States And Group Rights: Legal Pluralism And The Decentralization Of Judicial Power

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States And Group Rights: Legal Pluralism And The Decentralization Of Judicial Power

Abstract
When do states decentralize judicial power to ethnic and religious minority groups? This dissertation presents a theory to explain why states are willing to undertake significant transfers of power by lending their support to ascriptive, group-based law. It begins with a literature review of scholarship in comparative politics and public law, both of which argue, for different reasons, that because the judiciary is vital to the state's coercive apparatus, property rights regime, and governing functions, we should not expect states to decentralize judicial power. Yet over half of the world's states choose to officially engage with legal pluralism by delegating power to group-based law; so the remainder of this work builds a theory to explain under what conditions states devolve or share judicial power with ethnic or religious minority groups, and what accounts for the variation in state approaches to judicial decentralization. To do this, it uses process tracing methods and an institutional choice approach. It offers a test of this theory through three full case studies and three shadow cases: Lebanon, Egypt, and Tanzania (full cases); and the United Kingdom, France, and Malawi (shadow cases). The data that it draws upon consists of 21 months of fieldwork in all 6 countries in which the author conducted approximately 450 interviews, as well as local newspapers, archives, and secondary source materials. Using this data, the dissertation creates a typology that maps the concept of judicial decentralization according to two characteristics: the unity or plurality of the national court structure and the state's legal doctrine, with a resulting six types of judicial decentralization. Through a study of one case of each type, it finds that judicial decentralization is in significant measure the outcome of bargaining between state leaders and minority group elites, in which the capacities of the state's leaders and the capacities of group elites, both shaped by multiple factors, are decisive in determining the degree of decentralization. It concludes with a summary of findings, sample court cases from each case study country, and suggestions as to possible avenues for further research.

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STATES AND GROUP RIGHTS: LEGAL PLURALISM AND THE
DECENTRALIZATION OF JUDICIAL POWER

Emma Hayward

A DISSERTATION

In

Political Science

Presented to the Faculties of the University of Pennsylvania

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Dedication

For my family
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ABSTRACT

STATES AND GROUP RIGHTS: LEGAL PLURALISM AND THE DECENTRALIZATION OF JUDICIAL POWER

Emma Hayward

When do states decentralize judicial power to ethnic and religious minority groups? This dissertation presents a theory to explain why states are willing to undertake significant transfers of power by lending their support to ascriptive, group-based law. It begins with a literature review of scholarship in comparative politics and public law, both of which argue, for different reasons, that because the judiciary is vital to the state’s coercive apparatus, property rights regime, and governing functions, we should not expect states to decentralize judicial power. Yet over half of the world’s states choose to officially engage with legal pluralism by delegating power to group-based law; so the remainder of this work builds a theory to explain under what conditions states devolve or share judicial power with ethnic or religious minority groups, and what accounts for the variation in state approaches to judicial decentralization. To do this, it uses process tracing methods and an institutional choice approach. It offers a test of this theory through three full case studies and three shadow cases: Lebanon, Egypt, and Tanzania (full cases); and the United Kingdom, France, and Malawi (shadow cases). The data that it draws upon consists of 21 months of fieldwork in all 6 countries in which the author conducted approximately 450 interviews, as well as local newspapers, archives, and secondary source materials. Using this data, the dissertation creates a typology that maps the concept of judicial decentralization according to two characteristics: the unity or plurality of the national court structure and the state’s legal doctrine, with a resulting six types of judicial decentralization. Through a study of one case of each type, it finds that judicial decentralization is in significant measure the outcome of bargaining between state leaders and minority group elites, in which the capacities of the state’s leaders and the capacities of group elites, both shaped by multiple factors, are decisive in determining the degree of decentralization. It concludes with a summary of findings, sample court cases from each case study country, and suggestions as to possible avenues for further research.
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Chapter One: Methodology, Theory, and Causal Argument

Introduction

When do states decentralize judicial power, creating a particular form of legal pluralism? Why do they sometimes permit ethnic and religious groups to live under their own laws in their own communities? In many states, people belonging to different groups—usually divided along ethnic or religious lines—live under separate sets of laws. In Malaysia, for example, the state maintains two sets of official courts: one for Muslims and one for non-Muslims.1 While the state operates parallel judicial systems in Malaysia, in many other places, it instead allows minority groups to manage their own courts or legal procedures. Religious groups in Lebanon are given complete autonomy over personal status law, which governs marriage, divorce, custody, guardianship, and inheritance. For a long time, Lebanon’s 19 official religions had exclusive jurisdiction; only in 2013 did the Lebanese government pass a law creating an option for civil marriage offered by the state. In many other places, the relationship between minority group law and the state is more fluid and less official. In Malawi, for instance, tribal customary courts were abolished with the introduction of multi-party democracy, but in practice they continue to adjudicate the majority of the country’s disputes with the tacit acknowledgement of most politicians.2

In most states, judicial diversity is the norm. The end of colonialism forced newly independent governments to navigate a judicial terrain characterized by strong legal pluralism. Immigration sometimes has the effect of creating enclaves of like-minded citizens who find that they prefer not to fully abandon the legal edicts of their place of origin (England’s sharia councils are one such example). In the last half-century, treaties and global conventions such as International Labor Organization no. 169, which recognizes group rights explicitly, have legitimized the demands of minority groups that want state recognition for their norms and legal practices.\(^3\) Accordingly, most states find themselves having to decide how much judicial autonomy they both can and want to afford those minority groups that demand it. That governments seriously entertain thoughts of sharing judicial power, and that many of them choose to do so, flies in the face of traditional narratives of the state possessing a legitimate monopoly on the use of coercion. Existing theories of the state lead us to expect that states should seek to monopolize their coercive power and oppose devolutions of authority where state functions are delegated to sometimes-oppositional minority groups.

How, then, can we explain the fact that states delegate judicial power to minority groups? Is it that the states that do so are experimenting with new ways to manage ethnic conflict, or have the civil societies in these states gained sufficient strength to successfully make such demands? Or is this trend the by-product of democratization and the recognition of group rights? Neither regime type nor level of economic development, or even prior history of decentralization is able to fully explain this phenomenon. Yet the answers to these questions are crucial for developing a better understanding of how states

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are renegotiating their ties to ethnic and religious communities, whether immigrant or indigenous, and to extending our theoretical knowledge of comparative law beyond formal constitutionalism. This study thus aims to answer two separate questions: what causes states to devolve or share judicial power in the first place? And among those who devolve judicial authority, what accounts for the variation in state approaches to judicial decentralization?

Few political scientists have addressed the more general topic of legal pluralism, much less judicial decentralization, directly, although it sits at the intersection of a number of fields that have been of longstanding interest to the discipline. Research on legal pluralism has implications for ethnic conflict studies because, like consociationalism or federalism, each of which can be associated with legal pluralism, it offers minority groups a possible compromise between the preservation of identity and inclusion in the larger state. It is also of interest to scholars of state-society relations because the assumption of judicial functions by societal groups suggests a possible rethinking of the boundaries between the state and society.  

Perhaps more importantly, legal pluralism offers rich material to the field of democratization (and particularly de-democratization) because it has become popular in recent democracies such as South Africa and Bolivia as a way of recognizing group rights. Current research raises concerns, however, that the traditional authorities who are entrusted with adjudication responsibilities via judicial decentralization use their position to entrench their power and

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create authoritarian enclaves in otherwise constitutionally democratic states.\(^5\)

Additionally, the study of legal pluralism has implications for the rule of law literature because judicial decentralization creates tensions between the often-cited need for equality under the law (for example, Dicey 1915) and the practical reality that forcibly eliminating minority group adjudication forums often creates waves of violence and crime.\(^6\)

I propose that judicial decentralization can best be seen as the outcome of a process of bargaining and contestation in which the relative capacities of minority group elites in comparison to state leaders’ capacities determines the resulting institutional configuration. Capacity is further defined and discussed below. Six distinct patterns result from this process, ranging from the full devolution of judicial authority in a particular domain to incorporation of group law into state courts to a ban on anything other than state law. This study explores one case of each type. By uncovering the prevalence of judicial decentralization, this project challenges the norm of unified central judiciaries. It articulates the circumstances under which states give up a portion of their judicial power in contested processes that, in unmaking part of the state, often permit it to extend its power in other ways.

**Literature Review**


The study of judicially diverse states has long been the focus of the literature on legal pluralism. Legal pluralism was of particular interest to the academic community at the height of the critical legal studies movement in the 1970s and early 1980s, when legal sociologists and anthropologists determined, primarily through the study of individual cases, that beyond the domain of state law exists a vast and rich world of secondary, group-based legal systems that are as much or more binding on their constituents than state law. Most early studies of legal pluralism focused on places such as South Africa, Ghana, Indonesia, and other developing (and often post-colonial) states. The majority of data collected on legal pluralism at the time came from groups such as the Third World Legal Studies Association and the Commission on Folk Law and Legal Pluralism, whose names reflect their underlying and long-unchallenged assumption that legal pluralism was a cultural phenomenon that belonged distinctly to developing countries. It was studied primarily in places where customary law was predominant—typically, scholars found legal pluralism in the contrast between “unofficial” customary law systems and the “official” civil or common law legal systems that were established by and left over from colonial regimes. Moving away from tribal or customary law and toward a single, state-administered judicial system was often seen as not only desirable, but as a necessary condition in the process of modernization and state development.

Early correctives to this somewhat stark conception of legal pluralism came with a shift in focus to industrialized and “modernized” states. Chiba published an account of legal pluralism in Japan during and after the Meiji restoration, which he argues resulted

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from a process of clash and accommodation between old and new legal systems.\textsuperscript{10} Until recently, then, the legal pluralism literature focused on states where an old and a new, or an “indigenous” and an “imposed” system coexisted—in essence, states where two separate sources or types of law were brought together, and where legal pluralism has been the unintentional result of an inability to merge the two systems or for one system to completely replace the other. There has been much less research on states where legal diversity exists in an intentional framework, such as federal states or states that grant subgroups judicial autonomy in certain areas of the law. Accordingly, the outcome of interest for this study is judicial decentralization, a form of legal pluralism involving the transfer of judicial power to particularistic legal communities, usually ethnic or religious minority groups. Legal pluralism in many of its forms can exist with or without state recognition or interference; judicial decentralization is the result of institutional choice.

Most political science literature emphasizes the importance of state sovereignty, indicating that even small amounts of judicial decentralization should be a rare phenomenon. Even in the scholarship on state building, where one might expect to find more contingent assessments of the state’s capacity for full sovereignty, variations of Weber’s claim that a state possesses a “monopoly of the legitimate use of physical force within a given territory” are standard.\textsuperscript{11} In the introduction to \textit{Rule and Revenue}, Levi notes “The object of state regulations changes with time and place. However, all states attempt to monopolize the concentrated means of violence within a given territory. All implement and enforce property rights and other formal rules.”\textsuperscript{12} This definition, according to her, makes it possible to discern whether or not a state exists in a given

\begin{thebibliography}{99}
\bibitem{10} Chiba, 71.
\end{thebibliography}
territorial space. Tilly, who dispenses with the idea that the state’s coercive force must be legitimate, defines states as “Relatively centralized, differentiated organizations, the officials of which more or less successfully claim control over the chief concentrated means of violence within a population inhabiting a large, contiguous territory.”13 Because judiciaries are an integral part of the state’s coercive apparatus, giving that power away or sharing it would imply a partial unmaking of the state. Although the state-society literature engages with the mutually constitutive relationship between the state and its constituent societal groups, it has only preliminarily considered judicial power.

Two bodies of literature in public law and comparative politics present a strong theoretical and empirical explanation of why we expect that states avoid devolving judicial power. In the public law literature, Shapiro, Becker, and Ginsburg and Moustafa argue that states make use of courts to bolster the central authority and legitimacy of the regime.14 The three studies separately contend that alongside their dispute resolution function, courts also have social control and regime strengthening functions. Becker notes, “There seems little doubt that…governments can use the establishment of a court procedure and system to excellent advantage in fulfilling their desires for centralization or merely amalgamation of local power.”15 He argues that courts derive this ability to “induce political loyalty” from their “actual practice of impartiality and objectivity” as dispute resolvers.16 Shapiro agrees that courts can produce loyalty through impartiality,
but contends that wider power is derived from the norm-shaping role that state courts
exercise when they use state laws to resolve private and public disputes.\textsuperscript{17}

Both Becker and Shapiro use the example of medieval English courts shortly after
the Norman invasion to illustrate the part that courts play in regime centralization.
According to Becker, the crown, concerned about the wide-ranging powers of the barons
and unable to establish authority via military conquest, opted to establish a court system,
which, in order to “compete successfully with the lords’ private courts…had to offer
benefits their competitors did not, and even better, could not offer.”\textsuperscript{18} The royal courts
gained popularity for their perceived neutrality and logical procedures (at least in
comparison with the local lords’ courts). The barons came to understand that they, too,
could benefit from using these courts.\textsuperscript{19} Thus for Becker, centralization occurred via the
individual choice, market-based mechanism of forum shopping. Shapiro tells much the
same story but credits the success of courts as centralizers to additional factors. He
contends that the structure of the royal courts was specifically designed to augment
central authority. Rather than designate local deputies to judge disputes for the king, the
Norman court set up the “eyre” system, under which the king sent an administrative
official to hold court in the towns on brief tours through the countryside, after which he
would report back to the royal court.\textsuperscript{20} Thus, judicial officials never had the opportunity
to build local loyalty, and in addition, they served as a reporting mechanism to inform the
king about local infringements of the law.

\textsuperscript{17} Shapiro 1981, 18-26.
\textsuperscript{18} Becker, 366.
\textsuperscript{19} Ibid.
\textsuperscript{20} Shapiro notes “They were not local subordinates of a central judicial authority tied to it by lines of
hierarchical control, that is, appeals procedures. Instead, they were literally pieces of a central judiciary on
temporary trips through the countryside” 72-73.
Winning litigants away from local lords’ courts built direct ties between individual citizens and the regime. These ties gave the royal court the ability to provide a much-needed service (adjudication) directly to the people, cutting out the barons altogether. In addition, every time the king’s circulating official judged a dispute, he used the same set of norms and laws to do so. This law, for the first time, “developed as a uniform, national law, partially written and partly resident in the minds of a few hundred easily consulted lawyers in the capital, and directly backed by the authority of the crown.”\(^\text{21}\) Replacing local norms and practices with royal law meant that every instance of adjudication served to reinforce royal law and to further educate locals about its provisions. Shapiro generalizes this point beyond the English example: “a scattered population living largely by customary and local law may be governed more efficiently by central authorities if a unified body of law is introduced.”\(^\text{22}\) Indeed, in all states “a major function of courts…is to assist in holding the countryside” because “judging, like administering, may be principally designed to hold and exploit the countryside for the central regime.”\(^\text{23}\)

For these reasons, we should expect state authorities to avoid judicial decentralization. If courts are effective in centralizing power, then used in a similar way by local officials, they could also effectively decentralize or fragment political authority. If sub-state entities have the potential to develop dispute resolution mechanisms with all of the requisite criteria, then, as Shapiro argues, “for roughly the same reasons, courts may appeal to those who wish to resist, revolt against or maintain their independence

\(^{21}\) Shapiro, 79-80.
\(^{22}\) Ibid., 23.
\(^{23}\) Ibid., 24.
from central regimes.”24 Indeed, Shapiro cites Vietnam as a case where the Cao Dai, rebels against the French occupation and the central regime of Southern Vietnam, created a separate court system that drew litigants away from official state courts and bolstered support for the rebels.25 According to this logic, we should expect dissident groups to create their own courts, both to gain the ability to administer their own laws and norms and to increase support for the group’s institutions.

The literature on the rule of law also offers both a theoretical and empirical challenge to judicial decentralization. Most rule of law theories argue that citizens should be treated equally under the law, with the implication that everyone should be governed by the same sets of laws. Although there are usually legal exceptions for minors, those deemed mentally incompetent, and some other categories of people, today grounds for exception in most normative theories do not fall along ascriptive lines such as religion or race. Theories of the rule of law also view the state as legally monistic, claiming that for states to exercise authority over their citizens in a legitimate manner, certain requirements must be met such as holding the rulers accountable under the same set of rules that govern their citizens and treating all citizens equally under the law.26 Until recently, most rule of law consultants working in developing states advised legal centralization.27

The state building literature in comparative politics also indicates that we should expect states to avoid delegating coercive power, particularly if it involves property rights or punishing crimes. Scott, in Seeing Like a State, argues that states developed property

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24 Ibid., 24.
25 Ibid.
26 Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, Macmillan (1897); Lon L Fuller, The Morality of Law: Revised Edition, Yale University Press (1969.) Dicey and Fuller’s theories were developed partially in response to older theories of law (such as legal positivism, e.g. Austin 1885) to complicate the argument that the source of the law is its most important legitimizing characteristic.
law codes to simplify tax collection. States could not levy taxes on land unless there was an individual associated with the land who could pay the tax. State officials thus set out to destroy customary land tenure, which often allowed for rotating, temporary, and communal ownership. They replaced it with “modern” property law, which specified individual ownership. Scott notes “the very concept of a modern state presupposes a simplified and uniform property regime that is legible and hence manipulable from the center.” Additionally, as states have become the primary agents of property rights enforcement, they have gained an effective coercive tool in the form of threats to property (fines, fees, loss of land, etc.). We should thus expect states to resist devolving these capacities to local authorities—particularly local authorities not under the direct control of the state.

For Huntington, in *Political Order in Changing Societies*, a major source of political institutionalization lies in state autonomy from society. Institutionalization, for Huntington, is the best way to ensure that political institutions survive the process of modernization, which they must do if the polity is to avoid social upheaval and political violence. State autonomy involves developing institutions that pursue the interests of the state rather than those of families, clans, or other sub-state groups. This applies to the judiciary, in particular, which is “independent to the extent that it adheres to distinctly judicial norms and to the extent that its perspectives and behavior are independent of those of other political institutions and social groupings.”

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[29] Ibid.
[30] Ibid., 35.
[32] Ibid., 20.
[33] Ibid.
separate courts for different groups would necessarily contravene this principle and thereby hinder institutionalization.

In *Boundaries and Belonging*, Migdal explains that one of the primary functions of a state is to maintain its boundaries, both as physical borders and the more general conception of the state, against sub and supra-state challenges to them.\(^\text{34}\) He argues that boundaries are preserved through checkpoints such as borders, identity cards, and other means of separating entities within the state from those outside of it, and through mental maps, which “incorporate elements of the meaning people attach to spatial configurations, the loyalties they hold, the emotions and passions that groupings evoke, and their cognitive ideas about how the world is constructed.”\(^\text{35}\) When the mental maps held by subgroups within the state are incongruent with the physical boundaries of the state, people have to decide “which boundaries, principles, and practices to submit to and which to violate (with all the attendant consequences).”\(^\text{36}\) Migdal emphasizes that the decision to contest boundaries often involves challenging state law. He writes:

But in fact, the contestation of boundaries can be much more subtle and less immediately obvious. One way to think about these less obvious, but still insidious challenges to state boundaries is through a central institution of the state, the law. For states, probably nothing constitutes them more than law, the rules of conduct that prescribe proper behavior for its members and the control implied by the enforcement of the codes. Not only does the law set out the ways of doing things, it also projects an essential part of the image of the state, as when it denotes the whole body of rules, institutions (such as courts) associated with them, and their affective component (as in “respect for the law”). People are classified by whether they stay within state laws (law-abiding) or step outside them (lawbreakers). State law, then,

\(^{34}\) Joel S. Migdal, *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices*, Cambridge University Press (2008), see introductory chapter.
\(^{35}\) Ibid., 6-7.
\(^{36}\) Ibid., 23.
both prescribes behavior within the boundaries of the state and symbolically
demarks those boundaries by signifying the realm and limits of the state’s law.\textsuperscript{37}

Thus, law is a constitutive and central element of the state such that “when others put
forward an alternative code to state law—let’s say, that of a street gang—they contest not
only the code itself but the realm and its limits suggested by the law.”\textsuperscript{38} When the group
is not a street gang but a group of immigrants, or co-religionists, or indigenous
inhabitants, the challenge is correspondingly stronger.

For several scholars, there is something inherent in the nature of the modern state
that requires it to demand unquestioned sovereignty within its borders. In “State, Power,
and Citizenship in the Middle East,” Butenschon notes “The state commands
monopolistic control over coercive means within its jurisdiction. No other authority
structure in society—be it based in the family, religious leadership, or tribal
organization—can legitimately demand loyalty from one of its members in a way that
contradicts his or her obligations toward the state.”\textsuperscript{39} Migdal, in characterizing the state’s
relationship to society, argues “what has distinguished the modern state from most other
large-scale political organizations in history, such as empires, has been its insinuation
into the core identities of its subjects…they aim to shape people’s entire moral orders…a
transformative state simply cannot let any struggle over domination within its official
boundaries go uncontested; state leaders want the state to matter most, enough to die
for.”\textsuperscript{40} Thus, there is also a normative dimension to a state’s relationship with its

\textsuperscript{37} Ibid., 13.
\textsuperscript{38} Ibid.
\textsuperscript{39} Butenschon in Nils Butenschon, Uri Davis, and Manuel S. Hassassian, \textit{Citizenship and the State in the
\textsuperscript{40} Joel S Migdal, Atul Kohli, and Vivienne Shue, \textit{State Power and Social Forces: Domination and
subgroups—although the complexities of state bureaucracy generally compel a certain amount of delegation to local officials, a state will not accept challenges to its sovereignty.

There are clearly many compelling reasons for states to avoid judicial decentralization. Although local officials may administer state finances or run the local branches of state programs, there is a qualitative difference between these types of decentralization and judicial decentralization, because only the latter involves sharing or devolving coercive power. Even federal states, which are the most likely to accord substantial law-making and enforcement power to their federated sub-regions, often forestall unlimited local judicial discretion by mandating that local laws and practices be in accordance with a federal constitution. Nevertheless, at least half of the world’s states pursue some form of judicial decentralization. How can we explain why do they do so, and what accounts for different patterns of judicial decentralization?

**Conceptualization of Judicial Decentralization**

One of the challenges in studying judicial decentralization (or legal pluralism, in general) is that it is difficult to define the concept in an easily quantifiable manner. Even with a definition that permits coding, it is challenging to measure in practice. Nor do proxy variables manage to capture the concept accurately. What does it mean, really, for a state to decentralize judicial power? In some places, it involves an effort to codify group law for use in state courts by state judges. In others, it means turning a blind eye when groups choose to ignore the law on the books and solve community disputes
according to local standards of justice. Discovering the extent of judicial decentralization requires both familiarity with a country’s laws and observation of its courts in practice— most especially those in areas where conflicting, local norms appear to predominate. Until there is a better picture of the scope of legal pluralism world wide, quantitative analysis is limited in its ability to explain the phenomenon.

The overall methodology adopted here is thus qualitative. I rely on the comparative method in the form of paired cases, examined through process tracing.

Before theorizing about the causes of judicial decentralization, we need to both define the term and map the full extent of the concept. The former gains specific content from the latter, so I will begin with a conceptual typology that demarcates the different forms of judicial decentralization. Collier, LaPorte, and Seawright distinguish between typologies that serve a conceptual or descriptive purpose and those whose function is mainly explanatory. Conceptual typologies, appropriately developed and applied, “explicate the meaning of a concept by mapping out its dimensions.” By contrast, explanatory typologies, according to Elman, are “multidimensional conceptual classifications based on an explicitly based theory.”

Collier et al define explanatory typologies as those in which “cell types are the outcomes to be explained and the rows and columns are the explanatory variables.”

Explanatory typologies most often serve as a visual representation of the author’s causal

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42 Ibid., 218.


44 Collier et al 218. Many studies of typologies and typological reasoning precede those of Collier et al and Elman, including Marradi (1990), Bailey (1994), and others, but I rely on the two more recent studies because they extend the logics of previous analyses and discuss their applicability to more recent research methods.
argument, usually depicted as a two-by-two cell matrix whose contents are the product of certain combinations of variables. According to Elman, descriptive typologies answer the question “What constitutes this type?” while explanatory typologies answer the question “If my theory is correct, what do I expect to see?” Elman argues that explanatory typologies must be based on a preexisting theory, which may be derived through the inductive method of observation, or the deductive method of formal models, although they are more appropriately suited to the latter. Deductive reasoning, where variables yield types without prior reference to empirical observations, runs the risk of creating empty cells in a matrix. Comparing the typological reasoning used by Elman as opposed to that of Collier et al, one could argue that researchers who employ inductive reasoning begin with conceptual typologies and work toward explanatory ones, whereas deductive researchers begin with explanatory typologies and, based on them, generate conceptual ones.

Comparativists also rely on typologies in the process of case selection. Often, these typologies are preexisting. For researchers interested in developing new theories, or theories only peripherally based on preexisting work, both kinds of typologies are needed. This is particularly true of areas of the discipline that have been under theorized or weakly theorized in the past. For example, although authoritarianism had been the subject of previous study, Linz’s typology of different kinds of autocratic regimes

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45 Elman, 298.
46 Ibid.
47 Some researchers do employ explanatory typologies that yield empty cells. For instance, Elman cites Schweller’s balance-of-interests typology, 317-18.
48 For example, Gerring (2002) refers to nine different methods of case selection, including typical, influential, crucial, and pathway cases, all of which are chosen based on the case’s relationship to explanatory variables x and y (and sometimes x2 and y2), 89-90. A co-authored follow-up article (with Seawright) provides qualitative and quantitative methods for each type of case selection, but the exercise of defining a case as crucial, typical, or otherwise relies on the ability to classify the case as compared to similar cases, which is an inherently typologizing exercise.
brought clarity to the study of non-democracies and a wave of research based on his work followed.\textsuperscript{49} Catherine Boone’s \textit{Political Topographies of the African State} is a good example of the use of both kinds of typology to develop a new theory. It begins with a conceptual typology that delineates four variations of rulers’ institutional choices in Africa.\textsuperscript{50} Using the categories from this typology, she introduces three variables that are causally linked to the four institutional outcomes.\textsuperscript{51} Together, the two typologies map the domain of her theory and introduce variables and outcomes that she explores through case studies of each type.\textsuperscript{52}

This study follows the analytic two-step of pairing conceptual and explanatory typologies in building a theory to explain judicial decentralization. First, it is necessary to create a theoretically oriented conceptual typology that maps the complete domain of the concept both for analytic clarity and to ensure that the resulting theory does not omit crucial types. Three typologies of legal pluralism already exist, but they are unsuitable for present purposes for several reasons. Sezgin, Forsyth, and Malik all categorize legal pluralism, although Sezgin’s study is restricted to family law and Malik’s is limited to

\textsuperscript{50} Catherine Boone, \textit{Political Topographies of the African State: Territorial Authority and Institutional Choice}. Cambridge: Cambridge University Press (2003), 33. She uses two variables drawn from the public administration literature, namely the spatial configuration of the regime (concentrated or de-concentrated) and the identity of local authorities (rural elites or state agents) to categorize four types of regime strategy: power sharing, usurpation, non-incorporation, and administrative occupation. Given the presence of variables, it is tempting to see this typology as explanatory, but that is a mistake—the parameters of spatial configuration and identity are used to define, not generate, the resulting categories, i.e. a regime is categorized as power sharing because it is characterized by rural elites and a deconcentrated power structure, but those two variables alone are not enough to predict its presence. Rather, a regime’s choice of a power sharing strategy is explained by the presence of three variables: cash producing crops, a rural social hierarchy, and an elite dependent on the regime.
\textsuperscript{51} Ibid., 37.
\textsuperscript{52} Other scholars who use conceptual and explanatory typologies to generate new theories include Dahl (1971), Tilly and Tarrow (2007), and Falleti (2010), among others. This is by no means to claim that theory development is only possible, or even successful, if it incorporates typological reasoning. Many groundbreaking studies (Levi 1988; Rueschemeyer, Stephens, and Stephens 1992, and Brownlee 2007, among others) do not make use of typologies. Nevertheless, typologies have tremendous potential benefit for theory development, particularly as concerns developing well-defined concepts.
analysis of the United Kingdom. Forsyth’s typology is based on original fieldwork and an extensive review of the literature and presents the most wide-ranging framework of the phenomenon. She includes seven ways in which states choose to address legal pluralism including repression of non-state legal orders, tacit acceptance, active encouragement despite an official ban, and four types of government recognition of other legal orders. By mapping her types of legal pluralism along a single variable, degree of autonomy, Forsyth cannot distinguish between different sites of government policy, such as the difference between incorporating codified versions of group law into state courts versus delegating judicial power directly to group officials.

Accordingly, I propose a new conceptual typology of judicial decentralization mapped along two axes: the first concerns the structure of the national courts, and the second concerns the state’s legal doctrines. These dimensions are chosen because together, they describe the form and content of the judiciary. The structure of the national courts refers to whether or not the state permits the existence of multiple judicial forums with separate legal rules and procedures. We should expect, and indeed find, that most states attempt to preserve a unitary court system. This is true because a plural court structure is a larger delegation of power than merely incorporating separate legal codes or assessors into state courts. However, not every attempt to maintain a unified judiciary succeeds, so there are three sub-types within the larger category of a unified judiciary (see table below). Unitary national court systems are those in which the state successfully

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54 Forsyth, 70-72.
maintains a single national court system. Failed Unitary states are those whose policy preference is legal centralization, but for any one of a number of reasons, cannot attain full unity. Most states in this category intentionally adopt limited structural pluralism because they are unable to succeed with unification. Those that do so in combination with a unified legal doctrine mostly choose, however, to only tacitly accept the presence of non-state legal forums, whereas those with a plural legal doctrine usually explicitly permit a limited plural legal structure (see below for full definitions of both types). Plural court structures occur when the government acknowledges the existence of, and either recognizes or chooses to work with, one or more legal forums controlled by non-state agents.

The variable of the state’s legal doctrine refers to whether or not the state’s legal doctrine encompasses a single source or multiple sources of law. In unitary doctrinal systems, the state has a single, clearly defined legal doctrine and is not willing to admit any other legal codes or doctrines into state courts. In doctrinally plural states, the state engages with multiple legal codes or doctrines. Sometimes these separate laws are litigated in state courts by state judges, and sometimes in separate, group-based forums by group judges.

Like all ideal types, those used here involve necessary simplification. Regimes often use multiple strategies simultaneously. For example, Tanzania’s government incorporates the codified customary laws of many of its patrilineal tribes into state law, and judges are supposed to use this law when adjudicating disputes that fall under the

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55 The question of multiple sources of law necessarily excludes private international law. Even the most legally homogenous states do, by and large, honor legal covenants and contracts that its non-citizen residents entered into in the state that holds their citizenship. See Westlake and Topham (2013) and Borchers (2014) for more on private international law.
jurisdiction of customary law. In reality, however, most of Tanzania’s judicial decentralization is exercised at the level of its separate Ward Tribunals and ten-cell arbitration forums, run by local elders, and the assessors (also local elders) whose opinion is binding upon primary court judges. The delegation of judicial authority to community elders without legal training is both Tanzania’s most significant devolution of judicial power, and also the site of the greatest volume of adjudication, so it is fair to categorize Tanzania’s judicial decentralization as primarily sited outside of its state courts despite the addition of tribal law to Tanzania’s legal code. Similar caveats apply to each of the following types, but, following a tradition of ideal types in political science stretching back to Weber, the analytic clarity achieved by creating types outweighs the risks of oversimplification.

Table 1

Conceptual Typology of Judicial Decentralization

<table>
<thead>
<tr>
<th>Legal Doctrine</th>
<th>Structure of the National Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unified</td>
<td>Unitary</td>
</tr>
<tr>
<td></td>
<td>Full Centralization (France)</td>
</tr>
<tr>
<td>Diverse</td>
<td>Partial Incorporation (Egypt)</td>
</tr>
</tbody>
</table>

**Common Law Devolution**: A small category of states in the Unified/Failed Unitary category warrants special attention (and a separate name). Some liberal, common law states choose to devolve certain amounts of judicial power for political purposes, such as integration, the protection of diversity, etc. These states form a category titled “Common Law Devolution.” See below Table 2 for a description of each type.
All of these categories represent some degree of judicial decentralization with the exception of the full centralization type. A partial incorporation state, such as Egypt, incorporates the legal codes of minority groups into state law, allowing modification only through judges or parliamentary acts, whereas in a partial decentralization state such as Tanzania, the state creates structures that allow local elites more of a say in judicial matters. See below, following Figure 2, for a full description of each type. Before moving to causal analysis, however, it is useful to provide one further schema detailing the relationship between the above types. The conceptual typology maps the domain of judicial decentralization but does not fully indicate which types involve a greater transfer of judicial power. Although a typology that uses degree alone is not as useful as one that can more fully explicate each type, placing each type in order from the least to most amount of decentralization creates a useful visual and another dimension of comparison.

The risk of doing so is that judicial power can be measured in a number of different ways, especially vis-à-vis questions of decentralization. Has more decentralization taken place when the regime openly transfers judicial power through legislation, or when it officially bans non-state adjudication but deliberately turns a blind eye toward the operation of a complete parallel justice system? Perhaps surprisingly, the latter usually involves more actual autonomy for non-state agents who wield local-level judicial authority. Because

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56 For example, Forsyth categorizes Botswana as repressing non-state justice, the equivalent of the category “fully centralized” in the typology used here, because the state has officially incorporated customary law courts into the state system (73; 102-106). However, tribal chiefs or their deputies adjudicate disputes in these courts, and, with the exception of criminal law, they may apply non-state, tribal law as long as it does not conflict with state law. Additionally, as Forsyth acknowledges, many chiefs extend their delegated judicial function to rule on village-level customary cases outside state-based customary courts (73). Accordingly, based on the understanding of judicial decentralization used here, Botswana cannot be categorized as a fully centralized system. Rather, it is an example of partial decentralization, where non-state agents are deputized in particular domains (family law, etc.) but not others (criminal law).
the outcome of interest is judicial (de)centralization, it is tempting to view “official”,
legislation-based transfers of power as involving more decentralization, but the decision
to tacitly accept an officially banned form of adjudication, as long as the rules are
understood by the actors involved, does constitute a larger, if more precarious, transfer of
power. Accordingly, the metric adopted here is one of effective rather than de jure power.
From this standpoint, a ranking from least to most judicial decentralization is as follows:

Figure 1

A Ranking of the Types of Judicial Decentralization

A description of each type of legal pluralism follows below.

Full Decentralization:

Full decentralization involves the complete delegation of judicial authority to a
group such that it enjoys full autonomy over legal substance and procedure in a defined
area. It is characterized by a plural judicial structure that incorporates multiple legal
forums and a plural legal doctrine that recognizes more than one source of law. Although
this is somewhat rare, it occurs most frequently in Latin American states such as Bolivia
that are attempting to honor their commitment to ILO 169 and certain Middle Eastern
states, such as Lebanon, where family law is delegated to religious groups to the exclusion of the state. The most important feature of these states is that within the domain of law in which group courts have exclusive jurisdiction, there is no possible appeal to state courts. That said, states do not necessarily decentralize judicial power across the full legal realm; no state currently permits the existence of a complete parallel justice system that to which it lends its coercive power. However, full delegation in a domain such as family law, land law, and the like is a serious devolution of judicial power. States of this type include Lebanon, Bolivia, and Israel.

**Tacit Devolution:**

Like partial decentralization, tacit devolution is one of the broadest and most populated types. In this category, states maintain a unified judiciary that does not incorporate elements of minority group law, and they do not officially recognize group-based legal forums either. At the same time, the state chooses to ignore the existence of one or more sets of minority group judicial institutions that often provide the majority of judicial recourse at the local level. The state’s legal doctrine is unitary; its national courts recognize no source of law other than state law. The state maintains a unitary court system, but at the same time, it “delegates” the adjudication of disputes according to other legal systems to structures that it does not officially acknowledge. Crucially, the act of delegation is deliberately unofficial; although no acts or laws acknowledge it, every judicial and government officials are aware of the situation. As Forsyth argues “In the vast majority of countries in the world where there is both a weak state and a non-state justice system of some sort, there is no formal recognition given to a non-state justice
system, but the state turns a ‘blind eye’ to the fact that the non-state justice system processes the vast majority of disputes, and state actors often unofficially encourage reliance on the non-state justice system.”57

In most cases of this type, lack of resources is a compelling reason for states to unofficially permit parallel justice systems to handle most adjudication. However, in many places that are just as under-resourced, the state has managed to either incorporate tribal courts into the state judiciary or build sufficient numbers of courts to close down rival systems. Lack of resources is therefore not the primary reason for this policy. Instead, rural elites may possess the power to corral votes for candidates, or to delay or implement development projects, or other, similar types of authority that make urban rulers reluctant to curtail rural elite power in any kind of way that would lead them to oppose the ruling coalition. Lack of official recognition gives these states very little means of regulating parallel justice systems, and, as a consequence, these other tribunals are mostly left to establish their own laws and procedures. Examples of this type include Malawi, Ghana, Kiribati, the Solomon Islands, and Lesotho.

**Partial Decentralization:**

This category is perhaps the most broad and encompasses a larger number of cases than either of the previous two types. Partial decentralization includes a wide range of measures that give minority communities the right to adjudicate certain types of disputes without seeking recourse in state courts. It also gives them control over the content of their laws, as opposed to the static codes that characterize partial incorporation. The state consciously adopts a plural legal doctrine, and although it

57 Forsyth, 75.
maintains a unitary national court system, it uses two separate mechanisms to make space for its plural doctrine: assimilating group law into the national courts through the use of assessors, and delegating petty instances to forums operated by village elders that sit just below the bottom rung of the judiciary. In this category, it is usual for the state to preserve exclusive jurisdiction in criminal law matters of a non-petty nature and civil law cases that involve above a certain value of money. The state also retains control of at least parts of the appeals process, so that a case that begins in a non-state forum can always be appealed in state courts.

Beyond these measures of control, the state can decentralize judicial power in one or more ways, for instance by creating a layer of village or neighborhood-level adjudication forums operated by local lay officials where most, if not all judicial questions begin. These forums are usually not required to conform to standards of state law and instead are meant to achieve reconciliation or, in more serious cases, preliminary fact-finding before cases are passed along to state courts. States pursuing partial decentralization can also incorporate assessors into state courts, possibly giving them an important role in the evidentiary phase of the proceedings or even the ability to overrule the magistrate.58 The state can also designate a particular area of the law, often land law or family law, as being under the jurisdiction of local, community-run courts, with jurisdiction covering a higher monetary value than would be permitted in neighborhood

58 Several European countries such as Denmark and Germany use the term “assessor” to signify either a qualified magistrate or a judge-in-training. In the United Kingdom, assessors are technical content experts who provide specific testimony. Here, the term assessor is used in the sense in which it still operates in many former colonies, which is that of a lay official, usually a community member, whose role is to advise the magistrate or judge during trial proceedings and sometimes offer an opinion on questions of fact, local law, or even the verdict. Assessors were initially introduced to replace the seemingly more cumbersome full jury, and their participation is intended to provide community participation in adjudication and local knowledge, rather than expert or technical content. For more on assessors, see Gray (1958), Jearey (1961), Sawyerr (1969), and Vidmar (2002)
forums. In Tanzania, for example, until 2002 all land cases up to the value of three million shillings were required to be submitted first to locally-run Ward Tribunals, whose staff were not magistrates. In essence, partial judicial decentralization involves the delegation of certain, delimited judicial powers to non-state actors in a way that gives them flexibility regarding the contents of the law, but that preserves the state’s right to a final say through the appeals structure. The extent of decentralization varies from one case to the next, as does the amount of effective judicial power that is transferred. In many places, a dearth of state courts at the village level make local arbitration forums the first and last recourse for the majority of disputes that arise, petty or otherwise, and the option to appeal is rarely exercised. Examples of this type include Tanzania, Kyrgyzstan, Samoa, Botswana, and South Africa, among others.

**Partial Incorporation:**

States in this category have a unitary judicial system in which only state judges may adjudicate disputes. It differs from the next category, however, in that its judicial system incorporates multiple sets of legal codes that apply to different sectors of the population, usually according to ascriptive characteristics such as religious affiliation or ethnicity. It thus combines a unitary national court system with a plural legal doctrine. In these cases, state judges adjudicate all disputes and, in most places, they do so without regard to the identity of the litigants, i.e. in Egypt, a Muslim judge uses codified Coptic Orthodox law to judge a family law dispute between Coptic Orthodox co-religionists, although some places may stipulate that only co-group members can adjudicate disputes.

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59 In rural areas, Ward Tribunals still have the authority to adjudicate land disputes, but in municipal and urban areas, new land courts created by the Land Disputes Court Act of 2002 (Cap 216) have taken over this function.
Unlike partial decentralization states, however, partial incorporation states retain control over all legal codes used in its national courts, i.e. it uses a codified version of group law that the group may not alter. It is usual for the existence of separate codes to be limited to the domain of family law, although sometimes other types of civil law are included as well. In other words, there exist separate laws for separate communities, but these laws are fixed and often quite difficult to change. Examples of this type include Egypt, Jordan, and some states in India.

**Common Law Incorporation**

The fourth category is common law incorporation, in which liberal, common law states use various mechanisms to create judicial space for the customs and traditions of religious and ethnic groups. These states have a unitary legal doctrine of common law and unitary assimilating national courts. Assimilation takes place when, for reasons of equity, they temporarily and voluntarily incorporate group-based legal systems into the courts through the testimony of legal experts, or allow religious law to form a temporary standard for arbitration. It should be noted that this category is somewhat rare and is limited to states whose legal systems are not a hybrid between common law and other legal systems. The most common mechanisms for accommodating non-state law are arbitration, common law recognition, and permitting extrajudicial forums to exist on the sidelines of state courts with the explicit understanding that their rulings are not legal decisions. As opposed to countries in the full centralization type, these states permit, and sometimes encourage, religious or identity group-based arbitration.
In England, for example, groups may offer particularistic adjudication services, such as Sharia arbitration, so long as they use only those elements of Sharia law that are compatible with state law. In some states, magistrates and judges can choose to use group membership as a criterion in judicial decision-making such that they incorporate elements of the group’s legal system into the adjudication process despite having officially adopted neither the group’s legal code nor its legal procedures. In England, for reasons of equity, courts have chosen to recognize the validity of religious marriages that are otherwise precluded from official status by the 1949 Marriage Act. States in this category often also allow minority groups to provide wider-reaching adjudication outside the purview of state law. For example, in the United States and the United Kingdom, Jewish Beth Din and Muslim Sharia courts provide divorces and settle other family law disputes, although these decisions are neither recognized nor enforced by the state. At the same time, the government chooses not to eliminate these forums, unlike full centralization states. The best exemplar of this type is the United Kingdom, although certain states in the United States, such as New York, are also good examples.

**Full Centralization:**

60 The Muslim Arbitration Tribunal in the United Kingdom offers Sharia arbitration according to the Arbitration Act of 1996.

61 These types of legal exceptions or equity-based decisions also happen in adoptions, inheritance disputes, and other religious and family law cases. See, among others, the cases of Alhaji Mohamed v Knott [1969] 1 QB1, Chief Adjudication Officer v Kirpal Kaur Bath [2000] 1 FLR 8 CA, and the unreported 2000 case of Ali v Ali in Werner Menski “Governance and Governability in South Asian Family Laws and in Diaspora,” The Journal of Legal Pluralism and Unofficial Law, 45:1 (2013), 42-57. In theory, common law states use community norms to arrive at standards of behavior that are used to guide legal practitioners when relevant legal codes are either lacking or in need of clarification. In general, the standard used has been the behavior of the “rational man.” Recently, cultural critiques of the rational man argument have begun to emerge and to challenge a single, homogenous standard of rationality, and to promote the idea of different standards for different communities. Whether or not states are willing to tolerate multiple common law standards is still up for debate, but decisions that acknowledge plural communal norms begin to create grounds for diversity within common law.
States characterized by full centralization are those whose laws do not recognize the binding jurisdiction of any other judicial forums apart from the state judiciary. Their legal doctrines are unitary, as are their national court systems. By and large, these are civil law countries. Some states in this category permit arbitration tribunals, usually non-permanent, to resolve certain types of disputes, such as those involving business contracts, although not all of them do so. Even the ones that do allow arbitration retain the authority to remove certain areas of law from arbitration entirely. For example, in France, arbitration cannot ever be used in family law matters. Additionally, most countries require that an arbitrator disclose any reason as to why he may not be fully impartial in any given case. Religious or community membership can constitute such grounds. Many of these states, such as Germany and France, are also secular. In the judicial realm, this means that using religious standards for arbitration is impermissible, unlike in common law states such as Britain and the United States. Finally, these states do not tacitly accept the existence of minority group forums, even if they do not interfere with state courts. In sum, then, these states fully centralize law to the best of their ability. Examples of this type of state include France, Germany, Tunisia, Morocco, and Japan.

Methodology

With these six types established and defined, the next task is to develop a unified theory to explain judicial decentralization, accounting for its different iterations. Following Boone’s approach in *Political Topographies of the African State*, the

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62 The distinction between common and civil law states here is not absolute, but, by and large, common law states have more judicial structures in place to accommodate judicial diversity.
framework of analysis used here is one of institutional choice. The institutional choice approach is particularly useful for explaining variations in institutional structure in settings of contested authority where the state and other powerful groups, such as rural elites or interest groups, vie for control over resources. Institutional choice theory has been deployed to explain many different political and economic outcomes such as state formation (Levi 1988), regime structure (Frye 1997, Boone 2003, Benoit and Schiemann 2001), democratic transitions and consolidation (Elster 1996, Bastian and Luckham 2003, Bernhard 2005), and economic development (Ramseyer and Rosenbluth 1998, Bates 1998). Because it was developed, by and large, by scholars working in the state-society literature, it was initially used to explain the process of state making—how do states develop effective taxation strategies (Levi 1988)? How does the level of power vested in the executive emerge (Frye 1997)? Boone summarizes the components of this type of theory: “models of bargaining or competition over institutional choice should specify actors’ choice sets, interests, resources, and relative bargaining power.”

Institutions are thus seen as the product of negotiations, or what Boone terms “battling”, between multiple actors with different capacities for obtaining different sets of policy preferences.

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63 Limiting the study of judicial decentralization to more liberal states, it is tempting to see it as a process of political accommodation, which has been variously defined as “the outcome of the process of consultation, negotiation, compromise, and conflict whereby elites allocate public resources” (Presthus 1973) and “the objectives, arrangements, processes, or outcomes of mutual conciliation of people’s competing political interests and perspectives” (Hilal et al 2014). Although accommodationist politics can occur in contested settings, it is generally reserved for “situations where there is absence of comprehensive consensus but not a complete lack of consensus” (Hilal et al). Because states fundamentally oppose granting judicial autonomy, they do so only in situations of constrained choice, and so institutional choice theory is the better framework of analysis. Even states that have a normative commitment to judicial diversity prefer to honor it in ways that do not weaken state power. In Tanzania, for example, President Nyerere wanted to create a unified tribal customary law code that would bring African values into the legal system, but his preference was not to allow each tribe to preserve its own separate customary law, which was what actually happened.

64 Boone, 8.
As will be further explained below, I argue that the degree of judicial decentralization is shaped by bargaining between minority group elites and state elites. The outcome of this bargaining is determined by the capacities that group elites and state leaders bring to bear in the bargaining process. These capacities involve various factors, such as control over and access to coercive force; control over institutions; popular support; access to natural resources; wealth; and the degree of coordination that state leaders and group elites are able to achieve, among other factors. The importance of any one of these particular capacities depends on the context of the bargaining scenario, i.e. what the state most needs from group elites at the moment of bargaining over levels of judicial (de)centralization. Colonial legacies have a strong, but not exclusive role in shaping these capacities, as I will show in the following case study chapters. Colonial legacies alone, however, cannot explain changes in the degree of judicial decentralization that have taken place since the original postcolonial bargaining moment.

It is common for states to modify their policies of judicial decentralization over time, but the original degree of decentralization is usually arrived at during the process of state formation and consolidation, often in the years after independence (for post-colonial states). As such, any study of the phenomenon necessarily looks back in time to the state’s first attempt to navigate judicial diversity. Ideally, it would be possible to know each actor’s capacity and policy preference, and to track the process of bargaining through all of its stages. However, using historical data, sometimes going very far back (for example, Greif 1998, Levi 1988), or even in more recent cases where archival material has been destroyed or badly preserved, it is usually impossible to meet this standard. Even so, institutional choice theory is particularly well suited to situations
where access to data is constrained. It is effective even without quantitative measures, and for that reason it has been used to explain political outcomes in historical cases such as ancient Rome and medieval Europe where full retrospective measurement is not always possible.65

The more successful uses of institutional choice theory do not take actors’ interests as given, but rather use available data, historical or otherwise, to reconstruct preferences and capacities involved in the bargaining process. As such, this study views capacity formation as endogenous to the process as a whole. Accordingly, the first task for institutional choice theorists is to infer the capacities and interests of the parties involved from the available data. If one cannot know precisely what a group’s capacity is relative to the state, it should at least be possible to find evidence that it was high enough to prevent the state from implementing policy, or high enough to warrant attempts to win the group over to supporting the state’s position, etc. Process tracing devices such as smoking gun and straw in the wind tests (see below) can be used to ensure that the inference has strong empirical support.66

Because colonial legacies play a role in shaping the capacity of both group elites and state leaders, this study emphasizes the importance of temporality.67 Not all causal processes unfold at the same pace or occur simultaneously, but in many cases, events that happen earlier in a sequence have more causal weight than those that happen later.68 Pierson argues “placing politics in time—systematically situating particular moments

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65 For example, in Of Rule and Revenue Levi op. cit. argues that shifts in the bargaining power of the regime compared with that of the commons and changes in transaction costs allowed England to increase its tax collection during the eighteenth century (127-37). At no point does she quantify either bargaining power or transaction cost.
66 Collier 2011, Mahoney 2012.
67 See the following section for the full causal argument.
(including the present) in a temporal sequence of events and processes—can greatly enrich our understanding of complex social dynamics.⁶⁹ Accordingly, the trajectory of the variables is traced back at least one, and sometimes two, historical periods before the bargaining process.⁷⁰ However, because bargaining happens at a defined moment in history, these capacities must be examined through the lens of the bargaining context, i.e. what the state most needs from the groups in question such that it is willing to give up a degree of judicial control.

Because the analysis here involves inferring capacity formation across time, the method adopted is one of process tracing. Bernhard argues that institutional choice theory faces problems of evidence in articulating actors’ interests and preferences, but that these difficulties can be attenuated by relying on thick description rather than surveys of cross-national data.⁷¹ His argument is borne out by how many institutional choice studies rely on historically rich accounts.⁷² Process tracing has become widespread as a method to guide the researcher’s use and interpretation of historical narratives and to map causal processes over time.⁷³ Process tracing involves the creation of theory-guided dense

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⁶⁹ Paul Pierson, “Not Just What But When: Timing and Sequence in Political Processes,” "Studies in American Political Development" 14 (2000): 72-92, 72. Incorporating timing and sequence into causal analysis does not necessarily imply path dependence. Although some sequences are self-reinforcing, Pierson maintains that it is plausible to find that a sequence is causally relevant without arguing that it necessarily self-replicates. Equally, even a self-reinforcing sequence can be interrupted by an exogenous shock. Here, timing is incorporated into the analysis without prior commitment to either very long or self-reinforcing sequences.

⁷⁰ By this logic, newly independent states or new colonial regimes have weaker preferences than do the societal groups that they come to rule. For the most part, this is true, evidenced by the fact that regimes are often willing to trade one set of policy priorities for another according to various institutional choice scenarios. Sometimes, however, other forces aside from time, such as treaty obligations, inflexible budgets, or constitutional rules can make a regime’s commitments just as strong or stronger than those of interest groups, even when they form over a short period.

⁷¹ Michael Bernhard, *Institutions And The Fate Of Democracy: Germany And Poland In The Twentieth Century*, Pittsburgh: University of Pittsburgh Press (2005), 16.


narratives. Many different sources of data can be used to construct these narratives, but most process tracing involves using historical sources, interviews, and other qualitative data. George and Bennett describe process tracing in the following terms: “In process tracing, the researcher examines histories, archival documents, interview transcripts, and other sources to see whether the causal process a theory hypothesizes or implies in a case is in fact evident in the sequence and values of the intervening variables in that case.” Although there are several varieties of the method, they all involve the use of narrative accounts to test for the presence of sequences of events that permit the researcher to infer causal processes that lead to specified outcomes. One of the greatest concerns is thus ensuring that the hypothesized sequence of events is empirically borne out through case studies. Various tests have been proposed to assess the strength of evidence brought to bear in the causal narrative and to guide the researcher in determining whether particular components of the theory constitute necessary or sufficient conditions.

The most effective process tracing techniques involve the use of causal mechanisms, which Falleti and Lynch define as “relatively abstract concepts or patterns of action that can travel from one specific instance...of causation to another and that

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74 Vitalis (in Perecman and Curran 2006) argues that it is important to treat narratives of past events as quasi-statistical data points, and that with a wide enough sample, it is possible to discern a metaphorical line of regression that reveals the most probable causal narrative to account for the events of interest. When the event of interest is the subject of multiple historical analyses, it is preferable to follow Vitalis’ suggestion and avoid over-reliance on a handful of historical sources. When available data is scarcer, it is advisable, at a minimum, to attempt to triangulate between available sources using both primary and secondary source material where possible. Recent studies of process tracing make the case that it is a method ideally suited to situations in which data are scarce or difficult to come by, such as civil wars, because they allow for counterfactuals and elaborate theories that yield a larger number of predicted outcomes that can be observed. Both of these techniques help researchers test the presence of sequences of events or mechanisms even if the full sequence or mechanism cannot be observed. (Lyall in Bennett and Checkel eds, Process Tracing: From Metaphor to Analytic Tool, Cambridge University Press (2014)].

75 George and Bennett, 6.

76 See, for example, Bennett and Checkel for a range of new process tracing procedures and tests; Falleti (2006) on theory-guided process tracing.

77 See, for example, Collier 2011 and Mahoney 2012.
explain how a hypothesized cause creates a particular outcome in a given context.\footnote{78} They specify that causal mechanisms must be observable, generalizable across cases, and irreducible, and that they are portable across cases with proper attention to context and periodization.\footnote{79} Causal mechanisms are valuable because they allow researchers to establish causation with a greater degree of certainty than many other methods. Problematically, few studies that use the paradigm of institutional choice refer to causal mechanisms, although most rely on process tracing. In the absence of mechanisms, process tracing techniques often fall back on sequence. However, most users of institutional choice theory are for the most part unconcerned with sequences and temporality, focusing instead on actor interests and capacities that are assumed to be developed prior to the bargaining process. Without mechanisms and sequences, it can be argued that institutional choice theory does not really use process tracing so much as the approach modeled in \textit{Analytic Narratives}.\footnote{80} In a later exposition on the method, Levi makes clear that analytic narratives are distinct from process tracing. Although the former combine strategic, contingency-based choices with path dependence, they all explicitly rely on rational choice theory.\footnote{81}

How then, can institutional choice theory best be used in conjunction with process tracing? As previously stated, the institutional choice approach used here emphasizes temporality and locates the various components of its theory, including preference formation and bargaining or contestation, in time. Principally, it argues that long-held, ...
unchallenged preferences give rise to stronger interest articulation before and during the bargaining process. As such, timing matters. Next, it proposes to treat institutional choice itself as a causal mechanism. In that it is an irreducible pattern of action that is both context-dependent and portable across cases, the specific act of “choosing” an institution acts as a causal mechanism. It has multiple inputs in the form of preferences, capacities, and context, all of which are explained through prior processes in the causal sequence of events, but the institutional configuration that is the outcome of interest ultimately results from the mechanism of institutional choice.

Although only the latter explicitly acknowledges the role of causal mechanisms, a comparison of Boone’s and Bernhard’s theories illustrates the point. Boone articulates a theory of institutional choice to explain configurations of regime structure in rural Africa. She argues that cash crop production, rural social hierarchies, and elite economic dependence on the regime account for four outcomes that reflect the regime’s strategy for navigating political contexts in which the regime has more or less local authority and political presence. The causal mechanism is situated at the moment of institutional choice, which results from the regime’s solution to maximizing power in rural areas despite constraints. Bernhard, by contrast, argues that institutional choice theory can explain democratic survival by bringing clarity to the democratic transitions literature on political pacting. Examining two cases of democratic breakdown and two cases of democratic survival in Germany and Poland, he contends that the coalitions that assembled to create new rules of government did so using one of four choice

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82 Falleti and Lynch, for example, treat rational choice as a causal mechanism (1150).
84 Ibid., 33-37.
85 Bernhard 2005.
mechanisms: consensus, imposition, splitting differences, and trading support across issues.\(^{86}\) These four types of decision processes are, in his theory, the mechanisms that interact with contextual variables to produce democratic breakdown or stability. His causal mechanism is thus four-fold, with each mechanism acting in context to produce a different outcome.\(^{87}\)

This difference reveals two ways in which institutional choice theory can engage with causal mechanisms. In the first, the single mechanism of constrained choice results in various outcomes depending on context. In the second, actors select different mechanisms of choosing, and the variation in types of decision-making is what accounts for the variation in outcome. Although the second method has strong appeal because it relies less heavily on context variables and can account for variation based on differences in mechanism alone, it requires a tremendous amount of data about the actual process of bargaining or negotiating between actors with different interests. For legislative debates or treaty negotiations, it is a sophisticated method. However, for contexts in which there is less evidence concerning the bargaining/contestation process, it is not feasible. Accordingly, most institutional choice theories use mechanistic frameworks that more closely resembles Boone’s, even if, like hers, they are not explicitly theorized. This study follows the single mechanism approach.

**Research Design and Data**

\(^{86}\) Ibid., 18.
\(^{87}\) Although the four causal mechanisms he identifies lead to the outcomes he posits, institutional choice theory would posit a prior causal mechanism to those he identifies: the original choice of which decision method, or mechanism, to pursue during the transition.
The aim of this study is to build a theory to explain judicial decentralization, but to do so the conceptual typology includes judicial centralization as well, so as to not select only positive instances of the phenomenon. This project thus encompasses three full case studies accompanied by three shadow cases (six cases, each representing one of the six types of judicial decentralization) to study the full range of the theory.\(^88\) The three full case studies are of Lebanon (full decentralization), Tanzania (partial decentralization), and Egypt (partial incorporation). The three shadow cases are Malawi (tacit devolution), England (common law incorporation) and France (full centralization). Limited observations from the three shadow cases are interwoven into the three primary case studies. Apart from choosing one case of each type, cases were selected based on two criteria. One is that the case be a good example of its category (Gerring uses the term “typical case”).\(^89\) Using typical cases helps bring clarity to the inner workings of each type.

The second is that cases were selected, wherever possible, to rule out competing causal explanations. For instance, Tanzania and Malawi share a border and have similar histories of Arab invasions followed by British colonialism, and they achieved independence within two years of one another. Following independence, they were both ruled by a powerful and mostly popular lifelong president who governed through a one party system until the introduction of multi-party democracy in the mid 1990s. Nevertheless, they adopted widely different policies on judicial decentralization. John Stuart Mill’s famed comparative methods logic tells us that none of the factors that these

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two cases hold in common can be the cause of the divergent outcome. Additional variation across cases provides even stronger support for ruling out what would otherwise be plausible hypotheses. Given that Egypt also went through a long period of British colonial rule and adopted yet another type of judicial decentralization, it is safe to argue that differences in the colonial regime’s legal system are not the only driving force behind variation in outcome.90

Likewise, Lebanon and Egypt are characterized by similar levels of government decentralization in terms of administrative, fiscal, and political decentralization, but they pursued nearly opposite approaches to judicial decentralization. Prior experience with decentralization can thus be ruled out. England and France are in different categories in the above typology and both are liberal democracies. Whether the relevant group law is ethnic or religious does not seem to be important either. Variation within cases also makes it possible to eliminate hypothesized causes such as minority group size. The size of Malawi’s groups has remained more or less constant over time despite the 1990s shift from full to tacit decentralization. As will become clear in the case study chapters, some of these variables (such as whether the group is immigrant or indigenous) do have some causal weight for their role as part of the context in which institutional choice occurs. For the most part, however, comparison between cases helps to eliminate rival hypotheses.

Data used for process tracing is drawn from original fieldwork in each case study country as well as primary and secondary historical sources.91 I conducted 22 months of

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90 It has been argued in a wide range of literatures that the legacy of the colonial legal system, i.e. whether the newly independent state inherits a common or civil legal system, is largely responsible for a number of outcomes including stable trade regimes, the ability to attract international finance, rule of law performance, and human rights protections. See, for example, Blanton et al 2001; La Porta et al 1998; La Porta et al 2007; Joireman 2001 (and 2004); Mitchell et al 2013 op. cit.
91 Because legal pluralism and judicial diversity have not been thoroughly studied in every country, fieldwork was particularly crucial. Although Sezgin and Kunkler (forthcoming) are developing a
fieldwork in my case studies, divided as follows: Egypt (3 months), the UK (3 months),
France (3 months), Lebanon (4 months), Tanzania (5 months), and Malawi (4 months).
During this time, I conducted four hundred and fifty three interviews with litigants,
judges, group elites, non-state judges, local experts, NGO workers, community
stakeholders, and members of government. Most of these interviews were conducted one
on one, but I also held several group interviews, particularly of participants in a court
case. I also observed court sessions at state and non state courts, and interviewed
participants afterward whenever possible. In addition, I accessed preexisting local
primary sources where I could find them, including court records, conference
proceedings, parliamentary debates, and interviews and raw data from Masters and PhD
theses written at local universities. I also used multiple histories of each case study
country for secondary source information, useful in particular for better understanding the
colonial legacies particular to each case.

Law is a vast field, encompassing the subfields of criminal law, tax law, civil law,
and family law, among many others, and its various branches differ from one country to
the next. For instance, one of the three branches of Tanzania’s High Courts, which are its
first level appeal courts, is its section of land courts—a form of law that doesn’t exist as a
discrete category in the United States. As a consequence, the domain of law in which
decentralization takes place (or is desired to take place) differs from place to place.
However, there are a few nearly universal trends concerning which domains of the law
are the most and least decentralized. Criminal law is almost never decentralized, and any

 quantitative measure of legal pluralism that they plan to use to assemble a dataset that will contain a
 judicial diversity score for every country, at present no such data exists. Additionally, most legal texts focus
 on the formal judicial system, neglecting to mention parallel judicial systems that the state does not
 recognize. Any study of judicial decentralization based purely on library sources would miss a good deal of
 judicial diversity.
non state criminal adjudication tends not to be recognized by the state. Branches of law in which the state is a litigant are almost never decentralized. Family law is the most likely to be decentralized, both formally and tacitly, as is land law, in places where it exists as a separate branch of law. For the most part, then, this study focuses on family law (also called personal status law) as the legal site at which judicial decentralization is predicted to be mostly likely to occur. I do not restrict the domain of inquiry solely to family law, but focusing on it helps to set useful limits on the scope of the study.

Compared with the more attention-drawing fields of criminal law, where crimes are punished and societal justice is meted out (in theory, at least), and commercial law, where lucrative contracts are negotiated and enforced, family law is perhaps unglamorous. It is nevertheless an important area of the law, and should not be dismissed as being of secondary importance. Personal status law and family law, although considered to be different fields in some countries, govern marriage, the dissolution of marriage, alimony and other transfer payments between spouses, custody, guardianship, adoption, and inheritance, as well as further specialized fields in certain places. Inheritance and the formation and dissolution of marriage entail property transfer between individuals, which involves considerable sums of money and tracts of real estate (just think of the perennial melee that ensues over the estate tax in the United States). When, as in places like Lebanon and Egypt, personal status and family law are highly decentralized, the result is that citizens of the same state may have their wealth, property, and economic rights determined by very different rules. If we think property is important, we must think family and personal status law are important.
Additionally, custody and guardianship concern the welfare of children and their education, as well as the right of parents to see their children, and is of tremendous consequence. Family and personal status law are important for more than the crucial question of who has rights to raise a child. It is also crucial for determining which children will be citizens, and as members of what groups, who are eligible for often varying individual and group rights. As Sezgin argues, “Family law has long been considered by political elites as a useful instrument to ascertain the rules of inclusion and exclusion within the political community by telling their subjects who could marry whom or who could inherit from whom through juridification of reproductive relations in society.”92 Diamant adds, “modern state rulers have both envisioned a new family order and devoted considerable resources to remolding family structure and relations according to this vision.”93 As such, personal status law is an important site of negotiation between states and state sub-groups over group rights to maintain a distinct community within the state and individual rights to live according to rules they find meaningful.

Although many people go through their lives without ever writing a formal contract of sale or employing a lawyer, moreover, most inherit, marry, and have children. Personal status law is the area of the law that probably touches the greatest number of people, and as such it is one of the most important points of contact between the judicial system and individual citizens. It is the most perennially relevant area of the law for most people, which why it is also so deeply contested. In England, for example, some Muslims, both citizens and non-citizen residents, seek out Sharia councils to decide

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matters of marriage, guardianship, and property, even though these decisions are not binding according to state law or, indeed, even recognized by it. Ordinary people feel sufficiently involved in family law, and feel that they have enough at stake, that they will risk violating state law to preserve their personal status system. Accordingly, the decentralization of personal status law involves more than a token transfer of power to religious authorities. It allows non-state officials to regulate property transfer, determine norms regarding the rights of women and children, and influence larger areas of state law such as citizenship rights and civic education.

**Causal Argument**

It is proposed that states adopt one of six patterns of judicial decentralization as the result of a process of bargaining with groups whose elites have a strong preference for exercising judicial autonomy. Having outlined a conceptual typology above, the next task is to develop an explanatory typology that serves as an effective model of the institutional choice theory deployed here. Before continuing, however, it is necessary to establish a domain for the theory. Specifically, the model proposed here applies to non-federal states. This is true because institutional choice theory is best suited for situations in which a government and societal groups are able to bargain or battle directly. Also, policy on judicial decentralization may well differ between subunits in a single federal state. It would be possible to analyze each subunit separately, but for the sake of clarity, simplicity, and generalizability, this study is restricted to non-federal states.

To reiterate the point made above, institutional choice theory should articulate the interests, resources, and relative bargaining power of the relevant actors. However, these
factors must be assessed in context. Context informs both interest and capacity. For example, in some contexts, small minority groups can exercise outsize power. During Egyptian President Sadat’s visit to President Carter in 1978, protests by Orthodox Copts caused Sadat considerable embarrassment and nearly stalled the ongoing peace process with Israel. In response, Sadat tabled a constitutional amendment that would have curtailed Coptic Orthodox law. Had Sadat been relying on the help of a non-majority Christian country instead of the U.S., these protests would have been much less effective.

States bargain for various iterations of judicial centralization and decentralization as the result of strategic interactions with ethnic or religious minority group elites. Specifically, when states find that they need the cooperation or support of these groups in achieving particular goals, and when groups strongly prioritize retaining separate law, states compromise on certain aspects of judicial centralization to win group support. The outcome of the bargaining involved in this compromise is determined by the capacities that the state leaders and the capacities that the group elites are able to muster during the negotiations. I will further discuss some of these capacities below, but two sets of capacities are the most important: first, for the state, the relative advantage of its institutional development, along with its popular support, vis-a-vis the specific matter in dispute, and second, for the group, its ability for group elites to effectively coordinate, and the extent of its strength in the issue area that is being bargained over. For the purposes of this argument, then, state capacities will refer to the state’s popular support in

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95 When states have relatively narrow policy interests, such as election laws or environmental reforms, they can trade concessions in one policy area, such as judicial decentralization, for gains in another that they prioritize more highly. Each group must be willing to make concessions in the domain that it values less. In the institutional choice model used here, when states are unable to achieve a policy or policies that they value more highly than judicial centralization, and when groups place a high value on decentralization, states permit some degree of judicial decentralization in order to achieve their full objectives elsewhere.
the area of bargaining and the strength of its related institutions, and group capacities will refer to group elites’ ability to coordinate support and/or resources for bargaining. This will be expressed through two variables--group capacity relative to the state, to capture state capacities, and elite coordination, to capture group capacities—in the explanatory typology below.

A brief review of the existing literature on state capacity will show the extent to which this work draws on existing conceptualizations of the term and how it subtly differs. Sikkink defines state capacity according to how well state institutions can implement the state’s goals. Other studies have attempted to find proxies for state capacity or to build quantitative tools to measure it. For example, Fearon uses state reliance on lootable resources to proxy for state capacity. Following Krasner’s argument that capacity varies from one political sector to the next, two recent studies have developed multivariate measures of state capacity. Hendrix examines state capacity in the context of civil war onset. He compiles 19 conceptualizations of state capacity used in literature on civil wars and subjects each to construct validity tests. He finds that bureaucratic quality and the percent of a state’s GDP that is made up of tax revenue are the best measures of state capacity because they are highly correlated with other indicators of capacity and are linked through direct causal mechanisms. Hanson and Sigman emphasize the importance of tax revenue as a proportion of GDP, although they find that the extractive, coercive, and administrative capacities of states are often

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98 Krasner 1978, see also Skocpol in Evans et al 1985.
inextricably inter-woven and are thus difficult to measure in isolation.\textsuperscript{100} A Harvard-based consortium of scholars has recently developed a measure of state capacity based on three variables: extraction, reach, and allocation. This \textit{Performance of Nations} project resulted in a web-based data tool that allows researchers to access longitudinal data on each variable for all of the world’s states.\textsuperscript{101}

However, as Hendrix argues “Decisions about how to best operationalize the concept of state capacity are, to a certain extent, driven by the topics that researchers are addressing.”\textsuperscript{102} This study finds that states have widely different capacities in different policy areas. For example, the state may have greater capacity to impose its trade policy interests on groups because they have no way to negotiate trade agreements without the state as intermediary, whereas the state may be more constrained in the area of agricultural reforms because it generally has a weaker presence in rural areas. Two sets of interests are necessarily held constant: the regime’s desire to centralize its judiciary, and the group’s preference for judicial autonomy.\textsuperscript{103} It is the state’s other policy priorities, such as economic development and trade regimes, that are of primary interest here. Relative capacity is thus assessed within the specific domain of the policy interest that forms part of the institutional choice scenario. Because the state’s political goals shift over time, I use a context-specific measure of relative capacity that I establish through process tracing. Process tracing allows me to uncover levels of support for the state, as


\textsuperscript{102} Hendrix 273-4.

\textsuperscript{103} See literature review section. States do not willingly give away or share judicial power, and it thus follows that they would not do so if there were not a strong concomitant desire for it on the group’s part.
well as its institutional resources, which are the capacities of most interest to this study. Once process tracing has helped to uncover the factors underlying relative capacity, it is categorized as high, medium, and low, as shown in the table below, because a binary variable does not capture sufficient variation.

The second variable is elite coordination, meaning the extent to which group elites share a strong interest in judicial autonomy and are able to muster resources and support in their negotiation with the state. Elites disproportionately benefit from being given the authority to adjudicate disputes or participate in the adjudication process, so it is they who represent the group’s interest in maintaining separate law during the contestation process. They derive advantages from several components of the adjudication process. The first is that granting even partial judicial autonomy usually gives group elites considerable say in determining the content of their laws. Given the opportunity, they create norms that extend or preserve their status.104 When the same elites are also in control of the judicial process, they can ensure that norms are enforced and transgressions are punished. The act of adjudication in and of itself generates power.105 Elite coordination is thus the primary vehicle for conveying interest in judicial decentralization to the state. Process tracing is used to assess the group’s interest in judicial autonomy and elite coordination. It should be noted that coordination does not necessarily imply direct lobbying; merely having a coordinated, strong interest in judicial

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104 For example, when Western sociologists worked with local elites to codify Tanzanian tribal law, the resulting codes disproportionately emphasized rules that favored senior men (see Tanzania case study chapter).
105 This logic is similar to that used by Stone Sweet (2000 pp. 14-19) except that Stone Sweet “assumes a purely consensual world” in which judicial power accrues from the community’s decision to vest normative authority in a third party and the third party’s decisions begin to shape community behavior. Here, consent is neither required nor implied. Elites who possess power from other means entrench power-generating devices in local norms and shape behavior by punishing non-conformers.
autonomy should be sufficient to signal to the state that judicial decentralization is a fruitful area for granting concessions in return for cooperation elsewhere.\textsuperscript{106}

Various factors may interfere with the ability to coordinate such as splits between elites, geographical distance, or identity politics. Elites are able to overcome some but not all of these obstacles, so elite coordination is not a binary variable.\textsuperscript{107} Instead, level of coordination is categorized as high, medium, or low, as with the first variable.

With these two variables taken as its axes, the following table results:

\textsuperscript{106} See, in particular, the case study of Tanzania for an example of this.
\textsuperscript{107} As with the first variable, process tracing is used to uncover elite coordination or the lack thereof. The various factors that help or hinder elite coordination are too diverse to lend themselves easily to the construction of a quantitative set of indicators for the variable. For example, in Tanzania, the abolition of the chieftaincy and geographical distance hindered coordination, but the strong preference of the new, party elites for judicial decentralization and the absorption of former chiefs into the party structure kept coordination high enough to effect partial decentralization. In Egypt, geography favored strong coordination, but the delegation of powers to church and secular elites during the end of the period of Ottoman rule created power struggles between different factions of elites that severely hindered cooperation, leaving non-Muslim minorities with only partial incorporation of their laws into the state legal system. The most important factor here is the level of elite coordination regardless of its source.
Table 2

Determinants of Judicial Decentralization

<table>
<thead>
<tr>
<th>State capacities</th>
<th>Group capacity relative to the state</th>
<th>Elite coordination</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Tacit Devolution</td>
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<tr>
<td></td>
<td></td>
<td>(Malawi)</td>
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<tr>
<td></td>
<td>Medium</td>
<td>Partial</td>
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<tr>
<td></td>
<td></td>
<td>Incorporation</td>
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<td></td>
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<td>(Egypt)</td>
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<tr>
<td></td>
<td>Low</td>
<td>Common Law</td>
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<tr>
<td></td>
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<td>Incorporation</td>
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<tr>
<td></td>
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<td>(UK)</td>
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</tbody>
</table>

The greatest amount of judicial decentralization is predicted to take place when the state’s capacity is low relative to that of the group and group elite coordination is high, and the least amount when state capacity is high and elite coordination is low. Crucially, even when elites are able to coordinate or strongly share an interest in judicial autonomy, if the state’s capacity is high relative to that of the group, the state is not expected to devolve judicial power. It should have no need to in this configuration because it can impose its preference without needing to bargain or trade concessions. Only one type of state is predicted to decentralize judicial power to some degree under these conditions: liberal, common law states (described above). When state capacity is
either medium or low, if elites fail to prioritize judicial decentralization highly enough or are unable to coordinate to communicate their preference to the state, then judicial decentralization does not occur because the state chooses some other policy concession to win the group’s cooperation. The four primary types of judicial decentralization should be found in the middle ranges, where state and group capacity are more evenly matched, and elites can coordinate sufficiently to achieve various iterations of judicial decentralization.

To summarize, then, bargaining or contestation between states and group elites creates an institutional choice scenario that results in judicial decentralization, the degree of which depends on the level of elite coordination and relative capacity. Next, it is necessary give a temporal dimension to the theory. As made clear above, the variables occur at different moments in time and the processes that shape them unfold at different rates. Elite coordination changes relatively slowly over time. For example, the process that split elites into rival factions in Coptic Orthodox Egypt unfolded over approximately seventy years.

By contrast, relative state capacity changes more quickly because it depends heavily on the context of the bargaining. For example, Sadat’s attempt to further centralize the Egyptian judiciary in the early 1980s was borne of an initiative to win support from conservative Muslims, and from start to finish the proposal lasted only months. The schema outlined above represents the level of each variable at the moment of contestation or bargaining. If either variable later changes, the level of judicial decentralization may change as well. Other institutional choice models allow for

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108 See Michael Bratton and Nicholas van de Walle, Democratic Experiments in Africa: Regime Transitions in Comparative Perspective (1997). They argue that institutions constructed in the previous phase have a strong carryover effect in articulating the rules for the next iteration of the causal process.
institutional change as well. For example, Levi finds that changes in the relative levels of bargaining power between parliament, the crown, and ministers in eighteenth century Britain help account for changes in tax policy.\textsuperscript{109} However, the initial institutional choice usually happens at moments of political transition, such as state formation, independence, and the transition to democracy. Other types of transitions can also trigger these processes, such as demographic shifts (including immigration and baby booms) and economic changes (including recessions or exogenous shocks). Malawi’s institutional configuration changed from the full decentralization adopted at independence to tacit devolution during the shift to democracy in the early 1990s.

Generally, then, the sequence of events is as follows: elite preferences and ability to coordinate coalesce slowly in the period before the political transition. Then, a political transition creates space for the state and group elites to arrive at a new level of judicial decentralization. Once the transition has occurred, the new regime decides on its policy priorities. If it does not have sufficient capacity to enact them without the group’s support, and if elite coordination in favor of judicial autonomy is high enough, then either direct or indirect bargaining leads to some degree of judicial decentralization. The resulting institutional configuration lasts until there is a large enough change in one of the two key variables, or another moment of political transition intervenes. See the illustration below for a visual representation of how the two variables unfold over time, with the resulting bargaining matrix.

\textsuperscript{109} Levi, 1988 127.
The following chapters provide detailed analysis of each case. They are ordered from the greatest to the least extent of judicial decentralization among the full case studies considered here. Chapter two examines the case study of Lebanon, which is an example of full decentralization, where the state is relatively weak compared to societal groups. The Lebanese state functions badly, or not at all, without compliance from religious groups. Group elites in Lebanon are also well organized and able to make coherent demands of the state. They strongly resist subsequent changes to the judicial autonomy they are able to win. This is the sole category in which the state lends its coercive power to enforce judicial decisions that it takes no part in. In Lebanon, religious groups have full autonomy over personal status law, which encompasses the important
areas of inheritance, marriage, divorce, child custody, and guardianship. Groups have full control over both the content of the laws and the adjudication process. Until 2015, the state was not even authorized to issue civil marriages. Decisions made by religious tribunals cannot be appealed in state courts, which is the greatest extent of judicial decentralization possible.

Chapter three assesses partial judicial decentralization in Tanzania, which occurs when the state has somewhat less relative capacity than with the partial incorporation type, but elites retain a high level of coordination. In the post-independence period in Tanzania, the state had enough capacity that it could obtain more uncontroversial policy objectives without needing group cooperation. However, when it came to larger projects, or projects in a geographical area or interest domain where rural elites possess some capacity, the state needed their support. Here, elite coordination did not involve direct demands to the state. Instead, elite preferences aligned sufficiently strongly around judicial autonomy that state was able to discern these preferences without specific demands. Because the preferences were aligned so strongly, the cost for the state of ignoring these preferences was high. Tanzania thus allowed groups to retain control over the content of their customary law through codification as well as the use of assessors, community elders who advise magistrates on local customary law and have a binding vote on the verdict. It also created land tribunals and community arbitration forums that use local customary law. Its post-independence constitution eliminated the provision, preserved by many other African states, which automatically struck down customary law that was repugnant to the constitution. Some of its national laws, such as its marriage law,
preserve large portions of customary law. Nevertheless, it retains a unitary court system with an appeals process that can reverse the decisions of all lower courts.

Chapter four examines the legal pluralism type of partial incorporation through a case study of Egypt. In this case of partial incorporation, the state and group were relatively well matched in terms of capacity at the moments of bargaining, although that of the state was slightly higher. In this case, elites were able to coordinate only moderately well. They were thus less well equipped to resist state demands or to hold out for more concessions. The state was able to successfully offer concessions on terms that it controls, such as by incorporating codified group law into state courts. In Egypt, Orthodox Copts, Protestants, and other religious groups have the right to adjudicate their personal status cases according to codified laws particular to each group, but they do so in Egyptian state courts that are usually run by Muslim judges. Additionally, only cases between co-religionists are subject to group law. Cases that involve members of two religions default to Muslim personal status law. In Egypt, partial incorporation involves only limited concessions to each group, amidst an otherwise strong and centralized state court system.

Within chapters two, three, and four, comparisons from Malawi, England, and France are incorporated in the form of shadow cases. To make these comparisons more effective, I will briefly summarize each case here. The case study of Malawi investigates the legal pluralism type of tacit devolution. Cases of tacit devolution are characterized by high group capacity relative to the state, but only moderate amounts of elite coordination. In Malawi, because the state needs the cooperation of tribal groups to secure electoral coalitions, and to pursue rural development initiatives, it is loath to interfere in the
strongly institutionalized domain of community dispute adjudication. Because elites are unable to articulate a strong demand for judicial autonomy, Malawi does not lend its coercive power to tribal courts, but it knowingly and purposely permits them to operate their own judicial forums without state recognition. Especially after democratization in the mid 1990s, political parties used chiefs to corral votes, and were thus unwilling to erode any of their traditional powers. Accordingly, although the tribal court system that the previous regime used as a parallel justice system for punishing dissidents was severed of all ties to the state, it was left in place to function unofficially. Because there is no state oversight, chiefs adjudicate disputes in their own forums according to local norms. A recent law that has been passed by parliament but not yet implemented would re-authorize an attenuated version of these courts.

I evaluate the category of common law incorporation through a case study of England. Common law incorporation is in some ways the most unintuitive because it is restricted to a particular type of state: liberal democracies with common law legal systems. Because state capacity is very high relative to that of the groups, there is no need for the state to decentralize judicial power at all. It should be able to impose its policy preferences without doing so. However, elite coordination in this category is quite high, so the state is able to read the group’s strong preference for judicial autonomy. Because it values inclusion and possesses the necessary legal mechanisms to achieve it, this type of state is able to grant some judicial autonomy without giving away very much of its own judicial power. That said, this only happens if specific groups of elites are committed and coordinated enough to press these demands. These states are quite rare, but England is a good example. Some members of the Muslim community in England have expressed a
desire to have access to legal forums that use Muslim personal status law. The state has accommodated this request in three separate ways. The first is through arbitration—citizens have the right to have many types of disputes arbitrated outside of courts, and specialist Sharia tribunals have opened to fill this demand. Second, British common law courts are increasingly beginning to work with Muslim personal status law, for example by recognizing as valid Muslim marriages conducted in England that are not legal under the country’s law. Finally, the state refrains from closing the unofficial, unrecognized Sharia law tribunals that issue religious personal status decrees. It makes clear that these forums have no legal force, but does not shut them down, as other European states have done. Interestingly, its response to the Jewish community in the eighteenth and nineteenth centuries was similar.

France serves as a case study of full judicial centralization, with particular attention to the legal practices of immigrant Muslims. Full centralization occurs when relative group capacity and elite coordination are both low. France, like England, has no need to devolve judicial power to achieve policy objectives. Although some elites in the Muslim community may desire judicial autonomy, either they are in a minority or they are unable to articulate their preference. France’s Muslim community is internally divided into rival factions that approximate national divides between its three largest North African Muslim former colonies. Because components of French society have been suspicious of Muslim culture and personal status law, and French law is strongly secular, elites do not publicly voice their preference for Sharia law. As a result, France does not acknowledge any legal system apart from its own national law, and it even takes preemptive steps to prevent private religious arbitration. For example, it is illegal in
France to have a religious marriage ceremony before a civil ceremony, and France briefly jailed several imams who broke this law.

The final chapter offers some empirical observations from my case study research. It offers a glimpse of some of the court cases heard in state and non state courts in both the case studies presented here and the shadow cases. It also suggests avenues for further research on legal pluralism.
Chapter Two: Full Decentralization in Lebanon

Introduction

Lebanon is a case of full judicial decentralization within a particular delimited jurisdictional domain, in this case personal status law. Although a central legal system governs criminal, property, and other types of law, the vast and important domain of family law is entirely decentralized, with each of eighteen religious groups administering its own system of family law courts. Because Lebanon was never able to even partially centralize its personal status legal regime, until very recently the state had no power even to issue a civil marriage license. It is relatively common in Middle Eastern states, such as the case of Egypt (chapter four), for each religion to have a separate family law code, but Lebanon is unique in the region for the extent of the power that it devolves to sub-state groups. Religious groups, known as confessions (and sometimes sects) have the right to determine their own legal codes, to modify them without the consent of the state, to adjudicate family law matters, and to prevent laws that touch on their religious interests. Additionally, as we will see, the state judiciary is curtailed in the extent to which is can rule on issues such as women’s rights, citizenship laws, and inheritance tax, because all of these issues touch on personal status law. In Lebanon, non-state groups are powerful enough to rein in the central judiciary to preserve the powers of their separate courts.
Causal Argument: The Enduring Strength of the Lebanese Sect

The weakness of the Lebanese state is well known, and discussions of state strength and capacity are widespread in Lebanon. During research in other cases for this study, locals who agreed to be interviewed rarely mentioned the state, and if they did, it was in the context of a lack of state capacity to adjudicate certain types of disputes. In Lebanon, taxi drivers, waiters, and political science professors spoke with nearly equal fluency about the merits and perils of state strength for their country. The weakness of the Lebanese state is a consequence of the same forces that produced support for legal decentralization, and this central state weakness, in turn, contributes to the persistence of legal decentralization. The driving forces behind both decentralization and state weakness are, as further articulated below, the extraordinarily strong institutionalization of confessional legal practices (and confessional loyalty), which produced durable elite coordination in favor of decentralized authority, and the bargaining process between strong, coordinated confessional groups and first the Ottoman, and then the French administrators who ruled Lebanon.

Group elite capacities in Lebanon are sufficiently strong as to have blocked all state attempts at centralization. This state of affairs came about through the period leading up to and during state building, at which time political power was apportioned to religious groups based on their share of the population. This compromise, meant to share power between Lebanon’s diverse groups, ended up creating strong incentives for sects to control their group membership to make sure that no members left the group, which entailed the use of personal status law (family law) to police the group’s boundaries. By
the time the first centralizing efforts came, under the French Protectorate, decentralized personal status law had been so strongly institutionalized that the capacities of the religious group elites were far stronger than the capacities of the state leaders. Confessional leaders had strong popular support from their members and strongly hierarchical institutions that facilitated coordination among group elites. State leaders, by contrast, relied on their sect for their appointment to power (or their election to it). They thus lacked the direct popular support awarded to group elites. Furthermore, the status quo meant that state leaders were unable to centralize those portions of the law that would change this situation, by eroding confessionalism. The durable strength of Lebanon’s group elite capacities, pictured below, firmly place Lebanon in the category of full decentralization.

Table 3

Trajectory of Failed Judicial Centralization in Lebanon
In Lebanon, each confessional group, and there are eighteen of them, has strong control over its coreligionists. However, the three largest sects have the greatest amount of political power, both for the obvious demographic reason of proportional representation, and because the original political formula crafted to share power between Muslims and Christians gave the three most powerful political positions—the presidency, the office of prime minister, and also of speaker of parliament—to the Maronite Christians, Sunni Muslims, and Shiite Muslims, respectively (see below for more on this). For this reason, this chapter will primarily focus on Maronite Christians (36% of the population), Sunni Muslims (28.7 percent of the population), and Shiite Muslims (28.4% of the population).\(^{110}\)

The remainder of the chapter is divided into two sections. The first considers the historical origins of the strongly institutionalized confessionalism that empowers Lebanon’s group elites, thereby creating a political structure that involves strong group elite capacities and levels of coordination. It also argues that the defense of decentralized personal status law, individually controlled by each group, is essential to the preservation of this governing formula. The second section examines moments of contestation between state leaders and group elites during state efforts to centralize the judiciary. It demonstrates how group elites were able to prevail in these encounters.

**Personal Status Law and the Institutionalization of Confessional Politics**

Lebanon’s creation and maintenance of legal pluralism in the domain of personal status law is closely bound up with sectarian politics and the institutionalization of the confession-based consociational political system there. According to historian Safia Saadeh, it is impossible to have a civil personal status law in Lebanon, even as an optional alternative to confessional law, because “the preservation of the personal status laws within society complement the sectarian representation of the political system and the consociational system as a whole.”\(^{111}\) The consociational system relies on demographics because parliamentary seats and other political offices are apportioned proportionally, based on the size of the confessional groups. Were the lines around these groups to fade, it would become difficult to count the number of adherents to each confession and thus allocate seats accurately. Confessional leaders also fear that members of their religion might opt for civil marriage and thereby reduce their demographic clout in the next census.\(^{112}\) The fact that the last census was taken in 1932 does not seem to diminish these fears, or the accompanying reluctance to allow any jurisdiction over family law to leave confessional control. There is thus a strong and mutually reinforcing relationship between confessionalism and a decentralized judiciary.

This state of affairs grew out of the Ottoman millet system, summarized below, in which subject populations within the Ottoman empire were permitted to be governed by their own personal status laws even though they fell under central Ottoman jurisdiction in all other matters. In Lebanon, this had the effect of strengthening two groups who did not share the Sunni Muslim religion of the Ottoman Empire: Maronite Christians and Druzes, an offshoot of Shia Islam, who lived, respectively, in the north of the area known as

\(^{112}\) Author interview with M. Nokkari; Saadeh, 52.
Mount Lebanon, in and around Bsharre, and in the south of Mount Lebanon, in the Shouf mountains. Preservation of their personal status laws gave both groups the opportunity to at first retain and later expand their influence vis-à-vis the Ottoman Empire, such that in the mid eighteenth century, reinforced by external alliances, both groups put forward a claim for self-rule. The Ottoman Empire, unwilling to further subdivide its territory, created an autonomous area ruled by both groups, and also apportioned a certain amount of power to the other groups living in Mount Lebanon, such as the Greek Orthodox and Greek Catholics. From this moment onwards, confessionalism became a self-reinforcing institution.113

The preservation of personal status authority allows Lebanese confessions to draw boundaries around their group based on distinctions in religious practice. These boundaries keep group members distinct from adherents of other groups, and they operate as a basis for counting these members for the allocation of political authority. The institution of confessionalism becomes self-reinforcing because demographics are the basis of political power, so each group has a strong incentive to increase their population. The only way to do that is to keep people within the boundaries of the confession by regulating their marriages and the propagation of children by that particular group’s laws. As early as 1936, before Lebanon gained independence from France, Muslim community leader Salim Salam wrote to French High Commissioner Damien de Martel, in response to a proposal to partially centralize family law “Your Excellency knows that the main

113 “Self-reinforcing” is used in this context in the sense meant by Greif and Laitin (2004). An institution is self-reinforcing to the extent that it can continue to operate despite major systematic change, i.e. it is an institution that is able to reproduce itself despite the introduction of new variables. It attains this status when it becomes hegemonic. See Antonio Gramsci, Quintin Hoare, and Geoffrey Nowell-Smith. Selections from the Prison Notebooks of Antonio Gramsci. New York: International Publishers (1971).
principle on which the political system in Lebanon stands is the proportion of the populations of the communities to each other. The size [of community] determines the distribution of rights, [so the demographic issue] is vital from the viewpoint of the Muslims.”

Having separate personal status courts creates a world in which sub-state groups can manipulate their demographics, which is to their advantage in a proportionally representative system. Without separate personal status law, it would be possible to distinguish between groups, but only based on the more fleeting ties of voluntary association. To compete politically in a confessional system, the groups therefore prefer to make religious affiliation an ascriptive characteristic that is recorded at birth, registered on each citizen’s national identity card, and changeable only with maximum cost to the individual. As long as the Lebanese political system is consociational and based on confessionalism, Lebanon’s confessions fight hard to maintain control over personal status law, and thereby control group demographics. And as long as Lebanon’s confessional groups control personal status law, the largest groups have no incentive to permit the system that so benefits them to lapse. A summary of Ottoman and post-Ottoman Lebanese history will illustrate the self-reinforcing nature of an institutionalized confessional personal status regime and demonstrate the depth of its institutionalization.

In 1922, an anonymous American commentator on the King-Crane mission and the beginning of the French mandate observed. “The intricate mixture of races and religions that constitutes the population of Syria [greater Syria, including Lebanon] interferes naturally with any real national solidarity…In addition to the great Mohammedan-Christian division there are also the many subdivisions whose hostilities

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114 Letter from Salim Salam to D. de Martel, Ministere des Affaires Etrangeres Archives, in Firro, 157.
toward each other are often equally acute. The Maronites, Greek Catholics, Greek Orthodox, Latin Catholics, and other Christian communities have at times almost the same aversion to each other that the Sunnite Moslims have for the Shiites. Nor may one forget the communities of Aleouts [Alawites], Jews, and Druses that add their variations to the variegated whole. Religiously and racially, for the two factors are often inseparable, the Syrians have little unity.”\textsuperscript{115}

Although this fragmentation has been overcome periodically, when temporary alliances between disparate religious groups formed to protest particular laws, the community-based divisions delineated above are long-standing. They date from the Muslim conquest of the Middle East and the accommodations reached between the newly dominant religion and the preexisting enclaves of Christians of various denominations and Jews.

Lebanon was conquered by Muslim invaders from the Arabian Peninsula in the 630s and was officially ruled by Muslim empires (including the Ummayad, Abbasid, Mamluk, and Ottoman) from then onwards. The area was already home to Jewish and Christian communities. From almost the beginning of the period of their coexistence in Lebanon, Jewish, Christian, and Muslim communities shared space but lived according to their own sets of rules. During the beginning years of the Abbasid Caliphate, legal scholars gathered the texts of previous treaties between Muslim rulers and the Christian communities living within their jurisdiction.\textsuperscript{116} The Abbasids referred in particular to the “covenant of ‘Umar,” Caliph Umar’s instructions for the treatment of non-Muslims living

\textsuperscript{115} “Document concerning the French mandate in Syria, 1922”, Donald M. Brodie Miscellaneous Papers, 1919-1941, Box 2, Folder 9, Hoover Institution Archives, Stanford University. Published digitally by Oberlin College Archives.

\textsuperscript{116} David Grafton, \textit{The Christians of Lebanon}, I.B.Tauris (2003), 32.
in Muslim lands. The actual covenant varied from place to place according to the ruler’s preference. By the early-middle Abbasid period, scholars had reached a consensus that the covenant had eleven precepts, including a prohibition on building or repairing places of worship without permission, required service in the army, along with a mandatory tax “in return for protection from enemies.” In practice, however, these rules often fell into disuse, as evidenced by the periodic decrees issued by rulers to eject non-Muslims from the governing apparatus.

By the time the Ottomans invaded Lebanon in 1516, the dominant groups in Lebanon were the Druze, an offshoot of Shi'i Islam, and the Maronites, a Christian group from Syria who settled in the north of Lebanon. As was their standard practice, the Ottomans placed Lebanon under indirect rule. They tasked local notable families with collecting taxes for the empire in return for substantial local power including political administration and the creation and maintenance of a judiciary. These families built up considerable client networks and wealth derived from extra taxes that they were permitted to collect, and by the mid sixteenth century had amassed sufficient power to revolt against Ottoman rule. Over the next three centuries, rule over Mount Lebanon alternated between direct Druze rule, when rebellions against the Ottomans succeeded, and the reimposition of Ottoman rule and the tax-farming system. Lebanon even fell

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117 Ibid., 33. Grafton further notes, “the covenant was credited to ‘Umar apocryphally…the ascription of this document to ‘Umar is spurious,” but that crediting the later (probably 8th century) document to ‘Umar lent it authority (31).

118 Grafton, 61.


briefly under Egyptian rule between 1831-1840, when Muhammed Ali invaded Lebanon and Syria.\textsuperscript{122}

During this period, Lebanon was not considered to be a separate state, but rather part of Greater Syria, which included Lebanon, Syria, Jordan, and Palestine. There is no consensus as to when a distinct Lebanese political identity emerged. Zamir, an Israeli historian, dates “the history of Lebanon as a separate entity…[as beginning] in the late sixteenth and early seventeenth centuries during the reign of Fakhr al-Din II,” a Druze Ma’nid ruler who ruled Mount Lebanon from 1590-1633.\textsuperscript{123} For most of his rule, he served as Emir of the Ottoman sanjak (province) of Sidon-Beirut, an area approximately one-fifth the size of present-day Lebanon; but between 1605-7 and 1621-1633 successful rebellions allowed him to rule independently.\textsuperscript{124} Interestingly, a crucial part of his success in an even temporary victory against the Ottomans was an alliance with Florence, which prompted Pope Gregory XIII to write to the Maronite Patriarch to ask him to lend Maronite military support to Fakhr al-Din’s campaign.\textsuperscript{125} Fakhr al-Din even spent five years in exile in Florence from 1613-1618. During his stay, he noticed that one of the most profitable trade goods entering Italy at that time was silk, and he resolved to introduce silk production to Lebanon upon his return. His success in this project changed Lebanon in two fundamental ways: first, by bringing Maronite farmers from the north to the Druze-dominated Mount Lebanon to cultivate silk, he created the first mixed Druze-Christian principality, which would eventually become Christian-dominated. Second, his

\textsuperscript{122} Traboulsi, 12; Zamir, 8; Michael Hudson, Arab Politics: The Search for Legitimacy (1979), 36.
\textsuperscript{123} Zamir, 4-5; Traboulsi, 5.
\textsuperscript{124} Traboulsi, 5-8.
\textsuperscript{125} Ibid.
silk exports drew the attention of France, which would later become Lebanon’s largest trade partner and official protector of the Maronite confession.

The first major shift in Lebanese politics during the Ottoman era, and the moment most historians point to as the beginning of a Lebanon separate from Greater Syria, was a series of peasant revolts, which mostly took the form of Maronite-Druze clashes, between 1841-1861, and the consequent administrative reorganizations of 1843 and 1860. In 1843, the Ottoman Empire imposed the “double qa’imaqamiyyah” system on Lebanon, under which a dual administrative structure governed Lebanon, ruled by a Maronite Christian in the north and a Druze in the south.¹²⁶ This division came about primarily because of increased European interest in the Levant following Napoleon’s incursion into Egypt in 1798 and the strengthening of the French-Lebanese silk trade through the eighteenth and nineteenth centuries. In fact, the “double qa’imaqamiyyah” system was suggested by Chancellor Metternich of Austria, who brokered the agreement with England, France, and the Ottoman Empire to help bring an end to fighting caused at least partially by foreign intervention.

France, the largest import market for Lebanese raw silk, which had considered itself the foreign protector of the Maronites since the Crusades, a status Louis XIV renewed officially, backed Maronite domination of Lebanon as Ottoman influence began to wane.¹²⁷ The British supported the Druze claim to counter that of the Maronites, and indirectly, the French. Austria hoped to replace France as the guarantors of the Maronites. The Ottoman government, in the meantime, “tried to reassert its authority over the semiautonomous amirate [sic] by convincing the European powers that local rule was

¹²⁶ Hudson, 36; Salibi, 16; Traboulsi, 24; Zamir, 8.
¹²⁷ Hudson, 35; Zamir, 16.
impossible.” Metternich’s solution left the Ottoman Empire in control of the region but gave the two most influential groups significant spheres of influence by creating a Maronite governor for the north of Lebanon and a Druze governor for the south. They were each advised by a Maronite and a Druze wakil (deputy), each of whom would exercise judicial and fiscal power over their community.  

The “double qa’imaqamiyyah” was Lebanon’s first foray into confessional governance, i.e. the allocation of political power and representation based on religious affiliation. It did not stop the fighting between Druzes and Christians. By 1860, widespread massacres of Maronites living in Druze-dominated areas precipitated a civil war and the expulsion of Druzes from northern Maronite villages and Maronites from southern Druze areas. France, in their role as protector of the Maronites, invaded the Chouf mountains to pacify the Druze troops. In 1861, the Ottomans invited France, England, Austria, Prussia, and Russia to a conference to find a solution to the fighting. The result was the Règlement Organique of 1861, which made Lebanon an autonomous province within the Ottoman Empire, to be governed by a non-Lebanese Christian authority appointed by the Ottoman administration and approved by the European signatories to the Règlement Organique.

This system, known as the “mutasarrifiyyah” after the appointed mutasarrif (governor), also created Administrative Council to advise the governor and exercise veto power over tax increases and permission for Ottoman troops to enter the territory. It was elected by village notables on a proportional basis. Christian groups were awarded six seats of twelve seats, with the remainder reserved for Muslim deputies, until the

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128 Hudson, 36.
129 Traboulsi, 24-25.
130 Salibi, 16; Zamir, 8; Traboulsi, 33-35; Hudson, 36.
Règlement was altered in 1864 to give the Christians, then the largest group, seven seats to the Muslims’ five.\textsuperscript{131} This gave the Maronites four seats, the Greek Orthodox two, the Greek Catholics one, the Druze three, and a single seat each to the Sunni and Shia Muslims.\textsuperscript{132} The signatory powers arrived at this apportionment by excluding Beirut, Sidon, and Tripoli from the \textit{mutasarafiyyah} and leaving them under the control of the Ottoman province of Damascus. Otherwise, Sunni Muslims would have been the dominant group demographically.\textsuperscript{133} The treaty further divided the territory into seven smaller provinces to be administered by the majority confession in each area, which gave judicial and administrative control of each province to the largest group in it. The judiciary was made up of both officials elected by the central governor and locally appointed village notables, although minorities within each province were allowed to continue to seek out their own religious officials for matters of personal status law.\textsuperscript{134}

When asked about their history, the Lebanese frequently point to the \textit{mutasarafiyyah} as the moment when confessional politics in Lebanon became the status quo.\textsuperscript{135} Although the “double qa’imaqamiyyah” divided Lebanon into two zones, each administered by one of the two dominant religions, the \textit{mutasarafiyyah} went further by including six different confessions in the governing formula and institutionalizing the idea of confession-based proportional representation. Indeed, just sixty years later, when Lebanon was a French Mandate territory and the French conducted opinion polls of Lebanese politicians and notables concerning provisions to be included in the new constitution, opinion was almost unanimous that confessional politics was a necessary

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\textsuperscript{131} Traboulsi, 41; Zamir, 8-11.
\textsuperscript{132} Zamir, 11.
\textsuperscript{133} Traboulsi, 41.
\textsuperscript{134} Ibid., 42; Author interview with M. H. a-Amin.
\textsuperscript{135} See, for example, author interview with H. Khashan, Mohamed, N. Ferghal, and H. al-Amin.
evil. In his analysis of the Lebanese constitution, Edmond Rabbath summarizes the findings of the French commission. The sixth item on the questionnaire asked the deputies, drawn from prominent families, a wide range of professions, and government officials, whether they would support a confessional basis for apportioning parliamentary seats.136 Of one hundred thirty two deputies consulted, there was unanimous agreement that confessional politics would create prejudice between the various religious groups and undermine Lebanon’s stability.137 Nevertheless, one hundred twenty one of the deputies voted for confessional apportionment because they were concerned that failing to ensure representation for the smaller groups would give too much power to Lebanon’s largest groups, and also that Lebanese citizens would never accept a system in which confession was deemphasized for the sake of the larger political unit.138

The constitution promulgated by the French Mandate in 1926 did apportion parliamentary representation politically in Article 24, which also left changes in electoral law, such as a move away from proportional representation, to be determined by future electoral laws.139 This system has resulted in a certain amount of instability in the run up to elections in Lebanon, because each group attempts to change the law to whichever option would give it the greatest representation. The proportional system in place today is based on a census taken in 1932, which determined that Christians were the majority in Lebanon, with approximately 54% of the population.140 Since then, no census has been taken, and calls for a new count are seen as politically inflammatory because they might

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137 Ibid., 25.
138 Ibid., 26.
139 Ibid., 377.
change the makeup of the Lebanese government. As a consequence, anything touching on demographic issues, such as laws concerning nationality, birth, and marriage, are particularly sensitive. Attempts to legislate around these issues are met with strong resistance, as will be shown in the next section, which covers political bargaining over personal status laws.

Article Nine of the 1926 constitution had the effect of further institutionalizing the already strong role of religious groups in Lebanese politics. Article nine states “There shall be absolute freedom of conscience. The state, in rendering homage to the Most High, shall respect all religions and creeds and it guarantees, under its protection, the free exercise of all religious rites, provided that public order is not disturbed. It also guarantees that the personal status and religious interests of the population, to whichever religious sect they belong, are respected.”141 This article is directly derived from the French Mandate document for France and Syria, Article Eight of which states “The Mandatory shall ensure to all complete freedom of conscience and the free exercise of all forms of worship which are consonant with public order and morality,” and Article Six of which pledges “The Mandatory shall establish in Syria and the Lebanon a judicial system which shall assure to natives as well as to foreigners a complete guarantee of their rights. Respect for the personal status of the various peoples and for their religious interests shall be fully guaranteed.”142 Edmond Rabbath notes that Article Nine has the effect of constitutionalizing the customary right that had governed Lebanese groups for centuries.

141 1926 Constitution of Lebanon.
and thereby also guaranteed the “particular morphology of confessionalism.” Rabbath further notes the irony of including an article that guarantees absolute freedom of conscience in a country that does not recognize the right to disassociate oneself from a religious group.

Lebanon won independence from France in 1943, although French troops did not leave Lebanon until a year after the end of the Second World War in 1946. Post-Mandate Lebanon had two sources of governing principles: the new Lebanese constitution, based heavily on the 1926 text, promulgated in 1943, and an unwritten understanding known as the “National Pact.” The new constitution changed very little from the old except to remove any reference to the Mandate and to strengthen the role of the presidency to adopt some of the former powers of the Mandate. The National Pact, in contrast, changed Lebanon fundamentally. It was arrived at by two leaders of French resistance, Maronite Beshara al-Khoury and Sunni Riad al-Solh, as a means of creating a mixed-confessional governing structure that would be acceptable to both Christians and Muslims. The terms of the unwritten pact specified that the President of the country would be a Maronite, the Prime Minister Sunni, and in 1947, the position of Speaker of the House was reserved for the Shia community, then Lebanon’s third largest. In addition, it left the Head of Security, the Head of the Army, and other key security positions in the hands of the Maronites and reserved a certain number of cabinet posts for Muslim deputies. It addressed the greatest fears of both sides by guaranteeing that the Maronites would not seek external interference in Lebanese affairs by the French, and

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143 Rabbath 1982, 96 (translated by author from the French).
144 Ibid.
145 Traboulsi, 110.
146 Salibi, 186; Traboulsi, 112; Hudson, 44.
that the Muslims would not attempt to reattach Lebanon to Syria or any pan-Arab alliance.\textsuperscript{147}

Although the Pact was never written, it became the dominant understanding of Lebanese politics, such that even when provisions of the Constitution fell into disuse, the Pact was maintained. The 1989 Ta’if Accord that ended Lebanon’s civil war was based largely on the Pact, although it also extended the previous agreement in certain areas. Later, the terms of the Ta’if accord were incorporated into the constitution. In effect, the Accord reapportioned the confessional system, giving Christians and Muslims 1:1 parity in the number of parliamentary seats and ministerial posts and strengthening the role of the Prime Minister while diminishing the President’s power.\textsuperscript{148} More importantly here, the Ta’if Accord gives concrete expression to the absolute power held by Lebanon’s various religions over personal status law. Article Three calls for the creation of a new Constitutional Council competent to determine the permissibility of laws already passed by parliament, and Section B[2] of Article III stipulates “To ensure the principle of harmony between religion and state, the heads of the Lebanese sects may revise the constitutional council in matters pertaining to: 1. Personal status affairs; 2. Freedom of religion and the practice of religious rites; 3. Freedom of religious education.”\textsuperscript{149} This gives the heads of Lebanon’s religions the right to petition the Constitutional Council if the Parliament makes any law concerning personal status affairs that any of the religious authorities has not already approved. Although this seemingly gives a large amount of power to Lebanon’s confessions, as personal status law touches on many other areas of

\textsuperscript{147} Traboulsi, 44.
\textsuperscript{148} Ibid., 250-251. The Ta’if Accord also confirmed that structure of a Maronite President, a Sunni Prime Minister, a Shii Speaker of the House, and Maronite control over the National Army in exchange for excepting Hezbollah from the mandatory disarming of all militias.
\textsuperscript{149} Ta’if Accord.

Following centuries of communitarian life, it is unsurprising that levels of support for non-community based institutions are low. Only in recent years has the level of support for even optional civil marriage attained a majority. French political scientist Theodor Hanf conducted opinion polls in Lebanon on matters pertaining to attitudes on coexistence through and after the civil war, and in the mid 1980s began to track support for civil law as well. He finds that in 1987, fifty percent of the population would have supported an optional civil personal status law, and in 2006 that number had increased to 70%.

Polls conducted by the International Information Center, published in Lebanese newspaper *Al-Nahar* in January, 1997, report much lower levels of support for an optional personal status law. Although a majority of college students were in favor, only seventeen percent of the general population would have chosen to allow civil personal status law, even in optional form. The poll revealed that wealthier and more educated Lebanese tended to favor optional civil marriage, and that of the confessional groups, Christians were the most in favor and the Druzes most opposed. It is possible that the higher levels of support in Hanf’s poll in 2006 are a reflection of a general liberalizing trend, but interview evidence from 2012 evidences levels of support below fifty percent. The next question on Hanf’s poll also contradicts his findings, as fifty four percent of Lebanese in 1987 and sixty-nine percent in 2006 agreed that “it doesn’t matter

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151 Saadeh, 76.
152 Ibid.
153 Author interviews in Beirut, September-December 2012.
what anyone wants, secularization doesn’t seem to have a chance in Lebanon. Community membership is a reality you have to accept.”\textsuperscript{154}

Further evidence of the high level of institutionalization of community authority lies in the relative lack of judicial independence. In 2007, Judge Jon al-Azzi ruled that Lebanese women should have the right to pass on their nationality to their children even if the child’s father is not Lebanese, which had never been permitted, ostensibly on the grounds that it would open the door to many Palestinian refugees gaining Lebanese citizenship.\textsuperscript{155} His decision was reversed only months later, and Judge Azzi was transferred from the Court of Cassation (Lebanon’s highest court) to a lower level court. His state-appointed office was confiscated as well, leaving him to borrow a desk in a colleague’s office or work from home.\textsuperscript{156} Judge Ahmed Ayoubi was transferred from a central appeals court in Beirut to the real estate court of Tripoli after ruling against a Sunni judge in two cases.\textsuperscript{157} Even judges on the religious courts have been punished for upholding tenets of civil law in religious courts.\textsuperscript{158} Historian Safia Saadeh notes that a true sectarian system like that of Lebanon precludes an independent judiciary because the judiciary is prevented from arriving at rulings that might threaten sect interests.\textsuperscript{159} She further explains that "the demand for an independent judiciary means the eradication of the consociational system, because the sectarian grand coalition ascribes to itself absolute power, a reality that robs the judiciary of its two basic and fundamental principles:

\textsuperscript{154} Hanf, 46.
\textsuperscript{155} Author interview with O. Safa; author interview with J. Azzi.
\textsuperscript{156} Author interview with J. Azzi; author interview with N. Geagea, author interview with I. Traboulsi.
\textsuperscript{157} Interview with A. Ayoubi; interview with O. Safa.
\textsuperscript{158} Mohamed Nokkari, for example, was transferred to a judgeship in Chtoura, a rural town in the Bekaa, from his previous post within Dar al Fatwa, the central juridical apparatus of the Sunni confession, after he used civil law precepts in two of his rulings and advised the Grand Mufti that civil law was necessary for human rights (Author interview with M. Nokkari).
\textsuperscript{159} Saadeh, 43.
Thus, in Lebanon, the primacy of non-state law results in a system where the power of the state judiciary is reduced to safeguard confessional personal status law. According minority group rights to adjudicate family law according to each confession’s religious precepts has the net effect of weakening the state judiciary. This stands in direct contrast to places like England, where the legal system was fully institutionalized before identity groups with different norms sought to carve out spaces where their separate rules could apply. It was only in the early 2000s that Muslim immigrants to England began to form Sharia councils, and they never attempted to win state recognition for them. The adjudicators in these councils view their rulings as having a binding effect only insofar as the disputant’s faith dictates she follow them. Perhaps most importantly, these councils have no state-backed enforcement power. Thus, their existence has no effect of weakening the state judiciary’s monopoly on access to enforcement for its rulings, or legitimacy for the vast proportion of citizens.

Confessional politics and personal status law, as described above, have a mutually reinforcing tendency at the institutional level. That large groups would favor the maintenance of a system that guarantees their dominance makes sense, but the support of smaller groups is less intuitive. Lebanon’s smaller groups, such as the Syrian Catholics and Coptic Orthodox are complicit in keeping the system in place. Religious leaders realize that they would gain little by switching to majoritarian democracy, as they would

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160 Ibid.
161 Author interview with Imam Mohammad Yazdani Raza, Founder and Grand Sheikh at London Fatwa Council, May 10, 2012; Author interview with Sheikh Faiz Siddiqi, Chairman of the Muslim Arbitration Tribunal, May 8 2012; Author interview with Khurshid Drabu, Co-Founder, Muslim Council of Britain and Professor of Law at Middlesex University, April 24, 2012.
162 Author interview with M. Raza and K Drabu, see footnote 52.
163 It is worth mentioning that lack of official enforcement power doesn’t entirely deprive Sharia councils of all power to ensure their mandates are carried out. Social pressure on community members is a strong inducement for compliance, as are references to religious doctrine.
still be a minority group, and they would perhaps lose even the small share of influence they possess under consociationalism.\textsuperscript{164} Additionally, both small and large groups gain substantial revenue from managing personal status affairs. Although Muslim courts are included in the state budget, bribery is widespread and non-Muslim courts, which are not part of the state apparatus, are self-financed and thus charge hefty fees for annulment, guardianship transfer, and other family law services that require more than just the registration of an action such as marriage.\textsuperscript{165} At the individual and group level, family law adjudication is a lucrative business. Perhaps more importantly, the ability to adjudicate personal status disputes gives religious judges the power to set and reinforce community norms.\textsuperscript{166} It also reinforces the authority and legitimacy of the religious authorities. As Becker and Shapiro note, courts are effective in centralizing political power for whoever administers them.\textsuperscript{167} Religious judges in Lebanon are very much aware of the benefits that accrue to both them, individually, and to their confession from adjudicating personal status disputes, and as such are committed to keeping the system in place.

\textbf{Contestation and Bargaining: Preserving Judicial Decentralization}

Saadeh sees the preservation of confessional personal status law as a game that the various confessions play to keep power away from the central regime. In Lebanon, she claims, “the sects did not extricate powers from the state all at once, but proceeded to

\textsuperscript{164} Author interview with P. Maroun; see also Lijphart 1999, O’Leary 2005, Barry 1975.
\textsuperscript{165} Author interview with D. Moukalled; author interview with M. Zalzal; author interview with H. al-Amin.
\textsuperscript{166} For more on political power derived from adjudication, see Shapiro 1986.
\textsuperscript{167} Becker, 371; Shapiro 1986, 24.
follow the step by step method. First…[they acquired] a legal status that give them a wide range of leverage within the political system." 168 While Saadeh’s description is perhaps too cynical to be strictly accurate, Lebanese history evinces many episodes of bargaining between the leaders of confessional groups and the governing authorities concerning personal status jurisdiction. Thus far, none of the attempts to centralize Lebanon’s judiciary has succeeded even partially.

Although the French Mandate document for Syria and Lebanon guarantees the preservation of religious personal status law, France had always envisaged the creation of a general civil law statute that would apply to everyone regardless of religion and end a system that privileged religious law over civil law. 169 Accordingly, the Mandate authorities sought on several occasions to centralize judicial authority and to introduce a civil personal status law. During the first attempt in December, 1921, High Commissioner Gouraud abrogated Article 156 of the 1917 Ottoman Family Law code, which gave authority to each religion to manage its own family law and associated courts. Widespread protests immediately broke out and after only weeks, Gouraud reinstated the law to restore peace as the League of Nations oversaw the final preparations for the beginning of the Mandate in 1922. 170 The Mandate Document itself, as discussed previously, guaranteed the preservation of the Ottoman personal status system. In 1923, the first full year of Mandate authority, France decided to officially recognize the authority of confessional law in Arrêté No. 2851, and in the 1926 constitution guarantees the preservation of religious personal status law. 171 Shortly

168 Saadeh, 52.
169 Rabbath, 1973, 100.
170 Grafton, 96.
171 Ibid., 99; Constitution of Lebanon.
thereafter, however, High Commissioner de Jouvenel issued Arrêté No. 261, which gave civil tribunals the jurisdiction to hear personal status cases and created a civil marriage option; but the law was suspended with Mandate Decree 102 only two months later when protests grew difficult to contain.\textsuperscript{172}

The French authorities did not attempt to alter the personal status law again until a decade later, when High Commissioner Damien de Martel issued Arrêté No. 60 of March 13, 1936, amended by Mandate Decree 136 of November 23, 1938, which together reformed personal status law in Lebanon.\textsuperscript{173} Arrêté No. 60 recognized Lebanon’s confessions as distinct legal entities and required them to submit a copy of their legal code and rules of procedure, as well as their internal functioning, structure of their hierarchy, and many other details to Mandate Authorities.\textsuperscript{174} The laws of 1936 and 1938 together introduced three major reforms to the personal status system. The first created a procedure by which a Lebanese citizen could move from one personal status community to another, in effect an official means of conversion from one religion to another. The second placed Muslim and non-Muslim communities on an equal footing according to state law, such that Muslim personal status courts, previously part of the state, became independent and privately administered entities like their non-Muslim counterparts. The third divided Lebanese citizens into two groups: those who belong to historical personal status communities, of which the Arrêté lists fifteen, and those who belong to the common law community, an original French creation comprised of anyone who wanted to opt out of their confession and place themselves under the jurisdiction of secular, civil

\textsuperscript{172} Max Weiss, \textit{In the Shadow of Sectarianism}, Harvard University Press (2010), 110; Grafton 99.
\textsuperscript{174} Rabbath, 103.
law.\textsuperscript{175}

In 1938, massive protests broke out.\textsuperscript{176} Muslim leaders said that they would never consent to be treated as just another minority community in the state, and Druze and Alawite authorities refused to submit their personal law codes, because their religions required that these codes remain secret.\textsuperscript{177} All confessional groups expressed outrage over the creation of an optional civil status community available to all Lebanese, particularly coupled with the introduction of an official way to move from one community to another. Muslim protests, however, were the largest, and so in March 1939, High Commissioner Puaux, who took over from de Martel, issued Arrêté No. 53 to except Muslims from Arrêté No. 60 and Mandate Decree 136.\textsuperscript{178} In effect, this exempted approximately half of the population from the new laws, which severely dampened their effect. Nevertheless, both remain on the books and apply to non-Muslim communities. Combined, they are what allow Lebanese citizens to travel overseas to conduct a civil marriage that is then recognized in Lebanon.\textsuperscript{179} 1936 was the last attempt any of the French High Commissioners made to alter Lebanon’s judicial system.

In 1951, five years after the final French troops withdrew from Lebanon, President Beshara Khoury’s government again passed a law requiring Lebanon’s confessions to register their personal status code with the state, and again the confessions refused to do so.\textsuperscript{180} Although the government was prepared to accept failure, the Lawyers Syndicate decided to press the issue and went on strike on January 12, 1952 for eight

\textsuperscript{175} Ibid., 102-110; Firro, 153-155.
\textsuperscript{176} Saadeh, 53; Grafton 97; author interview with M. Zalzal.
\textsuperscript{177} Rabbath, 107, 104.
\textsuperscript{178} Ibid., 107; Saadeh, 53; Firro, 155.
\textsuperscript{179} Meier, 16; author interview with N. Geagea.
\textsuperscript{180} Saadeh, 57.
months in an attempt to abolish confessional law and create a unified civil code for personal status law. They claimed that working across eighteen different personal status codes undermined efficiency and wasted state resources when policemen were routinely sent after Muslim wives who had left their husbands without a legal divorce.\textsuperscript{181} Furthermore, they protested the violation of Lebanese sovereignty that occurs every time a Lebanese couple marries abroad and then returns home, where the marital law of the country where they were wed must govern their union.\textsuperscript{182} The strike ended when the Grand Mufti, the leader of Sunni Muslims in Lebanon, and the Patriarch, the head of the Maronite community, joined together to petition the President for an end to the strike, and to threaten to send their followers into the streets if the Lawyers Syndicate succeeded in its demands.\textsuperscript{183}

During the 1960s and 70s scattered attempts took place to introduce a civil marriage option, but 1952 was the last time that any attempt was made to eliminate confessional courts. From then onwards, and particularly in the period after the civil war, contestation in the domain of personal status law was reduced to attempts to introduce an optional civil law for secular Lebanese citizens. The state ended any attempts to centralize its legal system and instead attempted to assert equal authority in the area of family law to give its citizens a civil option. What is striking about the attempts to curtail confessional law described above is that there was very little true bargaining, in the sense of negotiations between rival parties. Contestation has thus far involved religious authorities inciting their followers to demonstrations, strikes, and sometimes-violent protests until the governing authority reverses its course. The 1998 attempt by President

\begin{flushright}
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\item \textsuperscript{181} Ibid.
\item \textsuperscript{182} Author interview with I. Traboulsi.
\item \textsuperscript{183} Saadeh, 57; Hudson, 128.
\end{itemize}
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Elias Hrawi to introduce an optional civil status law nicely demonstrates a wider range of tools available to religious authorities in bargaining with the state beyond protest.

In early 1998, President Hrawi worked with lawyer Ibrahim Traboulsi to draft a law that would create an optional civil law for marriage, divorce, and all other areas of the law covered by personal status law. On February 2, he submitted the draft law to the Council of Ministers, which approved the law on March 18 and passed it to Prime Minister Rafiq al-Hariri to present to the President to forward on to the Parliament for debate. 184 Before submitting the law to the Council of Ministers, Hrawi shared the text of the law with the heads of Lebanon’s religious communities to ask for their input, which was universally against the bill. As soon as the Council of Ministers approved the law, the confessional leaders began to campaign against it. According to Lebanese newspaper *Al-Nahar*, the Islamist group Jama’ah Islamiyya, based in Tripoli, organized mosque sit-ins for a month, at the end of which the group organized for its followers to be bused to Beirut to fight against the law by organizing massive protests outside the Parliament building and the homes of Council members. 185 The Grand Mufti of Lebanon issued a Fatwa announcing that any Muslim who contracts a civil marriage in Lebanon would be considered guilty of apostasy. 186 The Head of the Shia High Council, Mohammed Mahdi Shamseddine issued a statement saying “this law threatens to undermine Muslim and Christian religious courts and infringe on people's private lives; Lebanese citizens cannot be ruled by a law common to all sects.” 187

Some religious figures did support the draft law. Mohamed Hasan al-Amin, a Shia

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184 Saadeh, 62.
186 Al-Nahar March 23 1998 in ibid.
cleric, publicly announced that the law was necessary for Lebanon as a first step to erode
sectarianism, which weakens Lebanon with internal divisions.\textsuperscript{188} But these isolated
statements were insufficient to stop the momentum building against the law, particularly
once Maronite Patriarch Nasrallah Boutros Sfeir took the lead in attacking the proposed
law.\textsuperscript{189} The leader of the Maronite Union told \textit{Al-Nahar} “President Hrawi has connected
the issue of civil marriage with that of the abolition of sectarianism in politics. We
believe this act to be extremely dangerous as it violates the principle of power sharing
between the sects.” By tying the introduction of civil personal status law to the
weakening of the Lebanese confessional system, statements like these spread distrust of
the law among the smaller Christian sects that had originally supported the bill. Patriarch
Sfeir was slightly more subtle in his opposition to the bill, claiming that on a personal
level, he was neither for nor against the bill, but as long as Grand Mufti Qabbani opposed
the law he could never support it, and he thought it was bad timing for President Hrawi to
raise religious tensions immediately before an election.\textsuperscript{190}

When it appeared that Parliament might debate the bill, religious leaders escalated
their tactics. Patriarch Sfeir spread the word that as far as he was concerned, anyone who
contracted a civil marriage would be denied the last sacrament, and he urged his
followers to protest against any Members of Parliament who voted in favor of the law.\textsuperscript{191}
Grand Mufti Qabbani warned that if the bill moved to open debate he would take
Lebanon back into civil war and command his followers to attack the state.\textsuperscript{192}

\textsuperscript{188} Al-Nahar, March 23 1998 in ibid.; Author interview with M. H. Al-Amin.
\textsuperscript{189} Author interview with B. Wehbe.
\textsuperscript{190} Saadeh, 429-230.
\textsuperscript{191} Ibid. Author interview with P. Maroun.
\textsuperscript{192} Saadeh, 70; Author interview with I Traboulsi; Author interview with K. Karam; Author interview with
Z. Ghandour.
Qabbani also made phone calls to Muslim Members of Parliament to ask them to oppose the law, and he approached Prime Minister Hariri and urged him not to let the bill reach Parliament. Qabbani also noted that both he and Patriarch Sfeir were prepared to exercise their constitutional right to challenge the law, if it passed, in front of the Constitutional Council.\(^{193}\) Allegedly to forestall violence, Hariri shelved the bill in violation of the Lebanese Constitution, which mandates that once a draft law has been approved by the Council of Ministers, the Prime Minister, as Head of that Council, must present it to the President to send on to the Parliament for debate.\(^{194}\) Nevertheless, the law was never presented to Parliament.

Hrawi’s draft law demonstrates the power of Lebanon’s confessions. Religious leaders were able to not only eliminate the law—they prevented it from even reaching open debate in Parliament. Lebanon’s religious communities have a considerable amount of political power, delegated both officially in Lebanon’s constitution and rules of civil procedure and unofficially, through their ability to exercise leverage over their followers. As Saadeh notes, politicians generally follow the interests of their confession and the religious leaders who help them attain power—and who can just as easily endorse their rivals.\(^{195}\) The Grand Mufti and Patriarch also both use public sermons, the Friday *khutba* and the Sunday sermon respectively, to instruct their believers on religious matters, but also about who to vote for and how to respond to political events.\(^{196}\) The Lebanese state is more than an agglomeration of the confessional groups it is made up of, as

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\(^{193}\) As mentioned previously, Article 19 gives the heads of Lebanon’s religious communities the right to consult the Council regarding laws pertaining to religion and personal status. Author interview with M. Nokkari; Author interview with O. Safa; Author interview with K. Karam.

\(^{194}\) Articles 53 and 64 of the Constitution of Lebanon.

\(^{195}\) Saadeh, 61.

\(^{196}\) Author interview with M. Nokkari; Author interview with P. Maroun; Author interview with M. Shirdawi; Author interview with O. Safa; Author interview with C. Rizk; Author interview with M. H. Al-Amin; Author interview with Z. Ghandour.
demonstrated by the occasional passage of laws that one or another religious group opposes, such as a recent law concerning violence against women. The procedure for passing laws is democratic, however; even if elections are not always entirely free and fair, laws are not created by decree—they only come into being once voted into existence by Parliament and signed by the President and Prime Minister. As such, religious officials are able to maintain control over Lebanon’s legislative agenda so long as they exercise influence over Members of Parliament. That they do so is well known. According to Parliamentarian Ghassan Moukheiber, certain Maronite Members of Parliament are known to bring calculators to sessions of Parliament so that they can determine, during the course of the debate, the demographic effect of a proposed law. As long as Deputies are elected along confessional lines, religious officials are vital to helping candidates secure their seats, and once elected, the Deputies make sure to retain the support of their confession by voting in its interest. At yet another level, confessionalism is a self-reinforcing institution and creates conditions that make it difficult, if not impossible, for Members of Parliament to ever vote to centralize personal status law.

Contemporary Legal Pluralism in Lebanon

Several case studies of personal status law disputes in Lebanon show the ongoing

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197 Author interview with Z. Rouhana; Author interview with J. Katrib. It is worth pointing out, here, that the line between state and society is more porous in Lebanon than the already shadowy boundary between the two in many other contexts. Because the confessions constitute the state, state leaders are necessarily always part of their confession, even in nonreligious matters. However, because state leaders are sometimes able to enact reforms that the sects oppose, one supposes that their appointment to political office must, at least in some cases, permit nonconfessional actions.

198 Author interview with G. Moukheiber.
problems that durable judicial decentralization creates for Lebanese citizens. Mirna Shirdawi is a consultant who works for various non-governmental organizations such as USAID on Lebanese electoral reform. Her father is a Maronite Christian and her mother is a Sunni Muslim. Her parents had a civil marriage and, in order to respect both of the religions in their household, opted not to baptize their children.\footnote{199} Under Sunni law, as applied in Lebanon, Mirna is not considered to be Muslim because her father is not Muslim, and religion is determined according to paternity.\footnote{200} Although the Lebanese state considers her to be a Maronite Christian because she, like all other Lebanese children, was registered at birth as belonging to the religion of her father, the Maronite religious establishment does not consider her to be Maronite because she was not baptized.\footnote{201} Accordingly, she may not inherit from either her mother or her father, as Muslims and Christians have adopted internal laws that prohibit inheritance from non-group members.\footnote{202}

One of her friends, a personal status lawyer, has helped Mirna put together a revocable trust that should permit her and her siblings to gain the property of their parents after their death, but only because the property will be considered to have already passed into the children’s hands before death.\footnote{203} If anyone were to contest the arrangement, it is likely that, at a minimum, the Sunni religious establishment would be able to divide her mother’s estate according to sharia rules of inheritance, which would give her uncles the bulk of her mother’s property and block Mirna from inheriting at all.\footnote{204} Mirna’s brother...
decided when he attained the age of majority that he wanted to be baptized, and he is the only one of the children who can officially inherit his father’s property. However, when he wanted to separate from his wife, he was unable to procure an annulment from the Maronite church, which does not permit divorce, so he converted to the Syrian Orthodox Church, which solved his divorce problem but cut him off from his family and confession, as he is barred from rejoining the Maronite church.205

Perhaps one of the most (in)famous cases of personal status law-related problems involves Selim Hoss, former Prime Minister of Lebanon. Hoss and his wife had only one child, a daughter, who under Hanafi law, would inherit half the share of her brothers if she had brothers, and if not, then she would inherit nothing and her uncles would inherit her share instead.206 To allow her to inherit, he converted to Shii Islam because Jaafari law allows daughters to inherit as much as half of the family estate, even if they have no brothers.207 However, under the terms of the National Pact (and reinforced by the Ta’if Accord), the Prime Minister must be a Sunni Muslim, so Hoss converted back shortly after safeguarding his daughter’s inheritance so that he could remain Prime Minister of Lebanon.

These cases vividly illustrate the potential problems caused by legal pluralism in personal status law. It would take a book-length study to document cases of all of the jurisdictional problems that result from Lebanon’s system, but it is worth summarizing a few more of them. According to Lebanese lawyers, only certain types of mixed marriages can take place in Lebanon. For example, a Muslim man may wed anyone from Lebanon’s eighteen confessions within the Sunni Muslim faith, but a Muslim woman cannot, and

205 Interview with M. Shirdawi
206 Interview with N. Ferghal.
207 Interview with M H. Al-Amin.
only certain of the confessions that her husband might belong to would recognize their union unless she converts. As Lebanon does not have any civil marriage option, Lebanese solve the problem by leaving the country and marrying in another country that does have civil marriage.\textsuperscript{208} Cyprus is considered to have the most neutral laws for both parties, so it is a popular choice. Adoptions are banned for all Muslims and couples who married under Muslim law, even in mixed marriages. As previously mentioned, Muslims may not inherit from Christians and vice versa. Without recognition of civil law, all Lebanese are bound into one or another of these systems. Even if they marry abroad, issues relating to their children are often (but not always) governed by religious law. Some cases are never resolved because both civil and religious courts deny jurisdiction, leaving the litigant searching for a court to take up his case. Although a convenient means for groups to police their boundaries, decentralized personal status law creates legal quagmires in Lebanon that one suspects could rival Jarndyce and Jarndyce.

**Conclusion**

The Lebanese example stands in opposition to the trajectory of judicial centralization in Egypt (see chapter four). Unlike in Egypt, confessional courts are firmly established in Lebanese family law and have deep roots in the Lebanese political system. Repeated effects to repeal or legally circumvent their power and authority have failed, despite the popularity of the proposed reforms and their widespread adoption by other states. That religious law has such power demonstrates the self-reinforcing nature of Lebanese confessional politics. Unlike in other cases, strong institutionalization of these

\textsuperscript{208} Interview with N. Geagea; Interview with M. Zalzal.
norms and the extensive bargaining power of confessional elites at the time of the system’s formation guaranteed the existence and preservation of independent family law courts.

As long as ascriptive identity groups form the basis of political power in Lebanon, demographic policy will be a site of strong political contestation. The ability to draw boundaries between groups and control marriage, divorce, adoption, and other actions related to family life, is of central importance to group demographics, and thus political power. Once confessional politics was in place, it became self reinforcing by giving its constituent groups the need to police their boundaries. This necessitated preserving legal pluralism in family law.
Chapter Three: Partial Judicial Decentralization in Tanzania

Introduction

Tanzania is a case of partial judicial decentralization that allows space for locally distinct customary law, the content of which is determined by local or tribal communities. Although there have been several attempts to further centralize its judicial system, the contours of today’s judiciary were established soon after independence in the early 1960s, and efforts to change the balance between unified law and local law have not gone far. Nonetheless, largely as an artifact of other policies during the state building period, greater degrees of centralization in practice have been achieved over time. Consistent with the theory proposed in Chapter 1, Tanzania’s partial decentralization, stemming from the conditions of its modern origins and still only slowly altering, can be ascribed to a combination of the state’s need for the support of rural elites in implementing economic development programs after independence, and the strong, coordinated support of tribal elites for locally distinct customary law.

That coordinated support was far from inevitable. Challenges to elite coordination and support for local law came during the British colonial period, when the policy of indirect rule so radically altered the structure of the chieftaincy that deep splits formed between rival factions of elites. These splits worsened during the movement for independence, when the nationalist party’s strongest supporters were mostly anti-traditionalist, whereas the chiefs who practiced customary law by and large aligned
themselves with the British colonialists. Nevertheless, support for locally distinct customary law did survive among both more pro-nationalist and more traditionalist rural elites. During the post-independence period of reform, the nationalist party decided that it would support preservation of customary law as a means of diminishing rural elite opposition to its policies, thereby creating the system of partial decentralization that has endured since then.

Table 4

Trajectory of Judicial Decentralization in Tanzania

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<th>Group Capacities</th>
<th>Elite Coordination</th>
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<td>High</td>
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<td>High</td>
<td>Full Decentralization (Tanzania 1918-1963)</td>
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<tr>
<td>Medium</td>
<td>Partial Decentralization (Tanzania 1963-present)</td>
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<td>Low</td>
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In Tanzania, there are over 120 tribes, and the largest makes up only 13% of the population. The next largest comprises less than 5% of the population. Accordingly, no one group has anything close to a plurality of the population, so it is less fruitful to study only one or two groups, as I do in the cases of Lebanon and Egypt. I therefore focus on

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the largest group, the Sukuma, along with several of the smaller tribes including the Chagga, Nyamwezi, Haya, Kuria, and Shambaa. These tribes have been selected for their high level political involvement, and the depth with which they have been studied across multiple historical periods by anthropologists and historians. However, Tanzania’s history has been subjected to much less scrutiny than that of most European countries, and the existing accounts were by and large written by European scholars. Before the colonial era, there was very little record keeping, and records were not well preserved. The German and British colonial periods brought more widespread record keeping, as did independence, but not all of these records are accessible to researchers. Accordingly, while I have attempted to make mention of the majority of the above listed tribes in each section of the following chapter, I am not able to trace each individually through each historical period. However, their histories are similar, which suggests that there are broad commonalities in the trajectories of Tanzania’s tribes. Reference to supplementary material on other tribes helps to confirm this. While I would never claim that each tribe’s history is the same, I find that their shared characteristics, such as the ways in which they were managed by each colonial power, and their relationship to the post independence central government, are sufficiently similar to allow me to draw causal conclusions about their elites’ capacities and levels of coordination.

**Summary of the Argument**

The remainder of the chapter is divided into three sections. The first examines the evolution of support for locally distinct customary law during the German and British
colonial periods, despite widespread changes that were likely to have eroded its salience. This section begins with a brief history of pre-colonial East Africa, followed by an examination of the German and then British colonial periods. During the discussion of colonial rule, it emphasizes the changes made to the chieftaincy and the use of custom and tradition to support the structure of indirect rule. During these two periods, the primary variable of interest is elite coordination. It was the British structuring of customary law that created strong rural elite support for judicial decentralization.

The second section of the chapter considers the evolution of group elite coordination and the relative capacities of state leaders and group elites vis-à-vis post independence reforms. It also focuses on bargaining between group elites and state leaders over levels of judicial decentralization. During independence, divided elite opinion (some supported continued British involvement, and others favored independence) weakened the ability of rural elites to coordinate in support of decentralization. This left the state with sufficient capacities to enact certain components of centralization. However, the elimination of the chieftaincy after independence served as a rallying point to bring group elites together to coordinate in favor of judicial decentralization. As a result the state leaders, led by Julius Nyerere, acquiesced to a limited amount of judicial decentralization in return for group elite support for the government reforms in rural areas that were the group elites’ areas of strength. The sheer scale of Nyerere’s desired reforms provided the opening for contestation that resulted in the level of decentralization that persists today.

The third section considers judicial decentralization in Tanzania over the last twenty years and offers a perspective on the contemporary situation in Tanzania’s rural
courts. The chapter concludes that the relative though still partial centralization of Tanzania’s judiciary, particularly compared to other African countries, was caused more by the increase in group elite relative capacity that resulted from Nyerere’s nation-building policies than his original plan for judicial unification.

The case of Tanzania makes for an interesting comparison with that of Malawi, its neighbor to the south. Although the two share many characteristics, they adopted widely different approaches to judicial centralization after independence. Both are former British colonies that achieved independence at nearly the same time, were governed by single parties dominated by strong presidents, they share a border, and they have similar ethnic makeups, but Tanzania ended up partially decentralizing its judiciary, while Malawi began by fully decentralizing it, and then changed course to only tacitly devolve judicial authority. In Malawi, state leaders had relatively higher capacity than those in Tanzania, mostly because the post independence government was able to take over indirect rule system to concentrate power in the hands of President Banda, while Tanzania replaced the indirect rule structure with a decentralized governing system that gave more power to local elites. Tanzania’s decision to eliminate the chieftaincy brought group elites together to defend locally distinct customary law, one of their few remaining arenas of power, whereas Malawi’s government coopted group elites by binding the structure of the chieftaincy to the state, and thus making group elites dependent on state leaders for their authority.

The Evolution of Customary Law and Elite Coordination
Pre-Colonial and Early German Tanganyika

It is difficult to generalize about judicial and political institutions in pre-colonial East Africa because practices varied widely from one geographic area to the next. Most East Africans were members of tribes, but a large number of them were not, instead living in loose kinship associations without a single leader or group of leaders. The two most common units of political organization were the kinship group and the tribe, although there were many different ways of organizing authority within each. While some of East Africa’s tribes were strongly organized and hierarchical, others were components of much looser structures where village elders and other elites were part of the decision-making process. Mamdani emphasizes “the diversity of the pre-colonial experience” that encompasses stateless communities, traditional chiefs, administrative chiefs, and the melding of matrilineal and patrilineal practices within single societies. Far from the colonial perception of the tribe as a concrete, long-lasting, and locally legitimate form of rule, the power of chiefs was often highly contingent, subject to takeover or conquest, and tempered by the limits of obedience that were invisible to colonial officials.

Herbst notes that conquest was not a purely colonial endeavor. Because there were no maps with agreed-upon borders, expansion was a perennial project, and tribes

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210 John Iliffe, *A Modern History of Tanganyika*, Cambridge University Press (1979), 318. Iliffe argues that the Nyamwezi, one of Tanzania’s more prominent tribes during and after the colonial period, had no strong tribal identification before the arrival of the Germans.
raided one another for cattle and arable land. Some tribes conquered others to form empires, some of which endured until the German conquest. These conquests spread and altered some tribal customs at the expense of others. To the extent that conquest changed local norms, judicial reform took place routinely; however, without a single administrative apparatus for the territory. Consequently, these episodes of transformation cannot be viewed as judicial centralization or decentralization. Rather, it is important to examine pre-colonial legal institutions and practices to gain an understanding of the norms that were, at least to some degree, institutionalized among their practitioners, as well as the power structures within them. There are over one hundred twenty different tribes in present-day Tanzania, so it is not practical to scrutinize each in depth. However, a brief look at some of the larger tribes provides an idea of pre-colonial structures and norms, and adjudicative practices.

Sally Falk Moore describes organization among the Chagga of Kilimanjaro in the 18th-19th centuries as highly institutionalized and complex, consisting of a patrilineal chieftaincy with several layers of authority including chiefs, sub-chiefs, and lineage heads as well as the heads of age-set groups. Adjudication among the Chagga was both highly routinized and highly contingent. Most legal disputes were settled among particular social groupings such as the age-set, which included all young men born within several years of one another who progressed through life stages together. More formal dispute resolution began with the leader of the patrilineage, and it was considered taboo.

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213 Ibid., 38-40; Mamdani argues that the Portuguese, Islamic, and Bantu conquests had already disrupted any kind of stable precolonial tribal structure (19).
215 Ibid., 19.
to seek recourse outside the lineage group.\textsuperscript{216} Unresolved cases were sent to the chieftaincy for a hearing at one of approximately thirty Lawns of Justice, where chiefs judged disputes.\textsuperscript{216} In all legal venues, context and social ties were important to deciding how general norms should apply to a specific case.\textsuperscript{218} Enforcement of judicial decisions was achieved through shaming or the threat of exclusion from the community. Adjudication was thus a component part of and reflection of the political structure. Minor disputes were managed at the lowest-level political unit, the age-set, and appeals and more serious cases went to the higher levels of the kin group head and chief. The male heads of age-sets, lineage heads, and chiefs accordingly derived power from their adjudicatory role, and the norms they enforced typically upheld Chagga hierarchy.

By way of contrast, Wijsen and Tanner describe pre-colonial Sukuma social organization and adjudication as markedly different from that of the Chagga. The Sukuma, Tanzania’s largest tribe, never adhered to an age-grade structure or its associated life-cycle rituals of circumcision and other puberty-related ceremonies.\textsuperscript{219} Sukuma social groups were generally flexible, and it was possible for a person to belong to several different social sets simultaneously and identify with each of them depending on context. Norm enforcement relied much less heavily on authority structures or

\textsuperscript{216} Ibid., 8-89; note that patrilineage leaders reinforced these taboos to consolidate their monopoly on first instance dispute resolution.
\textsuperscript{217} Ibid., 17.
\textsuperscript{218} This type of law is usually referred to as customary law, a loose term for a style of adjudication in which context, relationships, and community participation are prioritized. Customary law is a catch-all term used to describe most pre-colonial law in Africa and elsewhere, as well as systems of law whose rules are contingent and are often not codified or pre-determined. For more on customary law in Africa see, in particular, A. N. Allott, \textit{Integration of Customary and Modern Legal Systems in Africa}, Abuja; Africana Publishing Company (1971); A. N. Allott, “The People as Law Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England,” \textit{Journal of African Law} 21.1 (1977): 1-23; Jeanmarie Fenrich, Paolo Galizzi, and Tracy E Higgins, \textit{The Future of African Customary Law}, Cambridge; New York: Cambridge University Press (2011).
\textsuperscript{219} Frans Wijsen and Ralph Tanner, “\textit{I Am Just a Sukuma}”: Globalization and Identity Construction in Northwest Tanzania, Rodopi (2002), 42.
hierarchies and more on institutional mechanisms. For instance, community elders had
the power to overrule the chief, and the numerous resulting veto points had the effect of
decentralizing power. The position of chief was also not inherited, nor was the chief
awarded extra land or property upon ascension to office. Authority nevertheless
resided in the same places as other tribes: the families of chiefs and male village elders.
Legal structures, too, were diffuse, with large variations in law between neighboring
chieftaincies.

The most routinized norms were those concerned with family law, and in
particular, marriage, divorce, and child custody rights. In particular, most kinship groups
had a bride wealth system to govern marriages, and as Abrahams notes, “in bride-wealth
marriage, a husband customarily acquires full rights over the children his wife bears.”
Men also had “customary rights to compensation” in the case of his wife’s adultery, but
only in bride wealth marriages. Wijsen and Tanner, however, note that in matrilineal
areas the bride wealth price was often set so high as to be impossible to pay fully over the
course of a lifetime, which ensured continuing support for the wife’s family and a
measure of control over her treatment. Although in matrilineal areas the wife’s family
typically retained rights over children in marriages without bride wealth, the husband’s
family had the option to purchase full rights to their labor. Cases of bride wealth
payments, adultery, and other family law matters were typically settled between lineage
groups, and inheritance cases rarely went beyond the immediate family for settlement. As

222 Abrahams 1967.
223 Ibid.
224 Wijsen and Tanner, 53.
225 Abrahams 1967, 256.
such, chiefs wielded less direct judicial authority than in other tribes. Crucially, the family law system gave tremendous power to men, and particularly village elders, who came to own the rights to labor of multiple wives and their offspring. Possession of labor gave them the ability to farm more acres and, accordingly, accrue more wealth. It has been argued that African customary law is usually structured to privilege the accrual of wealth and power by a small set of elites.\textsuperscript{226}

Malawi had a similar level of variation in types of adjudication and in the extent to which tribal court systems were formalized in the pre-colonial era. Before the arrival of British authorities, tribes in the south had a highly institutionalized method of dispute resolution that began with adjudication by family elders, followed by village elders and, as a last resort, the tribal chief.\textsuperscript{227} Tribes on the border of present day Zambia had some of the most powerful chiefs in pre-colonial East Africa, and their efforts to preserve their power to adjudicate disputes in post-independence Malawi were a strong component of its later judicial decentralization. The fact that in Malawi, unlike Tanzania, commitments and practices of local dispute resolution were more strongly institutionalized helps explain why the British strategy of indirect rule did not divide local elites as much as in Tanzania, requiring greater state acceptance of judicial decentralization in Malawi from the very start of independence.\textsuperscript{228}

Variations in Tanzanian tribal politics, however, continued into the era of German colonialism from the late 19\textsuperscript{th} century to the end of WW I, when the peace settlement included transferring imperial governance to the British. Although the German colonial


\textsuperscript{227} Benda-Beckmann, 34.

\textsuperscript{228} Author interview with Paramount Chief Mbelwa of Mzimba, June 9, 2013.
officers sought to standardize political and judicial structures in East Africa, their level of penetration varied considerably across the territory. The majority of German settlers who arrived in East Africa in the mid-1800s settled in the northern, mountainous parts of the country, whereas many fewer chose to live in the arid central plains. Accordingly, their ability to enact lasting reforms was stronger in the north. In the center of the territory, tribes such as the Bena led a revolt against German rule to resist change, mostly successfully. According to Swartz, the German presence eroded the importance of the warrior class and introduced new taxes, which forced a transition to growing more cash crops. But the overall social organization did not change, and the Bena chiefs, who had wide powers to allocate land, marry into important families, and adjudicate disputes, retained their influence.\textsuperscript{229}

The arrival of Germans settlers near Kilimajaro, on the other hand, altered the Chagga tribal power structure significantly. Colonial administrators sought allies among local rulers, in the manner of Britain’s “indirect rule,” because they also believed their work would be easier without local opposition. They accordingly abolished the tribe’s warrior class, effectively eliminating the only checks to the chief’s power.\textsuperscript{230} While the new German civil law courts had little effect on the Bena, as few of them ever came into contact with the new institutions, German colonialism altered Chagga judicial practice by giving the chief more judicial authority, supported by a German-run native affairs court whose decisions usually backed chiefly power.\textsuperscript{231} While German-introduced courts had little influence among the Sukuma, Abrahams notes that Sukuma kin groups that were

\textsuperscript{230} Moore, 96-104.
\textsuperscript{231} Swartz, 249; Moore, 103.
matrilineal were converted to being patrilineal during the German colonial period, as German administrators recognized only the existing chiefs’ son as rightful heir.\textsuperscript{232} Thus, in the areas of heaviest German penetration, there was a certain amount of judicial centralization around the figure of the tribal chief, but the Germans did not attempt to create a single court system for all of the tribes. Early efforts at building alliances between colonial administrators and tribal chiefs began to change the selection of and powers accorded to chiefs, but unevenly across the territory.\textsuperscript{233}

At the end of this period, certain chiefs had gained in power through cooperation with German settlers, and others, particularly among the Bena and their allies, had been stripped of the chieftaincy. In the center of the country, there was thus strong anti-German feeling, but there were no territory-wide coalitions or movements to displace German rule. At the same time, however, though customary law had shifted in some areas to accommodate German reforms, such as the strengthening of chiefly courts and weakening of age-set heads’ adjudication, there was no systematic attempt across German East Africa territory to replace local law with German law or the practices of other tribes. Entering the next critical period, tribal elites (including chiefs and lineage heads) and non-elites still supported local customary law, which was often the only local option. Accordingly, by the end of this period, the processes important to judicial

\textsuperscript{232} Abrahams 1967, 257.
\textsuperscript{233} This alteration of custom and customary law would seem to undermine its authenticity and thus the value of its preservation, either for those wishing to preserve it or the government that would later recognize portions of it. As with my other cases, the historical purity of the law, or the extent to which it was altered by accidents of colonial history, do not undermine its salience for group elites. As discussed in Chapter 1, dispute resolution and the authority to determine the content of the law confer power. Group elites act to preserve this power from the threat of centralization in case after case, even when the “customary” laws are really anything but. Also, in societies without record keeping, the chief’s word, or the word of the group elite, was often sufficient to convince non elites of the value of these norms. Finally, norms evolve over time. Just because they changed from one generation to the next doesn’t mean they wouldn’t still be more welcomed than entirely unfamiliar laws propagated from the political center.
centralization and decentralization had not yet begun to unfold.

**The British Colonial Period**

The transfer of German East Africa from Germany to the United Kingdom in 1918 as part of the settlement that ended the First World War brought major reforms that would eventually reshape the chieftaincy and the practice of customary law. The League of Nations gave Britain a mandate over the territory, which, since Kenya and Uganda already formed British East Africa, they called Tanganyika.\(^\text{234}\) Unlike German rule, the British colonial period was transformative for all of East Africa’s tribes. During their tenure, British colonialists created a central judiciary based on Britain’s common law tradition, which would soon come to compete with local customary forums, and they fundamentally altered both the tribal system and the local balance of power with the imposition of indirect rule. The transfer of the colony can thus be taken as the first critical moment in the causal sequence because of its effect of strengthening chiefly authority through indirect rule, thereby increasing rural elite support for customary law, and their subsequent desire to protect it against centralization.

Because early British colonialists were able to build on Germany’s infrastructure of roads and defensive installations, they were able to provide for their own defense and so faced relatively few armed insurrections. Previous colonial experience in India, Rhodesia, and, in particular, Nigeria, gave them the groundwork for putting a governing structure into place quickly. Although British administration at first took the form of

direct oversight and intervention, Donald Cameron, Tanganyika’s second governor, imported the indirect rule structure that Lugard had used with such comparative success in Nigeria.\(^{235}\) Indirect rule involved centralizing power around willing local tribal chiefs who were made dependent on British support for their authority.\(^{236}\) With the 1926 Native Authority Ordinance (Cap. 72), Cameron recognized traditional chiefs as rulers of their tribes, incorporating them into the colonial administrative structure. These men were expected to collect taxes, adjudicate disputes, and carry out development projects, among other things. They reported to District Offices, local outposts of the colonial regime usually manned by a District Officer and sometimes one or two other officials.

Cameron used indirect rule because it was an effective method to run a colony with very few resources, but he and his fellow officers were also concerned with building a structure that they believed could eventually function after Tanganyika gained independence. Because the most prominent indigenous political structures were tribal, they believed that tribes should form the basis for local governance. According to Iliffe, among colonial officials “the belief was that as every European had a nation, so every African had a tribe.” During the same year that Cameron introduced indirect rule to Tanganyika, he wrote “It is our duty to do everything in our power to develop the native on lines which will not Westernise [sic] him and turn him into a bad imitation of a European…We want to make him a good African…We must not destroy the African atmosphere, the African mind, the whole foundations of his race, and we shall certainly

\(^{235}\) Thomas Spear, “Indirect Rule, the Politics of Neo-Traditionalism, and the Limits of Invention in Tanzania” in Giblin and Maddox, eds., 71; Iliffe, 320.

\(^{236}\) British colonies in Africa were required to be financially self-sufficient and received no aid from Britain except in cases of dire need. The optimal way to govern with the resultantly constrained budget was deemed to be through a minimal colonial apparatus with few administrators, who delegated most governance to local rulers that they chose (Wijsen and Tanner, 83; Giblin and Maddox. 71-77; Maguire, 6). See Young (1997) for more.
do this if we sweep away all his tribal organisations…”  

As he announced to his fellow administrators, “If we aim at indirect administration through the appropriate Native Authority—Chief or Council—founded on the people’s own traditions and preserving their own tribal organisation, their own laws and customs purged of anything that is ‘repugnant to justice and morality’ we shall be building an edifice with some foundation to it.”  

Realizing this vision required radically restructuring East Africa’s tribes.

In some areas, colonial officers encountered pre-existing hierarchies led by chiefs with whom they could form alliances. In many places, these structures did not exist naturally, and British administrators were required to create local partners for the project of indirect rule. The goal, as one provincial administrator explained to his staff was that “Each tribe must be considered as a distinct unit…Each tribe must be under a chief.”  

Accordingly, colonial officers, sometimes aided by anthropologists, decided which tribes would participate in indirect rule, and how. When they found groups who claimed no tribal identity, they usually classified them as members of the nearest large tribe. Small tribes without a strong hierarchy were similarly lumped together with other tribes. The Nyika of southern Tanzania, for example, were classified as a sub-group of a nearby tribe, despite linguistic differences and historic mistrust between the two peoples. In large or well-defined tribes that lacked a clear ruler or hierarchy, the British appointed

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238 Governor Donald Cameron, minute, 24 April 1925, TNA 7777/3 in ibid., 322.
240 Marcia Wright, “Local, Regional, and National: South Rukwa in the 1950s,” in Giblin and Maddox, 156. The Sagara, too, who had been placed under Hehe control for their role in the Maji Maji uprising against German occupation, were permanently classified as Hehe (Iliffe, 330). The Ndamba tribe was similarly classed as part of the Bena hierarchy, despite strong protests against this designation (Jamie Monson, “The Tribal Past and the Politics of Nationalism in Mahenge District, 1940-60” in Giblin and Maddox, eds, 107).
chiefs selected from locally prominent families. In other areas, they aggregated tribal subsets into larger units, such as the Nyakyusa, who shared a language, but had previously lived as separate smaller chiefdoms. In the Usambara mountains, the British discovered evidence of a powerful Shambaa kingdom that had existed before the arrival of the Germans, which they decided to revive under the rule of a previous contender for the throne. The new Shambaa territory was much larger than the old one, and included the Zigua and Pare people, who had previously formed separate tribes, and who maintained strong opposition to Shambaa rule.

In tribes that already possessed a clear structure of authority, British officials built new levels of hierarchy to centralize administration under as few leaders as possible. For instance, several separate Bena lineages were brought together under a single paramount chief in 1926. The eight separate Haya chiefdoms were unified in 1926 under the rule of Francis Lwamugira, whose ability to force “through the building of schools and dispensaries and roads” and support for “any project of economic development unless it threatened the established order” won him strong British support. When local resistance to centralizing power around the chieftaincy was too strong to overcome easily, colonial officials found other ways to organize rule. According to Rwezaura, the British faced setbacks when they tried to appoint a paramount chief of the previously acephalous Kuria, who for a long time had been governed in small agnatic groups whose

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241 For example, chief Mgeni of the Turu became Tanganyika’s most powerful chief during Cameron’s tenure, even though the Turu had never previously had a central chief (Iliffe, 327).  
242 Iliffe, 332. The British established a Council of Nyakyusa Chiefs in 1933 and, “buttressed by distinctive culture, common language, and sheer isolation, the newly-invented Nyakyusa tribe soon became an effective political unit.”  
243 Ibid., 332.  
244 Ibid.  
245 Swartz, 250.  
246 Iliffe 329.
lineage head represented his group in a non-hierarchical tribal council.\textsuperscript{247} The British resolved this with the creation of a Kuria federation, which left the lineage heads (who they called sub chiefs) in control of their kin-group, but jointly responsible for a common treasury and court.\textsuperscript{248} Sukuma administration also took the form of a council rather than a single chieftaincy.\textsuperscript{249}

Many of the newly appointed chiefs worried about their legitimacy among their constituents, especially since their promotion came at the instigation of occupying forces. To bolster their claim to the chieftaincy, British officials revived and prioritized historical accounts that emphasized the importance of the families from which the new chiefs were drawn. Chiefs also spent considerable time and resources building histories of their family’s historical and hereditary right to rule.\textsuperscript{250} Iliffe quotes a Pare chief who claimed that when he chose to claim his tribe’s chieftaincy, he “wrote a ‘history’, which established that the chieftainship of the Pare District was [his].”\textsuperscript{251} Opponents to their rule and rival chiefs created separate histories to support alternate claims to power. The Ndamba tribe, which British officials categorized as part of the larger neighboring Bena tribe, sent historians Anton Mwilenga and John Kwalevele to Dar es Salaam to present their tribal histories and ethnographies to the British colonial government to make their case for independence from Bena rule.\textsuperscript{252} Similarly, according to Iliffe, “a Chagga

\textsuperscript{247} Rwezaura 16.
\textsuperscript{248} Ibid.
\textsuperscript{249} Göran Hydén, \textit{Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry}, University of California Press (1980), 101. Wijsen and Tanner (2002) argue that British officials wanted the chieftaincy to evolve into something resembling Britain’s constitutional monarchy on a smaller scale, so they sought out the most powerful local chiefs and increased their power to a scale unimaginable in pre-colonial times.
\textsuperscript{250} Monson in Giblin and Maddox, eds, 107-111; Giblin in Giblin and Maddox, eds, 142.
\textsuperscript{251} Emmanuel Sebughe to Jakson, 26 October 1944, TNA 32702/3A in Iliffe 1979, 337.
\textsuperscript{252} Monson in Giblin and Maddox, eds, 108. Their claim was unsuccessful.
dissident of 1937 wrote a history of Kilimajaro aimed against chiefly authority.\textsuperscript{253}

Histories of the Shambaa, Haya, Gogo, Safwa, and numerous other tribes appeared during the interwar years, and these treatises made a strong argument for or against the lineage-based legitimacy of particular chiefs.\textsuperscript{254}

Aside from commissioning or writing histories, chiefs reinforced their authority through references to, and sometimes reformulations of local customary law, and in particular those aspects connected to family life. Because the hierarchical structure introduced to many chieftaincies was usually unfamiliar to locals, chiefs attempted to portray “chiefly authority as an extension or elaboration of the authority normally exercised by senior men over their families.”\textsuperscript{255} In doing so, they often affirmed practices that shored up the power of senior men in the tribe, some of whom supported their claim to rule in return. They also used old rituals or invented new ones to lend legitimacy to their practices.\textsuperscript{256} Colonial officials collaborated with chiefs in articulating and formalizing (and sometimes inventing) versions of local custom that privileged the role of local elites, and in particular male village elders and patriarchs. These projects were often advanced even in areas where the population had a significant number of matrilineal kin groups.\textsuperscript{257}

In comparison, British rule in Malawi (known as Nyasaland) actually began earlier than in Tanganyika. The first British Consular Court, at first reserved for use for British officials only, was established in 1891, after Nyasaland declared a crown

\textsuperscript{253} Iliffe, 337.
\textsuperscript{254} Ibid.
\textsuperscript{255} James Giblin, “Some Complexities of Family and State in Colonial Njombe” in Giblin and Maddox, eds, 129.
\textsuperscript{256} Norman Miller, “Village Leadership and Modernization in Tanzania: Rural Politics Among the Nyamwezi People of Tabora Region,” Indiana University (1967), 109.
\textsuperscript{257} Ibid., 105, Wijsen and Tanner, 70-4; Abrahams 1962, 46-7; Giblin in Giblin and Maddox eds, 133.
This court was expanded into a three-tiered system of courts for Europeans, Asians, and “natives”, respectively, in 1902. In 1933, colonial administrators created a class of Native Courts, which were meant to adjudicate customary and petty criminal disputes. These were meant to bring tribal law under the control of the state, but because these courts were staffed with outsiders who were friendly to the colonial regime, they were mostly ignored in favor of preexisting local courts. Hence, this limited effort did not significantly alter already well-institutionalized patterns of judicial decentralization. At this stage, this pattern in Malawi largely replicates the British experience in Tanzania, in that both countries emerged from the colonial era with a multi-tier court system that used the preservation of customary law to bind traditional authorities to the colonial state. In both countries, the system’s skeptics would become some of the first anti colonial-nationalists.

The varied conditions in what would eventually become Tanzania, however, provided more opportunities for the British policy of indirect rule. Through it, the British created Tanganyika’s first centralized government, made up of British administrators and the tribal chiefs who enforced their laws. While some of these chiefs quietly opposed British rule, the majority of them supported British reforms, principally for the increased power and status that their cooperation brought. As in nearly all other colonies of the period, British or otherwise, a strong nationalist movement then grew to challenge colonial rule. One of the earliest movements was the Tanganyika African Association, founded in Dar es Salaam in 1929 as a forum of discussion for African urban elites. It wasn’t until the 1950s, however, that the Association, brought under the leadership of

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258 Benda-Beckmann, 174-5.
259 Maguire, 21.
Julius Nyerere, one of twenty-six children of the chief of the Zanaki and the first Tanganyikan to pursue higher education in Britain, became a widespread political movement. The Tanganyika African Association (TAA), which in 1954 was renamed the Tanganyika African National Union (TANU), drew diverse supporters, including dispossessed former chiefs, urban women, and educated young Tanganyikans who opposed colonialism as an institution.\textsuperscript{260}

Other proto-nationalists movements were also formed during this period, but the Tanganyika African Association was the first to gain widespread appeal beyond the immediate area of its inception. Others tended to be limited to membership by co-tribesmen. Maguire describes a group of Sukuma chiefs near Mwanza organizing, in 1937 to block changes to local treasuries, and a petition to the first United Nations visiting Mission to Tanganyika by the Sukumaland Federation in 1948, detailing demands for further African representation in the nationwide Legislative Council, more opportunities for education, greater allowance for native societies, invitations to trade meetings, and the prohibition of land alienation without the consent of local chiefs.\textsuperscript{261} The Sukuma Union, formed in 1945, began as a mutual aid society but quickly morphed into a forum for airing political grievances as its members, mostly teachers and clerks, began to realize that their economic complaints were bound up with the system of colonial governance.\textsuperscript{262} Hyden describes the activities of the Bahaya Union in the Haya

\textsuperscript{260} Although Nyerere drafted the rules for and presided over the name change and transformation into a political party, the instigation for these changes to the TAA came much earlier from Paul Bomani, a Sukuma who was prominent in both early Sukuma branches of the TAA and the Sukuma Union, along with other Sukuma branch chiefs including Saadani Abdo Kandoro and Joseph Petro (Maguire 138). See also Iliffe, 523.
\textsuperscript{261} Maguire, 51.
\textsuperscript{262} Ibid., 75; 83.
tribe, which brought grievances to British administrators. Here, as well, the TAA eventually gained greater local support when it more vocally demonstrated against British agricultural policies such as mulching banana stems. The Kilimanjaro Union served the same purpose for the Chagga.

Maguire argues that the development of nationalism in Tanganyika “varied in pace and differed in certain other respects in disparate areas depending on the impact of the colonial government’s policies, on the character of traditional tribal institutions, and on the nature of the economic and social environment.” Across most regions, however, some of its most prominent early followers were members of families who had been passed over for chieftaincy despite some claim to the title, or former chiefs whose small tribes had been amalgamated into larger tribes. When Anton Mwilenga and John Kwalevele, the Ndamba historians who traveled to Dar es Salaam to present their case for independence from the Bena, failed to win support for their cause, they went to a TANU rally to learn more about the nationalist movement. They decided to join the party, and they took 54 membership cards back home with them, which eventually yielded over one hundred Ndamba supporters who thought that TANU might be able to help free them from Bena rule. Iliffe cites Nyamwezi rival chiefs and village dissidents as the tribe’s first members.

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263 Hyden 1968 107.
264 Ibid., 115.
265 Iliffe, 525.
266 Maguire, 1969 xxii.
267 Monson in Giblin and Maddox, eds, 108.
268 Ibid.
269 Iliffe, 533. It is worth repeating here that the vast remaking of Tanzania’s tribal landscape risks making customary law, and its defense, look like weak demands for a separate system of law that has no historical basis for its protection. That custom and customary law changed fundamentally during this period is undeniable. However, because local group elites were tasked with writing and then administering these “customary” laws, they became tremendously valuable to these elites as sources of power. It is largely on
Because chiefs were directly responsible for carrying out some of the most widely opposed colonial initiatives, such as taxes and land alienation, opposition to colonial rule across the territory took the form of opposition to chiefs. Lord Hailey wrote a paper in 1950 warning that British over-reliance on Native Authorities would create opposition to their rule. His memorandum led to efforts to create more representative local government, but most chiefs refused to accept elected advisors.270 In the Arusha region, popular protests against colonial rule were almost always directed against local chiefs.271 In Njombe, British administrators forced local chiefs to help with confiscation of land for a large wattle (acacia) farm managed by the Colonial Development Corporation, which earned the latter widespread resentment.272 TANU accordingly received widespread support in Njombe as “TANU activists blamed the ruling clans for denying positions to well qualified and educated individuals, protecting unqualified office-holders, preventing appeals against the decisions of chiefs’ courts, and perpetuating inefficiency and corruption.”273 In Sukumaland, farmers came increasingly to resent the mandates that forced them to change the way they farmed by requiring that certain crops be fertilized with manure, demarcating where new cultivation might take place, ordering the killing of certain numbers of cattle every year, and the planting of a minimum acreage of cassava

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271 Spear in Giblin and Maddox, eds, 77.
272 Giblin in Giblin and Maddox, eds, 139. According to Maguire, District Officers in Busega, Sukumaland refused to hear grievances aired by the TAA unless they were relayed through the chief’s office (116).
273 Ibid., 143. According to Giblin, “when TANU organizers became active in Njombe in the 1950s, they directly attacked the concept that authority should be vested in particular clans. They did so because they recognized that, while clan identities could indeed unify chiefly office holders in defense of privilege, among common villagers ideas of clan hierarchy were foreign. Outside the tight circle of chiefs who controlled offices and opportunities for schooling, they failed to persuade anyone that the British-appointed chiefs possessed the right to rule.”
and cotton. Elites among the Sukuma accordingly created local associations and cooperatives meant to represent crop producers’ interests to the British administration. Concerned that these associations would provide alternative forums for political organization, the local District Officer prohibited them from operating in units other than that of the tribe. As a consequence, association and cooperative leaders became outspoken critics of the Native Authorities. Although in some cases chiefs chose to ally themselves with TANU, in most cases they remained loyal to the source of their authority. The British viewed party membership as open resistance to colonial rule, so many chiefs either joined in secret or never joined at all. Many of the early conflicts between British colonialists and nationalists was mediated by the role of the chiefs, which only grew worse as TANU began to address the British directly, rather than channeling their concerns through their chiefs, especially since many of their grievances concerned chiefly rule. Accordingly, the elimination of chiefly power formed an early part of TANU’s political platform, which meant that most traditional authorities remained strong supporters of the colonial regime.

TANU also drew early support from women who hoped that they might gain personal autonomy if it followed through on promises to eliminate traditional authority. By 1955, the majority of TANU members were women. Women were particularly

274 Maguire, 30.
275 Ibid., 99. Chiefs and other traditional authorities who joined cooperative associations had no authority beyond the vote that each member was allotted (110).
276 Miller 1966, 125-35
277 Maguire, 124.
278 Maddox in Giblin and Maddox, eds, 86. Maddox recounts several incidents of chiefs refusing to forward demands made by local associations, including TAA, to British officials, and subsequent hostility between local elites and the chieftaincy. New elites and emerging young politicians were dissatisfied with local representation and many British policies, and viewed the chiefs as an impediment to reform (119; 123).
enthusiastic about TANU because it promised dignity and equality and a vision for the future that included “men and women working side by side,” which they had been denied in the past.\textsuperscript{280} Geiger argues that colonial authorities regulated the activities of men directly but often left women’s affairs to African men: “the control of women was invariably left to colonized men—to fathers, husbands, brothers, or uncles—while its legal parameters were defined and redefined by colonial officials, including Native Authorities.”\textsuperscript{281} Perhaps the second most important figure in TANU, and the only other aside from Nyerere who was instantly recognizable to most members of the public, was Bibi Titi Mohamed, a Muslim woman from Dar es Salaam who was the first women’s chapter secretary. She, along with other women she recruited from local dance troupes, “stimulated and facilitated the emergence of a grassroots leadership and democratized the process of TANU organizing while at the same time providing TANU’s central leadership with a readily activated network for the transmission of information….\textsuperscript{282}

TANU also appealed to youth, who had few rights and little autonomy in most tribal societies.\textsuperscript{283} They, like some of TANU’s women, opposed Traditional Authorities and hoped for the erosion of “traditional” organization. Because TANU’s membership consisted mostly of opponents of the alliance between tribal chiefs and colonialists that formed the structure of indirect rule, TANU supporters favored eliminating chiefs and deprioritizing tribal identities.

\textsuperscript{280} Geiger in Maddox, 173. For this reason, women viewed TANU as important not only for its potential to overthrow the colonial order, but also to improve their position in the new state.
\textsuperscript{281} Ibid., 161. According to Geiger, most letters in the colonial archives concerning women are between Native Authorities and central colonial officials about bride price, punishments for adultery, punishment for impregnation, and other laws that regulated the lives of women.
\textsuperscript{282} Ibid., 156-171.
\textsuperscript{283} Iliffe, 532.
Between 1954 and 1960, when Nyerere was elected to lead Tanganyika during the one-year transition from British Mandate status to independence, TANU recruited members and opened offices in every province. In 1959, in every district, its members were voted into local and district level councils created by the British in preparation for the transition to independence, and some chiefs began to support the party in an attempt to retain power, although “most proved unable to convince TANU leaders of their nationalist credentials.” The 1959 and 1960 elections made TANU Tanganyika’s representative in independence negotiations and gave it decisive control of the first representative assemblies that presided over the transition at both the local and national level. In December, 1961 the transition period ended and Tanganyika became officially independent, and in 1962, Nyerere won over 99% of the vote to become the country’s first president.

The coalition that brought TANU to power was a sometimes counter-intuitive amalgamation of actors whose interests were either anti-British or anti-chieftaincy. Unpopular agricultural measures mandated by District Officers and threats of land alienation for British development schemes created strong opposition to British rule, and because they used Traditional Authorities to disseminate and enforce these policies, nationalists began to oppose chiefly rule as well. Thus, the British decision to rule through a coalition of Traditional Authorities and local chieftaincies presaged the anti-tradition composition of the pro-independence alliance. As will be shown in the following section, because the British chose to govern through local chiefs, they

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284 Maguire, 264; Iliffe shows a poll conducted across eighteen districts where 32 chiefs supported TANU and 71 opposed it (533).
285 The specific events leading up to independence are of less relevance here than the political alliance that united around the goal of political autonomy. For more on this period, see Iliffe 1979; Maddox and Giblin 2005; Maguire 1969; Hyden 1968.
supported, in general, most of what they believed were the traditional trappings of chiefly rule, and Traditional Authorities thus found it easy to institutionalize more deeply those components of local practice that furthered their authority. For this reason, although British administrators introduced a central judiciary and attempted to codify laws and rationalize the judicial bureaucracy, they never attempted to eliminate customary law. It formed the foundation of chiefly power, which was essential to the success of their strategy of indirect rule. However, the introduction of a centralized, British-run judicial system paved the way for eventual partial centralization of the post-independence judicial system.

As they had done in other Mandate territories and colonies, the British introduced far-reaching reforms into the Tanganyikan legal system. They established a bifurcated judiciary that separated cases involving the personal matters of colonial officers and other European expatriates, as well as commercial, criminal, and other cases in which non-Africans were involved, from “native” law, which governed East African colonial subjects.\(^286\) The former types of cases were heard in British common law courts, and the latter in tribal courts manned by Traditional Authorities and their deputies. Although they introduced the framework for a nationwide judiciary, then, British officials never seriously attempted to eliminate the adjudication function of chiefs, which they viewed as useful for social harmony.\(^287\) Under the new system, chiefs retained the right to adjudicate local cases, though now with few opportunities for the rest of the community to participate. Chiefs were also now required to keep records, and to pay the clerk’s


\(^{287}\) Moore, 156.
salary, a small fee was levied on all litigants. Furthermore, British officials created an appeals system for the “Native” courts, such that cases from chiefs’ courts could be appealed to regional colonial administrators.

After 1950, the judicial role of chiefs diminished as magistrates began to replace them in the “Native” courts. All of the new magistrate courts were established at the site of former chiefs’ courts, making use of the same building and often the same clerks. Because there were very few trained magistrates available, however, only a small number of chiefs’ courts became magistrate courts. The new magistrates often knew little about customary law, so the British introduced assessors to advise them on points of local law and to replace a formal jury system. Assessors were similarly introduced into many British colonies to replace the full jury system, which was often deemed unfeasible due to financial and administrative constraints. Assessors are lay members of the local community (usually elders) who are empowered to advise the magistrate on how a matter might be handled according to local custom. In some places, including Tanzania, they were later given power to overrule magistrates at the primary court level. Once they had created them, British officials also provided magistrates with copies of codified versions of tribal law that they could use to adjudicate cases that fell under the purview of customary law.

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288 Wijsen and Tanner, 83. Note that some form of payment for adjudication was normal in pre-colonial East Africa, but it was usually paid in livestock or crops and structured as an offering brought to the chief out of respect (see Moore 40-44).
289 Ibid., 84, Hyden, 101. As Moore (150) notes, until 1929 the British maintained a unified appeals system in which appeals from native courts and European courts were overseen by a single British appeals court, but in 1929 this changed and native courts were made completely separate, with colonial executive authorities as the highest level of appeals.
290 Moore, 148-50.
In order to create these codifications, the British led a widespread effort to research tribal norms and customs. This project was almost universally undertaken by European and American researchers, primarily anthropologists, who observed tribal practices and interviewed locals to create written versions of local norms that could be compiled into legal codes. Hans Cory, an Austrian anthropologist, was responsible for more of the codifications than any other scholar, including those of the Gogo, Nyamwezi, Sukuma, Haya, and Shambaa, as well as treatises on the political organization of Arusha-area tribes such as the Meru and Chagga. According to Maddox, Cory’s codification process privileged the accounts of senior men. During the codification of Gogo legal practices, for example, he called a group of male clan heads to a meeting in Dodoma to comment on his findings from several observation sessions. Their suggested changes shifted the focus to inheritance, adultery, and other family law matters that were often peripheral compared to other issues such as land and theft, and in any case were usually settled according to context rather than fixed rules. In protecting or promoting the legal agenda of village elders, Cory strengthened the alliance between them and the colonial administration. He also strengthened the support that patriarchs and lineage heads had for local customary law, because, having been given the opportunity to codify rules of their making, senior men took the opportunity to entrench rules that strengthened their authority.

Other studies have dealt, at length, with the problems of codifying customary law. The primary question here is the effect of codification and the disruptions to pre-colonial

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292 Maddox in Giblin and Maddox eds, 99.
293 Ibid.
political organization on the institutionalization of customary legal practices. Because the level of support for local customary law changes slowly, it is important to ascertain levels of support for it, or for other forms of law, in the period preceding the moment of judicial (de)centralization. Judicial reforms during the British Mandate period had a somewhat paradoxical effect on the institutionalization of locally distinct customary law. No contemporary surveys asked Africans about their preferences for one style of adjudication over another, or their attitude regarding the new tribal courts or legal codes. It is clear, however, that by and large, locals only used British institutions when required to do so. Many of them soon fell into obsolescence through disuse. As discussed, the close ties between chiefs and colonial authorities eventually earned the former the opposition of many of their constituents. One might expect that customary law, harnessed to bolster chiefly power, would lose support as well, particularly because new government courts provided an alternative to chiefly adjudication.

However, most litigants chose not to use courts set up by the government, whether those run by chiefs or the magistrate courts introduced at the district level, so some form of non-chiefly customary law continued to exist outside the domain of colonial government authority. By all indications, locals solved disputes mostly as they had before the advent of other types of courts, by referring disputes to village elders or settling them privately between those concerned. As Wijsen and Tanner note, most

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295 Thomas Spear, Mountain Farmers: Moral Economies of Land and Agricultural Development in Arusha and Meru. Oxford: James Currey (1997), 198-200. Aside from customary law codifications, Cory also created the Arusha constitution, a complete system of governance for the Arusha people of Northern Tanzania, ostensibly based on ethnographic research on traditional modes of governance, but in reality “an utterly new entity” of his fabrication (Spear 198). Meant to ease local opposition to colonial rule by “restoring” traditional forms, the Arusha “boycotted the new institutions, and the elaborate hierarchy of courts and local councils soon lapsed through their disuse” (Spear, 200). The same was true for courts that used the Sukuma legal code devised by Cory (Wijsen and Tanner, 84-86).
Sukuma used colonial courts as a threat of escalation to gain advantage in the local dispute resolution process. In some places, local customary courts persisted because the magistrate courts were too far away or too unfamiliar to be of use to litigants. In others, there was more active resistance to the new legal order. Rwezaura argues that courts in Tarime District were unable to both attract litigants and enforce the law, particularly in cases concerning bride wealth, the sum of money paid by one family to the other when a marriage is contracted. The Nyamwigura chief’s court registry for 1955, for example, shows that 48 percent of officially registered marriages involved a bride wealth payment above the permissible limit. Because chiefs could use their official capacity to sanction marriages, magistrates found that the only way to get locals to register their marriages in accordance with colonial policy was to ignore the details of the union.

As previously mentioned, many of the women and youth who joined nationalist movements hoped that independence would weaken the hold of chiefs and tribal hierarchies and give them greater freedoms, particularly with regard to marriage and work. Their importance to TANU, and the unwillingness of most chiefs to support TANU, meant that there was widespread support for the idea of abolishing the chieftaincy. In many tribes, customary law was tied closely to chiefly power, and the British practice of having chiefs perform adjudication (whether or not they had

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296 Wijsen and Tanner, 85.
297 Ibid.
298 A complex debate unfolded in central Tanganyika (and Tanzania) concerning acceptable amounts for bride wealth payments. It had long been a means of transferring wealth between families and a mainstay of Kuria social order (as well as that of most other East African tribes). The introduction of cash crops during the German colonial period began to inflate bride wealth payments, making it impossible for poorer families to marry. Accordingly, in 1929 the Kuria Federation imposed a limit on these payments at the level of three cattle, which was so universally repudiated that they raised the level to ten, and then fifteen cattle. British courts, on appeal, enforced these limits as part of local customary law. See Rwezaura, chapter 6.
299 Rwezaura, 101.
traditionally done so) strengthened the link. Support for eliminating the chieftaincy could, thus, be seen to imply similar disenchantment with customary law. At the same time, the only alternative to the customary law was colonial common law courts, and their promise of autonomy from chiefly rule was undermined by their direct association with colonial rule.

Additionally, while nationalist rhetoric emphasized democracy and self-determination, it also drew on pan-Africanism and respect for indigenous customs and institutions. Village elders and patriarchs were unwilling to forego rights to land and labor accorded them by customary law, which they could continue to enjoy even without chiefs to adjudicate disputes. Speaking generally, the women and youth who supported TANU had more influence in urban areas than the countryside, where customary law remained more popular. Also, as mentioned, the widespread invention of custom by British administrators, Western academics, and traditional authorities created stakeholders among the local elite whose status relied on the forces of tradition. Predictably, the beneficiaries of this arrangement continued to support it, and in rural areas, overall support for customary law remained high. In 1966, Tanner found “a noticeable withdrawal of customary law cases from primary courts” because litigants preferred to take their disputes to unofficial neighborhood arbitration tribunals, which would have been operated by community elders according to local rules of customary law. He ascribes this to the fact that “Most communities are so closely integrated that it would be impossible for anyone to act against their customary law and remain within the

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300 See the end of the following section for more discussion on this point.
community afterwards.\textsuperscript{302} This helps account for the low usage rates of primary courts, which within three years became so noticeable as to bring complaints from the government.\textsuperscript{303} That the same people who had brought TANU to power avoided its courts points to strong preference for local customary law. Tanner ascribes this preference to the relative proximity, low cost, and familiarity of local arbitration, but also that the unfamiliarity of the magistrate and “the shortness of the hearing will deprive them of personal satisfactions” in the process.\textsuperscript{304}

During the 1980s, war with Idi Amin’s Uganda took up vast amounts of state resources, and the resulting poverty and lack of funding for police and magistrates led to a crime wave in rural Tanzania. The result, in the Sukuma and Nyamwezi middle of the country, was the formation of vigilante groups (\textit{sungusungu}) whose job it was to find and punish perpetrators, particularly of cattle theft, which could be devastating to already impoverished communities. The quick formation of these groups and their near ubiquity suggest that many of these communities had continued to supplement state courts with non-state justice for the previous twenty years, lending support to the idea that customary law retained importance well beyond the colonial era.\textsuperscript{305} In 2013, there was still

\textsuperscript{302} Ibid., 113.
\textsuperscript{303} Criticisms of primary courts formed the subject of former Prime Minister Rashidi Kawawa’s address to the Judges’ and Magistrates’ Conference in Dar es Salaam in 1967. He told conference attendees “The major areas of criticism are delay, inefficiency, arrogance, isolation from the people, and dishonestly…” (Martin 68). Martin notes that again, at the 1969-70 Judges’ and Magistrates’ Conference, a speaker “state[d] that ‘dangerous complaints’ and ‘persistent dissatisfaction’ concerning the work of the Judiciary had been heard in parliament and Part Meetings, and noted in the press…For verification of the existence of this dissatisfaction, he referred to the inordinate number of complaints about the Judiciary in the annual reports of the Permanent Commission of Enquiry (\textit{The Standard}, 7 January 1970 in Martin, 69).
\textsuperscript{304} Tanner 1966, 110.
\textsuperscript{305} A full treatment of \textit{sungusungu} is beyond the scope of this work, particularly because it did not precipitate lasting changes in state policy on customary or non-state law. At the time, the Tanzanian government response to the extra-judicial killings was mixed. In some cases, \textit{sungusungu} participants were tried and convicted of murder, whereas in others, pardons were issued. The pardons demonstrate a willingness to condone some instances of self-defense or the punishment of serial offenders, but the convictions were meant to deter further vigilantism, and Tanzania did not permanently shift policy to
widespread support for the settlement of local disputes by village elders rather than courts, although there was more willingness to take “serious” matters such as large-scale thefts and violent crime to the police. Helen, an assessor for the Mtae Magistrate court in Lushoto district, explained that although she has an official role as an assessor at the local court, many people, especially women, bring their potential court cases to her for private resolution.306

In the same village, a wealthy bar and café owner joins with two fellow village elders to hear disputes in his café on weekends. He hears cases concerning inheritance, land boundary disputes, marriage problems, theft, and “many, many people who got in a fight.”307 The procedure varies little between cases: the elders summon the disputants and their families, hear each person who wants to contribute to the proceedings, and then ask both sides what they want from the other party and negotiate until an agreement is reached. The settlement or solution is rarely the same even across similar types of cases because the parties involved have different demands.308 During a focus group session at a Magistrate court in Iringa, an assessor claimed that in his village, several kilometers outside Iringa, it was quite common for village elders to adjudicate disputes privately

strengthen the judicial power of sungusungu participants. For more on sungusungu, see Abrahams (1987, 1989); Bukurura (1994); Fleisher (2000); Heald (2002, 2007).
306 Author interview with Helen, assessor, Mtae, Lushoto District, February 23, 2013. She provided details of several disputes that she had resolved privately in the last month. Most involved marital disputes, spousal abuse, child custody questions, spousal and child maintenance payments, and petty theft. According to Helen, “she would never recommend people to go to court….she herself knows what is going on there and often it is unfair, there is no justice, so it is better to solve issues outside of the court.” However, as is discussed in the conclusion, support for extra-judicial arbitration has weakened considerably since the colonial period.
307 Author interview with Mr. Pochi and two village elders (one retired schoolteacher, one business owner), Mtae, Lushoto District, February 23, 2013.
308 Ibid.
because the court would not recognize many transgressions as violations of law, so there could be no redress.\(^{309}\)

**Summary of the Argument**

That local customary law and village-level arbitration forums still have salience long after independence, especially since there has been a general erosion of tribal identity in Tanzania, emphasizes that formerly tribal tribunals retained support through the colonial era despite opposition from urban dwellers, rural youths and women, and the shocks to the system that resulted from power struggles between British-appointed chiefs and their rivals. The forces that opposed locally distinct customary law succeeded in undermining its hegemony to the extent that the government, after independence, attempted to unify customary law, and it created space for the limited success of government primary courts, which did receive some, if not a preponderance, of customary cases. However, because local elite support for a decentralized, non-state controlled version of customary law remained high, and villagers continued to bring judicial matters to the same places they had before independence, the level of institutionalization of these practices remained quite high. Accordingly, despite the divisions between local elites that resulted from the restructuring of the tribal system,

\(^{309}\) Focus group, Iringa Mjini Magistrate Court, March 14, 3013. The assessor remembers a case from his village that involved a local man who refused to attend funerals when his neighbors died. When someone in the transgressor’s family died, the village elders decided to use the occasion to punish the man. They encouraged all of the other villagers to attend the funeral to condole with him, but afterward they asked him if he had been sick during the other funerals, and when he said that he had not been ill, they caned him in front of the village. The two magistrates present at the focus group berated the assessor for allowing this to occur; as a government official, he should have put a stop to it because only courts have the authority to issue punishments.
elite coordination remained high, as former chiefs and other types of elites all prioritized the preservation of local customary law.

The vast remaking of Tanzania’s tribal landscape risks making customary law, and its defense, look like weak demands for a separate system of law that has no historical basis for its protection. That custom and customary law changed fundamentally during this period is undeniable. However, because local group elites were tasked with writing and then administering these “customary” laws, they became tremendously valuable to these elites as sources of power. It is largely on these grounds that they were so strongly defended by rural elites, rather than their historical authenticity. Group elites bargain for judicial decentralization based on their support for it as a source of power and authority, regardless of the alteration of custom over time. In fact, as I will argue in the next section, the elimination of the chieftaincy in Tanzania made preservation of these laws even more vital for chiefs, as one of the last remaining preserves of their power.

**Post Independence Coalition Building and Judicial Centralization**

As long as TANU’s supporters shared the common goal of independence for Tanganyika and the end of chiefly rule, they did not have to address any of the more contentious issues that might divide them, such as the nature of post-independence economic reforms or the status of customary law. Shortly after independence, these issues came to the forefront and resulted in the beginnings of opposition to TANU’s rule. These disagreements had far-reaching implications for the types of policies that were enacted, the coalitions needed for their passage, and the legitimating narratives put forward to
explain their importance to the new nation. During this period, Tanganyika faced the question of whether to create a centralized judicial system with a single legal standard that would apply to all of its citizens, or whether it should adopt some kind of hybrid legal system that would preserve a place for different types of customary law, or perhaps whether it should even retain two distinct court systems, as colonial administrators had done, to manage customary and non-customary cases.

With most of TANU’s membership and supporters (made up mostly of urban elites) opposing chiefs and tribal custom, the elimination of locally distinct customary law was a logical agenda item. Early on, Nyerere outlined an agenda for judicial centralization that would consist of a single court system that would use both common and customary law, the latter of which, crucially, would comprise a single form of customary law that would be amalgamated from the diverse existing customary legal regimes. According to Nyerere’s plan, the same magistrates would preside over common and customary law cases. The proposal is discussed in further detail below, but it is important to note that although there were some commonalities across the customary norms of some of Tanganyika’s tribes—for example, most tribes practiced some form of bride wealth—there were important discrepancies even within common practices. Even starker differences existed across regions. For example, family law rules varied among matrilineal and patrilineal tribes, and there were similar differences in rules concerning cattle between pastoralists and farmers. Creating a single version of customary law that could be codified for use by magistrates with no special training in the subject constituted an ambitious centralization project, as did the aim of bringing the two systems together. At independence, the majority of magistrates in Tanganyika were British, and it would
take some time to train sufficient numbers of African lawyers and judges to replace them. British magistrates would thus preside over customary law cases in Nyerere’s proposed courts.

Less than a decade later, Tanzania’s judicial system remained far more decentralized than Tanganyika’s leaders had initially intended. There was a single court system, but no unified customary law code. Instead, each tribe used its own customary law as interpreted either through an official codification or (and sometimes and) through the advice of assessors drawn from the local community. Other agents besides magistrates were empowered to adjudicate low-level disputes, and these neighborhood authorities formed a network of first instance hearings that screened cases for referral on to the court system when necessary. Most of these agents were TANU party officials, usually drawn from the ten-cell block, the most local unit of the party. In rural areas, many cases continued to be taken straight to village elders, regardless of whether they happened to also be TANU officials or not, as was customary.

The failure of Nyerere’s judicial reform agenda can best be explained by two separate processes, both of which began during the colonial era. The first, described above, is the survival of strong group elite support for locally distinct customary law. The second is the formation of opposition to the policies that Nyerere and other TANU officials built to enact economic reforms. Nyerere prioritized economic development highly, and most of his proposed policies were in the area of agricultural reform and village reorganization. In both of these domains, the capacities of state leaders to enact these reforms were relatively low, and required the cooperation of local group elites. The section on coalition building below makes the case that to attract support for his reforms
from rural elites, Nyerere had to abandon full judicial centralization. First, however, it is necessary to review the components of Nyerere’s legislation that were most concerned with (de)centralization.

A Summary of Legal Pluralism in Tanzania

The section that follows is not part of the causal argument. It contains an important sidebar on the nature of legal pluralism in Tanzania. The components of legal pluralism (the results of judicial decentralization) are a confusing tangle of certain individual pieces of legislation and exemptions to others. They are also manifest in the authority given to local government officials (ten cell heads) and assessors (court advisors). This description is vital for understanding the remainder of the causal argument.

Nyerere viewed judicial centralization as a necessary component of nation building because if Sukumas, Benas, and members of other tribes organized family life on the basis of tribal law, they would continue to prioritize their tribal identity over that of their new nation. His other reforms, such as a national curriculum and the resettlement of many Tanganyikans to under-populated areas, could be undermined by what he saw as tribal parochialism. In 1961, he accordingly wrote a letter to the first post-independence parliament asking them to help him unify customary law as a prerequisite to unifying the nation. 310 As part of this initiative, in 1963, Tanganyika hosted a conference on local

courts and customary law in which it and other former African colonies gathered to discuss strategies for unifying the many tribal and local legal systems into a single, effective judiciary. Cheikh Amri Abedi, Tanganyika’s Minister of Justice, welcomed his fellow delegates as follows: “The Tanganyika Government, having devoted much attention to the integration and unification of the legal and judicial systems of the country, believed that it would be valuable to review developments and consider objectives in this area of law together with other African states.”³¹¹

All of the countries in attendance agreed that the long-term goal was for “local courts to become an integral part of an independent judiciary,” but the question was how best to accomplish this.³¹² The delegates recognized that many of their citizens preferred the customary practice of arbitration by village elders because it was cheap, informal, close to the litigants involved, and trusted.³¹³ For this reason, and because it is an authentically “African” form of law, “there was wide agreement that there was no question of the disappearance of customary law in the foreseeable future as a significant part of African legal systems.”³¹⁴ The question was “how far this could be accomplished without attempting to impose a law so alien to the norms of a community as to be unacceptable.”³¹⁵

Accordingly, the delegates came up with a five-step roadmap for judicial centralization that would preserve a form of modified customary law. Many of the steps had been accomplished under colonialism and, for all but a handful of countries, only

³¹¹ Ibid., 7.
³¹² Ibid., 15.
³¹³ Ibid., 103. At the time, delegates estimated that over 80% of cases were heard in local customary courts (14).
³¹⁴ Ibid., 22.
³¹⁵ Ibid.
step five remained. In the first step, which they termed “non-recognition or toleration,”
European courts were introduced into only limited areas of the country, so existing
customary legal institutions continued to function as they had in the past, governing most
of the population. They were allowed to function as long as there was no clash with
official policy. The second step was recognition, in which colonial policies of indirect
rule brought recognition to local courts, although their jurisdiction was restricted to cases
where all parties were Africans and there were some limitations on the severity of crimes
that they could judge. The third step was termed “control.” During this phase, the central
colonial government gradually increased control through administrative officers who
were allowed to inspect courts and transfer cases from one jurisdiction to another. In this
phase an appellate body was also introduced. During the fourth step, “colonial re-
organization,” colonial officials begin to replace chiefs with magistrates, which reduced
the number of customary courts but increased their jurisdiction. In the fifth and final
stage, “African re-organization,” newly independent African states would enact
comprehensive legislation to reform their judiciary.  

This last step is noticeably vague. Conference delegates disagreed on the
necessity of assessors versus full juries, the training of magistrates, and the appeals
structure, so wide latitude was given for each state to plan its phase of “African re-
organization.” Some states even left the conference no longer fully committed to judicial
centralization, having newly understood the extent of possible dissent. Malawi, for
example, chose to maintain a separate but officially recognized system of chiefs’ courts
for political reasons. Indeed, despite Abedi’s affirmation of Tanganyika’s commitment to
centralization, articulated in a special Appendix to his report on the conference,

316 Ibid., 108.
Tanganyika’s plan for phase five noticeably leaves wide latitude for locally distinct customary law.\textsuperscript{317}

Nyerere’s chosen vehicle for unification was a restatement (codification) of customary law for patrilineal tribes.\textsuperscript{318} Cotran describes the process as follows: “tribal representatives, chosen for their expert knowledge of customary law by the District Council of the area meet to discuss their customary law, and agree on a first draft. The text is then submitted to a national panel of experts which considers it, makes amendments if it so wishes, and then refers it back to the District Council of the area which debates the text until it is finally approved.”\textsuperscript{319} A central panel of experts then compiled the various restatements into a single version that reflected the broad consensus of customary law in patrilineal tribes. The codification process began in 1961, and in 1963, Parliament promulgated Government Notices 279 and 436 as the official restatements, with the intent that all patrilineal tribes should adopt them as binding, replacing or amending portions of local customary law that were incompatible with the new codes.\textsuperscript{320}

However, the Judicature and Application of Laws Ordinance gives district councils the right to amend portions of the unified restatement that they found objectionable.\textsuperscript{321} Effectively, although a single customary law code was meant to govern the patrilineal tribes, each local area, as defined by district boundaries, was given the authority to amend

\begin{itemize}
\item \textsuperscript{317} Ibid., 101-15
\item \textsuperscript{318} That Nyerere chose the colonial method for managing judicial diversity, the codification of otherwise fluid legal practices, supports Mamdani’s contention that post-colonial African states perpetuated the colonial core-periphery logic.
\item \textsuperscript{320} A subsequent version for the minority group of matrilineal tribes was planned, but never actually created.
\item \textsuperscript{321} Cotran, 119 references sections 9A of the Ordinance.
\end{itemize}
the code as it would apply to them. If a district council decided to amend the code, it was required to submit the modification to the Ministry of Justice for approval, but the Minister only had the right to overrule portions of amendments that were contrary to Tanganyika’s written laws or those that imposed criminal sanctions for civil offenses. Otherwise, he had little authority to override District Council amendments, which gave districts the power to reinstate local versions of law.\textsuperscript{322} When the Government Notice 279 was sent to the districts for ratification at the end of June, 1963, only eighteen of Tanganyika’s then sixty-six districts signed on with no reservations or additional amendments.\textsuperscript{323} By 1964, twenty-six more joined, but the majority of districts did not. Effectively, these Notices gave tribal groups the power to preserve their own, separate forms of customary law.

Abedi’s Appendix makes clear that aside from the Government Notices regarding customary law, the government would entirely centralize the judicial system in its forthcoming Magistrates Courts Act, the first post-independence piece of legislation to reorganize the entire judiciary, which had previously only been modified piecemeal. The final version of the 1963 Magistrates Courts Act, however, also preserved wide swaths of local customary law. The Act, which establishes the structure of and rules of procedure for the judiciary, states specifically in its fourth schedule:

“In the exercise of its customary law jurisdiction, a primary court shall apply the customary law prevailing within the area of its local jurisdiction or, if there is more than one such law, the law applicable; in the area in which the act, transaction or

\textsuperscript{322} Ibid.
matter occurred or arose, unless it is satisfied that some other customary law is applicable; but it shall, subject to rules of court, apply the customary law prevailing within the area of its local jurisdiction in matters of practice and procedure to the exclusion of any other customary law.\footnote{Magistrates Courts Act 1963, Schedule 4.}

The Act clarifies that no court may refuse to recognize a rule of customary law just because it has not been established by evidence. It must “accept any statement thereof which appears to them to be worthy of belief which is contained in the record of the proceedings…or from any other source which appears to be credible, or of which the court may take judicial notice.”\footnote{Magistrates Courts Act 1963, PCh11s37(a).} The standard for determining whether particular citizens should be governed by customary law is a mode of life test, described in the Judicature and Application of Laws Act in the following terms:

“A person may become a member of such a community…by his adoption of the way of life of the first-mentioned community or his acceptance by such community as one of themselves, and such adoption or acceptance may have effect either generally or for particular purposes; (b) a person may cease to be a member of a community by reason of his adoption of the way of life of some other community (whether or not any customary law is established or accepted in such other community) or acceptance by some other community as one of themselves, but shall not be treated as having ceased to be a member of a community solely by his absence therefrom.”\footnote{Judicature and Applications of Laws Act PCh358s11(2[a]).}
In 1972, the High Court ruled in the case of Abdullah Shamte v Mussa (1972) HCD no. 9, customary law is presumed to apply in rural areas unless shown otherwise.\textsuperscript{327} For a long time, the presumption was in favor of customary identity, and it took several decades for magistrate courts to begin to use civil law codes for residents of large urban areas.\textsuperscript{328}

These sections, read together, are unequivocal—local customary law continues to be binding in the vast majority of disputes that come before magistrate courts. Appeals concerning whether customary law is the appropriate standard for adjudication can only be heard at the High Court level.\textsuperscript{329} In 1963, the government also removed the repugnancy clause from the constitution, which had previously proscribed the use of any customary law contrary to human rights or natural justice.\textsuperscript{330} In its absence, magistrates to this day are required to accept all customary law not specifically contravened by statute, and Tanzania’s parliament has been slow to curtail the reach of custom.

Other reforms adopted in the first ten years of independence continue to reflect a mixed agenda of centralization in some areas of the law coupled with a failure to centralize others. In 1962 and 1963, Tanzania replaced the British era penal code with its own criminal procedure code, and in 1966 and 1967 it published a binding, unified code of civil procedure for its courts.\textsuperscript{331} It also passed a unified Evidence Act, to make sure that its magistrates used consistent standards across Tanzania’s diverse districts.\textsuperscript{332} These

\textsuperscript{328} Author interview with High Court Registrar, Dar es Salaam, March 26, 2013.
\textsuperscript{329} Magistrates Courts Act 1963 PCh11s47(iv) and PCh11s64(b).
\textsuperscript{330} Sawyerr 1969, 31; Ghai 1976, 48.
\textsuperscript{331} See An act to amend the Penal Code of 1962 (Cap 12); Criminal Procedure Code (Amendment) Act of 1963 (Cap 48); Criminal Procedure Code (Amendment) Act No. 2 of 1963 (Cap 69); Government Notice No. 410 of 1966; The Civil Procedure Code of 1967 (Cap. 33).
\textsuperscript{332} Law of Evidence Act of 1967 (Cap. 6).
acts unified much of Tanzanian law, and eliminated distinctions between Africans and Europeans that had differentiated the two legal systems during the colonial era. The long-awaited Law of Marriage Act of 1971, which was expected to unify procedures of marriage and divorce including norms that varied widely from place to place such as rules concerning bride wealth and standards for divorce, however, failed to standardize key areas of the law.

The Law of Marriage Act places some limitations on forms of customary marriage, such as mandating the registry of all marriages, the maintenance of children, and stipulating equality between multiple wives, but it does so with strong deference to local customary law. For instance, part II, section 25(d) recognizes that a marriage may take civil, religious, or customary form. A state official need not be present for any of these types of union to be valid.\(^{333}\) Divorce must be granted when a marriage has broken down irreconcilably, and one standard for determining that is the custom of the local area. Perhaps more importantly, the post-divorce division of assets must take into consideration “the custom of the community to which the parties belong.”\(^{334}\) The act does eliminate customary law in some areas, such as by ordering state officials to treat marriages that are contracted without customary dowry or pre-marital gift-giving as valid (section 41(a)), by banning corporal punishment of wives (section 66), and freeing widows from all obligations to their husband’s family upon his death (section 68), among others. In these cases, magistrate courts can use state law in lieu of local customary law.

If these legal codes, which operate in all of Tanzania’s courts, were the only evidence available in assessing the degree of centralization in Tanzania’s judiciary, one

\(^{333}\) Law of Marriage Act 1971, section 43, part 5.

\(^{334}\) Law of Marriage Act 1971, section 114(a).
could argue that most aspects of family law are left fairly decentralized according to locally distinct jurisdiction of customary law, whereas the more extensive criminal and civil procedure codes are unified, effectively centralizing the majority of the judiciary. Two structural components of the new judiciary, however, complicate this picture, and demonstrate a surprising level of decentralization. The first of these is the government’s decision to preserve the office of assessors, first instituted under British rule. Because magistrates were given little to no training in understanding customary law in general, assessors were on hand to explain local rules concerning polygamy, bride wealth, cattle loaning, or other unfamiliar legal concepts. As experts in customary law, assessors have a large amount of discretion in dictating the content of the law.\footnote{Interestingly, although assessors probably once were former chiefs who were viewed as guardians as custom, these days they are often made up of the elderly and retired, regardless of their actual knowledge of customary law. While keeping the office of assessor in primary courts did initially devolve large amounts of judicial power to preexisting customary norms, at the moment it means that people with no training and no judicial background are permitted to contravene the decisions of state magistrates. There is a widespread movement to abolish the office of assessor, but proponents of locally distinct customary law have been able to preserve the office at least for the moment.} Allowing local elites to determine their own laws, through the office of the assessor, is a major devolution of judicial power. Assessors are still used in all first instance courts, and also at the level of the High Court. Meetings with assessors in several villages in three distinct regions of Tanzania confirms that in most cases, the office of assessor is held by a village elder or someone with previous bureaucratic experience, as originally intended.\footnote{Author interview with four assessors, Lushoto Primary Court, February 20, 2013; author interview with assessor, Mtae Ward Court, February 23, 2013; author interview with assessor, Mazombe Primary Court, March 18, 2013; author interview with three assessors, Iringa Boma Primary Court, March 11, 2013; author interview with two assessors, Kalenga Primary Court, March 14, 2013; author interview with two assessors, Kimande Primary Court, March 15, 2013; author interview with assessor, Kinondoni Primary Court, Dar es Salaam, February 28, 2013.} In 1969, the Magistrates Courts Act was amended to give assessors a binding vote in magistrate court hearings.\footnote{Note that assessors do not have a binding vote at the High Court.} Because the Magistrates Courts Act requires that a primary court may not
issue judgments without two assessors present, the binding vote gives the assessors, if
they agree with one another, the authority to overrule the magistrate’s decision. Village
elders who serve as assessors therefore have the power to prevent the magistrate from
issuing any rulings that contravene local law.

Three additional pieces of legislation strengthened the role of local officials in
determining the content of and managing disputes under local customary law.

Government Acts 219 and 219A of 1969 established Ward Tribunals, which initially
consisted of five members appointed by the local TANU party office, and today up to
five members appointed by the Ward or District Executive Committee. According to
Ghai, these tribunals are “intended to bring about an amicable settlement of the dispute,
and if such a settlement is achieved, it can be filed in the primary court and then becomes
enforceable as a judgment of that court.” These tribunals, although less formal than
first instance courts, are nevertheless part of the formal structure of the judiciary because
they are subject to the Magistrate courts through appeals. These Tribunals have
original jurisdiction in civil cases up to approximately three million shillings
(approximately $2,000), which is more than the annual GDP per person, meaning that
most civil cases are first heard by local government-appointed officials with no legal
training. They are empowered to hear both civil and criminal cases, although not

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338 Magistrates Courts Act PCh11s7(2). When it was first enacted in 1963, Part II, section 7 of the
Magistrates Courts Act specified that each magistrate must sit with at least two assessors in every hearing.
Six years later, then Minister of Justice Rashidi Kawawa introduced amendments to the Act to make the
opinion of the assessors binding, even when they disagree with the magistrate. The new sections were
added to the Magistrates Courts Act in 1969 (PCh11s7(2) and PCh11s7(3)).
340 Author interview with High Court Justice Samuel Karua, Dar es Salaam, January 15, 2013.
341 Ibid. Lawi notes that in practice, the Ward Tribunals are most often frequented by ordinary farmers and
those with low incomes, and that even rural businessmen circumvent the Tribunals in favor of Magistrate
courts, which also have original jurisdiction up to ten million shillings. The concurrent jurisdiction allows
capital crimes or instances of severe assault. Ward tribunals have jurisdiction over land disputes, but when it comes to matrimonial cases, they have the authority only to reconcile disputants, not divorce them. The adjudicators are usually village elders or other locally prominent people who are expected to have some knowledge of local custom. They also have no enforcement power. Although there are legal manuals available in some Ward Tribunals, most reconciliation sessions take place without reference to the law. Accordingly, at the lowest level of the Tanzanian judiciary, it is local understandings of justice and standards imposed by village elders, rather than national legal codes, that form the standard for adjudication.

Even before disputes reach the Ward Tribunals, however, they have almost always begun at one of two additional quasi-governmental institutions. The first is the head of the most local level of organization, the ten-house cell. The ten-cell was first instituted by TANU in 1963-4 to organize local political participation, provide information about the government to villagers, inform party officials about village activities, and provide order and security. Ten-cell units were units of the political party, not of the central government. Each cell consisted of ten households, and the households jointly elected one of their heads of household to lead the cell and to sit on various local committees such as the Ward Executive committee. Leaders were also

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342 Lawi (5) finds that the majority of ward tribunal members in his area of study were elderly relative to the local population, and overwhelmingly male.
343 Author interview with High Court Justice Fauz Twaib, Dar es Salaam, February 4, 2013.
344 Author interview with three assessors, Iringa Boma Primary Court, March 11, 2013. All three assessors also serve as Ward Tribunal members, and it is apparently common to find some overlap in these institutions, as they have similar recruitment requirements. Author interview with focus group of village elders (mostly retired teachers and business owners), Mtae, Lushoto District, February 23, 2013.
expected to adjudicate any disputes that occurred in their cell.\textsuperscript{346} By 1967 they had become the most influential unit of governance, and several studies that year report that most people would take a dispute or problem to a ten-cell leader before almost anywhere else, with the possible exception of former chiefs.\textsuperscript{347} Ingle argues that the ten-cell system functioned as an extension of the colonial system of indirect rule because ten-cell leaders performed the same function as the former traditional authorities, and many chiefs whose office disappeared following independence became a ten-cell leader.\textsuperscript{348} When TANU merged with the Zanzibar ruling party, the Afro-Shirazi Party (ASP), to form Chama Cha Mapinduzi (CCM), the ten-cell system continued as local party units. After the transition to multi-party government, the ten-cell system was officially abolished, but the vast majority of ten-cell units still exist, and research studies on agriculture, public health, local governance, and other all reference interviews with ten-cell leaders.\textsuperscript{349} Despite lack of official recognition, ten-cell leaders still adjudicate the majority of disputes before they are referred to the Ward Tribunal.\textsuperscript{350} Magistrates still ask disputants whether they have consulted their ten-cell leader before appearing in court.\textsuperscript{351} Ten-cell level adjudication is

\begin{thebibliography}{9}
\bibitem{346} Ibid., 218.
\bibitem{347} Miller 1967 survey; Ingle, 220.
\bibitem{348} Ingle 221-222; Miller 1968, 190-192.
\bibitem{350} Author interview with Augustini Ramadhani, Former Chief Justice of Tanzania and Vice-Chairman for the Commission to Reform the Constitution, Dar es Salaam, March 26, 2013; author interview with two assessors, Kalenga Magistrate Court assessors, Iringa, March 14, 2013; author interview with magistrate, Kimande Primary Court, Rift Valley, March 15, 2013. See also Lawi, 5.
\bibitem{351} Ghai, 70; author focus group, Iringa Mjini Magistrate court, March 14, 2013; author interview with magistrate, Kimande Primary Court, Rift Valley, March 15, 2013.
\end{thebibliography}
based “entirely [on] customary law” and involves no reference to national laws or standards.\textsuperscript{352}

Although ten-cell leaders address disputes that occur within their units, conflicts often occur across multiple ten-cell units. The official mechanism for disputes of this type is recourse to the local first instance court or Ward Tribunal, depending on the nature of the conflict and the parties involved. Ten-cell leaders, assessors, village heads, and villagers agree, however, that it is common to consult a group of village elders before resorting to either official venue (see above). Because village elders are called upon to participate in so many juridical functions, it is perhaps unsurprising that in many villages, the same elders function as assessors or Ward Tribunal members, ten-cell leaders, and unofficial arbitrators. Even if they do not serve concurrently, those with ten-cell or Ward Tribunal experience are likely to be chosen as assessors, and vice versa. Village elders accordingly have a near monopoly of control over judicial processes in rural areas of Tanzania. In urban areas, perhaps because of greater proximity to a wider range of judicial institutions and the declining importance of custom, recourse to elders is less common, although ten-cell leaders do still provide adjudication. For the seventy-five percent of Tanzanians who live in rural areas, however, courts are often not the first recourse for disputants. Even in the course of issuing recommendations for judicial centralization, Abedi’s 1963 report stressed the importance of non-formal adjudication, noting that the customary practice of arbitration by village elders is an “authentic feature of the customary system” for resolving disputes.\textsuperscript{353} He acknowledged that local people

\textsuperscript{352} Author interview with Augustini Ramadhani, Former Chief Justice of Tanzania and Vice-Chairman for the Commission to Reform the Constitution, Dar es Salaam, March 26, 2013.

\textsuperscript{353} Abedi, 111.
prefer it and make frequent use of it because it is cheap, informal, close to the litigants involved, and it trustworthy.

Many of the judicial reforms enacted during the first years of independence tread a fine balance between centralization and unification on the one hand and decentralization and the preservation of locally distinct forms of law on the other. Most serious crimes and civil cases involving over $6000 (depending on the exchange rate) are handled in a uniform manner involving a single legal code or codes adjudicated in the centralized judicial structure of Tanzania’s first instance and appeals courts. Petty civil cases as well as those concerning some matters of family law begin at the quasi-judicial level of the Ward Tribunal, but are still connected with the central judiciary. Even if these disputes go straight to a first instance court, the rules used to govern them may vary from place to place according to local custom as dictated by local variations on Government Notices 279 and 436 or as explained by assessors. When it comes to more minor matters, state law, until 1995, made provision for locally distinct answers provided by ten-cell leaders that might never make it to court. Given the strong reasons to centralize the judiciary following independence, as well as Nyerere’s stated intention to do so, why did the government never achieve more than partial centralization? Below, it will become clear that Nyerere’s reliance on rural elites, usually former chiefs, in implementing his economic reforms gave the rural elites sufficient relative capacity to protect locally distinct customary law.

In Malawi, the trajectory has been far more halting, and reversed itself several times. A full explication of the case is beyond the scope of a brief comparison with the events in Tanzania as they are outlined up to this point, but even brief reference to the
events taking place immediately south of Tanzania’s border is interesting from a comparative perspective. Where Nyerere sought to bring the structure of customary adjudication under state control by creating local level adjudication, he stripped it of decentralizing tendencies by attempting to replace the vast majority of local laws with a central legal code. In Malawi, no such attempt was made. Malawi’s first post-independence President, Hastings Banda, came to power as leader of an anti-colonial independence movement, in a similar fashion to Julius Nyerere and Kwame Nkrumah of Ghana. Instead of eliminating tribal courts, however, he created a parallel justice system, where state courts and local courts had concurrent power. Instead of abolishing chieftaincies and creating non-tribal institutions to take their place, Banda coopted the colonial system and took control of it. He made chiefs reliant on his patronage, and replaced those who resisted him. Having created a class of dependent traditional authorities, he then granted concessions to them in turn. Rather than negotiating specific areas of the law that might remain under local customary control, or attempting to codify customary law to bring it under the purview of the state, Banda granted state recognition to customary, tribal courts that formed an entirely separate court system. Later attempts to centralize the judiciary were impeded by the very fact that these former Banda loyalists were unwilling to relinquish the power he had given them, and had an easy avenue to coordination with one another through the chiefs’ council that Banda had formed.

355 Lwanda, 192.
Capturing the Rural Elite

With an understanding of legal pluralism in Tanzania in place, it is possible to turn back to the causal argument. In the section covering the colonial era, it was established that levels of support for locally distinct customary law were high enough for it to retain salience in the post-independence era. That precondition being met, however, bargaining between groups and the process of political coalition building is the most proximate cause of the level and type of judicial decentralization. In Tanzania, the first push for centralization came soon after independence, as did the coalition building that tempered its reach. After the initial level of centralization was set in 1962-4, it was tested once in 1970-1 before both sides widely accepted the status quo. Minor attempts to further centralize in the 1990s and 2013 failed, reinforcing the necessity of partial centralization to all parties. The period from 1962-4 receives the most detailed treatment here for its role in establishing the partial centralization that persists, at least on paper, today.

Following independence, Nyerere was elected to the presidency of Tanzania with over 99% of the vote. Equipped with a strong mandate, Nyerere identified economic development and the propagation of a national identity that would eliminate any tendency toward inter-tribal conflict as his two central priorities. In his inaugural address, he outlined his goals for the first ten years of Tanganyika’s independence, putting the greatest emphasis on the fight against hunger, poverty, and disease.357 Ideologically, Nyerere was committed to socialism, but rather than try to translate the ideas of Marx,

Trotsky, and other theorists of collectivism, Nyerere developed a new, context-specific form of socialism that, as Hyden explains, “explicitly stressed the use of local ideas and resources.” In 1967, Nyerere gave a speech to an assembly of TANU representatives that for the first time, fully articulated the political and economic philosophy that he had begun to put into practice in 1962. He labeled his philosophy “ujamaa”, a Kiswahili word meaning “extended family,” which he coined in a 1961 paper titled “Ujamaa—The Basis of African Socialism.” Over time, it became known as a uniquely Tanzanian form of socialism.

The first elements of ujamaa were put into effect in 1962. To achieve needed economic development, Nyerere drew on proposals that the World Bank had drafted during a visit to Tanganyika in 1960, during the transition to independence. The World Bank report suggested “planned and supervised settlement of areas which are at present uninhabited or thinly inhabited” to improve agricultural output. Most of these proposals involved reforms in rural areas where the capacity of rural elites was relatively high. Nyerere acknowledged that the government’s lack of resources would prevent it from being able to subsidize individual family farms. He therefore announced that, following the World Bank’s plans, “for the next few years, Government will be doing all it can to enable the farmers of Tanganyika to come together in village communities,” which he saw as the only way of providing equal access to tractors, schools, hospitals, clean drinking water, and other goods. The resulting plan, fully articulated in 1967, began as a voluntary effort to urge farmers to relocate to under populated areas of the

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358 Hyden 1980, 96.
country and, in more densely populated areas, to persuade families to live more closely together to share agricultural implements and one another’s labor. To fulfill some of the promises TANU made its supporters before independence and to eliminate potential obstacles to the new development agenda, Nyerere adopted two controversial policies within his first year and a half in office: he nationalized all land in Tanganyika, and eliminated the chieftaincy.

In 1962, shortly after assuming the presidency, the Tanganyikan government adopted a socialist land policy in Tanganyika and made the “state the ultimate trustee of all land and rule[d] out individual freeholding.” Nyerere had publicly argued for state control of land during the campaign for independence. In 1958, in a pamphlet written on property rights, he explains that because “we are mere tenants over land that does not actually, belong to us” it is impermissible to “distribute this land to other persons.” Land that had been held in the trust of the community would now transfer to national ownership. Referring to the pre-colonial era, he argues, “In the past, when our population was divided into different tribal groups, the land belonged to the particular tribe living on it. In future, however, our population will be united as one nation, and the land will belong to the nation.” Nyerere understood that ujamaa could not proceed under a system of private ownership. Farmers would not voluntarily move away from land that they owned, which would hinder resettlement schemes, and there was insufficient public land for the creation of communal villages. Although the reforms quickly generated opposition, especially among farmers who lost valuable plots to redistribution or villagization schemes, Nyerere saw nationalization as the first step in the larger process

362 Hyden 1980, 70.
363 Nyerere 1967, 55.
364 Ibid., 57.
of achieving economic development. His preliminary pamphlet on the topic generated widespread support in rural areas, so Nyerere had good reason to believe that the policy would succeed despite opposition from some landholders and rural elites.\footnote{365}{Paul K. Bjerk, \textit{Julius Nyerere and the Establishment of Sovereignty in Tanganyika}. University of Wisconsin—Madison (2008), 240.}

Although they were optimistic that many of their reforms would be popular, Nyerere and his ruling party colleagues had observed that most resistance to colonial policies came from tribal chiefs. Even when chiefs capitulated, dissidents could organize themselves around a rival chief. During the years of transition toward self-rule, most villagers refused to join TANU until their chief had already done so.\footnote{366}{Miller 1966, 120-35.} In light of their strong capacity to organize resistance and their perceived ambivalence about the new ruling party, Nyerere decided to remove the possible threat. In 1962, TANU officials began to request that chiefs voluntarily resign, and those who failed to resign were told that they must do so by the end of the year.\footnote{367}{Maguire, 331.} In 1963, the African Chiefs Ordinance (Repeal) Act abolished the institution of the chieftaincy entirely, and later in the same year, the Chiefs (Abolition of Office: Consequential Provisions) Act made it illegal for former chiefs to seek judicial redress for loss of office.\footnote{368}{This second act was made necessary by the high number of chiefs doing just that. In 1963, Marealle, the former chief of the Chagga, sued for dispossession of office. Marealle was elected by the Chagga Council to be Paramount Chief for life in 1952. After he was removed from office in 1959 because of differences of opinion with the Chagga council, he sued the Kilimanjaro District Council (the elected successors to the Chagga Council) in 1961 for breach of contract. Claiming that he was appointed for life, he demanded payment of his salary and other benefits that came with his former office. The case was heard on appeal by the High Court, but by the time the case reached the appellate level, the government had eliminated the chieftaincy. High Court judge Murphy sided with Marealle’s position and awarded him 919,900,000 Tanzanian shillings in damages for loss of office. If it had been forced to pay, the damages would have bankrupted the Kilimanjaro District Council (Martin 57). The government feared that, if successful, even a small number of these suits would deplete the treasury (Ghai 1976, 65). Accordingly, it supplemented the original act with the consequential provisions to block suits concerning loss of office. For more on the abolition of the chieftaincy, see Kjell J. Havnevik and Aida C. Isinika, \textit{Tanzania in Transition: From Nyerere to Mkapa}. African Books Collective (2010), 24; Bjerk, 243; Wijsen and Tanner, 123.}
To replace the structure of tribal authority, Nyerere and his advisors instituted an elaborate system of overlapping local committees, all of which were connected to the single party then governing Tanzania. At the very most local level, the ten-house cell system organized every village into groupings of ten houses that elected a leader to represent the cell to the local TANU office, manage security, and perform basic judicial functions for its households.\textsuperscript{369} These leaders were accountable to two types of local administration: village and ward committees, which were part of Tanzania’s local government structure, and local TANU party offices and the TANU Youth League, which were under party control.\textsuperscript{370} Some cell leaders were also elected to membership in local government offices.\textsuperscript{371} The shift from rule by chiefs to rule by political party bound citizens directly to the state through the ten-house cell system and created a two-way conduit of information: cell leaders reported local affairs to district party and government officers, and transmitted ideological statements and reform prerogatives to their local constituents.

Another of Nyerere’s reform platforms, national unification, envisioned a wide range of projects to forge a national identity and sense of cooperation. Nyerere’s speeches from the period demonstrate his awareness of the devastating consequences of tribal conflict in neighboring countries such as the Democratic Republic of the Congo. As early as 1955, he explained to the United Nations that one of TANU’s main concerns was “to build up a national consciousness among the African peoples in Tanganyika,” and that to

\textsuperscript{369} Ingle, 215. Note that some of these institutions predated independence, but they did not attain full local power until the abolition of the chieftaincy.

\textsuperscript{370} Miller, 62. In practice, during the one party era this distinction was less important, but following the introduction of multi-party democracy, political control shifted from local TANU offices to the offices of local government.

\textsuperscript{371} Ibid., chapter 2.
do so, it was necessary “to break up this tribal consciousness among the people and to build up a national consciousness.” The judicial centralization project described above formed part of this same effort to combat tribalism. Nyerere believed that creating a single judiciary and, more importantly, unifying customary law would weaken tribal loyalty while still infusing the judicial system with a distinctly African, customary character, which was necessary for the government’s bona fides as protector of African family structure and traditional identity (see below for more on this). Tanganyika was the first African country to attempt to codify and unify customary law. It was the instigator of the international conference on customary law and the state that had progressed the furthest in its thinking on customary law because the President stressed that “a unified code was important for the building of a nation.”

In his inaugural address in 1962, Nyerere announced the creation of a Ministry of National Culture and Youth, whose first task would be to compile the traditions and customs of Tanganyika’s tribes to form a national culture. As part of the project of national transformation, school curriculums across the country were standardized and Kiswahili was introduced as the universal language of instruction, in the hope that it would soon become the lingua franca. Nyerere also prioritized Africanization, the replacement of colonial British personnel with Tanganyikan staff, and by 1966 the process had been completed in two thirds of the lower rungs of the bureaucracy.

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374 Tanner 1966, 105.
375 Ibid.
376 Hyden, 41. The project of introducing Kiswahili as the new national language succeeded. Today, most city dwellers speak it as their first language, and in rural areas most people speak fluent Kiswahili in addition to their local language.
377 Ibid., 52.
Africanization and the creation of a national school system succeeded within the first decade of independence. Although it took longer, Kiswahili did become the national language following its classroom use by generations of Tanzanian schoolchildren.

Taken together, ujamaa and its concurrent centralization and bureaucratization measures constituted an enormously ambitious project to remake Tanzania. Old hierarchical tribal structures and forms of loyalty were dismantled by eliminating the chieftaincy and physically resettling Tanzania’s new citizens into sub-units that could be monitored by the one party system and organized by units of local government. Disputes that would have been taken to the village headman or local chief to resolve were now directed to the 10-house cell leader or the village chairman. Local youth, instead of entering the ceremonial warrior class after attaining majority, joined the TANU youth league. Scott argues that villagization can best be interpreted as a “high modernist” attempt to “reconfigure the rural population into a form that would allow the state to impose its development agenda and, in the process, to control the work and production of the cultivators.”

Nyerere’s speeches point to the nation-building character that he attempted to infuse into much of the reform process including the goals of equality between Tanzanian citizens, preventing class and tribal warfare, and furthering the principles of dignity and self-reliance. But ujamaa, first and foremost, was a program of economic development.

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378 Scott, 241.
379 At the opening of the University of Dar es Salaam College Campus in 1964, Nyerere emphasized “As circumstances change—and are changed by us—so the emphasis we can give to the social, economic, and political freedoms will also change. At present, however, we have to face the fact that in general terms the freedom for all to live a decent life must take priority. Development must be considered first, and other matters examined in relation to it. Our question with regard to every matter—even the issue of individual freedom—must be “How does this affect the progress of our Development Plan?” (Nyerere 1967, 314).
Other post-independence African states used chiefs in their development plans in much the same way that colonial officials had. Mamdani argues that in the many African states that failed to do away with chiefly power (and in some of those that did), the same traditional authorities who came to power through indirect rule continued to govern after independence, perpetuating the colonial structure of rule with African elites replacing colonial administrators. In Malawi, for example, President Banda used chiefs to corral votes, oversee development projects, and preside as judges in special, executive-branch controlled courts that were sometimes used to persecute political opponents. Without chiefs to oversee villagization, agricultural reforms, and other components of ujamaa, Nyerere and TANU required a sufficiently strong coalition to make sure that their reforms not only became law in Parliament, but also were carried out on the ground. This coalition necessarily had to involve rural elites, who had the most influence in the countryside, where most of the reforms would take place. In this particular domain, elite capacity was relatively high compared to that of the state, so the state needed to build a rural-national coalition to implement its reforms.

If the political coalition hypothesis is correct, it should be possible to find several indicators of its presence, even if no direct statements from Nyerere or TANU attest to the tradeoff between customary law and other goals. These indicators include the presence of opposition signals by TANU of willingness to attenuate or alter some sets of policies when confronted with opposition; and, to establish the place of judicial centralization in the larger process of bargaining, evidence that halting judicial centralization was timed to coincide with quelling opposition. Additionally, it should be possible to find evidence that Nyerere and other TANU politicians prioritized other

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380 Mamdani 1996.
policy goals higher than that of judicial centralization, and that they were less willing to compromise concerning these reforms. The evidence is in fact consistent with these expectations.

Within a year of Nyerere’s election, pockets of opposition to TANU had begun to develop in rural areas, including places such as Sukumaland, which had served as TANU’s strongest recruiting ground only years before. TANU’s success at gaining a strong following in the late 1950s was largely predicated on its ability to present an effective critique of the colonial regime’s policies. The most widely hated colonial policies involved changes to traditional methods of agriculture and tax collection. The post-independence policies went even further to transform rural agriculture, and quickly generated dissent. Hyden argues that Nyerere’s commitment to multiracialism and his decision to nationalize all land generated the most dissent, which created widespread opposition movements in 1962 through 1964. Although popular support for Nyerere remained strong, TANU became so unpopular in some regions of Tanganyika that during the District Council of 1963, just a year after Nyerere and TANU’s decisive victory, some of TANU activists who had played a role in the struggle for independence failed to be reelected to office.

The two primary centers for opposition to TANU were two rival political parties: the Tanganyika African National Congress (ANC) and the People’s Democratic Party (PDP). The ANC was founded by Zuberi Mtemvu in 1958 after a disagreement over TANU’s willingness to participate in the pre-independence elections of 1958. Its platform was, according to Hyden, traditionalist. Although it promoted some arguably

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381 Hyden 1980, 70. See also Maguire, 313.
382 Hyden 1968, 131; Maguire, 338-39.
leftist ideas such as a refusal to cooperate with multiracialism (in post-independence Tanganyika, multiracialism referred to protections for European and Asian land rights in Tanganyika), it drew most of its support from chiefs and other local elites who opposed the abolition of the chieftaincy. In Sukumaland, the local ANC leader explained that the difference between ANC and TANU was that ANC favored freedom for Africans only, “whereas TANU was a multi-racial [read: European-favoring] party,” and that the ANC “wished chiefs to retain their positions” after independence. Many ANC leaders were chiefs or sub-chiefs who had lost their position under British rule, and hoped to regain it after independence. ANC also opposed chiefs who favored TANU or who lent their voice to liberal projects such as inter-tribal social integration or land nationalization.

The People’s Democratic Party was founded in 1962 by a former TANU parliamentarian, C. K. Tumbo, who believed that TANU had not been radical enough in its approach. The PDP gained a strong following among the Sukuma, particularly after David Kidaha Makwaia, a prominent former chief, joined its ranks and began to recruit followers. Maguire argues “That the government was gravely concerned about the prospects for the organization and articulation of opposition sentiments in Sukumaland…could not have been made more clear than by the stern steps of deportation taken against them.” In other regions of Tanganyika, PDP failed to gain a local

384 Maguire, 340.
385 Ibid., 345. In one town where Maguire surveyed local opposition, two of the primary leaders were Chenge Mwanilanga and Longa Majebere, both former chiefs dismissed by British administrators for “unsatisfactory conduct.”
386 Hyden 1968, 132.
387 Maguire, 352-3.
388 Ibid.
389 Maguire, 355.
following, but other, non-party-affiliated opposition movements proliferated after independence. In Buhaya, a consortium of teachers, many of them already elected to the District Council on the TANU platform, decided to run as independents during the 1963 District Council elections.\textsuperscript{390} They won half of the local seats, but were ousted when the Minister of the Interior dissolved the Council and appointed local TANU supporters in place of the independence candidates. During the same 1963 District Council Elections, independents also won a quarter of the seats in Chaggaland until they were similarly dismissed.\textsuperscript{391} Hyden argues that the success of independent candidates in 1963 demonstrates that “some of the locally important groups had not been fully assimilated into the ranks of the party.”\textsuperscript{392}

In order for controversial reforms to move forward, TANU needed local elites—usually, former chiefs and traditional authorities—to lend them their support because, in most areas of Tanganyika, chiefly power retained salience even after the abolition of the chieftaincy. Surveys at the time show that few people openly opposed abolition, but few people supported it either.\textsuperscript{393} Well over 80\% of survey respondents among the Haya tribe agreed that one-party rule was necessary for good governance, and over 90\% agree that eliminating the patronage system surrounding the chieftaincy was a good thing.\textsuperscript{394} At the same time, fewer than 5\% listed the abolition of traditional authorities as having had a positive influence in their life.\textsuperscript{395} In 1965, surveys among the Nyamwezi determined that chiefs still played an important role in rural life.\textsuperscript{396} 80\% of local leaders (defined as

\textsuperscript{390} Hyden 1968, 132.  
\textsuperscript{391} Ibid., 135.  
\textsuperscript{392} Ibid., 135.  
\textsuperscript{393} Ibid., chapter 9.  
\textsuperscript{394} Ibid., 161-165.  
\textsuperscript{395} Ibid., 162.  
\textsuperscript{396} Miller 1966, part III.
members of local government and TANU) still believed that “a man should always obey his traditional chief,” and 98.5% of non-leaders believed the same.\textsuperscript{397} Hyden finds that in the Buhaya tribal region, former chiefs “remained influential among those who still believed in the validity of the traditional Haya myth.”\textsuperscript{398} Support for ten-house cell leaders was high, but support for TANU and local government officials was mixed; of those who supported either, few knew the function of various village officers.\textsuperscript{399} When villagers supported TANU officials, it was often for reasons other than political ideology, such as a personal or family connection within the village. Also, many former chiefs and sub chiefs became party officials. Maguire finds that in Sukumaland, half to two thirds of Divisional and Assistant Divisional Executive Officers were drawn from former traditional authorities.\textsuperscript{400} According to Miller, of 108 chiefs and village headmen in power when the chieftaincy was eliminated, 93 later obtained a position in the local government or TANU regional office.\textsuperscript{401} In other regions where chiefs were less successful, 25-35% were still able to find influential government jobs.\textsuperscript{402} Most villagers continued to feel more connected to fellow villagers and traditional institutions than to the new party structure, which made it difficult for TANU to achieve compliance with some of its new laws, particularly those involving agricultural reform and villagization, which aimed to physically resettle large numbers of Tanzanians.

Nyerere’s speeches from before independence and during the first few years of his presidency reflect a keen understanding of the need for popular support of his reforms.

\begin{footnotes}
\item[397] Ibid., 278.
\item[398] Hyden 1968, 133.
\item[399] Many ten-cell leaders were former traditional authorities. See Miller 1966, 280-290.
\item[400] Maguire, 334.
\item[401] Miller 1968, 191.
\item[402] Ibid.
\end{footnotes}
He argued, “the peace resulting from imposed law is short-lived. The moment a man feels himself strong enough he tries to throw off this law and substitute another more to his liking. Or he may even break out in sheer destructive desperation if the law appears to him to be threatening his life or that of his family…”\(^{403}\) An early presidential commission established to determine the long-term viability of one party rule noted that its recommendations must be tempered with consideration to the President’s strong feeling that “Democratic government cannot be practised [sic] nor individual rights protected in a society torn by internal disorder. For a young nation, public order is precious but it is also fragile.”\(^{404}\) In 1963, Nyerere noted, with respect to his economic reforms, “All schemes must be drawn up in relation to the people who are most directly concerned in them, and the amount of cultural change required should not be greater than they can accommodate.”\(^{405}\)

The later failure of TANU’s villagization project illustrates that the government was not always capable of legislating within the bounds of what ordinary Tanzanians might accept, but certainly to begin with, there is evidence that TANU was aware of growing opposition and worked to find ways to make their platform more palatable. Nyerere’s primary means of lobbying for his reforms, both before and after independence, was to couch his ideas in traditionalist terms that presented them as a familiar and authentically African form of power relations that predated the despised colonial laws. Tradition lent legitimacy because it evoked a now long-distant but seemingly better time before the introduction of taxes, cattle dipping, etc.

\(^{403}\) Nyerere 1967, 268.
\(^{405}\) Nyerere 1967, 237.
In 1958, in a pamphlet on property relations, he wrote “By his traditions, the African knows that the land belongs to his tribe and that he has traditional rights over that land.” The pamphlet, and others like it, extend this idea to make the case for promoting the nationalization of land. In a paper published in 1961, Nyerere makes the case for socialism by analogizing nation and tribe; just as individuals were rich or poor “according to whether the whole tribe was rich or poor,” the material well being of individual citizens depends on the nation’s prosperity. In 1963, in a pamphlet prepared to defend the idea of one-party rule, Nyerere contends that Africa was democratic before the advent of colonialism because elders gathered under a tree to discuss village affairs and decide matters together, and that TANU fulfills the same role at a larger scale via representatives. Crucially, the basis of ujamaa was the traditional African family. In these disparate policy areas, as well as with agricultural reform, education, villagization, and other matters, Nyerere reaches for tribe, patriarchal family organization, and the authority of village elders to explain and justify his reforms. In places, he even cites customary law.

Mamdani identifies the post-independence reference to tradition as a continent-wide strategy adopted by new rulers to preserve or reinforce colonial barriers between the educated, urban ruling elite and the uneducated rural peasant class to circumscribe privilege. The seeming contradiction between frequent reference to the virtues of traditional African values and anti-tradition policies such as eliminating the chieftaincy and moving to restrict customary law arguably lend support to Mamdani’s contention. It

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406 Ibid., 57.
407 Ibid., 166-8.
408 Ibid., 194-7.
409 See, for example, the statement, cited above: “If, therefore, according to traditional customary law, we are mere tenants over land that does not actually belong to us” (Ibid., 54-55).
misses, however, both the difficulty and necessity of building a coalition of local elites who might support TANU’s post-independence program, particularly since its continuation of taxes and agricultural reforms was bound to, and did, generate dissent. Having eliminated the chieftaincy and put into place a plan to centralize customary law, Nyerere was, as demonstrated, at risk of losing support from rural elites who had succeeded in retaining influence at the local level through TANU party and local government positions. As argued above, these elites, having helped to craft customary law, and relying on it for much of their power, would not support policies that weakened it. His framing of reform issues in traditional terms could not be credible if his new laws enfeebled or eradicated the institutions on which he claimed to base ujamaa.

Having disbanded the chieftaincy, both as a means of launching the nation-building project that must begin with the erosion of tribal identity and eliminating possible rallying points of opposition, Nyerere’s proposals to substitute local customary law with a unified code threatened the main sources of revenue and influence that empowered former chiefs, sub chiefs, and village heads even without their former titles. Because ordinary Tanzanians continued to express allegiance to former chiefs, the support of those chiefs was crucial to effecting reform. In fact, when political participation declined after independence, the party asked village elders to enlist new members because “it was hoped that these elders would be more acceptable to the ordinary citizen than the…Youth League contingents,” who were restricted to activities overseen by the elders. Their outsize political influence gave their preferences greater weight at the national level.

410 Maguire, 371.
Lineage heads and village elders traditionally held the right to the fruits of labor from their daughter-in-laws’ children and the power to allocate land within the family and to negotiate marriages. They accordingly resisted those elements of the new economic and social order that diminished their influence. Compulsory schooling took away from time that children spent laboring for village elders.\footnote{Rwezura 1982, 179-87.} Resettlement jeopardized their ability to allocate land and proposed reforms to family law threatened one of their most valuable resources: the wealth of cattle paid to them at their daughters’ marriage. Lineage heads and elders consequently found elaborate ways of bringing social pressure and shame to bear on their children to ensure compliance with the old order despite government reforms.\footnote{Ibid., see in particular chapters 5 and 6.} Any woman who complained to the courts was usually expelled from her home and kept away from her children, and she would be considered socially dangerous.\footnote{Ibid., 186. The courts were inconsistent in their response to often the diametrically opposed pulls of social opinion and statute law. For example, in the 1969 case of Robi Mangure v. Marwa Fiona (north Mara district civil revision no. 8/67), a son sued his father for refusing to make a bride wealth payment in his marriage to a woman he chose without his family’s consent. His father refused on the grounds of an ongoing quarrel with the woman's father, and stated that he would pay the bride wealth to any other family in the district except for the one specified. The primary court ruled that there is a customary obligation for fathers to pay bride wealth in the first marriage, and it gave an order to seize 40 of his cattle. Three years later, on appeal, the High Court (HCD 1969) overturned the previous decision because “it is undisputed that according to Kuria customary law the respondent had a right to claim bride price from his wealthy father and in the remote past, a reluctant father could have his cattle seized by clan elders and used for the son's bride price...but I am of the view that this obligation though very strongly felt by Kuria tribesmen, cannot be enforced by the courts. To do so would be dangerously encroaching on the individual rights to property.” Both cases are cited in Rwezura, 87-88. In this instance, the primary court, which sits in the village itself and is more subject to social pressure, used the constitutional right to marry to uphold local customary law, whereas the high court used the constitutional protection of property rights to weaken the hold of local tribal law and elders’ prerogatives.} Lwoga notes that in the village of Bigwa, when peasants were ordered to relocate as part of the villagization scheme, village elders refused to go and initiated a long-running dispute with higher authorities in Dar es Salaam, which they
won.\textsuperscript{414} Rwezaura documents village elites orchestrating thefts from ujamaa villages to protest their existence.\textsuperscript{415}

Although nation-building and other reforms were important to Nyerere, there is no question that economic development came first and foremost, and that he was willing to forego success elsewhere to achieve development. In August of 1964, Nyerere contended “As circumstances change—and are changed by us—so the emphasis we can give to the social, economic, and political freedoms will also change. At present, however, we have to face the fact that in general terms the freedom for all to live a decent life must take priority. Development must be considered first, and other matters examined in relation to it. Our question with regard to every matter—even the issue of individual freedom—must be “How does this affect the progress of our Development Plan?”\textsuperscript{416}

In 1965, he emphasized that economic development relied, above all, on agriculture, in the following terms: “Agricultural progress is indeed the basis of Tanzanian development—and thus of a better standard of living for the people of Tanzania.”\textsuperscript{417} If former chiefs and village heads actively opposed agricultural development policies, they could (and as demonstrated, sometimes did) have a deleterious effect on creating the needed agricultural surpluses. As Hyden argues “TANU was anxious not to take unpopular measures...Government policies slipped as a result of peasant indifference to their demands.”\textsuperscript{418} Nyerere’s stated priorities and his willingness to compromise are

\textsuperscript{414} Lwoga in Abrahams, 65.  
\textsuperscript{415} Rwezaura 1982, 280.  
\textsuperscript{416} Nyerere 1967 314.  
\textsuperscript{417} Ibid., 104.  
\textsuperscript{418} Hyden 1980, 76.
strong indicators that his reversal on judicial centralization was due to a need to win rural support for his reforms.

Furthermore, there was a financial cost to arresting the course of judicial centralization, which implies that it would only have been seriously considered if there were benefits to outweigh the cost. The creation of a unified customary law code was completed in 1963 for Tanzania’s patriarchal tribes, which included the vast majority of the country, and codification of matrilineal law was not anticipated in the short term. The capital required to interview locals about local customary law had already been spent. Also, allowing districts to submit modifications to the code, or to opt out entirely, added administrative expenses. Additionally, magistrates had already been posted to most rural courts, and more were in training. Adding assessors to primary courts for the purpose of advising on local customary law increased the judicial budget and tripled the number of individuals required in any given court session. The gains that accrued from halting judicial centralization must have outweighed the added capital outlay, particularly given Nyerere’s stated preference for the adoption of a uniform customary code. Given that there were no economic or ideological motivations for arresting the course of centralization, political tradeoffs are the most likely reason for it.

No records exist to document negotiations between rural elites and TANU officials, nor are there transcripts of parliamentary sessions or other documentary evidence detailing TANU’s decision to abandon judicial centralization to ward off opposition. However, TANU’s demonstrated need for the support of village elders in implementing policy, especially given the abolition of the chieftaincy; Nyerere’s demonstrated ability to prioritize goals and to decelerate or halt unpopular measures; the
strong preference of rural elites for locally distinct customary law; and the lack of alternate reasons for abandoning the carefully planned process of centralization create the strong inference that partial centralization was the result of political compromise. The timing of the reforms points to this conclusion as well. The abandonment of a unified customary law did not entirely forestall opposition in Tanzania, but it coincided with the end of opposition based on the idea of restoring the positions of former chiefs and the participation of chiefs in opposition parties. Maguire argues that the inability of rival parties to rally the support of greater numbers of rural supporters presaged their demise and the nearly universal support for the transformation to a one party state. The transition fundamentally changed the nature of opposition—challenges would now come to particular policies, such as villagization, rather than to Nyerere’s or TANU’s rule. Widespread opposition to TANU policies did unfold in the second half of the 60s, particularly after Nyerere announced widespread villagization in the 1967 Arusha Declaration, in which he launched the comprehensive development plan that he called ujamaa, drawing on a term he had used earlier to describe African socialism. Encouraging farmers to live in close-knit settlements where they could share goods and labor had been party policy since independence, but villagization took the idea of

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419 Maguire, 356.
420 It would be remiss to neglect the 1964 Tanganyika Rifles Mutiny in discussing opposition politics in Tanganyika and Tanzania. On January 19, 1964, the First Battalion of the Tanganyika Rifles deposed their officers and declared a mutiny against the new government. The main group fortified themselves within the strategically important Colito Barracks while other groups took over the State House and various other government and media buildings. On January 20, the Tabora division of the Rifles joined the mutiny. Nyerere asked for British help to quell the uprising, which they did on January 25. The mutiny was a noteworthy event because it revealed how “vulnerable the new independent government could be” (Maguire 359), especially since it required British troops to subdue the mutineers, but the event was of limited political significance. The mutinous troops demanded better pay and conditions within the army, but they did not make any political demands, nor did they have the backing of parties outside the army. The event is thus treated as unrelated to broader opposition politics and movements. For more on the mutiny, see Tanzania People’s Defense Forces 1993; Luanda and Mwanjabala 1998; Parsons 2003.
421 The full text of the speech can be found in Nyerere 1968, 231-251.
communal living much further. Villagization schemes moved farmers from their farmland into villages, where they were governed by the 10-house cell system. Villagization also collectivized labor; the new villagers were expected to farm surrounding land collectively, sharing profits equally between households. Nyerere hoped that the creation of cooperative villages would facilitate the introduction of new agricultural methods and projects, which were planned by agricultural experts in the central government.

The resulting movement of people was, according to Hyden, “the largest resettlement effort in the history of Africa.” For communities that resettled voluntarily, Nyerere promised wells, piped water, schools, and other development projects. The policy was made compulsory in 1973, but even then, compliance was not universal. Coulson demonstrates the many ways in which farmers resisted state sponsored agriculture programs from 1946 through 1976 by sabotaging crop production, machinery, and refusing to move. Once the new villages had been established, Walsh observes, “the village government was only as effective as local interests would allow.” Farmers often fled their new village. In Seeing Like a State, Scott argues that even Nyerere was surprised by the brutality that was required to forcibly move farmers off their land. Nyerere chose to make villagization optional to begin with because, as Maguire argues,

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422 For a plan of an ideal ujamaa village, see Scott 1998, 243.
423 Scott, 239.
424 Hyden, 130.
425 Scott, 236.
427 Walsh in Abrahams, 164.
428 Scott, 236.
he had learned that “if compulsion and resistance were not to feed on each other,” changes were necessary that would reduce government coercion.\textsuperscript{429}

Accordingly, Nyerere went to great lengths to persuade his citizens that villagization brought tangible benefits. To convince the people of the Dodoma Region to move into ujamaa villages in 1970, Nyerere spent a “long time” living in an early ujamaa village, Chamwino, to demonstrate its benefits, and afterward toured other villages to urge farmers to relocate.\textsuperscript{430} As with his efforts to eliminate opposition to agricultural reforms in the early 1960s, Nyerere again moved to further restrict the lingering influence of traditional authority, to further enmesh former chiefs into the party structure, and to maintain a balance between standardizing legal rules and giving local customs legal stature, this time with the regulation of marriage and divorce. With the African Chiefs Act of 1969, the Tanzanian Government eliminated the last official remnants of chiefly power by barring former chiefs from exercising any function under customary law or any other form of authority. The Act was designed to eliminate the vestiges of chiefs’ authority gleaned from citizens’ unofficial recourse to former chiefs as a source of dispute resolution.\textsuperscript{431} At the same time, the government’s passage of Government Acts 219 and 219A of 1969, which established Ward Tribunals, paved the way for chiefs to continue to exercise power, but on behalf of the Tanzanian government and TANU. Miller finds that local TANU officials often approached former chiefs to ask their help in mobilizing local support, particularly in increasing agricultural production and other “issues which required mobilization for an unpopular cause, or one requiring a great deal

\textsuperscript{429} Maguire, 360.
\textsuperscript{430} Hyden 1980 102.
\textsuperscript{431} See Stone Sweet 2000, chapter 1 for more on the power-generating logic of the triad, wherein the role of adjudication confers political power to the adjudicator.
of individual labor without visible rewards. In this particular area, the state’s capacity was lower than that of local elites. Finally, the Law of Marriage Act, described above, which was originally intended to standardize marriage and divorce law, was written in such a way as to allow local variations to persist.

The same sequence of events involving controversial government policies coupled with the elimination of rival sources of power or their cooptation to serve government purposes, further combined with careful avoidance of curtailing the powers accorded rural elites through customary law, played out in both 1962-64 and 1969-71. Its duplication suggests that judicial centralization was a bargaining piece in the government’s attempt to win loyalty from rural elites. The fierce opposition to attempts to further centralize law in the 1990s and 2013 suggests that the accommodations granted concerning locally distinct customary law are still strongly protected by select communities. An effort in the 1990s to create a uniform law of inheritance along the lines of the Law of Marriage Act (1971) was so controversial that the Law Reform Commission’s report on the law was immediately made confidential, and it remains impossible to obtain a copy. Debate over removing the binding vote of assessors in magistrate courts brought Tanzania’s parliament to a near shutdown during the spring of 2013, and the government was forced to withdraw its proposal in the face of massive resistance, particularly from parliamentarians from rural and strongly Muslim districts.

432 Miller 1966, 264.
433 That Nyerere was unable to persuade most farmers to abandon their plots and resettle does not detract from his efforts to avoid the use of coercion and force. Failure to persuade should not be taken as an absence of efforts to do so.
Because rural elites, whose support was necessary for effecting reform, prioritized the retention of locally distinct customary law, Nyerere slowed the process of judicial centralization to prevent their opposition to his policies. The resulting partial centralization has become strongly institutionalized. As will be seen in the next section, however, change is beginning to favor further centralization.

**Fifty Years Later: The Slow Erosion of Customary Law**

In 2013, fifty years after the Parliament session that gave rise to the Magistrates Courts Act and Government Notices 279 and 436, concerning the unification of customary law, much of Nyerere’s vision of judicial centralization had come to pass. These laws are still in effect, but the sections that allow for local variation in customary law are rarely invoked, and it is common for magistrates to ignore customary law entirely, except through the advice of the court assessors. Today, Tanzania’s judicial system is mostly centralized, and although some legal matters are resolved in venues other than state courts, no secondary system, recognized or not, vies for litigants or settles large disputes in a routinized manner. For the most part, the adjudication that takes place elsewhere than in primary courts happens within local government structures such as the ten-cell system.

Centralization was achieved not through changes of policy in the permissibility of using local customary law, but through the lengthy process of nation building that Nyerere put into place.\(^\text{436}\) Three elements of his program, in particular, caused important changes. The first is the adoption of Swahili as a national language. Although local

\(^{436}\) For excellent analysis on the effects of nation building in Tanzania versus Kenya, see Miguel 2004.
languages still thrive, all Tanzanians speak Swahili and can thus travel from one region to another without encountering language barriers, which has had a strong unifying effect. The language used in courts is Swahili, so there is no longer concern that people might not understand an esoteric court language, as is still the case in some states that have preserved English in the judiciary (such as Malawi). Second, the introduction of mandatory education exposed Tanzanians to a curriculum that teaches national history at the expense of local tribal history. As a result, many young Tanzanians know the names of important independence-era politicians, but few are able to say for sure who used to be a chief in the tribe, or which of their schoolmates might once have been chief or sub chief.

Perhaps most vitally, Nyerere brought about the vast movement of people across territory, both through villagization, but also through smaller, but more lasting, mechanism of rotating government officials through posts and sending children to different districts for different phases of their schooling. Although this last practice is beginning to weaken, official policy for most of the 1970s-90s was for students who qualified for anything beyond primary education to pursue their studies far from home, housed in government dormitories, and for secondary and tertiary education, they would move again. Many people met spouses or found employment far away from where they grew up, with the result of a large-scale intermixing of languages and cultures. This process is credited with increasing diversity across Tanzania and weakening tribal

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437 The 1974 Musoma Declaration succeeded in centralizing education and expanding it to include the vast majority of Tanzanian children. See Musoma Declaration of 1974; Chonjo, 36.
439 Ibid.
loyalty. Urbanization has also speeded this process. Magistrates were also rotated through posts fairly frequently, with the result that they never gained proficiency in the local form of customary law, and came to rely more on the unified version published in the Government Notices. As the cases that came to courts more commonly involved a mixture of tribal backgrounds and magistrates knew less of local custom, the use of locally distinct customary law declined.

Although magistrates-in-training do study customary law, they spend the bulk of their time on Tanzania’s civil and criminal law codes. Even at the primary court level, where customary law most often makes an appearance, magistrates are unable to say what the codified customary law rule is for a particular question, whereas they are more likely to know the relevant portion of the civil law code without needing to look it up. All of this means that custom is used less frequently in the courts as time progresses, and when “custom” is used, it takes the form more of common sense than of codified law. For example, in Iringa Mjini primary court, the magistrate issued a judgment in a case involving a local woman and the driver of one of the private shared vans that provides most transport in the area. The woman had paid a single fare for herself and her toddler, who she held in her lap, but when she grew tired she placed the child on the seat next to her. The driver demanded extra payment for the child, the woman refused, and so the man removed the child from the van and then locked the woman and the other passengers inside the van until she paid. She began to hit him, and a fight resulted in which the driver was slightly injured. The driver was the complainant in the case, wanting compensation.

for the assault. The magistrate acknowledged that assault had taken place but, with the consent of the assessors, advised the complainant that separating a toddler from his mother was unpardonable, and that the result of doing so was foreseeable. He accordingly dismissed the case on the grounds of lack of evidence, which he describes as a common means of dismissing cases where achieving any real justice would either be impossible based on the original suit, or so time-consuming as to not be worth it.\footnote{441 Interview with Iringa Mjini Magistrate, March 14, 2013.}

Locally distinct custom, that linked originally to the tribe, mostly survives through the position of court assessor. Assessors base their recommendations mostly on local customary law or, sometimes, on the practicalities of the case or their knowledge of the litigants. They are given a minimal stipend, and many of them are quite old, so there have been problems with absenteeism from court. Because the court cannot hear a case in the absence of either assessor, the result can be massive delays and backlogs of cases.\footnote{442 In Kinondoni Court, on the morning of February 28, 2013, 17 cases were postponed due to the absence of an assessor. Several of these cases were postponed for the second or third time. (Court observation session, Kinondoni Court, Dar es Salaam, February 28, 2013).}

Many magistrates, frustrated with the assessors’ lack of legal education, fail to consult the assessors entirely, or neglect to inform them that their vote is binding.\footnote{443 Author interview with Helen, assessor, Mtae, Lushoto District, February 23, 2013; Author interview with Ilvin Mugeta, Resident Magistrate, Kisutu Court, Dar es Salaam, February 7, 2013.} Accordingly, the Attorney General’s office has introduced a bill to eliminate the position of court assessor entirely, which most magistrates support.\footnote{444 Interview with Magistrate, Mazombe Primary Court, March 20, 2013, Mazombe; Interview with Resident Magistrate in Charge, Iringa RM Court, March 10, 2013, Iringa; Interview with primary court magistrate, Kimande Primary Court, March 15, 2013, Rift Valley. In Mjini Court in Iringa, during a roundtable session with several magistrates, assessors, and magistrates-in-training, two of the magistrates argued that assessors are useful for generating popular trust in the court system, while a magistrate-in-training claimed that in his last internship position, the magistrate had threatened to fire the assessors if they ventured an opinion (Roundtable Interview, Iringa Mjini Court, March 14, 2013, Iringa.) However, several MPs from predominately Muslim and rural areas have blocked a second reading of the bill,
threatening to shut Parliament down if the bill progresses to a second reading. For now, the official level of centralization continues to be protected by the same coalition as when it was originally established.

Outside of the court system, customary law continues to thrive, but in a modified sense. The Ward Tribunals are now mostly used as the first step for adjudicating land disputes, with appeals possible at the High Court level, and the Ward Tribunals do use custom. Likewise, the ten-cell system continues to thrive, and most disputes that eventually wind up in primary courts start at the ten-cell level, where elders use custom to decide the questions brought to them. In both Ward Tribunals and ten-cell adjudication sessions, custom has changed, and now mostly refers to a participant-driven process that uses few set rules and relies much more heavily on the values and interests of the parties involved. Compensation is regularly used, and everyone is given a turn to speak without formal rules of evidence or procedure. In many ways, customary law as practiced today more closely resembles the descriptions of customary law found in books on pre-colonial law, as opposed to the codified and hierarchical systems established by the British. For example, in Lushoto district, the practice of formal bride wealth payments has nearly disappeared, and it is now more common for the groom’s family to give gifts such as blankets, cookware, money, or chickens to the parents and uncle of the bride, who would once have been the recipients of bride wealth payments.\textsuperscript{445} The one major exception to this is in land disputes and inheritance, where it is quite common for elder male relatives to use local custom to dispossess widows, particularly in patriarchal areas.\textsuperscript{446} Although

\textsuperscript{445} Interview with Bahati, Tour Guide, Friends of the Usambaras, February 24, 2013, Lushoto.

\textsuperscript{446} Maira 2008 25-27; interview with Resident Magistrate in Charge, Iringa RM Court, March 10, 2013
disputes are sometimes settled outside of the formal court system and the party system, most cases of a more than trivial nature are soon brought to one or the other. A focus group meeting conducted in a court in Iringa, a small city in the south of Tanzania, illustrates the general attitudes toward the provision of justice. The magistrate had just issued a judgment in the case concerning a local woman and driver described above, and the magistrates, assessors, and magistrates-in-training gathered to discuss the case, the ruling, and other interesting cases of the day. Several times, the question of the place of customary law in primary courts came up. At one point, Andrew, the magistrate who had issued the ruling, asked if it would be better to simply eliminate customary law entirely. The resulting conversation ensued:

Male assessor 1: It is better for people to stick to customs because every place in Tanzania is different. It is good for them to follow their customs, because to adopt other customs makes people live not according to their specified place in life.

Magistrate (Mbeya): Due to developments and technology, it is better to eliminate customary law because some of it is discriminatory, and it is bad for people.

Magistrate (Mjini): I prefer that customary law continue to exist but in a form that is in accordance with the state law because if you have a custom that is contrary to the law, it must, by definition, be bad or discriminatory, for example female mutilation. Customs should continue through law because it makes people get along with one another better in the village and makes them continue to have good relations with the government.

Female assessor: Customs prevail to prevent ethics from being destroyed.

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447 Interview with Village Chairman of Ilembula, March 12, 2013, Mazombe. According to the Ethics Commissioner for the Tanzanian Government, “Slowly, people came to realize that if they wanted a decision enforced it was better to come to the government courts than the ward tribunal, so there was a slow shift of cases away from the local ward tribunals towards the state courts” (Interview with Salome Kaganda, Ethics Commissioner, Vice President’s Offices, March 27, 2013, Dar es Salaam).
Male magistrate-in-training 1: It is better to leave custom in place because it helps kids learn good behavior, but you have to adhere only to that customs that lead to a better society.

Magistrate (Mbeya): But what is really the difference between customs and norms and laws?

Magistrate (Mjini): Where does law come from? It must come from norms, and there is a fine line between customs and norms.

Magistrate (Mbeya): But doesn’t all law in Tanzania come from Europe?

Magistrate (Mjini): Some of it does, but norms are what creates laws, and how life is lived from day to day creates norms, so law comes from daily life. At least, it should. In law school we were taught that customary law is made up of norms that are so generally applicable that they can be enforced because they are expected.

Male assessor 1: I remember a case from my village where the elders of the village ruled that a man should be punished by caning. The circumstances were that the man had refused to attend local funerals when his neighbors died. Later, someone in his family died, and all of the other villagers attended the funeral to condole with him. At the same time, they asked him if he had been sick at the other funerals, and, when he said no, the elders voted to punish him by caning him in front of the village for breaking the law.

Magistrate (Mbeya): These elders were not in a position to punish this man. This is horrible, the man was not accused and he was not brought to court. They cannot just act like a court, they should go to jail for assault!

Magistrate (Mjini): Yes, but it is all very complicated, because for the villagers, they were enforcing the law. What would they have said in court?

This conversation reflects a wider debate across Tanzania about the place of custom in law. In general, there is widespread support for the preservation of custom as a valued piece of African and Tanzanian identity, and as a necessary means of instilling values in young people and ensuring harmony within communities. However, there is an increasing

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448 Funerals are an important social occasion when the village gathers to condole and offer food and money to the family of the deceased. In patrilineal areas, the family of the deceased usually butchers a cow to feed funeral attendees.
discomfort with custom as a judicial matter, particularly as women’s rights groups and international organizations bring to light the systematic use of customary law to impoverish rural women and children.\footnote{Interview with Victoria Mandari, Lawyer, January 24, 2013, Mikocheni, Dar es Salaam; Interview with Jovin Sanga, Publicity Director, Tanzania Women Lawyers Association (TAWLA), January 29, 2013, Ilala, Dar es Salaam. TAWLA and the Directorate of Local Courts both issue radio broadcasts to inform Tanzanians of their rights and to warn them of possible abuses that are preventable by bringing legal matters to primary courts rather than settling them at home.}

The role of custom in Tanzania is further complicated by the growth of the Muslim community on the mainland. Tanzanian law does not recognize Islamic religious law (\textit{sharia}) other than as part of local customary law, with the major exception of the island of Zanzibar, which joined then-Tanganyika to form Tanzania using a federal-style arrangement that permitted Zanzibar to leave Islamic law as its primary legal system. Because there is no codified version of \textit{sharia}, at least not in the Tanzanian judicial system, magistrates have no way of applying customary law when cases of Muslim family law are brought to them.\footnote{For more on Islamic law in mainland Tanzania, see Majamba 2007.} Accordingly, many magistrates report that Muslims in their communities tend to go to religious officials for questions of family law.\footnote{Interview with retired teacher, Sungea village, February 22, 2013, Western Usambara Mountains; Interview with magistrate, Kimande Primary Court, March 15, 2013, Rift Valley.} There is growing pressure, particularly among the Muslim community of Dar es Salaam, for the state to create an official means of litigating \textit{sharia} cases in primary courts, although there is also resistance to this idea, particularly among those who hope to weaken the role of customary law overall.\footnote{Author interview with Attorney General Francis Werema, Dar es Salaam, March 25, 2013. Interview with Professor Hamudi Majamba, University of Dar es Salaam School of Law, January 31, 2013, Dar es Salaam.}

There is a great deal of reform underway in the Tanzanian judiciary aimed to remedy problems with the existing system. Currently, only a limited number of Law
Reports are printed, so most lower courts are left without a record of High Court and Court of Appeals cases whose precedent should inform their interpretation of the law.\textsuperscript{453} The Directorate of Local Courts is trying to find a better system, perhaps electronic, to provide better access to the Reports.\textsuperscript{454} The project of codifying matrilineal customary law, on hold since the 1960s, has now been restarted, and there is hope that it will reach completion in the next calendar year.\textsuperscript{455} This time, the Tanzania Women Lawyers Association and other rights groups are advising the process to make sure that discriminatory processes such as unequal inheritance practices are removed. This will have the effect of altering local law, but participants in the project are unconcerned. The Tanzanian constitution is also being examined for the purpose of reform. The Constitutional Reform Commission, whose members include former high court judges, law professors and deans, and other government officials, is tasked with updating Tanzania’s outdated constitution—or, if the task of reconciling old and new becomes too cumbersome, writing whole sections of it anew. Perhaps necessarily, given the composition of the Commission, the judiciary is under intense scrutiny, particularly with regard to the appointment process for judges and the necessity of making sure that all laws currently on the books conform to human rights standards.\textsuperscript{456}


\textsuperscript{454} Interview with Warsha Sylvester Ng’humbo, Assistant Director of Primary Courts, April 9, 2013, Court of Appeals, Dar es Salaam.

\textsuperscript{455} Interview with the Secretary General Law of the Tanzania Law Reform Commission, April 8, 2013, Dar es Salaam.

\textsuperscript{456} Interview with Augustini Ramadhani, Former Chief Justice of Tanzania, Vice-Chairman, Commission on Constitutional Reform, March 26, 2013, Dar es Salaam; Interview with Sendongo Mvungi, former Dean of the University of Dar es Salaam, Commissioner, Commission on Constitutional Reform, February 6, 2013, Dar es Salaam.
Further centralization, the majority of commissioners agree, is inevitable. Not, however, because Tanzania is too judicially decentralized. On the contrary, there is a consensus that Tanzania’s judiciary is more centralized than the laws reflect, and it is now necessary to bring the written laws into line with actual practice. The Ethics Commissioner of Tanzania and the Attorney General both argue that it will be necessary to slowly curb some of the remaining customary practices that violate human rights, but both agree that the best way to do so is to improve education about women’s rights and human rights, and increase the efficiency of the state courts so that they continue to become more appealing than other, less easy to regulate venues of arbitration. They do not intend to promulgate legislation proscribing the problematic practices. In this regard, judicial centralization (and court reform, in general) continues very much along the lines initially established by Nyerere. After all, the Ethics Commissioner pointed out, in an echo of Nyerere, “Laws follow custom. You can’t impose strange laws, law only works if they are approximately congruent with what people actually practice.” What began as a necessary policy to secure elite rural support for other reforms has seemingly become an ethic of reform in and of itself.

Conclusion

Tanzania’s trajectory of judicial decentralization is long and complicated, but ultimately it is one of the most interesting case studies. Before the colonial era, each of Tanzania’s tribes practiced a different form of customary law, although there were some regional similarities in customs. During the German and British colonial periods, colonial

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457 Interview with Salome Kaganda, Ethics Commissioner, Vice President’s Offices, March 27, 2013, Dar es Salaam; Interview with Augustini Ramadhani.
458 Interview with Salome Kaganda; Interview with Francis Werema.
administrators entirely remade the tribal system and, with it, customary law. The British also used tribal group elites as their deputies, which, during the independence era, caused nationalists and non-elites to call for the abolition of the chieftaincy, since it was so closely linked with colonial rule. The post independence government succeeded in eliminating the chieftaincy, and this attack on tribal elite power brought former chiefs together, increasing their capacity to demand recognition for locally distinct customary law, which was one of their few remaining sources of power. Because Nyerere chose to pursue a policy of agricultural and local village reforms, he needed the support of these former chiefs to enact them, since they took place in rural areas far from the state leaders’ center of power. Despite losing their tribal status, former chiefs were able to become local government officials, and thus still had political saliency. The bargaining between these group elites and the state, with group elites favoring judicial decentralization to bolster their fading power, and the state agreeing in return for their support for ujamaa, resulted in Tanzania adopting a partially decentralized judiciary whose form persists to the present day.
Chapter Four: The Incorporation of Personal Status Law in Egypt

“The study of law as a system of social control reveals what a society claims to honor and tries to protect. The study of judicial administration discloses whether society in fact protects what it honors, and how.”


Introduction

The idea of one set of laws for all citizens, endorsed by Hayek and Dicey, among other legal theorists, is only fully possible in a state that is built on John Locke’s premise, articulated in “A Letter Concerning Toleration,” that “each of them [state and church] contain itself within its own bounds, the one attending to the worldly welfare of the commonwealth, the other to the salvation of soul.” In practice, this requires both that a state’s citizens put aside their commitment to either public, state-authorized religious or ethnic rituals and practices, and that the state make available a neutral public sphere in which the institutions of no particular group are privileged over others, and in which there is a minimum of interference in the commitments citizens hold in their private lives. In most places and times, at least one of these conditions has been impossible to achieve, making legal monism a convenient fiction, rather than an accurate descriptor of a country’s judicial system. In Egypt, citizens remain strongly committed to religious

identity in both the public and private sphere, and the state privileges the law of one religion, Sunni Islam, over those of its Christian and other religious minority groups.

Egypt’s history involves, in many ways, a classic trajectory of legal centralization from the nearly complete decentralization of the Ottoman period to its current state of partially incorporating minority group law into state courts. Nasser’s state-building project included eliminating sectarian courts and bringing family law almost entirely under the state’s control. However, this project never fully succeeded. Egypt left personal status law matters in the hands of religious authorities, resulting in a somewhat ambiguous legal state with multiple, overlapping jurisdictions in which it is possible that a person who has received a court-sanctioned divorce is nonetheless prohibited from remarrying when the religious officials who govern his religious community refuse to recognize the divorce. This chapter thus considers Egypt’s transition from several centuries of widespread and institutionalized legal pluralism to a somewhat unstable form of legal monism. It explains how variations in the relative capacities of the groups and the state, along with changes in levels of elite coordination, resulted in the judicial decentralization of the partial incorporation type.

Summary of Legal Pluralism in Egypt

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“See Nathalie Bernard-Maugiron’s excellent coverage of two recent cases in Egypt where Egyptian state courts issued and then upheld a divorce ruling for a Copt which the Coptic church refused to recognize, both of which prompted a lawsuit against Pope Shenouda for recognition of the divorce, without which the persons in question could not remarry. In Nathalie Bernard-Maugiron, “Divorce and Remarriage of Orthodox Copts in Egypt: The 2008 State Council Ruling and the Amendment of the 1938 Personal Status Regulations,” Islamic Law and Society, 18(3), 356–386.”
Before proceeding with the argument, it is worth briefly clarifying the somewhat confusing nature of legal pluralism in contemporary Egypt. Under Ottoman rule, there were separate personal status (family law) courts for the various non-Muslim communities in Egypt, including the Copts, Jews, Greek Orthodox, etc. This system continued through Mohamed Ali’s dynasty (1805-1848) and, although the subsequent British occupation (from, effectively, 1882 to 1954) changed the court structure, it did not eliminate separate jurisdictions for different classes of citizens. As such, during this period Egypt can be classified as a case of full decentralization. As Egypt transitioned toward full self-rule in the 1940s, various measures of judicial centralization were adopted, but it wasn’t until after the 1952 revolution that Nasser, as part of his state-building measures, brought all courts and judicial bodies under state control by eliminating religious courts.

In September 1955, the Egyptian government enacted the Sharia Courts and Community Tribunals Abolition Act, also known as Law No. 462, which eliminated personal status courts operated by religious communities and instead gave jurisdiction over family law matters to Egypt’s national courts. This act ended the most unconstrained period of legal pluralism in Egyptian history. But it did not completely end legal pluralism, as the new law required the national, civil law courts to use codified confessional law to arrive at rulings in personal law cases. In cases involving the majority

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population of Muslims, courts applied Hanafi sharia law, whereas cases involving only Copts or Jews, for example, were decided under the law of their respective community.  

**Summary of Causal Argument**

How and why did the government come to pass Law No. 462, and why were the communities that lost judicial control over intra-community disputes unable to prevent its enactment? Phrased differently, what were the circumstances that led to the abolition of institutional legal pluralism in Egypt and to its replacement with government-administered, centralized normative pluralism, achieved through the use of multiple codes of law in a single court system? This chapter argues that Egypt transitioned from being a case of full judicial decentralization to one of partial incorporation (see below) as the relative capacities of the group and the state shifted in the period following independence. Specifically, levels of elite coordination (a key capacity for group elites) among Orthodox Copts declined to levels at which the state had an advantage during bargaining over judicial decentralization. This same process that led to declines in elite coordination (the fragmentation of the Coptic Orthodox elite, discussed below) also weakened the group elites’ other capacities. The decline in group elites’ capacities resulted in the shift from full centralization to partial incorporation.

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*Pennington, 165; Yuksel Sezgin “God v Adam & Eve,” Unpublished dissertation manuscript, University of Washington, as edited 2011, 75.*
Centralization took place in two separate historical periods, both of which will be discussed in this chapter. The first was the moment of state-building and state consolidation in Egypt following independence, from 1952-57. The second was a moment of political crisis following Egypt’s defeat in the 1973 Arab-Israeli War. During the first period, from 1952-57, the relative capacities of the state were higher than that of the religious groups that opposed centralization, and the level of the group elites’ coordination was low as well. During the second, from 1975-85, the Coptic Orthodox community (which forms the main unit of analysis here, see below) underwent internal restructuring which resulted in a higher level of elite coordination, and the political context gave the group higher capacities than it normally enjoyed. These increased capacities allowed it to prevent the state from further centralizing personal status law,
which had been a state goal at that time. Consistent with the theory advanced in Chapter 1, Egypt was thus able to partially centralize its judicial system during the first period, but was not able to further centralize after that.

Two interrelated historical processes facilitated the drive for legal centralization that accompanied Nasser’s early state building. The first is the growth of internecine Coptic conflict during the late nineteenth and early twentieth centuries, which divided secular and religious elites on the question of who would govern the community, and in particular, who would administer Coptic personal status law. This hindered elite coordination during the crucial moment of legal centralization. The second process is the weakening of the Coptic papacy, which resulted both from the divide between the church and the lay community, and the political context of Egypt’s independence. This had the effect of reducing the capacity of the Coptic community to resist state reforms. The long struggle between the two factions of elites left Copts without a leader or credible spokesperson to bargain with the Egyptian government on its behalf, denying the community both agreement between elites on the issue of judicial autonomy and the ability to signal its preference to the state. The relatively low capacities of the Coptic Orthodox community did not significantly change until the 1980s, so changes in the level of judicial decentralization before then are likely associated with shifts in elite coordination. These two factors allowed the Egyptian government to complete the judicial portion of a process of centralization and bureaucratization that it pursued following Nasser’s 1952 revolution.

Even so, not all aspects of Egypt’s long-standing legal pluralism were eliminated, especially in regard to family law. Beginning in the mid-1970s, Anwar Sadat’s
administration sought to carry legal centralization to completion. This later effort came, however, at a time when the leading minority religious group, the Orthodox Copts, was in a better position to resist. The result was that centralizing efforts came at higher political costs, and the efforts did not achieve success. As a consequence of this series of developments, today certain powers often reserved for the state, such as legalizing marriages, remain shared with minority religious groups. The result is a somewhat paradoxical legal reality in which there are no judicial forums in which the entirety of a divorce or remarriage case can be adjudicated. This point will be discussed further at the end of the chapter.

In attempting to answer questions of this nature, the problem of complexity can become daunting and overwhelm the researcher’s best efforts to untangle causal processes. Law No. 462 eliminated all religious and confessional tribunals, not just those of the largest or most prominent groups. Must a full answer thus incorporate analysis of each group’s response to the reforms, which in Egypt’s case, includes seventeen different groups? Jacob Levy, in his analysis of state incorporation of indigenous law, recommends a more narrow focus. As he rightly points out “most states use elements of more than one mode of incorporation [essentially, state policy on non-state law]; but there are differences of emphasis. The self-government mode of incorporation is most important in the United States, and is also significant in Canada. Customary incorporation plays at least some part in most states that accord any status to indigenous law, but is relied on almost exclusively in South Africa. Australia places greater emphasis than other states on common law incorporation.”

While Australia uses common law incorporation to

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recognize some provisions of aboriginal tribal law, it generally does not do so with
religious law. In this case, as Levy acknowledges, too much granularity erodes the
researcher’s ability to detect overarching patterns and create larger categorizations.

Following Levy, I suggest that the best strategy for understanding Egyptian legal
reform is to focus on the experience of the country’s largest minority group, the Orthodox
Copts. Orthodox Copts have comprised seven to nine percent of Egypt’s population since
record keeping first began in 1897. This is partially true because their experience is
representative of many other communities (including other Christian communities, which
comprise ten of the seventeen recognized religious groups in Egypt) but also because
Egyptian policy was formulated in response to the dominant Sunni majority and the
Copts to a greater extent than other groups. Also, smaller groups have been unsuccessful
in blocking or altering government actions, whereas the majority Muslim population and
the Copts have often been able to influence policy. As such, focusing on the legal
experience of the Copts provides a useful lens for understanding Egyptian legal reform as
a whole.

The Egyptian Legal System Before 1955

It is difficult to follow the trajectory of judicial decentralization in Egypt without
an understanding of the judicial landscape both before and following Egyptian
independence. The following section will highlight the forms of the judiciary during the

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Cornelis Hulsman, “Discrepancies Between Coptic Statistics in the Egyptian Census and Estimates
Provided by the Coptic Orthodox Church,” Arab West Reports, MIDEO (2012). Accessed at
Ottoman and British colonial periods, as well as its effects on sectarian politics in Egypt. This background will help the reader better understand the process tracing narrative that is built below to explain shifts in the capacities of interest that led to changes in levels of judicial decentralization. It also provides a portrait of the legal pluralism that was the status quo in Egypt before the advent of the post-independence centralizing reforms.

The Ottoman Empire conquered Egypt in 1517 and quickly began to transform it into an Ottoman province modeled on its other holdings. Most private Egyptian land was confiscated on the grounds of improper record keeping and given directly to the Sultan.\textsuperscript{465} By 1525, Ottoman administrators had created three branches of government: military, financial, and judicial with an accompanying legal structure to govern their function.\textsuperscript{466} The judiciary was led by an Ottoman \textit{qadi askar} (functionally, chief justice) who presided over Egypt’s courts of all types.\textsuperscript{467} He was a Turkish-speaking Ottoman official from the capital appointed by the empire’s grand mufti for a period of one, but sometimes up to three years.\textsuperscript{468} The civil court system was divided into six levels, but only for the purpose of promoting judges through the ranks of the Ottoman Empire’s civil service, as the courts were non-hierarchical and could not hear appeals from lower levels.\textsuperscript{469}

The official Ottoman courts applied two forms of law: \textit{qanun}, a secular body of Ottoman law composed of executive decrees and custom, and \textit{sharia}, Islamic law.\textsuperscript{470} In general, \textit{sharia} law in Egypt was derived from the Hanafi school of jurisprudence, but the Ottoman judiciary made judges from the Hanbali, Shafi‘i, and Maliki schools of \textit{fiqh}

\textsuperscript{465} El-Nahal, 7.
\textsuperscript{466} Ibid.
\textsuperscript{467} Ibid., 14.
\textsuperscript{468} Ibid., 13.
\textsuperscript{469} Ibid., 17.
available as well. 471 These judgments were usually rendered from the mosque, although they were often verified by the district judge. 472 There were two types of judges who heard day to day civil and criminal law disputes: qadis, who headed the judiciary for each of the thirty-seven Egyptian judicial districts and na‘ibs, their deputies who heard most non-criminal first instance cases. The system was rigidly structured with rules governing which type of court could hear certain types of dispute, when higher-level judicial officials must be consulted, and guidelines to preserve the independence of the judiciary. Every judicial official was appointed by external Ottoman officials. 473 This system governed the vast majority of Egyptians and Ottoman administrators.

There were, however, communities in Egypt who were exempt from this elaborate Ottoman judicial apparatus. Non-Muslims, known as dhimmis, were not subject to Ottoman law. 474 Instead, religious leaders within each community judged disputes, unless the dispute occurred across sects, such as between a Muslim and a non-Muslim or a non-Muslim and the government, in which case it was decided under sharia law. 475 The local qadi adjudicated disputes between non-Muslims of different religions. 476

The practice of granting intra-community judicial autonomy to dhimmis stems from several Quranic passages urging limited interaction between Muslims and non-Muslims and from Caliph Umar’s interpretation of these passages, as well as customary rules governing inter-communal relations during the beginning of his reign. 477 According

471 El-Nahal, 15.
472 Ibid., 14-16.
473 Ibid., 17.
475 El-Nahal, 42.
476 Ibid.
477 Jacques Tagher, Christians in Muslim Egypt: An Historical Study of the Relations Between Copts and Muslims from 640 to 1922, Altenberge [Germany]: Oros Verlag (1998), 36, 61; Carter, 3-4. Note that the Hadith contains passages particularly favorable to the Copts, including statements from the Prophet such as
to Hoyle, in his analysis of Egyptian legal history “Following the Islamic principle that Sharia was for believers and not for non-Muslims, the varying jurisdictions of religious and personal status courts were accepted by the Arab rulers as normal, and foreigners and Christians encountered no trouble over their legal systems.” These rules were preserved with only slight alteration through the Ummayad and Abbasid Caliphates, and they were adopted by the Ottoman Empire as a means of administering a highly diverse empire. Although Egypt’s rulers were inconsistent about certain practices such as the jizyah (a special tax on dhimmis) and requiring distinctive garb for non-Muslims, they never attempted to diminish communal judicial autonomy.

The three-year French incursion into Egypt beginning in 1798 changed the composition of the judiciary but did not fundamentally alter its structure. According to Stanford Shaw, the French created a General Council composed of local notables, religious officials, merchants, peasants, farmers, and Bedouin chiefs whose job it was to formulate policies to govern Egypt. The Council “stated its opinion that the Muslim system of justice and the laws of inheritance should be maintained as they existed under Ottomans.” The only substantive changes were in the composition of the state judiciary. The French victory over Ottoman troops forced the Ottoman Governor and bureaucrats into exile, leaving the administrative apparatus virtually empty. Accordingly, French administrators appointed Egyptians to these posts, replacing all but five Ottoman judges with Egyptian religious officials, including the first Egyptian Qadi

“When you conquer Egypt, be kind to the Copts for they are your protégés and kith and kin” (see Carter, 4, and Tagher, 9).
480 Ibid.
481 Ibid., 23.
Business in the courts, which had often been conducted in Turkish, reverted to Arabic, a practice that would continue through the end of the French occupation and the beginning of Muhammad Ali’s dynasty.

The Copts received considerably better treatment after 1805 under Muhammad Ali’s dynasty, which succeeded the French occupation, than they had under previous rulers. They were given the freedom to dress as they pleased, to go on pilgrimages, to be hired by Muslims (previous laws had forbidden Muslims to employ Copts), and perhaps most importantly, to build as many churches as the community needed. Muhammad Ali’s successors introduced further reforms including the elimination of the *jizyah* (a tax on non-Muslims) in 1855, the inclusion of Copts in the national military draft, and the funding of the first state-sponsored Coptic Orthodox schools. Khedive Ismail, Muhammad Ali’s grandson, welcomed Copts into the civil service at both low and high levels, appointing them to judgements in civil courts and permitting them to run as candidates in the elections for his new Consultative Council. In 1892, British forces invaded Egypt during the Anglo-Egyptian war, resulting in a de facto protectorate that lasted until 1914, when it became official following the collapse of the Ottoman Empire following WWI. Egypt remained under full protectorate status until 1922, at which point it declared unilateral independence, which Britain ultimately recognized in 1936. British troops, and a strong British presence remained in Egypt until 1956.

The country’s first constitution was drafted after Egypt’s independence from Britain in 1922 under the direction of Fuad I, the ninth ruler in Muhammad Ali’s dynasty.

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482 Ibid., 28.
483 Tagher, 197-199
484 Ibid., 202-206.
485 Ibid., 206.
Published in 1923, the constitution stipulated legal equality between Muslims and non-Muslims and guaranteed freedom of religion.\textsuperscript{486} The advances in general rights and freedoms, however, did not signal any alternations in Coptic judicial administration. The community continued to govern intra-communal legal matters without reference to the outside courts, except in cases where a Muslim was involved.

During this period, another type of court was introduced to Egypt’s already plural legal system. In 1841, Britain, Austria, Prussia, France, and Russia entered into negotiations with the Ottoman Empire concerning Egypt’s status. The result was a decree that gave Egypt greater freedom within the Empire, and particularly judicial freedom, in return for military assistance.\textsuperscript{487} During and after the French occupation of Egypt, European trade with Egypt began to expand, bringing resident foreigners to Egypt in large numbers. These nationals of England, France, Greece, Austria, and elsewhere were exempt from the jurisdiction of the Ottoman court system because of a series of capitulations signed during the early 1800s. As a result, judicial matters involving foreigners were heard by consular courts, which used the law of their home country. This arrangement tended to mean that suits brought against foreigners by Egyptians almost always failed, and disputes between residents of different nationalities brought similar problems.\textsuperscript{488}

In 1875, Egypt inaugurated a new system of courts called the “Mixed Courts,” created in response to Egypt’s increasing independence from the Ottoman Empire during a moment of economic opening and growing trade.\textsuperscript{489} The Mixed Courts had jurisdiction

\textsuperscript{486} Ibid., 222.
\textsuperscript{487} Hoyle, xxiv.
\textsuperscript{488} Hoyle, 7, Cannon, 77.
\textsuperscript{489} Cannon, 65.
across the entirety of Egypt, although only in particular types of disputes. They formed one of four types of courts then in existence including administrative courts for administrative law and infringements of Ottoman general regulations; family law courts including personal status courts for religious minority groups and consular courts for the family law cases of foreigners; Sharia courts for all disputes involving Muslim Egyptians; and mixed courts for disputes concerning persons of multiple jurisdictions including disputes between Egyptians and foreigners, the Egyptian government and foreigners, and between foreigners of different nationalities. The mixed courts did not, in and of themselves, constitute legal pluralism. As Hoyle points out in his study of the mixed courts, “all laws, courts, and codes [in the Mixed courts] were Egyptian, the only mixed elements were the parties.” Legal pluralism instead resided in the multiple different courts that the Egyptian government administered with jurisdiction dependent on identity instead of territoriality, which effectively meant that an identical case of divorce, for example, would wind up in a different court depending on the religion and nationality of the claimants.

The mixed courts existed for seventy-four years until they were closed in 1949, and they were effective in centralizing and simplifying the complex jurisdictional landscape of pre-1875 Egypt. They became the country’s “foremost judicial authority” and convinced the Egyptian authorities that a comprehensive legal code was superior to Sharia-based rulings issued by religious officials. Within ten years of their creation, Egypt created a parallel system of “native courts” that applied similar codes to disputes between Egyptians, thereby partially supplanting the previously exclusive jurisdiction of

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490 Hoyle, 13.
491 Ibid.
Muslim courts in this domain.\textsuperscript{492} By 1937, Farouk I’s administration suggested a move away from a separate system of mixed and native courts, which applied many of the same codes, and the creation of a unified national court system. Later that year, at a meeting of the capitulatory powers, they and Egypt signed the Montreux Convention, which created a twelve-year plan to end the mixed courts.\textsuperscript{493}

On October 15, 1949 the new Egyptian National Courts took over all cases pending in the now-closed mixed and native courts.\textsuperscript{494} Although personal status cases involving foreigners were still heard by the consular courts, all other non-family law disputes went to the new National Courts, which centralized all but personal status law under a single system.\textsuperscript{495} Thus, the history of the Mixed Courts emphasizes the drive for centralization that, unimportant under Ottoman rule, became a central concern as European powers gained influence in Egypt. The Mixed Courts brought the multiple jurisdictions of the consular courts under a single court reserved for disputes involving foreigners, and once the efficiency of this model became apparent, they served as a model for the new Native Courts, which replaced the Ottoman system of local, mosque-run courts. The abolition of these and their replacement with the Egyptian national court system nearly completed the process of centralization as it brought all but the personal status courts under the jurisdiction of a single court system. However, this was not an instance of an independent state formulating its own policy on legal pluralism. This episode of legal centralization is provided as background for the reader rather than as a

\textsuperscript{492} Ibid., 184.
\textsuperscript{493} Ibid., 144-145.
\textsuperscript{494} Ibid., 182.
\textsuperscript{495} According to Hoyle, the 1949 Civil Law Code that formed the basis of the National Courts was “specifically drafted with the sharia in mind so that non-Islamic provisions were not inconsistent with it” (185). The courts also privilege an Islamic interpretation of the code. As such, it is not a surprise that Coptic officials (see next section) worked hard to keep Coptic law separate from the National Courts.
case study subjected to causal analysis because it was brought about by the capitulatory powers and overseen by the British. The case study of centralization under consideration here is that of Egypt as a newly independent state, able to formulate its own policy without foreign veto.

One of the most important results of the many invasions of Egypt is a contemporary legal system that is built on more than one source of law. Sharia law, Ottoman secular law, French civil law, and even a degree of English common law coexist in the country’s national courts alongside the family law codes of Egypt’s religious communities. The mixed courts normalized the concept that a central court system could adjudicate cases even when litigants came from different jurisdictions. Given the heterogeneous nature of the Egyptian legal system, it is important to remember that legal pluralism is defined as a plurality of types of law available in the same situation, not a plurality of sources of law. In other words, a mixed system of Ottoman law, French civil law, and Islamic law, if applied equally and in the same manner to all litigants, is not an instance of legal pluralism. Legal pluralism exists only when different laws apply to people in the same legal situations. Ottoman Egypt was characterized by a system of full decentralization in which non-Muslim communities adjudicated all disputes within their communities, including civil, criminal, and family law. In present-day Egypt, legal pluralism is restricted to the domain of family law, and exists by virtue of the different legal codes that are applied to identical situations such as divorce and inheritance according to the litigants’ religion, which particularly when compared to the cases of Tanzania and Malawi, is a weak form of legal pluralism.
Period 1: Legal Centralization during Egyptian State-Building

With a preliminary understanding of Egyptian legal history preceding 1955, it is possible to turn to the question of why, despite strong opposition from powerful groups in Egyptian society, Egypt ended up in the category of partial incorporation, which involves a lesser transfer of judicial power to non-state groups than many of the other types. This chapter argues that it is a decline in the relative capacities of the Coptic Orthodox elite that account for this outcome, so the following sections will examine changes in the capacities of the state leaders (in this case, Nasser and his deputies) and group elites (Coptic Orthodox elites). It will also examine the interests of both parties—the state leaders, in centralizing the judiciary, and the Coptic Orthodox elites, in preserving judicial decentralization.

Interests and Capacities of Egyptian State Leaders

Following his instatement as Egypt’s second president, Nasser adopted a policy of full judicial centralization. The history of the mixed courts demonstrates that Egypt had already experienced a certain amount of judicial centralization before the 1952 revolution. It would be wrong, however, to read Nasser’s reforms as an extension of this earlier tendency. Before the withdrawal of British troops in 1954, Egypt’s policies were either written by or under the heavy influence of the British, and cannot be counted as instances of a sovereign state formulating judicial policy. The British occupation
generated significant opposition, and after the July revolution of 1952 Egyptian politicians made a point of breaking with colonial policies.

Two interrelated programmatic agendas drove the campaign for judicial centralization during the Egyptian Republic’s early years. The first was a desire to bureaucratize and rationalize the Egyptian state, and the second was a movement toward a secular, Egyptian nationalist identity that would orient Egypt’s citizens towards the state, rather than the sects, as the appropriate locus of political loyalty. In general, the reforms were a central component of the period of modernization and bureaucratization that Nasser and the first president of Egypt, Mohamed Naguib, launched together with the avowed purpose of making Egypt more administratively efficient and democratic.\(^{496}\) According to Sezgin, Nasser’s “revolutionary government was mainly motivated by such mechanical concerns as to increase the efficiency of its central administration and reinstate the sovereignty of the Egyptian state over its territory.”\(^{497}\) The reforms formed part of the effort to strengthen the state apparatus. These are, of course, typical motives driving judicial centralization in many standard accounts of state building.

Having dismantled many of the existing political parties and removed officials from their government positions, the regime hired a whole new cadre of regime loyalists, expanding the bureaucracy and government payroll rapidly.\(^{498}\) Sezgin characterizes Nasser’s regime as bureaucratic-authoritarian for its program of top-down bureaucratic rationalization and its faith “in the value of specialized knowledge, professionalization,


\(^{497}\) Sezgin, 77.

and uniformity in public administration.”⁴⁹⁹ A senior official in the central Coptic patriarchate and a Coptic journalist both agree that Nasser’s centralization efforts were the driving force behind sectarian law reform.⁵⁰⁰ Science and progress were the regime’s watchwords, and anything that appeared to be irrational, unscientific or inefficient was on the agenda for reform. The regime at least nominally committed itself to the idea that its citizens should be equal under the law and governed by the same set of rules. Permitting religious officials, particularly officials from different religions, to adjudicate the disputes of Egyptian citizens violates these principles. One suspects, too, that perhaps even more, the regime strengthening character of a centralized judiciary, identified by Shapiro and Becker, appealed to Nasser during the early days of state formation.

Additionally, unlike his successor, Nasser was an Egyptian nationalist and pan-Arabist in political outlook. Although he was not against religious groups for the most part, he was suspicious of anything that might undermine ties between the citizen and state. He frequently worked with the Coptic Pope (explained further below) to aid church-building projects in return for the Pope’s, and by extension the Coptic community’s, political support. Prominent Copts had joined Egypt’s Wafd party, the political force that won independence from Great Britain in 1952. Pennington, Wakin, and other historians emphasize the extent to which Copts and Muslims worked together to achieve independence, and they highlight the fierce nationalism of the Copts, which led them to protest when the British attempted to reserve the right, after independence, to intervene in Egyptian affairs in matters concerning discrimination against the Coptic

⁴⁹⁹ Sezgin, 78.
⁵⁰⁰ Author interview with the Director of Status Affairs and Head of the Clerical Council of the Coptic Orthodox Church, February 16, 2012, Offices of the Coptic Patriarchate, Abbasiya, Cairo. Author interview with Sameh Fawzi, journalist, March 2, 2012, Cairo.
community. In return, Nasser declared himself a friend to Egypt’s Copts, claiming his childhood upbringing in a Copt-heavy village gave him a good opinion of Egypt’s Christians.

Nasser was not in his own view anti-Islam; he had publicly called for a “form of Islamicized modernity,” but one in which the mosque would be limited, in the tradition of John Locke, to the private sphere, leaving the state free to govern the public realm. He rarely, if ever used religious vocabulary in public, and he worked hard to diminish the strength of sectarian feeling, which he saw as an impediment to pan-Arabism. This stance, especially coming from a Muslim political leader, was unpalatable to Egypt’s Islamists, who worked to undermine Nasser’s agenda even before he became the head of state. The Brotherhood had vowed to block the withdrawal of British troops because they disliked the secular program of the Free Officers. Although their attempt failed, they collaborated with the British in 1955 to contact exiled King Farouk in Italy, who they planned to reinstate as ruler of Egypt with Jordanian and Saudi help.

In addition, Brotherhood members preached against Nasser during Friday sermons and built resistance to his rule in the countryside. As a result, Nasser began a series of targeted maneuvers against the Muslim Brotherhood, eliminated Muslim Brothers from Al Azhar (Egypt’s preeminent Muslim university) and replaced them with regime loyalists, and ordered secular sciences to be taught at Al Azhar. In 1954, a member of the Brotherhood tried to assassinate Nasser during a speech in Alexandria to

502 Wakin, 60.
503 Aburish, 140.
504 Ibid., 88-89.
505 Ibid., 141.
celebrate the evacuation agreement with England.\textsuperscript{506} In the following crackdown, seven hundred members of the Brotherhood were arrested and six condemned to death.\textsuperscript{507}

In his biography of Nasser, Aburish argues, “Nasser’s pragmatism and refusal to allow religion a direct say in governance showed very early. This time he scored against the country’s conservative institutionalized Islamic tendencies. He secularized the religious courts, which used the Koran for legal analogy and guidance, making them part of the civil courts.”\textsuperscript{508} Of course, Nasser’s reforms did not secularize Egyptian law. Family law disputes in the Muslim community, although adjudicated in secular civil law courts, were decided using a codified version of \textit{sharia} law. Nevertheless, his reform shifted judicial authority from priests and \textit{imams} to state judges, denying the former a powerful source of intra-community authority and bringing citizens to the state for adjudication.

Both this episode of judicial centralization and the next, under Sadat, involved the mobilization of a particular identity repertoire, but they were nevertheless extremely different. Nasser, although Muslim, advocated a pan-Arabist and Egyptian nationalist identity, which was equally foreign to all of Egypt’s religious groups. The elimination of sectarian courts was a byproduct of the more important agenda of centralizing the Egyptian state and consolidating its authority. It was perhaps inevitable that in this climate Nasser, who valued bureaucratized structures and rational systems so highly, would attempt to bring the final area, family law, under the jurisdiction of its courts as well. Eliminating sectarian courts was thus not part of a strategy to mobilize a particular identity repertoire to build loyalty with one group at the expense of another, as would

\textsuperscript{506} Mohamed Heikal, \textit{Autumn of Fury the Assassination of Sadat} (1983), 157; Aburish, 53.
\textsuperscript{507} Aburish, 45.
\textsuperscript{508} Ibid., 140.
later prove the case with Sadat. Nevertheless, although their motives were different, as Nasser upheld an Egyptian nationalism that was equally leery of all sectarian ties, whereas Sadat embraced Islamism at the expense of non-Muslim rights in Egypt, the outcome was in one vital respect the same: the elimination of minority group judicial power.

Under Nasser, legal centralization cannot be considered a punitive measure directed specifically at the Coptic community, but rather a part of Egypt’s post-colonial state building. Despite this motive, the Coptic community did not welcome the proposed abolition of their personal status courts, which allowed them to live under Christian family law. In other matters, the Coptic community had some success in persuading the government to abandon reform efforts, and through the 1940s it had been successful in delaying the abolition of Coptic church courts. Why, in 1955, did its attempt fail?

**The Decline of the Coptic Orthodox Elites’ Capacities**

Through most of the period outlined above, the Coptic Church had been rigidly hierarchical. The Patriarch, also called the Pope, was the supreme head of the Coptic Orthodox Church and he presided over several layers of religious officials including bishops, priests, and monks. This structure created a small group of elites who were easily able to coordinate with one another, and gave them the automatic support of the Coptic laity, which gave the Pope de facto power over 8% of Egypt’s population. The changes to this structure of authority weakened the capacities of the Coptic Orthodox
elites in the period leading up to independence, such that they were unable to preserve full judicial decentralization in the period after 1952.

During the 1700s, the Patriarch and his deputies governed the community without any competition from secular or lay Coptic organizations. The first substantive changes in community structure came during Muhammad Ali’s dynasty, when opportunities for Copts to participate in Egyptian government and upper-level society appeared.\textsuperscript{509} Peter VII, Patriarch from 1810-1852, supported a Coptic seminary that the Church Missionary Society founded in 1833 to provide better training for Coptic clergy.\textsuperscript{510}

Some of these better-educated clergy went on to become reform leaders during the next Patriarch’s reign. Cyril IV, called “The Father of Reformation,” introduced further changes into the Coptic community including four secular schools, two for boys and two for girls, and an Arabic printing press to print Coptic publications.\textsuperscript{511} This was done partly to educate members of the clergy, who were “ignorant, and negligent of their religious duties,” and partly to offer the laity an opportunity to gain some learning.\textsuperscript{512} He also pursued structural changes in the administration of the clergy. He ordered fixed salaries for priests to eliminate the private fundraising many carried out as a side business to supplement their poor wages, including selling church property and requiring fees for religious services.\textsuperscript{513} He also created a registry of the \textit{awqaf} (religious endowments), properties whose rents comprised a large share of church income, to prevent their

\textsuperscript{511} Bestavros, 7.
\textsuperscript{512} Seidaly, 248.
\textsuperscript{513} Ibrahim, 23; Seidaly, 249.
The effect of these reforms was a better-educated clergy and the beginnings of an educated laity.

This period coincided with two external reforms that were important for Coptic communal life. The first was the emergence of a Coptic upper class, which resulted from the opening of government jobs and the beginnings of large land ownership. Although Copts had acted as accountants and tax gatherers since the French occupation of Egypt, securing them a position in Egypt’s middle classes, they had been banned from high government office. But as this changed, Copts began to fill these posts, including the first Coptic foreign minister, Boutros Ghali, in 1893. Furthermore, both Abbas II and Khedive Ismail transferred large tracts of land to the Coptic Church, further enriching it and its clergy.

The second reform was a decree issued by the Ottoman Empire in 1856. The Khatt al Hamayoni (Hatt-i Humayun in Turkish, Jubilant Decree in English) provided guarantees for “spiritual privileges and tolerance” for the Empire’s Christian communities. It furthermore required that each Christian community elect a special council to decide on reforms necessary for the community and to share in the administration of “private suits such as those relating to inheritance.”

In fact, these lay councils were not created in Egypt until 1874 when the Coptic Papacy was vacant for four years. During this period, Bishop Mark (Marqus), who was

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514 Seidaly, 249.
515 Ibrahim, 54.
516 Bestavros, 8.
517 Ibid., 7; Ismail, 33.
518 Khatt al Hamayoni in Bestavros, 8.
appointed interim leader, chose select members of the Coptic upper class to help him govern the community, including two former students of Cyril IV’s schools. In 1874, he petitioned Khedive Ismail to make the position of these advisors permanent with the creation of an advisory board—in other words to establish a council, called the Majlis Milli (Community Council), to be composed of clergy and laity. The decree officially establishing the Council was quickly granted. The Council was composed of twelve lay members and twelve church deputies elected in five-year cycles and it was charged with overseeing the awqaf (religious endowments) and personal status law. This was the first time that lay members of the community had an opportunity to participate in its governance. Effectively, the decree ordering lay participation in adjudication and administration came only shortly after an educated upper class had emerged to fulfill it.

A few months later, the community overcame the disagreements that had prevented the appointment of a new Patriarch, and Cyril V (born al-Barmus) was appointed to the position. Almost immediately, a power struggle ensued between the Patriarch and the Majlis Milli, which resulted in many iterations of the successful elimination of the Majlis by the Patriarch, followed by its reinstatement by either Egypt’s ruler or the Coptic community. From this point forward, Copts were divided in opinion as to the correct source of authority concerning personal status law and the degree of allegiance due to the Patriarch and (or) the increasingly secular Majlis Milli. As Sana Hasan summarizes, they “vacillated between two competing modalities of solidarity: the

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519 Ibrahim, 34.
520 Ibid., 35; Bestavros, 9.
521 Ibrahim, 35.
religious one offered by the clergy, with the church as the communal meeting place, and the secular one offered by the Coptic upper class.”

By 1875, the first Majlis had been dissolved because the Patriarch refused to carry out its suggestions, and in the face of its increasing irrelevance, the council stopped meeting. In 1883, a group of reformers successfully lobbied Khedive Ismail to reestablish the Majlis, and it once again began to meet regularly to consider matters of personal status law and to administrate waqf (endowment) properties. But the Patriarch, still convinced that the council was a challenge to his authority, refused to attend meetings. Without his presence, the Majlis was unable to achieve any of its desired reforms, and it again stopped meeting in 1884. A group of upper class laymen successfully petitioned the government to bring the Majlis Milli back into existence in 1891. This time it lasted for two years, until the Patriarch and Bishop of Alexandria, in a gesture of defiance, excommunicated the Khedive’s choice of President for the new Majlis. In response, the Khedive sent Cyril V and the John, Bishop of Alexandria, into exile. Although the Majlis was pleased to have won definitive government support, the exile of the Patriarch left a vacuum in spiritual leadership which, according to Bestavros, resulted in turmoil for the community: “Churches turned into empty sanctuaries, baptisms were not celebrated, marriages were not contracted, even the final religious rites for the dying and the dead were not available.” In response, large delegations of Copts

523 Ibid., 252.
524 Ibid., 253.
525 Bestavros, 9.
526 Seidaly, 257-8.
527 Ibid.
petitioned the Khedive for the Patriarch’s pardon, and in 1893 the Patriarch returned to Cairo, where he promptly disbanded the Majlis Milli.528

The Majlis met again from 1906-1909, but was dissolved in 1909 after a bitter fight over who should have the authority to control church finances, and particularly the awqaf lands. This Majlis was composed entirely of lawyers who had been elected for their competence in managing community matters, particularly compared to the illiterate and often uneducated clergy.529 However, supporters of the Patriarch pointed out that the clergy were the “defenders of Christianity” and as such had the highest claim to important administrative duties.530 Bestavros acknowledges the claims of both sides—the laity were often better administrators and managed complex judicial and financial arrangements more ably than the clergy, but the clergy had the support of the majority of the Coptic community and the Patriarch, who was used to governing in a “traditional, autocratic manner”, was successful at mobilizing the community against the Majlis.531

The 1908-1909 clashes between the Majlis and the Patriarch played out during sermons, in debates published in Misr, a leading Coptic newspaper, and in private pamphlets printed by both sides lambasting the other.532 By 1912, the Patriarch had managed to pass two laws, one that limited the Majlis to twelve members, and the other stipulating that in the event of his absence, the Council could only meet under the leadership of his appointed deputy.533 During this period the number of educated Copts continued to rise, which fueled support for the Majlis.534 The net effect was a community divided between

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528 Bestavros, 10, Seidaly, 259.
529 Seidaly, 260-265
530 Ibid., 265.
531 Ibid., 260-1, Ibrahim 37.
532 Seidaly, 264.
533 Bestavros, 10.
534 Seidaly, 267.
supporters of the *Majlis* and supporters of the Patriarch, and an extremely weak administrative structure.

In 1927, the *Majlis Milli* was revived yet again according to its 1883 mandate, and this time managed to reach a compromise with the Patriarch over financial control of the *awqaf*. A sub-committee headed by the Patriarch and composed of four members of the *Majlis* and two Bishops administrated the *awqaf* for the next decade, until the *Majlis* again seized full control in 1937. By this point, the debate over *waqf* control was so salient that it became an issue in the election of the next two Patriarchs, Macarius III and Joseph II. In his single year as Patriarch, Macarius failed to negotiate a settlement over *waqf* control, and Joseph II was in 1946 elected on a platform of supporting laical control over the *awqaf*. However, Joseph II’s reign brought new conflict to the community. Having promised the *awqaf* to the laity, he reneged on the deal and supported the clergy’s bid to attain control over them. More seriously, by the early 1950s he faced charges of corruption for selling Bishoprics. Pennington describes him as “a feeble old man allegedly dominated by a manservant who did a roaring trade in the sale of ecclesiastical appointments.” During his reign and just following the Egyptian revolution, Ibrahim Fahmi Hilal, a young lawyer, established a reform movement, “The Coptic Nation,” to promote Coptic identity. Angered by the Patriarch’s corruption and the community’s inaction, Hilal and members of the Coptic Nation (which the regime had officially disbanded three months before) kidnapped Joseph II in July 1954 and forced him to sign

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535 Ibrahim, 145.
536 Bestavros, 11.
537 Ibid.
538 Pennington, 163.
539 Ibid., Ibrahim, 164-5. There are conflicting accounts about why the Coptic Nation was established, but the prevailing two theories (summarized by Ibrahim) are that it was a Coptic version of the many secular and religious societies that appeared in Egypt following the revolution, and that it was a possible counterpoint to the Muslim Brotherhood, which had been gathering support during the preceding decade.
papers authorizing his abdication.\textsuperscript{540} Although the government arrested the kidnappers and reinstated the Patriarch, he was never effectively community leader again, as a committee of Bishops was appointed to supervise him.\textsuperscript{541} In 1955, Joseph II made one last attempt to gain control by exiling a Bishop, which resulted in the Synod of Bishops and \textit{Majlis Milli} together petitioning the government for his removal, which was effected (he retired to a monastery) in 1955.\textsuperscript{542} Thus, during the crucial period of late 1954-1956, the Coptic community was effectively leaderless.

The result of the internecine struggle between the Patriarch and the \textit{Majlis Milli} was the deinstitutionalization of intra-communal adjudication mechanisms that dated back to before the Arab invasion of Egypt. A fractured community was left without a leader or spokesperson during the judicial reforms of 1955. By the time the responsibility for adjudicating family law disputes had been passed back and forth between the clergy and the \textit{Majlis Milli} several times, there was some confusion in the community as to who had, or ought to have, the authority to adjudicate these disputes. The laity seemed not to highly prioritize this issue, as adjudication became less about dispute resolution and more about the power struggle between the clergy and \textit{Majlis Milli}. Thus, by the time the British were in negotiations to leave Egypt, Coptic activists and reformers were the only members of their community who attempted to forestall government reforms that would have ended Coptic control over family law disputes. Family law was no longer the

\textsuperscript{540} Ibrahim, 168, Pennington ,163, Hasan, 60. In a 2008 interview, Ibrahim Fahmi Helal, the founder of the Coptic Nation and ringleader of kidnappers of the Pope stated that he kidnapped the Pope because he was unable to protect the Coptic community from legal encroachments on its sovereignty, such as making Islam the official religion of the state, or stipulating that the President must be a Muslim. The interviewer reveals that much of the Coptic community in later years believed that the kidnapping took place to avert a deal between Pope Youseb and President Nasser to allow the government to dissolve the \textit{Majlis Milli} and take over the administration of personal status law (Akhir Sa’a, “Coptic Divorce is a Political Problem, Says Defrocked Archpriest,” August 30, 2008).

\textsuperscript{541} Ibrahim, 174.

\textsuperscript{542} Ibid.
exclusive domain of the Coptic Orthodox Church; its dispute resolution mechanisms had become deinstitutionalized. As a result, it was no longer a salient issue that could mobilize community action.

Perhaps more importantly, the events leading up to 1955 had robbed the Coptic community of an authoritative leader or group that could advocate on its behalf during negotiations with the government. Previously, strong community leadership had been able to forestall government reforms. Law No. 462 was not the first effort by the Egyptian government to bring confessional courts under the control of the state. In 1927, the Minister of Justice was asked to come up with a comprehensive plan to unify the confessional family law courts, but when the Ministry of Justice asked for input from Egypt’s non-Muslim communities, he received overwhelming opposition from the Coptic community, leading him to conclude that only community clergy could change the law.543 In 1931, the government again attempted to discern whether it would be possible to create a single personal status code for non-Muslims, but Misr and other Coptic newspapers spread opposition to the plan, and it was never moved out of the Ministry of Justice.544 In 1936, the Ministry of Finance tried to move the Ministry of Justice plans to a Cabinet vote, and succeeded in galvanizing some support, only to have the Cabinet, composed mainly of Wafd party members (who were at the time allied closely with the Copts) declare the reforms beyond their jurisdiction.545 In 1944, the government attempted to pass a bill that would require all Egyptians, Muslim and non-Muslim alike, to use Muslim inheritance laws, but Coptic representatives in the Chamber of Deputies protested and the Patriarch withdrew into seclusion to protest the reforms, and they were

543 Carter, 233.
544 Ibid., 234.
545 Ibid., 236, 239.
never passed.\textsuperscript{546} In 1945, another attempt failed. In 1955, however, without a strong Pope, the only group to protest the reforms was a delegation of three bishops.\textsuperscript{547} Their objections were not successful because it was unclear to Nasser whether they truly represented the Coptic community or could mobilize the community on behalf of the regime.

Later, in the years after his 1959 election as Pope, Patriarch Cyril VI and President Nasser became good friends and political allies. As a consequence, the Coptic community was granted permission to build a number of new churches and rebuild churches that had fallen into disrepair.\textsuperscript{548} The personal friendship and political alliance between Cyril VI and Nasser proved to be of immense benefit to the Copts.\textsuperscript{549} This further illustrates the disastrous consequences of not having a spokesperson during the 1955 reform period. If one engages in counterfactual thinking, it is likely that had Cyril VI been Patriarch during the 1950s, the reforms might have been circumvented. In fact, Cyril VI and Nasser forged an understanding that both solved the \textit{waqf} crisis in the Coptic community and secured Nasser’s support for the community. At the Patriarch’s request, in 1962 the \textit{Majlis Milli} was disbanded, leaving control of the Coptic community to the Patriarch and his selected clergy.\textsuperscript{550} In return, Cyril VI pledged the support of the Coptic community to Nasser and publicly gave his blessing to many of Nasser’s projects. In particular, when Nasser attempted to resign his presidency followed the 1967 debacle with Israel, the Patriarch visited him at home to declare “the Copts’ insistence on his

\textsuperscript{546} Ibid.
\textsuperscript{547} Pennington, 165, Sezgin, 82, Wakin, 99.
\textsuperscript{549} Mariz Tadros, “Vicissitudes in the Entente Between the Coptic Orthodox Church and the State in Egypt (1952–2007),” \textit{International Journal of Middle East Studies} 41, no. 2 (2009), 271; Hasan 103-104.
\textsuperscript{550} Pennington, 165.
leadership.” During this period, Nasser granted the Coptic community sufficient funds to build a cathedral in Cairo and to construct a new monastery. Nasser even attended the ceremony where the cornerstone of the new cathedral was laid. In essence, what Tadros describes as the first “entente” between the Egyptian state and the Coptic community, an alliance that gave Nasser the unconditional political support of the Coptic community in return for advancing the Pope’s agenda, was materially profitable for both sides. But it came too late to stand in the way of the administrative reforms that removed Coptic law from communal adjudication and made it a part of the Egyptian court system.

Summary of the Argument

By the end of this period, then, Coptic Orthodox elite capacities had declined dramatically. The issue of preserving judicial decentralization no longer mobilized popular support for Coptic church leaders, so they had lost a large proportion of popular support. The community disagreed over whether the church or secular elites should govern, which caused a strong decline in elite coordination, since one half of the elites was bitterly opposed to the agenda against the other half. Finally, this dysfunction caused a vacuum in key leadership positions during the period of bargaining over the new level of judicial decentralization that post independence Egypt would adopt. By contrast,

551 Tadros, 272.
552 Ibid., 271, Pennington 166.
554 Tadros, 272. Author interviews with Rania Nagar and Sherine Lamy on February 29, 2012, said that “everyone” in the Coptic community knew that Nasser was very good to the Copts because he and Nasser were personal friends. Although Michael, in an author interview on February 26, expressed the belief that the friendship was one-sided and Nasser benefited more than Cyril, he agreed that there was also close cooperation.
Nasser came to power with a strong mandate to reform the governmental structure of the newly independent country. In sum, the fragmentation of the Coptic community that made it unable to bargain effectively with the Egyptian state in the 1950s proved key to Nasser’s largely successful effort at judicial centralization, driven by the kinds of concerns that have fostered judicial centralization in many settings.

**Period 2: Further Attempts at Judicial Centralization under Sadat**

The elimination of sectarian courts marks the end of formal judicial decentralization in Egypt. Constitutional reforms in the late 1970s and early 1980s further centralized Egypt’s legal code, but did so via a contentious process that produced less sweeping changes in practice than the state desired. This second period of reform demonstrates the importance of the relative contextual capacities of the state leaders and Coptic Orthodox elites, particularly the increase in elite coordination on judicial autonomy in minority communities, theorized here as necessary to constrain state centralization initiatives.

In 1970, Anwar Sadat succeeded Nasser as president of Egypt, and in 1971 he amended the constitution to list *sharia* law as “a” major source of legislation, thereby acknowledging the primacy of Islam in Egypt’s political life, but without mandating its use in drafting any particular legislation. In 1977, following bread riots and criticism of the ongoing peace efforts with Israel, Sadat proposed to amend the constitution to make *sharia* “the” primary source of law, which would make any civil laws on the books that clashed with *sharia* law candidates for nullification, and would preclude the introduction
of *sharia*-incompatible laws. This law represented a disaster for Egypt’s non-Muslim citizens. Although the move can be read as a populist measure to appease Egypt’s Islamists, who had become steadily more powerful through the 1970s, it was also timed to draw attention away from the peace process with Israel and economic problems. However, the Coptic church was able to delay the reforms until a complete breakdown in relations between the President and Pope led to the exile of the latter.

Pope Shenouda succeeded Cyril VI in 1971, the year after Anwar Sadat assumed the presidency of Egypt following Nasser’s death. Cyril VI maintained friendly relations with Nasser’s successor for the year that they overlapped, but Shenouda’s relationship with Sadat was strained from the beginning, and became outright hostile with time. Although Pope Shenouda was not the government’s least favored choice in the nomination process for Pope, Sadat preferred Anba Samuel, who was considered more “cautious and politically reliable.” Shenouda was viewed as too political for assuming the role of Bishop responsible for educational affairs and for the weekly question and answer sessions that he delivered at St. Mark’s Cathedral in Cairo, which routinely gave him an audience of thousands. Whereas Cyril VI quietly centralized church power through his friendship with Nasser by eliminating the *Majlis Milli*, he never challenged the 1938 marriage law promulgated by the *Majlis Milli* that served as the government’s legal code for Coptic family law cases in government courts. Pope Shenouda’s first act as Pope was to challenge the 1938 code by issuing a decree banning divorcees from

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555 Tadros, 274.
556 For more on Sadat’s turn to Islamist populism, see Hasan, 105-107.
557 Later, after a spate of sectarian clashes, Sadat stated that he missed Pope Cyril’s approach to “opposing sectarianism” and lamented his inability to work with his successor as easily. For more, see Cairo Press Review No 5908 May 15 1980, “Summary of Sadat’s Major Speech.”
558 Pennington, 167.
559 Ibid, Fiona McCallum, “The Political Role of the Patriarch in the Contemporary Middle East,” Middle Eastern Studies, 43(6), 930.
remarrying in cases where the divorce had been issued on any grounds other than adultery.\textsuperscript{560}

As this only affected a small number of Copts, the government did not immediately react, and during the first months after Shenouda’s consecration, both he and Sadat took a series of public steps to maintain an at least outwardly friendly relationship. Sadat sent high-level representatives to the consecration including Prime Minister Fawzy and Salah al Shahad, the Chief Presidential Chamberlain.\textsuperscript{561} Front-page pictures in newspapers the next day showed a smiling delegate from Al Azhar, the country’s preeminent Islamic religious institution, shaking hands with Shenouda.\textsuperscript{562} A few days later, Shenouda visited Vice Prime Minister Shafei on the occasion of Ramadan Bairam, a Muslim holiday, and the next day he called on Hafez Badawy, Speaker for the People’s Assembly, and Dr. Abdel Kader Hatem, the Deputy Prime Minister, to thank them for their role in his consecration.\textsuperscript{563} The Grand Sheikh of Al Azhar and Pope Shenouda were both invited to attend the Cairo National Congress at the end of November, and a few days later Pope Shenouda issued a statement supporting Sadat’s position on Israeli settlement in Palestine and called for national unity under Sadat’s leadership.\textsuperscript{564} At least to begin with, both leaders attempted to preserve the state-church relationship that gave

\textsuperscript{560} Al Gomhouria, “Papal Order Banning Marriage of Divorced Women ” November 26, 1971. Note that the Pope does not have unilateral power to change the contents of state law, so Shenouda could not issue a decree changing Coptic divorce law in Egyptian state courts. However, there is no civil marriage in Egypt, so two co-religionists must have a certificate from their religious institution in order to obtain a state marriage certificate. In cases of marriage across religions, Islamic law (Sharia) is used. In blocking the remarriage of divorces in cases other than adultery, Shenouda can effectively make divorce less legally meaningful, since divorcees cannot remarry unless the convert to another religion that does allow remarriage after divorce for any reason.


\textsuperscript{562} Ibid.


\textsuperscript{564} Al Ahram November 30, 1971 “Grand Sheikh and Pope Invited to Cairo Congress”; Al Ahram December 6, 1971 “Pope Shenouda Refutes Israel’s Claims in Palestine.”
the President the political support of the Coptic community in exchange for various public concessions.

By the mid-1970s, however, their relationship was becoming strained. Sadat had loosened restrictions on the Muslim Brotherhood, and Islamists had become increasingly powerful in major campus and professional organizations across Egypt. Sadat began to publicly demonstrate his piety, attempting to signal solidarity with the rising Islamist trend. According to Hasan “When Sadat began positioning himself as the as-Rais al-Mu’mīn (the devout president), seated cross-legged on the prayer rug for photographers, he was not introducing anything new: he was merely riding the crest of a wave of popular enthusiasm for Islam that had been latent during the last years of Nasser’s life. Once Nasser’s massive reassuring presence, which had managed in the aftermath of the defeat to hold together the conflicting elements within Egyptian society and to make them keep to the old beaten track of Arab socialism, was removed political Islam burst forth and filled [sic] the vacuum. In an attempt to consolidate his rule, Sadat began to lend state support to the Islamic groups both within and without the universities…”

Sadat, faced with rising opposition to his rule, sought a way to boost his popularity, and given that the most powerful members of Egyptian society were increasingly members of the Islamist opposition, appropriating the language and symbolism of Islam helped make his political agenda more palatable to the majority of Egyptians. Pan-Arabism was in

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565 For more on the social and political factors involved in the mobilization of Egypt’s Islamists, see Carrie Rosefsky Wickham, Mobilizing Islam, Columbia University Press (2002).
566 Tadros, 273.
decline and secularism unpopular, so Sadat mobilized his Islamic identity for political purposes, having himself photographed at prayer, meeting with the Sheikh of al-Azhar, and referring to himself as the Muslim president of a Muslim country.

As Sadat became less interested in representing Christian interests in Egypt, Shenouda became an increasingly political leader who mobilized his constituency to attain greater bargaining leverage with the Egyptian state. His greatest success was in centralizing the Coptic religious establishment and binding the Coptic community to it in such a way that the Coptic church became a corporate political entity, rather than a set of individuals bound together by a common faith. Centralization had begun under Cyril VI, who in 1960 changed the requirements for attaining priesthood to include graduation from the Coptic Clerical College, so that all priests would share a certain basic education directed by the central Patriarchate.\(^{567}\) Shenouda continued this trend, and one of his first moves was to ensure that the Majlis Milli, which still performed an administrative role even after losing its judicial role, was strictly loyal to him. During elections, he took to publishing his list of favored candidates in the Papal newspaper, and these candidates always won.\(^{568}\) He also brought the powerful institution of the bishopric under his control by subdividing existing dioceses and appointing young reformers who agreed with his campaign of reforms, in total quadrupling the number of bishops.\(^{569}\) Additionally, he recruited thousands of extra church servants to create another bond between the church


\(^{568}\) Hasan, 135.

\(^{569}\) Ibid., 124-125.
and its lay congregation and strengthened local church councils, which implemented his reforms at the local level.\textsuperscript{570}

These measures expanded the church’s reach, and Shenouda, along with some of his senior Bishops, used the extra manpower to extend the church’s influence in the daily lives of its congregation. Essentially, having eliminated opposition from within the community, Shenouda and his followers sought to reinstitutionalize the church as the central political authority for Copts, surpassing even the Egyptian state. To do so, they created new volunteer and social work programs for ordinary Copts and appointed a Bishop of Youth, tasked with involving young Copts in the life of the church.\textsuperscript{571} The new Bishop, Moses, used tactics such as engaging in topics like “drugs, sex, emigration, and job anxiety” that would appeal to youth and printing out “schedules of church meetings on the back of pictures of saints, so that the recipient of these schedules would be reticent to toss them into the wastepaper basket.”\textsuperscript{572} According to church workers at the Hanging Church, Cairo’s most famous Coptic place of worship, youth attendance at services increased from the 1980s onwards.\textsuperscript{573}

Shenouda revived the study of Coptic language and liturgy, and sponsored the recording of Coptic sacred music.\textsuperscript{574} In addition, innovations such as collective prayers, a weekly live address from the Pope during mass, excursions to monasteries, and community activities helped general church attendance to climb dramatically through the 1970s and 80s and to turn the church into “a rallying place for Copts, where they can

\textsuperscript{570} Ibid., 130-134.
\textsuperscript{571} Ibid., 151-152 and 184.
\textsuperscript{572} Ibid., 188.
\textsuperscript{573} Author interview with ‘Am Nagih, a guard at the Hanging Church, Cairo, February 12 2012; Author interview with Wafae, bookshop employee at the Hanging Church, Cairo, February 12 2012; Author interview with Murad, church worker, Hanging Church, Cairo, February 12 2012.
\textsuperscript{574} Hasan, 201.
reaffirm their collective identity.” Shenouda’s motives for these wide ranging reforms appears to have been a desire to increase the power of the Coptic church and to increase the ties of personal loyalty between his congregation and himself. He succeeded at both objectives; most Orthodox Copts today, even among the more educated youth who are often critical of the political turn that the church has taken, are hesitant to criticize Shenouda openly. Josephine, a young professional, spoke of “discontent among Coptic youth and quiet talk of a revolution within the church” but was scandalized that a group of Copts had dared to file a lawsuit against the Pope. Michael, a business executive, said that young Copts “resent the Church’s rigidity on certain issues like divorce and how hierarchical and authoritarian it all is,” but he supports Shenouda’s political leadership of the community. The vast majority of Copts are unwilling to express any disapproval of the Church or its leadership to outsiders, and the administrators of the central Patriarchate offices in Cairo display tremendous personal loyalty to Shenouda. The Coptic community thus entered the next period of attempted judicial centralization with a greater degree of elite coordination than it had during the first.

According to Hasan, “the unintended consequence [of the reforms] was to increase the weight of the church vis-à-vis the state. The head of the state no longer had to deal merely with one of Egypt’s spiritual dignitaries, but with the institutional representative of a large, well-organized and unified religious community.” As long as Shenouda was unequivocal in his support of the state, Sadat mostly left the Coptic community to its own devices, particularly as Shenouda could order the Coptic

575 Hasan, 209; 211.
576 Author interview with Josephine B., Maadi, Cairo, February 10 2012.
577 Author interviews with Michael S., Mohandiseen, Cairo, February 11 and 14, 2012.
578 Hasan, 135.
community to vote for Sadat’s preferred slate of candidates during national elections. Occasionally, though conflicts did flare up.

Not content with banning remarriage in the case of biblically unsanctioned divorces, Shenouda wanted to change the 1938 Coptic law used by the state courts to reflect the new divorce rules. He also lobbied to give Copts the right to use Coptic inheritance law to govern the transfer of property in inheritance cases, rather than the sharia-based inheritance law that is standard for all Egyptians.\(^{579}\) The Pope’s multiple requests to change the law, however, resulted in refusals—the President requested that Parliament not take the matter up, as it could not be allowed to pass.\(^{580}\) Additionally, the level of violence between Muslims and Christians rose steadily through the 1970s, beginning in 1972 with the November 6 and 7 burning of a church and subsequent sectarian riots in Al-Khanka, Egypt.\(^{581}\) This incident gave Pope Shenouda his first opportunity for open confrontation with the government on the matter of protecting Copts from armed attacks, a matter on which he intended to be more aggressive than his predecessor. He accordingly sent one hundred priests from Cairo to Al Khanka to march through the streets in protest.\(^{582}\) To defuse the incident, Sadat promised Pope Shenouda that he would authorize the building of fifty churches. Sadat also commissioned a parliamentary committee of inquiry led by the Deputy Speaker Gamal al-Otaifi. The commission issued two recommendations: that the government loosen its restrictions on

\(^{579}\) Author interview with S. Fawzi, Cairo, March 2 2012.

\(^{580}\) Author interview with R. Al-Naggar, Cairo, February 26, 2012.

\(^{581}\) Charles M Sennott, *The Body and the Blood: The Middle East’s Vanishing Christians and the Possibility for Peace*, Public Affairs (2003), 196; Pennington, 171. Interestingly, newspapers for November 6 and 7, 1972 have been removed from the Cairo Press Review, which summarizes main news stories in Egyptian newspapers.

\(^{582}\) McCallum, 930, Pennington, 171. This was partially so controversial because sending priests to demonstrate in an area where there had already been sectarian violence risked provoking attacks on the protestors, which would fuel conflict.
the building of churches and that the Coptic church reinstate the Majlis Milli, canceled by Nasser.\footnote{583} Although the law on church building was never reformed, the Pope did accept elections for a new Majlis Milli, albeit one that he tightly controlled.\footnote{584}

The next few years were relatively peaceful, featuring visits and addresses between the Pope and Sheikh of Al Azhar, and between government members and the Pope that marked their at least ceremonial cordiality to one another.\footnote{585} As a consequence of this improved relationship and, perhaps more fundamentally, his strengthened position as leader of a more united Coptic community, Pope Shenouda regained some of the bargaining power he initially lost due to his early conflicts with Sadat. He was able to forestall Sadat’s proposal that the Constitution be amended to change Islamic sharia from being “a” source of legislation to being “the” source of legislation.\footnote{586} The proposed change would have meant that in places where the Egyptian state had not yet made law, new legislation would have to originate from or at least be compatible with sharia law. At least in theory, it also meant that judges could “dismiss civil law deemed incompatible with the Sharia.”\footnote{587}

In protest, Pope Shenouda called a meeting of the Holy Synod, which concluded that sharia could only ever apply to Muslims, and when that failed to persuade the legislature, he ordered the Coptic community to fast for five days at the end of the

\footnote{583} Tadros, 273, Pennington, 171.\footnote{584} Pennington, 171.\footnote{585} See, for example “Christmas Message,” Al Ahram, January 7 1974, 5; “Pope Leads Christmas Celebrations,” Al Ahram, January 7 1975; “Accession of Patriarch Shenouda III to Papacy to be Celebrated Tomorrow,” Al Gomhouria, November 19, 1976, 6; “Salem Receives Pope Shenouda III,” Al Ahram, November 30, 1976, 8.\footnote{586} Author interview with Ishak Ibrahim, Researcher at the Egyptian Initiative for Personal Rights, February 19 2012; Tadros 274; McCallum 930.\footnote{587} Tadros, 274.
This was Shenouda’s first use of a collective fast to serve a political cause, and it was tremendously successful in mobilizing the Coptic community against the law.\footnote{588} In response, Prime Minister Salem visited the Pope to notify him that the proposed legislation had been tabled, and a few days later the Pope met with President Sadat and the Grand Sheikh of Al Azhar to pray together to reaffirm their good relations.\footnote{590} In this instance, the Pope’s protest was successful in averting legislation that would have brought the Coptic community under the jurisdiction of sharia law.

This victory turned out to be temporary, however, as in 1979, coinciding with the deeply unpopular peace treaty with Israel, Sadat again proposed a national referendum to approve an amendment to Article II of the Constitution to make sharia “the” source of national legislation, and by 1980 a full draft was sent to the Cabinet.\footnote{591} By this time, relations between Pope and President Shenouda were significantly worse than they had been. In 1978, 1979, and 1980 there had been sectarian conflicts in Assiut and Minya, two towns in Upper Egypt with the highest concentrations of Copts in Egypt, and in Alexandria and Cairo as well. In 1979, an ancient Coptic church in Cairo was burned, and in Alexandria in the spring of 1980, as Parliament debated the proposed amendment, large-scale clashes broke out between Muslim and Christian students at the University of Alexandria.\footnote{592} As Hasan points out, the Sadat’s politicization of Islamic identity involved portraying Copts as the “other” within Egypt. In response, Shenouda too emphasized the

\footnotesize{\begin{itemize}
\item Tadros, 274; Pennington, 172.
\item Hasan, 212.
\item “Salem Visits Pope Shenouda,” Al Ahram, September 13 1977, 1; “Sadat Meets with Grand Sheikh of Al Azhar and Pope Shenouda,” Al Gomhouria, September 22, 1977, 1; Pennington 172. Note that whenever there is an episode of sectarian tension, the state newspapers never print a report of the actual cause of the tension, but there is almost always a story about either a member of government visiting the Pope or the Pope and the Sheikh of Al Azhar holding a meeting.
\item “Code of Ethics’ Draft sent to the Cabinet,” Al Akhbar, March 23, 1980, 1; Hasan, 108; Tadros, 274.
\item Pennington, 172-174; “People’s Assembly Urges Firm Confrontation of Extremists and Fanatics,” Al Gomhouria, April 1, 1980.
\end{itemize}}
separateness of Coptic identity, which led both sides to overstate the threat that each posed to the other, heightening sectarian conflict during this period.593

Faced with both attacks on Copts and the advancement of the sharia legislation, the Pope canceled Easter and went into retreat in protest.594 These actions had a much larger effect than the previous order to fast because Pope Shenouda refused to receive the usual Easter greetings from the President and, in canceling Easter, he drew the attention of the expatriate Coptic community, who could not watch the usual broadcast of the Pope’s Easter sermon. As a result, a large group of Copts protested in the United States during Sadat’s visit to discuss with President Carter the terms of Egypt’s peace treaty with Israel.595

These events represented the first irrevocable breakdown in bargaining between Sadat and Shenouda who, if not happy with one another’s political activities most of the time, were at least able to exchange key goods such as permits to build churches, political appointments, and a certain degree of influence over the legislative agenda for political support and votes. Up to this point, their dependence on one another’s support meant that they were able to recover from setbacks in their political relationship. In addition to the rising sectarian violence, there are two particular incidents in the preceding three years that made it impossible for their political relationship to continue. The first was related to Sadat’s peace process with Israel. As part of the normalization of relations between the two states, Sadat asked Shenouda to send a delegation of priests and Bishops to Jerusalem on a symbolic pilgrimage. Shenouda refused, allegedly to prevent Egypt’s

593 See Hasan, chapter 10-11.
595 Hasan, 109.
Muslim population, the majority of whom were opposed to peace with Israel, from perpetrating further violence on the Coptic community, which would be seen as collaborating with Israel.\textsuperscript{596} This angered Sadat, who was particularly sensitive to anything that might get in the way of the peace process.\textsuperscript{597} In this particular context, because the state needed a particular good from the Coptic community, the latter’s relative capacity to bargain successfully increased beyond levels obtainable in most spheres of domestic politics.

The second episode was the Pope’s demand that Copts boycott the referendum to approve the Constitutional amendment that would alter the status of \textit{sharia} law. This was the first time that the Pope asked his followers not to vote for one of Sadat’s policies, and it demonstrated danger of a potential Coptic opposition to the regime. This time, instead of withdrawing the legislation, President Sadat gave a national address in which he criticized Pope Shenouda for canceling Easter, spreading sedition, inflaming American Copts against him, and for failing to live up to the high standard set by his predecessor’s cooperation with President Nasser.\textsuperscript{598} Coptic demonstrations made American Christians question Carter about his support for Sadat, potentially imperiling the peace negotiations. Also, signs held during Pope Shenouda’s first post-Easter speech saying “Shenouda is

\textsuperscript{596} Author interview with M. Makeen, Professor of Intellectual Property Law, School of Oriental and African Studies, University of London, April 26 2012.
\textsuperscript{597} Tadros, 273.
\textsuperscript{598} “Summary of Sadat’s Major Speech,” \textit{Cairo Press Review}, No. 5908, May 15, 1980. In his longest speech to date, which lasted just over four hours, Sadat took public exception to the way in which Pope Shenouda governed the Coptic community. The Cairo Press Review summarizes “President Sadat revealed the details of the decision which the church issued on the cancelation of celebrations marking the Eastern this year, he pointed out that the decision was aimed at making a fuss in the world against Egypt and Anwar El Sadat and against Islam,” and “If the second clause in the constitution, namely application of the Islamic jurisdiction, is the reason behind this situation then he [Sadat] would like to tell all Copts that since he assumed power he is ruling as a Muslim head of an Islamic state. Egypt is an Islamic state, and not only an Arab Islamic state, it has a pioneering and leading role in the Islamic world and Al-Azhar has protected Islam throughout one thousand years.” This speech, coming just after sectarian clashes, is unusual for its direct and public criticism of the Pope.
our President” seem to have angered Sadat for their challenge to his authority. On September 5, 1981, having passed the constitutional amendment, Sadat responded to the next widespread sectarian violence by revoking the decree that confirmed Shenouda as Pope and exiled him to Wadi Natroun, a monastery outside Cairo.\textsuperscript{599}

**Summary of the Argument**

While the judicial reforms of the 1950s were more wide reaching in their extent in terms of abolishing sectarian judicial institutions, the amendment of Article II of the Egyptian constitution served to further marginalize non-Muslim, minority law in Egypt. Whereas a law reforming Coptic Orthodox family law to permit adoption and non *sharia*-based inheritance might have been possible before 1980, the amendment of Article II made this kind of reform, and any law not in accord with *sharia* law, impossible. Whole segments of Christian sectarian family law are, at least for now, precluded under Egyptian civil law. Nonetheless, the state still recognizes or indeed requires sectarian authorizations in some areas of family law, particularly marriages. Complete abolition of legal pluralism has yet to occur, in significant measure due to coordinated Coptic opposition under Shenouda. Still, minority power is only minority power. Although the deinstitutionalization of Coptic legal tribunals and the breakdown of elite coordination created space for state judicial centralization during the 1950s, the 1970s and 80s initially offered the Coptic church an opportunity to reassert itself and prevent further centralization. However, when Pope Shenouda demanded too much from Sadat, extending his demands beyond those realizable even with the relatively expanded

\textsuperscript{599} Pennington, 176; Tadros, 273.
capacity that the Coptic church enjoyed during the peace process with Israel, bargaining broke down and some significant further centralization took place.

Recent Developments

The result of increased legal centralization in Egypt through these two eras of reforms is a somewhat confusing tangle of jurisdictions and competencies that overlap in some areas but not in others. For example, as noted, today jurisdiction over marriage remains shared between the state and Egypt’s various religious sects. An Egyptian wishing to marry must obtain a certificate of marriage from the relevant religious authority, and then, after the religious ceremony, register the marriage with the state. The state will not register marriages that are not accompanied by a religious certificate of marriage, and marriages are not considered valid until they are registered with the state. Centralization thus has now stopped at an awkward partway point, leaving religious sects with an almost token control over marriage but without power over divorce or forums in which to adjudicate marital disputes.

The case of legal centralization in France forms an interesting counterpoint to the case study of Egypt. Modern day France, like Egypt, was made up of multiple different territories and identity groups who were brought under a central authority via strategic alliances and conquest. Egypt’s Ottoman period left it with a legacy of legal accommodation for different religious norms which contrasts starkly with France, where Catholic-Protestant conflicts in the second half of the sixteenth century left millions dead and a long-term suspicion of religious identity. Even today, French politicians, asked why

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they choose not to accommodate aspects of Catholic, Muslim, or Jewish cultural practice or law (such as wearing a cross or headscarf, wedding via religious ceremony, etc.) bring up the siege of La Rochelle, where Catholics besieged and killed thousands of Huguenots in 1572-3.601 They argue, in an interestingly uniform narrative, that La Rochelle formed a turning point for religious identity in France, and that having once seen the violence unleashed by religious hatred, French officials would never again allow policies that support the mobilization of religious identity in French politics.602 While England ignores the presence of non-state mediation bodies such as the Sharia councils, and Egypt centralizes by bringing group law under extensive state control, France defines group law out of existence by eliminating the category of religion entirely from public life.

Egypt, in contrast, retains significant legal pluralism, even though centralization efforts have not disappeared after the two main initiatives discussed here. In 2000, Egypt further reformed its judiciary to introduce specific family law courts, effectively removing family law jurisdiction from the more general first instance courts. This change was entirely structural; the underlying laws remained the same. In practice, this had very little effect on minority law in Egypt, but it did offer the hope that the judges might possess some degree of specialization in the area of family law, including the family law of different religious denominations, as opposed to the generalist Muslim judges who had heard these disputes previously.

In Egypt today, all matrimonial law is governed under *sharia* law unless two co-members of a particular religion marry one another. If two Orthodox Copts wed, for

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601 Author interview with Alain Christnacht, President of the French Conseil d’Etat December 16, 2013.
602 Of course, banning religious practice can have a similarly mobilizing effect, but this is usually dismissed as a possibility.
example, their union is governed by Coptic Orthodox law, although the marriage must be legalized by the state through filing the appropriate, church-generated paperwork. This is true as well for Catholics, Protestants, and the various other Orthodox sects such as Greek and Syrian Orthodox Egyptians. When a Catholic marries a Protestant, or an Orthodox Copt marries a Muslim, these unions are solemnized under sharia law, which governs all “mixed” marriages as well as marriages between Muslims. In effect, Egyptians are governed according to religious identity, with Islam and its associated sharia law operating as a sort of trump card that operates when it is unclear whose law should prevail.

Divorce, on the other hand, is governed entirely by the state. Civil divorce is permitted as long as it is authorized by the legal code of at least one spouse, so that a Muslim may divorce a Catholic whose legal code would otherwise ban divorce. Because the courts rely on the relatively liberal 1938 Coptic Orthodox family law written by the secular Majlis Milli, divorce is legal for Orthodox Copts on nine separate grounds, which gives litigants a sufficiently wide range of options that most divorces go through. The Patriarchate, however, refuses to recognize the 1938 law because it was written by a secular body, and instead claims to follow the laws of the Bible, as codified by the Church in 1955. These codes allow divorce only in the case of adultery. This means that an Orthodox Copt can only divorce by proving adultery (and the guilty spouse loses custody of the children), or by converting to a different religion. Conversion is easier for men than women because they are less subject to sanction by the community, but it means that the couple’s children are automatically converted to that religion as well.

603 Bernard-Maugiron, 366.
which is not the case if the woman converts.\textsuperscript{604} The disparity in divorce law between the Egyptian civil courts and Patriarchate has led to the filing of several lawsuits against the Pope on behalf of litigants who possess a civil divorce but are unable to remarry because the Patriarchate, which issues marriage licenses, refuses to recognize their divorce.\textsuperscript{605}

The lawsuits pit two different views of Egyptian law against one another. The Pope’s lawyers argue that Egyptian civil courts, including the Supreme Administrative Court, which heard some of the cases on appeal, lack jurisdiction over religious law and thus cannot hear the case. They contend further that even if the civil courts had jurisdiction, the 1938 Coptic family laws that the court used in its decision are no longer valid, because the Coptic community now follows the law as written in the Bible.\textsuperscript{606}

The Supreme Administrative Court’s decision argues, in contrast, that it does have jurisdiction, because it views the Coptic Orthodox Patriarchate as a “public law corporate person” and that the 1938 laws have customary law status, and thus hold force.\textsuperscript{607} Furthermore, it notes that the Egyptian Constitution includes the right to form a family, and that Coptic religious officials only have the right to exercise jurisdiction over marital law to the extent that they do so within the bounds of Egyptian civil law, including the Constitution, and subject to judicial oversight.\textsuperscript{608} This decision, issued in 2008, comes closer than any other recent judgment to clarifying the relationship between sectarian law and Egyptian civil law. It makes clear that sectarian law holds a subordinate position to both the Egyptian Constitution and subsequent statute-based laws, and it

\textsuperscript{604} Author interview with Ehab Shafik, lawyer, Cairo, March 4, 2012.
\textsuperscript{605} For more, see Bernard-Maugiron on two prominent lawsuits filed by Copts against the Pope to have him recognize a civil divorce.
\textsuperscript{606} Bernard-Maugiron, 366.
\textsuperscript{607} Ibid., 367.
\textsuperscript{608} Ibid.
effectively rules that sectarian groups may not unilaterally change the content of their personal status laws.

In response, Shenouda ordered the Majlis Milli to pass a formal amendment to the 1938 Coptic Orthodox Personal Law Code to eliminate articles 52 through 58, leaving in place only articles 50 and 51, which authorize divorce in the case of proven adultery or conversion to another religion, respectively.\(^{609}\) This seems to have had little effect, however, because in 2010, the Supreme Administrative Court again ordered Pope Shenouda to allow a member of his congregation to remarry within the Coptic church after his former wife, the actress Hala Sidqi, converted to Syrian Orthodox Christianity to nullify their marriage.\(^{610}\) Shenouda refused to recognize the divorce because Sidqi had converted to another denomination of Orthodox Christianity, which meant that her divorce should still fall under Orthodox jurisdiction. The Supreme Administrative Court ordered the divorce to go through because denominational difference is sufficient for the Egyptian state to apply sharia law, which allows divorce, and because the Egyptian Constitution guarantees the “right to marry and form a family.”\(^{611}\)

In this case, as with the previous cases, Shenouda refused to acknowledge the court’s order and did not issue a remarriage license. His decision sparked days of widespread Coptic demonstrations in his support, and in favor of the Pope’s suggestion that the Egyptian state reestablish sectarian family courts to resolve this type of jurisdictional dispute. In response, then-President Hosni Mubarak ordered the Ministry of Justice to look into authorizing a unified personal status law for the various Christian sects of Egypt, something these sects had advocated since the 1950s. This initiative

\(^{609}\) Ibid., 370.
\(^{610}\) Ibid., 382.
\(^{611}\) Ibid.
would have allowed Christian rather than Muslim personal law to apply in cases of
denominational difference. That Mubarak seriously considered allowing the domain of
_sharia_ law to shrink in favor of Christian law is astonishing. Before he could decide
whether to follow through or not, he was forced out of the presidency in January, 2011. It
remains to be seen how Abdel Fattah el-Sisi’s government will address the ongoing
demand of the Orthodox Copts to adjudicate their own family law disputes once again, or
at least to place Egypt’s Christians beyond the jurisdiction of Islamic family law.

**Conclusion**

The case study of Egypt reveals two causal pathways to legal centralization. In the
first, a bureaucratizing state sought to rationalize its administrative structure and thus
attempted to eliminate non-state courts, succeeding in doing so only when the push for
centralization coincided with a weakening in group capacity. It was only once the group
in question, the Copts, became so internally disorganized and without leadership as to
have relatively low capacity in comparison to that of the state, as well as low elite
coordination within the group, that centralization largely succeeded. In the second, a
regime in crisis looked to further legal centralization as a tool to strengthen its position
against its Muslim opposition. Despite initial resistance from Coptic elites, abetted by
greater unification within the Orthodox Coptic community, the regime eventually
succeeded in centralizing to a significant extent when the regime replaced the recalcitrant
minority group leader with more accommodating community representatives. The state
thereby reduced Coptic elite coordination by depriving the community of a leader who
could successfully mobilize opposition to the reforms and bargain on its behalf. Since 2012, the Coptic community has been led by Shenouda’s successor, Pope Tawadros II, while Egypt has been led since 2014 by Abdel Fattah el-Sisi. The issues of whether the community will attain a unified Christian personal status law or regain the ability to adjudicate intra-community family law disputes remains unsettled. Their fate is likely to depend on how far Egypt’s current and future leaders rely on their Islamic identity to retain power and the political strength, as well as the savvy of the Orthodox Coptic Popes.
Chapter Five: Conclusion

Summary of the Overall Argument

One of the most pressing and under-researched issues in comparative politics is the delegation of the state’s coercive function to non-state groups such as military contractors, private jails, surveillance firms, and religious or ethnic courts. Many developed, democratic states hire private firms to enact force against international opponents and domestic law-breakers, but few are willing to permit the existence of separate, group-based courts and legal systems. Whereas contractors carry out the state’s mandate, courts make, revise, and implement laws, and, as such, are bound up with the governing authority of the state, as well as its coercive apparatus and its tax-generating property rights regime. Nevertheless, more than half of the world’s states do decentralize judicial power.

This project theorizes the phenomenon of legal pluralism resulting from judicial decentralization. It argues that while many different pathways lead to various levels of judicial decentralization, they involve some sort of bargaining process between the state and societal groups, usually tribal or religious, which are bound together by norms not shared by the state. In this bargaining process, the relative capacities of minority group elites and the state, and of these, levels of elite coordination within these identity groups determine the level of decentralization that result. Observations from the case studies of Egypt, Lebanon, and Tanzania lend support to this contention and further demonstrate the mechanisms of bargaining. In all three cases, elite members of groups whose support the state needed to enact a particular agenda were able to use their power to preserve varying
amounts of autonomy from the state vis-à-vis inheritance law, marriage and divorce law, and other areas of the law. The Tanzanian state’s need for support from former chiefs for post-independence state building projects, the Egyptian state’s need for support from Coptic authorities during state building and subsequent international conflicts, and the Lebanese state’s need for support from religious leaders in holding together a fragile pact that allowed the Lebanese state to cohere, all gave these minority group elites sufficient leverage to press for partial judicial autonomy.

Having examined judicial decentralization in three full case studies and three shadow cases, it becomes clear that while contestation whose outcome is determined by the above bargaining matrix is causally important, it is not the only important causal factor. In tracing state leaders’ and group elites’ capacities, I necessarily invoke the colonial period before independence and state building as a vital moment during which capacities took shape. As such, I begin to suspect that colonial legacies may be more decisively constitutive of subsequent bargaining positions and paths of development than my theory initially recognized. Comparativists have for similar reasons utilized colonial legacies to great effect in explaining outcomes in fields such as trade and finance (Mahoney 2001, Beck et al. 2003, La Porta et al. 2007), human rights (Cross 1999, Carey et al. 2002, Mitchell et al. 2013), ethnic conflict (Blanton et al. 2001) and the rule of law (Joireman 2001, Helmke and Rosenbluth 2009). Judicial decentralization, as a process rooted in the state’s post-independence trajectory, could also benefit from a greater emphasis on the constitutive role of colonial legacies.

In the context of this study, I imagine that several separate components of colonial legacies would be immensely helpful in further understanding relative capacities. For
example, what form did colonial governance take? States with systems of indirect rule would be more likely to have strong group elites, whereas those that were centrally governed might have a stronger state at the moment of independence. It would also be interesting to consider whether the colonial power had attempted to centralize or reform the judiciary before independence. This analysis could help explain the first period of contestation following independence, in particular, when the state and groups negotiate for the level of judicial decentralization for the first time.

However, colonial legacies alone cannot explain the full variation of types of judicial decentralization, and states’ trajectories in moving from one type to another. Because colonial legacies do not change after the end of the colonial period, they cannot explain later changes in levels of judicial decentralization. In Egypt, for example, Sadat accomplished further centralization in the 1980s. In Malawi, the state has reversed course on judicial decentralization policy three separate times. Colonial legacies also cannot explain judicial decentralization in states that were not former colonies. Nevertheless, emphasizing and exploring more fully the constitutive roles of colonial legacies is an important next step for this project, particularly since the first period of bargaining in all states that I have examined takes place either under colonial rule or in its immediate aftermath.

**Possible Directions for Further Research**

Given that the United Nations Transitional Authority in East Timor deliberately set up a legally pluralistic framework for the new government, under which separate
identity groups would be governed by separate laws, and similar arrangements have been proposed for Iraq and Afghanistan, legal pluralism is becoming of more than theoretical interest. Aside from its origins and structure, there are many aspects of legal pluralism that warrant further scholarly attention. Do particular types of litigants fare better in state or non-state courts? More concretely, in which venue do women fare better? Does the state’s commitment to its lower level courts in rural areas suffer when there are also non-state courts in these areas? How does long term reliance on or exposure to one type of venue or another alter citizens’ perception of the state or their participation in civic life? When states devolve judicial power to win support for their judicial projects, do they favor group rights at the expense of individual rights? These questions are yet to be answered, but I hope that a preliminary analysis of the types of legal pluralism and their origins will help to provide a foundation for these, and other similar inquiries. By understanding the political forces that give rise to differing levels of judicial decentralization and legal pluralism, we can not only recognize that legal pluralism represents a range of highly consequential political phenomena that are not likely to disappear any time soon, as accounts stressing the reasons for centralization and legal uniformity may seem to suggest. We can also begin to consider who benefits and who suffers, as well as which public goals are better advanced and which are not, by different forms of legal pluralism; and so we may be able to discern the prospects for constructing legal systems in many places that are more broadly beneficial for all they govern.
Appendix A

Anecdotes and Sample Court Cases from Each Country

The preceding analysis of the conditions that beget various iterations of legal pluralism primarily focuses on macro social forces, and by necessity abstracts elements of the available data to draw more general causal conclusions. It does not, however, give a good sense of what it is actually like to witness proceedings in the courts and judicial tribunals that result from legal pluralism. This project drew on primary observations of these court sessions, so I will describe them here to give the reader a better sense of the lived experience underpinning the above analysis. Because I devoted less space to them above, I will begin with the three shadow cases.

England

England’s Sharia councils have gained a degree of notoriety over the last decade. Newspaper and magazine articles have discussed, with varying degrees of hysteria and accuracy, the fact that some British Muslims choose to avail themselves of non-state, religious arbitration. I visited and witnessed proceedings in four different councils, and spoke with arbitrators from another two. What struck me, again and again, was the extent to which litigants in these councils needed their services. On the day I visited, the Islamic Sharia Council heard two divorce proceedings from women whose husbands had either abandoned or abused them, and so met the Islamic legal requirements for divorce.
Neither woman had had a civil marriage, and one of the women was confused that the lawyer she had spoken with had advised her that she did not need a divorce since she was never married. In both cases, the litigants needed a religious divorce so that they could remarry. That such a thing wasn’t required by civil law meant nothing to them—the religious laws that governed their behavior required a divorce before remarrying, and they had come to the only authority that they knew could provide them with one. Both women were successful in their suit, although a third was denied a divorce for failing to attempt to reconcile with her spouse before asking that their marriage end. The Islamic Sharia Council appears to attract litigants who are either recent immigrants to Britain, or are less aware of British civil law. In cases where a civil divorce was required, the arbitrator usually granted an Islamic divorce but advised the litigant(s) to seek a civil divorce as well.  

The Birmingham Sharia Council, by contrast, worked closely with local civil courts. In all of the divorce proceedings I witnessed, the Council refused to issue an Islamic divorce until the couple had obtained a civil divorce first. They did so both because they wanted to make sure that their litigants truly obtained the full outcome they desired, but also because they recognized that rulings in British courts were fully binding when it came to things like filing tax returns, establishing guardianship of children, and other matters. Although they saw their role as important in advising the proper outcome or giving religious support to the court’s decision, they did not see themselves as substitutes for British law. They were particularly exasperated with a male litigant who had two separate religious marriages to two women, and knew that he was married in a civil marriage to one of them, but couldn’t remember which since he had been filing

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612 Author interview and observation, London Sharia Council (Sheikh Suhaib Hasan), April 16, 2012.
single tax returns. Both women wanted to leave their marriage to the litigant, so the court interviewed both women, discovered which one had been involved in a civil marriage, granted the other a religious divorce, and sent the civilly married couple to the British courts for a divorce that they could then bring back to the Council for a religious one. The court advised the man not to seek guardianship of the children, even though they were of an age to be under his care according to Islamic law. When I asked them about this seeming contravention of the religious law that they purportedly used to arbitrate, they argued persuasively that they saw their role as helping members of their community to live according to their shared religious dictates to the best of their ability, but that they recognized that British laws and values were now an important part of that community. They also were sure that the children in this case would be better off with their mother.  

In cases that I witnessed at all four Councils, some litigants attempted to use the religious authority of the forum to help them get what they wanted in a civil divorce. In one case, a woman forced her husband to testify in front of her relatives that he had been unfaithful to her. By doing this, she gained their support in pressuring her husband to willingly participate in a civil divorce. In another case, a man had attempted to unilaterally divorce his wife while drunk. The woman used the resulting divorce hearing to reveal that her husband drank alcohol, and to ask for the Council’s intervention in helping him stop drinking, and to invalidate the divorce. The Council agreed to invalidate the divorce and referred the husband to a support group for alcohol addiction, but asked the couple to return in six months to establish whether the husband still wanted a divorce. I also witnessed cases where these Councils (and, in particular, the London

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613 Author interview and observation, Birmingham Sharia Council, May 9, 2012.
615 Author observation, Birmingham Sharia Council, May 9, 2012.
Sharia Council) directly contravened British law, for example by allocating all property of a divorced couple to the husband, or granting custody of the couple’s children to the husband’s mother, rather than the children’s mother. I would have loved to have been able to find out whether these rulings ultimately proved binding, or whether the woman in either case sought redress in civil court.

France

Coming from England, where Sharia Councils were widespread and easy for a researcher to access, it was somewhat jarring to find how closed the more observant sectors of French Muslim society were to outsiders. In interviews and conversations with French Muslims in the courtyards of mosques, bakeries, Arabic book shops, and cafes, it was easy to discern that French Muslims did not seem to approach their commitment to religious law with any greater or lesser degree of seriousness than their British counterparts. However, French law outright bans religious involvement in public life, so French Sharia Councils were an impossibility. Instead, I found that French imams quietly offered marriage and divorce services inside mosques on an as-needed basis. Support staff at the Union of Islamic Organizations in France spoke of visiting a mosque after their civil union to have a brief religious ceremony.\(^{616}\) This practice in no way contravenes French law, but it appears to be kept out of the public eye. More controversially, an imam at the Paris Central Mosque advised a woman who had just procured a divorce to ignore the French court’s allocation of the couple’s assets, and to

\(^{616}\) Author interview, UOIF, May 29, 2012.
return as a couple for a proper allocation that evening.\footnote{Author interview with Head of Religious Affairs, Paris Central Mosque, June 2, 2012.} The woman expressed concern that she would lose her ex-husband’s financial support, but the imam argued that it was now her responsibility, and the responsibility of her parents, to support her. Interestingly, a large sign on the wall behind the imam’s desk announced that no religious marriage or divorce proceedings could occur unless the couple in question brought proof of civil marriage or divorce with them. That said, proof of the involvement of French law did not prohibit its contravention by at least one religious authority. As he told me, the law was the law, but what people chose to do in their own homes was up to them, since God could see everywhere, but the French authorities could not.\footnote{Ibid.}

Malawi

In Malawi, courts governed according to local customary law and using chiefs, in Malawi termed Traditional Authorities, as judges were outlawed as part of the transition to multiparty democracy in 1994. However, many Malawians continued to use these courts, which were often never actually disbanded, and a law passed in 2011 reinstated these courts, although the Minister for Justice has never officially followed the law to recognize these courts.\footnote{Author interview with J. Ubink, July 2, 2013.} Whether cases end up in the courts of Traditional Authorities (henceforth referred to as TA courts) or state magistrates seems mostly to depend on questions of geography, family ties and social networks. In urban areas, where there is a greater concentration of magistrate courts and greater access to public transit, there is less reliance on TA courts. In more rural areas, a greater number of cases are decided in TA
courts, although the magistrate courts still have a heavy caseload. In the most rural districts, however, magistrates presiding over courts do not always have copies of the laws they are meant to uphold, and have not received dispatches outlining changes to the law in several years. For this reason, they appear to rely on a patchwork of whichever law books they possess, notes from their training, and local custom. In one court near the border of Zambia, a magistrate had a copy of the United States Constitution but not that of Malawi.

Because there is less ability to forum shop in rural areas, litigants are often left with no recourse when TA courts reach decisions they disagree with, even when they violate Malawian law. In a court in a rural district in the South of Malawi, I witnessed the fourth and final section of a longstanding case involving a land dispute between two neighbors. At issue was a parcel of land that both had planted on, and each claimed belonged to their now-deceased parents. The Traditional Authority had asked the litigants to return on three occasions to answer more questions and to allow her to pursue her own research into the question. In this final session, she ruled that neither person could legally plant on the land because it formed part of a national forest preserve. Both litigants were furious—they suspected (and one of the Traditional Authority’s aides later verified) that the TA in question had a history of requiring disputants to make multiple appearances so that she could justify charging a higher fee.\(^\text{620}\) The nearest magistrate court they could approach was in the city of Zomba, which was too far away to allow the multiple visits that would be required to settle the dispute. In other disputes, however, TA courts had been able to peacefully adjudicate disputes over chieftaincy succession, land rights, sales contracts, and petty crime.

\(^{620}\) Author interviews and court observation, TA Court, Zomba rural district, June 13, 2013.
In most districts, I found an unofficial but strong collaboration between magistrate and TA courts. They often referred cases back and forth—TA courts sent complicated cases, or those whose outcomes could jeopardize their legitimacy, to the local magistrates, and magistrates sent petty cases or those whose backgrounds they were having difficulty discovering to TA courts, which often had better access to family testimony.\textsuperscript{621} The confusion governing national level recognition of TA courts was in no way reflected at the local level. There, officials in different venues proved capable of collaborating effectively, and using components of the different laws and norms when they best suited the case at hand. Perhaps the best example of this was an attempted murder case from a court near Lake Malawi. A woman had accused her neighbor of attempting to poison her children, but the magistrate suspected it wasn’t really an attempted murder. However, he wanted the case to be followed up, so he passed it along to the local TA court. The TA determined that the man had put poisoned fish outside his house in an attempt to poison some neighboring dogs that had been stealing some of the fish that he left outside in the sun to preserve with salt, and he had not imagined that neighboring children might attempt to eat the poisoned fish. Fortunately, no one was hurt, but the TA fined the man and asked him not to repeat the practice.\textsuperscript{622}

Tanzania

\textsuperscript{621} Author interview with the District Commissioner of Nkhata Bay, June 25, 2013; author interview with the District Commissioner of Rumphi, June 27, 2013; author interview with Village Head, Rumphi Urban Council, June 27, 2013; author interview with Traditional Authority Malanda, Nkhata Bay District, June 27, 2013; author interview with Traditional Authority , Zomba district, July 6, 2013.

\textsuperscript{622} Author observation, Mangochi rural district court director, July 12, 2013.
Like Malawi, Tanzania’s court system is under resourced and has a long backlog of cases. In urban areas, this results in sometimes years-long waits for simple cases. A week of observing one of Dar es Salaam’s magistrate courts showed me that a large part of the problem was the assessors, whose presence in the courts leaves the possibility for the introduction of customary law into civil law courts. The post of assessor, it turns out, is not lucrative, and most of the people who have both sufficient knowledge of local custom and the time to spend in a less high earning position are too old to take other jobs. As a result, there is a high rate of absenteeism among assessors. During the week I attempted to observe court sessions, two full days had to be entirely canceled (a court cannot operate without the presence of two assessors) and one day’s session began three hours late. The assessors often fell asleep and had to be awakened to waive their right to question witnesses. The cases at the court that I witnessed were mostly petty criminal cases involving theft, bar fights, and non-payment of previous court fines. The issues were mostly handled through the imposition of fines or brief, 24-48 hour long stints in jail.

At a magistrate court in Iringa, a city in the south of Tanzania, the magistrate seemed to work much better with the assessors. He asked their opinion on all of the cases, and listened when they weighed in on histories of local property disputes and longstanding family feuds. In one case, an elderly man and woman were in court because the man’s chickens kept going into the woman’s garden and eating seeds. The session turned surprisingly acrimonious until one of the assessors got involved, at which point everyone began to laugh, including the litigants. The assessor, a friend of both parties, had called them both old chickens (apparently a hilarious insult) and asked them to
propose their own solution. They agreed that the two would share the cost of an improved chicken pen. Although Tanzanian law would have called for fines or damages, the magistrate went along with the assessor’s collaborative solution.\footnote{Author interview and observation, Iringa Mjini Court, March 14, 2013.}

In Mtae, a small village in Lushoto district that is cut off from main roads during the rainy season, local elders held informal adjudication sessions in Mr. Pochi’s restaurant, the town’s main gathering place. Mr. Pochi, the main adjudicator, had served as an assessor, but found he preferred to run his business full time. Knowledge of his experience as an assessor brought locals to him for dispute resolution, which he did in return for a small fee. In one of the two cases I observed, he spoke with the families of two young men who had been in a fight. One of the families threatened to take the case to the magistrate’s court in Lushoto, but Mr. Pochi talked them out of it. Instead, he helped the families negotiate a solution. The aggressor’s family agreed to pay the medical costs of the injured party, and both families agreed to keep the boys out of one another’s way until their tempers had cooled.\footnote{Author interview with E. Pochi, Mtae, February 23, 2013.} Normatively speaking, it was difficult to determine whether the litigants were intentionally avoiding state court in favor of a venue where they thought the result would favor reconciliation over restitution, or whether it was simply more convenient or less costly to do things this way. At the end of the day, both families were pleased—one had avoided the risk of having their son imprisoned, which would have deprived them of his labor, and the other had a small monetary settlement.

\textit{Egypt}
Arriving in post-revolution Egypt during the period when Mohamed Tantawi and a coalition of military authorities governed the country, before the election of Mohamed Morsi, and only a week after 79 people were killed in a revolution-related incident in Port Said, it became clear that it was going to be difficult to sit in on sessions in state courts. This proved to be the case, since not all courts were in session, and those that were operated under instructions to be wary of journalists. However, I was able to obtain firsthand accounts of proceedings in these courts from former litigants. By far the most common scenario I heard was that of a divorced Coptic couple attempting to remarry. The marriage law put into place by secular Copts in 1938 permits divorce, while the Coptic Orthodox church does not, so while Copts can receive a divorce under Coptic law in Egyptian state court, they cannot remarry, since marriages are still conducted by the church itself. One woman I spoke with was in a relationship with a man she intended to marry, but she was deciding whether her best bet would be for the man to convert to Islam, in which case they could be married under Muslim law, giving them a legitimate marriage in the eyes of the state but not their community, or whether they should marry overseas. Another woman had gone to court to ask for a divorce, but had changed her mind when she realized that her court-issued divorce would not be recognized by her family.

There was a lot of discussion among young, reform-minded Copts, particularly men, about pushing the church to recognize divorce as part of the newly forming alliance between the Coptic church and the transitional government. These hopes seemed to be on the verge of being realized after the death of Coptic Orthodox Pope Shenouda III, who

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had been one of the church’s staunchest opponents of divorce, and his replacement with Pope Tawadros II, who was seen as being more pro reform, and the election of Egypt’s first post-revolution president, Mohamed Morsi. However, Tawadros II’s participation in the coup replacing Morsi with General el-Sisi seemingly reestablished the traditional dynamic of the regime granting the Coptic Orthodox Church wide latitude in regulating its internal affairs without state interference in exchange for Church support for the ruling regime.

Lebanon

In Lebanon, I witnessed religious courts legally determine matters of post-divorce property allocation and guardianship, among many other matters. Having seen these types of decisions rendered before, but either unofficially, outside the domain of state law, or according to codes of law that didn’t necessarily reflect the community’s current understanding, it was somewhat jarring to realize that litigants in these venues did not have a backup option of appealing to civil law if they disagreed with the outcome. In a court near the border of Syria, a Sunni judge gave sole custody of a couple’s children to the husband, with only visitation rights for the wife. In another case, the court granted a man a divorce from a man and his wife, who although present, was represented by her father and not allowed to say anything except that she opposed the divorce. After the judge issued the divorce, he required the husband to repay his former wife the dowry she had brought to the marriage, but the wife’s father took the money instead. The court

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628 Author interview and observation, Sunni Sharia Court, Chtoura, Bekaa Valley, Lebanon November 17, 2012, with Judge Mohamed Nokkari.
reporter, a local, suspected that the father had forced the issue of the divorce.\textsuperscript{629} In another instance, the court issued a divorce to a woman whose husband had abused her, but in the following case, the judge denied a divorce in a similar situation until the couple had attempted to reconcile.

In a Maronite court, I witnessed an appeal from a couple that wanted to marry, but had been denied permission to do so. Although the couple was both Maronite Christians, the man had never been baptized, so the church did not recognize him as a suitable spouse.\textsuperscript{630} The church offered two choices—either the man could be baptized, or they could appeal to the Bishop for an exception. The couple chose the baptism option. In another case, a Maronite couple that had chosen to obtain a civil marriage in Cyprus requested a religious divorce so that the woman would be free to remarry. The judge explained that there was no concept of divorce in the Maronite church, and that their best recourse was to return to Cyprus to seek a divorce.\textsuperscript{631} Another case involved an interfaith couple where a Maronite man and Muslim woman were seeking to marry one another. They could not marry under Sunni Muslim law because Muslim women, according to some interpretations, are prohibited from marrying non-Muslims, so they were hoping that the Maronite court could help them. They, too, were referred to Cyprus.\textsuperscript{632} While many of the cases were resolved in a manner that appeared to be satisfactory to both parties, others did not. In these cases, the structure of appeal led up through the church hierarchy, ending with the Patriarch of the Maronite Church. Although the church did not

\textsuperscript{629} Ibid.
\textsuperscript{630} Interview and observation, Father Maroun Nasr, Judge on the Maronite Court of Appeals, President of the Catholic Court for the East, Saint Tekla Monastery, Wadi Chahrour, Lebanon, November 15, 2012.
\textsuperscript{631} Ibid.
\textsuperscript{632} Ibid.
condone it, litigants in the waiting room quietly traded tips about which religions they could convert to that might have laws more favorable to their hoped for outcome.

These observations, far from making it clear whether non-state courts are normatively desirable or not, serve to show how complicated the law is when people find themselves bound by multiple, sometimes conflicting sets of law, or when state law fails to reach all of its citizens in its intended form. Neither is it clear whether some forms of legal pluralism result in better outcomes for ordinary citizens than others. Even in places where pluralism is hidden from the state, such as France, citizens who find themselves in need of religious law are clearly able to access it, albeit discreetly. In England, the open nature of the Sharia Councils lends them greater visibility. This seems to help in most cases, as Council judges work more fluidly with state law, but it has also created a large backlash against Sharia councils and greater stereotyping of Sharia law. Whether or not the state brings minority group law into state courts, as in Egypt and Tanzania, or recognizes its use in other types of tribunals, as in Lebanon and Malawi, it is clear that legal pluralism is an integral part of the legal landscape of many countries.
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