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Rethinking Law and State Building in Sub-Saharan Africa

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MASSOUD, MARK FATHI. 2013. *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*. Cambridge/New York: Cambridge University Press. Pp. x–277. ISBN: 9781107440050. Paper $34.99

This essay is a response to Mark Massoud's Law's Fragile State*, and through comparative inquiry argues that highly contextualized analysis of courts is critical to gaining an understanding of judicial decision making and judicial empowerment. As Massoud demonstrates, focusing on the legal complex is a particularly worthwhile endeavor in fragile states. Although we may understand the sociology of the legal profession, we do not fully understand how professional networks, career paths, and identities truly impact the institutional pathways of the courts and the legal system as a whole.*

INTRODUCTION

Is more law always a good thing? Does a state become stronger when there are more courts, more law schools, and a legal marketplace saturated with lawyers? In an ethnically diverse society can a pluralistic legal system act as a unifying force? Mark Massoud's book *Law's Fragile State* simultaneously reveals the complexity behind these seemingly simple questions and propels us toward possible answers.

Through rich interdisciplinary analysis grounded in extensive fieldwork in Sudan, Massoud tells a compelling story about a state, which, since its inception, has remained virtually unaccountable to its people. The pursuit of private interests by small groups of elites has consistently trumped the collective public good, and in the hands of these elites, law is a strategic instrument of authority, control, and coercion. Yet this is only one thread of Sudanese state building; domestic and international civil society actors also use law as a tool of development and resistance through human rights narratives. Massoud's conclusion is that neither the authoritarian governments nor the humanitarian actors have done anything to enhance the lives of the majority of Sudan's population. This conclusion undermines the very foundation of many assumptions about rule-of-law promotion; that more rules, regulations, legal personnel, and courts will be the magic formula in protecting the free market and building and maintaining the liberal democratic state.

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Massoud's conclusion raises an important second question: Can law have a normative content distinct from the actors who use it? In 2007 I interviewed a Tanzanian judge who surprised me with his candid assessment of the malleability of the law. He stated: "During one-party government, even the judgments were written in that 'one-party language.' Now we are on the right track, we are writing in the 'multiparty language'" (Ellett 2013, 180). This judge did not see this as an abrogation of judicial independence, but as a common-sense approach to maintaining a degree of judicial autonomy and as an antidote to potentially destabilizing political conflict. Legal actors are subject to the calculations of political elites but, as this Tanzanian judge reminds us, also make political calculations of their own. Massoud's longitudinal analysis repeatedly demonstrates that the law is not the panacea for political instability, conflict, and authoritarianism (Massoud 2013, 212). Indeed, law is often part of the violence, rather than the solution to it. Law is part of the political struggle, not a rational bureaucratic edifice against political disorder and palace politics.

In general, rule of law has operated differently in the developing world and this is primarily due to the weak distinction between rule-of-law institutions and the state. As Tamanaha (2011, 2–3) elucidates, developing countries tend to have

> [f]ewer financial, material and human resources, defectively trained and disciplined legal officials, a poorly established legal profession, and an inadequately developed body of legal knowledge (with a greater proportion of transplanted legal norms derived from external sources). The presence and power of the state legal system may be weak or may have a limited reach . . . [law] may be seen as corrupt or incompetent or inefficient or prohibitively expensive. Or it may be seen as a tool of the elite. Or it may be dominated by a particular ethnic or religious subgroup in society. Or it may be stained by a history of oppressive authoritarian rule or by the use of the law by political or economic elites as a means of economic predation.

Tamanaha's "list" is a useful place to begin. It underscores the complexity and interdependence of the multiple parts of the rule of law. Perhaps one of the most important lessons learned by the law and development movement and rule-of-law practitioners is that each part is inextricably linked or interdependent, what Kleinfeld (2012) refers to as the four objects of change in rule-of-law reform—laws, institutions, power structure, and cultural norms—none of which can be tackled independently.

The notion that more law is intrinsically better has its roots in the first phase of the law and development movement, in which Western donors—primarily the United States—sought to reform the legal and justice institutions through building capacity. The focus was on training more lawyers and reforming local legal curricula in the mode of US law schools. In the wake of these ethnocentric failures (see Trubek and Galanter 1974), international rule-of-law promotion efforts stalled until the end of the Cold War. The milder policy critique of this period can be captured in the following way: "training justice sector professionals, lawyers and bar associations, reforming laws and legal frameworks among others, while effective, do not deliver by themselves long lasting and sustainable changes" (Mooney et al. 2010,

838). The harsher critique suggests that actual harm was done as law transitioned from being "inherently good" to ultimately "[a]s destructive to a recipient nation" (Rose 1998, 116).

Institutions operate in specific political and cultural contexts and in order to satisfactorily reach policy goals we have to analyze and formulate donor assistance to rule-of-law institutions within those contexts. Kleinfeld (2012, 15) succinctly captures the new insights—and dilemmas—of the second-generation rule-of-law reformers: "Power and culture, not laws and institutions, form the roots of a rule-of-law state . . . When the power structures and cultural norms are supportive, a country's law and institutions will follow." The implication of this argument is that it is very hard to instigate change externally. As Trubek and Galanter (1974) acknowledged several decades ago, we cannot blindly adhere to ideological assumptions that all individuals will be treated equally before the law within the context of a pluralistic and competitive political environment. Most African states did not meet either of these liberal conditions in the 1970s and the transition to political pluralism in the 1990s has not been automatically accompanied by a transition to an entrenched liberal, pro-rights state. Now there is an understanding of the failures of the past, the question we should be answering is how well contemporary rule of law practitioners and rule-of-law theorists can formulate alternative theoretical and policy responses. A key portion of this work involves shifting analysis toward the agency of individuals within the structure of institutions and the law. It is those individuals who give expression to political and cultural networks and norms.

To that end, in this essay I highlight what I believe to be the most promising aspect of Massoud's project: the integration of institutional analysis with a sociological analysis of individuals and their cross-cutting group identities—ethnicity, profession, class, political—for example. This is of particular importance in postcolonial states where relatively small classes of elites cycle in and out of government, the private sector, and international or local civil society. We know this, but we have not theorized the implications in terms of the institutional development of the courts or, indeed, state building writ large.

By adopting an instrumentalist approach to the analysis of law and the legal sector in Sudan, Massoud provides us with an intriguing window into broader questions of interest to scholars of politics, economics, and development studies. To shift "law's state" away from its fragile institutions toward consolidated, powerful institutions of justice and accountability, we have to look at the people inside and outside the institutions. Deployment of a series of formalistic policy prescriptions across states and regions obscures our understanding of the mechanisms by which the legal profession creates its own autonomy versus being granted autonomy in authoritarian settings. The idea of a state moving through presequenced phases toward full liberal democracy has now been discredited (Carothers 2002); instead, we have to accept that many states will be stuck in a permanent form of hybrid regime: neither fully democratic nor fully authoritarian, neither moving backward nor forward. We must redirect our attention to the specific demands this form of zero-sum competitive politics poses; particularly in regard to heightened uncertainty and insecurity, and how the legal complex navigates this political terrain.

LEGAL POLITICS IN AUTHORITARIAN STATES: SOME REGIONAL PERSPECTIVE

The story of British colonial rule in Sudan and the years immediately following independence in 1956 is a familiar one to those who study commonwealth Africa. For the British, the law was "[t]he cornerstone of the colonial administration" (Massoud 2013, 82), and after independence indigenous elites used the inherited common law system as a mechanism of control in a way that mirrored their colonial forbearers. One of the most salient qualities of colonial law, as illustrated by Massoud, was the symbolic power of the colonial narrative. First and foremost this was the myth that the law was the only thing standing between the citizens of Sudan and total chaos and anarchy. This myth then became the justifying principle for the repressive authoritarian state. As in other African states, the initial postindependence period of judicial autonomy in Sudan was whittled down over time until by the 1970s, the courts had become "an instrument of sectarian rivalries and authoritarian politics" (Massoud 2013, 118).

In Tanzania, Ghana, Zambia, Malawi, and many others, by the early 1990s, external international forces pressured long-standing authoritarian regimes into liberalizing both the economy and the state, and from within, opposition groups took advantage of these democratic openings and pushed toward multipartyism (see Bratton and Van de Walle 1997). Sudan, however, moved in the opposite direction, when, under Omar al-Bashir, rigid systems of political, social, and economic control were established. But instead of trying to marginalize or even eliminate the law and courts, as might be expected, President Bashir simply hollowed out the legal institutions through purging the legal profession and then rebuilding them in the image of his regime. Through the Islamization of the law, the state and the regime become entwined, mutually reinforcing entities. The expansion of law under Bashir and the imposition of a single unified legal framework of Islamic law aided in control of the opposition and other majoritarian institutions and it also played an important role in governance and the economy (Massoud 2013, 283). Echoing the findings of Moustafa (2007) from neighboring Egypt, under authoritarianism law was simply too important to the act of governing and the suppression of dissent to be dismantled altogether.

Massoud describes four key channels through which the regime has utilized law to sustain authoritarianism: "(1) the imposition of new legal ordinances, (2) the enforcement of the state's ability to punish, (3) the domination of the legal order, and (4) the management of grievances against the regime" (Massoud 2013, 215). Items 1, 2, and 4 have been, and continue to be, common strategies of control employed by political elites across Sub-Saharan Africa, even in those regimes classified as democratic. What is clear by the end of this book is that *allowing* civil society actors to engage in human rights promotion, or even when the regime develops its own human rights discourse, is enacting a subtle form of control. It could be framed as a kind of safety-valve mechanism, without which the regime would be operating solely through fear and physical coercion. The façade of a responsive legal system is far less costly—both in real terms and symbolic terms. Again, this strategy

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is prevalent across the continent, where election losers may contest the results of the election in court, but rarely succeed in ousting the incumbent. Conceptually, this is rule of law window dressing, but it has to be convincing enough to provide the legitimacy the regime covets.

It is strategy 3—the domination of the legal order—where the case study of Sudan truly diverges and demonstrates the entrenched nature of the Bashir regime and the total enmeshment of regime and state. In short, the concomitant expansion and Islamization of the law in the early 1990s is an intriguing strategy of authoritarian control. From a comparative perspective, there are some parallels with postindependence authoritarian regimes where expansion of law either through military tribunals (e.g., Uganda) or reinvention of traditional law (e.g., Malawi) served a similar function (Ellett 2013). Again, this adds an important nuance to the relationship between law and authoritarian regimes in Africa. It may not be as simple as to say authoritarianism equals more law and greater control. We have to delve into deeper questions of what kinds of law and legal institutions. We also need to consider the overlapping, layered, and path-dependent qualities of these forces, which necessitates a close examination of entire legal systems, legal education, legal personnel, and other aspects of the legal order (see Massoud 2013, 217).

CONTEXTUALIZING COURTS THROUGH THE LEGAL COMPLEX

One of the major contributions of Massoud's work is the multidimensional conceptualization of legal politics and rule-of-law promotion. For Massoud, the law is not a "thing," it is a "process," a process adopted by both state and nonstate actors to meet a variety of their goals or ends. Scholars of law and courts frequently become trapped in conceptual silos or, to borrow Susanne Hoeber Rudolph's (2005) term, they perpetuate an "imperialism of categories." We attempt to import the foundational concepts of our disciplines into every geographic corner of the world. One such problem in law and society—particularly in work by political scientists—is a narrow focus on high courts; Massoud makes a compelling case for expanding our focus. I agree, but would add that courts can and in many ways should remain central to our analysis, even as we broaden the scope of our research. Ultimately, it is courts that convert law from a source of potential power to actual power. As we observe across Sub-Saharan Africa, even courts whose independence has been compromised and whose autonomy is weak may operate as a form of restraint against power-grabbing executives and emaciated legislatures. Contextualizing our understanding of what makes courts "consequential" (Kapiszewski et al. 2013) necessitates the kind of interdisciplinary analysis exemplified by Massoud.

In resource-poor environments, civil society groups struggle to compete for influence. Lawyers and law societies are close to power and to money and hold disproportionately high levels of influence (see Gould 2012), but we have yet to fully theorize the relationship between lawyers, law societies, and the courts. As Halliday (2013, 346) recently opined, the very measure of success in theorizing about courts—intellectual parsimony—is also its greatest weakness:

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> A political jurisprudence or the politics of the courts qua courts has produced a sophisticated and complex body of knowledge . . . this has been possible because it has adopted a methodological and theoretical parsimony that has excluded parallel intellectual enterprises on other legal occupations . . . . It amplifies the power and autonomy of courts, at the same time concomitantly muting their contingency. Is it too much to say that a politics of consequential courts in the absence of its embedding, singular, and most proximate politics of the legal complex is comparable to a politics of legislatures without political parties, executive agencies without lobbyists, global lawmaking without lawyers?

While Halliday's concerns may be universal, I would make the case that in the postcolonial state, the imperative for multidisciplinary, embedded analysis of courts is even more urgent. Institutions in postcolonial Africa are comprised of a very small group of elites. Moreover, in politically volatile settings, the external networks of judicial elites often prove to be critical in preserving independence. As Widner (2001, 392) concludes in her analysis of the development of rule of law in Tanzania:

> [m]any of the institutions that governed social issues had a different character. They were "made, not born." They were crafted through a process of bargaining and negotiation. Instead of looking for a formula, people needed to recognize that the smartest strategy for building an independent judiciary would always depend on the behavior of many people, outside the courts as well as inside. There was no single best route.

Institutions are made from rules, but they are also made through individual actions and interactions. Indeed, "[t]he modern rule of law movement is based on the belief that change does not come naturally from key institutions but, rather, is dependent on key individuals" (Mooney et al. 2010, 842) This sociological approach makes theorizing more difficult because we are adding a greater number of potential independent variables. If we assume that courts as political institutions are vulnerable to the vicissitudes of elite calculations, then we need to turn our attention to the strategies of defense available to judges. Although judicial allies are important in established democracies, they may become critical lifelines in transitional or fragile states (Trochev and Ellett 2014).

Sometimes, the authoritarian state envelopes even the most independent minded of judges; success may be quickly followed by failure and further elite capture. Massoud's account of Sudan illustrates that building the rule of law and, more specifically, judicial empowerment is a nonlinear process. To turn to Widner (2001, 394) once more, the delegation of power to the courts could

> [e]asily prove ephemeral. There was little to prevent a change of heart among a country's leaders or a shift in the attitude of legislators. Nor was there any guarantee that either could control the behavior of supporters or local strong men. To secure an independent judiciary, to make it last, it was vital to find more permanent allies . . . . But it takes time for people

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> to develop maxims about where their interests lie in new contexts. The incentives institutional changes create in theory do not always match reality.

Widner's (2001) work pays particular attention to the role of the international community in supporting the work of domestic elites. They may provide intellectual support or desperately needed resources. However, this does not come without costs. It is well established that foreign actors have their own agendas, which may or may not align with those of the recipient communities. Or, as Massoud warns in the later chapters of his book, international actors may even do more harm than good by ignoring local contexts and local ways of thinking and by promoting a Western human rights discourse that "[m]ay produce dangerous expectations that the regime will listen or change" (Massoud 2013, 208). It is through this highly contextualized analysis that Massoud successfully demonstrates the dynamism of legal institutions; they are constantly morphing in response to the ebb and flow of local and international politics.

To understand this phenomenon it is helpful to look at the career paths of those in the legal profession over time. As in many other African states: "Rather than constituting a distinct segment of the society, the profession has permeable boundaries with the government and civil society elites .... Government ministers and officials often shift into and out of positions in private practice or the judiciary or legal academia before or after their time in state administration" (Massoud 2013, 224). To date, we do not fully understand the impact of career fluidity on the power of law and legal institutions, or their ability to promote a liberal, democratic polity. Career instability or opportunism can create schisms within the legal community, which subsequently weakens its ability to act as a coherent voice of political opposition or support. Whether the legal complex mobilizes to aid in the institutionalization of a nascent court or to defend the court from political attacks will depend, to a large degree, on the relationships between the judges, lawyers, journalists, and law professors. Moreover, it further depends on available resources and international support and connections.

Massoud's book offers some interesting clues about the connections between the legal complex and judicial behavior. The Sudanese legal complex was large, vibrant, and powerful from a much earlier point in time than other British colonies. In part, this is due to the creation of a local law school very early on in 1906[1] (Massoud 2013, 72–73) and the privileged position of the Sudanese bar association, which was active starting in the 1930s (Massoud 2013, 122–123). By way of contrast, local law programs in Kenya, Tanzania, and Uganda were not established until the 1960s and most national law societies were established in the 1950s right before independence. The total number of registered lawyers with the Sudan Bar at the 1956 independence was thirty-one. That number increased to 150 in 1961, and to

1. "Ghana started its law faculty in 1959; Ife and Ahmadu Bello in 1962 and Lagos in 1962; the University of Nigeria, Nsukka in 1961; Dar-es-Salaam (serving the whole of Eastern Africa) in 1961; Malawi (then Nyasaland) in 1962; Kenya School of Law in 1963; University of Botswana, Lesotho and Swaziland in 1965; Zambia in 1967; and Uganda in 1968" (Ghai 1987, 755).

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500 in 1974.[2] Although Massoud (2013, 123) characterizes the bar association as small—licensing on average thirty new lawyers a year between 1956 and 1981—this was at a faster rate than other former British colonies.[3] The robust population of locally trained Sudanese lawyers then spilled over to a rapidly indigenized judiciary, whereas in other former British colonies the norm was a weaker, expatriate-dominated bench in the years immediately following independence, or until much later in some cases (see Widner 2001; Ellett 2013).[4]

It was this strength and independence in the Sudanese legal profession that proved to be politically too threatening. The legal complex was utterly shattered by the tumultuous change from British common law to Egyptian civil law to Islamic law; in the words of Massoud, this "generated increased political space for elite maneuvering" (2013, 109), but it also created fissures within the legal profession, subsequently weakening the coherence of the entire legal complex.

CONCLUSION

If we consider the path dependency of the Sudanese judiciary, looking forward, have the old pro-democracy, pro-justice vestiges of the past disappeared for good? Or are they still there somewhere deep in the DNA of the legal system? Has the complete destruction of the Sudanese judiciary through the purging of over 300 judges in a five-year period (Massoud 2013, 132), to the almost complete emasculation of the legal complex, eliminated that possibility altogether? In other words, if we optimistically begin to think about a post-Bashir Sudan, are the changes enacted reversible?

Through analyzing one component of statehood, the law, Massoud demonstrates the way the African state is a constantly fluctuating site of contestation and political struggle and, perhaps even more importantly, he illustrates the porosity of state borders and institutions through pivoting between domestic actors and international actors. Massoud's conclusion that law has bestowed legitimacy, but not peace and development, in Sudan highlights the wide gap between the African state as an elite project and the lived realities of average African citizens.

The solution seems so simple—an institutional arrangement that can hold government accountable between elections—but reaching that solution is far from simple. It is clear that law, if not central to this endeavor, should be a major starting point, but as Massoud demonstrates, this is not a question of simply adding more law, or building more courts. Law cannot be automatically associated with one particular normative enterprise and this is particularly true in an ethnically and religiously pluralistic state like Sudan. Rather, law can be an important instrument of

2. The Sudanese data do not distinguish between ethnic backgrounds but Massoud's interviews suggest that most or all of these are Sudanese-trained (not foreign) lawyers. Author correspondence with Mark Massoud, May 8, 2015.

3. At independence, only ten out of 300 qualified lawyers in Kenya were African, in Tanganyika in 1960 there was only one African lawyer, in Uganda, twenty out of 150 (Ghai 1987, 752). At the far end of the spectrum is Botswana, where between 1971 and 1989 there were only eighty-three law graduates in total from a joint University of Botswana, Lesotho, and Swaziland program (author data obtained from University of Botswana Academic Calendars/Graduation Books).

4. For example, the first local judge was appointed to the Botswana High Court in 1992.

accountability in a way that promotes justice and the collective good, but in order to understand this, we have to begin our analysis in deeply contextualized and historicized case studies. For it is through these case studies that we can then build theory from the bottom up. Moreover, as Kleinfeld (2012) argues, by understanding how configurations of political power and culture come before technical legal institutional reform, we avoid falling into patterns that reproduce an "imperialism of categories" and, ultimately, we may achieve far more nuanced and effective policy prescriptions. Massoud's neutral tone in regard to the rule of law is refreshing. While it may seem a radical departure for many scholars, it creates space for the law to shift from a dependent variable (effect) to an independent variable (cause). Massoud makes a strong case for reexamining and complicating the ways that law, when placed on an ideological pedestal, is pursued as a good in itself.

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