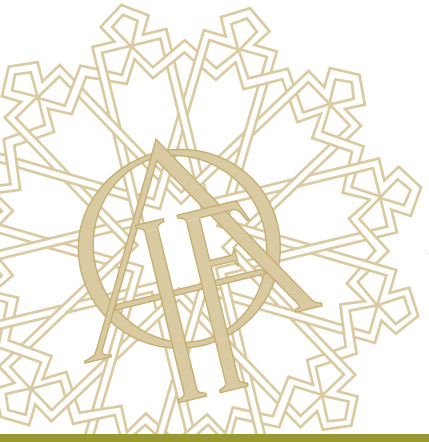

ANNALES ISLAMOLOGIQUES

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AnIsl 27 (1994), p. 5-28

A. Kevin Reinhart

Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

A. Kevin REINHART

TRANSCENDENCE AND SOCIAL PRACTICE:

*Muftī*s and *Qāḍī*s as Religious Interpreters

Introduction.

Ethicists increasingly realize that people act as they do more because of roles than because of rules: when confronted with a problem, people are more likely to ask — " is this the sort of thing that someone like myself *does* ? " than " does this act accord with the rules I hold ? " Most day-to-day acts have less to do with rules than with self-image, and the construct produced by self-descriptions plays an important part in social expectations and behaviors, even if, as in the case of American lawyers for instance, there is considerable dissonance permitted between the self-description and the daily conduct of business. [1] In questions of social praxis, we need to ask about the ideology of professions, that is, the way in which particularly the culture-producing classes justify and explain their activity and power to themselves and others. With the possible exception of the caliphate, the ideal roles that constituted pre-modern Islamic societies have been more alluded to than studied, though the material for such studies, particularly in the later periods, is plentiful. [2]

1. Moll, *The Lure of the Law* 13: " I can never recall working on a case where I thought the interest I was advancing would result in any harm. But do I think genuine social benefits will flow from victory in my cases? — precious few... As a practical matter, I hope I'm always perfecting my skills... But what is a lawyer with a social conscience doing here?... Money is probably the first thing that comes to mind. "

2. Discussions of *muftī*s and *qāḍī*s are fairly common in standard works on Islam and Islamic law. Previous studies such as Tyan's *Histoire de l'organisation judiciaire* or Levy's *Social Structure* are flawed by an attempt to present as sociology what was in fact ideology. (Additionally, both are dependent largely on non-legal sources; the legal sources for such a study as this have only become available in the last decade or so.) It is important to separate between self-description and the inculcation of values on the one hand (*normes juridiques*) and the social roles of *qāḍī*s and *muftī*s (*pratiques sociales*), on the other. The focus of this paper is on the self-descriptions found in legal texts. While we assume that these inform and constrain the social practices of legists in a particular historical and social context, these are not to be understood as histories of legal practice.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qāḍīs as Religious Interpreters.

Arguably the most characteristically *Islamic* personæ in pre-modern Muslim societies were the Islamic scholars: the *muftī* and the *qāḍī*. The work of Petry [3] and others has begun to show how scholars, in particular, trained, and the nature of their actual social roles in medieval Cairo, for instance, but little recent work has been done on what *muftī*s and *qāḍī*s, in particular, understood themselves to be doing in their work. [4] The terms *qāḍī* and *muftī* are usually translated as "judge" and "jurisconsult" or something along these lines. Viewed in purely functional terms, these professions appear to be analogs of the *muftī* and *qāḍī*: *qāḍī*s determine fact and pass judgment; *muftī*s give 'legal' advice. Yet from the point of view of *sharʿī* ideation, these labels are *faux amis*.

Several features of these two roles demand explanation, not the least of which is their remarkable stability. Wherever Islam was found, there too were found officers called *qādī*s and *muftī*s. In a religion that, as every introductory manual tells us, "has no priests", how are the stability and pervasiveness of these two roles to be explained?

Another question: if *qāḍī*s are characteristic Islamic personages, how is it that throughout Islamic legal history the *qādī*ship is regarded with suspicion, ambivalence, and at times disdain?

The aim of what follows is to re-describe the roles of the *qāḍī* and *muftī*, and the theory of *how* they do what they do. Thereby we hope to re-situate them in the ideal culture of Muslim society. In order to understand the legist, however, we must first apprehend that which he administered and performed.

The domain of the legist: the metaphysical *sharīʿah*.

The "law" which the Muslim legist administers and interprets differs from "law" in the demotic English sense of the word. The *scope* of the *sharīʿah* and its embodiment in *fiqh* is, as is obvious, much broader than what we think of as the scope of law — with its rules for eating, rules of ritual purification and the like in addition to contracts, criminal law, personal status law, etc. [5] On all these matters both *qāḍī* and *muftī* are expected to be knowledgeable.

The *method* of *sharīʿah* also differs. It is not, in the legists' view, a law *legislated* but *discovered*. It is well known that the task of these two sorts of legists is either to apply the previous discoveries of jurists or to discover for themselves the appropriate ruling and rule for a given case.

It is important to grasp that Islamic law is grounded in epistemology rather than in sociology, as it is with pragmatic European legislative law. In the 'high metaphysics'

3. Petry, *Civilian Elite*, 227-241 and passim.

4. Two important exceptions: Messick, "The Mufti, the Text, and the World;" Masʿūd, "*Ādāb al-Muftī*".

5. It might be pointed out that these other, "non-legal" items are seldom adjudicated and one might therefore be tempted to exclude them as Schacht does in his *Introduction*. Yet few *fiqh* handbooks do not include the *ʿibādāt*, and *muftī*s in particular are constrained to be competent on both the cultic and the practical if they are to be entitled to the name.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

of *sharīʿah* theory, the *ḥukm* or " assessment " appropriate to a particular case is more than just the application of rule to circumstance. Both overtly and obliquely, the role of the legists is to produce a kind of practical metaphysics by which the transcendent norms of Revelation are brought to bear on the realities of society. By the end of the 12th century, it was a commonplace that the *ḥukm* was part of God's speech. As such it existed coeternally with Him. [6]

The question posed to the scholars was this: How then to know the unseen (*al-ghayb*), that is, to know the assessment relevant to the circumstance at hand (*al-wāqiʿ*) ? The answer was by means of " signs " which are indexical, which point to something else and which, considered as a whole, constitute the moral discourse of God. For the *faqīh*, the Qur'ān and the reports of the Prophet's normative behavior (and the Imāms', for the Shīʿah) each comprise collections of discrete signs or indicants (*dalīl* pl. *dalā'il, adillah*). These particles are contextless in the text: what comes before or after does not determine the meaning of the word or phrase — they are free-floating pericopes of meaning. [7]

Each of these discrete units is an indicant, but only an " assessment " (*ḥukm*) *in potentia*. These indicants have no orientation until a context is provided, and that context is not only some particular legal problem that requires a ruling or assessment, but also the sum of all the other relevant indicants. The intent of the Legislator cannot be glimpsed in a passage of Qur'ān or in a single *ḥadīth* until all other relevant indicants have been assembled with it. In this sense the Qur'ān or report is translucent, not transparent to the *sharīʿah*. When, then, the collections of indicants called Qur'ān and *ḥadīth* are examined, some of these indicants become charged and, to the discerning (*faqīh*) and well-trained, align themselves with each other in ways that clarify the rule. These *relevant* indicants, considered together, form, as it were, a " thick " indicant called *khiṭāb*. The *khiṭāb* is a ' speaking to, ' that is, the *khiṭāb* once found amounts to God's speech to man, via the *qāḍī* or *muftī*. [8] God does not address Muslims directly, but only through those qualified to assemble the *khiṭāb*, *the speech act induced from the assembled indicants*. Hence a scholar like Ibn Qayyim al-Jawziyyah advises legal scholars:

> Do not speak until He speaks; do not command until He commands; do not produce a *fatwá* until He has produced a *fatwá*, do not pronounce a command until/unless He has assessed it and has produced it. [9]

6. *E.g. Qarāfī Tanqīḥ*, 67. Al-Shaybānī says " *al-ḥaqq qadīm* " which al-Sarakhsī misunderstands as meaning " *huwa al-aṣl al-maṭlūb*; " (al-Sarakhsī *al-Mabsūt*, 16:62).

7. This approach makes sense, given the fragmentary nature of the Revelational units as they are preserved in Qur'ān.

8. There is a considerable and unresolved discussion of whether the *khiṭāb* is transcendent/primordial (*qadīm*). For some of the discussion see *al-Kulliyyāt*, 2:286; *Qarāfī Tanqīḥ*, 67; al-Rāzī, *Maḥṣūl* 109-110; *Risālah* of ibn ʿArabī, p. 32 sq. The full argument justifying this metaphysical view of *sharīʿah* is much more extensive, and is the topic of my current research.

9. Ibn Qayyim, *Iʿlām*, 1:51.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

Moreover, the *sharī'ah* myth is that *sharī'ah* is all encompassing. In a key polemical passage Ibn Surayj says:

> There is nothing but that God has a *ḥukm* for it... There is nothing in the world deprtived of release (*iṭlāq*), or proscribing, or obligating, since everything of food and drink or clothing or intercourse (*munkaḥ*) on the earth, or of judgment between two disputants or anything else whatsoever — nothing lacks an assessment. [10]

At first glance, this seems most certainly so — the scope and detail of a comprehensive work like the *Mabsūṭ* of al-Shaybānī/al-Sarakhsī is astounding even to the familiar reader. That every topic seems covered, and covered exhaustively has led students of Islamic law to suppose, until recently, that the task of the jurist was merely to apply the rulings of predecessors to the case at hand, since, as we were told, ' the doors of *ijtihād* had long ago been closed. ' [11]

A careful reading of works by jurists on jurisprudence makes it clear, however, that even the most comprehensive *fiqh* work represented no more than a skeleton of the *shar'* — hence the popularity of later *fiqh*-organized works of *fatāwá* such as Qāḍī Khān's, or guides such as the *Fatāwá-ye 'Ālamgīrī*. [12] The task of the jurist then was to *extend* the known so that it soundly addressed the new.

> If it seems probable to [the legist] that the *ḥukm* in the original case is caused by an attribute, then he comes to suppose the existence of that attribute in another situation, he must suppose that God's assessment in the secondary case is like that in the original. [13]

The *ḥukm* is rightly understood not as something known, nor a ruling drawn and applied from a body of rules, but as something theoretically indeterminate until performed. *Fiqh* is the consequence of that performance, it is " understanding " (the literal meaning of '*fiqh* ') produced by the religiously legitimate process of measuring the situation at hand against the corpus of Revelation, and applying or extending the information in Revelation in certain specified ways. It is too much to say that judging (*qāḍā'*) or opining (*iftā'*) is a ritual, but it is certainly a religious observance; to be understood, this " religious " aspect of these activities must be understood as well. For the ideal jurist — the one envisioned by the jurists in their own literature — even a compendium of relevant *Fiqh* can be no more than guidance; there is no Islamic *corpus juris* in the jurists' view.

10. *Baḥr*, 20 a: 14-16.

11. See the two important articles of Hallāq, " ... the Controversy about Ijtihad... " and " Was the Gate of Ijtihad Closed? " The situation is more complex than Hallāq's article, which is designed to take on one of the clichés of Orientalism, engages. For some discussion of a particular controversy over the " openness " of the gates of *ijtihād*, see E. Sartain, *Jalāl al-Dīn al-Suyūṭī*, 62-64. See also her very clear analysis of the " gate of *ijtihād* ", question 66-68, offered in explanation of al-Suyūṭī, *al-Taḥadduth* 205.

12. Schacht, " On the Title of the *Fatāwā al-'Alamgīriyyah* " I am grateful to Dr. Carol Hillenbrand, who provided me a copy of the *festschrift* in which Schacht discusses the various meanings of *fatwá*.

13. On the process of extension through analogy see al-Rāẓī, *al-Maḥṣūl*, 3:3:10.

The absence of a code means the jurist must mediate between God and the laity. In effect, we shall argue, this puts the jurist into what amounts to a sacerdotal rule. " It is said of giving *fatwás* that they are a decree (*tawqīʿ*) from God. " [14] In cases of uncertainty, or conflict, guidance to right action is provided by the *muftī* or the *qāḍī*. Yet the jurist envisaged a world in which by far the minority of Muslims were competent to know how to act rightly. The consequence was a hierarchy of knowledge and knowers that goes back to the dawn of Islamic legal thought.

The Legist.

In his *Risālah*, al-Shāfiʿī argues that Muslims are of at least two sorts, the *ʿāmm* and *khāṣṣ* (*hoi polloi* and the qualified), and even among the latter there are degrees of status and obligation corresponding to the degree of knowledge (*ʿilm*). [15] This hierarchy within the community of Islam was taken utterly for granted by jurists, who saw themselves differing from the untrained as humans differ from cattle, as one scholar puts it. [16] Without legists, Muslims are confined to religious darkness. " The *ʿulamā'* are the lamps of the *ummah*. " [17] It is, briefly, the task of the *khāṣṣ* to guide the *ʿāmmī* in his or her acts. " Everyone agrees that it is rightful for them to guide the ones who seek knowledge, opine to the petitioner, advise the one [who seeks advice] and manifest knowledge to the questioner. Whoever suppresses knowledge — God shall bridle him with a bridle of fire. " [18] The *ʿulamā'* are necessary for the community. " Error and errancy are repelled from the people by virtue of the existence of a single one of these *ʿulamā'*. " [19]

This guidance was guidance from the *Shāriʿ*, the Legislator, to the *ʿammī*, [20] but it was mediated by scholars. " The *ʿulamā'* are between God and his creation. " [21] Insofar as they acted in this capacity, " the *ʿulamā'* [were] the heritage of the Prophets, " [22] as the *ḥadīth* says. It is precisely when they rule or opine that their status is transformed. " When a man comes and says ' O so-and-so, what do you (*aysh*) say about a man who swears to his wife such-and-such ? ' And he says, ' his wife is divorced ' this is the place

14. Ibn al-Ṣalāḥ, 4B. I have used the Çorlulu manuscript for reference, the printed edition having come to me too late to revise the pagination.

15. Al-Shāfiʿī, *al-Risālah*, 357-360, sections 961-971; Khadduri translation, p. 81 sq., (but not reliably translated). Indeed so decisive is *ʿilm* that in choosing between pieces of legal research or two pieces of information, those related by the more learned are preferred over those of the more virtuous. Ibn al-Ṣalāḥ, 19 a.

16. Ibn Mālik, *Sharḥ Manār al-Anwār*, 252 interior. See also Zysow, " Economy of Certainty ", 265, n. 28.

17. Anon., *Ādāb al-muftī*, 2 a.

18. Al-Subkī, *Muʿīd al-niʿam*, 67. I have used the Cairo edition throughout. The London edition is particularly valuable for its introduction and precis.

19. Anon, *Ādāb al-muftī*, 2 b.

20. " If it is correct, it is from God; if incorrect, from me. " Ibn al-Ṣalāḥ, 23 a.

21. Ibn Ṣallāh, 4 B.

22. Ibn Ṣallāh, 4 A; for other citations see Hallāq, " Controversy about *ijtihād* ", n. 24.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

(*maqām*) of the Prophets. " ... [Hence], " if you would see the meetings (*majālis*) of the Prophets look to the meetings of the scholars. " [23]

Both the *muftī* and the *qāḍī* belong to the category of persons qualified by their training to be called scholar (*ʿālim*) and legist (*faqīh*). The *qāḍī* and the *muftī* are not merely licensed in the law (by *ijāzah*s from their masters) but are recognized to perform these two roles — the *qāḍī* by appointment from a sovereign or other official person, [24] the *muftī* by being petitioned for his opinion (*fatwá*) by a petitioner (*mustaftī*). Both are expected to embody the norms of the Islamic community. The *muftī*, for example must be " legally capable (*mukallif*), Muslim, reliable trustworthy; free from taint of corruption, and from lapses in manly virtue (*musqaṭāt al-muruwwah*), for one who is deficient in these is not suitable (*ṣāliḥ*). " [25] Similar conditions apply to the *qāḍī*. In short they must be good Muslims. Nonetheless, it is their learning that qualifies them, even more than their virtue. If forced to choose between a pious but less learned, or learned but less pious *legist*, most scholars say the more learned should be chosen. [26] While both are legists, *muftī*s and *qāḍī*s do differ from each other in qualifications and in roles; it is sufficient for either merely to be trained in *sharīʿah* science.

The *Qādī*.

A Muslim can live a ritual life without a *qāḍī*, perhaps, but hardly a social life. The *qāḍī* is appointed to " call every reasonable persons to his senses. " [27] He establishes justice, removes oppression and rescues the oppressed. [28] The *qāḍī* himself must be a *normative* Muslim — free, sound of body and mind, sight and hearing, and male. [29]

The *qāḍī*'s court physically represents the norms of justice. For example, the two plaintiffs are placed equally before the judge. " For if a noble is placed forward of his opponent, he may expect preferment and his opponent anticipate injustice, " [30] and there are stories of caliphs forced to place themselves on the same level as their opponent in court. [31] The court is to be oriented as a mosque, with, in most accounts, the *qāḍī* sitting with his back to the *miḥrāb*, so that the plaintiffs face the *qiblah* while testifying. [32]

23. Ibn Ṣallāh, 4 B.

24. He may also be appointed by another judge, though this is controversial.

25. Ibn Ṣallāh, 7 b.

26. Al-Asnawī, *al-Tamhīd*, 510; see also Ibn Taymiyyah, *Siyāsah Sharʿiyyah*, p. 17-19; Ibn al-Ṣalāḥ, 19 a.

27. Al-Sarakhsī, *al-Mabsūt*, 16:60.

28. Al-Sarakhsī, *al-Mabsūt*, 16:60.

29. Abū Yaʿlā, *Aḥkām al-Sulṭāniyyah*, 44.

30. Al-Sarakhsī, *al-Mabsūt*, 16:61.

31. E.g. al-Sarakhsī, *al-Mabsūt*, 16:61.

32. Tyan, *Judiciaire*, p. 280; according to other sources, the *qāḍī* himself faces the *qiblah*. See *ibid.* There is a great deal of material with which to see the *qāḍī*'s court as a ritual domain. Yet accounts of *qāḍī*-court behavior usually emphasise the seeming informality and disorder. See Rosen, *Anthropology of Justice*, 8-11. As far as I know, no study of the orientation and physical disposition of *qāḍī*-courts exists.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

Yet despite undertaking a task that is both an obligation (*farīḍah*) and an act of worship (*ʿibādah*), and is "one of the strongest of religious obligations next to faith in God,"[33] there has always been an ambivalence about accepting a position as *qāḍī*; this ambivalence is revealing.[34] While composers of works and sections on *adāb al-qāḍī* urge the virtues of the position, there is a rigorist position held by the likes of Aḥmad ibn Ḥanbal, who argued that in a situation where no one else is qualified to be *qāḍī* and one is needed, even then it is abhorrent to take the office.[35] Al-Nawwawī adds that in case of need, the qualified person who accepts the *qāḍī*ship may anticipate both a mighty recompense (from God), but a mighty danger as well.[36]

The danger to judges, of which al-Nawwawī speaks above, was perceived to come first from the authorities. These had force both direct and indirect, and, it was supposed, attempted to put pressure on *qāḍīs* adjudicating matters that involved them. In a revealing *fatwá*, al-Subkī[37] presents the ideal response of a *qāḍī* being pressed by a powerful person to change his judgement. Of course, "if he is a violent oppressor who [physically] prevents [just] judgment, the matter comes under the heading of coercion, and [there is nothing that can be done, except to rule as he wishes.]"

However, the *qāḍī* is urged if at all possible to act otherwise. What interests us is his analysis of the inner dispositions that might lead him to act rightly. The *least* virtuous sort of *qāḍī* fearfully

> [considers] the rightful claim against the powerful person since [the powerful person] is in the wrong, 'in the truth is force and power.' This is fine, all by itself, and God is not thereby infringed against. Yet [the *qāḍī*'s] fear of the powerful person is [fear of] a person of affluence because he privileges high positions. Thereby moral (*dīnī*) matters become admixed with concupiscent matters; integrity is better.

Next to best is

> to have as a motive... hope for recompense from God for the judgement and fear of chastisement for not pronouncing judgment; this is a good state but lesser than [other motivations].

Better still, one can simply rule without comment on the truth of the matter. This too al-Subkī accepts, and inasmuch as the *qāḍī* has shown no regard for the powerful, this approach is better than the last.

33. Al-Sarakhsī, *al-Mabsūt*, 16:59-60; Tyan *Judiciare*, p. 280.

34. The best study of this hostility to the position of *qāḍī* is Coulson, "Doctrine and Practice."

35. Abū Yaʿlā, *Aḥkām al-Sulṭāniyah*, p. 54 sq.

36. Abū Yaʿlā, *Aḥkām al-Sulṭāniyah*, p. 55, n. 5. On this topic see Coulson, "Doctrine and Practice", 223 ff. This very subtle paper is flawed by a framework that assumes the rigidity of the "closing of the gate of *ijtihād*," the impracticality of Islamic law, etc. That Islamic law was "practiced" successfully is clear from Messick, "Muftī".

37. Taqī al-Dīn Alī ibn al-Ḥasan ibn ʿAbd al-Kāfī, himself a *qāḍī* in Damascus. Reference here is to *Fatāwā al-Subkī*, 1:60-61. Even al-Subkī the younger, himself a distinguished *qāḍī*, reports with approval the disdain of the pious for judgeships. Al-Subkī, *Muʿīd al-Niʿam*, 71, 72.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

Still better is :

to make the judgment in commiseration [with the wronged party] [intending thereby] to rescue him from oppression. This is a good state of mind (*ḥālah ḥasanah*) since by it [the wronged one] is aided and the *qāḍī* protects him from oppression; commiseration with a bondsman of God is among the best of characteristics.

Yet the best of means, and here we might be listening to an Islamic Jonathan Edwards, is to :

evoke the grandeur of the Lord and of His command, and at the same time his own insignificance, for he is an insignificant bondsman who is less than a thousandth of a gnat's wing's weight beside the command of the Eternal, Overwhelming, King. [In that state] his heart, tongue and limbs move only by His will. He is present with [the *qāḍī*] covering him with His gravity saying to him 'Judge!' Nothing is possible but to obey his (or His) command and to execute his judgment; thereby nothing obtains of the qualities of the one judged against.

The judge in these ideal views is subsumed in the judging, compelling God, who, through him, is made present at court. The *qāḍī* minimizes himself and thereby the court becomes, one might say, an anticipation of the Day of Judgement.

Yet, as Coulson notes [38], it is the ontological dubiousness of the *qāḍī*'s task that led to ambivalence about judgeships, more than fear of the authorities. In novel or uncertain cases, there is a sense in which the *qāḍī* both legislates and finds. He first determines what part of the sources of law applies to the case, and derives from these sources the rule. It may be that a consulting *muftī* has provided the argument in the case, but the *qāḍī*, by accepting and implementing, establishes (*anshā'a*) the law. This is a kind of legislation. He then finds that one of the two disputants, or the petitioner or whoever is before him, is subject to this law. There are thus two chances to err, and if these errors arise from carelessness or bad judgement, the judge must answer for them on the Day of Judgement, as we shall see below.

The *Muftī*.

Like *qāḍī*s, *muftī*s are essential to a life lived Islamically. [39] Rather than judging, the *muftī* clarifies and guides. Hence he may categorize acts using the full five assessments of Islamic law, including "commended" and "discouraged," not just "obligatory," "permitted," and "proscribed," as with the *qāḍī*. [40] Unlike *qāḍī*s, they are not disqualified by deafness, blindness, or deficiencies of the limbs; they may be female or

38. "Doctrine and Practice", 219 ff.

39. *Iftā'* is a *farḍ kifāyah*. Anon, *Ādāb al-Muftī*, 8a. The model for the *muftī* role is found in Qur'ān, 4:127; 176: "They will consult you... Say, God has decreed for you..." On *muftī*s and *mustaftī*s in general see, i.a. George Makdisi, *The Rise of Humanism*, esp. p. 30-37; see also *id. The Rise of Colleges*.

40. Al-Ashqar, *al-Futyā*, 11-12.

slave.[41] To perform their duties, therefore, they need only be *representatively* Muslim and learned. *Muftī*s are protected from the temptations of office by not holding one. Being insulated from worldly pressures, it is assumed they will be more learned than *qāḍī*s and that *qāḍī*s will be seeking *fatwá*s from jurisconsults. The question of qualifications to perform *fatwá*s is much disputed, for reasons we will discuss below. It is clear that one must be somewhat learned so as to know the position of his *madhhab* and be able to find the rest of the *madhhab*'s positions easily,[42] yet at least some sources suggest that in a pinch even a minimally learned scholar will do as a *muftī*: " If a man is correct more often than wrong, he is permitted to give *fatwá*s. "[43] Still, not everyone should practice *iftā'*: *muftī*s are part of the social division of labor that was an essential part of medieval Muslim social theory. " If everyone were a *muftī* there would be chaos. "[44]

The characteristic vice of *muftī*s was to be, in effect, lawyers, finders of loopholes.

> There are those who make some Revelational matter (*amr al-shar'*) simply an opinion and opine what no *madhhab* holds, and permit to notables what they do not permit to *hoi polloi*.[45]

Nonetheless, the distinguished jurist al-Subkī relates approvingly the story of Ibn 'Abbās who, when asked by a man " May a killer repent? " said " There is no repentance for him. " Asked by another the same question, he replied " he may repent. " When someone demanded explanation for these two different replies to the same question he said:

> As for the first — I saw in his eyes the desire to kill [someone] and I prevented him from it; as for the second — he came in surrender, having already killed [someone] and I did not cause him to despair.[46]

*Muftī*s then are not merely legal scientists reporting the transcendent facts. They respond also to their knowledge of the petitioner and his circumstances as well. In the *muftī* the transformative power of Muslim learning is clearly displayed. No wordly pressure can corrupt the qualities conferred upon the *muftī* by scholarship. He guides both laity and judges, assembling the transcendent data and the mundane, transmuting it into transcendent assessments of daily matters.

The Muftī and the petitioner (*al-mustaftī*).

The *muftī* must explain his ruling clearly to the petitioner. He mediates the transcendent to the masses; if he doesn't speak the language of the petitioner he must use a translator, and his eternal reward is greater if the petitioner to whom he

41. Abū Ya'lā, *Aḥkām*, 45; Mas'ūd, " *Ādāb al-Muftī* ", 132.

42. Al-Subkī, *Fatāwā*, 2:544, in a rather humorless discussion of what seems to have been a popular phrase: " The *qāḍī* opines and the *muftī* raves. "

43. From Ibn 'Abbās, quoted in Anon, *Ādāb al-Muftī*, 8b.

44. Sartain, *al-Suyūṭī*, p. 63, quoting al-Suyūṭī.

45. Al-Subkī, *Mu'īd al-ni'am*, 102.

46. Al-Subkī, *Mu'īd al-ni'am*, 104.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

patiently explains the ruling, is dim. [47] For his part the petitioner must be satisfied that the *muftī* is capable of *ijtihād*. Having done so, he is not to shop around for favorable *fatwás*, particularly if the *muftī* first asked is the first to address the question at issue. [48] No mere petitioner can be raised above the ranks of the unqualified, even if he has a modicum of religious knowledge, and so may not assess for himself or others. [49]

*Muftī*s represent a pure scholarship of Islamic indicants. They are the ones to whom, as it were, the community delegates the task of finding and understanding the law and then of passing that knowledge on in a form appropriate to the problems at hand. There is a sense in which the detachment of the *muftī* from the world secures the applicability of his assessments to cases as they occur. *Qāḍī*s by contrast represent the necessary resolution to the regrettable conflicts and injustices of the social realm. They are necessarily more wordly than *muftī*s, both in their responsibilities and in their necessary connection to the coercive and suspect institution of the State. Yet they too are necessary for an Islamic life. The *muftī* and the *qāḍī* are *sine quo non* for inexpert and conflict-ridden Muslims who make up the majority of the *ummah*.

What legists do.

What is it legists do? Both *muftī*s and *qāḍī*s produce assessments (*aḥkām*) as the end product of their deliberations. Legal theorists supposed that when presented with a problem, the problem was held against the Qur'ān, the *sunnah*, and the scholars' consensus, *seriatim*, in search of an applicable indicant; in case of conflict there were specified grounds for preference (*tarjīḥ*) of one solution over another. [50]

The psychology of this process is elusive. Al-Āmidī evidently saw the process as one of movement from *ẓann* (supposition) to *ḥukm al-muftī*. [51] Al-Subkī *major* mentions in sequence "having a notion" and then "the *ḥukm* appearing to one," which is followed by "execution of the writ." [52] Both allusions — for they cannot be called descriptions — suggest that a probable *ḥukm* quickly suggested itself to the trained legist; the first notion was followed then by an internal assent and confirmation. It may be that giving a *fatwá* was preceded by concentrated reflection, since assessing, say the sources, requires a tranquil state of mind: anger, thirst, hunger, grief are all to be avoided before assessment. [53]

The product of this reflective inquiry is the "assessment." Here a distinction must be drawn between the *muftī* and the *qāḍī*. While, in response to an unclear circumstance (*wāqiᶜ*, *ḥādithah*), both produce a *ḥukm*, the nature and role of their response is different.

47. "*Baʿīd al-fahm/ḍaʿīf al-ḥāl*". Ibn al-Ṣalāḥ, 21b.
48. Al-Āmidī, *al-Iḥkām*, 4:299; 4:318.
49. Al-Āmidī, *al-Iḥkām*, 4:306-309.
50. Al-Zarkashī, *al-Baḥr*, 182a.
51. Bernard Weiss "Muftīs and Qāḍīs in al-Āmidī" unpublished paper delivered, AOS, Spring 1990.
52. Al-Subkī, *Fatāwā al-Subkī*, 1:60. *Ẓahirat mukhayyilāt — ẓuhūr al-ḥukm — qiyām al-ḥujjah.*
53. Ibn al-Ṣalāḥ, 15a.

Ḥukm al-muftī.

The *ḥukm* of the *muftī* is to be seen as a rectification of an uncertain fit between the circumstance and transcendent norms. [54] His task is to connect the event with a rule grounded in Revelation, [55] for not every event is found in Revelation's corpus. [56] A petitioner (*mustaftī*) comes to him " when a circumstance befalls him which requires of him knowledge of its status. " [57] He need not give an opinion. Indeed it is reported that Ibn ʿAbbās said that, " anyone who gives a *fatwá* whenever he's asked, is crazy. " [58] Another would give no *fatwá* on anything that could come under adjudication in court. [59] Every act of giving a *fatwá* is a serious matter. When an *ʿālim* was pressed to answer a point, as it was just a small question " he became angry and said, ' in *ʿilm* there is nothing trivial (*khafīf*). All *ʿilm* is weighty (*thaqīl*). ' " [60] Moreover, even for the jurisconsult, the consequences of failure can be grave. Ṣaḥnūn is reported to have said that:

> the most wretched man is the one who exchanges his future life for wordly pleasure. Still more wretched is one who exchanges his own future life for *another's* wordly pleasure, as in the case of a man who perjures himself with regard to his wife and his slave (?). When the *muftī* says to him, ' there's nothing wrong with that ' the perjurer goes off and enjoys himself with his wife and his slave; then the *muftī* has exchanged *his own* future life (*dīnahu*) for *another*'s wordly pleasure (*dunyā*). [61]

The *muftī*'s ruling is not binding, though giving or seeking a *fatwá* when one has already been given is discouraged. His task is to guide and clarify, and unlike *qāḍīs*, whose assessments are restricted to " obligatory, " " permitted " and " proscribed, " *muftī*'s assessments include all five possible rulings, adding " commended " and " discouraged. " [62] Al-Qarāfī likens *muftīs* to translators. " They must, " he says, " follow the letters and words produced by the speaker, and inform [the listener] of the implications [of the words] without adding or subtracting. This is what is incumbent on the *muftī* — to follow the indicants after inducing them [from the texts] " [63] In al-Qarāfī's view, one of the characteristics of the *muftī* is that he " translates " from indicants (*adillah*). [64] These indicants are *textual* (the Book, the *sunnah*), *theoretical* (analogy, presumptive innocence, choosing the better, preferring the useful, persevering from harm, preferring the lighter) and *communal* (consensus, the consensus of Medinah, the consensus of the people of Kufah on an ungrounded opinion, the acts of the Companions, the acts of

54. " *Tabyīn mā ashkala*; " al-Subkī, *Fatāwā al-Subkī*, 2:543.

55. " *Liradd al-furūʿ al-maskūt ʿanhā ilā al-uṣūl al-manṭūq bihā*; " Abū Yaʿlā, *Aḥkām*, 45.

56. *Fa-inna al-hawāditha kulluha lā tajidu fī al-kitāb wa l-sunnah;* al-Sarakhsī, *al-Mabsūt*, 16:62.

57. Ibn al-Ṣalāḥ, 28b.

58. Ibn al-Ṣalāḥ, 4b; Ibn Qayyim, *Iʿlām*, 2:185.

59. Ibn al-Ṣalāḥ, 13b-14a.

60. Ibn al-Ṣalāḥ, 3b; when asked to opine, Abū Ḥanīfah would sigh deeply (Anon, *Ādāb al-Muftī*, 8a).

61. Quoted in Ibn al-Ṣalāḥ, 6a; " it is a mighty danger " (Anon, *Ādāb al-Muftī*, 8a).

62. Al-Ashqar, *al-Futyā*, 11-12.

63. *Baʿda 'stiqā'ih;* al-Qarāfī, *Iḥkām*, 29.

64. Al-Qarāfī, *Iḥkām*, 30.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

Abū Bakr and ʿUmar, the acts of the four caliphs and their consensus, the tacit consensus, the consensus of which no one says the contrary, the analogy of which no one says the contrary, etc.). There are also practical indicants — of the ways in which the times of worship are indicated, such as movement of the sun, the reading of an astrolabe, etc. [65] From these indicants the *muftī* induces his *ḥukm*. These indicants are, however, *a priori* in a sense. They come from outside and are applied to the matter at hand. These indicants are transcendent; the question is mundane. The *muftī*'s task is to fit the two together. The disjuncture between the particular and the ideal can be seen in the form of the request for a *fatwá — istiftā'*. " What do you say about a circumstance where... " " If X is the case, can one do Y? " " If, " " when, " are the domain of the *muftī*. Though many *fatwá*s are applications of Islamic norms to a situation that really occurs, and others in the *fatwá*-literature are hypothetical, all requests for a *fatwá* treat the events proposed for consideration in the abstract. [66] The *muftī* does not find fact, he establishes principles. Thus he does not say, " the evidence shows that Fulān stole ten dinars. " Rather, he says, " if this evidence should be sound, Fulān would be judged to have stolen the ten dinars in question. "

Ḥukm al-qaḍī.

The *ḥukm* of the *qāḍī* differs from the *muftī*'s assessment. It is performative in Austin's sense: when a *qāḍī* pronounces judgment, the effects consequent to a circumstance come into effect. Hence, if a *qāḍī* rules that a valid (*ṣaḥīḥ*/*ṣāḥḥah*) contract existed between Zayd and ʿAmr, the conditions specified come into binding effect upon his ruling so. If the *qāḍī* rules that Zayd has stolen five dirhams, then consequently his hand is cut off. [67] *Muftī*s are, in humility at their uncertain grasp of God's intent, obliged to hedge. *Qāḍī*s, deputized to *act* on God's behalf, cannot temporize. [68]

It might seem, then, the major danger to the *qāḍī* lies in his subservience to the powerful. As Coulson has noted, however, it is less the fear of coercion than of ontologically incorrect judgment made perhaps for the wrong reasons that afflicts the *qāḍī*. [69] Al-Subkī *minor* once more quite graphically describes this peril in a passage worth quoting at length. He says that judges must intend by their actions as judges, which he calls acts of worship (*ʿibādāt*), to draw near to God (*qaṣad al-qurbah*), an intention they should form at the beginning of their tenure.

Thereafter, their assessments may be ranked according to the degree of epistemological certainty and personal selflessness that condition the assessment arrived at. The first

65. Al-Qarāfī, *al-Furūq*, 1:128.

66. See for example the petitions cited in Messick, " Muftī... ", 107: " What do the scholars of Islam say... about a woman who has a young virgin daughter... " " What do the scholars say about a woman who died leaving her daughter... " " What do the scholars of Islam say about a man who sold a piece of land... "

67. Reinhart, " Islamic Law... ", p. 192-196.

68. Abū Yaʿlā, *Aḥkām al-Sulṭāniyyah*, 57: " The *qāḍī* may not delay the proceeding when it is brought to him except for extenuating circumstance. "

69. Coulson, " Doctrine and Practice ", 223 ff.

rank of assessments is derived with certainty from *sharʿī* indicants; the *qāḍī* (in this case) is unconstrained by worldly concerns, and he feels perfect comfort (*inshirāḥ al-ṣadr*) at his decision. The epistemological minimum is "likelihood" (*ghalbat al-ẓann*); in any circumstance less certain, the *qāḍī* is to resist making any assessment at all. Lesser ranks of assessments result from increasing admixtures of epistemological uncertainty and wordly pressures, until finally, at the lowest rank, the *qāḍī* rules according to what he is certain is contrary to the *sharʿī* indicants, solely for worldly gain.

The problem, he says, is less the lowest ranks, the fifth and sixth in his scheme, than the fourth. This sort of assessment is made when one has a doubt or perplexity (*shubhah*) that prevents the feeling of 'likelihood' that this is the assessment of God. In this case, making an assessment is not licit.

When uncertainty arises and one is preoccupied, your lower nature or Satan or some person may entice you... to judge from some end; it is easy because you have not determined that [the thing] is forbidden. Beware of making an assessment !... In this rank one finds many wicked brethren inveigling you to [make] the assessment. Beware !, then, beware ! Seek [rather] to make present in your heart the day of Resurrection when the Overwhelmer undertakes judgement. He comes with the prophets and martyrs, and he comes to you — O unfortunate one ! — and you are as wheat, nay as kernels of wheat beneath the feet of the [thrashers], or rather, less even than that. In that place is the Messenger of God, upon whom be God's blessings and peace, whose deputy you are, and who conveyed to you his *sharīʿah* and Gabriel who descended with [the *sharīʿah*] to [Muḥammad], and messengers of God most high and His prophets and His angels, and the righteous and the martyrs like lighted lamps in that place before God. And God will ask you without intermediary: "Why did you judge in this matter ? Who conveyed this to you from Me ?" You look to your right and your left and no sultan and no amir and no notable is to be found from those who inveigled you into making that assessment. You see yourself forlorn, disdained, solitary. You look to the Prophet, upon whom be God's blessings and peace, and he is foremost of those in that mighty place from whom you would wish intercession, but you have judged by other than his *sharīʿah*. How then is your reputation with him ? How then is your state with him... When God most high looks to you, at that time will one of the people of this world be of use to you, or property, or fame, or anything else ? No indeed ! So look — O unfortunate one — to this event. What you know will save you — do not be ashamed because of it then; do it ! And what is other than that, be leery of it even if the greatest kings of the earth offer all of its gold. If someone says: It may be that your hesitation is a failure to make the *ḥukm* which is obligatory [to render]. Say: It is only obligatory if [the likelihood] appears; and in uncertainty, [it is not obligatory]. If the matter remains between leaving off and uncertainty, and undertaking [the assessment] with uncertainty, leaving off is easier, less burdensome, and less risky. [70]

70. Al-Subkī, *Muʿīd al-Niʿam*, 58.

According to al-Qarāfī, the *qāḍī* differs from the *muftī* as a translator (between God and the laity) differs from a deputy (of God in assessment). Unlike the translator, who conveys, the *qāḍī* establishes fact (*anshā'a*).

> He is a follower of the one who deputized him in one respect, and not a follower in another respect. He is His follower in that he is entrusted by Him to do this and he is obedient; he is other than a follower in as much as that which issues from him [which constrains the disputants to act in a certain way] has not been preceded by its like in this particular occurrence (*hādhihi l-wāqʿah*), by [anything] from the One who appointed him. Rather, he originates with regard to it (*huwa aṣlun fīhi*). [71]
>
> [The *qāḍī*] establishes fact because that which he assesses is determined, but what he has determined is not stipulated [strictly] in the *sharīʿah*. Nor is his establishment of it on the basis of the indicants upon which depend the *fatwá*. Indicants require following the most likely (*al-rājiḥ*), but here [the *qāḍī*] is required to judge according to one of two equivalent statements, without indicants leading him to know about or prefer either of the two statements. Rather, the [*qāḍī*] follows evidence and the *muftī* follows indicants. [72]

Three things then differentiate the *qāḍī* from the *muftī*. The former establishes, the latter transmits; one determines definitively, the other determines only probably. The *qāḍī* works from documents that reflect the historical fabric of contentious society; the *muftī* works from the transcendent and unchanging truths of Revelation, and tries to fit them to mundane but still not quite real cases. His every assessment might be prefaced with, " if what you say is true, " and bracketed by " then it is most likely that... " The *qāḍī* determines, and by his utterance, performatively brings legal facts into existence.

In what has preceded, we have emphasized the religious aspects of what are of course roles and acts capable of other, complementary interpretations. Two aspects of legists' processional self-description call for particular attention: the mythic quality of the legist as a person embodying Islamic legal history, and the ritual, almost sacramental character of the process of finding transcendent norms for social action.

Process or person.

Legal sources emphasize both the independent value of the *process* of *ijtihād* and the importance of the *personal qualities* of the *muftī* and *qāḍī* who perform assessments and *ijtihād*. The charisma of the transcendent assessment — did it arise from the person or in the process — was it *ex opere operato*, in which the process of striving in the correct manner to assemble the indicants produced a salvific assessment, or was it *ex opere operantis*, whereby the validity of the assessment arose from the legist's virtue and knowledge ?

71. Al-Qarāfī, *Iḥkām*, 30.

72. What al-Qarāfī means by indicants is explained above. By evidence (*ḥijāj*) [voweled by editor following *Tāj al-ʿArūs*], see *Iḥkām*, p. 30), al-Qarāfī means a document (*al-bayyinah*), determination (*al-iqrār*), a witness (*shāhid*) andan oath (*al-yamīn*), a witness and a refusal to take (*al-takūl*) an oath, an oath and a refusal to take an oath, etc. Al-Qarāfī, *al-Furūq*, 1:129.

The personalists urged the petitioner to seek the most virtuous or learned among *mujtahids*; the formalists thought the legist's character a matter of theoretical indifference, since it was the act of *ijtihād* by someone with the proper rank or qualifications that was religiously significant. [73] As al-Āmidī argues, if a petitioner asks a *muftī* in good faith for a ruling and the *muftī* errs or lies, the petitioner is nonetheless obliged to follow the ruling and is exempt from any consequence; indeed he is obliged to follow him in error and falsehood. [74] This was the argument of al-Ghazālī also:

> Revelation indicates the religious quality (*ta'abbud*) of judging by likelihood, whether a witness tells the truth or lies, and it is obligatory for the unqualified to follow the *muftī* for Consensus indicates the duty of the unqualified to follow that, whether the *muftī* tells the truth or lies, errs or hits the mark. [75]

The importance of the *process* of *ijtihād*, as opposed to the *outcome*, is seen in the permissibility of asking for another *fatwá* and also in the requirement to repeat the *ijtihād* activity in some circumstances. For a *mujtahid* who assesses a situation and reaches an opinion, but does not define in his *fatwá* the precise means by which he reached the first decision, must, when the circumstance re-occurs, repeat the process so that the application of the first to the second circumstance is unambiguous. It is not that he must elaborate on his first judgment, but that he must repeat the *process* of striving to find a valid assessment for the circumstance. [76]

In this regard the question of whether every *mujtahid* is correct (*kull mujtahid muṣīb*) is illuminating. Superficially, what is being discussed is whether the legist's ruling is actually, from a transcendent perspective, correct ; that is, so that his ruling reflected actual understanding of the hidden. [77] At the heart of this question is an ambivalence inherent to law, but dealt with in a sophisticated way by the legists. Legists recognized that the interpretative process was at its core a speculative enterprise. There was no guarantee of the ontological correctness of their decisions, yet *qāḍī*s were *obliged* by God to judge, and *muftī*s were obliged by God to guide the less learned. By doing so they were guaranteed reward. The uncertainty of the result did not lead the legists to Derridian despair, but they retained the aspiration to find the assessment that coincided with " the assessment as it was with God. " [78] Yet at the same time they believed that, while in

73. This is the subject of considerable discussion. A clear presentation is al-Āmidī's, *al-Iḥkām*, 4:316-317, where he seems to suggest that Shāfi'ī*s* and Ḥanbalī*s* hold both the position that it is the process that validates, and that one ought to seek the most competent and pious *mujtahid*.

74. Al-Āmidī, *al-Iḥkām*, 4:309.

75. Al-Ghazālī, *al-Mustaṣfā*, 2:387.

76. Al-Zarkashī, *al-Baḥr*, 206B. While some argue that this is so that he might spot an error (see al-Āmidī, *al-Iḥkām*, 312-2), this notion is not endorsed by the compiler.

77. Al-Sarakhsī, *al-Mabsūṭ*, *al-fahm iṣābatu l-ḥaqq*; This vexed question is discussed at length in Zysow, " The Economy of Certainty, " chapter 5. See al-Zarkashī, *al-Baḥr*, 3:193b ff. A clear statement of the problem is in al-Asnawī, *al-Tamhīd*, 511-514. That it was still in the 8th Islamic century vexatious, is shown by al-Subkī's reference in his *Mu'īd al-ni'am*, 75.

78. Al-Zarkashī, *al-Baḥr*, 192a.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

matters of theology the goal should be knowledge (*'ilm*), in the application of *sharī'ah* the goal could be no more than supposition (*ẓann*).[79] In legal matters, indeed, some argued that the truth/reality (*al-ḥaqq*) was plural, so as to justify the position associated with the early Ḥanafī's, that every *mujtahid* was correct.[80]

There are many aspects of this problem, but among the ways to see it is the historian of religion's perspective, that this is a question of just how sacerdotal the legist is to be. Is he capable of producing by the *fiqh* process the ontologically real assessment? Or is the value of the act confined only to the process of assessing, while the unseen (*al-ghā'ib*) remains unknown ? Most scholars, in keeping with doctrines of the majestic remoteness of God, opted for the lower view of the legists' powers, though some Ḥanafī*s* retained the higher view.

If some Ḥanafi*s*, along with others, held high views of the significance of *ijtihād*, they held a correspondingly low view of the possibility of novel and independent *ijtihād* for all who lived after Islamic law's formative period.

The Legist as trans-historical person.

By virtue of the sound assessments of circumstances he makes, the legist bridges two domains : the here-and-now, and the eternal; the human and the divine. Of more immediate concern to him perhaps is the fact that he bridges the history of Islamic thought through his adherence to the discipline of the *madhhab*. In this way he embodies both the law and its transmission.

The member of each rank stands in relation to all those above him as a *muqallid*, literally someone who, as it were, entrusts others to make rulings for him, a *dependent* in legal matters. It is " Acceptance of the statement of one who is conceivably free from error, without proof of the matter on which [the *muqallid*] is accepting his statement. "[81] In mature works of Islamic law the notion of *taqlīd* is for most jurists no more pejorative than a humanist's acceptance of the research of a physicist on some matter in which the humanist has no expertise.

The ranks of legists are described in terms of their capacity for *ijtihād*.[82] A *mujtahid mustaqill* or *mujtahid muṭlaq* was a man capable of unfettered research into all aspects

79. Al-Zarkashī, *al-Baḥr*, 206a. See the brief discussion in Reinhart, " Islamic Law ".

80. Al-Zarkashī, *al-Baḥr*, 197a ff.

81. *Yajūz 'alayhi al-aḥrār 'alā al-khaṭā'...* Ibn al-Ṣalāḥ, 28b. " Acting according to the statement of another without compelling proof. " al-Āmidī, *al-Iḥkām*, 4:297. Hence, for him, the obedience of the unqualified to a *muftī* is not *taqlīd* since there is compelling proof of the need to obey them.

82. The terms *ijtihād* and *taqlīd* have become, since the 18th century, polemical terms and it is hard not to read Salafī, and Reformist critiques backward into them. Suffice it to say that in the mature works, and before, these are terms referring to capacity for efficacious legal research. On the issue of the freedom and independence of *mujtahid*s, there is a spectrum ranging from extreme Ḥanafī rejection to extreme Ḥanbalī insistence that every age has its absolute *mujtahid*s. Mas'ūd, *Ādāb al-Muftī*, passim; al-Āmidī, *al-Iḥkām*, 4:313; Anon., *Ādāb al-Muftī*, 8b: " Memorization/preservation (*ḥifẓ*) suffices in our time. "

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

of law (regardless of whether such work had been done before), and one whose opinions on all topics could be binding. [83] These figures were thought to have disappeared, a disappearance sometimes attributed to a decline of standards or capacity among later scholars, but more often because it was believed that the formative figures had definitively laid out the broad outlines of possibility for subsequent jurists. Next came the functional equivalent, the master of circumstances and methods (*ṣāḥib al-wujūh wa-l-ṭuruq*). He had all the capacities of the utterly independent *mujtahid*, but the *mujtahid muṭlaq mustaqill* having done his work, that work could not be done again; the possibilities for utter independence had been circumscribed, or better we should say, the limits had now been recognized and defined. Given the persistence of misunderstanding about " the closure of the gates of *ijtihād* ", it is important to make the point, yet again, that jurists in most understandings were free to exert *ijtihād* on whatever topic they wished. If a jurist came to differ from his school, he was said ' to have distinctive opinions within his school ' (*ṣāḥib wajh fī al-madhhab*). The esteem in which the great Imams were held, however, suggested that a reexamination of basic questions decided by an Imam would not be fruitful — just as the average physics teacher would think it pointless to re-demonstrate the theory of relativity or the laws of thermodynamics. [84]

By degrees downwards, capable jurists were categorized according to their descending capacity and competence to rule bindingly on novel or otherwise ambiguous matters.

> He must know his limitations and say, ' I don't know ' or, ' God knows. ' [85]

The lowest rank could do research binding only upon himself. Below even those was the *unqualified,* the *ʿāmmī.*

The prerequisite for limiting novel research is a convincing body of knowledge already at hand. The Islamic name for that knowledge is *madhhab*. *Madhhab* is usually translated as *school* of law and, in the sense of the Epicurean or Stoic schools of the Hellenistic world, more than of the Kantian or Logical Positivist school in a contemporary philosophy department. The *madhhab* is *legal content* produced in a coherent way by a particular *method.* Al-Qarāfī defines a *madhhab* as " Revelationally-grounded, derivative ' original ' assessments [and their supporting details]. " [86] Note that things held in common by all Muslims cannot be ascribed to the *madhhab,* but to the Muslim community. [87]

Allegiance to a *madhhab* was a discipline; it committed one presumptively to certain methods (for the Ḥanbalī to a restricted version of *qiyās* and *ijmāʿ* for example) and to certain prior jurisprudential analyses (for the Ḥanīfīs that there were two categories of

83. On the imprecision of these terms, see Hallāq, " Was the Gate of Ijtihad Closed ", 29-30.

84. See Hallāq, *ibid.*, for further demonstration of this point, though from a different perspective

85. Ibn Qayyim, *Iʿlām,* 2:185-187.

86. Al-Qarāfī, *Iḥkām,* 195: *al-iḥkām al-sharʿiyyah al-furūʿiyyah al-ijtihādiyyah,* etc.

87. *Al-ummah al-muḥammadiyyah;* Al-Qarāfī, *Iḥkām,* 195. Further: *Madhhab fulān* (the school of so-and-so) is only what he determined by *ijtihād;* (al-Rāẓī, *al-Maḥṣūl,* 3/3:13).

obligation, *farḍ* and *wājib* for example, while for the Shāfiʿīs, the terms were interchangeable). The one belonging to a *madhhab* (*muntasib ilá madhhab*) was also committed to certain practical and doctrinal rules (concerning for example the performing of ablutions without removing the foot coverings). Belonging to a *madhhab* qualified one for certain positions and defined one's constituency as fellow members of the *madhhab*.

More importantly, the *madhhab* served as a metaphor for conceptualizing the relations of a ruling to the collective wisdom of the school, going back to the eponym himself. This metaphorical quality, or perhaps one should say, ' mythic quality, ' is best seen in discussions of the limitations and attributions of a legist's judgment (*ḥukm*).

What is the relation between the legist and his *madhhab* ? Legists come in ranks, as al-Shāfiʿī had argued. The foremost rank, however, had long since been unattainable — " its carpet had been rolled up. " [88] Yet from this mythicization of the founding fathers of Islamic law, it follows neither that there was no *ijtihād* nor that legists were all " blind imitators " of these primordial figures. In fact, Ibn al-Ṣalāḥ argues that the rank just below the " absolute independent *mujtahid* " was functionally equivalent to him. [89] This *mujtahid* in his *fatwá* stands in place of the absolute *mujtahid*; it is only that he cannot originate anew; he cannot, in law, reinvent the wheel. He understands and encompasses knowledge as those of the first rank do, but he chooses to follow, or at least finds himself following, the Imāms. It is not a trivial matter that this rank of *mujtahid* exists, since it is an obligation of the sufficiency (*farḍ al-kifāyah*) that there be someone capable of exercising *ijtihād* ; [90] this capacity of the Masters of Aspects and Methods (*aṣḥāb al-wujūh wa-l-ṭuruq*) discharges the communal obligation just as did the Imām when he was practicing. [91]

There is a sense, however, in which the Imām is still, in fact, living, since when a *muftī* of a lower rank rules on a case as the Imām did, then the *fatwá* must be attributed to the Imām. [92] Moreover, the *muqallid* who sought opinion from a dependent legist is considered *muqallid* of the Imām of the *madhhab*. [93] He becomes " the tongue of the Imām. " [94]

While the foremost legists floated above the discipline of the *madhhab* — adherents only by their choice and appreciation of the founders' wisdom — the lesser legists were more dependent on the heritage of the *madhhab*. Though in their *fatwás* they discover as the first rank does, or nearly so, yet somehow theirs " do not reach as far as the *fatwás* of the Founders, nor the Masters of Aspects and Methods, nor is their capacity like them. " [95] For these, nonetheless, an honorable task remains, namely to preserve, transmit and understand the *madhhab*. [96]

88. Ibn al-Ṣalāḥ, 8b.
89. Ibn al-Ṣalāḥ, 9b.
90. Ibn al-Ṣalāḥ, 7b.
91. Ibn Ṣalāḥ, 9b ; see Sartain, *al-Suyūṭī*, 64 on al-Suyūṭī's understanding of " *mujtahid mustaqill*, " " *mujtahid muṭlaq*, " " *mujtahid muntasib*. "
92. Ibn Ṣalāḥ, 12a
93. Ibn al-Ṣalāḥ, 10a.
94. Al-Qarāfī, *Iḥkām*, 29.
95. Ibn Ṣalāḥ, 10b.
96. Ibn Ṣalāḥ, 11a.

It is not, however, any *madhhab* that will do. One cannot, for instance, follow the *madhhab* of the Prophet's Companions, " because it is not written down nor precisely established so as to be sufficient for the *muqallid.* " The laity may not directly attach themselves to the Companions but must instead

> follow the *madhhab*s of the *imām*s, who probed deeply, and inquired, and classified and recollected and set forth the basic questions and gathered these together and refined them and established them... What is appointed now is *taqlīd* of the four *imām*s and no one else... because they are widespread, and they knew [where] to restrict the absolute and specify the general, and they set the conditions for [the indicants'] ramifications, as opposed to just anyone's *madhhab.* [97]

Perhaps the most interesting question, in assessing the relations of the *mujtahid* (of whatever rank) to his *madhhab*, is the extent to which he is bound in his decisions by his school. This is a controversial topic — worthy of study itself — only the general lines of which can be sketched here. The two acceptable positions on this matter were that one must adhere strictly to one's *madhhab* in reaching assessments, and that one could incorporate rulings from other *madhhab*s either by choosing rulings on which the two *madhhab*s coincided or by turning to another *madhhab* if one's own had no defined position on the question at hand. Nonetheless, if a Shāfiʿī *muftī* is asked for a ruling by a Ḥanafī petitioner, a reply is no more than a literal quotation (*bi-ṭarīq al-ḥikāyah*), not a performance of *ijtihād.* That, an unqualified person can do himself. Those who permit such ersatz *ijtihād* refer to it merely as " derivation " (*tafrīʿ*). [98] A *muqallid* is bound to his school; if he follows one school in some matter he cannot combine that with practice of another school. If he follows the Mālikī rite which is in some regards liberal on loss of worship-purity, he must follow the Mālikī rules for ablution when he does ablute. One may marry without a guardian following Abū Ḥanīfah, or without witnesses following Mālik; if one marries with neither witness nor guardian, patching together both schools, then the intercourse that follows is capital adultery. [99]

No one of whom I am aware defended the notion that *madhhab*-allegiance was a matter of indifference or claimed to belong to no school, before the 19th century. [100] Although the formula *fī ikhtilāf raḥmah* (in difference of opinion is [God's] mercy) was embraced fairly early on, *madhhab*-chauvinism seems to have been the norm, and its opposite, an exception. [101]

97. Al-Asnawī, *al-Tamhīd,* 507f.
98. Al-Āmidī, *al-Iḥkām,* 316.
99. Al-Asnawī, *al-Tamhīd,* 508.
100. Al-Shawkānī was the first known to me, though in his case, *lā madhhabiyyah* means refusing, perhaps for reasons of social solidarity, to promote the Zaydī position over the Shāfiʿī.
101. For the story of *madhhab-chauvinism* in Nishapur, see Bulliet, *Patricians of Nishapur,* chapter 3.

Conclusion.

' Islam does not have priests ' we are truly told. This oft-repeated dogma, however, has led Islamicists to undervalue the sacral and even sacerdotal roles of the *muftī* and the *qāḍī*. The ' high ' view of their enterprise that comes from their works, though idealized and self-serving, helps us to understand the persistence and relative stability of these two social roles through Islamic history and the Islamic domains. Having said that ' Islam has no priests, ' however, the question of ' what Islam *has* ' has been ignored. The translations of ' scholar ' for *ʿālim*, ' jurisconsult ' for *muftī*, and ' judge ' for *qāḍī* deceive, and lead one to suppose that the *ʿulamā'* were academics pure and simple and that out of their ranks came bureaucrats and administrators. In the self-description of the *ʿulamā'* we see that, in Sunni Islam, scholars mediated transcendence and made it immanent in the ordinary world. When they spoke, it was, in a sense, an otherwise remote and therefore impartially wise God who intervened in the tumult of the social world. In this respect they resembled Protestant divines who were ' the tongues of the Holy Spirit. ' These were sacerdotal personages, consecrated by their knowledge and training; they were thereby able to transcend time and place, and in one view, always to be correct (*muṣīb*) in their rulings if they exerted effort (*ijtahada*) in the proper manner.

What did they mediate ? It is not faith or grace, or magic or charisma that these extraordinary (*khāṣṣ*) personages convey. It is, rather, right action. They clarify (*tabyīn*), make manifest (*iẓhār*), and guide (*irshād*) the ordinary Muslim (*ʿāmm*) to *right action.* Living as we do in an instrumentalist and pragmatic world where even ethics is almost always described in consequentialist terms, it is difficult to conceive of the deontological undergirding of, for instance, a judge in al-Subkī's Damascus. To act correctly (*bi-l-ḥaqq*) was to align oneself with the order-of-things which provided a satisfaction apart from success or effectiveness. Islamic morality is a morality of action, and right action is what *muftī*s and *qāḍī*s believed themselves to be conveying. Only God knows hearts, say the legal sources, so one must judge by actions. Right action is thus presumptive evidence of inward virtue. It is, in the classical definition of a sacrament, " the outward and visible sign of inward and invisible grace. " Right action then may, for purposes of comparison, be thought of properly as the sacrament of Sunni Islam.

Right action depends on transcendent knowledge (*ʿilm*), something that the average Muslim lacks, in the view of the scholar. Consequently, the unqualified (*ʿāmm*) are dependent on the knowledge and interpretations of knowledge conveyed by scholars. If the Christian religious economy was based on transactions in grace, the Sunni Muslim economy was based on transactions in knowledge.

To live a Muslim life, specialists in knowledge must be present. A group of Muslims must (from among themselves or from the outside) have access to a *qāḍī* and a *muftī*, for both *qaḍā'* and *iftā'* are " obligations of the sufficiency " (*furūḍ al-kifāyah*): if someone undertakes these duties, the community is relieved of the obligation; if no one undertakes them then each individual in the community has committed a religious transgression (*athima*).

One might expect tension between the hierarchy of scholars and the equalitarianism of Islamic ideology, but as the hierarchy is established by comparative degrees of knowledge acquired, there is in fact no tension here. The tension lies in fact between the ideal of the detached and speculative *muftī* and the engaged and practical *qāḍī*, the former perhaps deficient in all but mind, the latter assessing the world with every human faculty. The one is turned inward away from humankind, the other is turned outward to the world and so is vulnerable to it.

We may call these two roles the historical and the a-historical or the quietist and the activist. [102] The *qāḍī* embodies Islamic morality in action. His is the world of social stress and the strain of ideals realized in compromise; it should not surprise that the *qāḍī* too was compromised by this world. The *muftī*, by contrast, fashions and discovers an eternal and timeless Law — ever appropriate and true, not least because of its detachment from the hurly-burly of the present. The *muftī* is the meeting point between the purely theoretical (hence the long discussions of impossible events whose discussion clarifies the principles of Truth and Law), the practical (the very real situations put before the *muftī* to assess) and the meta-historical (in that he discovers the *ḥukm qadīm* appropriate to the situation, and that he has as his contemporary colleagues — as it were — the great legists of his *madhhab*). The *muftī* reflects the structural emphasis on continuity, the *qāḍī* an emphasis on change.

Finally, it must be seen that history, in one Islamic view, abrades Islam and divides Muslims. The *qāḍī* acts in history and makes history by determining effectively between two litigants or between society and the individual. He is necessary, but sullied. The *muftī* is the embodiment of the timeless *sharīʿah* that unites because (in part) it is somewhat indeterminate. Both sorts of legists (together of course with other sacerdotal figures like Sufi masters) mediate between the two ultimately irreconcilable domains: the transcendent and the mundane. By speculation, interpretation, and application of what always remains a metaphysical ideal, the legists seek to make the transcendent immanent in Muslim society.

102. Following Neusner, *Right Ways*.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

BIBLIOGRAPHY

Abū Yaʿlá, al-Qāḍī (458/1065). *Aḥkām al-Sulṭāniyyah.* (Cairo: Muṣṭafā al-Ḥalabī, 1357.)

Anonymous [*Ādāb al-muftī*]. Lahore Panjab University Library Ar.d II 23; ff. 22.

Al-Ashqar, Muḥammad Sulaymān ʿAbdallāh. *Al-Futyā wa-manāhij al-iftā'.* (Kuwait: Maktabat al-Manār al-Islāmiyyah 1976/1396.)

Al-Asnawī (772/1370). *Al-Tamhīd.* (Beirut: Mu'assasat al-Risālah, 1980/1400.)

Bulliet (Richard). *The Patricians of Nishapur.* (Cambridge MA: Harvard University Press, 1972.)

Calmard (J.). " Mujtahid [1991]. " *The Encyclopaedia of Islam.* Edited by C.E. Bosworth *et al.* (Leiden: E.J. Brill, 1960.) Vol. 7/119, 295-304.

Coulson (N.J.). " Doctrine and Practice in Islamic Law: One aspect of the Problem, " *Bulletin of the School of Oriental and African Studies, London,* vol. 18 (2) (1956): 211-226.

Coulson (N.J.). *A History of Islamic Law.* Islamic Surveys no. 2. (Edinburgh: Edinburgh University Press, 1978 [1964].)

Ibn Abī Dam al-Ḥamawī, Abū Isḥāq Ibrāhīm ibn ʿAbdallāh (642/1244). *Kitāb Ādāb al-Qāḍī, wa-huwa al-durr al-manẓūmāt fī aqḍiyah wa-l-ḥukūmāt.* (Damascus ? : n.p., 1975 ?)

Ibn Mālik, ʿAbd al-Laṭīf ibn ʿAbd al-ʿAzīz ʿIzz al-Dīn (830/1427). *Sharḥ Manār al-Anwār (of al-Naṣafī).* n.p. (Istanbul: 1315.)

Ibn Qayyim al-Jawziyyah, Abū ʿAbdallāh Muḥammad b. Abī Bakr al-Ḥanbalī (751/1350). *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn.* (Beirut: Dār al-Jalīl, 1973.) 4 vv.

Ibn Ṣalāḥ, Taqī al-Dīn ʿUthmān ibn ʿAbd al-Raḥmān (643/1245). *Ādāb al-Muftī wa-l-mustaftī.* (Beirut ? : Maktabat al-ʿulūm wa-l-ḥukm, n.d.)

Ibn Ṣalāḥ, Taqī al-Dīn ʿUthmān ibn ʿAbd al-Raḥmān (643/1245). *Ādāb al-Muftī wa-l-mustaftī.* Istanbul Çorlulu Ali Paşa 226/1; 33 folia.

Ibn Taymiyyah, Taqī al-Dīn Aḥmad (728/1328). *Siyāsah Sharʿiyyah.* (Beirut: Dār al-Kutub al-ʿArabiyyah, 1382/1966.)

Levy (Reuben). *The Social Structure of Islam.* (Cambridge UK: Cambridge University Press, 1957.)

Makdisi (George). *The Rise of Colleges; Institutions of learning in Islam and the West.* (Edinburg: the University Press, 1981.)

Makdisi (George). *The Rise of Humanism in Classical Islam and the Christian West with special reference to scholasticism.* (Edinburgh: Edinburgh University Press, 1990.)

Masʿūd (M. Khālid). " *Ādāb al-Muftī*; The Muslim Understanding of Values. Characteristics and Role of a *Muftī,* " *Moral Conduct and Authority; the Place of Adab in South Asian Islam.* Edited by B.D. Metcalf. (Berkeley: University of California Press, 1984.) 124-151.

AnIsl 27 (1994), p. 5-28 A. Kevin Reinhart
Transcendance and Social Practice: Muftīs and Qādīs as Religious Interpreters.

Messick (Brinkley). " The Mufti, the Text, and the World: Legal Interpretation in Yemen, " *Man; The Journal of the Royal Anthropological Institute,* vol. 21 (1) (1986): 102-119.

Moll (Richard W.). *The Lure of the Law; why people become lawyers, and what the profession does to them.* (New York: Penguin Books, 1990.)

Neusner (Jacob). *Wrong Ways and Right Ways in the Study of Formative Judaism.* (Atlanta, Georgia: Scholar's Press.)

Petry (Carl). *The Civilian Elite of Cairo in the Later Middle Ages.* (Princeton N.J.: Princeton University Press, 1981.)

Al-Qarāfī, Abū l-ʿAbbās Aḥmad b. Idrīs (684/1285). *Al-Iḥkām fī tamyīz al-Fatāwá ʿan al-aḥkām wa-taṣarrufāt al-Qāḍī wa-l-imām.* (Aleppo: Maktabatal-M aṭbūʿāt al-Islāmiyyah, 1387/ 1967.)

Al-Qarāfī, Abū l-ʿAbbās Aḥmad b. Idrīs (684/1285). *Sharḥ Tanqīh al-Fuṣūl fī Ikhtiṣār al-Maḥsūl fī al-Uṣūl.* Cairo, Maktabat al-Kuliyyāt al-Azhariyyah.)

Al-Rāẓī, Fakhr al-Dīn (606/1209). *Al-Maḥṣūl fī Uṣūl al-Fiqh.* (n.c.: Jāmiʿat al-imām Muḥammad ibn Suʿūd al-Islāmiyyah, 1401/1981) 2 in 6 vv.

Reinhart (A. Kevin). " Islamic Law as Islamic Ethics, " *Journal of Religious Ethics,* vol. 11/2 (Fall 1983) (1983): 186-203.

Rosen (Lawrence). *The Anthropology of Justice; Law as culture in Islamic society.* Lewis Henry Morgan Lectures. (Cambridge U.K.: Cambridge University Press, 1989.)

Rosen (Lawrence). *Bargaining for Reality.* (Chicago: University of Chicago Press, 1984.)

Al-Sarakhsī (483/1090). *Al-Mabsūt.* (Beirut : Dār al-Maʿrifah, 1046/1986.) Vol. 16 " Ādāb al-Qāḍī ". 31 in 16 vv.

Sartain (E.M.) *Jalāl al-Dīn al-Suyūṭī; Biography and Background.* (Cambridge UK: Cambridge University Press, 1975.)

Schacht (Joseph). *An Introduction to Islamic Law.* (Oxford: The Clarendon Press, 1964.)

Schacht (J.) " On the Title of the *Fatāwā al-ʿĀlamgīriyya,* " *Iran and Islam; in memory of the late Vladimir Minorsky.* Edited by C.E. Bosworth. (Edinburgh: The University Press, 1971.) 475-478.

Al-Shāfiʿī, Muḥammad b. Idrīs (204/819). *Al-Risālah.* [Cairo: Maktabat Dāra l-Turāth, 1979/ 1399 (2nd printing).]

Al-Shāfiʿī, Muḥammad ibn Idrīs. *Islamic Jurisprudence: Shafiʿī's Risālah* [*al-Risālah.*] Majid Khaddūrī trad. (Baltimore: The Johns Hopkins Press, 1961.)

Al-Subkī, Tāj al-Dīn ʿAbd al-Wahhāb ibn ʿAbd al-Kāfī (771/1368). *Muʿīd al-niʿam wa-mubīd al-niqam.* (Cairo: al-Khanjī, 1948/1367).

Al-Subkī, Tāj al-Dīn ʿAbd al-Wahhāb ibn ʿAbd al-Kāfī (771/1368). *Muʿīd al-niʿam wa-mubīd al-niqam; The Restorer of Favours and the Restrainer of Chastisments; The Arabic Text with and Introduction and Notes.* (London: Luzac & Co., 1908.) Vol. 18 in Luzac's Semitic Text and Translation Series.

Al-Subkī, Taqī al-Dīn ʿAlī ibn al-Ḥasan ibn ʿAbd al-Kāfī (756/1355). *Fatāwá al-Subkī.* (Cairo: Maktabat al-Qudsī, 1356.) 2 vv.

Al-Suyūṭī, Jalāl al-Dīn ʿAbd al-Raḥmān ibn Abī Bakr (911/1505). *Al-Taḥadduth bi-niʿmat Allāh.* (Cambridge UK: Cambridge University Press, 1975.) Vol. 2.

Tyan (Émile). *Histoire de l'organisation judiciaire en pays d'islam.* 2nd printing (revue et corrigée). Éd. (Leiden: E.J. Bill, 1960.)

Tyan (É.) "Ḳādī", *The Encyclopaedia of Islam.* Edited by E. van Donzel *et al.* (Leiden: E.J. Brill, 1960.) Vol. 4, 373-374.

Tyan (É.) and Walsh (J.R.). "Fatwa [1965]", *The Encyclopædia of Islam.* Edited by B. Lewis *et al.* (Leiden: E.J. Brill, 1960.) Vol. 2, 866-867.

Weiss (Bernard). "Exotericism and Objectivity in Islamic Jurisprudence," *Islamic Law and Jurisprudence; Studies in Honor of Farhat J. Ziadeh.* Edited by N. Heer. (Seattle: University of Washington Press, 1990.) 53-71.

Weiss (Bernard). "Muftīs and Qāḍīs in al-Āmidī," *Unpublished paper delivered, AOS, Spring 1990.*

Al-Zarkashī (794/1392). *Al-Baḥr al-Muḥīṭ.* Istanbul Aḥmed III. *Uṣūl al-fiqh* 721/1-3 (Catalog. # 33423, 33433, 33443); 3 volumes, ff. 259 + 273 + 213.

Ziādeh Farḥat J. "*Ādāb al-Qāḍī* and the Protection of Rights at Court." *Studies in Islamic and Judaic Traditions; papers presented at the Institute for Islamic-Judaic Studies.* Edited by W.M. Brinner, Ricks, Stephen D. (Atlanta GA: Scholars Press, 1989.) Vol. 1.

Zysow (Aron) 1984. "The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory." Ph.D dissertation, Harvard University.