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Refracting custom in Western Sahara's quest for statehood

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Refracting custom in Western Sahara's quest for statehood

Abstract
This article argues that distinctions made by local actors between different legal and normative orders within a broad field of "custom" should receive greater analytical attention. Local distinctions within custom have sometimes been overlooked in scholarly emphasis on other distinctions, such as between custom and state law, or between custom and religious law. The significance of local distinctions within custom comes to the fore in the case of the liberation movement from Western Sahara, a disputed territory partially annexed by Morocco in 1975. In exile in Algeria, Western Sahara's liberation movement has set up a state-like government that seeks international recognition as a state. In support of its efforts at state-making, the liberation movement has drawn on a longstanding local distinction within custom, between ʿurf *and* ʿāda, *to produce a distinction between* aʿrāf, *construed as tribal laws to be erased, and* ʿādāt, *construed as customary cultural heritage to be elevated.*

Keywords:
Custom, legal reform, liberation movement, North Africa, refugees, state power, Western Sahara

Anthropological interest in local law codes, rules, or norms has implied distinctions between a field of custom and other legal and normative orderings. Names as varied as custom, customary law, indigenous law, and tribal law, inter alia, have been used to describe a field that—for want of a single widely used term—I shall call "custom".[1] Custom has readily been distinguished from, and compared to, state law and religious law.[2] In addition, it is widely recognized that some forms of custom are "invented" (Hobsbawm 1983). "Customary law" which poses as pre-colonial indigenous law deployed in colonial and post-colonial contexts has been produced by the encounter between colonial authorities and native elites (Chanock 1985; Vincent 1989), and by post-colonial governments (Chanock 1989; Moore 1989).[3] As such, it is to be distinguished from the "norms and practices existing in the pre-colonial period" (Chanock 1985:240) and from "the reconstruction of precontact native law by an anthropologist" (Starr and Collier 1989:8-9). Recently, renewed interest in local law codes in the Middle East and North Africa highlights the need to distinguish between invented custom and longstanding non-state legal and normative orderings that cannot be reduced to colonial "inventions" (Dresch 2006; Dresch 2012; Scheele 2008).

The preoccupation with these two distinctions—between custom and other legal and normative orderings (state law, religious law), and between "invented" and "authentic" custom—exacerbates a tendency that has been noted for the field of custom to be "more often implicitly defined by what it is not" (Scheele 2008:895). Thus in different contexts a field of custom might be defined as "not state law" or "not a pre-colonial survival". The definition of custom through that which it is not in turn can reinforce a parallel tendency on which Scheele (ibid) also remarks. The content of local law codes, rules, or norms can be neglected. My intention here is to explore how close attention to the content of custom may enhance understandings of that field. Specifically, I foreground how custom not only varies from one setting to another, but may also in a given context accommodate a variety of distinct and potentially contrasting legal and normative orderings. In short, custom may be refracted. The greater preoccupation with another set of distinctions—between custom and state law or religious law, and between "invented" and "authentic" custom—has tended to eclipse these other distinctions within custom in a given setting. I argue that local distinctions made within custom are nevertheless analytically important in their own right.

I explore these issues by turning to the study of custom in the Muslim Middle East and North Africa (MENA). First, I trace an ongoing tendency to treat custom there as a field to be contrasted with and compared to state law and religious law. I argue that one consequence of this tendency is that local distinctions made within custom have often been overlooked.

Though often neglected, local distinctions within custom have nevertheless sometimes been observed. In order to examine the analytical importance of local distinctions made within the field of custom, I consider a distinction sometimes noted between *'urf* (pl. *a'rāf*) and *'āda* (pl. *'ādāt*) (Caro Baroja 1955; Chelhod 1971). Both terms are usually translated as meaning "custom" or "customary law"—although the first comes from a root meaning "to know", and the second from a root with the meaning "to be accustomed".

Bearing the distinction between *'urf* and *'āda* in mind, the article focuses on how the distinction between them has been put to politicized use by the liberation movement from Western Sahara, Polisario Front (henceforth Polisario). From its base in refugee camps in Algeria, Polisario governs a civilian population of refugees from the disputed territory of Western Sahara.[4] After describing the liberation movement and its quest to make a Sahrawi state, I examine how political and legal reforms implemented by Polisario have drawn on the distinction between *'urf* and *'āda*. Polisario has produced a distinction between *a'rāf*, construed as tribal laws to be erased, and *'ādāt*, construed as customary cultural heritage to be elevated.[5] I explore how both the techniques of erasure, and those of elevation, support Polisario's agenda for making a Sahrawi state.

Polisario's reforms saw different outcomes for distinct fields within custom. The case at hand thus underscores the need to refract the field of custom. Yet it highlights the need to refract not only custom, but also customary law understood as the process of (post-)colonial inventions. It is specifically Polisario's configurations of *a'rāf* and *'ādāt* that are to be erased

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and elevated respectively. In other words, two post-colonial inventions occur here, each leading to a different outcome.

In concluding, I suggest that through its strategies of erasure and elevation, Polisario uses its "aspirations for law" to attempt to make itself "legible" (Scheele 2012), on both local and international scales, as a polity deserving of international recognition as a state. In analyzing how Polisario draws on a distinction within custom to pursue two inventions of customary law, my broad purpose is to extend discussion of the dynamic relationship between custom, state law and religious law. I highlight dynamism within multiple notions of custom and their respective interactions with other legal and normative orderings.

Making—and omitting—distinctions
On the part of both scholars and those whom they study, the intellectual work of making—and omitting—distinctions shapes how the field of custom is conceived. In MENA, local actors and their governing authorities have readily distinguished between, on the one hand, custom, and, on the other hand, religious law (for Muslims *sharī'a*) and state law.[6] Reflecting on these claimed distinctions, some commentators have referred to a "legal triangle" of Islam, custom and state law (cf. al-Zwaini 2005). Yet scholars have also interrogated local actors' distinctions within this "legal triangle", especially claimed differences between custom and Islamic law (cf. Dresch 1989:186; Mundy 1979).

Although the relationship between custom, Islam, and state law has been scrutinized, scholars have used a variety of terms and translations for custom without subjecting relationships *within* custom to similar scrutiny. *'Urf* is widely used among arabophones, and has had varying translations: "customary law" (Bisharat 1989), "tribal law" (Weir 2007), and both "custom" and "tribal law" (Dresch 1989). *'Urf* may be a preferred term among several alternatives, such as *'āda* (Messick 1993:183).[7] Alternatively, *'āda* may be the preferred term (Denis 2001; Serjeant 1991). Sometimes the terms are used together in the phrase "*al-'urf wa-l-'āda*" [*sic*] (Bailey 2009). Elsewhere, no Arabic term whatsoever is given in discussions of "tribal law" in the Arab world and "customary law" among Bedouin (Stewart 1987; 2006). Amid the variation in the use, translation, and omission of terms for custom, seldom has it been asked whether different local terms might, in a given context, have distinct meanings. Indeed, readers of the Encyclopedia of Islam have been assured that, whilst the usage of the terms *āda* and *'urf* necessarily varies from region to region (in arabophone areas and beyond), the terms "have the same meaning" (Bousquet 1994:170).

Despite the tendency to leave different terms for custom unexamined, it seems that custom, and local terms used, may indeed encompass different meanings. Berque (1953) recognizes variation between settings in North Africa in different kinds of custom, such as different degrees of codification. He does not, however, address distinctions made within a given setting, nor does he examine the use of different local terms. Chelhod (1971:78-80) takes up exactly this question. He examines how Bedouin may contrast *'urf* with *āda*.[8] He argues that Bedouin understand *'urf* as a legal and normative ordering, the infringement of which

necessarily leads to punishment. In contrast, *'āda* is understood as a legal and normative ordering based on customary usage, adherence to which is expected yet infringement of which does not enjoin punishment.[9]

Chelhod offers several examples of this distinction. For instance, it is common practice—or *'āda*—among Bedouin to honor a guest of importance by slaughtering a sheep or goat. Yet there is no obligation to do so, and no punishment should such a slaughtering not take place. Nevertheless, according to *'urf*, a host who wishes to make such a slaughtering, but has no animal, may take a suitable animal from his neighbor, either by agreement or by force. This animal is to be repaid in kind or otherwise at a future date (Chelhod 1971:79-80).

The distinction described by Chelhod is similar to the (controversial) distinction in debates about legal pluralism between "norms", which are generally observed but not formally obligatory, and "law", which is formally obligatory. In the case of Bedouin, however, the "law" (*'urf*) is not enforced by a state, which is a requirement for some interpretations of "law" (Merry 1988; Tamanaha 1993). The possibility of a distinction between "norms" and "law" within custom is evoked elsewhere in MENA. In Rāziḥ, Yemen, alongside *'urf*, one also finds "*aslāf... al-qubul*" [*sic*], the latter term used with the sense of hereditary tradition (Weir 2007:147). In the arabophone north-west Sahara, as we shall see, a distinction between *'urf* and *'āda* has also been claimed (Caro Baroja 1955).

Though often neglected, distinctions within custom have been made locally in the Middle East and North Africa, then. Yet to what extent may distinctions within custom prove analytically significant in their own right? Their potential significance comes to the fore in the political and legal changes that have engulfed a troubled region of the arabophone north-west Sahara.

From decolonization to revolution
There is a long history of an awkward relationship between state power and Saharan north-west Africa. A recent and ongoing phase of this awkward relationship is the unfinished decolonization of Western Sahara. The north-west Sahara is home to "the Moors", Bedouin who are speakers of the Hassaniya dialect of Arabic. They established themselves there in the 13th – 16th centuries CE in the wake of the inter-mingling of migrant Arab tribes, Berbers, and black Africans (see Norris 1986). In pre-colonial times, the spaces in which hassanophones lived were the Saharan lands out of reach of bordering imperial powers, such as the Moroccan sultanate, the empire of Mali and the Songhay empire. In the colonial and post-colonial world hassanophones' homelands have been traversed by nation-state borders, some of which are disputed. Today, hassanophones are spread over southern Morocco, disputed Western Sahara, Mauritania, south-west Algeria and parts of Mali and Niger.

Hassanophone social structures have centered historically on patrilineal "tribes" (*qabīla* pl. *qabā'il*), and stratified status groups (elite warrior and religious groups, tribute payers,

blacksmiths, slaves, and freed-slaves).[10] There being no inclusive Hassaniya term equivalent to the somewhat colonialist "Moors", I use hassanophone here.

In the scramble for Africa, Spain claimed an area of hassanophone territory opposite the Canary Islands. The borders of this territory were delimited gradually over the following decades (see San Martín 2010) to form Spanish Sahara. The sparsely populated desert territory, about the size of the state of Colorado or the UK, was abruptly abandoned by Spain in 1975. Spain handed the territory over to Morocco (and, initially, Mauritania).[11] Claiming sovereignty over Western Sahara, Morocco partially annexed the territory in 1975. Since then it has retained control of the greater part of the territory. Although Morocco's annexation lacks international legitimacy, Morocco enjoys strong political support from its allies the US and France.

Pitted against Morocco is Western Sahara's liberation movement, Polisario, which also claims sovereignty over the territory. Polisario's allies, principally Algeria, are less influential internationally than Morocco's. But Polisario enjoys a strong legal position. The liberation movement is recognized as the representative of the Sahrawi people. The right to self-determination of the people of Western Sahara has been recognized in UN resolutions since the 1960s, and in the International Court of Justice's 1975 Advisory Opinion on Western Sahara. After a war between Polisario and Morocco 1975-1991, a UN-brokered ceasefire has held since 1991. UN attempts to negotiate a solution to the parties' claims have been at a standstill since the mid 2000s.[12]

One consequence of the intractability of the conflict over Western Sahara is that Polisario has been able to assume and develop the role of a rival state authority to Morocco. Polisario (like Morocco) governs part of the territory and the population of Western Sahara. A Moroccan-built military wall divides the territory. The westerly portion, larger and richer in resources and containing the main towns, is under Moroccan control. The easterly portion, without coastal access and with no significant towns at the time of separation, is under Polisario control.

Upon annexation, the Sahrawi population cleaved between those remaining in Moroccan-controlled Western Sahara, and a refugee population who fled the territory. The size of the exiled (and other) Sahrawi population(s) is disputed. Estimates of the refugee population in the 2000s range from 100,000 to 160,000.[13] The refugees have been settled since 1976 in refugee camps near Tindouf, Algeria, some 50km from the border with Western Sahara.

The refugees are governed, with Algerian consent, by an administrative fusion of Polisario and the state that it founded in 1976, the Sahrawi Arab Democratic Republic (SADR). The fusion of Polisario and SADR has state-like qualities. With ministries, a Parliament, and prisons, the interweaving structures of Polisario and SADR govern the civilian exiled population. The fusion of Polisario and SADR also engages in inter-state relations and

multilateral relations.[14] Yet this government is based in exile, and is only partially recognized by other states and inter-state organizations. Taking into account how this governing authority both resembles and differs from conventional notions of statehood, I refer to this entity through the term "state-movement".

For governing authorities in exile such as the Tibetans in India (McConnell 2009), the PLO in Lebanon in the 1970s (Peteet 2005), and indeed Polisario, the governance of a civilian population in exile provides the opportunity to practice state power. The state-movement has nurtured national identity (San Martín 2010), established organs of government, and courted international legitimacy. It has weathered changes such as migration movements pulling some refugees away from the camps (Wilson 2014). It also increasingly accommodates internal criticism within the refugee camps (Wilson In press). In sum, the refugees experience the state-movement as a form of state power which governs their lives.

Key to the state-movement's efforts to make a state authority for Sahrawis has been its pursuit of an agenda of revolution (*thawra*). This revolution sought to reconfigure Sahrawis' social and political relations in support of the claims and goals of the new state authority. These revolutionary aspirations extended to banning tribalism (*al-qabaliyya*). Official anti-tribalism, such as that of the state-movement, has been taken up at particular moments in various post-colonial states in Africa and the Middle East (e.g. Casciarri 2006; Lackner 1985; Lewis 1979; Takriti 2013). Tribalism is typically rejected on grounds such as that tribes are divisive of national identity, and introduce hierarchies that are problematic for societies aspiring to egalitarianism. In the case of the state-movement, anti-tribalism was even more intimately related to state-building. In the state-movement's nationalist and pro self-determination discourse, tribes were associated with resistance to state power (historically that of the Moroccan sultanate).

One of the ways in which tribes were perceived to be threatening to state power (potentially that of the state-movement too) was that tribes came with their own laws. These laws varied from tribe to tribe. The state-movement's revolution, then, included extensive legal reforms that introduced one set of laws for all Sahrawis (starting, due to the separation of Sahrawi populations, with those in the refugee camps). This introduction of state law simultaneously entailed the attempt to make obsolete the rival legal and normative ordering associated with tribes.

Erasing *a'rāf*
The legal and normative fields that Polisario sought to reform are challenging to reconstruct. Whilst there has been much attention paid to custom in other parts of North Africa, the paucity of studies of custom in the hassanophone region has been noted (Stewart 1987; Stewart 2006). Caro Baroja (1955), who conducted fieldwork in the 1950s in what would become Western Sahara, draws a parallel distinction to that made by Chelhod between *'urf* and *'āda*.[15] He explains that each tribe has its own *'urf*, which varies from tribe to tribe and is decided by the *jamā'a* (tribal council) (Caro Baroja 1955:43).[16] He explicitly contrasts *'urf*

and *'āda*. The first is "particular", whilst the second is "that which is general" (Caro Baroja 1955:43).[17]

Nothing further is said about *'āda* by Caro Baroja. *'Urf*, however, continues to receive attention. He explains that *'urf* specializes in the repression and punishment of crimes such as killing, theft, striking, wounding, threats of the former, infringements of the tent, and rape (Caro Baroja 1955:43). Other items of *'urf* deal with the paying of tribute and the conditions under which evidence is taken to be admissible (Caro Baroja 1955:43-44). Caro Baroja goes on to qualify his initial statement that each tribe has its own *'urf*. Rather, *'urf* pertains only to those tribes that are politically dominant (of whom he lists five).[18] A position of political dominance allowed for the recruitment of clients from whom tribute could be extracted and to whom protection could be offered. Crucially, the patron tribe's *'urf* would apply to clients. Thus, Caro Baroja explains, the case of the Awlād Tidrārīn was deemed problematic. Prior to Spanish colonialism the Awlād Tidrārīn tribe had fallen in status to become the clients of the Awlād Delīm. Although the Awlād Tidrārīn were known to have their own *'urf*, it was considered to be "internal". At times the Awlād Tidrārīn had had to submit to the *'urf* imposed by the Awlād Delīm or other tribes (Caro Baroja 1955:44).

The distinction observed by Caro Baroja apparently coincides with that described by Chelhod. That is to say, *'urf* would refer to laws that require obedience and the infringement of which entails formal penalties. These laws would be particular to politically-dominant tribes who, through their claims to political dominance, could enforce observation. In contrast, *'āda* would not entail such formal punishment when infringed. It therefore would not be linked to political positioning, nor be particular to tribes with the power to coerce. It falls beyond the scope of the present discussion to appraise Caro Baroja's observed distinction between *'urf* and *'āda*. The notion of that distinction is nevertheless important here for understanding the nuances of legal reforms carried out by the state-movement that reconfigured the field of custom.

The reshaping of custom by the state-movement occurred in the context of wide-ranging legal reforms. From the mid 1990s, these reforms converged on the creation of a professional judicial apparatus for SADR. The new apparatus replaced former institutions of popular justice.[19] A Court of First Instance, Criminal Court and Court of Appeal were founded. Professional judges and lawyers were appointed. In the case of the older generation of judges, some of them had previously served as a legal advisor in the days of popular justice. Now they served as judges in the Court of First Instance, which dealt with marriage, divorce, inheritance, sales, and contracts. In the late 2000s, all these areas were dealt with through *sharī'a* as interpreted by these judges. The judges in question were considered to be expert in the Malikite school of *sharī'a* jurisprudence. (Indeed, this was the very expertise that they had previously offered in the old style popular justice). The SADR had no codified laws in these areas equivalent to the codified forms of *sharī'a* family law found in other states in MENA.[20]

As for legal professionals of the younger generation, they had studied law wherever Sahrawi students had been welcomed as students by "friendly" countries. For instance, one judge in the Criminal Court and a female lawyer there had studied law in Algeria. Another male lawyer colleague of theirs had taken his law degree in Cuba. On their return to the refugee camps, young legal professionals were re-trained by the SADR Ministry of Justice in SADR law, which now began to be codified in selected areas. A SADR penal code was elaborated, in style and feel close to French-inspired Arabic language penal codes used in North African states. The codification of SADR penal law was one key element in the state-movement's production of a particular distinction with custom.

Codification targeted a specific category within custom, which both lay refugees and legal experts referred to as *a'rāf*. The plural *a'rāf* was used in the refugee camps to refer to the laws that were specific to a politically dominant tribe, in other words Caro Baroja's "*'urf*". Refugees, including their legal experts, also used the singular *'urf*, but they did so without the specific meaning of a tribe's penal code. Rather, they used it to refer to a broad field of custom distinguished from state law and Islamic law (somewhat equivalent to my use here). In the refugee camps, then, the plural *a'rāf* was used with a more specific meaning than the singular *'urf*.

The SADR penal code introduced new punishments for the very crimes that *a'rāf* addressed (theft, sexual offenses, murder). The punishments stipulated in *a'rāf*, which varied from tribe to tribe, were effectively replaced. For instance, according to three sets of *a'rāf* recorded by Caro Baroja, punishments for theft varied. Among the Ait Lahsen, stolen property had to be returned and a sheep or goat slaughtered in addition. Among the Izargiyen and the Rgaybāt, stolen property had to be given back four times over (that is, four sheep returned for the theft of one sheep) (Caro Baroja 1955:439-441).[21] In contrast, under SADR law a thief was liable to imprisonment. This form of punishment was reportedly applied. One of my Sahrawi friends worked as a teacher in the refugee camps' men's prison. He explained to me that the most common crime for which inmates had been sentenced (under SADR laws) and detained was theft. Rather than the historical situation of there being alternative penal laws according to one's tribe, the SADR penal code defined one set of punishments for a specified crime which applied to all Sahrawis (starting with the refugees), regardless of tribe. In theory, the SADR penal code made *a'rāf* obsolete.

To what extent was it plausible to erase *a'rāf*? Conceptually, jurists in the refugee camps took the erasure seriously. They opined that *a'rāf* were indeed made obsolete by the SADR penal code. In the view of the aforementioned judge at the Criminal Court who had first trained in Algeria, there was only one oblique exception to the erasure of *a'rāf*. Article 220 of the SADR penal code requires that compensation (*diya*) be paid in the case of murder in accordance with *sharī'a*. According to this judge, Article 220 obliquely referred to *a'rāf*, since it was necessary to turn to *a'rāf* to ascertain the amount of *diya* to be paid.[22] On a practical level, the fact that thieves in the refugee camps might face a spell in jail suggests that the erasure of *a'rāf* was not merely discursive. It was also effective in practice, at least to some extent.

Beyond the discursive and practical impact of the erasure of *a'rāf*, another factor might make its erasure plausible—even in a context where the observance of custom is much more longstanding than the observance of state law. Only *a'rāf* understood in the specific sense of the penal codes of particular tribes were targeted for erasure. In other forms, custom was not necessarily erased. As mentioned, refugees used *'urf* in the sense of a general field opposed to state law and Islamic law (but not in the specific sense of the penal codes of particular tribes). Refugees, including legal experts, did not consider that *'urf* in this broader sense had been erased. For instance, they considered that it persisted in practices such as dispute reconciliation (*ṣulḥ*) that took place outside law courts.[23] In perhaps the greatest contrast to the targeting of *a'rāf* for erasure, another form of custom was to be elevated. The form of custom thus favored by the state-movement was *'ādāt*, construed as customary cultural heritage.

Elevating *'ādāt*

The state-movement's cultivation of *'ādāt* occurred most explicitly in their pairing with *taqālīd* (traditions). *Al-'ādāt wa-ttaqālīd* (customs and traditions) were made into targets of celebration in stylized forms by the state-movement. Just as elsewhere folklore is put to the service of nationalism (c.f. Herzfeld 2003), the state-movement's celebration of *'ādāt* upheld the notion—here essential as justifications for national liberation and self-determination—of a distinctive Sahrawi national identity.

A poignant example of the official celebration of *al-'ādāt wa-ttaqālīd* is the Festival of Sahrawi Culture. This Festival has been organized by the state-movement in recent years, with the location varying from one refugee camp to another.[24] The Cultural Festival of December 2008 was held in the refugee camp named after Ausserd, Western Sahara.[25] Each neighborhood in each district from each refugee camp sent a delegation of women to the festival. Each delegation set up a goats-hair tent, such as was commonly used by mobile pastoralists until the 1970s. These goats-hair tents were an unusual sight in exile by the late 2000s. By then they had long been replaced by cloth tents provided by humanitarian organizations.

In each goats-hair tent, the women participating in the festival displayed *al-'ādāt wa-ttaqālīd* in material forms. The women showcased objects that they had made, borrowed or even arranged to buy for the occasion from families in the pasturelands. Objects not typically in use in the refugee camps abounded. These included implements for making tea that had been replaced by cheaper manufactured goods, and the paraphernalia for loading a household and some of its members onto a camel's back. My aged host father in Ausserd camp had grown up in the pasturelands. Having visited the festival, he remarked to me that he had seen sights from his childhood and youth that he had not realized still existed.

Al-'ādāt wa-ttaqālīd were also embodied at the festival. Some children staying with their mothers in the festival tents had their hair partially shaved to recreate children's hairstyles of bygone times. These styles caused amusement among some young adult refugees, to whom the coiffure was unfamiliar and exotic. Delegations at the festival also "enacted" *al-'ādāt wa-ttaqālīd*. These "enactments" included the staging of "a traditional Sahrawi wedding" (*al-'urs a-ttaqlīdī*), a "divorce party" (a celebration marking a divorced woman's return to marriageability), and even a circumcision. The latter was aborted, much to the relief of the boy in question, seconds prior to the crucial moment by the festival's judges. The latter were touring the tents to view and judge the enactments, in anticipation of announcing the "winners" of that year's festival.

The "enactments" of *'ādāt* bring to mind Chelhod's understanding of *'āda* as regularly observed practices the non-following of which nevertheless does not trigger a punishment. I had other, everyday encounters with *'ādāt*, often as I unwittingly blundered against their protocol. For instance, one evening I suggested to a married host sister, Suelma, that we greet our neighbors. Suelma demurred. Although I could go, she could not accompany me because it was not in the *'ādāt* of those neighbors for a married woman to visit their tent after nightfall.[26] On another occasion, I asked a young mother if she would decorate her hands with henna for Eid. She told me that she could not, because her son was not yet two years old. She explained that according to *'ādāt*, only after he had reached that age could she resume wearing henna.

In addition to specific instances of *'ādāt*, I also encountered talk of them as a general notion evoked, in an echo of the Cultural Festival, with pride as a sign of a prized and distinctive Sahrawi identity. A *'rāf* was never talked of thus, however. Not least because of the rarity of a clear scholarly distinction between *'urf* and *'āda*, I was intrigued by my encounter with the distinctions made in the refugee camps within custom.

I pressed some interlocutors on this question. One such inquiry met with indulgent laughter at my naivety. "Of course they are not at all the same", one middle-aged man chuckled to me. When I asked him to elaborate, the explanation he offered was that "al'urf ma'rūf wa-l-'ādāt dhā alli t'awwadnā 'ali"[27] [*'urf* is that which is known, and *'ādāt* are the things we are accustomed to]. This explanation draws on the etymological distinction of the two roots in question. *'Urf* is derived from a root meaning "to know", and *'ādāt* from a root with the meaning "to be accustomed". The explanation offered to me of the distinction between the two spheres highlighted two different sets of activities and relations. To "know" something, in the sense of having had knowledge imparted to one, is not the same as "to be accustomed" to something, with contrasting implications of access and exposure even without a deliberate act of knowledge having been imparted.

This interlocutor had distinguished between *'urf* and *'āda* as an opposition between the known and that to which one has become accustomed. Yet this distinction does not account for all the nuances of the distinction made by the state-movement between a *'rāf* and *'ādāt*.

Indeed, there was a critical difference between my everyday encounters with specific instances of *'ādāt*, and the more general evocations of *'ādāt* or its official sponsorship in events such as the Cultural Festival. Everyday encounters with specific manifestations of *'ādāt* could in fact be linked to a particular tribe. Such a link was typically left unmentioned, however, in initial explanations offered to me about everyday encounters with *'ādāt*. Thus the practice of not receiving married women visitors after dark turned out, on later discussion, to be particular to Suelma's neighbor's tribe (different from her own tribe). The presence or absence of henna prohibitions after the birth of a (male) child likewise varied, I learned with time, from tribe to tribe. I had observed variations at weddings in the refugee camps in the timing of the bride and groom's opportunity to consummate the marriage. Such variation had initially been explained to me as "some families doing it differently". Later, though, interlocutors explained that there were different *'ādāt* among tribes regarding when the bride was finally handed over.

The link between specific *'ādāt* and tribes was not usually made explicit in refugees' everyday practice of *'ādāt* . It might be said that refugees, who were aware that *'ādāt* varied from tribe to tribe, did not need to make the relationship explicit. But there was further reason for the refugees' discretion surrounding the connection between *'ādāt* and tribes. Mentioning tribes in the refugee camps was sensitive, even in conversation among refugees (and especially in conversation with a foreigner).

In the early years of the revolution, the state-movement's anti-tribalism had been virulent. Refugees recalled of the 1980s that mention of tribes was liable to punishment, such as being forced to make extra mud-bricks. In the 2000s, such punishments no longer applied. The open naming of tribes had been somewhat forced again on the refugees and on the state-movement by the conflict resolution efforts. The UN had sought to register voters for an eventual referendum on self-determination by ascertaining who genuinely belonged to a Sahrawi tribe. Refugees had thus been encouraged to claim, and be claimed, by a tribe. Nevertheless, the everyday mention of tribes in the refugee camps retained associations varying from indiscretion and bad taste to offence. Mention of specific tribes most often took place, then, when those gathered were assured that they would not thereby cause offence or be criticized.

In the context of refugees' guardedness about mentioning tribes, acknowledgement of the links between tribes and specific *'ādāt* practiced by refugees was discreet. It was confined to tacit interactions among refugee families in everyday life (such as Suelma's avoidance of her neighbor's home after dusk). Thus, the links between *'ādāt* on the ground and tribes were kept predominantly private. In contrast to this discretion stood the public discourse of proud yet general evocations of *'ādāt* as a sign of Sahrawi identity. An extreme form of this discourse was staged at the Cultural Festival. In this discourse, *'ādāt* had been unlinked from associations with tribes, and reappropriated as a homogenized body pertaining to "the Sahrawi people".

The official detribalization of *'ādāt* suggests how tribes were part of "cultural intimacy" (Herzfeld 2005). Anomalous to the official claims of nationalism, tribes were concealed from the account of Sahrawi national identity made available for external (and internal) consumption. But tribes were also that awkward intimate register on which nationalism relied. This was epitomized in the registration of voters for an eventual referendum on self-determination. Only voters who "proved" membership in a Sahrawi tribe could be registered. It was in belonging to a "Sahrawi" tribe that Sahrawis recognized of each other membership in the nation, and were promised such recognition from the international community.

It transpires that detribalization was not only pursued by the state-movement through the erasure of *a'rāf*. It was also pursued in the more subtle form of the retention and promotion of a detribalized version of *'ādāt*. Through the pursuit of these two forms of detribalization, the state-movement produced a specific distinction between *a'rāf* and *'ādāt*. The production of this distinction may have taken strength from a history of a distinction between *'urf* and *'āda* in this region. But the distinction took on new meanings in the politicized context of the state-movement's program of state-building and anti-tribalism. Others have sought to pair "*al-'urf wa-l-'āda*" (cf. Bailey 2009). The state-movement's political goals to make *a'rāf* obsolete, and yet to celebrate *'ādāt* as a sign of a distinct Sahrawi identity, led to a pairing of "*al-'ādāt wa-ttaqālīd*" and a bifurcation of *a'rāf* from *'ādāt*. In this case of post-colonial legal reforms in a quest for statehood, the malleability of the production of distinctions within custom is brought to the fore. Curiously, the elevation of *'ādāt*, just as much as the erasure of *a'rāf*, advanced the goals of the state-movement to make a Sahrawi state power.

Connection through distinction

This essay began by taking note of the tendency to overlook the content of local law codes, rules, and norms. I linked this oversight to a tendency among scholars of custom to focus on particular distinctions surrounding custom: the distinction between custom and state law and religious law, and the distinction between "invented" and "authentic" custom. Potential distinctions made locally within custom had nevertheless been neglected, as I showed to be the case in the arabophone Middle East and North Africa. There, although multiple local terms for custom had sometimes been observed, only rarely had local distinctions within custom been explored.

In order to examine the analytical importance of recognizing local distinctions within custom, I focused on the distinction made among Bedouin between *'urf* and *'āda*. I showed how in Saharan north-west Africa, that distinction was drawn on by the liberation movement of Western Sahara. In its political and legal reforms, the liberation movement produced a particular distinction within custom that supported the movement's aspirations to make a Sahrawi state, SADR. *A'rāf*, construed as tribal laws that were a rival to the penal code of the SADR, were to be erased so as to support the claims of the SADR to have founded a Sahrawi state authority. *'Ādāt*, construed as customary cultural heritage (that had been detribalized in official discourse), were to be elevated so as to function as evidence and guarantor of there being a unique Sahrawi national identity.

In this case of interrupted decolonization, the strategies of a post-colonial governing authority with regard to custom can only be fully understood when local distinctions within custom, and their manipulation by the governing authority in question, are taken into account. The distinctions made here within custom highlight how the dynamic "legal triangle" between custom, state law and religious may be even more malleable than has sometimes been assumed. Multiple notions of custom may be at stake, which may give rise to different interactions with state law and religious law.

The treatment of custom by Western Sahara's liberation movement hinges not only on a distinction made locally within the field of custom. The case also hinges upon a distinction made within customary law understood as the conceptualization of custom on the part of colonial and post-colonial states. Both *a'rāf* as conceived in the refugee camps as obsolete, and *'ādāt* as conceived by the state-movement as customary cultural heritage, are configurations on the part of the state-movement. They must be distinguished from *'urf* and *'āda* when not configured by the state-movement. In short, in this case we must refract not only custom (*'urf* and *'āda*) but also customary law (*a'rāf* and *'ādāt*).

We can also distinguish between two strategic approaches toward customary law, both adopted by the state-movement. On the one hand, as has been attempted under Wahabism in Saudi Arabia, the Zaydi Imamate in North Yemen, and the People's Democratic Republic of Yemen (Stewart 2006:271), the state-movement has sought to efface customary law (in the form *a'rāf*). On the other hand, in the manner of the post-colonial states of formerly British Africa (excluding Malawi), the state-movement has sought to co-opt customary law (in the form *'ādāt*) for the pursuit of the state authority's own goals. For British Africa, the co-optation of customary law served "to meet the needs of the new legal bureaucracy" (Chanock 1985:24). For the state-movement, both the co-optation of customary law in one form, and its erasure in another, served the needs of a program to build a state authority, and to seek recognition for that state authority.

I have focused here on distinctions made within custom, especially by the state-movement for its political goals of making a Sahrawi state. Distinctions may ultimately serve to make connections. The intense desire on the part of the state-movement to create SADR law, and the appetite among refugees for such laws to exist, brings to mind Scheele's (2012) notion of aspiration for law. She explores aspiration for law as a means of making the community submitting to that law "legible", and of claiming membership, through the practice of law, in a wider community. The state-movement's aspiration toward state law sought to make SADR "legible"—as a state, like any other, with its own laws—to its own citizens but also, crucially, to other states. Through the elaboration of state law, by which means it presented itself as similar to any other state, the state-movement reiterated its bid for full membership in the inter-state community.

A journey toward connection on an international scale (full international recognition for SADR) embedded the state-movement in a strategy of distinction at the local level within custom. That distinction in turn transposed into a distinction within customary law. Many post-colonial states have been associated with either the promotion, or the rejection, of customary law. The state-movement combined both strategies. In its quest to fashion itself in the image of other states, the state-movement perhaps surpasses its coveted model in the subtlety of its refractions of custom and customary law.

<div align="center">Notes</div>

1. Henceforth, I use "custom" to refer to a field which encompasses multiple terms used by other commentators, such as custom, customary law, indigenous law etc.
2. Distinctions between custom and state law, and custom or religious law, have been explored since Malinowski (1926). For more recent discussions see Dupret and Burgat 2005; Weir 2007; Dresch 2012.
3. Henceforth, I use "customary law" to refer (post-)colonial inventions of custom.
4. I conducted two years of fieldwork with Sahrawi refugees (2007-2009), focusing on the refugee camps near Tindouf or connected areas of Western Sahara. The main language of research was the Hassaniya dialect of Arabic, which I learnt.
5. In Polisario's distinction between *'ā'rāf*, to be erased, and *'ādāt*, to be elevated, it is specifically the plural forms of *'urf* and *'āda* that are used.
6. For local actors' distinctions between *'urf* and *sharī'a*, see e.g. Bisharat 1989; Weir 2007. On the relationship between state law and custom, see e.g. Dupret 2006; Ben Hounet 2012.
7. The alternatives to *'urf* that Messick (1993:183) lists are "*al-ma'ruf* ('the known'), *al-mashhur* ('the known'), *al-'ada* ('custom'…), *al-mu'tad* ('the customary')" [sic].
8. Bedouin are Arabic speakers traditionally specialized, among other activities, in animal-raising in arid steppelands. They are associated with tribal organization and well-developed systems of custom. For a discussion of Bedouin (the term and the people), see Cole 2003.
9. There may, however, be limitations to the extent to which *'urf* and *'āda* can be distinguished on the grounds of whether their infringement enjoins sanction. Formal sanction may pertain to *'urf* alone, but it is plausible that informal sanction, such as loss of reputation, might pertain to the infringement of *'āda*.
10. "Tribe" is a problematic term in anthropology (cf. Sneath 2007). On the *qabīla* and status groups among hassanophones, see Caro Baroja 1955.

11. Mauritania withdrew from the territory in 1979 and renounced its claims to Western Sahara.
12. On the Western Sahara conflict, see Zunes and Mundy 2010.
13. For a discussion of population figures for the camps, see Chatty, Fiddian-Qasmiyeh and Crivello (2010:41).
14. For a list of 80 recognitions of SADR by other states to 2006 (including 22 withdrawn or cancelled recognitions), see Pazzanita 2006:376-378. SADR has been recognized as a state by the African Union (formerly the Organization of African Unity).
15. In contrast to Caro Baroja (1955), in his recollections of administering colonial justice to hassanophone and non-hassanophone nomads around Tindouf, Denis (2001) remarks only upon *'āda*.
16. For Stewart (2006), one of the principal differences between Bedouin in Asia and Africa is the role in Africa of the tribal council in deciding laws.
17. I have used my own transliteration, rather than Caro Baroja's. All translations are mine unless otherwise stated.
18. The five tribes he lists as having *'urf* are: Ait Lahsen, Izargiyen, Awlād Delīm, 'Arousīn and Rgaybāt (Caro Baroja 1955:44).
19. Elsewhere (Wilson N. d.) I address in greater detail the popularization and professionalization of justice in the Sahrawi refugee camps, and relate the attempted erasure of *'ā'rāf* to the state-movement's attempts to exercise sovereignty.
20. For a discussion of the development of codified Islamic family law, see Mir Hosseini 1993.
21. For all the punishments listed for these three tribes, see Caro Baroja 1955:439-442.
22. Although the judge interpreted that it was necessary to look to *'ā'rāf* to specify the amount to be paid as *diya*, it is more generally interpreted that *diya* is set at 100 camels in Islamic law (Schacht 1964:185).
23. On changing forms of reconciliation in the refugee camps and their relationship to popularized and professionalized justice there, see Wilson N. d.
24. Deubel (2012) observes that the Moroccan state also organizes and sponsors festivals of Sahrawi culture, where the celebration of a distinctive Sahrawi cultural identity supports Moroccan nationalism. The intention is to confirm the place of Sahrawis as one of multiple ethnic identities in a pluralist Moroccan state.
25. The four main refugee camps are named after cities of Western Sahara: Ausserd, Dakhla, El Ayoune, and Smara.
26. All names are pseudonyms.
27. This transliteration reflects the pronunciation of Hassaniya, rather than classical Arabic.

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