UNDERSTANDING JURISTIC DIFFERENCES

By Ahmed Zaki Hammad

Ahmad Zaki Hammad: 'Agreeing to disagree', *Islamic Horizons*. Indianapolis, USA: Islamic Society of North America

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'The problem with Muslims is that they cannot agree on anything.'

I have heard this statement countless times in communities across the Muslim world. This is untrue. Our dilemma is that we do not know how to disagree.

There is a certain spirit of mercy and tolerance that must prevail when Muslims differ. That can only happen when a person begins to understand that the *Shariah*, which touches all of human activity, is miraculously flexible.

Yet the message that Islam is a comprehensive way of life will be empty if we fail to agree on the mentality that one must come to the *Shariah* with, and to recognise that understanding is a human quality which can naturally result in varied opinions and conclusions.

Amateur *faqihs* (who seem to be everywhere) and, worse, those who have not had a chance to fathom the depths of the *Shariah*, may be satisfied by their first or second or tenth encounter with a text or two, yet are shocked when they see others differing with their understanding.

Difference is not in itself evil. It is the Creator's signature across the universe, reflecting His splendour. But without a common knowledge for its causes, and Islam's ample room for it, differing can only be dangerous.

KHILAF AND *IKHTILAF*

Among other things, the Arabs have applied the noun *khilaf* to a barren tree, a willow which bears no fruit. The place where it grows is called *wadi al-makhlafa*, the valley of fruitlessness.

Coming from the same root as *khilaf* - *kh.l.f* - *ikhtilaf* means dissimilarity or disagreement. Al-Raghib al-Asfahani, a lexicographer of Quranic terminology, said: *Al-ikhtilaf* and *al-mukhalafa* denote that each thing is on a path other than the path of its counterpart, in state or in statement. Another of its meanings is 'inequality'; things which are not equal being certainly different and distinguished from one another. As for *khilaf*, it means 'conflict,' connoting the meaning of *ikhtilaf* and exceeding it.

The majority of scholars, however, do not distinguish in technical usage between *khilaf* and *ikhtilaf*. They use them interchangeably when describing conflict between persons based on differences of opinion, persuasion, belief, and matters of religion. In other words, the terms indicate discord in the points of view and positions of people.

Still, if the motive for disagreement is selfless, a matter of devotion to Allah, then, it is ultimately beneficial - in this world and the next. But the ends of self-serving dispute are punishment and suffering, here and in the hereafter.

ISLAMIC TEXTS AND *IKHTILAF*

The Quranic verses and the Prophet's utterances are unequivocal in urging Muslims to unity, solidarity, and a bonding commitment. Allah, the Exalted, states, *Hold firmly to the rope of Allah altogether, and do not become divided* (3: 103). Also, He says, *Truly Allah loves those who strive in His path in ranks as though they were a cemented structure* (61: 4).

Similarly, Allah has forbidden division and contentiousness in His statement: *Do not dispute or you will fail and lose your power; rather be patient. Indeed Allah is with the patient* (8: 46). And again, *Be not like those who divided and differed after Clear Signs had come to them. And it is those for whom there is a great punishment* (3: 105).

The Prophet also warned Muslims not to become divided; for 'indeed, those before you divided and they perished' (*Fath al-Bari*). The Prophet also has said, 'The Hand of Allah is with the Community, and whosoever secedes does so into the Fire.'

NATURAL DIVERSITY

Repeatedly, the Qur'an urges us to observe and contemplate the overwhelming diversity in creation. Unique and variant forms and colours in our vast universe are clear signs and displays of the power of the Creator. *Surely in the creation of the heavens and the earth and the diversity of night and day there are signs for those of insight* (3: 190). In another verse, *And of His Signs is the creation of the heavens and the earth and the diversity of your languages and colours* (30: 2).

Humanity's diversity is obvious. But it is not overwhelmed by things like colour and form. It includes natural gifts, talents, and temperaments. Dispositions differ to the extent that each one has his or her personal motivating forces. Even the anxieties that move people are different inside each individual. Indeed, natural diversity can affect each person's point of view.

Allah establishes in the Qur'an that had He so willed, *He would have made a single nation, yet they will not cease differing, except those upon your Lord has mercy - it is for this reason that He has created them* (11: 118).

Allah did not will to create a monolithic, uniform human species, equal and compatible in all ways. Rather, He cast human nature into various moulds and fixed firmly in it the capacity to bear diversity.

It is popularly attributed to the Prophet, peace be upon him, that he said, 'The Jews have split into seventy-one sects, the Christians into seventy-two; my Community will divide into seventy-three groups - all will be in Fire except one' (*Ahmad bin Hanbal*). This *hadith* is not acceptable as a justification for sectarianism among Muslims, nor does it deny the inherent evil of it. Rather, it is a warning to the intelligent to avoid the kind of diversity that leads to sectarianism.

BLAMEWORTHY DIVERSITY

Disbelief in and rejection of the *Shariah* is the most reprehensible type of *khilaf*, those holding that position being clearly astray. Indeed, it is a distinguishing characteristic of kufr or disbelief. The Qur'an states: *So let those who deviate from His commandments beware, lest they be struck by an affliction or a severe punishment* (24: 63). Also, *Surely those who oppose Allah and His Messenger, they are the lowly* (58: 20).

A second form of blameworthy divergence of opinion lies in claiming things to be part of Islam that Allah has not prescribed. 'Various forms of error and misguidance', the Prophet said, 'would emerge from a people coming forth from the East. They recite the Qur'an, yet it does not penetrate their beings any deeper than their throats. They fly out of Islam as arrows fly forth from their bows, and they return to Islam no more than a spent arrow returns to its archer' (*Fath al Bari*).

A third type of diversity takes place among the various legal Schools or *madhahib*: the belief of some that their positions are correct and all others invalid. A statement from al-Karkhi, a Hanafi scholar, epitomises the aberrant perspective that comes with excessive commitment to one's legal School: 'The guiding principle with us [Hanafi's] is that every Quranic verse which differs from our legal School must be interpreted as either being abrogated [by another verse] or improperly understood. In principle, every statement in dispute of a similar ruling of ours must be considered countered by our proof, so as to accommodate the School's final position.'

PRAISEWORTHY DIVERSITY

Allah and His Prophet have commanded the Muslims to differentiate themselves from pagans or advocates or holders of erroneous beliefs and behaviour. In a number of *ahadith*, Muslims are bid to distinguish themselves from and not mimic 'the Magians'; 'the pagans' and 'the Christians and Jews'.

Likewise, the Qur'an addresses the Prophet, *We have set you upon a sacred law in this affair. So consistently adhere to it and do not follow the vain desires of those who are devoid of knowledge* (45: 18). In the same light, the Prophet said, 'Whosoever imitates a people becomes one of them' (*Ahmad bin Hanbal*).

Other forms of praiseworthy diversity in which Muslims should be distinct from non-Muslims include the celebration of pagan sacred festivals and customary social practices, dress, and other commonly distinguishing factors that conflict with Islam. Ibn Taymiyya, however, held the following position: 'If a Muslim resides in a non-Muslim land that is either at war or peace [with Muslims], he is not compelled to oppose them in outward conduct because of the harm it may

bring. In fact, it may be preferable or even mandatory for him to occasionally participate in their outward conduct provided that there is a religious benefit, such as inviting them to religion, repelling their harms from Muslims, or other virtuous ends.'

WHY DIFFERENCES?

As we 'rethink' the original sources of Islam in our lives, we are bound to differ. Does that mean we can all be right in whatever well-intentioned decisions we make? Is it possible that all the various legal decisions are correct? Or is it the case that there are mistaken and correct ones?

Some jurists have opted for the idea that all conflicting judgements are accurate. Al-Qarafi, for instance, is reported to have described the relationship between variant opinions qualitatively. He said the *Shariah* encompasses all decisions due to its great breath. The majority of legal theorists, however, believed that the truth in each case is only one, even though people may be unable to conclusively reach it. However, the *mujtahid* or legal practitioner who has fully and conscientiously exhausted his ability and missed the correct position does not commit a violation and is not blameworthy. On the contrary, he receives heavenly praise, as the Prophet stated; and people are free to follow these legitimate legal positions.

CAUSES OF LEGAL DIVERSIFICATION

Most legal diversity between scholars can be reduced to one or a combination of five causal factors.

1) The Nature of Arabic

First, Arabic, like other languages, has its native intricacies. Scholars classify this as linguistic ambiguity, by which they mean some phrases validly accept more than one meaning, where the alternate meaning is literal and not metaphorical.

In the Qur'an there are some instances of this equivocal terminology. As such, scholars differed in their comprehension of what exactly Allah's intent was in certain instances.

The problem of a man engaging in non-conjugal sexual intimacy with his wife during her menstruation is a well-known example of this kind of differing. *They seek guidance in regard to menstruation. Say it is a harm,* the Qur'an reads. Also, *Refrain from your women during menstruation. Do not approach them until they have purified themselves* (2: 222).

What is the meaning of 'not approaching them' during menstruation? Prominent jurists like Malik and Abu Hanifa and a large number of other scholars, adopted the position that there should be total abstinence during menstruation. So they forbade that a man approach his wife for any type of sexual activity, except what had been clearly laid out in a *hadith* of the Prophet's wife, Aisha, and others of his wives.

The Prophet approached his wives, even during the height of anyone of their menstruation, enjoying intimate contact without intercourse. He would request them to wear a garment to cover the feminine organ.

Imam Shafi', in one opinion recorded of him, as well as the jurists Thawri, Dawud (of the Zahirite school) and Muhammad bin al-Hasan (a Hanafi) interpret the command 'Refrain from your women during menstruation' to mean 'avoidance of the organ itself, that is, the place of menstruation.

Another significant cause of juristic divergence when it comes to language is the various Quranic recitations, approved by the Prophet. A good example is the Quranic verse referring to the washing of the feet in *wudu* or ritual ablution. Does it state that we are obliged to 'wash' them or will a symbolic 'passing' of the hands over them suffice?

The underlying cause of the different opinions is the possible readings of the verse, *When you stand to pray, wash your faces, and your hands to the elbows, then wipe your heads, and feet to the ankles* (5: 6).

The discussion hinges on a point of Arabic grammar. Some scholars render the word ‘feet’ as *arjulakum* (accusative). Others, like Ibn Kathir, recited the same word as *arjulikum* (genitive). This variation in recitation thus gives way to divergence in law.

The first group says the washing of the feet is mandatory. Of course, they look to the Prophet's *Sunnah* to verify their judgement. They cite a *hadith* of the Prophet which establishes the obligation of foot washing in *wudu*: Abdullah b. Amr b. Al As reports: 'The Prophet parted from us during travel. We eventually caught up with him, though we had [delayed] the late afternoon Prayer. When we made ablutions, we were merely wiping our feet, at which the Prophet cried out in his loudest voice, 'Woe from the fire to those who fail to include the feet up to the ankles.' He said it two or three times.' (*Bukhari*).

The practice of the Prophet strengthens the statements recorded about him. He regularly washed his feet if he was barefooted, and wiped over his footwear if in shoes or leather socks. This is the opinion of most scholars, the stronger one according to Sunni juristic literature, in terms of evidence and validity.

Now, the literalist looked at this word and, since it contained both meanings, said the obligation is both washing and wiping. Others, like Ibn Jarir al-Tabari (ninth century CE), saw it as a choice between the two, washing or wiping. Shawkani has commented on these various legal opinions with great insight, and accuracy, I might add. 'As for those who have made wiping mandatory, they have not presented a clear decisive proof. This, even though they [in effect] differ from the Qur’an and [in fact] with the consensus of the *hadith* literature.'

2. Differing Methods of Analysis and Legal Approaches

The second problem relate to how a jurist approaches an issue and to what extent he can interpret texts. An important factor here is simply what sources a jurist deems valid, aside from the Qur’an and *Sunnah*. This is a matter of method. The Hanafi, for instance, are known to give much weight

to reason in their method. They use proof by analogy, called *qiyas*, extensively, holding it to be an important 'source' for the *Shariah*. In other words, when they come to an unprecedented case, they derive an Islamic rule for it by making an analogy between the new case and a similar one that has a specific ruling in the Qur’an or *Sunnah*. But other jurists reject *qiyas* as a valid source of the *Shariah*. Indeed, some discredit its use completely. It is easy to see how this difference in method can lead to a difference in law.

Some Schools hold a particular source of law to be valid, but differ on how it may be constituted. *Ijma*, for example, is the consensus of the community, or *ummah*. The Malikis readily acknowledge consensus as a valid *Shariah* source. But they consider the community of Madinah - the city of the Prophet - to be the community of consensus.

The Shafi'is, on the other hand, reject limiting consensus to Madinah, saying it is all Muslims at any given time, as represented by the community of scholars. Some think consensus can only be established by all Muslims from day one to the end of time, which means you couldn't have *ijma* until the Day of Judgement. Not a very useful source.

These differences in methodology profoundly affect the legal conclusions of various Schools. Let me try to clarify this by taking a case involving *qiyas*, analogy.

The Zahiris, who are literalists refuse analogy as a *Shariah* source. So they would conclude that deliberate eating or drinking during *Ramadan* would not necessitate atonement, called *kaffarah*. The reason being that *kaffarah*, according to them, is established based on a *hadith* that the Prophet uttered in regard to a particular incident, namely, intercourse between husband and wife during the fast of *Ramadan*. Since the *hadith* did not specify eating or drinking during the fast, they do not necessitate atonement. But the majority of jurists made the analogy for deliberate eating and drinking during *Ramadan* based on this *hadith*. They concluded atonement is obligatory for those who violate fasting by either eating or drinking, or intercourse during the actual fasting in *Ramadan*.

Now, we go to *ijma*. A number of reports related to the Prophet indicate that it is permissible to call the *iqama*, which tells us Prayer is imminent, repeating every phrase twice, exactly like the *adhan*, which is the call telling us Prayer is in. Yet *Imam* Malik disagreed with this understanding, based on the fact that the practice of the Madinah community was contrary to it. Remember, he considered consensus, *ijma*, a *Shariah* source, but limited it to the consensus of the scholars of Madinah.

As for the *iqama*, the second calling for Prayer, its words cannot be repeated (like the *adhan*). He says in his book *Al-Muwatta*, 'This in fact is the practice of the scholars in our city [Madinah].'

Many other cases show the effect of juristic method on *Shariah* rulings. So it is of the utmost importance to be aware of the characteristics of scholars' juristic thinking. This will go a long way to understanding the difference between their views.

3. Unfamiliarity or Uncertainty regarding Specific *Hadith*

This brings us to our third cause for legal divergence which relates to a jurist's lack of familiarity with a *hadith*, or his doubt as to its authenticity. Incomplete knowledge or doubt of the Qur'an cannot, of course, be used as a reason to justify dispute. This is because the Qur'an has been reported by what is called *tawatur*, a continuous, overwhelming and reliable chain of reporters. Ignorance here is no justification, unlike with *hadith*.

First, Muslims recognise that not all *ahadith* have been reported through *tawatur* from the Messenger of Allah. No one should find it strange that a number of jurists - even among the companions - were unaware of some *ahadith*, either forgetting them or simply not hearing them from the Prophet.

Abu Bakr, for instance, the first Caliph, did not know the share of the grandmother in inheritance. But he asked various companions until he found the answer with al-Mughirah b. Shu'ba and Muhammad b. Maslamah. Both told him what they had heard the Prophet say.

Also, Abu Hurayrah, the companion, used to say, 'Whosoever wakes up after dawn during *Ramadan* in a state of *janaba* (ritual impurity after sexual relations), his fasting is invalid.' He was not aware of the authentic report by the Prophet's wife, Aishah, that the Prophet sometimes heard the *adhan* for Dawn Prayer while in the state of *janaba*. Yet he continued his fast (*Muslim*).

Again, Abdullah b. Amr b. Al As used to instruct women who performed ritual bathing, *ghusl*, for either completing menstruation or giving birth, that they should untie or comb out their hair. Aisha objected to this saying, as only she could, 'What a strange position from the son of Amr. Shouldn't he require them also to shave their heads? When I used to perform *ghusl* with the Prophet from a single vessel, I simply poured water on my head three times' (Muslim).

Understanding this cause of juristic difference and reflecting on it explains why legal divergence occurred even in the community of the companions and their Successors. Knowledge of the Prophet's *Sunnah* and *ahadith*, which he taught, was learned by those who saw and heard him. Each one of them obtained as much as he or she could without any one of them enjoying mastery over it all. The companions who travelled to various regions taught their Successors whatever they knew, who taught people after them, and so on, through the incredible - and unparalleled - system of *riwaya*, transmission of *ahadith* from one generation to the next, until this day. It may not be an extreme position to say ignorance of *hadith* in our time - after the monumental and exhaustive efforts of our forefathers (and mothers) to report the *Sunnah* and write it in the various collections - is not justifiable by any jurist. 'I do not know the *hadith*' is not good enough. For virtually all of these ahadith texts are available to us, and the would-be jurist must begin by educating himself about them.

4. Apparent Conflict between Texts

Fourthly, there is the conflict between evidences. This is important, and requires, really, an excellent knowledge of a number of Islamic sciences. Sometimes it appears as if tension or conflict exists between separate *Shariah* texts, that is, the Qur'an and the *Sunnah*. In giving preference to one evidence over another, jurists varied in their approach to resolving apparent conflicts.

For example, the Prophet's *hadith*, 'Whosoever touches his genitals should not pray without performing ablution' is in apparent conflict with another. The Prophet was asked about a person who touches his genitals during Prayer. 'Isn't it part of your body,' he answered, meaning, continue Prayer if it should occur.

The first *hadith* is acknowledged by Shafi' and Ishaq b. Rahawi as being the latest statement of the Prophet. So it would abrogate the other reports on this topic. But Hanafite jurists have adopted the second *hadith* as valid, expressing uncertainty about the authenticity of the first. It should be clear that the cause of difference is the apparent conflict between two *Shariah* texts for one case, without it being decisive that one abrogates the other.

5. Unprecedented Occurrences not specifically Addressed by the *Shariah* Texts

The absence of a *Shariah* text for an unprecedented case increases the likelihood of legal differing. The best examples here are the many issues and challenges that we now face. In the areas of economics, politics, and so on, we have in our hands few explicit texts stating the Islamic position or the *Shariah* ruling. So jurists exert their efforts - in light of recognised sources of law, experience, and the general principles of *Shariah*, both the spirit and the letter - to find solutions. It is self-evident that their Islamic rulings and conclusions will differ based on the extent of their knowledge and mastery of the issues.

This phenomenon occurs naturally as issues and cases seem to change, while the *Shariah* texts are limited. Yet since Islam is the decreed way of life for humanity until the Day of Judgement, it is incumbent upon every generation to find solutions for new issues. Today's jurists should not freeze in their tracks, arguing that there are no texts to follow. We have an example of a case which the companions had to deal with after the death of the Prophet for which they had no precedent. Yet they faced them.

The governor of Yemen during the caliphate of Umar requested his Islamic judgement for a gruesome crime. A man, his wife, their servant, and a friend together killed a young boy, dismembered and stuffed the body in a leather container, and threw it in an abandoned well. When Umar consulted with the companions noted as jurists, a group said all must be executed for killing the young boy. Others argued that the killing of one human soul does not justify the execution of more than one person.

Ultimately, Umar enforced the execution of all who participated in the boy's murder, ruling that were it the entire community of San'a, the capital of Yemen, who participated in the slaying, all should be executed. Ali b. Abi Talib, among others, supported Umar in this position.

THE WAY AHEAD

This article on juristic dispute is a window to this important aspect of the world of Islamic law. It does not teach *fiqh, per se*, or its sources, but rather, the main causes and principles of juristic variance. It aims at helping to introduce a new attitude and a fresh way of thinking about the world of differing. In this direction, it is hoped that we can agree on the following 'heart-set':

1. Whosoever accepts true *tawhid*, Allah's Oneness, expressed in the Qur'an and the *Sunnah*, is a brother or a sister to every Muslim and must be loved and accorded loyalty and support based on the integrity of that commitment. Those who choose not to accept Islam have the right to be introduced to the Qur'an and the *Shariah* in the most gentle way, being secure in life, wealth, and, most importantly, dignity.

2. The principal Muslim references are the Book of Allah and the *Sunnah* of His Messenger. Their interpretation must be based on the principles of the Arabic language, without contriving meanings.

3. If qualified, legitimately chosen leaders in a given Muslim community or association see fit to adopt certain juristic positions for the general welfare of the community, or give valid preference to some opinions over others, it is essential for the members to honour these positions. But blind loyalty to one person or a particular juristic School is not befitting of any Muslim. The *Shariah* recognises the wisdom of following juristic authorities; learn the basis of their judgements and approach them with an open mind for guidance or correction - even if they differ with one's own bias or juristic affiliation.

4. All that has been reported to us from preceding generations (in harmony with the Book and the *Sunnah* of the Prophet) is accepted with awareness of the context involved. Insult, accusation, and innuendo are beneath the dignity of a Muslim. The Qur'an states: *This is a community that has passed on. For them is what they have earned. For you is what you have earned. And you will not be questioned about what they have done* (2: 134).

Remember this in your heart: juristic (*fiqhi)* dispute is forbidden if it leads to fighting, hatred, and fragmentation in the community, involving it in endless and senseless argumentation and disagreement. Co-operation in areas of agreement, tolerance of others, and understanding their point of view must be our attitude. Hasan al-Banna frequently said, 'We co-operate in whatever we agree upon. And let us excuse one another in the areas where we disagree.'

Let our position towards *fiqhi* differences regarding the details of the *Shariah* go only this far: 'Our founded opinion is correct, but liable to misjudgements; differing opinions are misjudgements, but plausibly correct.'

We ask Allah to honour us with devotion to His service and the ability to distinguish right from wrong. Indeed, Allah guides whom He wills to the Straight Way. In the end, as in the beginning, all praise belongs to Allah, the Lord of the Worlds.