Customary Law and Group Rights:
The Incomplete Centralization of Tanzania's Post-Colonial Judiciary

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[Please note: what follows is an except from a draft of a longer dissertation case study of judicial centralization in Tanzania. This is the first section—the following two portions explore the emergence of unofficial tribunals to try accused criminals in rural Tanzania in the 1980s, and contemporary debates around judicial centralization (this last portion draws heavily from my fieldwork in Tanzania). The larger dissertation project examines why and when states permit ethnic and religious groups to have their own courts—or other variations of partial judicial autonomy, including Tanzania's assessor and Ward Tribunal system.]

Introduction

Amidst a host of post-independence reforms designed to centralize political power, collectivize economic production, and erode tribal identities that threatened national solidarity, Tanzania's decision to maintain locally distinct customary law seems unlikely. It is particularly strange in light of the concomitant abolition of tribal chieftaincies and the elimination of separate customary law courts. Why preserve the content of tribal law, having done away with its institutional structure? The answer lies in the sequence of reforms that Tanzania adopted after independence.[1] By first removing the chiefs, who were uniquely able to generate compliance, Tanzania was left without sufficient legitimacy or coercive force to implement its reforms in rural areas without generating significant levels of dissent. Because it prioritized economic development, the

[1] A relatively recent approach to understanding causation in comparative politics is the "comparative sequential method" (Falleti 2010). The method is grounded in both macro-historical process tracing and more recent theories of institutional change (Falleti 20-22) and its strength lies in its ability to keep theoretical foundations and empirical findings in close dialogue. Process tracing has become widespread as a method to guide the researcher's use and interpretation of historical narratives and to map causal processes across time (George and Bennett 2005). The comparative sequential method is a more structured, guided approach to process tracing that "uncovers and specifies the causal mechanisms that link the main events of the processes under study and compares…across cases to explain the sources of variance in the outcomes of interest" by analyzing sequences of events (Falleti, 20).

single party government compromised on full judicial centralization in the short term to accomplish its goals. Tanzania's government partially devolved judicial power to local elites, particularly village elders, to help gain their cooperation (or at least forestall their full resistance) during the ujamaa reform period. However, the government's use of the devolution of judicial power as a bargaining tool served to further institutionalize local law, impeding Tanzania's efforts to centralize the judiciary later on.

Historical Background

Pre-colonial East Africa's political landscape consisted of tribal groups whose borders were fluid and often overlapped. Although there were some regional similarities in agricultural practices, political organization differed from group to group. Sally Falk Moore describes organization among the Chagga of Kilimanjaro in the 18th-19th centuries as highly institutionalized and complex, consisting of a patrilineal chieftain structure with several layers of authority.[2] Although chiefs traded with one another, there was no overarching kingdom or larger hierarchy. Adjudication among the Chagga was both highly routinized and highly contingent. Most legal disputes were settled among particular social groupings such as the age-set, which included all young men born within several years of one another who progressed through life stages together.[3] More formal dispute resolution began with the leader of the patrilineage, and it was considered taboo

[2] Moore 1986, 19-23.
[3] Moore 19.

to seek recourse outside the lineage group.[4] Unresolved cases were sent to the chieftaincy for a hearing on the chief's Lawn of Justice, of which there were approximately thirty within the Chagga.[5] In all legal venues, context and social ties were important to deciding how general norms should apply to a specific case.[6] Enforcement of judicial decisions was achieved through shaming or the threat of exclusion from the community.

Wijsen and Tanner describe pre-colonial Sukuma social organization and adjudication as markedly different from that of the Chagga. The Sukuma, Tanzania's largest tribe, never adhered to an age-grade structure or its associated life-cycle rituals of circumcision and other puberty-related ceremonies.[7] Sukuma social groups were generally flexible, and it was possible for a person to belong to several different social sets simultaneously and identify with each of them depending on context. Norm enforcement relied much less heavily on authority structures or hierarchies and more on institutional mechanisms. For instance, the political structure of the Sukuma was characterized by numerous veto points, such that the power of the chief was checked by community elders.[8] Power nevertheless resided in the same places as other tribes: the families of chiefs and male village elders. Legal structures, too, were designed to be self-enforcing.

Although there were some regional similarities in the approximately 120 tribes in

[4] Moore 8-89; note that patrilineage leaders reinforced these taboos to consolidate their monopoly on first instance dispute resolution.
[5] Moore 17.
[6] This type of law is usually referred to as customary law, a loose term for a style of adjudication in which context, relationships, and community participation are prioritized. Customary law is a catch-all term used to describe most pre-colonial law in Africa and elsewhere, as well as systems of law whose rules are contingent and are often not codified or pre-determined. For more on customary law in Africa see, in particular, Allot 1971; Allot 1977; Fenrich, Galizzi, and Higgens 2013.
[7] Wijsen and Tanner 2002, 42.
[8] Wijsen and Tanner 44.

the pre-colonial area of East Africa that would become Tanzania, before the German occupation they had never formed part of a single political entity. The German invasion altered the tribal system without changing it entirely. German penetration varied widely from region to region. Large numbers of colonials settled in the northern, mountainous parts of the country, whereas many fewer chose to live in the arid central plains, where several rebellions against German rule were based. For instance, among the Bena, the German presence had only minimal effect. In the pre-colonial period, Bena chiefs typically ruled three to five villages and they had wide powers to allocate land, take brides without payment, and adjudicate disputes.[9] They ensured compliance through fines, beatings, and threatening exile.[10] According to Swartz, the German presence eroded the importance of the warrior class and introduced new taxes, which forced a transition to growing more cash crops. But the overall social organization did not change, even following an unsuccessful rebellion.[11] By contrast, the arrival of the Germans changed the Chagga tribal power structure completely when the abolition of the warrior class eliminated the only checks to the chief's power. [12] While the new German civil law courts had little effect on the Bena, as few of them ever came into contact with the new institutions, German colonialism altered Chagga judicial practice by giving the chief more unilateral judicial authority, supported by a German-run native affairs court whose decisions usually backed chiefly power.[13] Decisions that had previously been made by groups of elders were now the sole prerogative of the chief. Thus, in the areas of heaviest

[9] Swartz 1964, 244-6.
[10] Ibid.
[11] Swartz 249-51.
[12] Moore 96-104.
[13] Swartz 249; Moore 103.

German penetration, there was a certain amount of judicial centralization around the figure of the tribal chief, but the Germans did not attempt to create a single court system for all of the tribes.

The British colonial period was, in many ways, more transformative. Because they were able to build on Germany's infrastructure of roads and defensive installations, they spent less time fighting insurrections. Previous colonial experience in India, Rhodesia, and elsewhere gave them the ability to establish an extensive institutional structure relatively quickly. By centralizing local power around rulers who were dependent on British support for their authority, the British were able to govern Tanganyika with comparatively few resources and resident officers.[14] To accomplish this, they built new levels of hierarchy in local tribal groups to centralize administration such that each self-governing unit of the tribe had a single leader to report to the local colonial officer and to gather taxes and enforce laws on his behalf. For example, the Bena, who had rebelled against German rule, were brought together under a single paramount chief in 1926.[15] When local resistance to centralizing power around the chieftaincy was too strong to easily overcome, colonial officials found other ways to organize rule. According to Rwezaura, the British faced setbacks when they tried to appoint a paramount chief of the previously acephalous Kuria, who for a long time had been governed in small agnatic groups whose lineage head represented his group in a non-hierarchical tribal council.[16] The British resolved this with the creation of a Kuria federation, which left the lineage

[14] In fact, the colony was required to be self-sufficient and received no financial aid from Britain except in cases of dire need. As such, the only way to govern within the resultantly constrained budget was through a minimal colonial apparatus (Wijsen and Tanner 83). See Young (1997) for more.
[15] Swartz 250.
[16] Rwezaura 16.

heads (who they called sub chiefs) in control of their kin-group, but jointly responsible for a common treasury and court.[17] The Haya, too, came to be governed by a Council of Chiefs, and Sukuma administration also took the form of a council rather than a single chieftaincy.[18]

Aside from restructuring tribal hierarchies, the British introduced far-reaching reforms into the Tanganyikan legal system. They established a bifurcated judiciary that separated cases involving the personal matters of colonial officers and other European expatriates, as well as commercial, criminal, and other cases in which non-Africans were involved, from "native" law, which governed East African colonial subjects. The former types of cases were heard in British common law courts, and the latter in tribal courts. Under the new system, chiefs still adjudicated local cases, but with fewer opportunities for the rest of the community to participate. Chiefs were also now required to keep records, and to pay the clerk's salary a small fee was levied on all litigants.[19] Furthermore, British officials created an appeals system for the "Native" courts, such that cases from chiefs' courts could be appealed to regional colonial administrators.[20]

After 1950, the judicial role of chiefs diminished as magistrates began to replace them in the "Native" courts. All of the new magistrate courts were established at the site

[17] Ibid.
[18] Hyden 101. Wijsen and Tanner (2002) argue that British officials wanted the chieftaincy to evolve into something resembling Britain's constitutional monarchy on a smaller scale, so they sought out the most powerful local chiefs and increased their power to a scale unimaginable in pre-colonial times.
[19] Wijsen and Tanner 83. Note that some form of payment for adjudication was normal in pre-colonial East Africa, but it was usually paid in livestock or crops and structured as an offering brought to the chief out of respect (see Moore 40-44).
[20] Wijsen and Tanner 84, Hyden 101. As Moore (150) notes, until 1929 the British maintained a unified appeals system in which appeals from native courts and European courts were overseen by a single British appeals court, but in 1929 this changed and native courts were made completely separate, with colonial executive authorities as the highest level of appeals.

of former chiefs' courts, making use of the same building and often the same clerks.[21] Because there were very few trained magistrates available, only a small number of chiefs' courts became magistrate courts. The new magistrates often knew little about customary law, so the British introduced assessors to advise them on points of local law and to replace a formal jury system.[22]

Despite the official changes, in most areas of Tanganyika chiefs continued to judge disputes until independence.[23] Wijsen and Tanner find that most Sukuma did not use colonial courts, and when they did it was for strategic reasons, usually to pressure a litigant engaged in a local dispute resolution process.[24] In some places, chiefs' courts persisted because the magistrate courts were too far away or too unfamiliar to be of use to litigants.[25] In others, there was more active resistance to the new legal order. Rwezaura illustrates that courts in Tarime District were unable to both attract litigants and enforce the law, particularly in cases concerning bride wealth, the sum of money paid by the groom's family to that of the bride when a marriage is contracted.[26] The Nyamwigura chief's court registry for 1955, for example, shows that 48 percent of officially registered

[21] Moore 148-50.
[22] Assessors were introduced into many British colonies to replace the full jury system, which was often deemed impossible because of financial and administrative constraints. Assessors are lay members of the local community (usually elders) who are empowered to advise the magistrate on how a matter might be handled according to local custom. For a more complete analysis of the role of assessors, see Gray 1958, Jearey 1960 and 1961 and Vidmar 2002.
[23] Moore 98.
[24] Wijsen and Tanner 85.
[25] Ibid.
[26] A complex debate unfolded in central Tanganyika (and Tanzania) concerning acceptable amounts for bride wealth payments. It had long been a means of transferring wealth between families and a mainstay of Kuria social order (as well as that of most other East African tribes). The introduction of cash crops during the German colonial period began to inflate bride wealth payments, making it impossible for poorer families to marry. Accordingly, in 1929 the Kuria Federation imposed a limit on these payments at the level of three cattle, which was so universally repudiated that they raised the level to ten, and then fifteen cattle. British courts, on appeal, enforced these limits as part of local customary law. See Rwezaura chapter 6.

marriages involved a bride wealth payment above the permissible limit.[27] Because chiefs could use their official capacity to sanction marriages, magistrates found that the only way to get locals to register their marriages in accordance with colonial policy was to ignore the details of the union.

Although they introduced the framework for a nationwide judiciary, British officials never seriously attempted to eliminate the adjudication function of chiefs, which they viewed as useful for social harmony.[28] This meant that while a great deal of legal centralization had already taken place in Tanganyika before independence, the actual power of the state courts was circumscribed in practice. The colonial period also gave the elites who came to govern newly independent Tanganyika an opportunity to watch the progress of various colonial reforms. By independence, they had a good sense of which generated the most resistance, and why.

The End of the Old Order and the Introduction of Ujamaa: 1961-1967

Following independence in 1961 and the union with Zanzibar in 1964, President Nyerere began a program of massive centralization and nation building titled "ujamaa", a Kiswahili word meaning "extended family" that became known as a uniquely Tanzanian form of socialism. Nyerere introduced ujamaa in the Arusha Declaration of 1967, although similar reforms predated the Declaration. As part of the project of national transformation, school curriculums across the country were standardized and Kiswahili was introduced as the universal language of instruction, in the hope that it would soon

[27] Rwezaura 101.
[28] Moore 156.

become the lingua franca.[29] Nyerere also prioritized Africanization, the replacement of colonial British personnel with Tanzanian staff, and by 1966 the process had been completed in two thirds of the lower rungs of the bureaucracy.[30] These and similar efforts were meant to foster a culture of Tanzanian identity and pride, and speeches from the time illustrate the idealistic enthusiasm of the era immediately following independence.[31] In them, hope for equality and a better life for most Tanzanians rests on the capacity for citizens of the new state to work together and with the state to build a new economic and political order.

Although they were optimistic that many of their reforms would be popular, Nyerere and his ruling party colleagues had observed that most resistance to colonial policies came from tribal chiefs. Even when chiefs capitulated, dissidents could organize themselves around a rival chief. During the years of transition toward self-rule, the nationalist political party TANU (Tanganyika African National Union) created local associations and lobbied hard for villagers to become card-carrying party members, but most villagers refused to do so until their chief joined the party. The British viewed party membership as open resistance to colonial rule, so many chiefs either joined in secret or never joined at all. [32] In light of their strong capacity to organize resistance and their perceived ambivalence about the new ruling party, Nyerere decided to eliminate chiefs. In 1963, the African Chiefs Ordinance (Repeal) Act abolished the institution of the chieftaincy, and later in the same year, the Chiefs (Abolition of Office: Consequential

[29] Hyden 41. The project of introducing Kiswahili as the new national language succeeded. Today, most city dwellers speak it as their first language, and in rural areas most people speak fluent Kiswahili in addition to their local language.
[30] Hyden 52.
[31] Nyerere 1972.
[32] Miller 1966, 120-35.

Provisions) Act made it illegal for former chiefs to seek judicial redress for loss of office.[33]

To replace the structure of tribal authority, Nyerere and his advisors instituted an elaborate system of overlapping local committees, all of which were connected to the single party then governing Tanzania. At the very most local level, the ten-house cell system organized every village into groupings of ten houses that elected a leader to represent the cell to the local TANU office, manage security, and perform basic judicial functions for its households.[34] These leaders were accountable to two types of local administration: village and ward committees, which were part of Tanzania's local government structure, and local TANU party offices and the TANU Youth League, which were under party control.[35] Some cell leaders were also elected to membership in local government offices.[36] The shift from rule by chiefs to rule by political party bound citizens directly to the state through the ten-house cell system and created a two-way conduit of information: cell leaders reported local affairs to district party and government officers, and transmitted ideological statements and reform prerogatives to their local constituents.

Alongside reforms to the structure of local government, Nyerere moved almost immediately after independence to centralize the judicial system. He eliminated the bifurcated legal system that discriminated between Africans and non-Africans, uniting

[33] This second act was made necessary by the high number of chiefs doing just that. In 1963, the former Chief of the Chagga (Ghai 1976, 65.)
[34] Ingle 215. Note that some of these institutions predated independence, but they did not attain full local power until the abolition of the chieftaincy.
[35] Miller 62. In practice, during the one party era this distinction was less important, but following the introduction of multi-party democracy, political control shifted from local TANU offices to the offices of local government.
[36] Miller 1966, chapter 2.

the judiciary under a single, central structure.[37] However, the legislation through which he did so, the 1963 Magistrates Courts Act, also preserved wide swaths of local customary law. Many of the judicial reforms enacted during the first years of independence thread a fine balance between centralization and unification on the one hand and decentralization and the preservation of locally distinct forms of law on the other. Contemporary accounts of judicial reform reflect this mixed agenda.

In 1963, Tanganyika hosted a conference on local courts and customary law in which it and other former African colonies gathered to discuss strategies for unifying the many tribal and local legal systems into a single, effective judiciary.[38] Cheikh Amri Abedi, Tanganyika's Minister of Justice, welcomed his fellow delegates as follows: "The Tanganyika Government, having devoted much attention to the integration and unification of the legal and judicial systems of the country, believed that it would be valuable to review developments and consider objectives in this area of law together with other African states."[39] All of the countries in attendance agreed that the long-term goal was for "local courts to become an integral part of an independent judiciary," but the question was how best to accomplish this.[40] The delegates recognized that many of their citizens preferred the customary practice of arbitration by village elders because it was cheap, informal, close to the litigants involved, and trusted.[41] For this reason, and because it is an authentically "African" form of law, "there was wide agreement that there was no

[37] Constitution of Tanzania, part III, section 13; Ghai 50.
[38] The conference proceedings were summarized and published by Cheikh Amri Abedi, the Minister of Justice for Tanganyika (Abedi 1964).
[39] Abedi 1964, 7.
[40] Abedi 15.
[41] Abedi 103. At the time, delegates estimated that over 80% of cases were heard in local customary courts (14).

question of the disappearance of customary law in the foreseeable future as a significant part of African legal systems."[42] The question was "how far this could be accomplished without attempting to impose a law so alien to the norms of a community as to be unacceptable."[43]

Accordingly, the delegates came up with a five-step roadmap for judicial centralization that would preserve a form of modified customary law. Many of the steps had been accomplished under colonialism and, for all but a handful of countries, only step five remained. In the first step, which they termed "non-recognition or toleration," European courts were introduced into only limited areas of the country, so existing customary legal institutions continued to function as they had in the past, governing most of the population. They were allowed to function as long as there was no clash with official policy. The second step was recognition, in which colonial policies of indirect rule brought recognition to local courts, although their jurisdiction was restricted to cases where all parties were Africans and there were some limitations on the severity of crimes that they could judge. The third step was termed "control." During this phase, the central colonial government gradually increased control through administrative officers who were allowed to inspect courts and transfer cases from one jurisdiction to another. In this phase an appellate body was also introduced. During the fourth step, "colonial re-organization," colonial officials begin to replace chiefs with magistrates, which reduced the number of customary courts but increased their jurisdiction. In the fifth and final

[42] Abedi 22.
[43] Ibid.

stage, "African re-organization," newly independent African states would enact comprehensive legislation to reform their judiciary.[44]

This last step is noticeably vague. Conference delegates disagreed on the necessity of assessors versus full juries, the training of magistrates, and the appeals structure, so wide latitude was given for each state to plan its phase of "African re-organization." Some states even left the conference no longer fully committed to judicial centralization, having newly understood the extent of possible dissent.[45] In a separate Appendix summarizing reforms in Tanganyika, Abedi reaffirms his country's commitment to unification, reminding his reader that Nyerere himself launched the process in 1961 in a letter to parliament in which he wrote that it was his wish to unify customary law because it was the best way to build a nation.[46] His preferred vehicle for doing so was unified restatements (codifications) of customary law for patrilineal tribes. In 1963, Government Notices 279 and 436 were introduced as the official restatements. However, as described above, custom and judicial procedure differed widely from tribe to tribe. To prevent the imposition of law so foreign as to be immediately rejected, the restatements were sent to individual district councils for debate and approval at the local level. Each council was permitted to modify the restatement, and the central government was not allowed to override any of these changes.[47] Effectively, these Notices gave tribal groups the power to preserve their own, separate forms of customary law.

[44] Abedi 10-15.
[45] Malawi, for example, chose to maintain a separate but officially recognized system of chiefs' courts for political reasons.
[46] Abedi 108.
[47] Abedi 109.

Likewise, the 1963 Magistrates Courts Act, which establishes the structure of and rules of procedure for the judiciary, states specifically in its fourth schedule: "In the exercise of its customary law jurisdiction, a primary court shall apply the customary

> law prevailing within the area of its local jurisdiction or, if there is more than one such law, the law applicable; in the area in which the act, transaction or matter occurred or arose, unless it is satisfied that some other customary law is applicable; but it shall, subject to rules of court, apply the customary law prevailing within the area of its local jurisdiction in matters of practice and procedure to the exclusion of any other customary law.[48]

The Act clarifies that no court may refuse to recognize a rule of customary law just because it has not been established by evidence; it must "accept any statement thereof which appears to them to be worthy of belief which is contained in the record of the proceedings…or from any other source which appears to be credible, or of which the court may take judicial notice."[49] The standard for determining whether particular citizens should be governed by customary law is a mode of life test, described in the Judicature and Application of Laws Act in the following terms: "A person may become a

> member of such a community…by his adoption of the way of life of the first-mentioned community or his acceptance by such community as one of themselves, and such adoption or acceptance may have effect either generally or for particular purposes; (b) a person may cease to be a member of a community by reason of his adoption of the way of life of some other community (whether or not any customary law is established or accepted in such other community) or acceptance by some other community as one of themselves, but shall not be treated as having ceased to be a member of a community solely by his absence therefrom.[50]

For a long time, the presumption was in favor of customary identity, and it took several decades for magistrate courts to begin to use civil law codes for residents of large urban areas.[51]

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[48] Magistrates Courts Act 1963, Schedule 4.
[49] Magistrates Courts Act 1963, PCh11s37(a).
[50] Judicature and Applications of Laws Act PCh358s11(2[a]).
[51] Author interview with High Court Registrar, Dar es Salaam, March 26, 2013.

These sections, read together, are unequivocal—local customary law continues to be binding in the vast majority of disputes that come before magistrate courts. Appeals concerning whether customary law is the appropriate standard for adjudication can only be heard at the High Court level.[52] In 1963, the government also removed the repugnancy clause from the constitution, which had previously proscribed the use of any customary law contrary to human rights or natural justice.[53] In its absence, magistrates to this day are required to accept all customary law not specifically contravened by statute, and Tanzania's parliament has been slow to curtail the reach of custom.

The conference proceedings and halting steps toward centralization demonstrate that Nyerere and his fellow TANU officials were deeply aware of the potential for opposition to the reforms, and they accordingly moved ahead slowly, prioritizing those areas (mostly economic development) that they felt were most crucial, compromising on other aspects. As Nyerere argued, "the peace resulting from imposed law is short-lived. The moment a man feels himself strong enough he tries to throw off this law and substitute another more to his liking. Or he may even break out in sheer destructive desperation if the law appears to him to be threatening his life or that of his family…".[54] In order for more wide reaching reforms to move ahead it was necessary to have a judiciary in place that would be effective in punishing non-compliance. Paradoxically, creating such an institution also created the risk of opposition. The small steps taken towards centralization with the creation of a single judiciary, albeit one that recognized substantial local differences in customary law, and unification of customary legal code

[52] Magistrates Courts Act 1963 PCh11s47(iv) and PCh11s64(b).
[53] Sawyerr 1969, 31; Ghai 1976, 48.
[54] Nyerere 1968, 8.

with room for wide-ranging exemptions, demonstrate the ruling party's attempts to navigate this paradox.

The question of how best to centralize governance in general was complicated by the mixed effects of eliminating the chieftaincy. Surveys at the time show that few people openly opposed abolition, but few people supported it either.[55] Well over 80% of survey respondents among the Haya tribe agreed that one-party rule was necessary for good governance, and over 90% agree that eliminating the patronage system surrounding the chieftaincy was a good thing.[56] At the same time, fewer than 5% listed the abolition of traditional authorities as having had a positive influence in their life.[57] In 1965, surveys among the Nyamwezi determined that chiefs still played an important role in rural life.[58] 80% of local leaders (defined as members of local government and TANU) still believed that "a man should always obey his traditional chief", and 98.5% of non-leaders believed the same.[59] Support for ten-house cell leaders was high, but support for TANU and local government officials was mixed; of those who supported either, few knew the function of various village officers.[60]

Although local government and political party offices were in place in most of rural Tanzania, and ten-house cells were set up in existing villages and urban areas by this point, TANU officials were aware of the problems with local leadership. Eliminating local customary law would have exacerbated tensions and heightened opposition to the government during the preparatory phase of TANU's most wide-ranging reforms, so it is

[55] See Hyden, chapter 9.
[56] Hyden 165; Hyden 161.
[57] Hyden 162.
[58] Miller 1966, part III.
[59] Miller 1966, 278.
[60] Miller 1966, 280-290.

unsurprising that the first efforts towards judicial centralization left ample room for local customary law and that further reforms were postponed. It was in this somewhat fraught atmosphere that villagization was introduced. Announced in 1967 as part of the Arusha Declaration, villagization schemes moved farmers from their farmland into villages, where they were governed by the 10-house cell system. Villagization also collectivized labor; the new villagers were expected to farm surrounding land collectively, sharing profits equally between households.[61] Nyerere hoped that the creation of cooperative villages would facilitate the introduction of new agricultural methods and projects, which were planned by agricultural experts in the central government.[62]

Taken together, ujamaa and its concurrent centralization and bureaucratization measures constituted an enormously ambitious project to remake Tanzania. Old hierarchical tribal structures and forms of loyalty were dismantled by eliminating the chieftaincy and physically resettling Tanzania's new citizens into sub-units that could be monitored by the one party system and organized by units of local government. Disputes that would have been taken to the village headman or local chief to resolve were now directed to the 10-house cell leader or the village chairman. Local youth, instead of entering the ceremonial warrior class after attaining majority, joined the TANU youth league. Scott argues that villagization can best be interpreted as a "high modernist" attempt to "reconfigure the rural population into a form that would allow the state to impose its development agenda and, in the process, to control the work and production of the cultivators."[63] Nyerere's speeches point to the moral character that he attempted to

[61] For a plan of an ideal ujamaa village, see Scott 1998, 243.
[62] Scott 239.
[63] Scott 241.

infuse into much of the reform process including the goals of equality between Tanzanian citizens, preventing class and tribal warfare, and furthering the principles of dignity and self-reliance, but ujamaa, first and foremost, was a program of economic development.[64]

Nyerere hoped that without chiefs to obstruct resettlement and the redistribution of land, local TANU officers could mobilize their constituents to move to the new ujamaa villages.[65] In fact, even by Nyerere's inflated numbers in his 1973 report, fewer than ten percent of Tanzanians then lived in ujamaa villages.[66] According to Abrahams, "the rate of involvement in the ujamaa programme varied greatly from one region to another and was, not surprisingly, highest in areas like Dodoma and Mtwara where people had, for various reasons, been compulsorily resettled. In several other areas, where the voluntaristic nature of the programme was adhered to, figures of 3% and less were to be found. Such figures themselves, moreover, often concealed the high rates of village failure which reflected both organizational difficulties and a range of motivational problems."[67] Despite the preventative measures of eliminating the chieftaincy and creating strong links between individual citizens and the state, villagization (and many other ujamaa reforms) faced massive resistance.

The Intensification of Ujamaa: 1969-1975

[64] Nyerere 1967; Nyerere 1971; Nyerere 1974.
[65] Tribal lands were usually controlled by the local chief and village headmen. Moving whole villages would have disrupted the economic power of chiefs, which relied heavily on the patronage that came with land ownership, and also some of the ceremonial functions of the chiefs surrounding graveyard rights.
[66] Scott 245.
[67] Abrahams in Abrahams, 6.

In response to the low rate of voluntary resettlement into ujamaa villages, Nyerere made a series of public speeches to promote the policy to Tanzanians.[68] In 1969, he also adopted a series of reforms designed to strengthen local government and TANU offices that would, at the same time, placate local elites whose support he needed for the reforms. With the African Chiefs Act of 1969, the Tanzanian Government eliminated the last remnants of chiefly power by barring former chiefs from exercising any function under customary law or any other form of authority. The Act was designed to eliminate the last vestiges of chiefs' authority gleaned from citizens' unofficial recourse to former chiefs as a source of dispute resolution.[69] At the same time, the government paved the way for chiefs to continue to exercise power, but on behalf of the Tanzanian government and TANU. Miller finds that local TANU officials often approached former chiefs to ask their help in mobilizing local support, particularly in increasing agricultural production and other "issues which required mobilization for an unpopular cause, or one requiring a great deal of individual labor without visible rewards."[70]

The government knew it was more likely to secure support from traditional authorities vis-à-vis its economic reforms if it preserved some of their former functions in different form. Accordingly, three pieces of legislation strengthened the role of local officials in determining the content of and managing disputes under local customary law. Government Acts 219 and 219A of 1969 established Ward Tribunals, which consist of five members appointed by the local TANU party office, and, according to Ghai, are "intended to bring about an amicable settlement of the dispute, and if such a settlement is

[68] Nyerere 1974.
[69] See Stone Sweet 2000, chapter 1 for more on the power-generating logic of the triad, wherein the role of adjudication confers political power to the adjudicator.
[70] Miller 1966, 264.

achieved, it can be filed in the primary court and then becomes enforceable as a judgment of that court."[71] There were no barriers to former chiefs becoming Tribunal members. Also in 1969, the Magistrates Courts Act was amended to give assessors, lay officials with no formal legal training, a binding vote in magistrate court hearings. The two mandated assessors, also chosen by TANU officials, could easily overrule the magistrate's decision.[72].

Finally, ten-house cell leaders were encouraged to resolve local disputes. Magistrate courts still usually require disputants to seek recourse with the cell leader before litigating a dispute, particularly in difficult cases.[73] There is evidence that former chiefs and village heads often filled these new positions. According to Miller, of 108 chiefs and village headmen in power when the chieftaincy was eliminated, 93 later obtained a position in the local government or TANU regional office.[74] In other regions where chiefs were less successful, 25-35% were still able to find influential government jobs.[75]

In addition to former chiefs, the government hoped to win over village elders, who were usually the wealthiest and most powerful members of local communities. As lineage heads, they traditionally held the right to the fruits of labor from their daughter-in-laws' children and the power to allocate land within the family and to negotiate marriages. They accordingly resisted those elements of the new economic and social

[71] Ghai 69-70.
[72] Magistrates Courts Act PCh11s7(2). When it was first enacted in 1963, Part II, section 7 of the Magistrates Courts Act specified that each magistrate must sit with at least two assessors in every hearing. Six years later, then Minister of Justice Rashidi Kawawa introduced amendments to the Act to make the opinion of the assessors binding, even when they disagree with the magistrate. The new sections were added to the Magistrates Courts Act in 1969 (PCh11s7(2) and PCh11s7(3)).
[73] Ghai 70.
[74] Miller 1968, 191.
[75] Ibid.

order that diminished their influence. Compulsory schooling took away from time that children spent laboring for village elders.[76] Resettlement jeopardized their ability to allocate land and proposed reforms to family law threatened one of their most valuable resources: the wealth of cattle paid to them at their daughters' marriage. Lineage heads and elders consequently found elaborate ways of bringing social pressure and shame to bear on their children to ensure compliance with the old order despite government reforms.[77] Any woman who complained to the courts was usually expelled from her home and kept away from her children, and she would be considered socially dangerous.[78] Lwoga notes that in the village of Bigwa, when peasants were ordered to relocate as part of the villagization scheme, village elders refused to go and initiated a long-running dispute with higher authorities in Dar es Salaam, which they won.[79] Rwezaura documents village elites orchestrating thefts from ujaama villages to protest their existence.[80]

There was hope that the preservation of local customary law through the various

[76] Rwezaura 1982, 1979-87.
[77] Rwezaura, see in particular chapters 5 and 6.
[78] Rwezuara 186. The courts were inconsistent in their response to often the diametrically opposed pulls of social opinion and statute law. For example, in the case of Robi Mangure v. Marwa Fiona (north Mara district civil revision no. 8/67), a son sued his father for refusing to make a bride wealth payment in his marriage to a woman he chose without his family's consent. His father refused on the grounds of an ongoing quarrel with the woman's father, and stated that he would pay the bride wealth to any other family in the district except for the one specified. The primary court ruled that there is a customary obligation for fathers to pay bride wealth in the first marriage, and it gave an order to seize 40 of his cattle. Three years later, on appeal, the High Court (HCD 1969) overturned the previous decision because "it is undisputed that according to Kuria customary law the respondant had a right to claim bride price from his wealthy father and in the remote past, a reluctant father could have his cattle seized by clan elders and used for the son's bride price...but I am of the view that this obligation though very strongly felt by Kuria tribesmen, cannot be enforced by the courts. To do so would be dangerously encroaching on the individual rights to property." Both cases are cited in Rwezaura, 87-88. In this instance, the primary court, which sits in the village itself and is more subject to social pressure, used the constitutional right to marry to uphold local customary law, whereas the high court used the constitutional protection of property rights to weaken the hold of local tribal law and elders' prerogatives.
[79] Lwoga in Abrahams, 65.
[80] Rwezaura 1982, 280.

mechanisms outlined above might attenuate some of the community elders' fears about the proposed reforms. In addition, the government took great care in writing new legislation that it balance the "modernizing" agenda of ujamaa on the one hand with preservation of elite interests on the other. For example, in 1971 the government took another small step toward judicial centralization by introducing civil statute law to govern marriage and divorce. The Law of Marriage Act places some limitations on forms of customary marriage, such as mandating the registry of all marriages, the maintenance of children, and stipulating equality between multiple wives, but it does so with strong deference to local customary law.

For instance, part II, section 25(d) recognizes that a marriage may take civil, religious, or customary form. A state official need not be present for any of these types of union to be valid.[81] Divorce must be granted when a marriage has broken down irreconcilably, and one standard for determining that is the custom of the local area. Perhaps more importantly, the post-divorce division of assets must take into consideration "the custom of the community to which the parties belong."[82] The act does eliminate customary law in some areas, such as by ordering state officials to treat marriages that are contracted without customary dowry or pre-marital gift-giving as valid (section 41(a)), by mandating that corporal punishment of wives is never allowed (section 66), and freeing widows from all obligations to their husband's family upon his death (section 68), among others. In these cases, magistrate courts can use state law in lieu of local customary law.

By 1973, rates of voluntary villagization were still low. By the most optimistic

[81] Law of Marriage Act 1971, section 43, part 5.
[82] Law of Marriage Act 1971, section 114(a).

estimates, fewer than 15% of Tanzanians were living in ujamaa villages.[83] In December of 1973, Nyerere issued an order to make villagization compulsory.[84] The resulting movement of people was, according to Hyden, "the largest resettlement effort in the history of Africa."[85] For communities that resettled voluntarily, Nyerere promised wells, piped water, schools, and other development projects.[86] Even after the shift, however, compliance was not universal. Coulson demonstrates the many ways in which farmers resisted state sponsored agriculture programs from 1946 through 1976.[87] Once the new villages had been established, Walsh observes, "the village government was only as effective as local interests would allow."[88] Farmers often fled their new village. In *Seeing Like a State*, Scott argues that even Nyerere was surprised by the brutality that was required to forcibly move farmers off their land.[89] In the end, villagization was never universal, and wide areas of the country, including the prosperous region around Lake Victoria and the northern mountains, were exempted from the policy.

The extent of the violence used to enforce villagization, including beatings, arrests, and the burning of whole villages, supports the contention that no amount of bargaining with former chiefs or coaxing of local elites would have been sufficient to win their support for so disruptive (and ultimately destructive) a policy. On the other hand, gaining the cooperation of community elders by allowing them to retain the norms and customs that had long ordered community life amidst the disruptions of post-

[83] Abrahams, 6.
[84] Hyden 1980, 129; Scott 234. Nyerere's order was later formalized through The Villages and Ujamaa Villages Act of 1975.
[85] Hyden 130.
[86] Scott 236.
[87] Coulsen
[88] Walsh in Abrahams, 164.
[89] Scott 236.

independence reforms proved more successful in the implementation of other projects. Despite initial opposition, Nyerere's introduction of mandatory primary education in the 1974 Musoma Declaration succeeded in centralizing education and expanding it to include the vast majority of Tanzanian children.[90] Not all villages had secondary schools, so students who qualified for further education were often sent to another city, usually several hours away by bus, to finish their education. Because many students traveled yet again for University or decided to settle in their secondary school town, the vast movement of people for post-primary education has been credited with increasing diversity across Tanzania and weakening tribal loyalty.[91]

The early use of customary law as a bargaining tool had the perhaps unintended effect of further institutionalizing local law. While loyalty to former chiefs did not survive for long, support for preserving distinct local customary law is still high.[92] An effort in the 1990s to create a uniform law of inheritance along the lines of the Law of Marriage Act (1971) was so controversial that the Law Reform Commission's report on the law was immediately made confidential, and it remains impossible to obtain a copy.[93] Debate over removing the binding vote of assessors in magistrate courts brought Tanzania's parliament to a near shutdown during the spring of 2013, and the government was forced to withdraw its proposal in the face of massive resistance, particularly from

[90] Musoma Declaration of 1974; Chonjo 36.
[91] Wedgwood 35; Author interview with F. Werema, Attorney General, Tanzania, March 25, 2013, Dar es Salaam.
[92] Many young Tanzanians today cannot identify who among their peers is related to a former chief, but they know all of their tribe's specific laws concerning bride wealth, inheritance, etc (author interviews in 5 villages in Tanga and Iringa Districts, Tanzania, February 19-February 27 and March 11-March 23, 2013).
[93] Author interview with an anonymous official at the Law Reform Commission, Dar es Salaam, April 8 2012. Author interview with Professor Sufian Bukurura, Law Reform Commission, Dar es Salaam, March 1, 2013.

parliamentarians from rural and strongly Muslim districts.[94] Accordingly, the Tanzanian judiciary has remained partially decentralized. Although it consists of a single hierarchy of courts, village elders retain a considerable amount of leeway in determining the content of customary law in state courts. Although bargaining over the extent of judicial centralization was, from the government's perspective, a means of securing compliance with economic reforms, the outcome was to institutionalize custom such that it would form an object of bargaining in its own right.

[94] Author interview with official in the Ethics Commission, Dar es Salaam, March 27, 2013. Author interview with Attorney General Francis Werema, Dar es Salaam, March 25, 2013.

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