 117

[16] *ibid*

[17] Al- Tabari, M. J (1961) *Tarikh al-Rusul wa al- Muluk*, Dar al –Ma'arif, Cairo, vol. 3, p.302. See also, Ibn al-Athir, A. A (1967) *al- Kamil fi al- Tarikh*, Dar al-Kitab al-Arabi, Beirut, vol. 4, p. 490

[18] Ibn al-Athir, A. A (1967) *al- Kamil fi al- Tarikh*, Dar al-Kitab al-Arabi, Beirut, vol. 4, p. 659

[19] Ibn Qayyim, J. op. cit.

complained of the inadequacy of the punishment of forty lashes as punishment for the offence of wine drinking, Umar summoned a council of the companions and informed them of Khalid's observation. Ali was reported to have suggested eighty lashes on the analogy of the punishment of slander (*qadhf*). He said when a person drinks, he becomes intoxicated and raves. When he raves, he commits slander. Therefore the punishment of one who drinks should be the same with that of a person who slanders[20]. This is a clear example of the use of *ra'y*. A very important example of how *ra'y* was applied to determine very crucial matters can be seen in the compilation of the *Quran*. It was Umar who suggested to Abubakar that there was the need to compile the *Quran* from the scattered parchments available into a book form. The only reason given by Umar to justify his opinion was that it will be for the good of the ummah. Umar relying on his well thought opinion feared that some parts of the *Quran* may be lost due to the large number of the memorizers that died in the battle of Yamamah[21]. The exercise of *ra'y* by Umar in this occasion is one that has placed on the ummah a debt of gratitude to him.

In one instance, Umar refused to apply the *hudud* punishment on some slaves of Hatim bn Balta'ah who had stolen and slaughtered a camel belonging to a Muzani man. Instead of punishing them, Umar blamed Hatib for not feeding them well and ordered him to pay the Muzani man eight hundred dirham, an amount that is double the price of the camel his slaves stole[22]. Similarly, Umar suspended the punishment of amputation during a period of famine[23]. Umar was aware that the imposition of the *huddud* punishment in these cases was not in line with the intendment of the Lawgiver, so he avoided applying the black letter of the law in favour of the spirit of Shariah. This he did by the explicit application *ra'y*.

In addition to these examples, Umar decided that a pronouncement of three divorces in a single phrase will count as three separate divorces[24]. In this, Umar went contrary to the decision of the Prophet and Abubakar for the prophet had declared such triple pronouncement of divorce as one. Abubakar too decided the same as the prophet. Umar decided differently because he observed the prevalence of such cases in his time and discovered that people treated the matter of divorce with levity. In the same vein Umar was against the marriage of a Muslim man to a woman from the People of the book. This was in spite of the

[20] Anas, M. op. cit.
[21] Al- Zarkashi. B. A (1972) Al- *Burhan fi ulum al- Qur'an*. Dar Isa al- Babi al-Halabi, vol.1, p223
[22] Anas, M. op. cit. ; Al- Shafi'i. M. I. (1973) *Al-Umm*. Dar al- Ma'arifah, Beirut. Lebanon, vol. 7, p.231; Al-Sarakhsi. M. A (2000) *Al- Mabsut li Sarakhsi*. Dar- el –Fikr. Beirut, Lebanon, vol. 4, p.4.
[23] Al- Sarakhsi. M. A (2000) *Al- Mabsut li Sarakhsi*. Dar- el –Fikr. Beirut, Lebanon. vol. 9, p. 140
[24] Muslim. A. (1978) Sahih Muslim. Dar al Fikr. Beirut. vol. 2. p.1099

fact that the *Quran* permits such marriage and the Prophet too sanctioned it. When Umar learnt that Hudhayfah al- Yaman had married a Jewish woman, he asked him to divorce her[25]. Umar was reported to be against this kind of marriage based purely on the exercise of *ra'y*.

It is important to note that Umar not only used his discretion to resolve issues, he also encouraged other people to do the same. The letters he wrote to Abu Musa al –Asha'ri and Qadi Shuraih[26] illustrates this point. These letters written to two different people at different times contain similar message as regard the point of discussion. Umar instructed them to apply *ra'y* by making comparison with similar cases and examine precedents before making final decision. Umar's exhortation to these people underscores the significance of *ra'y* to him and the fact that he considers it crucial in deciding matters in all affairs of the Muslims.

Other eminent companions also exercised *ra'y* in a plethora of occasions. Uthman's effort in the standardization of the *Qur'an*[27] and the report that he gave a share from the inheritance of a husband to the woman who was irrevocably divorced[28] points to his use of *ra'y*. Ali's decision that blood money should be paid from the treasury if a person dies while undergoing *hadd* or *ta'azir* punishment[29] and the fact that he exempted camel used for the purpose of transportation or on animal used in some work[30] also, illustrates his exercise of *ra'y*. An inquiry was made from Zaid as to the share of husband and parents. He explained that the husband and mother will take half of the property respectively while the father inherits the rest. Zaid was asked if this decision was from the *Quran* and he replied that it was his opinion[31].

The examples we have given so far goes to show the relationship that existed between *ra'y* and text of the *Quran* and *Sunnah*. *Ra'y* as illustrated above

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[25] Al-Jassas, A. A (1335 A.H) *Ahkam al-Qur'an*, Matba'ah al- Awqaf, Istanbul, vo.3, pp 123-124; Al-Tabari, M. J (1972) *Jami' al-Bayan fi Tafsir al-Qur'an*, Dar al-Ma'arifah, Beirut, vol. 10, p.112. According al-Tabari Umar's reason for not approving this kind of marriage is that ajami woman have attractive manners and will eventually overcome Muslim women. While al-Jassas Umar was of the opinion that Muslim women will emulate them and take to corruption.

[26] Al-Darimi, A. A (ND) *Sunan al- Darimi*, Dar al-Kutub al-Ilmiyah, Beirut, vol.1 p.60. See also, Ibn Qayyim op. cit. Ibn Qayyim made an extensive commentary on the letter written by Umar to Shuraih. Umar in the letter said *fajtahid ra'yaka* meaning exercise your judgement.

[27] Al- Suyuti, A. (1979) *Al- Itqan fi Ulum al-Qur'an*, Dar al-Fikr, Beirut, vol. 1, p.61. See also Al- Zarkashi, B. A. (1972) *Al- Burhan fi Ulum al- Qur'an*, Isa Bab AL –halabi, Cairo, vol.1, p.236

[28] Al- Ghazali, M. M (1413 A.H) *Al- Mustasfa*, Dar- al- Kutb al- Ilmiyah, Beirut, Lebanon, p.244. See also Al- Amidi, op.cit, vol.4, at p.55

[29] Al- Shafi'i op. cit ; Al- Sarakhsi op. cit

[30] Abu Hanifa, N. T (1332 A. H) *Jami' Masanid al- Imam* cited in: Faruqi, M. Y (1993) *Modes of Ijtihad in the Judgements of the Khulafa AL- Rashidun*, Journal of Intellectual Discourse, vol. 1, no. 1

[31] Al- Khatib, A. A (1975) *al- Faqih wa al- Mutafaqqih*, Dar Ihya al-Sunnah al-Nabawiya, Beirut, vol. 1 p. 200. See also al-Ghazali op.cit, vol.2, p.245

was used to provide answers to questions not explicitly covered by the text. Where there are texts, *ra'y* is used to understand and properly apply textual ruling to situations. In some instance the companions deviate from the explicit text through the use of *ra'y* in cases where a strict application of the text leads to absurdity to arrive at rulings that conform to the general principles of the *Quran* and *Sunnah*. *Ra'y* therefore at least in this time in Islamic history played an integral role in the development of the Jurisprudence of the law. It is worthy of note that *ra'y* as used here does not denote arbitrary opinion but rather a well considered opinion which is guided by the *Quran and the Sunnah.*

1.5 The use of *Ra'y* in the Period of Abu Hanifa and Malik

After the companions, the Imams of the orthodox schools also made use of *ra'y*. *Ra'y* played a critical role in the development of the schools of law as it was frequently used to solve legal problems[32]. The two distinct schools of law, i.e the Madinan and Iraqi schools both made extensive use of *ra'y*. These two schools were referred to as people of hadith, *ahl- al- hadith* and people of opinion *ahl-al-ra'y*. These two schools have been portrayed as opposing in the sense that one is known to be advocates of the use of *ra'y* and the other strictly applying the tradition[33]. The available evidence does not support this supposition. The appellation of *ahl- al ra'y* is not used to refer specifically to the Iraqis alone neither is *ahl- al- hadith* used to denote the scholars of Hijaz exclusively[34]. We shall examine the use of *ra'y* by Imam Malik who is known as an adherent of the school of tradition and that of Abu Hanifa who is commonly referred to as the advocate of *ra'y*.

The Madinan School often employs the use of *ra'y* in accepting or rejecting a tradition of the prophet. For example Malik narrates a tradition that the prophet combined *zuhr* and *asr* prayer and also combined *Maghrib* and *Isha* prayers without the presence of fear or rainfall. Malik exercise his opinion on this

[32] Hasan, A. op.cit, p.127; See also, Hasan, A. (2009) *Analogical Reasoning in Islamic Jurisprudence*. Adam Publishers and Distributors, New Delhi, India, p.12

[33] Among the scholars of later period who made this sharp categorization were Ibn Qutaybah and Al-shahrastani. Their criteria for these divisions is not very clear and shows that the clear- cut distinction between the two groups was a later development. For example, he mentioned a well known faqih Layth ibn Sa'ad among the people of hadith even though he had a distinct and independent school law and the fact that al- Shafi'i said Layth was more of a jurist than Malik. He also mentioned Imam Malik, Ibn abi Layla, Al-Auza'I and Sufyan al- Thauri among the people of ra'y. See Ibn Qutaybah, A. M (1300 A H) *Al- Ma'arif*, Matba'ah al- Shar'iyyah, Cairo, p. 173. In contrast, Al- Shahrastani mentions Malik, al-Shafi'i and Sufyan al-Thauri amomg the people of tradition. See Al- Shahrastani, M. A (1263) *al- Milal wa al Nahl*, Matba'ah al – Bulaaq, Cairo, vol.1, p.122.

[34] Hasan, A. op.cit, p.126. For a detailed discourse of this issue, see, Baltaji, M (2008) *Al- Tashri'i al- Islami fi al-Qarn al- Thani al- Hijri*. Dar- al- Salam, Cairo, Second edition, vol.2, pp 622-626

tradition and remarked 'I think (*ara*) it happened on a rainy day'[35]. In another instance, Malik reported that the prophet used to recite long *surahs* in *fajr* prayer, but he does not apply this tradition because in his opinion it will cause excessive hardship[36]. Malik does not consider it appropriate for a person to pray *tahiyat al-Masjid* when the Imam is already giving his sermon[37]. This is in spite of the fact that the prophet was reported to have ordered a person to perform them[38]. These examples were cited to buttress the point that even in Madina, ra'y was used amply in matters of the law. The most visible application of *ra'y* in the Madinan School is their insistence on the use of the practice of the scholars of Madina. Malik even rejects an authentic tradition if it goes contrary to the practice of Madinan Jurists[39]. The justification of the reliance on this principle is based purely on reason and opinion. Another important proof that *ra'y* was used in the camp of the supposed Traditionists is the fact that al- Shafi'i criticized them in al-Risala for arbitrary use of *ra'y*[40]. It is worthy of note that this criticism by al-Shafi'i is a strong point that supports this position. This is because he was a student of Malik; he lived with him in Madina and was well acquainted with the methodology of the Madinans. Even if there exists no other proof of the exercise of *ra'y* of the Madinan School except al- Shafi'i's criticism, it would have sufficed. We do not however subscribe to al- Shafi'i's opinion that the *ra'y* exercised by Malik was in any way arbitrary for their use of *ra'y* was based on well founded ground[41].

Imam Abu Hanifa and the Iraqians in general were referred to by al- Shafi'i as the people of analogy, *ahl-al-qiyas*[42]. They are well known for their use of *ra'y* especially in matters where they could not find answers in the *Quran* and the *Sunnah* or where they were not convinced as to the authenticity of the available tradition. Concerning the *musarrat* animal, the prophet was reported to have said whoever buys it has a choice, after milking it, to keep it with him or if he does not like it , to return the animal with one sa' of date. Abu Hanifa exercised *ra'y* on the point of giving the seller one sa' as compensation for the milk. He opines that the animal should rather be returned with the cost of the milk. He reasoned that the milk held in the udders of one animal may not be the same with that of another animal, therefore one *sa'* of date cannot be proper compensation in all cases[43]. It

[35] Anas, M. op.cit
[36] Al- Shafi'I, M. I (1321 A.H); *Kitab al Umm*, Bulaq, Cairo, vol.7, p192
[37] Sahnun, M. S. (2008)*Al- Mudawwana al- Kubra*, Dar Al-Kutub Ilmiyah, Beirut, Lebanon, vol1,p. 148,
[38] Al- Bukhari, kital jumuah bab iza ra'a imam rajulan. Muslim kitab jumah bab tahiyaya wal imam yakhtub
[39] Al- Suyuti, J. A (2000) *Tanwir al- Hawalik Sharh Muwatta al- Malik*, Dar ihya kutub al- arabiyyah, vol.2, p.161; See also Baltaji, op.cit, p.425
[40] Al- Safi'', op.cit, p.186
[41] See Hasan, A. op.cit, p.131
[42] *ibid*
[43] *ibid*

was reported that the prophet gave double share of the war booty to a horse while the rider has one but Abu Hanifa was of the opinion that a single share should be given to a horse and another single share to its rider[44].

The Iraqians are commonly regarded as making too much recourse to opinion so much that they neglect the tradition. But there are evidences to the effect that they also adhere strictly to texts of the prophetic tradition. The Hanafis for example followed a text of the hadith regarding atonement for a fast that was broken due to forgetfulness and held that such a fast will not be repaid. Concerning this matter, Abu Hanifa was reported to have said, "Were there no traditions available in this matter, I would have decided in favour of atonement by another fast"[45]. This example illustrates that the categorization of the Schools into "the people of opinion and the people of tradition" were mere appellations. This is because the Malikis in contrast to the Hanafis are opposed to this tradition. Malik was of the opinion that the traditions contradicts the established principle of the Shariah in that a mistake due to forgetfulness does not go without remedy in other pillars of Islam like prayer for example. He wondered why the case of fasting should be different. He therefore held that where a person eats or drinks during *Ramadan* out of forgetfulness, he must atone for it by another fast after *Ramadan*. We have also seen from the statement of Abu Hanifa above that he refrained from exercising his personal opinion due the presence of a prophetic tradition.

It seems very plausible that the reliance of Abu Hanifa on *ra'y* has been unjustly criticized. His reliance on *ra'y* was based on cogent reasons. He was reported to have said "What is from the messenger of Allah, then that will gladly be given priority,, what comes from the companions, we shall choose and what is apart from that, they are men and we are men"[46]. Apart from Abu Hanifa, even his student al- Shaybani used to criticize those that make recourse in matters where tradition from the prophet was available. He frowned at the exercise of opinion by the Madinans in the presence of tradition specifically in the matter of atonement for fast broken due to forgetfulness[47].

Our position from all the examples we have cited in the preceding pages is that the Imams of all the schools of law made recourse to *ra'y*. Even al-Shafi'i who criticized both the Madinans and the Iraqis on their exercise of *ra'y* was also

[44] Abu Yusuf (1302) Kitab al- kharaj, Bulaq, Cairo, p. 105
[45] *ibid*
[46] Al- Zahabiy, M . A (2006) *Siyar al- A'lam al- Nubala*, Dar al- Musssat al- Risalah, vol.6, p.401; See also Ibn Hajar, A. A (1327) *Al- Tahzib al-Tahzib*, Matba'ah Majlis al- Dairah al-Nizamiyyah, Hyderabad, vol. 10, p.451
[47] Al- Shaybani, op.cit.

found to have made use of it[48]. It would therefore become apparent that al-Shafi'i was merely advocating for the proper application of *ra'y*. In addition the commonly held opinion that there is a sharp distinction between the Iraqis and madinans in the sense that one took to pure application of *ra'y* and the other to strict application of tradition exclusive of *ra'y* is not correct. Rather, as we have demonstrated, both madinans and the Iraqis made ample use of ra'y to the extent that they can be said to use it almost in equal proportion. It is however more tenable to suggest that the Iraqis were not in possession of large number of traditions as the madinans who resided in the home of the *Sunnah*[49].

1.6 The Use of *Ra'y* in the Period of al- Shafi'i

Ra'y as earlier noted was very crucial in the development of the schools of law. The very nature of the application of *ra'y* gave rise to some challenges. The fact that each of the two major division of jurists i.e Iraq and Hijaz and even within a particular school, *ra'y* was applied in different forms allowed for the existence of a wide range of different ruling over a particular matter. Ibn Muqaffa' painted a gory picture of the contradictions in verdicts that was prevalent at that time due to the unrestricted use of *ra'y*. He said what was made lawful at Hirah was made unlawful at Kufa. Even in Kufa a thing can be declared lawful in one area and unlawful in another[50]. Ibn Muqaffa' was of the opinion that the leader can use *ra'y* in matters on military and civil administration and generally on mall matters on which there is no binding orders based on the *Quran* and *Sunnah*[51]. In his opinion only the caliph has the right to exercise the use of *ra'y*. He was of the opinion that the Caliph should supersede and regulate the use of *ra'y*. The people can only make suggestion to the leader but they are not allowed to freely employ their personal opinion to decide matters. This stance of Ibn Muqaffa' can be said to be a reaction to what he perceived as the arbitrary and whimsical use of *ra'y* in matters of the religion. He however did not advocate for its total exclusion but rather a restriction in its use. The nature of the disarray in the various centers of learning can also be inferred from the conversation of al-Shafi'i and his opponent. This state of affair eventually led al-Shafi'i to attempt to systematize the use of *ra'y* which he did by writing the Risala.

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[48] Al- Shafi'i, M. I (1321) *Al- Umm*, Matba'ah Al- Amiriyyah Al- Kubra, Bulaq, vol.2, p.4; see also See Hasan, A. (2009) Analogical Reasoning in Islamic Jurisprudence. Adam Publishers and Distributors, New Delhi. India. p.12

[49] Baltaji. M. op.cit pp 625

[50] Ibn al-Muqaffa'. (1954) *Risalah fi al- Sahabah in : Rasa'il al- Bulagha*. Cairo, p.126

[51] *ibid.* pp121-125

According to Wa'el, Al-Shafi'i appeared in the middle of the second century of Islam which was characterized by the competing movement that is tended towards the use of human reasoning, *ra'y* and another movement stressing the role of traditions in the theory of law[52]. Al-Shafi'i's Risala was written at a time when the movement of *ah-al-ra'y* was beginning to decline which was due to the rapid increase in the volume of prophetic traditions. Al-Shafi'i emphasized that the Qur'an and the Sunnah are the two main sources of law and rejected the use of arbitrary human reasoning. Thus, he went against the use of *ra'y* and established the pre-eminence of the *Qur'an* and *Sunnah*. But al-Shafi'i did not invalidate all forms of *ra'y*. He sanctioned some like *Qiyas* and rejected others like *Istihsan*[53].

Al-Shafi'i, it is noted, is important to the modification of Islamic legal reasoning mainly because his later works such as Risala represents a defense of Prophetic tradition in that he categorically labeled *ra'y* as arbitrary and excluded its use alongside Istihsan from the domain of reasoning all together[54]. He was the first jurist to have consciously articulated that revelation provides a full and comprehensive evaluation of human acts. Abu Zahra describes the following as al-Shafi'i's major achievements; he was the first scholar to formulate legal theory (*usul al-fiqh*); he compiled and collected Maliki and Hanafi jurisprudence; he regulated the method of *ra'y* by formulating rules for analogical reasoning; he standardized the Sunnah, he devised methods of interpreting the *Qur'an* and *Sunnah* and he was the first to clarify the notion of abrogation[55].

1.7 The use of *Ra'y* in Post al-Shafi'i Period

The controversy between the *ahl-al-hadith* became more serious in the post al – Shafi'i period. Ahmad Ibn Hambal and Dawud ibn Khalaf al-Zahiri were the two most influential antagonists of the use of ra'y[56]. They took al-shafi'i's condemnation of the use of arbitrary reasoning further. They placed emphasis on the centrality of scripture and on the repugnant nature of reasoning. Ibn Hanbal was more liberal of the two in that he only accepts the use of *ra'y* in the form of

[52] Hallaq, W. B. (2005) *The Origins and Evolution of Islamic Law*, Cambridge University Press, London, p.113. See also, Coulson, N. J. (1978) *A History of Islamic Law*, Edinburgh University Press, p.61

[53] Hallaq, W. B. (2005) *The Origins and Evolution of Islamic Law*, Cambridge University Press, London, p.115

[54] Hallaq W. B. (1993) *Was al-Shafi'i the Master Architect of Islamic Jurisprudence*? International Journal of Mid East Studies, Cambridge University Press, vol.25, p. 597

[55] Abu Zahra, M. (1948) *Al-Shafi'i, Hayatuhu wa 'Asruhu wa Ara'uhu wa Fiqhuhu*, Dar al- Fikr al- Arabi, Cairo, p.11; see also, Mas'ud, M. K. (2016) *Classical Islamic Legal Theory as Ideology Nasr Abu Zayd's Study of al-Shafi'i's Risala*, Amsterdam University Press, Amsterdam.

[56] Hallaq W. B. (1993) *Was al-Shafi'i the Master Architect of Islamic Jurisprudence*? Op. cit p. 597

analogy in extreme situations. Dawud on the other hand rejected the use of *ra'y* completely and became the staunchest critic of the use of human reasoning in the law. Dawud took to literal interpretation of the text of the *Qur'an* and *Sunnah* thus he was nicknamed al-Zahiri[57].

In the period under discussion, jurists such as al-Sha'bi were portrayed as an enemy of *ra'y* while Rabi'ah as a great exponent of the doctrine. It has been observed that the hostility on the part of the traditionalists was so extreme, to the extent that they stigmatized their opponents, *ahl al-ray* as the enemies of Sunnah[58]. However, this state, it appears did not go on for too long. Both camps soon made concessions especially after the period of the inquisition (*Mihna*). The jurists who had hitherto relied heavily on human reasoning began to give much preference to the *Qur'an* and *Sunnah* and the traditionalist camp were also compelled to accept ra'y in its restricted form. Thus, the Hanbalis among others came to accept the use of *Qiyas* and adopted it and other modes of human reasoning in their methodology of the law. Those who refused to make this concession like the Zahiris and Hashiwiyya ultimately fell outside the mainstream of the Sunni schools of jurisprudence[59]. *Ra'y* was later to be divided into three categories, namely void, sound and doubtful[60].

1.8 The Position of the Traditionalists (*Ahl al-Hadith*) on the Use of *Ra'y*

Even though the authority of *ra'y* in the form of *Qiyas* is generally accepted among the later Hanbalis, many reports transmitted from Ahmad b. Hanbal, the leader of ahl al-hadith, demonstrate his reluctance in accepting *Qiyas* as a valid method. Usul al- Sunnah, a work attributed to Ahmad b. Hanbal, begins with the following statement on the definition of the roots of Sunnah:

> According to us, the principles of the Sunnah 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 sunnah that entails signs of the Quran explains the Quran and there is no Qiyas

[57] *ibid*

[58] Hassan, A .op.cit., p.6

[59] Hallaq W. B. (1993) *Was al-Shafi'i the Master Architect of Islamic Jurisprudence?* op. cit p. 597, See also Hallaq, W. B. (1984) *Was the Gate of Ijtihad Closed*? International Journal of Middle East Studies, vol. 16, pp 5-7. See also Halkin, A.S. (1934) The *Hashwiyya*, Journal of the American Oriental Society, vol. 54, p.12

[60] Ibn Qayyim, J. op.cit.

> 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[61].

In certain legal topics, Ahmad b. Hanbal points out that he abandons *Qiyas* for the sake of the reports from the companions[62]. In another report, he states that *Qiyas* is comparing something to the original, when one makes qiyās, he does nothing but dismantle the original[63].

A similar attitude can be observed in al-Bukhari's compilation. Al-Bukhari devotes a sub-chapter to the condemning of independent opinion (*ra'y*) and the burden of analogy in which he relates only two reports. The first narration is the hadith that "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"[64]. The second report is from the companion, Sahl b. Hunayf, who encouraged people to condemn independent opinion and to favor religion instead[65].

These two reports show that al-Bukhari was following the arguments of *ahl al-ḥadith* in condemning independent opinion and *Qiyas*, though he did not delve into the details of *Qiyas*. It is apparent that he was regarding reports as the sole source of authoritative knowledge, i.e. *Sunnah,* after the *Quran*. This much which he emphasized in the title of his chapters titled "to hold fast the *Kitab* and *Sunnah*". However, he preferred to describe this stance with *dhamm* (condemnation) as opposed to a more categorical refutation such as *radd* (refutation).

Another traditionalist al-Qasim b. Sallam did not openly reject *Qiyas*, but like the others, he also does not support it explicitly in his writings. A few examples even show that he was reluctant to use this method and tended to keep cases separate where other scholars apply *Qiyas*. For instance, in the case of whether the saliva of predators makes water unclean he reports that Malik and the Madinans made an analogy between the predators and cats and argued that the

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[61] Hanbal, A. (1991) Usul al- Sunnah. Dar al-Manar. Riyadh, p. 14
[62] ibid, p.15
[63] ibid, p.17
[64] Al-Bukhari, M. I. (2001) Sahih al- Bukhari; Kitab al-I'tiṣam bi l-Kitab wa-al-Sunna. Dar Tawq al- Najah. Beirut, p. 100
[65] ibid

saliva of predators does not make water unclean while Sufyan al-Thawri and Iraqis made an analogy between the predators and dogs and argued that the saliva of predators may make water unclean, hence it is reprehensible. Al-Qasim makes the following statement about these analogical reasoning:

> I do not think applying *Qiyas* 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[66].

It is worthy of note that not all the traditionalists were reluctant to recognize the validity of Qiyas. For instance Ibn Qutayba , the prolific defender of *ahl al- hadith* in the second half of the third century, for example, mentions *Qiyas* as valid method and distinguishes it from ra'y that is invalid[67]. However, probably influenced by the reluctance of earlier scholars of *ahl al- hadith*, Ibn Qutayba borrows the argument of al-Nazzam and points out the unreliability of *Qiyas* 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 (*iddah*) is three menstrual periods for free women, while it is one menstrual period for female slaves. Elsewhere he retains this lighter reluctance towards *Qiyas* when he defends *ahl al-hadīth* by saying that those who adhere to the book of God and the *Sunnah* of his prophet illuminate themselves, open the door of maturity, and request the truth from its source[68].

1.9 Conclusion

From the discussions above, it is clear that although the use of ra'y is clearly evident in the life of the Prophet SAW and the early generation of Muslims, the scholars are not all agreed as to its permissibility as well as the premise and extent of its usage. The acceptance of human reasoning seems to have been determined and influenced by social and political factors. However even among the jurists that are averse to its use, some merely exercised caution on

[66] Ibn Sallam. Q. (2000) *Kitab al Amwal*. Dar al- Fikr. Beirut, p. 536
[67] Ibn Qutayba. op. cit.. p. 111
[68] Ibid. p. 142

its application while others were only weary of giving precedence to opinion over the texts of the Quran and the Sunnah.

It was therefore, not a question of whether or not human opinion should be used at all. Rather it was a disagreement on the nature and extent of its use. The majority of scholars and jurists past and present have upheld the eminent role played by human reasoning in the development and operation of Islamic law. In fact all secondary sources of law i.e, *Qiyas, Istishab, Istislah or Maalih al-mursalah, Sadd al dhari'ah* and *Urf* are all forms of the accepted use of opinion in Islamic law.