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THE MUFTI, THE TEXT AND THE WORLD: LEGAL INTERPRETATION IN YEMEN

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Muftis are literate scholars who specialise in Muslim legal-religious interpretation. They provide an example of a higher level of systematic indigenous interpretation than the common sense, everyday constructions of reality that have been discussed in anthropological accounts. I discuss the institutional form of the muftiship, and contrast it with the judgeship, with reference to indigenous ideal-types found in several categories of written Muslim social thought. This ideal form is then compared with the identities of historical and contemporary muftis in Yemen. The interpretive method employed by muftis joins a Greek-derived concept of analogy with recitation and hermeneutics. While their method is structurally similar to scriptural interpretation, muftis are worldly interpreters who address practical life problems posed by lay questioners.

Indigenous interpretation

One important potential connected with the advent of hermeneutical approaches in anthropology (Geertz 1973; 1983) is the enrichment of our notions of interpretation through analyses of non-western interpretive genres. 'Native' interpretations of one variety have, of course, long figured in anthropological accounts, witness, for example, the importance given by V. Turner (1967) to 'exegesis', provided by such specialist informants as Muchona. But such interpretations are of a distinct type, explicitly set in the context of discussions between the informant and the anthropologist. In the case of Turner's work with Muchona, it was a context in which the Ndembu 'philosophy don', as Turner fondly referred to Muchona, came to experience a 'quenchless thirst for objective knowledge' (1967: 150, 138). One wonders, however, about the character of Muchona's interpretive capacities and methods, as a Ndembu 'witchdoctor', prior to, or outside of his sessions with Turner. In literate civilisations, anthropologists may gain access to indigenous modes of interpretation that are neither oriented towards, nor dependent upon, communicating with outsiders such as anthropologists. Interpretive methodologies and models for institutions of interpretation may be tapped through analyses of diverse genres in textually based traditions (e.g., Errington 1979; Siegel 1979; O'Connor 1981).

Geertz has asserted that 'societies . . . contain their own interpretations' (1973: 453). He has also been clear about the fact that anthropological interpretations, those imperfect, 'bumpy spirals' (Boon 1978: 363) circling between the conceptual categories of the anthropologist and those of a particular population of 'natives', comprise two distinct levels of interpretation. Anthropological

interpretations are thus 'second and third order' (1973: 15) in that they are 'constructions of other people's constructions' (1973: 9), that is, our interpretations of their interpretations. I would argue further that *their* interpretations are of two general categories, one relatively embedded in everyday common sense and unnoticed (except by the anthropologist) *qua* interpretation, and the other set aside and clearly identified as 'native' interpretation. An example of the former is the Balinese cockfight analysed by Geertz (1973) and of the latter, Muslim legal interpretation in Yemen. Geertz has noted that in literate societies, such as those of the Middle East, 'native interpretations can proceed to higher levels' (1973: 150), going beyond the level of conceptual articulation characteristic of the world of common sense. As envisioned here, interpreting indigenous interpretation entails not only the elucidation of a distinctive methodology but also an examination of the conceptual setting in which interpreters interpret.

Legal interpretation: the mufti and his fatwa

A *mufti* is a Muslim jurist who delivers a non-binding type of legal opinion known as a *fatwa*, exercising in the process a form of legal-religious interpretation called *ijtihad*. Across the Middle East and north Africa, muftis great and small, official and unofficial have functioned at the interpretive interface of theory and practice in Islamic law for many centuries. Analogues for the muftiship have been identified in both Roman and medieval Jewish legal institutions¹.

For a mufti's questioner, obtaining a fatwa is an informational step, taken either to regulate the individual's personal affairs or with litigation or some form of settlement in mind. Questioners appear as individuals, not in adversarial pairs; posing a question to a mufti and receiving his response is not a judicial procedure like that in a judge's court. Also, in Yemen, fatwas are not presented in court cases². Without being binding, yet authoritatively, a fatwa simply provides the fatwa seeker with a legal rule relevant to the matter in question. Fatwa in hand, the questioner is free to arrange his affairs accordingly, or not; seek redress if he appears wronged, or not.

Muftis are intermediate figures. They occupy a niche between the jurist as teacher and the jurist as judge, mediating in identity and function between the opposed spheres of the *madrassa* (school) and the *mahkama* (law court)—between the cloistered, theoretical transmission of jurisprudence in the lesson circles and the public, practical application of the law in judicial proceedings. Many muftis were also teachers, but unlike the retiring purists among their professorial colleagues, muftis were jurists who projected their knowledge beyond the confines of the madrasa to address the affairs of the community. A mufti's involvement with the mundane world was more restrained, however, than that of a judge. As jurists and as moral beings, muftis typically distanced themselves from the considerable ambivalence surrounding the judgeship itself and the court, which many considered an arena of error, corruption and coercion.

Yet, in a sense, the impact of muftis upon practice has been greater than that of judges: perhaps the closest approximation in Islamic law to the weight of

precedent cases in Common Law is to be found in the non-binding fatwa opinions of muftis rather than in the decisions of judges. It has been argued that a legislative capacity is lacking in Islamic law and that this function has been filled by the institution of fatwa-giving (Tyan 1938: 323; Schacht 1964: 745).

Fatwas are related to judgments, however, in that both are interpretations, concerned with the interrelationship of law and fact. But their interpretive thrusts are diametrically opposed. The tension between the dictates of textual theory and the circumstances of actual cases results, in a fatwa, in a 'reading' of textual theory, while in a judgment it leads to a 'reading' of practical fact. Interpretive reciprocals, fatwas and judgments represent the application of an indigenous notion of text as a model, of and for, respectively, the factual world. As in the West, there is an important Muslim tradition of concrete hermeneutics (Goldziher 1981: 55f., 62), that is, scriptural interpretation. This madrasa-based tradition of Quranic exegesis and commentary upon and interpretation of other texts stands opposed in subject matter, yet related in structure, to the worldly interpretations of fatwas and judgments.

Here I examine the muftiship as the mediating role in a complex institutional system for the interpretive transmission of Islamic legal-religious knowledge (*fiqh*). The interrelated system of madrasa (school), muftiship and mahkama (court) serves to bring this knowledge into the world, and, as important, the world into knowledge. It must be stressed that *fiqh* does not have a narrow 'legal' referent but, like Jewish or Canon law, embraces in addition a wide gamut of ritual obligations, such as prayer and fasting, marriage and divorce rules, and such detailed requirements as those concerning correct conduct, attire and permissible foods. Far from being a narrowly circumscribed speciality, legal interpretation represents the paradigmatic form of Muslim interpretive thought.

To extend and qualify these schematic generalisations I shall describe the interpretive practices of muftis in the Yemen Arab Republic (North Yemen). Yemen has had only indirect experience of such public institutional elaborations of the office as occurred in Mamluk Egypt (Tyan 1938: 330) and in the central provinces of the Ottoman Empire (Gibb & Bowen 1957: 133-5; Walsh 1965). Yet muftis have served in Yemen both under the terms of official appointments and as private scholars, and they have ranged in stature from the most noted jurists of an era, such as Muhammad Ali al-Shawkani (1760-1832), to modest men practising in the provinces. There is currently a Mufti of the Republic in the capital city, and questioners from around the country now also have media access to a weekly radio 'fatwa show', and on Yemen television, bearded old scholars in turbans and robes answer viewers' questions in a similar format. Despite the great antiquity of the institution and this apparent continuity, however, the muftiship is not timeless. Rather, it is intimately linked historically to scholarly formation in the old madrasas (closed in the mid-1950's), a pre-legislative concept of law, and a distinctive notion of 'text'. I begin with a description of the activities of local muftis in the southern highland provincial capital of Ibb (Messick 1978).

A provincial mufti

The present day official Mufti in Ibb has held the title 'Mufti of Ibb Province' from the time of the Revolution in 1962. He receives a salary through the local branch office of the Ministry of Justice. Like muftis before him, however, he has no official place of work. He can be stopped while he is shopping in the town streets in the morning, and he also receives people and writes fatwas at his own residence, in a semi-public sitting room. After lunch, men begin to assemble there, some of them intending to settle in for an afternoon of chewing *qat*, a mildly narcotic shrub widely consumed on a daily basis in Yemen (Kennedy *et al.* 1980). The men sit on cushions against the wall at floor level. Light enters the room through two large windows, set nearly at floor level in one of the whitewashed walls. A simple wooden box, placed before a cushion and arm rests, marks the space where the mufti sits.

Descending from private upstairs rooms, the mufti enters the sitting room wearing a skull cap, a gown and a vest, and carrying his own bundle of *qat*. Without ceremony, he steps over the wooden box on his way to his accustomed place. He begins to chew his *qat* and adjusts his spittoon and his water thermos. The hose of the water pipe is passed to him to smoke. Outwardly, the scene is no different from that in many other afternoon *qat*-sessions in progress around the town, including those at judges' houses.

A majority of the ten or so men who typically appear at the mufti's sitting room on any given afternoon are from rural districts. Sometimes referred to as 'tribesmen', these men are cultivators of the small curved terraces that rise in steps up the steep mountainsides of the southern highlands. Aside from breaks associated with the two great ritual feasts of the lunar calendar and with the fasting month of Ramadan, the level of activity in the mufti's sitting room is tied to the annual agrarian cycle. As in the courts, harvest time in the late autumn is a slack period for the mufti.

Some men come to the mufti to settle disputes out of court. In acting as an arbitrator the mufti steps out of his role as mufti. 'We are in your hands; decide between us, and your decision will be implemented', is the formula of this request. Other uses of his legal expertise also go beyond his official work. For some men he acts as a notary (*katib*) who prepares legal instruments such as sale contracts (Messick 1983a; in press). Although he would never appear for a client in court as a legal representative (*wakil*), he does write claims, responses to claims, and appeals of decisions for his clients to present in court. In addition to his work delivering fatwas, there are other categories of legal activities in which he engages in his official capacity as mufti. Occasionally, he adds his signature to an attestation of poverty or of incapacity presented by an individual seeking admission to the charity rolls, or he is asked to countersign a legal instrument. Both rural and town people also come to him for legal evaluations of physical injuries (*arsh*)³.

But the main activity of the mufti is the writing of fatwas. A fatwa is the mufti's response to a question. Questions are posed in writing, by the literate for the illiterate, and usually by men for women in the case of a female questioner, using such common formulae as 'what do the scholars of Islam say about . . .' and the matter is stated, or in conclusion, simply 'give us a fatwa' concerning the

matter. On the same small piece of paper, usually in the space above the question, the mufti writes his '*jawab*', his answer, which is the fatwa, concluding with the formula *wa allahu a'lam* (God knows best) and his signature.

While most Yemenis these days use western fountain pens or ball points, this mufti continues to use an old-fashioned carved wooden pen which he dips repeatedly in an inkwell. He holds papers between the base of his writing hand and that of his left hand, which rests on his upright knee. As he writes, two fingers of his left hand glide along the back of the paper to meet the pressure of his pen. When he is finished writing, he hands the paper back to the questioner. No record is made as the mufti has no secretary (although I hired one with his permission for my research). While the mufti is paid as a matter of course for writing legal instruments and in dispute settlement, he does not always accept money for fatwas, or if he does it is a very small sum, considered a gift rather than a fee. When a fatwa-seeking question is posed, the mufti's response is always immediate. Far from pausing to refer to a legal manual, or, seemingly, even to reflect, he answers all questions without hesitation. This is remarkable, in view of the range and complexity of the questions he receives.

In general terms, the fatwas he issues may be classified as follows: marriage and divorce matters, inheritance and pious foundation questions, other property issues, and miscellaneous. This last category includes the occasional fatwa sought about a ritual detail. A prayer leader of a mosque next door, for example, came to ask about the fine points of timing for the first call to prayer of the day. Fatwas concerned with divorce support payments and inheritance divisions require calculation (as do wound evaluations). Part of this mufti's academic formation, however, is in the subjects of calculation and the law of inheritance, both of which he also taught prior to the Revolution at the madrasa of the Great Mosque of Ibb. Conflicts connected with marriage are the most numerous type of questions currently asked. Aside from the common questions about such matters as the validity of a threefold statement of divorce, this mufti receives many questioners whose lives have been influenced by the large scale recent migration of Yemeni men to Saudi Arabia for work. Many marital legal problems are connected with the absence of husbands. In estate related questions, many individuals want to know which relatives are heirs of a deceased person, and what share each heir should receive. A significant subset of these fatwas deals with problems concerning pious foundations, which are important in the economic history of the Ibb region. There are fatwas on such issues as the exclusion from foundation benefits of an out-marrying woman's descendants in favour of descendants in a direct male line, and others concerning the sale of inalienable foundation properties. There are also fatwas dealing with the invasion of property rights, or with whether an individual is allowed to retract a sale or exercise a right of pre-emption. For pre-emption matters this mufti now refers his questioners to a rule established by the Ministry of Justice.

Three queries and their associated fatwa-responses will serve to illustrate the Ibb genre. Concerned respectively with marriage, inheritance, and property rights, these texts appear concise and implicit in simple translation from the Arabic. Also, queries are often poorly phrased or confused, while fatwas sometimes must be explained to their recipients. Further explication, which is

not attempted here, would require a historical and ethnographic excursus into such matters as the law of marriage, guardianship and the structure of male-female relations; the law of inheritance, and the patterns of kinship; and the law of property and the contract of sale.

question 1

What do the scholars of Islam say, may God be pleased with you, about a woman who has a young virgin daughter and, following upon the absence of the full brother of this daughter, the mother undertakes to marry the girl without the consent of her brother, despite the fact that the brother wrote weekly? The contract was entered into under the auspices of the judge, and she had no guardian except him. He [the brother] was only in absence one month. Give us a fatwa.

fatwa

The answer: the judge does not have the right to make a contract given the existence of her legal guardian, her brother, as long as he had not abstained from the contract. God knows best. Mufti of Ibb Province, (signature).

question 2

What do the scholars of Islam say about a woman who died leaving her daughter and her full sister. She also has a husband and a half sister by her mother and a son of her father's brother. Give us a fatwa concerning the number of shares in this matter, and also who is legally entitled to inheritance and who is excluded, in detail. Prayers upon our master Muhammad and his people and his followers, and peace. February 4, 1976. Presented by (name and village).

fatwa

The answer: to the husband a quarter, and to the daughter a half, and the remainder to the full sister, and nothing to the half sister by the mother, and nothing to the father's brother's son. God knows best. 4 Safar 1396. Mufti of Ibb Province (signature).

question 3

What do the scholars of Islam say about a man who sold a piece of land, without knowing it and without knowing its value, to a buyer in whose possession the land was for cultivation, when it later became clear that the land was valuable and that he only received less than half of its value. Does the seller have a right to reclaim his land? March 22, 1980.

fatwa

The answer: there is no fraud when the seller is legally capable, except if a legal condition was placed upon the purchaser. God knows best. Mufti of Ibb Province (signature).

While most fatwas are brief and straightforward, lacking any explicit reasoning or citation of authorities, a few are more expansive and make reference to differences among the 'schools' of law or individual jurists. In one fatwa, for example, the mufti cites the uniform view of the four orthodox schools, notes that it is the same as that of the Hadawiyya (Zaidi) school with one condition, and then goes on to refer to the consensus of authoritative Yemeni jurists such as Muhammad Ali al-Shawkani and Muhammad Isma'il al-Amir, which is a different view.

His fatwas also make occasional reference to customary law (*'urf*). When he is specifying the level of support payments to divorced wives, for example, he details amounts of grain, money, rent per month and clothes per annum 'according to custom' (*bihisab al-ma'ruf*). Another type of question asks the mufti to evaluate a customary settlement from the perspective of the *shari'a*, or Islamic law. In one such instance, a dispute arose over whether a woman was or was not a virgin at the time of marriage. The conflict was resolved by rural leaders in the form of a *sulh*, or customary compromise, rather than in-court and

according to the *shari'a*. In his fatwa, the mufti found several of the money payments included in the terms of the settlement to be without basis. This opinion was implicit, however, as he merely stated what the only legal money payment should be.

In Ibb, the basic textual justification for the muftiship is identified as the Quranic injunction to 'ask those who know' (Bee Sura, v. 45). Thus the obligation to give of acquired knowledge, satisfied in teaching or when a man of learning acts as a mufti, is matched by its inverse, the requirement placed upon the uninformed (*jahil*, 'ammi) to question the learned. According to theory studied in Ibb (al-Juwayni n.d.: 38), the mufti and his questioner have opposed statuses in relation to interpretation. The mufti must be a qualified interpreter, and cannot be an accepting follower of doctrine, while the questioner cannot be an interpreter (i.e., must not attempt to interpret) and must be an accepting doctrinal follower (i.e., of the mufti, via his fatwas).

According to Weber (1978: 798–9, 821) and Schacht (1964: 74), the muftiship was originally a 'private' institution that later became 'public'. Schacht correctly adds, however, that the later official muftis 'had no monopoly of giving fatwas, and the practice of consulting private scholars of his reputation never ceased'. An official muftiship was established in Ibb during the second Ottoman occupation (1872–1919), but its public quality was not pronounced. Ahmad Muhammad al-Haddad, the official Mufti under imamic rule in the 1930's and 1940's, described his activities in the following terms:

The place of issuing fatwas was in the sitting room of my house, since there was no formal office place for any judicial or executive organ in the old days. Most of our time in those days was unoccupied and we spent it reading *Subul as-Salam* [by al-Amir (d. 1753), on Traditions] and other books during the afternoons. As for the mornings, we used to walk down into the valley, and if anyone came up to us with a matter we used to answer him in any place he found us, in the street or in any other place. (taped discussion, 1980).

Prior to the late nineteenth century, the giving of fatwas was an informal activity of leading scholars. 'He studied, he taught, he gave fatwas' (Al-Akwa' 1980: 234) is a summary statement of what a scholar did. A common formulation identifying a prominent scholar is *intahat ilayhi riyasat al'ilm*, with the sense being that the scholar in question was the final authority—literally, 'the leadership of knowledge ended up with him'. The separate strands of the composite identity of one local scholar are detailed in the same terms: 'the leadership of legal knowledge and fatwa—giving and instruction ended up with him' (*intahat ilayhi riyasat al-fiqh wa al-fatwa wa at-tadris* [Al-Akwa' 1980: 661]). This old idiom of scholarly preeminence (cf. Makdisi 1981: 129–33) occurs in local biographical dictionary accounts going back to the twelfth century⁴. A scholar without peer in the locality was by definition, and simultaneously, the individual sought out for instruction and the one prevailed upon to issue fatwas.

Muftis and judges: an indigenous typology

With regard to both its institutional form and the method of interpretation, the muftiship has given rise to systematic indigenous thought. This may be

categorised as follows: explicit theorising, including the formulation of 'ideal-types'; models, located in two categories of jurisprudential writings; condensed formulae, in both the Quran and the Prophetic Traditions; and stylised characterisations of individual scholars in the biographical dictionaries. Such thought was constructed not as an 'informant's discourse' (Bourdieu 1979: 18), but as an indigenous image for indigenous consumption, elements of a native social science (O'Connor 1981).

According to Ibn Khaldun (d. 1406), both the muftiship and the judgeship are among the '*diniyya shar'iyya*' ('religious-legal') functions that fall under the authority of the (great) imam, the leader of the Muslim community (1958: 448 sqq.). For al-Qarafi (d. 1301), 'every (great) imam is a judge and a mufti' (1967: 32), while the reverse is not true. Ruling Yemeni imams (until 1962) fit this type. In addition to his responsibility for the affairs of the 'world', an imam was both a mufti and judge in identity and capacity, in addition to being in a position of authority over simple official muftis and judges⁵.

In Islamic legal works, the muftiship and the judgeship are given contrasting treatment. It is in a methodological genre, known as the 'roots' of jurisprudence literature (in Ibb. al-Juwayni n.d.), that the muftiship is discussed. In the more practical manuals, the 'branches' literature (for Ibb. Abu Shuja' 1859; al-Nawawi n.d.), a chapter on the judgeship is standard, but there is no equivalent chapter on the muftiship. This separate treatment of the two offices in the methodological and practical literatures is consonant with differences in the kinds of interpretation engaged in by muftis as opposed to judges. The two offices are also distinguished with respect to the conditions set for candidates. In general, these conditions are not so highly elaborated for potential muftis as compared with those for individuals who would become judges (Tyan 1938: 334-6). A judge must be a male, free as opposed to being of slave status, and sound in sight and hearing. By contrast, these are no explicit requirements for muftis. Two other characteristics, moral uprightness and intellectual attainments, are the overriding determinants of suitability for the muftiship. '*Adala* (justness or probity) and advanced scholarly status enabling interpretation are absolute requirements for muftis, while for the judgeship both the admission to the office of an individual lacking in moral standards (*a fasiq*) and one totally ignorant (*a jahil*) are permissible, if by no means desired.

Further evidence of the conceptual contrast between the muftiship and the judgeship is found in a deep-seated ambivalence that has surrounded the judgeship from early times (Gottheil 1908; Amedroz 1910; Wensinck 1922; Coulson 1956). There exists a set of 'ominous' traditions concerning the office (e.g., 'of three judges, two are in Hell' and 'he who undertakes the judgeship slits his own throat without a knife')⁶, and jurists across the Muslim lands, including Yemen (Ibn Samura 1957: 94, 219, 247; al-Khazraji 1911: 58; al-Akwa' 1980: 272) often have been reluctant to serve as judges. Judges are held accountable for the historical divergence of theory and practice, for procedures and rulings not solidly anchored in the *shari'a*. As opposed to the imagery of Hell visited upon wayward judges, however, even the commission of errors by muftis in the course of their interpretive work is positively rewarded. According to a Tradition of the Prophet, 'If an interpreter is right he receives two rewards,

and if he is mistaken he receives one reward' (Schacht 1950: 96; for Ibb, al-Juwayni n.d.: 39).

While the mufti is sought out by single questioners for non-enforceable fatwas, a judge rules in contexts of two-party conflict and his judgments are enforceable. Ibn Khaldun blends the muftiship with the role of scholar-teacher, whose forum is the *madrasa*, the place of instruction. In Ibb, instruction was located in the main mosque, and the students lived and studied in sequestered separation from ordinary public life. The judge's *mahkama*, by contrast, is a quintessential public forum, a locus for the coercive exercise of state power, represented by the judge's soldier-retainers, and now police and prosecutors (Messick 1983b). Historically, Ibb muftis, like their earlier Ottoman colleagues (Gibb & Bowen 1957: 137), were supported by specially earmarked pious foundations. In this foundation support muftis were further associated with the *madrasa*, which was exclusively funded by foundations, and distinguished from judges and their profane income. In addition to state salaries for judges, corruption has loomed around court proceedings because judicial decisions count.

Ideals and men

In ideal terms a mufti is an intermediate figure, retaining the purity of the *madrasa* while approaching the rough and tumble of the *mahkama*, but actual muftis vary in their approximation of the norm. The present Mufti of Ibb retains an association with the *madrasa* (as a former teacher) and he has the retiring pious nature of a private scholar desiring to keep his distance from the boisterous arena of public life. There are other exemplars of this ideal posture. One was 'Ali Najj al-Haddad, the apical ancestor of the contemporary al-Haddad family of Ibb. In the late nineteenth century he was a teacher and a mufti, both activities being based in the town *madrasa*. Another is the great Yemeni jurist Muhammad 'Ali al-Shawkani (1760-1832). In his autobiography (1348 A.H. II: 214-25), Shawkani describes his isolation from the world (*al-dunya*) during the time he was a mufti and prior to being, as he puts it, 'afflicted' with the judgeship. Speaking of himself in the third person, Shawkani says, 'He did not stop at the door of a governor or judge, and did not befriend anyone of the "people of the world" (*ahl al-dunya*).' Of his work as mufti he proudly states that he issued fatwas for free: 'I acquired knowledge without a price and I wanted to give it thus'.

Muftis who were so inclined, however, could be important actors in 'the world'. For the Middle East generally, we have the notorious example of the Mufti of Jerusalem in this century, and there is evidence that at least some Ottoman official muftis became wealthy in their posts (Gibb & Bowen 1957: 137). Two Yemeni examples, again provincial and prominent, further demonstrate that the muftiship was no institutional straitjacket. 'Ali Najj al-Haddad's son Abdarrahman, one of three brothers who served as Ibb Mufti, was a scholar-politician who went on to become assistant to the Ottoman governor of Ta'izz District (then including Ibb) and, later still, the Presiding Judge of the

Court of Appeals under Imam Yahya. The Yemeni historian al-Wasi'i (1346 A.H.: 174, 201–4) provides an account of the political exploits of an official mufti of the entire Ottoman Province of Yemen, a man who was far from the model of a retiring scholar.

Interpretive method in fatwas and judgments

I have suggested that both fatwas and judgments are interpretations. Asked in writing to explain the difference between a fatwa and a judgment, the present Ibb Mufti responded, fatwa-style:

The answer: a fatwa is a legal clarification (*bayan*) for the judgment and the mufti is the ascertainer of the legal reference (*dalala*), and the clarifier in his response of (that which is) legal and illegal in the shari'a (Islamic law), but in it there is no enforcement (*ilzam*). The judgment requires enforcement. God knows best. (Signature)

In the same work in which he distinguishes the categories great imam, mufti, and judge, al-Qarafi (1967: 30–1, 41) also offers a typology for the fatwa and the judgment. Al-Qarafi's argument contrasts the conceptual bases of fatwa-giving and judgment-giving in a manner similar to the Mufti of Ibb. He says that a mufti refers to *adilla* (from the same root as the term *dalala*, used by the Mufti of Ibb), while judges refer to *hijaj*. *Adilla* are such sources of law as the Quran and the Sunna, while the *hijaj* include information about the world such as evidence and a disputant's acknowledgement of an act (cf. al-Qarafi 1344 A.H.: 128–9).

If both fatwa-giving and judgment-giving embody an interpretive bringing together of theory and practice—of the sources of law and actual occurrences—they do so with differing emphases. What is 'constructed' in a fatwa is an element of theory—a fatwa is concerned with and based upon theoretical texts (*adilla*), although it requires the specifics of an actual case as a point of departure. What is 'constructed' in a judgment is a segment of practice—a judgment is concerned with and based upon practical information (*hijaj*), although it requires a framework of theory as its point of reference. Fatwas utilise concrete descriptions as *given* instances necessitating interpretation in theory; judgments address cases as *problematic* instances that are themselves in need of interpretation. As interpretations, fatwas and judgments come to rest at opposed points on the same hermeneutical circle.

Fatwas and judgments are not direct interpretations of reality, however, and in this sense they are comparable to anthropological interpretations. The interpretive skills of a mufti or judge are engaged only following an original lay interpretation. Like the constructions of anthropologists, fatwas and judgments are 'second and third order'—interpretations of interpretations. The queries and cases presented to muftis and judges are, like the 'native' interpretations commonly discussed by anthropologists, composed of commonsensical, colloquial understandings of reality.

Interpretation, analogy and consensus

While the construction of the practical world via judgments is a crucial activity

in any society, perhaps even more fundamental is the interpretive augmentation of the basic corpus of legal theory itself. In the Muslim tradition, this has been accomplished in two ways: in the activity of jurists, usually associated with *madrasas*, who engaged in the purely theoretical extension and elaboration of the 'text' of existing law, and by some of the same jurists and others, acting as muftis, who took as their ground of interpretive departure not text but the facts of the world. Given the sacred quality of Islamic law, coupled with the historical fact that its means of sacred augmentation and interpretation (God's revelations to the Prophet Muhammad, which constituted the Quran, and the Prophet's own sayings and doings, which compose the second major source of law, the *Sunna*) were cut off with the death of the Prophet, it is understandable that further development of the law would prove problematic.

The method of *ijtihad* that evolved is one anchored in analogy (Bernard 1980; Schacht 1950: 98–132). A Greek logical method (Peters 1968) was wedded to the methods and constraints of interpreting a body of sacred text (Quran and Sunna). Analogy (*qiyas*)⁸ is the tool used to interpret new facts with reference to existing text, and, conversely, new text with reference to existing fact. In the 'roots' manual of jurisprudential method studied in Ibb (al-Juwayni n.d.: 67–71), analogy is first defined in terms of relating 'branch' to 'root', that is, a question of positive law to a source of law (Quran or Sunna). Analogy is further specified as occurring in three types: one which works through a 'middle term' (*'illa*); a second which operates through a direct 'indication' (*dalala*—cf. the usage by the Ibb Mufti); and a third involving a relation of 'similarity' (*shabah*). The range of interpretive linkages made possible—to shift momentarily to our discourse—roughly coincides with the complex of 'meaningful' relationships of system and syntagm, or association and similarity, in semiology (Barthes 1968). In Muslim legal interpretation, the underlying analogy is of the *text* and the *world*, allowing the systematic handling of a double-edged problem—creating new text and regulating new cases.

Analogically based *ijtihad* emerged as the accepted interpretive method in Islamic law only against the staunch opposition of strict or literal interpretationists, who rejected it outright, comparing it to 'carrion, to be eaten only when no other food is available' (quoted in Bernard 1980: 239). In an intellectual environment of 'Traditionalist' critiques, *ijtihad* was developed by jurists from a loose application of personal opinion to a comparatively strictly defined method based on analogic reasoning. No matter how rigorously defined, however, *ijtihad* was still an exercise of a single individual's interpretive capacity, and therefore, by definition—as human—potentially flawed. In fact, Muhammad al-Shafi'i, the famous Muslim jurist credited with both the initial elaboration of the whole 'roots' methodology and the grounding of *ijtihad* in strict analogy, recognised that divergent views were the necessary concomitant of the use of *ijtihad* (Schacht 1950: 97, 128). As is recognised regarding our own (anthropological) interpretive method (Geertz 1973: 29), the imperfect nature of *ijtihad* was well understood.

How could interpretations individual in origin become 'text', accepted as accretions to the corpus of the law? The answer lies in a mechanism placed third among the fundamental sources of law, the first two being the Quran and Sunna

and the sometimes included fourth being analogy. This is the principle of 'consensus' (*ijma'*), exemplified and justified by a Prophetic Tradition: 'my community will never agree in error'. Consensus, the means by which individual interpretations became integrated into the law, was also subject to a narrowing of definition, until it came to be associated not with the opinion of all the community members, but rather with that of the scholars alone, those deemed capable of evaluating an interpretation, either rejecting it as wrong or accepting it as authoritative. Consensus has been characterised as the 'the foundation of the foundation of the law' (Hurgronje 1957: 57; cf. Goldziher 1981: 50f.). Seen in relation to interpretation, consensus is the mechanism through which the *parole* of the individual interpreter could become part of the collective, consensual *langue* of the law.

Advocates of an active *ijtihad* were to have their victory over the 'Traditionalists' snatched away, however, at least according to one view of Islamic legal history. I am referring to what is known as the 'closing of the gate of *ijtihad*', which is how an apparent watershed (c. 900 A.D.) in the development of the Islamic legal corpus is characterised in the Muslim sources (cf. Schacht 1964: 69–75). Among westerners, Weber (1978: 819) represents an orthodox view of this event as marking both a 'crystallisation' of the four great schools of law and simultaneously, an end to further interpretive additions to the set corpus:

The crystallization was officially achieved through the belief that the charismatic, juridical prophetic power of legal interpretation (*ijtihad*) had been extinguished.

To the extent that *ijtihad* was still condoned, the new doctrine held that interpretation could address only formulations set within the frameworks of the authoritative works of the four schools, but could not directly address the Quran and Sunna. Yet, despite this doctrine, there were jurists in the subsequent centuries, including such formidable legal minds as Ibn Taymiyya (d. 1328) and Shawkani in early nineteenth-century Yemen, who brushed aside the boundaries and the ossified dogmas of the schools to rethink their positions from first principles, i.e., the Quran and Sunna. But further, it was the muftis of Islam, continuously and unobtrusively, across region and time, who provided the law with an interpretive dynamism through their exercise of *ijtihad* in fatwas (Schacht 1964: 73; Coulson 1964: 142–3).

Texts and interpretations

Does the ordinary mufti merely cite relevant law rather than interpret it? This question may be approached with reference to two complementary, *madrasa*-based interpretive techniques, two modes of relating to textual sources, one recitational, one hermeneutical. The first leads to a simple one-to-one association of fact and text element, the second to a complex, systemic use of analogy in new interpretations.

Recitational technique of interpretation. In the old *madrasa*, the fundamental mode of textual transmission was recitational. Basic texts including, initially, the Quran,

were presented and acquired orally in *madrasa* lesson circles and through repetition in later study. What a man qualified to teach was qualified to do was transmit texts: a scholar was licensed to carry out the oral transmission (*riwaya*) of a specific text or texts.

The paradigm is the Quran, which literally means 'recitation'. Received by the Prophet in oral revelations, the Quran was for a number of years a 'text' that existed only in the memories of his close companions. Even after it was placed in writing, oral recitation, usually from memory, remained the central act of worship. A similar oral character structures the second source of law, the Sunna. In succeeding generations, the Prophet's sayings and doings were related orally through chains of reliable transmitters. Later still, with the emergence of the four schools of law, short, basic and memorisable 'texts' (*mutun*, sing. *matn*, such as Abu Shuja' 's *Mukhtasar* and al-Nawawi's *Al-Minhaj* used in Ibb) became the instructional standards.

This recitational emphasis is not merely an 'oral residue' (Goody 1968: 14) in an evolving pattern of literacy; it is a distinctive element across the spheres of Muslim literate activity. Recitation also operates in the differing but related forums of court procedure and fatwa-giving. In judicial process, evidence was 'recitational': only the oral testimony of present witnesses received acceptance in procedural theory. For jurists, if not for practising judges, the widespread custom of using written legal documents was rejected as an evidential basis for judgment (Tyan 1959; Waking 1972; Messick 1983a; 1983b; in press).

Despite the fact that they are written, fatwas given by jurists such as the Mufti of Ibb have a pronounced recitational quality. Rather than engaging in a reflective pause to 'construct' what would mark the novel interpretation of a *mujtahid*, the mufti responds immediately. Having identified the issue, he essentially recites relevant text: this is the simple associative process of analogy, when neither fact nor text are new. Such fatwa-giving is analogous to *riwaya*, or oral transmission of text by a scholar qualified to do so by virtue of his own prior oral acquisition of the text in question. Involving no more creative interpretation than a matching of comprehended practice with an identified and then transmitted segment of existing text, such fatwas are recitations.

The hermeneutical technique (ijtihād). In the *madrasa*, recitation was followed and completed by the teacher's interpretive commentary⁹. Commentary was a method devised to meet the problems of understanding and augmenting a finite textual corpus. A fundamental structural process of filling in the gaps operates on several planes, from the micro-level where unwritten but vocalised 'vowels' must be inserted in spaces between strings of consonants to accomplish recitation, to that of written manuscripts where commentary text is inserted physically in the interstices of the basic text (which is set off in brackets), to the pedagogy itself where commentary completes recitation to constitute a lesson.

In the case of law, this process of 'filling in the gaps' began with the Sunna. The Prophet's sayings and doings stand in the relationship of interpretive expansion to the original text, the Quran (Goldziher 1981: 38). Later, the basic textual corpus, now composed of Quran and Sunna together, underwent further interpretive extension by the early jurists, resulting in the authoritative

texts of the four legal schools. The process of textual expansion continued, and commentaries on these authoritative texts, and even commentaries upon commentaries (such as that studied in Ibb by al-Bajuri (d. 1860), a super-commentary on the *al-Mikhtasar* of Abu Shuja') also became authoritative, functioning as sources of reference for textual theory.

Within the specialised sphere of the muftiship, where real world questions are addressed, interpretation via fatwas is modelled on, or is a model for, *madrasa*-based hermeneutics. If the ordinary mufti may be said to engage in an activity equivalent to *madrasa* recitation, great muftis such as Shawkani interpret in a manner analogous to the procedure of scriptural hermeneutics. While the ordinary mufti transmits text, one such as Shawkani creates it. The fatwas of qualified jurists were liable to be treated as authoritative because they offered either an innovative formulation of the textual sense, or an analogical extension—a 'filling in the gaps'—of the textual body. More complicated than the simple association of known fact to known text, the interpretive use of analogy spans a previously uncharted conceptual distance, from existing text to created text, departing from a new configuration on the level of fact.

According to a now familiar hermeneutical model (Ricoeur 1971), it might be assumed that an analogic mode of interpretation originally applied to scripture was extended, in the hands of muftis, to the interpretation of the world. But the reverse, namely, that a style of interpretation applied to the world was adapted to address text is not only equally plausible but is suggested, in part, by the oral quality of the 'text' in question.

Fatwas great and small

This recitational-hermeneutical dichotomy in interpretive method may be further related to different categories of fatwas. While the impact on theory of fatwas delivered in Ibb has been negligible, that of those given by such jurists as Shawkani, the North African al-Wansharisi, or the Egyptian Muhammad Abduh has been substantial. Ibb fatwas retain the genre's characteristic structural orientation towards *adilla*, but they are relatively unselfconscious about their import for theory. Despite their pedigree, these local fatwas have no greater ambition than contributing to the regulation of the practical affairs of people in Ibb and its hinterland¹⁰. It was perhaps such muftis, their fatwas devoid of expressed reasoning, that Weber (1978: 797) considered comparable to oracles.

The case of Shawkani is different. It should be noted, however, that Shawkani distinguished between his 'shorter', presumably ordinary fatwas, which 'could never be counted' and those he calls 'treatises' (*rasa'il*, *abhath*), which he says were collected as fatwas with the title, *al-fath ar-rabbani fi fatawi ash-shawkani* (1348 A.H. II: 223; Brockelmann 1943: 819). Shawkani tells us that requests for fatwas came to him from both the elite, presumably mainly scholars, and the common people. This breakdown according to source of query may parallel his distinction between his fatwa-treatises, preserved and published, and the uncounted ordinary fatwas which were dispersed without leaving a documentary

trace. The latter may resemble the fatwas delivered in Ibb with the important caveat that Shawkani was not a scholar of modest standing, but an 'absolute' (*mutlaq*) *mujtahid*, a jurist of international calibre exhibiting the highest realisation of interpretive legal ability.

Shawkani's fatwa-treatises retain the question and answer format, but (as in al-Qarafi 1967) the questions tend to be, if not purely hypothetical, at least abstractions of practice rather than the rough and ready statements of circumstance found in the ordinary query. Formulated by other scholars, or adapted for didactic purposes, the questions address both important public problems of the era—e.g., tobacco usage, the status of saintly miracles, disregard for the law among country people—and theoretical problems in jurisprudence. Shawkani acts as the scholar's scholar, the mufti's mufti. At this level of discourse, a jurist such as Shawkani provides both a decisive interpretation of the sources and, to the extent that this theory has a bearing on practice, an impact as well upon the conduct of individuals.

For Shawkani (as for al-Juwayni studied in Ibb) a mufti was by definition a qualified interpreter, a *mujtahid* (1349: 234; 1394: 43–5). For this reason the muftiship is integral to the central thrust of Shawkani's work: the assertion of the obligation of *ijtihad* and the refutation of its opposite, the intellectual posture of unquestioning acceptance (*taqlid*) of established doctrine—a posture associated with the assumption that the 'gate of *ijtihad*' was 'closed'. Shawkani brooks no exception to his argument that not only muftis but also judges must be *mujtahids* (1969: 35). Not only has he mustered the theoretical justifications (the *adilla*) for his position, but he also provides biographical examples of earlier Yemeni scholars who were also 'absolute' *mujtahids* (1348 A.H.II: 133; I: 360), and he presents a model programme of essential study for a would-be interpreter (1348 A.H.II: 214 sqq.). Articulated in highland Yemen, it was an advocacy of *ijtihad* that would be noted some decades later in Egypt as reformers there attempted to revitalise the concept as a tool for reform (Merad 1978).

Considering this wide spectrum of fatwas, ranging from those which endeavoured to extend the corpus of textual theory to those which were really devoted to the regulation of practice, the muftiship once again appears to be far from homogeneous. In practice, fatwa-giving was subdivided into one range which leaned towards the world of theory, and another associated more with that of practice.

Conclusion

I have attempted to take the notion that 'societies contain their own interpretations' beyond the sphere of common sense, beyond those constructions of reality that are viewed as interpretations by observing anthropologists but are not conceived of as such by the people themselves. To date, anthropological interpretation has been devoted to a circling between conceptually articulated western frames of reference and conceptually embedded nonwestern ones. The muftiship provides an example of a higher level system of indigenous interpretation, one anchored in a literate tradition, with both recitational and her-

meneutical modes of relating to a distinctive kind of text. Since muftis' interpretations are second and third order constructions, departing as they do from initial, first order constructions by their lay questioners, this indigenous system of worldly hermeneutics is comparable to anthropological interpretations of 'native' common sense.

The understanding of the muftiship I have advanced has considered both institutional form and interpretive method. It is an understanding based on several categories of written Muslim thought, including conceptualisations similar to ideal-types and models, and on the history and contemporary practices of muftis in Yemen.

As members of a society assumed to be stratified in terms of the distribution of legal-religious knowledge, scholars and ordinary people in Yemen are ideally conceived of as bound together by reciprocal obligations and statuses in connexion with the interpretive transmission of that knowledge. Schacht (1964: 74) suggests that the continuing importance of the muftiship is linked to the essential character of the knowledge, resulting in a 'constant need of specialist guidance'. But the muftiship is not simply an institution through which rarified scholarly disputes and the received wisdom of the jurists is brought down to earth in communicable form as 'guidance' for the common people. It is also the channel through which mundane, earth-hugging realities, including new factual developments, were formally noticed by and reflected upon by qualified scholarly minds, leading to analogical extensions of the body of textual theory. In a dialectical manner, locally generated questions are related to locally interpreted theory. Like Muslim poets (Geertz 1983: 117) and Muslim saints (B. Turner 1974: 39-55) in other realms, muftis have been the creative mediators of the sacred and profane, the ideal and the real of Muslim law.

NOTES

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¹ As a public institution, the mufti resembles the Roman *jus publice respondendi* (Weber 1976: 797-9; Tyan 1938: 323 sq.), while in its unofficial aspect, a mufti is similar to the responsa-delivering Jewish *rav*, a function distinguished from the position of judge and held by such men as Maimonides (Goitein 1971: 212, 325).

² Cf., for what is now the People's Democratic Republic of Yemen, Maktari 1971: 32 and Anderson 1970: 32-3.

³ After examining the wound indications on an individual's body, the Mufti writes a short document specifying the location and extent of each cut or bruise, with the associated penalty in money written next to each injury. The injured party can use the *Arsk* document to seek the monetary damages mentioned.

⁴ On the al-Buraihi line of local scholars see Ibn Samura 1957: 190; al-Khazraji 1914: 82; al-Akwa' 1980: 66. Muhammad Abdarrahan al-Buraihi (d. 1459) was a noted mufti whose fatwas was collected. Among the ancestors claimed by the contemporary 'al-Mufti' family is Abdarrahan 'Umar al-Hubaishi (d. 1388), whose fatwas were also preserved, cf. Brockelman 1943 II: 442; al-Akwa' 1980: 156-7. Three generations of the al-Haddad family, beginning with 'Ali Naji al-Haddad (d. 1893), held the official post in Ibb from the late nineteenth century to 1948.

⁵ Although they were Shi'i not Sunni Imams, the Yemeni rulers were muftis and judges writ large. Imams issued their own 'interpretations' (known as *ijtihadat* or *ikhtiyarat*) which had the force of law in imamic courts; they were also the final source of appeal for court decisions. Muftis in Ibb are Sunni scholars, however.

⁶ The only trace of opprobrium such as that heaped upon judges occurs in a single Tradition quoted by Ibn Khaldun (1958: 452): 'those of you who most boldly approach the task of giving fatwas are most directly heading toward Hell'. Also, an individual ought not actively to seek to become a mufti (Tyan 1938: 333).

⁷ Such muftis were public officials who sat as members of the High Administrative Council (Serjeant 1983: 98).

⁸ According to Schacht (1950: 99), the Arabic term was derived from a Jewish exegetical term.

⁹ Commentary (*sharh*), exegesis (*tafsir*), and interpretation (*ta'wil*, *ijtihad*) were the basic hermeneutical methods; cf. articles in the *Encyclopedia of Islam*.

¹⁰ Twentieth century muftis surveyed in the old Aden Protectorate reported that when acting unofficially, and when asked for a general opinion (i.e., not simply for the position of their school), they exercised a type of *ijtihad* they called '*bi'l fatwa*', considered by Anderson (1970: 38, 370) to be the lowest of four types.

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