

Islamic "Case Law" and the Logic of Consequence

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Social scientists have frequently asserted that the conjuncture of cultural concepts and social relations can be seen with great clarity in even the most arcane aspects of religious, economic, and political life. Whole visions of the world view of a people have been found in an isolated rite de passage, an entire ethos in the complex exchange of shells, and complete cosmologies in the struggle for transient elective office. Yet with few exceptions the operations of formal courts of law have been treated by anthropologists either as peculiar domains whose untypical language, rules, and procedures somehow remove them from the mainstream of cultural life, or as microcosmic realms beyond which one need seldom stray in order to understand how conflicts may be authoritatively composed. The tendency by anthropologists to avoid formal courts of law in the societies they study may be due in part to the distance with which courts and lawyers are viewed in Western culture—a domain seen to be fraught with professionally skewed assumptions and far from disinterested goals—or with an antiquated desire to show, contrary to colonial ideology, that native peoples possess law in every bit as refined a sense as Western societies do. The result has been a valuable acknowledgment of the nonjudicial modes of dispute management, but a sometimes inappropriate avoidance of the courts themselves.

But the modes of thought or forms of interaction found in courts are

not necessarily any less culturally characteristic of the broader societies than the modes of thought or forms of interaction found in a monastery, a market center, or a men's club—all of which anthropologists readily enter without further specialized study or fear of professional disapproval. Therefore, in what follows I want to consider a distinctly legal topic—the nature of case law in the courts of modern Morocco—and use this as a vehicle to show how in this society law pervades culture and culture informs law. Like a single ritual, a network of exchange, or a contest for political leadership, one cannot hope to see all of a society through such a limited focus. But such an example can show us what it means to speak of law as culture and to trace out some of the implications this approach may have to offer.

The Collections of Islamic Judicial Opinion

Earlier in the twentieth century a difference in interpretation arose between two of France's foremost scholars of Islamic law.¹ The dispute centered on a body of writings, collectively known as the *'amal* literature, which consist of the opinions of Islamic judges on a wide variety of issues they have been called on to decide. On one side stood Louis Milliot, the dean of French Islamic law scholars, who first brought to Western attention the *'amal* collections that formed a part of the legal literature of Morocco and who argued that these opinions constitute a set of doctrinal propositions that function like a body of positive law. Some years later, Jacques Berque, a former Affaires Indigènes officer and later professor at the Collège de France, suggested that the collections of judicial practice, far from being the functional equivalent of a code of law, might operate instead as a kind of case law, a series of opinions used to guide rather than settle certain cases coming before a court. The issue has considerable significance for the study of Islamic law not only in North Africa but also elsewhere in the Islamic world where scholar and judge, legal doctrine and judicial practice, may compete for authoritative voice. But beyond the historical and practical concerns the *'amal* literature provides for Islamic law studies, a larger set of questions that is relevant to the comparative study of legal development arises.

What, we may ask, does it mean to speak of a body of writing as

¹The key sources in this discussion are Berque 1944 and 1960, Milliot 1918:13–21, and Milliot and Lapanne-Joinville 1952:v–xix. See also Toledano 1981.

constituting either a codelike set of rules or a system of particularizing case-law when participants in the system have not themselves clearly calculated the respective importance of general rules and individual cases? How, in the absence of historical or anthropological examples, may we envision the use of actual court decisions in the Islamic law development of North Africa, and against what broader cultural features may we interpolate their role? Indeed, in what ways do the construction and implementation of doctrine and practice become clear when viewed in the light of those cultural assumptions that appear to suffuse the entire process of judicial reasoning and judicial fact-finding in the context of modern Islamic law?

In order to answer these questions, it may be helpful to describe briefly the nature of the *'amal* literature and the specific ways in which Milliot and Berque came to interpret it. Then, standing back from the *'amal* itself, it will be necessary to indicate how the larger background of cultural assumptions and modes of reasoning inform Islamic law and the uses to which actual judicial opinions are put by contemporary judges. Finally, a particular interpretation will be offered of the role and meaning of case law in the Moroccan context, and of the role it may play in the development of Islamic law in a modern nation-state.

The collection of writings called the *'amal* that Louis Milliot first described in his *Démembrements* (1918) consists primarily of a series of works drawn up in the fifteenth through seventeenth centuries. Unlike some other sources of Islamic law—particularly the Quran and the traditions concerning the Prophet's utterances and acts—or the treatises that set forth the approach of notable scholars around whom particular schools of thought developed or that constitute later commentaries on them, the *'amal* rest on the actual practice of judges of Islamic law. Some, such as the *Lamiyya* of Ali al-Zaqqaq, were composed as procedural guides that judges could consult to see how earlier jurists approached issues that came before them, while others, like the *'Amal al-Muṭlaq*, encouraged judicial use by presenting their materials as mnemonic poems or practical manuals. In each instance the approaches of named jurists are mentioned in the context of a series of distinct issues, though neither the details of particular cases nor the factual bases for distinguishing one type of case from another are elucidated. Rather, the presentation of opinions turns on the nature and range of acceptance of one approach over another. Because this rather technical factor is important to the relationship Moroccan culture has to Moroccan law, it is worth noting how this form of presentation and legal reasoning operates.

Faced with an issue not squarely covered by Quranic injunction, the *'amal* authors instructed judges to follow what is called the dominant opinion (*mashhur*)—the approach taken by most jurists in a given area and incorporated as such in most collections of judicial practice. However, a preferred approach (*rajih*), one based on what is socially desirable or customarily done, or even an isolated approach (*shadd*), one based on necessity, custom, or the approach of a well-known jurist, could be used in place of the predominant approach. While no specific techniques were established for distinguishing precisely when each of these approaches could be invoked, much less for distinguishing cases by their facts, it is clear that the overall orientation implied by the *'amal* is itself entwined with the added concepts of public welfare and custom, ideas that are themselves grounded on a series of broader cultural assumptions.

Although classical Islamic law allowed no specific place to custom as a source for judicial decision-making, the existence and shape of the opinions collected in the *'amal* writings clearly demonstrate that these collections themselves served as a vehicle for legitimizing local custom. Not only do preferred opinions appear to acquire their status because numerous judges have taken the same approach, but also their wide acceptance is often based directly on local practice. Working from the tradition that "what the faithful regard as good is good in the sight of God," Islamic judges have long incorporated the actual practices of those they serve as legitimate in the sight of the law. Indeed, preserving existing practice has long been recognized as one of the indispensable necessities for the preservation of communal harmony against that chaos and strife (*fiṭna*) that hang as an ever-present threat over human society. Yet instances may arise in which even the approach preferred by many, if not indeed the most distinguished, judges may need to give way in the face of a broader harm that may result from a strict application. In such an instance, a judge may turn to the concept of the public interest (*istislah*) or to the idea of a solution appropriate to the circumstance (*istihsan*) to resolve the issue at hand. Whether it be a case in which the law requires a custodial parent to remain near her former husband yet the court rules that it is unfair to make her move as frequently as the soldier/husband is required to move, or a case in which the judge grants the wife of an imprisoned man an irrevocable divorce because the sole form of divorce to which she is legally entitled would allow her husband to recall her to a life of continuing hardship, judges have available to them techniques articulated and legitimized in these early collections of judicial practice that allow both custom and circumstance to inform

specific judgments. But to understand the way the choice of approaches and rationales operates at present and may have operated when these practices were themselves being collected, we must have recourse to that larger set of cultural circumstances on which the actual practice of Moroccan law so clearly rests (see Rosen 1984).

The Cultural Context of Islamic Legal Thought

For Westerners first coming in contact with Moroccan society—or for that matter, societies throughout the Arab world—the institution of the bazaar marketplace often serves to establish a general perception of the culture. It is there that one encounters a domain where prices are not fixed and bargaining is ever-present, where the absence of clear indicators of quality, quantity, and availability leads to a constant quest for information or for personally reliable suppliers, and where the lines of competition run less between one seller and another than between any given seller and the buyer who stops for a moment before a shop or stall. If one were then to extend this image beyond the marketplace to the broader realm of social relations, one can grasp certain essential features of Moroccan social and cultural life. Just as in the bazaar, it is through a constant process of negotiation and contracting that Moroccans form relationships with one another. Family, tribe, or neighborhood may offer bases from and within which to fashion one's affiliations, but it is only through a constant process of constructing a network of obligations that each person can seek relationships in which security may be found. And just as in the marketplace, where conventions and institutions, shared concepts, and recognizable tactics give shape and order to the constant process of negotiation, so too in the realm of constructing one's social ties, wherever they may prove most desirable, individuals act against and through a set of common assumptions and institutions. For our purposes, three such sociocultural constellations are important.

The first relates to the central importance of the individual in Moroccan life. For Moroccans each individual stands at the center of a web of obligations and incorporates, in his or her own set of characteristics and network of ties, the features of social background (*asel*) and situated encounters (*hal*) by which they will be known to others. As each person tries to predict how another will act, and how he or she may fit in to their own network of affiliations, attempts will be made, as in the marketplace, to find out things about the other's associations and personal

characteristics. A wide range of cultural concepts is geared to this emphasis on knowing another's situated ties. Thus, if one looks at Moroccan narrative styles one sees that the constant emphasis is on knowing the host of situations in which one has encountered others. Because people do not fashion their individuated selves any more than humanity may fashion the moral precepts by which it must live, emphasis is not on the individual as the possessor of a psychic structure that generates a self that is, whatever its overt manifestations, most authentic where it is most private, but rather on the person as the embodiment of traits and ties that are discernible and subject to incorporation in one's own realm of affiliations. The narration of a story thus focuses on the situated encounters of the individuals involved rather than on inner states or implacable forces of nature or circumstance. Even time is seen less as the movement of events in conformity with an underlying design or revelatory direction and more as the encapsulation of affiliations as they may exist at any given instant. A believable account therefore relies not on chronological ordering but on seeing the person through the various encounters they have with others. Understanding a person is like understanding a gem not by its geological history but by the features it reveals as it is turned around in one's hand.

This stress on the contextualized person is itself connected to the Moroccan concept of truth, for truth is seen not as something that inheres in an utterance or an act, but as a process by which human beings bring otherwise neutral statements into the realm of human relationships and consequence. Just as a price mentioned in the marketplace is not true or false until an agreement—a relationship—is formed with reference to it, so too in the realm of social relations a statement about an attachment to another does not become subject to evaluation as true or false until it has been validated. Such validation may occur by using an oath, by marshaling public opinion to one's own view of the asserted relationship, or by confirming the relationship by acting as if it were indeed so. Thus, just as one keeps bargaining options open in the bazaar until an agreement receives accepted confirmation, so too one keeps open the possibility to form ties wherever they may prove most advantageous by not holding another's statements about his relation to you to its normal consequences until an institutionalized mode of validation brings it into the realm of the true, where it may be subject to the criteria and sanctions of the true.

If the situated individual and the validated utterance are two key ingredients of the Moroccan vision of reality, a third aspect is bound up

in the idea of consequence. In the Moroccan view, one can identify and assess a person, an utterance, or an act only by their consequences in the world of human relations. Thus it is not a person's inner state separate from his or her overt acts, or that person's claims to reciprocity apart from their validated status, that matter; it is the impact each person has on various networks of obligation that serve to place and measure him. And because the repercussions of one person's acts may differ markedly from those of another, the assessment of a person's deeds is an integral feature of determining that person's importance and reliability. So, for example, it is believed that a rich man can have a greater impact on relationships than a poor man, or a learned man can have a greater impact than one whose ignorance is less likely to make him a model to be followed or an ally to be sought out, and therefore that the harm that people of various categories may do suggests the standard of responsibility to which they should be held. An elaborate calculus of consequence thus serves to place actors and their attendant acts in context and to render them subject to evaluation as members of various social networks.

Each of these factors—of person, truth, and consequence—takes particular shape and implication in various situational and institutional settings. Because truth must be personal to have any consequence in the world of relations, it is to the reliable witness that one turns for authentication of a tradition of the Prophet, a claim to the occurrence of an act in the world, or the existence of a legally cognizable relationship. Just as it is the person who makes the assertion believable, so too it is the consequences a person may have in the world that makes the weight of that person's claim assessable. Just as it is the repercussions of one's acts that do not simply reveal but actually comprise the qualities associated with character and background, so too it is only within their personalized embodiment that significant social features possess meaning in the world. And just as one can trace the implications of this dynamic—of the individual unit set in an organizing but not governing framework—in the realm of social relations, artistic production, and religious rite, so too one can discern its role in the structure and process of Islamic adjudication (see Gittes [1983] on the Arabic frame tradition).

Islamic law courts in contemporary Morocco are characterized by several distinctive institutional features. As in earlier times, it is still the single judge, the *qadi*, who decides each case, and though his jurisdiction has been circumscribed by the creation of other courts within the unified legal system, and his place has been settled within the hierarchy

of a national bureaucratic structure, it remains true that his is a very traditional court both in the law it applies and in the process by which his judgment is brought to bear on individual cases (see also Rosen 1980–81). Briefly, it is to the *qadi* that cases are brought that involve matters of personal status or property matters in which the basis of one's claim is a document made out by notaries of the court. This latter feature would appear to suggest that written documents are the central form of proof in the *qadi*'s court, when in fact quite the reverse is true. Oral evidence is what really counts, the personal presentation before the court or its personnel of an individual's asserted claim. The notaries (*adul*) are simply the institutionalization, within the legal setting, of those reliable witnesses who, as in any social relationship, can serve to validate an utterance by the force of their own reputation as reliable actors in a network of consequential ties. It is before such notaries—who always work in pairs—that a litigant will therefore appear, often with a significant number of fellow witnesses, to make assertions that can be assessed as true or false only when the court personnel have transformed mere utterances into legally cognizable claims. In the role of notaries and in the emphasis on oral testimony we thus see in the domain of the law the centrality to Moroccan concepts of reality and credibility of the person and the impact of speech as acts affecting relationships. But the notaries are not alone in shaping issues for adjudication; courts also use various experts who come from the local area and who have been engaged in the craft or trade in which their expertise lies. At the judge's direction they may be sent to determine boundaries, the quality of construction, the costs of living for wives and children, and the like. Through them important aspects of local standards are brought before the court by people designated as personally knowledgeable about such matters.

When, therefore, a case actually comes up for a hearing, the mode of fact-finding and the form of judicial reasoning employed by the *qadi* reveal that they are closely related to the patterns of thought and action found in the culture at large. For example, at the outset of each case the *qadi* is very careful to determine the social background (*asel*) of each of the parties, for such information offers him, as any Moroccan, a clue as to the customary ways that such people enter into relations with one another and their most likely ties to one another. Moreover, he requires oral testimony, either by the parties or by their spokesmen, since it is only by such statements that one can probe for another's believability. Considerable discretion is involved in drawing bounds of relevance around the issue presented, and it is not uncommon for the *qadi* to

consider a wider range of relationships and issues when rich or important people, or populous or prestigious groups, are involved simply because the repercussions of such people's acts are regarded as more critical to the preservation of social harmony. But perhaps the most striking features of the *qadi's* proceeding are the emphasis on local circumstances and the style of judicial reasoning.

As already suggested, the *qadi* relies heavily on the notaries and the experts for determination of facts. Indeed, it can be argued that unlike many complex legal systems that propel investigation and decision-making up to the higher reaches of the legal order, in Morocco the process of adjudication continually pushes matters down and away from the *qadi*—down to the level where local custom and circumstance can become most significant. The use of multiple witnesses appearing before the notaries for certification of their oral claims, the frequent recourse to those who are experts on local matters, and a legal order in which the rules set down by authoritative sources are few and the scope for local practice is explicitly sanctioned—all contribute to the centrality of local customs and standards in the process of adjudication. The emphasis on the local is also evident in the judge's evaluation of oral evidence. For example, if the oral or notarized testimony of witnesses conflicts, the *qadi* will often turn to assumptions about what people of a given background or personal circumstances are most likely to be knowledgeable about or, as a matter of human nature, what they are most likely to have done. Thus, it is generally assumed that neighbors are more reliable than witnesses living at a greater distance, that relatives are more likely to lie on behalf of kinsmen than strangers are, and that a transaction is most likely to have occurred if people have operated as if it had existed for some time. Even when the evaluation of oral testimony or the discernment of local facts by experts cannot resolve a matter, a strong element of the rational and customary enters into the use of the ultimate vehicle of fact-finding—the decisional oath.

Oath-taking in Moroccan law, like the remnant still found in some European systems, allows the defendant to swear to his or her statements and thus bring the case to an end favorable to the oath-taker. However, the defendant may choose to refer the oath back to the plaintiff, who can successfully conclude the case by then swearing to his or her claims. Whoever takes the oath first wins. Where the element of rational, local practice enters is in the designation of the plaintiff and the defendant for purposes of oath-taking. It is not necessarily the one who files the case or answers it who plays each of these roles when oath

appointment is at issue. Rather, the defendant is whichever party the court believes is most likely to possess knowledge of the issue at hand and thus most able to swear to the matter. For example, a husband who sues his wife for return of their household goods may be designated the defendant when the question as to who owns articles that are normally associated with a man can be resolved by no other means than a decisory oath. If one traces the presumptions built into this system of oath-taking, it is clear that, far from being an "irrational" mode of proof, the process incorporates a broad range of cultural assumptions about who is most likely to know what, and thus have the first right—and the initial burden should they swear falsely—to conclude the case with an oath.

Similarly, the modes of legal reasoning employed suggest similar attention to local detail and broadly shared assumptions. Consider, for example, several elements of Moroccan judicial reasoning. There exists in Islamic law, not only as practiced in Morocco, the idea that positive assertions should take precedence over negative ones—that is, that (all other things being equal) testimony about something having occurred should be favored over testimony that it did not occur. Thus, testimony that a sale occurred is seen as positive, and a claim that nothing has occurred to alter prior circumstances is designated negative, while testimony impeaching another's character is taken as positive, and testimony tending to support one's character is demarcated negative. The law therefore seems to recognize that shifts in the balance of obligations among people are indeed the normal course of things and that such alterations should be given judicial sanction. So sales are taken as probable occurrences, disputed marriages are confirmed, and the likelihood acknowledged that a man who has not been able to establish his reputation for credibility before a dispute arises will be of poor moral character and an unreliable witness to events.

Judges may also draw together a series of features about background and circumstances to draw conclusions of legal import. Knowing that a person is from a given social background, that one is a man or a woman, or that one is learned or illiterate often implies, for judges as for others, a set of entailments that are taken as predictive of the impact of one's actions. In Morocco, the reference point in judicial logic, as in cultural logic, is therefore not so much to an antecedent set of rules or stereotyped categories of role or social position. Rather, the focus is on what John Dewey (1924) once called a "logic of consequence," in which the effects of another's acts are of central concern and prior data is marshaled toward the evaluation of one or another action in the world rather than to

the application of a set of rules. Thus, in the Moroccan case, knowledge about others cumulates into a conception of what a particular person is likely, by acts or utterances, to bring about in the world. It is not a system either of social or of legal perception that concentrates on judging individuals by standardized behavior or idealized roles, but one that assesses individual impact as a result of individuated circumstance. And it is against this background that the last feature of legal reasoning, and the one that will lead us back to an understanding of the literature on judicial practice, comes into play—namely, the role of analogic reasoning.

Qiyas, or analogic reasoning, is one of the acknowledged sources of law in Islam, a vehicle by which extensions could be made from the limited number of Quranic rules and Prophetic traditions to those circumstances that had never been addressed. Although individual authority to engage in extensions of the Sacred Law through such analogic reasoning was ostensibly circumscribed in the early centuries of Islam through the formation of specific schools of thought and the closure of “the gates of independent reasoning,” analogic reasoning has in fact continued to develop, often in arcane and scholastic ways, to present times. For our purposes, two points need to be underscored.

The first point concerns the materials used in constructing analogies. Traditionally, litigants submitted to the judge the opinions of scholars who themselves developed analogies that were proffered as solutions to the case at hand. These scholars distinguished cases not by reference to one another but against a general proposition embodied in a concrete circumstance. Thus, an argument in favor of holding a son to the payment of bridewealth when only his father had contracted for the payment would be analogized to the kind of unjust enrichment involved in loaning money for interest. Analogic reasoning thus worked through broad concepts exemplified by specific situations, rather than by eliciting detailed rules from acknowledged rules or by recourse to a logical principle by means of which a series of individual instances would have to be regularized in order to maintain doctrinal consistency (On analogic reasoning, see Makdisi 1985; Schacht 1964; Yamani 1968). The second point to underscore is that analogies are, as we implied earlier, framed in terms of repercussions instead of antecedent precepts. Thus, a judge will compare outcomes rather than prior rules, results rather than causes. To decide that reopening a long-closed passageway is like perpetuating avenues of trade and intercourse, or that stopping an ongoing injury by granting an irrevocable divorce where only a revocable one is allowed, is

to focus one’s comparisons on a local outcome and repercussion rather than on the refinement of a creed or code.

It is here, then, that we can recapture the role of the literature on judicial practice and the debate over its role as positive law or case law. The collections of *‘amal* writings depend, both in their structure and—we may conjecture—their acceptance, on many of the social and cultural features to which we have been referring. As one analyzes these collections, it becomes evident that the judicial choice among conflicting scholarly opinions is itself informed, through the principle of the socially useful, by the articulation to the court of local practice. Examples of this process abound. For instance, one can point to *‘amal* interpretations that say that even though the clause in a marriage contract allowing a woman to initiate a divorce is granted by the husband voluntarily, it should receive the stricter enforcement of an agreement that was actually bargained for because local custom regards it as something given in exchange for a lower brideprice. Or one could point to modern usages where the *qadi* refuses a rural woman’s claim against her former husband for the cost of hospital delivery of their child because birth at home is customary for such women even though most commentators include all birth expenses among those to which a woman is entitled.² In each instance the focus of judges, both historically and at present, is not on principles or doctrines as such, or on the factual differentiation of cases, but on an assessment of consequences, on the repercussions for the networks of ties that people possess, or should be free to contract, in face-to-face dealings. Just as the thrust of judicial organization and the determination of facts constantly involves the tendency to propel matters down to the locally defined and locally derived, so too the mode of judicial reasoning represented in the *‘amal* as in current practice channels the judge’s thinking not to the level of ever more refined doctrinal analysis or to the elaboration of legally distinct modes of reasoning, but to filling up propositions with local meaning.

Indeed, the study of contemporary judicial decision-making suggests that the goal of the law, now as at an earlier time, contributes greatly to the way it is formulated and implemented. It can be argued, accordingly, that the primary goal of the Islamic law judge is to put people back into a position of negotiating their own arrangements within the broad bounds laid down in the canon of Islamic law. If we look at Islamic law as

²These and many similar examples, as found in the writings of Sijilmasi, are elaborated in Toledano 1981.

a whole, as well as at collections of early and recent judicial practice, we can see that most critics are wrong when they claim that Islamic law, unlike other highly developed systems, lacks doctrinal refinement and consistency (see Schacht 1964:199–211). Such a criticism misses the point that Islamic law is consistent with those very relationships and assumptions that inform local society and that the court is seeking to reinforce, not with some internally refined set of principles. The role of the *qadi*, rather like that of Islam in general, is thus to set the general parameters of conduct but not to govern every detail of daily life. Just as in Islamic architecture, music, mathematics, and social organization, the law forms an organizing framework, not a governing force, and harmony lies in allowing such lines of individual-centered affiliation to work themselves out by the free arrangement of units according to local circumstance. That is why, in the context of the literature on judicial practice, one finds an early jurist emphasizing local consequences over the retention of doctrinal consistency when he says: "Once the argument of the opinion adopted in judicial practice becomes clear to you (O judge!) it becomes your duty to issue judgment in accordance with it, for adjudicating contrary to the judicial practice leads to civil strife and great corruption" (Toledano 1981:167).

Case Law, Code, or Cultural Process?

Interpolating from contemporary social, culture, and legal features to the meaning and role of the practice contained in the *'amal* writings thus leads to a view of this literature that is slightly different from that offered by either Milliot or Berque. Milliot (1920:15–21) saw in the collections of judicial practice the articulation of specific ways of resolving concrete situations. He distinguished these writings from form books and the opinions of scholars and equated the function of the *'amal* with that of legal opinions as used by lawyers in France. By seeing the *'amal* as tantamount to positive law, however, Milliot mistook a result for a process. He saw these opinions as a source of filling the lacunae in the Sacred Law rather than as an example of a mode of reasoning by which custom is drawn into the law not to develop a body of doctrine but to allow local circumstance judicial legitimacy. And by not probing for the highly personalistic way in which the opinion of one person may take precedence over another, he gave insufficient attention to how particular opinions have widely different effects when they might otherwise

seem to be on an equal footing. Thus, while Milliot was able to see that Islamic law was not the functional equivalent of the French code, he mistakenly believed that a rulelike set of propositions emanates from Islamic judicial practice and that the publications of contemporary opinions would succeed in establishing a new body of positive law that, under the French protectorate, would allow Islamic law to cope with modern circumstances.

By contrast, Jacques Berque has never felt that our understanding of the *'amal* allows for a definitive evaluation of its role. However, he has on several occasions suggested that the *'amal* appears to have functioned more as a set of specific solutions that could be adopted or rejected in case-law fashion by subsequent jurists: He has found no evidence that the *'amal* was meant to yield a set of rulelike propositions. In order to constitute positive law, the *'amal* would have to be based on a stable set of underlying precepts, when in fact, Berque argues, it has no such normative reference point. Instead, he characterizes Islamic judicial practice as pragmatic case-law.³ But Berque is not entirely clear about what he means by case law. If he means that the *'amal*—or any modern Islamic law judgment—is used as French lawyers use cases, he would be suggesting that while such cases lack any precedent value and may even not be frequently cited by judges in subsequent cases, they do suggest concrete solutions to cases that possess some authority for having been used by well-known judges or in important jurisdictions. By his reference to case law, Berque presumably does not mean that opinions in Islamic law operate as they do in Anglo-American law, where, to borrow Edward Levi's formulation, categorizing principles develop out of the factual circumstances of one case and are extended or distinguished by application to the facts of new cases that come before the courts. Such a formulation would, of course, be inappropriate in Islamic law, whereas Berque's vision of judicial practice as pragmatic guidance appears to be closer to the mark. What is, I believe, necessary in order to see more fully the role of the *'amal* literature—and to offer a more accurate interpretation of its role in the past—is to see how this pragmatic tool operated in the larger pragmatic context of Moroccan social and cultural life.

Seen from this vantage, decisions in prior cases replicate a process of fact-finding and reasoning whose goal is to put litigants back in a position

³See Berque 1944:33–50 and 1960. See also the discussion of Islamic case-law in Coulson 1959.

of negotiating their own ties. Islamic courts have the broad duty of retaining control over the practices specifically addressed by the Quran and of fulfilling, on behalf of all, those duties incumbent on the community of believers if it is to remain a moral body in the eyes of God. By constantly drawing the local into the ambit of the judicial, and by emphasizing the perception of social utility as seen by a judge who, like others in society, can make his the accepted view not by force alone but by conducting acceptance by those affected by his judgment, the pattern of Islamic judicial decision-making replicates social practice and thereby adds legitimacy to judicial practice. Prior decisions thus do not work like European positive law in their orientation toward the formation of a body of doctrinally consistent rules, nor are they isolated practices that should be treated as discrete artifacts, the traces of the passing of the law. Instead, the *'amal* and contemporary Moroccan opinions partake of a common process and by the different ways they are applied in the ongoing nature of that process they can be attended to or ignored or adduced or avoided, with the same force and in the same manner as any other human view. Because the law is regularized by reference to local practice rather than to doctrine, the *'amal* and current opinions make sense only as seen in light of the local. And because local law is itself not a body of artificial reason or professionalized doctrine so much as it is the articulation of the accepted, Islamic law makes sense, in turn, only as part of a larger social and cultural scheme.

Such an interpretation of Islamic law in Morocco, in the past as in the present, finds confirmation in the course of legal development in recent decades. In the first years following national independence in 1956, the Moroccan government formulated a new Code of Personal Status. This code, which remains very close to the traditional Islamic law, states that in the event that judges do not find guidance for a particular issue in the statute they may turn to local custom and the *'amal* writings. Indeed, there is some indication that the authors expected the code would contribute to the development of a new body of *'amal* writings.

But during the two decades since the code was adopted this has not proved to be true. The reason for this may be, first, that there is now an appellate hierarchy, which did not exist in precolonial times. In classical Islamic practice the idea of an appellate structure was contrary to the idea that no one could claim to speak definitively for the Sacred Law and, as our earlier analysis would suggest, the use of appeals might contradict the emphasis on local practice over the establishment of universal rules. And while appeals could certainly be used to create a body of substantive

national law, the appellate courts have not proceeded in this direction, but have acted like de novo review boards rehearing many facts and directing attention to code provisions that lower court judges may have missed. Thus we see that opinions in specific cases have not changed their role, even with the introduction of a national code or appellate structure.

But the existence of the code has changed something else. In the past, *qadis* seem to have set the general terms of many issues, while local practice set the particulars, but now the code has taken on some of the functional role of general guidance, and *qadis* appear less ready than some of their precursors to enunciate broad standards. Moreover, there has been a significant increase in the number of lawyers in Morocco, and their role may ultimately affect the use of judicial opinions too. So far, however, it is my impression that lawyers are not so much bringing to the attention of *qadis* the decisions of other courts—as the *'amal* and scholarly briefs did—as they are serving to regularize and facilitate the production of evidence to the court. Berque's (1944:28) suggestion that progress in Islamic law would come not through the perfection of positive law but through greater efficiency in the procedures and techniques employed in adjudication remains insightful if as yet unproved. What does seem clear thus far is that the process by which Islamic judicial decision-making has been characterized up to now—with its emphasis on reconstituting interpersonal negotiation and its orientation to the consequences of individual's acts—continues to play a conservative role in Moroccan legal development. Instead of becoming a vehicle for social reform by particular interest groups or an instrument for limiting or extending government control, case law represents instead the replication of local standards, at least as articulated by those chosen to give them voice, and thus it repeats, rather than challenges, existing patterns.⁴ Regularity in Islamic law, at least as presently practiced in Morocco, lies not in the similarity of results in cases that appear to be similar, but in the constancy of the mode of analysis—of employing reliable witnesses, focusing on oral testimony, weighing the social interest, and relying on local experts. The logic of the case is the logic of one of various alternative ways of reading local consequence, and an array of cases proves the array of possible alternatives. Moroccans can therefore see in the range of judicial decisions what they are wont to see in their

⁴Compare this interpretation with the image of Islamic law as a patrimonial system in Weber 1967. See also the discussion of Weber's interpretation in Turner 1974:107–121.

general lives—that consistency and harmony are not to be found in reducing differences to single propositions, or varied judgment to uniform antecedents. Rather, the appreciation of security and the avoidance of chaos will be further assured by cases that bespeak a common goal and a common process more than a common result, for that way lies conformity to the way people truly are and how God intended they should conduct themselves. It is therefore very likely that, short of a major upheaval in the body politic, Islamic law in Morocco will continue its conservative course and that individual opinions will contribute not to the development or regularization of doctrine but to the mutually reinforcing legitimization of interpersonal negotiation within a framework that partly for that very reason is regarded as authentically Islamic.

Law is, of course, only one domain in which a culture may reveal itself. But like politics, marriage, and exchange, it is an arena in which people must act, and in doing so they must draw on their assumptions, connections, and beliefs to make their acts effective and comprehensible. In the Islamic world, as in many other places, the world of formal courts offers a stage—as intense as ritual, as demonstrative as war—through which a society reveals itself to its own people as much as to the outside world.

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