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STATE-BUILDING, SYSTEMIC SHOCKS AND FAMILY LAW IN THE MIDDLE EAST AND NORTH AFRICA

by

CAMILLE LAYLI WOLPE

Under the Direction of Professor Carrie Manning

ABSTRACT

Family law regulates the formation of marriage, divorce, marital property rights, child custody, inheritance, and spousal duties. This study aims to demonstrate how family law formation in the Middle East and North Africa reflects the struggle among social and political forces to capture the state and assert authority. The balance of power between competing social forces impacts both the *timing* (short-term versus long-term struggle) and *type* (progressive or regressive) of family law after independence. The ability of one of two competing forces, broadly categorized as traditionalist versus modernist, to capture the state is necessary for codification and is predictive of family law content. Case studies reveal that systemic shocks (e.g. revolution, social unrest, or foreign intervention) tip the balance of power in favor of traditional or modernizing forces in the post-independence state-building process and facilitate the successful consolidation of power and the codification of family law.

INDEX WORDS: Family law, Islamic law, Tribal Law, Women's rights, State-building, North Africa, Middle East

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by

CAMILLE LAYLI WOLPE

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

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DEDICATION

This thesis is dedicated to Rishi, Jale, Abdi and Ipti for bringing pure happiness and fun into my graduate years in Atlanta.

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1. INTRODUCTION

Family law, also known as personal status laws, refers to the area of law which regulates the formation of marriage, divorce, marital property rights, child custody, inheritance, and spousal duties. Political scientists have highlighted the interconnectedness between patterns of state-building and the development of family law. An epic moment in state-building occurs when laws are enacted that regulate the private lives of individuals, facilitating the nationalization of family affairs. In North Africa and the Middle East, some countries adopted family law legislation fairly easily after winning state sovereignty, while others experienced great difficulty enacting similar laws for many years following independence. The extent to which family law content was regressive or progressive also varied significantly among North African and Middle Eastern countries. This study aims to demonstrate how family law reflects the struggle among various social and political forces to capture the state and assert authority in the state-building process. The balance of state power between competing traditional and modernizing forces impacts both the *timing* (short-term versus long-term struggle) and *type* (progressive or regressive) of family law after independence. Previous work has shown how societal-state relations, institutional legacies and styles of governance help determine family law content. This study identifies an additional explanatory variable for family law content: the struggle for power among different forces seeking to assert authority over the state. The ability of one of two competing forces, broadly categorized as traditionalists versus modernists, to capture the state is necessary for codification and is predictive of family law content. Case studies reveal that systemic shocks (e.g. revolution, social unrest, or foreign intervention) tip the balance of power in favor of traditional or modernizing forces in the post-independence state-building process and facilitate the successful consolidation of power and codification of family law. Systemic shocks refer to actors, events or crises outside of the state apparatus which disrupt the status quo. This study demonstrates that family law outcomes in the post-independence era is a not simply the fixed result of regime type, colonial history, or institutional legacy, but is also the result of a dynamic struggle for power, the outcome of which can largely be determined by the presence of such significant systemic shocks.

State capture by traditionalist forces over modernizing forces (or vice versa) is necessary for the codification of family law on a national level. Furthermore, family law content, whether progressive or regressive with respect to equality between men and women, depends on the style of state-building adopted by the group in power. State-building styles can be categorized in either one of two ways. First, the state may be captured by modernizers and undergo transformative state-building. Transformative state-building occurs when the goal is to build a single national identity, and weaken sub-state forces. The transformative project leads to progressive family law and rejects the social practices of sub-state actors in the tribal hinterland. Alternatively, the state may be captured by traditionalists (traditional, ethnic, religious or sectarian groups) and undergo accommodative state-building. Accommodative state-building occurs when the goal is to strengthen sub-state forces. The accommodative project leads to regressive family law and affirms the social practices of sub-state actors in the tribal hinterland. The first independent variable of interest, state capture by traditional or modernizing forces enabled by the presence of a systemic shock- affects the *timing* of successful codification. Rapid codification after a short-term struggle among various forces reflects both early and effective control of the state by one side or the other, whereas long-term struggle over codification results in gridlock for an extended period of time. The second independent variable, state-building style- accommodative or transformative- affects the *type* of family law. Transformative state-building promotes the weakening of sub-state tribalism and the coding of progressive family law, while accommodative state-building promotes the strengthening of sub-state tribalism and the coding of regressive family law.

Previous work has not clearly identified the importance of systemic shocks in the shaping of family law outcomes resulting from domestic power struggles. While quantitative and qualitative studies have shown that institutional legacies, state-societal relations and styles of governance are reflected in family law content (e.g. communism, theocratic regimes, colonial rule, and state-tribal alliances), this study stresses the dynamism of competing forces struggling to capture the state. I argue that the ability of either the modernizers or traditionalists to capture the state (at the expense of the other) in the presence of

a systemic shock eliminates policy gridlock, allowing for more *rapid codification* of family law. I define 'state capture' as the ability of either the modernists or traditionalists to assert authority and influence the state apparatus. The assertion of authority is made evident by the successful enactment of particular state-building agendas. For modernists, the agenda would be the building of an impersonal and modern nation-state, and for traditionalists, the agenda would be the reinforcement of a status quo system with sub-state sectarian, ethnic and religious concentrations of power. I further argue, as supported by the literature, that the *content* of family law is progressive or regressive for women depending on the state-building visions of the beneficiaries of state power and the styles of state-building, accommodative or transformative, adopted by such power holders.

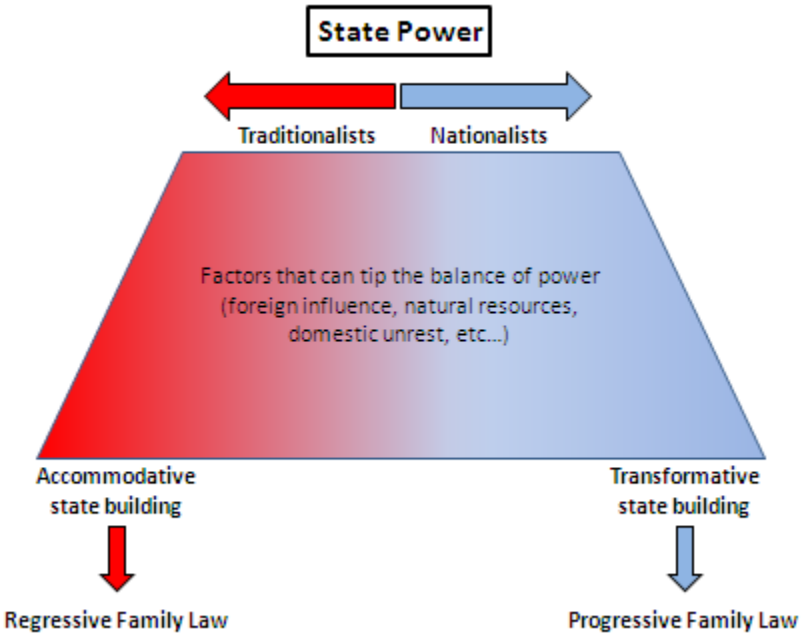

Figure 1.1: Theoretical Framework

2. LITERATURE REVIEW

2.1 Family Law and State Formation

Academics who study changes in gender policy write extensively about the political struggles which take place between monarchs or presidents and their "bases of power," distinct and usually powerful social groups in society, whether ethnic, tribal, sectarian or religious, which support the regime at the expense of a more broad, democratic consensus (Charrad, 1997; Hinnesbusch, 2003; Tilly, 2007). Authoritarian leaders rely on such segments of the population for political support and often maintain their place of power with clientelist networks, offering favors in exchange for votes or approval. Political scientists have argued that this characteristic of the Arab authoritarian government plays itself out in gender politics, and that family law itself is often a reflection of the preferences of such social bases of power (Manea, 2011). Charrad (2001) demonstrates that state autonomy from tribal groups or state alliances with tribal groups determines family law content. Charrad argues that the pre-colonial and colonial histories of North African countries structurally delimited a range of possible family law outcomes. This study suggests that the importance of state capture by traditionalists or modernists, made possible through the presence of significant systemic shocks, is an important determinant of the presence or absence of state-tribal alliances, and thus family law content. As will be demonstrated, major political and economic shocks tipping the balance in favor of one state-building vision over another have great implications for family law formulation.

In some contexts, such as in Tunisia in the 1990's or Iraq in the 1980's, feminist movements may also play a role in politics and the shaping of gender policy (Charrad, 1997; Efrati, 2005). Rather than focusing on the ongoing and continuous process of gender policy formation in Middle Eastern countries, an important process which has received much attention, this article deals with the impact of acute events occurring in the midst of post-colonial struggle for state power on the codification and evolution (or devolution) of family law. States in these contexts may fall short of Max Weber's conception of a state, which he defines as having a legitimate monopoly on the use of force. Instead, these states are marked by

the erection of an "institutional image" (Manea, 2011) as well as a centralized "rational-legal" administrative body, so that only one dimension of the Weberian state is fulfilled. In addition, I adopt a definition of the state formulated by Migdal (1994) which conceptualizes the state as a dynamic, rather than fixed, entity: "As the state organization comes into contact with various social groups, it clashes with and accommodates to different moral orders…The state is not a fixed ideological entity. Rather, it embodies an ongoing dynamic, a changing set of goals, as it engages other social groups." Thus, while institutional legacies profoundly affect the makeup of a state structure, state-societal relations are in a constant state of flux. Traditional and modernizing forces which shape the state-building visions of the state apparatus may emanate from as broad a range as a foreign government, tribal groups or a trade union.

Family law is relevant to state-building because it was once law which did not fall under the jurisdiction of the state (Glendon, 1989). Mala Htun and Laurel Weldon (2011) note, "family law is a barometer of the strength and scope of state power. Some state-building projects smashed traditional religious laws and customs. Other leaders preserved religious and customary family law to consolidate their power. Both projects used women's status in family law as an instrument"(7). The state's ability to gain enough administrative power and political legitimacy to regulate family law is tied to the state-building process. Many socialist regimes which adopted projects of modernization sought to secularize society and promoted gender equality (Molyneux 1985; Kandiyoti, 1991; Johson 1983). The communist ideology is identified as a particularly powerful political tool used by the state to transform social organization, and the principles of the communist doctrine are incidentally opposed to the economic and social subordination of women. Communist governments adopted egalitarian and secular family laws, leaving behind a legacy of gender equality (legally) throughout the Soviet bloc, as well as in China, Vietnam and Cuba (Hazard, 1939; Berman, 1946; Molyneux, 1985; Glendon, Gordon and Osakwe, 1985). In contrast, the political legacy of colonialism has been charged with creating fragmented legal systems in which customary and religious laws are codified. Htun and Weldon (2011) note that British colonial rule, "institutionalized religious dominion over religious customary laws. This policy forged a

symbolic linkage between the public status of a communal group on the one hand, and the preservation of a 'traditional,' 'authentic' vision of its family law on the other." In India, the newly independent government under Nehru retained the British policy of codifying separate family laws for the different religious groups in order to allay Muslim fears of Hindu domination (Williams, 2006). This exemplifies the admonishment from Huntington (1968) about the struggle that states with weak institutions and strong social forces face when trying to establish rule of law and political legitimacy. States with weak institutions and inadequate political legitimacy undergo accommodative state projects, consolidating their power by bargaining with and empowering religious and cultural sub-state groups (Charrad, 2001; Williams, 2006).

Trends in family law formulation and reform are closely related to "church-state relations, the consolidation of state power, and the assertion of cultural identity" (Htun and Weldon, 2011). Family law, codified in Morocco in 1958, Pakistan in 1961, Jordan in 1976, and Algeria in 1984, institutionalized female subordination and adhered to classical Sharia law (Esposito and Delong-Bas, 2001.) The national codification of oppressive social norms in personal status laws may indicate the central state's inability to escape the influences of religious or traditional sources of authority. In many Muslim-majority societies, personal status laws have been used by the government to codify the cultural and religious norms of traditional bases of power in order to gain state legitimacy (Manea, 2011).

The process of state-building is often characterized as consisting of disruptive and tumultuous social transformation (Huntington, 1968; Moore, 1967). Specifically, national structures emerge at the expense of local or traditional structures, a transition which is highly contentious. While the process of nationalization may play out differently within various contexts around the world, the basic plot of a central government struggling for political legitimacy remains fairly consistent (Acemoglu and Robinson, 2006; Tilly, 2007). Many Middle Eastern and North African countries suffer from the 'legitimacy deficit' and must undergo accommodative state-building projects, which means negotiating with sub-state cultural and religious groups (Hinnesbusch, 2003; Anderson, 1986). These negotiations are reflected in the family law preferences of those cultural and religious groups, and in turn the regime is able to win political

support and overcome the legitimacy deficit (Charrad, 2001; Manea, 2011). In addition, when the state adopts policies of modernization- industrialization, urbanization, expansion of free media, education, and increased literacy- relegating half the population to spheres of domesticity is not conducive for development (Khoury and Moghadam, 1995). External factors such as war may trigger the need for state modernization and administrative wherewithal through expanded bureaucracy (Moghadam, 1988). In the case of Iraq in the 1980s, the demand for female labor rose during the war with Iran due to increased manpower needs and an expanding state apparatus (Lorenz, 1991).

2.2 Tribal Interpretations of Islamic Family Law

Islamic family law is not tantamount to regressive family law. There is variation among countries in the extent to which the laws oppress women or advance their interests, and such variation occurs within the framework of Islamic law. Turkey is the only country in the Middle East to adopt a completely secular stance. The regressive content of some personal status codes stem from more tribal and traditional interpretations of Islamic Law. Just as modernization serves a purpose for state expansion and incorporation into the global economy, the subordination of women serves the needs of tribal solidarity. Islamic law, as well as the customary law of many tribes, generates a family structure largely based on the male bloodline, referred to in anthropology as the agnatic lineage. Within the patrilineal kinship structure, the socially meaningful ties within a given kin grouping are the male ties. Kinship is defined centrally by the unilineal descent of the agnatic line (Charrad, 2001). Traditional forms of agrarian or hinterland social organization emphasize the predominance of the patrilineal extended family in order to maintain group solidarity and cohesion. Mourina Charrad explains:

> Two contradictory principles historically have operated at once: a principle of unity, based on ties among men in the agnatic lineage, and a principle of division, introduced by the necessity to accept in the kin group a number of women from other lineages. The particularism of conjugal units represents a potential threat to the solidarity of the agnatic kin group, since conjugal units may break away from the group and thus bring division (51).

Agnatic lineages view marital bonds as potential threats of division to the unity of the extended kin grouping because new members (women) must be accepted from outside kin groups to propagate the bloodline. Marriages may also be used to build economic and political alliances between kin groupings and clans, giving way to tribal federations.

Kinship has been the main form of social organization in the Maghib and has also pervaded social organization throughout the rest of the Middle East historically. Islamic laws are designed to protect the solidarity of the patrilineal kin group through laws of inheritance, marriage, divorce, property, filiation and personal obligation which favor the male members of the family structure. The patrilineage shows a preference for keeping women within the kin group, and thus kin endogamy (marriage within the kin group) is highly valued since it prevents the fragmentation of property. Father-brother-daughter (FBD) marriages increase the size of the lineage because the lineage of the woman's father retains her children. Lastly, family reputation depends on the purity of the wives and daughters, a belief which lends great importance to the practice of veiling and gender segregation. A man's 'ird' (honor) is a collective responsibility for all men in the lineage, and the veil protects women from non-kin males. The conjugal relationship between man and wife is important only insofar as the unilineal descent of the male line may continue. Wives are seen as outsiders taken in from different kin groupings, and daughters are not as valuable since they will eventually be given away for marriage. Both historically and to some extent contemporaneously, such kinship structures and patrilineal bloodlines in the MENA region have been of tremendous political importance for the fortification of power within and among kinship groupings throughout the Middle East (Charrad, 2001; Beck and Keddie, 1978). While kinship groupings and tribal alliances may not be as common in many countries today as compared to the first part of the 20th century, the religious and customary norms stemming from such structures of kinship persist, and are mitigated through processes of modernization. Modernization through industrialization, urbanization, and education within a state seeking to incorporate women into rapidly growing economies works to dislodge the legacies of patriarchal and customary laws (Mogahadam, 1992). The entire tribal and sectarian social structure is built upon a system of alliances and social insulation. Marriage is the mechanism through

which tribal membership and alliances are regulated. Women, therefore are an important political tool in tribal politics, and must be regulated.

3. THEORY AND HYPOTHESIS

3.1 North Yemen: Systemic Shocks, State Capture and Family Law Codification

This article was primarily inspired by an analysis of the evolution of family law in North Yemen prior to unification by Elham Manea (2011). Manea suggests that the "politics of survival" as a result of social fragmentation was the primary cause for the fragmentation and regressive nature of family law. In addition, another key point can be gleaned from the political history of North Yemen: the systemic shock of a foreign intervention spurred by a proxy war between Saudi Arabia and Egypt determined family law outcomes by facilitating state capture by traditionalists or modernists. The case of North Yemen prior to unification demonstrates how family law fluctuated between reformed codification and oppressive codification throughout the duration of the proxy conflict depending on which side exerted greater control over the state. Saudi Arabia empowered traditionalists subscribing to tribalism, while Egypt offered military assistance to the socialist-minded Free Officers working to topple the monarchy and institute a government amenable to the eventual enactment of a pan-Arab nation. In contrast, South Yemen was politically and militarily backed by the Soviet Union, and the government enacted laws which befitted the socialist vision of society, offering greater legal equality for women. The fact that family law codification reflected the nature of the military struggle in North Yemen speaks to the relationship between the dynamic struggle to capture the state among various forces and family law codification.

The Yemen case study raises two important points regarding the codification of family law and its content. First, the legal status of family affairs depended on whether the modernizers (the Free Officers) had more influence over the state or whether the traditionalists (tribal leaders) had more influence over the state. Ultimately, the traditionalists captured the state and regressive family law was put into place. Second, foreign intervention by Egypt and Saudi Arabia, engaged in a proxy war, had a big impact on the domestic politics of North Yemen. This suggests that in the occurrence of significant

systemic shocks, such as foreign intervention or international war, the balance of power can be tilted to favor one side over the other, and the ability of one side to capture or influence the state is facilitated. The state-building styles of the beneficiaries of state power are incorporated into family law. Once the state was able to stabilize and the traditionalist forces consolidated power, a regressive family law emphasizing tribal preferences prevailed through a project of accommodative state-building. The case of Yemen suggests that state capture by a particular social force (modernizing or traditional) facilitated by the presence of a systemic shock factors into the politics of family law formation.

3.2 Timing of Successful Codification and the Struggle to Capture the State

I hypothesize that failure of either modernizing or traditional forces to capture the state in the absence of some systemic shock leads to policy gridlock and the absence of family law codification. In turn, I hypothesize that successful capture of the state facilitated by some systemic shock, and the assertion of authority by traditional or modernizing forces leads to the subsequent codification of family law due to the fact that effective control of the state apparatus by one side is made possible. Table 1 shows that among countries with post-independence traditionalist-modernist struggles for power, experience with direct colonization, and prolonged, violent wars for independence, Tunisia and Morocco were the only two countries to codify family law immediately following independence, whereas Iraq, Libya and Algeria all experienced delayed codification of family law.[1]

In my analysis of codification timing, the independent variable is state capture by modernizing or traditional forces, measured through the ability of one side to influence the state, assert authority and weaken opposing forces. Case studies shed light on the importance of systemic shocks for determining the outcome of such struggles to consolidate power. The dependent variable is the timing of successful codification of family law. I examine cases in which successful codification was accomplished rapidly

[1] Syria was not characterized by a traditionalist-modernist struggle. Syria emerged from the colonial period with a state dominated by traditional forces, resulting in the continuation of fragmented, regressive family law promulgated during the colonial period, and the enactment of a new regressive Syrian code seven years after independence.

after independence as well as cases in which codification was delayed and accomplished many years following independence. I hypothesize that Morocco and Tunisia codified family law and declared independence simultaneously due to the fact that the capturing of the state by dominant forces in the midst of struggle was achieved immediately, while state capture by traditionalists or modernists in Iraq and Algeria occurred much later.

3.3 Regressive vs. Progressive Family Law

Previous literature has shown that the state may establish itself through 'accommodative state-building' or 'transformative state-building,' and that such styles of state-building will be reflected in regressive or progressive family law, respectively. I hypothesize that states captured by modernizers seek to undergo projects of transformative nation-building and modernization, and will adopt unified, progressive family law. In turn, states captured by traditional forces which draw their stability from the status-quo by undergoing accommodative state-building projects will adopt regressive family law. In short, the second independent variable of interest predicting family law content is whether the state adopts transformative (modernizing domination) or accommodative (traditionalist domination) state-building behavior. The second dependent variable is a dichotomous variable indicating whether the codified laws are regressive or progressive.

Table 3.1 Case Selection

Country	Year of Country Independence	Regressive or Progressive Family Law	Direct or Indirect Colonial Rule	Year that Family Law was First Codified	Timing: Delayed versus Immediate
Countries with violent independent struggle					
Iraq	1932	Progressive	Direct	1959	Delayed
Syria	1946	Regressive	Direct	1953	Delayed
Libya	1951	Progressive	Direct	1972[1]	Delayed
Morocco	1956	Regressive	Direct	1957	Immediate
Tunisia	1956	Progressive	Direct	1956	Immediate
Algeria	1962	Regressive	Direct	1984	Delayed

[1] Libya codified only inheritance rights laws in 1959.

The goal is then to bridge the theory that state capture by traditional or modernizing forces, made possible by the presence of systemic shocks which tilt the balance of power, is reflected in family law policy with the current literature which states that state-building patterns are reflected in the family law content. If actors subscribing to the vision of the modernizers capture the state, then the state will be characterized by the policies of the modernizers, reducing the oppressive nature of sub-state tribal family law. In turn, if actors subscribing to the vision of the traditionalists capture the state, the state will be characterized by accommodative state-building, affecting the area of family law accordingly.

3.4 Case Selection

Middle Eastern and North African Countries may be divided into three categories based on historical experiences with colonization. The first category includes the Gulf States which were sparsely populated, resource-abundant, tribal states governed by ruling families and held together by a system of status-quo, patronage networks. These countries signed international treaties which allowed the British government access to natural resources and control over foreign policy. The second category includes states which experienced foreign intervention only insofar as they were given protectorate status. These states were required to maintain foreign policies which served the interests of the French/British governments, but had relatively high levels of autonomy over domestic policy. Party systems, elections, laws, and administration were sometimes in place long before official independence was declared. The third category is the countries which experienced direct colonization as well as prolonged, violent wars for independence. The governments of these states were comprised of colonial officials and both domestic and foreign policies were tightly controlled. It is the post-independence experience of the third category which is of interest to this study. Countries falling under this category include Morocco, Tunisia, Algeria, Syria, Libya and Iraq. Among these countries, Syria is the only country to have

emerged from the colonial period with no significant traditionalist-modernist power struggle. I will conduct short case studies of four countries each representing one of four possible configurations:

Table 3.2 Family Law Timing and Type in Selected Cases

	Type	
Timing	**Regressive**	**Progressive**
Rapid	Morocco	Tunisia
Delayed	Algeria	Iraq

4. CASE STUDIES: MOROCCO, ALGERIA, TUNISIA AND IRAQ

4.1 Morocco: Tribal-Monarchy Coalition and the fall of the Istiqlal Nationalist Party

Prior to French colonization, Morocco experienced a great deal of tension between the central government and the tribal hinterland. Clifford Geertz (1971) notes that pre-colonial Morocco was divided into two worlds. The first was the 'land of government' which was full of state officials, market inspectors, religious judges, and administrative representatives of government. It was a world where the authority of the sultan was recognized. The second world was the 'land of dissidence' which possessed no such representatives of the sultan, and fought aggressively to preserve tribal autonomy (Abu-Lughod, 1980; Charrad, 2001). Additionally, the Sultan constantly threatened tribal independence by imposing taxes through force, causing the chasm between 'the land of government' and 'the land of dissidence' to widen. Waterbury (1970) describes Morocco in the pre-colonial period as "a stable system of continuous violence…[the sultan] collect[s] taxes to pay the army to crush the tribes to collect still more taxes." The relationship between the tribal periphery and the royal core underwent a profound transformation due to

the politics of Moroccan decolonization, and the bitter rivalry between the tribal hinterland and the Sultanate soon sweetened into a strategic alliance.

Toward the end of the colonial period, Morocco's struggle for independence was led largely by the urban-based Istiqlal (meaning "independence" in Arabic) party. Throughout the 1940's and 1950's, the Istiqlal was the main organization leading the anti-colonial fight, and by 1947 the party had fifteen thousand members (Abun-Nasr, 1975). The leader of Istiqlal, Allal al-Fasi, was sent into exile from 1937 to 1946, a move which infuriated supporters and led to expansion of the party base.[2] The Istiqlal party drew most of its support from urban, commercial and religious establishments in the cities. The party platform was a fusion of modern nationalism and religious revivalism, and the French viewed the growing nationalist movement as a threat to colonial power. Charrad (2001) writes:

> The Istiqlal succeeded in mobilizing urban areas such as Fez, Casablanca, and Rabat. Its implementation in tribal areas, by contrast, was virtually nonexistent, thus leaving open the possibility for counter-mobilization. The French colonial regime seized the opportunity. The French responded to the predominantly urban-based Moroccan nationalism by manipulating tribal notables in rural areas as a counterweight to the urban nationalists. As in their other colonies, French colonial authorities resorted to direct repression against nationalist leaders, whom they arrested or sent into exile. In addition, when the French decided that it was time to use force against the nationalists, they found allies among some tribes and rural notables.

French support for tribal notables led to the formation of a coalition of warriors, led by the powerful leader al-Glawi, against the Istiqlal and the sultan. In 1953 the tribal coalition circulated a petition among tribal notables asking the French *resident general* of the colonial state to "deliver the people from the extremists of the Istiqlal party and from whoever [helped] them" (Hermassi, 1972). In 1953, al-Glawi marched on the cities of Fez and Rabat with Berber warriors as a show of force against the Istiqlal and the sultan (who was allied with the nationalist party.) Al-Glawi traveled throughout the country and demanded the removal of the sultan and the smashing of the Istiqlal, declaring, "If, contrary to our expectation, [the French government] does not show the firmness which the Moroccan people expect of it, France will lose her place in Morocco" (Abun-Nasr, 1975). When the sultan refused to

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[2] *See* Henry Munson Jr., *Religion and Power in Morocco* (New Haven: Yale University Press, 1993), 78-79 and Mohamed El Mansour, "Salafis and Modernists in the Moroccan Nationalist Movement," in *Islamism and Secularism in North Africa,* ed. John Ruedy (New York: St. Martin's, 1994), (for more on al-Fasi's views)

distance himself from the nationalists, the French deposed him 1953 and sent him into exile. Charrad (2001) writes, "With several tribal groups helping the French and forcefully opposing the Istiqlal, it was unlikely that the party would become the uncontested voice of the Moroccan nation." The decolonization process had ensured that the Istiqlal, a party embracing a modernizing vision of state-building, was left politically weak and ineffective.

In 1956, the alliance between the French colonial government and the tribal coalition rapidly unraveled as violence began to take hold in many Moroccan cities. The poorly organized Moroccan Liberation Army attacked French military units in several regions, and urban riots became widespread. In the midst of the Algerian conflict, the French colonial government was unenthusiastic about the prospect of being sucked into another war of attrition, and granted Morocco independence on 2 March 1956. Following independence, the Alawi dynasty, despite several hundred years of weak leadership, became the only possible point of agreement for Moroccan unity. After the illegitimacy of foreign colonial rule, the sultan drew legitimacy "from the history of the Moroccan sultanate, which combined temporal and spiritual power, even though its power had been historically rejected by the tribes. The sultan belonged to the Alawi dynasty, which first established itself in the mid-1600s and traced its descent to the Prophet Muhammad through bloodlines" (Charrad, 2001; Combs-Schilling, 1989). Moroccan independence was therefore consolidated under the leadership of the monarchy, and when the sultan was returned from exile, the 'land of dissidence' recognized his authority and he became the king of newly sovereign Morocco. However, despite the King's former association with the Istiqlal, the dominance of the tribal hinterland as the result of French military and political intervention, and his desire to keep the urban-based elites from curbing the power of the monarchy, compelled the King to forge an alliance with tribal leaders. The traditionalists had emerged from the colonial period unopposed by any formidable modernizing force, and the Istiqlal party quickly receded into the background. As a result, a family code was promulgated immediately, the same year that independence from the French was achieved.

The decolonization process in Morocco changed the relationship between the tribes and the monarchy by incorporating tribal groups into the national framework. Prior to colonial occupation the

hinterland had desired complete autonomy from the central government. Once the French had given tribal notables a stake a national politics by offering them administrative posts, military support, and political backing, tribal politics became prominent in post-independence political life (Gellner, 1972). The monarchy responded by isolating the urban-based modernizers and adopting an accommodative style of state-building. Tribal notables were embraced as allies and a system of patronage was put in place to secure the allegiance of the rural areas. Charrad (2001) writes: "As long as the system of patronage in tribal areas continued to provide power at the center, it was not to the advantage of the Moroccan monarchy to engage in any policy that might hasten the disintegration of tribal solidarities." One historian refers to the post-colonial countryside as the "defender of the throne," against the urban political elites who sought to potentially curb the power of the throne should they gain control of government (Leveau, 1976). The monarchy granted rural notables easy credit, subsidies and tax relief in exchange for political support. Tribal notables could, in turn, mobilize rural communities based on kin ties in response to unfavorable political developments. (Gellner, 1972; Eikelman, 1985). Thus, through a strong alliance between the monarchy and the rural traditionalists against the urban elites, the Moroccan regime remained stable and the modernizers remained weak. Traditionalist forces successfully captured the state and immediately formulated family law legislation after independence which reflected the preferences of sub-state tribalism and social organization.

State capture by traditionalist forces and the accommodative style of state-building adopted by the monarchy paved the way for a vision which sustained the tribal framework of society on a national level, leading to the codification of regressive family law. The fierce opposition of the tribal areas to the Istiqlal nationalist party was in large part due to the transformative method of state-building envisioned by the urban elites. The leaders of the Istiqlal wanted to see kinship ties and tribal solidarity replaced with a stronger national spirit. They wished to see the tribal unit break apart under new "forms of association based on social and economic interests as markets, schools, hospitals, and networks of agricultural production" (Charrad, 2001). Leaveau (1976) writes, "The [Istiqlal] reformers' guiding idea was to destroy the tribal framework, that is, the ties of solidarity and obligation generated by actual or

fictive kinship that maintained the cohesiveness of social groups in the traditional order." The nationalists desired the eradication of particularism, the abolition of customary tribal law, and the development of national ideals which transcend familial and communal concerns. In 1952, the founder and leader of the Istiqlal, Allal al-Fasi, published a book entitled, *al-Naqd al-dhati* (Self-criticism) outlining his vision of legal, social and economic reforms for Morocco.[3] Within the context of the time, his proposals were bold and in support of broad social transformation. In 1955, a resolution was passed at a convention held by the Istiqlal on the rights of women and children stating that it was "necessary to proclaim equality between the sexes," and that such equality should be "implemented in political and civil rights."[4] Al-Fasi viewed the social preponderance of the kinship structure as deleterious to progress and as a source of disharmony. He wrote: "The family, especially in some Berber areas, is sometimes so extended as to encompass a large number of men and women, boys and girls, and to become a tribal faction; whereas in cities, the family is more restricted, it is of the kind that is usually found in modern nations."[5] It is important to note that the Istiqlal party and its leader did not support a secular state, and al-Fasi believed that social transformation could occur under the banner of Islam. His support for a progressive family law did not stem from his desire to advance the interests of women, but instead from a desire to destroy the kinship structure that was so corrosive to the nationalist vision of modernization. Al-Fasi believed that reformation of the Moroccan family structure was vital for the process of nation-building, and he even made several legal propositions which would have worked to dissolve tribal solidarity. He argued that marriage should be based on mutual consent between two people, and called for "the abolition of the legal right of matrimonial constraint given by Islamic law to a woman's father or guardian over the choice of a spouse for the woman under his guardianship" (Charrad, 2001). He also supported outlawing child marriage and setting a minimum age for betrothal. He wanted to abolish polygamy and to make it legally compulsory for a man to compensate his 'repudiated wife.' Despite all of these proposals from al-Fasi and his nationalist supporters, the systems of patronage and their influence over the monarchy prevailed

[3] Allal al-Fasi, *al-Naqd al-dhati* (Self-criticism) (Cairo: al-Matba'at al-'Alamiyya, 1952).
[4] Resolution of the *Istiqlal, Revue de Presse (Maghreb, Proche-Orient, Moyen-Orient),* no.4 (Apr. 1956).
[5] Al-Fasi, *al-Naqd al-dhati*

in the end. The dominance of the traditionalists rendered the new state stable, and family law was immediately codified after independence. The content of the law reflected the social vision of tribal solidarity and the agnatic lineage.

The regressive Moroccan Code of Personal Status, also known as the *Mudawwana*, was passed in 1956 immediately following independence, and it adheres quite closely to the Maliki school of Islam, a body of law widely followed by tribal groups in North Africa. The kinship model of male-dominated bloodlines and the subordination of women was incorporated into the law and none of the reforms suggested by the Istiqlal were included. The following is a brief summary of the content of the law.[6]

Marriage: The definition of marriage adheres to the Maliki school of law, making it a contract between a man and a woman to make a family headed by the husband. The marriage is administered by the male representatives of each respective family, with or without the consent of the woman. The only requirement for the validation of the marriage contract is the presence of two witnesses and the payment of a bride price. The presence of the bride is not required. While the law stipulates that the male guardian of the bride has no general right to force her into a marriage, it states that she may be pushed into a marriage contract if she shows bad conduct, particularly in the form of sexual transgression. The judge has the power to rule that woman must marry even if against her will. Marriages between Moroccan Muslim women and non-Muslim men are forbidden. The law departs from strict Maliki law by setting a minimum age for marriage of 15 for girls, while the minimum age was set at 18 for boys. However, a judge is given the power to grant permission for child marriage in special circumstances.

Rights and Responsibilities of Each Spouse: The husband is made responsible to support his wife, and the wife needs the permission of her husband to visit her relatives. The wife is required to honor and obey her husband and his relatives, to remain pure, and to look after the household. She is granted the right to manage her own assets (from the bride price.)

Divorce and Repudiation: The law granted the man the right to divorce his wife without going through the judicial system by uttering the repudiation formula (*talaq)* in front of two witnesses.

Polygamy: Polygamy was made legal so long as the husband was able to treat all his wives equally. The wife had the option to request upon marriage that he refrain from taking future wives through a contract, but the law does not stipulate any form of retribution or legal safeguard should the husband breach the contract.

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[6] *See* Charrad 2001, pp. 163-167 (for the original source of the above summary.) The Mudawwana (books 1, 2, and 3, and a commentary) appears in book form in Mohamed Chafi, *Code du statut personnel annote* (Marrakech: Walili, 1996). The text of the Mudawwana was initially published in parts in the *Bulletin Officiel du Maroc,* books 1 and 2 (23 May 1958); book 3 (35 July 1958); book 4 (7 November 1958); book 5 (20 February 1959).

Filiation: The law favored paternal filiation and defines legal filiation as that "by which a child becomes part of the nasab of his father," *nasab* referring to the male line.

Inheritance: The law preserved the inequality in inheritance promulgated by Maliki law, making the inherited shares between men and women unequal, stating that "the share received by a man [is] twice as large as that received by a woman." The categories of heirs is strictly defined by the law and favors distant male relatives over immediate female relatives.

The Moroccan case was characterized by a decolonization process which enabled traditional forces to successfully capture the state and assert authority over the weak urban-based, modernizing opposition. The departing French colonial power intervened militarily in the power struggle and favored traditional forces by offering military assistance to the tribal hinterland. Morocco emerged from the colonial period with a state dominated by traditional forces which reinforced sub-state tribal identities, leading to the immediate promulgation of a regressive family law the same year that independence was achieved.

4.2 Algeria: Clashing Personalities, Policy Gridlock and Islamic Revivalism

Algeria's decolonization experience was devastating, brutal and prolonged. The French were far more determined to retain control over Algeria than they were to hold on to their other North African colonies because Algeria was considered to be an extension of France, with nearly a million French settlers living in the territory (Prochaska, 1990). Lasting from 1954 through 1962, the Algerian war was one of the most violent struggles for decolonization in the 20th century. Out of a population of 9 million, between 1 and 1.5 million Algerians were killed during those years (Hermassi, 1972). At the time, 77 to 88% of the population lived in rural areas[7]. The French viewed tribal federations and kin-based networks as a potential source of anti-colonial mobilization, and developed policies intended to break-up these power structures. One wealthy French settler, the Comte de Raousset-Boulbon, stated in 1947: "If one wanted to prepare the tribes for assimilation with France instead of reconstituting the government of

[7] The *United Nations Demographic Yearbook, 1960* (New York: United Nations Publications, 1961), 373, gives a figure of 22.9 percent for the urban population.

Arabs by Arabs, would it not be wise to disorganize them..?"[8] The colonial administration implemented policies of "confinement," "transplantation," and "segregation" in the tribal areas to secure land for French settlers (Abunn-Nasr, 1975; MacMaster, 1997; Prochaska, 1990 ; Ruedy, 1992):

> Confinement consisted of occupying the most fertile lands of a tribe, then confining the tribe to a restricted area. This measure left the tribes with a fraction of the land on which they had previously lived. Transplantation meant that the French physically transplanted entire tribal groups to another part of the country, usually to the south or to areas of poor arid land and then occupied the tribal territory. The third measured, segregation, consisted of fragmenting tribes and segregating the different parts in different geographic areas. In addition, French authorities restricted the mobility of members of Algerian tribes, thus hindering communication among their segments. In rural areas, Algerians had to obtain the authorization of the French military or administrative official in charge of the area, before they could leave their village or district (Charrad, 2001).

These policies fragmented local communities, disrupted local kin groupings and interfered with customary tradition. Rene Maunier wrote in 1949[9]: "Their societies [are] broken up, their unity destroyed, their traditions swamped, their customary law obliterated… [This] means the destruction of the tribal order, the dissolution of the ancestral group, which often forfeits even its name, even the memory of its past exploits."[10] In total, nearly two million Algerians were placed in war camps and entire villages were displaced throughout the course of the conflict. Although the policies succeeded in the short-term in subduing the population through division and displacement, the overall effect was actually the strengthening of kin-based solidarities and local loyalty (Charrad, 2001). The armed struggle and the emergence of the Front of National Liberation (FLN) in the 1950's quickly generated a strong sense of national identity for all Algerians.

Although the FLN-led armed struggle was far less centralized than the Neo-Destour national party-led resistance in Tunisia, the FLN was similar to the Neo-Destour in that it displayed broad social and ideological diversity as an organized anti-colonial movement during the armed struggle. The commitment to secure Algerian sovereignty from the French allowed a nationalist coalition with

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[8] Quoted in Peter von Sivers, "Insurrection and Accomodation: Indigenous Leadership in Eastern Algeria, 1840-1900," *International Journal of Middle East Studies* 6, no. 3 (July 1975): 259.
[9] Quoted in Hermassi, *Leaderhip*, 65.

heterogeneous leadership to form. This coalition was successful and in March 1962, the FLN leaders assembled at the congress of the Conseil National de la Revolution Algerienne in Tripoli to formally declare independence and discuss the future of Algeria at the Evian Accords (Stora, 2001). The Tripoli Program[11], the outline produced at the assembly, discussed leadership roles and proposals for a state agenda. The authors of the Tripoli program were comprised of four elite intellectuals, Reda Malek, Mohammed Ben Yahia, Mostefa Lacheraf, and Mohammed Harbi; all proponents of modernization and socialist policies. The Program foresaw an Algerian state which would subscribe to socialist ideals of collectively owned means of production, and also sought to encourage Algerian culture to be "national, revolutionary and scientific." The Program embraced Islam as a state religion, but only in its most modern and progressive interpretations. Unfortunately, such rhetoric would prove to be irrelevant to the real political challenges faced by the state, because just as in Tunisia, independence from France also marked the onset of internal divisions. Ideological cleavages, conflicting visions of state-building, distinct constituencies, and geographic chasms characteristic of the nationalist leaders materialized and gave way to political conflict for many years to follow (Barakat, 1993; Waltz, 1995; Quandt, 1969). The assembly failed to resolve power sharing disputes and procedures between political institutions. FLN leaders scrambled for power, and the Tripoli Congress gave way to a violent crisis of leadership. Two opposing factions, the pro-GPRA (provisional government of Algeria) and the anti-GPRA confronted one another in a violent conflict in the summer of 1962. The anti-GPRA group headed by Ahmed Ben Bella was victorious. However, elite divineness persisted in Algeria for years to come. Unlike Tunisia, where military victory for the modernizers led to a unified vision of state-building, the anti-GPRA group had no uniting ideology. Instead, "virtually all members of the elite ascribe the crisis of summer 1962 to personal conflicts rather than to ideological differences" (Quandt, 1969). The anti-GPRA group was best characterized as an unexpected alliance of individuals who shared some personal grievances but did not have uniting ideological commonalities. One Intellectual who tried to mediate between the two groups gave the following example of the "conflict of personalities":

[11] The text of the Tripoli Program can be found in the *Annuaire de l'Afrique du nord,* Volume 1, 1962, pp.683-704.

> Boudiaf and Ben Bella, after spending five years in jail together, couldn't stand each other. They would argue over anything- whether the tea should be served hot or cold, how much sugar should be in it. It was just like a scene out of Satre's *No Exit.* The crisis was simply a scramble for power. Abbas backed Ben Bella because he was bitter over having been replaced by Benkhedda.[12]

Importantly, the post-independence period of chaos in Algeria was not a crisis of ideas, a fact which allowed for the continuation of a divided government characterized by some leaders that subscribed to modern ideas and other leaders that subscribed to traditional ones. Ben Bella stated of the victorious anti-provisional government: "I'm not wedding myself to their ideas, I'm wedding myself to their force."[13] Quant writes of the 1962 newly independent Algerian government: "Without deep ideological convictions of his own, Ben Bella could engage in this game by favoring, alternately, the Liberals, the Revolutionaries, the Military, or the Intellectuals. Above all he would resist the emergence of a single group which might become significantly more powerful than any other."

A comprehensive Family Law in Algeria was debated and abrogated at least three times over a period of two decades before it was formally codified in 1984 (Library of Congress, 1994). Attempts to codify a comprehensive family law in 1963, 1966, 1970, 1973, and 1981 resulted in widespread disagreement, causing the government to shelve the legislation each time (Borrmans, 1977; Saadi, 1991). In 1963, a commission was appointed to draft a Family Code but the final version was too conservative to be accepted unanimously. Members of government disagreed on issues relating to marriage, divorce and polygamy and the project was abandoned. In 1966, the government shelved another draft of the law in response to rumors circulating that the new law was "reactionary to the utmost" (Saadi, 1991). The Minister of Justice stated on 26 February 1966: "These are rumors. For now we are only at the stage of planning. There is no family code yet… We are trying to see how to come back to the sanest conception of Islamic law to give it a necessarily progressive character and on that conforms to our ideas about marriage and divorce." [14] Other attempts after 1966 ended unsuccessfully due to such irreconcilable

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[12] Interview with Mabrouk Belhocine quoted in Quandt, *Revolution* 1969, pp. 172.
[13] Interview with Mohammedi Said quoted in Quandt, Revolution 1969, pp. 172.
[14] Quoted in Saadi, *La femme et la loi*, pp. 45.

differences among elites (Charrad, 2001). The most the government was able to achieve was a few laws setting the minimum age and requiring state registration for all marriages.[15] Another decree in 1963 reintroduced the concept of male guardianship and also outlawed marriages between Algerian Muslim women and non-Muslim men.[16]

In response to the oil crisis of the early 1980's, widespread protests in the rural areas and the rise of Islamic extremism began to take hold in the late 1970's. The government adopted accommodative state-building strategies in response to the growing power of traditionalist social forces in the hinterland. In the end "the balance tilted toward conservatism after twenty-two years of hesitation and gridlock" and the traditional elements of the divided government prevailed in the face of violence and economic crisis (Charrad, 2001). Islamists gained increasing influence in part because the self-labeled socialist government was unable to deliver promises of economic prosperity. In the late 1970s, Muslim activists engaged in isolated and relatively small forms of protest: harassing women whom they felt were inappropriately dressed and attacking stores serving alcohol (Library of Congress, 1994). In 1982, some Islamist groups took their activities further when they called for the socialist government to be replaced with an Islamic theocracy. After one incident on a college campus in which Islamists killed student, police arrested 400 Islamists. In response, nearly 100,000 demonstrators marched during Friday prayers at the university mosque; this in turn led to even more arrests. The government faced violent unrest in the region of Kabylia where the Kabyles people had demanded state recognition of their local language and culture. Similarly, but on a larger scale, was the "Berber Spring" of 1980 in which Berbers also demanded formal recognition of the Berber language and culture (Koven, 1980; Anderson, 1996). These domestic uprisings were exacerbated by the falling world oil prices in the early 1980's, which dramatically reduced an important source of government revenue and power. The rise in Islamist fundamentalism began to pose a threat to the government, and it finally began to make concessions to this increasingly important base of power. In 1984, the government opened one of the largest Islamic

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[1515] Khemisti Law, June 1963

[16] Decree of 23 April 1963, cited in Borrmans , *Statut personnel*, 520.

universities in the world in Constantine. In the same year, after twenty-two years of grappling over the issue, the government also acquiesced to Islamist demands by codifying the Algerian Family Code. This regressive set of laws "gave a privileged status to agnatic relationships within the extended patrilineal kin group and kept women in a subordinate status…[the code] included a conception of the family as an agnatic kinship structure in which the patrilineal male line had primacy and women were subordinate to both husbands and male kin" (Charrad, 2001; Library of Congress, 1996). The following summary of the 1984 code[17] is nearly identical to the regressive Moroccan code, with only a few differences.[18] The summary below focuses mainly on the parts of the code not found/as highly emphasized in the Moroccan code:

Marriage: The concept of marriage is placed within the framework of the larger kin group and is not defined as a contract between two consenting individuals. The woman is required to have a matrimonial guardian (father or close agnatic relative) and is not permitted to marry without his consent.

Polygamy: The first, second, or third wife must be informed of the husband's decision to take another wife.

Minimum Age: A minimum age of 18 is set for women and 21 for men.

Divorce: The husband retains the right to exercise the formula for repudiation but the repudiation must be registered by a judge. Women may, as the result of repudiation, be thrown out of the home with no recourse or financial support. Women may request divorce under limited circumstances, which include sexual infirmity of the husband or his prolonged absence.

Filiation: Defined as exlusively patrilineal. The child of an unmarried women has no legally recognized father. Boys may be in the custody of their mother until 10, but this can be extended until 16. Daughters may remain in the custody of their mother until marriage. Upon divorce, fathers always retain legal power over children, regardless of whether the mother holds custody or not. However, one aspect of the code which deviated from the strict agnatic kin-based model was the fact that women had the right to retain custody of children upon the death of the husband.

Upon achieving independence, the struggle between the modernizing and traditional forces remained unresolved, and neither side was able to successfully capture the state. The paralyzing tension resulting from the heterogeneous political configuration of power holders led to policy gridlock, and a

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[17] Law no. 84-11 of 9 June 1984, refers to the Algerian Family Code of 1984. The text appeared in the *Journal Officiel de la Republique Algerienne Democratique et Populaire,* no. 24 (12 June 1984). For a detailed analysis of the content of the code, see Saadi, *La femme et la loi.*

[18] *See* Charrad, *States and Women's Rights* 2001, pp 197-198 (for the original source of this analysis of the Algerian Family Law).s

failure to codify family law for nearly two decades following the achievement of state sovereignty. Finally, following the systemic shock of an oil crisis and economic instability in the late 1970's and early 1980's, the rise of Islamic revivalism and social unrest presented a threat to the state. Traditionalist forces gained momentum and triumphed over modernizing forces. The traditionalist capturing of the state thus resulted in regressive family law outcomes.

4.3 Tunisia: French Support for President Bourguiba's Nationalist Camp

In the two decades leading up to independence, Tunisia was led by a nationalist, urban-based party called Neo-Destour (*Destour* meaning "constitution" in Arabic.) By the 1950's, ninety thousand of the one hundred thousand members of the labor union belonged to the national party (Hermassi, 1972). However, unlike the Istiqal in Morocco, the nationalist party in Tunisia was widely regarded as a leader in the anti-colonial struggle and enjoyed nation-wide support from a diverse swath of society (Anderson, 1986). The Neo-Destour enjoyed strong support from the Tunisian labor union; as well as from intellectuals, urban workers and tribesmen alike. It has been estimated that by 1955 one in three male Tunisians were members of the party (Micaud, 1992). Unlike Tunisia's two North African neighbors, Morocco and Algeria, the urban-based nationalist party coordinated with the countryside to conduct guerrilla-style resistance against the French. In fact, the number of fighters in the rural areas is estimated to have been close to three thousand. Although, the number of foot soldiers may not have been overwhelming, the coordinated resistance efforts of the urban core and the rural hinterland was organized enough to pose a threat to the French colonial regime. The pronounced unity brought about under the banner of the urban-based Neo-Destour party was made possible only by the presence of a collective will to be rid of the foreign colonial government. Ideological differences were kept at bay and an emphasis was placed solely on the goal of national sovereignty (Anderson, 1986.) Charrad (2001) writes that "the

party leadership included liberal professionals such as lawyers and physicians who joined forces with religious figures and graduates of the Zaytuna (faculty of theology). Following the rule of ideological inclusion, the Neo-Destour incorporated within itself potentially conflicting tendencies…" Because Neo-Destour had made French resistance a primary rallying point, as the colonial occupation drew to a close, conflicting traditionalist and modernizing forces began to surface.

On the eve of independence, violent rivalries erupted within the nationalist movement and it became unclear what type of government Tunisia would form following the departure of the French (Moore, 1965). Two strong-willed leaders became chief representatives for the opposing modernizing and traditionalist state-building visions. The modernizing faction of Neo-Destour was led by Bourguiba, the eventual president of post-colonial Tunisia. Bourguiba had the support of the urban elites, the labor union, graduates of the College Sadiqi, and most of the inhabitants of the coastal towns (Hermassi, 1972). Bourguiba's rival, Ben Youssef, enjoyed the support of a rural base comprised mainly of tribes located in the central and southern parts of the countryside. His constituency also included those belonging to the religious establishment as well as rural migrants living in the cities suffering hardship in the urban slums. The two leaders represented the two most important party factions competing for state power in the post-colonial government. Charrad (2001) writes:

> Two nationalist leaders symbolized the contending tendencies: the reformist Bourguiba and the pan-Islamist Ben Youssef, his opponent who rallied enough support to pose a serious challenge. Bourguiba and Ben Youssef disagreed on the strategy to gain sovereignty, appealed to different constituencies, offered different visions of a future Tunisia, and had different outside allies. Regardless of the ideological distance separating the two men at the start of the conflict, Bourguiba's and Ben Youssef's positions hardened as each found a different source of support in the course of the nationalist struggle. Bourguiba and Ben Youssef gradually became spokesmen for different sectors of Tunisia society.

Bourguiba emphasized the importance of nation-building, while Ben Youssef underscored pan-Arabism and pan-Islamism. In 1932, a newspaper piece published by Bourguiba read: "The Tunisia we want to free [from colonial rule] will be a Tunisia for neither Muslims, nor Jews, nor Christians. It will be the Tunisia of all who will want to take it as their mother country without distinction of religion or

race."[19] In another statement in 1964, Bourguiba emphasized: "Whether one originates from Tunis, the South or the Sahel [coastal region], one can only react as a Tunisian, that is with a strong sense of belonging to the one and same family: the Tunisian nation."[20] With regard to French colonial rule, Bourguiba was in favor of pursuing negotiations whereas Ben Youssef wanted to use force (Larif, 1988; Moore, 1964). Pro-Ben Youssef fighters began to attack both French settlers and Tunisian Bourguiba supporters, and the country entered into a bloody period of factional confrontation. In 1955, Bourguiba and Ben Youssef parted ways for good when both leaders disagreed on strategies surrounding the anti-colonial struggle.

In a move which greatly caused the Ben Youssef faction to fall out of favor with the French, Ben Youssef "made a passionate speech in the highly symbolic setting of the Zaytuna mosque. Calling for the birth of a new Tunisia as an integral part of a broader Arab and Islamic supranation, Ben Youssef exhorted Tunisians to sustain the armed struggle in unity with Algeria and Morocco until the end of French rule in the Maghrib" (Charrad, 2001). French officials subsequently offered military and political support for Bourguiba, once it became clear that the colonial government would end its reign in occupied Tunisia. The French were interested in maintaining ties with a newly independent Tunisia for economic and security reasons, and disapproved of Ben-Youssef's radical rhetoric supporting pan-Arab Egypt and French colonized Algeria. In a violent, large-scale military operation, French troops annihilated Ben Youssef's guerilla supporters in the south, and Bourguiba's modernizing faction captured the state in newly sovereign Tunisia.

The dominance of the modernizing vision of state-building allowed the newly independent government to swiftly adopt a transformative style of state-building which sought to pull out "the roots on which Youssefism had prospered" (Bessis and Belhassen, 1992). In 1957, Bourguiba stated in a speech: "I disagree with those who defend the old traditional principle according to which some freedoms predate the state and take precedence over it… These freedoms must be banished if they jeopardize the

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[19] Quoted in Larif-Beatrix, *Edification Etatique,* 138.
[20] Quoted in Entelis, *Comparative Poltiics,* 151.

collectivity and risk to cause the state to unravel."[21] Consequently, the new Tunisian state worked aggressively to stamp out traditional kin-based solidarities through a series of reforms designed to weaken tribal structures in favor of nationalistic ideals and modernization:

> The targets attacked by the reforms included the collective tribal ownership of land, the autonomy of local areas, the inheritance rights of agnates within the lineage, the independent power of Islamic courts, religious property rights, and the privileges of extended kin in family matters. Occurring all within a few years, the measures implemented the elite's vision of a future Tunisia as a modern nation-state in which the foundation of kin-based tribal solidarities would be dismantled. The measures also cemented the defeat of the Ben Youssef faction and consolidated the power of the national elite under Bourguiba's leadership (Charrad, 2001).

The new Tunisian Code of Personal Status (CPS)[22] expanded women's rights and endorsed a nuclear family structure over the extended agnatic structure characteristic of tribal organization. It covered various areas of family law more comprehensively than the Moroccan code, regulating areas of marriage, divorce, alimony, custody, adoption, filiation and some aspects of inheritance. The following is a short summary of the CPS promulgated in 1956, within the framework of Islamic law:[23]

Marriage[24]*:* Consent from both spouses is required for a marriage to be considered valid. The bride must give her consent to the state, and the matrimonial guardian is abolished. Marriages must be registered by civil authorites.

Rights and Responsibilities of each Spouse[25]*:* The woman is required to obey her husband, and the husband is required to show love and kindness to the wife. However, where is in the Moroccan code a woman's bride price remains her own, the wife is expected to contribute to the expenses of the household if it is within her means. The law divides the responsibilities of the household between the spouses.

Minimum Age for Marriage[26]*:* The original code set the minimum age for marriage at fifteen for women and eighteen for men. However, due to concern that Tunisian men and women were marrying too young, lawmakers introduced a new law in 1964 which changed the minimum age to 20 for both men and women.

Divorce: The CPS abolished repudiation[27], making it mandatory for divorce to take place in court. Both husband and wife have the right to file for divorce, either through mutual consent or individually. Both spouses can be held liable for compensation and attempt at reconciliation is made

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[21] Quoted in Bessis and Belhassen, *Bourguiba*, vol.2, 10.
[22] Code du Status Personnel. (promulgated as the Decree of 13 August 1956 and officially published in the *Journal Officiel.)*
[23] *See* Charrad, 2001 (for a the original source of the summary and more in-depth analysis of the new laws.)
[24] Code du Statut Personnel, article 3.
[25] Code du Statut Personnel, article 3.
[26] Code du Statut Personnel, article 5
[27] Code du Statut Personnel, book 2, articles 29-33.

mandatory.[28] The original law defined adultery committed by women an offense, while adultery committed by men was not grounds for divorce. In 1968, the law was changed so that both men and women were treated the same in regard to adultery.[29]

Care of Children, Custody, and Adoption: The new law recognized adoption (whereas Maliki Islamic law did not) and gave adopted children the same rights as a natural child.[30] An individual adopting a child does not have to be married. The original CPS stated that in the case of divorce, a women's son would remain with her until the age of seven, and the daughter until the age of nine before custody was then transferred to the father. A new law passed eight years after the initial code removes limits placed on the duration of custody granted to the mother, and stipulates that the judge is to decide custody rights based on the best interests of the child rather than on types of kin relations.[31]

Polygamy:[32] The CPS outlawed polygamy completely, stating that "polygamy [was] forbidden."[33] Taking a second wife while married is made punishable with one year imprisonment and a fine of approximately 500 dollars, roughly the equivalent of one year's salary for a Tunisian family in 1956 (Charrad, 2001). However, the law does not make a second marriage null and void.

Inheritance:[34] This area of the CPS is the most regressive, due to the fact that the Maliki school of law leaves little room for interpretation. The ordering of heirs and their respective shares are explicitly laid out in clear terms. The agnatic relatives of the deceased are favored over immediate female relatives. However, the CPS did attempt to reform aspects of the inheritance laws by adopting alternative interpretations, specifically the Hanafi School of Islamic law on the subject of inheritance, and by abolishing certain aspects of Maliki law. The Decree of 1956 and the Law of 1957 abolished the *habus* institution in inheritance, which normally gives the deceased the option of donating the female relative's share of inheritance to religions institutions. The CPS made oral wills illegal and required wills to be written, dated and signed by the author. Lastly, in 1959 the CPS adopted the Hanafi principle of "return," stipulating that should there be no agnatic heirs to receive shares of the inheritance, the remainder of the shares be distributed to the first category of heirs.[35] Hanafi law excludes women from the principle of return, but the CPS altered this aspect of the principle and allowed female spouses to receive the remainder of the shares in the absence of distant agnatic heirs.

In the case of Tunisia, the traditionalist vision of maintaining the sub-state power of the tribal hinterland no longer had any political leverage in the post-colonial state. Due to the military intervention of the departing French colonial power, the factional struggle between the traditionalists and the modernizers came to an end with the Bourguiba's camp emerging from the conflict as the unchallenged power holder of the new nation-state. Family law was codified in August, 1956, only a few months after

[28] Code du Statut Personnel, article 32.
[29] Law of 8 March 1968
[30] Laws of 8 March 1958 and 19 June 1959.
[31] Law of 3 June 1966.
[32] Code du Statut Personnel, article 18; and Law-Decree of 20 February 1964.
[33] Code du Statut Personnel, article 18.
[34] Code du Statut Personnel, book 9, articles 89-152
[35] Law of 19 June 1959.

independence had been achieved. The reformist, urban-based party was committed to the transformative project of nation-building, and a program of reforms designed to implement the nationalists' vision of a modern nation state impacted the codification of family law accordingly, leading to a progressive code.

4.4 Iraq: 1958 Revolution and Evolving Tribal Polices

Following WWI, Iraq was formally made a British mandate at the 1919 Paris Peace Conference under Article 22 of the League of Nations. After the collapse of the Ottoman Empire, Iraq was characterized by deep sectarian, religious and ethnic division. The most politically significant divisions facing the state were the Arab-Kurdish/Sunni-Shi'ite divide and the large urban-rural divide. However, like many anti-colonial struggles, the wide spectrum of ideological, religious, ethnic and sectarian groups displayed a unity of purpose against foreign rule (Dawisha, 2009). In 1920, the Great Iraq Revolution (1920 rebellion) "was a watershed event in contemporary Iraqi history. For the first time Sunnis and Shi'ites, tribes and cities, were brought together in a common effort…The 1920 revolt had been very costly to the British in both manpower and money" (Library of Congress, 1988). British writer and political administrator in Iraq, Gertrude Bell, wrote to her father in 1920: "It is the uniting of Shi'ites and Sunnis that is the unity of Islam. [Prayers] are sometimes held in Shi'ite mosques, sometimes in Sunni mosques, and are attended by both sects. In reality, these meetings are political, not religious… and they all evolve around the idea of enmity to the infidels." Although the 1920 rebellion was a stunning and unprecedented display of national solidarity, British policy reinforced rural-urban divisions and sub-state identities throughout the duration of their mandate. In order to placate the majority rural population and consolidate control over the country, the British favored policies which reinforced tribal autonomy and social organization (Dodge, 2003; Sluglett, 2007.)

The Iraqi people were divided into two separate spheres each regulated by a distinct set of laws. The urban population was subject to civil and criminal law under the jurisdiction of the Baghdad Penal Code. The Baghdad Penal Code was created by the British in 1918 and was based on the Ottoman and Egyptian codes, which in turn, originated from the French Penal Code (Efrati, 2012). The rural

population was subject to a legal code created by the British in 1918 known as the Tribal Criminal and Civil Disputes Regulations (TCCDR). TCCDR was officially incorporated into state law under the 1924 British mandate by King Faisal and "was based on a perception of an Iraqi society culturally divided between a modernizing urban population and a traditional rural community" (Dawish, 2009). The TCCDR legally endorsed the use of "tribal methods" and "tribal law" as tools to resolve local disputes. The British granted official recognition to tribal chiefs, laws and customs, and the TCCDR "was among the measures intended to bolster [the shaikhs'] position by prescribing their judicial authority over their tribes" (Efrati, 2012). The British viewed the shaikhs as the "natural leaders" of the tribes and therefore ceded regulatory and administrative power to them. The shaikhs were charged with protecting property, collecting revenue and cutting off aid to Ottoman armies throughout the course of WWI. In exchange, the tribal leaders were given support, arms and land. Large tracts of land were allocated to the British-designated shaikhs, leading to the creation of landed tribal elites loyal to the British government (Farouk-Sluglett and Sluglett, 1983). Unsurprisingly, the social consequence of the TCCDR for women was egregious:

> As for customs concerning women, the British described them as particularly uncompromising and harsh. They found evidence for this callous treatment in numerous tenets: women could never inherit landed property; in the settlement of feuds, especially blood feuds, tribes required the guilty party, in addition to paying blood money, to hand over one or more women from his clan to the tribe or family of the victim for the purpose of marriage; a young woman was compelled to marry her paternal cousin or to receive his consent to marry another man- and if overlooked, the cousin was justified in killing the woman or the man she ultimately married; a girl or a married woman- indeed, any woman- who "lapsed from the strict path of virtue" brought a stain to the family honor that could be washed away only by her blood. Aberrations, when noted, were usually explained as exceptions to the rule or as deviation from tribal custom[36] (Efrati, 2012).

Thus, a major obstacle facing urban politicians in post-independence Iraq would be the powerful tribal landed elites who maintained a separate legal code under British rule.

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[36] *See for example*,"Administration Report of Suq al-Shuyukh and Hammar District for the Year 1918," in *Iraq Administration Reports*, 2:363; "Report on the Administration of Justice for the Year 1919," in *Iraq Administration Reports*, 3:380; "Monthly Report of Arbil District for the Month of October 1919," IO, L/P&S 11/168; "Monthly Report A.P.O. Basrah for the Month of December 1919, IO," L/P&S 10/621; "Review of the Civil Administration of Mesopotamia for 1920," in *Iraq Administration Reports*, 5:18.

Iraq was granted only limited independence in 1932. The domestic and foreign affairs of Iraq were tightly controlled by the British through a puppet monarchy and use of the tribal hinterland. Despite widespread opposition from urban politicians, state officials, lawyers and nationalist journalists, the British did not abrogate the TCCDR, and instead worked to increase the power of the landed tribal elites. A British report to the League of Nations on "the progress of Iraq during the period between 1920 and 1931" stated that "public opinion" in Iraq favored eliminating the use of local religious tribunals and referring all matters of personal status to the civil courts (Efrati, 2012). The British did not believe, however, that this "public opinion" represented the entire country and that such a move was politically unwise.[37] After Iraq's acquisition of limited independence, urban-based nationalist forces began to mobilize a revolutionary effort. Following a failed military coup by urban Arab nationalists (financed by the German Nazis in 1941 at the start of WWII), the British reasserted their control by re-occupying Iraq and implementing policies which strengthened the tribal hinterland and maintained the status-quo. The British viewed the TCCDR as serving its purpose as "the cornerstone of the administrative building"[38] and as serving as "one of the most valuable legacies of the British regime" (Longrigg, 1953).

Efforts in the 1930's and 1940's to establish a unified personal status code proved unsuccessful due to clashing views between conservative and reformist forces within parliament. In 1931, the Iraqi government enlisted the Ministry of Justice to "collect and re-edit shari'a doctrines" pertaining to personal status and then select and codify those provisions that "suite the demands of the present time."[39] When the draft was finished in 1933, opposition from religious circles claiming the legislation was contrary to Islamic doctrine caused the draft to be shelved.[40] In the late 1930's, the Ministry of Justice took up the project once again with the intent of proposing a law to parliament, but the project was again

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[37] "Special Report by His Majesty's Government on the Progress of Iraq During the Period 1920-1931," 10:78-79. (cited in *Efrati, Women in Iraq 2012*, pp. 55-56).
[38] "Tribal Code: Draft Law," February 1944, PRO, FO 624/38/493.
[39] Extract from Council Agenda, 13 December 1931, National Archives of India (NAI), Baghdad High Commission File (BHCF, Sharia Courts Laws and Regulations, 8/117, vol. 2 (cited in *Efrati, Women in Iraq 2012*, pp. 56).
[40] "Iraq Police Abstract of Intelligence," no. 16, 19 April 1933, and no.17, 27 April 1933, Public Records Office, London (PRO), Air 23/589, vol. XV. (Both Shi'ite and Sunni clerics opposed the draft).

abandoned.[41] In 1945, a third draft was presented by an appointed committee to the Ministry of Justice and in 1946 the proposal was presented to the Chamber of Deputies' Committee for Judicial Affairs. As before, religious and conservative circles mounted opposition to the draft and halted its momentum (Anderson, 1953). This pattern of clerical and religious opposition to a proposed bill repeated itself twice more in 1949 and 1952[42] (Efrati, 2012). Religious clerics, both Sunni and Shi'ite, articulated their opposition to proposed personal status legislation in letters and written appeals addressed to the minister of justice and heads of parliament throughout the 1940's (Anderson, 1953; Efrati, 2012). Most notably, they singled out provisions regarding divorce which sought to restrict husbands' rights and expand rights for women. They opposed provisions granting women the right to separation through judicial proceedings, and objected to the limitations placed on the man's right to unilateral repudiation. In addition to concerns relating to the legal rights of women within the family, opposition was also on the basis of rejecting the state's authority. It has been noted that "at the heart of the opposition from the '*ulama*' lay their rejection of the state's growing control over the legal system and its encroachment on matters that had traditionally been in their hands (Efrati, 2012).

In 1958 a military coup finally overthrew the monarchy, opening in Iraqi history a new era for social transformation and economic change. The 1958 Iraqi "revolution" was, in actuality, the work of disconcerted young officers in the military. The Free Officers, as their movement came to be known, were united by a desire to overthrow the existing regime. The resulting military dictatorship was headed by Abd al-Qasim (prime minister and minister of defense) and Abd al-Salam Arif (deputy prime minister and minister of the interior), both of whom had played large roles in carrying out the coup. The cabinet members included liberals, Marxists, Arab nationalists, and Kurds committed to greater Kurdish autonomy (Marr, 2004). The primary issue that divided the newly formed government was whether Iraq should participate in the creation of a larger Arab entity with greater collective power to challenge foreign

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[41] *Al-Istiqlal,* 21 August 1936, 2; *al-Istiqlal,* 8 March 1938, 2; 'Ala' al-Din Kharufa, *Sharh Qanun al-Ahwal al-Shakhsiyya,* 2 vols. (Baghdad: Matba'at al-'Ani, 1962-1963), 1:23.
[42] *Sada al-Ahali,* 29 April 1952, 2; *Liwa' al-Istiqlal,* 7 May 1952, 2; *Liwa; al-Isiqlal,* 8 May 1952, 2; *Liwa' al-Istiqlal,* 15 May 1952, 2.

threats, or whether Iraq should focus on generating a distinct national identity. Although the new officers were divided on how to prioritize these two state-building objectives and maintained personal rivalries, they were united in their rejection of tribal and sub-state solidarities. Two weeks after the fall of the monarchy, the "revolutionary" government abolished the separate legal status of the tribes by abrogating the 1924 Tribal Disputes Regulations and imposed a new tax on the tribal sheikhs and landowners (Eppel, 2004). In addition, the Qasim regime abolished the 1933 Law Governing the Rights and Duties of Cultivators, which released peasants from economic bonds tying them to their landlords and allowed them to migrate to cities (Dann,1969). Additionally, without tribal opposition in a parliament, the military government oversaw the codification of a new progressive Personal Status Law in December 1959. The law set limitations on polygamy, eliminated child marriage, required the woman's consent for marriage, granted men and women equal rights of inheritance, expanded women's right to divorce, eliminated the husband's ability to declare a unilateral divorce and gave the wife preferential custody of her children following divorce (Efrati, 2005).

The Ba'ath Party came to power in 1968, and they viewed the tribes as an obstacle to both political and economic modernization in Iraq (Nathan and Woods, 2010). In its Communique No. 1, the Ba'ath Party proclaimed its rejection of tribalism: "We are against religious sectarianism, racism, and tribalism…the remnants of colonialism" (Baram, 1997.) The Ba'ath party viewed the tribes as anathema to pan-Arab nationalism and worked to reduce the Sheikhs' power and influence. During the 1970's and 1980's, Saddam promulgated policies which marginalized and fragmented tribal solidarity. One Revolutionary Command Council decree forbade the use of tribal family names (Al-Khafaji, 1992). The regime's deportation policy attempted to geographically divide tribal communities and dilute kinship structures. Orders issued by Maysan Goveror Karim Hasan Rida guided the process of deportation to 1) disperse and distribute large families to separate villages, and 2) to cover villages to which members be deported with state security (Nathan and Woods, 2009). The regime not only viewed the tribes as impediments for modernization, but also as security threats. A report issued in 1984 by the Maysan

Governorate security Committee presented a report to the Office of the Ba'ath party which read the following:

> The village inhabitants of Al-Huwayzah marsh are connected by common tribal connections from ancient times between the Iraqi side and the Iranian side…The marsh inhabitants on the Iranian side are proficient in Arabic and Persian languages… which facilitates their exploitation by Iranain authority to perform sabotage and spying actions.[43]

According to an Iraqi Intelligence Service (IIS) memo, an assassination attempt on Saddam on 8 July 1982 by a tribal-based group of al-Da'wa party members provoked Saddam to respond with drastic measures. He signed execution orders for the 148 suspected collaborators and also ordered the ISS to detain the innocent families of the perpetrators. Nathan and Woods (2010) write: "By punishing the relatives and family members of the accused, Saddam preemptively sought to wipe out potential opposition to his reign…Saddam tapped into the culture of familial loyalty that runs deep through Iraqi society and successfully eliminated the immediate threat." Ironically, the regime began to consolidate power by restricting political and military power to those of certain tribal origin. To avoid the power-grappling characteristic of party-based politics and betrayal, Saddam kept power within the Tikriti group by entrusting it to his closest kin. In spite of the regime's use of tribal affiliation to consolidate power, however, its state policies facilitated fragmentation of tribal organization in favor of modernization and the elimination of sub-state concentrations of power. The regime's focus on distinct Iraqi nation-building and social transformation reflected itself in women's legal rights. The following is an analysis of the most relevant provisions of the 1959 Law of Personal Status and the appropriate amendments made throughout the duration of the Saddam regime[44]:

Marriage: The woman's consent is required for marriage,[45] sanity and puberty are essential for the capacity to marry, and the legal age for marriage is set at 18 (16 with the special permission of a judge.)[46] The court has the power to rule over the opposition of the male guardian to marriage, thus expanding the right of a couple to marry independent of the family. A 1978 amendment made signifiacant

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[43] Harmony document folder ISGQ-2003-00015598 (FOUO)_Studies of the Historical, Demographic, Geographic, and Political Aspects of the Al Ahwar Areas, 26 May, 1985. (cited in *Nathan and Woods, Saddam and the Tribes* 2010, pp. 16.

[44] *See Efrati, Negotiating Rights 2005,* pp. 581-593 (for original source of analysis.)

[45] Law No. 188 of 1959 Articles 19-22 and article 7(1)

[46] Articles 8 and 9

reforms to the 1978 code. The amendment permitted divorce through judicial proceedings for marriages taking place before the age of 18 and without approval from a judge. Forced marriages were nullified if not consummated and divorce was permitted in cases where the marriage had been consummated. Relatives could be imprisoned for up to ten years and fined for involving themselves in forced marriages. The right of a male cousin to forbid the marriage of his female relative was made illegal, sons were forbidden from preventing their mothers to remarry, and fathers were prevented from allowing their sons to choose a wife freely.

Polygamy: The 1958 law did not ban polygamy. Marriage with more than one wife was not sanctioned without the permission of a judge and such permission could be granted only if two conditions were met.[47] First, the husband had to be financially capable of taking a second wife. Second, the law required that there be some "lawful benefit involved" a stipulation which greatly limited the permissibility of polygamy. In addition, the husband has to prove that he can treat his wives equally. A 1978 amendment punished men who contracted polygamous marriages outside of court with up to five years imprisonment. In addition, the amendment gave a woman legal grounds for divorce if the second marriage was entered into without the judge's permission.

Divorce: The 1959 law imposed restrictions on a man's ability to divorce his wife. Repudiation was made invalid if uttered by a man who was intoxicated, angry or whose mental capacities were questionable.[48] Men were required to conduct divorce proceedings in court.[49] Women were also permitted to seek divorce through judicial proceedings on various grounds of injury, but more notably on the grounds of familial discord.[50] Grounds for injury included a husband's imprisonment, his disappearance, and inability to consummate the marriage, certain mental or physical illnesses, and his failure to pay maintenance.[51] The 1978 amendment additionally allowed a woman to file for divorce before the consummation of marriage and after the return of all marriage expenses to the man. An amendment in 1985 to article 39 provided that in the case of a man divorcing his wife arbitrarily, or in a case in which a divorce would be harmful to a woman, the man would be required to pay compensation. In 1983, Saddam issue Resolution No. 77 allowing a divorced woman to continue living without her husband in his residence for a period of three years granted she had not been the cause of the divorce. In 1978, husband's addiction to alcohol or drugs was also added to the list of injury justifying divorce for a woman.

Child Custody: The 1959 law stated that the mother had a preferential right of custody of her children, a right which could be revoked should she be a minor, insane, untrustworthy or unfit for responsibility.[52] However, such a right to custody wa guaranteed only until the child reached the age of seven, after which the court was responsible for determining whether the duration of the custody should be extended. A 1978 amendement increased the custody period until the age of 10 and allowed extension by the court to 15 before the issue would be re-opened by the court. A 1987 amendment granted that woman's custody rights would not be revoked in the instance of re-marriage.

Inheritance: The 1959 code stated that articles 1187-1199 of the Civil Code would govern the determination of inheritance matters.[53] The articles were derived from Ottoman law, which granted female heirs and equal share to that of their male counterparts under all circumstances. In 1963 an amendment restored the provisions of the Shari'a, making shares received by men and women unequal. However, the daughter of the deceased, whether Sunni or Shi'ite, could exclude entirely more remote

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[47] Article 3(4)
[48] Articles 35 and 37
[49] Article 39
[50] Article 40
[51] Articles 41, 43, 44 and 45
[52] Article 57
[53] Article 74

aganatic heirs from inheritance. In 1978 an amendment provided that if the deceased had no son, the daughter(s) would receive the remainder of the estate after the parents and spouse received their shares. Thus, the law eliminated the preponderance of the patrilineal, agnatic kin structure.

In the decades following establishment of the Personal Status Law, shifts in the power struggle between traditionalist and modernizing forces in Iraqi society became reflected in the state's determination of the legal status of women. Following a 1963 military coup, the regime in power slightly amended the Personal Status Law in exchange for tribal Shi'ite support during the regime overthrow (Anderson, 1963). Most of the code remained intact with only slight revisions regarding polygamy and the repealing of provisions granting men and women equal shares in inheritance. After the re-installation of the Ba'ath regime following the 1968 coup, however, the regime fully endorsed the emancipation of women as part of its project to build a modern and progressive society (Sharqi, 1982). It expanded women's access to employment and education, and also enacted policies which improved women's legal status. The regime weakened the power of kin groups, and the "integration of women into the new public institutions undermined any competition from the Right, such as the *al-'Asha'ir* (clans), who were identified with the power of extended patriarchal families" (Hatem, 1999; Joseph, 1981; Rassam, 1982).

Following the 1991 Gulf War defeat, Iraq lost a great deal of its military and economic power. Jabar (2000) writes: "Deprived of revenues, the state withdrew from social services, and salaried middle and lower urban and rural classes were hit hard by hyperinflation and newly introduced heavy taxation…The state, as an instrument of control and governance, sustained heavy damage: the army was downsized to less than a third of its prewar level, the party disintegrated and the security services suffered heavy losses during and after the March 1991 uprisings." The March 1991 uprisings exposed the weakness of the state's security apparatus. The March rebellion was a Shi'ite-led revolt against Sunni domination, Ba'athist secularism, and economic hardship brought on by the Gulf War. The regime abandoned its transformative state-building policies in the face of strong traditional social forces. Saddam expressed his change of policy in a meeting with military commanders:

> Regarding the tribes, we are facing a new reality…We need to develop and enhance the potential events to meet our needs. We need to enhance the people. We need to raise the confidence level

> in people, to make them useful and not side-lined…So what is the answer? We need to make people feel that they are our people and therefore these people will fulfill duties without requiring any instruction from us.[54]

Saddam rehabilitated a tribal-state alliance similar to that seen under the mandate system. However, Saddam's "neo-tribal" policies were far more extreme than the administrative techniques employed by the British. Saddam sought to glorify tribalism as the ancient and timeless legacy of the Iraqi nation. The post-1991 shift in Ba'athist policy consisted of elevating the tribes politically and incorporating tribal lineages and symbolisms into the fabric of the state (Jabar, 2000). Saddam provided the tribes with material wealth, resources, weaponry and political prestige. The reawakening of tribal identity was illustrated by soldiers having to identify themselves by tribal affiliation (Baram, 1997). Meetings between the President and tribal chiefs became commonplace and letters of support sent from tribes to the Presidential Palace were publicized in the Iraqi media.[55] In a complete reversal of the policies he publicly advanced in the 1970's and early 1980's Saddam ensured that "the prevailing traditions…among tribesmen should be respected and maintained."[56] The tribal chiefs received private payments, large tracts of land and a range of light arms including RPG rocket launchers, mortars, and howitzers. Baram (1997) notes that while the contribution of the tribes to state security was limited, their "activities saved the regime the need to spread its troops thinly over the countryside."

While the 1959 Personal Status Law was not officially repealed by the regime, legal autonomy and extra-judicial tribal rule of law were again sanctioned by the state. In a significant expansion of tribal jurisdiction, Saddam decreed that "all those who were pursued by the law and who sought refuge within the tribal domain would not be prosecuted" (Dawisha, 2009). In addition to Saddam's espousal of vigilante justice and legal tribal autonomy, the regime itself also officially codified forms of tribal family law. Saddam's Revolutionary Command Council passed a decision in 1990 that exempted men who

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[54] Harmony media file ISGQ-2003-M0005237 (FOUO)_Meeting between Saddam and Military Commanders, 29 February, 1992 (cited in *Nathan and Woods, Saddam and the Tribes 2010*, pp. 18.
[55] See, for example, *al-Thawra*, 26 January 1992; *al-Qadisiyya*, 27 April 1993; *Bahil*, 28 October 1993.
[56] *Al-Thawra*, 24 April 1994 ; and Republic of Iraq Radio Network in Arabic, 23 April 1994, in *FBIS-SERIAL JN 2304195394.*

murdered their female relatives suspected of adultery from legal punishment. Additionally, Article 111 of the Iraqi penal code exempted men from punishment for "honor killings" of women guilty of sexual impropriety, including those victimized by rape (Baram, 1997). Another example was the prohibition of women from traveling without the supervision of a male relative from the paternal side of the family (Davis, 2005). In the economic and political aftermath of the second Gulf War, a process of re-tribalization of Iraqi politics resurrected the policy of tribal legal autonomy first codified by the mandate system, and incorporated tribalism into the fabric of Iraqi identity and statehood. However, rather than altering the personal status code, Saddam sanctioned extra-judicial regulation of tribal affairs and created separate legislation under the civil code sanctioning the oppression and abuse of women.

5. CONCLUSION

5.1 Theoretical Implications and Complications

The findings of this study fit well into Migdal's conception of the state as being shaped by social and political elements that are not necessarily tied to 'government'. The above cases, although distinct in their respective paths toward the codification of family law, reveal a compelling pattern which holds great implications for the region today. In each case, changes in the distribution of power helped tilt the balance between modernizers and traditionalists, allowing one side to capture the state at the expense of the other. While previous studies have demonstrated how family law is a reflection of institutional legacies, societal-state alliances and styles of governance, this study suggests the importance of major systemic shocks for family law, specifically, uprisings, revolution, and foreign intervention. The decolonization experiences of Morocco and Tunisia were impacted by the direct military and political intervention of the departing colonial power. In Morocco, the threat of the Istiqlal nationalists prompted

the French to empower a tribal opposition in order to neutralize anti-colonial momentum. The military support and political mobilization of the hinterland bestowed upon tribal leaders the upper-hand, allowing newly independent Morocco to rapidly emerge as a state captured by traditional, sub-state forces. This dominance was manifested in the regressive family laws of Morocco passed in 1956, the same year of independence. Similarly, Tunisia's modernizers were given the opportunity to immediately enact their own vision of state-building once French colonial forces abolished the military threat of Ben-Youssef's tribal warriors. In the same year that independence was achieved, the Tunisian modernizers established their bold vision in the form of a progressive code of family law that took precedence over tribal laws. In Algeria, neither the traditionalist nor the modernizing forces prevailed until two decades following independence, when Islamist revivalism generated social unrest and coercion. Street protests, attacks on nightclubs, harassment of women, and political mobilization against the secular government generated a sense of urgency for accommodative state-building tactics and caused the modernizing forces to acquiesce to the traditionalists. Family law codification was delayed due to policy gridlock until the domination of traditionalist forces and the subsequent formulation of regressive law. Similar to Algeria, there was a long delay in the dominance of one group over another in Iraq because of the urban-rural balance of power generated by the British style of colonial rule. Iraq's modernizers finally implemented their state-building agenda after the 1958 revolution, and fully consolidated power a decade later when the authoritarian Ba'ath party ascended to power. Saddam's regime utilized draconian tactics of coercion in the 1970's and 1980's in order to implement policies of modernization. Family law was shelved by the government multiple times until the ascendancy of military leaders with modernizing state-building visions, resulting in the formulation of a progressive family law. It was not until traditional social forces rebelled violently in the 1990 March uprisings that the balance of power shifted from Saddam's security apparatus to the tribal areas. The threat of tribal insecurity compelled the state to adopt accommodative state-building practices through the glorification of tribalism and the devolution of power to previously marginalized communities. As a result, the government both sanctioned extra-judicial, regressive tribal law and codified regressive laws under the civil code.

An important issue that arises from the case studies is the notion that the tribalist vision of state-building and the modernist vision of state-building may have areas of overlap. In Tunisia, the traditionalist forces embodied by the tribal leader Ben Youssef were not restricted to the sole use of sub-state identities. Ben Youssef's advancement of pan-Islamism and pan-Arabism was rich with allusions to national and super-national constructs. Similarly, after the 1958 revolution in Iraq, some military leaders within the modernizing force preferred Pan-Arabism, as opposed to Qasim's purely 'Iraqi nation' orientation. Finally, Saddam Hussein's political co-optation of his sub-state tribal kin to foster loyalty, prevent conspiratorial plots and consolidate power, was a calculated political move that ran counter to the vision of a transformative nation-building project. Although these examples offer important nuance to the proposed paradigm, the case studies illustrate one incontrovertible fact: modernizers seek to weaken sub-state identities and centers of power, while traditionalists seek to reinforce such local constructs. Ben-Youssef endorsed Pan-Arabism and Pan-Islamism while also fully supporting the continuation of tribalism and kin-based solidarity. Elites in Iraq after the 1958 coup may have had distinct visions of state-building, but such differences cannot be drawn along traditionalist-modernist fault lines. Both ideologies of Pan-Arabism and Iraqi nationalism agreed, in the instance of the 1958 coup, on the abolition of sub-state power structures. Finally, Saddam escaped the cycle of state-instability and military coups by enlisting the loyalty of his kin, while also promulgating draconian policies of anti-tribalism in order to modernize the country.

The role of state capture by traditionalist or modernizing forces in the codification of family law continues to have important implications for modern societies. The case studies specifically illustrate the importance of systemic shocks in the distribution of power among traditionalists and modernizers. Systemic shocks tilting the balance of power manifested as social unrest from economic crises and military force, affecting the codification of family law accordingly. Huntington (1968) characterizes the modernization process as being turbulent, as a direct consequence of the tension between these traditional and modern forces. In the past decade, social mobilization (Arab Spring), military intervention (2003 invasion of Iraq and Afghanistan), and systemic military support of civil conflicts (NATO support of

Libyan rebels) have demonstrated the ongoing relevance of the traditionalist-modernist dichotomy in the North-African/Middle Eastern region. These interventions could tip the balance of power among dominant power holders who hold conflicting visions of state-building, and have profound ramifications on family law codification and the legal status of women. For example, the U.S. employment of tribal fighters in the Afghan counter-insurgency is a military tactic which may tip the balance of power in favor of traditionalist forces. In Libya, the identities and political aspirations of the rebel leadership receiving external military support is unclear, and there is already evidence of a lack of ideological cohesiveness as the new Libyan state comes to fruition. Diverse ideologies and visions of leadership emerging from the Arab spring make the future state of women's legal rights uncertain. Even in situations where family laws have already been codified, the potential for repeals, amendments and alterations to the laws keep their long-term effects unpredictable. The struggle between traditionalists and modernizers continues to be relevant today and the consequences on women's legal rights have yet to be seen.

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