EQUITY AND DISCRETION IN A MODERN ISLAMIC LEGAL SYSTEM

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Kadijustiz is a concept well known from the work of Max Weber. Its essential element, the means by which judicial discretion and equitable assessments are actually made, is, however, less clearly documented. Drawing on a detailed study of a *qadi*'s court in contemporary Morocco, the present article shows how cultural assumptions give shape to the judge's modes of reasoning, factual assessments, and choice of remedies. The study suggests that if careful attention is given to the broader cultural precepts within which judicial discretion is located, *Kadijustiz*, whether represented by an Islamic court official or a Western justice of the peace, will be seen to possess definite regularities.

In *Terminiello* v. *Chicago* (1949), Mr. Justice Frankfurter, commenting on his own court, said: "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency." For Justice Frankfurter, as for many others, the image of the Islamic law judge, the *qadi*, is often that of a man sitting barefoot and turbaned under a tree or in the corner of a mosque dispensing justice off the top of his head. Even Max Weber (1967: 351), who appreciated that actual Islamic adjudication was neither capricious nor unrestrained, chose the term *Kadijustiz* to refer to a type of legal system in which judges have recourse to a general set of ethical precepts unevenly employed on a case-by-case basis rather than to a series of rules abstractly formulated and uniformly applied (see generally Turner, 1974: 107-121). Although the traditional role of the *qadi* has been greatly altered by the introduction of western codes and the development of bureaucratic structures, the quest in many Moslem countries for an authentically Islamic way of life has given renewed emphasis to classic

* The research on which this study is based was carried out during three field trips: January, 1967-August, 1968; summer, 1969; and June-October, 1978. Support was provided by the National Institutes of Health, the University of Illinois, and the American Council of Learned Societies. Arabic terms are transcribed in the text without the use of diacritical marks.

LAW & SOCIETY REVIEW, Volume 15, Number 2 (1980-81)

precepts of Islamic jurisprudence. It is important, therefore, to appreciate that, far from being arbitrary or unsystematic, *qadi* justice partakes of regularities which reveal not only Islamic legal history but also the interplay between Islamic law and the society in which it is rooted.

Justice Frankfurter's statement, however, points up more than the limitations in our understanding of contemporary Islamic adjudication: it also raises fundamental questions about the nature of discretion and equity within a given legal tradition. Notwithstanding the existence of a body of legal rules or acceptable judicial procedures, the *qadi*, like his colleagues elsewhere, is often called upon to give substantive content to principles that cannot simply be mechanically implemented. How, under such circumstances, is he to define what shall for purposes of adjudication be regarded as a fact? By what means is he to choose among competing solutions? In what way is he to render a decision when the proper justification for his action is not immediately apparent from prior cases or guidelines? And where shall he turn for help when confronted with a situation in which rules, principles, or doctrines of law, if strictly applied, would lead to a result which seems contrary to his own comprehension of what is fair or just for all concerned?

Faced with these problems of equity and discretion, the Islamic judge finds considerable guidance in the precepts, procedures, and forms of judicial reasoning that have shaped the tradition within which he works. But this tradition, from its most settled rules to its most idiosyncratic decisions, is deeply suffused by a set of assumptions and concepts that have currency and implications in the wider cultural context. Thus, in his assumptions about human nature and social relationships, in his comprehension of the role of language and social discourse, and in his perception of recognizable modes of rational decision making, the *qadi* is affected not only by substantive and procedural elements distinctive to Islamic legal thought but also by a set of cultural propositions that render his actions comprehensible, if not universally acceptable, to the society he serves.

Admittedly, within the expansive realm of Islamic law, no single court or local tradition can fully represent all instances. In order to show how the justice of the *qadi* may be at once institutionally distinctive and culturally characteristic—how, in short, law is suffused by culture and culture is integral to law—the close analysis of a particular jurisdiction may prove most

illuminating. The present study will, therefore, focus on the *qadi*'s court in the Moroccan city of Sefrou and its surrounding countryside. In this ancient city of 50,000 people lying just south of Fez, and in the hinterland of the Middle Atlas Mountains with a population of 200,000 that it serves, one can see themes with analogues throughout the Islamic world while gaining an appreciation of the way *qadi* justice is embedded in local society and culture.

Factual Determinations and Legal Reasoning: The Nexus of Law and Culture

"It is a feature of the human predicament," says H.L.A. Hart (1961: 125), "that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards. . . . The first handicap is our relative ignorance of fact; the second is our relative indeterminacy of aim." For the *qadi*, no less than for judges elsewhere, the dual predicament of factual assessment and purposeful adjudication turns, initially, on the way in which an issue is framed for judicial consideration, the procedures available for assessing proffered facts, and the acceptable style of judicial reasoning and justification.

Pleading and Proof: The Social Construction of a Legal Case

In Morocco, the litigants and lower court personnel are primarily responsible for framing an issue for decision. The petitioner's complaint, whether made out by the court clerk, a public scribe, or the plaintiff, must set forth the nature of the case, the identity of the defendant, and the precise remedy sought. If the complaint lies within the subject matter jurisdiction of the *qadi*—presently limited to those matters covered by the 1958 Code of Personal Status[1] (marriage, divorce, filiation, inheritance, child custody), civil suits for which the amount in controversy does not exceed the statutory limit, or issues involving documents signed by the court notaries—the case will be listed on the court docket. The central concern for court and litigant alike will, however, be the construction of appropriate evidence. Here, the nature of

[1] The Arabic text of the Code (*Mudawwana*), together with an occasionally misleading French version, is most readily available in Colomer (1963, 1967). Portions of the Code also appear in English in Mahmood (1972: 121-128). For analyses of the Code, see Anderson (1958), Borrmans (1977), Lapanne-Joinville (1959), and Gallagher (1959).

persuasive evidence, the role of the court notaries, and the cultural creation of binding assertions become vital.

In a sense, all evidence that comes before the court is conceived of as oral in nature. From the point of view of classical Islamic legal theory, documents are regarded simply as written reminders of individual witnesses' statements, reminders that will serve to recall their testimony in any future dispute (Schacht, 1964: 193; see also Brunschvig, 1960; Linant de Bellefonds, 1965: 130). In actual practice this theory has long since given way to the use of documents as sufficient in themselves for purposes of evidentiary presentation (cf. Wakin 1972). Nevertheless, the *qadi*'s courts in Morocco still tend to scrutinize documents for probative value in terms of the courts' perception of the nature of oral assertions and to consider documents, regardless of the literacy of those involved, as embodying and supplementing that which has been uttered before appropriate court personnel.

The most impressive evidence a litigant may produce on trial is a document signed by two notaries which supports the litigant's factual claim. However, such a document is regarded as simply the reduction to writing of oral evidence presented to the notaries. Thus, in a marriage contract or a deed—the two kinds of documents that appear most frequently in litigation—the notaries merely inscribe the terms that have been orally presented to them by the parties involved. While the notaries may refuse to certify a relationship which is contrary to law—a marriage contract lacking some transfer of wealth from the groom to the bride or her marital guardian, a business agreement for an illicit purpose—it is less in their control over the content of such documents than in the form of validation supplied by such a document that the importance of the notarization process lies.[2] To appreciate this point one must understand the nature of binding obligations in the structure of Moroccan social life.[3]

To many westerners, Moroccan society appears reassuringly exotic and disconcertingly familiar. That women should appear veiled in public, that an ancient walled city should enclose a featureless maze of byways and blind alleys, that the marketplace should be a cacophony of hawking and

[2] By telling potential litigants that their case is of dubious merit, notaries may significantly affect the kinds of cases that come before the court. For an example of a notary discouraging litigation, see Wigmore (1936: 587).

[3] The following analysis of Moroccan society is developed more fully in Geertz, Geertz, and Rosen (1978); and Rosen (1968, 1970, 1972a, 1972b, 1973, 1978).

haggling is somehow more easily comprehended simply for being so different. More troubling, because superficially more recognizable, is the schema of social relationships. Notwithstanding references to tribe or urban quarter, genealogy or religious brotherhood, Moroccan society is not built up of a series of corporate groups for which membership alone might define one's place in society or one's expectable behavior. Quite the contrary, Moroccan society evokes a sense of the familiar by being constructed of a series of interpersonal ties, freely negotiated and highly expedient, which center on each individual. Associations of residence or kinship, identities of interest and occupation, affiliations of friendship and common experience constitute not a binding set of relationships but a repertoire of relational possibilities to be drawn upon in the formation of a personal network of relations. But where the individualism and instrumentalism of this social organization strike a recognizable chord for many Westerners, the nature and implications of the ways in which such ties are conceptualized and formed makes easy identity more elusive. For at the heart of Moroccan personal ties are a series of unapparent assumptions about the order and meaning of social life, assumptions that deeply affect the course and content of judicial decision making.

For Moroccans, every relationship implies an obligation. To be related in a particular degree of kinship, to be another's neighbor, to be the client of a merchant in the bazaar carries with it certain idealized expectations of mutual aid and potential recompense. Of crucial importance, however, is the fact that the specific content, the meaning, of each of these relationships is highly negotiable. Even within a family, for example, one can choose to have closer economic and political ties with some individuals than with others, or with outsiders than with family members. It is, however, clearly understood that every action one takes creates an obligation in the other, and the key to the formation of a network of personal ties, as well as to a sense of how others are most likely to act toward oneself, is to organize and learn about such obligations in the most effective way possible. This sense of mutual ingratiation and indebtedness is broadly subsumed by Moroccans under the central Arabic concept of *haqq*.

The term *haqq* has a variety of interconnected meanings (see Macdonald, 1961: 126). It means "right," "duty," "truth," "reality," and "obligation." In one context it can mean "you are right"; in another, "you are wrong." *Al-Haqq* is one of the

ninety-nine names of Allah known to man. (The hundredth, it is said, is known but to the camel; hence his enigmatic smile!) To speak of *haqq* is, in short, to convey that sense of mutual obligations which bind men to men, and man to God. What is "true" or "real" is the web of indebtedness which links sentient beings to one another in a chain of obligations. But since each obligation, of kinship or contract, residence or political aim, is itself subject to negotiation, and since each obligation formed may be fulfilled in a variety of reciprocating forms, each Moroccan must try to get his or her definition of a situation—as implying some specific form of obligation—to prevail. In this highly flexible and manipulable system, this running imbalance of one-upsmanship and ingratiation, one tries to add a degree of certainty by employing some of the recognized social conventions through which particular ties may be given more concrete definition and networks of affiliation an air of predictability.

Thus, one might make a form of ritual sacrifice at the doorway of a particular individual or at the threshold of a saintly shrine, a form of ingratiation which implies that failure to fulfill the request may call forth supernatural sanction. Or one may seek out an intermediary who, because of his own network of ties, can act as an agent for one's present request. One can bargain over the applicable term to characterize a given bond—as a tie among close kinsmen, or as a pact between neighboring tribes—in an attempt to make the broader ideals of these affiliations govern the relationship and its forms of reciprocation. Whether it is in the request for a woman in marriage to a dependent or for help in contacting a government official, the governing factors are the terms by which action will proceed, the knowledge that an obligation formed for one purpose can be called up for quite another, and the recognition that all men are bound up in such personal and ephemeral webs of indebtedness.

But if such obligations are indeed so flexible and changing, how are people to gain a sense of order in their relationships and how is a court of law to recognize a binding tie of a particular sort to which judicial sanction may be applied? The answer, of course, lies in the conventions by which particular obligations are given a degree of fixity in ordinary social life and by a series of mechanisms, consonant with social practice, by which the courts can give concrete meaning to such a bond. If two litigants disagree over their perception of the sort of tie they have indeed negotiated, the court, like the participants,

will look to the social conventions characterizing their relation and to the means by which their bond may be said to have taken on concrete obligations. In doing so the court will be mindful of the central importance of language in defining relationships in Morocco.

For Moroccans, no utterance can by itself create a binding obligation. Indeed, because individuals constantly try to get a relationship defined in a personally convenient way, it is well understood that where relationships of obligation are being formed, mere utterances imply nothing about the truth of the thing asserted.[4] For one man to say that his bond to another incorporates a mutual right and duty does not of itself convey any implication of its truth. What is crucial is that his assertion be validated. Here certain social conventions come into play. An assertion may be validated by formal agreement in front of others, by virtue of specific actions by both parties to demonstrate the particular meaning of their statements, or by means of one or both taking an oath. In a sense, therefore, mutual expressions mean nothing until something more has happened—until the *haqq*, in the sense of "obligation," has been sufficiently validated to render it capable of being assessed as "true" or "real."

One of the primary mechanisms for validating assertions is having some individual who is in a position to do so verify such utterances. In ordinary social relations this may, for example, involve the use of a go-between who, because of his dominance in the network of obligations he possesses to both parties, will be regarded by them and others as a guarantor of the facts asserted. In other domains, this role is more formalized. Thus, in the marketplace most occupational groupings choose one individual, called the *amin*, who because of his knowledge and the respect of his colleagues, acts as the articulator of acceptable standards and the verifier of commercial relationships. Overseeing the market as a whole stands another official (the *muhtasib*) who, like the *amin*, acts both as a regulator of market practice and a person who may be called upon to give acknowledged credence to what he has heard or seen.

It is in the broader context of seeking individuals who may validate actions and statements that the role of the notaries and other court officials is to be understood. The Arabic term

[4] I am indebted to Clifford Geertz for calling my attention to this issue. For data supporting this assertion see Bourgeoise (1959-60, fascicule no. 3: 80), and the discussion of truth in Crapanzano (1980: 80-81).

for notaries, *ᶜadul*, from a root meaning "just" or "equitable," has been wisely translated by Tyan (1960: 239) as "reliable witness."[5] For when a document has been signed by the requisite pair of notaries, they are really doing in the realm of the law what is sought, though not always with such formality, in other relationships: they are adding their stature, their word, as reliable witnesses to a bond that only takes on implications of truth, of interrelationship, by virtue of having received some form of validation. Along with court-appointed experts, who possess special knowledge on such diverse topics as construction, boundaries, or pregnancy, the notaries perform an indispensable function for the *qadi*: they "create" things as "facts" in order that they may be judicially recognized as facts.

There is, however, quite a range of documents a litigant may obtain from the notaries in order to make the oral testimony embodied by these documents more persuasive. Consonant with the emphasis on face-to-face evaluations of testimony, a litigant will often try to support his claim by having three, or preferably twelve, eligible witnesses come before two notaries and give testimony in support of the litigant's claims. The resultant document (called a *teleqiya*, if at least three witnesses testify; a *lafif*, if twelve or more do so) may be given still greater force by having each witness appear before two separate pairs of notaries. If the testimony of all witnesses remains consistent, the notaries will certify this in a document called a *stifsar*. This distinctively Moroccan practice may be derived from the custom of co-swearing among the Berbers in which a man chosen by the plaintiff swears to the truthfulness of the defendant's assertions, and an additional ten men add their voices in support of the reliability of the lead oath-taker (see Brunschvig, 1963: 180; Milliot, 1953: 737). To paraphrase Aeschylus, perhaps it is not the oath that makes the man believable, but the man the oath. The use of group witnessing in the *qadi*'s court, however, is directed toward the question of actual occurrences rather than character, and the court will subject even the testimony sworn separately before two sets of notaries to rational scrutiny. The unreported case of *Hussaini* v. *Alahami* (1965), involving the presentation of documents by both sides, will help illustrate this point.[6]

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[5] On the notarization process generally, see Tyan (1945). On the related role of experts, see, e.g., Dwyer (1977).

[6] Sefrou *Qadi*'s Court, No. 1965/65. Cases from the *qadi*'s court in Sefrou are not published. With the aid of an assistant who orally translated each dossier from classical to colloquial Arabic with the author, over 400 cases were collected from the court records. The citation system is that used by the

(3/4/65: Complaint) The plaintiff claims that his wife, the defendant, left their home five months ago and that although he has sent members of their tribe to request her return she has refused to come back. He wants the court to make her return.
(7/13/65) The defendant's father, appearing as his daughter's legal representative, says that the plaintiff divorced his wife seven months ago, and he presents a document in which fifty people testify to this effect. The document was not made out before notaries. The plaintiff denies having divorced his wife and says the defendant's witnesses are ineligible because they are all her close relatives. The *qadi* says that if the plaintiff wishes to contest the testimony of the witnesses he may request that they submit to a *stifsar* examination.
(10/26/65) The *qadi* states that a valid divorce must be conducted before notaries. Article 48 of the 1958 Code says that if there are witnesses to a divorce that is said to have occurred in the absence of notaries this testimony must itself be notarized. Since the defendant has not produced a *stifsar*, judgment must be entered for the plaintiff. Pending the introduction of any new evidence on appeal, the defendant must return to her husband.
(7/19/66: Before the Appellate Court) Two documents are presented. The defendant presents a notarized document in which twelve witnesses state that they know the couple was married for a little over one year, after which the husband repudiated his wife. The second document, presented by the plaintiff, contains the notarized testimony of twelve witnesses who state that the couple has been married for four years, that a brideprice of 750 dirhams was paid at the time of the marriage, and that all of the witnesses were present at the wedding and took part in the festivities. They further assert that at no time has the plaintiff divorced his wife.

The appellate court, reviewing the documents, rules that whereas all of the plaintiff's witnesses come from the

court: the year litigation began is indicated to the left of the stroke, the docket number to the right. As presented here, the cases are summaries rather than direct translations of the records. Occasionally, cases from different levels of the judicial hierarchy appear in the *Revue Algerienne, Tunisienne, et Marocaine de Legislation et de Jurisprudence*, the *Revue Marocaine de Droit*, and the *Revue Juridique, Politique et Economique du Maroc*. A major collection of cases from the Protectorate period will be found in Milliot (1920; 1924) and Milliot and Lapanne-Joinville (1952). For a full translation of a case drawn from the Milliot collection, see Wigmore (1936: 593-614). Examples of various notarized documents can also be found in Zeys and Said (1946).

settlement in which he and his wife lived, while those of the defendant live some distance away, and whereas it is more likely that those living in the same village would know if a divorce had been uttered, the ruling of the *qadi* is upheld. The woman must return to her husband's home, be a good wife, and pay court costs.

Confronted with two sets of witnesses, the court chose to assume that those living in the same settlement as the couple were more likely than those living at some distance to know the actual state of their relationship. But this was not the only assumption at work. Officials in the *qadi*'s court told me that in a case like this the burden of proof is largely placed on the wife. Obviously, they argued, the husband is eager to live with his wife or he would exercise his legally recognized right to divorce her unilaterally. And since no charges of mistreatment were made, the *qadi* might well suspect that the wife's family had played a significant role in creating the dispute. Moreover, they said, it was unlikely that the husband was holding out for a settlement in which he would receive some consideration for divorcing his wife, since he was willing to expend a good deal of time and money litigating his claim. Whatever the merits of these arguments, they demonstrate the kinds of cultural assumptions and legal presumptions that shape the *qadi*'s discretionary powers.

The testimony of the litigants and their witnesses, as well as the notarized documents they introduce, may be totally contradictory. Or there may simply be no evidence on either side to support the parties' assertions. In such a situation the court has the power to require that one or both of the litigants support his or her claims with a holy oath. The oath itself has no set form and may be taken anywhere, although most commonly it is taken in the presence of two notaries at a mosque, a saintly shrine, or in the lodge of a religious brotherhood.[7]

The most interesting feature of these oaths, however, is the apportionment of the burden of swearing and the legal presumptions that accompany its use.[8] The burden of oath-taking is not consistently placed on either the plaintiff or the

[7] See generally Westermarck (1926: 493-505, 564-569) where it is noted that both oaths and solemn promises usually begin with the word *haqq*.

[8] On the importance of oaths in Islamic society, see Mottahedeh (1980: 42-52). On the order of oathtaking in various Islamic jurisdictions and periods, see Berque (1944: 24), Brunschvig (1963: 177-180), Jennings (1979), Kellal (1958), Liebesny (1975: 243-254), Tribunal d'Appel du Chraa (1956), and Westermarck (1926: 510).

defendant in the case, and indeed the burden may shift within any one proceeding, depending on the subject matter involved in the oath. The standard procedure is for the plaintiff or the court to demand that the defendant take the oath, swearing, for example, that he did not take any of his wife's belongings with him upon their divorce. If the defendant takes the oath, he or she will be presumed innocent. If, however, the defendant refuses to swear, the plaintiff must take the oath; and if the latter does so, the case will be awarded to him or her. Should both parties take oaths—and only one such case has been found in the records of the Sefrou court—the *qadi* will dismiss the suit outright. The roles of plaintiff and defendant in this sequence may, however, be reversed when the matter involves an object of knowledge that the court regards as more likely to lie within the competence or control of only one of the parties involved. Thus, if a wife claims that her husband took something that would normally belong to a woman and it is she who is the plaintiff in the case, the burden of oath-taking will fall first to her and to her husband only if she refuses.

The importance of all this is related to the power that the oaths themselves are believed to contain. For the overwhelming majority of people in the Sefrou region whom I have interviewed, there is a real fear that a false oath will result in harsh supernatural punishment; and it is not at all unusual for an individual to maintain a particular testimony right up to the moment of oath-taking and then to stop, refuse the oath, and surrender the case. Even the fear of mistakenly swearing what the person thinks is true but about which he possesses some slight doubt may prevent an innocent party from taking the oath. Thus the presumptions and the order of oathtaking may, in certain circumstances, be the deciding factor in the case.

For present purposes, however, the point that bears stressing is simply that while the *qadi* may exercise some discretion in the matter, oath-taking itself places a significant limitation on the extent to which the *qadi* will have to rely on his personal judgment in deciding cases where no clear line of evidence has been established. Custom—and in a few instances the 1958 Code (e.g., Article 39)—will indicate the order of swearing and the nature of the presumptions involved. But as a release from the burden of adjudication and as a limitation on fact-finding procedures, the oath is a vital factor in confining and structuring the procedural and evidentiary discretion of the Moroccan religious law court judge.

Inquiry and Procedure: The Case in Court

Once a complaint has been filed and any pretrial documents acquired, the case is brought before the *qadi*. The following description, derived from notes taken during an early visit to the *qadi*'s court in Sefrou, will give some flavor of the proceeding.

> The *qadi*'s court meets in a long narrow room at the side of the city hall. The *qadi*, a clerk by his side, sits behind an expansive desk at one end of the room while litigants mill about in a courtyard just beyond the door at the other end. A uniformed aide ushers parties in as their case is called. This aide serves as a translator for Berbers who cannot understand the *qadi*'s Arabic and as a monitor of courtroom order, although his embellishment of the court's inquiries and his patronizing choreography of litigants lends an air of self-aggrandizement to these otherwise modest tasks. The *qadi* first determines who is who and how, if at all, they are related to one another. His first substantive question is usually the signal for the shouting to begin. The parties begin by talking to the *qadi* but often end by addressing the aide, the clerk, others crowded into the courtroom, and even a stray anthropologist. The *qadi* mutters, nods, and questions; the principals sit, stand, shout, and cry; the aide tries to quiet people by pinning down their hands, in the certain knowledge that no Moroccan can speak if his hands are not free; and the clerk rushes to finish writing up the last case and find the correct dossier for the present one. Eventually one person gets to tell a more or less coherent story, and women no less than men speak with great verve and style. Most cases are treated very rapidly. In one case a woman and her son appeared before the *qadi*. The woman, quite old and sick, claimed that her husband—the man's father—left her some land when he died and that she later sold it to her son with the understanding that a share of the income from its use would be given her as support. There were no witnesses or documents to support her claim. The woman kept interrupting her son as he denied that any support agreement was attached to the land sale. The woman kept trying to swear that what she said was true, but the *qadi* cut her off and summarily ordered the man to pay some eight dollars per month in support. Turning to the clerk, the *qadi* said that the father would certainly not have wanted his wife to be dispossessed by the son. The

aide shouted out the *qadi*'s judgment almost before the latter had finished and, with the litigants still shouting, hustled mother and son out of the courtroom in one great sweeping motion.

Almost twenty cases were heard in the two-hour court session—cases of inheritance and divorce predominating—and in each instance the *qadi* seemed most concerned with the relationships of the parties, the documents they presented, and only rarely with a detailed examination of the elaborate arguments each person seemed eager to present. Little deference was shown to the *qadi*, and the style of discourse reminded one of the public marketplace or a neighborhood dispute more than the forum of a high religious and legal official.

Throughout this seemingly chaotic proceeding there runs both method and purpose. *Qadis* in Sefrou, as well as in other parts of the country, are intent on determining certain basic factors about the people who come before them and initially give them wide latitude in arguing their case. Social background is especially important, and its relevance to judicial decision making is not unrelated to its role in general social interaction. The constant focus in Moroccan society is on the individual as the locus of a series of distinctive ties of obligation. Each of the social traits the individual possesses—place of origin, kin connections, residence, and occupation—contributes both to the repertoire he or she may draw upon in establishing a network and to the series of traits which others may use to predict his or her most likely affiliations, customary ways of forming ties to others, and the probable course and consequences of any relationship with the interlocutor. The extent to which any relationship may be governed by the stereotype of a person as Berber or Arab, townsman or countryman, member of a given tribal faction or practitioner of a given trade will vary with the situation and the parties. But this information is invariably regarded as useful to the overall assessment of one individual by another. For the *qadi*, the relevance of this information goes not to the question of any potential tie of his own to the litigant but to two related points. First, such information is taken as an indicator of a person's most likely ways of acting in any situation. To comprehend who someone is, say *qadis*, is to know what he may have done. And second, it is assumed that, within certain broad limits, it is only fair to gauge the standard of conduct to which an individual should be held according to what sort of person he

is. To hold an educated man to the same standards as one who is unlettered, or a woman to the same standards as a man, would, most *qadis* insist, be grossly unjust.[9] Just as in ordinary social life the constant focus is on what a person does and the range of relationships it affects, so in the judicial context it is through an assessment of the consequences of one's actions, measured against the traits and ties by which one is identified, that the *qadi* gains insight into the claims and actors before him.

Awareness of a critical feature of personal identity, therefore, leads to a series of cultural implications which, for all their variation within the society and across time, provide a code for the assessment of both character and action (see Dominguez, 1977). It is broadly assumed, for example, that women are more likely to be guided by passion and men by reason, that these motivating forces structure one's knowledge of the world, that knowledge is what sets one person's social stature above that of another, that stature is broadly related to particular types of obligational networks, and that interrelationships of various kinds entail qualities of social responsibility and harm on which the evaluation of social and legal repercussions may be based. The locus of these implications resides in neither a set of roles nor institutions, but in the individual as a concatenation of traits and ties, and hence this implicational code operates as both a cultural guide and a malleable gauge. Faced with the task of interpreting motives and acts, however, the code of cultural entailment becomes a tool of major significance in the *qadi*'s determination of facts and choice of legal remedies.

That there exists, in the *qadi*'s perception and evaluation of others, considerable scope for discrimination and injustice is a point not lost on many Moroccans. Yet the line of inquiry the *qadi* follows is so similar and the data he appears to seek so familiar from everyday life that approbation for his way of proceeding broadly outweighs criticism of particular results. This point is brought home both in the style of discourse between judge and witness and in the characterization of wise adjudication.

We noted earlier the importance of validating assertions in Moroccan life and the institutionalization of this process in the role of the notaries. The style of questioning and the modes of

[9] On the relation between social position and duty, see Yamani (1968: 17). On the role of character evidence in Moroccan criminal proceedings, see Morere (1961).

response often follow a common pattern. After his initial inquiry into social background, the *qadi* will ask the plaintiff to tell his story. Almost invariably, the plaintiff will be interrupted midway by the defendant, and both parties will begin to argue with one another. When asked, most *qadis* say that they want to see the two parties interact and want to gauge the intensity of their attachment to the issue. Moreover, the *qadi* is trying to determine how widely or narrowly to set the bounds of relevance in the case. If, for example, a woman has run away from her husband in part as the culmination of a property dispute between two kin groups, the *qadi* may or may not take this into consideration in his decision. His discretion in this matter is limited by the specific rules of the 1958 Code—e.g., a runaway wife must return to her husband unless severely mistreated and then file a separate suit seeking his proper behavior—but the boundaries he sets may also be influenced by his perception of how people of the sort before him are expected by him to comport themselves. Thus he may simply chide an unlettered country woman for running away but seek out the full nature of an educated urbanite's dispute while reminding him of the example he should set.

Often, too, a litigant will use a style of argument common to the broader social process of validating assertions. To get another to accept one's own definition of a situation, it is common to engage the other in a kind of Socratic dialogue in which a set of questions is posed to which the other is forced to respond on a yes or no basis. In court, litigants will often use this style with the judge. Accused of beating his wife, a man may say to the judge, "Is she not a woman? Doesn't the Quran say a man is the 'governor' of a woman? Is it not shameful for a woman to say these things to a man?" At each point he seeks to get the *qadi* to affirm his statement in the presence of others, just as he might in his ordinary social discourse.

In short, for the *qadi* the "facts" are estimations of character assumed by background and displayed by courtroom encounter as much as they are weightings, based on related considerations, of the notarized documents presented. It is interesting in this regard to note that when stories are told of really clever *qadis* they often involve the *qadi* trapping one of the parties in a display of his true character. Thus, a story may be recounted of how a *qadi* disguised himself and entrapped the person in a relationship similar to the sort he denies ever having formed, or how a *qadi* will have provoked a person in court until the litigant does or says what was earlier denied.

Interestingly, too, no penalties exist for perjury, even if a person has taken an oath, it being assumed that the harm to one's reputation as one who stands by a validated assertion, the loss of the case, or supernatural sanction will suffice as punishment (see Schacht, 1964: 159; Westermarck, 1926: 509).

In his evaluation of conflicting evidence the *qadi* may also have recourse to certain established presumptions. In line with Moroccan legal tradition, he may, for example, presume that testimony asserting a positive fact is more reliable than assertions about a negative—e.g., that a sale took place rather than that it never occurred—since every change of obligation, each shift in the distribution of *haqq*, constitutes an act, and acts have greater consequences than forbearance.[10] Here, as in ordinary social relations, the focus is not on a person's state of mind as such but on those actions which only a sane and competent adult must have intended to have engaged in such an act. And here, too, since consequence is perceived to vary with social characteristics, the *qadi* believes he can gauge his remedy according to the harm done by such a person acting in such a way. As in any judgment his decision embodies elements of the arbitrary, though his discretion is clearly bounded by law and culture alike.

Law and Equity: The Nexus of Reasoning and Justice

The 1958 Code of Personal Status controls a substantial proportion of the cases that come before the *qadi*. For issues not dealt with by the Code, as well as for some aspects of those that are, the *qadi* may utilize concepts and modes of analysis that contribute significantly to the shape of his discretionary and equitable powers. In particular, he may look for substantive guidance in local custom or past decisions and for legal justification in the concepts of analogic reasoning and the public good.

Most of the present-day creative use of custom is associated with the laws of personal status, and it is, therefore, to this domain that the present discussion will be limited. For example, in the formation of any marriage in Morocco the husband must pay to his wife or her marital guardian (*wali*) a sum of money or quantity of goods agreed upon by the parties as a brideprice (*sdaq*). It is usually the wife's father who serves as her marital guardian—generally seeking the mate as

[10] For a detailed listing of presumptions in the Malikite school of Islamic law, see Lapanne-Joinville (1957).

well as negotiating the marriage contract—and although local customs vary he will generally add at least an equivalent sum to the brideprice and then use the entire amount to purchase the girl's dowry (*attat l-bit*). This dowry remains the wife's property and will leave the marriage with her in the event of a divorce. The brideprice is always recorded in the marriage contract; but the recordation of the dowry is a matter of local custom, personal preference, and judicial discretion. It is a matter of some importance, too, because in the absence of any record to the contrary, the legal fiction obtains that all the "furnishings of the household" (the literal meaning of the Arabic term for dowry) belong to the wife even though they may have been purchased during the course of the union. And since much of a woman's marital security in this society, which still grants the husband the right of arbitrary divorce, resides in the threat to the husband of the financial loss he stands to suffer in the event of a divorce, the recording of a dowry may play an important role in the stability of the marriage itself (Rosen, 1970).

The *qadi* also possesses the power to order a girl's marital guardian to agree to a given marriage; and if the guardian refuses, the *qadi* may himself give the girl in marriage. The purpose of this provision, coupled with that which grants a woman freedom from arbitrary actions by her own marital guardian, is to insure that girls are not prevented, in effect, from contracting their own marriages if they choose to do so. In Sefrou this provision is employed in those cases in which a girl has been raped and her marital guardian opposes a subsequent marriage or where the girl herself has developed a bad reputation and it is thought best to marry her off so that her husband will keep her respectable. Moreover, Article 13 of the Code says that in such a situation the girl should be married "by means of an equivalent brideprice to a man of equal condition," which "condition," according to Article 14 (b), is to be determined "by reference to local custom (*ᶜurf*)." The determination of "equal condition" is thus left to the *qadi* and his sense of local customs to determine (cf. Ziadeh, 1957). On the few occasions in which Sefrou *qadis* have exercised this power, they have proved to be as sensitive to criteria of ethnicity, skin color, and familial reputation as to the financial status of the principals and their respective families.

One final example also concerns marital relations. The Code provides that when a man divorces his wife he must pay her a sum in compensation. This sum, called the *mutaᶜa*, is left

to the *qadi* to set; and in Sefrou, where such payments were often employed before the advent of the Code, the figure has customarily been set at one-third of the brideprice. However, if the marriage occurred long ago or involved a particularly high or low brideprice, the *qadi* will vary the amount due according to his own discretionary judgment.

In sum, the *qadi* possesses some leeway in utilizing local custom in his decisions. His perception of local custom may be highly idiosyncratic or represent the perspective of only one segment of the population. Custom, like prior cases, may serve as persuasive evidence or as the basis for a legal presumption, but even where the present code permits resort to custom, *qadis* appear to avoid controversy by relying on court experts and notaries to indicate the acceptable forms of local customary practice.[11]

In classical Islamic legal theory, a *qadi* was expected to justify his interpretation of novel facts or situations by means of an analogy firmly rooted in Quranic precept, the practices of the Prophet and his companions, or the consensus of scholars or notables. Early Islam permitted the exercise of personal reasoning (*ijtihad*) by those who were so knowledgeable in the sacred sources that they might penetrate to the correct solution of a problem when the answer was not immediately evident by strict analogy. By the tenth century, however, opinion hardened against new interpretations, and distinct schools of legal doctrine crystallized around notable scholars. Since Islamic law has long been an object of ethical contemplation as much as an instrument of adjudication, one or more legal scholars might be asked by a litigant to supply an advisory opinion to the court. Although the opinions of *qadis* were almost never published or cited in subsequent decisions, the views of respected scholars were more frequently collected and distributed.

Contemporary Moroccan jurisprudence is heir to this tradition in several key respects. Like his predecessors, the modern *qadi* may ignore analogic reasoning by basing his decision on an approach known to have been preferred by the consensus of earlier scholars. He may also rely on the principle of public utility (*istislāh*), arguing, for example, that it is better for society to force a man into marriage with a girl he has molested than to impose the penalties and shame of a

[11] The relation of Islamic law to custom and case law is discussed in Coulson (1959) and Ziadeh (1960).

criminal accusation.[12] He may also turn to a body of legal literature unique in Islamic law to Morocco, the *ᶜamal*, which are collections of actual judicial practice which often did not correspond with the preferred opinion of scholars. This latter body of literature has some of the qualities of both case law and substantive law, even though it lacks binding force and internal consistency.[13] Reference to *ᶜamal* decisions serves primarily to support the stature of individual judgments and adds to the flexibility and creativity by which judicial powers may be exercised.

Custom, prior opinions, analogic reasoning, and public interest evaluations all constitute sources of principles used by the *qadi* where code and text may be wanting. Coupled with his use of social perception and the modes of determining facts, they give substantive shape to discretionary power. But what happens when the law on a matter is quite clear, when there is no lacuna that would legitimize recourse to these other mechanisms, but the *qadi* nevertheless feels that justice would be violated by strict application of the law? This may be particularly true when the case involves a wife who possesses insufficient grounds to obtain a judicial remedy to her marital situation but who is clearly suffering some hardship as a result of her husband's actions. A single unreported case, *al-Haji* v. *Hedraz* (1961),[14] will serve to illustrate this point:

> (9/19/61: Complaint) The plaintiff states that her husband, the defendant, has been sent to jail for two years. For three years and two months prior to that he did not support her or their young daughter. She requests that the *qadi* divorce her because she cannot wait until her husband gets out of jail to support her and because a woman needs a husband to support her. Twice, she says, she has filed suits against her husband: the first case was thrown out on a technicality, and in the second the court ruled that the defendant should pay her support for the

[12] Obviously, the assessment of what serves the public weal can yield both varied and amusing results. Yamani (1968: 11) cites as "an excellent example of public interest consideration" the following story: "Ibn Al Kayem related that his teacher Ibn Taimiah passed a group of Tatar drinking wine. His disciples wanted to forbid them from doing so, but Ibn Taimiah did not allow this, his reasoning being that God prohibited wine because it distracts from prayer and devotional rituals, but in the case of the Tatars wine distracts them from murder, loot, and rape." On the principle of *istislah* generally, see Kerr (1968).

[13] On the role of *ᶜamal* as case law or substantive law, compare Berque (1944: 33-42, 119-132; 1960) with Milliot (1953: 167). For an analysis of one of the leading collections of *ᶜamal*, see Toledano (1974).

[14] Sefrou *Qadi*'s Court, No. 1961/262.

period of one year and four months, but he has not paid anything on this judgment. The plaintiff therefore also asks that the earlier judgment be enforced.

(10/16/61) A summons for the defendant has been sent to the jail in which he is incarcerated, but no answer has been received. The plaintiff tells the court that she knows her husband does not have the money with which to pay the support judgment leveled against him.

(2/19/62) Defendant absent. Public prosecutor in Fez claims communication foul-up between his office and the court. Delay ordered.

(3/12/62, 6/21/62, 9/12/62, 9/24/62) Each time the chief of the Fez court district has been asked to send the defendant for trial of the suit, but each time the defendant is absent.

(10/29/62) Again the defendant is absent. The court says it has communicated by letter and phone with the warden of the jail, the prosecutor, and the chief of the Fez court district asking for the man to be presented, and each time they have failed to bring him. As always, the plaintiff is present. She says she mainly wants a divorce. Her husband still has a year to serve.

(1/21/63) The *qadi* notes that the defendant is in jail for theft. He says that the plaintiff is always present, that the court itself is at fault for not presenting the defendant, and that a special effort must be made to help the plaintiff in reaching a decision on her petition. The *qadi* notes the defendant's admission in the earlier case that he did not support his wife and that he has since failed to obey the judgment entered against him. It is not right, says the *qadi*, for a woman to be alone while her husband is in jail: Allah considers marriage to be of great importance and wants the children of a marriage to be raised properly. Divorce is preferable to the continuation of the sort of situation with which we are presented here. The defendant has failed to support his family and has twice failed to obey the court order to do so. The defendant is therefore acting against the defining principles of a marriage and the laws of support. The law gives the *qadi* the right to divorce a couple if the husband cannot or will not support his wife. (A quotation from the Quran is cited here.) The *qadi* says that he knows the plaintiff's condition and that she has lived as a good woman throughout this period. Moreover, the defendant is a convicted thief. One school of law, says the *qadi*, says that a woman cannot request a divorce until

she has lived one year without her husband ever being present, while another school sets the minimum period at three years. Both schools would be satisfied by the circumstances of the present case. Finally, says the *qadi*, a judicial divorce in this kind of case would be irrevocable (*bᶜain*). A revocable kind of judicial divorce (*rjaᶜi*) would be less preferable anyway because the husband might take the plaintiff back as his wife again before the divorce became final thus granting him the opportunity to bring further hardships on his wife. There are, says the *qadi*, so many reasons to favor such a divorce that even if the defendant should appear in court it would not alter his decision. Therefore, the *qadi* pronounces an irrevocable judicial divorce. This judgment may, he concludes, be appealed.

(8/14/63: Before the appellate court) The court notes that the defendant has not paid the proper costs necessary to appeal the case within the allotted time. The defendant says he does not know the law. The appellate court dismisses the appeal.

It is important in analyzing the above case to understand that in Morocco there are two different kinds of divorces, revocable and irrevocable. Briefly, a man may repudiate the same woman three different times. After the first repudiation he may take her back as his wife within three months whether or not she wishes to return to him. After the second repudiation she must consent to being reunited within the three-month period. And after the third repudiation no direct reunion is permissible. Thus, only if the three-month separation period has elapsed and the man has twice previously repudiated the wife, a consideration is paid the husband to obtain the divorce, or the *qadi* grants the woman a judicial divorce for cause is an irrevocable divorce recorded. Absence of more than a year is sufficient grounds for an irrevocable divorce. Imprisonment of the husband does not constitute grounds for any kind of judicial divorce. Thus, as a matter of strict law the *qadi* could only grant the plaintiff a revocable form of divorce, one which would leave her husband free to reclaim her as his lawful wife any time within the following three months. The *qadi*, however, clearly felt that it would be unfair to the plaintiff to subject her to this possibility.

Two questions of central importance to our study of Islamic law must therefore be considered. First, on the basis of what information and through the medium of what processes did the

qadi decide that in this case it would be more equitable to violate the strict letter of the law than to obey it? And second, in terms of what principles did he construct the justification for his result? In order to answer the first of these questions we must have recourse to certain additional information; in order to answer the second we must relate this particular situation to those fundamental legal concepts mentioned earlier in our study.

To the extent that it is possible to reconstruct the history of this judicial decision and others like it, it is necessary to take into account the social positions of the participants and the process of decision making in which the *qadi* himself engaged. In his opinion the *qadi* points not only to the husband's bad record but also to the fact that he has acquainted himself with the circumstances in which the plaintiff lives and knows that she has constantly displayed the characteristics of a respectable woman. In cases of this sort the *qadi* obtains such information through two major sources. First, he may inquire, directly or through others, into the plaintiff's habits and condition from the head of the urban quarter (*muqqadem al-huma*) or *sheikh* of the rural settlement in which the plaintiff resides. These government-appointed officials have no formal ties with the judicial system, but may be relied on by the court to inform it on matters of this sort. In this particular case, the *qadi* learned that the plaintiff was from a good family of the city, that the husband had proved to be a scoundrel of uncertain background, and that the plaintiff's neighbors regarded her as circumspect, well-behaved, and long-suffering.

In addition to inquiry through the local officials, the *qadi* relied for information and general advice on several other persons in the community. In Morocco, as throughout the Arab world, people will often refer to certain individuals as "the notables of the area" (*aᶜyan al-bilād*). These community leaders possess no formal organization or recognition: they are merely those persons who, by general reputation, familial background, or position, are generally regarded as the standard-bearers of the distinctive customs and highest values of their region. They are at once the unofficial arbiters of local propriety and the embodiment—at least ideally—of the distinctive characteristics of the community as a whole. Many of these "notables" come into regular contact with the *qadi* or his closest associates and may be officials in the local court system itself. Indeed, since they form no corporate group or institutionalized entity, the determination of who is a "notable

of the area" is neither regular in its process nor subject to precise and uniform interpretation. The fact remains, nevertheless, that in some situations the *qadi* will consult informally with some of these persons in an attempt to determine certain facts about the litigants and—more importantly—what local practice, as articulated by these community leaders, is and should be in a given case. This is, then, a kind of informal consultation rather than a formal concilium, by means of which the *qadi* can determine the practice and sentiments of the community as articulated by some of its more notable citizens and diminish the exercise of his individual discretion through a process of consultation with important community leaders.[15]

In the present case the *qadi* did indeed consult with such notables about the disposition of the matter. He was apparently convinced that the equity of the woman's case was very substantial and that a decision granting her an irrevocable divorce would be regarded favorably by all knowledgeable persons. There remained only the determination of a proper rationale for such a decision.

Earlier in our discussion, reference was made to the concept of *istislah*, the implementation for reasons of public utility of a judicial approach which, though not based on strict analogies with formal legal sources, is adopted as the preferred approach to a given problem. The *qadi* in the present case clearly relied on this traditional form of Moroccan legal reasoning in reaching his decision. He refers in his opinion to the reasons why an irrevocable divorce should be granted the plaintiff and why it is better for her, her family, and society as a whole to dissolve her union irrevocably. The *qadi* was doubtless aware that the present Code allows reference to such sources and reasoning in the absence of an applicable statutory provision, but he was apparently willing to argue its importance even when there is an appropriate provision if the equities of the case appear overwhelming. The fact that the appellate court, which rarely enforces the technicalities of filing dates, did not choose to overrule his decision indicates that the *qadi*'s argument was convincingly presented. Although no formal confrontation of the rule of law and the role of equity was joined in this case, it appears that by using his powers of consultation and utilitarian reasoning, the present-day *qadi*

[15] On the concept of concilium in Islamic law, see Tyan (1955: 245-247).

may indeed be able to render an essentially lawless decision justified in terms of countervailing equities.

The Nature of Qadi Justice

In his critique of Weber's concept of *Kadijustiz*, Max Rheinstein wrote:

> Case law may tend toward irrationality, but even in that most extreme form in which it appears, that is, the practice of the khadi, it does not lack all rationality. Neither the Mohammedan khadi nor his counterpart, the English (or American) justice of the peace, is expected to administer justice according to his own arbitrary whim or momentary fancy. The "good" khadi is the one whose decision is in accordance with popular conviction, that is, with the religious or ethical value system prevailing at the time and place. In primitive or archaic circumstances this value system may be more felt than consciously known, but it exists wherever there exists a society and it is the very art of the khadi to articulate it as it applies to a concrete case. He is the one who is able to express in words, although of concrete application, what the common man but vaguely feels but cannot so easily apply and even less put into words. Only where he has succeeded in articulating in his decision the "sound feeling of the people" will the khadi's decision meet with that approval without which he cannot permanently maintain his authority. This practice will often contain a good measure of irrationality, but basically his thought is of the pattern of the substantively rational, although largely inarticulate, kind (1967: xlvii).

In fact, the equitable and discretionary powers of the contemporary Moroccan *qadi* are shaped as much by the sources of his legitimacy and the similarity of legal and cultural reasoning as by the articulation and enactment of assumptions that are characteristic of his society. Traditionally, the power of the *qadi* to interpose his own judgment was legitimized by the belief that adjudication in conformity with divine law is one of those duties which some individual must perform on behalf of all if the society is to remain a proper community of believers in the eyes of Allah (see Juynboll, 1961; Schacht, 1964: 206; Tyan, 1955: 243). In the past men have been known to refuse judicial appointment for fear that they might inadvertently mislead their fellow believers or be corrupted by deriving their powers from necessarily tainted secular officials.[16] For those who did serve, however, the burden of spiritual guardianship legitimized the search for morally

[16] So onerous is the responsibility of *qadi* said to be that even pious men might refuse to accept the post. "The *qāḍī* of Spain, Muhājir b. Naufal, who . . . is supposed to have spoken from his grave of the evil outcome of the office of *qāḍī*, used to weep and lament for his soul when he recalled the 'reckoning which awaits the *qāḍī* in the world to come for the discretionary choice and the *ijtihād* (personal interpretations) he is forced to employ' " (Coulson 1956: 219). More indicative of the potential entanglement with civil authorities may be the story of the man who was dissuaded from accepting a post as *qadi* when his traveling companion said: "Are you not then aware that when Allāh has no more use for a creature He casts him into the circle of officials?" (Coulson 1956: 212).

correct decisions. Although classical Islamic ethical thought turned, in part, on the categorization of all acts as obligatory, recommended, permissible, blameworthy, or forbidden, Moroccan juridical thought eschewed the elaboration of abstract concepts of right action in favor of more pragmatic evaluations of human relationships and the common weal. As Schacht (1974: 397) noted generally for Islamic law, "considerations of good faith, fairness, justice, truth, and so on play only quite a subordinate part in the system." Rather, it has been in the assessment of the features characterizing those who come before them and in the role of procedural constancy that one finds the distinctive qualities of *qadi* justice.

Moroccan jurisprudence, like Moroccan society, focuses on a series of human characteristics as they cohere in particular individuals. Notwithstanding the provisions of the 1958 Code, the *qadi*, once he has determined to keep the bounds of relevance widely set, probes for the background and relationships that bear on the network of obligations between or among the parties. Although *qadis* undoubtedly vary in their assessment of these factors and weigh them differently in setting the boundaries of the case or their depth of inquiry, each of the factors involved entails certain consequences. It is interesting to note in this regard that the term *asl*—which refers to one's origins, background, set of presumed associations and customs—also refers to that form of legal reasoning by entailment which a judge may rely upon in the implementation of legal presumptions. Thus, as we have seen, the *qadi* may legally presume who is most likely to possess certain knowledge in assigning the order of oath-taking. Or he may invoke a form of that implicational code which suggests that gender implies motivation; motivation, knowledge; knowledge, social position; position, network; and network, repercussions. Here, too, one may be able to discern significant shifts in the code of cultural entailment over time. It may be said of Moroccans, as of Saudi Arabians, that theirs is a world "in which people define tasks, roles, and institutions, not the other way around" (Iseman 1978: 50). What may be changing is not the overall tendency toward personalism but the fact that in the past a man's occupation, residence, kin group, and religious brotherhood ties cumulated such that knowledge of any one feature implied a series of others, whereas now the set of implications may be less tightly integrated or the need to consider it rendered less pressing because of the 1958 Code. Stereotypes, loosed from their cultural context, may now come

to serve judicial efficiency more than the articulation of community norms.

Indeed, it may be argued that Islamic law is, to borrow John Dewey's (1924) distinction, based on a logic of consequence rather than a logic of antecedent. Instead of considering prior cases or similar examples, the *qadi* focuses on the consequence of actions as the index of validated assertions and as the criterion for judging social implications. It is in the harm done or the alteration in relationships that the critical point lies. Thus, as in everyday social perceptions, the court ignores intent as an independent factor and concentrates instead on occurrences. The more serious the impact on society, the more serious are the legal implications. The requirement, for example, of four eyewitnesses to an act of fornication is not solely an evidentiary burden of extraordinary weight: it is also an assertion that if, contrary to the tradition (*hadith*) that "God loves those who hide their sins," one commits an act in so blatant a fashion that four people may have seen it, the harm to society must be serious indeed.[17] Similarly, the use of numerous witnesses to a man's mistreatment of his wife is a statement about social consequence converted into a legally recognizable infraction.

Justice, then, lies not in the simple invocation of rights and duties but in their contextual assessment and the mode of analysis. Procedure and reasoning are central. Asked how similar cases which result in divergent judgments can be justified, *qadis* invariably offer two answers: first, that no two individuals are identical and hence no two cases are the same. But more important, they insist that the same reasoning process—of drawing analogies, of weighing moral implications, of adducing evidence, of assessing entailments, of gauging the social interest—may reasonably lead to different conclusions, but that if the procedures are the same, the most important criterion for treating similar cases similarly will have been met.[18]

The emphasis on the form of procedure as opposed to its momentary result and the concern with individual assessment over routinized processing is closely related to the second handicap noted by Hart for the establishment of general rules: namely, the relative indeterminacy of aim. In the *qadi*'s court,

[17] This interpretation is taken from Yamani (1968: 34). The internal reference to the tradition of the Prophet is elaborated in Juynboll (1961).

[18] Berque (1944: 21) places particular emphasis on contradictory judicial results being understood as linked by common procedures.

the aim is neither the strict enforcement of rights nor the reconciliation of the parties, however much each of these elements may play a role in some cases. Rather, the aim is to give at least momentary order to shifting relationships and to validate their present status long enough to avoid violence and to set people back on a social course of negotiating their own ties peaceably. It is more than mere cynicism, therefore, that leads many Moroccans, when discussing the nature of *qadi* justice, to refer to the popular saying: "when the times are just, one day is for me and one day is against me."

Qadi justice in Morocco gives the appearance ultimately of an entity constructed around an elaborate exoskeleton. Rather than being built up from within by a series of rules and regulations, the system is bounded by a structure of assumptions and conventions by which the nonlegal world is set apart from the legal but within which both that outside world and the peculiar institutions of the law itself have merged to form an entity of enormous cohesion and resilience. The presence of statutes and appellate courts may contribute to greater rigidity or, as the authors of the 1958 Code hoped, to a new body of flexible judicial practice (*ʿamal*). Whatever its particular course, it is clear that legal precepts and procedures will continue to be influenced by changing cultural and moral ideas. Just as in American law where, for example, a witness may testify that someone was "drunk" but may not conclude that a person was "in love," so, too, in Moroccan law evidentiary standards and modes of legal reasoning partake of everyday assumptions about human conduct and fairness. For the student of law, a close analysis of *qadi* justice may demonstrate that the goal need not be that posed by the legal realists—the prediction of what judges will do—nor that suggested by the legal positivists—the enumeration of specific rules. Rather, one can show that discretionary judgments and equitable assessments are suffused by principles and standards which are as incomprehensible without an understanding of how cultural precepts shape them as would the study of social relations be incomplete without an understanding of their judicial articulation.

REFERENCES

ANDERSON, J.N.D. (1958) "Reforms in Family Law in Morocco," 2 *Journal of African Law* 146.

BERQUE, Jacques (1944) *Essai sur la Méthode Juridique Maghrébine*. Rabat.

——— (1960) "ᶜAmal," 1 *The Encyclopaedia of Islam, New Edition* 427.
BORRMANS, Maurice (1977) *Statut Personnel et Famille au Maghreb: de 1940 à nos Jours*. Paris: Mouton.
BOURGEOISE, Paul (1959-60) *L'Univers de l'Ecolier Marocain, fascicules no. 1-5*. Rabat: Faculté des Lettres et des Sciences Sociales.
BRUNSCHVIG, Robert (1960) "Bayyina," 1 *Encyclopaedia of Islam, New Edition* 1150.
——— (1963) "Le Systeme de la Preuve en Droit Musulman," 18 *Recueil de la Société Jean Bodin pour l'Histoire Comparative des Institutions* 169.
COLOMER, André (1963) *Droit Musulman, Tome Premier, Les Personnes—La Famille*. Rabat: E'ditions La Porte.
——— (1967) *Droit Musulman, Tome Deuxième, Statut Successoral*. Rabat: Editions La Porte.
COULSON, Noel (1956) "Doctrine and Practice in Islamic Law," 18 *Bulletin of the School of Oriental and African Studies* 211.
——— (1959) "Muslim Custom and Case-Law," 6 *Die Welt des Islams* 13.
CRAPANZANO, Vincent (1980) *Tuhami: Portrait of a Moroccan*. Chicago: University of Chicago Press.
DEWEY, John (1924) "Logical Method and Law," 10 *Cornell Law Quarterly* 17.
DOMINGUEZ, Virginia R. (1977) "Social Classification in Creole Louisiana," 4 *American Ethnologist* 589.
DWYER, Daisy Hilse (1977) "Bridging the Gap between the Sexes in Moroccan Legal Practice," in Alice Schlegel (ed.), *Sexual Stratification: A Cross-Cultural View*. New York: Columbia University Press.
GALLAGHER, Charles (1959) "New Laws for Old: The Moroccan Code of Personal Status," 5 *American Universities Field Staff Reports, North Africa Series* 1. Hanover, N.H.: American Universities Field Staff.
GEERTZ, Clifford, Hildred GEERTZ and Lawrence ROSEN (1979) *Meaning and Order in Moroccan Society: Three Essays in Cultural Analysis*. Cambridge: Cambridge University Press.
HART, H.L.A. (1961) *The Concept of Law*. Oxford: Oxford University Press.
ISEMAN, Peter A. (1978) "The Arabian Ethos," 256 *Harper's* 37 (February).
JENNINGS, Ronald C. (1979) "Limitations of the Judicial Powers of the Kadi in 17th C. Ottoman Kayseri," 50 *Studia Islamica* 151.
JUYNBOLL, Th.W. (1961) "ᶜAdhāb," in H.A.R. Gibb and J.H. Kramers (eds.), *Shorter Encyclopaedia of Islam*. Leiden: E.J. Brill.
KELLAL, Almenouar (1958) "Le Serment en Droit Musulman, Ecole Malékite," 74 *Revue Algerienne, Tunisienne et Marocaine de Legislation et de Jurisprudence* 18.
KERR, Malcolm H. (1968) "Moral and Legal Judgment Independent of Revelation," 18 *Philosophy East and West* 277.
LAPANNE-JOINVILLE, J. (1957) "Etudes de Droit Musulman Malékite: Les Présomptions," 73 *Revue Algerienne, Tunisienne et Marocaine de Législation et de Jurisprudence* 99.
——— (1959) "Le Code Marocain du Statut Personnel," 1959 *Revue Marocaine de Droit* 97.
LIEBESNY, Herbert J. (1975) *The Law of the Near and Middle East: Readings, Cases, and Materials*. Albany: State University of New York Press.
LINANT DE BELLEFONDS, Yvon (1965) *Traité de Droit Musulman Compareé, Tome I: Théorie Générale de l-Acte Juridique*. Paris: Mouton.
MACDONALD, D.B. (1961) "Hakk," in H.A.R. Gibb and J.H. Kramers (eds.), *Shorter Encyclopaedia of Islam*. Leiden: E.J. Brill.
MAHMOOD, Tabir (1972) *Family Law Reform in the Muslim World*. Bombay: N.M. Tripathi Pvt. Ltd.
MILLIOT, Louis (1920) *Recueil de Jurisprudence Chérifienne*, Tomes I, II. Paris: Editions E. Leroux.
——— (1924) *Recueil de Jurisprudence Chérifienne*, Tome III Paris: Editions E. Leroux.
——— (1953) *Introduction à l-E'tude du Droit Musulman*. Paris: Recueil Sirey.
——— and J. Lapanne-Joinville (1952) *Recueil de Jurisprudence Chérifienne*, Tome IV. Paris: Librairie du Recueil Sirey.
MORERE, Maurice (1961) "Le Procès Criminel: L'Enquête sur 'la personnalité des Inculpes' au Maroc," 1961 *Revue Marocaine de Droit* 433.
MOTTAHEDEH, Roy P. (1980) *Loyalty and Leadership in an Early Islamic Society*. Princeton: Princeton University Press.
RHEINSTEIN, Max (1967) "Introduction," to *Max Weber, On Law in Economy and Society*. New York: Simon and Schuster.

ROSEN, Lawrence (1968) "A Moroccan Jewish Community During the Middle Eastern Crisis," 37 *The American Scholar* 435.
——— (1970) "'I Divorce Thee,'" 7(8) *Transaction* 34.
——— (1972a) "Muslim-Jewish Relations in a Moroccan City," 3 *International Journal of Middle East Studies* 435.
——— (1972b) "Rural Political Process and National Political Structure in Morocco," in Richard Antoun and Iliya Harik (eds.), *Rural Politics and Social Change in the Middle East*. Bloomington: Indiana University Press.
——— (1973) "The Social and Conceptual framework of Arab-Berber Relations in Central Morocco," in Ernest Gellner and Charles Micaud (eds.), *Arabs and Berbers: From Tribe to Nation in North Africa*. London: Duckworth.
——— (1978) "The Negotiation of Reality: Male-Female Relations in Sefrou, Morocco," in Lois Beck and Nikki Keddie (eds.), *Women in the Muslim World*. Cambridge: Harvard University Press.
SCHACHT, Joseph (1964) *An Introduction to Islamic Law*. Oxford: Clarendon Press.
——— (1974) "Islamic Religious Law," in Joseph Schacht and C.E. Bosworth (eds.), *The Legacy of Islam*, 2nd edn. Oxford: Clarendon Press.
TOLEDANO, Henry (1974) "Sijilmāsī's Manual of Maghribī ᶜAmal, al-ᶜAmal al-Mutlaq: A Preliminary Study," 5 *International Journal of Middle East Studies* 484.
TRIBUNAL D'APPEL DU CHRAA (1956) "Audience du 12 avril 1955," 1956 *Revue Marocaine de Droit* 468.
TURNER, Bryan S. (1974) *Weber and Islam: A Critical Study*. London: Routledge and Kegan Paul.
TYAN, Emile (1945) *Le Notariat et le Régime de la Preuve par E'crit dans la Pratique du Droit Musulman*. Beirut: Université de Lyon, Annales de l'E'cole Française de Droit de Beyrouth.
——— (1955) "Judicial Organisation," in Majid Khadduri and Herbert J. Liebesny (eds.), *Law in the Middle East*, Vol. I. Washington: The Middle East Institute.
——— (1960) *Histoire de l'Organisation Judiciaire en Pays d'Islam*, 2nd edn. Leiden: E.J. Brill.
WAKIN, Jeanette A. (1972) *The Function of Documents in Islamic Law*. Albany: State University of New York Press.
WEBER, Max (1967) *Max Weber on Law in Economy and Society*. New York: Simon and Schuster.
WESTERMARCK, Edward (1926) *Ritual and Belief in Morocco*, Vol. I. London: Macmillan.
WIGMORE, John Henry (1936) *A Panorama of the World's Legal Systems*. Washington: Washington Law Book Co.
YAMANI, Ahmad Zaki (1968) *Islamic Law and Contemporary Issues*. Jidda: The Saudi Publishing House.
ZEYS, E. and Mohammed Ould Sidi SAID (1946) *Recueil d'Actes et de Jugements Arabes*. Algiers: Editions Jules Carbonel.
ZIADEH, Farhat (1957) "Equality (Kafa'ah) in the Muslim Law of Marriage," 6 *Journal of American Comparative Law* 503.
——— (1960) "ᶜ*Urf* and Law in Islam," in James Kritzeck and R. Bayly Winder (eds.), *The World of Islam: Studies in Honor of Philip Hitti*. London: Macmillan.

CASES CITED

Terminiello v. *Chicago*, 337 U.S. 1, 11, 1949.