Berber Customs as Heritage : The Discovery and Rediscovery of Customary Law in Morocco

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Berber Customs as Heritage: The Discovery and Rediscovery of Customary Law in Morocco

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Summary: Customary law has had quite an eventful life in Morocco since the beginning of the twentieth century. The French and Spanish protectorate authorities and related scholars created an opposition between two normative orders, customary and Islamic, which since at least the nineteenth century had been functioning in close interaction in many areas. Scholars and administrators formalised the opposition in conceptual and legal ways by transforming customs into *customary law*, imposing a continental European model of positive law on existing normative practices. Indignation over the division of the population into those ruled by Islamic law versus Berber tribesmen falling under customary law fueled the nascent nationalism among young urban men with Islamic reformist leanings. After independence, these nationalists created a new narrative on Moroccan culture that denied the existence of Berber law and language. At the beginning of the twenty-first century, the discourse started to change again, with a rediscovery of Berber culture and language. Urban intellectuals engaged in identity politics carry the new narrative, which recycles colonial materials that were taboo for four decades. Elites and subalterns in rural areas also make use of these ideas to support their claims to local rights to land and natural resources. Parties interested, both colonial and post-colonial, present Berber customary law as an aspect of authentic popular culture, but at closer inspection it turns out to be in its present form a product of elite engagement and of power struggles at national and local levels.

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Keyword: Berbers, Customary Law, Morocco, Heritage

1. Looking for Problems

"Customary law is a colonial invention, aimed at dividing the unity of the Moroccan nation." This was the reply that I got to my naive questions as a young doctoral student studying Islamic law and family relations at the end of the 1980s. People voiced a common sense view that demonstrated the success of three decades of nationalist teachings, which had also made Sufism and the brotherhoods into rather suspect phenomena. I learned to be critical of my orientalist biases and to be careful in my questions. My surprise was all the bigger when about fifteen years later, at the eve of the new millennium, I saw subtle changes in popular views on these issues. Intellectuals started to discover the mystical dimensions of Moroccan culture, becoming members of congregations such as the Boudchichiyya and publishing small tracts about local saint worship. In kiosks on the sidewalks, small booklets and more substantive volumes started to appear on the customary law of the Berbers, or *Imazighen* (singular *Amazigh*, "free man") as some started to call themselves. Younger men with university degrees pleaded for recognition of the rights and cultural identity of the "original" inhabitants of the country. Studies of colonial civil servants became important sources in their struggle.

In this article I try to understand the vicissitudes of the notion of "customary law" in Morocco, by reconstructing its "discovery" in the French and Spanish Protectorate (1912−1956), its repression during the first decades of regained independence, and its revival from the eve of this century[1]. It is a sequel to an earlier article on the invention of Islamic law that Baudouin Dupret and I published in 2011 and 2015. As so many terms, customary law is a multi-layered notion that means different things to different users, at different places and times. Philologists use it as a handy label to present transcriptions of conversations they had with "informants", or of texts directly produced by these informants in the vernacular, in order to record their language. Jurists identify certain normative practices or statements as customs in order to establish the local "law"[2]. By doing so they strive to contribute to the maintenance of social order and the rendering of justice. Their understanding may be based on the views of local elites, represented on councils or as advisers to local tribunals, who present their view as

authoritative, and therefore customary. For present day academically trained intellectuals customs are an expression of their collective identity, which back their claims to political recognition and cultural rights. Others might invoke customs to reform current understandings of Islamic law. Local actors, temporarily united in associations, refer to ancestral customs to support their claims to access natural resources and land.

In the framework of this small contribution I cannot give a full overview of all these meanings and understandings. I focus on the changes in people's views, related to changes in the political, economic, social and cultural contexts. Analysing "customary law" as a social construct and a tool for debate and administration allows us to go beyond its stereotypical presentation as a central element in immemorial "authentic" popular culture, a heritage bequeathed by the ancestors who were the original inhabitants of the land. This approach stresses the agency of the actors who think with this category, who make use of it in a specific setting. It is remarkable to see that ideas that were put into circulation by colonial administrators and scholars and that were condemned by nationalist thinkers get a new life in a post-colonial setting through the actions of activists at a national and local level. It demonstrates again that "popular culture" is often shaped by literate elite actors of all sorts, speaking, or more often writing, on behalf of the "people".

The present article offers a first sketch of my argument. I am looking for questions and problems, rather than giving detailed answers. I have limited my references to sources and secondary literature. I intend to develop my ideas more fully in a future publication. I will first present the colonial "discovery" or invention of customary law, then sketch its occultation after independence and replacement by a story of national unity, in order to end with its contemporary rediscovery as a heritage of the Imazighen on both the national and local level, serving different purposes for different actors.

2. Discovery, Invention, Recognition: Legal Pluralism and Its Discontents

Law was at the centre of the colonial enterprise, colonisers considered it to be a major tool to create social order and justice. These were both practical and ideological questions. Colonialism aimed at generating access to property, primarily land, for European settlers. The imposition of European rule was presented as an antidote to the anarchy and arbitrariness of the existing order. Colonialism was justified by its fairness, rule of law, and modernisation of society and economy. These elements were also present in the treaty that France concluded with the sultan of Morocco in Fez on 30 March 1912. The French obliged themselves to assist in modernisation and reform, but also to respect the religious

institutions in the framework of a protectorate. Colonial administrators and metropolitan policy makers saw themselves confronted again, as in so many previous situations of colonisation, with questions such as: what is the law? How to maintain order? How to render justice?

To these questions, several answers were possible, such as transplanting metropolitan law, or questioning local scholars and rulers and imposing their views (Bras ed. 2015; Buskens 2014). The French authorities had learned from previous experiences in Algeria, Tunisia and French West Africa, as well as from the governance of Muslims by other colonial powers, such as the British in India and the Dutch in Indonesia. Marshal Lyautey, the highest representative of the French Republic, wanted to avoid the mistakes made in Algeria and was committed to respect local culture. This resulted in an early recognition of the customary law of the Berbers in a *dahir*, a decree of the Sultan proposed by the French, on 11 September 1914, two years after the imposition of French rule. The *dahir berbère* of 16 May 1930 confirmed and developped the 1914 decree. The formal incorporation of Berber customs as law within the framework of the Protectorate resulted in a situation of official legal pluralism (Buskens 2010). The Moroccan legal system was divided in a "modern" part in which French law applied and a "Chérifien" system, consisting of Islamic law, Sultanic decrees, customary and Jewish law, embedded in the political framework of the protectorate regime. Whereas the modern part worked with law codes, according to the French model, there was no codification of the Cherifian rules.

This specific answer to the quest for justice aimed at providing internal and external legitimacy for the protectorate rule. The authorities intended to demonstrate their respect for local culture and institutions, as agreed upon in the Treaty of Fez. They considered to have made "a promise to keep." They also targeted an international audience to justify the French administration of Morocco by putting order in the legal, political and economic institutions. The recognition of customs as law was part of a wider movement in colonial administration and in academic study, which sought to combine profitable rule with ethical ideals. The Dutch approach in Indonesia, where scholars such as Christiaan Snouck Hurgronje and Cornelis van Vollenhoven were deciding in Leiden how to deal with customs for Indonesia, served as an example for France in Madagascar and the Maghrib. Georges-Henri Bousquet taught as a professor of Islamic and customary law at the Law Faculty of Algiers to follow the Dutch approach (Bousquet 1939). Snouck Hurgronje was in his turn an honorary adviser to the French government in Morocco.

The aim of the system was order and control. Lyautey opted for indirect rule via rural elites. He hoped to calm down the fierce resistance of the tribes, who nevertheless continued to fight against the French in the Atlas Mountains well into

the 1930s (Burke 2014). He was also looking for allies to fight the spectre of pan-Islamic anti-colonialism that haunted all European powers at least since end of the nineteenth century. While he cultivated his relations with urban notables, merchants, leaders of Sufi orders and scholars, the rural "supercaids" such as al-Glaoui became an important power base. He tried to commit the tribesmen to his project by promising to respect their customs and institutions. Lyautey based his policy on a notion of "authentic Moroccan culture", which he intended to revive from its present decay. He employed scholars to reconstruct this traditional culture, creating in Rabat the Institut des Hautes Etudes Marocaines, the precursor of the first modern national university, Université Mohammed. This pertained to many domains, such as the arts and crafts, but also law.

The tribes were the social basis of the customary law policy, with the *jma'a*, "council of elders", as an administrative body, complemented by the customary court as a judicial institution. French officials oversaw the workings of these bodies. The colonial administrators and scholars, of which Robert Montagne is a prime example, understood the tribe as a key to the imposition of order in these acephalous societies, which tended to anarchy because of their strong egalitarianism. The colonial project entailed the integration of the tribes in the new polity of a centralised colonial state by means of force, called "pacification". Conceptually, oppositions played an important role, such as between *makhzan*, the sultanic state apparatus, and *siba*, dissidence or disorder, between urban and rural, between Arab and Berber, and between *shari'a* and *'urf* (*l'urf*, *izerf* or *azerf* in various Berber languages), between Islamic versus customary law. The new colonial state was to encompass all these differences and oppositions, by giving Berbers a different treatment, also in legal terms[3)]. Administrators and researchers captured these differences in maps, such as the *Carte des tribus*, and in lists, such as the *Liste des tribus* or *Organisation territorial du Maroc à la date du 15 mars 1940*, which indicated the distribution of Arabs and Berbers and the areas with "Tribus de coutume berbère" falling under customary courts.

The Spanish protectorate authorities were confronted from 1921 with massive resistance of Rifians, who defeated the Spanish troops at several occasions. Only French help and poisonous gas made in Germany (or rather produced under licence near Madrid) could counter total defeat. Muhammad ben 'Abd al-Karim al-Khattabi, a Muslim scholar, judge, journalist and translator led his countrymen to victory under the banner of a Rif Ripublik, which had Islamic reform as a guiding ideology. He realised how devastating feuding and tribal warfare were and try to replace these with Islamic notions of order and justice. Consequently, the Spanish administration encouraged tribalism and vendetta in a classic attempt to divide and rule. The Spanish officer Emilio Blanco Izaga was the main scholar on Rifian culture and customs, compiling an important corpus of Rifian customary law

published in 1939 (Hart 1995).

The practice of colonial legal administration involved control and registration of decisions and other forms of information. One of the material traces are the many *alwah*, documents on word from Southern Morocco, on which stamps in French were put in order to confirm their incorporation in the new legal system and their acceptance as legal proof[4]. Writing in French according to the standards of the modern nation state and its codified law was an important aspect of the integration of customs into the new legal framework of protectorate law. Through these acts of inscribing, recording and archiving French administrators and scholars transformed observed normative practices into customary law. Their writings constituted a canon of customary law for practical usage in the administration of the tribes considered to be "of Berber custom". These texts were also a first step in the production of academic knowledge in the field of law, ethnology and linguistics. The model for writing about and dealing with customs as customary law was the three volume canonical work on Kabylia by Hanoteau and Letourneux (1872–1873) (Scheele 2008). Although the Maghrib has a long tradition of written rules ordering settled life, publicly accessible or not, the French colonial approach transformed the understanding by applying categories taken from Napoleonic law and by encouraging people to write down rules at their request, thereby fixating rules from a particular point of view (e.g., Marty 1928). This ethnocentric approach was already criticised during the colonial period, most vocally by Bousquet (1950; 1952), but remained dominant[5].

An early example of a study in this tradition are the two companion articles published by Montagne and Ben Daoud in the journal *Hespéris* of the Institut des Hautes-Etudes Marocaines in 1924 (Montagne 1924; Ben Daoud 1924; cf. Buazzit 2018). Montagne offers a monograph on the tribe of the Aït Massat to the South of Agadir, in which he discusses the interrelationship between Islamic and customary law, *'urf*. He stresses latent tensions between the two domains and the changes herein caused by the incorporation of the tribe in the sultanic state in the course of the nineteenth century. Gradually Islamic law gains ground, to the extent that around 1900 a local scholar proposes a general revision of the ʿurf to do away with all its contradictions with Islamic law. Montagne carefully indicates the existence of different versions of the compilation of ʿurf in a text called *lawh*. The military interpreter Ben Daoud, who was working on a general study of the written law of the tribes of the Sus valley, offers a French translation of a particular collection of rules in the possession of a local government official. In his first footnote he indicates that the decisions had been written down without any proper order, and that he has put them in a chronological sequence. These two studies together present one of the first stages of writings in the transformation of customs into customary law: a monographic study on social structure and institutions,

complemented by an orderly translation of local rules. We find similar materials in legal journals, small notes reporting particular local institutions, cases or court decisions, which their authors considered worth sharing with their fellow administrators and colonial scholars. Many soldiers and civil servants wrote overviews of the customary law of "their" area in the form of unpublished reports, which circulated as duplicates in order to inform their colleagues and successors to their posts.

On the basis of these "raw" materials, which were in fact carefully edited and put into a French style legal conceptual framework, researchers compiled comprehensive overviews of customary law of specific tribal groups. Robert Aspinion was a military officer who became a lecturer for colonial civil servants and at the Institut des Hautes-Etudes Marocaines. His overview of the customary law of the Zayan tribes went through two editions, in 1937 and 1946. In 1953 he also published a highly useful manual for the study of Tashelhiyt, the biggest Berber language of Morocco, prefaced by the *résident général de France*, the highest official in Morocco representing France. Aspinion opens his book by stressing the differences between Berber customary law and Roman and French civil law. Instead of imposing the deforming order of French law, he has followed the questionnaire designed by the linguist and jurist Loubignac. A few lines down he praises the work of Hanoteau and Letourneux, from which he has even copied certain rules since they were so similar to those of the Zayan. He aims to provide practical help to government commissioners attached to the customary law courts, and useful information for future scholarly syntheses.

The linguist and ethnographer Georges Marcy worked from 1938 until his death in 1946, in Algiers and Paris, at the most important compilation of the customary law of a Moroccan tribe in his *Le droit coutumier Zemmoûr* (1949). The book is grounded in a deep understanding of the language and ethnography of the Zemmour, a study of legal decisions of the courts, and of available literature. Its analysis entirely complies with the legal categories of Roman and French law, explaining local institutions and rules in a way that make them easy to understand for anybody with some knowledge of the metropolitan law (Bousquet 1952). The authors of general overviews of Berber customary law such as Georges Surdon (1938), took this assimilation to Roman-French legal categories to a more abstract level, explaining the commonalities of the different local and regional systems. Again, he intended to give both practical instruction to the men in the field, and scholarly information to scholars of comparative law and ethnology. These writings created a clear picture of Berber customs as law that became publicly and uniformly accessible through print culture.

This canonical understanding of Berber customary law was part of the formation of a corpus of Berber popular culture. Scholars such as Montagne,

Aspinion and Marcy stressed the interaction between Islamic and Berber law. In their understanding, Islam was a layer covering earlier Berber culture. The term "pre-Islamic survivals" was in wide-spread use, for example in the title of the famous Moroccan ethnographer Edward Westermarck's synthesising study *Pagan Survivals in Mohammedan Civilisation* (1933), which was also translated into French in 1936. This antiquarian view of Islamic versus Berber culture was intimately linked to the earlier mentioned paradigm of dichotomies. It opposed the Arabic literate culture of the Islamic scholars of the towns to the oral folkways of the Berbers in the countryside as the authentic inhabitants of the country, who were often only superficially Islamised. As heirs of Saint Augustine, they were potentially close to their European allies. Some researchers stressed the genetic proximity between the inhabitants of the Northern and the Southern shores of the Mediterranean, who had all formed part of the same Pax Romana that France was vying to restore (Guerin 2011).

The opposition between written and oral implied an academic division of labour between philology, history and orientalism versus ethnography and ethnology. As so often, these oppositions proved to be misleading and unproductive, as Jacques Berque demonstrated masterly in his work, fusing all these disciplines. It was already clear from the beginning, for example in the work of Montagne and Ben Daoud, that local literati wrote in Arabic, and sometimes in Tashelhiyt, about their customs, mixing these rules with provisions taken from the local understandings of the shari`a. The worlds of Islam and customs, of Arabs and Berbers, of city and countryside, of writing and oral transmission were intimately linked and mixed up. In the domains of law, poetry, music, magic, theology and many more. Only a man of both worlds like Berque, deeply rooted in the countryside and knowing his ways around the city of Fez, fluent in Arabic and in Tashelhiyt, familiar with manuscripts, lithographic editions and with an ear for the colloquials, blessed a politically as well as scholarly sensitivity, in short a philologist and a fieldworker, was well equipped enough to go beyond the colonial canon with important studies on written culture and customary law. In fact, the very first sentence of his famous monograph on the High Atlas already indicates how far he was ahead of the colonial times of which he was part, echoing the notion of *Writing Culture*: "I have written this book in collaboration of the tribes of the Western High Atlas, above all with the Seksawa." (Berque 1955: v)[6].

Reading the early texts on Islamic and customary law gives us some clues about how these scholars understood their work: there are tinges of discovery and excitement, entering a hereto unknown world. The linguist and jurist Louis Milliot came at the request of Lyautey from the French colony Algeria to Morocco to construct a proper understanding of Islamic law as practiced in Morocco, to feed a proper colonial administration of justice. He "discovered" the existence of the

phenomenon of *'amal*, the practice of the judges which allowed for the introduction of customary practices into Islamic jurisprudence at a practical and a theoretical level, which he considered characteristic for the Maghribi understanding of shari`a. This discovery came in handy to arrange transfers of real estate made into religious foundations (*hubus* or *awqaf*) at the advantage of the colonisers, which according to classical Islamic jurisprudence would have been impossible to bring about (Milliot 1918). His work became the foundation of the reform of the Islamic judiciary and the creation of an Islamic appeal court, of which he edited and annotated the most important decisions in three volumes (Milliot 1920−1924). Milliot would become the supreme authority on Islamic and customary law, first in Algiers and later in Paris, publishing the main introduction to Islamic law in France (1953/2001) and finally in 1958 becoming the president of the prestigious Académie internationale de droit comparé in The Hague (Blévis 2012). This particular case summarises many important elements of the transformation that is the subject of our study. The exploration of a foreign culture by linguistic and legal means in order to do justice, create order and to serve scholarship by creating texts in a new format and language, reproduced with the technologies of print culture. Already existing texts, oral communications, and observed practices were "translated" into the language of the colonisers using their concepts of normativity, grounded in the Napoleonic codifications.

The colonial scholars transformed through their writing local norms, embedded in lived practices and transmitted in oral and written vernacular texts, often linked to specific groups in power and the product of rather recent historical processes as the expansion of the Makhzan, into law and documents of authentic popular culture. Some of them explicitly expressed their being conscious of following European models of scripturalism and positive law, as taught by the disciplines of philology and jurisprudence, and imposed by the colonising metropolitan state. In creating popular culture, the scholars were formatting their materials according to the standards of European Romanticism. In 1814 the German scholar Von Savigny had formulated this model forcefully in the legal domain, presenting the law as an expression of the *Volksgeist*, the spirit of the people, which implied that every nation needed to have its own codification. Similar ideas linking the nation to a particular culture led to the collection of folktales and the compilation of dictionaries of national languages. An example of this approach is the work of the Grimm brothers, whose collecting and publishing was more creative than they might have been willing to admit themselves. A century later academics in Morocco were heirs to this approach, with philologists, ethnographers and jurisprudence joining forces with the colonial administration to do justice to both Arabs and Berbers, reconstructing for each of them their proper culture. Many of them showed a preference for the local "noble savages", the superficially Islamised

Berbers being more trustworthy than the decadent Arab townsmen. For this view the historians even found backing in the theory of civilisation of the great Ibn Khaldun.

As mentioned earlier, the recognition and promotion of authentic local culture was also aimed at larger international audiences. The study of customary law was part of the international science of colonial administration and of orientalism. Scholars and policy makers met at congresses and exchanged views in academic journals. They mixed their curiosity for the origins and evolution of culture and the functioning of society, with a desire to serve their country, and with lofty ethical ideals, sometimes phrased as taking up "the white man's burden." The notion of discovery also structured the heroic tale that Cornelis van Vollenhoven, the designer of the Dutch colonial legal policy, wrote in 1928 about the recognition of customs as law thanks to the hard work of scholars and practical men in his *De ontdekking van het adatrecht*, "The Discovery of Adatlaw", published in Paris in 1933 *La découverte du droit indonésien*, with a preface by the famous French sociologist and legal scholar on North-Africa René Maunier.

To understand what these men were involved in, it would have been more helpful to use the now fashionable concept of "invention" instead[7]. However, acknowledging the act of invention would not have worked out properly at that time. Recognition and emancipation of the authentic culture could only be presented as a way of doing justice, not as an invention according to European standards being imposed. Even today we can witness resistance among interested parties to the acceptance of the analytical distinction between European positive law and Islamic jurisprudence, or between customs and law. During the Protectorate, administrators and scholars positioned themselves as speaking for locals, at best giving them a voice. It was part of the civilising mission to instruct them in these new ways of speaking, writing and administering, notably in the Collège berbère in Azrou. The Berbers were by no means passive victims. They were playing an active role as informants and assistants, or as members of the local councils dispensing justice according to the recognised norms transformed into customary law. Access to administration and education became important resources for newly emerging elites, eager to seize the new opportunities that colonialism also offered to some. They were lucid about the important political and economic interests at stake. Later on in section 4 underneath, we will see similar processes at work in the contemporary post-colonial configuration, with certain actors again embracing the inventions as authentic heritage.

These political, legal and scholarly efforts had two contradictory consequences. On an official level, it resulted in a situation of official legal pluralism, with different legal orders applying to different groups of people. It set apart a modern domain form a traditional one. Within the traditional domain the major opposition

was between shari‘a and ‘urf, opposing Arabs versus Berbers. This opposition fitted with a divide and rule policy familiar to conquering powers since at least the time of Julius Caesar. In scholarly terms it was a false dichotomy, as the scholars themselves proved in their careful ethnographies and histories. The colonial opposition between Islamic and customary law, and between Arabs and Berbers, was a radical break with the pragmatic accommodation between customary practices and Islamic jurisprudence of the scholars that had been working out so well until the coming of the modern centralised state and the accompanying “pacification” of the areas of dissidence.

The sanctification of the new divide in the Dahir berbère of 1930 marked the public start of the unintended second consequence, leading eventually to the demise of the Protectorate (Lafuente 1999). The confirmation of the division of Morocco in two separate zones in which either Islamic or customary law would apply provoked fierce protests, especially among young urban educated men. Instead of emancipation they saw separation and division. They contested the splitting up of the *umma*, the community of believers, as anti-Islamic, taking away even the least legitimacy from the Protectorate rule. The young sultan Muhammad ben Yusuf got the benefit of the doubt from some, but he was in trouble as well. The protests spread all over the Muslim world, with some echoes even arriving in Indonesia.

The young men came up with a powerful counter narrative about Moroccan culture and identity, stressing the unity of the nation founded on Islam and Arabism. Some, such as ‘Allal al-Fasi, were related to Islamic reformist movements in the Middle East, and wanted to strip Islam from all later additions and misguided interpretations going against social justice. For them the early attempts at Islamic reform, replacing local customs with proper shari‘a, as undertaken by Muhammad ben ‘Abd al-Karim al-Khattabi in his struggle against the Spanish in the Rif war, were an example. Others were more interested in political nationalism and social justice, occasionally linked to ideals of Arab unity. Many were connected to intellectuals and activists in other parts of the Muslim world, through travel, exile and the circulation of periodicals. Especially in the Northern Spanish part of the Protectorate they could discuss and publish more freely. These debates and exchanges resulted in a new story of Moroccan identity and unity, which would bring together many opposing currents and individuals in an independence movement. The defeat of the Vichy regime in Morocco by the Allied Forces in 1942 marked the beginning of the rise to power of the independence movement. Berber freedom fighters in the mountains and the Sultan would join the young men and women in the towns in their struggle for a new independent Morocco united by Islam and the Arabic culture and language. Victory would come in 1956.

3. Interlude: The Taboos of Decolonisation and the Occultation of Customary Law

At first sight, decolonisation in 1956 implied a radical rupture with the protectorate rule. Regained independence meant unification of the legal system: the three legal zones, French, Spanish and International (the city of Tangier) were brought under one common legal regime. The official legal pluralism that structured the protectorate system, with its odious distinction (at least for the reformists) between shari`a and 'urf was immediately abolished. All Moroccans would live under the same law. 'Allal al-Fasi, the leader of the Istiqlal party who had returned from exile in Egypt, strived to create a new legislation based on Islamic law, understood according to the reformist ideals of the neo-salafiyya movement. This meant purifying Islamic law form all later additions and customary elements, which hampered the realisation of social justice. The first move towards the Islamisation of the legal system was the codification of Islamic family law from 1956 until 1958, a step the French had never dared to take. The new understandings of the committee of which 'Allal al-Fasi was the reporter, laid down in the *Mudawwanat al-ahwal al-shakhsiyya*, "The Code of Personal Status", were far less daring than the innovations produced at the same time in Tunisia. The family code offered a rather conventional summary of traditional Maliki jurisprudence, with some moral admonishments to men to treat their spouses and children fairly. The new code was nevertheless meant to be the symbol of the new cultural and legal unity of the kingdom, guided by Islam (Buskens 2014).

For 'Allal-al-Fasi the codification of family law was just a first step towards the Islamisation of the entire legal system. It also proved to be the final step. A code of nationality, abolishing the pre-modern distinction between Muslims and *dhimmi*-s, protected Jews and Christians, made all Moroccans into equal citizens. Soon criminal law and the relevant procedures were codified, according to French models, with only minimal references to notions of Islamic public morality. In 1962 Morocco got its first Constitution, which declared the country to be an Islamic state, while following French models of public law. During the 1960s and 1970s further legislation to unify the legal system and the judiciary would follow, making Arabic into the only language in use in the legal process, but taking French law as a model (Buskens 2014). In all these changes one things was clear from the outset: the Moroccan legal system did no longer give any role to customary law, nor to legal pluralism, except for granting the Jewish community their own internal law in family affairs.

The abolition of customary law may be understood as the triumph of certain political factions. In the struggle for independence the young urban youth of reformist and socialist leanings played an important role, next to armed resistance

in rural Berber speaking regions. After independence the young town dwellers of the Istiqlal party managed to seize political power, and started to disagree amongst themselves. Sultan Muhammad ben Yusuf had transformed himself into a symbol of national unity and gained the upper hand, changing his title to King. He was seconded by a cunning and ambitious crown prince, who commanded the royal forces. In 1958–1959 the future king Hassan II ousted a rebellion in the Rif mountains against the domination by the young men from the former French zone in an extremely violent way, soon to be followed by repressions of rebellions in other Berber speaking mountainous areas. The hero of the resistance against colonialism Muhammad ben ‘Abd al-Karim al-Khattabi chose not to return from his exile in Cairo to Morocco, but died in Egypt and was buried there in 1963. Although the rural elites remained an important powerbase for the monarchy, they demanded no recognition of the old customs as law. The taking over of the colonial polity and its transformation into a modern centrally governed nation state with monopolies on the use of violence, the production of legal norms and the levying of taxes apparently offered them enough spoils to remain loyal to the new rulers.

The further perfection of the nation state into a newly independent state gave rise to questions about the story to tell about the nation. Ernest Gellner analysed this issue in a stimulating early essay “The Struggle for Morocco’s Past” (1961). What was the culture, the history of this new old state? Where were its roots, where did its unity come from? How much diversity could this country tolerate? Clearly not as much as its colonial predecessor. The elite developed a folkloristic view of popular culture, aimed at entertainment, but inferior to the official civilisation of Arabic and Islam as resident in the cities. The monarchy would become the dominant element in the national narrative. Legal, linguistic and cultural pluralism were replaced by uniformity: standard Arabic was the only national language and Islam the religion of the state.

In academia, the diversity cherished in “colonial” disciplines like anthropology and linguistics became anathema. The study of Berber languages was hardly tolerated, scholars had to disguise themselves as general linguists working in the departments of French or English studies. Publishing in Berber was not allowed, and the use of colloquial Moroccan Arabic was at best frowned upon, diverting from the ideals of national unity. The ruling Arabophone elite might have some appreciation for the use of civilised French, they denied the right to their fellow citizens to speak their Berber mother tongue. The commercially minded Swasa from the South chose for profit and did their business, the people form the Rif opted out and emigrated to Europe. Only from the 1980s onwards, some local erudites started to publish about their culture in privately printed confidential brochures. A younger generation of students and young lecturers followed them,

claiming their cultural rights in a discrete way, for the time being quietly working and meeting in their departments. Among them were Ahmed Boukous, the future director of Institut Royal de la Culture Amazighe (IRCAM), Fatima Sadiqi, Moha Ennaji, and many others who would become prominent scholar-activists for the Berber cause.

These legal and cultural politics explain the nationalist answer to my awkward questions mentioned in the introduction. For young people educated in the 1970s and 1980s customary law, Sufi orders and Berber languages did not exist and should not exist. They were unmentionable inventions of perfidious colonialists, aimed at dividing a glorious nation, hiding the truth of unity rooted in Arabic and Islam.

In the spring of 1988, I discovered that there was one exception to this occultation, an academic haven where I could go to in order to discuss freely and openly about these questions: the department of rural sociology of the Institut Agronomique et Vétérinaire Hassan II. There I would find as a friend and a teacher Négib Bouderbala, a legal scholar specialised in rural law taking good care of the legacy of his recently deceased friend Paul Pascon (1932−1985), the founder of decolonised sociology in Morocco. This group of researchers had been consistently working at the study of rural Morocco to contribute to the development of agriculture in a newly independent state. Pascon and his colleagues educated a generation of students of agronomy according to demanding standards of empirical sociology, grounded in serious fieldwork and inspired by Marxist theory. Their combination of methodological rigour, an interest in theory, and prolonged and meticulous fieldwork resulted in important ethnographic studies of life in the countryside and its transformations. Their sympathies were with the landless peasants, and the youth longing for a better future. Their loyalty to the new nation, of which Pascon, born in Fez from French parents, acquired citizenship, was clear, but did not oblige them to adhere to the new nationalist vulgate. Instead, they developed the nuanced view of a "composite" society, anchored in a solid attention for the historicity of the subjects under study[8)].

The Tunisian jurist Négib Bouderbala contributed a series of important articles on law, partly together with Pascon, in which he systematically analysed the realities on the ground. Customs, and their relations to Islamic and state norms, were important elements to understand how actors in the countryside regulated access to water, land and pasture grounds. In this arrangement collective property, "administered" in the new state by the Ministry of Interior, played a pivotal role. Bouderbala addressed the empirical reality on the basis of his own and his students' observations. He casted the same "cold" gaze at the realities of normative daily life in the countryside as at the colonial legacy of scholarship and legislation. In their attempt at decolonisation of the social science at the service of the new

nation, guided by a mild Marxist theory, they were not offended by colonial scholarship, but put it to good use. No taboos for them. Recently, Bouderbala's work obtained fresh attention from a new generation of scholars. The sociologist Mohammed Zernine started to publish a series of collected essays, of which the first volume was dedicated to law (Bouderbala 2013). The Princeton based anthropologist Abdellah Hammoudi, a former colleague of Bouderbala and Pascon in Rabat, wrote a preface situating the texts in their time. Hammoudi himself is part of this story through his critical evaluation of the segmentary lineage analysis of Gellner (1977) and his seminal work on water rights in Southern Morocco (1985).

Gradually I learned about the work of other critical intellectuals who were discreetly studying customary practices without being hampered by nationalist ideologies, such as the anthropologist Hassan Rachik. In the wake of Pascon he started to do fundamental research on the countryside, on which he published for example an article on the *jma'a* in *Hespéris-Tamuda* (2001)[9]. The same periodical, the fusion of the two main scholarly journals of the French and Spanish protectorates, published a series of studies and editions by historians of written texts on local customs. As historians, they seemed to be on the safe side, studying customs in the past (Mezzine 1980; Hammam 1986; Stroomer 2005). The apogee was the monograph by Larbi Mezzine on the Tafilalt in the seventeenth and eighteenth century based on a written down version of local customs regulating life in the oasis settlement (1987). The subtitle shows that the author had no nationalist qualms about using this source: "Contribution to the History of Morocco in the XVIIth and XVIIIth Centuries."

On the Northern shore of the Mediterranean, in the Andalusian village of Garrucha, David Montgomery Hart (1927–2001), the grand old man of the Moroccan Berber studies, kept steadily working on his ethnographic and comparative studies of Moroccan and Pakistani tribesmen. This American anthropologist had started his fieldwork in the Rif in the last years of the Protectorate and had also become an authority on the Southern Ait Atta (Hart 1976; 1981; 1984). He generously shared his ideas in numerous letters to established colleagues and beginning students, like me, encouraging everybody to practice the noble craft of ethnography. From the beginning, he had shown a keen interest in segmentary social organisation and in customary law, freely combining his extremely rich field notes with historical sources and Spanish colonial ethnography, notably the work of Emilio Blanco Izaga. For him only his deep love of rural Morocco and its inhabitants counted, and he summarised his view of Moroccan history and culture in the oft-quoted dictum: "Scratch a Moroccan, find a Berber." From the end of the last century his work would become a major source of inspiration for a new generation of Imazighen scholars and activists, first among

them the heir to his archive and library Rachid Raha, who would rediscover their heritage and turn it to new usages[10].

4. Post-Colonial Rediscoveries and Recyclings: Customary Law as Heritage

At the turn of the millennium, I saw in bookstalls on the sidewalks of the capital gradually appearing informal publications on Berber customary law. One of the first brochures that I discovered was *Amawal azerfan. Lexique juridique Français-Amazighe* by Ahmed Adghirni, A. Afulay and Fouad Lahbib, privately published in Rabat in 1996. This small booklet, dedicated to the Kabyle writer, scholar and activist Mouloud Mammeri, offers 1368 terms divided in two parts: a lexicon of customary law translating Berber into French, and a legal lexicon translating from French into Berber. Its introduction is in Berber in Roman print. The small bibliography refers to works by French and Maghribi scholars, notably Surdon's *Institutions et coutumes des Berbères au Maghreb* (1938), Laoust's *Mots et choses berbères* (1920), a study on customary law and institutions by David Hart, Chafik's Arabic-Berber dictionary, and two works on Touareg language and culture. A drawing of a veiled Touareg man and the Tifinagh graph for Imazighen ("the free people") adorn the back-cover. Another volume that I picked up early on was *Les droits coutumiers amazighs. Izerfan imazighen. Tome I* by the Rabat based lawyer Ahmed Arehmouch (2001)[11]. This first volume is in French and Arabic, many normative texts are taken from colonial sources, some are post-independence, such as the text published by Mezzine (1987), a judgment from Tiznit of 1960, and original research by the compiler, again partly based on protectorate sources. This mixture of recycling of colonial materials that had been taboo for decades and new research would prove to be typical of this new trend: a rediscovery of Berber customary law.

These reclamations of Berber customary law caught my eye because of my focus on law and my disappointments in the 1980s. Upon closer inspection, they were just one manifestation of much larger cultural and political changes, in which the Berber identity movement played an important role, next to a renewed interest in Sufism and local shrines, and in the Jewish heritage. The times were clearly changing when the leading intellectual Mohamed Chafik launched a Berber manifesto in March 2000. A year later the anthropologist and activist Rachid Raha began to edit the trilingual journal *Le monde Amazigh / al-'Âlam al-amâzîghî* (http://amadalamazigh.press.ma/fr/), soon to be followed by other periodicals such as al-*Amâzîghiyya* and *Adlis. Revue de politologie et de sciences humaines et sociales* (from 2009).

Yet another year later, in 2002, Muhammad Munib published a polemical

pamphlet attacking the cornerstone of the nationalist ideology, "The Berber Dahir: The Biggest Political Lie in Modern Morocco". Using all kinds of sources, such as a speech of sultan Muhammad ben Youssef, the future King Mohamed V, asking the young men protesting to calm down, the author goes against the idea that the Berbers profited from a preferential treatment by being separated from the Arabs by customary law. He stresses the interrelations between customs and Islamic law that had existed for a long time. His treaty is a charge against the ensuing repression of the Berber language and culture after independence (Munib 2002; El Qadéry 2007; s.a.). The association Tamaynut edited an overview of customary law and a plea for its recognition in 2007. All these publications offer a similar mixture of cultural information, based on first and second hand sources, and activism. All claim official recognition of linguistic and cultural rights. They insist on the fact that the Imazighen, as the activists prefer to call themselves, have been the inhabitants of Northwest Africa for millennia, and that they should hence be at the heart of Moroccan culture.

The Amazigh movement was part of the emergence of a new public sphere at the end of the reign of King Hassan II, from the 1990s onwards. Citizens started to unite themselves in NGOs to claim economic, political and cultural rights, referring to a global discourse of civil and human rights (Buskens 2003). Different currents, secularists, feminists, islamists, even atheists explored to what extent they could express their opinions and claim their rights in public after three decades of severe political repression. The death of King Hassan II and the succession to the throne of his son Mohammed VI in July 1999 created considerable hope for a change in society. When the young King went as one of his first official visits to the Rif, a region that his father had always avoided after his disastrous suppression of a revolt in 1958–1959, Amazigh activists took this as an encouragement for their cause. The King stressed the importance of the Berber heritage for the Moroccan national identity in his speech in Ajdir in October 2001, when he put his seal on the decree creating the Royal Institute for Amazigh Culture (IRCAM). In the popular imagination, he was not only the king of the poor and the young, but also the son of a Berber speaking mother.

This recognition of cultural rights of what is almost the majority of the Moroccan population was related to important political and economic transformations. From the 1980s Morocco became further integrated in a global economy structured by neo-liberal ideas such as the strengthening of private entrepreneurship. The state allowed a new elite to seize opportunities arising from the privatisation of public services and collective property. The claims of "indigenous populations", referring to human rights and United Nations conventions was a result and a reaction to these new politics and economics. In many states regionalist movements arose, while central governments allowed for

more cultural diversity, also acknowledging legal claims based on customs. Governments and the populations created museums and proclaimed sites as heritage (Clifford 2013). UNESCO played an important role in this processes by confirming the category of "world heritage". In Morocco the adobe settlement Ait Ben Haddou, built by Tashelhiyt speaking Berbers on the Southern slopes of the High Atlas, was the first world heritage site to be recognised in 1987.

The popular and official attention for Amazigh culture led to the publication of various kinds of texts on Berber customary law. Many of these editions are quite informal, to be found in small bookstalls or in stands of Amazigh associations in the yearly Casablanca bookfair. At the beginning of this section I already introduced a first genre, the compilations of legal terms and collections of customary rules. A second category are the considerable number of books on the institution of *al-kadd wa-l-si'aya*. This customary rule entitled women to a share of what was constructed as marital property in Berber speaking regions. Some Islamic scholars accepted this rule, thus going beyond the rules of classical Islamic law, which insist on a separation of property between the spouses. A third genre are the local histories written by local erudites. Again, their format and distribution is quite informal, often published at the costs of the author after many years of research based on the recycling of colonial materials and privately held papers. They can be rich sources for new discoveries of customary law documents and local practices (Handaine 2009; Amshra 2014; Buazzit 2018). Their authors fit into a longer genealogy of discreet scholars such as Aomar Afa and Muhammad al-Mustawi who had been working on collecting and editing local materials since the late 1970s, who in their turn might feel related to a famous scholar and nationalist Muhammad al-Mukhtar al-Susi.

The IRCAM soon became an important publisher for materials on Berber customary law. Its researchers composed important studies and editions of texts (Yasin ed. 2015), on specific customary institutions and practices, such as ritual kinship (Belghazi 2008), the management of agricultural and pastoral production, and the institutions and customs of particular groups or the Imazighen in general, which they often present as examples of social solidarity and grass roots democracy (El Manouar 2012; Kherdi 2012; Mahdi 2007; Rachid 2005). Colonial studies by for example Aspinion and Blanco Izaga were translated into Arabic and Spanish. Workshops about customary law in past and present resulted in edited volumes showing the value of these norms for regulating society according to democratic and egalitarian principles (Ouaazzi et Aît Bahcine eds. 2005; Aboulkacem et al. 2018). Berber customs also oblige people to deal in an ecological way with natural resources such as water and pastures, for example through the institution of the *agdal* (Bentaleb et al. eds. 2018; Auclair et Alifriqui 2012).

The royal institute officially stimulates and supports the renewed interest in Berber language, history, culture and customs. It actively encourages that colonial sources, which were suspect for decades, are put into circulation again. Many colleagues consider it acceptable to present themselves as anthropologists, pleading allegiance to a discipline that until recently was out of grace, and IRCAM has a "Centre for Anthropological and Sociological Studies". In the past the government kept Berber culture in the closet, occasionally taking it out as a folkloric curiosity. The IRCAM serves nowadays to confirm that Amazigh languages and customs are an integral and essential part of the national heritage. Members of the younger generations are actively in search of the Amazigh roots, donning tattoos, proudly speaking their language, occasionally writing in it, and translating the seminal works of David Hart into Arabic. Rifians in the Netherlands arranged for a Dutch translation of part of Hart's impressive monograph on the Aith Waryaghar. This shows the transnational dimension of the Amazigh movements. The children of immigrants in Europe discover and cultivate their roots, sometimes opposing their Amazigh identity to militant forms of islamism. Activists in the different states of the Maghrib also unite. Kabyles in Algeria and in France try to play a leading role, and occasionally find refuge in Morocco from menaces in Algeria[12)].

When we look at the actual producers of these ideas, texts and manifestations, we can identify grossly speaking two different sets of actors. On the one hand, we can discern a community of intellectuals, who do not always agree with each other, actively producing ideas and texts about customary Berber law as a part of popular culture. They are very vocal in the public debate, claiming recognition of the Amazigh language and cultural identity. Some obtained a position at IRCAM, others left disappointed. They fuse and fission in NGOs and other associations according to the rules of the new public sphere and civil society. Many have an academic degree, in law, philosophy, linguistics, or anthropology. Some are active in big cities like Rabat, Casablanca, Agadir, Marrakech and Tangier, while others struggle for recognition in smaller provincial towns, arguing locally with kindred spirits. Apart from internet, two or three bookstalls at the annual Casablanca book fair are a good site to see what the trends are. These scholar-activists are active producers of popular culture through their lectures, postings and publications. We find traces of it in Amazigh periodicals, but also in the widely read historical monthly *Zamane* (both in a French and Arabic edition. History is heritage, self-presentation and a tool to claim rights.

We have already come across several actors belonging to these groups of intellectuals. Rachid Raha is the heir to the archive of David Hart and recently founded a library in the Rif, with the help of the spouse of a wealthy banker who is also the daughter of an important army general. Mohamed Chafik published his dictionary with the royal academy and received important distinctions in several

countries. Ahmed Assid has been an engaged intellectual for decades, but is now showing increasing trust in the government as a defence against the islamist movement, which favours the unity of Islam and Arabic over the new cultural diversity. The university professor and prolific writer Hassan Aourid, born in the Tafilalt oasis in 1962, acts as an adviser to the editorial board of *Zamane*. In 1999 he defended a doctoral thesis on islamist and Amazigh protest movements at the Faculty of Law in Rabat. He also happens to be a former classmate of the king and a one-time powerful administrator.

Customary law is a tool in the culture wars between liberals and islamists. The reform of the family law in 2004 was partly justified by referring to authentic Berber customs such as the already mentioned institution of *al-kadd wa-l-si'aya* (Mouaqit 2016). The leading scholar in Islamic matters Professor Ahmed Abbadi and the leftist activist Ahmed Assid, *bien étonnés de se trouver ensemble*, both argue in favour of the abolition of the death penalty by referring to Berber customary law, which does not know capital punishment, but only banishment.

On the other hand, at a local level, we can discern all kinds of temporary coalitions and individual actors. These local activists are often primarily interested in access to specific natural resources and to land. The social status of these activists varies. Some belong to local elites seizing fresh opportunities, or aspire to join these elites, while others are subalterns, landless peasants, or people who struggle against losing their local rights. These struggles are often related to collective property, commons, to which people had shared access because of their membership in local social groups. The liberalisation of the economy brings the Ministry of Interior to change their policy from administering these commons on behalf of the local communities to the division of individual property rights, *melkisation* in proper French. The commodification of the countryside leads to enclosures, to the sale of individual property to large landowners, to a transformation of the "traditional" ways of using arable land, forests, pastures, water, and other resources, such as minerals and sites for finding fossils. Local people try to get their share, or more, by using whatever tools they can think of. People take to the streets, they create associations and cooperatives for local development, for women, for ecological agriculture, for the production of argan oil, which has become a symbol for authentic Amazigh culture.

Some activists refer to customary law, while the so-called Soulaliyate, a movement of women in the region of Mehdia, consider Islamic law and human rights to be a defence against their exclusion from owning landed property according to custom (Ait Mous et Berriane 2016; Berriane 2018). Many of these activists seem to be primarily motivated by material interest, rather than by ideology. The anthropologist Mayuka Tanabe has published an important case study on disputes over property in the Tafilalt oasis, where Arabic and Berber speakers

face each other, as well as local elites and subalterns. Some claim their rights by referring to colonial documents, which they have reappropriated in their recent struggle by adoring it with the drawing of a *tizerzai*, the fibula that people commonly use as a symbol for Amazigh culture and identity (Tanabe 2015; 2016). Paul Silverstein has studied the coming together of intellectual and grassroots movements, activism and entrepreneurship in the Southern town of Goulmima. In a recent paper, he describes how difficult it is to be an anthropologist amongst these educated activists who combine a struggle for recognition with a pursuit of material gain (Silverstein 2013). The studies of Tanabe and Silverstein show how sometimes intellectuals and subalterns work together, but how they also often live in worlds apart, with the intellectuals claiming to speak for people with whom they barely share any ideas. We find similar misunderstandings and different uses of a Berber heritage in Southern Tunisia vividly described by Sonia Ben Meriem (2018)[13]. What both groups, intellectuals and local activists, do share is a new language in which notions of culture, heritage, authenticity and ecology figure large. Different actors put the colonial knowledge, resulting in the transformation of customs into customary law, to good fresh use again, serving different interests of different groups.

The protests that started in Morocco in February 2011, which people saw as part of the Arab Spring, resulted in a speedily adopted new constitution in July of the same year. Its preamble is a consecration of diversity, in which the recognition of the Amazigh roots looms large. It is one of the main constituents of its unity, at the same level as the Arabic-Islamic and Saharan-Hassani components, to which are African, Andalusi, Hebrew and Mediterranean influences added. One may understand this recognition of diversity as an expression of strength of the state. It is a reply to contestation by co-opting critics, and maybe by trying to divide them according to an old recipe. The past decade has witnessed a further development of this policy of diversity and pluralism, with the publication of a new official history[14], and new cultural politics stressing diversity as a wealth. Amazigh language and culture play a prominent place in the official image that the state promotes, their role in education has been confirmed in a law in July 2019 putting the principles of the Constitution into effect. In matters of religion, we see similar tendencies, with state support for Sufism and local shrines, and with a protection of Jewish heritage through restauration projects. These policies have not only political, but also economic results. They contribute to Morocco's top ranking as an international tourist destination.

The Moroccan state is now facing the question whether their policies of cultural diversity are sufficient to deal with the kinds of unrest that are popping up in peripheral, partly rural areas. In these margins, as seen from the political and economic centre in the Atlantic plains, people feel left out. Mappings of poverty

shows that the poor mainly live in the countryside, in mountainous Berber speaking areas. The most well-known protests started in Al Hoceima, one of the two main cities of the Rif, in autumn 2016. Local people took to the streets to ask for the implementation of the promised economic policies, for hospitals and a university. Amazigh symbolism was prominent in this Hirak movement, with youngsters and middle-aged people brandishing the multi-coloured flag with the Tifinagh symbol for Amazigh, and protraits of the Lion of the Rif, Muhammad ben ‘Abd al-Karim al-Khattabi. The banner of his Ripublik was only to be seen with supporters in Europe, claims of secessionism being a huge taboo in Morocco. In the Hirak movement we see the coming together of many of the issues discussed in this section: local and national intellectuals showing a strong attachment to regional language, culture and custom, and a consciousness of a regionally shared history, backed by supporters in other countries in the Maghrib, and by migrant communities in Europe. In this case the intellectuals involved in identity politics successfully linked up with grass roots protesters claiming specific improvements on the ground. For the Makhzan this was too much diversity to tolerate.

The rediscovery of customary law has not led to official legal pluralism or self-government, only to recognition of cultural identity and local rights. Berber law is useful for elites, both for established and for aspiring ones, for subalterns, and for intellectuals. Berber law is good to think with, to formulate cultural and societal critique. It is also a tool to work with, for political and economic contestation in various contexts and arenas, to claim rights to specific property and resources. The tool itself is a product of reinvention and recycling in which intellectual and political elites have the lead. The rediscovery of customary law is accommodated into a national narrative celebrating diversity and pluralism, while its supporters are co-opted into a royal institute to spread the new story of a neo-liberal state.

5. Conclusions: Popular Culture as an Elite Construction and a Subaltern Tool

Stressing that customary law is a construct is stating the obvious. The analytical tool of “invention of tradition” has become ubiquitous since the famous volume edited by Hobsbawm and Ranger (1983). But the idea itself was already clear to prominent colonial scholars such as Aspinion (1937: 9), Snouck Hurgronje and Van Vollenhoven. They combined a thorough familiarity with the field, grounded in colonial administration, with a sensitivity to issues of language and style, with what Van Vollenhoven called “the poetry of Adatlaw”. For them the language was much more than just a medium to formulate rules, it was part of the message. Despite these understandings, they contributed to the transformation of customs into law, guided by their idea of ethics. They thought they were contributing to the

emancipation of indigenous people, and to the wealth of their own nation.

In this brief contribution, I have tried to reconstruct the social processes in which the notion of customary law gained or lost importance during the past hundred years in Morocco. It is a story of discovery, occultation, and rediscovery structured by ideas about authentic culture and heritage and identity. Who were the constructors, when, what did they tell, for what audiences, and with what purposes?

Colonial scholars and administrators discovered the existence of customs among the Berber speaking population, which deserved recognition. By almost immediately (dahir of 1914) warranting the rights of the indigenous population they thought to suppress resistance, create justice and social order, and legitimacy for their rule both in the Maghrib and in Europe. Recognising customs as law epitomised the objective of the Protectorate: modernising the country by respecting its traditions. After regained independence in 1956 an urban elite with reformist ideas gained the upper hand, in conjunction with the monarch. Their story of Moroccan culture pleaded radical unity: all Moroccans were united under one king, who as a commander of the faithful guided them in Islam in Arabic. Instead of legal, linguistic and pluralism they proposed uniformity and unity. Codification of Moroccan law according to Islamic and French models replaced colonial legal pluralism. The code of family law embodied Morocco's Islamic and Arabic identity.

Again, it took almost forty years for a new story to emerge, despite contestation. The strengthening of civil society was linked to internal developments such as the tremendous increase of urban youth and the connection of Morocco to a global neo-liberal economy. An emerging human rights discourse accompanied the recognition of cultural diversity as a source of wealth and strength, also attracting foreign tourists. The recognition of Tamazight as a national language strengthened all kind of local and national movements of Imazighen claiming their cultural rights. Various kinds of activists referred to customary law to claim their rights: to speak in public and obtain official recognition, as well as to obtain access to local resources such as land. The Constitution of 2011 was the result of the "Arab Spring" in Morocco and summarised a new version of Moroccan identity. Morocco is a diverse country that is proud of the many influences coming together in a national framework of an Islamic state. The new policy and its histories serve to manage a growing urban population and an impoverished countryside dominated by large-scale agricultural enterprises.

It is not my aim to understand the birth, demise and rebirth of customary law in Morocco as a conspiracy in which actors scheme to achieve hidden objectives, such as to divide in order to rule. Its history is more complex and nuanced. I have tried to demonstrate that what various actors choose to present as a part of an

ancient and authentic popular culture, is at closer inspection the product of historical processes in which political and academic elites play a decisive role. For more than a century they have been playing a decisive role in the transformation of customary practices of everyday life into normative rules through their writings and their political interventions. In recent times recycling and re-appropriation of colonial sources have become an important tool. It seems to be the dire plight of anthropologists and historians to demonstrate again and again that there is no such thing as an "authentic popular culture", not even in the field of customary law in the Maghrib.

Notes

1) I am most grateful to the organisers of the workshop for their kind invitation and to the participants for their helpful comments and questions. I would like to thank especially François Pouillon, Saito Tsuyoshi and Toriyama Junko for their help and encouragement. Participation in the workshop and subsequent presentations of my research in other seminars in Paris were made possible by a generous invitation by IISMM at the EHESS between 2016 and 2019, while Baudouin Dupret, always a loyal friend, has kept reminding me to pursue this shared interest. I am greatly indebted to Harry Stroomer for more than thirty years of instruction in the study of Berber cultures and languages.
2) Some of the conceptual and theoretical considerations underlying my understanding of the phenomenon of normativity have been ably summed up by Baudouin Dupret in an already famous article (2007).
3) French protectorate policy is the subject of a considerable body of literature, to the point of almost seeming to be overstudied. Apart from the numerous nationalist readings produced by Moroccan historians and its French counterparts, it has also received ample attention in the Anglo-American world. The classic overview of the relations between Arabs and Berbers is the volume edited by Gellner and Micaud (1973). Recent monographs on French colonial administration and scholarship are Burke (2014) and Wyrtzen (2015). The Spanish protectorate is increasingly being studied as well, mainly by Spanish scholars as for example Mateo Dieste (2003) and in English recently by Calderwood (2018). Berber policy and customary law have been addressed in a volume of studies in honour of David Hart edited by Ramírez and López García (2002). Scheele (2019) offers a recent discussion of the notion of segmentation in Northwest Africa.
4) Buskens (2017) offers a study of the materiality of colonial law with further references. Hoffman (2010) presents a research project on colonial legal practice in Southern Morocco grounded in the reading of over twenty thousand customary court records from 1936 until 1956.
5) For bibliographical overviews of and learned introductions to the French colonial doxa on customary and Islamic law in the Maghrib, see: Flory et Henry (1989); Henry et Balique (1979); Shinar (1983). Lahnite (2011) gives an overview of French customary law policy making and its local implementation in Southern Morocco.
6) See Berque (2001), especially volume I on the anthropology of law. His studies on the uses of written proof is of great value to understand the interpenetration and

accommodation of customary practices and Islamic jurisprudence (Berque 1950; 1955). François Pouillon (2019) discusses the embeddedness of Berque in the colonial context and gives ample further references. See also Bousquet (1950; 1952) for a critique of the colonial vulgate, from a different angle, especially on Hanoteau and Letourneux. It would be interesting to compare the lives and works of Berque and Bousquet, working in a similar context on similar issues, but taking radically different political positions. Unlike Berque, Bousquet took what proved to be a wrong turn in the struggle for Algerian independence, and became a kind of *persona non grata* in the history of French orientalism. Their different personalities might also account for the different degrees of attention they have obtained from later generations.

7) As done for example by Bontems (2014); Guerin (2011); and also Buskens and Dupret (2015), all following the famous lead given by Hobsbawm and Ranger (1983).
8) Pascon and Bouderbala formed part of a larger group of critical scholars, of Moroccan and foreign origin, studying life in the countryside and questions of what was then called "rural development", who paid attention to customary rules and institutions and published important empirical studies. Next to scholars such as Mohamed Ait Hamza, Abdellah Hammoudi and Abdellah Herzenni, geographers Grigori Lazarev and Gérard Fay were very productive. Three collections of articles of the last two have been published in 2014 and 2015 at the Faculté des Lettres et des Sciences Humaines in Rabat (Fay 2015; Lazarev 2014a, 2014b), while Lazarev has also published his memoirs (2012).
9) Rachik (2016a) brings together many articles directly relevant to the subject of this contribution, including his article on the institution of the *jma'a*. Rachik (2019) is a synthesis of his views and teachings on the rural Maghrib.
10) Michael Peyron has been studying and teaching about Middle Atlas language, literature and culture for more than forty years in Rabat and Ifrane, and has published numerous studies. His importance for the present generation of researchers in Morocco and abroad was recently acknowledged in a volume of studies in his honour edited by Abdelaziz Allati (2017). Peyron (2018) is a contribution to study of customary law in the Middle Atlas, in which he mentions the recent changes in attitude towards what was considered as "a backwood culture" (Peyron 2018: 289).
11) In September 2006 he would publish a second volume, with the emancipatory title: *Code des droits positifs amazigh*; in 2012 he edited yet another volume, with a similar title: *Les valeurs de justice dans les droits positifs amazigh*. Arehmouch clearly understands Berber customs as law, at a par with French codified models.
12) Rachik (ed.) (2006) offers an excellent overview of the Amazigh movements in Morocco, also discussing the international dimension. Rachik (2016) contains important studies on customary practices and legal debate, demonstrating the close relation between customs and the access to property and natural resources. There are many other studies and collected volumes on the Berber movements in Morocco and in North Africa in general, such as: Kratochwil (2002); Pouessel (2010); Hoffman and Miller (eds.) (2010); Maddy-Weitzman (2011).
13) Lacroix (2005) offers a case study of local power struggles, reinvented and new institutions, and the intervention of migrants in processes of "development" in Southern Morocco.
14) The new national narrative was edited by the prominent historian Kably in 2011 under

the revealing title *Histoire du Maroc. Réactualisation et synthèse*, and published by the Royal Institute for Research on the History of Morocco. The English translation has as its subtitle: *A Work of Synthesis and Update* (2015). Nordman (2016) places the work in its context, as a new replacement fort he colonial vulgate which nationalists already had tried to do away with (Gellner 1961) and which Abdallah Laroui had criticised severly in his revisionist *Histoire du Maghreb* (1970).

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