Change: A Constant Variably Defined - Law and Anthropology Perspectives on Historical Changes to the Rule of Law

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CHANGE: A CONSTANT VARIABLY DEFINED—
LAW AND ANTHROPOLOGY PERSPECTIVES ON
HISTORICAL CHANGES TO THE RULE OF LAW

Dylan Oliver Malagrino*

"It is perfectly proper to regard and study the law simply as a great
anthropological document."

- Oliver Wendell Holmes

ABSTRACT: History has shown many periods of legal change dramatically
transforming law in society. Although anthropology and law might have a wide
area of interdisciplinarity, these two disciplines’ treatments of legal change are
still quite different. For example, lawyers read legal change as new concepts
from within a legal tradition continually evolving over time, but anthropologists,
analyzing the social relations between persons and abstract personae, see legal
change as a significant break to a social history. In what follows here, I have
examined instances of significant legal change in societies very different from the
presumptions of our own modern-state, capitalist-commercial societies: societies
of entirely oral culture without state government; societies with scriptural
writing systems; and societies with very different forms of government to our
common understandings of the “modern state.” In this paper, I present
conclusions based on specific instances of historical legal change in the Ottoman
19th century, North Yemen, Turkey in 1926 and Syria. These conclusions
demonstrate that, although anthropology considers legal change in terms of
rupture from the social past, the law must treat legal change as a categorical
redefinition from what it was before.

I. INTRODUCTION

In the 19th century, the Ottoman Empire had a strong centralizing imperial
tradition. There were changes to Ottoman legal theory and administrative
practice in the 18th and 19th centuries that signaled the emergence of a unified
legal status for citizens. Furthermore, the Ottoman state sought to change law to
Islamic jurisprudential terms. Specifically, one major historical matter of legal

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change was the transformation that marked Ottoman agrarian property relations in the 19th century. The 19th century Ottoman reform law effectively changed individual property rights by gradually redefining the long-established legal language that governed different types of property. By applying a historical analysis approach, anthropologists have seen such legal change in property relations as a rupture away from past power relationships, thus revealing an era of new power relations. On the other hand, lawyers see this legal change as a categorical redefinition of rights that already existed but merely underwent a gradual change.

Any period of significant legal change, even when the transition arguably is toward the better, often is accompanied by discomfort and uneasiness,¹ making legal change a focus of research and debate for experts from many disciplines. Although it is beyond the scope of this essay, such periods of legal change are common in the international arena and are deserving of analysis.² Yet, the

1. See generally Elizabeth Colson, TRADITION AND CONTRACT: THE PROBLEMS OF ORDER (Aldine Press, 1974). Colson examines how the Native Americans, who at one time enjoyed life as an egalitarian community before American colonization, were denied their sovereign autonomy in their struggle against the United States policy of cultural assimilation because Indian tribes and institutions were seen as a barrier to American assimilation. Thus, the period of legal change within Native American communities that occurred during the aftermath of United States colonization forced the Native Americans to witness the erosion of their cultural autonomy as the native peoples’ nations were reduced in their rights to self-government by United States’ incremental control and policy that eventually lead to the relocation and termination of Native American nations. Colson draws upon her fieldwork among Native American societies whose members believed, at one time, that they were part of a society where the members enjoy equal access to resources and share decision-making power, most commonly referred to as an egalitarian community. Colson illustrates that such societies do not have a formalized government, and therefore require its members to place constraints on their own actions and conduct in order to maintain harmony in their society. A shift in the struggle for social and cultural power occurs once the society members accept formalized methods of government. The members of these societies no longer have to place self-controls on their actions and the actions of other members, but face a new struggle to protect their own freedom from encroachment by centralized government and multiplying external controls. Colson’s book examines how the Native Americans faced this shift in power struggles as the tribal communities tried to protect their sovereign autonomy.

perspective of any analysis will depend on the expert’s academic slant. For example, anthropologists, like historians, consider legal change in terms of rupture, whereas lawyers instead must treat legal change as a categorical redefinition.

Why?

In this paper, I will begin with a brief legal anthropology primer that describes the three main periods of legal anthropology processes and current trends in anthropological contributions today. Also, I will describe the historical analysis approach that some legal anthropologists will favor over the current anthropological trends. Then, I will contrast the two academic disciplines - anthropology and law - and their differing perspectives on significant legal change. Next, I will introduce and explain my observations regarding how and why anthropologists characterize significant legal change as rupture, whereas lawyers treat such change as a categorical redefinition. Finally, I conclude this paper by surveying a few illustrative examples of historical periods of significant legal change and by examining the differing perspectives of such change.

This paper aims to contrast legal and anthropological analyses of legal change by looking at changing legal institutions and rules of law in polities far removed from our Western, Euro-American understandings of law and legal institutions. This paper also seeks to contribute to developing methodologies to direct future research about historical instances of legal change, which might weigh in on the import of change to the rule of law in any society.

II. LEGAL ANTHROPOLOGY PRIMER FOR LAWYERS

The history of legal anthropology can be divided into three main periods of processes. First, prior to the mid-1960s, most empirical monographs had seven common characteristics. These characteristics were: 1) historical; 2) ethnographic descriptions; 3) based on inductive empiricism; 4) using some form of the case method; 5) to study a single ethnic group; 6) relatively homogenous; and 7) capable of being isolated as a society for the purpose of analysis. Also,
most empirical monographs 1) relied on Western conceptions of law; 2) considered disputes as the main index of law or its primary locus; 3) abstracted from the processes of colonial domination and from the profound economic and social changes during the colonial period; 4) were functionalist in orientation and concerned the maintenance of social order; and 5) considered law primarily as a framework rather than a process.⁶

Historically, legal anthropology compared legal institutions and focused on non-state societies and their systems of social control.⁷ Anthropologists examining customary dispute settlement procedures showed the regulation of social life; thus, dispute settlement analysis revealed the forms of social control in different societies.⁸ Therefore, the object of study for legal anthropologists became "dispute resolution processes."⁹

After 1965, there was a shift in the study of anthropology, especially in the United States, toward dispute settlement and law as process.¹⁰ Laura Nader and her Berkeley Village Law Project from 1965–1975 defined this period.¹¹ Nader argued that anthropologists should place legal processes in their social context and "aim at empirical and explanatory generalizations."¹² She emphasized dispute settlement and dispute processes as the central themes of legal anthropological study, which was a shift from social organization to processes and from groups to networks of individuals.¹³ At the time, most anthropologists focused on the characteristics of disputes and the process of handling them.¹⁴

Since the mid-1970s, the focus of legal anthropologists has shifted to access to justice and informal alternatives to courts, due in part to less money available

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6. Snyder, supra note 3 at 67-68. But see generally BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926). Snyder describes Malinowski's short study as a "radical innovation" of the time by being based on extensive fieldwork, which was not, but since has been, a precondition of any valid anthropological study of law. Synder, supra note 3, at 66. "Malinowski insisted on the necessity of emphasizing function over form and giving priority to cultural and ideological categories of actors," instead of missing Western legal ideas and institutions when analyzing social relations in the non-West. Id. at 66-67.

7. See id. at 66-68.
8. See id. at 66-67.
9. See id. at 66-68. Likewise, Snyder argues, among other points, that anthropological approaches to law tended to "reduce law to dispute settlement and to view legal and social processes as not simply inseparable but identical." Id. at 87.
10. Id. at 68.
11. Synder, supra note 3, at 69.
12. Id.
13. Id. at 69. According to the Berkeley Village Law Project, there are three phases to the life history of disputes: the pre-conflict or grievance, the conflict, and the dispute. Id. at 71.
14. Id. at 66-68.
for anthropological research and fewer opportunities for research in developing countries.\(^\text{15}\) Anthropological contributions now concern: 1) the influence of social organization on dispute processing and informal alternatives to courts, and 2) the individual perceptions of justice and the means of expressing complaints.\(^\text{16}\)

Also, since the 1970s, there have been many different approaches to anthropological research, all more concerned with theory and the role of the state.\(^\text{17}\) Recent trends include: 1) anthropologists today are more concerned with the study of legal processes in advanced capitalist societies; 2) anthropological approaches have increasingly sought to place legal processes in their broader national and international contexts; 3) renewed concern with law as a subject of study; and 4) movement toward use of macro-sociological theory as a source of research questions, working hypotheses, and potential explanations.\(^\text{18}\) There has been an increased emphasis in legal anthropology regarding the ways in which people conceive, create, and sustain definitions of situations, especially though the use of language.\(^\text{19}\) Also, there has been an emphasis on economic bases of political and legal institutions, the relationship of law to class formation, and the connections between changes in legal processes and the development of capitalism as a distinct historical form, including Marxist themes regarding the relationship between the development of capitalism and processes of legal change.\(^\text{20}\)

In contrast to the current focus on dispute processes and settlement, June Starr and Jane F. Collier suggest in their report, *Historical Studies of Legal Change*, that many anthropological researchers have abandoned the dispute paradigm because it was too normative and positivistic; instead, anthropological researchers are using a historical analysis approach to understand legal change.\(^\text{21}\) They wrote:

> [T]o focus directly on legal change meant using analytical strategies that differed from those of the earlier community or regional studies. Now, instead of focusing on disputes and attempts at settlement of problems, new objects of study surfaced: how culture mediated legal ideas, the legal strategies of a ruling or a minority group, the

\(^{15}\) Id. at 73.

\(^{16}\) Snyder, *supra* note 3, at 74. Two critical claims of this movement towards access and informal alternatives are that access will lead to political struggles and informal mechanisms will lead to greater state control. Id. at 75.

\(^{17}\) Id. at 68.

\(^{18}\) Id. at 76-77. Additionally, Snyder identifies some recent legal anthropological themes, including: 1) rules and processes; 2) legal pluralism; and, 3) the political economy of law. Id. at 77-81.

\(^{19}\) Id. at 78.

\(^{20}\) See Snyder, *supra* note 3, at 81-83.

negotiation of a dispute across international boundaries, the creation by legislation of new "redistributive" networks, how state-enacted law changed rural agrarian hierarchies, or how less powerful groups struggled to obtain law representing their interests.  

Thus, Starr and Collier observed that the focus of legal anthropologists in examining legal change had transitioned to viewing law as that which was negotiated over time between colonial rulers and those they ruled. Under this approach, legal anthropologists examine historical research and asymmetrical power relationships to conclude that legal change is a change in power relationships of the past. This approach is in harmony with the theme formulated by Sally Falk Moore, that legal change is a change in power relationships.

III. THE AREA OF INTERDISCIPLINARITY BETWEEN LAW AND ANTHROPOLOGY

Although the relationship between anthropology and law might be difficult to define, the demarcation line between them is sometimes not obvious because both disciplines originate in Western thought and in particular worldviews.

Also, the work of the lawyer and the work of the anthropologist inform each other. For example, lawyers contribute to the ethnography of law by responding to anthropologists' inquiries about comparative law and the legal problems associated with cultural subjectivity. Both disciplines confront power

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22. Id. at 105-106.
23. Id. at 106.
24. See id.
25. Id. at 106; see generally SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH (James Cury Publishers, 2000) (arguing that "semi-autonomous groups" everywhere elaborate their own rules and common ways of doing things; hence, "legal pluralism" is a fact of life).
26. LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS 73 (Univ. of Cal. Press, 2002) (providing an overview of the history of legal anthropology and considering the rise of the alternative dispute resolution movement). Nader links the increasing popularity of the alternative dispute resolution movement, and its profound impact on the U.S. judicial system since the 1960's, with the erosion of the plaintiff's power and suggests that mediation as an approach to conflict resolution is structured to favor the interests of those in power. Id. at 14. In this article, when comparing the two disciples of law and anthropology, I build on the significant work, observations, and taxonomy of Prof. Nader, provided throughout the cited text.
27. Id. at 74. For examples of discussion relating to comparative law and the cultural subjectivity, see generally Mabo & Ors v. State of Queensland, 175 CLR 1 (1992) (recognizing the validity of traditional Aboriginal common law), Milpurruru v. Indofum Pty. Ltd. 130 ALR 659, 19 (1995) (protecting the Aboriginal common law in the context of copyright laws), and John Bulun Bulun & Milpurruru v. R & T Textiles Pty Ltd., (1998) 3 ALR 547 (considering whether the circumstances in which the artist's work was created gave rise to equitable interests in the Ganagingu People; claim for equitable relief dismissed).
relationships of and tradition looms large in both disciplines, as when facing class and gender conflicts and debating kinship regimes.

Further, the work of lawyers and the work of anthropologists often overlap. Anthropological knowledge often is used to inform political initiatives, and anthropological methods are used to gauge the human response to legal policy; at the same time, law and legal categories are becoming increasingly global and multicultural. New configurations of knowledge and practice regarding law and anthropology are emerging continually to discern the engagement between these two disciplines. Anthropologists Martha Mundy and Tobias Kelly have said: "law is itself a series of techniques of knowledge and governance the forms of which ... anthropologists have taken care to document."

However, more than one hundred years of interdisciplinarity demonstrates that these two disciplines use different paradigms when examining legal change. Such differing paradigms have been used to examine many significant changes such as: the development of evolutionary theories of rights in property that provide the authority for ownership rights to have vested absolutely in the sovereign state in connection with the Euro-American notions of colonization.

29. Id. See generally Sally Falk Moore, History and Redefinition of Custom on Kilimanjaro, in HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 277–302 (June Starr & Jane F. Collier eds., 1989) (examining the one hundred years of legal change among the Chagga of Mount Kilimanjaro in an attempt to convey the facts and significance of a historical instance of shifting traditions even as familiar customs are repeated for different reasons); see also DIVORCE: IRANIAN STYLE (Kim Longinotto & Ziba Mir-Hosseini 1998) (examining the divorce process in Iran and the lost political saliency and sociality of Iranian women, via a video documentary).
31. Id. (discussing the frequent intersection between the two disciplines and explaining that both disciplines examine power in the relationships between the dominant and subordinate groups in a society, and that anthropology examines this in greater detail because "tradition" and law have commonly been used as political stratagems in colonial settings).
32. Id.
34. See generally Snyder, supra note 10 (discussing the history and evolution of research regarding the interdisciplinarity of law and anthropology); Riles, supra note 5 (same).
36. Nader, supra note 26, at 10. Since the 1970's, several academic movements that involved law and anthropology have flourished; examples include the Law and Society Movement, the Critical Legal Studies movement, and the Law in Economics movement. See Christopher Fennell, SOURCES ON ANTHROPOLOGY AND LAW, http://www.anthro.illinois.edu/faculty/cfennell/syllabus/anth560/anthlawbib.htm (last visited Jan. 10, 2014). This history of interdisciplinarity shows the various and different legal paradigms used as a tool to effectuate legal change.
37. Nader, supra note 26, at 10; see, e.g., Johnson v. M'Intosh, 21 U.S. 543, 591–603 (1823) (holding that, when the Europeans discovered the aboriginal-occupied land in the Americas, that discovery vested title in the discovering nation because the sovereign power determines which physical relation to land qualifies for the purpose of "first in time" to possession, thus rendering the Native
to interpret the rights of minorities in ways that enhance Western notions of position and place;\textsuperscript{38} to hold that the law responds to changing social conditions rather than performs the social conditioning itself;\textsuperscript{39} and "to fight to reverse the burden of proof in a highly industrialized world."\textsuperscript{40}

Yet, despite clear scholarly arguments supporting each paradigm's vision,\textsuperscript{41} neither lawyers nor anthropologists have adequately recognized a commonality in their analyses of legal change—notably, significant historical changes to the rule of law in a society.

So what?

When we examine issues concerning how legal institutions and legal processes reach into, shape, and are shaped by daily affairs in the lives of

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American occupants incapable of transferring title as original owners because the sovereign held exclusive, absolute title, not the Native Americans).

38. Nader, supra note 26, at 10; see e.g., Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that it was unconstitutional to criminalize same-sex sexual activity among consenting adults).


40. Nader, supra note 26, at 10; see, e.g., N. Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding that a public official can only recover damages for a false defamatory statement relating to his conduct as a public official if he or she can satisfy the burden of proving the statement was made with "actual malice," or actual knowledge that the statement was false or with reckless disregard of whether it was false or not); MacPherson v. Buick Motor Co., 138 N.Y.S. 224, 227–28 (1912) (holding that, when a manufacturer is selling goods that could cause danger and harm to a subsequent purchaser if made defectively, the manufacturer owes a duty of care to the consumer, even if that consumer is not the immediate purchaser). An action for negligence arises when the manufacturer fails to observe this duty by manufacturing a defective product; here, the defendant car manufacturer was found liable for damages because he failed to inspect the wheels before selling the car to the public, and it was foreseeable that defective wheels would be very likely to cause injury to the consumer plaintiff. Macpherson, 138 N.Y.S. at 227-28. This decision marks a significant legal change in which the burden of care and vigilance is placed on the powerful corporate defendant in order to protect the less powerful individual consumer.

communities and individuals, we must consider questions of power and meaning, and above all, their historical interplay. 42

IV. THE POWER AND MEANING OF LAW AND LEGAL CHANGE

When we study the relationship between law and anthropology with respect to legal change, there are two reasons to investigate power and meaning: the central considerations in contemporary law-in-society and legal-anthropological interpretive analyses. 43

The first reason is that the forms laws take and their impact on the socio-micro level are shaped by struggle, which can be understood in terms of historically-located class or gender/sex or race/aboriginal relations. At the same time, law shapes the context and trajectory of such struggle. 44

The second reason is that the significance of legal change is often greater than the meaning intended for it. 45 Legal change never speaks for itself. Its meaning is a matter of interpretation and contention. It must be understood by the cultural terms with which individuals interpret and experience it in relation to their goals and objective interests. 46

Law is power: legal change accompanies political hegemonic shift; when the perspectives differ on its occurrence, the legal change becomes even more significant because it is often assumed, quite incorrectly, to be a natural or harmless or inexplicable end, accomplished through means within an institutional framework. 47 Moreover, entwined in legal hegemonies is great potential for social and cultural controls, so any change to the rule of law requires thorough understanding from the differing perspectives.

As Laura Nader consistently shows throughout her work, power must be a consideration when analyzing legal change because the forms that laws take and the impact of those laws at the local level are each shaped by struggle that is constantly in tension and in flux. 48 A change to the rule of law will be the

43. See generally id.
44. See generally id.
45. Nader, supra note 26, at 10 (describing that when the significance of legal controls, or hegemonies, is not recognized, they actually become more powerful than intended because they are incorrectly assumed to be natural or harmless).
46. Id. at 11-13 (explaining that sources of power and social controls are in constant flux because they are defined and redefined by various persons and institutions within diverse social, cultural, and political contexts). Once anthropological studies began to emphasize process models during the 1950s, anthropologists began to conclude that law is not autonomous. OXFORD UNIVERSITY PRESS, THE OXFORD COMPANION TO AMERICAN LAW 28 (Kermitt L. Hall ed., 2002)
47. Nader, supra note 26, at 11-13.
48. Id.
outcome of struggle, and sometimes it will even result from contention for control of the state itself.\textsuperscript{49} However, laws also can shape the context and trajectory of struggle, creating within the legal order new space over which old parties may contend and within which new interests may emerge.\textsuperscript{50} The social spaces, asymmetrically embedded as they often are in the larger fields of power relations, experience the consequences of the power flux that ensues from legal change, and sometimes contribute to it,\textsuperscript{51} resulting in altered socialities and revealing new relationship status quos.\textsuperscript{52}

Law is meaning: law and culture are embedded in one another, so much so that even as culture shapes different legal forms, law redefines social issues and restructures the relationships among groups in society.\textsuperscript{53} When particular emphasis is placed on the cultural modalities, the concept of controlling processes is useful in delineating differing paradigms of legal change, with particular emphasis on who uses the law and for what—an inquiry relevant to both disciplines.\textsuperscript{54}

Meaning must be a consideration because signification always exceeds intention, in the legal arena as in any other.\textsuperscript{55} What struggle for legal change means to individuals differs in relation to each person’s goals and objective interests according to the contextually and culturally specific terms in which they interpret their experience. The meaning of legal change in local communities may diverge substantially from what the change agents intended, especially insofar as signification will reflect the situationally specific terms in which those in local spaces interpret the law.\textsuperscript{56}

In sum, power and meaning must be considered in the context of law and legal change. Power must be considered because legal change is normally associated with a shift in past power relationships, and the form and impact of

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Starr & Collier, supra note 21, at 368. In discussing the analysis of change in power relationships among groups over time and the insight into legal change it might provide, Sally Falk Moore formulated the concept of “the anthropology of sequences of asymmetrical relations.”
\textsuperscript{52} Id.
\textsuperscript{53} See Collier, supra note 42.
\textsuperscript{54} Nader, supra note 26, at 11. Of course, here, I define law firmly within this more general category of social and cultural control, or at least the controlling of processes more specifically, instead of our Western presumptions that law implies police and courts and judges for its existence.
\textsuperscript{55} See id.
\textsuperscript{56} Id. at 15. For a similar discussion, see Paul Bohannan, Justice and Judgment Among the Tiv 57 (1957), in which Bohannan asserts that the “Tiv have laws, but do not have law” because the Tiv legal system lacks any codification or systematization of rules or laws. Bohannan’s description of the Nigerian court system illustrates that the notion of “law” is very different from our own Western understandings of “law”. When settling disputes, the Tiv do not follow any established laws or guidelines because they do not exist; instead, they resolve disputes according to their own cultural understanding of law and justice.
such legal change is shaped by a struggle for control between the powerful and the powerless. The meaning of a law must be considered because the true meaning of a legal change is understood differently according to how each individual experiences it in relation to their own goals and interests. Anthropologists who use the historical analysis approach when examining legal change give significant consideration to power and meaning because they must consider the asymmetrical power relationships and historical context in place when the legal change occurred.

V. CONTRAST WITHIN THE AREA OF INTERDISCIPLINARITY REGARDING LEGAL CHANGE

Despite the common understandings that power and meaning are rooted in law, what remains dissimilar is the handling of changes to the rule of law. Through the anthropologic lens, legal change is a rupture from the social past, whereas law sees such change as a redefinition, emerging from legal evolution.

This difference is, in part, because anthropologists focus their research on social relationships and the resolution of disputes and conflicts. Anthropologists see legal change as some defining point between polemic fractions within a society and very telling of how social relationships operate and disintegrate. Lawyers focus on classifications in explaining away legal change as progress/regress or evolution/devolution from within the established institution. Lawyers describe legal change as a potential threat to the consistency and dependability of the rules that have governed different power relationships in a society. Perhaps the best explanation lies in the purposes of each discipline.

Lawyers systematize, elaborate, and interpret doctrine and technique within (or at least with reference to) some national legal traditions. Anthropolgy, on the other hand, analyzes social relations and practice without such specific reference.

Anthropologists weave together law as a symbolic system, an encoding of asymmetrical power relationships, to allow for comparison across cultures, societies, and time periods. Anthropology documents the complex interface between individuals or and the plural persons of written law, which represent the individual. And, more specifically, anthropological approaches to legal change tend to reduce law to dispute settlement and to view legal and social processes as not simply inseparable, but identical. Anthropologists, in examining law, view

57. Mundy & Kelly, supra note 35, at xv.
58. See e.g., CLIFFORD GEERTZ, LOCAL KNOWLEDGE (1983).
59. Mundy & Kelly, supra note 35, at xix. Historically, anthropology, as the sociology of the non-European world, had been engaged with the systems of European colonialism and now is engaged with systems of post-European colonialism; the discipline has examined critically its long association with imperial rule, and accordingly analyzes social relations and practice.
legal change as the culmination of a shift in the power relationships of social life. 60

Ideas about culture are interwoven with notions of control and the dynamics of power. 61 Thus, the study of structures and activities crossing boundaries illuminate places where power is being reconfigured and reconstituted. Anthropologists of law know that dispute resolution ideologies have long been used for the transmission of hegemonic ideas, but this knowledge has yet to be extended beyond those who study disputing processes.

Anthropological studies of law had developed rich descriptions of how social order was maintained in tribal and peasant societies that lacked police, a Western-style judiciary, or prisons and jails. In fact, most anthropologists studying legal change avoid using a lawyer’s sense of what “law” is, 62 and instead see law firmly within the more general category of social and cultural control, or at least the controlling of processes more specifically. 63

When the anthropology of law is infused with history, anthropologists studying legal processes avoid simplistic ideas of legal evolution, a bastion of progress and legitimacy for lawyers, rooted in the recognized importance of precedent, stare decisis, and legal stability. However, anthropologists seem to see the embeddedness of law in culture and of culture in law yielding information too rich to meet the criteria of evolutionary explanation. Instead, committed to searching for a better understanding of how law changes within particular societies through time, anthropologists have come to recognize that legal forms differ by place and time and cannot be correlated with stages in societal evolution or state development—an evolution required for lawyers operating within legal institutions and seeing the foundational legitimacy of continuity and predetermination as essential substance to their discipline. 64

Instead, focusing on how law changes without using unidirectional evolutionary notions, anthropologists take stock of what comparative frameworks and ideas might be used in discussing similarities across a range of cultures and societies. 65 And, this difference is one possible explanation for the differing paradigms and different understandings of legal change.

60. See generally Nader, supra note 26, at 11–167.
61. Id. at 118.
62. Id. at 47.
63. Id.
64. See id. at 12–16.
65. See generally LAURA NADER, THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (Harry F. Todd ed., Columbia University Press 1978) [hereinafter The Disputing Process]. The author examined the different ways that people of various cultures resolve their disputes. Anthropologists applied Nader’s ethnography-of-law approach to dispute processes in very different communities. This work illustrates the growing anthropological focus on the cultural and social foundations of an ordered life when examining the dispute processes that make such a life possible.

For another example, consult OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS
VI. PERSPECTIVES ON CHANGE TO THE RULE OF LAW

Significant changes to the rule of law pose unique problems concerning the relationship between law and ideology, and the changing social structure of power and meaning for anthropologists. First, lawyers themselves know full well legal change cannot be understood completely by reading the case opinion rationales or arguments in the preparatory reports preceding the passage of a new statute. The reasons given and the theories on which they rest must often be seen as legitimation for the achievement of other goals and policies favored for the furtherance of interests that are not often expressed clearly. The second result, related to the first, is that as a result, there will often be a discrepancy between the law on the books and the law in action. This disconnect does not mean that such laws, although they might fail in relation to their stated goals, are inconsequential. The resulting legal changes often set the stage for more profound reforms, to which anthropologists take note.

In seeking explanations for legal change, legal anthropologists have acknowledged the boundaries between law in society and legal anthropology.66 Furthermore, some legal anthropologists have found that the modern dispute processes paradigm does not provide an adequate understanding of the role and significance of legal change because the focus is limited to disputes and alternative ways to access courts.67 Such a narrowed scope of analysis does not take into consideration the power and temporal dimensions that contributed to legal change in a society. Thus, some legal anthropologists favor the historical analysis approach described by Starr and Collier because, rather than merely focusing on settling disputes, it focuses on the power relations and historical

67. See id. at 1-2.
context that led up to the legal change.\textsuperscript{68} Often, by making asymmetrical power relations and the historical context essential to their analyses, the conclusions of legal anthropologists are quite different from those of academic lawyers working without temporal or power dimensions to their research.\textsuperscript{69}

Under the historical analysis approach, as Starr and Collier observed, legal anthropologists view the law as that which was negotiated, or brought about, by power struggles between the rulers and those who were ruled.\textsuperscript{70} As such, legal change under the historical analysis approach is described as a change in power relationships. Because it focuses on power relations and the world historical times, historical analysis thus becomes a dynamic aid in understanding the role legal change plays in altering asymmetrical power relationships among social groups, and how that role is observed. Instead of treating legal change and power differences as variables that amend a structural or structural-functional analysis of dispute management, legal anthropologists focus on power differentials to understand both the impact of legal change and the persistence of certain legal ideas and processes through time. Rather than simply asking how societies achieve the peaceful resolution of disputes under the dispute processes approach, legal anthropologists ask how individuals and groups in particular times and places have used legal resources to achieve their instrumental ends. Instead of focusing on either normative systems or dispute processes, legal anthropologists who use the historical analysis approach examine the relationship of law to wider systems of social relations.

Law is beyond the confines of a system dominated by courts and judges and police, and legal change is change in the way power and privilege are distributed through legal means. Law and anthropology share the assumption that social order invariably creates inequality.\textsuperscript{71} Thus, any changes in asymmetrical power relations among social groups are the defining features of legal change.\textsuperscript{72}

Some anthropologists have focused on actual changes in legal rules or procedures, observing that such changes are the cause of dramatic change in power relations, or signal an approaching change in power relations.\textsuperscript{73} Lawyers focus on discontinuities with the legal system that are apparent or actual.\textsuperscript{74}

\textsuperscript{68} See id. at 1-3.
\textsuperscript{69} Id at 1-2.
\textsuperscript{70} See id.
\textsuperscript{71} Dialogues in Legal Anthropology, supra note 66, at 13.
\textsuperscript{72} Id.
\textsuperscript{73} Id; see also Anton Blok, The Symbolic Vocabulary of Public Executions, in History and Power in the Study of Law: New Directions in Legal Anthropology 31-54 (Starr & Collier eds., 1989). Anton Blok studied the outlaw Bokkerijders as a way of understanding the 18th century transition from public executions to imprisonment, which was a hugely significant shift in European legal practices. Blok examined historical records and texts to understand how those in power used public disembarkment, burning, and hanging as a horrifying symbol to communicate the state’s awesome power. The historical records showed a steady decline in the theatricality of if executions, but offered
Because lawyers focus on both change and continuity, they tend to choose processes, rather than entities defined in space and time, as the units of their analyses. Instead of focusing on "societies," communities, or institutions abstracted from time, they tend to choose a process, an extended case, or a set of concepts to follow across spatial and temporal boundaries.

Some anthropologists focus on specific historical events, others on the historical processes themselves, presenting legal changes as historical ruptures revealing a new era of power relations.

few clues as to the reason for it. Blok speculated that the resistance to public executions was part of a wider movement among both the illiterate town dwellers and the literate elite class that protested against theatricality in general as promoting idleness and disorder among the low class. See also Starr & Collier, supra note 21, at 370 ("Blok suggests that the change from theatrical punishments to imprisonment in 18th century Europe indicated an increase in the power of elites to control the population"); see generally Collier, supra note 42. In the 1930's, Spanish national land reform laws unexpectedly led to two opposing groups, "workers" and "owners." The two groups struggled for control over the municipal government in order to implement or suppress these new national laws. Id. Collier's study shows that legislation at the government level can produce unexpected results at the local level. Starr & Collier, supra note 21, at 369 ("Collier discusses a situation in which previously deprived groups in a Spanish Village were empowered by new legislation.").

Snyder's study of negotiation tactics used by France over sheep meat production and distribution illustrates the role of law in such a context. See Francis G. Snyder, Thinking about "Interests": Legislative Process in the European Community, in History and Power in the Study of Law: New Directions in Legal Anthropology 168-200 (Starr & Collier eds., 1989). France, after failing to secure its goals in negotiations over sheep meat quotas, successfully forced another round of bargaining when it resorted to the tactic of "stomewalling" by refusing to accept a ruling from the European high court. Id. Snyder suggests that the study of how power arises from such tactics must be included in an analysis of general power relations in order to understand the politics that lead to lawmaking. See Starr & Collier, supra note 21, at 368 ("Cohn and Arjomand write about elites who created new legal orders giving controlling power to their groups. Vincent and Snyder, by contrast, focus less on how legal changes empower already recognized groups and more on the role of law in structuring interests and in organizing the alignments of groups and individuals.").

74. Dialogues in Legal Anthropology, supra note 66, at 13 ("For example, Aubert, Starr, and Moore argue that apparent continuities in key legal concepts—such as "rule of law" in Norway, or the early occurrence of "private property" under Roman Law, or "customary law" in Tanzania—can in fact mask changes both in power relations and in the substance of legal rules."). For example, see Vilhelm Aubert, Law and Social Change in Nineteenth-Century Norway, in History and Power in the Study of Law: New Directions in Legal Anthropology 55-80 (Starr & Collier eds., 1989), June Starr, The "Invention" of Early Legal Ideals: Sir Henry Maine and the Perpetual Tutelage of Women, in History and Power in the Study of Law: New Directions in Legal Anthropology 345-68 (Starr & Collier eds., 1989) and Dialogues in Legal Anthropology, supra note 66, at 13 ("Starr and Collier note that Nash, Nader, and Boisevain and Grotenbreg are less concerned with changes than with analyzing struggles for power within existing frameworks. Rosen and Greenhouse focus on continuities. They write about those central cultural concepts that people continue to invoke despite historical changes in power relations.").

75. Dialogues in Legal Anthropology, supra note 66, at 13

76. Id.

77. Id. at 14 ("Cohn, Arjomand, Blok, and George Collier, for example, take particular happenings, such as the writing of constitutions, the passing of legislation, or specific trials, as points of entry for studying ongoing processes . . . . Finally, Greenhouse, Boisevain and Grotenbreg, Rosen, and Starr refer to specific historical events, but treat them less as points of entry than as evidence of ongoing processes.").
Lawyers and anthropologists emphasize differing aspects of law and legal systems. Although there is considerable overlap between them, there are three different approaches to defining legal change: the interactional, the cultural, and the institutional. The anthropologists who adopt an interactional approach focus on individuals and groups who use laws and legal processes for pursuing their own ends. They take an instrumental perspective and tend to examine particular behaviors. Legal change is the culmination of the instrumental ends.

The anthropologists who use a cultural approach tend to treat laws and legal systems as elements of a discourse. They focus on the communicative dimension of law, recognizing that a new rule of law is ushered into social space through dramatic communicative change.

78. Id. ("Aubert, Vincent, Moore, Nader, and Nash seldom mention specific historical events, preferring instead to chart ongoing processes.").
79. Dialogues in Legal Anthropology, supra note 66, at 21.
80. Id.
81. Id. Anthropologists who adopt this approach emphasize the ordering dimension of law and focus on ways in which groups hold power seek to create or oppose governmental structures. Starr & Collier, supra note 21, at 369. One example of the interactional approach is Robert Hayden’s study of Yugoslav workers who resisted proposed court reform is one example of a group using legal processes to achieve their instrumental ends. Oppressed workers sought a legal forum that was free of control by factory managers. In 1982, the government proposed to reform the overloaded labor courts by moving them inside factories. The workers’ trade union representatives succeeded in defeating the proposed reform and the courts remained free of management control. Robert M. Hayden, Social Courts in Theory and Practice: Yugoslav Workers’ Courts in Comparative Perspective (1990).
82. Dialogues in Legal Anthropology, supra note 66, at 21; see also Starr & Collier, supra note 21, at 369. For an example, see Nader, supra note 36, at 122–24. Nader introduces the concept of “harmony ideology,” which is a form of pacification by means antagonistic to legal centralism. Harmony ideology is a policy position that may seem, on the surface, to be considered natural and compatible with the needs of the multinational organizations of global economics. However, there is no consideration of whether this ideology is compatible with the values of human freedom and justice. To illustrate, Nader discusses Native American groups in the Americas who were denied local autonomy because the United States used harmony ideology in its pursuit of cultural assimilation, and Indian institutions were seen as a barrier to cultural assimilation.

For further reading, see Jeremy and Boissevain & Hanneke Grotenberg, Entrepreneurs and the Law: Self-Employed Surinamese In Amsterdam, in History and Power in the Study of Law: New Directions in Legal Anthropology 223–51 (Starr & Collier eds., 1989) where Boissevain and Grotenberg write about how Surinamese entrepreneurs in Holland have either avoided or used Dutch laws regulating small businesses. Surinamese entrepreneurs founded a Federation of Muslim Organizations to speak for all Muslim butchers in the Netherlands in order to subvert a law prohibiting ritual slaughter. Although the organization was able to have the prohibition against ritual slaughter repealed, the Surinamese entrepreneurs had to increase compliance with other Dutch regulations in order to secure the legal change. Thus, Dutch regulatory agencies were granted more power over their lives and activities.
83. Dialogues in Legal Anthropology, supra note 66, at 21, 371.
84. Id. at 21, 370. For an example, see Lawrence, Rosen, Islamic "Case Law" and the Logic of Consequence, In History and Power in the Study of Law: New Directions in Legal Anthropology 302-319 (Starr & Collier eds., 1989), where Rosen discusses how the concepts and procedures used in Moroccan courts inform and reinforce the common-sense understandings that Moroccans draw on in everyday life. Rosen stated that Islamic law as practiced in Morocco does not attempt to build up a body of doctrine that is distinct from local custom. The methods employed by Islamic courts to conduct fact-
The institutional approach is the main paradigm for lawyers explaining legal change. This approach leads to a focus on economic and political processes, treating individuals as representatives of particular economic interests or social groups, and laws as representing particular ideological positions.\textsuperscript{85} Thus, the lawyers focus on the ordering dimension of law, emphasizing the role of legal processes in preserving or changing established power asymmetries within the established legal institution.\textsuperscript{87}

finding and the forms of judicial reasoning used are not very different from the ways in which a person's credibility and truthfulness are judged in business transactions conducted in the bazaar. Thus, Islamic court decisions in Morocco encourage litigants to return to society so they will resume negotiations with one another within the broad boundaries established by the canons of Islamic law.

For further discussion, see Carol Greenhouse, \textit{Interpreting American Litigiousness,} in History and Power in the Study of Law: New Directions in Legal Anthropology 252-276 (Starr & Collier eds., 1989), discussing Greenhouse treats the North American cultural concepts as resources that people use in their conversation with others to communicate their intentions and positions. Greenhouse showed that in the town of Hopewell, Virginia, the current Baptist avoidance of state courts could be traced to the period just before the Civil War when conflicts over important issues such as states' rights and the abolition of slavery threatened to destroy the community. Baptist leaders were able to save their diminished church by preaching that conflict was un-Christian and that litigiousness was the undoing of God's order. Greenhouse, who studied the Baptists as a way to understand wider North American attitudes towards litigiousness, argued that in experiencing a need for social distance from local populists, the Baptists in Hopewell elaborated the ideal of nonlitigiousness, a resource available in the wider culture.

\textsuperscript{85} \textit{Dialogues in Legal Anthropology, supra} note 66, at 21-22.

\textsuperscript{86} \textit{Id.} at 21-22, 368. For an example, see Sally Falk Moore, \textit{History and the Redefinition of Custom on Kilimanjaro,} in History and Power in the Study of Law: New Directions in Legal Anthropology 277-301 (Starr & Collier eds., 1989). Moore and Joan Vincent argued that, when placed in historical context, "customary law" is not a "folk system" in the consciousness of the people themselves, but rather the outcome of historical struggles between native elites and their colonial and postcolonial rulers. Based on investigation of legal change among the Chagga of Tanzania, Moore carefully identifies the institutional and class forces affecting Chagga use of "customary law." Moore showed that among the Chagga, several different power groups like the Christian church, the colonial administration, the Tanzanian national government, and the local coffee-marketing cooperative all affected notions of "customary law" by altering the character of struggles between the Chagga and their overlords. The underlying issue of these struggles was determining which areas of life would be treated as within Chagga control--in other words, which areas of life would be governed by "customary law."

For further discussion, see Joan Vincent, \textit{Contours of Change: Agrarian Law in Colonial Uganda, 1895-1962,} in History and Power in the Study of Law: New Directions in Legal Anthropology 153–67 (Starr & Collier eds., 1989), where Vincent (and Snyder) tried to identify the interest groups that both create and are created by legislation. Based on her analysis of laws passed in Uganda, Vincent recognized that a wide geographic area and an institutional framework that goes beyond local interests must be included in analyzing how certain interests coalesced in shaping legal change within a region over time. Vincent recognized that many of the laws passed in Uganda do not reflect local interests but the interests of dominant groups such as Manchester manufacturers, missionary societies, and planters in Kenya. Thus, any given state is the outcome of a historically specific set of conflicting interests among groups whose reconciliations have been recognized in law. See also \textit{Dialogues in Legal Anthropology, supra} note 66, at 21-22 ("Bloch identifies the class positions of the 18th-century bandits he studied and of their victims and prosecutors"); Anton Bloch, \textit{The Symbolic Vocabulary of Public Executions,} in History and Power in the Study of Law: New Directions in Legal Anthropology 31–54 (Starr & Collier eds., 1989).

\textsuperscript{87} \textit{Dialogues in Legal Anthropology, supra} note 66, at 22.
Lawyers and anthropologists also define their problems differently. Some lawyers try to understand major legal turning points, or watersheds. These lawyers are concerned less with analyzing particular historical shifts or continuities and more with building theoretical frameworks to understand legal processes. When law and legal forms are viewed as historical products, anthropologists no longer assume essential comparability of law per se. Anthropologists analyze law and law-like forms as embedded in and created both by particular historical circumstances and by interrelationships between local, national, and international events. From local tribal law to the law of modern industrial states, anthropologists express concern with understanding the specific historical form, which is shaped by cultural and interest-group configurations.

Anthropologists recognize that law has a tendency to intrude into all kinds of relationships, from those of economic production to those of philosophical treatises where it hides in the guise of ideology. Although superordinates may exercise a disproportionate influence on the forms that go into the making of legal relationships, "the forms are manufacture[d], reproduced, and modified for special purposes by everyone, at every level, all the time." To which it is now useful to examine some examples of periods of legal change.

VII. HISTORICAL EXAMPLES OF LEGAL CHANGE

The first example is a deeper examination of the Islamic legal tradition in the Ottoman Empire, which incidentally was a strong and modernizing polity. Then, there is the example of the 19th century shari'a reform, followed by a look at the anthropological work regarding the legal tradition in North Yemen, where a dynastic state met strong rural political organization well into the 20th century. Further examples mentioned infra include legal change in Syria and Turkey.

VIII. OTTOMAN 19TH CENTURY

The most cursory inspection of the legal situation of any modern nation at the beginning of the 19th century reveals great legal changes. The Ottoman Empire in the 19th century was a very different polity from North Yemen. While North

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88. Id.
89. Id.
90. Id.
91. Id. at 24.
92. Id.
93. Dialogues in Legal Anthropology, supra note 66, at 22.
Yemen was an area with a weak central state government, the Ottoman Empire had a strong centralizing imperial tradition.94

There were changes to Ottoman legal theory and administrative practice in the 18th and 19th centuries that signaled the emergence of a unified legal status for citizens.95 It had greater state legal plurality than in Yemen, where legal plurality was primarily in the social traditions recognized as outside the government. The Ottoman state also sought to change law to Islamic jurisprudential terms.96

Yet, even in the Ottoman Empire there were certain limits to this legal change to Islamic jurisprudential terms.97 Part of the challenge was to see how the Ottoman institutions reformed themselves from the inside, not under immediate colonial dictate. For example, one major historical problem was the transformation that marked Ottoman agrarian property relations in the 19th century. In the Ottoman Empire, the recasting of property law was linked intimately to changes in administrative government; for instance, the techniques of registration and the separation of “person” and “thing” by separating the objects of property from their tax potential.98 The 19th century Ottoman reform law changed individual property rights by gradually redefining the long-established legal language that governed different types of property.99

In Governing Property,100 Mundy and Saumarez Smith describe the legal change in this polity regarding the legal framing of property rights in Syrian agricultural land as rupture.

Fiqh, or Islamic jurisprudence, has almost 1000 years of history; and, over this span of time, the Islamic tradition underwent fundamental change.101 For example, there were important and interrelated shifts under the Mamluks of the 13th and 14th centuries; the doctrine of state ownership of land and the

94. Id.
95. Similarly, in Western Europe, modernity signaled the emergence of a unified legal status for citizens.
96. Dialogues in Legal Anthropology, supra note 66, at 116.
97. Id.
98. MARTHA MUNDY & RICHARD SAUMAREZ SMITH, GOVERNING PROPERTY, MAKING THE MODERN STATE: LAW, ADMINISTRATION AND PRODUCTION IN OTTOMAN SYRIA 2 (2007) (noting that anthropological analyses consider property a social relation between persons and both material and immaterial things) [hereinafter GOVERNING PROPERTY].
100. Id. at 94.
101. Id. at 150–51 (explaining that Fiqh was a jurists’ law; it remained part of an Islamic tradition in which ethical arguments of fundamental principles competed with jurists’ justifications of the necessity of legal change).
theoretical legitimizing of the resulting hierarchically disposed rights to the taxes and the land's potential.

Lawyers describe the historical legal change in property relations as having not required doctrinal rupture because it was legitimated by the earlier owners' gradual dying out and their land escheating to the state treasury. However, legitimizing the emerging hierarchically disposed rights over taxes and the land's potential proved more problematic and significant. This legitimation involved: 1) adapting contractual categories such as lease and rent; 2) analogizing the changes with other models of split rights over taxes and land potential, such as use-right to a slave; and, 3) arguing for the changes on the basis of social interest, necessity, and reason of state.

For example, historically, Hanafite jurisprudence had distinguished between ownership of land by Muslims and non-Muslims. Like Muslims, non-Muslims were recognized as the proprietors of land, and they acknowledged Muslim sovereignty through payment of taxes. New forms of taxation reflected Muslim sovereignty, but property was not in itself seen as created thereby, it merely was recognized legally. As such, the lawyers' accounts of the Hanafite tradition's legal history of property rights in land entailed no fundamental rupture in property itself. From the 14th century, fundamentally different ideas of property rights in land emerged, where the state eventually replaced the individual as the owner of agricultural land.

However, anthropologists view this legal change differently. The doctrine of escheat was ancient, but its extension to all the lands of the Mamluks was a radical departure from the interpretation of the doctrine in earlier centuries. "The earlier doctrine was not formally rejected nor was it forgotten; rather, history—in the form of the gradual death without heirs of tax-paying owners—had simply rendered it obsolete." It is necessary to analyze legal concepts from inside a legal tradition evolving over time. As such, historical depth is necessary to examine the legal changes of the 19th century and to understand how the Hanafite legal tradition responded to change.

Anthropologist Baber Johansen classifies the legal change regarding the interpretation of the doctrine of escheat in the Hanafite legal tradition among a

103. See generally, Mundy, supra note 99; see also Governing Property, supra note 98.
105. Id. at 58.
106. Governing Property, supra note 98, at 12.
107. Id.
series of Hanafite doctrinal ruptures regarding agricultural contracts.\textsuperscript{108} For example, Johansen documents how from the 8th century the potential use-value of land in a lease contract and the exchange of the use of land for a share of the cultivated produce, instead of a clearly defined quantity, were doctrinal changes in the Hanafite tradition that reflected the peasants’ complete loss of property rights by the 15th century. Johansen’s account shows that change in a basic theory of property rights in land fundamentally changed individual property rights to land;\textsuperscript{109} so much so that under the 15th century Hanafite legal tradition, ownership of all agricultural land was vested in the treasury.

However, lawyers view this legal change as a categorical redefinition. That the legal change to the property laws in the Ottoman 19th century was more gradual than in earlier centuries; thus, reflecting the slow reworking of legal vocabularies.\textsuperscript{110} For example, Dina Khoury observed that as early as 1840 there were gradual changes to the land tenure system.\textsuperscript{111} The first and most important change concerned the succession to miri land, land to which rights are based on cultivation. The old law excluded female children from rights of inheritance, whereas now they partake in the right of inheritance of land because the new law granted daughters’ rights to sons and, in the absence of a son, a daughter could receive all the estate.\textsuperscript{112} How was this legal change legitimated?

Although women do not cultivate the miri land, they do form an agricultural family and, thusly, contribute to the cultivation of the land to which they should succeed.\textsuperscript{113} The elaboration of rights to miri land is evidence of “the justice, concern and compassion of the sultan and the splendid effect of his imperial presence working for an age of equity.”\textsuperscript{114}

As another example of change in the Ottoman 19th century, the Land Code and the tapu laws of the 1850s and 1860s introduced modifications within the existing vocabulary of the legal regulation of miri property.\textsuperscript{115} The interpretations of which are varied. On the one hand, adopting a highly restricted form of private property asserted central governmental control in the Ottoman state. Yet, on the other hand, the Land Code modifications redefined the legal expression of

\textsuperscript{108} Mundy, supra note 99, at 148 (citing Baber Johnson, The Islamic Law On Land Tax And Rent: The Peasants’ Loss Of Property Rights As Interpreted In The Hanafite Legal Literature Of The Mamluk And Ottoman Periods (1988)).
\textsuperscript{109} Mundy, supra note 99, at 147-51.
\textsuperscript{110} Governing Property, supra note 98, at 12.
\textsuperscript{111} Id. (citing Dina Khoury, State and Provincial Society in the Ottoman Empire: Mosul, 1540-1834, at 150 (1997)).
\textsuperscript{112} Id. at 45.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 48.
prior developments regarding private property in land, documenting a history of gradual legal change.\textsuperscript{116}

IX. FROM THE SHARI'A TO THE MAJALLA IN NORTH YEMEN

Max Weber noted that the rationalization of sacred law is substantive in character because there is no interest in separating law and ethics.\textsuperscript{117} Therefore, the theocratic influence produces legal systems that are combinations of legal rules and ethical demands. The result is a specific non-formal type of legal system.\textsuperscript{118} Islamic law is a good example.

It is not only in the modern European state that we observe dialectic between forms of state and domestic rule. True, the forms change: from litigation to discipline, from the state as legal authority (before which members of domestic units fight out their contests) to regulatory agencies that knit the domestic domain to the project of the state’s discipline. But a unity in the diverse forms of rule, from state to family, is not unique to modernity.\textsuperscript{119}

The ideal character of Islamic law predominated over its practical aspect from its very inception in the eighth century of the Common Era. Islamic legal traditions are derived from the same Roman and Semitic legal cultures as Western European legal traditions. In his book \textit{The Calligraphic State}, Brinkley Messick analyzes the Islamic shari’a as a general societal discourse.\textsuperscript{120} The legal analysis of the shari’a is particularly useful in observing the Islamic legal tradition of North Yemen because North Yemen remained, as did pre-conquest Tibet,\textsuperscript{121} one of the few countries in the world that did not fall under European

\begin{itemize}
\item \textsuperscript{116} \textit{Id.} at 234.
\item \textsuperscript{117} 2 \textit{Weber, Economy and Society: An Outline of Interpretive Sociology} 810-11 (Guenther Roth & Claus Wittich eds., 1978).
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Martha Mundt, Domestic Government: Kinship, Community, and Polity in Northern Yemen} 5 (1995).
\item \textsuperscript{120} \textit{See generally} Brinkley Messick, \textit{The Calligraphic State: Textual Domination and History in a Muslim Society} (1993).
\item \textsuperscript{121} \textit{See generally Rebecca Redwood French, The Golden Yoke: The Legal Cosmology of Buddhist Tibet} (1995). There is a commonality in colonial history of North Yemen and in Tibet; perhaps the differing interpretations of legal change can be attributed to each discipline’s handling of communication. Anthropology, as the study of humanity, is a first-level or primary-level communicative system; it looks to understand a deeper communality of human cognition and communicative mode, whereas in secondary-level communicative systems like law, differing technologies, such as scriptural forms, are indications of one culture from the next. For example, the Tibetan “legal system” corresponds to the Buddhist society’s scriptural traditions. Thus, Tibetan “law” must be read against the background of the wider scriptural tradition. In \textit{The Golden Yolk}, Professor French explores how the Tibetan legal system is a form of political society intimately bound up with particular forms of scriptural tradition; thus in pre-conquest Tibet, law must be read against the background of the wider scriptural tradition. \textit{Id.} at 59.
\end{itemize}
colonial rule; North Yemen was a part of the Islamic world where local governance remained strong and where the great Islamic empires of the early modern period did not really rule.\textsuperscript{122}

The term shari'a refers to the body of Islamic law. In the 19th century, the shari'a was contained in a new type of authoritative textual form, the legislated code. This shift to a written code of Islamic law is an example of significant legal change that even changed the legal personalities within the Yemeni legal tradition. For instance, the idea that this new digest of laws would be accessible to anyone was quite revolutionary, and it directly threatened the exclusive roles of the shari'a jurists.\textsuperscript{123} Prior to this change in form, the shari'a had been a jurist's law, which had been developed and had retained its vitality through exercises of interpretive ijtihad, through commentary and opinion giving.\textsuperscript{124}

Western law models were used in various ways with newly formalized shari'a materials.\textsuperscript{125} Western law models were used during this period of legal change because the shari'a was seen as immutable; and, as such, largely irrelevant, because law that did not adapt to changing social circumstances must be increasingly out of touch.\textsuperscript{126} This was in contrast to Western law, which was seen as, "re[spOND[ING] . . . to the ever changing patterns of social and economic life."\textsuperscript{127} It was with the Majalla, the name given to the product of codifying the shari'a, this reworking of the shari'a began.\textsuperscript{128}

Where Muslim populations were under direct Western rule, local versions of the shari'a changed in several characteristic directions. For example, in Algeria\textsuperscript{129} and Tunisia, colonial French jurists fused elements of the shari'a with aspects of the Continental legal tradition; while in India, the law that appeared was a combination of the shari'a and English law. Further, in an extreme

This entailed: 1) the transmission of ancient texts of religious learning (the starting point of which was viewed as the writing down of the Buddha's words in the form of the 258 rules for monks in the Vinaya); 2) the recitation of this ancient text (a text in a dead language, something inconceivable without writing) where it is embodied and issued in oral form by literate specialists, who turn the divine signs into sound and hence mediate with the non-literate; 3) the elaboration and articulation of this script tradition alongside iconic representations of centrality and cosmic-moral order; and, 4) an intellectual tradition that stressed memorization, training of the hand and aesthetic representation of script and disposition of the particular, the development of logic of the case.

\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} MESSICK, supra note 120, at 56-57.
\textsuperscript{126} Id. at 58 (citing HERBERT J. LIEBESNY, THE LAW OF THE NEAR AND MIDDLE EAST 93 (1975)).
\textsuperscript{127} Id. at 59.
\textsuperscript{128} Id. at 58 (citing J.N.D. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD 81 (1959)).
\textsuperscript{129} Id. at 62 (noting that Algeria recognized that milk, the shari'a's category of individually help property, was extremely important in the local land regime and very similar to the Western notion of private property).
resolution to adopting a rule of law, Turkey, in 1926 fully accepted assimilation with Western law models by rejecting the shari’a and replacing it with the Swiss Civil Code.130 Perhaps the shari’a was viewed as backwards as a religious-based code embodied in the Majalla, and the modernizing framers of the Turkish Civil Code wished to show Turkey as having emerged from its former, primitive state to a modern form of civilization. However, this radical example of a period of legal change begs the question: is a true change in the rule of law possible without a rupture from its former embodiment?

Another type of change, especially in short-term areas or areas under partial colonial rule was the relation of the shari’a to local custom. From the point of view of the colonizers, custom had to be either standardized and incorporated or abolished in favor of a unified legal system.131 Although the shari’a was considered a “disorderly” relative to Western law, when compared with custom it appeared orderly.132 Consequently, the colonizers and local elites, in seeking to suppress local custom, extended the application of the shari’a.133

In Yemen, in the absence of colonial rule, imams and town-based scholars long felt it was necessary to spread the shari’a to remote “tribal” districts where ignorance of Islam and pagan customs were thought to prevail.134 Yet, in Yemen, it has appeared possible, as the Preamble to the Yemeni Constitution says, to “preserve . . . character, customs, and heritage” while adapting to the standards of the community of “interlocked” nations.135 In fact, in Yemen, where there was no colonial rupture with the past because of the absence of prior colonial rule, legal change involved critiques of the old regime and systematic installations of new institutions made possible by revolution.136

In 1975, a commission of shari’a jurists produced two types of legislation, one of which is explicitly shari’a based.137 Also, the commission was associated with the Civil Code,138 which actually has the double title of the “Civil Code” and the “Shari’a Transactions”, involving both the Western law model of civil legislation and the fiqh model of the mu’amalat, which is explicitly shari’a derived legislation.139 In fact, the first article refers to the law as “taken from...Islamic shari’a principles”.140 Messick notes, “whereas shari’a

130. MESSICK, supra note 120, at 58-65.
131. Id. at 65.
132. Id.
133. Id.
134. Id.
135. Id. at 71.
136. MESSICK, supra note 137, at 72.
137. Id. at 68.
138. Id. at 69.
139. Id.
140. Id.
jurisprudence once drew on ‘sources,’ it now has become the source drawn upon.”141

Further, in contrast to rejections of religious law as immutable, reflected by the Turkish choice to adopt the Swiss Code, the Yemeni Constitution states, “Islam, with its instructions, magnanimity, and breadth, is synonymous with development, marches with the times, and does not stand as an obstacle in the path of progress in life.”142

Messick gives a unique account of legal transformation in Yemen, which is not the usual legal anthropological analysis.143 The standard anthropological and historical look at the rupture that led to change in Yemeni society usually begins with Yemeni students in the mid-1930s, who studied at the Iraqi military academy in Baghdad, and continues with students trained in the 1940s in Yemen by Iraqi military missions and then trained in Yemen and Egypt by Egyptian officers after 1952.144 Having accepted the revolutionary ideas of their foreign trainers, these former cadets participated in several attempted coups and eventually launched the Revolution of 1962.145 By contrast, Messick offers a different analysis; he emphasizes shifts in organization and techniques. He states that, “where the sword served to threaten or coerce, the authority of the pen concerned the conveyance of ruling ideas.”146

Messick characterizes the shari’a as a “general societal discourse” rather than as “Islamic law”.147 This formulation places the emphasis of analysis on a historical transition to the codified and legislated form of law. The move from old manuals to legislation, from open to closed shari’a texts, represents both an instance of discursive transformation and a foundation for the legal changes that have occurred in other institutions. Messick shows that alteration in the form of

141. Id. at 69-70 (explaining that in its new status as a source, the drafters ideally treated shari’a jurisprudence as a “whole corpus” to quell divisive concerns).
142. MESSICK, supra note 120, at 71 (citing Yemen Arab Republic, Permanent Constitution of the Yemen Arab Republic, 25 MIDDLE EAST JOURNAL 389, 389-401 (1971)).
143. Id. at 54-71 (discussing many local changes that led to new notions concerning the concept of “law,” which is beyond the scope of this essay regarding the concept of “change”). Specifically, Messick discusses educational reform, new methods of instruction, changes in court proceedings, and legal document registration. Id. Additionally, Messick notes that dichotomies, such as opposed epistemes a la Michel Foucault, have heuristic importance of succinctly summarizing the scope of change. All of these changes, according to Messick, were expressions of a fundamental reordering Yemeni society that was not the result of rupture.
144. Id. at 107.
145. Id. at 107 (citing MANFRED W. WENNER, MODERN YEMEN, 1918-1966 58, 94 (1967); ROBERT W. STOCKY, YEMEN 210-11 (1978); J.E. PETERSON, YEMEN: THE SEARCH FOR A MODERN STATE 86-87 (1982)).
146. MESSICK, supra note 120, at 107-08, 251.
147. Id. at 253.
the shari’a has changed the nature not only of legal interpretation, but also of administration of law.  

The legal transformation was part of a larger historical event—a gradual incorporation of North Yemen into the world system. However, in a world influenced by the colonial West, North Yemen represents a situation at one end of the spectrum of possibility, where legal change occurred without rupture at a pace marked by an absence of imperial intervention, but which is traditionally written as revolutionary by anthropologists.

X. Conclusion

In summary, history has shown many periods of legal change dramatically transforming that which is law in society. And, although anthropology and law might have a wide area of interdisciplinarity, these two disciplines’ treatments of change are still quite different. The discipline of anthropology considers change in terms of rupture, whereas law must treat change as categorical redefinition. Whether examining significant, historical changes to the rule of law in North Yemen, the Ottoman 19th century, Turkey in 1926 and Syria, or any other society, academic lawyers will read legal concepts from inside a legal tradition evolving over time, and anthropologists will continue to analyze the social relations between persons, and view such change as a rupture.

148. Id.
149. Id. at 254.