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Institutional Consensus: A Comparative Analysis
of Rules of Law in Lebanon and Somalia

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Abstract

Situated within broader contexts of literature on the origin of rule of law, this paper analyzes the rules of law in Lebanon and Somalia and offers commentary on the relationship between weak states and the rule of law. Both divided states that succumbed to brutal civil wars, Somalia was able to foster a strong rule of law whereas Lebanon was not. Rule of law, in this analysis, requires a common conception of justice and institutions that embody these values. Following Paul Kahn's prescription for a cultural study of law, this paper analyzes the emergence of social consensus and institutional congruence. Lebanon's top-down imposition of legality precludes justice by solidifying religious divides and prioritizing elite power over reconciliation, resulting in a culture of impunity. In comparison, Somalia's bottom-up construction of institutions aligns with unified religious values that enable rule of law in the absence of a strong centralized government. This paper concludes bottom-up creations of justice are more efficacious than top-down impositions.

Introduction

Weak states, defined by their inability to provide adequate resources to their populations, are commonly considered to be unable to administer justice effectively, resulting in depictions of lawlessness and disorder.¹ Following brutal and total civil wars, Lebanon clutches to a government barely controlling a fractious society, and Somalia's government disintegrated and lacks any control over its territory. The absolute and relative weaknesses of these states are codified by the Fragile States Index (FSI), which orders 178 states by weakness and fragility. Somalia ranks the second most fragile state, while Lebanon is the 41st.² Human Rights and Rule of Law, which is one component of the aggregate score, is assessed on a scale from 0 to 10, with 0 representing sustainable state structures and 10 absolute fragility. It conceptually makes sense that Somalia, the quintessential failed state, is unable to administer justice and scores a perfectly imperfect score of 10.0, and Lebanon, with its still-intact judiciary, a more modest 7.2. However, these rankings are not indicative of the lived legality in these societies. Burgeoning local courts in Somalia offer justice and a semblance of rule of law that is absent in Lebanon whose formal institutions perpetuate a culture of impunity and complete lack of governmental accountability. Why does Somalia, a failed state, have a stronger rule of law than Lebanon? And generally, why does the rule of law exist in the absence of a strong state in some cases and not in others?

Despite similar factors contributing to state weakness, Somali and Lebanese rules of law differ significantly. Inherited judicial structures from colonial powers deteriorated following independence, and these structures all but disappeared following brutal civil wars. However, Lebanon has held onto these deteriorating institutions as an attempt to preserve some order and

¹ Rotberg, Robert. "The Failure and Collapse of Nation States: Breakdown, Prevention, and Repair." in *When States Fail: Causes and Consequences*, 4.

² Fragile States Index, "Lebanon" and "Somalia," *The Fund for Peace*, 2015.

continually prioritizes political stability over justice.³ Selectively ignoring past crimes erodes all legitimacy in the eyes of the public. In contrast, many Somalis have ignored formal institutions established with help from international powers. Instead, local judicial initiatives have flourished, and Somalis widely support traditional clan law, Sharia courts, and their conflict-resolution mechanisms.⁴ These varied responses to post-war crisis have altered each state's rule of law, which are both wrongly represented in rankings. In order to engage in an analysis of the counterintuitive strengths of rules of law in Lebanon and Somalia, it is first important to understand the inaccuracy of these rankings, which requires an overview of the landscape of current rule of law scholarship.

Review of Current Literature

Although rule of law is frequently discussed as the hallmark of a modern state, the definition of this concept predates modern societies. Greece, as early as the sixth century BC, entertained discussions on a culture of legality and the idea that, as Aristotle writes, "It is more proper that the law should govern than any of the citizens."^{5,6} The supremacy of law over human rule is central to the idea of rule of law. Law, in contrast to specific rules enacted by a government, is a general body of "abstract rules that bind a community together."^{7,8} The function of this abstract body of rules is commonly agreed upon to be twofold: to protect citizens from

³ International Center for Transitional Justice (ICTJ). "Failing to Deal with the Past: What Cost to Lebanon?" *International Center for Transitional Justice* (2014), 10.

⁴ LeSage, Andre. "Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives." *Center for Humanitarian Dialogue* (2005), 8.

⁵ May, Christopher. "The Rule of Law: Athenian Antecedents to Contemporary Debates." *Hague Journal on the Rule of Law* 4, no. 02 (2012), 236.

⁶ Hayek, Frederick A. *The Constitution of Liberty*. Chicago: 1960, 165.

⁷ Raz, Joseph. "The Rule of Law and Its Virtue," in *Liberty and the Rule of Law* ed. Robert L. Cunningham. 1979, 6.

⁸ Fukuyama, Francis. *The Origins of Political Order*. New York: 2011, 246.

arbitrary rule and to protect citizens from each other and the Hobbesian “state of nature.”^{9,10,11,12} However, these basic functions are some of only a few aspects on which all rule of law scholars can agree.

Disagreements center on defining the essential components of rule of law—whether it is a means or an end. Some argue rule of law is a means—a set of procedures that determine how justice is administered, while others argue rule of law requires a defined end—a substantive definition of justice. Procedural law scholars highlight how law works and argue rule of law requires laws that are accessible, clear, widely known, and universally enforced, ideally by an independent and efficient judiciary.¹³ These procedures, according to Joseph Raz, allow the essence of rule of law, which is that it “be capable of guiding the behavior of its subjects.”¹⁴ Raz’s definition conforms to common principles of rule of law by precluding arbitrary governance because without clearly defined laws, citizens’ are incapable of predicting how a government will respond to a certain action. In contrast, scholars promoting substantive law argue the procedures of an effective legal system are not inherently desirable unless they are promoting or protecting some value.¹⁵ Thus, they prescribe an end goal for law, which necessitates valuations on ideal justice and, as Randall Peerenboom asserts, requires analyzing the specific cultural and social context within which the assertions are being made.^{16,17} It is right,

⁹ Bedner, Adriaan. “An Elementary Approach to the Rule of Law.” *Hague Journal on the Rule of Law* (2010), 50.

¹⁰ Raz, “Rule of Law and Its Virtue,” 12.

¹¹ Carlin, Ryan. “Rule of Law Typologies in Contemporary Societies” *Justice System Journal* (2012), 155

¹² Kleinfeld-Belton, Rachel. “Competing Definitions of the Rule of Law: Implications for Practitioners.” 3

¹³ Tamanaha, Brian. “The History and Elements of the Rule of Law,” *Singapore Journal of Legal Studies* 2012, 233.

¹⁴ *Ibid.*, 233.

¹⁵ Kleinfeld-Belton, Rachel. “Competing Definitions of the Rule of Law: Implications for Practitioners,” 3.

¹⁶ Peerenboom, Randall. “Varieties of Rule of Law: An Introduction and Provisional Conclusion.” *Asian Discourses of Rule of Law* (2004), 9.

¹⁷ Kleinfeld-Belton, “Competing definitions of the rule of law,” 3.

therefore, to refer to *a* rule of law rather than *the* rule of law to capture the different conceptions of justice operating in different societies.

To account for different manifestations of law, scholars have studied the origin of rules of law. Some scholars assert a consensus of legality arose prior to the codification of laws, while others advocate the exact opposite: that law meant to protect elite power and only later was distributed among the general populace. Rule of law is a “social institution” that defines interactions and expectations among the population.^{18,19} Thus, the former theory, posited by Frederick Hayek, asserts social consensus and law develops “spontaneously” as localities experiment with different modes of interaction, with the most effective methods evolving into broader norms that are later codified.²⁰ The origin of Western European rule of law and English Common Law in particular supports spontaneity.²¹ As an example, Bruce Benson chronicles the advent of European commercial law through the interactions between international law merchants in the Middle Ages. These merchants required contracts to facilitate their economic transactions, which frequently differed among disparate localities. However, common codes among localities coalesced in the community of traders to create standardized interactions. European governments later enacted these codes into law, creating commercial law that was “voluntarily produced, voluntarily adjudicated, and voluntarily enforced.”²² Thus, rule of law

¹⁸ May, “Athenian Antecedents,” 241.

¹⁹ Unger, Roberto Mangabeira. *Law in Modern Society*. Simon and Schuster, 1977, 49.

²⁰ Fukuyama, Francis. *The Origins of Political Order*. New York: 2011, 253.

²¹ Hayek, *Constitution of Liberty*, 199.

²² Benson, Bruce L. “Justice without Government: The Merchant Courts of Medieval Europe and Their Modern Counterparts” in *The Voluntary City: Choice, Community, and Civil Society*, edited by David Beito et. al. University of Michigan Press, 2002, 128, 131.

predated modern European states and originated through the voluntary adoption of common modes of interaction.²³

In opposition to this bottom-up creation of legality, others posit law requires a centralized authority. Francis Fukuyama asserts Hayek's argument for spontaneity is historically flawed because centralized governments altered, enacted, and enforced legality, and without this intervention, rule of law in these societies would not exist.²⁴ Luigi Ferrajoli agrees in the necessity of authoritative articulation of law, asserting law is "wholly an artificial object 'posited' or 'produced' by human beings and thus dependent on their responsibility, on how they consider, draft, produce, interpret, and apply it."²⁵ In order for law to control powerful actors, it must be capable of restraining powerful elites who must view law as legitimate.²⁶ Thus, Fukuyama argues, the government initially applies protections from arbitrariness to elites only in order to co-opt their support.²⁷ In states with strong rules of law, these protections are only later expanded to include the general population. Additionally, the professionalization of judges concentrates legal power among elites who then use legal apparatus to ensure their interests and agenda.²⁸ Thus, Brian Tamanaha characterizes law as "spoils that go to the winners," and the losers in these battles comply only for hope they may one day "take their turn to wield the law."²⁹ Studying the origin of the rule of law has been important to understand its different manifestations; however, research must expand to increase its analysis.

²³ Fukuyama, Francis. "Transitions to the Rule of Law." *Journal of Democracy* 21, no. 1 (2010), 36.

²⁴ Fukuyama, *The Origins of Political Order*, 253.

²⁵ Ferrajoli, Luigi. "The Past and the Future of the Rule of Law." In *The Rule of Law History, Theory and Criticism*, edited by Pietro Costa, Houten: Springer, 2007, 331.

²⁶ Fukuyama, *The Origins of Political Order*, 247.

²⁷ *Ibid.*, 250.

²⁸ Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004, 137.

²⁹ Tamanaha, "History and Elements of Rule of Law," *Singapore Journal of Legal Studies*. (2012), 225.

Rule of law scholarship currently lacks a robust analysis of non-Western trajectories. The largest body of non-Western analysis concerns the differences in the emergence, or lack thereof, of rule of law in India and China, respectively.^{30,31,32,33} China developed into a strong, centralized state absent the rule of law, while India has failed to develop a strong state even given its robust conception of rule of law.³⁴ Analyzing these states, Fukuyama asserts religion plays a central role in the formation of an abstract conception of legality by placing a divine restriction on rulers. The advent of religion in India prevented accumulation of power and creation of a strong state, while the absence of a strong Chinese religious tradition allowed the state to accumulate power unhindered by religious elites.^{35,36} In addition to restricting state power, religion provides an articulated and universal conception of legality that followers voluntarily adopt. While this consensus supports the bottom-up origin of rule of law, Fukuyama maintains religion's structure and level of institutionalization are vital for the state adoption of legality. For example, Indian Brahmins lacked the strict hierarchy and political power characteristic of the Catholic Church.³⁷ The Church's power was ultimately responsible for the widespread adoption and codification of legality in Western European societies. The interplay between bottom-up and top-down origins of law is important for future study especially in regards to legal development.

The absence of robust comparative analysis on rules of law and the failure to acknowledge the heterogeneity of relationships between rule of law and state strength

³⁰ Peerenboom, Randall. "Varieties of Rule of Law: An Introduction and Provisional Conclusion." *Asian Discourses of Rule of Law* (2004).

³¹ Unger, Roberto Mangabeira. *Law in Modern Society*, 49.

³² Ocko, Jonathan and David Gilmartin. "State, Sovereignty, and the People: A Comparison of the 'Rule of Law' in China and India." *The Journal of Asian Studies*. vol 68 no 1 (2009).

³³ Fukuyama, *The Origins of Political Order*.

³⁴ Unger, *Law in Modern Society*, 87.

³⁵ Fukuyama, "Transitions to Rule of Law" 43.

³⁶ Peerenboom, "Varieties of Rule of Law," 1.

³⁷ Fukuyama, *The Origins of Political Order*, 277.

complicates the analysis and development of rules of law. In current development discourse, a strong rule of law becomes a metric for a strong, modern state.^{38,39} Thus, rule of law is frequently cited as a panacea for weak states. However, definitions of rule of law impact the pursuit of development. Focusing on only institutions and procedures can, as Raz concedes, legitimize a wide array of regimes including repressive colonialism and apartheid.⁴⁰ However, focusing only on developing substantive rule of law, as development scholarship is currently dominated by Western conceptions, furthers “economic, cultural, political, and legal hegemony.”^{41,42} Without taking into account differing justices and public acceptance of norms, the imposition of Western legal procedures, themselves based on imperfect systems, “can have no effect but to destroy the respect for [these institutions] even where they deserve it.”^{43,44} The ineffectiveness of these reforms arise from an inability, or unwillingness, to adequately understand the multiplicity of rules of law in existence. A major reason for this gap in scholarship is the lack of robust comparative work on the origins of rules of law.

Framing the Paper

Both Lebanon and Somalia are weak states, and analysis of their rules of law, if done at all, commonly conform to dominant development discourses. This paper seeks to fill the gap in current literature by providing a comparative analysis of rules of law in Lebanon and Somalia

³⁸ Peerenboom, Randall. “Rule of Law in China and India: A Historical-Cultural Approach” in *Commentaries of Ocko and Gilmartin*: 112.

³⁹ Ezrow, Natasha M. and Erica Frantz. “Judicial Institutions,” in *Failed States and Institutional Decay: Understanding Instability and Poverty in the Developing World* (New York: Bloomsbury Publishing, 2013), 132.

⁴⁰ Peerenboom, “Varieties of Rule of Law,” 36.

⁴¹ Carothers, Thomas. “The Rule of Law Revival” in *Promoting the Rule of Law Abroad: In Search of Knowledge*, 5.

⁴² Peerenboom, “Varieties of Rule of Law,” 4.

⁴³ Kleinfeld-Belton, “Competing definitions of the rule of law,” 19.

⁴⁴ Hayek, *The Constitution of Liberty*, 219.

disconnected from development goals. Believing procedural law is not inherently valuable, this paper views rule of law as a means to an end, generally defined as justice, but this end goal is socially constructed within the context it operates. In order to effectively analyze the achievement or failure of justice, this paper uses Paul Kahn, a law professor at Yale specializing in international human rights and cultural theory, as a guide. He prescribes a method for a cultural study of law that focuses on uncovering the cultural significance of law for specific communities. To do this, he requires distancing one's own beliefs to avoid normative valuations on what rule of law *should* be. Rather, he asserts, rule of law is “a distribution of power that works to sustain the conditions of belief that are constitutive of the unity of the nation as a single community.”⁴⁵ In order for rule of law to effectively rule, there must be “a reasonable congruence” between a culture's values and the legal order.⁴⁶ Thus, this paper assesses rule of law in Lebanon and Somalia by whether there is an articulated national consensus on identity and justice—referred to as social consensus—and whether institutions embody this ideal—known as institutional congruence.

Lebanon and Somalia animate the discussion on the alternative frameworks for the rule of law, as these guide the differing trajectories of rule of law in each state. Lebanese law is imposed on its population through institutions that are increasingly disconnected from reality. Rigid structures solidify societal divisions, and the top-down imposition of law prevents the formation of social consensus. Furthermore, these institutions work to cement elite power, further removing these institutions from their societies and preventing institutional congruence. In contrast, Somalia has a rule of law due to the bottom-up creation of institutions that are part

⁴⁵ Kahn, Paul W. *The Cultural Study of Law: reconstructing legal scholarship*. University of Chicago Press, 2000, 113,

⁴⁶ *Ibid.*, 103.

and parcel of the communities in which they operate. These institutions draw on unified values and provide social order unhindered by centralized government. Thus, this paper argues rule of law exists in weak states when it is realized spontaneously rather than imposed by elites.

To account for the absence of rule of law in Lebanon and a burgeoning rule of law in Somalia, this paper traces the top-down imposition of legal principles in Lebanon and the bottom-up realization of social consensus in Somalia. This paper first establishes the decimation of rule of law through civil war and state crisis, which provides the arena for the rebuilding of justice in each state.⁴⁷ Next, this paper defines identity by analyzing Lebanon's unsuccessful articulation of social consensus compared to Somalia's successful rendering of unified values. This paper then analyzes the importance of accountable institutions to foster rule of law. Finally, this paper concludes in the importance of substantive law rather than just procedural law.

Background: Civil War and State Crisis

First, it is necessary to chronicle the Lebanese and Somali civil wars because their atrocities abolished any semblance of rule of law. These civil wars decimated society, and inept institutions faced the challenge of rebuilding the state. These wars are certainly not the origin of state weakness nor does the total destruction present an unhindered opportunity to rebuild society. Rather, these conflicts uncover underlying weaknesses, and their legacies pervade government institutions and citizens' memories. The atrocities committed during the civil wars shape the landscape and identity of both states.

⁴⁷ Lebanon and Somalia are not unitary states, and this paper focuses on rule of law in Lebanon as a whole but confines its analysis in Somalia to the southern region. While the Lebanese government still claims control over the entire territory, Somaliland and Puntland are separated from the south by self-declarations of independence and autonomy, respectively.

Lebanon

Internal instability exploited by international powers characterizes the Lebanese civil war. Originating with colonial manipulation of different communities to suppress competitions for power, Lebanese communities have had extensive ties to external powers. Since gaining independence in 1943, Lebanon has repeatedly arbitrated conflicts between disparate communities in the context of regional conflicts. Situated between Israel and Syria, Lebanon became the locus for the Israeli-Palestinian conflict, which destabilized its fragile balance of power between communities.⁴⁸ Beginning on April 13, 1975, an attack on Palestinian refugees expanded to include other armed groups in the area factionalized by community ties and religious affiliations.⁴⁹ Syria and Israel intervened and specifically exploited internal divisions especially along Christian and Muslim divisions, which “played a catalytic role” in the further destabilization of Lebanon’s already divided society.⁵⁰ After the army factionalized, the war disintegrated into “little wars” between sectarian communities outfitted with their own militias.⁵¹ This conflict deteriorated into “appalling savagery” as “the clan and extended family [were] now armed to the teeth and caught in the grip of sectarian hysteria.”⁵² The war did not end until 1989 with the ratification of the Ta’if Accord, which was overseen by the US and Syria.⁵³ Although the war collapsed the state, the government “emerged from its ordeal still unified, with one

⁴⁸ Picard, Elizabeth. *Lebanon, a Shattered Country: Myths and Realities of the wars in Lebanon*. Holmes & Meier Pub, 2002, 85.

⁴⁹ Kurtulus, Ersun N. "Exploring the Paradoxical Consequences of State Collapse: the cases of Somalia 1991–2006 and Lebanon 1975–82." *Third World Quarterly* 33, no. 7 (2012), 1291.

⁵⁰ Picard, *Lebanon, a Shattered Country*, 90. 134.

⁵¹ *Ibid.*, 107.

⁵² Khalidi, Walid. *Conflict and violence in Lebanon: confrontation in the Middle East*. Vol. 38. Center for International Affairs, Harvard University, 1979. 48.

⁵³ Ghosn and Khoury. "Lebanon after the civil war," 383.

central government, one parliament for one people, and all the formal attributes of a sovereign (yet non-independent) state on an undivided (although occupied) territory.”⁵⁴

Somalia

Similar to Lebanon, the Somali war and state crisis encompassed the entire state and revealed the volatility of its clan relations. Following its independence from Britain, Italy, and France in 1960, Somalia was dominated by a single party whose rule was “a rarefied game with little relevance to the daily challenges facing the population.”⁵⁵ Thus, citizens widely welcomed General Mohamed Siad Barre’s bloodless coup in October, 1969.⁵⁶ Despite the initial successes of Siad Barre’s Supreme Revolutionary Council including codification of a written Somali language, a massive literacy campaign, and promises of unifying Somalia’s various clans, Siad Barre manipulated clan loyalties to consolidate his rule, which proved tenuous.⁵⁷ As his hold on power deteriorated, Siad Barre sought “clan scapegoats,” but soon resistance spread throughout Somalia eventually reducing Siad Barre to the “Mayor of Mogadishu.”^{58,59} On January 27, 1991, the United Somali Congress (USC) drove Siad Barre out of power, but similar to Lebanon, the contest to fill his vacancy led to militia fighting organized by clan identity. The USC itself succumbed to sub-clan conflicts, which prevented the emergence of any unified national government.⁶⁰ Somalia’s government collapsed, and, unlike Lebanon, the state failed to function at all.

⁵⁴ Dagher, Carole H., and Paul Kingston. *Bring Down the Walls: Lebanon's Post-War Challenge*, (2001), 3.

⁵⁵ Lyons, Terrence, and Ahmed Ismail Samatar. *Somalia: State collapse, multilateral intervention, and strategies for political reconstruction*. Brookings Institution Press, 1995, 14.

⁵⁶ Harper, Mary. *Getting Somalia Wrong: Faith, War and Hope in a Shattered* (2012), 54.

⁵⁷ Lyons and Samatar, “Somalia: State Collapse,” 14.

⁵⁸ *Ibid.*, 15, 17.

⁵⁹ Harper, *Getting Somalia Wrong*, 56.

⁶⁰ *Ibid.*, 57.

Moving Forward

These wars physically and psychologically destroyed Lebanon and Somalia. In Lebanon, one in every thirty people died, and most were civilians.⁶¹ Those who did not lose their lives faced disease, starvation, and psychological trauma, as “all witnessed or were victims of bombing, assault, torture, or extortion.”⁶² Statistics on Somali casualties remain unknown because violence continues and thwarts record-keeping. However, hundreds of thousands of Somalis were killed from the “man-made” famine resulting from the destruction of livestock and land, and millions remain affected by continued famine and disease.^{63,64} Terrence Lyons characterizes the collapsed state as a time when “the Somali people suffered the horrible brutality of living in a Hobbesian world without law or institutions to regulate relations among groups or to protect the most vulnerable from the most vicious.”⁶⁵ These atrocities have lasting impacts.

These wars consumed every aspect of Lebanese and Somali societies and destroyed not only trust in the government but also trust between citizens. The utter lawlessness of these wars shattered any conception of justice and thus any semblance of rule of law. In addition to rebuilding infrastructure and institutions, Lebanese and Somali governments must reconstitute their societies. The physical destruction of the state and society is matched with the psychological terror of pitting neighbors against neighbors. Due to the totality of destruction, post-war Lebanon and Somalia provide fertile ground for studying the origin of legality and assessing how Somalia was able to achieve rule of law, while Lebanon was not. Following

⁶¹ Picard, *Lebanon, a Shattered Country*, 145.

⁶² *Ibid.*, 145.

⁶³ Lyons and Samatar, “Somalia: State Collapse,” 7. Harper, *Getting Somalia Wrong*, 59.

⁶⁴ Menkhaus, Ken. “Governance without government in Somalia: spoilers, state building, and the politics of coping.” (2007), 81.

⁶⁵ Lyons and Samatar, “Somalia: State Collapse,” 7.

Kahn's framework, in order for law to represent commonly held beliefs, a state must define and unify its citizens. The following discussion traces the factors contributing to Lebanon's failure and Somalia's success in articulating a national consensus.

Social Consensus

Rebuilding societal consensus represents one of the most difficult hurdles in post-conflict environments, but also one of the most important for the establishment of the rule of law. The rule of law is not obeying rules for fear of outright punishment, but rather voluntarily complying with rules because they conform to an individual's sense of justice.⁶⁶ Universal application of legal codes requires the merging of law and ethics across the population—creating a unified community.⁶⁷ In order to determine whether a social consensus exists, it is important to explore a state's articulation of identity and justice. Defining justice for Lebanon and Somalia is certainly beyond the scope of this paper, so cooperation among citizens will be used as an indicator of consensus. This paper assumes cooperation arises from shared goals; thus, high levels of cooperation would indicate either numerous shared goals or few deeply held goals.

For Lebanon and Somalia, it is important to look at the role of religion because, as Fukuyama asserts, religion offers a unified conception of morality and creates community consensus. However, religion plays opposing roles in these states. Both societies are deeply divided, and religious identity frustrates the articulation of a national consensus in Lebanon while it serves to unite all Somalis. Religion entrenches cultural differences among Lebanese sects and precludes national consensus by inhibiting cross-cultural dialogue. In contrast, Islam in

⁶⁶ Fukuyama, *Origins of Political Order*, 260.

⁶⁷ Ferrajoli, "The Past and the Future of the Rule of Law," 325.

Somalia merges with traditional clan law and provides a unifying connection and consensus between differing clan identities.

Lebanon

Similar to the emergence of unified rules among law merchants, Lebanese society originated with codes of conduct locally specific to religious communities. Lebanon is a nation defined by its religious communities. Thus, similar to other weak states, the challenge for Lebanon is the creation of a national consensus that eschews purely ethnic and religious conceptions of nationalism.⁶⁸ Concurrent with the emergence of European commercial law, similarities among locally specific codes of conduct were unified into a general body of rules forming a consensus of behavior. However, this consensus across communities failed to emerge in Lebanon because the government institutionalized religious pluralism in lieu of forging a unified social consensus.

Based on Lebanon's commitment to religious freedom, the state defined religious communities, rather than individuals, as the basic unit of society. Lebanon is composed of eighteen officially recognized religious communities, which form the basis of societal organization.⁶⁹ Lebanon has long been a refuge for religious minorities and enshrines religious freedom in its 1926 Constitution.⁷⁰ The co-existence of each of these communities was a hallmark of early Lebanese identity, and Pope John Paul II remarks, "Lebanon is more than a country; it is a message," signifying the importance of Lebanon's multi-confessional identity.⁷¹

⁶⁸Ezrow and Frantz, "Judicial Institutions," 57.

⁶⁹ CIA, "Lebanon," *The World FactBook*.

⁷⁰ Human Rights Watch, "Unequal and Unprotected: Women's Rights Under Lebanese Personal Status Laws", *Human Rights Watch*, 2015, 19.

⁷¹ Dagher, *Bring Down the Walls*, , 7, 29.

In order for each community to freely practice their faiths, the government granted significant levels of autonomy allowing each sect to establish its own religious courts and schools.⁷² The Lebanese state, in tune with its liberalism and laissez-faire governance of the economy and society, allowed each community unfettered control of its internal affairs.⁷³⁷⁴ This communal individualism created locally specific legal codes; however, due to the lack of oversight of these religious courts, the state was unable to unify legality across communities.⁷⁵ The primacy of religion and its lack of national coherence makes Lebanon a “federation of communities” without any unifying values.^{76,77} Paradoxically, what originally began as the essential component of Lebanese identity—religious freedom—has now prevented the emergence of a unified Lebanese identity.

In addition to the administrative separation between these communities, differing interests supported by external factors strengthen the animosity between communities. Because Lebanon serves as a refuge for religious minorities, each community seeks desperately to preserve its distinct identity and to avoid assimilation of any kind by remaining separate from other sects.⁷⁸ These separations were rarefied by colonial exploitation of these communities as European powers sought ties to assert their control once the Ottoman Empire collapsed, which provided each community its own benefactor.⁷⁹ Connections to and privileging of external actors destabilized domestic politics. Furthermore, because the civil war was internationalized,

⁷² Human Rights Watch, “Unequal and Unprotected,” 28.

⁷³ Kurtulus, “Exploring the Paradoxical Consequences of State Collapse,” 1292.

⁷⁴ Dagher, *Bring Down the Walls*, 127.

⁷⁵ Human Rights Watch, “Unequal and Unprotected,” 28.

⁷⁶ Koury, Enver M. *The Crisis in the Lebanese System: Confessionalism and Chaos*, 8.

⁷⁷ Dagher, *Bring Down the Walls*, 172.

⁷⁸ Koury, *Crisis in the Lebanese System*, 2.

⁷⁹ Meo, Leila MT. *Lebanon, improbable nation: a study in political development*. Indiana University Press, 1965, 15.

connections to outside powers often defined one's enemies—Syrian-oriented Muslim sects fought viciously against Christian sects and vice versa.⁸⁰ The international and sectarian character of the civil war continued the exploitation of identities and Lebanon was “reduced to cantons surrounded by unknown hostile areas.”⁸¹ Following the sectarian violence of the civil war, communities once again sought refuge—withdrawing to “confessional ghettos” or “isolated cultural islands.”⁸² Due to the autonomy and isolation awarded to these communities, there was no need to construct a dialogue between sects. Each community, equipped with its own schools, was allowed to construct its own historical narrative and memory of the war—inhibiting national reconciliation and general knowledge about “the other.”⁸³ Communal animosities become the hallmark of the Lebanese state as they are enshrined within the very structure of government.

Confessionalism: Entrenching Separation

In order to balance community autonomy with national unity, Lebanon's government grants representation based on communal identity, which serves as the basis of all political interactions. The National Pact of 1943 established Confessionalism and allocated political power based on religious affiliation “provided such measures will not harm the general welfare of the state.”^{84,85} The Pact split political authority by requiring a Maronite president and commander-in-chief, a Sunni prime minister, a Shi'a parliamentary president, a Greek Orthodox vice president, and a proportionally represented parliament with a quota of six Christians for

⁸⁰Picard, *Lebanon, a Shattered Country*, 111.

⁸¹ *Ibid.*, 149.

⁸² Dagher, *Bring Down the Walls*, 53.

⁸³ Haugbolle, Sune. *War and memory in Lebanon*. Vol. 34. Cambridge University Press, 2010, 192.

⁸⁴ Ghosn, Faten, and Amal Khoury. "Lebanon after the civil war: peace or the illusion of peace?." *The Middle East Journal* 65, no. 3 (2011), 382.

⁸⁵ Koury, *Crisis in the Lebanese System*, 5.

every five Muslims.⁸⁶ Confessionalism was thought to balance competing interests, which was especially compelling following the war. Thus, the system was renewed with the 1990 Ta'if Accord, which was “meant to compel each group to assume its share in the shaping of the future and to get rid of the ‘victim syndrome’ or the ‘conspiracy theory’ [of the civil war] entrenched in Lebanese mentality.”⁸⁷ Confessionalism, at its core, is designed to honor and preserve the myriad of Lebanese communities, though it actually entrenches disparate interests and prevents any substantial cooperation between sects.

Unfortunately, Confessionalism, rather than unifying communities, discourages compromise by incentivizing the pursuit of power for a single sect. For plural societies to work, there must be a balance between particular conceptions of justice for each community as well as universal rights to forge cooperation between communities.⁸⁸ However, as previously discussed, there is no unified consensus. Thus, Confessionalism “prevented the development among the citizenry of a Lebanese national consciousness, for one owed loyalty not to the nation, but to one’s religious community and to its spokesmen within the government.”⁸⁹ This then precluded any sort of debate over divisive issues such as a unified Lebanese identity and heightened the insular and particular nature of Confessional culture as representatives of each sect were attempting to promote their own version of the good and define their own version of “Lebanese.”^{90,91} Confessionalism assures a balance of power among faiths, but without a common purpose, the government becomes the arena for sects to achieve and consolidate individual power; thus,

⁸⁶ Picard, *Lebanon, a Shattered Country* 70.

⁸⁷ Dagher, *Bring Down the Walls*, 175.

⁸⁸ Ghai, Yash. “Ethnicity and Competing Notions of Rights” in Schwartz, Harvey, *Rights in Divided Societies*, 2012, 84.

⁸⁹ Meo, *Lebanon, improbable nation*, 37.

⁹⁰ Picard, *Lebanon, a Shattered Country*, 169, 157.

⁹¹ Khalidi, *Conflict and violence in Lebanon*, 147.

each community has a vested interest in perpetuating Confessionalism and its source of access to state resources.

Confessionalism rewards clientelistic relationships, which causes civil society to maintain religious affiliations preventing cooperation. Clientelism ensures communities, not individuals, are the primary actors within the state.⁹² This clientelistic system rewards actors that offer political benefit to specific communities. Thus, civil society organizations have oriented themselves to work within the sectarian political climate, often explicitly advertising their religious orientation.⁹³ Even the multitude of organizations demanding accountability from the war are religiously organized. For example, groups demanding inquiries into missing family members are divided between Muslim and Christian identities due to the sectarian application of crimes during the war.⁹⁴ Thus, civil organizations do not bridge communal affiliations and serve only to continue clientelism and erode the government's pursuit of a common good.^{95,96} Lebanon is characterized by limited cross-cultural cooperation, which is not the case in Somalia even though clans offer a similarly divisive social arrangement.

Somalia

Similar to religious affiliation in Lebanon, clan identity in Somalia guides social interactions. Clan relations, cited as cause of the dysfunction of Somali society, commonly

⁹² Picard, *Lebanon, a Shattered Country*, 170.

⁹³ Clark, Janine A., and Bassel F. Salloukh. "Elite strategies, civil society, and sectarian identities in postwar Lebanon." *International Journal of Middle East Studies* 45, no. 04 (2013), 731.

⁹⁴ Humphrey, "Special Tribunal," 18.

⁹⁵ Salamey, Imad, and Rhys Payne. "Parliamentary consociationalism in Lebanon: equal citizenry vs. quotated confessionalism." *The Journal of Legislative Studies* 14, no. 4 (2008), 455.

⁹⁶ AbiYaghi, Marie-Noëlle. "Civil Mobilisation and peace in Lebanon: Beyond the Reach of the 'Arab Spring'?" in *Reconciliation, Reform and Resilience: Positive Peace for Lebanon*. Edited by Elizabeth Picard and Alexander Ramsbotham. London: Conciliation Resources, issue 24. (2012), 22.

define Somalia as a “pre-nation state of isolated communities,” which resembles Lebanese society.⁹⁷ However divisive clan relations may be, these individual networks have interacted through forums offering dialogue and consensus through traditional clan practices and Islamic beliefs. These modes of interaction formulate a social consensus absent Lebanon’s institutionalization of difference.

Clan identities are comprehensive and define the prism through which social organization is viewed. All Somalis belong to one of six clan families—Dir, Isaaq, Hawiye, Daarood, Digil, and Rahanweyn—which trace back generations to a common ancestor. These clan families are then broken up into clans, sub-clans, primary lineages, and *diya*-paying groups, with alliances and animosities shifting frequently.⁹⁸ Although alliances shift, the actual genealogies are permanent, with youth learning to recite their ancestors back twenty generations.⁹⁹ In the intense competition for resources among nomads and pastoralists, clan affiliations determined the threat of an approaching individual; so strong are animosities that the failure to recount one’s ancestors can result in death, and members of rival clans “[kill] each other with abandon.”^{100,101} Siad Barre identified clan identities as inimical to modern society. However, his manipulation of clan affiliations to rule exacerbated animosities and partially prevented clans from uniting following his collapse.¹⁰² Similar to Lebanon, the absence of a united morality during and after Siad Barre’s regime led Somalis to rely even more upon clan networks especially in organizing militias and

⁹⁷ Drysdale, John. *Whatever happened to Somalia?: A tale of tragic Blunders*. Haan Pub, 2001, 152.

⁹⁸ Lewis, Ioan Myrddin. *Understanding Somalia and Somaliland: Culture, History, Society*. New York: Columbia University Press, 2008, 4.

⁹⁹ Young, Crawford. *The Postcolonial State in Africa: Fifty Years of Independence, 1960–2010*. University of Wisconsin Press, 2012, 262.

¹⁰⁰ Harper, *Getting Somalia Wrong*, 36, 39.

¹⁰¹ Lewis, “Understanding Somalia,” 30.

¹⁰² Menkhaus, “Governance without government,” 80.

competing for resources.¹⁰³ Clan competition absent morality caused “ruinous clanism unmitigated by kinship and mutual obligation, which gets more bizarre and destructive as the underlying society fails to produce a new and sustainable cultural foundation.”¹⁰⁴ However, Somalia is able to transcend this discord through traditional dialogue.

Although deeply ingrained clan animosities would appear to preclude any consensus across clans, traditional clan law offers uniform norms regulating behavior between clans. The nomadic nature of Somali societies forces interactions between clans and necessitates a method for arbitrating disputes, which is informally codified through *xeer*, traditional clan law. Although the application of *xeer* varies across Somalia, essential elements are uniform across localities, very similar to the law merchants.¹⁰⁵ *Xeer* establishes a social contract “defining the terms of their collective unity.”¹⁰⁶ The competition for resources and the previously discussed violence between clans led to principles of interaction; *xeer* certainly did not eliminate conflict, but it did provide accepted standards for dealing with disputes.^{107,108} Most notable to this discussion is the payment of *diya*—blood compensation—between clans.¹⁰⁹ An elder, mutually agreed upon by the two clans, presides over a court, whereby a payment is decided in congruence with the injury that is to be paid by all members of the *diya*-paying subgroup of a clan.¹¹⁰ These court proceedings not only mitigate disagreements between clans, they also demonstrate a source of common respect for law.

¹⁰³ Simon, Anna. “Somalia and the Dissolution of the Nation-State,” *American Anthropologist*, 1994, 820.

¹⁰⁴ Lyons and Samatar, “Somalia: State Collapse,” 64.

¹⁰⁵ LeSage, “Stateless Justice in Somalia,” 32.

¹⁰⁶ Lewis, “Understanding Somalia,” 3.

¹⁰⁷ These interactions included the the protection of “socially respected groups” including women, the elderly, and poets in addition to wedding customs and regulation of resources.

¹⁰⁸ Lyons and Samatar, “Somalia: State Collapse,” 10.

¹⁰⁹ LeSage, “Stateless Justice in Somalia,” 32.

¹¹⁰ *Ibid.*, 35.

The collective responsibility among *diya*-paying groups as well as the formal structure of mediation has led many to romanticize *xeer* as a truly just process.¹¹¹ However, *xeer* often requires negotiation with dominant clans exerting influence for more favorable outcomes.¹¹² Thus, justice is “the interest of the stronger.”¹¹³ Even if *xeer* evades equitable justice, it still offers a forum for the articulation and practice of common inter-clan practices, a parallel of which Lebanon lacks. Furthermore, even with power disparities between clans, rulings can offer some justice. As previously mentioned, Tamanaha asserts weaker groups can comply with unequal legal codes voluntarily because they may want to maintain the structures in hopes they will be able to one day “take their turn to wield the law.” Even if this argument is unconvincing, Somalis remain united through their common religion.

Islam presents a more prevalent source of consensus, and provides a legal authority over *xeer* principles and a common moral code. Somalis are predominantly Muslim and are “firmly attached” to their faith.¹¹⁴ The “twin pillars” of Somali tradition, *xeer* and Islam, fused in a “symbiotic relationship” indelibly ingraining Islam into traditional clan practices.¹¹⁵ Even among intense clan animosities, Islam still provides a base of consensus that some assert is a more ubiquitous aspect of their identity than clan affiliations.¹¹⁶ This sentiment is highlighted by the fact that each clan family traces their ancestry to the founder of Arabian Islam, who supersedes

¹¹¹ Schlee, Günther. "Customary law and the joys of statelessness: idealised traditions versus Somali realities." *Journal of Eastern African Studies* 7, no. 2 (2013), 259.

¹¹² *Ibid.*, 36.

¹¹³ This represents a Thrasymachian definition of justice, famously “disproved” by Socrates; Tamanaha, “Collapse of Higher Law,” 220.

¹¹⁴ Lewis, “Understanding Somalia,” 2, 17.

¹¹⁵ Lyons and Samatar, “Somalia: State Collapse,” 64; Shay, Shaul. *Somalia Between Jihad and Restoration*. New Brunswick: Transaction Publishers, 2008, 37.

¹¹⁶ Abdulkadir, Rahma, and Caroline Ackley. "The Role of Shari'a-Based Restorative Justice in the Transition from Armed Conflict to Peacebuilding: Do Somalis Hold the View That the Restorative Justice Aspects within Qisas Offer a Solution?." *Northeast African Studies* 14, no. 2 (2014), 119.

each clan-family's common ancestor.¹¹⁷ Islam's role in Somali society supports Fukuyama's assertion of the role of religion in origins of rule of law by "infusing new moral language into the culture and requiring all believers to see one another as members of a large fraternity, committed to doing and earning good in this world to secure salvation in the next life."¹¹⁸ The promotion of a consensus of justice and a restriction on courts is evidenced by a Somali adage: "To dispute the judgement of a court is to dispute with God."¹¹⁹ Islam is a common tie between all clans, and, unfortunately, Lebanon lacks a parallel.

The existence of a general consensus has important impacts on society by fostering levels of trust between citizens. One notable example of this trust is the prosperity of the Somali economy following the collapse of Siad Barre's regime. State structures remain impoverished and militia-rule strong, though economic interactions do not entirely conform to images of lawless looting and coercive bargaining.^{120,121} Even Somali pirates, needing a market to sell their stolen goods, require a certain level of structure in order to profit from their crimes.¹²² Similar to the law merchants, livestock traders have historically negotiated contracts without regulation by the state and continue to do so following the collapse of the central government.¹²³ The ability for Somali civil society to fill the vacuum of state failure has built a prosperous economy especially compared to the economy under Siad Barre but also compared to neighboring states during the

¹¹⁷ Lewis, "Understanding Somalia," 130.

¹¹⁸ Lyons and Samatar, "Somalia: State Collapse," 10.

¹¹⁹ Lewis, "Understanding Somalia," 232.

¹²⁰ McAuliffe, Padraig. "The Prospects for Transitional Justice in Catalyzing Socioeconomic Justice in Postconflict States: A Critical Assessment in Light of Somalia's Transition." *Northeast African Studies* 14, no. 2 (2014), 80.

¹²¹ de Groot, O. J., Rablen, M. D. and Shortland, A. (2011). "Gov-aargh-nance – 'even criminals need law and order.'" *Economics of Security Working Paper* 46, Berlin: Economics of Security, 4.

¹²² *Ibid.*, 9.

¹²³ Little, Peter D. *Somalia: Economy without state*. Indiana University Press, 2003, 152.

same time period.¹²⁴ This economic vitality requires trust and reciprocity.¹²⁵ In the words of one Somali businessman,

“Trust is the secret of the success of the Somalis. Also, Somalis are amazingly energetic and dynamic. Because of the war in Somalia, there is no central government, there are no institutions to help people, so everybody has to do their own thing, you have to depend on yourself. Everybody has relatives who are suffering, so everyone feels responsible for doing things for other people.”¹²⁶

This quote highlights the important difference between Somalia and Lebanon. Both states are extremely divided by religious or clan affiliations. However, absent a centralized government, Somalis are able to draw on shared Muslim values to cooperate with economic endeavors as well as establishing legal structures, which will be discussed below. In contrast, the Lebanese government, with the purpose of ensuring the autonomy of its religious groups, solidified communal differences and the clientelism of Confessionalism precludes cross-community cooperation.

Identity and institutions complexly intertwine, and the following discussion depicts institutions and their roles in fostering or hindering the rule of law.

Institutional Congruence

Institutions articulate and administer law, and thus, for a state to have a strong rule of law, Kahn requires a “reasonable congruence” between a culture’s values and its legal order. Other theorists support this supposition but use terms such as “ownership” of institutions. How to achieve ownership and who achieves it are important questions to ask when assessing rules of

¹²⁴ Kurtulus, “Exploring the Paradoxical Consequences of State Collapse,” 1285-88.

¹²⁵ Widner, Jennifer. A. “Building Effective Trust in the Aftermath of Severe Conflict.” In *When States Fail: Causes and Consequences*. Edited by Rotberg, Robert. Princeton: Princeton University Press, 2010, 223.

¹²⁶ Harper, *Getting Somalia Wrong*, 116.

law.¹²⁷ The above discussion about the origins of rule of law provide a framework to answer these questions. Lebanon and Somalia present alternative constructions of institutions. Because the Lebanese government survived the war, Lebanon institutions reasserted their control “inorganically” via top-down methods. In contrast, Somalia had no centralized government, and thus its institutions were “organically” realized, manifesting themselves from the bottom-up.¹²⁸ This intrinsically does not matter as imposed or realized institutions can be accountable as long as they reflect citizens’ interests^{129,130}

Scholars have theorized the failure of institutions to match their societies. This process, labelled “political decay” by Fukuyama or “judicial corrosion” by John Kleinig, is the result of institutional rigidity and the failure to match citizens’ expectations.^{131,132} Following the war, Lebanese sought to maintain political unity by forgoing reconciliation efforts and instating elites into the government. Without reconciliation, the Lebanese government failed to represent popular interests. In contrast, Somali institutions were constructed within specific localities, and were thus very responsive to local needs. This next section investigates the contributing factors of institutional decay and accountability.

Lebanon

This paper has already established Lebanon lacks social consensus in large part due to the solidification of communal differences within the Confessional political system. Absent any

¹²⁷ Chesterman, Simon. “‘Ownership’: The Transfer of Authority in Postconflict Operations.” In *Civil War and Rule of Law*. Edited by Hurwitz, Agnes and Reyko Huang. Boulder: Lynne Rienner, 2009. 154.

¹²⁸ Menkhaus, "Governance without government," 77.

¹²⁹ Chesterman, “Ownership,” 145.

¹³⁰ Rausch, Collete and Vivienne O’Connor. “Model Codes: Laying the Foundations of the Rule of Law.” In *Civil War and Rule of Law*. Edited by Hurwitz, Agnes and Reyko Huang. Boulder: Lynne Rienner, 2009, 125.

¹³¹ Fukuyama, Francis. *Political order and political decay: From the industrial revolution to the globalization of democracy*. Macmillan, 2014, 462.

¹³² Kleinig, John. "Judicial Corrosion: Outlines of a Theory." *Criminal Justice Ethics* 31, no. 1 (2012).

social consensus and thus substantive purpose of legality, Lebanese institutions resemble procedural law only. These procedural institutions support a regime of elite control and benefit. However, this alone does not preclude Lebanon from rule of law. As Fukuyama asserts, rule of law often begins by assuring elites protections from government power, which is later democratized to the whole population.¹³³ However, elite control of Lebanese institutions actively suppresses justice and precludes any congruence of consensus through the politically expedient, though socially harmful, practice of ignoring past and present injustice. This ignorance is procedurally legislated. However, this procedural law erodes substantive justice and the rule of law by placing political unity above law and specifically by valuing the maintenance of elite power over citizen justice.

Following the war, the government prioritized institutional unity above reconciliation, and the resulting institutional denial of responsibility for the war prevents any reconciliation among the populace. Because the war subsumed the entire country, attempts to hold people accountable would necessarily involve trials against many government officials. In order to avoid this destabilization, the government passed a law in 1991 granting amnesty for all crimes committed before March 1991.¹³⁴ The purpose was to assert that in the war, there was “no victor and no vanquished” and to provide a “clean slate” for people to forgive and move forward.¹³⁵ Just as Confessionalism hindered its designed purpose of religious equality, general amnesty violated any semblance of social unity. Other than “amnesia,” the government failed to propose a national reconciliation strategy, and even today there remains no unified narrative of the war,

¹³³ Fukuyama, *The Origins of Political Order*, 247.

¹³⁴ ICTJ, “Failing to Deal With the Past,” 9.

¹³⁵ Haugbolle, “*War and memory in Lebanon*,” 193.

with history books ending with independence in 1943.¹³⁶ Thus, all healing and reconciliation resides within specific communities. Due to cultural separation previously discussed, these personal narratives centralize one's own sect and "otherize" all others—failing to acknowledge any common experiences with other communities.¹³⁷ A 2009 survey found communities blame others for the war and do not take personal responsibility, which demonstrates that the government's calls for unified guilt were unsuccessful and have lasting implications.¹³⁸ Thus, the Amnesty Law encouraged the perpetuation of a divisive narrative between communities.

Although the government declared the war was equally devastating to all, incorporation of militia leaders into the government and unequal application of the Amnesty law bestows victory on the elites and vanquishes public justice. Government institutions did survive the war, but they were surely not powerful enough to assert control over the divisive, destroyed society. Thus, the government sought to co-opt militia leaders by giving them government positions; "Warlords thus became Statelords."¹³⁹ Now, people responsible for war crimes and crimes against humanity are allowed to "parade around the corridors of power in civilian clothes" with complete impunity.¹⁴⁰ Rule of law, at its core, is subjecting government officials to the authority of the law. Thus, pardoning the crimes of those in power certainly precludes justice.

Even focusing on the procedural aspect of the law—it was created and passed by the legislature—contradicts the rule of law because this law was selectively applied. The South Lebanese Army, considered an Israeli proxy, and individuals uncooperative with the post-war

¹³⁶ Ghosn and Khoury. "Lebanon after the civil war," 392.

¹³⁷ *Ibid.*, 392.

¹³⁸ *Ibid.*, 392.

¹³⁹ Dagher, *Bring Down the Walls*, 174.

¹⁴⁰ Picard, *Lebanon, a Shattered Country* 167.

regime were exempt from the Amnesty Law.¹⁴¹ This selectivity served explicit political purposes defined by the needs of elites in power; immunity was not granted for assassinations of religious and political leaders, yet perpetrators of war crimes were pardoned and the fate of the missing was never seriously pursued by the government.¹⁴² Thus, “Amnesty protected the lives of leaders but not the victims of their crimes,” and this was justified to avoid instability.¹⁴³ Elite impunity predicated the entire reconstruction of the state, and remains a touchstone of Lebanese politics as amnesia is repeatedly asserted after crises posing threats to political stability.

Increasingly separated from citizens and reality, elites in power cling to the institutions to maintain their power. Recognizing the deleterious impacts of sectarian politics, the Ta’if Agreement, which formally ended the civil war, proscribed the abolishment of Confessionalism as a “fundamental national objective” to be replaced by a system of equal power sharing between Christians and Muslims without reference to particular sects.^{144,145} However, there have been no moves to abolish Confessionalism even as institutional ineptitude—due to decades of “communitarianism [taking] precedence over that of competence”—becomes clear.¹⁴⁶ Outsourcing justice to the UN Special Tribunal for the investigation into the 2005 assassination of Prime Minister Rafik Hariri paired with “de facto amnesties” from the failure to prosecute crimes indicate the extent to which Lebanese institutions are incapable of administering justice.

¹⁴¹ Abu-Saba, Mary Bentley. "Planning for Justice in South Lebanon." *Peace Review* 12, no. 1 (2000), 44; Dagher, *Bring Down the Walls*, 138.

¹⁴² ICTJ, “Failing to Deal with the Past,” 15.

¹⁴³ Humphrey, Michael. "The special tribunal for Lebanon: emergency law, trauma and justice." *Arab Studies Quarterly* (2011), 17.

¹⁴⁴ “The Ta’if Agreement.” Accessed through *United Nations* online records.

¹⁴⁵ The agreement also called for abolishing the requirement to include sect and denomination on identity cards. The Lebanese Parliament did this in 2009, but due to the weakness of civil codes, the Lebanese state does not know how to adjudicate personal status issues— such as marriage—without referring to religious courts. Dagher, *Bring Down the Walls*, 22.

¹⁴⁶ Picard, *Lebanon, a Shattered Country* 70.

¹⁴⁷ However, elites repeatedly adhere to Confessionalism and amnesia as a way to avoid addressing the actual issues of disunity.¹⁴⁸ Unsurprisingly, the failure to acknowledge issues continually reinjures an already devastated population. Michael Humphrey addresses the impacts of silence on the community,

“In Lebanon, the phantom is the collective trauma imposed on the population by the elite solution of amnesty and amnesia to chronic political crisis. Political peace has been constantly bought by confessional pacts between political elites, auto-impunity, forgetting and rendering victims invisible...The misrecognition is sedimented in the amnesia of the layers of violence on which peace is constantly reconstituted. The political landscape is generationally haunted by the victims of past violence for whom no-one has been held accountable and whose anxieties and grief reinforce communal victimhood and grievance.”¹⁴⁹

This amnesia covers all sources of disunity, not just the civil war. For example, the Doha Agreement reasserted the Confessional system following a series of riots in 2008.¹⁵⁰ Any reforms, such as majority rule, are staunchly resisted over fears that subjecting a society resembling a “ethno-religious kaleidoscope” to reforms will result in another war.¹⁵¹ Thus, elites maintain Confessionalism to guarantee their own personal power, but justify it under the “logic of saving citizens from something more catastrophic.”¹⁵² However, the impunity permeating Lebanese society prohibits rule of law and furthers the injustices experienced by citizens. Lebanese institutions are at the center of the state’s avoidance of rule of law. Thus, Somalia’s absence of formal institutions following the civil war present a unique corollary to Lebanon’s case.

¹⁴⁷ Humphrey, “Special Tribunal,” 5.

¹⁴⁸ El Khazen, Farid. *The Breakdown of the State in Lebanon, 1967-1976*. Harvard University Press, 2000, 14.

¹⁴⁹ Humphrey, “Special Tribunal,” 6.

¹⁵⁰ Ibid., 18.

¹⁵¹ Dagher, *Bring Down the Walls*, 176.

¹⁵² Humphrey, “Special Tribunal,” 18.

Somalia

Somalia supports the Lebanese conclusion that top-down imposition of order through institutions disconnected from society hinder the realization of justice and prevent the rule of law. However, Somalia, since the collapse of its government, has served as an arena ripe for Hayek's spontaneous experiments with legality unhindered by institutions. Somali institutions have been capable of supporting the rule of law because they are established by the general populace and based on widely held religious values. This section will juxtapose the failures of orthodox institutions with the successes of informal initiatives to highlight the importance of institutional congruence.

Similar to Lebanon, newly established central governments in Somalia have failed to capture control or legitimacy because they do not match social consensus. Since 1991, Somalia has had three central governments: the Transitional National Government (TNG) (2000-2004), the Transitional Federal Government (TFG) (2004-2012), and the current government (2012-present), recognized by the US State Department on January 17, 2013.^{153,154} However, these "inorganic" governments avoid widespread support from a populace deeply distrustful of central government due to colonial manipulation and Siad Barre's predation.^{155,156} Established outside Somalia, these governments failed to offer any order among violent militias and not only did the public not view them as legitimate, they were increasingly hostile to their claimed authority.¹⁵⁷ Like the post-war Lebanese government, the TFG avoided reconciliation because it

¹⁵³ Shay, *Somalia between Jihad and Restoration*, 74, 80.

¹⁵⁴ Bureau of African Affairs, "US Relations With Somalia: Fact Sheet," *US Department of State*, 15 June 2015.

¹⁵⁵ LeSage, "Stateless Justice in Somalia," 36.

¹⁵⁶ Menkhaus, "Governance without government," 94.

¹⁵⁷ Lewis, "Understanding Somalia," 85.

is too divisive in the war-weary society and thus avoided all legitimacy.¹⁵⁸ Without being entrenched within the social consensus, these governments are viewed as vehicles for power, rather than social good.¹⁵⁹ Thus, politics is viewed as a zero-sum game able to provide an edge to rival clans.¹⁶⁰ Furthermore, the current government structure is consociational—based on proportional clan representation—and thus the discussion about the perils of Lebanese Confessionalism offer warnings for the future of Somali politics.¹⁶¹ The current government has already wavered; President Hassan Sheikh Mohamud has delayed popular presidential elections in 2016 stating he does not “want the election to create new conflict, new division, within the society....Somalia is still fragile.”¹⁶² While the election is still scheduled, the next president will be chosen by a group of 135 clan elders.¹⁶³ Suspending a popular vote on the basis of security and unity concerns harkens back to the discussion on Lebanese elite control for the purpose of stability.

Although the current Somali government parallels the challenges facing Lebanon, Somalia is able to transcend decay through the bottom-up construction of institutions. Between 1991 and when the TNG was established in 2000, Somalia was run by warlords and is frequently characterized as a Hobbesian state of nature. However, beginning in 1993, local militias established Shari’a courts.¹⁶⁴ Although these courts controlled only a “few city blocks,” they were widely supported by a population tired of violence and disorder.¹⁶⁵ Though these courts

¹⁵⁸Menkhaus, "Governance without government," 99.

¹⁵⁹ Ibid., 94.

¹⁶⁰ Ibid.

¹⁶¹ Consociationalism is the general term for a political system based on representation of different identities. Lebanese Confessionalism is consociationalism based on religious affiliation.

¹⁶² McCormick, Ty. “Somalia’s Incredible Shrinking Election,” *Foreign Policy*, 6 August 2015.

¹⁶³ Ibid.

¹⁶⁴ Shay, *Somalia between Jihad and Restoration*, 93.

¹⁶⁵ Harper, *Getting Somalia Wrong*, 79-80.

were organized along clan identities and had their own militias, they were praised for their “discipline and good conduct.”¹⁶⁶ Noah Feldman, acknowledging the challenges of these courts, states,

“Nevertheless, the Islamic courts had a set of special advantages for the task of combating disorder. First, because most Somalis are Muslim, they would probably have expected that the substantive rulings of the courts would be fair and just. Second, the scholars—few and poorly trained though they might be—still possessed enough residual respect and authority as interpreters of the law that they were able to constitute these courts under the most difficult conditions imaginable, and at considerable personal risk.”¹⁶⁷

These courts offered noticeable improvements in security within their communities, allowing people to “walk the streets without fear” for the first time since 1991.¹⁶⁸ The success of these courts can be attributed to their articulation and commitment to Islamic ideals that unite Somalis.

Furthermore, the Islamic Courts Union (ICU), created in 2004, unified independent courts and began institutionalizing these norms providing law and order.¹⁶⁹ The Supreme Council of the ICU functioned like a parliament and “sort[ed] out any problems in outlying courts, [kept] all the programs in line, and [made] sure everyone is reading from the same script.”¹⁷⁰ The ICU represents the most successful form of justice and governance in Somalia to date and supports the bottom-up theory of rule of law because “there is no legislature that passes laws. Instead, law is ‘discovered’ through the dispute resolution process. Indeed, it’s not entirely unlike the early

¹⁶⁶ Shay, *Somalia between Jihad and Restoration*, 93.

¹⁶⁷ Feldman, Noah. *The fall and rise of the Islamic state*. Princeton University Press, 2012, 140.

¹⁶⁸ Harper, *Getting Somalia Wrong*, 81.

¹⁶⁹ Barnes, Cedric, and Harun Hassan. "The rise and fall of Mogadishu's Islamic Courts." *Journal of Eastern African Studies* 1, no. 2 (2007), 154.

¹⁷⁰ Shay, *Somalia between Jihad and Restoration*, 96.

English common law system that [the US] legal system evolved from.”¹⁷¹ Unfortunately, with help from the US and Ethiopia, the ICU was defeated in 2006 by the TFG.¹⁷²

The ICU puts top-down and bottom-up institutions directly in conversation. The ICU was the result of spontaneous calls for order in war-torn Somalia, and thus the ICU—drawing on common Islamic values as well as a unified war-weariness—enjoyed wide public support. The international intervention displacing the ICU represents an elite, top-down imposition of external values, and mirrors the dysfunction of Lebanese institutions as the intervention was based on personal goals and denial of the actual reality of the situation. Essential to the defeat of the ICU was the US fear of Islamic organizations. What follows is a brief discussion on Islamic organizations in Lebanon and Somalia in relation to the international community.

Top Down Imposition: International Perceptions of Fundamentalism

Although this analysis focuses on domestic forces contributing to the realization or avoidance of the rule of law, the conclusions drawn can be useful for informing international perceptions on the efficacy of institutions in Lebanon and Somalia. The international community generally fears the emergence of Islamic organizations such as the ICU, Al-Shabaab, and Hezbollah, which are commonly equated because the West often conflates organizations centered on Islamic values with terrorism. However, this perception is based on a failure to acknowledge the actual workings of these groups. The ICU, Al-Shabaab, and Hezbollah function disparately within their societies and deserve discussion.

¹⁷¹ Powell, Benjamin. “US Recognition Doesn’t Bode Well for Somalia.” *Huffington Post*, 23 January 2013.

¹⁷² Shay, *Somalia between Jihad and Restoration*, 81.

The failure to differentiate between Islam and terrorism led to the destruction of the ICU and the most promising opportunity for unifying Somalia under a central authority. The US was involved in efforts to promote the rule of law in Somalia but clung to its orthodox perception of legal institutions and failed to recognize the successes of the ICU.^{173,174} Consequently, the US supported Ethiopia's 2006 invasion of Somalia to oust the ICU from power.¹⁷⁵ This was a mistake that, unfortunately, is likely to be repeated again without a nuanced understanding of the cultures within which these organizations operate. It is important to make clear the difference between Al-Shabaab and the ICU. In contrast to the ICU, which, as previously discussed, offered stability and rule of law to Somalia, Al-Shabaab is a terrorist organization with ties to Al-Qaeda.¹⁷⁶ Al-Shabaab explicitly advocates for the establishment of an Islamic state and implements strict Shari'a rule in the territories it controls.¹⁷⁷ While this can be used as evidence of the radicalization of the Somali people, most Somalis do not support radical Islam and oppose stricter elements of Shari'a law.^{178,179} The forceful recruitment of local Somalis in comparison to the voluntary recruitment of diaspora Somalis speaks to the lack of support for terrorism.¹⁸⁰ Al-Shabaab is a top-down imposition of order that is not rooted within national consensus. However, US labels of terrorism do not perfectly characterize organizations as evidenced by Hezbollah.

¹⁷³ Ganzglass, Martin. "The Restoration of the Somali Justice System." in *Learning from Somalia: The Lessons of Armed Humanitarian Intervention*. ed by Walter Clarke and Jeffrey Herbst. 1997, 27.

¹⁷⁴ Menkhaus, "Governance without government," 87.

¹⁷⁵ Shay, *Somalia between Jihad and Restoration*, 110.

¹⁷⁶ Harper, *Getting Somalia Wrong*, 86.

¹⁷⁷ *Ibid.*

¹⁷⁸ Lewis, "Understanding Somalia," 87.

¹⁷⁹ Harper, *Getting Somalia Wrong*, 74.

¹⁸⁰ *Ibid.*

The US State Department lists Hezbollah, like Al-Shabaab, as a terrorist organization.¹⁸¹ However, Hezbollah more closely resembles the ICU as it serves to unite Lebanese across sects. Hezbollah gained initial support through its provision of welfare and services the national government fails to provide.¹⁸² Additionally, Lebanese of all religions demonstrated national solidarity with Hezbollah's resistance to Israel's invasion during the civil war.¹⁸³ Although Hezbollah is explicitly a Shi'a organization, it has expanded its membership to include other sects.¹⁸⁴ Sheikh Naim Kassem, the Vice General Secretary of Hezbollah says, "We believe in Islam, but we will not impose Islam on anybody else. We do not consider that there is a fundamental conflict between Muslims and Christians in Lebanon. We want to build bridges of understanding and cooperation with the Christians."¹⁸⁵ Furthermore, Hezbollah's inclusion in the national government has marginally increased the government's legitimacy because Hezbollah is "disciplined, solidly in command...reputedly honest, and devoted to the public welfare."¹⁸⁶ Thus, Hezbollah represents an institution that crosses sectarian divides and can possibly be the vehicle toward a more unified public consensus.

Without advocating any policies, this analysis provides a useful framework for determining possible responses to terrorism. The importance of understanding the cultural significance of organizations is not only important to avoid inciting anti-American sentiment, it is also important for the longevity of justice within a community.

¹⁸¹ Bureau of Counterterrorism. "Foreign Terrorist Organizations." *US Department of State*.

¹⁸² Kurtulus, "Exploring the Paradoxical Consequences of State Collapse," 1298.

¹⁸³ Dagher, *Bring Down the Walls*, , 134.

¹⁸⁴ Bahout, "Armed Groups and Sovereignty" in *Reconciliation, Reform and Resilience: Positive Peace for Lebanon*. Edited by Elizabeth Picard and Alexander Ramsbotham. London: Conciliation Resources, issue 24. (2012), 58.

¹⁸⁵ Dagher, *Bring Down the Walls*, 145.

¹⁸⁶ Picard, *Lebanon, a Shattered Country*, 186.

Conclusion

This paper, situated within broader discussion of the origin of the rule of law, has presented a comparative analysis of two states' differing trajectories of the rule of law. Although vastly different states, Lebanon and Somalia faced similar environments for rebuilding rules of law. Each state faced the challenge of establishing a common conception of justice in the context of historical divisions of identity made ever more pervasive by completely atrocious civil wars. The ability for Somalia to foster a common consensus and create congruent institutions speaks to the success of bottom-up creation of legality rooted in citizens' needs. In contrast, Lebanon provides warning for the detrimental impacts of elite control of institutions and the failure to reconcile injustices committed along communitarian divides.

In keeping true to Kahn's method of the cultural study of law separate from its practice, this paper makes no policy recommendations. However, this analysis is situated within a massive gap in current rule of law literature. This discussion prompts further research into other rules of law. Especially interesting would be an analysis of two states with plural religious identities to study how states could articulate a consensus absent a unifying religious code. This study could also expand to include in-depth analyses of the effectiveness or ineffectiveness of international organizations, which can help improve the efficacy of the currently moribund success of rule of law promotion.

If nothing else, this paper has established that the existence of procedural law, without an accompanying social consensus, does not foster the rule of law. Furthermore, seeking stability over reconciliation in post-war environments destroys institutional legitimacy and perpetuates the injuries of the war atrocities. Years after the end of the war, Lebanese officials admitted

“they had botched the end of the war and that no politician had spoken the language of courage and effort or risen above the fray of special interests.”¹⁸⁷ So, while amnesia may be expedient in the short-term, the lasting longevity of justice requires deliberate and painful discussions on atrocities and identity. Rule of law does require elites to prioritize communal justice over personal power. Furthermore, however ruthless a crisis may be, Somalia demonstrates that citizens, without hindrance from unresponsive institutions, will not succumb to a Hobbesian state of nature, but will cooperate to restore order, trust, and justice.

¹⁸⁷ Picard, *Lebanon, a Shattered Country*, 175.

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