

Rule of Law in Law's Absence: Examining the Legal Politics of Sudan

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Introduction

To the people of Sudan, war is not a new concept. The colonial regime was established out of war, the authoritarian regime thrived during war, and the modern Sudan and South Sudan were divided because of war. Similarly, war declared on the legal structure is equally essential to the various regimes, authoritarian or otherwise, and continues to be in the modern Sudanese states. In order to expand the power and influence of any given regime, the leaders worked within the complex confines of law. Even the international community is forced to act within the legal structure that Sudan has established and replaced throughout its brief history. Ultimately, changes in law and legal politics would shape the Sudanese state in ways that consistently supported the centralized power of the nation's leader.

The history of law in Sudan is rooted in an insufficient structural foundation. The aims of each regime crowded out the true expansion of law within the Sudanese state. Because the judiciary acted obsequiously within the regime, law is a tool of those in power. Authoritarian leaders were able to wield the courts to exercise their own personal agendas and maintain power. No leader was more successful in this respect than Omar Hassan al-Bashir, who simultaneously ruled for the longest period of any regime in the independent Sudanese state, proving that power in Sudan stems from the law. Thus, the ability to manipulate the law in favor of the regime leads to political power in Sudan.

Authoritarian leaders in Sudan, especially Bashir, established their legitimacy and power using three main concepts: rule of law, legal pluralism, and judicialization of politics. Each of these concepts was at work in order to cement the goals of the regime. Rule of law was expanded throughout the history of Sudan, as it gave the regime legitimacy from the citizens, who were firmly rooted in its teachings. Due to conflicting ideologies on law, however, Sudan was forced to act in a culture of legal pluralism, where competing visions of law dictated how law was executed. Finally, judicialization was built up in the society to the point where authoritarian leaders began to see it as a threat and attempt to eliminate it. The various leaders of Sudan, through the expansion of the rule of law, the balancing of legal pluralism, and the dismantling of judicialization, expanded their political power.

Expanding the Rule of Law

The rule of law was central to all aspects of Sudanese history. Former United States Supreme Court Justice Antonin Scalia argues that the rule of law is divided into two categories: “general rule of law” and “personal discretion to pursue justice.”¹ The first refers to the power of the government to make laws that apply to all people and that the citizens respect these laws. For a colonial or authoritarian regime, representing the majority of stages for Sudan, this piece is essential as it allows those in power to rule. The second category handles “individual cases.”² This category is essential to establishing a legitimate rule of law since the people are given the chance to voice their grievances with the government. Thus, the regimes in Sudan had the incentive to actively work in creating

¹ Antonin Scalia, 1989, “The Rule of Law as a Law of Rules,” *The University of Chicago Law Review* 56, no. 4, 1176.

² Antonin Scalia, 1989, “The Rule of Law as a Law of Rules,” *The University of Chicago Law Review* 56, no. 4, 1176.

this rule of law in order to advance their own political power. This is why building the rule of law was so essential throughout Sudan's history.

The modern state of Sudan was founded in 1820, with the introduction of Ottoman rule. Khartoum quickly became a major economic center for the Ottoman Empire because of its distance from the center of the Empire in Turkey and location as the intersection of the White and Blue Niles. It thrived off the slave trade, and by 1850, the need for administrative and judicial rule in Sudan was evident. Thus, the Ottomans instituted a series of reforms in the territory. Carolyn Fluehr-Lobban, founder of the Sudan Studies Association, states:

The *Tanimat* reform of 1850 in the Ottoman empire organized the administration of the law into a commercial code, largely of European origin, and a criminal code, that were administered through a system of secular courts (*nizamiya*), while the Shari'a courts, applying Hanafi law, were confined to the law of personal status and family relations.³

The civil law system created by the Ottomans was a combination of traditional Islamist law and modern European innovations. While much of the system itself was dismantled after the colonization of Sudan by the British, two pieces were central to the foundation of the judiciary in modern Sudan. First, the emphasis on Shari'a law in order to solve disputes between families would persist throughout every regime shift. Second, the introduction of "legal-political vocabulary" was essential in establishing the rule of law within Sudan.⁴

Following the formation of a formal Sudanese state under the Ottoman Empire, Sudan entered into a period of British colonial rule. Unlike other British colonies in India or

³ Carolyn Fluehr-Lobban, 2007, *Islamic Law and Society in the Sudan*, Abingdon: Routledge, 30.

⁴ Carolyn Fluehr-Lobban, 2007, *Islamic Law and Society in the Sudan*, Abingdon: Routledge, 30.

South Africa, very few British citizens lived in Sudan. Because of this, the traditional need for the judiciary in the British Empire, protection of the social status of British citizens, was not needed in the new colony. Instead, Mark Fathi Massoud, professor of politics and legal studies at the University of California, Santa Cruz, argues that the desire to “advance the rule of law” was the primary driving force behind building the court system in Sudan.⁵ In doing so, the British regime was able to create “an image of legal certainty, supremacy of the law, and a benevolent and trustworthy legal system.”⁶ The British believed that the rule of law would bring them absolute supremacy in the subjugation of the Sudanese people without the need for direct intervention.

Despite the prominence of the rule of law under Ottoman rule, the British colonial government decided to create a completely new system. The previous regime, according to Olaf Köndgen, scholar of Islamic law at the University of Amsterdam, was structured mostly around the Mahdi, or predetermined Islamic leader. His death meant that the previous rule of law had been almost completely destroyed, and the British colonists were able to build a new legal system from scratch. This new system, created in 1899 and composed of the Penal Code and the Criminal Procedure Act, “was based on Anglo-Indian colonial legislation” and “British military law.”⁷ This reestablished the rule of law and rooted it almost explicitly in the British tradition. However, the system had to be adapted for the Sudanese condition and did allow for the use of Shari’a law in certain situations. Thus,

⁵ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 47.

⁶ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 47.

⁷ Olaf Köndgen, 2010, “Shari’a and national law in Sudan,” *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by Jan Michiel Otto, Leiden: Leiden University Press, 185-6.

while it was partially dismantled, the British government ultimately chose to build upon the preexisting rule of law from the Ottoman regime. As a result, the rule of law was further expanded, as opposed to reestablished, in the region of Sudan under colonial rule.

The colonial government functioned in many ways similar to an authoritarian regime. According to associate professor of history at the University of Michigan Abdullahi Ali Ibrahim, the Egyptian colonists of the British Empire were “recruited into subordinate posts in the administration” with the fear of being removed if they did not comply with the regime.⁸ The British colonial government established the rule of law in a similar top-down manner. As a result, legal knowledge and access to legal services spread quickly through colonial Sudan. According to Massoud, Britain’s Sudan Political Service (SPS), composed entirely of recent college graduates from Cambridge or Oxford, quickly worked to establish the rule of law in Sudan. They built courts and employed members of the general public as judges, magistrates, and other administrative staff. They also created a legal department that led the construction of “formal legal infrastructure capable of hearing and resolving disputes among the Sudanese.”⁹ Slowly, the SPS began building the rule of law in the colony of Sudan. Massoud asserts that this rule of law came about through “drafting ordinances, hiring personnel, and providing limited access to legal education and training.”¹⁰ Thus, in order to build their own legitimacy as a governing body, the British created a system rooted in the rule of law that would continue to be central to the Sudanese judiciary.

⁸ Abdullahi Ali Ibrahim, 1997, “Tale of Two Sudanese Courts: Colonial Government Revisited,” *African Studies Review* 40, no. 1, 18.

⁹ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 56.

¹⁰ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 81.

Britain worked with Sudanese officials in a transitional government following the British move for decolonization in 1956. During the period of transition before gaining its independence, the British colonial government once again placed a great deal of emphasis on the rule of law. "Colonial representatives closely supervised the work of judges and judiciary officials," according to Massoud, to ensure that the rule of law would continue to be respected.¹¹ Furthermore, the judiciary was structured in such a way as to ensure that the British "common-law system would survive any political turmoil."¹² Thus, even as the British began to leave the regime, its emphasis was still on maintaining the rule of law. The judiciary, then, remained as the most stable branch of government during the period of transition and after independence. It is because of this that the later regimes, whether they were democratic or authoritarian, would first look to the rule of law in order to empower the state.

Despite attempts to create a democratic government after its independence, Sudan fell into authoritarian rule in 1958. General Ibrahim Abboud led a successful military coup and took control of the government. However, the rule of law still continued to be a powerful force within Sudan despite harsh military rule. During British rule, the SPS placed a large emphasis on the increasing the knowledge of the judiciary. According to Massoud, "the courts were imbued with a sense of honor, prestige, and professionalism" that Abboud and his supporters lacked.¹³ Thus, the influence of the rule of law continued to grow.

¹¹ Mark Fathi Massoud, 2013, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 88.

¹² Mark Fathi Massoud, 2013, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 89.

¹³ Mark Fathi Massoud, 2013, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 96.

Ultimately, the Abboud regime collapsed due to a lack of legitimacy brought about by the power of the courts. This led to a long period of democracy, lasting from 1964 to 1969.

The traditional rule of law for the Sudanese government came under scrutiny after Colonel Jafaar Nimeiri rose to power through a military coup in 1969. Massoud explains that Nimeiri was “exposed to a mix of socialist and pan-Arab ideologies” that would play a major role in his formation of the rule of law.¹⁴ Nimeiri, with the support of Egyptian president Gamal Abdel Nasser, was deeply concerned with uniting Egypt, Libya, and Sudan. In order to move toward this pan-Arab state, Nimeiri had to abandon the English common law system that had been central to the judiciary since the British initially gained controlled. “Sudan’s legal code needed to be rewritten to make it more consistent with Egypt’s,” a civil law system with its basis in Shari’a law.¹⁵ However, soon after the new legal code was enacted, it became clear that the established rule of law would not go quietly. Economic decline coupled with decreasing support for Nimeiri, so the people continued to uphold the previous system with its roots in English common law. In spite of these efforts, in 1983, Nimeiri was able to enact legal reforms that made Shari’a law central to the Sudanese system.

The new rule of law established by Nimeiri differed greatly from that of its predecessors. Three laws, the Evidence Act of 1983, the Penal Code of 1983, and the Civil Transactions Act of 1984, came to dominate the rule of law under Nimeiri. Each of these acts worked to expand the power of Shari’a law in the regime. First, the Evidence Act

¹⁴ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 104.

¹⁵ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 107.

required that all witnesses in trials be Muslim men. In a similar manner, the Penal Code redefines crimes according to the Qur'an. This, according to Lino J. Lauro, graduate of Yale Law School and attorney at Latham and Watkins, and Peter A. Samuelson, graduate of Yale Law School and attorney at Hughes, Hubbard, and Reed, has significant effects on non-Muslim citizens. Prior to the implementation of the Penal Code, English common law supported the beliefs and actions of these non-Muslim citizens, but after its inception, non-Muslim citizens were reduced to the "status of second-class citizens" deprived of the rights and power of their Muslim counterparts.¹⁶ Finally, the Civil Transactions Act brought Shari'a law into the business and banking realm. Financial transactions were now dictated on the basis of Shari'a law as opposed the property rights of English common law. These three acts transformed the rule of law in Sudan. It no longer originated in British colonial rule and instead found its basis in religion.

The sweeping reforms drafted under Nimeiri's rule would result in a civil war between the northern and southern regions. While the official state policy of Sudan was still rooted in Shari'a law, many of the policies that the regime tried to implement were delayed in action. Because of the civil war reaction, Shari'a law would still not become synonymous with rule of law in Sudan until Nimeiri's successor, Omar Hassan al-Bashir, came to power. Bashir's regime would effectively wield the power of rule of law in ways that his predecessors seemed to fail. Ultimately, Shari'a law would flourish under the rule of Bashir and the National Islamic Front (NIF).

¹⁶ Lino J. Lauro and Peter A. Samuelson, 1996, "Toward Pluralism in Sudan: A Traditionalist Approach," *Harvard International Law Journal* 37, no.1, 80.

Bashir, in order to maintain his power, systematically expanded the rule of law. The legal system created by Bashir was essentially that established by Nimeiri in 1983 but with slight tweaks to ensure its success. The greatest difference lied in the NIF's desire to obtain greater political power. Lauro and Samuelson illustrate how Bashir and the NIF utilized the rule of law in order to expand their power. After gaining power in 1989, the NIF has violently suppressed any dissent to Shari'a law. In addition, they pursued a policy that "seeks complete centralization of power" through the execution of the law.¹⁷ This abusive system of punishment still needed to hold its basis within the rule of law in order to establish legitimacy and support from the people of Sudan. Thus, while many of the policies that the Bashir regime implemented appear very similar to those used by other authoritarian regimes, the necessity of the rule of law made it significantly more successful.

Because of the power of the rule of law in Sudan, Bashir had to work within its confines to expand his regime's power. According to Massoud, "Bashir created institutional avenues for public-interest lawyering" in order to construct the rule of law, and the most significant of which was the creation of a Constitutional Court.¹⁸ However, due to large delays and extremely high court fees, accessing the Constitutional Court or the Supreme Court was nearly impossible for the average citizen. Furthermore, both courts were closely monitored by the government, with special attention given to the Constitutional Court. The creation of these new court systems gave Bashir a sense of legitimacy, both from the international community and his own citizens, but their actions in reality granted him

¹⁷ Lino J. Lauro and Peter A. Samuelson, 1996, "Toward Pluralism in Sudan: A Traditionalist Approach," *Harvard International Law Journal* 37, no.1, 68.

¹⁸ Mark Fathi Massoud, 2013, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 130.

power. In a similar manner, Bashir appointed a number of justices from the minority parties, but he ensure that they would always be outvoted by those favorable to the regime. In this manner, Bashir began to resemble the rulers before him, utilizing the rule of law in order to maintain his power.

While Bashir mostly operated within the rule of law, there were moments where he enacted extralegal policies. Lauro and Samuelson outline the use of security forces in the regime, which were “not accountable when they [went] beyond the bounds of law.”¹⁹ The security force gave considerable power to the regime. While their primary targets were meant to be non-Muslim citizens who refused to adhere to Shari’a law, the security forces could be deployed on Muslim citizens as well. However, even when acting in this shadow area of the law, trials still followed any imprisonment from the security forces, illustrating the influence that the established rule of law had on the Bashir regime.

As distrust of the Bashir regime began to grow, the rule of law started to deteriorate in Sudan. While it was once the cornerstone of Sudanese politics, the people have begun to lose confidence in the system. Sebastien Gouraud, rule of law program officer for the United Nations Development Program, explains:

Given the current increase in crime and in land and property claims, plus the general lack of trust in state institutions, it is critical to provide returnees and receiving communities with effective mechanisms to provide protection, resolve disputes and redress grievances. Establishing rule of law in Sudan will require a combination of community-based approaches and capacity building of rule-of-law institutions.²⁰

¹⁹ Lino J. Lauro and Peter A. Samuelson, 1996, “Toward Pluralism in Sudan: A Traditionalist Approach,” *Harvard International Law Journal* 37, no.1, 72.

²⁰ Sebastian Gouraud, 2006, “Rule of law in Sudan’s Three Areas,” *Forced Migration Review* 1, no. 26, 58.

It is becoming significantly more difficult for the state to reestablish the rule of law, as the citizens have grown to distrust their government. Also, as it became increasingly clear to the people that the judiciary engaged in the repeated miscarriage of justice, citizens further lost faith in the rule of law and legal institutions. It can no longer be used to expand the power of the regime unless it can be revived. Massoud argues that this breakdown in the rule of law is the result of Sudanese leaders building “the rule of law without building the law itself.”²¹ While the various leaders of Sudan emphasized establishing rule of law, there was little done in creating true statutory law. Institutions were built without the knowledge of how to perform. This eventually led to distrust of the regime and the destruction of the rule of law.

Reestablishing the rule of law has proven especially difficult in the new state of South Sudan, which gained its independence in 2005, marking the official conclusion of the civil war that began under Nimeiri. Much of the judicial emphasis in South Sudan is placed on customary courts. While their primary jurisdiction is family law, customary courts, according to senior project manager at the Legal Empowerment for the Poor, Open Society Justice Initiative, Tiernan Mennen, also often deal with “the administration of justice throughout the 10 states of Southern Sudan.”²² In fact, “90% of legal disputes in South Sudan were handled in customary courts” according to David Pimentel, professor of law at

²¹ Mark Fathi Massoud, 2013, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 215.

²² Tiernan Mennen, 2010, “Lessons from Yambio: Legal Pluralism and Customary Justice Reform in Southern Sudan,” *Hague Journal of the Rule of Law* 2, no. 2, 220.

Ohio Northern University.²³ The extended use of customary law demonstrates the distrust that the Sudanese have in traditional administrative law. In order to reestablish the rule of law that was once prominent in Sudan, the government needs to rebuild trust within the regime for administrative law, rather than focusing simply on expanding customary law.

The establishment of the rule of law in South Sudan was further complicated by lack of experience of the new judiciary. Pimental states that the new judicial system established by South Sudan would have its basis in “a common-law system akin to that of their southern neighbors, Kenya and Uganda.”²⁴ This system was relatively unknown to the people of South Sudan, who had lived by the code of Shari’a law for the past twenty years. Furthermore, the courts were an underdeveloped and underutilized resource within the society of South Sudan. While the various regimes throughout Sudan’s history took steps to expand the judiciary in the North, access to legal education and courts in South Sudan was nearly impossible. Pimental illustrates this remote region by explaining that in the over 100,000 square kilometers of territory that encompasses South Sudan, “there are no more than 6 kilometers of paved roads.”²⁵ Reaching the few courts and legal institutions that exists within the country, then is nearly impossible. Because of this, reestablishing the rule of law in South Sudan is an extremely difficult task.

²³ David Pimentel, 2010, “Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan,” *Hague Journal of the Rule of Law* 2, no. 1, 14.

²⁴ David Pimentel, 2010, “Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan,” *Hague Journal of the Rule of Law* 2, no. 1, 13.

²⁵ David Pimentel, 2010, “Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan,” *Hague Journal of the Rule of Law* 2, no. 1, 13.

While the rule of law has collapsed in Sudan, it was essential for establishing the legitimacy of the regimes for years to come. Each successive leader chose to expand upon the current rule of law in order to maintain power and advance the goals of the regime. Whether the basis was common law or Shari'a law, the methods were always the same; a ruler expanded access to the law, and, using the courts as a tool to support the regime, increased his own political power. The use of the rule of law in this way could not last forever, though, and ultimately came under scrutiny with the leadership of Bashir, who did originally work to expand the rule of law but also engaged in extralegal means. In the end, this created distrust within the regime and led to a collapse of the rule of law and faith in legal institutions. However, the legacies and influence of the rule of law are still evident in modern Sudan and South Sudan, as both nations look to rebuild it.

Balancing Legal Pluralism

The second major point of emphasis for the Sudanese legal system is the importance of legal pluralism. Brian Z. Tamanaha, professor of law at St. John's University, defines legal pluralism as "a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level"²⁶ The various layers of legal structures imposed on an individual make up the essence of legal pluralism. Furthermore, the overlapping within these layers creates tensions with legal pluralism. Much of the modern Sudanese conflict with the law arises from a conflict of legal pluralism. This can be either between different state introductions of law, such as Shari'a and common, as well as a conflict between state and international law.

²⁶ Brian Z Tamanaha. 2008, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30, no. 3, 376.

Even as early as the Ottoman rule, the balance of legal pluralism was central to Sudan. The conflict that began in this time centered on the differences between Islamic law and European standards of law. According to Fluehr-Lobban, the transition to rule by the Ottoman Turks in Sudan in 1819 was “accompanied by the imposition of taxation authorized by the Shari’a.”²⁷ Thus, the supremacy of Shari’a law was established in Sudan to justify the profit motive of the Ottoman Empire. However, as the Empire continued to develop, its views on law began to shift to a predominantly European perspective. Professor of history at the University of California, Santa Barbara Robert O. Collins states that, while they were expected to apply Shari’a law, by 1883, the leaders of the Ottoman Empire “regularly heard cases and passed judgments” themselves on the basis of European criminal law.²⁸ Therefore, while the legal basis of Sudan was Islamic, the actual practice began to resemble that of Europe. Thus, the practice of legal pluralism became a central piece of the Sudanese system that would only continue to dominate the system as it matured.

Similar to its emphasis on rule of law, the colonial government set up in Sudan by the British placed a large emphasis on legal pluralism. Ibrahim explains that the colonial government in Sudan was divided between “the needs of its sponsors and subjects.”²⁹ Rather than abandon the Shari’a system set up by the Ottoman Empire, the British chose to implement it within the already existing British judiciary model, essentially creating two

²⁷ Carolyn Fluehr-Lobban, 2007, *Islamic Law and Society in the Sudan*, Abingdon: Routledge, 31.

²⁸ Robert O. Collins, 2008, *A History of Modern Sudan*, New York: Cambridge University Press, 24.

²⁹ Abdullahi Ali Ibrahim, 1997, “Tale of Two Sudanese Courts: Colonial Government Revisited,” *African Studies Review* 40, no. 1, 16.

different rules of law operating with mutual coexistence. Two institutions were tasked with managing cases involving Shari'a law in the Sudanese system: the Board of Ulema and the Shari'a division of the Sudanese Judiciary. The Shari'a Court Division even "applied an English-based civil law and a criminal code based on the Islamist Penal Code."³⁰ Thus, the two systems came together and blended to create a new judiciary that utilized the best characteristics of each system.

Even after its independence, Sudan maintained a similar view on legal pluralism. Köndgen illustrates that the early Sudanese democracy quickly engaged in a debate for which legal system the new state would follow. Three major ideological camps were formed. The first, composed of the Umma Party, the Democratic Unionist Party, and the Muslim Brothers, proposed "an Islamic constitution and legislation."³¹ The second group argued for "Egyptianisation of the Sudanese legal system."³² This group was made up mainly of the Nasserites, Ba'athists, and Arab nationalists. The final ideological group feared the expansion of Islamic law but did endorse "reform of the existing legal system" and was made up of the secular intelligentsia.³³ These three ideologies created the basis in determining how legal pluralism was to be balanced in the future of Sudan.

³⁰ Abdullahi Ali Ibrahim, 1997, "Tale of Two Sudanese Courts: Colonial Government Revisited," *African Studies Review* 40, no. 1, 19.

³¹ Olaf Köndgen, 2010, "Shari'a and national law in Sudan," *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by Jan Michiel Otto, Leiden: Leiden University Press, 187.

³² Olaf Köndgen, 2010, "Shari'a and national law in Sudan," *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by Jan Michiel Otto, Leiden: Leiden University Press, 187.

³³ Olaf Köndgen, 2010, "Shari'a and national law in Sudan," *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by Jan Michiel Otto, Leiden: Leiden University Press, 188.

Initially, the secular intelligentsia won out, and the judicial structure created under British rule remained relatively intact throughout the early years of an independent Sudan. According to Kent Benedict Gravelle, graduate of the University of Oklahoma Law School and member of the Minnesota Bar Association, under this system “family, gift, and inheritance law disputes between Muslims were covered by the Shari’a courts while all other matters were resolved through the English common law.”³⁴ Once again, Sudan relied on a division of the rule of law between that of Islamic Shari’a law and English common law. According to Massoud, as the country matured, a small, yet vocal, number of justices chose to expand the power of Shari’a law to include “contracts, property, and crimes.”³⁵ This created an even greater overlap between the two systems of law, as both were tasked with handling very similar cases. Thus, legal pluralism continued to be a persistent issue within the Sudanese legal system even after the state gained its independence.

Once Nimeiri came to power, the system that had previously relied heavily on legal pluralism began to break down. Ibrahim states that Nimeiri “imposed full-fledged Islamic law” in 1983, abandoning the previous emphasis on the English common law system.³⁶ The result of this change was civil war between the ethnically Arab Muslims and the minorities concentrated mostly in southern Sudan. However, even after Abd ar Rahman Siwar adh Dhahab temporarily overthrew Nimeiri, Shari’a law continued to be the only legitimate system for the courts. Thus, the idea of legal pluralism, which was at one point central to

³⁴ Kent Benedict Gravelle, 1998, “Islamic Law in Sudan: A Comparative Analysis,” *ISLA Journal of International and Comparative Law* 5, no. 1, 3.

³⁵ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 97.

³⁶ Abdullahi Ali Ibrahim, 1997, “Tale of Two Sudanese Courts: Colonial Government Revisited,” *African Studies Review* 40, no. 1, 3.

the maintenance of the Sudanese state, had been somewhat abandoned. The balance between English common law and Shari'a law had been tipped in favor of the latter.

While legal pluralism between Shari'a and English common law had been somewhat abandoned after Nimeiri rose to power, the remnants of the system still played a major role in the shaping of the legal system of Sudan. The system of criminal law, while rooted firmly in the Qur'an, relies heavily on the rule of law emphasized by the British system. According to Ibrahim, there are three categories of crime in the Islamic tradition: Hudud, Qesas, and Ta'azir. The Sudanese system abides by these categories, but rather than rely simply on the Qur'an for sentencing guidelines and definition of crime, the government has created statutory laws that reflect both the influences from the Islamic religion and the British common law system. For example, the Sudanese government tends to follow the Qur'an very closely, but the Hudud crime of apostasy was not enforced until late into the fully Islamist regime. Hudud crimes require mandatory "punishment by the State," so the delay in action by the regime demonstrates the effect that legal pluralism still has on the judiciary.³⁷ Therefore, even after legal pluralism had been formally abandoned in Sudan, its legacies played a large role the execution of Shari'a law.

In order to maintain his position of power, Bashir placed an even greater emphasis on Islamic law than his predecessor. The greatest difference between the Islamization of Nimeiri and Bashir was, according to Massoud, "the addition of a penalty for the crime of ridda [apostasy]."³⁸ This change was extremely significant as disagreements with the state

³⁷ Abdullahi Ali Ibrahim, 1997, "Tale of Two Sudanese Courts: Colonial Government Revisited," *African Studies Review* 40, no. 1, 7.

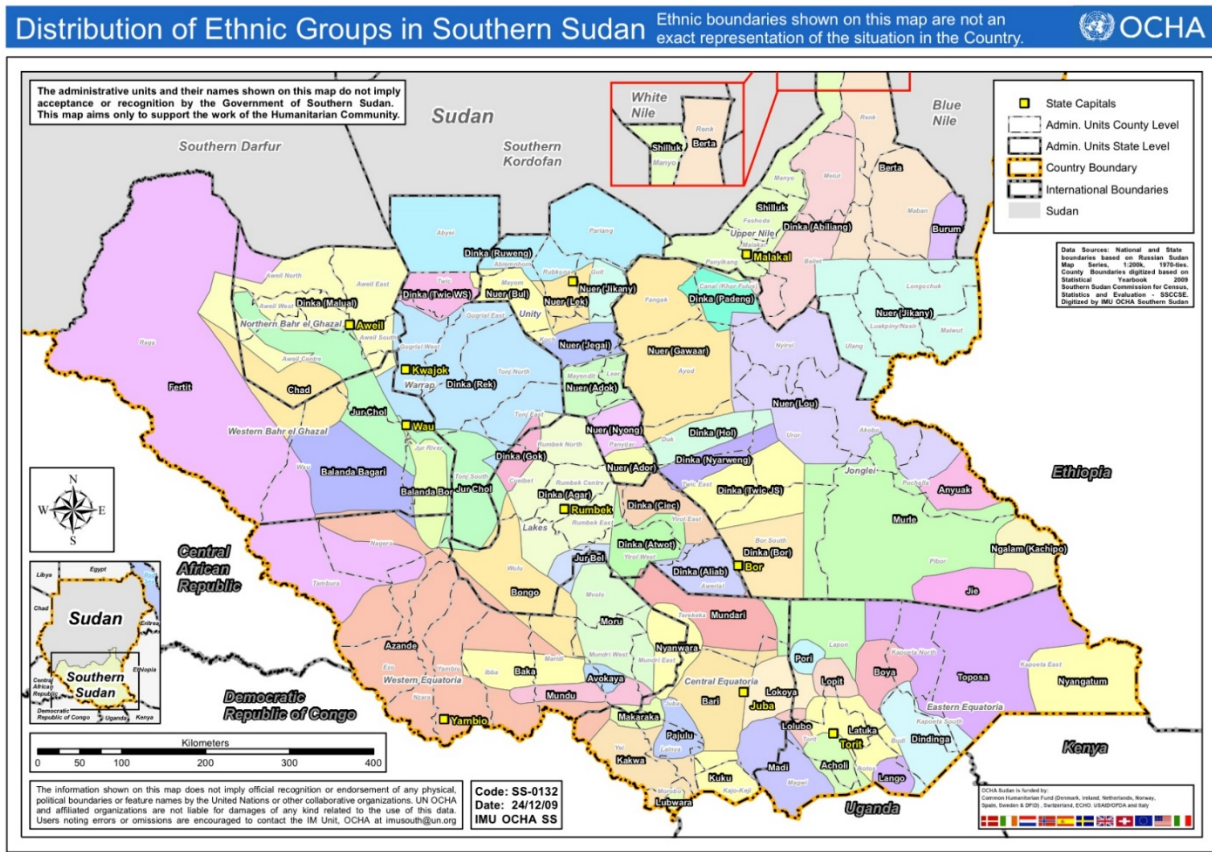
³⁸ Mark Fathi Massoud, 2013, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 126.

would be referred to as a disrespect of Islam. Also, the crime was punishable by death in all cases. In this way, Bashir was able to crush legal pluralism in order to advance his own power in the regime. The growing divide between Shari'a and common law created an opportunity for Bashir to cement his political power. In choosing a direction for which rule of law the nation was to follow, Bashir was given the power to crush any resistance to his reign.

The crackdown on legal pluralism and non-Muslim views by the Bashir regime only served to increase sentiment for civil war in South Sudan. As a result, a final push was made in 2005, and South Sudan gained independence. While the Bashir regime actively worked to dismantle legal pluralism, Mennen argues that South Sudan continued the policy of legal pluralism since it is "representative of cultural identity."³⁹ The proliferation of tribes, subtribes, and clans within South Sudan, as illustrated in Figure 1,⁴⁰ each with its own history and culture,

³⁹ Tiernan Mennen, 2007, "Legal pluralism in Southern Sudan: Can the rest of Africa show the way?" *Africa Policy Journal* 3, no. 1, 50.

⁴⁰ *Distribution of Ethnic Groups in Southern Sudan* [map].



creates a need for legal pluralism in the judiciary. Thus, while legal pluralism between different cultural systems of law was abandoned with the introduction of Islamic law under Nimeiri, it resurfaced with the foundation of South Sudan.

The independence of South Sudan also created a gap in legal pluralism. The foundation of a new state, in addition to bad blood between Sudan and South Sudan, led to questions in citizenship for residents of both states. As a result, many people are left in a position of de jure statelessness. Mike Sanderson, lecturer of law at the University of Exeter, explains:

Individuals with family or ethnic connections to South Sudan will acquire the nationality of South Sudan even in the absence of a positive administrative determination by the South Sudanese state. Any later administrative determinations by the South Sudanese state can only be declarative (descriptive or constative) in

their effect. The combined effect of these provisions makes analyzing the position with respect to resulting statelessness complex.⁴¹

Because each of the states is attempting to exclude the citizens of the other, many people are left without a home in either. Overlapping restrictive laws ultimately result in negative consequences for many people in the regime. Thus, legal pluralism failed to act in regards to the displaced people of the civil war, leaving them without a state.

The Bashir regime primarily suffered a different conflict of legal pluralism than the traditional divide between Shari'a law and English common law. International law and state law came in conflict rather severely. The United Nations Security Council accused Bashir of crimes against humanity in Darfur during civil war with the South and referred him to the International Criminal Court (ICC). Jennifer Falligant, graduate of the University of Wisconsin Law School and attorney at Stroud, Willink, and Howard, claims that in 2008, the ICC declared that Bashir "committed not only war crimes and crimes against humanity, but genocide."⁴² The regime of Bashir, on the other hand, attempted to cover up the actions that harmed the people of Darfur. There was significant outcry against Bashir's prosecution because he was "a sitting head of state."⁴³ Thus, the overlap in jurisdiction between the international community and the sovereignty of Sudan caused a delay in action, demonstrating the role that legal pluralism continued to play even into the Bashir regime.

⁴¹ Mike Sanderson, 2014, "Statelessness and Mass Expulsion in Sudan: A Reassessment of the International Law," *Journal of International Human Rights* 12, no. 1, 86.

⁴² Jennifer Falligant, 2009, "The Prosecution of Sudanese President al Bashir: Why a Security Council Deferral would Harm the Legitimacy of the International Criminal Court," *Wisconsin International Law Journal* 27, no. 4, 739.

⁴³ Jennifer Falligant, 2009, "The Prosecution of Sudanese President al Bashir: Why a Security Council Deferral would Harm the Legitimacy of the International Criminal Court," *Wisconsin International Law Journal* 27, no. 4, 740.

Legal pluralism between state and international law was further advanced in Sudan with the expansion of humanitarian organizations within the state. Massoud believes that humanitarian organizations use the “framing and shaming” model of rights expansion.⁴⁴ This model encompasses framing human rights in the typical Western mindset and then shaming abuses of these rights by the government through the resource of mass media. This creates an avenue for the international community to engage in a discussion of rights within a repressive state like Sudan. These human rights violations often work in direct contrast with the aims and goals of the regime, and Bashir was no exception. Humanitarian organizations, then, in Sudan add another layer of law on the people: international human rights.

The need to balance conflicting legal ideologies was central to the maintenance of the Sudanese state. Under British rule, common law and Shari’a law intersected in order to support the customs of the people as well as the colonial regime. This practice of legal pluralism was continued throughout the lifetime of the regime until Nimeiri seized power in 1983. At this point, Shari’a law was implemented as the only source of formal law within the Sudanese system. However, the legacies of a legally pluralistic judiciary continued to play a major role in the shaping of how Shari’a law was to be enacted. Also, the expansion of international law created another, more complicated layer within the traditional system of legal pluralism, further complicating the judicial system in Sudan. Thus, while expanding the rule of law led to increased power of the regime, rulers needed to operate within a system of legal pluralism for these advancements to have traction.

⁴⁴ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 184.

Dismantling Judicialization

Finally, judicialization has played a large role in the formation and maintenance of the modern Sudanese regime. John Ferejohn, professor of law at New York University, states that judicialization is the “shift in power away from legislatures and toward courts and other legal institutions.”⁴⁵ Furthermore, “the fact that courts frequently intervene in policy-making processes” is the major consequence that has followed the recent rise in judicialization.⁴⁶ In Sudan, like many authoritarian regimes, the reasoning behind judicialization is to ensure that power can be maintained in the executive. It also serves to give a sense of legitimacy for the regime to the international community. However, unlike many other regimes, Bashir’s government worked to dismantle judicialization, as it had posed a major threat to his predecessors.

Judicialization, like many trends within the modern Sudanese judiciary, arose out of the period of British colonial leadership. The majority of British resources were used for the Great War, so the SPS lacked the man-power necessary to staff the Sudanese judiciary with their own legal scholars. Therefore, according to postdoctoral fellow at Simon Fraser University Jeffrey Adam Sachs, legal institutions “were staffed entirely by Egyptians.”⁴⁷ Then, after a series of nationalist uprisings in 1924, the SPS chose to grant legal authority

⁴⁵ John Ferejohn, 2002, “Judicializing Politics, Politicizing Law,” *Law and Contemporary Problems* 65, no. 3, 41.

⁴⁶ John Ferejohn, 2002, “Judicializing Politics, Politicizing Law,” *Law and Contemporary Problems* 65, no. 3, 41.

⁴⁷ Jeffrey Adam Sachs, 2013, “‘Native Courts’ and the Limits of the Law in Colonial Sudan: Ambiguity as Strategy,” *Law and Social Inquiry* 38, no. 3, 978.

to the tribal sheikhs, who, at the time, were seen as unacceptable to be “legal and administrative authorities.”⁴⁸ The necessity of maintaining a stable legal structure in the face of limited staffing created the need to bring judicial knowledge to the ordinary citizens of Sudan. Also, the SPS chose to empower the judiciary in order to advance the rule of law that was needed to empower the regime. Thus, the colonial government began the process of judicialization in Sudan, as well as making the court independent from the native citizenry.

The period of transition from colonial rule to independence was the greatest instance of true judicialization within the Sudanese system. According to Massoud, “fragmented political authority” created a vacuum from which judicial power was able to emerge.⁴⁹ The legal structure created by the colonial administration was left most unharmed by the transition to independence. Because of this, a great deal of power and influence was left in the hands of the judiciary. The freedom of the courts from the rest of the state allowed them to combat the early trends towards authoritarianism. Abboud’s military coup was unable to effectively break the structure of judicial independence, in large part due to “the influence wielded by an elite group of British-trained professional jurists.”⁵⁰ Therefore, the judicialization that occurred during the period of transition gave the judiciary immense power. This, in turn, would force Nimeiri and Bashir to work on reforming the judiciary in order to keep their power.

⁴⁸ Jeffrey Adam Sachs, 2013, “Native Courts’ and the Limits of the Law in Colonial Sudan: Ambiguity as Strategy,” *Law and Social Inquiry* 38, no. 3, 979.

⁴⁹ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 94.

⁵⁰ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 95.

Even before Bashir's massive reforms within the judiciary, the power of the courts established during the period of judicialization were beginning to wane. As illustrated by Lauro and Samuelson, throughout the mid-1980s, "a vacancy in the position of Chief Justice for the highest court in Sudan was not filled."⁵¹ This lack of action on the part of the government and judiciary demonstrates the limited role of the courts at this point in the regime. Due to the reforms of Nimeiri, the judiciary was forced to return to its original role as a reactionary institution. After the coup of 1989, the position of Chief Justice was quickly filled by a friendly to the Bashir government. The new leader had thus taken the first steps toward dismantling the system of judicial empowerment.

Unlike his predecessors, Bashir did not only work to expand the rule of law in Sudan, but he also utilized the court system to empower himself, primarily through dismantling judicialization. Bashir's first challenge in achieving this goal was controlling the bar association. Both Abboud and Nimeiri were taken down by the legal professionals they worked so hard to create, so Bashir quickly recognized the lawyers as one of the greatest threats to his regime. According to Massoud, the state "captured and imprisoned key leaders of the bar association," replacing them with loyalists to the regime.⁵² In doing so, Bashir created a large number of lawyers and judges that would rule significantly more in his favor. Thus, Bashir was able to grant more power to the judiciary with the promise that it would continue to support him.

⁵¹ Lino J. Lauro and Peter A. Samuelson, 1996, "Toward Pluralism in Sudan: A Traditionalist Approach," *Harvard International Law Journal* 37, no.1, 87.

⁵² Mark Fathi Massoud, 2013, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 121.

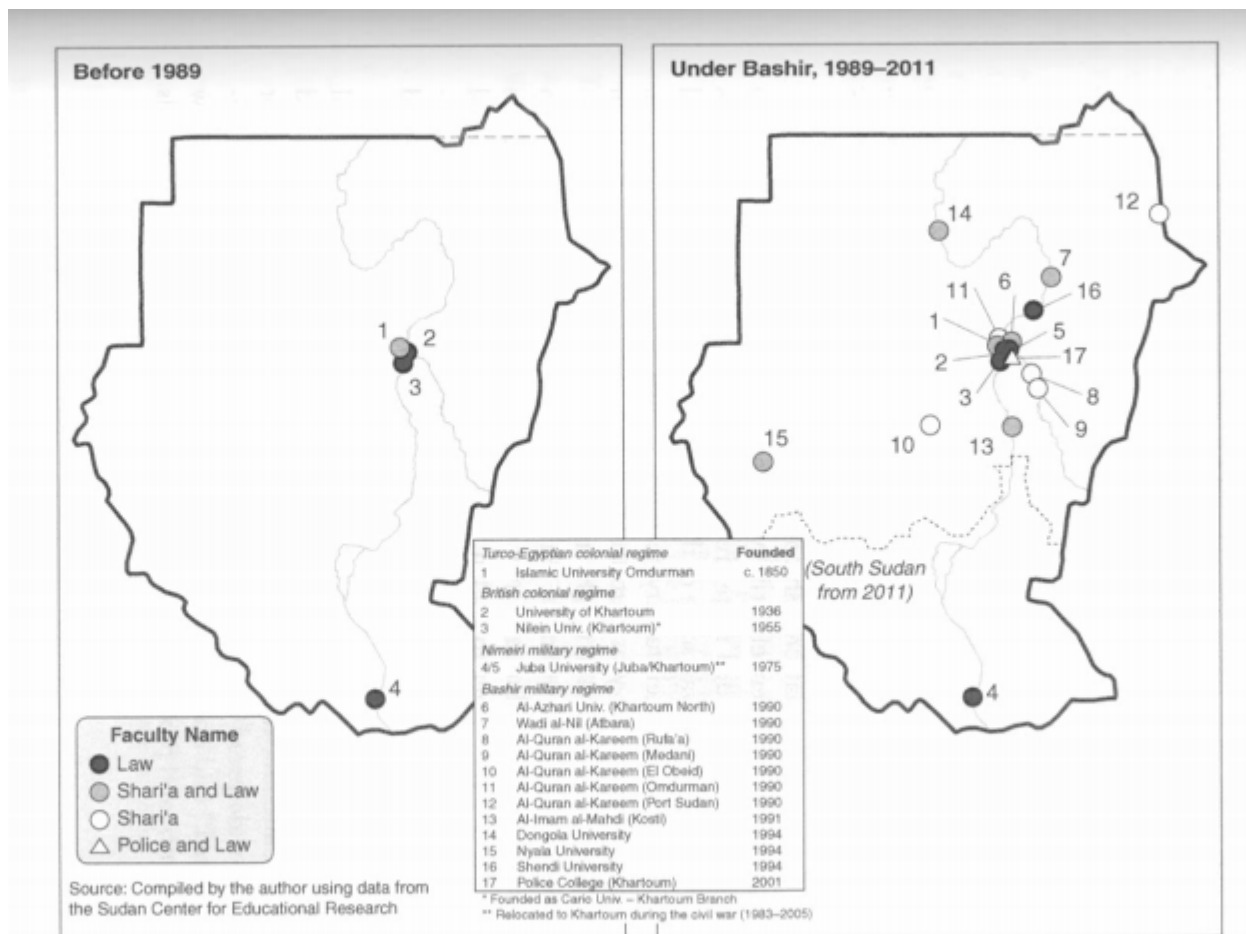
In a similar act, Bashir looked to control the lawyers once again through their access to legal education. As illustrated by Köndgen, Bashir once again worked to purge the education system by removing many high education officials and replacing them with friendlies to the regime. Köndgen writes:

A takeover of educational facilities and the underlying bureaucratic infrastructure was effectuated. The Ministry of Education was purged, teachers and faculty members replaced by NIF members, and the elected faculty unions dissolved. Furthermore, the regime islamised the curricula, and Arabic became the language of instruction in all public universities.⁵³

By recreating the education system from the ground up as well as placing new members in its ranks, Bashir effectively mitigated the threat that future lawyers posed to him. In addition to increasing the power of Bashir, the new policy also alienated many members of the South, who were often much less familiar with Arabic. In this way, Bashir began to dismantle the independence of the judiciary. This, in turn, limited the power that it began to amass through the period of judicialization in the transitional government.

Prior to the Bashir regime, law was a field that was mostly accessed by the elites in society. Thus, Massoud argues that Bashir undertook an “educational revolution aimed at

⁵³ Olaf Köndgen, 2010, “Shari’a and national law in Sudan,” *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by Jan Michiel Otto, Leiden: Leiden University Press, 198-9.



expanding access to higher education, particularly in law.”⁵⁴ Figure 2⁵⁵ demonstrates the large number of new higher education institutions created under Bashir’s leadership. Like many of Bashir’s reforms, increasing the access to higher education seems like a positive idea in theory. A better educated society should be a better off society. However, Bashir’s intentions were not as simple as they may originally seem. Massoud gives three explanations for the expansion of legal education in Sudan. First, the increased number of lawyers decreases the cohesiveness among members of the bar. Next, since the schools would be state-sponsored, they would “provide a space in which students would learn

⁵⁴ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 135.

⁵⁵ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press.

about and internalize state-approved ideologies and expectations.”⁵⁶ Finally, expanding access to legal education would build support for the regime outside of Khartoum, as illustrated by Figure 2. Thus, while the expansion of education limited the power of the judiciary, it placed a greater emphasis on the judicial education. In this way, Bashir was able to disperse the power granted to the courts under the period of judicialization in order to increase his own power.

While expanding the number of schools dedicated to higher education in order to dismantle the power of legal institutions, Bashir systematically closed private schools. This in turn forced citizens to attend the public schools that would reinforce the favorable outlook on the regime. Schools that did not “teach in Arabic or agree that their students will not sit for admittance to Sudanese universities” were forced to close.⁵⁷ This worked to further advance the legal education of the citizens of Sudan that expanded the power of Bashir. Once again, the leader utilized another aspect of the education system to dismantle the long-lasting effects of the period of judicialization.

While not as powerful as the judiciary because of the period of judicialization, Bashir also worked to control the legislature. It was in this area that he was able to use judicialization as a weapon in order to avoid expanding the power of the courts. According to Ioannis Mantzikos, senior analyst in the Research Institute for European and American Studies, the previous prime minister of Sudan, like many officials in Sudan, was

⁵⁶ Mark Fathi Massoud, 2013, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 135.

⁵⁷ Lino J. Lauro and Peter A. Samuelson, 1996, “Toward Pluralism in Sudan: A Traditionalist Approach,” *Harvard International Law Journal* 37, no.1, 74.

“overthrown in an NIF-instigated a military coup.”⁵⁸ Bashir then named himself as prime minister of Sudan in addition to being the government’s president, and the courts chose to support Bashir in this move rather than oppose him. However, this move did not stop the parliament from attempting to grow in power and rival the authority of Bashir. The most prominent figure in this venture was Hassan al-Turabi, who quickly became one of the most powerful members of the parliament. In 1999, Turabi drafted a series of bills that would limit Bashir’s executive powers through requiring that he give up his post as prime minister, appoint a vice president, and give the National Assembly the right to remove the president with a two-thirds majority vote. In response, Bashir, with the support of the judiciary, “dissolved the National Assembly.”⁵⁹ Thus, while Bashir made it a goal of his regime to curb the power of the judiciary, he was still willing to cooperate with it in order to expand his own power.

The final area that Bashir worked to purge was the judiciary itself. Köndgen states that from 1989 and 1991 “between 300 and 400 judges were dismissed or resigned.”⁶⁰ For the most part, the replaced judges lacked proper training in Shari’a law, forcing them to place their trust in the Bashir regime. The judges that were most commonly targeted by the NIF originally came from the South, further dividing the two Sudans. Lauro and Samuelson illustrate that those southern judges that did not resign or were not dismissed were

⁵⁸ Ioannis Mantzikos 2010, “Why the Islamic Revolution Ended: The Regional Politics of Sudan since 1989,” *Mediterranean Quarterly* 21, no. 3, 48.

⁵⁹ Ioannis Mantzikos 2010, “Why the Islamic Revolution Ended: The Regional Politics of Sudan since 1989,” *Mediterranean Quarterly* 21, no. 3, 55.

⁶⁰ Olaf Köndgen, 2010, “Shari’a and national law in Sudan,” *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by Jan Michiel Otto, Leiden: Leiden University Press, 199.

“relocated to the North and assigned to traffic courts or other minor roles.”⁶¹ At the same time, the regime built up a system of military courts called the Security of Revolution Courts and Public Order Courts. The combination of the actions meant that the Bashir regime handled “more than 95% of the caseload in Sudan.”⁶² The power that the courts had gained was effectively exchanged to Bashir at this point. The period of judicialization had come to an end and been almost completely dismantled.

The effect of the dismantling of judicialization by the Bashir regime is most clearly illustrated in its dealings with humanitarian organizations. Massoud states that international nongovernmental organizations are only able to educate the citizens of Sudan about their rights; they cannot prevent the government from refusing to hear the cases of Sudanese citizens. This is because “effectively asserting one’s rights requires political influence” in the Sudanese state.⁶³ Accessing the law became almost impossible under the Bashir regime, despite the supposed expansion of it. Thus, in its dealings with humanitarian organizations, the Bashir regime proved its effectiveness in dismantling the judicialized politics of Sudan and thereby limiting their role in Sudanese society.

Despite efforts of Bashir to dismantle the power of the judiciary, small gains in power have still been acquired by the courts. The *Sudan Tribune*, a French newspaper released in both Sudans, explains that on May 1, 2016, the Supreme Constitutional Court lifted a ban on the newspaper *Al-Tayyar*. This was the second time that the National

⁶¹ Lino J. Lauro and Peter A. Samuelson, 1996, “Toward Pluralism in Sudan: A Traditionalist Approach,” *Harvard International Law Journal* 37, no.1, 86.

⁶² Olaf Köndgen, 2010, “Shari’a and national law in Sudan,” *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by Jan Michiel Otto, Leiden: Leiden University Press, 199.

⁶³ Mark Fathi Massoud, 2013, *Law’s Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, New York: Cambridge University Press, 195.

Intelligence and Security Services (NISS) had banned the newspaper and thereby the second time the ban had been lifted. In both rulings, the Supreme Constitutional Court stated that the NISS lacks “the power to suspend newspapers.”⁶⁴ The Supreme Constitutional Court, by ruling against the regime and expanding its own power, was once again engaging in judicialization. Thus, while much of the power gained by the courts during the period of judicialization was lost with the regime of Bashir, recent developments prove that the courts are beginning the process of judicialization once again.

In addition to the small gains that the judiciary was able to make on its own, pressures from the international community have contributed to a new phase of judicial emphasis within Sudan. However, this new judicial emphasis represents a distinctly different phase from that of the previous expansion of judicial power. This phase is referred to as international arbitration by Massoud, and it “is a private, extra-judicial, and often ad-hoc dispute-resolution mechanism.”⁶⁵ While it technically operates outside of the traditional judiciary, the court-like system reinforces the practices of traditional judicialization. The large untapped oil reserves in Sudan have attracted a number of foreign investors in recent years. Courts are needed for the expansion of industry and private property, so Sudan will allow international investors to use international arbitration in order to increase the nation’s industry. This, in turn, creates a need for an established and trustworthy judiciary. However, the lack of power in the traditional court system, as a result of Bashir’s reforms, have meant that it needed to adapt the policy of international

⁶⁴ “Sudan Constitutional Courts lift ban on newspaper,” *Sudan Tribune* (Paris, Fr.), May 1, 2016.

⁶⁵ Mark Fathi Massoud, 2014, “International Arbitration and Judicial Politics in Authoritarian States,” *Law and Social Inquiry* 39, no. 1, 2.

arbitration in order to support “joint ventures and foreign investment alongside continued control of domestic courts.”⁶⁶ The use of international arbitration is therefore seen as necessary in Sudan.

The use of international arbitration has been effective in Sudan, both at attracting foreign direct investment and expanding the need for the judiciary. Massoud explains that Bashir introduced two new laws, the Investment Encouragement Act of 1999 and the National Arbitration Law of 2005, in order to encourage investment in Sudan. Both laws turned to international arbitration as an outlet for commercial disputes in Sudan. Figure 3⁶⁷ shows the growth of foreign direct investment and oil exports in Sudan during the Bashir regime thus illustrating the laws’ successes. Following the new legislation introduced by Bashir, economic

Figure 3

⁶⁶ Mark Fathi Massoud, 2014, “International Arbitration and Judicial Politics in Authoritarian States,” *Law and Social Inquiry* 39, no. 1, 9.

⁶⁷ Mark Fathi Massoud, 2014, “International Arbitration and Judicial Politics in Authoritarian States,” *Law and Social Inquiry* 39, no. 1.

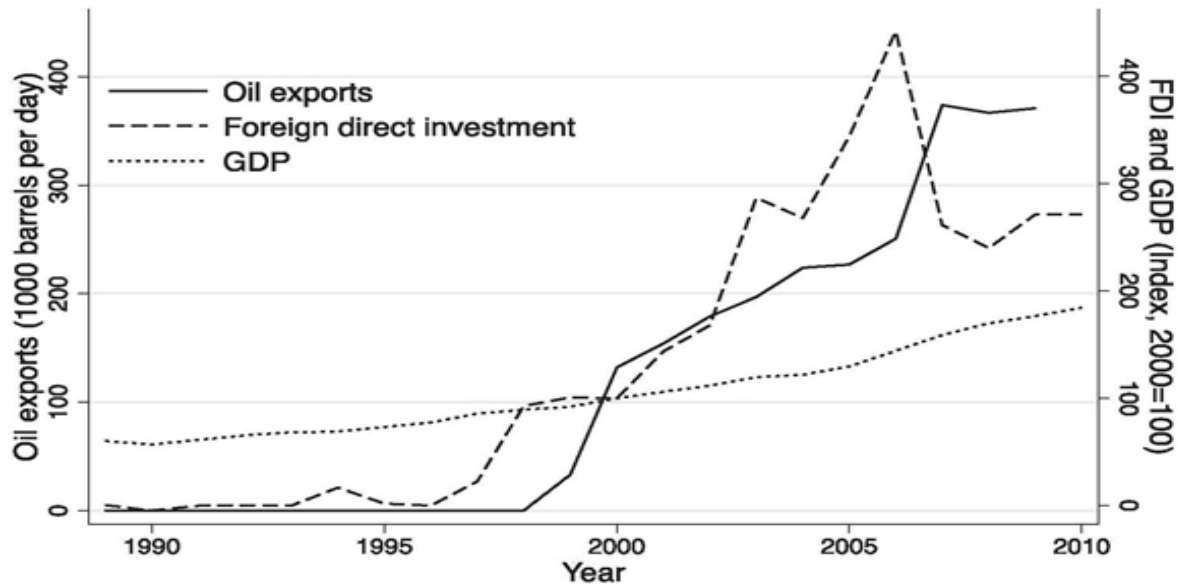


FIGURE 2.
Growth in Key Economic and Energy Indicators in Sudan Under President Bashir (1989–2011)

Note: In this figure, GDP and FDI are measured in purchasing power parity in 2005 dollars; oil production includes natural gas liquids in kilo-barrels per day.

growth greatly increased. At the same time, the judiciary was also expanded. International arbitration allows for foreign investors to “resolve commercial disputes” even when the regime is full control of the judiciary.⁶⁸ Thus, the international community and economic development has created the need for the expansion of the judiciary in Sudan.

While international arbitration has led to a period of judicialized expansion, it demonstrates a systematic weakness within the Sudanese judiciary. According to Massoud, the judiciary is so damaged by “political intervention and the quality of judges,” and this problem is only further illustrated through the use of extralegal means.⁶⁹ While international arbitration resembles a traditional judiciary, it diverts power away from the Sudanese courts. The need to rely on arbitration also illustrates the distrust that foreign

⁶⁸ Mark Fathi Massoud, 2014, “International Arbitration and Judicial Politics in Authoritarian States,” *Law and Social Inquiry* 39, no. 1, 17.

⁶⁹ Mark Fathi Massoud, 2014, “International Arbitration and Judicial Politics in Authoritarian States,” *Law and Social Inquiry* 39, no. 1, 17.

investors have in the Sudanese courts. The reforms of Bashir had decreased the power and legitimacy of the courts to such a point that they discouraged economic growth. The most fundamental aspect of a court system, according to Ferejohn, is the protection of “property rights,” with “personal rights and liberties” being expanded when the court becomes more developed.⁷⁰ However, as represented by the lack of foreign investment prior to the introduction of international arbitration, the domestic courts of Sudan fail to accomplish this responsibility. Thus, the need to establish these arbitrations illustrates the deconstruction of judicialization within Sudan.

The process of judicialization within Sudan began in the colonial period and was greatly expanded upon in the transitional period between colonialism and independence. The then powerful judiciary worked to preserve the democratic nature of Sudan, even in the face of authoritarian rule. Thus, it became a central goal of the Bashir regime to dismantle the judicialized politics of the society in which he came to power. Therefore, a multitude of policies were introduced to dilute the power of the judiciary by Bashir. These policies were for the most part very effective in curbing the power of the courts and dismantling judicialization, as illustrated by the need of the government to take extralegal paths in the expansion of the economy.

Conclusion

Legal politics in Sudan are based primarily on expanding the rule of law, balancing legal pluralism, and dismantling judicialization. The Bashir regime, however, began to face problems once the rule of law began to disintegrate. The construction of a state with a

⁷⁰ John Ferejohn, 2002, “Judicializing Politics, Politicizing Law,” *Law and Contemporary Problems* 65, no. 3, 55.

fundamental basis in rule of law but significantly lacking in formal law led Bashir to lose the support and legitimacy from the Sudanese people. As Sudan and South Sudan continue to develop in the modern world, a combination of rule of law and access to law needs to be established. Furthermore, this firmly founded rule of law cannot allow for a fluid manipulation of its values. Sudan suffered from constant changes in legal basis that made the rule of law difficult to track, leading to its implosion.

In a similar manner, by abandoning its balance of legal pluralism, the Sudanese state suffered from civil war that diverted its resources and changed the ways in which law was to deal with the problems. Until the rule of Nimeiri, legal pluralism was used to satisfy both Muslims and non-Muslims in the nation. Once this balance was tipped to favor Shari'a law, the legitimacy of the regime began to erode. Citizens, especially in the South, were outraged by the persecution they experienced. Finally, the dismantlement of judicialization, while initially holding the regime together, also proved ineffective in the absence of law. By significantly reducing the power of the courts, Bashir accelerated the rate of deterioration of the rule of law. Scholars and citizens quickly began to recognize that the courts held no true power, and the rule of law had been lost in Sudan.

Several governments ruled Sudan throughout its history, but the tactics employed were always the same. In order to maintain power in Sudan, law and judiciary must be used. At the same time, expanding the power of the courts too far or relying on one legal theory too heavily creates instability. Therefore, war of ideology had to be declared on legal structures to maintain power in the same way that war with people had to be declared to gain power.

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