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The anthropology of justice

Law has often been seen as a relatively autonomous domain, one in which a professional elite sharply controls the impact of broader social relations and cultural concepts. By contrast this study asserts that the analysis of legal systems, like the analysis of social systems generally, requires an understanding of the concepts and relationships encountered in everyday social life. Using as its substantive base the Islamic law courts of Morocco, the study explores the cultural basis of judicial discretion. From the proposition that in Arabic culture relationships are subject to considerable negotiation the idea is developed that the shaping of facts in a court of law, the use of local experts, and the organization of the judicial structure all contribute to the reliance on local concepts and personnel to inform the range of judicial discretion. By drawing comparisons with the exercise of judicial discretion in America the study demonstrates that cultural concepts deeply inform the evaluation of issues and the shape of a judge's decision.

The Anthropology of Justice is not only the first full-scale study of the actual operations of a modern Islamic law court anywhere in the Arab world but a demonstration of the theoretical basis on which a cultural analysis of the law may be founded.

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Engraving of a qadi and attendant scholars, from an original design by William Harvey, in Edward Lane, *The Thousand and One Nights*, vol. II (London: Chatto and Windus, 1889), p. 568.

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Law as culture in Islamic society

LAWRENCE ROSEN
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For Mary Beth

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Foreword

Lewis Henry Morgan, in whose honor this lecture series was established, never attempted to develop an approach to law commensurate with his contributions to the study of kinship. Yet his training as a lawyer clearly had consequences in various aspects of his work, and recent developments in the anthropology of law would surely have intrigued him.

Professor Rosen delivered the 1985 Lewis Henry Morgan Lectures on March 19, 21, 26, and 28, and the present volume is an expanded and revised version of his lectures. Since Professor Rosen is one of those working on the anthropology of law who has been trained in both disciplines, his work repays careful attention, for he has developed an approach that integrates the two specialities. Here, he demonstrates the value of such an integrative approach when it is used to examine Islamic law. By considering particular personal status cases brought before a qadi (judge) in a small Moroccan town, Professor Rosen is able to illuminate hitherto obscure points with regard to Islamic law and procedure. He is also able to show how closely related the law and the court are to many other aspects of Moroccan society and culture.

Professor Rosen's work cannot easily be categorized as belonging to one or another tradition in either anthropology or law. What he has to say frequently bears on issues of importance, both older and more recent, in these fields. These include such diverse concerns as Malinowski's (or Bourdieu's) emphasis on context, Mauss's and Fortes' discussion of the person and personhood, and Austin's performative utterances. These and other matters are, however, here subordinate to Professor Rosen's desire to deepen and broaden our understanding not only of Islamic law, but of law in general. The reader is inevitably led to wonder what a comparable examination of our own courts might reveal by way of underlying similarities. As with any original work, questions asked and answered raise yet further questions.

Alfred Harris, Editor
The Lewis Henry Morgan Lectures

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Preface

It was Justice Holmes who once said: "If your subject is law, the roads are plain to anthropology." He might well have added, "or vice versa." For while neither law nor anthropology is coincident with or reducible to the other, the study of each may lack a critical dimension if considered alone. For the anthropologist, law – like ritual, politics, and marriage – constitutes a realm within which it is possible to see people acting in accordance with their deepest assumptions and beliefs; for the legal scholar, it is precisely in the concepts and relationships encountered in ordinary social life that many of the presumptions and procedures of the law find their predominant genesis and ultimate acceptability.

Yet despite their obvious points of coincidence, law and anthopology have not contributed as fully to one another as they might. Difficulties arise in terms of both subject matter and theory. As to the former, anthropologists have, with a few noteworthy exceptions, treated a predominant focus of the legal scholars – the operations of formal courts of law – either as a peculiar domain whose untypical language, rules, and procedures somehow remove it from the mainstream of cultural life or as an arcane realm that loses by its institutional rigidity the capacity to resolve disputes without alienating large segments of the population it serves. This avoidance of studying formal courts may be due, in part, to the tendency in our own society to view the courts as fraught with professionally skewed assumptions and far from disinterested goals, or to an outdated desire to show, contrary to colonial ideology, that native peoples possess law in every bit as refined a sense as do western societies. Similarly, legal scholars often approach the patterns of social and cultural life either as intrinsically interesting but not directly germane to the course of actual legal decisionmaking or in need of being kept distinct from law in order to establish or deny that the law may be reduced to explanations drawn exclusively in terms of economic, political, or psychological factors.

This mutual truncation of subject matter has its correlate in theoretical orientations. Anthropologists are frequently concerned to show that diverse features of social and cultural life have connections to one another, contribute

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to one another's operation, and move through time in relation to one another. Yet in the pursuit of elegant theories and the retention of the discipline's traditional focus on such topics as kinship, myth, and ritual, anthropologists for many years avoided those situations in which change, manipulation, and differential access to power might confute existing styles of explanation. From their side, legal scholars often sought to articulate the implicit propositions through which diverse judgments could be reconciled or to admit extrajudicial influences on the law only if those influences could be shown to form part of the conscious design or terms of discussion of the legal world itself.

The result of these topical and theoretical propensities has often been a sufficiently high degree of curiosity and fellow-feeling to allow nodding acquaintances to develop into episodes of mutual visitation where each discipline partakes of the other's exotic repast, tries on the other's peculiar garb, or is conducted through a quaint ritual of fictive kinship. But for contact to become conjuncture and itemized comparison to become integral concern it may be necessary to take quite seriously an approach that actually partakes of elements of both disciplines and which, by application across disciplinary lines, offers the promise of elaborating the insights developed by each. The approach in question suggests, quite simply, that the analysis of legal systems, like the analysis of social systems, requires at its base an understanding of the categories of meaning by which participants themselves comprehend their experience and orient themselves toward one another in their everyday lives. The institutions of class and money, power and privilege, far from being submerged by such an analysis, are seen to depend for their very impact on the broader system by which knowledge itself is produced; the significance of rules and procedures is seen to reside in their capacity to operate as systems whose constituent features are far more extensive and interrelated than our own disciplinary divisions may embrace. Seen in this fashion, law and anthropology are not just inextricably linked to one another; they actually constitute two sides of the same configuration.

It is from such an orientation, too, that an intriguing array of questions about legal and social life can be formulated. Instead of simply asking how judges decide cases, we can ask what some of the key concepts are that cut across the domains of law and culture giving shape to each. How, in the culture at large, are facts defined and truth conceived? How does the view of what persons are like take shape when the law must ask particular questions of character and state of mind? What role do cultural assumptions about the nature of human nature play in the development of evidentiary concepts, and how do these legally formulated concepts in turn evince themselves in the style by which people attribute actions to one another? To what complex of circumstances and relationships is the idea of power connected such that the law may address itself, successfully or not, to the general acceptance of its procedures and final decisions? By tacking back and forth across law and

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social life, by viewing both domains through a common frame of theory and practice, we can give serious consideration, in a way that may be applicable to a wide variety of societies, to the proposition that it is indeed possible to formulate a study of law as culture and culture as integral to law.

Few places offer greater opportunities for exploring the implications of these ideas than does the contemporary Islamic world. For westerners, Islamic law often incorporates images of a canonical system of medieval intricacy or criminal penalties of biblical intensity. In fact, for the one out of eight people on the planet who live subject to a legal system touched by Islamic precepts the role and importance of the law are inseparable from its connections to a wide range of social and cultural practices. By focusing on such questions as how the Islamic law judge exercises his discretion in a culturally characteristic fashion, or by questioning whether the forms of discerning facts and explaining causal links gain legitimacy in the law for being part of the common sense of a culture, it will be possible to explore, in ways that carry implications for western systems of law as well, how these two analytically distinguishable domains constitute a unified subject of study.

The chapters that form this book were first delivered as the 1985 Lewis Henry Morgan Lectures at the University of Rochester. Although the original format of the lectures has been retained, the text has been substantially revised and expanded. A series of notes and a still more extensive bibliography have also been added: they are intended to serve both as citations of actual sources and as guidance to the reader interested in the range of publications that have contributed to the present approach.

Like any author I am, of course, deeply indebted to many people for making this study possible. To Professor Alfred Harris and the Department of Anthropology at the University of Rochester I am extremely grateful for the opportunity afforded by these lectures and for the intellectual stimulation provided during my stay at the University. In Morocco, I am grateful to the Ministry of Justice, the Chief Judge and court personnel of the Sefrou District, and the many local officials who have made my work possible over the years. Colleagues too numerous to mention have given me the benefit of their thoughts, and I am especially cognizant of the tremendous debt I owe to Princeton University, Columbia Law School, the University of Pennsylvania Law School, Northwestern Law School, and the American Bar Foundation for the many opportunities they have afforded me. The typescript was completed during my tenure as a Visiting Fellow of Wolfson College, Oxford and the Centre for Socio-Legal Studies, and I am sincerely grateful to Donald Harris, Keith Hawkins, and Sir Raymond Hoffenberg for their hospitality. Funding for my work has been provided by the John Simon Guggenheim Foundation and the John D. and Catherine T. MacArthur Foundation, and I am most appreciative of the confidence they have reposed in me.

A special note of thanks must be addressed to my friend and colleague

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Leonard V. Kaplan, who read the entire typescript with extraordinary care and insight and who, as on so many occasions in the past, has vastly extended the range of my understanding about law and life.

Finally, the book is dedicated to my wife, Mary Beth Rose, who not only shared with me an important part of the field experience, but has, through her deep appreciation of the human quest for meaning, contributed immeasurably to my own.

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