

With its tolerance of disagreement among the ulama over juristic issues, Islamic law is described as being one of diversity within unity – diversity in details and unity in principles. *Ikhtilaf* (juristic differences) in Islamic law is reflected in the existence of at least five different schools of jurisprudence surviving to this day. Islamic law has a rich tradition of diversity and disagreement even as it has remained open to the influence of various legal traditions.

*Ikhtilaf* however needs to be viewed in conjunction with the Islamic principle of *tawhid*, the belief in the Oneness of God. *Tawhid* is the first article of the Muslim faith. It is a major Qur'anic theme emphasising one God, one Islam, one scripture and one ummah. The plurality of schools and mazhab does not alter the fact that there is only one shariah. The various mazhab that have emerged over the centuries are schools of fiqh that have interpreted the shariah in light of the realities of their time. None has claimed to be shariah unto itself, yet all share the same shariah.

Fiqh is narrowly concerned with the practicalities of conduct and legal rules. Shariah, however, broadly encompasses this and the very essence of belief. It is in the realm of fiqh that *ikhtilaf* operates as Islam's dogma, and moral teachings are not open to *ikhtilaf*. Even the slightest bit of disagreement over the faith's essentials, for example its five pillars, is not tolerated. Indeed, the *tawhidi* philosophy of Islam is very strong, though people tend to notice the disagreements over this consonance.

Recently we have seen signs of gradual unity among Muslims. During the era of imitation – *taqlid* – the schools of law emphasised their own identity, occasionally making self-righteous assertions of their shariah interpretations. But in the present century, many a prominent Sunni jurist writes on the juristic legacy of the Shi'ite ulama and lauds their contributions. Such an open and accepting spirit is at the heart of *ikhtilaf*.

### Ikhtilaf and Ijma'

*Ikhtilaf* is accepted at the level of juristic interpretation only and needs to be seen with the competing concept of *ijma'* that limits *ikhtilaf's* scope. After the Qur'an and the Sunnah, *ijma'* is theoretically the benchmark for proof and source of Islamic law. It embodies the collective conscience of the Muslim community, the undivided consensus over correct textual interpretations reached through *ijtihad*. On its own, individual *ijtihad*, however sound, is not binding on anyone. All enjoy the liberty of their own opinion, naturally ensuring disagreement before an '*ijma'*' materialises on a

### Tawhid

In Arabic, it literally means "making one" or "unifying." It is considered by many twentieth-century Islamic activists to be the defining doctrine of Islam. Although it was also traditionally recognised as a fundamental doctrine, its popularity as Islam's defining doctrine is a modern development. The term *tawhid* is not mentioned in the Qur'an.

Early theologians used it in their interpretations of the relationship between the Divine Essence and Divine Attributes. In the thirteenth century, Ibn Taymiyyah clarified the early theologians' positions, and added his own interpretation which shifted the emphasis on *tawhid* from being purely theological towards more socio-moral issues. The modern importance of *tawhid* only emerged after the reformist Sheikh Muhammad Abduh published a full discussion of its implications in his *Theology of Unity*.

Source: The Oxford Encyclopedia of the Modern Islamic World, John Esposito (editor in chief) (1995: Oxford University Press, Oxford)

### The era of imitation

According to some Sunni theorists, the so-called *bab al-q'tihad* (gate of independent legal thought) was "closed" at the time of the carionisation of the schools of Islamic law (circa tenth century CE). *Ijtihad* (the exercise of independent judgment by one who has sufficient knowledge) was therefore superseded by *taqlid* (the imitation of those precedents that went before). The rationale for *taqlid* was that earlier scholars were unsurpassed in their knowledge of the sacred sources and that they accomplished the interpretative work underlying inherited doctrine in a manner that exceeded the capacities of later generations. However, followers of the Hanbali school, particularly Ibn Taymiyyah, held that the gate of dependent legal thought was never closed.

Source: Newby's Concise Encyclopedia of Islam (2002: bneworld, Oxford) and The Oxford Encyclopedia of the Modern Islamic World.

particular ruling. *Ijtihad* with its capacity for disagreement can thus be seen as another name for *ikhtilaf*.

If the issue of *ijtihad* is important to the community as a whole, it calls for general scrutiny by the ulama and *mujtahidin*. Two possibilities can follow: the individual *mujtahid* is not supported by *ijma'* and the opinion remains an isolated one, or it is elevated to the status of *ijma'* supported by general consensus. In this process *ikhtilaf* is tolerated as a matter of principle. No one can prevent a *mujtahid* from expressing opinions in accordance with his

*The following Hadith is often quoted as a theoretical basis for legitimising ijtihad "When a Judge exercises ijtihad and gives a right judgment, he will have two rewards, but if he errs in his judgment he will still have earned one reward" The Hadith encourages tolerance in academic endeavors. In this spirit, other scholars and mujtahids may do well to exercise restraint in denouncing views they consider erroneous.'*

true convictions.

But *ikhtilaf* must meet two basic requirements: opposing views must be based on valid evidence and cannot lead to something unrealistic. These must also have a basis in *ijtihad* supported by valid evidence.

And when there is general consensus over a particular ruling, *ikhtilaf* must come to an end. The *mujtahid* with a differing opinion is expected to conform to the *ijma'*. Thus, the *raison d'être* of *ijma'* is to regulate and put an end to *ikhtilaf* in order to preserve the unitarian spirit which is of central importance in Islam.

### Causes of Ikhtilaf

Three factors cause disagreements among *ulama*: (1) linguistic matters related to the interpretation of the relevant text; (2) knowledge and authenticity of a Hadith; and (3) proofs and principles of *usul al-fiqh*.

The Qur'an contains words and sentences that are open to interpretation. Disagreements over the meaning of a word might stem from homonyms which carry more than one meaning. Take for example the word *guru'* (verse 2:228). The text in question concerns the waiting period (*iddah*) a divorced woman must observe before she remarries. Her *iddah* consists of three *guru'*, which could mean either three menstruations (*hayd*) or three clean periods (*tuhr*) between menstruations. The latter meaning would actually imply four menstruations and, therefore, a longer waiting period. The Companions differed over this and

subsequent generations of *ulama* have inherited these differences, leaving the *ikhtilaf* unresolved.

A second cause of *ikhtilaf* is ignorance of a Hadith, especially in the period prior to the compilation of Hadith in mid-third century Hijrah. Some of the disagreements that arose between the Traditionalists (Ahl al-Hadith) and Rationalists (Ahl al-Ra'y) related to the fact that the scholastic centres of Kufah and Basrah in Iraq did not know some of the Hadith known in Makkah and Madinah. On these issues, it seems, the ulama of Kufah resorted more frequently to *ra'y* and *qiyas* (analogy). Even the ulama of Madinah were not at times well informed of the relevant Hadith and resorted to Madinan practice

### Usul al-Fiqh

Muslim jurists generally define *usul al-fiqh* ("roots of law") as the body of principles and the investigative methodology through which practical legal rules are derived from their particular sources. Its scope of interest may be likened to the field of jurisprudence in English law, as well as to the field of interpretation of statutes. Imam Shafi'i, in his *Risalah*, identified the sources of law (*usul al-fiqh*) as:

- the Qur'an
- the Sunnah of the Prophet
- *Ijma'* (consensus of those with sufficient knowledge to practise *ijtihad*) and
- *Qiyas* (deductive reasoning that allows one legal ease to be linked to another by analogy)

Other sources of *fiqh* practised by the other Sunni schools of thought are:

- *Amal Madinah* (the practices in Madinah)
- *Ijtihad* (independent judgment by those who have sufficient knowledge)
- *Istihsan* (juristic preference)
- *Maslahah* (public interest)

Source: Newby's Concise Encyclopedia of Islam and The Oxford Encyclopedia of the Modern Islamic World.

Carnal ahl al-Madinah) or to *qiyas*.

Considerable differences have also arisen among schools on certain methodologies and principles of *usul al-fiqh*. There are differences with regard to juristic preference or *istihsan*, the nearest shariah equivalent of the doctrine of equity in Western jurisprudence. *Istihsan* authorises a judge or a *mujtahid* to find an alternative solution to an issue when the strict application of existing laws leads to unsatisfactory results. While the majority accepts *istihsan*, the Shafi'i school has rejected it altogether.

### Etiquette of Disagreement

The Qur'an and Sunnah are generally supportive of rational inquiry into its laws. The Companions were actively engaged in discussing legal questions. They differed from one another on matters of interpretation and *ijtihad* but tended to acknowledge and tolerate *ikhtilaf*. Their method of resolving differences was to first refer to the Qur'an and Sunnah. Only in the absence of a clear ruling in these, did they resort to *ijtihad and shura*. *Shura* (consultation) is a Qur'anic principle regularly practised by the Prophet (peace be upon him).

4

The following Hadith is often quoted as a theoretical basis for legitimising *ijtihad*: "When a judge exercises *ijtihad* and gives a right judgment, he will have two rewards but if he errs in his judgment he will still have earned one reward." The Hadith encourages tolerance in academic endeavours. In this spirit, other scholars and *mujtahids* may do well to exercise restraint in denouncing views they consider erroneous.

Even so, the Prophet also directed his Companions to avoid purposeless and destructive disagreement. On one occasion the Prophet heard two people arguing over the minor points of a Qur'anic verse such as its accentuation. He came out evidently angered with the kind of *ikhtilaf* they were engaged in and said: "Verily people were destroyed before you for (their excessive) disagreement over the Scripture." In other words, *ikhtilaf* can be destructive even if the parties mean well.

### Types of Ikhtilaf

The ulama have classified *ikhtilaf* into three types: praiseworthy (*mahmud*) — such as disagreement with the advocates of heresy and misguidance; blameworthy (*madhmum*) — of the kinds mentioned in the Hadith cited above; and one which falls between the two. The hallmarks of distinction between the praiseworthy and blameworthy *ikhtilaf* are sincerity and devotion. Whether the purpose is a worthy one, such as the advancement of sound *ijtihad*, or tainted by selfish interest, is likely to play a crucial role in determining the merits of *ikhtilaf*.

In Risalah, Imam Shafi'i divided *ikhtilaf* into two types: forbidden disagreement (*al-Ikhtilaf al-muharram*) and permissible disagreement (*al-Ikhtilaf al-ja'iz*). Disagreement is forbidden in matters determined by clear textual evidence in the Qur'an and Sunnah for anyone who is aware of it. In support of the Qur'anic directive, Shafi'i then said to the believers: "And be not like those who are divided amongst themselves and fall into disputations (*ikhhtalafu*) after receiving clear signs." On matters of permissible *ikhtilaf*, Shafi'i referred to the general rules and guidelines of *ijtihad* discussed in Risalah, with the proviso that priority should be given to supportive evidence obtained from the Sunnah or through *qiyas*.

*Ikhtilaf* is a well-developed area of fiqh and works of

### Imam Shafi'i

Imam Shafi'i (b. 767 — d. 820 CE) started off as a dedicated student of Imam Malik. When Shafi'i went to Baghdad, he found that many people were ready to find fault with the legal opinions and methods of the Ibadinan, especially Imam Malik. Shafi'i stood up in Malik's defence. Later, when Shafi'i travelled to Egypt, he encountered a different situation: most people there adhered strictly and unquestioningly to the opinions of Malik. Consequently, Shafi'i conducted a critical analysis of Malik's opinions and found, among other things, that in some cases, "... he (Malik) formulates opinions on the basis of a general principle, while ignoring the specific issue; whereas at other times he gives a ruling on a specific issue and ignores the general principle." Moreover, Malik claimed in many cases that there was *firm* concerning the matter, when there was, in fact, disagreement about it. It was from this critical analysis of Malik's opinions that led Shafi'i to write Risalah.

Extracted from:

[http://www.usc.edu/dept/MSA/law/alalwani\\_usulalfiqh/ch4.html](http://www.usc.edu/dept/MSA/law/alalwani_usulalfiqh/ch4.html)

scholarship on *ikhtilaf* date as far back as those of *fiqh* itself. The first known extant work of *ikhtilaf* 4s by Abu Hanifah titled *Ikhtilaf al-Sahabah* (Disagreement among the Companions). His disciple Abu Yusuf wrote a book entitled *Ikhtilaf Abi Hanifah wa Ibn Abi Layla*. Shafi'i also wrote a book entitled *Ikhtilaf Abi Hanifah wa'l-Awza'i* and has a chapter on *ikhtilaf* in Risalah. He also recorded in Kitab al-Umm his disagreements with Malik.

The style and content of these works have changed over time. Initially the style of writing tended to be somewhat defensive, seeking to vindicate one's own views without discussing the works of other *mazhab*, except perhaps in areas of difference. Subsequent works had a more comparative style of writing, and later, especially after the fifth-century Hijrah, following the decline of *ijtihad*, *ikhtilaf* works were influenced by regional developments. The focus shifted to disagreements within the ranks of the schools, including those between the leading imam and his disciples, or among the disciples themselves. Another notable development in this context is that the writers began to indicate their preferred positions and there emerged a genre of juristic literature on preferences (*al-tarjih*).

## Conclusion

The existence of *ikhtilaf* as a well-developed and recognised branch of fiqh reflects the healthy climate of tolerance among the leading ulama and scholars of Islam. The fact that several schools of law have attempted to provide equally valid interpretations of the shariah - that they have accepted one another and have in turn been accepted by the Muslim community - is evidence of Islamic law's pluralism.

In the formative stages of Islamic jurisprudence - during the first three centuries - the scholars tended to excel in the degree of latitude and acceptance of *ijtihad-oriented ikhtilaf*. The Companions disagreed about matters of interpretation and it is even said that they had reached an agreement to disagree. Their example also finds support among the leading authorities and *ulama* of the era of *ijtihad*.

Yet this understanding and openness was subject to restrictions during the era of imitation (*taqlid*) with instances verging on rigidity and stricture among the ulama's lower ranks. Indeed, the mazhab divisions in the Muslim ummah today, especially between Sunnis and the Shi'ah and among the students of different Sunni legal corpus, often tend to violate the spirit of *ikhtilaf*. There is a great need today for Muslims to unite and maintain consensus while recognising that these emerge out of open deliberation and principled *ikhtilaf ikhtilaf* and *ijma'* are inseparable even if they appear to be contradictory.

But even as *ikhtilaf* has played an inspiring role in Islam's intellectual heritage, its role should not be exaggerated. A legal order in society cannot proceed on the basis of never-ending *ikhtilaf*. The value of *ikhtilaf* is relative to and not independent of conformity and consensus that must be accepted as the stronger influences demarcating *ikhtilaf's* limits.

"The fact that several schools of law have attempted to provide equally valid interpretations of the shariah - that they have accepted one another and have in turn been accepted by the Muslim community - is evidence of Islamic law's pluralism."

To determine the correct procedure for the resolution of *ikhtilaf* in Muslim societies today, one should refer to the Constitutions and laws of the countries concerned. Resolutions of differences must be made in a *maslahah* oriented manner in the interests of the people and by accommodating their views. Once a selection has been made by the ruling authorities, everyone must comply with it and disagreements must be laid to rest.

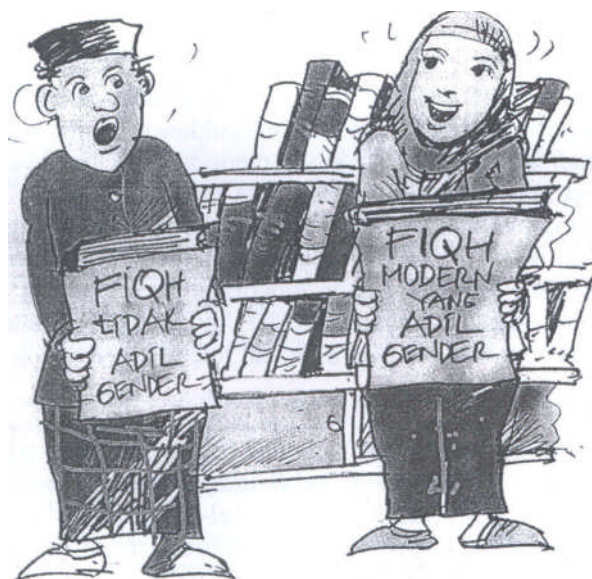
Of course, there is no single formula for resolving *ikhtilaf*. Often the shariah, or the applied law of a country, provide only general guidelines and leave specific decisions to be made by the experts or those in charge of community affairs. Yet,

ultimately we must live with some of the unresolved *ikhtilaf* in juridical and theological issues that history has bequeathed generation after generation of Muslims. This is also partly a function of *ikhtilaf's* circumstantial character that tends to increase in relation to new developments and unprecedented experiences. As such, it must remain the responsibility of every generation of the ummah to seize the opportunities they are endowed with to resolve inherited *ikhtilaf* or find a better way of reconciling their differences with it.

## Acknowledgements

Prof Dr Hashim Mohammad Kamali is the Dean of the International Institute of Islamic Thought and Civilisation (ISTAC) at the International Islamic University Malaysia.

This piece is a summary of a more extensive essay by the author originally published in the Islamic Studies quarterly journal, Vol 37, No 3, Autumn 1998, of the Islamic Research Institute, International Islamic University, Islamabad, Pakistan. It is reprinted here in this form with the kind permission of the author.



Man: Fiqh with no gender justice. Woman: Modern Fiqh that is gender just.

Illustration taken from "Dakwah Fiqh Perempuan: Modul Kursus Islam dan Gender" Muhammad, Husein et al. March 2006, Cirebon: Fahima Institute.