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978-1-107-02607-0 - Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan

Mark Fathi Massoud

Excerpt

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INTRODUCTION

One of the first interviews I did for this book was with a well-respected Sudanese lawyer. We met outside the offices of the Sudan Bar Association in Khartoum and sipped sugary tea from miniature glass cups. Our movements were slow, weighted by the heavy Saharan heat. I told him that I was planning to write a book on the development of law in Sudan. “Law in Sudan?” he asked. “Really?” He gently put down his cup and turned his gaze away from me toward the stark emptiness of the desert beyond us. Then he fixed his eyes back on me. I held my pen over a fresh page, eagerly waiting to memorialize his words. “Your book,” he said, “will be a very short one.”

There is a common perception among both Sudanese and foreigners who know the country well that Sudan lacks any semblance of law or legal strictures. It is easy to see why, troubled as Sudan is by violence and political volatility. Sudan’s national experience has been characterized by alternating horrors: the immediate suffering of war and the attenuated suffering of broken promises and dashed hopes. For sixty years, Sudan has been known around the world for the brutality perpetrated by its own people against one another and the trauma endured by the survivors. One of its many interconnected civil wars would become infamous as Africa’s longest. It ignited in southern Sudan in 1983, and, by the time peace accords were signed in 2005, more than two million people had been killed and Sudan was left with the world’s largest population of internally displaced persons. The resumption of violent conflict in Darfur in 2003, clashes along the border with South Sudan, and sporadic battles between the government army and splinter

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groups continue to typify the horrors of the region. Multiple wars are due in part to claims that the political leadership in Khartoum fails to represent Sudan's diverse population and to Khartoum's incessant drive to quell rather than to accommodate resistance.¹

Because of Sudan's long history of political instability, legal scholars inside and outside the country perceive it as existing in a kind of legal vacuum. The view of Sudan as a nation without law is supported by its consistent ranking among the world's "failed" states.² Among scholars, there is also widespread acceptance of the idea that the law, where it exists to limit the actions of states, promotes peace and prosperity. Legal reform plays an important role in the efforts of humanitarian actors to consolidate democratic stability in war-torn areas and to rescue weak states from their failures. Their efforts to promote the rule of law have largely centered on building up legal institutions responsive to the needs of citizens.

The rule of law, it has been argued, can counter a recalcitrant and repressive authority,³ moderate state power and build capacity for good governance,⁴ reduce the likelihood of violent conflict,⁵ combat terrorism, support stable and accountable institutions, enhance security, and

¹ Douglas H. Johnson, *The Root Causes of Sudan's Civil Wars* (Bloomington: Indiana University Press, 2003); Francis Deng, *War of Visions: Conflict of Identities in the Sudan* (New York: Brookings Institution Press, 1995).

² In the five-year period 2008–12, *Foreign Policy* and the Fund for Peace ranked Sudan as the second- or third-most "failed" state in the world, following two years (2006 and 2007) as the most failed state. Their *Failed States Index* (2012) ranks 177 countries using twelve political and social indicators, including human-rights failures, human flight, uneven development, state delegitimization, factionalized elites, and economic decline. Sudan has also been ranked the second "most fragile" state in the world by the Center for Systemic Peace. Freedom House ranked Sudan among its "worst in the world" index in 2012, for a dearth of political rights and civil liberties. See <http://www.foreignpolicy.com/failedstates2012> (accessed January 9, 2013); Monty G. Marshall and Benjamin R. Cole, *Global Report 2011: Conflict, Governance, and State Fragility* (Vienna, VA: Center for Systemic Peace); Freedom House, *Worst of the World 2012: The World's Most Repressive Societies* (Washington, DC, 2012).

³ Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992), 289.

⁴ Susan Rose-Ackerman, "Establishing the Rule of Law," in *When States Fail: Causes and Consequences*, ed. Robert Rotberg (Princeton: Princeton University Press, 2004), 182–221.

⁵ James Fearon, "Governance and Civil War Onset," *World Development Report 2011 Background Paper* (Washington, DC: World Bank, 2011).

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pave the way for economic and social development. It is believed that the rule of law can end corruption, instability, and tyranny.⁶ For this reason, a great deal of international aid is earmarked for programs that try to establish “law” as a step toward building a robust rule of law in countries wrestling with economic and political crisis or civil war. As important as direct provision of food, shelter, or health care can be in these dire situations, supporting the growth of legal institutions is seen as a way for aid donors to address the fundamental institutional needs of fragile states.⁷

By all accounts the rule-of-law enterprise is sweeping. Global legal and judicial development assistance from Organization for Economic Cooperation and Development (OECD) countries tripled between 2006 and 2008, from USD 841.5 million to USD 2.6 billion.⁸ In addition to funding state legal development programs, OECD sources provide approximately USD 1 billion annually for grassroots human-rights projects and activities.⁹ Some estimates also suggest nearly half of the World Bank’s annual spending has some rule-of-law component.¹⁰ Similarly, United Nations officials have called the rule of law the “driving force” behind the UN’s work and the “very heart” of its mission to promote peace.¹¹ In 2006 the UN established a systemwide Rule of Law Unit under the direct authority of the secretary general, and UN agencies actively design and fund programs intended to construct legal institutions and to promote legal principles and awareness in high-conflict settings.¹²

⁶ Thomas Carothers, “The Rule of Law Revival,” in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed. Thomas Carothers (Washington, DC: Carnegie Endowment for International Peace, 2006), 3–14.

⁷ *World Development Report: Conflict, Security, and Development* (Washington, DC: World Bank, 2011).

⁸ See *Legal and Judicial Development Assistance Global Report 2010* (Rome, Italy: International Development Law Organization, 2010), 10–12.

⁹ *Ibid.*

¹⁰ “Briefing: Economics and the Rule of Law,” *Economist* (March 15–21, 2008), 84.

¹¹ “Promoting Rule of Law ‘Very Heart of the United Nations Mission,’ Says Deputy Secretary-General, in Legal Committee Remarks,” United Nations Department of Public Information, DSG/SM/346 GA/L/3327 (2007). Available: <http://www.un.org/News/Press/docs/2007/dsgsm346.doc.htm> (accessed January 9, 2013). See also “United Nations and the Rule of Law,” <http://www.un.org/en/ruleoflaw/index.shtml> (accessed January 9, 2013).

¹² United Nations, *Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* 2004; UN Development Programme

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Contemporary law-building programs in fragile states operate on two primary assumptions about the law. First, the law is either tarnished or entirely lacking in these places, and, second, through foreign assistance and “capacity building” states may build up a legal order rooted in the rule of law, to move from authoritarianism and war to democracy and peace. The mechanisms for introducing the rule of law are both top-down and bottom-up: providing advice and training to government staff to install a top-down political and economic order, and to civil society activists to promote a bottom-up social order that respects human rights. Ultimately the goal is to transform traditional or conflict-ridden societies into modern, liberal states.

This book challenges both of these assumptions: that a legal order does not exist in so-called failed states like Sudan and that legal tools and practices intrinsically serve to promote democracy and human rights. On the first assumption, I show that repressive regimes fighting civil wars may quite effectively use the law and legal resources to their own benefit just as they do their militaries in civil war. Where the law supplants violence, it can allow an illegitimate government to appear more moderate, thereby augmenting its authority. Civil society actors also adopt legal strategies of their own, by educating impoverished populations displaced by war to see human rights as an accessible set of legal tools and to adopt legal solutions to their oppression. On the second assumption, I argue that law's normative character is not inherent and should not be taken for granted. Different political actors insert

and UN Population Fund 2007:4; Louise Arbour (2008) “Foreword,” in *Claiming the Millennium Development Goals: A Human Rights Approach*, Geneva: United Nations Office of the High Commissioner for Human Rights HR/PUB/08/3. Available: <http://www.unhcr.org/refworld/docid/49fac1162.html> (accessed January 9, 2013); UNICEF, “The Human Rights-Based Approach: Statement of Common Understanding,” in *State of the World's Children (Annex B)*, 2004. Available: http://www.unicef.org/sowc04/sowc04_annexes.html (accessed January 9, 2013); Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge: Cambridge University Press, 2010); Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights: Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press, 2006); James J. Heckman, Robert L. Nelson, and Lee Cabatingan, eds., *Global Perspectives on the Rule of Law* (New York: Routledge, 2010); Amanda Perry-Kessaris, ed., *Law in the Pursuit of Development: Principles into Practice?* (New York: Routledge, 2010); Chandra Lekha-Sriram, Olga Martin-Ortega, and Johanna Herman, eds., *Peacebuilding and the Rule of Law in Africa* (New York: Routledge, 2011).

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their own distinct moral predilections into the law to manufacture a range of tools to build up stability or security.

Law, then, cannot be detached from political systems and behaviors; it is, instead, inherent to politics. Determining which normative qualities are associated with law and legal practices involves investigating who uses the law, what their goals are, and how they implement their political agenda. The case of Sudan reveals this multifaceted nature of law and legal processes and, ultimately, how law is essential to, rather than missing from, unstable political environments.

Sudan serves as a useful case study for this type of inquiry into the multifaceted nature of law because the country's history exposes the variety of legal tools that elite actors use to achieve their aims in the battle for political influence over a diverse and divided population. Law in Sudan operates in a context marked by extreme human suffering, desperation, and a political structure perpetually on the edge of collapse. But contrary to conventional wisdom, law matters hugely in a nation as fragile as Sudan. Legal practices and ideas shape both the unstable bedrock of the state and the efforts to rescue it from future failure. The meaning of the law, then, emerges not only through struggles for national independence or democracy but also as law is incorporated into political violence and takes on new roles, articulations, and significance. (I define the central concepts used in this book, including law and legal politics, in detail in Chapter 1.)

Does it ask too much of the law to demand that it serve as a bulwark against tyranny or even genocide? After all, legal institutions in even the most democratically advanced nations are constrained entities.¹³ Courts in the robust democracies of the United States, Canada, and nations in Western Europe have the power of neither sword nor purse,¹⁴ and in many cases the poor face a range of complex social, legal, and financial obstacles to accessing the court system.¹⁵ In

¹³ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd ed. (Chicago: University of Chicago Press, 2008); Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994); Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

¹⁴ See Alexander Hamilton, *Federalist* No. 78 (1788). Available: <http://www.constitution.org/fed/federa78.htm> (accessed January 9, 2013).

¹⁵ Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *9 Law & Society Review* (1974): 95–160; Kristin Bumiller, "Victims

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authoritarian states, legal institutions are susceptible to manipulation by elites seeking to monopolize power.¹⁶ Nevertheless, the full force of the international aid community is now behind legal initiatives in the belief that building elaborated legal mechanisms and institutions in conflict settings will meaningfully alleviate the burdens of the poor and besieged.¹⁷ Investigating these initiatives within the historical and political contexts in which they take place reveals the critical role of law and law-centered political strategies in the attempts to rescue states from their failures.

Sudan illustrates the ways legal tools and practices are used as political resources precisely because it is a weak state that has swung so wildly among the extremes of colonialism, socialism, authoritarianism, and democracy. During these regime shifts, court benches have been hastily emptied and refilled; legal systems have flip-flopped between common law, civil law, and Islamic law; and human-rights organizations have been shuttered and reopened. In this complex and troubled setting aid agencies inspired by a sense of humanitarianism have been trying to promote legal progress and develop the rule of law. In less volatile states, the range of legal toolkits is certainly more limited, as law is constitutive of a relatively orderly and more stable state infrastructure. In erratic or threatening environments, a wider array of legal tools and concepts can be adopted, manipulated, and discarded to build support for colonial administrators, authoritarian governments, and human-rights groups seeking to reach the war-displaced poor.

in the Shadow of the Law: A Critique of the Model of Legal Protection," 12 *Signs* (1987): 421–39; William L. F. Felstiner, Richard L. Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...," 15 *Law & Society Review* (1980–81): 631–54.

¹⁶ See Kathryn Hendly, *Trying to Make Law Matter: Legal Reform and Labor Law in the Soviet Union* (Ann Arbor: University of Michigan Press, 1996). See also Tom Ginsburg and Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008); Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective," *Annual Review of Political Science* 12 (2009): 345–66.

¹⁷ Mark Fathi Massoud, "Do Victims of War Need International Law? Human Rights Education Programs in Authoritarian Sudan," *Law & Society Review* 45 (2011): 1–32; *World Development Report: Conflict, Security, and Development* (Washington, DC: World Bank, 2011); *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies S/2004/616* (United Nations Security Council, 2004).

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How do colonial, authoritarian, and humanitarian actors use these legal toolkits to build stability in unstable places? In general, they seek to stabilize the political and economic order by constructing (or demolishing) key building blocks of the rule of law, including drafting constitutions, writing or reforming legal rules, and encouraging the development of courts and the creation of spaces for grievances to be heard. Colonial officials, for instance, set up a state-supervised legal infrastructure to civilize local subjects in their image. Authoritarian leaders calling for Islamic law similarly construct courts and law schools to extend social control, but also to provide state resources to those citizens who surrender to the regime's claims to authority. And civil society actors eager for foreign resources encourage impoverished persons to mobilize for peace and democracy under the shield of human-rights law. These three distinct actors have been among those most responsible for shaping Sudan's modern political history, and they create change through law-based reform and encourage the Sudanese people to follow their examples and turn toward the law. Table I.1 spotlights the primary law-based political strategies they have used in Sudan.

THE APPEAL OF LEGAL POLITICS

State and nonstate actors design, deploy, and destroy a variety of strategies and technologies to meet the goals of state building. States weakened by war or political violence, for instance, will seek to forestall the possibility of domestic revolution by providing resources to citizens. Building schools and providing subsidies for basic commodities, such as food and fuel, are obvious tactics. Less obvious are the protean legal strategies that states take, which include writing and enforcing laws that build social order, establishing law schools to train professionals, hiring judges to resolve citizen disputes, and improving the legal system's speed and effectiveness.

The process of achieving political, social, or economic objectives using legal mechanisms – or, *legal politics* – is complex, disordered, and often violent. For instance, some of the most democratically minded lawyers and judges in Sudan reversed course during military rule. When lured by the promise of political power, they imprisoned activists and colleagues in the legal profession. Paradoxically, the case of Sudan sheds light on the precarious path toward E. P. Thomson's vision of the rule-of-law ideal as an unqualified human good: the rule of law in action is stained by the blood of activists, nonviolent resisters, and the

Table I.1. The legal arsenal (law-based political strategies by elite actors in a fragile state)

Law-based Strategy	Actors		
	Colonial	Authoritarian	Humanitarian
Investing in courthouse construction and judicial training	X	X	X
Building law schools and the legal profession	X	X	X
Creating spaces for grievances against the government to be heard, managed, and processed	X	X	X
Encouraging citizens to use courts to seek redress of grievances and resolve private disputes	X	X	X
Training citizens to trust that knowledge of the law is valuable and righteous	X	X	X
Drafting constitutions, ordinances, and legal codes for domestic enforcement	X	X	X
Overhauling the legal system to leave an enduring legacy, facilitate economic development, or divert attention from political divisions or a collapsing economy	X	X	X
Devolving judicial power to local elites dispatched or co-opted by the central administration	X	X	
Appointing ideological supporters to the bench; dismissing nonaligned judges	X	X	
Monitoring and stifling dissent among legal academics and professionals	X	X	
Compartmentalizing religious (Islamic) law to private, family matters and limiting access to legal education	X		
Funding construction of religious institutions under a legal department, to attempt to enhance legitimacy and monitor activity among indigenous elites	X		
Ensuring the bar association is under the control of the dominant political party		X	
Increasing the number of criminal courts to promote social control, enforce the ability to punish, and dominate the legal order		X	
Adopting a sweeping vision of Islamic law to reinforce political control through claims to religious authority		X	
Shuttering human-rights organizations, overseeing ideologically supportive groups, and monitoring independent organizations		X	
Encouraging the belief among the poor that law – particularly international law – is an instrument of liberation from oppression			X

Source: Author.

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poor. The *longue durée* of the Sudanese legal order may one day reveal that law ultimately protects and empowers the poor as much as it has also subjugated them. But it is precisely the poor who are left behind during a process captured by elite political actors carrying legal tools of their own.

The goals and ethical leanings of British colonial officials, postcolonial authoritarian leaders and their opponents, and contemporary civil society activists and their donors could hardly be more different. They range from the consolidation of territorial control and the expansion of state authority to the promotion of human-rights principles and human security. And yet, these actors all have similarly directed their limited resources toward drafting laws, constructing legal institutions, and training legal personnel – or, constructing a legal order. Why? By encouraging citizens to trust in and turn to formal legal institutions to resolve grievances with one another and with the government, law and legal institutions – particularly during periods of civil war and entrenched authoritarianism – become release valves for pressure that builds in civil society and spaces for anger to dissipate. Creating institutions like courts and grievance boards that purport to place limits on the regime's power helps those regimes swallow, digest, and discharge grievances against them, rather than allowing those grievances to fester and gain potency. By financing the expansion of courts, regimes institutionalize claims against them, paradoxically boosting the regime's legitimacy and authority by creating neutral spaces for dispute resolution. As civil society activists and aid donors encourage a similar expansion of legal institutions, authoritarian governments have been rewarded with more space to manufacture the image of legitimacy and social control.

But why would an unrepentantly nondemocratic regime like that of Sudan's President Bashir, or earlier President Nimeiri, use law instead of merely guns or buyouts to get what it wants? Law can be just as effective as an arsenal to manufacture and maintain authority: state actors see legal order as a public good they can deliver to help them hold on to power despite fueling catastrophic wars. Legal strategies are hidden behind the weak forms of legitimacy that otherwise illegitimate governments possess. But the results of these undertakings are in plain view – new courthouses and law schools, as well as the careers of lawyers and judges fulfilling the regime's vision of dispute resolution. When peace accords signed by the government also create openings for civil society interventions in the name of human rights (as occurred in Sudan in 2005), foreign aid actors and the local civil society groups

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they fund turn to international law to undermine authoritarianism and develop a grassroots legal culture of human rights. Legal resources, both domestic and international, are tools that elite actors use to achieve their political or moral ends. State actors turn to the law in order to consolidate top-down power and influence in moments of economic or political crisis, while civil society actors use it to promote human rights and political development from the ground up.

In times of political fumbling and crisis, elite actors turn to legal tools and resources to achieve twin goals: to expand their influence in society and to restrict the behavior and limit the power of adversaries. Nondemocratic states struggling to support themselves adopt legal innovations to prevent collapse, to monitor and control civil society, and to defuse tensions against the regime. Law becomes part of the technology they use to create stability and sow legitimacy in those areas where and among those populations over whom they seek control. Activists and nongovernmental groups use informal legal training practices to carve a space for grassroots social change, encouraging masses of war-displaced persons to see law as a mechanism to free themselves from the limits imposed upon them by states. From the perspective of states, law is an attractive tool to facilitate the management of civil society, and from the perspective of civil society, knowledge of the law is an advantageous start to contain the power of government. Connecting the behaviors of states and survivors reveals that state actors are not alone in their use of legal means to produce political change – civil society activists and aid workers are also deeply engaged in the project of building a legal order that supports their interests. Both political actors seeking to consolidate authority and those seeking to disrupt or challenge that rule employ legal toolkits to achieve their respective ends. In this way, law can serve tyranny and violence as easily as it can serve liberty and peacebuilding.

Legal tools and resources are inherent to the politics of both violence and peacebuilding precisely because law can be represented as distinct from politics. Its appeal as a social good and as an expression of a desired moral order gives meaning and rationale to everyday actions, even actions that heighten state violence. That law articulates a preferred moral order allows it to be used by scrupulous and unscrupulous elites who turn it into a weapon in their arsenal for change.¹⁸

¹⁸ On law as an enterprise rather than “inert matter,” see Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969), 123. See also Martin