

Archival Ethnography in the Customary Courts: Legal and Linguistic Pluralism under French Protectorate

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Abstract: This article examines the multiple languages and legal codes used in the Berber customary courts (*tribunaux coutumiers*) established by the French Protectorate of Morocco and serving rural Berber communities for two decades, from around 1930 to 1956. It examines the ways in which both French and North African scribes and officers encoded court proceedings primarily in French, as per policy, but used transliterated *Tashelhit* Berber terms for uniquely Berber legal institutions, concepts, and deed types, as well as items of material culture. This examination of the use and effects of the entextualization of otherwise oral Berber language and law into writing, focusing on five customary courts of the eastern Anti-Atlas Mountains, suggests that the widespread practice of using Berber in Protectorate documents both reflected oral interactions in the courts and furthered French Native Policy goals. The latter primarily encouraged the promulgation of Berber custom over Islamic law, and framed custom as distinct from Islamic law despite evidence of a more fluid legal pluralism long in place. Nonetheless, the result was a set of legal registers that were incomprehensible to French officials other than those familiar with *Tashelhit* Berber language and Berber customary legal concepts.

Keywords: Customary Law, Islamic law, Morocco, Protectorate, Language, *Tashelhit*.

In the late nineteenth and early twentieth centuries, rural North African legal systems (in Morocco, Algeria, Libya and Tunisia) were a patchwork of tribal or regional Berber customary and Islamic legal codes, often overlapping but at other times functioning distinctly from each other. Prior to the establishment of the French Protectorate (1912-1956), *qāḍīs* (Islamic judges) adjudicated over courts in Moroccan cities and towns, whereas in the countryside, judiciary councils and arbitrators resolved disputes. Many rural Arabic-speaking and Berber-speaking populations alike followed regional forms of customary law.¹ The written and oral legal codes that governed customary law varied by tribe or sub-tribal fraction, although the boundaries

1. In this paper, I use the term “Berber” as a blanket term for both the range of Tamazight regional language varieties (including in Morocco primarily the geolects known as *Tashelhit* in the southwest and western High Atlas, Tarifit in the North, and Tamazight in the Middle Atlas and eastern high Atlas) and their speakers. The term Berber was in common usage during the Protectorate by outsiders for both an Amazigh person and the Tamazight language, primarily in contrast to Arabs and Arabic. A fuller discussion of the etymology of these terms is beyond the scope of this paper, but the choice of “Berber” here is the most neutral, geographically inclusive, and period-appropriate one. “Amazigh” would be an alternative term, but the period documents and correspondence in French cite specific tribal names and “Berber” more generally.

of these sociopolitical-geographic entities expanded and contracted with shifting alliances. Much as the Berber linguistic varieties (collectively called Tamazight or Amazigh language today) took on aspects of Arabic language through sustained contact in Morocco, different forms of Berber customary law absorbed elements of Maliki *fiqh* over time; the extent of this influence on previously secular Amazigh law varied by location. Berber customary law in the Anti-Atlas Mountains of southwestern Morocco, the region on which this article concentrates, was perhaps the most strongly marked by Islamic *fiqh*, largely due to the long tradition of religious schooling in the Sous region at a time when education focused almost exclusively on religious sciences.² As in Hopi tribal courts,³ “custom” as concept featured centrally in Berber customary court dockets as judiciary councils of elders weighed the range of principles available for a given case. Metapragmatic preoccupations of court actors included the structure of court interactions, the language(s) to be used by actors, the relative authority of the competing or complementary legal frameworks, and the appropriateness of various interpretive frames.⁴

While earlier analysis of the customary court daybooks (*registres brouillard*) considered forms of legal pluralism in use,⁵ this paper concentrates on the court’s text artifacts as central to an “archival ethnography”: an investigation into the practices and ideologies involved in the production of

2. For overviews of Berber customary law in Morocco in the pre-Protectorate and Protectorate periods, see Interprete-Lieutenant R. Aspinon, *Contribution à l'étude du droit coutumier berbère marocain: Etude sur les coutumes des tribus zayanes* (Casablanca: Éditions A. Moynier, 1937); Mustafa Bentahar, “La coutume au Maroc, simple phénomène social ou véritable source normative?,” in *Droit et Société au Maroc*, ed. Elhoussine Ouazzi (Rabat: IRCAM, 2005), 15-28; Henri Bruno, *Cours de droit coutumier berbère* (Bibliothèque Nationale Royale du Maroc C930, 1916), leçon 12; Aboulkacem-Afulay El Khatir, “Droit coutumier amazigh face aux processus d’institution et de mise en place de la législation nationale au Maroc,” in *Le droit coutumier et les législations au Maroc*, ed. Organisation Tamaynut (Rabat: Tamaynut, 2007), 79-130; Jules Griguer, *Des différents régimes de successions au Maroc* (Paris: Librairie de la Société du Recueil Sirey and Tanger and Fez: Éditions Internationales, 1935); Mohammed Handaine, “Le droit coutumier et les législations au Maroc: Approche historique,” in *Le droit coutumier et législations au Maroc*, edited by Organisation Tamaynut (Rabat: Tamaynut, 2007), 14-78; Katherine E. Hoffman, “Le droit coutumier amazigh au Maroc,” *Perspectives* 9 (Spring 2013), 3-5 and “Le serment, les marabouts et la mosquée dans le droit coutumier berbère au Maroc” in *Les justices de l’invisible*, ed. Raymond Verdier, Nathalie Kalnoky and Soazick Kerneis (Paris: L’Harmattan, 2013), 373-90; Jean Lafond, *Les sources du droit coutumier dans le Sous: le statut personnel et successoral*. Rapport du 1947 (Service historique de l’armée de terre (SHAT) 3H 2017), chapitre XI:1; Georges Marcy, “Le problème du droit coutumier berbère,” *Revue Algérienne, Tunisienne et Marocaine de Législation et de Jurisprudence* 1 (1954): 1-44.

3. Justin B. Richland, *Arguing with Tradition: the Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008).

4. Katherine E. Hoffman, “Berber Law by French Means: Islam and Language in the Moroccan Hinterlands, 1930-1956,” *Comparative Studies in Society and History* 52, 4 (2010): 851-80.

5. *Ibid.*

the archival record, in this case, a jotted docket of notes on cases *in situ*.⁶ My analysis of the court daybook-dockets contributes to anthropological scholarship that has begun theorizing the relationship between colonizer and colonized through its documentation in the archival record.⁷ Along with oral histories from key local actors in the Anti-Atlas, daybooks are rich data in the construction of what Stoler has called the ethnography of colonialism.⁸

Customary court textual artifacts are replete with hitherto unwritten social history.⁹ The registers also appear to have played a discursive role in French efforts to limit linguistic Arabization and religious Islamization of rural Berbers by elevating custom to the status contemporaneously held by Islamic law in Morocco, and by enforcing customary rulings.¹⁰ Protectorate Native Affairs officers stationed among Berber-speaking tribes received instructions from Rabat and Paris to document law among rural populations with the goal of establishing a baseline against which to compare and ultimately limit the shift from customary towards Islamic law. One means for Native Affairs officers to demonstrate the ethnic particularity of the populations they administered was to highlight the unequivocally Berber nature of legal claims brought to customary courts.¹¹

In what follows, I focus on one facet of this effort: Protectorate officials' peppering of the daybooks with *Tashelhit* Berber words and phrases. In using *Tashelhit* terms, French and North African clerks textually instantiated the ethnic particularity of Berberophone tribes who, as legal scholar Surdon quipped, "have the [Islamic] faith but not the [Islamic] law (*ont la fois mais*

6. Brinkley Messick, "Shari'a Ethnography," in *The Law Applied: Contextualizing the Islamic Sharī'a*, eds. Peri Bearman, Wolfart Heinrichs, Bernard Weiss (London: I.B. Taurus, 2008), 174.

7. Ilana Feldman, *Governing Gaza: Bureaucracy, Authority, and the Work of Rule (1917-1967)* (Durham: Duke University Press, 2008); Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2002) and *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, NJ: Princeton University Press, 2010); Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993).

8. Stoler, *Along the Archival Grain*.

9. Amina Aouchar, *Colonisation et campagne berbère au Maroc* (Casablanca: Afrique-Orient, 2002).

10. Jean Paul Charnay, *La vie musulmane en Algérie, d'après la jurisprudence de la première moitié du XXe siècle* (Paris: Presses Universitaires de France, 1991); Mohamedi Hédi Cherif, "Les statuts et les formes de propriété" in *Maghreb: Peuples et civilisations*, eds. Camille Lacoste and Yves Lacoste (Paris: La Découverte, 1995); Jean Lafond, "Les sources du droit coutumier dans le Sous: le statut personnel et successoral," Service historique de l'armée de terre (SHAT) 3H 2017 (unpublished report, 1947), chapitre XI, 9; Alain Mahé, *Histoire de la grande Kabylie XIXe et XXe* [History of Greater Kabylia the in the 19th and 20th centuries], (Alger: Éditions Bouchene, 2001).

11. For a discussion of French Native Policy (*politique indigène*) and the ideological and practical facets of the Berber-Arab distinction, see Katherine E. Hoffman, "Purity and Contamination: Language Ideologies in French Colonial Native Policy in Morocco," *Contemporary Studies in Society and History* 50, 3 (2008): 724-52; Hoffman, "Berber Law by French Means."

non la loi."¹² Both the legal concepts and the material culture particular to Anti-Atlas populations during the last twenty years of the Protectorate were recorded in daybooks through a range of civil and penal claims. In what follows, I draw on text artifacts from five customary courts operating between 1935 and 1956 in Igherm.¹³ Of most interest in this corpus are the minutes in the daybooks recording proceedings in real time before final transcription into the neatly penned (and later typed), edited, and official registers of rulings (*registres de jugements*). Prior to the creation of customary courts, there were no written records of oral mediation or arbitration in Berber lands.¹⁴ With the new courts in the 1930s, French bookkeeping practices and terminology entered the literacy environment of the Berber countryside.¹⁵ Simultaneously, *Tashelhit* legal and cultural terminology entered the French Protectorate record. Multiple levels of translation and interpretation were required to register rural Berbers' complaints with French authorities and render verdicts into written French and in some cases, Arabic. The extensive traces of the otherwise exclusively spoken *Tashelhit* Berber in the official French records suggest that knowledge of indigenous legal institutions and custom were crucial to understanding cases.

Linguistic Pluralism in the Customary Court Record

The court's legal pluralism echoed in the daybooks' linguistic pluralism. Alongside the French commissioner, court clerks and interpreter-officers came from either France or the Amazigh Moroccan Middle Atlas Mountains and Algerian Kabyle mountains. While the dockets were supposed to be

12. Typescript of conferences held during preparatory courses for Services des Affaires Indigenes for the 1927-1928 academic year by Georges Surdon, "Esquisse de droit coutumier berbère marocain," *Institut des Hautes-Etudes Marocaines*, (Rabat: Moncho, 1928).

13. My remarks here are based on reading thousands of court cases (in both the ad-hoc daybooks [*registres brouillard*], the *registres de jugements*, and the few extant penal dockets) recorded in the five *tribunaux coutumiers* that were held in Igherm and Ait Abdallah (also called the Illalen de l'Est). The four courts in Igherm divided jurisdiction over tribes as follows: TC 1: Ida Ouzddoute, Indouzal, and Ida Oukensous; TC 2: Ida ou Nadif, Inda u Zal, and Tagmout; TC 3: Issafen; and TC 4: Ida ou Zekri. Cases typically ranged from a few lines to a page, although some have appendices and supporting documents pinned into the dockets. Bookkeeping styles, levels of clarity, detail, and penmanship varied significantly by clerk. In piecing together personnel chronologies (archived in Vincennes and Nantes) with handwriting and signatures to assess which officials used the most non-French terms, one finding is that officers used little *Tashelhit* as they took up their posts but, if they learned *Tashelhit*, increasingly court inscriptions reflected this. Often commissioners served as court scribes; Captain Ropars was one such individual (see Hoffman, "Berber Law by French Means").

14. For a discussion of records, see Henry Toledano, *Judicial Practice and Family Law in Morocco* (New York: Columbia University Press, 1981) and Lawrence Rosen, "Islamic 'Case Law' and the Logic of Consequence," in *History and Power in the Study of Law*, eds. Starr and Collier (Ithaca: Cornell University Press, 1989), 302-19.

15. Hoffman, "Berber Law by French Means."

kept in French, clerks and officers who mastered *Tashelhit* used it fluidly in entextualizing oral proceedings in documents, transcribing *Tashelhit* in Roman letters. Given the substantial case load that court clerks and Native Affairs officers handled, as just one of many regular tasks for rural administrators,¹⁶ we can suspect there was unselfconscious note-taking in transcribing key case features. When listening to the *Tashelhit*-language court proceedings, it surely seemed logical to inscribe *Tashelhit* terms used by parties and judges when either (a) there was no French equivalent or (b) participants knew to which institutions, practices, or objects these *Tashelhit* terms referred. It is also possible that the clerks' use of *Tashelhit* in the daybooks, however inconsistent, reflects a conscious choice as officers were attempting to codify custom in anticipation of creating and then strengthening regional customary appeals courts, an ambitious central state goal that received little traction on the ground.¹⁷ In addition to legal practices and principles, the daybooks record the sparse material culture shared by these modest mountain communities, particularly in household inventories, wedding gifts and trousseau lists, and divorce contracts.

What did this multilingualism look like in the otherwise French-language daybooks? In the examples below, I translate French into English while keeping the original *Tashelhit* (italicized) and Arabic (underlined) terms, with original spellings, capitalizations, and punctuation. Bivalent terms found in both *Tashelhit* and Arabic are italicized and underlined.¹⁸ By staying close to the archival grain,¹⁹ rather than attempting to translate all terms into English and standardize orthography, I intend to give the anglophone reader a sense of the way a contemporary French official in Marrakesh or a newly assigned rural officer might have encountered the daybooks. *Tashelhit* terms were indispensable for conveying concepts particular to these communities, such as spatial orientations, household objects, and Berber legal institutions. The textual encoding of what had long been verbal practice lent support to the official French position that customary (Berber) justice was distinct from

16. Moustafa El Qadery, "La 'science sociale' des Affaires indigènes au Maroc," *Cahiers de recherche du Centre Jacques Berque*, n. 3-2005 (Rabat, 2004), 215-30; Hoffman, "Purity and Contamination."

17. In this respect, the use of *Tashelhit* terms in French-language legal documents is fundamentally different from the use of Greek or Latin terms in Western law. The use of Greek or Latin terms does not suggest cultural particularity (Greek-ness or Roman-ness) of a law, but rather reflects widespread conventions adapted into other legal forms. In the customary court documents, in contrast, *Tashelhit* terms interspersed into French text were used in complaints, defenses, and deliberations, all of which were processes that took place orally in *Tashelhit*.

18. Kathryn A. Woolard, "Simultaneity and Bivalency as Strategies in Bilingualism," *Journal of Linguistic Anthropology* 8, 1 (2008): 3-29.

19. Stoler, *Along the Archival Grain*.

Islamic (Arab) justice.²⁰ A few examples chosen from the corpus for their representativeness illustrate this point.

Example 1 from 1950 is a request for land reacquisition:

Ex. 1

TC 3-4:45/1950 [*Tribunal coutumier* 3, register 4, case 45 from 1950]

Plaintiff (via proxy): “I request a repurchase of our property ceded to the defendant in *rahn*.”

Defendant: “I have the *qiloula*²¹ [*qilūla*] and the *Tadagart*. I agree so long as there is no *Anafay*.”

The italicized and underlined terms are foreign to the non-Berber reader of these registers, and even to many familiar with Tashelhit today.²² More crucially, the whole rationale behind property reacquisitions (misleadingly and consistently labelled *rachats*, ‘repurchases,’ in the French documents) – the most common petition in the customary courts – only makes sense when one knows that no land transfer is final under Berber law unless it is specifically designated as such under exceptional circumstances. Otherwise, what the French documents call a “sale” (*vente*) was really a *rahn*: property collateral, that is, a lease on a property that could be held for as little as a few years or as long as a few generations. As phrased in the dockets, people often leased (Fr. ‘sold’) their property for temporary profit then reclaimed (Fr. ‘bought’) lands back. The institution of the *rahn* helped ensure that everyone had farmable subsistence land even when they lacked property ownership.²³

20. This theoretical distinction was challenged by interlegal practices in the Anti-Atlas region, as I elaborate in the book project from which this article derives (Hoffman n.d.). See also John R. Bowen, “Consensus and Suspicion: Judicial Reasoning and Social Change in an Indonesian Society 1960-1994,” *Law and Society Review* 24, 1 (2000): 97-127; Brinkley Messick, “Written Identities: Legal Subjects in an Islamic State,” *History of Religions* 38, 1 (1998): 25-51.

21. In this article, I retain the French spellings of foreign terms as recorded in the daybooks and registers alongside standard transliterations.

22. I am grateful to an anonymous reviewer familiar with *Tashelhit* and Arabic for confirming my suspicion that some of these *Tashelhit* terms cannot be easily glossed in English. Few cases in the daybooks provide sufficient context to ascertain all terms’ meanings satisfactorily, and to date oral histories have not been conclusive, either. Further research, interviews and cross-referencing of legal documents may clarify these terms. My point in this article however is less to argue for the legal novelty of Berber custom and more to analyze the French documentary process of creating court daybooks to capture customary court proceedings and the inclusion of *Tashelhit* language terms to do so.

23. Despite the difference between usufruct rights and sale, the dockets use the terms *rahn* and *vente* for these transactions. A final sale, the rare transfer of land into another’s hands outside of inheritance, is written in these documents as *vente finale*. Surprisingly given the prevalence of this institution in the court dockets, David Hart, who otherwise was one of the principal authorities on Berber Morocco, claims that *rahn* became less common during the Protectorate (2000, 215). Aomar Boum also discusses *rahn* (2013, 50-51).

In the example above, the *qilūla* is a deed of *rahn*. As to the other terms, assessing from their use in multiple cases, the *tadagart* seems to be property, and the *anafay* document details inheritance.²⁴ Some French officials expressed disapproval of *rahn* on the grounds that it violated the Islamic legal prohibition on interest, although it remains unclear why they would attempt to regulate Muslim piety, unless they wished to fend off potential criticism that they were not supporting existing Moroccan Islamic institutions as was the Protectorate's original mandate.

Other customary court cases evoke the widespread norm of keeping property in the extended family. In Example 2 from 1941, plaintiff Sidi Brahim accuses a woman named Sfia of unduly planting on his lands:

Ex. 2

TC 3-1: 133/1941

Plaintiff accused Sfia of planting a [plot of] land that Sidi Brahim told her to evacuate the previous year.

Defendant Sfia: "It's my *asel* ['aʃl]; I have the *toufrit* for it."

Here again it is impossible to understand Sfia's defense without knowing both Tashelhit and Arabic concepts and knowing basic Berber customary legal principles. Sfia's defense is that the land is her "roots" or "origins" (Ar. 'aʃl) and that she has the inheritance deed (*toufrit*) proving it. By extension, Sfia suggests in her defense, she has every right to plant on land to which she holds title through inheritance.

Example 3 concerns the division of an estate. The issue of land leased through *rahn* becomes contentious when inheritance is involved and outsiders occupy the land. This was the case in an estate division initiated by a woman named Zaina Ahmed in 1950.

Ex. 3

TC 3-4: 56/1950:

Zaina Ahmed: "I request my share of the estate of my mother, sister of the second defendant, [which is] occupied by the defendants."

Defendants: "We do not occupy all of it."

24. There remains some doubt about the precise meanings of *tadagart* and *anafay* that I expect to resolve before book manuscript publication. In some cases, *tadagart* is the Tashelhit term for *qilūla*, which is Arabic, making them identical.

Clerk notes: “The above members attest that the defendants only presented a single ‘*agalay* of *ḥabous*.’ Upon questioning they request an extension to present other ‘*Igalains*.’ The court asks them to present them at the next session. They present an *agalay* for 1300, an *anfissal* of this *agalay* 1300, and an undated inventory of property. The parties appear and declare that they have settled amicably in the following fashion: the defendant consents to give the plaintiff a *ziyāda*.”

Isterkab no. []

Here we have not only *Tashelhit* terms for different deeds, but both plural and singular forms for one such term (sing. *agalay* [often spelled *aguellay*] and pl. “*igalains*” for the deed of a plot of land as part of an inheritance share). The latter word here has the French/s/plural marker which is redundant since the word-initial/i/and word-final/in/in *Tashelhit* morphology indicate masculine plural. Regardless, only by knowing the force of the deeds mentioned, the *agalay* and *anfissal*, can the reader of French (or English in translation) make sense of the case. Additionally, the plaintiff received not her land back but a *ziyāda* (Ar. increase, literally ‘extension’) to the original lease paid so as to retain occupation. Even the deed type that would then enter the French files is noted here in *Tashelhit*/Arabic. The *isterkāb* (elsewhere spelled *istirkāb*) was a deed of substitution that allowed the person to inherit in the place of another relative. When a deed was not particular to Berber custom, but was shared under law by Arabs, the clerk referred to it simply as an *acte* (deed).

Example 4 from 1955 lists household items in a dispute between estranged spouses. Not only does the complaining husband get back the property he claims his wife “stole” when leaving their home; he also avoids paying the wife for work she did on the marital property just by pronouncing divorce. The unilateral speech act enacting repudiation or divorce is available only to the husband in both Maliki *fiqh* and customary law in the Eastern Anti-Atlas, even though impotence is legitimate grounds for a woman to initiate divorce.

Ex. 4

TC 4-8:4/1955 p64

Plaintiff: “My wife, the defendant, left the conjugal home a year ago and took my property with her. I request the return of my property:

1 *tafagout*, 1 pair of babouches, a shawl, *tel mharel*, *tisgunit*, a teapot, a blanket.”

“Defendant Fadma Addi acknowledges having the property claimed by the plaintiff but asks to be repudiated by her husband. Defendant claims her husband cannot complete his conjugal duties.”

Court assigns members to “watch the plaintiff return her husband’s affairs that she stole.”

“Plaintiff agrees to repudiate his wife on the condition that she renounce her rights over the work she did on the house. Defendant declares that she abandons her rights to her sayats [*si ‘āyāt*].”²⁵

The plaintiff then declares: “I repudiate my wife: Fadma Addi nt Bella.”

Repudiation 10/55

Husbands in general were slow to enact divorce because they did not want to have to pay their wives for their share in the marital capital. The fact that this Fadma agreed to her husband’s terms and renounced her rights to a share of the profit from her labor during marriage meant that she was left with nothing. We can only imagine how urgently she wished to be rid of her husband if she made such a significant concession. Even though the courts in many ways helped women leave neglectful husbands, they did little to ensure women retained their economic rights vis-à-vis their husbands.

Berber Clarity, French Imprecision

When the clerks and Native Affairs officers overseeing the courts were closely familiar with Anti-Atlas society, the written record moves fluidly between French, *Tashelhit*, and Arabic such that oftentimes it is clear that the register’s audience was a local one rather than a central Protectorate one. This makes it all the odder to find imprecision in terminology in at least three areas: kinship titles, types of divorce, and property categorizations. Despite the alleged clarity of French,²⁶ French terminology lacks the requisite specificity to entextualize kinship-based inheritance practices. For instance, the question of women inheriting land from their male relatives was contentious; while Islamic law stipulated clear proportions for female and male relatives, Berber customary law disinherited women. Customary juries disagreed as to which

25. *Si ‘āyat* (Ar. *al kaddu wa al si ‘āya*; *Tashelhit tighrad*, lit. ‘shoulders’) is the share of wealth accumulated during the course of a marriage and distributed at divorce or death. This institution was common in the Anti-Atlas Mountains during the Protectorate period except when the wife initiated divorce. Court dockets regularly note the inventories of women’s *si ‘āyat* at divorce. A revision to the

Moroccan Family Code in 2010, in Article 19, is seen by some jurists as a resuscitation of this practice for all marriages at their termination. For a discussion of *al si ‘āyat* in both pre-Independence and 21st century forms in Morocco, see Husayn Al Melki, *Niḡhām al kad wa al si ‘āya* (Rabat: Maktaba Dar Esslam, 2002) and Hoffman, “Berber Law by French Means,” 880. For more on ‘*ulama* interpretations of the place of custom in law, see Omar ibn Abdalkarim Jidi, *Al ‘urf wa al ‘amal fī al madhhab al Māliki wa mafhūmuhumā ladā ‘ulamā’ al-Maghrib* (Rabat: Ṣundūq Ihyā’ al-Turāth al-Islāmī al-Mushtarak bayna al-Mamlakah al-Maghribīyah wa-al-Imārāt al-‘Arabīyah al-Muttaḥidah, 1984).

26. Pierre Swiggers, “Ideology and the ‘clarity’ of French,” in *Ideologies of Language*, eds. John E. Joseph and Talbot J. Taylor (New York: Routledge, 1990), 112-30.

system to follow, and plaintiffs and defendants argued for their best interests. Given the region's legal pluralism, women often did inherit, although typically only a portion of perishable foodstuffs or household goods.

It is unclear how much of the more permanent land Anti-Atlas women actually inherited, partly because of the terminological imprecision of the French used to record transactions. The clerks could have used Tashelhit and Arabic terms for kin, more precise than the French terms they chose. For instance, *Tashelhit* and Arabic languages both require precision as to "mother's father" or "father's father" rather than the French "grandfather," and "mother's brother" or "father's brother" rather than the generic French "uncle." Additionally, the most common relational term in the registers is the French gender-invariable term *parent* which can refer to any relative, including a parent or any extended family member. Thus it is impossible to know whether a person was inheriting from a biological parent or a more distant relative such as an uncle, cousin, or grandfather. Assessing proximity of successors is crucial to estate division in both customary and Islamic law.

Similarly, the French term for property and belongings alike in these court records was *les biens*, which included land, buildings, household goods, and perishable foodstuffs. Even when the more precise *immobilier* (real estate, property) and *meublier* (furniture, furnishings) appear, the former could mean any real estate, land or buildings, and the latter any removeable possessions including home furnishings, clothes, foodstuff, etc. Thus, the written record might state that a person's *biens* (goods, possessions, assets) were divided among the surviving children in proportions of one-fourth or one-eighth. But the contents of each share are often impossible to determine, and in particular whether a given daughter's share included land parcels or instead bags of barley. At times, the daybooks refer specifically to a "house" as such (*une maison*), but usually only when there was dispute over the allocation of rooms for successors with separate entrances. Additionally, when a woman's brother or father appeared in court as her *mandant* (Fr. summoner), a legal category for which papers would have had to be filed with the Native Affairs administrator, there is no way to ascertain whether the *bien* went to the woman herself or instead to her summoner after divorce or estate division.

In another important distinction, the French terms *répudiation* and *divorce* both appear in the court registers, sometimes within the same case. Yet "repudiation" is a reversible divorce (*talāq raja' ī*) in Maliki *fiqh* used in Berber custom. In contrast, divorce prevents a husband from requiring a wife's return until both former spouses have married and divorced other people, an

unlikely series of events. For instance, a man could be plaintiff in a case in which the register records a speech act he practiced outside the court such as “I repudiate my wife [so-and-so].” The deed confirming this speech act and the resulting change in personal status is usually called the divorce deed (*acte de divorce*) in the daybooks. The courts issued no *acte de répudiation*. Occasionally daybooks indicated degree of divorce (e.g. “talaq talat” [*ṭalāq thālāth*] meaning “third divorce,” more formally known in Arabic as *al-ṭalāq al-bayyin*, “irrevocable divorce”), yet court clerks inconsistently applied this term, too.

Pragmatically, a man’s utterance could elicit the wife’s consent (or that of her male proxy), although the wife’s refusal had no consequence. In contrast, if the wife requested divorce, the husband could decline, and the court could order the wife to return to the conjugal home. Most frequently, when a husband’s abuse or neglect prompted a wife’s request for what the daybooks alternatively term “divorce” or “repudiation,” the wife disobeyed the return order and instead took refuge in her father’s or brother’s home. Subsequently, she could either be imprisoned for defying court or be granted divorce, if the husband conceded and after she renounced the rights to which she should have been entitled. As with impotence, neglect and abuse were legally legitimate grounds for a wife to request divorce. Yet initiating a divorce left most women in situations where they were forced to renounce the compensation they were due.

In this respect, men and women could perform different speech acts in regards to divorce, as in Islamic legal practice. Husbands had three possibilities. First, a husband could register an already uttered repudiation, with or without witnesses, and simply come to court to settle accounts. Second, the husband could declare in front of the court: “I repudiate [wife’s name].” Third, a husband could come to court and state, “I request divorce from/I wish to divorce/I desire a divorce from [wife’s name],” performing a request that demands the wife’s response. The record then notes the wife’s response, invariably “I accept” to which she often added “and request my rights.” Her response conditionally qualified her consent in an additional speech act: her compensation request. The written record captures only a little of the complexity of the divorce continuum, as when the husband declared, “I repudiate my spouse, the defendant, once (*par une fois*).”²⁷ It is unclear whether there was an order from Protectorate officials as to the preferred terminology for marital separation similar to the order on orthographic

27. See TC 2, Registre 9, case 40/1955.

conventions to use in standardizing transcription of place and tribal names; conversely, orthographic conventions privileged French pronunciations over local ones and conflated sounds that have clear distinctions in Arabic and Tamazight languages.²⁸

The wife's request for divorce was a different speech act with a separate set of conditions. Daybooks show wives stated, "I request my divorce," "I request a/my divorce," or "I want a divorce" to which they sometimes added "and my rights." She could also preface her request with a declaration as to the reason for the request, such as "My husband does not take care of me."²⁹ When a man served as proxy for the female plaintiff, a common formula was something like "My daughter is married to the defendant who abandoned her five years ago. I request divorce."³⁰ These formulae may have been distilled down by the clerk transcribing the case, despite commonly-occurring quotation marks, yet this is unlikely given significant variation in the daybook wording noting the reasons she requested divorce.

For instance, a certain plaintiff Mamas Addi declared in 1954, "My husband left to work and left me with no resources. I ask that he be required to either repudiate me or take care of me."³¹ In another case from the same year, a plaintiff declared, "My husband mistreats me, I request a divorce."³² Five years previously, a plaintiff stated, "I request a divorce; my husband has been absent for six years and no longer looks after me."³³ As the years passed, husbands increasingly left their wives and children in the countryside to seek economic opportunity in northern cities and even France. Unlike in the contemporary Anti-Atlas Mountains, where emigrant men retain strong

28. Rather than endorsing greater precision for clarity's sake, Protectorate officials in Rabat standardized transcription and recordkeeping in such a way that glossed over phonological differences by region and language. In one example, a 1932 directive for transcription of Arabic and Berber mandated the use of single Roman letters to represent a range of sounds in the source languages; among many similar elisions, the directive instructed for four distinct sounds – *dāl*, *dhāl*, *zā'*, and *dād* (د ذ ظ ض) – to be transcribed with *d*. Such directives reflect the prevailing tendency to favor French speaker pronunciation rather than native speaker pronunciation. See Arrêté résidentielle, 6 June 1932, *Bulletin Officiel* no. 1025 (17 June 1932), 699-700 (available at the Centre des Archives Diplomatiques de Nantes).

29. See TC 2, Registre 8, case 69/1954.

30. See TC 4, Registre 7, case 41/1954. In this case, the husband disputed owing the wife anything on the grounds that she had left the conjugal home three years earlier. Two months later, the wife appeared and declared her husband impotent. She and her father abandoned all their rights in favor of the defendant. "This session, the defendant pronounces once that Fadma Ben Ali is divorced." Through the husband's speech act, then, he repudiated her (giving him the right to take her back) even though she and her father (who had housed her) had initially requested the divorce.

31. See TC 2, Registre 8, case 70/1954.

32. See TC 4, Registre 8, case 67/1954.

33. See TC 3, Registre 4, case 60/1949.

material and affective ties to their homelands and consider periodic returns crucial to their honor and that of their extended families,³⁴ emigrant men in the Protectorate period often lacked the financial ability or commitment to return. As a result, neglected wives insisted on relief from the financial burden of their situation, married yet unable to feed themselves and their children, and unable to return to their parents or to remarry. The chorus of wives demanding divorce unsettled French officers, one of whom argued against the moral imperative of helping women leave neglectful husbands lest it provoke a “women’s revolution” that would turn Moroccan men against the Protectorate.

Conclusion

The customary court daybooks threatened to circulate Tashelhit language outside of the region in which it was spoken, and insert it into institutions and domains where it ostensibly did not belong. The simultaneous use of not only French but also *Tashelhit* and Arabic in the customary court registers raises several related questions. What was the intended trajectory of court records? Who was meant to read them and where were they supposed to travel? Many transcribed cases are largely incomprehensible without the reader’s familiarity with Berber institutions and with Berber and Arabic languages.³⁵ Appendices such as genealogies, lists of land parcels, and lists of home furnishings were in Arabic and *Tashelhit* transcribed in Arabic script, carefully pinned onto the registers with thin, firm thorns with tufted tops from local vegetation. Yet policy correspondence with supervisors in Rabat, Marrakesh, and Paris suggests that the court daybooks were intended for posterity, or at least for Protectorate archives. Rather than traveling back to the Metropole with the French in 1956, then settling into the archives on French territory, court daybooks remained in the Moroccan countryside, never archived or even dusted off or organized until 2009 when I found them scattered and stacked on floors and shelves in a corner of the same Igherm courthouse where the French held audiences deep in the eastern Anti-Atlas Mountains. Many daybooks were cast asunder into what was once the court fireplace, aptly enough because upon Independence in 1956, Moroccan civil servants burned

34. Katherine E. Hoffman, *We Share Walls: Language, Land, and Gender in Berber Morocco*, (Malden: Blackwell-Wiley, 2008).

35. An example is the institution of *amerwas* (Ar. *ṣadaqa*), the monetary gift from groom to bride’s family that in many Berber communities remained unpaid unless the husband repudiated his wife, and *lqimt* (Ar. *qīma*, “value”), or the goods a bride brought to the marriage. See Souad Azizi, “L’amerwas et la lqimt chleuhs: instruments coutumiers de domination masculine et de stabilité conjugale,” in *Droit et société au Maroc*, ed. Elhoussine Ouazzi (Rabat: IRCAM, 2005), 46-49.

copious Native Affairs records, at least those they did not relocate to personal libraries. Other court artifacts disappeared in the 1980s when men arrived in two Land Rovers from an unidentified ministry in Rabat and removed papers, as locals described it thirty years later.

The customary court daybooks in Igherm escaped this fate. We can ask why they did not circulate up to the capital even though they were of potentially great interest to policy debates about how to govern the so-called *indigènes*. Additionally, they would have been useful to the post-Independence ministries of the interior and of justice if administrators wish to understand rural legal practices. To the anthropological and historical eye, however, these raw texts remain among the only extant records of dispute resolution in the mountains in the first half of the twentieth century. Beyond law, they provide rich accounts of material, political, social, and linguistic life among mountain groups during a period of great transition. Resorting to *Tashelhit* rather than French to encode key elements of mountain dwellers' disputes was not surprising given the particularity of Berber institutions and material culture; further, the imprecision of French for more complex concepts highlights the relative utility of transcribing the original spoken terms into the court records. Arguably and perhaps ironically, more *Tashelhit* rather than less would have increased the transparency of the court registers and the processes of social conflict resolution documented therein.

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الإثنوغرافيا الأرشيفية في المحاكم العرفية: التعددية القضائية واللغوية في فترة الحماية الفرنسية

ملخص: تبحث هذه المقالة في اللغات المتعددة والمصطلحات القانونية المستخدمة في المحاكم العرفية الأمازيغية (tribunaux coutumiers) التي أنشأتها سلطات الحماية الفرنسية بالمغرب وتخدم المجموعة السكانية الأمازيغية القروية لمدة عقدين من الزمن، من حوالي 1930 إلى 1956. قام الكتبة والضباط الفرنسيون والشمال أفريقيون بترميز إجراءات المحكمة في المقام الأول بالفرنسية، وفقاً للمتطلبات السياسية للفترة المعنية بها، لكنهم استخدموا مصطلحات تاشلحيت الأمازيغية المترجمة للمؤسسات القضائية الأمازيغية الفريدة، والمفاهيم، وأنواع السندات، بالإضافة إلى عناصر الثقافة المادية. ويشير هذا الفحص إلى استخدام وتأثيرات ترسيخ اللغة الأمازيغية الشفوية والقانون في الكتابة، مع التركيز على خمس محاكم عرفية في شرق جبال الأطلس الصغير، إلى أن الممارسة الواسعة الانتشار لاستخدام البربر في وثائق المصالح الإدارية التابعة لسلطات الحماية الفرنسية تعكس التفاعلات الشفوية في المحاكم وعززت أهداف السياسة الأهلية الفرنسية على الصعيد المحلي. وقد شجعت هذه الأخيرة في المقام الأول على نشر الأعراف البربرية على حساب الشريعة الإسلامية، كما تمكنت من صياغة العرف على أساس اعتباره مختلف عن الشريعة الإسلامية على الرغم من توفر أدلة على وجود تعددية قانونية وقضائية أكثر مرونة منذ فترة طويلة. ومع ذلك، كانت النتيجة هي وجود مجموعة من السجلات القانونية غير المفهومة من قبل المسؤولين الفرنسيين بخلاف أولئك المطلعين على لغة تاشلحيت الأمازيغية والمفاهيم القانونية العرفية الأمازيغية.

الكلمات المفتاحية: القانون العرفي، الشريعة الإسلامية، المغرب، الحماية، اللغة، تاشلحيت.

Ethnographie archivistique dans les tribunaux coutumiers: Pluralisme juridique et linguistique sous Protectorat français

Résumé: Cet article examine les multiples langues et codes juridiques utilisés dans les tribunaux coutumiers berbères établis par le Protectorat français du Maroc et au service des communautés rurales berbères pendant deux décennies, de 1930 à 1956 environ. Il examine les façons dont les deux, scribes et officiers français et nord-africains codaient les procédures judiciaires principalement en français, conformément à la politique, mais utilisaient des termes berbères translittérés de *Tashelhit* pour désigner des institutions juridiques, des concepts et des types d'actes uniquement berbères, ainsi que des éléments de la culture matérielle. Cet examen de l'utilisation et des effets de l'entextualisation de la langue et du droit berbères autrement oraux dans l'écrit, en se concentrant sur cinq tribunaux coutumiers des montagnes de l'Anti-Atlas oriental, suggère que la pratique répandue d'utiliser le berbère dans les documents du Protectorat reflétait les échanges oraux au sein des tribunaux et a fait progresser les objectifs de la politique autochtone française. Cette dernière a principalement encouragé la promulgation de la coutume berbère sur la loi islamique, et a défini la coutume comme distincte de la loi islamique malgré les preuves d'un pluralisme juridique plus fluide depuis longtemps en place. Néanmoins, le résultat a été un ensemble de registres juridiques qui étaient incompréhensibles pour les fonctionnaires français autres que ceux qui connaissaient la langue berbère de *Tashelhit* et les concepts juridiques coutumiers berbères.

Mots-clés: Droit coutumier, droit islamique, Maroc, protectorat, langue, *Tashelhit*.