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Law and culture: the appeal to analogy

Several years ago I stood before a judge in an American courtroom nervously awaiting the outcome of a case upon which depended a great deal of my financial well-being and peace of mind. Together with my neighbors and representatives of several municipal and community organizations, we had – after the failure of many attempts at negotiation and political infighting – found ourselves with no other choice than to file suit against the public utility company whose practices were threatening to make the homes in which my neighbors and I had sunk so much of our fortunes and our energies both worthless and unliveable. As I stood there in that moment of inadvertent calm, when fear and diffidence are poised on the edge of another's decision, I could not help but reflect on several distinct impressions that had returned to me again and again over the course of the day's hearing. What a strange commentary it was on my legal education, I thought, that even though I was a lawyer, a member of the state and federal bars, and an adjunct professor at a nearby law school, I had, until this very moment, never once set foot in an American court of law! How ironic it was, too, I thought, that having spent innumerable hours in Islamic courts I was quite sure how best to argue the matter to a Muslim judge but far less certain of exactly what I should say in a court before which I was, in theory, actually trained to practice! So much was my experience of courtroom proceedings based on my Moroccan studies that I automatically began thinking in Arabic only to be struck by how odd it was that I could, without strain or hesitation, understand everyone – from the whispering clerk to the bailiff with the missing teeth – because every last one of them spoke my mother tongue.

But far and away the most striking impression I had in this entire process was the intense realization that here, in the lowest-level court of equity in the state, I was almost entirely at the mercy of a single judge - a man who, in his personal discretion, in an instant of seemingly boundless might, could magically lift or permanently affix a burden that had been laying upon me and my neighbors for almost an entire year. Like countless supplicants and cowards arraigned before an oracle, whether legal or religious, I tried to strike

a bargain with the spirits of the place. Earlier in the day I had shamelessly bound myself over to the position of the Legal Realists who had warned me to bend all my efforts not to an understanding of what the law on the matter is but to predicting what in fact the judge would do, and I was now ready to pledge myself, in return for a favorable result, to a life of mortifying realism and never-ending rule skepticism. Should circumstances demand, I was, however, no less prepared to barter my soul to the gods of Legal Positivism if only I could be assured that the judge, whatever the whisperings of his own moral sense, would realize that all of the valid legal rules were just as I had argued them and that the "uniquely correct decision" had my name written all over it.

But above and beyond all such promptings of legal artifice and craven servility I found myself repeatedly confronted by an overriding sense of fascination, a fascination which, I confess, was at that moment as much like that which a bird has for a snake as a scholar has for an enigma. For as impatient as I was to know *what* the judge was going to decide I was even more curious about *how* he was going to go about making his decision. So many things could sway him to one side or another, so many influences could be put together in different ways. Was it possible, I wondered, that he had had a fight with his wife at breakfast and would, in response, now leave me dangling from whatever legal peg lay readily to hand? Had he (I most devoutly prayed) himself once encountered a mean-spirited public utility official upon whom he might now avenge his ancient consumer's pride? Or was his line of thought, whatever its actual course, utterly beyond our ken – indeed, beyond his own – lodged in that murky brew of lawyer's art and psychic flaw out of which it is possible, as David Reisman once quipped about lawyers generally, to turn a personality defect into a professional advantage?

It was not, of course, only the ghosts of squeamish litigants and zealous counsel who shared with me their awe at just how judges do it. Justice Benjamin Cardozo, pondering the issue of judicial discretion, once answered the question, "What is it I do when I decide a case?" by posing a further set of questions:

> To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions.

If, however, it is self-evident that a very wide range of factors goes into the exercise of judicial decision making it is no less obvious that, even where discretion appears most unbounded, it is likely to possess qualities that are at

once distinctive to and characteristic of the time, the culture, the circumstances, and the background of those who exercise such judgment. Like so many other areas of nature and of human society, the problem is not in determining whether there are regularities to systems of law and aspects of judicial independence but how best to probe for and interpret these regularities. And as in so many other areas of common curiosity and scholarly investigation, we grope our way through areas initially uncharted and inchoate by applying to the unknown analogies drawn from familiar terrain. To understand how, as an anthropologist, I want in the course of this study to look at a particular legal system and the culture of which it is a part, it may prove helpful to see how the process of drawing analogies from one domain to the other and back again has in the past and may in the present case reveal features that might otherwise escape our notice.

It was Samuel Butler who once said that "though analogy is often misleading, it is the least misleading thing we have." Whether it is because, as Coleridge argued, an analogy partakes of the essence of the thing to which it is extended or because it is simply convenient for humans to approach the uncertain through such crabwise modes of thought, analogies clearly serve to direct or misdirect our inquiries and thus may speed or hinder access to an understanding of the thing itself. Surely it makes a difference to what we learn and how we move forward if we think of the eye as a beacon or as a receptor, the atom as a seamless sphere or as a miniature planetary system, society as a clockwork mechanism or as a living organism. One area in which the interchange of analogies from one field to another has clearly proved thought-provoking in the past has been in the nexus of law and anthropology. For some scholars this has meant extending the concept of rules, as prescriptive ordinances, as they are thought to exist in the law to realms of social activity – marriage, alliance, and network formation – not previously grasped in rule-like form. Others, working in the opposite direction, have sought to comprehend legal forms and legal change by drawing analogies based on the idea of physical and social evolution, the similarity of legal process to ritual activity, or the usefulness of reading legal sources like literary texts.

This study too will work back and forth, with the help of analogies, between law and anthropology, extending themes from each to the other. Specifically, I want to grapple with the problem of judicial discretion as a cultural phenomenon. And as might be expected from an anthropologist, I want to approach the broader aspects of this issue by cutting my teeth on the exotic – by trying to understand the nature of judicial discretion in the Islamic courts of Morocco. Since the Islamic judge, the *qadi*, has long been taken by western commentators as the archetype of the legal figure able to exercise vast discretion, there is particular appropriateness in taking these judges as our point of entry. But perhaps more to the point, if, as will be argued, a fuller understanding of judicial decision making can be gained by analyzing its cultural characteristics, it may be from the perspective of a distant culture that

features of our own may be more clearly seen. The plan of this study, therefore, is quite simple: first to discuss, by means of a concrete analogy, an interpretation of Moroccan culture – a view of how some of the pieces of society, culture, and religion fit together in this part of the world and how, in broad outline, they manifest themselves in the proceedings I have observed that take place before the qadis. Then I want to consider how, in the context of this overall set of cultural assumptions and beliefs, the qadi faces the problem of determining the indeterminable – how he goes about discerning the facts in a case, indeed how he decides what shall be considered a fact, and how, drawing upon a style of reasoning that is both institutionally distinctive and culturally recognizable, he reasons his way to a final decision. If, as will be argued throughout, concepts of knowledge and right, of human nature and human utterance, play a central role in both the law and society of Morocco, then, next, it will be necessary to explore the implications of these concepts for the qadi by considering how he assesses what is in the public interest, how he and his culture calculate the consequences of individual acts, and how particular states of mind are attributed to individual actors. Finally, a number of these issues will be drawn together in order to formulate a specific interpretation of Islamic judicial discretion and the concept of justice that suffuses it. But no less importantly, it will be suggested that a cultural analysis of judicial discretion can contribute to the perennial debate on the nature of legal decision making and that such an approach may be helpful in the study of courtroom proceedings in western countries as well.

Like any scholar I begin from a baseline of certain assumptions, orientations that will influence both the choice of analogies and the overall goal. But scholars, unlike bankers, are under no obligation to make clear the price one is really going to have to pay for trafficking with them. Were we to legislate a sort of academic truth-in-lending, readers might be entitled to know at the very outset something of the overall orientation toward law and culture that will lie behind much of the present argument.

There have been many approaches by social scientists to the study of law, but I have not, I confess, been wholeheartedly attracted to any one of them taken in its entirety. I am not eager, like some, to demonstrate that *The Law* (spelled with capital letters and uttered in stentorian tones) evolves as a kind of driving force which an anthropomorphized *Society* nurtures in embryo in savage communities until, in the springtime of the species, it blossoms forth in a profusion of writs and deeds to challenge even the arts as the capstone of humanity's enviable achievements. Nor do I find myself taken with the idea that law is preeminently a mechanism of dispute *resolution* – an attitude which, even if one had never been involved in an endless and bitter legal case that never really resolved anything, could probably be dispelled by spending an afternoon in front of the television screen watching the sequence that runs from *Family Feud* through *The Edge of Night* to *The People's Court*, and back again. And while I admire their industry and erudition, I tend to regard those who have lost themselves deeply in the quest for an ultimate definition of the

law as making even seekers after the Holy Grail appear the very embodiment of the Reality Principle.

Rather, it appears more fruitful to view law as part of the larger culture, a system which, for all its distinctive institutional history and forms, partakes of concepts that extend across many domains of social life. In law, as in politics and marriage, one has the opportunity to see ordinary assumptions put to the test of scope and implication, and though the response may be peculiar to its own domain, analyzing the realm of the law as a cultural phenomenon is no more unusual than viewing aspects of a society through the behavior of its members in the public market-place, the family dwelling, or the house of worship. Such a view of law is therefore indistinguishable from a view of how anthropological inquiry in general may be conducted – as a search for the concepts by which a community of human beings categorize and group their experience of an otherwise undifferentiated universe into packets of meaning, symbolically grasped and manipulated, as they go about arranging the relationships of everyday life. This is not, of course, to discount the connections – whether causative, dependent, or mutually supportive – that exist between law and its economic and political surround. It is, instead, to say that as people attempt to comprehend their circumstances and orient themselves toward them they grasp that world through categories and assumptions that are themselves cast up by the full range of historical factors that shape their lives. The anthropologist's task is to sort out these influences and to see how, given the particular issue under study, a balanced apportionment of the contributing factors best accounts for the matter at hand. In the analysis of contemporary Islamic law, it is necessary but not sufficient to understand the ways in which the struggle among contending interest groups and the tug of conflicting economic strains have enacted themselves in the forum of the law. For it is also necessary to see how the substantive and procedural ideas available at a given moment constitute the terms through which events are discussed, shaped, fought over, and fought for. The result, at any particular moment, may be one of simple imposition through existing institutions of the self-supporting concepts of the more powerful, or – as will be argued for the situation under study here – one in which a set of concepts, broadly shared throughout Moroccan society, suffuses a host of different aspects of collective life, thereby facilitating the struggle for individual success without the loss of a deeply felt collective order. And because the principles by which people can orient themselves toward the acts of others traverse analytically separable bounds of social life, it becomes imperative to see the legal realm – its struggles, its terms, its power, and its dependence – as an extremely characteristic part of the entire social fabric. It is from such an orientation – of conceptual ordering and institutionalized enactment – that one must try, often with the aid of metaphor and analogy, to understand the nature of judicial decision making and the constitutive role of law in Moroccan life.

During the course of many months stretching over nearly two decades, I

have observed the proceedings and pored over the documents in the qadi's court of a city of 50,000 people called Sefrou which is located just south of Fez on the edge of the Middle Atlas Mountains. Lying between upland and plain, predominantly Arabic-speaking and largely Berber-speaking areas, Sefrou possesses many of the features and many of the strains distinctive to contemporary Moroccan life. Both the city and its hinterland have, through the course of many centuries, demonstrated in their organization, politics, and religious institutions their centrality and typicality of the nation as a whole. And while no single place can contain all variations that may be found in a complex society like that of Morocco, much less the entire Arab world, Sefrou embodies, in a theme-and-variation sense, an extraordinarily characteristic array of Muslim social and cultural features. It is, therefore, possible to enter the court of the qadi of Sefrou with the sense that, even in a single morning, one can gain a good appreciation of how a typical Islamic court operates and how judicial discretion is grounded in a cultural base.

The qadi's court is situated in one wing of the small palace built by a powerful administrator of the Sefrou region at the turn of the century. With its tiled courtyard and broken fountain, its shuffling clerks and toppling stacks of legal paperwork, the precincts suggest that mixture of Moorish ease and bureaucratic impulse that pervade so much of Moroccan official life. Although judges must be competent to sit in the civil or criminal proceedings that are the subject of other branches of the unified legal system, one judge continues to be designated as qadi, and it is he who enters the courtroom unceremoniously and, a clerk by his side, takes his seat at a table on a low platform at the front of the room. Those already seated in the court may continue to talk among themselves, return the nod of a passer-by viewed through the doorway that leads to the courtyard and lane beyond, or unflinchingly study the man at the front of the room. The qadi is a short, strongly built man in his early fifties, dressed in an ordinary jellaba over western trousers and sporting a bright red fez and a pair of tinted glasses. When he speaks, it is in a harsh, rasping voice which, however conversational its tone or abrupt its invocation, startles its listeners and commands their instant attention.

Litigants are called forward by a uniformed aide, a good-humoured Berber of the *ancien combatant* variety who not only tries to keep traffic moving and to translate for those few Berber tribesmen who do not speak Arabic very well but who, since the qadi's voice makes him difficult to understand at the best of times, repeats – often with embellishments and questions of his own – many of the qadi's utterances. As people come forward to be heard they may make some acknowledgment of the qadi – a curt bow of the head and shoulders by the women, a desultory military salute by the men – but the gesture is usually lost on the court or interrupted midway by the aide who nudges them into position before the qadi.

Regardless of the kind of case or the details contained in the petition and

dossier on his desk, the qadi always begins by ascertaining who is who and how they are connected to each other. He is particularly careful to ask how people are related to one another when marital or inheritance matters are involved and to determine if the parties are speaking for themselves or through a spokesman. His first substantive question is usually the signal for the shouting to begin. Everyone wants to tell his or her side of the story, and no one seems eager to sit quietly while an opponent is speaking. Litigants and witnesses begin by talking to the qadi, but often end by addressing the aide, the clerk, the onlookers, and even a stray anthropologist. The qadi nods, listens, questions: the principals sit, stand, shout, and cry; the aide tries to quiet people by holding their hands down, in the certain knowledge that no Moroccan is comfortable speaking if he cannot gesticulate freely; and the clerk rushes to finish writing up the last case and find the correct dossier for the present one. Sometimes the qadi lets people shout at each other for a little while – whether to let them vent their anger or to gauge the intensity of their feelings – and sometimes he intercedes immediately to move things along. Eventually one person gets to tell a more or less coherent story, and women no less than men speak expressively and forthrightly with just that sort of keen timing and assured style they have developed in years of arguing before that most discriminating of judges, the crowd of relatives and neighbors who collect around any audible dispute. Most cases are handled with considerable rapidity: in the space of two hours it is not uncommon for the qadi to issue rulings on more than a dozen cases and to handle portions of a score of continuing matters. Often one of the principals will fail to show up or a necessary document will be missing, thus keeping a case from being heard in its entirety. Often, too, cases continue over a number of months and even years so that more than one qadi may have a hand in the matter.

The first case heard on this day involved a marital dispute. The wife stated in her petition that her husband forced her out of their home some three months earlier and had subsequently failed to provide her and their two small children with support. The qadi first inquired as to the area from which each party came and confirmed what the dossier listed, that they both came from a Berber-speaking settlement nearby in the countryside. In response to the qadi's questions the husband denied having forced his wife out of their home while the woman, in turn, acknowledged that she had neither witnesses nor notarized affidavits to support her claims. Without further inquiry the qadi ordered her to return immediately to the marital home and either offer proof of nonsupport in a subsequent hearing or risk having her case dismissed.

The next case, too, involved a marital dispute. Both husband and wife were from families whose members had, for countless generations, worked as craftsmen and gardeners in the city – a fact of which the qadi seemed to be well aware as he knowingly nodded his head while stating their personal and familial names. It was the woman's contention that the couple were living with the husband's family, that there were constant arguments between her and her

in-laws, and that she wanted the qadi to order the husband to find them a new residence away from the husband's kinsmen. When the husband was called upon he spoke hesitantly, said it was all very shameful, and in a tone of familiarity and world-weariness allowed as to how the qadi must know that women are querulous by nature and that a new apartment would cost a lot of money. The wife interrupted to restate her claim in a way that indicated she knew full well the scope of her legal rights, to say nothing of the character of her in-laws. The qadi inquired as to whether other family members might help resolve the matter and whether more time might be useful, but the wife was quite insistent, and, after a moment's pause and in a voice fraught with resignation, the qadi ordered the husband to find the couple a new and separate place of residence.

Many of the cases heard by the qadi involve aspects of divorce, and it was as the result of one such divorce that the following dispute arose. The wife claimed that when the couple split up the husband kept a number of objects belonging to her, including some furnishings, tools, and clothing. Neither had witnesses who could appear for them. After barely a moment's inquiry the qadi ordered that the furnishings be given to the wife but that if the husband swore an oath that the clothes and tools were his, those objects would be awarded to him. If he refused the oath and his wife agreed to take it the items would be awarded to her. The husband said he would indeed swear the necessary oath before notaries at the mosque that Friday, and the matter was rapidly concluded.

The qadi also has the power to hear cases involving real property if any documents pertaining to it were initially drawn up by his court and if no title has been registered through a separate legal procedure overseen by a ministry and court in Fez. In a property case decided on this day the qadi was faced with a somewhat unusual situation. In constructing a new room on top of his house the defendant had placed a window in such a way that, the plaintiff claimed, it was possible for the women in his house to be seen by people looking out of the defendant's new window. The qadi had sent two of the experts attached to the court to determine the situation, and they reported back that it was indeed possible to see through the new window into the plaintiff's house, though one had to look at an angle to do so, a finding that raised the question whether the view was so intrusive as to warrant reconstruction. The qadi, refusing to hear any more testimony from the litigants and speaking more to the clerk than the parties, said that the school of Islamic law practiced in Morocco gives preference to positive assertions over negative ones, that the claim of actual harm is a positive assertion and should thus be favored over the claim of no harm, that people in the city as opposed to the countryside always place their windows so that one cannot see into another's house, and therefore that the defendant must indeed brick up his new window or move it to another place in the wall.

A small cluster of people now came forward in response to the aide's

announcement of their case, and it took a little while before the jostling figures were sorted out and quieted so the qadi could proceed. He reminded himself who they were – he had, as a matter of fact, seen many of them quite often, since their dispute had been dragging on for more than a year. It began when the husband claimed that his wife left him and, though intermediaries of their tribal fraction had been sent to her father's house to request her return, she and her father had rebuffed all overtures at settlement. At the first hearing of the case the wife failed to appear and the qadi entered an order requiring her to return to her husband. Subsequently, however, the wife, with her father acting as her spokesman, appeared in court and said that the husband had actually divorced the wife several months before filing the present suit. A document was then produced in which two court notaries stated that fifty witnesses had appeared before them and attested to the fact that such a divorce had indeed taken place. The husband denied this claim and argued that the witnesses were not credible since they were all relatives of the wife and her father's family. The qadi then gave the husband the opportunity to request that a procedure be held whereby each of the fifty witnesses comes before two separate pairs of notaries who inscribe the testimony of each, and if the testimony of all remains consistent before both sets of notaries, a document will be presented to this effect to the court.

After numerous delays, in which both sides told the qadi they were having trouble getting all of the witnesses together, each party now appeared with a new set of documents. The wife presented a notarized assertion by twelve witnesses who stated that a divorce did indeed occur, while the husband brought an identical document in which his twelve witnesses attested to the exact opposite. There was considerable argument among the litigants and their respective cliques, but when the uniformed aide finally got everyone more or less quieted the qadi announced that whereas the husband's witnesses all came from the settlement in which the couple lived while those of the defendant-wife resided quite some distance away and would therefore be less likely to know about the couple's marital relation, it was the court's opinion that the wife should return to the husband's house and live there with him in peace. The prospects for this seemed rather uncertain as the collected relatives continued to shout and argue with great agitation while the aide jostled the entire lot out of the courtroom on the prow of his ample midsection.

By now the court had been sitting for several hours and the strain of hurried work, frequent bickering among the litigants, and the day's increasing heat were beginning to show. At times the qadi had clearly lost his patience, especially when delays led him to suspect, as he actually told some litigants, that they were just playing around with the law. He had listened quietly too, while some people told obvious lies, but if he regretted his inability to mete out punishment for such lying he never let on about it. Nor did he seem to mind that no elaborate deference had been shown to him as a high religious and legal figure or that the style of courtroom discourse appeared indis-

tinguishable from that of a neighborhood dispute, a market-place squabble, or a family tiff. Eventually, with neither ceremony nor public acknowledgment, the qadi simply rose from his place and, with the dossier-laden clerk shambling after, walked briskly out of the courtroom.

In many respects the proceedings of the qadi's court are unlikely to strike western observers as particularly strange. Perhaps one might have expected greater formality, the occasional intonation of Quranic phrases, or frequent reference to obscure points of Islamic law. Although one might assume that the court has an essentially religious foundation it would be important to appreciate that its jurisdiction is nowadays limited to matters of family law and those property cases for which the court itself drew up the documents. The limited role it once played in the regulation of public morals – a role shared with the government appointed market regulator (*muḥtassib*), the head of each occupational group (*amin*) and urban quarter (*muqqadem*), and various familial, residential, and religious intermediaries (sing., *wasīṭa*) – is, therefore, even further diminished at present. Contemporary Moroccan qadis must be competent to sit in the civil or criminal chambers of the unified court system and though specialization is usual, it may turn out that on an untypical day the "qadi" is actually a judge (*ḥakem*) from another chamber. Indeed, since it has been common in the Arab world since the earliest days of Islam for government officials to have their own separate jurisdiction, a number of issues touching on state policy and the well-being of the community of believers has never been within the exclusive control of the qadi. Perhaps, too, one might have expected women to speak less readily or less forcefully in their own behalf or to be less cognizant of their legal rights. Indeed, one might have expected in a tradition that pays such heed to the written word that even greater use would have been made of documentary evidence. But while the judge's rulings certainly do not appear wildly unpredictable or arbitrary, their precise rationale is not always self-evident. For even though the qadi is undoubtedly exercising his own judgment in some of the matters before him the real mystery lies in the particular way in which his engagement in such a process of discretion is shaped by the overall context of his court and his culture.

Why, for example, is he so concerned about people's social origins? What does such information tell him, and why is it relevant? When, in the first case of marital support, he asks few questions of the poor Berber country folk before him but tries to see if intermediaries might help resolve the claim of the urban Arab woman seeking a new residence away from her in-laws, is he using ethnicity as an index of interpersonal behavior or simply to sustain some prejudicial view of his own? Is he willing to grant the urban wife's request for a new apartment because of a clear legal right when, on other occasions, he has been known to dissuade a wife on economic grounds from pushing her claim? Or is he looking forward to a time when non-family members may be needed to witness the couple's conduct and the implementation of a court order? Why